A DIGEST

OF

CANADIAN CASES

RELATING TO

RAILWAY, TELEGRAPH, TELEPHONE AND EXPRESS COMPANIES

Being a Digest of "Canadian Railway Cases," Vols. 1 to 24, together with decisions of the Federal and Provincial Courts of Canada, the Judicial Committee of the Privy Council on appeal therefrom, the Board of Railway Commissioners for Canada, and Provincial Railway Boards, up to the end of the year 1919.

CROSS REFERENCED AND ANNOTATED

BY

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TORONTO:
CANADA LAW BOOK COMPANY, LIMITED
84 BAY STREET
1920

EXPLANATIONS.

"Board" and "Railway Board"—The Board of Railway Commissioners for Canada, established 1903.

"Railway Committee"—The Railway Committee of the Privy Council of Canada, which was superseded, in 1903, by the Board of Railway Commissioners for Canada.

"Privy Council"—Judicial Committee of the Privy Council (Imperial) sitting in London, England,—the final Court of Appeal in Canadian cases.

"B.N.A. Act"—British North America Act, 1867 (Imperial).

"I.C.R."—Intercolonial Railway of Canada (Dominion Government Railway System).

"C.A. Dig."—Canadian Annual Digest of the year which follows.

"(D)"—Statute of Dominion of Canada.

"The Railway Act"—The Railway Act of Canada of the year which follows.

RAILWAY ACTS.

The following are the General Railway Acts of Canada, in chronological order, up to March 1st, 1920:—

1851 (14–15 Vict.), c. 51, "The Railway Clauses Consolidation Act."

1859 (Consolidated Statutes of Canada), c. 66, "The Railway Act."

1868 (31 Vict.), c. 68, "The Railway Act."

1879 (42 Vict.), c. 9, "The Consolidated Railway Act, 1879."

1886 (Revised Statutes of Canada), c. 109, "The Railway Act."

1888 (51 Vict.), c. 29, "The Railway Act."

1903 (3 Edw. VII.), c. 58, "The Railway Act."

1906 (R. S. C.), c. 37, "The Railway Act."

1919 (9–10 Geo. V.), c. 68, "The Railway Act."

CASES DIGESTED.

DIGEST

ACCIDENT REPORTS.

See Discovery.

ACCOMMODATION.

See Carriers of Passengers.

ACCOUNTING.

Action for—Onus—Particulars.

In an action en reddition de compte by a company against its president it is for the defendant who alleges that the board of directors of the plaintiff is not complete to prove it. The plaintiff, which demands that in default of rendering an account the defendant be condemned to pay a certain amount which it has been informed he has received under certain contracts, is not bound to state at what date and from what persons such sum was received.

Temiscouata Ry. Co. v. Macdonald, 3 Que. P.R. 462.

ACQUISITION OF RAILWAY.

Acquisition by government—"Subsidies"—"Actual cost"—Interest and charges on bonds—Value of undertaking.

The Court was required to fix the value of certain railways to be acquired by the Crown under the provisions of 6 & 7 Geo. V. c. 22. By s. 2 of such statute it was provided that the consideration to be paid for each of the said railways should be the value as determined by the Exchequer Court of Canada, "said value to be the actual cost of the said railways, less subsidies and less depreciation, but not to exceed $4,349,000, exclusive of outstanding bonded indebtedness, which is to be assumed by the Government, but not to exceed in all $2,500,000." Held, that the word "subsidies" in the above section did not relate only to those granted by the Dominion Government but extended to any subsidies granted by the provincial Government to the railways in question. The Court in finding the "actual cost" ought not to proceed as if the matter were an accounting between the directors of the railways and the shareholders. The duty of the Court was to ascertain the value of the railways as between vendor and purchaser, and that value must be taken to be the actual cost of the railways less subsidies and less depreciation. Interest on bonds issued by the company and moneys paid on the flotation of bonds during the period of construction of the railways could not be included in "actual cost" as the term was used in the statute.

Attorney General of Canada v. Quebec & Saguenay Ry. Co., 23 Can. Ry. Cas. 310, 41 D.L.R. 576, 17 Can. Ex. 306.

ACTION.

Injuries resulting from operation of street railways, see Street Railways.

See Negligence; Notice of Action; **Pleading and Practice.**

Annotation.

Right of action in Quebec when barred in Ontario. 19 Can. Ry. Cas. 44.

ADVERTISING.

Advertising contract with street railway, see Contracts.

AGENTS.

SHIPPING NOTE—FRAUDULENT RECEIPT OF AGENT—LIABILITY OF COMPANY.

C., freight agent of respondents at Chatham, and a partner in the firm of B. & Co., caused printed receipts or shipping notes in the form commonly used by the railway company to be signed by his name as the company's agent, in favour of B. & Co., for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from B. & Co. the flour addressed to the appellants, and were attached to drafts drawn by B. & Co., and accepted by appellants. C. received the proceeds of the drafts and absconded. In an action to recover the amount of the drafts:—Held, Fournier and Henry, JJ., dissenting, that the act of C. in issuing a false and fraudulent receipt for goods never delivered to the company, was not an act done within the scope of his authority as the company's agent, and the company was therefore not liable. [3 A.R. (Ont.) 446, 42 Q.B. 90, affirmed.]

Erb. v. Great Western Ry. Co., 5 Can. S.C.R. 179.

[Discussed in Ward v. Montreal Cold Storage Co., 26 Que. S.C. 320; distinguished in Moore v. Ontario Investment Assn., 16 O.R. 269; Ward v. Montreal Cold Storage Co., 26 Que. S.C. 341; Randall et al. v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 343, 21 D.L.R. 457; followed in Dominion Express Co. v. Krigbaum, 18 O.L.R. 533; referred to in Monteith v. Merchants' Despatch Co., 1 O.R. 47.]

FREIGHT AGENTS—AUTHORITY TO ADVISE OF SHIPMENTS.

E., in British Columbia, being about to purchase goods from G., in Ontario, signed, on request of the freight agent of the Northern Pacific Ry. Co. in British Columbia, a letter to G. asking him to ship goods via Grand Trunk Ry. and Chicago & N. W. Ry. Co., care Northern Pacific Ry. at St. Paul. This letter was forwarded to the freight agent of the Northern Pacific Ry. Co. at Toronto, who sent it to G. and wrote to him, "I enclose you card of advice, and if you will kindly fill it up when you make the shipment send it to me, I will trace and hurry them through and advise you of delivery to consignee." G. shipped the goods as suggested in this letter deliverable to his own order in British Columbia:—Held, affirming the decisions of the Courts below, 21 A.R. (Ont.) 322, 22 O.R. 645, that on arrival of the goods at St. Paul the Northern Pacific Ry. Co. was bound to accept delivery of them for carriage to British Columbia and to expedite such carriage; that they were in the care of said company from St. Paul to British Columbia; that the freight agent at Toronto had authority so to bind the company; and that the company was liable to G. for the value of the goods which were delivered to E. at British Columbia without an order from G. and not paid for. [21 A.R. (Ont.) 322, affirming 22 O.R. 645, affirmed.]

Northern Pacific Ry. Co. v. Grant, 24 Can. S.C.R. 546.

[Referred to in Boyle v. Victoria Y.T. Co., 9 B.C.R. 322.]

Terms of bill of lading—Authority of agent.

A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped. Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud, or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business, and seeks to vary terms of a prior mutual assent. Taschereau, J., dissented on the facts.

N.W. Transportation Co. v. McKenzie, 25 Can. S.C.R. 38.

[Approved in Bicknell v. Grand Trunk Ry. Co., 26 A.R. (Ont.) 431: referred to in Conmee v. Securities Holding Co., 38 Can. S.C.R. 619: Melady v. Jenkins Steamship Co., 18 O.L.R. 251: St. Mary's Creamery v. G.T.R. Co., 5 O.L.R. 742: Wilson v. C.D. Co., 9 B.C.R. 107.]

Sale of money orders—Representation of authority.

A father and son were ostensible partners: the father held out the son as doing insurance business with him as a principal, under the name of M. & Son; the son, by signature and conduct, represented to the plaintiffs that he was authorized to use the father's name, and obtained an agency from the plaintiffs for the issue and sale of money orders in the name of M. & Son, the plaintiffs believing that the father and son were partners. Publicity as to the firm of M. & Son was given by advertisement, letterheads, office sign:—Held, that, to fix the father with the consequences of his son's acts in the name of the firm, it was not essential that the father should have himself made any representation to the plaintiffs; it was enough that the father had held out his son as his partner under such circumstances of publicity as to satisfy a jury that the plaintiffs knew of it and believed the son to be a partner of the father; and upon the evidence the father was liable to the plaintiffs for money orders issued by the son.

Dominion Express Co. v. Maughan, 20 O.L.R. 310.

[Reversed in 21 O.L.R. 510, the next following case.]

Sale of money orders—Estoppel—Representation of Authority—Public repute.

On an appeal to the Court of Appeal in the above case (20 O.L.R. 310), it was held, upon the evidence, that there was no actual partnership between the defendant J. M. and his son, the defendant H. M., carried on in the firm name of J. M. & Son; and that there was no holding out by J. M. of his son H. M. as a member of the partnership; Meredith, J.A., dissenting. Per Moss, C.J.O., that the facts showed it to be not a case of J. M. holding out his son to the plaintiffs as a partner, but of his son assuming to hold himself out to the plaintiffs as in partnership with his father. If the father is to be made liable, it is because what was done was done under circumstances which bound him as well as his son; and there was no proof of any express authority, or of any acts from which authority might reasonably be inferred, to the son to represent his father as in partnership with him. Per Middleton, J., that the plaintiffs must fail, because, assuming in their favour that there was a holding out, no evidence was given to show that at the time credit was given the plaintiffs knew of the circumstances now relied on as constituting a "holding out," or that they gave credit upon the faith of any public repute which would satisfy a jury "that the plaintiffs knew of it and believed him to be a partner." [Dickinson v. Valpy (1829), 10 B. & C. 128, 140; Ford v. Whitmarsh (1840), Hurl. & Walm. 53.] And, again, the plaintiffs failed because the holding out was of a partnership as "general insurance agents," while the liability sought to be imposed was as "agents for the sale of signed money orders" issued by the plaintiffs, and such an agency was beyond the scope of the business held out. Per Meredith, J.A., that, upon the undisputed facts, there was authority from the father to the son to use the father's name and to pledge his credit; and, assuming that that authority extended only to the business of insurance agents, the transaction in question was sufficiently connected with that business to come within the authority. Judgment of Divisional Court reversed.

Dominion Express Co. v. Maughan, 21 O.L.R. 510.

AGENCY FOR SALE OF MONEY ORDERS—THEFT AND FORGERY BY SERVANT OF AGENT—PAYMENT—LIABILITY OF AGENT.

The defendant, on appointment as agent for the sale of the signed money orders of an express company, agreed in writing to be responsible for the "due issue and sale thereof" and "to account for each money order and the proceeds thereof." An employee of the defendant stole a book of money orders, forged the defendant's counter-signature (which was required), and issued orders which the plaintiffs, being unaware of the forgeries, paid, and now brought this action for the amount:—Held, that the defendant was not liable, inasmuch as the money orders in question had not been issued or sold by him, and that he had duly accounted for them by showing that, without negligence on his part, they had been stolen from him, and he was therefore unable to return them. Semble, also, that, even if the orders had in fact been countersigned by the defendant, they would not have been binding on the company, inasmuch as to issue them, when the money they represented had not been received by him, would be an act outside the scope of his authority as agent, and for this reason the plaintiffs could not recover. Held, further, that, even if there was a breach of the defendant's contract, the plaintiffs suffered no damage by it, as they incurred no liability to the payee or transferee of the money orders, inasmuch as neither of the latter would be entitled to sue upon them, there being no privity of contract between them and the plaintiffs.

Dominion Express Co. v. Krigbaum, 18 O.L.R. 533.

CUSTOMS AGENT—SCOPE OF AUTHORITY.

Where a railway company furnished its customs agent with the necessary documents, including accepted cheques, for the payment of duties necessary to enter goods through the customs house, and the agent, by a system of frauds, was able to pass a large quantity of goods free of duty, receiving back from the customs officers, on the assumption that all imposts had been fully paid, the difference between the face of the cheques and the duty actually paid, which the agent converted to his own use, the company is estopped in an action by the Crown for the duties unpaid on goods so passed and not entered for duty from claiming that in accepting the money returned, he was not acting within the scope of his employment. [Fry v. Smellie, [1912] 3 K.B. 282; Whitechurch v. Cavanagh, [1902] A.C. 117-130; Low v. Bouverie, [1891] 3 Ch. 82; Lloyd v. Grace, [1912] A.C. 716, specially referred to; British Mutual Banking Co. v. Charnwood Forest

R. Co., 18 Q.B.D. 714; Ruben v. Great Fingall Consolidated, [1906] A.C. 439, distinguished.] The King v. Can. Pac. Ry. Co., 11 D.L.R. 681, 14 Can. Ex. 150.

PAYMENT TO AGENT'S WIFE—EFFECT.

Payment of freight charges to the wife of the local agent before his dismissal by the railway company, she having been permitted frequently to act about the office in the agent's capacity, constitutes payment to the company, notwithstanding a notice on the bill that all cheques should be made payable to the railway company.

Grand Trunk Pacific Ry. Co. v. Opperthauser, 26 D.L.R. 209.

AIR BRAKES.

Equipment of passenger trains with air brakes, see Carriers of Passengers.

ALIGHTING FROM CARS.

See Carriers of Passengers; Street Railways.

AMALGAMATION.

Effect of amalgamation as to parties to action, see Pleading and Practice.

AMALGAMATION AGREEMENTS—DOMINION AND PROVINCIAL RAILWAYS—SPECIAL ACTS.

Application under s. 361 of the Railway Act, 1906, for a recommendation by the Board to the Governor-in-Council for the sanction of amalgamation agreements between Dominion and provincial railway companies. The Montreal Park & Island and Montreal Terminal Ry. Cos. were incorporated by the Parliament of Canada and the Montreal Street Ry. Co. by a statute of the Province of Quebec. Agreements were made between the three companies apparently pursuant to the authority given in two special Acts of the Dominion incorporating the first two railway companies for the sale of these railways with their facilities and assets to the provincial railway:—Held (1), that under ss. 361, 362 (which must be read together), the Board has no jurisdiction to deal with the amalgamations of railway companies incorporated under Dominion and provincial statutes. (2), That the proper mode of procedure would be to apply as provided by the special Acts for sanction of the agreements to the Governor-in-Council.

Re Amalgamation Agreements, 13 Can. Ry. Cas., 150.

EFFECT ON CHARTER POWERS.

A restriction in the charter of a street railway company that prevented it from importing electricity from without the city limits, is not binding upon a company formed by the amalgamation of such street railway company with other companies, none of which were so restricted.

Winnipeg Elec. Ry. Co. v. Winnipeg, 4 D.L.R. 116, [1912] A.C. 355.

EFFECT ON CHARTER POWERS—STREET RAILWAYS.

After an electric street railway has, to the knowledge of a city and its officers, and with their active co-operation, erected beyond the city limits, at a cost of millions of dollars, a plant for the generation of electricity, located its subpower houses and erected poles and wires in the city, and after the city has received about $100,000 in taxes from the company, and has adopted by-laws and resolutions requiring a company that the street railway had absorbed by amalgamation, to lay double tracks on certain streets, and to establish a schedule for operating its cars, the city cannot deprive the street railway company of the right to introduce into the city electricity generated beyond the city limits, on the ground that its charter forbade such importation of electricity, or that permits were void which the city had granted for the erection of poles. [Winnipeg v. Winnipeg Elec. Ry. Co., 20 Mann. L.R. 337, reversed.]

Winnipeg Elec. Ry. Co. v. Winnipeg, 4 D.L.R. 116, [1912] A.C. 355.

ANIMALS.

See Fences and Cattle Guards.
Carriage of Live Stock; Street Railways (I).

APPEALS.

A. In General.
B. From Orders of Railway Board.
C. From Expropriation Awards.

See Assessment and Taxation.

Annotations.

Appeal from award. 6 Can. Ry. Cas. 199.

Appeal from order refusing leave. 4 Can. Ry. Cas. 396.

Jurisdiction in appeals from awards. 21 Can. Ry. Cas. 38.

Power of Appellate Court to remit award to arbitrators. 21 Can. Ry. Cas. 413.

A. In General.

CASE—AMENDMENT OF.

Where it appeared that certain papers which a Judge of the Court below had directed should form part of the case had been incorrectly printed, especially the factum of the respondent in said Court, which had been translated and in which interpolations had been made, the registrar was directed to remit the case to the Court below to be corrected.

Parker v. Montreal City Pass. Ry. Co., Cass. Can. S.C.R. Dig. 1893, p. 674.

MOTION TO STRIKE APPEAL OFF LIST—NOTICE.

A motion to strike an appeal off the list of appeals inscribed for hearing must be on notice.

Parker v. Montreal City Passenger Ry. Co., Cass. Can. S.C.R. Dig. 1893, p. 686.

FACTUM—LEAVE TO DEPOSIT.

When appeal inscribed for hearing ex parte is called, counsel for respondents asks leave to be heard and to be allowed to deposit factum. Counsel for appellant consents. Granted.

Parker v. Montreal City Passenger Ry. Co., Cass. Can. S.C. Dig. 1893, p. 683.

FACTUM—POINT NOT RAISED BY.

A point is raised at the hearing not in factum, and counsel for respondent therefore objects that he is not prepared to argue it. The Court adjourns hearing for a week.

Western Counties Ry. Co. v. Windsor & Annapolis Ry. Co., Cass. Can. S.C.R. Dig. 1893, p. 683.

Case—Extending time for printing and filing.

Under s. 79 of the S. & E. C. Act and Rules 42 & 70 S.C., a Judge in Chambers of the Supreme Court has power to extend the time for printing and filing case.

Canada Southern Ry. Co. v. Norvell (1880), Cass. Can. S.C. Dig. 1893, p. 673.

Review of costs—Motion to reopen.

In this case, the Supreme Court had refused by their judgment to give a writ of prohibition to prevent the taxation of respondent's costs by the county Judge, such taxation having been made before the judgment of the Supreme Court was given; but the Court stated that the respondent was not entitled to costs. Counsel for appellants moved to reopen argument of that part of the appeal as to the right to the prohibition, and for a reconsideration thereof, on the ground that the amount taxed to respondent has been paid into the County Court, and that the county Judge might make an order directing the money so paid into his Court to be paid out to respondent unless prohibited:—Held, that the application which was really for a rehearing of the appeal, which had been duly considered and adjudicated upon by the Court, could not be entertained; that the Court could not assume that the County Court Judge would act illegally, and in defiance of the judgment of the Court, to the effect that the respondent was not entitled to costs; but that if the County Court Judge should propose so to act, the appellants would have their remedy against him, and might apply to one of the superior Courts for a writ of prohibition. Counsel for appellants not called upon. Motion refused with $25 costs.

Ontario & Quebec Ry. Co. v. Philbrick (1886), Cass. Can. S.C. Dig. 1893, p. 687.

Review of costs.

It is only when some fundamental principle of justice has been ignored, or some other gross error appears that the Supreme Court will interfere with the discretion of provincial Courts in awarding or withholding costs.

Smith v. Saint John City Ry. Co.; Consolidated Elec. Co. v. Atlantic Trust Co.; Consolidated Elec. Co. v. Pratt, 28 Can. S.C.R. 603.

Matters of prohibition.

S. 2 of c. 25 of 54 & 55 Vict., giving the Supreme Court of Canada jurisdiction to hear appeals in matters of prohibition, applies to such appeals from the Province of Quebec as well as to all other parts of Canada.

Shannon v. Montreal Park & Island Ry. Co., 28 Can. S.C.R. 374.

[Overruled in Desormeaux v. Ste. Thérèse de Blainville, 43 Can. S.C.R. 82; considered in Wynnes v. Montreal P. & I. Ry. Co., 9 Que. Q.B. 498.]

Finality of judgment—Appeal from order for new trial.

In an action brought to recover damages for the loss of certain glass delivered to defendants for carriage, the Judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question submitted the jury disagreed. Defendant then moved the Divisional Court for judgment, but pending such motion the plaintiffs applied for and obtained an order of the Court amending the statement of claim, and charging other grounds of negligence. The defendants submitted to such order and pleaded to such amendments, and new and material issues were thereby raised for determination. The action as so amended was entered for trial, but was not tried before the Divisional Court pronounced judgment on the motion dismissing plaintiff's action.

On appeal to the Court of Appeal, the judgment of the Divisional Court was reversed and a new trial ordered. On appeal to the Supreme Court:—Held, that the judgment of the Court of Appeal ordering a new trial in this case was not a final judgment nor did it come within any of the provisions of the Supreme Court Act authorizing an appeal from judgments not final. Can. Pac. Ry. Co. v. Cobban Mfg. Co., 22 Can. S.C.R. 132.

JUDGMENT, INTERLOCUTORY OR FINAL.

The plaintiff sued for $5,000 as damages alleged to have been caused by the defendants. The Superior Court dismissed the action, and the Court of Review reversed that judgment and sent the case back to the Superior Court to ascertain the damages. The defendants appealed from this judgment to the Court of Queen's Bench, but that Court, on motion of plaintiff, before any other proceeding on the appeal, quashed the writ of appeal on the ground that it had been issued de plano and not with the permission of the Court as required by Art. 1116, C.C.P., the Court being of opinion that the judgment was not a final but an interlocutory judgment within that article:—Held (1), a judgment of the Court of Queen's Bench for Lower Canada (appeal side) quashing a writ of appeal on the ground that such writ had been issued contrary to the provisions of Art. 1116, C.C.P., is not "a final judgment" within the meaning of s. 28 of the Supreme and Exchequer Courts Act. [Shaw v. St. Louis, 8 Can. S.C.R. 387, distinguished.] (2) The Supreme Court has no jurisdiction under s. 29 of the Supreme and Exchequer Courts Act, to hear an appeal by the defendant where the amount in controversy has not been established by the judgment appealed from. [But see S. & E. C. Act, 1891, 54 & 55 Vict. c. 25, s. 3.] Ontario & Quebec Ry. Co. v. Marcheterre, 17 Can. S.C.R. 141.

FINALITY OF JUDGMENT.

A judgment allowing demurrer to plaintiff's replication to one of several pleas, which does not operate to put an end to the whole or any part of the action or defence is not a final judgment from which an appeal will lie. Shaw v. Can. Pac. Ry. Co., 16 Can. S.C.R. 703.

FINALITY OF JUDGMENT—QUASHING INTERIM INJUNCTION.

In this case, on the 1st September, 1883, Torrance, J., of the Superior Court (Quebec), ordered the issue of a writ of injunction, returnable on the 30th day of October, then next, enjoining the respondents and certain other persons named from issuing or dealing with certain bonds until otherwise ordered by the said Court or a Judge thereof. About the 13th November, the Canada Atlantic Ry. Co. presented a motion to quash the injunction. On the 13th December, Mathieu, J., of the Superior Court, declared that the writ of injunction had been issued without reason (sans cause) and he suspended it until the final adjudication of the action on the merits. Both the appellants and respondents appealed from this judgment to the Court of Queen's Bench which Court on the 21st of January, 1885, rendered judgment quashing the injunction absolutely. On the 9th of February following, the appellants gave notice of their intention to appeal to the Supreme Court of Canada, and on the 19th February presented a petition to Monk, J., one of the Judges of the Court of Queen's Bench, for the allowance of the appeal. On the 20th of February, Monk, J., rendered judgment, refusing to allow the appeal on the ground that the judgment quashing the writ of injunction was not a final judgment, and, "notwithstanding the offer and sufficiency of the security." On the 27th of February, the appellants, by their attorneys, served notice of their intention to move before a Judge of the Supreme Court to be allowed to give proper security to the satisfaction of that Court, or of a Judge thereof, for the prosecution of their appeal to that Court, notwithstanding the refusal of the Court below to accept said security, and notwithstanding the lapse of thirty days from the rendering of the judgment from which they desired to appeal, and further to obtain an extension of time for settling the case in appeal. This motion came before Henry, J., in Chambers, on the 5th March, who enlarged it into Court, and it was on the same day argued at length before the Court:—Held, that the judgment of the Court of Queen's Bench (appeal side), quashing the interim injunction, was not a final judgment from which an appeal would lie. Motion refused.

Stanton v. Canada Atlantic Ry. Co. (1885), 21 C.L.J. 355.

Final judgment—Rule nisi.

The judgment making absolute a rule nisi against a witness who fails to appear at the trial of an action after summons, is a final judgment from which there is a right of review or appeal. The witness served with the rule nisi is not obliged to appear in person, but may show cause by attorney. The witness may appeal from judgment making the rule absolute without being obliged to appeal also from the judgment ordering the rule to issue and the delay for bringing the appeal runs from the latest judgment only.

Collins v. Can. Northern Quebec Ry. Co., 11 Que. P.R. 133 (Ct. Rev.).

Appeal from assessment—Final judgment.

By 52 Viet. c. 37, s. 2, amending the Supreme and Exchequer Courts Act, an appeal lies in certain cases to the Supreme Court of Canada from Courts "of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such Court is or are appointed by provincial or municipal authority." By the Ontario Act," 55 Vict. c. 48, as amended by 58 Vict. c. 47, an appeal lies from rulings of Municipal Courts of Revision in matters of assessment to the County Court Judges of the County Court District where the property has been assessed. On an appeal from a decision of the County Court Judges under the Ontario statutes:—Held, King, J., dissenting, that if the County Court Judges constituted a "Court of last resort" within the meaning of 52 Vict. c. 37, s. 2, the persons presiding over such Court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act. Held, per Gwynne, J., that as no binding effect is given to the decision of the County Court Judges, under the Ontario Acts cited, the Court appealed from was not a "Court of last resort" within the meaning of 52 Vict. c. 37, s. 2. Quære.—Is the decision of the County Court Judges a "final judgment" within the meaning of 52 Vict. c. 37; s. 2?

Toronto v. Toronto Ry. Co., 27 Can. S.C.R. 640.

[Leave to appeal to Privy Council refused.]

Right to appeal—Disposal of questions of fact by Court—Consent of parties.

In an action against a railway company for damages for an injury caused by an engine of the company, the counsel for both parties agreed at the trial as follows: "That the jury be discharged without giving a verdict, the whole case to be referred to the Court, which shall have power to draw inferences of fact, and if they shall be of opinion, upon the law and the facts, that the plaintiff is entitled to recover, they shall assess the damages, and that judgment be entered as the verdict of the jury. If the Court should be of opinion that the plaintiff is not entitled to recover, a nonsuit shall be entered." The jury were then discharged, and the Court in banc, in pursuance of such agreement, subsequently considered the case, and assessed the damages at $300, considering plaintiff entitled to recover. The company sought to appeal from such decision. By the practice of the Supreme Court of New Brunswick all questions of fact are to be tried by a jury, and the Court can only deal with such questions by consent of parties:—Held, Gwynne and Patterson, JJ., dissenting, that as the Court took upon itself the decision of the questions of fact, in this case without any legal or other authority therefor, than the consent and agreement of the parties, it acted as quasi-arbitrators, and the decision appealed from was that of a private tribunal constituted by the parties, which could not be reviewed in appeal or otherwise, as judgments pronounced in the regular course of the ordinary procedure of the Court may be reviewed and appealed from:—Held, also, that if the merits of the case were properly before the Court, the judgment appealed from should be affirmed:—Held, per Gwynne and Patterson, JJ., that the case was appealable, and, on the merits, it appearing from the evidence that the servants of the company had done everything required by the statute to give notice of the approach of the train, the appeal should be allowed and a judgment of nonsuit entered. 31 N.B.R. 318, affirmed.

Can. Pac. Ry. Co. v. Fleming (1893), 22 Can. S.C.R. 33.

[Applied in Quebec & Lake St. John Ry. Co. v. Girard, 15 Que. K.B. 56; followed in Champaigne v. Grand Trunk Ry. Co., 9 O.L.R. 589; referred to in Voigt v. Groves, 12 B.C.R. 180.]

FINALITY OF JUDGMENT—DISPUTE OF TITLE UNDER LEASE—RULING OF MASTER.

Where a master, on a reference under the Vendor and Purchaser Act to settle the title under a written agreement for a lease, ruled that evidence might be given to shew what covenants the lease should contain, an appeal does not lie to the Supreme Court from the judgment affirming such ruling, it not being a final judgment and the case not coming within the provisions of s. 24 (e) of the Supreme and Exchequer Courts Act relating to proceedings in equity, Gwynne, J., dissenting.

Can. Pac. Ry. Co. v. Toronto, 30 Can. S.C.R. 337.

DISMISSAL OF APPEAL.

Where the jurisdiction of the Supreme Court of Canada to entertain an appeal was in doubt, but it was considered that the appeal should be dismissed on the merits, the Court heard and decided the appeal accordingly.

Can. Pac. Ry. Co. v. The King, 38 Can. S.C.R. 137.

RIGHT TO APPEAL—JURISDICTIONAL AMOUNT.

The plaintiff claimed $1,500 damages for delay in delivery of iron. The defendants, besides denying the charge of nondelivery in due time, counterclaimed for $1,223 demurrage. At the trial judgment was given for plaintiff for $1,000 and the counterclaim was dismissed. Upon appeal to the Court of Appeal, the judgment was varied by limiting the damages to the fall in the price of iron during a considerably shorter time than that fixed in the Court below, the amount to be ascertained on a reference. Upon a motion by the defendants to allow a bond given by them as security upon an appeal by them to the Supreme Court of Canada, the plaintiff's counsel stated that the plaintiff's claim on the reference would be less than $1,000, and contended that no appeal lay:—Held, however, that as the plaintiff claimed $1,500 and was not limited by the judgment of the Court of Appeal to any particular sum, the matter in controversy on the appeal exceeded the sum of $1,000, so that the appeal lay:—Held, also, that upon the counterclaim the sum of $1,223 was involved, and that an appeal lay in respect thereof. The Court of Appeal declined to grant, ex cautela, leave to appeal to the Supreme Court of Canada, the case not being one in which leave, if it were necessary, ought to be granted.

Frankel v. Grand Trunk Ry. Co., 3 O.L.R. 703 (C.A.).

To Supreme Court of Canada—Amount of controversy.

A judgment for $1,000 damages with interest from a date before action brought is appealable under 60-61 Vict. (Can.) c. 34, s. 1 (c).

Canadian Railway Accident Insurance Co. v. McNevin, 32 Can. S.C.R. 194.

Privy Council—Matter in controversy exceeding $4,000.

On a motion by the plaintiffs for the allowance of the security on an appeal from the Court of Appeal to the Privy Council, in an action brought by the corporation of a city against two electric light companies to have it declared that they had forfeited their rights under certain agreements with the city, under which they held their franchises, on the ground that they had amalgamated contrary to the terms of such agreements, which action had been dismissed:—Held (Meredith, J.A., dissenting), that the whole matter in controversy at the trial (being the destruction, not the acquisition of the defendants' franchise) was whether the companies had forfeited their right by amalgamation, and this clearly did not come within the last branch of s. 1 of R.S.O. 1897, c. 48, and that there was nothing before the Court to shew that such matter was of value to the plaintiffs of more than $4,000, or of any sum or value capable of being ascertained or defined. Per Meredith, J.A.:—The matter in controversy much exceeded $4,000, and if controverted leave should be given to the appellants to prove their value.

Toronto v. Toronto Elec. Light Co., 11 O.L.R. 310 (C.A.).

Workmen's Compensation Act, B.C.—Arbitrator.

No appeal lies from the decision of an arbitrator appointed by a Supreme Court Judge under clause 2 of the second schedule to the Workmen's Compensation Act, 1902. Lee v. Crow's Nest Pass Coal Co., 11 B.C.R. 323.

Court of review—Jurisdiction of—Review of merits of case reserved.

The Court of Review has absolute and unrestricted power to decide the merits of a cause reserved for its consideration, without regard to the verdict of the jury (Art. 496 C.C.P.).

Ferguson v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 420, 20 Que. S. C. 54.

[Referred to in Miller v. Grand Trunk Ry. Co., 21 Que. S.C. 350, 2 Can. Ry. Cas. 449, 34 Can. S.C.R. 70.]

Misdirection—Correction after specific objection—Practice.

Where, on a specific objection to his charge, the trial Judge recalled the jury and directed them as requested, the contention that the directions thus given were erroneous should not be entertained on an appeal.

Can. Pac. R. Co. v. Hansen, 7 Can. Ry. Cas. 441, 40 Can. S.C.R. 194.

Right to—Additional relief—Injunction—Choice of remedies.

Quære per Stuart, J.:—Whether or not a dissatisfied litigant who has the right to appeal must appeal and is not at liberty to bring the same matter before the Court in a different way, but:—Held, that where the right of appeal was doubtful and the plaintiff had given notice of appeal, and at the same time brought an action for injunction, in which action the validity of the order appealed from would have to be inquired into, the matter was properly before the Court:—Held, also, that the Court will not be bound by agreements of counsel in a stated case as to the effect upon the rights of parties to the action by determination of certain questions submitted in certain specified ways.

Marsan v. Grand Trunk Pacific Ry. Co., 9 Can. Ry. Cas. 341, Alta. L.R. 43.

[Followed in Girouard v. Grand Trunk Ry. Co., 9 Can. Ry. Cas. 354, 2 Alta. L.R. 54; considered in Sanders v. Edmonton Dunvegan & B. C. Ry. Co. 16 Can. Ry. Cas. 142.]

MATTERS APPEALABLE—QUESTION NOT RAISED IN LOWER COURT—ESTOPPEL.

Where a matter relied upon to support the action was not urged at the trial nor asserted on an appeal to the Provincial Court it is too late to put it forward for the first time on an appeal to the Supreme Court of Canada.

Laidlaw & Laurie v. Crow's Nest Southern Ry. Co., 10 Can. Ry. Cas. 32, 42 Can. S.C.R. 355.

[Judgment appealed from, 14 B.C.R. 169, 10 Can. Ry. Cas. 27, affirmed, Idington, J., dissenting.]

REVIEW OF FINDINGS OF FACT.

Upon an appeal from the findings of a Judge who has tried a case without a jury, the Court appealed to does not and cannot abdicate its right and its duty to consider the evidence. And if it appear from the reasons given by the trial Judge that he has misapprehended the effect of the evidence of failed to consider a material part of it, and the evidence which has been believed by him, when fairly read and considered as a whole, leads the Appellate Court to a clear conclusion that the findings of the trial Judge are erroneous, it becomes the plain duty of the Court to reverse the findings.

Beal v. Michigan Central Ry. Co., 10 Can. Ry. Cas. 37, 19 O.L.R. 502.

[Approved in Gordon v. Goodwin, 20 O.L.R. 327; Ryan v. McIntosh, 20 O.L.R. 31.]

REVIEW OF FACTS ON APPEAL.

Under the British Columbia Railway Act, R.S.B.C. 1911, c. 194, s. 68, upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings, the Court will not supersede the arbitrators but will review the award as it would review the judgment of a subordinate Court in a case of original jurisdiction, considering the award on its merits, both as to the facts and the law. [Atlantic and North-West Ry. Co. v. Wood, [1895], A.C. 257, 64 L.J.P.C. 116, followed, under which a similar question under subs. 2 of s. 161 of the Railway Act, 1888, being s. 168 of 3 Edw. VII. (D) c. 58, was decided.]

Canadian Northern Pacific Ry. Co. v. Dominion Glazed Cement Pipe Co., 7 D.L.R. 174, 22 W.L.R. 335, 14 Can. Ry. Cas. 265.

REVIEW OF FACTS—VERDICT.

On appeal to the appellate division of the Ontario Supreme Court from the judgment of a trial Court, based upon the findings of a jury in favour of the plaintiff, who was the sole witness for himself, though the Appellate Court may doubt the plaintiff's story or disbelieve him, they have no right to substitute their own opinion of the facts for that of the jury, but if there is some evidence to support the finding of the jury, it cannot be disturbed. (Per Garrow, J.A.)

Stevens v. Can. Pac. Ry. Co., 10 D.L.R. 88, 15 Can. Ry. Cas. 28.

Motion to affirm jurisdiction—Finality of judgment.

A preliminary motion to affirm the jurisdiction on an appeal to the Supreme Court of Canada will be dismissed and the parties left to their rights on the hearing, if the facts shewn on the preliminary motion are insufficient to enable the Court to finally determine whether the judgment or order appealed from was final and so subject to appeal or was interlocutory only and, therefore, not subject to appeal. [Clarke v. Goodall, 44 Can. S.C.R. 284; Crown Life v. Skinner, 44 Can. S.C.R. 616, and McDonald v. Belcher, [1904] A.C. 429, specially referred to.]

Windsor, Essex & Lake Shore Rapid Ry. Co. v. Nelles, 1 D.L.R. 309.

[Referred to in 2 D.L.R. 732; Vanbuskirk v. McDermott, 5 D.L.R. 5, 46 N.S.R. 98.]

Limitation of time of appeal.

The limitation of sixty days for appealing to the Supreme Court of Canada under s. 69 of the Supreme Court Act, R.S.C. 1906, c. 139, may, under s. 71 of that Act, be extended by the Court appealed from, but not by the Supreme Court of Canada. [Windsor, Essex & L.S. Rapid Ry. Co. v. Nelles (1912), 1 D.L.R. 156, affirmed on this point.]

Windsor, Essex & Lake Shore Rapid Ry. Co. v. Nelles, 1 D.L.R. 309.

[Referred to in 2 D.L.R. 732; Vanbuskirk v McDermott, 5 D.L.R. 5, 46 N.S.R. 98.]

Notice of appeal.

An appeal from the judgment of the provincial Court of last resort affirming the judgment given at the trial of the action disposing of the rights of the parties and directing a reference to determine the amount of damages, is not an appeal from "a judgment upon a motion to enter a verdict or nonsuit upon a point reserved at the trial" within the terms of s. 70 of the Supreme Court Act, R.S.C. 1906, c. 139, so as to require a notice of appeal within twenty days after the decision of the Court of Appeal of the province.

Windsor, Essex & Lake Shore Rapid Ry. Co. v. Nelles, 1 D.L.R. 156.

[Referred to in 1 D.L.R. 309, 2 D.L.R. 732; Vanbuskirk v. McDermott, 5 D.L.R. 5, 46 N.S.R. 98.]

Right to appeal—Finality of judgment.

Where the judgment sought to be appealed from is that of the highest provincial Court of final resort upon an appeal from a judgment which varied the report of a Referee or Master upon an appeal from his report in a reference which had been directed at the trial to assess the damages in the action, such judgment of the highest provincial Court is not a final judgment appealable to the Supreme Court of Canada, but an appeal lies from the judgment on further directions afterwards given upon the varied report. [Clarke v. Goodall (1911), 44 Can. S.C.R. 284, followed.]

Windsor, Essex and Lake Shore Rapid Ry. Co. v. Nelles, 1 D.L.R. 156.

[Referred to in 1 D.L.R. 309, 2 D.L.R. 732; Vanbuskirk v. McDermott, 5 D.L.R. 5, 46 N.S.R. 98.]

Extension of time for appealing.

Where a judgment of the Court of Appeal has given to the plaintiff in an action for specific performance of an agreement to deliver stock and bonds his choice between specific performance and a reference as to damages, and the defendant has not appealed from such judgment to the Supreme Court of Canada, being under the impression that no appeal would lie, and the plaintiff has elected to take a reference, and appeals have been taken from the Referee's report, the Court of Appeal should not, at the instance of the defendant, extend the time for appealing to the Supreme Court of Canada from its original judgment.

Nelles v. Hesseltine; Windsor, Essex & L.S. Rapid Ry. Co. v. Nelles (No. 4), 6 D.L.R. 541, 27 O.L.R. 97.

Finality of judgment.

A judgment of a provincial Court of last resort varying the judgment given on the trial of an action for damages for alleged breach of contract, and affirming the plaintiff's right of recovery with certain limitations as to damages as to which a reference was directed, is not a "final judgment" from which an appeal lies to the Supreme Court of Canada, within the statutory definition of that term contained in s. 2 of the Supreme Court Act, R.S.C. 1906, c. 139, as a judgment order or decision "whereby the action is finally determined and concluded." [Clarke v. Goodall, 44 Can. S.C.R. 284, and Crown Life Insurance Co. v. Skinner, 44 Can. S.C.R. 616, specially referred to.]

Nelles v. Hesseltine; Windsor, Essex & L.S. Rapid Ry. Co. v. Nelles (No. 2), 2 D.L.R. 732, 3 O.W.N. 862.

[Referred to in Vanbuskirk v. McDermott, 5 D.L.R. 5, 46 N.S.R. 98.]

Leave to appeal—Finality of judgment.

S. 71 of the Supreme Court Act, R.S.C. 1906, c. 139, providing that the Court proposed to be appealed from, or any Judge thereof, may, under special circumstances, allow an appeal although the same is not brought within the time prescribed by the Act, applies only to judgments otherwise appealable, and does not confer power to grant leave to appeal from a judgment which is interlocutory only or which is not a "final judgment" within the definition of that statute. [Vaughan v. Richardson, 17 Can. S.C.R. 703, and News Printing Co. v. Macrae, 26 Can. S.C.R. 691, specially referred to.]

Nelles v. Hesseltine; Windsor, Essex & L.S. Rapid Ry. Co. v. Nelles, 2 D.L.R. 732, 3 O.W.N. 862.

[Referred to in Vanbuskirk v. McDermott, 5 D.L.R. 5, 46 N.S.R. 98.]

Notice of appeal—Sufficiency of.

A notice of appeal is insufficient where the grounds stated therein are: (1) That the judgment appealed from is against the law, evidence, and the weight of evidence; (2) that the trial Judge erroneously admitted and excluded evidence; and (3) that the judgment was erroneous "upon such other grounds as may appear in the pleadings and proceedings, such alleged grounds being too indefinite." (Per Beck, J.)

Alfred v. Grand Trunk Pacific Ry. Co., 5 D.L.R. 154, 20 W.L.R. 111.

[Affirmed in 5 D.L.R. 471; referred to in Alfred v. G.T.P. (No. 2), 6 D.L.R. 147.]

Amendments on appeal.

A question not going to the merits of a case and not raised by the notice of appeal, cannot be brought to the attention of the Court by a supplementary or "explanatory" notice of appeal. (Per Beck, J.)

Alfred v. Grand Trunk Pacific Ry. Co., 5 D.L.R. 154, 20 W.L.R. 111.

[Affirmed in 5 D.L.R. 471; referred to in Alfred v. G.T.P. (No. 2), 6 D.L.R. 147.]

STAY OF PROCEEDINGS PENDING APPEAL.

Where the plaintiffs in an action have succeeded at the trial and in the provincial Appellate Court, and the defendants have elected to appeal to the Supreme Court of Canada, in which also they have been unsuccessful, and, while the Supreme Court still had jurisdiction over the case, a Judge of that Court has refused a stay of proceedings pending an appeal to the Privy Council, and it appears that there has not been any miscarriage of justice through accident, mistake or otherwise, but that every question in dispute has been fully considered, and that the case involves merely a question of fact and nothing of public importance, and that the Privy Council is likely to refuse leave to appeal, a Judge of the provincial Court of first instance should not grant a stay of proceedings pending an appeal to the Privy Council. [Alfred v. Grand Trunk Pacific Ry. Co., 5 D.L.R. 154, and Grand Trunk Pacific Ry. Co. v. Alfred, 5 D.L.R. 471, specially referred to.]

Alfred v. Grand Trunk Pacific Ry. Co., 6 D.L.R. 147, 22 W.L.R. 65.

INSCRIPTION IN LAW—REVIEW OF FACTS.

By an inscription in law, defendant cannot raise questions of facts, nor deny the facts alleged, but the same must be presumed to be true. In the present case the evidence alone of the divers circumstances and facts alleged in plaintiff's declaration will shew whether the responsibility and compensation for the accident in question in this cause, are to be determined by the Workmen's Act, 9 Edw. VII. c. 66, or by the common law, and under such circumstances the Court will order "preuve avant faire droit" on defendant's inscription in law.

Biggs v. Grand Trunk Ry. Co., 18 Rev. de Jur. 383.

GRANTING LEAVE TO APPEAL.

Leave to appeal to a Divisional Court from order of Judge in Chambers was granted.

Swaisland v. Grand Trunk Ry. Co., 2 D.L.R. 898, 3 O.W.N. 1083.

LEAVE TO APPEAL—ORDER GRANTING NEW TRIAL.

Where a party appeals to a Divisional Court from a judgment after trial with a jury, and contends that he is entitled to judgment upon the findings of the jury, but does not ask for a new trial, and the Divisional Court nevertheless grants a new trial without disposing of the motion for judgment, it is a proper case for granting leave to appeal to the Court of Appeal, but such leave should be upon the terms that the party appealing shall abandon his right to a new trial.

Dart v. Toronto Ry. Co., 3 D.L.R. 776, 3 O.W.N. 1202.

POWER TO REVIEW MERITS OF CASE.

Although an appellate Court may think that the preponderance of testimony is in favour of the unsuccessful party in an action tried with a jury, it cannot substitute its opinion for that of the jury, or interfere with the jury's conclusions except upon some error or other substantial ground.

Zufelt v. Can. Pac. Ry. Co., 7 D.L.R. 81, 4 O.W.N. 39.

INADVERTENCE OF SOLICITOR—FAILURE TO GIVE NOTICE OF APPEAL.

Helson v. Morrisey, Fernie & Michel R. Co. (No. 2), 7 D.L.R. 822.

REVIEW OF FACTS ON NONSUIT.

On an appeal from a judgment of a County Court (Man.), ordering a nonsuit, the Manitoba Court of Appeal may draw its own conclusions from plaintiff's evidence brought out at the trial, where there are no conflicting statements nor any contradictory evidence.

Stitt v. Can. Northern Ry. Co., 15 Can. Ry. Cas. 333, 23 Man. L.R. 43, 10 D.L.R. 544.

Costs only involved—Refusal to entertain—Statutory right to costs —Wrong order of Court below—Duty of Court to reverse.

While the Supreme Court of Canada ordinarily refuses to entertain an appeal which merely involves costs, where a party entitled by statute to receive his costs of certain proceedings from his opponent has been ordered to pay that opponent's costs it is the duty of the Court to reverse such order. [Gavin v. Kettle Valley Ry. Co., 23 Can. Ry. Cas. 379, 43 D.L.R. 47, reversed.]

Gavin v. Kettle Valley Co., 25 Can. Ry. Cas. —, 47 D.L.R. 65.

Criminal appeal—Privy Council—Nuisance.

S. 1025 of the Criminal Code, which purports to limit the right of appeal to the Privy Council in criminal matters, does not apply to a prosecution by indictment for a noncriminal offence such as the class of noncriminal nuisances referred to in Criminal Code, s. 223.

Toronto Ry. Co. v. The King, 23 Can. Ry. Cas. 183, [1917] A.C. 630, 38 D.L.R. 537.

Question not raised below—Cause of action.

A question not raised in the Court appealed from will not be considered by the Supreme Court of Canada when not mentioned in the factum, and when all evidence pertaining to such question had, by consent of the parties, been omitted from the appeal book.

Can. Pac. Ry. Co. v. Kerr, 16 Can. Ry. Cas. 25, 49 Can. S.C.R. 33, 14 D.L.R. 840.

Expropriation—Application to appoint arbitrator—Persona designata —Amount in controversy—Jurisdiction.

A railway company served notice of expropriation of land on the owner, offering $25,000 as compensation. It later served a copy of said notice on S., lessee of said land for a term of ten years. On application to a Superior Court Judge for appointment of arbitrators S. claimed to be entitled to a separate notice and an independent hearing to determine his compensation. The Judge so held and dismissed the application and his ruling was affirmed by the Court of King's Bench. The company sought to appeal to the Supreme Court of Canada. The appeal was dismissed. Per Fitzpatrick, C.J., and Idington, J.:—That the Judge was persona designata to hear such applications as the one made by the company, that the case did not therefore originate in a Superior Court and the appeal would not lie. Can Pac. Ry. Co. v. Little Seminary of Ste. Thérèse, 16 Can. S.C.R. 606; St. Hilaire v. Lambert, 42 Can. S.C.R. 264, followed. Per Davies, Duff, Anglin, and Brodeur, JJ., that as there was nothing in the record to shew that the amount in dispute was $2,000 or over, and no attempt had been made to establish by affidavit that it was, the appeal failed.

Can. Northern Ontario Ry. Co. v. Smith, 21 Can. Ry. Cas. 98, 50 Can. S.C.R. 476, 22 D.L.R. 265.

B. From Orders of Railway Board.

Appeal to Privy Council—Application to allow security.

Where the sole question in two actions was as to the validity of an order of the Railway Committee requiring the plaintiffs to build a bridge:

—Held, refusing an application to allow the security upon a proposed appeal to the Privy Council from the decision of the Court of Appeal, that an appeal did not lie as of right under R.S.O. 1897, c. 48, s. 1.
Can. Pac. Ry. Co. v. Toronto, 19 O.L.R. 663.

JUDGE IN CHAMBERS—APPEAL TO FULL COURT.

No appeal lies to the Supreme Court of Canada from an order of a judge of that Court in Chambers granting or refusing leave to appeal from a decision of the Board under s. 44 (3) of the Railway Act, 1903.
Williams v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 302, 36 Can. S.C.R. 321.
[Relied on in Re Richard, 38 Can. S.C.R. 398; referred to in Re Telford, 11 B.C.R. 365.]

JURISDICTION—PUBLIC IMPORTANCE.

Where the judge entertained doubt as to the jurisdiction of the Board to make the order complained of and the questions raised were of public importance, special leave for an appeal was granted, on terms, under the provisions of s. 44 (3) of The Railway Act, 1903.
Montreal Street Ry. Co. v. Montreal Terminal Ry. Co. and Board of Railway Commissioners for Canada, 4 Can. Ry. Cas. 369, 35 Can. S.C.R. 478.

ORDER IMPOSING TERMS.

The Board granted an application of the James Bay Ry. Co. for leave to carry their line under the track of the G.T. Ry. Co., but, at the request of the latter, imposed the condition that the masonry work of such undercrossing should be sufficient to allow of the construction of an additional track on the line of the G.T. Ry. Co. No evidence was given that the latter company intended to lay an additional track in the near future or at any time. The James Bay Co., by leave of a Judge, appealed to the Supreme Court of Canada from the part of the order imposing such terms, contending that the same was beyond the jurisdiction of the Board:—Held, that the Board had jurisdiction to impose said terms:—Held, per Sedgewick, Davies and Maclennan, JJ., that the question before the Court was rather one of law than of jurisdiction, and should have come up on appeal by leave of the Board or been carried before the Governor-General-in-council.
James Bay Ry. Co. v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 164, 37 Can. S.C.R. 372.

JURISDICTIONAL AMOUNT—COSTS OF FARM CROSSING.

An application to have the appeal quashed on the grounds that the cost of the establishing the crossing demanded, together with the damages sought to be recovered by the plaintiff, would amount to less than $2,000, and that the case did not come within the provisions of the Supreme Court Act permitting appeals from the Province of Quebec, was dismissed.
Grand Trunk Ry. Co. v. Perrault, 5 Can. Ry. Cas. 293, 36 Can. S.C.R. 671.

LIMITATION OF TIME—JURISDICTION.

Except in the case mentioned in rule 59, there is no limitation of the time within which a Judge of the Supreme Court may grant leave to appeal under s. 56 (2) of the Railway Act, 1906, on a question of the jurisdiction of the Board.
Grand Trunk Ry. Co. v. Department of Agriculture for Ontario, 10 Can. Ry. Cas. 84, 42 Can. S.C.R. 557.

LEAVE TO APPEAL—JURISDICTIONAL GROUNDS.

On an application for leave to appeal to the Supreme Court from an order of the Board permitting the Montreal Light, Heat & Power Co. to erect, place and maintain its wires beneath the tracks of the Montreal Terminal Ry. Co.:—Held, that, as only a question of jurisdiction and not of law was involved, the application must be refused.

Montreal Terminal Ry. Co. v. Montreal Light, Heat and Power Co., 10 Can. Ry. Cas. 133.

LEAVE TO APPEAL—WIRES BENEATH TRACKS.

An order of the Board permitting a power company to maintain its wires beneath the tracks of a railway company involves a question of jurisdiction and not of law, from which leave to appeal to the Supreme Court will be refused.

Montreal Terminal Ry. Co. v. Montreal Light & Power Co., 10 Can. Ry. Cas. 138.

LEAVE TO APPEAL—JURISDICTION OF BOARD.

Where a question of law is one of jurisdiction, the party who disputes the jurisdiction should apply to a Judge of the Supreme Court for leave to appeal, but the Board should not, under its power to submit questions of law to the Supreme Court, submit a question which is really of jurisdiction.

Prince Albert v. Can. Northern Ry. Co., 11 Can. Ry. Cas. 200.

LEAVE TO APPEAL—JURISDICTION OF BOARD.

A judge of the Supreme Court of Canada will not grant leave to appeal from the decision of the Board on a question of jurisdiction if he has no doubt that such decision was correct. Leave refused.

Halifax Board of Trade v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 58.

ORDERS OF BOARD—FORM OF SUBMISSION—DEFINING QUESTIONS OF LAW.

The Supreme Court of Canada will not entertain an appeal under s. 56 (3) of the Railway Act, 1906, unless some specific question is stated, or otherwise defined, in the order granting leave to appeal made by the Board which, in its opinion, is a question of law.

Can. Pac. and Can. Northern Ry. Cos. v. Regina Board of Trade (Regina Toll Case), 12 Can. Ry. Cas. 369, 44 Can. S.C.R. 328.

[See 45 Can. S.C.R. 321, 13 Can. Ry. Cas. 203, affirming 11 Can. Ry. Cas. 380.]

ORDERS OF BOARD—JURISDICTIONAL GROUNDS—CROWN GRANTING LEAVE.

An appeal from the order of the Board lies to the Supreme Court under s. 56, subs. 2, of the Railway Act, 1906, after the leave prescribed by that section has been obtained, on any question of jurisdiction or law. Under subs. 3 the Supreme Court is to determine by its judgment the questions submitted, and under subs. 5 to certify its opinion to the Board, which is to make an order in accordance therewith, and that order by subs. 9 is declared to be final:—Held, that the provisions of s. 56 are not sufficient to take away the prerogative of the Crown to grant leave to appeal from their judgment. [Grand Trunk and Can. Pac. Ry. Cos. v. Toronto (Toronto Viaduct Case), 42 Can. S.C.R. 613, 11 Can. Ry. Cas. 38, affirmed.]

Can. Pac. Ry. Co. v. Toronto and Grand Trunk Ry. Co. (Toronto Viaduct Case), 12 Can. Ry. Cas. 378, [1911] A.C. 461.

Order of Railway and Municipal Board.

The right of a municipality to appeal from an order of the Ontario Railway and Municipal Board permitting a street railway to deviate its line, is not lost or waived by the failure of the city to appeal from the mere ruling of the Board in favour of the railway company as to the right to deviate when the deviation plan was not approved at that hearing, as it may wait until the making of the formal order and appeal therefrom on obtaining the requisite leave.

Re Toronto and Toronto & York Radial Ry. Co., 15 Can. Ry. Cas. 277, 12 D.L.R. 331, 28 O.L.R. 180.

[Affirmed in 17 Can. Ry. Cas. 346, 15 D.L.R. 270; applied in Re Toronto & York Radial Ry. Co. and Toronto, 26 D.L.R. 244.]

Ontario Railway Board—Special Act—No express right given—Jurisdiction of Appellate Court to grant leave.

S. 48 (1) of the Ontario Railway and Municipal Board Act (R.S.O. 1914, c. 186), which provides that an appeal shall lie from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law, applies to the jurisdiction given to the Board by the Ontario Act, 1917, 7 Geo. V. c. 92, s. 4, by which power is given to the City of Toronto to expropriate part of the Toronto & York Radial Ry. and although under the later Act no right of appeal is expressly given to the County of York, the Appellate Court has jurisdiction to grant leave.

Re Toronto and Toronto & York Radial Ry. Co. et al., 23 Can. Ry. Cas. 218, 42 O.L.R. 545, 43 D.L.R. 49.

C. From Expropriation Awards.

Order by Judge in Chambers as to moneys deposited.

The College of Ste. Thérèse having petitioned for an order for payment to them of a sum of $4,000 deposited by the appellants as security for land taken for railway purposes, a Judge of the Superior Court in Chambers after formal answer and hearing of the parties granted the order under the Railway Act, R.S.C., 1886, c. 109, s. 8, subs. 31. The railway company appealed against this order to the Court of Queen's Bench for Lower Canada and that Court affirmed the decision of the Judge of the Superior Court:—Held, that the order in question having been made by a Judge sitting in Chambers, and, further, acting under the statute as a persona designata, the proceedings had not originated in a Superior Court within the meaning of s. 28 of the Supreme and Exchequer Courts Act, and the case was therefore not appealable.

Can. Pac. Ry. Co. v. Ste. Thérèse, 16 Can. S.C.R. 606.

[Affirmed in St. John & Quebec Ry. Co. v. Bull, 16 Can. Ry. Cas. 284, followed in Can. Northern Ontario Ry. Co. v. Smith, 21 Can. Ry. Cas. 98.]

Amount in controversy—Costs.

In a railway expropriation case the respondent in naming his arbitrator declared that he only appointed him to watch over the arbitrator of the company, but the company recognized him officially and subsequently an award of $1,974.25 damages and costs for land expropriated was made under Art. 5164, R.S.Q. The demand for expropriation as formulated in their notice to arbitrate by the appellants was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award:—

Held, affirming the judgment of the Courts below, that the appointment of respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction. Strong and Taschereau, JJ., doubted if the amount in controversy was sufficient to give the Court jurisdiction to hear the appeal, the amount of the award being under $2,000, and to make up the appealable amount either interest accrued after the date of the award and after action brought or the costs taxed on the arbitration proceedings would have to be added.

Quebec, Montmorency & Charlevoix Ry. Co. v. Mathieu, 19 Can. S.C.R. 426.

[Distinguished in Dufresne v. Guévrement, 26 Can. S.C.R. 219.]

JUDICIAL NOTICE OF APPEAL—JURISDICTION.

In expropriation proceedings under the Railway Act a single Judge of the Superior Court may take judicial notice of the proceedings on appeal from the award, though such appeal was not by direct action, but by petition, and that even in the absence of rules of special practice to this effect as such rules are not required to confer jurisdiction. Hence it follows that such appeal may be taken without direct action and by means of a petition. The appeal in this case will lie "as in a cause of original jurisdiction" on all questions of law and fact according to the evidence before the arbitrators. The Judge can only alter the award when it is clear that it results from a gross error of law, or in appreciation of the facts, on the part of the arbitrators.

Neilson v. Quebec Bridge Co., 21 Que. S. C. 329.

[Approved in Lamarre v. Grand Trunk Ry. Co., 11 Que. P.R. 217.]

APPEAL TO COURT OF KING'S BENCH.

Quaere, does an appeal lie to the Court of King's Bench from a judgment of the Superior Court sitting in an appeal from an award of arbitration under s. 200 of the Railway Act, 1906?

Quebec, Montreal & Southern Ry. Co. v. Landry, 19 Que. K.B. 82.

APPEAL TO SUPERIOR COURT.

For an appeal to the Superior Court from the award of arbitrators in expropriation proceedings under the Railway Act a petition alone is sufficient; the petition need not be accompanied by a writ.

Lamarre v. Grand Trunk Ry. Co., 11 Que. P.R. 216.

RECUSATION OF ARBITRATOR—EXPROPRIATION BY A RAILWAY COMPANY.

No appeal lies to the Supreme Court of Canada from a judgment of the Court of Queen's Bench, confirming a judgment of the Superior Court, which dismissed a recusation of an arbitrator appointed in an expropriation by a railway company.

Richelieu Ry. v. Ménard, 5 Que. P.R. 179, Wurtele, J.

DISCONTINUANCE OF EXPROPRIATION PROCEEDINGS.

An order allowing or confirming a discontinuance, by the city of Montreal, of expropriation proceedings under ss. 429 to 439 of the 63 Vict. c. 58, is not a final judgment of the Superior Court susceptible of appeal to the Court of King's Bench, and, therefore, no appeal lies from it to the Court of Review. Per Archibald, J.:—The city had no right to discontinue the proceedings, but the order allowing it to do so is not a judgment, it is a purely ministerial act of the Judge, and is not therefore susceptible of review. Per Charbonneau, J.:—The order, if it is a judgment, must be a final one, and, as s. 439 expressly takes away the right of appeal from a final judgment homologating the report of the commissioners for expropriation, the right of appeal is impliedly taken away from this one. Per Fortin, J.:—The order is a judgment of the Superior Court, susceptible of appeal to the Court of King's Bench, and, therefore, an appeal lies from it to the Court of Review. In this case, the judgment was founded in law and should be confirmed. The Judge, therefore, concurred in striking out the inscription in review, which leaves the judgment undisturbed.

Re Lafontaine Park; Montreal v. Cushing, 40 Que. S.C. 1.

"EVENT" READ DISTRIBUTIVELY—"ISSUE" AS DISTINGUISHED FROM "EVENT"—COSTS OF AND INCIDENTAL TO ARBITRATION.

Sam Kee, having obtained an award from arbitrators appointed under the Railway Act, 1903, which award, by reason of s. 162 of the Act, entitled him to the costs of the arbitration, the railway company appealed to the full Court, advancing several distinct grounds of appeal, on all of which, with the exception of the rate of interest allowed by the arbitrators, they failed, the interest being reduced to the statutory rate, from six per cent to five per cent:—Held (Irving, J., dissenting), (1) that the word "event," in s. 100 of the Supreme Court Act, 1904, may be read distributively. (2) That s. 162 of the Railway Act, 1903, does not apply to costs of appeals to the full Court from award of arbitrators, but that such appeal is an independent proceeding, and is therefore governed by s. 100 of the Supreme Court Act, 1904. (3) That the success of the appellant company on the question of interest was merely an "issue" arising on the appeal, and not an "event" on which it was taken.

Vancouver, Westminster & Yukon Ry. Co. v. Sam Kee, 12 B.C.R. 1.
[Following in Hopper v. Dunsmuir, 12 B.C.R. 22.]

CHOICE OF FORUM.

By s. 168 of the Railway Act, 1903, if an award by arbitrators on expropriation of land by a railway company exceeds $600, any dissatisfied party may appeal therefrom to a Superior Court, which in Ontario means the High Court or the Court of Appeal (Interpretation Act, R.S.C. 1906, c. 1, s. 34, subs. 26):—Held, that if an appeal from an award is taken to the High Court, there can be no further appeal to the Supreme Court of Canada, which cannot even give special leave.

James Bay Ry. Co. v. Armstrong, 6 Can. Ry. Cas. 196, 38 Can. S.C.R. 511.

[Affirmed in [1909] A.C. 624, 10 Can. Ry. Cas. 1; followed in St. John & Quebec Ry. Co. v. Bull, 16 Can. Ry. Cas. 284.]

APPEAL TO HIGH COURT—NO FURTHER APPEAL TO SUPREME COURT.

According to the true construction of s. 168 of the Railway Act, 1903, the appeal given thereby to a Superior Court from an award under that Act, lies in the Province of Ontario to either the Court of Appeals or the High Court of Justice therein at the option of an appellant; but in case of appeal to the High Court, inasmuch as it is the last resort in the province within the meaning of the Supreme and Exchequer Courts Act, R.S.C. 1886, c. 135, s. 126, there is no appeal therefrom to the Supreme Court of Canada.

James Bay Ry. Co. v. Armstrong, 10 Can. Ry. Cas. 1, [1909] A.C. 624.

[Relied on in Quebec and Montreal Southern Ry. Co. v. Landry, 19

Que. K. B. 89; Vallières v. Ontario and Quebec Ry. Co., 19 Que. K. B. 524; followed in Re Davies & James Bay Ry. Co., 10 Can. Ry. Cas. 226, 20 O.L.R. 534; followed in St. John & Quebec Ry. Co. v. Bull, 16 Can. Ry. Cas. 284.]

EXPIRY OF STATUTORY PERIOD—ORDER GRANTING LEAVE.

The Court refused to entertain a motion to quash the appeal on the ground that it had not been taken within the sixty days limited by the statute and that an order by a Judge of the Court appealed from after the expiration of that time was ultra vires, and could not be permitted under s. 42 of the Supreme and Exchequer Courts Act, R.S.C. c. 135.

Temiscouata Ry. Co. v. St. Clair, 6 Can. Ry. Cas. 367, 38 Can. S.C.R. 230.

INVALID ORDER OF POSSESSION—APPEAL FROM—ADDITIONAL RELIEF, INJUNCTION.

The plaintiff, instead of taking an appeal from an invalid order granting possession to lands taken by a railway company under invalid expropriation proceedings, brought an action against the railway company, claiming injunction and damages:—Held, that the plaintiff could maintain the action, for the reason that, even if an appeal would lie from the order, the plaintiff was entitled to additional relief by way of injunction and damages, which could not be given on appeal.

Girouard v. Grand Trunk Pac. Ry. Co., 9 Can. Ry. Cas. 354, 2 Alta. L.R. 54.

APPEAL TO COURT OF KING'S BENCH.

Under s. 209 of the Railway Act, 1906, an appeal from an award only lies to a Superior Court. If an appeal has already been heard by the Superior Court, there cannot be a further appeal to the Court of King's Bench.

Vallières v. Ontario & Quebec Ry. Co., 11 Can. Ry. Cas. 18, 11 Que. P.R. 245, 19 Que. K.B. 521.

[Applied in Bickerdike v. Montreal P. & I. Ry. Co., 11 Que. P.R. 260.]

DECISION OF ARBITRATORS.

(1) In a railway expropriation an appeal to the Superior Court from the decision of the arbitrators may be instituted before the award is deposited with the records of said Court. (2) It is not essential that plaintiff should allege affirmatively that the appeal is taken within a month after the reception of the notice of the award.

Bickerdike v. Montreal Park & Island Ry. Co., 11 Que. P.R. 260.

TIME—DELAYS—PETITION.

(1) In a railway expropriation every party to the arbitration may appeal within one month after receiving a written notice of the making of the award. (2) If such notice has been given on the 9th of December, the appeal may be presented on the 10th of January next, if the 9th is a Sunday. (3) A petition to appeal from the award of arbitrators in a railway expropriation is not in the nature of an application for certiorari and does not need to be supported by affidavit.

Montreal Park & Island Ry. Co. v. Bickerdike, 11 Que. P.R. 261.

REVIEW OF AWARD—INADEQUACY OF COMPENSATION.

No appeal lies in the Province of Quebec to the Court of King's Bench from the judgment of the Superior Court upon an appeal under s. 209 of the Railway Act, 1906, from the award of an arbitrator.

Rolland v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 21, 7 D.L.R. 441.

RULES OF DECISION—PROVINCIAL COURTS FOLLOWING DECISION OF PRIVY COUNCIL.

Under the British Columbia Railway Act, upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings where the principle applicable to such an appeal has already been laid down by the Privy Council under the Dominion Railway Act, 1888, which is, so far as material, identical in language with the British Columbia statute, that construction will be adopted. [Atlantic & North-West Ry. Co. v. Wood, [1895] A.C. 257, 64 L.J.P.C. 116, applied.]

Can. North. Pac. Ry. Co. v. Dominion Glazed Cement Co. (B. C.), 14 Can. Ry. Cas. 265, 7 D.L.R. 174.

REVIEW OF FACTS.

The Appellate Court, on an appeal from an award in eminent domain proceedings, should come to its own conclusion upon all the evidence, paying due regard to the award and findings and reviewing them as it would those of a subordinate Court. On an appeal from an award, the latter will not be set aside merely because the Appellate Court disagrees with the reasoning of the arbitrators, but will stand if it can be supported on any ground sufficient in law. James Bay Ry. Co. v. Armstrong, [1909] A.C. 624, 10 Can. Ry. Cas. 1, referred to.

Re Ketcheson and Can. Northern Ontario Ry. Co., 13 D.L.R. 854.

[Followed in Green v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 171, 8 Sask. L.R. 53.]

UNSATISFACTORY AWARD BASED ON UNCONTRADICTED EVIDENCE.

The fact that arbitrators in awarding damages for the expropriation of a railway right-of-way through a brick-making plant which entailed additional expense for the carriage of brick-making materials to the factory, based their award on uncontradicted evidence as to an impracticable system of transportation will not justify interference with the award by the Appellate Court if there is evidence to support it, even though the Court is dissatisfied with the award; as the appeal must be dealt with on the evidence produced before the arbitrators and the Court cannot remit to them for the taking of additional testimony an award made under the Railway Act. [Atlantic & North-West Ry. Co. v. Wood, [1895] A.C. 257, and Re McAlpine and Lake Erie & Detroit River Ry. Co., 3 Can. Ry. Cas. 95, 3 O.L.R. 230, referred to.]

Re Davies and James Bay Ry. Co., 16 Can. Ry. Cas. 78, 13 D.L.R. 912, 28 O.L.R. 544.

EMINENT DOMAIN—REMITTING AWARD TO ARBITRATORS—FAILURE TO ITEMIZE LUMP SUM AS EQUIVALENT TO VERDICT OF JURY.

On an appeal from the award of arbitrators in an expropriation proceeding the Court has power, under s. 46 of the Expropriation Act, R.S.M. 1902, c. 61, to refer back the award for reconsideration and redetermination where it is impossible to deal intelligently with the appeal by reason of a lump sum being awarded, without any indication by the arbitrators, who refused to give their reasons for their award, as to the nature of the items of damages comprising it. An award of a lump sum as damages for land expropriated will not be treated on appeal as equivalent to the verdict of a jury, where it is apparent from the evidence that some items entering into the award should have been eliminated as a matter of law. [Vezina v. The Queen, 17 Can. S.C.R. 1, at 16, followed.]

Re Van Horne and Winnipeg & Northern Ry. Co., 16 Can. Ry. Cas. 72, 14 D.L.R. 897.

EVIDENCE SUFFICIENT TO SUSTAIN AWARD.

Where, in an arbitration proceeding, the appellant's evidence was directed to establishing damages on a wrong basis, and, on appeal, he does not seek a rehearing on that ground, but insists that such evidence was proper, the award will be upheld if there is any evidence to sustain it. (Per Harvey, C.J., and Walsh, J.)

Saskatchewan Land & Homestead Co. v. Calgary & Edmonton Ry. Co., 16 Can. Ry. Cas. 114, 14 D.L.R. 193.

JURISDICTION—SECOND APPEAL AFTER APPEAL FROM ARBITRATORS TO JUDGE.

No further appeal lies to the Court en banc from an order of a judge of the Supreme Court of New Brunswick setting aside an award on an appeal to him under s. 17, subss. (20) and (21) of C.S.N.B. 1903, c. 91, which permit an appeal on questions of law or fact to a judge of such Court from an award made by arbitrators in an expropriation proceeding. [Birely v. Toronto, Hamilton & Buffalo Ry. Co., 25 A.R. (Ont.) 88 Canadian Pacific Ry. Co. v. St. Thérèse, 16 Can. S.C.R. 606; Ottawa Elec. Co. v. Brennan, 31 Can. S.C.R. 311; and Re Armstrong & James Bay Ry. Co., 12 O.L.R. 137, 5 Can. Ry. Cas. 306; James Bay Ry. Co. v. Armstrong, 38 Can. S.C.R. 511, 6 Can. Ry. Cas. 196, affirmed 1909, A.C. 624, 10 Can. Ry. Cas. 1, followed.]

St. John & Quebec Ry. Co. v. Bull, 16 Can. Ry. Cas. 284.

REVIEW OF AWARD—REASONS NOT APPARENT OF RECORD.

The reasons or principles which guided arbitrators in making an award not contained in the award or supplemented therewith, will not be reviewed on appeal.

St. John & Quebec Ry. Co. v. Fraser, 19 Can. Ry. Cas. 177, 24 D.L.R. 339.

EMINENT DOMAIN—PRESENT AND FUTURE VALUE OF LANDS.

An award of arbitrators increased by the Appellate Division (Ontario), from $9,350 to $15,842, was restored by the Supreme Court, the amount added for filling having been already allowed in the award and the increase in the award for frontage value to a portion of the land taken on Bank Street, a country road outside the city limits being disallowed, where there was free land in abundance in the neighbourhood with no building operations in progress and no evidence of actual demand of land for building purposes. Upon an appeal from an award under s. 209 of the Railway Act, 1906, it is competent for the Courts to decide any question of fact upon the evidence taken before the arbitrators as in a case of original jurisdiction, subject to the following rules: (1) An appeal upon a question which is merely one of value should be discouraged. Musson v. Canada Atlantic Ry. Co., 17 L.N. 179, at p. 181, followed. (2) There must be such a plain and decided preponderance of evidence against the findings of the arbitrators as to border strongly on the conclusive. (3) The latter rule should be more strictly followed where the arbitrators are experienced in such matters, have local knowledge and the great advantage of a personal view of the premises, and of seeing and hearing the witnesses. Lemoine v. Montreal, 23 Can. S.C.R. 390, at p. 392; Kearney v. The Queen, Cam. S.C. Cas. 344, at p. 347, followed. In eminent domain proceedings what is to be ascertained is the value to the owner as it existed at the date of the taking, not to the taker, such value consists in all the advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. Cedars Rapids Co. v. Lacoste, [1914] A.C. 569, at p. 576, followed.

Can. Northern Ry. Co. v. Billings, 19 Can. Ry. Cas. 193.

[Followed in Lake Erie & Northern Ry. Co. v. Muir, 21 Can. Ry. Cas. 350, 32 D.L.R. 252.]

VALUE OF LAND—EVIDENCE—EXPROPRIATION.

The Court refused to set aside an award of arbitrators having the advantage of local knowledge and personal inspection of the property upon concurrent testimony of a large number of witnesses in favour of the owner and no contradictory evidence was given on behalf of the appellant railway company: Decision of the Ontario Appellate Division affirmed, 16 Can. Ry. Cas. 286. Per Anglin, J. (dissenting).—An objection was properly taken against the introduction of evidence of more than five expert witnesses (see R.S.C. c. 145, s. 7) and the proper course was to eliminate from the evidence all testimony improperly introduced, and to determine as in a case of original jurisdiction (but see Wood v. Atlantic & N. W. Ry. Co. (1895), A.C. 257) what the award should be on the remaining testimony.

Can. Northern Ry. Co. v. Ketcheson, 21 Can. Ry. Cas. 104, 32 D.L.R. 629.

COURT'S POWER TO REMIT AWARD—INVALIDITY OF AWARD—IMPROPER EVIDENCE—EXPERTS.

The provisions of the Arbitration Act (Alta., 1909, c. 6) apply to arbitrations under the Alberta Railway Act (1907, c. 8), so as to empower the Court or a Judge, on appeal from an award, to remit it to the arbitrators for reconsideration. The reception by the arbitrators of testimony of a number of expert witnesses greater than that limited by the Evidence Act (Alta., 1910, 2nd Sess., c. 3) is a ground for setting aside the award.

Can. Northern Western Ry. Co. v. Moore, 21 Can. Ry. Cas. 112, 53 Can. S.C.R. 519, 31 D.L.R. 456.

REASONS FOR AWARD—EXAMINATION OF ARBITRATORS—APPOINTMENT BY SPECIAL EXAMINER—WITNESS.

On an appeal from an award of arbitrators under the Railway Act, 1906, the arbitrators cannot be examined on oath for the purpose of obtaining their reasons for the award for the information of the Court; and an appointment issued by a special examiner without leave of the Court for the examination of one of them as a witness, as on a pending motion, was set aside with costs.

Clarkson (Lloyd) v. Campbellford, Lake Ontario & Western Ry. Co., 21 Can. Ry. Cas. 330, 35 O.L.R. 345.

SCOPE OF APPEAL.

It is competent for the Court, apart from the jurisdiction given by the Railway Act, 1906, to act upon its own view of the evidence taken by the arbitrators in expropriation proceedings upon an appeal taken from the award. [Re Macpherson and Toronto, 26 O.R. 558, followed.]

Re Muir and Lake Erie & Northern Ry. Co., 19 Can. Ry. Cas. 107, 20 D.L.R. 687.

[Reversed in 21 Can. Ry. Cas. 350.]

CONCLUSIVENESS OF AWARD—AMOUNT.

The Appellate Court will not interfere with the award of arbitrators who have had the advantage of viewing the property, on a mere matter of valuation, unless it is evident that they have acted on a wrong principle in making the award. [Re Muir and Lake Erie & Northern Ry. Co., 32 O.L.R. 150, 19 Can. Ry. Cas. 107, reversed; Cedars Rapids Co. v. Lacoste, [1914] A.C. 569 at p. 576; Can. Northern Ry. Co. v. Billings, 19 Can. Ry. Cas. 193 at p. 200 followed.]

Lake Erie & Northern Ry. Co. v. Muir, 21 Can. Ry. Cas. 350, 32 D.L.R. 252.

INCREASING AMOUNT OF ARBITRATORS' AWARD.

Upon an appeal from the award of arbitrators made under the Railway Act, 1906, the Appellate Court may increase the amount of the award, upon consideration of the evidence given before the arbitrators.

Lake Erie & Northern Ry. Co. v. Brantford Golf & Country Club, 21 Can. Ry. Cas. 360, 32 D.L.R. 219.

REVIEW OF AWARD.

The award of arbitrators under s. 209 of the Railway Act, 1906, is similar to the judgment of a trial Judge. An appeal, upon law and fact, is always open. But an appeal Court will not interfere with the decision, unless there is good and special reason for doubting the soundness of the award.

Ruddy v. Toronto Eastern Ry. Co., 21 Can. Ry. Cas. 377, 33 D.L.R. 193. [Applied in Noble v. Campbellford etc., Ry. Co., 21 Can. Ry. Cas. 380.]

AWARD VARIED—"GOOD AND SPECIAL" REASONS—AMOUNT.

An award of arbitrators under the Railway Act, 1906, will not be varied by an Appellate Court upon a mere question of valuation except for "good and special" reasons, even when the Appellate Court is of opinion that the amount awarded is very excessive or very inadequate. [Ruddy v. Toronto Eastern Ry. Co., 21 Can. Ry. Cas. p. 377 applied.]

Noble v. Campbellford, Lake Ontario & Western Ry. Co., 21 Can. Ry. Cas. 380.

POWER TO REMIT AWARD—COMPENSATION—MINING RIGHTS.

Where, in an arbitration under the Railway Act, 1906, the arbitrators refused, for legal reasons to entertain a claim, an Appellate Court on appeal therefrom, has power to remit the case to the arbitrators, to be dealt with by them on the merits; the question of compensation if any to be paid for a mining right under a coal lease is one of fact for the arbitrators. [Can. Northern Western Ry. Co. v. Moore, 21 Can. Ry. Cas. 112, 53 Can. S.C.R. 519, 31 D.L.R. 456, followed; Davies v. James Bay Ry. Co., 19 Can. Ry. Cas. 86, [1914] A.C. 1043, 26 D.L.R. 450, considered.]

Re Nash & Williams and Edmonton, Dunvegan & British Columbia Ry Co., 21 Can. Ry. Cas. 399, 36 D.L.R. 601.

SUPERIOR COURT—MEANING OF—INTERPRETATION ACT.

According to the Interpretation Act (R.S.C. 1906, c. 1, s. 34 (26)), the Superior Court to which an appeal may be taken in British Columbia against an award of arbitrators under the Railway Act 1906, s. 209, is the Supreme Court of British Columbia: there is no further appeal from such Court to the Court of Appeal.

Re Kitsilano Arbitration, 23 Can. Ry. Cas. 324, 41 D.L.R. 170.

Review of facts—Improper admission of evidence.

Where the arbitrators admitted as evidence of value, matters which the Court on appeal decided were inadmissible and which may have materially affected the arbitrators' finding, the Court hearing an appeal from the award is not bound under s. 114 of the Railway Act, Alta. 1907, c. 8 to decide the question of fact raised by the appeal as in a case of original jurisdiction; it is only where there is nothing but a question of fact involved that the Court is bound under s. 114 to decide the same upon the evidence taken before the arbitrators instead of setting aside the award or remitting the case. [Atlantic and N.W.R. Co. v. Wood, [1895] A.C. 257; Cedars Rapids Mfg. Co. v. Lacoste, 16 D.L.R. 168, 83 L.J.P.C. 162, considered.]

Can. Northern Western Ry. Co. v. Moore, 23 D.L.R. 646, 8 Alta. 379.

Jurisdiction to set aside or remit.

The Court hearing an appeal from an award under s. 114 of the Railway Act, Alta., 1907, c. 8, has jurisdiction on setting aside the award and remitting the case to the arbitrators to dispose of the costs of the abortive arbitration proceedings. [Cedars Rapids Mfg. Co. v. Lacoste, 16 D.L.R. 168, 83 L.J.P.C. 162, referred to.]

Can Northern Western Ry. Co. v. Moore, 23 D.L.R. 646, 8 Alta. L.R. 379.

Practice—Adding new evidence on appeal.

It not being the practice in the Superior Court of Quebec on an appeal from an inferior Court to permit further evidence to be given on the appeal and no general rule having been made to that end, new evidence is not admissible on an appeal under s. 209 to the Superior Court from the award of arbitrators in an expropriation under the Railway Act, 1906.

Lachine, Jacques-Cartier, etc., Ry. Co. v. Kelly, 20 D.L.R. 587.

Question of law or fact—Written notice.

An appeal from the arbitrators' award under s. 209 of the Railway Act, 1906, upon any question of law or fact, as distinguished from a motion to set aside an award, is too late if taken more than one month after the other party to the proceedings had served a writ and petition in appeal therefrom under the Quebec law, although no "written notice" had been given by any of the arbitrators of the making of the award.

Lachine, Jacques-Cartier, etc., Ry. Co. v. Kelly, 20 D.L.R. 587.

Appeal to Superior Court (Quebec)—Revision—Jurisdiction of Court of Review.

Lefebvre v. Lachine, Jacques, Cartier, etc., Ry. Co., 16 D.L.R. 858.

APPORTIONMENT OF COSTS.

See Highway Crossings; Railway Crossings; Wires and Poles; Farm Crossings.

ARBITRATION AND AWARD.

Arbitration of railway construction contracts, see Contracts; Government Railways.

See Appeals; Expropriation.

ARREST.

See False Arrest.

ASSAULTS ON PASSENGERS.

See Carriers of Passengers.

ASSESSMENT AND TAXATION.

See Customs Duties.

Annotation.

Assessment and taxation of railway lands and superstructure, 2 Can. Ry. Cas. 233.

RAILWAY BRIDGE AND RAILWAY TRACK.

(1) The portion of the railway bridge built over the Richelieu river, and the railway track belonging to appellant's company within the limits of the town of St. Johns, are exempt from taxation under ss. 326, 327 of 40 Viet. c. 29 (Que.), although no return had been made to the council by the company of the actual value of their real estate in the municipality. (2) That a warrant to levy the rates upon such property for the years 1880–1883, is illegal and void, and that a writ of injunction is a proper remedy to enjoin the corporation to desist from all proceedings to enforce the same. As to whether the clause in the Act of incorporation of the town of St. Johns (Que.), extending the limits of said town to the middle of the Richelieu, a navigable river, is intra vires of the legislature of the Province of Quebec, the Supreme Court of Canada affirmed the holding of the Court below that it was intra vires. [Judgment of the Court of Queen's Bench for Lower Canada, reversed.] (Fournier and Taschereau, JJ., dissenting.)

Central Vermont Ry. Co. v. St. Johns, 14 Can. S.C.R. 288.

[In this case leave to appeal was granted by the Privy Council. After argument the judgment of the Supreme Court was affirmed, 14 App. Cases 590. Considered in Re Can. Pac. Ry. Co. and Macleod, 2 Can. Ry. Cas. 203, 5 Terr. L.R. 194; distinguished in Dominion Express Co. v. Brandon, 19 Man. L.R. 258; referred to in Hurdman v. Thompson, 4 Que. Q.B. 452.]

FRANCHISE—INTERNATIONAL BRIDGE.

In assessing for the purpose of taxation that part of a bridge crossing the Niagara River, lying within a township in Canada, regard cannot be had to its value in proportion to the value of the franchise or of the whole bridge, or to the cost of construction, but only to the actual cash price obtainable for the land and materials, situate within the township. [Re Bell Telephone Co. Assessment (1895), 25 A.R. 351, and Re London Street Ry. Co. Assessment (1897), 27 A.R. (Ont.) 83, applied.]

Re Queenston Heights Bridge Assessment, 1 O.L.R. 114.

[Applied in Re Stratford Waterworks Co., 21 C.L.T. 479; distinguished in International Bridge Co. v. Bridgeburg, 12 O.L.R. 314; followed in Belleville Bridge Co. v. Ameliasburg, 15 O.L.R. 174, 10 O.W.R. 571.]

TAX ON TELEGRAPH COMPANIES—COMPANIES INCORPORATED BY PARLIAMENT—INTERPROVINCIAL LINES.

(1) The Quebec Act, imposing an annual tax of $2,000 on all telegraph companies having a paid-up capital exceeding $50,000, and operating lines of telegraph for the use of the public within the province, and doing business

there, is intra vires of the Legislature. (2) The telegraph company, appellant, although incorporated by Parliament and operating interprovincial lines of telegraph, that is to say, in all the provinces of Canada, except British Columbia and Prince Edward Island, having a paid-up capital exceeding $50,000, is liable for this annual tax of $2,000, inasmuch as it carries on business in the Province of Quebec and operates a part of its lines of telegraph therein for domestic despatches, that is to say, for despatches sent from one point to another within the province. (3) The action of the collector of revenue in his capacity as such for the recovery of the tax is presumed to be managed and directed by the Attorney-General, who is dominus litis thereof, and, consequently, the intervention of the Attorney-General for the purpose of sustaining the constitutionality of the statute is a useless and superfluous proceeding, in respect of which, under the circumstances, he cannot be given costs. (4) The Court of Appeal will not take into consideration objections more to the form than to the merits of the case, which have not been taken in the Court of first instance.

Great North-West Telegraph Co. v. Fortier, 12 Que. K.B. 405.

LANDS OF THE C.P. RY. CO.—EXEMPTIONS FROM TAXATION.

By the charter of the C.P. Ry. Co. the lands of the company in the North-West Territories, until they are either sold or occupied, are exempt from Dominion, provincial or municipal taxation for twenty years after the grant thereof from the Crown:—Held, affirming the judgment of the Court below, that lands which the company have agreed to sell and as to which the conditions of sale have not been fulfilled are not lands "sold" under this charter. Held, further, that the exemption attaches to lands allotted to the company before the patent is granted by the Crown. Lands which were in the N.W.T. when allotted to the company did not lose their exemption on becoming, afterwards, a part of the Province of Manitoba.

Cornwallis v. Can. Pac. Ry. Co., 19 Can. S.C.R. 702.

[Considered in Ruddell v. Georgeson, 9 Man. L.R. 415; discussed in Ruddell v. Georgeson, 9 Man. L.R. 56; distinguished in Water Commissioners of Windsor v. Canada Southern Ry. Co., 20 A.R. (Ont.) 388; referred to in R. v. Victoria Lumber and Mfg. Co., 5 B.C.R. 302; South Norfolk v. Warren, 8 Man. L.R. 489; relied on in Balgonie Protestant School v. Can. Pac. Ry. Co., 5 Terr. L.R. 131; North Cypress v. Can. Pac. Ry. Co., 35 Can. S.C.R. 558.]

TAXATION OF RAILWAY—POWERS OF ASSESSORS—DEPARTURE.

By the assessment law of the city of St. John, 53 Vict. c. 27, s. 125 (N.B.), the agent or manager of any joint stock company or corporation established abroad or out of the limits of the province may be rated and assessed upon the gross and total income received for such company or corporation, deducting only therefrom reasonable cost of management, etc., and such agent or manager is required to furnish to the assessors each year a statement under oath in a prescribed form showing the gross income and the deductions of the various classes allowed, the balance to be the income to be assessed; and, in case of neglect to furnish such statement, the assessors are to fix the amount of such income to be assessed according to their best judgment, and there shall be no appeal from such assessment. The Atlantic division of the C.P.R. runs from Megantic, in the Province of Quebec, through the State of Maine into New Brunswick. On entering New Brunswick it runs over a line leased from a N.B. Co. to the western side of the river St. John, and then over a bridge into the city, where it takes the I.C.R. road. The general superintendent has an office in the city, but all moneys received there are sent to the head office in Montreal. The superintendent was furnished with a printed form to be filled up for the assessors, as required by said Act, which was as follows: "Gross and total income received for company during the fiscal year of ——, next preceding the first day of April. This amount has not been reduced or offset by any losses, etc." This latter clause the superintendent struck out and filled in, in the first place, by stating that no income had been received by the company, the remainder of the form, consisting of details of the deductions, was not filled in. This was given to the assessors as the statement called for, and they disregarded it, assessing the company on an income of $140,000, without making any inquiries of the superintendent, as the Act authorized them to do. A rule for a certiorari to quash this assessment was obtained, but discharged by the Court on the ground that the superintendent had so far departed from the prescribed form that he had in effect failed to furnish a statement as required by the Act, and the assessment against him was final:—Held, reversing the decision of the Supreme Court of New Brunswick, Fournier and Taschereau, JJ., dissenting, that the superintendent had a right to modify the form prescribed to enable him to shew the true facts as to the business of the company in St. John, and the assessors had no right to arbitrarily fix an amount assessable against him without taking any steps to inform themselves of the truth or falsity of the statement furnished:—Held, also, that the provision that there should be no appeal from the assessment where no statement is furnished, relates only to an appeal against overvaluation under C.S.N.B. c. 100, s. 60, and does not abridge the power of the Court to do justice if the assessors assess arbitrarily or upon a wrong principle or no principle at all:—Held, per Gwynne and Patterson, JJ., that the assessment law of St. John does not apply to railway companies, there being no provision made for ascertaining the amount of business done in the city as proportioned to the whole business of the company. Appeal allowed with costs.

Timmerman v. St. John (1893), 21 Can. S.C.R. 691.

TAX ON RAILWAY—EXEMPTION—RAILWAY INCIDENT TO MINING.

By R.S.N.S. (5th Ser.), c. 53, s. 9, subs. 30, the roadbed, etc., of all railway companies in the Province is exempt from local taxation. By s. 1 the first part of the Act from s. 5 to 33 inclusive, applies to every railway constructed and in operation, or thereafter to be constructed under the authority of any Act of the Legislature, and by s. 4, part 2 applies to all railways constructed or to be constructed under the authority of any special Act, and to all companies incorporated for their construction and working. By s. 5, subs. 15, the expression "the company" in the Act means the company or party authorized by the special Act to construct the railway:—Held, reversing the decision of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that part one of this Act applies to all railways constructed under provincial statutes and is not exclusive of those mentioned in part two; that a company incorporated by an Act of the Legislature as a mining company, with power "to construct and make such railroads and branch tracks as might be necessary for the transportation of coals from the mines to the place of shipment, and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation of railways," and empowered by another Act (49 Vict. c. 45, N.S.) to hold and work the railway for general traffic, and the conveyance of passengers and freight for hire, as well as for all purposes and operations connected with said mines in accordance with and subject to the provisions of part second of c. 53, R.S.N.S. (5th Ser.), entitled "Of Railways," is a railway company within the meaning of the Act; and that the reference in 49 Viet. c. 145, s. 1, to part two, does not prevent said railway from coming under the operation of the first part of the Act.

International Coal Co. v. Cape Breton, 22 Can. S.C.R. 305.

Municipal assessment of street railway—Repair of roadway—Local improvements.

A street railway company in Toronto was to be assessed in respect of repairs to the roadway traversed by the railway, as for local improvements, which, by the Municipal Act, constitute a lien upon the property assessed, but not a personal liability upon owners or occupiers after they have ceased to be such:—Held, that after the termination of its franchise, the company was not liable for these rates.

Toronto v. Toronto Street Ry. Co., 23 Can. S.C.R. 198.

Taxation of horse cars.

By a by-law of the city of Montreal a tax of $2.50 was imposed upon each working horse in the city. By s. 16 of the appellant's charter it is stipulated that each car employed by the company shall be licensed and numbered, etc., for which the company shall pay "over and above all other taxes the sum of $20 for each two-horse car, and $10 for each one-horse car":—Held, affirming the judgment of the Court below, that the company was liable for the tax of $2.50 on each and every one of its horses. 2 Que. Q. B. 391 affirmed.

Montreal Street Ry. Co. v. Montreal, 23 Can. S.C.R. 259.

Tax on business including railway.

The statute, 29 Vict. c. 57 (Can.), consolidating and amending the Acts and Ordinances incorporating the city of Quebec, by subs. 4 of s. 21, authorizes the making of by-laws to impose taxes on persons exercising certain callings, "and generally on all trades, manufactories, occupations, business, arts, professions or means of profit, livelihood or gain, whether hereinbefore enumerated or not, which now or may hereafter be carried on, exercised or in operation in the city; and all persons by whom the same are or may be carried on, exercised or put in operation therein, either on their own account or as agents for others; and on the premises wherein or whereon the same are or may be carried on, exercised or put in operation":—Held, that the general words of the statute quoted are sufficiently comprehensive to authorize the imposition of a business tax upon railway companies; and, further, that the power thus conferred might be validly exercised by the passing of a by-law to impose the tax in the same general terms as those expressed in the statute:—Held, per Strong, C.J., that where taxes have been paid to a municipal corporation voluntarily and with knowledge of the state of the law and the circumstances under which the tax was imposed, no action can lie to recover the money so paid from the municipality. [Judgment of the Court of Queen's Bench, 8 Que. Q.B. 246, affirmed.]

Can. Pac. Ry. Co. v. Quebec, 30 Can. S.C.R. 73.

School taxes—Exemption from municipal rates.

By-law No. 148 of the city of Winnipeg, passed in 1881, exempted for ever the C.P.R. Co. from "all municipal taxes, rates and levies and assessments of every nature and kind":—Held, reversing the judgment of the Court of Queen's Bench, 12 Man. L.R. 581, 1900 C.A. Dig. 326, that the exemption included school taxes. The by-law also provided for the issue of debentures to the company, and by an Act of the Legislature. 46 & 47 Vict. c. 64, it is provided that by-law 148 authorizing the issue of debentures granting by way of bonus to the C.P.R. Co. the sum of $200,000 in consideration of certain undertakings on the part of the said company; and by-law 195 amending by-law No. 148 and extending the time for the completion of the undertaking . . . be and the same are hereby declared legal, binding and valid. . . . :—Held, that, notwithstanding the description of the by-law in the Act was confined to the portion relating to the issue of debentures, the whole by-law, including the exemption from taxation, was validated. 12 Man. L.R. 581, reversed.

Can. Pac. Ry. Co. v. Winnipeg, 30 Can. S.C.R. 558.

[Considered in Balgonie Prot. School v. Can. Pac. Ry. Co., 5 Terr. L.R. 132; discussed in Re Toronto School Board & Toronto, 2 O.L.R. 727; distinguished in Pringle v. Stratford, 20 O.L.R. 246; followed in North Cypress v. Can. Pac. Ry. Co., 35 Can. S.C.R. 556; referred to in Toronto School Board v. Toronto, 4 O.L.R. 468.]

Exemptions of mortgages—Railway bonds secured by mortgage.

The whole of an estate of a deceased person, liable to be assessed in the city of St. John, may be rated in the names of the resident trustees, under 52 Vict. c. 27, s. 135, though one of the three trustees in whom it is vested is resident abroad. Railway bonds, secured by a mortgage, are not mortgages within the meaning of s. 121, as amended by 63 Vict. c. 43, and are not exempt from taxation.

The King v. Sharp; Ex parte Lewin, 35 N.B.R. 476.

Income assessment—Dividends on shares in Ottawa Electric Ry. Co. —Agreements between company and city corporation—Exemptions.

By an agreement dated the 28th June, 1893, between the corporation of the city of Ottawa and the two companies which were amalgamated under the name of the Ottawa Electric Railway Company, by statutes which confirmed the agreement, it was provided, inter alia, that "the corporation shall grant to the said companies exemption from taxation and all other municipal rates . . . on the income of the companies earned from the working of the said railway":—Held, that the plaintiff's income from dividends upon shares of the capital stock of the Ottawa Electric Ry. Co. was not, by reason of the agreement in part above recited, nor by reason of an earlier agreement, exempt from municipal taxation:—Held, also, that the Ottawa Electric Ry. Co. is not a company which would, but for the agreements mentioned, be liable to be assessed for income under the provisions of the Assessment Act, 1904; and, therefore, s. 5, subs. 17, does not apply to exempt dividends or income from the stock. The Assessment Act does not confer upon the shareholders of a company which is not liable to income assessment, but is liable to business assessment, an exemption from assessment upon their dividends from stock in the company, except as contained in s. 10, subs. 7.

Goodwin v. Ottawa, 12 O.L.R. 236.

[Leave to appeal refused, 12 O.L.R. 603.]

Book debts—Railway bonds—Mortgages.

Book debts are assessable in the city of St. John, under s. 121 of 52 Vict. c. 27, as amended by 63 Vict. c. 43. Railway bonds secured by a mortgage are not exempt under the said Acts.

The King v. Sharp; Ex parte Turnbull, 35 N.B.R. 477.

Revision of valuation roll—Art. 746a, M.C.

The terms of Art. 746a, Municipal Code, so far as regards the revision of the valuation roll "in the months of June or July," are directory only, and the municipal council charged by law with the duty of revision is not divested of authority to make such revision where the time specified in the article has expired before the duty has been performed.

Can. Pac. Ry. Co. v. Allan, 19 Que. S.C. 57 (Curran, J.).

Assessment of railway—"Lands."

The buildings of a railway company are assessable under s. 3 of the Ordinance respecting the assessment of railways, the word "lands" therein being properly interpreted as including the building. The assessment must prima facie be taken as being correct in amount. [Can. Pac. Ry. Co. v. Macleod School District (1901), 5 Terr. L.R. 187, followed.]

Can. Northern Ry. Co. v. Omemee School District, 6 Terr. L.R. 281.

C.P.R. Lands—Exemption from taxation—Sale—Proper authority to assess.

Lands vested in the Canadian Pacific Ry. Co. subject to a provision that the same should, "until they are sold or occupied, be free from taxation for 20 years," were by the company agreed to be sold and conveyed to the appellants as trustees, who were to sell them, accounting for an interest in the proceeds to the company. At the date of the assessment of the lands, the consideration owing by the trustees to the company had been paid:—Held, that the lands had ceased to be exempt from taxation. Held, also, Wetmore and McGuire, JJ., dissenting, that, in view of the Ordinances relating to municipalities and to schools, the lands being situated partly within and partly without the municipality, the school district was authorized to assess and need not make a demand upon the municipality to do so.

Angus v. School Trustees of Calgary, 1 Terr. L.R. 111.

Exemptions from taxation—Land subsidies of the Canadian Pacific Railway—Extension of boundaries of Manitoba.

The land subsidy of the Canadian Pacific Ry. Co. authorized by 44 Vict. c. 1 (D), is not a grant in praesenti and, consequently, the period of twenty years of exemption from taxation of such lands provided by s. 16 of the contract for the construction of the Canadian Pacific Ry. begins from the date of the actual issue of letters patent of grant from the Crown, from time to time, after they have been earned, selected, surveyed, allotted and accepted by the Canadian Pacific Ry. Co. The exemption was from taxation "by the Dominion, or any Province hereafter to be established or any municipal corporation therein":—Held, that when, in 1881, a portion of the North-West Territories in which this exemption attached was added to Manitoba the latter was a Province "thereafter established" and such added territory continued to be subject to the said exemption from taxation. The limitations in respect of legislation affecting the territory so added to Manitoba, by virtue of the Dominion Act, 44 Vict. c. 14, upon the terms and conditions assented to by the Manitoban Acts, 44 Vict. (3rd Sess.), cc. 1, 6, are constitutional limitations of the powers of the Legislature of Manitoba in respect of such added territory and embrace the previous legislation of the Parliament of Canada relating to the Canadian Pacific Ry. and the land subsidy in aid of its construction. Taxation of any kind attempted to be laid upon any part of such land subsidy by the North-West Council, the North-West Legislative Assembly, or any municipal or school corporation therein is Dominion taxation within the meaning of the sixteenth clause of the Canadian Pacific Ry. contract providing for exemption from taxation. Per Taschereau, C.J.:—The case of the Springdale School District, as the whole cause of action arose in the North-West Territories, the Court of King's Bench for Manitoba had no jurisdiction to entertain the action or to render the judgment appealed from in that case and such want of jurisdiction could not be waived. Appeals by North Cypress and Argyle dismissed; appeal by the C.P.R. allowed; judgment of the King's Bench of Manitoba, 14 Man. L.R. 382, varied accordingly.

North Cypress v. Can. Pac. Ry. Co., 35 Can. S.C.R. 550.

[Referred to in Toronto v. Grand Trunk Ry. Co., 37 Can. S.C.R. 256.]

"Rolling stock, plant, and appliances"—Construction of statute—Ejusdem generis.

The Act 2 Edw. VII. c. 31, s. 1, amending s. 18 of the Assessment Act, R.S.O. 1897, c. 224, provides by subs. 3 for the assessment as "land" of "the rails, ties, poles, wires, gas and other pipes, mains, conduits, substructures and superstructures" of companies of the kind referred to in the section,—"upon the streets, roads, highways, lanes and other public places of the municipality,"—and by subs. 4, that "save as aforesaid, rolling stock, plant and appliances" of such companies, "shall not be 'land' within the meaning of the Assessment Act, and shall not be assessable": —Held, that upon the proper construction, this means that the rolling stock, rolling plant, and rolling appliances of such companies, which is found and used on the streets, etc., shall not by reason merely of the wide words "substructures and superstructures" in subs. 3, be liable to assessment as "land" save as mentioned in subs. 3. There is no intention to exempt the companies in question from assessment in respect of such of their plant and appliances, as is otherwise "land" within subs. 9 of s. 2 of the Assessment Act, but is not on the street, etc. Held, also, that the lamps, hangers and transformers of an electric light company, though easily transferable from one place to another, were "superstructures" upon the street within the meaning of subs. 3.

Re Assessment Appeals, Toronto Ry. Co. et al., 6 O.L.R. 187 (C.A.).

Valuation of property—Electric companies—Rails, poles and wires—Wards—Franchise—Going concern—Integral part of whole.

The Act 1 Edw. VII. c. 29, s. 2 (Ont.) has made no difference in the mode of valuing for assessment purposes the rails, poles, wires and other plant of electric companies erected or placed upon the highways of municipalities, which was held to be proper by the decision in Re Bell Telephone Co. Assessment (1898), 25 A.R. (Ont.) 351.

Re Toronto Elec. Light Co. Assessment, 3 O.L.R. 620 (C.A.).

[Distinguished in International Bridge Co., 12 O.L.R. 314.]

Exemptions—Railway—By-law of municipality—Commutation—School rates.

A city council in 1897 passed a by-law providing that a certain annual sum should be accepted from a railway company for 15 years "by way of commutation and in lieu of all and every municipal rate or rates and assessment," in respect of certain lands owned by the railway company. This by-law was passed under the authority of a special Act respecting the railway company, 48 Vict. c. 65 (O.), s. 3 of which provided that it should be lawful for the corporation of any municipality through which any line of the railway had been constructed to exempt the company and its property within such municipality, in whole or in part, from municipal assessment or taxation, or to agree to a certain sum per annum or otherwise in gross or by way of commutation or composition for payment of all municipal rates. By a subsequent general enactment, 55 Vict. c. 60, s. 4 (O.), it was declared that no municipal by-law thereafter passed for exempting any portion of the rateable property of a municipality from taxation, in whole or in part, should be held or construed to exempt such property from school rates. The general Act did not by express words repeal the special Act:—Held, that it did not effect a repeal by necessary implication—generalia specialibus non derogant:—Held, also, that there was nothing to shew that the sum which the railway company were to pay was not more than the school taxes which they would be liable to pay if they were not entitled to any exemption.

Way v. St. Thomas, 12 O.L.R. 238.

Special rate—Bonus to railway.

By a by-law passed under the provisions of ss. 386, 694, 696 of the Municipal Act, R.S.O. 1897, c. 223, a township corporation was authorized to raise a sum by issuing debentures, to be met by special rate, to provide a bonus in aid of a railway company, payable upon its compliance with certain conditions, no time for compliance being limited. The debentures were duly executed, but remained unissued in the possession and under the control of the municipality:—Held, that until the sale or negotiation of the debentures, there was no debt on the part of the township, and that the special rate was not leviable, though the time fixed for payment of some of the debentures had passed. Judgment of Meredith, J., 32 O.R. 135, reversed.

Bogart v. King, 1 O.L.R. 496 (C.A.).

Pasture land—Valuation—Art. 942a, M.C.

The C.P. Ry. Co. had acquired more than 200 arpents of land for railway purposes, but, changing its intention, let it as a farm by an annual lease, with the condition that it should only be used for pasturage, for which it was entirely unsuited. The company had also prepared a plan for dividing the land into lots, and had taken steps to have it adopted by the corporation and the Government, and a cadastre made. It even gave notice of its sale in lots. For assessment purposes the land had been appraised at its real value, and the company petitioned the corporation to reduce the valuation. This having been refused, the company appealed to the Circuit Court, claiming that the land should be valued according to its value for agricultural purposes only:—Held, that the property should be estimated at its real value, and not according to any value it might possess for agricultural purposes alone.

Can. Pac. Ry. Co. v. Verdun, 20 Que. S.C. 194 (Cir. Ct.).

Express company—Provincial tax—Municipal business tax.

S. 3 of the Corporations Taxation Act provides that every express company doing an express business shall pay a tax to the province; and s. 18 provides that, where a company pay the tax, no similar tax shall be imposed or collected by any municipality in the province:—Held, that a business tax imposed by a city corporation in respect of the premises occupied by an express company in the city, under the Assessment Act, 63 & 64 Vict. c. 35, s. 2, was a "similar tax" to that imposed by the province, which had been paid by the express company, and was, therefore, illegal and void. The Assessment Act and the Corporations Taxation Act having been assented to on the same day, it was intended that s. 18 of the later Act should govern and exclude the tax imposable under the earlier.

Dominion Express Co. v. Brandon, 15 W.L.R. 26 (Man.).

Business tax—Express company.

Dominion Express Co. v. Town of Niagara, 15 O.L.R. 78.

Street railway—Special privileges—Assessment roll—Description of property.

A municipal corporation which, under authority of a special Act, grants to a street railway company, in consideration of the annual payment of a percentage of its profits, the privilege of establishing its right of way, and erecting poles and other necessary constructions on the streets and elsewhere in the municipality, is not thereby deprived of its power to tax such constructions, etc., under the general powers given to it by its charter. A waiver in writing by a ratepayer of the prescription against collecting his taxes is valid and prevents the time from running.

Montreal v. Montreal Street Ry. Co., 35 Que. S.C. 321 (Ct. Rev.).

Railway—Assessment on buildings—"Lands"—Valuation of buildings.

Re Can. Northern Ry. Co. and Omemee School District, 4 W.L.R. 547 (Terr.).

Property purchased by railway company for right of way, but not used as such—Assessment as of lands of private owners.

Re Edmonton and Can. Pac. Ry. Co., 6 W.L.R. 786 (Alta.).

School taxes—Exemption—Canadian Pacific Ry. Co.—Lands in 24-mile belt granted to company.

Re Spruce Vale School District, No. 209, and Can. Pac. Ry. Co., 6 W.L.R. 526 (N.W.T.).

Lease from municipal corporation—Usual covenants—Taxes.

Re Can. Pac. Ry. Co. and Toronto, 5 O.L.R. 71 (C.A.).

Exemption from taxation—Branch lines—"Superstructure"—Value of roundhouses, freight sheds, and other buildings.

Clause 16 (relating to exemption from taxation) of the agreement between the Canadian Pacific Ry. Co. and the Government of Canada, as embodied in the Act, 44 Vict. (1881), c. 1, provides that "The Canadian Pacific Railway Company, and all stations and station grounds, workshops, buildings, yards, and other property, rolling stock, and appurtenances required and used for the construction and working thereof, and the capital stock of the company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any municipal corporation therein; and the lands of the company in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown." Clause 14 of the same agreement also provides that "the company shall have the right, from time to time, to lay out, construct, equip, maintain, and work branch lines of railway from any point or points along their main line of railway to any point or points within the territory of the Dominion":—Held, that clause 16 of the agreement is not applicable to the Crow's Nest Pass Ry., but is applicable only to the main line of the Canadian Pacific Ry. Co. and to such branches thereof as the company was authorized by clause 14 of the agreement to construct from points on the main line, and does not extend to other distinct lines of railway which the company may have been subsequently authorized to construct. Under the Ordinance respecting the assessment of Railways, Con. Ord. 1898, c. 71, s. 3, the roundhouses, station, or office buildings, section houses, employee's dwellings, freight sheds, and other buildings of like nature belonging to a railway company and situated upon it, are not included in the term "superstructure," but may be assessed separately as personal property under the Municipal Ordinance. Such buildings should not be valued as part of the railway as a going concern, and as having a special value as such, but merely at what they are worth separate and distinct from other portions of the railway. When only two and a half stalls of a roundhouse were situated within the municipality, and the roundhouse was shewn to be worth $900 a stall, the assessment was fixed at $2,250.

Re Can. Pac. Ry. Co. and Macleod, 2 Can. Ry. Cas. 203, 5 Terr. L.R. 192.

[Followed in Grand Trunk Pacific Ry. Co. v. City of Calgary, 21 Can. Ry. Cas. 200, 55 Can. S.C.R. 104, 36 D.L.R. 538.]

TAXATION BY SCHOOL DISTRICT—UNPATENTED LAND SET APART—EXEMPTION FROM TAXATION.

Crown lands which have been set apart for the land grant of the C.P.R. Co., and earned by that company as part of its land grant under the schedule to 44 Vict. (1881), c. 1, "An Act respecting the Canadian Pacific Railway," but which have never been sold or occupied by the company, are exempt from taxation by School Districts in the Territories by virtue of s. 16 of the Schedule. Per Richardson, J.:—On the ground that a School District is a "municipal corporation." Per Wetmore, J.:—On the ground that the Territorial Legislative Assembly—and consequently a Territorial School District—acts merely by authority delegated by the Dominion Parliament, and, therefore, that taxation by a Territorial School District is taxation "by the Dominion." Per McGuire, J.:—On the ground that the Territorial School Ordinance exempts from taxation lands held by Her Majesty, and does not authorize the taxation of any interest therein, and that as to the lands in question the company is at best in the position of purchasers who had paid their purchase money, but had not yet actually received a conveyance, and, until conveyed, the lands are held by Her Majesty. Semble, per Wetmore, J.:—Territorial School Districts are not "municipal corporations." Semble, per McGuire, J.:—Taxation by a School District is not taxation "by the Dominion," which latter means taxation direct by the Dominion. A School District is not a "municipal corporation." The effect of the Act was not to make ipso facto a grant to the company, nor to operate as a grant to the company as each 20 miles of railway was completed, but to entitle the company as each 20 miles was completed to ask for and receive a grant of the land subsidy applicable thereto. Construction of statutes discussed.

Balgonie Protestant Public School District v. Can. Pac. Ry. Co., 2 Can. Ry. Cas. 214, 5 Terr. L.R. 123.

[Referred to in North Cypress v. Can. Pac. Ry. Co., 14 Man. L.R. 406, 5 Terr. L.R. 573.]

EXEMPTION—SUPERSTRUCTURES—BUILDINGS.

An agreement between a city and a railway company which also conducted an electric lighting plant exempting from certain taxes "the tracks, right of way, wires, rolling stock, and all superstructures and substructures and all the properties of the railway company" does not entitle the company to an exemption from taxes on its buildings, machinery, poles and wires used in connection with its lighting plant.

Re Sandwich, Windsor & Amherstburg Ry. Co. and Windsor, 3 D.L.R. 43, 3 O.W.N. 575.

EXEMPTIONS—BUSINESS TAXES.

Under the Assessment Act, 4 Edw. VII. (Ont.), 1904, c. 23, s. 226, providing that the Act shall not affect the terms of any agreement made with a municipality, a railway company is exempt from the ordinary business tax under an agreement with the city exempting its property from all taxes other than school rates.

Re Sandwich, Windsor & Amherstburg Ry. Co. and Windsor, 3 D.L.R. 43, 3 O.W.N. 575.

ASSESSMENT AND APPORTIONMENT OF RAILWAY PROPERTY.

The assessment of the real property of a steam railway company does not become fixed for the next following four years, under s. 45 of the Ontario Assessment Act, 1904, upon the mere formal receipt by the clerk of the municipality of the company's annual statement of such property, and the transmission to the company of a notice of the amount of the assessment thereof, such amount being the same as the amount of the previous year; the only assessment which remains so fixed is an actual assessment after inspection and valuation.

Re Steelton and Can. Pac. Ry. Co., 3 D.L.R. 402, 3 O.W.N. 1199.

STREET RAILWAY TAXES.

A city by-law relating to the taxation of an electric street railway company, which provided that the company should keep and maintain within the city limits all of its engines, machinery, power houses and shops, will not prevent the company importing, for the operation of its plant, electricity generated at a point beyond the city limits.

Winnipeg Elec. Ry. Co. v. Winnipeg, 4 D.L.R. 116, [1912] A.C. 355.

EXEMPTIONS—RAILWAY PROPERTY.

The exemption privilege given to railways under s. 14, c. 40, R.S.S. 1909, providing that the railway and the land comprised in the right-of-way, station grounds, yards and terminals, and all buildings, structures and personal property used for the purposes of the operation of a railway shall be free and exempt from taxation, does not apply to arrears of taxes which were a charge on the land in question before it was purchased by the railway company, nor to assessments for local improvements made on the land. The exemption privilege given by s. 14, c. 40, R.S.S. 1909, to railway companies may be claimed by a railway company on land having a maximum area of one mile in length by 500 feet in width, which amount of land they are allowed to expropriate under s. 177 of the Railway Act 1906, for stations, depots, yards and other structures for the accommodation of traffic, even though the land in question is not actually used or immediately needed for railway purposes, and whether the land had been obtained by expropriation proceedings or by voluntary sale or otherwise; and to exempt a further area the railway must shew that the additional land is necessary for the purposes set out in s. 177 of the Railway Act. A railway company is not entitled, under the statute R.S.S. 1909, c. 40, to an exemption from taxation on land in excess of the area they are allowed to expropriate under subs. (a) of s. 177 of the Railway Act giving them the right to take for right of way land 100 feet in width, and under subs. (b) giving them the right to take for stations, yards and other structures for accommodation of traffic an area one mile in length by 500 feet in breadth, including the width of the right-of-way, unless they shew that the additional area is necessary for the purposes set out in subs. (b); such necessity will be presumed if the additional area was obtained by permission of the Board, as provided in s. 178 of the Act, but not otherwise.

Prince Albert v. Can. Northern Ry. Co. (Sask.), 10 D.L.R. 121, 15 Can. Ry. Cas. 87.

EXEMPTION UNTIL LANDS "SOLD"— EXEMPTION FOR 20 YEARS AFTER "GRANT FROM CROWN."

Certain lands granted to a railway company were exempted from taxation "until they are either sold or occupied, 'for 20 years' after the grant thereof from the Crown":—Held, (1) That the word "sold" involved a completed sale; and (2) that the proper meaning of the expression "grant from the Crown" was a conveyance by letters patent under the Great Seal, and, therefore, that in the case of lands not sold or occupied the period of exemption from taxation ran from the date of the letters patent conveying the lands to the railway company.

The Minister of Public Works of the Province of Alberta v. Can. Pac. Ry. Co.; The King v. Can. Pac. Ry. Co. (1911), 27 Times L.R. 234 (P.C.).

REVISION OF ASSESSMENTS.

By 52 Vict. c. 37, s. 2, amending the Supreme and Exchequer Courts Act, an appeal lies in certain cases to the Supreme Court of Canada from courts "of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such Court is or are appointed by provincial or municipal authority." By the Ontario Act, 55 Vict. c. 48, as amended by 58 Vict. c. 47, an appeal lies from rulings of Municipal Courts of revision in matters of assessment to the County Court Judges of the County Court district where the property has been assessed. On an appeal from the decision of the County Court Judges under the Ontario statutes:—Held, King, J., dissenting, that if the County Court Judges constituted a "Court of Last Resort" within the meaning of 52 Vict. c. 31, s. 2, the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act:—Held, per Gwynne, J., that as no binding effect is given to the decision of the County Court Judges, under the Ontario Acts cited, the Court appealed from was not a "Court of Last Resort" within the meaning of 52 Vict. c. 37, s. 2. Quaere.—Is the decision of the County Court Judges a "final judgment" within the meaning of 52 Vict. c. 37, s. 2?

Toronto v. Toronto Ry. Co., 27 Can. S.C.R. 640.

[Leave to appeal to Privy Council refused.]

ACTION FOR MUNICIPAL AND SCHOOL TAXES—JURISDICTION—DECLINATORY EXCEPTION.

In a suit in the Superior Court, claiming municipal taxes to an amount exceeding $100, accompanied with a demand for school taxes, a declinatory exception asking the dismissal of that portion of the demand which is for school taxes, on the ground that the Circuit Court has exclusive jurisdiction, will be maintained, notwithstanding Art. 170 C.C.P., it being impossible in such a case to transmit the whole record to the Circuit Court.

Dudswell v. Quebec Central Ry. Co., 19 Que. S.C. 116 (White, J.).

TAX SALE—INJUNCTION—APPEAL TO COURT OF REVISION—ESTOPPEL.

An injunction may be granted to restrain a tax sale. It is not necessary that exemption from taxation should be raised before the Court of Revision, and a party, wrongfully assessed by reason of exemption, is not estopped by appealing to the Court of Revision.

Can. Pac. Ry. Co. v. Calgary, 1 Terr. L.R. 67.

INJUNCTION—LEVY OF ILLEGAL TAX BY MUNICIPALITY.

A party who brings an action against a municipality for a declaration that he is not liable for a tax imposed upon him, and for an injunction to restrain the attempted levy of such tax, is not entitled to an interim injunction to restrain such levy, as he has another adequate remedy, namely, to pay the tax under protest and sue to recover it back.

Dominion Express Co. v. Brandon, 19 Man. L.R. 257, 20 Man. L.R. 304.

APPEAL—GENERAL PLAN OF ASSESSMENT—LAND AND BUILDINGS.

Under ordinary circumstances it is incumbent upon an appellant who complains that he is assessed too high to shew that the property is not worth the amount for which he is assessed, but where, although this is not shewn, it appears that under the general scheme of assessment, lands of a particular description are assessed generally at a certain fixed sum per acre, and that the appellants' lands of that description, which are of no greater value either by reason of their situation or otherwise, are assessed at a larger amount, the assessment should be reduced to accord with the general scheme of assessment. A school district assessor assessed certain of the appellants' lands at $800, and the dwelling houses thereon at $2,000:—Held, that the assessment should stand, although the more correct course would have been to assess the whole as "land," and place a single value upon both soil and buildings as "land."

Re Can. Pac. Ry. Co. and Macleod Public School District, 2 Can. Ry. Cas. 210, 5 Terr. L.R. 187.

[Approved in Can. Nor. Ry. Co. v. Omemee School Dist., 6 Terr. L.R. 282, 4 W.L.R. 547.]

TAXES—CROWN GRANT—RAILWAY BRIDGE ACROSS RIVER.

A railway bridge constructed across a river in pursuance of a Crown grant is a "structure on railway land" within the meaning of subs. 3 of s. 47 of the Assessment Act, R.S.O. 1914, c. 195, exempting same from assessment by the township municipality. The ownership of the Crown in the soil and freehold of the bed of a river and of the islands therein extends usque ad cœlum, and a grant by the Crown of the right to construct and maintain a railway bridge across such river carries with it the ownership of so much of the soil as is occupied by the superstructure as well as by the piers.

Re Ottawa & New York Ry. Co. v. Cornwall, 20 Can. Ry. Cas. 91, 34 O.L.R. 55.

EXEMPTION—BRIDGE—CROWN GRANT—ONTARIO ASSESSMENT ACT.

An international bridge constructed across the St. Lawrence river at Cornwall, under the authority of the Parliament of Canada, and supported by piers resting on Crown soil, used for the operation of trains is exempt from assessment and taxes under the Ontario Assessment Act, R.S.O. 1914, c. 195, s. 47 (3).

Cornwall v. Ottawa & New York Ry. Co., 20 Can. Ry. Cas. 96, 52 Can. S.C.R. 466.

[Affirmed in 20 Can. Ry. Cas. 435, [1917] A.C. 399, 35 D.L.R. 468.

MUNICIPAL TAXATION—RAILWAY BRIDGE—"RAILWAY LANDS"—ONTARIO ASSESSMENT ACT.

The words, "on railway lands," in R.S.O. 1914, c. 195 s. 47 (3) (the Assessment Act), exempting certain structures and other property "on railway lands" from municipal assessment, include all lands in the lawful use and occupation of a railway company, exclusively for railway purposes, or incidental thereto, without reference to the title under which they may be held. [Cornwall v. Ottawa & New York Ry. Co., 30 D.L.R. 664, 52 Can. S.C.R. 466, affirmed.]

Cornwall v. Ottawa & New York Ry. Co., 20 Can. Ry. Cas. 435, [1917] A.C. 399, 35 D.L.R. 468.

ASSESSMENT OF OWNER OF LAND—OCCUPANT—PURCHASER.

A purchaser of Crown lands entitled to possession thereof, the title remaining in the Crown until completion of payment, is assessable as the equitable owner and occupant of the land. [Southern Alta. Land Co. v. McLean, 29 D.L.R. 403, 53 Can. S.C.R. 151; Smith v. Vermilion Hills, 20 D.L.R. 114, 49 Can. S.C.R. 563, affirmed in 30 D.L.R. 83, [1916] 2 A.C. 569, followed.]

Grand Trunk Pacific Ry. Co. v. Calgary, 21 Can. Ry. Cas. 200, 55 Can. S.C.R. 104, 36 D.L.R. 538.

ASSESSMENT OF RAILWAYS—"SUPERSTRUCTURE."

The "superstructure" of a railway, within the meaning of an assessment statute (Con. Ord. N.W.T. 1898, c. 71, s. 3), includes that which constitutes the line of railway, such as the ties, rails, bridges, culverts, platforms, etc., but not the buildings thereon. [Re C.P.R. and Macleod, 5 Terr. L.R. 192, 2 Can. Ry. Cas. 203, followed.]

Grand Trunk Pacific Ry. Co. v. Calgary, 21 Can. Ry. Cas. 200, 55 Can. S.C.R. 104, 36 D.L.R. 538.

EXPRESS AND TELEPHONE COMPANIES—"FINANCIAL INSTITUTIONS."

Neither an express nor a telegraph company can be classed as "a bank, loan company or financial institution" within the meaning of s. 302 (2) of the Towns Act (Sask.), providing the mode of their assessment for taxation.

Can. Northern Express Co. v. Rosthern; Can. Northern Telegraph Co. v. Rosthern, 23 D.L.R. 64, 8 Sask. L.R. 285, 8 W.R. 1181, 31 W.L.R. 868.

EXEMPTION—RAILWAY PROPERTIES—WHAT ARE—LAND.

Lands acquired by a railway company for railway purposes, contingent upon the approval of the plans by the Minister of Railways, are not, until definitely appropriated as part of the railway and taken from other uses, "properties and assets which form part or are used in connection with its railway," so as to be exempt from taxation under clause 13 (e), c. 3, B.C. statutes 1910. [See annotation 11 D.L.R. 66.]

Can. Northern Pacific Ry. Co. v. New Westminster, 36 D.L.R. 505, [1917] A.C. 602.

[Followed in Can. Northern Pacific Ry. Co. v. Kelowna, 44 D.L.R. 315, 3 W.W.R. 845.

EXEMPTION—RAILWAY PROPERTIES—WHAT ARE RAILWAY LANDS.

Lands acquired by the plaintiff railway company cannot be said to form part of the railway, nor can they be classed as lands used in connection with the operation of the railway, so as to be exempt from taxation under clause 13 (e), c. 3, B.C. statutes 1910, until plans of these lands have

been filed, or submitted for approval, by the Minister of Railways. [Can. Northern Pacific Ry. Co. v. New Westminster, 36 D.L.R. 505, [1917] A.C. 602, followed. See also Canadian Northern Pacific Ry. Co. v. Vernon, 44 D.L.R. 317.]

Canadian Northern Pacific Ry. Co. v. Kelowna, 44 D.L.R. 315, 3 W.W.R. 845.

Railway property—What is—Exemption from taxation—Evidence as to use.

The plaintiff company having led evidence, defining and fixing a right-of-way so as prima facie to bring it within the exemption fixed by (clause 13 (e) c. 3, B.C. Statutes 1910) the agreement between the plaintiff and the Province of British Columbia. It is incumbent upon a corporation seeking to tax a portion of such right-of-way to establish that such portion, declared to be exempt, was in use for other than railway purposes. [Canadian Northern Pacific Ry. Co. v. New Westminster (1915), 25 D.L.R. 28, 22 B.C.R. 247, (1917) 36 D.L.R. 505, [1917] A.C. 602; Canadian Northern Pacific Ry. Co. v. Kelowna, 44 D.L.R. 315, referred to.]

Canadian Northern Pacific Ry. Co. v. Vernon, 44 D.L.R. 317.

Voluntary payment—Recovering back.

A taxpayer who voluntarily pays taxes without protest, in the absence of any attempt to collect by distress or threat of distress, cannot recover back the amount so paid.

New York & Ottawa Ry. Co. v. Cornwall, 16 Can. Ry. Cas. 403, 29 O.L.R. 522, 15 D.L.R. 433.

What taxable—International bridge.

That portion of an international bridge lying within the Province of Ontario is subject to taxation as real property under s. 2, subs. 7 (d) of c. 23 of the Assessment Act, 4 Edw. VII. (Ont.), R.S.O. 1914, c. 195, declaring that real property shall include "all buildings, or any part of any building, and all structures." [Belleville & Prince Edward Bridge Co. v. Ameliasburg, 15 O.L.R. 174, and Niagara Falls Suspension Bridge Co. v. Gardner, 29 U.C.R. 194, followed.]

New York & Ottawa Ry. Co. v. Cornwall, 16 Can. Ry. Cas. 403, 29 O.L.R. 522, 15 D.L.R. 433.

Jurisdiction—Municipal matters—Review.

Whether property is subject to taxation is, under ss. 17 (3) and 51 of the Ontario Railway and Municipal Board Act, 6 Edw. VII. c. 31, 3 & 4 Geo. V. c. 37, R.S.O. 1914, c. 186, conferring authority on the Railway and Municipal Board, a question exclusively within its jurisdiction, which cannot be determined by the Courts in the first instance, but only by way of appeal in the manner pointed out by the Act. The Ontario Railway and Municipal Board is clothed by ss. 17 (3) and 51 of the Ontario Railway and Municipal Board Act, 6 Edw. VII. c. 31, 3 & 4 Geo. V. c. 37, R.S.O. 1914, c. 186, with exclusive jurisdiction to determine whether or not property is subject to taxation. Apart from any right to bring an action for money illegally exacted as and for taxes, the Ontario Courts have no jurisdiction to grant a declaratory judgment or an injunction to restrain the enforcement of an assessment, since, under c. 31 of the Ontario Railway and Municipal Board Act, 6 Edw. VII., 3 & 4 Geo. V. c. 37, R.S.O. 1914, c. 186, the Railway and Municipal Board has exclusive jurisdiction over questions pertaining to taxation.

New York & Ottawa Ry. Co. v. Cornwall, 16 Can. Ry. Cas. 403, 29 O.L.R. 522, 15 D.L.R. 433.

Railway property—Ontario Assessment Act—Conclusiveness for four years.

The provisions of s. 45 of the Assessment Act, 4 Edw. VII. (Ont.) c. 23, R.S.O. 1914, c. 195, declaring that the amount of an assessment of railway property under s. 44 of the Act, as finally made in the corrected rolls, shall stand for the following four years in respect of property included in the assessment, relates only to the amount of the assessment, and not to its regularity, or the jurisdiction to make it.

New York & Ottawa Ry. Co. v. Cornwall, 16 Can. Ry. Cas. 403, 29 O.L.R. 522, 15 D.L.R. 433.

Water tanks and platforms.

Water tanks and platforms are part of the superstructure of a railway and, as such, are not assessable apart from the roadway.

Grand Trunk Ry. Co. v. Port Perry, 34 C.L.J. 239.

[Followed in Re Can. Pac. Ry. Co. and Macleod, 2 Can. Ry. Cas. 207.]

Taxation—Exemption—Plans of right-of-way—Filing—Sanction by Minister.

When the plan and book of reference sanctioned by the Minister do not comply with the Railway Act, if there has been an approval of the location of the railway and the grades and curves as shewn on the plan, it is sufficient for exemption from taxation under the Municipal Act. Sanction by the Minister under s. 18 of the Act, establishes a prima facie case for definite appropriation and exemption, and the burden is on the municipality to displace such exemption, which may be done by showing the lands still remain in use for the purpose for which they were previously used. When land that is purchased by the company is cleared for certain purposes in connection with the operation of the railway, and is left in that state until such time should arrive for actual construction, it may be looked upon as a "definite appropriation" as part of the railway and exempt from taxation. [Can. Northern Pacific Ry. Co. v. New Westminster, A.C. 602, and Can. Northern Pacific Ry. Co. v. Kelowna, 25 B.C.R. 514, followed.]

Can. Northern Pacific Ry. Co. v. Vernon; Can. Northern Pacific Ry. Co. v. Armstrong, 26 B.C.R. 221.

Exemption—Railways—Local assessments.

The exemption of railway property from all assessments and taxation of every nature and kind, as provided by s. 18 of the Railway Taxation Act, 1900, c. 57, is subject to the limitation of the amending Act, 1900, c. 58 (R.S.M. 1913, c. 193, s. 18), empowering municipal corporations to assess the real property of railway companies for local improvements, the exemption, however, extending to special survey charges made under the Special Survey Act (R.S.M. 1913, c. 182). [Can. Northern Ry. Co. v. Winnipeg, 27 D.L.R. 369, 26 Man. L.R. 292, affirmed.]

Can. Northern Ry. Co. v. Winnipeg, 36 D.L.R. 222.

Municipal Taxes—Telephone poles and wires—Illegality of.

The municipal tax imposed by a village municipality on the telephone

poles and wires situate in the streets of the village is illegal and cannot be recovered.

Pierreville v. Bell Telephone Co., 23 D.L.R. 635.

ASSIGNMENT OF CLAIMS.

See Claims.

Annotation.

Assignment of Judgments. 6 Can. Ry. Cas. 479.

AWARD.

See Appeals; Expropriation.

BAGGAGE.

Liability for loss of baggage by transfer company, see Carriers of Goods (B); Limitation of Liability.

PERSONAL BAGGAGE—LIABILITY FOR.

The plaintiff was one of fifty-four Chinamen traveling over the defendants' railway on one ticket purchased on their behalf by an employment agent, who received the price of his passage from each of the Chinamen, out of the wages earned by him after reaching his destination. The plaintiffs' baggage, consisting of personal effects and bedding, was destroyed by the burning of the baggage car, the cause of the fire being unknown:—Held, that the contract was with each Chinaman, to carry him and his baggage safely, and that the defendants were liable in damages:—Held, also, that the defendants having accepted the bedding as personal baggage were liable for it as such, and semble, that it would have been held, under the circumstances, to be personal baggage, even without such acceptance.

Chan Dy Chea v. Alberta Ry. & Irrigation Co., 6 Terr. L. R. 175, 1 W.L.R. 371 (N.W.T.).

LOSS OF BAGGAGE—HOUSEHOLD EFFECTS.

(1) Only the passenger or his assignee can sue a railway company on the implied contract with a passenger to carry safely his personal baggage arising from his having purchased a ticket for his conveyance. (2) If the action were founded in tort and it was shewn that the goods were lost through the defendants' negligence, the owner of the goods, though he was not the passenger, could sue. (3) In the absence of proof of negligence, the passenger can only recover for personal baggage lost, and only on clear evidence that such were contained in the missing pieces. (4) In the case of a married woman traveling with infant children to join her husband, the husband's clothing, household effects and the clothing of grown-up daughters cannot be classed as personal baggage.

Callan v. Can. Northern Ry., 19 Man. L.R. 141.

LOSS OF PASSENGER'S LUGGAGE—LIABILITY AS WAREHOUSEMEN.

The defendants' agent checked the plaintiff's luggage in advance and sent it on by an earlier train than that by which she traveled. The luggage arrived at its destination before the plaintiff arrived, and, four hours after its arrival, was destroyed by fire:—Held, that, even assuming that there was no negligence on the part of the defendants, the interval of four hours was not sufficient to change the status of the defendants from carriers to warehousemen, when they knew that the plaintiff was coming by another train on a later day; and the defendants were liable for the value of the luggage. [Penton v. Grand Trunk Ry. Co., 28 U.C.R. 367, distinguished; Vinberg v. G.T.R., 13 A.R. (Ont.) 93; Penton v. G.T.R., 28 U.C.R. 376, followed.]

Hamel v. Grand Trunk Ry. Co., 2 O.W.N. 1286.

PASSENGER'S BAGGAGE—LOSS.

MacIntosh v. Cape Breton Ry., 7 E.L.R. 142 (N.S.).

INJURY TO PASSENGERS' BAGGAGE LYING AT STATION—BAILEES FOR REWARD—WAREHOUSEMEN.

Where passengers by railway checked their baggage on the day on which they purchased their tickets, but (without the knowledge or fault of the railway company) did not begin their journey until the following day, and their baggage reached their destination before them, and was injured by an accidental explosion, while in the baggage room of the railway company, it was:—Held, that the liability of the company was that of gratuitous bailee, i.e., for gross negligence only. Definition of "gross negligence." Review of the authorities:—And held, upon the evidence, that the company were not guilty of gross negligence. Semble, also, that the company, if they were to be considered as bailees for reward—warehousemen—were not liable; they had discharged the onus of proving that the explosion was not due to negligence.

Carlisle v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 518, 25 O.L.R. 372.

INCIDENTAL POWERS OF RAILWAY COMPANY—CARRIAGE OF BAGGAGE.

The carriage of baggage to and from its own stations is a power fairly "incidental" to the statutory powers of a railway company.

Grand Trunk Ry. Co. v. James, 21 Can. Ry. Cas. 429, 10 Alta. L.R. 109, 29 D.L.R. 352.

TRADE NAME—CARRIAGE OF BAGGAGE BY RAILWAY COMPANY—INFRINGEMENT—INJUNCTION.

A railway company is entitled to the exclusive use of the trade name they adopt in carrying on a baggage transfer business, and any infringement thereupon by a third party subsequently attempting to carry on a similar business under a similar trade name will be restrained by injunction. [Grand Trunk Ry. Co. v. James, 22 D.L.R. 915, affirmed.]

Grand Trunk Ry. Co. v. James, 21 Can. Ry. Cas. 429, 29 D.L.R. 352, 10 Alta. L.R. 109.

SKIFFS, CANOES AND ROWBOATS—LIMITATION OF LIABILITY—WAREHOUSEMAN.

Canoes, skiffs and rowboats are not such articles of necessity or personal convenience as are usually carried by passengers for their personal use so as to be "baggage." [Macraw v. G.W.R. Co., L.R. 6 Q.B. 612, considered.] The construction of the words, "owner's risk," used in r. 12 (Baggage Rules) is a matter for decision by the Courts. The Board has power under s. 340 of the Railway Act, 1906, to sanction the limitation of the carrier's liability to $100 in the case of baggage checked free of charge, and the limitation is a reasonable one. The Board is not given any jurisdiction under s. 340 to limit the carrier's liability as a warehouseman. [Rule 2, s. (c.), 11 and 26 (c) of the Baggage Rules also considered. S. 283 of the Railway Act, 1906, considered.]

Re Baggage Car Traffic Rules, 33 W.L.R. 54.

Negligence—Limitation of Liability—Check room.

The liability of a common carrier with respect to baggage checked for safe keeping is that of a bailee for hire, and he is liable for a loss thereof through misdelivery notwithstanding a condition on the receipt limiting the liability of which the holder had no notice.

McEvoy v. Grand Trunk Ry. Co. (Que.), 35 D.L.R. 301.

Check room—Receipt—Limitation of liability.

The receipt of a railway company to a passenger delivering baggage to its parcels office for safe keeping, on payment of five cents, is not a contract of hiring, but a merely voluntary deposit or hiring of services, which renders the depositary or lessor liable for the loss of the deposited articles only in case of negligence; the burden of proof of such is on the depositing party. One who obtains the receipt, without informing himself of the conditions thereon limiting the company's liability, is guilty of negligence; and if such person is accustomed to travel on that railway and often makes use of the parcels office, the court will presume that he had knowledge of the conditions printed thereon.

Dorion v. Grand Trunk Ry. Co., 53 Que. S.C. 106.

BILLS OF LADING.

Authority of agents to bind company to terms of bill of lading, see Agents.

See Carriers of Goods; Limitation of Liability; Claims.

Approval by board—Clause invoked not approved by noncompliance.

A clause in a bill of lading which would be, if lawful, an exception to the general law, is binding only after it has been approved by the Board.

Auger v. Can. Northern Quebec Ry. Co., 22 Rev. de Jur. 585.

Stipulation as to notice of loss—Failure to give.

A bill of lading, approved by the Board, containing a clause releasing the carrier from liability if notice of the loss is not given within four months of a reasonable time for delivery, is binding upon the shipper and will bar his right of recovery for a lost shipment where the required notice is not in fact given.

Drury v. Can. Pac. Ry. Co., 48 Que. S.C. 326.

BOARD OF RAILWAY COMMISSIONERS.

See Railway Board.

BONDS AND SECURITIES.

Appointment of receiver upon foreclosure, see Receivers.

Bonds and debentures respecting construction of railways, see Railway Subsidy.

Mortgage by railway company—Power of company to mortgage its road.

Bickford v. Grand Junction Ry. Co., 1 Can. S.C.R. 696.

[Commented on in Canada Life Assn. Co. v. Peel Mfg. Co., 26 Gr. 477; considered in Re Farmers Loan Co., 30 O.R. 337; discussed in King v. Alford, 9 O.R. 643; McDougall v. Lindsay Paper Mill Co., 10 P.R. (Ont.) 247; Winnipeg & Hudson's Bay Ry. Co. v. Mann, 7 Man. L.R. 97; distinguished in Re Rockwood Elec. Div. Agr. Soc., 12 Man. L.R. 661, 667;

followed in Charlebois v. G.N.W. Central Ry. Co., 9 Man. L.R. 11; referred to in Bégin v. Levis County Ry. Co., 27 Que. S.C. 183; Blackley v. Kenny, 16 A.R. (Ont.) 522; Clarke v. Union Fire Ins. Co., 16 A.R. (Ont.) 161; Re Dominion Provident Assn., 25 O.R. 619; Farrell v. Carribou Gold Mining Co., 30 N.S.R. 203; Haley v. Halifax Street Ry. Co., 25 Can. S.C.R. 148; Hutton v. Federal Bank, 9 P.R. (Ont.) 568; Long v. Hancock, 12 A.R. (Ont.) 137; Re Munsie, 10 P.R. (Ont.) 98; Rowland v. Burwell, 12 P.R. (Ont.) 607; Toronto General Trusts v. Central Ontario Ry. Co., 6 O.L.R. 1; Whiting v. Hovey, 13 A.R. (Ont.) 7; Wiley v. Ledyard, 10 P.R. (Ont.) 182.]

RAILWAY BONDS—CONDITION PRECEDENT—CERTIFICATE OF ENGINEER.

Quebec v. Quebec Central Ry. Co., 10 Can. S.C.R. 563.

[The Privy Council allowed leave to appeal in this case, but the appeal was settled before argument.]

RAILWAY BONDS—TRUST CONVEYANCE.

In virtue of the provisions of a trust conveyance, granting a first lien, privilege and mortgage upon the railway property, franchise and all additions thereto of the South-Eastern Ry. Co. and executed under the authority of 43 & 44 Vict. (Que.) c. 49, and 44 & 45 Vict. (Que.) c. 43, the trustees of the bondholders took possession of the railway. In actions brought against the trustees after they took possession, by the appellants for the purchase price of certain cars and other rolling stock used for operating the road, and for work done for, and materials delivered to, the company after the execution of the deed of trust, but before the trustees took possession of the railway:—Held, (1) affirming the judgments of the Court below, that the trustees were not liable. (2) That the appellants lost their privilege of unpaid vendors of the cars and rolling stock as against the trustees, because such privilege cannot be exercised when moveables became immoveable by destination, as was the result with regard to the cars and rolling stock in this case, and the immovable to which the moveables are attached is in the possession of a third party or is hypothecated. Art. 2017, C.C. (Que.) (3) But, even considered as moveables, such cars and rolling stock became affected and charged by virtue of the statute and mortgage made thereunder, as security to the bondholders, with right of priority over all other creditors, including the privileged unpaid vendors. Per Gwynne, J., that the appellants might be entitled to an equitable decree, framed with due regard to the other necessary appropriations of the income in accordance with the provisions of the trust indenture, authorizing the payment by the trustees "of all legal claims arising from the operation of the railway, including damages caused by accidents and all other charges," but such a decree could not be made in the present action. Per Strong, J.: Quære—Whether the principle as to the applicability of current earnings to current expenses, incurred either whilst or before a railway comes under the control of the court by being placed at the instance of mortgagees in the hands of a receiver in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses should be adopted by Courts in this country. Mont. L.R. 6 Q.B. 77, reversing Mont. L.R. 3 S.C. 238, affirmed.

Wallbridge v. Farwell, Ontario Car & Foundry Co. v. Farwell, 18 Can. S.C.R. 1.

[Applied in Ahearn & Soper v. New York Trust Co., 42 Can. S.C.R. 270; followed in Connolly v. Montreal P. & I. Ry. Co., 22 Que. S.C. 340; Lainé v. Béland, 26 Can. S.C.R. 429; referred to in Bank of Montreal v.

Kirkpatrick, 2 O.L.R. 113; applied in Ahearn & Soper v. New York Trust Co., 18 Que. K.B. 83; relied on in Leonard v. Willard, 23 Que. S.C. 489.]

MORTGAGE OF RAILWAY BONDS AS SECURITY FOR ADVANCES.

W., having agreed to advance money to a railway company for completion of its road, an agreement was executed by which, after a recital that W. had so agreed and that a bank had undertaken to discount W.'s notes, indorsed by E. to enable W. to procure the money to be advanced, the railway company appointed said bank its attorney irrevocable, in case the company should fail to repay the advances as agreed, to receive the bonds of the company (on which W. held security) from a trust company, with which they were deposited, and sell the same to the best advantage, applying the proceeds as set out in the agreement. The railway company did not repay W. as agreed, and the bank obtained the bonds from the trust company, and having threatened to sell the same, the company, by its manager, wrote to E. & W. a letter requesting that the sale be not carried out, but that the bank should substitute E. & W. as the attorney irrevocable of the company for such sale, under a provision in the aforesaid agreement, and if that were done, the company agreed that E. & W. should have the sole and absolute right to sell the bonds for the price and in the manner they should deem best in the interest of all concerned and apply the proceeds in a specified manner, and also agreed to do certain other things to further secure the repayment of the moneys advanced. E. & W. agreed to this, and extended the time for payment of their claims and made further advances, and, as the last-mentioned agreement authorized, they rehypothecated the bonds to the bank on certain terms. At the expiration of the extended time the railway company again made default in payment, and notice was given them by the bank that the bonds would be sold unless the debt was paid on a certain day named; the company then brought an action to have such sale restrained:—Held, affirming the decision of the Supreme Court of Nova Scotia, that the bank and E. & W. were respectively first and second incumbrancers of the bonds, being to all intents and purposes mortgagees, and not trustees of the company in respect thereof, and there was no rule of equity forbidding the bank to sell or E. & W. to purchase under that sale:—Held, further, that if E. & W. should purchase at such sale, they would become absolute holders of the bonds, and not liable to be redeemed by the company:—Held, also, that the dealing by the bank with the bonds was authorized by the Banking Act. 23 N.S.R. 172, affirmed.

Nova Scotia Central Ry. Co. v. Halifax Banking Co. (1892), 21 Can. S.C.R. 536.

OPPOSITION À FIN DE CHARGE—PLEDGE.

The respondent obtained against the Montreal & Sorel Ry. Co. a judgment for the sum of $675 and costs and having caused a writ of venditioni exponas to issue against the railway property of the Montreal & Sorel Ry., the appellants, who were in possession and working the railway, claimed under a certain agreement in writing to be entitled to retain possession of the railway property pledged to them for the disbursements they had made on it, and filed an opposition à fin de charge for the sum of $35,000 in the hands of the sheriff. The respondent contested the opposition. The agreement relied on by the appellant company, was entered into between the Montreal & Sorel Ry. and the appellant company, and stated amongst other things that "the Montreal and Sorel Railway Company was burthened with debts and had neither money nor credit to place the road in running order, etc." The amount claimed for disbursements, etc., was over $35,000. The Superior Court, whose judgment was affirmed by the Court of Queen's Bench for Lower Canada, dismissed the opposition à fin de charge. On appeal to the Supreme Court the respondent moved to quash the appeal on the ground that the amount of the original judgment was the only matter in controversy and was insufficient in amount to give jurisdiction to the Court. The Court without deciding the question of jurisdiction heard the appeal on the merits, and it was:—Held, (1) That such an agreement must be deemed in law to have been made with intent to defraud and was void as to the anterior creditors of the Montreal & Sorel Ry. Co. (2) That as the agreement granting the lien or pledge affected immovable property and had not been registered it was void against the anterior creditors of the Montreal & Sorel Ry. Co. [Arts. 1977, 2015, 2094, C.C. (Que.)] (3) That Art. 419, C.C. (Que.) does not give to a pledgee of an immovable who has not registered his deed a right of retention as against the pledger's execution creditors for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an opposition à fin de conserver to be paid out of the proceeds of the judicial sale. Art. 1972, C.C. (Que.).

Great Eastern Ry. Co. v. Lambe, 21 Can. S.C.R. 431.

Debentures—Security—Hypothec to trust company—Holder of coupons—Exclusive right of action in trustee.

The holder of coupons is bound by conditions in the debentures to which they had been attached both as to payment and the mode of recovering the same; he is, therefore, in the same position as the owner of the debenture before the coupons were detached and, in the present case, is, like said owner, subject to a condition of a deed by which the real estate of the railway company issuing the debentures were hypothecated as security for their payment, namely, that such trustee should have the exclusive right of enforcing payment both of capital and interest, and, the Legislature having passed an Act to ratify the contract between the company and the trustee, an action taken in the name of the holder of coupons, even when the same were payable to bearer, was not well founded and was dismissed.

Levis County Ry. Co. v. Fontaine, 13 Que. K.B. 523.

Trust deed—Registration—Trustee's salary—Prescription—Salary of director—Privilege of bondholder.

The deposit of a trust deed by a railway company with the Secretary of State and notice thereof given in the Canada Gazette, as required by s. 94 of 51 Vict. c. 29, satisfies the requirements of Title XVIII. C.C. (Que.) with respect to registration. (2) The holding of a railway bond by one of several trustees of a railway company as collateral security for the payment of salary to such trustees is an interruption of prescription under Art. 2260 C.C. (Que.) from the time it was deposited with such trustee. (3) The power of the Parliament of Canada to legislate upon the subject of railways extends to civil rights arising out of, or relating to, such railways. (4) A cestui que trust cannot act as trustee for his own trustee and recover remuneration for his services as such. (5) A director of a company is not entitled to any remuneration for his services, without a resolution of the shareholders authorizing the same. (6) The failure on the part of a bondholder to deposit his bonds within a certain period, in the hands of a named trustee in compliance with the terms of a scheme of arrangement, duly confirmed by the Court under the provisions of the Railway Act, deprives him of any privilege attached to his bonds, and he must be ranked only with the unsecured creditors. (7) Where bonds find their way into the hands of a creditor as a mere pledge for his debt, not being bought in open market, the creditor can only recover the amount of his debt and not the face value of the bonds. (8) Leave to amend under rule 86 of the practice of the Court becomes null and void if not acted upon within the period fixed for the purpose. (9) Under the law of the province of Quebec a hypothec cannot be acquired by the registration of a judgment upon the immoveables of a person notoriously insolvent at the time of such registration, to the prejudice of existing creditors. (10) Under the facts of this case, trustees under a debenture holder's trust deed were held to be entitled to be indemnified in preference to all other creditors out of the trust property, for all costs, damages and expenses incurred by them in the performance of the trust. [Re Accles Limited (1902), 17 T.L.R. 786, referred to.] (11) The word "approved" written by the debtor upon an account against him, and dated, will not suffice to revive the debt already prescribed under the provisions of Art. 2267 C.C. (Que.).

Royal Trust Co. v. Atlantic & Lake Superior Ry. Co., 13 Can. Ex. 42.

SALE OF SECURITIES—RIGHT-OF-WAY CLAIMS—LEGAL EXPENSES INCURRED IN SETTLEMENT.

The plaintiffs sold the defendants stock and bonds of the P. & I. Ry. Co., with an agreement in writing which contained a clause stipulating as a condition that the vendees might declare the option of paying a further sum of $30,000 in addition to the price of sale, in consideration of which the vendors agreed to pay all the debts of the P. & I. Ry. Co., except certain specially mentioned claims, some of which were in respect of settlement for the right-of-way. The final clause of the agreement was as follows:—"After two years from the date hereof the M. S. Ry. Co., will assume the obligation of settling any right of way claims which the vendors may not previously have been called upon to settle and will contribute $5,000 towards the settlement of any such claims which the vendors may be called upon to settle within the said two years. Any part of the said sum not so expended in said two years or required by the purchasers so to be, shall be paid over to the vendors at the end of the said period, it being understood that the purchasers will not stir up or suggest claims being made." The vendees exercised the option and paid the $30,000 to the vendors who reserved their right to any portion of the $5,000 to be contributed towards settlement of the right-of-way claims which might not to be expended during the two years. An unsettled claim for right-of-way, in dispute at the time of the agreement was, subsequently, settled by the vendors within the two years. The question arose as to whether or not this claim, then known to exist, and legal expenses connected therewith was a debt which the vendors were obliged to discharge in consideration of the extra $30,000 so paid to them, and whether or not the $5,000 was to be contributed only in respect of right of way claims arising after the date of the agreement:—Held, affirming the judgment appealed from (15 Que. K.B. 77), that the agreement must be construed as being controlled by the provisions of the last clause thereof; that said last clause was not inconsistent with the previous clauses of the agreement, and that the vendees were bound to contribute to the payment of such claims and legal expenses in respect of the right-of-way to the extent of the $5,000 mentioned in the last clause.

Montreal Street Ry. Co. v. Montreal Construction Co., 38 Can. S.C.R. 422.

BONDS PLEDGED AS COLLATERAL SECURITY—RIGHTS OF PLEDGEE—BONDHOLDERS.

The pledgee of the bonds of a railway company, deposited with him as security for the payment of advances to the company, cannot use them as if he were a holder for value, and is not a bondholder within the meaning of the Railway Act, 1903, ss. 111, 116. He cannot, therefore, cause them to be registered in his name, nor in that of parties to whom he has transferred them; nor deal with them as if they were his property, e.g., by detaching coupons therefrom, so as to change their appearance and reduce the extent of their nominal value.

Atlantic & Lake Superior Ry. Co. v. De Galindez, 14 Que. K.B. 161.

Mortgage—Working expenditures—Lien—Priorities.

The Railway Act, 1888, after providing that a railway may secure its debentures by a mortgage upon the whole of such property, assets, rents and revenues of the company as are described in the mortgage, provides that such rents and revenues shall be subject in the first instance . . . to the payment of the working expenditure of the railway. By the Railway Act, 1903, the lien is enlarged to apply to the property and assets of the company, in addition to its rents and revenues. A mortgage by the defendants, made in 1897, was foreclosed and the property sold, the proceeds being paid into Court. In a claim for a lien thereon in priority to the mortgagee for working expenditure made after the commencement of the Act of 1903:—Held, that the lien under the Act of 1903 was not retroactive, and that as the lien under the Act of 1888 was limited to rents and revenues, and did not apply to the fund in Court, the claim should be disallowed.

Barnhill v. Hampton & Saint Martins Ry. Co., 3 N.B. Eq. 371.

Conveyance in trust for bondholders—Insurance money.

Defendant company conveyed to a trust company, in trust for bondholders, all rights accrued or thereafter to accrue to the company:—Held, that the conveyance covered a sum of money paid by an insurance company to their agent, and that the money in the hands of the agent was not subject to garnishee process at the instance of a judgment creditor of the company. Also that, as against an attaching creditor, the equitable title of the trust company was perfect without notice, and, therefore, there was no fund upon which the attachment could operate. Per Drysdale, J.: The mere circumstance that insurers doing business outside the jurisdiction of the Court send money to their agent within the jurisdiction with instructions to pay it to the defendant company, imposes no liability on the part of the agent to the defendant, in the absence of assent on the part of the agent to pay the money in accordance with the instructions received. The plaintiff in such case is not within the provisions of Ordinance 43, rule 1, and has no right to the money in question.

Terrell v. Port Hood Richmond Ry. & Coal Co., 45 N.S.R. 360.

Collateral securities—Railway bonds—Bank—Power of sale.

As collateral security to a promissory note the makers deposited with a bank certain railway bonds, and, by memorandum of hypothecation, authorized the bank, upon default, "from time to time to sell the said securities . . . by giving 15 days' notice in one daily paper published in the city of Ottawa . . . with power to the bank to buy in and resell without being liable for any loss occasioned thereby." Default having been made, notice of intention to sell was duly published, and, pursuant to the notice, the bonds were offered for sale at public auction, after two postponements at the request of the pledgors, but no sale was made for want of bidders. The bank afterwards made a private sale of the bonds without any further advertisement:—Held, that the words "by giving" in the memorandum were equivalent to "after giving" or "first giving" or "giving," and the condition of publication of the notice having been performed, the power to sell arose and might be exercised afterwards without a fresh notice:—Held, also, that there was nothing upon the evidence to shew that the purchasers were not bona fide purchasers for value or that they had any reason to suppose that the bank were not authorized to sell; and under these circumstances the construction of the power of sale should not be strained against the purchasers.

Toronto General Trusts Corp. v. Central Ontario Ry. Co., 3 Can. Ry. Cas. 344, 7 O.L.R. 660.

[Reversed in 4 Can. Ry. Cas. 359, 10 O.L.R. 347, which see below.]

Collateral securities—Railway bonds—Bank—Power of sale.

As collateral security to a promissory note, the makers deposited with a bank 300 railway bonds, and, by a memorandum of hypothecation, authorized the bank, upon default, "from time to time to sell the said securities . . . by giving 15 days' notice in one daily paper published in the city of Ottawa . . . with power to the bank to buy in and resell without being liable for any loss occasioned thereby":—Held, reversing the judgment of Street, J. (7 O.L.R. 660, 3 Can. Ry. Cas. 344), Osler, J.A., dissenting, that the power was to sell by auction, and that the bank had no power to sell by private contract. Semble, that, even if there was power to sell by private contract, the sale made to the respondents could not, upon the evidence as to the methods adopted, be supported, they having notice that the bank held the bonds as pledgees.

Toronto General Trusts Corp. v. Central Ontario Ry. Co., 4 Can. Ry. Cas. 359, 10 O.L.R. 347.

Railway mortgage bonds—Interest coupons—Arrears—Real property limitation act.

The restrictions placed upon the right to recover arrears of interest charged upon land imposed by ss. 17, 24 of the Real Property Limitation Act, R.S.O. 1897, c. 133, are not applicable to the case of coupons for the payment of interest on railway mortgage bonds, which are secured by mortgage deeds of trust. The coupons are, in effect, documents under seal —the bond under seal containing a covenant for payment of the coupons— and they, therefore, partake of the nature of a specialty, and are good for at least twenty years.

Toronto General Trusts Corp. v. Central Ontario Ry. Co. et al., 3 Can. Ry. Cas. 339, 6 O.L.R. 534.

[Affirmed in 8 O.L.R. 604, 7 Can. Ry. Cas. 70.]

Interest—Arrears—Foreclosure—Limitation of actions.

Bonds under seal issued by a railway company contained a covenant to pay half-yearly instalments of interest evidenced by attached coupons, and payment of principal and interest was secured by a mortgage of the undertaking, which also contained a covenant to pay:—Held, in foreclosure proceedings upon this mortgage, that the interest being a specialty debt and the mortgaged undertaking consisting in part of realty and in part of personalty not subject to division, the holders of coupons, whether attached to the bonds or detached therefrom, were entitled to rank for all instalments which had fallen due within twenty years, and not merely for those which had fallen due within six years. Judgment of Boyd, C., 6 O.L.R. 534, 3 Can. Ry. Cas. 339, affirmed:—Held, also, that even if the case were dealt with upon the footing of the mortgage being one of realty only, there was the right to rank, for there were no subsequent encumbrancers, and there had been shortly before the claims were filed a valid acknowledgment by the company of liability for all the interest in question.

Toronto General Trusts Corp. v. Central Ontario Ry. Co., 4 Can. Ry. Cas. 70, 8 O.L.R. 604.

Bondholders—Right to vote—Scope of.

A provincial Act applicable to the bonds of a railway company provided that, "In the event at any time of the interest upon the bonds remaining unpaid and owing, then at the next ensuing general annual meeting of the said company all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders":—Held, that the bondholders' right to vote might be exercised at any time when interest was in arrear, and was not restricted to the one general annual meeting next after the interest fell into arrear:—Held, also, Osler and Maclaren, JJ.A., dissenting, that each bondholder had one vote for every $100 of his bond, the shares being $100 shares:—Held, per Osler and Maclaren, JJ.A., that each bondholder had as many votes as he had bonds and no more.

Weddell et al. v. Ritchie et al., 4 Can. Ry. Cas. 347, 10 O.L.R. 5.

Regularity of issue—Rights of bondholders.

A railway company and its creditors exercising its rights are estopped from setting up irregularities in the issue of its bonds against trustees for bondholders who had no reason to suspect them.

Veilleux v. Atlantic & Lake Superior Ry. Co. et al., 12 Can. Ry. Cas. 91, 39 Que. S.C. 127.

Pledge of locomotives—Possession—Rights of creditors.

B., who was the principal owner of the S. E. Ry. Co. was in the habit of mingling the moneys of the company with his own. He bought locomotives, which were delivered to, and used openly and publicly by, the railway company as their own property for several years. In January and May, 1883, B., by documents sous seing privé, sold, with the condition to deliver on demand, ten of these locomotive engines to F. et al., the appellants, to guarantee them against an endorsement of his notes for $50,000, but reserved the right, on payment of said notes or any renewals thereof, to have said locomotives redelivered to him. B. having become insolvent, F. et al., by their action directed against B., the S. E. Ry. Co. and R. et al., trustees of the company, under 43-44 Vict. c. 49 (Que.), asked for the delivery of the locomotives, which were at the time in the open possession of the S. E. Ry. Co., unless the defendants paid the amount of their debt. B. did not plead. The S. E. Ry. Co. and R. et al., as trustees, pleaded a general denial, and during the proceedings O'H. filed an intervention, alleging he was a judgment creditor of B., notoriously insolvent at the time of making the alleged sale to F. et al.:—Held, affirming the judgment of the Court below, that the transaction with B. only amounted to a pledge not accompanied by delivery, and, therefore, F. et al. were not entitled to the possession of the locomotives as against creditors of the company, and that in any case they were not entitled to the property as against O'H., a judgment creditor of B., an insolvent. Mont. L.R. 2 Q.B. 332, affirmed.

Fairbanks v. Barlow, 14 Can. Ry. Cas. 217.

[Followed in Vassal v. Salvas, 5 Que. Q.B. 356.]

Bonds—Coupons—Assignment.

McKenzie v. Montreal & City of Ottawa Ry. Co., 29 U.C.C.P. 333.

DELIVERY OF BONDS AND SECURITIES.

Declaration on a bond whereby defendants covenanted to pay R., or the holder, at, &c., £200, on &c., and interest thereon semiannually on the delivery at the Gore Bank of the warrants therefor to the bond annexed, and that the plaintiffs became the holders, and have always been ready and willing to deliver said warrants at, &c., but £12 for interest is now due:—Held, bad, in not averring an actual delivery of, or an offer to deliver, the warrants at the bank.

Osborne et al. v. Preston & Berlin Ry. Co., 9 U.C.C.P. 241.

PRESENTMENT OF BONDS FOR PAYMENT.

McDonald v. Great Western Ry. Co., 21 U.C.Q.B. 223.

MORTGAGE—BENEFICIAL OWNER—LIABILITY ON COVENANTS.

National Trust Co. v. Brantford Street Ry. Co., 4 D.L.R. 301, 3 O.W.N. 1615.

[The case involved other questions upon which a new trial was granted, 11 D.L.R. 837, 4 O.W.N. 1341.]

BONDHOLDERS — MORTGAGES — SALE OF RAILWAY BY RECEIVER — DISTRIBUTION OF PROCEEDS OF SALE—CONFLICTING CLAIMS—PRIORITIES—LIENS OF BONDHOLDERS—CLAIM TO LIENS BY HOLDERS OF DETACHED COUPONS—TRANSFER OF COUPONS—PURCHASE OR SATISFACTION—PRESERVATION OF LIEN—EXCHANGE OF BONDS OF FIRST ISSUE FOR SECOND ISSUE—AGREEMENT FOR EXCHANGE PROCURED BY MISREPRESENTATION—RELIEF BY RESCISSION OR REINSTATEMENT—OPERATION OF MORTGAGE UPON RAILWAY AFTERWARDS ACQUIRED—RENTAL—CHARGE ON LANDS—DISCHARGE.

Trusts & Guarantee Co. v. Grand Valley Ry. Co., 44 O.L.R. 398.

BONUS.

See Railway Subsidy.

BOX CARS.

See Cars.

BRAKEMAN.

See Signals and Warnings, Employees.

BRANCH LINES AND SIDINGS.

As a work for general benefit of Canada, see Constitutional Law; Expropriation.

Limitation of actions for damages for removal of siding, see Limitation of Actions.

Jurisdiction of Board to order establishment of sidings, see Railway Board.

BRANCH LINES—CANADIAN PACIFIC RY. CO.'S CHARTER—LIMITATION OF TIME.

The charter of the Canadian Pacific Ry. Co., 44 Vict. c. 1 (D.), and schedules thereto appended imposes limitations neither as to time nor point of departure in respect of the construction of branch lines;—they may be constructed from any point of the main line of the Canadian Pacific

Ry., between Callender Station and the Pacific seaboard, subject merely to the existing regulations as to approval of location, plans, etc., and without the necessity of any further legislation. On a reference concerning an application to the Board for the approval of deviations from plans of a proposed branch line, under s. 43 of the Railway Act, 1903, it is competent for objections as to the expiration of limitation of time to be taken by the said Board, of its own motion, or by any interested party.

Re Branch Lines C.P.R.; Can. Pac. Ry. Co. v. James Bay Ry. Co., 36 Can. S.C.R. 42.

[Explained in Montreal & Southern Counties Ry. Co. v. Woodrow, 11 Que. P.R. 232.]

EXTENSION OF SIDING INTO PRIVATE PROPERTY.

A spur track connected the main line of the C.N.R. with private property. This spur track or siding was constructed, under an agreement between the railway company and the private owners, by the latter, who were also to pay annual compensation for the use thereof—the railway company having a right to use the siding for shunting. The railway desired to continue the siding so as to reach the property of S., and in order to do so had to cross the land of B. An order was made by the Board giving leave to extend the track across B.'s land and authorizing the expropriation of a strip of B.'s land for the purpose:—Held, that the extension of the siding was within the purview of the Railway Act, and that the Board had power to make the order under ss. 221, 222, 223; their order concluded the matter until it was reversed on appeal; and it was not open to a Judge, upon an application by the railway company under s. 217 for a warrant for immediate possession, to consider whether the right was disputable:—Held, however, that the company had not made out a right to the warrant under the terms of s. 217.

Re Can. Northern Ry. Co. and Blackwoods, 15 W.L.R. 454.

BRANCH LINE—CONTINUOUS ROUTE—INTERCHANGE OF TRAFFIC.

The G.T.R. Co. constructed a branch line connecting its line of railway with that of the C.P.R. Co.; both companies having terminal facilities in the city of London and no other connection at or near London, except this branch. The G.T.R. Co. refused to interchange traffic by means of such branch line, claiming that, in the division of rates for traffic interchanged by this branch by the two companies, a larger portion should be assigned to them than would be a fair remuneration for the service to be rendered in transporting cars over this branch and its London terminal lines and loading and unloading them:—Held, that the G.T.R. Co. was obliged to furnish for the carriage over its proportion of the continuous line (formed by this branch with the line of the C.P.R. Co.), and for the receipt and delivery of such traffic and for the loading and unloading of cars for the purpose, the same facilities as in respect of traffic passing over its own lines only or transferred to or by it at distant points of the C.P.R. system, and that the apportionment of rates should be deemed to be made on this basis that the division between the railway companies of the joint rates for traffic thus interchanged should be made upon the principle of giving reasonable compensation for the services and facilities furnished by the respective companies in respect of the particular traffic thus interchanged, and not by reference to the magnitude of the business of one company or the other at particular points or the respective advantages which each can offer to the other there, or a comparison of the loss which the one is likely to sustain with the gain likely to accrue to the other from the giving of the facilities which the law requires. Upon appeal to the Supreme Court of Canada:—

Held (1), that the Board had authority under the Railway Act, 1903, and particularly under ss. 253, 266, 267, 271, to make the order in question under the circumstances in this case. (2) That ss. 266, 267 of the Railway Act, 1903, are applicable under the circumstances of this case where one and the same through rate is charged to and from all points within the district lying in and about the city of London to which the order applies. (3) That the order appealed from does not involve the obtaining by the C.P.R. Co. of the use of the tracks, station or station grounds of the G.T.R. Co. at London, for which the G.T.R. Co. should obtain compensation under the Railway Act, 1903, and particularly under s. 137. (4) That the Board was not "bound as a matter of law" to take into consideration, in estimating the remuneration or compensation to be allowed to the G.T.R. Co. in consequence of or for what was required of that company by the said order:—(a) The magnitude of the business of the G.T.R. Co. at London as compared with that of the C.P.R. Co. at that point; (b) the comparative advantages which each of the said two companies can offer to the other there; (c) a comparison of the loss which one company is likely to sustain with the gain likely to accrue to the other company from the giving of these facilities which the law requires; (d) the amount which may have been expended by the G.T.R. Co. in the acquisition of its terminal facilities at London or the value of its investments therein, otherwise than as evidence of the fair value of the service to be rendered and of the use of the facilities to be afforded under the said order.

Grand Trunk Ry. Co. v. Can. Pac. Ry. Co. and London (London Interswitching case), 6 Can. Ry. Cas. 327.

[Affirmed in 13 Can. Ry. Cas. 435; followed in Can. Manufacturers' Assn. v. Can. Freight Assn., 7 Can. Ry. Cas. 303; Thorold v. Grand Trunk et al. Ry. Cos., 24 Can. Ry. Cas. 21; Gillies Bros. and Grand Trunk Ry. Co. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 44; Re Interswitching Service, 24 Can. Ry. Cas. 324.]

OPERATION ALONG HIGHWAY—STREET RAILWAY—LEAVE OF MUNICIPALITY.

The N. St. C. & T. Ry. Co. applied to the Board for leave to cross certain streets in the town of Thorold by a branch line already authorized by the Board. The municipality contended that the applicants' railway is a street railway or tramway, or operated as such, and that, under the Railway Act, 1903, s. 184, the leave of the municipality must be obtained by by-law before a street railway or tramway can cross its streets:—Held, upon the evidence, that the proposed branch line is not a street railway or tramway, and that s. 184 only applies to operation along highways and not to crossings thereof.

Re Niagara, St. Catharines & Toronto Ry. Co. (Thorold Street Crossings), 6 Can. Ry. Cas. 145.

PROVINCIAL RAILWAY—AUTHORITY OF THE BOARD.

B. & Sons applied to the Board for an order directing the H. & D. Street Ry. Co. (incorporated by the Legislature of Ontario) to construct and maintain a siding from their railway to the premises of the applicants:—Held, that the application must be refused, as the Board had no jurisdiction over a provincial railway, and no power to make an order for the construction of a siding by it.

Bertram v. Hamilton & Dundas Street Ry. Co., 6 Can. Ry. Cas. 158.

TRAFFIC ACCOMMODATION—RESTORING CONNECTIONS.

On an application to the Board under the Railway Act, 1903, for a direction that a railway company should replace a siding, where traffic facilities had been formerly provided for the respondents with connections upon their lands, and for other appropriate relief for such purposes:—Held, that, under the circumstances, the Beard had jurisdiction to make an order directing the railway company to restore the spur-track facilities formerly enjoyed by the applicants for the carriage despatch and receipt of freight in carloads over, to and from the line of railway.

Can. Northern Ry. Co. v. Robinson, 6 Can. Ry. Cas. 101, 37 Can. S.C.R. 541.

[See 11 Can. Ry. Cas. 289, 19 Man. L.R. 300, 11 Can. Ry. Cas. 304, 43 Can. S.C.R. 387, 13 Can. Ry. Cas. 412, [1911] A.C. 739, 14 Can. Ry. Cas. 281, 5 D.L.R. 716, followed in Dominion Transportation Co. v. Algoma Central v. Hudson Bay Ry. Co., 17 Can. Ry. Cas. 422.]

Track facilities—Damages for refusal to supply—Limitation of Action.

Action for damages for taking away spur-track facilities formerly enjoyed, and refusing to restore same for plaintiffs' use on their land adjoining the railway yards. The Board had by order dated 19th February, 1906, made under ss. 214, 253 of the Railway Act, 1903, found as a fact that the defendants had refused to afford "reasonable and proper facilities" as required by s. 253 and directed the defendants to restore these spur-track facilities within four weeks, which order was affirmed by the Supreme Court of Canada, 37 Can. S.C.R. 541:—Held (1), an action lies for such damages under the circumstances, the finding of fact by the Board being conclusive under s. 42 (3) of the Act, and this Court has jurisdiction to find and assess the damages. (2) Plaintiffs were entitled to damages from the date of the breach and not merely from the date of the Board's order. (3) The Board had no jurisdiction to deal with the question of damages and, not having assumed to do so, the plaintiffs were not estopped from bringing this action by any adjudication of the Board. (4) Damages should be allowed during the time taken up by the appeal to the Supreme Court, and Peruvian Guano Co. v. Dreyfus, [1902] A.C. 166, did not apply. (5) S. 242 of the Act, limiting the time for bringing "all action or suits for indemnity by reason of the construction, or operation of the railway," does not apply to an action for a breach of a statutory duty in neglecting and refusing to supply reasonable and proper facilities.

Robinson v. Can. Northern Ry. Co., 11 Can. Ry. Cas. 289, 19 Man. L.R. 300.

[Affirmed in 43 Can. S.C.R. 387, 11 Can. Ry. Cas. 304.]

Denial of traffic facilities—Injury by reason of operation of railway—Limitation of actions.

Injuries suffered through the refusal by a railway company to furnish reasonable and proper facilities for receiving, forwarding and delivering freight, as required by the Railway Act, to and from a shipper's warehouse, by means of a private spur track connecting with the railway, do not fall within the classes of injuries described as resulting from the construction or operation of the railway, in s. 242 of the Railway Act, 1903, and, consequently, an action to recover damages therefor is not barred by the limitation prescribed by that section for the commencement of actions and suits for indemnity. Judgment appealed from, 19 Man. L.R. 300, 11 Can. Ry. Cas. 289, affirmed, Girouard and Davies, J.J., dissenting.

Can Northern Ry. Co. v. Robinson, 11 Can. Ry. Cas. 304, 43 Can. S.C.R. 387.

[Affirmed in [1911] A.C. 739, 13 Can. Ry. Cas. 412; distinguished in Grand Trunk Ry. Co. v. Sarnia Street Ry. Co., 21 Can. Ry. Cas. 160.]

REMOVAL OF A SIDING—LIMITATION.

The appellant company having constructed a spur track or siding into the respondent's yard for the convenience of traffic, in November, 1904, cut it off, and on February 19, 1906, the Board, under ss. 214, 253 of the Railway Act, 1903, directed its restoration, which was carried out on September 28, 1906. In an action for damages for breach by the appellants of their statutory obligations between October 31, 1904, and September 28, 1906:—Held, that under s. 42 of the Railway Act, 1903, the order of the Board, affirmed as it was by the Supreme Court on appeal, was conclusive as to the question of fact, that the facilities previously enjoyed by the respondents were of a kind to which they were entitled:—Held, also, that the special provisions of the Act as to one year's limitation (see s. 242 substantially re-enacted by s. 306 of the Railway Act, 1906), relate to damages sustained by the construction or operation of the railway and do not apply to the refusal of facilities by means of a siding outside the railway as constructed, which is not an act done in the operation of the railway. [Can. Northern Ry. Co. v. Robinson, 43 Can. S.C.R. 387, 11 Can. Ry. Cas. 304, affirmed.]

Can. Northern Ry. Co. v. Robinson, 13 Can. Ry. Cas. 412, [1911] A.C. 739.

[See 14 Can. Ry. Cas. 281, 5 D.L.R. 716; distinguished in Grand Trunk Ry. Co. v. Sarnia Street Ry. Co., 21 Can. Ry. Cas. 160.

MEASURE OF COMPENSATION—REMOVAL OF SPUR TRACK BY RAILWAY.

The measure of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard from which track, at small expense, coal and lumber could be unloaded from cars directly into such yard, is the additional cost of handling and hauling of such commodities from the freight yards of the company to the coal and lumber yard. The award of damages for the wrongful removal by a railway company of a spur track adjoining a coal and lumber yard from which coal and lumber could be unloaded from cars into the yard with little labour, based upon the owner's evidence of the additional cost of hauling coal and lumber from the company's freight yards, is not erroneous, though evidence that a transfer company would handle such commodities at a less sum per day for each team, if it appeared that the coal and lumber owners' teams were better than those of the transfer company and would do more work per day. Demurrage charges upon cars, due to slowness in unloading them by reason of a longer haul, may be considered as an element of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which tracks cars of coal and lumber could be quickly and cheaply unloaded directly into such yard, where, by reason of such removal, such commodities had to be hauled by the owner of such yard from a greater distance in a slower manner.

Robinson v. Can. Northern Ry. Co. (Man.), 14 Can. Ry. Cas. 281, 5 D.L.R. 716.

[See 6 Can. Ry. Cas. 101, 37 Can. S.C.R. 541, 11 Can. Ry. Cas. 289, 19 Man. L.R. 300, 11 Can. Ry. Cas. 304, 43 Can. S.C.R. 387, 13 Can. Ry. Cas. 412, [1911] A.C. 739.]

INDUSTRIAL SPUR TRACK—EXTENSION.

An application to construct a branch line by extending an industrial spur across certain private property of the respondent company. The applicant relied upon a letter from the owners of the property that they were willing to grant the right of way for the spur over their land, and that arrangements could be made later. The respondent objected before the Board to the application being granted:—Held, that the Board had jurisdiction to make the order.

Can. Northern Ry. Co. v. Blackwoods et al., 12 Can. Ry. Cas. 40.

[Reversed in 44 Can. S.C.R. 92, 12 Can. Ry. Cas. 45; distinguished in Boland v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 60.]

Private siding—Branch of railway.

The Board has not the power (except on expropriation or consent of the owner), to order that a private industrial spur track or siding, constructed and operated under an agreement between a railway company and the owner of the land upon which it is laid and used only in connection with the business of such owner, shall be also used and operated as a branch of the railway with which it is connected.

Blackwoods, etc. v. Can. Northern Ry. Co. et al., 12 Can. Ry. Cas. 45, 44 Can. S.C.R. 92.

[Distinguished in Boland v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 60.]

Private siding—Industrial spur track—Power to construct.

Notwithstanding provisions in an agreement under which a private industrial spur or siding has been constructed entitling the railway company to make use of it for the purpose of affording shipping facilities for themselves and persons other than the owners of the land upon which it has been built, the Board except on expropriation and compensation, has not the power, on the application under s. 226 of the Railway Act, 1906, to order the construction and operation of an extension of such spur or siding as a branch of the railway with which it is connected. [Blackwoods v. Can. Northern Ry. Co., 144 Can. S.C.R. 92, applied, Duff, J., dissenting.]

Clover Bar Coal Co. v. Humberstone, Grand Trunk Pacific Ry. and Clover Bar Sand & Gravel Cos., 13 Can. Ry. Cas. 162, 45 Can. S.C.R. 346.

[Distinguished in Boland v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 60.]

Sidings—Proximity of stations.

The Board will not order railway companies to put in sidings every three or four miles along their lines.

Pheasant Point Farmers v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 13, 7 D.L.R. 887.

[Followed in McPherson v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 57; Kelly v. Grand Trunk Ry. Co., 24 Can. Ry. Cas. 367.]

Jurisdiction—Question of title—Spur line.

In deciding upon an application to construct a spur line under section 226 of the Railway Act, 1906, the Board is not the proper forum to determine questions of title. The question is for the Provincial Courts to decide.

Greenfield Conduit Co. v. Hetherington, 16 Can. Ry. Cas. 444.

Unjust discrimination—Facilities—Equal basis—Switching tolls—Rebates.

The object of s. 226, of the Railway Act, 1906, was to compel carriers, instead of leaving it entirely to their discretion, to construct spurs furnishing facilities to all traders on an equal basis, not subject to any special or arbitrary switching toll for the use of such spur, and failure to do so is unjust discrimination, but if, after the spur has been constructed, the traffic moved is not sufficient to warrant its construction, the loss is on the trader and not on the carrier. The rebate provided by s. 226 is not limited to the charge made for switching over the spur in question but extends to the tolls charged on cars moved over such spur. The Board has the right to order rebates either in proportion to the amount of tolls charged upon such car or by a fixed charge per car. [Grand Trunk Ry. Co. v. Chirstie, Henderson & Co., 9 Can. Ry. Cas. 502; Pilon v. Grand Trunk Ry. Co., 16 Can. Ry. Cas. 433, followed.]

Hepworth Silica Pressed Brick Co. v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 9.

[Affirmed in 19 Can. Ry. Cas. 395.]

CONSTRUCTION OF SPURS—BREAK IN MAIN LINE—DANGEROUS—LIGHT TRAFFIC.

The practice of breaking a single track main line for industrial spurs at points where trains are operated at high speed is more or less dangerous, and will not be countenanced by the Board, although in the past switches have been put in which were not objectionable on account of light traffic and slow movement on the line. [Pheasant Point Farmers v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 13, followed.]

McPherson v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 57.

JURISDICTION—ACQUISITION OF LAND FOR SPUR—C.L. TRAFFIC.

Where a spur is built by a railway company, under an order of the Board, to handle C.L. traffic, the carrier has fulfilled its obligation when it places a car on the spur for discharging or receiving of traffic. The Board has no jurisdiction to direct the respondent to acquire land on such spur for the purpose of leasing it to the applicants for a coal shed site.

Forward v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 434.

SPURS—CONSTRUCTION—RIGHTS-OF-WAY—OWNERSHIP—JURISDICTION.

Spur lines constructed under the provisions of s. 222, of the Railway Act, 1906, do not ipso facto become part of the railway of the company from whose line they are built under the provisions of an agreement providing that the railway company furnish the ties, rails and fastenings, which remain their property, and the owner provides the right-of-way. Such a siding cannot be extended to the land of another owner under an order of the Board, but the Board may, in the public interest, authorize the expropriation of the right-of-way upon which the siding is built and its extension to the lands of an adjoining owner requiring railway accommodation.

[Blackwoods et al. v. Can. Northern Ry. Co. and Winnipeg, 44 Can. S.C.R. 92, 12 Can. Ry. Cas. 45; Clover Bar Coal Co. v. Humberstone, Grand Trunk Pacific Ry. and Clover Bay Sand & Gravel Cos., 45 Can. S.C.R. 346, 13 Can. Ry. Cas. 162, distinguished.]

Boland v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 60.

[Followed in Standard Crushed Stone Co. v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 374.]

SPURS—MAINTENANCE—OWNERSHIP.

When a spur is constructed so that it becomes part of the railway company's property, the company should repair and maintain it, but where part of the right-of-way of the spur is upon the property of the railway company and part upon the applicant company's property, the railway company, in the absence of an agreement to the contrary, should maintain that part of the spur upon its own right-of-way and renew the rails (belonging to it) of the extension of the spur into the applicant company's property, but the applicant company should maintain and repair the understructure on its own lands.

Wolfeville Milling Co. v. Dominion Atlantic Ry. Co., 18 Can. Ry. Cas. 367.

Spur—Ownership—Construction and operation—Ownership of right-of-way.

When the order of the Board authorizing the construction and operation of an industrial spur provides that the respondent should retain the ownership of the right-of-way on which the siding is located, the Board can only authorize the applicant to take expropriation proceedings to enable it to acquire the right-of-way across the lands of the respondent so as to reach by an extension of the spur another industry which it desires to serve.

Grand Trunk Ry. Co. v. Hamilton & Toronto Sewer Pipe Co., 18 Can. Ry. Cas. 369.

Spurs or branch lines—Ownership of lands required.

S. 225 of the Railway Act, 1906, applies to spurs or branch lines ordered under s. 226 as well as to branch lines authorized under s. 222. The lands necessary for a spur constructed under s. 226, are therefore to be acquired by agreement or expropriation in the same manner as lands for other railway purposes. Consequently where lands so required are owned by the applicant for the spur, and the applicant has not been compensated for them in accordance with the Act, they do not become vested in the railway company by the mere operation of s. 226, subs. 5, upon refund of the cost of the spur by means of rebates. [Boland v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 60, followed.]

Standard Crushed Stone Co. v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 374.

Tolls—Carriage of freight—Spur line—Rebate.

In subs. 3 of s. 226 of the Railway Act, 1906, the words "tolls charged by the company in respect of the carriage of traffic for the applicant over the spur line" mean the tolls charged for the transportation, on the railway company's line, of goods carried to or from the applicant's premises and not tolls charged for the movement of freight on the spur alone; consequently a railway ordered to build a spur line to an industrial plant under s. 226 at the expense of the applicant and to move cars over it without additional toll may be directed by the Board to rebate to the applicant a fixed sum per car from the tolls on business done with the applicant and carried over the spur line until the cost of construction shall have been repaid by the railway. [Hepworth Silica Pressed Brick Co. v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 9, affirmed.]

Grand Trunk Ry. Co. v. Hepworth Silica Pressed Brick Co., 19 Can. Ry. Cas. 365, 51 Can. S.C.R. 81, 21 D.L.R. 480.

Private Siding—Facilities—Placing Cars.

A private siding, not on the railway right-of-way, is not part of the railway, and a carrier cannot be ordered, at the instance of a stranger, to connect it with the railway for the purpose of operating it as part of the railway or to place cars upon it for receipt of traffic.

Kammerer v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 74.

[Followed in New Minas Fruit Co. v. Dominion Atlantic Ry. Co., 24 Can. Ry. Cas. 97.]

Siding on right-of-way—Exclusive privileges—Unjust discrimination.

A railway company should not enter into an agreement for the construction of a private siding upon its right-of-way. Such an agreement defeats the purpose of its undertaking and by means of it unjust discrimination may be practised.

Can. Pac. Ry. Co. v. Vancouver Ice & Cold Storage Co., 23 Can. Ry. Cas. 1.

Sidings on right-of-way—Jurisdiction—Approval—Adequate accommodation for traffic.

Subject to the jurisdiction of the Board in respect of adequate and suitable accommodation for traffic, the railway company may, after the route map has been approved, locate its tracks upon its own right-of-way without approval from the Board as to the location of these tracks, except where highways are crossed.

Re Great Northern Ry. Co. Sidings, 23 Can. Ry. Cas. 5.

Siding on Right-of-way—Removal—Industries—C.L.

When industries have become dependent upon C.L. facilities afforded by a particular track (other than a team track) located wholly on the railway right-of-way, such track should not be removed or re-located, if the parties do not agree, without leave of the Board.

[Kammerer v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 74; Can. Pac. Ry. Co. v. Vancouver Ice, etc. Co., 23 Can. Ry. Cas. 1, referred to.]

Re Great Northern Ry. Co. Sidings, 23 Can. Ry. Cas. 5.

Industrial spur—Cost of.

Where an industrial spur is built in the interests of commerce at the expense of the industry to be served, the entire cost both of construction and maintenance should be borne by such industry.

Bienfait Commercial Co. v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 62.

Placing cars—Private siding—Compensation.

A carrier which, for the convenience of shippers or consignees and at their request, places their cars on a private siding owned by other parties, is entitled to charge against such shippers or consignees the amount of compensation payable by the carrier to the owners of the siding for such use of it.

Canyon City Lumber Co. v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 9.

Jurisdiction—Spurs—Construction—Ownership.

A spur line constructed under s. 222 of the Railway Act, 1906, does not become part of the railway from whose line it is built under an agreement with the owner providing that the railway company furnish the rails, ties and fastenings, which remain their property, and the owner provides the right-of-way, even if no reference is made to such agreement in the Board's order authorizing the construction of the spur, and the Board has no jurisdiction to authorize an adjoining owner to use such spur.

[Blackwoods, etc. v. Can. Northern Ry. Co. and Winnipeg, 44 Can. S.C.R. 92, 12 Can. Ry. Cas. 45; Clover Bar Coal Co. v. Humberstone, Grand Trunk Pacific Ry. et al. Cos., 45 Can. S.C.R. 346, 13 Can. Ry. Cas. 162; Boland v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 60; Kammerer v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 74, followed.]

Beverly Coal Mine and Humberstone Coal Cos. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 64.

Spurs—Location—Construction—Facilities—Accommodation.

Where the trackage for siding facilities offered by a railway company will only serve a particular site but does not give suitable accommodation for the warehouse of the applicant, the railway company may be ordered to provide siding facilities for the site selected by the applicant, but at no greater cost than if these facilities were furnished at the site proposed by the railway company.

Wolfeville Fruit Co. v. Dominion Atlantic Ry. Co., 24 Can. Ry. Cas. 11.

Industrial spur—Highway—Removal.

An industrial siding crossing a highway should only be removed by direction of the Board and not upon notice given by the council of the municipality controlling the highway. The terms on which it may cross the highway were fixed by the Board.

[Shragge v. City of Winnipeg, 24 Can. Ry. Cas. 61, followed.]

Grand Trunk Ry. Co. v. Cobourg, 25 Can. Ry. Cas. 58.

Spurs—Removal—Notice—Application to Board.

A municipality, on giving notice, may require a spur to be removed. If there are reasons why this should not become operative the railway company may apply to the Board to stay the effect of the notice.

Shragge v. Winnipeg, 24 Can. Ry. Cas. 61.

Sidings—Installation—Jurisdiction—Agreement—Facilities.

The Board has no jurisdiction under s. 284 of the Railway Act, 1906, to direct that facilities, such as sidings, should be installed between stations, and the fact that such siding has been installed by agreement between the parties does not extend the powers of the Board.

[Kammerer v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 74, followed.]

New Minas Fruit Co. v. Dominion Atlantic Ry. Co., 24 Can. Ry. Cas. 97.

Construction of spur for shipper—Expense determined by board.

When an order is made by the Board for the construction of a spur line for the accommodation of a shipper, under s. 226 of the Railway Act, 1906, the question as to payment of expenses should be dealt with by the Board—not only the question as to work or practices which may in the future mean expenditure, but also the disposition of the resultant cost.

Re S. A. Hamilton Co. and Can. Pac. Ry. Co., 28 W.L.R. 109.

Spurs—Industrial or Business—Team Tracks—General Interswitching order.

General Order No. 11 of the Board, dated July 8, 1908 known as the General Interswitching Order, was confined in its operations to industrial or business spurs, and did not extend to team tracks which form part of a railway's terminals.

Re Interswitching Service, 24 Can. Ry. Cas. 324.

Interswitching—General Orders Nos. 230 and 252.

In view of the fact that interswitching from and to private spurs has been freely accorded in the past by the carriers to one another, those provisions of General Order No. 230, issued pursuant to the judgment of May 15, 1918, which were designed to protect the initial carrier in its enjoyment of the line haul, were amended by General Order No. 252, so as to apply to team tracks only, and not to be applicable to shipments interswitched from private spurs.

[Grand Trunk Ry. Co. v. Can. Pac. Ry. Co. and London (London Interswitching Case), 6 Can. Ry. Cas. 327, followed.]

Re Interswitching Service, 24 Can. Ry. Cas. 324.

BRIDGES.

A. Construction and Maintenance.
B. Injuries on Bridges.

See Highway Crossings.

Bridge as a means of farm crossing, see Farm Crossings.

Annotations.

Statutory height of bridges and penalties for violation, 4 Can. Ry. Cas. 53.

Bridges at Highways, 1 Can. Ry. Cas. 497.

A. Construction and Maintenance.

CANAL BRIDGE—AGREEMENT BETWEEN CROWN AND COMPANY AS TO CONSTRUCTION.

The suppliants' predecessor in title applied to the Minister of Railways and Canals for leave to construct a railway bridge across the Otonabee River, undertaking at the same time to construct a draw in such bridge in case the Crown should at any time thereafter determine it to be necessary for the purposes of navigation. By order in council, and agreement made in pursuance thereof, between the suppliants' predecessor and the Crown, permission was given to the former to construct a bridge across the river, on their undertaking to construct at their own cost a swing in the bridge, should the Government at any time thereafter consider that to be necessary, or in case of the carrying out of the proposed canal for the improvement of the Trent River navigation, and a swing in the said bridge not being necessary, that there should in that case be a new swing bridge over the said canal, the cost of the swing and the necessary pivot therefor to be borne by the said company. The canal having been constructed, it became necessary to have a new swing bridge over the canal on the company's line of railway. This bridge was built, and the suppliant company discharged the obligation to which it succeeded to pay the cost of the pivot pier and of the swing or superstructure of the bridge. Held, that in the absence of any stipulation in the agreement between the parties as to which should bear the cost of such maintenance and operation, the suppliants having built the pivot pier and swing as part of their railway and property, should maintain and operate them at their own cost.

Can. Pac. Ry. Co. v. The King, 10 Can. Ex. 317.

[Affirmed in 38 Can. S.C.R. 211.]

SWING BRIDGE—COST OF CONSTRUCTION—MAINTENANCE.

The C.P.R. Co. applied for liberty to build a bridge over the Otonabee, a navigable river, undertaking to construct a draw in it should the Government deem it necessary. An order-in-council was passed providing that "the company . . . shall construct either a swing in the bridge now in question . . . the cost to be borne by themselves or else a new swing bridge over the contemplated canal (Trent Valley Canal) in which case the expense incurred over and above the cost of the swing itself and the necessary pivot pier therefor shall be borne by the Government." A new swing bridge was constructed over the canal by agreement with the company:—Held, that the words "the cost of the swing itself and the necessary pier" included, under the circumstances and in the connection in which they were used, the operation and maintenance also of the swing by the company. 10 Can. Ex. 317, affirmed.

Can. Pac. Ry. Co. v. The King, 38 Can. S.C.R. 211.

Highway crossing—Diverting stream under highway—Erection of substitutional bridge—Liability to keep in repair.

A railway company, desiring to cross a highway at a point where it was carried by a bridge over a small stream, in pursuance of its statutory powers, diverted the stream to a point some distance away, and built a new bridge over it where it there intersected the highway:—Held that, whatever remedy the municipality might have if it had sustained damage by reason of the exercise by the railway company of its rights, the latter was under no liability, in the absence of special agreement, to keep the bridge substituted by it in repair.

Peterborough v. Grand Trunk Ry. Co., 1 Can. Ry. Cas. 494, 32 O.R. 154.

[Affirmed in 1 O.L.R. 144, 1 Can. Ry. Cas. 497; discussed in Palmer v. Michigan Central Ry Co., 6 O.L.R. 90; distinguished in Hanley v. Toronto, Ham. & Buffalo Ry. Co., 11 O.L.R. 91; followed in Palmer v. Michigan Central Ry. Co., 2 Can. Ry. Cas. 239, 2 O.W.R. 477.]

Highway bridge—Esplanade Tripartite Agreement—Railway Committee—Jurisdiction of.

By the Esplanade Tripartite Agreement, dated 26th July, 1892, between the City of Toronto and the two railway companies (G.T.R. and C.P.R.), confirmed by statute 55 & 56 Vict. c. 48 (D) the C.P.R. agreed to build a highway bridge over the tracks of the railway companies—the portion of the cost to be borne by each to be settled by arbitration or paid equally by the C.P.R. and the City, in case the G.T.R. was found to be exempt from, or entitled to idemnity against, liability for any portion of the cost. The rights of the G.T.R. as to such exemption or indemnity were, by the agreement, to be decided by the submission to the Court of a special case between the City and the G.T.R. After the bridge was built, in accordance with plans and specifications approved by the Railway Committee and while an action brought by the City against the G.T.R. and C.P.R., in lieu of such special case, was pending, an application was made by the City to the Railway Committee for an order to authorize and ratify the construction of the bridge, and direct the terms upon which the cost of the work was to be borne:—Held, that the application must be refused, the question involved not being of a public nature, but the settlement of a dispute of a private nature, which the parties by their agreement had left to be settled by the Courts.

[Merritton Crossing Case, 3 Can. Ry. Cas. 263, followed.]

Toronto v. Grand Trunk Ry. Co. and Can. Pac. Ry. Co. (York Street Bridge Case), 4 Can. Ry. Cas. 62.

Viaduct—Highway protection—Access to harbour.

Prior to 1888 the G.T.R. Co. operated a portion of its railway upon the "Esplanade," in the city of Toronto, and, in that year, the C.P.R. Co. obtained permission from the Dominion Government to fill in a part of Toronto Harbour lying south of the "Esplanade" and to lay and operate tracks thereon, which it did. Several city streets abutted on the north side of the "Esplanade," and the general public passed along the prolongations of these streets, with vehicles and on foot, for the purpose of access to the harbour. In 1892, an agreement was entered into between the city and the two railway companies respecting the removal of the sites of terminal stations, the erection of overhead traffic bridges and the closing or deviation of some of these streets. This agreement was ratified by statutes of the Dominion and provincial legislatures, the Dominion Act (56 Vict. c. 48), providing that the works mentioned in the agreement should be works for the general advantage of Canada. To remove doubts respecting the right of the C.P.R. Co. to the use of portions of the bed of the harbour on which they had laid their tracks across the prolongations of the streets mentioned, a grant was made to that company by the Dominion Government of the "use for railway purposes" on and over the filled-in areas included within the lines formed by the production of the sides of the streets. At a later date the Dominion Government granted these areas to the city in trust to be used as public highways, subject to an agreement respecting the railways, known as the "Old Windmill Line Agreement," and excepting therefrom strips of land 66 feet in width between the southerly ends of the areas and the harbour reserved as and for "an allowance for a public highway." In June, 1909, the Board, on application by the city, made an order directing that the railway companies should elevate their tracks on and adjoining the "Esplanade" and construct a viaduct there:—Held, Girouard and Duff, J.J., dissenting, that the Board had jurisdiction to make such an order; that the street prolongations mentioned were highways within the meaning of the Railway Act; that the Act of Parliament validating the agreement made in 1892 was not a "special Act" within the meaning of the Railway Act and did not alter the character of the agreement as a private contract affecting only the parties thereto, and that the C.P.R. Co. having acquired only a limited right or easement in the filled-in land, had not such a title thereto as would deprive the public of the right to pass over the same as a means of communication between the streets and the harbour.

Grand Trunk and Can. Pac. Ry. Cos. v. Toronto (Toronto viaduct case), 11 Can. Ry. Cas. 38, 42 Can. S.C.R. 613.

[Affirmed in [1911] A.C. 461, 12 Can. Ry. Cas. 378; followed in Oakville v. Grand Trunk and Canadian Pacific Ry. Cos., 22 Can. Ry. Cas. 433.]

VIADUCTS—HIGHWAY PROTECTION.

The Railway Committee, in the exercise of powers preserved to it under s. 238 of the Dominion Railway Act, 1906, on January 14, 1904, ordered the appellant and respondent railway companies to carry a bridge over their respective lines at Yonge street, in the City of Toronto. The Railway Board constituted by the Railway Act, 1903, consolidated in 1906, on June 9, 1909, ordered the said two companies to construct an elevated viaduct several miles in length, for the purpose of carrying four of the tracks of their railways through the said city:—Held, that under the said s. 238, and the amending, Act of 1909 (8-9 Edw. VII. c. 32), ss. 237. 238, the Railway Committee and the Board had jurisdiction to make these orders, the latter of which virtually superseded the former. The evidence shewed that the lines of rails were laid "upon or along or across a highway"—highway being defined by s. 2, subs. 11, of the Railway Act, 1906. as including "any public road, street, lane or other public way or communication." As regards the respondent company, the lines were laid along an esplanade, which was deemed a public highway under 28 Vict. c. 24. As regards the appellant company, they were laid along a route as to which there was actual user by the public, whether by right or leave and license express or implied. It was accordingly within the words "public communication," and exposed to the danger from which the public were under s. 238 entitled to be protected:—Held, further, that the Board, where it has jurisdiction, may in its discretion make any order of this kind for the protection, safety, and convenience of the public, except where it is restricted by s. 3 of the Act of 1906, which enacts that, where the provisions of the Act of 1906, and of any special Act passed by the Parliament of Canada, relate to the same subject, the latter, so far as necessary, shall override the former. But the Dominion Act, 56 Viet. c. 48, relied on by the appellants, which is a special Act within the meaning of s. 2, subs. 28, of the Act of 1906, does not relate to the same subject as the Act of 1906. The former empowers the companies affected thereby to construct and use certain specified works; the latter empowers the Board to require railway companies to construct such works as it may deem necessary for the protection and convenience of the public. Effect can be given to both statutes, and s. 3, consequently, does not in this case restrict in any way the power of the Board. [42 Can. S.C.R. 613, 11 Can. Ry. Cas. 38, affirmed.]

Can. Pac. Ry. Co. v. Toronto and Grand Trunk Ry. Co. (Toronto Viaduct Case), [1911] A.C. 461, 12 Can. Ry. Cas. 378.

Overhead bridge—Railway crossing—Seniority—Expense of removal—Spur line.

On an application under s. 227 of the Railway Act, 1906, for leave to cross the main line of the respondent by an overhead bridge, the question arose as to who should bear the expense of removing the spur of the respondent and relaying it under the bridge. The location of the applicant was approved before the location of the respondent, but the respondent's spur had been constructed for some time before:—Held (1), that "construction" and not "approval of location" gave priority. (2). That the respondent was senior to the applicant at the crossing and all the expense connected with the removal of the spur should be borne by the applicant. [Can. Northern Ry Co. v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 297, followed.]

Can. Northern Ry. Co. v. Can. Pac. Ry. Co., 11 Can. Ry. Cas. 432.

[Followed in Midland Ry. Co. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 80.]

Number and speed of trains—Vehicular and pedestrian traffic.

Application for the construction of a highway bridge to be substituted for a level crossing over the main line of the respondent:—Held (1), that the three main factors to be considered as creating the necessity for protection at a highway crossing are, the number of trains, and especially the rate of speed at which trains run over the crossing, the amount of vehicular and pedestrian traffic over the crossing, and the view which those using the highway have of trains approaching in both directions. (2) That the rate of speed at which trains run is a matter of greater importance than the number of trains passing over the crossing. (3) That only limited weight should be given to arguments based on the amount of vehicular or pedestrian traffic passing over the crossing. (4) That the rate of speed at which trains pass over the crossing is a very important factor. (5) That the extent of the view at such crossing is a matter of the greatest consequence. (6) That the application should be granted and a highway bridge substituted for the level crossing over the double track main line of the respondent notwithstanding the fact that the traffic on the highway at the point in question is comparatively light.

Front of Escott v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. **315.**

Cost of overhead bridge—Municipality.

Leave was granted by the Board to a municipality to carry a highway over the right of way and tracks of two railways by means of a bridge where no highway existed and the development of a village had been retarded for want of a crossing upon condition that the municipality bear the whole cost of construction. An easement was granted over the right of way, with right of support by piers without payment of compensation to the railway companies.

Bridgeburg v. Grand Trunk and Michigan Central Ry. Cos., 14 Can. Ry. Cas. 10, 8 D.L.R. 951.

[Followed in London v. Grand Trunk Ry. Co., 20 Can. Ry. Cas. 242.]

Overhead bridge—Railway crossed by highway—Suitable structure —Municipality.

In dealing with an application by a municipality to direct a railway company to carry a new highway across its tracks by an overhead crossing, the Board's jurisdiction is confined to giving directions as to the structure when railway property is interfered with and upon the municipality passing a by-law providing a proper and suitable structure for the purpose an order will go approving of same, and in such case the whole cost of the new highway will be upon the applicant.

Mission District Board of Trade v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 331.

Highway crossed by railway—Bridge—Railway yard—Apportionment of cost.

Where an application was made by a local improvement district for a bridge carrying the highway over railway tracks, and the limits of an adjoining city were afterwards extended so that the highway became wholly within the city limits, the Board decided that the district should not bear any portion of the cost of such bridge, that the city should contribute $5,000 of the cost for that portion of the bridge which crosses the through tracks of the railway company, who must bear the whole cost of extending the bridge across their yard, 20 per cent of the cost of the whole bridge to be paid out of the Railway Grade Crossing Fund and the balance by the railway company.

Saskatchewan Local Improvement District No. 161 v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 337.

Highway bridge—Cost of maintenance.

The usual rule in cases of repairing and maintaining highway bridges, apart from special circumstances, is, that the railway company is responsible for railway structures, and the municipality for structures handed over to it for municipal and highway purposes.

Assiniboia v. Can. Northern Ry. Co., 14 Can. Ry. Cas. 365.

Bridges over highways.

A bridge crossing a river, connecting the separated parts of a public highway is part of the highway itself and is also a public place, and is within the operation of s. 248, subs. 2, of the Railway Act, 1906.

Haldimand v. Bell Telephone Co., 2 D.L.R. 197, 25 O.L.R. 467.

Duty to erect—Irrigation works.

Where an irrigation company had received, under the North-West Irrigation Act, 61 Vict. (Can.) c. 35 (now R.S.C. 1906, c. 61), a license to take water to use in its business in the North-West Territory, and obtained authority to cross with its works road allowances not yet used as public highways reserved from its lands by the Crown for future use as public highways, such company is itself bound, it being the party for whose convenience and profit the road allowances had been interfered with, to build bridges when the road allowances afterwards become public highways on both sides of the works constructed across them by the company, even though it had never stipulated that it would maintain the necessary bridge or bridges at the points indicated in an accompanying plan, where their works crossed road allowances or public highways as provided by subs. (b), s. 11, of the said Irrigation Act (now subs. 1 (b) s. 15, R.S.C. 1906, c. 61) which it did in an application required of every applicant for license under the Act to file with the Commissioner of Public Works for the North-West Territories, by the aforesaid subsection for the right to construct any canal, ditch, reservoir, or other works referred to in the memorial, across any road allowance or surveyed public highway, which may be affected by such works. [Rex v. Alberta Ry. & Irrigation Co., 3 Atla. L.R. 70, affirmed on appeal; Alberta Ry. & Irrigation Co. v. The King, 44 Can. S.C.R. 505, reversed on appeal.]

Rex v. Alberta Railway & Irrigation Co., 7 D.L.R. 513, [1912] A.C. 827.

Overhead bridge—Contract to maintain—Change in traffic conditions.

On it becoming necessary to repair or replace an overhead bridge carrying the tracks of a railway company over the road of another railway company, the latter is bound to provide a structure sufficient for the conditions of modern traffic, although the bridge displaced was ample for the needs at the time it was built, where, by contract, it was required at its own expense to maintain such bridge in a good and safe state, so as not to endanger the property, fixed or moveable, of the other company, and to save it from damage due to the construction or nonmaintenance of the bridge.

Grand Trunk Ry. Co. v. Can. Pac. Ry. Co. (Myrtle Bridge Case), 15 Can. Ry. Cas. 433, 12 D.L.R. 475.

[Affirmed in Can. Pac. Ry. Co. v. Grand Trunk Ry. Co., 17 Can. Ry. Cas. 300; distinguished in Hamilton v. Can. Pac. and Toronto H. & B. Ry. Cos. (Hamilton Bridge Case), 20 Can. Ry. Cas. 159; referred to in Windsor v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 66.]

Railway crossings—Overhead bridges—Maintenance—Future traffic—Senior and junior.

A junior wishing to cross the line of a senior railway company, contracted for four crossings, three by overhead bridges and one by a subway under a bridge of the senior, to be constructed according to plans and specifications approved by the chief engineer of the senior, and having agreed that if it failed to maintain such crossings to his satisfaction, the senior could cause the necessary work to be done at the cost of the junior, was obliged not only to keep the crossings in good and sufficient repair in the condition they were in when the contract was made, but could at any time be ordered by the Board to make them fit for the heavier traffic caused by the increased business of the senior. [Grand Trunk Ry. Co. v. Can. Pac. Ry. Co. (Myrtle Bridge Case), 15 Can. Ry. Cas. 433, affirmed.]

Can. Pac. Ry. Co. v. Grand Trunk Ry. Co. (Myrtle Bridge Case), 17 Can. Ry. Cas. 300, 49 Can. S.C.R. 525.

LIGHTS—APPORTIONMENT OF COST.

By an order of the Board, the Grand Trunk Ry. Co. was ordered to construct an overhead bridge at the crossing of the Upper Lachine Road by its railway at Rockfield, Que., the cost of construction and maintenance being divided amongst the various parties interested, including the City of Lachine. After the bridge was constructed the city applied to the Board to compel the railway company to erect the necessary poles and wires and to light the bridge by electricity as a part of the work directed to be done under the order. Electric lighting of a highway bridge falls within the purview of the municipality, and the parties (other than the municipality) contributing to the cost of maintenance, should contribute only an amount representing the cost of the additional light required beyond that necessary for the highway, if the bridge had not been constructed.

Lachine v. Grand Trunk Ry. Co., 20 Can. Ry. Cas. 82.

TRAFFIC BRIDGE—RAILWAY AND HIGHWAY—PROTECTION.

Under an agreement with the Provincial Government of Saskatchewan, a railway bridge was erected by the respondent company over the North Saskatchewan river, with a twelve foot roadway on each side clear of the railway track, and separated from it by a fence admitted to be safe and satisfactory for the purpose. There was no provision in the agreement for protection to vehicular traffic from trains passing over the bridge. The Board refused an application by an adjoining municipality for an order, that the respondent should provide gates and watchmen at both ends of the bridge to warn the public against approaching trains, holding that the necessity for such protection was incidental to the use of the bridge as a highway.

Buckland v. Can. Northern Ry. Co., 23 Can. Ry. Cas. 13.

FALSEWORK—CLEARANCES—NEGLIGENCE—AGREEMENT.

An agreement between two railway companies for the construction of falsework to carry the line of railway of one company over the tracks of the other company without the standard clearances, may properly contain a clause indemnifying the company whose line is crossed from all loss, damage or expense of any nature occasioned to it, including loss, damage and expense that has been occasioned, or contributed to, by the negligence of its servants or agents or otherwise howsoever.

Can. Pac. Ry. Co. v. Can. Northern Ry. Co. (Falsework Case), 24 Can. Ry. Cas. 5.

B. Injuries on Bridges.

NOTICE TO ENGINE DRIVERS TO STOP BEFORE APPROACHING BRIDGE—"RES IPSA LOQUITUR."

Can. Pac. Ry. Co. v. Lawson (1885), Cass. Can. S.C.R. Dig. 1893, p. 729.

BRIDGE ACCIDENT—NERVOUS SHOCK RESULTING FROM FRIGHT.

A railway company is liable in an action at the suit of one injured in an accident while a passenger in the company's train for damages and pecuniary loss consequent upon a fright resulting in a shock to the nervous system causing physical injury if the fright was the result of the accident, and was reasonable and natural.

Kirkpatrick v. Can. Pac. Ry. Co., 35 N.B.R. 598.

Defective bridge—Intoxicated passenger.

The deceased was a passenger on the defendants' railway. At a certain point there was a defective bridge over which it was dangerous to run a train. At this bridge passengers were taken from one train and were obliged to walk across a part of the bridge and board another train at the opposite side. The deceased was intoxicated and asleep when the train arrived at the bridge. His companion shook him and told him it was time to transfer. The deceased paid no heed. As the passengers left the car the conductor noticed the deceased, and that he was drunk and asleep, but made no effort to wake him or to transfer him to the other train. Shortly after this, and while the train still stood on the bridge, one of the railway employees heard a splash in the water in the river. Some days afterwards the body of the deceased was found some twelve miles below the bridge. The face bore marks of a severe bruise, which was, according to the evidence of the coroner and undertaker, sustained before death. Harvey, J., at trial nonsuited the plaintiff:—Held, on appeal (Stuart, J., dissenting), affirming the judgment of the trial Judge, that there was no evidence to go to the jury that the death of the deceased was caused by any negligence of the defendant company. [McArthur v. Dominion Cartridge Co., [1905] A.C. 72, and Hainer v. G.T.R. Co., 36 Can. S.C.R. 180, distinguished.]

Beck v. Can. Northern Ry. Co., 2 Alta. L.R. 549.

Bridge over highway—Height of—Injury to person.

The plaintiff was driving a load of hay on a public highway within the limits of a village, sitting on top of his load. A railway, at a point within the village, was carried over the highway by an iron bridge, and the plaintiff, while driving along the highway under the bridge, was struck on the head by the girders and knocked off the load and injured. The bridge, when constructed, was built at a height greater than that required by the s. 185 of the Railway Act, 1888, but the municipality and their predecessors, owners of the road, subsequently so raised its level as to leave less than the statutory space between the road and the bridge:—Held, that the section must be construed as compelling the railway company to construct their bridges, in the first place, so as to leave the required space below them to the highway, and to maintain them at, at least, that height from the original surface of the highway, and not as obliging them to conform from time to time to new conditions created by the persons having control of the highway. [Gray v. Danbury (1887), 54 Conn. 574, specially referred to.]

Carson v. Weston et al., 1 Can. Ry. Cas. 487, 1 O.L.R. 15.

Injury to infant playing thereon—Notice to public that bridge not to be used.

While the defendants were repairing a highway bridge, having the entrance barricaded and a "No thoroughfare" notice, a boy, after working hours but while it was still light, went upon the bridge and, stepping upon a loose plank, fell upon the railway track beneath, and was killed. The jury, having found no negligence on the part of the boy, and that the company were negligent in not having a watchman, assessed the plaintiff's damages at $800:—Held, upon appeal, that the defendants were not liable. [Ricketts v. Markdale, 31 O.R. 610, doubted.]

Farrell v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 249, 2 O.W.R. 85.

[Referred to in Burtch v. Can. Pac. Ry. Co., 13 O.L.R. 632.]

OVERHEAD BRIDGE—TRAIN OF FOREIGN COMPANY—STATUTORY HEIGHT OF CAR.

When a car of a foreign railway company forms part of a train of a Canadian railway company, it is "used" by the latter company within the meaning of s. 192 of the Railway Act, 1888, so as to make that company liable in damages for the death of a brakeman caused by the car being so high as not to leave the prescribed headway between it and an overhead bridge. Judgment of Meredith, C.J., affirmed.

Atcheson v. Grand Trunk Ry. Co., 1 Can. Ry. Cas. 490, 1 O.L.R. 168.

[Referred to in Deyo v. Kingston & Pembroke Ry. Co., 8 O.L.R. 588; Stephens v. Toronto Ry. Co., 11 O.L.R. 19.]

STATUTORY HEIGHT—OVERHEAD BRIDGE—CONTRIBUTORY NEGLIGENCE.

Upon the proper construction of s. 192 of the Railway Act, 1888, a railway company, whether the owners or not of a bridge under which their freight cars pass, are prohibited from using higher freight cars than such as admit of an open and clear headway of seven feet between the top of such cars and the bottom of the lower beams of any bridge which is over the railway. [McLauchlin v. Grand Trunk Ry. Co., 12 O.R. 418, and Gibson v. Midland Ry. Co., 2 O.R. 658, distinguished.] Contributory negligence may be a defence to an action founded on a breach of statutory duty. A brakeman, standing on the top of a freight car, part of a moving train, was killed by coming in contact with an overhead bridge:—Held, that as the evidence shewed he was on top of the car contrary to the rules of the company, of which he was aware, the accident was caused by his own negligence, and the defendants were not liable, although there was not a clear headway space as required by the above section.

Deyo v. Kingston & Pembroke Ry. Co., 4 Can. Ry. Cas. 42, 8 O.L.R. 588.

[Distinguished in Muma v. Can. Pac. Ry. Co., 14 O.L.R. 147, 6 Can. Ry. Cas. 444; referred to in Street v. Can. Pac. Ry. Co., 18 Man. L.R. 342; followed in Ruddick v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 484.]

DEFECTIVE BRIDGE—GRATUITOUS PASSENGERS—LIABILITY OF CARRIER.

In the absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger. [Moffat v. Bateman (L. R. 3 C.P. 115) followed. Harris v. Perry, [1903] 2 K.B. 219, distinguished.] Although a railway company may have failed to properly maintain a bridge under their control so as to ensure the safety of persons traveling upon their trains, the mere fact of such omission of duty does not constitute evidence of the gross negligence necessary to maintain an action in damages for the death of a gratuitous passenger. Judgment appealed from (9 B.C.R. 453,) affirmed.

Nightingale v. Union Colliery Co., 4 Can. Ry. Cas. 197, 35 Can. S.C.R. 65.

[Commented on in Barnett v. Grand Trunk Ry. Co., 20 O.L.R. 390; discussed in Ryckman v. Hamilton, Grimsby, etc., Ry. Co., 10 O.L.R. 419; followed in Rayfield v. B.C. Elec. Co., 15 B.C.R. 366.]

NEGLIGENCE—RAILWAY AND TRAFFIC BRIDGE—RAILWAY PART NOT FLOORED —TRESPASSER FALLING THROUGH.

The owner of a railway and traffic bridge, one portion of which is used for railway traffic only and is not floored, the other portion being fenced off from the railway portion and used for the passage of persons and vehicles only and for the use of which a small charge is made, is not liable in damages for the death of a person who, in a state of intoxication, and in order to avoid payment of the charge, attempts to cross on the railway portion of the bridge, falls through and is killed. Such person being a trespasser, the doctrine of implied invitation does not apply. [Stevens v. Jeacocke (1848), 11 Q.B. 731, 116 E.R. 647; Gorris v. Scott (1874), L.R. 9 Ex. 125; Walker v. Midland R. Co. (1886), 2 Times L.R. 450, followed.]

Walsh v. International Bridge & Terminal Co., 45 D.L.R. 701.

BUS LINE.

Access to station, see Stations.

CABS.

Right of access to stations, see Stations.

CARRIAGE OF LIVE STOCK.

Injuries to animals running at large, see Fences and Cattle-Guards

Conditions limiting liability for the loss or damage to cattle in transit, see Limitation of Liability.

Notice of loss, or of claims, see Claims.

Carriage of animals creating nuisance, see Nuisance.

Annotation.

Liability of common carrier for loss of or damage to animals it undertakes to carry, 3 Can. Ry. Cas. 189.

LOSS OR INJURY TO LIVE STOCK—CONDITION OF BILL OF LADING.

Plaintiffs having carried on business for over twenty-five years, and having shipped live stock frequently, should have known of the conditions mentioned in the company defendant's bill of lading, and plaintiffs having failed to prove any fault or negligence on the part of the company defendant, the latter must be declared relieved of any responsibility for the loss of live stock in transit, under the terms of the bill of lading duly signed by plaintiffs.

Hatte et al. v. Grand Trunk Ry. Co., 18 Rev. de Jur. 320.

LIABILITY FOR INJURY.

The carrier who accepts an animal for transportation takes it under his care and is in the position of a person using it. He is, therefore, liable under the provisions of Art. 1055 C.C. Que. for damage which the animal causes.

Léonard v. Can. Pac. Ry. Co., 35 Que. S.C. 382.

FERRYMAN—TRANSPORTATION OF LIVE ANIMALS—RESPONSIBILITY FOR LOSS OF.

Where a traveler put his horses upon a ferry boat of the above description with side-rails only 15 inches high, saw the risk to which his animals were exposed, and kept them under his own charge during the crossing, he is not entitled to recover from the owner of the ferry boat the value of a horse which became frightened, jumped overboard and was drowned where the accident occurred through no fault of omission or commission on the part of the carrier or his employees, but from the restless disposition of the horse and the inability of the owner to keep him quiet.

Roussel v. Aumais, 18 Que. S.C. 474.

LIABILITY FOR LOSS OF DOG.

The defendants are, by the Railway Act, 1888, common carriers of animals of all kinds; and in this case were held liable for the loss of a dog which was received by them for carriage by their railway and was not delivered to the plaintiff in accordance with the contract made with him. Distinction between the English and Canadian Railway Acts pointed out. Judgment of the County Court of Wentworth affirmed.

McCormack v. Grand Trunk Ry. Co., 3 Can. Ry. Cas. 185, 6 O.L.R 577.

LIMITATION OF LIABILITY.

The plaintiff delivered to the defendants, at Stony Point, eighty-six hogs, and on the following day he put on board the same car, at Thamesville, on the way, twenty more hogs, to be carried to Guelph. He got, at Stony Point, a drover's pass to pass him in charge of his stock. The agent there said that he allowed the plaintiff to label the car "Thamesville," on condition that the plaintiff would see the label changed, and that if it had been labelled "Guelph" it would not have stopped at Thamesville at all. The plaintiff went as far as Thamesville with the hogs, and from thence went on by express. By some error the car went round by Hamilton; a delay of several days occurred, by which the hogs were injured, and several died; and when the car reached Guelph nine were missing altogether. The jury found that they were lost after leaving Thamesville, but how they could not say. Upon the shipping bill, as well as upon the plaintiff's pass, was endorsed a condition that upon a free pass being given, defendants would not be responsible for any negligence, default, or misconduct, gross, culpable, or otherwise, on the part of defendants or their servants, or of any other person causing or tending to cause the death, injury or detention of the goods:—Held, that the condition protected the defendants, for it sufficiently appeared that the loss must have happened from some cause within it; and, Quaere, whether it was not a reasonable condition, the pass being given to enable the plaintiff to accompany and take care of the stock:—Held, also, that the plaintiff was to blame for not having the proper label put on at Thamesville, and for not remaining himself or sending someone with the hogs.

Farr v. Great Western Ry. Co., 35 U.C.Q.B. 534.

LIMITATION OF LIABILITY.

To a declaration against defendants, setting out a special contract entered into with plaintiff to carry certain cattle, whereby plaintiff undertook "all risk of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance, and otherwise, no matter how caused," and alleging the consequent duty on defendants' part to furnish suitable and safe carriages, and the breach of such duty, whereby some of the cattle were killed aand others injured, defendants pleaded this special contract, and that while said cattle were being so conveyed a door of one of the cars became open, and some of the cattle fell out and were injured:—Held, on demurrer, a good plea and that defendants were not liable.

Hood v. Grand Trunk Ry. Co., 20 U.C.C.P. 361.

LIMITATION OF LIABILITY—INABILITY TO READ OR UNDERSTAND CONDITIONS.

Plaintiff sent some cattle from Beachville by defendants' railway, signing a paper which declared that he undertook all risk of loss, injury or damage, in conveyance and otherwise, whether arising from the negligence, default, or misconduct, criminal or otherwise, on the part of defendants and their servants. He was told by the stationmaster that he would have to sign these conditions, which he did without taking time to read them. To an action for negligence in the carriage of the cattle, by which five of them were killed, defendants pleaded these conditions, which the jury found that the plaintiff had signed:—Held, that he was bound by them, though he might not have read or understood the paper. [Simons v. Great Western Ry. Co., 2 C.B.N.S. 620, distinguished, as being founded on the fraud practised on the plaintiff to induce him to sign.]

[O'Roarke v. Great Western Ry. Co., 23 U.C.Q.B. 427.]

SPECIAL CONTRACT—INJURY TO PERSONS IN CHARGE TRAVELING FREE.

The third parties shipped two carloads of horses over the defendants' line, and placed G. and R. in charge. G. was killed and R. injured while on the defendants' train, through the negligence of the defendants, and in actions brought by the administrator of the estate of G. and by R. against the defendants, judgments were recovered against the defendants for damages for the negligence. The defendants sought indemnity against the third parties, the owners and shippers of the horses. Special contracts for shipment of live stock were signed by the defendants' agent and by the third parties, the form of contract being that authorized by the Board under the Railway Act. The rate of freight charged was that authorized under Canadian classification No. 14, dated the 15th December, 1908, and approved by the Board, in cases where the stock is shipped under the terms and conditions of the special contract, which classification contains certain general rules governing the transportation of live stock, including this, that the owner or his agent must accompany each carload, and owners or agents in charge of carloads will be carried free on the same train with their live stock, upon their signing the special contract approved by the Board. G. and R. were carried free, but neither signed the special contract, nor was any pass issued and delivered to either of them embodying its terms, and neither of them knew the contents of the special contract. Upon the face of each contract was written, "Pass man in charge." Among the conditions of the contract were, that the liability of the defendants should be restricted to $100 for the loss of any one horse, and that in case of the defendants granting to the shipper or any nominee or nominees of the shipper a pass or privilege less than full fare to ride on the train in which the property is being carried, for the purpose of caring for the same while in transit, and at the owner's risk, then, as to every person so traveling, the defendants are to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the defendants or their servants or employees, or otherwise howsoever. On the back of the contract, and as part of the document approved by the Board, provision was made for each person entitled to free passage to sign his name, followed by a note that agents must require such persons to write their own names on the lines above. The defendants' agent neglected to observe this direction:—Held, that the third parties owed no duty to the defendants to inform G. and R. of the terms of the special contract. (2) Looking at the express terms of the written contract, including the rule set forth in classification 14, intended for the guidance of both parties, and having regard to all the circumstances under which the contract was entered into, there was no implied agreement on the part of the third parties to indemnify the defendants, in order to give the transaction such efficacy as both parties must have intended it to have. There would have been no claim against which to be indemnified if the defendants' agent had performed his duty, and it would be contrary to principle to imply an agreement by the third parties to protect the defendants from the consequences of their own carelessness.

Goldstein and Robinson v. Can. Pac. Ry. Co., 12 Can. Ry. Cas. 141, 21 O.L.R. 575.

[Affirmed in 12 Can. Ry. Cas. 485, 23 O.L.R. 536.]

INJURY TO PERSONS IN CHARGE TRAVELING ON PASS—CLAIM FOR INDEMNITY.

Held, affirming the judgment of Teetzel, J. (21 O.L.R. 575, 12 Can. Ry. Cas. 141, above), that the third parties were not bound to indemnify the defendants in respect of the sums paid to the plaintiffs. Per Garrow, J.A.: The general rule as to the right of indemnity is, that the claim, unless expressly contracted for must be based upon a previous request of some kind, either express or implied, to do the act in respect of which the indemnity is claimed; and, there being no express covenant or contract of indemnity, it was impossible, in the circumstances, to imply one; to do so would not be in furtherance of an existing contract, but to make an entirely new and different one. [Birmingham & District Land Co. v. London & North Western Ry. Co. (1886), 34 Ch. D. 261, 274, Sheffield v. Barclay, [1905] A.C. 392, 397, and Dugdale v. Lovering (1875), L.R. 10 C.P. 196, specially referred to.] Semble, per Garrow, J.A., that the failure to obtain the signatures of G. and R. was not material—they could not repudiate the contract which conferred the right which they were exercising. [Hall v. North Eastern Ry. Co. (1875), L.R. 10 Q.B. 437.] Per Meredith, J.A.: No sort of obligation, indemnity, insurance, or otherwise, on the part of the third parties, had been proved.

Goldstein v. Can. Pac. Ry. Co.; Robinson v. Can. Pac. Ry. Co., 12 Can. Ry. 485, 23 O.L.R. 536.

LIABILITY OF RAILWAY TO CARETAKER OF STOCK.

One traveling upon a railway in charge of live stock at a reduced fare, which is paid by the shipper of the live stock, is not bound by a special contract between the shipper and the railway company relieving the company from liability in case of his death or injury, of which he had no knowledge, to which he was not a party, and from which he derived no benefit, where the railway company failed to do what was necessary to bring the special conditions of the contract to the attention of the traveler. [Robinson v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 444, 8 D.L.R. 1002, reversed; Robinson v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 441, restored.]

Robinson v. Grand Trunk Ry. Co., 15 Can. Ry. Cas. 264, 12 D.L.R. 696, 47 Can. S.C.R. 622.

[Reversed in 19 Can. Ry. Cas. 37.]

CARRIERS OF GOODS.

A. Carriage of Freight.
B. Express and Transfer Companies.
C. Charges.

Carriage of traffic before opening of railway, see **Tolls and Tariffs** (Refund).

See **Baggage**; **Cars**; Claims; Carriage of Live Stock; Freight agents; Government Railways; Limitation of Actions; Limitation of Liability; Tolls **and Tariffs.**

Annotations.

Liability of railway company for goods which it undertakes to carry, 1 Can. Ry. Cas. 226.

Connecting lines as affected by conditions in bill of lading limiting liability, 2 Can. Ry. Cas. 117.

Liability of carrier for loss of goods when conditions with reference to insurance of goods not complied with by shipper, 2 Can. Ry. Cas. 134.

Duties and liabilities of carriers of goods, see Carriers of Goods, 2 Can. Ry. Cas. 172.

The Crown as a common carrier, 35 D.L.R. 285.

Routing of freight, 19 Can. Ry. Cas. 363.

Liability of carriers for value of shipment, 23 Can. Ry. Cas. 335.

A. Carriage of Freight.

INTERPRETATION OF AGREEMENT—CONTROLLABLE FREIGHT.

By an agreement providing that the defendants should ship by the lines of the plaintiffs their controllable freight for points reached by the lines of the plaintiffs and their connections to the amount of $35,000 per annum, if the controllable freight amounted to that; if not, then all of it. The defendants contended that the plaintiffs should supply them with cars for the carriage of the freight according to the custom or practice alleged to be usual in the case of a local line bringing freight to a trunk line consigned to a point on the trunk line or reached by its connections:—Held, restoring the judgment of Boyd, C., at the trial and reversing the Court of Appeal, Maclennan, J.A., dissenting. (1) That "controllable freight" means business, that is goods, which the shipper has not himself directed to be carried by a particular line or route to its destination. (2) That the alleged practice to supply cars was not to be imported into the special contract between the plaintiffs and defendants. (3) That the contract was plain, certain and unambiguous both on its face and when applied to the subject of it for fulfilment and execution, and its meaning was not rendered uncertain by anything extrinsic; and the evidence that the plaintiffs' officers for a time acted upon the defendants' understanding of the contract would not affect the legal construction of it. (4) That the plaintiffs were entitled to a reference to ascertain the amount received for any "controllable freight" shipped by the defendants contrary to the terms of the agreement.

Michigan Central Ry. Co. v. Lake Erie & Detroit River Ry. Co., 6 Can. Ry. Cas. 83.

AGREEMENT TO FURNISH CARGOES—IMPOSSIBILITY OF PERFORMANCE—FORTUITOUS EVENT—DESTRUCTION OF BRIDGE.

A railway company undertaking to furnish full cargoes for ships, supplying the quantity that may be wanting in any case, is discharged from such obligation by any fortuitous event, as when a bridge on its line is burned down by a forest fire, so that the railway company is absolutely prevented from delivering the cargoes it had undertaken to furnish.

Furness, Withy & Co. v. Great Northern Ry. Co., 10 Can. Ry. Cas. 440, 32 Que. S.C. 121.

[Affirmed in part and varied as to damages in 10 Can. Ry. Cas. 453, 42 Can. S.C.R. 234, 10 Can. Ry. Cas. 479.]

Cargoes for steamers—Contract—Impossibility of performance—Destruction of bridge—Vis major.

A railway company, which agrees to provide full cargoes for steamers and to pay for any unfilled space on such steamers, is not relieved of its obligation by reason of fortuitous event, when a bridge on its line has been destroyed by a fire of unknown origin and the railway company is thereby prevented from delivering, over its own line, the cargoes it had undertaken to provide. To free itself from liability the railway company would have to prove that there had been such a fire as would constitute vis major.

Furness, Withy & Co. v. Great Northern Ry. Co., 10 Can. Ry. Cas. 453.

[Varied as to quantum of damages in 42 Can. S.C.R. 234, 10 Can. Ry. Cas. 479.]

Traffic agreement—Furnishing cargoes—Freight rates—Failure to find full cargoes—Vis major.

Appeal from the judgment of the Court of King's Bench, 10 Can. Ry. Cas. 453, affirming the judgment of the Superior Court, District of Quebec (10 Can. Ry. Cas. 440, 32 Que. S.C. 121), which maintained the plaintiffs' (respondents') action, in part, and increasing the amount awarded by that judgment to $3,992, with interest and costs.

Great Northern Ry. Co. v. Furness, Withy & Co., 10 Can. Ry. Cas. 479, 42 Can. S.C.R. 234.

Carriage over connecting lines—Authority of freight agent.

E., in British Columbia, being about to purchase goods from G., in Ontario, signed, on request of the freight agent of the Northern Pacific Ry. Co. in British Columbia, a letter to G. asking him to ship goods via Grand Trunk Ry. and Chicago & N.W., care Northern Pacific Ry. at St. Paul. This letter was forwarded to the freight agent of the Northern Pacific Ry. Co. at Toronto, who sent it to G., and wrote to him, "I enclose you card of advise and if you will kindly fill it up when you make the shipment send it to me, I will trace and hurry them through, and advise you of delivery to consignee." G. shipped the goods as suggested in this letter, deliverable to his own order in British Columbia:—Held, affirming the decision of the Court of Appeal, that on arrival of the goods at St. Paul the Northern Pacific Ry. Co. was bound to accept delivery of them for carriage to British Columbia and to expedite such carriage; that they were in the care of said company from St. Paul to British Columbia; that the freight agent at Toronto had authority so to bind the company; and that the company was liable to G. for the value of the goods which were delivered to E. at British Columbia without an order from G., and not paid for. 21 A.R. (Ont.) 322, affirming 22 O.R. 645, affirmed.

Northern Pacific Ry. Co. v. Grant, 24 Can. S.C.R. 546.

[Referred to in Boyle v. Victoria Y.T. Co., 9 B.C.R. 322.]

Liability for articles stolen—Failure to count or check.

The plaintiff shipped a number of bundles of iron by defendants' railway from Montreal to London, subject to a condition that on its arrival, and on being detached from the train, the delivery was to be complete and the liability of defendants to terminate. On the arrival of the iron defendants forthwith sent the plaintiff advice notes of its arrival, on which were endorsed the above conditions, and from which it would appear that all the iron had arrived: and requested him to send for it without delay, and that it thenceforth remained at his risk. The plaintiff, who was the ticket clerk at the London station during all the time that the iron was there, saw the iron and could have counted the bundles and have seen that they were correct. Instead, however, of doing so and taking it away, he allowed it to remain in a place where, by an arrangement which had existed for some years between him and defendants, it was accustomed to be placed free of charge and for his sole convenience, and where he was enabled, from time to time, to send for and take such portions as he required:—Held, that under these circumstances defendants were not bound to shew that all the iron shipped had in fact arrived; that therefore no liability would attach upon them for an alleged deficiency; and, at all events, that this point could not now be raised, as it was not taken at the trial.

Taylor v. Grand Trunk Ry. Co., 24 U.C.C.P. 582.

LOSS OF GOODS AT STATION—JUS TERTII—RIGHT OF RECOVERY.

Plaintiff had sold certain goods to M., which were at the time lying at defendants' railway station, and defendants were fully aware of the sale, but notwithstanding they contracted with plaintiff to carry and deliver them for him as required, and gave him a shipping bill accordingly. In an action by plaintiff against defendants for the nondelivery:—Held, that the defendants could not set up M.'s title to the goods as against the plaintiff. It further appeared that beyond the fact of M. having notified defendants of his claim, and making a demand for the goods, he did nothing to indicate his intention of looking to them for damages, but in fact sued plaintiff and recovered the whole amount of his claim from him:—Held, that the case could not be brought within the principle of a bailee setting up the jus tertii against the bailor, as there was here no bona fide defending in right and title of such third person. Held, also, that plaintiff was entitled to recover the whole value of the property converted, and not merely the difference between the price at the time of refusal to deliver and tender of it back again. The tender in question was made in writing by defendants' solicitor, two days before the commission day of the assizes, offering for plaintiff's acceptance the fifty kegs of butter (the goods in question), sold by him to M., and for which M. had recovered against him, stating same to be at T. at plaintiff's own risk:—Held, wholly illusory, and not to partake of any of the incidents of a legal tender.

Brill v. Grand Trunk Ry. Co., 20 U.C.C.P. 440.

[See Milligan v. Grand Trunk Ry. Co., 17 U.C.C.P. 115, 3203; Crawford v. Great Western Ry. Co., 18 U.C.C.P. 510, p. 3192.]

NONDELIVERY OF GOODS—NOTICE OF NECESSITY FOR PROMPT DELIVERY.

In an action by plaintiffs against defendants for damages occasioned by the nondelivery of a certain article of machinery contracted to be delivered by them for plaintiffs, it appeared that no notice had been given at the time of the contract to the defendants of the necessity for a prompt delivery of the machinery, nor of the use it was to be put to:—Held, on the authority of Cory v. Thames Iron Works Co., L.R. 3 Q.B. 181, affirming Hadley v. Baxendale, 9 Ex. 341, that the plaintiffs could only recover the value of the missing article, and were not entitled to the loss of profits arising from this nondelivery, or the wages of certain workmen employed upon the building in which the machinery was to be used.

Ruthven Woollen Mfg. Co. v. Great Western Ry. Co., 18 U.C.C.P. 316.

IRON INJURED BY RUST IN RAILWAY YARD—FAILURE TO CHECK AMOUNT.

Defendants received 2000 bundles of hoop iron to be carried to London and delivered at their station there to the plaintiffs. On its arrival, the plaintiffs having no agent in London and living in Montreal, defendants sent to them their advice notes of the arrival, and unloaded the iron in their yard, where it remained for nearly three weeks and was injured by rust and exposure:—Held, that the defendants as common carriers were not liable. Eighteen bundles were missing, and defendants' officers, not having checked the number taken out of the cars, could only say that if the 2000 bundles arrived there it was all placed in the yard, and must have been stolen from there:—Held, that the defendants were liable for the eighteen bundles.

Hall et al. v. Grand Trunk Ry. Co., 34 U.C.Q.B. 517.

[See Milligan v. Grand Trunk Ry. Co., 17 U.C.C.P. 115, p. 3203.]

STOPPAGE IN TRANSITU—NOTICE OF.

Goods which came from Montreal in bond, were deposited in the customs warehouse at the Grand Trunk Ry. Station at Toronto. The consignees became insolvent, and the consignors gave notice of stoppage in transitu to the railway company, after which the agent of the company gave an order for delivery on payment of charges to another person, who made the entry and received them from the customs:—Held, that such notice was sufficient, though in such cases it is advisable to give notice also to the customs officer; and that an action would lie against the company for such delivery.

Ascher v. Grand Trunk Ry. Co., 36 Q.B. 609.

YARDS AND WAREHOUSES—DELAY IN DELIVERY—LIMITATION OF LIABILITY.

On 3rd of April, 1871, defendants received at Montreal a case of hats to be carried to Toronto, consigned to the plaintiffs. The goods arrived in due course at Toronto, and were placed in defendants' warehouse, but were not delivered to the plaintiffs until the 15th of June following, whereby the sale of the goods was lost, and their value very considerably deteriorated. It appeared, however, that the goods were carried under this special condition: "The company will not be responsible for any goods left until called for or to order, warehoused for the convenience of the parties to whom they belong, or by or to whom they are consigned; and that the delivery of the goods will be considered complete, and the responsibilities of the company will be considered to terminate, when placed in the company's shed or warehouse." But it also appeared that it was the custom of defendants to deliver to the consignees goods brought by them and warehoused, and to charge for the cartage in the freight:—Held, that the condition would only relieve defendants from liability as common carriers, but not as warehousemen; and that being bound in the latter capacity to deliver the goods, they were liable for the loss sustained by the detention. It appeared also that the address in the shipping bill was not very distinctly written and it was contended that this was the cause of the delay; but this was expressly left to the jury, who found for the plaintiffs, and the Court would not interfere.

McCrosson et al. v. Grand Trunk Ry. Co., 23 U.C.C.P. 107.

[See Penton v. Grand Trunk Ry. Co., 28 U.C.Q.B. 367; Hall v. Grand Trunk Ry. Co., 34 U.C.Q.B. 517; Mason v. Grand Trunk Ry. Co., 37 U.C.Q.B. 163.]

YARDS AND WAREHOUSES—DELIVERY TO BONDED WAREHOUSE—DELAY—LIABILITY.

Declaration, that the plaintiff delivered goods to defendants as common carriers, valued at £150, to be safely conveyed from Suspension Bridge to Toronto, within a reasonable time, for hire. Breach, that defendants did not, within such reasonable time, take care of and convey the said goods to Toronto, and never delivered the same. The plaintiff, on the 24th July, 1856, received a notice that "the undermentioned goods consigned to you have arrived here this day; we will thank you to send for them as soon as possible, as they remain here at your risk and expense." The goods were spring goods, which had arrived from the Bridge on the 5th of April and 11th of March, and were placed by defendants in a bonded warehouse, being subject to duties. Being unseasonable at the time of receipt of the notice, plaintiff refused to take them:—Held, that the goods being bonded goods, subject to duty, and defendants having conveyed them within a reasonable time to the warehouse, where they were bound by law to deliver them, they were not bound to give notice of their arrival there, and their duty as common carriers had ceased.

O'Neill v. Great Western Ry. Co., 7 U.C.C.P. 203.

YARDS AND WAREHOUSES — LOSS OF GOODS BY FIRE — LIABILITY AS WAREHOUSEMEN.

Plaintiff delivered to defendants, as common carriers, foreign goods in bond at Buffalo, to be carried to Brantford. A receipt was given (26th April, 1854) for (amongst other things) a box at Buffalo for way station. The contract alleged was to carry the goods from Buffalo to Brantford, and there to deposit and keep them for the plaintiff, for reward, &c. Frequently, before defendants' freight station was burnt at Brantford (on the 8th or 9th May), and afterwards, the plaintiff applied for the goods, when the answer was "not arrived." On 9th of May the answer was, "burnt up." It was admitted that the goods arrived on the 5th or 6th of May, and were stored in a bonded warehouse in defendants' control, and were burnt up on the 8th or 9th, and that no notice of arrival was sent to the consignee:—Held, that under the contract as stated in the declaration and proved, defendants' liability as common carriers had ceased, and that of warehousemen commenced: and that whatever their liability was as warehousemen, they were not liable under the contract as alleged, and not bound to give notice.

Bowie v. Buffalo, Brantford & Goderich Ry. Co., 7 U.C.C.P. 191.

LOSS BY FIRE IN WAREHOUSE.

In an action by S., a merchant at Merlin, Ont., against the Lake Erie & Detroit River Ry. Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere to be delivered, some to the G.T.R. Co., and the rest to the C.P.R. and other companies, by the said several companies to be, and the same were, transferred to the Lake Erie Co., for carriage to Merlin, and that on receipt by the Lake Erie Company of the goods it became their duty to carry them safely to Merlin, and deliver them to S. There was also an allegation of a contract by the Lake Erie for storage of the goods and delivery to S. when requested, and of lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Co. at Merlin:—Held, reversing the decision of the Court of Appeal, that as to the goods delivered to the G.T.R.Co. to be transferred to the Lake Erie Co., as alleged, if the cause of action stated was one arising ex delicto it must fail, as the evidence shewed that the goods were received from the G.T.R. Co. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G.T.R. Co. to the consignors, and if it was a cause of action founded on contract it must also fail as the contract under which the goods were received by the G.T.R. Co., provided among other things, that the company would not be liable for the loss of goods by fire; that goods stored should be at sole risk of the owners; and that the provisions should apply to and for the benefit of every carrier:—Held, further, that as to the goods delivered to the companies other than the G.T.R. Co. to be transferred to the Lake Erie Co., the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of lading contained no clause, as did those of the G.T.R. Co., giving subsequent carriers the benefit of their provisions; and that as the two Courts below had held that the loss was caused by the negligence of servants of the Lake Erie Co., such finding should not be interfered with:—Held, also, that as to goods carried on a bill of lading issued by the Lake Erie Co., there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one as the company only undertakes to warehouse goods of necessity and for convenience of shippers. 17 P.R. (Ont.) 224, reversed.

Lake Erie & Detroit River Ry. Co. v. Sales et al., 26 Can. S.C.R. 663.

[See Richardson v. Can. Pac. Ry. Co., 19 O.R. 469; referred to in Elmsley v. Harrison, 17 P.R. (Ont.) 725; Hunter v. Boyd, 6 O.L.R. 639; applied Neil v. American Express Co., 20 Que. S.C. 258; approved Laurie v. Can. North. Ry. Co., 21 O.L.R. 178; distinguished Allen v. Can. Pac. Ry. Co., 19 O.L.R. 510, 21 O.L.R. 416.]

Connecting lines—Damage to Goods—Admission and promises of servants.

The consignee of goods carried by two successive carriers has recourse only against the latter for the damaged condition in which they may be delivered upon establishing his negligence. Proof that 50 cases of oranges, out of 200 were damaged when the shipment was transferred from the first to the second carrier raises a violent presumption that they were in a damaged condition and relieves the second carrier from liability for damages. (2) A transportation company is not bound by the admissions or promises of its employees unless it is shewn that those employees were authorized to make such admissions or promises.

Coté v. Grand Trunk Ry. Co., 28 Que. S.C. 529.

Goods in bond—Arrival at destination—Notice to consignees—Payment of duty—Collector's warrant for delivery—Negligence of customs officer in mislaying warrant.

De Toumancourt v. Grand Trunk Ry. Co., 6 E.L.R. 367 (Que.).

Goods lost in transit—Shipping directions.

Plaintiffs shipped a number of cases of goods by the Dominion Atlantic Ry. addressed to M. & Co. at Winnipeg, Man., giving directions, by words written across the face of the shipping bill, to "Ship C.P.R." At St. John, N.B., where the system of the Dominion Atlantic Ry. terminated, the goods were handed over to the defendant company, who issued a new shipping bill acknowledging the receipt of the goods from (name blank) in apparent good order and condition, to be forwarded to the consignee subject to terms and conditions set out on the shipping bill, which was stated to be "delivered by the company and accepted by consignor or his agent," as the basis upon which the receipt for the property mentioned was given. Several of the cases having been lost in transit:—Held, affirming the judgment of the trial Judge, that the directions given by plaintiffs to the Dominion Atlantic Ry. Co. to "Ship C.P.R." constituted the company to which the goods were first delivered, plaintiffs' agents, to enter into a new contract with defendant company at St. John, and established a privity of contract between plaintiffs and the defendant company, and that the latter company was liable directly to plaintiffs for the loss of the goods while in their custody.

McKenzie et al. v. Can. Pac. Ry. Co., 43 N.S.R. 452.

LIMITATION OF LIABILITY—DELIVERY OF GOODS TO CONNECTING LINES.

Declaration upon a contract by defendants to carry goods from St. Mary's to Hamilton within a reasonable time, alleging nonperformance. Plea, that the goods were carried upon certain special conditions, providing, in substance, that goods addressed to points beyond defendants' railway would be forwarded by public carriers, and defendants' responsibility should cease on notice to such carriers that the goods were ready for them; and that defendants should not be responsible for any damage or detention after said notice, or beyond their limits, nor for "claims arising from delay or detention of any train, whether in starting, or at any station, or in the course of the journey." And the defendants alleged that they had no station at Hamilton, and that they conveyed the goods to their nearest station thereto, and handed them over to the Great Western Ry. Co., which conveyed them to Hamilton. Replication, that the plaintiff sues not only for the neglect and delay in the plea alleged, but for unreasonable delay by defendants at St. Mary's and for neglect to carry from thence to their station nearest to Hamilton. Rejoinder, repeating the conditions set out in the plea, and alleging that defendants only agreed to carry on those conditions:—Held, on demurrer, that the rejoinder was bad, for not stating any facts to bring defendants within the conditions; and that the plea was bad for not averring that defendants conveyed the goods to their nearest station to Hamilton, and gave notice to the Great Western Ry. Co., within a reasonable time.

Devlin v. Grand Trunk Ry. Co., 30 U.C.Q.B. 537.

LIMITATION OF LIABILITY—DESTRUCTION OF GOODS IN TRANSIT—CONNECTING LINES.

Plaintiff's correspondents in Chicago delivered there to the Michigan Southern Ry. Co. certain merchandise, to be transported to Toronto for plaintiff, that company at the time of delivery giving a receipt note to the effect that they had received from plaintiff's correspondents the merchandise in question, consigned to plaintiff at Toronto, to be transported over their line of road to their terminus, and delivered to the company whose line might be considered a part of the route, to be carried to the place of destination: the Michigan company not to be liable as common carriers for the goods whilst at any of their stations awaiting delivery to the company which was to forward them: and that no company or carrier forming part of the line over which the freight was to be carried, should be responsible for demurrage or detention at its terminus, or beyond or on any part of the line, arising from any accumulation or over pressure of business; and that "the company" should not be liable for the destruction or damage of the freight from any cause whilst in the depot of the company, or for any loss or damage from "providential" causes, or from fire, whilst in transit or at the stations. There was an arrangement between the Michigan company and defendants that the latter should carry their freight from the terminus of their line to certain points in Canada, and this freight arrived in Detroit, the terminus of the Michigan company, who telegraphed defendants' agent the day before its destruction by fire, that it was in store, and requested them to forward it. Defendants had such an accumulation of freight on hand that it could not transport it all over their line, and could not therefore receive plaintiff's goods, which were destroyed by fire at the Michigan company's station in Detroit, the day after the defendants were advised of their arrival. In an action against defendants for the value of the goods, charging a refusal on their part to receive them:—Held, that the plaintiff could not recover, for that under the receipt note given by the Michigan company, they became the carriers; but that they only undertook to carry over their own line, and were plaintiff's agents to deliver over his merchandise to defendants to be carried to Toronto; but that the arrangement between them and defendants created no privity between defendants and plaintiff, so as to enable him to sue defendants for not carrying it out; and that, even if defendants were bound to receive the merchandise at Detroit, for carriage to Toronto, the evidence shewed that they were not liable for not receiving, owing to the overcrowded state of their premises, and the pressure of freight upon them:—Held, also, that plaintiff could not, in any case, recover more than nominal damages, as the value of the goods would not be the damages naturally flowing from a breach of contract to carry, in disregard of defendants' common-law obligations to do so; for that the loss by fire arose from the omission to insure, and it would by no means follow that, even if defendants had received the property, it might not have been on the express condition of exemption from liability in that event:—Held, also, that the condition that "the company" should not be liable for loss from providential causes, or from fire from any cause whatever, etc., applied to the Michigan company alone, and not to defendants also.

Crawford v. Great Western Ry. Co., 18 U.C.C.P. 510.

LIMITATION OF LIABILITY—FRUIT FROZEN IN TRANSIT.

S. 20, subs. 4, of the Railway Act, 1868, as amended by 34 Vict. c. 43, s. 5 (D), is not, by virtue of s. 7 of the latter Act, made applicable to the Great Western Ry. Co.; and therefore that they were not deprived of the protection afforded by one of their special conditions—which stated that fruit was to be carried only at the risk of the owners, and that they would not be liable for injury occasioned by frost—although the jury found that the fruit in question, which was being carried by them, became frozen owing to their negligence.

Scott et al. v. Great Western Ry. Co., 23 U.C.C.P. 182.

LIMITATION OF LIABILITY—GOODS OF COMBUSTIBLE NATURE.

Defendants received at Petrolia two carloads of coal oil to be carried to London. The shipping notes stated, "The G.W. Ry. will please receive the undermentioned property, to be sent subject to their tariff, and under the conditions stated above and on the other side," one of which conditions was that the defendants would not be liable for the loss or damage to goods of a combustible nature. One of the cars never arrived, and defendants could give no account of it; the other reached London, and was damaged there, as was supposed, and all the oil in it lost:—Held, that defendants were liable, for the condition related only to risk of carriage.

Fitzgerald et al. v. Great Western Ry. Co., 39 U.C.Q.B. 525.

PERISHABLE ARTICLES—LOSS THROUGH UNAVOIDABLE DELAY.

Defendants, an express company, undertook to forward a quantity of fresh fish for plaintiffs from Port Mulgrave, in the Province of Nova Scotia, to New York, and the evidence shewed that defendants spared no effort to have the fish forwarded with all possible despatch, but on account of the journals of the car upon which they were placed heating, the car was delayed at two points, and when the fish arrived at their destination they were spoiled, and that the accident which caused the delay was one which could not have been avoided:—Held, that the trial Judge erred in not submitting to the jury questions tendered on behalf of the defendants, and intended to secure the finding of the jury as to where the defendants were negligent or failed in their undertaking, such finding being material to the decision of the case. The jury found in answer to the only question submitted that defendant company did not deliver the fish within a reasonable time, looking at all the circumstances of the case:—Held, that the latter finding was against the weight of evidence and could not stand, and that there must be a new trial.

Matthews v. Canadian Express Co., 44 N.S.R. 202.

MISDELIVERY—"ORDER"—PRODUCTION OF SHIPPING BILLS.

The plaintiff knowing that the defendants sometimes delivered goods without production of the shipping bills where not consigned "to order," consigned certain goods to the "I.C: Company," not yet incorporated, and the defendants delivered them to an individual carrying on business in that name and at the ostensible office of the company, without production of the bill:—Held, that the defendants were not liable for misdelivery. There is no law in Ontario requiring carriers to take up shipping bills before the delivery of goods.

Conley v. Can. Pac. Ry. Co., 32 O.R. 258.

[Affirmed by a Divisional Court, 1 O.L.R. 345.]

DESTRUCTION OF GOODS BY FIRE—TERMINATION OF TRANSIT—WAREHOUSEMEN.

The defendant company between the 30th April and the 4th May received goods at Winnipeg from the plaintiffs for carriage. The goods were addressed to the plaintiffs, in some instances, "Prince Albert," in others, "Prince Albert via Qu'Appelle," in others, "Prince Albert, Qu'Appelle," in others, "Duck Lake, Qu'Appelle," in others, "c/o George Hanwall, Qu'-Appelle." Of the places named, only Qu'Appelle was a station on the company's line. The goods were destroyed by fire about noon, on the 13th May. They had arrived at Qu'Appelle from day to day between the 5th and noon of the 12th May, and were apparently on the same days put in the company's freight sheds. The plaintiff's agent at Qu'Appelle was aware each day of the arrival of the goods:—Held, following Mayer v. G.T.R., 31 U.C.C.P. 248, that the company's duties as common carriers had ceased before the fire, and that they were liable, if at all, only as warehousemen.

Walters v. Can. Pac. Ry. Co., 1 Terr. L.R. 88.

[Doubted in Great Western Supply Co. v. Grand Trunk Pacific Ry. Co., 19 Can. Ry. Cas. 347.]

NONACCEPTANCE BY CONSIGNEE—LIABILITY AS WAREHOUSEMEN.

A railway company ceases to be liable as a carrier, and the transitus is at an end when the consignees refuse to accept the goods. Upon such refusal the railway company became involuntary bailees of the goods, with the duty to the owners of taking reasonable care of them and delivering them to the owners when required. An amendment to the record allowing the plaintiffs (who had sued the defendants as carriers for nondelivery) to claim against the defendants as warehousemen, ordered.

Frankel v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 136.

[Reversed in part in 33 Can. S.C.R. 115, 2 Can. Ry. Cas. 155.]

NONACCEPTANCE BY CONSIGNEE—LIABILITY AS WAREHOUSEMEN—LIABILITY FOR GROSS NEGLIGENCE.

F. Bros., dealers in scrap iron at Toronto, for some time prior to and after 1897 had sold iron to a Rolling Mills Co. at Sunnyside in Toronto West. The G.T.R. had no station at Sunnyside, the nearest being at Swansea, a mile further west, but the Rolling Mills Co. had a siding capable of holding three or four cars. In 1897 F. Bros. instructed the G.T.R. Co. to deliver all cars addressed to their order at Swansea or Sunnyside to the Rolling Mills Co., and in October, 1899, they had a contract to sell certain quantities of different kinds of iron to the company and shipped to them at various times up to January 2nd, 1900, five cars, one addressed to the company and the others to themselves at Sunnyside. On January 10th the company notified F. Bros. that previous shipment had contained iron not suitable for their business and not of the kind contracted for and refused to accept more until a new arrangement was made, and about the middle of January they refused to accept part of the five cars and the remainder before the end of January. On February 4th the cars were placed on a siding to be out of the way and were there frozen in. On February 9th F. Bros. were notified that the cars were there subject to their orders and two days later F., one of the firm, went to Swansea and met the company's manager. They could not get at the cars where they were and F. arranged with the station agent to have them placed on the company's siding and he would have what the company would accept taken to the mills in teams. The cars could not be moved until the end of April when the price of the iron had fallen, and F. Bros. would not accept them, but after considerable correspondence and negotiation they took them away in the following October and brought an action against the G.T.R. Co. founded on the failure to deliver the cars. It appeared that in previous shipments the cars were usually forwarded to the rolling mills on receipt of an order therefor from the company but sometimes they were sent without instructions, and on February 3rd the station agent had written to F. Bros. that the cars were at Swansea and would be sent down to the rolling mills:—Held, affirming the judgment of the Court of Appeal, that the Rolling Mills Co. were consignees of all the cars and that they had the right to reject them at Swansea if not according to contract. Having exercised such right the railway company were not liable as carriers, the transitus having come to an end at Swansea by refusal of the company to receive them. The Court of Appeal, while relieving the railway company from liability as carriers, held them liable as warehousemen and ordered a reference to ascertain the damages on that head. Held, reversing such decision, Mills, J., dissenting, that the action was not brought against the railway company as warehousemen, and as they could only be liable as such for gross negligence and the question of negligence had never been raised nor tried, the action must be dismissed in toto, with reservation of the right of F. Bros. to bring a further action should they see fit.

Grand Trunk Ry. Co. v. Frankel, 2 Can. Ry. Cas. 155, 33 Can. S.C.R. 115. [Followed in Swale v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 363.]

LIMITATION OF LIABILITY—LIABILITY BEYOND INITIAL CARRIER'S LINE.

In 1874, the plaintiff, at Toronto agreed with the defendants to forward all his goods for the season of 1874, via the defendants' railway and Lake Superior Line of steamers to Duluth, and thence to Fort Garry, the defendants to forward the goods from Toronto to Duluth at 75 cts. per 100 lbs., and the rate from Duluth to Fort Garry to be $2.90 per 100 lbs., subject to changes of tariff of the Northern Pacific Ry., and Kitson's line of Red River steamers. The goods in question were shipped by plaintiff under a shipping note, addressed to himself at Fort Garry, "G.G. Allen, C.O.D.," subject to the following amongst other conditions: That when goods are addressed to consignees beyond the places of the company's stations, they will be forwarded by public carriers or otherwise, as opportunity may offer, &c.; but that the delivery by the company will be complete, and their responsibility cease when such carriers have received notice that the company is prepared to deliver to them the goods for further conveyance; and they will not be responsible for any damage or detention, &c., after such notice, or beyond their limits. The goods were carried by defendants to Collingwood, and thence by the Lake Superior steamers to Duluth, where they were delivered to the N.P.R. Co. and carried by them and K.'s steamers to Fort Garry, and there delivered to G.G. Allen, but without the payment of the price. The plaintiff then made a claim against defendants for such delivery without payment, and so opened his case at the trial, but on its appearing that payment was to be made to the express company, and on the plaintiff stating that his claim was for the delivery without his order or endorsement of the shipping note, his claim was rested on this ground:—Held, that plaintiff could not recover, for that the defendants' contract was only to carry to Duluth, and on the delivery there to the N.P.R. Co., their liability was at an end. Semble, that even if defendants' contract extended to Fort Garry, there would be no liability, for the evidence shewed that it was never intended that the goods should not be given up except on a formal order by the plaintiff or endorsement of the shipping bill.

Rennie v. Northern Ry. Co., 27 U.C.C.P. 153.

Limitation of liability—Liability beyond initial line—Notice or condition.

The plaintiff signed a paper requesting the defendants to forward certain goods received from him at Toronto, to Indianapolis, in Indiana, "subject to their tariff and under the conditions stated on the other side." On the other side, headed "General notices and conditions of carriage," the company "gave public notice," that in certain events specified they would not be responsible. The tenth paragraph, after stating the course which would be pursued by them with respect to goods addressed to consignees resident beyond the places at which defendants had stations, proceeded, "and the company hereby further give notice, that they will not be responsible for any loss, damage, or detention," to goods beyond their limits. It was found by the jury that all the goods had been delivered by defendants to a railway connecting at Detroit with their line and running to Indianapolis:—Held, that the latter part of the sentence could not be regarded as a notice as distinguished from a condition; and that, whether a notice or a condition, it formed part of a special contract on which defendants received the goods, and by which they were exempted from liability. The plaintiff was at Indianapolis when the goods (except the missing box sued for) arrived there, and remained until some time in the month following:—Held, that he was resident there within the condition, and having named himself as the consignee at that place, he was estopped from denying such residence.

La Pointe v. Grand Trunk Ry. Co., 26 U.C.Q.B. 479.

Limitation of liability—Notice of claims—Storing goods pending transfer to connecting lines.

Defendants on the 5th of October, 1874, received goods at Montreal for the plaintiff, addressed to the plaintiffs at Peterborough, "by the Grand Trunk Ry. Co. to Port Hope, thence by the Midland Ry." One of the conditions on which the defendants received the goods was, that no claim for damages to, loss of, or detention of goods, should be allowed "unless notice in writing, and the particulars of the claim for said loss, damage, or detention, are given to the station freight agent at the place of delivery within thirty-six hours after the goods in respect of which the said claim is made, are delivered." The goods got to Port Hope on the 8th of October, but by some mistake one case was not given by the defendants to the Midland Ry. till the 9th of November, and the plaintiffs were advised of its arrival at Peterborough on the 11th. On the 12th the plaintiffs wrote to the defendants' agent at Montreal, and to the station agent of the Midland Ry. at Peterborough, that they had been advised of its arrival but that they refused to accept it, because the delay had been most unreasonable, they had suffered loss through the detention, and had been compelled to reorder goods; and they required the defendants to compensate them for the loss sustained, and the value of the package. Held, that these letters were not a compliance with the condition:—Held, also, that the "place of delivery," mentioned in the condition above stated, was Peterborough, the place of delivery to the plaintiffs, not Port Hope, where the goods were to be delivered to the Midland Ry.; and that such notice should be given to the station freight agent at Peterborough, who would be the person agreed upon to receive it:—Held, also, that such notice was required, though the place of delivery was off the defendants' line:—Held, also, that the defendants were under no obligation to give notice of the delivery of the goods by them to the Midland Ry. Another condition was, that goods addressed to places beyond the defendants' line, and respecting which no direction to the contrary should have been received would be forwarded by the defendants as opportunity might offer, by public carriers or otherwise, or might be suffered to remain in the defendants' warehouse, at the risk of the owner; but that the delivery by the defendants should be considered complete, and their responsibility cease, when the other carriers should have received notice that the defendants were prepared to deliver the goods to them; and that the defendants would not be responsible for any loss or detention after arrival at their station nearest the place of consignment. The third count alleged that the goods were delivered to the defendants to be carried from Montreal to Peterborough, subject to this condition (setting it out), amongst others, and averred that the defendants did not forward the goods to Peterborough within a reasonable time, but on the contrary detained them at Port Hope in their warehouse:—Held, that defendants were charged as carriers, and were so acting, not as warehousemen.

Mason et al. v. Grand Trunk Ry. Co., 37 U.C.Q.B. 163.

LIMITATION OF LIABIILTY—NOTICE OF CLAIMS—WHARFINGER NOT FREIGHT AGENT.

One condition required the plaintiffs to give notice in writing of their claim to the defendants' station freight agent within twenty-four hours after the delivery of the goods. It appeared that Halifax, the place to which the goods were sent, was beyond the limits of defendants' railway, and where they had no station, but that all freight carried over their railway for delivery there, was transmitted to one B., a wharfinger, who received the same as he did the goods of other persons, making for his own benefit a special charge thereon:—Held, that B. was not a station freight agent within the meaning of the condition.

Fitzgerald et al. v. Grand Trunk Ry. Co., 28 U.C.C.P. 587.

[See Fraser et al. v. Grand Trunk Ry. Co., 26 U.C.Q.B. 488; Gordon et al. v. Great Western Ry. Co., 25 U.C.C.P 488; Smith v. Grand Trunk Ry. Co., 35 U.C.Q.B. 547.]

LIMITATION OF LIABILITY—SHIPMENT OF GLASS AND CHINA—VALIDITY OF STIPULATION.

Defendants received certain plate glass to be carried for the plaintiff, who signed a paper, partly written and partly printed, requesting them to receive it upon the conditions endorsed, which provided that they would not be responsible for damage done to any china, glass, etc., delivered to them for carriage; and defendants gave a receipt with the same conditions upon it:—Held, that such delivery and acceptance formed a special contract, which was valid at common law, and exempted defendants from injury to the goods, even though caused by gross negligence.

Hamilton v. Grand Trunk Ry. Co., 23 U.C.Q.B. 600.

[Followed in Spettigue v. Great Western Ry. Co., 15 U.C.C.P. 315, and Bates v. Great Western Ry. Co., 24 U.C.Q.B. 544. Remarks as to the necessity and justice of legislative redress in such cases. Bates v. Great Western Ry. Co., 24 U.C.Q.B. 544.]

LIMITATION OF LIABILITY—STATUTORY REGULATION.

Subs. 4, s. 20, of the Railway Act of 1868, does not extend to all cases in which negligence is charged against the railway company, but to cases only of neglect coming within the provisions of subs. 2, 3. They are not prevented therefore from stipulating for a limited liability in other cases.

Scarlett v. Great Western Ry. Co., 41 U.C.Q.B. 211.

LIMITATION OF LIABILITY—STATUTORY REGULATION OF.

Subs. 4, of s. 20, of the Railway Act, 1868, gives an action against certain railway companies for neglect to carry goods, etc., but the Act does not apply to the Great Western Ry. Co., the defendants. By s. 5 of 34 Vict. c. 43 (D.), this subsection "is hereby amended by adding thereto the following words: 'From which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants'"; and by s. 7, "The provisions of this Act" are made applicable to every railway company:—Held, that the subsection of the earlier Act, as thus amended, did not apply to defendants; but that the effect of the later Act was merely to add the newly enacted words to the subsection, and "The provisions of this Act," therefore did not include the amendment. To a declaration for breach of contract to carry goods within a time agreed on, or within a reasonable time, from G. to B., defendants pleaded setting up a special condition of the contract, that defendants "should not be liable under any circumstances for loss of market or other claims arising from delay or detention of any train, whether at starting for any of the stations, or in the course of the journey, nor for damages occasioned by delays from storms," etc. Replication, that the damages sued for arose from negligence and omission of the defendants and their servants within the Railway Act of 1868, s. 20, subs. 4, as amended by 34 Vict. c. 43, s. 5, (D.) in this, that the car in which the goods were placed was negligently allowed to remain at a station unattached to any train, and was negligently attached to a train on a different branch of defendants' railway from that between G. and B., and was carried thereon to W., at a distance from B., and allowed to remain there a long time:—Held, on demurrer, replication bad, for it was not a traverse of the plea, but the allegation of negligence was dependent upon the previous reference to and reliance on the statute. Quaere, whether the replication of negligence alone would have been an answer to the plea, independent of the statute.

Allen v. Great Western Ry. Co., 33 U.C.Q.B. 483.

LIMITATION OF LIABILITY—TERMINATION OF LIABILITY UPON NOTICE TO CONNECTING LINES.

The declaration charged defendants, in the first count, on a contract to carry certain wool from Cobourg to Boston within a reasonable time, subject to certain conditions endorsed on a receipt given by defendants—amongst others, that defendants should not be responsible for damages occasioned by delays from storms, accidents, or unavoidable causes—and alleging as a breach the neglect to carry. In the second count the contract was stated to be to carry within a reasonable time, and so that the wool should be imported into the United States before the 17th of March, when the Reciprocity Treaty would expire. Breach, that defendants did not so carry, by which the plaintiffs were disabled from importing the wool into the States unless upon payment of duties. As to the first count, it appeared by the defendants' receipt, put in by the plaintiffs, that there was an additional condition, that as to goods addressed to consignees resident beyond the places where defendants had stations (as these goods were), defendants' responsibility should cease upon their giving notice to the carriers onward, that they were prepared to deliver the goods to them for further transport:—Held, a substantial qualification of the contract declared on, which therefore was not proved as alleged. As to the second count, the same receipt applied, which named no day for carriage into the United States, but there was verbal evidence of an agreement to forward by the 17th March:—Held, that though this term might thus be added to the written contract, it would not dispense with the condition above mentioned, which shewed a substantial variance from the contract declared on. The plaintiffs, therefore, were held not entitled to recover on either count.

Fraser v. Grand Trunk Ry. Co., 26 U.C.Q.B. 488.

YARDS AND WAREHOUSES—GRAIN ELEVATOR—LIABILITY FOR GRAIN DESTROYED BY FIRE.

Defendants undertook to carry for plaintiffs a quantity of oats to T., which they did, delivering them at an elevator there belonging to S., who received them to hold for plaintiffs. Of the quantity thus delivered plaintiffs received part before the elevator was destroyed by fire, as it subsequently was. There was a very large amount of grain besides the plaintiffs' in the elevator at the time of its destruction, most of which settled down in a conical mass on the wharf on which the building stood, the remainder falling into the water. Plaintiffs desired to remove what remained of their grain, alleging that they could select it from the general mass, from their knowledge of the portion of the building in which it had been stored; but defendants, who were the bailees of the greater part, assumed charge of the whole for the benefit of all, and refused to allow plaintiffs to do so, stating that it would be sold for the general benefit, which it accordingly was, when the plaintiffs' share of the proceeds was found to amount to only about $28:—Held, that plaintiffs could maintain trover against defendants in respect of their grain so disposed of by defendants, inasmuch as the latter had no control over it, and ought not to have prevented plaintiffs from removing it if they could find it:—Held, also, that this was a case in which no greater than the actual damages sustained should have been assessed; and, the jury having awarded excessive damages, the Court ordered a new trial, unless plaintiffs would reduce their verdict to a sum named.

Moffatt et al. v. Grand Trunk Ry. Co., 15 U.C.C.P. 392.

LOSS WHILE IN POSSESSION OF INTERMEDIATE CARRIER—LAKE AND RAIL ROUTES—THROUGH ROUTE.

An action to recover damages for nondelivery of a carload of tools lost in transit by the wrecking, on Lake Superior, of a steamship of the

Northern Navigation Co. The goods were shipped from Kakabeka Falls in a Canadian Pacific Ry. Co.'s car, and Canadian Northern Ry. Co. to Port Arthur, placed on board the steamship for transportation to Point Edward, thence via Grand Trunk Ry. for delivery to the plaintiffs at St. Catharines:—Held, reversing the trial Judge, and affirming the Court of Appeal, that the defendants contracted only to deliver the goods at Port Arthur to the Northern Navigation Co., which they did, and were, therefore, not liable for nondelivery.

Jenckes Machine Co. v. Can. Northern Ry. Co., 11 Can. Ry. Cas. 440, 14 O.W.R. 307.

[Distinguished in Laurie v. Can. Northern Ry. Co., 21 O.L.R. 178.]

INJURY TO PERISHABLE GOODS BY DELAY—CONNECTING LINE—PRIVITY—FOREIGN CONTRACT.

A carload of pineapples purchased by the plaintiffs in New York was consigned by the vendors to the plaintiffs at Ottawa, on the 22nd June. The goods were delivered to the New York Central R. R. Co., and the route specified was by the defendants' railway, which connected with the New York Central line. The fruit did not arrive at Ottawa until the 25th June, which was a Saturday, and no notice of its arrival was given to the plaintiffs until the morning of the 27th. The fruit was then badly damaged by heating; a substantial portion of the injury took place between Saturday afternoon and Monday morning, and some injury during the journey; the delay in the journey took place partly upon the New York Central line, and partly upon the defendants' line:—Held, Riddell, J., dubitante, that the defendants were liable for the deterioration of the fruit. Judgment of the County Court of the county of Carleton reversed. Per Boyd, C.: The defendants received the fruit either as common carriers or as under a new contract conformable to the terms of the original carriers' bill of lading, and in either aspect were liable for negligence in handling the car or in the lack of due diligence in giving notice of its arrival. The goods were manifestly of a perishable character, and called for reasonable diligence in giving notice of their arrival; till such notice was given, the defendants were liable as carriers. Per Middleton, J.: The contract made with the initial carrier, applicable to the whole journey, defines the terms upon which the subsequent carrier undertakes to carry, and must be deemed to be the contract between the parties: if it were otherwise, the defendants, when they undertook the carriage of the goods, received them as common carriers, and there was no restriction upon their common-law liability. The liability of the defendants, according to clause 5 of the United States form of contract, under which the goods were shipped, was that of carriers until the expiry of 48 hours after notice that the goods were ready for delivery; and, apart from contract, the goods being of a perishable nature, it was the defendants' duty to give notice promptly, and their liability as carriers continued while that duty remained undischarged. [Corby v. Grand Trunk Ry. Co., 6 O.W.R. 81, 492, approved and followed.]

Corby v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 494, 23 O.L.R. 318.

LIABILITY FOR LOSS OF GOODS—GOODS LADEN BY SHIPPER ON CAR ON SIDING.

The liability of common carriers under Art. 1674 C.C. Que. begins only from the time of delivery of the goods, and when a shipper, for his own convenience, puts them himself on board the cars of a railway company, on a siding near his warehouse, the delivery to the company takes place when it seals the cars, or otherwise takes charge of them, and hands the shipper a bill of lading. It incurs no liability for loss from pilfering, etc., that occurs before that.

Spedding v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 46, 40 Que S.C. 463.

PROVISION IN BILL OF LADING FOR PROTECTIG GOODS AGAINST FROST—CONNECTING CARRIER.

Where, under a bill of lading which required protection of goods from frost, a carrier has had possession, for an unreasonably long time during very cold weather, of a consignment of figs, which were found to be frozen upon arrival at their destination, a prima facie case of negligence on the part of that carrier is established which casts the onus upon it, in order to escape liability of shewing that the consignment was in a damaged condition when received from the connecting carrier.

Albo v. Great Northern Ry. Co. (B.C.), 14 Can. Ry. Cas. 82, 2 D.L.R. 290.

UNREASONABLE DELAY IN DELIVERING GOODS BY CONNECTING CARRIER.

Where it appears that the climate at the point of shipment precludes the frosting of a consignment of figs at the time of their delivery to an initial carrier, and that a connecting carrier had possession of them for an unreasonably long time in very cold weather without offering any acceptable explanation for the delay, a strong presumption arises that if they were damaged by frost it was while in the latter's possession.

Albo v. Great Northern Ry. Co. (B.C.), 14 Can. Ry. Cas. 82, 2 D.L.R. 290.

CONSIGNEE REFUSING TO ACCEPT DELIVERY.

A consignee is justified in refusing to accept a consignment of figs, which, through the negligence of the carrier, were frozen in transit.

Albo v. Great Northern Ry. Co. (B.C.), 14 Can. Ry. Cas. 82, 2 D.L.R. 290.

DAMAGE—PAYMENT OF PART—EFFECT.

The payment by a common carrier of damages for injuries to a portion of a consignment of goods is not an admission of liability in respect to other portions thereof. (Per Irving, J.A.)

[Hennell v. Davies, [1893] 1 Q.B. 367, followed.]

Albo v. Great Northern Ry. Co. (B.C.), 14 Can. Ry. Cas. 82, 2 D.L.R. 290.

BILL OF LADING—ASSIGNMENT OF.

The declaration alleged that the plaintiff by his agents delivered to the defendants 8,000 bushels of his corn, to be carried from Chicago to Stratford, &c., and to be delivered to the Bank of Montreal or their assigns; that the bank assigned the corn to the plaintiff, yet that defendants neglected for an unreasonable time to carry and deliver it, whereby the plaintiff lost a market and was afterwards obliged to sell for a less price than he would otherwise have done. It appeared that the corn was shipped by M. & Co., "as agents and forwarders," on account of whom it might concern, to be delivered to the Bank of Montreal or their assigns, and the bill of lading was endorsed by the agent of the bank to the plaintiff, with whom the defendants treated as the owner, and delivered it to him after some delay caused by a charge made and afterwards remitted by them. It was objected that the consignor or consignee could only sue upon this contract, not the plaintiff; that the bank could not assign to him; and if they could, the right of action would not pass. There was no evidence to shew what interest the bank had in the corn:—Held, there being no plea denying plaintiff's property in the corn, that he was admitted to have been the owner when it was shipped; that the bill of lading did not transfer the property to the bank, in whom no other right was shewn;

that their endorsement was therefore unnecessary, and that he was entitled to maintain the action. Semble, however, that if he had first acquired his title by such endorsement, he might have sued defendants for any negligence occurring after they had recognized him as owner.

Kyle v. Buffalo & Lake Huron Ry. Co., 16 U.C.C.P. 76.

BILL OF LADING—THROUGH RATE—PRIVITY OF CONTRACT.

Plaintiffs bought twenty-four bales of cotton in Cincinnati, through their agent B., who delivered it there to the C.H. & D. Ry. Co. The bill of lading contained a heading "contract for a through rate." Under the general heading of the C.H. & D. Ry. Co., it stated that the cotton was forwarded by B., and that the shipping marks were: "G. & M.—for Gordon, MacKay & Co., Thorold, Ont., via Detroit & G.W.Ry.," and in the margin were added the words, "Through at 40c. per 100 lbs., &c., to D. via ———." The cotton was delivered without instructions to defendants, at D., by the teamster of a line connecting with the C.H. & D. Ry. Co., and was burned while in transit on defendants' line to T.:—Held, that the bill of lading shewed a contract with the C.H. & D. Ry. Co. for a through rate to T., and therefore that defendants were not liable to the plaintiffs. The nonsuit was affirmed.

Gordon et al. v. Great Western Ry. Co., 34 U.C.Q.B. 224.
[But see the next case.]

BILL OF LADING—THROUGH RATE—PRIVITY OF CONTRACT.

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Gordon et al. v. Great Western Ry. Co., 25 U.C.C.P. 488.

DELIVERY TO CARRIERS.

In the absence of direct evidence the contents of a box of military supplies was sufficiently shewn in an action by the Crown against a railway company for its loss, by the testimony of the officer in charge of the supplies, that he selected them from the general stores and turned them over to a person of excellent character, whose duty it was to box and ship them, and that the latter delivered a heavy box to the railway company, which receipted for it, and that such person could not be produced at the trial, as his term of enlistment had expired, and his whereabouts was unknown.

Rex v. Can. Pac. Ry. Co. (Alta.), 14 Can. Ry. Cas. 270, 5 D.L.R. 176.

Shipment of perishable goods in box car.

Where butter is shipped in a box car and the weather is such that a refrigerator car is necessary to keep it in good condition, and the plaintiff's agents, the consignees, caused a delay in delivery by failing to pay the freight charges, the defendants are not liable for injury to the butter where an unreasonable time is not occupied in making delivery.

Lessard v. Can. Pac. Ry. Co. (Alta.), 14 Can. Ry. Cas. 277, 7 D.L.R. 901.

Refusal to accept shipment.

Where a shipper entrusted goods to a carrier for delivery to a consignee and the consignee refuses to accept the goods and on being informed thereof by the carrier, the shipper acquiesces in such refusal and instructs the carrier to return the goods immediately, the carrier is responsible for the value of such goods if he deliver them to another party, even if he does so on the consignee's order presented by a third party who holds himself out as the shipper's agent.

Zimmerman v. Can. Pac. Ry. Co., 8 D.L.R. 990, 15 Can. Ry. Cas. 78, 43 Que. S. C. 297.

Connecting carriers—Liability.

In the case of a shipment forwarded to its destination by different successive carriers, each one is liable only for his handling of it, and is in no wise the warrantor of the others. Hence, if it arrives in a damaged condition, the consignee or owner has no action against the last carrier, unless the latter have, himself, by neglect or otherwise, caused the damage.

McCready v. Grand Trunk Ry. Co., 15 Can. Ry. Cas. 179, 43 Que. S.C. 160.

Injury to perishable goods by delay in transportation and want of ventilation in car.

Vernon Fruit Co. v. Can. Pac. Ry. Co., 12 W.L.R. 445 (Sask.).

Damages—Loss of goods by carrier—Tender of lost articles—Nominal or substantial damages.

Action for the value of 50 kegs of butter delivered by plaintiff to defendants to carry from G. to T. Defendants relied upon a tender of the butter to plaintiff, as preventing the recovery of more than nominal damages. The tender was made in writing by defendants' solicitor, two days before the Assizes, offering for plaintiff's acceptance the 50 kegs of butter, which had been sold by plaintiff to M., and for which M. had recovered against the plaintiff, stating same to be at T. at plaintiff's own risk:—Held, wholly illusory, and not to partake of any of the incidents of a legal tender, and that plaintiff was entitled to recover the full value of the property.

Brill v. Grand Trunk Ry. Co., 20 U.C.C.P. 440.

Damages—Negligence in carriage of goods—Nominal or substantial damages.

In an action for not carrying goods safely, whereby they were lost, issues in fact were left to a jury, reserving the question of nominal or substantial damages for the opinion of the Court:—Held, that the only question for the Court was, whether the plaintiff should be limited to nominal damages, or recover the actual value of his goods; and that the question of mitigating the damages upon the facts proved, could not be considered.

Robson v. Buffalo & Lake Huron Ry. Co., 10 U.C.C.P. 279.

FRAUD AND DECEIT—MISREPRESENTATION OF RATES.

Certain bars and bundles of iron came by ship from Glasgow to Montreal, consigned to the plaintiff. His agent gave to defendants' agent an order to get them from the ship, and afterwards received from the latter a receipt, specifying the number of bars and bundles and the gross weight, but with a printed notice at the top of it, that "rates and weight entered in receipt or shipping bills will not be acknowledged." All the iron received by defendants for the plaintiff was delivered at Guelph, but there was a very considerable deficiency in the weight. So far as appeared, the iron had not been weighed either on being taken from the ship, or afterwards:—Held, that defendants were not estopped by their statement of weight in the receipt, and were not liable to the plaintiffs.

Horseman v. Grand Trunk Ry. Co., 31 Q.B. 535, in appeal from 30 U.C.Q.B. 130.

LIMITATION OF LIABILITY—LIABILITY BEYOND INITIAL CARRIER'S LINE.

Defendants were charged with negligence and delay in the carriage of certain furs belonging to the plaintiff, from Toronto to New York, in pursuance of their contract. Defendants' railway extended only to the Suspension Bridge, and it appeared that the goods were delivered to them, addressed to R., at New York, and a receipt given, which specified that they were received to be forwarded to such address, subject to their tariff, rules and regulations. In these conditions it was stated that when goods were intended, after being conveyed by their railway, to be forwarded by some other means to their destination, the company would not be responsible after they were so delivered. The goods were sent on by defendants to the Bridge, and there delivered to the New York Central Ry. Co., which placed them in the bonded warehouse of the American customs, until certain documents were procured, without which they could not be sent on. The plaintiff was asked by defendants for such papers, but they were not furnished for some time, and the furs were spoiled by the delay:—Held, that defendants were not liable, for there was no contract by them to convey the goods to New York as alleged, but their undertaking was only to carry them over their own line, and deliver them to the company which was to take them on.

Rogers v. Great Western Ry. Co., 16 U.C.Q.B. 389.

STATIONS—REGULAR AND FLAG—TRAFFIC—C.L. AND L.C.L.—CONSIGNED TO ORDER—REBILLING—DEMURRAGE.

A railway company is justified in refusing to take shipments of C.L. and L.C.L. traffic to flag stations when consigned "to order." Traffic to flag stations consigned "to order" should be billed to the nearest regular station short of the flag station and sent on to destination, after the endorsed bill of lading has been produced and surrendered and the freight tolls paid. For unloading into the freight shed and reloading and for rebilling L.C.L. traffic from regular to flag stations, forwarding to and unloading at the said station, the carrier should receive the local toll between the two stations and for C.L. traffic the through toll should be charged with an additional toll of $3 per car for rebilling and terminal charges. The detention allowance of 48 hours free time is computed from the time of notice of the arrival of the car by the agent to the consignee after which the carrier will be entitled to charge the authorized demurrage toll. [Canadian Manufacturers' Assn. v. Canadian Freight Assn. (Interswitching Rates Case), 7 Can. Ry. Cas. 302, followed.]

McMahon v. Canadian Freight Assn., 16 Can. Ry. Cas. 230.

BILL OF LADING—CONNECTING CARRIERS—INLAND DESTINATION—JURISDICTION.

A bill of lading issued by a steamship company containing the inland destination and the through toll thereto is made a through bill of lading although it does not contain the conditions of carriage by rail. By Order No. 7562, dated July 15, 1909, the Board prescribed the form of bill of lading for inland carriage from a Canadian seaport. Section 2 of the Order provides that the carrier issuing the bill of lading shall be liable for any loss, damage or injury sustained to the goods carried under such bill of lading, but the delivering carrier is not made liable unless it be so de facto. Where a shipment was carried under a through bill of lading issued by a steamship company from India to Boston, Mass., and thence to final destination at Winnipeg, where delivery was made by the last connecting carrier, the Board has no jurisdiction over the steamship company nor over the initial carrier at Boston, and the delivering carrier is not liable for the shortage of goods received by it "short" from its connections.

Smart-Woods v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 340.

CARE OF PROPERTY—UNCLAIMED FREIGHT.

The purpose of a bill of lading is satisfied when the transit is complete except as to any rights of lien or of absolution from claims not promptly made; and where the consignee fails to take over the goods under a condition that the consignee should pay the charges and take the goods within twenty-four hours after their arrival, the railway company is in the position of an involuntary bailee thereof. [Mayer v. G.T.R., 31 U.C.C.P. 248, distinguished; Grand Trunk Ry. Co. v. Frankel, 33 Can. S.C.R. 115, 2 Can. Ry. Cas. 155, followed.]

Swale v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 363, 29 O.L.R. 634, 15 D.L.R. 816.

[Distinguished in Getty & Scott v. Can. Pac. Ry. Co., 22 Can. Ry. Cas. 297, 40 O.L.R. 260.]

JURISDICTION—TRAFFIC—ACCOMMODATION AND FACILITIES—COMPETITION.

The Board under ss. 2 (21), 284, 317 of the Railway Act, 1906, has jurisdiction to direct the respondent to maintain its dock at Michipicoten harbour and provide facilities thereat for receiving, loading, carrying, unloading and delivering traffic of the applicant in competition with traffic of the respondent. [Can. Northern Ry. Co. v. Robinson, 37 Can. S.C.R. 541, 6 Can. Ry. Cas. 101, followed.]

Dominion Transportation Co. v. Algoma Central & Hudson Bay Ry. Co., 17 Can. Ry. Cas. 422.

HEATED CARS—PERISHABLE COMMODITIES—LIMITATION OF DAMAGES.

The carrier should be obliged to accept shipments of perishable commodities, providing heated cars; subject to the stipulation that the shipper must sign a release waiving all claim for frost damage unless he can prove that the heating appliances were missing; with a further exception that if the heaters are allowed to go out through the negligence of the carrier, the damages recoverable will be limited to one half the freight tolls charged on the shipment in question.

Fernie-Fort Steele Brewing Co. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 426.

NOTICE OF ARRIVAL—PERSON OTHER THAN CONSIGNEE—PRACTICE OF COMPANIES.

Where a railway bill of lading is issued with the name and address of a party other than the consignee as a person to be notified on bulk grain reaching the destination, the railway is under obligation to send notice to such person, and is not relieved therefrom by the practice of the terminal elevator companies of forwarding weight certificates; and the railway is liable for delay in giving notice due to the freight conductor's error in naming in the waybill as the party to be notified, another firm having no interest in the matter. [Golden v. Manning, 3 Wils. 429, and Collard v. South Eastern Ry. Co., 30 L.J. Ex. 393, followed.]

Armstrong v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 333, 7 Sask. L.R. 214, 20 D.L.R. 695.

Goods received, carried and delivered—Bill of lading.

It is not open to a railway company which has actually received grain for transportation to dispute the bill of lading or shipping bill issued on its regular form merely on the ground that its agent had not, by reason of some inside regulations between the company and its servants, the power to sign the bill, where the company received and carried the grain, collected the freight and made delivery pursuant to its terms. [Erb v. G.W. Ry. Co., 5 Can. S.C.R. 179; Oliver v. G.W. Ry. Co., 28 U.C.C.P. 143, distinguished.]

Randall et al. v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 343, 21 D.L.R. 457.

Estoppel—Bill of lading—Weights or quantities—"More or less."

Where there is nothing in the bill of lading or shipping bill of the rail way to limit its responsibility for the weights or quantities entered on the bill the railway company is estopped from denying that approximately the quantity stated with the addition of the words "more or less" had been received for shipment.

Randall et al. v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 343, 21 D.L.R. 457.

Bill of lading—Loss in transit—Presumption of negligence.

Where the bill of lading called for "eleven hundred bushels more or less" of flax and the evidence proved the delivery of over 900 bushels in a car-load lot, the onus is upon the railway company to account for the deficiency on the car arriving at destination with only half the quantity stated in the bill; where no satisfactory explanation of the loss is given by the railway, negligence may be presumed against it. [Ferris v. Can. Northern Ry. Co., 15 Man. L.R. 144, followed.]

Randall et al. v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 343, 21 D.L.R. 457.

[Followed in Ogilvie Flour Mills Co. v. Can. Pac. Ry. Co., 47 D.L.R. 226.]

Loss of goods entrusted to carrier—No explanation—Presumption of negligence.

In the absence of evidence that the loss of goods entrusted to a railway company for carriage was not caused by the negligence of the railway company, the rule res ipsa loquitur applies and the carrier is responsible. [Ferris v. C.N.R.Co. (1905), 15 Man. L.R. 134; Randall v. C.N.R. Co. (1915), 21 D.L.R. 457, 19 Can. Ry. Cas. 343, 25 Man. L.R. 293; Scanlin v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 336, 44 D.L.R. 352, followed.]

Ogilvie Flour Mills Co. v. Can. Pac. Ry. Co., 47 D.L.R. 226, 25 Can. Ry. Cas.

SALE OF GOODS—RAILWAY COMPANY CONTRACTING TO DELIVER—FAILURE TO DELIVER—NONPERFORMANCE OF CONTRACTS.

Northern Pacific Ry. Co. v. Fullerton, 47 D.L.R. 705.

INITIAL CARRIER—LONGEST HAUL—SHIPPING INSTRUCTIONS.

The right of the initial carrier to the "longest haul" is recognized by Canadian decisions, and founded on sound principle; the initial carrier in choosing between two routes, equally advantageous to the shipper as to time, toll, and facilities, may select the route which will give it the longest haul, notwithstanding routing directions of the shipper to the contrary, and the principle will be applied where the railway of the initial carrier, technically owned by a separate company maintaining a distinct organization, is, in fact, operated under lease as part of a larger system. [Imperial Steel & Wire Co. v. Grand Trunk Ry. Co., 11 Can. Ry. Cas. 395, followed.]

Jacobs Asbestos Co. v. Quebec Central Ry. Co., 19 Can. Ry. Cas. 357.

[Followed in Re Coal Transportation Facilities, 22 Can. Ry. Cas. 338.

NOTICE OF ARRIVAL—LIMITATION OF LIABILITY AT STATION HAVING NO AGENT.

Under a bill of lading condition that "goods in carloads destined to a station where there is no authorized agent shall be at the risk of the carrier until placed on the delivery siding" the carrier is not under obligation to give notice of the arrival of the car as a condition of being relieved of responsibility for the goods after the car is so placed.

Rogers Lumber Co. v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 432, 9 Sask. L.R. 188, 27 D.L.R. 414.

PROOF OF DELIVERY—RECEIPT—ONUS.

A receipt for goods by the consignee's agent is not necessarily conclusive as to their actual delivery; the burden of proof is upon the carrier to shew that the goods were in fact delivered, where it was shown that it was usual for the carrier's agent to take a receipt for the goods before delivery and before the carrier's agent had ascertained whether or not the goods had arrived at the place where delivery was to be made. [See 16 D.L.R. 420.]

Henderson v. Inverness Ry. & Coal Co., 21 Can. Ry. Cas. 173, 50 N.S.R. 518, 33 D.L.R. 374.

LIABILITY FOR WAREHOUSE RECEIPTS ISSUED AND SIGNED BY AGENT—KNOWLEDGE OF COMPANY—RELEASE OF GOODS WITHOUT PERMISSION OF HOLDER—CONTRIBUTION BY OWNER.

A railway company maintaining warehouses as a necessary incident to its business is bound by the act of its agent acting within the scope of the authority, which it holds him out to the world to possess, in signing warehouse receipts; it is, therefore, liable for shortages, in consequence of the agent's release of the goods to the shipper, without the permission of a bank to which they were hypothecated as collateral security; the railway company, however, is entitled to contribution from the shipper to the amount recovered by the bank for such shortages.

Can. Pac. Ry. Co. v. Canadian Bank of Commerce; McDonald v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 415, 30 D.L.R. 316, 44 N.B.R. 130.

Demand for delivery after earlier refusal to accept—Undertaking to pay tolls—Acceptance—Waiver of prepayment or tender—Sale of freight to pay tolls—Delay in transmitting request for return of freight—Negligence—Damages—Carriers or warehousemen—Shipping contract—Special provision as to damages—Value of freight at date of shipment—Application to freight held by carriers as warehousemen.

Certain packages of leather were carried by the defendants for the plaintiffs to Galt, and on the 20th May, 1915, delivery thereof was tendered to the plaintiffs, who refused delivery; and it was found that thereafter the defendants became warehousemen of the goods, and retained possession of them as such until the 21st January, 1916, when the defendants sold them for unpaid charges for transportation and storage. On the 18th January, 1916, the plaintiffs requested the chief agent of the defendants at Galt to deliver the goods to the plaintiffs, and undertook to pay the charges thereon; the agent, on behalf of the defendants, accepted the undertaking; and it was found that prepayment or tender of tolls and charges was thereby effectually waived. At that date, the goods had been forwarded to Montreal to be sold there; and, in consequence of delay in communicating to the proper authority at Montreal the request to return the goods to Galt, the request did not reach the proper hands in Montreal until after the goods had been sold; and this delay was found to have arisen from the negligence of the defendants' clerks. In these circumstances, it was held, that the defendants were liable in damages; and, although on the 21st January, 1916, they held the goods as warehousemen, they were entitled to the benefit of a provision in the shipping contract that "the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment. . . ." When the stipulation is one which, by its terms, is to apply to a state of things which may arise after the goods have arrived at their destination, it remains in force notwithstanding that the transit is ended. [Swale v. Can. Pac. Ry. Co. (1913), 29 O.L.R. 634, 16 Can. Ry. Cas. 363, 15 D.L.R. 816, distinguished; Mayer v. Grand Trunk Ry. Co. (1880), 31 U.C.C.P. 248, referred to.] The damages were accordingly computed on the basis of the value of the goods in May, 1915.

Getty & Scott v. Can. Pac. Ry. Co., 22 Can. Ry. Cas. 297, 40 O.L.R. 260.

Initial or originating carrier—Long haul—Reasonable—Lines—Own.

The initial or originating carrier is entitled to as long a haul as reasonable on its own lines. [Imperial Steel & Wire Co. v. Grand Trunk Ry. Co., 11 Can. Ry. Cas. 395; Can. Pac. Ry. Co. v. Nelson & Fort Sheppard Ry. Co. (memorandum), 11 Can. Ry. Cas. 400; Jacobs Asbestos Co. v. Quebec Central Ry. Co., 19 Can. Ry. Cas. 357; Plymouth Devonport, etc., Ry. Co. v. Great Western Ry. Co., 10 Ry. & Ca. Tr. Cas. 68; Riddle v. Pittsburgh & Lake Erie Ry. Co., 1 I.C.C.R. 374, followed.]

Re Coal Transportation Facilities, 22 Can. Ry. Cas. 338.

Facilities—Sand and gravel—Special doors.

Carriers will not be ordered to supply special doors for box cars, used to carry sand or gravel, as in the case of grain shipments, the circumstances and conditions (see s. 317 of the Railway Act, 1906) of sand and gravel traffic being dissimilar to those of grain traffic.

McKenzie v. Canadian Pacific and Canadian Northern Ry. Cos., 23 Can. Ry. Cas. 99.

Delivery to carrier—Loss of part of goods—Presumption of negligence.

Where goods are shewn to have been delivered to a railway company for carriage, and they are not delivered, at their destination, and no explanation is furnished, negligence may be presumed. Where the initial carrier undertakes the entire transportation, the connecting carriers through whose hands the goods pass in the performance of the contract are the agents of the initial carrier, who is liable for their negligence. [Ferris v. C.N.R. Co. (1905), 15 Man. L.R. 134; Henry v. C.P.R. Co. (1884), 1 Man. L.R. 210, followed.]

Scanlin v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 336, 44 D.L.R. 352.

[Followed in Ogilvie Flour Mills Co. v. Can. Pac. Ry. Co., 25 Can. Ry. Cas., 47 D.L.R. 266.

Cars—Loading—"Shippers load and count"—Bill of lading.

The practice of carriers in endorsing on a bill of lading, the provision "shippers load and count" where cars are loaded by the shipper on private sidings and not checked by the carrier, is reasonable and lawful. See ss. 284 (7), 340, of the Railway Act, 1906.

Bole Grain Co. v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 25.

Shippers load and count—Shipping bill—Effect of receipt—Station agent—Onus of proof.

No effect, as regards a shipper, can be given to the placing of "S.L. & C." upon the shipping bill describing the goods shipped, nor to an explanation given him by the agent of the carrier that there being no opportunity to count the goods his count would have to be accepted. While a shipping bill is a receipt for goods shipped, it is not conclusive and may be controverted by evidence shewing that the goods were not received, the agent of the carrier has no authority to make a contract of carriage binding on the defendants, save in respect of goods actually received, the receipt given is prima facie evidence, which places the onus upon the defendants of explaining it away. [Leduc v. Ward, 20 Q.B.D. 479; Smith & Co. v. Bedouin Steam Navigation Co. (1896), A.C. 70, applied and followed.] Upon the evidence, weighing the preponderating probability having regard to the onus, it was held that the carrier delivered to the plaintiff all the goods it had actually received.

Nathanson v. Grand Trunk Ry. Co., 23 Can. Ry. Cas. 328, 43 O.L.R. 73.

[See Bole Grain Co. v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. at p. 31 note.]

Initial switching carrier—Line haul—Bills of lading.

The Board will not order initial switching carriers to issue through bills of lading covering interswitching of traffic over their lines and the lines of carriers who enjoy the line haul; in the absence of arrangement, two bills of lading are necessary, one by the switching carrier and the other by the line haul carrier.

Renfrew Machinery Co. v. Canadian Freight Assn., 24 Can. Ry. Cas. 31.

"At owner's risk."

Where the carrying of goods is stipulated in the bill of lading to be "at owner's risk," this does not have the effect of excusing a common carrier from its liability for damages caused by its fault, or the fault of those for whom it is responsible.

Ottawa Forwarding Co. v. Ward, 23 D.L.R. 645, 47 Que. S.C. 171.

CONTRACT OF SHIPMENT—FIXING LIABILITY AND VALUE—LOSS OF PART OF SHIPMENT.

Where the contract of shipment fixes the value of the goods shipped and limits the liability of the carrier to that value, in case of a loss of part of the shipment, the shipper may recover the real value of the property lost, not exceeding the limit of liability stipulated in the contract, and is not limited to a recovery of such proportion of the amount named in the contract as the value of the property destroyed bore to the value of all the property shipped. [Gibbon v. Payton (1769), 4 Burr 2298, 98 E.R. 199; Bradley v. Waterhouse (1828), 3 C. & P. 318; McCance v. London & N.W.R. Co. (1864), 3 H. & C. 343, distinguished.]

Spaner Bros. v. Central Canada Express Co., 23 Can. Ry. Cas. 332, 43 D.L.R. 400.

[Appeal to Court of Appeal dismissed. See 23 Can. Ry. Cas. 335.]

ACCEPTANCE OF GOODS FOR CARRIAGE—NEGLIGENCE.

A railway company which, by its local station agent, accepts and receives goods for carriage is bound to use reasonable care for the protection of such goods. If they are carelessly left on the station platform uncovered overnight and thereby become damaged, the company is liable.

Fisher v. Can. Pac. Ry. Co., 44 D.L.R. 517.

LIABILITY FOR DELAY—CONNECTING LINE—JOINT TARIFF.

An initial carrier, who contracted to be liable to the shipper for loss on connecting railways, unless expressly stipulated otherwise, has the burden of proof of the existence of such stipulation.

Ouellet v. Manager of Government Railways, 33 D.L.R. 655.

TERMINATION OF LIABILITY—ARRIVAL OF GOODS—REASONABLE TIME FOR DELIVERY.

The liability of carriers by railway, qua carriers, terminates upon the arrival of the goods carried at their destination and the expiration of a reasonable time for delivery. Where a car of potatoes arrives at a station at 5 A. M. on Saturday in very cold weather the freight should be paid and delivery taken on the same day. [Grand Trunk Ry. Co. v. McMillan, 16 Can. S.C.R. 543, followed.]

Lockshin v. Can. Northern Ry. Co., 24 Can. Ry. Cas. 362, 47 D.L.R. 516.

CARRIAGE ON PERISHABLE GOODS—WRONGFUL DELIVERY—DAMAGES—LOSS OF MARKET—REJECTION OF GOODS BY PURCHASER.

Lemon v. Grand Trunk Ry. Co., 32 O.L.R. 37, 5 O.W.N. 813, 7 O.W.N. 76.

VALID DELIVERY—ONUS OF PROVING—RAILWAY RECEIVING GOODS FOR LAST PORTION OF TRANSPORTATION.

The onus of proving a valid delivery of the goods under a bill of lading by which they were consigned to the consignors or their assigns is upon the railway company which received the goods for the last portion of the transportation from the preceding carrier.

Wolsely Tool & Motor Car Co. v. Jackson, 21 D.L.R. 610.

B. Express and Transfer Companies.

See also A; Carriage of Freight, (p. 77).

DELAY IN DELIVERY OF MERCHANDISE.

A carrier who has no notice of special cause for the delivery of the goods within a given time, is not liable for general damages for delay.

Clarke v. Holliday, 39 Que. S.C. 499.

Licensed expressman—Carrying goods for hire—Liability for loss by fire.

The defendant, duly licensed as an expressman by virtue of a city by-law, was engaged to carry for hire a load of furniture to the railway station in one of his wagons. Before delivery the goods were destroyed by fire, not caused by the act of God or the King's enemies, and not arising from any inherent quality or defect of the goods themselves:—Held, that the defendant was acting as a common carrier, and, as such, not having limited his liability by any condition or contract, was responsible for the loss. [Brind v. Dale, 2 C. & P. 207, doubted; Farley v. Lavery, 54 S.W. Reporter 840 (U.S.), concurred in.]

Culver v. Lester, 37 C.L.J. 421 (McDougall, Co. J.).

Express companies—Cost of transportation.

The appellant agreed with the agent of the company, respondent, at a fixed price for the transportation of goods from France. The respondent having carried a package to Montreal, to the appellant's address, refused to deliver it unless he paid $11.84 for disbursements and cost of transportation, and this without the production of bills of lading and waybills, of which the originals had been sent to New York:—Held, reversing the judgment of Charland, J., that the respondent company could not arbitrarily, and as a condition of delivery, impose upon the plaintiff the payment of this sum, except upon verification and subsequent rebate for overcharge, if any, and that it was liable to indemnify him for such damages as he may have suffered on account of the nondelivery of the package.

Poindron v. American Express Co., 12 Que. K.B. 311.

Nondelivery and conversion of goods—Termination of transitus—Conditional refusal of consignee to accept.

Trees consigned by the plaintiffs to one C. at Aylmer, Quebec, were delivered by a railway company, by mistake, at Aylmer, Ontario. The defendants, pursuant to a message received from the railway company, ("Ship by express C.'s trees to Aylmer, Quebec," carried the trees as far as Ottawa, and were about to send them on by wagon to Aylmer, Quebec, when C., who was the only person known in the transaction by the defendants, appeared at Ottawa, and said to the defendant's agent that he would not accept the trees until he saw one F. There were no further communications between the defendants and C. The defendants held the goods and sought out the consignors and notified them of C.'s refusal:—Held, in an action by the consignors for damages for nondelivery and conversion of the trees, that the defendants' contract was not one to deliver the goods to C. at Aylmer and not elsewhere, and his refusal to accept, even if not absolute, was such as dispensed with any further action on the part of the defendants till they had a message from C. that he was ready and willing to receive; and this never having come, the defendants acted reasonably in holding the goods and notifying the consignors, and were not liable for the loss. The findings of the jury not having supplied material for a final disposition of the case, the Court, acting under Con. Rule 615, instead of directing a new trial, set aside the findings and gave judgment on the whole case for the defendants, deeming that if the proper questions had been put to the jury they could have been answered only in one way.

Smith et al. v. Canadian Express Co., 12 O.L.R. 84.

EXPRESS COMPANY—CONDITIONS OF CARRIAGE—KNOWLEDGE OF CONSIGNOR.

The assent necessary to form a contract cannot exist on the part of a party who is in ignorance of its purpose. Hence, the acceptance by the shipper of the receipt of an express company who carries goods for him does not constitute an agreement on his part to conform to the conditions printed on the back which are neither read over nor explained to him, especially if he is unable to read or write. The carrier is liable for the loss of goods carried up to their value at their destination but not for the profit that the owner might have made by selling them if nothing took place when the contract for carriage was made to make him aware that such would be the consequence of his failure to execute it.

Black v. Canadian Express Co., 36 Que. S.C. 499.

EXPRESS COMPANIES—CONNECTING LINES—GOODS DAMAGED DURING TRANSIT.

An express company is not responsible for the damages to goods entrusted for carriage, when the accident happened on another and connecting line of transfer, and the bill of lading contained a clause by which the company was relieved from any liability if the loss or injury happened at a place beyond its lines or control.

Neil v. American Express Co., 2 Can. Ry. Cas. 111, 20 Que. S.C. 253.

PERISHABLE GOODS—DELAY IN TRANSMISSION—LIABILITY.

The defendants undertook to forward a consignment of fish from Selkirk, Manitoba, to Toronto, Ontario, subject to certain conditions expressed in the contract:—Held, that the defendants' engagement implied that a safe and rapid transit would be furnished for the whole distance, and that contract was broken when the perishable goods were transferred to a freight train at Winnipeg, by which delivery was delayed; and this was negligence for which the defendants were liable as common carriers.

James Co. v. Dominion Express Co., 6 Can. Ry. Cas. 309, 13 O.L.R. 211.

[Approved in Dominion Express Co. v. Rutenberg, 18 Que. K.B. 53.]

TRANSFER COMPANY—LOSS OF BAGGAGE—CONDITIONS OF RECEIPT.

Defendants carried and delivered baggage to and from railways, steamboats, etc. The plaintiff, who was a passenger on a steamer, on his arrival at the wharf in Toronto handed the steamer check for his trunk to his father-in-law, R., to have the trunk sent up to R.'s house. R., who was an employee in the customs, handed the check to H., also a customs officer, and asked him to pass the trunk and have it sent up to the house. H. gave D., the defendant's agent, on the wharf, the check and twenty-five cents which R. had given him, told him to have the trunk sent up to R.'s house, and walked away. D. then gave the money to S., a soliciting agent of the defendants, and proceeded to take the steamer check off the trunk. H. returned in about fifteen minutes after he had left the check and the money with D., and asked him for a receipt for the trunk. S. then wrote out the receipt and handed it to H., who looked at but did not read it, nor was his attention called to any terms upon it. He knew, however, that the defendants were in the habit of giving receipts upon taking over baggage for transfer. About an hour and a half thereafter H. handed the check to R., who passed it on to the plaintiff, who did not read it till about ten days afterwards. The receipt was a document which had legibly printed on its face a notice by which the defendants agreed to receive and forward the article for which the receipt was given, subject to a condition that they should "not be liable for any loss or damage of any trunk . . . for over $50." The receipt was in a form generally used by the defendants in the course of their business, and no proof was given that their agents, who did the work of receiving and receipting for baggage had authority to receive it on any other footing. The trunk was lost or stolen; but without negligence on the part of the defendants. The defendants tendered to the plaintiff $50 as in full discharge of their liability under their contract, which the plaintiff refused, and brought this action:—Held, that the plaintiff was entitled to recover the full value of the trunk and its contents, inasmuch as the defendants, who as common carriers were liable to their customer for the full value of the property entrusted to their care in the absence of notice, brought home to the customer, that their liability was limited to a certain sum, had failed to discharge the onus which lay upon them to shew that the plaintiff at the time when he made his contract with the defendants had received notice that their liability was limited, or that the stipulation limiting their liability had been at any time accepted by him as a term of his contract. [Harris v. Great Western Ry. Co. (1876), 1 Q.B.D. 515; Henderson v. Stevenson (1875), L.R. 2 H.L. Sc. 470, and other cases bearing on the liability of carriers for loss or damage to luggage discussed.] Per Meredith, J.A., that the question whether the plaintiff had accepted the condition limiting the defendants' liability was one of fact, and the finding of the trial Judge in favour of the defendants should not be reversed unless plainly shewn to be wrong on the evidence. Judgment of a Divisional Court reversing the judgment of Boyd, C., at the trial, affirmed.

Lamont v. Canadian Transfer Co., 9 Can. Ry. Cas. 387, 19 O.L.R. 291. [Distinguished in Spencer v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 207.]

Intoxicating liquors—Provincial powers as to—Interprovincial trade—Liability for refusal to carry lawful shipment of liquor.

Gold Seal v. Dominion Express Co., 37 D.L.R. 769.

Delay in delivery of goods.

A carrier in the habit of receiving moving picture films, to be delivered for their exhibition on a certain date, is liable to the shipper for the loss occasioned by a delay in the delivery until after that date.

Victoria Dominion Theatre Co. v. Dominion Express Co., 35 D.L.R. 728, 23 B.C.R. 396.

C. Charges.

Wrongful sale of goods for nonpayment of freight.

Conditions in a shipping receipt relieving the carrier from liability for loss or damage arising out of "the safe keeping and carriage of the goods," even though caused by the negligence, carelessness or want of skill of the carrier's officers, servants or workmen, without the actual fault or privity of the carriers, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carrier. A shipping receipt with terms as above was for carriage by the defendants' line and other connecting lines of transportation and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with plaintiff but delivered the receipt to his agent at the point of the shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the shipping season of 1899, the variation being shewn by a clause stamped across the receipt, of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transportation on account of nonpayment of freight by one of the companies in control of a connecting line to which the goods had been delivered by the defendants:—Held, that the plaintiff's agent at the shipping point had no authority, as such, to consent to a variation of the special contract, nor could the carrier do so by inserting the clause in the receipt without the concurrence of the plaintiff; that the sale, so made at the intermediate point, amounted to a wrongful conversion of the goods by the defendants, and that they were not exempted by the terms of the shipping receipt from liability for their full value. As the evidence shewed definitely what damages had been sustained, and there being no good reason for remitting the case back for a new trial, the Supreme Court of Canada, in reversing the judgment appealed from (9 B.C. 82), ordered that the damages should be reduced to those proved in respect of the goods sold and converted. Armour, J., however, was of opinion that the judgment of Craig, J., at the trial, including damages for the loss on other goods, should be restored.

Wilson v. Canadian Development Co., 33 Can. S.C.R. 432.

SEIZURE FOR UNPAID TOLLS—TERMINATION OF CARRIER'S LIEN—DEMAND—CONVERSION.

By s. 345 of the Railway Act, 1906, a railway company may, instead of proceeding by action for the recovery of tolls upon goods carried, "seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof," etc.:—Held, that a railway company are not, by this enactment, given a lien on property carried, to such an extent and of so general and wide an application as to allow them to retake goods which have been delivered, and as to which the ordinary carrier's lien has terminated; the section does nothing more than confirm and establish the carrier's lien; there is the right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee. Semble, that in this case there was not a sufficient demand for the tolls due to the defendants, on account of which they seized goods which they had previously delivered to the consignee, the demand being for a gross sum, including a sum for tolls:—Held, also, that the defendants, having converted the goods, were liable for damages; and the measure was the value of the goods.

Clisdell v. Kingston & Pembroke Ry. Co., 9 Can. Ry. Cas. 78, 18 O.L.R. 251.

ACTION FOR FREIGHT—REMEDIES OF CONSIGNEE—ACCEPTANCE BY CONSIGNEE.

Defendants purchased a quantity of cement for shipment to them at Regina, and it was so shipped by the consignors. The contract of shipment provided that delivery should be made in the railway company's shed at destination or when the goods had arrived at the place to be reached on the company's railway. The goods arrived at Regina and were with the consent of the defendant placed for unloading at a point indicated by the defendant's manager. The goods were subsequently taken away by another party who had purchased them from defendant and who did not pay the freight, and the defendant refusing to pay the same the plaintiff brought action to recover the charges:—Held, where goods are with the consent or by the authority of the purchaser consigned by the vendors as consignors to be carried by a railway company as common carriers to be delivered to the purchaser as consignee, and the name of the consignee is known to the carrier, the ordinary inference is that the contract of carriage is between the carrier and consignee, the consignor being the agent of the consignee to make it, and the contract in this case was therefore between the carrier and the consignee. (2) That the plaintiff company could therefore maintain an action for recovery of the freight charge from the consignee. (3) That the plaintiff completed its contract and became entitled to recover its charges when the car containing the goods was placed for unloading with the knowledge and consent of the consignee.

Can. Pac. Ry. Co. v. Forest City Paving & Construction Co., 10 Can Ry. Cas. 295, 2 Sask. L.R. 413.

WRONGFUL SALE OF GOODS FOR UNPAID CHARGES.

A carrier sued for conversion of goods by the consignor in respect of an alleged neglect of duty on the part of the auctioneer employed by the carrier to sell the goods for unpaid charges, and for alleged failure to account for all of the goods sold, may properly bring in the auctioneer as a third party and claim indemnity and relief over against him under Ont. Rule 209 (C.R. 1897). [Swale v. Can. Pac. Ry. Co., 1 D.L.R. 501, 3 O.W.N 601, reversed.]

Swale v. Can. Pac. Ry. Co. (No. 2), 2 D.L.R. 84, 25 O.L.R. 492.

WRONGFUL SALE OF GOODS.

An auctioneer to whom goods in bulk are entrusted by a carrier to sell for unpaid charges against them impliedly contracts with the warehousemen employing him, that he will exercise reasonable care in selling the goods. [Gagné v. Rainy River Lumber Co., 20 O.L.R. 433, specially referred to.]

Swale v. Can. Pac. Ry. Co. (No. 2), 2 D.L.R. 84, 25 O.L.R. 492.

SALE OF GOODS TO PAY CHARGES—FAILURE TO DELIVER SURPLUS GOODS—NEGLIGENCE OF AUCTIONEER—BILL OF LADING LIMITING AMOUNT OF RECOVERY.

Swale v. Can. Pac. Ry. Co., 10 D.L.R. 815, 24 O.W.R. 224.

"SWITCHING CHARGES."

Grand Trunk Ry. Co. v. Laidlaw Lumber Co., 2 O.W.N. 548, 18 O.W.R. 340.

CONTRACT FOR CARRIAGE— ACTION FOR DAMAGES FOR BREACH BY FAILURE TO DELIVER IN TIME—LIEN FOR FREIGHT—EVIDENCE.

Ludwig v. Beede, 8 W.L.R. 973 (Y.T.).

UNCLAIMED FREIGHT—SALE FOR CHARGES.

Where a consignee fails to pay the charges and takes over the goods at the destination, the railway company has a right to detain them and to sell them for unpaid charges under the statutory authority conferred by the Railway Act, 1906, ss. 345, 346, and the goods remain "at owner's risk" while in the custody of the railway; but the railway company is not excused thereby from responsibility for the default of an auctioneer to whom the goods were handed over to sell for unpaid charges to account for the surplus of the goods not required for that purpose and the railway company will be liable for such negligence of its agent, the auctioneer, as would make a bailee liable for damages or would constitute conversion. [Dixon v. Richelieu Navigation Co., 15 A.R. (Ont.) 647, followed.]

Swale v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 363, 29 O.L.R. 634, 15 D.L.R. 816.

STATUTORY RIGHT TO SELL UNCLAIMED FREIGHT FOR CHARGES—EMPLOYMENT OF AUCTIONEER—AGENCY.

The Railway Act, 1906, does not require the employment of a licensed auctioneer to carry on the sale of unclaimed freight for unpaid tolls; the statutory right conferred on the railway company to sell by auction goods on which the charges have not been paid is one necessary to the carrying on of a railway business and such right cannot be qualified by any limitations imposed by provincial authority. [Grand Trunk Ry. Co. v. Attorney-General of Canada [1907] A.C. 65, 7 Can. Ry. Cas. 472, followed.]

Swale v. Can. Pac. Ry. Co. 16 Can. Ry. Cas. 363, 29 O.L.R. 634, 15 D.L.R. 816.

MISTAKE IN EXPENSE BILL—FREIGHT CHARGES UNPAID—RIGHT OF CARRIER TO RECOVER.

Where the consignee of goods is not the purchaser or otherwise the owner of them and owing to the carrier's mistake in the making out of the expense bill is led to suppose on the delivery of the goods to him that the freight charges have been paid, such charges cannot be recovered from him by the carrier. [Domett v. Beckford, 3 Barn. & Adol. 524, 39 R.R. 559, 2 N. & M. 374, 3 L.J.K.B. 10, followed.]

Can. Pac. Ry. Co. v. Watts, 19 Can. Ry. Cas. 338, 8 Alta. L.R. 174, 20 D.L.R. 607.

CONSIGNEE'S DELAY IN UNLOADING—NOTICE TO SHIPPER.

When a railway company has delivered to a consignee goods which it undertook to carry, it is not bound to notify the shipper of delay caused by the consignee in unloading, and of the costs incurred by the consignee in consequence. If the shipper subsequently pays such costs, to the discharge of the consignee, he has no action in repetition (i.e., money paid under a mistake) against the railway company.

Raine v. G.T.R. Co., 54 Que. S.C. 474.

CARRIERS OF PASSENGERS.

A. Injuries to Passengers.
B. Duty of Protection; Trespassers.
C. Ejection from Train.

Injury to passenger by reason of defective bridge, see Bridges.

Injuries occasioned by reason of defective station grounds, see Stations.

Ejection of passenger for violating conditions of ticket, see Tickets and Fares.

Injuries to employees, see Employees.

Loss of baggage, see Baggage.

See Government Railways; Train Service.

Annotations.

Duties and liabilities of carriers of passengers. 1 Can. Ry. Cas. 262.

Carrier's duty to protect passengers. 2 Can. Ry. Cas. 96.

Carriers of passengers and duties toward passengers alighting from cars. 2 Can. Ry. Cas. 37.

Liability of carrier for injuries to passengers riding on platform. 4 Can. Ry. Cas. 258.

Duty of carriers to provide accommodation for passengers. 4 Can. Ry. Cas. 427.

Transportation of immigrants. 4 Can Ry. Cas. 416.

Liability of carrier for injuries inflicted by fellow passenger. 4 Can. Ry. Cas. 448.

Liability of carrier for injuries to passenger or licensee. 2 Can. Ry. Cas. 64, 4 Can. Ry. Cas. 200, 4 Can. Ry. Cas. 491.

Licensees and trespassers. 12 Can. Ry. Cas. 245.

Evidence of negligence in carrying passengers. 9 Can. Ry. Cas. 269.
Review of cases on negligence. 3 Can. Ry. Cas. 316.
The Crown as a common carrier, 35 D.L.R. 285.
Liability of carrier of passengers as a common carrier, 23 Can. Ry. Cas. 305.

A. Injuries to Passengers.

See also Limitation of Liability (B); Street Railways (G); Negligence (A.)

DERAILMENT OF TRAIN.

Where the breaking of a rail is shewn to be due to the severity of the climate and the suddenly great variation of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selection, testing, laying and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail. Fournier, J., dissenting, on the ground that as the accident was caused by a latent defect in the rail in use, the company was responsible. Mont. L.R. 2 S.C. 171, Mont. L.R. 3 Q.B. 324, reversed.

Can. Pac. Ry. Co. v. Chalifoux, 22 Can. S.C.R. 721, 24 C.L.J. 501.

[Applied in Guinea v. Campbell, 22 Que. S.C. 261; referred to in Quebec & Lake St. John Ry. Co. v. Duquet, 14 Que. K.B. 484; Quebec Central Ry. Co. v. Lortie, 22 Can. S.C.R. 343.]

NEGLIGENCE IN ALIGHTING—TRAIN LONGER THAN PLATFORM.

L. was the holder of a ticket and a passenger on the company's train from Levis to Ste. Marie Beuce. When the train arrived at Ste. Marie station, the car upon which L. had been traveling was some distance from the station platform, the train being longer than the platform, and L., fearing that the car would not be brought up to the station, the time for stopping having nearly elapsed, got out at the end of the car, and, the distance to the ground from the steps being about two feet and a half, in so doing he fell and broke his leg, which had to be amputated. The action was for $5,000 damages, alleging negligence and want of proper accommodation. The defence was contributory negligence. Upon the evidence the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, gave judgment in favour of L. for the whole amount. On appeal to the Supreme Court of Canada:—Held, reversing the judgments of the Courts below, that in the exercise of ordinary care, L. could have safely gained the platform by passing through the car forward, and that the accident was wholly attributable to his own default in alighting as he did, and therefore he could not recover; Fournier, J., dissenting.

Quebec Central Ry. Co. v. Lortie, 22 Can. S.C.R. 336.

[Referred to in Guay v. Can. North. Ry. Co., 15 Man. L.R. 279.]

PASSENGER ALIGHTING FROM TRAIN WHERE NO PLATFORM.

If there is a platform at a railway station, the railway company is bound to bring the passenger car of a train stopping there up to the platform to permit passengers to step down on it in alighting, or to provide some other safe means for passengers to alight. The plaintiff was a passenger on one of defendants' trains. On stopping at the station where she wished to get off, the train was left so that the car in which the plaintiff was, stood entirely behind the station platform. The conductor having offered plaintiff his hand to assist her in alighting, she took it and jumped to the ground, three feet below. The ground at that point sloped slightly downwards from the track and was slippery with snow or ice. The plaintiff received serious injury in consequence of the jump. She was two months advanced in pregnancy, was very unwell for the next six days and then had a miscarriage, from which she suffered great weakness for a considerable time. Plaintiff did not know at the time she jumped that there was a platform at the station:—Held, (1) The defendants were liable in damages for the injury suffered by plaintiff, as the conductor had been guilty of negligence. (2) The plaintiff was not bound to disclose her pregnancy to the conductor, so that he might know that special care was necessary in aiding her to alight.

Guay v. Can. Northern Ry. Co., 15 Man. L.R. 275.

Collision—Negligence of conductor.

While the plaintiff was being conveyed as a passenger on a car of the defendants, he was injured in consequence of the car being run into from behind by another car on the same track. The motorman and conductor of the other car had, contrary to the express rules of the company, exchanged places, and the conductor in operating the car, either through negligence or incompetence, allowed the collision to take place:—Held, that the negligence of the motorman in abandoning his post to the conductor was the effective cause of the accident, and that the defendants were liable in damages for the injury to the plaintiff, although the conductor, whose act was the immediate cause of the accident, was not acting within the scope of his employment at the time. [Englehart v. Farrant, [1897] 1 Q.B. 240, followed; Gwilliam v. Twist, [1895] 2 Q.B. 84; Beard v. London, [1900] 2 Q.B. 530; Harris v. Fiat (1907), 23 T.L.R. 504, distinguished]: — Held, that, in order to make the defendants as carriers of passengers by the railway liable to the plaintiff, it was enough to shew that the negligence or omission which caused the accident was that of the defendants' servants then in actual charge of the car. [Wright v. Midland Ry. Co. (1873), L.R. 8 Ex. 137; Thomas v. Rhymney Ry. Co. (1871), L.R. 6 Q.B. 266, and Taylor Manchester, etc. Ry. Co., [1895] 1 Q.B. 134, followed; Vance v. G.T.P. Ry. Co. (1910), 17 O.W.R. 1000, distinguished.]

Hill v. Winnipeg Elec. Ry. Co., 21 Man. L.R. 442.

Negligence in manner of running trains—Ordinary incident in railway traveling.

Plaintiff was a passenger by a night train on the defendant company's railway between Montreal and Toronto. After retiring to the berth assigned to her—an upper one—she endeavoured to make some change in the manner in which the berth was made up. She next tried to reach the other end of the berth from the inside, but, just as she leaned to the inside of the car, there was a violent lurch and jerk which threw her into the middle of the passage way, on her back, inflicting severe injuries. On the trial of the action brought by plaintiff to recover damages for the injuries sustained by her, the learned trial Judge withdrew the case from the jury for the reasons (1) that there was no evidence of negligence on the part of the defendant, and (2) that the plaintiff's evidence was consistent with the view that her own efforts to better her condition, in her fear arising from the motion of the car, resulted in the accident:—Held, there being doubt as to the proper inference to be deduced from the facts in proof, there being two reasonable but different views that might be taken, that the case was improperly withdrawn from the jury, and plaintiff was entitled to an order for a new trial with costs:—Held, that, apart from the question of plaintiff's negligence in attempting to turn in her berth, or the occasion for making such a change, there was evidence for the jury of negligence on the part of defendant. Semble, that a train should not be managed in such a way, whether by excessive speed in going around curves or otherwise, that a passenger should be thrown from the berth by the swaying and lurching of the car, this being not at all an ordinary incident in railway traveling.

Smith v. Can. Pac. Ry. Co., 1 Can. Ry. Cas. 231, 34 N.S.R. 22.

[Reversed in 31 Can. S.C.R. 367, 1 Can. Ry. Cas 255; followed in Lougheed v. Hamilton, 1 Alta. L.R 17, 7 W.L.R. 204; referred to in Jackson v. Can. Pac. Ry. Co., 1 S.L.R. 88.]

NEGLIGENCE—PASSENGER IN SLEEPING BERTH.

S., an elderly lady, was traveling on a train of the C.P.R. Co. from Montreal to Toronto. While in a sleeping berth at night, believing that she was riding with her back to the engine, she tried to turn around in her berth, and the car going around a curve at the time she was thrown out on to the floor and injured her back. On the trial of an action against the company for damages it was not shewn that the speed of the train was excessive or that there was any defect in the roadbed at the place where the accident occurred to which it could be attributed:—Held, reversing the judgment of the Supreme Court of Nova Scotia (1 Can. Ry. Cas. 231), that the accident could not be attributed to any negligence of the servants of the company which would make it liable in damages to S. therefor.

Can. Pac. Ry. Co. v. Smith, 1 Can. Ry. Cas. 255, 31 Can. S.C.R. 367.

FALLING FROM PLATFORM OF VESTIBULE CAR—MOVING TRAIN.

Railway companies are not insurers of their passengers. Where a passenger while passing through a vestibule from one car to another on a moving train fell from the platform through a door partially opened by some unknown means and was killed:—Held, that there was no evidence from which the jury might reasonably have inferred negligence on the part of the defendants, causing the accident, and the defendants were entitled to a nonsuit.

Campbell v. Can. Pac. Ry. Co., 1 Can. Ry. Cas. 258.

[Inapplicable in Bell v. Winnipeg Elec. Street Ry. Co., 15 Man. L.R. 344.]

NEGLIGENCE IN STOPPING TRAIN—OPPORTUNITY TO ALIGHT.

A railway company which has undertaken to carry a passenger to a station on its line must stop its train at that station long enough to give the passenger a reasonable opportunity of getting off. If the train stops and the passenger, after making reasonable efforts to do so, is unable to get off before it starts again, and jumps off and is injured, the company is liable in damages; provided, however, that when the passenger jumps off the train is not moving at such a rate of speed as to make the danger of jumping obvious to a person of reasonable intelligence.

Keith v. Ottawa & New York Ry. Co., 2 Can. Ry. Cas. 23, 3 O.L.R. 265.

[Affirmed in 5 O.L.R. 116, 2 Can. Ry. Cas. 26.]

ALIGHTING FROM TRAIN WHILE IN MOTION—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

The fact of a passenger getting off a train while it is in motion is not necessarily negligence. In every case it is a question to be decided by the jury whether the passenger acted as a reasonable man would do under the circumstances. Where a train, scheduled to stop at a named station, did not on arriving there stop a sufficient length of time to enable the passengers to get off, and a passenger in attempting to do so, after the train had started again, fell and was injured, and it was found by the jury on the evidence that he acted as a reasonable man would do under the circumstances, the Court declined to interfere with the finding.

Keith v. Ottawa & New York Ry. Co., 2 Can. Ry. Cas. 26, 5 O.L.R. 116.

[Referred to in Simpson v. Toronto & York Radial Ry. Co., 16 O.L.R. 31; applied in McDougall v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 316, 8 D.L.R. 271.]

DEFECTIVE DOOR APPLIANCES—INJURY TO CHILD PASSENGER.

The plaintiff, a boy four years of age, with his parents, was being carried as a passenger on a steamboat of the defendants. The child and his mother were in a house on the boat's deck, leading from which out on to the deck were doors fitted with appliances intended to keep them fastened back, when they should happen to be flung wide open. While the plaintiff was in the act of passing through one of the doorways to get out on the deck to his father, the door swung to and jammed his fingers, so that the tips of some of them had to be amputated. The plaintiff's father and elder brother swore that the fastening of the door was out of order, and would not hold it back. There was evidence to shew that the doors of the house were frequently being opened and shut by passengers and others, and that a very few minutes before the accident a passenger had gone through the doorway in question, leaving the door on the swing. It was also proved that the fastenings had been put on the door in order to hold them open in warm weather for the purpose of ventilation. In an action on the case for negligence brought on the part of the plaintiff by his father as his next friend against the company to recover damages for the injury above mentioned:—Held, that there was no duty cast upon the defendant company to provide the doors with the appliances mentioned or to maintain them in good working order; and, even if they were, the evidence went to shew that the proximate cause of the accident was the act of the passenger in leaving the door on the swing, for which the company could not be held liable.

Cormier v. Dominion Atlantic Ry. Co., 3 Can. Ry. Cas. 304, 36 N.B.R. 10.

CROWDED TRAINS—STANDING ON PLATFORM—CONTRIBUTORY NEGLIGENCE.

The plaintiff when traveling by a train of the defendants was forced by overcrowding to resort to the platform outside one of the cars, and for better protection sat down on the second step, and while so sitting was thrust out by a swerve of the train, which made the people standing on the platform press up against him suddenly. This caused him to lose his balance, and one of his legs protruding, was struck by some fixture on the track, and he sustained injuries:—Held, that the defendants were liable. [Metropolitan Ry. Co. v. Jackson (1877), 3 App. Cas. 193, specially referred to.]

Burriss v. Pere Marquette Ry. Co., 4 Can. Ry. Cas. 251, 9 O.L.R. 259.

LATENT DEFECT IN WHEEL OF CAR—DERAILMENT.

The plaintiff brought this action for injury sustained by her owing to the breaking of a flange in the hind wheel of a car of the defendants, on which she was a passenger, on the occasion of an excursion, causing partial derailment and her violent ejection. The flange broke because of an inherent defect in the shape of an airhole at the time of the manufacture of the wheel. The defendants did not shew what tests had been applied by the manufacturers of the wheel, or what could be done to detect the flaw;

neither did they shew that they themselves made any proper examination of the wheel before using it:—Held, that the defendants had failed adequately to discharge their duty of examining thoroughly and skilfully the equipment furnished for the excursion and were liable. Judgment of Clute, J., affirmed.

Gaiser v. Niagara St. Catharines & Toronto Ry. Co., 9 Can. Ry. Cas. 266, 19 O.L.R. 31.

Absence of facility for alighting—Contributory negligence.

Plaintiff was a passenger lawfully on a passenger train of a railway company. On arriving at her destination the train stopped, the name of the place was announced, and the plaintiff, finding the door of the car open, went out and stepped off, expecting to step on the platform, but there being no platform she fell four feet and was injured. It was late at night, very dark, and no lights were provided and the plaintiff was unfamiliar with the surroundings:—Held, that under the Railway Act it was the duty of the company to provide proper facilities for passengers alighting from their trains. (2) That the announcement of the station, the stoppage of the train, and the open door, constituted an invitation to the plaintiff to alight, and an intimation that she might alight safely, and no warning being given the company was guilty of negligence if the passenger, without contributory negligence, did not alight safely. (3) That under the circumstances the defendant was entitled to alight, and there was no contributory negligence in not satisfying herself that there was a platform to alight upon.

Wray v. Can. Northern Ry. Co., 10 Can. Ry. Cas. 196, 3 Sask. L.R. 42.

Passenger crossing tracks at station.

The plaintiff sued the Wabash and Grand Trunk railway companies to recover damages for injury caused to her by a train of the Wabash company, at the Belle River railway station. The railway was owned by the Grand Trunk company, the Wabash company having running rights over it. The plaintiff was a passenger on a Grand Trunk train, and alighted at the Belle River station for the purpose of going to the village. There were two tracks, running east and west, and the plaintiff was on the platform on the north side of the two tracks, which she had to cross in a southerly direction to reach the village. At the easterly end of the station platform was a sidewalk and pathway for foot passengers, but this pathway where it crossed the railway right-of-way was not a public highway, but the private property of the Grand Trunk company. The Grand Trunk train by which the plaintiff had arrived was on the southerly track, and the plaintiff was standing just clear of the north track, waiting for that train to proceed easterly before she attempted to cross. As the last car reached the crossing, she stepped upon the north track, in front of a Wabash train approaching from the east, and sustained the injuries complained of. There was nothing to obstruct the view from the platform to the approaching Wabash train, and warning of its approach had been given by whistling. The jury found negligence on the part of both companies—the Grand Trunk, because "they should have taken more care of the passengers on account of the train being late:" and the Wabash, because they "did not take proper precautions knowing that the Grand Trunk train was late":—Held, that the action was properly dismissed by the trial Judge, whether as upon a nonsuit because there was no evidence of negligence on the part of the defendants, or either of them, or upon the findings of the jury, in effect negativing negligence other than as found by them, and they having found no act of negligence which caused the injury. Judgment of Middleton, J., affirmed. Per Riddell, J. That it was properly ruled at the trial that the station-master's statement after the accident was not admissible as evidence against the defendants: [Wilson v. Botsford-Jenks Co. (1902), 1 O.W.R. 101]:—Held, also, per curiam, that a new trial should not be ordered. Per Mulock, C.J.:—That there was no reason to suppose that upon a new trial the evidence would be different; and no exception could be taken to the charge, the Judge having instructed the jury that, if they found negligence causing the accident, they must go further and find the particular act of negligence which caused the accident. Per Riddell, J.:—That it would be improper to send the case back for a new trial on the supposition that another jury might find some specific act of negligence which the former jury could not. [Cooledge v. Toronto Ry. Co. (1907), 10 O.W.R. 739.] Semble, per Riddell, J.:—That, even if negligence had been proved against the defendants, the plaintiff could not recover, for everything proved was consistent with the plaintiff's own negligence, and there was nothing to contraindicate it.

Antaya v. Wabash Ry. Co., 12 Can. Ry. Cas. 448, 24 O.L.R. 88.

Duty to close vestibule door—Finding as to negligence.

Upon a question of fact, as to whether the rear vestibule and trap doors of a day car of a railway train, on which car the plaintiff was riding, were closed while the train was standing at a certain station; where the jury balances the probabilities (a) on the testimony of the defendant company's conductor and brakeman for the negative and (b) on that of the plaintiff and a disinterested witness for the affirmative, and finds on that point for the plaintiff, such finding is within the jury's province and will not be disturbed.

McDougall v. Grand Trunk Ry. Co. (Ont.), 14 Can. Ry. Cas. 316, 8 D.L.R. 271.

Hotelkeeper—Conveyance of guest from station—Hire of omnibus.

Barker v. Pollock, 4 W.L.R. 327 (Terr.).

Passenger attempting to board car—Findings of jury—Evidence—Damages.

D'Eye v. Toronto Ry. Co., 3 O.W.N. 38, 20 O.W.R. 5.

Contributory negligence—Car leaving track—Passenger jumping from car.

Shea v. Halifax & S.W. Ry. Co., 3 E.L.R. 431 (N.S.).

Negligence of street railway—Allowing time to alight—Inferences.

Where the circumstances of the case are such that positive and direct evidence of specific negligence cannot be given, as where a street car had stopped to permit a passenger to alight, and the latter, while in the act of alighting, is rendered unconscious so as not to be able to remember what happened after getting to the car step, and where it is proved that when the car had proceeded only a short distance ahead without knowledge of the accident by any one on it, the passenger was found injured and unconscious by the track, and where there was no evidence to indicate any intervening cause, the jury may infer in the absence of any evidence for the defence, that the car had been negligently started before the passenger had alighted, and that such negligence caused the fall and consequent injuries. [Schwartz v. Winnipeg Elec. Ry. Co., 9 D.L.R. 708, 23 Man. L.R. 60, affirmed; McArthur v. Dominion Cartridge Co., [1905] A.C. 72, and Grand Trunk Ry. Co. v. Hainer, 36 Can. S.C.R. 180, followed.]

Winnipeg Elec. Ry. Co. v. Schwartz, 17 Can. Ry. Cas. 1, 49 Can. S.C.R. 80, 16 D.L.R. 681.

EVIDENCE—PRESUMPTION OF NEGLIGENCE—DERAILMENT—WHO ARE PASSENGERS—PERSON OBTAINING REDUCED FARE WRONGFULLY.

The presumption of negligence arising from an injury to a passenger as the result of the derailment of a car at a switch over which many passenger trains passed daily, is not displaced by the railway company shewing that the accident was caused by the working out of an insecurely fastened bolt from a switch rod, if the defective condition should have been discovered by ordinary care. The fact that a person who was injured by the derailment of a passenger car, obtained his ticket at a reduced rate by presenting a commercial traveler's card after he had ceased to be entitled to use it, does not make him a trespasser on the train so as to relieve the carrier from liability.

Ashbee v. Can. Northern Ry. Co., 18 Can. Ry. Cas. 87, 14 D.L.R. 701, 6 Sask. L.R. 135.

DERAILMENT OF CAR—EFFECT OF, IN NEGLIGENCE CASES—HOW WAIVED.

Although proof of derailment of a railway car and its resultant injury generally establishes a prima facie case of negligence against the defendant company in a personal injury action, yet the plaintiff who goes further and undertakes without success to shew specifically the cause of such derailment thereby waives the prima facie case upon which he might otherwise have relied.

Curry v. Sandwich, Windsor & Amherstburg Ry. Co., 18 D.L.R. 685.

PASSENGER STEPPING OFF MOVING TRAIN—INVITATION TO ALIGHT—NEGLIGENCE.

The conductor of a vestibuled car, in the service of the defendant company, on a dark night, after announcing the station, said to a passenger, "This is your station; this is where you get off," and opened the door of the car, and going into the vestibule, opened the trap or outside door, and the passenger followed down the steps, unwarned by the conductor, and stepped off the train while it was in motion, and was fatally injured. The court was equally divided as to whether or not the defendant company was guilty of negligence.

Mayne v. Grand Trunk Ry. Co., 22 Can. Ry. Cas. 199, 39 O.L.R. 1, 34 D.L.R. 644.

[Reversed in 22 Can. Ry. Cas. 218.]

PASSENGER STEPPING OFF TRAIN—INVITATION TO ALIGHT—NEGLIGENCE.

A conductor of a passenger train, who after telling a passenger that the next stop is his station, "where you get off," opened the door guarding the steps of the car, and allowed the passenger to go down the steps from which the passenger stepped off, while the train was still going at a high rate of speed, was not guilty of negligence; the conductor was entitled to assume that the passenger would act with ordinary prudence and discretion. [Mayne v. Grand Trunk Ry. Co., 22 Can. Ry. Cas. 199, 39 O.L.R. 1, 34 D.L.R. 644, reversed.]

Grand Trunk Ry. Co. v. Mayne, 22 Can. Ry. Cas. 218, 56 Can. S.C.R. 95, 39 D.L.R. 691.

[Approved in Can. Pac. Ry. Co. v. Hay, 46 D.L.R. 87, 24 Can. Ry. Cas. 359, 58 Can. S.C.R. 283.]

STREET RAILWAYS—INVITATION TO ALIGHT WHILE CAR MOVING—NEGLIGENCE.

The opening of the door of a street car by the conductor at a regular stopping place is prima facie an invitation to alight: and if the car is moving slowly so that a reasonably careful passenger thinks the car has stopped, it is negligence on the part of the company. [Mayne v. Grand Trunk Ry. Co., 39 O.L.R. 1, 34 D.L.R. 644 (reversed in 56 Can. S.C.R. 95, 39 D.L.R. 691, 22 Can. Ry. Cas. 199, 218), referred to.]

Gazey v. Toronto Ry. Co., 22 Can. Ry. Cas. 233, 40 O.L.R. 449, 38 D.L.R. 637.

STREET RAILWAY—INJURY TO PERSON ATTEMPTING TO ENTER MOVING CAR—"INVITATION"—SUDDEN INCREASE OF SPEED—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—FINDINGS OF JURY.

The plaintiff, a workingman, elderly but active, was crossing from the north side of a street to the south with the intention of becoming a passenger upon an east bound car of the defendants, which had reached a stopping place and was standing still, and which he could not enter except by the rear door on the south side. The car began to move when he was about halfway across the street, but the motorman motioned him to go in front of the car, and stopped it; the plaintiff passed in front of the car and proceeded to the rear end of it; before he reached that end, the car had (without any signal from the conductor) begun to move slowly: the plaintiff attempted to step on; but, as he did so, the car gave "a sudden jolt forward," he failed to get on the step of the platform, fell, and was injured. At the trial of an action for damages for his injuries, there was no conflict of testimony; and the jury found: (1) That the plaintiff was invited by the motorman to get on the car when it was in motion; (2) that the danger of getting on the car when in motion was not so obvious that a reasonable man would not have accepted the invitation; (3) that the plaintiff's injuries were caused by the negligence of the defendants; (4) in "not seeing the passenger safely on the car;" (5) no contributory negligence. The Court affirmed a judgment for the plaintiff, the findings of the jury being considered such as reasonable men might make upon the evidence. Per Meredith, C.J.C.P.:—The conclusion that reasonable men could find that the car was stopped to take up the plaintiff being reached, the finding must be for the plaintiff on the question of the defendants' negligence; because it was negligent to put the car in motion again until the motorman was signalled by the conductor to do so. Proof of the fact that a person attempts to board or alight from a street car in motion is not necessarily proof of contributory negligence. The question is, whether, in all the circumstances of the case, the attempt shews a want of that care which is ordinarily taken in the like circumstances. It must always be a question of circumstances, and generally a question for the jury. A standing car is not necessarily an invitation to enter, if an invitation be needed; neither is a slowly moving car a revocation of an invitation—if there were any—so long as the door is open and no attempt is made to prevent boarding or alighting. The word "invitation" is inappropriate and aften misused. The defendants are carriers for hire, obliged to carry, not those they invite, but every one willing to pay the fare. Per Lennox, J.:—There was evidence upon which the jury could reasonably reach their conclusions, and the judgment based on their findings could not properly be disturbed. Per Rose, J.:—If any invitation was to be found, it was to be found from all the acts sworn to—the stopping, the motion made by the motorman, and the starting slowly forward; and the jury might treat these acts as constituting an invitation to enter the car when it was in motion. It was said that, whatever might be thought about the plaintiff trying to enter a slowly moving car, he ought to have desisted as soon as he found the speed increased. But, on the evidence, the plaintiff was confronted with a sudden emergency, and it was open to the jury to find that his perseverance in his attempt to enter the car was the result of an error of judgment, in that emergency, which ought not to be called negligent.

Hill v. Toronto Ry. Co., 22 Can. Ry. Cas. 240, 40 O.L.R. 393.

REQUEST TO BRAKEMAN TO STOP TRAIN—AGREEMENT TO SLOW UP—DIRECTIONS TO PASSENGER TO JUMP.

A request by a passenger to a brakeman to allow him to get off the train at a certain station, casts upon the brakeman the obligation of seeing that the proper steps are taken to have the train stopped, and upon the company the obligation of stopping it; if the brakeman acting within the apparent scope of his employment refuses to stop the train but slows it down, and allows the passenger to jump from it, telling him when to jump, the company is guilty of negligence and liable for resulting injuries, unless the train was traveling at such a speed that no reasonable man would jump from it even under the direction of a train official.

Hay v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 275, 11 Sask. L.R. 127, 40 D.L.R. 292.

[Reversed in 46 D.L.R. 87, 24 Can. Ry. Cas. 359, 58 Can. S.C.R. 283.]

DERAILMENT OF CARS—CAR DEFECTIVE—NEGLIGENCE—PROOF.

The plaintiff was injured by the derailing of a passenger coach in which he was riding as a passenger on defendants' railway; the cause of the derailment was the breaking of an equalizing bar. The Court held that the maxim res ipsa loquitur applied and that by proving that the car in which he was riding ran off the track the plaintiff made a prima facie case of negligence and that the duty then devolved upon the defendant to shew that the accident was not due to any fault or carelessness on its part. As carriers of passengers the defendants' undertaking was to exercise a high degree of care, and to carry safely as far as reasonable care and forethought could attain that end. The verdict of the jury that the negligence of the defendant consisted "in not having proper inspection or testing of equalizing bars, since it has been known of their breaking," was justified on the evidence.

Pyne v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 281, 43 D.L.R. 625.

[Affirmed in 48 D.L.R. 243.]

REFUSAL TO STOP TRAIN FOR PASSENGER TO ALIGHT—AGREEMENT TO SLOW UP—PASSENGER JUMPING UNDER DIRECTION OF BRAKEMAN.

A traveler on a railway train who, wishing to alight at a station where the train does not stop and which is not the destination to which he has bought his ticket, assents to a suggestion of the brakeman that the train should be slowed down in order that he may jump from the moving train, takes all the risk of alighting, although he acts under the direction of such brakeman as to when it is safe to do so. [Hay v. Can. Pac. Ry. Co., 40 D.L.R. 292, 23 Can. Ry. Cas. 275, reversed; Grand Trunk Ry. Co. v. Mayne (1917), 39 D.L.R. 691, 22 Can. Ry. Cas. 218, approved.]

Can. Pac. Ry. Co. v. Hay, 46 D.L.R. 87, 24 Can. Ry. Cas. 359, 58 Can. S.C.R. 283.

B. Duty of Protection; Trespassers.

DETACHMENT OF CAR—DUTY OF NOTICE.

Beyond the obligations, arising from the contracts for transport, to protect the persons and preserve the property of passengers, a liability attaches to common carriers for any loss occasioned by the negligence of their officials. And it is negligence for employees of a railway company, who detach one car from a train in the course of transit to give notice of such action in that car alone and fail to do so in the others to one of which a passenger interested may have temporarily betaken himself.

Great Northern Ry. Co. v. Tainar, 18 Que. K.B. 72.

ASSAULT ON PASSENGER—DUTY OF CONDUCTOR.

If a passenger on a railway train is in danger of injury from a fellow passenger, and the conductor knows, or has an opportunity to know, of such danger, it is the duty of the latter to take precautions to prevent it, and if he fails or neglects to do so the company is liable in case the threatened injury is inflicted. [Pounder v. North-Eastern Ry. Co., [1892] 1 Q.B. 385, dissented from.] Judgment of the Court of Appeal, 5 O. L.R. 334, affirmed.

Can. Pac. Ry. Co. v. Blain, 34 Can. S.C.R. 74.

[Leave to appeal from this judgment was afterwards refused by the Privy Council, [1904] A.C. 453.]

ASSAULT BY FELLOW PASSENGER—DUTIES OF CONDUCTOR.

(1) Not only in the exercise of his general authority but with reference to the rules of the defendants, a conductor has the right to preserve order on a train, and, if necessary, to eject therefrom persons who are in a state of intoxication, or disorderly, or who are infringing the reasonable rules of the railway company, and it is his duty to exercise that right in order to ensure the comfort and safety of passengers under his charge. (2) A railway company, through the conductor, is charged with the duty of preserving order on a train, and is liable for injuries sustained by a passenger in consequence of violence inflicted by a fellow passenger, provided the railway company has had notice through its employees of the danger of violence, and has failed to reasonably discharge its duty.

Blain v. Can. Pac. Ry. Co., 2 Can. Ry. Cas. 69.

[Affirmed in 5 O.L.R. 334, 2 Can. Ry. Cas. 85; varied in 3 Can. Ry. Cas. 143, 34 Can. S.C.R. 74; distinguished in Galbraith v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 43, 17 D.L.R. 65.]

ASSAULTS ON PASSENGERS—DUTIES OF CONDUCTOR.

The plaintiff, a ticket holder and passenger on one of the defendants' trains, was, without any provocation, assaulted several times by a drunken man. The conductor did not see the assaults, but was told of them, and of the assailant's threats to continue them, and yet refused to restrain the latter or to put him off the train:—Held, that the defendants' duty to the plaintiff as a passenger was to carry him to his destination, and use reasonable care and diligence in providing for his comfort and safety while so conveying him; and that it was for the jury to decide whether the conductor had acted reasonably and diligently, and judgment upon a verdict of the jury in the plaintiff's favor was affirmed:—Held, also, that evidence was rightly rejected of improper relations between the plaintiff and the wife of his assailant, alleged as provocation for the assaults. [Pounder v. North-Eastern Ry. Co., [1892] 1 Q.B. 385, discussed.]

Blain v. Can. Pac. Ry. Co., 2 Can. Ry. Cas. 85, 5 O.L.R. 334.

[Varied in 34 Can. S.C.R. 74, 3 Can. Ry. Cas. 143.]

DANGER OF ASSAULT UPON—DUTY OF RAILWAY TO PROTECT.

If a railway company through its officers know that an assault upon a passenger is probable it is the former's duty to take reasonable precautions to prevent it, and if it fails to do so it is liable for its neglect to do so. [Pounder v. North-Eastern Ry. Co., [1892] 1 Q.B. 385, doubted.] At the trial damages were claimed and allowed for a second and third attack upon the plaintiff, and this judgment was affirmed by the Court of Appeal for Ontario, but held also that there was no evidence that either the plaintiff or defendants had any reason to anticipate the second attack, and a new trial was granted unless plaintiff would accept a reduction of damages from $3,500 to $1,000. Judgments of Falconbridge, C.J., at the trial (2 Can. Ry. Cas. 69), and of the Court of Appeal for Ontario (2 Can. Ry. Cas. 85), varied.

Can. Pac. Ry. Co. v. Blain, 3 Can. Ry. Cas. 143, 34 Can. S.C.R. 74.

[Second appeal dismissed in 4 Can. Ry. Cas. 429, 36 Can. S.C.R. 159; leave to appeal refused by Privy Council, [1904] A.C. 453.]

ASSAULT BY FELLOW PASSENGER.

B., a passenger on a railway train, was thrice assaulted by a fellow passenger during the passage. The conductor was informed of the first assault immediately after it occurred and also of the second, but took no steps to protect B. In an action against the railway company, B. recovered damages assessed generally for the injuries complained of. The verdict was maintained by the Court of Appeal but the Supreme Court of Canada ordered a new trial unless B. would consent to his damages being reduced (34 Can. S.C.R. 74, 3 Can. Ry. Cas. 143). In the reasons for the last-mentioned judgment, it was held that damages could be recovered for the third assault only, but the judgment as entered by the registrar stated the Court ordered the reversal of the judgment appealed from and a new trial unless the plaintiff accepted the reduced amount of damages. Such amount having been refused, a new trial was held on which B. again obtained a verdict, the damages being apportioned between the second and third assaults. On appeal to the Supreme Court of Canada from the judgment of a Divisional Court maintaining this verdict:—Held, Taschereau, C.J., and Davies, J., dissenting, that as the decree was in accordance with the judgment pronounced by the Court when its decision was given, and as it left the whole case open on the second trial, the jury were free to give damages for the second assault and their verdict should not be disturbed:—Held, per Taschereau, C.J., that the decree of the Court should have been framed with reference to the opinion giving the reasons for the judgment and, if necessary, could be amended so as to read as the Court intended.

Can. Pac. Ry. Co. v. Blain, 4 Can. Ry. Cas. 429, 36 Can. S.C.R. 159.

INSULTING LANGUAGE AND CONDUCT BY SERVANTS TO PASSENGERS—LIABILITY.

Common carriers are liable, for insulting language and conduct of their servants to their passengers, in damages measured by circumstances, such as the sex and social standing of the party aggrieved, and the nature and gravity of the offence. Hence, when a railway conductor, in a controversy with a lady passenger, as to the fares of her children, says he does not believe her, and persists in speaking to her, though told to desist, and, when she moves away, follows her with the annoyance, the company will be condemned to pay her $100, the full amount of her action.

Tudor v. Quebec & Lake St. John Ry. Co., 13 Can. Ry. Cas. 387, 41 Que. S.C. 19.

TRAVELING ON LOCOMOTIVE—PASSENGER MERE LICENSEE—DUTY OF CARRIER.

The relation of common carrier and passenger does not exist when a person travels on the locomotive of a coal train without the permission of some officer who has authority to give such permission, and if injured, such a person has no right of action unless injured through the dolus as distinguished from the culpa of the carrier. N. had a contract with defendant company to repair a bridge, and while riding on the locomotive of the company's coal train on his way to the work, he was killed by reason of the train falling through a bridge. The engineer in charge of the train (there being no conductor) had no authority to take passengers, and had instructions not to allow people to travel on the engine without permission from some competent authority, but the company's officers and servants and other persons authorized by the manager and master mechanic used to ride on the coal train. A few days before the accident N. and the defendants' manager had gone down to the bridge on the engine of a coal train and returned the same way the same day. In an action by N.'s representative to recover damages from the company for his death, the jury held that the company had undertaken to carry N. as a passenger:—Held, on appeal, setting aside judgment in plaintiff's favour, that there was no evidence to support such a finding, and that N. was a "mere licensee." Per Hunter, C.J.: The power which a Judge has to take a case away from the jury should be exercised only when it is clear that plaintiff could not hold a verdict in his favour; if the matter is reasonably open to doubt the Judge should let the case go to the jury, and then decide, if necessary, whether there is any evidence on which the verdict can be supported.

Nightingale v. Union Colliery Co., 2 Can. Ry. Cas. 47, 9 B.C.R. 453.

[Affirmed in 4 Can. Ry. Cas. 197, 35 Can. S.C.R. 65; commented on in Barnett v. Grand Trunk Ry. Co., 20 O.L.R. 390; discussed in Ryckman v. Hamilton, Grimsby, etc., Ry. Co., 10 O.L.R. 419; followed in Rayfield v. B.C. Elec. Co., 15 B.C.R. 366.]

DEFECTIVE BRIDGE—GRATUITOUS PASSENGERS—LIABILITY OF CARRIER.

In the absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger. [Moffatt v. Bateman, L.R. 3 C.P. 115, followed. Harris v. Perry & Co., [1903] 2 K.B. 219, distinguished.] Although a railway company may have failed to properly maintain a bridge under their control so as to ensure the safety of persons traveling upon their trains, the mere fact of such omission of duty does not constitute evidence of the gross negligence necessary to maintain an action in damages for the death of a gratuitous passenger. Judgment appealed from (2 Can. Ry. Cas. 47), affirmed.

Nightingale v. Union Colliery Co., 4 Can. Ry. Cas. 197, 35 Can. S.C.R. 65.

[Commented on in Barnett v. Grand Trunk Ry. Co., 20 O.L.R. 390; discussed in Ryckman v. Hamilton, Grimsby, etc., Ry. Co., 10 O.L.R. 419; followed in Rayfield v. B.C. Elec. Co., 15 B.C.R. 366.]

COLLISION—GRATUITOUS PASSENGER—FREE PASS—LIABILITY.

The plaintiff brought an action for damages for injuries received in an accident while traveling on an unconditional free pass upon the defendants' railway. The only evidence of negligence was that there was a head-on collision between two cars on the defendants' line managed by the defendants' servants:—Held, that this being prima facie evidence of negligence, and even of gross negligence, if such were necessary, as to which quaere—the plaintiff was entitled to recover.

Ryckman v. Hamilton, Grimsby & Beamsville Elec. Ry. Co., 4 Can. Ry. Cas. 457, 10 O.L.R. 419.

[Adopted in Sayers v. B.C. Elec. Ry. Co., 12 B.C.R. 109; referred to in

British Columbia Elec. Ry. Co. v. Crompton, 43 Can. S.C.R. 7, 14 B.C.R. 226; Lumsdem v. Temiskaming & North. Ry. Co., 15 O.L.R. 469, 7 Can. Ry. Cas. 156; North. Counties Ins. Trust v. Can. Pac. Ry. Co., 13 B.C.R. 131; Robinson v. Can. Northern Ry. Co., 19 Man. L.R. 315.]

Collision—Injury to person on train—Licensee or trespasser.

In a collision between a van or car of the defendants and a backing train of the Pere Marquette Ry. Co. the plaintiff, who was standing on the platform of one of the Pere Marquette coaches, the foremost one in the train as it moved reversely, and who was on the coach not as a paying passenger, but getting a gratuitous "lift" for a short distance, was injured. The collision was caused by the negligence of the defendants:—Held, that the plaintiff was a licensee, and, not being wrongfully where he was, was entitled to recover damages against the defendants. [Harris v. Perry & Co., [1903] 2 K.B. 219, and Sievert v. Brookfield, 35 Can. S.C.R. 494, followed.] And semble, per Boyd, C., that, in the circumstances, the defendants would not be exempt from liability, though the plaintiff was nothing else than a mere trespasser. At the trial the jury found, in answer to questions, that the plaintiff was not upon the train or platform by permission of the Pere Marquette Ry. Co. The jury were not asked to find whether he was there with the permission of the trainmen in charge of the train:—Held, that it was open to the jury to find, and they should have found, upon the direct evidence as to that occasion, that the plaintiff was there with the knowledge and consent of the man conducting the backing operations, and also, on the uncontradicted evidence, that he and others had been there on many other occasions; and this was sufficient to justify a verdict for the plaintiff. At the trial, the parties consented to the Court determining any point necessary for the determination of the rights of the parties not covered by the questions submitted:—Held, that the judgment for the defendants entered upon the findings of the jury should be set aside, and judgment entered for the plaintiff for the damages assessed by the jury; the necessity for a new trial being obviated by the consent. Judgment of Meredith, C.J.C.P., reversed.

Barnett v. Grand Trunk Ry. Co., 10 Can. Ry. Cas. 46, 30 O.L.R. 390. [Affirmed in 22 O.L.R. 84, 12 Can. Ry. Cas. 192; reversed in [1911] A.C. 361, 12 Can. Ry. Cas. 205.]

Collision—Injury to person on train—Trespasser.

The Pere Marquette Ry. Co. under an arrangement with the defendants, used the yard and station ground of the defendants at London. A Pere Marquette train came into the defendants' station at London, discharged its passengers, and was proceeding backwards to its destination for the night, when the plaintiff jumped on board, intending to ride a short distance towards his home. He stood upon the rear platform of a car, and was in that position when a collision took place between the train he was on and a car of the defendants, upon a "lead" of the defendants, on which the train was lawfully proceeding, by reason of the negligence of the defendants, whereby the plaintiff was injured:—Held, Meredith, J. A., dissenting, that the plaintiff, whatever his position as regards the Pere Marquette Ry. Co., whether trespasser, occupant at sufferance, or licensee, was not a trespasser upon the rights of the defendants; for the time being the defendants had no right of occupation or passage upon the place where the collision occurred; and the defendants were liable to the plaintiff in damages for the injuries caused by their negligence. [Judgment of Divisional Court, 20 O.L.R. 390, 10 Can. Ry. Cas. 46, affirmed.]

Barnett v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 192, 22 O.L.R. 84.

[Reversed in [1911] A.C. 361, 12 Can. Ry. Cas. 205; applied in Diplock v. Can. Northern Ry. Co., 20 Can. Ry. Cas. 356.]

COLLISION—TRESPASSER—BREACH OF DUTY.

In an action against the appellant railroad company for damages for personal injuries resulting from collision caused by the negligence of the appellants' servants it appeared that the collision took place on the property of the appellants to which the train carrying the plaintiff, which belonged to another company, had access by their leave and license. It further appeared that the plaintiff was a trespasser on the appellants' property and also on the said train, which to his knowledge was not at the time in use as a passenger train and in which he had taken up a precarious position on the platform and step of a carriage in disobedience of a by-law of both companies:—Held, that the appellants were not liable, for no breach of duty had been shewn.

Grand Trunk Ry. Co. v. Barnett, 12 Can. Ry. Cas. 205, [1911] A.C. 361.

[Applied in Diplock v. Can. Northern Ry. Co., 20 Can. Ry. Cas. 356; followed in De Vries v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 375.]

TRESPASSER—USE OF PULLMAN FOR PURPOSE OF GETTING OFF TRAIN.

A passenger in a day coach who finds the ordinary mode of exit at the rear vestibule closed at his destination, and who thereupon enters the adjoining Pullman car in search of an opened vestibule, is not a trespasser as to such Pullman coach so as to disentitle him to damages for personal injuries received in alighting therefrom.

McDougall v. Grand Trunk Ry. Co. (Ont.), 14 Can. Ry. Cas. 316, 8 D.L.R. 271.

TRANSPORTATION OF EMIGRANTS—DETENTION.

Where immigrants of Chinese origin are merely passing through Canada, under a contract with a railway company for their transportation to a point or destination beyond the limits of Canada, the railway company (under the provisions of 63-64 Vict. c. 32, since repealed by 3 Edw. VII. c. 8), were justified in detaining them, and in refusing them permission to remain on Canadian territory, they not having complied with the provisions of the Act 63-64 Vict. (C.), c. 32, then in force, applicable to Chinese immigrants entering Canada with intention to remain therein.

Re Wing Toy et al., 4 Can. Ry. Cas. 410, 13 Que. K.B. 172.

DERAILMENT—RAILWAY MAIL CLERK AS PASSENGER.

The action for damages for injury caused by negligence of a common carrier of passengers is in tort. A duty is imposed by law upon a common carrier of passengers to carry them safely and securely so that no damage or injury shall happen to them by the negligence or default of the carrier. A breach of this duty is one for which an action lies which is founded on the common law, and requires not the aid of contract to support it. It is now settled by law that corporations are liable for negligence whether they derive any ultimate pecuniary benefit or not from the performance of the duty imposed on them. If the passenger be carried in performance of a contract, it is immaterial whether he himself negotiated the contract or paid the fare, or whether any fare were paid, or if paid whether it went into the pocket of the defendants. The

C. & E. Ry. Co. were the owners of a railway between Calgary and Edmonton, but owned no rolling stock and employed no staff for the operation of the road. They entered into an agreement with the C.P.R. Co., the defendants, "for the regulation and interchange of traffic and the working of traffic over the railways of the said companies, and for the division and apportionment of tolls, rates and charges, and generally in relation to the management and working of the railways," of the two companies, whereby the defendants agreed to operate the railway line on behalf of the C. & E. Co. "with a staff and organization appointed by the C.P.R. Co. (the defendants), and to provide a service of such efficiency and speed and operate the property of the C. & E. Co. as agents for and on account of the C. & E. Co., as may be required or directed by that company or its officers." The contract also provided that the defendants should not be required to maintain the road "below a point of efficiency necessary to the safe and proper handling of such train service, as may be required for the proper operation of the railway." All the expenses of operating the road were to be paid in the first instance by the defendants but were to be charged against the C. & E. Co. under a special clause in the agreement for the apportionment of the tolls and receipts. The rolling stock used in operating the road bore the name of the defendants. The officials employed in operating it wore caps indicating that they were servants of the defendants. The defendants sold tickets entitling the holder to travel over the C. & E. line, and issued a "Time Bill" giving the time tables of the western division of the defendants in which the line between Calgary and Edmonton was referred to as the "Edmonton Section," and this time bill was endorsed with the names of the leading officials of the defendants. The plaintiff was a railway mail clerk in the employ of the Government of Canada, whose duty it was to handle and attend to the Government mail matter carried on the C. & E. line between Calgary and Edmonton. This mail matter and the plaintiff were both carried under a contract between the Postmaster-General of Canada and the C. & E. Co., and the C. & E. Co. received from the Government the moneys paid for carrying the mail matter, and no part of such money was received by the defendants. The plaintiff was injured by the derailment of a train, and brought action for damages against the defendants:—Held, that plaintiff being lawfully in the mail car with the knowledge and consent of the defendants, and a passenger under the charge and care of the defendants, a duty was imposed upon the defendants to carry him safely; that for a breach of this duty an action would lie independently of any contract, and that the question whether or not the defendant company received a reward for carrying the plaintiff did not affect the rights of the parties:—Held, also, against the contention that the defendants were merely agents for the C. & E. Co., and that the officials and workmen operating the road were the servants, not of the defendants, but of the C. & E. Co., and that the latter company, if anyone, were responsible; that there was evidence to shew that the officials and workmen were the servants of the defendants and that the defendants were not merely agents but were independent contractors:—Held, also, against the contention that the defendants were agents of the C. & E. Co. in operating the road, and were, therefore, liable only for a misfeasance but not for a nonfeasance; that the omission to take proper care in respect to the condition of the bridge, and the track, and the running a train over the track and bridge while in an unsafe condition, would be a misfeasance and not a nonfeasance, and that, therefore, even if the defendants were merely agents of the C. & E. Co. they would still be liable.

Kenny v. Can. Pac. Ry. Co., 4 Can. Ry. Cas. 474, 5 Terr. L.R. 420.

SAFETY AT STATIONS—AS TO THROWING OFF BAGGAGE.

Negligence cannot be predicated against a railway company merely on its failure to protect an intending passenger, standing on a station platform on its line, from injury due to the unauthorized action of a passenger, unconnected with the railway company, in throwing off his baggage while the train passed through without stopping. [Blain v. C.P.R. Co., 5 O.L.R. 334, distinguished.]

Galbraith v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 43, 17 D.L.R. 65.

TRESPASSERS—DUTY TOWARDS—INJURIES—LIABILITY—NEGLIGENCE.

Even to trespassers a railway company owes a duty not to wilfully injure them or endanger their safety; and where trespassers are stealthily riding on a ledge 14 inches wide at the back of the tender, and the brakeman while in the course of his employment and without ascertaining the dangerous position of the trespassers as a reasonable man would, forces one of them from the ledge thereby knocking him against the other and causing the latter to fall beneath the train and seriously injuring him, it is sufficient to warrant a jury's finding of the company's negligence; whether or not the brakeman had knowledge of their position, or whether he acted as a reasonable and prudent man, are questions of fact for the jury. [Grand Trunk Ry. v. Barnett, [1911] A.C. 361, 22 O.L.R. 84, 12 Can. Ry. Cas. 192, 205, applied; Bondy v. Sandwich, Windsor & Amherstburg Ry. Co., 24 O.L.R. 409, 12 Can. Ry. Cas. 57, considered; Lowrey v. Walker, [1911] A.C. 10, distinguished. See also Nolan v. Montreal Tramways Co., 26 D.L.R. 527.]

Diplock v. Can. Northern Ry. Co., 20 Can. Ry. Cas. 356, 9 Sask. L.R. 31, 26 D.L.R. 544.

[Affirmed in 20 Can. Ry. Cas. 365.]

PASSENGER KILLED BY TRAIN WHEN ALIGHTING FROM ANOTHER TRAIN AT STATION—INVITATION TO ALIGHT—COUNTERMAND—FAILURE TO BRING KNOWLEDGE OF PASSENGER—DUTY OF CONDUCTOR AND TRAINMEN TO CARE FOR SAFETY OF PASSENGERS—FATAL ACCIDENTS ACT—DAMAGES.

Pesha v. Can. Pac. Ry. Co., 14 O.W.N. 135.

TRESPASSER—NEGLIGENCE—EVICTION.

A railway company is liable to a trespasser for damages sustained by him in consequence of the reckless indifference of a brakeman, amounting to negligence, while ejecting another trespasser from the train. [Diplock v. Can. Northern Ry. Co., 20 Can. Ry. Cas. 356, 26 D.L.R. 544, 9 S.L.R. 31, affirmed.]

Can. Northern Ry. Co. v. Diplock, 20 Can. Ry. Cas. 365, 53 Can. S.C.R. 376, 30 D.L.R. 240.

HIGHWAY—NEGLIGENCE—COLLISION—PRIVATE CROSSINGS—TRESPASSERS.

The fact that a roadway used as a transmission line for the conveyance of employees, over which public travel has been forbidden, is extensively used by the public, does not necessarily constitute it a public highway so as to charge a railway company with the statutory duty to give warnings at highway crossings, and in the absence of evidence that the locomotive engineer had seen a vehicle approaching the crossing, the railway company cannot be held responsible for the collision of a train with a trespassing vehicle at such crossing. [Royle v. Canadian Northern Ry. Co., 14 Man. L.R. 275, 3 Can. Ry. Cas. 4; Grand Trunk Ry. Co.

v. Anderson, 28 S.C.R. 541; Grand Trunk Ry. Co. v. Barnett, [1911] A. C. 361, 12 Can. Ry. Cas. 205, followed.]

De Vries v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 375, 27 D.L.R. 20, 26 Man. L.R. 156.

C. Ejection from Train.

Passenger refusing to pay fare.

By s. 248 of the Railway Act, 51 Vict. c. 29 (1888), any passenger on a railway train who refuses to pay his fare may be put off the train:—Held, reversing the decision of the Court of Appeal, 20 A.R. (Ont.) 476, and of the Queen's Bench Division, 22 O.R. 667, Fournier, J., dissenting, that the contract between the person buying a railway ticket and the company on whose line it is intended to be used, implies that such ticket shall be produced and delivered up to the conductor of the train on which such person travels, and if he is put off a train for refusing or being unable so to produce and deliver it up, the company is not liable to an action for such ejectment. [20 A.R. (Ont.) 476, affirming 22 O.R. 667, reversed.]

Grand Trunk Ry. Co. v. Beaver, 22 Can. S.C.R. 498.

[Leave to appeal to Privy Council refused, 23 Canada Gazette, 320. See Quebec Central Ry. Co. v. Lortie, 22 Can. S.C.R. 336; Jones v. Grand Trunk Ry. Co., 18 Can. S.C.R. 696; Oldright v. Grand Trunk Ry. Co., 22 A.R. (Ont.) 286, Canadian Pacific Ry. Co. v. Chalifoux, 22 Can. S.C.R. 721; Haist v. Grand Trunk Ry. Co., 26 O.R. 19, 22 A.R. (Ont.) 504.]

[Distinguished in Haines v. Grand Trunk Ry. Co., 16 Can. Ry. Cas. 359, 15 D.L.R. 174, 29 O.L.R. 558.]

Drunken passenger.

The deceased was a passenger on the defendants' train from Detroit to Buffalo. Between Detroit and Bridgeburg he drank heavily, and when near Bridgeburg began to annoy passengers, and the conductor compelled him to leave the train at that station, which was 700 feet from the end of the International Railway Bridge over the Niagara River, and the deceased, who was not given into the charge of anybody, being intoxicated, strayed after the train on which his luggage remained, and fell over the bridge and was drowned. It would have been easy to have taken care of deceased and to have prevented him interfering with the passengers. At Bridgeburg the train was only 5 minutes' run from the City of Black Rock, and only 20 minutes' run from Buffalo, its destination:—Held, that the defendants were liable, inasmuch as the act of the deceased was what it might reasonably be expected that a man in his condition would do upon being put off the train when and where he was put off, and that the damages were not too remote.

Delahanty v. Michigan Central Ry. Co., 3 Can. Ry. Cas. 311, 7 O.L.R. 690.

[Reversed in 4 Can. Ry. Cas. 451, 10 O.L.R. 388.]

Disorderly passenger—Expulsion from train—Drowning while following train.

A passenger traveling from Detroit to Buffalo on defendants' train, who was somewhat excited from liquor, but physically capable of taking care of himself, was guilty of several disorderly acts, amongst others of molesting fellow passengers. He was put off the train at Bridgeburg, a station near the Canadian end of the International Railway Bridge crossing the Niagara River, and about a mile distant from his destination. He followed the train on foot and after a scuffle with the bridge guard jumped or fell off the bridge into the river and was drowned:—Held, that the defendants were justified in putting him off the train, and were neither obliged to put him under restraint and carry him to Buffalo, nor to place him in charge of some one at Bridgeburg. On the evidence it was impossible to say whether deceased fell off the bridge accidentally or threw himself off; or that his death was the natural or probable result of his being removed from the train:—Held, also that there was no evidence of any negligence on the part of the defendants to be submitted to a jury. Judgment of Britton, J., 7 O.L.R. 690, 3 Can. Ry. Cas. 311, reversed.

Delahanty v. Michigan Central Ry. Co., 4 Can. Ry. Cas. 451, 10 O.L.R. 388.

[Followed in Dunn v. Dominion Atlantic Ry. Co., 25 Can. Ry. Cas., 45 D.L.R. 51.]

Right to particular seat—Authority of conductor—Smoking car.

The plaintiff, B., entered a smoking car of the defendant company and took a vacant seat, although told by the persons sitting near that it was taken and vacated temporarily. Upon his refusing to vacate the seat after having been, by the conductor, twice required to do so, the conductor removed him forcibly without using unnecessary force and placed him in the passageway pointing him to vacant seats:—Held (1), that the plaintiff could not recover damages for an assault or removal from the seat; the conductor having full authority to determine what seat a passenger is to occupy. (2) That railway companies are not bound to furnish smoking cars or any particular description of car beyond what the passenger's ticket calls for.

Brazeau v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 477.

Ejection from train—Threats and force—Trespasser.

The respondent (plaintiff) while leaving a train of the appellants (defendants), on which he had been stealing a ride, met with an accident by falling from the train, resulting in the loss of his arm. The plaintiff said that the conductor did not touch him, but used threatening language in ordering him off the train, while a witness stated that the conductor put the plaintiff off the train by force. The conductor and witnesses called for the defendants gave evidence that no physical force was used, and the conductor denied speaking to the plaintiff. The jury found that the defendants were to blame because the conductor had no right to put him off the train while moving, and assessed the damages to the plaintiff at $2,000. A new trial was ordered by the Court of Appeal on the following grounds; (1) the damages were excessive; (2) the verdict was against the weight of evidence, and (3) on account of the uncertainty as to the meaning of the answers of the jury. Meredith, J.A., dissenting. Per Osler, J.A.:—But for the evidence of Egerton the action should have been dismissed. Upon appeal to the Supreme Court of Canada the order for a new trial was affirmed. Fitzpatrick, C.J., and Davies, J., dissenting. Per Anglin, J.:—Putting aside the evidence of Egerton, the case involves two questions of fact, which should be submitted to the jury. (1) Did the plaintiff leave the moving train under compulsion of the conductor's order, having reasonable ground for believing that if he did not obey, he would be put off by physical force. (2) Having regard to the circumstances, the place at which the order was given and the speed at which the train was moving, was the conduct of the conductor in giving this order proper and reasonable? Per Anglin and Duff, J.J.:—The evidence as to the rate of speed was distinctly conflicting, and was not such that "only one conclusion can be drawn." The power conferred by Rule 817 O.J.A. is discretionary, and, where the Court of Appeal has declined to exercise it, a second appellate tribunal should only interfere in a very extreme case. Per Fitzpatrick, C.J., dissenting:—No appeal lies in this case from the exercise of judicial discretion within s. 45 of the Supreme Court Act and from which there is no appeal. [Toronto Ry. Co. v. McKay, Cout. Cas. 419.] Per Davies, J., dissenting:—The appeal should be allowed and the action dismissed.

Can Pac. Ry. Co. v. Lloyd Brown, 12 Can. Ry. Cas. 228.

Refusal to produce hat check.

A passenger on a railway subject to the Railway Act, 1906, who has lost the "hat check" given him on the surrender of his ticket by the conductor for the latter's own convenience, is not liable to expulsion from the train in default of paying another fare under a railway by-law purporting to authorize the company to put off the train any passenger who refuses to produce and deliver up his "ticket" on demand. [Grand Trunk Ry. Co. v. Beaver, 22 Can. S.C.R. 498, distinguished; Butler v. Manchester, Sheffield & Lincolnshire Ry. Co., 21 Q.B.D. 207, followed.]

Haines v. Grand Trunk Ry. Co., 16 Can. Ry. Cas. 359, 29 O.L.R. 558, 15 D.L.R. 174.

Riotous or disorderly conduct of passenger—Proper stopping place—Wandering on track.

Riotous or disorderly conduct, or the use of indecent or profane language in a railway passenger coach, works a forfeiture of a passanger's right to be carried as such, and he may for such conduct be ejected from the train, unless he is through drunkenness or other cause bereft of all intelligence and is put off and left on a track or other dangerous place, under such circumstances that the conductor ought to have known that putting him off was equivalent to putting him to death. A railway company is not liable for the death of a passenger, who is ejected from the train at a proper stopping place, for drunkenness and riotous conduct, if at the time he is put off the train he is capable of taking care of himself, although subsequently he wanders on to the track and several hours later is killed by another train at a place where those in charge of the latter train could not see him in time to prevent the accident. [Delahanty v. Michigan Central Ry. Co., 4 Can. Ry. Cas. 451, 10 O.L.R. 388, followed.]

Dunn v. Dominion Atlantic Ry. Co., 45 D.L.R. 51, 25 Can. Ry. Cas.

Right to a seat—Passenger carried standing—Expulsion from train.

The contract between a railway company and a passenger to whom the company sells a ticket, gives the passenger the right to a seat in a car. If the company cannot, on account of the number of travelers, give him a seat, the traveler can refuse to be carried standing; he can get off the train and exercise his right to recover damages for nonfulfilment of the contract. But if he prefers to stay on the train and be carried standing, he cannot refuse to give up his ticket, or to pay his fare. Such a refusal gives the conductor the right to put him out of the train, as provided by art. 6637, of R.S.Q. 1909. (See also, the Railway Act, 1906, s. 281.) This can only be done at a usual station, and, if it is done elsewhere, the expelled passenger has the right to recover the damages which result.

Langlois v. Quebec & Lake St. John Ry. Co., 45 Que. S.C. 223.

CARS.

Statutory height of cars passing under overhead bridge, see Bridges.
See Carriers of Goods (A); Street Railways (C).

Annotations.

Equipment of cars with long lever equipment. 15 Can. Ry. Cas. 428.
Automatic appliances used in coupling cars. 18 Can. Ry. Cas. 250.

TANK CAR EQUIPMENT.

Upon an application that the railway company be required to provide adequate and suitable tank car equipment for the transportation of finished product of the applicant from its works at Wallaceburg to points in Canada. The railway company had made an agreement with the applicant to supply the equipment when required:—Held, that under the provisions of s. 1 of 8 & 9 Edw. VII. c. 32, the Board has jurisdiction to require and direct the railway company to supply the equipment, from time to time, when ordered by the applicant.

Empire Refining Co. v. Pere Marquette Ry. Co., 10 Can. Ry. Cas. 158.

DOMESTIC SOFT COAL—OPEN AND BOX CARS—ACCUMULATION OF SNOW AND ICE—DELAY IN MAKING CONNECTIONS.

Complaint against the system of transporting domestic soft coal in open cars instead of box cars, and delay in making collections from railway companies for shortages. The applicant complained that he suffered loss and damage from pilferage, leakage, snow and ice accumulating on the top of the coal, for which he had to pay as coal at an increased cost, and waste by having to throw the coal into the sheds over the side of the open cars, thus breaking the coal, instead of wheeling it from box cars. The respondents contended that they had used their best endeavours to supply box cars for the transportation of coal and had largely succeeded. That if dealers placed large orders for shipment during the spring and summer there would be no difficulty in furnishing box or stock cars, instead of these shipments being made in October, when every available box car was needed for the carriage of bulk grain to the head of the lakes, and in the movement of stock; that other railway companies engaged in carrying coal for domestic use and the respondents for their own employed open cars. That open cars could be much more easily loaded and unloaded than box cars at mines and sheds equipped with modern devices. That the applicant's contention that he was charged for the accumulation of snow and ice as coal was not correct because the freight tools were assessed on the weights at the mines from the track scales controlled by the shippers; that no material loss had been noticed owing to the use of open cars for coal shipments:—Held (1), that from the letters submitted by the applicant there was no evidence of the percentage of open cars received by dealers. (2) That certain dealers had always been able to get their coal transported in box cars. (3) That it might work greater injustice to the general public requiring the railway companies' equipment, to compel railway companies to furnish box cars for coal shipments, than if the Board left the dealers to their remedy under the bills of lading. (4) That under the new form of bill of lading the railway companies were liable for the losses of the kind referred to in the complaint and s. 3 expressly placed upon the railway companies the burden of proving that they were free from negligence. (5) That it had not been shewn that the railway companies had neglected to furnish box cars for this traffic when these were obtainable. (6) That this application had been dealt with upon the assumption that this commodity moved more safely in box cars; it had been shewn that the railway companies used their utmost endeavours to supply such cars, that open cars were supplied only when box cars are not available, and the railway companies assumed the risk arising from coal being lost in transit or injured by the elements when carried in open cars. (7) That the Board must decline to make any general order.

Brown v. Can. Pac. and Can. Northern Ry. Cos., 11 Can. Ry. Cas. 152.

CAR SHORTAGE—INITIAL OR ORIGINATING RAILWAY.

Complaint against respondents of unjust discrimination for refusing to supply cars for shipment of traffic from Collingwood to Winnipeg via North Bay although willing to supply foreign cars for this traffic via Chicago. It appeared that at the time of the occurrence there was a car shortage throughout Ontario, and to protect its Canadian local traffic, and preserve sufficient equipment the respondent was compelled to secure from connecting lines foreign empties that might be required for loading on said lines:—Held (1), that the complaint should be dismissed; no unjust discrimination having been shewn. (2) That a manufacturer located on one line of railway is not entitled to as good transportation facilities as if located at a point where there were two or three connecting lines. (3) That in times of car shortage it is the privilege and duty of a railway company to retain its equipment so as to properly take care of traffic on its own lines. (4) That assuming the respondent was endeavouring to take care of the traffic on its own lines, the applicant was not entitled to compel it to furnish its own cars to move the traffic along the route desired. (5) That it has been well settled that an initial or originating railway company is entitled to as long a haul on its own lines as might be reasonable. [Can. Pac. Ry. Co. v. Nelson & Fort Sheppard Ry. Co., 11 Can. Ry. Cas. 400; Plymouth, Devonport & S.W. Junction Ry. Co. v. Great Western Ry. Co., 10 Ry. & C. Tr. Cas. 68, and Riddle v. Pittsburgh & Lake Erie Ry. Co., 1 I.C.C.R. 374, followed.]

Imperial Steel & Wire Co. v. Grand Trunk Ry. Co., 11 Can. Ry. Cas. 395.

[Followed in Jacobs Asbestos Co. v. Quebec Central Ry. Co., 19 Can. Ry. Cas. 357; Re Coal Transportation Facilities, 22 Can. Ry. Cas. 338.]

DUTY TO FURNISH CARS—TRANSPORTATION—TRAFFIC FACILITIES—JOINT TARIFF.

Every railway company should furnish accommodation and facilities for the receipt and transportation of traffic upon its own line, either by interchanging cars, or transshipping the goods.

Can. Pac. Ry. Co. v. Nelson & Fort Sheppard Ry. Co., 11 Can. Ry. Cas. 400.

[Followed in Imperial Steel, etc., Co. v. Grand Trunk Ry. Co., 11 Can. Ry. Cas. 396; Re Coal Transportation Facilities, 22 Can. Ry. Cas. 338.]

BOX AND FLAT OR OPEN—STAKES AND FASTENINGS—WEIGHT ALLOWANCE.

An application to direct the respondent association to reimburse shippers for the expense sustained in equipping flat cars with stakes and fastenings. By the existing tariffs a weight allowance of 500 lbs. is made in favour of the shipper by the respondent association: Held (1), that on the evidence it would be impossible to fix an average weight allowance applicable throughout Canada. (2) That under subss. 2, 3 of s. 284, of the Railway Act, 1906, the Board has direction in passing on questions of accommodation under which questions of carriage arise. (3) That the Board could consider traffic conditions, peculiar circumstances and whether it was physically possible for the railway company to supply permanent stakes and fastenings. (4) That in shipments in flat or open cars an allowance of 500 lbs. should be made for stakes and fastenings supplied by the shipper and no freight should be charged thereon. [National

Wholesale Lumber Dealers' Assn. v. Atlantic Coast Line Ry. Co., 14 I.C.C.R. 157, at pp. 157-162, referred to.]

Canadian Manufacturers' Assn. v. Canadian Freight Assn. 12 Can. Ry. Cas. 27.

REFRIGERATOR AND BOX—HEATING—CARLOAD WEIGHT.

Application for a reduction in the minimum C.L. weight of musical instruments from 12,000 to 10,000 lbs., or, in the alternative, that the respondent be directed to install oil heaters in box cars for shipment of musical instruments during the winter months. The applicant claimed that it is necessary to prevent injury; that pianos shipped to the west in the winter months should be carried either in a refrigerator car or in a box car with a special heater. Some railway companies had put special heaters into box cars for shipment of pianos to the west during winter months, but this practice had been prohibited. Pianos, a bulky commodity, were shipped standing upright in one tier because of their fragile nature, thus much space was lost in the car. Sixteen pianos could be shipped in a box car of more than the mimimum weight of 12,000 lbs., while in a refrigerator car only ten pianos could be shipped, weighing less than 10,000 lbs. The respondent submitted that these heaters were dangerous, the goods of the shippers and rolling stock had been destroyed by fires originating from them, and their use involved additional expense for examination at divisional points:—Held (1), that the Board had no jurisdiction to make an order under s. 317 (3), par. (c), of the Railway Act, 1906. (2) That under the circumstances the minimum carload weight of 12,000 lbs. is not unreasonable and the application should be dismissed.

Canadian Piano & Organ Manufacturers' Assn. v. Canadian Freight Assn., 12 Can. Ry. Cas. 22.

SHIPPING SYSTEM—TARE OF CARS—ABSORPTION OF MOISTURE.

Application directing the respondents to continue the allowances for blocking, dunnage and temporary racks, and that the railway companies' weighmen should not be allowed to estimate by guesswork the allowances to cover the weight of accumulated ice, snow or refuse which may be in or upon the car. The respondents, who had for many years made certain allowances from track scale weights to rectify any variation in the tare of cars or increased weight thereof caused by reason of the absorption of moisture and the accumulation of snow, ice and refuse, filed new tariffs doing away with the former allowances for blocking, dunnage and temporary racks. The question for consideration was whether these regulations should be modified by the carriers, and whether in the past they had been reasonable or burdensome upon them:—Held (1), that although the weighing system had been much improved, if some arbitrary allowances could not be agreed upon between the parties for the accumulation of snow, ice and refuse, some other system would have to be devised than that proposed. (2) That before the proposed tariffs were made effective the applicants and respondents should have a further conference and then the Board would dispose of all matters the parties had been unable to adjust.

Canadian Manufacturers', etc., Assn. v. Canadian Freight Assn., etc., 13 Can. Ry. Cas. 3.

SHIPPING SYSTEM—SUITABLE ACCOMMODATION—CARRIAGE OF MEAT.

Application directing the respondent to furnish an adequate supply of cars suitably equipped for the carriage of fresh meat and packing-house products and to disallow the increase in rates. The respondent neglected to supply cars with cross pieces in the top so that the shipper might hang his meat to hooks inserted in them. On the 3rd October, 1910, the respondent issued a tariff effective on 10th October, granting certain commodity rates on the commodities in question. This tariff remained in effect until 1st August, 1911, when a supplement was filed more than doubling the rates and raising the minimum C.L. weight from 17,000 to 20,000 lbs. It was said that these charges were made in error and that they should have been upon a mileage basis at 9 cents per 100 lbs.:—Held (1), that suitable accommodation for carrying the traffic under s. 284 of the Act included furnishing cross pieces in the top of the car for the shipper to put his hooks in for his meat. (2) That the tariff of 1st August, 1911, should be cancelled and the tariff of 10th October, 1910, reinstated and should remain in effect for at least one year, and during that time if the respondent can shew that the tariff is not fair or remunerative, an opportunity will be given it to increase the rates. (3) That the Board had no jurisdiction to order a refund.

Vancouver-Prince Rupert Meat Co. v. Great Northern Ry. Co., 13 Can. Ry. Cas. 15.

CAR SERVICE RULES—DETENTION OF REFRIGERATOR CARS FOR STORAGE PURPOSES.

Application by the Canadian Freight Assn. to revise the charges provided by the car service rules with reference to refrigerator cars. The association proposed to leave the charge, as at present, for the first two days at $1 per car per day after the expiration of the 48 hours free time; but to charge for the next two days $3 per car per day or fraction thereof; and for each succeeding day thereafter $4 per car per day or fraction thereof. With the object of obtaining the benefit of the cold or warm storage at the nominal charge of $1 per car per day until the contents of cars were disposed of, consignees have been holding perishable freight loaded in refrigerator cars very frequently from 10 to 15 days, commonly 20 days, and in various cases over a month. The said charge of $1 was cheaper than that in any other cold storage warehouse in Winnipeg or any other city in the west:—Held (1), that cars were transportation facilities, not a portion of the warehousing premises of the consignee leased from a railway at a nominal rental. (2) That such undue detention of cars for storage purposes was contrary to the public interest and a hardship where refrigerator cars were required. (3) That s. 6 of the bill of lading in use by carriers should be sufficient to enable them to deal with the matter. (4) That though it appeared that a grievance existed, the Board should not take any action or make any direction until it was affirmatively shewn that the matter could not be adequately dealt with under the said section.

Canadian Freight Assn. v. Winnipeg Board of Trade and Canadian Manufacturers' Assn., 13 Can. Ry. Cas. 122.

EQUIPMENT OF FREIGHT CARS—FOREIGN CARS INTERCHANGED.

Subs. 5 of s. 264 of the Railway Act, 1906, which requires "all box freight cars of [a railway] company" to be equipped with outside ladders on the ends and sides thereof, applies only to cars owned by the defendant company and not to those of a railway company operating in the United States, that were received by the defendant in interchange of traffic under s. 317 of the Act.

Stone v. Can. Pac. Ry. Co. (Ont.), 14 Can. Ry. Cas. 61, 4 D.L.R. 789. [Reversed in 13 D.L.R. 93, 47 Can. S.C.R. 634.]

EQUIPMENT OF FOREIGN FREIGHT CARS.

Notwithstanding that s. 261 (1) of the Railway Act, 1906, requires every railway company to provide cars with couplers coupling by impact, that can be uncoupled without the necessity of men going between the ends of cars, the fact that a car, which in the interchange of traffic, under s. 317 of the Act was received from and was owned by a railway company operating in the United States, had an operating lever on its coupling device which was shorter than those on cars owned by the defendant, is not a defect so as to render the defendant liable for injuries sustained by a brakesman while attempting to couple it, since cars with short levers were constantly being received and passed in the ordinary course of inspection.

Stone v. Can. Pac. Ry. Co. (Ont.), 14 Can. Ry. Cas. 61, 4 D.L.R. 789. [Reversed in 13 D.L.R. 93, 47 Can. S.C.R. 634.]

Equipment of foreign cars—Couplers—Short levers.

For a railway company to haul a box freight car owned by a foreign company, which was equipped with a coupling lever so short that it could not be operated without going between the ends of the cars, is a violation of s. 264 (1) of the Railway Act, 1906, requiring all freight cars to be equipped with couplers that can be uncoupled without the necessity of men going between the ends of the cars. [Stone v. Can. Pac. Ry. Co., 4 D.L.R. 789, 14 Can. Ry. Cas. 61, 26 O.L.R. 121, reversed.]

Stone v. Can. Pac. Ry. Co., 47 Can. S.C.R. 634, 13 D.L.R. 93.

Embargo on cars of another railway.

The Board may order discontinued an embargo placed by a railway against receiving, for interswitching delivery, upon private sidings of their line, the loaded cars of another railway from stations on such other railway, if taken merely as a means whereby to recover cars of the railway placing such embargo located along the line of the railway from which the shipments originated, where there were at the points of shipments no cars belonging to the railway seeking to enforce such embargo available for the use of the shippers affected thereby.

Marchand Sand Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 224.

Box and ore cars—Absorption of moisture.

Box cars are suitable—in many cases necessary—for ore traffic, and must be supplied where required, since the extra weight in open dump cars used for carrying ore, caused by absorption of moisture in wet weather or winter time, would make the toll prohibitive. The duty of a railway in furnishing adequate facilities for traffic includes supplying cars for business originating on its lines in Canada, independently of whether or not box cars are received from the United States waiting to be unloaded and returned, and it is neither necessary nor desirable to hold any particular cars exclusively for Canadian traffic.

Iron Mountain, etc. v. Great Northern Ry. Co., 15 Can. Ry. Cas. 311.

Station Agent—Authority—Knowledge of special purpose—Breach of Contract.

Where a special horse car was ordered from a railway station agent for the purpose made known to the agent of carrying horses to be exhibited at a winter fair and the agent had previously supplied cars upon similar orders. His action in this instance having been ratified by his superiors, there being no notice to the plaintiff of any limitation of the agent's authority, the company is bound by the agent's action in accepting the order for the car and is liable in damages for failure to supply it. The plaintiff was justified on discovering the lack of efficient action in supplying the car to treat it as a breach of contract sufficient to relieve him from bringing the horses forward for shipment and is entitled to damages for (1) entry fees paid to enter the horses for exhibition, (2) extra labour in fitting horses for exhibition, (3) extra blacksmithing, (4) extra feed, grain and hay, (5) loss of profits in selling horses after exhibition, (6) extra expenses of carrying the horses until the following spring (1st May), but not for prospective prizes which might have been won at the Fair or for loss of advertising through not being shewn thereat.

Mancell v. Michigan Central Ry. Co., 19 Can. Ry. Cas. 246.

Facilities—Grain cars—Congestion—Switching.

It is in the public interest that there should be no congestion of the railway facilities at elevator terminals. Accordingly, an application for switching cars of grain to private elevators at Fort William after the cars had been placed for unloading at other elevators was refused. Under the provisions of s. 8 of the Bulk Grain Bill of Lading, delivery may be made at any of the elevators at Port Arthur, Fort William or West Fort, without waiting 48 hours after written notice of arrival has been sent or given.

Ostrander v. Can. Pac., Can. Northern and Grand Trunk Pacific Ry. Cos., 19 Can. Ry. Cas. 251.

Obligation to supply cars.

The obligation of a carrier under s. 317 of the Railway Act, 1906, is to supply cars according to their respective powers. Where a carrier is called upon to supply a car which is not carried on its equipment register, it is within its powers to supply a car on its equipment register which is nearest available to the length asked for. When foreign cars of larger sizes than are carried on their equipment register are available, carriers may furnish such cars, but the Board has no jurisdiction to compel carriers to supply a larger car of foreign equipment.

Hunting-Merritt Lumber Co. v. Can. Pac. and British Columbia Elec. Ry. Cos., 20 Can. Ry. Cas. 181.

Tolls—Car service rules—Obligations.

The obligations of carriers under contracts of carriage cease when notice of the arrival of the car has been given or it has been placed for unloading and the free time allowed under the car service rules has elapsed. The car service tolls are independent of the toll applying on the shipment and the car is liable to the car service tolls in force at the time of its arrival at destination.

Security Traffic Bureau v. Canadian Freight Assn., 20 Can. Ry. Cas. 186.

Supply—Grain—Congestion—Public interest.

The Board having satisfied itself that a very large quantity of grain (estimated at 60 per cent of the year's crop) remaining in the Goose Lake District at the end of February, 1916, awaiting transportation, was in danger of deterioration and loss, and that the Canadian Northern Ry. Co. was unable to move the crop quickly enough to serve the public interest, made an order under 6 & 7 Geo. V. c. 2 s 317 (a) amending the Railway Act:—(a) Requiring the Canadian Northern Ry. Co. to supply at once 1,200 cars and 36 engines to be used solely in that district in carrying grain to the terminal elevator at Saskatoon and to the transfer track of the Grand Trunk Pacific Ry. Co. there. (b) Requiring the Grand Trunk Pacific Co. (which had cars idle) to use all available rolling stock in carrying grain from the Saskatoon elevator to eastern points and to supply the Canadian Northern with one empty box car for each car of grain received at the transfer track. (c) Directing the railway companies to fix proportionals of the through rate (while was not to be increased) in such manner as to give the Canadian Northern a larger share than it would receive on a mileage basis as its proportion of the through rate.

Re Goose Lake District Grain, 21 Can. Ry. Cas. 38.

LOADING CAPACITY—WEIGHT—MINIMUM.

A reduction in the general minimum weight will not be made because in a particular instance it is slightly in excess of the average loading capacity of the car.

Hay and Still Mfg. Cos. v. Grand Trunk and Canadian Pacific Ry. Cos., 21 Can. Ry. Cas. 43.

JURISDICTION—PLACING CARS—FACILITIES.

The Board has no jurisdiction to order a carrier to place cars for receipt of traffic at points on its railway other than the point of starting, points of junction with other railways, and established stopping places.

Kammerer v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 74.

DIVERSION—TOLLS—SPECIFIC SIDING—TERMINALS—C.L. TRAFFIC.

The holding of C.L. traffic until directions are given to place upon a specific siding would involve great confusion, delay and loss, and would be impracticable owing to the large amount of space required for sufficient yardage at important terminal points. A toll of $3 was approved for diversion of cars at large terminals.

Montreal Board of Trade v. Can. Pac. Ry. Co., 22 Can. Ry. Cas. 235.

CAR SERVICE—EXPRESS TRAFFIC—UNREMUNERATIVE EARNINGS.

Where after a thorough test of the extra car service ordered by the Board, the earnings on the express traffic from the points in question are unremunerative, being less than the operating costs, the Board directed that the service be discontinued.

Jordan Co-Operative Co. et al. v. Canadian Express Co., 23 Can. Ry. Cas. 55.

TRANSPORTATION FACILITIES—COMPETING LINES—SHORTAGE—EQUIPMENT.

Shippers located on one line of railway are not entitled to as good transportation facilities as if located on two or more competing lines. In times of car shortage it is the duty of a carrier to retain its equipment so as to serve shippers on its own line. [Can. Pac. Ry. Co. v. Nelson & Fort Sheppard Ry. Co., 11 Can. Ry. Cas. 400, followed.]

Re Coal Transportation Facilities, 22 Can. Ry. Cas. 338.

ORIGINATING LINES—LONG HAULS—PER DIEM TOLLS—PROMPT RETURN—JUNCTION POINT.

The Board laid down the following rules for the movement of coal, not only to points on the originating line but also to points on other lines: (a) Cars must be supplied for this purpose as well as for delivery at points on the originating line to the full extent cars are available; (b) where the originating or receiving line enjoys the long haul it must supply the cars; (c) where the line that ought to supply the cars is unable to do so, then the other line although not enjoying the long haul should supply the cars and be paid by the defaulting line a per diem toll of $1.25 instead of 45 cts. from the time the car leaves until it is returned to the owning line, but no existing freight toll may be increased to cover the additional per diem toll; (d) it is the duty of the receiving line to return the cars promptly to the owning line, either at the junction point where the car was received or, in case return loads can be obtained, to another junction point on the line of the return movement.

Re Coal Transportation Facilities, 22 Can. Ry. Cas. 338.

EMERGENCY—COAL SHORTAGE—INSUFFICIENT EQUIPMENT—ALTERATION OF CARS.

To provide for an emergency due to shortage of equipment and scarcity of coal, railway companies without sufficient equipment were ordered to make forthwith the necessary changes in flat or live stock cars to enable them to carry coal.

Re Coal Transportation Facilities, 22 Can. Ry. Cas. 338.

SPECIAL EQUIPMENT—POTATOES—OPERATING CONDITIONS AND EFFICIENCY.

The fitting of cars used for shipping potatoes with special equipment, such as air spaces in the sides and bottoms, to prevent damage by freezing, is a matter concerned with operating conditions and efficiency, and the Board is not justified in making an experimental order requiring carriers to so equip cars, there being no assurance that an improvement will be effected.

Potato Shippers v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 46.

SINGLE DECK—MINIMUM—C.L.—WEIGHT.

The Board declined to approve a reduction in the minimum C.L. weight on sheep from 16,000 lbs. to 12,000 lbs. in single deck cars.

South Alberta Wool Growers' Assn. v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 54.

LINED AND RACKED BOX CARS—REFRIGERATOR—SHORTGAGE—HEATERS SUPPLIED BY SHIPPERS—NO REMUNERATION—FREE RETURN.

Where the shortage of refrigerator cars has been relieved by supplying lined and racked box cars, but the carrier has been unable to secure a sufficient number of heaters for them, such heaters ought to be supplied as far as possible at the tolls provided by the tariffs, but in cases where heaters are supplied by the shippers, the carrier is entitled to no remuneration, and should also return the shippers' heaters from destination to point of origin free of cost. During the shortage of 1917-18 caused by the European War, the Board declined to direct carriers to supply men to see that heaters in cars were properly looked after, when under tariff shippers' messengers are provided with free transportation for that purpose.

Okanagan Valley Growers v. Can. Freight Assn., 24 Can. Ry. Cas. 55.

CONTRACT TO FURNISH CARS.

Where the railway company makes a continuing offer and in effect says "order our cars and we will supply them at a certain rate of freight" a complete contract is established between a railway company and a shipper the moment the shipper gives the order in consequence.

Starratt v. Dominion Atlantic Ry. Co., 16 D.L.R. 777.

CARTAGE.

See Tolls and Tariffs (E).

CATTLE.

See Fences and Cattle Guards; Carriage of Live Stock; Limitation of Liability (B).

CATTLE GUARDS.

See Fences and Cattle Guards.

CATTLE PASS.

See Farm Crossings.

CHARTERS.

See Corporate Powers.

CHILDREN.

Injuries to children allured to railway premises, see Negligence; Bridges. Note 2 Can. Ry. Cas. 250.

Injury to child passenger, see Carriers of Passengers.

CLAIMS.

A. In General.
B. Notice of Claim.
C. Assignment of Claims.

Claims against the Crown, see Government Railways.

See Limitation of Actions; Limitation of Liability.

Annotations.

Assignment of judgments. 6 Can. Ry. Cas. 479.

Condition requiring notice of goods being lost. 7 Can. Ry. Cas. 378.

A. In General.

Estoppel—Conduct—Unpaid receipted accounts.

Where a debt or obligation has been contracted through an agent, and the principal is induced by the conduct of the creditor to reasonably believe that the agent has paid the debt or discharged the obligation, and, in consequence of such belief, pays or settles or otherwise deals to his prejudice with the agent, the creditor is not permitted to deny as between himself and the principal that the debt has been paid or the obligation discharged. A railway engineer who was supplied with money by a railway company to pay for supplies and the board of his men, being credited with the amounts of the receipted accounts as they came in, and who had induced a firm of hotelkeepers who had furnished both to receipt the accounts in advance on the representation that the company as part of their system required receipts before they would pay the accounts:—Held, that the company were justified in relying on these representations that the accounts were paid, and as they had altered their position—the engineer having left their employment without accounting—on the faith of them, the hotelkeepers were estopped from setting up to the prejudice of the company that the accounts were not in fact paid.

Gentles v. Can. Pac. Ry. Co., 14 O.L.R. 286.

Garnishment—Money due contractor—Building contract.

Moneys earned by a contractor under contracts for the erection of buildings, and payable by instalments as the work progresses on certificates of the engineer employed by the proprietor, should be deemed to be "accruing due," and, therefore, attachable by a garnishing order at the suit of a creditor, (a) in the case of a completed contract, at the date of completion, (b) in the case of a contract abandoned by the contractor before completion and subsequently completed by the proprietor, at the date of the abandonment; provided that, in both cases, the engineer has subsequently given his certificates shewing that the amounts were payable to the contractor, and the garnishee has paid the moneys into Court, unless it has been proved affirmatively that the certificate of the engineer was to be a condition precedent to the moneys becoming payable.

Empire Sash & Door Co. v. McGreevy, 8 D.L.R. 27, 22 Man. L.R. 676.

RAILWAY CONSTRUCTION CONTRACT—SET-OFF—PERSONAL INJURY OF EMPLOYEE.

Plaintiffs brought action to recover $5,655, balance alleged to be due on a contract to build a railway for defendants. Defendants pleaded that under the agreement it was the duty of plaintiffs to fill the narrow places between the rails at frogs, guard rails and switches with standard wooden blocks, and that, by reason of plaintiffs' failing to do, one Clarke, an employee of the C.P.R. Co. to which the road had been leased by defendants, had his foot caught in a frog and was run over and killed, and the defendants had to pay his legal representatives $5,250. Defendants paid into Court $405 as a balance due plaintiffs on their contract. At trial, Boyd, C., held, that the action should be dismissed with costs, the money in Court to be paid out to plaintiffs unless it was sought to impound it to answer costs. The Court of Appeal reversed that judgment on the ground that there was no liability upon plaintiffs to the C.P.R. Co. for injury done to that company's servant. Judgment entered for amount of plaintiff's claim with costs.

MacDonald v. Walker & Lucknow Ry. Co., 1 O.W.N. 967, 16 O.W.R. 558.

SUPPLY OF GOODS FOR RAILWAY CONSTRUCTION—ACTION FOR PRICE—PREMATURITY—DEFENSE OF SURETIES.

Allen v. Grand Valley Ry. Co., 12 D.L.R. 855.

B. Notice of Claim.

CLAIM FOR MONEY PARCEL—FORMAL NOTICE.

Where an express company gave a receipt for money to be forwarded with the condition indorsed that the company should not be liable for any claim in respect of the package useless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed:—Held, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the express company for failure to deliver the parcel to the consignee. [Richardson v. Canada West Farmers' Ins. Co., 16 U.C.C.P. 430, distinguished; 10 Man. L.R. 595, reversed].

Northern Pac. Express Co. v. Martin et al., 26 Can. S.C.R. 135.

NOTICE OF CLAIMS—LIMITATION OF TIME.

A condition of a contract for carriage of goods by railway provided that no claim for damages to, loss of, or detention of goods should be allowed unless notice in writing, with particulars, was given to the station agent at or nearest to the place of delivery within thirty-six hours after delivery of the goods in respect to which the claim was made:—Held, per Strong, J., that a plea setting up noncompliance with this condition having been demurred to, and the plaintiff not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defence was res judicata:—Held, also, per Strong, J., Gwynne, J., contra, that part of the consignment having been lost such notice should have been given in respect to the same within thirty-six hours after the delivery of the goods which arrived safely. Quaere.—In the present state of the law is a release to, or satisfaction from one of several joint tortfeasors, a bar to an action against the others? 15 A.R. (Ont.) 14, 12 O.R. 103, reversed.

Grand Trunk Ry. Co. v. McMillan, 16 Can. S.C.R. 543.

[Leave to appeal refused by Privy Council, May 17th, 1889.]

[Discussed in Richardson v. Can. Pac. Ry. Co., 19 O.R. 369; referred to in Bate v. Can. Pac. Ry. Co., 14 O.R. 625; Cobban v. Can. Pac. Ry. Co., 23 A.R. (Ont.) 115; Ferris v. Can. Northern Ry. Co., 15 Man. L.R. 144; McKenzie v. Can. Pac. Ry. Co., 43 N.S.R. 460; Robertson v. Grand Trunk Ry. Co., 21 A.R. (Ont.) 204, 24 O.R. 75; Tolmie v. Michigan Central Ry. Co., 19 O.L.R. 26; followed in Lockshin v. Can. Northern Ry. Co., 24 Can. Ry. Cas. 362, 47 D.L.R. 516.

PRESENTATION IN WRITING.

Where a condition of a contract for carriage of goods is that a claim for loss or damage should be presented to the defendants in writing "at this office," presentation at the head office of the defendants satisfies this requirement. Judgment of Clute, J., affirmed.

James Co. v. Dominion Express Co., 6 Can. Ry. Cas. 309, 13 O.L.R. 211.

[Approved in Dominion Express Co. v. Rutenberg, 18 Quebec K.B. 53.]

DAMAGE TO GOODS—CONDITION REQUIRING NOTICE OF CLAIM.

A condition in a shipping bill providing that there should be no claim for damages to goods shipped over a railway unless notice in writing and the particulars of the claim are given within thirty-six hours after delivery, if it has been approved by order or regulation of the Board, under s. 275 of the Railway Act, 1903, is binding upon the shipper, even if negligence on the part of the railway company is proved, notwithstanding the language of subs. 3 of s. 214 of the Act, enacting that "subject to the Act" the company shall not be relieved from an action by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants, as both sections of the Act must be read together. [Grand Trunk Ry. Co. v. McMillan (1889), 16 Can. S.C.R. 543, and Mason v. Grand Trunk Ry. Co. (1873), 37 U.C.R. 163, followed.]

Hayward v. Can. Northern Ry. Co., 6 Can. Ry. Cas. 411, 16 Man. L.R. 158.

[Questioned in Sheppard v. Can. Pac. Ry. Co., 16 O.L.R. 259; referred to in Sutherland v. Grand Trunk Ry. Co., 18 O.L.R. 139; Wilkinson v. Can. Express Co., 14 Can. Ry. Cas. 267, 7 D.L.R. 450.]

LOSS OF BOXES SHIPPED—NECESSITY FOR NOTICE OF LOSS.

One of the conditions of a railway waybill was that there shall be "no claim for damage for loss of or detention of, or injury or damage to, any goods for which the company is accountable, unless and until notice in writing and the particulars of the claim of said loss, damage, or detention, are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect of which said claim is made, or such portion of them as are not lost are delivered." Two boxes of blankets shipped by the plaintiff were reshipped by the railway to the original place of shipment, and an advice note of their arrival sent to the plaintiff, which stated that there was "one box short":—Held, that under the terms of the condition the box could not be said to be "lost," and notice in writing by the plaintiff to the defendants, within the thirty-six hours of the receipt of the advice note of the loss of the box, was not essential to entitle the plaintiff to recover its value.

Sheppard v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 374, 16 O.L.R. 259.

[Referred to in Sutherland v. Grand Trunk Ry. Co., 18 O.L.R. 139.]

INJURY TO LIVE STOCK—NOTICE OF—OMISSION TO GIVE.

By s. 284 (7) of the Railway Act, 1906: "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants." By s. 340: "No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board. (2) The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired." The defendants received from the plaintiff a mare, with other animals, to be carried from a station on their railway in Ontario to a point in British Columbia, under a special contract, approved of by the Board, and which the plaintiff signed. Under this contract the animals were carried at a lower rate than the company were entitled to charge. The contract contained a provision that the defendants should in no case be responsible for any amount exceeding $100 for the loss of any one horse, or a proportionate sum in any one case for injuries to same, and that any loss or damage should be computed and paid for on such basis. There was a further provision relieving the company from liability, "unless a written notice, with the full particulars of the loss or damage and of the claim to be made in respect thereof, is delivered to the station agent at the said point of delivery within 24 hours after the said property, or some part of it, has been delivered." During the carriage on the railway, the mare was, through the defendants' negligence, seriously injured. Before the consignment arrived at its destination the plaintiff, finding that the mare was permanently injured, by the permission of the railway superintendent there, removed the mare from the car at an intermediate station and sold her at a loss, the remainder of the shipment being carried on to the place of delivery. No notice of the loss was given there to the company's official within the 24 hours:—Held, that notwithstanding the loss was sustained through the defendants' negligence, the special contract was binding on the plaintiff, so that in no event could he recover more than the proportionate part of $100; but that the omission to give the required notice relieved the company from all liability. [Robertson v. Grand Trunk Ry. Co. (1895), 24 Can. S.C.R. 611, followed; St. Mary's Creamery Co. v. Grand Trunk Ry. Co. (1904), 8 O.L.R. 1, distinguished.] Judgment of the County Court of Grey affirmed.

Mercer v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 372, 17 O.L.R. 585.

[Commented on in Newman v. Grand Trunk Ry. Co., 20 O.L.R. 285; distinguished in Tolmie v. Michigan Central Ry. Co., 19 O.L.R. 26, 9 Can. Ry. Cas. 336; referred to in Sutherland v. Grand Trunk Ry. Co., 18 O.L.R. 139; Wilkinson v. Can. Express Co., 14 Can. Ry. Cas. 267, 7 D.L.R. 450.]

Claim for loss—Time—Necessity of writing—Quantity—"More or less."

A bill of lading of the defendants, covering wheat shipped, provided that its surrender should be required before delivery of the wheat, and that claims for loss or damage must be made in writing to the defendants' agent at point of delivery promptly after arrival of the wheat, and if delayed for more than thirty days after such delivery, or after due time for delivery, the defendants should not be liable in any event:—Held, that the failure to make such claim in writing within the time specified did not relieve the defendants from liability resulting from breach, not of their contract of affreightment,' but of their contract to deliver the wheat to the holder of the bill of lading and to no one else. Where, therefore, the defendants had delivered the wheat without obtaining surrender of the bill of lading:—Held, that the defendants were liable to the consignor to the value of the number of bushels of wheat expressed in the bill of lading to have been received by them, but not for any more, although more had been actually shipped, and the words "more or less" in the bill of lading did not, in the circumstances, affect the matter. [Mercer v. Can. Pac. Ry. Co. (1908), 17 O.L.R. 585, 8 Can. Ry. Cas. 372, distinguished.]

Tolmie v. Michigan Central Ry. Co., 9 Can. Ry. Cas. 336, 19 O.L.R. 26.

Claim for detention—Failure to give notice—Misprint—"Or"—"Are."

Although the defendants were found guilty of negligence in unreasonably detaining and failing within a reasonable time to deliver a carload of beans shipped by the plaintiff, an action to recover damages for that negligence was dismissed because the plaintiff had failed to give notice in writing and particulars of his claim for detention, to the station freight agent at or nearest to the place of delivery, within thirty-six hours after the goods were delivered. The condition printed on the back of the shipping bill requiring such notice was one approved by the Board, and read: "There shall be no claim for . . . detention of any goods . . . unless notice in writing and the particulars of the claim . . . are given . . . within thirty-six hours after the goods . . . or such portions of them as are not lost or delivered":—Held, that "or" should be read "are," for which it was obviously a misprint, and the condition so made effective.

Newman v. Grand Trunk Ry. Co., 10 Can. Ry. Cas. 248, 20 O.L.R. 285.

Claim for detention—Failure to give notice—Condition—Misprint—"Or"—"Are."

In an action for damages for breach of a contract for the carriage of goods, held, affirming the judgment of Teetzel, J., 20 O.L.R. 285, that the word "are" should be substituted for "or" in the condition on the back of the shipping bill—in the form approved by the Board and, the contract being thereby rendered intelligible, and the plaintiff, not having complied with the requirements of the condition, that the defendants were relieved from the consequences of the negligence found against them.

Newman v. Grand Trunk Ry. Co., 10 Can. Ry. Cas. 254, 21 O.L.R. 72.

C. Assignment of Claims.

Personal injuries—Assignment of claim for—Assignability of.

The plaintiff brought an action for damages for personal injuries sustained by his being run down by a car of the defendants, and for the killing of his master's horse which he was riding at the time, and in respect to which he claimed under assignment from his master:—Held, that the action was properly dismissed as to the latter claim upon the ground that it was not an assignable chose in action.

McCormack v. Toronto Ry. Co., 6 Can. Ry. Cas. 474, 13 O.L.R. 656.

[Referred to in Beal v. Michigan Central Ry. Co., 19 O.L.R. 502; Moritz v. Can. Wood Specialty Co., 17 O.L.R. 53; McGregor v. Campbell, 19 Man. L.R. 44, 61; Powley v. Mickleborough, 21 O.L.R. 556.]

Subcontractor—Instalments accruing on original contract—Assignability.

An agreement whereby a contractor for work subcontracts with another to do the same work at the same price as he is to receive and agrees to pay the second contractor in the same instalments as are stipulated for in the original contract with the property owner, does not constitute an assignment to the person who performs the work of the moneys to accrue under the original contract made by the property owner, and such transaction is not an equitable assignment of a chose in action.

Fraser v. C.P.R. Co., 1 D.L.R. 678, 22 Man. L.R. 58.

[Reversed in Fraser v. Imperial Bank, 10 D.L.R. 232, 47 Can. S.C.R. 313.]

Assignment of future chose in action.

An assignment of a future chose in action by way of a construction contract for a number of railway stations operates in equity as an agreement binding the conscience of the assignor and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done and that the agreement imports in equity a trust. [Tailby v. Official Receiver, 13 A.C. 523; Fraser v. Imperial Bank, sub nom. Fraser v. Can. Pac. Ry. Co., 1 D.L.R. 678, 22 Man. L.R. 58, reversed.]

Fraser v. Imperial Bank, 10 D.L.R. 232, 47 Can. S.C.R. 313.

CLEARANCE.

See Bridges.

Jurisdiction—Dominion railway.

The Board has jurisdiction over all clearances on Dominion railways, whether operated by steam or electricity. Under special circumstances a clearance, in the case of poles already erected of 7 feet 3 inches, was approved, upon the company undertaking to keep its employees off the side of the cars on that side of the track on which the poles are erected, the clearance for unerected poles to be 7 feet 6 inches.

Hydro Electric Power Commission v. London & Port Stanley Ry. Co., 17 Can. Ry. Cas. 326.

COLLISIONS.

See Street Railways; Negligence; Crossing Injuries; Employees.

COMBUSTIBLE MATERIAL.

See Weeds; Fires.

COMPANY.

See Bonds; Corporate Powers; Shares.

COMPENSATION.

See Damages; Expropriation.

COMPOSITION WITH CREDITORS.

See Scheme of Arrangement.

CONDUCTORS.

Conductors' duties towards passengers, see Carriers of Passengers; Street Railways.

Negligence of operation of railway causing death of conductor, see Employees.

CONFLICT OF LAWS.

EMPLOYMENT CONTRACTS—INJURIES TO EMPLOYEES.

The civil liability, in a matter of delict or quasi delict, is subject to the rule lex loci regit actum. Therefore, workmen engaged in Quebec to work in Quebec and Ontario, who are injured through the act or fault of their employers in Ontario, have only the remedy given by the laws of that province. When the evidence shews that the foreign law does not recognize the right to the proceedings taken by the plaintiff, and upon which a verdict was found in his favour, his action should be dismissed non obstante veredicto, a new trial being useless. [38 Que. S.C. 394, reversed.]

Grand Trunk Ry. Co. v. Maclean, 21 Que. K.B. 269.

LORD CAMPBELL'S ACT—ACTION BY FATHER AND MOTHER FOR SON'S DEATH.

The father and mother can in their personal names sue a railway company for damages for their son's death occasioned in Manitoba if the defendant company have accepted the jurisdiction of the Quebec Court and have an office in the Province of Quebec.

Boon v. Can. Northern Ry. Co., 7 Que. P.R. 239.

LEX LOCI—CAUSE OF ACTION IN ANOTHER PROVINCE.

In an action for damages caused by an accident in another province the defendant who pleads that according to the law of such province he is not liable, is not obliged to set out in his plea the law relied on but it suffices that he states the fact.

Noruszuk v. Can. Pac. Ry. Co., 9 Que. P.R. 274.

EMPLOYER AND EMPLOYEE—INJURY IN COURSE OF EMPLOYMENT.

Liability for tort is governed by the lex loci actus, and, in an action by an employee against his employer arising out of a personal injury, is not affected by the law of the place where the contract of lease and hire of work was made. Hence when a railway company running trains in both the provinces of Ontario and Quebec hired one of its servants in Quebec, and he was injured through the fault of the company in Ontario, his claim for compensation is governed by the law of the latter province. [Dupont v. Quebec Steamship Co., 11 Que. S.C. 188; Lee v. Logan, 31 Que. S.C. 469 and 39 Can. S.C.R. 311; Albouze v. Temiskaming Navigation Co., 38 Que. S.C. 279, referred to.]

Marleau v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 149, 38 Que. S.C. 394.

[Reversed in part 21 Que. K.B. 269, 14 Can. Ry. Cas. 284.]

Liability of master—Injury in course of employment.

(1) Common-law liability, in cases involving delict or quasi delict, is governed by the lex loci regit actum. Hence workmen hired in Quebec to be employed in Quebec and Ontario, who are injured by the positive act or by the fault of their employers in the latter province, have no remedy except under the provisions of its laws. (2) When the evidence shews that the foreign law does not admit of the remedy relied upon by the plaintiff, and upon which a verdict has been given in his favour by the jury, he must be nonsuited, non obstante veredicto, a new trial being ineffective. [Marleau v. Grand Trunk Ry. Co., 38 Que. S.C. 394, 12 Can. Ry. Cas. 149, reversed in part.]

Grand Trunk Ry. Co. v. Marleau, 14 Can. Ry. Cas. 284, 21 Que. K.B. 269.

Dependants—Person killed in Ontario—Right of Action in Quebec—Action barred in Ontario.

An action will lie in Quebec by the dependants of a person killed in Ontario, although in Ontario no action would lie unless the deceased would have had a right of action had he survived; however, where he had barred such action by the contract he had signed; in Quebec, the right of action is not subject to such condition, but the wrongful act must be of a class actionable in Ontario. [Parent v. Can. Pac. Ry. Co., 46 Que. S.C. 319, affirmed.]

Can. Pac. Ry. Co. v. Parent, 19 Can. Ry. Cas. 1, 51 Can. S.C.R. 234, 21 D.L.R. 681.

Actions ex delicto—Place of accident in another province.

A legal obligation ex delicto, where the res gestæ giving rise to the obligation have occurred outside the territorial jurisdiction of a province, may be enforced in the Courts of that province, if a like obligation would have arisen, had the accident occurred within that jurisdiction; and a right of action by common law, accruing in Ontario, where the accident occurred, is enforceable in the Province of Manitoba where a similar right of action would have arisen. [Phillips v. Eyre, L.R. 6 Q.B., referred to.]

Lewis v. Grand Trunk Pacific Ry. Co., 20 Can. Ry. Cas. 318, 52 Can. S.C.R. 227, 26 D.L.R. 687.

CONNECTING LINES.

As affecting liability for negligence, see Negligence.

As affecting limitations of liability, see Limitation of Liability; Tickets and Fares; Claims.

See Carriers of Goods; Carriage of Live Stock; Tolls and Tariffs.

CONSTITUTIONAL LAW.

A. Powers of Dominion.
B. Provincial Powers.
C. Territorial Powers.

See Appeals.

Annotations.

Railways as works for general advantage of Canada. 2 Can. Ry. Cas. 265.

Works for the general advantage of Canada as affected by provincial statute. 3 Can. Ry. Cas. 142.

Provincial legislation affecting awards, interest, costs, and filing plans under expropriation of railway. 3 Can. Ry. Cas. 120.

Government regulation of railway companies respecting agreements exempting employers from liability for negligence. 5 Can. Ry. Cas. 15.

Dominion railway company taking lands of provincial railway company. 18 Can. Ry. Cas. 144.

Work for general advantage of Canada, and provincial jurisdiction. 19 Can. Ry. Cas. 170, 20 Can. Ry. Cas. 128.

A. Powers of Dominion.

Legislative powers of Dominion Parliament—Provincial laws relating to property and civil rights.

The legislation of the Parliament of Canada on matters exclusively within its legislative powers is of paramount authority and is not subject to restrictions and formalities imposed by the law relating to property and civil rights in the provinces.

Veilleux v. Atlantic & Lake Superior Ry. Co., 12 Can. Ry. Cas. 91, 39 Que. S.C. 127.

Provincial regulation of ditches—Railway works.

By the true construction of the B.N.A. Act, s. 91, subs. 29 and s. 92, subs. 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair, and alteration of the appellant's railway; and the provincial legislature has no power to regulate the structure of a ditch forming part of its authorized works. But the provisions of the Municipal Code of Quebec, which prescribe the cleaning of the ditch and the removal of an obstruction which has caused inundation on neighbouring land, are intra vires of the provincial legislature.

Can. Pac. Ry. Co. v. Notre Dame de Bonsecours, [1899] A.C. 367.

[Applied in Can. Pac. Ry. Co. v. The King, 39 Can. S.C.R. 479; Grand Trunk Ry. Co. v. Therrien, 30 Can. S.C.R. 492; considered in Atty.-Genl. v. Can. Pac. Ry. Co., 11 B.C.R. 300, [1906] A.C. 210; distinguished in Madden v. Nelson, etc., Ry. Co., [1899] A.C. 628; followed in Crawford v. Tilden, 13 O.L.R. 169; referred to in Grand Trunk Ry. Co. v. McKay, 34 Can. S.C.R. 92; Grant v. Can. Pac. Ry. Co., 36 N.B.R. 546; relied on in Re Railway Act, 36 Can. S.C.R. 151.]

Regulation of Railway construction—Contracts—Powers of the Dominion Parliament.

The Consolidated Railway Act, 1879, s. 19, subs. 16, enacts: "No person holding any office, place or employment in or being concerned or interested in any contracts under or with the company, shall be capable of being chosen a director, or of holding the office of director, nor shall any person being a director of the company enter into, or be directly or indirectly, for his own use and benefit, interested in any contract with the company, not relating to the purchase of land necessary for the railway, or be or become a partner of any contractor with the company." It was admitted that the appellant was a director and the president of the Temiscouata Ry. Co., at the time he entered into certain agreements with the contractors for the construction of the road, which agreements gave him an interest in their contracts:—Held, the provisions of the enactment above cited are constitutional. The Dominion Parliament having the right to legislate on matters concerning railways, it has also the power to legislate on all incidents which may be required to carry out the object it had in view, provided such incidents are essentially and strictly connected with the principal object, and are primarily intended to assist in carrying out such principal object; and the capacity or incapacity of directors is a matter essentially connected with the internal economy of a railway company.

McDonald v. Riordan, 30 Can. S.C.R. 619, 8 Que. Q.B. 555.

Foreshore of Vancouver harbour—Occupation of by C.P.R. Co. terminals—Powers of Dominion Parliament.

The public has a right to access to the waters of Vancouver Harbour through certain streets, and the streets, at the time of the construction of the Canadian Pacific Ry., were public highways extending to low-water mark and the public right of passage over said highways existed at the time of the admission of British Columbia into Canada, but these public rights have been extinguished or suspended by reason of the construction of the said railway. The foreshore of Vancouver Harbour is under the jurisdiction of the Parliament of Canada, either as having formed part of the harbour at the time of the union of British Columbia with the Dominion, or by reason of the jurisdiction of the Dominion attaching at the union. The Parliament of Canada has power to appropriate provincial public lands for the purposes of a railway connecting two or more provinces. The Act respecting the Canadian Pacific Ry., 44 Vict. c. 1, should not be construed in the same way as an ordinary Act of incorporation of any ordinary railway, but it should be interpreted in a broad spirit and bearing in mind the objects sought to be accomplished. Per Hunter, C.J.:—The B.N.A. Act assigns public harbours to the Dominion, not so much qua property or land as qua harbours; the jurisdiction of the Dominion is latent and attaches to any inlet or harbour so soon as it becomes a public harbour, and is not confined to such harbours as existed at the time of union.

Attorney-General for British Columbia v. Can. Pac. Ry. Co., 11 B.C.R. 289.

[Affirmed in [1906] A.C. 204, followed in Lachine, Jacques Cartier, etc., Ry. Co. v. Montreal Tramways, etc., Ry. Cos., 18 Can. Ry. Cas. 133.]

Power of the Dominion to legislate for certain provincial Crown property—Provincial foreshore—Harbour.

S. 108 of the B.N.A. Act, empowers the Dominion Parliament to legislate for any land, including foreshore, which is proved to form part of a public harbour. Ss. 91, 92, read together, empower the Dominion to dispose of provincial Crown lands and therefore of a provincial foreshore, for the purpose of the respondent railway, which is a transcontinental railway connecting several provinces:—Held, that s. 18 (a) of the respondents' incorporating Dominion Act, 44 Vict. c. 1, is not controlled by the Consolidated Railway Act, 1879, and applies to provincial as well as Dominion Crown lands. Power given thereunder to appropriate the foreshore in question includes a power to obstruct any right of passage previously existing across it. [1 W.L.R. 299, 11 B.C.R. 289, affirmed.]

Attorney-General for British Columbia v. Can. Pac. Ry. Co., [1906] A.C. 204.

[Followed in Lachine, Jacques-Cartier, etc., Ry. Co. v. Montreal Tramways, etc., Ry. Cos., 18 Can. Ry. Cas. 133; distinguished in Grand Trunk Ry. Co. v. Toronto, 42 Can. S.C.R. 628; referred to in Burrard Power Co. v. The King, 43 Can. S.C.R. 55; relied on in Montreal Street Ry. Co. v. Montreal, 43 Can. S.C.R. 240.]

Works for the general advantage of Canada—Branch lines.

The Columbia & Western Ry. Co., was incorporated in 1896, by the Provincial Legislature, one of the powers given it being to build branch lines; and on 13th June, 1898, by an Act of the Dominion Parliament its objects were declared to be works for the general advantage of Canada, and thereafter to be subject to the legislative authority of the Dominion Parliament and to the provisions of the Railway Act:—Held, on an application for a warrant of possession, that the company's power to acquire land for branch lines after 13th June, 1898, must be exercised in accordance with the Dominion Railway Act.

Re Columbia & Western Ry. Co. and the Railway Acts, 2 Can. Ry. Cas. 264, 8 B.C.R. 415.

CROWN FRANCHISES REGULATION ACT—DOMINION COMPANIES.

The defendant company was originally incorporated in 1897 by a provincial Act, and in 1898 by a Dominion Act its objects were declared to be works for the general advantage of Canada, and thereafter to be subject to the legislative authority of the Parliament of Canada and the provisions of the Railway Act:—Held, by Irving, J., setting aside an order allowing the provincial Attorney-General to bring an action at the instance of a relator under the Crown Franchises Regulation Act, that the said Act did not apply to the company.

Attorney-General of British Columbia v. Vancouver, Victoria & Eastern Ry. etc., Co., 3 Can. Ry. Cas. 137, 9 B.C.R. 338.

WORK FOR THE GENERAL ADVANTAGE OF CANADA—DOMINION REGULATIONS.

A railway incorporated under the laws of a provincial Legislature, whose undertaking is afterwards declared to be a work for the general advantage of Canada is subject to the exclusive control of the Parliament of Canada and the Railway Act applies. No provincial legislation can restore control, legislatively speaking, to the provincial Parliament.

Re Shore Line Railway, 3 Can. Ry. Cas. 277.

NEGLIGENCE—AGREEMENTS FOR EXEMPTION FROM LIABILITY—POWER OF PARLIAMENT TO PROHIBIT.

An Act of the Parliament of Canada providing that no railway company within its jurisdiction shall be relieved from liability for damages for personal injury to any employee by reason of any notice, condition or declaration issued by the company, or by any insurance or provident association of railway employees; or of rules or by-laws of the company or association; or of privity of interest or relation between the company and association or contribution by the company to funds of the association; or of any benefit, compensation or indemnity to which the employee or his personal representatives may become entitled to or obtain from such association; or of any express or implied acknowledgment, acquittance or release obtained from the association prior to such injury purporting to relieve the company from liability, is intra vires of said Parliament. Nesbitt, J., dissenting.

Re Railway Act Amendment, 1904, 5 Can. Ry. Cas. 1, 36 Can. S.C.R. 136.

[Affirmed in Grand Trunk Ry. Co. v. Atty.-General, [1907] A.C. 65, 7 Can. Ry. Cas. 472.]

PROHIBITING CONTRACTS AGAINST LIABILITY FOR NEGLIGENCE—INJURY TO SERVANTS.

The Dominion Parliament is competent to enact s. 1 of Dominion Statute, 4 Edw. VII. c. 31, which prohibits "contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants.

That section is intra vires the Dominion as being a law ancillary to through railway legislation, notwithstanding that it affects civil rights which, under the B.N.A. Act, s. 92, subs. 13, are the subject of provincial legislation. 36 Can. S.C.R. 136, 5 Can. Ry. Cas. 1.

Grand Trunk Ry. Co. v. Attorney-General for Canada, 7 Can. Ry. Cas. 472, [1907] A.C. 65.

[Followed in Toronto v. Grand Trunk Ry. Co., 37 Can. S.C.R. 238; referred to in Montreal Street Ry. Co. v. Montreal Terminal Ry. Co., 36 Can. S.C.R. 380; relied on in Montreal Street Ry. Co. v. Montreal, 43 Can. S.C.R. 242; applied in Toronto v. Can. Pac. Ry. Co., [1908] A.C. 58; commented on in R. v. Hill, 15 O.L.R. 406; followed in Crown Grain Co. v. Day Co., [1908] A.C. 58; Re Narain Singh, 13 B.C.R. 479; Northern Counties Inv. Trust v. Can. Pac. Ry. Co., 13 B.C.R. 138; relied on in Couture v. Panos, 17 Que. K.B. 562.]

PROTECTION OF HIGHWAY CROSSINGS—APPORTIONMENT OF COSTS—PARTIES INTERESTED.

Ss. 187, 188 of the Railway Act, 1888, empowering the Railway Committee to order any crossing over a highway of a railway subject to its jurisdiction to be protected by gates or otherwise, are intra vires of the Parliament of Canada. (Ss. 186, 187 of the Railway Act, 1903, confer similar powers on the Board.) These sections also authorize the committee to apportion the cost of providing and maintaining such protection between the railway company and "any person interested":—The municipality in which the highway crossed by the railway is situate is a "person interested" under said sections.

Toronto v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 138, 37 Can. S.C.R. 232.

[Applied in Ottawa Elec. Ry. Co. v. Ottawa, 37 Can. S.C.R. 360, 5 Can. Ry. Cas. 131; commented on in Montreal Street Ry. Co. v. Montreal, 43 Can. S.C.R. 219; relied on in Carleton v. Ottawa, 41 Can. S.C.R. 552, 557; applied in Can. Pac. Ry. Co. v. Toronto, 7 Can. Ry. Cas. 274; followed in Thorold v. Grand Trunk et al. Ry. Cos., 24 Can. Ry. Cas. 21.]

PROTECTION OF HIGHWAY CROSSING—CONTRIBUTION OF COSTS—MUNICIPALITY AS "PERSON INTERESTED."

Ss. 187, 188 of the Railway Act, 1888, empowering the Railway Committee to order the protection of highway crossings and the apportionment of the costs thereof between railway companies and any "person interested" therein extend also to municipalities, and are intra vires of the Dominion Parliament by force of the B.N.A. Act, s. 91, subs. 29, and s. 92, subs. 10 (a).

Toronto v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 282, [1908] A.C. 54.

[Followed in Re Narain Singh, 13 B.C.R. 479; Thorold v. Grand Trunk et al. Ry. Cas. 24 Can. Ry. Cas. 21; relied on in Carleton v. Ottawa, 41 Can. S.C.R. 552, 557; Montreal Street Ry. Co. v. Montreal, 43 Can. S.C.R. 204.]

INTERCHANGE OF TRAFFIC—JUNCTIONS—POWER OF GOVERNMENT TO REGULATE.

A physical connection was made and used some years before 1st February, 1903, between the lines of a Provincial and Dominion railway, but no order was obtained authorizing such connection under s. 173, of the Railway Act, 1888, or s. 177 of the Railway Act, 1903, although a crossing had been duly authorized by the Railway Committee in 1897. Upon an application being made under ss. 253, 271 of the Railway Act, 1903, to compel an interchange of traffic between the two railways:—Held, that Parliament has the incidental power to determine the terms upon which a railway, not otherwise subject to its legislative authority, may connect with or cross one that is so subject, and the obligations between the companies concerned. [B.N.A. Act, s. 91 (10) (a) and (c), and s. 92 (29), ss. 306, 307, of the Railway Act, 1888, and s. 7 of the Railway Act, 1903, referred to]:—Held, that such connection being illegal, no order should be made. An application to authorize the connection, under s. 177, Railway Act 1903, must first be made.

Patriarche et al. v. Grand Trunk Ry. Co. et al., 5 Can. Ry. Cas. 200.

PROVINCIAL RAILWAY—"THROUGH TRAFFIC"—FEDERAL REGULATION.

The Railway Act, 1906, does not confer power on the Board to make orders respecting through traffic over a provincial railway or tramway which connects with or crosses a railway subject to the authority of the Parliament of Canada. Davies and Anglin, JJ., contra. Per Fitzpatrick, C.J., and Girouard and Duff, JJ.:—The provisions of subs. (b) of s. 8 of the act are ultra vires of the Parliament of Canada.

Montreal Street Ry. Co. v. Montreal, 11 Can. Ry. Cas. 203, 43 Can. S.C.R. 197.

[Affirmed in [1912] A.C. 333, 13 Can. Ry. Cas. 541, 1 D.L.R. 681.]

RAILWAY ACT OF CANADA ULTRA VIRES—PROVINCIAL RAILWAYS.

S. 8, subs. (b), of the Railway Act, 1906, which subjects any provincial railway (although not declared by Parliament to be a work for the general advantage of Canada) to those of its provisions which relate to through traffic, is ultra vires of the Dominion Parliament. An order dated May, 4, 1909, of the Board (created by the Railway Act, 1903, and beyond the jurisdiction and control of any province), directed with regard to through traffic over the Federal Park Ry. and the provincial street railway, both within and near the city of Montreal, that the latter should "enter into any agreement or agreements that may be necessary to enable" the former company to carry out its provisions with respect to the rates charged so as to prevent any unjust discrimination between any classes of the customers of the Federal Line:—Held, that the said order so far as it related to the provincial street railway was made without jurisdiction. [Montreal Street Ry. Co. v. Montreal, 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203, affirmed.]

Montreal v. Montreal Street Ry. Co., 13 Can. Ry. Cas. 541, [1912] A.C. 333, 1 D.L.R. 681.

[Referred to in Montreal Tramways, etc. Cos. v. Lachine, Jacques Cartier, etc. Ry. Co., 18 Can. Ry. Cas. 122, 50 Can. S.C.R. 84.

SEPARATION OF GRADES—COST OF—IMPOSING PART ON STREET RAILWAY COMPANY.

The provisions of ss. 8 (a), 59, 237, 238 of the Railway Act, 1906, as amended by 8 & 9 Edw. VII. c. 32, permitting the Board to impose on a street railway company a portion of the cost of separating the grade of a street at a railway crossing, is not ultra vires. (Per Idington, Anglin and Davies, JJ.). [Toronto v. Can. Pac. Ry. Co., [1908] A.C. 54; Can. Pac. Ry. Co. v. Notre Dame de Bonsecours, [1899] A.C. 367; Toronto v. Grand Trunk Ry. Co., 37 Can. S.C.R. 232; Carleton v. Ottawa, 41 Can. S.C.R. 552; and Re Can. Pac. Ry. Co. and York, 25 A.R. (Ont.) 65 followed.]

British Columbia Elec. Ry. Co. v. Vancouver, etc., 48 Can. S.C.R. 98, 13 D.L.R. 308, 15 Can. Ry. Cas. 237.

[Reversed in 18 Can. Ry. Cas. 287, 19 D.L.R. 91; considered in city of Vancouver v. Vancouver, Victoria & Eastern Ry. Co., 18 Can. Ry. Cas. 296, distinguished in Toronto Ry. Co. v. Toronto and Can. Pac. Ry. Co., 20 Can. Ry. Cas. 280.]

POWERS OF RAILWAY COMMITTEE—ERECTION AND MAINTENANCE OF GATES AT CROSSINGS.

The legislation of the Parliament of Canada with reference to the guarding of the crossings of a railway, which under subs. 10 of s. 92 of the B.N.A. Act is under the exclusive legislative authority of Parliament, is within the scope of necessary legislation.

Re Can. Pac. Ry. Co. and York, 1 Can. Ry. Cas. 36, 27 O.R. 559.

[Reversed in part in 1 Can. Ry. Cas. 47, 25 A.R. (Ont.) 65; adopted Winnipeg v. Toronto General Trusts, 19 Man. L.R. 429; applied Montreal Street Ry. Co. v. Montreal, 43 Can. S.C.R. 251; approved in Re McAlpine & Lake Erie Ry. Co., 37 Can. S.C.R. 240; considered in Atty.-General v. Can. Pac. Ry. Co., 11 B.C.R. 302; referred to in Grant v. Can. Pac. Ry. Co., 36 N.B.R. 532; Grand Trunk Ry. Co. v. Cedar Dale, 7 Can. Ry. Cas. 73; Can. Pac. Ry. Co. v. Toronto, 7 Can. Ry. Cas. 274.]

WORKS FOR THE GENERAL ADVANTAGE OF CANADA—PROVINCIAL STREET RAILWAY—RIGHTS IN, AND USE OF, STREETS AND HIGHWAYS.

The provisions of subs. (b) of s. 8 of the Railway Act, 1906, purporting to subject to the Dominion Railway Act the through traffic upon any railway or street railway authorized by special act of a provincial Legislature which connects with a Dominion railway, although such provincial railway or street railway had not been declared by Dominion statute to be a work for the general advantage of Canada, is ultra vires of the Parliament of Canada. [Opinion of Fitzpatrick, C.J., Girouard and Duff, JJ., in Montreal Street Ry. Co. v. Montreal, 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203, affirmed on this point on appeal to the Privy Council.]

Montreal v. Montreal Street Ry. Co., 1 D.L.R. 681, 13 Can. Ry. Cas. 541, [1912] A.C. 333.

[Referred to in Auger et al. v. Grand Trunk and Can. Pac. Ry. Cos., 19 Can. Ry. Cas. 401.]

PROVINCIAL LEGISLATION REGULATING WORK ON SUNDAY—RIGHT OF PARLIAMENT TO PASS.

S. 9 of the Railway Act, 1906, enacting that every railway situated wholly within one province of Canada and declared by Parliament to be either wholly or in part a work for the general advantage of Canada, shall be subject to any Act of the Legislature of the province in which it is situated prohibiting or regulating work on Sunday, is intra vires of the Parliament of Canada.

Kerley v. London & Lake Erie, etc., Co., 14 Can. Ry. Cas. 111, 6 D.L.R. 189.

[Reversed in 13 D.L.R. 365, 15 Can. Ry. Cas. 337.]

"GENERAL ADVANTAGE OF CANADA"—EXCLUSIVE LEGISLATIVE JURISDICTION.

Where a railway and transportation company is incorporated under an Act of the Parliament of Canada: (a) conferring power to operate beyond as well as within a certain province, and (b) declaring its undertaking to be a work for the general advantage of Canada, its undertaking falls within the exclusive legislative authority of the Parliament of Canada conferred by subs. 29 of s. 91 of the B.N.A. Act. [Kerley v. London &

Lake Erie etc., Co., 6 D.L.R. 189, reversed; Toronto v. Bell Telephone Co., [1905] A.C. 52, followed.]

Kerley v. London & Lake Erie, etc., Co., 15 Can. Ry. Cas. 337, 28 O.L.R. 606, 13 D.L.R. 365.

Exclusive jurisdiction—Extraterritorial undertaking.

Where powers conferred by the Parliament of Canada for an undertaking extending beyond as well as within the limits of a province and falling within the exclusive jurisdiction of the Dominion Parliament, a declaration thereby that such undertaking is a work for the general advantage of Canada is unnecessary to bring it within the ambit of that exclusive jurisdiction and is therefore "unmeaning." [Kerley v. London & Lake Erie, etc., Co., 6 D.L.R. 189, reversed; Toronto v. Bell Telephone Co., [1905] A.C. 52, at p. 60.]

Kerley v. London & Lake Erie, etc., Co., 15 Can. Ry. Cas. 337, 28 O.L.R. 606, 13 D.L.R. 365.

"General advantage of Canada"—Construction of statutes.

S. 6 of the Dominion Railway Act, 1903, as amended by c. 32 of 1904, s. 2. (re-enacted substantially in R.S.C. 1906, c. 37, s. 9), subjecting certain railways to provincial legislation and confirming and ratifying such legislation (s. 193 of Ontario Railway Act, 1906), is construed as covering the peculiar status of those railways (and only those railways) declared by the Dominion Parliament to be "works for the general advantage of Canada" and solely by such Federal declaration withdrawn from the provincial jurisdiction to which otherwise they, as provincial undertakings, would have been subject. [Kerley v. London and Lake Erie, etc., Co., 6 D.L.R. 189, reversed.]

Kerley v. London & Lake Erie, etc., Co., 15 Can. Ry. Cas. 337, 28 O.L.R. 606, 13 D.L.R. 365.

Statutes—Construction—Speculation as to legislative intent.

In deciding a question of statutory construction, a Court of Justice is not entitled to speculate as to which of two conflicting policies was intended to prevail, but must confine itself to the construction of the language of the relevant statutes taken as a whole. The language of the Railway Act, 1906, expresses an intention to preserve intact all powers conferred by previous special Acts of incorporation upon companies within its scope, except where otherwise specifically mentioned. S. 248 of the Act, shews that, where Parliament intended by that Act to interfere with the powers of companies other than railway companies, it has done so by special provision.

Toronto & Niagara Power Co. v. North Toronto, 14 Can. Ry. Cas. 392, [1912] A.C. 834, 5 D.L.R. 43.

Dominion franchise—Acquisition—Operation.

A municipality may acquire the undertaking of a Dominion railway, but under s. 299 of the Railway Act, 1906, is without power to operate it under the Act except under the authority of the Minister of Railways and Canals, with the obligation of applying for an enabling Act at the next session of Parliament.

Re Grand Valley Ry. Co., 18 Can. Ry. Cas. 430.

Construction of statute—Subdivision of land—Sale of lots—Severance.

Where many of the lots in a registered subdivision have been sold and the remainder owned by the subdivider do not form a connected compact piece of land, he may be treated as having himself made a severance of the entire block as shewn on the plan so as to disentitle him to damages for injurious affection of lots no part of which are taken for the railway in an arbitration under the Railway Act, in addition to compensation for entire lots taken, where there is no severance of any one lot. [Railway Act, s. 155 considered; Cowper-Essex v. Local Board of Acton, 14 App. Cas. 153, distinguished.]

Can. Northern Ontario Ry. Co. v. Holditch, 19 Can. Ry. Cas. 112, 50 Can. S.C.R. 265, 20 D.L.R. 557.

[Affirmed in 20 Can. Ry. Cas. 101.]

Criminal law and procedure—Indictment for noncriminal offense.

It was competent to the Parliament of Canada under s. 91 (27) of the B.N.A. Act, in legislating as to criminal law and procedure, to declare that what might previously have constituted a criminal offence should no longer do so although a procedure in form criminal was kept alive.

Toronto Ry. Co. v. The King, 23 Can. Ry. Cas. 183, [1917] A.C. 630, 38 D.L.R. 537.

Jurisdiction—Works ordered by Board—Apportionment of cost.

Ss. 8 (a), 28, 59 of the Railway Act, 1906, empowering the Board to apportion among the persons interested the cost of works and construction which it orders to be done or made are intra vires. [British Columbia Elec. Ry. Co. v. Vancouver, etc., 15 Can. Ry. Cas. 237, 13 D.L.R. 308, distinguished.]

Toronto Ry. Co. v. Toronto and Can. Pac. Ry. Co., 20 Can. Ry. Cas. 280

B. Provincial Powers.

Provincial regulation—Dominion railways.

The provincial Legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of railways subject to the provisions of the Railway Act of Canada. [Can. Pac. Ry. Co. v. Notre Dame de Bonsecours, [1899] A.C. 367, followed].

Grand Trunk Ry. v. Therrien, 30 Can. S.C.R. 485.

[Applied in Grand Trunk Ry. Co. v. Perrault, 36 Can. S.C.R. 677; followed in Perrault v. Grand Trunk Ry. Co., 14 Que. K. B. 249.]

Vancouver Island Settlers' Rights Act, 1904—Powers of local Legislature—British North America Act, s. 92, subs. 10.

The British Vancouver Island Settlers' Rights Act, 1904, directed that a grant in fee simple without any reservations as to mines and minerals should be issued to settlers therein defined, and thereunder a grant was made to the appellant of the lot in suit. By an Act of the same Legislature in 1883, land which included the said lot had been granted with its mines and minerals to the Dominion Government in aid of the construction of the respondents' railway, and in 1887 had been by it granted to the respondents under the provisions of a Dominion Act passed in 1884:—Held, that the Act of 1904 on its true construction legalized the grant thereunder to the appellant, and superseded the respondents' title. Held, also, that the Act of 1904 was intra vires of the local Legislature. It had the exclusive power of amending or repealing its own Act of 1883. The Act, moreover, related to land which had become the property of the respondents, and affected a work and undertaking purely local within the meaning of s. 92, subs. 10, of the B.N.A. Act.

McGregor v. Esquimalt & Nanaimo Ry. Co., [1907] A.C. 462, reversing judgment of British Columbia Supreme Court, 12 B.C.R. 257.

[Commented on in Burrard Power Co. v. The King, 43 Can. S.C.R. 56; Esquimalt & N. Ry. Co. v. Fiddick, 14 B.C.R. 413.]

Sunday traffic—Ontario Lord's Day Act—Matter relating to criminal law and not to civil rights—Legislative power of Dominion Parliament—British North America Act.

The Ontario Lord's Day Act, R.S.O. 1897, c. 246, is ultra vires of the Ontario Legislature, as the subject thereof comes under the classification of "criminal law," which by the B.N.A. Act is under the exclusive legislative authority of the Parliament of Canada. 24 A.R. (Ont.) 170 affirming 27 O.R. 49, reversed.

Attorney-General (Ont.) v. Hamilton Street Ry., [1903] A.C. 524.

[Applied in Re Criminal Code, 43 Can. S.C.R. 453; Re Sunday Labour Act, 35 Can. S.C.R. 591; distinguished in Tremblay v. Quebec, 38 Que. S. C. 90; Wilder v. Quebec, 25 Que. S.C. 148; referred to in Re Fisher and Village of Carman, 15 Man. L.R. 477, 16 Man. L.R. 561; followed in Rex. v. Yaldon, 17 O.L.R. 179, 12 O.W.R. 384; referred to in Re Cohen, 8 O.L.R. 143; Re Ontario Medical Act, 13 O.L.R. 501; Tremblay v. Quebec, 37 Que. S.C. 378; relied on in Re Coal Mines Regulation Act, 10 B.C.R. 423.]

Provincial regulation of crossings and roadbed.

The provincial Legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of railways subject to the provisions of the Railway Act of Canada. [Can. Pac. Ry. v. Notre Dame de Bonsecours, [1897] A.C. 367, followed.]

Grand Trunk Ry. Co. v. Therrien, 30 Can. S.C.R. 485.

[Applied in Grand Trunk Ry. Co. v. Perrault, 36 Can. S.C.R. 677, 14 Que. K. B. 249.]

Municipal corporations—Construction of highway across railway—Railway Committee—Intra vires.

In an action to restrain the defendants from acting upon an order of the Railway Committee, made under s. 14 of the Railway Act, 1903, giving them the option to open a new street, by means of a subway, across the property and under the tracks of a Dominion railway company, but without compensation, and requiring the company to pay a portion of the cost of construction, and meanwhile allowing a temporary crossing for foot passengers only, and making certain other provisions upon the subject:—Held, that the provincial Legislature alone had power to confer upon the defendants legal capacity to acquire and make the street in question. (2) It has conferred such capacity. (3) In virtue of its power over property and civil rights in the province, the provincial Legislature has power to authorize a municipality to acquire and make such a street, and to provide how and upon what terms it may be acquired and made. (4) But that power is subject to the intervention of Federal legislation respecting works and undertakings such as the railway in question. (5) The manner and terms of acquiring and making such street, and also the prevention of the making or acquiring of such a street, are proper subjects of such supervening legislation. (6) Such legislation may rightly confer upon any person or body the power to determine in what circumstances, and how and upon what terms, such a street may be acquired and made, or to prevent the acquiring and making of it altogether, and therefore s. 14 of the Railway Act is not ultra vires. (7) Such legislation, in virtue of its power over such railway corporations, as well as such works and undertakings, may confer power to impose such terms as have in this case been imposed upon the plaintiffs, and to deprive such corporations of any right to compensation for lands so taken or injuriously affected; and has conferred such power on the Railway Committee, under s. 14, in such a case as this. (8) Such legislation has not conferred upon the Committee power to give the temporary footway in question. (9) Nor any authority to delegate its powers. (10) The work it directs must be constructed under the supervision of an official appointed for that purpose by the Committee. (11) The railway company may, if they choose, construct the works directed, under such supervision, instead of permitting the municipality to do so.

Grand Trunk Ry. Co. v. Toronto, 1 Can. Ry. Cas. 82, 32 O.R. 120.

[Approved in Re McAlpine & Lake Erie Ry. Co., 3 O.L.R. 230; considered in Atty.-General v. Can. Pac. Ry. Co., 11 B.C.R. 303.]

Mechanics' Lien Act—Dominion company.

The Mechanics' and Wage Earners' Lien Act, R.S.O. 1897, c. 153, does not apply to a railway company incorporated under a Dominion Act and declared thereby to be a company incorporated for the general advantage of Canada.

Crawford v. Tilden, 6 Can. Ry. Cas. 300, 13 O.L.R. 169.

[Affirmed in 14 O.L.R. 572, 6 Can. Ry. Cas. 437.]

Prairie Fires Ordinance—Conflict with Dominion legislation.

(1) The provisions of the Prairie Fires Ordinance imposing penalties upon railway companies governed by the Dominion Railway Act for kindling fires and letting it run at large in the operation of locomotive steam engines on their railway are valid. [Rex v. Can. Pac. Ry. Co., 1 West. L.R. 89, followed.] (2) Where provincial legislation imposing penalties for failing to observe the precautions to protect does not conflict with Dominion legislation upon the same subject the provincial legislation is not rendered inoperative by such Dominion legislation. (3) Where provincial regulations do not attempt to interfere with the structure of authorized works of the railway but merely require the removal of weeds or some alteration in its surface in order to prevent injury to other property, such legislation is not invalid, provided the management of the company's business as a railway and the railway works themselves are not interfered with. [Madden v. Nelson & Fort Sheppard Ry. Co., [1899] A.C. 626, discussed; Can. Pac. Ry. Co. v. Notre Dame, etc., [1899] A.C. 367, followed.]

Rex v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 421, 6 West. L.R. 126 (Sask.).

[Reversed in 39 Can. S.C.R. 476, 7 Can. Ry. Cas. 176.]

"The Prairie Fires Ordinance"—Works controlled by Parliament—Operation of Dominion railway.

In so far as they may relate to matters affecting the operation of a railway under the control of the Parliament of Canada, the provisions of s. 2, subs. (a) and (2), of c. 87, Con. Ord. N.W.T. (1898), as amended by the N.W.T. Ordinances, c. 25 (1st sess.) and c. 30 (2nd sess.) of 1903, constitute "railway legislation," strictly so-called, and were beyond the competence of the Legislature of the North-West Territories. [Can. Pac. Ry. Co. v. Notre Dame de Bonsecours, [1899] A.C. 367, and Madden v.

Nelson & Fort Sheppard Ry. Co., [1899] A.C. 626, referred to. The judgments appealed from, 6 Can. Ry. Cas. 421, were reversed.]

Can. Pac. Ry. Co. v. The King, 7 Can. Ry. Cas. 176, 39 Can. S.C.R. 476.

[Applied in Montreal Street Ry. Co. v. Brialofsky, 19 Que. K.B. 338.]

PROVINCIAL REGULATION OF RAILWAY EMPLOYMENT.

The limitation of time prescribed by s. 306 of the Railway Act, 1906, relates only to actions against railway companies provided for in the act itself, and was not intended to apply to actions the rights of which exist at common law or under provincial legislation. Dominion railways are subject to provincial legislation on the relations between master and servant, such as the Workmen's Compensation for Injuries Act, unless the field has been covered by Dominion legislation ancillary to Dominion legislation respecting railways under the jurisdiction of Parliament, and subs. 4 of s. 306 of the Railway Act, qualifies its main clause and excludes its operation where the injury complained of comes within the jurisdiction of, and is specially dealt with by the laws of, the province in which it takes place, provided such laws do not encroach on Dominion powers. [C.P.R. v. Roy, [1902] A.C. 220, distinguished. Canada Southern v. Jackson (1890), 17 Can. S.C.R. 325, followed.]

Sutherland v. Can. North. Ry. Co., 13 Can. Ry. Cas. 495, 21 Man. L.R. 27.

CONSTRUCTION OF PROVINCIAL ENACTMENT—LEGISLATIVE INTENT—POWER OF COURTS TO QUESTION THE REASONABLENESS OF THE ENACTMET.

In considering the constitutionality of any enactment of a provincial Legislature, every intendment will be made to support it, and it is not the business of the courts to pass upon its wisdom or reasonableness, but simply to say whether it is fairly within the area of the constitutional powers of the Legislature.

Kerley v. London & Lake Erie, etc., Co., 14 Can. Ry. Cas. 111, 6 D.L.R. 189.

[Reversed in 13 D.L.R. 365, 15 Can. Ry. Cas. 337.]

EXTRATERRITORIAL UNDERTAKINGS.

Upon a question of provincial as distinct from Federal jurisdiction over a railway with a Federal charter conferring powers to operate beyond the limits of a province, the governing principle is the conferring of such powers and not whether they were actually exercised. [Toronto v. Bell Telephone Co., [1905] A.C. 52, referred to.]

Kerley v. London & Lake Erie, etc., Co., 15 Can. Ry. Cas. 337, 28 O.L.R. 606, 13 D.L.R. 365.

CONSTRUCTION OF PROVINCIAL RAILWAY ACT.

Although the language of s. 193 of the Ontario Railway Act, 1906 (now R.S.O. 1914, c. 185), is wide enough to embrace all street railways, tramways, and electric railways situate within the province, it must be read with ss. 3, 5, as based upon s. 79 of 4 Edw. VII. c. 10, and by virtue thereof applies only to railways subject as such to provincial jurisdiction. [Kerley v. London & Lake Erie, etc., Co., 6 D.L.R. 189, reversed.]

Kerley v. London & Lake Erie, etc., Co., 15 Can. Ry. Cas. 337, 28 O.L.R. 606, 13 D.L.R. 365.

JURISDICTION OF PARLIAMENT AND LEGISLATURE—EXTRATERRITORIAL UNDERTAKINGS.

Where powers are conferred by the Dominion Parliament for an undertaking beyond as well as within the limits of a province and consequently falling within the exclusive jurisdiction of the Dominion Parliament, the Legislature of such province has no jurisdiction to impose conditions precedent to the exercise of such powers. [Kerley v. London & Lake Erie, etc., Co., 6 D.L.R. 189, reversed; Toronto v. Bell Telephone Co., [1905] A.C. 52, followed.]

Kerley v. London & Lake Erie, etc., Co., 15 Can. Ry. Cas. 337, 28 O.L.R. 606, 13 D.L.R. 365.

PROVINCIAL LEGISLATION—INTERFERENCE WITH DOMINION RAILWAYS.

It is not competent to the Legislature of the Province of Alberta to enact legislation authorizing the construction and operation of railways in such a manner as to interfere with the physical structure or operation of railways subject to the jurisdiction of the Federal Parliament.

Re Alberta Railway Act, 15 Can. Ry. Cas. 213, 12 D.L.R. 150, 48 Can. S.C.R. 9.

[Affirmed, 19 Can. Ry. Cas. 153.]

POWER OF PROVINCIAL RAILWAY TO TAKE LANDS OF DOMINION—CROSSING DOMINION RAILWAY—LEGISLATIVE AUTHORITY OF PROVINCE—ALBERTA RAILWAY ACT—B.N.A. ACT.

S. 7 of c. 15, of the Statutes of Alberta 1912, amending the Alberta Railway Act, s. 82 (1 & 2), which provides that a railway company authorized by that Act may, subject to the approval, order, or direction of the Lieutenant-Governor, take possession of, use, or occupy the lands belonging to another railway company by adding subs. (3), which purports to apply its provisions to the lands of every railway company authorized otherwise than under the legislative authority of the province, "in so far as the taking of such lands does not unreasonably interfere with the construction and operation" of the railway whose lands are taken, is ultra vires a provincial Legislature under the B.N.A. Act, and would not be intra vires if the word "unreasonably" were omitted. In a suitable case, having regard to the interests of the public, the Railway Board, acting under s. 8 of the Railway Act may grant permission for a provincial railway to cross a Dominion railway, the crossing being regulated in accordance with those interests. [Attorney-General for Canada v. Attorney-General for Alberta (In re Alberta Railway Act), 48 Can. S.C.R. 9, 15 Can. Ry. Cas. 213, affirmed.]

Attorney-General for Alberta v. Attorney-General for Canada, 19 Can. Ry. Cas. 153, [1915] A.C. 363, see 22 D.L.R. 502.

[Followed in Midland Ry. Co. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 80.]

JURISDICTION OF PROVINCIAL RAILWAY BOARD—WORK FOR GENERAL ADVANTAGE OF CANADA.

S. 306 of the Dominion Railway Act, 1888, which declares certain named railways to be "works for the general advantage of Canada," only applies to the particular railways enumerated in the section and their branch lines, but does not apply to an electric railway that only crosses one of the railways named therein; consequently such railway is not subject to the exclusive jurisdiction of the Dominion Parliament, but it remains subject to the authority of the Legislature of the Province of Ontario by which it was incorporated, and to the orders of the provincial railway board.

Re Ross and Hamilton, Grimsby & Beamsville Ry. Co., 19 Can. Ry. Cas. 166, 25 D.L.R. 613.

[Affirmed in 20 Can. Ry. Cas. 123.]

Obscure language in enacting agreement.

A section in an Act of the Legislature, enacted to confirm an agreement, which repeats some portion of the agreement in clumsy and obscure language, should be regarded rather as by way of identification than by way of conferring actual or independent rights. [Re Toronto Ry. Co. and Toronto, 26 D.L.R. 581, 34 O.L.R. 456, 19 Can. Ry. Cas. 323, affirmed.]

Toronto v. Toronto Ry. Co., 20 Can. Ry. Cas. 115, [1916] 2 A.C. 542, 29 D.L.R. 1.

Dominion powers—"General advantage of Canada."

The Parliament of Canada has power by subsequent enactment to properly and effectually modify or repeal a declaration under s. 92 (10), B.N.A. Act, whereupon a railway previously declared "to be for the general advantage of Canada, or for two or more of the provinces," becomes again subject to the jurisdiction of the province in which it is situate. [Re Ross and Hamilton, Grimsby & Beamsville Ry. Co., 25 D.L.R. 613, 34 O.L.R. 599, 19 Can. Ry. Cas. 166, affirmed.]

Hamilton, Grimsby & Beamsville Ry. Co. v. Attorney-General for Ontario, 20 Can. Ry. Cas. 123, [1916] 2 A.C. 583, 29 D.L.R. 521.

C. Territorial Powers.

Territorial franchise to tramway over Dominion lands.

The executive government of the Yukon Territory may lawfully authorize the construction of a toll tramway or waggon road over Dominion lands in the territory, and private persons using such road cannot refuse to pay the tolls exacted under such authority.

O'Brien v. Allen, 30 Can. S.C.R. 340.

CONSTRUCTION AND LOCATION.

Location and plans, compensation for lands and injuries to, see Expropriation.

Priorities in point of construction as affecting protection of crossings, see Railway Crossings, Highway Crossings.

See Damages (F).

CONTINUOUS ROUTE.

As affecting rates, see Tolls and Tariffs.

CONTRACTS.

A. In General.
B. Railway Construction Contracts.

Agreements respecting controllable freight, see Carriers of Goods.

See Amalgamation; Employees; Fences and Cattle Guards; Carriers of Goods; Government Railways; Provisional Directors; Telephones.

Annotations.

Covenants of railway companies, 1 Can. Ry. Cas. 289.

Whether mandamus, injunction, specific performance or damages is the proper remedy for the enforcement of covenants by railway companies. Note, 1 Can. Ry. Cas. 294.

Limitation of liability in live stock contracts, 19 Can. Ry. Cas. 44.

A. In General.

Powers of president.

Where, by an agreement which is in writing but which it would have been competent to the parties to make without any writing, the president of an incorporated company enters into an undertaking expressly upon his own behalf and upon behalf of the company, but signs the agreement in the name of the company only, the written document will be regarded merely as a record of the agreement and not as the agreement itself, and the president will be held personally bound by his undertaking.

Wood v. Grand Valley Ry. Co., 5 D.L.R. 428, 26 O.L.R. 441.

[Varied and damages reduced in 16 Can. Ry. Cas. 220, 10 D.L.R. 726, 27 O.L.R. 556; affirmed in 16 D.L.R. 361.]

Signature of company.

The name of an incorporated company at the foot of an agreement, followed, as part of the same signature, by the name of its president and the word "president," is the signature of the company and not of the president personally.

Wood v. Grand Valley Ry. Co., 5 D.L.R. 428, 26 O.L.R. 441.

[Varied and damages reduced in 16 Can. Ry. Cas. 220, 10 D.L.R. 726, 27 O.L.R. 556.]

Coal shipment—Train service.

The plaintiffs, while expressly stipulating against any obligation to deliver, offered to sell to defendants "20 cars of Pittsburg slack, at $1.25 at mine," which they would ship all rail, if defendants wished, and if plaintiffs could procure the necessary cars. The defendants telegraphed giving order at the price named, "f.o.b. mine," adding "Route it G.T.R. London." On the same day the plaintiffs wrote accepting the order, and stating that they would ship as soon as railroad equipment could be furnished, that an all-rail rate of $2.10 to London had been quoted them, and they would ask the carriers to put same through at once. Subsequently, and before any shipment had been made, it was arranged between plaintiffs and defendants that No. 8 Pittsburg slack could be substituted for Pittsburg slack, and at the same "delivered price." Invoices sent with the coal shewed the mine price as $1.65, but, notwithstanding, defendants accepted the coal, and made no protest until making their first payment:—*Held*, that the price of delivery was to be at London at the price of $3.35, and, even if the defendants could claim to have been misled by the correspondence, they were estopped by dealing with the coal when the invoices were received from shewing the contrary.

Burton v. London Street Ry. Co., 7 O.L.R. 717.

Meal tickets—Contract—Liability of railway.

Where an employer arranges with a restaurant keeper to supply an indefinite number of midnight meals from time to time to his employees producing the employer's meal tickets, redeemable by the latter at a fixed rate per meal, there is no implied stipulation that the employer shall send all or any of his employees to get their meals exclusively at that restaurant; and an action for damages does not lie against the employer at the instance of the restaurant keeper for issuing tickets good as well at other restaurants as at that of the plaintiff for their employees' meals. [The Queen v. Demers, [1900] A.C. 103, applied.]

Bouton v. Can. Pac. Ry. Co., 10 D.L.R. 463, 43 Que. S.C. 495.

Contract between shipper and purchaser—Jurisdiction—Tolls.

The Board has no jurisdiction to deal with questions of contract between shippers and purchasers, and therefore, the parties are not bound by any finding of the Board, except with regard to tolls.

Oliver-Serim Lumber Co. v. Can. Pac. and Esquimalt & Nanaimo Ry. Cos., 17 Can. Ry. Cas. 324.

Liability of president on agreement on his own behalf and that of company—Signature of company.

Where, by an agreement which is in writing, but which it would have been competent to the parties to make without any writing, the president of an incorporated company enters into an undertaking expressly upon his own behalf and upon behalf of the company, but signs the agreement in the name of the company only, the written document will be regarded merely as a record of the agreement and not as the agreement itself, and the president will be held personally bound by his undertaking. [Wood v. Grand Valley Ry. Co., 16 Can. Ry. Cas. 220, 10 D.L.R. 726, 27 O.L.R. 556, affirmed in this respect.]

Wood v. Grand Valley Ry. Co., 16 D.L.R. 361.

Recovery of money paid—Nonperformance of promise.

Money cannot be ordered repaid as upon a failure of consideration, where the failure is the nonperformance of a promise, the remedy in such case is the recovery of damages for the breach of the promise. [Wood v. Grand Valley Ry. Co., 10 D.L.R. 726, 4 O.W.N. 556, reversed in part; Wood v. Grand Valley Ry. Co., 5 D.L.R. 428, 26 O.L.R. 441, reinstated in part.]

Wood v. Grand Valley Ry. Co., 16 D.L.R. 361.

B. Railway Construction Contracts.

Construction of fences—Adoption and ratification of contract—Power to bind company.

7 A.R. (Ont.) 646, affirmed.

Canada Central Ry. Co. v. Murray, 8 Can. S.C.R. 313.

[Affirmed in 8 App. Cas. 574; applied in Sénésac v. Central Vermont Ry. Co., 26 Can. S.C.R. 646; distinguished in Miller v. Cochran Hill Gold Mining Co., 29 N.S.R. 314; discussed in Rathbone v. Michael, 20 O.L.R. 503; followed in Trumble v. Hortin, 22 A.R. (Ont.) 51; referred to in Allen v. Ontario & Rainy River Ry. Co., 29 O.R. 510; Bernardine v. North Dufferin, 6 Man. L.R. 101, 19 Can. S.C.R. 611; Lawrence v. Lucknow, 13 O.R. 432; McDonald v. Consolidated Gold Lake Co., 40 N.S.R. 367; Stillwell v. Rennie, 11 A.R. (Ont.) 724.]

Certificate of engineer.

McC. et al., appellants, entered into a contract with McG., respondent, the contractor for the construction of the North Shore Ry. between Montreal and Quebec, to do certain construction on a portion of the road, and by a clause in his contract agreed "to keep open at certain times and hours at his own cost and expense the main line for the passage of traffic or express trains run by McG. without any charge to the latter;" but there was a proviso that "any time occupied on the road over and above what may be required by the hours hereinbefore mentioned, or any expense caused thereby shall be paid by the contractor McG., on a certificate to that effect signed by the superintendent of the contractor." On an action brought by appellants against respondent for damages caused by the interruption of the work on said road by the passing of respondent's trains:—Held, affirming the judgment of the court below, that it was the duty of the appellants to get the superintendent's certificate within a reasonable time, and not having taken any steps to get it until six years after the superintendent had left the respondent's employment, the failure to produce such certificate was sufficient ground for dismissing the appellant's action. 14 Rev. Leg. 422, affirmed.

McCarron v. McGreevy, 13 Can. S.C.R. 378.

AGREEMENT TO PURCHASE RAILWAY—ROLLING STOCK.

B., the contractor for building the E. & H. Ry., and, practically, the owner thereof, negotiated with the solicitor of the C.S.R. for the sale to the latter of the E. & H. Ry., when built. While the negotiations were pending B. went to California, and the agents who looked after the affairs of the E. & H. Ry. in his absence applied to the manager of the C.S.R. for some rolling stock to assist in its construction. The manager of the C.S.R. was willing to supply the rolling stock on execution of the agreement for sale of the road which was communicated to B., who wrote a letter to the manager in which the following passage occurred: "If from any cause our plan of handing over the road to your company should necessarily fail, you may equally depend on being paid full rates for the use of engine and cars and any other assistance or advantage you may have given Mr. Farquier (the agent)." The negotiations for the purchase of B.'s railway by the C.S.R. having fallen through, an action was brought by the latter company against B. and the E. & H. Ry., for the hire of the rolling stock which was resisted by B. on two grounds, one that the rolling stock was supplied in pursuance of the negotiations for the sale of his road to the plaintiffs, which had fallen through by no fault of B. and the other, that if the plaintiffs had any right of action it was only against the E. & H. Ry. and not against him. By consent of the parties the matter was referred to the arbitration of a County Court Judge, with a provision in the submission that the proceedings should be the same as on a reference by order of the Court, and that there should be a right of appeal from the award as under R.S.O. c. 50, s. 189. The arbitrator gave an award in favour of the plaintiffs; the Queen's Bench Divisional Court held that there was no appeal from the award on the merits, and as it was regular on its face refused to disturb it; the Court of Appeal held that there was an appeal on the merits but upheld the award. The defendants then appealed to the Supreme Court of Canada:—Held, affirming the judgment of the Court of Appeal that the arbitrator was justified in awarding the amount he did to the plaintiffs, and that B. as well as the company was liable therefor.

Bickford v. Canada Southern Ry. Co. (1888), 14 Can. S.C.R. 743.

SUBCONTRACT—ENGINEER'S CERTIFICATE.

A subcontract for the construction of a part of the North Shore Ry. provided inter alia that, "the said work shall, in all particulars, be made to conform to the plans, specifications and directions of the party of the second part, and of his engineer, by whose classifications, measurements and calculations, the quantities and amounts of the several kinds of work performed under this contract shall be determined, and who shall have full power to reject and condemn all work or materials which, in his opinion, do not conform to the spirit of this agreement, and who shall decide every question which may or can arise between the parties relative to the execution thereof, and his decision shall be conclusive and binding upon both parties hereto. The aforesaid party of the second part hereby agrees, and binds himself, that upon the certificates of his engineer, that the work contemplated to be done under this contract has been fully completed by the party of the first part, he will pay the said party of the first part for the performance of the same in full, for materials and workmanship. It is further agreed, by the party of the second part, that estimates shall be made during the progress of the work on or about the first of each month, and that payments shall be made by second party upon the estimate and certificate of this engineer, to the party of the first part, on or before the 20th day of each month, for the amount and value of work done, and materials furnished during the previous month, ten per cent being deducted and retained by the party of the second part until the final completion of the work embraced in this contract, when all sums due the party of the first part shall be fully paid, and this contract considered cancelled." Upon completion of the contract the engineer made a final estimate fixing the value of the work done by the subcontractor at $79,142.65, and after deducting the money paid to and received by the subcontractor, and a clerical error appearing on the face of the certificate, a sum of $4,187.32 remained due to the subcontractor. Upon an action brought by the subcontractor to recover the sum of $36,312.12, the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, granted the plaintiff the amount of $4,187.32 with interest and costs. On appeal to the Supreme Court:—Held, affirming the judgment of the Court below, that the estimate as given by the engineer was substantially such a certificate as the contract contemplated, but if not the plaintiff must fail as a final certificate of the engineer was a condition precedent to his right to recover.

Guilbault v. McGreevy, 18 Can. S.C.R. 609.

BOND—CONDITIONS.

H. tendered for the construction of a line of railway pursuant to an advertisement for tenders, and his offer was conditionally accepted. At the same time H. executed a bond reciting the fact of the tender and conditioned, within four days, to provide two acceptable sureties and deposit 5 per cent of the amount of his tender in the Bank of Montreal, and also to execute all necessary agreements for the commencement and completion of the work by specified dates, and the prosecution thereof until completed. These conditions were not performed and the contract was eventually given to other persons. In an action against H. on the bond:—Held, affirming the judgment of the Court of Appeal for Ontario, that the agreement made by the bond was unilateral: that the railway company was under no obligation to accept the sureties offered or to give H. the contract; that the bond and the agreement for the construction of the work were to be contemporaneous acts, and as no such agreement was entered into H. was not liable on the bond. 18 A.R. (Ont.) 415, affirmed.

Brantford, Waterloo & Lake Erie Ry. Co. v. Huffman, 19 Can. S.C.R. 336.

APPROVAL OF ENGINEER.

Where the contract for construction of a railway provided that the work was to be done to the satisfaction of the chief engineer of a railway company, not a party to such contract, who was to be the sole and final arbiter of all disputes between the parties, the contractor was not bound by such condition when the party named as arbiter proved to be, in fact, the engineer of the other party to the contract.

Dominion Construction Co. v. Good & Co., 30 Can. S.C.R. 114.

STATUTORY PROHIBITION OF OFFICERS AND DIRECTORS.

Where a contract is prohibited by statute, such contract is void, although the statute itself does not state that it is so, and only imposes a penalty on the offender. Consequently, where the president of a railway company entered into a secret partnership with the contractors for the construction of the road, no action can be maintained by him against his partners to enforce such contract.

McDonald v. Riordan, 30 Can. S.C.R. 619, 8 Que. Q.B. 555.

Bond—Assessment.

On the 31st October, 1876, one A. entered into a contract with the Government of Nova Scotia for the construction of a railway from New Glasgow, N.S., to a point on the Strait of Canso, known as the Eastern Extension Ry. On the 20th of December, in the same year, A. assigned all his right to said contract to the appellants, and on the same day an agreement was entered into between the appellants and the Canada Improvement Co., whereby the latter undertook to build and equip the said Eastern Extension Ry. On 22nd December the respondent agreed with the C.I. Co. to do the necessary work on the said road, for which the company agreed to pay per mile the sum of $4,800 in cash, and $3,750 in first mortgage bonds of the respondent company. As security for his performance of the agreement, the respondent gave to the C.I. Co. a bond, with two sureties, in the penal sum of $100,000, which bond was afterwards assigned to the Government of Nova Scotia. The respondent proceeded with the work according to the said agreement, but the said bonds were not delivered as the work progressed, and the said C.I. Co. represented that they could not be issued at that time. The respondent, therefore, suspended the work and took proceedings against the C.I. Co. for breach of the said contract. These proceedings were settled by a payment to the respondent of a certain sum in cash and notes, and an agreement was entered into between the appellants of the first part; the C.I. Co. of the second part, and the respondent of the third part, which agreement, after reciting the above facts, provided inter alia, as follows: That the C.I. Co. would deliver to respondent $80,000 of first mortgage bonds of appellant's company as soon as the same could be legally issued, and use every diligence to have them issued, and they should, so far as the parties of the first and second parts could make them, be a lien on the Truro and Pictou Branch Ry., which the Government of the Dominion were to hand over to the appellants, upon the Eastern Extension Ry. and upon the appellant company and its property rights and privileges set forth in s. 32 of its act of incorporation. That such bonds or other conveyances, or lien by which they might be secured, should be free from any clauses restraining a sale of the property to which such lien attached, or in any way impairing the remedy of the holders thereof in default of payment. That the whole issue of the first mortgage bonds should not exceed $1,250,000 and should bear interest at 6 per cent, and that no other security should take precedence of the bonds to be given to the respondent. But provision might be made for giving clear titles of the company's bonds in the event of their being sold, the proceeds to be secured for the benefit of the bondholders. That the appellants covenanted and guaranteed that the bonds would be delivered to respondent as above set out, and that they would, if necessary, endeavour to procure such legislation as would remedy any defects now existing in their organization. That the Government of Nova Scotia would use all means within its power to enforce the delivery of such bonds and might refuse government aid to said companies, until satisfied that respondent's right to receive the said bonds was protected and assured. That the contract between the C.I. Co. and the respondent should be cancelled, and the bond given by respondent delivered up to him. On or about the first day of February, 1879, the appellants entered into an agreement with the Governments of the Dominion and of Nova Scotia relinquishing their rights to the "Pictou Branch Ry.," mentioned in said agreement, and agreed to the repeal of the act providing for the transfer of the same to the appellants, and that it should be retained by the Dominion until the Eastern Extension Ry. to the Strait of Canso and the steam ferry across the strait should be completed, and then transferred to the appellants on certain conditions. This the respondent claimed to be a breach of the above agreement, and brought an action against the appellants and the C.I. Co. the latter, however, not being served with the writ issued in the cause. The defendants pleaded, inter alia, that as to $40,000 of the said bonds the plaintiff had given an order on the C.I. Co. for their delivery to Hon. P. C. Hill, Provincial Secretary of Nova Scotia, which order had been accepted by the company, and was, in effect, an assignment of that portion of the said bonds. The evidence of the plaintiff was that the order was given on the condition that an order in council should be passed by the Nova Scotia Government protecting the right of the said plaintiff to have the said bonds delivered to him, and the bonds given to the C.I. Co. as security for the due performance by the plaintiff of the work on the Eastern Extension Ry. delivered up to the plaintiff; and on these conditions being fulfilled the plaintiff was to give to the Government a formal assignment of the mortgage bonds to the extent of $40,000, but that such conditions were never carried out. The plaintiff recovered in the action, and the verdict in his favour was affirmed by the Supreme Court of Nova Scotia, whereupon the defendants in the action appealed to the Supreme Court of Canada, and, on the argument of the last-mentioned appeal an agreement was entered into between the parties, to which agreement the Government of Nova Scotia became a party, empowering the Court to decide the case on the merits irrespective of the pleadings or any technical defence raised thereon, and limiting the amount in question to the sum of $40,000, the balance being satisfied by a judgment recovered by the respondent against the C.I. Co., in the Province of Quebec:—Held, affirming the judgment of the Supreme Court of Nova Scotia, that the agreement entered into by the appellants with the governments of the Dominion and the Province of Nova Scotia, was a breach of the agreement made between the appellants, the C.I. Co., and the respondent, above in part recited:—Held, also, that the order given to the Hon. P. C. Hill, was given on certain conditions which were never carried out, and was not an assignment of the bonds therein mentioned, and therefore the respondent was entitled to recover the said sum of $40,000, with interest from the date of the breach of the agreement. Appeal dismissed with costs.

Halifax & Cape Breton Coal & Ry. Co. v. Gregory, 16th February, 1885, Cass. Can. S.C.R. Dig. 1893, p. 727.

[An application was made to the Privy Council for leave to appeal. The application was refused with costs. Their lordships considered that in deciding the case under the agreement entered into at the hearing of the appeal, the Supreme Court was not acting in its ordinary jurisdiction as a Court of Appeal, but was acting under the special reference made to it under this agreement. Further, that even if it were open to them to give leave to appeal, the questions raised were not of sufficient public interest to induce them to depart from the ordinary rule that persons who have gone to the Supreme Court of Canada, and have there failed, shall not proceed any further to Her Majesty in Council.—3rd April, 1886. Gregory v. Attorney-General of N.S., 11 App. Cas. 229.]

Liability for supplies.

Where a railway company which was unable at the time to definitely award a contract, by telegram guaranteed to the plaintiff that in the event of a contract for the construction of a portion of its road not being awarded him, the cost, as well as ten per cent advance on all contractor's supplies placed by him on the ground, upon its becoming apparent that such contract would not be awarded him, a new contract does not arise from a subsequent promise of the company to assume the liability imposed by such telegram; such promise was, however, an admission that the alternative provision for paying such cost and percentage had come into effect.

Alfred v. Grand Trunk Pacific Ry. Co., 5 D.L.R. 154, 20 W.L.R. 111.

[Affirmed on appeal, 5 D.L.R. 471; referred to in Alfred v. G.T.P. (No. 2), 6 D.L.R. 147.]

Liability for supplies.

Where a railway company, upon its failure to award the plaintiff a contract for constructing a piece of railway, did not pay him the value of construction supplies he had provided, and for which the railway company had agreed upon that contingency to pay for, the plaintiff becomes entitled upon the company's default to the cost of insurance carried on the supplies only after the time when the defendant became liable to pay for such supplies, when such insurance would be justifiable as in protection of the plaintiff's lien as an unpaid seller. (Per Simmons, J.)

Alfred v. Grand Trunk Pacific Ry. Co., 5 D.L.R. 154, 20 W.L.R. 111.

[Affirmed on appeal, 5 D.L.R. 471; referred to in Alfred v. G.T.P. (No. 2), 6 D.L.R. 147.]

Construction of railroad or sidetrack—Liability for supplies.

Where a railway company was unable to definitely award the plaintiff a contract for construction of so much road as he could, agreed with him, that in order to keep his teams employed during the winter, he might put in supplies necessary for the construction of so much road as he could complete during the working portion of the following summer, and that the company would guarantee him, in the event of its being unable to award such contract, the cost of such supplies, together with ten per cent advance thereon, the company upon not being able to award the plaintiff such contract, is liable to him for such advance upon a total cost of the supplies, and also for the loss sustained by him on a sale thereof, after due notice to the company. [Alfred v. Grand Trunk Pacific Ry. Co., 5 D.L.R. 154, affirmed on appeal.]

Grand Trunk Pacific Ry. Co. v. Alfred, 5 D.L.R. 471.

[See Alfred v. Grand Trunk Pac. Ry. Co., 6 D.L.R. 147, 22 W.L.R. 65.]

Subcontract—Subcontractee's rights—Assignability.

Where a railway contractor turns over to the plaintiff a number of contracts for the construction of railway stations under an arrangement which was in effect that the plaintiff should supply all materials for and construct the stations in the place and stead of the original railway contractor and that the latter would pay over to the plaintiff the progressive payments as and when they were from month to month received from the company, such a turning over is a valid and enforceable equitable assignment placing the assignee in the shoes of the original contractor, even without the railway company's consent as a literal compliance with the original contract, and the plaintiff can collect for his work and materials. [Fraser v. Imperial Bank et al., sub nom. Fraser v. Can. Pac. Ry. Co., 1

D.L.R. 678, 22 Man. L.R. 58.] Where, under an equitable assignment of a railway contract for the construction of a number of railway stations the plaintiff, with the knowledge and permission and encouragement of the defendant bank (whose customer he is) goes on supplying materials for and constructing the railway stations, the defendant bank is estopped from subsequently setting up a prior assignment in its own favour for future advances as against the plaintiff's claim for the materials and work so contributed by him in good faith and without notice; especially where to defeat the plaintiff's claim would be an injustice tantamount to a reproach upon the law, and where the bank failed to notify the plaintiff of its prior assignment. [Russell v. Watts, 10 A.C. 590; Stronge v. Hawkes, 4 DeG. M. & G. 186, applied; Fraser v. Imperial Bank, sub nom. Fraser v. Can. Pac. Ry. Co., 1 D.L.R. 678, 22 Man. L.R. 58, reversed.]

Fraser v. Imperial Bank, 10 D.L.R. 232, 47 Can. S.C.R. 313.

IMMUNITY CLAUSE—RESPONSIBILITY—PUBLIC ORDER—INSURANCE—TRANSFEREE.

A clause in an agreement between a railway company and an individual for the building of a siding, connecting with the company's railways, which purports to exempt the company from liability for injury or loss caused by its negligence or that of its servants in use of said siding, is not void as being against public order, as far as the fault of the company's employees is concerned. Such a contract does not require the authorization and approval of the Board under s. 340 of the Railway Act, 1906.

Can. Northern Que. Ry. Co. v. Argenteuil Lumber Co., 28 Que. K.B. 408.

QUANTITY AND CLASSIFICATION OF WORK—FINAL ESTIMATE OF ENGINEER—ENGINEER EMPLOYED BY ANOTHER COMPANY—COMPLIANCE WITH CONTRACT.

Spadafora v. Griffin, 20 B.C.R. 475.

CONTRIBUTORY NEGLIGENCE.

See Negligence; Carriers; Crossing Injuries.

As affecting liability for injuries to employees, see Employees.

As affecting liability for injuries to passengers, see Carriers of Passengers; Street Railways.

CONVERSION.

Conversion of goods by carrier after termination of carrier's lien for charges, see Carriers of Goods.

CORPORATE POWERS.

Powers of provisional directors, see Provisional Directors.

Annotation.

Expiration of charter powers of railway company, 4 Can. Ry. Cas. 97.

RIGHT TO BUILD LINE BEYOND TERMINUS.

The Canadian Pacific Ry. Co. has power, under its charter, to extend its line from Port Moody, in British Columbia, to English Bay. 1 B.C.R. (pt. 2) 287, reversed.

Can. Pac. Ry. Co. v. Major, 13 Can. S.C.R. 233.

[Adhered to in Can. Pac. Ry. Co. v. Edmonds, 1 B.C.R. (pt. 2) 296: referred to in Atty.-General v. Can. Pac. Ry. Co., 11 B.C.R. 314; Vancouver v. Can. Pac. Ry. Co., 23 Can. S.C.R. 21; relied on in Re Branch Lines Can. Pac. Ry. Co., 36 Can. S.C.R. 79.]

Lease of road for term of years—Transfer of corporate rights.

The Canada Southern Ry. Co., by its charter and amendments thereto, has authority to enter into an agreement with any other railway company with respect to the traffic arrangements or the use and working of the railway or any part thereof, and by the Railway Act, 1879, it is authorized to enter into traffic arrangements and agreements for the management and working of its railway with any other railway company, in Canada or elsewhere, for a period of twenty-one years:—Held, reversing the decision of the Court of Appeal, that authority to enter into an agreement for the "use and working" or "management and working" of its road conferred upon the company a larger right than that of making a forwarding agreement or of conferring running powers; that the company could lawfully lease a portion of its road to a foreign company and transfer to the latter all its rights and privileges in respect to such portion, and the foreign company in such case would be protected from liability for injury to property occurring without negligence in its use of the road so leased, to the same extent as the Canada Southern Ry. Co. is itself protected. Same case, sub nom. Wealleans v. Canada Southern Ry. Co., 21 A.R. (Ont.), 297, reversed.

Michigan Central Ry. Co. v. Wealleans, 24 Can. S.C.R. 309.

[Distinguished in Lynch v. Wm. Richards Co., 38 N.B.R. 179.]

Abstaining from exercise of public franchise—Public policy.

An agreement by a corporation to abstain from exercising franchises granted for the promotion of the convenience of the public is invalid as being contrary to public policy and cannot be enforced by the Courts. Where a company subject to the Railway Act, with powers to construct railways and tramways has allowed its powers as to construction of new lines to lapse by nonuser within the time limited it is not competent for it to enter into an agreement with a municipality for the construction of a tramway within the municipal limits under the provisions of Art. 479 C.C.P.

Montreal Park & Island Ry. Co. v. Chateauguay & Northern Ry. Co., 4 Can. Ry. Cas. 83, 35 Can. S.C.R. 48.

Right to erect poles on street by power company—Special act—Amendment—Construction.

Where a general clause of another statute is by the incorporating Act made applicable to a corporation, and its undertakings by a reference which does not specify an amendment already made to such general clause, such amendment is to be read as forming part of the company's Act of incorporation and will control the powers granted to the company. [Interpretation Act, R.S.C. 1906, c. 1, s. 20 (b) construed.] A clause in a general Act making it a condition precedent to the erection of electric light poles and wires, in a municipality, that the consent of the municipal council shall be first obtained and that the whole work incident to the erection of the poles shall be under the supervision of an appointee of the council, is not inconsistent with nor superseded by special provisions contained in the Act of incorporation of an electric light company conferring upon it the power to erect poles in a street, and to operate the business of the company and making the company responsible for damages caused in carrying on or maintaining their works. Powers conferred by a special

Act of Parliament incorporating an electric light and power company whose powers include the erection of poles and the doing of all things necessary for the transmission of light, heat, and power, provided that the same is done so as not to "incommode" the public use of streets are not in conflict with the provisions of an amended section of a general Act, which is made applicable to the corporation by its Act of incorporation, and which makes it a condition precedent to the erection of poles that the consent of the municipal council shall be first obtained.

Toronto & Niagara Power Co. v. North Toronto, 14 Can. Ry. Cas. 379, 25 O.L.R. 475, 2 D.L.R. 120.

[Reversed in [1912] A.C. 834, 14 Can. Ry. Cas. 392, 5 D.L.R. 43.]

SPECIAL ACT CONFERRING POWERS ON ELECTRIC LIGHT COMPANY—USER OF HIGHWAY—ERECTION OF POLES IN STREET.

The powers conferred upon the Toronto & Niagara Power Co. by ss. 12, 13 of its Act of Incorporation of 1902, remain intact notwithstanding the provisions of the Railway Act, 1906, and that company is entitled to erect poles for the purpose of stringing power transmission lines along the streets of a municipality without the consent of the municipality. [Toronto & Niagara Power Co. v. North Toronto, 14 Can. Ry. Cas. 379, 2 D.L.R. 120, reversed on appeal.]

Toronto & Niagara Power Co. v. North Toronto, 14 Can. Ry. Cas. 392, [1912] A.C. 834, 5 D.L.R. 43.

AMALGAMATION OF TWO RAILWAYS—EFFECT ON CONSTITUENT COMPANIES AS CORPORATE ENTITIES.

Upon an agreement for the amalgamation of two railway companies being sanctioned by Order-in-Council under s. 361 of the Railway Act, 1906, the amalgamated company becomes a new corporation with the rights and liabilities of the constituent companies, and the latter cease to exist as corporate entities; and it is not competent for one of the constituent companies thereafter to prosecute an appeal from an award made against it prior to the amalgamation.

Re Van Horne and Winnipeg & Northern Ry. Co., 18 D.L.R. 517.

TELEPHONE COMPANY—FRANCHISE—USE OF STREETS—TIME LIMIT—ONTARIO MUNICIPAL ACT.

The Legislature of Ontario has not given the municipalities of the province authority to permit telephone companies to occupy the streets and highways with their poles and wires for a longer period, at one time, than five years. An agreement by a municipality to permit, by irrevocable license, a telephone company to occupy the streets with poles and wires is ultra vires. Judgment of the Appellate Division (44 O.L.R. 366), reversed; that on the trial (42 O.L.R. 385), restored.

Cobalt v. Temiskaming Telephone Co., 59 Can. S.C.R. 62.

COSTS.

For the construction of crossings, see Highway Crossings; Railway Crossings; Farm Crossings; Wires and Poles.

In expropriation proceedings, see Expropriation.

See Appeals.

COURTS.

See Jurisdiction; Railway Board; Appeals.

As to assessment of damages by Court or Jury, see Damages.

COVENANTS AND CONDITIONS.

See Contracts.

Convenants limiting liability, see Limitation of Liability.

Conditions in bill of lading, see Carriers of Goods.

Conditions on passenger tickets, see Tickets and Fares.

Conditions as to notice of claims, see Claims.

Covenants of railway companies with employees, see Employees.

Covenants of street railway companies with municipalities, see Street Railways.

Covenants affecting the carriage of live stock, see Limitation of Liability; Carriage of Live Stock.

Covenants in bonds, see Bonds and Securities.

Covenants by railway companies respecting bonuses and subsidies, see Railway Subsidy.

Agreements respecting telephones, see Telephones.

CREDITORS.

See Scheme of Arrangement.

CRIMES AND OFFENCES.

Constitutionality of provincial statute as to railway fires, see Constitutional Law.

Imposition of penalties on street railways, see Street Railways.

Annotations.

Liability of a railway company to indictment, 1 Can. Ry. Cas. 521, 6 Can. Ry. Cas. 489.

RUNNING CARS WITHOUT PROPER PRECAUTIONS—NEGLIGENCE ENDANGERING LIFE.

The omission of an electric railway company operating their cars upon a highway to use reasonable precautions so as to avoid endangering the lives of the public using the highway in common with the company, is a breach of legal duty constituting a common nuisance under the Criminal Code, ss. 191, 213, for which an indictment will lie.

R. v. Toronto Ry. Co., 4 Can. Cr. Cas. 4.

[Referred to in R. v. Toronto Ry. Co., 10 O.L.R. 26.]

OBSTRUCTING REGIMENT ON MARCH—STREET CAR AT STREET CROSSING.

(1) Where the alleged obstruction of a regiment on parade by an electric car of which the accused was the motorman, appears on the rehearing on appeal to have been accidental, the Court will reverse the summary conviction. (2) Per Court of Appeal:—A County Judge hearing an appeal from a summary conviction has no power to state a case to the Court of Appeal in respect of points of law arising on the appeal before him.

The King v. McIntosh, 17 Can. Cr. Cas. 295 (Man.).

PRAIRIE FIRES.

The fact that shortly after the passing of a locomotive a fire is seen near the railway track, where none existed before, is prima facie evidence that the fire originated from sparks from the locomotive. The provisions of the Prairie Fires Ordinance requiring locomotives to be equipped with certain appliances and in casting on a defendant the onus of proof in a criminal charge relating thereto, are binding on a railway company deriving its powers from the Parliament of Canada, but operating lines of railway in the North-West Territories.

Rex v. Can. Pac. Ry. Co., 7 Terr. L.R. 286.

EXPRESS COMPANY—DELIVERY OF LIQUOR C.O.D.

A consignment of liquor was shipped by Dominion Express from Amherst to Moncton, C.O.D., and delivered to the purchaser at the latter place by the agent of the company upon the payment of the price:—Held, that the agent was not guilty of an offence against the Canada Temperance Act. Rule absolute for certiorari to remove conviction.

Ex parte Trenholm, 37 C.L.J. 43.

MANSLAUGHTER—GRIEVOUS BODILY INJURY—INDICTMENT OF CORPORATION—PUNISHMENT.

The defendants were indicted for neglecting to take reasonable precautions and to use reasonable care in maintaining a bridge forming part of their railway which was used for hauling coal and carrying passengers, and that a locomotive engine and several cars then being run along said railway and across said bridge, owing to the rotten state of the timbers of the bridge, were precipitated into the valley underneath, thereby causing the death of certain persons. The defendants were found guilty and a fine of $5,000 was inflicted by Walkem, J., at the trial:—Held, per McColl, C.J., and Martin, J., on appeal affirming the conviction, that such an indictment will lie against a corporation under s. 252 of the Criminal Code. Per Drake and Irving, JJ.: Such an indictment will not lie against a corporation. Ss. 191, 192, 213, 252, 639, 713 of the Code considered. A corporation cannot be indicted for manslaughter. Per McColl, C.J.: The words "grievous bodily injury" in s. 252 have no technical meaning, and in their natural sense include injuries resulting in death. Per Drake, J.: The indictment charges the company with the death of certain persons owing to the company's neglect of duty and is a charge of manslaughter, the punishment of which is a term of imprisonment for life, and because a corporation cannot suffer imprisonment therefore the punishment laid down in the Code is not applicable to such a body. When death ensues the offence is no longer "grievous bodily injury," but culpable homicide.

Regina v. Union Colliery Co., 1 Can. Ry. Cas. 499, 7 B.C.R. 247.

[Affirmed in 31 Can. S.C.R. 81, 1 Can. Ry. Cas. 511, 4 Can. Cr. Cas. 400; referred to in R. v. Toronto Ry. Co. (No. 1), 18 Can. Cr. Cas. 426.]

MANSLAUGHTER—INDICTMENT AGAINST BODY CORPORATE—CRIM. CODE—FINE.

Under s. 213 of the Criminal Code a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control. The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not ground for quashing the indictment. As s. 213 provides no punishment for the offence the common-law punishment of a fine may be imposed on a corporation indicted under it. 1 Can. Ry. Cas. 499, affirmed.

Union Colliery Co. v. The Queen, 1 Can. Ry. Cas. 511, 31 Can. S.C.R. 81.

FAILURE TO ISSUE TARIFF OF FARES—OFFICER OF RAILWAY COMPANY—OFFENCE OF COMPANY.

The defendant, who was second vice-president and the general manager of a railway company, was convicted by a police magistrate under s. 138 of the Criminal Code of an offence against s. 3 of 16 Vict. c. 37 (D.) on the following findings: That the company had not during the year 1906 fixed or issued a tariff of fares or charges, payable by each third class passenger by any train on said railway for each mile traveled; that the company had not during that time permitted a third class passenger to travel by any train on said railway at the fare or charge of one penny currency for each mile traveled; and that the said company had not, during that time provided that at least one train having in it third class carriages should run each day to ... from ..., being part of the said railway:—Held, that the conviction of the defendant for the omission of the company was bad:—Held, also, that in any event the operation of s. 138 of the Criminal Code was in this case excluded by the existence of a penalty for the offence under s. 294 of the Railway Act, 1903.

Rex v. Hays, 6 Can. Ry. Cas. 480, 14 O.L.R. 201.

Protection of street crossing—Charge of failure—Joint indictment.

The Railway Committee, upon the application of a city, in order to provide protection at a place where a street was crossed by the tracks of two railways, ordered and directed that the two railways should, within a specified time, properly plank between their said tracks, and also provide gates and watchmen thereat, and should thereafter maintain and protect the said crossing:—Held, that a joint indictment against the two companies for the failure to place gates and a watchman at the crossing, would not lie; and therefore there was no jurisdiction in the Court of General Sessions of the Peace to try such an indictment, and a conviction made at the sessions against the two companies was quashed. [The effect of ss. 165, 221, 247 of the Criminal Code, and ss. 33, 427, 431 of the Railway Act, 1906, considered.]

Rex v. Grand Trunk & Can. Pac. Ry. Cos., 8 Can. Ry. Cas. 453, 17 O.L.R. 601.

Order of Board—Establishment and maintenance of fireguard—Conviction—Nonpublication of order in Canada Gazette.

R. v. Can. Northern Ry. Co., 8 W.L.R. 889 (Sask.).

Secret commission—Supplying empty cars.

The Board should not take action under s. 431 of the Railway Act, 1906, against a railway employee for taking a bribe to supply empty cars contrary to ss. 317, 427 unless where it considers there has been a failure on the part of the railway company to administer such discipline as the public safety demands. In such a case the proper remedy is for the local Crown Attorney to take criminal proceedings under 8 & 9 Edw. VII. c. 33, s. 3 (a).

Re Conductor A.B., 18 Can. Ry. Cas. 54.

CROSSING INJURIES.

A. In General.
B. Speed.
C. Signals and Warnings.
D. Duty to Look and Listen.
E. Flagmen; Gates.

Injuries by street railways, see Street Railways.
Protection of highways, see Highway Crossings.
Protection of railway crossings, see Railway Crossings.
Regulation of farm crossings, see Farm Crossings.

Regulation of wire crossings, see Wires and Poles.
Defective approaches to station causing injury, see Stations.
See Negligence; Hand Cars.

Annotations.

Signals at highway crossings. 1 Can. Ry. Cas. 347.
Contributory negligence at highways. 1 Can. Ry. Cas. 350.
Negligence and Contributory Negligence. 4 Can. Ry. Cas. 225.
Negligence at crossings, and failure to give warnings. 19 Can. Ry. Cas. 221.

A. In General.

COLLISION—AIR BRAKES—FAILURE TO COMPLY WITH STATUTE.

The Grand Trunk Ry. crosses the Great Western Ry., about a mile east of the city of London, on a level crossing. A Grand Trunk train, on which plaintiff was on board as a conductor, before crossing, was brought to a stand. The signalman who was in charge of the crossing, and in the employment of the Great Western Ry. Co., dropped the semaphore, and thus authorized the Grand Trunk train to proceed, which it did. While crossing the track, appellant's train, which had not been stopped, owing to the accidental bursting of a tube in air brakes, ran into the Grand Trunk train and injured plaintiff. It was shewn that these air brakes were the best known appliances for stopping trains, and that they had been tested during the day, but that they were not applied at a sufficient distance from the crossing to enable the train to be stopped by the hand brakes, in case of the air brakes giving way. C.S.C., c. 66, s. 142, R.S.O., c. 165, s. 90, enacts that "every railway company shall station an officer at every point on their line crossed on the level by any other railway, and no train shall proceed over such crossing until signal has been made to the conductor thereof, that the way is clear." S. 143 enacts that "every locomotive . . . or train of cars on any railway shall, before crossing the track of any other railway, on a level, be stopped for at least the space of three minutes":—Held, that the appellants were guilty of negligence is not applying the air brakes at a sufficient distance from the crossing to enable the train to be stopped by handbrakes in case of the air brakes giving way. That there was no evidence of contributory negligence on the part of the Grand Trunk Ry., as they had brought their train to a full stop, and only proceeded to cross appellant's track when authorized to do so by the officer in charge of the semaphore, who was a servant of the Great Western Ry. Co., 2 A.R. (Ont.) 64, 40 Q.B. 333, affirmed.

Great Western Ry. v. Brown, 3 Can. S.C.R. 159.

[Approved in White v. Gosfield, 10 A.R. (Ont.) 555; Jennings v. Grand Trunk Ry. Co., 15 A.R. (Ont.) 477; referred to in Gray v. Steel Co. of Canada, 12 N.S.R. 509.]

OBSRUCTION TO HIGHWAY—CAR LYING ON CROSSING—FRIGHTENING HORSE.

Defendants have two lines of railway crossing a street known as Spadina crescent in Saskatoon. In obtaining permission to build the second line of railway across this street the Board required the company to raise the street to a certain level. This work had partly been done, but there was a portion left unfinished which left a ditch about three feet deep in one part of the street. The plaintiff was driving along this street and when crossing the defendants' track his horse shied at a caboose lying on the track and projecting into the street, and which had been so lying for more than five minutes. Upon the horse shying the plaintiff's buggy went over the side of the ditch before referred to, throwing him out, whereby he was injured and the horse running away was also injured:—Held, that leaving the caboose standing on the street for the time it was shewn to have been constituted an unauthorized user of the highway, and the accident having resulted from such unauthorized user together with the condition of the street by reason of the company's failure to comply with the order of the Board, the company was liable in damages.

Weaver v. Can. Northern Ry. Co., 13 Can. Ry. Cas. 468, 4 Sask. L.R. 201.

Injury to person crossing track.

The fact that the person injured was walking on the tracks itself and not alongside will not constitute him a trespasser if his walking on the track was incidental to a reasonable attempt on his part to cross the railway at a crossing regularly used by the public without objection or warning on the part of the railway company.

Grand Trunk Ry. Co. v. McSween, 2 D.L.R. 874.

Foot caught in space of rail.

A verdict of a jury for the plaintiff, in an action to recover damages for injury resulting from the alleged negligence of a railroad company in leaving an unnecessarily wide space between the planking and the inside of one of the rails of their track at a highway crossing, whereby the plaintiff while walking along the highway at night got his foot caught in the space, and being unable to extricate it in time, it was cut off by a locomotive, should not be disturbed on appeal, where the jury find that the railroad company was negligent in not having the crossing in proper order, and that the plaintiff could not by the exercise of reasonable care have avoided the accident.

Stevens v. Can. Pac. Ry. Co., 10 D.L.R. 88, 15 Can. Ry. Cas. 28.

B. Speed.

Excessive speed—Running train through town—Contributory negligence.

In an action against the G.T.R. Co. for causing the death of the plaintiff's husband by negligence of their servants, it was proved that the accident occurred while the train was passing through the town of Strathroy; that it was going at a rate of over thirty miles an hour; and that no bell was rung or whistle sounded until a few seconds before the accident:—Held, affirming the judgment of the Court of Appeal, 13 A.R. (Ont.) 174, that the company was liable in damages. For the defense it was shewn that the deceased was driving slowly across the track with his head down, and that he did not attempt to look out for the train until shouted to by some persons who saw it approaching when he whipped up his horses and endeavoured to drive across the track and was killed. As against this there was evidence that there was a curve in the road, which would prevent the trains being seen, and also that the buildings at the station would interrupt the view. The jury found that there was no contributory negligence:—Held, per Ritchie, C.J., and Fournier and Henry, JJ., that the finding of the jury should not be disturbed. Strong, Taschereau and Gwynne, JJ., contra. [13 A.R. (Ont.) 174, 8 O.R. 601, affirmed.]

Grand Trunk Ry. Co. v. Beckett (1887), 16 Can. S.C.R. 713.

[Leave to appeal was refused by the Privy Council, 9 Canada Gazette 394. See the Grand Trunk Ry. Co. v. Jennings, 13 App. Cas. 800, in which this case was discussed and approved.]

[Approved in Grand Trunk Ry. Co. v. Jennings, 13 App. Cas. 802; followed in Preston v. Toronto Ry. Co., 13 O.L.R. 369; referred to in Hollinger v. Can. Pac. Ry. Co., 21 O.R. 705; Warboys v. Lachine Rapids Hydraulic and Land Co., 22 Que. S.C. 541; distinguished in Tinsley v. Toronto Ry. Co., 17 O.L.R. 74; followed in Cameron v. Royal Paper Mills Co., 31 Que. S.C. 286.]

RUNNING LOCOMOTIVE REAR END FOREMOST—SPEED OF TRAIN AT RAILWAY CROSSING.

A railway company that uses a locomotive, rear end foremost, to haul a train, so that the driver cannot see the track immediately ahead, is guilty of negligence and liable to contribute to the loss arising from a carriage being run down at a railway crossing, when the accident might possibly have been averted, had the driver of the locomotive been able to see the carriage approach. There is no statutory obligation to slacken the speed of a railway train at an ordinary railway crossing.

Grand Trunk Ry. Co. v. Daoust, 14 Que. K.B. 548.

[Applied in Can. Pac. Ry. Co. v. Toupin, 18 Que. K.B. 559.]

STREET CROSSINGS—EXTRAORDINARY PRECAUTIONS.

A railway company is under no legal obligation to slacken the speed of its trains through a town, if its track is properly fenced. The failure of a railway company to have a guardian, or gates or some equivalent form of protection at a street crossing, however dangerous from the lay of the land making it impossible to see approaching trains, is not a fault that will make the company liable for accidents by collision with its passing trains.

Quebec & Lake St. John Ry. Co. v. Girard, 15 Que. K.B. 48.

EXCESSIVE SPEED—THICKLY PEOPLED DISTRICT.

Railway companies are responsible for accidents caused by their trains in thickly peopled portions of towns traveling at a rate of speed exceeding ten miles per hour. They cannot invoke the exception made when the right-of-way is enclosed if the fences have gaps or openings without protection opposite intersecting streets on one of which the accident occurred.

Jolicoeur v. Grand Trunk Ry. Co., 34 Que. S.C. 457.

STREET CROSSING—EXCESSIVE SPEED—INJURY TO PERSON DRIVING ACROSS TRACKS.

In an action against a railway company for negligence, it appeared that a locomotive of the defendants was running at a dangerous rate of speed for the locality, and struck and killed a person who was driving a team and waggon over the track at a street crossing. There was a tool house near the crossing, which to some extent obstructed the view, and there was also another train shunting near by. The jury found that death was caused by the defendants' negligence in failing to reduce the speed of their train as provided by the Railway Act, and that the deceased had committed no acts of contributory negligence. No questions were submitted to the jury as to whether the defendants were guilty of any other acts of negligence. It was held, that as the noise of the shunting train might have reasonably engaged the attention of the deceased, and as his view near the crossing was obstructed by the tool house, the jury was justified in finding that there was no contributory negligence; but that following G.T.R. v. McKay, 3 Can. Ry. Cas. 52, 34 Can. S.C.R.

81, the verdict in the plaintiff's favour should be set aside, and (Wetmore, J., dissenting) a new trial ordered.

Andreas v. Can. Pac. Ry. Co., 7 Terr. L.R. 327.

[Followed in Minor v. Grand Trunk Ry. Co., 22 Can. Ry. Cas. 194, 35 D.L.R. 106.]

INJURY TO PERSON CROSSING TRACK—TRAIN RUNNING BACKWARDS—RATE OF SPEED IN CITY—WARNING—CONTRIBUTORY NEGLIGENCE.

Special circumstances may call for other precautions in addition to those prescribed by statute, as to ringing the bell or blowing the whistle as a warning, and what those additional precautions are, is, in each case, a question of fact for the jury. [Lake Erie & Detroit River Ry. Co. v. Barclay, 30 Can. S.C.R. 360, followed.] The provision that the speed of trains on the Toronto Esplanade shall not exceed four miles an hour, 28 Vict. c. 34, s. 7, has not been superseded by the Railway Act, 1888, s. 259, and 55 & 56 Vict. c. 27, s. 8. It is for the jury to consider in the light of all the surrounding circumstances whether the fact that deceased did not look in the direction of an approaching engine, is such negligence as disentitles his representatives from recovering in an action against a railway company for negligence. The jury found that deceased was guilty of contributory negligence, but that defendants could have avoided the accident by the exercise of reasonable care. Held, that the plaintiff was entitled to judgment.

Moyer v. Grand Trunk Ry. Co., 3 Can. Ry. Cas. 1, 2 O.W.R. 83.

[Referred to in Smith v. Niagara, etc., Ry. Co., 9 O.L.R. 158.]

STREET CROSSING—COLLISION—RATE OF SPEED.

Where all the usual signals and warnings were given by the railway company, and the proximate and determining cause of the accident of which the plaintiff complained was the imprudence and recklessness of her deceased husband and his brother, the plaintiff is not entitled to recover. It was unnecessary to decide whether s. 259 of the Railway Act, 1888, prohibiting a rate of speed, through a thickly peopled portion of a city, exceeding six miles an hour applies to highway crossings, because, in the opinion of the Court of Review, the accident would have happened even if the rate of speed had been less than six miles an hour. Judgment of Superior Court reversed.

Tanguay v. Grand Trunk Ry. Co., 3 Can. Ry. Cas. 13, 20 Que. S.C. 90.

[NOTE.—The two Courts differed upon a question of fact. The Judge a quo was of opinion that the accident would not have occurred if the train had been going at a speed less than six miles an hour, and that s. 259 of the Railway Act, 1888, prohibits a speed exceeding six miles an hour across highway crossings in cities, towns and villages.]

EXCESSIVE SPEED—CROSSING TRACK WHILE ENGINE ABOUT STARTING—PROXIMATE CAUSE.

Three persons were near a public road crossing when a freight train passed after which they attempted to pass over the track and were struck by a passenger train coming from the direction opposite to that of the freight train and killed. The passenger train was running at the rate of forty-five miles an hour, and it was snowing slightly at the time. On the trial of actions under Lord Campbell's Act against the Railway Company the jury found that the death of the parties was due to negligence "in violating the statute by running at an excessive rate of speed" and that deceased were not guilty of contributory negligence. A verdict for the plaintiff in each case was maintained by the Court of Appeal:—Held, that the railway company was liable; that the deceased had a right to cross the track and there was no evidence of want of care on their part and the same could not be presumed; and though there may not have been precise proof that the negligence of the company was the direct cause of the accident the jury could reasonably infer it from the facts proved and their finding was justified. [McArthur v. Dominion Cartridge Co., [1905] A.C. 72, followed; Wakelin v. London & South Western Ry. Co., 12 App. Cas. 41, distinguished]:—Held, also, that the fact of deceased starting to cross the track two seconds before being struck by the engine was not proof of want of care; that owing to the snowstorm and the escaping steam and noise of the freight train they might well have failed to see the headlight or hear the approach of the passenger train if they had looked and listened.

Grand Trunk Ry. Co. v. Hainer; Grand Trunk Ry. Co. v. Hughes; Grand Trunk Ry. Co. v. Bready, 5 Can. Ry. Cas. 59, 36 Can. S.C.R. 180.

[Applied in Jolicoeur v. Grand Trunk Ry. Co., 34 Que. S.C. 460; followed in Winnipeg Elec. Co. v. Schwartz, 17 Can. Ry. Cas. 1, 16 D.L.R. 681; Minor v. Grand Trunk Ry. Co., 22 Can. Ry. Cas. 194, 35 D.L.R. 106; distinguished in Beck v. Can. Nor. Ry. Co., 2 Alta. L.R. 558; Tinsley v. Toronto Ry. Co., 17 O.L.R. 74; referred to in Eisenhauer v. Halifax & S. W. Ry. Co., 42 N.S.R. 434.]

Excessive speed—Finding of jury—Misdirection—Signals and warnings.

Where in an action against a railway company to recover damages for the death of the plaintiff's husband, the findings of the jury are to the effect that the death of the deceased was caused in consequence of running the defendant's train at an excessive rate of speed, but were not directed to any findings as to whether or not the deceased had been guilty of contributory negligence where there was sufficient evidence of the ringing of the bell, the blowing of the whistle, the shunting of cars, together with other circumstances which might have acquainted the deceased of an approaching train, a verdict in favour of the plaintiff under such facts does not warrant a new trial, but the whole action must be nonsuited.

Andreas v. Can. Pac. Ry. Co., 5 Can. Ry. Cas. 440, 2 W.L.R. 249.

[Affirmed in 5 Can. Ry. Cas. 450, 37 Can. S.C.R. 1.]

Excessive speed—Signals.

A. brought an action, as administratrix of the estate of her husband, against the C.P.R. Co., claiming compensation for his death by negligence and alleging in her declaration that the negligence consisted in running a train at a greater speed than six miles an hour through a thickly populated district and in failing to give the statutory warning on approaching the crossing where the accident happened. At the trial questions were submitted to the jury who found that the train was running at a speed of 25 miles an hour, that such speed was dangerous for the locality, and that the death of deceased was caused by neglect or omission of the company in failing to reduce speed as provided by the Railway Act. A verdict was entered for the plaintiff and on motion to the Court, en banc, to have it set aside and judgment entered for defendants a new trial was ordered on the ground that questions as to the bell having been rung and the whistle sounded should have been submitted to the jury. The plaintiff appealed to the Supreme Court of Canada to have the verdict at the trial restored, and the defendants, by cross-appeal, asked for judgment:—Held, affirming 2 W.L.R. 249, 5 Can. Ry. Cas. 440, Idington, J., dissenting, that by the above findings the jury must be held to have considered the other grounds of negligence charged, as to which they were properly directed by the Judge, and to have exonerated the defendants from liability thereon, and the new trial was improperly granted on the ground mentioned:—Held, also, that though there was no express findings that the place at which the accident happened was a thickly peopled portion of the district, it was necessarily imported in the findings given above; that this fact had to be proved by the plaintiff and there was not evidence to support it; and that as the evidence shewed it was not a thickly peopled portion, the plaintiff could not recover and the defendants should have judgment on their cross-appeal.

Andreas v. Can. Pac. Ry. Co., 5 Can. Ry. Cas. 450, 37 Can. S.C.R. 1.

[Followed in McGraw v. Toronto Ry. Co., 18 O.L.R. 154; referred to in Eisenhauer et al. v. Halifax & S. W. Ry. Co., 42 N.S.R. 438; followed in Paquette v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 68, 19 O.W.R. 305.]

Previous accident—Rate of speed.

By reason of the provisions contained in s. 275 of the Railway Act, 1906, as to the making of reports and inspection of accident occurring at railway crossings, that part of the section added by 8-9 Edw. VII. (Can.) c. 32, prohibiting a speed of more than 10 miles an hour by trains at certain crossings not protected to the satisfaction of the Railway Commission where accidents resulting in bodily injury or death had previously occurred, must be held to be limited in the latter respect to accidents of which the railway company is fixed with notice by reason of physical impact occasioning the same or by reason of the train employees actually becoming aware of the accident so as to report it; a previous accident by a horse taking fright at a passing train after passing over the crossing will not bring the subs. (4) into operation where it was not observed by the railway employees so as to call upon them to make a report.

Bell v. Grand Trunk Ry. Co., 16 Can. Ry. Cas. 318, 29 O.L.R. 247, 14 D.L.R. 279.

[Reversed in 16 Can. Ry. Cas. 324.]

Excessive speed—Protected crossing.

An instruction to the jury, in an action for injuries sustained by a collision at a highway crossing, that it was negligence to run a train through a thickly settled part of a town or village at more than 10 miles an hour, is erroneous, unless qualified by stating in effect the exceptions contained in s. 275 of the Railway Act, 1906, permitting a greater rate of speed where the crossing is protected in accordance with an order of the Board or other competent authority. [Grand Trunk Ry. Co. v. McKay, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52, followed.]

Bell v. Grand Trunk Ry. Co., 16 Can. Ry. Cas. 318, 29 O.L.R. 247, 14 D.L.R. 279.

[Reversed in 16 Can. Ry. Cas. 324.]

Burden of proof—Speed limit.

Where a damage action against a railway company is based upon a level crossing accident due to the running of trains at a rate far exceeding that of ten miles an hour through the thickly peopled portion of a village or town and so primarily in contravention of s. 275 of the Railway Act, 1906, as amended by 8-9 Edw. VII. (Can.), c. 32, s. 13, the onus of proof is upon the railway company to shew that it comes within the exceptions contained in the statute by having a special order of the Railway Committee or of the Board governing the mode of protection of the crossing and so exempting the company from the restriction of ten miles an hour at the locus in quo, or to show that the company had permission to exceed that limit by some regulation or order of the Board applicable to the particular locality. [Bell v. Grand Trunk Ry. Co., 14 D.L.R. 279, 29 O.L.R. 247, reversed; Grand Trunk Ry. Co. v. McKay, 3 Can. Ry. Cas. 52, 34 Can. S.C.R. 81, distinguished; Britannic Merthyr Coal Co. v. David, [1910] A.C. 74, and Watkins v. Naval Colliery Co., [1912] A.C. 693, followed.]

Bell v. Grand Trunk Ry. Co., 16 Can. Ry. Cas., 324, 48 Can. S.C.R. 561, 15 D.L.R. 874.

[Followed in Lowland v. Hamilton, Grimsby, etc., Ry. Co., 19 Can. Ry. Cas. 214.]

Excessive speed—Ultimate negligence.

The findings of a trial Judge that an injury to a person by a moving train at a highway crossing was caused by operating the train at an excessive rate of speed, which could have been avoided by a slackening of the speed immediately upon seeing the person, will not be interfered with on appeal; the crossing being in a thickly peopled portion of the city the onus was upon the railway company to shew its compliance with s. 275 (3) of the Railway Act, 1906, as amended by 1909, c. 31, s. 13. [B.C. Elec. Ry. Co. v. Loach, 20 Can. Ry. Cas. 309, [1916] 1 A. C. 719, 23 D.L.R. 4, applied.]

Critchley v. Can. Northern Ry. Co., 21 Can. Ry. Cas. 277, 34 A.L.R. 245.

Locality not "thickly peopled"—Negligence.

The locality in which an accident occurred by a collision with a railway train not being "thickly peopled," s. 275 of the Railway Act, 1906, does not apply. [Grand Trunk Ry. Co. v. McKay, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52; Grand Trunk Ry. Co. v. Hainer, 36 Can. S.C.R. 180, 5 Can. Ry. Cas. 59; Andreas v. Can. Pac. Ry. Co., 37 Can. S.C.R. 1, p. 19, 20; 5 Can. Ry. Cas. 450; Zufelt v. Can. Pac. Ry. Co., 23 O.L.R. 602, 12 Can. Ry. Cas. 420; Parent v. The King, 13 Can. Ex. 93, followed.]

Minor v. Grand Trunk Ry. Co., 22 Can. Ry. Cas. 194, 38 O.L.R. 646, 35 D.L.R. 106.

[Distinguished in Follick v. Wabash Ry. Co., 48 D.L.R. 526.]

C. Signals and Warnings.

See also D. (p. 187).

Failure to sound whistle; Accident from horse taking fright.

Consolidated Statutes of Canada, c. 63, s. 104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by said statute, whether such damage arises from actual collision, or, as in this case, by a horse being brought over near the crossing and taking fright at the appearance or noise of the train. The jury, in answer to the question, "If the plaintiffs had known that the train was coming would they have stopped their horse further from the railway than they did?" said "Yes":—Held, though the question was indefinite, the answers to the questions as a whole, viewed in connection with the Judge's charge, and the evidence, warranted the verdict. 8 A.R. (Ont.) 482, affirming 32 U.C.C.P. 349, affirmed.

Grand Trunk Ry. v. Rosenberger, 9 Can. S.C.R. 311.

[Followed in Grand Trunk Ry. Co. v. Sibbald, 20 Can. S.C.R. 259, 19 O.R. 164; approved in Hollinger v. Can. Pac. Ry. Co., 21 O.R. 705; Lemay

v. Can. Pac. Ry. Co., 17 A.R. (Ont.) 293; commented on in Roe v. Lucknow, 21 A.R. (Ont.) 1; applied in Sibbald v. Grand Trunk Ry. Co., 18 A.R. (Ont.) 184, 20 Can. S.C.R. 259; discussed in Hurd v. Grand Trunk Ry. Co., 15 A.R. (Ont.) 58; Vanwart v. N.B. Ry. Co., 27 N.B.R. 65; distinguished in New Brunswick Ry. Co. v. Vanwart, 17 Can. S.C.R. 41; followed in Henderson v. Can. Atlantic Ry. Co., 25 A.R. (Ont.) 437; referred to in Atkinson v. Grand Trunk Ry. Co., 17 O.R. 220; Nightingale v. Union Colliery Co., 8 B.C.R. 137.]

Approaching siding—Notice of approach.

At a place which was not a station nor a highway crossing, the N.B. Ry. Co. had a siding for loading lumber delivered from a saw mill and piled upon a platform. The deceased was at the platform with a team for the purpose of taking away some lumber when a train coming out of a cutting frightened the horses, which dragged the deceased to the main track, where he was killed by the train:—Held, that there was no duty upon the company to ring the bell or sound the whistle or to take special precautions in approaching or passing the siding. 27 N.B.R. 59, reversed.

New Brunswick Ry. Co. v. Vanwart, 17 Can. S.C.R. 35.

[Discussed in Hollinger v. Can. Pac. Ry. Co., 21 O.R. 705.]

Failure to give signals when approaching crossing.

On the trial of an action against a railway company for injuries alleged to have been caused by negligence of the servants of the company in not giving proper notice of the approach of a train at a crossing, whereby plaintiff was struck by the engine and hurt, the case was withdrawn from the jury by consent of counsel for both parties and referred to the full Court, with power to draw inferences of fact and on the law and facts either to assess damages to the plaintiff or enter a judgment of nonsuit. On appeal from the decision of the full Court assessing damages to plaintiff:—Held, Gwynne and Patterson, JJ., dissenting, that as by the practice in the Supreme Court of New Brunswick all matters of fact must be decided by the jury, and can only be entertained by the Court by consent of parties, the full Court in considering the case pursuant to the agreement at the trial acted as a quasi-arbitrator, and its decision was not open to review on appeal as it would have been if the judgment had been given in the regular course of judicial procedure in the Court:—Held, further, that if the merits of the case could be entertained on appeal the judgment appealed from should be affirmed:—Held, per Gwynne and Patterson, JJ., that the case was properly before the Court, and as the evidence shewed that the servants of the company had complied with the statutory requirement as to giving notice of the approach of the train the company was not liable. 31 N.B.R. 318, affirmed.

Can. Pac. Ry. Co. v. Fleming, 22 Can. S.C.R. 33.

[Applied in Quebec & Lake St. John Ry. Co. v. Girard, 15 Que. K.B. 56; followed in Champagne v. G.T.R. Co., 9 O.L.R. 589, 4 Can. Ry. Cas. 207; referred to in Voigt v. Groves, 12 B.C.R. 180.]

Impairing usefulness of highway; Frightening horses.

A railway company has no authority to build its road so that part of its roadbed shall be some distance below the level of the highway unless upon the express condition that the highway shall be restored so as not to impair its usefulness, and the company so constructing its road and any other company operating it is liable for injuries resulting from the dangerous condition of the highway to persons lawfully using it. A company which has not complied with the statutory condition of ringing a bell when approaching a crossing is liable for injuries resulting from a horse's taking fright at the approach of a train and throwing the occupants of the carriage over the dangerous part of the highway on to the track though there was no contact between the engine and the carriage. [Grand Trunk Ry. Co. v. Rosenberger, 9 Can. S.C.R. 311, followed, 18 A.R. (Ont.) 184, 19 O.R. 164, affirmed.]

G.T.R. Co. v. Sibbald; G.T.R. Co. v. Tremayne, 20 Can. S.C.R. 259.

[Approved in Fairbanks v. Yarmouth, 24 A.R. (Ont.) 273; Hockley v. Grand Trunk Ry. Co., 7 O.L.R. 186; followed in Steves v. South Vancouver, 6 B.C.R. 23; referred to in Fraser v. London Street Ry. Co., 18 P.R. (Ont.) 370; McHugh v. Grand Trunk Ry. Co., 2 O.L.R. 600; Sheppard Pub. Co. v. Press Pub. Co., 10 O.L.R. 243; Henderson v. Canada Atlantic Ry. Co., 25 A.R. (Ont.) 437.]

FAILURE TO GIVE SIGNALS OR WARNINGS.

The respondent W. obtained a verdict from a jury in the Superior Court, District of Iberville, for injuries sustained by being run over by a locomotive engine of the appellants, while he was crossing their railway track on a public highway. The motion for judgment on the verdict was not made before the Superior Court, District of Iberville, but was drawn up and placed on the record while the case was pending before the Court of Review at Montreal. That Court, on motion, directed a new trial, but the Court of Queen's Bench, on appeal, held that from the evidence in the record it appeared that the accident occurred through the gross negligence of the employees of the appellants in not ringing the bell and sounding the whistle, as they were bound to do, when approaching the crossing, and that the verdict rendered by the jury ought, therefore, to be maintained and the motion for a new trial rejected. [See 2 Dorion's Q.B.R. 131.] On appeal to the Supreme Court of Canada:—Held, Taschereau and Gwynne, JJ., dissenting, that the judgment of the Court of Queen's Bench should be affirmed. Per Taschereau and Gwynne, JJ., dissenting:—The Superior Court, sitting in review at Montreal, has no jurisdiction, either under 34 Vict. c. 4, s. 10, or 35 Vict. c. 6, s. 13 (Que.), to determine a motion for judgment upon the verdict in a case tried in one of the rural judicial districts, and therefore the Court of Queen's Bench had no power to enter judgment for the respondents upon the verdict. (2) The Court of Review, on a motion for new trial in the first instance, having in its discretion granted same, judgment should not have been reversed on appeal.

Grand Trunk Ry. Co. v. Wilson, Cass. Can. S.C.R. Dig. 1893, p. 722.

FAILURE TO BLOW WHISTLE AND RING BELL.

Action for damages for the killing of plaintiff's horses at a highway crossing by an engine of the defendants. The learned trial Judge did not think it necessary to decide, upon the conflicting evidence, whether the whistle had been blown as required by s. 224 of the Railway Act, 1903, but he found that the bell had not been rung and the defendants had, therefore, been guilty of negligence. He was, however, inclined to believe that the plaintiff's driver had been guilty of contributory negligence in not looking out for the engine. The action was dismissed on the ground that the plaintiff had not proved that there was no by-law of the city prohibiting the blowing of whistles and ringing of bells because, under that section, if such a by-law was in force, the whistle should not be blown nor the bell rung:—Held, on appeal, that, upon the plaintiff's filing an affidavit proving the nonexistence of such a by-law, there should be a new trial, as the evidence strongly indicated negligence and there was no positive finding of contributory negligence. Quære, whether the onus was on the plaintiff to prove the nonexistence of such a by-law. Semble, the trial Judge might properly have allowed such proof to have been made by affidavit.

Pedlar v. Can. Northern Ry. Co., 18 Man. L.R. 525.

Accident at level crossing—Sounding whistle and ringing bell.

Two of the plaintiff's teams driven by his servants were approaching the level crossing of the highway with defendants' railway. The drivers were on the lookout for trains but saw and heard nothing and proceeded to drive across the track when a train struck and killed one of the teams and damaged the waggon and harness. The engineer and fireman both swore that the whistle had been sounded as required by s. 274 of the Railway Act, 1906, but they did not claim that the bell had been rung as that section also required. The two drivers swore that they did not hear the whistle. The defendants also contended that the drivers should have seen the headlight of the engine and therefore were guilty of contributory negligence, but there was some evidence that the headlight might have been obscured at the moment by escaping steam:—Held, that the plaintiff was entitled to a verdict for the amount of his loss.

Pedlar v. Can. Northern Ry. Co., 20 Man. L.R. 265.

Footpath crossing—Reversing train—Precautions.

There is negligence for which a railway company is responsible when the conductor of a train moving backwards to be coupled to a car left upon a siding crossed by a frequented footpath did not station somebody at the place to warn people passing.

Grand Trunk Ry. Co. v. Daoust, 14 Que. K.B. 548, Can. Pac. Ry. Co. v. Brazeau, 19 Que. K.B. 293.

[Applied in Can. Pac. Ry. Co. v. Toupin, 18 Que. K.B. 559.]

Signals and warnings—Accident—Life policy—Deduction from damages.

Plaintiff's husband was driving in his waggon along the highway in the town of Strathroy where it crossed the defendant's railway. There was evidence to shew that the view of an approaching train was obstructed by the station house, buildings and cars, until a person approaching on the highway had reached within a short distance of the main line. The evidence was contradictory as to the ringing of a bell or the sounding of a whistle, but the jury found that the engineer had failed to do either in approaching the crossing in question. The plaintiff's evidence shewed that the deceased, in approaching the crossing, was driving with his head down, apparently oblivious of his surroundings. For the defence, it was deposed to, that the deceased was driving slowly in approaching the main track with his head down, but when some distance off he perceived the train and struck his horse with a whip, but was hit before he was able to cross the line. The jury found the defendants guilty of negligence and negatived any contributory negligence on the part of the deceased. The deceased had effected a policy of insurance on his life, and, at the trial, the jury were directed to deduct the amount of the policy from the verdict. The Divisional Court, Wilson, C.J., dissenting, held that the case was one for the jury; that the findings in plaintiff's favour should not be disturbed, and that the policy of insurance had been improperly directed by the learned Judge at the trial to be deducted from the damages. In the Court of Appeal it was held that it could not be said that the verdict of the jury was against the weight of evidence, applying the principles laid down in Metropolitan Ry. Co. v. Wright, 11 App. Cas. 152. Hagarty, C.J., and Osler, J., were of opinion that the policy of insurance should be deducted from the damages, while Burton and Patterson, JJ., were of the contrary opinion:—Held, per Sir W. J. Ritchie, C.J., Fournier and Henry, JJ., that the appeal should be dismissed with costs:—Held, per Strong, Taschereau and Gwynne, JJ., dissenting, that the deceased was guilty of contributory negligence:—Held, per Sir W. J. Ritchie, C.J., and Strong, Fournier and Henry, JJ., that the policy of insurance should not be deducted from the damages:—Held, per Taschereau, J., that it was the duty of the deceased before attempting to cross the track to look and see whether a train was approaching, and that his failure to do so was the cause of the accident:—Held, the Court being equally divided, that the appeal should be dismissed without costs. 13 A.R. (Ont.), 174, 8 O.R. 601, affirmed.

Grand Trunk Ry. Co. v. Beckett (1887), 1 S.C. Cas. 228, 16 Can. S.C.R. 713.

[Distinguished in Tinsley v. Toronto Ry. Co., 17 O.L.R. 74; followed in Cameron v. Royal Paper Mills Co., 31 Que. S.C. 286; approved in Grand Trunk Ry. Co. v. Jennings, 13 App. Cas. 802; followed in Preston v. Toronto Ry. Co., 13 O.L.R. 369; referred to in Hollinger v. Can. Pac. Ry Co., 21 O.R. 705; Warboys v. Lachine Rapids etc., Co., 22 Que. S.C. 541.]

HIGHWAY CROSSING—NEGLECT TO GIVE STATUTORY WARNING—CONTRIBUTORY NEGLIGENCE.

Persons lawfully using a highway are entitled to assume that the statutory warning will be given by a train crossing the highway, and are not necessarily guilty of contributory negligence because, while driving a restive horse, they approach, in the absence of warning, so close to the crossing as to be unable to control the horse when the train crosses, and are injured, even though by looking or listening they probably would have learned of the approach of the train in time to stop far enough away to be in safety. The question of contributory negligence in such a case is for the jury to determine under all the circumstances of the case. [Morrow v. Can. Pac. Ry. Co. (1894), 21 A.R. (Ont.) 149, followed.] Judgment of Meredith, C.J., affirmed.

Vallee v. Grand Trunk Ry. Co., 1 Can. Ry. Cas. 338, 1 O.L.R. 224.

[Discussed in Champagne v. G.T.R. Co., 9 O.L.R. 589, 4 Can. Ry. Cas. 207; distinguished in Tinsley v. Toronto Ry. Co., 15 O.L.R. 438; followed in Misener v Wabash Ry. Co., 12 O.L.R. 71; followed in Sims v. Grand Trunk Ry. Co., 10 O.L.R. 330, 12 O.L.R. 39; followed in Wright v. Grand Trunk Ry. Co., 12 O.L.R. 114; referred to in Jones v. Toronto, etc., Radial Ry. Co., 20 O.L.R. 71; referred to in London & Western Trusts v. Lake Erie, etc., Ry. Co., 12 O.L.R. 28.]

HIGHWAY CROSSING—OMISSION TO RING BELL OR SOUND WHISTLE—CONTRIBUTORY NEGLIGENCE.

(1) The word "highway" in s. 256 of the Railway Act, 1888, requiring a bell to be rung or a whistle sounded by a railway locomotive engine on approaching a crossing over a highway, means a public highway, which is so as of right. Semble: The question whether there is a public highway at any point is one which a County Court is precluded by subs. (d) of s. 59 of the County Courts Act, R.S.M., c. 33, from trying. (2) Where a trail or way over a railway track is used by the public by invitation or license of the railway company, a person crossing the track upon the same is bound to observe reasonable precautions to avoid injury by trains; and where the evidence shews that he had not done so, he cannot recover

from the company for such injuries without proving that they were immediately caused by the negligence of the company's servants only. Quaere: Whether the failure of the person in charge of a locomotive to ring a bell or sound a whistle or observe other precautions on approaching such a crossing constitutes actionable negligence. [Cotton v. Wood (1860), 8 C.B.N.S. 568, and Weir v. C.P.R. (1889), 16 A.R. (Ont.) 100, followed.]

Royle v. Can. Northern Ry. Co., 3 Can. Ry. Cas. 4, 14 Man. L.R. 275. [Followed in De Vries v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 375.]

Dangerous crossing—Failure to give warning—Contributory negligence.

A siding of the defendants' railway, which was not used by the defendants more than two or three times a week, crossed a narrow arched-in lane or alleyway, held on the evidence to be a highway, very close to the face of the walls. The plaintiff's servant had driven the plaintiff's horse and waggon across the siding and through the alleyway to a warehouse close by, there being no engine or cars on the siding. The waggon was within a short time loaded with boxes, and the plaintiff's servant then returned through the alleyway, the servant walking beside the waggon in order to steady the load. Just as the horse came out of the alleyway it was struck by a passing engine and severely injured. The whistle of the engine had not been sounded nor the bell rung. The plaintiff's servant did not stop the horse at the mouth of the alleyway or look or listen for trains:—Held, that assuming, but not deciding, that the duty to sound the whistle or ring the bell did not apply in the case of engines using a siding, it was nevertheless incumbent upon the defendants to give some warning before crossing the lane, especially in view of the very dangerous nature of the crossing, and that, not having done so, they were guilty of negligence and prima facie liable in damages:—Held, also, that under all the circumstances it could not be said that there was not some evidence to support the finding of the Judge at the trial (the case having been tried without a jury) that the plaintiff's servant had not acted unreasonably, and was therefore not guilty of contributory negligence. Judgment of the County Court of Lincoln affirmed.

Smith v. Niagara & St. Catharines Ry. Co., 4 Can. Ry. Cas. 220, 9 O.L.R. 158.

Neglect of statutory warning—Collision at crossing—Contributory negligence.

The deceased, who was well acquainted with the locality, while driving along a highway running in the same direction as and crossing a railway was killed at the crossing by a locomotive, running alone, coming from a direction behind him. The trial Judge left it to the jury to say whether there was negligence on the part of the defendants, and whether the deceased could with ordinary diligence have seen the engine in time to avoid the collision, and whether he was guilty of any want of ordinary care and diligence which contributed to the accident. The jury found that the engine was going unusually fast; that the whistle was sounded at a crossing three-fifths of a mile off, but was not continued at the other crossings and that the deceased was not guilty of contributory negligence:—Held, affirming 10 A.R. (Ont.) 191, that the case had been properly left to the jury and that the verdict not being against the weight of evidence ought not to be disturbed.

Peart v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 347, 10 O.L.R. 753.

[Considered in Weir v. Can. Pac. Ry. Co., 16 A.R. (Ont.) 100; discussed in Blake v. Can. Pac. Ry. Co., 17 O.R. 177; Ryan v. Can. South Ry. Co., 10 O.R. 745; followed in Misener v. Wabash Ry. Co., 12 O.L.R. 71; Tinsley v. Toronto Ry. Co., 17 O.L.R. 74; Sims v. Grand Trunk Ry. Co., 12 O.L.R. 39; referred to in Champagne v. G.T.R. Co., 4 Can. Ry. Cas. 207, 9 O.L.R. 589; Copeland v. Blenheim, 9 O.R. 19; Hollinger v. Can. Pac. Ry. Co., 21 O.R. 705; Johnston v. Grand Trunk Ry. Co., 21 A.R. (Ont.) 408; Jones v. Toronto, etc., Ry. Co., 20 O.L.R. 71; Pettigrew v. Thomas, 12 A.R. (Ont.) 577; Wright v. Grand Trunk Ry. Co., 12 O.L.R. 114.]

Injury to person at highway crossing—Train "behind time."

In an action to recover damages for the death of a man who was struck by a train of the defendants at a highway crossing, the evidence as to whether the statutory signals were given was conflicting, and, while it was shewn that the train was about ten minutes late, there was no evidence as to the cause of the delay, nor was it shewn that the deceased was misled thereby. The jury found that the defendants were guilty of negligence, which consisted in the train being "behind time;" but they did not answer a question put to them as to whether the bell was ringing:—Held, that no actionable negligence was shewn or found, and the action should be dismissed; it was not a case for a new trial. S. 215 of the Railway Act, 1903, which requires that all regular trains shall be started as nearly as practicable at regular hours, fixed by public notice, did not aid the plaintiffs. Judgment of Boyd, C., reversed.

Hanly et al. v. Michigan Central Ry. Co., 6 Can. Ry. Cas. 240, 13 O.L.R. 560.

[Followed in McGraw v. Toronto Ry. Co., 18 O.L.R. 154.]

Crossing in town—Handcar—Warning—Infant—Coasting.

A child of ten years of age was coasting down an incline on a street in a town crossed by a railway, and was run down and injured by a handcar proceeding along the railway. At the trial, the jury found, in answer to questions, that the defendants were negligent in not giving some warning in approaching the crossing; that the defendants could have avoided injuring the plaintiff by stopping the handcar, and that it was their duty, apart from the provisions of the Railway Act, to have given warning:—Held, that the jury, in finding that warning should have been given, were not assuming to lay down any general rule as to what care or precaution should be taken, but simply that under the circumstances some warning should have been given, and that the answer was unobjectionable and in no way infringed upon the jurisdiction of the Board:—Held, also, that even if a hand-car is not a train, a warning is necessary apart from the Railway Act:—Held, also, that, although there was a municipal by-law prohibiting coasting, the plaintiff had not been notified as required by the by-law, and the onus was on the defendants to prove criminal capacity at common law, and under the Criminal Code, of an infant under fourteen, and the defendants were not entitled to invoke such by-law for another purpose:—Held, lastly, that, although a defendant is not liable if the injury is caused entirely by an infant's own negligence, the capacity of the infant to be guilty of contributory negligence is a question for the jury, and that as the plaintiff was not a trespasser and was where he had a right to be, and had not been notified under the provisions of the by-law, or his capacity for crime shewn, the whole case was properly submitted to the jury.

Burtch v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 461, 13 O.L.R. 632.

Destruction of horses at crossing—Failure to ring bell.—Neglect to look out.

An accident having occurred upon a highway crossing in the city of Winnipeg and there having been some evidence of neglect on the defendants' part, the plaintiff would have been entitled to recover but for his failure to shew under s. 224 of the Railway Act, 1903, that there was no by-law of the city of Winnipeg prohibiting the defendants from sounding the whistle and ringing the bell, the onus being upon the plaintiff to prove the nonexistence of such by-law.

Pedlar v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 1, 6 West. L.R. 201.

Signals and warnings—Contributory negligence.

In an action to recover damages for the death of a man who was struck by a train of the defendants at a highway crossing where the evidence for the plaintiff shewed at most a total absence of warning, but there was not at the close of the whole case any evidence upon which the jury, acting reasonably, could find that the absence of warnings caused, or in the slightest degree contributed to the accident, which the undisputed evidence shewed was wholly due to the reckless conduct of the deceased in attempting to cross after he became fully aware of the approaching train:—Held, reversing the judgment at the trial, that the case should not have been submitted to the jury, but the action should have been dismissed. In such cases, the facts, if in dispute, must be found by the jury, but the Judge must first rule as a matter of law whether there is any evidence from which the inference necessary to support the plaintiff's case can reasonably be drawn, if there is no such evidence, the plaintiff's case fails. The statutory signals required to be given by s. 274 of the Railway Act, 1906, are intended to warn persons likely to be in danger. If not given there is a presumption of safety upon which a reasonable person may act, and if, while so acting, he is injured, the company may be liable, but he cannot, because no warning had been given, proceed to cross in front of an advancing engine which he sees or hears, and then blame the absence of warnings for his injury.

Hanna v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 392, 11 O.W.R. 1069.

Collision—Disobedience of orders—Signals—Contributory negligence—Lord Campbell's Act.

M., a locomotive engineer in the employ of the C. P. R. Co., was killed in a collision between trains of the C.P.R. and defendant railway companies. An action was brought by his widow against the Wabash Co. claiming damages under Lord Campbell's Act. M., before attempting to cross, brought his train to a full stop, but not at the stop-board, as required by the rules of the railway company, and proceeded slowly when the signals indicated the crossing was clear, thus complying with the Railway Act, 1906, ss. 277, 278. The Wabash train, on the other hand, without coming to a full stop, although the signals were against it, attempted to make the crossing at the speed, according to the jury, at "the diamond" of eight or nine miles an hour. The real cause of the accident was the reckless disregard of the statute by the defendant's employees in charge of the train:—Held, Meredith, J.A., dissenting, that on the answers of the jury the defendant company was liable in damages for the accident.

McKay v. Wabash R. R. Co., 7 Can. Ry. Cas. 444, 10 O.W.R. 416.
[Affirmed in 40 Can. S.C.R. 251, 7 Can. Ry. Cas. 466.]

Collision—Stop at crossing—Statutory rule—Contributory negligence.

A train of the Wabash R.R. Co., and one of the C.P.R. Co. approached a highway crossing at obtuse angles. The former did not, as required by s. 278 of the Railway Act, 1906, come to a full stop; the latter did at a semaphore nearly 900 feet from the crossing and receiving the proper signal proceeded without stopping again at a "stop post" some 400 feet nearer where a rule of the company required trains to stop. The trains collided and the engineer of the C.P.R. Co. was killed. In an action by his widow:—Held, that the failure of the engineer to stop the second time was not contributory negligence which prevented the recovery of damages for the loss of plaintiff's husband caused by the admitted negligence of defendants.

Wabash Ry. Co. v. McKay, 7 Can. Ry. Cas. 466, 40 Can. S.C.R. 251.

Failure to give signals—Contributory negligence—Husband and wife.

A waggon driven by E., and containing also his wife and his son, while attempting to pass a dangerous crossing on defendants' railway was struck by an engine, resulting in E. and his wife being killed and the son seriously injured. There was negligence on the part of the company's servants in failing to give proper signals in approaching the crossing, and in running the engine at excessive speed which would have rendered the company liable, but the trial Judge found contributory negligence on the part of E. precluding those claiming under him from recovering, and this finding was sustained by the Court:—Held, nevertheless, that such negligence was not a bar to the wife or those claiming under her, or to the son, precluding them from recovering for personal injuries in the absence of evidence of contributory negligence on their part. While the common-law relations between husband and wife have been changed by statute so that a married woman is entitled to recover in her own right in cases of damages, the contributory negligence of the husband, when in company with his wife, is not chargeable to her in such actions.

Eisenhauer v. Halifax & South Western Ry. Co., 12 Can. Ry. Cas. 168, 42 N.S.R. 426.

Death of persons crossing track—Inefficient headlight on snow-plough—Excessive speed—"Village."

The plaintiffs sought damages, under the Fatal Accidents Act, for the death of their children, alleged to have been caused by the negligence of the defendants. The deceased were driving across the defendant's track at a street crossing in a village, when they were struck by a snowplough in front of the locomotive of a train, and sustained injuries which resulted in their death. The jury found that the snowplough had a headlight, but it was insufficient because not placed in a suitable position so as to shew the light directly in front of the snowplough; that there was a failure to sound the whistle and to ring the bell as required by the statute; that the place was thickly peopled; that the speed was 15 miles an hour, and was excessive; that the three causes of the injury were, an insufficient headlight on the snowplough, failure to sound the whistle and bell, and excessive speed; and that there was no contributory negligence; and they assessed the damages at $3,000. Judgment was entered by the trial Judge, upon these findings, in favour of the plaintiffs, for the recovery of $3,000:—Held, that the verdict was not satisfactory, and there should be a new trial. Per Moss, C.J.O.:—There is no obligation, statutory or otherwise, upon railway companies to maintain a headlight on a snowplough; but there was a headlight upon this particular snowplough; and there was no evidence upon which a jury could reasonably find negligence so far as the headlight was concerned. The finding with regard to running at an excessive speed through a thickly peopled portion of the village was not complete, for all the necessary facts were not found. And the finding with respect to the statutory signals was not a reasonable one upon the evidence. Per Garrow, J.A.: As to the sufficiency of the headlight, if that was a question proper for the jury at all, which was doubtful, there was no evidence to justify their finding. As to the statutory signals, the onus was upon the plaintiffs to give some evidence from which the jury might reasonably find the fact to be that the signals were not given. Evidence of persons who say that they did not hear the signals must go for nothing if there is reasonable evidence, by equally credible witnesses, that the signals which the others did not hear were actually given; and that was the situation here. The finding was not merely against the weight of evidence, but approached, if it did not reach, the perverse. The findings as to excessive speed and a thickly peopled place were immaterial without a finding as to fencing. Per Meredith, J.A.: The verdict was not rightly found, because the jury were, in effect, told by the trial Judge, that any ten of them could answer any of the questions, and that it was not necessary that the same ten should agree upon more than one answer: And that was erroneous. On the facts of this case, it was necessary that the same ten jurors should have agreed upon some set of facts entitling the plaintiffs to recover before any verdict or judgment could be given in their favour. Per Moss, C.J.O., and Garrow, J.A., that, upon the proper construction of s. 108 of the Judicature Act, having regard particularly to the language of subs. 2, it is enough if any ten jurors concur in answering each question. Per Garrow and Maclaren, JJ.A.:—"Village" in s. 275 of the Railway Act, 1906, includes what is known as "a police village," that is, an unincorporated village, organised for certain limited purposes under the Municipal Act.

Zuvelt v. Can. Pac. Ry. Co., 12 Can. Ry. Cas. 420, 23 O.L.R. 602.

[Followed in Minor v. Grand Trunk Ry. Co., 22 Can. Ry. Cas. 194, 35 D.L.R. 106.]

Signboard at crossing—Absence of—Excessive grade—Statutory signals.

An action to recover damages for the death of one C. due to negligence of the appellant company. The accident happened about seven o'clock in the evening of a winter's day, said to be somewhat dark, while a waggon in which the respondent was simply a passenger was being driven across the tracks of the appellants at the intersection of the highway. Three acts of negligence were found by the jury, to which they attributed the accident:—(1) Absence of warning signboard required by the Railway Act at highway crossings. (2) Excessive grade in highway approaching crossing. (3) Failure to give statutory signals, and negativing contributory negligence;—Held, affirming the judgments of the trial Judge, the Divisional Court and the Court of Appeal for Ontario, in favour of the respondent for damages with costs. Girouard and Idington, JJ., that the absence of the signboard was the cause of the accident. Duff, J., that the failure to give the statutory signals caused the accident. Davies and Anglin, JJ., dissenting, that because no one saw the accident the proximate cause thereof was a guess or conjecture.

Pere Marquette Ry. Co. v. Crouch, 13 Can. Ry. Cas. 247.

Absence of warning at crossing—Reasonable inferences.

An action for damages for death of one G., caused by being run down by the defendants' train, while deceased was crossing a public highway. The evidence shewed that the train gave no warning either by whistle or bell.

Another train was passing upon the other track in the opposite direction at the same time, which gave the necessary signals. No one saw the accident. The jury found that the accident was caused by the violation of the statutory duty to whistle and ring the bell, and negatived contributory negligence. Middleton, J., entered judgment for plaintiff for $2,000 and costs as awarded by the jury. Moss, C.J.O., granted leave to appeal direct to the Court of Appeal. The Court of Appeal dismissed the defendants' appeal with costs. Meredith, J.A., dissenting, being in favour of granting a new trial.

Griffith v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 287, 17 O.W.R. 509, 19 O.W.R. 53.

[Affirmed in 45 Can. S.C.R. 380; 13 Can. Ry. Cas. 302.]

ABSENCE OF WARNING AT CROSSING—REASONABLE INFERENCES.

About 5:30 on a December afternoon, G. left his place of employment to go home. An hour later his body was found some 350 yards east of a crossing of the Grand Trunk Ry., nearly opposite his house. There was no witness of the accident, but it was shewn on the trial of an action by his widow and children, that shortly after he was last seen an express train and a passenger train had passed each other a little east of the crossing, and there was evidence shewing that the latter train had not given the statutory signals when approaching the crossing. The jury found that G. was killed by the passenger train, and that his death was due to the negligence of the latter in failing to give such warnings. This finding was upheld by the Court of Appeal:—Held, that the jury were justified in considering the balance of probabilities and drawing the inference from the circumstances proved, that the death of G. was caused by such negligence.

Grand Trunk Ry. Co. v. Griffith, 13 Can. Ry. Cas. 302, 45 Can. S.C.R. 380.

INJURY TO PERSON CROSSING TRACK.

A railway company will be liable in damages for injuries suffered by a person, who whilst attempting to cross the tracks to reach an adjoining roadway or whilst walking along the tracks with this end in view is struck by a train moving backwards (or engine backing up) when no one has been placed at the forward end of the train to warn persons at the crossings or along the tracks.

Grand Trunk Ry. Co. v. McSween, 2 D.L.R. 874.

ACCIDENT AT CROSSING—SIGNALS—CITY STREETS—SHUNTING ENGINE.

The requirement of s. 274 of the Railway Act, 1906, that a train on approaching a highway crossing shall sound its whistle when at least eighty rods therefrom is not applicable to an engine engaged in shunting cars in a city yard, which at no time was more than one hundred yards distant from a street crossing. It is not necessary that a person about to cross a railway track at a street crossing should have actually heard the warning given by an employee standing on the tender of a backing locomotive, in order to relieve a railway company of the duty imposed on it by s. 276 of the Act, in running trains not headed by an engine moving forward in the ordinary manner over a level crossing, to have a man stationed on the part of the train then foremost, in order to warn persons standing on or about to cross the tracks; since the warning required is only such that, if given in time to avoid danger, it ought to have been apprehended by a person in possession of ordinary faculties, in a reasonably sound, active and alert condition. The duty incumbent on a person who is about to cross a railway track at a highway crossing at grade to look for moving trains is not satisfied by merely looking both ways on approaching the tracks; he must look again just before crossing. In order that a railway company may be held responsible in damages for its negligent omission to perform a statutory duty, it must appear that the injury was the result of such omission and not of the folly or recklessness of the injured person: but the fact that the negligence of the plaintiff contributed to or formed a material part of the cause of his injury, will not preclude him from recovering damages if the consequences of his contributory negligence could have been avoided by the exercise of ordinary care and caution on the part of the defendant. [Dublin, Wicklow & Wexford Ry. v. Slattery, 3 A.C. 1155, 1166; and Davey v. London & South Western Ry. Co., 12 Q.B.D. 70, specially referred to.]

Grand Trunk Ry. Co. v. McAlpine, 16 Can. Ry. Cas. 186, [1913] A.C. 838, 13 D.L.R. 618.

[Followed in Mackenzie v. British Columbia Elec. Ry. Co., 16 Can. Ry. Cas. 337; Doyle v. Can. Northern Ry. Co., 46 D.L.R. 135, explained in Ramsay v. Toronto Ry. Co., 17 Can. Ry. Cas. 6, 17 D.L.R. 220.]

Signals—Failure to give—Ringing bell—Instructions.

In an action for injuries sustained at a highway crossing by being struck by a train an instruction to the jury that the law requires the whistle of the engine to be sounded more than eighty rods away (which was done near another crossing more than eighty rods distant), and that the evidence shewed that the bell was not rung for the latter crossing, is erroneous, and entitles the railway company to a new trial, where the failure to ring the bell was the only negligence on which a verdict for the plaintiff could be sustained, and the jury stated that they "believed that the bell was not ringing continuously," such answer being too ambiguous to sustain the verdict.

Bell v. Grand Trunk Ry. Co., 16 Can. Ry. Cas. 318, 29 O.L.R. 247, 14 D.L.R. 279.

[Reversed in 16 Can. Ry. Cas. 324.]

Signals and warnings—Incompetent brakeman.

The statutory duty under s. 276 of the Railway Act, 1906, to warn persons crossing or about to cross the track of the approach of a train backing up across the street is one for the nonobservance of which the railway company may be liable in damages for an accident resulting from the failure of the brakeman to give sufficient warning with the air whistle at the rear of the train; the placing in charge of the rear end of the train when moving reversely upon level crossings in a town of a brakeman unacquainted with the conditions existing near the crossing which would interfere with persons seeing the approaching train and without knowledge of where the crossing was, is in itself negligence for which the company is liable.

Mitchell v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 188, 22 D.L.R. 804.

Operation—Signals and flagmen—Yard train.

S. 251 of the Railway Act, 1906, under which a man must be stationed on the last car to give warning of the train's approach when it is moving reversely in a city, town or village, applies to a work train operating on the surface wholly within the plant of a company subject to the Railway Act, situate in a city, town or village as well as to cases where the streets of the municipality are crossed by the train moving backwards. [McMullin v. N.S. Steel Co., Can. Ry. Cas. 198, 39 Can. S.C.R. 593, applied.]

Campbell v. Nova Scotia Steel & Coal Co., 22 D.L.R. 885, 48 N.S.R. 540 [Affirmed in 35 D.L.R. 800.]

Signals—Failure to look—Snowstorm.

Failure to ring the bell and blow the whistle while a train is approaching in a snowstorm within 550 feet of a highway, although there is no statutory duty to blow the whistle, may justify a jury's finding of negligence in an action for injuries to a vehicular traveler on the highway; the jury's finding negativing contributory negligence, because of the plaintiff's failure to look, cannot be disregarded by the trial Judge, particularly when the vision was obstructed by the snowstorm.

Gray v. Wabash Ry. Co., 20 Can. Ry. Cas. 391, 35 O.L.R. 510, 28 D.L.R. 244.

Level crossing—Contributory negligence—Findings of jury—Form of questions—Trial—Supplementary findings—Absence of warning—Failure to ring bell—Competence of witnesses—Negativing by jury of alleged failure to sound whistle—Evidence of Person injured—Contradiction—Denial of new trial.

Jaroshinsky v. Grand Trunk Ry. Co., 31 D.L.R. 531.

D. Precautions; Duty to Look and Listen.

Failure to stop, look or listen.

It is a matter of common sense that a person about to pass over a railway crossing upon a level would look to see whether or not a train is approaching. The driver of a train approaching the crossing is entitled to rely upon such person using due care and stopping before reaching the track. He is not bound to anticipate negligence on the part of the person approaching the track and guard against it beforehand. He is only bound, where he has notice of the negligence, to take the ordinary means of evading its consequences. Where deceased, driving a carriage, attempted to cross the track of the defendant company without looking to see whether a train was approaching, or the direction from which the train was coming, the finding of the jury to the effect that deceased should have stopped a short distance from the track and made sure that there was no danger from trains, indicates that the efficient proximate cause of the accident was her not stopping and that such cause was in force at the time of the accident.

Morrison v. Dominion Iron & Steel Co., 45 N.S.R. 466.

Negligence—Contributory negligence.

The plaintiff in attempting to cross the defendants' tracks at a busy level crossing in a city, where there were five tracks, with gates and a watchman, came into contact with a locomotive of the defendants, and was injured. The jury found that the gates were down when the plaintiff attempted to cross, except the arm over the southeast sidewalk; that the defendants were guilty of negligence in not having the arm over the southeast sidewalk; that the plaintiff was guilty of negligence because she should have used more precautions to protect herself; that the accident would not have happened but for her negligence; that the driver of the engine could not, after he became aware of the plaintiff's danger, by the exercise of reasonable care have prevented the accident; that the driver, if he had exercised reasonable care, ought to have sooner seen the danger to the plaintiff, and he could, by the exercise of reasonable care, have prevented the accident, if he had acted more promptly:—Held, that, upon these findings, the judgment should have been entered for the defendants. Judgment of Meredith, C.J.C.P., reversed. Per Osler, J.A., that the negligence of both parties was concurrent and continuous down to the moment of the accident. The proximate cause of the injury was the negligence as well of the plaintiff as of the defendants. Where that is the case, the plaintiff is not entitled to recover—in pari delicto potior est conditio defendentis.

Fewings v. Grand Trunk Ry. Co., 1 O.W.N. 1 (C.A.).

Contributory negligence—Train running backwards—Obstruction of view—Failure to look and listen.

When a railway company, directly or through its employees, has taken all possible and reasonable precautionary measures, it is ipso facto exempt from any responsibility.

Villeneuve v. Can. Pac. Ry. Co., 2 Can. Ry. Cas. 360, 21 Que. S.C. 422.

[Referred to in Girard v. Quebec & Lake St. John Ry. Co., 25 Que. S.C. 247.]

Contributory negligence—Failure to look—Train moving reversely.

The plaintiff while crossing the tracks of the G.T.R. Co. at Seaforth was injured by a train moving reversely. After having crossed a siding and the main track of the railway in safety the plaintiff while attempting to cross the second siding without looking drove into a train which was crossing the highway:—Held (Boyd, C., MacMahon and Teetzel, JJ.), reversing the judgment entered upon the verdict of the jury at the trial, that the plaintiff's failure to look was not a matter of contributory negligence but was the real cause of the accident and the omission to give him warning, if such was the case, was immaterial.

Wright v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 202, 5 O.W.R. 802.

[Reversed in 12 O.L.R. 114, 5 Can. Ry. Cas. 361.]

Failure to look—Contributory negligence.

The plaintiff was injured by being run over at a highway crossing by a train moving reversely, and brought this action to recover damages for his injuries. The jury found that the plaintiff's injury was caused by the defendants' negligence in not using sufficient signals to attract his attention, that the conductor was not on the rear end of the car, and that the plaintiff could not by the exercise of ordinary care have avoided the injury. The train was coming from the east, and the plaintiff on approaching the track looked to the east and did not see it, his view being obstructed, and, his attention being directed to a train standing at the station to the west, did not again look to the east when, just before attempting to cross, he might have seen the train approaching:—Held, that it was not so clearly manifest that the plaintiff was the cause of his own injury that there was nothing to leave to the jury; although the plaintiff might be guilty of some neglect in approaching the track, it was for the jury to say whether the defendants might not still have avoided the accident if they had discharged their statutory duty; the case was properly left to the jury; and their findings were sufficient to support a verdict for the plaintiff. Decision of a Divisional Court reversed.

Wright v. Grand Trunk Ry. Co., 5 Can. R. Cas. 361, 12 O.L.R. 114.

[Referred to in Jones v. Toronto, etc., R. Co., 20 O.L.R. 71; Cooper v. London Street Ry. Co., 14 Can. Ry. Cas. 91, 5 D.L.R. 198.]

Looking out—Whistling and ringing bell.

Plaintiff was driving a buggy on a road which crossed a railway. There was evidence that the night was very dark, the landmarks being indistinguishable; that he was watching to keep on the highway, to avoid other vehicles, and was going faster than he thought he was, and not knowing he was near it, came on the railway crossing before he expected and was struck by a train, which had not given the statutory warning by blowing a whistle or ringing a bell, as it approached the crossing. There was also evidence that had he looked he might have seen the headlight of the advancing train, as the country was flat, and only one obstacle, an orchard and some trees, near the crossing:—Held, that the case should not have been withdrawn from the jury, and a nonsuit was set aside and a new trial granted.

Champagne v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 207, 9 O.L.R. 589.
[Referred to in London & Western Trusts Co. v. Lake Erie, etc., Ry. Co., 12 O.L.R. 28.]

FAILURE TO LOOK FOR TRAIN—CONTRIBUTORY NEGLIGENCE.

The plaintiff was injured by being struck by the engine of a train of the defendants while crossing their track at a level highway crossing. Had he looked, he could have seen the approach of the train, but he did not look. There was some evidence that the usual statutory signals of the approach of the train were not given. The plaintiff sought to recover damages for his injuries.:—Held, not a case which could be withdrawn from the jury. The defence that the plaintiff should have looked out for the train was one of contributory negligence, and must be left to the jury. [Morrow v. Can. Pac. Ry. Co., 21 A.R. (Ont.) 149, and Vallee v. Grand Trunk Ry. Co., 1 O.L.R. 224, followed.]

Sims et al. v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 82, 10 O.L.R. 330.
[Affirmed in 12 O.L.R. 39, 5 Can. Ry. Cas. 352; reversed in 8 Can. Ry. Cas. 61; distinguished in Tinsley v. Toronto Ry. Co., 15 O.L.R. 438, 8 Can. Ry. Cas. 69.]

FAILURE TO LOOK FOR TRAIN—CONTRIBUTORY NEGLIGENCE.

The infant plaintiff was injured by being struck by the engine of a train of the defendants while crossing their track at a level highway crossing. Had he looked, he could have seen the approach of the train, but he did not look. There was some evidence that the usual statutory signals of the approach of the train were not given. The infant plaintiff sought to recover damages for his injuries, and the adult plaintiff, the infant's father, claimed damages for loss and expense incurred by him in consequence of the injuries:—Held, affirming the decision of Street, J., 10 O.L.R. 330, 5 Can. Ry. Cas. 82, that the case would not have been withdrawn from the jury; but that the findings were opposed to the great weight of evidence, and the damages recovered by the father excessive; and therefore there should be a new trial.

Sims et al. v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 352, 12 O.L.R. 39.
[Reversed in 8 Can. Ry. Cas. 61.]

LEVEL CROSSING—STATUTORY SIGNALS.

S. sustained injuries through running into the engine of a railway train while he was riding a bicycle over a level highway crossing. On the trial of his action to recover damages, his witnesses stated that they had not heard the whistle sounded nor the bell of the engine rung, and he admitted that he had not taken any precautions to ascertain whether he could cross the track in safety. The evidence for the defense was positive as to the statutory signals being properly given, as well as other warnings of danger:—Held, per Fitzpatrick, C.J., and Duff J., that the question was not as to the credibility of the witnesses on either side, but whether the character of the evidence for the plaintiffs could, in a reasonable view of the whole evidence adduced, be held to countervail the direct and positive testimony on behalf of the defendants, and, as it could not, the findings by the jury that the company had been guilty of negligence in failing to give the statutory signals were against the weight of evidence and unreasonable. Per Girouard, J., that S. was guilty of contributory negligence in failing to take proper precautions to avoid the accident and the action should be dismissed. [Railroad Co. v. Houston, 95 U.S.R. 697, referred to.] The judgment appealed from was reversed and a new trial ordered, Idington and Maclennan, JJ., dissenting.

Grand Trunk Ry. Co. v. Sims, 8 Can. Ry. Cas. 61.

[Distinguished in Tinsley v. Toronto Ry. Co., 15 O.L.R. 438, 8 Can. Ry. Cas. 69.]

Failure to look—Contributory negligence.

In an action under the Fatal Accidents Act to recover damages for the death of a man who was struck by a light engine of the defendants when attempting to cross their track in a waggon with horses, it appeared that the deceased on approaching the track looked both ways, but did not look again just before crossing when he could have seen the engine. The jury found that the whistle was not sounded nor the bell rung, that such neglect was the proximate cause of the injury, and that the deceased could not by the exercise of ordinary care have avoided the injury:—Held, that the omission to look again was not such a circumstance as would have justified withdrawing the case from the jury; and a judgment for the plaintiffs upon the findings should not be disturbed. Decision of Meredith, J., affirmed.

Misener et al. v. Wabash Ry. Co., 5 Can. Ry. Cas. 356, 12 O.L.R. 71.

[Affirmed in 38 Can. S.C.R. 94, 6 Can. Ry. Cas. 70; referred to in Jones v. Toronto, etc., Ry. Co., 20 O.L.R. 71.]

Crossing at acute angle—Signals and warnings—Failure to look.

M. attempted to drive over a railway track which crossed the highway at an acute angle where his back was almost turned to a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing when he could have seen an engine approaching which struck his team and he was killed. In an action by his widow and children the jury found that the statutory warnings had not been given and a verdict was given for the plaintiffs and affirmed by the Court of Appeal:—Held, affirming the judgment of the Court of Appeal (12 Ont. L.R. 71), Fitzpatrick, C.J., hesitante, that the findings of the jury were not such as could not have been reached by reasonable men and the verdict was justified.

Wabash Ry. Co. v. Misener, etc., 6 Can. Ry. Cas. 70, 38 Can. S.C.R. 94.

[Referred to in Hansen v. Can. Pac. Ry. Co., 6 Terr. L.R. 420; Jones v. Toronto, etc., Ry. Co., 20 O.L.R. 71; see Andreas v. Can. Pac. Ry. Co., 5 Can. Ry. Cas. 440, 450, 37 Can. S.C.R. 1, affirming 2 W.L.R. 249; followed in Doyle v. Can. Northern R. Co., 46 D.L.R. 135, 24 Can. Ry. Cas. 319.]

Foggy weather—Contributory negligence.

The defendants' railway ran east and west through the plaintiff's farm. The dwelling house was on a hill about 330 feet north of the railway track and standing about twenty feet from the highway leading to and across the railway track. There was nothing to obstruct the view in coming from the plaintiff's house to the crossing for a considerable distance on either side. The down grade of the highway is very slight for the last forty or fifty feet from the track. The morning train coming from Elora, west of the plaintiff's farm, due to cross the highway three or four minutes before nine a. m., was eight minutes late on the morning in question. The plaintiff before leaving his house that morning saw that it was ten or fifteen minutes after nine and concluded that the train must have passed without any one noticing it. In two or three minutes he heard a long whistle denoting a whistle for a station which he concluded was for Belwood Station, distant three miles to the north-east and therefore thought the train had passed over the highway at his farm. The whistle he heard, however, was to the south-west as there was no other train on the line and it passed across the highway a few minutes later. Shortly after this his son Byron, who intended going to a farm owned by the plaintiff across the railway track asked his father if the train had passed, who replied it must have passed, as it was nearly fifteen minutes past nine when he left the house. Byron then went into the house and left it with his brother James, a lad of twelve years old, to cross the railway track. A few minutes after Byron had left the plaintiff was standing near the barn, beside the house, when he heard the train rush eastward through the mist, but he heard no whistle or bell. The morning was foggy and the plaintiff stated a person could not see an object at a greater distance than 37 yards. After the accident the plaintiff was notified and at once went to the crossing where he found Byron on the eastern half of the highway about two feet from the north rail of the track. He was taken home and died shortly afterwards, remaining perfectly conscious meanwhile. According to the statement of the deceased, made to his father, he was some yards from the track when he heard the noise of the train and the steam from the engine as it passed, but was unable to stop and was struck by the step of the last coach. A motion for a nonsuit at the close of the plaintiff's case was refused and the jury brought in a verdict for $2,000 in favour of the plaintiff, finding the defendants guilty of negligence is not giving the statutory signals, that the injury was caused by the defendants' negligence, and that the deceased was not guilty of negligence and could not by the exercise of reasonable care have avoided the accident. The Divisional Court dismissed the defendants' appeal, holding that the case could not have been withdrawn from the jury. MacMahon, J., dissenting, held that on the admission made by the deceased that he heard the train coming and did not stop or could not stop, there was nothing to be left to the jury and the motion for nonsuit should have prevailed. The Court of Appeal allowed the defendants' appeal and dismissed the action. Per Osler, J. A., agreeing with MacMahon, J.:—The deceased according to the evidence was the author of his own injury, the accident could only be attributed to his negligence, and not to the negligence of the defendants in omitting, if they did omit, to sound the bell or whistle. Per Meredith, J.A.:—The plaintiff should not have been nonsuited but there was no reasonable evidence upon which the jury could find that there was not contributory negligence. The evidence shewed that the deceased was to have the farm on the father's death, in the meantime they were to be partners, and the son was to get what he needed out of the common fund, the plaintiff has proved no pecuniary loss and the action must fail on that ground also.

Moir v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 380, 10 O.W.R. 414.

CONTRIBUTORY NEGLIGENCE—DUTY TO STOP, LOOK AND LISTEN.

Although a railway company is negligent in leaving cars standing upon a side track at a public crossing in such a way as to obstruct the public view of trains approaching the crossing on the main track, still a person operating an automobile over the crossing is guilty of such contributory negligence as will bar a recovery against the railway company for injuries sustained by reason of a collision with one of its trains if, when approaching the track, knowing that trains, yard engines and hand cars were liable to pass at any moment, and finding his view obstructed by the standing cars and realizing the danger, he fails to reduce the speed of the automobile which he was operating, and fails to exercise care both by looking and listening.

Campbell v. C.N.R. Co. (Man.), 9 D.L.R. 777, 15 Can. Ry. Cas. 31. [Reversed in 12 D.L.R. 272, 23 Man. L.R. 385.]

Obstructing view—Collision with automobile.

A railway company that permits the end of a string of freight cars to project into a highway for some time, in violation of s. 279 of the Railway Act, 1906, so as to obstruct the public view of approaching trains, is liable for a collision between an engine and an automobile driven by the plaintiff who, although he exercised due care, was unable, because of such obstruction, to see the engine in time to avoid the collision. It is not contributory negligence to drive an automobile across a railway track at a speed of eight miles an hour at a public highway crossing, although the plaintiff knew that trains and engines were liable to pass at any time, where, by reason of cars negligently left projecting into the highway, it was impossible for him to discover the approach of an engine, although the statutory signals were given, where the plaintiff and those riding with him looked and listened before going upon the track without hearing the engine, which was traveling "light." [Campbell v. Can. Northern Ry. Co., 9 D.L.R. 777, 15 Can. Ry. Cas. 31, reversed.]

Campbell v. Can. Northern Ry. Co. (No. 2), 12 D.L.R. 272, 15 Can. Ry. Cas. 357, 23 Man. L.R. 385.

Person on track—Contributory negligence—Licensee.

A railway company is not answerable for the death of a person who, in possession of his faculties of seeing and hearing, walks along a railway track without looking for an approaching train which he could have seen by the exercise of the most ordinary care. A licensee who walks along a railway track assumes all risk of injury from being struck by trains.

Hinrich v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 393, 12 D.L.R. 367.

"Look and listen" doctrine—Crossing the tracks.

Whether or not a person about to cross a railway track should have looked more than once to see if he could make the crossing in safety is a question of fact to be passed upon by the jury in the particular circumstances of each case. [Re Grand Trunk Ry. Co. v. McAlpine, 13 D.L.R. 618, 16 Can. Ry. Cas. 186, followed.]

MacKenzie v. B. C. Electric Ry. Co., 16 Can. Ry. Cas. 337, 15 D.L.R. 530.

Operation—Negligence—Excessive speed—Injury to trespasser.

A railway company may be liable for injury to a trespasser upon the right-of-way in breach of s. 408 of the Railway Act, R.S.C. 1906, c. 37, if their engine driver neglected to apply the emergency brakes at the time he became aware of the danger of accident when he first noticed deceased attempting to cross the tracks. [Hinrich v. C.P. Ry. Co., 12 D.L.R. 367, 15 Can. Ry. Cas. 393, affirmed.]

Can. Pac. Ry. Co. v. Hinrich, 16 Can. Ry. Cas. 303, 48 Can. S.C.R. 557, 15 D.L.R. 472.

NEGLIGENCE—STATUTORY DUTY IMPOSED ON RAILWAY CO.—FAILURE TO COMPLY WITH—DUTY OF TRAVELER APPROACHING TRACK.

Where a statutory duty is imposed on a railway company to sound the whistle and ring the bell of the engine when a train is approaching a highway at level rail, a traveler has a right to expect this to be done, and is not required to look to see if a train is approaching. The omission to carry out the statutory duty imposed amounts to negligence and renders the company liable for resulting injury. [Grand Trunk Ry. Co. v. McAlpine, [1913] A.C. 838, 13 D.L.R. 618, 16 Can. Ry. Cas. 186; Smith v. South Eastern Ry. Co., [1896] 1 Q.B. 178; Wabash Ry. Co. v. Misener, 38 Can. S.C.R. 94, at p. 100, 6 Can. Ry. Cas. 70; Rex v. Broad, [1915] A.C. 1110, followed.]

Doyle v. Can. Northern Ry. Co., 46 D.L.R. 135, 24 Can. Ry. Cas. 319.

E. Flagmen; Gates.

SHUNTING CARS—WANT OF WARNINGS AND WATCHMAN.

B., in driving towards his home on a night in September, had to cross a railway track between nine and ten o'clock, on a level crossing near a station. Shortly before a train had arrived from the west which had to be turned for a trip back in the same direction, and also to pick up a passenger car on a siding. After some switching the train was made up, and just before coming to the level crossing the engine and tender were uncoupled from the cars to proceed to the roundhouse. B. saw the engine pass but apparently failed to perceive the cars, and started to cross, when he was struck by the latter and killed. There was no warning of the approach of the cars which struck him. In an action by his widow under Lord Campbell's Act the jury found that the railway company was guilty of negligence, and that a man should have been on the crossing when making the switch to warn the public. A verdict for the plaintiff was sustained by the Court of Appeal:—Held, affirming the judgment of the Court of Appeal, Gwynne, J., dissenting, it was properly left to the jury to determine whether or not, under the special circumstances, it was necessary for the company to take greater precautions than it did and to be much more careful than in ordinary cases where these conditions did not exist; and that the case did not raise the question of the jury's right to determine whether or not a railway company could be compelled to place watchmen upon level highway crossings to warn persons about to cross the line.

Lake Erie & Detroit River Ry. Co. v. Barclay, 30 Can. S.C.R. 360.

[Discussed in Champagne v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 209, 9 O.L.R. 589; distinguished in Grand Trunk Ry. Co. v. McKay, 34 Can. S.C.R. 81; followed in Burtch v. Can. Pac. Ry. Co., 13 O.L.R. 632.]

NEGLIGENCE—DANGEROUS CONDITION OF CROSSING.

Where the railway traffic at the crossing of a highway was very great, and there was no gate, guardian, lamp, or other protection, for the public, although the railway company had been notified of the dangerous condition of the crossing, the company was responsible under s. 288 of the Railway Act, 1888, for a collision which caused the death of plaintiff's son, and which occurred without any fault on his part.

Girouard v. Can. Pac. Ry. Co., 1 Can. Ry. Cas. 343, 19 Que. S.C. 539.

SPEED—GATES AND WATCHMAN—STATUTORY REQUIREMENTS.

By the Railway Act, 1888, s. 197, as amended by 55 & 56 Vict. c. 27, s. 6, it is provided that "at every public road crossing at rail level of the railway, the fence on both sides of the track shall be turned in to the cattle guards, so as to allow of the safe passage of trains." By s. 259 of the former Act, as amended by s. 8 of the latter, it is provided that "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than six miles an hour, unless the track is fenced in the manner prescribed by this Act:—Held, that the words "in the manner prescribed by this Act" do not refer to the turning in of the fence to the cattle guards; and, although no other fence is specifically prescribed in the railway legislation, the meaning of s. 259 is, that unless the track, including the crossing, is properly fenced or otherwise protected so as to efficiently warn or bar the traveler while a train is crossing or immediately about to cross, the maximum speed at which a train may cross in thickly peopled portions of cities, towns and villages, is six miles an hour. The plaintiff was struck by a train at a crossing over a main street in an incorporated town, not protected by a gate or watchman. In an action to recover damages for his injuries, the jury found that the train was traveling at the rate of twenty miles an hour, and that the injury complained of was caused by this excessive speed, coupled with the absence of proper protection at the crossing, and without negligence on the plaintiff's part; and the Court, though there was strong evidence of contributory negligence, declined to interfere.

McKay v. Grand Trunk Ry. Co., 3 Can. Ry. Cas. 42, 5 O.L.R. 313.

[Reversed in 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52.]

PROTECTION AT CROSSINGS—SPEED OF TRAINS.

The Railway Act, 1888, ss. 197, 259, as amended by 55 & 56 Vict. c. 26 (D.), ss. 6, 8, do not require that railway companies shall erect fences and gates at highway crossings in thickly peopled parts of cities, towns, and villages before running their trains across such highways at a greater speed than six miles an hour. The power to determine whether gates should be placed at highway crossings rests with the Railway Committee and not with a jury. [Lake Erie, etc., Ry. Co. v. Barclay, 30 Can. S.C.R. 360, distinguished.]

McKay v. Grand Trunk Ry. Co., 3 Can. Ry. Cas. 52, 34 Can. S.C.R. 81.

[Followed in Tabb v. Grand Trunk Ry. Co., 8 O.L.R. 514; Clark v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 51, 2 D.L.R. 331; adhered to Grand Trunk Ry. Co. v. Hainer, 36 Can. S.C.R. 183; Grand Trunk Ry. Co. v. Perrault, 36 Can. S.C.R. 678; Lake Erie & D.R. Ry. Co. v. Marsh, 35 Can. S.C.R. 198; discussed in Perrault v. Grand Trunk Ry. Co., 14 Que. K.B. 248, 260; distinguished in Burtch v. Can. Pac. Ry. Co., 13 O.L.R. 632; followed in Carrier v. St. Henri, 30 Que. S.C.R. 47; Grand Trunk Ry. Co. v. Daoust, 14 Que. K.B. 551; Quebec & Lake St. John Ry. Co. v. Girard, 15 Que. K.B. 51; referred to in R. v. Grand Trunk Ry. Co., 17 O.L.R. 601; Smith v. Niagara & St. Catharines Ry. Co., 9 O.L.R. 158; Wabash Ry. Co. v. Misener, 6 Can. Ry. Cas. 70, 38 Can. S.C.R. 99; relied on in Girard v. Quebec & Lake St. John Ry. Co., 25 Que. S. C. 248.]

PUBLIC PARK—GATE AND WATCHMAN AT RAILWAY CROSSING.

Within a public park maintained and controlled by the defendants, a

municipal corporation, they erected a gate near a railway crossing, and kept a watchman, to open the gate when there was no danger from passing trains, and to close it when trains were approaching the crossing. The plaintiff, driving through the park, desiring to pass through the gate to the highway beyond the railway, and finding the gate open, took that as an intimation that no train was approaching, and attempted to cross the railway, when he was struck by a train and injured:—Held, that the defendants owed him no duty, and were not liable in damages for his injuries.
Soulsby v. Toronto, 7 Can. Ry. Cas. 65, 15 O.L.R. 13.

[Referred to in Woodburn Milling Co. v. Grand Trunk Ry. Co., 19 O.L.R. 276.]

Failure to fence and protect—Crossing not a highway.

A crossing built by a railway company and designated by a sign as a "railway crossing" which the public is permitted to use, but the opening of which has not been sanctioned by the Board is not a highway under the Railway Act, 1906, ss. 242, 243, so as to impose a duty on the railway company as to construction and maintenance of fences and the protection of highways, and, therefore, cannot be charged with negligence for any omission to fence or for defective approaches, particularly where the crossing had been previously used safely by the same person and others.
Bird v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 195, 6 W.L.R. 393.

[Reversed in 1 S.L.R. 266, 8 Can. Ry. Cas. 314.]

Crossing not authorized by Board—Dedication.

When a railway company establishes a crossing, not authorized by the Board, over its railway, at a point other than on a highway and invites the public to use such crossing, it is the duty of the company to take every precaution for the safety of the public using such crossing, and in view of the statutory provisions requiring the company to fence the approaches to a railway crossing over a highway properly authorized, the failure of the company to so fence an authorized crossing constitutes such negligence as will render the company liable for injury to any person sustained on such crossing when the proximate cause of such injury is the failure of the company to fence. 7 Can. Ry. Cas. 195, 6 W.L.R. 393, reversed.
Bird v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 314, 1 S.L.R. 266.

Entering between gates—Contributory negligence—Failure as to warnings and flagmen.

Where the erection of gates at a level highway crossing is not authorized or required by an order of the Board, the lowering of the gates is but a warning to persons desiring to cross the tracks that it is dangerous to do so, and the entry of a person upon the portion of the highway between the gates, when the gates are down, is not as a matter of law, or per se, negligence, disentitling him to recover damages for injuries sustained by him while upon that portion of the highway, by reason of the negligence and breach of duty of the railway company as to signals and warnings.
Garside v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 272, 23 D.L.R. 463.

CROSSINGS.

See Farm Crossings; Highway Crossings; Railway Crossings; Junctions.

Dominion and provincial railway—Jurisdiction—Double track crossing—Tracks and connections—Cost.

The Board has jurisdiction under ss. 8, 29, 32, 227 of the Railway Act, 1906, to order a single track crossing (provided under an order of the Railway Committee) of a Dominion railway by a Provincial street railway, to be changed to a double track crossing, in the public interest. The applicant which made the application for the double track crossing was ordered to furnish the necessary diamonds, and the street railway company to pay interest at 7 per cent upon the expense incurred by the applicant, the street railway company to lay the necessary tracks and connections.

London v. London Street Ry. Co., 19 Can. Ry. Cas. 436.

[Followed in Midland Ry. Co. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 80.]

JURISDICTION—DOMINION RAILWAY CROSSING PROVINCIAL.

The Board has jurisdiction to regulate the crossing of a Provincial over a Dominion railway at the point of intersection. [Lake Erie & Northern Ry. Co. v. Brantford Street Ry. Co., 16 Can. Ry. Cas. 244, at p. 245; Attorney-General for Alberta v. Attorney-General for Canada, [1915] A.C. 363, 19 Can. Ry. Cas. 153; City of London v. London Street Ry. Co., 19 Can. Ry. Cas. 436, followed.]

Midland Ry. Co. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 80.

CROWN RAILWAYS.

See Government Railways.

CULVERTS.

See Drainage.

Duty to fence, see Farm Crossings.

CUSTOMS DUTIES.

EXEMPTION FROM DUTY—STEEL RAILS FOR USE ON STREET RAILWAYS.

The exemption from duty in 50 & 51 Vict. c. 39, item 173, of "steel rails weighing not less than twenty-five pounds per lineal yard, for use on railway tracks," does not apply to rails to be used for street railways which are subject to duty as "rails for railways and tramways of any form," under item 88. Strong, C.J., and King, J., dissenting.

Toronto Ry. Co. v. The Queen, 25 Can. S.C.R. 24.

[Reversed in [1896] A. C. 551.]

IMPORTED STEEL RAILS—STREET RAILWAYS.

Although there may be in various Canadian Acts and for other purposes substantial distinctions between railways or railway tracks and street railways and tramways, yet, for the purpose of separating free and dutiable articles, such distinction is not maintained in Canadian Act, 50 & 51 Vict. c. 39, and its three predecessors. According to the true construction of that Act (see s. 1, item 88, and s. 2, item 173), the question whether imported steel rails are taxed or free depends solely upon their weight, not upon the character of the railway track for which they are intended. 25 Can. S.C.R. 24, affirming 4 Can. Ex. 262, reversed.

Toronto Ry. Co. v. The Queen, [1896] A.C. 551.

[Approved in Edison Gen. Elec. Co. v. Edmonds, 4 B.C.R. 367; commented on in Ross v. The King, 32 Can. S.C.R. 538.]

FOREIGN-BUILT SHIPS.

A foreign-built ship bought in the United States and brought to Canada is liable to the duty imposed by the Canadian Customs Tariff Act, 1897, s. 4. [32 Can. S.C.R. 277, affirmed.]

Algoma Central Ry. Co. v. The King, [1903] A.C. 478.

AGENT FOR CUSTOMS—CONVERSION OF MONEY FURNISHED FOR PAYMENT OF DUTIES—LIABILITY OF PRINCIPAL.

Where, without the knowledge of a railway company an agent appointed by it under R.S.C. 1886, c. 32, s. 157, etc., for customs purposes, by a system of frauds in the underpayment to the Crown of customs duties converted to his own use moneys furnished by the company for the payment of the rightful amount of duties, the company is answerable to the Crown upon the discovery of the fraud, for duties on all goods, which, by reason of the agent's fraud, were not declared or entered and the customs paid thereon, since the agent's acts in which the frauds were committed were within the scope of his employment. An internal rule of a customs house prohibiting the cashier from furnishing change beyond fifty cents, is not a limitation of his authority sufficient to relieve a company from liability for unpaid duties on goods entered fraudulently by its duly appointed customs agent, where the company furnished cheques for the correct amount of duties and the cashier returned to the agent, who converted it to his own use, the difference between the amount of the cheque and the duties actually paid, since the agent's authority was broad enough to include the receipt of such moneys. In an action by the Crown to recover customs duties on goods not entered or declared, the onus rests upon the defendant to shew payment and full compliance with the requirements of the Customs Act. [Lloyd v. Grace, [1912] A.C. 735; Brocklesby v. Temperance Permanent Building Society, [1895] A.C. 173; Fry v. Smellie, [1912] 3 K.B. 295, specially referred to; Erb v. G.W.R. Co., 5 Can. S.C.R. 179; City Bank v. Harbour Commissioners of Montreal, 1 L.C.J. 288, distinguished.]

The King v. Can. Pac. Ry. Co., 11 D.L.R. 681, 14 Can. Ex. 150.

DAMAGES.

A. Assessment; Excessiveness.
B. Personal Injuries.
C. Nervous or Mental Shock.
D. Lord Campbell's Act.
E. Workmen's Compensation Act.
F. Injury to Property.

See Expropriation.

Damages in lieu of injunction, see Injunction.

Damages caused by operation of government railways, see Government Railways.

Annotations.

Lord Campbell's Act, measure and apportionment of damages. 2 Can. Ry. Cas. 18.

Inadequacy of damages. 3 Can. Ry. Cas. 287.

Damages for nervous shock. 4 Can. Ry. Cas. 231.

Damages for personal injuries. 5 Can. Ry. Cas. 125.

Damages for death and personal injury. 9 Can. Ry. Cas. 247.

Compensation for injuries caused by operation of railway. 20 Can. Ry. Cas. 109.

A. Assessment; Excessiveness.

BY WHOM DAMAGES ASSESSED—JUDGE OR JURY—EXCESSIVENESS.

The words "the Court may give such damages," in consolidated ordinances, N.W.T. (1898) c. 48, s. 3 means the Judge at trial, or the Judge and the jury, as the case may be. Semble, a verdict of $4,500, awarded to a widow for the death of her husband caused by the defendants' negligence cannot be seriously excepted to.

Toll v. Can. Pac. Ry. Co., 1 Alta. L.R. 318, 8 Can. Ry. Cas. 294.

HOW DAMAGES ASSESSED—COURT OR JURY.

S. 3, c. 48 of the Con. Ord. N.W.T. providing that damages are to be determined by the Court, means a "Court" consisting of a Judge and jury, and the jury is the proper part of the Court to fix the amount of damages.

Andreas v. Can. Pac. Ry. Co., 5 Can. Ry. Cas. 440, 2 W.L.R. 249.

[Affirmed in 5 Can. Ry. Cas. 450, 37 Can. S.C.R. 1.]

REMOTENESS—DEPRIVATION OF USE.

Damages for breach of contract must be direct and none are recoverable that are indirect or remote. Hence, where a carrier for hire loses a piece of machinery, sent through him for repairs, the owner is not entitled to recover from him, as damages, the loss incurred through having been deprived of the use of it for a season.

Thiauville v. Canadian Express Co., 33 Que. S.C. 403.

SUBSTANTIAL DAMAGES—DIFFICULTY IN ASSESSING.

Substantial damages may be awarded in spite of the fact that some speculation and uncertainty is necessarily involved in the assessment thereof. [Chaplin v. Hicks, [1911] 2 K.B. 786, followed.]

Wood v. Grand Valley Ry. Co., 5 D.L.R. 428, 26 O.L.R. 441.

[Varied, and damages reduced, 16 Can. Ry. Cas. 220, 10 D.L.R. 726.]

REFERENCE—POWERS OF CLERK.

The clerk of a Court cannot, upon a reference to him to ascertain the plaintiff's damages, consider the question of the liability of the defendant in the action, since that was settled by the order of reference.

Lavallee v. Can. Northern Ry. Co. (No. 2), 4 D.L.R. 376, 20 W.L.R. 547.

ASSESSMENT ON REFERENCE.

If the clerk of a Court, on a reference to ascertain the plaintiff's damages, misconceiving his duty, hears evidence and, determining that the defendant was not liable, refuses to assess damages in the plaintiff's favour, the Supreme Court of Alberta may, on an application to vary the clerk's report, direct him to proceed with the assessment of damages.

Lavellee v. Can. Northern Ry. Co. (No. 2), 4 D.L.R. 376, 20 W.L.R. 547.

MISDIRECTION AS TO ASSESSMENT—EXCESSIVE.

Where there was a misdirection as to the assessment of damages merely, and it appeared to the Court that the damages assessed by the jury were grossly excessive, the Supreme Court made a special order, applying the principle of art. 503 C.C.P. directing that the appeal should be allowed, and a new trial had to assess damages, unless the plaintiff consented that the damages should be reduced to an amount mentioned.

Central Vermont Ry. Co. v. Franchere, 35 Can. S.C.R. 68.

[Referred to in Renwick v. Galt Street Ry. Co., 11 O.L.R. 168; Sadlier v. Grand Trunk Ry. Co., 28 Que. S.C. 502.]

Review of amount by Appellate Court.

Where the damages awarded by the jury at the first trial were held to be excessive and the Court of Appeal had ordered a new trial and the result of the new trial was a verdict for a still larger sum, the Court of Appeal, upon an appeal from the second verdict, may itself fix the amount of damages instead of sending the case back for a third trial before a jury by virtue of its statutory powers. [See Annotation to this case.]

Taylor v. B.C. Elec. Ry. Co., 1 D.L.R. 384, 19 W.L.R. 851.

[Affirmed in 8 D.L.R. 724.]

Excessiveness—Disregarding direction of Court.

To justify the setting aside of a verdict on the ground of excessive damages, the Appellate Court must find that the damages are so excessive that twelve reasonable men could not have given them, or that the jury have disregarded some direction of the Judge or have considered topics which they ought not to have considered, or have applied a wrong measure of damages. [Praed v. Graham, 24 Q.B.D. 53, and Johnston v. Great Western Ry., [1904] 2 K.B. 250, 73 L.J.K.B. 568, 20 Times L.R. 455, applied.]

Taylor v. British Columbia Elec. Ry. Co., 1 D.L.R. 384, 19 W.L.R. 851.

[Affirmed in 8 D.L.R. 724.]

Reduction by Appellate Court.

The rule that the Supreme Court of Canada will not interfere with the judgment of a Provincial Court of Appeal reducing the quantum of damages assessed by the trial Court does not prevent interference in cases where some element of damages for which no compensation is allowed by law may have been given a place in the total of damages reached. [Praed v. Graham, 24 Q.B.D. 53, considered; see also Johnston v. Great Western Ry. Co., [1904] 2 K.B. 250, and Dunn v. Prescott Elevator Co., 26 A.R. (Ont.) 389, 30 Can. S.C.R. 620.] (Dictum per Idington, J.)

Taylor v. British Columbia Elec. Ry. Co. (No. 2), 8 D.L.R. 724.

Review of quantum by Appellate Court.

The Supreme Court of Canada will not disturb a judgment of the Court of Appeal of British Columbia on a mere question of quantum of damages, where that Court, by virtue of the power given to it by rule 869 (a) of the rules of the Supreme Court of British Columbia, has reduced a verdict of the trial Court in an action for personal injuries arising out of an accident. [Taylor v. British Columbia Elec. Ry. Co., 1 D.L.R. 384, 16 B.C.R. 420, affirmed.]

Taylor v. British Columbia Elec. Ry. Co. (No. 2), 8 D.L.R. 724.

Varying assessment on reference.

The Supreme Court of Alberta cannot entertain an application to vary the finding of a clerk of the Court on a reference to him to ascertain damages, since that can be done only on an appeal from the final judgment in the action. [Marson v. G.T.P. Ry. Co., 17 W.L.R. 693, on appeal, 1 D.L.R. 850, 20 W.L.R. 161, followed.]

Lavallee v. Can. Northern Ry. Co. (No. 2), 4 D.L.R. 376, 547, 4 Alta. L.R. 245.

Reduction by Appellate Court.

Where an action has been twice tried with a jury, and upon the second trial the jury have found in favour of the same party, but have reduced the damages, a third trial will not be ordered merely because the findings of the jury at the second trial are contrary to what the Appellate Court regards as the weight of evidence, if there is some evidence upon which the verdict can be sustained.

Zufelt v. Can. Pac. Ry. Co., 7 D.L.R. 81, 4 O.W.N. 39.

Agreement for compensation—Scope as to costs "incidental to the reference."

Where a railway company agreed with a town corporation to pay the latter any damages accruing by reason of the building of a bridge by the railway company, such damages to be ascertained in a summary manner by a Referee appointed by the Board for the purpose, and subsequently pursuant to this agreement an application was made to the Board and a Referee appointed, in which order of appointment it was provided "that the costs of and incidental to the reference, including those of the Referee shall be in the discretion of the said Referee," the Referee has power to award the costs of the application to the Board, notwithstanding the general policy of the Board not to award costs of proceedings before it. [Curry v. Can. Pac. Ry. Co., 13 Can. Ry. Cas. 31, criticized; Re Bronson and Canada Atlantic Ry. Co., 13 P.R. (Ont.), 440, applied. See also Re False Creek Flats Arbitration, 8 D.L.R. 922.]

Re Can. Pac. Ry. Co. and Walkerton, 10 D.L.R. 347, 15 Can. Ry. Cas. 85.

Reduction—Consent—New trial.

The Court of Appeal pronounced judgment dismissing the defendants' appeal except upon the question of damages. It was held that the damages assessed by the jury were excessive, and a new trial was ordered unless the plaintiff would consent to a reduction. The certificate of this judgment not having issued, the Court reconsidered the matter, and, acting under rule 786, directed a new trial confined to the question of the amount of damages:—Held, following Watt v. Watt, [1905] A.C. 115, that the Court has no jurisdiction, without the defendants' consent, to make the new trial dependent upon the consent of the plaintiff to reduce the damages.

Hockley v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 122, 10 O.L.R. 363.

Suspending the payment of damages to infant during minority.

The Court has the power, by its judgment, to order that a sum assessed by a jury as the amount of damages sustained by the plaintiff, a minor suing through his tutor in an action of tort or ex quasi-delicto, be paid, in part at once, the remainder when he becomes of age, and not at all if he dies before, and that the interest on such remainder be paid to his tutor until he comes of age or dies during minority.

Montreal Street Ry. Co. v. Girard, 21 Que. K.B. 121.

Measure of compensation for breach of contracts to complete railway.

The loss of benefits which would ordinarily accrue to merchants in the transaction of their business from the construction of a line of railway connecting with another railway the place where their respective businesses were being carried on, is not too remote to be considered in assessing damages to such merchants who purchased bonds of the railway under an agreement by the railway company to complete and operate the line in respect of the company's failure so to do. [Candy v. Midland Ry. Co., 38 L.T. 226; Simpson v. London & N. W. Ry. Co., 1 Q.B.D. 274, 277, and Chaplin v. Hicks, [1911] 2 K.B. 786, followed.]

Wood v. Grand Valley Ry. Co., 16 Can. Ry. Cas. 220, 27 O.L.R. 556, 10 D.L.R. 726.

[Affirmed in 16 D.L.R. 361.]

Not excessive—Personal injuries—Continual incapacity—Verdict of jury—Sufficiency and correctness—Omission to answer some question.

The verdict of a jury in an action for the recovery of damages arising out of a railway accident, which allows the plaintiff (aged 45 and earning $2,000 per annum), besides the cost of his medical treatment, $1,000 for past suffering, $1,500 for future suffering and medical attendance, and $18,000 for other damages, is not excessive, when the evidence shews that the injuries he has incurred have diminished his physical capacity one half and he is likely to suffer from morbidness, insomnia, vertigo, etc., for the rest of his life. The omission of the jury to find in what these damages consist, and their nature, under some particular question which called for same, is not ground for setting aside the verdict, when all this is sufficiently shewn in the answers to the other questions.

Can. Pac. Ry. Co. v. Roy, 17 Can. Ry. Cas. 46, 22 Que. K.B. 459.

Appeal—Reduction of damages.

An award of damages greater than the amount claimed in the pleadings will be reduced on appeal. [Dutton v. Can. Northern Ry. Co., 23 D.L.R. 43, 19 Can. Ry. Cas. 72, affirmed except as to damages.]

Dutton v. Can. Northern Ry. Co., 21 Can. Ry. Cas. 294, 26 Man. R. 493, 30 D.L.R. 250.

Injury to railway engineer—Permanent incapacity—Pain and suffering.

An award of $27,000 to a railway engineer aged 32, and earning a yearly income of $2,122, for personal injuries incapacitating him for life, such award being based on the pain and suffering and the pecuniary loss for the duration of life, was held by a divided Court to be a fair compensation under the circumstances. [Phillips v. L. & S.W.R. Co., 5 Q.B.D. 78, 5 C.P.D. 280; Johnston v. Great Western Ry. Co., [1904] 2 K.B. 250; Rowley v. L. & N.W. Ry. Co., L.R. 8 Ex. Ch. 221, applied.]

Jackson v. Can. Pac. Ry. Co. 24 D.L.R. 380.

Verdict—Excessive award—Personal injuries—Complete reparation—Loss of prospective earnings—Pain and suffering—Evidence—Mortuary tables—Practice—New trial.

Where from the amount of the damages awarded and the circumstances of the case, it does not appear that the jury took into consideration matters which they should not have considered, or applied a wrong measure of damages, the verdict ought not to be set aside or a new trial directed simply because the amount of damages awarded may seem excessive to an Appellate Court. Duff, J., dissented on the ground that a jury appreciating the evidence and making due allowance for the risk of accident apart from negligence, in the hazardous pursuit in which the plaintiff was employed, could not have given the verdict in question.—Per Idington and Anglin, JJ. The evidence of a witness testifying in regard to estimates based on mortuary tables in use by companies engaged in the business of annuity insurance is admissible, quantum valeat, notwithstanding that he may not be capable of explaining the basis upon which the tables had been prepared. [Rowley v. London & North Western Ry. Co., L.R. 8 Ex. 221, and Vicksburg & Meridian Ry. Co. v. Putnam, 118 U.S.R. 545, referred to.] Judgment appealed from, 8 W.W.R. 1043, affirmed, Duff, J. dissenting.

Can. Pac. Ry. Co. v. Jackson, 52 Can. S.C.R. 281.

B. Personal Injuries.

Bodily disfigurement—Permanent impairment of physical strength.

When damages from an explosion consist of total inability to work and acute suffering during three months, bodily disfigurement, diminished sense of hearing and permanent impairment of physical strength to a table-waiter on a steamboat, whose earnings are about fifty dollars a month during the season of navigation, a verdict of $6,000 is not so grossly excessive that it should be set aside.

Richelieu & Ontario Navigation Co. v. Dorman, 16 Que. K.B. 375.

Excessive or punitive damages—Permanent injury.

Plaintiff was injured in a collision between two cars of the defendant company, the collision having occurred admittedly through the company's negligence. No evidence was offered by the company at the trial. Plaintiff's hip was dislocated and permanently injured, rendering him unable to follow certain branches of his trade, that of tinsmith. There was some medical evidence that an operation might improve his condition so as to reduce the disability. He was, at the time of the accident, 24 years of age, and earned $4 per day when working. His medical and other expenses in connection with the accident amounted, roughly, to $500. Added to this should be loss of work on account of the accident. In an action for damages, the jury awarded him $11,500:—Held, on appeal, that the damages were excessive, and there should be a new trial.

Farquharson v. British Columbia Elec. Ry. Co., 15 B.C.R. 280.

Married woman—Injury to—Damages awarded husband.

The female plaintiff, 62 years of age, wife of the male plaintiff, who was 70 years of age, in attempting to alight from one of the defendants' cars, was through the defendants' negligence thrown to the ground and seriously injured. She was in the doctor's hands for several months, and her arm and hand which were injured were not likely to be as useful to her as before the accident. The jury awarded the wife $1,000 and the husband $1,200:—Held, that the amount awarded the wife could not be deemed to be unreasonable; but, as regarded the husband, after due allowance for the medical expenses and for nursing, and attendance, and considering the age of the parties, the amount awarded him was excessive, and a new assessment was ordered, unless an agreement was come to between the parties that the damages should be reduced to $400.

Clarke v. London Street Ry. Co., 5 Can. Ry. Cas. 381, 12 O.L.R. 279.

Impairment of prospects of marriage—Remoteness—Excessive damages.

In an action for negligence, impairment of the prospects of matrimony, in the case of a young woman, by reason of physical injuries, may be taken into consideration by the jury in estimating the damages. In such a case of accident to a young woman of about 21 years of age, living with her father, but earning $6 a week as a stenographer, which accident resulted in the amputation of her left leg at the knee, paresis in a hand and arm of which there might never be complete recovery, injury to her back, and a very serious shock to her nervous system:—Held, that a verdict of $5,500 damages was not so excessive as to necessitate a new trial.

Morin v. Ottawa Elec. Ry. Co., 9 Can. Ry. Cas. 113, 18 O.L.R. 209.

INJURIES TO MINING ENGINEER—PERMANENT DISABILITY—MENTIONING SUM TO JURY.

The plaintiff, though not originally trained as a mining engineer, had by long experience become an expert examiner of gold mining locations; was 37 years of age, physically strong and healthy, and of excellent character. He was in receipt of a salary of $6,000 a year from employers interested in gold properties, who spoke very highly of his capabilities and prospects. He was permanently disabled by injury sustained on one of the defendants' cars through their negligence. A jury awarded him $30,000:—Held, on appeal, that the amount was not so excessive as to entitle the defendants to a new trial:—Held, also, that by a reference in the charge to the jury to $25,000 as a sum which would not appear large to a man earning $6,000 a year, and by a mention of the sum claimed as $50,000, the jury were not, reading the charge as a whole, left under the impression that they were directed as to the amount they were to fix:—Held, also, that counsel for the plaintiff, in opening to the jury, mentioning the sum claimed in the statement of claim, was not so objectionable as to be a ground for granting a new trial. Judgment of Anglin, J., affirmed.

Bradenburg v. Ottawa Elec. Ry. Co., 9 Can. Ry. Cas. 242, 19 O.L.R. 34.

LOSS OF BUSINESS PROFITS.

The plaintiff, a married woman, was injured while a passenger on one of the defendants' cars, by reason of the negligence of the defendants' servants, as found by a jury, who assessed her damages at $1,900 for her injuries and $600 for loss of business. The separation of the two items was made by the jury, and the Judge entered judgment for $2,500:—Held, notwithstanding the form of the judgment, that the Court was enabled by the division made by the jury, to consider the propriety of the allowance made for loss of profits. The plaintiff was fifty-six years old, and was in business as a baker. After her injury she sold the business. Some evidence was given as to profits being earned in the business at the time of the injury, but there was nothing to shew a reasonable certainty of future profits:—Held, that the allowance for loss of profits was not supportable, the alleged damages being remote and conjectural, and the judgment should be varied by reducing the amount to $1,900:—Held, as to the $1,900, that the amount was not so large as to shew that the jury neglected their duty or were actuated by any improper motive or did not appreciate the grounds on which they might act in awarding damages. Judgment of Britton, J., varied.

Wright v. Toronto Ry. Co., 10 Can. Ry. Cas. 10, 20 O.L.R. 498.

REDUCTION OF DAMAGES—PRINCIPLE OF ASSESSMENT.

The plaintiff's damages for personal injury by the negligence of the defendants having been assessed by a Judge at $10,000, the Court of Appeal reduced the amount to $7,000, evidence having been received by the Court to shew that a large sum paid to the plaintiff, and said by her to be part of her earnings, was in fact paid upon another account. Per Meredith, J.A.:—in estimating damages recoverable for personal injury by negligence, the jury must not attempt to award the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider, in all the circumstances, a fair compensation; and the same rule applies to a Judge.

Sheahen v. Toronto Ry. Co., 13 Can. Ry. Cas. 270, 25 O.L.R. 310.

PERMANENT DISABILITY—MEASURE OF DAMAGES—REDUCTION—REMITTITUR.

In an action for personal injuries in a negligence action against a street railway, where it appeared that the plaintiff, a man aged thirty-one, was permanently incapacitated by the injury from following any continuous occupation, although he might be able to earn something towards his own support, a verdict for $11,500 is not unreasonable and will not, under ordinary circumstances, form a ground for ordering a new trial or reducing the verdict on appeal.

Carty v. British Columbia Elec. Ry. Co., 2 D.L.R. 276, 19 W.L.R. 905.

PERMANENT DISABILITY—CONDUCTOR.

Twelve thousand dollars is not an excessive verdict for damages for personal injuries to one left a permanent cripple and unable to follow his usual occupation as conductor of a construction train earning two hundred and fifty dollars a month in summer and as conductor of a freight train in winter earning, at least, one hundred and twenty dollars a month, whose future earning power would be problematical and such verdict cannot be said to have been founded upon a wrong measure of damage where the income which it would bring in, at current investment rates, would be less than one-half of his previous earnings. [Johnson v. G.W.R. Co., [1904] 2 K.B. 250; Bateman v. Middlesex, 25 O.L.R. 137, and Sheahen v. Toronto Ry. Co., 13 Can. Ry. Cas. 270, 25 O.L.R. 310, specially referred to.]

Tobin v. Can. Pac. Ry. Co., 2 D.L.R. 173, 5 S.L.R. 381.

[Followed in Staats v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 38, 17 D.L.R. 309.]

LOSS OF HAND—BRAKEMAN—MEASURE OF DAMAGES.

The sum of ten thousand dollars is not excessive damages for personal injuries to a servant twenty-six years old due to a collision between trains causing him to be knocked down by the coal heater of the car he was in and to be so severely burned by the coals that his face was badly disfigured and his head was left so tender that he would not be able to stand extreme heat or cold and his right hand was so severely burned as to render it permanently useless, leaving him unable to follow his trade of blacksmith. [Tobin v. Can. Pac. Ry. Co., 2 D.L.R. 173, and Johnston v. Great Western Ry. Co., [1904] 2 K.B. 250, specially referred to.]

Gordon v. Can. Northern Ry. Co., 2 D.L.R. 183, 5 S.L.R. 169.

PERMANENT INJURIES—EXCESSIVENESS.

$6,532.25 damages for injuries resulting from negligence, is not excessive for a man thirty-four years of age, capable of earning $700 a year, where his injuries were found to have resulted in a life-long loss of earning power.

Can. Pac. Ry. Co. v. Quinn, 11 D.L.R. 600.

INJURIES TO INFANT—INCOME—ACCIDENTS OF LIFE.

In awarding damages for injuries sustained by a child eight and one-half years old by reason of a collision with a street railway car, whereby the child's right arm had to be amputated below the elbow, the jury ought not to give the plaintiff such a sum as, if invested, would produce the full amount of income which he might be expected to earn if he had not been injured, but they should take into account the accidents of life and other matters, and give to the plaintiff what they consider, under all the circumstances, a fair compensation for the loss. [Rowley v. London & N.W. Ry. Co., L.R. 8 Ex. 221, and Johnston v. Great W. Ry. Co., [1904] 2 K.B. 250, referred to.]

Schwartz v. Winnipeg Elec. Ry. Co., 12 D.L.R. 56, 23 Man. L.R. 483.

Joint tortfeasors—Division of damages—Negligence.

The obligation of tortfeasors in respect of negligence is joint and several as between them and the person injured, but as between themselves the damage is apportionable under Quebec law, so where three parties were equally in fault but only one is sued by the injured person, that one on bringing in the others to answer as defendants in warranty is entitled to indemnity for two-thirds of the amount, one-third against each of the other tortfeasors.

Legault v. Montreal Terra Cotta Co., 20 D.L.R. 388.

C. Nervous or Mental Shock.

Damages by way of solatium.

In an action for damages brought for the death of a person by the consort and relations under Art. 1056, C.C. (Que.), which is a re-enactment and reproduction of the Con. Stat. L.C. c. 78, damages by way of solatium for the bereavement suffered cannot be recovered. Judgment of the Court below reversed and new trial ordered. Mont. L.R. 2 Q.B. 25, reversed.

Can. Pac. Ry. Co. v. Robinson, 14 Can. S.C.R. 105.

[Applied in Robinson v. Can. Pac. Ry. Co., Mont. L.R. 5 S.C. 237; commented on in Can. Pac. Ry. Co. v. Lachance, 42 Can. S.C.R. 208; followed in Bernard v. Grand Trunk Ry. Co., 11 Que. S.C. 11; Filion v. The Queen, 4 Can. Ex. 145; Quebec Ry., L. & P. Co. v. Poitras, 14 Que. K.B. 431; Re Central Bank and Yorke, 15 O.R. 625; followed in Jeannotte v. Couillard, 3 Que. Q.B. 461.]

Loss of support—Funeral expenses—Nervous shock.

Damages could not be claimed for the loss of the care and aid of a mother 76 years old killed by the accident, or for the nervous shock to one of the plaintiffs at her death, such damages being problematical, indirect and remote; nor could plaintiffs, after accepting their mother's succession, claim to be reimbursed the expenses of the funeral of the victim and of the mourning, as in paying them they only discharged the debts inherent to the succession, which is presumed to be more advantageous than onerous as they accepted it.

Filiatrault v. Can. Pac. Ry. Co., 18 Que. S.C. 491.

Nervous shock—Impact.

The plaintiffs were driving on a highway in an enclosed vehicle which owing, as was found, to the negligence of the defendants, was struck by a moving car of the defendants, pushed a short distance sideways, and struck on the other side by another car moving in the opposite direction. The plaintiffs suffered no visible bodily injuries except slight bruises, but complained of mental or nervous shock, and a jury assessed damages therefor:—Held, that damages of this kind were not recoverable notwithstanding the impact and the bodily injuries. [Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, and Henderson v. Canada Atlantic Ry. Co. (1898), 25 A.R. 437, followed.]

Geiger v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 85, 10 O.L.R. 511.

[Distinguished in Toms v. Toronto Ry. Co., 12 Can. Ry. Cas. 126, 22 O.L.R. 204.]

Excessiveness—Solatium doloris.

The Court refused to order a new trial or reduction of damages under the provisions of arts. 502, 503, C.C.P., where it did not appear that, under the circumstances, the amount of damages awarded by the verdict was so grossly excessive as to make it evident that the jury had been led into error or were influenced by improper motives. Davies, J., dissented in respect of that part of the verdict awarding damages in favour of one of the sons who was almost 21 years of age and earning wages at the time deceased was killed. Quaere.—In an action under art. 1056 C.C. (Que.), can a jury award damages in solatium doloris? [Robinson v. Can. Pac. Ry. Co., [1892] A.C. 481, referred to.]

Can. Pac. Ry. Co. v. Lachance, 10 Can. Ry. Cas. 22, 42 Can. S.C.R. 205.

[Commented on in Montreal Street Ry. Co. v. Brialofsky, 19 Que. K.B. 338.]

Collision of street car—Physical shock—Resulting nervous condition.

The plaintiff, an elderly man, was a passenger in a street car of the defendants, which was negligently allowed to come into collision with an engine at a railway crossing. By the force of the collision he was violently thrown from his seat over to the back of the next seat in front of him. No bones were broken, and there was no great bruising or other external injury. He got off the car without assistance and walked a short distance, and then, as he said, "collapsed," and for the time could go no further. Eventually he reached the place where he was employed, but was quite unable to work, and was obliged to go to his home and to bed, where he remained off and on for several weeks under a physician's care. Subsequently, the condition of traumatic neurasthenia developed, as the result, it was said, of the shock of the collision, and the plaintiff, it was asserted, was still suffering from that trouble at the time of the trial. A physician testified that the physical shock suffered excited the subsequent condition, and that that condition did not arise purely from an effect created on his mind:—Held, that the case was different from those in which the mental shock, as from fright and the like, was the primary cause to which the resulting physical consequences had to be traced—the shock in this case was not primarily mental at all, but physical; the trial Judge properly refused to direct the jury to assess separately the damages resulting exclusively from mental shock and those resulting from physical injury; and a judgment for the plaintiff for $1,500 damages assessed by the jury should not be disturbed. [Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, Henderson v. Canada Atlantic Ry. Co. (1898), 25 A.R. 437, and Geiger v. Grand Trunk Ry. Co. (1905), 10 O.L.R. 511, 5 Can. Ry. Cas. 85, distinguished.] Judgment of Falconbridge, C.J.K.B., affirmed.

Toms v. Toronto Ry. Co., 12 Can. Ry. Cas. 126, 22 O.L.R. 204.

[Affirmed in 44 Can. S.C.R. 268, 12 Can. Ry. Cas. 250.]

Physical injuries—Mental shock.

T. was riding in a street car when it collided with a train. He was thrown violently forward on the back of the seat in front of him, but was able to leave the car and walk a short distance towards his place of business when he collapsed and was taken home in a cab. He was laid up for several weeks and never recovered his former state of health. On the trial of an action against the railway company one medical witness gave as his opinion that the physical shock received by T. was the exciting cause of his condition, while others ascribed it to a disturbed nervous system. Negligence on the part of the company was not denied, but the trial Judge was asked to direct the jury to distinguish, in assessing damages, between the physical and nervous injuries, which he refused to do:—Held, affirming the judgment of the Court of Appeal (22 Ont. L.R. 204, 12 Can. Ry. Cas. 126), that the trial Judge properly refused to direct the jury as requested; that the injuries to T.'s nervous system were as much the direct result of the negligence of the company as those to his physical system, and he could recover compensation for both; and that in any case it was impossible for the jury to sever the damages. [Victorian Railway Commissioners v. Coultas, 13 App. Cas. 222, distinguished.]

Toronto Ry. Co. v. Toms, 12 Can. Ry. Cas. 250, 44 Can. S.C.R. 268.

MENTAL SHOCK—EXCESSIVENESS.

A jury should not be asked to assess separately damages resulting from shock caused by blows and those resulting from bodily injury independently of nervous shock. Remarks per Irving, J.A., as to cases in which the damages were so assessed. In this case a new trial was ordered (Irving J.A., dissenting), on the ground that the damages awarded were excessive. [Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, followed.]

Taylor v. British Columbia Elec. Ry. Co., 13 Can. Ry. Cas. 400, 16 B.C.R. 109.

CONSEQUENTIAL INJURIES—TRAUMATIC NEURASTHENIA.

Where, as a result of a collision between a railway train and a street car due to negligent operation of the train, a passenger on the street car was thrown into a subway, a verdict for substantial damages may be given against the railway company whose negligence caused the injury, although the only substantial injury proved was that the plaintiff had in consequence suffered from traumatic neurasthenia and caused the plaintiff to be subject to insomnia and nerve troubles incapacitating him for his usual occupation, although such result is attributable to the mental shock as well as to the physical. [Victorian Railways Commission v. Coultas (1888), 13 A.C. 222, and Dulieu v. White, [1901] 2 K.B. 669, considered; Geiger v. G.T.R. Co., 10 O.L.R. 511, and Henderson v. Canada Atlantic, 25 O.L.R. 437, specially referred to.]

Ham v. Can. Northern Ry. Co., 1 D.L.R. 377, 20 W.L.R. 359.

[Varied by disallowing claim for interest, Ham v. Can. Northern Ry. Co. (No. 2), 7 D.L.R. 812.]

D. Lord Campbell's Act.

DEATH OF WIFE—DAMAGES TO HUSBAND—LOSS OF HOUSEHOLD SERVICES—CARE AND TRAINING OF CHILDREN.

Although on the death of a wife, caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services, accustomed to be performed by the wife, which would have to be replaced by hired services, may be a substantial loss for which damages may be recovered, and so also may be the loss to the children of the care and moral training of their mother. In this case the Privy Council refused leave to appeal; see Canada Gazette, vol. 6, p. 583; 11 A.R. (Ont.) 1, reversing 1 O.R. 545, affirmed.

St. Lawrence & Ottawa Ry. Co. v. Lett, 11 Can. S.C.R. 422.

[Discussed in Ricketts v. Markdale, 31 O.R. 610; followed in McKeown v. Toronto Ry. Co., 19 O.L.R. 361; referred to in Beckett v. Grand Trunk Ry. Co., 13 A.R. (Ont.) 174; Hollinger v. Can. Pac. Ry. Co., 21 O.R. 705;

New Brunswick Ry. Co. v. Vanwart, 17 Can. S.C.R. 37; Rombough v. Balch, 27 A.R. (Ont.) 32; relied on in Davidson v. Stuart, 14 Man. L.R. 81, 89; adopted in Collins v. St. John, 38 N.B.R. 90, 91; applied in Canada Atlantic Ry. Co. v. Henderson, 29 Can. S.C.R. 636.]

Right to deduct life insurance from damages.

Where the life of the deceased is insured, the amount of the insurance must not be deducted from the damages assessed. 13 A.R. (Ont.) 174, 8 O.R. 601, affirmed.

Grand Trunk Ry. Co. v. Beckett, 16 Can. S.C.R. 713.

Pecuniary loss—Life insurance.

The right conferred by Lord Campbell's Act, adopted by Consolidated Statutes of Ontario, c. 135, ss. 2, 3, to recover damages in respect of death occasioned by wrongful act, neglect or default is restricted to the actual pecuniary loss sustained by the plaintiff. Where the widow of deceased is plaintiff, and her husband had made provision for her by a policy on his own life in her favour, the amount of such policy is not to be deducted from the amount of damages previously assessed irrespective of such consideration. She is benefited only by the accelerated receipt of the amount of the policy, and that benefit being represented by the interest of the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased. [Hicks v. Newport, etc., Ry. Co., 4 B. & S. 403, n., approved; 15 A.R. (Ont.) 477, affirmed.]

Grand Trunk Ry. Co. v. Jennings (1888), 13 App. Cas. 800.

[Adopted in Royal Paper Mills Co. v. Cameron, 39 Can. S.C.R. 369; referred to in Warboys v. Lachine Rapids, etc., Co., 22 Que. S.C. 541; relied on in Davidson v. Stuart, 14 Man. L.R. 81; applied in Allen v. Can. Pac. Ry. Co., 19 O.L.R. 510; followed in London & Western Trusts v. Traders Bank, 16 O.L.R. 382; referred to in Bicknell v. Grand Trunk Ry. Co., 26 A.R. (Ont.) 431; Nightingale v. Union Colliery Co., 8 B.C.R. 136.]

Effect of insurance.

Where the widow or heirs of a person killed as the result of an accident sue the person responsible for such death in damages the defendant is entitled to have the amount of damages suffered diminished by whatever sums the heirs may have received under the terms of accident policies carried by the deceased.

Can. Northern Quebec Ry. Co. v. Johnston, 7 D.L.R. 243, 22 Que. K. B. 63.

Government railway—Negligence of Crown's servants—Action by parent of deceased—Pecuniary benefit—Pain and suffering.

In the case of death resulting from negligence, and an action taken by the party entitled to bring the same under the provisions of R.S.N.S. 1900, c. 178, s. 5, the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Such party is not to be compensated for any pain or suffering arising from the loss of the deceased, or for expenses of medical treatment of the deceased, or for his burial expenses, or for family mourning. [Osborne v. Gillett, L.R. 8 Ex. 88, distinguished.]

McDonald v. The King, 2 Can. Ry. Cas. 1, 7 Can. Ex. 216.

Negligence causing death—Apportionment of damages between widow and children.

An action brought against a railway company by a widow on behalf of herself and four infant children, aged respectively seven, five, three and one year, to recover damages for the death of her husband through the company's negligence, was settled by the company paying $4,800. On application to a Judge the amount was apportioned by giving the widow $1,200 and each of the children $900, the widow also to be paid for the children's maintenance, $200 a year for three years, the fact of the widow having already received $1,000 for insurance on the husband's life, being taken in consideration in apportioning her share.

Burkholder v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 5, 5 O.L.R. 428.

Services of child—Intention of helping parent.

Damages to the amount of $2,100 were recovered by the plaintiff suing as the father and administrator of his deceased son, 22 years of age, who was killed through defendants' negligence. The son's occupation was principally that of a labourer, the highest rate of wages received by him being for a few days at the rate of $35 a month. His mother was dead and his father had married again. He lived with a widowed sister, but was on good terms with his father and stepmother, whom he visited once or twice a month, on such occasions giving his father from $2 to $4, and once $5. His habits were good and he was of a generous disposition. Evidence was received of his intention of helping his father to build a house, of assisting him in paying off a mortgage of $650 on his property, as well as a debt of $400, which he owed another son, and for which the father had given his promissory notes:—Held, that the evidence of such expressed intention was properly admitted, not necessarily as shewing a promise to make the payments, but of his being well disposed to his father; the amount awarded the plaintiff for damages however was clearly excessive, and a new trial was ordered unless the parties agreed to a reduction of the damages to $500.

Stephens v. Toronto Ry. Co., 5 Can. Ry. Cas. 102, 11 O.L.R. 19.

[Referred to in Moffit v. Can. Pac. Ry. Co., 2 Alta. L.R. 486, 489.]

Negligence—Death of child—Reasonable expectation of pecuniary benefit.

The plaintiff, a married woman, who had to depend on her own exertions for her support and maintenance and that of her daughter, her husband contributing nothing, had striven to give her daughter a good education. The daughter was a little over seventeen years of age, and was just finishing her course at a collegiate institute, which would have qualified her for a first-class teacher's certificate, and expected to be earning in the course of a year from $300 to $500. She was a strong active girl and worked in a mill during the holidays, earning from $6 to $7 a week, which she gave to her mother, for whose maintenance and support she had often expressed the intention of providing. The daughter having been killed through the defendants' negligence, a finding in favor of the mother for $3,000 was upheld.

Renwick v. Galt, Preston, etc., Ry. Co., 5 Can. Ry. Cas. 108, 11 O.L.R. 158.

[Reversed in 12 O.L.R. 35, 5 Can. Ry. Cas. 376; referred to in McKeown v. Toronto Ry. Co., 19 O.L.R. 361.]

Loss of child—Reasonable expectation of pecuniary benefit.

Damages assessed by a jury at $3,000 for the loss of a daughter seventeen years old by reason of the negligence of the defendants, were held to be excessive, and a new trial was directed unless both parties would agree to have the damages fixed at $1,500. Order of a Divisional Court, 11 O.L.R. 158, 5 Can. Ry. Cas. 108, reversed.

Renwick v. Galt, Preston & Hespeler Street Ry. Co., 5 Can. Ry. Cas. 376, 12 O.L.R. 35.

Service of child—Pecuniary loss—Ownership in common between parent and child—Survivorship.

In an action by a father to recover damages for the death of his son caused by the negligent operation of a train, no pecuniary loss is proven where it is shewn that the services rendered by the deceased to his father were in pursuance of an agreement that they were both to be partners of the farm where the work was being done but that the son was to have the farm on the father's death, and that he was also to get what he needed out of the common fund.

Moir v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 380, 10 O.W.R. 414.

Excessive damages—Death of wife and mother.

In an action under the Fatal Accidents Act, R.S.O. 1897, c. 166, to recover damages for the death of a married woman, 62 years of age, the jury awarded $3,325, apportioning $325 to the executors of her husband who survived her, $800 to a daughter 36 years of age, $700 to a son 27 years of age, and $1,500 to a son 21 years of age:—Held, that damages recoverable being entirely pecuniary, the above (except as to the executors), considering the ages and circumstances of the children, and the age and financial ability of the mother, were grossly excessive, and the case must go to a new assessment.

Ronson v. Can. Pac. Ry. Co., 9 Can. Ry. Cas., 361, 18 O.L.R. 337.

Death of child—Pecuniary loss of parent—Reasonable expectation of benefit.

A verdict of a jury for $300 damages for the death of the plaintiff's child, aged four years, in an action under the Fatal Accidents Act, was upheld by a Divisional Court and by the Court of Appeal (Moss, C.J.O., and Maclaren, J.A., dissenting), where it appeared that the child was healthy, intelligent, and with as good a prospect of prolonged life as any infant of that age could be said to have. The question is for the jury, upon the evidence; pecuniary benefit or advantage need not have been actually derived by the parent previous to the death; the probability of the continuance of life and the reasonable expectation that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration. [Pym v. Great Northern Ry. Co. (1862), 2 B. & S. 759, and Blackley v. Toronto Ry. Co., 27 A.R. (Ont.) 44n., applied and followed.] The trial Judge's direction to the jury upon the questions of damages and the findings of the jury upon the question of negligence were also considered and upheld by the Divisional Court.

McKeown v. Toronto Ry. Co., 9 Can. Ry. Cas. 449, 19 O.L.R. 361.

[Referred to in Moffit v. Can. Pac. Ry. Co., 2 Alta. L.R. 489.]

Pecuniary loss of parents—Reasonable expectation of benefit.

A lad of twenty, a brakesman employed by the defendants, was killed in a collision upon the railway, by reason of the negligence of the defendants' servants, and this action was brought under the Fatal Accidents Act, R.S.O. 1897, c. 166, by the administrators of his estate, to recover damages for his death, for the benefit of his parents, who lived in England. The claim was made and the assessment of the damages was based upon the principle of the Workmen's Compensation for Injuries Act. The jury found that the estimated earnings of a person in the same grade as the deceased, in the like employment, in this Province, for the three years allowed by the statute, would be $1,800, and they assessed the damages at that sum apportioning them between the father and mother. The evidence shewed that the deceased was unmarried; had been about four years in Canada, and about a month in the service of the defendants. He had corresponded with his mother, but had sent his parents no money. He had received a good and rather expensive education, at his father's expense, and the father swore to an understanding between the son and the parents that the son would, in consideration of the large sum so expended, assist the parents in their old age:—Held, that the plaintiff's right of recovery was limited in amount to the pecuniary loss which it could be fairly and reasonably found that the parents had suffered by the son's death; and, upon the evidence and in all the circumstances, taking into account the uncertainties and contingencies, there was such a reasonable and well-founded expectation of pecuniary benefit as could be estimated in money so as to become the subject of damages; but, having regard to all these matters, the award of damages was excessive and extravagant, and therefore unreasonable; and there should be a new assessment of damages, unless the parties could agree upon some amount. It is the plain duty of the Court to see that an award of damages, in an action of this kind, which appears to have been arrived at upon considerations not warranted by the evidence, shall not stand. Principles upon which damages to be assessed pointed out.

London & Western Trusts Co. v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 133, 22 O.L.R. 262.

DEATH—PAIN AND SUFFERING—RECOVERY BY DECEDENT'S FAMILY.

In an action by the widow and administratrix of the deceased for damages under the Manitoba Act, for compensation to families of persons killed by accident (R.S.M. 1902, c. 31), the measure should be for the widow's pecuniary loss sustained because of the death, in a sum that will give her the physical comfort which she had at the time of her husband's death out of his labor and earnings to be continued during the expectancy of life, subject to the accidents of health and employment; but not covering the physical and mental suffering of the deceased nor the mental sufferings of the plaintiff for the loss of her husband. $5,000 is an excessive recovery by a surviving wife under the Manitoba Act (R.S.M. c. 31) for accidental death of her husband, and the recovery should be reduced to $3,000, where he was 65 years old and earned only $45 monthly, and she was 57 years old, though he was apparently a strong, healthy man. [Blake v. Midland, 18 Q.B. 93; C.P.R. Co. v. Robinson, 14 Can. S.C.R. 105; Rowley v. London, L.R. 8 Ex. 221, and Lamonde v. G.T.R. Co., 16 O.L.R. 365, referred to; Pettit v. Can. Northern Ry. Co. (No. 1), 7 D.L.R. 645, varied.]

Pettit v. Can. Northern Ry. Co. (No. 2), 11 D.L.R. 316, 15 Can. Ry. Cas. 272, 23 Man. L.R. 213.

DEDUCTION OF MONEY PAID BEFORE DEATH.

In an action brought by the widow and children of a decedent under the Families Compensation Act, R.S.B.C. c. 82, for damages for injuries sustained through the alleged negligence of the defendants resulting in the death of the decedent, where it appears that prior to the death of the deceased the latter received a sum of money for the injuries sustained and executed a release of the cause of action to the defendants, it is not necessary for the plaintiffs to return the sum of money received by the deceased, or to offer to return it, as a condition precedent to their right to have the release set aside on the ground that it was obtained from the deceased by fraud, but such money is to be taken into consideration on the assessment of damages and the amount treated as a payment on account. [Trawford v. British Columbia Elec. Ry. Co., 8 D.L.R. 1026, reversed; Lee v. Lancashire, L.R. 6 Ch. 527, distinguished.]

Trawford v. British Columbia Elec. Ry. Co., 15 Can. Ry. Cas. 39, 9 D.L.R. 817.

Mother and widow—Apportionment of damages.

On an application by a widow of a deceased for apportionment, under ss. 4, 9 of the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, between her and the mother of the deceased of a sum of money paid over as damages for the death of the deceased, the apportionment should be made in proportion to the damages sustained by each of them and the analogy of the Statute of Distributions does not apply. The basis of apportionment on an application by a widow of a deceased person, under ss. 4, 9 of the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, for apportionment between her and the mother of the deceased of a sum of money paid over as damages for the death of the deceased, is not affected by the fact that the widow was separated from her husband, inasmuch as he still continued to be liable for her support, and the amount the husband contributed to his mother's support is immaterial, the only question being, on such an application, what the wife and mother would relatively have had a right to expect if the deceased had continued to live. [Sanderson v. Sanderson (1877), 36 L.T.N.S. 847, disapproved: Bulmer v. Bulmer, 25 Ch. D. 409, and Burkholder v. Grand Trunk Ry. Co., 5 O.L.R. 428, followed.]

Scarlett v. Can. Pac. Ry. Co. (Ont.), 9 D.L.R. 780, 15 Can. Ry. Cas. 184.

Apportionment of damages—Beneficiaries.

In apportioning money recovered under the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, and under the Ontario Workmen's Compensation for Injuries enactments, the true guide must be the actual pecuniary loss of each of the claimants, and the statute as to distribution of decedents' estates furnishes no satisfactory guide. Money recovered under the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, or the Ontario Workmen's Compensation for Injuries enactments, may properly be apportioned by the Court in one of two ways: (1) By finding the amount of pecuniary damages which each of the claimants has really sustained, and if the whole be more or less than the fixed sums, awarding to each his proper proportion; or (2) by finding the proportion which the right of each bears to the others, and dividing the amount available accordingly. Infant stepchildren of the deceased who were dependent upon him for support have a right to share in the distribution of the proceeds of money collected under the Ontario Workmen's Compensation for Injuries enactments or the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, as damages for his death through the negligence of another, though in the apportionment of the fund they would not be entitled to as large a sum as would be children of deceased's own.

Brown v. Grand Trunk Ry. Co., 15 Can. Ry. Cas. 350, 11 D.L.R. 97, 28 O.L.R. 354.

E. Workmen's Compensation Act.

Injury affecting claimant's earning power.

In estimating compensation under the Workmen's Compensation Act, for the loss of a thumb, consideration must be given to the fact that while the claimant is not thereby entirely prevented from carrying on his occupation, his chances of employment in competition with others are lessened, and his earning power consequently reduced.

Roylance v. Can. Pac. Ry. Co., 14 B.C.R. 20.

DEATH OF WORKMEN—ACTION BY WIDOW—DEDUCTION OF INSURANCE MONEYS.

In an action under the Workmen's Compensation for Injuries Act, by the widow and administratrix of a man who was killed while in the employment of the defendants, to recover damages as compensation for his death, the evidence shewed that the damages, based upon an estimate of the wages for three years of a person in the same grade as the deceased, would amount to at least $2,200. Counsel for the plaintiff, however, in addressing the jury told them that they should deduct from the amount they found on that basis a sum of $1,000 which the plaintiff had received for insurance on the life of the deceased. The jury announced a verdict of $1,200, not saying that they had found $2,200 and deducted $1,000; but the trial Judge asked them if that was what they meant, and they said it was:—Held, having regard to s. 7 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, that the $1,000 ought not to have been deducted; and that, upon the findings of the jury, judgment should be entered for $2,200. [Beckett v. Grand Trunk Ry. Co. (1885), 8 O.R. 601, 13 A.R. (Ont.) 174, 16 Can. S.C.R. 713, and Grand Trunk Ry. Co. v. Jennings (1888), 13 App. Cas. 800, specially referred to.]

Dawson v. Niagara & St. Catharines Ry. Co., 12 Can. Ry. Cas. 107, 22 O.L.R. 69.

[Varied in 12 Can. Ry. Cas. 411, 23 O.L.R. 670.]

DEATH OF WORKMAN—ACTUAL PECUNIARY LOSS—PROCEEDS OF ACCIDENT INSURANCE POLICY.

The plaintiff sued, as administratrix of the estate of her deceased husband, to recover damages for his death, alleged to have been caused, while he was a workman in the defendants' employment, by their negligence. At the trial the jury found negligence of the defendants and absence of contributory negligence on the part of the plaintiff; they assessed the damages at $1,200. The trial Judge, on questioning the jury, found that they had estimated the damages, under the Workmen's Compensation for Injuries Act, at $2,200, and had deducted $1,000 which the plaintiff had received from the proceeds of an accident insurance policy upon the life of her husband; and he directed judgment to be entered for the plaintiff for $2,200:—Held, that the action rested for its basis upon the Fatal Accidents Act, R.S.O. 1897, c. 166 (now 1 Geo. V. c. 33), and upon it alone, although the amount recoverable was necessarily limited by the provisions of the Workmen's Compensation for Injuries Act. Under the Fatal Accidents Act, the only recovery possible is in respect of proved pecuniary loss; and it is the exclusive province of the jury, upon the evidence and under proper instructions by the Judge, to fix the amount of such loss, limited in such a case as this by the maximum amount recoverable under the first part of s. 7 of the Workmen's Compensation for Injuries Act, but unaffected by the latter part of that section, which has no application in a case where the plaintiff's actual pecuniary loss is to be ascertained. The jury should be told that it is their duty to take into account such items as the insurance money in question, but there is no cast-iron rule which compels them to deduct the whole amount. They are to consider all the circumstances, that included, and to return such a verdict as the whole evidence warrants. Semble, that there is no distinction in this regard between moneys received under a life insurance policy and moneys received under an accident insurance policy. [Grand Trunk Ry. Co. v. Jennings (1888), 13 App. Cas. 800, followed. Hicks v. Newport, etc., Ry. Co. (1857), 4 B. & S. 403 (n.), remarked upon]:—Held, also, that the findings of the jury were based upon reasonably sufficient evidence, and should not be disturbed. Judgment of Clute, J., 22 O.L.R. 69, 12 Can. Ry. Cas. 107, varied by directing a new assessment of damages, if the defendants desired it.

Dawson v. Niagara, St. Catharines & Toronto Ry. Co., 12 Can. Ry. Cas. 411, 23 O.L.R. 670.

Wage-earning capacity—Higher wage—New employment.

A reduction in wage-earning capacity is to be established according to the ordinary rules, and the employer cannot, by offering a higher wage or a new employment at the old figures, prevent the workman from obtaining compensation under the Quebec Workmen's Compensation Act. [Grand Trunk Ry. Co. v. McDonnell, 5 D.L.R. 65, 18 Rev. de Jur. 369, followed.]

McDonnell v. Can. Pac. Ry. Co., 7 D.L.R. 138, 22 Que. K.B. 207.

Medical services—Nurses—Loss of time—Expenses of cure.

Damages to the amount of $1,750 are not excessive in an action under the Employers' Liability Act (B.C.) where the plaintiff, a stevedore, was struck between the shoulders by the fall of a "sling board" and traumatic neurasthenia resulted, the medical treatment of which is particularly expensive. [Toronto Ry. Co. v. Toms, 44 Can. S.C.R. 268, referred to.]

Snell v. Victoria & Vancouver Stevedoring Co., 8 D.L.R. 32.

Death of employee—Workmen's Compensation Act (Sask.)—Assessment.

In estimating the compensation recoverable under s. 15 of the Workmen's Compensation Act, Sask. Stat. 1910–1911, c. 9, of such sum as is found to be equivalent to the estimated earnings during the three years preceding the injury in like employment, a shewing of $182 for one and three-quarter months is not of itself, under the principle of the Act, sufficient to base a finding in excess of $1,800 for the three years. [Uhlenburgh v. Prince Albert Lumber Co., 9 D.L.R. 639, followed.]

Kennedy v. Grand Trunk Pacific Ry. Co., 16 Can. Ry. Cas. 46, 15 D.L.R. 172.

F. Injury to Property.

Trespass—Special damage—Measure of.

The rental value of land is not to be adopted as the measure of damages for a trespass thereon if special damage is alleged and proved and the trespasser will be liable for loss shewn to have been suffered by the owner by reason of his being deprived of an actually intended and natural and probable use of his land. [France v. Gaudet, L.R. 6 Q.B. 199, followed.]

Marson v. Grand Trunk Pac. Ry. Co. (Alta.), 14 Can. Ry. Cas. 26, 1 D.L.R. 850.

[Followed in Lavallee v. Can. Northern Ry. Co., 4 D.L.R. 376.]

Forcible possession of land—Anticipated use.

The extension by the owner of land of an existing pig corral is not such a peculiar and unusual use of the land as will relieve a trespasser from the duty of anticipating the probability of it, and being charged in damages for the interference with the owner's intended exercise of his right in that respect.

Marson v. Grand Trunk Pac. Ry. Co. (Alta.), 14 Can. Ry. Cas. 26, 1 D.L.R. 850.

[Followed in Lavallee v. Can. Northern Ry. Co., 4 D.L.R. 376.]

LOSS OF PROFIT—EXCLUSION FROM LAND.

Where excavations and other trespasses by a railway company prevented the landowner from extending his pig corral so as to keep the increase of the pigs and the corral thereby became crowded and unhealthy, resulting in the death of some of the pigs and the depreciation of others in value, the owner will be limited to such damage as would have resulted had he reduced the number of his pigs to what he had theretofore safely kept, and he cannot recover as special damage more than the difference in the selling value, at the time of the trespass of the pigs he should have removed and sold for lack of accommodation to keep them and their value at the time when they would have been the most fit to sell less the saving in feed and labour by reason of the reduced number.

Marson v. Grand Trunk Pac. Ry. Co. (Alta.), 14 Can. Ry. Cas. 26, 1 D.L.R. 850.

[Followed in Lavallee v. Can. Northern Ry. Co., 4 D.L.R. 376.]

MEASURE—WRONGFUL REMOVAL OF SPUR TRACK—SUFFICIENCY.

The measure of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which track, at a small expense, coal and lumber could be unloaded from cars directly into such yard, is the additional cost of handling and hauling of such commodities from the freight yards of the company to the coal and lumber yard.

Robinson v. Can. North. Ry. Co. (Man.), 14 Can. Ry. Cas. 281, 5 D.L.R. 716.

[See 6 Can. Ry. Cas. 101, 37 Can. S.C.R. 541, 11 Can. Ry. Cas. 289, 19 Man. L.R. 300, 11 Can. Ry. Cas. 304, 43 Can. S.C.R. 387, 13 Can. Ry. Cas. 412, [1912] A.C. 739.]

JURISDICTION—INDEMNITY FOR LOSS, DAMAGE, OR INJURY.

Under s. 250 of the Railway Act, 1906, the Board has jurisdiction to authorize the laying of a gas main under the tracks of a railway company, by a public utility company, an adjacent landowner, and to fix the amount of damages payable for the privilege, imposing as terms and conditions precedent, that the applicant must undertake full responsibility for maintaining the gas main and indemnify the respondent from any loss, damage or injury to its property, employees, or the traveling public.

Montreal Light, Heat & Power Co. v. Grand Trunk Ry. Co., 17 Can. Ry. Cas. 330.

LAND ABUTTING ON RAILWAY—COMPENSATION.

The owner of land adjacent to or abutting upon the street over which a railway subject to the Railway Act, 1906, is to be constructed may be awarded compensation by the Board under the statute 1 & 2 Geo. V. c. 22, s. 6, for consequent injury to such land, although damages of that character cannot be awarded in an arbitration under the Railway Act. [Grand Trunk Pacific Ry. Co. v. Fort William, Fort William Land & Investment Co., et al., [1912] A.C. 224, 13 Can. Ry. Cas. 187, referred to.]

Can. Northern Ontario Ry. Co. v. Holditch, 19 Can. Ry. Cas. 112, 50 Can. S.C.R. 265, 20 D.L.R. 557.

RAILWAY ON HIGHWAY—LANDS INJURIOUSLY AFFECTED—RELEASE.

The Board has no jurisdiction to grant damages for lands injuriously affected by the construction of a railway on a highway where the applicant has signed an agreement releasing the railway company from such claims. Such a release must stand until set aside by a Court of competent jurisdiction.

Remy v. Lake Erie & Northern Ry. Co., 20 Can. Ry. Cas. 207.

ELECTRIC RAILWAY ON HIGHWAY—LANDS INJURIOUSLY AFFECTED.

Damages have never yet been allowed by the Board to an adjoining landowner for the construction of an electric railway along a highway. The Board dismissed the claim of the applicant for damages under s. 235, of the Railway Act, 1906, alleging that his lands had been injuriously affected by the construction of an electric railway on the highway made two years after the work was finished.

Griffin v. Toronto Eastern Ry. Co., 20 Can. Ry. Cas. 210.

GRADE CROSSINGS—ELIMINATION—CLOSING HIGHWAY—JURISDICTION.

The Board is empowered by the Railway Act, 1906, s. 238, as amended by 8 & 9 Edw. VII. c. 32, s. 5, to act upon its own motion to facilitate the elimination or diminishing of grade crossings; and for this purpose authority is conferred upon the Board to order that part of a highway be closed or to require the proper municipal authority to close it and the railway company is not required to comply with s. 167. [Parkdale v. West (1887), 12 App. Cas. 602, distinguished.]

Brant v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 268, 36 O.L.R. 619, 30 D.L.R. 782.

[Followed in North Bay Landowners v. Can. Northern Ontario Ry. Co., 23 Can. Ry. Cas. 35.]

ALTERING GRADE OF HIGHWAY—DAMAGES—REMEDY—ARBITRATION.

For damages to property by altering the grade of a street under a valid order of the Board, to alter a grade crossing, the remedy is by arbitration proceedings under the Railway Act, 1906, not by an action against the railway company acting under the order.

Brant v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 268, 36 O.L.R. 619, 30 D.L.R. 782.

[Followed in North Bay Landowners & Can. Northern Ontario Ry. Co., 23 Can. Ry. Cas. 35.]

STREET RAILWAY CROSSING—DIAMOND—DERAILMENT OF TRAIN—LIMITATION OF ACTION.

The defendants' railway crossed at grade the plaintiffs' tracks under an order of the Board, which directed that the defendants provide a diamond for the crossing at their own expense. Several years later cars of the plaintiffs passing over the diamond became derailed and were injured or destroyed, and an action was brought more than a year after the accident to recover damages for the injury and destruction. The plaintiffs charged that it was the defendants' duty to keep the diamond and all appliances in connection with the crossing in good repair, which they had failed to do and had so caused the derailment and damage. The derailment was not shewn to have been the result of want of maintenance or of negligence on the part of the defendants and they were not bound under the order of the Board to maintain and repair the diamond. The action was dismissed because barred by s. 306 of the Railway Act. [Guelph & Goderich Ry. Co. v. Guelph Radial Ry. Co., 5 Can. Ry. Cas. 180; Grand

Trunk Ry. Co. v. United Counties Ry. Co., 7 Can. Ry. Cas. 294; Can. Northern Ry. Co. v. Robinson [1911] A.C. 739, 13 Can. Ry. Cas. 412, distinguished; Edmonton Street Ry. Co. v. Grand Trunk Pacific Ry. Co., 7 D.L.R. 888, referred to.]

Grand Trunk Ry. Co. v. Sarnia Street Ry. Co., 21 Can. Ry. Cas. 160, 37 O.L.R. 477.

LIABILITY TO ABUTTING OWNERS FOR OBSTRUCTING HIGHWAY WITH RAILWAY—REMEDY.

A railway company for which a municipal corporation agrees to close a certain street, and which is authorized by the Board to construct a level crossing thereon, is liable in damages to the owners of lots on said street, if, before the street is closed by the city, the company obstructs the street by constructing a railway across it; such damages may be recovered in an action, although a claim for compensation is pending, under the Railway Act, 1906, for trespass on the land of the plaintiff actually taken for the purposes of the railway, or for portions of lots of which parts have been so taken.

Holmested v. Moose Jaw and Can. Northern Ry. Co., 22 Can. Ry. Cas. 169, 9 Sask. L.R. 327, 29 D.L.R. 761.

[Followed in Holmested v. Moose Jaw and Can. Northern Ry. Co., 22 Can. Ry. Cas. 177, 36 D.L.R. 747.]

TENDER OF AMOUNT OF DAMAGES FOR CONSTRUCTION—CONDITION PRECEDENT—SMOKE AND NOISE.

S. 235 of the Railway Act, 1906, as amended by 1-2 Geo. V. c. 22, s. 6, does not make the payment or tender of the amount of damages the land would suffer by the building of the railway, a condition precedent to the building of such railway. The section does not give the Court jurisdiction to award damages due to noise, smoke and vibration caused by operation of the railway; any such claim should be made by application to the Board. [Parkdale v. West (1887), 12 App. Cas. 602, referred to.]

Hornstein v. Can. Northern Ry. Co., 23 Can. Ry. Cas. 424, 44 D.L.R. 511.

LIABILITY FOR DAMAGES CAUSED BY BLASTING.

A railway company specially authorized by Dominion Act (2 Geo. V. c. 74), to construct and operate a tunnel is liable in damages under the Dominion Railway Act and the common law of Quebec for injury to property caused by blasting in connection with such construction although a necessary consequence thereof.

Bickerdike v. Can. Northern Montreal Tunnel & Terminal Co., 38 D.L.R. 425.

HIGHWAYS—CHANGING GRADE OF STREET—SUBWAY—DAMAGES TO LANDOWNER.

The fact that an order-in-council authorizing the construction of a subway at a railway crossing had directed that "all land damages" should be paid by the municipality on whose behalf the application had been made, in pursuance of the Nova Scotia Railways Act, R.S.N.S. 1900, c. 99, ss. 178, 179, does not confer a right of action in damages for the change of grade against the municipality upon a landowner whose land fronted upon the opposite side of the street from that on which the subway was built and where there was consequently left to the landowner his original mode of access on his side of the street, although of diminished width. [Compare Parkdale v. West, 12 A.C. 602, 56 L.J.P.C. 66, affirming West v.

Parkdale, 12 Can. S.C.R. 250; and see East Freemantle v. Annois, [1902] A.C. 213.]

Burt v. Sydney, 15 D.L.R. 429.

INDEPENDENT CONTRACTOR—LIABILITY OF EMPLOYER—INJURIES TO ADJOINING OWNER.

A railway company will be liable for damage to land adjoining its right-of-way occasioned by the negligent operations of its contractors for the construction of the roadbed, if in letting the contract no care was exercised by the railway company to provide that in the blasting operations which were an essential part of the contract the "top-lofting" method which would throw debris upon the lands of the adjoining owner should not be adopted, and the contractors damaged the adjoining property by following that method where another course of operations was open to them under which the injury might have been avoided. [Hounsome v. Vancouver Power Co., 9 D.L.R. 823, 18 B.C.R. 81, affirmed; Hardacre v. Idle District, [1896] 1 Q.B. 335, and Robinson v. Beaconsfield, [1911] 2 Ch. 188, referred to.]

Vancouver Power Co. v. Hounsome, 19 D.L.R. 200.

RELEASE—WHAT INCLUDED IN—INJURING ADJOINING PROPERTY.

A release of all damages which the landowner conveying a strip of land for a railway right-of-way may sustain "by reason of the construction and operation of the railway," and which does not specifically cover injuries due to the company's negligence, will not prevent a recovery for damages occasioned to the adjoining lands of the grantor by blasting operations conducted by the construction contractor, in respect of which the railway company in letting the contract was negligent in imposing no precautions for protecting the adjoining land.

[Hounsome v. Vancouver Power Co., 9 D.L.R. 823, 18 B.C.R. 81, affirmed.]

Vancouver Power Co. v. Hounsome, 19 D.L.R. 200.

EXPROPRIATION—COMPENSATION—LOSS OF ACCESS—HIGHWAY CROSSED BY RAILWAY.

The obstruction of natural, proximate and direct approaches to land by the construction of a railway, across existing streets, entitles the owner to compensation for depreciation in the value of the land, as against the railway company, but not against the city agreeing to the location. [Holmested v. C. N. Ry. Co., 22 Can. Ry. Cas. 169; Holditch v. Can. Northern Ontario Ry. Co., 27 D.L.R. 14, [1916] 1 A.C. 536, 20 Can. Ry. Cas. 101, followed.]

Holmested v. Moose Jaw and Can. Northern Ry. Co., 22 Can. Ry. Cas 177, 36 D.L.R. 747.

DAMAGES—LOSS OF ARCHITECT'S DRAWINGS—MEASURE OF DAMAGES—VALUE OF PLANS.

Where architectural plans of a building submitted in competition and not accepted were, in the course of transit, destroyed by fire, the proper measure of damages is the value of the plans to the architect for exhibition purposes, and not the cost of their reproduction.

Nicolais v. Dominion Express Co., 20 B.C.R. 8.

JURISDICTION—HIGHWAY CLOSED—BY-LAWS—LANDOWNERS, ADJACENT AND ABUTTING.

Where streets are crossed by the construction of a railway after an agreement is entered into with the municipality specifying the manner in which such crossings are to be made, providing that by-laws are to be passed to close portions of certain streets, and for the payment of compensation by the railway company, and an order of the Board is obtained granting permission to cross the streets upon the conditions of such agreement and providing that the railway company be responsible for any compensation which property owners affected (i. e., landowners adjacent or abutting on the streets) may be legally entitled to recover under the Railway Act and the Municipal Act, and such compensation is withheld or refused to be made by the railway company, the Board has jurisdiction to determine it or refer the matter either to a member of the Board under s. 13, amended by 7 & 8 Edw. VII. c. 62 (D.), s. 4, or to a person appointed by the Board under s. 60 for inquiry and report, and the previous order of the Board granting permission to carry the railway across the streets should be amended accordingly. Subsequently a by-law was passed, closing the portions of such streets and an amending order became unnecessary. [See ss. 29 and 235, amended by 1 & 2 Geo. V. c. 22, s. 6; Holditch v. Can. Northern Ontario Ry. Co., [1916] 1 A.C. 536, at p. 543, 20 Can. Ry. Cas. 101; Brant v. Can. Pac. Ry. Co., 36 O.L.R. 619, 20 Can. Ry. Cas. 268, followed. Can. Northern Ontario Ry. Co. v. North Bay, 18 Can. Ry. Cas. 309, reversed.]

North Bay Landowners v. Can. Northern Ontario Ry. Co., 23 Can. Ry. Cas. 35.

DEBENTURES.

See Bonds and Securities.

DECEIT.

See Fraud and Deceit.

DEMURRAGE.

As to charges, see Tolls and Tariffs.

Quick release of cars—Small and large dealers—Credit for free time.

The Wallaceburg Sugar Co. applied to the Board for an order directing the railway companies to establish what is generally known as an Average Demurrage Plan. Under the Canadian Car Service Rules (framed for the quick release of cars rather than the collection of demurrage) of the Canadian Car Service Bureau, to whose rules Canadian and foreign railway companies operating in Canada conform, 48 hours free time are allowed to dealers for the unloading of cars, for an additional time $1.00 per car per day is charged unless on account of the number of cars tendered to the dealer being unreasonable or the inclemency of the weather preventing unloading with reasonable despatch, an extension of free time is justified and allowed. By the establishment of the Average Demurrage Plan the dealer would get credit on future shipments of the free time he had saved under the 48 hours previously and could hold such shipments in cars without any demurrage charge until the time credited to him had expired:—Held (1), that in the public interest the application should be dismissed; 48 hours under ordinary circumstances being sufficient time for unloading cars. (2) That the contract of carriage is, that the car containing the goods after reaching the point of destination shall be released and unloaded with all reasonable despatch, not to exceed 48 hours in the case under consideration. (3) The penalty of $1.00 per day for extra time makes the dealer prompt in releasing cars and thus increases the supply of them for the shipping public, while the Average Demurrage Plan might make a dealer dilatory in unloading so long as he had free time to his credit. (4) Each car, under the Car Service Rules being dealt with by itself, insures equal treatment between the smaller and larger dealer, but if the Average Demurrage Plan were in force it would give preference and advantage to the dealer with a large number of cars to unload and with a large capacity for storage.

Wallaceburg Sugar Co. v. Canadian Car Service Bureau (Average Demurrage Case), 8 Can. Ry. Cas. 332.

Free time—Extension—Unreasonableness of two-day limit—Weather conditions.

The applicants applied to the Board to extend the free time for unloading charcoal from two to three days:—Held (1), that the applicants have failed to shew that the time limit of two days is not sufficient under ordinary circumstances and the onus of establishing the unreasonableness of the two-day limit is upon them. (2) Railway companies now allow additional free time when the weather conditions are unfavourable for unloading expeditiously. (3) The application must fail, the time limit of two days being sufficient.

McDiarmid v. Grand Trunk and Can. Pac. Ry. Cos., 8 Can. Ry. Cas. 337.

Demurrage charges—Spur track facilities.

Demurrage charges upon cars, due to slowness in unloading them by reason of a longer haul, may be considered as an element of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which tracks cars of coal and lumber could be quickly and cheaply unloaded directly into such yard, where, by reason of such removal, such commodities had to be hauled by the owner of such yard from a greater distance in a slower manner.

Robinson v. Can. Northern Ry. Co. (Man.), 14 Can. Ry. Cas. 281, 5 D.L.R. 716.

[See 6 Can. Ry. Cas. 101, 37 Can. S.C.R. 541, 11 Can. Ry. Cas. 289, 19 Man. L.R. 300, 11 Can. Ry. Cas. 289, 43 Can. S.C.R. 387, 13 Can. Ry. Cas. 412, [1912] A. C. 739.]

Free time—Transshipping grain.

A period of five days, excluding Sundays and legal holidays, is sufficient time free from demurrage for transshipping grain from cars to vessels at St. John, N.B.

Montreal Board of Trade v. Can. Pac. Ry. Co. (St. John Demurrage Case), 23 Can. Ry. Cas. 10.

Notice of arrival—Delivery of notice—Demurrage.

An advice note mailed to a consignee, but not received by him, is not notice within the meaning of a bill of lading subjecting the goods to demurrage charges if not removed after "written notice has been sent or given;" the burden of proving that the notice reached the consignee is upon the sender.

Duquette v. Can. Pac. Ry. Co., 37 D.L.R. 298.

Demurrage rules—Revised and adopted.

Canadian Car Demurrage Rules were revised and adopted by the Board.

Discussion of average and reciprocal demurrage was postponed until after the conclusion of the war.

Re Car Demurrage Rules (Canadian Car Demurrage Rules Case), 24 Can. Ry. Cas. 180.

DEPARTMENT OF RAILWAYS.

See Government Railways.

DERAILMENT.

See Negligence; Rails and Roadbed; Street Railways; Carriers of Passengers; Crossing Injuries; Employees.

DEVIATION OF LINE.

Jurisdiction—Constructed line—Location—Request—Municipal by-law—Special act.

The Board has no power under s. 167 of the Railway Act, 1906, to order deviations, changes or alterations in a constructed line of railway, of which the location has been definitely established, except upon the request of the railway company. Anglin, J., contra. [Grand Trunk Ry. Co. v. Department of Agriculture for Ontario (Vinelands Station Case), 42 Can. S.C.R. 557, 10 Can. Ry. Cas. 84, distinguished.] Per Fitzpatrick, C.J., and Idington, J.—The Dominion statute, 58 & 59 Vict. c. 66, confirming the municipal by-law by which the location of the portion of the railway in question was definitely established constitutes a special Act within the meaning of the Railway Act, 1906, ss. 2 (28) and 3. [Can. Pac. Ry. Co. v. Toronto (Toronto Viaduct Case), [1911] A.C. 461, 12 Can. Ry. Cas. 378, distinguished.]

Hamilton v. Toronto, Hamilton & Buffalo Ry. Co. (Hunter Street Case), 17 Can. Ry. Cas. 370, 50 Can. S.C.R. 128.

Jurisdiction—Located and constructed lines—Special act—Municipal by-law.

Ss. 26 (2) and 28 of the Railway Act, 1906, give the Board jurisdiction under the provisions of s. 167 to order railway companies to deviate their located and constructed lines. If the powers of the Board are not over-ridden by the special Act and municipal by-law, it may, on fair and reasonable terms, disregard any contract, agreement or arrangement by ordering deviations of the located and constructed lines of railway companies, as it may decide that the public interest and safety demands. [Grand Trunk Ry. Co. v. Department of Agriculture for Ontario (Vinelands Station Case), 42 Can. S.C.R. 557, 10 Can. Ry. Cas. 84; C.P.R. Co. v. Toronto (Toronto Viaduct Case), [1911] A.C. 461, 12 Can. Ry. Cas. 378, followed; Central Saskatchewan Boards of Trade v. Grand Trunk Pacific Ry. Co., 10 Can. Ry. Cas. 135; British Columbia and Alberta Municipalities v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 463, referred to.]

Hamilton v. Toronto, Hamilton & Buffalo Ry. Co. (Hunter Street Case), 17 Can. Ry. Cas. 353.

DRUNKENNESS.

Ejection of drunken passenger from train, see Carriers of Passengers.

DIRECTORS.

See Provisional Directors.

Prohibition of railway directors to be parties to railway construction contracts, see Contracts; Constitutional Law.

DISCOVERY.

EXAMINATION—PRIVILEGED DOCUMENTS—REPORTS OF OFFICIALS TO COMPANY RESPECTING ACCIDENTS.

(1) Reports made by the employees of a railway company to their superior officers in accordance with its rules concerning an accident resulting in death, and immediately thereafter, are not privileged from production in an action against the company for damages arising out of the accident, if they were made in the discharge of the regular duties of such employees and for the purpose of furnishing to their superiors information as to the accident itself and were not furnished merely as materials from which the solicitor of the company might make up a brief, and an officer of the company who has made an affidavit on production of documents, must, on his examination on such affidavit, answer questions as to whether such reports were made, who received them, and how they came to be made, and generally furnish such information concerning them that the Court may be in a position to decide, on a further motion, whether they are privileged or not. [Wooley v. North London Ry. Co. (1869), L.R. 4 C.P. 602; and Anderson v. Bank of British Columbia (1876), 2 Ch. D. 644, followed.] (2) If any of the information sought on such examination, and to which the plaintiff is entitled, is not within the knowledge of the deponent, he must ascertain the facts and give the information. [Harris v. Toronto Elec. Light Co. (1899), 18 P.R. (Ont.) 285, followed.] (3) That the names of some of the defendants' witnesses would be disclosed, if the questions were answered is not a sufficient reason for refusing to answer. [Marriott v. Chamberlain (1886), 17 Q.B.D. at p. 165, and Humphries v. Taylor (1888), 39 Ch.D. 693, followed.] (4) Questions as to whether reports had been sent in as to the condition of the locomotive before the accident, and as to repairs thereto, must also be answered.

Savage v. Can. Pac. Ry. Co., 15 Man. L.R. 401.

[Relied on in Bain v. Can. Pac. Ry. Co., 15 Man. L.R. 545.]

REPORTS OF OFFICIALS OF COMPANY RESPECTING ACCIDENTS.

(1) In an action for damages resulting from a railway accident, when negligence is charged, reports of officials of the company as to the accident made before the defendants had any notice of litigation, and in accordance with the rules of the company, are not privileged from production, although one of the purposes for which they were prepared was for the information of the company's solicitor in view of possible litigation. (2) The fact that the reports sought to be withheld were written on forms all headed, "For the information of the solicitor of the company and his advice thereon," is not sufficient of itself to protect them from production. (3) When the officer of the defendants who made the affidavit on production was cross-examined upon it and as a result made a second affidavit producing a number of documents for which he had claimed privilege in the first, the examination on the first affidavit may be used to contradict the statements in the second, although there was no further examination. (4) An affidavit on production cannot be contradicted by a

controversial affidavit; but, if from any source an admission of its incorrectness can be gathered, the affidavit cannot stand.

Savage v. Can. Pac. Ry. Co., 16 Man. L.R. 381.

Damages for accident—Reports—C.C.P. 334.

A company sued in damages on account of an accident may be compelled to produce at the trial all reports of the accident made by its employees in the ordinary course of their business, or of their duty, but not its reports made at the request or instance of its solicitor, in answer to inquiries made to the latter, with a view to and in contemplation of anticipated litigation.

Stocker v. Can. Pac. Ry. Co., 5 Que. P.R. 117.

Officer of railway company — Station agent — Section foreman — Chief clerk in office of general superintendent.

A station agent is an officer of a railway company within the meaning of Rule 201 and liable to be examined for discovery. A section foreman is not such an officer, nor is the chief clerk in the office of a general superintendent.

Eggleston v. C.P.R. Co. 5 Terr. L.R. 503.

Engineer in charge.

The word "manager" in Art. 286 C. C. P. may be interpreted as being the manager of the works, and in an action in damages for an accident the man who was in charge of the works when the accident took place can be examined on discovery on behalf of the victim of the accident.

Piti v. Atlantic, Quebec & Western Ry. Co., 10 Que. P.R. 162.

Medical examination before statement of defence.

An examination under Con. Rule 462 is an examination for discovery, and that rule must be applied in the same way as Con. Rule 442; and an order for the medical examination of the plaintiff, in an action where the liability is disputed, will not be made if opposed before the delivery of the statement of defence.

Burns v. Toronto Ry. Co., 13 O.L.R. 404.

Examination of officer of defendant company—Information not in personal knowledge of officer—Memorandum prepared by others —Refusal to vouch for accuracy—Duty of officer to investigate.

Fraser v. Can. Pac. Ry. Co., 4 W.L.R. 525 (Man.).

Officer of company—Engine driver.

An engine driver in the employment of a railway company is an officer thereof within the meaning of Con. Rule 439, and may be examined for discovery under the provisions of that rule. [Knight v. Grand Trunk Ry. Co. (1890), 13 P.R. (Ont.) 386, overruled. Leitch v. Grand Trunk Ry. Co. (1888), 12 P.R. (Ont.) 541, 671, (1890), 13 P.R. (Ont.) 369; Dawson v. London Street Ry. Co. (1898), 18 P.R. (Ont.) 223; and Casselman v. Ottawa, Arnprior & Parry Sound Ry. Co. (1898), 18 P.R. (Ont.) 261, considered and applied.]

Morrison v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 390, 4 O.L.R. 43.

[Reversed in 5 O.L.R. 38, 2 Can. Ry. Cas. 398; considered in Eggleston v. Can. Pac. Ry. Co., 5 Terr. L.R. 504; considered in Gordanier v. Can. North. Ry. Co., 15 Man. L.R. 5; followed in Ahrens v. Tanners' Assn., 6 O.L.R. 63.]

Officer of company—Engine driver.

On application for leave to examine an engine driver for discovery, under Con. Rule 439, as an officer of the defendants, in an action under R.S.O. 1897, c. 166, the Fatal Accidents Act:—Held, reversing 4 O.L.R. 43, 2 Can. Ry. Cas. 390, that, inasmuch as the engine driver never was in charge of the train, never assumed the duties of conductor, and never acted for the defendants in relation to the control of the train, so as to make him responsible to the defendants, except for the management of his engine, he was not an officer of the company examinable under that rule.

Morrison v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 398, 5 O.L.R. 38.

Former agent of company.

Where relevant information for discovery to the opposite party in a damage action is specially within the knowledge of the plaintiff company's former agent and not of their present manager, the Court may direct that the plaintiffs shall either produce the former agent for discovery, or in the alternative, that the plaintiff company's manager attend for further examination for discovery after having applied to the former agent for the information and thereupon disclose the information so obtained. [Bolckow v. Fisher, 10 Q.B.D. 161, distinguished.]

Ontario & Western Co-operative Fruit Co. v. Hamilton, G. & B. Ry. Co., 1 D.L.R. 485, 21 O.W.R. 82.

Accident reports—Employees.

A company examined on discovery by a plaintiff injured in a railway accident will be compelled to produce and file a report of such accident prepared by the company's employees (e.g., motorman or conductor) at the time of the accident when such report is required from them in the ordinary course of their duties; such report being a "document" within the meaning of C.C.P. 289. [Southwark v. Quick, 9 Ruling Cases 587, approved.]

Feigleman v. Montreal Street Ry. Co., 3 D.L.R. 125, 13 Que. P.R. 353. [Reversed in 7 D.L.R. 6, 22 Que. K.B. 102.]

Accident reports—Employees.

A document or statement of facts prepared by the employees of a company (e.g., conductors and motormen) at the request of the company and ostensibly for the use of the solicitors of the company in case of litigation is a privileged communication of which the adverse party cannot compel the production at an examination on discovery, notwithstanding that such report was made at a time when no litigation was contemplated and that it was only communicated to the solicitors of the company ten months after the accident. [Feigleman v. Montreal Street Ry. Co., 3 D.L.R. 125, reversed.]

Montreal Street Ry. v. Feigleman, 7 D.L.R. 6, 14 Que. P.R. 108, 19 Rev. Leg. 45, 22 Que. K.B. 102.

Accident reports—Employees.

A statement of facts prepared by the employees of a company at the request of the company is privileged although it were only a subterfuge on the part of the company to avoid disclosure of the facts of the action when it appears that the persons making the report prepared it under the impression that it was to be treated as confidential. [Southwark & Vauxhall Water Co. v. Quick, L.R. 3 Q.B.D. 315; Anderson v. Bank of British Columbia, L.R. 2 Ch.D. 644; Bondy v. Valois, 15 Rev. Leg. 63; Hunter

v. G.T.R., 16 P.R. (Ont.) 385, referred to; Collins v. London General Omnibus Co., 68 L.T. 831, followed; see also Swaisland v. G.T.R., 5 D.L.R. 750.]

Montreal Street Ry. v. Feigleman, 7 D.L.R. 6, 14 Que. P.R. 108, 19 Rev. Leg. 45, 22 Que. K.B. 102.

REPORTS OF RAILWAY COMMISSIONERS—AFFIDAVIT ON PRODUCTION.

Shapter v. Grand Trunk Ry. Co., 3 D.L.R. 877, 3 O.W.N. 1334.

PRELIMINARY EXAMINATION—OFFICER OF COMPANY.

It is not competent for the plaintiff in an action against a railway company for personal injuries to use the examination for discovery of an officer of the company for the purpose of contradicting an affidavit filed by such officer in his examination on a motion to require the production of certain reports to the company as to the happening of the accident which gave rise to the action made by its officials who had investigated the same, which affidavit was to the effect that such reports were made for the information of the company's solicitor and his advice thereon.

Swaisland v. Grand Trunk Ry. Co., 5 D.L.R. 750, 3 O.W.N. 960.

[Referred to in Montreal Street Ry. Co. v. Feigleman, 7 D.L.R. 6, 22 Que. K.B. 102.]

ACCIDENT REPORTS—OFFICER OF COMPANY.

In an examination of an officer of a railway company for discovery in an action against the company for personal injuries where a motion was made by the plaintiff to require the production by such officer of certain reports to the company as to the happening of the accident which gave rise to the action, made by its officials who investigated the same, an affidavit as to the privilege of the reports filed by the officer being examined, must clearly and specifically state that they were provided solely for the purpose of being used by the company's solicitor in any litigation which might arise out of such accident and in the absence of such clear and specific statement a further and better affidavit will be directed to be filed.

Swaisland v. Grand Trunk Ry. Co., 5 D.L.R. 750, 3 O.W.N. 960.

[Referred to in Montreal Street Ry. Co. v. Feigleman, 7 D.L.R. 6, 22 Que. K.B. 102.]

ACCIDENT REPORTS—OFFICER OF COMPANY.

Where the plaintiff in an action against a railway company for personal injuries moved, in the examination of an officer of the company for discovery, to have produced certain reports to the company as to the happening of the accident which gave rise to the action made by its officials who investigated the same, there is no right under the practice established in discovery proceedings to cross-examine upon an affidavit filed by the officer being examined if such reports were made for the information of the company's solicitor and his advice thereon.

Swaisland v. Grand Trunk Ry. Co., 5 D.L.R. 750, 3 O.W.N. 960.

[Referred to in Montreal Street Ry. Co. v. Feigleman, 7 D.L.R. 6.]

ACCIDENT REPORTS—OFFICER OF COMPANY.

In an examination of an officer of a railway company for the purpose of discovery in an action against the company for personal injuries, a motion to require the company to produce reports of its employees as to the accident which gave rise to the action, is answered by an affidavit made by another officer that such reports stated on their face that they were made only for the information of the company's solicitor and his advice thereon, and such affidavit is conclusive on the question of privilege as far as the motion proceedings are concerned, unless it can be shewn from the documents produced or from the admissions in the pleadings or by the party himself that the affidavit is either untrue or has been made under a misapprehension of the legal position. [Savage v. Can. Pac. Ry. Co., 16 Man. L.R. 376, specially referred to.]

Swaisland v. Grand Trunk Ry. Co., 5 D.L.R. 750, 3 O.W.N. 960.

[Referred to in Montreal Street Ry. Co. v. Feigleman, 7 D.L.R. 6.]

Accident reports—Officer of company.

In an examination of an officer of a railway company in an action against the company for personal injuries on a motion to require the production of certain reports of the company as to the happening of the accident in which the action was based, made by the company's officials who investigated the same, an affidavit filed by the officer being examined as to the privileged character of such reports, must set forth and so clearly identify such reports and give names of the officials investigating the accident so that there will be no difficulty in procuring the conviction of the deponent for perjury should it afterwards appear that his affidavit was untrue.

Swaisland v. Grand Trunk Ry. Co., 5 D.L.R. 750, 3 O.W.N. 960.

[Referred to in Montreal Street Ry. Co. v. Feigleman, 7 D.L.R. 6, 22 Que. K.B. 102.]

Accident reports—Officials of company.

In an action for damages in a railway accident, reports made by officials of defendant railway company relative to the accident admitted by a district superintendent of the company upon his examination for discovery to be in its custody or power, such reports being made in regular routine as in all such accidents and not for the purpose of the defence of the action at bar nor with reference to any particular action, though perhaps in anticipation of possible future actions, must be produced for inspection upon an examination for discovery, under Alberta Rules 207, 212, 215, and Eng. O. 31, Rule 19a (2) of 1893 in force in Alberta. [Cook v. North Metropolitan Tramway Co., 6 Times L.R. 22, followed; R. v. Greenaway, 7 Q.B. 126; Phipson on Evidence, 4th ed., p. 413, referred to.]

Stapley v. Can. Pac. Ry. Co., 6 D.L.R. 97, 22 W.L.R. 1.

[Varied in 6 D.L.R. 180, 22 W.L.R. 85.]

Inspection of Documents—Privilege.

Where, on an application in Alberta for an order for inspection of documents, privilege is claimed for any document, the Judge applied to should not order the inspection of such document without first exercising his power under the Supreme Court Rules to inspect it himself, in order to see whether the claim for privilege is well founded.

Stapley v. Can. Pac. Ry. Co. (No. 2), 6 D.L.R. 180, 22 W.L.R. 85.

Inspection of Documents—Privilege.

The object of the provision in the Alberta Supreme Court Rules, permitting the Court to inspect any document, for which privilege is claimed upon an application for an order for inspection, is to get rid of the fetters imposed by the old practice, and to give power to determine at once whether the objection sought to be raised is well founded. [Ehrmann v. Ehrmann (No. 2), [1896] 2 Ch. 826, referred to.]

Stapley v. Can. Pac. Ry. Co. (No. 2), 6 D.L.R. 180, 22 W.L.R. 85.

INSPECTION OF DOCUMENTS—PRIVILEGE.

An affidavit on production is conclusive, and must be accepted as true by the opposite party, not only as regards the documents that are or have been in the possession of the party making production, and their relevancy, but also as to the grounds stated in support of any claim for privilege from production, subject, however, to the provisions of a rule of Court whereby the Court is authorized to judicially determine the question of privilege upon inspection of the document. [Stapley v. C.P.R. (No. 1), 6 D.L.R. 97, varied on appeal.]

Stapley v. Can. Pac. Ry. Co. (No. 2), 6 D.L.R. 180, 22 W.L.R. 85.

INTERROGATORIES OR DEPOSITIONS—EXAMINATION OF FOREIGN DEFENDANT ON COMMISSION—CON. RULE 477—PAYMENT OF CONDUCT MONEY TO BRING DEFENDANT TO ONTARIO.

Allen v. Grand Valley Ry. Co., 1 D.L.R. 903.

PRODUCTION OR INSPECTION OF DOCUMENTS—ACTION ON JUDGMENT—INQUIRY AS TO PROPERTY OF JUDGMENT DEBTORS—COMPANY—PRODUCTION OF MINUTE BOOKS AND ACCOUNTS.

Carry v. Toronto Belt Line Ry. Co., 1 D.L.R. 908, 3 O.W.N. 751.

FURTHER AFFIDAVIT ON PRODUCTION—INSUFFICIENT MATERIAL—INSPECTION OF CAR.

Ramsay v. Toronto Ry. Co., 4 O.W.N. 420, 23 O.W.R. 513.

COSTS OF DEPOSITIONS—UNNECESSARY EXAMINATION FOR DISCOVERY.

An application by defendants for a fiat to tax the costs of examining for discovery a person out of the jurisdiction will be refused where it appears that by the examination of that person the defendants obtained no material discovery that they had not already obtained from other witnesses, that no part of the examination was used at the trial nor did defendants apply for leave to use it, but, instead, they brought in that person as a witness on the trial, although the examination may have been sought to disclose and did disclose that the witness in question could give material evidence for the defendants.

Winnipeg v. Winnipeg Elec. Ry. Co., 9 D.L.R. 399.

OFFICER OF CORPORATION—DUTY TO ASCERTAIN FACTS PRIOR TO EXAMINATION—LOCOMOTIVE FOREMAN.

An officer of a company attending to be examined for discovery must acquaint himself with the facts that are not within his personal knowledge by enquiring from other officers, servants or agents who have, in their respective capacities, acquired such knowledge. A locomotive foreman of a railway company is an officer for the purpose of examination.

Giddings v. Can. Northern Ry. Co., 12 S.L.R. 381.

DISCRIMINATION (UNJUST).

See Cars; Tolls and Tariffs.

DRAINAGE.

Constitutionality of provincial statute regulating ditches forming part of railway works, see Constitutional Law.

Annotation.

Railway lands brought under Drainage Acts, approval of drainage plans and appeals from assessment for drainage. 16 Can. Ry. Cas. 249.

Construction of drain—Powers of council as to additional necessary works.

Where a municipal by-law authorized the construction of a drain, benefiting lands in an adjoining municipality which was to pass under a railway, where it was apparent that a culvert to carry off the water brought down by the drain and prevent the flooding of adjacent lands would be an absolute necessity, the construction of such culvert was a matter within the provisions of s. 573 of the Municipal Act (R.S.O. 1887, c. 184), and a new by-law authorizing it was not necessary. Taschereau, J., dissenting. 22 A.R. (Ont.) 330, affirming 25 O.R. 465, reversed.

Can. Pac. Ry. Co. v. Township of Chatham, 25 Can. S.C.R. 608.

[Leave to appeal to Privy Council refused. Distinguished in East Gwillimbury v. King, 20 O.L.R. 510.]

Higher and lower lands—Drainage.

Lands of railways under the jurisdiction of the Parliament of Canada are subject, in the Province of Quebec, to Art. 501, C.C. (Que.), and are bound to receive water flowing naturally from higher lands. A ditch on the line between two higher lands, required by the needs of cultivation, is not an aggravation of the servitude of the flow of the water, although it thus receives the water from the two higher lands and ends on the lower land of the railway company. If the company dams the ditch where it reaches its land, it will be liable in damages and will be ordered to remove the obstruction and allow the water to come on its land. The company made a ditch on each side of its road. For want of sufficient slope the water remained stagnant, making the adjoining lands wet and hindering their cultivation:—Held, that the company was liable in damages to the owners of such adjoining lands. The first paragraph of s. 196 of the Railway Act, 1903, does not apply to railways actually constructed when it was passed, and only the Railway Committee—not the present Board—can order the company owning such a railway to construct works for conducting water which it is bound to receive on its land or to give a greater slope to its ditches.

Langlais v. Grand Trunk Ry. Co., 26 Que. S.C. 511.

[Affirmed by Court of King's Bench, 30th May, 1905.]

Purposes of railway efficiency—Dangers of injury by water.

When a system of drainage established upon the construction of the railway is subsequently found to be insufficient, improvments may be made therein, and such further drainage works executed as will assist in keeping the railway in efficient condition and relieve it from danger of injury by water. For this purpose the company may avail itself of the power contained in the Railway Act, 1903, s. 118 (m), to make drains into or through lands adjoining the railway and the lands of others as far as may be reasonably necessary to effect the purpose for which they are constructed. Naturally such drainage works must be adapted to the formation of the lands requiring to be drained without regard to the ownership of the particular strips or parcels of land through which it is necessary to carry them. In such cases ownership should not be treated as an element in determining whether or not any particular lands are "lands adjoining the railway."

Can. Pac. Ry. Co. v. Murphy, 5 Can. Ry. Cas. 477.

Filling of culvert—Cattle pass—Substituting drainage pipe.

In an action against the defendants for damages for filling up a culvert used as a cattle pass under the defendants' embankment and substituting a drainage pipe, the plaintiff claimed the right to have the culvert maintained at its full size under an agreement made at the time of construction, providing that the flow of the waters of a certain drain upon the lands to be crossed by the railway should not be interfered with, that he had acquired an easement by prescription and that under s. 257 of the Railway Act, 1906, the defendants could not fill in the culvert without leave of the Board:—Held (1), that the defendants had the right to substitute any other means of drainage to enable the water to flow through the drain mentioned in the agreement. (2) That no easement by prescription had been acquired. [Can. Pac. Ry. Co. v. Guthrie, 31 Can. S.C.R. 155, 1 Can. Ry. Cas. 9, followed.] (3) That s. 257 of the Railway Act did not apply.

Oatman v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 521, 2 O.W.N. 21.

Irrigation works—Duty to protect highway crossings.

S. 37 of North-West Irrigation Act, 61 Vict. (Can.) c. 35, providing that any person or company constructing an irrigation works should during such construction keep open for safe and convenient travel "all public highways theretofore publicly traveled as such," when they are crossed by such works, and shall, before the water is diverted into, conveyed or stored by any such works, extending into or crossing such highway, construct, to the satisfaction of the Minister of the Interior, a substantial bridge, not less than a certain number of feet in breadth, with proper and sufficient approaches thereto, over such works, and always thereafter maintain every such bridge and approaches thereto, has, of course, no application to road allowances as in its own words it deals only with "all public highways theretofore publicly traveled as such."

Rex v. Alberta Ry. & Irrigation Co., 7 D.L.R. 513, [1912] A.C. 827.

Jurisdiction—Approval.

By s. 251 of the Railway Act, 1906, before drainage works can be constructed on railway lands, the Board must be satisfied that the proposed works are sufficient and proper for railway operation and for the safety of the traveling public, and must approve the plans of such works.

Tilbury v. Grand Trunk Ry. Co., 16 Can. Ry. Cas. 246.

Jurisdiction—Approval—Assessment—Surface water.

Under s. 250 of the Railway Act, 1906, the only matter open to the Board is to approve of the character of the drainage work on the railway property having regard to its sufficiency for railway operation, and the safety of the traveling public. Ordinarily, the Board does not interfere with an assessment under a by-law passed in accordance with the appropriate Act, and has no jurisdiction to do so, except where there are special circumstances. In this case, the works for carrying the water under the railway cost $2,191.09, and were executed by the railway company. As the railway had interfered with the culverts, which formerly carried the water, so as to lessen their capacity, and it was estimated that it would cost about $250 each to repair the culverts, the total cost which the municipality had to pay for these works was fixed at $1,600.

Humberstone v. Grand Trunk Ry. Co., 17 Can. Ry. Cas. 316.

Conveyance of land—Release from damages.

A general clause of release from damages in a conveyance of lands taken for railway purposes does not relieve the railway company from the obligation imposed on it by s. 250 (2) (b) of the Railway Act, 1906, to provide means of drainage under the railway for the adjacent lands.

Denholm v. Guelph & Goderich Ry. Co., 17 Can. Ry. Cas. 318.

[Distinguished in Department of Agriculture v. Grand Trunk Ry. Co., 23 Can. Ry. Cas. 77.]

Drainage works—Construction—Reasonable exercise of powers—Adjoining landowner.

Where no negligence has been shewn on the part of the railway company in carrying out the construction of drainage works, and the damage, if any, is due solely to reasonable exercise by the company of the powers conferred upon it, the owner of adjoining lands cannot recover compensation. Such an injury should have been foreseen and compensation claimed for it under the statute at the time the railway was constructed. Under the circumstances, the cost of lowering a railway culvert after construction to provide better drainage should be borne by the adjoining landowner. [Wallace v. Grand Trunk Ry. Co., 16 U.C.R. 551; Knapp v. Great Western Ry. Co., 6 U.C.C.P. 187; Nicol v. Canada Southern Ry. Co., 40 U.C.R. 583; L'Esperance v. Great Western Ry., 14 U.C.R. 173, followed; Denholm v. Guelph & Goderich Ry. Co., 17 Can. Ry. Cas. 318, distinguished.]

Department of Agriculture for Canada v. Grand Trunk Ry. Co. (Farnham Drainage Case), 23 Can. Ry. Cas. 77.

Obstruction of drains and ditches—Inundation—Railway Board.

Although s. 250 of the Railway Act, 1906, gives exclusive jurisdiction to the Board to compel a company to make drainage works deemed necessary, one who suffers damages on account of the negligence of a railway company to carry out drainage works which the law required is not compelled to apply to the Board to have the works declared insufficient, before claiming damages in the civil Courts. The compensation for expropriation granted to an owner of land under cultivation for all damages which he might suffer on account of the construction and laying out of a railway only covers damages which result from the construction of the railway, under the conditions provided for by the Act, and not those which result from the culpable negligence of the company to maintain ditches and drains sufficient to drain the lands divided by the construction of the way.

Can. Northern Quebec Ry. Co. v. Desmarais, 27 Que. K.B. 509.

EASEMENTS.

See Right of Way; Farm Crossings.

Dominant and servient tenements.

When the ownership of the dominant and servient tenements is united the servitude is extinct by confusion unless the relation of common servitude between the two parcels is maintained by the owner through a written instrument declaring his intention therefor.

Rosaire v. Grand Trunk Ry. Co., 42 Que. S.C. 517.

EJECTION FROM TRAINS.

See Street Railways; Carriers of Passengers.

Expulsion from car for nonpayment of fare, see Street Railways; Carriers of Passengers.

Ejection for noncompliance with requirements respecting tickets, see Tickets and Fares.

Expulsion of drunken passenger, see Carriers of Passengers.

ELECTRICITY.

See Telephones; Street Railways; Wires and Poles.

ELECTRIC RAILWAYS.

See Street Railways; Train Service.

EMBANKMENTS.

Embankment causing additional servitude, see Expropriation.

Injury to property by construction of embankment.

F. brought an action on the case against the G.T. Ry. Co. for having been deprived of access from his property to the street by the building of an embankment. The defendants claimed that the work was done by the P. & C. Lake Ry. Co. who were the parties, if any, liable to plaintiff:—Held, affirming the judgment of the Court of Appeal for Ontario and of the Divisional Court, that the evidence established the liability of the defendants.

Grand Trunk Ry. Co. v. Fitzgerald, 19 Can. S.C.R. 359.

Embankment causing flood—Obstruction to ingress and egress—Trespass—Continuing damage.

In 1888 the Canada Atlantic Ry. Co. ran their line through a street, in connection with which they built an embankment and raised the level of the street. In 1895 the plaintiffs became owners of land on said street on which they have since carried on their business. In 1900 they brought an action against the Canada Atlantic Ry. Co. alleging that the embankment was built and level raised unlawfully and without authority and claiming damages for the flooding of their premises and obstruction to their ingress and egress in consequence of such work:—Held, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the property might have taken an action in which the damages would have been assessed once for all. His right of action being barred by lapse of time when the plaintiff's action was taken the same could not be maintained.

Chaudière Machine & Foundry Co. v. Canada Atlantic Ry. Co., 2 Can. Ry. Cas. 306, 33 Can. S.C.R. 11.

[Followed in Anctil v. Quebec, 33 Can. S.C.R. 349; referred to in Bureau v. Gale, 36 Que. S.C. 88; Clair v. Temiscouata Ry. Co., 37 N.B.R. 621; distinguished in Westholm Lumber Co. v. Grand Trunk Pacific Ry. Co., 25 Can. Ry. Cas., 41 D.L.R. 42.

Riparian rights—Access to harbour—Construction of embankment.

Application by landowners that in case the respondents' plans were filed for approval, authorizing the respondent to construct a solid embankment across the entrance to Market Cove the rights of the parties located thereon should be protected. The respondent had already by the construction of a solid embankment cut off all access from the Harbour of Prince Rupert to all points around the Cove or Bay:—Held (1), that these applicants by taking leases of lots abutting on the Cove acquired access to the water and riparian rights. (2) That the statement of the respondent when withdrawing the location plans that the embankment was constructed on their own lands was untrue, but even if the respondent had title to the said lands it had no right to construct its railway without approval of the route map by the Minister and the location plans by the Board. (3) That the applicants' lands and business had been damaged and injured by the wrongful and illegal acts of the respondent. (4) That there was no necessity for the embankment and no reason existing why a means of access inward and outward should not have been left. (5) That the respondent must leave an opening in the embankment at least 30 feet wide.

Rochester v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 421.

[Affirmed in 15 Can. Ry. Cas. 306.]

Construction and operation—Railway crossing—Subway—Contribution.

The C.N.O. Ry. crossed under the line of the G.T. Ry. by means of a subway. Subsequently the C.L.O. & W. Ry. obtained authority from the Board to cross the C.N.O. Ry., using for that purpose the embankment of the same subway:—Held, that the C.N.O. Ry. was not entitled to receive any contribution from the C.L.O. & W. Ry. towards the expense it had already incurred in making the embankment.

Campbellford, Lake Ontario & Western Ry. Co. v. Can. Northern Ontario Ry. Co., 14 Can. Ry. Cas. 220.

EMBARGO.

See Cars.

EMINENT DOMAIN.

See Expropriation.

EMPLOYEES.

A. In General; Wages; Insurance.
B. Injuries to Employees; Workmen's Compensation.
C. Safety as to Place and Appliances.
D. Signals and Warnings.
E. Health Protection.
F. Licensee; Trespasser; Free Pass.
G. Assumption of Risk; Volens.
H. Negligence of Fellow-Servant.
I. Duty of Care; Contributory Negligence.
J. Rules and Orders.
K. Limitation of Liability.
L. Independent Contractor.
M. Injuries by Employees.
N. Sufficiency of Jury Findings.

See Limitation of Actions; Negligence.

Measure of damages and compensation, see Damages.

Injuries to employees on Government railways, see Government Railways.

Constitutionality of statute prohibiting agreements exempting employers from liability for negligence, see Constitutional Law.

Regulation of safety of employees, see Railway Board.

Employees' patents of inventions, see Patents and Inventions.

Injuries to employees of telegraph or telephone companies, see Telegraphs; Telephones; Wires and Poles.

Injury to brakeman by overhead bridge, see Bridges.

Regulation of section men, see Railway Board.

Annotations.

Master and Servant; Workman's Compensation Act; Notice of Injury; Waiver of Notice; Evidence; Res Gestae. 1 Can. Ry. Cas. 448.

Lord Campbell's Act as arising between master and servant, and the effect of a release by employee. 2 Can. Ry. Cas. 501.

Injuries growing out of the relationship of Master and Servant. 2 Can. Ry. Cas. 365.

Effect of release by employee exempting employer from liability for negligence. 3 Can. Ry. Cas. 173.

Fellow-servant as affected by Workmen's Compensation Act. 4 Can. Ry. Cas. 250.

Liability of master for tortious acts of servant in course of employment. 4 Can. Ry. Cas. 240, 4 Can. Ry. Cas. 408.

Government regulation of railway companies respecting agreements exempting employers from liability for negligence. 5 Can. Ry. Cas. 15.

Appliances for coupling and connecting cars. 18 Can. Ry. Cas. 250.

A. In General; Wages; Insurance.

Workmen's compensation—Provincial regulation of railway employment.

Dominion railways are subject to provincial legislation on the relations between master and servant, such as the Workmen's Compensation for Injuries Act, unless the field had been covered by Dominion legislation ancillary to Dominion legislation respecting railways under the jurisdiction of Parliament, and subs. 4 of s. 306 of the Railway Act, 1906, qualifies its main clause and excludes its operation where the injury complained of comes within the jurisdiction of, and is specially dealt with by the laws of the province in which it takes place, provided such laws do not encroach upon Dominion powers. [C.P.R. v. Roy, [1902] A.C. 220, distinguished. Canada Southern v. Jackson, 17 Can. S.C.R. 325, followed.]

Sutherland v. Can. Northern Ry. Co., 13 Can. Ry. Cas. 495, 21 Man. L.R. 27.

Termination of employment—Length of notice.

Where a railway conductor had been employed continuously for twelve years by the same railway company and the practice of the company had been not to dismiss employees of that grade in their service without holding an official enquiry, it may be assumed, in the absence of any contract to the contrary, that he should have a reasonable notice of the termination of his engagement other than for cause, and damages for wrongful dismissal are properly computed on the basis of the conductor being entitled to three months' notice.

Halliday v. Can. Pac. Ry., 7 D.L.R. 198, 15 Can. Ry. Cas. 275.

Contract of employment—Authority of foreman.

A railway company is not liable to an employee as for breach of an agreement by its foreman to allow such employee, as pay for his services and in addition to per diem wages, to cut hay growing on the company's premises, where the wages proper agreed upon were at the maximum rate which the foreman, who employed him, was authorized to allow, and where there was no shewing that the foreman was authorized to bind the company by the agreement respecting the hay, though it was his duty to see that the hay was removed.

Cleveland v. Grand Trunk Ry. Co. (Ont.), 11 D.L.R. 118, 15 Can. Ry. Cas. 165.

Employment obtained by infant misrepresenting his age—Whether this constitutes "serious and wilful misconduct"—Release signed by infant.

The making of a false representation by an infant to the effect that he is of full age in order to secure employment is not such "serious and wilful misconduct or serious neglect" as disentitles the applicant to recover under the Workmen's Compensation Act, 1902, it not appearing that the accident in question was "attributable solely" to such misrepresentation. An infant having been injured in the course of employment so obtained, signed a release, but subsequently tendered repayment of the consideration for the release:—Held, that this was not a bar to his recovering.

Darnley v. Can. Pac. Ry. Co., 14 B.C.R. 15.

Employees engaged in manual labour—Conductors and motormen—lien for wages.

Motormen and conductors on electric tramways and teamsters who haul the materials, remove the snow, etc., for these tramways are "employees of railways engaged in manual labour" within the meaning of par. 9 of art. 2009 C.C. (Que.). These employees have a lien on the tramway and its appurtenances for three full months' wages without regard to the date of seizure or of the sale that may be made of it.

Paquet v. New York Trust Co., 15 Que. K.B. 179, reversing 28 Que. S.C. 178.

[Followed in Rousseau v. Toupin, 32 Que. S.C. 232.]

Insurance of railway employees—Unreasonable conditions.

It is a reasonable regulation, and not contrary to good morals and public order, for an association organized to insure the employees of a designated railway company against injury or death, to provide by by-law that it will pay but one-half of the amount due on the death or injury of a member caused by the default of the railway company, unless any action brought therefor against such railway company shall first be formally dismissed or withdrawn.

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

[Referred to in Cousins v. The Brotherhood, etc., 6 D.L.R. 26, 42 Que S.C. 110.]

Insurance societies—Demand of benefits.

The exhibition of a certificate of membership in a mutual association organized to insure the employees of a railway company against death or injury, to the secretary-treasurer of the association, and an offer by the latter to pay the amount due thereon, if, as required by a by-law of the association, a release was furnished of all claim against the railway company for causing the death of a member, and the giving by that officer of a printed receipt to that effect constitute a sufficient demand of payment.

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

[Referred to in Cousins v. Brotherhood, etc., 6 D.L.R. 26, 42 Que S.C. 110.]

B. Injuries to Employees; Workmen's Compensation.

(See also A. on p. 233.)

Liability of master—Conflict of laws.

Liability for tort is governed by the lex loci actus, and, in an action by an employee against his employer arising out of a personal injury, is not affected by the laws of the place where the contract of lease and hire of work was made. Hence when a railway company running trains in both the Provinces of Ontario and Quebec hired one of its servants in Quebec, and he was injured through the fault of the company in Ontario, his claim for compensation is governed by the law of the latter province. [Dupont v. Quebec Steamship Co., 11 Que. S.C. 188; Lee v. Logan, 31 Que. S.C. 469 and 39 Que. S.C. 311; Albouze v. Temiskaming Navigation Co., 38 Que. S.C. 279, referred to.]

Marleau v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 149, 38 Que. S.C. 394. [Reversed in part 21 Que. K.B. 269, 14 Can. Ry. Cas. 284.]

Conflict of laws—Liability of master.

Common-law liability, in cases involving delict or quasi delict, is governed by the lex loci regit actum. Hence workmen hired in Quebec to be employed in Quebec and Ontario, who are injured by the positive act or by the fault of their employers in the latter province, have no remedy except under the provisions of its laws. When the evidence shews that the foreign law does not admit of the remedy relied upon by the plaintiff, and upon which a verdict has been given in his favour by the jury, he must be nonsuited, non obstante veredicto, a new trial being ineffective. [Marleau v. Grand Trunk Ry. Co., 38 Que. S.C. 394, 12 Can. Ry. Cas. 149, reversed in part.]

Grand Trunk Ry. Co. v. Marleau, 14 Can. Ry. Cas. 284, 21 Que. K.B. 269.

Injury resulting in death—Claim of widow—Prescription.

The husband of respondent was injured while engaged in his duties as appellants' employee, and the injury resulted in his death about fifteen months afterwards. No indemnity having been claimed during the lifetime of the husband, the widow, acting for herself as well as in the capacity of executrix for her minor child, brought an action for compensation within one year after his death:—Held, reversing the judgment of the Superior Court, and the Court of Queen's Bench for Lower Canada (appeal side) (Fournier, J., dissenting), (1) that the respondent's right of action under art. 1056, C.C. (Que.) depends not only upon the character of the act from which death ensued, but upon the condition of the decedent's claim at the time of his death, and if the claim was in such a shape that he could not then have enforced it, had death not ensued, the article of the code does not give a right of action, and creates no liability whatever on the person inflicting the injury. (2) That as it appeared on the record that the plaintiff had no right of action, the Court would grant the defendant's motion for judgment non obstante veredicto. Art. 433, C.C.P. (3) That at the time of the death of the respondent's husband all right of action was prescribed under art. 2262, C.C. (Que.), and that this prescription is one to which the tribunals are bound to give effect, although not pleaded. Arts. 2267 and 2188, C.C. (Que.). [M.L.R. 6 Q.B. 118, M.L.R. 5 S.C. 225, reversed.]

Can. Pac. Ry. Co. v. Robinson, 19 Can. S.C.R. 292.

[Reversed in [1892] A.C. 481; distinguished in The Queen v. Grenier, 30 Can. S.C.R. 42; applied in Re Aird, 28 Que. S.C. 238; Grand Trunk Ry. Co. v. Miller, 34 Can. S.C.R. 58; Lavoie v. Beaudoin, 14 Que. S.C. 253; Zimmer v. Grand Trunk Ry. Co., 19 A.R. (Ont.) 693; considered in De Laval Separator Co. v. Walworth, 13 B.C.R. 76; R. v. Union Colliery Co., 7 B.C.R. 251; followed in Miller v. Grand Trunk Ry. Co., [1906] A.C. 187; Robillard v. Wand, 17 Que. S.C. 474; Walkerton v. Erdman, 23 Can. S.C.R. 362; referred to in Canada Newspaper Syndicate v. Gardner, 32 Que. S.C. 454; Can. Pac. Ry. Co. v. Lachance, 42 Can. S.C.R. 205; Gosselin v. The King, 33 Can. S.C.R. 264; Ikezoya v. Can. Pac. Ry. Co., 12 B.C.R. 456; Miller v. Grand Trunk Ry. Co., 21 Que. S.C. 351, 362; Warboys v. Lachine Rapids Hydraulic Land Co., 22 Que. S.C. 542; applied in Montreal v. McGee, 30 Can. S.C.R. 586; Montreal Street Ry. Co. v. Brialofsky, 19 Que. K.B. 338; discussed in Grand Trunk Ry. Co. v. Miller, 12 Que. K.B. 11; followed in Dupuis v. Can. Pac. Ry. Co., 12 Que. S.C. 195; Grenier v. The Queen, 6 Can. Ex. 297; Griffith v. Harwood, 9 Que. Q.B. 306; Thibault v. Vanier, 11 Que. S.C. 495; referred to in Ordman v. Walkerton, 20 A.R. 444; Martial v. The Queen, 3 Can. Ex. 127; British Columbia Elec. Ry. Co. v. Turner, 18 Can. Ry. Cas. 133, 18 D.L.R. 430.]

ACCIDENT TO EMPLOYEE—PERFORMANCE OF DUTY—CONTRIBUTORY NEGLIGENCE.

J., a switch tender of the C.S. Ry. Co., was obliged, in the ordinary discharge of his duty, to cross a track in the station yard to get to a switch, and he walked along the ends of the ties, which projected some sixteen inches beyond the rails. While doing so an engine came behind him and knocked him down with his arm under the wheels and it was cut off near the shoulder. On the trial of an action against the company in consequence of such injury the jury found that there was negligence in the management of the engine in not ringing the bell and in going faster than the law allowed. They also found that J. could not have avoided the accident by the exercise of reasonable care:—Held, that the Workmen's Compensation for Injuries Act of Ontario, 49 Vict. c. 28, applies to the C.S. Ry. Co., notwithstanding it has been brought under the operation of the Government Railways Act of the Dominion:—Held, also, Gwynne and Patterson, JJ., dissenting, that there was no such negligence on J.'s part as would relieve the company from liability for the injury caused by improper conduct of their servants and the judgment of the Court below sustaining a verdict for the plaintiff was right, therefore, and should be affirmed.

Canada Southern Ry. Co. v. Jackson, 17 Can. S.C.R. 316.

[Considered in Wallman v. Can. Pac. Ry. Co., 16 Man. L.R. 92; discussed in Washington v. Grand Trunk Ry. Co., 24 A.R. (Ont.) 183; referred to in Atcheson v. Grand Trunk Ry. Co., 1 O.L.R. 168; Crawford v. Tilden, 13 O.L.R. 169; relied on in Can. Pac. Ry. Co. v. Boisseau, 11 Que. K.B. 415; Can. Pac. Ry. Co. v. The King, 39 Can. S.C.R. 497; McMullin v. Nova Scotia Steel & Coal Co., 39 Can. S.C.R. 607; Re Railways Act, 36 Can. S.C.R. 151.]

INJURY BY WEEDS GROWING ON TRACKS.

For a railway company to permit grass and weeds to grow on a side track is not such negligence as will make it liable to compensate an employee who is injured in consequence of such growth while on the side track in the course of his employment. 6 B.C.R. 561 affirmed.

Wood v. Can. Pac. Ry. Co., 30 Can. S.C.R. 110.

[Applied in Hill v. Granby Consol. Mines, 12 B.C.R. 125; Jamieson v. Harris, 35 Can. S.C.R. 639; referred to in Canada Woolen Mills v. Traplin, 35 Can. S.C.R. 448; Center Star v. Rossland Miners' Union, 11 B.C.R. 205; Warmington v. Palmer, 8 B.C.R. 349.]

INJURY TO CONDUCTOR—PERSON IN CHARGE—MOTORMAN—WORKMEN'S COMPENSATION ACT.

The motorman of an electric car may be a "person who has charge or control" within the meaning of s. 3 of the Workmen's Compensation Act

(R.S.O. [1897] c. 160), and if he negligently allows an open car to come in contact with a passing vehicle whereby the conductor, who is standing on the side in discharge of his duty, is struck and injured, the electric company is liable in damage for such injury. Judgment of the Court of Appeal (Snell v. Toronto Ry., 27 A.R. (Ont.) 151), affirmed.

Toronto Ry. Co. v. Snell, 31 Can. S.C.R. 241.

Servant's duty—Contributory negligence—Employers' Liability Act.

F., a conductor and brakeman in the employ of the defendants company, while turning the brake wheel fell from his train and was run over and killed. The nut which fastens the brake wheel to the brake mast, and which should have been on, was not on, and so the wheel came off and the accident resulted. It was the duty of the deceased to examine the cars of the train and see that they were in good order before leaving the station which the train was just leaving:—Held, affirming Irving, J., in an action by F.'s personal representatives, to recover damages in respect of death, that it was F.'s own neglect in not seeing that the brake was in a secure condition, and that there was therefore no case for the jury. 8 B.C.R. 393, affirmed.

Fawcett v. Can. Pac. Ry. Co., 32 Can. S.C.R. 721.

[Referred to in Deyo v. Kingston & Pembroke Ry. Co., 8 O.L.R. 588.]

Employment accident laws—Benefits.

When s. 2 of c. 66, 9 Edw. VII. relating to employment accidents, allows to an employee an income in a case when he receives an injury during his employment, which injury carries with it a permanent partial incapacity, it is on condition that his professional capacity would decrease, and be lasting in reduction of his salary. It is this reduction of salary that should be the basis of figuring the income to which the employee will have a right, income which will amount to one-half the reduction in salary which he suffered through the accident. This essential condition required by law will not apply when, after the accident, the plaintiff voluntarily renewed his employment with the same salary as he received before the accident. In such circumstances, he will find that s. 2 of the above Act is, by voluntary act of the plaintiff, rendered inapplicable, and that, in the present state of the legislation, he has no right to any income.

Cater v. Grand Trunk Ry. Co., 18 Rev. de Jur. 27.

Workmen's Compensation Act—Review of arbitrator's finding.

An arbitrator under the Workmen's Compensation Act, 1902, s. 2, subs. (3) having jurisdiction to settle any question as to whether the employment is one to which the Act applies:—Held, Irving, J.A., dissenting, that the only way to review the arbitrator's finding thereon is by a case submitted under s. 4 of the second schedule. Per Morrison, J., on the motion to set aside the award of the arbitrator:—The work of clearing land from the natural growth thereon is not a work of construction, alteration or repair meant by the Act to be termed an engineering work.

Basanta v. Can. Pac. Ry. Co., 16 B.C.R. 304, 18 W.L.R. 353.

Workmen's compensation—Death of brakesman—Right of mother.

A brakesman who, though forbidden by a superior official, jumps on a train and is killed, is not the victim of an accident happening in the course of his employment. Moreover, his fault is inexcusable and makes the accident one intentionally produced by himself. The mother of a workman killed by an accident in course of his employment, who has remarried and lives with her husband cannot claim that the victim had been her sole support, and, therefore, is not entitled to the recourse given by the Act respecting Accidents to Workmen to the ascendants in such case.

Jetté v. Grand Trunk Ry. Co., 40 Que. S.C. 204 (Sup. Ct.).

Death while handling dynamite—Workmen's compensation—Common employment.

The death of the deceased was caused by carelessness and ignorance in the handling of dynamite by the deceased and a fellow workman named Anderson employed by the roadmaster of the defendants to look after the work. Anderson and White were not competent persons to be so employed, and the roadmaster was aware that they were not:—Held (1), the plaintiffs could not recover under Lord Campbell's Act, because the roadmaster was a fellow workman with the deceased. (2) The plaintiffs were entitled to recover damages under the Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, because, by the jury's findings, the death was caused by reason of the negligence of a person in the service of the employer who had superintendence entrusted to him, whilst in the exercise of such superintendence: Paragraph (b) of s. 3. [Dominion Natural Gas. Co. v. Collins, [1909] A.C. 440, 79 L.J.P.C. 16, followed as to the duty of those who cause others to handle specially dangerous things.]

White v. Can. Northern Ry., 20 Man. L.R. 57.

Injury to brakeman—Struck by switchstand—Finding of jury.

Leitch v. Pere Marquette Ry. Co., 2 O.W.N. 617, 18 O.W.R. 433.

Employers' Liability Act—Common employment—Negligence in operating railway in mine—Contributory negligence—Statutory obligation.

Bell v. Inverness Coal & Ry. Co., 4 E.L.R. 144, 405 (N.S.).

Negligence—Accumulation of snow—Workmen's Compensation Act—Notice of injury.

The knowledge of the defendants of the injury and the cause of it, at the time it occurs, is (in case of death) a reasonable excuse for the want of the notice of injury required by s. 9 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, where there is no evidence that they were in any way prejudiced in their defence by the want of it. Where the deceased received the injuries from which he died by being run over by a train of cars, a statement made by him immediately after he was run over, in answer to a question as to how it happened, "I slipped and it hit me," was held admissible in evidence. [Thompson v. Trevanion (1693), Skin. 402; Aveson v. Kinnaird (1805), 6 East 188, 193, and Rex v. Foster (1834), 6 C. & P. 325, followed.] Upon that evidence, and evidence of the slippery condition, by reason of snow and ice, of the place where the deceased slipped, a question should have been submitted to the jury whether he slipped by reason of such condition and whether such condition was due to the negligence of the defendants.

Armstrong et al. v. Canada Atlantic Ry. Co., 1 Can. Ry. Cas. 444, 2 O.L.R. 219.

[Reversed in 2 Can. Ry. Cas. 339, 4 O.L.R. 560.]

WORKMEN'S COMPENSATION ACT—NOTICE OF INJURY—REASONABLE EXCUSE FOR WANT OF.

While the notice of injury required by s. 9 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, is for the employer's protection against stale or imaginary claims, and to entitle him, while the facts are recent, to make enquiry, the injured workman is the primary object of the legislative consideration; and under such section and ss. 13, 14, notice may be dispensed with where there is reasonable excuse for the want of it, the employer not being prejudiced. What constitutes reasonable excuse must depend upon the circumstances of each particular case, and such may be inferred where there is the notoriety of the accident, the knowledge of the employers of the injury which resulted in death, and its cause, and of a claim having been made on them by the deceased's representative. Judgment of the Divisional Court, 1 Can. Ry. Cas. 444, reversed.

Armstrong v. Canada Atlantic Ry. Co., 2 Can. Ry. Cas. 339, 4 O.L.R. 560.

Considered in Lever v. McArthur, 9 B.C.R. 418; distinguished in Bell Bros. v. Hudson's Bay Ins. Co., 2 S.L.R. 361; followed in O'Connor v. Hamilton, 8 O.L.R. 391, 3 O.W.R. 918; Smith v. McIntosh, 13 O.L.R. 118; referred to in Giovinazzo v. Can. Pac. Ry. Co., 19 O.L.R. 325; Iveson v. Winnepeg, 16 Man. L.R. 364; O'Connor v. Hamilton, 10 O.L.R. 529, 6 O.W.R. 227; Plouffe v. Can. Iron Furnace Co., 10 O.L.R. 37.]

WORKMEN'S COMPENSATION—EMPLOYEE MEMBER OF INSURANCE SOCIETY—RELEASE.

An action for damages under Workmen's Compensation Act against a railway company cannot be maintained where it appears that the servant is a member of the Insurance Society of the company and actually received benefits from it, the rules of the society providing that no member shall have any claim against the railway company for compensation on account of injury or death from accident.

Harris v. Grand Trunk Ry. Co., 3 Can. Ry. Cas. 172, 3 O.W.R. 211.

WORKMEN'S COMPENSATION FOR INJURIES ACT—SUPERINTENDENCE—DEFECTS IN WORKS, PLANT, ETC.

While one railway employee H. was engaged with another railway employee D. in loosening a hand brake on a flat car, the brake being suddenly released by D., H. was thrown from the car by the revolving handle of the brake and received injuries from which he died. D. had general superintendence over H., but had given no orders to H. as to this particular job, and had voluntarily come to the assistance of H. when H. was alone unable to loosen the brake in question:—Held, that D. was not acting in the course of his superintendence nor was H. acting in conformity to any order of D. The use upon a flat car of a "T" brake, that is, a brake having for a handle a straight iron crossbar at the top of the brakemast instead of a wheel brake, that is, a brake having for a handle a wheel, is not a defect in the condition or arrangements of the ways, works, machinery or plant of a railway company. In an action for damages for injuries the presiding Judge virtually directed the jury to find for the defendants. Despite his direction the jury answered all the questions submitted to them in favor of the plaintiff. The trial Judge, having set aside the findings of the jury as perverse and dismissed the action, his judgment was affirmed by a Divisional Court.

Hodson v. Toronto, Hamilton & Buffalo Ry. Co., 3 Can. Ry. Cas. 289.

Negligence of fellow servant—Defect in Machinery—Defective system of inspection—Workmen's Compensation Act.

In an action brought against a railway company to recover damages because of the death of a fireman who was scalded by steam which escaped in consequence of the giving way of a water pipe in an engine, evidence was given on behalf of the plaintiff that the type of engine in question was of dangerous construction and especially liable to accidents of the kind, but it was shewn on cross-examination of the plaintiff's witnesses that the use of engines of this type was well established and that they had many points in their favour:—Held, that the principle adopted in actions of negligence against professional men should be applied, namely, that negligence cannot be found where the opinion evidence is in conflict and reputable skilled men have approved of the method called in question. At common law a master is bound to provide proper appliances for the carrying on of his work, and to take reasonable care that appliances which if out of order will cause danger to his servants are in such a condition that the servant may use them without incurring unnecessary danger. These duties he may discharge either personally or by employing a competent person in his stead, and the purpose of subs. 1 of s. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, as modified by s. 6, subs. 1, is to take from the master his common-law immunity for the neglect of such a person. Where therefore an accident occurred as the result of the giving way of a water pipe in an engine which had not long before been in the defendants' repair shop for the purpose of having the water pipes repaired, it was held that the inference might be drawn that there had been negligence on the part of the workman entrusted with the duty of making the repairs and either absence of inspection or negligent inspection, and that if an inference of either kind were drawn the defendants would be liable. A nonsuit granted by Meredith, J., was therefore set aside and a new trial ordered.

Schwoob v. Michigan Central Ry. Co., 4 Can. Ry. Cas. 242, 9 O.L.R. 86.

[Affirmed in 10 O.L.R. 647, 5 Can. Ry. Cas. 58.]

Defect in machinery—Defective system of inspection—Workmen's compensation.

On the trial of this action—which was against a railway company to recover damages for the death of the deceased through scalding by the escape of steam occasioned by the giving away of a water tube in a locomotive engine on which he was working—the jury, in answer to questions submitted to them, which, with the answers to them, are set out in the report, found that the death was caused by a defect in the condition of the locomotive, "through the defendants not supplying proper inspection," the defect itself not being specified, but from a discussion which the trial Judge had with the jury when they brought in their answers, and from the answers to further questions submitted to them, such defect it appeared consisted in the fact that the end of the tube in question had not been sufficiently "belled" by one J., who had put the tube in the boiler:—Held, that there was no evidence to support liability at common law, but that the evidence and findings of the jury sufficiently established what the defect was, and that J. was a person entrusted with the work, so that there was liability under the Workmen's Compensation Act, in respect of which the deceased's widow and administratrix could maintain the action, and was entitled to recover the damages assessed by the jury under the above Act.

Schwoob v. Michigan Central Ry. Co., 6 Can. Ry. Cas. 287, 13 O.L.R. 548.

[Referred to in Hanley v. Michigan Central Ry. Co., 13 O.L.R. 560, 6 Can. Ry. Cas. 240.]

WORKMEN'S COMPENSATION ACT—LICENSEE—STATUTORY DUTY—DEFECTIVE SYSTEM.

S. 9 of the Workmen's Compensation for Injuries Act, which requires notice of the injury to be given, provides that the notice must be given within twelve weeks after the occurrence of the accident causing the injury and that in the case of death the want of notice shall not bar the action which the Act gives, if the Judge is of opinion that there was "reasonable excuse" for the want of notice:—Held, that ignorance of the law is not a "reasonable excuse;" and in this case the plaintiff, the brother of the deceased person who was injured, might have given the notice before he was appointed administrator, and his solicitor's mistaken idea to the contrary did not excuse the want of the notice; and the action therefore failed. Judgment of a Divisional Court reversed. The deceased was employed by the defendants as a workman on the tracks in a railway yard, and, when crossing the tracks with other workmen on his way home from work, was struck by an engine and killed. The negligence alleged was that the engineer in charge of another engine in the yard let off a large quantity of steam, which prevented the deceased from seeing or hearing the engine which struck him. The jury found that the defendants were guilty of negligence by blowing off steam or hot water at such a critical moment with such a large number of employees between the tracks; that the deceased came to his death by reason of the negligence of a person in charge of an engine of the defendants, such negligence consisting in blowing off steam or hot water, and that a proper lookout was not kept in a proper place on both engines when backing; and that there was no contributory negligence. On these findings the trial Judge entered judgment for the plaintiff:—Held, by the Divisional Court, that the position of the deceased, in view of clause 5 of s. 3 of the Workmen's Compensation for Injuries Act, was, in the absence of any finding to the contrary, that of a mere licensee; that he could not claim the benefit of s. 276 of the Railway Act, 1906, because the engine was not passing over or along a highway at rail level; but that the deceased might have had cause to complain of a defective system, within the meaning of clause 1 of s. 3 from the facts developed in the evidence, although not specifically mentioned in the pleadings; and a new trial was ordered, with leave to amend. The Court of Appeal, reversing the judgment upon the other ground, did not as a Court express an opinion upon these points. But, semble, per Osler, J.A., referring to Willetts v. Watt & Co., [1892] 2 Q.B. 92, that the discretion of the Court below in allowing the plaintiff to make a new case, after the time had elapsed within which a new action could be brought, should not, on that ground, be interfered with. Semble, per Garrow, J.A., that the true position of the deceased at the time of the accident was not that of a mere licensee but of a person upon the defendants' premises by their invitation, and one to whom the defendants owed a duty to take reasonable care that he should not be injured. And semble, per Meredith, J.A., that there was no proof of any negligence on the part of the defendants; and the granting of a new trial in order to enable the plaintiff to set up an entirely new case was contrary to proper practice.

Giovinazzo v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 423, 19 O.L.R. 325.

INJURY TO SERVANT—FALL OF COAL FROM LOCOMOTIVE TENDER—WORKMEN'S COMPENSATION—RES IPSA LOQUITUR—RELEASE.

The plaintiff was in the employment of the defendants, and, while at work upon a railway track, was struck by a lump of coal which fell from the tender of a passing locomotive, and injured. It appeared from the evidence, in an action for damages for the injury sustained, that the coal was unnecessarily piled in the tender above the sides in such quantity and manner that the rapid motion of the train shook down the lump, which, falling upon the corner, flew off with dangerous force and struck the plaintiff:—Held, that the unexplained fall of the coal, in the circumstances stated, was in itself evidence from which an inference might well be drawn that those in charge or control of the locomotive (Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, s. 3, subs. 5) were negligent in their mode of using it by piling or permitting coal to be piled upon the tender so high and without protection that chunks of it could be hurled by the necessary motion of the train with such force as to break a man's leg 15 or 20 feet away: and a verdict for the plaintiff for $1,500 under the Workmen's Compensation for Injuries Act, was upheld. Doctrine of res ipsa loquitur explained and applied. The defendants set up as a bar to the action a release signed by the plaintiff, after action, in consideration of $300 paid to him by the defendants. The plaintiff was without independent advice, and stated that he believed from what was said that what he was releasing, and all he intended to release, was a claim to wages during his compulsory idleness, all parties, including the doctor, being under the impression that at the end of the period for which he was being paid he would be well and back at work:—Held, that, as the plaintiff's statement was believed by the trial Judge, a finding against the validity of the release should not be disturbed. Judgment of Clute, J., affirmed.

O'Brien v. Michigan Central Ry. Co., 9 Can. Ry. Cas. 442, 19 O.L.R. 345.

[Applied in Lawrence v. Kelly, 19 Man. L.R. 372; referred to in Rostrom v. Can. Northern Ry. Co., 16 Can. Ry. Cas. 168.]

COLLISION—DEFECTIVE SYSTEM, WORKMEN'S COMPENSATION ACT.

The Railway Act prescribes that rules and regulations for travelling on and the use or working of a railway must be approved by the Governor-General-in-Council and that, until so approved, such rules and regulations shall have no force or effect, when approved they are binding on all persons. Rule 2 of the rules of the Grand Trunk Ry. Co. provides that "In addition to these rules, the time-tables will contain special instructions, as the same may be found necessary. Special instructions, not in conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force." Trains running out of Brantford, are under control of the train despatcher at London. The railway time-table for many years contained the following footnote:—"Tilsonburg Branch.—Yard engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. station without special orders from the train despatcher. Yard foreman in charge of yard engine will be held responsible for protecting the return of the yard engine, and for knowing such engine has returned before allowing a train or engine to follow.—

A. J. Nixon, Assistant Superintendent." This regulation or instruction had not then been submitted for the approval of the Governor-General-in-Council. By Rule 224 "all messages or orders respecting the movement of trains . . . must be in writing":—Held, Davies and Duff, JJ., dissenting, that assuming the footnote on the time-table to be a "special instruction" under Rule 2, it is inconsistent with the train-despatching system in force at Brantford and if, as the evidence indicates, it purports to authorize the sending out of engines under verbal orders to push freight trains up the grade it is also inconsistent with Rule 224. Such instruction has, therefore, no legal operation:—Held, per Girouard and Anglin, JJ., that it was not a "special instruction" but a regulation, and not having been sanctioned by order-in-council operation under it was illegal. By the Railway Act a "train" includes any engine or locomotive. Rule 198 provides that it "includes an engine in service with or without cars equipped with signals":—Held, per Girouard, Idington and Anglin, JJ., Duff, J., contra, that an engine returning to the yard after pushing a train up the grade, is a "train" subject to the provisions of Rule 224, and to the rules of the train despatching system. The accident in this case occurred through the yard foreman failing to protect the engine on its return to the yard:—Held, Davies and Duff, JJ., dissenting, that the company operated the yard engines under an illegal system and were liable to common-law damages and that subs. 2 of s. 427 of the Railway Act, 1906, applied:—Held, per Duff, J., that since, as regards the danger of collision with trains stopping at Brantford for orders, the system of operating the yard engines through the telegraphic despatchers would clearly have afforded greater protection than that in use, and since there was admittedly no impediment in the way of adopting the former system, there was evidence for the jury of want of care in not adopting the safer system; and the fact that the existing system had been in operation for 25 years was evidence from which the jury might infer that the general governing body of the company was aware of it. And further, following Smith v. Baker, [1891] A.C. 325, and Ainslie Mining & Ry. Co. v. McDougall, 42 Can. S.C.R. 420, that, in these circumstances, the company was responsible for the defects in the system.

Fralick v. Grand Trunk Ry. Co., 10 Can. Ry. Cas. 373, 43 Can. S.C.R. 494.

Workmen's Compensation Act—Negligence of fellow servant—Person in position of superintendence—Voluntary assumption of risk.

The plaintiff and T. were both employed by the defendants. The plaintiff was assisting T. in repairing a car standing on a track in the defendants' yard, when the yard engine propelled other cars against the car under repair, and injured the plaintiff, who brought this action to recover damages for his injuries, under the Workmen's Compensation for Injuries Act, alleging negligence on the part of T., a person in a position of superintendence, to whose orders the plaintiff was bound to conform and did conform, in not placing a flag or flags in a position to give warning that work was going on upon the track. At the trial, the jury, in answer to questions, found: (1) That the plaintiff's injuries were caused by negligence of the defendants; (2) that the negligence was the neglect of T. in not placing the flag for protection; (3) that the injuries were caused by the negligence of a person in a position of superintendence over the plaintiff and to whose orders he was bound to conform; (4) that T. was that person, and his negligence consisted in not placing the flag; (5) that the plaintiff's injuries were not caused by his own want of care; "it was no part of his duty to place these flags;" and they assessed the damages at $1,980:—Held (Meredith, J.A., dissenting), that, notwithstanding that the jury had not found that T. was exercising superintendence at the time of the injury, and had not found that the plaintiff did conform to T.'s orders, yet, having regard to the evidence and the Judge's charge, the findings were sufficient, under the Workmen's Compensation for Injuries Act, to support a judgment for the plaintiff. [Marley v. Osborn (1894), 10 Times L.R. 388, specially referred to.] After counsel had addressed the jury, and when the Judge was about to begin his charge, a discussion arose about the frame of two of tne questions proposed to be submitted to the jury, in the course of which the defendants' counsel suggested another question, "Did the plaintiff voluntarily perform the acts which caused his accident, knowing of the dangers which he ran?" This defence was not set up in the pleadings nor previously at the trial; and no application was made for leave to amend or to reopen the case or postpone the trial. The Judge declined to submit the question, saying that he did not think it fair to introduce it at that stage:—Held, Meredith, J.A., dissenting, a proper exercise of discretion. Judgment of Falconbridge, C.J.K.B., affirmed.

Brulott v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 76, 24 O.L.R. 154.

[Affirmed in 13 Can. Ry. Cas. 95, 46 Can. S.C.R. 629.]

WORKMEN'S COMPENSATION FOR INJURIES ACT—NEGLIGENCE OF FELLOW SERVANT—VOLENS.

Held by the Supreme Court of Canada, affirming 13 Can. Ry. Cas. 76, 24 O.L.R. 154, that the jury having found that the defendants were negligent and the plaintiff free from contributory negligence necessarily precluded a finding that the plaintiff was volens:—Held, Idington, J., that s. 306 of the Railway Act, 1906, was not applicable to the facts of this case and volens should have been specially pleaded. Davies, J., dissenting, thought there should be a new trial.

Grand Trunk Pacific Ry. Co. v. Brulott, 13 Can. Ry. Cas. 95, 46 Can. S.C.R. 629.

WORKMEN'S COMPENSATION—VOLENS—CONTRIBUTORY NEGLIGENCE.

Where one employed by another as a car repairer was ordered by another employee to assist him in repairing a car standing upon a track in the yard when other cars were propelled against it and injured him, the master, in the absence of a plea of volens or evidence that the negligence of the servant contributed to the injury, is liable in an action under the Workmen's Compensation Act (Ont.) for the injuries thus sustained.

Grand Trunk Ry. Co. v. Brulott, 46 Can. S.C.R. 629, 13 Can. Ry. Cas. 95, affirming Brulott v. G.T.R. Co., 24 O.L.R. 154, 13 Can. Ry. Cas. 76.

INJURY TO EMPLOYEE—NEGLIGENCE OF FELLOW EMPLOYEE—SUPERINTENDENCE—LIABILITY OF EMPLOYER AT COMMON LAW—WORKMEN'S COMPENSATION.

The plaintiff's claim was for injuries sustained by the explosion of some dynamite while he was thawing it for use in blasting out hard pan in a gravel pit under the superintendence of one Campbell, a roadmaster in defendant's employ. In answer to questions, the jury at the trial found that the plaintiff was ignorant of the material he was using, that Campbell had not given him proper instructions, that the injury had been caused by the negligence of the defendant company, that such negligence consisted in not employing a competent person to superintend the work and in not furnishing proper appliances and storage for explosives, and that the defendant company had not used reasonable and proper care and caution in the selection of the person to superintend the work:—Held, Howell, C.J.M., dissenting, that the evidence at most shewed that, on the occasion in question, Campbell might have been negligent in his superintendence of the work, that there was no proof of his incompetency otherwise or that the defendant had been negligent in appointing him, or in furnishing proper appliances, the onus of proving which was on the plaintiff, and, therefore, the plaintiff could not recover at common law, but was entitled under the Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, s. 3, to the amount alternatively fixed by the jury under s. 6 of that Act. [Smith v. Howard (1870), 22 L.T.N.S. 130; Young v. Hoffman, [1907] 2 K.B. 650; and Cribb v. Kynoch, [1907] 2 K.B. 548, followed.] Per Howell, C.J.M.: There was evidence to submit to the jury on all the questions answered by them and the verdict for damages at common law should not be disturbed:—Held, also, by all the Judges that the damages had not been "sustained by reason of the construction or operation of the railway," and, therefore, the plaintiff was not barred by s. 306 of the Railway Act, 1906, from bringing his action after the lapse of one year.

Anderson v. Can. Northern Ry. Co., 13 Can. Ry. Cas. 321, 21 Man. L.R. 121.

[Reversed as to common-law liability, otherwise affirmed in 45 Can. S.C.R. 355, 13 Can. Ry. Cas. 339.]

DANGEROUS WORK—DANGEROUS MATERIALS—RISK OF EMPLOYMENT—WARNINGS AND INSTRUCTIONS—EMPLOYER'S LIABILITY.

Where instructions and warning are necessary to enable employees, in circumstances involving danger, to appreciate and protect themselves against the perils incident to the work in which they are engaged, it is the duty of the employer to take reasonable care to see that such instructions and warnings are given. The employer may delegate that duty to competent persons, but, where compensation is sought for injuries sustained by an employee owing to neglect to give such instructions and warning, the onus rests upon the employer to shew that the duty was delegated to a person qualified to discharge it or that other adequate provision was made to ensure protection against unnecessary risk to the employees. The failure of the employer to take reasonable care in the appointment of a properly qualified superintendent, to whom the duty of selecting persons to be employed is entrusted, amounts to negligence involving liability for damages sustained in consequence of the acts of incompetent servants. [Young v. Hoffman Manufacturing Co. (1907), 2 K.B. 646, applied; judgment appealed from (21 Man. L.R. 121, 13 Can. Ry. Cas. 321), affirmed.] In this case, as the risk incident to the employment of an incompetent foreman was not one of those which are assumed by an employee, the plaintiff was entitled to recover damages at common law. Judgment appealed from (21 Man. L.R. 121, 13 Can. Ry. Cas. 321) reversed. The limitation of one year, in respect of actions to recover compensation for injuries sustained "by reason of the construction or operation" of railways, provided by s. 306 of the Railway Act, 1906, relates only to injuries sustained in the actual construction or operation of a railway; it does not apply to cases where injuries have been sustained by employees engaged in works undertaken by a railway company for procuring or preparing materials which may be necessary for the construction of their railway. [Can. Northern Ry. Co. v. Robinson ([1911] A.C. 739), applied]; judgment appealed from, 21 Man. L.R. 121, 13 Can. Ry. Cas. 321, affirmed.

Can. Northern Ry. Co. v. Anderson, 13 Can. Ry. Cas. 339, 45 Can. S.C.R. 355.

Engineer running a snow plough—Proceeding in absence of crossing or station signals—Workmen's Compensation Act.

A case for compensation under the Workmen's Compensation Act, R.S.O. 1897, c. 160, but not a case at common law, is shewn where an engineer in charge of a locomotive propelling a snow plough ran it for some time without ascertaining why crossing or station signals were not being given by the signalman on the plough, and a collision with another train resulted, in which the fireman of such locomotive was killed.

Jones v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 76, 5 D.L.R. 332.

[Reversed in 16 Can. Ry. Cas. 205, 13 D.L.R. 900.]

Workmen's compensation—Injury to foreman of railway yard—Fellow servant.

Subs. 5 of s. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, should receive a liberal construction in the interests of the workman. An employer may be responsible for the negligence of an employee resulting in injury to another employee, although the one injured is in authority over the other. The plaintiff was foreman of a railway yard of the defendants, and M. was his assistant and subject to his orders. In carrying out the plaintiff's orders, M. gave a wrong direction to the driver of the yard engine, by reason of which the plaintiff was struck by the engine and injured. The engine driver testified that he took his instructions from M.:—Held, Lennox, J., dissenting, that there was reasonable evidence that M. was, on the occasion in question, a person in charge or control of the engine, within the meaning of subs. 5: and, upon the findings of the jury, in an action to recover damages for the plaintiff's injury, the defendants were responsible for the negligence of M. Judgment of Mulock, C.J.Ex.D., affirmed.

Martin v. Grand Trunk Ry. Co., 27 O.L.R. 165, 15 Can. Ry. Cas. 1.

Workmen's compensation—Negligence of fellow servant.

A master is liable, under subs. 5 of s. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, making the employer liable where the injury is caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon any railway, tramway or street railway," where a yard foreman is injured by being struck by an engine engaged in shunting operations and under the control of his assistant by reason of the negligence of the assistant in failing to carry out an order of the foreman.

Martin v. Grand Trunk Ry. Co., 8 D.L.R. 590, 27 O.L.R. 165, 15 Can. Ry. Cas. 1.

Workmen's Compensation Act—Strict or liberal construction.

Subs. 5 of s. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, making the employer liable where the injury is caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon any railway, tramway or street railway," should receive a liberal construction in the interests of the workman. [Gibbs v.

Great Western Ry. Co., 12 Q.B.D. 108; McCord v. Cammell [1896] A.C. 57, referred to.]

Martin v. Grand Trunk Ry. Co., 8 D.L.R. 590, 27 O.L.R. 165, 15 Can. Ry. Cas. 1.

INJURY TO BRAKEMAN—NEGLIGENCE OF ENGINEER—WORKMEN'S COMPENSATION.

Where a brakeman engaged in coupling cars at night is injured by reason of the negligence of the engineer in charge of the locomotive in failing to wait for a new signal to start, it having been prearranged between the two that the brakeman was to give such signal by lantern, the master is liable under subs. 5 of s. 3 of the Workmen's Compensation for Injuries Act, making an employer responsible "by reason of negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon a railway, tramway or street railway." [Martin v. Grand Trunk Ry. Co., 4 O.W.N. 51, applied.]

Allan v. Grand Trunk Ry. Co., 8 D.L.R. 697, 15 Can. Ry. Cas. 14.

[Applied in Simmerson v. Grand Trunk Ry. Co., 11 D.L.R. 104.]

WORKMEN'S COMPENSATION ACT—PROCEDURE—ARBITRATOR.

After an award of an arbitrator appointed under the Workmen's Compensation Act, R.S.B.C. 1911, c. 244, has been reduced to writing and published, he cannot submit questions under s. 4 of the Act, to a Judge of the Supreme Court.

Lewis v. Grand Trunk Pacific Ry. Co., 15 Can. Ry. Cas. 173, 13 D.L.R. 152.

WORKMEN'S COMPENSATION.

Under the Quebec Workmen's Compensation Act the annual payment to be made for permanent disability is one-half of the average yearly wage of which the injured party is deprived by reason of such incapacity. [Grand Trunk Ry. Co. v. McDonnell, 5 D.L.R. 65, 18 Rev. de Jur. 369, followed.]

McDonnell v. Can. Pac. Ry. Co., 7 D.L.R. 138, 22 Que. K.B. 207.

WORKMEN'S COMPENSATION.

A workman who is entitled to a permanent disability claim under the Quebec Workmen's Compensation Act has the option of accepting the annual income specified in the Quebec Workmen's Compensation Act or of demanding that the capitalization thereof (not exceeding $2,000) be handed over to an insurance company in order to purchase an annuity therewith, but no similar option is available to the employer to confess judgment for $2,000 or for the annuity which that sum would purchase, as in satisfaction of his liability. [Grand Trunk Ry. Co. v. McDonnell, 5 D.L.R. 65, followed.]

McDonnell v. Can. Pac. Ry. Co., 7 D.L.R. 138, 22 Que. K. B. 207.

FOR WHAT ACTS OF CONTRACTOR EMPLOYER IS LIABLE.

Under the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, s. 4, both the immediate employer and owner of the premises on which one is working as an independent contractor are jointly responsible for injuries to a servant of the latter, where it appears that, although the work was being done originally by the independent contractor alone, it later developed that it was impossible to carry out the original agreement and an arrangement was entered into whereby the work was done under their joint supervision, and the accident occurred through the negligence of both the independent contractor and the owner.

Dallontania v. McCormick and Can. Pac. Ry. Co., 8 D.L.R. 757, 4 O.W.N. 547.

[Affirmed in 29 O.L.R. 319, 16 Can. Ry. Cas. 173, 14 D.L.R. 613; Distinguished in Romanink v. Grand Trunk Pacific Ry. Co., 18 Can. Ry. Cas. 170.]

Liability of master—Course of employment—Saskatchewan Workmen's Compensation Act.

Where a railway employee is injured while removing personal belongings from the defendants' car with the permission of the defendant company, the accident is one arising out of and in the course of his employment, for which he is entitled to compensation under the provisions of the Saskatchewan Workmen's Compensation Act, even though an action brought by him at common law for damages had been dismissed on the ground that at the time of the accident he was on business of his own and was a mere licensee, if the accident occurred during the time he was in defendant's employment. [Blovelt v. Sawyer, 89 L.T. 658 and Morris v. Lambeth, 22 Times L.R. 22, followed.]

Gonyea v. Can. Northern Ry. Co., 9 D.L.R. 812, affirmed in 16 Can. Ry. Cas. 33.

Death—Right of action—Workmen's compensation.

Under the Ontario Workmen's Compensation for Injuries enactments giving any person entitled in case of death "the same right of compensation as if the workman had not been a workman," the "same right of compensation" means that which is conferred by the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33.

Brown v. Grand Trunk Ry. Co., 15 Can. Ry. Cas. 350, 11 D.L.R. 97, 28 O.L.R. 354.

Workmen's Compensation Act—Accident causing death—Compensation to children.

Notwithstanding the provision in art. 7323, R.S.Q., 1909, that compensation is payable to children "to assist them to provide for themselves until they reach the full age of sixteen years," the child of a workman killed in an accident, whatever his age may be, however near to that of sixteen years, is entitled to recover from the employer a sum equal to four times the average yearly wages of the deceased.

Palmiero v. Grand Trunk Ry. Co., 15 Can. Ry. Cas. 354, 42 Que. S.C. 435.

Person in charge—Brakeman giving signals.

A brakeman, standing on the ground and giving signals to the engineer of a locomotive engaged in transferring cars from one track to another, is a person in charge or control of the engine, within the meaning of s. 3, subs. 5, of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160. [Allan v. Grand Trunk Ry. Co., 8 D.L.R. 697; Martin v. Grand Trunk Ry. Co., 8 D.L.R. 590, applied.]

Simmerson v. Grand Trunk Ry. Co., 11 D.L.R. 104.

[Affirmed in 12 D.L.R. 847.]

Master and servant—Workmen's compensation—"Course of employment."

A claim for compensation against a railway company, under the provisions of the Alberta Workmen's Compensation Act, 1908, by reason of the death of an alleged employee, cannot be made unless it appears that the accident in question not only arose out of the employment, but also happened in the course thereof, as it is impossible to construe disjunctively the word "and" in the second line of s. 3 of the Act. [See also Re Eddles and School District (No. 1) of Winnipeg, 2 D.L.R. 696.] Where one who has left the employ of a railway company is killed while on his way to the office of the company to get his pay on the day following such abandonment of his employment, no compensation for his death can be claimed under the Alberta Workmen's Compensation Act, 1908, since the accident in question did not arise out of or happen in the course of his employment within the meaning of s. 3.

Lastuka v. Grand Trunk Pacific Ry. Co., 11 D.L.R. 375, 16 Can. Ry. Cas. 31.

Injury to servant—Coupling cars—Negligence.

A railway company is liable for injury to an employee who was caught in a narrow space between a car which he was moving and a nearby building, while he was climbing the nearest side-ladder to reach the brake to stop the car, though he could have safely used a ladder on the other side of the car, where, he, being ignorant of the closeness of the building to the track, naturally used the particular ladder, and where the danger must have been obvious to the foreman who directed him to move the car, and the foreman negligently failed to warn him of the danger. [Shondra v. Winnipeg Elec. Ry. Co., 21 Man. L.R. 622, affirmed.]

Winnipeg Elec. Ry. Co. v. Shondra, 11 D.L.R. 392.

Accident arising "out of" the employment.

An accident arises "out of" the workmen's employment where such accident is shewn to have been due to and resulted from a risk reasonably incident to the employment; in construing the term "out of and in the course of the employment" in the Workmen's Compensation Act, Sask. Stat. 1910-1911, c. 9, s. 4, the words "out of" point to the origin or cause of the accident, and the words "in the course of" apply to the time, place and circumstances. [Fitzgerald v. Clarke, [1908] 2 K.B. 796, followed.]

Kennedy v. Grand Trunk Pacific Ry. Co., 16 Can. Ry. Cas. 46, 15 D.L.R. 172.

"Out of and in the course of employment"—Method of doing work assigned.

In a railway case, where a brakeman switching cars on the "flying shunt" process, is killed while performing such duty, the accident may be found to have arisen "out of and in the course of the employment," although, when such accident occurred, the brakeman was on the ground (contrary to the rules of his employment) instead of on the engine-tender step while doing such work. [Harding v. Brynddu Colliery Co., [1911] 2 K.B. 747 at 750 and 753, followed.]

Kennedy v. Grand Trunk Pacific Ry. Co., 16 Can. Ry. Cas. 46, 15 D.L.R. 172.

Joint liability of proprietor and independent contractor—Injury to servant of contractor.

A railway company's reservation by contract of complete control over and the right to direct an independent contractor in respect of tunnelling work, renders the former jointly liable with the contractor (notwithstanding the latter's individual liability under the Workmen's Compensation Act, R.S.O. 1897, c. 160) to a servant of the contractor for injuries sustained as the result of being required to work in a place known by both defendants to be one of danger by reason of the omission of the railway company or the contractors to provide safeguards against the falling of rock upon the workmen.

Dallontania v. McCormick, 16 Can. Ry. Cas. 173, 29 O.L.R. 319, 14 D.L.R. 613.

Switching of cars—Negligence—Scope of employment—Employer's liability.

A train crew of the defendants while performing their duty in the transfer yard of another railway company were directed by the yardmaster to remove a special car of freight which was to be transferred to the defendants' railway from amongst a number of other cars in the yard. In order to do so it was necessary to shunt several cars placed in front of the car to be transferred and the train crew switched these cars to certain tracks on which there was then standing a train of the other railway company, headed by an engine under which the fireman, plaintiff, was then working. They undertook to couple the cars which they were switching to the standing train, as a matter of convenience, and, in doing so, struck the rear of the train with such force as to move the engine and cause injuries to the fireman who was working under it. Specific questions were not submitted to the jury, notwithstanding suggestions made by defendants' counsel after the Judge had charged them, and they returned a general verdict in favour of the plaintiff. An appeal from the judgment of the Court of Appeal (Manitoba) affirming the judgment at the trial in favour of the plaintiff was dismissed on the ground that in so proceeding to couple the cars they had switched on to the standing train the defendants' train crew were still acting within the scope of their employment in the defendants' business and, as they performed the work in a negligent manner, the defendants were liable in damages for the injuries caused to the plaintiff.

Grand Trunk Pacific Ry. Co. v. Pickering, 18 Can. Ry. Cas. 225, 50 Can. S.C.R. 393.

Engineer—Defective roadbed—Speed of train—Disobedience to orders.

A sinkhole due to the inherent weakness of the subsoil of a roadbed, over which place trains were ordered by the railway company to be run at a slow speed, is not necessarily negligence per se and will not support the findings of a jury, that an accident causing the death of a locomotive engineer was caused by the defective roadbed and not having a watchman for same, where the real cause of the accident arose from the excessive and prohibited speed at which the deceased was running his train. [Lewis v. Grand Trunk Pacific Ry. Co., 19 D.L.R. 606, 24 Man. L.R. 807, affirmed.]

Lewis v. Grand Trunk Pacific Ry. Co., 20 Can. Ry. Cas. 318, 52 Can. S.C.R. 227, 26 D.L.R. 687.

Liability for injuries—Member of wrecking crew—Rail plunging.

Where in emergency work on a railroad, a member of the wrecking crew, while assisting in clearing the track after an accident from an unknown cause, is injured by the unexpected and unusual plunge of a twisted rail on its release by cutting the bolts on the fishplate connecting the rail, no negligence is shewn against his employer and the doctrine res ipsa loquitur does not apply. [Readhead v. Midland, L.R. 4 Q.B. 379;

Ferguson v. C.P.R., 12 O.W.R. 943; O'Brien v. Michigan Central Ry. Co., 19 O.L.R. 345, 9 Can. Ry. Cas. 442, specially referred to.]

Rostrom v. Can. Northern Ry. Co., 16 Can. Ry. Cas. 168, 22 Man. L.R. 250, 3 D.L.R. 392.

Injury to conductor—Pole near track—Leaving car to adjust trolley.

In an action by a conductor of a municipal owned street railway for injuries sustained by colliding with a metal standard close to the track while adjusting the trolley pole, the fact of the close proximity of the standard otherwise properly constructed, or that because of the overcrowding of the vestibule he is compelled to leave it when adjusting the trolley pole, or the violation of rules of operation which are not pleaded, does not support a jury's finding of negligence against the defendant.

Schell v. Regina, 24 D.L.R. 755.

Negligence—Breach of statutory duty—Failure to prove—Contributory negligence by deceased employee.

A railway company is not necessarily liable for personal injuries received by trainmen because of a derailment at a depression or "sink hole" on a new piece of road due to an inherent weakness in the ground underneath the roadbed and not to negligent construction of the road; and it is properly absolved from liability for the death of the engineer of a heavy freight train if the derailment was caused by his running the engine at a rate of speed much in excess of that to which his orders limited him, and if the railway company, in addition to restricting the speed limit, took all reasonable precautions to ballast with gravel from time to time, the depressions varying from two to four inches occurring at the spot.

Lewis v. Grand Trunk Pacific Ry. Co., 19 D.L.R. 606.

Negligence causing death—Limitation to injuries within province.

The Employers' Liability Act, R.S.M. 1913, c. 61 was intended to be confined in its operation to injuries occurring in the Province of Manitoba, and is not available in an action against a railway company for negligence causing death brought in Manitoba by a Manitoba administratrix in respect of a fatal accident occurring on a part of the railway in Ontario; nor will an action in Manitoba be available under the corresponding Ontario statute unless the plaintiff has given the notice of injury which the latter requires. [Simonson v. Can. Northern Ry. Co., 17 D.L.R. 516, 24 Man. L.R. 267; Johnson v. Can. Northern Ry. Co., 19 Man. L.R. 179, followed; Giovinazzo v. C.P.R., 19 O.L.R. 325, referred to.]

Lewis v. Grand Trunk Pacific R. Co., 19 D.L.R. 606.

Accident arising "out of" the employment—Method of doing work.

An accident arises "out of" the workmen's employment where such accident is shewn to have been due to and resulted from a risk reasonably incident to the employment; in construing the term "out of and in the course of the employment" in the Workmen's Compensation Act, Sask. Stat. 1910-1911, c. 9, s. 4, the words "out of" point to the origin or cause of the accident, and the words "in the course of" apply to the time, place and circumstances. [Fitzgerald v. Clark, [1908] 2 K.B. 796, applied.] In a railway case, where a brakeman switching cars on the "flying shunt" process, is killed while performing such duty, the accident may be found to have arisen "out of and in the course of the employment," although, when such accident occurred, the brakeman was on the ground (contrary to the rules of his employment) instead of on the engine tender step while doing such work.

Kennedy v. Grand Trunk Pacific Ry. Co., 16 Can. Ry. Cas. 46, 15 D.L.R. 172.

Damages—Compensation—Assessment.

In estimating the compensation recoverable under s. 15 of the Workmen's Compensation Act, Sask. Stat. 1910–1911, c. 9, of such sum as is found to be equivalent to the estimated earnings during the three years preceding the injury in like employment, a shewing of $182 for one and three-quarter months is not of itself, under the principle of the Act, sufficient to base a finding in excess of $1,800 for the three years. [Uhlenburgh v. Prince Albert Lumber Co., 9 D.L.R. 639, applied.]

Kennedy v. G.T.P. Ry. Co., 16 Can. Ry. Cas. 46, 15 D.L.R. 172.

Workmen's Compensation Act—Employee of contractor with railway company—Placing of gravel at highway crossing as work "in the way of the principal's trade or business."

The placing of gravel at a highway crossing is not work in the way of a railway company's business within the meaning of s. 6 of the Workmen's Compensation Act, c. 12, 1908; and, therefore, the railway company is not liable under the Act for injury to an employee of a contractor engaged to do such work, even though the injury arose out of the operation of a train by the railway company.

Ringwood v. Kerr Bros. & G.T.P. Ry. Co., 7 Alta. L.R. 226.

Work of brakeman.

By hiring as a brakeman on a railway an employee does not undertake to assume the risk of an accident caused by the neglect of the company to take all necessary and legal precautions for the protection of its employees, and the company is liable in damages for an accident caused by such neglect.

Wentzell v. New Brunswick, etc., Ry. Co., 43 N.B.R. 475.

Course of employment—Temporary retirement.

The work of a workman begins as soon as he is at the disposal of his employer, and ends when he, the employee, leaves the place of work and regains his complete liberty of action. An employee may temporarily suspend his labour and quit his post to go into other parts of the building connected with the enterprise, without losing his right of compensation under the law in case of accident. A fireman, on a locomotive in a yard, is still at his work, if he leaves it for a moment, without leave from his engineer, to get some drinking water, as it is customarily done at this place.

Greig v. G.T.R. Co., 51 Que. S.C. 50.

Employee doing act expressly forbidden.

A brakeman while engaged in coupling railway cars shoved the drawbar with his foot and received injuries. The rules of the employer expressly forbade this practice and the workman was aware of it. Held, that the accident did not arise out of the employment and that compensation was not recoverable under the Workmen's Compensation Act.

Jackson v. C.P.R. Co. 12 D.L.R. 435.

C. Safety as to Place and Appliances.

Regulation of safety of employees—Wages of injured employees.

Application that railway companies remedy certain complaints dealing with (1) and (6) installation of signboards at the limits of municipalities and yards, (2) and (11) liability to accident and exposure from locomotives running tender first and recommending storm protector on locomotive, (3) installation of power headlamps and air bell ringers, (4) providing an engineer as pilot instead of conductor, brakeman or fireman, where the regular engineer is unfamiliar with the road, (5) and (9) providing suitable quarters at divisional and terminal points and more ample room on locomotives for engineers and firemen, (7) removal of certain snow cleaning devices from locomotives, inspection (8) of wooden bridges and (10) of locomotives by a competent inspector after arrival at terminals, (12) payment of wages of injured employees during recovery:—Held, 1, that the request in (1) is too broad and no general order should be made, and (6) that in all individual instances where necessity exists, the request shall be granted. 2. That in (2) and (11) the requests should be refused, no evidence being given that trains were so operated, except in cases of emergency, and nothing being known as to the storm protector. 3. That the request in (3) as to the installation of power headlamps should be refused, and as to air bell ringers granted. 4. That the request in (4) should be refused, as granting it would rescind a previous rule. 5. That the Board has no jurisdiction to deal with the requests in (5) and (12). 6. That the application in (7) should stand for further information. 7. That as to the request in (9) the Board should not make any general regulation without specific information. 8. That the application in (8) had been dealt with by order No. 11445 and that the application in (10) should be refused.

Re Brotherhood of Locomotive Engineers, 11 Can. Ry. Cas. 330.

DEFECTIVE APPLIANCES—ABSENCE OF BUFFERS ON CARS.

The plaintiff was a motorman in the employ of the defendant company, and his action was brought under the Workmen's Compensation Act to recover damages for injuries sustained while coupling together a street car and trailer. The main ground of negligence charged was the absence of buffers to protect the employees from injury in coupling. The plaintiff had a verdict at the trial which, on motion for a new trial, was affirmed by the Divisional Court and by the Court of Appeal for Ontario. The Supreme Court of Canada held that there was negligence on the part of the company in not having proper appliances to prevent injury, and that a new trial had been properly refused. 22 A.R. (Ont.) 78, affirmed. The appeal was dismissed with costs.

Toronto R. Co. v. Bond, 24 Can. S.C.R. 715.

DEATH OF SERVANT CAUSED BY COLLISION—FAULT OF FELLOW SERVANT—DEFECTIVE SYSTEM.

Deceased, a motorman, met his death in a collision between two cars of the defendant company, on the 7th of November, 1908, but the writ in the action was not issued until the 2nd of August, 1909, the action being brought under Lord Campbell's Act. The questions at issue were: (1) Was the accident caused by the negligence of a fellow servant? On this point the facts were that the cars leaving Vancouver had a double line of track as far as a place called Cedar Cottage, after which there was only a single track. On foggy nights there was a watchman at Cedar Cottage to advise conductors and motormen as to the condition of traffic. The men in charge of the colliding cars were killed, so it was not possible to ascertain whether the watchman had advised the conductor or motorman whether the line was clear. The jury, on the evidence, found a defective system:—Held, that the appeal from the verdict based on this finding should be dismissed. Martin, J.A., expressing no opinion as to there being no evidence to support such a finding. (2) Lord Campbell's Act gives a limitation of twelve months within which an action for damages caused by the death of a relative may be brought, so that the writ here was issued in ample time to comply with that statute. But in the defendant company's Act of incorporation, a limitation of six months is set for bringing actions to recover damages incurred by reason of the tramway or railway or works or operations of the company. Per Irving, J.A., following Green v. B. C. Elec. Ry. Co. (1906), 12 B.C.R. 199, that the limitation in the company's statute was not applicable. Per Martin, J. A.: That the section was applicable and the action was therefore barred. Remarks per Martin, J. A., as to the Court of Appeal following or being bound by the decisions of the late Full Court.

McDonald v. British Columbia Elec. Ry. Co., 18 W.L.R. 284, 16 B.C.R. 386.

Defective apparatus—Notice of defects in machinery—Provident society—Contract exempting employer.

The "sander" and sand valves of a railway locomotive, which may be used in connection with the brakes in stopping a train, do not constitute part of the "apparatus and arrangements" for applying the brakes to the wheels required by s. 243 of the Railway Act, 1888. Failure to remedy defects in the sand valves, upon notice thereof given at the repair shops in conformity with the company's rules, is merely the negligence of an employee, and not negligence attributable to the company itself; therefore, the company may validly contract with its employees so as to exonerate itself from liability for such negligence, and such a contract is a good answer to an action under Art. 1056 C.C. Que. [The Queen v. Grenier, 30 Can. S.C.R. 42, followed. Girouard, J., dissenting on the ground that the negligence found by the jury was negligence of both the company and its employees. Miller v. G.T.R., 21 Que. S.C. 346, and G.T.R. v. Miller, 12 Que. K.B. 1, reversed.]

Grand Trunk Ry v. Miller, 34 Can. S.C.R. 45, 3 Can. Ry. Cas. 147.

Duty of employer—Proper system—Common employment.

An employer is under an obligation to provide safe and proper places in which his employees can do their work and cannot relieve himself of such obligation by delegating the duty to another. It follows that if an employee is injured through failure of his employer to fulfil such obligation the latter cannot in an action against him for damages, invoke the doctrine of common employment. Judgment of Supreme Court of Nova Scotia, affirmed.

Ainslie Mining & Ry. Co. v. McDougall, 42 Can. S.C.R. 420.

[Relied on in Fralick v. Grand Trunk Ry. Co., 43 Can. S.C.R. 496, followed in Hall v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 163, 20 D.L.R. 666.]

Injury to brakeman—Defective apparatus.

The plaintiff, a brakeman on duty in the defendants' employ, was injured in an attempt to uncouple a number of cars from an engine, the train moving slowly backward. There was evidence that the lever on the engine tender failed to lift the pin; that there was no lever on the end of the car next the tender, and that the plaintiff, in order to uncouple, had to reach in between the ends of the cars in an effort to pull out the coupling pin. In so doing he either tripped or was knocked down and had an arm cut off by the wheels of the tender:—Held, that, in view of the requirement in subs. (c) of s. 264 of the Railway Act, 1906, that all cars should be equipped with apparatus which should prevent the necessity of brakemen going in between the ends of the cars to uncouple, the plaintiff had made out a prima facie case of negligence and the verdict of the jury in his favour should not be interfered with.

Scott v. Can. Pac. Ry. Co., 19 Man. L.R. 165.

INJURY TO LABOURER—ATTEMPT TO JUMP ON MOVING TRAIN—CONCEALED DANGER.

The plaintiff was a labourer in the employment of contractors for the grading of a portion of a railway being constructed by the defendants, and was in charge of a machine which was being carried by the defendants on a flat car forming part of a train used in grading operations. At a station the plaintiff got down from the car and stood upon the platform, the train standing still. When it started again, he attempted to jump on, the train being in motion, but came in contact with a baggage truck on the platform, and was injured. He was not invited to alight, nor to jump on again:—Held, in an action to recover damages for the plaintiff's injuries, that the rule of evidence res ipsa loquitur did not apply; the plaintiff was bound to give reasonable evidence of the nature and extent of the duty owed to him by the defendants and the facts which constituted the breach of such duty: the position of the plaintiff was that of a mere licensee; the duty of the owner of the premises toward him was confined to two things, that he should not be exposed to a trap or other concealed danger, and that the owner should not be guilty of acts of active negligence; in other respects the licensee must at his own risk use the premises as he finds them; and in this case there was no trap—the accident happening in broad daylight—and no active negligence; and a nonsuit was affirmed.

Perdue v. Can. Pac. Ry. Co., 1 O.W.N. 665 (C.A.).

NEGLIGENCE OF FELLOW SERVANT—DEFECTIVE SYSTEM—COMMON-LAW LIABILITY.

The plaintiff's husband was engine driver on a train of the defendants which, shortly after leaving Brantford station, collided with a pilot engine which had gone out from Brantford yard a short time before: he was killed in the collision. By the defendants' rules, the pilot engine was under the direction of M., the yard foreman at Brantford, and it was admittedly owing to his neglect that the accident ocurred. The jury found that the system in use on the defendants' railway in respect to the pilot engine was not a reasonably safe and adequate one, but was defective and exposed their employees to unnecessary danger, and that the pilot engine, when away from the Brantford yard, should have been under the control of the train despatcher at London, and not under that of M.; that the adoption and use of this defective system was due to the negligence of the defendants' superintendent, G., and their yardmaster, M., and that the accident would not have happened but for the defect in the system; that the defendants' railway was managed and the rules for its operation made by competent officials, and that the deceased did not voluntarily undertake the risk. The jury assessed the damages at $8,250 at common law, and at $3,300 under the Workmen's Compensation Act:—Held, that judgment was properly entered for the plaintiff for $3,300, there being evidence to justify a verdict for that amount under the Workmen's Compensation Act; and no evidence to sustain a verdict based on common-law negligence or a defective system. Per Maclaren, J.A., that, it being admitted that the accident could not have occurred but for the negligence of M., the jury were not justified, on the evidence, or without evidence in attributing it to a more remote cause. If M. had obeyed the rule, the accident could not have happened. The jury were not entitled to speculate and say that it was negligence in the defendants not to have adopted at Brantford the practice of handling the pilot engine in use at London. The verdict as to defective system was directly contrary to the only competent evidence before them on the point, and their findings could not stand.

Fralick v. Grand Trunk Ry. Co., 1 O.W.N. 309.

DEATH OF BRAKEMAN—DEFECTIVE EQUIPMENT—LORD CAMPBELL'S ACT—LOSS OF PROSPECTIVE BENEFIT FROM CONTINUANCE OF LIFE.

The plaintiff's claim was for damages for the death of his son, an infant, alleged to have been occasioned by the negligence of defendants, on one of whose freight trains he was working as a brakeman at the time of the accident which resulted in his death. The alleged negligence consisted of the absence of air brakes and bell signal cord from the equipment of the train. The statement of claim was demurred to on various grounds and the following points were decided: (1) No person can sue under the Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 187, for damages for the death of a deceased relative, who could not sue under c. 31, R.S.M. 1902, and the statement of claim must shew, either that the plaintiff is the executor or administrator of the deceased, or that there is no executor or administrator, or, if there be one, that no action has been commenced within six months after the death of the deceased by or in the name of the executor or administrator; and it was not sufficient for plaintiff to state simply that he was the father and sole heir at law of the deceased. [Lampman v. Gainsborough (1888), 17 O.R. 191, and Mummery v. G.T.R. (1900), 1 O.L.R. 622, followed.] (2) It is necessary that the statement of claim should shew that the plaintiff had a reasonable prospect of future pecuniary benefit from the continuance of the life of the deceased. [Davidson v. Stuart, 14 Man. L.R. 74, followed.] When the failure to prove a fact will cause the action to fail, that fact is a material one upon which the plaintiff relies, and, under Rule 306 of the King's Bench Act, R.S.M. 1902, c. 40, should be set out in the statement of claim. (3) Under the circumstances appearing in this case it was not necessary that the action should be shewn to be brought for the benefit of all persons entitled to claim damages. (4) Although the Railway Act in force at the time of the accident required only passenger trains to be equipped with bell signal cords and air brakes, it is still a question of evidence whether the absence of those appliances on freight trains is negligence for the purposes of such an action, that is, whether they may be reasonably required or could be reasonably furnished for the protection of the train hands, and the statement of claim was not demurrable because it relied on that absence as constituting negligence. (5) The statement of claim should allege that the defendants were aware of the defects relied on as constituting negligence or should have known of them. (6) It is not necessary to allege that the deceased was ignorant of the alleged defects. [Smith v. Baker, [1891] A.C. 325, and Williams v. Birmingham, [1899] 2 Q.B. 338, followed.] (7) The requirements of s. 9 of the Workmen's Compensation for Injuries Act are directory rather than imperative and the omission to give the name and description of the person in defendant's service by whose negligence the accident occurred is a matter to be dealt with by an application for particulars and not by demurrer. (8) The refusal or neglect of defendants to provide medical or surgical attendance for the injured employee gives no cause of action. Therefore the allegations in the statement of claim that the deceased came to his death as the result of the injuries received and of the alleged neglect to provide medical or surgical care are demurrable. (9) Plaintiff in such an action has no right to claim for funeral expenses. (10) That the time allowed by the statute for the commencement of the action had expired when the demurrer was argued was no objection to the allowance of amendments to the statement of claim which did not seek to introduce any new parties or different causes of action. (11) Under Rule 453 of the King's Bench Act, it is only in respect of some question of law which is fundamental or goes to the root of the cause or defence set-up that there should be a separate argument before the trial. As to all other matters in the pleading which may be objectionable, an application in Chambers under Rule 326, to strike them out is the proper remedy.

Makarsky v. Can. Pac. Ry. Co., 15 Man. L.R. 53.

[Referred to in Gardiner v. Bickley, 15 Man. L.R. 356.]

DANGEROUS APPLIANCES.

An employer is not obliged to provide the most modern appliances or tools, but if obsolete, inferior and dangerous tools or appliances are kept in use, it constitutes an element of negligence on his part obliging him to observe greater vigilance in order to avoid liability for injuries. In the present case, as the vigilance of the company was not such as was necessary with the obsolete couplers they used, they were held liable for injuries. [Judgment appealed from (25 Que. S.C. 82), affirmed, Hall, J., dissenting.]

Quebec & Lake St. John Ry. Co. v. Lemay, 14 Que. K.B. 35.

WATER TANK—COMPRESSED AIR—APPLIANCES.

When a water tank is used, from which water is distributed through pipes by means of compressed air pressure, and its lid has to be removed from time to time for refilling, the failure to provide it with a valve or stopcock, to relieve the pressure, is negligence which makes the owner liable for accidents; and the finding of a jury that the death of a workman, employed to remove the lid, against whom it was thrown by an explosion, was partly due to such negligence, is proper and will not be disturbed.

Stevenson v. Grand Trunk Ry. Co., 32 Que. S.C. 423.

DEATH OF ENGINEER—INSUFFICIENCY OR IMPROPER HANDLING OF BRAKES.

(1) A railway company is liable for the death of an engine driver in a collision shewn to have been caused by the insufficiency of the brakes on the train, or by their not having been properly applied by the other servants. (2) The claim of the widow and children of the deceased, under Art. 156, C.C. (Que.), cannot be affected, nor its amount reduced, by an insurance obtained by the deceased and paid after his death. [Miller v. Grand Trunk Ry. Co., 15 Que. K.B. 118, followed.]

Johnson v. Can. Northern Quebec Ry. Co., 39 Que. S.C. 263.

INJURY TO SERVANT—NEGLIGENCE—DEFECTS IN MACHINERY—CONTRIBUTORY NEGLIGENCE.

Short v. Can. Pac. Ry. Co., 3 W.L.R. 326 (Terr.).

NEGLIGENCE—INJURY TO WORKMAN—UNSKILFUL USE OF TOOL—UNSUITABILITY OF TOOLS SUPPLIED FOR WORKMAN'S USE—CONTRIBUTORY NEGLIGENCE.

Great Northern Ry. Co. v. Turcot, 4 E.L.R. 361 (Que.).

DERAILMENT—DEFECTIVE ROADBED—VIS MAJOR.

In an action by a widow for the death of her husband, the engine driver of a train which was derailed and wrecked, it was:—Held, that in constructing a roadbed, without sufficient examination, upon treacherous soil and failing to maintain it in a safe and proper condition, a railway company is prima facie guilty of negligence which casts upon them the onus of shewing that the accident was due to some undiscoverable cause. This onus is not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility of the accident having been occasioned by other causes which might have been foreseen and guarded against, and consequently, the company is liable in damages. Judgment appealed from affirmed, following Great Western Ry. Co. v. Braid (1 Moo. P.C. (N.S.) 101).

Quebec & Lake St. John Ry. Co. v. Julien, etc., 6 Can. Ry. Cas. 54, 37 Can. S.C.R. 632.

[Referred to in Isbister v. Dominion Fish Co, 19 Man. L.R. 449.]

Dangerous condition of premises—Accumulation of snow and ice.

Action against a railway company for alleged negligence. The deceased was killed by being run over while shunting cars. The evidence shewed that the space between two sets of tracks in the defendants' yard was dangerous by reason of an accumulation of snow and ice thereon, but there was no evidence that the tracks themselves were not in good condition, and it was merely a matter of conjecture whether, at the time of the accident, the deceased was on the tracks or on the space between them:—Held, that under the circumstances the accident was not due to the defendants' negligence. Judgment of the Divisional Court, 1 Can. Ry. Cas. 444, reversed.

Armstrong v. Canada Atlantic Ry. Co., 2 Can. Ry. Cas. 339, 4 O.L.R. 560.

[Considered in Lever v. McArthur, 9 B.C.R. 418; distinguished in Bell Bros. v. Hudson's Bay Ins. Co., 2 S.L.R. 361; followed in O'Connor v. Hamilton, 8 O.L.R. 391, 3 O.W.R. 918; Smith v. McIntosh, 13 O.L.R. 118; referred to in Giovinazzo v. Can. Pac. Ry. Co., 19 O.L.R. 325; Iveson v. Winnipeg, 16 Man. L.R. 364; O'Connor v. Hamilton, 10 O.L.R. 529, 6 O.W.R. 227; Plouffe v. Can. Iron Furnace Co., 10 O.L.R. 37.]

Negligence—Duty to pack frogs.

Contributory negligence may be a defence to an action for damages, suffered in consequence of a breach of a statutory duty. [Groves v. Wimborne, [1898] 2 Q.B. 419, and Beven on Negligence, pp. 633, 634, 643, and the cases there cited, followed.] In an action for damages for injuries suffered by the plaintiff, a brakeman, in consequence of putting his foot in a frog which it was alleged had not been properly packed as required by s. 288 of the Railway Act, 1906, the trial Judge charged the jury that if the frog was unpacked, the company would be liable, whether the plaintiff was guilty of contributory negligence or not:—Held, that this was a misdirection, and that notwithstanding the question of contributory negligence was submitted to the jury and answered in plaintiff's favour, there should be a new trial. [Bray v. Ford, [1896] A.C., at p. 49, and Lucas v. Moore (1878), 3 A.R. (Ont.) at p. 614, followed.]

Street v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 212, 18 Man. L.R. 334.

Brakeman injured whilst uncoupling cars—Defective apparatus.

The plaintiff, a brakeman on duty in the defendants' employ was injured in an attempt to uncouple a number of cars from an engine, the train being in motion. There was evidence that the lever on the engine tender failed to work properly, that there was no lever on the end of the car next the tender, and that the plaintiff, in order to uncouple, had to reach in between the ends of the cars in an effort to pull out the coupling pin. In so doing he either tripped or was knocked down and had an arm cut off by the wheels of the tender:—Held, that in view of the requirement of par. (c) of subs. 1 of s. 264 of the Railway Act, 1906, that all cars should be equipped with apparatus which shall prevent the necessity of brakemen going in between the ends of the cars to uncouple, the plaintiff had made out a prima facie case of negligence, and that the nonsuit entered at the trial should be set aside, and a new trial granted. Costs of the former trial and of the appeal to be costs to the plaintiff in any event of the cause. The trial Judge had made an order that, if a new trial should be granted by the Court of Appeal, then in the event of either of the plaintiff's witnesses being out of the country, he should have the right to read the evidence such witness had given at the trial on the case coming up for trial again, and the Court ordered this provision to be embodied in the judgment.

Scott v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 222, 19 Man. L.R. 29.

Dangerous way—Position of peril—Fair inference.

An action to recover damages for the death of plaintiff's (respondent's) son, an employee of the appellant company, because of its alleged negligence. The deceased was engaged at the time of the accident in wheeling concrete in a wheelbarrow from the mixer along and over a runway and platform. The body was found on the ground below with the head to the northeast and the feet to the southwest, 12 or 15 feet to the northeast of the said runway and east of its centre; while the wheelbarrow is described as being found "right in under the narrow runway right against the west abutment, cement and all in the corner." There was no eye witness of the accident. The jury found that the death was owing to the negligence of the company by allowing men to use a runway only 20 inches wide at a height of 29 feet from the ground; that the way was defective for the same reason and that the deceased could not by the exercise of reasonable care, have avoided the injury:—Held (1), that the company was guilty of negligence in having a runway which was defective because of being unnecessarily narrow. (2) That the deceased fell from the narrow north runway was the only fair and legitimate inference.

Can. Pac. Ry. Co. v. McKeand, 13 Can. Ry. Cas. 472.
[See 18 O.W.R. 309, 16 O.W.R. 664.]

Liability of railway company to brakeman—Standpipe near track.

A railway company which has complied with an order of the Board, under par. (g) of s. 30, of the Railway Act, 1906, requiring its water stand pipes to be placed 7 feet 6 inches from the centre of its tracks, is relieved from liability to a brakeman for injuries sustained while riding on a ladder on the side of a car, by coming into contact with a standpipe located as required by such order. [G.T.R. v. McKay, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52, followed.]

Clark v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 51, 2 D.L.R. 331.
[Referred to in Kizer v. Kent Lumber, 5 D.L.R. 317.]

Improper car equipment.

The fact that a box freight car was not equipped with ladders at the ends as required by subs. 5 of s. 264 of the Railway Act, 1906, will not render a railway company liable for injuries sustained by a servant while attempting to couple cars, where the absence of such ladder was not the contributing cause of such injury.

Stone v. Can. Pac. Ry. Co. (Ont.), 14 Can. Ry. Cas. 61, 4 D.L.R. 789. [Reversed in 13 D.L.R. 93.]

Absence of ladder from end of foreign railway car—Statutory condition.

A verdict for the defendant should be directed where the evidence shews that the plaintiff, a brakeman in the former's employ, received an injury as the result of his own carelessness while attempting to couple cars, and not as the result of the absence of a ladder from the end of a car that, in the interchange of traffic, under s. 317 of the Railway Act, 1906, was received by the defendant from and was owned by a railway company operating in the United States, which was not shewn to be under any obligation, statutory or otherwise, to maintain ladders on the ends as well as the sides of its box freight cars.

Stone v. Can. Pac. Ry. Co. (Ont.), 14 Can. Ry. Cas. 61, 4 D.L.R. 789. [Reversed in 13 D.L.R. 93.]

Operation of snowplough—Defective system.

In order to entitle the plaintiff to recover from a railway company for negligently causing the death of a locomotive fireman as the result of a defective system of operating a snowplough, which was being propelled by the locomotive at the time of the accident, by placing a signalman on the plough who had not passed the necessary eye and ear test, and an examination as to train rules, it must appear that such negligence was the proximate cause of his death.

Jones v. Can. Pac. Ry. Co. (Ont.), 14 Can. Ry. Cas. 76, 5 D.L.R. 332. [Reversed in 16 Can. Ry. Cas. 305, 13 D.L.R. 900.]

Duty to inspect—Latent defects—Ice in car coupler.

The duty of a railway company to inspect cars for defects was discharged, so as to absolve it from liability for an injury to a brakeman through the failure of an automatic car coupler of the best known type to work properly by reason of an accumulation of ice inside it, where the car, on its arrival at a station, was given the usual inspection, and no practicable system of inspection would have disclosed the presence of the ice.

Phalen v. Grand Trunk Pacific Ry. Co., 16 Can. Ry. Cas. 152, 12 D.L.R. 347, 23 Man. L.R. 435.

[Affirmed in 18 Can. Ry. Cas. 233.]

Railway track—Accumulation of ice—Negligence.

It is the duty of the employer to provide safe premises for his servants to work: allowing ice and snow to accumulate along the side of a railway track so as to be a trap for a workman walking along the track in the performance of his duty is negligence and if the cause of an accident the company is liable. The fact that the accident happened on a highway is no defence, the duty being founded not on ownership but on possession.

McEntee v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 269, 11 Sask. L.R. 145, 40 D.L.R. 322.

Negligence—Dangerous train yard—Death—Remedy.

Insufficient space between tracks in a train yard, where snow and ice had been permitted to accumulate, the yard being inadequately lighted, is negligence which will render a master liable for the death of a servant who has been run over by an engine while at work thereat; the damages therefore may be enforced by an action at common law, under Lord Campbell's Act, and need not be restricted under the Employer's Liability Act.

Armstrong v. Can. Northern Ry. Co., 35 D.L.R. 568, 3 W.W.R. 219.

DUTY AS TO SAFETY—DECAYED POLE—INJURY TO LINEMAN—LIABILITY OF MASTER.

The decayed condition of a pole, undiscovered because of the master's negligent inspection, will render the master liable for the death of a lineman caused by his jumping from the pole as it appeared to be about to fall.

Christie v. London Elec. Co., 23 D.L.R. 476, 33 O.L.R. 395.

SWITCH STAND TOO NEAR RAILS—INJURY TO SWITCHMAN.

A railway company is not liable to a switchman for injuries sustained in consequence of their placing a switch stand too near the rails, in the absence of evidence that the placing of the switch in that manner was not according to proper railway practice. [Mallory v. Winnipeg Joint Terminals, 22 D.L.R. 448, 25 Man. L. R. 456, 18 Can. Ry. Cas. 277 (annotated), affirmed in 29 D.L.R. 20, 53 Can. S.C.R 323, followed.]

Nelson v. Can. Pac. Ry. Co., 35 D.L.R. 318.
[Reversed in 39 D.L.R. 760.]

DAMAGED CAR—DEFECTIVE LADDER—NOTICE—STATUTORY DUTY—BREACH OF RULES—PROXIMATE CAUSE.

Smith v. Grand Trunk Ry. Co., 20 D.L.R. 961.

PROPER SYSTEM AND PLACE TO WORK—SUITABLE MATERIALS—COMMON-LAW LIABILITY.

The master's primary duty to the employee is to provide in the first instance fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work, but he is not bound to see that the place is safe from day to day or from hour to hour; so if changes have to be made incidental to the work and to the place the employee is called upon to work in, and if these are made under the direction of persons competent to carry forward the work and under a system and with resources which would enable them to carry it out with due regard to the safety of themselves and their fellow servants, the master is not at common law liable for the failure of such persons to exercise due care, skill and diligence in its prosecution unless the negligent performance amounts to a breach of a statutory duty imposed on the master or unless he had after actual or implied notice of the mistakes of the persons so entrusted failed to correct the same. [Ainslie v. McDougall, 42 Can. S.C.R. 420, applied; Fakkema v. Brooks, 44 Can. S.C.R. 412, distinguished; Wilson v. Merry, L.R. 1 H.L. (Sc.) 326, referred to.]

Hall v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 163, 20 D.L.R. 666.

DUTY TO INSPECT—"INEVITABLE ACCIDENT"—LATENT DEFECTS.

A car attached to a fast freight train arrived at a station on the railway, in Saskatchewan, during a cold night in the winter; it was equipped with an approved coupling device, as required by s. 264 (c) of the Railway Act, 1906, and, on the arrival of the train, it had been inspected according to the usual practice and no defect was then found. When the train was being moved for the purpose of cutting out the car, the uncoupling mechanism failed to work and, in consequence, the plaintiff, an employee, sustained injuries. Subsequently the coupler was taken apart and it was then discovered that the locking-block was jammed with ice (not visible from the exterior) which had formed inside the chamber and prevented its release by the uncoupling device used to disconnect the car before the train was moved. In an action for damages, instituted in the Province of Manitoba, the jury found that the company had been negligent "through lack of proper inspection," and judgment was entered on their verdict. An appeal from the judgment of the Court of Appeal for Manitoba setting aside the verdict and entering judgment for the defendants was dismissed on the ground that the obligation resting upon the company, both under the statute and at common law, was discharged by the customary inspection of the car which had been made according to what was shewn to be good railway practice, and there was no further duty imposed in regard to unusual conditions not perceivable by the ordinary methods of inspection. [Phalen v. Grand Trunk Pacific Ry. Co., 23 Man. L.R. 435, 16 Can. Ry. Cas. 152, affirmed.]

Phelan v. Grand Trunk Pacific Ry. Co., 18 Can. Ry. Cas. 233, 51 Can. S.C.R. 113, 23 D.L.R. 90.

[See Stone v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 408, 14 Can. Ry. Cas. 61; Can. Pac. Ry. Co. v. Frechette, 18 Can. Ry. Cas. 251; distinguished in Nelson v. Can. Pac. Ry. Co., 39 D.L.R. 760, 24 Can. Ry. Cas. 308.]

Board—Order not applicable—Switch stand—Location—Negligence—Good railway practice.

The fact that an order of the **Board** does not govern the location of switch stands of a certain height, constructed according to good railway practice, does not justify a railway company placing such a stand so close to passing cars that it is dangerous to brakemen.

Nelson v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 308, 55 Can. S.C.R. 626, 39 D.L.R. 760.

Shunting cars—Actionable negligence—Precautionary duties—"Defective system," when negatived—Workmen's compensation—Common law.

Kreuszynicki v. Can. Pac. Ry. Co., 16 D.L.R. 879.

Duty of employer—Obvious dangers.

An employer is not entitled to expose his servants unnecessarily to obvious dangers, which they can escape only by constant vigilance or unfailing alertness. A member of a railway company's switching crew was knocked from a ladder on a side of a car by a switch stand and injured by a following car. The jury found the railway company negligent in placing the switch stand too near the rails, and found that there was no contributory negligence. On appeal it was held (Lamont, J., dissenting) that there was no evidence showing, or from which the inference could fairly be drawn, that the position of the switch stand was contrary to any order of the Board, or was not according to good railway practice, and furthermore, that the accident was due to plaintiff's own negligence.

Nelson v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 308, 55 Can. S.C.R. 626, 39 D.L.R. 760.

Appliances—Reasonably fit for the work—Defect—Finding of jury—New trial.

A railway company is not obliged to have the best appliances for the purpose of discharging freight if the appliances used are reasonably fit for the purpose. If the jury give no finding from which it can be inferred what the defect was which led to the accident, a new trial will be ordered.

Wamboldt v. Halifax & South Western Ry. Co., 40 D.L.R. 517.

D. Signals and Warnings.

Injury to switchman—Failure to warn.

At the trial before a jury of an action by a switchman to recover damages against a railway company for injuries alleged to have been caused to him while engaged in the execution of his duty under the orders of his foreman through negligence in the operation of a train by other servants of the company and because there was not sufficient room between the different tracks in the railway yard to enable the plaintiff to carry on his work safely, the defences of contributory negligence and volenti non fit injuria are properly for the jury, and, when there was some evidence that the bell had not been rung or the whistle sounded on the train which struck the plaintiff, and to shew that the "layout" of the yard was defective, a verdict entered for the defendants by the direction of the trial Judge should be set aside and a new trial granted. [Toronto Ry. Co. v. King, [1908] A.C. 260; and Higley v. Winnipeg (1910), 20 Man. L.R. 22, followed.]

Wood v. Can. Pac. Ry. Co., 20 Man. L.R. 92; affirmed in C.P.R. v. Wood, 45 Can. S.C.R. 7, 47 Can. S.C.R. 403.

Negligence causing death—Train moving backwards—Absence of lights to warn.

A conductor in defendants' employ, while engaged in the performance of the duty for which he was engaged at the Windsor Station of the C. P. R. in Montreal, was killed by a train which was being moved backwards in the station yard. There was no light on the rear end of the last car of the train, nor was there any person stationed there to give warning of the movement of the train:—Held, that by omitting to have a light on the rear end of the train the railway company failed in its duty, and this constituted prima facie evidence of negligence.

Can. Pac. Ry. Co. v. Boisseau, 2 Can. Ry. Cas. 335, 32 Can. S.C.R. 424.

[Applied Jess v. Quebec & Levis Ferry Co., 25 Que. S.C. 241; distinquished in Can. Pac. Ry. Co. v. Dionne, 18 Que. K.B. 389; followed in Lamond v. Grand Trunk Ry. Co., 16 O.L.R. 365, 7 Can. Ry. Cas. 401.]

Failure to give signals—Death of track foreman—Negligence of crew of engine.

The plaintiff's husband, while in the actual discharge of his duty as section foreman on the defendants' railway examining the track, was struck by a yard engine running backwards. No lookout was on the tail board or rear of the engine and no signal of any kind was given to warn the deceased of the approach of the engine:—Held, that there was ample evidence to support the findings of the jury that the deceased came to his death in consequence of the negligence of the engine crew in neither blowing the whistle, ringing the bell nor keeping a proper lookout, and that the deceased could not, by the exercise of reasonable care under the circumstances, have avoided the accident, and that the appeal from the verdict in favour of the plaintiff should be dismissed. Although the deceased, if he had looked round, would have seen the approaching engine and stepped out of the way, yet he was engaged at the time in the discharge of a duty of an absorbing character which would naturally take his whole attention and, under the circumstances, a jury might properly infer that there was no absence of reasonable care on the part of the deceased. Moreover, even if the deceased had been guilty of negligence, the defendants would still be liable if the engine crew could, by the exercise of reasonable care, have avoided the accident. [Coyle v. Great Northern Ry. Co. (1887), L.R. 20 Ir. 409; The Bernina (1887), 12 P.D. 89; Kelly v. Union Ry. & T. Co. (1888), 8 S.W.R. 20; Canada Southern Ry. Co. v. Jackson (1890), 17 Can. S.C.R. 316; London & Western Trusts Co. v. Lake Erie & Detroit River Ry. Co. (1906), 12 O.L.R. 28, 7 O.W.R. 751, 5 Can. Ry. Cas. 364, followed.] The omission of a common-law duty is actionable negligence equally with the omission of a statutory duty, and the common law requires the defendants' servants, when running through the yard, to take the obvious precaution of watching for workmen lawfully on the track and giving them timely warning. [Canada Atlantic Ry. Co. v. Henderson (1899), 29 Can. S.C.R. 632.]:—Held, also, that the jury would have been justified if they had drawn inferences unfavourable to the defence from the fact that neither the engineer nor the fireman who were in charge of the engine was called to give evidence for the defence: [Green v. Toronto Ry. Co. (1895), 26 O.R. 326.] The accident occurred within twenty feet of a public highway crossing, but, Quære, whether s. 224 of the Railway Act, 1903, requiring that the whistle should be sounded when approaching a highway crossing and that the bell should be continuously rung until the highway is crossed, can be invoked on behalf of any persons except those using the highway crossing.

Wallman v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 229, 16 Man. L.R. 82. [Distinguished in Isbister v. Dominion Fish Co., 19 Man. L.R. 443; doubted in Lamond v. Grand Trunk Ry. Co., 16 O.L.R. 365.]

Signals and warnings—Breach of statutory duty—Common employment—Liability Act—Fatal Injuries Act.

S. 251 of the Railway Act of Nova Scotia provides that when a train is moving reversely in a city, town or village the company shall station a person on the last car to warn persons standing on or crossing the track, of its approach and provides a penalty for violation of such provision:—Held, that this enactment is for the protection of servants of the company standing on or crossing the track as well as of other persons. M. was killed by a train, consisting of an engine and coal car, which was moving reversely in North Sydney. No person was stationed on the last car to give warning of its approach and as the bell was encrusted with snow and ice it could not be heard. Evidence was given that on a train of the kind the conductor was supposed to act as brakesman and would have to be on the rear of the coal car to work the brakes but when the car struck M., who was engaged at the time in keeping the track clear of snow, the conductor was in the cab of the engine:—Held, Idington, J., dissenting, that an absolute duty was cast on the company by the statute to station a person on the last car to warn workmen, as well as other persons, on the track which, under the facts proved, they had neglected to discharge. The defence under the doctrine of common employment was, therefore, not open to them.

[Groves v. Wimborne, [1898] 2 Q.B. 402, followed]:—Held, per Idington, J., that the evidence shewed the only failure of the company to comply with the statutory provision to have been through the acts and omissions of the fellow servants of deceased; that the company, therefore, could not be held liable for the consequences under the Fatal Injuries Act; that it is, therefore, unnecessary to determine the applicability of the said section of the Railway Act, as the fellow servants were guilty of common-law negligence which rendered the company liable but only by virtue of and within the limits of the Employers' Liability Act, 41 N.S.R. 514, reversed.

McMullin v. Nova Scotia Steel & Coal Co. 7 Can. Ry. Cas. 198, 39 Can. S.C.R. 593.

[Followed in Pettit v. Can. North. Ry. Co., 14 Can. Ry. Cas. 293, 7 D.L.R. 645; applied in Campbell v. Nova Scotia Steel & Coal Co., 22 D.L.R. 885.]

ACCIDENT TO EMPLOYEE—WATCHMAN AT CROSSING—BACKING TRAIN.

A watchman of the defendant company at a certain crossing in a city was killed by two cars being "kicked off" in the usual way from a train which was backing in an easterly direction for that purpose. A brakeman with a lamp was on top of the western-most of the two cars, but was not keeping a lookout, and gave no warning that the cars were moving. There was no light on the crossing, nor was any one stationed on the cars "kicked off," to warn people, and the engine bell was ringing:—Held, that the defendants were guilty of negligence and were liable for his death, not having complied with s. 276 of the Railway Act, 1906, by stationing a person on the front car to warn people. Although the deceased was an employee of the defendants and it was his duty to protect persons crossing the track from the cars, he had a right to rely, so far as his own safety was concerned, on nothing being done to expose him to unnecessary danger, and on the above section being complied with. [Can. Pac. Ry. Co. v. Boisseau (1902), 32 Can. S.C.R. 424, followed.]

Lamond v. Grand Trunk Ry. Co., 7 Can. Ry. Cas. 401, 16 O.L.R. 365.

[Followed in Pettit v. Can. North. Ry. Co., 14 Can. Ry. Cas. 293, 7 D.L.R. 645.]

INJURY TO CAR CLEANER WALKING ON TRACK—TRAIN AHEAD OF TIME—EXCESSIVE SPEED—FAILURE TO RING BELL.

A car cleaner employed by the defendants was injured through being struck by a locomotive engine while walking upon the track upon which the engine was moving. The jury at the trial found that the injured party was not guilty of any negligence which caused or contributed to the accident, but that the negligence which caused the accident was improper light of yards during time of alterations and the train being a little ahead of time running at an excessive rate of speed. The jury did not answer the question as to failure to ring the bell:—Held, that the accident was not due to actionable negligence on the defendants' part and the action must be dismissed. Moss, C.J.O.:—When a jury exonerate an injured party from the charge of contributory negligence upon the evidence which but for the finding would appear to shew very convincingly that he was the author of his own injuries, the Court should ascertain whether there is evidence upon which the jury might reasonably find negligence on the part of the defendants which actually caused the injury or whether the findings of the jury make a case of actionable negligence against the defendants. Charges of alleged negligence expressly put to the jury upon which the jury did not make a finding must be taken to have been negatived. Meredith, J.A.:—There was no duty owed by the defendants to the plaintiff regarding the time of arrival of any of its trains. There is no rule of law limiting the rate of speed of railway trains in the interests of railway workmen.

Paquette v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 68, 19 O.W.R. 305.

[Andreas v. Can. Pac. Ry. Co., 37 Can. S.C.R. 1, 5 Can. Ry. Cas. 450, followed.]

Sectionman killed on track—Absence of headlight in fog—Contributory negligence.

Early on a foggy morning in September, the plaintiff's husband, a sectionman employed by the defendants, was working on the north track of the defendants' double-tracked line, when he was struck by an engine coming from the west upon the north track, and killed. He must have heard the engine approaching, but supposed that it was on the south track, which was the usual one for east-bound trains. In an action by his widow to recover damages for his death, the jury, in answer to questions submitted, found that the defendants had been negligent in: (1) "neglecting to switch back train on to right line at Lyn;" (2) not carrying a headlight. The jury also found that there had been no contributory negligence; and they assessed the plaintiff's damages at a sum for which the trial Judge pronounced judgment in her favour, with costs:—Held, on appeal, that there was no proper evidence to support the first finding of negligence; but (Meredith, J.A., dissenting) that, as there was uncontradicted evidence that the engine had no headlight, as the defendants' rules provided that a train running when obscured by fog must display a headlight, as the jury might well infer that, if it had been displayed, it probably would have prevented the accident, as the point was, though not specially mentioned in the pleadings, submitted to the jury by the trial Judge, without objection, and was, in the circumstances, one proper for their consideration, and as there was evidence upon which the jury might well negative contributory negligence, judgment was properly given for the plaintiff. Per Meredith, J.A.:—The jury may act upon proper presumptions of fact, but may not draw upon their imaginations, nor supply facts which ought to be proved under oath. The analogy of judicial notice obtains to some extent, but is limited to a few matters of elemental experience; and it is not in the category of elemental experience that in a dense fog in the daylight the headlight of an engine would have conveyed to the deceased the fact that the train was running on the east-bound track, in time to save him from his assurance that it was on the other track. There was not a particle of evidence that the negligence of the defendants in running the train without a headlight was the cause of the accident; and there should be a new trial.

Graham v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 232, 25 O.L.R. 429.

Swing bridge on railway—Semaphore and bridge lights.

The exception to a rule of a railway company that its trains are entirely under the control of the conductors and that their orders must be obeyed except when they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable, does not apply where an engine driver passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine when he signaled to the conductor that he was ready to go ahead and the conductor signaled to him to go ahead and he ran on to an open bridge which was near the tank and the engine ran off into the water and the engineer was drowned and where the jury found that the engineer acted reasonably and with proper precaution when he saw that the lights of the bridge indicated that all was right to go across and that he went ahead upon being signalled by the conductor to do so. Where a locomotive driver passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled the conductor, who, by a rule of the company had entire control of the train, that he was ready to go ahead and he ran on to a swing bridge which was then being opened to let a tug pass and the engine ran off into the water and the engineer was drowned, his death was due to the negligence of the conductor and not to his own, his act of negligence in passing the semaphore having expended itself when the train stopped at the water tank. Smith v. Grand Trunk Ry. Co., 3 O.W.N. 279, reversed.

Smith v. Grand Trunk Ry. Co. (Ont.), 14 Can. Ry. Cas. 49, 2 D.L.R. 251.

[Reversed in 14 Can. Ry. Cas. 300, 8 D.L.R. 171.]

RAILWAY SWING BRIDGE—NEGLIGENCE.

Where a locomotive driver ignored and passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled the conductor, who, by a rule of the company, had entire control of the train, that he was ready to go ahead, and the conductor signalled him to go ahead, and he, still ignoring the semaphore, ran on to a swing bridge which was then being opened to let a tug pass and the engine ran off into the water and the engineer was drowned, his death was due to his own negligence. The exception to a rule of a railway company that its trains are entirely under the control of the conductors and that their orders must be obeyed except when they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable, is applicable where an engine driver passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled to the conductor that he was ready to go ahead and the conductor signalled to him to go ahead and he ran on to an open bridge which was near the tank and the engine ran off into the water and the engineer was drowned, although the jury found that the engineer acted reasonably and with proper precaution when he saw that the lights on the bridge indicated that all was right to go across and that he went ahead upon being signalled by the conductor to do so. [Smith v. Grand Trunk Ry. Co., 3 O.W.N. 379, restored; Smith v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 49, 2 D.L.R. 251, reversed.]

Smith v. Grand Trunk Ry. Co. (No. 2), 14 Can. Ry. Cas. 300, 8 D.L.R. 171.

RAILWAY FIREMAN—NEGLIGENCE OF ENGINEER—ABSENCE OF SIGNALS—COMMON LAW.

A railway company is not liable at common law for the death of the fireman of a locomotive that was propelling a snow plough, as the result of a collision with another train, due to the negligence of the engineer in charge of the engine in continuing to run it without attemping to learn the cause of the failure of the signalman on the plough to give crossing and station signals, where no negligence on the part of the signalman was shewn, as the engineer whose negligence caused the accident was the deceased's fellow servant.

Jones v. Can. Pac. Ry. Co. (Ont.), 14 Can. Ry. Cas. 76, 5 D.L.R. 332. [Reversed in 16 Can. Ry. Cas. 305, 13 D.L.R. 900.]

Drunkenness of signalman causing derailment—Interlocking plant.

The Board granted the application of the C. P. R. Co. to cross the tracks of the C. N. R. Co. upon the terms that the applicant should at its own expense, insert a diamond in the track, provide, maintain and operate an interlocking plant including the cost of keeping a signalman in charge of the crossing. The signalman was appointed by the C. N. R. to the satisfaction of both companies. While a C. P. R. train was approaching the crossing the signalman, being intoxicated, derailed the train, killing the fireman. The C. P. R. Co. was held liable in damages for the death of its servant, the fireman, because it was alone responsible for the negligence of the signalman, who, at the time of the accident, while adjusting the points and giving the signals for its train, was to be regarded as a person in its employment. The whole circumstances of the employment must be looked at and the real effect of the actual relation existing must not be lost sight of in deference to a formula about hiring and paying. [Hansford v. Grand Trunk Ry. Co. (1909), 13 O.W.R. 1184, at p. 1187, specially referred to.]

Pattison v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 401, 24 O.L.R. 482. [Reversed in 26 O.L.R. 410, 14 Can. Ry. Cas. 405].

Duty to warn—Workmen at tramway crossing—Approaching cars—"Defective system."

The work of laying planks at a tramway crossing may properly be found to have been done under a "defective system" when the foreman, whose duty it was to watch and warn the men of approaching cars passing at high speed at about fifteen-minutes intervals, was also required to do manual work along with the men in his charge, thus distracting his attention from the watching which was necessary for their protection.

Ellis v. British Columbia Elec. Ry. Co., 20 D.L.R. 82.

Liability of master—"Respondeat superior"—Negligence of signalman.

The application of the rule respondeat superior to each particular case depends upon facts and is a question of fact. [McCartan v. Belfast Harbour Commissioners, [1911] 2 Ir. R. 143, 44 Irish L.T. 223, referred to.] Where a railway company applies to the Board under s. 227 of the Railway Act, 1906, for leave to cross the line of another railway company, and the Board, by its order giving leave to cross, directs that an interlocking plant shall be established at the crossing at the expense of the applicant company, and that the other company, whenever it desires to make use of the crossing shall be entitled upon notice to the applicant company, to place a signalman in charge thereof, whose wages are paid by the company appointing him and reimbursed to it by the applicant company, the signalman so appointed is the servant of the company appointing him, and that company, and not the applicant company, is liable to a servant of the applicant company who is injured by the negligence of the signalman in passing a train of the applicant company over the crossing. Judgment of Boyd, C., Pattison v. C.P.R., 24 O.L.R. 482, 14 Can. Ry. Cas. 401, reversed, Garrow, J.A., dissenting.

Pattison v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 405, 26 O.L.R. 410.

E. Health Protection.

UNLICENSED PHYSICIAN ENGAGED TO ATTEND EMPLOYEES—LIABILITY OF RAILWAY COMPANY.

Where it is established that a physician engaged by an employer, upon salary provided by means of deduction from the wages of the employees, for the purpose of affording medical care and attendance to the employees, was not a licensed medical practitioner, the employer is liable for damages sustained through the fault of the physician, unless he produces evidence to shew that the engagement was made through error and without fault attributable to him.

North Shore Power & Navigation Co. v. Wallis, 20 Que. K.B. 506.

F. Licensee; Trespasser; Free Pass.

EMPLOYEES OF OTHER COMPANY—DUTY OF REASONABLE CARE TO.

A lumber company had railway sidings laid in their yard for convenience in shipping lumber over the line of railway, with which the switches connected, and followed the practice of pointing out to the railway company the loaded cars to be removed, the railway company thereupon sending their locomotive and crew to the respective sidings in the lumber yard and bringing away the cars to be despatched from their depot as directed by the bills of lading:—Held, that in the absence of any special agreement to such effect, the railway company's servants, while so engaged, were not the employees of the lumber company, and that the railway company remain liable for the conduct of the persons in charge of the locomotive used in the moving of the cars; and that where the lumber company's employees remained in a car lawfully pursuing their occupation there, the persons in charge of the locomotive owed them the duty of using reasonable skill and care in moving the car with them in it, so as to avoid all risk and injury to them. 22 A.R. (Ont.) 292, affirming 25 O.R. 209, affirmed.

Canada Atlantic Ry. Co. v. Hurdman, 25 Can. S.C.R. 205.

[Referred to in Tobin v. New Glasgow Iron, Coal & Ry. Co., 29 N.S.R. 76.]

EMPLOYEE TRAVELING ON PASS—FELLOW SERVANT—COMMON EMPLOYMENT.

Deceased, an employee of defendant company, was killed in a collision between the car of the defendant company on which he was traveling to his work, and a freight car which had been allowed to get loose and run down grade alone. There was no proof of how this car got away. Some evidence was given of a pass from the company having been found on deceased, but not to shew that this pass had been issued to him over that portion of the line, nor was the pass produced:—Held, that the onus was on the defendant company to shew that deceased was traveling on a pass and that it was not shewn that he was being carried in such circumstances as to make him a fellow servant with those operating the line. Per Irving, J.A.:—That the case had not been tried out, because the trial Judge, after instructing the jury that defendant company would not be liable if it was found that deceased was traveling on a pass by reason of the negligence of a fellow servant, asked the jury to find whether the accident was due to a defective system without explaining to them what constituted a defective system.

Wilkinson v. British Columbia Elec. Ry. Co., 13 Can. Ry. Cas. 378, 16 B.C.R. 113.

[Affirmed in 45 Can. S.C.R. 263, 13 Can. Ry. Cas. 382.]

Defective system—Gratuitous passenger—Free pass—Fellow servant.

The plaintiff's husband was an employee engaged as a mechanic in the company's workshops and was traveling thither to his work on one of the company's passenger cars, as a passenger, without payment of fare. A freight car became detached from a train, some distance ahead of the passenger car and proceeding in the same direction, it ran backwards down a grade, collided with the passenger car and the plaintiff's husband was killed. The manner in which the freight car became detached was not shewn. On the body of the deceased there was found a permit or "pass," which was not produced, and there was no evidence to shew any conditions in it, nor over what portion of the company's lines nor for what purposes it was to be honoured. On the close of the plaintiff's case, the defendants adduced no evidence whatever, and the jury found that the company was at fault, owing to a defective system of operation of their trains, and assessed damages, at common law, for which judgment was entered for the plaintiff:—Held, that there was a presumption that deceased was lawfully on the passenger car, and, in the exercise of their business as common carriers of passengers, the company were, therefore, obliged to use a high degree of care in order to avoid injury being caused to him through negligence; that there was nothing in the evidence to shew that deceased occupied the position of a fellow servant with the employees engaged in the operation of the trains which were in collision; and that, in the absence of evidence shewing any agreement, express or implied, or some relationship between the company and deceased which would exclude or limit liability, the plaintiff was entitled to recover damages at common law.

Judgment appealed from, B.C.R. 113, 13 Can. Ry. Cas. 378, affirmed. [Nightingale v. Union Colliery Co., 35 Can. S.C.R. 65, distinguished.]

British Columbia Elec. Ry. Co. v. Wilkinson, 13 Can. Cr. Cas. 382, 45 Can. S.C.R. 263.

Liability—Brakeman of another railway—Tracing cars.

A brakeman who was employed by a railway company other than the defendant, cannot recover for injuries sustained by being struck by a train where, without the knowledge or leave of the defendant, he was in its yard looking for cars that might be delivered to his master in due course, so as to, for his own convenience, expedite their disposal, when received, since no breach of any duty owed him by the defendant was the cause of his injury.

Cunningham v. Michigan Central Ry. Co. (Ont.), 14 Can. Ry. Cas. 96, 4 D.L.R. 221.

Employee of another railway in defendant's yard—Duty to trespasser—Speed of train in railway yard.

A brakeman of a railway company other than the defendant cannot recover for injuries sustained while, for purposes of his own, he was in the defendants' yard, by being struck by a train that gave all statutory warnings of its approach, where the plaintiff stated immediately after the accident that he saw the train coming but supposed that it was on a track different from that near which he was standing and where no peculiar circumstances are shewn to require a lessening of speed in the yard below that permitted by statute.

Cunningham v. Michigan Central Ry. Co. (Ont.), 14 Can. Ry. Cas. 96, 4 D.L.R. 221.

ACQUIESCENCE OF RAILWAY COMPANY.

Permission of a railway company to a brakeman of another company to enter its yards to look for cars that might be delivered his master in due course, so as to, for his own convenience, facilitate their disposal when received, cannot be inferred from the testimony of the plaintiff that he had done so for several months in the nighttime, or from the testimony of a servant of the defendant that he had "seen them come out different times," since it was not sufficient to shew knowledge on the part of the defendant of the plaintiff's conduct, much less to establish acquiescence therein sufficient to amount to leave or right to do so.

Cunningham v. Michigan Central Ry. Co. (Ont.), 14 Can. Ry. Cas. 96, 4 D.L.R. 221.

G. Assumption of Risk; Volens.

NEGLIGENCE—RISK VOLUNTARILY INCURRED—"VOLENTI NON FIT INJURIA."

On the trial of an action for damages in consequence of an employee of a lumber company being killed in a loaded car which was being shunted, the jury had found that "the deceased voluntarily accepted the risks of shunting," and that the death of the deceased was caused by defendant's negligence in shunting, in giving the car too strong a push:—Held, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skilful manner, and that the maxim "volenti non fit injuria" had no application. [Smith v. Baker, [1891] A.C. 325, applied.] 22 A.R. (Ont.) 292, affirming 25 O.R. 209, affirmed.

Canada Atlantic Ry. Co. v. Hurdman, 25 Can. S.C.R. 205.

[Referred to in Tobin v. New Glasgow Iron, etc., Ry. Co., 29 N.S.R. 76.]

DANGEROUS WORKS—ORDINARY PRECAUTIONS—KNOWLEDGE OF RISK—CONTRIBUTORY NEGLIGENCE—VOLUNTARY EXPOSURE TO DANGER.

An employer carrying on hazardous works is obliged to take all reasonable precautions, commensurate with the danger of the employment, for the protection of employees, and, where this duty has been neglected, the employer is responsible in damages for injuries sustained by an employee as the direct result of such omission. [Lepitre v. Citizens Light & Power Co., 29 Can. S.C.R. 1, referred to by Nesbitt, J.] In such a case it is not sufficient defence to shew that such a person injured had knowledge of the risks of his employment but there must be such knowledge shewn as, under the circumstances, leaves no doubt that the risk was voluntarily incurred and this must be found as a fact. Judgment of the King's Bench, Montreal, affirmed.

Montreal Park & Island Ry. Co. v. McDougall, 36 Can. S.C.R. 1.

[Followed in Grenier v. Wilson, 32 Que. S.C. 207.]

DANGEROUS WORK—COMMON FAULT.

Where an employee of a railway company was killed while engaged in a dangerous operation permitted by the conductor, both the company and employee were held to be negligent.

Great Northern Ry. Co. v. Cyr, 18 Que. K.B. 410.

OPERATION OF COAL MINE—NEGLIGENCE OF EMPLOYEE.

Under the system of operating the defendant company's coal mine, coal was brought to the surface by means of box cars and at intervals what was termed a "rake of cars" was sent down to bring up men. In the latter case the rules of the company required the man in charge of the brake to give four raps upon the rope connecting the cars with the hoisting engine at the surface as a signal that men were on board, when the cars were raised at a much slower rate of speed than that employed in raising coal. The man in charge of the brake, in violation of the rules, gave only one rap upon the rope (the signal used where coal was being raised) and the cars being brought up at a great speed ran off the track, resulting in the death of one man and serious injury to another. In an action under the Employers' Liability Act, R.S. 1900, c. 179:—Held, affirming the judgment of the trial Judge, (1) That the case was within s. 3, subs. (e) of the Act, relating to the negligence of persons in the service of the employer and having "charge or control of any points, signal, upon a railway, etc." (2) That there was no such contributory negligence on the part of plaintiff in remaining upon the cars (there having been an opportunity of getting off at a stopping place) as would disentitle him to recover. (3) That the principle volenti non fit injuria could not be invoked on behalf of the defendant company.

Bell v. Inverness Ry. & Coal Co., 42 N.S.R. 265.

Knowledge of defects or danger by servant—Statutory duty imposed on master.

Where a statutory duty is cast upon a master in any particular work, the fact that a servant continues in that work with knowledge of its dangerous character and appreciation of the risk thereof, does not render the maxim "volenti non fit injuria" applicable so as to absolve the master from liability, unless it is shewn that the servant undertook the employment not only with knowledge of the risk involved, but also of the master's statutory duty in respect thereto. (Per Galliher, J.A.)

Clark v. Can. Pac. Ry. Co. (B.C.), 14 Can. Ry. Cas. 51, 2 D.L.R. 331.

Volens a question for jury—Function of Court of Appeal on review—Order of Board—Failure to publish in Gazette.

In the absence of express consent or agreement to take the risk without precautions, the question of volens is peculiarly one for the jury, and the Court of Appeal should only interfere where the evidence is of such a character that only one view can reasonably be taken of the effect of the evidence (Galliher, J.A. dissenting). [McPhee v. Esquimalt and Nanaimo Ry. Co., 49 Can. S.C.R. 43, followed.] Per Irving, J. A.: The omission to publish in the Gazette an order of the Board cannot invalidate it, but merely necessitates proper proof of the order before the Court can act on it.

McPhee v. Esquimalt & Nanaimo Ry. Co., 22 B.C.R. 67.

Injuries to switchman—Defective engine—Unauthorized use—Contributory negligence—Proximate cause.

There can be no recovery either at common law or under the statute where the real basic cause of an accident and the resultant injuries to a switchman is the unauthorized taking and using of an untested and defective engine by the switching crew whom he voluntarily assisted in the taking and using of the engine with knowledge of its defective condition.

Hile v. Grand Trunk Pacific Ry. Co., 24 D.L.R. 9.

Alighting while train moving.

A workman engaged in taking wires up and down telegraph poles, and for that purpose traveling in a work train with a crew from place to place, is not justified in alighting from one car and attempting to get on another while the train is in motion, and between stations; and such conduct is not a "risk arising out of and incident to the nature of the employment" wthin the meaning of s. 6 of the Workmen's Compensation Act, Sask. Stat. 1910-11, c. 9, so as to render the employer liable for injuries to the employee resulting therefrom, the employer's liability in such case being limited to the ordinary risks of travel. [Plumb v. Cobden Flour Mills Co., [1914] A.C. 62; Barnes v. Nunnery Colliery Co., [1912] A.C. 44, followed; Herbert v. Fox, 84 L.J.K.B. 670; Jibb v. Chadwick, 84 L.J.K.B. 1241; Parker v. Black Rock, 84 L.J.K.B. 1373; Price v. Tredegar, 30 T.L.R. 583, referred to.]

Bechtel v. Can. Pac. Ry. Co., 26 D.L.R. 339, 9 S.L.R. 3, 33 W.L.R. 426.

TEMPORARY SUSPENSION OF WORK—VOLENS—DANGEROUS LOCALITY.

A temporary suspension of work does not always deprive the workman of his recourse under the Workmen's Compensation Act (Que.) if he is the victim of an accident during such suspension; but if the workman, notwithstanding the employer's orders to the contrary, withdraws from the latter's superintendence, leaves his work and traverses, in his own interest, a dangerous place, situated where the work is carried on, he loses his recourse against his employer.

Lavery v. Grand Trunk Ry., 26 Que. K.B. 281.

H. Negligence of Fellow Servant.

NEGLECT OF FELLOW WORKMAN—CONTRIBUTORY NEGLIGENCE—DEFECTIVE SYSTEM.

Deceased while engaged in discharging the duties of section foreman for the defendant company in their railway yard was run over by a train and killed. There was a high wind blowing at the time accompanied by considerable snow, and deceased was occupied in keeping the points of a switch clear of snow. This required constant attention and under the conditions prevailing at the time prevented him from observing the approach of the train. The train was being moved in a reverse direction and the accident was shewn to have been wholly due to the neglect of the proper persons, employed in connection with the running of the train, to ring the bell or blow the whistle or to stand on the forward end of the car for the purpose of giving the necessary warning. Plaintiffs, the widow and children of the deceased, sued for damages under the common law as aided by Lord Campbell's Act:—Held, that deceased was not guilty of contributory negligence, but that as all the negligent omissions were those of fellow workmen and there was no proof of a system on the part of the defendant company of running their trains without these precautions being taken, defendant was not liable.

McMullin v. Nova Scotia Steel & Coal Co., 41 N.S.R. 514.

UNSKILLED WORKMAN DIRECTED TO PERFORM WORK WHICH REQUIRES SKILL TO AVOID ACCIDENT.

Although an employer is not liable as a general rule, for the result of accidents which happen to employees from dangers essentially inherent in the work which is being performed, he, nevertheless, becomes liable when reasonable precautions have not been taken by him to reduce the danger to the lowest point or remove it altogether. And so, when work which is not specially unsafe for a skilled workman, such as the driving of spikes on a railway, is entrusted to an unskilled person, the employer is responsible for an accident to the workman resulting from his inexperience, reasonable precautions to avoid it not having been adopted.

Sparano v. Can. Pac. Ry. Co., 22 Que. S.C. 292 (Archibald, J.).

INJURY TO EMPLOYEE ROLLING TIMBERS—FELLOW SERVANT—FELLOW SERVANTS AND THEIR NEGLIGENCE.

Where an employee, while engaged with fellow workmen in rolling up timbers on flat cars, which timbers were similar to telegraph poles, being larger at one end than the other, and the only inference to be drawn from the evidence as to the cause of the accident is one of three alternatives:—(1) The small end was rushed up too fast; or (2) the fellow employees of the plaintiff let go the big end when they should and could have held it; or (3) there were not sufficient men on the job to hold the timber up, a judgment by the trial Court in favour of the defendant will be reversed on appeal and judgment entered for the plaintiff for his damages sustained. [Rostrom v. C.N.R., 3 D.L.R. 302, 21 W.L.R. 225, distinguished.]

Torangue v. Can. Pac. Ry. Co., 8 D.L.R. 211.

NEGLIGENCE OF TRACKMASTER—FELLOW SERVANT—COMMON EMPLOYMENT.

Negligence of a trackmaster of a railway company causing an injury to a man employed as one of a crew engaged in removing gravel from a ballasting train working on a section of the road under the control of the trackmaster is the negligence of a fellow servant engaged in a common employment, and the company is not liable in an action for damage resulting therefrom.

Day v. Can. Pac. Ry. Co., 3 Can. Ry. Cas. 307, 36 N.B.R. 323.

COLLISION—DEATH OF RAILWAY FIREMAN ON SNOWPLOUGH—UNQUALIFIED SIGNALMAN.

A railway company cannot be held liable for the death of a fireman on a snow-plough train as a result of a collision, merely because it employed an unqualified signalman on the snowplough, where it did not appear that an accident was the result of his disqualification.

Jones v. Can. Pac. Ry. Co. (Ont.), 14 Can. Ry. Cas. 76, 5 D.L.R. 332. [Reversed in 16 Can. Ry. Cas. 305, 13 D.L.R. 900.]

NEGLIGENCE OF FELLOW SERVANT.

Where a yard foreman, engaged with his assistant upon their duties in the yard, was struck and injured by an engine which was being used for shunting purposes, a finding by the jury that the accident was caused by reason of the negligence of the assistant and that the latter had the charge or control of the engine, within the meaning of subs. 5 of s. 3 of the Workmen's Compensation for Injuries Act, is supported by reasonable evidence where it appears that the engine was being run by an engineer who was subject to the orders of the assistant, who failed to carry out the orders he received from the yard foreman.

Martin v. Grand Trunk Ry. Co., 8 D.L.R. 590, 27 O.L.R. 165, 15 Can. Ry. Cas. 1.

STATUTORY DUTY—RAILWAY EMPLOYEES PASSING TEST—COMMON EMPLOYMENT.

Where a railway company in breach of the duty imposed by Order No. 12225 of the Board, permits an employee to engage in the operation of trains without the specified examination and test, the company is, by virtue of s. 427 of the Railway Act, 1906, liable in damages to any person injured as a result of such breach of duty. [Jones v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 76, 5 D.L.R. 332, 3 O.W.N. 1404, reversed: see also Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, R.S.O. 1914, c. 146, and Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, amending R.S.O. 1897, c. 166, R.S.O. 1914, c. 151.] The defence of common employment is not available to the master in a case in which injury has been caused to a servant by the negligence of a fellow servant selected by the master in breach of a statutory duty to employ in the particular service only persons who have passed a qualifying test, if the injury be the natural consequence of the lack of capability which the test should have disclosed. [Jones v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 76, 5 D.L.R. 332, 3 O.W.N. 1404, reversed; Groves v. Wimborne, [1898] 2 Q.B. 402, applied.] The flagrant failure of a section foreman improperly entrusted with the charge of a railway snow-plough train in violation of statutory regulations requiring that only employees should be placed in charge who had passed the prescribed examination to observe the signals or to signal to the engine driver in rear may, in the absence of evidence to the contrary, be presumed to have resulted from his want of skill, knowledge or experience, or to some physical incapacity or defect, which the statutory examination or test would have revealed; and the railway company is properly held liable in damages for the death of his assistant on the snowplough in a collision resulting from the section foreman's neglect in which he also was killed; the company's action in setting an unqualified man to do such work was either the sole effective cause of the accident or a cause materially contributing to it, and the case therefore could not have been properly withdrawn from the jury. Jones v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 76, 5 D.L.R. 332, 3 O.W.N. 1404, reversed.

Jones v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 305, 13 D.L.R. 900, 30 O.L.R. 331.

FELLOW SERVANTS—WATCHMAN AT LEVEL CROSSING—TRAIN CREW—COMMON-LAW REMEDY.

A person employed by a railway company as a watchman at the crossing of its railway with a street railway at level is a fellow servant with the crew of a train passing over the crossing; and, if he is killed in consequence of the negligence of the train crew, his widow cannot recover damages at common law against the railway company. [Waller v. South Eastern Ry. Co., 2 H. & C. 102; Morgan v. Vale of Neath Ry. Co., L.R. 1 Q.B. 149, and Lovell v. Howell, 1 C.P.D. 161, followed.] S. 276 of the Railway Act, 1906, is for the protection of employees of the railway company as well as of the public, and the widow and administratrix of a watchman employed by the company at a level crossing of the railway with a street railway, who is killed in an accident caused by a breach of that section by the running of a freight train backwards over the crossing without any person on the end car to give proper warning of its approach, resulting in a collision with a street car crossing the tracks, may recover damages against the company under that section. [McMullin v. N.S. Steel & Coal Co., 7 Can. Ry. Cas. 198, 39 Can. S.C.R. 593, and Lamond v. G.T.R. Co., 7 Can. Ry. Cas. 401, 16 O.L.R. 365, followed.] Even if it were shewn that a street railway company, as well as a railway company, might also be liable for the consequences of an accident which resulted in the death of one of the railway's employees because of the negligence of the motorman, an employee of the street railway company, that would not prevent the recovery of full damages from the railway company. ["The Bernina," 13 A.C. 1, and Burrows v. March Gas & Coke Co., L.R. 5 Ex. 67, followed.]

Pettit v. Can. Northern Ry. Co. (Man.), 14 Can. Ry. Cas. 293, 7 D.L.R. 645.

[Varied in 11 D.L.R. 316, 23 Man. L.R. 213 by reducing the damages.]

PERSONAL INJURIES—COMMON LAW—DANGEROUS SYSTEM.

The personal injuries received by the plaintiff, a front end brakesman, while in the performance of his duty standing on the gangway between the locomotive and tender, looking for signals on the approach of a station, and observing if there were any hot boxes in the trucks of the cars, by being knocked from the train in stepping backward, by a poker in the hands of the fireman, and run over by the train were not due to the negligence of the defendants at common law, or the use of an alleged dangerous system by them.

McIntyre v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 160. See 6 O.W.N. 618.

I. Duty of Care; Contributory Negligence.

ACCIDENT TO WORKMEN ON TRACK—CONTRIBUTORY NEGLIGENCE.

The plaintiff, a workman in the employ of the company, was injured by a car striking him while working on the track. In an action for damages the company defended on the ground that he had not been reasonably careful in looking out for the cars. The trial Judge held that plaintiff was the cause of his own misfortune and could not hold defendants liable. This judgment was affirmed by the Divisional Court, but reversed by the Court of Appeal for Ontario, which ordered a new trial. The Supreme Court of Canada affirmed the decision of the Court of Appeal, Gwynne, J., dissenting, but, on counsel for the company stating that a new trial was not desired, judgment was ordered to be entered for plaintiff with $500 damages, the amount assessed by the jury at the trial, and the appeal was dismissed with costs.

Hamilton Street Ry. Co. v. Moran, 24 Can. S.C.R. 717.

[Distinguished in O'Hearn v. Port Arthur, 4 O.L.R. 209; referred to in Preston v. Toronto Ry. Co., 11 O.L.R. 56.]

INJURY TO WORKMAN—COMMON FAULT.

When an accident to a workman is due to his own negligence the employer cannot be held equally negligent on account of defects in the working apparatus in the absence of positive proof that such defect contributed to the accident.

Dorin v. Can. Pac. Ry. Co., 37 Que. S.C. 493 (Ct. Rev.).

INJURIES TO EMPLOYEE—MOVING CAR—NEGLIGENCE OF FOREMAN.

A railway company is not liable to an employee for injuries sustained by him when he, well knowing the dangers of the work and being an old hand, stepped on a track in front of a car moving in his direction, without looking to see whether anything was approaching. In order to succeed, the employee would have to shew want of proper precaution, or something in the conduct of the man in charge of the car which would amount to negligence. [Dominion Iron & Steel Co. v. Oliver, 35 Can. S.C.R. 517, followed.]

Lennox v. Grand Trunk and Can. Pac. Ry. Cos., 19 O.W.R. 169, 2 O.W.N. 1078.

INJURY TO EMPLOYEE—ENGINE MOVING BACKWARDS IN RAILWAY YARD—RAILWAY YARD.

Under s. 276 of the Railway Act, 1906, as amended by 9 & 10 Edw. VII. c. 50, s. 7, it is only when a train is passing or about to pass over or along a highway that the railway company is required, in case the train is not headed by an engine moving forward in the ordinary manner, to station a man on that part of the train, or of the tender if that is in front, which is then foremost, to warn persons standing on or crossing or about to cross the track, and s. 274 of the Act, requiring the use of the bell and whistle, should be interpreted as limited in the same way. The plaintiff's husband, an employee of the defendant company, while proceeding through the railway yards on business of his own, stepped off the track on which he was walking, to avoid an approaching express train, and stepped on to another track, when he was struck and killed, at a point which was not near any highway crossing, by a yard engine moving reversely without any person stationed on the part of the tender, which was foremost. There was a path between the two tracks on which the deceased might have walked safely:—Held, without a finding on the evidence as to whether or not the bell of the yard engine had been rung, that the defendants were not liable, as they had not been guilty of any negligence, and the deceased was guilty of contributory negligence in going upon the other track. Semble, the deceased had no right to be where he was at the time of the accident and was therefore a trespasser: [Deane v. Clayton (1817), 7 Taunt. 489, and Jordin v. Crump (1847), 8 M. & W. 782], and no action was maintainable without evidence of intention to injure.

Skulak v. Can. Northern Ry. Co., 20 Man. L.R. 242, 15 W.L.R. 699.

INJURY TO YARDMASTER—SHUNTING CARS—FAILURE TO LOOK.

Action by the administrators of the estate of a railway yardmaster in the service of the defendants, to recover damages for his death caused by their negligence, by being knocked down and killed, while at work in the yard, by two shunted cars under the control of the defendant. The jury found a verdict for plaintiffs. A motion for a nonsuit was made by defendants and was reserved till after verdict:—Held, per Meredith, J., that the motion must be sustained because of the contributory negligence of the deceased in not looking out, when going behind some other cars on the track, to see whether there was danger.

London & Western Trusts Co. v. Pere Marquette Ry. Co., 5 Can. Ry. Cas. 44, 6 O.W.R. 321.

[Reversed in London & Western Trusts Co. v. Lake Erie & Detroit River Ry. Co., 12 O.L.R. 28, 5 Can. Ry. Cas. 364. See 5 Can. Ry. Cas. 53, 7 O.W.R. 511.]

INJURY TO YARDSMAN SHUNTING CARS—ABSENCE OF WARNING—FAILURE TO LOOK.

A railway yardsman in the ordinary course of his duty was passing behind the most westerly of four cars standing by themselves on a side line. As he was crossing the track, two cars of the defendants, propelled by a flying shunt, came from the east and ran into the standing cars, with the result that he was knocked down, run over, and killed by the car behind which he was passing. There was no evidence that cars were liable to be shunted negligently or unexpectedly, and he did not see or hear the cars, and no warning was given to him:—Held, that there was evidence of negligence on the part of the defendants to go to the jury, and that the fact that the yardsmaster did not look for approaching cars before going behind the standing car was not sufficient to shew that he was guilty of such negligence as ipso facto to deprive him of the right to recover. Judgment of Meredith, J., 6 O.W.R. 321, 5 Can. Ry. Cas. 44, reversed.

London & Western Trusts Co. v. Lake Erie & Detroit River Ry. Co., 5 Can. Ry. Cas. 364, 12 O.L.R. 28.

[Followed in Wallman v. Can. Pac. Ry. Co., 16 Man. L.R. 82, 6 Can. Ry. Cas. 229.]

Duty of employee—Imperfect insulation of electric wires—Duty of inspection.

An electric line foreman in the company's employ met his death from contact with imperfectly insulated live wires while at some work in proximity to them in the powerhouse. The evidence left doubt whether the duties of deceased included the inspection and care of the wires both inside and outside of the powerhouse, or whether his engagement was to perform the duties in question in respect only to the wires outside the powerhouse walls:—Held, that the onus of proof as to the point in dispute was on the defendants, and, such onus not having been satisfied, they were liable in damages. Judgment appealed from affirmed, Davies, J., dissenting, on a different view of the evidence in holding that the duties of deceased included inspection and care of the interior wiring.

Quebec Ry., Light & Power Co. v. Fortin, 7 Can. Ry. Cas. 252, 40 Can. S.C.R. 181.

Injury to conductor by gravel-spreading machine—Failure to look—Obstruction of view.

In an action by the conductor of a construction train for injuries resulting from a wing of a gravel-spreading machine operated by air pressure, coming down upon him, caused by the engineer in charge of the machine unintentionally starting it by striking his knee against the handle of a valve used to set it in motion while attempting to get closer to the air gauge, which, owing to the darkness, he could not see from where he stood without a light, to ascertain if there was sufficient air in the reservoir of the machine to operate the same, a motion for the nonsuit was rightly refused, it being for the trial Judge to say whether any facts have been established in evidence from which negligence may be inferred, and for the jury to say whether or not from these facts negligence ought to be inferred. [Metropolitan Ry. Co. v. Jackson, 3 A.C. 197, followed.]

Tobin v. Can. Pac. Ry. Co., 2 D.L.R. 173, 20 W.L.R. 676.

Injury in course of employment—Removing train stalled in snow—Employee warming up at time of accident.

An employee is shewn to have been injured during and in consequence of his employment with the railway where it appeared that he, with others, was hired by the conductor to dig out a freight train stalled in snow, and was told at the time of the hiring that he would be carried to the place and back and after the train was dug out, the men, at the invitation of the conductor, went into the caboose to warm themselves and to wait to go back, and, while they were there waiting, another train collided with the caboose and caused the injuries complained of. [Holmes v. Great Northern Ry. Co., [1909] 2 Q.B. 409, approved.]

Gordon v. Can. Northern Ry. Co., 2 D.L.R. 183, 20 W.L.R. 705.

Injury to employee walking between tracks—Failure to look.

An employee of a railway company is guilty of contributory negligence, which will bar a recovery of damages by his personal representatives against the railway company for his death in the course of his employment, where it is shewn that the deceased was walking between two parallel tracks in a railway yard, and, without looking to ascertain if any train was approaching, stepped upon a track on which a freight train was moving and where the yard helper on one of the moving cars had done his utmost to warn the deceased, and when it became apparent that no notice was being paid to the warnings, immediately gave the stop signal, and caused the brakes to be applied, although not in time to prevent the deceased being struck.

McEachen v. Grand Trunk Ry. Co., 2 D.L.R. 588, 3 O.W.N. 628.

Locomotive engineer—Death caused by jumping from train.

Plaintiffs sued defendant company for damages for the death of their son, a locomotive engineer in the defendants' employ, who was killed by having jumped from a train over which he had lost control. The jury found $6,000 damages:—Held, on appeal, per Hunter, C.J., that the only verdict reasonably open to the jury was that the deceased lost his life by his own negligence. Per Irving, J.:—That the damages were excessive. Per Morrison, J.:—That the verdict should stand. New trial ordered.

White v. Victoria Lumber & Mfg. Co., 11 Can. Ry. Cas. 473, 14 B.C.R. 367.

[Reversed in [1910] A.C. 606, 11 Can. Ry. Cas. 489.]

Negligence—Misdirection—Contributory negligence.

In an action for damages for the death of the appellant's son while acting as engineer of the respondent's lumber train, the respondents were charged with negligence in respect of the train having been equipped with defective brakes and an incompetent brakesman, while the deceased was charged with contributory negligence in jumping from the train. The jury found for the appellants, but a new trial was ordered by the Supreme Court. One Judge was dissatisfied with the verdict on the ground of misdirection in regard to contributory negligence, and another Judge held, contrary to both his colleagues, that the damages were excessive:—Held, that the order must be reversed. It was too late for the respondents to rely on misdirection which they had not excepted to at the trial, or in the notice of appeal or in oral argument before the Supreme Court. There were no sufficient grounds for a new trial on the head of excessive damages. Appeal from a judgment of the Full Court, setting aside the judgment of Clement, J. and ordering a new trial. See 14 B.C.R. 367, 11 Can. Ry. Cas. 473.

White v. Victoria Lumber & Mfg. Co., 11 Can. Ry. Cas. 489, [1910] A.C. 606.

Contributory negligence of servant—Coupling cars.

It is contributory negligence for a brakesman, while standing with one foot on a loose step on the side of a box car 6½ inches below the bottom thereof, and with one hand holding a rung of a ladder on the side of the car 14 inches above the bottom of the car, to attempt to open the coupling device by working the lever that operated it, the end of which was about 15 or 16 inches from the side of the car.

Stone v. Can. Pac. Ry. Co. (Ont.), 14 Can. Ry. Cas. 61, 4 D.L.R. 789.

[Reversed in 15 Can. Ry. Cas. 408, 13 D.L.R. 93.]

Contributory negligence of brakeman—Coupling cars.

It is not contributory negligence for a brakeman, while standing in a crouching position on the side of a moving freight car with one foot on a loose step 6½ inches below the bottom of the car, and holding with one hand to a rung of a side ladder 14 inches above the bottom of the car to attempt to open the car coupler, by reaching around the end of the car in order to work the lever operating the coupling apparatus, which was considerably shorter than the levers commonly used on other cars. [Stone v. Can. Pac. Ry. Co., 4 D.L.R. 789, 14 Can. Ry. Cas. 61, 26 O.L.R. 121, reversed.] A railway company is liable for an injury sustained by a brakeman while coupling a car belonging to a foreign company, that had a short coupler lever which could not be operated without going between the end of the cars; since the hauling of a car so equipped was a violation of s. 264 (1) of the Railway Act, 1906, requiring all freight cars to be provided with couplers that can be uncoupled without the necessity of men going between the ends of the cars. [Stone v. Can. Pac. Ry. Co., 4 D.L.R. 789, 14 Can. Ry. Cas. 61, 26 O.L.R. 121, reversed.] For a brakeman, while standing on the side ladder of a freight car, to lean around the end of the car in order to open the coupler, the lever of which was too short to be worked from the side of the car, is not a violation of a rule against going between moving cars to adjust couplers. (Per Idington, Anglin, and Brodeur, JJ.)

Stone v. Can. Pac. Ry. Co., 47 Can. S.C.R. 634, 13 D.L.R. 93, 15 Can. Ry. Cas. 408.

Injury to lineman—Climbing pole—Disregard of practice—Contributory negligence.

The disregard by a lineman of a practice, not a rule, in not ascending an old pole before it was lashed to the new pole is not in itself contributory negligence to warrant a withdrawal of the case from the jury. [Randall v. Ahearn & Soper, 34 Can. S.C.R. 698, applied.]

Christie v. London Elec. Co., 23 D.L.R. 476, 33 O.L.R. 395.

Unprotected frog—Contributory negligence—Uncoupling cars in motion.

An unprotected frog is not of itself negligence where the deceased met his death in an attempt to uncouple cars while in motion, unless his duties required him to do so.

Western Trust Co. v. Regina, 24 D.L.R. 26.

Defective ladder.

A workman is not entitled to recover for injuries sustained through the fall of a ladder, caused by the rounding of the edges at its end, when he has failed to report the defects to the proper authorities, so that they might be remedied. Judgment of Alberta Supreme Court affirmed.

Green v. Grand Trunk Ry. Co., 10 W.W.R. 430.

J. Rules and Orders.

Collision of trains—Contributory negligence—Violation of rules governing trains—Starting train on conductor's signal.

By rule 232 of the Grand Trunk Ry. Co., "conductors and enginemen will be held responsible for the violation of any of the rules governing their trains, and they must take every precaution for the protection of their trains even if not provided for by the rules." By rule 52, enginemen must obey the conductor's orders as to starting their trains unless such orders involve violation of the rules or endanger the train's safety, and rule 65 forbids them to leave the engine except in case of necessity. Another rule provides that a train must not pass from double to single track until it is ascertained that all trains due which have the right-of-way have arrived or left. M. was engineman on a special rain which was about to pass from a double to a single track, and, when the time for starting arrived, he asked the conductor if it was all right to go, knowing that the regular train passed over the single track about that time. He received from the conductor the usual signal to start and did so. After proceeding about two miles his train collided with the regular train and he was injured. In an action against the company for damages in consequence of such injury:—Held, affirming the judgment of the Court of Appeal, that M. was not obliged, before starting, to examine the register and ascertain for himself if the regular train had passed, that duty being imposed by the rules on the conductor alone, that he was bound to obey the conductor's order to start the train, having no reason to question its propriety, and he was, therefore, not guilty of contributory negligence in starting as he did.

Grand Trunk Ry. Co. v. Miller, 2 Can. Ry. Cas. 350, 32 Can. S.C.R. 454.

WORKMEN'S COMPENSATION ACT—SIGNALS—INTERLOCKER OUT OF ORDER—CONTRIBUTORY NEGLIGENCE—VIOLATION OF ORDERS TO ENGINE DRIVERS.

The defendants were erecting an interlocking apparatus at a point of their main line where there was a siding, whereby the switch could be worked and a signal shewn to indicate how it was set, by lowering the upper or lower arm of the signal, as the case might be. The plaintiff's husband, an experienced engine driver in defendants' employ, having been informed before starting with his train that the apparatus was in working order and that all trains were to be governed by the rules applicable in such cases, approaching the spot, saw the signal with both arms down, intimating that the interlocker was out of order, but, nevertheless, proceeded, and, the switch not being fastened in any way, the train was derailed and he was killed. As a matter of fact the apparatus was not in working order, a switchman of the defendants being at the spot with flag signals to use in case of necessity, but he failed to warn the deceased. The defendants' rules governing engine drivers provided that they should stop when in doubt as to the meaning of a signal, also that a signal imperfectly displayed must be regarded as a danger signal, and that in case of doubt they were to take the safe course and run no risk. Employees were also specially instructed that if an interlocker was out of order trains were to be flagged through. The plaintiff brought this action for damages under R.S.O. 1897, c. 166:—Held, that, although there was a plain defect in the condition of the way which was the cause of the derailment of the engine, the plaintiff was properly nonsuited, in that her husband, had he survived, could not have maintained an action, having negligently disobeyed his orders as contained in the rules, by proceeding with his train in spite of the condition of the signals.

Holden v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 352, 5 O.L.R. 301.

[Referred to in Deyo v. Kingston & Pembroke Ry. Co., 8 O.L.R. 588.]

DISOBEDIENCE OF ORDERS—FAILURE TO SIGNAL.

A rule of the company defendant required the display of a blue signal (blue flag by day and blue light by night) while a car is being repaired on the track. Solely in consequence of the failure of the plaintiff, an employee of the defendant, to comply with this rule a train backed down while he was working at a car on the track, and he was injured:—Held, affirming the judgment of the Superior Court, Curran, J., that the plaintiff had no claim for compensation under the circumstances.

Coutlee v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 36, 23 Que. S.C. 242.

CONTRIBUTORY NEGLIGENCE—CONDUCTOR JUMPING FROM TRAIN—VIOLATION OF RULES.

A railway train was approaching a station in London and the conductor jumped off before it reached it intending to cross a track between his train and the station contrary to the rule prohibiting employees to get off a train in motion. A light engine was at the time coming towards him on the track he wished to cross which struck and killed him. The light engine was moving slowly and shewed a red light at the end nearest the conductor which would indicate that it was either stationary or going away from him. In an action by the conductor's widow she was nonsuited at the trial and a new trial was granted by the Court of Appeal:—Held, reversing, the judgment of the Court of Appeal, 3 O.W.R. 892, Davies and Killam, JJ., dissenting, that as the light engine had been allowed to pass a semaphore beyond the station on the assumption, which was justified, that it would pass before the train came to a stop at the station, and as, if the deceased had not, contrary to rule, left the train while in motion, he could not have come into contact with said engine, the plaintiff was not entitled to recover:—Held, per Davies and Killam, JJ., dissenting, that the act of the deceased in getting off the train when he did was not the proximate cause of the accident and plaintiff was entitled to have the opinion of the jury as to whether or not deceased was misled by the red light.

Grand Trunk Ry. Co. v. Birkett, 5 Can. Ry. Cas. 54, 35 Can. S.C.R. 296.

Work train—Rule as to protecting by flagmen—Absence of continuous air brakes—Liability at common law—Workmen's Compensation Act.

The deceased, who was in charge of a gang of labourers, employed in removing earth from a cutting on the defendants' railway, acting, as he believed, in the company's interests, to prevent the loss to them of the labourers' time, by the work train engaged in the work being kept at a siding, induced the conductor in charge of the train to move it on to the main track, and to proceed to the cutting, by backing the train slowly. By one of the company's rules, the train should not have been moved—unless other sufficient precautions were taken—until flagmen were placed at stated intervals in front and rear of the train. Flagmen were not placed; but the conductor took the precaution of standing himself, as a lookout, on the top of the van, and for a like purpose placed the deceased in the cupola, while it was the duty of the engine driver to keep a strict lookout towards the conductor, so as to observe his signals and to act upon them. When the train was distant some 600 yards from another work train approaching them, also moving slowly, the conductor signalled the engine driver to stop, and had he done so, a collision which occurred, whereby the deceased was killed, would have been avoided:—Held, that the company were liable, under the Workmen's Compensation for Injuries Act, for the deceased's death through the neglect of the engine driver. [Deyo v. Kingston & Pembroke Ry. Co., 8 O.L.R. 538, distinguished.] Liability was claimed at common law by reason of the train not being furnished throughout with air brakes, as required by the Railway Act, 1903:—Held, that no such liability existed, for the train was not a passenger train, and the accident did not occur through the want of brakes, but by reason of the engine-driver's failure to see and act on the conductor's signal.

Muma v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 444, 14 O.L.R. 147.

Collision—Death of engine driver—Disobedience to rules—Negligence of fellow servants.

The deceased, an engine driver in the employ of the defendants, while driving a train was killed in a rear end collision betwen his locomotive and a train in front caused by his disobedience to rules, either in not seeing the danger signal or if he did, in not stopping his train:—Held, (1) that the engineer was the author of his own misfortune and his widow could not recover damages from the defendants for his death. (2) That the negligence of his fellow servants did not better the condition of the servant in fault.

Ruddick v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 484.

Collision—Disobedience of rules.

In an action for damages for the death of an engine driver of the Grand Trunk Ry. Co., whose train came into collision with a train of the defendant railway, it was contended by defendants that the accident happened through the negligence of the deceased in disobeying certain rules of his employers. Questions were put to the jury as to the negligence of the defendants and contributory negligence of the deceased:—Held, that there must be a new trial, because the jury should also have been asked whether the deceased had obeyed the rules of his employers applicable to the circumstances under which he was placed at the time of the accident, and whether but for that disobedience the accident would have happened. It is for the trial Judge to interpret such written rules of railway companies, subject to this, that it is for the jury to determine the meaning of technical terms used in them on the explanatory evidence offered.

Walker v. Wabash Ry. Co., 8 Can. Ry. Cas. 487, 18 O.L.R. 21.

Negligence of fellow servant—Violation of regulations—Common Knowledge.

A railway company is responsible for an accident caused by reason of the violation by its employees of regulations made for the protection of all and which causes the death of one of them. It is barred from opposing to an action taken in consequence thereof that the fact complained of occurred owing to an understanding between the employees concerned, especially when there is no proof that the victim had a full knowledge of said understanding. Under these conditions, there is no reason to quash the verdict which declares that there was fault and which determines the amount of the damages caused.

Lachance v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 16, 25 Que. S.C. 494.
[Affirmed in 42 Can. S.C.R. 205, 10 Can. Ry. Cas. 22.]

Disobedience of orders—Walking on siding—Accumulation of snow and ice—Railway frog not packed—Coupling lever defective.

The plaintiff's husband, a brakeman, in the employ of the defendants, was accidentally killed while walking on a siding by being run over by one of the cars of the defendants. The negligence charged was that (1) the plaintiff was compelled to walk upon the siding, no way being left on either side on account of lumber being piled too close; (2) the siding had become defective, unsafe and insufficient by reason of the accumulation of snow and ice; (3) the railway frog was not packed and the coupling lever was defective:—Held, (1) that the proximate cause of the accident was the falling of the deceased on the siding and being run over by a moving car. (2) That the unsafe and almost impassable condition of the said siding and the defective construction or condition of the coupling, if it was defective, owing to the negligence of the defendants, were not the proximate cause of the accident. (3) That the deceased took the risk of accident by disobedience to the orders of the defendants, and no action for negligence would lie.

Pettigrew v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 118.

Injury to servant of contractor—Absence of supervision.

Rock filling in a bay for the protection of a railway embankment is not work of such a dangerous character as to impose upon the railway company any duty to safeguard the servants of independent contractors executing the work under the general supervision of the railway company's engineer as to the actual construction of the "fill," where the injury took place from the fall of rock in quarrying the material upon the railway lands with the company's permission, but the latter had under the contract no control over the manner in which the material should be taken out nor as to where or how the contractors should procure the material, and, in fact, exercised no supervision over the quarrying. [Dallantonia v. McCormick, 8 D.L.R. 757, 14 D.L.R. 613, 29 O.L.R. 319, 16 Can. Ry. Cas. 173, and Penny v. Wimbledon, [1899] 2 Q.B. 72, distinguished; Hole v. Sittingbourne, 6 H. & N. 488, applied.]

Romaniuk v. Grand Trunk Pacific Ry. Co., 18 Can. Ry. Cas. 170, 20 D.L.R. 301.

K. Limitation of Liability.

INJURY TO EMPLOYEE TRAVELING ON PASS—LIMITATION OF LIABILITY.

Deceased was employed in the defendants' workshops, and traveled to and from his work on a pass. The condition on the back of the pass, exempting the company from liability for damages to person or property of holder of pass, was not signed by the workman. Deceased was a man skilled in his particular trade, and refused to work for the company unless given transportation. The jury found as a fact that deceased was traveling on a pass, but that there was not sufficient evidence to shew that he was made acquainted with the conditions thereon, and gave a verdict for $9,000, which, on motion for judgment, was sustained by the trial Judge:—Held, per Macdonald, C.J.A., and Galliher, J.A.:—That, the finding as to want of knowledge of the condition on the pass should not be interfered with. Per Irving, J.A.:—That the finding was against the weight of evidence. Deceased, while traveling on his employers' car, was injured, and subsequently died from his injuries, in a collision between a car which broke away or became detached from the motor which was pulling it, and ran back down grade, crashing into the car occupied by deceased. Defendants, in their pleadings, admitted that the accident occurred through the negligence of fellow servants in the employment of defendant company, but there was no other evidence of negligence:—Held, on appeal, that it was for the plaintiff to shew that the accident was due to some specific act of negligence for which the defendants were responsible. Appeal allowed, and verdict set aside.

Farmer v. British Columbia Elec. Ry. Co., 16 B.C.R. 423.

LORD CAMPBELL'S ACT—EXONERATION OF LIABILITY.

Art. 1056 C.C. (Que.) embodies the previous right of action under an Act of Prov. of Canada re-enacting Lord Campbell's Act. [Robinson v. Can. Pac. Ry. Co., [1892] A.C. 481, distinguished.] A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action under Lord Campbell's Act. [Griffiths v. Earl Dudley, 9 Q.B.D. 357, followed.]

The Queen v. Grenier, 2 Can. Ry. Cas. 409, 30 Can. S.C.R. 42.

[Commented on in Armstrong v. The King, 11 Can. Ex. 126; Miller v. Grand Trunk Ry. Co., 21 Que. S.C. 361, 371; followed in Miller v. Grand Trunk Ry. Co., 21 Que. S.C. 350, 353.

INSURANCE OF EMPLOYEES—STIPULATION FOR IMMUNITY IN CASE OF ACCIDENTS—INSURANCE EFFECTED BY EMPLOYER.

An employer may stipulate with his employee that, in consideration of a contribution by the latter to an insurance and provident society formed to assist workmen and their families in case of injury or death by accident, he will not be liable in consequence of an accident suffered by the employee and caused by the fault of his coemployee. [The Queen v. Grenier, 30 Can. S.C.R. 42, followed.] In this case the insurance and provident society was legally constituted.

Ferguson v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 420, 20 Que. S.C. 54.

[Referred to in Miller v. Grand Trunk Ry. Co., 21 Que. S.C. 350, 2 Can. Ry. Cas. 449, 34 Can. S.C.R. 70.]

STIPULATION EXEMPTING EMPLOYER FROM LIABILITY FOR NEGLIGENCE—RIGHT OF ACTION OF WIDOW NOT AFFECTED.

A railway company cannot stipulate immunity from damages caused by neglect and failure on its part to comply with a duty imposed on it by law for the safety of passengers and employees, e.g., equipment of the cars with efficient brakes, such stipulation being void under s. 243 of the Railway Act, 1888 (By Pagnuelo and Curran, JJ.):—The action of the widow under Art. 1056, C.C. (Que.) is not a representative one, but independent of that of the injured person; and, therefore, even if an agreement stipulating immunity from responsibility for damages caused by negligence were valid as regards the injured person, it would not bind his widow or other persons having rights under the article above mentioned.

Miller v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 449, 21 Que. S.C. 346.

[Affirmed in 12 Que. K.B. 1, 2 Can. Ry. Cas. 490; reversed in 34 Can. S.C.R. 45; 3 Can. Ry. Cas. 147; reinstated in [1906] A.C. 187, 15 Que. K.B. 118; commented on in Armstrong v. The King, 11 Can. Ex. 126; Stuart v. Bank of Montreal, 41 Can. S.C.R. 543; followed in R. v. Armstrong, 40 Can. S.C.R. 248, 5 E.L.R. 182; R. v. Desrosiers, 41 Can. S.C.R. 71, 6 E.L.R. 119; referred to in Ferguson v. Grand Trunk Ry. Co., 20 Que. S.C. 75, 2 Can. Ry. Cas. 420; Montreal Street Ry. Co. v. Brialofsky, 19 Que. K.B. 338.]

CONTRACT EXEMPTING EMPLOYER FROM RESPONSIBILITY FOR ACCIDENT—PUBLIC POLICY—RIGHT OF ACTION OF WIDOW—ACTION NOT REPRESENTATIVE ONE—"INDEMNITY OR SATISFACTION."

A railway company cannot, under a contract between its employee and an insurance and provident society, in consideration of an annual subscription to such society, be exempted from responsibility for damages caused by neglect and failure on its part to comply with a duty imposed on it by law for the safety of passengers and employees, e.g., equipment of the cars with efficient brakes, such stipulation being without effect under s. 243 of the Railway Act, 1888. The right of the widow and other relatives under Art. 1056, C.C. (Que.), is not a representative one, but is independent of that of the injured person; and, therefore, even if an agreement stipulating immunity from responsibility for damages caused by faute lourde were valid as regards the injured person, it would be without effect as regards his widow or other persons having rights under Art. 1056. An agreement exempting a party from responsibility for damages caused by his gross negligence, or faute lourde, is null and void, as being contrary to public order. The words, "indemnity or satisfaction," in Art. 1056, imply compensation by the person responsible for the damage suffered, and not a payment made under a contract with an insurance society.

Grand Trunk Ry. Co. v. Miller, 2 Can. Ry. Cas. 490, 12 Que. K.B. 1.

[Reversed in 34 Can. S.C.R. 45, 3 Can. Ry. Cas. 147.]

DEFECTS IN MACHINERY—CONTRACT INDEMNIFYING EMPLOYER—INDEMNITY AND SATISFACTION.

The "sander" and sand valves of a railway locomotive, which may be used in connection with the brakes in stopping a train, do not constitute part of the "apparatus and arrangements" for applying the brakes to the wheels required by s. 243 of the Railway Act, 1888. Failure to remedy defects in the sand valves, upon notice thereof given at the repair shops in conformity with the company's rules, is merely the negligence of an employee and not negligence attributable to the company itself; therefore, the company may validly contract with its employees so as to exonerate itself from liability for such negligence and such a contract is a good answer to an action under Art. 1056 C.C. (Que.). Girouard, J., dissented on the ground that the negligence found by the jury was negligence of both the company and its employees. [The Queen v. Grenier, 30 Can. S.C.R. 42, 2 Can. Ry. Cas. 409, followed.]

Grand Trunk Ry. Co. v. Miller, 3 Can. Ry. Cas. 147, 34 Can. S.C.R. 45.

L. Independent Contractor.

INDEPENDENT CONTRACTOR—TORTIOUS ACT OF—LIABILITY OF RAILWAY COMPANY.

A company building a railway is not liable for injury to property caused by the wrongful act of their contractor in borrowing earth for embankments from a place, and in a manner, not authorized by the contract.

Kerr v. Atlantic & N.W. Ry. Co., 25 Can. S.C.R. 197.

[Applied in Croysdill v. Anglo-American Telegraph Co., 10 Que. P.R. 37; Lavoi v. Beaudoin, 14 Que. S.C. 254; Montreal v. Montreal Brewing Co., 18 Que. K.B. 406; Préfontaine v. Grenier, 27 Que. S.C. 349; referred to in Beauchemin v. Cadieux, 22 Que. S.C. 487; Bureau v. Gale, 36 Que. S.C. 88.]

INDEPENDENT CONTRACTOR—LIABILITY OF EMPLOYER—INJURIES TO ADJOINING OWNER.

Where contractors for the blasting operations incidental to the preparation of a railway right-of-way caused large quantities of the dislodged rock to be deposited on the land of an adjoining owner, the company owning the right-of-way may be held liable for the damage to the land, if, in letting the contract in which the blasting operations were included, no care was exercised by it to provide against the resultant damage to the adjoining property which damage was such as should reasonably have been anticipated; it is, in such case, the duty of the property owner upon whose property the endangering work is being carried on to see that reasonable skill and care is exercised by the contractor to prevent injury to the adjoining property and the owner of the latter is not restricted to a claim against the contractor. [Black v. Christchurch Finance Co., [1894] A.C. 48; Hughes v. Percival, 8 A.C. 443; Dalton v. Angus, 6 A.C. 740, and Bower v. Peate, 1 Q.B.D. 321, considered.]

Hounsome v. Vancouver Power Co. (B.C.), 9 D.L.R. 823, 15 Can. Ry. Cas. 69.

ROAD LABOURER STRUCK BY TRUCK—CONTRIBUTORY NEGLIGENCE—LICENSEE.

An action to recover damages for negligence whereby the appellant was permanently injured. The appellant was a labourer in the employ of the contractors for grading a portion of a new line of railway then being constructed by the respondents. The appellant alighted from a "Ledgerwood" on a flat car, used in such construction, on to the platform of Bala Station, and while attempting to get on board the car, while in motion, came in contact with a truck standing on the platform and was injured. The acts of negligence complained of were (1) the presence of the truck; (2) inviting the appellant to board and starting too soon; (3) appliances for boarding the train imperfect and out of repair. The respondents contended that there was no negligence on their part, but that the appellant was guilty of contributory negligence in attempting to board the train when in motion, having alighted and remained on the platform out of mere idle curiosity until the train began to move:—Held, (1) affirming the judgments of the trial Judge and the Court of Appeal for Ontario, that the true position of the appellant was at the best that of a mere licensee. (2) That the respondent owed no duty to the appellant who knew of the risk and deliberately accepted it. (3) That there was no evidence to shew how long the truck had been left on the platform or who put it there nor was there in any respect, negligence in this regard for which the company was liable.

Perdue v. Can. Pac. Ry. Co., 12 Can. Ry. Cas. 216.

INJURY TO EMPLOYEE OF CONTRACTOR WITH RAILWAY—COUPLING CARS.

A railway company is liable for injury to a fencing contractor's employee while at work in a car, caused by a negligently violent coupling of cars by the company's employees. An employee of an independent contractor engaged by a railway company to fence its right-of-way does not assume the risk of being injured while at work in a car, through a negligently violent coupling of cars by employees of the railway company. A contract to fence a railway company's right-of-way, in which the contractor further agreed to indemnify the railway company against claims for injury to persons or property "occasioned in carrying on the work," entitles the company to indemnity against a claim of an employee of the contractor for injury received while at work in a car caused by a negligently violent coupling of cars made by the railway company's employees.

Walker v. Can. Northern Ry. Co., et al., 11 D.L.R. 363, 18 B.C.R. 63.

[This finding does not seem to be in accord with the principles of interpretation laid down in Beal, Cardinal Rules of Interpretation, 2nd ed., 121.]

INSECURE ELECTRIC POLE—INJURY TO SERVANT OF INDEPENDENT CONTRACTOR.

The owner of a line of poles, some of which were insecure, who employed an independent contractor to string wires on them, is liable for an injury sustained by one of the latter's servants by the falling of an insecure pole on which he was working, notwithstanding the contractor was paid to strengthen all of the insecure poles; since it was the defendant's duty to see that its poles were safely secured before permitting the plaintiff to work upon them. [Marney v. Scott, [1899] 1 Q.B. 986; Valiquette v. Fraser, 39 Can. S.C.R. 1, and Canada Woollen Mills v. Traplin, 35 Can. S.C.R. 424, specially referred to.]

Velasky v. Western Canada Power Co. (B.C.), 12 D.L.R. 774.

M. Injuries by Employees.

ASSAULT BY WATCHMAN ON TRESPASSING CHILDREN—SCOPE OF EMPLOYMENT.

A watchman was employed by the defendants to lower bars or gates across the highway at each side of a crossing on the approach of trains, and to raise them as soon as the trains had passed, the gates being lowered and raised by means of a lever which was some distance from them. While a train was passing and the gates down, the plaintiff, a lad of sixteen, and two other lads, climbed or leaned upon one of the gates, and the watchman was prevented by their weight from raising the gates after the train had passed. In order to get them off he threw a cinder towards them, which struck the plaintiff in the eye, destroying the sight:—Held, that, this act having been done not of mere malice or ill-will or to punish the plaintiff, but for the purpose of warning him to get off the gate, and so of enabling the watchman to perform the duty required of him, the defendants, his employers, were responsible in damages.

Hammond v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 232, 9 O.L.R. 64.

Malicious assault by foreman—Scope of employment—Liability of master.

An employer is not responsible for the consequences of an assault committed by a foreman upon a labourer under him arising out of malice or ill-temper.

Roth v. Can. Pac. Ry. Co., 4 Can. Ry. Cas. 238.

Nuisance—Course of employment—Piling ties on highway.

A number of worn out railway ties were taken from the line of railway during ordinary working hours by section men employed by the defendant company and were piled on a highway at a railway crossing, the foreman of the section men intending to take them to his house for firewood. It was the custom of the section men to get rid of the worn out ties either by burning them beside the track or by taking them home for firewood. The plaintiff's horse while being driven along the highway shied at the ties and the plaintiff was injured:—Held, that there was evidence to support the jury's finding that the ties had been placed upon the highway in the course of the employment of the section men, and that the defendants were therefore prima facie responsible, but that there being no finding that the ties were a nuisance in the sense of being calculated to frighten horses generally, this being an essential element of liability, a new trial was necessary. Judgment of a Divisional Court reversed.

Forsythe v. Can. Pac. Ry. Co., 4 Can. Ry. Cas. 404, 10 O.L.R. 73.

N. Sufficiency of Jury Findings.

Injury to employee coupling cars—Finding of jury.

W. was an employee of the G.T.R. Co., whose duty it was to couple cars in the Toronto yard of the company. In performing this duty on one occasion, under specific directions from the conductor of an engine attached to one of the cars being coupled, his hand was crushed owing to the engine backing down and bringing the cars together before the coupling was made. On the trial of an action for damages resulting from such injury the conductor denied having given directions for the coupling, and it was contended that W. improperly put his hand between the draw bars to lift out the coupling pin. It was also contended that the conductor had no authority to give directions as to the mode of doing the work. The jury found against both contentions and W. obtained a verdict, which was affirmed by the Divisional Court and Court of Appeal:—Held, per Fournier, Taschereau and Sedgewick, JJ., that though the findings of the jury were not satisfactory upon the evidence a second Court of Appeal could not interfere with them:—Held, per King, J., that the finding that specific directions were given must be accepted as conclusive; that the mode in which the coupling was done was not an improper one, as W. had a right to rely on the engine not being moved until the coupling was made, and could properly perform the work in the most expeditious way, which it was shewn he did; that the conductor was empowered to give directions as to the mode of doing the work, if as was stated at the trial, he believed that using such a mode could save time; and that W. was injured by conforming to an order to go to a dangerous place, the person giving the order being guilty of negligence. [20 A.R. (Ont.) 528, affirming 23 O.R. 436, affirmed.]

Grand Trunk Ry. Co. v. Weegar, 23 Can. S.C.R. 422.

INJURY TO CONDUCTOR—CONSTRUCTION TRAIN—MISDIRECTION.

In an action for personal injuries to the conductor of a construction train resulting from a wing of a gravel-spreading machine operated by air pressure, coming down upon him, caused by the engineer in charge of the machine unintentionally starting it by striking his his knee against the handle of a valve used to set it in motion while attempting to get closer to the air gauge, a statement by a witness that the engineer must have been climbing up the machine, together with the evidence that the valve was from two and a half to three feet above the slot where the engineer was standing, would justify a suggestion in the trial Judge's charge that the engineer might have touched the valve with his knee while climbing up the machine to get a nearer view of the gauge.

Tobin v. Can. Pac. Ry. Co., 2 D.L.R. 173, 20 W.L.R. 676, 5 Sask. L.R. 381.

NEGLIGENCE OF FOREMAN—CONTRIBUTORY NEGLIGENCE OF SERVANT.

The plaintiff was injured while in the service of the defendants, and brought this action for damages for his injury, alleging negligence. In answer to questions, the jury found that McN. was a person in the service of the defendants to whose orders the plaintiff was, at the time of the injury, bound to conform; that McN. gave the plaintiff orders (specifying the orders); that the plaintiff conformed to those orders; that injury resulted to the plaintiff from so conforming; that negligence on the part of N. caused the injury (specifying the negligence); and that the plaintiff, by the exercise of reasonable care, might have avoided the accident. The jury were not asked in what respect the plaintiff omitted to take reasonable care:—Held, that it was not necessary to ask that question, there being evidence upon which the jury might find that the plaintiff was guilty of negligence or contributory negligence; and that, upon that finding, supported by the evidence, the action should be dismissed. [London Street Ry. Co. v. Brown, 31 Can. S.C.R. 642, followed.]

Shondra v. Winnipeg Elec. Ry. Co., 19 W.L.R. 13 (Man.).
[Reversed in 19 W.L.R. 578.]

NEGLIGENCE OF FOREMAN—CONTRIBUTORY NEGLIGENCE.

The judgment of Robson, J., 19 W.L.R. 13, upon the findings of a jury, dismissing the action, was set aside, and a new trial directed, upon the ground that the finding of the jury as to contributory negligence was insufficient.

Shondra v. Winnipeg Elec. Ry. Co., 19 W.L.R. 578 (Man.).

VERDICT AGAINST RAILWAY FOR NEGLIGENTLY CAUSING DEATH—ABSENCE OF EVIDENCE TO SUPPORT JURY'S FINDING.

A verdict of a jury in favour of the plaintiff in an action against a railway company for negligently causing the death of the fireman of a locomotive that was propelling a snowplough, cannot be sustained where there was no evidence tending to support the jury's finding that his death was due to the negligence of the railway company in operating the plough under a defective system by placing it in charge of a servant who had not passed the necessary eye and ear test, or to shew that the accident was due to a defect in the hearing or vision of such person.

Jones v. Can. Pac. Ry. Co. (Ont.), 14 Can. Ry. Cas. 76, 5 D.L.R. 332. [Reversed in 16 Can. Ry. Cas. 305, 13 D.L.R. 900.]

Negligence of railway—Questions for jury.

Where the jury omitted to answer a direct question submitted to them on the trial of a railway employee's action against the railway for damages for negligence causing personal injury as to whether there was negligence on the part of the plaintiff or of the defendant company or of both, their negative answer to another question as to whether the car was reasonably safe for the employees, which latter question was not directly pointed at the alleged defects leading to the injury, is not alone a finding of negligence and is insufficient to support a verdict for plaintiff.

Stone v. Can. Pac. Ry. Co. (Ont.), 14 Can. Ry. Cas. 61, 4 D.L.R. 789. [Reversed in 15 Can. Ry. Cas. 408, 13 D.L.R. 93.]

Basis of action—Absence of negligence on part of defendant.

A verdict for the plaintiff for injuries received while in the employ of a railway company cannot be sustained where neither the evidence nor the answers of the jury to questions submitted them disclose, on the part of the defendant, negligence that contributed to the plaintiff's injury.

Stone v. Can. Pac. Ry. Co. (Ont.), 14 Can. Ry. Cas. 61, 4 D.L.R. 789. [Reversed in 15 Can. Ry. Cas. 408, 13 D.L.R. 93.]

EMPLOYER'S LIABILITY.

See Employees.

EQUIPMENT.

See Cars.

ESTOPPEL.

See Street Railways (A.).

Receipt delivered to local agent of railway company before payment of freight.

The local agent of the railway company received the personal cheque of the defendants' agent in settlement of freight charges due by the defendants and thereupon receipted the freight bills. By means of these receipted bills the defendants' agent was enabled to obtain the amount of the freight charges from his employers and absconded, leaving no funds to meet his cheque, which was dishonoured. In an action for the recovery of the amount of the freight charges:—Held, reversing the judgment appealed from (8 Alta. L.R. 363), Duff and Brodeur JJ. dissenting, that the delivery of the receipts in advance of payment afforded means of inducing the defendants to pay over the amount represented by them to their agent and, consequently, the plaintiffs were estopped from denying actual receipt of payment of the freight charges.—Per Duff J. dissenting. In the circumstances disclosed by the evidence in the case the principle of estoppel could not be applied. [Gentles v. Can. Pac. Ry. Co., 14 O.L.R. 286, distinguished.]

Continental Oil Co. v. Can. Pac. Ry. Co., 52 Can. S.C.R. 605.

EVIDENCE.

See Expropriation (B.); Pleading and Practice.

EXCHEQUER COURT.

See Government Railways; Jurisdiction.

EXECUTION.

See Sale and Foreclosure

Execution lien affecting title to lands, see Title to Lands.

Order of Board directing payment by company to municipal corporation of part of cost of bridge—Order made rule of Court—Issue fi. fa.—Motion to stay execution—Jurisdiction of Supreme Court of Ontario—Jurisdiction of Board—Sale of "public utility" under execution—Power of Dominion to adopt machinery of provincial Courts—Control of provincial Courts over orders of Board—Finality of order of Board—Unconditional direction for payment—Form of order.

Re Toronto and Toronto Ry. Co., 42 O.L.R. 82, 43 D.L.R. 739.

EXEMPTIONS.

Exemption from taxation, see Assessment and Taxation.

See Limitation of Liability; Employees.

EXPLOSIVES.

Regulation by Board as to the carriage of explosives, see Railway Board.

Exposure of explosives to children, see Negligence.

EXPRESS COMPANIES.

See Assessment and Taxation; Carriers of Goods; Claims (B); Tolls and Tariffs.

Sale of money orders, see Agents.

Transportation of liquor, see Crimes and Offences; Carriers of Goods (B).

EXPROPRIATION.

A. In General.
B. Arbitration and Award.
C. Compensation; Measure of.
D. Water Rights; Foreshore.
E. Gravel and Timber.
F. Highways; Diversion.
G. Railway Lands; Crossings.
H. Possessory Rights; Trespass.
I. Conveyances.
J. Location; Plans; Deviation.
K. Possession; Abandonment; Notice.
L. Costs.

Appeal from award of arbitration, see Appeals.

Expropriation for Crown railways, see Government Railways.

Lands acquired by contract, see Title to Lands.

Injunction in default of compensation for interference with access to bridge by reason of railway crossing highway, see Injunction.

Measure of damages for injuries to land, see Damages.

Jurisdiction of County Court to award damages for trespass to lands involving dispute of title, see Jurisdiction.

Support of land by minerals, see under (C) above.

Evidence of value, see under (C) above.

Interest on awards, see Interest.

Jurisdiction of Board respecting Provincial railway lands taken by Dominion railway, see Railway Board.

Annotations.

Taking of lands for railway purposes and compensation therefor. 1 Can Ry. Cas. 484.

Provincial legislation affecting awards, interest, costs, and filing plans 3 Can. Ry. Cas. 120.

Expropriation of lands of another railway company. 3 Can. Ry. Cas. 180, 13 Can. Ry. Cas. 134.

Remedy of landowner for taking lands under expropriation. 3 Can. Ry. Cas. 393.

Lands injuriously affected by the construction and operation of a railway. 4 Can. Ry. Cas. 33.

Notice of expropriation. 5 Can. Ry. Cas. 28.

Expropriation and compensation. 6 Can. Ry. Cas. 131.

Right of compensation by occupant of land under possessory title. 6 Can. Ry. Cas. 180.

Appeal from award. 6 Can. Ry. Cas. 199.

Conduct of arbitrators. 6 Can. Ry. Cas. 194.

Payment of compensation into Court. 6 Can. Ry. Cas. 202.

Expropriation of mines, the power to expropriate and compensation. 6 Can. Ry. Cas. 217.

Damage resulting from the exercise of corporate powers, and the right of recovery. 6 Can. Ry. Cas. 365.

What constitutes an interest in land or lease, and the loss of profit and injury to business, goodwill, liquor license, etc., entitling to right of compensation. 6 Can. Ry. Cas. 404.

Validity of award exceeding powers of arbitrators. 7 Can. Ry. Cas. 343.

Statutory power of Board to order railway company to acquire lands within a fixed period. 12 Can. Ry. Cas. 91.

Compensation, and payment of to proper party. 13 Can. Ry. Cas. 411.

Compensation to abutting landowners upon construction of railway upon highway. 14 Can. Ry. Cas. 199.

Taking by Dominion railway company of lands of Provincial railway company. 18 Can. Ry. Cas. 144.

Reasons for award required from arbitrators. 16 Can. Ry. Cas. 77.

Lands dedicated to public use. 18 Can. Ry. Cas. 442.

Injuries caused by taking lands. 20 Can. Ry. Cas. 109.

Arbitrators reasons for award. 21 Can. Ry. Cas. 332.

Compensation for special adaptability to owners business. 21 Can. Ry. Cas. 349.

Power of Appellate Court to remit award to arbitrators. 21 Can. Ry. Cas. 413.

Jurisdiction in appeals from awards. 21 Can. Ry. Cas. 381.

Property expropriated in eminent domain proceedings, measure of compensation. 1 D.L.R. 508.

A. In General.

PROVINCIAL PUBLIC LANDS.

The Parliament of Canada has power to appropriate provincial public lands for the purposes of a railway connecting two or more provinces.

Attorney-General (B.C.) v. C.P.R. Co., 11 B.C.R. 289.

[Referred to in Atty.-General v. Ruffner, 12 B.C.R. 301, followed in Lachine, Jacques Cartier, etc., Ry. Co. v. Montreal Tramways, etc., Ry. Cos., 18 Can. Ry. Cas. 133.]

LAND OWNED AND USED BY MUNICIPAL CORPORATIONS.

Under ss. 118, 139 of the Railway Act, 1903, railway companies may expropriate the lands of municipal corporations used by them for municipal purposes.

Re Grand Trunk Ry. Co. and Ste. Henri and Ste. Cunegonde, 4 Can. Ry. Cas. 277.

STREET RAILWAY—ACQUISITION OF LAND FOR CAR BARNS.

The Toronto Ry. Co., which has no powers of expropriation, acquired by purchase from the owners certain land in a residential locality, on which they proposed to erect car barns, being a purchase authorized by the agreement with the city, as validated by 53 Vict. c. 90 (Ont.) and submitted the plans to the city for its approval, whereupon a petition was presented to the Board of Control, by the residents of the locality, asking the intervention of the city against such proposed use of the land, as well as against the laying of tracks on certain streets as a means of access to the barns, which was referred to the corporation's counsel for his opinion as to the city's powers. The city had at that time under consideration the acquisition of a specified block of land in the locality for park purposes, but subsequently to the presentation of the petition the Parks and Gardens Committee recommended the expropriation of the company's land for such purpose, and under their instructions a by-law therefor was drafted by the city solicitor. On the matter coming before the council, the recommendation was struck out and the question of procuring park lands referred back to the committee, and on the following day, but after the plaintiffs had commenced this action, the architect was instructed by the Board not to deal with the plans, pending the result of the proposed expropriation proceedings. There was nothing to shew that the course pursued by the city was not actuated by good faith. In a action claiming a declaratory judgment of the company's right to so use the land:—Held, that while there was undoubted power in the Court to grant declaratory judgments it was a discretionary power; and that in this case, the exercise of the discretion by the trial Judge, in refusing to grant such a judgment, would not under the circumstances be interfered with

Toronto Ry. Co. v. Toronto, 13 O.L.R. 532.

INTERFERENCE WITH EXPROPRIATION—PRIVATE RIGHT-OF-WAY.

In an action by a railway company, which had the right to expropriate the land in dispute, to restrain the defendant from interfering with the construction by the company of its railway across a certain road, in which action a counterclaim was made by the defendant for a declaration of his right to the road as a private way and for an injunction restraining the company from trespassing thereon, the ex parte injunction granted the company should not be dissolved and the injunction awarded the defendant upon the merits in accordance with his counterclaim should not be made operative until an opportunity is given to the company to take expropriation proceedings. [Sandon Water Works & Light Co. v. Byron N. White Co., 35 Can. S.C.R. 309, followed.]

Can. Northern Ry. Co. v. Billings, 5 D.L.R. 455, 3 O.W.N. 1504.

Additional lands—Railway yards.

Under the provisions of s. 178 of the Railway Act, 1906, giving the Board the right to give a railway company permission to take more land for railway purposes than they are entitled to take under subs. (b) of s. 177 of the Act, providing that there may be taken for stations, depots, etc., an area one mile in length by 500 feet in breadth including the width of the right-of-way, if such additional land is shewn to be "necessary," the word "necessary" should be given a liberal construction. (Dictum per Brown, J.)

Prince Albert v. Can. Northern Ry. Co. (Sask.), 10 D.L.R. 121, 15 Can. Ry. Cas. 87.

Compulsory expropriation—Mandamus.

(1) A written offer to sell land on certain terms, accompanied by an intimation that, if the purchaser takes possession, the vendor would treat that act as an acceptance of the offer, and the subsequent taking of such possession, without further communication with the vendor, together constitute a binding contract of purchase and sale of the land, which is taken out of the Statute of Frauds by that act of taking possession, such act being in itself a part performance of the contract, as well as an essential in the making of it. [Carlill v. Carbolic Smoke Ball Co. (1893), 1 Q.B. 256, followed.] (2) If there had been no contract between the parties respecting the land taken by the defendants for their right-of-way, the plaintiff would have been entitled to the alternative relief claimed by way of mandamus to compel the defendants to proceed to have the compensation determined under the provisions of the Railway Act. (3) Relief by way of mandamus may now, under Rule 879 of the King's Bench Act, be obtained by an action. [Morgan v. Metropolitan Ry. Co. (1868), L.R. 4 C.P. 97, followed.]

Carr v. Can. Northern Ry. Co., 7 Can. Ry. Cas. 258, 17 Man. L.R. 178.

Duty of company to take lands.

A railway company, in its requirement of right-of-way, included, inter alia, land in which the plaintiff had a lease-hold interest, but the right-of-way was at no time wholly upon the plaintiff's property, the greater portion being upon adjoining lands. The company, without proceeding to arbitration, acquired the interest of the plaintiff's lessor, and built its road clear of but adjoining that portion of the indicated right-of-way over the land in which the plaintiff was interested. In an action to compel the company to acquire and pay for the right-of-way as indicated, the company contended that it could be compelled to pay for only that portion of the right-of-way which it actually took possession of, and Irving, J., at the trial, dismissed that contention and held that the plaintiff was injuriously affected by the construction and operation of the railway:—Held, on appeal (Martin, J.A., dissenting), that the trial Judge was right.

McDonald v. Vancouver, Victoria & Eastern Ry., etc., Co., 12 Can. Ry. Cas. 67, 15 B.C.R. 315.

[Reversed in 12 Can. Ry. Cas. 74, 44 Can. S.C.R. 65.]

ACTION TO COMPEL EXPROPRIATION—COMPENSATION.

The approval and registration of plans, etc., of the located area of the right-of-way, under the provisions of the Railway Act, 1906, and the subsequent construction and operation of a railway along such area, do not render the railway company liable to mandamus ordering the expropriation of a portion of the lands shewn upon the plans which has not been physically occupied by the permanent way so constructed and operated. Judgment appealed from, 12 Can. Ry. Cas. 67, 15 B.C.R. 315, reversed, the Chief Justice and Davies, J., dissenting.

Vancouver, Victoria & Eastern Ry., etc., Co. v. McDonald, 12 Can. Ry. Cas. 74, 44 Can. S.C.R. 65.

LANDS PUT TO PUBLIC USE—PROVINCIAL STATUTE.

Lands dedicated to a public use under a provincial statute may be expropriated under the Railway Act for railway purposes.

Lachine, Jacques Cartier, etc., Ry. Co. v. Montreal Gas Co., 18 Can. Ry. Cas. 438.

QUEBEC STATUTE—RETROACTIVENESS.

By the Quebec Act of 1912, 3 Geo. V. c. 42, the arbitration in the matter of expropriation by railway companies is abolished and replaced by an enquête before a Judge of the Superior Court, but this Act has no retroactive effect, and does not apply to an arbitration started before December 21, 1912, the date on which the Act was brought into force.

Girard v. Ha-Ha-Baie Ry. Co., 47 Que. S.C. 325.

B. Arbitration and Award.

APPRAISEMENT OF LANDS—ORDER TO SET ASIDE PROCEEDINGS—ESTOPPEL.

This was an application to the Supreme Court of Nova Scotia asking it to set aside, in a summary manner, the whole appraisement of land damages awarded to be paid by the county to the several proprietors of lands in Pictou county, whose lands had been expropriated for the line of railway extending from New Glasgow, in Pictou county, to the strait of Canso, and known as the Eastern Extension. This appraisement was made on the assumption that under the contract with the Nova Scotia Government for the construction of this line of railway and the statutes relating thereto, and providing for the expropriation of lands for right of way, etc., appraisement of damages or compensation to the proprietors and payment thereof, the right-of-way was furnished to the company free, and the compensation for land damages was to be paid after appraisement in the manner prescribed by the Custos of the various counties through which the line ran issuing debentures for the amounts due to the proprietors, which debentures were to be redeemed by means of local taxation. Before the Provincial Government of Nova Scotia had entered into the contract for the construction of the Eastern Extension Line, and while they were negotiating therefor, the Nova Scotia legislature, on the 4th April, 1876, passed c. 3 of theActs of 1876, to enable the Government to enter into a contract for the construction of this line of railway, and made provision thereby for the payment of a subsidy and grants of land to those undertaking it, and for the expropriation of land for the right-of-way for the line. On the same date c. 74 of the Acts of 1876 was passed, and, in order to incorporate and give any contractors whose tender for construction should thereafter be accepted the same corporate powers and privileges as those mentioned in c. 74, s. 4 of the Acts of 1876 was passed. By s. 36 of c. 74, and also by s. 6, c. 3, Acts of 1876, certain ss of c. 70 of the Revised Statutes, third series, are incorporated in these enactments and made applicable to this line of railway, which sections more particularly relate to the mode of acquiring lands for the right-of-way, stations, etc., the procedure for appraising damages, and the mode of assessing the various counties for the payment of the amounts awarded. C. 70 Revised Statutes, third series, comprises in consolidated form all enactments in force in Nova Scotia at that date, relating to provincial railways. For convenience the various railway companies in Nova Scotia, such as the Windsor & Annapolis Ry. Co., the Western Counties Ry. Co. (see c. 34 Acts of 1868, c. 81, Acts of 1870), have, in obtaining their acts of incorporation, availed themselves of similar clauses from c. 70, Revised Statutes 3rd series, by express enactment, without repeating them in the Act or providing other machinery for the expropriation of lands, and the ascertaining of land damages. When the Revised Statutes, 4th series, was prepared, certain Acts of the province not re-enacted were continued in force, and among them so much of c. 70 of the 3rd series as was therein specified. (See the Act to provide for the publication of the Consolidated Statutes, 30th April, 1873, Revised Statutes, 4th series page 2.) Mr. Abbott, having entered into the contract with the Government for the construction of this line, sought, under c. 4 of the Acts of 1876, incorporation and the benefit of the provisions of c. 74, Acts 1876, and obtained a certificate of incorporation under the name of the Halifax & Cape Breton Ry. & Coal Co. The company was organized under this Act, and the right-of-way having been obtained under the statutes, the damages were appraised and the work of construction began and was carried on. In 1877 an order was made by the Chief Justice of the Supreme Court of Nova Scotia, on the petition of a number of the property owners whose lands would be affected by the building of the railway, directing the prothonotary of the county to draw and strike a jury, under the provisions of c. 70, of the Revised Statutes, third series, to appraise the lands and property taken for the purpose of the Eastern Extension Ry. In 1878 a rule nisi was taken to set the whole proceedings aside, but a year later it was discharged on motion of the party who had obtained it. A question having been raised as to the validity of the incorporation of the company under c. 4, Acts of 1876, by the Local Government, and legislation being about to be passed to remove such doubts, another rule was obtained in 1879, on the ground that the Halifax & Cape Breton Ry. & Coal Co. had no legal existence. After the argument of this rule, and before the judgment, cc. 60 and 70 of the Acts of 1879 were passed by the Legislature of Nova Scotia. After hearing the Custos of the county by counsel before a committee of the Legislature, two sections of the Act were added in th interest of the county. The Supreme Court of N.S. held that the county of Pictou were estopped by those statutes last mentioned from disputing the appraisement of the lands taken, and by their act in issuing debentures to parties to whom damages had been awarded for the lands appropriated to the railway, some of which had been indorsed to third parties. (See 1 Russ. & Geldert, 448.) On appeal to the Supreme Court of Canada:—Held, that the judgment of the Court below was not one from which an appeal would lie, there being no finality about the order made by the Chief Justice of the Court below in 1777, which was what this appeal sought to set aside.

Hockin v. Halifax & Cape Breton Ry. & Coal Co. Cass. Can. S.C.R. Dig. 1893, p. 423.

ARBITRATION—AWARD—MATTERS CONSIDERED BY ARBITRATORS.

A railway company, having taken certain lands for the purposes of their railway, made an offer to the owner in payment of the same which offer was not accepted and the matter was referred to arbitration under the Consolidated Railway Act, 1879. On the day that the arbitrators met the company executed an agreement for a crossing over the said land, in addition to the money payment, and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration, the company because the award was less than their offer, and the owner because the value of the crossing was included in the sum awarded which would make it greater than the offer:—Held, affirming the judgment of the Court of Appeal, and the judgment of the Divisional Court, 5 O.R. 674, Gwynne, J., dissenting, that under the circumstances neither party was entitled to costs. [Appeal dismissed with costs. 5 O.R. 674, affirmed.]

Ontario & Quebec Ry. Co. v. Philbrick, 12 Can. S.C.R. 288.

Award—Validity of—Description of land.

The plaintiffs, joint owners of land in the city of Quebec were awarded $11,900 under 43-44 Viet. c. 43, s. 9, for a portion of said land expropriated for the N.S. Ry. Co. and brought an action against the company based on the award. The company not having pleaded, foreclosure was granted. The notice of expropriation and the award both described the land expropriated as No. 1, on the plan of the railway company deposited according to law, but in another part of the notice it described it as forming part of a cadastral lot 2345, and in the award as forming part of lots 2344-2345. Judgment was rendered for the amount of the award. From this judgment the railway company appealed to the Court of Queen's Bench and that Court reversed the judgment of the Superior Court, holding inter alia the award bad for uncertainty, and that the case should be sent back to the Superior Court. On appeal to the Supreme Court of Canada, it was:—Held, reversing the judgment of the Court of Queen's Bench that there was no uncertainty in the award, as the words of the award and notice were sufficient of themselves to describe the property intended to be expropriated and which was valued by arbitrators.

Beaudet et al. v. North. Shore Ry. Co., 15 Can. S.C.R. 44.

[The Privy Council refused leave to appeal in this case, 10 Can. Gaz. 463. Followed in Wynnes v. Montreal P. & I. Ry. Co., 9 Que. Q.B. 497.]

Award—Arbitrators—Jurisdiction of—Lands injuriously affected.

In a railway expropriation case the respondent in naming his arbitrator declared that he only appointed him to watch over the arbitrator of the company, but the company recognized him officially and subsequently an award of $1,974.25 damages and costs for land expropriated was made under Art. 5164, R.S.Q. The demand for expropriation as formulated in their notice to arbitrate by the appellants was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award:—Held, affirming the judgment of the Courts below, that the appointment of respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction. Strong and Taschereau, JJ., doubted if the amount in controversy was sufficient to give the Court jurisdiction to hear the appeal, the amount of the award being under $2,000, and to make up the appealable amount, either interest accrued after the date of the award and after action brought or the costs taxed on the arbitration proceedings would have to be added.

Quebec, Montmorency & Charlevoix Ry. Co. v. Mathieu, 19 Can. S.C.R. 426.

[Distinguished in Dufresne v. Guévrement, 26 Can. S.C.R. 219.]

ENFORCEMENT OF AWARD—ADDITIONAL INTEREST—CONFIRMATION OF TITLE.

On a petition to the Superior Court, praying that a railway company be ordered to pay into the hands of the Prothonotary of the Superior Court a sum equivalent to six per cent on the amount of an award previously deposited in Court under s. 170 of the Railway Act, 1888, and praying further that the company should be enjoined and ordered to proceed to confirmation of title, with a view to the distribution of the money, the company pleaded that the company had no power to grant such an order, and that the delays in proceeding to confirmation of title had been caused by the petitioner who had unsuccessfully appealed to the higher Courts for an increased amount:—Held, reversing the judgment of the Court below, that by the terms of s. 172 of the Railway Act it is only by the judgment of confirmation that the question of additional interest can be adjudicated upon:—Held, further, that assuming the Court had jurisdiction, until a final determination of the controversy as to the amount to be distributed, the railway company could not be said to be guilty of negligence in not obtaining a judgment in confirmation of title. (Railway Act, s. 172.)

Atlantic & North-West Ry. Co. v. Judah, 23 Can. S.C.R. 231.

[See Atlantic & N.W. Ry. Co. v. Judah, 20 Rev. Leg. 527; referred to in Neilson v. Quebec Bridge Co., 21 Que. S.C. 332; followed in Montreal v. Gautier, 26 Que. S.C. 354; Montreal v. Lemoine, 3 Que. Q.B. 199; referred to in Montreal v. Baxter, 15 Que. S.C. 152.]

DEATH OF ARBITRATOR PENDING AWARD.

In relation to the expropriation of lands for railway purposes, ss. 156, 157 of the Railway Act, 1888, provide as follows:—"156. A majority of the arbitrators at the first meeting after their appointment or the sole arbitrator, shall fix a day on or before which the award shall be made; and, if the same is not made on or before such day, or some other day to which the time for making it has been prolonged, either by consent of the parties or by resolution of the arbitrators, then the sum offered by the company as aforesaid, shall be the compensation to be paid by the company." "157. If the sole arbitrator appointed by the Judge, or any arbitrator appointed by the two arbitrators dies before the award has been made, or is disqualified, or refuses or fails to act within a reasonable time, then, in the case of the sole arbitrator, the Judge, upon the application of either party, and upon being satisfied by affidavit or otherwise of such death, disqualification, refusal or failure, may appoint another arbitrator in the place of such sole arbitrator; and in the case of any arbitrator appointed by one of parties, the company and party respectively may each appoint an arbitrator in the place of its or his arbitrator so deceased, or not acting; and in the case of the third arbitrator appointed by the two arbitrators, the provisions of s. 151 shall apply; but no recommencement or repetition of the previous proceedings shall be required in any case." (S. 151 provides for the appointment of a third arbitrator either by the two arbitrators or by a Judge.):—Held, that the provisions of s. 157 apply to a case where the arbitrator appointed by the proprietor died before the award had been made, and four days prior to the date fixed for making the same; that in such a case the proprietor was entitled to be allowed a reasonable time for the appointment of another arbitrator to fill the vacancy thus caused, and to have the arbitration proceedings continued although the time so fixed had expired without any award having been made, or the time for the making thereof having been prolonged.

Shannon v. Montreal Park & Island Ry. Co., 28 Can. S.C.R. 374.

[Overruled in Desormeaux v. Ste. Thérèse de Blainville, 43 Can. S.C.R. 82; considered in Wynnes v. Montreal P. & I. Ry. Co., 9 Que. Q.B. 498.]

IMPROPER ASSESSMENT OF DAMAGE.

On an arbitration in a matter of the expropriation of land under the provisions of the Railway Act, the majority of the arbitrators appeared to have made their computation of the amount of the indemnity awarded to the owner of the land by taking an average of the different estimates made on behalf of both parties according to the evidence before them:—Held, reversing the decision of the Court of Queen's Bench, and restoring the judgment of the Superior Court (Taschereau and Girouard, JJ., dissenting), that the award was properly set aside on the appeal to the Superior Court, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded.

Grand Trunk Ry. Co. v. Coupal, 28 Can. S.C.R. 531.

[Applied in Ontario & Quebec Ry. Co. v. Vallières, 36 Que. S.C. 359; referred to in Fairman v. Montreal, 31 Can. S.C.R. 218.]

AWARD—EQUITY OF REDEMPTION—NO NOTICE TO THIRD ARBITRATOR.

Bills filed to enforce awards and to recover moneys to be paid thereunder for lands taken by the C.S. Ry. Co. The facts connected with the making of the awards and the subsequent litigation will be found in 41 U.C.Q.B. 195, 28 U.C.C.P. 309, 5 A.R. (Ont.) 13, and 9 A.R. (Ont.) 310. The C.S. Ry. Co. appealed to the Supreme Court of Canada from the judgments of the Courts below maintaining the awards. Before the Supreme Court, counsel for the appellants for the first time contended that, in the Norvell case the award was bad because the arbitrators had dealt only with the equity of redemption of the landowner, and that in the other cases the awards were bad on their face as being signed by only two of the three arbitrators without shewing a notice to the third arbitrator:—Held, in the Norvell case, that the C.S. Ry. Co. should be allowed to amend their answer in the cause in the Court of Chancery as they might be advised, in order to shew that the award was in respect only of the equity of redemption and not the fee simple, and upon such amendment being made, the award should be declared null and void:—Held, in the other cases, that the C.S. Ry. Co. should be at liberty to amend their answer in order to shew that the awards were made by two of the arbitrators in the absence of, and without notice of the meeting of the said two arbitrators to, the third arbitrator, with liberty to the plaintiffs to file with the registrar of the Supreme Court their signification of their desire for new trials, when such new trials should be granted without costs; in default of such signification in any case the award was declared null and void. Appeals allowed, but without costs, the objections having been taken for the first time on appeal.

Canada Southern Ry. Co. v. Norvell. See Cass. Can. S.C.R. Dig. 1898, p. 34.

[Commented on in Freeman v. Ontario, etc., Ry. Co., 6 O.R. 413; referred to in Birely v. Toronto, Hamilton & Buffalo Ry. Co., 25 A.R. (Ont.) 88.]

NOTARY PUBLIC AS ARBITRATOR.

An award was made by a majority of arbitrators, establishing at the amount of $4,474 the indemnity to be paid to the respondents for a piece of land of which they were dispossessed by appellants under 45 Vict. c. 23 (Que.). Action was taken for the above sum and costs of arbitration and law costs, amounting altogether to $4,658.20. Judgment was rendered by the Superior Court against the appellants for said amount, with interest and costs, which judgment was unanimously confirmed by the Court of Queen's Bench. The principal ground for defence was that Mr. C., being the agent of the respondents, was disqualified from acting as their arbitrator. On appeal to the Supreme Court of Canada:—Held, that the evidence shewing that Mr. C. was not in the continuous employ of respondents, but acted for them from time to time only, in his professional capacity as a notary public, and not in any other capacity, he has not disqualified from acting as arbitrator. Appeal dismissed with costs.

North Shore Ry. Co. v. Ursuline Ladies of Quebec (1885), Cass. Can. S.C.R. Dig. 1898, p. 36.

ARBITRATION—ADJOURNMENT.

The consent of the parties to an arbitration under the Railway Act, 1906, to an adjournment as provided by s. 204 can be given verbally, and the statement of it in the minutes of a subsequent sitting of the arbitrators is valid.

Can. Northern Ry. Co. v. Nault, 42 Que. S.C. 121, 22 Que. K.B. 221. [Affirmed in Can. Northern Ry. Co. v. Nault, 16 Can. Ry. Cas. 198.]

APPOINTMENT OF ARBITRATORS BY JUDGE.

A judge, in exercising in the power conferred by s. 196 of the Railway Act, 1906, to appoint arbitrators to assess the compensation to be paid to the owners by a railway company for land compulsorily taken, acts as persona designata, and, after making the appointment, he is functus officio and has no jurisdiction to rescind the order of appointment, even if it is shewn that such order had been made without jurisdiction. [C.P.R. v. Little Seminary of St. Thérèse, 16 Can. S.C.R. 606, followed.]

Re Chambers and Can. Pac. Ry. Co., 20 Man. L.R. 277, 15 W.L.R. 694.

NOMINATION OF ARBITRATORS—POWER OF ARBITRATORS.

(1) The choice of a third arbitrator, left by agreement to two arbitrators named by the parties, may be made, although there may have been no disagreement between such two arbitrators, as the Act does not require that as a condition precedent. (2) An agreement to dispense with the hearing of witnesses does not prevent the arbitrators doing so of their own motion should they judge it expedient. (3) In the estimation of compensation for expropriation of land, under the Railway Act, 1903, arbitrators ought not to take into consideration the increased value which the construction of the railway gives to the locality generally, but the excess of increased value, if any, received by the lands of which the expropriated property was part, over that given to neighbouring lands. (4) Where arbitrators have been given the power of finally determining the questions under arbitration, they may allow interest upon the amount of the compensation awarded from the time of taking possession of the land expropriated or condemn the expropriating party to perform works required to reduce the damages to the amount of the compensation awarded against them.

Quebec Improvement Co. v. Quebec Bridge & Ry. Co., 29 Que. S.C. 328. [Reversed in 16 Que. K.B. 107, [1908] A.C. 217.]

ARBITRATION—PAYMENT OUT OF COURT TO LANDOWNER.

The power to "set aside or discharge" mentioned in s. 50 of the English Judicature Act, 1873, implies the power to "vary." A Judge sitting in Court has power to vary an order which he has made in Chambers. Semble, the practice of the Chancery Division of the High Court in England as to varying orders is the most convenient and should be adopted in Alberta. Where money was in Court, paid in by a railway company under an order enabling the company to proceed with work which has been enjoined in the action and after the award of arbitrators under the expropriation provisions of the Railway Act a Judge in Chambers ordered payment out of part of the money to satisfy the award, which last-mentioned order was entitled as well as in the action as in the matter of the arbitration proceedings:—On application to the same Judge sitting in Court:—Held, that the Judge was not acting wholly as a persona designata, as in making the order he acted as well in the cause as in the arbitration proceedings and was not, therefore, after order made functus officio, and had power to vary the order made.

Re Grand Trunk Pacific Ry. Co. and Marsan, 3 Alta. L.R. 65.

ADJOURNMENT FOR AWARD.

Arbitrators appointed to fix the compensation to be paid in an expropriation under the Railway Act had, at their first meeting, fixed July 6th, 1897, for giving their award. On June 29th, 1897, after the enquête for the expropriation was closed, the proceedings were adjourned to July 8th without any special enlargement of the time for rendering the award. At the time of the adjournment the solicitors for both parties were present and made no objection:—Held, that the adjournment on June 29th, was a sufficient enlargement of the time fixed for the rendering of the award.

Wynnes v. Montreal Park & Island Ry. Co., 9 Que. Q.B. 483, reversing 16 Que. S.C. 105 and restoring 14 Que. S.C. 409.

COMPENSATION FOR LAND TAKEN—ARBITRATION—JUDGMENT TO ENFORCE AWARD.

Usher v. Town of North Toronto, 2 O.W.N. 851, 18 O.W.R. 808.

APPOINTMENT OF SOLE ARBITRATOR—"OPPOSITE PARTY," MEANING OF—EVIDENCE BY AFFIDAVIT.

A railway company having served on both the owner of the land and the mortgagee the notice and certificate prescribed by ss. 146, 147 of the Railway Act, 1888, the owner refused the sum offered and notified the company of the name of her arbitrator, but the mortgagee gave no such notice:—Held, that, under s. 150 of the Act, the company was entitled to apply to have a sole arbitrator appointed, as the mortgagee should be treated as an "opposite party" within the meaning of that section. After giving notice to the company of the name of her arbitrator, the owner sold and conveyed the property to another person. The land had been bought under the Real Property Act, and on the certificate of title issued to the purchaser there was endorsed a memorandum of the deposit in the Land Titles Office of the minister's certificate and the plan and book of reference:—Held, that the purchaser must be deemed, under s. 145 of the act, to have had notice of the expropriation proceedings and was bound by them. Evidence in support of an application under s. 150 of the Act may be by affidavit.

Re Can. Pac. Ry. Co. and Batter, 1 Can. Ry. Cas. 457, 13 Man. L.R. 200.

CLERICAL ERROR IN AWARD—MOTION TO REFER BACK.

Motion for an order referring back to the arbitrators, to enable them to correct a clerical error, an award made under the Dominion Railway Act:—Held, that if the provincial legislation (R.S.O. 1897, c. 62) applied, the motion was needless, the arbitrators having power (s. 9 (e)) correct the mistake. If that legislation were not applicable, there was no power, under the Dominion Railway Act or otherwise, to remit the award, nor to correct the error upon this motion.

Re McAlpine and Lake Erie & Detroit River Ry. Co., 3 Can. Ry. Cas. 95, 3 O.L.R. 230.

REVISION OF AWARD AS TO AMOUNT—AWARD OF COSTS BY ARBITRATORS.

(1) On an appeal from an award of arbitrators, under the Railway Act, 1888, s. 161, so far as the appreciation of damages is concerned no new evidence can be adduced, and no objection based upon the admission of illegal evidence, or the exclusion of legal evidence, can be considered, unless the illegalities complained of appear of record. (2) The award cannot be explained or varied by extrinsic evidence of the intention of the party making it. Error of law or fact on the part of the arbitrators, or excess of jurisdiction, must appear on the face of the award, or from the evidence or documents of record. (3) The Court will not interfere with the discretion of the arbitrators as to the amount of the award, unless it be as a check upon possible fraud, accidental error, or gross incompetence. (4) The award of costs by the arbitrators does not invalidate the award, where it simply follows the rule established by the Railway Act itself, for in such case the party has no grievance. (5) The award of a block sum is valid, the law not requiring the arbitrators to distinguish between the amount awarded for value of land taken, and that awarded for damages to other lands.

Pontiac Pacific Junction and Ottawa, etc., Ry. Cos. v. Community General Hospital, etc., 3 Can. Ry. Cas. 99, 20 Que. S.C. 567.

[Approved in Ontario & Que. Ry. Co. v. Vallières, 36 Que. S.C. 354.]

NOTICE—COMPENSATION—ARBITRATION.

A railway company, having given notice of requiring certain land for their railway, and having taken possession of it, cannot abandon their notice and give a new notice for the same land. [Can. Pac. Ry. Co. v. Little Seminary of Ste. Thérèse, 16 Can. S.C.R. 606, applied.] Where the company named in their new notice a larger sum of compensation money than in their original one, and a different arbitrator:—Held, upon a motion by the landowner to compel company to proceed with the arbitration, that, although the new notice was ineffective, and the arbitration could proceed only under the original notice, the appointment of the new arbitrator should be confirmed (the landowner not objecting), and the company should be allowed to increase their offer, but not so as to prejudice the owner as to anything that might have occurred before the new notice, and the offer of the increased sum might be taken into consideration upon the question of costs.

Re Haskill et al. and Grand Trunk Ry. Co., 3 Can. Ry. Cas. 389, 7 O.L.R. 429.

AUTHORITY OF ARBITRATOR—FAILURE TO GIVE NOTICE—TRESPASS.

By c. 104 of the statutes of 1902, the recompense to the owner of land taken for railway purposes, and for the value of earth, stones, gravel, etc., removed, was required to be fixed by three arbitrators, one chosen by the company, another by the owner or proprietor, and, where these were unable to agree as to the amount of their award, a third, to be appointed by the two arbitrators first nominated. The company's engineer wrote to M., who had previously acted for the company, requesting him to ascertain whether plaintiffs had arranged their title to the gravel pit at Loch Ben in such a way that the arbitrators could get to work and, if so, to let them know that he (M.) was prepared to act, "and asked them to appoint their man so that you two, if you cannot agree to the valuation, may select a third." He added, "I will send an agreement of arbitration which each one can subscribe to, or, if they have one already drafted, you can forward it here for approval." No agreement was sent by the engineer, and none was forwarded for approval by M., but, acting on the letter received, M., in company with plaintiff's nominee, met and investigated the damages, and, with C., who was appointed third arbitrator, signed an award for the amount of which action was brought:—Held, Russell, J., dissenting on this point:—that the letter written by the company's engineer, in the absence of anything in the statute as to how the arbitration was to be conducted, or the steps to be taken previous to inquiry, was as effective as any agreement, even if such were necessary, and the company were bound by it:—Held, also, that defendants, having failed to proceed in the regular way, by giving notice to the proprietors of the purposes for which they entered, and for which they could only enter after notice, were trespassers and liable as such.

McIsaac et al. v. Inverness Ry. & Coal Co., 6 Can. Ry. Cas. 112, 38 N.S.R. 80.

[Reversed in 37 Can. S.C.R. 134, 6 Can. Ry. Cas. 121.]

AUTHORITY FOR SUBMISSION TO ARBITRATION—TRESPASS.

By statute, in Nova Scotia, if land is taken for railway purposes the compensation therefor, and for earth, gravel, etc., removed, shall be fixed by arbitrators, one chosen by each party and the third, if required, by those two. A railway company intending to expropriate, their engineer wrote to M., who had acted for the company in other cases, instructing him to ascertain whether the owners had arranged their title so that the arbiration could proceed and, if so, to ask them to nominate their man, who, with M., could appoint a third if they could not agree. The engineer added, "I will send an agreement of arbitration which each one can subscribe to, or, if they have one already drafted, you can forward it here for approval." No such agreement was sent by, or forwarded to, the engineer, but the three arbitrators were appointed and made an award on which the owners of the land brought an action:—Held, reversing the judgment appealed from, 38 N.S.R. 80, 6 Can. Ry. Cas. 112, that as the company had not taken the preliminary steps required by the statute which, therefore, did not govern the arbitration proceedings, the award was void for want of a proper submission. The company entered upon land and cut down trees and removed gravel therefrom without giving the owners the notice required by statute of their intention to take their property. The owners by their action above mentioned, claimed damages for trespass as well as the amount of the award:—Held, that as the act of the company was not authorized by statute the owners could sue for trespass and as, at the trial, the action on this claim was dismissed on the ground that such action was prohibited there should be a new trial.

Inverness Ry. & Coal Co. v. McIsaac, 6 Can. Ry. Cas. 121, 37 Can. S.C.R. 134.

MISCONDUCT OF ARBITRATORS—GROSS UNDERVALUATION OF MINING CLAIM —INTERESTED MOTIVES.

The Court will not interfere to set aside an award unless corruption, partiality, misconduct or irregularity is distinctly proved against the arbitrators, and mere suspicion is not sufficient; or unless the sum awarded is so grossly and scandalously inadequate as to shock one's sense of justice. The plaintiff having made an application under subs. 3 of s. 168 of the Railway Act, 1903, to set aside the award of the majority of the arbitrators on the ground that it was unjust, improper, unreasonable and grossly and scandalously inadequate and against the weight of evidence, also, that no reasons were given for the amount of the award:—Held, (1) that there was no evidence which would warrant a finding of corruption, partiality or irregularity on the part of the majority of the arbitrators or that the amount of the award was grossly and scandalously inadequate. (2) Under s. 164 arbitrators are not bound to give reasons for their conclusions though it would be better to do so.

Morley v. Klondike Mines Ry. Co., 6 Can. Ry. Cas. 183, 5 West. L.R. 109.

[Followed in Harrigan v. Klondike Mines Ry. Co., 6 Can. Ry. Cas. 193, 5 W.L.R. 137.

MISCONDUCT OF ARBITRATORS—GROSS UNDERVALUATION OF MINING CLAIM—INTERESTED MOTIVES.

Application by plaintiffs, similar to that in Morley v. Klondike Mines Ry. Co., 5 W.L.R. 109, 6 Can. Ry. Cas. 183, to set aside the award of a majority of the arbitrators, on the ground that the award is unjust, improper, unreasonable, and grossly and scandalously inadequate, and that the same was made without regard to the evidence, and on the ground that the majority of arbitrators acted unfairly, improperly and not as fair or just arbitrators between the parties on such arbitration, or in making such award:—Held, following case supra, that where there is no evidence of corruption or to sufficiently sustain the reasons set out in the application, the award must stand.

Harrigan v. Klondike Mines Ry. Co., 6 Can. Ry. Cas. 193, 5 West. L.R. 137.

TERMS OF SUBMISSION EXCEEDED.

Where arbitrators were appointed under deeds of submission to value three expropriated lots of ground and the indemnity for damages, it being declared that they should act as mediators (amiables compositeurs) but should be bound to conform to the provisions of s. 161 of the Railway Act, 1903, and the award in lieu of valuing the third lot in money ordered that the expropriators should return it in part and construct a road on their own adjoining land, to be maintained by them in perpetuity for the benefit of the parties expropriated:—Held, affirming 16 Que. K.B. 107, that arbitrators who are also appointed mediators cannot disregard their instructions, and that the error vitiated the whole award.

Quebec Improvement Co. v. Quebec Bridge & Ry. Co., 7 Can. Ry. Cas 336, [1908] A.C. 217.

COMPULSORY TAKING OF LAND—APPEAL FROM AWARD OF ARBITRATORS.

(1) Upon an appeal, under s. 209 of the Railway Act, 1906, from an award of arbitrators determining the compensation to be paid to an owner for the compulsory taking of his lands by a railway company, the Court will not assume the function of the arbitrators and make an independent award, but will rather treat the matter as it would an appeal from the

decision or verdict of a Judge, and the award will not be disturbed, unless the arbitrators manifestly erred in some principle in arriving at their conclusion. (2) Interest on the amount awarded should not be added by the arbitrators, especially in a case where the claimant remains in possession of the property until after the date of the award. (3) It is proper that the claimant should be allowed the actual value of the property to him, and not merely the market value as on a sale. (4) The arbitrators are not bound to allow ten per cent, extra on the amount of the compensation for the compulsory taking, although that is frequently done, and the Court will not interfere with their refusal to allow such percentage.

Can. Northern Ry. v. Robinson, 8 Can. Ry. Cas. 226, 17 Man. L.R. 396.

[Approved in Re Clarke and Toronto, Grey & Bruce Ry. Co., 18 O.L.R. 628, 9 Can. Ry. Cas. 290; commented on in Re Davies and James Bay Ry. Co., 20 O.L.R. 534.]

RATIFICATION OF AWARD.

A petition for the ratification of an arbitration award, upon an expropriation of land by a railway company for the building of its line, is presented in the interest of the railway company solely, the company shall pay the costs of appearance upon the petition, with the costs of the exprporiated owner's attorneys on the petition, but not the costs on a reply to the petition. The costs incurred in the distribution of the moneys deposited in Court by the company petitioner shall be taken out of the said moneys as in the ordinary course of law.

Chateauguay & Northern Ry. Co. v. Laurier, 9 Can. Ry. Cas. 51, 9 Que. P.R. 245.

INTERVENTION—INTERESTED PARTY—JURISDICTION OF SUPERIOR COURT.

A party, claiming the ownership of land expropriated by a railway company, may intervene in the expropriation proceedings; but such intervention will not affect the validity of any proceedings had till then against the registered proprietor. The Superior Court is the tribunal which has jurisdiction to allow such intervention.

Re Montreal & Southern Counties Ry. Co. and Woodrow, 10 Can. Ry. Cas. 496, 11 Que. P.R. 230.

COMPENSATION—VALUE OF LAND TAKEN—DAMAGE TO RESIDUE—AMOUNTS NOT SEPARATED IN AWARD—INTERFERENCE WITH WORKING OF FARM.

Arbitrators having awarded to the claimant $30,607 as compensation for about 4½ acres of his stock and dairy farm of 465 acres, expropriated by the contestants for their right-of-way, under the Railway Act, and for damage to the residue of his land, the amount awarded was reduced on appeal to $20,000. The arbitrators not having stated the principles by which they were guided in coming to their conclusions, and not having separated the amount allowed for the land actually taken and the amount awarded as damages for lands injuriously affected, the course taken by the Court on the appeal was that commended by the Privy Council in James Bay Ry. Co. v. Armstrong, [1909] A.C. 624, 10 Can. Ry. Cas. 1, viz., to go through all the evidence, and, having due regard to the findings of the arbitrators, so far as they could be ascertained, to examine into the justice of the award. The award was that of two of the three arbitrators: the nonassenting arbitrator stated his views and also his understanding of the grounds on which his colleagues based their award:—Held, that the Court could not pay regard to this statement as setting forth the grounds upon which the award was based. The part of the farm taken for the railway was in the valley of the Don river, which traversed a part of the

farm. The farm buildings were for the most part in the valley, but the arable part of the farm was largely in the uplands, and access from the buildings to the uplands was gained by means of a loop shaped roadway, commencing at a gate entrance to the farmyard on the east side of the west or north branch of the Don, and going in a southerly direction towards the Don Mills road, there turning westerly and crossing the stream by means of a bridge, and then proceeding in a northwesterly direction to a gate at the foot of the roadway leading up a very steep hill and ascending by means of it to the uplands. The gates were kept closed or open as occasion needed for the purpose of controlling the wandering of the stock, and regulating the hauling of loads to and from the uplands. The roadbed embankment of the railway intersected both of the roadways at a height of 6 or 7 feet above their grade. The main complaint of the claimant was, that passing to and fro between the buildings and the uplands with horses, cattle, vehicles, and farm implements, involved crossing the railway twice, and opening and closing four gates, together with the delay and risk attendant thereon:—Held, upon the evidence, that the difficulty could be overcome by the construction of a new roadway with a bridge, at an expense of $3,000, which was an ample allowance in respect of this cause of complaint; and, while it might be true, as stated by the arbitrators, that it was not within their power to compel either the claimant or the contestants to construct the roadway and bridge, yet they were not justified in making an allowance for that particular damage greater than a sum sufficient to enable it to be obviated for all time. The measure of the damage to which the claimant was entitled was the value of the land taken and the depreciation occasioned to the remainder by the construction and user of the railway upon the part taken; and justice to the contestants required that the award should shew on its face what amount was allowed in respect of each of these items. The principle on which the inquiry as to the compensation when some land is taken and some injuriously affected should be proceeded with is to ascertain the value to the claimant of his property before the taking, and its value after the part has been taken, having regard to all the directions of s. 198 of the Railway Act, and deduct the one sum from the other. [James v. Ontario & Quebec Ry. Co., 12 O.R. 624, 15 A.R. (Ont.) 1, followed.] The contestants took possession of the land on the 13th October, 1905, and the arbitrators awarded interest from that day:—Held, that s. 153 (2) of the Act 3 Edw. VII. c. 58, (s. 192 (2) of the Railway Act, 1906) was enacted for the purpose of fixing the time as of which the value and damage are to be ascertained; the question of interest is not dealt with in terms, and there is nothing in the words to interfere with the operation of the general law, which, as between vendor and purchaser, fixes the time at which interest commences as that at which the purchaser takes or may safely take possession. When some land is taken, and other land is injuriously affected, the amounts awarded in respect of both are to be treated as purchase money. [Re Macpherson and Toronto, 26 O.R. 558, approved.] Whether or not it was correct for the arbitrators to award the interest was not material; no substantial wrong had been done by stating it in the award.

Re Davies and James Bay Ry. Co., 10 Can. Ry. Cas. 225, 20 O.L.R. 534.

[Followed in Re Ketcheson and Can. Northern Ontario Ry. Co., 16 Can. Ry. Cas. 286.]

Compensation—Damages—Indemnity—Proprietors bordering on public canals—Nullity of award.

(1) The appeal to the Superior Court from the decision of arbitrators

in matters of expropriation for a railway given under s. 209 of the Railway Act, 1906, and the action to annul the award under the law of the Province of Quebec recognized under subs. 4 of the same section, are separate remedies which cannot be joined in one and the same demand. (2) A difference between the award as established by the deed executed by the arbitrators before a notary and the award as recorded on the minutes of the final session of the arbitrators is an irregularity, but does not necessarily entail nullity. (3) The nullity of one part of the award only entails the nullity of the remainder if the award is indivisible or if one of the parties suffers prejudice. Consequently the award which adjudicates upon the costs of the arbitration notwithstanding that the law itself determines upon whom they shall fall, is null for such part only, but may be valid for the rest. (4) When the indemnity is for several different objects, that is to say, land expropriated, buildings, inconveniences resulting from the expropriation, etc., it is not necessary that the award should specify the amount awarded under each heading. It may fix a lump sum for the whole. (5) The proprietor expropriated is only entitled to those damages which are the direct and exclusive result of the expropriation. The arbitrators cannot take into account other inconveniences which he may suffer in common with the rest of the public, such as those caused by noise, smoke, and the greater difficulty of access. (6) A property separated from a canal by a highway is not a property bordering (riverain) upon the canal. (7) Proprietors whose lands front upon public canals but who are not owners of the banks nor the water have no rights in the canal either of ownership or in servitude (easement). (8) Where in fixing the indemnity arbitrators have taken into consideration proof of loss or inconvenience of a nature for which the law allows no indemnity, the award is null. For the purpose of reducing the award, proof cannot be admitted to shew what proportion of the award has been accorded upon illegal grounds. (9) The Superior Court in deciding an appeal must decide upon the indemnity according to the proof made before the arbitrators.

Ontario & Quebec Ry. Co. v. Vallières, 11 Can. Ry. Cas. 1, 36 Que. S.C. 349.

EVIDENCE DISREGARDED—SETTING ASIDE AWARD.

Arbitrators appointed under the Railway Act, 1906, to determine the value of lands expropriated by the railway must base their award on the evidence given and, while authorized under s. 201 of the Act to view the land expropriated, they may not disregard the evidence and substitute their own opinion of the value for the evidence of the witnesses, the proper purpose of the view being to enable the arbitrators to better understand the evidence given. The award of arbitrators stated: "We have been thrown very considerably upon our own judgment in arriving at this decision. Reasoning from our own judgment and a view of the actual facts submitted in evidence, we are convinced that the sum of $2,900 is a fair and just valuation of the land under dispute":—Held, that the award should be set aside and the value fixed by the Court on the evidence given pursuant to the authority contained in s. 209 of the Act.

Re Calgary & Edmonton Ry. Co. and Mackinnon, 11 Can. Ry. Cas. 27, 2 Alta. L.R. 438.

[Reversed in 43 Can. S.C.R. 379, 11 Can. Ry. Cas. 32.]

VALIDITY OF AWARD.

In expropriation proceedings, under the Railway Act, the arbitrators in making their award stated that they had not found the expert evidence a valuable factor in assisting them in their conclusions and that, after viewing the property in question, they had reached their conclusions by "reasoning from their own judgment and a few actual facts submitted in evidence." On appeal from the judgment of the Supreme Court of Alberta setting aside the award and increasing the damages:—Held, that it did not appear from the language used that the arbitrators had proceeded without proper consideration of the evidence adduced or upon what was not properly evidence and, therefore, the award should not have been interfered with. 11 Can. Ry. Cas. 27, reversed.

Calgary & Edmonton Ry. Co. v. MacKinnon, 11 Can. Ry. Cas. 32, 43 Can. S.C.R. 379.

Enforcement of award—Omission to name day.

The Ontario Arbitration Act, 9 Edw. VII. c. 35, s. 14, applies to awards under the Dominion Railway Act so as to confer jurisdiction upon the High Court to entertain summary applications to enforce such awards. The Dominion Act provides for appeals, but does not provide machinery for the enforcement of awards; the Provincial Act applies to all awards where the particular act does not provide machinery for enforcement. The omission of arbitrators to name a day before which the award is to be made (s. 204 of the Dominion Railway Act) does not invalidate the award; naming a day is not a condition precedent to jurisdiction; the ascertaining of the sum offered as that to be paid results from failure to award within a time fixed, and not from failure to fix a time; the statutory provision is one in favour of the railway company, and is waived by proceeding with the arbitration.

Re Horseshoe Quarry Co. and St. Mary's & Western Ontario Ry. Co., 12 Can. Ry. Cas. 155, 22 O.L.R. 429.

Review of award—Inadequacy of compensation.

An application to the Superior Court in the Province of Quebec under s. 209 of the Railway Act, 1906, to set aside an award of arbitrators, made in expropriation proceedings under that act, on the ground of the inadequacy of the compensation awarded, which application is instituted by a petition praying that a writ of appeal may be issued in the nature and form of an appeal from a decision of an inferior Court, and that the Court may decide upon the amount of compensation and may render the award which the arbitrators should have rendered, is an appeal to the Superior Court from the award, and not an action in that Court to set the award aside, and, therefore, no further appeal lies to the Court of King's Bench from the decision of the Superior Court upon such an application.

Rolland v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 21, 7 D.L.R. 441.

Conclusiveness of award—Setting aside for failure to carry out undertaking.

An award made by arbitrators appointed under s. 196 of the Railway Act, 1906, to ascertain the compensation that should be paid for injuries to land not actually taken or used by the railway, the owners claiming that the land was injuriously affected because the railway was built between the land and the sea, thereby cutting off their rights of access to the sea, will be set aside because of the failure of the arbitrators to keep a promise made by them to the owners of the land when the suggestion was offered on the arbitration proceedings that the question of the applicability of s. 198 of the Act to such a case should be referred to the Court, which promise was that they, the arbitrators, should have it appear on the face of the award whether or not such section applied.

Re Vancouver, Victoria & Eastern Ry. Co., 14 Can. Ry. Cas. 101, 5 D.L.R. 722.

[Judgment in 1 W.W.R. 894 affirmed by divided Court.]

AWARD—SCOPE OF APPELLATE JURISDICTION.

Under the British Columbia Railway Act, R.S.B.C. 1911, c. 194, s. 68, upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings, the Court will not supersede the arbitrators but will review the award as it would review the judgment of a subordinate Court in a case of original jurisdiction, considering the award on its merits, both as to the facts and the law. Under the said s. 68, upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings where conflicting views as to the quantum of damages were apparent, but the estimate made in the award cannot be said to be unreasonable or manifestly incorrect, the findings of the arbitrators will not in that respect be disturbed, the arbitrators having seen and heard the witnesses and viewed the land in question. [Atlantic & Northwest Ry. Co. v. Wood, [1895] A.C. 257, 64 L.J.P.C. 116, followed, under which a similar question under subs. 2 of s. 161 of the Dominion Railway Act, 1888, being s. 168 of 3 Edw. VII. (D) c. 58, was decided.]

Canadian Northern Pacific Ry. Co. v. Dominion Glazed Cement Pipe Co. (B.C.), 14 Can. Ry. Cas. 265, 7 D.L.R. 174.

APPOINTMENT OF ARBITRATORS—VALUE OF PROPERTY AT THE TIME.

The exception of arbitrations then "pending" from the amendment made by 8 & 9 Edw. VII. (D.) c. 32, to the Railway Act, 1906, as to the time in relation to which the value of property expropriated is to be fixed where title is not acquired by the railway within a year from the date of depositing the plans, does not apply so as to exclude the application of the amending act, unless the arbitrators had taken office before the statute took effect after having been sworn in under s. 197; so where prior to the amending statute (1909), an order had been made appointing arbitrators, but one of them declined the appointment and a new arbitrator was not appointed until after the passing of the amending act, the "arbitration" was not "pending" when the latter act was passed. [Robinson v. C.N.R. Co., 17 Man. L.R. 583, referred to.]

Re Taylor and Can. Northern Ry. Co. (Man.), 15 Can. Ry. Cas. 51, 9 D.L.R. 695.

LAND CONTRACT—CONSEQUENTIAL DAMAGE.

An agreement alleged to import the renunciation of a right is interpreted strictly; and where a landowner permits his land to be taken for the construction of a railway, and reserves his right of action for possible damages resulting from the obstruction or closing of a roadway leading from his farm to the St. Lawrence River, he is not estopped therefrom by a stipulation in the agreement of sale to the effect that the price of the land sold on the same day to the company "shall include all damages caused by the running of the railway over the land sold." An alleged agreement, for arbitration of damages arising from the construction, maintenance and operation of a railway over the plaintiffs' lands, which specifies that "the damages shall be fixed by appraisers to be named by the parties," but neither specifies the names of the arbitrators, nor the subject-matter of the dispute, nor fixes the time within which the arbitration award shall be rendered, is not a compromise, but is merely a promise to compromise, and does not estop a person suffering damages from a right of action for the recovery of such damages. [McKay v. Mackedie, 11 Que. S. C. 513, followed.]

Desmeules v. Quebec & Saguenay Ry. Co., 15 Can. Ry. Cas. 94, 43 Que. S. C. 150.

Compensation—Review of award—Consequential damage.

An award under the Railway Act will not be set aside by reason of the fact that after a view of the lands in question the arbitrators have not put in writing a statement sufficiently full to enable a judgment to be formed of the weight which should be attached to their finding. [Arbitration Act, 9 Edw. VII. (Ont.) c. 35, s. 17 (3),] but will be referred back for a supplementary certificate. (2) When a railway intersects a piece of land the company must pay not only compensation for the land actually taken, but also damages for injuries to the remainder of the parcel sustained by reason of the compulsory severance. (3) The date of the deposit of a plan, profile and book of reference is the date with reference to which compensation or damages for land taken by a railway company under the Railway Act, 1903, are to be ascertained, and subsequent dealings with the land by the owner cannot affect the amount of compensation or damages to be awarded.

Re Myerscough and Lake Erie & Northern Ry. Co. (Ont.), 11 D.L.R. 458, 15 Can. Ry. Cas. 168.

[Followed in Re Billings and Can. Northern Ontario Ry. Co., 16 Can. Ry. Cas. 375, 15 D.L.R. 918.]

Values of lands—Similar settlements—Relevancy.

Evidence of settlements made by the railway with other persons for parts of other farms taken for the right-of-way is not relevant in expropriation proceedings under the Railway Act, 1906. The fact that one party to the issue presented on an arbitration is allowed to give evidence of a class which is not relevant, does not entitle the opposing party to answer with the same kind of irrelevant testimony; and the opposing party, although successful in the issue is properly refused costs of his irrelevant evidence. [R. v. Cargill, [1913] 2 K. B. 271, applied.]

Re Ketcheson and Can. Northern Ontario Ry. Co., 13 D.L.R. 854, 16 Can. Ry. Cas. 286, 29 O.L.R. 339.

[Followed in Green v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 171, 8 S.L.R. 53.]

Award—Extension of time—Agreement to extend.

A formal extension in writing during the limitation period, of the time for the arbitrators to make their award upon an arbitration in expropriation proceedings under the Railway Act, 1906, is not a sine quâ non to their jurisdiction; there may be circumstances which debar either party from setting up the lack of a formal extension, such as an arrangement made for the postponement of the proceedings for the convenience of counsel, which was equivalent to a consent to the making of a formal extension by the arbitrators either before or after the time fixed at the first meeting pursuant to s. 204 of the Railway Act, 1906. [Can. Northern v. Naud, 42 Que. S.C. 121, and 22 Que. K.B. 221, affirmed; see MacMurchy & Denison's Railway Law, 2nd ed., 260, and Montreal Park, etc., Ry. Co. v. Wynness, 16 Que. S.C. 105.]

Can. Northern Quebec Ry. Co. v. Naud, 16 Can. Ry. Cas. 198, 48 Can. S.C.R. 242, 14 D.L.R. 307.

Evidence—Relevancy—Value of land in vicinity—Undivided interest in property expropriated.

To establish the value of land expropriated, evidence is admissible shewing recent sales of land of similar character and use in the neighborhood of that taken. [Doe dem. Barrett v. Kemp, 2 Bing. N.C. 102; Dendy v. Simpson, 18 C.B. 831, and Re Ketcheson and Can. Northern Ontario Ry. Co., 13 D.L.R. 854, 16 Can. Ry. Cas. 286; Dodge v. The King, 38 Can. S.C.R. 149, and The King v. Condon, 12 Can. Ex. 275, followed.] **Evidence of the sale of an undivided half of property expropriated is admissible on the question of damages in order to establish market value, but it is to be considered along with other circumstances establishing value.** [Dodge v. The King, 38 Can. S.C.R. 149, followed.]

Re National Trust Co. and Can. Pac. Ry. Co., 16 Can. Ry. Cas. 291, 15 D.L.R. 320, 29 O.L.R. 462.

Defective award—Appeal—Power of Court.

On an appeal from an award in expropriation proceedings under the Railway Act, the Court may send the case back to the same arbitrators to make a new award where the first one is defective in that it does not definitely and clearly disclose what the award is based upon and how the sam awarded is arrived at, where it seems probable that some wrong principle has been applied by the arbitrators.

Can. Pac. Ry. Co. v. Ball, 19 Can. Ry. Cas. 99, 20 D.L.R. 903.

Separate claim for occupation prior to award.

An award in expropriation proceedings under the Railway Act, fixing the compensation for land taken for the railway and the damages to the remainder of the land, does not include the damages to which the owner is entitled for the company's wrongful use and occupation of the lands prior to the expropriation. [Gauthier v. Can. Northern Ry. Co., 14 D.L.R. 490, 16 Can. Ry. Cas. 354, and Dagenais v. Can. Northern Ry. Co., 14 D.L.R. 494, 16 Can. Ry. Cas. 353, affirmed.]

Gauthier v. Can. Northern Ry. Co. and Dagenais v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 144, 17 D.L.R. 193.

Evidence—Admissions—Affidavit—Value of land.

An affidavit by an owner of land whose property has been expropriated, made by him prior to the expropriation, when he was acting in the capacity of an administrator, should not be received in evidence against him as an admission of its value at the time of expropriation. [Can. Northern-Western Ry. Co. v. Moore, 23 D.L.R. 646, 8 Alta. L.R. 379, affirmed.]

Can. Northern-Western Ry. Co. v. Moore, 21 Can. Ry. Cas. 112, 53 Can. S.C.R. 519, 31 D.L.R. 456.

Amalgamation of companies—Tender of conveyance.

An amalgamation under the Dominion Railway Act 1906, ss. 361-3, will not affect arbitration proceedings already begun under a provincial statute, and the award may be enforced against the amalgamated company; a tender of a conveyance of the expropriated land is not a statutory prerequisite to the validity of the award.

Haney v. Can. Northern Ry. Co., 21 Can. Ry. Cas. 388, 36 D.L.R. 674.

When award complete—Promulgation—Arbitrators functus officio—Setting aside.

An award under the Railway Act on the expropriation of land for railway purposes is not conclusive merely on the signing of an award by a

majority of the arbitrators; in order to be binding it must be published or promulgated within the period provided for making the award, as although signed within such period, it is subject to modification until published; upon the expiration of such period the arbitrators are functi officio and the award must be set aside, if the parties were not notified of its making, until after the expiry of the time limited for that purpose. [Hampson v. Dupuis, 8 D.L.R. 500, applied.]

Lachine, Jacques Cartier & Maisonneuve Ry. Co. v. Theberge et al., 21 Can. Ry. Cas. 385, 20 D.L.R. 703.

Provincial railway—Expropriation under provincial act—Amalgamation with Dominion company—Award preserved.

The award of arbitrators appointed under the Manitoba Expropriation Act (R.S.M. 1913, c. 61) to fix the compensation for lands crossed by a provincial railway company is not rendered void by the amalgamation of such company with a Dominion company, after the appointment of the arbitrators but before the award has been made, the arbitration proceedings having been continued after the amalgamation without objection on the part of either company. Ss. 362 and 363 of the Dominion Railway Act, 1906, continue and preserve the award against the amalgamated company. [Fargey v. Grand Junction Ry. Co., 4 O.R. 232, followed; Van Horne v. Winnipeg & Northern Ry. Co., 18 D.L.R. 517, referred to.]

Haney v. Can. Northern Ry. Co., 23 Can. Ry. Cas. 232, 42 D.L.R. 41.

Validity of award—Improper valuation as to dates.

An award in expropriation proceedings under the Railway Act, Alta., 1907, c. 8, is not invalidated because the arbitrators proceeded to fix the value as of the date of the arbitration instead of the date a few months earlier in the same year, when the appointment of the third arbitrator was made by a Judge's order, if the case developed no distinction as to value between those dates and both parties at the opening of the arbitration had acquiesced in the arbitrators' suggestion that the present value should be the basis of compensation.

Can. Northern-Western Ry. Co. v. Moore, 23 D.L.R. 646, 8 Alta. L.R. 379.

Arbitration, what constitutes—"Valuation" distinct from "Arbitration."

It is indicative that a valuation and not an arbitration was intended by the written submission to three persons that they are therein termed "valuers," and that the submitting parties offered no evidence.

Re Laidlow and Campbellford, Lake Ontario & Western Ry. Co., 19 D.L.R. 481.

Award—Conclusiveness—Review—Mistake.

To justify the setting aside of an award by a single arbitrator on the ground of mistake not appearing on the face of the award or in papers incorporated therewith, the arbitrator's admission of the mistake is necessary; so where there were three arbitrators, two of whom published an award, both must concur in certifying the mistake not apparent upon the award which the Court is to rectify and no relief can be granted where one of them denies that there is any mistake although the other asserts there was and desires the assistance of the Court. [McRae v. Lemay, 18

Can. S.C.R. 280; Dinn v. Blake, L.R. 10 C.P. 388; Flynn v. Robertson, L.R. 4 C.P. 324, referred to.]

Re Laidlow and Campbellford, Lake Ontario & Western Ry. Co., 19 D.L.R. 481.

AWARD—CONCLUSIVENESS—APPEAL.

An award in arbitration proceedings under the Railway Act, R.S.B.C. 1911, is final and conclusive except for the statutory right of appeal (s. 68); it cannot be altered except by the Court on the hearing of the appeal, and the power of remitting and setting aside an award upon motion is excluded. [Van Horne v. Winnipeg Ry. Co., 14 D.L.R. 897, and Ontario & Quebec Ry. Co. v. Vallières, 11 Can. Ry. Cas. 1, cited.]

Re British Columbia Railway Act and Can. Northern Pacific Ry. Co., 20 D.L.R. 633.

CONCLUSIVENESS OF ADJUDICATION—MEMORANDUM—FORMAL AWARD—PREPARATION OF—ADJOURNED MEETING—CHANGING ADJUDICATION.

On a majority of the arbitrators signing a memorandum of their adjudication under the Railway Act, 1906, and adjourning the arbitrators' meeting pending the preparation of a formal award as an authentic notarial document, it is too late for one of the majority to have the adjudication varied at the adjourned meeting if notice of such adjudication has been given to the parties; a notarial document passed on the later date with a lesser sum awarded than that first decided upon and notified to the parties, will be set aside.

Lachine, Jacques Cartier, etc., Ry. Co. v. Kelly, 20 D.L.R. 587.

REMITTING AWARD—JURISDICTION UNDER B.C. RAILWAY ACT.

There is no jurisdiction to remit an award in an arbitration held under the British Columbia Railway Act.

Re Can. Northern Pacific Ry. Co. and Finch, 20 B.C.R. 87.

RIGHT OF JUDGE TO APPOINT—NOTICE TO OWNER.

A Judge of the County Court alone has jurisdiction to appoint a sole arbitrator to determine the value of lands taken or required under the provisions of the New Brunswick Railway Act, except when he is personally interested in the lands, in which case a Judge of the Supreme Court has such jurisdiction. Where an owner of land omits to name an arbitrator in expropriation proceedings after notice is served on him as required by the New Brunswick Railway Act, a sole arbitrator cannot be appointed by any Judge until notice of the intended application for such appointment has first been given to the land owner.

St. John & Quebec Ry. Co. v. Anderson, 43 N.B.R. 31.

QUEBEC—SPECIAL STATUTORY PROCEDURE.

In railway expropriations the parties have a right to refuse to take proceedings under the special statutes passed for this purpose and to agree to an ordinary, voluntary and conventional arbitration, these acts not being of public order.

Girard v. Ha-Ha-Baie Ry. Co., 47 Que. S.C. 325.

C. Compensation, Measure of.

INJURY TO PROPERTY BY CONSTRUCTION OF SUBWAY—LIABILITY OF MUNICIPALITY.

A special statute in Ontario, 46 Vict. c. 45, authorized the municipalities of the city of Toronto and the village of Parkdale, jointly or separately, and the railway companies whose lines of railway ran into Toronto, to agree together for the construction of railway subways; provision was made in the Act for the issue of debentures to provide for the cost of the work, and the by-law for the issue of such debentures was not required to be submitted to the ratepayers; there was also provision for compensation to the owners of property injuriously affected by such work, such compensation to be determined by arbitration under the Municipal Act if not mutually agreed upon. The municipalities not being able to agree, Parkdale and the railway companies entered into an agreement to have a subway constructed at their joint expense, but under the direction of the municipality and its engineer, and on the application of Parkdale and the railway companies to the Railway Committee purporting to be made under 46 Vict. c. 24 (D.), an order of the Railway Committee was obtained authorizing the work to be done according to the terms of such agreement. The municipality of Parkdale then contracted with one G. for the construction of the subway, and a by-law providing for the raising of Parkdale's share of the cost of construction was submitted to, and approved of, by the ratepayers of that municipality. In an action by the owner of property injured by the work:—Held, per Ritchie, C.J., Fournier and Henry, JJ., that the work was not done by the municipality under the special Act, nor merely as agent of the railway companies, and the municipality was, therefore, liable as a wrongdoer. Per Gwynne, J.:—That the work should be considered as having been done under the special Act, and the plaintiffs were entitled to compensation thereunder. Per Taschereau, J.:—That the work was done by the municipality as agent of the railway companies, and it was, therefore, not liable. 12 A.R. (Ont.) 393, reversing 8 O.R. 59, 7 O.R. 270, reversed.

West v. Parkdale, 12 Can. S.C.R. 250.

[Affirmed, 12 App. Cas. 602; discussed in Ayers v. Windsor, 14 O.R. 682; referred to in Grand Trunk Ry. Co. v. Hamilton Radial, 29 O.R. 143; Mason v. South Norfolk Ry. Co., 19 O.R. 132; Platt v. Grand Trunk Ry. Co., 11 O.R. 246; applied in Chaudiere Machine & Foundry Co. v. Canada Atl. Ry. Co., 33 Can. S.C.R. 14, 2 Can. Ry. Cas. 306; Saunby v. London Water Commissioners, [1906] A.C. 110; Water Commissioners of London v. Saunby, 34 Can. S.C.R. 664; approved in Arthur v. Grand Trunk Ry. Co., 22 A.R. (Ont.) 89; considered in Marsan v. Grand Trunk Pac. Ry. Co., 2 Alta. L.R. 51; distinguished in Can. Pac. Ry. Co. v. Grand Trunk Ry. Co., 12 O.L.R. 320; followed in Bannatyne v. Suburban Rapid Transit Co., 15 Man. L.R. 19; Hanley v. Toronto, Hamilton & Buffalo Ry. Co., 11 O.L.R. 91; Hendrie v. Toronto, Hamilton, etc., Ry. Co., 26 O.R. 667; Smith v. Public Parks Board, 15 Man. L.R. 258; referred to in Baskerville v. Ottawa, 20 A.R. (Ont.) 108; Birely and Toronto, etc., Ry. Co., Re, 28 O.R. 468; Clair v. Temiscouata Ry. Co., 37 N.B.R. 613; McArthur v. Northern & Pacific Junction Ry. Co., 17 A.R. (Ont.) 86; Nelson & F.S. Co. v. Jerry, 5 B.C.R. 405; Winnipeg v. Toronto General Trusts, 19 Man. L.R. 427; relied on in Sandon Waterworks & Light Co. v. Byron N. White Co., 35 Can. S.C.R. 321.]

ALTERATION OF ROUTE.

An order of the Railway Committee under s. 4 of the Railway Act, 1886, does not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the proper carrying out of the requirements of the Railway Committee, authorize or empower the railway company on whom the order is made to take any person's land or to interfere with any person's right. Such provisions of law include all the provisions contained in the Consolidated Railway Act, 1879, under the headings of "Plans and Surveys" and "Lands and their valuation" which are applicable to the case; the taking of land and the interference with rights over land being placed on the same footing in that Act. Where a railway company, acting under an order of the Railway Committee, did not deposit a plan or book of reference relating to the alterations required by such order it was not entitled to commence operations. Under the Act of 1879 the payment of compensation by the railway company is a condition precedent to its rights of interfering with the possession of land or the rights of individuals. [Jones v. Stanstead Ry. Co., L.R. 4 P.C. 98; distinguished 12 Can. S.C.R. 250, reversing 12 A.R. (Ont.) 393, restoring 8 O.R. 59, 7 O.R. 270, affirmed.]

[Followed in Burt v. Dom Iron & Steel Co., 19 Can. Ry. Cas. 187, 25 D.L.R. 252; distinguished in Brant v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 268.]

Parkdale v. West (1887), 12 App. Cas. 602.

Award—Inadequate compensation.

In a case of an award in expropriation proceedings under the Railway Act, 1886, c. 109, it was held by the Superior Court for L.C. and the Court of Queen's Bench for L.C. that the arbitrators had acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed, and that the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice. On appeal to the Supreme Court of Canada:—Held, that the judgment should not be interfered with. [6 (Que.) Q.B. 385, M.L.R. 5 (Que.) S.C. 136, affirmed.]

Benning v. Atlantic & N.W. Ry. Co., 20 Can. S.C.R. 177.

Sufficiency of award.

Appeal and cross-appeal from the judgment of the Exchequer Court on a claim arising out of an expropriation of land at Port Hawkesbury, N.S., for the purposes of the Cape Breton Ry. The amount awarded to the claimant was $9,223.50, and the Exchequer Court judgment, which is reported at length in 2 Can. Ex. 149, was unanimously affirmed by the Supreme Court.

Paint v. The Queen (1891), 18 Can. S.C.R. 718.

[Applied in The Queen v. Clarke, 5 Can. Ex. 65; commented on in The Queen v. Barry, 2 Can. Ex. 352; followed in Re Gilbert and St. John Horticultural Assn., 1 N.B. Eq. 448; The Queen v. Harwood, 6 Can. Ex. 423; referred to in The King v. Harris, 7 Can. Ex. 280; Letourneux v. The Queen, 7 Can. Ex. 8; Neilson v. Quebec Bridge Co., 21 Que. S.C. 334; The Queen v. Murray, 5 Can. Ex. 72.]

Damage by reason of construction.

Under s. 159 of the Railway Act, 1906, the Board ordered that the location of the appellants' line of railway along certain streets in the city of Fort William be approved in accordance with an agreement between the appellants and the municipal corporation, but subject to the condition that the appellants shall "make full compensation to all persons interested for all damage sustained by reason thereof:"—Held, that the order must be rescinded. Under s. 237 (3) the power to award damages was in respect of construction, and s. 47 did not on its true construction extend that power to meet the case of location; and as the condition failed there was no approval.

Grand Trunk Pacific Ry. Co. v. Fort William et al., [1912] A.C. 224.

LAND INJURIOUSLY AFFECTED.

Where the statute under which a claim was made for damages to land, caused by the construction of certain works and the closing up of certain streets, provided that any advantage which the real estate might derive from the contemplated works should be deducted from the sum estimated for damage done to the land in arriving at the compensation to be paid, and it was found that the detriment to the claimant's property caused by the closing of the streets was more than offset by the advantage accruing to it from the construction of the works; it was held, that the claimant could not recover anything in respect to such detriment:—Held, also, that, even if the detriment to the claimant's land should alone be considered, he is not entitled to compensation by reason only that he is, by the construction of a public work, deprived of a mode of reaching an adjoining district from his land and is obliged to use a substituted route which is less convenient, if the consequent depreciation in the value of his property is general to the inhabitants of the particular locality affected, though his property may be depreciated more than that of any of the others. The claimant in such a case would have no right of action at common law, and therefore his land was not injuriously affected within the meaning of the statutes, the test in such cases being, would the complainant have a right of action if the work had been done without statutory authority.

Re Shragge and Winnipeg, 20 Man. L.R. 1.

FARM CROSSING—COMPENSATION IN LIEU OF.

When the value of a piece of land enclosed by a line of railway is so small as to be disproportionate to the cost of a farm crossing, and is of no utility to the farm from which it is so separated, the Court has the power and the discretion to grant to the proprietor a pecuniary compensation in lieu of a crossing.

Martin v. Maine Central Ry. Co., 19 Que. S.C. 561.

CLAIM FOR COMPENSATION—AMENDMENT—MISCONDUCT OF PARTY.

In an action claiming compensation for land taken for railway purposes, defendant appealed from that part of the order of the trial Judge which required him to pay costs of the action and trial to plaintiff except costs of the order to amend. It appeared that defendant was at no time liable in the action, either before or after the amendment, but was entitled to have the action dismissed, and, in the ordinary course, with costs:—Held, that the trial Judge, under these circumstances, while he could deprive defendant of costs, for reasons of misconduct set forth in his order, could not make defendant pay costs to plaintiff.

Sawler v. Municipality of Chester, 41 N.S.R. 168.

INJURY TO ADJOINING PROPERTY.

Independently of the right to indemnity to be determined by arbitration for the value of his land, an owner whose land is taken for construction of a railway has a right of action for damages against the company for injury to his works situated outside the line of the 100 feet the law permits the latter to expropriate.

Germain v. Can. Northern Quebec Ry. Co., 36 Que. S.C. 10.

B. Arbitration and Award.

ENHANCED VALUE OF RESIDUE OF LAND.

If, by reason of benefit, however questionable and uncertain it may be, the value of land (part of which had been expropriated for construction of a railway) has been enhanced on the market, the arbitrators may take this increased value into account in estimating the damages caused by the expropriation.

Chateauguay & Northern Ry. Co. v. Trenholme, 11 Que. K.B. 45.

Railway purposes—Grounds of compensation—Appeal from award.

(1) When the arbitrators in expropriation proceedings, under the Railway Act, 1906, have allowed one of the parties to proceed irregularly in the production of his evidence, if the other party though objecting afterwards puts in his evidence, he cannot set up the irregularity as a ground of appeal from the award. It comes within the class of technical objections which are provided against in s. 205 of the Act. (2) The award is validly made by the arbitrators at a meeting of which the arbitrator, named by the expropriating party, has had due notice, and it need not be served upon such party. (3) A party who appeals from an award is estopped from attacking it, on the ground that it was not served. (4) The admission of irrelevant evidence by the arbitrators, if not shewn to have affected the amount of the award, is no ground of appeal therefrom. (5) The Court, adjudicating on an appeal under s. 209 of the Act, is bound to go through all the evidence and examine into the justice of the award, paying due regard to the finding of the arbitrators, whose conclusion, however, is not binding, even though they be not shewn to have erred in principle or to have abused their authority. (6) In fixing compensation, regard should be had to the prospective capabilities of the property, arising from its character and situation. (7) When the evidence is deficient on an element of damage (e.g. the severance of the property into two blocks by the railway), which the arbitrators were enabled to appreciate by inspection, their finding in that regard will not be disturbed in appeal. (8) The benefit derivable from the railway that can be set off against the damage caused by the expropriation, must be such as is "beyond the increased value, common to all lands in the locality." If the property be a mill site, with a water power available, it cannot be urged that its only value is given it by the railway, inasmuch as the owner of a rival mill site in the locality, not touched by the railway, would presumably derive the same benefit from it.

Quebec, Montreal & Southern Ry. Co. v. Landry, 19 Que. K.B. 82.

Award of damages—Review by certiorari—Error in principle—Allowance of value of improvements made by company.

Re Maritime Coal & Ry. Co. and Elderkin, 2 E.L.R. 284 (N.S.).

Value of land taken—Railway crossing.

Rex v. McPhee, 5 E.L.R. 440.

Station purposes—Business losses.

Upon application under s. 139 of the Railway Act, 1903, to acquire lands for station purposes the Board may consider not merely the traffic coming to the station on the railway of the applicants immediately or from a distance, but also future traffic on the railway and the future accomodation of the public. In dealing with the question of compensation, the Board may require the applicants to do any act whatever, including the payment of money, in addition to the compensation ordinarily allowed under the statute, but any such additional compensation should be allowed only under very peculiar circumstances. Where warehouse property had been destroyed by fire, and an application was made to expropriate the land under s. 139:—Held, per Killam, Chief Commissioner:—That compensation should not be paid to the owners for business losses sustained since the fire and during proceedings taken before the

Board for leave to expropriate, but interest from the date of the orginal application for such leave was allowed. Per Bernier, Deputy Chief Commissioner (dissenting):—The principles upon which compensation should be allowed are fixed by the Railway Act and the Board has no power to order payment of compensation for any other damage than that which the statute allows in the ordinary case of expropriating lands under the Railway Act. Per Mills, Commissioner (dissenting):—That compensation can be allowed under s. 139, for business losses sustained while an application for leave to expropriate is pending, and that this was a proper case for allowing damages for such losses.

Re Grand Trunk Ry. Co. and Esplande in City of Toronto (Burnt District Case, Toronto, No. 25), 4 Can. Ry. Cas. 290.

Severance of farm—Access of cattle to springs.

The railway company took for the purposes of their railway 3.09 acres of a grain and dairy farm of about 195 acres. The railway crossed the farm, severing from the front part of it about 24 acres, including a field of 18 acres which contained springs affording a supply of water for the cattle and horses on the farm. Upon an arbitration to ascertain the compensation to be paid for the land taken and the damages sustained by reason of the exercise of the railway company's power of expropriation, the owner of the farm claimed damages inter alia for the loss or serious impairment of the convenient use for the purpose of the farm of the springs in the field mentioned. The company contended that the loss would be minimized by the construction of a farm crossing across the railway, and offered to appear before the Board and consent to an order directing that such a crossing be constructed and maintained by them:—Held, applying Vézina v. The Queen (1889), 17 Can. S.C.R. 1, that the owner of the farm had no statutory right under s. 198 of the Railway Act, 1903, to have a farm crossing sufficient to provide a satisfactory means of access for his cattle to and from the springs, and therefore, that he might be deprived thereof at any time at the will of the government, he was entitled to damages in respect of this claim. Construction of subss. 1 and 2 of that section of the Railway Act:—Held, upon the evidence, that the sum of $1,170 awarded by the majority of the arbitrators was not adequate compensation for the land taken and the injury done, and the amount was increased upon appeal to $2,250. Remarks upon the large costs and expenses incurred in arbitrations under the Railway Act and the harshness of the rule which throws them upon the landowner if the amount awarded is less than that offered by the company.

Re Armstrong and James Bay Ry. Co., 5 Can. Ry. Cas. 306, 12 O.L.R. 137.

Farm crossing—Right to undercrossing.

Where the railway was carried across a farm upon a high embankment, and any crossing over it would be inconvenient, the owner was held entitled to an undercrossing, in addition to payment of the purchase money for the land taken and damages. [Reist v. G.T.R. Co., 6 U.C.C.P. 421, approved; Armstrong v. James Bay Ry. Co., 5 Can. Ry. Cas. 306, 12 O.L.R. 137, not followed.]

Re Cockerline and Guelph & Goderich Ry. Co., 5 Can. Ry. Cas. 313.

[See Lalande v. Can. Northern Ontario Ry. Co., 21 Can. Ry. Cas. 194; followed in Atkinson v. Vancouver, Victoria & Eastern Ry. Co., 24 Can. Ry. Cas. 378.

VALUATION BY ARBITRATORS—IMPROVEMENTS.

A railway company in 1900 entered upon lands and made valuable improvements, intending to take and use the lands for the purpose of their railway. In 1905 they obtained authority to take the lands, and filed their plan under the Railway Act on the 23rd March, 1905. Arbitrators, in awarding compensation to be paid by the company for the lands, allowed to the claimants a sum for the improvements actually made by the company:—Held, that the company did not stand in the same position as an ordinary trespasser going upon lands; they had a statutory right to acquire a title, and entered after negotiation with the true owners, and with the permission of one who claimed to be, but turned out not to be, the true owner; although the improvements were fixtures, dedication to the land owners was not to be presumed, but the contrary; and the amount of the award should be reduced by the sum allowed for the improvements. S. 153 of the Railway Act, 1903, which provides that the date of the deposit of the plan shall be the date with reference to which the compensation or damages shall be ascertained does not mean that all the company's improvements made before depositing the plan go to the land owner; the lands dealt with in this section are the lands as the company obtained them, in the condition they were at the time they entered, valued as of the date of filing the plan; the claimants' right to compensation accrued at the date the lands were taken, and stood "in the stead of the lands" by virtue of s. 173; and so the improvements were not put upon the lands of the claimants at all.

Re Ruttan and Dreifus and Can. Northern Ry. Co., 5 Can. Ry. Cas. 339, 12 O.L.R. 187.

BARRISTER AS ARBITRATOR—HOTEL PROPERTY—GOODWILL—LICENSE.

There is no objection to an arbitrator who is a barrister and probably also a solicitor making an affidavit shewing how the amount found by the arbitrators was made up for use on an appeal from an award under the Railway Act, 1903; and it is therefore properly receivable on such appeal, as is also the evidence of an arbitrator given on his examination as a witness on a pending motion. Where the land taken consisted of an hotel property, an allowance was properly made for the loss sustained by the owner for the disturbance of his business and anticipated profits by reason of the expropriation, notwithstanding by the fencing off of the railway property therefrom, which the company had the right to do, the hotel property might have been rendered valueless as such, but which right the company had never attempted to exercise and presumably never would have exercised. The value of the license of an hotel is also a proper subject of allowance, though merely a personal right, and the renewal thereof, though reasonably probable, is not absolutely certain. Interest on the amount of compensation awarded is properly allowable from the date of the taking of the land, which in this case was the filing of the plan shewing the land expropriated, and the order of the Board authorizing the taking.

Re Cavanagh and Atlantic Ry. Co., 6 Can. Ry. Cas. 395, 14 O.L.R. 523. [Disapproved in Re Can. North. Ry. Co. and Robinson, 17 Man. L.R. 415; Re Clarke and Toronto, Grey & Bruce Ry. Co., 18 O.L.R. 628, 9 Can. Ry. Cas. 290; referred to in Can. Pac. Ry. Co. v. Brown Milling Co., 18 O.L.R. 85.]

LICENSED HOTEL—LIQUOR LICENSE.

The Crown expropriated for the purposes of a public work certain premises which the owner used as a hotel licensed to sell liquors. The license was an annual one, but, as the license laws then stood, it could be renewed in favour of the then owner, or in case of his death, of his widow; but no license could be granted to any other person for such premises. If the owner sold the property it was shewn that the use to which he put it could not be continued:—Held, that while this particular use of the property added nothing to its market or selling value, it enhanced its value to the owner at the time of the expropriation and that such was an element to be considered in determining the amount of compensation to be paid to him for the premises taken.

The King v. Rogers, 6 Can. Ry. Cas. 409, 11 Can. Ex. 128.

[Adopted in Re Can. North. Ry. Co. and Robinson, 17 Man. L.R. 406.]

Damages for business—Depreciation of value of machinery.

Where the whole property is taken and there is no severance the owner is entitled to compensation for the land and property taken, and for such damages as may properly be included in the value of such land and property. He is not entitled to damages because such taking injuriously affects a business which he carried on at some other place. Defendants, in expropriation proceedings, at the time their premises were taken had them fitted up as a boiler and machine shop. The machinery was treated as personal property by the defendants, and sold for less than it was worth to them when used for such purposes:—Held, that they were entitled to compensation for the depreciation in value of the machinery by reason of the taking of the premises where it had been used.

The King v. Stairs, 6 Can. Ry. Cas. 410.

Additional lands—Stations—Terms and conditions.

The Board, on February 23rd, 1905, made an order authorizing the Grand Trunk Ry. Co. to take certain lands in the city of Toronto for a railway passenger station, etc., upon certain terms and conditions (Burnt District Case, 4 Can. Ry. Cas. 290). One of the terms and conditions (No. 7), was that the applicant should pay to the owner, if thereto required by notice in writing given to it before the appointment of arbitrators, compensation with interest at 5 per cent per annum from May 4th, 1904. Arbitrators were appointed on January 23rd, 1906. On February 4th, 1907, Eckardt applied to the Board for an order to vary clause 7, so as to dispense with or extend the time for giving the said notice or allowing it to be given nunc pro tunc or for such further and other order as to the Board might seem proper:—Held, that the application should be dismissed; the railway company had acquired a vested right to obtain the land upon the statutory terms and the matter had passed out of the hands of the Board.

Eckardt v. Grand Trunk Ry. Co. (Burnt District Case (2) No. 595), 7 Can. Ry. Cas. 90.

Damage to remaining land.

A railway company under its compulsory powers of expropriation acquired from the owner a certain portion of his land for the purposes of their undertaking. A majority of arbitrators by their award allowed compensation for depreciation to the remainder of his land resulting from the operation of the railway elsewhere than on the land so taken:—Held, upon appeal (1), that the award must be set aside and the question referred back to the arbitrators for further consideration and award. (2) That the plaintiff is entitled to compensation for the depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the lands which have been taken from him under the Railway Act. (3) That the arbitrators may take into consideration the fact that the lands sought adjoin the railway premises and are convenient for extension of their yard.

Can. Pac. Ry. Co. v. Gordon, 8 Can. Ry. Cas. 53.

[Followed in Re Billings and Can. Northern Ontario Ry. Co., 16 Can. Ry. Cas. 375, 15 D.L.R. 918.]

ACCEPTANCE OF AMOUNT OFFERED BY COMPANY.

Under s. 159 of the Railway Act, 1903, if the owner of land sought to be expropriated by the railway company does not accept the offer of the railway company within ten days, the company may at once proceed to have the amount of the compensation payable determined by arbitration; but the owner may accept the offer at any time after the expiration of ten days if in the meantime the company has taken no further proceedings, and such offer and acceptance will constitute a binding contract between the parties upon which the owner may proceed in an action to recover the amount offered.

Bennetto v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 223, 18 Man. L.R. 13.

PAYMENT INTO COURT—COSTS.

In an action brought by plaintiff claiming damages for lands taken for railway purposes, part of plaintiff's claim had been the subject of arbitration and award, but it appeared that part of the work of construction preceded the filing of the expropriation plans:—Held, that plaintiff was entitled to recover for all damages which could have been legitimately excluded from the consideration of the arbitrators, and that plaintiff's claim could not be deemed to have been satisfied by an award for injuries which would not have formed a legitimate subject for the consideration of the arbitrators. Defendant paid into Court a sum of money which the trial Judge held insufficient, but which the Court, under the evidence, thought excessive, if not the extreme limit of any damage of which there was reasonable evidence:—Held, in respect to this portion of the judgment appealed from, that defendant's appeal must be allowed with costs.

Beaton v. Mabou & Gulf Ry. Co., 8 Can. Ry. Cas. 251, 41 N.S.R. 429.

RENEWABLE LEASE—TENANCY AT WILL—"PERSONS INTERESTED."

Lessees under a renewable lease, or their assignees, where the lessors have an option to renew or to pay for improvements, who remain in possession after expiration of the term, but to whom no renewal lease is granted, although demanded, are in occupation as tenants at will merely, and are not "persons interested" in the land within the meaning of s. 155 of the Railway Act, 1906, and are therefore not entitled to compensation for expropriation of any part of the lands demised. Judgment of Riddell, J. reversed.

Can. Pac. Ry. Co. v. Brown Milling & Elevator Co., 9 Can. Ry. Cas. 56, 18 O.L.R. 85.

[Affirmed in 10 Can. Ry. Cas. 74, 42 Can. S.C.R. 600.]

PERSONS INTERESTED—LESSOR AND LESSEE.

The covenant for renewal of a lease for a term of years is indivisible and if the lessee assigns a part of the demised premises neither he nor his assignee can enforce the covenant for renewal as to his portion. The assignment of part of the leasehold premises included an assignment of the right to renewal of the lease for such part and the lessor executed a consent thereto:—Held, that he did not thereby agree that his covenant for renewal would be exercised in respect to a part only of the demised premises. In the case mentioned the lessee who has severed his term cannot, when the land demised is expropriated by a railway company, obtain compensation on the basis of his right to a renewal of his lease. [Can. Pac. Ry. Co. v. Brown Milling & Elevator Co., 18 O.L.R. 85, 9 Can. Ry. Cas. 56, affirmed.]

Brown Milling & Elevator Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 74, 42 Can. S.C.R. 600.

WARRANTS OF POSSESSION—PAYMENT INTO COURT.

The power conferred on arbitrators appointed under the Railway Act, 1906, to award compensation for lands taken by a railway company is limited to determining the amount of such compensation merely; and, therefore, they exceeded their jurisdiction in awarding interest on the amounts allowed as compensation from the date with reference to which the same were ascertained, namely the date of the filing of the plan, etc. [Re Can. Northern Ry. Co. and Robinson (1908), 17 Man. L.R. 396, 8 Can. Ry. Cas. 226, approved of; Re Cavanagh and Canada Atlantic Ry. Co. (1907), 14 O.L.R. 523, 6 Can. Ry. Cas. 395, dissented from.] Cases decided under the arbitration sections of the Municipal Act distinguished. Prior to the making of the awards, possession of the lands was taken by the railway company under warrants of possession issued by a Judge, payment into Court being then made by the company of sums deemed sufficient to satisfy the compensation to be awarded:—Held, that the owners were entitled to have paid to them, out of the moneys in Court, not only the amounts of the compensation awarded, but also interest thereon, not limited to such interest as, according to the practice of the Court, is payable on moneys in Court, but at the legal rate of interest, namely, five per cent, payable from the date of the warrants of possession until the date of the payment out. [Re Lea and Ontario & Quebec Ry. Co. (1885), 21 C.L.J. 154; Re Taylor and Ontario & Quebec Ry. Co. (1896), 11 P.R. 371, and Re Philbrick and Ontario & Quebec Ry. Co. (1886), 11 P.R. (Ont.) 373, referred to and discussed.]

Re Clarke and Toronto Grey & Bruce Ry. Co., 9 Can. Ry. Cas. 290, 18 O.L.R. 628.

[Referred to in Re Ketcheson and Can. Northern Ontario Ry. Co., 16 Can. Ry. Cas. 286.]

ADDITIONAL LANDS—DATE OF ACQUISITION.

Application, under s. 178 of the Railway Act, 1906, to take additional lands about two miles in length by some 2.5 or 2.700 feet in width for railway terminals, shops, storage yards and other railway purposes:—Held (1), that the right of eminent domain is given to railway companies not for their own benefit but in the public interest and to enable reasonable facilities to be given to the public. (2) That upon a strict compliance with the provisions of s. 178 the company has the right to acquire the lands covered by its application unless it is established that the application is not bona fide and that the company does not require the lands for public purposes or that it is acquiring them for some ulterior purpose. (3) That this application should be granted subject to the following conditions:—(a) That the applicant (if required within ten days after making the award) must purchase from the landowners, portions of whose lands are authorized to be taken, the remainder of their lands, at the same rate as may be fixed by the award for the portions taken, but should the amount awarded for the portions taken include compensation for damages to the remaining lands, then such amount shall be deducted from the purchase price of the remainder of said lands. (b) The operation of the order should be stayed as to the lands covered by options until the pending litigation is terminated, when, if expropriation takes place, the compensation to be awarded shall be based upon the value of such lands at the time the applicant actually acquires title thereto pursuant to 8 & 9 Edw. VII. c. 32. s. 3. (c) The applicant shall provide the Pitt River Lumber Co. with suitable railway facilities for the mill proposed to be erected on its lands adjoining those authorized to be taken and if the extra expense of the new railway facilities over the cost of the present railway facilities is not taken into consideration in the compensation awarded for the portion taken, the question of such additional expense shall be reserved for further consideration.

Can. Pac. Ry. Co. v. Coquitlam Landowners, 13 Can. Ry. Cas. 25.

[See Burnt District Case Toronto, 4 Can. Ry. Cas. 290.]

RIGHT TO COMPENSATION—ANTICIPATED PROFIT ON A CROP—ABANDONMENT OF PROCEEDINGS.

The owner of land cannot recover as special damage resulting from the service of a notice of expropriation, by a railway company, which was abandoned, the anticipated profit on a crop which the owner desisted from raising because of the notice having been served.

Marson v. Grand Trunk Pac. Ry. Co. (Alta), 14 Can. Ry. Cas. 26, 1 D.L.R. 850.

[Followed in Lavalee et al. v. C.N.R., 4 D.L.R. 376.]

DAMAGES—VALUE OF EXPROPRIATED LANDS.

The value of lands expropriated for a public work is to be determined prima facie upon the basis of the market price, but the prospective capabilities of the property have to be taken into account in ascertaining the market price, and an additional allowance made for compulsory expropriation. [Brown v. The King, 12 Can. Ex. 463, and Dodge v. The King, 38 Can. S.C.R. 149, specially referred to.]

The King v. Moncton Land Co., 14 Can. Ry. Cas. 36, 1 D.L.R. 279.

ADDITIONAL SERVITUDE—ABUTTING OWNERS—INCREASE OF TRAFFIC.

Where a railway established a freight shed and freight shunting yard which materially increased the traffic upon that part of the railway running along a city street and injuriously affected the value of the property fronting on the street to an extent not contemplated when the grant was made many years previously by the municipal corporation of permission to carry the railway line along such street, the Board will order compensation to be paid by the railway to such of the landowners within the territory injuriously affected as were the owners of their property prior to such change of conditions.

Hamilton v. Grand Trunk Ry. Co. (Re Shunting on Ferguson Avenue, Hamilton), 14 Can. Ry. Cas. 196, 5 D.L.R. 60.

ADDITIONAL SERVITUDE.

Purchasers of property upon a street upon which a railway is operated who bought subsequently to the establishment of a railway yard and the incidental damage to the properties on that street by reason of the shunting of cars thereon, having purchased with notice of the new conditions, are not entitled to compensation in damages as are the landowners who had acquired title previous to the establishment of the railway yard.

Hamilton v. Grand Trunk Ry. Co. (Re Shunting on Ferguson Avenue, Hamilton), 14 Can. Ry. Cas. 196, 5 D.L.R. 60.

Removal of spur track.

The award of damages for the wrongful removal by a railway company of a spur track adjoining a coal and lumber yard from which coal and lumber could be unloaded from cars into the yard with little labour, based upon the owner's evidence of the additional cost of hauling coal and lumber from the company's freight yards, is not erroneous, though evidence that a transfer company would handle such commodities at a less sum per day for each team, if it appeared that the coal and lumber owners' teams were better than those of the transfer company and would do more work per day.

Robinson v. Can. North. Ry. Co. (Man.), 14 Can. Ry. Cas. 281, 5 D.L.R. 716.

[See 6 Can. Ry. Cas. 101; 37 Can. S.C.R. 541; 11 Can. Ry. Cas. 289; 19 Man. L.R. 300; 11 Can. Ry. Cas. 304; 43 Can. S.C.R. 387; 13 Can. Ry. Cas. 412, [1911] A.C. 739.]

Public improvements—Spur or switch.

The Board will usually follow the principle that a railway company desiring to take land of a private individual should be given the right, provided the individual can be properly compensated for his land and for damages to adjoining land, but it is a ground for refusing to give the railway company that privilege that the proposed railway line is a cut-off for freight only which if permitted would run through a valuable suburban subdivision for the development of which the land proprietor had dedicated large sections for the construction of driveways and parks, which might be expected to benefit both the suburban locality and the adjoining city and so be considered as in the nature of a public undertaking.

Can. Pac. Ry. Co. v. Smith, 5 D.L.R. 391.

Inconvenience and additional cost of cultivating farm crossed by railway—Interest.

In awarding damages against the railway in eminent domain proceedings in respect of a railway right-of-way across a farm, the inconvenience of transferring machinery and farm implements, and the like, from one part of the farm to another and the inconvenience in farming and cultivating the land, occasioned by the construction of the railroad, are not separate items to be capitalized on an ascertainment of a prospective annual loss to the owner whose farm is divided, but are to be considered only as factors in fixing the depreciation of the market value of the remaining parts of the farm.

Re Ketcheson and Can. North. Ont. Ry. Co. (Ont.), 16 Can. Ry. Cas. 286, 13 D.L.R. 854, 29 O.L.R. 339.

Damages—Depreciation—Railway right-of-way across farm.

The loss of time and inconvenience of transporting the crop from the part of the farm separated from the buildings by the construction of the railway on a compulsory taking of a strip of land for the right-of-way, is proper to be considered in estimating the damages only in so far as it effects a depreciation of the market value of the land not taken. [Idaho & W. Ry. Co. v. Coey, 131 Pac. Rep. 810, approved.]

Re Ketcheson and Can. North. Ont. Ry. Co. (Ont.), 16 Can. Ry. Cas. 286, 13 D.L.R. 854, 29 O.L.R. 339.

Underlying minerals.

The value of minerals underlying the usual 100-foot strip of land expropriated for a railway right-of-way cannot be included in an award of damages, as the railway company does not become vested with any right to such minerals by virtue of the expropriation; the landowner's right thereto is merely suspended until such future time as the Board shall, on the latter's application, under ss. 170, 171 of the Railway Act, 1906, require the company to compensate the landowner for the value of the minerals if necessary for the safe support of the railway; or to submit to such order as the Board may make relative to the working of the minerals by the landowner. A railway company does not acquire any right to minerals underlying land expropriated for a right-of-way; since the respective rights of the company and the landowner to the minerals are to be fixed and determined under ss. 170, 171, on future application to the Board, which may require the company to purchase the minerals, if necessary for the safe support of the railway, or to submit to such order as the Board may make relative to the working of the minerals by the landowner. Notwithstanding that ss. 170, 171, relating to the rights of a landowner and a railway company in minerals underlying land expropriated for railway purposes are silent as to the right of the landowner to compensation for the vaue of such minerals, ss. 2, 26, 28, 48, 59, 178, 179 of the Act shew that the Board, in making an order under ss. 170, 171 relating to such underlying minerals, may require the railway company to make compensation therefor if the minerals are necessary for the safe support of the railway. The value of minerals underlying land expropriated for a railway right-of-way cannot be allowed as an injurious affection of the land resulting from the exercise of the power of eminent domain conferred by the act, since the act gives the right to expropriate the surface of the land without taking the underlying minerals. [Rex v. Pease, 4 B. and Ad. 30; Hammersmith, etc., Ry. Co. v. Brand, L.R. 4 H.L. 171; London & North Western Ry. Co. v. Evans, [1893] 1 Ch. 16; Smith v. Great Western Ry. Co., 3 App. Cas. 165; Ruabon Brick & Terra Cotta Co. v. Great Western Ry. Co., [1893] 1 Ch. 460, referred to; Grand Trunk Pacific Ry. Co. v. Fort William et al., [1912] A.C. 224, 13 Can. Ry. Cas. 187, considered.]

Re Davies and James Bay Ry. Co., 13 D.L.R. 912, 28 O.L.R. 544.

[Followed in Woodstock v. G. N. W. Telegraph Co., 19 Can. Ry. Cas. 427.]

TAKING LAND OF BRICK PLANT—SEPARATION FROM SOURCE OF SUPPLY—COST OF CROSSING.

Where the expropriation of a railway right-of-way through land owned by a brick manufacturing company separates its factory from the source of its supply of brick-making material, all of which, however, was not needed for immediate use, the benefits conferred on the land by the construction of the railway and which may be off-set against the damages sustained by the landowner, must be based on the present worth of a sum payable not when the railway is built, but at such future time when the materials will be needed in the landowner's business. On the expropriation of a railway right-of-way through a brick-making plant so as to separate the factory from its supply of brick-making materials, the cost of grading a necessary crossing over the railway may be awarded as damages, notwithstanding that the construction of such crossing depends on the subsequent consent of the Board.

Re Davies and James Bay Ry. Co., 13 D.L.R. 912, 28 O.L.R. 544.

RIGHT-OF-WAY THROUGH FARM—DAMAGES.

Gray v. Grand Trunk Pac. Branch Lines Co. (Sask.), 11 D.L.R. 861.

Damages—Condemnation or depreciation in value by eminent domain—Taking land for railway purposes—Underlying minerals.

The value of minerals underlying the usual 100-foot strip of land expropriated for a railway right-of-way cannot be included in an award of damages, as the railway company does not become vested with any right to such minerals by virtue of the expropriation; the landowner's right thereto is merely suspended until such future time as the Board shall, on the latter's application, under ss. 170, 171 of the Railway Act, 1906, require the company to compensate the landowner for the value of the minerals if necessary for the safe support of the railway; or to submit to such order as the Board may make relative to the working of the minerals by the landowner.

Re Davies and James Bay Ry. Co., 16 Can. Ry. Cas. 78, 28 O.L.R. 544, 13 D.L.R. 912.

Eminent domain—Taking land for railway purposes—Underlying minerals.

A railway company does not acquire any right to minerals underlying land expropriated for a right-of-way; since the respective rights of the company and the landowner to the minerals are to be fixed and determined under ss. 170, 171 of the Railway Act, 1906, on future application to the Board, who may require the company to purchase the minerals, if necessary for the safe support of the railway, or to submit to such order as the Board may make relative to the working of the minerals by the landowner.

Re Davies and James Bay Ry. Co., 16 Can. Ry. Cas. 78, 28 O.L.R. 544, 13 D.L.R. 912.

Eminent domain—Necessity of making compensation—Taking land for railway purposes—Underlying minerals.

Notwithstanding that ss. 170, 171 of the Railway Act, 1906, relating to the rights of a landowner and a railway company in minerals underlying land expropriated for railway purposes are silent as to the right of the landowner to compensation for the value of such minerals, ss. 2, 26, 28, 48, 59, 178, 179 of the Act shew that the Board, in making an order under ss. 170, 171 of the Act relating to such underlying minerals, may require the railway company to make compensation therefor if the minerals are necessary for the safe support of the railway.

Re Davies and James Bay Ry. Co., 16 Can. Ry. Cas. 78, 28 O.L.R. 544, 13 D.L.R. 912.

[Rex v. Pease, 4 B. & Ad. 30; Hammersmith, etc., R. Co. v. Brand, L.R. 4 H.L. 171; London & North Western Ry. Co. v. Evans, [1893] 1 Ch. 16; Smith v. Great Western R. Co., 3 App. Cas. 165; Ruabon Brick & Terra Cotta Co. v. Great Western Ry. Co., [1893] 1 Ch. 460, referred to; Grand Trunk Pacific Ry. Co. v. Fort William Land & Investment Co., [1912] A.C. 224, considered.]

Condemnation or depreciation by eminent domain—Taking land for railway purposes—Underlying minerals.

The value of minerals underlying land expropriated for a railway right-of-way cannot be allowed as an injurious affection of the land resulting from the exercise of the power of eminent domain conferred by the Railway Act, 1906, since the Act gives the right to expropriate the surface of the land without taking the underlying minerals.

Re Davies and James Bay Ry. Co., 16 Can. Ry. Cas. 78, 28 O.L.R. 544, 13 D.L.R. 912.

Condemnation or depreciation in value by eminent domain—Special benefits—Value for future uses.

Where the expropriation of a railway right-of-way through land owned by a brick manufacturing company separates its factory from the source of its supply of brick-making material, all of which, however, was not needed for immediate use, the benefits conferred on the land by the construction of the railway and which may be off-set against the damages sustained by the landowner, must be based on the present worth of a sum payable not when the railway is built, but at such future time when the materials will be needed in the landowner's business.

Re Davies and James Bay Ry. Co., 16 Can. Ry. Cas. 78, 28 O.L.R. 544, 13 D.L.R. 912.

Damages—Condemnation or depreciation in value by eminent domain—Taking land for railway purposes—Underlying minerals in slope supporting right-of-way.

In expropriating land for a railway right-of-way an element of damage to be taken into consideration in making an award is the value of minerals underlying the land supporting the slopes of the right-of-way, but outside of and beyond the 40-yard strip under which the landowner is prohibited by s. 171 of the Railway Act, 1906, from working the minerals without an order from the Board. [London & North Western R. Co. v. Evans, [1893] 1 Ch. 16, and London & North Western Ry. Co. v. Howley Park Coal & Cannel Co., [1911] 2 Ch. 97, at 130, affirmed in [1913] A.C. 11, specially referred to.]

Re Davies and James Bay Ry. Co., 16 Can. Ry. Cas. 78, 28 O.L.R. 544, 13 D.L.R. 912.

Damages—Eminent domain—Value for special use—Future expansion.

The measure of damages for the expropriation for railway purposes of a portion of land owned by a manufacturing concern, which, although not in present use, is the natural outlet for the future expansion of the business, is not the probable future profits that might be realised from the utilization of the land taken, considered apart from its conjunction with the remainder of the land owned by the company, but is such proportion of the profits arising from the whole of the land, occupied by the entire plant, including that expropriated, as the amount of the land taken bears to all of the land occupied by the company's plant.

Re Davies and James Bay Ry. Co., 16 Can. Ry. Cas. 78, 28 O.L.R. 544, 13 D.L.R. 912.

Damages—Eminent domain—Value of land taken—Land not in present use, future expansion.

Where land owned by a manufacturing company, but not required for present use, is expropriated for railway purposes, damages for the taking are to be based on the present worth or the future value of the land to the owner at such time as he may require it for use in his business.

Re Davies and James Bay Ry. Co., 16 Can. Ry. Cas. 78, 28 O.L.R. 544, 13 D.L.R. 912.

Damages—Eminent domain—Consequential injuries—Severancy from mineral supply—Additional cost of transportation.

Where the expropriation of a railway right-of-way through land owned by a brick-making company severed its factory from a source of future supply of brick-making material, an element of damage to be considered

in awarding damages is the additional cost of transporting material as the result of the building of the railway; although, if the material will not be required for many years, only the present value of the cost of transporting at the time when required for use, should be awarded.

Re Davies and James Bay Ry. Co., 16 Can. Ry. Cas. 78, 28 O.L.R. 544, 13 D.L.R. 912.

[Varied in 19 Can. Ry. Cas. 86.]

Principle of compensation—Market value.

The principle upon which compensation and damages should be awarded upon an expropriation of land is the market value, including the potential value of the land taken, at the time of the filing of the plans, without taking into consideration the values and elements of compensation incident to the property at the time of the award.

St. John & Quebec Ry. Co. v. Fraser, 19 Can. Ry. Cas. 177, 24 D.L.R. 339.

Evidence as to value of property.

The price paid for lands contiguous to the land concerned in expropriation proceedings by a railway company, although such price includes damages caused by the operation of the railway alongside the property, is properly regarded in proof of the value of the expropriated property as is also the price mentioned in an option to purchase the same. [Dodge v. The King, 38 Can. S.C.R. 149, followed.]

Re Billings and Can. Northern Ontario Ry. Co., 16 Can. Ry. Cas. 375, 29 O.L.R. 608, 15 D.L.R. 918.

Condemnation proceedings—Adaptability.

In ascertaining the quantum of damages in expropriation proceedings, consideration must be given to the possible profitable uses the land might be put to or is available for as well as what it has been customarily used for, as affecting its present market value. [Ford v. Metropolitan, etc., Ry. Co., 17 Q.B.D. 12, followed.]

Re Billings and Can. Northern Ontario Ry. Co., 16 Can. Ry. Cas. 375, 29 O.L.R. 608, 15 D.L.R. 918.

Obstructing access to street.

Where a strip of land not a part of, but adjoining, a public highway and used in conjunction therewith is expropriated by a railway company, the landowner who has used the strip in conjunction with the highway as a means of access to his land is deprived of a valuable right for which he must be compensated, even though his user depends partly on the consent of a third party, apparently willing to grant it on terms dealing with future developments. [Holt v. Gas Light & Coke Co., L.R. 7 Q.B. 728; O'Neil v. Harper, 13 D.L.R. 649, 28 O.L.R. 635; Re Myerscough and Lake Erie & Northern Ry. Co., 11 D.L.R. 458, 15 Can. Ry. Cas. 168, followed.]

Re Billings and Can. Northern Ontario Ry. Co., 16 Can. Ry. Cas. 375, 29 O.L.R. 608, 15 D.L.R. 918.

[Reversed in 21 Can. Ry. Cas. 310.]

Construction and operation of second railway.

The owner of property over which one railway has obtained a right-of-way is entitled to other and different damages from a second company

expropriating land alongside the first, the property having already adjusted itself to the first invasion.

Re Billings and Can. Northern Ontario Ry. Co., 16 Can. Ry. Cas. 375, 29 O.L.R. 608, 15 D.L.R. 918.

Noise, smoke and vibration—Condemnation proceedings.

Where part of a proprietor's land is taken from him and the future use of the part so taken may damage the remainder, such damage may be an injurious affecting of the proprietor's other lands; so a railway expropriating a narrow strip of land for trains to cross over is liable for the injurious affecting of the land adjoining by reason of smoke, noise and vibration occasioned by trains passing over such strip. [Cowper Essex v. Local Board for Acton, 14 A.C. 153 at 161; Horton v. Colwyn Bay, etc., [1908] 1 K.B. 327; Rex v. Mountford, [1906] 2 K. B. 814; Can. Pac. Ry. Co. v. Gordon, 8 Can. Ry. Cas. 53, followed.]

Re Billings and Can. Northern Ontario Ry. Co., 16 Can. Ry. Cas. 375, 29 O.L.R. 608, 15 D.L.R. 918.

Separate titles and offers to treat.

Where titles are distinct, each separate owner is entitled as of right to have a separate offer of compensation made to him by the railway company expropriating the land for railway purposes.

Re Edmonton, Dunvegan & British Columbia Ry. Co., 16 Can. Ry. Cas. 396, 15 D.L.R. 938.

Minerals—Subjacent and adjacent—Right of support.

The effect of the Railway Act, 1906, with regard to the expropriation of land by a railway company differs from that of the Railway Clauses Consolidation Act, 1845, in that under the former Act the company acquiring the surface has a right of support from minerals subjacent and adjacent to the line.

Davies v. James Bay Ry. Co., 19 Can. Ry. Cas. 86, [1914] A. C. 1043.

Mine owner—Restriction of rights—Minerals—Future use—Compensation.

Under the Railway Act, 1906, the owner of minerals is entitled to compensation for loss arising from the restriction of his rights, without waiting until he wishes to work the minerals; this compensation is to be ascertained as at the date of the deposit of plans, and once for all. [Davies v. James Bay Ry. Co., 28 O.L.R. 544, 16 Can. Ry. Cas. 78, varied.]

Davies v. James Bay Ry. Co., 19 Can. Ry. Cas. 86, [1914] A. C. 1043.

Valuation—Present value of land taken.

On the expropriation of land for railway purposes the value to be paid is the value to the owner as it existed at the date of the taking and not the value to the taker; such value is the present value alone of the advantages which the land possesses whether present or future. [Cedars Rapids v. Lacoste, 16 D.L.R. 168, [1914] A.C. 569; R. v. Trudel, 19 D.L.R. 270, 49 Can. S.C.R. 511, followed.]

Green v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 139, 22 D.L.R. 15.

Plan of subdivision—Severance.

A severance of subdivision property, by a railway expropriation, which does not injuriously affect the land as a whole is not an element of compensation. [Holditch v. Can. North. Ont. Ry. Co., 27 D.L.R. 14, [1916] 1 A.C. 536, 20 Can. Ry. Cas. 101, followed.]

Re Can. Northern Pac. Ry. Co. and Byng-Hall, 21 Can. Ry. Cas. 324, 23 B.C. 38, 35 D.L.R. 773.

Principles governing compensation—Review by Appellate Court.

1. Upon an appeal from an award of arbitrators determining the compensation to be paid to the owner of land compulsorily taken for railway purposes, and for land injuriously affected by the construction of a railway, under the Railway Act, 1906, Held, that the principles upon which compensation is to be awarded are:—(a) The value to be paid for land is the value to the owner as it existed at the date of the taking, not the value to the taker. (b) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. Cedars Rapids v. Lacoste, [1914] A.C. 569, 576; King v. Trudel, 49 Can. S.C.R. 501, 511, followed. 2. The land in question closely adjoined the city of Moose Jaw and there was a likelihood of its being subdivided. Held, that in determining the value of the property evidence should be directed to its value, having in view the possibility of its being subdivided, and not to the fact that lands surrounding and in the neighbourhood of the land in question had been subdivided and sold at certain prices. 3. It is the duty of the Court on such an appeal to consider all the evidence that has come before the arbitrators, and if there is evidence that would justify the arbitrators in reaching their conclusion, that conclusion should be sustained, if possible, but the Court is entitled and bound to come to its own conclusion upon all the evidence, and is also entitled to disregard the reasoning of the arbitrators if it does not agree with it, or to adopt it if it so desires, or to support the award on any ground sufficient in law, whether or not that ground is relied on by the arbitrators; provided that the Court pays due regard to the award and findings of the arbitrators and reviews them as it would that of a subordinate Court. [Re Ketcheson and Can. Northern Ontario Ry. Co., 29 O.L.R. 339, at p. 347, 16 Can. Ry. Cas. 286, followed.]

Green v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 171, 8 Sask. L.R. 53.

Estimation of value of land—Reconveyance of part taken.

Though an owner cannot be compelled to take back land after it has been found unsuitable for the purpose for which it was taken by a railway company, the fact, that by accepting a reconveyance, the value of the remaining land would be materially increased, should be taken into consideration when awarding compensation therefor.

Re Hannah and Campbellford, Lake Ontario & Western Ry. Co., 21 Can. Ry. Cas. 326, 34 O.L.R. 615, 25 D.L.R. 234.

Lands injuriously affected—Severance—Jurisdiction—Noise—Smoke—Vibration.

Upon the compulsory taking of lands under the Railway Act, 1906, the owner is not entitled to compensation for severance from other lands owned by him unless the lands taken are so connected with, or related to, the lands left that he is prejudiced in his ability to use or dispose of the latter. Compensation for injury likely to arise from the access to lands being rendered more difficult by reason of the railway being carried along or across streets rests with the Board upon making an order that the railway shall be so carried. Further, an owner is not entitled to compensation for injurious affection by noise, smoke and vibration to lands separate and disjoined from those taken. The language of s. 155 of the Railway

Act, 1906, is founded on that of the proviso to s. 16 of the Railway Clauses Consolidation Act, 1845, and the English decisions with regard to the effect of the latter section apply to the former. [Can. Northern Ry. Co. v. Holditch, 50 Can. S.C.R. 265, 19 Can. Ry. Cas. 112, affirmed.]

Holditch v. Can. Northern Ontario Ry. Co., 20 Can. Ry. Cas. 101, [1916] 1 A.C. 536, 27 D.L.R. 14.

[Followed in Re Can. Northern Pacific Ry. Co. and Byng-Hall, 21 Can. Ry. Cas. 321, 35 D.L.R. 773; North Bay Landowners v. Can. Northern Ontario Ry. Co., 23 Can. Ry. Cas. 35.

Compensation—Access—Devisees—Cotenants.

Tenants in common, devisees of a strip of land, intended by the testator to be dedicated and used as a public road, and who have refused to follow out the testator's wishes, and have held the land for the purpose of obtaining damages for expropriation thereof, have no such interest as will entitle them to damages under s. 155 of the Railway Act, 1906, although the land has been used as a means of better ingress and egress to and from land owned by one of the parties. [English Railways Clauses Consolidation Act, s. 16, Railway Act, 1906, s. 155; Ricket v. Metropolitan Ry. Co., L.R. 2 H.L. 175-176; Hammersmith Ry. Co. v. Brand, L.R. 4 H.L. 171; Cowper Essex v. Acton, 14 App. Cas. at 153; Stubbing v. Metropolitan Board of Works, L.R. 6 Q.B. 37, referred to; Can. Northern Ry. Co. & Billings, 15 D.L.R. 918, 29 O.L.R. 608, 16 Can. Ry. Cas. 375, reversed.]

Can. Northern Ry. Co. v. Billings, 21 Can. Ry. Cas. 310, 32 D.L.R. 35.

Special value—Adaptability for business.

In expropriating lands their special suitability for the carrying on of the owner's business and the savings and additional profits which the owner will derive from so carrying it on, are proper elements in assessing the compensation; but the owner is not entitled to have the capitalized value of these savings and profits added to the market value of the lands; what a prudent man in the owner's position would pay for them is the proper measure of value.

Lake Erie & Northern Ry. Co. v. Schooley, 21 Can. Ry. Cas. 334, 34 O.L.R. 328, 25 D.L.R. 537, 30 D.L.R. 289, 53 Can. S.C.R. 416.

Access to river—Accruing advantages.

The advantage accruing to a large residential property capable of useful subdivision from its frontage along a river is to be considered in fixing the compensation for injurious affection of the remaining lands on a strip of the property being taken for a railway right-of-way which cut off access to the river. [R. v. Buffalo & Lake Huron Ry. Co., 23 U.C.R. 208; North Shore Ry. Co. v. Pion, 14 App. Cas. 612, referred to.]

Re Muir and Lake Erie & Northern Ry. Co., 19 Can. Ry. Cas. 107, 20 D.L.R. 687.

Minerals—Quarry of rock.

The words "or other minerals" used in s. 133 of the Ontario Railway Act (R.S.O. 1914, c. 185) do not include the ordinary rock of the district; where a quarry of such rock has a special value, such value should be included by arbitrators in fixing the amount of compensation for land expropriated. [Imperial Acts, also Great Western Ry. Co. v. Carpalla, etc., Clay Co., [1910] A.C. 83; North British Ry. Co. v. Budhill Coal Co.,

[1910] A.C. 116, Caledonian Ry. Co. v. Glenboig, [1911] A.C. 290; Symington v. Caledonian Ry. Co., [1912] A.C. 87, considered.]

Re McAllister and Toronto Suburban Ry. Co., 22 Can. Ry. Cas. 272, 40 O.L.R. 252, 39 D.L.R. 207.

PERMISSION TO ENTER LAND—ORAL AGREEMENT—STATUTES OF FRAUDS—COMPANY—AUTHORITY OF PRESIDENT.

A railway company, without expropriating, ran its line through the yards of a tanning company and did work improving the yards and other work beyond the ordinary scope of a railway project. Four years later the tanning company applied to a judge for the appointment of arbitrators under the Railway Act to determine the compensation for the right-of-way which the railway company, opposing the application, claimed to be entitled to without payment under an oral agreement with the president of the tanning company since deceased. The judge ordered the trial of an issue, with the railway company as plaintiff, to determine the rights of the parties, and on appeal from the judgment of the Appellate Division, affirming the judgment at the trial in favor of the plaintiffs, the Court found that the evidence established that such an agreement was entered into and was binding on the tanning company, that said company was owned and controlled by a commercial firm of which the president was the head, and the partnership articles and evidence at the trial showed that he had authority to bind the company; and that the Statute of Frauds could not be relied on to defeat the action, as it was not brought to charge the defendants on a contract for the sale of land or of an interest in land. If applicable it was taken out of the statute by part performance. Idington and Duff, JJ., dissenting.

Acton Tanning Co. v. Toronto Suburban Ry. Co., 22 Can. Ry. Cas. 279, 56 Can. S.C.R. 196, 40 D.L.R. 421.

STATUTORY RIGHTS—ABANDONMENT OF PROPERTY.

The rights of the County of York to damages for expropriation by the City of Toronto of the Toronto & York Radial Ry. Co. and all its real and personal property within the city are statutory under the Act of 1897, and are not affected by the fact that by a by-law the county has abandoned certain roads over which the line is operated to minor municipalities of the county.

Re Toronto and Toronto & York Radial Ry. Co. et al., 23 Can. Ry. Cas. 218, 42 O.L.R. 545, 43 D.L.R. 49.

SUBWAY—CONSTRUCTION—REMOVAL OF DIRECT APPROACH TO PROPERTY—COMPENSATION—LOSS OF BUSINESS.

Where a claimant's land is injuriously affected by the removal of the direct approach to the premises, by the construction of a subway by a railway company in a street in front of the land, such claimant is entitled to full compensation for all damage arising therefrom although no land is taken. The arbitrator, under s. 155 of the Railway Act, 1906, should ascertain the entire compensation to which the claimant is entitled and in doing so should consider evidence of loss of business and make such allowance therefor as forming part of the compensation to be allowed as he may think just under the circumstances. [Review of authorities; see also annotation on Damages upon Expropriation, 1 D.L.R. 508.]

Re Birely and Toronto, Hamilton & Buffalo Ry. Co., 28 O.R. 468, affirmed 25 A.R. (Ont.) 88, followed.

Albin v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 398, 47 D.L.R. 587.

DAMAGES—VALUE—ESTIMATION OF—TIME.

The intention of the Railway Act, Alta., 1907, c. 8, is to fix the last convenient date as that in reference to which the value of propery expropriated shall be determined; if there is an agreement of sale the date of that agreement is taken or if there is a Judge's order appointing an arbitrator, the date of that order is taken, but if no such order is required by reason of the parties agreeing on the third arbitrator, the value is fixed as of the date of the service of the notice to treat under s. 101.

Can. Northern Western Ry. Co. v. Moore, 23 D.L.R. 646, 8 Alta. L.R 379.

OPINION EVIDENCE—STATUTORY LIMITATION AS TO NUMBER—APPLICABILITY TO EXPROPRIATION AWARDS.

S. 10 of the Evidence Act, Alta., limiting to three the number of witnesses on each side to be called to give opinion evidence applies to an arbitration under the Railway Act, Alta., 1907, c. 8, to fix compensation for land compulsorily taken.

Can. Northern Western Ry. Co. v. Moore, 23 D.L.R. 646, 8 Alta. L.R. 379.

OWNER'S RIGHT TO COMPENSATION—AMOUNT UNDER "VALUATION" AS DISTINCT FROM "ARBITRATION."

The "amount of compensation payable under the Railway Act" (1906), may refer as well to money payable under a valuation as to money payable under an arbitration, both methods being recognized by the act. (Per Hodgins, J.A.)

Re Laidlaw and Campbellford, Lake Ontario & Western Ry. Co., 19 D.L.R. 481.

VALUE—AGRICULTURAL PURPOSES—DEVELOPMENT.

Lands in the vicinity of what promises to become a railway junction have a higher value than that of land for agricultural purposes, and are to be valued as land of the industrial or building class, in estimating the amount of compensation for their expropriation by the Crown.

The King v. Quebec Improvement Co., 18 Can. Ex. 35.

SECOND EXPROPRIATION—ELEMENTS OF DAMAGE—BENEFITS DUE TO EXPROPRIATION—QUANTUM OF DAMAGES.

Where by a second expropriation a railway takes a strip of land for a railway yard on each side of the right-of-way first taken, the extra inconvenience and delay due to longer crossing and to the more extensive use of the property as a yard, are elements of the damages to be allowed. The benefits accruing to the remaining part of the property by the expropriation and the use to be made of the land taken, will be taken into consideration in fixing the quantum of damages due an owner.

The King v. Fontaine, 19 Can. Ex. 188.

LESSEE—COMPENSATION.

The lessee in a case of expropriation by a railway company of land occupied by him is entitled to a compensation.

Can. Northern Ontario Ry. Co. v. McAnulty, 23 Que. K.B. 472.

VALUE OF LAND—SPECIAL VALUE.

The law of Canada, in matter of expropriation as regards the principles upon which compensation for the land taken is to be awarded is the same as the law of England. The indemnity to be paid for land is the value to the owner as it existed at the date of taking, not the value to the taker. The value to the owner consists of all advantages which the land possesses, present or future, but it is the present value along of such advantages that falls to be determined. When there is a special value over the bare value of the ground consisting in a prospective value on account of certain undertaking, the value is not a proportional part of the assessed value of the whole undertaking, but is merely the price enhanced above the bare value of the ground, which possible intending undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers or acquired the other subjects, which made the undertakings, as a whole, a realized possibility.

Lachine, Jacques Cartier & Maisonneuve Ry. Co. v. Mitcheson, 47 Que. S.C. 3.

Stated case—Method of fixing compensation—Foreshore rights——Separate interests to be ascertained by arbitrators.

Is ascertaining the compensation to be made to a landowner where foreshore rights are in question for land expropriated for a railway under s. 57 of the British Columbia Railway Act, any increased value which the arbitrators may find is given to the remainder of the lands and foreshore in which the parties are interested beyond the increased values common to all lands in the locality, shall be set off against both the amount which may be awarded as the value of the foreshore taken and also any sum which may be awarded as damages for the taking and severance as distinguished from the value of the lands taken. The arbitrators, in making their award on a property in which more than one person is interested, shall set out the amount to which each party is entitled.

Re Pacific Great Eastern Ry. Co. and Larsen, 22 B.C.R. 4.

Set-off—Use and occupation.

On an application for payment out of Court of moneys paid in by a railway company for lands taken by it, held that the applicant was entitled to the sum unpaid of the amount awarded by the arbitrators with interest at 5 per cent. [Green v. C.N.R., 33 D.L.R. 609, followed]; and that the company was not entitled on such application to a set-off for the value of the use and occupation of the land by the applicant.

Re Grand Trunk Pacific Branch Lines Co. and Law, Re Railway Act (Alta.), [1917] 2 W.W.R. 1011.

Taking part of golf course—Compensation—Value of land—Cost of acquiring additional land—Award—Allowance for reconstruction of course.

A railway company having taken 8 out of 76 acres belonging to a club and laid out as a golf course, and having by the construction of the railway severed 7 acres from the rest, it was held, that the club was not bound to put up with such a course as could be laid out on the 67 acres left, nor to play over the railway lands; and the cost of acquiring other premises (15 acres), suitable and convenient, was a fair test of the damage suffered. [The Queen v. Burrow, Metropolitan Ry. Co. v. Burrow (1884), London Times 24th January and 22nd November, 1884, Boyle and Waghorn on Compensation, p. 1052, and Hudson on Compensation, p. 1521, and City of Edinburgh v. North British Ry. Co., Princes' Street Gardens Arbitration (1892), Hudson, p. 1530, applied.] Where the most advantageous use has been made of property by its owner, it is that value that the taker must pay, and the taker cannot reduce that value by limiting the damage to what lies immediately near the part taken, if the owner suffers through his whole property by its being reduced to an area too restricted to be used to the same advantage as that which the whole afforded. The compensation should include an allowance for the acquisition of additional acreage, for sewer piping, etc., taken and rendered useless, for reconstructing and providing tees and greens, and for damage to the clubhouse from smoke, noise, and vibration.

Re Brantford Golf & Country Club and Lake Erie & Northern Ry. Co., 32 O.L.R. 141, 7 O.W.N. 197.

LAND INJURIOUSLY AFFECTED.

Where one parcel of land is expropriated for railway purposes and another parcel of land of the same owner is injuriously affected by the carrying out of such purposes, the amounts awarded in arbitration proceedings in respect to both subjects are to be treated as purchase money. [Re MacPherson and Toronto, 26 O.R. 558, and Re Davies and James Bay Ry. Co., 20 O.L.R. 534, followed.]

Green v. Can. Northern Ry. Co., 8 S.L.R. 255, 9 W.W.R. 907.

"SPECIAL VALUE" OF LAND FOR BUSINESS CARRIED ON—BUSINESS DISTURBANCE—"SPECIAL ADAPTABILITY"—ELEMENTS OF DAMAGE.

Re Schooley and Lake Erie & Northern Ry. Co., 34 O.L.R. 328.

VALUE AT DATE OF TAKING.

In expropriation for railway purposes under the Railway Act, 1906, the landowner's compensation is to be fixed according to the value at the date of expropriation, taking into account the future potentialities of the property only as they affect the present market value. [Cedars Rapids v. Lacoste, 16 D.L.R. 168, 30 Times L.R. 293, and Re Lucas and Chesterfield, [1909] 1 K.B. 16, followed.]

The King v. Trudel et al., 19 D.L.R. 270.

DATE FOR VALUATION OF LANDS—DEPOSIT OF PLAN—NOTICE—BENEFIT TO LANDS NOT TAKEN—SET-OFF—EXCESSIVE COMPENSATION—APPEAL.

Where the expropriation of land is governed by the provisions of the Ontario Railway Act of 1906 the date for valuation is that of the notice required by s. 68 (1). The effect is the same under the Act of 1913 if the land has not been acquired by the railway company within one year from the date of filing the plan, etc. The compensation for the land expropriated should not be diminished by an allowance for benefit by reason of the railway to the lands not taken, the Ontario Railway Acts making no provision therefor. On appeal in a matter of expropriation the award should be treated as the judgment of a subordinate court subject to rehearing. The amount awarded should not be interfered with unless the appeal Court is satisfied that it is clearly wrong, that it does not represent the honest opinion of the arbitrators, or that their basis of valuation was erroneous. Where the land expropriated is an important and useful part of one holding and is so connected with the remainder that the owner is hampered in the use or disposal thereof by the severance he is entitled to compensation for the consequential injury to the part not taken: [Holditch v. Can. Northern Ry. Co., 50 Can. S.C.R. 265, [1916] 1 A.C. 536, distinguished]. To estimate the compensation for lands expropriated the arbitrators are justified in basing it on a subdivision of the property if its situation and the evidence respecting it shew that the same is probable:—Held, per Fitzpatrick, C.J. and Anglin, J., that to prove the value of the lands expropriated evidence of sales between the date of filing the plans and that of the notice to the owner is admissible and also of sales subsequent to the latter date if it is proved that no material change has taken place in the interval. Brodeur J., dissenting, held that the damages should be reduced; that the arbitrators should have considered only the market value of the lands established by evidence of recent sales in the vicinity.

Toronto Suburban Ry. Co. v. Everson, 54 Can. S.C.R. 395.

WHEN COMPENSATION AWARDED—DEPOSIT OF PLAN—NOTICE.

The word "title" employed in s. 192 (2) of the Railway Act, 1906, as amended by 8-9 Edw. VII. 1909, c. 32, is equivalent to the word "right" and "effectively acquire a title under the terms of said statutes, to the lands which a company requires for its works" means acquiring a right which prevents the proprietor from disposing of his property. If an expropriating company has, within the year of the deposit of the plans and book of reference, served on the interested parties the notice mentioned in pars. (a) and (b) of s. 193, of the Railway Act, 1906, the arbitrators must determine the compensation with reference to the date of such deposit, even if their award is made only after the expiry of the year from such deposit.

Forget v. Lachine, etc., Ry. Co., 24 Que. K.B. 174.

LANDLORD AND TENANT.

Where land expropriated by a railway company is subject to a lease separate amounts should be awarded to both landlord and tenant. [Johnson v. Ontario, Simcoe & Huron Ry. Co., 11 U.C.Q.B. 246, referred to.] Quaere as to whether a tenant has a right to have his compensation ascertained by a separate award by a different board of arbitrators. It is contrary to sound construction to permit the use of a term not altogether apt to defeat the intention of the Legislature, which must not be assumed to have foreseen every result that may accrue from the use of a particular word. [Regina Trustees v. Gratton Trustees, 7 W.W.R. 1248, referred to.]

Pacific Great Eastern Ry. Co. v. Larsen, 8 W.W.R. 1.

D. Water Rights; Foreshore.

AWARD—VALIDITY OF—RIPARIAN RIGHTS.

In an award for land expropriated for railway purposes where there is an adequate and sufficient description, with convenient certainty of the land intended to be valued and of the land actually valued, such award cannot afterwards be set aside on the ground that there is a variation between the description of the land in the notice of expropriation and in the award. A riparian proprietor on a navigable river is entitled to damages against a railway company for any obstruction to his rights of accès et sortie, and such obstruction without parliamentary authority is an actionable wrong: [Pion v. North Shore Ry. Co., 14 App. Cas. 612, followed.] Taschereau, J., was of opinion that the award in this case included compensation for the beach lying in front of plaintiff's property, which belongs to the Crown, and, for that reason, should be set aside.

Bigaouette v. North Shore Ry. Co., 17 Can. S.C.R. 363.

[Referred to in Bannatyne v. Suburban Rapid Transit Co., 15 Man. L.R. 19.]

POWER TO EXPROPRIATE FORESHORE—JUS PUBLICUM.

By 44 Vict. c. 1, s. 18, the C.P.R. Co., "have the right to take, use and hold the beach and land below high-water mark, in any stream, lake, navigable water, gulf or sea in so far as the same shall be vested in the Crown, and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways." By 50 & 51 Vict. c. 56, s. 5, the location of the company's line of railway between Port Moody and the city of Westminster, including the foreclosure of Burrard Inlet at the foot of Gore Avenue, Vancouver city, was ratified and confirmed. The Act of incorporation of the city of Vancouver, 49 Vict. c. 82, s. 213 (B.C.) vests in the city all streets, highways, etc., and in 1892 the city began the construction of works extending from the foot of Gore Avenue, with the avowed object to cross the railroad track at a level, and obtain access to the harbour at deep water. On an application by the railway company for an injunction to restrain the city corporation from proceeding with their work of construction and crossing the railway:—Held, affirming judgment of the Court below that as the foreshore forms part of the land required by the railway company, as shewn on the plan deposited in the office of the Minister of Railways, the jus publicum to get access to and from the water at the foot of Gore Avenue is subordinate to the rights given to the railway company by the statute (44 Vict. c. 1, s. 18a), on the said foreshore, and therefore the injunction was properly granted. 2 B.C.R. 306, affirmed.

Vancouver v. Can. Pac. Ry. Co., 23 Can. S.C.R. 1.

[Considered in Atty.-General v. Can. Pac. Ry. Co., 11 B.C.R. 299; followed in Can. Pac. Ry. Co. v. Parke, 6 B.C.R. 15; referred to in Can. Pac. Ry. Co. v. McBryan, 5 B.C.R. 198.]

Drainage rights—Compensation—Necessary agricultural works.

The owner of the lower lands is bound, under Art. 501 C.C. (Que.) to receive the water brought from the higher lands upon his property by a line ditch constructed by the owner of the higher lands for their cultivation, such necessary works not falling within the exception in that article as to artificial constructions. The compensation paid to the owner of land for an expropriation in connection with the construction of a railway does not include damages caused by the penning back of waters.

Grand Trunk Ry. Co. v. Langlois, 14 Que. K.B. 173.

[Applied in Lapointe v. Tellier, 32 Que. S.C. 531.]

Obstruction of water supply following expropriation—Compensation for loss of water.

In an arbitration to determine the amount to be paid to the owner of land expropriated by a railway company, the arbitrators found for the owner as compensation for the land, $2,950, and for loss of water supply from a spring, obstructed in consequence of such expropriation, two of the arbitrators awarded the sum of $1,200. The third arbitrator returned a finding against any compensation for deprivation of the water in the absence of a water record:—Held, that the owner was entitled. Where the three arbitrators agreed on the amount of compensation for land taken, and the third returned a separate finding dissenting, on the construction of a statute, from giving compensation for deprivation of a water supply, and an appeal was taken:—Held, on objection raised to the appeal as being based on an insufficient amount in dispute, under s. 209 of the Railway Act of B.C. that there was only one award given, and the appeal was properly brought. The owner of land on which there is a spring or stream has rights therein to the exclusion of all other persons not holding records under the Water Clauses Consolidation Act, 1897.

Re Milsted, 13 B.C.R. 364.

EMBANKMENT PREVENTING ACCESS TO WATER—COMPENSATION.

Certain lands in the District of Rainy River vested in Her Majesty for the use of the Province of Ontario, being taken by Her Majesty for the use of the Dominion under 31 Vict. c. 12, and 37 Vict. c. 13 and 14 (D.), for the defendants' railway, and the lands adjoining the railway lands having been alienated by the province, the claim to compensation therefor and for all damages which could be reasonably foreseen as likely to be suffered by the province from the exercise by the Dominion of its powers with regard to the said lands, became vested in the province. Part of the lands so taken were covered by the waters of a bay on the Lake of the Woods, across which the railway was first built on trestle work with riprap foundations, protected by a cribwork of stone:—Held, that the subsequent construction of a solid embankment replacing the trestle work was a proper exercise by the defendants, as successors to the right of the Dominion, of its powers and such as might be reasonably foreseen, and that, therefore, the plaintiffs, who became owners of the adjoining lands after their severance by the railway and its first construction, were not entitled to maintain an action for damages on account of the construction of the embankment and the consequent deprivation of access to the waters of the Lake of the Woods. Per McMahon, J.: Such claim, even if valid, is barred by the limitation clause of the Railway Act, 1888, and in any event the proper remedy is by arbitration under the compensation clauses of the Railway Act.

Ross v. Can. Pac. Ry. Co., 1 Can. Ry. Cas. 461.

RIPARIAN RIGHTS—COMPENSATION—WHEN COMMON-LAW REMEDY NOT SUPERSEDED.

Dorchester Elec. Co. v. Roy (Que.), 12 D.L.R. 767.

E. Gravel and Timber.

POWER TO ENTER LANDS AND TAKE MATERIAL FOR REPAIR OF HIGHWAYS.

The onus is on a district municipal council entering on land and taking any timber, stones, gravel or other material for repair of roads, etc., to shew what is intended to be taken, and the extent of the operations to be carried on.

Cook v. North Vancouver, 16 B.C.R. 129.

TRAMWAY FOR TRANSPORTATION OF MATERIALS—RIGHT OF PASSAGE—ADDITIONAL SERVITUDE.

The place where materials are found, referred to in s. 114 of the Railway Act, 1888, means the spot where the stone, gravel, earth, sand or water required for the construction or maintenance of railways are naturally situated and not any other place to which they may have been subsequently transported. Per Taschereau and Girouard, JJ.:—The provisions of s. 114 confer upon railway companies a servitude consisting merely in the right of passage and do not confer any right to expropriate lands required for laying the tracks of a tramway for the transportation of materials to be used for the purpose of construction.

Quebec Bridge Co. v. Roy, 5 Can. Ry. Cas. 18, 32 Can. S.C.R. 572.

TAKING GRAVEL—RIGHT TO CROSS HIGHWAY.

For the purpose of taking gravel from lands on both sides of a highway, a railway company applied to the Board for authority to construct and operate tracks over such highway for a term of years, to close to public traffic a portion of such highway, and to open a new road in lieu thereof:—Held, that it is not necessary to comply with s. 141 of the Railway

Act, 1903, where the company can acquire the lands containing the gravel and has a right-of-way thereto, that for such purposes the company may exercise the same powers for crossing and diverting highways as for the construction and operation of its main line, and that a diversion of the highway may be authorized for the time necessary to exhaust the gravel pit upon proper terms for safeguarding the interests of the municipality and of the public. [Railway Act, 1903, s. 2 (s) and (bb), ss. 118 (1) and (q) 119, 141, 186 referred to.]

Can. Pac. Ry. Co. v. North Dumfries, 6 Can. Ry. Cas. 147.

[Followed in Campbellford, Lake Ontario & Western Ry. Co. v. Camden, 16 Can. Ry. Cas. 236.]

Removal of gravel—Rights of homesteaders on Dominion lands.

The defendant constructed a line of railway across Government land and opened a gravel pit thereon, from which large quantities of gravel were removed. The plaintiff made entry for the land as a homestead. In an action for trespass:—Held, that a homesteader on Dominion lands has the exclusive right to the possession thereof, and may maintain an action for trespass. The company endeavoured to justify its action under s. 19, Sch. A. of 44 Vict. c. 1, which authorizes the company to take from adjacent public lands gravel for the construction of the railway. The evidence shewed that the gravel was used for maintenance of the right-of-way:—Held, that statute referred to did not authorize the taking except for the purpose of construction which did not include maintenance of the right-of-way.

Smyth v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 265, 1 Sask. L.R. 165.

Filing plans—Condition precedent to entering lands—Right to take gravel.

The sale, by deed, stipulating for immediate delivery and possession, to a railway company of all that portion of certain lots required by it for its right-of-way and other purposes necessary for construction, maintenance, or operation as the same appears on the plans already filed or to be filed in the land registry office of the county in which such lands are situate, does not give the company any right to the possession for the purpose of taking away sand and gravel therefrom, of lands outside of the lands designated upon the plan or plans filed under the Railway Act, 1906, if further lands are required, the new or amended plan must first be filed before the railway acquires any right of possession under such deed.

Ha Ha Bay Ry. Co. v. Larouche, 10 D.L.R. 388, 22 Que. K.B. 92.

Eminent Dominion—Land taken by railway to obtain gravel.

Compensation for land taken by a railway company under s. 180 of the Railway Act, 1906, to obtain a supply of material for the construction, maintenance or operation of a railway, is to be made as of the time when the company takes possession of the land. (Per Harvey, C.J., Simmons, and Walsh, JJ.)

Saskatchewan Land & Homestead Co. v. Calgary & Edmonton Ry. Co., 16 Can. Ry. Cas. 114, 14 D.L.R. 193.

[Affirmed in 19 Can. Ry. Cas. 126.]

Filing plans with Railway Board—Plan for taking land to obtain construction materials.

S. 160 (2) of the Railway Act, 1906, providing that copies of the plans, etc., of a railway, when sanctioned by the Board, shall be deposited in the office of the registrar of deeds for the district or county to which they relate, does not apply to or require the registration of plans prepared under s. 180 of the Act, for the compulsory taking of land to obtain stone, gravel, earth, etc., for construction or maintenance purposes. (Per Harvey, C.J., Simmons, and Walsh, JJ.)

Saskatchewan Land & Homestead Co. v. Calgary & Edmonton Ry. Co., 16 Can. Ry. Cas. 114, 14 D.L.R. 193.

[Affirmed in 19 Can. Ry. Cas. 126].

Eminent Dominion—Surveys—Taking gravel land.

Compensation for a gravel pit and the right of way thereto taken by a railway company under s. 180 of the Railway Act, 1906, to obtain a supply of material for construction purposes is to be made as of the time when the company took possession of the land under Judge's order or as of the service of the notice to treat and not on the basis of values some years later when the arbitration took place. Gravel land which is required by a railway company for obtaining construction material and the right-of-way for a spur line to take it out may be expropriated under s. 180 of the Railway Act, without any plans being submitted to the Board; no deposit of plans is required as would be necessary were the land required for a right-of-way for its line, but a certified copy of the surveyor's plan is to be served upon the property owner as well as the notice to treat.

Saskatchewan Land & Homestead Co. v. Calgary & Edmonton Ry. Co., 19 Can. Ry. Cas. 126, 51 Can. S.C.R. 1, 21 D.L.R. 172.

[Saskatchewan Land & Homestead Co. v. Calgary & Edmonton Ry. Co., 14 D.L.R. 193, 6 Alta. L.R. 471, 16 Can. Ry. Cas. 114, affirmed.]

F. Highways; Diversion.

Authority to use streets—Damages—Nonliability of municipality.

By 16 Vict. c. 100 (Que.) the N.S. Ry. Co. was authorized to construct a railway to connect the cities of Quebec and Montreal, with the restriction that the railway was not to be brought within the limits of the city of Quebec without the permission of the corporation of the city expressed by a by-law. In July, 1872, the city council, by resolution, had given to the company the liberty to choose one of the streets to the north of St. Francis street in exchange for St. Joseph street, which had been at one time chosen for that purpose. In 1874 the city council were informed by the company that the line of railway had been located in Prince Edward street, and the company asked the council to take the necessary step to legalize the line, but the corporation did not take any further action in the matter. In 1875, the company being unable to carry on its enterprise, the railway was transferred to the Province of Quebec by a notarial deed, and the transfer was ratified by 39 Vict. c. 2 (D.). By that act the name of the railway was changed and the Legislature authorized the construction of the road to deep water in the port of Quebec. It moreover declared that the railway should be a public work and should be made in such places and in such manner as the Lieutenant-Governor-in-council should determine and appoint as best adapted to the general interest of the province. After the passing of this Act the Provincial Government caused the road to be completed, and it crossed part of the city of Quebec from its western boundary by passing through Prince Edward street along its entire length. The road was completed in 1876. In 1878, L. (the appellant), owner of several houses bordering on Prince Edward street, sued the corporation of the city of Quebec for damages suffered on account of the construction and working of the railway:—Held, affirming the judgment of the Court of Queen's Bench for Lower Canada, that the respondent had no right of action against the corporation for the damages which he may have suffered by the construction and working of the railway in question. If the corporation gave the authorization required by 16 Vict. c. 100, s. 3, there was a complete justification of the acts complained of. The imposing of terms was discretionary with the corporation. But the corporation never acted on the demand to legalize, and never authorized, the building of the railway through Prince Edward street. If the corporation could have prevented the Government from constructing the railway in the streets of the city, in the face of the provisions of 39 Vict. c. 2, the respondent could also have prevented it. His recourse, if any, was not against the corporation but against the Provincial Government, the owners of the railway. Appeal dismissed with costs.

Lefebvre v. Quebec. See Cass. Can. S.C.R. Dig. 1893, p. 176.

REMOVAL OF TREES ON HIGHWAY—RIGHTS OF OWNER OF ADJOINING LAND.

The right of property in shade trees on highways and to fence them in conferred upon the owners of the land adjacent to the highways by s. 688 of the Municipal Act, R.S.M. 1902, c. 116, is not taken away by an act incorporating a railway company with power to construct a railway along the public highway with the consent of the municipality and according to plans to be approved by the council of the municipality, even although such consent has been given and such plans approved. [Douglas v. Fox (1880), 31 U.C.C.P. 140, and Re Cuno (1888), 43 Ch. D. 12, followed.] The defendants' act of incorporation provided that the several clauses of the Manitoba Railway Act, R.S.M. 1902, c. 145, should be incorporated with and deemed part of it. And the Railway Act provides that the several clauses of the Manitoba Expropriation Act, R.S.M. 1902, c. 61, with respect to the expropriation of land and the compensation to be paid therefor shall be deemed to be incorporated mutatis mutandis with the Railway Act:—Held, that the defendants had no right to cut down the trees on the highway or to lower the grade in front of the plaintiff's land, although such action was necessary in carrying out the approved plans without taking the proper steps, under the Railway Act and the Expropriation Act, either to ascertain and pay the damage suffered by the plaintiffs to their land injuriously affected by the intended construction, or to procure an order from a Judge, under s. 25 of the Railway Act, giving them the right to take possession upon giving security for payment of the compensation to be awarded.

Bannatyne v. Suburban Rapid Transit Co., 15 Man. L.R. 7.

RIGHT TO CROSS STREETS—EXPROPRIATION PROCEEDINGS OR COMPENSATION —EXTENTION OF CITY LIMITS—TOLL ROAD, PURCHASE OF—EFFECT OF.

Railways incorporated by the Dominion Parliament, where in the construction of their lines of railways, they have complied with the requirements of the Railway Act and obtained the consent of the Railway Committee, have the right to cross the highways of a city without taking expropriation proceedings under the Railway Act, or without making any compensation to the city therefor. Where under the powers conferred by 51 Vict. c. 53, s. 9 (Ont.) for extending the limits of the city of Ottawa, the city acquired at an agreed price, part of the road of a toll road company within such extended limits, such part thereupon ceased to have its previous character of a toll road, and became a highway like the other public streets of the city.

Canada Atlantic Ry. Co. v. Ottawa. Montreal & Ottawa Ry. Co. v. Ottawa, 1 Can. Ry. Cas. 298, 2 O.L.R. 336.

[Affirmed in 4 O.L.R. 56, 1 Can. Ry. Cas. 305, 33 Can. S.C.R. 376.]

Highway crossing—Compensation to municipality—"At or near" city—Power to take through county.

The plaintiffs were authorized by 47 Vict. c. 84 (D) to lay out, construct, and finish a railway, from a point on the Grand Trunk Ry. in the Parish of Vaudreuil, in the Province of Quebec, to a point at or near the city of Ottawa, in the Province of Ontario, passing through the counties of Vaudreuil, Prescott, and Russell, and also to connect their railway with any other railway having a terminus at or near the city of Ottawa:—Held, that "at or near the city of Ottawa" should be read as "in or near the city of Ottawa," and the plaintiffs were authorized to carry their line to a point in the city and to connect it with the line of the Canadian Pacific Ry. Co. in the city. (2) That the plaintiffs had power, by implication, to take their line into the county of Carleton. (3) That the portion of the Richmond road (or Wellington street) within the limits of the city of Ottawa which the plaintiffs' line crossed, was a public highway and not the private property of the defendants. (4) That the plaintiffs, having taken the proper proceedings under the Railway Act and being duly authorized to cross the highway, were not bound to make compensation to the defendants for crossing it. Judgment of Boyd, C., 1 Can. Ry. Cas. 298, 2 O.L.R. 336, affirmed.

Montreal & Ottawa Ry. Co. v. Ottawa, 1 Can. Ry. Cas. 305, 4 O.L.R. 56. [Affirmed in 33 Can. S.C.R. 376.]

Deviation and closing street—Lands injuriously affected—Costs of arbitration and award.

The claimants alleged that their lands were injuriously affected by the doing of certain acts authorized by clause 2 of the Tripartite Agreement and two by-laws passed by the respondents—(1) Authorizing and permitting the Grand Trunk Ry. Co. to place, maintain, and use certain tracks on the Esplanade opposite the claimants' premises; (2) deviating and closing a portion of Berkeley street. The premises of the claimants were 125 feet to the west of Berkeley street, and south of the Esplanade. The Tripartite Agreement was validated by 55 Vict. (Ont.) c. 90, s. 2, the latter providing that the respondents should pay to any person whose lands are injuriously affected by any act of the corporation in the execution of said agreement, compensation, which, if not agreed upon, should be ascertained by arbitration. The arbitrators awarded $100 as damages for the deviation and closing of Berkeley street, and found that the other matters, for which compensation was claimed, were not acts done by the respondents in the execution of the Tripartite Agreement, for which the claimants were entitled to any compensation from the respondents. The award also provided that the arbitrators' and stenographers' fees and costs of the award should be paid by the respondents in any event:—Held (1), that the claimants were not entitled to damages for the deviation and closing of Berkeley street. [Moore v. Esquesing (1891), 21 C.P. 277; Falle v. Tilsonbury (1893), 23 C.P. 167, followed.] (2) That the railway tracks were placed upon the Esplanade under the authority of an order of the Railway Committee. (3) That the respondents had done none of the acts complained of in the execution of the Tripartite Agreement. (4) That the respondents had no authority, since 51 Vict. c. 29, to consent to a railway company constructing its lines upon any street in the city of Toronto. (5) That the claimants' lands were not "injuriously affected," within the meaning of the Railway Act, 1888, so as to entitle them to compensation. [Powell v. T., H. & B. Ry. Co. (1898), 25 A.R. (Ont.), 209, followed.] (6) That the respondents were entitled to the general costs of the arbitration and award. [Re Pattullo and Orangeville (1899), 31 O.R. 192, followed.]

The claimants also claimed damages to two water lots opposite their property in the harbour and unpatented. Held, that the respondent was not liable.

Re Medler & Arnot and Toronto, 4 Can. Ry. Cas. 13.

[Followed in Can. Northern Ontario Ry. Co. 18 Can. Ry. Cas. 309.]

DIVERSION OF HIGHWAY—COMPENSATION—LANDOWNERS—ACCESS TO NAVIGABLE RIVER.

A railway company applied to the Board under s. 178 of the Railway Act, 1906, for authority to expropriate certain lands for the purpose of the diversion of a public highway. The landowners interested opposed the application unless the following conditions were granted: (1) That the adjoining landowners be paid compensation for the lands (part of the public highway) on which the railway was to be built on the ground that the said lands would revert to them as a closed public highway; (2) that the company pay compensation to the owners of the land required for the diverted highway; (3) that the owners be given the right of crossing on foot and to maintain landings and nethouses on the company's right-of-way next the river opposite the lands of each owner:—Held, that the application should be granted subject to the condition as to foot crossings.

Vancouver, Victoria & Eastern Ry. Co. v. Delta, 8 Can. Ry. Cas. 354.

PARTIES—JURISDICTION—INJUNCTION.

In an action by a municipality for an injunction against a railway company to restrain the latter from closing up or interfering with a certain road, it developed that the Board had made an order authorizing the railway company to divert a portion of the said road and construct their line between certain points of such diversion. The trial Judge decided that the municipality could maintain such an action only by the Attorney-General as plaintiff:—Held, on appeal, that, while the Court had jurisdiction to grant all proper relief, the Board having dealt with the matter, the plaintiffs should apply to the Board for relief as they had complete control over their order.

Delta v. Vancouver, etc., Ry. & Nav. Co., 8 Can. Ry. Cas. 362, 14 B.C.R. 83.

RAILWAY UPON OR ALONG HIGHWAY—DAMAGES TO ABUTTING LANDOWNERS.

Having obtained the consent of the municipality to use certain public streets for that purpose, the G.T.P. Ry. Co. applied to the Board for leave to construct and approval of the location of the line of their railway upon and along the highways in question. None of the lands abutting on these highways were to be appropriated for the purposes of the railway, nor were the rights or facilities of access thereto to be interfered with except in so far as might result from inconvenience caused by the construction and operation of the railway upon and along the streets. In granting the application the Board made the order complained of subject to the condition that the company should "make full compensation to all persons interested for all damage by them sustained by reason of the location of the said railway along any street." On appeal to the Supreme Court of Canada:—Held, Davies and Duff, JJ., dissenting, that, under the provisions of s. 47 of the Railway Act, 1906, the Board had, on such application, the power to impose the condition directing that compensation should be made by the company in respect of the damages which might be suffered by the proprietors of the lands abutting on the highways of the municipality upon and along which the line of railway so located was to be constructed.

Grand Trunk Pacific, etc., Ry. Cos. v. Fort William et al., 11 Can. Ry. Cas. 271, 43 Can. S.C.R. 412.

[Reversed in [1912] A.C. 224, 13 Can. Ry. Cas. 187.]

CONDITION AS TO COMPENSATION—INTERESTED PERSONS.

Under s. 159 of the Railway Act, 1906, the Board ordered that the location of the appellants' line of railway along certain streets in the city of Fort William be approved in accordance with an agreement between the appellants and the municipal corporation, but subject to the condition that the appellants shall "make full compensation to all persons interested for all damage sustained by reason" thereof:—Held, that the order must be rescinded. Under s. 237 (3) the power to award damages was in respect of construction, and s. 47 did not on its true construction extend that power to meet the case of location; and as the condition failed there was no approval. [Grand Trunk Pacific and Can. Pac. Ry. Cos. v. Fort William, et al., 43 Can. S.C.R. 412, 11 Can. Ry. Cas. 271, reversed.]

Grand Trunk Pacific Ry. Co. v. Fort William et al., 13 Can. Ry. Cas. 187, [1912] A.C. 224.

[Referred to in Can. Northern Ry. Co. v. Holditch, 19 Can. Ry. Cas. 112.]

ADDITIONAL LANDS—PUBLIC LANE OR HIGHWAY.

Application to expropriate a strip of land from the city of Guelph which the applicant claimed to be private property, and not as contended by the respondent a public lane or highway. It appeared that a portion of the land in question had been leased by the respondent to the Guelph Junction Ry. Co. for its right-of-way, and in the lease there was a recital that the lane was no longer necessary for public purposes:—Held (1), that the declaration in the lease could not be regarded as evidence of the acceptance of dedication of the strip of land in question, and not having been otherwise accepted or dedicated by the municipality as a public lane it was not in fact a public lane. (2) That as the Canada Company might still be the owner of the land in question, it should be added as a party nunc pro tunc to these proceedings, and an order might go granting the application.

Grand Trunk Ry. Co. v. Guelph, 12 Can. Ry. Cas. 371.

LOCATION PLAN—OPENING AND CLOSING STREETS—LANDS INJURIOUSLY AFFECTED—ARBITRATION—JURISDICTION.

Upon a location plan being approved by the Board and an agreement made with the respondent municipality, that if the respondent closed certain streets and opened others, the applicant would pay compensation to any one whose lands were injuriously affected; the remedy of the property owners is against the respondent, recoverable by arbitration proceedings under the Municipal Act, and the applicant is responsible to the respondent for the amount of compensation awarded. The Board has no jurisdiction to decide whether the damages sustained by the property owners are recoverable under the appropriate sections of the Railway Act dealing with arbitrations, or by action. [Re Medlar & Arnott and Toronto, 4 Can. Ry. Cas. 13, followed.]

Can. Northern Ontario Ry. Co. v. North Bay, 18 Can. Ry. Cas. 309.

[Reversed in North Bay Landowners v. Can. Northern Ontario Ry. Co., 23 Can. Ry. Cas. 35.]

G. Railway Land; Crossings.

See also Constitutional Law.

RIGHT-OF-WAY—ORDER OF RAILWAY COMMITTEE—JUNCTION OF ELECTRIC RAILWAY WITH STEAM RAILWAY—CONSENT OF MUNICIPALITY.

The defendants were a company incorporated under statutes of the Province of Ontario, operating an electric railway upon Yonge street between the town of Newmarket and the city of Toronto, with its southern terminus in the northern part of the city, a few yards north of the Canadian Pacific Ry. lines. By order, the Railway Committee reciting the consent of counsel on behalf of the city of Toronto, approved of the defendants connecting their tracks with the tracks of the C.P.R. Co. by means of a switch, as shewn on a plan annexed to the order, and on the conditions imposed by the order:—Held, that the defendants had not the right, without the authority or consent of the city, to occupy or expropriate or otherwise to force their way over a part of Yonge street within the limits of the city so as to enter the lands of the C.P.R. Co. and make the proposed junction. The order of the Railway Committee was to be regarded as dealing only with the mode of junction or union, and not as professing to expropriate a right-of-way over the highway. And the consent of counsel for the city, when before the Railway Committee, was to be viewed in the same way. S. 173 of the Railway Act, 1903, does not give the Railway Committee power to expropriate land or to deal with the right of property. The protection of the crossing or junction is the object of the Committee, which has to approve of the place and mode thereof, and which is not concerned, so far as this section applies, with how the railways arrive at the point of union:—Held, also, that the defendants had not, by virtue of any statute or agreemen, viewing their road as a mere street railway, the right to expropriate the right-of-way; and even if their road was a railway within the meaning of the Railway Act, s. 183 was not applicable, for the proposition here was not to carry the tracks "along an existing highway;" and they could not avail themselves of s. 187, for the provisions of law applicable to the taking of land by the company had not been complied with. The plaintiffs were therefore entitled, without derogation of the order of the Railway Committee, to an injunction restraining the defendants from effecting the proposed junction by the method shewn on the plan.

Toronto v. Metropolitan Ry. Co., 1 Can. Ry. Cas. 63, 31 O.R. 367.

[Applied in Re Toronto & York Radial Ry. Co. and Toronto, 26 D.L.R. 244.]

INTERSECTION OF RAILWAY—EXPROPRIATION OF LANDS OCCUPIED BY ANOTHER RAILWAY—ORDER OF RAILWAY COMMITTEE.

Where an order has been obtained from the Railway Committee allowing one railway company to expropriate a right-of-way over the lands of another company any subsequent notice of expropriation served by the expropriating company must be set out with sufficient accuracy the lands which it is proposed to occupy, and any material error in the description of such lands or material variance from the description given in the order permitting expropriation will invalidate such notice.

Grand Trunk Ry. Co. v. Lindsay, Bobcaygeon & Pontypool Ry. Co., 3 Can. Ry. Cas. 174.

RAILWAY LANDS—COMPENSATION.

The Guelph & Goderich Ry. Co. applied to the Board under s. 137 of the Railway Act, 1903, for authority to take possession of, use and occupy land of the Grand Trunk Ry. Co. along the harbour of the town of Goderich.

The latter company opposed the application claiming that they were likely to require for their business in the future two additional sets of tracks upon that land. The land in question was upon a hillside and the construction of the two additional tracks would cut away a strip of land required for the proper support of the tracks which the Guelph & Goderich Ry. Co. wished to lay upon the land required from the Grand Trunk:—Held, that the Board is empowered by s. 137 of the Railway Act, 1903, to authorize one railway company to occupy and use the lands of another, even to the serious loss and detriment of the latter, due compensation being made therefor, but such injury should be avoided except where the public interest imperatively demands it.

Re Guelph & Goderich Ry. Co. and Grand Trunk Ry. Co., 6 Can. Ry. Cas. 138.

[Followed in South Ontario Pacific Ry. Co. v. Grand Trunk Ry. Co. (Junction Cut Case), 20 Can. Ry. Cas. 152.]

Branch line—Spurs—Construction of.

Application under s. 176 of the Railway Act, 1906, for leave to expropriate a portion of a triangular piece of land for the purpose of constructing a spur across it from the applicant's branch line on Lauriston street, in the city of Saskatoon. The said land had been acquired by the respondent from the former owner, one A. Bowerman, the respondent had been authorized by order of the Board to construct certain spurs across the land in question when the applicant's spur was constructed with the exception of the section crossing the portion of the land aforesaid. The order authorizing construction of the branch line and the said spur of the applicant was made before the respondent had acquired the said land:—Held (1), that the applicant should be authorized to take so much of the said land as would be necessary for the construction of its spur. (2) That if a dispute should arise as to the area necessary to be so taken, the matter should be determined by an engineer of the Board. (3) The expense of making the necessary railway crossings on the land should be borne jointly by the applicant and respondent. [Can. Northern Ry. Co. v. Can. Pac. Ry. Co. (Kaiser Crossing Case), 7 Can. Ry. Cas. 297; Grand Trunk Pacific Ry. Co. v. Can. Pac. Ry. Co. (Nokomis Crossing Case), 7 Can. Ry. Cas. 299, distinguished.]

Qu'Appelle Long Lake & Saskatchewan Ry. etc., Co. v. Can. Pac. Ry. Co., 13 Can. Ry. Cas. 131.

Right of Dominion railway to expropriate unused right-of-way of provincial railway.

A provincial railway company that has neither graded nor built tracks upon a right-of-way acquired by it, cannot prevent a Dominion railway company from expropriating the lands so held by the provincial company and utilizing them for the actual construction of a railway authorized by the Parliament of Canada. A Dominion railway company will not be enjoined from expropriating and building tracks on a right-of-way acquired by a provincial railway company, where the latter has not yet utilized it for railway purposes; the rights of a Dominion railway company being in such case superior to those of the provincial company.

Can. Northern Western Ry. Co. v. Can. Pac. Ry. Co., (Alta.) 13 D.L.R. 624.

Jurisdiction—Compensation—Rights—Terms—Fee simple.

In fixing the rights which may be taken in railway lands, and the terms and compensation under s. 176 of the Railway Act, 1906, lands which are not only not put to an immediate railway use, but (as the Board find) will not reasonably and probably be required for such purposes by the senior railway, should be dealt with as the lands of a private individual, and absolute rights conferred on the applying company therein, but the fee in railway lands which may reasonably be required at some time in the future to be put to a railway use by the senior company, should be left in the senior company and compensation should be paid for the use and enjoyment that the applicant company obtains. [Re Guelph & Goderich Ry. Co. and Grand Trunk Ry. Co., 6 Can. Ry. Cas. 138, followed.]

South Ontario Pacific Ry. Co. v. Grand Trunk Ry. Co. (Junction Cut Case.), 20 Can. Ry. Cas. 152.

[Followed in Midland Ry. Co. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 80.

RIGHT OF DOMINION RAILWAY TO BUILD ON UNUSED RIGHT-OF-WAY OF PROVINCIAL RAILWAY.

A provincial railway company that has neither graded nor built tracks upon a right-of-way acquired by it, cannot prevent a Dominion railway company from expropriating the lands so held by the provincial company and utilizing them for the actual construction of a railway authorized by the Parliament of Canada. A Dominion railway company will not be enjoined from expropriating and building tracks on a right-of-way acquired by a provincial railway company, where the latter has not yet utilized it for railway purposes; the rights of a Dominion railway company being in such case superior to those of the provincial company.

Can. Northern Western Ry. Co. v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 105, 13 D.L.R. 624.

H. Possessory Rights; Trespass.

Construction of embankments, see Embankments.

COMPENSATION—POSSESSORY TITLE OF OCCUPANT—CONTINUING TRESPASS.

The plaintiff and his predecessors in title were in possession as trespassers of certain land since 1871; the defendants entered upon a portion of it in 1890 and constructed their railway upon it and continued in undisturbed possession of such portion until 1904 and no claim was made for the land so taken though the defendants were willing to pay compensation to any one who could prove that he was entitled to it. In the year 1905 the plaintiff brought this action of trespass. The defendants pleaded (1) that he was not the owner of the lands; (2) that his claim, if any, was barred by the Statute of Limitations:—Held (Tuck, C.J. and McLeod, J., dissenting), that though the plaintiff or his predecessor in title was originally a trespasser, yet having been in peaceable possession at the time of the defendants' entry on the lands, he was entitled to damages for being disturbed in his possession. (2) That each passing over the land was a new trespass and therefore the defendants would be liable for all except for so much as was barred under their plea of the Statute of Limitations which only voids a remedy and does not change the nature of the act.

Clair v. Temiscouata Ry. Co., 6 Can. Ry. Cas. 171, 1 E.L.R. 524.

[Reversed in 38 Can. S.C.R. 230; 6 Can Ry. Cas. 367.]

TRESPASS—POSSESSION—CASUAL USE.

The casual use of land for pasturing cattle in common with other persons does not constitute evidence of possession sufficient to maintain an action for trespass against a railway company for the taking of the land for railway purposes without compensation. [Judgment appealed from, 1 E.L.R. 524, 6 Can. Ry. Cas. 171, reversed.]

Temiscouata Ry. Co. v. Clair, 6 Can. Ry. Cas. 367, 38 Can. S.C.R. 230.

Damage to lands—Trespass—Compensation.

The foundation of proceedings under s. 146 et seq. of the Railway Act, 1888, to determine the compensation to be paid a landowner for lands taken or injuriously affected by a railway company in the exercise of their statutory powers, is the notice to be served on the landowner thereunder; and in the absence thereof the railway company is, as to the lands damaged by its construction, a trespasser, and like any other trespasser responsible to the person injured in damages to be recovered in the ordinary Courts of the country. Where, therefore, without taking any proceedings under said sections, the defendants, a railway company, for the purposes of their railway made a cutting adjoining the plaintiff's lands, which caused a subsidence thereof, whereupon the plaintiff brought an action, claiming a mandatory order to compel the defendants to support his lands and prevent further subsidence, and recovered damages for the actual loss then sustained:—Held, that the plaintiff was entitled to the order and to the damages recovered; but as he would be entitled to maintain actions for the recovery of damages as further loss was sustained, leave was given to the defendants to take proceedings under the above sections for the assessment of compensation so as to have future damages settled, the judgment being stayed for a limited time.

Hanley v. Toronto, Hamilton & Buffalo Ry. Co., 5 Can. Ry. Cas. 25, 11 O.L.R. 91.

Trespass—Entry before expropriation proceedings.

The filing of a plan, profile and book of reference under the Railway Act, 1903, shewing the land required for the railway, does not warrant the company in taking possession of it before proceedings for expropriation are commenced, unless by agreement with the owner; and, if such possession is taken, the company is a trespasser, and the owner is not limited to the remedy by arbitration provided by the Act, but may proceed by an ordinary action at law against the company.

Wicher v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 181, 16 Man. L.R. 343.

[Relied on in Carr v. Can. Northern Ry. Co., 17 Man. L.R. 181.]

Rights of placer miners—Deposit of waste—Compensation.

The defendants claimed the right to construct their railway under the authority of certain orders in council having obtained the approval of the Board and Minister of the Interior of a route map referred to in subs. 1 of s. 122 of the Railway Act, 1903, but not that referred to in subs. 5 of s. 122:—Held (1), before the defendants could expropriate land without the consent of the owners they must comply with the provisions of the Act. (2) Placer miners are owners within the meaning of the Act, and entitled to compensation. (3) A placer mine is an open mine within s. 132 of the Act. (4) The plaintiffs were entitled to an injunction restraining the defendants from constructing their works and injuriously affecting the working of the plaintiffs' placer mining claims held by them under licenses issued under the placer mining regulations, ss. 132, 133. [Yale Hotel Co. v. Vancouver, Victoria & Eastern Ry., etc., Co., 3 Can. Ry. Cas. 108, followed.]

Day v. Klondike Mines Ry. Co., 6 Can. Ry. Cas. 203, 2 W.L.R. 205.

TRIAL LINE—ARBITRATION—DAMAGES RESULTING FROM EXERCISE OF STATUTORY POWERS.

If damages are occasioned to a landowner by the exercise of the powers conferred on a railway company by the Railway Act and there is no negligence in the mode of exercising such powers, the person injuriously affected is limited to the provisions of the Act for compensation. [C.P.R. Co. v. Roy, [1902] A.C. 220, and Bennett v. G.T.R. Co. (1901), 2 O.L.R. 425.] But if there is negligence in such exercise of statutory powers, or if damages are unnecessarily inflicted, then an action will lie and the complainant is not limited to the remedy given by the arbitration clauses of the Act. The plaintiff's claim was for damages for cutting down trees in his grove through which the defendants were making a survey for a trial line for a proposed branch of their railway, but the possibility of running the trial line through the grove, without cutting down the trees by making a rectangular detour around it was not raised at the trial and the trial Judge did not pass upon it:—Held, that the plaintiff, who had been nonsuited at the trial, was entitled to a new trial to determine whether the line could not have been run in the manner suggested.

Barrett v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 356, 16 Man. L.R. 549.
[See note below.]

DAMAGES FOR CUTTING DOWN TREES—TRIAL LINE—ARBITRATION.

At the new trial ordered in the foregoing case, 16 Man. L.R. 549, 6 Can. Ry. Cas. 356, the County Court Judge again nonsuited the plaintiff who appealed to the Court of Appeal:—Held, that the evidence shewed that it was unnecessary to cut down the trees for the purpose of running the required trial line and that the plaintiff was entitled to recover in the action, and that judgment should be entered for him for $250.00 damages and costs of both trials and both appeals.

Barrett v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 364, 16 Man. L.R. 558.

TRESPASS—TAKING POSSESSION OF STRIP NOT OF STATUTORY WIDTH.

A railway company cannot, in an action for a trespass in laying sidetracks on the plaintiff's land, justify on the ground that its predecessor in title, without right, took a strip of land twelve feet wide from that owned by the plaintiff, for part of is right-of-way, which was not, at such place, of the width allowed by statute, and that therefore it became entitled to claim the full ninety-nine feet allowed by statute for a right-of-way, which would include the land on which the sidetracks were laid, since the Court cannot presume that the company, by taking possession of the twelve-foot strip, also took possession of the entire ninety-nine feet which it was entitled to expropriate for a right-of-way.

Carr v. Can Pac. Ry. Co. (N.B.), 14 Can. Ry. Cas. 40, 5 D.L.R. 208.

EXPROPRIATION PENDING TRESPASS ACTION.

Where, pending an action against a railway company for trespass, the company takes expropriation proceedings in respect of the land in question, judgment may be given for the plaintiff for such damages as he has sustained apart from the compensation which he would be entitled to claim in the arbitration to be held in respect of the expropriation of the land.

Como v. Can. Northern Alberta Ry. Co. and Can. Northern Ry. Co., 15 Can. Ry. Cas. 46, 9 D.L.R. 683.

SALE TO COMPANY BY REGISTERED OWNER—RIGHT OF PRIOR PURCHASER UNDER AGREEMENT FOR SALE—CAVEAT.

The plaintiff having purchased the land under an agreement for sale, and having filed a caveat to protect his interest in such land, has a right of action against a railway company that enters upon his land for the purpose of making their railway and permanently occupying the same, until it has paid a sum mutually agreed upon or paid into Court what it thinks fit to offer as a fair compensation.

Holmested v. Can. Northern Ry. Co. and Annable, 19 Can. Ry. Cas. 102, 7 Sask. L.R. 200, 20 D.L.R. 577.

Injunction—Trespass—Statutory right to do legally.

Damages are not assessable in a trespass action where the defendants have by statute a right to do legally (on complying with certain prerequisites) the very thing which constitutes the trespass. The proper course is by injunction restraining the defendants from continuing the trespass unless they acquire title and proceed to have the compensation or damages determined under the provisions of the Railway Act, within a reasonable time. [Holmested v. Can. Northern Ry. Co., 20 D.L.R. 577, varied.]

Holmested v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 105, 22 D.L.R. 55

I. Conveyances.

Title to land—Tenant for life—Conveyance to railway company.

By C.S.C. c. 66, s. 11 (Railway Act), all corporations and persons whatever, tenants in tail or for life, grèves de substitution, guardians, etc., not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent . . . seized, possessed of or interested in any lands, may contract for, sell and convey unto the company (railway company) all or any part thereof; and any contract, etc., so made shall be valid and effectual in law:—Held, affirming the decision of the Court of Appeal, that a tenant for life is authorized by this Act to convey to a railway company in fee, but the company must pay the remainderman or into Court the proportion of the purchase money representing the remainderman's interest.

Midland Ry. Co. v. Young, 22 Can. S.C.R. 190.

[Followed in Forbes v. Grimsby Public School Board, 6 O.L.R. 539, approved in Re Toronto Belt Line Ry. Co., 26 O.R. 413.]

Agreement to purchase land—Taking possession—Landowner's remedy—Arbitration.

In carrying out the agreement provided for in 63 Vict. c. 77 (Ont.), an Act respecting the Town of Meadford, the town agreed with the plaintiff for the purchase of and possession by the railway company of the portion of the plaintiff's land required by the company, but without fixing the price. The company, pursuant to s. 131 of the Railway Act, 1888, deposited a plan, profile and book of reference of the land required in the county registry office, which was approved by the Railway Committee, shewing the plaintiff's lands entered upon it, and completed the work. The purchase money not having been agreed upon, or paid, plaintiff brought an action against the town and the railway company for damages to the land, and for interference with his business, whereupon the town paid into Court $375.50, and set up, by way of defence, that plaintiff's remedy was by arbitration under the Municipal Act:—Held, that the defendants, the town, were not liable, and the plaintiff's remedy against the railway company was by arbitration proceedings under the Railway Act, and not by action, and that the money in Court should be paid out to him without prejudice to his right to proceed further against the company. [Judgment of Falconbridge, C.J., varied.]

Todd v. Meaford, 3 Can. Ry. Cas. 375, 6 O.L.R. 469.

OWNER OF LAND—TRUSTEE AS "OWNER"—NOTICE.

A bare trustee of land is not "the owner of the land or the person empowered to convey the land, or interested in the land sought to be taken," within the meaning of s. 71 of the Railway Act, 1903: and notice under that section must be served upon all the cestuis que trust.

Re James Bay Ry. Co. and Worrell et al., 5 Can. Ry. Cas. 21, 6 O.W.R. 473.

INFANT REMAINDERMEN—TENANT FOR LIFE—ORDER AUTHORIZING CONVEYANCE.

Where a widow was entitled to a life estate in certain lands and her infant children to the remainder in fee, and she had made an agreement with a railway company to sell them such part of the lands as they required for their right-of-way, at a reasonable price, approved by the official guardian on behalf of the infants, an order was made by a Judge under s. 184 of the Railway Act, 1906, giving her power to sell the lands and the rights of the infants therein, which power, joined to her legal power as tenant for life, would enable her to sell and convey the fee: the purchase money to be paid into Court, and the company to pay the costs. [Re Dolsen (1889), 13 P.R. 84, followed, the sections of R.S.C. 1906, c. 37, being substantially the same as in the Act of 1888.]

Re Can. Pac. Ry. Co. and Byrne, 7 Can. Ry. Cas. 71, 15 O.L.R. 45.

COMPENSATION—PURCHASE OF LAND FOR RIGHT-OF-WAY—SALE BY INSTITUTE—RECOURSE OF SUBSTITUTES.

The sale or conveyance of lands for right-of-way permitted under the Railway Act from institutes to railway companies, is binding upon the substitutes, notwithstanding violation of the rules respecting payment of the consideration money. Hence, when the company has paid the consideration money to the institute, instead of paying him the annual rent, thereon, the substitute has no recourse against the railway company other than a right to recover his share of the consideration money, as determined at the time of the sale. He cannot claim, at the opening of the substitution, his share of the accrued value of the land sold.

Latour v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 404, 40 Que. S.C. 514.

PURCHASE OF LAND—POSSESSION—NECESSITY OF EXPROPRIATION.

A contract to purchase is not established as against a railway company entitled to take lands by eminent domain proceedings, by the fact of the company having taken possession of same after notice from the owner naming his price and stating that if they took possession he would construe their action as an acceptance of his terms.

Haney v. Winnipeg & Northern Ry. Co. (Man.), 14 Can. Ry. Cas. 39, 1 D.L.R. 387, 20 W.L.R. 540.

PURCHASE OF LAND—NOTICE OF ARBITRATION—STATUS OF OWNER.

On an application to the Court to restrain expropriation proceedings taken by a railway company on the ground that the company had agreed upon a price with plaintiff, the plaintiff's status is proved prima facie by shewing that he had been served as owner with notice of arbitration proceedings by the company without his further shewing his title or interest in the land.

Haney v. Winnipeg & Northern Ry. Co. (Man.), 14 Can. Ry. Cas. 39, 1 D.L.R. 387, 20 W.L.R. 540.

J. Location Plans; Deviation.

DESCRIPTION IN MAP OR PLAN FILED.

A company built its line to the termini mentioned in the charter and then wished to extend it less than a mile in the same direction. The time limited for the completion of the road had not expired, but the company had terminated the representation on the board of directors which, by statute, was to continue during construction and had claimed and obtained from the city of K. exemption from taxation on the ground of completion of the road. To effect the desired extension it was sought to expropriate lands which were not marked or referred to on the map or plan filed under the statute:—Held, affirming the judgment of the Court below, that the statutory provisions that land required for a railway shall be indicated on a map or plan filed in the Department of Railways before it can be expropriated applies as well to a deviation from the original line as to the line itself, and the company, having failed to shew any statutory authority therefor, could not take the said land against the owner's consent:—Held, also, that the proposed extension was not a deviation within the meaning of the statute, 42 Vict. c. 9, s. 8, subs. 11 (D.). Per Ritchie, C.J., Strong, Fournier and Taschereau, JJ., that the road authorized was completed as shewn by the acts of the company, and upon such completion the compulsory power to expropriate ceased. Per Gwynne, J.:—That the time limited by the charter for the completion of the road not having expired the company could still file a map or plan shewing the lands in question, and acquire the land under s. 7, subs. 19 of the Act, 42 Vict. c. 9, 11 O.R. 302, 582, affirmed.

Kingston & Pembroke Ry. Co. v. Murphy, 17 Can. S.C.R. 582.

[Approved in Barbeau v. St. Catherines & Niagara Central Ry. Co., 15 O.R. 586; distinguished in Brooke v. Toronto Belt Line Ry. Co., 21 O.R. 401.]

AGREEMENT—MISDESCRIPTION—PLANS AND BOOKS OF REFERENCE.

In matters of expropriation, where the railway company has complied with the directions and conditions of Arts. 5163, 5164, R.S.Q. 1888, as to deposit of plans and books of reference, notice and settlement of indemnity with the owners, or with at least one-third of the owners par indivis, of lands taken for railway purposes, the title to the lands passes forthwith to the company for the whole of the property by mere operation of the statute, even without the consent of the other owners par indivis, and without the necessity of formal conveyance by deed or compliance with the formalties prescribed by the Civil Code as to the registration of real rights. The provisions of the Civil Code respecting the registration of real rights have no application to proceedings in matters of expropriation of lands for railway purposes under the provisions of R.S.Q. Pending expropriation proceedings begun against lands held in common (par indivis), for the purposes of appellants' railway, the following instrument was signed and delivered, in 1886, to the company by six, out of nine, of the owners par indivis, viz.: "We, the legatees Patterson of the Parish of Beauport, County of Quebec, do promise and agree that as soon as the Q.M. & C. Ry. is located through our land in Parishes of Notre-Dame des Anges, Beauport and L'Ange-Gardien, and in consideration of its being so located, we will sell, bargain and transfer to the Q.M. & C. Ry. Co., for the sum of one dollar, such part of our said land as may be required for the construction and maintenance of the said railway, and exempt the said company from all damages to the rest of the said property, and that, pending the execution of the deeds, we will permit the construction of said railway to be proceeded with over our said land, without hindrance of any kind, provided that the said railway is located to our satisfaction." Afterwards, the line of the railway was altered and more than one year elapsed without the deposit of an amended plan and book of reference to shew the deviation from the line as originally located. The company, however, took possession of the land and constructed the railway across it and, in August, 1889, the same persons who had signed the above instrument granted an absolute deed of the lands to the company for a consideration of five dollars, acknowledged to have been paid, reciting therein that the said lands had "been selected and set apart by the said railway company for the ends and purposes of its railway, and being already in the possession of the said railway company since June 11th 1886, in virtue of a certain promise of sale sous seing privé by the said vendor in favour of the said company." Neither of the instruments were registered. G. purchased the New Waterford Cove property in 1889 and, after registering his deed, executed by all the owners par indivis, brought a petitory action to recover that part of the property taken by the railway company, alleging that the instruments mentioned constituted a donation of the lands and did not come within the operation of Arts. 5163 and 5164:—Held, that the terms of subs. 10 of Art. 5164, were sufficiently wide to include and apply to donations; that the instrument in question was not properly a donation, but a valid agreement or accord within the provision of said tenth subs. under onerous conditions of indemnity which appeared to have been satisfied by the company; that, as the agreement stipulated no time within which the new plan should be filed and the location appeared to have been made to the satisfaction of the required proportion of the owners, it was sufficient for the company to file the amended plan and book of reference at any time thereafter and that, as the indemnity agreed upon by six out of nine of the owners par individis had been satisfied by changing the location of the railway line as desired, the requirements of Art. 5164 had been fully complied with and the plaintiff's action could not, under the circumstances, be maintained.

Quebec, Montmorency & Charlevoix Ry. Co. v. Gibsone, 29 Can. S.C.R. 340.

POWERS OF EXPROPRIATION—PLANS AND LOCATION.

In their private Act, 61 Vict. c. 68 (O.), the defendants incorporated ss. 13 to 20 of the Railway Act of Ontario, R.S.O. 1897, c. 207, relating to the expropriation of land, but omitted to incorporate s. 9 of the last-mentioned Act, by which a general power to take land is conferred, and s. 10, by which a railway is entitled to make surveys and file a plan and book of reference:—Held, that ss. 19, 20 of the Railway Act of Ontario were unworkable by defendants as the powers of compulsory alienation given by s 20 do not arise until the map and book of reference have been deposited under s. 10, but, assuming that ss. 9, 10 were incorporated, as no plan or book of reference has been filed by defendants, they were without the protection afforded by the Act. 2 O.L.R. 240, affirmed.

Hopkin v. Hamilton Elec. Light & Cataract Power Co., 4 O.L.R. 258.

COMMENCEMENT OF EXPROPRIATION—OMISSION TO FILE PLANS—FORFEITURE.

The defendant company was originally incorporated in 1897 by an Act of the Legislature of British Columbia, and in 1898, by an Act of the Parliament of Canada, its objects were declared to be works for the general advantage of Canada, and thereafter to be subject to the legislative authority of the Parliament of Canada and the provisions of the Railway Act, except s. 89 thereof. S. 4 of the Dominion Act of 1898 required the railway to be commenced within two years. In 1901, the defendants commenced expropriation proceedings in respect of the plaintiff Hotel Company's lands, and by consent took possession and proceeded with construction, negotiations to determine the amount of compensation by arbitration being carried on in the meantime. The defendants had purchased, for its line of railway, land on either side of the plaintiff railway company's right-of-way and had applied to the Railway Committee for leave to make a crossing. On the application of plaintiffs who alleged inter alia that the defendants' railway was not commenced within the two years, that no map or plan and profile of the whole line of railway had been prepared and deposited in the Department of Railways, and that the work being done by the defendants was not authorized and was not being prosecuted in good faith by the company under its charter, but was really for the benefit of the Great Northern Ry. Co., so that it might extend its railway system, which lies south of the International Boundary, into British Columbia, injunctions were granted restraining, until the trial of the action, defendants from continuing in possession and proceeding with the expropriation of the land of the plaintiff Hotel Company, and also from taking any proceedings toward effecting the proposed crossing of the right-of-way of the plaintiff Railway Company. Motions to dissolve the injunctions were refused. The full Court (Irving, J., dissenting), dismissed an appeal on the ground that there were several points of importance which should be decided at the trial. Per Irving and Martin, JJ. (Drake, J., dissenting):—Special sittings of the Full Court may be held either at Victoria or Vancouver to hear appeals in actions irrespectively of where the writs of summons were issued.

Yale Hotel Co. v. Vancouver, Victoria & Eastern Ry. Co.: Grand Forks, etc., Ry. Co. v. Vancouver, Victoria & Eastern Ry. Co., 3 Can. Ry. Cas. 108, 9 B.C.R. 66.

[Referred to in Fry v. Botsford, 9 B.C.R. 243.]

Deviation—Order authorizing—Application to rescind.

Certain landowners applied to rescind an order of the Board authorizing a deviation from the located line of the T. & N. Power Co. previously approved by the Board:—Held, (1), that the company's powers under its act of incorporation (2 Edw. VII. c. 107 (D)), were not exhausted by the construction of one line as in the case of a company authorized to build between two termini or any specified number of lines. (2) That the cases relating to deviations by railway companies do not apply. (3) Without considering the jurisdiction of the Board to make the orders respecting location plans, the applications must be refused.

Walker v. Toronto & Niagara Power Co., 5 Can. Ry. Cas. 190.

Liability of municipality—Filing plan—Mistake.

Under the act incorporating the I. & R. Ry. Co., and amending acts, it was provided that lands required by the company for its right-of-way, station grounds, etc., should be vested in the company upon the filing of a plan thereof, as if the same were deeded to the company, and that the owners of the same should only have recourse for the lands taken against the municipality of the county. By an Act passed in 1903, c. 97, a resolution of the Municipal Council, adopted for the express purpose of settling what land the municipality was to pay for, was confirmed. Lands of the plaintiff were taken for the purposes of the company, and a plan filed indicating the land taken, and shewing it to be land which was the subject of an award in plaintiff's favour under the act:—Held, that the land, being clearly marked and indicated, became the property of the company on the filing of the plan, and was properly charged up against defendant under the legislation relating to the company:—Held, also, that the liability of the defendant would not be affected by a mistake in the resolution in relation to an immaterial matter.

McIsaac v. Inverness, 6 Can. Ry. Cas. 105, 38 N.S.R. 76.
[Affirmed in 37 Can. S.C.R. 75, 6 Can. Ry. Cas. 109.]

Excessive expropriation—Description of lands—Reference to plans.

A municipality passed a resolution by which it agreed to pay for lands required for the right-of-way, station grounds, sidings and other purposes of a railway as shewn upon a plan filed under the provisions of the general Railway Act. At the time of the resolution there were four such plans filed, each shewing a portion of the land proposed to be taken for these purposes, and including in the aggregate, a greater area than could be expropriated for right-of-way and station grounds under the provisions of the Acts applicable to the undertaking of the railway company. The Legislature passed an Act confirming such resolution. To an action by the owner of the land taken, on an award fixing the value of that in excess of what could be so expropriated, the corporation pleaded no liability on account of such excess, and also, that there was no specific plan on file describing the land:—Held, affirming the judgment appealed from (38 N.S.R. 76, 6 Can. Ry. Cas. 105), that the first defence failed because of the Act confirming the resolution, and, as to the second, that the four plans should be read together and considered to be the plan referred to in such resolution.

Inverness v. McIsaac, 6 Can. Ry. Cas. 109, 37 Can. S.C.R. 75.

Deviation of line—Date of filing new plan—Compensation—Roadside landowner.

On an application by a landowner for an order rescinding an order of the Board allowing an electric railway company to change the location of its line from the centre to the west side of a public highway on the ground that such deviation would injuriously affect his property:—Held (1), refusing the application, that the Board having already sufficient material before it, could authorize such deviation without the filing of further plans and profiles. (2) That the railway in question was one "to be operated as a street railway or tramway" within the meaning of s. 235 of the Railway Act, 1906, and that the Board must either authorize the placing of the railway upon the street in accordance with the terms of the consent of the municipality (that it should be on the west side of the highway) or refuse the authority entirely. Chief Commissioner:—The construction of the railway would more than offset the damage to the owner's land. Deputy Chief Commissioner dissenting. The question of compensation should be decided by the ordinary Courts of justice and rests entirely between the immediate landowner and the municipality. Commissioner Mills, dissenting. The order should stand only on condition that the landowner is allowed reasonable compensation.

Robertson v. Chatham, Wallaceburg & Lake Erie Ry. Co., 7 Can. Ry. Cas. 96.

Location—Registration—Plans.

Application to the Board for an order under ss. 26, 30, 158 of the Railway Act, 1906, declaring the plan, profile and book of reference affecting certain lots deposited in the Registry Office by the railway company, not to be in accordance with the provisions of the Railway Act. The plan had been registered with respect to a portion of the property in question, but no steps had been taken for several years to negotiate with the owners and fix the price to be paid by the railway company:—Held (1), that an order should be made canceling the location shewn by such plan, etc., through the lots in question. (2) That the Board has jurisdiction under s. 29 of the amendment to the Railway Act, 7 & 8 Edw. VII. c. 62, to review, rescind, change, alter or vary any order made by it. (3) That the charter of the company does not authorize it to register plans upon the lands of private persons and then take no steps to acquire title to such lands during the life of the charter. (4) If the company is willing to expropriate the lands in question upon the basis of the present value of such lands, no order need issue. (5) Leave to appeal should be obtained from a Judge of the Supreme Court as the question is one of jurisdiction.

McDougall and Secord v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 201.

REQUIREMENTS OF PLANS—INJUNCTION.

While a substantial compliance only is needed with the provisions of s. 158 of the Railway Act with respect to plans, profiles and books of reference to be filed prior to expropriation proceedings being taken, it must clearly appear from the plans, profiles and books of reference filed, exactly what portion of the land of each separate owner the railway company requires, and the mere indication of the centre line of the proposed railway is not sufficient; the book of reference is a necessary part of the filings to substantially comply with the provisions; if the first definite information of the owner as to the quantity of land to be taken is obtainable only from the notice served, there has not been substantial compliance with the act. In the absence of evidence that the company has been oppressive or high handed, an injunction will not be granted to restrain the railway company from proceeding with the railway, even if there has not been substantial compliance with the act, provided the railway company will enter into an undertaking to comply forthwith with the requirements of the act and to facilitate the proceedings for determining the amount of compensation to be paid—following Parkdale v. West. L.R. 12 App. Cas. 602, 56 L.J.P.C. 66, 57 L.T. 602, and Hendrie v. Toronto, Hamilton & Buffalo Ry. Co., 26 O.R. 607, affirmed 27 O.R. 46. But the Court will reserve to the plaintiff the right to apply to a single Judge for an injunction to prevent any unnecessary delay in proceeding to comply with the Act and pay compensation. Warrants of possession improperly granted to a railway company which has not complied with the provisions of the Act will not prevent or render invalid the registration of a plan subdividing the lands required by the railway company, but:—Held, that in the absence of acceptance by the municipality of the streets, and evidence of a user of the streets by the public, or of evidence of the sale of lands in the subdivision, the streets shewn on the plan do not become highways. Quaere, per Stuart, J.:—Whether or not the judgment of a Judge who is persona designata is appealable in view of the decision in C.P.R. v. Litt'e Seminary of Ste. Thérèse, 16 Can. S.C.R. 606, since the enactment of s. 220 of the Railway Act. Quaere, per Stuart, J.:—Whether or not a dissatisfied litigant who has the right to appeal must appeal and is not a liberty to bring the same matter before the Court in a different way, but:—Held, that where the right of appeal was doubtful and the plaintiff has given notice of appeal, and at the same time brought an action for injunction, in which action the validity of the order appealed from would have to be inquired into, the matter was properly brought before the Court:—Held, also, that the Court will not be bound by agreements of counsel in a stated case as to the effect upon the right of parties to the action by determination of certain questions submitted in certain specified ways.

Marsan v. Grand Trunk Pacific Ry. Co., 9 Can. Ry. Cas. 341, 2 Alta. L.R. 43.

[Partly followed and distinguished in Girouard v. Grand Trunk Pacific Ry. Co., 9 Can. Ry. Cas. 354, 2 A.L.R. 54; considered in Sanders v. Edmonton, Dunvegan & B. C. Ry. Co., 16 Can. Ry. Cas. 142.

ROUTE MAP—LOCATION PLANS.

Application for approval of its location. "Prince Rupert westerly, mile 0 to mile 3.23." The applicant proceeded to construct the roadbed but found that it could not obtain some $400,000 under its contracts with the Government unless it was able to shew that the three and one-quarter miles of railway had been constructed under the provisions of the Railway Act, 1906. The applicant contended that this being merely the yard of the company, no route map or location plan was required:—Held (1), that the company not having complied with the provisions of ss. 157, 158, 159 of the Railway Act, the application must be refused. (2) That the Board had no jurisdiction under 9 & 10 Edw. VII. c. 50, s. 2, empowering the Board to approve of works constructed without approval before December 31st, 1909, since the roadbed in question had been constructed subsequent to that date.

Re Prince Rupert Location, Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 153.

PLANS—DELAY IN COMMENCING PROCEEDINGS.

Where the plan of the line of a proposed railway has been approved by the Railway Commissioner of Manitoba, and filed in the land titles office of the district, but nothing has been done towards actually establishing the railway, except the obtaining of a charter which incorporated the provisions of the Manitoba Railway Act, and the payment in of a specified deposit in respect of such charter, the railway company should with reasonable dispatch exercise its right to acquire the land through which its proposed line runs by eminent domain proceedings, and an owner through whose property the proposed line runs may, on the company's default in proceeding within a reasonable time, apply pursuant to the provisions of the Manitoba Railway Act, 3 Geo. V. (Man.), to have the plans set aside.

Re Winnipeg North-Eastern Ry. Co. (Man.), 15 Can. Ry. Cas. 66, 10 D.L.R. 469.

[Affirmed in 11 D.L.R. 147.]

PLANS AND PROFILE—VACATING FOR DELAY.

Where the plan of the line of a proposed railway has been approved by the Railway Commission of Manitoba, and filed in the land titles office of the district, but nothing has been done towards actually establishing the railway, except the obtaining of a charter which incorporated the provisions of the Manitoba Railway Act, and the payment in of a specified deposit in respect of such charter, the Public Utilities Commission of Manitoba has jurisdiction, upon the application of an owner through whose property the proposed line runs, to set aside the plans on the company's default in proceeding within a reasonable time. [Re Winnipeg North-Eastern Ry. Co., 10 D.L.R.469, affirmed as to jurisdiction.]

Re Winnipeg North-Eastern Ry. Co. (No. 2), 11 D.L.R. 147.

Senior and junior rule—Location plan—Deposit—Priority.

The provisions of the Railway Act, 1906, as to deposit of location plans in the appropriate Registry Offices, and notice of such deposit override the provisions of provincial Registry Acts, giving priority to plans formally registered in accordance with their requirements; and, therefore, a highway laid out on a plan duly registered under a provincial Registry Act is junior to a railway built in accordance with approved location plan, previously deposited in accordance with the Railway Act, but not registered. Re Grand Trunk Pacific Branch Lines, 22 W.L.R. 515, 16 Can. Ry. Cas. 243, distinguished; Tennant v. Union Bank, [1894] A.C. 45, followed; Edmonton v. Edmonton, Yukon & Pacific Ry. Co., 13 Can. Ry. Cas. 128, referred to.]

Regina v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 238.

Location plan—Subsequent registered plan—Priority.

A location plan having been deposited, under the provisions of the Railway Act, the right of the landowner to lay out streets thereafter is subject to the railway company's right to proceed with its undertaking; and subsequent registration of a plan opening highways is ineffective as against the company.

Edmonton v. Calgary & Edmonton Ry. Co., 16 Can. Ry. Cas. 420.

[Affirmed in 22 Can. Ry. Cas. 182, 30 D.L.R. 222; followed in Midland Ry. Co. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 80.

Location plan—Registration—Seniority.

The proper registration of the location plan of a railway approved by the Board sufficiently establishes the railway company's seniority over a municipality, at points of highways not previously dedicated by the filing of plans or used, constructed or accepted by the corporation. [Edmonton v. Calgary & Edmonton Ry. Co., 16 Can. Ry. Cas. 420, affirmed.]

Edmonton v. Calgary & Edmonton Ry. Co., 22 Can. Ry. Cas. 182, 53 Can. S.C.R. 406, 30 D.L.R. 222.

[Followed in Midland Ry. Co. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 80.]

Location plans—Registration—Effect.

The date of the registration of the railway's location plan under the Railway Act governs as to the compensation to be paid on expropriation; and any change either in title or in improvement to the land to be expropriated is subject to the notice resulting from such registration.

Re Edmonton and Calgary & Edmonton Ry. Co., 15 D.L.R. 417.

Plans—Modification.

An order of the Board authorizing an expropriation, and the plans and specifications approved by it, for this purpose, can only be changed or modified by another order of the Board.

Baril v. Grand Trunk Ry. Co., 46 Que. S.C. 295.

Street extension—Relocation of railway line—Reconstruction of bridge.

A portion of a railway line being relocated under an order of the Board in order to provide for a street extension, another and junior railway company whose overhead structure on the first or senior railway company's land required reconstruction to permit the extension of the street must do the necessary work at its own expense where there is no provision for such work being done at the city's expense in the former order of the Board.

Hamilton v. Hamilton Electric and Toronto, Hamilton & Buffalo Ry. Cos. (Birch Avenue Extension Case), 19 Can. Ry. Cas. 290.

K. Possession; Abandonment; Notice.

POSSESSION BEFORE PAYMENT OF COMPENSATION.

An order of the Board giving leave to a railway company to construct an extension of a spur track and authorizing the expropriation of the necessary land is conclusive, unless reversed on appeal to the Supreme Court, as to the right of the company to expropriate the land and construct the extension, and the fact that the owner of the land is bona fide proceeding to appeal to the Supreme Court from such order would not justify a delay in granting a warrant, under s. 217 of the Railway Act, 1906, to put the company in possession of the required land before payment of the compensation, as that section makes it the duty of the Judge to grant the warrant on affidavit to his satisfaction that immediate possession is necessary. Such a warrant should, however, not be granted unless there is some urgent and substantial need for immediate action in the interest of the railway itself or of the public, and it is not sufficient to shew that the interests of an individual, whose property would be reached by the spur line when built, urgently call for such construction in order that he may profitably carry on his business on such property. [Kingston & Pembroke Ry. Co. and Murphy (1886), 11 P.R. 304, and C.P.R. v. Ste. Thérèse, 16 Can. S.C.R. at p. 617, followed.]

Re Can. Northern Ry. Co. and Blackwood, 20 Man. L.R. 113, 15 W.L.R. 454.

WARRANT OF POSSESSION—MANDATORY PROVISIONS.

The effect of the change of the word "may" in s. 217 of the Railway Act, R.S.C. 1906, c. 37, to "shall" is that, once it is established to the satisfaction of the Judge that immediate possession of the land by the company is necessary, the Judge has no alternative but to grant the warrant. He must exercise his discretion, however, as to whether necessity is established. And here there was no suggestion of the necessity of immediate provision of facilities for the public; the possession was not necessary for any urgent purpose of the company; the basis of the application was the necessity of S.; and B.'s property rights were as much entitled to consideration as the necessities of S.

Re Can. Northern Ry. Co. and Blackwood, 15 W.L.R. 454.

WARRANT OF POSSESSION—JURISDICTION OF JUDGE AS PERSONA DESIGNATA —CONDITIONS PRECEDENT—DEPOSIT OF PLAN.

Re Grand Trunk Pacific Ry. Co. and Marsan, 9 W.L.R. 211 (Alta.).

WARRANTS FOR POSSESSION—SUMS TO BE PAID INTO COURT.

Re Campbellford, Lake Ontario & Western Ry. Co., 3 D.L.R. 889, 3 O.W.N. 1513.

NOTICE—EXTENT OF RIGHT—EASEMENT—"LANDS"—AMENDMENT OF NOTICE.

A notice of expropriation containing a clause: "Reserving to the said" (landowners) "the right or privilege by way of easement upon the lands expropriated of maintaining, repairing and using the dams, sluice gates, and head race at present constructed and existing upon the said lands, and of maintaining and using in their present condition and capacity the hydraulic rights and privileges thereby controlled or enjoyed." By the interpretation clause of the Railway Act, 1903, s. 2 (m.), "The expression 'lands' means lands the acquiring, taking or using of which is incident to the exercise of the powers given by this Act or the special Act, and includes real property, messuages, tenements, and hereditaments of any tenure. . . .":—Held, by the reservation contained in the notice, if effect were given thereto, the railway company would acquire an easement over at least a portion of the lands of the owners, and as, under the above clause of our Railway Act, the company have no right to acquire an easement, the order for immediate possession must be refused, unless the owners permit an amendment in the notice by striking out the objectionable clause. [Reference to s. 85 of the English Land Clauses Consolidation Act; Hill v. Midland Ry. Co., 21 Ch. D. 143; Ayr Harbour Trustees v. Oswald, 8 App. Cas. 623; Ontario & Quebec Ry. Co. v. Philbrick, 12 Can. S.C.R. 288.]

Re James Bay Ry. Co. and Worrell, 5 Can. Ry. Cas. 23, 6 O.W.R. 512.

SUFFICIENCY OF NOTICE—IMMEDIATE POSSESSION.

The defendants had, under their special Act, power, to acquire "any privilege or easement required by the company . . . over and along any land, without the necessity of acquiring a title in fee simple thereto;" and the act defined "land" as including any such privilege or easement, etc. In giving notice of expropriation the defendants did not state whether it was the fee simple, or merely some easement or privilege over the land which they sought to acquire, but only that they proposed to acquire the land "to the extent required for the corporate purposes of the company:"—Held, that such notice was too uncertain a foundation for expropriation proceedings, and the defendants were not entitled to a warrant for immediate possession under s. 170 of the Railway Act, 1903.

Lees v. Toronto & Niagara Power Co., 6 Can. Ry. Cas. 128, 12 O.L.R. 505.

IMMEDIATE POSSESSION—STATION SITE—PLANS NOT PREPARED.

A railway company having obtained an order from the Board authorizing it to take the lands of the owner for the purposes of a station the company made a motion under s. 170 of the Railway Act, 1903, for an order for immediate possession of the said lands:—Held, that as the affidavits failed to show that the railway company was ready forthwith to proceed with the erection of the station, the motion must be dismissed but without prejudice to the right of the railway company to renew the motion when the conditions have changed.

Re Williams and Grand Trunk Ry. Co., 6 Can. Ry. Cas. 200, 8 O.W.R. 277.

WARRANT OF POSSESSION—PRACTICE.

Where a railway company under its powers to expropriate land obtained a warrant for possession and the amount awarded the owner in subsequent arbitration proceedings is less than the amount at first offered by the company, the costs of obtaining the warrant for possession shall be borne by the owner.

Re Vancouver, Victoria & Eastern Ry., etc., Co., and Milsted, 7 Can. Ry. Cas. 257, 13 B.C.R. 187.

WARRANT OF POSSESSION—APPEAL FROM—RES JUDICATA.

The defendant applied for warrant of possession under the Railway Act regarding expropriation of lands, and the Judge, sitting in Court, granted the warrant of possession on facts which the Court en banc, in Marsan v. Grand Trunk Pacific, 9 Can. Ry. Cas. 341, 2 Alta. L.R. 43, held were not sufficient to give the Judge jurisdiction, and the order was therefore invalid. The plaintiff, instead of taking an appeal from the order, brought an action against the railway company, claiming injunction and damages:—Held, that the plaintiff could maintain the action, for the reason that, even if an appeal would lie from the order, the plaintiff was entitled to additional relief by way of an injunction and damages which could not be given on appeal:—Held, also, the principle of res judicata would not apply, as the order granting the warrant of possession was made without jurisdiction. [Attorney-General for Trinidad v. Eriche, 63 L.J.P.C. 6, L.R. (1893) A.C. 518, 1 R. 440, 69 L.T. 505, referred to]—Held, also, that the railway company having acted under the invalid warrant of possession had committed a technical trespass and was liable for nominal damages, which carried costs. [Marsan v. Grand Trunk Pacific Ry. Co., 9 Can. Ry. Cas. 341, distinguished.]

Girouard v. Grand Trunk Pacific Ry. Co., 9 Can. Ry. Cas. 354, 2 Alta. L.R. 54.

Warrant for immediate possession—Judicial discretion.

Where a railway company moved, under s. 217 of the Railway Act, 1906, for a warrant for immediate possession, it was held, that although it was a case of hardship on the landowner there was no discretion left to the Judge under the statute.

McCarthy v. Tillsonburg, Lake Erie & Pacific Ry. Co., 12 Can. Ry. Cas. 272, 2 O.W.N. 34.

Abandonment of notice—Enforcing award—Possession.

An abandonment of a notice to take lands for railway purposes, under the Railway Act, 1886, c. 109, s. 8, subs. 26, must take place while the notice is still a notice and before the intention has been exercised by taking the lands. The proper mode of enforcing an award of compensation, made under the Railway Act, is by an order from the Judge. Quaere, whether subs. 31 of s. 8, permits possession to be given before the price is fixed and paid of any land, except land on which some work of construction is to be at once proceeded with.

Can Pac. Ry. Co. v. Ste. Thérèse, 16 Can. S.C.R. 606.

Abandonment—Service of new notice.

Defendant company proposing to expropriate certain lands of plaintiff, served notice to treat pursuant to s. 193 of the Railway Act, 1906, but upon disagreement as to price applied to a Judge for the appointment of an arbitrator, under s. 196, and also for a warrant of possession under ss. 217, 218. This aplication was refused because the notice to treat was not accompanied by the certificate of a disinterested surveyor under s. 194. Thereupon the company served a new notice, accompanied by a proper certificate, and at the same time served a notice abandoning and desisting from the first notice and all proceedings had thereon. Plaintiff treated this latter notice as given under s. 207 and proceeded to tax costs as of an abandonment under ss. 199, 207. The costs were submitted to Clement, J., the Judge applied to, who directed that they be taxed by the registrar, and Clement, J. adopted the taxation. At the trial, Irving, J., came to the conclusion that the confirmation by the Judge after preliminary taxation by his clerk, amounted to a taxation in fact by him, and on the merits was of opinion that there was no abandonment, and dismissed the plaintiff's action:—Held, on appeal, that the new notice to treat being served at the same time as the abandonment of the first notice, was manifestly a continuation of the original proceedings, and did not come within s. 207, an abandonment under which is one with the intention of wholly discontinuing and taking no further action. Held, further, that the subject was not res judicata by reason of the taxation by the Judge or by the taxing officer on the Judge's direction. Semble, per Galliher, J.A.:—That it was competent for the Judge to direct the taxation as he did and then adopt it as his own act, it not being the intention of the statute that the Judge should perform the actual clerical work of taxation.

Atwood v. Kettle River Valley Ry. Co., 15 B.C.R. 330.

USUFRUCT—ABANDONMENT.

The abandonment of the usufruct from land need not be made in any particular form. It may result from circumstances such as the conduct of the usufructuary, his failure to exercise his rights, etc., from which the Court may determine it. Expropriation for the purposes of an electric railway (Art. 5164 et seq. R.S.Q.) does not affect the right of the owner expropriated to damages for injury to the land which is left by the substitution of a steam for an electric railway. Therefore, this right is independent of the enhanced value, if any, that is given to the land by the railway and the arbitrators' award fixing the indemnity, is not a bar to recovery of a claim, resulting from the expropriation. Such claim, moreover, is in no way based on the special provisions above referred to, but is founded on the common-law liability stated in Art. 1053 C.C. (Que.). Therefore it only applies to the damages actually suffered, to be revived in case of fresh damage afterwards and cannot be determined by a gross amount covering past and future damages.

Lapointe v. Chateauguay & Nor. Ry. Co., 38 Que. S.C. 139 (Sup. Ct.).

RIGHT ACQUIRED BY RAILWAY COMPANY—ABANDONMENT BY RAILWAY—EASEMENT.

The title to land expropriated for a right-of-way by a railway company that received a subsidy under 27 Viet. (N.B.), c. 3, 1864, and 28 Viet. (N.B.), c. 12, 1865, is, by the provisions of such acts, limited to an easement merely, and upon abandonment thereof for railway purposes the title reverts to the original owner.

Carr v. Can. Pac. Ry. Co. (N.B.), 14 Can. Ry. Cas. 40, 5 D.L.R. 208.

PROCEDURE—WARRANT OF POSSESSION—NONCOMPLIANCE WITH STATUTORY REQUIREMENTS.

A warrant of possession, issued under s. 217 of the Railway Act, 1906, will be valid until set aside, although all of the statutory requirements were not strictly complied with, as s. 220 of the Act provides that the proceedings are to be continued in the Court which issued the warrant. [Marsan v. Grand Trunk Pacific Ry. Co., 2 Alta. L.R. 43, 9 Can. Ry. Cas. 341, and Can. Pac. Ry. Co. v. Ste. Thérèse, 16 Can. S.C.R. 606, considered.]

Sanders v. Edmonton, Dunvegan & British Columbia Ry. Co., 16 Can. Ry. Cas. 142, 14 D.L.R. 88.

[Referred to in 18 Can. Ry. Cas. 71.]

TRESPASS—DEFENCES—WARRANT OF POSSESSION—SERVICE OF, ON REGISTERED OWNER AFTER SALE.

In an action against a railway company for a trespass, a warrant of possession for the locus in quo, issued under s. 217 of the Railway Act, 1906, will be a good defence, although some of the statutory requirements pertaining to the issue of the warrant were not complied with, as the regularity of the warrant can be inquired into only in the proceeding in which it was issued. The service on the registered owner of land of notice of an application, under s. 217 of the Railway Act, 1906, for the issuance of a warrant of possession, is a sufficient compliance with s. 220, requiring that such notice shall be served on "the owner . . . or the persons empowered to convey the lands, or interested" therein, notwithstanding that before the warrant was granted, the registered owner sold the land to and it was then in the possession of a third person, whose transfer had not been registered, and whose interest was not disclosed by caveat or otherwise. (Per Harvey, C.J., and Scott, J., affirming the decision appealed from on an equal division of the Court.)

Sanders v. Edmonton, Dunvegan & British Columbia Ry. Co., 16 Can. Ry. Cas. 142, 14 D.L.R. 88.

[Referred to in 18 Can. Ry. Cas. 71.]

Service of notice—Owner at time of deposit of plan—Subsequent purchaser—Order restraining arbitrators—Rights of owner.

A railway company taking expropriation proceedings for its right-of-way under the Railway Act, 1906, is not entitled to proceed upon a notice to treat served upon a person who was the owner at the time of the deposit of its plan, profile and book of reference, to the exclusion of a purchaser whose title was already registered at the time the notice to treat was served on his vendor; the purchaser is entitled to have an offer made to him which he can either accept or refuse and it is not sufficient that the purchaser was offered the opportunity of taking the vendor's place in the arbitration proceedings. Prohibition lies at the instance of the purchaser to restrain arbitrators in expropriation proceedings under the Railway Act, from proceeding upon a notice to treat served upon his vendor who has ceased to have any title to the land in dispute upon the registration of the purchaser's deed prior to such notice to treat.

Lachine, Jacques Cartier & Maissoneuve Ry. Co. v. Reid, 20 D.L.R. 816.

L. Costs.

See also B. on p. 295.

Expropriation costs.

(1) The costs of an owner who succeeds in an arbitration under the Railway Act shall be taxed as between solicitor and client. (2) The tariff of costs prescribed for ordinary litigation may be accepted as a general guide for taxing the costs of such an arbitration.

Can. Northern Quebec Ry. Co. v. Paquin, 11 Que. P.R. 237.

Counsel fees.

The costs of a successful attorney in a railway expropriation over $10,000 include the sum of $25 for the first sitting at enquête, instead of $10; $70 as attorney's fee, $15 hearing fee, $20 for filing factums and an additional fee of $50, the amount of the case being over $10,000; but the sum of $25 for the special enquête fee will not be allowed.

Can. Pac. Ry. Co. v. Oligny, 12 Que. P.R. 11.

Fees of arbitrator who resigned pending the arbitration.

Application by the railway company under s. 199 of the Railway Act, 1906, to have its costs of an arbitration to determine the amount of compensation to be paid for land taken taxed by the Judge, the board of arbitrators having awarded only the sum previously offered by the company, J. one of the arbitrators first appointed, resigned before the award was made and a new arbitrator was appointed in his stead. The owner took up the award, paying the fees of all the arbitrators but J. who came in on this application and asked that his fees be paid:—Held, that he could have no relief on this application, but must be left to his remedy, if any, against the owner by action. In taxing the costs of the arbitration under the statute, the Judge acts ministerially and cannot decide anything as to the right to costs. [Ontario & Quebec Ry. Co. v. Philbrick (1886), 12 Can. S.C.R. 288, followed.]

Blackwood v. Can. Northern Ry. Co., 20 Man. L.R. 161, 15 W.L.R. 110.

NOTICE OF ABANDONMENT.

The word "desist" in C.S.C. c. 66, s. 11, subs. 6, has the same meaning as "abandon" in the Railway Act, 1888, i. e., to leave off or discontinue. Whether voluntarily or compulsorily makes no difference; if the railway company cease operations to expropriate land and give notice as to other operations, that is desistment or abandonment, and the company must pay the costs to the landowner. [Widder v. Buffalo & Lake Huron Ry. Co. (1865), 24 U.C.R. 222, 234, applied and followed.]

Re Oliver & Bay of Quinte Ry. Co., 3 Can. Ry. Cas. 384, 6 O.L.R. 543.

PROPER PROCEDURE—WHAT SHOULD BE ALLOWED.

The usual and convenient course in regard to costs of proceedings under the Railway Act, 1888, provided for by ss. 154, 158, is not for the Judge to tax in the first instance, but to relegate the bill of costs to an officer conversant with the practice of taxation to ascertain what has been properly incurred; and his conclusions may be adopted or varied by the Judge. If lands are taken compulsorily, the costs should be allowed in larger measure than in ordinary litigation, but in the case of mere desistment, it is enough if the bill is fairly taxed:—Held, with regard to items in dispute upon taxation:—(1) That a consent to take possession was not part of desistment proceedings, and the costs of it were properly disallowed. (2) That costs of steps taken to appoint a third arbitrator were not costs of the landowner; the appointment was a matter to be arranged by the two arbitrators already named. (3) That "instructions for brief" upon arbitration should be allowed. (4) That what was actually disbursed in witness fees to a necessary and material witness as to value should be allowed. (5) That the quantum of the counsel fee upon the arbitration was in the discretion of the taxing officer, and should not be interfered with. (6) That "instructions to move for costs of arbitration" was properly disallowed by the taxing officer, in the discretion given by item 38 of the tariff of the Supreme Court of Judicature. (7) That the costs of a formal order for taxation and its incidents, and not a mere fiat or direction to tax, should be allowed, the liability for costs having been disputed. See 6 O.L.R. 543, 3 Can. Ry. Cas. 384.

Re Oliver and Bay of Quinte Ry. Co., 3 Can. Ry. Cas. 386, 7 O.L.R. 567. [Adopted in Re Can. Nor. Ry. Co. and Robinson, 17 Man. L.R. 580.]

ARBITRATOR'S FEES—COUNSEL FEES—FEES OF EXPERT WITNESSES.

(1) Under subs. (5) of s. 2 of the Railway Act, 1906, interpreting the word "costs" used in s. 199 of the Act, as including fees, counsel fees and expenses, the costs of an owner who succeeds in an arbitration under the Railway Act should be taxed as between solicitor and client. [Malvern

Urban District v. Malvern (1900), 83 L.T. 326, followed.] (2) The tariff of costs prescribed for ordinary litigation may be accepted as a general guide for taxing the costs of such an arbitration; but when, in the opinion of the taxing officer, the fees fixed by that tariff are inadequate compensation for the services necessarily and reasonably rendered, he is not bound by it and should not follow it. (3) For the purposes of the taxation of such costs the arbitration began when the company served notice upon the owner offering an amount which they were willing to pay and naming its arbitrator, and items for work done even before that date should be allowed if they were for work that would properly be costs of the arbitration if done after that date; for example, Fee perusing the order of the Board giving leave to expropriate, and taking instructions. (4) The owner was entitled to tax the fees paid to the arbitrators on taking up the award. [Shrewsbury v. Wirral, [1895] 2 Ch. 812, distinguished.] (5) Counsel fees allowed by the taxing officer were reduced to $100 per day for first counsel and $75 per day for second counsel. (6) The fees actually paid to expert witnesses should not necessarily be allowed, but only fair and reasonable fees for the time occupied in attending before the arbitrators and in qualifying themselves to give evidence. (7) The costs of the taxation, including a fee of $25 for the argument before the Judge, should be borne by the company.

Can. Northern Ry. Co. v. Robinson, 8 Can. Ry. Cas. 244, 17 Man. L.R. 579.

CLERK'S FEES.

(1) The award by the arbitrators does not constitute a judgment for costs and, therefore, the latter cannot be recovered against the losing party by way of execution. (2) By s. 162 of the Railway Act, 1903, the Judge, in taxing the costs, is exercising a function merely ministerial, and such taxation has not the effect of giving to the party in favor of whom the costs have thus been taxed, a judgment upon which he might proceed to recover his costs. (3) The only means to recover the costs under the Railway Act, would be by way of an ordinary action. [Compare Ex parte Gagnon, 3 Que. S.C. 288.]

Can. Northern Ry. Co. v. Touchette & Fortier, 9 Can. Ry. Cas. 53, 9 Que. P.R. 125.

DAMAGES.

A railway company which after having given a notice of expropriation, abandoned it under the provisions of s. 207, of the Railway Act, 1906, is obliged to pay besides the taxed costs, the damages incurred by the owner notified. These damages comprise the fees paid to an architect and an advocate employed in making arrangements for the arbitration.

Gravel v. Grand Trunk Ry. Co., 11 Can. Ry. Cas. 437, 38 Que. S. C. 347.

COSTS OF ARBITRATION.

The fact that a landowner has not appealed from or moved to set aside an award made in arbitration proceedings to ascertain the compensation to be paid for the taking of his lands by a railway, does not preclude him from objecting to the payment of the company's costs of arbitration with which the arbitrators assumed to deal although without jurisdiction to do so. A railway company expropriating lands must give the notice contemplated by the statute, i.e., offering to pay "a certain sum or rent, as compensation," in order to be entitled to costs in the event of the arbitrators' finding that the offer of the company was for sufficient compensation.

Re Grand Trunk Ry. Co. and Ash; Re Grand Trunk Ry. Co. and Anderson, 15 Can. Ry. Cas. 48, 9 D.L.R. 453.

[Affirmed in 10 D.L.R. 824.]

DAMAGES—DEPRECIATION BY EMINENT DOMAIN—COSTS OF LANDOWNER'S SUBSEQUENT APPLICATION TO BOARD.

The cost of a landowner's future application to the Board for an order relative to the working of minerals underlying land expropriated for a railway right-of-way, cannot be included in an award of damages for the land taken; the Board will have authority to award costs when such application is made.

Re Davies and James Bay Ry. Co., 16 Can. Ry. Cas. 78, 28 O.L.R. 544, 13 D.L.R. 912.

DAMAGES—TAKING LAND—SEPARATION FROM SOURCE OF SUPPLY—COST OF CROSSING RAILWAY.

On the expropriation of a railway right-of-way through a brick-making plant so as to separate the factory from its supply of brick-making materials, the costs of grading a necessary crossing over the railway may be awarded as damages, notwithstanding that the construction of such crossing depends on the subsequent consent of the Board.

Re Davies and James Bay Ry. Co., 16 Can. Ry. Cas. 78, 28 O.L.R. 544, 13 D.L.R. 912.

LAND TAKEN FOR RAILWAY PURPOSES—WHEN AWARD EXCEEDS AMOUNT OFFERED—INTEREST.

Whether an award for land expropriated for railway purposes is in excess of the sum offered therefor by a railway company so as to cast upon it, under s. 199 of the Railway Act, 1906, the costs of an arbitration, is to be determined not from the amount of the award itself, but by adding thereto the interest or such other sum to which the landowner is entitled under the Act or otherwise.

[Gauthier v. Can. Northern Ry. Co. (Alta), 16 Can. Ry. Cas. 354, 14 D.L.R. 490, followed]

Dagenais v. Can. Northern Ry. Co., 16 Can. Ry. Cas. 353, 14 D.L.R. 494.

CONDEMNATION PROCEEDINGS—LAND TAKEN FOR RAILWAY PURPOSES—WHEN AWARD EXCEEDS AMOUNT OFFERED—INTEREST.

In determining whether an award in a proceeding to expropriate land for railway purposes exceeds the sum offered by the company so as to cast upon it, under s. 199 of the Railway Act, 1906, the costs of the arbitration, there must be added to the amount of the award the interest or such other sum to which the landowner is entitled either under the Act or otherwise.

Gauthier v. Can. Northern Ry. Co., 16 Can. Ry. Cas. 354, 14 D.L.R. 490.

ARBITRATORS' FEES—TAXATION OF.

The arbitrators' fees are not to be included in and made part of the award in an expropriation for railway purposes; such fees are governed by s. 199 of the Railway Act, 1906, and are to be taxed if the parties do not agree upon the amount.

Green v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 139, 171, 22 D.L.R. 15, 8 Sask. L.R. 53.

NOT SUBJECT TO VARIATION.

The costs of an arbitration in expropriation proceedings under the Railway Act are fixed and payable under the terms of that statute, and are not subject to variation in an action by the landowner for trespass and compensation in which the expropriation and award are set up in defense. [Gauthier v. Can. Northern Ry. Co., 14 D.L.R. 490, 16 Can. Ry. Cas. 354, and Dagenais v. Can. Northern Ry. Co., 14 D.L.R. 494, 16 Can. Ry. Cas. 353, varied.]

Gauthier v. Can. Northern Ry. Co.; Dagenais v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 144, 17 D.L.R. 193.

NOT TO BE ADDED TO AMOUNT OF AWARD.

The taxed costs of the arbitration are not to be added to the amount of the award in fixing the liability for costs of the arbitration under s. 199 of the Railway Act, 1906, in expropriation proceedings.

Dagenais v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 144, 17 D.L.R. 193. [Reversed in 19 Can. Ry. Cas. 144.]

COSTS OF ARBITRATION—JURISDICTION TO GRANT.

Re Windatt and Georgian Bay & Seaboard Ry. Co., 24 D.L.R. 877.

RIGHT OF JUDGE TO TAX ARBITRATORS' FEES—EXCESSIVE FEES.

The fees of arbitrators under the Railway Act, 1906, s. 199, are not subject to taxation as between the arbitrators, and either the railway company or the landowner, and the taxation contemplated by s. 199 of the Act is that between the railway company and the landowner only. Where a party in order to obtain the award from the arbitrators has been obliged to pay an excessive fee, such party may recover the excess beyond what is a reasonable fee in an action against the arbitrators for money had and received.

Can. Northern Ry. Co. v. Green, 21 Can. Ry. Cas. 157, 9 Sask. L.R. 371, 30 D.L.R. 546.

AWARD.

The costs under s. 199 of the Railway Act, 1906, of an arbitration, if they are to be borne by the party whose land is expropriated, cannot exceed the amount of the award. [Calgary & Edmonton Ry. Co. v. Saskatchewan Land & Homestead Co., 44 D.L.R. 133, reversed.]

Calgary & Edmonton Ry. Co. v. Saskatchewan Land & Homestead Co., 46 D.L.R. 357, 24 Can. Ry. Cas. 346.

COMPANY ENTITLED TO—AMOUNT—COSTS EXCEEDING AWARD.

Under s. 199 of the Railway Act, 1906, where the company is entitled to the costs of an arbitration, it is entitled to the full amount of such costs as taxed although they exceed the amount of the award. If by statute a party is entitled to costs it is implied that there is a right to recover even though not so stated in express terms.

Calgary & Edmonton Ry. Co. v. Saskatchewan Land & Homestead Co. 24 Can. Ry. Cas. 343, 44 D.L.R. 133.
[Reversed in 46 D.L.R. 357, 24 Can. Ry. Cas. 346.]

COMPENSATION OF ARBITRATORS—EXPROPRIATION ACT (SASK.).

Can. Northern Ry. Co. v. Ouseley, et al., 42 D.L.R. 772.

FACILITIES.

See **Carriers of Goods; Carriers of Passengers; Carriage of Live Stock; Cars; Stations; Train Service; Baggage.**

FALSE ARREST.

Annotations.

Malicious prosecution and false arrest. 3 Can. Ry. Cas. 373.

Liability of railway company for damages for false arrest. 6 Can. Ry. Cas. 380.

MALICIOUS PROSECUTION—PARTICULARS—COSTS.

The plaintiff claimed damages from the defendant company for "causing and procuring one M. to lay a series of criminal charges against" him. On application of the defendants, the Referee ordered plaintiff to give further and better particulars in writing of the manner in which the defendant caused and procured M. to lay the charges. The plaintiff claimed that he could not furnish such particulars:—Held, on appeal, that the order should be varied as to require only that the plaintiff should furnish the best particulars he could give, with liberty to supplement his particulars after examining the defendants' officers and securing production, such additional particulars to be furnished not later than ten days before the trial of the action. [Marshall v. Inter-oceanic (1885), 1 Times L.R. 394, and Williams v. Ramsdale (1887), 36 W.R. 125, followed.]

Cousins v. Can. Northern Ry. Co., 18 Man. L.R. 320.

PROBABLE CAUSE—LIABILITY OF CORPORATION FOR ACTS OF OFFICERS.

In an action for malicious prosecution and false imprisonment, it was proved on the trial that the plaintiff and one L. were fellow passengers on the defendants' road. L. complained to an officer of the company that a revolver had been stolen from his valise. The plaintiff had been seen by an official of the defendant company at one of the stations to take something from L.'s valise. L. made a charge of theft against the plaintiff, and he was arrested by a constable appointed by the Government on the recommendation of the defendants, and employed by them for duty on their road and paid by them. The prosecution was carried on by L., but at the instance and with the assistance of the officer making the arrest and other constables in the employment of the defendants. After an investigation by the P.M. of W. the plaintiff was discharged:—Held, that the evidence shewed probable cause for the arrest and prosecution, and defendants were not liable. That if there was want of probable cause the evidence failed to connect the defendants with the prosecution and imprisonment so as to make them responsible.

Dennison v. Can. Pac. Ry. Co., 3 Can. Ry. Cas. 368, 36 N.B.R. 250.

[Referred to in Thomas v. Can. Pac. Ry. Co., 14 O.L.R. 55.]

RAILWAY WATCHMAN—RAILWAY CONSTABLE—SCOPE OF AUTHORITY.

A watchman of the defendant company, who was also a constable appointed on their application under s. 241 of the Railway Act, 1903, arrested the plaintiffs at a spot about half a mile from the railway line, and swore out an information against them for breaking into a freight car with intent to steal. The evidence failed, and they were discharged, and brought this action for false arrest and malicious prosecution:—Held, that the defendant company was not liable because the watchman in his capacity as such had no authority express or implied, either to arrest or prosecute the plaintiffs under the circumstances; and, as constable, he was to be regarded as an officer of the law, and not as a servant of the company, and there was no evidence that the defendant company exercised any control over his action as constable.

Thomas v. Can. Pac. Ry. Co.; Bush v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 372, 14 O.L.R. 55.

PLEA OF GUILTY TO CHARGE—EFFECT.

No action to recover damages for false arrest will lie in favour of a party who pleads guilty to a charge of trespass preferred against him when arrested.

Mignault v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 52, 40 Que. S. C. 475.

PROBABLE CAUSE.

The entire absence of reasonable and probable cause constitutes malice in law which entitles the plaintiff to recover damages in an action for false arrest.

Can. Pac. Ry. Co. v. Waller, 1 D.L.R. 47, 19 Can. Crim. Cas. 190.

LIABILITY UNDER QUEBEC LAW.

The principles of the French law as laid down in Art. 1053 C.C. (Que.) and not the principles of the English law govern in a case of false arrest. [Copeland v. Leclerc (1886), M.L.R. 22 K.B. 365, disapproved.]

Can. Pac. Ry. Co. v. Waller, 1 D.L.R. 47, 19 Can. Cr. Cas. 190.

FARES.

See Tickets and Fares.

FARM CROSSINGS.

Right-of-way on railway station grounds, see Right-of-Way.

Compensation or substitution of farm crossing by reason of expropriation, see Expropriation.

Liability of Crown for compensation of farm crossing, see Government Railways.

Annotations.

Rights to and repairs of farm crossings and approaches. 3 Can. Ry. Cas. 200.

Farm Crossings. 1 Can. Ry. Cas. 33, 2 Can. Ry. Cas. 247, 5 Can. Ry. Cas. 317.

LIABILITY OF RAILWAY COMPANY TO PROVIDE—AGREEMENT WITH AGENT OF COMPANY.

The C.S.R. Co. having taken for the purposes of their railway the lands of C., made a verbal agreement with C., through their agent T., for the purchase of such lands, for which they agreed to pay $662, and they also agreed to make five farm crossings across the railway on C.'s farm, three level crossings and two under crossings; that one of such under crossings should be of sufficient height and width to admit of the passage through it, from one part of the farm to the other, of loads of grain and hay, reaping and mowing machines; and that such crossings should be kept and maintained by the company for all time for the use of C., his heirs and assigns. C. wished the agreement to be reduced to writing, and particularly requested the agent to reduce to writing and sign that part of it relative to the farm crossings, but he was assured that the law would compel the company to build and maintain such crossings without an agreement in writing. C. having received advice to the same effect from a lawyer whom he consulted in the matter, the land was sold to the company without a written agreement and the purchase money paid. The farm crossings agreed upon were furnished and maintained for a number of years until the company determined to fill up the portion of their road on which were the under crossings used by C., who thereupon brought a suit against the company for damages for the injury sustained by such proceeding and for an injunction:—Held, reversing the judgment of the Court below, Ritchie, C.J., dissenting, that the evidence shewed that the plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not, therefore, compel the company to provide an under crossing through the solid embankment formed by the filling up of the road, the cost of which would be altogether disproportionate to his own estimate of its value and of the value of the farm:—Held, also, that the company were bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location, and number of said crossings to be determined on a reference to the Master of the Court below. The substitution of the word "at," in s. 13 of c. 66 of the Consolidated Statutes of Canada, for the word "and" in s. 13 of c. 51 of 14 and 15 Vict. is the mere correction of an error and was made to render more apparent the meaning of the latter section, the construction of which it does not alter nor affect. [Brown v. Toronto & Nipissing Ry. Co., 26 U.C.C.P. 206, overruled. 11 A.R. (Ont.) 287, varying 4 O.R. 28, reversed.]

Canada Southern Ry. Co. v. Clouse, 13 Can. S.C.R. 139.

[Applied in Can. Pac. Ry. Co. v. Guthrie, 31 Can. S.C.R. 164; Grand Trunk Ry. Co. v. Therrien, 30 Can. S.C.R. 489; discussed in Ontario Lands & Oil Co. v. Canada Southern Ry. Co., 1 O.L.R. 215; Vezina v. The Queen, 17 Can. S.C.R. 12; referred to in Guthrie v. Can. Pac. Ry. Co., 27 A.R. (Ont.) 64; applied in Perrault v. Grand Trunk Co., 14 Que. K.B. 256; distinguished in Wells v. Northern Ry. Co., 14 O.R. 594; referred to in Erwin v. Canada Southern Ry. Co., 11 A.R. (Ont.) 306.]

Under crossings—Agreement for cattle pass—Trestle bridge, right to substitute embankment for.

This case differs from the preceding of Clouse v. Canada Southern Ry Co. (13 Can. S.C.R. 139), in this, that an agreement was reduced to writing to the effect that S., through whom the plaintiff claimed, should "have liberty to remove for his own use all buildings on the said right-of-way, and that in the event of there being constructed on the same lot a trestle bridge of sufficient height to allow of the passage of cattle, the company will so construct their fence to each side thereof as not to impede the passage thereunder":—Held, reversing the judgment of the Court of Appeal for Ontario (4 A.R. (Ont.) 306), Ritchie, C.J., dissenting:—That the agreement provided for a passage for cattle only, and that conditional upon there being a trestle bridge of sufficient height to permit of such a passage, and did not make the right of the company to discontinue the trestle bridge and erect an embankment subject to the construction of a cattle pass in the embankment or a revaluation of the land. The plaintiff's statement of claim should be dismissed with costs, but such dismissal would not operate against any claim which he might have under the law for such farm crossings as might be necessary for the reasonable enjoyment of the severed lands. [11 A.R. (Ont.) 306, reversed.]

Canada Southern Ry. Co. v. Erwin, (1886), 13 Can. S.C.R. 162.

[Applied in Can. Pac. Ry. Co. v. Guthrie, 31 Can. S.C.R. 164.]

LAND ADJOINING UPON ONE SIDE OF RAILWAY.

An owner whose lands adjoin a railway subject to the Railway Act of Canada, upon one side only, is not entitled to have a crossing over such railway under the provisions of that Act, and the special statutes relating to the G.T.R. Co. do not impose any greater liability in respect to crossings than the Railway Act. [Midland Ry. Co. v. Gribble, [1895] 2 Ch. 827, and Canada Southern Ry. Co. v. Clouse, 13 Can. S.C.R. 139, referred to.] The Provincial Legislatures have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of railways subject to the provisions of the Railway Act of Canada. [Can. Pac. Ry. Co. v. Notre-Dame de Bonsecours, [1899] A.C. 367, followed.]

Grand Trunk Ry. Co. v. Therrien, 30 Can. S.C.R. 485.

[Applied in Grand Trunk Ry. Co. v. Perrault, 36 Can. S.C.R. 677; followed in Perrault v. Grand Trunk Ry. Co., 14 Que. K.B. 249; Hillhouse et al. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 427. See O'Brien Bros. v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 197.]

CLOSING UP CROSSING.

The farm crossings which railway companies are obliged to provide for the convenience of the owners of the lands the railway runs through constitute a legal servitude and such owners are not obliged to establish a title thereto. When a company has once provided such crossings as it considers necessary it cannot close up any of them on the ground that those left are sufficient. The Board has no jurisdiction to declare an existing crossing unnecessary and authorize it to be closed up.

Saindon v. Temiscouata Ry. Co., 41 Que. S.C. 337.

PRESCRIPTION—RIGHT-OF-WAY.

When a line of railway severs a farm, and no crossing is provided by the company, a right-of-way across the line may be acquired by the owner of the farm by prescription. A farm crossing, provided by a railway company, may be used by any person who, after the severance, becomes the owner of portions of the farm on both sides of the line of railway, and has a right of access to the crossing. A right-of-way may be acquired, although the dominant tenement is not contiguous to the servient tenement. Judgment of Boyd, C., affirmed.

Guthrie v. Can. Pac. Ry. Co., 1 Can. Ry. Cas. 1, 27 A.R. (Ont.) 64.

[Reversed in 1 Can. Ry. Cas. 9, 31 Can. S.C.R. 155; distinguished in Grand Trunk Ry. Co. v. Valliear, 3 Can. Ry. Cas. 399, 7 O.L.R. 364.]

EASEMENT—RIGHT-OF-WAY—USER—PRESCRIPTION.

A railway line passed over the northern half of lots 32, 33, 34 respectively, having a trestle bridge over a ravine on 34, near the boundary of 33. G., the owner of lot 33 (except the part owned by the railway company) for a number of years used the passage under the trestle bridge to reach a lane on the south half of lot 34 over which he could pass to a village on the west side, his predecessor in title, who owned all these lots, having used the same route for the purpose. The company having filled up the ravine, G. applied for an injunction to have it reopened:—Held, reversing the judgment of the Court of Appeal (27 A.R. (Ont.) 64, 1 Can. Ry. Cas.

1), that such user could never ripen into a title by prescription of the right-of-way nor entitle G. to a farm crossing on lot 34.

Can. Pac. Ry. Co. v. Guthrie, 1 Can. Ry. Cas. 9, 31 Can. S.C.R. 155.

[Distinguished in Grand Trunk Ry. Co. v. Valliear, 2 Can. Ry. Cas. 245, 1 O.W.R. 695; followed in Oatman v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 521, 2 O.W.N. 21, 16 O.W.R. 905; distinguished in Leslie v. Pere Marquette Ry. Co., 13 Can. Ry. Cas. 219, 24 O.L.R. 206.]

Duty to provide—Retroactivity of statute.

Before the Railway Act of 1888 there was no statutable obligation upon a railway company to provide and maintain a farm crossing where the railway severed a farm, and s. 191 of that Act, providing that every company shall make crossings for persons across whose lands the railway is carried, is not retrospective. [Vézina v. The Queen (1889), 17 Can. S.C.R. 1, and Guay v. The Queen (1889), ib. 30, in effect overrule Canada Southern Ry. Co. v. Clouse (1886), 13 Can. S.C.R. 139, and approve Brown v. Toronto & Nipissing Ry. Co. (1876), 26 U.C.C.P. 206.]

Ontario Lands & Oil Co. v. Canada Southern Ry. Co. et al., 1 Can. Ry. Cas. 17, 1 O.L.R. 215.

[Followed in Carew v. Grand Trunk Ry. Co., 5 O.L.R. 653, 2 Can. Ry. Cas. 241; relied on in Perrault v. Grand Trunk Ry. Co., 14 Que. K.B. 249; followed in Wright v. Michigan Central Ry. Co., 6 Can. Ry. Cas. 133.]

"Farm purposes"—Injury to stranger—Duty.

The defendants having, in compliance with the requirements of s. 191 of the Railway Act, 1888, made, and assumed the duty of keeping in repair a crossing over their railway where it crossed a certain farm, nevertheless allowed it to get into an unsafe and defective condition whereby a horse of the plaintiff was injured. The plaintiff was at the time using the horse, with the permission of the owner of the farm, in hauling gravel from a part of the farm to the highway, for which purpose it was necessary to cross the railway:—Held, without deciding whether the right of user of such a crossing is limited to a user for farm purposes, but assuming it to be so limited, that the hauling of gravel was, under the circumstances, a farm purpose, and that the defendants owed a duty, even apart from s. 289, towards one using the crossing by invitation of the owner.

Plester v. Grand Trunk Ry. Co., 1 Can. Ry. Cas. 27, 32 O.R. 55.

[Discussed in Tor. Ham. & Buffalo Ry. Co. v. Simpson Brick Co., 8 Can. Ry. Cas. 464, 17 O.L.R. 632; referred to in Clayton v. Can. North Ry. Co., 7 Can. Ry. Cas. 355, 17 Man. L.R. 432.]

Pecuniary compensation in lieu of crossing.

When the value of a piece of land enclosed by a line of railway is so small as to be disproportionate to the cost of a farm crossing; and is of no utility to the farm from which it is so separated, the Court has the power and the discretion to grant to the proprietor a pecuniary compensation in lieu of a crossing.

Martin v. Maine Central Ry. Co., 1 Can. Ry. Cas. 31, 19 Que. S.C. 561

Nonrepair of approach within farm—Injury to tenant of farm—Duty of railway company as to repair.

A railway company is not obliged or authorized to go upon the adjoining lands of the owner and repair the approaches to a farm crossing over the railway. Where an accident to the plaintiff was caused by such approach being out of repair, held that the defendants were not liable, and a nonsuit was granted. [Peterborough v. Grand Trunk Ry. Co., 32 O.R. 154, affirmed, 1 O.L.R. 144, followed.]

Palmer v. Michigan Central Ry. Co., 2 Can. Ry. Cas. 239, 2 O.W.R. 477, 6 O.L.R. 97.

[Affirmed in 7 O.L.R. 87, 3 Can. Ry. Cas. 194.]

DUTY TO PROVIDE—CONVEYANCE OF LAND TO.

The plaintiff's father in 1882 conveyed part of his farm to the Midland Ry. Co., who constructed their railway so as to sever the farm, but did not agree to make a farm crossing. In 1900 the father conveyed to the plaintiff all the farm not previously conveyed to the railway company:—Held, that the plaintiff could not compel the defendants, who had acquired the Midland Ry. in 1893, to provide a farm crossing, either by virtue of the Dominion Railway Act or Ontario legislation applicable to the railway before 1893. Review of the statutes affecting the Midland Ry. Co. [Ontario Lands and Oil Co. v. Canada Southern Ry. Co. (1901), 1 O.L.R. 215, followed.]

Carew v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 241, 5 O.L.R. 653.

PRIVATE WAY ACROSS RAILWAY LANDS—EASEMENT BY PRESCRIPTION—USER NOT INCOMPATIBLE WITH REQUIREMENTS OF RAILWAY.

Railway lands may be dedicated for public or other user so long as that user is not incompatible with the present and actual requirements of the railway. Where an adjoining landowner had used a well-defined path across railway station grounds continuously for over 30 years, his user was held to be confirmed by lapse of time. [Can. Pac. Ry. Co. v. Guthrie, 1 Can. Ry. Cas. 9, distinguished.]

Grand Trunk Ry. Co. v. Valliear, 2 Can. Ry. Cas. 245, 1 O.W.R. 695.

[Reversed in 7 O.L.R. 364, 3 O.W.R. 98.]

RIGHTS TO—APPROACHES—DUTY TO REPAIR.

Where a railway severs a farm and the company have constructed a farm crossing, no duty is cast upon them, in the absence of express agreement, to keep in repair the approaches thereto within the farm. Semble, in the case of the approaches to an overhead bridge on a public highway, the presumption would be that the approach is part of the bridge and to be kept in repair by the railway company. [6 O.L.R. 90, 2 Can. Ry. Cas. 239, affirmed.]

Palmer v. Michigan Central Ry. Co., 3 Can. Ry. Cas. 194, 7 O.L.R. 87.

TITLE TO—JURISDICTION OF MAGISTRATE'S COURT.

In an action for a farm crossing, it is sufficient if the plaintiff be shewn to be the actual bona fide owner, and in possession as such of the land crossed by the railway, although his title is not registered; and the fact that the land was purchased and cleared by him, long subsequent to the building of the railway, is no bar to his right of action. The district Magistrate's Court has no jurisdiction to order the construction of a farm crossing even when the cost thereof is alleged to be less if the crossing would create a servitude, and would be interfering with future rights.

Bolduc v. Can. Pac. Ry. Co., 3 Can. Ry. Cas. 197, 23 Que. S.C. 238.

CATTLE AND FARM PASSAGE—TRESTLE BRIDGE.

A railway company, desiring to fill up a trestle bridge under which there is a farm and cattle passage, in lieu thereof offered a farm crossing at rail level:—Held, that the application must be refused because the agreement is valid and binding between the parties as to the crossing, and the application is not in the public interest, but solely to save expense to the railway company.

Anderson v. Toronto, Hamilton & Buffalo Ry. Co. (Farm Crossing Case), 3 Can. Ry. Cas. 444.

Means of access for cattle—Statutory right of landowner—Right of ownership.

The owner of a farm has no statutory right under s. 198 of the Railway Act, 1903, to have a farm crossing constructed to sufficiently provide a satisfactory means of access for his cattle to and from a spring. [Vézina v. The Queen (1889), 17 Can. S.C.R. 1. applied.]

Re Armstrong and James Bay Ry. Co., 5 Can. Ry. Cas. 306, 12 O.L.R. 137.

Jurisdiction of Superior Courts.

At the final hearing of a case, the Court has power to reverse an interlocutory judgment rejecting a declinatory plea, and to dismiss the action for want of jurisdiction. The Superior Court of Quebec has jurisdiction in actions to compel railway companies within the legislative authority of the Parliament of Canada, to make railway crossings, to pay damages for their neglect to do so, etc., the Railway Act, 1903, having nowhere taken away such jurisdiction by express words, or necessary implication.

Perrault v. Grand Trunk Ry. Co., 14 Que. K.B. 245.

[Reversed in 36 Can. S.C.R. 671, 5 Can. Ry. Cas. 293.]

Right to—Enforcement of—Statutory contract.

The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company cannot be enforced under the provisions of the Act, 16 Vict. c. 37 (Can.) incorporating the G.T.R. Co. Judgment appealed from 14 Que. K.B. 245, reversed, Idington J., dissenting in regard to damages and costs.

Grand Trunk Ry. Co. v. Perrault, 5 Can. Ry. Cas. 293, 36 Can. S.C.R. 671.

Crossing under railway—High embankment.

The Board has jurisdiction under s. 198 of the Railway Act, 1903, to require a railway company to make a farm crossing under its railway. Where the railway was carried across a farm upon a high embankment, and any crossing over it would be inconvenient, the owner was held entitled to an undercrossing, in addition to payment of the purchase money for the land taken and damages. [Reist v. G.T.R. Co., 6 U.C.C.P. 421, approved; Armstrong v. James Bay Ry. Co., 5 Can. Ry. Cas. 313, 12 O.L.R. 137, not followed.]

Re Cockerline and Guelph & Goderich Ry. Co., 5 Can. Ry. Cas. 313.

[See Lalande v. Can. Northern Ontario Ry. Co., 21 Can. Ry. Cas. 194; followed in Atkinson v. Vancouver, Victoria & Eastern Ry. Co., 24 Can. Ry. Cas. 378.]

Sale of land to railway company—Reservation of right-of-way—Span bridge.

On the sale and conveyance of land to a railway company, on which there existed a bridge or viaduct spanning a valley, the vendors reserved "the right-of-way under the said bridge as now enjoyed by the vendors." At that time the only use made of the right-of-way was by persons on foot, or with horses, carts, etc.:—Held, that "as now enjoyed" meant "as now use," i.e., for farm purposes, and did not justify the laying and using a railway under the bridge. [Dand v. Kingscote, 6 M. & W. 174, and United

Land Co. v. Great Eastern Ry. Co., L.R. 17 Eq. 158, 10 Ch. 586, distinguished.]

Can. Pac. Ry. Co. v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 400, 12 O.L.R. 320.

[Relied on in Fraser v. Can. Pac. Ry. Co., 17 Man. L.R. 672, 8 W.L.R. 380.]

STATUTORY RIGHT TO—MAINTENANCE OF.

Wright having purchased lands on both sides of the C.S. Ry. Co. after the line was constructed, for which no farm crossing had been furnished, applied to the Board for a farm crossing over the railway. Without this crossing an inconvenient route was necessary to reach the lands of the owner across the railway:—Held, by the Chief Commissioner, following Ontario Lands & Oil Co. v. Canada Southern Ry. Co., 1 Can. Ry. Cas. 17, that the applicant had no absolute legal right to the crossing; that it could only be granted by the Board in the exercise of the discretion given by s. 253 of the Railway Act 1906 (subs. 2, s. 198 of the Railway Act, 1903): that the applicant should, therefore, bear the cost of its construction and maintenance and the company should receive reasonable compensation, but: —Held, by the majority of the Board that the railway company must construct and maintain at its own expense an adequate and satisfactory farm crossing over the railway on Wright's farm.

Wright v. Michigan Central Ry. Co., 6 Can. Ry. Cas. 133.

TEMPORARY ROAD—ENTRANCE GATES—AGREEMENT TO PROVIDE.

The plaintiffs constructed their railway through a quadrilateral parcel of land owned by one S. the predecessor in title of the defendant. By an agreement with S. the plaintiffs acquired (for a temporary road) a strip of land crossing their tracks leading from the Hamilton road to the Johnson Settlement road, which was used as a diversion under s. 183 of the Railway Act, 1888, while a bridge was being constructed to carry the railway over the Hamilton road and afterwards while repairs were being made. In the deed from S. the plaintiffs agreed to erect in lieu of farm crossings, four gates for entrances to the temporary road from the four parcels of land into which the original parcel had been subdivided. The plaintiffs closed that part of the temporary road leading from their right-of-way to the Johnson Settlement road and brought an action for an injunction restraining the defendant from trespassing upon it:—Held, that the temporary road had not been dedicated as a highway, but that the defendant was entitled to a right-of-way over it to reach the Johnson Settlement road.

Toronto, Hamilton & Buffalo Ry. Co. v. Hanley, 6 Can. Ry. Cas. 321, 6 O.W.R. 921.

BRIDGE AND UNDERPASS—AGREEMENT—MAINTENANCE.

A railway constructed by the defendants' predecessors in title crossed the plaintiffs' respective farms. In 1854, when the railway was being laid, bridges and an underpass were constructed by the railway company to enable the owners of the farms to pass from one side of the railway to the other, and were for more than 50 years maintained and used in connection with the plaintiffs' farms, with the knowledge of the defendants and their predecessors in title, without any objection on their part:—Held, on the evidence, that the bridges and underpass were provided for and enjoyed by the plaintiffs' predecessors in title as part of the agreements or arrangements under which the defendants' predecessors in title acquired their right-of-way through the lands in question, and the defendants were bound by them. There could be no question of ultra vires; the subject-matter of the agreements was within the powers and authority of the railway company in dealing for the acquisition of a right-of-way. The defendants were in the wrong in assuming to alter or reconstruct the bridges and underpass without the sanction of the Board; and it was for them, and not for the plaintiffs, to apply to the Board. Judgments of Boyd, C., and Meredith, C.J.C.P., 7 O.W.R. 798, affirmed.

McKenzie v. Grand Trunk Ry. Co.; Dickie v. Grand Trunk Ry. Co., 7 Can. Ry. Cas. 47, 14 O.L.R. 671.

[Followed in Toronto, H. & B. Ry. Co. v. Simpson Brick Co., 17 O.L.R. 632; Leslie v. Pere Marquette Ry. Co., 13 Can. Ry. Cas. 219, 24 O.L.R. 206.]

Landlocked lands—Way of access to brickyard—Land on one side of the railway—Cost of construction.

H. N. (a brick manufacturer) applied to the Board under ss. 252, 253 of the Railway Act, 1906, for an order directing the T. H. & B. Ry. Co. to provide and construct a suitable crossing where the railway abuts on the lands of the applicant. By reason of the construction of the T. H. & B. Ry., N. was deprived of access to a traveled road except by passing over the lands of his sons and crossing a number of railway tracks. The object of the application was to obtain access to the said road by a crossing over the railway for the purpose of more conveniently carrying on his manufacturing business, but not in any way for farm purposes or as a farm crossing:—Held, that the application for a crossing of the nature of a farm crossing should be granted by the Board in the exercise of its discretion, upon the condition that all expenses of construction and maintenance of the crossing must be borne by the applicant.

New v. Toronto, Hamilton & Buffalo Ry. Co., 8 Can. Ry. Cas. 50.

[Followed in Richards, etc. v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 329.]

Contract—Undercrossing—Suitable farm crossing.

An application was made to the Board under ss. 252, 253 of the Railway Act, 1906, for an order directing the C.P.R. Co. to provide and construct a suitable farm crossing. The applicant complained that the present undercrossing was too small to carry on properly his farming operations, and applied to have it enlarged:—Held, that the application must be refused, the railway company having carried out their contract in regard to the undercrossing.

Stiles v. Can. Pac. Ry. Co. (Case No. 1141), 8 Can. Ry. Cas. 190.

Manufacturing purposes—Use of crossing for business of brickyards—Agreement to provide.

S. 191 of the Railway Act, 1888, is not restricted in its application to crossings for farm purposes merely, notwithstanding the heading and sidenote "Farm Crossings," which may be taken as descriptive of the character of the construction of the crossing, and not restrictive of the purposes for which it may be used or of the uses to which the lands crossed by the railway may be put, and notwithstanding the words of the section itself, "convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles," which may be similarly interpreted. The defendants, as lessees of S., occupied and operated a brickyard, in a city, on the north side of the plaintiffs' railway, and in connection with their business used a private lane over the property of M., lying to the south of the railway. This lane led to a street, and was the only means of access from the brickyard to a public highway. To reach this lane, the defendants used a crossing over the railway and their right to do so was called in question by this action. When the railway was built, the land leased by the defendants and that owned by M. were the property of the Messrs. B., who in December, 1894, conveyed to the plaintiffs a right-of-way through their property, and obtained simultaneously with their conveyance an agreement by which the plaintiffs covenanted to provide and maintain "a farm crossing" at the point now in question, which was duly constructed. The Messrs. B. conveyed both properties to M. in 1901, and in 1903 F. acquired from M. the premises afterwards leased by the defendants. In his conveyance M. granted to F. a right-of-way over the lane opposite the crossing. S. acquired title from F. and subsequently leased to the defendants. This land had been in use as a brickyard since 1868, but lay idle from that year until 1903, when S. established a brick-making industry upon it. The plaintiffs were aware that S. bought with the intention of using the crossing and the lane to the south as the means of conveying from his yard, brick for local trade, and with this knowledge they reconstructed and kept in repair the crossing in question which was used by S. and the defendants for that purpose, without objection by the plaintiffs, until 1906, when they complained of its use, and began this action in July, 1907:—Held, that a railway company acquiring a right-of-way may take the land required subject to reservations in favour of the grantor of such rights of crossing or other easements as may be agreed upon, and are not inconsistent with the use of the right-of-way for railway purposes; an agreement for a crossing contemporaneous with the deed of the right-of-way is equivalent to a reservation in the deed itself; and, the vendors having made such an agreement, the character and extent of the right of crossing must be determined by the terms of that agreement. Subject to the question of severance, the covenant of the plaintiffs with the "vendors, their heirs, executors and administrators," enured to the benefit of the assigns or grantees of the vendors, including lessees of such grantees; and the use which the defendants were making of this crossing was within the rights conferred upon the Messrs. B. by the agreement of the plaintiffs, not being, upon the evidence, inconsistent with the safe operation of the railway, nor unduly increasing the burden of the easement created by the agreement:—Held, also, that, although when the right of crossing was created the lands on either side of the railway belonged to the same owners, and were now held by different owners, there was no such severance as would involve the cesser of the right of crossing. [Midland Ry. Co. v. Gribble, [1895] 2 Ch. 827, distinguished.]

Toronto, Hamilton & Buffalo Ry. Co. v. Simpson Brick Co., 8 Can. Ry. Cas. 464, 17 O.L.R. 632.

[Followed in Hillhouse, et al. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 427.]

CATTLE PASS—SUBSTITUTING DRAINAGE PIPE.

In an action against the defendants for damages for filling up a culvert used as a cattle pass under the defendants' embankment and substituting a drainage pipe, the plaintiff claimed the right to have the culvert maintained at its full size under an agreement made at the time of construction, providing that the flow of the waters of a certain drain upon the lands to be crossed by the railway should not be interfered with, that he had acquired an easement by prescription, and that under s. 257 of the Railway Act, 1906, the defendants could not fill in the culvert without leave of the Board:—Held, (1) that the defendants had the right to substitute any other means of drainage to enable the water to flow through the drain mentioned in the agreement. (2) That no easement by prescrip-

tion had been acquired. [Can. Pac. Ry. Co. v. Guthrie, 31 Can. S.C.R. 155, 1 Can. Ry. Cas. 9, followed.] (3) That s. 257 of the Act did not apply.

Oatman v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 521, 2 O.W.N. 21.

COST OF MAKING—PROPER ENJOYMENT OF LAND.

Application under ss. 252, 253 of the Railway Act, 1906, directing the respondent to construct a farm crossing for the proper enjoyment by the applicant of his land on the north side of the railway. The applicant's farm of 72 acres was a subdivision of a larger farm provided with a crossing, but was worked as a separate farm only, upon its being acquired by the applicant, thus requiring a crossing to join the two portions of the farm. The practice of the Board has not been uniform, but not infrequently the entire cost of making a farm crossing has been imposed upon the railway company, especially in the Province of Quebec and Eastern Ontario, the facts and circumstances, especially the size of the farms, being considered in each case:—Held, that the respondent should be directed by agreement to construct at its own expense a farm crossing for the applicant upon the dividing line between him and his neighbour.

Riddell v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 216.

SEVERANCE OF FARM—UNDERGRADE CROSSING—AGREEMENT—MAINTENANCE OF.

In 1885, the predecessor in title of the plaintiffs conveyed to a railway company, the predecessors of the defendants, a certain strip of land, running across a farm, for the right-of-way of the railway. The conveyance was in fee, the consideration was $40, and there was no reference in the deed to a crossing. The defendants' predecessors, however, constructed an undergrade crossing, which was necessary for the working of the farm, and this was maintained and kept in repair by the defendants or their predecessors, and was used by the plaintiffs or their predecessors until 1906, when the defendants closed it up:—Held, having regard to the surrounding circumstances and the evidence, that it was a part of the agreement and arrangement, made at the time of the purchase of the right-of-way, that the plaintiffs' predecessor should have an underpass for the passing of waggons and cattle from one part of the farm to the other—the granting of the pass was a part of the consideration for the right-of-way; and the plaintiffs were entitled to have it maintained. [McKenzie v. Grand Trunk Ry. Co., Dickie v. Grand Trunk Ry. Co., 7 Can. Ry. Cas. 47, 14 O.L.R. 671, followed. Oatman v. Grand Trunk Ry. Co., 2 O.W.N. 21, distinguished]:—Held, also, upon the evidence that the pass was used in connection with and for the purposes of the farm for over twenty years; and the plaintiffs had established an easement by continuous user as of right for that period. [Can. Pac. Ry. Co. v. Guthrie (1901), 31 Can. S.C.R. 155, 1 Can. Ry. Cas. 9, and Grand Trunk Ry. Co. v. Valliear (1904), 7 O.L.R. 364, 3 Can. Ry. Cas. 399, distinguished.] Semble, also, that the doctrine of presumption of a lost grant could be applied. It being conceded by the defendants that the plaintiffs were entitled to a level crossing, and the plaintiffs being willing to accept such a crossing, with damages, in lieu of the underpass, damages arising from the depreciation of the land by the change from an underpass to a level crossing, and damages on account of the underpass having been closed since 1906, were assessed.

Leslie v. Pere Marquette Ry. Co., 13 Can. Ry. Cas. 219, 24 O.L.R. 206. [Affirmed in 13 Can. Ry. Cas. 228, on the ground that the plaintiffs' right to an undergrade crossing had been established as an easement by continuous user for twenty years.]

Crossings for the convenience of lands—Rights and obligations of companies and proprietors.

Crossings which railway companies are bound to make for the convenience of the lands over which the line is carried, are legal servitudes, and the proprietors are not obliged to establish a title. When a railway company has once provided crossings which it recognizes as being necessary, it cannot abolish one, under the pretext that one crossing was sufficient. The Board has no power to declare that an existing crossing is useless.

Saindon v. Temiscouata Ry. Co., 14 Can. Ry. Cas. 326, 41 Que. S.C. 337.

Crossing in the nature of a farm crossing—Access to highway—Construction and maintenance—Gates.

The Board granted a crossing in the nature of a farm crossing from the applicants' lands to a highway upon condition that all expenses of construction and maintenance be borne by the applicants and that gates be established, which must be kept closed, on both sides of the railway. [New v. Toronto, Hamilton & Buffalo Ry. Co., 8 Can. Ry. Cas. 50, followed.]

Richards & Bennett v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 329.

Statutory right—Release by landowner.

Where a railway corporation buys a strip of land to be used as a right-of-way for a railway across a farm and takes with the deed of the strip the vendor's release of all claims for severance or depreciation without any reservation to the vendor of any right to cross the railway over such a strip, the vendor is not entitled as of right upon the subsequent passing of a statute (B.C. Stat. 1911, c. 44, s. 167) directing the company to make farm crossings for "persons across whose lands the railway is carried" to compel the company to provide a crossing over the strip so conveyed.

Hounsome v. Vancouver Power Co., 9 D.L.R. 823, 15 Can. Ry. Cas. 69.

[Compare s. 169 of B.C. Stat. 1911, c. 44, as to the power of the British Columbia Minister of Railways to order a crossing.]

Lands taken for right-of-way—Compensation—Live stock or cattle pass.

Upon an application by a landowner (after receiving compensation for land taken for right-of-way) for a cattle pass, the Board ordered that the pass be built upon condition that the money received from the company be returned, and in case of disagreement that the compensation be determined by arbitration under the Railway Act. In view of the inconvenience caused upon farms in which live stock is kept amounting in some cases to the equivalent of a capital investment of $1,200, railway companies should be willing to give a live stock or cattle pass where possible.

Wilson Bros. v. Can. Northern Ontario Ry. Co., 16 Can. Ry. Cas. 270.

Railways built before enactment of Railway Act—Existing farm crossings became easements—Railway increasing difficulties.

43-44 Vict. (Que.) c. 43, s. 16 (1, 2), (Art. 6806, R.S.Q. 1909), compels railway companies to construct and maintain crossings, wherever farms are crossed, by the railway. This obligation is imposed as well on railways already constructed as on those constructed after the passing of the Act, and, in respect of the former, the existing farm crossings become a legal servitude (easement) in favour of the real property connected by them. Consequently, railway companies cannot render the use of such farm crossing more difficult by widening the right-of-way and rendering the crossing steeper, and if they do so they are liable in damages.

Drolet v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 280, 44 Que. S.C. 86.

Reopening—Reservations.

Prior to the passing of the Railway Act of 1888, there was no right to a farm crossing unless it was specifically covered in the conveyance from the landowner to the railway, and to retain it, successors in title must have it explicitly reserved in the conveyances to them. [Midland Ry. Co. v. Gribble, 2 Ch.D. 129, 827; Toronto, Hamilton & Buffalo Ry. Co. v. Simpson Brick Co., 17 O.L.R. 632, 8 Can. Ry. Cas. 464, followed.]

Hillhouse, Hume & Booth v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 427.

Agreement between company and landowner—Jurisdiction of Board—Compensation—Arbitration.

The Board is unwilling to disturb agreements between railway companies and landowners as to farm crossings to be provided, but it is not bound by such an agreement if in contravention of the Railway Act, 1906, or for other reasons void or voidable, and will in a proper case over-ride it in order to see that the Railway Act is followed and a proper and convenient crossing given. When an agreement between a railway company and a landowner specifies a level crossing, and it appears that the company has paid larger compensation in order to avoid the construction of an undercrossing, the Board if it afterwards orders an undercrossing, notwithstanding the agreement, may insist that the parties be restored to their original position, and may require the owner, as a condition of the order, to give security for the return of such part of the compensation already paid him as shall represent the excess over the compensation properly payable, having in view the improved facilities, such compensation to be determined by arbitration if necessary.

Ray v. Can. Northern Ry. Co., 16 Can. Ry. Cas. 276.

Right to crossing—Relinquishment—Conveyance.

A provision in a deed of lands taken for right-of-way by a railway company, that the consideration is to include full compensation and indemnity for all damages or injury to the property by reason of the railway, does not constitute a relinquishment of the right to a farm crossing over the railway lands.

Lusty v. Pere Marquette Ry. Co., 21 Can. Ry. Cas. 93.

[Followed in Atkinson v. Vancouver, V. & E. Ry. Co., 24 Can. Ry. Cas. 378.]

Senior and junior rule—Right-of-way—Patent—Cost of constructing crossing.

The senior and junior rule applies to the case of a railway company with prior location having a patent of its right-of-way through a farm lot and when the owner of the adjoining lands has a patent for the several portions subsequent to the date of the company's patent, the expense of constructing the crossing must be borne by the owner of the farm.

Wimbles v. Grand Trunk Pacific Ry. Co., 21 Can. Ry. Cas. 191.

Lapse of time—Conveyance of right-of-way—Right to crossing extinguished—Agreement.

Notwithstanding the lapse of time without a demand for a farm crossing, by the landowner or a conveyance of the lands taken for right-of-way for valuable consideration, the Board will apply s. 252 of the Railway Act, 1906, which provides that every company shall make crossings for persons across whose lands the railway is carried convenient and proper for the crossing of the railway for farm purposes, in all cases to which it may be applicable, unless the right to the crossing has by express terms been extinguished, either in the conveyance of the right-of-way itself or by a sufficient agreement otherwise expressed.

Harris v. Great Northern Ry. Co., 21 Can. Ry. Cas. 193.

[Followed in Atkinson v. Vancouver, V. & E. Ry. Co., 24 Can. Ry. Cas. 378.]

CROSSING AT GRADE—CATTLE PASS.

Where the railway was carried across a farm on a high embankment, and any crossing over it would be inconvenient for cattle to get to pasture and water unless driven, the owner of the farm crossed by the railway was held entitled to a cattle pass (not an undercrossing) in line with farm lane. [Re Cockerline and Guelph & Goderich Ry. Co., 5 Can. Ry. Cas. 313, followed.]

Lalande v. Can. Northern Ontario Ry. Co., 21 Can. Ry. Cas. 194.

[Followed in Atkinson v. Vancouver, V. & E. Ry. Co., 24 Can. Ry. Cas. 378.]

LOSS OF RIGHT TO FARM CROSSING BY SEVERANCE OF OWNERSHIP ON EITHER SIDE.

The mere acquisition of lands on both sides of a railway right-of-way does not per se give a right to a farm crossing. The original owner having lost his right to a crossing by conveying the lands on one side to another person, a subsequent owner purchasing the lands on both sides from different vendors does not thereby acquire a right to a farm crossing to connect them. The Board, however, has jurisdiction under s. 253 of the Railway Act, 1906, to order a crossing, which it will exercise in a proper case and on proper terms. [See Grand Trunk Ry. Co. v. Therrien, 30 Can. S.C.R. 485; Midland Ry. Co. v. Gribble (1895), 2 Ch. 129, 827.]

O'Brien Bros. v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 197.

EXPROPRIATION—CONTRACT—SERVITUDE—VALUE.

An owner entitled, under indenture with the Crown, to a crossing from one part of his farm to another, the land expropriated from him having been converted into a railway yard, and it being impossible to give the crossing contracted for, is entitled to the value thereof upon releasing and discharging the Crown from the obligation of constructing the same.

Fontaine v. The King, 38 D.L.R. 622, 16 Can. Ex. 199.

OVERHEAD CROSSING—AGREEMENT FOR GRADE—SEVERANCE—COSTS.

When the landowner has received a liberal price for his land taken for the railway right-of-way, released the company by agreement from all claims for damages to the remainder by reason of severance, and been given a farm crossing at grade, the Board, although not bound by private agreements, will not grant an overhead farm crossing at a more suitable location unless the owner agrees to bear a portion of the cost. [Re Cockerline and Guelph & Goderich Ry. Co., 5 Can. Ry Cas. 313; Lusty v. Pere Marquette Ry. Co., 21 Can. Ry. Cas. 93; Lalande v. Can. Northern Ry. Co., 21 Can. Ry. Cas. 194, followed, and Harris v. Great Northern Ry. Co., 21 Can. Ry. Cas. 193, referred to, are cited by the dissenting judgment of Commissioner Boyce, with reference to the apportionment of costs.]

Atkinson v. Vancouver, Victoria & Eastern Ry. Co., 24 Can. Ry. Cas. 378.

MAINTENANCE—CLIMATIC CONDITIONS.

A railway company is not obliged, during the winter season, to keep snow on a level farm crossing during mild weather, to meet a climatic condition entirely controlled by the elements.

Sagala v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 386.

PRIVATE OR FARM CROSSINGS—CULVERT FOR FRESHETS—SPECIFIC PERFORMANCE—DAMAGES FROM "CONSTRUCTION, MAINTENANCE AND OPERATION."

An agreement by a railway company with the landowner from whom it purchased a right-of-way and as part consideration therefor to build a culvert so as not to obstruct freshet overflows which benefited his land, may be the subject of a decree for specific performance and the landowner's remedy is not one in damages only if the location and character of the culvert required are capable of precise ascertainment. [Sanderson v. Cockermouth & Workington Ry. Co., 11 Beav. 497, 19 L.J. Ch. 503, and Clowes v. Staffordshire, L.R. 8 Ch. 125, referred to.] A verbal agreement to construct a culvert so as not to obstruct a freshet overflow which was of benefit to the party conveying the right-of-way may be shewn notwithstanding a release contained in the conveyance of all claims for severance and depreciation arising out of the taking or out of the "construction, maintenance and operation" of the railway; such release does not absolve the railway from liability in respect of its failure to use such means to prevent damage to the landowner as are reasonably possible consistently with the proper construction, maintenance and operation of the railway. [R. v. Wycombe Ry. Co., L.R. 2 Q.B. 310; London & N.W. Ry. Co. v. Ogwen, 80 L.T. 401, 63 J.P. 295, referred to.]

Whitcomb v. St. John & Quebec Ry. Co., 18 D.L.R. 558.

FATAL ACCIDENTS ACT.

See Employees; Lord Campbell's Act; Negligence.

FENCES AND CATTLE GUARDS.

A. Duty to Fence; In General.
B. Injury to Animals; Cattle Guards.
C. Defective Fences.
D. Animals at Large.

Injuries to cattle on government railways, see Government Railways.

Injury to animals on street railways, see Street Railways.

Injuries to animals while in transit, see Carriage of Live Stock; Limitation of Liability.

Annotations.

Duty to fence and liabilities arising therefrom. 1 Can. Ry. Cas. 436, 2 Can. Ry. Cas. 378.

Duty of railway company to maintain fences and liability for breach of, for injuries caused to animals. 3 Can. Ry. Cas. 248, 7 Can. Ry. Cas. 366.

Defective fences. 3 Can. Ry. Cas. 338.

Liability of railway company for injuries to children in consequence of failure to fence railway premises. 4 Can. Ry. Cas. 11.

Railway Fences and Cattle Guards. 6 Can. Ry. Cas. 50.

Right to recover for animals killed or injured on the railway. 9 Can. Ry. Cas. 48.

Injury to animals resulting from wilful act or omission of owner. 13 Can. Ry. Cas. 361.

Liability of railway company for injury to cattle running at large by reason of failure to fence. 14 Can. Ry. Cas. 263, 7 Can. Ry. Cas. 366, 17 Can. Ry. Cas. 76.

Liability for defects in fences and cattle guards. 16 Can. Ry. Cas. 19, 17 Can. Ry. Cas. 76.

Animals at large. 16 Can. Ry. Cas. 19, 17 Can. Ry. Cas. 76, 19 Can. Ry. Cas. 321, 21 Can. Ry. Cas. 135.

Negligence or wilful act or omission of owner. 21 Can. Ry. Cas. 135.

Animals on railway tracks. 21 Can. Ry. Cas. 154.

Animals at large through "wilful act or omission of owner." 7 Can. Ry. Cas. 366, 32 D.L.R. 397, 33 D.L.R. 423, 35 D.L.R. 481.

A. Duty to Fence; In General.

Highway crossing—Protection—Statutory requirements.

By the Railway Act, 1888, s. 197, as amended by 55 & 56 Vict. c. 27, s. 6, it is provided that "at every public road crossing at rail level of the railway, the fence on both sides of the track shall be turned in to the cattle guards, so as to allow of the safe passage of trains." By s. 259 of the former Act, as amended by s. 8 of the latter, it is provided that "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is fenced in the manner prescribed by this Act:"—Held, that the words "in the manner prescribed by this Act" do not refer to the turning in of the fence to the cattle guards; and, although no other fence is specifically prescribed in the railway legislation, the meaning of s. 259 is, that unless the track, including the crossing, is properly fenced or otherwise protected so as to efficiently warn or bar the traveler while a train is crossing, or immediately about to cross, the maximum speed at which a train may cross in thickly peopled portions of cities, towns, and villages, is six miles an hour. The plaintiff was struck by a train at a crossing over a main street in an incorporated town, not protected by a gate or watchman. In an action to recover damages for his injuries, the jury found that the train was traveling at the rate of twenty miles an hour, and that the injury complained of was caused by this excessive speed, coupled with the absence of proper protection at the crossing, and without negligence on the plaintiff's part; and the Court, though there was strong evidence of contributory negligence, declined to interfere.

McKay v. Grand Trunk Ry. Co., 3 Can. Ry. Cas. 42, 5 O.L.R. 313.

[Reversed in 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52.]

Highway crossings—Protection at.

Ss. 197, 259 of the Railway Act, 1888, as amended by 55 & 56 Vict. c. 26 (D.), ss. 6, 8, do not require that railway companies shall erect fences and gates at highway crossings in thickly peopled parts of cities, towns, and villages before running their trains across such highways at a greater speed than six miles an hour. The power to determine whether gates should be placed at highway crossing rests with the Railway Committee and not with a jury. [Lake Erie, etc., Ry. Co. v. Barclay, 30 Can. S.C.R. 360, distinguished.]

Grand Trunk Ry. Co. v. McKay, 3 Can. Ry. Cas. 52, 34 Can. S.C.R. 81.

[Followed in Tabb v. Grand Trunk Ry. Co., 8 O.L.R. 514; Clark v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 51, 2 D.L.R. 331; adhered to in Grand Trunk Ry. Co. v. Hainer, 36 Can. S.C.R. 183; Grand Trunk Ry. Co. v. Perrault, 36 Can. S.C.R. 678; Lake Erie & D. R. Ry. Co. v. Marsh, 35 Can. S.C.R. 198; discussed in Perrault v. Grand Trunk Ry. Co., 14 Que. K.B. 248, 260; distinguished in Burtch v. Can. Pac. Ry. Co., 13 O.L.R. 632; Gowland v. Hamilton, Grimsby, etc., Ry. Co., 19 Can. Ry. Cas. 214; followed in Carrier v. St. Henri, 30 Que. S.C. 47; Grand Trunk Ry. Co. v. Daoust, 14 Que. K.B. 551; Quebec & Lake St. John Ry. Co. v. Girard, 15 Que. K.B. 51; Minor v. Grand Trunk Ry. Co., 22 Can. Ry. Cas. 194, 35 D.L.R. 106; referred to in R. v. Grand Trunk Ry. Co., 17 O.L.R. 601; Smith v. Niagara & St. Catharines Ry. Co., 9 O.L.R. 158; Wabash Ry. Co. v. Misener, 6 Can. Ry. Cas. 70, 38 Can. S.C.R. 99; relied on in Girard v. Quebec & Lake St. John Ry. Co., 25 Que. S.C. 248.]

FAILURE TO FENCE—CONTRIBUTORY NEGLIGENCE—INFANT.

A street ran to the north and to the south from the defendants' tracks in a city but did not cross them. With the tacit acquiescence of the defendants, however, foot passengers were in the habit of crossing the tracks from one part of the street to the other and for convenience in doing so part of the fence between the tracks and each part of the street had been removed. A boy of nine intending to cross from one part of the street to the other walked through the opening in the fence to one of the tracks. While he was standing and playing upon this track waiting for a train on another track to pass he was struck by a train running at a speed of about forty miles an hour and was killed:—Held, that there was a clear neglect of a statutory duty by the defendants in permitting the track to remain unfenced and at the same time running at such a high rate of speed; that it was for the jury to say whether upon all the facts the deceased had displayed such reasonable care as was to have been expected from one of his tender years; and that their verdict in favour of the child's father could not be interfered with. Judgment of Falconbridge C.J., affirmed.

Tabb v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 1, 8 O.L.R. 203.

[Followed in Potvin v. Can. Pac. Ry. Co., 4 Can. Ry. Cas. 8.]

FAILURE TO FENCE—CONTRIBUTORY NEGLIGENCE—INFANT.

On the west side of a street in a city, east of and parallel to the railway, were a number of dwelling houses, with the lots on which they stood not fenced, leaving a large open space in the rear, next to the railway fence, in which there were openings. A boy of eight years and seven months, while engaged in playing with his companions, went through one of the openings in the railway fence, and getting upon the line was killed by a train running at the rate of twenty-five miles an hour. The jury found that the boy's death was due to the negligence of the defendants, consisting in the poor condition of their fence; that it was not due to the boy's own negligence, who was incapable of reasonable thought in the matter, and that he was not a trespasser:—Held, affirming the judgment of Falconbridge, C.J.K.B., that the Court might draw the inference of fact, under Con. Rule 817, that the boy's death was due to defendants' negligence in allowing their train to pass through a thickly peopled portion of the city without the track's being properly fenced and that the defendants were liable. [Tabb v. G. T. Ry. Co., 4 Can. Ry. Cas. 1, 8 O.L.R. 203, followed.]

Potvin v. Can. Pac. Ry. Co., 4 Can. Ry. Cas. 8.

INJURY TO CHILD—UNFENCED PREMISES—TRESPASSER.

A boy, over eight years of age, entered from the adjoining highway the unfenced freight yard of the defendants, for the purpose of gathering pieces of coal dropped from the cars, and in doing so got under or alongside the wheels of a car which, in being shunted, ran over and killed him, at a place over 400 feet from where he entered the yard:—Held, that he was wrongfully trespassing where he had no business or invitation to be:

—Held, also, that the plaintiffs had not satisfied the onus cast upon them to establish by evidence circumstances from which it might fairly be inferred that there was reasonable probability that the accident resulted from the absence of a fence at the place where the boy entered. [Williams v. Great Western Ry. Co. (1874), L.R. 9 Exch. 157, distinguished; Daniel v. Metropolitan Ry. Co. (1868), L.R. 3 C. P. 216, affirmed (1871), L.R. 5 H.L. 45, followed.]

Newell v. Can. Pac. Ry. Co., 5 Can. Ry. Cas. 372, 12 O.L.R. 21.

[Referred to in Gloster v. Toronto Elec. Light Co., 12 O.L.R. 413.]

Highway crossing—Township roads—Fencing.

The provisions of 55 & 56 Vict. c. 27, s. 6 amending s. 197 of the Railway Act, 1888, and requiring, at every public road crossing at road level of the railway the fences on both sides of the crossing and of the track to be turned into the cattle guards applies to all public road crossings and not to those in townships only as in the case of the fencing prescribed by s. 194 of the Railway Act, 1888. [Grand Trunk Ry. Co. v. McKay, 3 Can. Ry. Cas. 52, 34 Can. S.C.R. 81, followed.]

Grand Trunk Ry. Co. v. Hainer, etc., 5 Can. Ry. Cas. 59, 36 Can. S.C.R. 180.

[Applied in Jolicoeur v. Grand Trunk Ry. Co., 34 Que. S.C. 460; distinguished in Beck v. Can. North. Ry. Co., 2 A.L.R. 558; Tinsley v. Toronto Ry. Co., 17 O.L.R. 74; referred to in Eisenhauer v. Halifax & S. W. Ry. Co., 42 N.S.R. 434.]

Right to fence right-of-way—Interference with access to spring.

A railway company which in constructing its line and fencing in its right-of-way pursuant to its statutory right so to do, thereby interfered with plaintiff's access to a spring on the premises of another railway which he was permitted to use as a mere licensee, is not liable to him for damages for such interference.

Ball v. Sydney & Louisburg Ry. Co., 9 D.L.R. 148.

Uninclosed lands—Fences—Orders for all railways.

Under the Railway Act, 1906, the Board does not possess authority to make a general order requiring all railways subject to its jurisdiction to erect and maintain fences on the sides of their railway lines where they pass through lands which are not inclosed and either settled or improved; it can do so only after the special circumstances in respect of some defined locality have been investigated and the necessity of such fencing in that locality determined according to the exigencies of the case. Duff, J., contra. The Railway Act empowers the Board to order that, upon lines of railway not yet completed or open for traffic or in course of construction, where they pass through inclosed lands, the railway companies should construct and maintain such fences or take such other steps as may be necessary to prevent cattle and other animals from getting upon the right-of-way. Idington, J., contra.

Re Can. Northern Ry. Co. and Board of Railway Commissioners (Fencing Case), 42 Can. S.C.R. 443, 10 Can. Ry. Cas. 104.

[Followed in Nutana v. Can. North. Ry. Co., 14 Can. Ry. Cas. 11, 7 D.L.R. 888.]

Failure to fence—Duty of Crown.

(1) Where the Crown is not required by the adjoining proprietors to fence its line of railway, there is no duty, in favour of a trespasser, cast upon the Crown by the provisions of ss. 22, 23 of the Government Rail-

ways Act to fence as aforesaid. (2) The suppliant, while working on a property adjoining the I.C.R. within the city of Levis, was injured while innocently trespassing on the right-of-way, there being no fence erected, or other means taken, by the Crown to mark the boundary between the adjoining property and the railway. It was not alleged that the adjoining owner had requested the Crown to fence:—Held, that the suppliant had made no case of negligence against the Crown under subs. (c) of s. 20 of R.S.C., c. 140.

Viger v. The King, 10 Can. Ry. Cas. 201, 11 Can. Ex. 328.

Right-of-way fences—Default—Penalty.

Where a railway was built and not fenced for many years through a thickly settled, highly cultivated and rich agricultural district, the Board ordered the right-of-way to be fenced by the railway company under s. 254 of the Railway Act, 1906, and imposed a penalty of $50 a day for each day's default after the time specified in its order. [Re Board of Railway Commissioners and Can. Northern Ry. Co. (Fencing Case), 42 Can. S.C.R. 143, 10 Can. Ry. Cas. 104, followed.]

Nutana v. Can. Northern Ry. Co., 14 Can. Ry. Cas. 11, 7 D.L.R. 888.

Orders of Board—Extension of time—Statutory requirement.

The obligation to fence being imposed by statute and not, in the first place, by order of the Board, the Board will not extend the time for complying with a specific order requiring fencing, but will preferably cancel its orders on the subject, and leave all parties to the operation of the act.

Re Fencing at Savona, B.C., 16 Can. Ry. Cas. 195.

Injury to animals.

S. 294 of the Railway Act, 1906, must be read with reference to conditions of s. 254, and where there is no obligation to fence there can be no liability for injury to cattle, whether "at large" or "at home;" but where there is an order compelling railway companies in general to fence, a special order partly relieving a railway company from such duty at certain portions of the locality in question does not relieve the company from liability, in the absence of evidence as to where the animals got upon the railway. (Per McCarthy, J.) [Higgins v. C.P.R. Co., 9 Can. Ry. Cas. 34, followed; Parks v. C.N.R. Co., 14 Can. Ry. Cas. 247, disapproved.]

Waite et al. v. Grand Trunk Pacific Ry. Co., 21 Can. Ry. Cas. 126, 27 D.L.R. 549.

[But see 21 Can. Ry. Cas. 135 (note).]

Fences—Right-of-way—Navigable river—Obstruction.

Under s. 254 of the Railway Act, 1906, the respondent is only obliged to maintain right-of-way fences turned in to the track at each end of the bridge over the Souris river, a stream on which timber may be floated; therefore, under s. 230 the respondent is prohibited from placing fences, which would amount to an obstruction, across the river.

Abrey v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 17.

Contiguous parallel lines—Private lands—Responsibility—Joint tortfeasors.

The provisions of s. 254 of the Railway Act, 1906, as to fencing the right-of-way apply so as to require a fence between two contiguous parallel lines of different railway companies, and default in maintaining same may involve both in responsibility for the killing of cattle straying upon the track because of a defect in the railway fencing adjacent to private lands.

Legault v. Montreal Terra Cotta Co., 20 D.L.R. 388.

STANDARD OF FENCES—STATUTORY OBLIGATIONS.

The statutory obligation imposed upon railway companies to provide fences which would prevent cattle and other animals from getting on the railway is a sufficient protection to the public, and it is inadvisable for the Board to prescribe any standard fence.

Re Standard Railway Fences, 29 W.L.R. 452.

NEGLECT OF COMPANY TO FENCE RIGHT-OF-WAY—INJURY TO ADJOINING LAND BY CATTLE STRAYING—BOUNDARY FENCES.

Under s. 145 of the Alberta Railway Act, 1907, dealing with damages for failure of a railway company to fence a right-of-way, and being the counterpart of s. 194 of the Dominion Railway Act, as it stood from 1890 until 1903, the duty of the company extended only to fencing for the purpose of preventing animals from being injured by the company's trains and engines, and did not impose the duty of erecting boundary fences to prevent animals from straying from the right-of-way to adjoining lands. [Grand Trunk Ry. Co. v. James, 31 Can. S.C.R. 420, applied and followed; Winterburn v. Edmonton Yukon & Pacific Ry. Co., 1 Alta. L.R. 92, 298, referred to.]

Philip v. Canadian North-Western Ry. Co., 28 W.L.R. 451, 6 W.W.R. 1220.

B. Injury to Animals; Cattle Guards.

See also C., p. 395, and D., p. 398.

STATEMENT OF DEFENCE—LEAVE TO PLEAD OTHER DEFENCES WITH "NOT GUILTY BY STATUTE"—INJURY TO ANIMALS ON TRACK—CATTLE GUARDS.

Daniel v. Can. Pac. Ry. Co., 6 W.L.R. 538.

[Followed in Lougheed v. Hamilton, 1 Alta. L.R. 17, 7 W.L.R. 204.]

NEGLECT TO FENCE—INJURY TO CROPS ON ADJACENT FARM BY CATTLE TRESPASSING.

Pempeit v. Can. Northern Ry. Co., 12 W.L.R. 384 (Alta.).

ANIMALS KILLED ON TRACK—DUTY TO FENCE—UNENCLOSED LANDS.

(1) Where the locality is one in which the lands on either side of the railway right-of-way are not enclosed and either settled or improved, there is no liability on the defendants to fence. (2) Where animals are killed on railway property, and there is no evidence of the existence of any highway, the burden was on the defendants, under s. 294 of the Railway Act, 1906, to shew that the animals were at large through the negligence or wilful act or omission of the owner; and they satisfy this onus by shewing, from the plaintiff's own evidence, that when his horses were let out of the stable they could go anywhere they wished—that no restraint was imposed on them, and no care taken to see that they did not go directly to the railway track. Whether cattle are "at large" or no, depends on whether they are under restraint or control, quite irrespective of whether they are on their owner's land or not. If, however, the animals were not "at large" s. 294 did not apply, and the plaintiff had no cause of action, because the defendants were under no liability to fence.

Krenzenbeck v. Can. Northern Ry. Co., 13 W.L.R. 414, 14 Can. Ry. Cas. 226.

Animals killed on track—Highway crossing—Insufficient cattle guards.

The plaintiff's horse got on the right-of-way of the defendants, and was killed by a passing train. The evidence shewed that the animal got on the right-of-way from the highway, where he was at large, being frightened and driven there by the train which killed him; he was not struck until after he was in the right-of-way and had passed over three cattle guards: —Held, that the defendants could not escape liability under s. 294 (4) of the Railway Act, 1906, on the ground that the animal did not stray but was driven by their train into the right-of-way; the cattle guards at the highway crossing was not "sufficient," within the meaning of s. 254 (3), because the animal did get on the railway. Parliament has imposed on railway companies the absolute duty to protect their lines from animals. [Becker v. Can. Pac. Ry. Co., 5 W.L.R. 570, approved.]

Clare v. Can. Northern Ry. Co., 17 W.L.R. 536 (Alta.).

Culvert—Duty to fence—Negligence.

A natural watercourse, which flowed through a culvert under a railway track, dried up in the summer, and to prevent cattle from passing through it the railway company had placed gates in the culvert, which they neglected to keep up, and by reason of the absence thereof, of which the company was duly notified, the plaintiff's cattle, which were lawfully pasturing in a field on one side of the track, got through the culvert into a field on the other side of the track, and from thence on to the railway track, where they were injured:—Held, that the defendants were bound to keep the watercourse as part of their railway properly fenced, and were liable for the damages sustained by the plaintiff.

James v. Grand Trunk Ry. Co., 1 Can. Ry. Cas. 407, 31 O.R. 672.

[Affirmed in 1 O.L.R. 127, 1 Can. Ry. Cas. 409; reversed in 31 Can. S.C.R. 420; 1 Can. Ry. Cas. 422; approved in McKellar v. Can. Pac. Ry. Co., 14 Man. L.R. 618; distinguished in Arthur v. Central Ont. Ry. Co., 11 O.L.R. 537; Davidson v. Grand Trunk Ry. Co., 5 O.L.R. 574, 2 Can. Ry. Cas. 371; Fensom v. Can. Pac. Ry. Co., 7 O.L.R. 254; Winterburn v. Edmonton Y. & P. Ry. Co., 1 Alta. L.R. 315; followed in Hunt v. Grand Trunk Pac. Ry. Co., 18 Man. L.R. 503, 10 W.L.R. 581; referred to in Daigle v. Temiscouata Ry. Co., 37 N.B.R. 223; Winterburn v. Edmonton Y. & P. Ry. Co., 1 Alta. L.R. 95.]

Culvert—Animals on track—Duty to fence—Negligence.

The plaintiff's horses, which were in a field on one side of the defendants' line of railway, passed to a field on the other side through an unfenced culvert over which the line ran, and the fence in that field being broken, wandered to the highway, and then at a crossing went on the line of railway and were killed:—Held, that the defendants were bound to fence the culvert, and that not having done so they could not set up that the horses were not lawfully on the highway, or defeat the plaintiff's claim to damages. Judgment of Street, J., 1 Can. Ry. Cas. 407, 31 O.R. 672, affirmed. [Young v. Erie & Huron Ry. Co., 27 O.R. 530, commented on.]

James v. Grand Trunk Ry. Co., 1 Can. Ry. Cas. 409, 1 O.L.R. 127.

[Reversed in 31 Can. S.C.R. 420, 1 Can. Ry. Cas. 422.]

Duty of fencing a culvert—Negligence—Cattle on highway.

A railway company is under no obligation to erect or maintain a fence on each side of a culvert across a watercourse and where cattle went through the culvert into a field and from thence to the highway and straying on to the railway track were killed, the company was not liable to their owner.

Grand Trunk Ry. Co. v. James, 1 Can. Ry. Cas. 422, 31 Can. S.C.R. 420.

[Distinguished in Davidson v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 371, 5 O.L.R. 574; followed in Fensom v. Can. Pac. Ry. Co., 2 Can. Ry. Cas. 376, 2 O.W.R. 479.]

DUTY TO FENCE RIGHT-OF-WAY—LIABILITY FOR DEATH OF ANIMAL NOT ACTUALLY STRUCK BY TRAIN.

Under subs. 3 of s. 194 of the Railway Act, 1888, as re-enacted by 53 Vict. c. 28, s. 2, a railway company is not liable in damages for the death of an animal which, having got on the track through a defective fence, is frightened by a train and then runs into a barbed wire in another part of the fence and is so cut by the barbs that it dies. The damage to the animal cannot be said to be "caused by any of the company's trains or engines," unless the animal is actually struck by the train or engine. [Dicta of the Judges in James v. Grand Trunk Ry. Co., 1 O.L.R. 127, 31 Can. S.C.R. 420, and decision in Winspear v. Accident Insurance Co., 6 Q.B.D. 42, followed.]

McKellar v. Can. Pac. Ry. Co., 3 Can. Ry. Cas. 322, 14 Man. L.R. 614.

[Followed in Hunt v. Grand Trunk Pac. Ry. Co., 18 Man. L.R. 604, 10 W.L.R. 581; distinguished in Winterburn v. Edmonton, Y. & P. Ry. Co., 1 Alta. L.R. 95.]

ANIMAL KILLED ON TRACK—ESCAPE TO HIGHWAY—OPEN GATE.

The plaintiff's horse escaped from a field by jumping a gate without the owner's knowledge and got upon the highway, went a short distance and on to the track where it was killed by a train:—Held, that the company was negligent for failing to have the place fenced or properly protected through which the horse reached the track, [Railway Act, 1903, s. 199] that the case could not have been withdrawn from the jury and that the plaintiff was entitled to recover the value of the horse, though not in charge of a competent person [Railway Act, 1903, s. 237 (4)].

Lebu v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 329, 12 O.L.R. 590.

[Followed in Parks v. Can. Northern Ry. Co., 14 Can. Ry. Cas. 247.]

DUTY OF MAINTENANCE—LACK OF FENCE BY CONSENT—ANIMALS OF THIRD PARTY.

S. 194 of the Railway Act, 1888, obliging railway companies to construct fences on both sides of their track, is imperative and a matter of public interest, and the responsibility it imposes extends to a third party whose animal being lawfully on neighbouring ground is killed owing to the absence of such fence, although it was at the request of the proprietor whose land bordered on the railway track, that the company omitted to make said fence.

Quebec Central Ry. Co. v. Pellerin, 6 Can. Ry. Cas. 1, 12 Que. K.B. 152.

[Considered in Carruthers v. Can. Pac. Ry. Co., 16 Man. L.R. 327, 6 Can. Ry. Cas. 13.]

ANIMAL KILLED ON TRACK—ABSENCE OF FENCE—LANDS NOT IMPROVED.

The railway line of the defendants passes through the land of the plaintiff which is owned, occupied, and cultivated by him. There is no fence whatever on or around plaintiff's land, nor on either side of the railway. Plaintiff's cow was pasturing on his land south of the railway when she ran on the track and was killed. Held, that the lands adjoining the railway must not only be improved or settled but also enclosed before the company is required to erect fences under s. 199 of the Railway Act, 1903.

Schellenberg v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 29, 3 W.L.R. 457.

[Referred to in McLeod v. Can. North. Ry. Co., 8 Can. Ry. Cas. 39, 18 O.L.R. 616.]

INJURY TO CATTLE—CROSSING—SPECIAL AGREEMENT—TENANT.

S. 237, subs. 4, of the Railway Act, 1903, enacts that: "When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of such animals so killed or injured shall be entitled to recover the amount of such loss or injury against the company . . . unless the company . . . establishes that such animals got at large through the negligence . . . of the owner or his agent . . . ":—Held, that, on the proper construction, the reference in the above section is not to animals getting upon the railway from an adjoining enclosure, but only to animals at large upon the highway or otherwise at large; and that it can have no reference to animals escaped from an adjoining field where, apart from any defect in railway fencing, they were properly enclosed. The action was brought for the loss of cattle of the plaintiff which escaped from his enclosure and got upon the railway and were killed. The plaintiff was a lessee from the owner for one year, and his animals got on the railway owing to a defective gate at the farm crossing. Prior to the plaintiff's lease the owner had agreed with the defendants that he might put in the crossing provided he did it himself and would keep his gates up, and that the defendants should not be responsible for anything he might lose on that crossing:—Held, that this agreement exonerated the defendants, the plaintiff being bound by it whether he knew it or not when he took his lease:—Held, also, per Riddell, J., that the plaintiff's contributory negligence disentitled him to recover. It was proved by evidence properly admitted that the plaintiff had agreed with the owner to keep up the gates, and while this could not be relied upon by the defendants as an estoppel, or, in itself a perfect defence by way of contract, it was cogent evidence of contributory negligence, for the plaintiff knew it was his duty to keep the gate in repair and he knew that the gate was not a safe gate, yet he deliberately put his animals into the field.

Yeates v. Grand Trunk Ry. Co., 7 Can. Ry. Cas. 4, 14 O.L.R. 63.

[Discussed in Woodburn Milling Co. v. Grand Trunk Ry. Co., 19 O.L.R. 276; referred to in Clayton v. Can. Northern Ry. Co., 17 Man. L.R. 433, 7 Can. Ry. Cas. 355; referred to in Higgins v. Can. Pac. Ry. Co., 18 O.L.R. 12.]

LIABILITY TO FENCE—LANDS NOT ENCLOSED—CATTLE AT LARGE.

The plaintiff's cattle passed from his land (lots 41 and 42) on to the defendants' right-of-way, and westerly thereon to and across lots 43 and 44, and from off lot 44 again on to the right-of-way, where they were killed by a passing train. The railway was not fenced across these lots, nor for many miles on either side of the plaintiff's lands. South of the railway the plaintiff's land was improved and settled, and was enclosed in the following manner: A colonization road ran south-westerly through the plaintiff's land and was fenced on each side; there was a fence on the east side of lot 41 from the colonization road to the right-of-way, and on the west side of lot 42 there was a fence from the colonization road to a point within 70 rods of the right-of-way, of which 70 rods about 50 rods was a "slash" of upturned trees, whose roots had been burned and then blown down and left just as they fell; for 20 rods south from the right-of-way there was no fence or other obstruction but a ditch had been dug by the defendants upon their right-of-way south of the roadbed extending westward on defendants' land to the north of plaintiff's land and part of McMullen's (the adjoining owner) land, until it turned southward for a distance of more than 20 rods to a creek on lot 44, for the purpose of carrying off the water from defendants' land. The remainder of plaintiff's land south of the colonization road was in a state of nature and used for pasture except a small enclosed portion. There were no fences on McMullen's land other than that referred to on the west side of plaintiff's land. The plaintiff claimed the right, under an agreement, with McMullen to pasture his cattle on lots 43 and 44:—Held, (1) that neither the plaintiff's nor McMullen's land was so enclosed as to make the defendants liable to erect a fence between their right-of-way and these lands as required by s. 254 of the Railway Act, 1906, and s. 199 of the Railway Act, 1903. [Phair v. Can. Northern Ry. Co., 5 Can. Ry. Cas. 334, referred to.] (2) That the plaintiff's cattle having the right to be on McMullen's land were not at large within the meaning of subs. 4 of s. 294 of the Railway Act, 1906, and the defendants were not liable for their loss, but even if the cattle were considered to be at large, the plaintiff could not recover. [Carruthers v. Can. Pac. Ry. Co., 6 Can. Ry. Cas., at p. 19, followed.]

Biddeson v. Can. Northern Ry. Co., 7 Can. Ry. Cas. 17.

ANIMAL KILLED ON TRACK—FARM CROSSING—ANIMAL AT LARGE.

Action for damages for a mare killed on the defendants' railway track while the mare was running at large, having presumably got upon the railway track at the farm crossing of a man named Morton at which there were cattle guards but no gates:—Held, Martin, J., dissenting, that in the absence of evidence that the mare was unlawfully at large at Morton's crossing, the railway company was negligent in not maintaining gates at Morton's crossing, and that, according to the law to be administered in British Columbia, she was "not wrongfully on the railway" and the owner was entitled to recover:—Held, further, that the fact of farm crossings being provided with cattle guards instead of gates at the request of Morton, the owner, did not relieve the defendants from their statutory duty under the Railway Act to maintain gates at this point. Decision of Irving, J., at the trial, reversed.

Coen v. New Westminster Southern Ry. Co., 7 Can. Ry. Cas. 60, 5 W.L.R. 214.

"LOCALITY," MEANING OF—OBLIGATION OF RAILWAY TO FENCE.

Plaintiff's animals were killed on defendants' track, the right-of-way of which passed in front of his land. There was no fence erected on this portion of land, either by the railway company or plaintiff. The north end of the plaintiff's ranch was within 800 yards of the municipal limits of Fernie. There were about two acres of the ranch with a frontage of 450 feet on the right-of-way, and about 200 feet off was an enclosure used as a goat pen, about 20 by 30 feet. There was also a potato patch of about three-quarters of an acre, and a moveable fence separating this patch from a grassy portion. This, together with a piece of fencing along a waggon road, but not reaching the right-of-way by some 225 feet, was the only fencing on the ranch. There was evidence of scattered places in the vicinity, some being fenced and others not, but with unfenced and unoccupied land intervening:—Held, by the Full Court, reversing the holding of Wilson, Co. J., (Clement, J., dissenting), that as the land in question per se could not be classed as a settled or inclosed locality, there was no obligation on the company to fence its right-of-way in the absence of an order from the Board to do so; and that their contiguity to the limits of an incorporated town did not constitute the lands a portion of the settled locality of such town. Having regard to the powers given the Board by s. 254 of the Railway Act, 1906, and particularly the language of subs. 4, the word "locality" must be construed without reference to the proximity of town limits.

Cortese v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 345, 13 B.C.R. 322.

Liability to fence—Lands not enclosed—Cattle at large.

S. 254 (4) of the Railway Act, 1906, is not retroactive. The exemption from the obligation to erect fences in localities described in this subs. does not relieve a railway company from liability for animals killed on the railway where fences were erected before the passing of the Act, and were thereafter maintained. The track of a railway company passing through a locality in which the lands on either side were not enclosed and either settled or improved (s. 254 (4)) was fenced on both sides where adjacent to a public highway. The plaintiff's cow was turned out of its stable to pasture on unenclosed land and wandered along the public highway (which highway ran parallel to the railway) until it got upon the property of the defendants, through their defective fence, where it was killed:—Held, (1) that the defendants had not established upon the evidence that such animal had got at large through the negligence or wilful act or omission of the plaintiff. (2) That the defendants having erected the fence although not bound by law to do so and maintained it before and since the passing of the Act, are not exempted from liability to the plaintiff under s. 254 (4).

Quinn v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 143.

Damage to crops by animals—Access from right-of-way—Liability.

S. 254 of the Railway Act, 1906, requires the railway to fence its right-of-way under certain conditions, and subs. 3 provides "such fences . . . shall be suitable and sufficient to prevent cattle and other animals from getting on the railway." S. 427 provides that "every company omitting to do any act or thing required to be done . . . is liable to any person injured thereby for the full amount of damages sustained by such omission":—Held, that where the railway company had not fenced its right-of-way adjacent to the plaintiff's lands, and cattle came in on such lands and caused damage to crops by reason of the company's neglect to erect fences, the railway company is liable notwithstanding that the rest of the lands are not enclosed by a "lawful fence." [Remarks on Fence Ordinance (N.W.T. 1903, 2nd Session, c. 28), subss. 2, 7.]

Winterburn v. Edmonton, Yukon & Pacific Ry. Co., 9 Can. Ry. Cas. 1, 1 Alta. L.R. 92.

[Affirmed in 1 Alta. L.R. 298, 9 Can. Ry. Cas. 7; considered in Brox v. Edmonton Y. & P. Ry. Co., 2 Alta. L.R. 381; White v. Grand Trunk Pac. Ry. Co., 2 Alta. L.R. 546; Hunt v. Grand Trunk Pac. Ry. Co., 18 Man. L.R. 609, 613, 10 W.L.R. 581.]

Omission to fence—Liability—Damage to adjoining landowner occasioned by animals—History of legislation.

Where a statutory duty is imposed, neglect of the duty gives the party damnified thereby a right of action, unless the person damnified is excluded from a particular class of persons who are alone intended to be benefited by the statute. The fences required to be erected by the railway company under s. 254 of the Railway Act, 1906, are for all purposes which they may serve, and consequently, by virtue of s. 427, the company is liable for all damage of whatever kind resulting from the omission to fence:—Held, affirming the judgment of Harvey, J., that "where the railway company had not fenced its right-of-way, adjacent to the plaintiff's lands, and cattle came in on such lands, and caused damage to crops, by reason of the company's neglect to erect fences, the railway company is liable notwithstanding that the rest of the lands are not enclosed by a 'lawful fence.'" Per Stuart, J.:—The Fence Ordinance (N.W.T. 1903, 2nd session, c. 28) has no application to a case where it is the duty of the person charged with damage to maintain that portion of the fence through which animals doing damage have entered. It makes no difference whether the rest of the lands are fenced or not. History and effects of the pleas of "Not guilty," and "Not guilty by statute," traced and discussed. The necessity of noting in the margin of the plea, the statute permitting the plea, and the particular statute relied on, discussed, with remarks ab inconvenienti in respect of these pleas: [Toll v. Can. Pac. Ry. Co., 1 Alta. L.R. 244, 8 Can. Ry. Cas. 291, quaere].

Winterburn v. Edmonton, Yukon & Pacific Ry. Co., 9 Can. Ry. Cas. 7, 1 Alta. L.R. 298.

Duty to fence—Injury to crops caused by cattle straying.

The duty of a railway company to provide under s. 254 of the Railway Act, 1906, fences and cattle guards suitable and sufficient to prevent cattle and other animals from getting on the railway, is prescribed only to protect the adjoining landowners from loss caused by their animals being killed or injured on the track; and, notwithstanding the general language of s. 427 of the Act which gives a right of action to anyone who suffers damages caused by the breach of any duty prescribed by the Act, an adjoining owner whose crops are injured by cattle straying on to his land from the railway track, in consequence of the absence of fences and cattle guards, has no right of action against the railway company in respect of such injury. Richards, J., dissented. [James v. G.T.R., 31 Can. S.C.R. 420; Gorris v. Scott (1874), L.R. 9 Ex. 125, and McKellar v. C.P.R. (1904), 14 Man. L.R. 614, followed; Winterburn v. Edmonton Ry. Co. (1908), 8 W.L.R. 815, not followed.]

Hunt v. Grand Trunk Pacific Ry. Co., 9 Can. Ry. Cas. 365, 18 Man. L.R. 603.

Agreement—Protection of railway from animals—Gate left open—Escape and destruction of animal.

A siding was constructed by the defendants from the main line of their railway to the plaintiffs' mills, which stood in a two-acre enclosure bounded on one side by the defendants' fence. At the point where the siding entered the plaintiffs' land the defendants constructed and maintained a gate across the siding and connected with the fence on each side; this gate was usually kept shut by the defendants' servants except when taking cars to or from the mills, but it was not alleged that there was any agreement that the defendants should keep it shut. The gate was left open by the defendants' servants on one occasion after they had removed a car from the siding, and the plaintiffs' horse, which was loose in the two-acre yard, escaped through the gate and was run over by a train of the defendants on the permanent way. In an action to recover damages for the loss of the horse, the jury found that the injury was caused by the negligence of the defendants' servants in leaving the gate open. A clause in the agreement between the parties concerning the use and maintenance of the siding provided that the plaintiffs should "protect the railway of the company from cattle and other animals escaping thereupon from such portion of the siding as may be outside of the lands of the company":—Held, that this meant that the plaintiffs should keep animals from escaping from that part of their land occupied by the siding to the property of the company; the defendants owed no duty to the plaintiffs to keep their animals away from the line of railway; the placing of the gate by the defendants, their custom of closing it, and the complaints of the plaintiffs that it was sometimes left open, could not create such a duty; and, therefore, there could be no negligence on the part of the defendants. Per Riddell, J., that in the construction of the agreement it was of no significance that the clause above quoted was in the printed form of the defendants, a great part of the form having been struck out and much matter written in; also, that the practice of importing implied terms into a contract is a dangerous one; and there could be no implication here of a condition that the plaintiffs would be relieved from the agreement if the defendants left the gate open. [Judgment of the County Court of Middlesex affirmed; Britton, J., dissenting.]

Woodburn Milling Co. v. Grand Trunk Ry. Co., 9 Can. Ry. Cas. 374, 19 O.L.R. 276.

UPKEEP OF FENCES ALONG RIGHT-OF-WAY—ANIMALS KILLED WHILE WANDERING ON TRACKS—FENCES IN BAD STATE OF REPAIR.

Railway companies who do not maintain their fences and gates in the condition provided by law, are at fault and liable for the loss of animals who thereby gain access to the tracks and are killed.

Bouchard v. Quebec Ry. Light & Power Co., 14 Can. Ry. Cas. 241, 41 Que. S.C. 385.

BREACH OF STATUTORY DUTY—LIABILITY.

A railway company which fails to maintain such fences and gates, as are required by the Railway Act of Quebec, commits a breach of duty and will as a result be presumed responsible for any damages caused to animals escaping on to its right-of-way unless it can rebut absolutely the statutory presumption that it is responsible for the killing of the animals on the track. [Can. Pac. Ry. Co. v. Carruthers, 39 Can. S.C.R. 251, 7 Can. Ry. Cas. 23, and Rogers v. G.T.P. Ry. Co., 2 D.L.R. 683, specially referred to.]

Rowe v. Quebec Central Ry., 14 Can. Ry. Cas. 245, 3 D.L.R. 175.

CATTLE GUARDS—FAILURE TO PROVIDE.

In an action to recover the value of a horse claimed to have been killed by an engine of the defendants' railway, the fact that the statement of claim alleges an absence of cattle guards at the railway crossing on plaintiff's land, does not preclude the plaintiff from relying on evidence adduced at the trial as to a defective fence, where the statement of claim does not specifically allege that the loss of the horse was due to the absence of cattle guards, but alleges in general terms that it was due to the negligence of the defendants.

Stitt v. Can. Northern Ry. Co., 15 Can. Ry. Cas. 333, 23 Man. L.R. 43, 10 D.L.R. 544.

ANIMALS ON TRACKS—ENGINEER'S DUTY.

Prima facie there is no duty on the engineer operating a railway train who discovers stray animals in danger on the right-of-way over which he is passing to stop his train for the purpose of driving such animals from the track so as to save them from injury.

Sporle v. Grand Trunk Pacific Ry. Co., 17 Can. Ry. Cas. 71, 17 D.L.R. 367.

C. Defective Fences.

See also B., p. 387, and D., p. 398.

REPAIR OF FENCES.

As the railway law imposes the duty upon railway companies of keeping in proper repair the fences on each side of the railway track, it follows that they are liable in damages for injury to an animal on account of one of these fences being left with an unprotected opening of sufficient size to enable an animal to pass through, even when such opening is at a place where there is a ditch for draining the land on each side of the railway.

Huot v. Quebec Ry., L. & P. Co., 2 Can. Ry. Cas. 367, 21 Que. S.C. 427.

CATTLE GETTING ON TO HIGHWAY AND TRACK—NEGLIGENCE.

The plaintiff was the owner of a field, bounded on one side by the main line of the defendants' railway, and on the other side by a switch thereof, and abutting on a highway, which was crossed by both tracks. Owing to a defect in the fence between the switch and the field, the plaintiff's cow escaped from the field on to the switch, which she crossed and going over the land of a private owner, which was not fenced off from the switch, and then along a lane she went on to the highway and then proceeded along it to the main line, whence by reason of a defective cattle guard she got on to the track and was killed by a passing train:—Held, that the defendants were liable therefor. [Grand Trunk Ry. Co. v. James, 1 Can. Ry. Cas. 422, distinguished.]

Davidson v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 371, 5 O.L.R. 574.
[Distinguished in Fensom v. Can. Pac. Ry. Co., 7 O.L.R. 254.]

BARBED WIRE FENCE—INHERENT DANGERS OF—INJURY TO HORSE THEREFROM.

The company maintained along its line of railway a barbed wire boundary fence, without any pole, board or other capping connecting the posts; plaintiffs' horse, picketed in their field adjoining, became frightened from some cause unexplained, and ran into the fence, receiving injuries on account of which it had to be killed:—Held, that the fence was not inherently dangerous, and therefore the company was not liable. The test is whether the fence is dangerous to ordinary stock under ordinary conditions, and not whether it is dangerous to a bolting horse. Judgment of Leamy, Co. J., reversed, Irving, J. dissenting.

Plath and Ballard v. Grand Forks & Kettle River Valley Ry. Co., 3 Can. Ry. Cas. 331, 10 B.C.R. 299.

IMPROVED LANDS.

There was a defective fence, which defendants had erected, along the line between their right-of-way and plaintiff's land. Owing to its defects the cow got on to the right-of-way and was killed by one of the defendants' trains. The trial Judge held that defendants were under a duty to maintain the fence and gave judgment in plaintiff's favour:—Held, affirming judgment of the trial Court, that under s. 199 of the Railway Act, 1903, there is a duty cast on a railway company to fence where the adjoining land is either (1) improved or (2) settled and enclosed.

Dreger v. Can. Northern Ry. Co., 5 Can. Ry. Cas. 332, 15 Man. L.R. 386.

[Not followed in Schellenberg v. Can. Pac. Ry. Co., 16 Man. L.R. 155; referred to in McLeod v. Can. Northern Ry. Co., 9 Can. Ry. Cas. 39, 18 O.L.R. 616.]

ANIMALS KILLED ON TRACK—KNOWLEDGE.

Four horses, the property of the plaintiff, escaped through an opening on to a highway, thence through an opening on to a neighbour's land and thence through an opening in defendants' fence to the track where they were injured by one of defendants' trains:—Held (affirming Richards, J.), 6 Can. Ry. Cas. 13, 3 W.L.R. 455, that under the Railway Act, 1903, ss. 199, 237, subs. 4, the defendants were liable.

Carruthers v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 15, 16 Man. L.R. 323.

[Affirmed in 39 Can. S.C.R. 251, 7 Can. Ry. Cas. 23; followed in Biddeson v. Can. Northern Ry. Co., 7 Can. Ry. Cas. 17; adhered to in Clayton v. Can. Northern Ry. Co., 17 Man. L.R. 431; referred to in Atkin v. Can. Pac. Ry. Co., 18 Man. L.R. 619; Higgins v. Can. Pac. Ry. Co., 18 O.L.R. 12; McLeod v. Can. Northern Ry. Co., 9 Can. Ry. Cas. 39, 18 O.L.R. 616; Coen v. New Westminster South. Ry. Co., 12 B.C.R. 424; McDaniel v. Can. Pac. Ry. Co., 13 B.C.R. 53.]

ANIMALS AT LARGE—TRESPASS FROM LANDS NOT BELONGING TO OWNER.

C.'s horses strayed from his enclosed pasture situated beside a highway which ran parallel to the company's railway, entered a neighbour's field adjacent thereto, passed thence upon the track through an opening in the fence which had not been provided with a gate by the company, and were killed by a train. There was no person in charge of the animals, nor was there evidence that they got at large through any negligence or wilful act attributable to C.:—Held, affirming the judgment appealed from (16 Man. L.R. 323, 6 Can. Ry. Cas. 13), that, under the provision of subs. 4, of s. 237 of the Railway Act, 1903, the company was liable in damages for the loss sustained notwithstanding that the animals had got upon the track while at large in a place other than a highway intersected by the railway.

Can. Pac. Ry. Co. v. Carruthers, 7 Can. Ry. Cas. 23, 39 Can. S.C.R. 251.

[Referred to in Rowe v. Quebec Central Ry. Co., 14 Can. Ry. Cas. 245, 3 D.L.R. 175; followed in Parks v. Can. Northern Ry. Co., 14 Can. Ry. Cas. 247.]

DAMAGES TO TRESPASSING CATTLE.

A railway company is liable for damages for killing a cow which was at large on the highway with the knowledge of the owner contrary to the Railway Act, 1903, and which strayed from the highway to the land of D., and from there to the railway track through a defective fence which the defendant company were obliged to maintain. The company are liable for damage done to the land of an adjoining owner by cattle of a neighbour trespassing by reason of a defective fence which it was the duty of the company to maintain.

Lizotte v. Temiscouata Ry. Co., 6 Can. Ry. Cas. 41, 37 N.B.R. 397.

[Observed in Winterburn v. Edmonton, Y. & P. Ry. Co., 1 Alta. L.R. 97; referred to in McLeod v. Can. North Ry. Co., 9 Can. Ry. Cas. 39, 18 O.L.R. 616; relied on in Winterburn v. Edmonton, Y. & P. Ry. Co., 1 Alta. L.R. 309.]

ANIMAL KILLED BY FALL FROM BRIDGE.

The plaintiff was the owner of a farm adjoining the defendants' railway. The tenant of the plaintiff made an opening in the railway fence without the knowledge of the defendants through which a few hours after the plaintiff's horse escaped on to the railway, where it was killed by falling from a bridge:—Held, that the defendants were not liable for the act of a third party (the tenant) in making an opening in the fence.

Flewelling v. Grand Trunk Ry. Co., 6 Can. Ry. Cas. 47.

[Followed in Atkins v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 204, 18 Man. L.R. 624, 11 W.L.R. 1.]

ANIMALS KILLED ON TRACK—ESCAPE TO HIGHWAY—OPEN GATE—FENCE AND GATE NOT OF SUFFICIENT HEIGHT.

The plaintiff's horses escaped from his field by jumping over a fence of insufficient height and going upon the highway, went a short distance, got on to the track through an open gate leading to defendants' station ground, where they were killed by a train:—Held, that the company was not negligent by failing to keep their gate closed through which the horses reached the track, and the negligence of the plaintiff in having a fence of insufficient height was the cause of the accident.

Laporte v. Can. Northern Quebec Ry. Co., 8 Can. Ry. Cas. 137.

[Reversed in 36 Que. S.C. 179.]

CATTLE AT LARGE—ANIMAL KILLED BY FALLING FROM RAILWAY BRIDGE.

A heifer, while being fed in the stable of an hotel adjacent to the defendants' railway, escaped into the yard of the hotel and from thence on to the defendants' railway through a defective fence. The animal was pursued along the track by the man who had her in charge, till she came to a bridge, and falling through, fell a distance of about 30 feet to the ground beneath and was so severely injured that she had to be killed:—Held, that the defendants were not liable under the Railway Act, 1906, s. 427 (2), the animal not having been killed by the defendants' train. [Young v. Erie & Huron Ry. Co., 27 O.R. 530, followed.]

Douglas v. Grand Trunk Ry. Co., 9 Can. Ry. Cas. 27.

SHEEP ESCAPING TO ADJOINING FARM—OPENING UNDER GATE AT FARM CROSSING—OPENINGS IN FENCE.

The plaintiff's sheep, without any negligence on his part, escaped from his farm into that of the adjoining owner, through which the defendants' railway ran, and thence having got upon the railway track were killed. There was a gate at a farm crossing on the adjoining owner's farm which had been raised by the defendants at the request of such adjoining owner, leaving an opening under the gate sufficient for the sheep to get through. There were also openings in the fence through which the sheep could have got upon the track; but there was no finding of the jury as to the place at which the sheep got upon the track:—Held, that the defendants were liable under s. 294 (4) of the Railway Act, 1906, even assuming that the sheep got upon the track through the opening under the gate. The effect of the words contained in the section, namely, "at large whether on the highway or not," is that the section is not limited to cattle being at large on the highway and thence getting upon the railway premises.

Higgins v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 34, 18 O.L.R. 12.

GAP LEFT IN FENCE—ANIMALS—INJURY TO—WHEN "AT LARGE"—CONTRIBUTORY NEGLIGENCE—LANDS ENCLOSED.

The plaintiffs had leased a field, on which they pastured their horses, adjoining the track of the defendants' railway, from which it was separated by a fence erected by the defendants, in which they had left a gap, through which the horses strayed on to the track, where they were run down by a train and killed:—Held, that the horses were not "at large" within the meaning of s. 294 of the Railway Act, 1906, which was in force at the date of the accident, and which does not cover the case of such owners as the plaintiffs, who were using their pasturing land adjoining the railway track in the usual manner for the purpose of keeping and feeding their cattle, nor could such owners be considered as "suffering" their animals to "enter upon" the railway, and so losing their right of action under s. 295 (e). (2) There is no express provision in the Railway Act, 1906, equivalent to s. 16 of the Consolidated Railway Act of 1879, as amended by 46 Vict. c. 24, s. 9 (D.), under which it was decided in **Davis v. Can. Pac. Ry. Co.**, 12 A.R. (Ont.) 724, that the question of contributory negligence did not arise where the proximate cause of the damage was the omission of the railway company to make or maintain fences as required by the statute. (3) Notwithstanding the absence of an express provision such as is above referred to, the defendants were liable to the plaintiffs for the damages sustained by them, by reason of the duty imposed upon the defendants by s. 254 of the Railway Act, 1906, to "erect and maintain upon the railway" fences "suitable and sufficient to prevent . . . animals from getting on the railway," for breach of which duty a statutory right of action against the company is given by subs. 2 of s. 427 of the Act, to any person injured, for the full amount of damage sustained thereby. (4) Prima facie the fence was erected by the company in accordance with their statutory obligation to do so where the lands through which the railway passes are "enclosed and either settled or improved" (s. 254, subs. 4); and the onus lay on the defendants to shew that at the time when the fence was erected it was not "required" by the Act. Judgment of Clute, J., affirmed. [New Brunswick Ry. Co. v. Armstrong (1883), 23 N.B.R. 193, approved and followed.]

McLeod v. Can. Northern Ry. Co., 9 Can. Ry. Cas. 39.

[Followed in Palo v. Can. Northern Ry. Co., 16 Can. Ry. Cas. 1.]

ANIMALS KILLED ON TRACK—DEFECTIVE SWING-GATE.

Action to recover damages for loss of horses killed by defendants' train, where it crossed plaintiff's farm. Evidence was received as to plaintiff's horses getting on defendants' tracks by reason of a defective gate which it was the defendants' duty to maintain. The jury found in plaintiffs' favour, and Boyd, C., entered judgment accordingly. Divisional Court affirmed above judgment on the ground that defendants had not discharged their statutory obligation to maintain the gate with proper hinges and fastenings, as required by Railway Act, 1906, s. 254, and there being no evidence of contributory negligence as provided for by s. 295.

Dolsen v. Can. Pac. Ry. Co., 12 Can. Ry. Cas. 246.

D. Animals at Large.

STRAYING ANIMAL KILLED ON TRACK—MUNICIPAL BY-LAW PROHIBITING ANIMALS RUNNING AT LARGE—VALIDITY—DEFECTIVE FENCES.

McDonnell v. Inverness Ry. & Coal Co., 4 E.L.R. 365 (N.S.).

DAMAGE TO TRESPASSING CATTLE.

Where the plaintiff allowed his cattle to run at large upon the highway, and a calf got upon the railway track from land adjoining the plaintiff's at a place where there was no fence along the track, it was held that the calf got at large through the negligence or wilful act or omission of the plaintiff, and therefore under s. 294, subs. 4, of the Railway Act, 1906, he could not recover.

Dixon v. Can. Pac. Ry. Co., 39 N.B.R. 305.

ANIMALS KILLED ON TRACK—LIABILITY.

Where animals are run over by an engine or train on a railway track, the onus is on the railway company, under subs. 4 of s. 294 of the Railway Act, 1906, to shew that the animals got at large through the negligence or wilful act or omission of the owner. [Parks v. Can. Northern Ry. Co., 15 W.L.R. 445, 18 W.L.R. 118, followed.]

Foster v. Can. Pac. Ry. Co., 19 W.L.R. 623.

STRAYING ANIMALS—DUTY AS REGARDS TRESPASSERS—HERDING STOCK.

A railway company is not charged with any duty in respect of avoiding injury to animals wrongfully upon its line of railway until such time as their presence is discovered. [1 W.L.R. 356, 6 Terr. L.R. 168, reversed.]

Can. Pac. Ry. Co. v. Eggleston, 36 Can. S.C.R. 641.

[Considered in McLean v. Rudd, 1 A.L.R. 508; applied in Coen v. New Westminster Southern Ry. Co., 12 B.C.R. 425.]

ACTION FOR HORSES KILLED ON TRACK.

In an action for damages for the value of horses killed by a train, the plaintiff need not plead negligence of the railway company under the Railway Act, 1903, but the defendants may plead the general issue and may give the Railway Act and special statutes in evidence thereunder.

Rocheleau v. Grand Trunk Ry. Co., 9 Que. P.R. 402.

ANIMALS ON TRACK—WILFUL ACT OR OMISSION.

Action to recover damages for horses killed on defendants' track. It was admitted that at the place where the animals reached the railway the defendants were under no liability to fence, under subs. 4 of s. 254 of the Railway Act, 1906; and, in fact, they had not fenced. The plaintiff contended that he was entitled to recover under subss. 4, 5 of s. 294:—Held, that the application of subss. 4, 5 of s. 294 is not restricted to cases where the railway company are under a liability to fence; and that, under these subsections, the railway company can escape liability only by shewing that the animals got at large through the negligence or wilful act or omission of the owner. [History of the legislation and review of the authorities.] And held, upon the evidence, that the animals, in the circumstances set out below, were not at large through the negligence or wilful act or omission of the plaintiff.

Parks v. Can. Northern Ry. Co., 15 W.L.R. 445 (Man.).

INJURIES TO STRAYING ANIMALS.

Plaintiff left a number of horses in a pasture partially enclosed, being fenced in two sides, bounded by a shallow creek on the third side and unenclosed on the fourth. He had been using this pasture for the purpose of keeping his horses over night for some years, and up to the time in question none had ever strayed out. On this occasion the horses being left for some days unattended to on account of a severe storm left the pasture, there being no evidence as to how they escaped, and strayed on to the railway of defendants, where two of them were killed by a train, and one so seriously injured that it had to be destroyed. In an action for damages for the loss of the animals:—Held, that the plaintiff did not take reasonable precautions to safely keep the horses in question and prevent them from getting at large, and could not therefore, under the provisions of subs. 4 of s. 237 of the Railway Act, 1903, recover the value of those killed, there being no evidence of negligence on the part of the defendants. (2) That subs. 4 of s. 237, which reads "when any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train the owner . . shall be entitled to recover" means any cattle or animals at large upon the highway or upon other places than the highway.

Murray v. Can. Pac. Ry. Co., 1 S.L.R. 283.

Neglect to fence—Escape of animals from private way to track—Escape from highway.

Plaintiff's cattle, allowed to be at large by municipal by-law, strayed upon a path or track (not being a highway within s. 271 of the Railway Act, 1888), and thence from a farm lot, upon the unfenced railway track, and were killed:—Held, that the defendants were liable. Certain other cattle of the plaintiff's also strayed and entered upon the track from a highway crossing, and were killed:—Held, that the defendants were not liable. [Nixon v. Grand Trunk Ry. Co., 24 O.R. 124; Grand Trunk Ry. Co. v. James, 1 Can. Ry. Cas. 422, followed.]

Fensom v. Can. Pac. Ry. Co., 2 Can. Ry. Cas. 376, 2 O.W.R. 479.

[Varied in 7 O.L.R. 254; 3 Can. Ry. Cas. 231; 8 O.L.R. 688; 4 Can. Ry. Cas. 76; followed in Carruthers v. Can. Pac. Ry. Co., 16 Man. L.R. 328.]

Duty to maintain—Cattle running at large—Crown lands—Powers of municipalities.

The Railway Act, 1888, as amended by 53 Vict. c. 28, s. 2, enacts that, if in consequence of the omission of a railway company to erect and maintain a fence, "any animal gets upon the railway from an adjoining place where under the circumstances it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines." The plaintiff's cattle running at large in a municipality, as by one of the by-laws they were permitted to do, got upon Crown lands, and from the Crown lands on to the railway, and were killed on the track by one of the defendants' trains:—Held, that by virtue of the by-laws permitting running at large, the cattle were properly on the Crown lands, and hence the defendants were liable under the above enactment. Per Meredith, J. (dissenting):—Municipal bodies have no such control or power, either over private property or Crown lands, as to enable them to give a right to the cattle to be where they were when they strayed on to the railway track. Varying 2 Can. Ry. Cas. 376, 2 O.W.R. 479.

Fensom v. Can. Pac. Ry. Co., 3 Can. Ry. Cas. 231, 7 O.L.R. 254.

[Affirmed in 8 O.L.R. 688, 4 Can. Ry. Cas. 76.]

Crown lands—Powers of municipalities.

The Railway Act, 1888, s. 194 as amended by 53 Viet. c. 28, s. 2 enacts that, if in consequence of the omission of a railway company to erect and maintain a fence, "any animal gets upon the railway from an adjoining place where under the circumstances it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines," and that "no animal allowed by law to run at large shall be held to be trespassing on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there." The plaintiffs' cattle running at large in a municipality, as by one of the by-laws they were permitted to do, got upon Crown lands, and from the Crown lands, on to the railway, and were killed on the track by one of the defendant's trains:—Held, that notwithstanding the by-law permitting running at large, the cattle were not properly on the Crown lands; yet the defendants could not defend themselves by saying that they were trespassing there.

but were liable under the above enactments. The authority of a municipal council under R.S.O. 1897, c. 223, s. 546 (2) extends no further than to allow the running at large upon the roads and highways of the municipality. 3 Can. Ry. Cas. 231, 7 O.L.R. 254, affirmed.

Fensom v. Can. Pac. Ry. Co., 4 Can. Ry. Cas. 76, 8 A.L.R. 688.

CATTLE AT LARGE—INTERSECTION OF RAILROAD AND HIGHWAY.

On the proper construction of s. 237, subs. 4 of the Railway Act, 1903, while it is unlawful for the owner of cattle to permit them to be at large within half a mile of the intersection of a highway with a railway, and while if killed at the intersection, the railway is exempt from liability—if by reason of the failure of the company to comply with the statutory requirements as to fencing, construction of cattle guards, etc., the cattle reach the line of railway and are killed or injured at a point on the railway other than the intersection, the company are liable, unless they can establish affirmatively that the owner was guilty of negligence. The mere fact that the cattle were at large or the fact that they were not in charge of a competent person does not prevent the plaintiff's recovery.

Arthur v. Central Ontario Ry. Co., 5 Can. Ry. Cas. 318, 11 O.L.R. 537.

[Considered in Carruthers v. Can. Pac. Ry. Co., 16 Man. L.R. 329; followed in Lebu v. Grand Trunk Ry. Co., 12 O.L.R. 590, 5 Can. Ry. Cas. 329; referred to in McDaniel v. Can. Pac. Ry. Co., 13 B.C.R. 52. See Bacon v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 325, 12 O.L.R. 196; followed in Parks v. Can. Northern Ry. Co., 14 Can. Ry. Cas. 247.]

ANIMAL KILLED ON TRACK—NEGLIGENCE.

In an action for damages for the loss of a horse killed by a train upon the defendants' track, the jury found that the horse was killed upon the property of the defendants, and that the defendants were responsible for that:—Held, that upon the proper construction of s. 237, subs. 4, of the Railway Act, 1903, a finding that the horse was killed upon the property of the defendants was sufficient to entitle the plaintiff to recover unless it was shewn by the defendants that the animal got at large through the negligence of the owner or custodian, and such negligence was sufficiently negatived, in view of the Judge's charge, by the finding of the jury that defendants were responsible. Judgment of the county Court of Simcoe reversed.

Bacon v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 325, 12 O.L.R. 196.

[Followed in Carruthers v. Can. Pac. Ry. Co., 16 Man. L.R. 329; Cortese v. Can. Pac. Ry. Co., 13 B.C.R. 323; Lebu v. Grand Trunk Ry. Co., 12 O.L.R. 590, 5 Can. Ry. Cas. 329; referred to in McDaniel v. Can. Pac. Ry Co., 13 B.C.R. 53; vide Arthur v. Central Ont. Ry. Co., 5 Can. Ry. Cas. 318, 11 O.L.R. 537; followed in Parks v. Can. North. Ry. Co., 14 Can. Ry. Cas. 247.

"NEGLIGENCE OF OWNER"—"IMPROVED OR SETTLED AND ENCLOSED."

Lands adjoining a railway must not only be improved or settled but also enclosed before the company is required to erect fences under s. 199 of the Railway Act, 1903:—An owner of lands adjoining the railway, but which the company is not bound to fence, cannot maintain an action under s. 237 (4) for the loss of a horse killed on the railway.

Phair v. Can. Northern Ry. Co., 5 Can. Ry. Cas. 334, 6 O.W.R. 137.

[Commented on in Re Can. North. Ry. Co., 42 Can. S.C.R. 475; referred to in Daigle v. Temiscouata Ry. Co., 37 N.B.R. 220; McLeod v. Can. Northern Ry. Co., 9 Can. Ry. Cas. 39, 18 O.L.R. 616; Biddeson v. Can. North. Ry. Co., 7 Can. Ry. Cas. 17.]

Cattle straying on track—Liability for killing—Meaning of "Otherwise."

Cattle being pastured in common by the occupiers of improved lands bordering on the defendant company's railway found their way to the track, and were killed by a passing train of the defendant company. It was proved that the defendants' fence along the common pasture was defective, that the company had notice of the defect and neglected to repair it, but there was no evidence as to how the cattle got on the track:—Held, that under the Railway Act, 1903, it might be inferred that the cattle found their way to the track through the defendants' defective fence, and a verdict for the plaintiff should have been sustained. Subs. 4 of s. 237 of the Act provides that when any cattle or other animals at large upon the highway or "otherwise" gets upon the property of the company and are killed or injured by a train, the owner shall be entitled to recover for the loss or injury from the company, unless they shew the negligence or wilful act or omission of the owner:—Held, that the word "otherwise" means "otherwise at large," and not otherwise at large in a place ejusdem generis with a highway.

Daigle v. Temiscouata Ry. Co., 6 Can. Ry. Cas. 33, 37 N.B.R. 219.

[Referred to in McLeod v. Can. North. Ry. Co., 9 Can. Ry. Cas. 39, 18 O.L.R. 616.]

Animal killed on track—Negligence of owner.

Plaintiff's horses were found by defendants' section foreman on their right of way about a quarter of a mile from a highway crossing. The fences were in good repair and so were the cattle guards at the crossing prior to a snowstorm which filled them up. The horses were killed after the snow storm. There was no evidence as to how they came to their death nor any evidence of external violence. It was shewn that the horses were put in pasture at a distance from the plaintiff's residence without any one being left in charge and in such a position that they might easily have escaped:—Held, that the plaintiff could not recover as the horses were at large through his negligence or wilful act or omission.

Becker v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 29, 5 West. L.R. 569.

[Approved in Clayton v. Can. North. Ry. Co., 17 Man. L.R. 426, 7 W.L.R. 721, 7 Can. Ry. Cas. 355; followed in Parks v. Can. North. Ry. Co., 14 Can. Ry. Cas. 247; Wallace v. Grand Trunk Ry. Co., 17 Can. Ry. Cas. 64.

Pasture in open.

Plaintiff's animals were set at large to pasture in the open country, and were killed at a place where the company was not bound to fence:—Held, that he could not invoke the aid of s. 237, subs. 4, of the Railway Act, 1903. Decision of Forin, Co. J., affirmed, Martin, J., dissenting.

McDaniel v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 34, 13 B.C.R. 49.

[Followed in Power v. Jackson Mines, 13 B.C.R. 208; referred to in Clayton v. Can. Northern Ry. Co., 17 Man. L.R. 426, 7 Can. Ry. Cas. 355.]

Loss of cattle straying on railways—Omission of owner.

Under subs. 4 of s. 237 of the Railway Act, 1903, which provides that railway companies shall be liable for the loss of cattle killed on their roads except when it is proved that such cattle "got at large through the negligence or wilful act or omission of the owner or his agent," no liability whatever is incurred by the company for contributory negligence or otherwise when the case falls within the exception.

Bourassa v. Can. Pac. Ry. Cas. 41, 30 Que. S.C. 385.

[Approved in Clayton v. Can. North. Ry. Co., 17 Man. L.R. 426, 7 W.L.R. 721, 7 Can. Ry. Cas. 355; followed in Renaud v. Can. Pac. Ry. Co., 13 Can. Ry. Cas. 358.]

"NEGLIGENCE OF OWNER."

Where horses had been placed by the plaintiff in a corral bounded on the south and west by a fence, on the east by a creek, and not closed in in any way on the north, the creek being frozen over so that the horses could pass over it, it was held that there was a wilful omission or negligence on the part of the owner within the meaning of the statute in leaving horses in such a place at night, and that the owner, therefore, could not recover against the railway company. The statute does not intend that railway companies should be insurers against any accident which may occur by reason of their trains. Some duty is cast upon the owners of all animals that are likely to be placed in danger by reason of the trains, and they must take reasonable precautions to prevent them getting at large, so that accidents may not happen to them. The facts are sufficiently set out in the judgment of Wetmore, C. J.

Murray v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 351, 7 West. L.R. 50 (Sask.).

[Referred to in Clayton v. Can. North. Ry. Co., 17 Man. L.R. 437, 7 Can. Ry. Cas. 355.]

NEGLIGENCE OF OWNER—OBLIGATION TO FENCE.

When it is proved that animals killed by a train of a railway company had been allowed to go at large on a public road through the negligence or wilful act or omission of the owner or his agent, and, in consequence thereof, got upon the right of way through a defect in the railway fence, subs. 4 of s. 237 of the Railway Act, 1903, (s. 294 of the Railway Act, 1906), protects the company from any claim for damages, although the company had failed to observe the requirement of s. 199 (s. 254 of 1906) by neglecting to keep the fence along the right-of-way in proper repair. S. 237 deals completely with the question of animals at large getting upon the railway track and being killed or injured, and, therefore, s. 294 (s. 427 of 1906) being only of general application, cannot be interpreted so as to make the company liable in a case in which, by s. 237, it is expressly relieved from liability. Howell, C.J.A., dissenting. [Murray v. Can. Pac. Ry. Co. (1907), 7 W.L.R. 50; Becker v. Can. Pac. Ry. Co. (1906), 7 Can. Ry. Cas. 29, and Bourassa v. Can. Pac. Ry. Co. (1906), 7 Can. Ry. Cas. 41, followed.]

Clayton v. Can. Northern Ry. Co., 7 Can. Ry. Cas. 355, 17 Man. L.R. 426.

COMPETENT PERSON—INFANT IN CHARGE.

S. 294 of the Railway Act, 1906, enacts that "no horses . . . or other cattle shall be permitted to be at large upon any highway within half a mile of (its) intersection with any railway at rail level, unless . . . in charge of some competent person . . . to prevent their loitering . . . on such highway . . . or straying upon the railway. If the horses . . . of any person which are at large contrary to . . . this section are killed . . . by any train at such point of intersection . . . he shall not have any right of action against any company in respect of the same being killed or injured." The plaintiff, a farmer, sent a lad about ten years old to take fourteen cows along a public highway and across the defendants' line of railway. The trains of the defendants ran over and killed four of the cows, and the jury found negligence on the part of the defendants, and also that the boy was a "competent person" within the meaning of the above section:—Held, that the plaintiff was entitled to judgment.

Sexton v. Grand Trunk Ry. Co., 9 Can. Ry. Cas. 119, 18 O.L.R. 202.

Duty to fence—Animal getting on track—Open gate at farm crossing.

If a gate in the fence at a farm crossing of a railway is left open by the person for whose use the crossing is provided or any of his servants or by a stranger or by any person other than an employee of the company, the company is relieved by the s. 295 of the Railway Act, 1906, from the liability imposed by subs. 4 of s. 294 to compensate the owner for the loss of an animal at large without his negligence or wilful act or omission getting upon the railway track through such gate and killed by a train. Per Perdue, J.A.:—Some negligence or breach of statutory duty on the part of the railway company in respect of such gate would have to be shewn to render the company liable in such a case. Per Howell, C.J.A.:—If railway fences or gates are torn down or get open by the action of the elements or by some accident or default not caused by the act of man, and an animal thereby gets upon the track and is killed, none of the exceptions in s. 295 would apply, and the company would be liable under subs. 4 of s. 294. Nonsuit ordered, reserving right of plaintiff to bring another action. [Flewelling v. Grand Trunk Ry. Co. (1906), 6 Can. Ry. Cas. 47, followed.]

Atkin v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 204, 18 Man. L.R. 617.

Animal killed on track—Negligence—Liability.

The plaintiff's son, a boy of only 12, but a "competent person," was leading the plaintiff's horse along a highway parallel with the defendants' railway, when the horse became frightened, broke away from the boy, left the highway, crossed lots, and got upon the defendants' tracks, where it was killed by one of the defendants' trains. The facts, as found, were: (1) that there was no negligence on the part of the train crew; (2) that the animal did not get at large through the negligence or wilful act of the owner or custodian of the animal; (3) that the lands on either side of the railway at the place where the horse was killed were not enclosed or either settled or improved, and there were no fences, gates, or cattle-guards:—Held, upon consideration of ss. 254, 294, 295 of the Railway Act, 1906, that, in these circumstances, the law imposed no duty on the defendants, and they were not liable to the plaintiff for the loss of the horse.

Seigle v. Can. Pac. Ry. Co., 12 Can. Ry. Cas. 463, 13 W.L.R. 627.

Defective fence—Negligence—Wilful act of owner.

Action for the value of two horses alleged to have been killed by one of the company's trains through its neglect to fence its right of way at the place in question. The horses escaped from the pasture field by reason of the defective fence (slash fence) with which it was enclosed; strayed on to the unfenced right-of-way of the railway company and were killed by a passing train:—Held (1), that, under subs. 4 of s. 237 of the Railway Act, 1903, the defendant escaped liability through the wilful act or omission of the owner of the animals in question by having a defective fence. (2) That, therefore, the exception in subs. 4 of s. 254, relieving a company from fencing did not need to be decided. [Bourassa v. Can. Pac. Ry. Co., 30 Que. S.C. 385, 7 Can. Ry. Cas. 41, followed.]

Renaud v. Can. Pac. Ry. Co., 13 Can. Ry. Cas. 358.

Wilful act or omission of owner—Defective fences.

Action to recover the value of cattle found killed on the defendant's railway. The plaintiff's cattle escaped by knocking down or jumping over a fence of insufficient strength and height from one pasture field to another, and from there got through the highway fence part of which was constructed of brush with poles; thence along the highway, got over the cattle guards at the crossing and were killed by a passing train. The plaintiff's son admitted that said cattle had got out to the highway more than once through the fences which he had fixed at different times in different places after they had got out:—Held, that the cattle got at large through the wilful act or omission of the plaintiff by reason of his fences both of the pasture field and at the highway being insufficient and insecure and he cannot recover their value from the defendant.

Wilkinson v. Grand Trunk Ry. Co. (Ont.), 14 Can. Ry. Cas. 236.

LIABILITY FOR ANIMALS KILLED ON TRACK—FENCES—WILFUL ACT OF OWNER.

The liability of a railway company, under subss. 4, 5 of s. 294 of the Railway Act, 1906, for damages in the case of animals at large killed or injured by a train is not limited to territory where the company is by s. 254 obliged to erect suitable fences, and the company can only escape such liability by shewing that the animals got at large through the negligence or wilful act or omission of the owner or his agent or the custodian of such animals or his agent. The Railway Act of 1903 changed the law in this respect. [Bank of England v. Vagliano, [1891] A.C., per Lord Herschell at p. 144, followed as to the interpretation of a statute intended to be a code of law on the subject referred to.] The plaintiff had for two years been accustomed to turn his horses out of the stable in the winter to go without halters to a watering trough about fifteen yards away and driving them back to the stable after drinking. On the occasion in question, the plaintiff and his hired man were carrying out the usual routine when three of the horses after drinking, without their noticing it, walked off in the direction of the road instead of returning to the stable. When the fourth had finished drinking it started to walk after the others. The plaintiff observed this and immediately tried to intercept the horses, but the three escaped and, although the plaintiff followed them up at once and did his best to recover them, they eventually got on to the defendant's railway track and were killed by a train on a bridge:—Held, that the plaintiff was not guilty of negligence or any wilful act or omission in the matter so as to disentitle him to recover. [Arthur v. Central Ontario Ry. Co., 11 O.L.R. 537, 5 Can. Ry. Cas. 318; Bacon v. Grand Trunk Ry. Co., 12 O.L.R. 196, 5 Can. Ry. Cas. 325; Lebu v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 329, 12 O.L.R. 590; Carruthers v. C.P.R. Co., 16 Man. L.R. 323, 6 Can. Ry. Cas. 15, 39 Can. S.C.R. 251, 7 Can. Ry. Cas. 23, and Becker v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 29, 5 W.L.R. 569, followed.]

Parks v. Can. Northern Ry. Co. (Man.), 14 Can. Ry. Cas. 247.

[Distinguished in Hupp v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 66, 16 D.L.R. 343.]

NEGLIGENCE OF OWNER.

A railway company operating under and subject to the Railway Act, 1906, is liable for killing horses at large upon the railway line, unless the railway company establishes under s. 294 (4), that the animals got at large through the negligence or wilful act of the owner or his agent or the custodian of such animals or his agent, or unless the circumstances as to the manner in which the horses came to be at large are within the special exceptions from liability stated in ss. 294, 295.

Rogers v. Grand Trunk Pac. Ry. Co., 2 D.L.R. 683, 22 Man. L.R. 349. [Referred to in Rowe v. Quebec Central Ry. Co., 3 D.L.R. 175.]

INJURIES TO ANIMALS AT LARGE.

Under s. 294 of the Railway Act, 1906, as amended by 9-10 Edw. VII. c.

50, s. 8, imposing a liability on a railway company for injuries to animals "at large" on its right-of-way, the onus of proving negligence on the part of the owner of the animal in allowing a horse to be "at large" is upon the railway company.

Stitt v. Can. North. Ry. Co., 15 Can. Ry. Cas. 333, 23 Man. L.R. 43, 10 D.L.R. 544.

DEFECTIVE FENCE—ANIMALS AT LARGE UNDER BY-LAW.

Cattle turned out to graze on the highways as authorized by a municipal by law are not "at large through the negligence or wilful act or omission of the owner" so as to relieve a railway company, under s. 294 (4) of the Railway Act, 1906, as amended by 10 Edw. VII. c. 50, s. 8, from liability for running down animals that came upon its right-of-way at a place other than a highway crossing, by reason of defects in the fencing which the railway company was under a statutory obligation to maintain.

Greenlaw v. Can. North. Ry. Co., 15 Can. Ry. Cas. 329, 12 D.L.R. 402, 23 Man. L.R. 410.

[Distinguished in Doble v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 312, 27 D.L.R. 115; followed in Koch v. G.T.P. Branch Lines Co., 21 Can. Ry. Cas. 136, 32 D.L.R. 393.]

INJURY TO ANIMALS BY TRAINS—LACK OF PROPER FENCE—OWNER'S NEGLIGENCE.

The fact that the owner of an animal turns it out to pasture on his own land beside a railway track which a company had not fenced as required by law, does not shew that the animal was at large through negligence or wilful act of the owner so as to relieve the company from liability under s. 294 (4) of the Railway Act, 1906, for injuries inflicted on it while on the right-of-way; the company's omission to construct a fence did not deprive the adjoining owner of the right to turn his animals out to pasture on his own land. [McLeod v. Can. Northern Ry. Co., 18 O.L.R. 616, 9 Can. Ry. Cas. 39, followed.]

Palo v. Can. Northern Ry. Co., 16 Can. Ry. Cas. 1, 29 O.L.R. 413, 14 D.L.R. 902.

INJURIES TO ANIMALS—CONTRIBUTORY NEGLIGENCE—ONUS.

Under the provisions of subss. 4, 5 of s. 294 of the Railway Act, 1906, the onus of establishing that horses were at large through the negligence of their owner or custodian, is upon the railway company seeking to avoid liability for their getting upon the right-of-way and being run down by a train. The onus of proof upon the defendant company, under subss. 4 and 5 to establish negligence against the plaintiff in an action for injury to animals on the track, is not displaced by a finding that the plaintiff was careless in looking after the injured animals, if the nature of such carelessness was not determined.

Maves v. Grand Trunk Pacific Ry. Co., 16 Can. Ry. Cas. 9, 14 D.L.R. 70.

NEGLIGENCE OF OWNER—UNENCLOSED LANDS.

Where a horse got at large from unenclosed lands by reason of the negligence of its owner in not properly confining it he cannot recover damages for its loss, although the animal wanders a considerable distance before getting upon the right of way of the defendant. [Becker v. Can. Pac. Ry. Co. 7 Can. Ry. Cas. 29, followed.]

Wallace v. Grand Trunk Ry. Co., 17 Can. Ry. Cas. 64.

LIABILITY OF RAILWAY—KILLING HORSE ON TRACK.

Where a horse which had been turned out to pasture on unfenced range lands adjoining a railway took fright on being driven into camp by the owner's employee and escaped from his control and was killed by a train, the owner has no right of action against the railway company under s. 294, subs. 4, of the Railway Act, 1906 (as amended 9 & 10 Edw. VII. c. 50, s. 8), for, if he had the landowner's permission to pasture on the lands, the horse while thereon was not "at large," and, if he had not such permission, the horse was put "at large" by the plaintiff's wilful act in pasturing the horse there within the exception of the enactment.

Hupp v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 66, 16 D.L.R. 343.

[McLeod v. Canadian Northern R. Co., 18 O.L.R. 616; Parks v. Can. Northern R. Co., 14 Can. Ry. Cas. 247, 21 Man. L.R. 103, distinguished; see also as to animals at large, Rogers v. Grand Trunk R. Co., 2 D.L.R. 683.]

INJURIES TO ANIMALS ON TRACKS BY TRAINS.

The evident purpose of Parliament to deal with the whole question of a railway company's liability for injury to animals at large by the provisions of s. 294 of the Railway Act, 1906, as amended, constitutes s. 294 a specific code laying down a general statutory liability and providing a special defence, thereby precluding the plaintiff, in such cases, from resting liability upon a breach of s. 254 read with the general provisions of s. 427. [Clayton v. Can. Northern Ry. Co., 7 Can. Ry. Cas. 355, 17 Man. L.R. 433, followed.]

Sporle v. Grand Trunk Pacific Ry. Co., 17 Can. Ry. Cas. 71, 17 D.L.R. 367.

INJURY TO ANIMALS BY TRAINS—CATTLE GUARDS—GATES—"UNUSED HIGHWAY."

The Railway Act, 1906, does not forbid, either by s. 254 or otherwise, the erection of a farm crossing in lieu of cattle guards at a road allowance which is unused as a highway and is in fact used as farm land, and where a railway company and an adjoining farm owner concur in so treating an "unused highway" the farm owner is bound under s. 255 to keep the gates on each side of the railway closed when not in use, and damage to the owner's animals through his own neglect to perform such statutory duty is not recoverable from the railway company, no negligence on the part of those in charge of the train being shewn.

Brook v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 78, 18 D.L.R. 184.

INJURIES—MUNICIPAL BY-LAW—ENACTMENT BY IMPLICATION—NEGLIGENCE OF OWNER.

A municipal by-law which restrains animals from running at large for a certain number of hours of the day does not give rise to an enactment by implication permiting them to run at large during the remaining hours of the day in derogation of the common-law duty of the owner to keep the animals from his neighbour's land, and there can be no recovery when they are killed on the right of way of a railway company, if the animals are at large through the negligence of the owner within the meaning of subs. 4 of s. 294 of the Railway Act, 1906, as amended by s. 8, c. 50, 9-10 Edw. VII. [Greenlaw v. Can. Northern Ry. Co., 15 Can. Ry. Cas. 329, 12 D.L.R. 402, 23 Man. L.R. 410, distinguished; Watt v. Drysdale, 17 Man. L.R. 15, followed; Garrioch v. McKay, 13 Man. L.R. 404; Crowe v. Steeper, 46 U.C.Q.B. 87, referred to.]

Doble v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 312, 27 D.L.R. 115.

[See also Duncan v. Can. Pac. Ry. Co., 21 O.R. 355.]

Animals killed on right-of-way—Cattle guards—Maintenance—Intersection of railway and highway—Wilful act of owner—Contributory negligence—Railway Act, s. 294.

The plaintiff turned out certain of his horses and allowed them to run at large without being under the charge of any person. The horses strayed upon the defendant's railway at the intersection of the railway with a highway, there being no cattle guard to prevent them from going on the railway at such point of intersection. The horses strayed thence upon the right-of-way and were killed by the defendant's train, but at a point other than the intersection of the railway with the highway. *Held*, that the rights and liabilities of the railway company in respect to animals at large are declared by s. 294 of the Railway Act, 1906, and no section of general application contained in the Act should add to or interfere with the specific provisions contained in the section specially framed to deal with it, and the plaintiff cannot invoke the general principle of the common law to cure his contributory negligence in the face of a specific enactment making that contributory negligence an absolute defence to the action.

Early v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 316, 8 Sask. L.R. 27, 21 D.L.R. 413.

Cattle on range.

Cattle running at large on the range are lawfully at large, and, if the cattle are killed on a railway track, the railway company is liable under s. 295 of the Railway Act, 1906.

Bardgett v. Can. Pac. Ry. Co. (B. C.), 10 W.W.R. 810.

Injury to animals at large—"Wilful act or omission of owner."

The expression "wilful act or omission" has a meaning distinguishable from "negligence," in that the former denotes a deliberate and conscious intention; hence animals on the lands of new settlers, which are kept together by means of tethering one of the oxen and which escape as a result of the ox releasing himself from the fastening, are not at large through the "wilful act or omission of the owner," within the meaning of s. 294 (4) of the Railway Act, 1906 (amended by 9-10 Edw. VII 1910, c. 50, s. 8), and entitles the owner to recover for their being killed or injured on the right-of-way of a railway company. [Parks v. Can. North. Ry. Co., 14 Can. Ry. Cas. 247, followed.]

Waite et al. v. Grand Trunk Pacific Ry. Co., 21 Can. Ry. Cas. 126, 27 D.L.R. 549.

Injury to animals—Unfenced track—Negligence of owner.

The word "negligence" in s. 294 (4) of the Railway Act, 1906, as as amended by 9-10 Edw. VII. c. 50, s. 8, is not used in the sense generally attributed to it in common law. An owner is not necessarily negligent because he leaves a large number of cattle near a railway in charge of one man. In considering the alleged negligence of the owner, the absence of a fence which the railway company was legally liable to erect should not be taken into account. [See also Waite v. G.T.P. R. Co., 27 D.L.R. 549.]

Quast v. Grand Trunk Pacific Ry. Co., 21 Can. Ry. Cas. 132, 9 Alta. L.R. 496, 28 D.L.R. 343.

Injury to animals—Owner's negligence.

Bugg v. Can. Northern Ry. Co., 36 D.L.R. 776, 3 W.W.R. 458.

Injury to animals—Owner's negligence.

Where it is shewn that animals were at large, that they got upon railway property, and were injured thereon, not at an intersection with the highway, the railway company is liable under the Railway Act, 1906, s. 294, unless it can prove that the case falls within the provisions of s. 295, or that the animals got at large through the negligence or wilful act or omission of the owner. An owner cannot be held guilty of negligence in allowing his animals to run at large where a valid by-law exists permitting him to do so. [Greenlaw v. Can. Northern Ry. Co., 12 D.L.R. 402, 23 Man. L.R. 410, 15 Can. Ry. Cas. 329, followed.]

Koch v. G.T.P. Branch Lines Co., 21 Can. Ry. Cas. 136, 32 D.L.R. 393.

INJURY TO ANIMALS—OWNER'S NEGLIGENCE—WILFUL ACT OR OMISSION.

It is a wilful act within the meaning of s. 294 (1) of the Railway Act, 1906, to turn animals at large upon a highway within half a mile of an intersection at rail level despite a provincial Act permitting animals to run at large, and if the animals so at large get from the highway to railway property and are killed or injured there, the railway company is not liable.

Anderson v. Can. Northern Ry. Co., 21 Can. Ry. Cas. 140, 33 D.L.R. 418, 35 D.L.R. 473.

[Affirmed in 23 Can. Ry. Cas. 243, 43 D.L.R. 255.]

INJURY TO ANIMALS—WILFUL ACT—NEGLIGENCE.

"Wilful" in s. 294 (4) of the Railway Act, 1906, means "intentional," and an owner who intentionally turns his animals at large cannot recover damages if they stray to a railway right-of-way and are killed thereon by a train.

Anderson v. Can. Northern Ry. Co., 21 Can. Ry. Cas. 145, 35 D.L.R. 473.

INJURY TO ANIMALS—NEGLIGENCE—WILFUL ACT.

S. 294 of the Railway Act, 1906, s. 294, as amended by 9-10 Edw. VII. c. 50, s. 8, means that if animals are allowed by their owner to be at large within one-half mile of the intersection of the railway and a highway at level, the owner takes the risk upon himself of any damages which may be caused to or by them upon the intersection, and if such damages are caused to the animals, not upon the intersection but upon the railway property beyond it, the company would be liable, unless it established that the animals got at large through the negligence or wilful act or omission of the owner or his agent. [Anderson v. Can. Northern Ry. Co., 21 Can. Ry. Cas. 140 at p. 145, 35 D.L.R. 473, affirmed.]

Anderson v. Can. Northern Ry. Co., 23 Can. Ry. Cas. 243, 57 Can. S.C.R. 134, 43 D.L.R. 255.

FARM CROSSING—SWING GATES—MAINTENANCE OF.

S. 295 of the Railway Act, 1906, provides that "no person whose horses . . . are killed or injured by any train shall have any right of action against any company in respect of such horses . . . being killed or injured, if the same were so killed or injured by reason of any person (a) for whose use any farm crossing is furnished failing to keep the gates at each side of the railway closed when not in use." This section is no defence to an action for damages if the gates when erected would not swing, and the hinges and fastenings have not been maintained as required by s. 254 and have become useless.

Prouse v. Can. Northern Ry. Co., 23 Can. Ry. Cas. 247, 42 D.L.R. 159.

MUNICIPAL BY-LAW—NEGLIGENCE—OWNER'S RISK.

Where the by-laws of a municipality permit the running at large of animals, it is not negligence but a wilful act or omission within the meaning of s. 294 (4) of the Railway Act, 1906, for the owner to allow them to run at large. If such animals are allowed to be at large within one-half mile of the intersection of the railway and a highway at rail level, the owner takes the risk of any damage.

Fraser v. Can. Northern Ry. Co., 23 Can. Ry. Cas. 250, 43 D.L.R. 562.

STATUTORY DUTY TO REPAIR FENCES.

A railway company incorporated under a Quebec Statute and never declared to be for the general advantage of Canada, or to come under the provisions of the Dominion statute, is only obliged to build and keep in repair such fences as were required for the protection of the animals belonging to the adjoining owner, or of those who were rightly occupying the adjoining land.

Dodier v. Quebec Central Ry. Co., 23 D.L.R. 667.

ANIMALS KILLED ON TRACK—NEGLIGENCE OR WILFUL ACT OR OMISSION OF OWNER—ABSENCE OF CATTLE GUARDS.

Where animals at large through the negligence or wilful act or omission of the owner stray on to the right-of-way of a railway company and are there injured or killed, the company is not liable in damages, under s. 294, subs. 5 of the Railway Act, 1906, and the absence of cattle guards does not render the company liable even where it is under a statutory duty to maintain them. [Clayton v. Can. Northern Ry. Co., 7 W.L.R. 721, followed.]

Durie v. Can. Pac. Ry. Co., 30 W.L.R. 768.

CATTLE "AT LARGE"—ROAD ALLOWANCE.

Cattle turned out upon a road allowance so that they can range upon an open section must be said to be "at large," and a railway company, even though their cattle guards or fences are negligently constructed, are not liable for injuries thereto.

Fleming v. C.P.R. Co., 7 W.W.R. 525.

MUNICIPAL BY-LAW—RESTRICTIONS.

The effect of a municipal by-law which permits animals to run at large "except as prescribed or restricted by law or by this by-law or other by-laws of the municipality," is to leave the case of an animal killed by a train within half a mile of the intersection of a highway with a railway within the operation of subs. 1, s. 294, Railway Act.

Block v. Can. Northern Pacific Ry. Co. (Alta.), 10 W.W.R. 1228.

FERRIES.

See Wharves and Ferries.

FIRES.

See Carriers of Goods; Constitutional Law; Limitation of Actions.

Accumulation of Weeds on Right-of-Way, see Weeds.

On Crown Railways, see Government Railways.

Annotations.

Liability of railway companies for fires. 1 Can. Ry. Cas. 208.

Use of defective engines or appliances, and improper and negligent management of trains. 1 Can. Ry. Cas. 212.

Failure to remove combustible material from railway lands. 1 Can. Ry. Cas. 213.

Actions for damages done by fire. 13 Can. Ry. Cas. 516.

SPARKS FROM ENGINE—PROPER CARE TO PREVENT EMISSION OF—USE OF WOOD OR COAL FOR FUEL.

R. owned a barn situated about two hundred feet from the N.B. Ry. Co's. line, and such barn was destroyed by fire, caused, as was alleged, by sparks from the defendants' engine. An action was brought to recover damages for the loss of said barn and its contents. On the trial, it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy upgrade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the defendants did not use reasonable care in running the engine, but in what the want of such care consisted did not appear by their finding:—Held, reversing the judgment of the Supreme Court of New Brunswick, that the company was under no obligation to use coal for fuel, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that therefore there should be a new trial. 23 N.B.R. 323, reversed.

New Brunswick Ry. Co. v. Robinson (1884), 11 Can. S.C.R. 688.

[Applied in Campbell v. McGregor, 29 N.B.R. 660; Glidden v. Woodstock, 33 N.B.R. 392; distinguished in Campbell v. McGregor, 29 N.B.R. 648; inapplicable in Leonard v. Can. Pac. Ry. Co., 15 Q.L.R. 95.]

FIRE COMMUNICATED FROM PREMISES OF COMPANY.

Action by the respondent against the appellants for negligence in causing the destruction of the respondent's house and outbuildings by fire from one of their locomotives. The freight shed of the company was first ignited by sparks from one of the company's engines passing Chippawa station, and the fire extended to respondent's premises. The following questions, inter alia, were submitted to the jury, and the following answers given:—Q. Was the fire occasioned by sparks from the locomotive? A. Yes. Q. If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A. Yes. Q. If so, state in what respect you think greater care ought to have been exercised? A. As it was a special train and on Sunday, when employees were not on duty, there should have been an extra hand on duty. Q. Was the smoke stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind, or because it was out of order? A. Out of order. Verdict for plaintiff, $800. On motion to set aside verdict, the Queen's Bench Division unanimously sustained the verdict. On appeal to the Supreme Court:—Held, affirming the judgment of the Court below, Henry, J., dissenting, (1) that the questions were proper questions to put to the jury, and that there was sufficient evidence of negligence on the part of the appellants' servants to sustain the finding. (2) If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons by fire communicating thereto from the property of the railway company themselves, which had been ignited by fire escaping from the engine coming directly in contact therewith. (3) The statute 14 Geo. III. c. 78, s. 86, which is an extension of 6 Anne c. 31, ss. 6, 7, is in force in the Province of Ontario as part of the law of England introduced by the Constitutional Act, 31 Geo. III. c. 31, but has no application to protect a party from legal liability as a consequence of negligence.

Canada Southern Ry. v. Phelps (1884), 14 Can. S.C.R. 132.

[Applied in Campbell v. McGregor, 29 N.B.R. 648; Central Verm. Ry. Co. v. Stanstead & Sherbrooke Ins. Co., 5 Que. Q.B. 251; Jackson v. Grand Trunk Ry. Co., 32 Can. S.C.R. 247; referred to in Grant v. Can. Pac. Ry. Co., 36 N.B.R. 542; Morris v. Cairncross, 14 O.L.R. 544; Oatman v. Michigan Central Ry. Co., 1 O.L.R. 145; relied on in Laidlaw v. Crow's Nest Southern Ry. Co., 14 B.C.R. 173.]

SPARKS FROM ENGINE—PRESUMPTION AS TO CAUSE OF FIRE.

A train of the C.A. Ry. Co. passed the sheriff's farm about 10.30 a.m., and another train passed about noon. Some time after the second train passed it was discovered that the timber and wood on plaintiff's land was on fire, which fire spread rapidly after being discovered and destroyed a quantity of the standing timber on said land. In an action against the company it was shewn that the engine which passed at 10:30 was in a defective state, and likely to throw dangerous sparks, while the other engine was in good repair and provided with all necessary appliances for protection against fire. The jury found, on questions submitted, that the fire came from the engine first passing, that it arose through negligence on the part of the company, and that such negligence consisted in running the engine when she was a bad fire thrower and dangerous:—Held, affirming the judgment of the Court of Appeal, that there being sufficient evidence to justify the jury in finding that the engine which passed first was out of order, and it being admitted that the second engine was in good repair, the fair inference, in the absence of any evidence that the fire came from the latter, was that it came from the engine out of order, and the verdict should not be disturbed:—Held, also, Henry J., dissenting, that the locomotive superintendent and locomotive foreman of a railway company are "officers of the corporation" who may be examined as provided in R.S.O. (1877) c. 50, s. 136, and the evidence of such officers as to the conditions of the respective engines and the difference as to danger from fire between a wood-burning and a coal-burning engine, taken under said section, was properly admitted on the trial of this cause; and certain books of the company containing statements of repairs required, on these engines among others, were also properly admitted in evidence without calling the persons by whom the entries were made. 14 A.R. (Ont.) 309, affirmed.

Canada Atlantic Ry. Co. v. Moxley, 15 Can. S.C.R. 145.

[Applied Campbell v. McGregor, 29 N.B.R. 648; commented on in Knight v. Grand Trunk Ry. Co., 13 P.R. (Ont.) 386; discussed in Leitch v. Grand Trunk Ry. Co., 13 P.R. (Ont.) 369; distinguished in Jackson v. Grand Trunk Ry. Co., 32 Can. S.C.R. 250; followed in Dixon v. Winnipeg Elec. St. Ry. Co., 10 Man. L.R. 665; Gordanier v. Can. Northern Ry. Co., 15 Man. L.R. 3; Sinden v. Brown, 17 A.R. (Ont.) 173; referred to in Can. Pac. Ry. Co. v. Roy, 9 Que. Q.B. 570; relied on in Dominion Cartridge Co. v. McArthur, 31 Can. S.C.R. 405.]

DAMAGES CAUSED BY SPARKS FROM LOCOMOTIVE.

Running a train too heavily laden on an upgrade, when there was a strong wind, caused an unusual quantity of sparks to escape from the locomotive, whereby the respondents' barn, situated in close proximity to the railway track, was set on fire and destroyed:—Held, affirming the judgments of the Courts below, that there was sufficient evidence of negligence to make the company liable for the damage caused by the fire. M. L.R. 5 Q.B. 122, affirmed.

North Shore Ry. Co. v. McWillie, 17 Can. S.C.R. 517.

[Applied in McDougall Co. v. Boisvert, 24 Que. S.C. 166; approved in Can. Pac. Ry. Co. v. Roy, 9 Que. Q.B. 573; commented on in Zimmer v. Grand Trunk Ry. Co., 19 A.R. (Ont.) 693; followed in Fournier v. Can. Pac. Ry. Co., 33 N.B.R. 568; Roy v. Can. Pac. Ry. Co., 9 Que. Q.B. 551; not followed in Northern Counties Inv. Trust v. Can. Pac. Ry. Co., 13 B.C.R. 131; referred to in British Columbia Elec. Ry. Co. v. Crompton, 43 Can. S.C.R. 17; Northern Counties Inv. Trust v. Can. Pac. Ry. Co., 13 B.C.R. 138; Robinson v. Can. Northern Ry. Co., 19 Man. L.R. 315; Ryckman v. Hamilton etc. Ry. Co., 10 O.L.R. 419.]

SPARKS FROM ENGINE OR "HOT BOX."

In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot box of a passing train, in which the Court appealed from held that there was no sufficient proof that the fire occurred through the fault or negligence of the company, and it was not shewn that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding. 9 Que. S.C. 319, affirmed.

Sénésac v. Central Vermont Ry. Co., 26 Can. S.C.R. 641.

[Distinguished in Rainville v. Grand Trunk Ry. Co., 28 O.R. 625; followed in Collins Bay Rafting etc. Co. v. Kaine, 29 Can. S.C.R. 262; Grand Trunk Ry. Co. v. Rainville, 29 Can. S.C.R. 205; Mayrand v. Dussault, 38 Can. S.C.R. 465; referred to in Can. Pac. Ry. Co. v. Roy, 9 Que. Q.B. 573.]

SPARKS FROM RAILWAY ENGINE—RUBBISH ON RAILWAY BERM.

In an action against a railway company for damages in consequence of plaintiff's property being destroyed by fire alleged to be caused by sparks from an engine of the company the jury found, though there was no direct evidence of how the fire occurred, that the company negligently permitted an accumulation of grass or rubbish on their road opposite plaintiff's property which, in case of emission of sparks or cinders would be dangerous; that the fire originated from or by reason of a spark or cinder from an engine; and that the fire was communicated by the spark or cinder falling on the company's premises and spreading to plaintiff's property. A verdict against the company was sustained by the Court of Appeal:—Held, affirming the judgment of the latter court (25 A.R. (Ont.) 242), and following Sénésac v. Central Vermont Ry. Co. (26 Can. S.C.R. 64); George Matthews Co. v. Bouchard (28 Can. S.C.R. 580); that the jury having found that the accumulation of rubbish along the railway property caused the damages, of which there was some evidence, and the finding having been affirmed by the trial Court and Court of Appeal, it should not be disturbed by a second Appellate Court. 25 A.R. (Ont.) 242, 28 O.R. 625, affirmed.

Grand Trunk Ry. Co. v. Rainville et al., 29 Can. S.C.R. 201.

[Applied in Cameron v. Royal Paper Mills Co., 31 Que. S.C. 280.]

FIRE FROM ENGINES—DESTRUCTION OF ADJOINING PROPERTY—INFERENCE FROM CIRCUMSTANCES.

In an action for damages for the plaintiff's loss by fire alleged to have been communicated to their buildings and premises, adjoining the defendants' railway, by sparks emitted from the defendants' engines:—Held, on the evidence, that the defendants' engines were as safely built and equipped as the nature of such means of traffic could admit, and that the train was operated in a reasonable manner; no negligence was shewn; and the action, therefore, rested upon s. 298 of the Railway Act, 1906:—Held, also, on the evidence, that the fire originated from sparks emitted by the defendants' engines; the evidence was not direct, as no sparks were seen to fly and alight; but the inference from the circumstance in evidence was a reasonably certain one:—Held, also, that, as the action rested on the statute, contributory negligence was not to be considered; the plaintiffs could use their land and premises as they pleased, provided that they were not actuated by motives amounting to fraud. [Fraser v. Pere Marquette Ry. Co., 18 O.L.R. 589, 13 O.W.R. 883, distinguished]:—Held, also on the evidence, that the defendants had an insurable interest in the premises under s. 298 (3) of the Act. Damages assessed for injury to the plaintiff's warehouse and contents; but not for loss of trade, no specific damage being shewn.

Winnipeg Oil Co. v. Can. Northern Ry. Co., 15 W.L.R. 120.

DAMAGE TO WOODLAND BY FIRE—FIRE STARTED BY SECTION FOREMAN.

In an action brought by the owner of a lot of woodland adjoining defendants' railway to recover damages alleged to have been caused by a fire negligently started by defendants' servants and allowed to extend to plaintiff's land, it appeared in evidence that N., a section foreman of the defendants' railway, set fires to burn up some piles of sleepers and rubbish on the railway line. The weather had been very dry for a long time, and forest fires were burning all over the country. Witnesses, on behalf of the plaintiff, testified that they saw fire on the railway line at this time, and traced its course through the fence to the plaintiff's land. N. swore that the fires which he started were all burnt out before the first was seen on the plaintiff's property, and other evidence was given to the same effect. The jury found that the fire spread from the fire set by N., and that N. negligently and unreasonably allowed it to extend. A verdict was entered for the plaintiff for $500:—Held, that there was sufficient evidence to justify the verdict. Per Tuck, C.J., and McLeod, J., that the Acts 48 Vict. c. 11, and 60 Vict. c. 9 (to prevent the destruction of forests and other property by fire) are not ultra vires of the local Legislature. Per McLeod, J., that the defendants having brought on their land a dangerous element, not naturally there, did so at their peril, and, if it caused injury, they were liable, though no negligence was proved. The provision of said Acts declaring that a person starting a fire, except for certain purposes specified, between May 1st and December 1st, is guilty of negligence, applied to the defendants, and they were, therefore, liable under the Acts as well as at common law.

Grant v. Can. Pac. Ry. Co., 36 N.B.R. 528.

SPARKS FROM ENGINE.

An action for damages for the destruction of the plaintiff's property by fire alleged to have been started by sparks from an engine of the defendants, was dismissed, after trial without a jury, the evidence leaving the origin of the fire doubtful.

Farquharson v. Can. Pac. Ry. Co., 18 W.L.R. 76 (B.C.).

FIRE CAUSED BY SPARKS FROM ENGINE—CIRCUMSTANTIAL EVIDENCE.

In an action against a railway company for negligently causing fire by

sparks from their engine, the cause of the fire may be proved by circumstantial evidence.

Rainville v. **Grand Trunk** Ry. Co., **1** Can. Ry. Cas. 113, 28 O.R. 625.

[**Affirmed** in 25 A.R. (**Ont.**) **242, 1 Can.** Ry. Cas. **117, 29 Can. S.C.R.** 201, **1 Can.** Ry. Cas. 125.]

DUTY OF CUTTING DOWN WEEDS.

A railway company is responsible for damages caused by fire which is started by sparks from one of their engines, in dead grass and shrubs allowed by them to acumulate in the usual course of nature from year to year on their land adjoining the railway track. It is the company's duty in such a case to remove the dangerous accumulation. Judgment of Ferguson, J., affirmed.

Rainville v. Grand Trunk Ry. Co., **1** Can. **Ry. Cas.** 117, **25 A.R. (Ont.) 242.**

[Affirmed in 29 Can. S.C.R. 201, **1** Can. **Ry. Cas. 125.**]

ACCUMULATION OF WEEDS.

In an action against a railway company for damages in consequence of plaintiff's property being destroyed by fire alleged to be caused by sparks from an engine of the company, the jury found, though there was no direct evidence of how the fire occurred, that the company negligently permitted an accumulation of grass or rubbish on their road opposite plaintiff's property which, in case of emission of sparks or cinders, would be dangerous; that the fire originated from or by reason of a spark or cinder from an engine; and that the fire was communicated by the spark or cinder falling on the company's premises and spreading to plaintiffs' property. A verdict against the company was sustained by the Court of Appeal:—Held, affirming the judgment of the latter Court (25 A.R. (Ont.) 242), and following Sénésac v. Central Vermont Ry. Co. (26 Can. S.C.R. 641); George Matthews Co. v. Bouchard (28 Can. S.C.R. 580); that the jury having found that the accumulation of rubbish along the railway property caused the damages, of which there was some evidence, and the finding having been affirmed by the trial Court and Court of Appeal, it should not be disturbed by a second Appellate Court.

Grand Trunk **Ry. Co. v. Rainville,** 1 Can. Ry. Cas. **125, 29 Can. S.C.R.** 201.

[**Applied in Can. Pac. Ry. Co. v. Grand Trunk Ry. Co.,** 12 **O.L.R.** 320, 5 Can. **Ry. Cas. 400.**]

SPARKS FROM ENGINES.

In an action against a railway company, carrying on business under legislative sanction, to recover damages resulting from a fire alleged to have been caused by a spark from an engine, the plaintiff must, in addition to giving evidence from which it may reasonably be inferred that the fire was caused as alleged, also give some evidence of negligence on the part of the defendants, e.g., in the construction or management, or want of repair, of the engine, and the onus is not upon the defendants to prove that they have adopted and used with due care reasonable contrivances to avoid the danger of fire. Judgment of Armour, C.J., reversed.

Oatman **v. Michigan Central Ry. Co., 1** Can. **Ry. Cas. 129, 1 O.L.R. 145.**

[Applied in Jackson v. **Grand Trunk** Ry. Co., 32 Can. S.C.R. 247. 1 Can. Ry. **Cas.** 156; **referred to in same** case, 2 O.L.R. 689, **1 Can. Ry.** Cas. 141.]

CAUSE OF FIRE—EXPERT TESTIMONY.

In an action against a railway company to recover damages because of fire caused by sparks from an engine, two witnesses called on behalf of the plaintiff, men without much practical experience, testified that, in their opinion, the engine in question was defective constructively in a certain particular, while eleven witnesses called by the defendants, all men of practical experience, testified that the engine was constructed in accordance with the best prevailing practice. The jury found for the plaintiff: —Held, that in a case of this kind, depending upon the weight to be given to scientific and expert testimony and not upon questions of credibility and demeanour, such a verdict could not stand, and it was set aside and the action dismissed. Judgment of Falconbridge, J., reversed. Armour, C.J.O., dissenting.

Jackson v. Grand Trunk Ry. Co., 1 Can. Ry. Cas. 141, 2 O.L.R. 689.

[Affirmed in 32 Can. S.C.R. 245, 1 Can. Ry. Cas. 156; referred to in Sheppard Pub. Co. v. Press Pub. Co., 10 O.L.R. 243.]

SPARKS FROM ENGINE—DEFECTIVE CONSTRUCTION.

Fire was discovered on J.'s farm a short time after a train of the defendants had passed it drawn by two engines, one having a long, and the other a short, or medium, smoke box. In an action against defendants for damages it was proved that the former was perfectly constructed. Two witnesses considered the other defective, but nine men, experienced in the construction of engines, swore that a larger smoke box would have been unsuited to the size of the engine. The jury found that the fire was caused by sparks from one engine, and they believed it was from that with the short smoke box; and that the use of said box constituted negligence of the defendants which had not taken the proper means to prevent emission of sparks:—Held, affirming the judgment of the Court of Appeal (1 Can. Ry. Cas. 191, 2 O.L.R. 689), that the latter finding was not justified by the evidence and the verdict for plaintiff at the trial was properly set aside.

Jackson v. Grand Trunk Ry. Co., 1 Can. Ry. Cas. 156, 32 Can. S.C.R. 245.

FIRE CAUSED BY SPARKS FROM LOCOMOTIVE.

Under the law of Quebec, even when no proof of negligence is adduced by the plaintiff, a railway company, although authorized by statute to use locomotives, and although it has complied with all the requirements of the law and adopted the most approved appliances known to science for preventing the escape of sparks from its locomotives, is nevertheless responsible for damages so caused. Quaere, as to the responsibility of railway companies under the Railway Act, 1888.

Can. Pac. Ry. Co. v. Roy, 1 Can. Ry. Cas. 170, 9 Que. Q.B. 551.

[Reversed in 12 Que. K.B. 543, [1902] A.C. 220, 1 Can. Ry. Cas. 196; applied in Jackson v. Grand Trunk Ry. Co., 32 Can. S.C.R. 247, 1 Can. Ry. Cas. 156; commented on in Royal Electric Co. v. Hévé, 32 Can. S.C.R. 465; discussed in Boudreau v. Montreal Street Ry. Co., 6, 13 Que. K.B. 534; distinguished in Davie v. Montreal Water and Power Co., 23 Que. S.C. 146, 13 Que. K.B. 456; distinguished in Garand v. Montreal Light, Heat and Power Co., 33 Que. S.C. 417; distinguished in Jones v. Atlantic and N.W. Ry. Co., 12 Que. K.B. 403; distinguished in Montreal Water & Power Co. v. Davie, 35 Can. S.C.R. 263; followed in Montreal Light, Heat & Power Co. v. Dumphy, 15 Que. K.B. 14; followed in Montreal Street Ry. Co. v. Gareau, 10 Que. K.B. 427; referred to in Shawinigan Carbide Co. v. Doucet, 42 Can. S.C.R. 349.]

FIRE CAUSED BY SPARKS FROM LOCOMOTIVE—LIABILITY OF RAILWAY COMPANY.

The respondent brought suit for damages caused by a fire originating from sparks escaping from a locomotive engine of the company appellant, while the engine was employed in the ordinary use of its railway. The question of negligence on the part of the company was specially withdrawn from the consideration of the tribunal on the present appeal:—Held, reversing the judgment of the Court of Queen's Bench, 9 Que. K.B. 551, 1 Can. Ry. Cas. 170:—A railway company, authorized by statute to carry on its railway undertaking in the place and by the means adopted, is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway.

Can. Pac. Ry. Co. v. Roy, 12 Que. K.B. 543.

[Affirmed in 1 Can. Ry. Cas. 196, [1902] A.C. 220.]

SPARKS FROM ENGINES—ACTS DONE UNDER STATUTORY AUTHORITY—NON-LIABILITY FOR DAMAGE.

A railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway; or in other words, by the proper execution of the power conferred by the statute. The previous state of the common law imposing liability cannot render inoperative the positive enactment of a statute. Neither the C.C. (Que.) Art. 356, nor the Dominion Railway Act, 1888, ss. 92, 288, on their true construction contemplates the liability of a railway company acting within its statutory powers. So, where the respondent had suffered damage caused by sparks escaping from one of the appellants' locomotive engines while employed in the ordinary use of its railway, the appellants were held liable. [Geddis v. Proprietors of Bann Reservoir (1878), 3 App. Cas. 430, 438; and Hammersmith Ry. Co. v. Brand (1869), L.R. 4 H.L. 215, followed.]

Can. Pac. Ry. Co. v. Roy, 1 Can. Ry. Cas. 196, [1902] A.C. 220.

[Followed in Greer v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 58, 23 D.L.R. 337.]

INFLAMMABLE MATERIALS ALONG TRACK.

A fire starting on or near the right-of-way of a railway company caused by one of their locomotives spread or jumped to the property of the plaintiffs, which was destroyed. The defendants contended that the rocky bluff where the fire started was not within their right-of-way, that s. 239 of the Railway Act, 1903, applies only to property upon or along the route of the railway and did not apply to that of the plaintiffs, which was three miles distant:—Held, Martin, J., dissenting, that the question of how the fire reached the plaintiff's property and the position of the rocky bluff were properly left to the jury. (2) That the word "along" in s. 239 does not mean only "adjoining to" or "contiguous to," as does the word "alongside," but "in the neighbourhood of" or "near" or "close to" and receives additional force from the expression "upon or along" not simply "along." The jury found a general verdict for $18,000. It was urged that under s. 239 the damages could not exceed $5,000, but:—Held, that the finding that the defendants left inflammable material on the right-of-way disposed of that objection and the defendants were liable for the full amount as found by the jury.

Blue v. Red Mountain Ry. Co., 6 Can. Ry. Cas. 219, 5 W.L.R. 1, 12 B.C.R. 460.

[Reversed in 39 Can. S.C.R. 390, 7 Can. Ry. Cas. 150; restored in [1909] A.C. 361, 9 Can. Ry. Cas. 140.]

COMBUSTIBLES LEFT ON RIGHT-OF-WAY.

The question for the jury was, whether or not the place of origin of the fire which caused the damages was within the limits of the "right-of-way" which the defendants were, by the Railway Act, 1903, obliged to keep free from unnecessary combustible matter, and their finding was that it did, but the charge of the Judge was calculated to leave the impression that any space where trees had been cut, under the powers conferred by s. 118 (j) of that Act, might be treated as included within the "right-of-way" and, in effect, made a direction, on issues not raised by the pleadings or at the trial, as to negligent exercise of the privilege conferred by that section:—Held, that, in consequence of the want of more explicit directions to the jury on the question of law and the misdirection as to the issues, the defendants were entitled to a new trial. The Court refused an application by the respondents, on the hearing of the appeal, for leave to supplement the appeal case by production of plans of the right-of-way which had not been produced at the trial, as being contrary to the established course of the Court.

Red Mountain Ry. Co. v. Blue, 7 Can. Ry. Cas. 150, 39 Can. S.C.R. 390. [Reversed in [1909] A.C. 361, 9 Can. Ry. Cas. 140.]

DAMAGES BY FIRE—IGNITION OF COMBUSTIBLE MATTER ON RAILWAY.

By s. 239 of the Railway Act, 1903, c. 58, it is provided that the respondent railway company shall at all times keep its right-of-way free from combustible matter, subs. 2 providing that when damage is caused by a fire started by a railway locomotive the company shall be liable whether guilty of negligence or not, in the latter case the liability being limited to a specified amount. Where ignition occurred from the respondents' engine sparks at a rocky bluff shewn by a map filed by them in the Department of Railways and Canals under s. 134 of the Railway Act of 1888, repeated by s. 128 of the later Act, to be within the delineated right-of-way, the respondents were held to be liable, for the damages assessed by the jury. The Supreme Court of Canada, having on the objection of the respondents refused to admit the map in evidence on the ground that it had not been tendered at the trial, ordered a new trial:—Held, that whether or not the Supreme Court was right in refusing to admit the map their lordships would admit it, that it was conclusive in favour of the appellants, and that there had been no misdirection.

Blue v. Red Mountain Ry. Co., 9 Can. Ry. Cas. 140, [1909] A.C. 361. [Followed in Dutton v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 72.]

SPARKS FROM A LOCOMOTIVE—JOINDER OF PLAINTIFFS.

If it appears from the evidence that there was no other possible cause for the starting of a prairie fire near a railway track than sparks from a passing locomotive, the proper conclusion to be drawn is that the railway company is liable, notwithstanding that the sparks must have carried the fire an unusual distance and that no evidence was given as to the condition of the smoke stack and netting at the time. A number of plaintiffs joined in the Tait case presenting separate claims for losses by the same fire which plainly appeared by the statement of claim, to which the defendants filed a statement of defence without having moved to strike out any of the claims:—Held, without deciding whether Rule 218 of the King's Bench Act justified the joinder of plaintiffs in this case, that it was too late to take the objection of misjoinder at the trial. A deduction was ordered to be made from plaintiff's counsel fees for the trial, because considerable time was taken up in proving title to the property destroyed which the defendants had not been asked to admit, and which would be presumed from mere possession as against tortfeasors.

Tait v. Can. Pac. Ry. Co.; Bain v. Can. Pac. Ry. Co.; Kellett v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 417, 16 Man. L.R. 391.

[Referred to in Clark v. Ward, 2 Alta. L.R. 468.]

Consolidation of actions.

The consolidation of four actions, each by a different plaintiff against the same defendants, cannot, upon the motion of the common defendants, be granted either in the strict sense of the word "consolidation," to stay absolutely the proceedings in three actions and to require the plaintiffs to unite all their claims in one action, or, in the looser and less accurate sense, to select one action as the test action and stay the trial of the others pending the determination of the test action, as the particular issues in each case would be distinct from the issue in the others, though each action was based upon an alleged injury to the premises of the plaintiff, caused by the spread of the same fire negligently set out by the defendants on their land and negligently allowed to spread to the plaintiff's land. [2 D.L.R. 900, 3 O.W.N. 1015, affirmed.] [Amos v. Chadwick (1877), 4 Ch. D. 869, affirmed (1878), 9 Ch. D. 459; Westbrooke v. Australian R.M.S.N. Co. (1853), 23 L.J.N.S. C.P. 42; Lee v. Arthur (1908), 100 L.T.R. 61; Williams v. Raleigh, 13 P.R. (Ont.) 50, specially referred to.]

Kuula v. Moose Mountain (No. 2), 5 D.L.R. 814, 26 O.L.R. 332.

Fire from locomotive—Damage to "standing bush"—"Lands"—"Plantations."

In an action brought under s. 298 of the Railway Act, 1906, to recover the amount of damage caused to "standing bush" on the plaintiff's land by a fire, alleged to have been started by a locomotive of the defendants, there was a conflict of evidence as to whether the fire which actually did the damage spread to the plaintiff's land from a fire started by the defendants' locomotive, or from a fire started on the land of one H.:—Held, that there was evidence to justify the written finding of the jury that the damage to the plaintiff's property was caused by fire from the defendants' locomotive, and that an apparently inconsistent oral response made by the foreman to a question put by the trial Judge, was on the evidence, reconcilable with the written finding:—Held, also, that "standing bush" comes within the provisions of s. 298, being included in "lands," notwithstanding the occurrence of "plantations" in the words of the enactment, "crops, lands, fences, plantations, or buildings and their contents." In regard to legislation of this kind, the rule is to adopt the construction most beneficial to the public; see s. 15 of the Interpretation Act, R.S.C. 1906, c. 1, s. 15.

Campbell v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 300, 18 O.L.R. 466.

Sparks from locomotive—Proximate cause.

Plaintiff was the owner of a warehouse in close proximity to defendants' railway. Within six feet of the warehouse he piled a quantity of hay, which became ignited by a spark from a locomotive on the railway, and the fire spread to the warehouse, which was totally destroyed. The jury found that the fire originated from the defendant's engine, but that the plaintiff had been guilty of negligence in storing the hay in such close proximity to the railway:—Held, that as the jury had found the plaintiff negligent, and as such negligence was the proximate cause of the damage, he could not recover.

Cairns v. Can. Northern Ry. Co., 9 Can. Ry. Cas. 306, 2 S.L.R. 71.

DESTRUCTION OF "CROPS"—SPARKS FROM LOCOMOTIVE—MARSH HAY CUT AND BALED.

The Railway Act, 1906, s. 298, enacts that "whenever damage is caused to crops . . . plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage": —Held, that the plaintiff was not entitled to recover under the above section in respect to marsh hay cut at some distance from the railway and baled and piled on the property of another person along a siding of the defendants, to which place it had been carried while awaiting shipment, and where it had been destroyed by fire caused by sparks from one of the defendants' locomotives. Judgments of Teetzel, J., and a Divisional Court reversed.

Fraser v. Pere Marquette Ry. Co., 9 Can. Ry. Cas. 308, 18 O.L.R. 589.

[Referred to in Ottawa Y.M.C.A. v. Ottawa, 20 O.L.R. 567.]

FIRE SPREAD TO ADJOINING PROPERTY—CONDITION OF RIGHT-OF-WAY—ORIGIN OF FIRE.

Fire was seen smouldering in a dry stump on a high bank, about level with an engine smokestack, on defendant company's right-of-way. Evidence was given that one engine passed the place ten hours, and another six hours previously. Evidence also went to shew that the right-of-way contained inflammable material, and that there were other fires, whose origin was unknown, in the vicinity of the right-of-way. The fire in question was first seen by some of plaintiff's workmen, when it was insignificant in extent and the weather was calm, but the wind rising, the fire spread and burnt plaintiffs' mill property and a large extent of timber area:—Held, on appeal (affirming the finding of Irving J., at the trial, dismissing the action), that there was no evidence to connect the setting of the fire by sparks from the defendant company's engines.

Laidlaw v. Crow's Nest Southern Ry. Co., 10 Can. Ry. Cas. 27, 14 B.C.R. 169.

[Affirmed in 10 Can. Ry. Cas. 32, 42 Can. S.C.R. 355.]

COMBUSTIBLE MATTER ON BERM—ORIGIN OF FIRE—DAMAGE TO ADJOINING PROPERTY.

In an action against a railway company subject to the British Columbia Railway Act, if there is no evidence that the company had knowledge or notice of the existence of a fire on their right-of-way, not caused by the operation of the railway, the fact that the condition of the right-of-way facilitated the spread of the fire to adjoining property which was destroyed by it does not amount to actionable negligence. [10 Can. Ry. Cas. 27, 14 B.C.R. 169, affirmed.]

Laidlaw v. Crow's Nest Southern Ry. Co., 10 Can. Ry. Cas. 32, 42 Can. S.C.R. 355.

CAUSE OF FIRE—SPARKS FROM RAILWAY LOCOMOTIVE—CONJECTURE.

In an action to recover damages for the destruction of property of the plaintiff by fire alleged to have been started by sparks from a locomotive of the defendants, the trial Judge, MacMahon, J., found in favour of the plaintiffs:—Held, by a Divisional Court, reversing the finding, which was based upon a misapprehension of the evidence, that the plaintiffs had failed to meet the onus cast upon them by the law and to prove that the fire which caused the damage came from the defendants' engine. In every case there must be evidence from which it can fairly be inferred, not simply guessed, that the damage was caused by the defendant. [Connacher v.

Toronto, an unreported decision of the Queen's Bench Division, 4th March, 1893, and Campbell v. Acton Tanning Co., an unreported decision of the Court of Appeal, 29th June, 1900, specially referred to.]

Beal v. Michigan Central Ry. Co., 10 Can. Ry. Cas. 37, 19 O.L.R. 502.

[Approved in Gordon v. Goodwin, 20 O.L.R. 327; Ryan v. McIntosh, 20 O.L.R. 31.]

PRAIRIE FIRE—STATUTORY AUTHORITY FOR SETTING FIRE—WANT OF REASONABLE CARE—CONSENT OF ADJOINING LANDOWNERS.

Defendant in the month of September undertook to burn a fireguard along its track. No guards were ploughed before the fire was set. The defendants' foreman went ahead of the other employees and fired the prairie, and the others followed at some distance with appliances for extinguishing fire. The wind was blowing in gusts and away from the track, and the men were unable to stop the fire, which escaped and burned the plaintiff's crop. The defendants sought to explain their neglect to plough a guard on the ground that the guard must be 300 feet from the line, and to do so they must have trespassed on the property of others. It was not shewn, however, that the owners of such land had refused permission to plough a guard thereon. The defendants, after filing a defence, obtained leave to pay certain money into Court, and paid a certain sum in, but gave no notice of payment:—Held, that while the company had a right to burn its right-of-way and was required by the Railway Act to do so, yet in so burning it must exercise reasonable care to see that the fire does not escape. (2) That the degree of care required varies at different seasons, and when the grasses are dry and the conditions are conducive to the spread of fire especial care is required, and the starting of a fire when the conditions are favourable to its escape without proper guard and precautions is prima facie negligent. (3) That the company was not excused from complying with the statutory provisions as to ploughed guards by reason of the fact that such guards would have to be ploughed on the property of others, unless it was shewn that such adjoining landowners refused to permit such guards to be ploughed. (4) That no notice of payment in of the amount awarded as damages having been given by the defendant to the plaintiff, the defendant was not entitled to be relieved of costs by such payment in.

Kennermann v. Can. Northern Ry. Co. (Sask.), 10 Can. Ry. Cas. 287.

LIABILITY FOR FIRES—FIRE STARTING ON RIGHT-OF-WAY—BREACH OF STATUTORY DUTY.

Under c. 91 of R.S.N.S. 1900, which requires a railway to clear from off the sides of its roadway, where it passes through woods, all combustible material, it is answerable for the value of property adjacent to its roadway that was destroyed by fire which was started on the roadway by sparks from engines, in an accumulation of dried grass, ferns, bushes, and turf. [Rainville v. Grand Trunk, 25 A.R. (Ont.) 242, affirmed, sub nom. Grand Trunk v. Rainville, 29 Can. S.C.R. 201, specially referred to.]

Schwartz v. Halifax & S. W. Ry. Co. (N.S.), 14 Can. Ry. Cas. 85, 4 D.L.R. 691.

[Affirmed in 15 Can. Ry. Cas. 186, 11 D.L.R. 790, 47 Can. S.C.R. 590.]

LIABILITY FOR FIRES—BREACH OF STATUTORY DUTY—COMBUSTIBLES.

Since an absolute duty is imposed on a railway company by R.S.N.S. 1900, c. 91, to at all times keep its right-of-way where it passes through woods, clear from all combustible material, such as bushes, grass and fern, it is answerable for damages caused an adjoining landowner by fire started in an accumulation of combustible material on its right-of-way, by sparks from a locomotive. [Schwartz v. Halifax & South-Western Ry. Co., 4 D.L.R. 691, 14 Can. Ry. Cas. 85, 46 N.S.R. 20, affirmed.]

Halifax & South-Western Ry. Co. v. Schwartz, 11 D.L.R. 790, 47 Can. S.C.R. 590, 15 Can. Ry. Cas. 186.

Proximate cause—Spread of fire—Several concurrent fires as cause

Where it appears that the loss by fire was occasioned by the concurrence of several fires for only one of which the defendant was liable, a refusal to put to the jury the question of what other fires were burning at the time in that vicinity and which one or more of such fires occasioned or contributed to the burning of the plaintiff's property, will not justify a new trial, where the Judge in his instructions to the jury fully covers that point.

King Lumber Co. v. Can. Pac. Ry. Co. (B. C.), 14 Can. Ry. Cas. 313, 7 D.L.R. 733.

[Appeal to Privy Council withdrawn by consent.]

Sparks from locomotive.

Where, from the testimony, the inference is strong that sparks from a locomotive started a fire at a point off a railway company's right-of-way, where, to the knowledge of the company's servants, the fire smouldered for nearly a month, and then, fanned by a highwind, it spread, jumped across a river and destroyed standing timber belonging to the plaintiff, the company is properly held liable therefor under s. 298 of the Railway Act, 1906.

Farquharson v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 190, 3 D.L.R. 258, 20 W.L.R. 914.

[Followed in Kerr v. Can. Pac. Ry. Co., 12 D.L.R. 425, 15 Can. Ry. Cas. 193.]

Fires—Locomotive—Inference.

The fact that no fire was seen at or near a railway track until twenty minutes after the passage of a railway locomotive which had not been recently inspected, justified an inference that the fire originated from sparks from such locomotive. [Farquharson v. Can. Pac. Ry. Co., 3 D.L.R. 258, followed. (See also Railway Act, 1919, s. 231).]

Kerr v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 193, 12 D.L.R. 425.

[Affirmed in 16 Can. Ry. Cas. 25.]

Crown timber licencee—Right of licencee to sue for damages.

An action for damage by fire to timber growing on lands held under license from the Crown can be maintained by the plaintiff as licencee.

West v. Corbett, 15 Can. Ry. Cas. 195, 41 N.B.R. 420.

[Affirmed in 15 Can. Ry. Cas. 202, 47 Can. S.C.R. 596, 12 D.L.R. 182; referred to in Greer v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 47.]

Locomotive of another company with running rights.

If the operating railway company contracts to give another railway company concurrent running rights over its line, it must be taken to be "making use of" the locomotive of the company having such running rights within the meaning of s. 298 of the Railway Act, 1906, so as to fix the granting company with liability for damage caused by sparks from a locomotive of the other company while using the line of the granting company. [Lemire v. Quebec & Lake St. John Ry. Co., 3 Que. S.C. 192, referred to.]

Fredette v. Grand Trunk Ry. Co., 16 Can. Ry. Cas. 22, 15 D.L.R. 131.

ORIGIN FROM LOCOMOTIVE—INFERENCE.

The fact that no fire was seen at or near a railway track until a few minutes after the passing of a railway locomotive which had not been recently inspected, justifies an inference, where no other cause seemed probable, that the fire originated from sparks from such engine, so as to fix the railway with liability under s. 298 of the Railway Act, 1906 [Kerr v. Can. Pac. Ry. Co., 12 D.L.R. 425, 15 Can. Ry. Cas. 193, affirmed; National Trust v. Miller, 3 D.L.R. 69, referred to.]

Can. Pac. Ry. Co. v. Kerr, 16 Can. Ry. Cas. 25, 49 Can. S.C.R. 33, 14 D.L.R. 840.

DESTRUCTION OF TIMBER—LIMITATION OF AMOUNT RECOVERABLE—ORDER STAYING PROCEEDINGS PENDING TRIAL OF ISSUE.

To determine the proportion of loss by fire which an owner is entitled to recover from a railway company having regard to s. 298 of the Railway Act, 1906, the Court may order the trial of an issue to determine, first, whether the fire causing the damage resulted from the negligence of the company, and second, whether any, and, if so, what claims exist for loss caused to other persons by the same fire.

Fawcett v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 313.

OPERATION—LACK OF SAFETY APPLIANCES.

The Railway Act, 1906, s. 298, places the onus on the railway company of shewing that modern and efficient appliances were used on the locomotive to prevent the sparks from same causing fires in property adjacent to the railway in order to claim the benefit of the limitation of $5,000, which is made applicable by that section in that contingency if the company has not otherwise been guilty of negligence.

Dutton v. Can. North. Ry. Co., 19 Can. Ry. Cas. 72, 23 D.L.R. 43.

[Affirmed except as to damages, 21 Can. Ry. Cas. 294.]

COMBUSTIBLE MATERIAL ON RIGHT-OF-WAY—FIRE SPREADING—DAMAGES.

The persistent failure of a railway company to remove from its right-of-way, as required by statute, growing combustible material likely to catch fire from sparks from the locomotives and to spread to adjoining owners' property is an element to be considered in favour of awarding liberal damages in that contingency.

Westhaver v. Halifax & S.W. Ry. Co., 16 Can. Ry. Cas. 29, 14 D.L.R. 633.

OPERATION—COMBUSTIBLES ON RIGHT-OF-WAY.

Noncompliance with the requirements of s. 297 of the Railway Act, 1906, which requires the company to keeps its right-of-way free from dead, dry grass and weeds and other unnecessary combustible matter is negligence on the part of the railway company. [Blue v. Red Mountain Ry. Co., [1909] A.C. 361, 9 Can. Ry. Cas. 140, followed.]

Dutton v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 72, 23 D.L.R. 43.

DESTRUCTION OF TIMBER—CONTRIBUTORY NEGLIGENCE.

Where a timber license from the Department of the Interior stipulated that the license should dispose of the tree tops, branches and other debris, of the lumbering operations in accordance with the directions of the Department, so as to minimize the danger of fire, but it is not shewn that any directions were given by the Department in that respect, the failure of the lumberman, cutting timber by virtue of such license, to so dispose of the debris is not attributable to him as contributory negligence in an action against the railway company for the destruction of his logs by fire caused by sparks from the locomotive.

Dutton v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 72, 23 D.L.R. 43.

Timber—Rights of purchaser—Liability of railway company for destruction.

On a licensee under a timber license from the Department of the Interior making a sale of the logs to another who did the lumbering, the logs when cut became the personal property of the buyer and he has the right to maintain an action against a railway company through whose negligence the same were destroyed while still on the limits, although such buyer had no assignment of the government license. [Booth v. McIntyre, 31 U.C.C.P. 183, distinguished.]

Dutton v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 72, 23 D.L.R. 43. [Affirmed except as to damages, 21 Can. Ry. Cas. 294.]

Duty to clear right-of-way—Origin of fires—Negligence—Onus.

S. 297 of the Railway Act, 1906, which requires railway companies to keep the right-of-way free from dead grass, weeds and unnecessary combustible matter, applies only to a line of railway under operation, not whilst it is under construction; to charge a company with common-law negligence, while constructing a railway, for causing fires by sparks escaping from locomotives, and from burning logs and rubbish necessary for clearing the right-of-way, the onus is upon the plaintiff to prove that the fire originated from the sparks, and that the defendant was guilty of negligence in setting-out the fire or allowing it to escape. Per McCarthy, J.:—A person lighting a fire is not bound to prevent injury in all events, but only that injury shall not occur through his negligence. [Rylands v. Fletcher, L.R. 3 H.L. 330, considered; Margach v. MacKenzie & Mann, 32 W.L.R. 162, affirmed. See also Dutton v. Can. Northern Ry. Co., 23 D.L.R. 43, 19 Can. Ry. Cas. 72.]

Margach v. Mackenzie, Mann & Co., 20 Can. Ry. Cas. 427, 9 Atla. L.R. 548, 28 D.L.R. 1.

Interest of plaintiff—Wrongful owner in possession—Jus Tertii.

One in possession of timber which he has wrongfully taken to his limits from government lands has a sufficient possessory title to maintain an action for their destruction by fires caused by sparks from locomotives in violation of ss. 297, 298 of the Railway Act, 1906, amended by 1-2 Geo. V. (1911), c. 22, s. 10. The railway company cannot set up jus tertii.

Dutton v. Can. Northern Ry. C., 21 Can. Ry. Cas. 294, 30 D.L.R. 250.

Originating cause.

In the absence of evidence of any other probable source, evidence that three locomotives of a defendant railway company passed the spot where a fire originated about the time of the fire, is evidence from which a jury might not improbably infer that the fire was caused by sparks emitted from one of these locomotives.

Hearn v. Nelson, 8 W.W.R. 99.

FLAG STATIONS.

See Stations.

FLAGMEN.

See Highway Crossings; Railway Crossings; Crossing Injuries.

FORECLOSURE.

See Bonds and Securities; Sale.

FOREIGN COMPANIES.

See Bridges; Cars; Railway Board; Telegraphs; Tolls and Tariffs.

FORESHORE.

See Title to Lands, Expropriation; Waters.

Interference with access to Harbour, see Injunction.

Power of Dominion Parliament to regulate Provincial Foreshore and Harbour, see Constitutional Law.

FRANCHISES.

See Corporate Powers; Railway Subsidy; Street Railways.

FRAUD AND DECEIT.

Annotation.

Misrepresentations supporting action for deceit. 12 Can. Ry. Cas. 520.

DUTY OF RAILWAY COMPANY TO QUOTE CORRECT RATES.

A railway company, as a common carrier, apart from any statutory obligation, is bound to give accurate information when requested by any prospective shipper as to the rate of freight on goods proposed to be shipped. The provisions of s. 339, subs. 3, of the Railway Act, 1906, making it compulsory upon the agent to produce any particular tariff upon demand, do not affect the duty of the common carrier at common law to give correct information on request. If the station agent in the ordinary course of his duty, upon request of prospective shipper, misrepresents, even though innocently and without fraud, the rate of freight on the goods to be shipped, knowing the shipper intends to rely upon the rate quoted in making contract of sale of these goods, the railway company is liable in an action of deceit for the damage occasioned to the shipper by his reliance upon the agent's statement—and this even where the agent was supplied with full and accurate information by the company and the agent made such untrue representation without the knowledge of the company. Semble, if the improper quotation is made negligently, an action for damages based on negligence will probably also lie. Semble, if, however, any person requires and is satisfied with the production of the proper tariff in compliance with the statutory duty imposed on the railway company, and relies on his own efforts to ascertain the correct rate therefrom, the railway company will not be liable for any mistakes he may make in the absence of request for assistance from the company's agent. Where the shipper relies upon untrue representations of the freight rate and sells goods on the basis of the freight rate quoted which is a lesser rate than the correct rate, the measure of damages is not the difference between the rate quoted and the rate paid, but is the difference, if any, between the net price realized for the goods, and the wholesale price at the point of shipment at the time of shipment, plus expenses of sale and shipment. Where the trial Judge adopted an improper measure of damages, the case was remitted to him for reassessment. Judgment of District Court Judge

affirmed as to defendant's liability, but case remitted to him for reassessment of the damages.

Urquhart v. Can. Pac. Ry. Co., 12 Can. Ry. Cas. 500, 2 Atla. L.R. 280. [Disapproved in Gillis Supply Co. v. Chicago, Milwaukee, & Puget Sound Ry. Co., 13 Can. Ry. Cas. 35, 16 B.C.R. 254.]

INCORRECT RATE QUOTED BY AGENT.

Plaintiff company, a British Columbia concern, sought from the defendant company's agent at Seattle, Wash., U.S.A., information as to the rate on plaster from a point in Kansas and was given a certain figure per ton. There was some dispute as to whether the rate quoted was from Kansas to Seattle (according to defendant company's contention) or to Vancouver, B.C. (according to plaintiff company's contention), but a letter from an official of defendant company confirming the quotation of a rate to Vancouver was put in evidence. There was no evidence that there had been any carelessness or recklessness shewn in giving the information:—Held, on appeal, reversing the finding of the trial Judge, that an action of deceit did not lie in the circumstances:—Held, further, that there is no duty cast upon a common carrier to give correct verbal information as to rates:—Held, further, that to entitle plaintiff company to succeed, the wrong complained of, having been committed in the state of Washington, must be shewn to be actionable in British Columbia as well. [Urquhart Co. v. Can. Pac. Ry. Co., 2 Alta. L.R. 280, 12 Can. Ry. Cas. 500, disapproved.]

Gillis Supply Co. v. Chicago, Milwaukee & Puget Sound Ry. Co., 13 Can. Ry. Cas. 35, 16 B.C.R. 254.

FREE PASS.

Injuries to employees traveling on free pass, see Employees.

FREIGHT.

See Carriers of Goods; Tolls and Tariffs; Train Service.

FREIGHT AGENTS.

See Agents.

GARNISHMENT.

See Claims.

GATES.

See Fences and Cattle Guards; Highway Crossings; Railway Crossings; Farm Crossings; Crossing Injuries.

GENERAL ADVANTAGE OF CANADA.

See Work for General Advantage of Canada.

GOODS.

See Carriers of Goods; Title to Goods.

GOVERNMENT RAILWAYS.

A. Contracts.
B. Expropriation; Compensation.
C. Negligence, in general.
D. Fences and Cattle Guards.
E. Fires.
F. Injuries to Employees.
G. Injuries to Passengers.
H. Carriage of Goods; Loss; Damage.
I. Construction and Operation; Damage.

Liability of Crown for construction and maintenance of railway bridges, see Bridges.

Annotation.

Liability of Government Railway as a common carrier. 53 C.L.J. 281, 23 Can. Ry. Cas. 305.

A. Contracts.

CLAIM FOR EXTRA WORK—CERTIFICATE OF ENGINEER.

The suppliant contracted with the Minister of Public Works, to construct, for the sum of $78,000, a deep sea wharf at the Richmond station, Halifax, agreeably to the plans in the engineer's office and specifications, and with such directions as would be given by the engineer in charge during the progress of the work. By the 7th clause of the contract no extra work could be performed, unless "ordered in writing by the engineer in charge before the execution of the work." By letter, subsequently the Minister authorized the suppliant to make an addition to the wharf, by the erection of a superstructure to be used as a coal floor, for the additional sum of $18,400. Further extra work, which amounted to $2,781, was performed under another letter from the Public Works Department. The work was completed, and on the final certificate of the Government's engineer in charge of the works, the sum of $9,681, as the balance due, was paid to the suppliant, who gave the following receipt, dated 30th April, 1875:—"Received from the Intercolonial Railway, in full, for all amounts against the Government for works under contract, as follows: 'Richmond deep water wharf, works for storage of coals, works for bracing wharf, rebuilding two stone cribs the sum of $9,681.'" The suppliant sued for extra work, which he alleged was not covered by the payment made on the 30th April, 1875, and also for damages caused to him by deficiency in and irregularity of payments. The petition was dismissed with costs; and a rule nisi for a new trial was subsequently moved for and discharged:—Held, affirming judgment of the Court below, that all work performed by the suppliant for the Government was either contract work within the plans or specifications, or extra work within the meaning of the 7th clause of the contract, and that he was paid in full the contract price, and also the price of all extra work for which he could produce written authority, and that the written authority of the engineer and the estimate of the value of the work are conditions precedent to the right of the suppliant to recover payment for any other extra work. Henry, J., dissenting. Per Ritchie, C.J.: Neither the engineer, nor the clerk of the works, nor any subordinate officer in charge of any of the works of the Dominion of Canada, has any power or authority, express or implied, under the law to bind the Crown to any contract or expenditure not specially authorized by the express terms of the contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract.

O'Brien v. The Queen, 4 Can. S.C.R. 529.

Petition of right—Intercolonial railway contract—Condition precedent to recovery of money for extra work—Certificate of chief engineer—Approval of commissioners—Power to bind Crown—Tort—Fraudulent misconduct of Crown's servants.

Jones v. The Queen, 7 Can. S.C.R. 570.

[Adhered to in Berlinquet v. The Queen, 13 Can. S.C.R. 74; followed in The Queen v. McGreevey, 18 Can. S.C.R. 384.]

Tender for work on Intercolonial ry.—Liability of Crown—Neglect of I.C.R. commissioners—Power to order extra work—Certificate of chief engineer.

Isbester v. The Queen, 7 Can. S.C.R. 696.

Petition of right—Contract for construction of railway.

The suppliants by their petition of right alleged that they were contractors for the building of section No. 4 of the Intercolonial Ry., and duly entered upon and completed their contract, which contract they alleged was, under the Act entitled "An Act respecting the construction of the Intercolonial Ry.," within the time, and according to the terms, covenants and conditions set forth in said contract. That in following the directions and instructions of the commissioners and the engineers employed and placed in charge of the said works, which directions and instructions were given from time to time as provided by the contract, and the said suppliants were bound to follow, and did follow, they performed a large amount of extra work not comprised in said contract, nor in the data furnished to them at the time the said contract was entered into, nor in the schedules and specifications referred to in said contract and connected therewith, and not intended to be covered by the lump sum, which formed the consideration money of said contract. That they were put to great expense by delays in preparations by the commissioners and engineers, and to great loss and damage by reason of changes and alterations necessitated by the unskilful manner in which the works had been laid out by the engineers. That the suppliants were deceived and misled in making their estimates by insufficient and erroneous data in the schedule of works and quantities prepared and published by the chief engineer. That it had not been the usage, nor was it the intention of the parties, to be held to the strict letter of the contract when the schedule gave erroneous or insufficient information, entailing extra work which could be performed only with ruinous consequences, but they were entitled to be paid for such extra work. The suppliants set out at length the various kinds of extra work done and changes made, and prayed for a settlement of accounts, that they might be allowed their claim for the extra work done, for the materials provided by them, for damages resulting from defects of plans, specifications and surveys, from changes made in location, grade, etc., from the negligence and want of skill of the Government engineers, and for breach of the contract in being prevented from proceeding with the work, and that they might be reimbursed sums of money advanced during the progress of the work with interest. The Attorney-General demurred on the following grounds: That it did not appear by the petition that the chief engineer of the I.C. Ry. had certified that the work for or on account of which the suppliants claimed had been duly executed, or that the suppliants were entitled to be paid therefor or for any part thereof, nor that such certificate had been approved of by the commissioners of said railway as required by s. 18 of the Act of Parliament of Canada, entitled "An Act respecting the construction of the I.C. Ry.," passed in the 31st year of H.M. reign; that H.M. was not responsible in a petition of right for the damages and injuries mentioned; that it did not appear by the terms of the contract the commissioners or their engineers were under any obligation to lay out work or furnish specifications therefor; that it appeared by the petition that the extra work claimed for was done in pursuance of directions given by the engineers as provided by the contract, and it was not alleged any extra payment was to be made therefor; that it was immaterial that the schedules of works were defective or erroneous, because such schedules were not alleged to have been warranted as accurate, but only of probable quantities, and the demurrer denied liability for any of the other matters mentioned in the petition on the ground that the contract provided for them, or that the work, if done, was not in any way warranted by H.M., or had been done under the directions of the engineers acting within the contract. In the Exchequer Court, Henry, J., overruled the demurrer with costs. On appeal to the Supreme Court of Canada by the Attorney-General:—Held, that the suppliants' petition was too indefinite in form, and was insufficient in not setting out the contract, and a compliance with the requirements of s. 18 of 31 Vict. c. 13 (D.), or satisfactory ground of compliance with the condition precedent required by that section. Appeal allowed. Judgment of the Exchequer Court reversed, with leave to the suppliant (the Crown assenting) to amend his petition, on payment of costs of appeal and demurrer, by setting out the contract and such averments as he might be advised.

The Queen v. Smith, Cass. Can. S.C.R. Dig. 1893, p. 634.

Government contract—Assignment—Knowledge of minister of public works—Assent of Crown—Clause prohibiting assignment without assent.

The Queen v. Smith, 10 Can. S.C.R. 1.

Breach of contract—Agreement with Government for continuous possession of railroad—Misfeasance.

By an agreement entered into between the Windsor & Annapolis Ry. Co. and the Government, approved and ratified by the Governor-in-Council, 22nd September, 1871, the Windsor Branch Ry., N.S., together with certain running powers over the trunk line of the Intercolonial, was leased to the suppliants for the period of 21 years from 1st January, 1872. The suppliants under said agreement went into possession of said Windsor Branch and operated the same thereunder up to the 1st August, 1877, on which date C.J.B., being and acting as Superintendent of Railways, as authorized by the Government (who claimed to have authority under an Act of the Parliament of Canada, 37 Vict. c. 16, passed with reference to the Windsor Branch, to transfer the same to the W.C. Ry. Co. otherwise than subject to the rights of the W. & A. Ry. Co.) ejected suppliants from and prevented them from using said Windsor Branch and from passing over the said trunk line; and four or five weeks afterwards said Government gave over the possession of said Windsor Branch to the W.C. Ry. Co., who took and retained possession thereof. In a suit brought by the W. & A. Ry. Co. against the W.C. Ry. Co. for recovery of possession, etc., the Privy Council held that 37 Vict. c. 16 did not extinguish the right and interest which the W. & A. Ry. Co. had in the Windsor Branch under the agreement of 22nd September, 1872. On a petition of right being filed by suppliants, claiming indemnity for the damage sustained by the breach and failure on the part of the Crown to perform the agreement of 22nd September, the Exchequer Court held that the taking possession of the road by an officer of the Crown under the assumed authority of an Act of Parliament was a tortious act for which a petition of right did not lie. On appeal to the Supreme Court of Canada:—Held, Strong and Gwynne, JJ., dissenting, that the Crown by the answer of the Attorney-General did not set up any tortious act for which the Crown claimed not to be liable, but alleged that it had a right to put an end to the contract and did so, and that the action of the Crown and its officers being lawful and not tortious, they were justified. But, as the agreement was still a continuous, valid and binding agreement to which they had no right to put an end, this defence failed. Therefore, the Crown, by its officers, having acted on a misconception of or misinformation as to the rights of the Crown, and wrongfully, because contrary to the express and implied stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconscious of the wrong, by such breach become possessed of the suppliant's property, the petition of right would lie for the restitution of such property and for damages. Prior to the filing of the petition of right, the suppliants sued the W.C. Ry. Co. for the recovery of the possession of the Windsor Branch, and also by way of damages for moneys received by the W.C. Ry. Co. for the freight or passengers on said railway since the same came into their possession, and obtained judgment for the same, but were not paid. The judgment in question was not pleaded by the Crown, but was proved on the hearing by the record in the Supreme Court of Canada, to which Court an appeal in said cause had been taken, and which affirmed the judgment of the Supreme Court of Nova Scotia:—Held, per Ritchie, C.J., and Taschereau, J., that the suppliants could not recover against the Crown, as damages, for breach of contract, what they claimed and had judgment for as damages for a tort committed by the W.C. Ry. Co., and in this case there was no necessity to plead the judgment. Per Fournier and Henry, JJ., that the suppliants were entitled to damages for the time they were by the action of the Government deprived of the possession and use of the road to the date of the filing of their petition of right.

Windsor & Annapolis Ry. Co. v. The Queen and Western Counties Ry. Co., 10 Can. S.C.R. 335.

[In this case on appeal to the Privy Council the judgment of the Supreme Court was reversed in part. See 55 L.J.P.C. 41.]

[Applied in McLean v. The King, 38 Can. S.C.R. 546; discussed in Re Massey Mfg. Co., 11 O.R. 444; distinguished in Brigham v. The Queen, 6 Can. Ex. 418; McLean v. The King, 38 Can. S.C.R. 549; followed in R. v. Dartmouth, 17 N.S.R. 317; referred to in Johnson v. The King, 8 Can. Ex. 369; relied on in Hall v. The Queen, 7 B.C.R. 92; Reg. v. Mowatt, 1 N.W. Terr. (Pt. 1) 87.]

Petition of right—Intercolonial Ry. contract—Certificate of engineer a condition precedent to recover money for extra work.

Berlinquet v. The Queen, 13 Can. S.C.R. 26.

[Commented on in The King v. Stewart, 32 Can. S.C.R. 499.]

Contract to build government railway—Conditions precedent.

The compulsory powers given to the Government of Canada to expropriate lands required for any public work can only be exercised after compliance with the statute requiring the land to be set out by metes and bounds and a plan or description filed; if these provisions are not complied with, and there is no order-in-council authorizing land to be taken when an order-in-council is necessary, a contractor with the Crown who enters upon the land to construct such public work thereon is liable to the owner in trespass for such entry. 20 N.S.R. 30, reversed.

Kearney v. Oakes, 18 Can. S.C.R. 148.

Claim for extra and additional work done on Intercolonial Railway—Certificate by chief engineer—Approval by commissioner or minister.

In 1879 the respondent filed a petition of right for $608,000 for extra work and damages arising out of his contract for the construction of s. 18 of the I.C.R. without having obtained a final certificate from F., who held at the time the position of Chief Engineer. In 1880, F. having resigned, F.S. was appointed Chief Engineer of the I.C.R. and investigated the respondent's claim, and reported a balance in his favor of $120,371. Thereupon the respondent amended his petition and made a special claim for the $120,371, alleging that F.S.'s report or certificate was a final closing certificate within the meaning of the contract, which question was submitted for the opinion of the Court by special case. This report was never approved of by the I.C.R. Commissioners or by the Minister of Railways under 31 Vict. c. 13, s. 18. The Exchequer Court, held that the suppliant was entitled to recover on the certificate of F.S. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of the Exchequer Court, (1) per Ritchie, C.J. and Gwynne, J., that the report of F.S., assuming him to have been the Chief Engineer to give the final certificate under the contract, cannot be construed to be a certificate of the Chief Engineer, which does or can entitle the contractor to recover any sum as remaining due and payable to him under the terms of his contract, nor can any legal claim whatever against the Government be founded thereon. (2) Per Ritchie, C.J.:—That the contractor was not entitled to be paid anything until the final certificate of the Chief Engineer was approved of by the Commissioners or the Minister of Railways [31 Vict. c. 13, s. 18, and 37 Vict. c. 15; Jones v. The Queen, 7 Can. S.C.R. 570.] (3) Per Patterson, J.:—That although F.S. was duly appointed chief engineer of the I.C.R., and his report may be held to be the final and closing certificate to which the suppliant was entitled under clause 11 of the contract, yet as it is provided by clause 4 of the contract that any allowance for increased work is to be decided by the Commissioners and not by the engineer, the suppliant is not entitled to recover on F.S.'s certificate. Per Strong and Taschereau, JJ. (dissenting):—That F.S. was the Chief Engineer and as such had power under clause 11 of the contract to deal with the suppliant's claim and that his report was "a final closing certificate" entitling the respondent to the amount found by the Exchequer Court on the case submitted. Per Strong, Taschereau and Patterson, JJ.:—That the office of Commissioners having been abolished by 37 Vict. c. 15, and their duties and powers transferred generally to the Minister of Railways, the approval of the certificate was not a condition precedent to entitle the suppliant to claim the amount awarded to him by the final certificate of the Chief Engineer. 1 Can. Ex. 321, reversed.

The Queen v. McGreevy, 18 Can. S.C.R. 371.

[Applied in Burroughes v. The Queen, 20 Can. S.C.R. 429; followed in Ross v. The Queen, 4 Can. Ex. 397; Ross v. The Queen, 25 Can. S.C.R. 564; referred to in Goodwin v. The Queen, 5 Can. Ex. 324.]

PETITION OF RIGHT—SUBMISSION—MEDIATORS—AWARD—REASONS FOR SETTING ASIDE.

McGreevy v. The Queen, 19 Can. S.C.R. 180.

[Referred to in Quebec Bridge & Ry. Co. v. Quebec Improvement Co., 16 Que. K.B. 112.]

DEPARTMENT OF RAILWAYS—CLAIMS FOR SUPPLIES.

S. 23 of the Act respecting the Department of Railways and Canals, R.S.C. 1886, c. 37, which requires all contracts affecting that department to be signed by the Minister, the Deputy Minister or some person specially authorized, and countersigned by the secretary, has reference only to contracts in writing made by that department (Gwynne, J., contra). Where goods have been bought by and delivered to officers of the Crown for public works, under orders verbally given by them in the performance of their duties, payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing. (Gwynne and King, JJ., contra.) 6 Can. Ex. 39, affirmed.

The Queen v. Henderson et al., 28 Can. S.C.R. 425.

[Commented on The King v. British American Bank Note Co., 7 Can. Ex. 135; distinguished Ross v. The King, 7 Can. Ex. 287.]

ACCIDENT—PRESCRIPTION—CONSTRUCTION—STIPULATION RELIEVING THE CROWN OF LIABILITY—INSURANCE.

Saindon v. The King, 15 Can. Ex. 305.

CONTRACT BETWEEN EMPLOYEE AND I.C.R. AND P.E.I. EMPLOYEES RELIEF AND INSURANCE ASSOCIATION TO RELEASE CROWN OF LIABILITY—RECEIPT GIVEN IN ERROR.

Hudon v. The King, 15 Can. Ex. 320.

B. Expropriation; Compensation.

EXPROPRIATION OF LAND FOR RAILWAY PURPOSES—VALUE OF LAND FOR BUILDING PURPOSES—DAMAGES RESULTING FROM WANT OF CROSSING.

The Crown had expropriated a certain portion of land which the claimant contended was held for sale as building lots. It was established in evidence that such land had not been laid off into lots prior to the expropriation, and that none of it had, therefore, been sold for building purposes. There was evidence, however, to shew that there was a remote probability that the land would become available for such purposes upon the extension of the limits of an adjoining town. By the absence of a crossing over the railway, claimant was deprived of access to the shore, and thereby suffered loss in the use and occupation of the property remaining to her:—Held, per Burbidge, J., in the Exchequer Court of Canada (see 2 Can. Ex. 21) that, while such remote probability added something to the value which the property would otherwise have had, compensation should not be based on any supposed value of the land for building purposes at the time of the expropriation:—Held, also, that claimant was entitled to compensation in respect of the damage resulting from the want of a crossing. On appeal by the claimant to the Supreme Court of Canada:—Held, that the amount of compensation awarded should be increased, on the ground that it did not appear that such compensation was assessed in view of the future damage that might result from the want of a crossing. 2 Can. Ex. 21, varied.

Kearney v. The Queen (1889), Cass. Can. S.C.R. Dig. 1893, p. 313.

[Followed in Re Gilbert and St. John Horticultural Assn., 1 N.B. Eq. 448; Can. Northern v. Billings, 19 Can. Ry. Cas. 193.]

EXPROPRIATION—SUFFICIENCY OF AWARD.

The Crown represented by the Minister of Railways and Canals, requiring a portion of a lot belonging to the respondents, for the construction of the St. Charles Branch of the I.C.R., deposited in the proper registry office, in accordance with s. 10 of the Government Railways Act, 1881, a plan of the land so required, and gave notice under s. 15 of said Act, tendering the sum of $2,662.42 as compensation for the land expropriated. The lot in question had been used as a cove, where a profitable lumber business had been conducted. To enable such a business to be carried on advantageously, a valuable wharf was erected, running into deep water, at which vessels of large size could load. Upon the respondents' refusing to accept the sum tendered, the question of the value to be paid by the Crown for the land so expropriated, was submitted by the said Minister, under the provisions of the Government Railways Act, 1881, to the Board of Official Arbitrators of Canada for their investigation and award. The said Board awarded the claimants the amount which had been tendered and refused as full compensation for the land expropriated, and all damage to the balance of the property, and imposed the cost of the arbitration upon the claimants. The respondents appealed to the Exchequer Court, and Fournier J., who heard the appeal, and before whom one witness on either side was examined, set aside the award of the arbitrators, and allowed the claimants $11,073 (being $8,500 as damages suffered by the property through the construction of the road through it, and $2,573 as the value of the land expropriated), also the claimants costs of the appeal (save of their witnesses examined in the Exchequer Court) and before the arbitrators. On appeal from this judgment the Supreme Court held that the judgment of the Court below was affirmed and the appeal dismissed with costs.

The Queen v. Murphy, Cass. Can. S.C.R. Dig. 1893, p. 314.

INTERCOLONIAL RY. EXTENSION—DAMAGES—SUBMISSION—PETITION OF RIGHT.

Halifax City Ry. Co. v. The Queen (1885), Cass. Can. S.C.R. Dig. 1893, p. 37.

DAMAGES TO PROPERTY FROM WORKS EXECUTED ON GOVERNMENT RAILWAY.

Where, by certain work done by the Government Railway authorities in the city of St. John, the pipes for the water supply of the city were interfered with claimants were entitled to recover for the cost reasonably and properly incurred by their engineer in good faith, to restore their property to its former safe and serviceable condition, under an arrangement made with the Chief Engineer of the Government railway, and upon his undertaking to indemnify the claimants for the cost of the said work. Strong and Gwynne, JJ., dissenting on the ground that the Chief Engineer had no authority to bind the Crown to pay damages beyond any injury done. 2 Can. Ex. 78, affirmed.

The Queen v. St. John Water Commissioners, 19 Can. S.C.R. 125.

AWARD OF OFFICIAL ARBITRATORS—COMPENSATION FOR LAND TAKEN.

On an appeal to the Supreme Court from a judgment of the Exchequer Court increasing the amount awarded by the official arbitrators to the claimant for expropriation of land for the I.C.R.:—Held, reversing the judgment of the Exchequer Court and restoring the award of the official arbitrators, that to warrant an interference with an award of value necessarily largely speculative an Appellate Court must be satisfied beyond all reasonable doubt that some wrong principle has been acted on or something overlooked which ought to have been considered by the official arbitrators, and upon the evidence in this case this Court refused to interfere with the amount of compensation awarded by the official arbitrators.

The Queen v. Paradis, The Queen v. Beaulieu, 16 Can. S.C.R. 716, 1 Can. Ex. 191.

[Applied in Bertrand v. The Queen, 2 Can. Ex. 292; Macarthur v. The King, 8 Can. Ex. 257; referred to in Re Gilbert & St. John Horticultural Assn., 1 N.B. Eq. 442; relied on in The Queen v. Carrier, 2 Can. Ex. 44.]

AWARD OF ARBITRATORS INCREASED BY THE EXCHEQUER COURT.

In an expropriation of land for the Intercolonial Ry., the award of the arbitrators was increased by the Judge of the Exchequer Court, after additional witnesses had been examined by the Judge. On appeal to the Supreme Court it was:—Held, affirming the judgment of the Exchequer Court, that as the judgment appealed from was supported by evidence, and there was no matter of principle on which such judgment was fairly open to blame, nor any oversight of material consideration, the judgment should be affirmed. Gwynne, J., dissenting. 1 Can. Ex. 291, affirmed.

The Queen v. Charland, 16 Can. S.C.R. 721.

[Referred to in Re Gilbert & St. John Horticultural Assn., 1 N.B. Eq. 442.]

EXPROPRIATION FOR GOVERNMENT RAILWAY PURPOSES—SEVERANCE OF LAND —FARM CROSSINGS—COMPENSATION.

When land expropriated for Government railway purposes severed a farm the owner, although not at the time entitled to a farm crossing apart from contract, was entitled to full compensation covering the future as well as the past for the depreciation of his land by want of such a crossing. Gwynne, J., dissenting on the ground that the owner was entitled to a crossing as a matter of law.

Guay v. The Queen, 17 Can. S.C.R. 30.

[Applied in Grand Trunk Ry. Co. v. Perrault, 36 Can. S.C.R. 677; discussed in Ontario Lands & Oil Co. v. Canada Southern Ry. Co., 1 O.L.R. 215.]

DAMAGES—FARM CROSSINGS.

Where land is taken by a railway company for the purpose of using the gravel thereon as ballast, the owner is only entitled to compensation for the land so taken as farm land, where there is no market for the gravel. The compensation to be paid for any damages sustained by reason of anything done under and by authority of R.S.C., 1886, c. 39, s. 3, subs. (e), or any other act respecting public works or government railways, includes damages resulting to the land from the operation as well as from the construction of the railway. The right to have a farm crossing over one of the Government railways is not a statutory right, and in awarding damages full compensation for the future as well as for the past for the want of a farm crossing should be granted. Gwynne, J., dissenting, was of opinion that the owner had the option of demanding, and the Government had a like option of giving, a crossing in lieu of compensation, and that on the whole case full compensation had been awarded by the Court below. 2 Can. Ex. 11, reversed.

Vezina v. The Queen, 17 Can. S.C.R. 1.

[Adhered to in Guay v. The Queen, 17 Can. S.C.R. 32; applied in Re Armstrong & James Bay Ry. Co., 12 O.L.R. 137, 7 O.W.R. 713; Grand Trunk Ry. Co. v. Perrault, 36 Can. S.C.R. 677; Ontario Lands & Oil Co. v. Canada Southern Ry. Co., 1 O.L.R. 215; distinguished in Grand Trunk

Ry. Co. v. Huard, 1 Que. Q.B. 510; followed in Can. Northern Quebec Ry. Co. v. Frenette, 10 Que. P.R. 321; Re Van Horne and Winnipeg & Northern Ry. Co., 16 Can. Ry. Cas. 72, 14 D.L.R. 897; referred to in Neilson v. Quebec Bridge Co., 21 Que. S.C. 334.]

VALUE OF LAND TAKEN—AWARD BY EXCHEQUER COURT JUDGE.

The Supreme Court of Canada will not interfere with the award of the Judge of the Exchequer Court as to the value of land expropriated for railway purposes where there is evidence to support his finding and such finding is not clearly erroneous.

Levis v. The Queen, 21 Can. S.C.R. 31.

[Referred to in Re Gilbert & St. John Horticultural Assn., 1 N.B. Eq. 442.]

TRANSCONTINENTAL RAILWAY COMMISSION—EXPROPRIATION.

The Transcontinental Railway Act, 3 Edw. VII. c. 71, does not expressly empower the Commissioners to deal with compensation for land taken for the railway, and s. 15, giving them "the rights, powers, remedies and immunities conferred upon a company under the Railway Act," does not confer such power. The Transcontinental Railway is a public work within the meaning of s. 2, subs. (d), of the Exchequer Court Act, and proceedings respecting compensation of land taken for the railway may be taken by or against the Crown in the Exchequer Court. Judgment of the Exchequer Court, 13 Can. Ex. 171, reversed.

The King v. Jones, 44 Can. S.C.R. 495.

VESTING—TIME POSSESSION TAKEN.

Under s. 18 of the Government Railways Act, 1881 [now R.S.C. 1906, c. 143, s. 22], lands taken for the purposes of a Government railway became absolutely vested in the Crown at and from the time of possession being taken on its behalf, and compensation must be assessed in respect of the value of the lands at that period. [The Queen v. Clarke (5 Can. Ex. 64), explained.]

The King v. Royal Trust Co., 12 Can. Ex. 212.

SIDING—UNDERTAKING IN MITIGATION OF DAMAGES IN PRIOR SUIT.

In certain expropriation proceedings between the Crown and the suppliant's predecessor in title, the Crown, in mitigation of damages to lands not taken, filed an undertaking to lay down and maintain a railway track or siding in front of, or adjoining, said lands, and to permit the then owner, "his heirs, executors, administrators, assigns (and the owner or owners for the time being of the said land and premises or any part thereof and each of them) to use the same for the purposes of any lawful business to be carried on or done on the said lands or premises." By order of Court the suppliant's predecessor in title was declared to be entitled to the execution of such undertaking. The undertaking was given in 1907, and at that time the lands in question were not being used for any particular purpose. The Crown in execution of its undertaking subsequently laid down a siding in front of or adjoining the said lands. There was, however, a retaining wall between the siding and such lands, and the Crown informed the solicitor of the suppliant on the 5th October, 1909, that "at any time you may desire, we are prepared to open a way through this retaining wall so as to give access to the siding in order that you may conduct your business in the manner contemplated in the order of the Court"; but, although the suppliant presented his claim for damages on the basis that the Crown had not given him a siding suitable for carrying on a corn-meal milling business, at the time of the institution of the present proceedings nothing had been done to utilize the property for any particular business:—Held, that upon the facts the Crown had fully complied with the terms of the undertaking mentioned, and that the suppliant had not made out a claim for damages. Quaere, whether the suppliant had any right to take proceedings to compel the execution of the undertaking by the Crown until the property was occupied for the purposes of some particular business. (2) Whether the suppliant would have any right to enforce a claim for damages in view of the fact that he had no assignment of any such claim from his predecessor in title.

Hart v. The King, 13 Can. Ex. 133.

Value—Prospective capability.

In estimating the amount of compensation for the expropriation of land by the Crown, the prospective capabilities of the property or its speculative value cannot be taken into consideration. The compensation should be measured by the prices paid for similar properties in the immediate neighborhood.

King v. Blais et al., 18 Can. Ex. 63.

Residential property—Valuation.

The reinstatement principle cannot be taken as the basis of compensation for residential property expropriated for a public work; nor can the prospective value of the property arising from the construction of the work be taken into consideration. The best guide is the selling value of similar property in the locality.

King v. Blais et al., 18 Can. Ex. 67.

Shunting-yard—School—Harbour—Riparian rights—Consequential injuries.

The Dominion Government in the operation of its railways, constructed a shunting-yard on lands reclaimed by it from the waters of Bedford Basin, partly in front of the school buildings of the suppliant corporation. The latter owning water lots thereon, which had been improved as a bathing pavilion and wharf in connection with the school, claimed compensation for injurious affection by reason of the construction and operation of said yard:—Held, Bedford Basin being a public harbour at the time of Confederation, was the property of the Dominion by virtue of the B.N.A. Act, and no title to water lots thereon could pass under a provincial grant. [Maxwell v. The King, 40 D.L.R. 715, 17 Can. Ex. 97, followed.] The fact that the suppliant had been allowed a crossing over the railway tracks to reach the beach where its lots were situated, did not give it an irrevocable license as against the Crown, nor could it under the circumstances claim such license as a riparian proprietor, nor could such license be considered as an element of compensation. The injury having been caused by the operation of works on lands other than those expropriated from the suppliant, the latter was not entitled to compensation therefor.

Sisters of Charity of Rockingham v. The King, 24 Can. Ry. Cas. 383, 18 Can. Ex. 385, 46 D.L.R. 213.

Expropriation—Public work—Abandonment—Revesting of land taken—Compensation—Estimating damages—Construction of statute—Jurisdiction of Exchequer Court—National Transcontinental Railway Act—Railway Act—Exchequer Court Act—"Expropriation Act"—Railways and Canals Act.

[The King v. Jones, 44 Can. S.C.R. 495, followed.]

Gibb et al. v. The King, 52 Can. S.C.R. 402, 27 D.L.R. 262; reversed by P.C. 42 D.L.R. 336.

Gravel pit—Basis of value.

Where land was taken for the purpose of a gravel-pit for a Government Railway, the price paid on the sale of the land some three years after the expropriation of the right-of-way when the land had been enhanced in value by the operation of the railway, was held to be the best test and starting point for ascertaining the market value of the land.

Demers v. The King, 15 Can. Ex. 492.

Hotel property—Easement.

Upon an expropriation by the Crown of a portion of a hotel site for railway purposes, compensation should be allowed on the basis of a building lot for injury to the property from the construction and operation of the railway, and for an easement of a right-of-way over a street affected by the expropriation.

The King v. Birchdale, 16 Can. Ex. 375.

Flooding from ditches.

The Commissioners of the National Transcontinental Ry. had expropriated a certain portion of a farm while in the possession of the suppliant's predecessor in title and paid him compensation therefor and for all damages resulting from the expropriation—the deed of sale stating that the compensation paid comprised "all damages of every nature whatsoever." After the suppliant acquired the farm, flooding occurred, and the suppliant claimed that it was due to the construction of a new drain by the railway authorities. The evidence showed that the flooding was occasioned by the failure of the suppliant to open and complete his boundary ditches. Held, that the injury, even if it arose from anything done by the railway authorities, was covered by the compensation paid to the suppliant's auteur (i.e. former owner), and that no claim for damages would lie unless another expropriation had been made or some new work performed, causing damages of a character not falling within the scope of those arising from the first expropriation. [Jackson v. The Queen, 1 Can. Ex. 144, referred to.]

Moisan v. The King, 16 Can. Ex. 431.

C. Negligence; In General.

Liability of Crown for negligence.

The Crown, in its operation of the Intercolonial Railway, is not a common carrier, and, apart from its statutory duties, is not subject to the duties imposed by the common law upon common carriers. [The Queen v. McLeod, 8 Can. S.C.R. 1; The Queen v. McFarland, 7 Can. S.C.R. 216, referred to.]

Williams v. Government Railways Management Board, 11 E.L.R. 10.

Damage to farm from overflow of water—Boundary ditches—Maintenance of.

Under 43 Vict. c. 8, confirming the agreement of sale by the Grand Trunk Ry. Co. to the Crown of the purchase of the Rivière du Loup branch of their railway, the Crown cannot be held liable for damages caused from the accumulation of surface water to land crossed by the railway since 1879 unless it is caused by acts or omissions of the Crown's servants, and as the damages in the present case appear, by the evidence relied on, to have been caused through the nonmaintenance of the boundary ditches of claimant's farm, which the Crown is under no obligation to repair or keep open, the appellant's claim for damages must be dismissed. 2 Can. Ex. 396, affirmed.

Morin v. The Queen, 20 Can. S.C.R. 515.

DEATH ARISING FROM NEGLIGENCE—DEFECTIVE ENGINE—DANGEROUS CROSSING—UNDUE SPEED—"TRAIN OF CARS."

The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level crossing over the Intercolonial Ry. tracks in the city of Halifax. The evidence shewed that the crossing was a dangerous one, and that no special provision had been made for the protection of the public. Immediately before the deceased attempted to cross the tracks, a train of cars had been backed, or shunted, over this crossing in a direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was leaking steam. The atmosphere was at the time heavy, and the steam and smoke from the engine did not lift quickly but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over towards the track on which the engine and tender were running, and obscured them from the view of anyone who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing the deceased attempted to cross, and when he had reached the track on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way. At the time of the accident the engine and tender were being backed at the rate of six miles an hour:—Held, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway both in using a defective engine, as above described, and in maintaining too high a rate of speed under the circumstances. (2) An engine and tender do not constitute a "train of cars" within the meaning of s. 29 of the Government Railways Act, R.S.C. 1886, c. 38 (now R.S.C. 1906, c. 36 s. 35). [Hollinger v. Can. Pac. Ry. Co., 21 O.R. 705, not followed.] (3) Where the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ a watchman or to set up gates at any level crossing over the Intercolonial Ry., it is not for the Court to say that the minister or the officer was guilty of negligence because the facts shew that the crossing in question was a very dangerous one.

Harris v. The King, 9 Can. Ex. 206.

INJURY TO THE PERSON—CROSSING—RECKLESS CONDUCT OF DRIVER OF VEHICLE.

When the point where the accident in question occurred was not a "thickly peopled portion of a . . . village," within the meaning of s. 34 of R.S.C., 1906, c. 36, the officials in charge of the engine and train were not guilty of negligence in running at a rate of speed greater than six miles an hour. [Andreas v. Can. Pac. Ry. Co., 37 Can. S.C.R. 1, 5 Can. Ry. Cas. 440, 450, applied.] (2) Under the law of Quebec where the direct and immediate cause of an injury is the reckless conduct of the person injured the doctrine of faute commune does not apply, and he cannot recover anything against the other party. (3) Where a person of full age is injured in crossing a railway track by the reckless conduct of the driver of a vehicle in which he is being carried, as between the person injured and the railway authorities, the former is identified with the driver in respect of such recklessness and must bear the responsibility for the accident. [Mills v. Armstrong (The Bernina), L.R. 13 A.C. 1, referred to and distinguished.]

Parent v. The King, 13 Can. Ex. 93.

[Followed in Minor v. Grand Trunk Ry. Co., 22 Can. Ry. Cas. 194, 35 D.L.R. 106.]

Accident to the person—Negligence of Crown's servants—Action by parent of deceased—Pecuniary benefit.

In the case of death resulting from negligence, and an action taken by the party entitled to bring the same under R.S.N.S. c. 178, s. 5, the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Such party is not to be compensated for any pain or suffering arising from the loss of the deceased, or for expenses of medical treatment of the deceased, or for his burial expenses, or for family mourning. [Osborne v. Gillett, L.R. 8 Ex. 88, distinguished.]

McDonald v. The King, 2 Can. Ry. Cas. 1, 7 Can. Ex. 216.

Liability for negligence—Exchequer Act.

To render the Crown liable upon a petition of right for acts of negligence of servants of the Crown in the operation of a Government railway within the provisions of the Exchequer Court Act, R.S.C. 1906, c. 140, s. 20 (f) (amendment of 1910), such negligent acts must be the proximate, determining and decisive cause of the injury.

Charlton v. The King, 8 D.L.R. 911, 14 Can. Ex. 41.

Level crossing—Projecting tracks.

The condition of a crossing whereby tracks are allowed to project above a highway level in violation of the Government Railways Act (R.S.C. 1906, c. 36, s. 16) is negligence which will render the Crown liable for an accident caused by round sticks placed between the rails by an unknown person to assist vehicles across the tracks.

Belanger v. The King, 20 Can. Ry. Cas. 343, 54 Can. S.C.R. 265, 34 D.L.R. 221.

Negligence causing death—Operation of railway.

Negligence of a servant in the unloading of coal for the Intercolonial Railway from a ship moored to a pier is "in, on or about" the operation of the railway, within the Exchequer Court Act (R.S.C. 1906, c. 140, s. 20 (f)) as amended by 9 & 10 Edw. VII., c. 19, for which the Crown is liable.

Begin v. The King, 33 D.L.R. 203, 16 Can. Ex. 349.

Public work—Collision—Stalled automobile.

The collision of a train with an automobile stalled on a level crossing of the Intercolonial Railway, occasioned by the delay of the engine driver to apply his brakes the moment he became aware of the presence of the motor upon the track, is an accident "on a public work" and caused by the "negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway," within the meaning of s. 20 of the Exchequer Court Act.

Dunnett v. The King, 41 D.L.R. 405.

Level crossing—Government Railways Act—Gross negligence.

Where the Minister, or the Crown's officer, in the exercise of his discretion decides not to make a viaduct or put gates across a highway, it is not for the Court to say that the Crown was guilty of negligence, even where the facts shew the crossing to be a very dangerous one; and where the crossing was not in "a thickly peopled portion of any city, town or village" within the meaning of the Government Railways Act (R.S.C. 1906, c. 36), there was no negligence in running a train at a greater speed than six miles per hour, if the proper signals were given by the trainmen. [Harris v. The King, 9 Can. Ex. 206, followed.]

Lucas v. The King, 18 Can. Ex. 281.

Faute commune—Quebec law—Employer failing to comply with act.

The doctrine of faute commune does not obtain under the law of Quebec where the claimant contributes to the proximate or determining cause of the accident.

Brillant v. The King, 15 Can. Ex. 42.

Public work—Highway—Exchequer Court Act.

An action in tort does not lie against the Crown, except under special statutory authority, and where a suppliant, while measuring lumber on the King's highway was injured by a passing train of the Transcontinental Ry. he must bring the facts of his case within par. (c) of s. 20 of the Exchequer Court Act, R.S.C. 1906, c. 140. As the accident happened on the highway and not on a public work, as required by the Act, his action fails.

Theriault v. The King, 16 Can. Ex. 253, 38 D.L.R. 705.

Crown's Servant—"Upon, in or about railway"—Death—Measure of damages.

Par. (f) of s. 20 of the Exchequer Court Act, R.S.C. 1906, c. 140, as amended by 9-10 Edw. VII. c. 19, does not require, in order to recover against the Crown, that the death or injury occur on a public work, but it is sufficient that the injury complained of be caused by the negligence of the Crown's servant acting within the scope of his duties "upon, in or about the construction, maintenance or operation of the I.C.R. or the P.E.I. Ry." The Crown is liable for an accident in the course of unloading coal for the I.C.R. from a steamer moored at a wharf, belonging to the Crown and used as part of the I.C.R. such accident being occasioned by the negligence of an officer or servant of the Crown. In an action to recover for death by negligent act the plaintiffs are entitled to such damages as will compensate them for the pecuniary loss sustained thereby, together with the pecuniary benefits reasonably expectant from the continuation of life, taking into account the age of the deceased, his state of health, his expectation in life, his earnings and his future prospects. Insurance money received or about to be received by plaintiffs should also be taken into consideration when making the assessment.

Jacob v. The King, 16 Can. Ex. 349, 33 D.L.R. 203.

Crown's servants—Injury to brakeman.

A brakeman on the I.C.R. has no recourse against the Crown for injuries sustained in the course of his employment, in the absence of proof of any negligence on behalf of any officer or servant of the Crown giving rise to the accident.

McNeil v. The King, 16 Can. Ex. 355.

D. Fences and Cattle Guards.

(1) Where the Crown is not required by the adjoining proprietors to fence its line of railway, there is no duty, in favour of a trespasser, cast upon the Crown by the provisions of ss. 22, 23 of the Government Railways Act to fence as aforesaid. (2) The suppliant, while working on a property adjoining the I.C.R. within the city of Levis, was injured while innocently trespassing on the right-of-way, there being no fence erected, or other means taken, by the Crown to mark the boundary between the adjoining property and the railway. It was not alleged that the adjoining owner had requested the Crown to fence:—Held, that the suppliant had made no case of negligence against the Crown under subs. (c) of s. 20 of R.S.C., c. 140.

Viger v. The King, 10 Can. Ry. Cas. 201, 11 Can. Ex. 328.

E. Fires.

FIRE OCCASIONED BY CINDERS FROM ENGINE—GOVERNMENT RAILWAYS ACT.

The suppliant's property was destroyed by fire caused by cinders carried in smoke emitted by an engine on the I.C.R. There was no negligence proved against the employees of the Dominion Government in charge of the train, and it was established that the engine in question was of a most approved type, and was equipped with all modern and efficient appliances for the prevention of the escape of sparks, etc.:—Held, that the case fell within the provisions of subs. 2 of s. 61 of the Government Railways Act, as amended by 9-10 Edw. VII. c. 24, and that the damages must be limited to the sum of $5,000, to be divided amongst the suppliant and others who had suffered loss by the fire.

Duclos v. The King, 10 E.L.R. 138 (Exch. Court).

FIRE FROM ENGINE—NEGLIGENCE.

By 7 & 8 Edw. VII. c. 31, s. 2, the Government of Canada is liable for damage to property caused by a fire started by a locomotive working on a Government railway, whether its officers or servants are or are not negligent, and by a proviso the amount of damages is limited if modern and efficient appliances have been used and the officers or servants "have not otherwise been guilty of any negligence.":—Held, Davies, J., dissenting, that the expression "have not otherwise been guilty of any negligence" means negligence in any respect and not merely in the use of a locomotive equipped with modern and efficient appliances. Sparks from a locomotive set fire to the roof of a Government building near the railway track and the fire was carried to and destroyed private property. The roof of this building had on several previous occasions caught fire in a similar way and the Government officials, though notified on many of such occasions, had only patched it up without repairing it properly:—Held, reversing the judgment of the Exchequer Court (12 Can. Ex. 389), that the Government officials were guilty of negligence in having a building with a roof in such condition so near to the track, and the owner of the property destroyed was entitled to recover the total amount of his loss. 12 Can. Ex. 389, reversed.

Leger v. The King, 43 Can. S.C.R. 164.

LIABILITY FOR NEGLIGENCE—LEASED ROAD.

The Crown is liable under s. 20 (c) of the Exchequer Court Act (R.S.C. 1906, c. 140, as amended in 1910, c. 19), for an injury resulting from the negligent setting out of fires by section men on a railway track leased by the Crown and operated as part of the Intercolonial railway system.

New Brunswick Ry. Co. v. The King, 37 D.L.R. 366.

F. Injuries to Employees.

NEGLIGENCE OF SECTION FOREMAN.

Suppliant's husband, while engaged in coupling cars as a brakesman on the I.C.R. caught his heel between the rail and the guard rail and being unable to get clear was run over by the cars and killed. It was shewn to be the duty of the section foreman to see that the space between the rail and guard rail was properly filled or packed, and that he had been guilty of negligence in respect of such duty:—Held, that the Crown was liable for such negligence.

Desrosiers v. The King, 11 Can. Ex. 128.
[Affirmed in 41 Can. C.S.R. 71.]

INJURY TO EMPLOYEES—LIABILITY OF THE CROWN—COMMON EMPLOYMENT.

Under subs. (c) of s. 16 of the Exchequer Court Act, 50 & 51 Vict. c. 16, an action in tort will lie against the Crown, represented by the Government of Canada. Under C.C. (Que.) in case of death by negligence of servants of the Crown, an action for damages may be maintained by the widow of the deceased on behalf of herself and her children. The action of the widow is not barred by her acceptance of the amount of a policy of insurance on the life of deceased from the I.C.R. Employees' Relief and Insurance Assn., under the constitution, rules and regulations of which the Crown is declared to be released from liability to make compensation for injuries to or death of any member of the Association. [Miller v. Grand Trunk Ry. Co., [1906] A.C. 187, followed.] The doctrine of common employment does not prevail in the Province of Quebec. The right of action for compensation for injury or death by negligence of Government employees does not abate on demise of the Crown. [Viscount Canterbury v. The Queen, 12 L.J. Ch. 281, referred to: 11 Can. Ex. 128, affirmed.]

The King v. Desrosiers, 41 Can. S.C.R. 71.

RUNNING RIGHTS AND POWERS OVER ANOTHER RAILWAY.

The suppliant's husband was mortally injured while employed as a locomotive fireman on an I.C.R. train, running between Levis and Chaudière, at a point on the Grand Trunk Ry. enclosed between two sections of the I.C.R. over which the Government of Canada had acquired running rights and powers in perpetuity and free of charge under 43 Vict. c. 8. Over this section of railway the Government operated its trains and locomotives as on a part of the I.C.R. system:—Held, that the place where the accident happened might properly be taken as an extension of the I.C.R. and therefore was to be regarded as a public work within the meaning of s. 20 (c) of R.S.C. 1906, c. 140.

Lefrançois v. The King. 11 Can. Ex. 252.

NEGLIGENCE OF FELLOW SERVANT—OPERATION OF RAILWAY—DEFECTIVE SWITCH—PUBLIC WORK.

In consequence of a broken switch, at a siding on the I.C.R. (a public work of Canada), failing to work properly although the moving of the crank by the pointsman had the effect of changing the signal so as to indicate that the line was properly set for an approaching train, an accident occurred by which the locomotive engine was wrecked and the engine driver killed. In an action to recover damages from the Crown, under Art. 1056 C.C. (Que.):—Held, affirming the judgment appealed from (Armstrong v. The King, 11 Can. Ex. 119), that there was such negligence on the part of the officers and servants of the Crown as rendered it liable in an action in tort; that the Exchequer Court Act, 50 & 51 Vict. c. 16, s. 16 (c), imposed liability upon the Crown, in such a case, and gave jurisdiction to the

Exchequer Court to entertain the claim for damages; and that the defence that deceased, having obtained satisfaction or indemnity within the meaning of Art. 1056 C.C. (Que.), by reason of the annual contribution made by the Railway Department towards the I.C.R. Employees' Relief & Insurance Assn., of which deceased was a member, was not an answer to the action. [Miller v. Grand Trunk Ry. Co., [1906] A.C. 187, followed.]

The King v. Armstrong, 40 Can. S.C.R. 229.

[Followed in The King v. Desrosiers, 41 Can. S.C.R. 71.]

Injury to employee—Lord Campbell's Act—Exoneration for liability.

In s. 50 of the Government Railways Act, R.S.C., 1886, c. 38, providing that "Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the Minister," the words, "notice, condition or declaration," do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow servants. [Grand Trunk Ry. Co. v. Vogel, 11 Can. S.C.R. 612, disapproved.] An employee on the Intercolonial Ry. became a member of the I.C.R. Relief and Assurance Assn., to the funds of which the Government contributed annually $6,000. In consequence of such contribution a rule of the Association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant:—Held, reversing the judgment of the Exchequer Court, 6 Can. Ex. 276, that the rule of the Association was an answer to an action by his widow under Art. 1056 C.C. (Que.) to recover compensation for his death. The doctrine of common employment does not prevail in the Province of Quebec. [The Queen v. Filion, 24 Can. S.C.R. 482, followed.]

The Queen v. Grenier, 2 Can. Ry. Cas. 409, 30 Can. S.C.R. 42.

[Commented on in Armstrong v. The King, 11 Can. Ex. 126; Miller v. Grand Trunk Ry. Co., 21 Que. S.C. 361, 371; followed in Miller v. Grand Trunk Ry. Co., 34 Can. S.C.R. 45, 3 Can. Ry. Cas. 147.]

Open switch—Air brakes—Contributory negligence—Prescription—Interruption.

An injury to a brakeman on a train of the I.C.R., resulting from the negligence of the employees of the railway in leaving a switch open without warning, is actionable against the Crown under s. 20 of the Exchequer Court Act. The suppliant having himself been guilty of contributory negligence in failing to have on the air brakes, as required by the rules, the doctrine of faute commune was applied and the damages assessed accordingly. 2. The doctrine of fellow servant is not in force, in the Province of Quebec. 3. The prescription for the filing of a petition of right is interrupted by the deposit of the petition with the Secretary of State.

Dionne v. The King, 18 Can. Ex. 88.

Negligence—Yard—Injury to trackman—Shunting—Appliances—Signals—Lookout.

The Crown is not responsible for the death of a trackman run over by an engine carefully backing into a yard of the I.C.R., not occasioned by the negligence of any officer or servant of the Crown in or about the operation of the railway, within the meaning of s. 20 (f) of the Exchequer Court Act, but brought about by the negligence of the deceased in having failed to keep an especially good lookout for train signals as required by the rules. S. 35 of the Government Railways Act, requiring the stationing of a person in the rear of a train moving reversely, and the rules governing the running of trains, do not apply to shunting engines in a railway yard. The fact that the engine attending to the shunting had no sloping tender and no footboard and railing was immaterial under the circumstances.

Cantin v. The King, 18 Can. Ex. 95.

Negligence—Employees' Relief Fund—Temporary employee—Contract of service—Estoppel.

An agreement by a temporary employee of the I.C.R., as a condition to his employment, to become a member of the Temporary Employees' Relief and Insurance Assn. and to accept the benefits provided by its rules and regulations in lieu of all claim for personal injury, is perfectly valid and is a bar to his action against the Crown for injuries sustained in the course of employment. By accepting the benefits he is estopped from setting up any claim inconsistent with those rules and regulations. [Miller v. Grand Trunk Ry. Co., [1906] A.C. 187, and Saindon v. The King, 15 Can. Ex. 305, distinguished; Conrod v. The King, 49 Can. S.C.R. 577, followed.]

Gingras v. The King, 18 Can. Ex. 248, 44 D.L.R. 740.

Accident to workman repairing cars—Failure to observe rules—Faute commune.

Samson v. The King, 15 Can. Ex. 75.

Regulations—Operation of trains—Negligent signaling—Fault of fellow servant—Common fault—Boarding moving train—Disobedience of employee—Voluntary exposure to danger.

By a regulation of the I.C.R., no person is allowed to get aboard cars while trains are in motion. Without ascertaining that all his train crew were aboard, the conductor signalled the engineman to start his train from a station, where it had stopped to discharge freight. One of the crew, who had been assisting in unloading, then attempted to board the moving train and, in doing so, he was injured:—Held, that the injury sustained by the employee was the direct and immediate consequence of his infraction of the regulation which he was, by law, obliged to obey and not the result of the fault of the conductor; that by disobedience to the regulation, the employee had voluntarily exposed himself to danger from the moving train; that the negligence of the conductor in giving the signal to start the train was not an act for which the Government of Canada could be held responsible and that its relation to the accident was too remote to be regarded as the cause of the injury:—Judgment appealed from, 15 Can. Ex. 331, affirmed.

Turgeon v. The King, 51 Can. S.C.R. 588.

Negligence—Employees' relief fund—Validity of contract—Estoppel.

The agreement of an employee of the I.C.R., as a condition to his employment, to become a member of the Temporary Employees' Relief and Insurance Association, and under its constitution and by-laws to accept its benefits in lieu of all claims for personal injury, is perfectly valid and may be set up as a complete bar to his action against the Crown for injuries sustained in the course of employment: By accepting the benefits he will be estopped from setting up any claim inconsistent with the rules and regulations.

Gagnon v. The King, 17 Can. Ex. 301, 41 D.L.R. 493.

NEGLIGENCE—INJURY TO BRAKEMAN—ACCIDENT.

The death of a brakeman riding on a box car while in the discharge of his duties on the I.C.R. occasioned by the overturning of the car when it suddenly jumped the track, the roadbed and the car being in perfect condition and the train traveling at a moderate speed, must be regarded as an accident due to an unforseen event and is not attributable to the "negligence of any officer or servant of the Crown . . . in or about the construction, maintenance or operation of the Intercolonial Railway," within the meaning of s. 20 of the Exchequer Court Act.

Thibault v. The King, 17 Can. Ex. 366, 41 D.L.R. 222.

G. Injuries to Passengers.

NEGLIGENCE OF CONDUCTOR—INVITATION TO BOARD TRAIN.

The plaintiff, standing on an I.C.R. station platform, and intending to travel upon a train then opposite the platform, hearing the conductor call "all aboard" went towards the train as quickly as possible for the purpose of boarding it, and having in her hand a paper box. The conductor, instead of being at his proper place on the platform, had gone to the other side of the train to signal to the engine driver, as he could not be seen from the platform. The train started while the plaintiff was attempting to board the train, and she slipped, owing to the motion of the train, and was seriously injured. The jury found that the call, "all aboard," was a notice to passengers to get on board. The Supreme Court of New Brunswick held, that, although the plaintiff's contract was with the Crown, the defendant owed to her as a passenger a duty to exercise reasonable care, and that there was ample evidence of negligence for the jury. The facts will be found fully reported in 19 N.B.R., 3 Pugs. & Bur. 340, and 21 N.B.R. 586. On appeal to the Supreme Court of Canada:—Held, that the judgment of the Court below should be affirmed. Taschereau and Gwynne, JJ., dissenting. Per Ritchie, C.J.:—There was no obligation on the part of the passengers to go on board the train until it was ready to start, or until invited to do so by the intimation from the conductor, "all aboard." It was his duty to be careful before starting his train to see that sufficient time and opportunity were afforded passengers to board the car in the inconvenient position in which it was placed, and the evidence shewed the defendant exercised no care in this respect. Per Henry, J.:—There was no satisfactory proof of contributory negligence on the part of the plaintiff. The package she carried was a light one, and such as is often carried by passengers with the knowledge and sanction of railway conductors and managers, and a tacit license is, therefore, given to passengers to carry such with them in the cars. The plaintiff violated one of the regulations in attempting to get on the car while in motion. But the defendant could not shelter himself under those regulations. The conductor was estopped from complaining that the plaintiff did what, by calling "all aboard," he invited her to do. After the notification, "all aboard," is given by a conductor, it is his duty to wait a reasonable time for passengers to get to their places.

Hall v. McFadden, Cass. Can. S.C.R. Dig. 1893, p. 723.

LIABILITY OF CROWN FOR NONFEASANCE OR MISFEASANCE OF ITS SERVANTS.

The suppliant purchased, a first-class ticket from Charlottetown to Souris, on the Prince Edward Island Ry., owned by the Dominion of Canada, and, while on said journey, sustained serious injuries, the result of an accident to the train. By petition of right the suppliant alleged that the railway was negligently and unskilfully managed and did not carry safely and securely suppliant on said railway, and claimed $50,000. The Attorney-General pleaded that the Crown was not bound to carry safely and securely, and was not answerable by petition of right for the negligence of its servants. The trial Judge found that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of contract to carry the suppliant safely and securely, and awarded $36,000:—On appeal to the Supreme Court of Canada:—Held, Fournier and Henry, JJ., dissenting, that the establishment of Government railways in Canada, for the benefit and advantage of the public, is a branch of the public police created by statute for the purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation, and that a petition of right does not lie against the Crown for injuries resulting from the nonfeasance or misfeasance, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed on the public service on said railways. That the Crown is not liable as a common carrier for the safety and security of passengers using said railways.

The Queen v. McLeod, 8 Can. S.C.R. 1.

Intending passenger waiting for train—Negligence of crown's servant.

The suppliant, while waiting on the platform of an I.C.R. station, to board a train, was knocked down by a baggage truck and injured. The truck was being moved by the baggage-master. The evidence shewed that the accident could have been prevented by the exercise of ordinary care on the part of the baggage-master:—Held, that as the injuries of which the suppliant complained were received on a public work, and resulted from the negligence of a servant of the Crown while acting within the scope of his duties and employment, the Crown was liable therefor.

Sedgewick v. The King, 11 Can. Ex. 84.

Passenger alighting from train.

The suppliant was a passenger on an I.C.R. train. Owing to the negligence of a brakeman in failing to open the vestibule door of the car next to the station platform, and leaving the opposite door open, the suppliant, was compelled to use the latter. While in the act of alighting and before she had reached the ground, the conductor started the train, with the result that the suppliant was thrown down and sustained bodily injury:—Held, that both the conductor and brakeman of the train were guilty of negligence upon the facts shewn, and that the Crown was liable in damages.

Ryan v. The King, 11 Can. Ex. 267, affirmed by Supreme Court.

Regulations—Liability of crown.

Where an engine driver of a train on a Government railway, in the manner of moving his train at a station, transgressed the regulations of the railway, and a passenger was injured in alighting from the train by reason of the wrongful conduct of the engine driver, a case of negligence was established for which the Crown was liable under the provisions of s. 20 of the Exchequer Court Act, R.S.C. 1906, c. 140. (2) The rule as to the preponderance of affirmative evidence over evidence of a merely negative character as laid down in Lefeunteum v. Beaudoin, 28 Can. S.C.R. 89, applied.

Hamilton v. The King, 14 Can. Ex. 1.

Injury to trespasser—Negligence.

B., in going towards a station of the I.C.R., instead of using a safe public way or road thereto, entered, contrary to s. 78 of the Government Railways

Act, upon the track of the railway. Held, that inasmuch as B. was a trespasser on the track, the only duty cast upon an engine driver was to abstain from wilfully injuring B. while so trespassing, and further that inasmuch as the engine driver had applied the emergency brakes as soon as he saw B. on the track he had done all he could to avoid the accident, and there was no negligence attributable to him.

Brochu v. The King, 15 Can. Ex. 50.

H. Carriage of Goods; Loss; Damage.

CARRIGE OF GOODS—BREACH OF CONTRACT—DAMAGES—NEGLIGENCE.

The suppliant sought to recover a sum alleged to have been lost by him on a shipment of sheep undertaken to be carried by the Crown from Charlottetown, P.E.I., to Boston. The loss was occasioned by the sheep not arriving in Boston before the sailing of a steamship thence for England on which space had been engaged for them; and the cause of such failure was lack of room to forward them on a steamboat by which connections are made between the Summerside terminus of the P.E.I. Ry. and Pointe du Chêne, N.B., a point on the I.C.R. The suppliant alleged that before the shipment was made the freight agent of the P.E.I. Ry., at Charlottetown, represented to him that if the sheep were shipped at Charlottetown on a certain date, which was done, they would arrive in Boston on time:—Held, that even if the suppliant had proved, which he failed to do, that this representation had been made, it would have been inconsistent with the terms of the waybill and contrary to the regulations of the P.E.I. Ry., and therefore in excess of the freight agent's authority. (2) That the evidence did not disclose negligence on the part of any officer or servant of the Crown within the meaning of s. 16 (c) of the Exchequer Court Act.

Wheatley v. The King, 9 Can. Ex. 222.

LIABILITY OF CROWN AS COMMON CARRIER—LOSS OF ACID IN TANK CAR DURING TRANSPORTATION—CONTRACT.

The Crown is not, in regard to liability for loss of goods carried, in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of goods, and any special contract made is in general in mitigation of its common-law obligation and liability. The Crown, on the other hand, is not liable at common law, and a petition will not lie against it for the loss of goods carried on its railway except under a contract or where the case falls within the statute, under which it is in certain cases liable for the negligence of its servants (50-51 Vict. c. 16, s. 16), and in either case the burden is on the suppliant to make out his case. (2) By an arrangement between the consignee of the acid in question and the I.C.R. freight charges on goods carried by the latter were paid at stated times each month, and in case anything was found wrong a refund was made to the consignee. In the present case the consignee paid the freight on the acid amounting to $135.00, no refund being made by the Crown. This amount was paid to the consignee by the suppliant, and it claimed recovery of the same from the Crown in its petition of right. The evidence shewed that by the arrangement above mentioned the freight was not payable on the transportation of the tank car, but on the acid contained in the car, at the rate of 27 cents per 100 pounds of acid:—Held, that the Crown was only entitled to the freight on the number of pounds delivered to the consignee at Sydney, and that the balance of the amount paid by the consignee should be repaid to the suppliant with interest.

Nicholls Chemical Co. v. The King, 9 Can. Ex. 272.

LOSS OF GOODS.

A claim for the loss of goods through the negligence of a servant of the Crown in the operation of the I.C.R. alleging damages caused by negligence of an officer and servant of the Crown, is within the purview of the Government Railways Small Claims Act, 9-10 Edw. VII. (Can.) c. 26, and is within the jurisdiction of a Provincial County Court.

Williams v. Government Rys. Managing Board, 11 E.L.R. 10.

NEGLIGENCE OF STATION-MASTER—WRONGFUL DELIVERY OF GOODS.

A station-master, employed by the Crown in the operation of the I.C.R., who, in the course of his employment, delivers goods to a stranger upon the mere assertion of ownership by the latter, without requiring any bill of lading or other satisfactory evidence of ownership, is guilty of negligence, damages for the loss of which are recoverable by the owner from the Crown in an action on the case, independent of any contract on which the cause of action is based, in any provincial Court having jurisdiction to the said amount by virtue of the Government Railways Small Claims Act, 9-10 Edw. VII. (Can.) c. 26, s. 2.

Williams v. Govt. Rys. Managing Board, 11 E.L.R. 10.

I. Construction and Operation; Damage.

SMALL CLAIMS ACT—CONSTRUCTION AND OPERATION.

The Government Railways Small Claims Act, 1910, c. 26 (D), as amended by Acts 1913, c. 20, 1914, c. 9, does not confer jurisdiction to hear and determine claims for damages arising out of the construction of a railway, but merely those "arising out of operation," although the damages resulting from the construction were caused during the operation of the railway.

Lewis v. General Manager of Government Railways. 33 D.L.R. 20.

NEGLIGENCE—PUBLIC WORK—RAILWAYS—CONTRACTOR—SAND DEPOSITS—EXPROPRIATION.

Damages suffered by a landowner from sand deposits in the course of construction of a Crown railway are only recoverable as against the contractors; the injury not having resulted from any expropriation of land is not actionable against the Crown under the Expropriation Act, and having happened 10 acres away from the railway, was not "on a public work" within the meaning of s. 20 of the Exchequer Court Act, and therefore not actionable against the Crown under the latter statute.

Theberge v. The King, 41 D.L.R. 282.

GRADES, SEPARATION OF.

See Highway Crossings (Bridges and Subways); Railway Board.

GRASS.

See Weeds.

HAND CAR.

See Crossing Injuries (C).

HAND CAR—SIGNAL—CONTRIBUTORY NEGLIGENCE.

Although small hand cars used for working on railways are not provided with any alarm signal, and although the Railway Act and the rules of the Board do not call for any, yet, as these hand cars are not bound to stop at crossings, their drivers must signal their approach, either to avoid a collision or to enable the driver of a horse approaching the railway to watch his horse and to master it in time. Although the omission of giving such signal is an act of negligence rendering the railway company liable in the event of an accident, it is not so when a passer-by, the victim of the accident, saw the hand car coming and nevertheless took upon himself to cross the railway.

Lemieux v. Langevin, 54 Que. S.C. 542.

HARBOURS.

See Waters.

HEALTH PROTECTION.

See Medical Attention.

Duty to provide hospitals and surgical attendance for injured employees, see Employees.

HIGHWAY CROSSINGS.

A. Leave to Cross Highway or Railway.
B. Protection; Crossings.
C. Construction and Maintenance; Costs.
D. Bridges and Viaducts.
E. Subways.

See Crossing Injuries: Damages (F); Railway Crossings.

Construction of bridges and viaducts, see Bridges.

Protection of highways crossed by irrigation works, see Drainage.

Injunction in default of compensation for interference with access to bridge by reason of railway crossing highway, see Injunction.

Constitutionality of statute empowering Railway Board to order the protection of highway crossings, see Constitutional Law. See Re Can. Pac. Ry. Co. and York, 1 Can. Ry. Cas. 47, 25 A.R.(Ont.) 65; reversing in part 1 Can. Ry. Cas. 36, 27 O.R. 559; Toronto v. Grand Trunk Ry. Co., 37 Can. S.C.R. 232, 5 Can. Ry. Cas. 138.

Annotations.

Protection of highway crossings. 3 Can. Ry. Cas. 59.

Highways and right of control and possession of. 3 Can. Ry. Cas. 92.

Right of railway to cross highway. 1 Can. Ry. Cas. 335, 5 Can. Ry. Cas. 163.

Jurisdiction of Railway Board as to apportionment of costs of highway crossings. 5 Can. Ry. Cas. 163.

Highway across railway. 6 Can. Ry. Cas. 355, 7 Can. Ry. Cas. 89.

Jurisdiction of Board to order highway across railway. 13 Can. Ry. Cas. 136.

A. Leave to Cross Highway or Railway.

Dedication of highway.

A dedication of land to public purposes must be made with the intention to dedicate, and the mere acting so as to lead persons into the supposition that a way was dedicated to the public does not of itself amount

to dedication. [Simpson v. Attorney-General, [1904] A.C. 476, at p. 493, followed.]

Can. Northern Ry. Co. v. Billings, 5 D.L.R. 455, 3 O.W.N. 1504.

Right of railway to cross public highway—Dedication.

Where it appeared that a testator had for years used as a private road a strip of his lands and in his will reserved the same as a public road by words insufficient to amount to a dedication of such strip for such purpose the reservation apparently being made for the purpose of widening a public road which was established many years after he had made his private road on a strip of land adjoining his by the owner thereof, and where an order of the Board granted the application of a railway company for permission to cross the public road which was described in the plan accompanying the application somewhat inaccurately as the road between the testator's land and the adjoining land above mentioned which order was made after a contest which was confined to the terms upon which the railway company should be permitted to cross the public road, nothing being said about the private road and no question being raised as to whether it was or was not part of the public road, such order did not give the railway company any permission to cross the private road.

Can. Northern Ry. Co. v. Billings, 5 D.L.R. 455, 3 O.W.N. 1504

Construction of highway across railway.

In an action to restrain the defendants from acting upon an order of the Railway Committee, made under s. 14 of the Railway Act, 1886, giving them the option to open a new street, by means of a subway, across the property and under the tracks of a Dominion railway company, but without compensation, and requiring the company to pay a portion of the cost of construction, and meanwhile allowing a temporary crossing for foot passengers only, and making certain other provisions, upon the subject:—Held, that the Provincial Legislature alone had power to confer upon the defendants legal capacity to acquire and make the street in question. (2) It has conferred such capacity. (3) In virtue of its power over property and civil rights in the province, the Provincial Legislature has power to authorize a municipality to acquire and make such a street, and to provide how and upon what terms it may be acquired and made. (4) But that power is subject to the supervention of Federal legislation respecting works and undertakings such as the railway in question. (5) The manner and terms of acquiring and making such street, and also the prevention of the making or acquiring of such a street, are proper subjects of such supervening legislation. (6) Such legislation may rightly confer upon any person or body the power to determine in what circumstances, and how and upon what terms, such a street may be acquired and made, or to prevent the acquiring and making of it altogether, and therefore s. 14 of the Railway Act is not ultra vires. (7) Such legislation, in virtue of its power over such railway corporations, as well as such works and undertakings, may confer power to impose such terms as have in this case been imposed upon the plaintiffs, and to deprive such corporations of any right to compensation for lands so taken or injuriously affected; and has conferred such power on the Railway Committee, under s. 14, in such a case as this. (8) Such legislation has not conferred upon the Committee power to give the temporary footway in question. (9) Nor any authority to delegate its powers. (10) The work it directs must be constructed under the supervision of an official appointed for that purpose by the Committee. (11) The railway company may, if they choose, construct the works directed, under such supervision, instead of permitting the municipality to do so.

Grand Trunk Ry. Co. v. Toronto, 1 Can. Ry. Cas. 82, 32 O.R. 120.

[Approved in Re McAlpine and Lake Erie Ry. Co., 3 O.L.R. 230; considered in Atty.-Genl. v. Can. Pac. Ry. Co., 11 B.C.R. 303.]

RIGHT TO CROSS STREETS—EXPROPRIATION PROCEEDINGS—NECESSITY FOR—EXTENSION OF CITY LIMITS.

Railways incorporated by the Dominion Parliament, where in the construction of their lines of railways, they have complied with the requirements of the Railway Act, 1888, and obtained the consent of the Railway Committee, have the right to cross the highways of a city without taking expropriation proceedings under the Railway Act, or without making any compensation to the city therefor. Where under the powers conferred by 51 Vict. c. 53, s. 9 (Ont.), for extending the limits of the city of Ottawa, the city acquired at an agreed price, part of the road of a toll road company within such extended limits, such part thereupon ceased to have its previous character of a toll road, and became a highway like the other public streets of the city.

Canada Atlantic Ry. Co. v. Ottawa, and Montreal & Ottawa Ry. Co. v. Ottawa, 1 Can. Ry. Cas. 298, 2 O.L.R. 336.

COMPENSATION TO MUNICIPALITY—PRIVATE OWNERSHIP OF HIGHWAY—"AT OR NEAR" CITY—POWER TO TAKE THROUGH COUNTY.

The plaintiffs were authorized by 47 Vict. c. 84 (D.) to lay out, construct and finish a railway, from a point on the Grand Trunk Ry. in the parish of Vaudreuil, in the Province of Quebec, to a point at or near the city of Ottawa, in the Province of Ontario, passing through the counties of Vaudreuil, Prescott and Russell, and also to connect their railway with any other railway having a terminus at or near the city of Ottawa:—Held, that "at or near the city of Ottawa" should be read as "in or near the city of Ottawa," and the plaintiffs were authorized to carry their line to a point in the city and to connect it with the line of the Canadian Pacific Ry. Co. in the city. (2) That the plaintiffs had power, by implication, to take their line into the county of Carleton. (3) That the portion of the Richmond road (or Wellington street) within the limits of the city of Ottawa which the plaintiffs' line crossed, was a public highway and not the private property of the defendants. (4) That the plaintiffs, having taken the proper proceedings under the Railway Act and being duly authorized to cross the highway, were not bound to make compensation to the defendants for crossing it. Judgment of Boyd, C., 1 Can. Ry. Cas. 298, 2 O.L.R. 336, affirmed.

Montreal & Ottawa Ry. Co. v. Ottawa, 1 Can. Ry. Cas. 305, 4 O.L.R. 56.

MUNICIPAL CORPORATION—OPERATION OF RAILWAY—USE OF STREETS—REGULATIONS.

By the Nova Scotia statute, 63 Vict. c. 176, the L. & M. Ry. Co. was granted powers as to the use and crossing of certain streets in the town, subject to such regulations as the town council might from time to time see fit to make to secure the safety of persons and property:—Held, reversing the judgment appealed from, Davies, J., dissenting, that such regulations could only be made by by-law and that the by-law making such regulations would be subject to the provisions of s. 264 of "The Towns Incorporation Act." (R.S.N.S. c. 71.)

Liverpool & Milton Ry. Co. v. Town of Liverpool, 3 Can. Ry. Cas. 80, 33 Can. S.C.R. 180.

[Distinguished in Black v. Winnipeg Elec. Ry. Co., 17 Man. L.R. 83; Toronto v. Toronto Ry. Co., 12 O.L.R. 534; followed in Quebec Ry. L. & P. Co. v. Recorder's Court, 17 Que. K.B. 261; referred to in Dickie et al. v. Gordon, 39 N.S.R. 331; Leslie v. Malahide, 15 O.L.R. 4; Shawinigan Water & Power Co. v. Shawinigan Falls, 19 Que. K.B. 551.]

OPERATION ALONG HIGHWAY—STREET RAILWAY—LEAVE OF MUNICIPALITY.

The N. St. C. & T. Ry. Co. applied to the Board for leave to cross certain streets in the town of Thorold by a branch line already authorized by the Board. The municipality contended that the applicants' railway is a street railway or tramway, or operated as such, and that, under the Railway Act, 1903, s. 184, the leave of the municipality must be obtained by by-law before a street railway or tramway can cross its streets:—Held, upon the evidence, that the proposed branch line is not a street railway or tramway, and that s. 184 only applies to operation along highways and not to crossings thereof.

Re Niagara, St. Catharines & Toronto Ry. Co. (Thorold Street Crossings), 6 Can. Ry. Cas. 145.

CROSSING AND DIVERTING HIGHWAYS—TAKING GRAVEL.

For the purpose of taking gravel from lands on both sides of a highway, a railway company applied to the Board for authority to construct and operate tracks over such highway for a term of years, to close to public traffic a portion of such highway, and to open a new road in lieu thereof:—Held, that it is not necessary to comply with s. 141 of the Railway Act, 1903, where the company can acquire the lands containing the gravel and has a right-of-way thereto, that for such purposes the company may exercise the same powers for crossing and diverting highways as for the construction and operation of its main line, and that a diversion of the highway may be authorized for the time necessary to exhaust the gravel pit upon proper terms for safeguarding the interests of the municipality and of the public. Railway Act, 1903, s. 2 (s) and (bb), ss. 118 (1) and (q), 119, 141, 186, referred to.

Can. Pac. Ry. Co. v. North Dumfries, 6 Can. Ry. Cas. 147.

HIGHWAYS ACROSS RAILWAY—RIGHT OF PRIVATE INDIVIDUALS—PUBLIC INTEREST.

Upon applications by certain towns and villages in Alberta in respect of street crossings over the Canadian Pacific Ry.:—Held, that while the Board has no general jurisdiction to determine whether a public right of crossing over a railway exists, yet in cases where it is called upon to exercise the powers specifically conferred upon it, or its jurisdiction to enforce the performance of the duties of railway companies with respect to highways, it has incidentally to inquire and determine whether in fact a right of crossing does or does not exist at any particular point, ss. 186, 187, Railway Act, 1903. S. 187 enables the Board to give leave for the construction of a highway across a railway, but does not provide means by which private individuals or bodies not otherwise possessed of power to open highways, can do so. The Board is not authorized to direct or compel railway companies to construct of make highways across their lands, where a public right of crossing does not already exist by law, although it may give leave to a company or some other body to do so. The question as to the power of a railway company to dedicate a portion of its right-of-way for use as a public highway without the authority of the Railway Committee or the Board under the Railway Acts reserved for further argument.

High River et al. v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 344.

RAILWAY CROSSED BY HIGHWAY—PROTECTION.

Application for leave to carry Inkerman street across the lands of the respondent. Inkerman street was not opened up to the right-of-way of the respondent on the south side and there was a block of land owned by the respondent between its terminus and the said right-of-way:—Held (1), that under s. 237 of the Railway Act, 1906, the Board had jurisdiction to give leave to construct a highway across "any railway." (2) That under s. 2 (21) of the Act, the word "railway" included real property such as the said block of land. (3) That the application should be refused as not being in the public interest because the crossing would be dangerous and would almost at once require protection. Commissioner McLean questioned whether "railway," as used in s. 237, would include more than the full width of the right-of-way and not "property, real or personal and works connected therewith."

St. Thomas v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 134.

APPORTIONMENT OF COST—SENIOR AND JUNIOR RULE.

When a railway is sought to be crossed by a highway the Board will give authority for the construction of the crossing, as long as it is unobjectionable and is constructed in accordance with the standard regulation of the Board, on terms that the cost, under the senior and junior rule, is not thrown on the respondent railway company. The local authorities will determine whether or not to construct the crossing.

Saskatchewan Board of Highway Commissioners v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 295.

ROAD ALLOWANCES—BY-LAW—DEDICATION AND PRESCRIPTION.

In the Province of Quebec, as distinguished from Ontario, there are no road allowances, highways being opened across railways (1) by resolution or by-law emanating from the municipal authority (2), by the Lieut.-Governor-in-Council under art. 2052, R.S.Q. 1909 (3), by dedication and prescription. Where there is nothing in the application to show that the highway concerned was opened before the railway under any of the above heads, the crossing should be authorized at the municipality's expense. [Caldwell v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 497, distinguished.]

Pontiac v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 298.

PUBLIC NECESSITY—USER—ENCROACHMENT.

The Board will recognize the public necessity for a highway crossing over a railway especially at or near a point where for a long period the railway company has allowed the public the use of such crossing and it will order the railway company to make the crossing conform to its standard regulations affecting highway crossings as amended May 4th, 1910. The Board is not called upon to deal with the question of an encroachment by a railway company upon the highway. [Weston v. Can. Pac. and Grand Trunk Ry. Cos. (Denison Avenue Crossing Case, No. 593), 7 Can. Ry. Cas. 79, followed.]

Moodie v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 217.

JURISDICTION—QUESTIONS OF LAW—AGREEMENT.

The Board gave leave to the appellant to appeal on two questions of law: (1) Was the Board bound by the agreement between city of Edmonton and Grand Trunk Pacific Ry. Co., s. 7 of which provides that an application must first be submitted to the Lieutenant-Governor-in-council for approval of the crossing before the application is made to the Board, and, (2) if it was not so bound, do the provisions of s. 7 of the agreement mean that the railway company should not pay such expense as is placed upon it by the Board's order? The members of the Court answered the second question in the negative. The Chief Justice and Davies, J., in answer to question 1, said that the agreement was an element to be considered in determining the rights of the parties with respect to the cost of constructing and maintaining the crossing, or the installation or maintenance of the protection required. Idington, J.:—The question of the bearing of the relation of seniority of construction upon the determination of the proper shares of the costs respectively to be borne by crossing railways is one entirely in the discretion of the Board. [Edmonton v. Grand Trunk Pacific Ry. Co. (Twenty-first Street Crossing Case), 14 Can. Ry. Cas. 93, affirmed.]

Grand Trunk Pacific Ry. Co. v. Edmonton (Twenty-first Street Crossing Case), 15 Can. Ry. Cas. 445.

PUBLIC INTEREST—ADDITIONAL FACILITIES—JURISDICTION.

The Board, in granting permission under s. 237 of the Railway Act, 1906, to a railway company to cross a highway against the protest of the municipality, must be satisfied that the crossing is in the public interest—e.g., that additional facilities are necessary—but it has no jurisdiction to require, as a condition of granting the crossing, the acquisition of additional lands.

Can. Northern Quebec Ry. Co. v. Montreal, 18 Can. Ry. Cas. 389.

TEMPORARY DIVERSION AND CLOSING—COMPENSATION.

The Board, under s. 180 of the Railway Act, 1906, in a proper case will authorize the construction and operation of a temporary spur upon and over a highway and the temporary closing and diversion of a portion of the highway for that purpose, imposing such conditions, including compensation to persons directly and specifically injured, as the Board thinks proper. [Can. Pac. Ry. Co. v. North Dumfries, 6 Can. Ry. Cas. 147, followed.]

Campbellford, Lake Ontario & Western Ry. Co. v. Camden, 16 Can. Ry. Cas. 236.

AGREEMENT—ABUTTING LANDOWNERS—DAMAGES.

When an order has been made authorizing the crossing of certain streets by a railway, upon condition that the railway company should enter into an agreement to indemnify the city against all claims for damages by abutting landowners, the Board will not, after the execution of such agreement, order the railway company to carry out its terms.

Calgary v. Can. Northern Ry. Co., 18 Can. Ry. Cas. 25.

HIGHWAY CROSSED BY RAILWAY—STEAM AND MUNICIPAL STREET RAILWAY—SENIOR AND JUNIOR RULE—PROTECTION—APPORTIONMENT OF COSTS.

The Board granted an application, by a municipally-owned street railway under s. 227 of the Railway Act, 1906, to cross the tracks of a steam railway on a city street, which was senior to the tracks of the steam railway. The tracks of the municipally-owned street railway were not considered by the Board as junior to those of the steam railway, and the cost of construction and maintenance of the railway crossing, as well as the installation and maintenance of the protection, were directed to be borne equally by the respondent and appellant.

Grand Trunk Pacific Ry. Co. v. Edmonton (Twenty-first Street Crossing Case), 15 Can. Ry. Cas. 445.

[Distinguished in Grand Trunk Ry. Co. v. Kitchener & Waterloo Street Ry. Co., 24 Can. Ry. Cas. 13.]

B. Protection; Crossings.

See also "C" and "D."

SIGNALS AND WARNINGS—SHUNTING TRAINS.

S. 256 of the Railway Act, 1888, providing that "the bell with which the engine is furnished shall be rung, or the whistle sounded, at the distance of at least eighty rods from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals until the engine has crossed such highway" applies to shunting and other temporary movements in connection with the running of trains as well as to the general traffic. 25 A.R. (Ont.) 437, affirmed.

Canada Atlantic Ry. Co. v. Henderson, 29 Can. S.C.R. 632.

[Applied in McMullin v. Nova Scotia Steel & Coal Co., 39 Can. S.C.R. 606; followed in Wallman v. Can. Pac. Ry. Co., 16 Man. L.R. 91; Geiger v. Grand Trunk Ry. Co., 10 O.L.R. 511; distinguished in Geiger v. Grand Trunk Ry. Co., 5 O.W.R. 434.]

SPECIFIC PERFORMANCE—VAGUENESS AND UNCERTAINTY OF ORDER OF BOARD.

An order of the Board requiring a railway company to put a highway "in satisfactory shape for public travel" should not be made a rule of this Court under s. 46 of the Railway Act, 1906, on the application of the municipality interested, because the wording of it is too vague and uncertain to permit of its enforcement afterwards if made such a rule. A Court of equity would not decree specific performance of an agreement couched in such vague terms, and the cases are analogous. [Taylor v. Portington (1855), 7 DeG. M. & G. 328, referred to.]

Strathclair v. Can. Northern Ry. Co., 21 Man. L.R. 555.

MUNICIPAL REGULATION REQUIRING ERECTION OF GATES.

By the Act amending the Act of Incorporation of the defendant company, the company was given the right to lay its tracks across the streets of the plaintiff town, provided that before doing so the consent of the town council should first have been obtained. On application by defendant to the town council for permission to cross one of the streets of the town, a resolution was passed granting the application, "subject to such regulations as the town council may, from time to time, make to secure the safety either of persons or property." Subsequently, the town council passed a resolution requiring the company to forthwith erect and maintain two gates, of the latest approved pattern of railway gates, on and across the streets on either side of the track. Defendant failed to comply with the resolution so made:—Held, that the regulation was one that it was within the powers of the town council to make:—Held, that the town council having a special interest in the subject matter, the action could be brought in the name of the town, without joining the Attorney-General:—Held, that the regulation in question being made by virtue of a power given by a special act, was not, in the absence of express words to that effect, a by-law of the town which required the assent of the Governor-in-council before going into operation:—Held, that such assent was required only in connection with the cases specially mentioned in the Act. [Towns' Incorporation Act, R.S. (1900), c. 71, ss. 263, 264.]

Liverpool v. Liverpool Ry. Co., 35 N.S.R. 233.

Obligation to erect gates at street crossings.

A railway company in running its trains through the streets of a town should not only refrain from exceeding the rate of speed prescribed by the Railway Act in passing through crowded places, but should in addition thereto, in order to avoid liability for accidents, place gates or other protection at the crossings.

Gerard v. Quebec & Lake St. John Ry. Co., 25 Que. S.C. 245 (Ct. Rev.)

Right-of-way—Obstruction of highway.

An action for an injunction to restrain the defendants from obstructing a highway in the township, by fences on both sides of defendants' tracks where they crossed the highway, and for a mandatory order compelling the removal of the fences:—Held, that the allowance for the road in question, having been made by a Crown surveyor, was a highway within the meaning of s. 599 of the Municipal Act, and although not an open, public road, used and traveled upon by the public, it was a highway within the meaning of the Railway Act, 1888, (2) that, although the road allowance had not been cleared and opened up for public travel and had not been used as a public road, it was not necessary for the municipality to pass a by-law opening it before exercising jurisdiction over it; the council might direct their officers to open the road, and such direction would be sufficient. (3) That the right of the railway company under s. 90 (g) of the Act to construct their tracks and build their fences across the highway, was subject to s. 183, which provides against any obstruction to the highway, and s. 194, which provides for fences and cattle guards being erected and maintained; and, therefore, the defendants had no right to maintain fences which obstructed the highway or interfered with the public user or with the control over it claimed by the municipality. (4) That the Railway Committee had no jurisdiction to determine the questions in dispute; s. 11 (h) and (q) of the Act not applying. (5) That the Court had jurisdiction to grant the relief sought. (6) That the highway being vested in the township corporation, who desired to open it and make it fit for public travel, the plaintiffs were entitled to have the defendants enjoined from obstructing it and ordered to remove the fences. [Fenelon Falls v. Victoria Ry. Co. (1881), 29 Gr. 4, and Toronto v. Lorsch (1893), 24 O.R. 227, followed.]

Gloucester v. Canada Atlantic Ry. Co., 1 Can. Ry. Cas. 327, 3 O.L.R. 85.

[Affirmed in 4 O.L.R. 262, 1 Can. Ry. Cas. 334; followed in Sasman v. Can. Northern Ry. Co., 20 Can. Ry. Cas. 246.]

Municipal corporation—Liability to repair.

By s. 611 of the Municipal Act, R.S.O. c. 23, first introduced into the Municipal Act in 1896, no liability is now imposed on a municipal corporaton for want of repair of a railway crossing by reason of its being of too high a grade and the omission to fence, the obligation therefor being under s. 186 of the Railway Act, 1888, solely on the railway company.

Holden v. Yarmouth et al., 3 Can. Ry. Cas. 74, 5 O.L.R. 579.

Highways across railway—Right of private individuals to make—Powers of Board as to specific performance.

A private individual applied under s. 186 of the Railway Act, 1903, to compel a railway company to make and maintain highway crossings across its railway adjoining the lands of the applicant which had been laid out into town lots with intersecting streets. The municipality had passed a by-law purporting to establish as public highways such streets without complying with s. 632 of the Municipal Act, R.S.O. 1897, c. 223:—Held (1), under s. 186 either a railway company or other parties may apply to construct such highway crossings. (2) The by-law of the municipality was inoperative to establish a highway across the railway against the will of the company. (3) The Surveys Act, R.S.O. 1897, c. 181, s. 39, cannot create highways across the land of a railway company or give any right to the applicant to have his streets extended across the railway. (4) A railway company may, with the leave of the Board, lay out and dedicate portions of its right-of-way for use as highways which the municipality could accept without passing a by-law for that purpose. (5) The applicant is only entitled to an order from the Board authorizing the railway company to lay out and construct such highways. The by-law of the municipality may be considered an acceptance of such highways. (6) The Board does not enforce specific performance of such agreements. It is not empowered to compel the railway company to construct the highway at the instance of the applicant. (7) As no other Court of authority than the Board can legally allow the railway company or any other person to construct the highway, the application should proceed for the purpose of enabling the Board to determine whether it will give this permission.

Re Reid and Canada Atlantic Ry. Co., 4 Can. Ry. Cas. 272.

[Inapplicable in Bird v. Can. Pac. Ry. Co., 1 S.L.R. 279.]

Cattle guards—Township roads.

The provisions of 55 & 56 Vict. c. 27, s. 6, amending s. 197 of the Railway Act, 1888, and requiring, at every public road crossing at road level of the railway the fences on both sides of the crossing and of the track to be turned into the cattle guards applies to all public road crossings and not to those in townships only as in the case of the fencing prescribed by s. 194 of the Railway Act, 1888. [Grand Trunk Ry. Co. v. McKay, 3 Can. Ry. Cas. 52, 34 Can. S.C.R. 81, followed.]

Grand Trunk Ry. Co. v. Hainer, 5 Can. Ry. Cas. 59, 36 Can. S.C.R. 180.

[Applied in Jolicoeur v. Grand Trunk Ry. Co., 34 Que. S.C. 460; distinguished in Buck v. Can. Northern Ry. Co., 2 Alta. L.R. 558; Tinsley v. Toronto Ry. Co., 17 O.L.R. 74; referred to in Eisenhauer v. Halifax & S.W. Ry. Co., 42 N.S.R. 434.]

Street railway intersection—Municipality—Costs.

By agreement made in 1888 between the town of Chatham and the Ontario & Quebec Ry. Co., the company agreed to maintain on two streets gates and watchmen where the railway crossed the highway, and to permit crossings to be made over four streets by the Chatham Street Ry. Co. and "such other companies or corporations as the town might from time to time authorize to construct and run street railways in Chatham." By by-law of the city of Chatham passed 1905, the Chatham W. & L.E. Ry. Co. (incorporated by 4 Edw. VII. c. 105, Dom.) was authorized to lay down and construct a street railway in Chatham and was given extensive privileges of running passenger and freight cars by electric power on certain streets, including those crossed by the Ontario & Quebec Ry. Co. The Chatham W. & L.E. Ry. Co. applied to build and operate its tracks along two streets across the tracks of the Canadian Pacific Ry. Co., the lessees of the Ontario & Quebec Ry. Co.:—Held, that the applicants, although possessing greater powers than an ordinary street railway, came within the terms of the agreement of 1888 as being a company authorized to construct and run a street railway in Chatham:—Held, also, that the consent of the railway company in the agreement of 1888 to permit crossings for street railway purposes did not amount to a consent to permit crossings for all purposes nor require it to bear the cost of any extra protection necessary in consequence of a street railway or other railway building across its line, and that the extra expense incurred ought to be borne by the applicants.

Chatham, Wallaceburg & Lake Erie Ry. Co. v. Can. Pac. Ry. Co., 5 Can. Ry. Cas. 175.

PROTECTION—OMISSION.

Where the Railway Committee, in view of a dangerous crossing at any point, has not been invoked under s. 187 of the Railway Act, 1888, to make the necessary regulations to minimize or do away with the danger, a railway company cannot be held to have committed an act of negligence by reason of such omission.

Andreas v. Can. Pac. Ry. Co., 5 Can. Ry. Cas. 440, 2 W.L.R. 249.

[Affirmed in 5 Can. Ry. Cas. 450, 37 Can. S.C.R. 1.]

HIGHWAY NOT SANCTIONED BY BOARD—DUTY OF PROTECTION.

A crossing built by a railway company and designated by a sign as a "railway crossing," which the public is permitted to use, but the opening of which has not been sanctioned by the Board, is not a highway under the Railway Act, 1906, ss. 242, 243, so as to impose a duty on the railway company as to construction and maintenance of fences and the protection of highways, and, therefore, cannot be charged with negligence for any omission to fence or for defective approaches, particularly where the crossing had been previously used safely by the same person and others.

Bird v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 195, 6 W.L.R. 393.

[Reversed in 1 S.L.R. 266, 8 Can. Ry. Cas. 314.]

DEFECTIVE CONSTRUCTION—CROSSING NOT ON HIGHWAY—DUTY OF COMPANY TO FENCE.

When a railway company establishes a crossing, not authorized by the Board over its railway, at a point other than on a highway and invites the public to use such crossing, it is the duty of the company to take every precaution for the safety of the public using such crossing and in view of the statutory provision requiring the company to fence the approaches to a railway crossing over a highway properly authorized, the failure of the company to so fence an unauthorized crossing constitutes such negligence as will render the company liable for injury to any person sustained on such crossing when the proximate cause of such injury is the failure of the company to fence. 7 Can. Ry. Cas. 195, 6 W.L.R. 393, reversed.

Bird v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 314, 1 S.L.R. 266.

REOPENING HIGHWAY—CONDITIONS AS TO SAFETY—CONTRIBUTION.

On an application to review, rescind or vary a former order of the Board approving the closing of a public highway across the right-of-way of a railway company and the substitution of a stile therefor:—Held (1), that conditions have greatly changed since the date of the former order, the reasonable convenience of the public requires the highway to be open, which had never been legally closed:—Held (2), that the application for the reopening of the highway should be granted on condition that the railway company construct crossing, the city maintain the same and make such changes in the locality as will render the crossing as safe as may be under the circumstances.

Victoria v. Esquimalt & Nanaimo Ry. Co., 9 Can. Ry. Cas. 470.

HIGHWAY CROSSED BY RAILWAY—DIVERSION OF HIGHWAY—PLAN AND PROFILE.

Instead of carrying the Saskatchewan Trail beneath their track by means of a subway, the respondents, by order dated October 29, 1909, were given the alternative of closing the said Trail by the diversion of it to Norton street, provided that releases from the landowners who might be injured were secured and filed. An order was given to the respondents to expropriate the properties of such landowners as would not give releases. Without conforming with the Railway Act, 1906, by filing a plan and profile of the highway diversion, the respondents, by faulty construction of the works, made the Trail dangerous and Norton street impassable:—Held (1), the respondents were and are still trespassers by contravening the act and the Board's permission. (2) The respondents must provide subways at both streets as apparently was their original intention, and not to close and divert the Trail. (3) The order of October 29th, 1909, should be rescinded entirely. (4) A new order might go requiring the respondents to construct an overhead crossing for the Saskatchewan Trail, fifty feet in width, abutments parallel with the highway, or if they chose sixty-six feet in width abutments at right angles with railway. (5) Detail plans must be filed within thirty days for approval of the Board's engineer, and work completed within ninety days after said approval. (6) A penalty of $100 a day for every day's default in observing the above conditions.

Edmonton v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 444.

DIAMOND CROSSING—STREET RAILWAY—PROTECTION AT CROSSING.

Upon an application to direct the removal of the respondent's track from a public highway, and by the respondent to legalize its maintenance under ss. 59A, 222, 237 of the Railway Act, 1906, the Board granted the respondent's application upon condition that upon the construction of a street railway upon the highway, diamond crossings should be installed and sufficient protection given at the crossing at the respondents' expense and that the movement of the steam railway upon the highway should be restricted.

Ottawa v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 185.

STREET RAILWAY—TEMPORARY AND PERMANENT CROSSING.

Upon an application to have a temporary right of crossing the tracks of a steam railway with the tracks of a municipal electric railway made permanent, where the highway crossing was permanent, and the respondent steam railway company had originlly consented to the temporary crossing, and thereupon permanent works had been constructed by the municipality, the Board made no order but directed that unless there was an elimination of grade or change in the street car location a system of derails should be installed against the electric car line on account of the dangerous character of the crossing.

Lethbridge v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 345.

Division of highway—New grade crossing.

The jurisdiction of the Board as to the closing of a highway is limited to the extinguishment of the public right to cross the railway; and this power is ordinarily exercised by first granting permission to divert the highway and afterwards making the order to close the road allowance within the limits of the company's right-of-way after the construction of the new grade crossing on the diverted highway.

Re Highways and Railway Crossings, 12 D.L.R. 389.

Width of highway—Restricting to portion devoted to highway traffic.

The right of the public in a street over a railway right-of way is not limited to the portion planked and gravelled for traffic by reason of the fact that no town by-law was adopted for opening the street, under s. 705 (b) of c. 57 of 8 & 9 Edw. VII. after the crossing was ordered by the Board, where, prior to application to the Board a by-law was passed authorizing the extension of such street across the right-of-way of the railway company; and the latter acquiesced in the opening of the road for its full width, and subsequently recognized its existence. 9 D.L.R. 777, 15 Can. Ry. Cas. 31, reversed.

Campbell v. Can. North. Ry. Co. (No. 2), 12 D.L.R. 272, 15 Can. Ry. Cas. 357, 23 Man. L.R. 385.

Abolition of grade crossings—Cost—Liability of railway.

Where the main track of a railway was laid across a street prior to the passage of s. 238A of the Railway Act amendment (8 & 9 Edw. VII. c. 32), imposing on railways thereafter to be constructed the cost of providing for the protection, safety and convenience of the public at highway crossings, such provision is not rendered applicable to such railway by reason of the fact that its sidetracks were also laid across the street after the adoption of such section.

British Columbia Elec. Ry. Co. v. Vancouver, Victoria Ry. etc. Co., 15 Can. Ry. Cas. 237, 48 Can. S.C.R. 98, 13 D.L.R. 308.

[Reversed in 18 Can. Ry. Cas. 287, 19 D.L.R. 91; considered in Vancouver v. Vancouver, Victoria etc., Ry. Co., 18 Can. Ry. Cas. 296.]

Right-of-way—Contemporaneous acquisition—Equal rights—Jurisdiction—Electric bell—Apportionment of cost.

Where the rights of the municipality are at least equal to those of the railway company, the creation of the street crossing having been contemporaneous with the acquisition of the land for railway right-of-way, the Board may make an order for contribution by the municipality towards the cost of protecting a level crossing by gates and watchmen. The Board has jurisdiction to make a further contribution from the Railway Grade Crossing Fund towards the cost of protection works at a crossing after contributing to the cost of installing an electric bell at the same crossing more than a year ago.

Lachine v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 23.

Obstruction of street crossing—Standing cars—Gates.

To justify conviction of a railway company under s. 394 of the Railway Act, 1906, for obstructing a street crossing by allowing cars to stand across the street, it must be shewn by the prosecution that the obstruction was wilful, and where the crossing was protected by gates and the only evidence was of the times when the gates remained closed against street traffic for periods in excess of five minutes, a conviction should be quashed where it was not shewn that any one train or car caused the obstruction, nor was it shewn that the delay was not attributable to the gateman rather than to the trainmen; s. 394 of the Railway Act does not apply to obstruction caused by the gateman's neglect at a street crossing.

Rex v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 74, 18 D.L.R. 323.

Highway crossings, what are—Private driveway.

A private driveway across a railway used by the public as a means of access to an adjoining farm is not a highway crossing within the meaning of s. 155 of the Ontario Railway Act, R.S.O. 1914, c. 185, nor within the purview of s. 259 of the Dominion Railway Act, 1888, respecting the fencing of and regulation of speed at crossings.

Gowland v. Hamilton, Grimsby & Beamsville Elec. Ry. Co., 19 Can. Ry. Cas. 214, 24 D.L.R. 491.

Substituted highway—Apportionment of cost.

Where it is necessary to open a new highway across a railway on account of the dangerous and unsatisfactory condition of existing highway crossings, it may be considered as a substituted highway and the expense of protection at the crossing should be divided equally as near as possible between the municipality and railway company concerned.

Sarnia v. Pere Marquette Ry. Co., 16 Can. Ry. Cas. 233.

Gates and watchmen—Heavy traffic—Cost.

Where the traffic on the highway is much heavier than on the railway by which it is crossed, and protection by gates and watchmen is necessary, the Board ordered 20% of the cost of protection to be paid out of the Railway Grade Crossing Fund, and the remaining 80% to be divided equally between the applicant and respondent as well as the cost of operation.

Toronto v. Can. Pac. Ry. Co. (Symington Ave. Crossing Case), 19 Can. Ry. Cas. 293.

Protection—Costs of maintenance and operation.

At the crossing in question, where there are four tracks and considerable shunting traffic, protection by an electric bell is not so satisfactory as at crossings where there are fewer tracks and less shunting, and the Board directed protection by gates, operated night and day, apportioning the costs of installation as follows: Township of Howard, 10%; Village of Thamesville, 15%; Grand Trunk Ry. Co., 55%; and Railway Grade Crossing Fund 20%; the Township, the Village and the Railway to bear 10%, 15%, and 75% respectively of the costs of maintenance and operation, the statute not permitting anything to be given towards the costs of maintenance and operation from the Fund.

Thamesville et al. v. Grand Trunk Ry. Co., 23 Can. Ry. Cas. 33.

Inadequate protection—Dangerous crossing—Costs of construction and installation.

Where two railways in close proximity cross two highways the Board decided that towers should be erected to operate pairs of gates day and night at the points of crossing, on the ground that the protection was inadequate (there being none where the junior railway crossed the highways), and the crossings were dangerous owing to the heavy volume of traffic on the railways and highways and the obstruction of the view; apportioned the cost as it considered fair under the circumstances, with the usual contribution from the Railway Grade Crossing Fund towards construction and installation.

Walkerville v. Grand Trunk and Pere Marquette Ry. Cos., 24 Can. Ry. Cas. 1.

PROTECTION BY ELECTRIC BELL—COST—CONSTRUCTION—MAINTENANCE.

Where a highway is senior to a railway which crosses it, it is the practice of the Board to exempt the municipality controlling the highway from any contribution to the cost of installation or maintenance of an electric bell to protect the crossing.

Morse v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 64.

COST OF PROTECTION—ELECTRIC BELL—SENIOR AND JUNIOR RULE.

The Board will not require any contribution from the local authority towards the cost of protection by electric bell at a highway crossed by a railway, the question of seniority is not considered, the usual contribution of 20% is made from the Railway Grade Crossing Fund and the remainder of the expense is borne by the railway company. [See Morse v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 84.]

Mission City Board of Trade v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 253.

WATCHMAN OF GATES MAINTAINED BY COMPANY AND MUNICIPALITY—NEGLIGENCE OF—LIABILITY OF MUNICIPALITY.

A highway crossing the tracks of two railway companies, the Board made an order for the installation of gates to be operated by watchmen. One of the railway companies was directed to install the gates, and the cost was divided between the municipality and the two companies in certain proportions. The cost of maintenance was divided the same way. An accident having been occasioned by the negligence of one of the watchmen appointed by the company having the conduct of the work, an application was made by the other company, whose engine caused the accident, to have the damage paid by the company appointing the watchman, or to provide as to division of responsibility for accidents due to the negligence of the watchman. Held, that the watchman should be regarded as the agent of the company, whose trains or engines do the damage, and the municipality should not be responsible for any damages caused by the negligence of the watchman.

Re Royce Ave. Crossing (Toronto), 32 W.L.R. 227.

C. Construction and Maintenance; Costs.

APPORTIONMENT OF COST OF PROTECTION—ELECTRIC STREET RAILWAY—MUNICIPALITY.

A municipal corporation in New Brunswick applied for an order under s. 187 of the Railway Act, 1903, for protection of two of its highways where crossed by the railway:—Held, that the Board had jurisdiction under s. 47 of the Railway Act, 1903, to order the municipality liable under the Provincial Act, 63 Viet c. 46 (N.B.), for the support and maintenance of its highways, to contribute to the expense of protecting such crossings as in other provinces. [Toronto v. Grand Trunk Ry. Co., 37 Can. S.C.R. 232, referred to.] An order was made by the Board that the municipality should pay one-half the wages of watchmen employed to operate gates to be installed, operated and maintained by the railway company at the crossing to be protected.

Saint John v. Can. Pac. Ry. Co., 5 Can. Ry. Cas. 161.

"Municipality or person interested"—Protection by gates—Contribution to cost of.

Where an electric street railway crossed the G.T. Ry. outside the limits of a town, even where the corporation admitted it was interested in having gates to protect the crossing, it was held that the costs should be borne by the G.T.R. Co. [Grand Trunk Ry. Co. v. Kingston, 8 Can. Ex. 349, 4 Can. Ry. Cas. 102; Re Can. Pac. Ry. Co. and York, 27 O.R. 539, 25 A.R. (Ont.) 65, 1 Can. Ry. Cas. 36, 47, referred to.]

Grand Trunk Ry. Co. v. Cedar Dale et al. (Cedar Dale Crossing Case) 7 Can. Ry. Cas. 73.

[Followed in Thorold v. Grand Trunk et al. Ry. Cos., 24 Can. Ry. Cas. 21.

Highway across railway—Municipality—Cost of construction and maintenance.

At the end of a village street a private level crossing over two lines of railway was allowed to be used for many years by the public for access to a stove foundry across the tracks without any active steps being taken by the railway companies owning them to prevent this practice. The land on the village side had been subdivided into lots and built upon across the tracks. This street had been laid out in continuation through farm lands to a public highway. The railway companies put up warning notices and occasionally closed the gates at each side of their lines thereby preventing any inference of any intention to dedicate this portion of their lines to public use as a highway crossing. Upon application by such adjoining village municipality for an order directing the railway companies to construct a public highway across their lines at the place in question:—Held (1), that the applicant should be granted leave at its own expense to construct and maintain a highway across the railways and the lands of both companies. (2) The multiplication of level crossings is entirely undesirable but, not so undesirable as illegal level crossings and railway companies should either fence off their lines and take steps to prevent the unlawful crossing of their tracks or allow public highways to be placed across them where the public interest demands such a course.

Weston v. Can. Pac. and Grand Trunk Ry. Cos. (Denison Avenue Crossing Case), 7 Can. Ry. Cas. 79.

[Followed in Montreal v. Can. Ry. Co., 18 Can. Ry. Cas. 50; Lachine v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 385; Moodie v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 217; London v. Grand Trunk Ry. Co., 20 Can. Ry. Cas. 242; Grand Trunk Ry. Co. v. Hamilton, 22 Can. Ry. Cas. 442.]

Construction on highway—Leave of the Board and municipality—Priority—Protective appliances—Apportionment of cost.

Where in a railway company's original Act of incorporation the construction of its railway along a highway, except under a by-law of the proper municipal council is expressly prohibited and the prohibition is repeated in the act declaring the company's railway to be a work for the general advantage of Canada, the Board has power under the Railway Act, 1906, s. 26, to prohibit the company from maintaining or using its railway upon the public highway, if constructed thereon without due authority; but semble, the general jurisdiction conferred upon the Board by s. 26 apart from special circumstances does not extend to the prohibition of placing rails upon or along public highways merely because the leave of the Board has not been given. Such unauthorized acts are not usually done in contravention of the Railway Act, and being breaches of the general law forbidding the obstruction of highways are not within the jurisdiction of the Board. An order of the Board approving location plans of a railway does not give authority to construct or operate the railway upon or across a public highway. The railway of the Windsor Co. was constructed along a public highway without the necessary authority of the municipality and the Board. The consent of the municipality or municipalities was afterwards obtained, but not the requisite leave of the Board. The Board, however, granted leave to the Windsor Co. to cross the Canadian Pacific Ry. Co.'s line upon the highway, and afterwards the Essex Co., with its location plan properly sanctioned by the Board, and having the leave of the Board to cross the highway on the line of that location, applied to have the railway of the Windsor Co. removed from the highway or to be allowed to cross it at the expense of the former, and to have the orders sanctioning the location plans of the Windsor Co. and giving that company leave to cross the line of the Canadian Pacific Ry. Co. set aside, the Essex Co. claiming a right of seniority because the construction of the Windsor Co.'s railway on the highway was unauthorized:—Held (1), that, while the Board had jurisdiction to require the removal of the Windsor Co.'s rails from the highway at the point where the Essex Co. obtained leave to cross, no absolute right of priority was acquired by priority of sanction of location plans, or of leave to cross the highway, as the two railways were constructed almost simultaneously, and the application was refused by the Board in the fair exercise of its discretion, the maintenance and operation of the Windsor Co.'s line along the highway was authorized, and leave was given to the Essex Co. to cross the lines of the Windsor Co. and the Canadian Pacific Ry. Co., the cost of maintenance and operation of protective appliances at the crossings being divided equally between the two companies. (2) That the Essex Co. had no status for the purpose of its application to cross the line of the Windsor Co. to question the legality of the location of the latter's line upon the highway.

Essex Terminal Ry. Co. v. Windsor, Essex & Lake Shore Rapid Ry. Co., 7 Can. Ry. Cas. 109.

[Affirmed in 40 Can. S.C.R. 620, 8 Can. Ry. Cas. 1; followed in Hamilton v. Toronto, Hamilton & Buffalo Ry. Co., 17 Can. Ry. Cas. 366, 370.]

LOCATION OF RAILWAY—CONSENT OF MUNICIPALITY—CROSSING—LEAVE OF BOARD.

On August 12, 1905, the Township of Sandwich West passed a by-law authorizing the W. E., etc., Ry. Co. to construct its line along a named highway in the municipality, but the powers and privileges conferred were not to take effect unless a formal acceptance thereof should be filed within thirty days from the passing of the by-law. Such acceptance was filed on September 12, 1905. This was too late, and on July 20, 1907, the council of Sandwich West and of Sandwich East respectively passed by-laws containing the necessary authority. In April, 1906, the location of the line of the E. T. Ry. Co. was approved by the Board. In June, 1906, the Board made an order allowing the W.E., etc., Ry. Co. to cross the line of the C.P.R. In March, 1907, another order respecting said crossing was made and also an order approving the location of the W.E. Ry. Co., the municipal consent being obtained three months later. The E.T. Ry. Co. applied to the Board to have the orders of June, 1906, and March, 1907, rescinded and for an order requiring the W.E. Ry. Co. to remove its track from the highway at the point where the applicant proposed to cross it to discontinue its construction at such point or, in the alternative, for an order allowing it to cross the line of the W.E. Ry. Co. on said highway. The applicants claimed to be the senior road, and that the W.E. Ry. Co. had never obtained the requisite authority for locating its line. On a case stated to the Supreme Court by the Board:—Held, that the Board had power to refuse to set aside the said orders; that the by-laws passed in July, 1907, were sufficient to legalize the construction of the W.E. Ry. Co.'s line on said highway; and that the Board can now lawfully authorize the latter company to maintain and operate its railway thereon:—Held, further, that leave of the Board is necessary to enable the E.T. Ry. Co. to lay its tracks across the railway of the W.E. Ry. Co. on said highway:—Held, also, that the Board, in exercise of its discretion, has power by order to authorize the maintenance and operation of the W.E. Ry. Co. along said highway and to give leave to the E.T. Ry. Co. to cross it and the line of the C.P.R. near the present crossing and to apportion the cost of maintaining such crossing equally between the two companies instead of imposing two thirds thereof upon the E.T. Ry. Co., as was done by a former order not acted upon; and to order that if the E.T. Ry. Co. finds it necessary in its own interest to have the points of crossing differently placed, it should bear the expense of removing the line of the W. E. Ry. Co., to the new point of crossing.

Essex Terminal Ry. Co. v. Windsor, Essex & Lake Shore Rapid Ry. Co., 8 Can. Ry. Cas. 1, 40 Can. S.C.R. 620.

PROTECTION BY MEANS OF GATES AND WATCHMEN—CONTRIBUTION TO COST OF —MUNICIPAL CORPORATION.

Until 31st December, 1901, the defendants paid their share of the cost of protecting certain level crossings in and about the city of Toronto pursuant to the order of the Railway Committee dated 8th January, 1891, and then ceased from making further payments:—Held (1), in an action brought to enforce payment, that the defendants were concluded by the authority of decided cases. [Re Can. Pac. Ry. Co. and York, 27 O.R. 559, 25 A.R. (Ont.) 65, 1 Can. Ry. Cas. 36, 47; Toronto v. Grand Trunk Ry. Co., 37 Can. S.C.R. 232, 5 Can. Ry. Cas. 138.] (2) That the order of the Railway Committee was valid and binding until rescinded by the Board.

Can. Pac. Ry. Co. v. Toronto, 7 Can. Ry. Cas. 274, 8 O.W.R. 348, 9 O.W.R. 785.

[Affirmed in [1908] A.C. 54, 7 Can. Ry. Cas. 282; followed in Hamilton Street Ry. Co., 17 Can. Ry. Cas. 393; Grand Trunk Ry. Co. v. Kitchener & Waterloo Street Ry. Co., 24 Can. Ry. Cas. 13.]

PROTECTION OF HIGHWAY CROSSINGS—CONTRIBUTION OF COSTS—MUNICIPALITIES—BRITISH NORTH AMERICA ACT, S. 91, SUBS. 29—S. 92, SUBS. 10 (A)—"PERSON."

The Railway Committee, by order made under ss. 187, 188 of the Railway Act, 1888, directed certain measures to be taken to safeguarding the respondents' railway, which it a through railway, and for the protection of the public in traversing it at certain level crossings where it passes across public streets at points within or immediately adjoining the boundary of the appellant city, and directed the cost thereof to be borne in equal proportions by the railway and the city. In a suit by the railway after the execution of works as directed to recover the apportioned amount from the corporation:—Held, that ss. 187, 188 were intra vires of the Parliament of Canada by force of the B.N.A. Act, s. 91, subs. 29, and s. 92, subs. 10 (a): —Held, also, that, having regard to s. 7, subs. 2, of the Interpretation Act (R.S.C., 1886, c. 1), "person" in s. 188 includes a municipality.

Toronto v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 282, [1908] A.C. 54.

[Followed in Re Narian Singh, 13 B.C.R. 479; relied on in Carleton v. Ottawa, 41 Can. S.C.R. 552, 557; Montreal Street Ry. Co. v. Montreal, 43 Can. S.C.R. 204; Grand Trunk Ry. Co. v. Kitchener & Waterloo Street

Ry. Co., 24 Can. Ry. Cas. 13; Thorold v. Grand Trunk et al Ry. Cos., 24 Can. Ry. Cas. 21.]

Contribution to cost—Party interested—Municipality.

A municipality may be a "party interested" in works for the protection of a railway crossing over a highway though such works are neither within or immediately adjoining its bounds and the Board has jurisdiction to order it to pay a portion of the cost of such work.

Carleton v. Ottawa, 9 Can. Ry. Cas. 154, 41 Can. S.C.R. 552.

[Followed in Thorold v. Grand Trunk et al. Ry. Cos., 24 Can. Ry. Cas. 21.]

Highways across railway—Railway to open and bear expense.

On application by a municipality for a highway crossing over the line of the C.P.R. Co. at the expense of the railway company on the town line between two townships where no road allowances had been reserved in the original survey, but under this system of survey, when patents issue, a reservation of five per cent is made for roads, with the right in the Crown to lay out same, where necessary or expedient:—Held, in view of such reservation by the Crown, that the railway company should be prepared to bear the expense of opening the highway across its right-of-way.

Caldwell v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 497.

[Distinguished in Pontiac v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 298.]

Gates—Grade crossing fund—Contribution by municipality.

Application by the municipality for an order requiring the company to place gates at a highway crossing already protected by an electric bell. It was shewn that this crossing was particularly dangerous owing to obstructions to the view, the heavy traffic both on highway and railway, and the bell being constantly out of repair:—Held, that the company should install and maintain gates at this crossing, that twenty per cent of the cost of installation should be payable from the Railway Grade Crossing Fund, that ten per cent of the cost of operation be borne by the municipality.

Walpole v. Grand Trunk Ry. Co., 9 Can. Ry. Cas. 499.

Highway across railway—Municipality—Cost of construction.

A complaint by the town of St. Pierre that the respondent intended to close Simplex street where it crossed its tracks and asking that the respondent should bear part of the cost of protecting the crossing. Simplex street had been originally a farm crossing but was now used as a general public highway crossing. The Board's officers reported that the crossing should be made a regular highway crossing and be fully protected by gates and watchmen:—Held, that the applicant must reimburse the respondent for the cost of construction, maintenance and protection of the crossing, receiving from the Railway Grade Crossing Fund, 20 per cent of the cost of the protection works.

St. Pierre v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 1.

[See Grand Trunk Ry. Co. v. Toronto, 32 O.R. 120, 1 Can. Ry. Cas. 82, 92; Weston v. Can. Pac. and Grand Trunk Ry. Cos., 7 Can. Ry. Cas. 79; followed in Montreal v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 50; Lachine v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 385; London v. Grand Trunk Ry. Co., 20 Can. Ry. Cas. 242; Grand Trunk Ry. Co. v. Hamilton, 22 Can. Ry. Cas. 442.]

Branch line—Spur crossing—Expense of construction.

Application under s. 176 of the Railway Act, 1906, for leave to expropriate a portion of a triangular piece of land for the purpose of constructing a spur across it from the applicant's branch line on L. street, in the city of Saskatoon. The said land had been acquired by the respondent from the former owner, one B. the respondent had been authorized by order of Board to construct certain spurs across the land in question when the applicant's spur was constructed with the exception of the section crossing the portion of the land aforesaid. The order authorizing construction of the branch line and the said spur of the applicant was made before the respondent had acquired the said land:—Held (1), that the applicant should be authorized to take so much of the said land as would be necessary for the construction of its spur. (2) That if a dispute should arise as to the area necessary to be so taken, the matter should be determined by an engineer of the Board. (3) The expense of making the necessary railway crossings on the land should be borne jointly by the applicant and respondent. [Can. Northern Ry. Co. v. Can. Pac. Ry. Co. (Kaiser Crossing Case), 7 Can. Ry. Cas. 297; Grand Trunk Pacific Ry. Co. v. C.P.R. (Nokomis Crossing Case), 7 Can. Ry. Cas. 299, distinguished.]

Qu'Appelle, L.L. & Sask. Ry., etc., Cos. v. Can. Pac. Ry. Co., 13 Can. Ry. Cas. 131.

Highway crossed by railway—Protection—Cost—Apportionment.

Application to determine the character of the protection at a crossing of a highway by a railway and to apportion the cost thereof. The railway of the first respondent crosses a public highway leading to an amusement park, known as Grimsby Beach, with a double track and the other respondent operates an electric railway on the east side of the highway ending a short distance south of the tracks of the first respondent:—Held (1), that one watchman should be employed from May 1 to October 1, for the first year to see if that would afford sufficient protection. (2) That the township should bear 15 per cent and the first respondent the remaining 85 per cent of the cost and that the second respondent should bear no portion of the cost of protection. Commissioner McLean:—That the second respondent contributed to the danger and should pay half of 85 per cent of the cost of protection.

Grimsby Beach Amusement Co. v. Grand Trunk and Hamilton, etc., Ry. Cos., 13 Can. Ry. Cas. 138.

Gates—Construction—Maintenance—Cost—Apportionment.

Application directing the respondent to construct, maintain and operate gates at two highway crossings within 150 feet of one another:—Held (1), that the respondent should erect, maintain and operate the gates and be reimbursed to the extent of 20 per cent out of the Railway Grade Crossing Fund for the cost of construction of each pair of gates, the applicant to contribute 30 per cent towards the cost of their operation and maintenance. (2) That the rule is that the smaller rural municipalities should contribute on a basis of 15 per cent, but in this case the highways being so close and the municipality being unwilling to close either on account of land damages and inconvenience it should pay a larger proportion.

Tavistock v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 442.

Separation of grades—Steam railway and electric street railway—Apportionment of cost.

Upon an application by a municipality for an order to carry four streets over the intersecting tracks of a steam railway company, two of these streets being occupied by the tracks of an electric street railway, the Board decided that the cost be apportioned as follows:—For the streets not occupied by the electric railway, the steam railway to contribute 75 per cent, and the municipality 25 per cent of the cost; for the streets occupied by the electric railway, the steam railway to contribute 60 per cent, the electric railway 20 per cent, and the municipality 20 per cent of the cost, with contributions in three cases from the Railway Grade Crossing Fund of 20 per cent up to $5,000, such cost to include the cost of depressing the tracks of the steam railway, and damages to its lands exclusive of the right-of-way.

Vancouver v. Great Northern and British Columbia Elec. Ry. Cos., 14 Can. Ry. Cas. 333.

STREET RAILWAY—PROTECTION—APPORTIONMENT OF COST.

The Board granted an application by a municipality for a crossing on the highway of a steam railway by its electric street railway to save a detour of three thousand feet on condition that the applicant pay for its own construction, its own rails, and other work and the diamonds, but the cost of protection, that is, the installation of the interlocking plant, its maintenance and operation, to be borne equally by the applicant and respondent. The municipality was not estopped, and had the right to make the application under the changed conditions, irrespective of any action previously taken by the Board. The rights of municipalities to apply to the Board to open level crossings, in the public interest, are higher and should more readily be given effect to than applications of railway companies to cross highways on the level.

St. Thomas v. Michigan Central Ry. Co., 14 Can. Ry. Cas. 339.

LIGHTING—RAILWAY AND TRAFFIC BRIDGE—VOLUME OF TRAFFIC—TOLLS.

The Board will exercise jurisdiction to require a railway company to provide proper lighting for and approaches to a railway bridge upon which provision is made for vehicular and pedestrian traffic, for the use of which bridge tolls are charged, and toward whose construction assistance was given under the Dominion Subsidy Act (1900), 63-64 Vict. c. 8.

Mahon v. Grand Trunk Ry. Co., 16 Can. Ry. Cas. 268.

SEPARATION OF GRADES—PUBLIC INTEREST—LEVEL CROSSINGS—DIVERSION.

After closing and diverting a highway crossing over two railways on the level it is in the public interest that the Board should not order another highway to be opened across these railways for the convenience of a few landowners who are cut off from access to the diverted highway except by going some distance east to where the diverted road joins the old road by an overhead bridge.

Bush et al. v. Grand Trunk and Campbellford, Lake Ontario & Western Ry. Cos., Bush Road Crossing Case, 16 Can. Ry. Cas. 437.

OPENING OF HIGHWAY—RIGHT-OF-WAY.

The Board will not invoke its compulsory powers to compel a railway company to supply a right-of-way across its own lands for a municipal highway to be used for highway purposes quite irrespective of railway purposes.

Courtney v. Esquimalt & Nanaimo Ry. Co., 18 Can. Ry. Cas. 284.

OPENING OF HIGHWAY—RIGHT-OF-WAY—APPORTIONMENT OF COST.

The opening of a highway across the lands taken for right-of-way of a railway company is a new public right over it, and the cost of its construction and maintenance should be borne by the applicant municipality.

Mont Laurier v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 387.

APPORTIONMENT OF COST—EXPENSE REIMBURSED.

Where the Board grants permission to the applicant to open up a highway across the right-of-way of the respondent, the uniform practice is to place the whole cost of construction and maintenance upon the applicant, but the order may provide, if the applicant so desires, that the work of construction may be done by the respondent, the expense thereof being reimbursed by the applicant. [Weston v. Grand Trunk and Can. Pac. Ry. Cos. (Denison Avenue Crossing Case), 7 Can. Ry. Cas. 79; St. Pierre v. Grand Trunk Ry. Co. (Simplex Avenue Crossing Case), 13 Can. Ry. Cas. 1; Bridgeburg v. Grand Trunk and Michigan Central Ry. Cos., 14 Can. Ry. Cas. 10; Montreal v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 50; Lachine v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 383, followed.]

London v. Grand Trunk Ry. Co. (Ashland Avenue Crossing Case.), 20 Can. Ry. Cas. 242.

ROAD ALLOWANCE—SENIOR AND JUNIOR RULE—COSTS—APPORTIONMENT—IMPROVEMENTS.

In applying the senior and junior rule between railway companies, construction of the crossing and not approval of location gives priority, but between municipalities and railway companies that principle cannot be applied, when it is sought to cross a railway by a highway where a road allowance previously existed then no matter how long the railway may have been constructed it is considered to be junior, and the railway company should install and maintain the necessary crossing. [Can. Northern Ry. Co. v. Can. Pac. Ry. Co. (Kaiser Crossing Case), 7 Can. Ry. Cas. 297; Can. Northern Ry. Co. v. Can. Pac. Ry. Co., 11 Can. Ry. Cas. 432, followed.] Where there is no road allowance and the municipality desires to use the land of the railway company upon which to construct a highway, the entire costs of the highway improvements will be borne by the applicant. [Gloucester v. Canada Atlantic Ry. Co., 3 O.L.R. 85, 1 Can. Ry. Cas. 327, followed.]

Sasman v. Can. Northern Ry. Co. (Kylemore Crossing Case), 20 Can. Ry. Cas. 246.

DEDICATION OF CROSSING—APPORTIONMENT OF COST—CONSTRUCTION AND PROTECTION.

The Board has decided on a number of occasions, that to fix a railway company with a portion of the cost of constructing and protecting a highway crossing, there must be some act by the railway company dedicating the crossing to the public, but, where the crossing is a way of communication under the Railway Act, the municipality will be assisted to the extent of 20 per cent from the Railway Grade Crossing Fund in bearing the whole cost of constructing and protecting a proper crossing. [Weston v. Grand Trunk and Can Pac. Ry. Cos., 7 Can. Ry. Cas. 79; St. Pierre v. Grand Trunk Ry. Co. (Simplex Avenue Crossing Case), 13 Can. Ry. Cas. 1, followed.]

Montreal v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 50.

[Followed in Lachine v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 385; London v. Grand Trunk Ry. Co., 20 Can. Ry. Cas. 242; Grand Trunk Ry. Co. v. Hamilton, 22 Can. Ry. Cas. 442.]

DEDICATION OF WAY—APPORTIONMENT OF COSTS—GRADES—SEPARATION—SUBWAY.

The well-defined policy of the Board in cases where there is no evidence of any dedication of a way of communication to the public by a railway company across its tracks, is that the entire expense of grade separation necessary to carry the subway under the existing tracks of a railway company should be borne by the applicant municipality. [Weston v. Grand Trunk and Can. Pac. Ry. Cos. (Denison Avenue Crossing Case), 7 Can. Ry. Cas. 79; Town of St. Pierre v. Grand Trunk Ry. Co. (Simplex Avenue Crossing Case), 13 Can. Ry. Cas. 1; Montreal v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 50, followed.]

Lachine v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 385.

[Followed in London v. Grand Trunk Ry. Co., 20 Can. Ry. Cas. 242.]

SENIOR AND JUNIOR RULE—COSTS.

The senior and junior rule which is sometimes applied by the Board when determining who should pay the cost of the crossing of one railway over another, should not be applied where a highway is crossed by a railway, as the municipality being the owner of the street and now being the owner of the street railway, should not be considered junior to the steam railway company and the costs of protecting the crossing should be apportioned equally between them.

Brantford v. Grand Trunk Ry. Co., 20 Can. Ry. Cas. 166.

EVIDENCE OF DEDICATION—EXPENDITURE OF PUBLIC MONEY—SENIOR AND JUNIOR RULE.

When it is sought to open a highway across a railway, there must be evidence of intention to dedicate by the owner, acceptance by the municipality, user by the public, and expenditure of public money to keep the proposed highway in repair and fit for use to bring it within the category of a public highway under the Municipal Act, R.S.O. 1914, c. 192, s. 432. Without such evidence the proposed highway is junior to the railway and under the senior and junior rule the whole of the expenditure required will be placed on the applicant. [Gooderham v. Toronto, 25 Can. S.C.R. 246, distinguished.]

Hamilton v. Hamilton Radial Elec. Ry. Co., 22 Can. Ry. Cas. 438.

DEDICATION—ACCEPTANCE—DEVISE—RIGHT-OF-WAY—SENIOR AND JUNIOR RULE.

A will devising a right-of-way to a certain class of individuals does not make a right-of-way, where it crosses a railway, a highway crossing: there being no evidence of the acceptance of a highway at that point by the municipality nor recognition of its existence by the railway company: the railway is senior to the highway at the point of crossing. [Weston v. Can. Pac. and Grand Trunk Ry. Cos. (Denison Avenue Crossing Case), 7 Can. Ry. Cas. 79; St. Pierre v. Grand Trunk Ry. Co. (Simplex Avenue Crossing Case), 13 Can. Ry. Cas. 1; Montreal v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 50, followed.]

Grand Trunk Ry. Co. v. Hamilton (Depew Street Crossing Case), 22 Can. Ry. Cas. 442.

APPORTIONMENT OF COST—VOLUME OF TRAFFIC—SENIOR AND JUNIOR RULE.

In apportioning the cost of protection at railway crossings of highways which have been in existence for many years, the volume of traffic on the highway and railway respectively, which has made the crossing dangerous, is an element to which more weight should be given than the question of seniority merely.

Montreal v. Grand Trunk Ry. Co. (St. Henri Yards Crossing Case), 22 Can. Ry. Cas. 444.

HIGHWAY CROSSING LEGALIZED—COSTS OF PROTECTION.

Where a highway crossing over a railway has not been legally established prior to April 1, 1909, it may be considered a highway crossing of the railway at grade level within the meaning of the Railway Grade Crossing Fund, s. 239 (A), 8 & 9 Edw. VII. c. 32, s. 7, and the Board may legalize the crossing and make a contribution of 20 per cent out of that fund towards the installation of gates, the remainder of the costs of protection to be borne by the applicants.

Maisonneuve v. Can. Northern Ry. Co., 22 Can. Ry. Cas. 446.

BRIDGE—RECONSTRUCTION—SENIOR AND JUNIOR RULE.

Under the senior and junior rule the highway being senior to the railway no part of the cost of reconstructing the bridge on the highway over the railway should be put upon the respondent city, but the respondent tramways company being junior to the railway, one-fourth of the cost of reconstruction to make the bridge strong enough to carry electric cars should be imposed upon it. [Toronto Railway Co. v. Toronto and Can. Pac. Ry. Co. (Avenue Road Subway Case), 53 Can. S.C.R. 222, 20 Can. Ry. Cas. 280, followed.]

Can. Pac. Ry. Co v. Montreal and Montreal Tramways Co. (Notre Dame Street Bridge Case), 23 Can. Ry. Cas. 31.

STEAM AND MUNICIPALLY-OWNED STREET RYS.—CONSTRUCTION—APPORTIONMENT OF COSTS—SENIOR AND JUNIOR RULE.

The rule of the senior and junior road does not apply in apportioning the cost of a municipally-owned street railway whose tracks are subsequently laid across the tracks of steam railways upon the street, but the cost of making the crossing should be borne by the city and the cost of the protective appliances and their maintenance should be borne equally by the city and the steam railways.

Edmonton v. Grand Trunk Pacific and Can. Northern Ry. Cos. (Syndicate Avenue Crossing Case), 15 Can. Ry. Cas. 443.

[Distinguished in Grand Trunk Ry. Co. v. Kitchener & Waterloo Street Ry. Co., 24 Can. Ry. Cas. 13.]

SENIOR AND JUNIOR RULE—STREET RAILWAY ACQUIRED BY MUNICIPALITY.

A steam railway does not lose its seniority at a crossing on the highway of an electric street railway when the electric railway is acquired by the municipality. [Can. Pac. Ry. Co. v. Toronto, 7 Can. Ry. Cas. 274, affirmed; Toronto v. Can. Pac. Ry. Co. [1908] A.C. 54, 7 Can. Ry. Cas. 282; Grand Trunk Ry. Co. v. United Counties Ry. Co. (St. Hyacinthe Crossing case), 7 Can. Ry. Cas. 294; Can. Northern Ry. Co. v. Can. Pac. Ry. Co. (Kaiser Crossing Case), 7 Can. Ry. Cas. 297, followed; Edmonton Street Ry. Co. v. Grand Trunk Pacific Ry. Co., 14 Can. Ry. Cas. 93, affirmed; Grand Trunk Pacific Ry. Co. v. Edmonton Street Ry. Co. (Twenty-First Street Crossing Case), 15 Can Ry. Cas. 445; Edmonton v. Grand Trunk Pacific and Can. Pac. Ry. Cos. (Syndicate Avenue Crossing Case), 15 Can. Ry. Cas. 443, distinguished.]

Grand Trunk Railway Co. v. Kitchener & Waterloo Street Ry. Co., 24 Can. Ry. Cas. 13.

DIVERSION—ELIMINATION—COSTS.

Where crossings of a highway by a railway are eliminated by the diversion of a highway, the rule usually followed by the Board is to place the greater portion of the cost on the railway and the remainder on the municipality or municipalities interested. In the present case, two-thirds of the cost was apportioned to the railway and one-third to the local authorities.

Canadian Government Railways v. Mulgrave et al. (Cesale's and Auld's Cove Crossing Case), 24 Can. Ry. Cas. 68.

CONSTRUCTION—JURISDICTION.

Where a railway company's Act of incorporation, 6 Edw. VII. c. 70. s. 9, enables it to "construct, maintain and operate" . . . equipment and appliances for the supply of heat, light, water and power, then under ss. 2 (21), 235, 237, of the Railway Act, 1906, the Board has jurisdiction to authorize the company to lay and maintain across public highways conduits containing pressure steam.

Toronto Terminals Ry. Co. v. Toronto and Toronto Harbour Commissioners, 24 Can. Ry. Cas. 71.

[An appeal to the Supreme Court of Canada was dismissed.]

D. Bridges and Viaducts.

FOOTBRIDGE OVER RAILWAY.

The city of Vancouver applied for an order permitting it to construct at its own expense a wooden footbridge across the tracks of the C.P.R. Co. at the north end of C. street, where a street ends at the south boundary of the railway right-of-way; the footbridge being in continuation northerly of the street and leading to wharves, the property of the railway company, on the water front of Vancouver Harbour. The nearest highway crossing of the railway was several hundred feet distant from the site of the proposed footbridge. The company contended that the Board had no jurisdiction to grant the application, its power being limited to order the erection of a footbridge at an existing highway crossing under s. 239 of the Railway Act, 1906:—Held, that under s. 237 the Board had jurisdiction to grant the application:—Held, that the footbridge so erected shall be a highway across the railway.

Vancouver v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 478.

SEPARATION OF GRADES—BRIDGE—NUMBER AND SPEED OF TRAINS—VEHICULAR AND PEDESTRAIN TRAFFIC.

Application for the construction of a highway bridge to be substituted for a level crossing over the main line of the respondent:—Held (1), that the three main factors to be considered as creating the necessity for protection at a highway crossing are, the number of trains, and especially the rate of speed at which trains run over the crossing, the amount of vehicular and pedestrian traffic over the crossing, and the view which those using the highway have of trains approaching in both directions. (2) That the rate of speed at which trains run is a matter of greater importance than the number of trains passing over the crossing. (3) That only limited weight should be given to arguments based on the amount of vehicular or pedestrian traffic passing over the crossing. (4) That the rate of speed at which trains pass over the crossing is a very important factor. (5) That the extent of the view at such crossing is a matter of the greatest consequence. (6) That the application should be granted and a highway bridge substituted for the level crossing over the double track main line of the respondent notwithstanding the fact that the traffic on the highway at the point in question is comparatively light.

Front of Escott v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 315.

RAILWAY CROSSED BY HIGHWAY—COST OF OVERHEAD BRIDGE—MUNICIPALITY.

Leave was granted by the Board to a municipality to carry a highway over the right-of-way and tracks of two railways by means of a bridge where no highway existed and the development of a village had been retarded for want of a crossing upon condition that the municipality bear the whole cost of construction. An easement was granted over the right-of-way, with right of support by piers without payment of compensation to the railway companies.

Bridgeburg v. Grand Trunk and Michigan Central Ry. Cos., 14 Can. Ry. Cas. 10, 8 D.L.R. 951.

[Followed in City of London v. Grand Trunk Ry. Co., 20 Can. Ry. Cas. 242.]

RAILWAY CROSSED BY HIGHWAY—BRIDGE—COST—MUNICIPALITY.

In dealing with an application by a municipality to direct a railway company to carry a new highway across its tracks by an overhead crossing, the Board's jurisdiction is confined to giving directions as to the structure when railway property is interfered with and upon the municipality passing a by-law providing a proper and suitable structure for the purpose an order will go approving of same, and in such case the whole cost of the new highway will be upon the applicant.

Mission District Board of Trade v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 331.

BRIDGE—RAILWAY YARD—APPORTIONMENT OF COST.

Where an application was made by a local improvement district for a bridge carrying the highway over railway tracks, and the limits of an adjoining city were afterwards extended so that the highway became wholly within the city limits, the Board decided that the district should not bear any portion of the cost of such bridge, that the city should contribute $5,000 of the cost for that portion of the bridge which crosses the through tracks of the railway company, who must bear the whole cost of extending the bridge across their yard, 20 per cent of the cost of the whole bridge to be paid out of the Railway Grade Crossing Fund and the balance by the railway company.

Saskatchewan Local Improvement, etc. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 337.

RAILWAY AND TRAFFIC BRIDGE—REPAIR AND MAINTENANCE—USUAL RULE.

The usual rule in cases of repairing and maintaining highway bridges, apart from special circumstances, is that the railway company is responsible for railway structures, and the municipality for structures handed over to it for municipal and highway purposes.

Assiniboia v. Can. Northern Ry. Co., 14 Can. Ry. Cas. 365.

OBSTRUCTION BY IRRIGATION WORKS.

Where in the exercise of a right conferred by statute upon a public service corporation, a public highway is interrupted by the work which the public service corporation is authorized to construct, there is an implied obligation that the public service corporation shall maintain an adequate substitute for the highway by a bridge or other means. [The King v. Alberta Ry. & Irrigation Co., 3 Alta. L.R. 70, affirmed on appeal; Alberta Ry. & Irrigation Co. v. The King, 44 Can. S.C.R. 505, reversed on appeal. See also The Queen v. Inhabitants of the Isle of Ely, 117 Eng. Reports 671, 15 Q.B. 827, 19 L.J.M.C. 223, 14 Jur. 956; R. v. Southampton, 17

Q.B.D. 435; Hertfordshire County Council v. New River Co., [1904] 2 Ch. 520.]

Rex v. Alberta Railway & Irrigation Co., 7 D.L.R. 513, [1912] A.C. 827.

Crossing over highway—Order of Board—Failure to Comply with conditions imposed, where highway diverted—Rescission of order—New order for construction of overhead bridge.

Re Grand Trunk Pacific Ry. Co. and Fort Saskatchewan Trail, 7 D.L.R. 891, 21 W.L.R. 364.

Bridge—Maintenance—Apportionment of cost—Jurisdiction.

Apart from any question of contract, the obligation of a company maintaining a bridge carrying a highway over a railway must be construed with regard to the requirements of the present-day traffic. In 1896, by an order of the Railway Committee, the respondent railway company was authorized to carry a highway (King street in the city of Hamilton) over the railway by a bridge of a certain width. The order contained no provision as to maintenance, extension or widening of the bridge. Upon the growth of the city and a new district (McKittrick Subdivision) being laid out beyond the city limits, in which a new bridge was constructed on the extension of King street, designed to accommodate a double line of street cars, the Board made an order for the construction by the Hamilton company of a new bridge of the same width and strength, in lieu of the bridge built in 1896. Under the special circumstances of the case the municipality was required to contribute 30 per cent and the railway 70 per cent of the cost. [Grand Trunk Ry. Co. v. Can. Pac. Ry. Co. (Myrtle Bridge Case), 15 Can. Ry. Cas. 433, sub nom. Can. Pac. Ry. Co. v. Grand Trunk Ry. Co., 49 Can. S.C.R. 525, 17 Can. Ry. Cas. 300, 20 D.L.R. 56, distinguished.]

Hamilton v. Can. Pac. and Toronto, Hamilton & Buffalo Ry. Cos. (Hamilton Bridge Case), 20 Can. Ry. Cas. 159.

[Followed in Windsor v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 66.]

Bridge—Widening—Public interest—Second track of street railway—Apportionment of cost.

Where the respondent had discharged its responsibility to maintain a bridge carrying a highway over a railway sufficient to accommodate present traffic, the Board in the public interest ordered the bridge to be widened from 40 to 56 feet to enable a street line to be double tracked. The proposed second street railway track being junior to that of the respondent the Board apportioned the cost as follows, 65 per cent to the respondent and 35 per cent to the applicant or street railway company. [Hamilton v. Can. Pac. and Toronto, Hamilton & Buffalo Ry. Cos., 20 Can. Ry. Cas. 159, followed; Can. Pac. Ry. Co. v. Grand Trunk Ry. Co. (Myrtle Bridge Case), 49 Can. S.C.R. 525, 17 Can. Ry. Cas. 300, 20 D.L.R. 56; London v. London Street Ry. Co., 19 Can. Ry. Cas. 436, referred to.]

Windsor v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 66.

Separation of grades—Jurisdiction—Public safety—Apportionment of cost.

Under ss. 8, 59, 227, 237, 238 of the Railway Act, 1906, the Board has jurisdiction, in the interest of public safety, to order that a railway crossing of a highway should be protected or that the grades be separated, and to apportion the cost between Dominion and provincial railway companies and municipalities interested in the works ordered. [Re Can. Pac. Ry. Co. and York, 25 A.R. (Ont.) 65, 1 Can. Ry. Cas. 47; Toronto v. Grand Trunk Ry. Co., 37 Can. S.C.R. 232, 5 Can. Ry. Cas. 138; Can. Pac. Ry.

Co. v. Toronto, 7 Can. Ry. Cas. 274; Toronto v. Can. Pac. Ry. Co. [1908] A.C. 54, 7 Can. Ry. Cas. 282, followed; Can. Pac. Ry. Co. v. Toronto (Toronto Viaduct Case) [1911] A.C. 461, 12 Can. Ry. Cas. 378; Attorney-General for Alberta v. Attorney-General for Canada, et al., 31 T.L.R. 32; British Columbia Elec. Ry. Co. v. Vancouver, Victoria & Eastern Ry. Co. and Vancouver [1914] A.C. 1067, considered.]

Hamilton Street Ry. Co. v. Grand Trunk Ry. Co., 17 Can. Ry. Cas. 393

[Followed in London Railway Commission v. Bell Telephone Co., 18 Can. Ry. Cas. 435.]

Separation of grades—Highway—Pavement—Apportionment of cost.

When ordering the separation of grades between a highway and railway, the practice of the Board in the case of unpaved streets has been not to treat the cost of the pavement as part of the cost of the works, but when a permanent pavement has been destroyed by the construction of the works, the new pavement and cost thereof is treated as part of the undertaking.

Can. Pac. Ry. Co. v. Calgary, 18 Can. Ry. Cas. 38.

Jurisdiction—Dominion and provincial railways—Apportionment of cost—Separation of grades.

The provisions of ss. 8 (a), 28, 59 of the Railway Act, 1906, empowering the Board to apportion among the persons interested the cost of works and construction which it orders to be done or made intra vires. The tracks of the appellant crossed those of the respondent railway company at grade on a public highway. On the report of the engineer that the crossing was dangerous, the Board of its own motion ordered that the street be carried under the respondent railway company's tracks. The grade separation relieved the appellant from the expense of maintaining an interlocking plant and benefited it otherwise. [British Columbia Elec. Ry. Co. v. Vancouver, Victoria & Eastern Ry. etc., Co. and Vancouver [1914] A.C. 1067, 18 Can. Ry. Cas. 287, distinguished.]

Toronto Ry. Co. v. Toronto and Can. Pac. Ry. Co., 20 Can. Ry. Cas. 280 (Avenue Road Subway Case), 53 Can. S.C.R. 222, 30 D.L.R. 86.

[Followed in Can. Pac. Ry. Co. v. Montreal and Montreal Tramways Co., 23 Can. Ry. Cas. 31; Thorold v. Grand Trunk et al. Ry. Cos., 24 Can. Ry. Cas. 21.

E. Subways.

Construction of subway—Local improvements.

An agreement was entered into by the city of Toronto with a railway company and other property owners for the construction of a subway under the tracks of the company ordered by the Railway Committee the cost to be apportioned between the parties to the agreement. In connection with the work a roadway had to be made, running east of King street to the limit of the subway, the street being lowered in front of the company's lands, which were to some extent cut off from abutting as before on certain streets; a retaining wall was also found necessary. By the agreement the company abandoned all claims to damages for injury to its lands by construction of the works. The city passed a by-law assessing on the company its portion of the cost of the roadway as a local improvement, the greater part of the property as assessed being on the approach to the subway:—Held, that to the extent to which the lands of the company were cut off from abutting on the street as before the work was an injury, and not a benefit to such lands, and, therefore, not within the clauses of the Municipal Act as to local improvements; that as to the length of the retaining wall the work was necessary for the construction of the subway and not assessable; and that the greater part of the work, whether or not absolutely necessary for the construction of the subway, was done by the corporation under the advice of its engineer as the best mode of constructing a public work in the interest of the public, and not as a local improvement:—Held, further, that as the by-law had to be quashed as to three-fourths of the work affected, it could not be maintained as to the residue which might have been assessable as a local improvement if it had not been coupled with work not so assessable. Notice to a property owner of assessment for local improvements under s. 622 of the Municipal Act cannot be proved by an affidavit that a notice in the usual form was mailed to the owner; the Court must, upon view of the notice itself, decide whether or not it complied with the requirements of the Act. In the result the judgment of the Court of Appeal, 23 A.R. (Ont.) 250, was affirmed.

Toronto v. Can. Pac. Ry. Co., 26 Can. S.C.R. 682.

[Referred to in The King v. Chappelle, 32 Can. S.C.R. 624.]

Subway—Apportionment of cost—Railway companies and municipalities.

An order of the Railway Committee authorized an electric street railway to cross the tracks of a steam railway beyond the limits of the city, the expense of protecting the crossing by gates and watchmen was by agreement divided equally between the two companies. Subsequently the limits of the city were extended beyond the crossing, and the growth of population having rendered additional protection necessary, application was made by the city to the Board for the construction of a subway on the highway, and the apportionment of the cost thereof between the two railway companies:—Held, that the city should contribute equally with the steam railway company of the cost of the work:—Held, also, that the electric street railway company should likewise contribute to the cost of the work. Ordered that the cost of construction of the subway, including compensation for land damages, be borne by the parties in the following proportions: Three-eighths by the city, three-eighths by the steam railway company, one-quarter by the electric street railway company.

Ottawa v. Canada Atlantic Ry. Co. and Ottawa Elec. Ry. Co. (Bank Street Subway Case), 5 Can. Ry. Cas. 126.

[Affirmed in 37 Can. S.C.R. 354, 5 Can. Ry. Cas. 131.]

Construction of subway—Apportionment of cost—Person interested—Street railway.

The Board, on application by the city of Ottawa, ordered a subway to be made under the track of the C. A. Ry. Co. where it crosses Bank street, the cost to be apportioned among the city, the C.A. Ry. Co. and the Ottawa Elec. Ry. Co. By an agreement between the Electric Co. and the city the company was given the right to run its cars along Bank street and over the railway crossing, paying therefor a specified sum per mile. The company appealed from that portion of the order making them contribute to the cost of the subway, contending that the city was obliged to furnish them with a street over which to run their cars and they could not be subjected to greater burdens than those imposed by the agreement:—Held, that the Electric Co. was a company "interested or affected" in or by the said work within the meaning of s. 47 of the Railway Act, 1903, and could properly be ordered to contribute to the cost thereof:—Held, further that there was nothing in the agreement between said company and the city to prevent the Board making said order or to alter the liability of the company so as to contribute.

Ottawa Elec. Ry. Co. v. Ottawa and Canada Atlantic Ry. Co., 5 Can. Ry. Cas. 131, 37 Can. S.C.R. 354.

[See Toronto v. Grand Trunk Ry. Co., 37 Can. S.C.R. 232, 5 Can. Ry. Cas. 138; followed in Thorold v. Grand Trunk et al. Ry. Cos., 24 Can. Ry. Cas. 21.]

SUBWAY UNDER RAILWAY—PRIVILEGE TO RAISE GRADE OF HIGHWAY.

For many years the defendants, by agreement with the city of Winnipeg, had occupied a portion of the width of Point Douglas avenue in said city with the tracks of its main line. In 1904 a further agreement was made between the city and the company, and ratified by the legislature, whereby the company obtained the right to raise the grade of Point Douglas avenue or of any part thereof to a height not exceeding ten feet above the then existing grade, upon certain conditions:—Held, that the words "or any part thereof" related to a part of the breadth as well as of the length of the avenue, and that the defendants had a right to raise the grade of the southerly forty-five feet in width of the avenue leaving twenty-one feet at its original height, although the result of that was to diminish the value of the plaintiff's lots on account of the construction of a subway alongside of them:—Held, also, that an order of the Board granting leave to the defendants to construct such subway was valid and binding, although it had been made ex parte and in ignorance of the fact that the plaintiff had previously obtained an interim injunction against such construction, the plaintiff having made no application to rescind or vary the order as he might have done. The interim injunction granted in 1905 had been affirmed on appeal before the hearing of the cause:—Held, that that decision was not binding on the trial Judge and did not divest him of the responsibility of deciding the case upon the merits at the hearing. [C.P.R. v. G.T.R. (1906), 12 O.L.R. 320, followed.]

Fraser v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 205, 17 Man. L.R. 667.

SUBWAY—LEVEL CROSSING—AGREEMENT—TRAFFIC LIGHT.

Application by the municipality to rescind an order of August 9, 1910, approving of a level crossing where the track of the railway crossed Choate road, and to restore the order of February 15, 1910, requiring the railway company to construct a subway thereat. In July, 1910, a petition was received from residents of the township stating that they would prefer a level crossing to a subway; the railway company then applied to rescind the order for a subway and for authority to construct a level crossing. Upon a report and recommendation of the engineer of the Board (treating the petition as expressing the views of the municipality) an order was issued on 9th August, 1910, cancelling the order for the subway and approving of a level crossing. At the hearing, the municipality stated that in consideration of getting a subway at Choate road they had consented to level crossings at other places in the township, where, if such consent had not been given, a different character of crossing might have been ordered. This statement was not denied by the railway company. The railway company contended for a level crossing because a subway would be difficult and expensive to construct on account of the nature of the soil. The Board's engineer agreed with the statement of the railway company that the subway would be difficult and expensive and pointed out that traffic on the highway was light:—Held (1), that the order for a level crossing should be rescinded and the order for a subway restored. (2) That the approval given by the municipal council to level crossings at other highways in the township upon the understanding that they were to have a subway at Choate road was an agreement from which the railway company should not be relieved. Application for diversion of a highway into another highway where there was a subway under the railway:—Held (1), upon the evidence that the diversion would be unreasonable and the railway company should construct a subway carrying the highway under the railway. (2) That the use of public highways should be disturbed as little as possible in the construction of railways, except where some change is necessary in the interests of public safety.

Clarke v. Can. Northern Ry. Co., 11 Can. Ry. Cas. 161.

SUBWAY—APPORTIONMENT OF COST—SENIOR AND JUNIOR ROAD.

The city of Regina applied to extend Broad street by building a subway under the yards of the railway company, and consented to close Hamilton street crossing the railway yards at grade. A crossing of necessity had been established at Hamilton street and acquiesced in by the railway company for many years. The railway company contended that Hamilton street was a mere trespass crossing, and the public could be prevented from using it at any time; that if the application was granted, the crossing would be junior to the railway, and the whole expense should be borne by the city:—Held (1), that the application should be granted, and the railway company should contribute to the cost of the work because it had brought about an intolerable situation by laying out the town, and not providing proper access from one part to the other. (2) That the city should bear the cost of constructing the subway and substructures, and the railway company should bear the cost of the superstructures. (3) That the company should provide the approaches and the city should bear the abuttal damages, both at the subway and the closed level crossing at Hamilton street. (4) That the sum of $5,000 be paid out of the railway grade crossing fund, and be divided between the parties in the proportion that the cost borne by each bears to the cost of the work. (5) That the rule of the senior and junior road has been relaxed by the Board in favour of the railway company at points where a separation of grades is made and the highway is senior to the railway.

Regina v. Can. Pac. Ry. Co., 11 Can. Ry. Cas. 165.

[Followed in City of Medicine Hat v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 413.]

SUBWAY—AGREEMENT—COMPENSATION.

Application to alter or rescind an order confirming an agreement between the town and the Railway Co. in regard to the protection and closing of certain streets and approving the works covered thereby. Under the agreement the Railway Co. agreed to construct a subway at Cornelia street, an overhead footbridge at George street, and convey two strips of land on each side of its right-of-way to connect other four streets, and to bear all damages in connection with those works and alterations in the streets of the town; the municipality, on its part, agreed to pass by-laws closing five streets, including Cornelia, except that portion occupied by the subway, and sell the portions within the right-of-way to the Railway Co. The landowners objected to the provision of the agreement dealing with damages on the ground that they would not be able to recover full compensation under the provisions of the Municipal Act, for injury done to their holdings:—Held (1), that the agreement, on the whole, was not one that should be interfered with. (2) That the landowners should be left to their legal rights to have the amount of their various claims settled by the proper tribunal.

Re Smith's Falls and Can. Pac. Ry. Co., 11 Can. Ry. Cas. 180.

SUBWAYS—SENIORITY—DATES OF REGISTRATION—APPORTIONMENT OF COST.

Application that the municipally owned electric railway of the applicant upon a highway be granted leave to cross the line of the respondent by a subway instead of a level crossing:—Held (1), that it was shewn that a plan shewing the location of the street was registered prior to the location plan of the respondent. (2) That the street now being within the boundaries of the applicant municipally carried with it the attribute of seniority acquired by the prior registration of the plan according to the provisions of N.W.J. Ord., c. 4, s. 75 (1901), Public Works Act. (3) That the respondent should shew cause why an order should not be made for a subway, the cost to be apportioned equally between the applicant and the respondent subject to a contribution of 20 per cent up to $5,000 to the cost of the work from the Railway Grade Crossing Fund.

Edmonton v. Edmonton, Yukon & Pacific Ry. Co., 13 Can. Ry. Cas. 128. [Referred to in Regina v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 238.]

APPLICATION FOR CONSTRUCTION OF SUBWAY—EXCESSIVE EXPENDITURE—PROPOSED DIVERSION OF HIGHWAY—SUBMISSION OF PLANS.

Re Savoy and Can. Northern Ry. Co., 7 D.L.R. 886, 21 W.L.R. 377.

SEPARATION OF GRADES—APPORTIONMENT OF COST—VOLUME OF TRAFFIC—SENIOR AND JUNIOR RULE.

In apportioning the cost of separation of grades, the amount of traffic on the highway and railway respectively are more important factors than the question of seniority, and the senior and junior rule should not be given as much weight as in the case of one railway crossing another.

Ste. Anne de Bellevue & Senneville v. Grand Trunk and Can. Pac. Ry. Co., 16 Can. Ry. Cas. 250.

PUBLIC HIGHWAY—PUBLIC INTEREST—APPORTIONMENT OF COST.

In a city which was originally planned, and laid out by a railway company without adequate provisions for highway crossings over its tracks, and which has grown to large proportions on both sides of the railway so that numerous crossings are necessary, and an existing highway crossing is found to be congested and dangerous, the Board may require the company to bear a part of the cost of carrying another de facto highway by means of a subway across the railway in order to relieve the congestion, notwithstanding that such last-mentioned highway has no legal existence where it crosses the tracks, and that the proposed subway construction therefore creates an entirely new public right of crossing. [Regina v. Can. Pac. Ry. Co., 11 Can. Ry. Cas. 165, followed.]

Medicine Hat v. Can. Pac. Ry. Co. (Medicine Hat Streets Case), 16 Can. Ry. Cas. 413.

SUBWAY—PUBLIC HIGHWAY—COST OF MUNICIPALITY—PUBLIC INTEREST.

As a general proposition, there is no objection to municipalities building subways at their own cost, if they desire to make the expenditure, provided they do not interfere with railway facilities, irrespective entirely of circumstances which would justify the Board ordering such action in the public interest under the Act.

Medicine Hat v. Can. Pac. Ry. Co. (Medicine Hat Streets Case), 16 Can. Ry. Cas. 413.

Railway grade crossing fund—Apportionment of cost.

Where there has been actual long continued use by the public (though without legal right) of a level crossing in the nature of a highway crossing over a railway, the Board, in ordering in the public interest, that the highway be legally established, and carried across the railway by means of a subway, may direct that part of the cost be paid from the Railway Grade Crossing Fund, as in the case of separation of grades at a railway crossing of a legal highway. [Regina v. Can. Pac. Ry. Co., 11 Can. Ry. Cas. 165, followed.]

Medicine Hat v. Can. Pac. Ry. Co. (Medicine Hat Streets Case), 16 Can. Ry. Cas. 413.

Highway opened—Senior and junior rule—Equities—Subway.

A street having been opened across the right-of-way of the respondent, the applicant was given permission by the Board to construct and maintain a subway under the railway at its own expense and the respondent, under the senior and junior rule, was not ordered to contribute to the expense, but if the applicant agrees to close a neighbouring street, notwithstanding this rule and that the equities as well as the title are in the respondent's favour, the cost of the subway will be apportioned equally between the applicant and respondent.

Winnipeg v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 381.

Compensation to abutting owner—Consequential injuries.

The construction of a subway in pursuance of an order-in-council under ss. 178, 179 of the Railway Act, R.S.N.S. 1900, c. 99, required for the public safety to carry a highway under a railway, entitles an abutting property owner to recover, from the company executing the work, compensation for the value of his land injuriously affected thereby, though the land itself is not actually taken. [Parkdale v. West, 12 App. Cas. 602, followed; Burt v. Sydney, 15 D.L.R. 429, 50 Can. S.C.R. 6, 16 D.L.R. 853, followed.]

Burt v. Dominion Iron & Steel Co., 19 Can. Ry. Cas. 187, 25 D.L.R. 252.
[Reversed in 20 Can. Ry. Cas. 134.]

Pedestrian and vehicular subway—Highway closed—Grade separation—Cost of construction.

A municipality and a railway company by agreement (ratified by bylaw) closed a portion of a highway, except for foot traffic. More than ten years after the highway was closed the municipality, alleging an improvident bargain, applied to the Board for an order requiring the respondent to construct a vehicular and pedestrian subway under the railway at the closed portion of the highway. The Board ordered the railway company to contribute 60 per cent of the cost of the pedestrian subway, after allowing a 20 per cent contribution out of the Railway Grade Crossing Fund, but held that as to vehicular traffic the agreement must stand and that if the city wished to construct a vehicular subway, the contribution of the respondent should not be increased.

Brantford et al. v. Grand Trunk Ry. Co., 23 Can. Ry. Cas. 7.
[Valid in 24 Can. Ry. Cas. 371.]

Pedestrian and vehicular subway—Cost—Public interest.

The decision of the Board in the previous case, 23 Can. Ry. Cas. 7, was varied by directing a vehicular subway to be built in the public interest, the respondent railway company to make the same contribution towards the cost of the vehicular subway that it was ordered to make in the case of the pedestrian subway, namely 60 per cent of the cost of the pedestrian subway.

Brantford v. Grand Trunk Ry. Co., 24 Can. Ry. Cas. 371.

COST—APPORTIONMENT—SENIOR AND JUNIOR RULE—FACILITIES—TOWNSITE.

The senior and junior rule that, when a railway is crossed by a highway, the applicant should bear all the cost, does not apply where the railway company lays out a townsite and benefits from the sale of lots; in that townsite it should assist in providing suitable facilities for the public to get across the railway property. At Virden, in Manitoba, the Board directed the construction of a pedestrian subway by the railway company, the cost of the subway to be apportioned equally between the railway company and the town, and to be kept clean and lighted by the town, and, in case an extension of the subway became necessary in the future, the costs were to be apportioned equally between the parties. [Regina v. Can. Pac. Ry. Co., 11 Can. Ry. Cas. 165; Medicine Hat v. Can. Pac. Ry. Co. (Medicine Hat Streets Case), 16 Can. Ry. Cas. 413, followed.]

Virden v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 70.

SUBWAY UNDER TRACKS—PUBLIC PARK—COST—SENIOR AND JUNIOR RULE.

Where a subway was built under railway tracks in a public park, to which the railway was senior, to give access between the portions lying north and south of the railway of which the entire cost was borne by the municipality except the superstructure (borne by the railway company), and the municipality having given the land on which to lay tracks to serve elevators south of the railway, of which six were to be built immediately south of the railway main line, applied for a subway under such six tracks, the senior and junior rule does not apply, and the cost of the work will be divided equally between the municipality and the railway companies interested.

Port Arthur v. Can. Pac. and Can. Northern Ry. Cos., 23 Can. Ry. Cas. 89.

HIGHWAYS.

See Highway Crossings; Crossing Injuries.
Compensation to adjoining landowners, see Expropriation.
See Nuisance; Highway Crossings.

Annotation.

Right of control and possession of highways, 3 Can. Ry. Cas. 92.

CONSTRUCTION OF RAILWAY ON HIGHWAY—SPECIAL CIRCUMSTANCES.

Construction of a railway along a highway is objectionable, and, except under special circumstances, the Board will not exercise its jurisdiction to authorize such construction (for example, where the object of the company's incorporation would otherwise fail).

Essex Terminal Ry. Co. v. Sandwich, 19 Can. Ry. Cas. 304.

IMMIGRANTS.

See Carriers of Passengers.

CHINESE IMMIGRATION ACT—HABEAS CORPUS.

Chinese immigrants who are refused admission in the United States, Can. Ry. L. Dig.—31.

and do not appeal from the decision so rendered against them, are not entitled to a writ of habeas corpus, while being transported from the United States to China, in conformity with the agreement between the United States and the Canadian Pacific Ry. Co.

Chew and Can. Pac. Ry. Co., 6 Que. P.R. 14.

Annotation.

Transportation of immigrants. 4 Can. Ry. Cas. 416.

INDUSTRIAL SPURS.

See Branch Lines.

INJUNCTION.

Mandatory injunction enforcing contract regulating train service, see Train Service.

Mandatory injunction compelling street railway to specifically perform contract with municipality respecting street car service, see Street Railways.

Injunction restraining interference with expropriation, see Expropriation.

Jurisdiction of Board to grant relief by injunction, see Railway Board.

Prevention from interference with highways, see Highway Crossings.

Annotation.

Whether mandamus, injunction, specific performance or damages is the proper remedy for the enforcement of covenants by railway companies. Ed. Note, 1 Can. Ry. Cas. 294.

DAMAGE CAUSED BY INJUNCTION—WANT OF PROBABLE CAUSE.

Where a registered shareholder of a company, finding the annual reports of the company misleading, applies after notice for a writ of injunction to restrain the company from paying a dividend, and upon such application the company do not deny even generally the statements and charges contained in the plaintiff's affidavit and petition, there is sufficient probable cause for the issue of such writ; and, consequently, the defendant, who upon the merits has succeeded in getting the injunction dissolved, has no right of action for damages resulting from the issue of the injunction. [18 Rev. Leg. 12, Mont. L.R. 3 S.C. 232, 17 Rev. Leg. 550, affirmed.]

Montreal Street Ry. Co. v. Ritchie, 16 Can. S.C.R. 622.

[Followed in Lavoie v. Duret, 7 Que. S.C. 155.]

RESTRAINING USE OF FORESHORE OF HARBOUR.

The Dominion Act, 44 Vict. c. 1, s. 18, gave the C.P.R. Co. the right to take and use the land below high-water mark in any stream, lake, etc., so far as required for the purposes of the railway:—Held, that the right of the public to have access to a harbour, the foreshore of which had been taken by the company under this Act, was subordinate to the rights given to the company thereby, and the latter could prevent by injunction an interference with the use of the foreshore so taken. [2 B.C.R. 306, affirmed.]

Vancouver v. Can. Pac. Ry. Co., 23 Can. S.C.R. 1.

[Leave to appeal to Privy Council refused, 23 Can. Gaz. 360; considered in Attorney-General v. Can. Pac. Ry. Co., 11 B.C.R. 299; followed in Can. Pac. Ry. Co. v. Parke, 6 B.C.R. 15; referred to in Can. Pac. Ry. Co. v. McBryan, 5 B.C.R 198.]

EXPROPRIATION FOR STATED PURPOSE—VIOLATION OF CONTRACT.

(1) Where a petitioner for injunction shews that his rights under the terms of a contract made by him with the respondent and under a servitude granted by it over the property acquired are violated by it and another railway under agreement with it, an interlocutory order of injunction will be granted to restrain both respondents from the performance of any acts in violation of the contract and servitude. (2) Where a railway company, by expropriation proceedings, obtains land for one object and makes use of it for another, causing additional damage to the expropriated party, particularly when the railway company has declared that it is so expropriated for the former object in order to save the greater danger resulting from the other object, the expropriated party is entitled to an interlocutory order of injunction, irrespective of his right to recover damages, the object of the law being that all damages must be paid before expropriation.

Hampson v. Chauteauguay & Northern Ry. Co., 6 Que. P.R. 283.

[Applied in United Shoe Machinery Co. v. Brunet, 27 Que. S.C. 213.]

MALICE—IRREPARABLE DAMAGE.

The plaintiff had obtained the right to operate a line of electric railway in certain streets within the limits of the municipality defendant, under a by-law of the town council and under a contract passed between plaintiff and defendant. The defendant, by the contract, reserved the right to take possession of the streets used by the plaintiff, for the purpose of changing the level and the performance of other necessary work. It was acting under these powers when the work was stopped by a temporary injunction order:—Held (affirming the judgment of the Superior Court, Archibald, J.): (1) Where one of two parties to a contract is doing a thing which, by the terms of the contract, he has specially reserved the right to do, the other party to the contract is not entitled to an injunction to restrain the doing of the thing, on the ground that the work is proceeding in a way which inflicts more damage than would be caused if another method, more expensive, had been adopted. So, in the present case, the defendant, which had granted certain powers to the plaintiff, but had reserved the right to take possession of the streets when necessary for road operations, was not bound to adopt a more lengthy and expensive though less injurious method of performing the work. (2) In order to obtain an injunction in such circumstances, where there has been no invasion of a legal or equitable right, it must be established that irreparable injury will be caused if an injunction is not granted. (3) A temporary interruption of traffic and injurious method of removing the rails, causing a damage in the nature of a pecuniary loss, do not constitute an irreparable injury. (4) Although difficulties had existed between the parties, and defendant may have derived satisfaction from the thought that the exercise of its rights would cause the plaintiff damage, yet malice alone does not open any right of action, where, as here, there was a real intention to accomplish the work, and defendant was acting within its right.

Montreal Park & Island Ry. Co. v. St. Louis, 17 Que. S.C. 545.

HIGHWAY CROSSING—INTERFERENCE WITH ACCESS TO BRIDGE.

The permission granted by the Railway Committee for the crossing of a public highway by a railway at a place where there are approaches to a bridge belonging to a private individual does not deprive such person of his recourse for indemnity and, in default of previous tender of such indemnity, he may, by injunction, prevent the railway company constructing the crossing over the approaches to his bridge.

Jones v. Atlantic & North-West Ry. Co., 12 Que. P.R. 392.

Restraining the running of cars—Enforcement of agreement.

By an agreement made between the plaintiffs, the municipality of Toronto, and defendants, a street railway company, the defendants agreed that, upon receiving at any time twenty-four hours' notice from the plaintiffs' engineer, they would cease running their cars by electricity on the portion of the Yonge Street within the city limits:—Held, that, nothing having occurred to operate as a waiver by the plaintiffs of this term of the agreement, and the notice having been duly given, the plaintiffs were entitled to an injunction restraining the defendants from propelling their cars by electricity within the limits of the city.

Toronto v. Metropolitan Ry. Co., 1 Can. Ry. Cas. 63, 31 O.R. 367.

Railway committee—Location of line—Conflicting surveys—Jurisdiction.

An injunction will not be granted to restrain one railway company making its surveys and locating its line so as to cross and recross the line of another. The Railway Committee is the tribunal specially constituted, having powers and jurisdiction respecting the crossing, intersection and junction of railways, the alignment, arrangement, disposition and location of tracks, the use by one company of the tracks of another and every matter, act or thing which by the Railway Act, 1888, or the special Act of any railway company is sanctioned, required to be done or prohibited. The Court in a case of this nature, in which the Railway Committee has jurisdiction, will not make a declaration of the rights or priorities of the contending parties.

Ottawa, Arnprior & Parry Sound Ry. Co. v. Atlantic & North-West Ry. Co., 1 Can. Ry. Cas. 101.

[Referred to in Perrault v. Grand Trunk Ry. Co., 14 Que. K.B. 249.]

Interlocutory injunction—Expropriation—Commencement of work—Omission to file plans.

[See note of this case under Expropriation (J).]

Yale Hotel Co. v. Vancouver, Victoria & Eastern Ry. Co.; Grand Forks & Kettle River Ry. Co. v. Vancouver, Victoria & Eastern Ry. Co., 3 Can. Ry. Cas. 108, 9 B.C.R. 66.

[Referred to in Fry v. Botsford, 9 B.C.R. 243.]

Restraining construction of railway—Franchise.

Per Sedgewick and Killam, JJ.:—A company having power to construct a railway within the limits of the municipality has not such an interest in the municipal highways as would entitle it to an injunction prohibiting another railway company from constructing a tramway upon such highways within the permission of the municipality under the provisions of Art. 479 of the Quebec Municipal Code. The municipality has power, under the provisions of the Municipal Code, to authorize the construction of a tramway by an existing corporation notwithstanding that such corporation has allowed its powers as to the construction of new lines to lapse by nonuser within the time limited in its charter. Per Girouard and Davies, JJ.:—A railway company which has allowed its powers as to construction to lapse by nonuser within the time limited in its charter and which does not own a railway line within the limits of a municipality where such powers were granted has no interest sufficient to maintain an injunction prohibiting the construction therein of another railway or tramway.

Montreal Park & Island Ry. Co. v. Chauteauguay & Northern Ry. Co., 4 Can. Ry. Cas. 83, 35 Can. S.C.R. 48.

Construction of railway—Injury to mines—Compensation.

The defendants claimed the right to construct their railway under the authority of certain orders-in-council, having obtained the approval of the Board and Minister of the Interior of a route map referred to in subs. 1 of s. 122 of the Railway Act, 1903, but not that referred to in subs. 5 of s. 122:—Held (1), before the defendants could expropriate land without the consent of the owners, they must comply with the provisions of the Act. (2) Placer miners are owners within the meaning of the Act, and entitled to compensation. (3) A placer mine is an open mine within s. 132 of the Act. (4) The plaintiffs were entitled to an injunction restraining the defendants from constructing their works and injuriously affecting the working of the plaintiff's placer mining claims held by them under licenses issued under the placer mining regulations, ss. 132, 133 of the Act. [Yale Hotel Co. v. Vancouver, Victoria & Eastern Ry., etc., Co., 3 Can. Ry. Cas. 108, followed.]

Day v. Klondike Mines Ry. Co., 6 Can. Ry. Cas. 203, 2 W.L.R. 205.

Expropriation—Oppressiveness—Compensation—Unnecessary delay.

In the absence of evidence that the company has been oppressive or high-handed, an injunction will not be granted to restrain the railway company from proceeding with the railway, even if there has not been substantial compliance with the Act, provided the railway company will enter into an undertaking to comply forthwith with the requirements of the Act and to facilitate the proceedings for determining the amount of compensation to be paid. [Following Parkdale v. West, 12 App. Cas. 602, 56 L.J.P.C. 66, 57 L.T. 602, and Hendrie v. Toronto, Hamilton & Buffalo Ry. Co., 26 O.R. 607, affirmed 27 O.R. 46.] But the Court will reserve to the plaintiff the right to apply to a single Judge for an injunction to prevent any unnecessary delay in proceeding to comply with the Act and pay compensation.

Marsan v. Grand Trunk Ry. Co., 9 Can. Ry. Cas. 341, 2 Alta. L.R. 43.

[Distinguished in Girouard v. Grand Trunk Pac. Ry. Co., 9 Can. Ry. Cas. 354, 2 Alta. L.R. 54.]

Expropriation—Invalid warrant of possession.

The defendant applied for warrant of possession under the Railway Act regarding expropriation of lands, and the Judge, sitting in Court, granted the warrant of possession on facts which the Court en banc, in Marsan v. Grand Trunk Pacific, 9 Can. Ry. Cas. 341, 2 Alta. L.R. 43, held were not sufficient to give the Judge jurisdiction, and the order was therefore invalid. The plaintiff, instead of taking an appeal from the order, brought an action against the railway company, claiming injunction and damages:—Held, that the plaintiff could maintain the action, for the reason that, even if an appeal would lie from the order, the plaintiff was entitled to additional relief by way of an injunction and damages which could not be given on appeal:—Held, also, the principle of res judicata would not apply, as the order granting the warrant of possession was made without jurisdiction. [Attorney-General for Trinidad v. Enriche, 63 L.J.P.C. 6, [1893] A.C. 518, 1 R. 440, 69 L.T. 505, referred to]:—Held, also that the railway company having acted under the invalid warrant of possession had committed a technical trespass and was liable for nominal damages, which carried costs. [Marsan v. Grand Trunk Pacific Ry. Co., 9 Can. Ry. Cas. 341, 2 Alta. L.R. 43, distinguished.]

Girouard v. Grand Trunk Pacific Ry. Co., 9 Can. Ry. Cas. 354, 2 Alta. L.R. 54.

Damages in lieu of injunction.

The ordinary rule is to grant damages in lieu of an injunction in cases where (a) the injury to plaintiff's legal rights is small, and (b) is capable of being estimated in damages, and (c) can be adequately compensated by a small-money payment, and (d) where it would be oppressive to defendant to grant an injunction. [Shelfer v. London Elec. Lighting Co. (No. 1), [1895] 1 Ch. 287, at 322, approved.]

Can. Pac. Ry. Co. v. Can. Northern Ry. Co., 7 D.L.R. 120, 22 W.L.R. 289.

Damages in lieu of injunction.

Where an injury has not been actually committed, but is threatened, it is still a matter of doubt, whether the Court which might grant an injunction to restrain the threatened injury has any jurisdiction to award damages in lieu of an injunction which would have been preventive only and not mandatory. [Martin v. Price, [1894] 1 Ch. 276, considered.]

Can. Pac. Ry. Co. v. Can. Northern Ry. Co., 7 D.L.R. 120, 22 W.L.R. 289.

Injury or inconvenience to property—Irrigation works.

Where a railway company had agreed in building its road to erect permanent bridges over plaintiff's irrigation ditches and it appeared that, without first erecting temporary bridges, and maintaining them, for some months, the agreement could only be performed with great difficulty and considerable delay and consequent loss to the company and there was no proof that plaintiff would sustain more than nominal damages, the Court has a discretion to refuse an interim injunction to restrain the railway company from erecting the temporary structures, leaving it open for the Court at the trial to make a mandatory order for their removal or to award damages or to do both, and this particularly in view of an express statutory power to award damages in lieu of, or in addition to, an injunction for breach of contract.

Can. Pac. Ry. Co. v. Can. Northern Ry. Co., 7 D.L.R. 120, 22 W.L.R. 289.

Street railways—Violation of franchise.

An injunction will be denied a city to enjoin the operation of an electric railway on the ground that the company has no power to do so by reason of an irregularity in the proceedings of the municipality purporting to confer the franchise on the company, where it does not appear that the railway is a nuisance, or that the city suffered special damages from its operation, although it crossed some public streets under an order made by the Board.

Burnaby v. B.C. Elec. Ry. Co., 12 D.L.R. 320.

Restraining application to Governor-in-council for leave to expropriate land.

The Court will not enjoin a proposed application by a company to the Governor-in-council for permission to expropriate land or an easement for the purposes of its business, as permitted by its charter, c. 113 of N.S. Acts, 1911, on the ground that the property sought was not such as could be acquired by expropriation, because affected with public rights, or rights already acquired by others under statutory grants; since the Court cannot assume in advance that the Governor-in-council will exceed his jurisdiction

or act illegally and grant permission to take land not subject to expropriation. (Per Townshend, C.J., and Longley, J.)
Miller v. Halifax Power Co. (N.S.), 13 D.L.R. 844.

WATER RIGHTS—DEFECTIVE DRAINAGE.

The provisions of s. 166 of the Railway Act (B.C.) 1911, c. 44, authorizing the Minister of Railways to make orders in cases of defective drainage do not deprive the Courts of jurisdiction in a proper case to grant an injunction. (Dictum of Irving, J.A.)
McCrimmon v. British Columbia Elec. Ry. Co., 19 Can. Ry. Cas. 329, 24 D.L.R. 368.

INJURIES.

See Crossing Injuries; Employees; Carriers of Passengers; Limitation of Liability (B); Wires and Poles.

INSOLVENCY.

See Sale; Receivers.

UNSECURED CREDITOR NOT ASSENTING TO SCHEME OF ARRANGEMENT.

(1) An unsecured creditor who does not assent to a scheme of arrangement filed under s. 285 of the Railway Act, 1903, is not bound thereby. (2) It is, however, a good objection to such scheme that it purports in terms to discharge the claim of such creditor. (3) By a scheme of arrangement, between an insolvent railway company and its creditors, it was proposed to cancel certain outstanding bonds and to issue new debentures in lieu thereof against property that was at the time in the possession of the trustees for the bondholders of another railway company. Part of such new debentures were to be issued upon the insolvent company acquiring the control of certain claims, bonds and liens against the railway; and part upon a good title to the railway being secured and vested in the trustees for the new debenture holders. The railway company, the trustees for whom bondholders were in possession of the railway, objected to the scheme of arrangement. Its rights therein had not been determined or foreclosed:—Held, that the railway company was entitled to be heard in opposition to the scheme, and that the latter was open to objection in so far as it purported to give authority to issue a part of the new debentures upon acquiring the control of such claims, bonds and liens, and without any proceedings to foreclose or acquire the rights of such railway company in the railway. (4) No scheme or arrangement under the Railway Act, 1903, ought to be confirmed if it appears or is shewn that all creditors of the same class are not to receive equal treatment.
Re Baie des Chaleurs Ry., 9 Can. Ex. 386.

SALE—PRIOR ENQUIRY INTO CLAIMS OF CREDITORS—PLEDGE OF BONDS—TRUSTEE FOR BONDHOLDERS.

An enquiry before a referee into the validity and priority of the claims of creditors of an insolvent railway may be ordered before an order for the sale of the railway is made under the provisions of s. 26 of the Exchequer Court Act (R.S.C. 1906, c. 140). (2) A pledgee of railway bonds has a sufficient interest (in the nature of that of a mortgagee) in such bonds to institute an action for the sale of the railway under the provisions of s. 26 of the Exchequer Court Act. (3) A trustee for the bondholders of an insolvent railway may become a purchaser, as such trustee, at the sale of the railway. (4) Under the terms of s. 26 of the Exchequer Court Act part of a railway may be sold when the railway is in default in paying interest on its bonds. (5) A director, being a creditor of a railway company, present at a meeting where authority is given to pledge the bonds of the company, is estopped from setting up the invalidity of such bonds in an action by the pledgee. (6) The Court in exercising its jurisdiction in respect of railway debts under the said section, will not review the judgment of another Court of competent jurisdiction affecting the railway, but will leave the rights of any person entitled to attack the judgment to the determination of the Court which pronounced the same.

Royal Trust Co. v. Baie des Chaleurs Ry. Co., 13 Can. Ex. 1.

STATUS OF CREDITOR AS MORTGAGEE OF BONDS AND TRUSTEE.

Certain of the defendants, who were creditors of the railway company defendant, asked leave during the progress of the trial to amend their defence by setting up noncompliance by the railway company with certain statutory requirements as to the issue of bonds:—Held, that the amendment asked would result in raising a new issue between the parties, and the application should be refused as having been made too late. (2) By its statement of claim the plaintiff company asked among other things, that certain mortgage bonds of the defendant company held by them together with a mortgage deed in favour of the plaintiff, as trustee, made by the defendant company to secure certain bonds or debentures, be declared a "first claim and privileged debt" ranking on the property of defendant company's railway:—Held, that judgment should be entered declaring that said mortgage bonds and trust deed constituted "a claim and privileged debt," but that their rank, amount and priority should be determined by the registrar of the Court, to whom a general reference was directed to take accounts and ascertain what was due to the several creditors and what the priorities were as between them, and whether there were any prior claims, and, if any, for what amounts respectively.

Royal Trust Co. v. Atlantic & Lake Superior Ry. Co., 13 Can. Ex. 38.

SCHEME OF ARRANGEMENT—ENROLLMENT WHERE NO OBJECTIONS.

Motion to confirm a scheme of arrangement, between the Great Northern Ry. Co. and its creditors, filed in the Exchequer Court under the provisions of s. 285 of the Railway Act, 1903. Per Curiam:—The motion will be granted. The scheme of arrangement will be confirmed, and, as there is no objection, the same will be enrolled by the Registrar forthwith.

Re Great Northern Ry. Co., 5 Can. Ry. Cas. 416, 9 Can. Ex. 337.

SCHEME OF ARRANGEMENT—MOTION TO RESTRAIN PENDING ACTION.

In proceedings taken to confirm a scheme of arrangement, filed by a railway company under the provisions of s. 285 of the Railway Act, 1903, an application was made, on behalf of the railway company, for an order to restrain further proceedings in an action against such company begun in the Superior Court for the District of Montreal, by certain creditors, before the filing of the scheme of arrangement but which had not proceeded to judgment:—Held, that as there were real and substantial issues to be be tried out between the parties in the action pending in the Superior Court, the same ought to be allowed to proceed pending the maturing of the scheme of arrangement. [Re Cambrian Ry. Co.'s Scheme, L.R. 3 Ch. App. 280, n. 1, referred to.]

Re Atlantic & Lake Superior Ry. Co., 5 Can. Ry. Cas. 418, 9 Can. Ex. 283.

INSURANCE.

Of employees, see Employees.

Condition in bill of lading requiring insurance of goods, see Carriers of Goods; Limitation of Liability.

As affecting amount of damages, see Damages.

INTERCHANGE OF TRAFFIC.

See also Tolls and Tariffs.

JUNCTION OF TWO RAILWAYS—AUTHORITY OF THE BOARD.

The object of the Railway Act, 1903, (ss. 177, 253, 271) is to ensure that all reasonable and proper facilities for the handling, forwarding and interchange of traffic shall be afforded to the shipping public. For this purpose the Board may, without the sanction and against the will of a railway company, permit a junction to be made with its line by another railway where, in the opinion of the Board, such junction is reasonably necessary in the public interest and in the interest of traffic in the district through which the railway passes. The parties to a lease of a railway cannot by stipulation between themselves restrict the powers or discretion of the Board to authorize such a junction.

Niagara, St. Catharines & Toronto Ry. Co. v. Grand Trunk Ry. Co. (Stamford Junction Case), 3 Can. Ry. Cas. 256.

CONNECTION OF RAILWAYS—INTERCHANGE OF TRAFFIC.

A physical connection was made and used some years before 1st February, 1903, between the lines of a provincial and Dominion railway, but no order was obtained authorizing such connection under s. 173, Railway Act, 1888, or s. 177, Railway Act, 1903, although a crossing had been duly authorized by the Railway Committee in 1897. Upon an application being made under ss. 253, 271 of the Railway Act, 1903, to compel an interchange of traffic between the two railways:—Held, that Parliament has the incidental power to determine the terms upon which a railway, not otherwise subject to its legislative authority, may connect with or cross one that is so subject, and the obligations between the companies concerned. [B.N.A. Act, s. 91 (10) (a) and (c), and s. 92 (29); ss. 306, 307, Railway Act 1888, and s. 7, Railway Act, 1903, referred to]:—Held, that such connection being illegal, no order should be made. An application to authorize the connection, under s. 177, Railway Act, 1903, must first be made.

Patriarche v. Grand Trunk Ry. Co. et al., 5 Can. Ry. Cas. 200.

DOMINION RAILWAY—PROVINCIALLY INCORPORATED RAILWAY—CONNECTION.

The Board has no jurisdiction to order a connection to be made or traffic to be interchanged between a Dominion railway and a provincially incorporated railway which it crosses, such provincial railway not having been declared a work for the general advantage of Canada. Under s. 8 of the Railway Act, 1906, the jurisdiction of the Board is confined to the point of crossing, and does not extend to the whole line of the provincial railway. Where a railway company incorporated by the Parliament of Canada was authorized to acquire two provincially incorporated railways, but no work had been done in connection with such railway, and the validating Act provided that the acquisition should not make such railways subject to the Railway Act, 1903, or works for the general advantage of Canada, but that they should remain subject to the legislative control of the province:—Held, (1) that under s. 3, the special provincial Act overrides the Railway Act. (2) That there is no jurisdiction to authorize making connections with or affording facilities to a Dominion railway which does not exist, and an order requiring such connection to be made would be in effect ordering a provincial railway to connect with a Dominion railway, as to which the Board has no jurisdiction.

Boards of Trade of Galt, etc. v. Grand Trunk, Canadian Pacific, etc., Ry. Cos., 8 Can. Ry. Cas. 195.

COMPULSORY CONNECTION AND INTERCHANGE OF TRAFFIC.

Subs. 4 of s. 57 of the Ontario Railway Act, 1906, 6 Edw. VII. c. 30, applies only to railways actually in existence and operation at the time of the application to the Ontario Railway and Municipal Board thereby provided for, and there is no difference in this respect when the railways in question, or any of them, are street railways. Where, under subs. 6 of s. 57, the Railway and Municipal Board makes an order declaring that s. 57 shall apply to two railways, as to one of which it has jurisdiction to make such an order, but not as to the other, the intention being to bring about an interchange of traffic between them, the Court of Appeal will not strike out that part of the order which is beyond the Board's jurisdiction and let the remainder stand, when the effect of so doing would be to name a different order from that which the Board intended to make, and, in fact, made. Upon the proper construction of the said subs. 6, the said Board has power only to declare that that section shall apply to a particular railway, without any limitation as to the railways with which such railway may thereby become liable to interchange traffic, but such a declaration does not restrict the power of the said Board to refuse subsequently to order an interchange of traffic between such railway and any other railway, or to impose such terms of interchange as it may see fit. S. 57 does not apply to a railway owned by a municipal corporation.

Re Toronto and Toronto Ry. Co., 14 Can. Ry. Cas. 422, 3 D.L.R. 561, 26 O.L.R. 225.

PASSENGERS—THROUGH—JOINT TICKETS.

The Board is not concerned with the disputes of rival railway companies as such, or with the fact that one desires to do business with another to the exclusion of a third, its only interest being that of the public in the transportation of passengers and freight. Under the special circumstances of this case the respondent Michigan Central Ry. Co. are obliged under ss. 217 and 334 of the Railway Act, 1906 to make reasonable traffic arrangements to enable the applicant to do business with it, by issuing through joint tickets for the transportation of passengers.

London & Lake Erie Ry. Co. v. Michigan Central and London & Port Stanley Ry. Cos., 20 Can. Ry. Cas. 194.

SUBDIVISION—DIVERSION—SENIOR AND JUNIOR—COST—CONSTRUCTION AND MAINTENANCE.

The general practice of the Board when an application is made for an interchange track for the purpose of interchanging traffic, where it appears that the effect of establishing such interchange is to subdivide the traffic by diverting it from the older line, is to place the full cost of construction and maintenance on the junior line.

Grand Trunk Pacific Ry. Co. v. Can. Pacific Ry. Co. (Calgary Interswitching Case), 21 Can. Ry. Cas. 187.

TRANSFER TRACK—REMOVAL—FACILITIES.

The Board may authorize the removal of a transfer track used for the interchange of traffic, when the interchange can be done at another point, resulting in economy of rolling stock movement in the public interest, thus relieving the strain on the existing facilities by removing the track and using the rails and ties at other points where there is urgent need.

Can. Pac. Ry. Co. v. Saskatoon and Moosejaw Boards of Trade, 22 Can. Ry. Cas. 349.

INTERCHANGE TRACKS—INTERSWITCHING FACILITIES—APPORTIONMENT OF COST.

The Board under s. 228 of the Railway Act, 1906, grants, to any person or persons interested, interchange tracks and interswitching facilities, not for the purpose of benefiting one railway company at the expense of another, but solely in the public interest, the cost of providing such facilities to be borne by the applicant industry, and the railway company to whose tracks access is desired. [Grand Trunk Ry. Co. v. Can. Pac. Ry. Co. and London (London Interswitching Case), 6 Can. Ry. Cas. 327, at p. 331, followed.]

Gillies Bros. and Grand Trunk Ry. Co. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 44.

INTERCHANGE TRACK—CONNECTION WITH PROVINCIAL RAILWAY.

The Board will order, in the public interest, an interchange track for transferring passengers and freight, to be built by the Dominion railway company connecting its line with that of a Provincial railway company, upon condition that the Provincial company contribute one third of the expense.

Cumberland Board of Trade v. Esquimalt & Nanaimo Ry. Co., 18 Can. Ry. Cas. 118.

GENERAL INTERSWITCHING ORDER—AGREEMENT.

The provisions of the General Interswitching Order do not apply to the case of an agreement making special provision for the cost of interswitching in a particular locality. [Can. Pac. Ry. Co. v. Grand Trunk Ry. Co. (London Interswitching Case), 13 Can. Ry. Cas. 435, followed.]

Fergus v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 42.

[Distinguished in Can. Pac. Ry. Co. and Spanish River etc. v. Algoma Eastern Ry. Co., 22 Can. Ry. Cas. 381.]

TRAFFIC—INTERCHANGE—FACILITIES—PUBLIC INTEREST—ECONOMY—CONVENIENCE.

Public interest, economy of movement to shippers and convenience must be established before the Board will grant to one carrier interchange traffic facilities with another. No carrier is entitled to such facilities as of right. The property and advantages of one carrier should not be interfered with for the mere benefit of another, but objections by a carrier on the ground that the other carrier will thereby obtain a great advantage at its expense will be overruled in the interest of the public.

Can. Northern Ontario Ry. Co. v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 200.

INTERCHANGE TRACKS—COSTS—SHIPPING POINTS—INTERSWITCHING FACILITIES—LINE HAUL—DELIVERY.

The carrier who obtains access to industries on the lines of other carriers should construct at its own expense tracks to be used for the interchange of traffic. Where traffic moves between a certain point and a shipping point or destination common to the carriers concerned, or any two of them, where interswitching facilities are provided, the carrier upon whose line, including private sidings tributary thereto, the traffic is loaded, is entitled to the line haul and the privilege of effecting the required delivery on the line of the other carrier by means of interswitching at destination, provided that the said carrier can afford facilities and privileges equal to those of the competing carrier at no greater charge.

Re Belleville Interchange Tracks, 23 Can. Ry. Cas. 22.

INTERCHANGE TRACK—EXPENSE.

An interchange track between the lines of the C. P. R. Co. and a branch line of the G. T. P. Co. was ordered by the Board to be constructed at Forrest, ten miles from Brandon, at the expense of the G. T. P. Co. in order to give Brandon a connection with the latter railway.

Brandon Shippers v. Can. Pac. and Grand Trunk Pacific Ry. Cos., 23 Can. Ry. Cas. 28.

FACILITY—"INTERESTED OR AFFECTED"—APPORTIONMENT OF COSTS.

Where, upon the application of a municipality, the Board directs the construction of an interchange track, as a necessary facility for the handling of traffic, the applicant municipality will not be ordered to contribute any portion of the costs of the work as being "interested or affected" within the meaning of s. 59 of the Railway Act. [Re Can. Pac. Ry. Co. and York, 27 O.R. 559, 25 A.R.(Ont.) 65, 1 Can. Ry. Cas. 36, 47; Grand Trunk Ry. Co. v. Kingston et al., 8 Can. Ex. 349, 4 Can. Ry. Cas. 102; Ottawa Elec. Ry. Co. v. Ottawa and Canada Atlantic Ry. Co. (Bank Street Crossing case), 37 Can. S.C.R. 354, 5 Can. Ry. Cas. 131; Toronto v. Grand Trunk Ry. Co., 37 Can. S.C.R. 232, 5 Can. Ry. Cas. 138; Grand Trunk Ry. Co. v. Can. Pac. Ry. Co. and London (London Interswitching case), 6 Can. Ry. Cas. 327; Grand Trunk Ry. Co. v. Cedar Dale, 7 Can. Ry. Cas. 73, at pp. 77, 78; Toronto v. Can. Pac. Ry. Co. [1908] A.C. 54, 7 Ry. Cas. 282; Carleton v. Ottawa, 9 Can. Ry. Cas. 154; British Columbia Elec. Ry. Co. v. Vancouver, Victoria & Eastern Ry. & Nav. Co. and Vancouver [1914] A.C. 1067, 18 Can. Ry. Cas. 287; Toronto Ry. Co. v. Can. Pac. Ry. Co. and Toronto (Avenue Road Subway case), 53 Can. S.C.R. 222, 20 Can. Ry. Cas. 280, 30 D.L.R. 86, followed.]

Thorold v. Grand Trunk and Niagara, St. Catharines & Toronto Ry. Cos., 24 Can. Ry. Cas. 21.

INTERSWITCHING—CARRIERS COMPELLED TO FURNISH SERVICE—TRACKS—INTERCHANGE—EQUALITY OF SERVICE.

Interswitching, having regard to the public interest, should be treated as a right, and carriers should be compelled at all times, according to their powers, to furnish an interswitching service, as to all their tracks, including team tracks, equal to the service accorded to their own traffic at all points, where interchange tracks are now installed, or may hereafter be provided.

Re Interswitching Service, 24 Can. Ry. Cas. 324.

INTERSWITCHING—TERMS—TEAM TRACKS—SPURS—PRIVATE OR INDUSTRIAL—DISTINCTION—TOLLS—ABSORPTION.

Distinction should be made between team tracks and private or industrial spurs as to terms of interswitching, the service to team tracks being subject to the consideration (a) that the first duty to the carrier owning the terminal facilities is to provide for its own traffic, and (b) that the carrier owning the terminal is entitled to fair remuneration for the use of its property. Interswitching tolls in the case of team tracks should be higher than for private or industrial spurs, and should be absorbed by the line carrier, as in the case of private spur.

Re Interswitching Service, 24 Can. Ry. Cas. 324.

INTEREST.

A. On Arbitration Awards.
B. Generally.

On bonds, see Bonds and Securities.

A. On Arbitration Awards.

Condemnation proceedings—Jurisdiction of arbitrators.

Interest on the sum awarded as compensation as of the date of the deposit of the plan and profile, should not be given by arbitrators as a part of their award for land expropriated for railway purposes, and will be struck out as beyond their jurisdiction; the right to interest from that date is conferred under the Railway Act, 1906, and not left to be determined by the arbitrators. [Re Clarke and Toronto Grey & Bruce Ry. Co., 18 O.L.R. 628, 9 Can. Ry. Cas. 290, referred to: Re Davies and James Bay Ry. Co., 20 O.L.R. 534, 10 Can. Ry. Cas. 225, followed.]

Re Ketcheson and Can. Northern Ontario Ry. Co., 16 Can. Ry. Cas. 286, 29 O.L.R. 339, 13 D.L.R. 854.

[Followed in Re National Trust Co. and Can. Pac. Ry. Co., 16 Can. Ry. Cas. 292, 15 D.L.R. 320, 29 O.L.R. 462; Green v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 139, 22 D.L.R. 15.]

Condemnation proceedings—When interest begins to run.

To the amount of an award for land expropriated for railway purposes interest attaches not from the date of the award but from a previous taking possession by the railway company. [Gauthier v. Can. Northern Ry. Co. (Alta), 16 Can. Ry. Cas. 354, 14 D.L.R. 490, followed.]

Dagenais v. Can. Northern Ry. Co., 16 Can. Ry. Cas. 353, 14 D.L.R. 494.

Condemnation proceedings—When interest begins to run.

Where a railway company takes possession of land before proceeding to expropriate it, on an award of damages being subsequently made, interest attaches, not from the date of the award, but from the time of taking possession. [Re Clarke and Toronto, Grey and Bruce Ry. Co., 18 O.L.R. 628, 9 Can. Ry. Cas. 290; Rhys v. Dare Valley Ry. Co., L.R. 19 Eq. 93, and Re Shaw and Birmingham Corp., L.R. 27 Ch. D. 614, 54 L.J. Ch. 51, followed.]

Gauthier v. Can. Northern Ry. Co., 16 Can. Ry. Cas. 354, 14 D.L.R. 490.

[Followed in Dagenais v. Can. Northern Ry. Co., 16 Can. Ry. Cas. 353.]

Statutory right to interest—Power of arbitrators.

The right to interest upon the compensation awarded for the compulsory taking of lands under the Railway Act, 1906, is a statutory right, and the arbitrators have no power to include such interest in their award. [Re Ketcheson and Can. Northern Ontario Ry. Co., 16 Can. Ry. Cas. 286, 29 O.L.R. 339 at p. 347, 13 D.L.R. 854, followed.]

Green v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 139, 171, 22 D.L.R. 15, 8 Sask. L.R. 53.

FROM DATE OF WARRANT OF POSSESSION.

Interest should be allowed to the owner of property, on the amount awarded by the arbitrators, from the date of the warrant of possession. [Clarke v. Toronto, Grey & Bruce Ry. Co., 18 O.L.R. 628, followed.]

Re Grand Trunk Pacific Ry. Co. and Marsan, 3 Alta. L.R. 65.

ON PURCHASE MONEY FROM SERVICE OF NOTICE.

Arbitrators may award interest on purchase moneys from the date of the service of the notice of expropriation.

Green v. C. N. Ry. Co., 8 S.L.R. 255, 9 W.W.R. 907.

B. Generally.

INTEREST ON PAYMENTS IN ARREAR—TRACK RENTALS.

Under the true construction of the Ontario Judicature Act (R.S.O. 1897, c. 51, s. 113), it is incumbent upon the court to allow interest for such time and at such rate as it may think right in all cases where a just payment has been properly withheld, and compensation therefor seems fair and equitable. In the present case the company was ordered to pay interest on arrears of track rentals.

Toronto Ry. Co. v. Toronto [1906] A.C. 117, 5 O.W.R. 130, 132.

[Affirmed in 19 Can. Ry. Cas. 323, 26 D.L.R. 581.]

INTERLOCKING APPARATUS.

See Crossing Injuries; Railway Crossings; Employees; Negligence.

INTERSWITCHING.

See Tolls and Tariffs; Interchange of Traffic; Branch Lines and Sidings.

IRRIGATION.

See Drainage.

JOINT TARIFF.

See Tolls and Tariffs.

JUDGMENT.

See Pleading and Practice; Appeals.

Annotation.

Assignment of judgment. 6 Can. Ry. Cas. 479.

JUNCTIONS.

See Railway Crossings; Interchange of Traffic; Branch Lines and Sidings.

JUNCTIONS—CROSSINGS.

The "joining" of two different lines of railway for which the leave of the Board is required under the Railway Act, 1906, s. 227, means joining on the same level so as to enable cars to be transferred from one road to the other The "crossing" of two different lines of railway for which the leave of the Board is required under the Railway Act, means the passing of the tracks of one railway on, over, or under, the tracks of another by meeting at any angle, continuing at the same angle to the opposite side of the track crossed and immediately leaving the track crossed.

Canadian Northern Western Ry. Co. v. Can. Pac. Ry. Co. (Alta.), 16 Can. Ry. Cas. 105, 13 D.L.R. 624.

"JOINING"—"CROSSING."

The "joining" of two different lines of railway for which the leave of the Board is required under the Railway Act, 1906, s. 227, means joining on the same level so as to enable cars to be transferred from one road to the other. The "crossing" of two different lines of railway for which the leave of the Board is required under s. 227, means the passing of the tracks of one railway on, over, or under, the tracks of another by meeting at any angle, continuing at the same angle to the opposite side of the track crossed and immediately leaving the track crossed.

Can. Northern Western Ry. Co. v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 105, 13 D.L.R. 624.

JURISDICTION.

Of Railway Board and Railway Committee, see Railway Board.

Of Recorder's Court to collect street railway lines, see Street Railways.

Annotations.

Jurisdiction in appeals from awards. 21 Can. Ry. Cas. 332, 381.

Dominion and Provincial Jurisdiction. 20 Can. Ry. Cas. 128.

Jurisdiction of Commissioner under Public Utilities Act of Manitoba. 30 D.L.R. 159.

Jurisdiction of Supreme Court of Canada as to Jurisdiction of Commissioner under Public Utilities Act of Manitoba. 30 D.L.R. 159.

EXCHEQUER COURT—RAILWAY COMMITTEE—POWER TO MAKE SAME ORDERS.

By s. 17 of the Railway Act, 51 Vict. c. 29 (1888), the Exchequer Court is empowered to make an order of the Railway Committee a rule of Court; but where there are proceedings pending in another Court in which the rights of the parties under the order of the Railway Committee may come in question, the Exchequer Court, in granting the rule, may suspend its execution until further directions. (2) The Court refused to make the order of the Railway Committee in this case a rule of Court upon a mere ex parte application, and required that all parties interested in the matter should have notice of the same.

Re Metropolitan Ry. Co. and Can. Pac. Ry. Co., 1 Can. Ry. Cas. 96, 6 Can. Ex. 351.

COURT OF REVIEW—JURISDICTION TO REVIEW MERITS OF CASE.

The Court of Review has absolute and unrestricted power to decide the merits of a cause reserved for its consideration, without regard to the verdict of the jury. (Art. 496, C.C.P.).

Ferguson v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 420, 20 Que. S.C. 54.

[Referred to in Miller v. Grand Trunk Ry. Co., 21 Que. S.C. 350, 2 Can. Ry. Cas. 449, 34 Can. S.C.R. 70.]

COUNTY COURTS—TITLE TO LAND—PROPERTY IN SAND AND GRAVEL ON HIGHWAYS.

(1) A claim of a municipality for damages for the taking by a railway company of quantities of sand and gravel from alleged highways and allowances for roads in the municipality not in its actual possession or occu-

pation, if disputed, raises a question of the title to a corporeal hereditament within the meaning of s. 59 of the County Courts Act, R.S.M., c. 33, and the jurisdiction of the County Court to adjudicate on such claim is ousted when such a question of title is bona fide raised, notwithstanding the provisions of ss. 615, 644 of the Municipal Act, R.S.M., c. 100, giving the right of possession of such roads to the municipality and power to pass by-laws for preserving or selling timber, trees, stone or gravel on any of such roads. (2) Under the enactment substituted for s. 315 of the County Courts Act by 59 Vict. c. 3, s. 2, an appeal to this Court lies from the decision of a County Court Judge on the question of jurisdiction as well as from all other decisions in actions in which the amount in question is $20 or more. (3) Although the action in the County Court failed for want of jurisdiction, the plaintiff should be ordered to pay the costs of it under s. 1 of c. 5 of 1 Edw. VII., and also the costs of the appeal. [Fair v. McCrow (1871), 31 U.C.R. 599, and Portman v. Patterson (1861), 21 U.C.R. 237, followed.]

Louise v. Can. Pac. Ry. Co., 3 Can. Ry. Cas. 65, 14 Man. L.R. 1.

MAGISTRATE'S COURT—FARM CROSSINGS.

In an action for a farm crossing, it is sufficient if the plaintiff be shewn to be the actual bona fide owner, and in possession as such, of the land crossed by the railway, although his title is not registered; and the fact that the land was purchased and cleared by him, long subsequent to the building of the railway, is no bar to his right of action. The district magistrate's Court has no jurisdiction to order the construction of a farm crossing even when the cost thereof is alleged to be less than $50 if the crossing would create a servitude and would be interfering with future rights.

Bolduc v. Can. Pac. Ry. Co., 3 Can. Ry. Cas. 197, 23 Que. S.C. 238.

SUPERIOR COURT—EXPROPRIATION—INTERVENTION.

A party claiming to be owner of land expropriated by a railway company can intervene in the course of the proceedings for expropriation, but such intervention will not affect the validity of proceedings taken up to that time. The Superior Court has jurisdiction to decide the case on the intervention.

Montreal & Southern Counties Ry. Co. v. Woodrow, 11 Que. P.R. 230, 10 Can. Ry. Cas. 496.

PUBLIC UTILITIES' COMMISSION—QUEBEC—SUBMISSION OF DOMINION COMPANY—RIGHT TO ORDER TRAINS OF ONE COMPANY TO RUN OVER LINE OF ANOTHER.

1. Although the Quebec Public Utilities' Commission, has not supervision over Federal utilities, and can not issue orders against them, such want of jurisdiction is only ratione personae, and can only be invoked by the party who claims that he is not subject to the jurisdiction of the Commission. 2. The Commission has the right to order a company to allow another company to run trains over its line, for a remuneration which the Commission has the right to fix. Such power may be inferred from the interpretation of Art. 742, R.S.Q. 1909, in which the enumeration of the powers is not specific.

Canada & Gulf Terminal Ry. Co. v. Fleet, 28 Que. K.B. 112.

SUPREME COURT—ONTARIO RAILWAY AND MUNICIPAL BOARD ACT—CONSTRUCTION.

S. 63 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII., c. 31 (transferred with some modification to the Ontario Railway

Act, R.S.O. 1914, c. 185, s. 260), which was intended to get over the difficulty of forcing the railway company to obey an order of the Board does not deprive the Supreme Court of jurisdiction to entertain an action for damages for breach of contract.

Toronto v. Toronto Ry. Co., 46 D.L.R. 435, 24 Can. Ry. Cas. 255, 44 O.L.R. 308.

Exchequer Court—Cutting of timber—Construction of Crown railway.

The Exchequer Court has jurisdiction to entertain a claim for the cutting and removing of timber by officers and servants of the Crown while engaged in the construction of a Crown railway.

Malone v. The King, 18 Can. Ex. 1.

JURY.

Findings of Jury, see Pleading and Practice (F.); Street Railways (K.).

LANDS.

See Expropriation; Title to Lands.

LAST CHANCE.

See Ultimate Negligence.

LEASES.

See Contracts.

LEVEL CROSSINGS.

See Highway Crossings; Crossing Injuries.

LICENSEES.

See Carriers of Passengers; Employees.

Annotation.

Liability of carrier for injuries to passenger or licensee. 4 Can. Ry. Cas. 200.

LIMITATION OF ACTIONS.

A. Generally.
B. Street Railway Claims.
C. Foreclosure Proceedings.

Notice of Claims, see Claims; Limitation of Liability.

Limitation of actions for removal of siding as injury by reason of railway operation, see Branch Lines and Sidings.

Annotations.

Practice in damage and personal injury cases against railways and limitations of actions. 2 Can. Ry. Cas. 383.

Limitation of actions for damages by reason of construction or operation of railway. 13 Can. Ry. Cas. 512.

A. Generally.

DAMAGE CAUSED BY OPERATION OF RAILWAY.

The "damage" referred to in s. 27, of the Railway Act, 1886, and s. 287 of the Railway Act, 1888, is "damage" done by the railway itself, and not by reason of the default or neglect of the company running the railway, or of a company having running powers over it, and therefore the prescription of six months referred to in said sections is not available in an action like the present.

Mont. L.R. 5 Q.B. 122, affirmed; North Shore Ry. Co. v. McWillie, 17 Can. S.C.R. 511.

COMMENCEMENT OF PRESCRIPTION—CONTINUING DAMAGE.

The prescription of a right of action for injury to property runs from the time the wrongful act was committed, notwithstanding the injury remains as a continuing cause of damage from year to year, when the damage results exclusively from that act, and could have been foreseen and claimed for at the time.

Kerr et al. v. Atlantic & North-West Ry. Co., 25 Can. S.C.R. 197.

[Applied in Croysdill v. Anglo-American Telegraph Co., 10 Que. P.R. 37; Lavoi v. Beaudoin, 14 Que. S.C. 254; Montreal v. Montreal Brewing Co., 18 Que. K.B. 406; Prêfontaine v. Grenier, 27 Que. S.C. 349; referred to in Beauchemin v. Cadieux, 22 Que. S.C. 487; Bureau v. Gale, 36 Que. S.C. 88.]

LIABILITY AS WAREHOUSEMAN.

The Railway Act applies to an action charging a railway company with negligence as warehouseman, and an action not commenced within six months, is barred.

Walters v. Can. Pac. Ry. Co., 1 Terr. L.R. 88.

[Doubted in Great West Supply Co. v. Grand Trunk Pacific Ry. Co., 19 Can. Ry. Cas. 347.]

CONTINUOUS DAMAGE—FLOODED LANDS.

The limitation of one year in s. 306 of the Railway Act, 1906, does not apply to an action of damages for the continuous flooding of land, caused by the defective construction of culverts on a railway within the legislative authority of the Parliament of Canada.

Leamy v. Can. Pac. Ry. Co., 38 Que. S.C. 149.

ACTS OF COMMISSION OR OMISSION.

The provisions of The Railway Act, 1888, s. 287 (as to limitations of actions for damages or injury sustained by reason of the railway) apply to actions founded on the commission of acts, not to those founded on the omission of acts, which it was the company's duty to perform. If, in an action against a railway company, an amendment of the statement of claim is asked for, it should not be allowed if s. 287 applies, and the amendment sets up a new cause of action. [Kelly v. Ottawa Ry. Co., 3 A.R. (Ont.) 616; McWillie v. N.S.R. Co., 17 Can. S.C.R. 511; Zimmer v. G.T.R. Co., 19 A.R. (Ont.) 693, considered.]

Findlay v. Can. Pac. Ry. Co., 2 Can. Ry. Cas. 380, 5 Terr. L.R. 143

[Commented on in Can. Northern Ry. Co. v. Robinson, 43 Can. S.C.R. 408; referred to in Robinson v. Can. Northern Ry. Co., 19 Man. L.R. 315.]

Injury to gratuitous passenger—Common-law liability—Claim "by reason of railway."

Where an action for damages for injuries received on defendants' railway while traveling on an unconditional free pass was brought more than six months after the happening of the accident, the action is not barred under the limitation clause of the Ontario Railway Act, R.S.O. 1897, c. 207, s. 42, incorporated into the defendants' special Act—because it was based on the defendants' breach of their common-law duty, founded on their undertaking to carry the plaintiff safely, and not on injury sustained "by reason of the railway" within the meaning of that clause. Semble, that the words "may prove that the same was done in pursuance of and by authority of this Act and the Special Act" in the latter part of R.S.O. 1897, c. 207, s. 42 (1), mean no more than "may prove that the damage or injury was sustained by reason of the railway," as in the earlier part of the section.

Ryckman v. Hamilton, Grimsby & Beamsville Elec. Ry. Co., 4 Can. Ry. Cas. 457, 10 O.L.R. 419.

[Adopted in Sayers v. British Columbia Elec. Ry. Co., 12 B.C.R. 109; referred to in British Columbia Elec. Ry. Co. v. Crompton, 43 Can. S.C.R. 7, 14 B.C.R. 226; Lumsden v. Temiskaming & North. Ry. Co., 15 O.L.R. 469; North. Counties Ins. Trust v. Can. Pac. Ry. Co., 13 B.C.R. 131; Robinson v. Can. North. Ry. Co., 19 Man. L.R. 315; distinguished in Greer v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 52, 19 D.L.R. 140; followed in Traill v. Niagara, St. Catherines & Toronto Ry. Co., 21 Can. Ry. Cas. 165, 33 D.L.R. 47.]

Damages "sustained by reason of railway"—Timber cut for construction—Trespass.

The defendants, the T. & N.O. Railway Commission, were incorporated by 2 Edw. VII. c. 9 (Ont.) which provides, by s. 8, that they shall have in respect of the railway all the powers, rights, remedies, and immunities conferred upon any railway company by the Railway Act of Ontario. The latter Act, R.S.O. 1897, c. 207, s. 42, provides that "all actions for indemnity for damages or injury sustained by reason of the railway, shall be instituted within six months next after the time of the supposed damage sustained." The defendants (the Railway Commission and a contractor under them), before the filing of the plans of the railway, and in the course of constructing it, entered upon the timber limits of the plaintiffs and cut timber for construction purposes. These acts ceased much more than six months before the commencement of this action, brought to recover damages for the trespass and for the value of the timber:—Held, following McArthur v. Northern & Pacific Junction Ry. Co. (1888–90), 15 O.R. 733, 17 A.R. (Ont.) 86, that the plaintiffs' claim was for damages sustained by reason of the railway, and was barred by the statute; and it made no difference that the Commission had not filed the plans of their railway or taken the necessary steps to compensate those whose lands or interests they entered upon or affected. [Judgment of Riddell, J., 10 O.W.R. 115, affirmed.]

Lumsden et al. v. Temiskaming & Northern Ontario Railway Commission, et al., 7 Can. Ry. Cas. 156, 15 O.L.R. 469.

[Followed in Westholme Lumber Co. v. Grand Trunk Pacific Ry. Co., 25 Can. Ry. Cas., 41 D.L.R. 42.]

Damages caused by sparks from engine—"By reason of the construction and operation of the railway."

In an action for damages caused by sparks from a railway engine, the railway company claimed the benefit of s. 27 of the Consolidated Railway Act, 1879, which was incorporated into their charter by Parliament. Said s. 27 provides, in part, that all suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained:—Held, on appeal, per Hunter, C.J., and Clement, J., that by virtue of s. 20 of the Interpretation Act (Dominion), the Railway Act, 1903, applies to the Canadian Pacific Ry. Per Irving, J.:—The general Railway Act of 1879, notwithstanding its repeal by subsequent general legislation governs the Canadian Pacific Ry.

Northern Counties Investment Trust v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 164, 13 B.C.R. 130.

Defective crossing.

The provisions of the Railway Act, 1903, as to the time in which actions may be brought apply to the Canadian Pacific Ry. Co., and an action for injuries resulting from a defective crossing was properly brought more than six months, but within one year after the date of the injury complained of.

Bird v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 314, 1 S.L.R. 266.

Spur track facilities—Damages for refusal to supply.

S. 242 of the Railway Act, 1903, limiting the time for bringing "all action or suits for indemnity by reason of the construction or operation of the railway," does not apply to an action for a breach of a statutory duty in neglecting and refusing to supply reasonable and proper facilities.

Robinson v. Can. Northern Ry. Co., 11 Can. Ry. Cas. 289, 19 Man. L.R. 300.

Denial of traffic facilities—Injury by reason of operation of railway.

Injuries suffered through the refusal by a railway company to furnish reasonable and proper facilities for receiving, forwarding and delivering freight, as required by the Railway Act, to and from a shipper's warehouse, by means of a private spur track connecting with the railway, do not fall within the classes of injuries described as resulting from the construction or operation of the railway, in s. 242 of the Railway Act, 1903, c. 58, and, consequently, an action to recover damages therefor is not barred by the limitation prescribed by that section for the commencement of actions and suits for indemnity. [Judgment appealed from, 19 Man. L.R. 300, 11 Can. Ry. Cas. 289, affirmed, Girouard and Davies, JJ., dissenting.]

Can. Northern Ry. Co. v. Robinson, 11 Can. Ry. Cas. 304, 43 Can. S.C.R. 387.

[Affirmed in 13 Can. Ry. Cas. 412, [1911] A.C. 739.]

Operation of railway—Refusal of facilities by means of siding.

The special provisions of the Railway Act, 1903, as to one year's limitation (see s. 242, substantially re-enacted by s. 306 of the Railway Act, 1906), relate to damages sustained by the construction or operation of the railway, and do not apply to the refusal of facilities by means of a siding outside the railway as constructed, which is not an act done in the operation of the railway. [Can. Northern Ry. Co. v. Robinson, 43 Can. S.C.R. 387, 11 Can. Ry. Cas. 304, affirmed.]

Can. Northern Ry. Co. v. Robinson, 13 Can. Ry. Cas. 412, [1911] A.C. 739.

THAWING DYNAMITE—CONSTRUCTION OF RAILWAY.

Injuries sustained by an employee of a railway company by the explosion of dynamite while thawing it for use in blasting out hard pan in a gravel pit are not damages "sustained by reason of the construction or operation of the railway," and, therefore, the employee is not barred by s. 306 of the Railway Act, 1906, from bringing his action after the lapse of one year.

Anderson v. Can. North. Ry. Co., 13 Can. Ry. Cas. 321, 21 Man. L.R. 121. [Affirmed in 45 Can. S.C.R. 355, 13 Can. Ry. Cas. 339.]

INJURIES TO EMPLOYEE—PROCURING MATERIALS—CONSTRUCTION OF RAILWAY.

The limitation of one year, in respect of actions to recover compensation for injuries sustained "by reason of the construction or operation" of railways, provided by s. 306 of the Railway Act, 1906, relates only to injuries sustained in the actual construction or operation of a railway; it does not apply to cases where injuries have been sustained by employees engaged in works undertaken by a railway company for procuring or preparing materials which may be necessary for the construction of their railway. [Can. Northern Ry. Co. v. Robinson, [1911] A.C. 739, applied; judgment appealed from, 21 Man. L.R. 121, 13 Can. Ry. Cas. 321, affirmed.]

Can. Northern Ry. Co. v. Anderson, 13 Can. Ry. Cas. 339, 45 Can. S.C.R. 355.

INJURY RECEIVED WHILE WORKING AT ICEHOUSE FOR RAILWAY COMPANY.

An injury caused by the defective state of the scaffold being used in the construction of an icehouse for the use of a railway company is not one "sustained by reason of the construction or operation of the railway," within the meaning of s. 306 of the Railway Act, 1906, and therefore an action to recover damages for such injury is not barred by that section by the lapse of a year. The limitation of time prescribed by s. 306 relates only to actions against railway companies provided for in the Railway Act itself, and was not intended to reply to actions, the rights of which exist at common law or under Provincial legislation. Per Cameron, J.A.:—Although the definition of the word "railway" in paragraph (21) of s. 2 of the Railway Act would seem to include icehouse in question, yet that is subject to the qualifying provision "unless the context otherwise requires," at the beginning of s. 2, and the context in s. 306 does otherwise require. [Ryckman v. Hamilton, Grimsby & Beamsville Ry. Co. (1905), 10 O.L.R. 419, and C.N.R. v. Robinson, 43 Can. S.C.R. 387, followed.]

Sutherland v. Can. Northern Ry. Co., 13 Can. Ry. Cas. 495, 21 Man. L.R. 27.

CONTINUOUS DAMAGE BY RAILWAY.

Where an injury or damage caused by the construction or operation of a railway is continuous, the limitation of one year for bringing an action therefor, as prescribed by s. 306 of the Railway Act, 1906, does not apply.

Carr v. Can. Pac. Ry. Co. (N. B.), 14 Can. Ry. Cas. 40, 5 D.L.R. 208.

TRESPASS TO LAND—RAILWAY LAYING SIDETRACK.

An action against a railway company for a trespass committed by laying sidetracks on the plaintiff's land, is not an action for injuries sustained by reason of the construction or operation of a railway, which must, under s. 306 of the Railway Act, 1906, be brought within one year after the cause of action arose.

Carr v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 40, 5 D.L.R. 208.

Injury to lands by diverting surface water.

The flooding of an adjoining owner's land by a railway company by interference with the natural flow of surface water may result in such continuing damage as to extend the time for bringing an action for damages sustained by reason of the construction or operation of the railway.

Niles v. Grand Trunk Ry. Co., 15 Can. Ry. Cas. 73, 9 D.L.R. 379.

Damage by fire—Contractor.

An action to recover damages caused by negligence on the part of the defendants in not providing modern and efficient apparatus for preventing the escape of sparks from a locomotive used during the construction of a railway, must be brought under the provisions of s. 306 of the Railway Act, 1906, within one year from the date when such damage was caused.

West v. Corbett, 15 Can. Ry. Cas. 195, 41 N.B.R. 420.

[Affirmed in 15 Can. Ry. Cas. 202, 117 Can. S.C.R. 596, 12 D.L.R. 182; referred to in Greer v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 47.]

Breach of contract to locate station.

An action for the breach of an agreement to locate a railway station on the plaintiff's land in consideration of a right-of-way over it is not within the limitation of one year prescribed by s. 306 of the Railway Act, 1906, for actions for damages or injury sustained by reason of the construction or operation of a railway. [Beard v. Credit Valley Ry. Co., 9 O.R. 616, followed.]

Gauthier v. Can. Northern Ry. Co., 16 Can. Ry. Cas. 354, 14 D.L.R. 490.

Actions against municipalities—Negligence—Statutory period.

S. 2 of the Municipal Act, R.S.O., 1914, c. 192, which bars any action for negligence against a municipality if not brought within three months from the time when the damages were sustained, will also apply to a case where the municipality is added as a party defendant after the expiration of the statutory period, although the action was instituted within the time.

Burrows v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 183, 23 D.L.R. 173.

Negligence—Right of action—General statutory provisions—Lord Campbell's Act—Carriers.

By s. 60 of the Consolidated Railway Company's Act (B.C.), 59 Vict. c. 55, actions to fix damages for injury sustained by reason of a tramway or railway or the works or operations of the company, are subject to a limitation for six months. The limitation thus provided for the protection of a private corporation has not the effect of altering the general limitation of twelve months provided by s. 5 of the Families Compensation Act, R.S.B.C. 1911, c. 82. [Green v British Columbia Elec. Ry. Co., 12 B.C.R. 199; Can. Northern Ry. Co. v. Robinson, 43 Can. S.C.R. 387, 11 Can. Ry. Cas. 304; Zimmer v. G. T. Ry. Co., 19 A.R. (Ont.) 693; Markey v. Tolworth, etc., Hospital District (1900), 2 K.B. 454; Williams v. Mersey Docks, etc., (1905), 1 K.B. 804, referred to.] Per Duff, J.:—S. 60 of the Consolidated Railway Company's Act (B.C.), 59 Vict. c. 55, has no application to an action brought against the company for breach of duty as a carrier: [Sayers v. British Columbia Elec. Ry. Co., 12 B.C. 102, referred to; Trawford v. British Columbia Elec. Ry. Co., 18 B.C. 132, 15 Can. Ry. Cas. 39, affirmed; British Columbia Elec. Ry. Co. v. Turner, sub. nom.; Trawford v. British Columbia Elec. Ry. Co., 18 B.C. 132, 15 Can. Ry. Cas. 39, affirmed.]

British Columbia Elec. Ry. Co. v. Turner, 18 Can. Ry. Cas. 193, 49 Can. S.C.R. 470, 18 D.L.R. 430.

[Followed in Traill v. Niagara, St. Catharines & Toronto Ry. Co., 21 Can. Ry. Cas. 165, 33 D.L.R. 47.]

NEGLIGENCE—BURNING DECAYED TIES.

The burning on the right-of-way of worn out and decayed ties removed in the ordinary course of the maintenance of the railway is within the term "construction or operation of the railway" so as to bar an action in Ontario against the railway for injury sustained by the spreading of the fire to adjoining property unless brought within one year under the Railway Act, 1906, s, 306. [McArthur v. Northern & Pacific Junction Ry. Co., 15 O.R. 733; Ryckman v. Hamilton, Grimsby & Beamsville Ry. Co., 10 O.L.R. 419, 4 Can. Ry. Cas. 457; Can. Northern v. Robinson, [1911] A.C. 739, 13 Can. Ry. Cas. 412; and West v. Corbett, 12 D.L.R. 182, 47 Can. S.C.R. 596, 15 Can. Ry. Cas. 202, referred to.]

Greer v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 47, 31 O.L.R. 419, 19 D.L.R. 135.

[Affirmed by Supreme Court of Ontario, 19 Can. Ry. Cas. 52, 32 O.L.R. 140, 19 D.L.R. 140; affirmed by Supreme Court of Canada, 19 Can. Ry. Cas. 58, 51 Can. S.C.R. 333, 23 D.L.R. 337.]

LIMITATION OF ACTIONS—CONSTRUCTION AND OPERATION—OCCUPATION.

An action for damages suffered by the landowner which could not be included in the award on expropriation of the land under the Railway Act, 1906, ex. gr., for a wrongful occupation by the railway prior to taking expropriation proceedings, is not within the limitation of one year prescribed by s. 306 of the Act, as such injury arises merely out of the occupation by the railway company and not out of the "construction or operation" of the railway. [Gauthier v. Can. Northern Ry. Co., 14 D.L.R. 490, 16 Can. Ry. Cas. 35, affirmed.]

Gauthier v. Can. Northern Ry. Co. and Dagenais v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 144, 17 D.L.R. 193.

FLOODING OF LANDS—DEFECTIVE CULVERT—CONTINUATION OF DAMAGE.

The negligent construction of a culvert obstructing the flow of a natural watercourse and causing the flooding of lands is a continuation of damage, and the limitations under s. 267 of the Railway Act of British Columbia, 1911, c. 44, will not begin to run until after one year after the doing or committing of such damage ceases. [McGillivray v. Great Western Ry. Co., 25 U.C.R. 69, followed.]

McCrimmon v. British Columbia Elec. Ry. Co., 19 Can. Ry. Cas. 329, 24 D.L.R. 368.

NEGLIGENT WAREHOUSING—DAMAGE FROM "CONSTRUCTION AND OPERATION."

An action for breach of a railway company's contract of warehousing entered into by it after the arrival of the consignment at destination is not within the limitation of s. 306 of the Railway Act, 1906, which deals with actions for damages caused by reason of the "construction or operation" of the railway. [Lilly v. Doubleday, 7 Q.B.D. 510, followed; Walters v. Can. Pac. Ry. Co., 1 Terr. L.R. 88, doubted.]

Great West Supply Co. v. Grand Trunk Pacific Ry. Co., 19 Can. Ry. Cas. 347, 23 D.L.R. 780.

NEGLIGENCE—BURNING WORN-OUT TIES ON RIGHT-OF-WAY.

The injury done to adjoining property by the railway company setting out fire on its right-of-way for the purpose of destroying worn-out ties, and by its omission to prevent the spread of the fire, is an injury caused by the "operation of the railway" within the time limitation for bringing action therefor imposed by the Railway Act, 1906. [Greer v. C.P.R., 19 D.L.R. 135, 31 O.L.R. 419, affirmed; McCallum v. G.T.R., 31 U.C.R. 527, followed; Ryckman v. Hamilton, G. & B. R. Co., 10 O.L.R. 419, 4 Can. Ry. Cas. 457; Can. Northern Ry. Co. v. Robinson, [1911] A.C. 739, 13 Can. Ry. Cas. 412; Grant v. C.P.R., 36 N.B.R. 528, distinguished.]

Greer v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 52, 32 O.L.R. 140, 19 D.L.R. 140.

[Followed in Can. Northern Ry. Co. v. Pszenicnzy, 20 Can. Ry. Cas. 417.]

Injury from construction or operation of railway—Loading rails.

The statutory limitation as to time for bringing an action for damages for injuries sustained by reason of "the construction or operation of the railway" (Railway Act, 1906, c. 37, s. 306), extends to a case of injury sustained by a labourer, who was employed in a gang loading old rails on flat cars by means of a crane and steel chain which broke, such work being performed in the actual "construction or operation of the railway."

Danyleski v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 410, 21 Man. L.R. 364, 32 D.L.R. 95.

Injury from construction or operation of railway—Loading rails.

Injuries sustained while unloading rails from a box car to a flat car for easier distribution in replacing the old track, are sustained "by reason of the construction or operation" of the railway, within the meaning of the Railway Act, 1906, and an action for damages must be commenced within one year as provided by s. 306, of the Act. [Greer v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 58, 23 D.L.R. 337, 51 Can. S.C.R. 338, followed.]

Can. Northern Ry. Co. v. Pszenicnzy, 20 Can. Ry. Cas. 417, 54 Can. S.C.R. 36, 32 D.L.R. 133.

Street railway crossing—Diamond—Derailment of train—Construction or operation of railway.

Grand Trunk Ry. Co. v. Sarnia Street Ry. Co., 21 Can. Ry. Cas. 160, 37 O.L.R. 477.

Injury—Construction or operation—Negligence—Carriage.

The time limit imposed by s. 306, of the Railway Act, 1906, respecting actions for injuries caused by reason of the "construction or operation of the railway" does not apply to actions arising for injuries to passengers out of negligence in their carriage. [Ryckman v. Hamilton, Grimsby & Beamsville Elec. Ry. Co., 10 O.L.R. 419, 4 Can. Ry. Cas. 457; Sayers v. B.C.E.R. Co., 12 B.C.R. 102; B.C.E.R. Co. v. Turner, 18 D.L.R. 430, 49 Can. S.C.R. 470, 18 Can. Ry. Cas. 193, followed.]

Traill v. Niagara, St. Catharines & Toronto Ry. Co., 21 Can. Ry. Cas. 165, 38 O.L.R. 1, 33 D.L.R. 47.

Construction of railway—Obstruction of access to sea—Navigable waters.

The obstruction of a right of access to the sea by reason of the construction of a railway is within the meaning of s. 306 of the Railway Act, 1906, and an action for damages occasioned thereby must be brought within one year of the placing of the obstruction. [McArthur v. Northern Pacific Junction Ry. Co., 17 A.R. (Ont.) 86; Lumsden v. Temiskaming &

Northern Ontario Ry. Co., 15 O.L.R. 469, 7 Can. Ry. Cas. 156, followed. Chaudiere Machine & Foundry Co. v. Canada Atlantic Ry. Co., 2 Can. Ry. Cas. 306, 33 Can. S.C.R. 11, distinguished.]

Westholme Lumber Co. v. Grand Trunk Pacific Ry. Co., 25 Can. Ry. Cas., 25 B.C.R. 343, 41 D.L.R. 42.

B. Street Railway Claims.

CLAIMS—STREET RAILWAYS.

The statutory exemption as to limitation of actions provided by s. 60 of the Consolidated Railway Company's Act, 1896 (B.C.), does not enure to the benefit of the British Columbia Electric Ry. Co.'s operations as carried on in the city of Victoria. The doctrine that private legislation must be strictly construed against the company or corporation obtaining the same, applied.

Crompton v. British Columbia Elec. Ry. Co., 10 Can. Ry. Cas. 256, 14 B.C.R. 224.

[Reversed in 43 Can. S.C.R. 1, 10 Can. Ry. Cas. 266.]

STREET RAILWAY CLAIMS—PRIVITY.

The appellant company, having acquired the property, rights, contracts, privileges and franchises of the Consolidated Railway & Light Co., under the provisions of the Consolidated Railway Company's Act, 1896 (B.C.), is entitled to the benefit of the limitation of actions provided by s. 60 of that statute. Idington, J., dissenting. The limitation so provided applies to the case of a minor injured, while residing in his mother's house, by contact with an electric wire in use there under a contract between the company and his mother. Judgment appealed from, 14 B.C.R. 223, 10 Can. Ry. Cas. 256, reversed, Davies and Idington, JJ., dissenting.

British Columbia Elec. Ry. Co. v. Crompton, 10 Can. Ry. Cas. 266, 43 Can. S.C.R. 1.

STREET RAILWAY ACCIDENTS—COLLISION.

The limitation period for commencing an action for damages for personal injury against the owners of a motor vehicle by collision with the motor vehicle is six years from the time when the cause of action arose, under 10 Edw. VII. (Ont.) c. 34, s. 49 (g) as an action "upon the case." [Peterborough v. Edwards (1880), 31 C.P. 231; Thomson v. Lord Clanmorris, [1900] 1 Ch. 718, referred to.]

Maitland v. MacKenzie and Toronto Ry. Co., 6 D.L.R. 336, 4 O.W.N. 109.

[Affirmed in 13 D.L.R. 129.]

MUNICIPAL STREET RAILWAY—NEGLIGENT CONSTRUCTION AND OPERATION.

The limitations of time for bringing actions against a municipality for its negligent construction or operation of a street railway, are governed by the Ontario Railway Act, R.S.O. 1914, c. 185, s. 265; and the Municipal Act, R.S.O. 1914, c. 192, the Public Utilities Act, R.S.O. 1914, c. 204, and the Public Authorities Protection Act, R.S.O. 1914, c. 89, have no application in this respect.

Kuusisto v. Port Arthur, 20 Can. Ry. Cas. 335, 37 O.L.R. 146, 31 D.L.R. 670.

ONTARIO RAILWAY ACT—"FOR DAMAGE OR INJURY SUSTAINED BY REASON OF A RAILWAY."

The provisions of the Ontario Railway Act, 1906, 6 Edw. VII. c. 30, s. 223, whereby actions for damage or injury sustained by reason of a railway under that Act, must be brought within one year, are in effect incorporated with the special Act 36 Vict. (Ont.), c. 99 (under which the London Street Ry. Co. was incorporated) and the limitation of one year substituted for that of six months under the Railway Act, C.S.C., c. 66, s 83, which by the special Act were declared to be incorporated therewith. [Re Wood's Estate, 31 Ch. D. 607; Clarke v. Bradlaugh, 8 Q.B.D. 63, and Metropolitan v. Sharpe, 5 A.C. 425, referred to.]

Kilgour v. London Street Ry. Co., 19 D.L.R. 827.

DIFFERING PERIODS OF LIMITATION—GENERAL LIMITATION UNDER PROVINCIAL RAILWAY ACT—LONGER PERIOD UNDER LORD CAMPBELL'S ACT (B.C.)—ACTION AGAINST RAILWAY FOR CAUSING DEATH.

[Green v. B.C. Elec. Ry. Co., 12 B.C.R. 199, followed.]

Gentile v. British Columbia Elec. R. Co., 15 D.L.R. 384.

C. Foreclosure Proceedings.

INTEREST COUPONS—REAL PROPERTY LIMITATION ACT.

The restrictions placed upon the right to recover arrears of interest charged upon land imposed by ss. 17, 24 of the Real Property Limitation Act, R.S.O. 1897, c. 133, are not applicable to the case of coupons for the payment of interest on railway mortgage bonds, which are secured by mortgage deeds of trusts. The coupons are, in effect, documents under seal—the bond under seal containing a covenant for payment of the coupons—and they, therefore, partake of the nature of a specialty, and are good for at least twenty years.

Toronto General Trusts Corp. v. Central Ontario Ry. Co., 3 Can. Ry. Cas. 339, 6 O.L.R. 534.

[Affirmed in 8 O.L.R. 604, 4 Can. Ry. Cas. 70.]

LIMITATION OF ACTIONS.

Bonds under seal issued by a railway company contained a covenant to pay half yearly instalments of interest evidenced by attached coupons, and payment of principal and interest was secured by a mortgage of the undertaking, which also contained a covenant to pay:—Held, in foreclosure proceedings upon this mortgage, that the interest being a specialty debt and the mortgaged undertaking consisting in part of realty and in part of personalty not subject to division, the holders of coupons, whether attached to the bonds or detached therefrom, were entitled to rank for all instalments which had fallen due within twenty years, and not merely for those which had fallen due within six years. Judgment of Boyd, C., 6 O.L.R. 534, 3 Can. Ry. Cas. 339, affirmed:—Held, also, that even if the case were dealt with upon the footing of the mortgage being one of realty only, there was the right to rank, for there were no subsequent encumbrancers, and there had been shortly before the claims were filed a valid acknowledgment by the company of liability for all the interest in question.

Toronto General Trusts Corporation v. Central Ontario Ry. Co., 4 Can. Ry. Cas. 70, 8 O.L.R. 604.

Annotations.

Connecting lines as affected by conditions in bill of lading limiting liability. 2 Can. Ry. Cas. 117.

Government regulation of railway companies respecting agreements exempting liability for negligence. 5 Can. Ry. Cas. 15.

Liability of carriers for the loss of goods notwithstanding special contract limiting liability. 5 Can. Ry. Cas. 399.

Limitation of liability by express companies for losses of or damage to goods. 6 Can. Ry. Cas. 318.

Limitation of liability to person in charge of live stock. 19 Can. Ry Cas. 44.

LIMITATION OF LIABILITY.

- **A. Loss or Damage to Goods.**
- **B. Live Stock; Persons in Charge.**
- **C. Loss of Baggage.**
- **D. Express Companies.**

Exoneration from liability of master to servant, see Employees.

Limitation of liability to employee traveling on free pass, see Employees.

Constitutionality of statute regulating agreements limiting for negligence, see Constitutional Law.

A. Loss or Damage to Goods.

CARRIAGE OF PETROLEUM—LIABILITY—CONDITIONS—"AT OWNER'S RISK."

The respondents sued the appellants' railway company for breach of contract to carry petroleum in covered cars from L. to H., alleging that they negligently carried the same upon open platform cars, whereby the barrels in which the oil was were exposed to the sun and weather and were destroyed. At the trial a verbal contract between plaintiffs and defendants' agent at L. was proved, that the defendants would carry the oil in covered cars with despatch. The oil was forwarded in open cars and delayed in different places, and, in consequence, a large quantity was lost. On the shipment of the oil a receipt note was given which said nothing about covered cars, and which stated that the goods were subject to conditions endorsed thereon, one of which was "that the defendants would not be liable for leakage or delays, and that the oil was carried at the owner's risk":—Held, per Ritchie, C.J., and Fournier and Henry, JJ., that the loss did not result from any risks by the contract imposed on the owners, but that it arose from the wrongful act of the defendants in placing the oil on open cars, which act was inconsistent with the contract they had entered into, and in contravention as well of the undertaking as of their duty as carriers. Per Strong, Fournier, Henry and Gwynne, JJ.:—The evidence was admissible to prove a verbal contract to carry in covered cars, which contract the agent at L. was authorized to enter into, and which must be incorporated with the writing, so as to make the whole contract one for carriage in covered cars, and that noncompliance with the provision as to carriage in covered cars prevented the appellants setting up the condition that "oil was carried at the owner's risk" as exempting them from liability. Judgment in 27 U.C.C.P. 528, 28 U.C.C.P. 586, and 4 A.R. (Ont.) 601, affirmed.

Grand Trunk Ry. Co. v. Fitzgerald, 5 Can. S.C.R. 204.

[See Bicknell v. Grand Trunk Ry. Co., 26 A.R. (Ont.) 431; commented on in Grand Trunk Ry. Co. v. McMillan, 16 Can. S.C.R. 557; discussed in Mayer v. Grand Trunk Ry. Co., 31 U.C.C.P. 248; McNeeley v. McWilliams, 9 O.R. 728; referred to in Dixon v. Richelieu Navigation Co., 15 A.R. (Ont.) 647; Ellis v. Abell, 10 A.R. (Ont.) 226; relied on in Dyment v. Northern & N.W. Ry. Co., 11 O.R. 343; Grand Trunk Ry. Co. v. Vogel, 11 Can. S.C.R. 626; McMillan v. Grand Trunk Ry. Co., 15 A.R. (Ont.)

14; McNeely v. McWilliams, 13 A.R. (Ont.) 324; Robertson v. Grand Trunk Ry. Co., 24 O.R. 75, 21 A.R. (Ont.) 204; Stafford v. Bell, 31 U.C.C.P. 77; St. Mary's Creamery v. Grand Trunk Ry. Co., 5 O.L.R. 742.]

CONTRACT BY ONE FOR SEVERAL—CUSTODY OF GOODS—DELIVERY—NEGLIGENCE.

The M.D.T. Co., through one B., contracted with H. to carry a quantity of butter from London, Ontario, to England, and the bills of lading were signed by B., describing himself as agent severally, but not jointly, for the G.W. Ry. Co., the M.D.T. Co. and the G.W.S.S. Co. named as carriers therein. The G.W. Ry. Co. were to carry the goods from London to the Suspension Bridge, the M.D.T. Co. from the Suspension Bridge to New York, and it was then to be delivered to the S.S. Co. for carriage to England. It was provided by one clause in the bill of lading that if damage was caused to the goods during transit the sole liability was to be on the company having the custody thereof at the time of such damage occurring. The butter was carried to New York, where it was taken from the car and placed in lighters owned by the M.D.T. company to be conveyed to the steamer "Dorset" belonging to the S.S. Co. On arriving at the pier where the steamer lay, the lighter could not get near enough to unload, and the stevedore in charge of the steamer had it towed across the river with instructions for it to remain until sent for. The "Dorset" sailed without the butter, which was sent by another steamer of the S.S. Co. some five days later. The butter was damaged by heat while in the lighter:—Held, affirming the judgment of the Court below, that the M.D.T. Co., having made a through contract for the carriage of the goods, they were liable to H. for the damage, and even under the bill of lading were not relieved from liability, as the butter was never delivered to, and received by, the S.S. Co., but was in the custody of the M.D.T. Co. when the damage occurred. 12 A.R. (Ont.) 201, 4 O.R. 723, affirmed.

Merchants' Despatch Transportation Co. v. Hately, 14 Can. S.C.R. 572.

SHIPMENT OF GOODS TO A POINT BEYOND DEFENDANTS' LINE—NEGLIGENCE—CONSTRUCTION OF CONDITIONS OF CONTRACT.

Action for damages for the loss of goods carried by the defendants from Toronto to McGregor station, on the C.P.R. in Manitoba, and for delay in transport. The defendants' road extended as far as Fort Gratiot, Mich., and the goods were carried the rest of the way by other companies, and were damaged by the negligence of one or more of such companies. The defendants set up the 10th condition indorsed on the receipt given to the plaintiff for the amount paid for carriage, which was as follows: "Goods addressed to consignees at points beyond the places at which the company has stations, . . . will be forwarded to their destination by public carrier or otherwise." Held, that the contract of the defendants was to carry the goods to McGregor station; and the 10th condition applied only to the forwarding of the goods from the place to which the defendants had contracted to carry them, whether that was a place on the line of the defendants' or a connecting railway, and had not the effect of limiting the liability of the defendants to matters occurring on their own line only. [Collins v. Bristol & Exeter R. Co., 7 H.L. Cas. 194, followed.] Held, also, that s. 104 of the Railway Act, 1886, which precludes a railway company from relieving itself from liability by any notice, condition, or declaration, if the damage arises from any negligence, omission, or misconduct of the company or its servants, do not apply to a contract to carry goods over other lines, even though such are within the territorial jurisdiction of the Parliament of Canada. [Judgment of Q.B.D. (12 O.R. 103) affirmed, but on different grounds.]

McMillan v. G.T.R. Co., 15 A.R. (Ont.) 14.

CARRIAGE BEYOND TERMINUS OF LINE—STATUTORY LIABILITY—JOINT TORT-FEASORS—RELEASE.

Where a railway company undertakes to carry goods to a point beyond the terminus of its own line its contract is for carriage of the goods over the whole transit, and the other companies over whose lines they must pass are merely agents of the contracting company for such carriage, and in no privity of contract with the shipper. [Bristol & Exeter Ry. Co. v. Collins (7 H.L. Cas. 194), followed.] Such a contract being one which a railway company might refuse to enter into, s. 104 of the Railway Act, 1886, c. 109, does not prevent it from restricting its liability for negligence as carriers or otherwise in respect to the goods to be carried after they had left its own line. The decision in Vogel v. G.T.R. Co., 11 Can. S.C.R. 612, does not govern such a contract. One of the conditions in a contract by the G.T. Ry. Co. to carry goods from Toronto to Portage la Prairie, Man., a place beyond the terminus of their line, provided that the company "should not be responsible for any loss, misdelivery, damage or detention that might happen to goods sent by them, if such loss, misdelivery, damage, or detention occurred after said goods arrived at the stations or places on their line nearest to the points or places which they were consigned to, or beyond their said limits":—Held, that this condition would not relieve the company from liability for loss or damage occurring during the transit even if such loss occurred beyond the limits of the company's own line:—Held, per Strong and Taschereau, JJ., that the loss having occurred after the transit was over, and the goods delivered at Portage la Prairie, and the liability of the company as carriers having ceased, this condition reduced the contract to one of mere bailment as soon as the goods were delivered, and also exempted the company from liability as warehousemen, and the goods were from that time in custody of the company on whose line Portage la Prairie was situate, as bailees for the shipper. Fournier and Gwynne, JJ., dissenting. Another condition of the contract provided that no claim for damage to, loss of, or detention of goods should be allowed unless notice in writing, with particulars, was given to the station agent at or nearest to the place of delivery within thirty-six hours after delivery of the goods in respect to which the claim was made:—Held, per Strong, J., that a plea setting up noncompliance with this condition having been demurred to, and the plaintiff not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defence was res judicata:—Held, also, per Strong, J., Gwynne, J., contra, that part of the consignment having been lost, such notice must be given in respect to the same within thirty-six hours after the delivery of those which arrive safely. Quære—In the present state of the law is a release to, or satisfaction from, one of several joint tort-feasors, a bar to an action against the others? Judgment in 12 O.R. 103 and 15 A.R. (Ont.) 14, reversed.

G.T. Ry. Co. v. McMillan, 16 Can. S.C.R. 543.

[In this case application was made to the Privy Council for leave to appeal, but was refused on the ground that the case admittedly did not affect property of considerable amount, nor could it well be described as being of a very substantial character, the sum at stake being reduced to something under £250 stg.; and the judgment of the Supreme Court did not determine a question of great public interest, or an important question of law. Gagon v. Prince, 8 App. Cas. 103, approved. May 17th, 1889.]

[Discussed in Richardson v. Can. Pac. Ry. Co., 19 O.R. 369; referred to in Bate v. Can. Pac. Ry. Co., 14 O.R. 625; Cobban v. Can. Pac. Ry. Co., 23 A.R. (Ont.) 115; Ferris v. Can. Northern Ry. Co., 15 Man. L.R. 144, 1 W.L.R. 177; McKenzie v. Can. Pac. Ry. Co., 43 N.S.R. 460; Robertson v. Grand Trunk Ry. Co., 21 A.R. (Ont.) 204, 24 O.R. 75; Tolmie v. Michigan Central Ry. Co., 19 O.L.R. 26, followed in Lockshin v. Can. Northern Ry. Co., 24 Can. Ry. Cas. 362, 47 D.L.R. 516.]

CONNECTING LINES—LOSS BY FIRE IN WAREHOUSE.

In an action by S., a merchant at Merlin, Ont., against the L. E. & D.R. Ry. Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere to be delivered, some to the G.T.R. Co., and the rest to the C.P.R. and other companies, by the said several companies to be, and the same were, transferred to the L.E. etc., Co., for carriage to Merlin, and that on receipt by the L.E. Co. of the goods it became their duty to carry them safely to Merlin, and deliver them to S. There was also an allegation of a contract by the L.E. Co. for storage of the goods and delivery to S., when requested, and of lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the L.E. Co., at Merlin:—Held, reversing the decision of the Court of Appeal, that as to the goods delivered to the G.T.R. Co. to be transferred to the L.E. Co. as alleged, if the cause of action stated was one arising ex delicto it must fail, as the evidence showed that the goods were received from the G.T.R. Co. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G.T.R. Co. to the consignors, and if it was a cause of action founded on contract it must also fail as the contract under which the goods were received by the G.T.R. Co. provided, among other things, that the company would not be liable for the loss of goods by fire; that goods stored should be at sole risk of the owners; and that the provisions should apply to and for the benefit of every carrier:—Held, further, that as to the goods delivered to the companies, other than the G.T.R. Co., to be delivered to the L.E. Co., the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of lading contained no clause, as did those of the G.T.R. Co., giving subsequent carriers the benefit of their provisions; and that the two Courts below had held that the loss was caused by the negligence of servants of the L.E. Co., and such finding should not be interfered with:—Held, also, that as to goods carried on a bill of lading issued by the L.E. Co., there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one, as the company only undertakes to warehouse goods of necessity and for convenience of shippers. 17 P.R. (Ont.) 224, reversed.

Lake Erie & Detroit River Ry. Co. v. Sales, 26 Can. S.C.R. 663.

[See Richardson v. Can. Pac. Ry. Co., 19 O.R. 369; referred in Elmsley v. Harrison, 17 P.R. (Ont.) 425; Hunter v. Boyd, 6 O.L.R. 639; applied Neil v. American Express Co., 20 Que. S.C. 258; approved Laurie v. Can. Northern Ry. Co., 21 O.L.R. 178; distinguished Allen v. Can. Pac. Ry. Co., 19 O.L.R. 510, 21 O.L.R. 416.]

MARINE RAILWAY—CONTRACT FOR HAULING VESSEL.

Defendants took charge of plaintiffs' vessel for the purpose of hauling it out on defendants' marine railway and making certain repairs. While the work of hauling out was proceeding the vessel fell over and was injured. In an action claiming damages defendants relied upon a written contract containing the following provision: "The company give distinct notice to all parties intending to use or using the railway and it shall be held to be part of their contract with such parties that the company will not be liable for any injury or damage by accident . . . which vessels or their cargoes or machinery may sustain on the railway or whilst being moved there or being launched therefrom":—Held, that such provision did not in any way limit the responsibility of the company for acts of well-established negligence. Further, that it was not necessary to plaintiffs' right to recover that some specific act of negligence on their part should be established, but that such negligence might be inferred from the facts proved.

Gorton-Pew Fisheries Co. v. North Sydney Marine Ry. Co., 44 N.S.R. 493.

LOSS OF WHEAT—INDORSEMENT OF BILL OF LADING.

When it clearly appears that the loss of goods shipped by railway must have been caused by the negligence or omission of the railway company or its servants, the company is precluded by subs. 3 of s. 246 of the Railway Act, 1888, from relying on a condition of the bill of lading exempting it from liability for any deficiency in weight or measurement. (2) The certificate of a weighmaster under s. 9 of the Manitoba Grain Act, 1900, being only prima facie evidence of the weight of grain in a car, may be rebutted. (3) The indorsement of a bill of lading to a bank for collection, though it passes the property in the goods, does not prevent the shipper from bringing an action in respect of the loss of the goods, if he still has an interest in them. (4) S. 21 of the Weights and Measures Act, R.S.C., c. 104, does not apply to a contract for carrying wheat by the carload, although the number of bushels in the car had been ascertained by bag measurement.

Ferris v. Can. Northern Ry. Co., 15 Man. L.R. 134.

[Followed in Randall et al. v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 343, 21 D.L.R. 457; Scanlin v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 336; Ogilvie Flour Mills Co. v. Can. Pac. Ry. Co., 47 D.L.R. 226.

CARRIAGE OF GOODS—NOTICE STIPULATING FOR NONLIABILITY.

A carrier cannot stipulate that by reason of the reduced charge for carriage of goods he will not be liable for injury thereto even if caused by the fault or negligence of his employees; but when such stipulation has been made the owner of the goods damaged must prove that it was caused by such fault or negligence.

Drainville v. C.P.R. Co., 22 Que. S.C. 480 (Cir. Ct.).

DAMAGE TO GOODS—CONTRACT LIMITING LIABILITY—NEGLIGENCE—FRAUD—GOODS DEPOSITED IN CUSTOMS WAREHOUSE.

Normandin v. National Express Co., 4 E.L.R. 558. (Que.).

SHIPPING RECEIPT—LIMITED LIABILITY—SECOND CARRIER.

Mackenzie v. C.P.R., 7 E.L.R. 26 (N.S.).

CARRIAGE OF GOODS—LOSS BY FIRE—NOTICE OF ARRIVAL.

A railway company may, by condition, relieve itself from liability for damage to goods in transportation caused by fire, where such fire does not occur through the negligence or omission of the company or its servants. It is not necessary by the law of Canada that such a condition should be "just and reasonable." Goods arrived at the railway station to which they were destined and notice of the arrival was given the same day to the consignee who, however, did not remove them and they were destroyed by fire at the station five days afterwards:—Held, on the evidence, that the notice given was sufficient, and that the consignee had had a reasonable time within which to remove the goods.

McMorrin v. Can. Pac. Ry. Co., 1 Can. Ry. Cas. 217, 1 O.L.R. 561.

Bill of lading—Condition requiring insurance—Breach of—Loss of goods.

Under s. 246 of the Railway Act, 1888, a railway company is precluded from setting up a condition endorsed on a bill of lading relieving the company from liability for damage sustained to goods while in transit, where the damage is occasioned through negligence. Consignors, by their own shipping bill, agreed to insure the goods to be shipped, the railway company being thereby subrogated to consignors' rights in case of loss, and a condition of the bill of lading given by the railway company on the shipment of goods, required the consignor to effect an insurance thereon, which, in case of loss or damage, the company were to have the benefit of. The consignors insured the goods, but afterwards countermanded the insurance:—Held, that the bill of lading superseded the shipping bill and formed the contract between the parties, and that the railway company under the above section were precluded from setting up the breach of such conditions as a ground for relief from liability, where the damage to the goods had been occasioned through negligence.

St. Mary's Creamery Co. v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 122, 5 O.L.R. 742.

[Affirmed in 8 O.L.R. 1, 3 Can. Ry. Cas. 447; distinguished in Mercer v. Can. Pac. Ry. Co., 17 O.L.R. 585, 8 Can. Ry. Cas. 372; Sutherland v. Grand Trunk Ry. Co., 8 Can. Ry. Cas. 389, 18 O.L.R. 139.]

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St. Mary's Creamery Co. v. Grand Trunk Ry. Co., 3 Can. Ry. Cas. 447, 8 O.L.R. 1.

Shipping bill—Contract for carriage by water—"Owner's risk."

Plaintiff, a Syrian merchant imperfectly acquainted with English, executed, without solicitation, a contract for the shipment of furniture from Toronto to Fort William via Owen Sound, the goods being shipped at a reduced rate by defendants' boat from Owen Sound. On the boat they were damaged by water, the boat having run on a rock, but no evidence shewing negligence in the management of the boat was given. The contract provided that the goods should be shipped at "owner's risk," and that the defendants should not be liable for "damages occasioned by . . . wet":—Held, (1) there was no evidence that the goods had been damaged by the defendants' negligence; the mere fact that their boat had run upon a rock without evidence of the circumstances causing the accident not being proof that there had been any negligence in the management of the boat by defendants' officers. (2) Even if there had been evidence of negligence, the plaintiff could not recover because he was bound by his contract relieving defendants from liability, and as the goods were being carried by water and not upon a line of railway, the operation of the contract was not limited by the Railway Act, 1888, s. 246 (3), to cases where the damage was due to causes other than the negligence of the defendants.

Abdou v. Can. Pac. Ry. Co., 4 Can. Ry. Cas. 56.

CONTRACT LIMITING LIABILITY—VALIDITY—ORDER OF BOARD—FRACTIONS OF A DAY.

On the 17th October, 1904, the plaintiff shipped three packages of household goods on the defendants' railway, and signed a special contract by which he undertook that no claim in respect of injury to or loss of the goods should be made against the defendants exceeding the amount of $5 for any one of the packages. On the same day the Board, by order, approved of the form of special contract signed by the plaintiff, under s. 275 of the Railway Act, 1903, providing that no such contract shall be valid unless "such class of contract" shall have been first authorized or approved by the Board. In an action to recover the value of the goods, which were lost by the defendants:—Held, that, under ss. 23, 24, 25, 275 of the Act, the Board had jurisdiction to make the order, the making of it was a judicial proceeding, and the order must be regarded as in full force during the whole of the 17th October, 1904; and, therefore, the contract was valid, and the plaintiff entitled to recover only $15. Review of cases bearing upon the rule that in judicial proceedings fractions of a day are not regarded.

Buskey v. Can. Pac. Ry. Co., 5 Can. Ry. Cas. 384, 11 O.L.R. 1.

[Followed in Underhill v. Can. Northern Ry. Co., 18 Can. Ry. Cas. 313.]

FREEDOM FROM LIABILITY—"PROPERTY," MEANING OF—EJUSDEM GENERIS.

In consideration of the construction of a siding to their mill premises, plaintiff company entered into an agreement with the railway company freeing them from liability for damage to the "siding or to buildings, fences or other property whatsoever" of the plaintiff company "or of any other person." Two horses of the plaintiff company, engaged in hauling a car from one part of the siding to another, were killed by being run down with a car sent on the siding by a flying switch:—Held, reversing the finding of Wilson, Co. J., that the word "property" in the agreement was not confined to fixtures, buildings and rolling stock, and that the horses were properly included.

East Kootenay Lumber Co. v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 310, 13 B.C.R. 422.

LIABILITY FOR DAMAGE TO GOODS IN TRANSIT—CONTRACT LIMITING LIABILITY.

In an action against a carrier for damage to goods in transit, it must be proved that the goods were undamaged when delivered to the carrier. When goods are shipped by rail under a contract limiting liability and providing for transport at owner's risk, the railway company is not liable for damage to such goods unless it be proved that such damage is the result of negligence on the part of the company.

Mason & Risch Piano Co. v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 369, 1 S.L.R. 213.

STIPULATION STRICTLY CONSTRUED—DESCRIPTION "BRITTLE AND FRAGILE OBJECTS" NOT TO APPLY TO WOODEN CHEESE BOXES—LIABILITY OF CARRIER.

Common carriers, as the insurers of the goods entrusted to them, are liable for loss of, and damage to, them. Stipulations in contracts for the carriage of goods and in bills of lading, exempting the carrier from liability in certain cases, are construed strictly. Wooden cheese boxes do not come under the description, in such a stipulation, of "brittle and fragile objects," especially when it appears at the end of a long enumeration of objects wholly dissimilar. Supposing, however, the clause to apply, the carrier would still be liable for damage proved to be caused by his fault, and such fault is established, as to one shipment of cheese in wooden boxes, by shewing that 11 per cent of the boxes were damaged, with the additional proof that the average number damaged, in ordinary shipments in the cheese trade, is only 5 per cent.

Alexander v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 406, 33 Que. S.C. 438.

[Affirmed in 18 Que. K.B. 530; applied in Manufacturers' Paper Co. v. Cairn Line SS. Co., 38 Que. S.C. 362.]

FAULT OF CONNECTING CARRIER—TRANSPORT BY SLEIGH ROAD.

The plaintiff delivered to the defendants lumber to be forwarded to G. station, subject to the conditions of the shipping bill, and paid the freight to G. The lumber was conveyed to S., the station nearest to G. on the defendants' line. The only transportation possible from S. to G. was over a sleigh road by teams owned by a transport company, with whom the defendants had a working arrangement. The car containing the lumber was left on a siding at S., and the agent of the transport company was notified, but that company did not forward the lumber to G., and the defendants shipped it back to the plaintiff without delay, and returned the freight. By clause 10 of the conditions on the back of the shipping bill it was, inter alia, provided that the defendants did not contract for the safety or delivery of any goods except on their own lines, and that where a through rate was named to a point on other lines, the defendants were to act only as agents of the owner of the goods as to that portion of the rate required to meet the charges on such other lines, and that their responsibility in respect of any loss, misdelivery, or detention of goods carried under the contract should cease as soon as the defendants should either deliver them to the next connecting carrier for further conveyance or notify such carrier that they were ready to do so:—Held, in an action for breach of the contract by nondelivery of the goods, that this clause relieved the defendants; "the next connecting carrier" was not limited to a railway company operating other lines, but meant any connecting carrier. Clause 15 provided that the defendants should not be liable for loss of market or for claims arising from delay or detention of any train in the course of its journey, and any loss or damage for which the defendants might be responsible should be computed upon the value or cost of the goods at the place and time of shipment:—Held, that this clause also applied; the immunity from liability for loss of market was not limited to claims arising from delay or detention of any train, but was general:—Held, also, that, there being a limitation under the contract itself, the law applicable to common carriers did not apply:—Held, also, that the plaintiff was not entitled to succeed as in an action for tort, as the defendants received the lumber for carriage under the provisions of a special contract:—Held, lastly, that the defendants had fulfilled their obligations under the contract, and were not liable under s. 284 paras. (b), (c), (d), of the Railway Act, 1906. [Judgment of Magee, J., affirmed.]

Laurie v. Can. Northern Ry. Co., 10 Can. Ry. Cas. 431, 21 O.L.R. 178.

Loss while in possession of intermediate carrier—Lake and rail routes.

An action to recover damages for nondelivery of a carload of tools lost in transit by the wrecking, on Lake Superior, of a steamship of the N.N. Co. The goods were shipped from Kakabeka Falls in a C.P.R. Cos car via Canadian Northern Ry. Co. to Port Arthur, placed on board the steamship for transportation to Point Edward, thence via Grank Trunk Ry. for delivery to the plaintiffs at St. Catharines. The plaintiffs contended that the terms of the contract were for transportation all rail and not by lake and rail, and that the defendants were liable for breach of a through contract to carry by a through route and at a through toll: —Held, reversing the trial Judge, who gave judgment in favour of the plaintiffs, holding that the defendants not having contracted themselves out of liability for the loss that occurred became liable under their contract to deliver to the plaintiffs at destination, and affirming the judgment of the Court of Appeal that the defendants contracted only to deliver the goods at Port Arthur to the N.N. Co., which they did, and were therefore not liable for nondelivery.

Jenckes Machine Co. v. Can. Northern Ry. Co., 11 Can. Ry. Cas. 440, 14 O.W.R. 307.

[Distinguished in Laurie v. Can. Northern Ry. Co., 21 O.L.R. 178.]

Liability for delay—Delay caused on connecting railway—Notice to shipper.

A carrier by land, who receives goods to be forwarded by other carriers, is not liable, in the absence of notice of special cause for delivery within a given time, for damage arising from delay caused by congestion of traffic in the hands of the next succeeding carrier. A stipulation in a bill of lading, by a carrier of goods to be forwarded by him and other carriers, limiting his liability to loss or injury caused by his own negligence, is valid and binding, though the shipper's attention is not specially drawn to it. [Clarke v. Holliday, 39 Que. S.C. 499, followed.]

Ram v. Boston & Maine Ry. Co., 13 Can. Ry. Cas. 370, 41 Que. S.C. 68.

Termination of liability—Arrival of goods—Reasonable time for delivery.

The liability of carriers by railway quâ carriers terminates upon the arrival of the goods carried at their destination and the expiration of a reasonable time for delivery. From Saturday morning until Monday is not a reasonable time in which to pay the freight and demand delivery of a carload of potatoes in very cold weather.

Lockshin v. Can. Northern Ry. Co., 24 Can. Ry. Cas. 362, 47 D.L.R. 516.

Shipment of grain—Liability of intermediate carriers.

When a shipment of grain is despatched in a sealed car over several lines of railway consecutively, the intermediate carriers are only answerable for damage arising from their own acts. In the absence of proof to this effect, they are relieved of all liability.

Duchesneau v. Can. Northern Ry. Co., 23 Que. K.B. 19.

B. Live Stock; Persons in Charge.

NEGLIGENCE—POWER OF COMPANY TO PROTECT ITSELF FROM—LIVE STOCK AT OWNER'S RISK.

A dealer in horses hired a car from the G. T. R. Co. for the purpose of transporting his stock over their road, and signed a shipping note by which he agreed that "the owner of animals undertakes all risks of loss, injury, damage and other contingencies, in loading, etc. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind, on the part of the company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury or detention of any person or persons traveling upon any such free passes. . . . the person using any such passtakes all risks of every kind, no matter how caused." The horses were carried over the G. T. R. in charge of a person employed by the owner, such person having a free pass for the trip. Through the negligence of the company's servants a collision occurred by which the said horses were injured. On appeal from the Court of Appeal for Ontario, 10 A.R. (Ont.), 162, affirming the judgment of the Divisional Court, 2 O.R. 197, in favour of the defendants:—Held, per Ritchie, C.J., and Fournier and Henry, JJ., that under the General Railway Act, 1868, c. 68, s. 20, subs. 4, as amended by 34 Viet. c. 43, s. 5, re-enacted by Consol. Railway Act, 1879, c. 9, s. 25, subss. 2, 3, 4, which prohibits railway companies from protecting themselves against liability for negligence by notice, condition or declaration, and which applies to the G. T. R. Co., the company could not avail itself of the stipulation that it should not be responsible for the negligence of itself or its servants. Per Strong and Taschereau, JJ.:—That the words "notice, condition or declaration," in the said statute, contemplate a public or general notice, and do not prevent a company from entering into a special contract to protect itself from liability.

Grand Trunk Ry. Co. v. Vogel, Grand Trunk Ry. Co. v. Morton, 11 Can. S.C.R. 612.

[Disapproved in The Queen v. Grenier, 30 Can. S.C.R. 42; applied in Brasell v. Grand Trunk Ry. Co., 11 Que. S.C. 157: considered in Burdett v. Can. Pac. Ry. Co., 10 Man. L.R. 11; Walters v. Can. Pac. Ry. Co., 1 N. W. Terr. R. 28, 38: discussed in St. Mary's Creamery v. Grand Trunk Ry. Co., 5 O.L.R. 742; distinguished in Robertson v. Grand Trunk Ry. Co., 24 Can. S.C.R. 615; followed in Cobban v. Can. Pac. Ry. Co., 26 O.R. 732, 23 A.R.(Ont.) 115: referred to in Canada Permanent v. Teeter, 19 O.R. 156; Glengoil S.S. Co. v. Pilkington, 6 Que. Q.B. 104; commented on in Bate v. Can. Pac. Ry. Co., 14 O.R. 625, Cam. S. C. Cas. 10; considered in Robertson v. Grand Trunk Ry. Co., 24 O.R. 75; distinguished in Bicknell v. Grand Trunk Ry. Co., 26 A.R. (Ont.) 431; Cobban v. Can. Pac. Ry. Co., 26 O.R. 732: McCormack v. Grand Trunk Ry. Co., 6 O.L.R. 577; McMillan v. Grand Trunk Ry. Co., 15 A.R. (Ont.) 14; Robertson v. Grand Trunk Ry. Co., 21 A.R. (Ont.) 204; Sutherland v. Grand Trunk Ry. Co., 18 O.L.R. 139; followed in Cobban v. Can. Pac. Ry. Co., 23 A.R. (Ont.) 115; McMillan v. Grand Trunk Ry. Co., 12 O.R. 103; St. Mary's Creamery Co. v. Grand Trunk Ry. Co., 8 O.L.R. 1; referred to in Bate v. Can. Pac. Ry. Co., 15 A.R.(Ont.) 388; Ferris v. Can. Northern Ry. Co., 15 Man. L. R. 144; Shaw v. Can. Pac. Ry. Co., 5 Man. L.R. 337.]

Carriage of live stock.

By s. 246 (3) of the Railway Act, 1888, "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants":—Held, affirming the decision of the Court of Appeal, that this provision does not disable a railway company from entering into a special contract for the carriage of goods and limiting its liability as to amount of damages to be recovered for loss or injury to such goods, arising from negligence. [Vogel v. Grand Trunk Ry. Co., 11 Can. S.C.R. 612, and Bate v. Can. Pac. Ry. Co., 15 A.R. Ont. 388, distinguished.] The Grand Trunk Ry. Co. received from R. a horse to be carried over its line, and the agent of the company and R. signed a contract for such carriage which contained this provision: "The company shall in no case be responsible for any amount exceeding one hundred dollars for each and any horse," etc.:—Held, affirming the decision of the Court of Appeal, that the words "shall in no case be responsible" were sufficiently general to cover all cases of loss however caused, and the horse having been killed by negligence of servants of the company, R. could not recover more than $100, though the value of the horse largely exceeded that amount. [21 A.R. (Ont.) 204, affirming 24 O.R. 75, affirmed.]

Robertson v. Grand Trunk Ry. Co., 24 Can. S.C.R. 611.

[Applied in Grenier v. The Queen, 6 Can. Ex. 302; discussed in Cobban v. Can. Pac. Ry. Co., 26 O.R. 732; St. Mary's Creamery Co. v. Grand Trunk Ry. Co., 5 O.L.R. 742: distinguished in St. Mary's Creamery Co. v. G.T. Ry. Co., 8 O.L.R. 1; followed in Mercer v. Can. Pac. Ry. Co., 17 O.L.R. 585, 8 Can. Ry. Cas. 372; Sutherland v. Grand Trunk Ry. Co., 18 O.L.R. 139; referred to in Cobban v. Can. Pac. Ry. Co., 23 A.R. (Ont.) 115; Lamont v. Can. Transfer Co., 19 O.L.R. 291; Mowatt v. Provident Assn. Co., 27 A.R.(Ont.) 675; McCormack v. Grand Trunk Ry. Co., 6 O.L.R. 577; Taylor v. Grand Trunk Ry. Co., 4 O.L.R. 357; Wensky v. Can. Development Co., 8 B.C.R. 195; relied on in Central Vermont Ry. Co. v. Franchère, 35 Can. S.C.R. 74; Wilson v. Can. Develop. Co., 9 B.C.R. 108; see Grenier v. The Queen, 6 Can. Ex. 276.]

Carriage of live stock—Delay of shipment—Abandonment—Sale by carrier.

A shipper of goods is bound by the conditions to which he has subscribed in the bill of lading, and where one of such conditions was that the carrier (a railway company) should not be liable for the delay of its trains, and damage was caused to the shipper of live stock by a delay of two hours, he could not recover. If the stock is abandoned to the company and sold, the latter has the right, before remitting the proceeds of the sale, to demand from the ship the return of the bill of lading.

Lafontaine v. Grand Trunk Ry. Co., 26 Que. S.C. 455.

Live stock—Contravention of Lord's Day Act.

The provisions of a special contract of carriage limiting the liability of the defendants, common carriers, in case of a collision to a stated sum, do not apply where the common carrier is guilty of a corporate act in contravention of a statute where that corporate act occasioned the collision. Where, therefore, a railway company received live stock for carriage at a lower rate than it was entitled to charge in consideration of the shipper executing a special contract limiting the company's liability in the event of a collision of its trains to $100 per head of such live stock killed, and a collision occurred between the train upon which the live stock was carried and which was being run lawfully and another train of the same company which was being run unlawfully in contravention of the Lord's Day Act, and an action was brought by the owner of the live stock in tort claiming the full value of the animal killed by such collision:—Held, that the special contract had not the effect of limiting the company's liability or excusing the defendants from liability if such liability arose by reason of the breach of a prohibitive statute; that the unlawful running of the train in contravention of the Lord's Day Act was a corporate act of the defendants, and that the principles of the law of negligence were not applicable. The judgment of Sifton, C.J., upon a stated case affirmed by the Court en banc.

Rise v. Can. Pac. Ry. Co., 3 Alta. L.R. 154, 14 W.L.R. 635.

LOSS OF HORSES—SPECIAL CONTRACT LIMITING LIABILITY.

In an action for damages for the loss of two horses out of a carload of fourteen shipped over defendants' railway, judgment was entered for the plaintiff upon the answers of the jury finding the defendant company guilty of negligence and that the plaintiff could not have avoided the accident by the exercise of reasonable care. Upon motion in term the County Judge held the defendant company exempt from liability under the terms of a special contract permitting its liability, approved by the Board under s. 275 (1) of the Railway Act, 1903, and dismissed the action:—Held, upon an appeal to the Divisional Court that upon the true construction of the contract it did not cover negligence of the company or its servants and that the Board has no power to limit the liability of the company for negligence contrary to the provisions of the Railway Act, 1903, s. 214 (3):—Held, also, that the findings of the jury upon the evidence were so unsatisfactory a new trial must be ordered.

Booth v. Can. Pac. Ry. Co., 5 Can. Ry. Cas. 389, 7 O.W.R. 593.

[Referred to in Sutherland v. Grand Trunk Ry. Co., 18 O.L.R. 139; relied on in Mason & Risch Piano Co. v. Can. Pac. Ry. Co., 1 S.L.R. 215.]

ANIMALS—SPECIAL CONTRACT LIMITING LIABILITY—NOTICE OF LOSS.

By s. 284 (7) of the Railway Act, 1906, "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants." By s. 340: "No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board. (2) The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired." The defendants received from the plaintiff a mare, with other animals, to be carried from a station on their line of railway in Ontario to a point in British Columbia, under a special contract, which had been approved of by the Board (which the plaintiff signed). Under this contract the animals were carried at a lower rate than the company were entitled to charge. The contract contained a provision that the defendants should in no case be responsible for any amount exceeding $100 for the loss of any one horse, or a proportionate sum in any one case for injuries to same, and that any loss or damage should be computed and paid for on such basis. There was a further provision relieving the company from liability, "unless a written notice, with the full particulars of the loss or damage and of the claim to be made in respect thereof, is delivered to the station agent at the said point of delivery within 24 hours after the said property, or some part of it, has been delivered." During the carriage on the railway, the mare was, through the defendants' negligence, seriously injured. Before the consignment arrived at its destination the plaintiff, finding that the mare was permanently injured, by the permission of the railway superintendent there, removed the mare from the car at an intermediate station and sold her at a loss, the remainder of the shipment being carried on to the place of delivery. No notice of the loss was given there to the company's official within the 24 hours:—Held, that notwithstanding the loss was sustained through the defendants' negligence, the special contract was binding on the plaintiff, so that in no event could he recover more than the proportionate part of $100; but that the omission to give the required notice relieved the company from all liability. [Judgment of the County Court of the county of Grey, affirmed. Robertson v. Grand Trunk Ry. Co. (1895), 24 Can. S.C.R. 611, followed; St. Mary's Creamery Co. v. Grand Trunk Ry. Co. (1904), 8 O.L.R. 1, 3 Can. Ry. Cas. 447, distinguished.]

Mercer v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 372, 17 O.L.R. 585.

[Commented on in Newman v. Grand Trunk Ry. Co., 20 O.L.R. 285; distinguished in Tolmie v. Michigan Central Ry. Co., 19 O.L.R. 26, 9 Can. Ry. Cas. 337; referred to in Sutherland v. Grand Trunk Ry. Co., 18 O.L.R. 139; Wilkinson v. Can. Express Co., 14 Can. Ry. Cas. 267, 7 D.L.R. 450.]

SHIPMENT OF LIVE STOCK—LIMITATION OF LIABILITY—CONNECTING CARRIERS.

The plaintiff delivered to a railway company at Brockton, Mass., U. S., a number of valuable horses for carriage to Grimsby, Ontario, under a contract known as a live stock contract, by which the horses were to be carried on the line of that railway as far as it went and then by connecting lines to the place of delivery, the contract being expressly entered into by the contracting railway on its own behalf, as well as on behalf of the connecting lines. The contract contained a provision that on payment of a specified rate of freight, being a rate lower than that which the company was entitled to charge, liability was to be limited to an amount not exceeding $100 for each animal, or a total liability not exceeding $1,200, the plaintiff having the option of shipping at a higher rate and obtaining the company's liability as common carriers. The provision restricting liability was similar to that contained in the form of live stock contract of the defendants approved by the Board under s. 340 of the Railway Act, 1906. The horses were carried by the contracting railway as far as its line extended, and were then delivered to a connecting railway and thence to the defendants, and during the transit on the defendants' line an accident occurred through the negligence of the defendants, in which some of the animals were killed and others injured:—Held, that by the terms of the contract it applied not only to the railway company with which it was made, but with the connecting railways, and that by its terms the defendants were exempted from liability beyond the amount stipulated for; and that, even if the approval of the Board was essential to its validity, such approval had been obtained, for it was, in substance, the same class of contract which had been approved.

Sutherland v. Grand Trunk Ry. Co., 8 Can. Ry. Cas. 389, 18 O.L.R. 139.

Carriage of live stock—Special contract—Injury to persons in charge traveling free.

The third parties shipped two carloads of horses over the defendants' line, and placed G. and R. in charge. G. was killed and R. injured while on the defendants' train, through the negligence of the defendants, and in actions brought by the administrator of the estate of G. and by R. against the defendants, judgments were recovered against the defendants for damages for the negligence. The defendants sought indemnity against the third parties, the owners and shippers of the horses. Special contracts for shipment of live stock were signed by the defendants' agent and by the third parties, the form of contract being that authorized by the Board under the Railway Act. The rate of freight charged was that authorized under Canadian classification No. 14, dated the 15th December, 1908, and approved by the Board in cases where the stock is shipped under the terms and conditions of the special contract, which classification contains certain general rules governing the transportation of live stock, including this, that the owner or his agent must accompany each carload, and owners or agents in charge of carloads will be carried free on the same train with their live stock, upon their signing the special contract approved by the Board. G. and R. were carried free, but neither signed the special contract, nor was any pass issued and delivered to either of them embodying its terms, and neither of them knew the contents of the special contract. Upon the face of each contract was written, "Pass man in charge." Among the conditions of the contract were, that the liability of the defendants should be restricted to $100 for the loss of any one horse, and that in case of the defendants granting to the shipper or any nominee or nominees of the shipper a pass or privilege less than full fare to ride on the train in which the property is being carried, for the purpose of caring for the same while in transit, and at the owner's risk, then, as to every person so traveling, the defendants are to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the defendants or their servants or employees, or otherwise howsoever. On the back of the contract, and as part of the document approved by the Board, provision was made for each person entitled to free passage to sign his name, followed by a note that agents must require such persons to write their own names on the lines above. The defendants' agent neglected to observe this direction:—Held, that the third parties owed no duty to the defendants to inform G. and R. of the terms of the special contract. (2) Looking at the express terms of the written contract, including the rule set forth in classification 14, intended for the guidance of both parties, and having regard to all the circumstances under which the contract was entered into, there was no implied agreement on the part of the third parties to indemnify the defendants, in order to give the transaction such efficacy as both parties must have intended it to have. There would have been no claim against which to be indemnified if the defendants' agent had performed his duty, and it would be contrary to principle to imply an agreement by the third parties to protect the defendants from the consequences of their own carelessness.

Goldstein v. Can. Pac. Ry. Co., 21 O.L.R. 575, 12 Can. Ry. Cas. 141. [Affirmed in 23 O.L.R. 536, 12 Can. Ry. Cas. 485.]

Injury to passenger in charge—Shipper of animal—Reduced rate.

By the terms of a special contract, in a form approved by the Board, it was agreed between the defendants and the plaintiff, a shipper of a horse by the defendants' railway, that the defendants, granting to the plaintiff, traveling on the train in which the horse was being carried, for the purpose of taking care of it, the privilege of traveling at a reduced fare, should "be entirely free from liability in respect to his death, injury, or damage," whether caused by negligence or otherwise. The plaintiff, while so traveling, was injured, and brought this action to recover damages for his injury:—Held, that the defendants were authorized to make the contract, and were thereby relieved from liability to the plaintiff. Ss. 284, 340 of the Railway Act, 1906, considered. The word "impairing" in s. 340 is intended to cover the case of total exemption from liability:—Held, also, that it was immaterial whether the plaintiff, who signed the contract, had read it or knew its contents.

Heller v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 363, 25 O.L.R. 117. [Affirmed in 25 O.L.R. 488, 13 Can. Ry. Cas. 367.]

INJURY TO PASSENGER—CARRIAGE OF HORSE AND PASSENGER.

By s. 2 (31) of the Railway Act, 1906, "traffic" means the traffic of passengers, goods, and rolling stock; and the provision of the special contract in question in this case (set out in the judgment of Mulock, C.J., 13 Can. Ry. Cas. 363, 25 O.L.R. 117) entirely freeing the defendants from liability in respect of the death or injury of the passenger traveling in charge of a horse, both being carried under the one contract, was not a destruction of all liability under the contract, but a limitation to the goods carried; and this came within s. 340 (2) of the Act. Upon this ground, the judgment of Mulock, C.J., was affirmed; Riddell, J., agreeing with the judgment as to the meaning of the word "impairing" in s. 340 of the Act; and Falconbridge, C.J.K.B., not dissenting therefrom.

Heller v. Grand Trunk Ry. Co., 13 Can. Ry. Cas. 367, 25 O.L.R. 488, 2 D.L.R. 114.

LIABILITY OF RAILWAY TO CARETAKER OF LIVE STOCK—REDUCED FARE—PRIVITY OF CONTRACT.

One traveling upon a railway in charge of live stock at a reduced fare, which is paid by the shipper of the live stock, is not bound by a special contract between the shipper and the railway company relieving the company from liability in case of his death or injury, of which he had no knowledge, to which he was not a party, and from which he derived no benefit. [Goldstein v. Can. Pac. Ry. Co., 23 O.L.R. 536, specially referred to.]

Robinson v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 441, 5 D.L.R. 513, 26 O.L.R. 437.

[Reversed in 14 Can. Ry. Cas. 444, 8 D.L.R. 1002, 27 O.L.R. 290; restored in 47 Can. S.C.R. 622, 15 Can. Ry. Cas. 264, 12 D.L.R. 696, and reversed again in Grand Trunk Ry. Co. v. Robinson, [1915] A.C. 740, 19 Can. Ry. Cas. 37, 22 D.L.R. 1.]

LIABILITY OF RAILWAY COMPANY TO CARETAKER OF LIVE STOCK—REDUCED FARE.

One who travels upon a railway in charge of live stock, at a reduced fare paid by the shipper of the stock under a special contract between the shipper and the railway company, and pays no fare himself, and has no other ticket or other authorization entitling him to be upon the train at all, cannot be heard to deny that he is traveling under the provisions of the special contract, though he has neither read nor signed it, and is bound by a provision therein relieving the railway company from liability for his death or injury, though caused by the negligence of the company. It is within the power of the Board under the provisions of the Railway Act, 1906, to authorize a contract relieving the company from liability to one traveling in charge of live stock at a reduced fare, for injuries caused by the negligence of the company or otherwise. [Dicta in Goldstein v. C.P.R., 23 O.L.R. 536, followed; Robinson v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 441, 26 O.L.R. 437, 5 D.L.R. 513, reversed.]

Robinson v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 444, 8 D.L.R. 1002, 27 O.L.R. 290.

[Reversed in 16 Can. Ry. Cas. 264, 47 Can. S.C.R. 622, 12 D.L.R. 696, and restored in 19 Can. Ry. Cas. 37, 22 D.L.R. 1, [1915] A.C. 740.]

LIABILITY OF RAILWAY TO CARETAKER OF STOCK—REDUCED FARE.

One traveling upon a railway in charge of live stock at a reduced fare, which is paid by the shipper of the live stock, is not bound by a special contract between the shipper and the railway company relieving the company from liability in case of his death or injury, of which he had no knowledge, to which he was not a party, and from which he derived no benefit, and where the railway company failed to do what was necessary to bring the special conditions of the contract to the attention of the traveler. [Robinson v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 444, 8 D.L.R. 1002, reversed; Robinson v. Grand Trunk Ry. Co., 5 D.L.R. 513, 14 Can. Ry. Cas. 441, restored.]

Robinson v. Grand Trunk Ry. Co., 47 Can. S.C.R. 622, 12 D.L.R. 696, 15 Can. Ry. Cas. 264.

[Reversed in 19 Can. Ry. Cas. 37.]

PERSON IN CHARGE OF LIVE STOCK—NEGLIGENCE—FREE PASS—CONTRACT LIMITING LIABILITY OF COMPANY.

A railway company is liable in damages for the death of a person caused by the negligence of the company's employees, notwithstanding that the party killed was in charge of live stock and was being carried on a free pass and had signed a contract releasing the company from all liability, where the party signing could not read or write, and could not have known the nature of the conditions signed, and the company had not done what was reasonably sufficient to give him notice of the conditions.

Can. Pac. Ry. Co. v. Parent, 19 Can. Ry. Cas. 1, 51 Can. S.C.R. 234, 21 D.L.R. 681.

[Reversed in 20 Can. Ry. Cas. 141.]

LIABILITY TO CARETAKER OF STOCK—REDUCED FARE—EXEMPTION FROM LIABILITY.

One who travels upon a railway in charge of live stock, at a reduced fare paid by the shipper of the stock under a special contract between the shipper and the railway company, and pays no fare himself, and has no other ticket or other authorization entitling him to be upon the train, cannot be heard to deny that he is traveling under the provisions of the special contract, though he has neither read nor signed it, and is bound by a provision therein relieving the railway company from liability for his death or injury, though caused by the negligence of the company. [Robinson v. Grand Trunk Ry. Co., 47 Can. S.C.R. 622, 15 Can. Ry. Cas. 264, 12 D.L.R. 696, reversed.]

Grand Trunk Ry. Co. v. Robinson, 19 Can. Ry. Cas. 1, [1915] A.C. 740, 22 D.L.R. 1.

CARRIERS—LIVE STOCK—INJURY TO CARETAKER.

A condition in a live stock contract between shippers and a railway company, relieving the company of liability for injury or death of men in charge of cattle while being carried by the railway, is binding on the men so in charge if they accept passes, granted under the contract containing substance of the conditions, the acceptance or otherwise is a question of fact. [Can. Pac. Ry. Co. v. Parent, 21 D.L.R. 681, 51 Can. S.C.R. 234, 19 Can. Ry. Cas. 1, reversed.]

Can. Pac. Ry. Co. v. Parent, 20 Can. Ry. Cas. 141, [1917] A.C. 195, 33 D.L.R. 12.

C. Loss of Baggage.

Loss of baggage—Notice of conditions.

The plaintiff purchased from an agent of the defendants at Ottawa what was called a land-seeker's ticket, the only kind of return ticket issued on the route, for a passage to Winnipeg and return, paying some thirty dollars less than the single fare each way. The ticket was not transferable and had printed on it a number of conditions, one of which limited the liability of the company for baggage to wearing apparel not exceeding $100 in value, and another required the signature of the passenger for the purpose of identification and to prevent a transfer. The agent obtained the plaintiff's signature to the ticket, explaining that it was for the purpose of identification, but did not read nor explain to her any of the conditions, and having sore eyes at the time she was unable to read them herself. On the trip to Winnipeg an accident happened to the train and plaintiff's baggage, valued at over $1,000, caught fire and was destroyed. In an action for damages for such loss the jury found for the plaintiff for the amount of the alleged value of the baggage:—Held, reversing the judgment of the Court of Appeal, 15 A.R. (Ont.) 388, and the Divisional Court, 14 O.R. 625, Gwynne, J., dissenting, that there was sufficient evidence that the loss of the baggage was caused by defendants' negligence, and the special conditions printed on the ticket not having been brought to the notice of plaintiff she was not bound by them and could recover her loss from the company. 15 A.R. (Ont.) 388, 14 O.R. 625, reversed.

Bate v. Can. Pac. Ry. Co., 18 Can. S.C.R. 697, 1 Cam. S.C. Cas. 10.

[Considered in Robertson v. Grand Trunk Ry. Co., 24 O.R. 75; discussed in Cobban v. Can. Pac. Ry. Co., 26 O.R. 732; distinguished in Coombs v. The Queen, 26 Can. S.C.R. 15; Mowat v. Provident Assurance Co., 27 A.R. (Ont.) 675; Provident Savings Life Assur. Soc. v. Mowat, 32 Can. S.C.R. 161; Robertson v. Grand Trunk Ry. Co., 21 A.R. (Ont.) 204, 24 Can. S.C.R. 611; Sibbald v. Grand Trunk Ry. Co., 18 A.R. (Ont.) 184; explained in Robertson v. Grand Trunk Ry. Co., 24 Can. S.C.R. 617; referred to in Grand Trunk Ry. Co. v. Sibbald, 20 Can. S.C.R. 265; Lamont v. Can. Transfer Co., 19 O.L.R. 291.]

Baggage delivery service—Notice of conditions.

The acceptance from a carrier of a receipt on which conditions are printed limiting his liability, creates no presumption of knowledge of them against the acceptor, within the meaning of art. 1676, C.C. (Que.), which limits the operation of such printed notices to those who have knowledge of them.

Conway v. Canadian Transfer Co., 40 Que. S.C. 89.

Transfer company—Lost baggage—Receipt—Condition limiting liability.

[See note of this case under Carriers of Goods (B).]

Lamont v. Canadian Transfer Co., 9 Can. Ry. Cas. 387, 19 O.L.R. 291.

[Distinguished in Spencer v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 207.]

Baggage of passenger—Condition on back of check.

A passenger who checks his baggage on a ticket previously purchased is not bound by a condition printed on the check but not on the ticket, limiting the liability of the carrier in case of loss, where such condition was not brought to the notice of the passenger, and the circumstances disclosed no assent either actual or constructive to such condition by the passenger. [Lamont v. Canadian Transfer Co., 9 Can. Ry. Cas. 387, 19 O.L.R. 291, considered.]

Spencer v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 207, 13 D.L.R. 836, 29 O.L.R. 122.

Check-room—Condition on receipt.

The liability of a common carrier with respect to baggage checked for safe keeping is that of a bailee for hire, and he is liable for a loss thereof through misdelivery notwithstanding a condition on the receipt limiting the liability, of which the holder had no notice.

McEvoy v. Grand Trunk Ry. Co., 35 D.L.R. 301.

D. Express Companies.

Carriage by express—Liability for safety of goods—Onus of proof.

(1) An express company which formally undertakes to forward goods is not a mere agent or intermediary between the shipper and the actual carriers. It is itself a common carrier, and, as such, liable for the safe carriage and delivery of the goods, and the onus of proof is on it to shew that loss of them is due to irresistible force or the act of God. (2) A clause in a bill of lading for goods forwarded by express that the company will not be bound, in case of loss, beyond a stated amount unless their value be declared in it, is valid and binding.

Dominion Express Co. v. Rutenberg, 18 Que. K.B. 53, 5 E.L.R. 314.

Connecting lines—Responsibility for goods damaged during transit.

An express company is not responsible for the damages to goods entrusted for carriage, when the accident happened on another and connecting line of transfer, and the bill of lading contained a clause by which the company was relieved from any liability if the loss or injury happened at a place beyond its lines or control.

Neil v. American Express Co., 2 Can. Ry. Cas. 111, 20 Que. S.C. 253.

Liability for gross negligence.

A special condition that the defendants should not be liable for loss or damage, unless it should be proved to have occurred from the gross negligence of the defendants or their servants, did not avail the defendants, because the railway companies employed by the defendants for the transaction of their business were to be regarded as the defendants' servants, and the negligence was to be accounted gross negligence.

James Co. v. Dominion Express Co., 6 Can. Ry. Cas. 309, 13 O.L.R. 211. [Approved in Dominion Express Co. v. Rutenberg, 18 Que. K.B. 53.]

Privity of contract—Liability in tort.

The plaintiff delivered to the Dominion Express Co. at Toronto goods for transmission to Quebec. The goods were being carried in a car upon the defendants' railway, when a collision took place, and the goods were destroyed; the car was the defendants', but the contents were wholly under the control and in the possession and under the physical oversight of a servant of the express company:—Held, that, although there was no privity of contract between the plaintiff and the defendants, the plaintiff had a good cause of action in tort. [Review of the authorities.] The shipping bill contained various provisions limiting the liability of the express company, inter alia, also, this provision: "And it is also understood that the stipulation contained herein shall extend to and enure to the benefit of each and every company or person to whom, through this company, the below described property may be intrusted or delivered for transportation":—Held, upon a construction of the whole shipping bill, that the defendants were not a company to whom, through the express company, the property was intrusted or delivered for transportation, and the goods were, therefore, not being carried by them under a special contract with the plaintiff; and they were liable as in tort for the value of the goods. [Lake Erie & Detroit River Ry. Co. v. Sales (1893), 26 Can. S.C.R. 663, distinguished.] Quaere, whether, if the defendants had been such a company, they could have taken advantage of a contract made by another company for their benefit, but without their privity.

Allen v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 408, 19 O.L.R. 510.

[Affirmed in 21 O.L.R. 416, 10 Can. Ry. Cas. 424; relied on in Duryea v. Kauffman, 21 O.L.R. 161; referred to in British Columbia Elec. Ry. Co. v. Crompton, 43 Can. S.C.R. 7, 10 Can. Ry. Cas. 266.]

LIABILITY IN TORT—ABSENCE OF PRIVITY.

The plaintiff delivered to the Dominion Express Co. at Toronto a trunk of valuable samples to be carried to Quebec. The company gave him a receipt therefor, whereby, as he failed to place a value on the articles in the trunk, their value was fixed, as between him and the company, at $50. The company was an independent company, operating upon the lines of railway of the defendants in Canada, under a general agreement with the defendants, by one clause of which the express company assumed all responsibility for and agreed to satisfy all valid claims for the loss of or damage to express matter in its charge, and to hold the defendants harmless and indemnified against such claims. The trunk was placed by the express company in a car of the defendants upon the defendants' railway, and was there, in charge of the express company's servant, when a collision occurred, as a result of which a fire took place, and the trunk and contents were destroyed. The defendants admitted that the collision was caused by the negligence of their servants:—Held, that an action in tort lay against the defendants for the loss of the goods; the defendants were liable for their "active" negligence in bringing about the collision:—Held, also, that the defendants were not entitled, as against the plaintiff, to the exemption from liability stipulated for in their agreement with the express company, under which they received and were carrying the goods; nor to the benefit of the limitation of liability to $50 provided for in the plaintiff's contract with the express company; for to the first agreement the plaintiff was a stranger, and to the second the defendants were in the same position; and, in addition, the exemption clauses should be construed strictly, and the exemptions claimed would not extend to include an act of collateral or "active" negligence. [Martin v. Great Indian Peninsular Ry. Co. (1867), L.R. 3 Ex. 9, specially referred to. Lake Erie & Detroit River Ry. Co. v. Sales (1896), 26 Can. S.C.R. 663, distinguished.] Semble:—That, if the agreement between the plaintiff and the express company had any application, the clause "that the stipulation contained herein shall extend to and inure to the benefit of each and every company or person to whom through this company the below described property may be intrusted or delivered for transportation" did not apply to the defendants, but to a person or company beyond the line of the defendants' railway, to whom it might be necessary for the express company to part with the property in order that it should reach its destination.

Allen v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 424, 21 O.L.R. 416.

[Judgment of Riddell, J., 19 O.L.R. 510, 10 Can. Ry. Cas. 408, affirmed.]

COMPANY'S RECEIPT TO PARTY OTHER THAN THEIR CUSTOMER—SPECIAL CONDITIONS.

A person who forwards his railway baggage checks to an express company with instructions to take delivery of the baggage and reforward it by express may claim damages for its loss in transit while in their custody as upon the company's common-law liability, and is not bound by a condition of a shipping receipt issued to the railway company on receiving delivery from it, purporting to limit the maximum liability of the express company in case of loss, where the contract evidenced by such shipping receipt is in terms made between the express company and the railway company only and its provisions were not communicated to the owner of the baggage. The fact that an express company is enabled by statute to make use of a special form of contract impairing, restricting, or limiting its liability does not prevent the company from contracting upon the basis of a more extended liability as upon its contractual rights at common law, although such special form has received the approval of the Board, exercising governmental powers of supervision over common carriers.

Wilkinson v. Canadian Express Co. (Ont.), 14 Can. Ry. Cas. 267, 7 D.L.R. 450.

[See Edwards v. Sherratt, 1 East. 604; Lohden v. Calder, 14 Times L.R. 311; Hayward v. Can. Northern Ry. Co., 6 Can. Ry. Cas. 411; Mercer v. C.P.R., 8 Can. Ry. Cas. 372.]

LIQUOR SHIPMENT.

See Crimes and Offences.

LIVE STOCK.

See Carriage of Live Stock; Fences and Cattle Guards; Limitation of Liability (B.).

LOCATION.

See Construction and Location.

LOCOMOTIVES.

Causing fires, see Fires.

Injuries to animals, see Fences and Cattle Guards.

Excessive speed, see Crossing Injuries; Carriers of Passengers; Highway Crossings; Railway Crossings.

LORD CAMPBELL'S ACT.

See Negligence; Employees; Pleading and Practice; Government Railways.

Right of action in one province for death occasioned in another, see Conflict of Laws.

LORD'S DAY ACT.

See Sunday Traffic; Constitutional Law.

MALICIOUS PROSECUTION.

See False Arrest.

MANDAMUS.

Mandamus compelling street railway to specifically perform contract with municipality respecting street car service, see Street Railways.

Mandamus enforcing passenger accommodation and rates, see Tolls and Tariffs.

Annotations.

Whether mandamus, injunction, specific performance or damages, is the proper remedy for the enforcement of covenants by railway companies. 1 Can. Ry. Cas. 294, note (4).

Mandamus compelling transfer of shares. 7 Can. Ry. Cas. 373.

REMOVAL OF RAILWAY FENCES—JURISDICTION OF BOARD.

The concurrence of three conditions is necessary to give a right to proceed by mandamus—(a) an imperative official duty to be performed by a public body or officer; (b) a refusal to perform it; (c) the absence of any other recourse to remedy the consequences of such refusal. There is no imperative duty cast on a municipal corporation to cause the removal of fences placed on one of its roads by the Federal Government at a point where Government railway crosses it. And the Railway Act, 1903, gives to the Board power to hear and determine complaints arising out of such a matter and its jurisdiction excludes that of the ordinary Courts. For these reasons the remedy by mandamus against the corporation is not open.

Carrier v. St. Henri, 30 Que. S.C. 45.

CARRIAGE OF PASSENGERS—RATES AND ACCOMMODATIONS—ENFORCEMENT.

Two questions must be found in favour of the applicant before the writ of prerogative mandamus can issue: First, has the applicant a specific legal right to the performance of some duty by the respondent; and, second, will the applicant without the benefit of the writ be left without effectual remedy? Where the applicant sought a mandamus to compel the Grand Trunk Ry. Co., pursuant to s. 3 of their Act of incorporation, 16 Vict. c. 37 (D.), to run a train containing third-class carriages, and to permit the applicant to travel therein on payment of a fare not exceeding one penny a mile:—Held, that the applicant had an adequate remedy under the provisions of the Railway Act, 1903 (ss. 8, 23, 25, 44, 214, 294, being specially referred to), and that that remedy could be more conveniently applied and executed under the direction and supervision of the Board than by the Court; and the application was refused.

Re Robertson and Grand Trunk Ry. Co., 6 Can. Ry. Cas. 490, 14 O.L.R. 497.

[See Robertson v. Grand Trunk Ry. Co., 6 Can. Ry. Cas. 494.]

COMPULSORY EXPROPRIATION—COMPENSATION.

Where there is no contract between the parties respecting land taken by a railway company for a right-of-way, the landowner may be entitled to relief, under Rule 879 of the King's Bench, by way of mandamus to compel the company to proceed to have compensation determined under the provisions of the Railway Act, 1906.

Carr v. Can. Northern Ry. Co., 7 Can. Ry. Cas. 258, 17 Man. L.R. 178.

SHARES—TRANSFER ON COMPANY'S BOOKS—MANDAMUS TO ENFORCE TRANSFER.

The owner of two shares of stock in the defendants' railway, assigned them to the plaintiff, endorsing the assignment on the certificate. The plaintiff called at the head office and demanded that the necessary transfer should be made on the company's books, and also saw the president; and, after some correspondence, the transfer not having been made, he procured a duplicate assignment of the stock, and placed the matter in the hands of his solicitor, who thereupon wrote the company demanding a transfer, and enclosed one of the duplicate assignments, and stated that he would attend on a named hour, ready to surrender the certificate, and have the transfer completed, and, on receiving a reply that it could not be attended to, this action was brought, in which an order for a mandamus was claimed. An interlocutory order made by a Judge in Chambers directing a mandamus to issue, was, on appeal to the Divisional Court, set aside, and the matter left for decision at the trial.

Nelles v. Windsor, Essex & Lake Shore Rapid Ry. Co., 16 O.L.R. 359, 7 Can. Ry. Cas. 367.

DUTY OF COMPANY TO TAKE LANDS.

A railway company, in its requirement of right-of-way, included, inter alia, land in which the plaintiff had a leasehold interest, but the right-of-way was at no time wholly upon the plaintiff's property, the greater portion being upon adjoining lands. The company, without proceeding to arbitration, acquired the interest of the plaintiff's lessor, and built its road clear of but adjoining that portion of the indicated right-of-way over the land in which the plaintiff was interested. In an action to compel the company to acquire and pay for the right-of-way as indicated, the company contended that it could be compelled to pay for only that portion of the right-of-way which it actually took possession of, and Irving, J., at the trial, dismissed that contention and held that the plaintiff was injuriously affected by the construction and operation of the railway:—Held, on appeal, Martin, J.A., dissenting, that the trial Judge was right.

McDonald v. Vancouver, Victoria & Eastern Ry., etc., Co., 12 Can. Ry. Cas. 67, 15 B.C.R. 315.

[Reversed in 44 Can. S.C.R. 65, 12 Can. Ry. Cas. 74.]

ACTION TO COMPEL EXPROPRIATION—COMPENSATION.

The approval and registration of plans, etc., of the located area of the right-of-way, under the provisions of the Railway Act, 1906, and the subsequent construction and operation of a railway along such area, do not render the railway company liable to mandamus ordering the expropriation of a portion of the lands shewn upon the plans which has not been physically occupied by the permanent way so constructed and operated. Judgment appealed from, 12 Can. Ry. Cas. 67, 15 B.C.R. 315, reversed, Fitzpatrick, C.J., and Davies, J., dissenting.

Vancouver, Victoria & Eastern Ry., etc., Co. v. McDonald, 12 Can. Ry. Cas. 74, 44 Can. S.C.R. 65.

MARCONI WIRELESS.

See Telegraphs.

MASTER AND SERVANT.

See Employees.

Annotation.

Applicability of rule of res ipsa loquitur. 23 Can. Ry. Cas. 305.

MEAL TICKETS.

Contract of railway company with restaurant keeper for the supply of meals to employees, see Contracts.

MECHANICS' LIEN.

Mechanics' Lien Act—Dominion railway.

A lien under the Mechanics' and Wage Earners' Lien Act, R.S.O. 1897, c. 153, cannot be enforced against the railway of a company incorporated under a Dominion Act, and declared thereby to be a company incorporated for the general advantage of Canada. Decision of a Divisional Court, 13 O.L.R. 169, 6 Can. Ry. Cas. 300, affirmed.

Crawford v. Tilden et al., 6 Can. Ry. Cas. 437, 14 O.L.R. 572.

Mechanics' and Wage-Earners' Lien Act—Not enforceable against Dominion railway—Constitutional law.

A lien under the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1914, c. 140, cannot be enforced against a railway company incorporated under Dominion Act. [Crawford v. Tilden, 6 Can. Ry. Cas. 437, 14 O.L.R. 572, followed; Johnson & Carey Co. v. Can. Northern Ry. Co., 43 O.L.R. 10, affirmed on this point.] Where the lien cannot be enforced against the property of the company, no valid lien, which justifies the plaintiff in proceeding to judgment under s. 49 of the Act, can be established. [Johnson & Carey Co. v. Can. Northern Ry. Co., 43 O.L.R. 10, reversed.]

Johnson & Carey Co., v. Can. Northern Ry. Co., 24 Can. Ry. Cas. 294, 44 O.L.R. 533, 47 D.L.R. 75.

MEDICAL ATTENTION.

See Health Protection.

Compensation for medical attention, see Damages.

Duty of railway company as to persons injured, see Employees.

Authority of railway official to engage physician to render services to person injured.

Where a person has been injured by a railway accident, the highest official of the company on the ground has authority to bind the company for the cost of such medical services and attendance as may be immediately requisite. And where the facts were reported by such official to the company immediately, and no disavowal or counter order was sent to the physician engaged until seven weeks later, the company is responsible to the physician engaged for the value of his medical attendance and services during this period.

Gaudreau v. Canada Atlantic Ry. Co., 24 Que S.C. 337.

MINES AND MINERALS.

See Title to Lands.

Compensation for, see Expropriation.

MONEY ORDERS.

Claims for loss of money, see Claims.

Authority of agents to receive money orders, see Agents.

MORTGAGES.

See Bonds and Securities.

MOTIONS.

See Pleading and Practice.

MUNICIPAL OWNERSHIP.

Municipal ownership of street railways, see Street Railways.

See Limitation of Actions.

MUNICIPALITY.

As party interested in protection of highway crossings, see Highway Crossings.

Municipal assent, see Street Railways; Highway Crossings.

Actions for negligent construction or operation of municipally owned street railway, see Limitation of Actions.

NAVIGATION.

Obstruction of navigation, see Waters.

NEGLIGENCE.

A. In General.
B. Contributory Negligence.
C. Ultimate Negligence.
D. Injuries to Children.
E. Injuries to Husband or Wife.
F. Lord Campbell's Act.

Injuries while visiting railway yard, see Warehouse, Yards and Workshops.

Lex Loci Actus as affecting liability for tort, see Conflict of Laws.

Injuries occuring on Government railways, see Government Railways.

Injuries occasioned by reason of defective station grounds, see Stations.

Accidents occurring on bridges, see Bridges.

As creating nuisance, see Nuisance.

Injuries caused by fires, see Fires.

Injuries on street railways, see also Street Railways.

Injuries to employees, see Employees.

Injuries at crossings, see Crossing Injuries.

Damage occasioned by reason of construction of railway, see Expropriation.

Injuries to passengers, see Carriers of Passengers.

Loss or damage to goods, see Carriers of Goods.

Injuries to live stock, see Carriage of Live Stock; Fences and Cattle Guards.

Injuries or damage resulting from the accumulation of weeds, see Weeds.

Negligence of railway constables in making false arrest, see False Arrest.

Injuries caused by negligence of employee, see Limitation of Liability; Carriers of Passengers.

Annotations.

Contributory negligence at highways. 1 Can. Ry. Cas. 350.

Negligence and contributory negligence. 1 Can. Ry. Cas. 405, 4 Can. Ry. Cas. 225.

Lord Campbell's Act; Measure and apportionment of damages. 2 Can. Ry. Cas. 18.

Negligence causing the allurement of children to places of danger. 2 Can. Ry. Cas. 250.

Negligence on train of another company. 2 Can. Ry. Cas. 259.

Review of cases of negligence. 3 Can. Ry. Cas. 316.

Injuries to children in consequence of failure to fence railway premises. 4 Can. Ry. Cas. 11.

Injuries to children trespassing on railway premises. 9 Can. Ry. Cas. 360.

Ultimate negligence. 12 Can. Ry. Cas. 104. 40 D.L.R. 103.

Licensees and trespassers. 9 Can. Ry. Cas. 360; 12 Can. Ry. Cas. 245.

Parents claim under Fatal Accidents Law, Lord Campbell's Act. 15 D.L.R. 689.

Negligence or wilful act or omission. 35 D.L.R. 481.

Incompetent employee. 18 Can. Ry. Cas. 286.

Breach of statutory duty. 18 Can. Ry. Cas. 284.

Defective system and premises. 18 Can. Ry. Cas. 285.

Common employment. 18 Can. Ry. Cas. 285.

Specific and general allegations of negligence. 19 Can. Ry. Cas. 213.

Nuisance authorized by municipal by-law authorized by provincial statute. 19 Can. Ry. Cas. 239.

Injuries caused by interference with dangerous equipment. 19 Can. Ry. Cas. 245.

Ultimate negligence. 21 Can. Ry. Cas. 288.

Animals at large. 21 Can. Ry. Cas. 135.

Doctrine of res ipsa loquitur. 23 Can. Ry. Cas. 305.

A. In General.

JOINT OPERATION OF RAILWAY—RESPONSIBILITY FOR ACT OF JOINT EMPLOYEE—TRAFFIC AGREEMENT.

Where by the negligence of the train despatcher engaged by the G.T.R. Co., and under its control and directions, injuries were caused by a collision of two I.C.R. trains on the single track of a portion of the G.T. Ry. operated under the joint traffic agreement, ratified by the Act, 62 & 63 Vict. c. 5 (D.), the company is liable, notwithstanding that the train despatcher was declared by the agreement to be in the joint employ of the Crown and the railway company, and the Crown was thereby obliged to pay a portion of his salary. Judgment appealed from, affirmed.

Grand Trunk Ry. Co. v. Huard, 36 Can. S.C.R. 655.

LOSS OF BAGGAGE—NOTICE OF CONDITIONS.

[See note of this case under Limitation of Liability (C.).]

Bate v. Can. Pac. Ry. (1889), 1 Cam. S.C. Cas. 10, 18 Can. S.C.R. 697.

Liability of joint owners—Joint ownership of the Crown and a private company.

When the trains of two railways run over a section of the line of one of them, under an agreement which provides, inter alia, that the servants employed on the section in common use, shall be considered, and shall be, in fact, in the joint employ of the owners of the two railways, the latter are both jointly and severally liable for the consequences of a collision of two trains belonging to one of them, caused by the fault or neglect of a servant so employed. If, therefore, one of the railways is the property of the Crown, and the other of a private company, the latter is liable in damages as sole tortfeasor. [Atkinson v. Grand Trunk Ry. Co., 27 Que. S.C. 227, affirmed.]

Atkinson v. Grand Trunk Ry. Co., 36 Can. S.C.R. 655.

Statutory rules for running of trains—Observance by employees.

The provisions of the Railway Act for the protection and safety of the public are not supposed to provide for all possible contingencies and the fact that mechanics and officials in charge of trains have observed them does not suffice to relieve their employers from liability in case of accident. They are also bound to act with ordinary prudence; for example, trains should not be run at the maximum speed prescribed in places where there is danger in doing so.

Grand Trunk Ry. Co. v. Fecteau, 20 Que. K.B. 131.

Person killed between tracks and platform—Trespasser or licensee —New trial.

Carruthers v. Toronto & York Radial Ry. Co., 19 O.W.R. 983, 3 O.W.N 14.

Unlocked turntable—Infant.

Can. Pac. Ry. v. Coley, 3 E.L.R. 126 (Que.).

Walking on track in a stormy day—Liability of railway for death.

Grand Trunk Ry. Co. v. Parent, 7 D.L.R. 810.

Breach of statutory duty—Right of action.

Where a statutory duty is imposed, neglect of the duty gives the party damnified thereby a right of action, unless the person damnified is excluded from a particular class of persons who are alone intended to be benefited by the statute.

Winterburn v. Edmonton, Yukon & Pac. Ry. Co., 9 Can. Ry. Cas. 7, 1 Alta. L.R. 298.

Proximate cause—Injury caused by a thing—Fault of the owner.

In an action of damages for an injury caused by a thing, it is incumbent upon the plaintiff to establish affirmatively, not only the damage claimed, but also fault, negligence or imprudence on the part of the defendant, as owner or person having the care of the thing. Such ownership or care has not, in law, the effect of placing upon the defendant the burden of proving negatively the absence of fault on his part, or that of his servants.

Can. Pac. Ry. Co. v. Dionne, 10 Can. Ry. Cas. 57, 18 Que. K.B. 385.

[Relied on in Shawinigan Carbide Co. v. Doucet, 42 Can. S.C.R. 306, 18 Que. K.B. 288.]

Injury to trespasser—Excessive speed—Proximate cause.

A railway company may be liable for injury to a trespasser upon the right-of-way in breach of s. 408 of the Railway Act, 1906, if their engine driver neglected to apply the emergency brakes at the time he became aware of the danger of accident when he first noticed deceased attempting to cross the tracks.

[Hinrich v. Can. Pac. Ry. Co., 12 D.L.R. 367, 15 Can. Ry. Cas. 393, reversed: Judgment of B.C. Court of Appeal (not reported), affirmed.]

Can. Pac. Ry. Co. v. Hinrich, 16 Can. Ry. Cas. 303, 48 Can. S.C.R. 557, 15 D.L.R. 472.

Locomotive engineer—Duties as to precaution—Collision.

A locomotive engineer or other railway employee having control of the tracks, after becoming aware of the presence of any person dangerously near the track, however imprudently, is bound to use ordinary care to avoid injury to him when he knows that the danger of collision is imminent; mere knowledge that the danger is possible is not enough, there must be knowledge that a collision was likely to occur. [Mills v. Armstrong, 13 A.C. 1; Purdy v. G.T. Ry. Co. (1904), (Ont.), unreported; Jones v. Toronto & York Radial Co., 23 O.L.R. 331, 12 Can. Ry. Cas. 436; Weir v. C.P.R., 16 A.R. (Ont.), 104, referred to.]

London v. Grand Trunk Ry. Co.: Summers v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 174, 32 O.L.R. 642, 20 D.L.R. 846.

Verdict of jury—Direct act or omission causing injury—Presumption.

A finding by the jury in a negligence action against an electric railway company that the defendants were guilty of negligence consisting of the motorman being incompetent of running the car will not in itself be sufficient to render the company liable unless it is proved in evidence and found by the jury that the incompetence of the motorman resulted in some definite act or omission which was the direct cause of the injury. Where the only finding of the jury on the question of negligence in a collision case against an electric railway company was, that the defendants were negligent in appointing an incompetent motorman, it is to be assumed that the jury found in defendants' favour on the other questions raised in the case, such as the speed of the car, the failure to sound the gong, the sufficiency of the brakes and the alleged operation of the car on the wrong track of a double track system.

Mehner v. Winnipeg Elec. Ry. Co., 18 Can. Ry. Cas. 179, 21 D.L.R. 786.

Highway crossing—Dangerous subway.

A railway company charged with the duty under the Railway Act, 1906, s. 241, to maintain safe structures by which any highway is carried over or under any railway, will be liable for injuries resulting from the dangerous condition of a subway constructed by the railway company at the expense of a municipality.

Burrows v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 183, 23 D.L.R. 173.

Operation—Uncovered switch rods.

In the absence of any regulation by statutory authority requiring a railway company to cover the switch rods of a hand switch on the railway, it is not open to a jury to find that the failure to do so constitutes negligence. [Zuvelt v. Can. Pac. Ry. Co., 23 O.L.R. 602, 12 Can. Ry. Cas. 420, referred to.]

Mallory v. Winnipeg Joint Terminals, 18 Can. Ry. Cas. 277, 22 D.L.R. 448.

[Affirmed in 29 D.L.R. 20, 20 Can. Ry. Cas. 382, followed in Nelson v. Can. Pac. Ry. Co., 35 D.L.R. 318.

Operation—Switch rods uncovered—Findings of jury.

A finding by a jury of negligence in permitting switch rods to be uncovered will not be upheld when the evidence is that the practice universally followed on this continent was observed, and no evidence was given that covering was practicable. [Mallory v. Winnipeg Joint Terminals, 22 D.L.R. 448, 25 Man. L.R. 456, 18 Can. Ry. Cas. 277, affirmed.]

Mallory v. Winnipeg Joint Terminals, 20 Can. Ry. Cas. 382, 53 Can. S.C.R. 323, 29 D.L.R. 20.

[Discussed in Herman v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 416, 44 D.L.R. 343; distinguished in Nelson v. Can. Pac. Ry. Co., 55 Can. S.C.R. 626, 39 D.L.R. 760, 25 Can. Ry. Cas.]

Licensee—Damages—Laying water pipes.

In obtaining permission from the Board to lay a water main under the railway yard of the respondent, the applicant, who is a mere licensee, should assume responsibility for all damages that may occur, arising from any negligence on the part of its employees or those of the respondent, connected with the laying, renewing or repairing of its water pipes, through the respondent's property.

Winnipeg v. Can. Pac. Ry. Co. (Greater Winnipeg Water District Case), 23 Can. Ry. Cas. 75.

Crossing track in front of electric car—Reasonable care—Circumstances.

A person about to cross a track in front of an electric car running on rails must exercise reasonable care. What is reasonable care depends on the circumstances of each case and is a matter to be determined by the jury.

Orth v. Hamilton, Grimsby & Beamsville Elec. Ry. Co., 23 Can. Ry. Cas. 344, 43 O.L.R. 137, 43 D.L.R. 544.

Negligence of employees of two different companies—Joint and several liability.

The jury having found on sufficient evidence that an accident resulted from the common negligence of the employees of two different companies, such companies are in law jointly and severally liable for the damage. [Jeannotte v. Couillard (1894), 3 Que. Q.B. 461, distinguished.]

Grand Trunk Ry. Co. and Montreal v. McDonald, 23 Can. Ry. Cas. 361, 57 Can. S.C.R. 268, 44 D.L.R. 189.

Street car approaching railway crossing—Negligence of motorman—Collision with work train—Injury to passenger.

An electric railway company which by the inexcusable negligence and breach of rules of one of its motormen, places the passengers of a car in a position of great peril from imminent danger of collision with a railway work train, is liable in damages for the death of one of the passengers who becoming terrified jumps or falls off the car and is killed by the train. The trainmen being suddenly faced with a new situation of danger which gave them little, if any time to think and act, even if they could have done anything more than was done to avoid the accident are not required to possess the presence of mind which would enable them to do the best thing possible. A work train is not required to be equipped with air brakes.

Bartlett v. Winnipeg Elec. Ry. Co. and Can. Northern Ry. Co., 23 Can. Ry. Cas. 381, 29 Man. L.R. 91, 43 D.L.R. 326.

RAILWAY YARD—SWITCH STAND TOO NEAR TO TRACK—OPERATION.

In an action by a freight conductor in the employ of the defendant company for damages for injuries sustained while making a flying or drop switch, the jury found that there was no negligence on the part of the plaintiff, but that the defendants were guilty of negligence in building the switch which the plaintiff was operating at the time of his injury. Haultain, C.J.S., on appeal held that in view of the evidence, which was conflicting, the verdict could not be said to be perverse and should not be disturbed. Newlands, J.A., thought that, the jury having held that the defendants were guilty of negligence, in having the switch too near the track, not for all purposes but for the purpose of performing the operation in which the plaintiff was injured and that operation being a proper one to be performed, at the time and having been properly performed, the verdict should not be disturbed. Lamont and Elwood, JJ.A., held that, according to the evidence, the cause of the accident was the cutting away of the engine from the cars at a point too close to the switch and whoever was responsible for this was guilty of the negligence which caused the accident. Also, the defendants could not be said to be negligent in placing the switchstand when it was done under the advice of their railway experts, with whose opinions nearly all the experts at the trial agreed, juries could not be allowed to set up a standard which should dictate the practice of railway companies in the conduct of their business and the verdict should be set aside. [Nelson v. C.P.R. Co. (1917), 39 D.L.R. 760, 55 Can. S.C.R. 626, [1918] 2 W.W.R. 177; Mallory v. Winnipeg Joint Terminals (1916), 29 D.L.R. 20, 53 Can. S.C.R. 323, 20 Can. Ry. Cas. 382, discussed.]

Herman v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 416, 44 D.L.R. 343.

TRAIN RUN JOINTLY BY TWO COMPANIES—NEGLIGENCE OF ENGINEER—CONTROL OF SERVANT AT TIME OF ACCIDENT.

An agreement was entered into between the Central Vermont Ry. Co., which was operating a line between St. Albans, U.S.A., and St. Johns, P.Q., and the Grand Trunk Ry. Co., which was operating a line between St. Johns and Montreal whereby they were to run a train jointly between St. Albans and Montreal. The same train crew was to remain in charge during the trip, but each company was to pay the crew while running over its own line and each company was to assume all liability for loss or damages sustained in operating trains on its own line. The Court held that the Central Vermont Co. could not be held liable for damages for injuries caused by the negligence of the engineer while running on the Grand Trunk Co.'s line between St. Johns and Montreal. As the engineer was at the time of the accident under the control of, and paid by the Grand Trunk Co., it alone was liable.

Central Vermont, Ry. Co. v. Bain; Grand Trunk Ry. Co. v. Bain, 48 D.L.R. 199.

RAILWAY RULES—SWITCH STAND AND FIXED SIGNAL.

A switch stand is not a fixed signal within the meaning of the railway regulations and is governed by different rules; an engineer is not guilty of negligence in passing a red light on a switch stand, although compelled by the railway rules to stop where such is shewn as a signal.

Walker v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 390, 11 S.L.R. 192, 40 D.L.R. 547.

[Affirmed in 23 Can. Ry. Cas. 399.]

RAILWAY RULES—SWITCH STAND AND FIXED SIGNALS—OPERATION.

A switch stand is not a fixed signal within the meaning of the railway rules and regulations and is governed by different rules; an engineer is not guilty of negligence in passing a red light on a switch stand although compelled by the railway rules to stop where such light is shewn as a fixed signal. Per Anglin, J.:—The words "must know" in rule 401 do not import knowledge acquired by use of the engineer's own eyes to the exclusion of every other source of knowledge however reliable.

Can. Pac. Ry. Co. v. Walker, 23 Can. Ry. Cas. 399, 57 Can. S.C.R. 493, 43 D.L.R. 698.

Operation—Coal companies—Defective appliances.

A coal company which operates wholly on its own lands in connection with its mines a railway and on it carries passengers and freight may properly be found negligent in operating its cars with a "link and pin" coupling long after the general introduction of safer and better methods, although the company may not be subject to the Railway Act, 1906, s. 264. [Fralick v. G.T.R., 43 Can. S.C.R. 494, 10 Can. Ry. Cas. 373; Stone v. C.P.R., 47 Can. S.C.R. 634, 13 D.L.R. 93, referred to.]

Cook v. Canadian Collieries, 21 D.L.R. 215.

Brakes on cars released by children.

A company which, by its employees, without the authority of the owners of a railway, moves cars placed on a track at the top of a grade for the purpose of being unloaded further down the grade, and merely hand brakes them, without securely air braking and blocking them, assumes the risk of the cars' being started down the grade by mischievous boys releasing the brakes, and is responsible for all resulting damage to life or property.

Geall v. Dominion Creosoting Co.; Salter v. Dominion Creosoting Co., 39 D.L.R. 242.

Negligence—Bumping of car.

Failure to detect bumping by a railway car, which later overturned, does not of itself imply negligence.

Pyne v. Can. Pac. Ry. Co., 37 D.L.R. 751.

Duty of engineer to look and warn—Speed—Joint operation.

An engineer in charge of a locomotive is not obliged constantly to look forward to see if there is anyone or anything on the track, and he may occupy himself, while the train is in motion, in making repairs to his engine if he has given the warnings required by law at crossings and other places. Where there is no statutory regulation as to the speed of a railway train it cannot be taken into consideration to determine the cause of an accident. A railway company which grants to another company the right of running over its line and its joint operation is liable for the consequences of accidents which occur on it.

Collin v. G.T.R. Co., 48 Que. S.C. 106.

Engine without lights.

A railway company which permits the public to habitually use its track as a short cut, knowing it to be so used, is guilty of negligence, if without giving the public warning it runs an engine, without lights and with a defective whistle, over the track on an extra trip, on a dark and windy night. [Lowery v. Walker, [1911] A.C. 10, followed.]

Herdman v. Maritime Coal, Ry. & Power Co. (N.S.), 40 D.L.R. 96, annotated.

B. Contributory Negligence.

WALKING BETWEEN RAILS—NONSUIT.

A railway car in which was a horse in charge of the plaintiff had on arrival at a station been shunted on to one of several lines of rails in the defendants' station yard. The plaintiff left the car and returned to it, crossing several tracks in doing so, and again left it, in broad daylight, to procure water for the horse. There was less snow between the rails than upon the space between the tracks, and the plaintiff, according to his own evidence, having to walk some little distance along the railway lines, chose to walk between the rails to avoid getting his feet wet, and while so walking was overtaken by an engine and tender slowly moving, reversed without the necessary warning, and was knocked down and injured:—Held, affirming the nonsuit at the trial, that even if the defendants were guilty of negligence in not giving notice that the engine and tender were in motion, the accident was caused not by reason of their negligence but by the plaintiff's own negligence in choosing to walk in a place of extreme danger, instead of a place of perfect safety which was open and known to him. [Callendar v. Carleton Iron Co. (1893), 9 Times L.R. 646, and (1894) 10 Times L.R. 366, followed.]

Phillips v. Grand Trunk Ry., 1 Can. Ry. Cas. 399, 1 O.L.R. 28.

[Distinguished in Tinsley v. Toronto Ry. Co., 15 O.L.R. 438; referred to in London & Western Trusts v. Lake Erie, etc., Ry. Co., 12 O.L.R. 28; Preston v. Toronto Ry. Co., 13 O.L.R. 369.]

DEFENCE TO ACTION—BREACH OF STATUTORY DUTY.

Contributory negligence may be a defence to an action founded on a breach of statutory duty.

Deyo v. Kingston & Pembroke Ry. Co., 4 Can. Ry. Cas. 42, 8 O.L.R. 588.

[Distinguished in Muma v. Can. Pac. Ry. Co., 14 O.L.R. 147, 6 Can. Ry. Cas. 444; referred to in Street v. Can. Pac. Ry. Co., 18 Man. L.R. 342.]

OBSTRUCTION OF VIEW—REASONABLE CARE AFTER PASSING.

A tool house obstructing the view of a railway track for a considerable distance does not exonerate the injured from contributory negligence, where, after passing the obstruction, he could, by the exercise of reasonable care, have looked in the direction from which the train was coming and thus avoid the injury.

Andreas v. Can. Pac. Ry. Co., 5 Can. Ry. Cas. 440, 2 W.L.R. 249.

[Affirmed in 5 Can. Ry. Cas. 450, 37 Can. S.C.R. 1.]

WHEN CONTRIBUTORY NEGLIGENCE A DEFENCE.

In order to disentitle a plaintiff to recover upon the ground of contributory negligence it must be found distinctly that the accident was attributable to his failure in the duty imposed upon him. [Rowan v. Toronto Street Ry. Co., 29 Can. S.C.R. 718, referred to.]

Dart v. Toronto Ry. Co. (No. 2), 8 D.L.R. 121, 4 O.W.N. 315.

INJURY TO PERSON ON TRACK—LICENSEE.

A railway company is not answerable for the death of a person who, in possession of his faculties of seeing and hearing, walks along a railway track without looking for an approaching train which he could have seen by the exercise of the most ordinary care. A licensee who walks along a railway track assumes all risk of injury from being struck by trains.

Hinrich v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 393, 12 D.L.R. 367.

CROSSINGS—RIDING WITH ANOTHER.

A person being given a gratuitous ride on a wagon and sitting beside the driver is under no duty on approaching the crossing of an electric railway to use extraordinary care as to the approach of cars; and on his being killed in a collision with a car not seen by either of them, an action on behalf of his family against the electric railway for damages for his death is not defeated by a finding that the deceased was negligent in not taking "extraordinary precautions to see that the road was clear," in view of further findings of excessive speed by the railway and that the railway motorman could have stopped the car and have avoided the accident had it not been for the defective brakes which the railway negligently maintained as part of the car equipment. [Brenner v. Toronto Ry. Co., 6 Can. Ry. Cas. 261, 13 O.L.R. 423, on appeal 7 Can. Ry. Cas. 210, 15 O.L.R. 195, and 8 Can. Ry. Cas. 108, 40 Can. S.C.R. 540, considered; Pike v. London General Omnibus Co., 8 Times L.R. 164; Dublin, etc., Ry. Co. v. Slattery, 3 A.C. 1155; and Grand Trunk Ry. Co. v. McAlpine, 13 D.L.R. 618, [1913] A.C. 838; Scott v. Dublin, etc., Ry. Co., 11 Ir. C.L. 377; and Herron v. Toronto Ry. Co., 11 D.L.R. 697, 15 Can. Ry. Cas. 373, referred to.]

Loach v. British Columbia Electric Ry. Co., 17 Can. Ry. Cas. 21, 16 D.L.R. 245.

[Affirmed in 20 Can. Ry. Cas. 309, 23 D.L.R. 4; followed in Ontario-Hughes-Owens v. Ottawa Elec. Ry. Co., 23 Can. Ry. Cas. 252.

EFFICIENT CAUSE—DEFENSE.

In an action for negligence causing death in which a defence of contributory negligence is raised, if a negligent act on the part of the deceased is established which was the efficient cause of the fatal injury the question of the deceased's view of the possibilities of his act is immaterial, and whether the possibility of injury was or was not foreseen by him all the consequences which are the direct and natural outcome of his negligent act are attributable to same in bar of the action. [Lake Erie & Western Ry. Co. v. Craig, 73 Fed. Rep. 642, criticized.] Negligence or want of ordinary care or caution on the plaintiff's part as constituting contributory negligence may disentitle him to recover where it is such that otherwise the injury could not have happened. [Smith v. London & S. W. Ry. Co., L.R. 6 C.P. 14, referred to; and see Jones v. Can. Pac. Ry. Co., 30 O.L.R. 331, 13 D.L.R. 900, 16 Can. Ry. Cas. 305, and Grand Trunk Ry. Co. v. McAlpine, 13 D.L.R. 618, [1913] A.C. 838, 16 Can. Ry. Cas. 186.]

Cook v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 150, 32 O.L.R. 108, 19 D.L.R. 600.

ACCIDENT AT CROSSING—RIDING WITH ANOTHER.

Contributory negligence of the person who had hired the vehicle and was himself driving it is not attributable to the passenger who is riding with him in the vehicle and who has no control over same, in answer to the latter's action for damages against the railway, under the Fatal Accidents Act (Ont.), where the passenger jumped from the vehicle when a collision seemed imminent and was killed and the accident was due to the company's neglect of its statutory duty under s. 276 of the Railway Act, 1906, to give warning of the approach of the train moving reversely over a level crossing.

Mitchell v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 188, 22 D.L.R. 804.

INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE—ULTIMATE NEGLIGENCE.

Even if the deceased who was killed while crossing the railway was guilty of contributory negligence in not looking for approaching trains damages will be awarded against the railway if there was such ultimate negligence on the part of its employees operating the train that the collision might have been avoided after they became aware of the danger had the watchman stationed at the rear of the train moving reversely shouted a warning (on seeing the horses and load of lumber), to the driver walking on the far side and not visible to him, instead of jumping off and attempting only to warn the other train hands. [Jones v. Can. Pac. Ry. Co., 30 O.L.R. 331, 13 D.L.R. 900, 16 Can. Ry. Cas. 305; Wakelin v. London & S. W. Ry. Co., 12 App. Cas. 41, referred to.]

O'Callaghan v. Great Northern Ry. Co., 18 Can. Ry. Cas. 156, 20 D.L.R. 145.

COMMON FAULT—NEGLIGENCE OF PLAINTIFF SOLE EFFECTIVE CAUSE.

By the law which prevails in the Province of Quebec in actions for negligence where both parties have been in fault, damages are awarded proportionate to the degree in which the respective parties are to blame; where, however, the sole effective cause of an accident is the plaintiff's own negligence he is not entitled to recover any damages.

Can. Pac. Ry. Co. v. Frechette, 18 Can. Ry. Cas. 251, [1915] A.C. 871, 22 D.L.R. 356.

CONTINUING NEGLIGENCE OF DEFENDANT—CAUSE OF INJURY.

The principle that the contributory negligence of a plaintiff will not disentitle him to recover damages if the defendant, by the exercise of care, might have avoided the result of that negligence, applies where the defendant, although not committing any negligent act subsequent to the plaintiff's negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the plaintiff's negligence. [Loach v. British Columbia Elec. Ry. Co., 16 D.L.R. 245, 19 B.C.R. 177, 17 Can. Ry. Cas. 21 affirmed; Judgment of Anglin, J., in Brenner v. Toronto Ry. Co., 13 O.L.R. 423, 6 Can. Ry. Cas. 261, approved.]

British Columbia Elec. Ry. Co. v. Loach, 20 Can. Ry. Cas. 309, [1916] 1 A.C. 719, 23 D.L.R. 4.

[Considered in Tait v. British Columbia Elec. Ry. Co., 20 Can. Ry. Cas. 408; followed in Columbia Bitulithic v. British Columbia Elec. Ry. Co., 21 Can. Ry. Cas. 243, 37 D.L.R. 64; considered in Smith v. Regina, 21 Can. Ry. Cas. 270, 34 D.L.R. 238; applied in Critchley v. Can. Northern Ry. Co., 21 Can. Ry. Cas. 277, 34 Alta. L.R. 245.

C. Ultimate Negligence.

TIME—ANTICIPATED DANGER.

In an action for negligence against a railway company the trial Judge should confine all questions of ultimate negligence to the time from which the defendants or their servants could have anticipated the danger.

McEachen v. Grand Trunk Ry. Co., 2 D.L.R. 588, 3 O.W.N. 628.

CONCURRENT CAUSES.

Where an injury is the direct immediate result of two operating causes, viz., the negligence of the plaintiff and that of the defendant, the plaintiff cannot recover damages.

Long v. Toronto Ry. Co., 10 D.L.R. 300, 15 Can. Ry. Cas. 35.

CONCURRENT NEGLIGENCE.

In an action of negligence, a plaintiff, whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendants' earlier or concurrent negligence, the mishap, in which the injury was received, would not have occurred. [Herron v. Toronto Ry. Co. (No. 1), 6 D.L.R. 215, reversed.]

Herron v. Toronto Ry. Co., 15 Can. Ry. Cas. 373, 11 D.L.R. 697, 28 O.L.R. 59.

ULTIMATE NEGLIGENCE.

Ultimate negligence is constituted by a repetition or continuance of the primary negligent act coupled with a present ability to discontinue or avoid it, and a failure to do so. [B.C. Elec. Ry. Co. v. Loach, 23 D.L.R. 4, [1916] 1 A.C. 719, 20 Can. Ry. Cas. 309, considered.]

Smith v. Regina, 21 Can. Ry. Cas. 270, 10 Sask. L.R. 72, 34 D.L.R. 238.

[Affirmed in 42 D.L.R. 647.]

INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

In an action for damages for injuries sustained, where contributory negligence is alleged, a new trial will be ordered if the attention of the jury has not been directed to the question whether but for the negligence of the defendant the accident might have been avoided notwithstanding the negligence of the plaintiff, and their finding is not conclusive on this point. [Loach v. British Columbia Elec. Ry. Co., 23 D.L.R. 4, [1916] 1 A.C. 719, 20 Can. Ry. Cas. 369, followed.]

Ontario—Hughes-Owens v. Ottawa Elec. Ry. Co., 23 Can. Ry. Cas. 252, 40 O.L.R. 614, 39 D.L.R. 49.

D. Injuries to Children.

FAILURE TO FENCE—CONTRIBUTORY NEGLIGENCE—INFANT.

[See note of this case under Fences and Cattle Guards (A).]

Potvin v. Can. Pac. Ry. Co., 4 Can. Ry. Cas. 8.

[Tabb v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 1, 8 O.L.R. 203, followed.]

FAILURE TO FENCE—INFANTS—CONTRIBUTORY NEGLIGENCE.

[See note of this case under Fences and Cattle Guards (A).]

Tabb v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 1, 8 O.L.R. 203.

[Followed in Potvin v. Can. Pac. Ry. Co., 4 Can. Ry. Cas. 8.]

UNFENCED PREMISES—TRESPASSER—INFANT.

[See note of this case under Fences and Cattle Guards (A).]

Newell v. Can. Pac. Ry. Co., 5 Can. Ry. Cas. 372, 12 O.L.R. 21.

[Referred to in Gloster v. Toronto Elec. Light Co., 12 O.L.R. 413.]

ALLOWING CHILDREN ACCESS TO MACHINERY.

A railway company that leaves a mechanical contrivance (e.g., a turntable) in an open place to which children of tender years are allowed access, is guilty of negligence and liable for the consequence of their unskilful handling of it. [29 Que. S.C. 282, 8 Can. Ry. Cas. 269, affirmed.]

Can. Pac. Ry. Co. v. Coley, 8 Can. Ry. Cas. 274, 16 Que. K.B. 404.

[Approved in Roullier v. Magog, 37 Que. S.C. 249; referred to in Normand v. Hull Elec. Co. 35 Que. S.C. 340.]

INJURIES TO MINORS—LIABILITY TO MINORS—"STEALING RIDE" ON COW-CATCHER—EVIDENCE—NONSUIT.

Wallace v. Can. Pac. Ry. Co., 6 D.L.R. 864, 4 O.W.N. 133.

E. Injuries to Husband or Wife.

ACTION BY HUSBAND FOR INJURIES TO WIFE—PARTIES.

The right of action for damages for personal injuries sustained by a married woman, commune en biens, belongs exclusively to her husband, and she cannot sue for the recovery of such damages in her own name, even with the authorization of her husband. Where it appears, upon the face of the writ of summons and statement of claim, that the plaintiff has no right of action, it is not necessary that objection should be taken by exception a la forme. Absolute want of legal right of action may be invoked by a defendant at any stage of a suit. Judgment of the Court of Queen's Bench, 3 Que. P.R. 1, overruled on the motifs, but affirmed in its result.

McFarran v. Montreal Park & Island Ry. Co., 30 Can. S.C.R. 410.

[Applied in Desrouard v. Fortier, 5 Que. P.R. 251; distinguished in De Councy v. David, 33 Que. S.C. 180; Girard v. Vincent, 21 Que. S.C. 207; followed in Sauriol v. Clermont, 10 Que. K.B. 304, 306.]

F. Lord Campbell's Act.

BENEFICIARIES—PARENTS.

The right of action given to the mother of a minor, killed by accident, by art. 1056 C.C. (Que.), is personal to her and does not come from the deceased nor from the succession.

Richard v. Can. Pac. Ry. Co., 13 Que. P.R. 268 (Sup. Ct.).

FATAL ACCIDENTS ACT—DEATH OF BENEFICIARY—SURVIVAL OF ACTION—EXECUTORS AND ADMINISTRATORS.

Upon the death before judgment of the sole beneficiary on whose behalf an administrator has brought an action under the Fatal Accidents Act, R.S.O. 1897, c. 166, the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative. Judgment of Ferguson, J., 32 O.R. 234, reversed.

McHugh v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 7, 2 O.L.R. 600.

[Approved in Hockley v. Grand Trunk Ry. Co., 7 O.L.R. 186; followed in Blayborough v. Brantford Gas Co., 18 O.L.R. 243.]

BENEFICIARIES—WIDOW OF SECOND MARRIAGE.

A woman claiming to be the widow of a man killed owing as alleged to the negligence of the defendants, brought an action against them with her two children as coplaintiffs to recover damages. Subsequently another action was brought by another woman also claiming to be the deceased's widow to recover damages for the benefit of herself and her child, her marriage having taken place after an alleged divorce of the first plaintiff:—Held, that only one action would lie under the Act: that that action would be for the benefit of the persons in fact entitled; and that, there being no doubt as to the right of the children in the first action, that action should be allowed to proceed and the rights of all parties worked out in it, the second action being stayed; the plaintiff in the second action to be represented by counsel at the trial if desired. Judgment of Falconbridge, C.J., reversed.

Morton v. Grand Trunk Ry. Co., 3 Can. Ry. Cas. 455, 8 O.L.R. 372.

[Referred to in Reid v. Goold, 13 O.L.R. 51.]

BENEFICIARIES—RIGHT OF MOTHER WHILE FATHER LIVING.

The mother of the deceased is a person for whose benefit an action can be brought under the Fatal Accidents Act, although the father is living.

Renwick v. Galt, Preston & Hespeler Street Ry. Co., 5 Can. Ry. Cas. 376, 12 O.L.R. 35.

BENEFICIARIES—RELEASE.

In an action brought under the Families Compensation Act, R.S.B.C. 1911, c. 82, by the widow and children of a deceased person, for damages for injuries resulting in the death of such person through the negligence of the defendants, where the defendants' statement of defence sets up that the deceased during his lifetime accepted compensation from them in full satisfaction of the injuries and signed an agreement releasing the defendants from all present or future liability to himself or to his heirs, the plaintiffs may, without bringing in the personal representative of the deceased as a party, attack the validity of such release on the ground that it was obtained by fraud. [Trawford v. British Columbia Elec. Ry. Co., 8 D.L.R. 1026, reversed].

Trawford v. British Columbia Elec. Ry. Co., 15 Can. Ry. Cas. 39, 9 D.L.R. 817.

[Affirmed in 18 Can. Ry. Cas. 193.]

DEATH OF PARENT—ACTION BY CHILDREN—EVIDENCE OF PROBABLE DURATION OF LIFE—DAMAGES—PROBABLE ACCUMULATIONS.

That the premature death of an aged parent caused an acceleration of the enjoyment of his estate by his children is not such a benefit as will prevent them recovering under the Fatal Injuries Act, 1 Geo. V. c. 33, R.S.O. 1914, c. 151, where there is a reasonable probability that had the parent lived he would have saved all of his income for the benefit of his children. The fact that the deceased was an unusually healthy man, although 82 years old, may be considered in awarding damages under the Act, and a finding of a probable greater duration of life than that of the average man may be based thereon. [Rowley v. London & N.W. Ry. Co., L.R. 8 Ex. 221, 226, followed.] The measure of damages under the Fatal Injuries Act, where it appears that the deceased would have saved the annual income from his property for the remainder of his life for the benefit of his children, is not the full amount thereof for the probable duration of his life, but the present value of the annual payments thereof capitalized at five per cent.

Goodwin v. Michigan Central Ry. Co., 16 Can. Ry. Cas. 51, 29 O.L.R. 422, 14 D.L.R. 411.

RELEASE BY DECEASED—REPUDIATION FOR FRAUD.

Where a release by the deceased is relied upon by the defendants in an action for damages by his dependents, under the provisions of the Families Compensation Act, R.S.B.C. 1911, c. 82, the plaintiffs may take exception to the release on the ground that it was fraudulently procured, although the personal representative of the deceased has not been made a party to the action. Such an exception may be entertained by a Court of equity notwithstanding that the money paid as consideration for the release is neither tendered back to the defendants nor brought into Court to abide the issue of the action. [Lee v. Lancashire & Yorkshire Ry. Co., 6 Ch. App. 527; Read v. Great Eastern Ry. Co., L.R. 3 Q.B. 555; Robinson v. Can. Pac. Ry. Co., [1892] A.C. 481; Rideal v. Great Western Ry. Co., 1 F. & F. 706; Clough v. London & N. W. Ry. Co., L.R. 7 Ex. 26; Seward v. The "Vera Cruz," 10 App. Cas. 59; Pym v. Great Northern Ry. Co., 2 B. & S. 759, 4 B. & S. 396; Williams v. Mersey Docks etc. (1905), 1 K. B. 804; Erdman v. Walkerton, 20 A.R. (Ont.) 444; Johnson v. Grand Trunk Ry. Co., 21 A.R. (Ont.) 408, referred to.]

British Columbia Elec. Ry. Co. v. Turner, 18 Can. Ry. Cas. 193, 49 Can. S.C.R. 470, 18 D.L.R. 430.

Action for benefit of family—Time for commencing proceedings—Limitation in special act.

The Families Compensation Act of British Columbia is, save in slight and immaterial respects, in the same terms as the Fatal Accidents Act, 1846 (known as Lord Campbell's Act), and provides that actions thereunder shall be commenced within twelve calender months of the death of the deceased. The appellants operated a tramway under powers conferred by an Act of the above province which by s. 60 provided a six months' period of limitation in respect of "actions for idemnity for any damage or injury sustained by reason of the tramway, or the operations of the company." One of the appellants' tramcars having knocked down and instantly killed a man, the respondent commenced an action against them under the Families Compensation Act for the benefit of the father and mother of the deceased. The action was commenced more than six months but less than twelve months after the accident and death. The cause of action under the Families Compensation Act was a different cause of action from that which the deceased person would have had if he had lived, and was not one to which the limitation section in the appellants' Act applied; and that the action was accordingly maintainable. [Markey v. Tolworth etc., Board, [1900] 2 Q.B. 454, disapproved.]

British Columbia Elec. Ry. Co. v. Gentile, 18 Can. Ry. Cas. 217, [1914] A.C. 1034, 18 D.L.R. 264.

Trespasser—Course of employment—Conforming to orders of superior.

A workman in the employ of a railway company as telegraph lineman was struck and killed by an engine of another company while walking along the latter company's tracks. He was at the time returning with his foreman and several fellow workmen after finishing the day's work, to the boarding car provided for them by their employers, in which they kept their tools, slept and took their meals. In an action under Lord Campbell's Act against two companies, a jury found against them both, but the trial Judge dismissed the case as against the company on whose tracks the deceased was walking, holding that as to them the deceased was a mere trespasser, and that they had been guilty of no negligence and of no breach of duty to him as such. Judgment was entered against deceased's employers on the ground that the deceased was at the time under the directions of the foreman who had left the boarding car with the party in the morning and had been in charge of the work on which he had been engaged during the day; and that the foreman had led the deceased, without warning, into a place of danger. Held, on appeal (reversing the judgment against the employers and dismissing the action) that the evidence did not support the findings of the jury; deceased's work for the day had come to an end and he was no longer under the direction of the foreman nor bound to conform to his orders; that there was no evidence of any order or direction by the foreman to proceed along the track; and that the injury was not sustained in the course of the deceased's employment. [Holmes v. Machay & Davis (1899), 2 Q.B. 319; Kelly v. Owners of the Ship Foam Queen (1910), B.W.C.C. 113; Walters v. Stanley Coal & Iron Co. (1910), 4 B.W.C.C. 89, followed.]

Sharpe v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 224. See 23 D.L.R. 487.

DEATH—REMEDIES FOR—QUE. C.C.

Art. 1056, C.C. (Que.) confers an independent and personal right of action upon the consort and ascendant and descendant relatives of a person who dies in consequence of an offence or quasi offence, not on the representatives (as Lord Campbell's Act does), but the offence or quasi offence must occur in Quebec.

Can. Pac. Ry. Co. v. Parent, 20 Can. Ry. Cas. 141, 33 D.L.R. 12, [1917] A.C. 195.

ACCIDENT—PROXIMATE CAUSE—TRAIN—OPERATION.

A verdict of a jury will not be set aside if they were justified in coming to the conclusion that the direct cause of the accident was in the arrangement and equipment of the train, and if there was evidence upon which they might properly find that the negligence of the company was in the system employed for the operation of the particular train.

Cheeseman v. Can. Pac. Ry. Co., 22 Can. Ry. Cas. 253, 40 D.L.R. 437.

[Reversed in 23 Can. Ry. Cas. 429, 57 Can. S.C.R. 439, 45 D.L.R. 257.

DEFECTIVE SYSTEM—BRAKES—FELLOW SERVANT—WORKMEN'S COMPENSATION.

The use of an auxiliary truck in substitution of a damaged car next to the engine, unconnected with the braking apparatus, thereby reducing the braking efficiency to one-half, is not of itself evidence of a defective system so as to charge the railway company with common-law liability for the death of the engineer when the cab of the engine was struck by it in the process of shunting; the accident having been occasioned by the negligence of a fellow servant in thus placing the truck, the liability of the company was limited to recovery under the Workmen's Compensation Act. [Cheeseman v. Can. Pac. Ry. Co., 45 N.B.R. 452, 22 Can. Ry. Cas. 253, 40 D.L.R. 437, reversed.]

Can. Pac. Ry. Co. v. Cheeseman, 23 Can. Ry. Cas. 429, 57 Can. S.C.R. 439, 45 D.L.R. 257.

NEW TRIAL.

See Pleading and Practice; Negligence; Street Railways; Employees; Crossing Injuries.

NOT GUILTY.

See Pleading and Practice.

NOTICE.

See Expropriation.

NOTICE OF. ACTION.

See Street Railways (J); Claims.

MUNICIPAL CORPORATION—SUFFICIENCY OF NOTICE.

Claiming damages against a municipality "for smashing plaintiff's automobile by car No. 46 on Cumberland St. North this morning" is a sufficient notice of action, if any be necessary.

Kuusisto v. Port Arthur, 20 Can. Ry. Cas. 335, 37 O.L.R. 146, 31 D.L.R 670.

ACTION FOR DAMAGES—NOTICE OF ACTION UNDER STATUTE—DEFAULT—EFFECT OF OMISSION OF NOTICE.

An Act which requires persons having claims for damages against a street railway company to give a month's notice in writing before bringing action does not subordinate the right of action to the observance of such formality. It is only required to render less onerous, for the company, the settlement of claims in case of accidents for which it is responsible. Therefore, the omission to give notice does not involve rejection of the action and has no other result than to subject the party in default to costs.

Montreal Street Ry. Co. v. Patenaude, 16 Que. Q.B. 541.

CONDITION PRECEDENT—DILATORY EXCEPTION.

The provision in the charter of the Montreal Street Ry. Co., compelling any one desiring to bring an action against the company for damages to give 30 days' notice does not make such notice a condition precedent to the right of action; it is merely one of the prejudicial requirements the nonobservance of which should be invoked by a dilatory exception.

Mattice v. Montreal Street Ry. Co., 20 Que. S.C. 222.

NOTICE OF CLAIMS.

See Claims.

NOTICE OF LOSS.

See Claims; Limitation of Liability.

NUISANCE.

As to embankment causing flood, see Embankment.
See Street Railways.

Annotations.

Operation of railway creating nuisance. 1 Can. Ry. Cas. 454.
Nuisance resulting from exercise of public franchise. 2 Can. Ry. Cas 303.
Notice arising from exercise of statutory privilege. 5 Can. Ry. Cas. 439.
Nuisance causing continuing damage. 2 Can. Ry. Cas. 309.
Injuries caused by operation of a railway. 20 Can. Ry. Cas. 109.

OPERATION OF MACHINERY—CONTINUING NUISANCE—NEGLIGENCE—VIBRATIONS, SMOKE, DUST, ETC.—STATUTORY FRANCHISE.

Where injuries caused by the operation of machinery have resulted from the unskilful or negligent exercise of powers conferred by public authority and the nuisance thereby created gives rise to a continuous series of torts, the action accruing in consequence falls within the provisions of Art. 2261, C.C. (Que.), and is prescribed by the lapse of two years from the date of the occurrence of each successive tort. In the present case, the permanent character of the damages so caused could not be assumed from the manner in which the works had been constructed and, as the nuisance might at any time be abated by the improvement of the system of operation or the discontinuance of the negligent acts complained of, prospective damages ought not to be allowed, nor could the assessment, in a lump sum, of damages, past, present and future, in order to prevent successive litigation, be justified upon grounds of equity or public interest. Judgment appealed from reversed, the Chief Justice and Girouard, J., dissenting. [Fritz v. Hobson, 14 Ch. D. 342, referred to; Gareau v. Montreal Street Ry. Co., 31 Can. S.C.R. 463, distinguished.]

Montreal Street Ry. Co. v. Boudreau, 36 Can. S.C.R. 329.

[Applied in Montreal v. Montreal Brewing Co., 18 Que. K.B. 406; followed in Lapointe v. Chateauguay & Northern Ry. Co., 38 Que. S.C. 142.]

Smoke—Noise—Vibration.

Where there has been a manifest disturbance of enjoyment and violation of rights of ownership, e. g., by the smoke, noise and vibration caused by the operation of machinery on an adjoining property, the person so disturbed in his enjoyment is entitled even without proof to any precise amount of damages suffered, to nominal or exemplary damages. Moreover, on a question of the appreciation of damages, the Court of Appeal will not disturb the award of the Court below, in the absence of any special ground for doing so.

Montreal Street Ry. Co. v. Gareau, 13 Que. P.R. 12.

Electric light power house—Vibration—Injunction—Damages.

An electric light company incorporated under the Ontario Companies Act, R.S.O. 1897, c. 200, purchased a piece of land adjoining plaintiff's residence and erected a transforming and distributing power house thereon. By the working of the engines so much vibration was caused in the adjoining land as to render the plaintiff's house at times almost uninhabitable and to create a nuisance though doing no actual structural injury. The company had no compulsory powers to take lands, and no opportunity had been afforded the plaintiff of objecting to the location of its works. Moreover the company was under no compulsion to exercise its powers, nor was any statutory compensation provided for any injury of the character in question done by such exercise, nor was there any evidence that the company's powers might not have been exercised so as not to create a nuisance:—Held, that the plaintiff was entitled to an injunction and a reference as to damages.

Hopkin v. Hamilton Elec., etc., Co., 4 O.L.R. 258, affirming 2 O.L.R. 240

Carriage of animals—Proper exercise of powers—Negligence.

Railway companies to which the Railway Act applies are authorized by law to carry cattle and hogs, and as a necessary incident thereto for the purpose of shipping the animals to have pens for herding them, and they are not liable if, in the proper exercise of their powers in doing so, without negligence, they create a nuisance. [London & Brighton Ry. Co. v. Truman (1885), 11 App. Cas. 45, followed.]

Bennett v. Grand Trunk Ry. Co. et al., 1 Can. Ry. Cas. 451, 2 O.L.R. 425.

[Relied on in Barrett v. Can. Pac. Ry. Co., 16 Man. L.R. 556, 3 W.L.R. 132; referred to in Bessette v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 113.]

Vibration and smoke—Authorized industry.

The fact that a company has been authorized by the Legislature to carry on an industry does not relieve it from the legal obligation to rectify any injury that the working of this industry may cause to neighbouring owners. [Can. Pac. Ry. Co. v. Roy, 9 Que. Q.B. 551, followed.] When the carrying on of an industry even in a manufacturing centre results in a prejudice to neighbouring owners to an extent which surpasses the ordinary inconveniences of vicinage—for example, through vibrations caused by powerful machines, and through smoke charged with soot which escapes from the furnaces—he who carries on this industry is obliged to rectify the prejudice so caused.

Montreal Street Ry. Co. v. Gareau, 2 Can. Ry. Cas. 286, 10 Que. Q.B. 417.

[Applied in Gareau v. Montreal Street Ry. Co., 31 Can. S.C.R. 467, 2 Can. Ry. Cas. 297.]

Operation of electric railway—Power house machinery—Vibrations, smoke and noise—Injury to adjoining property.

Notwithstanding the privileges conferred by its Act of Incorporation upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of a city, the company is responsible in damages to the owners of property adjoining its power house for any structural injuries caused by the vibrations produced by its machinery, and the diminution of rentals and value thereby occasioned. [Drysdale v. Lugas, 26 Can. S.C.R. 20, followed.] In an action by the owner of adjoining property for damages thus caused, the evidence was contradictory and the Courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality:—Held, that notwithstanding the concurrent findings of the Courts below, as the witnesses were equally credible, the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations. In reversing the judgment appealed from, the Supreme Court, in the interest of both parties, assessed damages, once for all, at an amount deemed sufficient to indemnify the plaintiff for all injuries, past, present, and future, resulting from the nuisance complained of, should she elect to accept the amount so estimated in full satisfaction thereof; otherwise, the record was ordered to be transmitted to the trial Court to have the amount of damages determined.

Gareau v. Montreal Street Ry. Co., 2 Can. Ry. Cas. 297, 31 Can. S.C.R. 463.

[Note.—This case is not an appeal from that of Montreal Street Ry. Co. v. Felix Gareau, 10 Que. K.B. 417, 2 Can. Ry. Cas. 286. Followed in Boudreau v. Montreal St. Ry. Co., 13 Que. K.B. 533; Davie v. Montreal Water & Power Co., 23 Que. S.C. 141.]

Overcrowded street car—Inadequate car equipment—Endangering public comfort—Continuance—Indictment.

The intention of s. 223 of the Cr. Code, 1906 (Cr. Code, 1892, s. 193), which was taken from s. 152 of the English draft Criminal Code, is to leave untouched the common-law right to proceed by indictment or information as a remedy for a public nuisance not involving public safety or public health or occasioning injury to the person of an individual (Cr. Code, s. 222), but which merely endangers the property or comfort of the public (Cr. Code, s. 221); the latter remains a crime, but the remedy is now restricted by Cr. Code, s. 223, to that of abatement. A nuisance maintained by a company which operates a street railway on city streets by the systematic and continued overcrowding of cars through failure to put on a proper equipment is none the less a public or common nuisance and indictable as such, although only a portion of the general public who used the cars had their comfort or property endangered by the overcrowding. [R. v. Toronto Ry. Co. (No. 1), 18 Can. Cr. Cas. 417, 23 O.L.R. 186, affirmed on appeal; Macdonald v. Hamilton, etc., Road Co., 3 U.C.C.P. 402, referred to.] Judgment for the abatement of it, on a conviction for a public nuisance, cannot be given unless the nuisance continues at the time of the indictment.

Rex v. Toronto Ry. Co., 25 D.L.R. 586.

[Reversed in 23 Can. Ry. Cas. 183, [1917] A.C. 630, 38 D.L.R. 537.

Snow and ice—Removal of from highway—Repairs.

The efficient removal of snow and ice from a highway, in accordance with statutory powers given, by a municipality does not create a nuisance for which damages can be recovered. [Elliott v. Winnipeg Elec. Ry. Co., 22 Can. Ry. Cas. 258, 38 D.L.R. 201, followed. Note. This case was reversed in 23 Can. Ry. Cas. 194, 42 D.L.R. 106, and trial judgment restored.] In determining whether a highway is in repair at the time an accident occurs, it is necessary to take into account the nature of the country, the character of the roads, the care usually exercised by municipalities in reference to such roads, the season of the year and the nature of the accident.

Clark v. Winnipeg and Winnipeg Elec. Ry. Co., 40 D.L.R. 533.

Municipal corporations—Smoke regulation—Railway roundhouse.

The smoke stack of a locomotive engine is not a flue stack or chimney within clause 45 of s. 400 of the Municipal Act, R.S.O. 1914, c. 192, which empowers municipal councils to pass by-laws for smoke regulation; and a railway company is not liable to conviction under clause 45 for the discharge of smoke from its locomotives while in the roundhouse. [R. v. Can. Pac. Ry. Co., 23 Can. Cr. Cas. 487, affirmed on a different ground.]

R. v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 311, 33 O.L.R. 248, 25 D.L.R. 444.

Alteration of highway—Violation of statute—Remedy.

One who suffers special damage by reason of a nuisance created in a highway, by the execution of certain works under statutory powers, has a right of action at common law, if conditions precedent to such execution prescribed by statute have not been observed. [Burt v. Dominion Iron & Steel Co., 40 N.S.R. 335, 19 Can. Ry. Cas. 187, reversed.]

Dominion Iron & Steel Co. v. Burt, 20 Can. Ry. Cas. 134, [1917] A.C. 179, 33 D.L.R. 425.

Railway upon highway—Statutory powers conferred—Snow and ice.

Where statutory powers have been conferred in respect of a public highway, the efficient exercise of these powers in accordance with the provisions of the statute does not create a nuisance for which damages can be recovered.

Elliott v. Winnipeg Elec. Ry. Co., 22 Can. Ry. Cas. 258, 28 Man. L.R. 363, 38 D.L.R. 201.

[Reversed in 23 Can. Ry. Cas. 194, 42 D.L.R. 106, 56 Can. S.C.R. 560.]

Endangering public comfort—Overcrowding of street cars.

The franchise granted to a street railway company by agreement between it and the municipality, confirmed by the Provincial Legislature, to operate street cars on the public streets does not make the overcrowding of the street cars a public nuisance within Cr. Code, s. 223, where the lives, safety or health of the public are not endangered and where no injury is occasioned to the person of any individual (Cr. Code, s. 222); and a demurrer to an indictment in so far as it charged same should have been allowed. [R. v. Toronto Ry. Co., 25 Can. Cr. Cas. 183, 25 D.L.R. 586, 34 O.L.R. 589, reversed.]

Toronto Ry. Co. v. The King, 23 Can. Ry. Cas. 183, [1917] A.C. 630, 38 D.L.R. 537.

Indictments for public nuisance.

The effect of s. 223 of the Criminal Code is to leave indictment as a method of procedure for trying the general question whether a common nuisance to the detriment of the property or comfort of the public generally, though not affecting life, safety or health, has been committed; but where life, safety or health is not involved (Cr. Code, s. 222), the conviction on such indictment is not for a crime but for a civil wrong only and the consequential proceedings to which s. 223 refers are not for the punishment of the person convicted but for the abatement or remedy of the mischief done.

Toronto Ry. Co. v. The King, 23 Can. Ry. Cas. 183, [1917] A.C. 630, 38 D.L.R. 537.

Railway on highway—Snow and ice—Unsafe—Damages.

Where statutory power has been conferred on a street railway company for the removal of snow from its tracks "so as to afford a safe and unobstructed passageway for carriages and vehicles" the company is liable in damages, if in the exercise of such power it renders the highway unsafe for traffic thereby causing injury to a pedestrian. [Elliott v. Winnipeg Elec. Ry. Co., 28 Man. L.R. 363, 22 Can. Ry. Cas. 258, 38 D.L.R. 201, reversed.]

Elliott v. Winnipeg Elec. Ry. Co., 23 Can. Ry. Cas. 194, 42 D.L.R. 106, 56 Can. S.C.R. 560.

OBSTRUCTION.

See Highway Crossings (B).

OFFENCES.

See Crimes and Offences.

OPERATION OF RAILWAY.

See Railway Board.

Negligent operation of railway, see Negligence; Carriers of Passengers; Carriers of Goods; Carriage of Live Stock; Fires; Crossing Injuries; Street Railways; Employees; Nuisance; Pleading and Practice (H).

PARTICULARS.

See Pleading and Practice.

PARTIES.

See Pleading and Practice; Third Party Procedure.

PASS.

See Employees.

PASSENGERS.

See Carriers of Passengers; Train.

PATENTS FOR INVENTIONS.

RAILROAD TIE PLATES—NOVELTY—PATENTABILITY.

S., the plaintiffs' predecessor in title, obtained Canadian letters patent for improvements on wear plates for railroad ties, which, according to the specification, consist in a flat, or comparatively flat, body portion, provided at its opposite sides with depending flat-edge flanges adapted to enter the wooden body of the crossties without injuring the same, which flanges are relatively parallel and lie in planes approximately at right angles to that of the said body portion. The inventor claimed (1) a wear plate for railroad ties consisting of a body having projecting flanges at its side edges; and (2) the combination with a railroad rail and supporting crossties of a wear plate consisting of a body having projecting side flanges; said plate being interposed between the rail and tie with its flanges entered into the tie longitudinally or parallel with the grain or fibres of the tie. The substance of the invention was the projecting or depending flanges at the edges of the plate adapted to enter the wooden body of the crossties without injuring the same. S. had also obtained an earlier patent in 1882, which only differed from the one above set out in having one or more flanges or ribs placed under the plate for insertion into the tie, its object being the durability of railway ties. Prior to S.'s alleged improvements, iron or steel plates had been used as tie plates, and it was common knowledge that the insertion of such a plate between an iron or steel rail and a wooden tie would give greater durability to the rail. It was also a matter of general knowledge that reduction of the weight of the plate without loss of strength could be effected by using channel iron or angle iron, or by having the plate made with flanges or ribs. It was equally a matter of common knowledge that if such flanges or ribs were sharpened they could be driven into the tie, and that such flanges or ribs would in that position assist in holding the plate in place:—Held, that there was no invention in either of the improvements for which S.'s patents were granted. (2) Costs were withheld because the judgment proceeded upon a defence not raised in the pleadings, but in respect of which defendant was allowed to amend the statement of defence after trial.

Servis Railroad Tie Plate Co. v. Hamilton Steel & Iron Co., 8 Can. Ex. 381.

EMPLOYEE'S INVENTIONS.

Where a form of license to use a patented invention was signed by the employee in whose favour the patent had been issued, to license the employers, a railway company, to use the same for a nominal consideration of one dollar without royalty or further payments being thereby provided, and the railroad company objected to the inclusion of a clause in the license which purported to restrict the license so as to exclude the use of the invention by certain allied railway companies and gave notice of such objection to the proposed licensors, and the license was not executed by the company nor was anything done towards its acceptance further than the retention by the company of the copy forwarded to them, such retention without registration thereof will not be held to be an acceptance of the agreement binding upon the company, if it appears that the alleged invention was perfected in the course of the employee's work for the company and that the licensors knew that the company always demanded from employees who invented a device under such circumstances an absolute license without cost to the company for the use of the invention on their own and all allied lines.

Imperial Supply Co. v. Grand Trunk Ry. Co., 1 D.L.R. 243, 10 E.L.R. 414, 13 Can. Ex. 507.

[Referred to in 7 D.L.R. 504, 14 Can. Ex. 88.]

Sale—License—Assignment.

Whree a servant devises an invention in the time and at the expense of his master and with the use of the master's material, and, having obtained a patent for the invention, assents to its use by the master, the proper conclusion is that he has given the master an irrevocable license to use the invention. The question of the respective rights of master and servant in patents obtained by the servant must be decided in each particular case upon the facts of that case.

Imperial Supply Co. v. Grand Trunk Ry. Co., 7 D.L.R. 504, 11 E.L.R. 340, 14 Can. Ex. 88.

Estoppel to deny validity of patent.

A master who uses an invention under a license from his servant, the patentee, which license is not express, but is implied by law from their relationship and from the circumstances surrounding the invention is estopped from denying the validity of the patent. [Imperial Supply Co. v. Grand Trunk Ry. Co. (No. 1), 1 D.L.R. 243, 13 Can. Ex. 507, referred to.]

Imperial Supply Co. v. Grand Trunk Ry. Co., 7 D.L.R. 504, 11 E.L.R. 340, 14 Can. Ex. 88.

Invention of servant—Ownership.

In the absence of a special contract, the invention of a servant, even though made in the master's time, and with the use of the master's material and at the expense of the master, does not become the property of the master, so as to justify him in opposing the grant of a patent for the invention to the servant, who is the proper patentee. [Re Marshall and Naylor's Patent, 17 R.P.C. 553, referred to; Worthington Pumping Engine Co. v. Moore, 20 R.P.C. 41, distinguished.]

Imperial Supply Co. v. Grand Trunk Ry. Co., 7 D.L.R. 504, 11 E.L.R. 340, 14 Can. Ex. 504.

PETITION OF RIGHT.

See Government Railways; Jurisdiction.

PIPES.

See Wires and Poles (B).

PLANS.

See Expropriation (J).

PLEA.

See Pleading and Practice.

PLEADING AND PRACTICE.

A. Statement of Claim; Particulars.
B. Pleas.
C. Reply; Amendments.
D. Parties; Joinder; Names.
E. Service; Venue.
F. Trial; Jury; Findings.
G. Evidence; Witnesses.
H. Stay of Proceedings; Security.
I. Judgments; Motions.
J. New Trial; Misdirection; Nonsuit.
K. Third Party Procedure.

See Discovery; Street Railways.

Annotations.

"Not Guilty by Statute." 1 Can. Ry. Cas. 526.

Third Party Procedure. 1 Can. Ry. Cas. 532.

Jury findings and general verdict in cases of negligence. 2 Can. Ry. Cas. 337.

Practice in proceedings upon examination for discovery. 2 Can. Ry. Cas. 405.

Practice in service of process on railway companies. 3 Can. Ry. Cas. 134.

Findings and functions of jury. 3 Can. Ry. Cas. 301.

Inference and permissible probability. 13 Can. Ry. Cas. 319.

General issue and plea of not guilty by statute. 13 Can. Ry. Cas. 512.

A. Statement of Claim; Particulars.

PARTICULARS—CLAIM OF DEDICATION.

In an action by the provincial Attorney-General for a declaration that the public had a right of access to the sea over the embankment of the C.P.R. via certain streets in Vancouver, it was alleged that in 1870, Her Majesty, by the officers of her colony of British Columbia, laid out and planned a town site on Burrard Inlet and dedicated certain parts of the town site to public uses:—Held, that plaintiff must give (1) particulars of the authority under which the town site was laid out; (2) of the nature and dates of dedication and by whom made, and (3) of what portions of the town site were dedicated.

Attorney-General v. Can. Pac. Ry. Co. (No. 2), 10 B.C.R. 184.

GENERAL ALLEGATION OF ILLEGALITY—DEBENTURES.

Particulars will be ordered to be given of a paragraph in a contestation, alleging generally the illegality of an issue of debentures, without averring in what the illegality in question consists.

Connolly v. Baie Des Chaleurs Ry. Co., 4 Que. P.R. 178.

STATEMENT OF CLAIM—DELAY IN MOVING—CON. RULE 268.

Delap v. Can. Pac. Ry. Co., 4 O.W.N. 416, 23 O.W.R. 644.

PARTICULARS—NEGLIGENCE—DEATH IN RAILWAY ACCIDENT—RES IPSA LOQUITUR—DISCOVERY.

Madill v. Grand Trunk Ry. Co., 3 D.L.R. 876, 3 O.W.N. 1333.

STATEMENT OF CLAIM—SUFFICIENCY OF ALLEGATIONS—ANIMAL KILLED.

A statement of claim in writing that on a certain day, near a certain place, plaintiff's horse was killed by the defendant railway company's engine, to his damage in a certain sum, is a fairly comprehensive statement of the facts shewing what the cause of action is for, within the meaning of s. 95 of the County Courts Act, R.S.M. 1902, c. 38, allowing a "simple statement in writing of the cause of action such that it may be known or understood by a person of ordinary intelligence what the action is brought for." Where a statement of claim is defective in that it does not fully disclose a cause of action, but the evidence does shew a cause of action, and there is no surprise of the opposite party, the trial Judge should amend if he thinks an amendment necessary.

Stitt v. Can. Northern Ry. Co., 15 Can. Ry. Cas. 333, 23 Man. L.R. 43, 10 D.L.R. 544.

ALLEGATIONS AS TO DAMAGES—GENERAL—SPECIAL.

A general damage need not be specially pleaded, but special damage must be pleaded in order that the defendant may not be taken by surprise at the trial.

Staats v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 7, 17 D.L.R. 309.

ESTOPPEL—INCONSISTENCY IN CLAIMS—SWORN STATEMENT.

A plaintiff suing a railway company for the value of logs cut in lumbering operations and which had been set fire by sparks from a locomotive of the railway line which ran through the timber limits, will, in the absence of satisfactory evidence of mistake, be held to the statement made in his sworn return to the Government agent of the number of logs destroyed by the fire.

Dutton v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 72, 23 D.L.R. 43.

PARTICULARS—ACCIDENT TO TRAIN.

In an action for damages against a railway company occasioned by the derailment and wrecking of a train, it is not necessary to particularly specify, on a claim for general damages, the negligence alleged in the particulars of claim; the fact that damage is done by something getting out of control which normally is, or ought to be, under control, raises a presumption or rational inference of fact, that the accident is due to the negligence of the user or his servants, and an order by a Master for further particulars thereon cannot be supported, the occurrence itself when proved warranting a finding of negligence.

Mulvenna v. Can. Pac. Ry. Co., 15 D.L.R. 616.

DAMAGES FROM DEATH—LORD CAMPBELL'S ACT.

In an action under the Fatal Accidents Act, 1 Geo. V. c. 33, R.S.O. 1914, c. 351, an order for a statement of particulars from the parents of the benefits received from their son during his lifetime should not be made as it would be compelling the plaintiffs to give particulars of the evidence by which they intended to support their claim.

Mulvenna v. Can. Pac. Ry. Co., 15 D.L.R. 616.

PARTICULARS—WORKMEN'S COMPENSATION CASES.

S. 15 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, R.S.O. 1914, c. 146, requiring that where the injury complained of has arisen by reason of the negligence of any person in the defendant's service, particulars shall be given by the plaintiff of the name and description of such person, applies only where the claim is based on some specific act of misconduct on the part of a fellow-servant, and is not intended to shift the onus thrown on the defendant in cases where the plaintiff can rely upon the res ipsa loquitur rule.

Pierce v. Grand Trunk Ry. Co., 16 D.L.R. 69.

LORD CAMPBELL'S ACT—CONTRAVENTION OF RAILWAY RULES BY COMPANY.

In an action against a railway company under Lord Campbell's Act for negligence causing death, an order should not be made that the plaintiff deliver particulars of the railway company's rules and regulations in contravention of which the plaintiff claimed that a defective and improper system was maintained in leaving switches unprotected, which had led to the personal injury which caused the death.

Pierce v. Grand Trunk Ry. Co., 16 D.L.R. 69.

B. Pleas.

ACTION OF DAMAGES FOR DEATH—PRESCRIPTION—PLEA OF.

In an action by a widow for compensation for the death of her husband from injuries received in the employ of the defendants:—Held, Fournier, J., dissenting:—That at the time of the husband's death all right of action was prescribed under Art. 2262, Que. C.C., and the prescription was one to which the Courts were bound to give effect although it was not pleaded.

Can. Pac. Ry. Co. v. Robinson, 19 Can. S.C.R. 292.

[Reversed, [1892] A.C. 481; distinguished in The Queen v. Grenier, 30 Can. S.C.R. 42.]

LOSS OF MONEY ORDER—MONEY HAD AND RECEIVED—SPECIAL PLEAS—"NEVER INDEBTED."

An express company gave a receipt for money to be forwarded with the condition indorsed that the company should not be liable for any claim in respect of the package unless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed:—Held, that in an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted," put in issue all material facts necessary to establish the plaintiff's right of action. 10 Man. L.R. 595, reversed.

Northern Pacific Express Co. v. Martin et al., 26 Can. S.C.R. 135.

[Referred to in Leroy v. Smith, 8 B.C.R. 297; relied on in Fairchild v. Rustin, 17 Man. L.R. 209.]

VAGUENESS OF PLEA—CUSTOM OF EMPLOYEES OF RAILWAY COMPANY.

In an action in damages by the widow of a railway conductor against the railway company for the death of her husband, where the defendant pleads that the victim took no steps to protect his own train, as required by the rules and regulations of the company, and that such negligence was the determining cause of the accident, it is not legal for the plaintiff to answer that the deceased "had done all that was customary for the employees of the said railway company defendant," and such allegation being too vague will be rejected on an inscription in law.

Leahey v. Grand Trunk Ry. Co., 5 Que. P.R. 350.

DEFENCE—"NOT GUILTY BY STATUTE."

A railway company cannot be required to give particulars of the defence of "not guilty by statute." The right to plead such a defence, being expressly preserved by Rule 286, the application of Rule 299 is excluded. [Jennings v. Grand Trunk Ry. Co., 11 P.R. (Ont.) 300, overruled.]

Taylor v. Grand Trunk Ry. Co., 2 O.L.R. 148, 1 Can. Ry. Cas. 523.

"Not guilty by statute"—Specific denial—Necessity of amendment at trial.

The plea of "not guilty by statute" is not a specific denial of the representative character of the plaintiff alleged in the statement of claim. Where, therefore, a plaintiff, as administratrix of her deceased husband, sued a railway company for damages for causing his death by negligence, and the company pleaded "not guilty by statute," but did not specifically deny the representative character of the plaintiff:—Held, that, although the evidence shewed that the plaintiff was an infant at the time letters of administration were granted, this fact was no answer to a motion for judgment on the verdict of the jury in favour of the plaintiff, no amendment having been asked for at the trial, and the case having been left to the jury on the pleadings as they stood.

Toll v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 291, 1 Alta. L.R. 244.

[Affirmed in 1 Alta. L.R. 318, 8 Can. Ry. Cas. 294; applied in White v. Grand Trunk Pac. Ry. Co., 2 Alta. L.R. 535; observed in Winterburn v. Edmonton, Y. & P. Ry. Co., 9 Can. Ry. Cas. 8, 1 Alta. L.R. 311, 8 W.L.R. 795.]

Action by infant without next friend—Grant of letters of administration to—Validity.

"The Ordinance respecting Juries" was not brought into force in Alberta by reason of the repeal of the North-West Territories Act by R.S.C. 1906, schedule "A," vol. 3, p. 2941. [The effect of 6-7 Edw. VII. (D.) c. 44, considered.] Independently of "The North-West Territories Act, 1905" (4-5 Edw. VII. (D.) c. 27) the effect of the Alberta Act was not to repeal the former North-West Territories Act, but to prevent its remaining in force proprio vigore; and to continue (s. 16) in force the law therein contained as a body of law, in the same manner as the common and statute law of England, as it stood on July 15th, 1870, was introduced into the Territories. If an infant sues, without naming a next friend, it is a mere irregularity, and may be waived by an unconditional appearance of the defendant. But quite independently of waiver there must in every case be some stage at which it is too late to take advantage of a mere irregularity. In any case the Judge can deal with it under rule 538. Letters of administration granted to an infant are not void, but voidable: and semble until revoked the infant can sue, qua administrator, and need not be represented, when so suing by a next friend. In an action for negligence, it is not improper to receive evidence as to what may have been done by the defendants subsequently to remedy the defects or dangers complained of, but the jury should be warned that such evidence taken by itself is no evidence of negligence. If there be no other evidence of negligence the case should be withdrawn from the jury. The evidence in this case considered, as to whether the case should have been left to the jury or not. It is within the discretion of the trial Judge to submit special questions to the jury or not; but in either case the jury may render a general verdict. The words "the Court may give such damages," in Con. Ord. N.W.T. c. 48, s. 3, means the Judge at trial, or the Judge and the jury, as the case may be. Semble, a verdict for $4,500, under the circumstances of this case, cannot seriously be excepted to.

Toll v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 294, 1 Alta. L.R. 318.

Plea "not guilty"—History of.

History and effect of the pleas of "Not guilty," and "Not guilty by statute," traced and discussed. The necessity of noting in the margin of the plea, the statute permitting the plea, and the particular statute relied on, discussed, with remarks ab inconvenienti in respect of these pleas. [Toll v. Can. Pac. Ry. Co., 1 Alta. L.R. 244, 8 Can. Ry. Cas 291, quaere; 9 Can. Ry. Cas. 1, 1 Alta. L.R. 92, affirmed].

Winterburn v. Edmonton, Yukon & Pacific Ry. Co., 9 Can. Ry. Cas. 7.

TAX EXEMPTIONS—DEFENCE OF.

In an action by a city corporation against a railway company for the recovery of taxes assessed against certain property belonging to the company within the city limits, the company may set up as a defence the exemption privilege provided in s. 14, c. 40, R.S.S., notwithstanding an unsuccessful appeal by them from the assessment to the Court of Revision and the dismissal of a subsequent appeal to a Judge of the District Court on this very ground.

City of Prince Albert v. Can. Northern Ry. Co. (Sask.), **10 D.L.R.** 121, 15 Can. Ry. Cas. 87.

[See Nickle v. Douglas, **37 U.C.Q.B.** 51.]

C. Reply; Amendments.

REPLY—AVOIDANCE OF FORMAL RELEASE PLEADED IN DEFENCE.

Where the equitable defence of a release of the cause of action is set up, the Court, on finding that the release was fraudulently obtained, may refuse to give effect to the document without decreeing its cancellation or annulment. (Per Macdonald, C.J.A.) The plaintiff may properly plead in reply that a release, which is set up as a defence in an action for damages for injuries sustained through the alleged negligence of the defendant, was obtained by fraud, since, under the Judicature Act, both legal and equitable questions can be disposed of in the one action; and it is not now necessary, as was the former practice, to file a bill in equity to restrain the defendant from relying on the release as a bar on the ground that it was fraudulently obtained. (Per Macdonald, C.J.A.)

Trawford v. Elec. Ry. Co., 15 Can. Ry. Cas. 39, 9 D.L.R. 817.

[Affirmed in British Columbia v. Turner, 18 Can. Ry. Cas. 193.]

AMENDMENT—COLLISION—SPECIFICATION OF TORTIOUS ACTS AND NEGLIGENCE.

1. When a plaintiff in an action of damages specifically charges the tortious act or negligence that caused the injury, he is estopped from proving any other at the trial, and the admission of such evidence by the Judge is a sufficient ground to quash a verdict in his favour. (2) Leave to amend a declaration "so as to agree with the facts proved," will not be granted if the amendment changes the nature of the demand, or is such as to lead the defendant into error as to the facts intended to be proved. In an action of damages caused by a collision with a tramcar, in which it is alleged that "the car which struck the plaintiff was crossing another car moving on the same street, in the opposite direction," the plaintiff cannot, after trial, amend his declaration to make it set forth that the second car was stationary and not moving. Leave granted him to do so by the trial Judge is a sufficient ground to quash a verdict in his favour.

Lemieux v. Montreal Street Ry. Co., 38 Que. S.C. 400.

REPLY—DEPARTURE—REFORMATION OF CONTRACT.

The plaintiffs alleged that they supplied the defendants, under an agreement, with patent brakes for use on their railway, and that the defendants altered them and infringed the plaintiffs' patent. The defendants alleged that they had a right under their agreement with the plaintiffs to do what they had done. The plaintiffs, by their reply, denied any such agreement, and alleged that if the written agreement did give any such right, it was not the true agreement, and they asked to have it reformed:—Held, that there was no departure in the reply; for the fact that, by mutual mistake, the written agreement did not set forth the true agreement between the parties in this particular respect was a perfectly good answer to the plea of the agreement, and it was not necessary that the agreement should be actually corrected before the mistake could operate as an answer to its terms. Held, also, that, even if the portion of the agreement upon which the defendants relied was contained in the same instrument as the "agreement" mentioned in the statement of claim, the plaintiffs might, consistently with their relying upon one part of it, ask to have another part reformed.

MacLaughlin v. Lake Erie & Detroit River Ry. Co., 2 O.L.R. 151. [Reversed in 3 O.L.R. 706.]

D. Parties; Joinder; Names.

JOINDER OF DEFENDANTS—ELECTION TO PROCEED AGAINST.

In an action brought against the G. & G. Ry. Co., the C. P. Ry. Co., and the Canada Foundry Co., jointly, in which it was alleged that the plaintiff was employed by the C.P.R. Co., to work upon the construction of a line of railway being constructed by the C.P.R. Co., under the name of the G. & G. Ry. Co., leased and operated by the C.P.R. Co., on which the Canada Foundry Co. agreed to construct a steel bridge, and the plaintiff was ordered by his employers to assist in that work and did so; that "the defendants" undertook the placing of a necessary girder and the plaintiff assisted on his employers' orders; that the work of placing the girders was so negligently done that he was injured; that the apparatus used, including the roadbed, was under the control of "the defendants;" that they were negligent in not providing a safe roadbed and efficient apparatus; that there were defects in the derrick and plan adopted, and that "the said accident happened by reason of the said negligence of the said defendants, and by reason thereof the plaintiff suffered the injuries herein complained of":—Held, that the statement of claim sufficiently alleged a joint cause of action, and the plaintiff was not bound to elect against which of the several defendants he would proceed.

Symon v. Guelph & Goderich Ry. Co., 13 O.L.R. 47.

NEGLIGENCE—OPERATING TRAIN ON LINE OF OTHER COMPANY—SUBSEQUENT AMALGAMATION—NAME OF AN AMALGAMATED COMPANY.

An engine and train was operated over the road of the E. & H. Ry. Co. by the servants of the defendants, the two companies subsequently becoming amalgamated by agreement confirmed by 2 Edw. VII. c. 69 (D.), as the L.E. & D. Ry. Co., which succeeded to the rights and became subject to the liabilities of both companies:—Held, that an action for negligence for injuries to the plaintiff caused while crossing the track, before amalgamation, was rightly brought against the defendants, and an order to amend or revive was superfluous. The jury awarded the plaintiff $1,600 for his personal injuries (dislocation or fracture of collar bone):—Held, excessive, and a new trial ordered unless the plaintiff agreed to accept $1,200.

Brewer v. Lake Erie & Detroit River Ry. Co., 2 Can. Ry. Cas. 257, 2 O.W.R. 125.

JOINDER OF PARTIES—HUSBAND AND WIFE—PERSONAL INJURIES—LOSS OF SERVICE.

Per Stuart, J.:—Where a married woman sues in tort to recover damages for personal injuries, and not in respect of either her separate, real or personal property, it is not only proper to join the husband as a party plaintiff, but if he is not joined the defendant can insist upon the joinder, either by motion in Chambers or summarily at the trial of the action. The husband has a right of action in himself alone for the loss of the services of his wife occasioned by such injury. The wife herself has no cause of action arising from such loss, and she cannot be joined as a party plaintiff with the husband in such form of action. The individual action of the husband for loss of services can be joined with the action of the husband and wife jointly for general damages for the injury suffered by the latter. Semble, that the Common-Law Procedure Act, 1852, s. 40, is in force in Alberta, and quaere whether English Order 18, Rule 4, is in force here or not.

Swan v. Can. Northern Ry. Co., 9 Can. Ry. Cas. 251, 1 Alta. L.R. 427.

JOINDER OF ACTION—PARTIES—IRREGULARITY—PRELIMINARY PLEA—ESTOPPEL.

Two navigation companies which enter into a covenant with a railway company to furnish ships to ply regularly between two ports, the consideration being certain reciprocal obligations assumed by the railway company, can be joined in the same action to claim diverse sums, exigible by each of the two companies from the railway company for breach of its covenants. In any event, the irregularity of this joinder, if irregularity there be, must be raised by the defendant by way of preliminary exception. By proceeding to trial without raising it, the defendant is held to have waived the objection, and is thereby estopped from founding thereupon at the hearing upon the merits of the action.

Furness, Withy & Co. v. Great Northern Ry. Co., 10 Can. Ry. Cas. 440, 32 Que. S.C. 121.

[Affirmed on this point in 10 Can. Ry. Cas. 453, 42 Can. S.C.R. 234, 10 Can. Ry. Cas. 479.]

JOINT ACTION—PARTIES—IRREGULARITY—PRELIMINARY EXCEPTION.

Two steamship companies who agree to provide a railway company with steamers for a regular service between two ports, subject to reciprocal obligations, may join in the one action to recover from the railway company, for nonexecution of its obligations, different sums of money due to each of them. In any event, if such action is irregular, the point should be raised by preliminary exception; by proceeding with the contestation of the case without objection on its part, the railway company is presumed to have acquiesced in the action and the point cannot be raised at the hearing of the case on its merits.

Furness, Withy & Co. v. Great Northern Ry. Co., 10 Can. Ry. Cas. 453.

[Affirmed on this point in 42 Can. S.C.R. 234, 10 Can. Ry. Cas. 479.]

INFANTS—SUIT BY NEXT FRIEND—ADDING AT TRIAL.

The bringing, by an infant under twenty-one of an action to recover damages for personal injury without joining a next friend is a mere irregularity which may be cured by adding a next friend at the trial, when the circumstance of the original plaintiff not being of age was then first disclosed without objection having previously been taken. [Re Brocklebank, 6 Ch. D. 358, followed.]

Durie v. Toronto Ry. Co., 16 Can. Ry. Cas. 334, 15 D.L.R. 747.

COSTS—ADDING PARTY DEFENDANT—MUNICIPALITY—NEGLIGENCE.

Costs may properly be allowed a plaintiff where it appears reasonable and proper for him to add as a party defendant a municipality chargeable with negligence. [Till v. Oakville, 21 D.L.R. 113; Besterman v. British Motor Cab. Co., [1914] 3 K.B. 181, followed.]

Burrows v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 183, 23 D.L.R. 173.

PARTIES—INTERVENTION—INTEREST ACQUIRED PENDENTE LITE.

A person having an unregistered interest in land in Alberta within the knowledge of a railway company at the time of the service of the "notice to treat" in expropriation proceedings and registering his interest after such proceedings have been commenced must be treated as a purchaser pendente lite because of the provisions of the Land Titles Act (Alta.) 1906, c. 24, but may be allowed to intervene and be added as a party to the arbitration proceedings. [Sanders v. Edmonton Dunvegan & B.C. Ry. Co., 14 D.L.R. 88, 16 Can. Ry. Cas. 142, referred to.]

Re Edmonton, Dunvegan & B.C. Ry. Co., 16 Can. Ry. Cas. 396, 15 D.L.R. 938.

[Varied in Sanders v. Edmonton Dunvegan & B.C. Ry. Co., 18 Can. Ry. Cas. 71.]

E. Service; Venue.

SERVICE UPON RAILWAY—JUDICATURE ACT.

44 Vict. (1881), c. 1 (D.), entituled "An Act respecting the Canadian Pacific Railway Company," Schedule A., s. 9 (1), providing for a place of service in each Province or Territory is special legislation, and is mandatory, and quoad the C.P.R. Co., it overrides the general provisions as to service of s. 14 (3) of the Judicature Ordinance. Judgment of McGuire, J., reversed.

Lamont v. Can. Pac. Ry. Co., 3 Can. Ry. Cas. 124, 5 Terr. L.R. 60.

[Discussed in R. v. Massey-Harris Co., 6 Terr. L.R. 130.]

NOTICE TO TREAT—SERVICE ON REGISTERED OWNER ONLY.

The service of a notice to treat on the expropriation of lands for railway purposes need only be made upon the registered owner, and, in the absence of fraud, the railway company may disregard an unregistered interest of which they have notice; on the subsequent registration of an interest in a part only of the land the holder thereof may be added as a party to the expropriation proceedings, but he is not entitled to a separate offer of compensation or a separate award against the company for his portion. [Re Edmonton, Dunvegan & B.C. Ry. Co., 16 Can. Ry. Cas. 396, 15 D.L.R. 938, varied. See also, on sufficiency of notice, Sanders v. Edmonton, Dunvegan & B.C. Ry. Co., 16 Can. Ry. Cas. 142, 14 D.L.R. 88.]

Sanders v. Edmonton, Dunvegan & British Columbia Ry. Co., 18 Can. Ry. Cas. 71, 18 D.L.R. 633.

VENUE—NEGLIGENCE—PLACE OF ACTION.

An action for the negligent destruction by a fire of the plaintiff's logs piled in readiness for transportation need not be brought in the province in which the logs were situate, but may be brought in another province in which the defendant company carries on business. [Tytler v. C.P.R., 26 A.R. (Ont.), 467, followed.]

Dutton v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 72, 23 D.L.R. 43.

Change of venue—Free transportation.

Where the defendant seeking a change of venue was a railway company the order granting the change should be made conditional upon the defendant's affording free transportation for the plaintiff and his witnesses upon their line of railway to and from the place to which the venue was changed. And where it appears from the affidavits read that a strong feeling exists in the county in which the venue is laid which will make it difficult to obtain a jury with no interest in the matters involved, the Court will order the venue to be changed to a county in respect to which no such difficulty exists.

Starratt v. Dominion Atlantic Ry. Co., 5 D.L.R. 641, 46 N.S.R. 272.

[Followed in Carruthers v. Nova Motor Co., 8 D.L.R. 689, 46 N.S.R. 514.]

F. Trial; Jury; Findings.

Negligence—Findings of jury—Contributory negligence.

In an action founded on personal injuries caused by a street car the jury found that defendants' negligence was the cause of the accident and also that plaintiff had been negligent in not looking out for the car:—Held, reversing the judgment of the Court of Appeal (2 O.L.R. 53) that as the charge to the jury had properly explained the law as to contributory negligence the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence and he could not recover.

London Street Ry. Co. v. Brown, 1 Can. Ry. Cas. 390, 31 Can. S.C.R. 642.

[Applied in Brenner v. Toronto Ry. Co., 40 Can. S.C.R. 556, 13 O.L.R. 423, 1 Can. Ry. Cas. 261; followed in Weir v. Amherst, 38 N.S.R. 489.]

Negligence—Specific findings.

In an action for damages for personal injury caused by a car of the defendants, the jury found that defendants' negligence was the cause of the accident, but also that the plaintiff might, by the exercise of reasonable care, have avoided the accident. There was evidence sufficient to justify both these findings. The trial Judge dismissed the action, following London Street Ry. Co. v. Brown (1901), 31 Can. S.C.R. 642. On appeal, the Court ordered a new trial on the ground that the jury's finding that the plaintiff might have avoided the accident by the exercise of reasonable care was not sufficient without their saying in what respect he failed to exercise reasonable care, as the Court was unable to determine from the jury's finding whether the plaintiff was in law guilty of contributory negligence or not. The Court suggested that the proper course for the trial Judge to take in such a case would be to submit to the jury two questions, such as, 1. Was the plaintiff guilty of negligence? 2. If yes, what was this act of negligence? and that it would probably be well to add a third question: Whose negligence really caused the accident?

Shondra v. Winnipeg Elec. Ry. Co., 21 Man. L.R. 622.

Negligence—Contributory negligence—Form of questions to jury.

When contributory negligence is set up in an action to recover damages for negligence, which is being tried before a jury the plaintiff is entitled to a clear and distinct finding upon the point. In an action against a street railway company to recover damages, the jury, after finding in answer to questions that the defendants were guilty of negligence, in running at too high a rate of speed, not properly sounding the gong, and not having the car under proper control, and that the plaintiff's injury was caused by this negligence, said in answer to further questions, that the plaintiff was guilty of contributory negligence in not using more caution in crossing the railway tracks:—Held, that this answer was ambiguous and unsatisfactory, and, in view of the previous distinct answers, not fairly to be treated as a finding of contributory negligence. Per Osler, J.A.:—Instead of putting in such cases the question, "Was the plaintiff guilty of contributory negligence?" involving as it does, both the fact and the law, it would be better to ask, "Could the plaintiff by the exercise of reasonable care have avoided the injury?" and to provide for the case of an affirmative answer by the further question, "If so, in what respect do you think the plaintiff omitted to take reasonable care?" Judgment of Meredith, C.J., reversed.

Brown v. London Street Ry., 1 Can. Ry. Cas. 385, 2 O.L.R. 53.

[Reversed in 31 Can. S.C.R. 642, 1 Can. Ry. Cas. 390; referred to in Hinsley v. London Street Ry. Co., 16 O.L.R. 350.]

Negligence—Contributory negligence—Findings of jury.

On the trial of an action against a street railway company for damages in consequence of injuries received through the negligence of the company's servants, the jury answered four questions in a way that would justify a verdict for the plaintiff. To the fifth question: "Could R. by the exercise of reasonable care and diligence have avoided the accident?" the answer was: "We believe that it could have been possible:"—Held, reversing the judgment of the Court of Appeal, that this answer did not amount to a finding of negligence on the part of the plaintiff as a proximate cause of the accident which would disentitle him to a verdict. Held, further, that as the other findings established negligence in the defendant as the cause of the accident which amounted to a denial of contributory negligence; as there was not evidence of negligence on plaintiff's part in the record; and as the Court had before it all the materials for finally determining the questions in dispute a new trial was not necessary.

Rowan v. Toronto Ry. Co., 29 Can. S.C.R. 717.

[Approved in Brown v. London Street Ry. Co., 1 Can. Ry. Cas. 385, 2 O.L.R. 53; distinguished in London Street Ry. Co. v. Brown, 1 Can. Ry. Cas. 390, 31 Can. S.C.R. 651; O'Hearn v. Port Arthur, 4 O.L.R. 209; Pouffe v. Can. Iron Furnace Co., 11 O.L.R. 52, 10 D.L.R. 37; followed in Badgeley v. Grand Trunk Ry. Co., 14 O.W.R. 425; referred to in Bell v. Winnipeg Elec. Street Ry. Co., 15 Man. L.R. 346; Halifax Elec. Tram Co. v. Inglis, 30 Can. S.C.R. 258; Sheppard Pub. Co. v. Press Pub. Co., 10 O.L.R. 243.]

Trial—Negligence of street railway—Modification of instructions.

Where, in a jury trial of an action for negligence against a street railway company and a municipal corporation, the plaintiff desists from his action as against one of two defendants jointly sued in damages and the trial Judge thereupon modifies the assignment of facts to be submitted to the jury, no prejudice is suffered by the remaining defendant if the assignment of facts as modified allows the jury to find the accident was due either to the negligence of the plaintiff, or to that of the defendant or to that of neither of them.

Montreal Street Ry. Co. v. Conant, 14 Can. Ry. Cas. 305, 7 D.L.R. 261.

Negligence—General verdict—Answers to questions.

Where a jury returns a verdict in favour of the plaintiff and then at the request of the trial Judge verbally give their reasons for the result, their finding is nevertheless a general verdict and their reasons may be disregarded if there is sufficient evidence to support the finding. Quære, whether a jury's answers to questions must be in writing.

Balfour v. Toronto Ry. Co., 2 Can. Ry. Cas. 325, 5 O.L.R. 735.
[Affirmed in 32 Can. S.C.R. 239, 2 Can. Ry. Cas. 330.]

Appeal—Question of procedure—Verdict—Weight of evidence.

The Supreme Court of Canada refused to interfere with a decision of the Court of Appeal for Ontario in a matter of procedure, namely, whether a verdict of a jury was a general or special verdict. The Court also refused to disturb the verdict on the ground that it was against the weight of evidence after it had been affirmed by the trial Judge and the Court of Appeal.

Toronto Ry. Co. v. Balfour, 2 Can. Ry. Cas. 330, 32 Can. S.C.R. 239.
[Commented on in Jamieson v. Harris, 35 Can. S.C.R. 643.]

Cause of injury—Province of jury—Specific questions.

Where on the trial of an action based on negligence questions are submitted to the jury, they should be asked specifically to find what was the negligence of the defendants which caused the injury; general findings of negligence will not support a verdict unless the same is shewn to be the direct cause of the injury.

Mader v. Halifax Elec. Tramway Co., 5 Can. Ry. Cas. 434, 37 Can. S.C.R. 94.
[Referred to in Toll v. Can. Pac. Ry. Co., 1 Alta. L.R. 332.]

Charge to jury—Misdirection—Objection at trial—Failure, Effect of.

Per Osler, J.A.:—There is no hard and fast rule which absolutely prohibits the Court from entertaining an objection on the ground of misdirection when the party has omitted to take it at the trial.

Brenner v. Toronto Ry. Co., 7 Can. Ry. Cas. 210, 15 O.L.R. 195.
[Affirmed in 40 Can. S.C.R. 540, 8 Can. Ry. Cas. 108.]

Misdirection—Correction after specific objection—Review on appeal.

Where, on a specific objection to his charge, the trial Judge recalled the jury and directed them as requested, the contention that the directions thus given were erroneous should not be entertained on an appeal.

Can. Pac. Ry. Co. v. Hassen, 7 Can. Ry. Cas. 441, 40 Can. S.C.R. 194.

Remedying defects of danger—Evidence.

In any action for negligence, it is not improper to receive evidence as to what may have been done by the defendants subsequently to remedy the defects or dangers complained of, but the jury should be warned that such evidence taken by itself is no evidence of negligence. If there be no other evidence of negligence the case should be withdrawn from the jury. The evidence in this case considered, as to whether the case should have been left to the jury or not. It is within the discretion of the trial Judge to submit special questions to the jury or not; but in either case the jury may render a general verdict. The words "the Court may give such damages," in Con. Ord. N.W.T. c. 48, s. 3, means the Judge at trial, or the Judge and the jury, as the case may be. Semble, a verdict for $4,500, under the circumstances of this case, cannot seriously be excepted to.

Toll v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 294, 1 A.L.R. 318.

[Applied in White v. Grand Trunk Pac. Ry. Co., 2 Alta. L.R. 535; observed in Winterburn v. Edmonton, Y. & P. Ry. Co., 1 Alta. L.R. 311, 8 W.L.R. 795.]

TRIAL—JURY—TWO EQUALLY POSSIBLE VIEWS ON FACTS.

If the facts which are admitted are capable of two equally possible views, which reasonable people may take, and one of them is more consistent with the case for one party than for the other, it is the duty of the Judge to let the jury decide between such conflicting views. [Davey v. London & S. W. Ry. Co., 12 Q.B.D. 70, followed.]

Ramsay v. Toronto Ry. Co., 17 Can. Ry. Cas. 6, 30 O.L.R. 127, 17 D.L.R. 220.

SPECIAL FINDINGS—VERDICT—NEGLIGENCE.

The finding of a jury in a railway personal injury case that the defendant railway company was guilty of negligence in "nonobservance of rules in going through a closed switch," does not necessarily refer to the company's printed book of rules, put in as evidence by the plaintiff, but may be supported as referring to a rule of operation to that effect proved by oral testimony as governing the conduct of employees, although not embodied in the printed rule book.

Staats v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 38, 17 D.L.R. 309.

VERDICT—DAMAGES EXCEEDING AMOUNT CLAIMED.

A jury cannot award as special damages an amount greater than the amount claimed, unless the pleadings are amended so as to cover the larger amount. [Chattell v. Daily Mail Publishing Co., 18 Times L.R. 165, followed.]

Staats v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 38, 17 D.L.R. 309.

TRIAL—VERDICT—SUFFICIENCY AND CORRECTNESS—DAMAGES.

In a personal injury case where the jury's award of general damages at $15,000 is attacked as excessive and the evidence shews that the injuries sustained were unusually severe, the award will not be disturbed where it stands the test that twelve reasonable men might reasonably find the damages at that amount. [Tobin v. Can. Pac. Ry. Co., 2 D.L.R. 173, 5 S.L.R. 381; and Gordon v. Can. Northern Ry. Co., 2 D.L.R. 183, 5 S.L.R. 369, followed.]

Staats v. Can Pac. Ry. Co., 17 Can. Ry. Cas. 38, 17 D.L.R. 309.

TRIAL—CONTRIBUTORY NEGLIGENCE—WHEN A QUESTION FOR JURY.

Contributory negligence is primâ facie a question for the jury, and only where it is very clear that no jury could reasonably find otherwise should a case be withdrawn from the jury on the ground that contributory negligence has been established. [Daynes v. British Columbia Elec. Ry. Co., 7 D.L.R. 767, 17 B.C.R. 498, 14 Can. Ry. Cas. 309, reversed.]

Daynes v. British Columbia Elec. Ry. Co., 18 Can. Ry. Cas. 146, 49 Can. S.C.R. 58, 19 D.L.R. 266.

TRIAL—FINDINGS OF JURY—STATEMENTS OF FOREMAN.

The oral statements of the foreman of a jury, explaining to the Court the cause of an accident as found by the jury, cannot override the deliberate written verdict of the whole jury, so as to warrant the action of the trial Judge in entering judgment against their verdict.

Gray v. Wabash Ry. Co., 20 Can. Ry. Cas. 391, 35 O.L.R. 510, 28 D.L.R. 244.

New trial—Verdict against weight of evidence—Reasonableness.

Where the verdict arrived at by the jury upon evidence properly submitted to them upon questions of fact is one that reasonable men might reach, the verdict will not be disturbed as being against the weight of evidence. [Commissioners of Railways v. Brown, 13 A.C. 133; Windsor Hotel Co. v. Odell, 39 Can. S.C.R. 336, followed. See also MacKenzie v. B.C. Elec. Ry. Co., 21 B.C.R. 375; McDonald v. Campbell (N.S.), 22 D.L.R. 748; Ball v. Wabash Ry. Co. (Ont.), 26 D.L.R. 569; Morgan v. McDonald (Can.), 27 D.L.R. 125; Can. Pac. Ry. Co. v. Walsh, 24 Que. K.B. 185; Suarez v. Eisenhauer, 47 N.S.R. 418; Tobin v. Halifax (N.S), 16 D.L.R. 367; Holt Timber Co. v. McCallum (P.C.), 25 D.L.R. 445.]

Fraser v. Pictou County Electric Co., 20 Can. Ry. Cas. 400, 50 N.S.R. 30, 28 D.L.R. 251.

Finding of jury—Contributory negligence.

When he meaning to be given to the finding of the jury is that the leaving of one of the gates at a railway crossing open was an invitation to the driver of a truck that he might safely cross the tracks, and where there is evidence to support this finding and also a finding against contributory negligence, the findings will not be disturbed.

Armstrong Cartage, etc., Co. v. Grand Trunk Ry. Co., 23 Can. Ry. Cas. 264, 42 O.L.R. 660, 43 D.L.R. 122.

Questions submitted to jury—Interpretation of findings—Negligence.

About 10 o'clock at night a farmer was found on the tracks of the defendant company with both thighs amputated above the knee and one foot caught in a "split switch"—no one saw the accident and the injured person died shortly after being found. The jury in answer to questions, found that the death was caused by the defendants' negligence in having a split switch on a public highway and they found against contributory negligence. The Court held that under the circumstances there was evidence to go to the jury on the question of negligence, and in basing their conclusion on a consideration of that evidence, the jury were not usurping the jurisdiction of the Board. The finding was not in the nature of a direction as to what the protection to the public should be, but a finding that from the kind and manner of construction of the switch, it was dangerous to persons using the highway, and that those responsible for its presence on the highway were negligent if it was the cause of injury. Also that an authorised act must be done not only in a reasonable way and without negligence, but there is the additional obligation upon one exercising a statutory or authorised power not to extend that power. Whatever were the rights which the defendants acquired in respect of the highway they did not extend to or include the erection and maintenance of the split switch. [Southwark & Vauxhall Water Co. v. Wandsworth, [1898] 2 Ch. 603; Roberts v. Charing Cross (1903), 87 L.T.R. 732; Moore v. Lambeth Waterworks Co. (1886), 17 Q.B.D. 462, referred to.]

Brunelle v. Grand Trunk Ry. Co., 23 Can. Ry. Cas. 348, 43 O.L.R. 220, 44 D.L.R. 48.

Negligence—Action for damages—Finding of jury—Excessive speed.

In an action for damages for injuries sustained by being run down by defendants' engine, the Court on appeal held that the finding of the jury, that the company was guilty of negligence in not "proceeding with sufficient caution when approaching wreckage zone," was covered by the allegation of "excessive speed" in plaintiff's pleading, and excessive speed would be such speed as would be excessive under all the circumstances of the case, and that the jury had the right to pass upon the question of excessive speed. [Minor v. G.T.R. Co., 35 D.L.R. 106, 38 O.L.R. 646, distinguished; Columbia Bitulithic v. B.C. Elec. Ry. Co., 37 D.L.R. 64, 55 Can. S.C.R. 1; Orth v. Hamilton Grimsby & Beamsville Elec. Ry. Co., 43 D.L.R. 137, 43 O.L.R. 137, referred to.]

Follick v. Wabash R. R. Co., 48 D.L.R. 526.

Street railway—Reasonable care—Collision with automobile.

An action for injury to an automobile by a collision with a street car on turning a corner cannot be maintained against the electric railway if there was no evidence to warrant the jury in finding that the motorman by exexercising reasonable care could have stopped his car and have avoided the collision after he had become aware or ought to have become aware that danger was imminent.

Gooderham v. Toronto Ry. Co., 22 D.L.R. 898.

Injury to switchman—Negligence—Want of printed rules—Specific findings.

The general finding of a jury that the injuries sustained by a switchman were caused by the negligence of the railway company is limited by a specific finding that the negligence consisted in not having definite printed rules and in not seeing that they are at all times strictly obeyed, and discloses no specific act of negligence on which an action at common law is maintainable.

Hile v. Grand Trunk Pacific Ry. Co., 24 D.L.R. 9.

Jury — Findings — Expert evidence — Switch stand — Location — Too close to rail.

A jury may find, without the assistance of expert evidence, that the location of a switch stand in a railway yard is too close to the rail, and is not reasonably sufficient to permit of the safe passage through it of a man riding on the side ladder of a car. [Mallory v. Winnipeg Joint Terminals, 53 Can. S.C.R. 323, 20 Can. Ry. Cas. 382, 29 D.L.R. 20; Phelan v. Grand Trunk Pacific Ry. Co., 51 Can. S.C.R. 113, at p. 133, 18 Can. Ry. Cas. 233, 23 D.L.R. 90, distinguished.]

Nelson v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 308, 55 Can. S.C.R, 626, 39 D.L.R. 760.

Verdict of jury—Weight of evidence.

If the answers by a jury to questions submitted can be supported by any reasonable construction, an appellate Court should support them, and not set aside the findings as contrary to the weight of evidence unless they are such as in the opinion of the appellate Court could not have been arrived at by reasonable men. [McKelvey v. Le Roi Mining Co., 32 Can. S.C.R. 664; Jamieson v. Harris, 35 Can. S.C.R. 625, referred to.]

Starratt v. Dominion Atlantic Ry. Co., 16 D.L.R. 777.

Findings of jury—Setting aside verdict—Contributory Negligence.

In an action for damages for injury to an automobile on a highway the findings of the jury should not be disturbed although they have not directly indicated the connection between the negligence found and the accident, if they did on the evidence reasonably draw the inference that the effective cause of the accident was the "excessive rate of speed," and that the plaintiff was not guilty of contributory negligence.

Gallagher v. Toronto Ry. Co., 23 Can. Ry. Cas. 257, 41 O.L.R. 143, 40 D.L.R. 114.

G. Evidence; Witnesses.

WITNESSES—RERFESHING RECOLLECTION—REFERENCE TO NOTES MADE AT TIME OF TRANSACTION.

A witness may refresh his recollection from notes made by him at the time of a transaction in question and then make a statement as to the truth of the memorandum. The rule is that the memorandum proposed to be looked at must be made by the witness, or adopted as a correct account by him at or about the time when it was made. (Per Irving, J.A.) Where the loss of original notes of a certain transaction in question has been proved, and that a transcript thereof has been made on the following day, and that this copy was accurate, and the memory of the witness has been exhausted on the subject, he has a right to refresh his memory by reference to the copy. (Per Martin, J.A.)

Daynes v. British Columbia Elec. Co., 14 Can. Ry. Cas. 309, 7 D.L.R. 767.

[Reversed in 18 Can. Ry. Cas. 146, 49 Can. S.C.R. 58, 19 D.L.R. 266.]

CROSS-EXAMINATION OF WITNESS BY REFERENCE TO DEPOSITION TAKEN ON DISCOVERY—FALSE IMPRESSIONS DRAWN THEREFROM—DISCRETION OF TRIAL JUDGE.

Where a witness is cross-examined by reference to his deposition taken on discovery, it is not permissible to conduct the proceedings in such a way as to give to the jury a false impression of the evidence given by the witness on discovery, and where that is attempted, the trial Judge, in his discretion, may allow the whole of the discovery evidence to be read, or permit such other steps to be taken as may be necessary to remove the false impression. (Per Irving, J.A.)

King Lumber Co. v. Can. Pac. Ry. Co. (B.C.), 14 Can. Ry. Cas. 313, 7 D.L.R. 733.

[Appeal to Privy Council withdrawn by consent.]

WITNESSES—REFRESHING MEMORY—REFERENCE TO NOTES MADE AT TIME OF TRANSACTION.

A witness may properly be asked to refresh his memory by looking at a copy of his notes which he was prepared to verify as having been made by himself from the original which was a transcript of his stenographic report of the interview between the parties; and refusal to permit that course is ground for a new trial where it is impossible for the appellate Court to say that its rejection did not materially affect the issue. [Daynes v. British Columbia Elec. Ry. Co., 7 D.L.R. 767, 17 B.C.R. 498, 14 Can. Ry. Cas 309, reversed.]

Daynes v. British Columbia Elec. Ry. Co., 18 Can. Ry. Cas. 146, 49 Can. S.C.R. 58, 19 D.L.R. 266.

EVIDENCE—MEDICAL TESTIMONY—EXPERT OPINIONS—NUMBER.

S. 10 of the Evidence Act, R.S.O. 1914, c. 76, which prohibits the calling of more than three expert witnesses without leave of the Court, is not violated if in connection with the statutory number of experts there is also given the testimony of the attending physician describing the condition of the injured after the accident and that of the physician who made an examination for insurance, but not being regarded as expert witnesses.

Burrows v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 183, 23 D.L.R. 173.

EVIDENCE—TRAIN—SUDDEN STOP—BREAKING COUPLING PIN—INJURY—NEGLIGENCE.

The undisputed evidence that an employee of a railway company who was employed to heat the cars in the railway yard, while attending to his duties, was going from a second-class car to the baggage car for coal, that as he was reaching for the door of the baggage car the train suddenly stopped, the bagagge car and the second-class car parted from the breaking of a knuckle pin, the employee being thrown to the ground and injured by the wheels of the baggage car, is sufficient evidence to justify the jury in finding that the injuries were the result of the negligence of the company in stopping the train too suddenly, when air brakes and safety chains were not in use.

Worsley v. Can. Northern Ry. Co., 23 Can. Ry. Cas. 385, 11 Sask. L.R. 473, 43 D.L.R. 287.

EVIDENCE—BURDEN OF PROOF—DELIVERY—RECEIPTS TO CARRIERS—RECEIPT PRIOR TO LOCATING GOODS.

The rule of evidence that a written receipt signed and delivered (acknowledging the delivery of goods by the shipper to a consignee) shifts the burden of proof, cannot be applied in favour of the shipper, in the face of the consignee's direct denial of delivery and the fact that such receipts were by the consignee company's rules of business exacted prior to inspection or delivery of the goods and that such receipts were not really effective until a later stage when the goods, if found, might be checked and delivered.

Henderson v. Inverness Ry. Co., 16 D.L.R. 420.

ONUS—EXCEPTIONS OR EXEMPTIONS—RAILWAY CONSTRUCTION CONTRACT—STATEMENT AS BASIS FOR SUBSIDY.

Where a railway construction contractor and his employer stipulate that the payment to the contractor of a certain item of the contract price must depend upon the contractor's statement of the construction cost being passed by the Federal Government as basis for a specified additional subsidy, the employer is relieved from the payment where the subsidy in question is withheld by the Government on the ground, among others, that the contractor's construction statement is not even in part established, unless the contractor satisfies the onus shifted upon him and affirmatively proves some other efficient cause for the denial of the subsidy.

Dini v. Brunet, 18 D.L.R. 385.

H. Stay of Proceedings; Security.

STAY OF PROCEEDINGS—APPEAL PENDING.

The Court in its discretion may always grant a stay of proceedings pending an appeal to the Supreme Court, but where there is no express rule permitting such an appeal such discretion should only be exercised on account of the existence of special circumstances which must be shewn by the applicant.

Hockley v. Grand Trunk Ry. Co., Davis v. Grand Trunk Ry. Co., 3 Can. Ry. Cas. 252, 7 O.L.R. 186.

[Affirmed in 7 O.L.R. 658.]

I. Judgments; Motions.

Failure to move for judgment—Verdict of special jury—Lapse of time.

The provisions of Art. 494, C.C.P., are not on pain of nullity, and a failure to move for judgment in accordance with the verdict of a special jury until after the lapse of the time prescribed by this article, does not deprive the party of the right to a judgment, unless the action itself has been declared perempted for failure to proceed therein during two years.

Miller v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 449, 21 Que. S.C. 346.

[Affirmed in Grand Trunk Ry. Co. v. Miller, 2 Can. Ry. Cas. 490, 12 Que. K.B. 1; reversed on other grounds in 34 Can. S.C.R. 45, 3 Can. Ry. Cas. 147.]

Short notice of motion—Service of—Contents of notice.

Where a party applies for special leave to serve short notice of motion, he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party.

Can. Pac. Ry. Co. v. Vancouver, Westminster & Yukon Ry. Co., 3 Can. Ry. Cas. 273.

Order—Purchase money—Payment into Court—Service of—Setting aside.

An order made under the N.B. Railway Act, C.S.N.B., c. 91, s. 17, for claimants on purchase money for a railway right-of-way paid into Court by the railway will be set aside where the mortgagor who contracted for the sale had no authority to do so for the mortgagees, nor was service of the order made on an assignee of the mortgages, as had been directed by the Court when the order was made.

Re Reardon and St. John & Quebec Ry. Co., 20 D.L.R. 910.

J. New Trial; Misdirection; Nonsuit.

New trial—Misdirection—Right to re-examination.

By 60 Vict. c. 24, s. 370 (N.B.), "A new trial is not to be granted on the ground of misdirection, or of the improper admission or rejection of evidence unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action." On the trial of an action against the Electric Street Ry. Co. for damages on account of personal injuries, the vice-president of the company, called on plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel on opening to the jury having stated that the company was making large sums of money out of the road. On cross-examination the witness was questioned as to the disposition of the proceeds of debentures, and on re-examination plaintiff's counsel interrogated him at length as to the selling price of the stock on the Montreal Exchange, and proved that they sold at about 50 per cent premium. The Judge, in charging the jury, directed them to assess the damages as "upon the extent of the injury plaintiff received, independent of what these people may be, or whether they are rich or poor." The plaintiff obtained a verdict with heavy damages:—Held, that on cross-examination of the witness by defendant's counsel, the door was not open for re-examination as to the selling price of the stock; that in view of the amount of the verdict it was quite likely that the general observation of the Judge in his charge did not remove its effect on the jury as to the financial ability of the company to respond well in damages. 35 N.B.R. 1, varied.

Hesse v. Saint John Ry. Co., 30 Can. S.C.R. 218.

[Considered in Sinclair v. Ruddell, 16 Man. L.R. 60.]

NEW TRIAL—GENERAL VERDICT—DOUBT AS TO MEANING OF JURY.

In an action for damages for injury to a child who was run over by a car of the defendants, in which negligence was alleged, several questions were submitted to the jury by the trial Judge, but he also told them that they might, if they chose, find a general verdict. When the jury returned into Court, the foreman announced, "We award the plaintiff $300 damages." On being asked by the trial Judge whether they had answered the questions, they said they had answered three, as follows: "1. Q. Was the company guilty of negligence? A. Yes. 2. Q. If so, in what did such negligence consist? A. Over-speed. 3. Q. Was the plaintiff guilty of contributory negligence? A. Yes." On this the trial Judge dismissed the action:—Held, that there should be a new trial; it was probable that the verdict was intended to be a general one, but the matter was not free from doubt; and the jury should have been asked to make the matter plain before being discharged. Among the questions that were not answered by the jury was the following: "Could the motorman, after it became apparent to him that the boy was going to cross the track, by the exercise of reasonable care and skill, have prevented the accident, if he had been running at a reasonable rate of speed?" In leaving this question, the trial Judge said: "I want you to consider that last element, because it is not, 'Could he have prevented the accident if running at an unreasonable rate of speed.' ": —Held, that this question was not properly framed, and the jury were not properly directed. The unreasonable rate of speed was the original negligence, and the question which the jury had to consider, after finding such negligence, was whether, notwithstanding that unreasonable rate of speed, the motorman, after seeing the child committing or about to commit a negligent act, could, by the exercise of reasonable care, have avoided the consequences of it:—Held, that the defendants should pay the costs of the plaintiff's appeal from the judgment dismissing the action (Martin, J.A., dissenting as to this); and that the costs below should abide the result of the new trial.

Rayfield v. British Columbia Elec. Ry. Co., 14 W.L.R. 414.

NEW TRIAL—INSUFFICIENCY OF DAMAGES—COMPROMISE VERDICT.

A new trial on the ground of the insufficiency of the damages will not be granted unless it appears clearly to the Court that the smallness of the damages has arisen from mistake upon the part of either the Court or jury, or from some unfair practice on the part of the defendant. A verdict will not be set aside on the ground that it is a compromise verdict if it can be justified upon any hypothesis presented by the evidence.

Currie v. Saint John Ry. Co., 3 Can. Ry. Cas. 280, 36 N.B.R. 194.

NEW TRIAL—INVALID GRANTING OF.

It is not a valid ground for ordering a new trial that the Judges differ from the conclusions at which the jury have arrived or consider that the findings shew that the defendants had not had a fair and unprejudiced trial. Hence, in an action for damages for loss of life occasioned by the negligent management of a street car where the jury finds that the defendant was guilty of negligence in causing the accident and that the deceased was not guilty of contributory negligence, it is error in setting aside a judgment entered upon such verdict and ordering a new trial, where the evidence of both sides was properly submitted to the jury.

Toronto Ry. Co. v. King, 7 Can. Ry. Cas. 408, [1908] A.C. 260.

[Commented on in Brenner v. Toronto Ry. Co., 40 Can. S.C.R. 552; followed in Tinsley v. Toronto Ry. Co., 17 O.L.R. 74; referred to in Berthelot v. Salesses, 39 N.B.R. 149; White v. Victoria Lumber, etc., Co., 14 B.C.R. 374; distinguished in Milligan v. Toronto Ry. Co., 17 O.L.R. 530.]

New trial—Misdirection—Verdict on issues.

An order for a new trial should not be granted merely on account of error in the form of the questions submitted to the jury where no prejudice has been suffered in consequence of the manner in which the issues were presented by the charge of the Judge at the trial and the jury has passed upon the questions of substance. The judgment appealed from (18 Man. L.R. 134, 9 Can. Ry. Cas. 126) was affirmed, the Chief Justice dissenting, and Davies, J., hesitante, as to the quantum of the damages awarded.

Winnipeg Elec. Ry. Co. v. Wald, 9 Can. Ry. Cas. 129, 41 Can. S.C.R. 431.

New trial—Jury findings—Perplexed jury—Uncertainty.

Where the result of jury findings and of what takes place at the trial with reference to their answers and to questions put by trial Judge (both written and oral) leaves uncertainty as to what they meant, a new trial will be granted.

Herron v. Toronto Ry. Co., 14 Can. Ry. Cas. 124, 6 D.L.R. 215.

[Reversed in 11 D.L.R. 697, 15 Can. Ry. Cas. 373.]

New trial—Jury findings—Uncertainty.

Where a jury's original written findings of answers to questions submitted are inconsistent, and, in an answer to an enquiry by the trial Judge, the jury orally explains and harmonizes the various answers in open Court, the result from this course is, that the earlier written findings are displaced pro tanto by the final verbal findings, and the inconsistency of the findings may thereby be cured.

Herron v. Toronto Ry. Co., 15 Can. Ry. Cas. 373, 11 D.L.R. 697, 28 O.L.R. 59.

[Herron v. Toronto Ry. Co. (No. 1), 14 Can. Ry. Cas. 124, 6 D.L.R. 215, reversed.]

New trial—Vague and ambiguous findings.

In a personal injury case arising from a street car colliding with a rig, where the jury, upon their first return into Court, found under one question that, after defendants' motorman saw that the plaintiff was about to drive across the tracks, the motorman could not by reasonable care have avoided the accident, while finding under another question that the motorman was guilty of negligence in waiting too late before applying the brakes, and while finding under a third question that the motorman was negligent in not applying the brakes when he first noticed the plaintiff heading across the tracks, and where, upon proper comment by the trial Judge on such contradictory findings, the perplexed jury struck out the answers to the two questions first mentioned, still leaving doubt as to what they meant by the answer to the third question, such findings are vague and ambiguous and a ground for a new trial.

Herron v. Toronto Ry. Co., 14 Can. Ry. Cas. 124, 6 D.L.R. 215.

[Reversed in 11 D.L.R. 697, 15 Can. Ry. Cas. 373, 28 O.L.R. 59; referred to in Loach v. British Columbia Elec. Ry. Co., 17 Can. Ry. Cas. 21, 16 D.L.R. 245.]

New trial—Inconsistent and uncertain findings of jury.

In a personal injury action arising from a car colliding with a rig, where the jury finds (a) that by reasonable care plaintiff, had he seen that he had sufficient time to cross the tracks, could have avoided the accident, (b) that by reasonable care defendant's motorman had he applied the brakes when he first noticed plaintiff heading across the tracks could have avoided the accident, (c) that the accident was caused by negligence of both plaintiff and defendant, such findings are inconsistent and uncertain and a ground for a new trial.

Herron v. Toronto Ry. Co., 14 Can. Ry. Cas. 124, 6 D.L.R. 215.

[Reversed in 11 D.L.R. 697, 15 Can. Ry. Cas. 373, 28 O.L.R. 59.]

New trial—Misdirection.

The Judge's charge to the jury is to be read as a whole, and if in view of its general meaning and effect, the jury were not left under any erroneous impression as to the real nature of the issues to be determined or as to the law applicable, misdirection cannot be predicated upon an isolated portion of the charge when read apart from the other portions, so as to constitute a ground for ordering a new trial. [Jones v. Can. Pac. R. Co., 14 Can. Ry. Cas. 76, 5 D.L.R. 332, 3 O.W.N. 1404, reversed.]

Jones v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 305, 13 D.L.R. 900, 24 O.W.R. 917, 30 O.L.R. 331.

Negligence—Amputation of foot—Evidence.

The injury for which plaintiff sued was his foot being crushed, and on the day of the accident the medical staff of the hospital where he had been taken held a consultation and were divided as to the necessity for amputation. Dr. W., who thought the limb might be saved, was, four days later, appointed by the company, at the suggestion of plaintiff's attorney to co-operate with the plaintiff's physician. Eventually the foot was amputated and plaintiff made a good recovery. On the trial plaintiff's physician swore to a conversation with Dr. W. four days after the first consultation, and three days before the amputation, when Dr. W. stated that if he could induce plaintiff's attorney to view it from a surgeon's standpoint, and not use it to work on the sympathies of the jury he might consider more fully the question of amputation. The Judge in his charge referred to this conversation and told the jury that it seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when it should have been taken off, and that he thought it very reprehensible:—Held, Strong, C.J., and Gwynne, J., dissenting, that as Dr. W. did not represent the company at the first consultation when he opposed amputation; as others of the staff took the same view and there was no proof that amputation was delayed through his instrumentality; and as the jury would certainly consider the Judge's remarks as bearing on the contention made on plaintiff's behalf that amputation should have taken place on the very day of the accident. It must have affected the amount of the verdict. To tell a jury to ask themselves "If I were plaintiff how much ought I to be paid if the company did me an injury?" is not a proper direction. 35 N.B.R. 1, varied.

Hesse v. Saint John Ry. Co., 30 Can. S.C.R. 218.

[Considered in Sinclair v. Ruddell, 16 Man. L.R. 60.]

New trial—Conflicting findings as to negligence.

The findings of a jury in an action for personal injuries sustained by a locomotive fireman by reason of the escape of steam from a valve in the engine, that the injuries were caused by the negligence of the defendant in not seeing the valve properly closed, and that the plaintiff by the exercise of reasonable care in examining the valve could have avoided the accident, are conflicting and ground for a new trial under r. 501 (1) (Ont.). [St. Denis v. Baxter, 13 O.R. 41, 15 A.R. (Ont.) 387; Australasian Steam, etc., Co. v. Smith (1889), 14 App. Cas. 321, followed; Kerry v. England, [1898] A.C. 742, distinguished.]

Ball v. Wabash Ry. Co., 20 Can. Ry. Cas. 329, 35 O.L.R. 84, 26 D.L.R. 569.

New trial—Errors of Court—Appellate judgment on merits.

Where a trial Judge directs a judgment against the verdict of the jury, the Appellate Court in setting the judgment aside will not order a new trial, but will direct a judgment to be entered in accordance with the verdict. [Jones v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 305, 13 D.L.R. 900, 30 O.L.R. 331, referred to.]

Gray v. Wabash Ry. Co., 20 Can. Ry. Cas. 391, 35 O.L.R. 510, 28 D.L.R. 244.

New trial for errors of court—Insufficiency of issues submitted—Negligence.

In an action for damages for injuries sustained by the plaintiff by being struck by the defendant's street car while the plaintiff on foot was crossing the track, if upon the facts (a) the plaintiff's conduct may not have been negligent, and (b) the defendant may have been guilty of negligence which occasioned the accident, the omission at the trial to pass in a satisfactory way upon these issues is ground for a new trial. [Myers v. Toronto Ry. Co., 10 D.L.R. 754, reversed.]

Myers v. Toronto Ry. Co., 18 D.L.R. 335.

Action for damages—Negligence—Mutual obligations—Insufficiency of issues submitted to jury.

In an action for damages for injuries sustained in a collision between a motor car and a passenger train when both parties have been guilty of negligence, a new trial will be ordered where the Court has failed to submit the mutual obligations of the parties to the jury, with proper and complete directions on the law and as to the evidence applicable so as to enable them to come to a reasonable conclusion.

Gavin v. Kettle Valley Ry. Co., 23 Can. Ry. Cas. 379, 43 D.L.R. 47.
[Affirmed in 25 Can. Ry. Cas., 47 D.L.R. 65.]

Inaccuracy in summing up—Conducing to wrong verdict.

An inaccurate statement as to the facts made by a Judge in summing up, will not necessarily be a ground for a new trial; the party claiming to have been adversely affected by the error must shew that the misstatement was of a character which must have conduced to a wrong verdict. [Clark v. Molyneux, 3 Q.B.D. 237, referred to.]

Starratt v. Dominion Atlantic Ry. Co., 16 D.L.R. 777.

Misdirection—Instructions, correctness of—Damages—Personal injuries—Impairment of earning capacity.

In a negligence case against a railway company by a fireman in its employment, for permanent personal injury impairing his earning capacity, the Judge should charge the jury to consider, on the quantum of damages, the general opportunities in life still open to the plaintiff, and there is misdirection where the charge limits those opportunities to the plaintiff's particular calling or even the class of callings within his general industrial field, for instances, railroading. [Johnston v. Great Western Ry. Co., [1904] 2 K.B. 250; Rowley v. London & N.W. Ry. Co., L.R. 8 Ex. 221, specially referred to; Schwartz v. Winnipeg Elec. Co., 12 D.L.R. 56, and Bateman v. Middlesex, 6 D.L.R. 533, considered.] In a negligence action for damages for permanent personal injury to the plaintiff, a railroad man, impairing his earning capacity, it is misdirection for the trial Judge to charge the jury by suggesting that the jurymen put themselves in the plaintiff's place and consider for themselves whether, in similar circumstances, any of them would be willing to undergo such suffering and loss, and to seek employment in industrial fields other than railroading. [Johnston v. Great Western Ry. Co., [1904] 2 K.B. 250; Rowley v. London & N.W. Ry. Co., L.R. 8 Ex. 221, specially referred to.]

Pickering v. Grand Trunk Pacific Ry. Co., 14 D.L.R. 584.

NEW TRIAL—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSUFFICIENT INSTRUCTIONS TO JURY.

The jury having found negligence on the part of the defendants' employees and of the plaintiff's wife, who was driving his automobile, in answer to two further questions found that after the employees of the defendants became aware, or ought to have become aware, that the automobile was in danger of being injured, they could have prevented the injury in the exercise of reasonable care by the speedy application of brakes. On these findings the trial Judge entered judgment for the plaintiff. The Court held that the Court of Appeal was justified in ordering a new trial on the ground that the jury should have been instructed that it was the duty of the driver of the motor car as well as that of the railway employees to have taken all reasonable care to avoid the collision, when the danger of it should have been apparent, and that questions as to her conduct at that stage of the occurrence, similar to those with regard to the conduct of the railway employees should have been submitted to the jury. [Gavin v. Kettle Valley Ry. Co., 23 Can. Ry. Cas. 379, 43 D.L.R. 47, affirmed.]

Gavin v. Kettle Valley Ry. Co. (25 Can. Ry. Cas., 47 D.L.R. 65).

NEGLIGENCE—EVIDENCE—PRIVILEGE—JURY—IMPROPER COMMENTS BY COUNSEL—MISDIRECTION—NEW TRIAL—COSTS OF ABORTIVE TRIAL.

In an action for damages owing to the negligence of the motorman of a street car, the conductor refused to produce in evidence the written report of the accident that he had given to his company, the contents of which were privileged. Counsel for the plaintiff, when addressing the jury, said: "The plaintiff has sworn to one set of facts with regard to the occurrence, the conductor has sworn to another, the evidence as to which is right may be found in that report, the company have declined to allow its contents to be disclosed. Now, gentlemen, you may draw such an inference," and the learned Judge not having instructed the jury that they were not entitled to draw an unfavourable inference from the nonproduction of the report, there was misdirection and there must be a new trial. [Wentworth v. Lloyd (1864), 10 H.L. Cas. 589, followed. Note on ruling as to costs.]

Errico v. British Columbia Elec. Ry. Co., 23 B.C.R. 468.

K. Third Party Procedure.

INDEMNITY—DIRECTIONS—ORDER ALLOWING NOTICE—APPEAL.

In an action to recover damages for the death of an employee of the defendants, who was killed at the crossing of defendants' railway with another railway, the defendants obtained an ex parte order allowing them to serve a third party notice upon the other railway company, claiming indemnity under an agreement whereby the latter company were allowed to put in the crossing at the point where the accident happened, upon their indemnifying the defendants against any claim for damages arising during the progress of the work. The defendants asserted and the other company denied that the accident in question happened during the progress of the work:—Held, that it was desirable that the question as to the defendants' liability to the plaintiff should be established in such a way as to be binding upon the third parties, although all the matters in dispute between the defendants and the third parties could not be determined in the action. [Baxter v. France (No. 2), [1895] 1 Q.B. 591, distinguished.] Form of order giving directions as to trial and questions of costs in such a case, settled. Semble, referring to Baxter v. France, [1895] 1 Q.B. 455, 458, that it was the duty of the third parties, if they objected to being added, to appeal within due time against the order allowing the notice to be served upon them.

Holden v. Grand Trunk Ry. Co., 1 Can. Ry. Cas. 529, 2 O.L.R. 421.

[Discussed in Donn v. Toronto Ferry Co., 11 O.L.R. 16, 6 O.W.R. 920, 973.]

POLICE.

See False Arrest.

PRACTICE.

See Pleading and Practice.

PRIORITIES.

See Railway Crossings; Highway Crossings; Wires and Poles.

PROCEDURE.

See Pleading and Practice; Third Party Procedure.

PROTECTION OF CROSSINGS.

See Highway Crossings; Railway Crossings; Crossing Injuries; Wires and Poles; Farm Crossings.

PROTECTION OF PASSENGERS.

See Carriers of Passengers.

PROVISIONAL DIRECTORS.

Statutory prohibition of officers and directors as parties to railway construction contracts, see Contracts; Constitutional Law.

Power of Provisional Directors to execute bond for the performance of conditions in consideration of a bonus, see Railway Subsidy.

ELECTRIC RAILWAY COMPANY—POWERS OF PROVISIONAL DIRECTORS—CONTRACT.

The provisional directors of the defendant company, incorporated by 1 Edw. VII. c. 92 (O), to build an electric railway, gave power to their president and secretary to make a bargain with the plaintiffs, who were promoting a rival electric railway. A bargain was made, and the result reported to the provisional directors, who ratified what had been done. The contract purported to be made between the company and the plaintiffs; the plaintiffs were to cease operations in support of any other rival railway and to assist the company in securing franchises, etc., and were to receive $1,000. The plaintiffs carried out their part of the bargain, and now sued the company for the $1,000, asking in the alternative damages for misrepresentation against the president and secretary, who were joined as defendants. The company had not been organized at the time of the contract; but the president and secretary believed that the company had power to enter into the contract; and they represented to the plaintiffs, and the plaintiffs believed, that they had power to make the contract. The president and secretary were guilty of no fraud. The Act of incorporation provided (s. 12) that the several clauses of the Railway Act should be incorporated with and be deemed to be part of the Act of Incorporation:—Held, having regard to the provisions of s. 44 of the Electric Railway Act, R.S.O. 1897, c. 209, that the provisional directors had no power to enter into the contract, and the contract was not binding on the company, nothing having been done to ratify it:—Held, however, that, as the power of the company to enter into such a contract was not excluded by its Act of Incorporation, but depended upon facts as to organization, etc., the representation of the president and secretary was not as to law, but as to fact, and they were liable to the plaintiffs therefor. [Struthers v. Mackenzie (1897), 28 O.R. 281, distinguished.]

Selkirk v. Windsor, Essex & Lake Shore Rapid Ry. Co., 12 Can. Ry. Cas. 273, 20 O.L.R. 290.

[Reversed in 21 O.L.R. 109, 12 Can. Ry. Cas. 279, 22 O.L.R. 250, 12 Can. Ry. Cas. 282.]

ELECTRIC RAILWAY COMPANY—POWERS OF PROVISIONAL DIRECTORS—CONTRACT.

S. 9 of the Special Act, 1 Edw. VII. c. 92 (O.), incorporating the defendant company, enacts that the provisional directors may agree to pay for the services of persons who may be employed by the directors for the purpose of assisting the directors in furthering the undertaking, or for the purchase of the right-of-way, and any agreement so made shall be binding on the company:—Held, that the express language of the special Act prevails over the general provision (s. 44) of the Electric Railway Act, R.S.O. 1897, c. 209, all the clauses of which; except so far as inconsistent, were, by s. 12 of the Special Act, incorporated with and deemed to be a part of the special Act; and, therefore, the provisional directors had power to bind the company by making the contract sought to be enforced, a contract to pay the plaintiffs for services in furthering the company's undertaking. The Special Act, s. 9, says that this can be done by the provisional directors "when sanctioned by a vote of the shareholders at any general meeting":—Held, approving and following McDougall v. Lindsay Paper Mill Co. (1884), 10 P.R. (Ont.) 247, 252, that the plaintiffs' contract was not affected by the nonobservance of this direction; and, apart from that, the contract was approved, before and after it was made, by the whole body of shareholders, though not formally assembled in general meeting. Judgment of Riddell, J., 20 O.L.R. 290, 12 Can. Ry. Cas. 273, which was in favour of the plaintiffs against the individual defendants, reversed, and judgment directed to be entered for the plaintiffs against the company.

Selkirk v. Windsor, Essex & Lake Shore Rapid Ry. Co., 12 Can. Ry. Cas. 279, 21 O.L.R. 109.

[Affirmed in 22 O.L.R. 250, 12 Can. Ry. Cas. 282.]

ELECTRIC RAILWAY COMPANY—POWERS OF PROVISIONAL DIRECTORS—CONTRACT.

S. 9 of the Special Act, 1 Edw. VII. c. 92 (O.), incorporating the defendant company, is an enabling enactment, enlarging the powers of the provisional directors, and authorizing them to act for and on behalf of the company to an extent much beyond the scope to which provisional directors are limited by s. 44 of the Electric Railway Act, R.S.O. 1897, c. 209. The language of s. 9 distinctly implies that the provisional directors are authorized, with the sanction of the shareholders, to engage the services of promoters or other persons for the purpose of assisting them in furthering the undertaking; and the power to engage services implies the power to pay or agree to pay for such services. The services of the plaintiffs which were engaged under the agreement sued upon were within the class of purposes requiring the sanction of the shareholders if the agreement had been to pay in paid-up stock or bonds. If the sanction of the shareholders was necessary in order to make the agreement binding upon the company, it was given in substance. [Monarch Life Assn. Co. v. Brophy (1907), 14 O.L.R. 1, distinguished.] Apart from these considerations, the agreement being under the seal of the company, and the services having been rendered in fact by the plaintiffs and accepted in fact by the company, there was ample consideration to support the claim against them for the sum mentioned in the agreement. The company having appealed from the judgment against them, and the plaintiffs, as the direct result of the company's appeal, having appealed from the dismissal of the action as against the individual defendants, both appeals were dismissed with costs, but the company were order to pay to the plaintiffs the cost to be paid by the latter to the individual defendants. [Lawford v. Billericay, [1903] 1 K.B. 772, and East Gwillimbury v. King (1910), 20 O.L.R. 510, followed; judgment of a Divisional Court, 21 O.L.R. 109, 12 Can. Ry. Cas. 279, affirmed.]

Selkirk v. Windsor, Essex & Lake Shore Rapid Ry. Co., 12 Can. Ry. Cas. 282, 22 O.L.R. 250.

PROVISIONAL DIRECTORS—POWERS OF—CONDUCTING BUSINESS.

Under the Railway Act, 1906, provisional directors of a railway company have no right to carry on the business of the undertaking, their powers being limited to those specifically defined by s. 81, subs. 3, to merely opening stock books, receiving and safely depositing stock subscriptions, making plans and surveys.

Re Burrard Inlet Tunnel & Bridge Co., 10 D.L.R. 723.

PUBLIC AID.

See Railway Subsidy.

RAILS AND ROADBED.

Injuries resulting by reason of defective rails or roadbed, see Carriers of Passengers; Crossing Injuries; Employees; Negligence; Street Railways.

Jurisdiction of Railway Committee to exonerate railway company from filling in spaces, see Railway Board.

ROADBED—FILLING IN SPACES.

Under the true construction of the Railway Act, 1888, the power conferred by subs. 4 of s. 262, upon the Railway Committee to exonerate a railway company during a specified portion of the year from the duty of filling certain spaces specified in subs. 4, did not apply to the duty imposed by subs. 3 of filling certain other spaces specified by subs. 3. Such extension of power was not authorized by the grammatical construction of the subsections, nor rendered imperative by the context.

Grand Trunk Ry. Co. v. Washington, [1899] A.C. 275.

DEFECTIVE CONSTRUCTION OF ROADBED—DERAILMENT—LATENT DEFECT.

The roadbed of applicants' railway was constructed, in 1893, at a place where it followed a curve around the side of a hill, a cutting being made into the slope and an embankment formed to carry the rails, the grade being one and one-half per cent or 78.2 feet to the mile. The whole of the embankment was built on the natural surface, which consisted as afterwards discovered, of a layer of sandy loam of three or four feet in depth resting upon clay subsoil. No borings or other examinations were made in order to ascertain the nature of the subsoil and the roadbed remained for a number of years without shewing any subsidence except such as was considered to be due to natural causes and required only occasional repairs; the necessity for such repairs had become more frequent, however, for a couple of months immediately prior to the accident which occasioned the injury complained of. Water, coming either from the ditch, or from a natural spring formed beneath the sandy loam, had gradually run down the slope, lubricated the surface of the clay and, finally, caused the entire embankment and sandy layer to slide away about the time a train was approaching, on th evening of 20th September, 1904. The train was derailed and wrecked and the engine-driver was killed. In an action by his widow for the recovery of damages:—Held, that in constructing the roadbed, without sufficient examination, upon treacherous soil, and failing to maintain it in a safe and proper condition, the railway company was, prima facie, guilty of negligence which cast upon them the onus of shewing that the accident was due to some undiscoverable cause; that this onus was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility of the accident having been occasioned by other causes which might have been foreseen and guarded against, and that, consequently, the company was liable in damages. Judgment appealed from affirmed, following Great Western Ry. Co. v. Braid, 1 Moo. P.C. (N.S.) 101.

Quebec & Lake St. John Ry. Co. v. Julien, 6 Can. Ry. Cas. 54, 37 Can. S.C.R. 632.

[Referred to in Isbister v. Dominion Fish Co., 19 Man. L.R. 449.]

TRACKS—PAVING—AGREEMENT—APPORTIONMENT OF COST—JURISDICTION.

Where a railway company laid "T" rails for an electric railway upon the street of a municipality under an agreement and confirmatory by-law containing the provision "the said rails to be level with the existing roadbed and that gravel be placed and maintained in good order by the company between the rails and two feet on either side thereof," such company is not bound at the request of the municipality, at a later date, to construct a permanent foundation of any character and pave between the rails. The Board has jurisdiction under ss. 5 and 26A (8 & 9 Edw. VII., c. 32), and may authorize the municipality at its own expense to change the railway grade to conform to the altered grade of the highway and if it desires to surface the railway right-of-way in the same way and with the same foundations as the adjacent highway, the railway company contributing such portion of the cost as represents its contractual liability to lay gravel between the tracks and two feet on either side thereof.

St. Lambert v. Montreal & Southern Counties Ry. Co., 19 Can. Ry. Cas. 283.

RAILWAY ACT.

Construction and constitutionality, see Constitutional Law.

RAILWAY BOARD.

A. Dominion Board.
B. Provincial Board.

See Amalgamation; Appeals; Branch Lines and Sidings; Crossings; Damages; Demurrage; Expropriation; Farm Crossings; Highway Crossings; Mandamus; Railway Crossings; Stations; Telegraphs; Telephones; Tolls and Tariffs; Train Service; Wires and Poles.

Annotations.

Jurisdiction of Railway Committee. 1 Can. Ry. Cas. 111, 4 Can. Ry Cas. 411.

Jurisdiction of Board. 5 Can. Ry. Cas. 163, 174.

Jurisdiction of Board to order compensation to abutting landowners upon construction of railway upon highway. 14 Can. Ry. Cas. 199.

Jurisdiction of Board to order highway across railway. 7 Can. Ry. Cas 89.

Jurisdiction of Board respecting railway crossings. 5 Can. Ry. Cas. 413, 6 Can. Ry. Cas. 144.

Jurisdiction of Board with respect to regulating rates and tariffs of through traffic. 13 Can. Ry. Cas. 556.

Jurisdiction of Board to authorize Dominion railway company to take lands of Provincial railway company. 18 Can. Ry. Cas. 144.

Jurisdiction of Board to order contribution by Provincial companies to cost of Separation of Grades. 18 Can. Ry. Cas. 296.

Orders of Provincial Boards respecting street railways, see Street Railways.

Regulation of car equipment, see Cars.

Constitutionality of statutes empowering Board to make orders and regulations, see Constitutional Law.

Orders for compensation for damage to lands, see Expropriation.

Regulation of shipping system, see Cars.

Refunds for overcharges, see Tolls and Tariffs.

Stop-over privileges, see Train Service.

Apportionment of costs of works ordered by Board, see Highway Crossings (D).

Land for spurs, see Branch Lines.

Tolls in foreign country, see Tolls and Tariffs (A).

Regulation of traffic facilities, see Interchange of Traffic; Junctions.

Ordering of interlocking appliances at crossings, see Railway Crossings.

A. Dominion Board.

POWERS OF RAILWAY COMMITTEE—MAINTENANCE OF GATES AT CROSSINGS —MUNICIPALITIES.

Under ss. 11, 18, 21, 187, 188 of the Railway Act, 1888, Parliament conferred upon the Railway Committee the power to order that gates and watchmen should be provided and maintained by such a railway at crossings of highways traversing different adjacent municipalities; to decide which municipalities are interested in the crossings; to fix the proportion of the cost to be borne by the different municipalities; to vary any order made by adding other municipalities as interested, and to readjust the proportion of the cost; and the decision of the committee cannot be reviewed by the Court. Municipalities are subject to such legislation and the orders of the committee in the same way as private individuals.

Re Can. Pac. Ry. Co. and County and Township of York, 1 Can. Ry. Cas. 36, 27 O.R. 559.

[Reversed in part in 1 Can. Ry. Cas. 47, 25 A.R. (Ont.) 65; adopted in Winnipeg v. Toronto General Trusts, 19 Man. L.R. 429; applied in Montreal Street Ry. Co. v. Montreal, 43 Can. S.C.R. 251; approved in Re McAlpine & Lake Erie Ry. Co., 37 Can. S.C.R. 240; considered in Atty.-General v. Can. Pac. Ry. Co., 11 B.C.R. 302; referred to in Grant v. Can. Pac. Ry. Co., 36 N.B.R. 532; Grand Trunk Ry. Co. v. Cedar Dale, 7 Can. Ry. Cas. 73; Can. Pac. Ry. Co. v. Toronto, 7 Can. Ry. Cas. 274; followed in Thorold v. Grand Trunk et al. Ry. Cos., 24 Can. Ry. Cas. 21.]

Orders and regulations—Highway crossings—Maintenance of gates—Apportionment of cost—Municipalities.

The Railway Committee on the application of the city of Toronto, ordered the Canadian Pacific Ry. Co. to put up gates and keep a watchman where the line of railway crossed a highway running from the city of Toronto into the township of York, the line of railway being at the place in question the boundary between the two municipalities, and ordered the cost of maintenance to be paid in equal proportions by the railway company and the city. On a subsequent application by the city representing that the township was equally interested and asking for contribution from the township, the township brought in the county, and an order was made by the Railway Committee that the county and township should contribute in certain proportions:—Held, per Burton, C.J.O., and Maclennan, J.A.: That, assuming the validity of legislation conferring jurisdiction on the Railway Committee, their powers were limited to persons or municipalities invoking the exercise of their jurisdiction, and that their order was invalid so far as it imposed a burden upon the township and county. Per Osler, J.A.: That the legislation was intra vires, and that the township and county were persons interested within the meaning of the Act, and subject to the jurisdiction of the Railway Committee. Per Meredith, J.: That the legislation was intra vires, but that the county was not a person interested, not being under any responsibility for the maintenance of the highway in question. Per Curiam: That the decision of the Railway Committee upon a subject, and in respect of persons within its jurisdiction, cannot be reviewed or interfered with by the Court. In the result an appeal from the judgment of Rose, J., 27 O.R. 559, 1 Can. Ry. Cas. 36, was allowed as to the county of York, and dismissed as to the township of York.

Re Can. Pac. Ry. Co. and York, 1 Can. Ry. Cas. 47, 25 A.R. (Ont.) 65.

[Followed in Hamilton Street Ry. Co. v. G. T. R. Co., 17 Can. Ry. Cas. 393.]

Railway Committee—Making order rule of Exchequer Court—Ex parte order.

By c. 29 of the Railway Act, 51 Vict. s. 17, the Exchequer Court is empowered to make an order of the Railway Committee a rule of Court;

but where there are proceedings pending in another Court in which the rights of the parties under the order of the Railway Committee may come in question, the Exchequer Court, in granting the rule, may suspend its execution until further directions. (2) The Court refused to make the order of the Railway Committee in this case a rule of Court upon a mere ex parte application, and required that all parties interested in the matter should have notice of the same.

Re Metropolitan Ry. Co. and Can. Pac. Ry. Co., 1 Can. Ry. Cas. 96, 6 Can. Ex. 351.

Railway Committee—Conflicting surveys and locations—Injunction—Declaration of right.

An injunction will not be granted to restrain one railway company making its surveys and locating its line so as to cross and recross the line of another. The Railway Committee is the tribunal specially constituted, having powers and jurisdiction respecting the crossing, intersection and junction of railways, the alignment, arrangement, disposition and location of tracks, the use by one company of the tracks of another and every matter, act or thing which by the Railway Act or the special Act of any railway company is sanctioned, required to be done or prohibited. The Court in a case of this nature, in which the Railway Committee has jurisdiction, will not make a declaration of the rights or priorities of the contending parties.

Ottawa, Arnprior & Parry Sound Ry. Co. v. Atlantic & North-West Ry. Co., 1 Can. Ry. Cas. 101.

[Referred to in Perrault v. Grand Trunk Ry. Co., 14 Que. K.B. 249.]

Railway Committee—Construction of subway—County road and city streets—Cost of construction.

The municipal corporation of a city was one of the movers in an application to the Railway Committee for an order authorizing the construction of a subway under a railway, by which one of the city streets was made to connect with a county road, the works being adjacent to a city street but not within the city limits:—Held, that the city was interested within the meaning of the terms as used in s. 188 of the Railway Act, which provides that the Railway Committee might apportion the cost of such works as those in question between the railway company and "any person interested therein." (2) On an application to make an order of the Railway Committee a rule of Court, the Court will not go into the merits of the order, or consider objections to the procedure followed by the Railway Committee. Semble, that while the Railway Committee has jurisdiction in such a case, to impose upon the party interested an obligation to bear part of the expense, it has no jurisdiction to compel a party other than the railway company to execute the works.

Re Grand Trunk Ry. Co. and Re Railway Act, 4 Can. Ry. Cas. 102, 8 Can. Ex. 349.

[Followed in Thorald v. Grand Trunk et al. Ry. Co., 24 Can. Ry. Cas. 21.]

Construction of subway—County road and city streets—Cost of construction.

The municipal corporation of a city was one of the movers in an application to the Railway Committee for an order authorizing the construction of a subway under a railway, by which one of the city streets was made to connect with a county road, the works being adjacent to a city street but not within the city limits:—Held, that the city was interested within the meaning of the terms as used in s. 188 of the Railway Act, which provides that the Railway Committee might apportion the cost of such works as those in question between the railway company and "any person interested therein." (2) On an application to make an order of the Railway Committee a rule of Court, the Court will not go into the merits of the order, or consider objections to the procedure followed by the Railway Committee. Semble, that while the Railway Committee has jurisdiction in such a case to impose upon the party interested an obligation to bear part of the expense, it has no jurisdiction to compel a party or other than the railway company to execute the works.

Re Grand Trunk Ry. Co. and Kingston, 4 Can. Ry. Cas. 102, 8 Can. Ex. 349.

[Referred in Grand Trunk Ry. Co. v. Cedar Dale, 7 Can. Ry. Cas. 73; followed in Thorold v. Grand Trunk et al. Ry. Cos., 24 Can. Ry. Cas. 21.]

HIGHWAY CROSSING—SPECIFIC PERFORMANCE.

The Surveys Act, R.S.O. 1897, c. 181, s. 39, cannot create highways across the land of a railway company or give any right to the applicant to have his streets extended across the railway. A railway company may, with the leave of the Board, lay out and dedicate portions of its right-of-way for use as highways which the municipality could accept without passing a by-law for that purpose. The applicant is only entitled to an order from the Board authorizing the railway company to lay out and construct such highways. The by-law of the municipality may be considered an acceptance of such highways. The Board does not enforce specific performance of such agreements. It is not empowered to compel the railway company to construct the highway at the instance of the applicant. As no other Court or authority than the Board can legally allow the railway company or any other person to construct the highway, the application should proceed for the purpose of enabling the Board to determine whether it will give this permission.

Re Reid & Canada Atlantic Ry. Co., 4 Can. Ry. Cas. 272.

[Distinguished in Bird v. Can. Pac. Ry. Co., 1 S.L.R. 279.]

ADJUDICATION OF PAST TRANSACTIONS—DEFAULT IN DEMURRAGE CHARGES—PREMATURE SALE OF GOODS FOR—POWER OF BOARD TO AWARD DAMAGES.

The Board is a judicial, as well as an executive body, created to enforce the railway legislation of the Dominion Parliament, but not to supplant or supplement the Provincial Courts in the exercise of their ordinary jurisdiction. In making orders and regulations under ss. 23, 25 of the Railway Act, 1903, the Board is not to adjudicate in respect to rights arising out of past transactions but to lay down rules for future conduct. The Board is not empowered to award damages or any other relief for any injury caused by an infraction of the Act, e.g., s. 241. Cars loaded with coal were held by the railway company for payment of demurrage or car storage charges and in default of payment were disposed of by private sale before the expiry of six weeks specified by s. 280 (2):—Held, that any claim for damages for premature or improvident sale should be prosecuted by action in the Provincial Courts.

Duthie v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 304.

[Approved in Robinson v. Can. Northern Ry. Co., 19 Man. L.R. 306; followed in Victoria et al. v. Esquimalt & Nanaimo Ry. Co., 24 Can. Ry. Cas. 84.]

STREET RAILWAYS—MUNICIPAL ASSENT—USE OF HIGHWAYS IN CITIES AND TOWNS—CONSENT BY MUNICIPAL AUTHORITY.

In the case of a street railway or tramway or of any railway to be operated as such upon the highways of any city or incorporated town, the consent of the municipal authority required by s. 184 of the Railway Act, 1903, must be by a valid by-law approved and sanctioned in the manner provided by the provincial municipal law, and, in the absence of evidence of such consent having been so obtained, the Board has no jurisdiction to enforce an order in respect to the construction and operation of any such railway. The order appealed from was reversed and set aside, the Chief Justice and Girouard, J., dissenting.

Montreal Street Ry. Co. v. Montreal Terminal Ry. Co., 4 Can. Ry. Cas. 373, 36 Can. S.C.R. 369.

[Adhered to in Essex Terminal Ry. Co. v. Windsor, Essex & L.S. Ry. Co., 40 Can. S.C.R. 625.]

HIGHWAY CROSSINGS—SUBWAY—MUNICIPALITY.

The power of the Board under s. 186 of the Railway Act, 1903, to order a highway to be carried over or under a railway is not restricted to the case of opening up a new highway, but may be exercised in respect to one already in existence. The application for such order may be made by the municipality as well as by the railway company. [Bank Street Subway Case, 5 Can. Ry. Cas. 126, affirmed.]

Ottawa Elec. Ry. Co. v. Ottawa and Canada Atlantic Ry. Co., 5 Can. Ry. Cas. 131, 37 Can. S.C.R. 354.

[See Toronto v. Grand Trunk Ry. Co., 37 Can. S.C.R. 232, 5 Can. Ry. Cas. 138.]

POWER TO IMPOSE TERMS.

The Board granted an application of the James Bay Ry. Co. for leave to carry their line under the track of the G.T.R. Co., but, at the request of the latter, imposed the condition that the masonry work of such undercrossing should be sufficient to allow of the construction of an additional track on the line of the G.T.R. Co. No evidence was given that the latter company intended to lay an additional track in the near future or at any time. The James Bay Co., by leave of a Judge, appealed to the Supreme Court of Canada from the part of the order imposing such terms contending that the same was beyond the jurisdiction of the Board:—Held, that the Board had jurisdiction to impose said terms:—Held, per Sedgewick, Davies and Maclennan, JJ., that the question before the Court was rather one of law than of jurisdiction and should have come up on appeal by leave of the Board or been carried before the Governor-General-in-council.

James Bay Ry. Co. v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 164, 37 Can. S.C.R. 372.

FARM CROSSINGS.

Orders directing the establishment of farm crossings over railway subject to the Railway Act, 1903, are exclusively within the jurisdiction of the Board.

Grand Trunk Ry. Co. v. Perrault, 5 Can. Ry. Cas. 293, 36 Can. S.C.R. 671.

[Applied in Valieres v. Ontario & Quebec Ry. Co., 19 Que. K.B. 523.]

CROSSINGS UNDER RAILWAY.

The Board has jurisdiction under s. 198 of the Railway Act, 1903, to require a railway company to make a farm crossing under its railway.

Re Cockerline and Guelph & Goderich Ry. Co., 5 Can. Ry. Cas. 313.

[See Lalande v. Can. Northern Ry. Co., 21 Can. Ry. Cas. 194; followed in Atkinson v. Vancouver, Victoria & Eastern Ry. Co., 24 Can. Ry. Cas. 378.]

RAILWAY CROSSINGS.

The defendants obtained an ex parte order from the Board authorizing them to construct, maintain, and operate certain sidings involving the crossing of the right-of-way of another railway. The plaintiffs, on becoming aware of this order, moved against it before the Board, under ss. 25, 32 of the Railway Act, 1903, but the Board confirmed it:—Held, that by such application to vary or amend the order the plaintiffs had submitted to the jurisdiction of the Board, and were concluded within the scope of their judgment, and could not now go behind the orders in the present action, which was for damages and an injunction; and this, whether the application for the ex parte order could be considered an application under s. 177 of the Railway Act for a crossing order or not. The plaintiffs objected that the Board had no jurisdiction because the line in question, being a branch line, the plans were not filed in the Registry Office, pursuant to s. 175, subs. 2, and s. 122 of the Act:—Held, that they could not raise the question of jurisdiction in this way, the Act specially providing by s. 44 for an appeal from orders of the Board to the Supreme Court of Canada on such questions. By virtue of s. 7 of the Railway Act, 1903, where one railway crosses another which is subject to the Act, the Board has exclusive jurisdiction.

Can. Pac. Ry. Co. v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 400, 12 O.L.R. 320.

[Relied on in Fraser v. Can. Pac. Ry. Co., 17 Man. L.R. 672, 8 W.L.R. 380.]

DRAINAGE WORKS.

Under subs. 1 (b) of s. 23 of the Railway Act, 1903, as amended by 6 Edw. VII. c. 42, s. 2, the Board may sanction and approve proposed drainage works authorized by s. 118 (m).

Can. Pac. Ry. Co. v. Murphy, 5 Can. Ry. Cas. 497.

PROTECTION OF HIGHWAY CROSSINGS—CONTRIBUTION OF COSTS.

The Board, in matters pertaining to the protection of highway crossings and the apportionment and contribution of costs therein, is a Court of original jurisdiction and must decide for itself not merely questions of law, but also questions of fact as regards the "interest" in such matters of the parties concerned, and also whether, in the exercise of its discretion, a municipality or township should contribute to the costs of protecting any crossings.

Grand Trunk Ry. Co. v. Cedar Dale, etc., 7 Can. Ry. Cas. 73; Thorold v. Grand Trunk et al. Ry. Cos., 24 Can. Ry. Cas. 21.

JUNCTION—DOMINION RAILWAY—PROVINCIALLY INCORPORATED RAILWAY.

The Board has no jurisdiction to order a connection to be made or traffic to be interchanged between a Dominion railway and a provincially incorporated railway which it crosses, such provincial railway not having been declared a work for the general advantage of Canada. Under s. 8 of the Railway Act, 1906, the jurisdiction of the Board is confined to the point of crossing, and does not extend to the whole line of the provincial railway. Where a railway company incorporated by the Parliament of Canada was authorized to acquire two provincially incorporated railways, but no work had been done in connection with such railway, and the validating Act provided that the acquisition should not make such railways subject to the Railway Act, 1903, or works for the general advantage of Canada, but that they should remain subject to the legislative control of the province:—Held, (1) that, under s. 3, the special Provincial Act overrides the Railway Act. (2) That there is no jurisdiction to authorize making connections with or affording facilities to a Dominion railway which does not exist, and an order requiring such connection to be made would be in effect ordering a provincial railway to connect with a Dominion railway, as to which the Board has no jurisdiction.

Boards of Trade of Galt, etc. v. Grand Trunk, Can. Pac., etc., Ry. Cos., 8 Can. Ry. Cas. 195.

SUBWAY UNDER RAILWAY TRACKS ALONG HIGHWAY—PRIVILEGE TO RAISE GRADE OF HIGHWAY.

For many years the defendants, by agreement with the city of Winnipeg, had occupied a portion of the width of Point Douglas avenue in said city with the tracks of its main line. In 1904 a further agreement was made between the city and the company, and ratified by the Legislature, whereby the company obtained the right to raise the grade of Point Douglas avenue or of any part thereof to a height not exceeding ten feet above the then existing grade upon certain conditions:—Held, that the words "or any part thereof" related to a part of the breadth as well as of the length of the avenue, and that the defendants had a right to raise the grade of the southerly forty-five feet in width of the avenue leaving twenty-one feet at its original height, although the result of that was to diminish the value of the plaintiff's lots on account of the construction of a subway alongside of them:—Held, also, that an order of the Board granting leave to the defendants to construct such subway was valid and binding, although it had been made ex parte and in ignorance of the fact that the plaintiff had previously obtained an interim injunction against such construction, the plaintiff having made no application to rescind or vary the order as he might have done. [C.P.R. v. G.T.R. (1906), 12 O.L.R. 320, 5 Can. Ry. Cas. 400, followed.] The interim injunction granted in 1905 had been affirmed on appeal before the hearing of the cause:—Held, that that decision was not binding on the trial Judge, and did not divest him of the responsibility of deciding the case upon the merits at the hearing.

Fraser v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 205, 17 Man. L.R. 667.

COMPENSATION—RUNNING RIGHTS.

The Bay of Quinte Ry. Co. applied to the Board, under s. 364 of the Railway Act, 1906, or any other pertinent section, for an order directing the K. & P. Ry. Co. to ascertain and settle the compensation payable by the applicant to the respondent in respect to the running rights possessed by the applicant over a portion of the K. & P. Ry. By an agreement between the parties, validated by statute 52 Vict. c. 77 (D), such compensation, in case of dispute, was to be settled by arbitration:—Held, that the Board had no jurisdiction to entertain the application.

Bay of Quinte Ry. Co. v. Kingston & Pembroke Ry. Co., 8 Can. Ry. Cas. 202.

INJUNCTION—DIVERSION OF HIGHWAY.

In an action by a municipality for an injunction against a railway company to restrain the latter from closing up or interfering with a certain road, it developed that the Board had made an order authorizing the railway company to divert a portion of the said road and construct their line between certain points of such diversion. The trial Judge decided that the municipality could maintain such an action only by the Attorney-General as plaintiff:—Held, on appeal, that, while the Court had jurisdiction to grant all proper relief, the Board having dealt with the matter, the plaintiffs should apply to the Board for relief, as they had complete control over their order.

Municipality of Delta v. Vancouver, Victoria & Eastern Ry. & Nav. Co., 8 Can. Ry. Cas. 362, 14 B.C.R. 83.

Protection of highway crossings—Contribution of costs—Municipality as "party interested."

A municipality may be a "party interested" in works for the protection of a railway crossing over a highway, though such works are neither within or immediately adjoining its bounds, and the Board has jurisdiction to order it to pay a portion of the cost of such work.

Carleton v. Ottawa, 9 Can. Ry. Cas. 154, 41 Can. S.C.R. 552.

[Followed in Thorold v. Grand Trunk et al. Ry. Cos., 24 Can. Ry. Cas. 21.]

Express companies—Dangerous commodities—Refusal to carry.

Application to the Board for an order directing the express companies operating in Canada to receive and carry a certain commodity. The express companies contended that the Board had no jurisdiction to order them to carry any class of commodity and refused to carry the said commodity because it was dangerous and liable to explode:—Held, under the relevant provisions of the Railway Act, 1906, ss. 317, 348-354, express companies are at liberty to exercise their own discretion in refusing to carry by express any particular commodity.

Canadian and Dominion Express Cos. v. Commercial Acetylene Co., 9 Can. Ry. Cas. 172.

Damages—Wrong-billing—Negligence.

On an application to recover damages for the company's alleged negligence in waybilling a skiff to the wrong address, and charging excess tolls for sending it in a roundabout course to its proper destination, it being in dispute who was responsible for the erroneous waybilling:—Held, that the Board had no jurisdiction to entertain the complaint; the complainant must be left to her rights in the Courts:—Held, that the Board could only investigate the error in computing the express tolls of the company, but as the company offers to refund the excess the Board should not interfere.

Rogers v. Canadian Express Co., 9 Can. Ry. Cas. 480.

Foreign railway—Station facilities—Through traffic.

An application was made to the Board for an order directing the Great Northern Ry. Co. to construct a platform and station building. The New Westminister Southern, a provincial railway, incorporated by an Act of the Legislature of British Columbia, had not been declared a work "for the general advantage of Canada." The trains of the Great Northern, a foreign railway, used the line of the New Westminister Southern as a connecting line between its line in the State of Washington and Vancouver in British Columbia. The latter company was not shewn to have any rolling stock or equipment, or so far as operation was concerned to be in any way a separate organization from the former:—Held (1), that the Great Northern, a foreign railway, is subject to the jurisdiction of the Board in so far as it operates in Canada. (2) That the New Westminster Southern, a provincial railway, although not declared to be a work "for the general advantage of Canada," but connecting with a railway subject to the jurisdiction of the Board, is, by s. 8 (b) as regards through traffic upon it, and all matters appertaining thereto, subject to the Railway Act. (3) That station facilities are matters appertaining to through traffic. (4) That proper facilities should be provided for the safety and convenience of the public using the trains of the Great Northern. (5) If the Great Northern desires to apply for leave to appeal upon the question of jurisdiction, the issue of the order may be delayed for 30 days but, if not, the size and location of the station and platform may be defined by an engineer of the Board.

Thrift v. New Westminster Southern and Great Northern Ry. Cos., 9 Can. Ry. Cas. 205.

[Followed in Stewart, etc. v. Napierville Junction Ry. Co., 12 Can Ry. Cas. 399.]

ACCOMODATION OF TRAFFIC—STATIONS.

The Board has power to order a railway company whose line is completed and in operation to provide a station at any place where it is required to afford proper accommodation for the traffic on the road. Idington and Duff, JJ., dissenting.

Grand Trunk Ry. Co. v. Department of Agriculture for Ontario, 10 Can. Ry. Cas. 84, 42 Can. S.C.R. 557.

FENCES AND CATTLE GUARDS—GENERAL ORDER FOR ALL RAILWAYS.

Under the provisions of the Railway Act the Board does not possess authority to make a general order requiring all railways subject to its jurisdiction to erect and maintain fences on the sides of their railway lines where they pass through lands which are not inclosed and either settled or improved; it can do so only after the special circumstances in respect of some defined locality have been investigated and the necessity of such fencing in that locality determined according to the exigencies of the case. The Railway Act empowers the Board to order that, upon lines of railway not yet completed or open for traffic or in course of construction, where they pass through inclosed lands, the railway company should construct and maintain such fences or take such other steps as may be necessary to prevent cattle and other animals from getting upon the right-of-way.

Can. Northern Ry. Co. and Board of Railway Commissioners (Fencing Case), 10 Can. Ry. Cas. 104, 42 Can. S.C.R. 443.

OPENING ROAD FOR TRAFFIC—PASSENGER SERVICE.

Upon an application for an order to compel the railway company to institute and operate an adequate daily first-class passenger service on its line between Winnipeg and Edmonton during the period of construction:—Held, (1) that under s. 261 of the Railway Act, 1906, the Board has no jurisdiction to open a railway for the carriage of traffic other than for the purposes of construction, until application has been made therefor by the railway company. (2) That since the Government by the provisions of the special Act incorporating the Grand Trunk Pacific Ry. Co. (4 & 5 Edw. VII. c. 98), has power to fix by order-in-council the date of the completion of the railway, it may be that the Board cannot open the railway until such order is issued, the special Act over-riding the Railway Act under s. 3 of the latter Act.

Central Saskatchewan Board of Trade v. Grand Trunk Pac. Ry. Co., 10 Can. Ry. Cas. 135.

[Referred to in city of Hamilton v. Toronto, Hamilton v. Buffalo Ry. Co., 17 Can. Ry. Cas. 353.

REGULATION OF SAFETY OF EMPLOYEES—WAGES OF INJURED EMPLOYEES.

Application that railway companies should remedy certain complaints dealing with (1) and (6) installation of signboards at the limits of municipalities and yards, (2) and (11) liability to accident and exposure from locomotives running tender first and recommending storm protector on locomotive, (3) installation of power head-lamps and air bell ringers, (4) providing an engineer as pilot instead of conductor, brakeman or fireman, where the regular engineer is unfamiliar with the road, (5) and (9) providing suitable quarters at divisional and terminal points and more ample room on locomotives for engineers and firemen, (7) removal of certain snow cleaning devices from locomotives, inspection (8) of wooden bridges and (10) of locomotives, by a competent inspector after arrival at terminals, (12) payment of wages of injured employees during recovery:—Held, (1) that the request in (1) is too broad and no general order should be made, and (6) that in all individual instances where necessity exists, the request shall be granted. (2) That in (2) and (11) the requests should be refused, no evidence being given that trains were so operated, except in cases of emergency, and nothing being known as to the storm protector. (3) That the request in (3) as to the installation of power head-lamps should be refused, and as to air bell ringers granted. (4) That the request in (4) should be refused, as granting it would rescind a previous rule. (5) That the Board has no jurisdiction to deal with the requests in (5) and (12). (6) That the application in (7) should stand for further information. (7) That as to the request in (9) the Board should not make any general regulation without specific information. (8) That the application in (8) had been dealt with by order No. 11445 and that the application in (10) should be refused.

Re Brotherhood of Locomotive Engineers, 11 Can. Ry. Cas. 330.

ORDER IMPOSING UNENFORCEABLE CONDITIONS.

An order of the Board imposing some conditions on an applicant railway company that the Board did not have power to impose in invitum, is void unless such conditions are assented to by the company, as it cannot accept part and reject the remainder of the order; and if the terms upon which the Board's order was made are rejected by the applicant company, and an appeal taken instead of a motion to rescind the order, it may be declared upon appeal that the order shall remain inoperative unless or until the terms are accepted.

Can. Northern Ry. Co. v. Taylor, 15 Can. Ry. Cas. 298, 11 D.L.R. 435.

ACTION FOR DAMAGES—REMOVAL OF SIDING.

Action for damages for taking away spur track facilities formerly enjoyed and refusing to restore same for plaintiff's use on their land adjoining the railway yards. The Board had, by their order, made under ss. 214, 253 of the Railway Act, 1903, found as a fact that the defendants had refused to afford "reasonable and proper facilities" as required by s. 253 and directed the defendants to restore these spur track facilities within four weeks, which order was affirmed by the Supreme Court of Canada, 37 Can. S.C.R. 541:—Held (1), an action lies for damages under the circumstances, the finding of fact by the Board being conclusive under s. 42 (3) of the Act, and this Court has no jurisdiction to find and assess the damages. (2) Plaintiffs were entitled to damages from the date of the breach and not merely from the date of the Board's order. (3) The Board had no jurisdiction to deal with the question of damages and, not having assumed to do so, the plaintiffs were not estopped from bringing this action by any adjudication of the Board. (4) Damages should be allowed during the time taken up by the appeal to the Supreme Court, and Peruvian Guano Co. v. Dreyfus, [1902] A.C. 166, did not apply.

Robinson v. Can. North. Ry. Co., 11 Can. Ry. Cas. 289, 19 Man. L.R. 300.

[Affirmed in 43 Can. S.C.R. 387, 11 Can. Ry. Cas. 304, [1911] A.C. 739, 13 Can. Ry. Cas. 412.]

SECTION MEN—LENGTH OF SECTIONS—NUMBER OF MEN TO BE EMPLOYED.

An application that the B.S. & H.B. Ry. Co. be directed to employ two men and a foreman on each of certain sections of its railway. The application was granted under an order of the Board. Subsequently the railway companies were notified that the Board would take up the question of fixing the length and number of men to be employed on the sections of the railway:—Held, that, under s. 269 of the Railway Act, the Board had no jurisdiction in the matter in question.

Re Section Men, 12 Can. Ry. Cas. 375.

HIGHWAY CROSSINGS—VIADUCTS AND BRIDGES.

Held, affirming 42 Can. S.C.R. 613, 11 Can. Ry. Cas. 38, that, under s. 238, and the amending Act of 1909 (8-9 Edw. VII. c. 32), ss. 237, 238, the Railway Committee and the Board had jurisdiction to make orders requiring two railway companies to construct a bridge over their lines and an elevated viaduct several miles in length, for the purpose of carrying four of the tracks of their railways through the city, the latter of which virtually superseded the former. The evidence shewed that the lines of rails were laid "upon or along or across a highway"—highway being defined by s. 2, subs. 11, of the Railway Act, 1906, as including "any public road, street, lane or other public way or communication." As regards the respondent company, the lines were laid along an esplanade, which was deemed a public highway under 28 Vict. c. 24. As regards the appellant company, they were laid along a route as to which there was actual user by the public, whether by right or leave and license express or implied. It was accordingly within the words "public communication," and exposed to the danger from which the public were under s. 238 entitled to be protected:—Held, further, that the Board, where it has jurisdiction, may in its discretion make any order of this kind for the protection, safety and convenience of the public, except where it is restricted by s. 3 of the Railway Act, 1906, which enacts that where the provisions of that Act, and of any special Act passed by the Parliament of Canada, relate to the same subject, the latter, so far as necessary, shall override the former. But the Act, 56 Vict. c. 48, relied on by the appellants, which is a special Act within the meaning of s. 2, subs. 28, of the Railway Act of 1906, does not relate to the same subject as the Railway Act. The former empowers the companies affected thereby to construct and use certain specified works; the latter empowers the Board to require railway companies to construct such works as it may deem necessary for the protection and convenience of the public. Effect can be given to both statutes, and s. 3 consequently does not in this case restrict in any way the power of the Board.

Can. Pac. Ry. Co. v. Toronto and Grand Trunk Ry. Co. (Toronto Viaduct Case), 12 Can. Ry. Cas. 378, [1911] A.C. 461.

[Followed in city of Hamilton v. Toronto, Hamilton v. Buffalo Ry. Co., 17 Can. Ry. Cas. 353, distinguished in 17 Can. Ry. Cas. 370.]

TRAIN SERVICE—FOREIGN RAILWAYS.

An application to direct the respondent to furnish adequate station accommodation and satisfactory train service on its line of railway. The respondent, a Canadian railway, incorporated by the Province of Quebec, was operated by the Delaware & Hudson Ry. Co., a foreign company, through its agent and subsidiary company, the Quebec, Montreal & Southern Ry. Co., another Canadian company:—Held, (1) that the respondent company was not a separate organization and that there was no separate management. (2) That under subs. 3 of s. 258 of the Railway Act, 1906, the Board had jurisdiction to direct the respondent, subsidized by the Parliament of Canada, to maintain and operate suitable stations with suitable accommodation or facilities. (3) That under s. 11 of 8 & 9 Edw. VII., amending the Railway Act, the Delaware, Hudson & Quebec and Montreal & Southern Ry. Cos. were both subject to direction to maintain proper train service and facilities upon this section of the line. [Thrift v. New Westminster Southern and Great Northern Ry. Cos., 9 Can. Ry. Cas. 205, followed.]

Stewart et al. v. Napierville Junction Ry. Co., 12 Can. Ry. Cas. 399.

AMALGAMATION AGREEMENTS—DOMINION AND PROVINCIAL RAILWAYS.

Application under s. 361 of the Railway Act, 1906, for a recommendation by the Board to the Governor-in-council for the sanction of amalgamation agreements between Dominion and provincial railway companies. The Montreal Park & Island and Montreal Terminal Ry. Cos. were incorporated by a Dominion Act and the Montreal Street Ry. Co. by an Act of the Province of Quebec. Agreements were made between the three companies apparently pursuant to the authority given in two special Acts of the Dominion incorporating the first two railway companies for the sale of these railways with their facilities and assets to the provincial railway:—Held, (1) that, under ss. 361, 362 (which must be read together), the Board has no jurisdiction to deal with the amalgamations of railway companies incorporated under Dominion and provinvial statutes. (2) That the proper mode of procedure would be to apply as provided by the special Acts for sanction of the agreements to the Governor-in-council.

Re Amalgamation Agreements, 13 Can. Ry. Cas. 150.

ROUTE MAP—LOCATION PLANS.

Application for approval of its location, "Prince Rupert westerly, mile 0 to mile 3.23." The applicant proceeded to construct the roadbed, but found that it could not obtain some $400,000 under its contracts with the Government unless it was able to shew that the three and one-quarter miles of railway had been constructed under the provisions of the Railway Act, 1906. The applicant contended that this being merely the yard of the company, no route map or location plan was required:—Held (1), that the company not having complied with the provisions of ss. 157, 158, 159 of the Railway Act, the application must be refused. (2) That the Board had no jurisdiction under 9 & 10 Edw. VII. c. 50, s. 2, empowering the Board to approve of works constructed without approval before

December 31st, 1909, since the roadbed in question had been constructed subsequent to that date.

Re Prince Rupert Location, Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 153.

STREET RAILWAYS—PROVINCIAL RAILWAY—"THROUGH TRAFFIC."

The Railway Act, 1906, does not confer power on the Board to make orders respecting through traffic over a provincial railway or tramway which connects with or crosses a railway subject to the authority of the Parliament of Canada. Davies and Anglin, JJ., contra. Per Fitzpatrick, C.J., and Girouard and Duff, JJ.:—The provisions of subs. (b) of s. 8 of the Railway Act are ultra vires of the Parliament of Canada.

Montreal Street Ry. Co. v. Montreal, 11 Can. Ry. Cas. 203, 43 Can. S.C.R. 197.

[Affirmed in [1912] A.C. 333, 13 Can. Ry. Cas. 541.]

PROVINCIAL STREET RAILWAY.

By an order dated May 4, 1909, the Board of Railway Commissioners for Canada (created by Dominion Railway Act, 1903, and beyond the jurisdiction and control of any province), directed with regard to through traffic over the Federal Park Ry. and the provincial street railway, both within and near the city of Montreal, that the latter should "enter into any agreement or agreements that may be necessary to enable" the former company to carry out its provisions with respect to the rates charged so as to prevent any unjust discrimination between any classes of the customers of the Federal Line:—Held, that the said order so far as it related to the provincial street railway was made without jurisdiction. [Montreal Street Ry. Co. v. Montreal, 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203, affirmed.]

Montreal v. Montreal Street Ry. Co., [1912] A.C. 333, 13 Can. Ry. Cas. 541.

FOREIGN CARRIERS—REDUCTION OF RATES.

The Board has no jurisdiction to order a reduction in rates from initial points in the United States. [Can. Northern Ry. Co. v. Grand Trunk and Canadian Pacific Ry. Cos. (Muskoka Rates (No. 2)), 10 Can. Ry. Cas. 139 at pp. 147, 148, followed.]

Continental, Prairie & Winnipeg Oil Cos. v. Can. Pac. etc., R.W. Cos., 13 Can. Ry. Cas. 156.

[Followed in Fullerton, etc., Co. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 79.]

CONSTRUCTION OF PRIVATE SIDING.

Notwithstanding provisions in an agreement under which a private industrial spur or siding has been constructed entitling the railway company to make use of it for the purpose of affording shipping facilities for themselves and persons other than the owners of the land upon which it has been built, the Board, except on expropriation and compensation, has not the power, on the application under s. 226 of the Railway Act, 1906, to order the construction and operation of an extension of such spur or siding as a branch of the railway with which it is connected. [Blackwoods v. Can. North. Ry. Co., 44 Can. S.C.R. 92, applied. Duff, J., dissenting.]

Clover Bar Coal Co. v. Humberstone, etc., Cos., 45 Can. S.C.R. 346, 13 Can. Ry. Cas. 162.

[Distinguished in Boland v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 60, 21 D.L.R. 531.]

FOREIGN EXPRESS COMPANIES—LOCAL AND THROUGH TOLLS—JOINT THROUGH TARIFFS.

Application for a joint through tariff of tolls from points in the United States contiguous to Spokane to Regina, Sask., of $2 per 100 lbs. on berries, small fruit and vegetables. The Great Northern Express Co. agreed to accept 80 cents per 100 lbs. out of whatever toll the applicant might make with the respondent based upon 20,000 lbs. minimum to the point in question from Spokane. The respondent's tariffs on the said commodities from Spokane to Calgary, Regina and Medicine Hat were $2 per 100 lbs., minimum 20,000 lbs., and to Strathcona and Saskatoon $2.25 per 100 lbs., and by adding the local to Spokane made through tolls of $3.10 and $3.35 respectively. The applicant contended that the Board might require the respondent to reinstate the joint through tariff in effect with the Great Northern Express Co. in 1908:—Held (1), that under s. 336 of the Railway Act, 1906, the Board had no jurisdiction to order the initial foreign carrier to file or concur in joint tariffs at the request of the applicant. (2) That while the Board could not require the foreign carrier to either file or concur in filing joint tariffs, it might require the respondent to file same if the foreign carrier concurred and vice versa if such joint tariffs were thought by the Board to be fair and reasonable. (3) That since the foreign carrier had not concurred, and the difference in toll was such that it would be unfair to require the Canadian carrier to accept all the shrinkage necessary to bring the toll down to $2; this application must be refused. [Stockton et al. v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 165, distinguished.]

Stockton et al. v. Dominion Express Co., 13 Can. Ry. Cas. 459, 3 D.L.R. 848.

CONSTRUCTION PERIOD—OPENING ROAD FOR TRAFFIC.

Application to compel the respondent to open its line for traffic from Prairie Creek, westward. The respondent carried contractor's supplies and labourers for the construction of the railway, part of the supplies were sold and not used by the contractors. The respondent also carried passengers and accepted fares from the general public, publishing a time table that it was operating the main line of its railway between Edmonton and Fitzhugh:—Held, (1) that notwithstanding s. 261 of the Railway Act that the railway should not be opened for traffic (other than for purposes of construction by the company) without leave of the Board, it was reasonable that it should carry ordinary supplies and labourers for contractors during the construction period. (2) That the respondent had violated s. 261 by establishing a general passenger service. (3) That by s. 317 the respondent was prohibited from unjust discrimination in favour of its contractors by carrying their supplies for sale in competition with other merchants. (4) That the respondent should cease unjust discrimination subject to a fine of $100 for any and every case of default or continuation. (5) That the board had no jurisdiction to compel the respondent to open its railway for traffic; but if it applied for permission to do so it must carry freight and passengers under the provisions of the statute.

British Columbia and Alberta Municipalities v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 463.

WORKS CONSTRUCTED WITHOUT LEAVE.

The Board has no jurisdiction to approve of works constructed without its leave subsequent to December 31, 1909. The statute 9 & 10 Edw. VII. (D.) c. 50, s. 2, does not apply to works constructed after that date.

Re Grand Trunk Pac. Branch Lines Co., 14 Can. Ry. Cas. 12, 7 D.L.R. 885.

Limitation of liability.

It is within the power of the Board under the provisions of the Railway Act, 1906, to authorize a contract relieving the company from liability to one traveling in charge of live stock at a reduced fare, for injuries caused by the negligence of the company or otherwise.

Robinson v. Grand Trunk Ry. Co., 8 D.L.R. 1002, 27 O.L.R. 290, 14 Can. Ry. Cas. 444.

[Reversed in Robinson v. G.T.R., 12 D.L.R. 696, 47 Can. S.C.R. 622, on other grounds.]

Special and General orders of board—Erections near track.

A special order of the Board under subs. (g) of s. 30. of the Railway Act, 1906, providing that water stand pipes shall be placed not less than 7 feet 6 inches from the centre of the tracks of the C.P.R., is not abrogated by a subsequent general order, not retroactive in effect, which prohibited the placing of water stand pipes, so that there should be less than 2 feet 6 inches between them and the widest engine cab, so as to render the railway company liable to a brakeman who was injured by coming in contact, while riding on a ladder on the side of a car, with a stand pipe which was 7 feet 6 inches from the centre of the track, but not 2 feet 6 inches from the side of the widest engine cab. A general order of the Board under subs. (g), providing that thereafter no structure more than 4 feet in height shall be placed within 6 feet from the nearest rail of a railway track, and that no water stand pipe shall be placed so that there shall be less than 2 feet 6 inches between it and the widest engine cab, is not retroactive, and does not contemplate the removal of stand pipes within such prohibited distance erected under a special order of such Board permitting the C.P.R. to maintain its stand pipes at a lesser distance. [Kutner v. Phillips, [1891] 2 Q.B. 267, specially referred to.]

Clark v. Can. Pac. Ry. Co. (B.C.), 14 Can. Ry. Cas. 51, 2 D.L.R. 331.

[Referred to in Kizer v. Kent Lumber Co., 5 D.L.R. 317.]

Express companies—Exclusive operation.

The Board cannot compel an express company to operate and compete over the line of a railway from which it has withdrawn by reason of the acquirement of the line by a railway operating an express service through its allied express company. [Continental, Prairie and Winnipeg Oil Cos. v. Can. Pac. et al. Ry. Cos., 13 Can. Ry. Cas. 156, followed.]

Shippers by Express v. Can. Northern Express Co. and Central Ontario Ry. Co., 14 Can. Ry. Cas. 183.

Tolls and rates—International traffic.

The Board has no jurisdiction to regulate an international rate except in so far as the haul within Canada is concerned.

Dominion Sugar Co., Canadian Freight Assn., 14 Can. Ry. Cas. 188.

Railway on street—Compensation to landowners.

The Board may make it a condition of the occupation of a street by a railway company's tracks running along that street, that the railway company should compensate landowners injuriously affected because of the operation of the railway on the highway, if such landowners have not been compensated in some other way.

Hamilton v. Grand Trunk Ry. Co. (Re Shunting on Ferguson avenue, Hamilton), 14 Can. Ry. Cas. 196, 5 D.L.R. 60.

PROVINCIAL RAILWAY.

The St. J. & Q. Ry. Co., a provincial railway company having applied to the Board under ss. 227, 229 of the Railway Act, 1906, for authority to connect its tracks with those of the C.P.R. Co. and operate its trains over them between certain points, to rearrange certain tracks of the C.P.R. Co., construct and operate switches from its lines at certain points, and make other physical changes. The Board refused the application on the ground that the benefits of the provisions of the Railway Act allowing one railway company to use the lines and appliances of another can only be given to Dominion railways, and that the statutes 1 & 2 Geo. V. (1911) c. 11, and 2 Geo. V. (1912) c. 49, do not place the applicant railway under the jurisdiction of the Board. [Preston & Berlin Street Ry. Co. v. Grand Trunk Ry. Co., 6 Can. Ry. Cas. 142, followed.]

St. John & Quebec Ry. Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 360.

COMPLETION OF RAILWAY—LOCATION PLANS—APPROVAL—OPENING FOR TRAFFIC.

The Board has no jurisdiction to entertain an application for the completion of a line of railway where the route map has been approved. Its jurisdiction is confined to approval of the location plans and upon application to open the railway lines for traffic when constructed.

Mervin Board of Trade v. Can. Northern Ry. Co., 14 Can. Ry. Cas. 363.

STOP-OVER PRIVILEGES—DEMURRAGE.

It is entirely within the discretion of the carriers to grant or withhold stop-over privileges on carload and part carload shipments during its transportation to final destination at concentration points for the purpose of storage, inspection or completion of carload; therefore, where the stop-over privilege is not granted, unjust discrimination not having been established, the Board is without jurisdiction to direct that this privilege shall be given by the carrier.

Simcoe Fruit, etc., Assn. v. Grand Trunk, etc., Ry. Cos., 14 Can. Ry. Cas. 370.

RAILWAY AND TRAFFIC BRIDGE—MUNICIPALITY—REPAIR AND MAINTENANCE.

The Board has no jurisdiction to decide a dispute between a municipality and a railway company as to which of them is liable for the repair and maintenance of a combined railway and traffic bridge, which ends on railway property, on both sides of a river, and whose approaches run over a municipal highway; the matter is entirely between the railway company and the provincial authorities, who aided in the construction of the bridge.

Assiniboia v. Can. Northern Ry. Co., 14 Can. Ry. Cas. 365.

NONEXISTENT RAILWAY—RECONSTRUCTION—REOPENING FOR TRAFFIC.

The Board has no jurisdiction to entertain an application where the wrong complained of happened ten years before the Board was constituted, nor can it compel a railway company, the successor in title of the respondent, to reconstruct and reopen for traffic, with proper facilities, a portion of its railway which has become nonexistent.

Chambers of Commerce Federation v. South Eastern Ry. Co., 14 Can. Ry. Cas. 367.

TOLLS—FOREIGN RAILWAY.

The Board, not having any jurisdiction over the tolls charged in a foreign country, no comparison can be made between them and those in Canada for the transportation of the same commodity.

Imperial Rice Milling Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 375.

OPENING ROAD FOR TRAFFIC.

The Board cannot compel a railway company to open and operate for passenger and freight traffic a newly constructed road, as the determination as to when it shall be opened for traffic rests solely with the railway company.

Re Grand Trunk Pacific Ry. Co., 3 D.L.R. 819.

OPENING ROAD FOR TRAFFIC.

Where a railway company had been carrying passengers over a newly constructed road that had not been opened for traffic by an order of the Board under s. 261 of the Railway Act, 1906, the Board will refuse to make any order directing the company to open the road for traffic on that account, but will forbid the company from continuing to carry passengers except under the provisions of the Railway Act.

Re Grand Trunk Pacific Ry. Co., 3 D.L.R. 819.

RAILWAY IN COURSE OF CONSTRUCTION.

A railway company may rightfully carry as freight over a road that is in course of construction, for an independent contractor, who was building it, ordinary construction and camp supplies necessary to such work and, as passengers, it may also carry labourers for employment thereon, notwithstanding the road has not been opened for general traffic by an order of the Board under s. 261 of the Railway Act, 1906.

Re Grand Trunk Pacific Ry. Co., 3 D.L.R. 819.

JURISDICTION—PROVISIONAL DIRECTORS—IRREGULARITIES.

The Board will not pass on any issue arising between provisional directors of a railway company and municipalities in regard to the legality of payments for calls on subscriptions made by the provisional directors, or other issues of such character.

Re Burrard Inlet Tunnel & Bridge Co., 10 D.L.R. 723.

JURISDICTION—PARTIALLY ORGANIZED COMPANY—STATUS.

A railway company, whose organization has not been completed as required by the provisions of the Railway Act, but which is assuming to carry on business through its provisional directors, has no standing to file detailed plans of its undertaking with the Board, it being necessary, on the part of the company to file evidence with the Board shewing that the provisions of the Railway Act relating to organization have been complied with as a condition precedent to its right to file such plans, or of its right to any recognition by the Board of any such partially organized company.

Re Burrard Inlet Tunnel & Bridge Co., 10 D.L.R. 723.

WIDENING RIGHT-OF-WAY—RETROSPECTIVE ORDER.

The Board cannot, seven years after the filing and approval of the location plans of a railway, by an order not based on s. 162 or 167 of the Railway Act, 1906, permit the filing of a new plan to take effect as of the

date of the original, so as to increase the width of the company's right-of-way.

Chambers v. Can. Pac. Ry. Co., 48 Can. S.C.R. 162, 11 D.L.R. 669.

Overhead bridge—Street railway.

The Board has jurisdiction, under ss. 8 (a), 59, 237, 238 of the Railway Act, 1906, as amended by 8 & 9 Edw. VII. c. 32, to require a tramway company to bear a portion of the cost of an overhead bridge on the elevation of a city street on which such company's car lines ran, at the point where it crosses a Dominion railway.

British Columbia Elec. Ry. Co. v. Vancouver, etc., 15 Can. Ry. Cas. 237, 48 Can. S.C.R. 98, 13 D.L.R. 308.

[Reversed in 18 Can. Ry. Cas. 287, 19 D.L.R. 91; distinguished in Toronto Ry. Co. v. City of Toronto and Can. Pac. Ry. Co., 20 Can. Ry. Cas. 280.]

Questions of law—Leave to appeal.

Application for leave to set down an application for leave to appeal to the Supreme Court on questions of law arising upon an order of the Board approving of crossings by the applicants' line of railway of highways in the city of Prince Albert upon condition that the applicant compensate the landowners on the highways for damages (if any) suffered by them by reason of the location of the railway along the highway:—Held, that, the question of law being one of jurisdiction, the party who disputes the jurisdiction should apply to a Judge of the Supreme Court for leave to appeal, but the Board should not, under its powers to submit questions of law to the Supreme Court, submit a question which is really one of jurisdiction. Application refused.

Prince Albert v. Can. Northern Ry. Co. (Canadian Northern Street Crossings, Prince Albert), 11 Can. Ry. Cas. 200.

Leave to appeal—Jurisdiction.

A Judge of the Supreme Court of Canada will not grant leave to appeal from the decision of the Board on a question of jurisdiction if he has no doubt that such decision was correct. Leave refused.

Halifax Board of Trade v. Grand Trunk Ry. Co. (Halifax Rates Case), 12 Can. Ry. Cas. 58.

Jurisdiction—Question of law.

A question of jurisdiction may also be a question of law within the meaning of s. 55 of the Railway Act, 1906, and the Board may submit for the opinion of the Supreme Court questions of law which involve the matter of the jurisdiction of the Board. [Essex Terminal Ry. Co. v. Windsor, Essex & Lake Shore Rapid Ry. Co., 7 Can. Ry. Cas. 109, at p. 124, 40 Can. S.C.R. 620, 8 Can. Ry. Cas. 1, followed.]

Hamilton v. Toronto, Hamilton & Buffalo Ry. Co. (Hunter Street Case), 17 Can. Ry. Cas. 366.

Jurisdiction—Question of law—Stated case.

Under s. 55 of the Railway Act, 1906, the Board may, of its own motion, state a case in writing for the opinion of the Supreme Court of Canada upon a question of jurisdiction which, in the opinion of the Board, involves a question of law. [Essex Terminal Ry. Co. v. Windsor, Essex

& Lake Shore Rapid Ry. Co., 7 Can. Ry. Cas. 109, at p. 124, 40 Can. S.C.R. 620, 8 Can. Ry. Cas. 1, followed.]

Hamilton v. Toronto, Hamilton & Buffalo Ry. Co. (Hunter Street Case), 17 Can. Ry. Cas. 370, 50 Can. S.C.R. 128.

ABOLITION OF GRADE CROSSINGS—LIABILITY OF STREET RAILWAY—POWER AS TO COST.

Where the Board makes a permissive order on the application of a municipal corporation authorizing the latter to construct viaducts to carry streets over a railway which is subject to Dominion legislation and it is left to the municipality to avail itself of the order or not, s. 59 of the Railway Act, 1906, does not apply, and it is not competent for the Board to include in its order a direction that a tramway company, whose line and crossing of the other railway would be affected by the change of grade, shall contribute (on the ground of the benefit which it would receive) a certain portion of the expense if the application on which the tramway company appeared was one solely between the other railway and the municipality and no relief was claimed against the tramway company in the notice of motion. [British Columbia Elec. Ry. Co. v. Vancouver, Victoria & Eastern Ry., etc., Co. and Vancouver, 13 D.L.R. 308, 48 Can. S.C.R. 98, 15 Can. Ry. Cas. 237, reversed.]

British Columbia Elec. Ry. Co. v. Vancouver, Victoria & Eastern Ry., etc., Co. and Vancouver, 18 Can. Ry. Cas. 287, [1914] A.C. 1067, 19 D.L.R. 91.

[Followed in Thorold v. Grand Trunk et al. Ry. Cos., 24 Can. Ry. Cas. 21.]

SEPARATION OF GRADES—JURISDICTION—HIGHWAY IMPROVEMENTS—APPORTIONMENT OF COST—CONTRACT AND CIVIL RIGHTS.

A municipality making highway improvements for the convenience of the public, with the incidental grade separation, should, in addition to its own portion of the cost of the works, bear the portion of such cost from which an electric railway operating on the highway was relieved by the judgment of an appellate Court. In grade separation proceedings the cost of pavements and sidewalks on highways carried over the railway should be borne by the municipality unless a permanent pavement already laid is destroyed by the work ordered by the Board; in that case the cost of the substituted pavement is added to the cost of such work. The Board does not pass on matters of contract and civil rights between the parties concerned in the work of grade separation, but only directs by which party the works authorized or ordered shall be done, leaving it to that party to carry out the work properly and without undue expense, and without interference by the Board except for the purpose of seeing that its order is properly carried out. [British Columbia Elec. Ry. Co. v. Vancouver, Victoria and Eastern Ry., etc., Co. and Vancouver, [1914] A.C. 1067, 18 Can. Ry. Cas. 287, considered.]

Vancouver v. Vancouver, Victoria & Eastern Ry., etc., Co., 18 Can. Ry. Cas. 296.

JURISDICTION—VALIDITY OF ORDERS—PUBLICATION.

Publication in the Canada Gazette is not a condition precedent to the operation of an order of the Board even as regards general orders affecting the public; s. 31 of the Railway Act, 1906, requires that judicial notice shall be taken of an order published by the Board or by leave of the Board, but in other cases the order may be proved by a certified copy under s. 69 of the Act. [R. v. C.N.R. Co., 18 Can. Cr. Cas. 170; Buskey v. Can. Pac. Ry. Co., 11 O.L.R. 1, 5 Can. Ry. Cas. 384, followed.]

Underhill v. Can. Northern Ry. Co., 18 Can. Ry. Cas. 313, 22 D.L.R. 279.

JURISDICTION—MUNICIPAL IMPROVEMENT—GRADES—SEPARATION.

The jurisdiction of the Board is confined in cases of separation of grades to the public interest in so far as Dominion franchises are concerned and the proper administration of them by Dominion railway companies. It is not the business of the Board to decide an issue of municipal expediency, whether or not municipalities should make certain improvements in cases where the whole cost will be on the municipality.

Winnipeg v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 317.

JURISDICTION—TELEPHONES—UNJUST DISCRIMINATION.

The powers conferred on the Board in regard to telephone companies are not necessarily identical with those conferred in respect of railway companies. The powers of the Board with regard to the former are defined and restricted by 7-8 Edw. VII. c. 61, part 1, s. 5. The Board has no jurisdiction to order the reopening of a telephone pay station, although such an application may be justified under the provisions of the Railway Act against unjust discrimination.

Stoney Point v. Bell Telephone Co., 18 Can. Ry. Cas. 319.

JURISDICTION—AUTHORIZATION OF CONTRACT EXEMPTING FROM LIABILITY.

It is within the power of the Board under the provisions of the Railway Act, 1906, to authorize a contract relieving the company from liability to one traveling in charge of live stock at a reduced fare, for injuries caused by the negligence of the company or otherwise.

Grand Trunk Ry. Co. v. Robinson, 19 Can. Ry. Cas. 1, [1915] A.C. 740, 22 D.L.R. 1.

[Robinson v. Grand Trunk Ry. Co., 47 Can. S.C.R. 622, 15 Can. Ry. Cas. 264, 12 D.L.R. 696, reversed.]

JURISDICTION—OPEN FOR TRAFFIC—TRANSPORTATION—TOLLS—CONSTRUCTION PERIOD.

The Board has no jurisdiction over carriers, so far as traffic is concerned under proper application is made to open for traffic under s. 261 (2), of the Railway Act, 1906, although it may well be that in the public interest some provision should be made in connection with transportation tolls, even before the railway has passed the construction period. [Baker, Reynolds & Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 151; Randall, et al. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 252; Riverside Lumber Co. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 17, followed.]

Re Edmonton, Dunvegan & British Columbia Ry. Co., 19 Can. Ry. Cas. 395.

JURISDICTION—PROVINCIAL CARRIERS.

It is not the function of the Board to decide whether a section of the Railway Act (8 & 9 Edw. VII. c. 32, s. 5A), giving it jurisdiction over a provincial carrier is ultra vires or not. [Montreal v. Montreal Street Ry. Co., [1912] A.C. 333, 13 Can. Ry. Cas. 541, affirming Montreal Street Ry. Co. v. Montreal, 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203, referred to.]

Auger et al. v. Grand Trunk and Can. Pac. Ry. Cos., 19 Can. Ry. Cas 401.

EXPLOSIVES—INITIAL CARRIERS—DISCRETION—OBLIGATION.

An initial carrier is under no obligation to become a member of the Bureau of Explosives if it satisfies the Board that a competent inspector has been appointed and proper arrangements made for the inspection of shipments of explosives originating on its line. Under s. 317 of the Railway Act, 1906, connecting carriers must accept such shipments of explosives when presented for transportation and cannot under s. 286 exercise their discretion by declining to accept the shipments.

Can. Northern Ry. Co. v. Grand Trunk and Canadian Pacific Ry. Cos. (Bureau of Explosives Case), 20 Can. Ry. Cas. 220.

JURISDICTION—WATER GATE—CULVERT.

The Board has no jurisdiction under ss. 26 (2) or 26 (a) of the Railway Act, 1906, to make an order directing the respondent to construct a water gate at the culvert on its right-of-way to protect the applicants from being flooded.

Trites v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 1.

JURISDICTION—STOPOVER PRIVILEGE—DISCRETION OF CARRIER.

The Board has no jurisdiction to compel carriers to put in a milling-in-transit or stopover privilege of a similar character. It is in the discretion of the carrier to grant it or not. The Board can only intervene when unjust discrimination or undue preference has been shewn.

Shingle Agency v. Can. Pac., Can. Northern and Great Northern Ry. Cos., 21 Can. Ry. Cas. 9.

REHEARING—DOUBT AS TO CORRECTNESS—NEW EVIDENCE.

The Board will not reconsider its former decision unless doubt has arisen in the minds of the Board as to the correctness of the first conclusion by reason of new matter advanced on an application to reopen or otherwise as to the soundness of the first conclusion, or when new evidence on a material issue can be presented.

American Coal & Coke Co. v. Michigan Central Ry. Co., 21 Can. Ry. Cas. 15.

JURISDICTION—TOLLS—DIVISION—LAKE AND RAIL.

The Board has no jurisdiction over the tolls charged or the division demanded by the different steamship companies operating boats on the St. Lawrence or Great Lakes, except that under s. 333 (3) of the Railway Act it has jurisdiction over the tolls on the steamships owned, operated and used by the Canadian Pacific Ry. Co.

Boards of Trade of Montreal and Toronto et al. v. Canadian Freight Assn., 21 Can. Ry. Cas. 77.

JURISDICTION—BREACH OF AGREEMENT.

A specific breach of an agreement must be shown to give the Board jurisdiction under 8 & 9 Edw. VII. c. 32, s. 1.

Hamilton v. Grand Trunk Ry. Co. (Burlington Beach Case), 21 Can. Ry. Cas. 211.

JURISDICTION—RAILWAY BRIDGE—BRANCH LINE.

Where a company is authorized by its charter to build a bridge and lay railway tracks upon it, but has no power to build a railway the Board has no jurisdiction to authorize it to build a branch line of railway under s. 175 of the Railway Act, 1903.

International Bridge & Terminal Co. v. Can. Northern Ry. Co., 21 Can. Ry. Cas. 218.

DOMINION RAILWAY TAKING LAND OF PROVINCIAL RAILWAY.

The Board has no jurisdiction, under s. 176 of the Railway Act, 1906, to order that a Dominion railway company should be authorized to take and use lands which, at the time of the application for the approval and of the approval of the location of the Dominion railway, had become the property of a provincial railway company. [Montreal v. Montreal Street Ry. Co., [1912] A.C. 333, 13 Can. Ry. Cas. 541, referred to.] Per Idington J. (dissenting).—The Board has the same power to make orders respecting the use and occupation of the lands of a provincial railway company as it has in regard to the lands of any other corporate body created by a provincial legislature.

Montreal Tramways and Montreal Park & Island Ry. Cos. v. Lachine, Jacques Cartier & Maisonneuve Ry. Co., 18 Can. Ry. Cas. 122, 50 Can. S.C.R. 84.

JURISDICTION—TELEPHONE SERVICE—FACILITIES.

2 & 3 Edw. VII. c. 41, s. 2, limits the Board's jurisdiction to direct the installation of a telephone service but gives the Board no power in regard to facilities such as it has in the case of railway companies. [Tinkess v. Bell Telephone Co., 20 Can. Ry. Cas. 249, at p. 255, followed.]

North Lancaster Exchange v. Bell Telephone Co., 21 Can. Ry. Cas. 220.

[Followed in Re Anderson and Bell Telephone Co., 24 Can. Ry. Cas. 224.]

JURISDICTION—STRUCTURE NEAR TRACKS.

Applications to the Board, under the provisions of general Order No. 65, which provides that "No structure over four feet high shall hereafter be placed within six feet from the gauge side of the nearest rail without first obtaining the approval of the Board," for the purpose of obtaining a limited clearance, affect a matter connected with the operation of the railway, and should be made by the railway company concerned and not by the individual or industry affected.

Re General Order No. 65, 16 Can. Ry. Cas. 412.

JURISDICTION—RAILWAY ON HIGHWAY—MUNICIPAL USE OF HIGHWAY.

In dismissing an application by a railway company to construct a spur on a highway, the Board has no jurisdiction to impose terms on the municipality concerned as to the use it should make of the highway in question. The Board's jurisdiction is confined to authorizing the construction and maintenance of the railway on the highway.

Montreal v. Can. Pac. Ry. Co. (Longue Point Spur Case), 21 Can. Ry. Cas. 224.

JURISDICTION—TOLLS—REASONABLE—EXPERIMENTAL—INDUSTRY DEVELOPMENT.

The jurisdiction of the Board is confined to dealing with the reasonableness of tolls, and it is not its function to put in experimental tolls with a view to developing industry. [British Columbia News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 176, at p. 178, followed.]

Southern Alberta Hay Growers v. Can. Pac. Ry. Co. (Timothy Seed Case), 21 Can. Ry. Cas. 226.

JURISDICTION — OPERATION OF RAILWAY — NOISE — MUNICIPAL BY-LAW — SMOKE FROM LOCOMOTIVES.

Unless it can be established that a railway company in carrying on its undertaking authorized by Parliament upon its own property, in a manner which is calculated to do as little harm to adjacent owners as possible, is not exercising as much care as it might, to lessen the noise of operation, the Board has no jurisdiction to interfere. It is not incumbent upon the Board to summon offending parties before the Courts of the Province for violation of its own order and a municipal by-law regulating the emission of smoke from railway locomotives.

Toronto v. Can. Northern Ry. Co (Don Valley Shunting Case), 21 Can. Ry. Cas. 452.

JURISDICTION—TRAFFIC AGREEMENT—CONDITIONS.

The Board has no jurisdiction under s. 364 (3) of the Railway Act, 1906, to dispense with the sanction of the Governor-in-Council required by s. 364 (2), but can only recommend for such sanction a traffic agreement, properly brought before it, of which it approves. The Board has jurisdiction to dispense with conditions as to consent of shareholders, advertising in local papers and other conditions as to procedure in bringing the matter properly before the Board.

Re Grand Trunk and Quebec, Montreal & Southern Ry. Cos., 23 Can. Ry. Cas. 101.

JURISDICTION—TOLLS—WATER BORNE TRAFFIC—LOCAL PORTS.

The Board has no jurisdiction to deal with a tariff of tolls for water borne traffic between local ports, no part of such traffic being attributable to railway traffic. [Dawson Board of Trade v. White Pass & Yukon Ry. Co., 9 Can. Ry. Cas. 190, distinguished.]

Massett v. Grand Trunk Pacific Steamship Co., 23 Can. Ry. Cas. 121.

DISPUTED ACCOUNTS—JURISDICTION—REFERENCE.

In a case of dispute between a municipality and a railway company over the cost of a bridge carrying a highway over a railway, of which each pays a certain proportion, where owing to the length and intricacy of the accounts it is impossible for the Board in the exercise of its jurisdiction to decide the questions at issue at an ordinary hearing, the matter was referred to a Referee under s. 60 of the Railway Act to take the accounts and report to the Board what amount (if any) is due by one party to the other, the reference being at the applicant's risk as to costs. [See North Bay Landowners v. Can. Northern Ry. Co., 23 Can. Ry. Cas. 35.]

Vancouver v. Vancouver, Victoria & Eastern Ry., etc., Co., 23 Can. Ry. Cas. 123.

JURISDICTION — BRIDGE — HIGHWAY AND RAILWAY — PEDESTRIAN — PUBLIC WAYS.

The Board has only such jurisdiction as is given it by the express terms of the statute or by the necessary implications therefrom. S. 59 of the Railway Act, 1906, does not confer jurisdiction on the Board to order a combined highway and railway bridge. The Board having found upon the evidence that the respondent built the extensions on either side of a rail way bridge for the pedestrian use of the public, it was held that the footpaths so provided were, in fact, public ways and communications. [Duthie v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 304, at p. 311, followed.]

Victoria and Attorney-General for British Columbia v. Esquimalt & Nanaimo Ry. Co., 24 Can. Ry. Cas. 84.

PUBLIC NUISANCE—STOCK PENS—JURISDICTION.

The Board has no jurisdiction, under ss. 26 (2), 284 of the Railway Act, 1906, or otherwise, to direct the removal, as a public nuisance, of a stock pen on the railway. [Bennett v. Grand Trunk Ry. Co., 2 O.L.R. 425, 1 Can. Ry. Cas. 451, referred to.]

Bessette v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 113.

AGREEMENT—VALIDATION—JURISDICTION—EX POST FACTO ORDERS.

Where a railway company entered into agreements for the purchase of the assets, stock and franchises of other railway companies, and subsequently became insolvent, the Board has no jurisdiction, under s. 361, of the Railway Act, 1906, to recommend such agreements for validation. [Niagara, St. Catharines & Toronto Ry. Co. v. Grand Trunk Ry. Co. (Merritton Crossing Case), 3 Can. Ry. Cas. 263, at p. 267, referred to.]

Re Central Ry. Co. Agreements, 24 Can. Ry. Cas. 117.

LANDS OF PROVINCIAL RAILWAY—POWERS OF DOMINION PARLIAMENT—JURISDICTION—LOCATION PLAN.

S. 176 of the Railway Act, 1906, does not authorize the taking of lands of a provincial railway company; and the settled practice of the Board, accords with this view. The Dominion Parliament has power, ancillary to its main legislative power regarding railways, to authorize the taking of lands of a provincial railway by a Dominion railway company, to the extent necessary to give effect to the purpose of the Dominion incorporation. To the extent necessary to give effect to the purpose of the Dominion incorporation, the Board has jurisdiction under the Railway Act to authorize the expropriation by a Dominion railway company of lands of a provincial railway company, either by an order approving location plan under s. 159, or in a proper case, by order, e.g., under s. 178, in the same manner as lands of individuals. Semble, when application is made under s. 159 of the Railway Act for the approval of a location plan of a Dominion railway crossing lands of a provincial railway company, the Board must first determine in each case, whether expropriation of the required lands of the provincial railway should be authorized, since the order of approval carries with it the right of expropriation of such lands within the limits set out in s. 177 of the Act. [Preston & Berlin Street Ry. Co. v. Grand Trunk Ry. Co., 6 Can. Ry. Cas. 142; St. John & Quebec Ry. Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 360; Toronto v. Bell Telephone Co., [1905] A.C. 52; Atty.-General for British Columbia v. Can. Pac. Ry. Co., [1906] A.C. 204, followed; Atty.-General for Alberta v. Atty.-General for Canada, 31 T.L.R. 32, referred to.]

Lachine, Jacques Cartier, etc., Ry. Co. v. Montreal Tramways and Montreal Park & Island Ry. Cos., 18 Can. Ry. Cas. 133.

JURISDICTION—SPECIFIC TIME—PUBLIC INTEREST.

The Board has no jurisdiction under the Railway Act, 1906, (ss. 30, 268, 270, 307), to prevent the use by railway companies of any specific time, unless such use is shewn to be against the comfort, convenience and safety of the traveling public and railway employees. The Daylight Saving Act, 1918, according to the ordinary canons of construction, remains in force until repealed.

Re Daylight Saving Act, 1918, 24 Can. Ry. Cas. 199.

ACT—OPERATION—JUDICIAL AND ADMINISTRATIVE BODY—DISCRETIONARY—LEGISLATIVE—JURISDICTION.

Parliament having stated its intention that the operation of the Daylight Saving Act should not extend beyond the year 1918, it is inadvisable that the Board should under all the circumstances take any action under it. The Board is both a judicial and administrative body, its jurisdiction is largely discretionary and in some instances legislative in its character.

Re Daylight Saving Act, 1918, 24 Can. Ry. Cas. 199.

JURISDICTION—DISMISSAL OR DISCIPLINE OF EMPLOYEE—INTERNAL MANAGEMENT.

The Board has no jurisdiction to discipline or remove an employee of a railway or telephone company; the matter is entirely one of internal management of the company. [Tinkess v. Bell Telephone Co., 20 Can. Ry. Cas. 249, at pp. 253, 255; North Lancaster Exchange v. Bell Telephone Co., 21 Can. Ry. Cas. 220, followed.]

Re Anderson and Bell Telephone Co., 24 Can. Ry. Cas. 224.

EXCLUSIVE JURISDICTION—ACCOMMODATION FACILITIES—REASONABLENESS.

The Board has exclusive jurisdiction to determine whether a railway has provided reasonable accommodation and facilities for traffic as required by ss. 284, 317 of the Railway Act, 1906, and there being no finding of the Board that the plaintiff had been wrongfully deprived of such accommodation or facilities he cannot recover in this action. Per Barker, C.J., McLeod and White, JJ. (Landry and Barry, JJ., dissenting): [Can. Northern Ry. Co. v. Robinson, 43 Can. S.C.R. 387, [1911] A.C. 739, distinguished.]

Meagher v. Can. Pac. Ry. Co., 42 N.B.R. 46.

JURISDICTION—REASONABLENESS—DISCRETION OF CARRIERS—DEVELOPMENT OF BUSINESS—FLAT TOLL—WEIGHT.

Carriers in their discretion may fix tolls to develop business; the Board's jurisdiction is concerned only with the reasonableness of tolls. [Canadian Portland Cement Co. v. Grand Trunk and Bay of Quinte Ry. Cos., 9 Can. Ry. Cas. 209; Blaugas Co. v. Canadian Freight Assn., 12 Can. Ry. Cas. 303, at p. 304; British Columbia News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 76, at p. 78; Hudson Bay Mining Co. v. Great Northern Ry. Co., 16 Can. Ry. Cas. 254, at p. 259; Canadian China Clay Co. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos., 18 Can. Ry. Cas. 347; Roberts v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 350, followed.] The Board upholding the principle of charging on the unit of weight, refused to grant a flat toll instead of a toll by weight on shipments of wood from Algonquin Park, Ontario, to municipalities for distribution among their citizens cost. The Board has no power under s. 341 (a) of the Railway Act, 1906, to extend the carriage of traffic so as to include a practice not already existing where no question of unjust discrimination arises. The granting of the tolls provided for by s. 341 is permissive so far as the carrier is concerned; the jurisdiction of the Board under that section is simply amendatory.

Waterloo et al. v. Grand Trunk Ry. Co., 24 Can. Ry. Cas. 143.

JURISDICTION—QUESTION OF LAW—PHYSICAL CONNECTIONS.

Under s. 176 of the Railway Act, 1906, the Board as a question of law, has no jurisdiction to authorize a Provincial railway company to take and use the lands and tracks of a Dominion railway company, although under 1 & 2 Geo. V. c. 22, s. 5 (3), amending s. 228, the Board can make supplemental orders for the safe and proper transfer of engines and equipment of the provincial railway company by the Dominion railway company by means of a physical connection. [Preston & Berlin Street Ry. Co. v. Grand Trunk Ry. Co., 6 Can. Ry. Cas. 142; St. John & Quebec Ry. Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 360, followed.]

St. John & Quebec Ry. Co. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 334.

B. Provincial Board.

PUBLIC UTILITIES COMMISSION, QUEBEC—WORKS FOR GENERAL ADVANTAGE OF CANADA—PROVINCIAL REGULATION.

When a railway of a company constituted by a Provincial Act is, after completion, declared by Parliament to be a work for the general advantage of Canada, it becomes subject to Federal jurisdiction; but if, by a Federal Act, the company is authorized to purchase and operate another provincial railway which is not declared to be a work for the general advantage of Canada, it remains subject, as to the latter, to provincial jurisdiction. Therefore, the Public Utilities Commission is competent to arbitrate on disagreements provided for by art. 740 et seq. R.S.Q. 1909, which may arise respecting the last-mentioned railway between the company and individuals.

Quebec Railway, Light, Heat & Power Co. v. Langlais, 21 Que. K.B. 167.

ONTARIO BOARD—JURISDICTION—MUNICIPAL RAILWAY.

A formal agreement between municipalities which is not of a voluntary character but which is executed in conformity with a direction of the Ontario Railway and Municipal Board as to the operation of a municipal railway is within the exclusive jurisdiction of the said Board as to adjustment of differences arising thereunder between the municipalities in the accounting for the profits of the operation of the road, and an action in the High Court will be dismissed.

Waterloo v. Berlin, 7 D.L.R. 241, 4 O.W.N. 256.

[Affirmed in Waterloo v. Berlin, 12 D.L.R. 390, 28 O.L.R. 206; distinguished in Brantford v. Grand Valley Ry. Co., 16 Can. Ry. Cas. 408, 15 D.L.R. 87.]

ONTARIO BOARD—JURISDICTION—POWER TO PERMIT STREET RAILWAY TO DEVIATE LINE.

As the Toronto & York Radial Ry. Co. is not authorized by legislation to deviate its line from Yonge street, in the city of Toronto, to a private right-of-way, the Ontario Ry. and Municipal Board is without jurisdiction to permit it to do so.

Toronto v. Toronto & York Radial Ry. Co., 12 D.L.R. 331, 28 O.L.R. 180, 15 Can. Ry. Cas. 277.

[Affirmed in 17 Can. Ry. Cas. 346, 15 D.L.R. 270.]

ONTARIO BOARD—CONSTITUTION—POWERS AND DUTIES—NOT A COURT.

The Ontario Railway and Municipal Board although it has for some purposes, as part of its powers and duties, judicial functions to perform, is not a Superior Court within the meaning of s. 96 of the B.N.A. Act. [Winnipeg Elec. Ry. Co. v. Winnipeg (1916), 30 D.L.R. 159, distinguished.]

Re Toronto Ry. Co. and Toronto, 46 D.L.R. 547.

Ontario Board—Jurisdiction—Inherent powers—Tax appeal—Re-opening of.

Where the assessment for school purposes of a power company was fixed on the company's appeal to the Ontario Railway and Municipal Board on the consent of the company and the municipality in an unorganized district of Ontario, that Board had no jurisdiction after the passing and entry of such order, to reopen the appeal on the application of the town school board and a ratepayer, and to substitute a higher assessment for its previous order; the effect of subs. 5 of s. 4 of the Ontario Railway and Municipal Board Act, 6 Edw. VII. c. 31, providing that the Board shall have all the powers of a Court of record, gave it such jurisdiction as in inherent in a Court of record but not powers which are conferred on particular Courts by statute or by rules of Court passed under statutory authority.

Re Ontario & Minnesota Power Co. and Fort Frances, 19 D.L.R. 429.

RAILWAY COMMITTEE.

See Railway Board.

RAILWAY CROSSINGS.

A. Leave to Cross.
B. Junctions.
C. Protection; Seniorities; Costs.

See Crossings; Farm Crossings; Highway Crossings; Interchange of Traffic.

Distinction between Crossing and Junction, see Junction.

Crossing railway by overhead bridge, see Bridges.

Annotations.

Power of Board to authorize railway crossings. 6 Can. Ry. Cas. 144.

Senior and Junior Rule, Priority of Construction and Apportionment of Cost. 15 Can. Ry. Cas. 450.

Senior and Junior rule at crossings. 22 Can. Ry. Cas. 188.

Negligence in not giving warning signals at crossings. 19 Can. Ry. Cas. 221.

Costs of installation, operation and maintenance of protection at highway crossing. 22 Can. Ry. Cas. 188.

A. Leave to Cross.

Permission of Railway Committee—Appeal from—Injunction—Costs.

The defendant company had obtained from the Railway Committee an order permitting it to cross the C.P.R. track. Pending an appeal by the C.P.R. Co. from the order to the full Cabinet, the defendant company proceeded to lay the crossing and the C.P.R. Co. applied for an injunction:—Held, that defendant company was not exceeding the terms of the order, which was binding on the Court until reversed on appeal to a competent authority, and therefore an injunction could not be granted. Before laying a crossing notice should be given of the time at which it is intended to commence work. Failure by a company to give such notice constituted good cause for depriving it of the costs of successfully resisting a motion for an injunction.

Can. Pac. Ry. Co. v. Vancouver, Westminster & Yukon Ry. Co., 3 Can. Ry. Cas. 273, 10 B.C.R. 228.

PROVINCIAL RAILWAY—MUNICIPAL FRANCHISES.

The Preston & Berlin Street Ry. Co., operating a provincial railway under municipal franchises, applied to the Board, under s. 177 of the Railway Act, 1903, for authority to construct two crossings over the Grand Trunk Ry. Co.'s tracks, or in the alternative for an order directing the Grand Trunk to shift its tracks so as to afford the applicants access to their freight terminals in the town of Waterloo. It was suggested on behalf of the town of Waterloo that an order might be made for this purpose under s. 187:—Held (1), that the application for the crossings must be refused as not proper in the public interest. (2) And that the Board, under the Railway Act, 1903, has no authority to compel the Grand Trunk, a Dominion railway, to shift its tracks for the convenience of the applicants, a Provincial railway. (3) And that the Board, under s. 137 of the Railway Act, 1903, had not jurisdiction to grant to a Provincial railway company power to take, use or occupy the lands of a Dominion railway company.

Preston & Berlin Street Ry. Co. v. Grand Trunk Ry. Co., 6 Can. Ry. Cas. 142.

[Followed in St. John & Quebec Ry. Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 360; St. John & Quebec Ry. Co. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 334; Lachine, Jacques Cartier etc., Ry. Co. v. Montreal Tramways etc., Ry. Cos. 18 Can. Ry. Cas. 133.]

LEVEL CROSSING—PROVINCIAL RAILWAY—WORK FOR THE GENERAL ADVANTAGE OF CANADA—APPROVAL OF ROUTE.

The Windsor, Essex etc., Ry. Co. applied to the Board to rescind or vary its order for a subway under the tracks of the Michigan Central Ry. Co. at Essex, and substitute a level crossing. Upon the evidence the Board reluctantly accepted the recommendation of the chief engineer in favour of a level crossing. The applicants were originally incorporated under the provisions of the Ontario Electric Railway Act, R.S.O. 1897, c. 209. After obtaining an order for a crossing, their railway and works were declared by 6 Edw. VII. c. 184 (D.) to be works for the general advantage of Canada:—Held, that the route and location plans need not be approved by the Board under the Railway Act, 1903, before the variation of the former order for a crossing could be made.

Windsor, Essex & Lake Shore Rapid Ry. Co. v. Michigan Central Ry. Co., 6 Can. Ry. Cas. 152.

MUNICIPALLY OWNED STREET RAILWAY—APPLICATION TO CROSS TO LIEUTENANT-GOVERNOR-IN-COUNCIL.

An application of a street railway to cross the tracks of a steam railway company at a place where the latter crosses a city street, need not be submitted to the Lieutenant-Governor-in-council for approval, under s. 122 of c. 8, of the Alberta Statutes of 1907, as to steam railways under Federal control, since such application falls within s. 227 of the Railway Act, 1906.

Edmonton Street Ry. Co. v. Grand Trunk Pacific Ry. Co., 14 Can. Ry Cas. 93, 4 D.L.R. 472.

[See 7 D.L.R. 888; 22 W.L.R. 45.]

B. Junctions.

JUNCTIONS—GENERAL ADVANTAGE OF CANADA.

The railways of the Canadian Pacific Ry. Co., the Great Northern Ry. Co., the Quebec Ry. and Light & Motive Force Co., all enterprises for the general advantage of Canada and under control of Parliament, and also the railway of the Quebec & Lake St. John Ry. Co., an enterprise of a purely provincial nature under control of the Legislature of Quebec, all four enter the city of Quebec; and the Quebec Harbour Commission, which is under the control of Parliament, in order to facilitate the access of these four railways to the Louise dock, constructed on their property a railway siding about 300 feet in length, which forms in no manner any part of the systems of any of these four railways, but by the means of which the trains of the Quebec & Lake St. John Ry. transfer to the Canadian Pacific Ry. and vice versa:—Held, reversing the judgment of Cimon, J. (1), that this does not constitute on the part of the Quebec & Lake St. John Ry., a connection with the Canadian Pacific Ry., nor a required crossing within the meaning of s. 306 of the Railway Act of Canada, 1888, so as to make the Quebec & Lake St. John Ry. an enterprise for the general advantage of Canada and place it under the control of Parliament; that the connection or crossing referred to in said s. 306 must be a physical and immediate connection without any intermediary rails:—(2) Held, further, that the general language of said s. 306 is insufficient to make the railways which are not expressly and specifically mentioned enterprises for the general advantage of Canada:—(3) Held, also, that construing the said s. 306 and s. 177 of the same act, the said s. 306 should be interpreted as applying only to any branch line or line of railway which, on account of the junction, should become part of the system of railways enumerated in the section, and, consequently, a branch line of one of these railways.

Garneau v. Quebec & Lake St. John Ry. Co., 12 Que. K.B. 205.

CONNECTION OF TRACKS—PROVINCIAL RAILWAY.

The St. J. & Q. Ry. Co., a provincial railway company, having applied to the Board under ss. 227, 229 of the Railway Act for authority to connect its tracks with those of the C.P.R. Co. and operate its trains over them between certain points, to rearrange certain tracks of the C.P.R. Co., construct and operate switches from its lines at certain points, and make other physical changes. The Board refused the application on the ground that the benefits of the provisions of the Railway Act allowing one railway company to use the lines and appliances of another can only be given to Dominion railways, and that the statutes 1 & 2 Geo. V. (1911), c. 11, and 2 Geo. V. (1912), c. 49, do not place the applicant railway under the jurisdiction of the Board. [Preston & Berlin Street Ry. Co. v. Grand Trunk Ry. Co., 6 Can. Ry. Cas. 142, followed.]

St. John & Quebec Ry. Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 360.

[Followed in Lachine, Jacques Cartier, etc., Ry. Co. v. Montreal Tramways, etc., Ry. Cos., 18 Can. Ry. Cas. 133.]

C. Protection; Seniorities; Costs.

PACKING RAILWAY FROGS.

The proviso of subs. 4 of s. 262 of the Railway Act, 1888, does not apply to the fillings referred to in the subs. 3, and confers no power upon the Railway Committee to dispense with the filling in of the spaces behind and in front of railway frogs or crossings and the fixed rails of switches during the winter months. Judgment of the Court of Appeal for Ontario, 24 A.R. (Ont.) 183, reversed.

Washington v. Grand Trunk Ry. Co., 28 Can. S.C.R. 184.

[Affirmed [1899] A.C. 275; applied in Weddell v. Ritchie, 10 O.L.R. 5; commented on in Fralick v. Grand Trunk Ry. Co., 43 Can. S.C.R. 515;

distinguished in Grant v. Can. Pac. Ry. Co., 36 N.B.R. 533; followed in Curran v. Grand Trunk Ry. Co., 25 A.R. (Ont.), 407.]

Crossings of two railways—Interlocking signal system—Contribution.

Where two railway companies differ as to the nature and extent of the protection prescribed by an order of the Railway Committee to be furnished at a crossing of two railways, and one company voluntarily provides the additional protection which it claims the other company should supply according to the terms of such order, the Board will not, by an ex post facto order, direct repayment by the other company of the expenditure thereby incurred, and in default of payment order that the crossing be discontinued. In such cases the proper course is to apply to the Courts for an interpretation of the order. The order of the Railway Committee directed that an interlocking signal system and all the necessary works and appliances for properly operating the same be provided at such crossing:—Held, that derails do not form part of the appliances required by such order, and a permanent watchman is not necessarily required. Compensation is not allowed (1) for the use of the land of the senior company occupied by the crossing tracks of the junior company, where no substantial injury is done to the lands of the senior company; nor (2) for interference with the business of the senior company, or for any other delays in the use of its railway due to precautions taken in the use of the crossing required for public safety. (S. 177, Railway Act, 1903.) The Board fixed $90 as the annual compensation to be paid by the junior company for the use of two sidings belonging to the senior company, having lengths of 1,200 and 661 feet respectively, the cost of maintenance of such siding to be borne by the two companies upon wheelage basis.

Niagara, St. Catharines & Toronto Ry. Co. v. Grand Trunk Ry. Co. (Merritton Crossing Case), 3 Can. Ry. Cas. 263.

Railway intersection—Protection—Costs—Priority.

The G. & G. Ry. Co. was incorporated on 6th June, 1904, by 4 Edw. VII. c. 81 (D), a plan shewing the location of its line across the Elora road, outside the city of Guelph, was approved by the board on 2nd July, 1904, filed in the Registry Office on 8th July, and notice thereof given in the local newspapers in August. The G.R. Ry. Co. on 25th May, 1905, by 5 Edw. VII. c. 91 (Ont.) was empowered to build and operate an extension of its railway on the Elora road outside the city of Guelph. Its location had been authorized by a by-law passed by the council of the county of Wellington on 4th June, 1904, when the rails were laid and the line put into operation:—Held, upon an application by the G. & G. Ry. Co. to cross the G.R. Ry. Co., that the location and operation of the latter had, under the circumstances, become authorized on 25th May, 1905, and was prior to that of the applicant company, who, according to the usual rule, must bear the expense of crossing and maintenance of the necessary protection.

Guelph & Goderich Ry. Co. v. Guelph Radial Ry. Co., 5 Can. Ry. Cas. 180.

[Distinguished in Grand Trunk Ry. Co. v. Sarnia Street Ry. Co., 21 Can. Ry. Cas. 160, 37 O.L.R. 477.]

Interlocking appliances—Order of the board.

Under an agreement dated May 22nd, 1887, it was agreed between the Grand Trunk Ry. Co. and the I.C.R. (whose successor is the C.P.R. Co.), that the said I.C.R. should bear the cost of providing, maintaining, equipping and working an ordinary level railway crossing together with all risk arising from such constructions and operations. The agreement also contained the following provision: "In the event of the Government of this Dominion passing any Act whereby certain signals, interlocking switches or other appliances shall be used on level railway crossings, it is hereby understood and agreed that the party of the second part" (being the International Company) "will provide, work and maintain such at their own expenses:"—Held, that the said clause of the agreement should not be narrowly construed, that the Board had authority under the Railway Act, 1903, to order an interlocking system at this crossing for the protection of the public. Ordered, that the C.P.R. Co. do install, maintain and operate the ordinary interlocking, derailing and signal system at its own expense at the said crossing.

Re Can. Pac. Ry. Co. and Grand Trunk Ry. Co. (Lennoxville Crossing Case), 6 Can. Ry. Cas. 77.

DOUBLE TRACK — PRIORITY — EXPENSE OF PROTECTING CROSSING — SENIOR AND JUNIOR COMPANIES.

A railway company having the right, under its charter to construct one or more sets of tracks becomes the senior company not only when its line is crossed by the line of a junior company, but also in respect of the crossing of any additional tracks subsequently laid by it, and the junior company must bear the expense of making and protecting all such crossings, as new tracks are laid by the senior company:—Held, that under the circumstance of this case, the United Counties Ry. Co. should bear the expense of protecting the crossing of its line by the intended double track of the Grand Trunk Ry. Co.

Grand Trunk Ry. Co. v. United Counties Ry. Co. (St. Hyacinthe Crossing Case), 7 Can. Ry. Cas. 294.

[Followed in Fort William v. Copp Bros., 11 Can. Ry. Cas. 149; distinguished in Grand Trunk Ry. Co. v. Sarina Street Ry. Co., 21 Can. Ry. Cas. 160; Midland Ry. Co. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 80; Grand Trunk Ry. Co. v. Kitchener & Waterloo Street Ry. Co., 24 Can. Ry. Cas. 13.]

PRIORITY OF APPROVAL—REGISTRATION—OWNERSHIP.

The map shewing the location and the plan of a branch line of the applicant were approved under ss. 157, 159 and registered as required by s. 160, of the Railway Act, 1906, prior to the respondent. The respondent owned in fee the land at the point of crossing of the two locations prior to the approval of any plans. The respondent's line at the point of crossing was built first and the railway was in operation when construction work upon the applicant's railway reached the crossing:—Held, that the respondent was senior to the applicant at the crossing.

Can. Northern Ry. Co. v. Can. Pac. Ry. Co. (Kaiser Crossing Case), 7 Can. Ry. Cas. 297.

[Followed in Can. North. Ry. Co. v. Can. Pac. Ry. Co., 11 Can. Ry. Cas. 432; Sasman v. Can. Northern Ry. Co., 20 Can. Ry. Cas. 246; Midland Ry. Co. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 80; Grand Trunk Ry. Co. v. Kitchener & Waterloo Street Ry. Co., 24 Can. Ry. Cas. 13; distinguished in Qu'Appelle, etc., Ry. Co. v. Can. Pac. Ry. Co., 13 Can. Ry. Cas. 131; Erie & Ontario Ry. Co. v. Niagara, St. Catharines & Toronto Ry. Co., 18 Can. Ry. Cas. 29.]

PRIORITY OF APPROVAL—OWNERSHIP—SENIORITY.

The respondent, prior to the applicant, obtained approval of the location and proceeded with the construction of a branch line under 44 Vict. c. 1, s. 14. The applicant pending an application to cross said line, obtained a grant from the Crown (Dominion) of the land at the crossing pursuant to 3 Edw. VII. c. 7, s. 46. Held, that the respondent was senior to the applicant at the crossing. [Re Branch Lines, 36 Can. S.C.R. 42, followed.]

Grand Trunk Pacific Ry. Co. v. Can. Pac. Ry. Co. (Nokomis Crossing Case), 7 Can. Ry. Cas. 299.

[Distinguished in Qu'Appelle, etc., Ry. Co. v. C.P.R. Co., 13 Can. Ry. Cas. 131; followed in Erie & Ontario Ry. Co. v. Niagara, St. Catharines & Toronto Ry. Co., 18 Can. Ry. Cas. 29; Midland Ry. Co. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 80.]

INDUSTRIAL SPUR—STREET RAILWAY—LEAVE TO CROSS—EXPENSE OF—PROTECTING CROSSING—SENIOR AND JUNIOR COMPANY.

Application for an order under s. 227 of the Railway Act, to cross the spur or branch line of the C.P.R. Co., known as the Copp Foundry Industrial Spur with a second street railway track. By agreement with Copp Brothers made in 1902 the town of Port Arthur permitted its street railway to be crossed by a spur from the main line of the C.P.R. Co. at the expense of Copp Brothers. The city of Fort William subsequently became the owners of the street railway. By agreement with Copp Brothers the city constructed a second street railway track across the spur and applied to the Board for an order directing whether Copp Brothers or the city should pay the expense of constucting and protecting the second crossing. The Board refused to entertain the application because the city had no right to construct this crossing without first having obtained leave to cross. A further application was then made as above stated. The real object of the city, although not stated in the application was to compel Copp Brothers to bear the cost of constructing and protecting the second crossing on the ground that the street railway was the senior company:—Held, that with respect to a steam railway senior as to one line it must continue to be senior when it comes to double track. That if the city had made an application in the regular way for leave to cross, the matter would then have been properly before the Board, but that it was quite irregular for the municipality to construct the crossing without authority and then apply to the Board for the purpose of making Copp Brothers pay the expense incident thereto, and the application must be refused. [Grand Trunk Ry. Co. v. United Counties Ry. Co. (St. Hyacinthe Crossing Case, No. 2991), 7 Can. Ry. Cas. 294, followed.]

Fort William v. Copp (Copp Foundry Industrial Spur Case), 11 Can. Ry. Cas. 149.

CROSSING OF STEAM RAILWAY BY MUNICIPALLY OWNED STREET RAILWAY—STREET SENIOR OF RAILWAY—LIABILITY FOR COST.

Where, in point of time, a city street is senior to the tracks of a steam railway that cross it, the tracks of a municipally owned street railway which are subsequently laid across the tracks of the steam railway, are not junior thereto so as to require the whole cost of the installation, maintenance and protection of the crossing to be borne by the city, but it will be divided equally between them.

Edmonton Street Ry. Co. v. Grand Trunk Pac. Ry. Co., 14 Can. Ry. Cas. 93, 4 D.L.R. 472.

[Grand Trunk Ry. Co. v. Kitchener & Waterloo Street Ry. Co., 24 Can Ry. Cas. 13. See 7 D.L.R. 888. 22 W.L.R. 45, affirmed in 15 Can. Ry. Cas. 445.]

ORDER OF BOARD—SUPREME COURT—COST OF INSTALLATION, MAINTENANCE AND PROTECTION OF CROSSING OF RAILWAY BY MUNICIPALLY-OWNED STREET RAILWAY.

Edmonton Street Ry. Co. v. Grand Trunk Pacific Ry. Co. (No. 2), 7 D.L.R. 888, 22 W.L.R. 45.

CONSTRUCTION AND OPERATION—SUBWAY—CONTRIBUTION.

The Canadian Ontario Ry. crossed under the line of the Grand Trunk Ry. by means of a subway. Subsequently the Campbellford, Lake Ontario & Western Ry. obtained authority from the Board to cross the C.N.O. Ry., using for that purpose the embankment of the same subway:—Held, that the C.N.O. Ry. was not entitled to receive any contribution from the C.L.O. & W. Ry. towards the expense it had already incurred in making the embankment.

Campbellford, Lake Ontario & Western Ry. Co. v. Can. Northern Ontario Ry. Co., 14 Can. Ry. Cas. 220.

SENIOR AND JUNIOR—TITLE—RIGHT-OF-WAY.

When a railway company has secured a right-of-way, its tracks on that right-of-way, no matter when laid, are always senior to those of any railway company desiring to cross such right-of-way. [Grand Trunk Pacific Ry. Co. v. Can. Pac. Ry. Co. (Nokomis Crossing Case), 7 Can. Ry. Cas. 299, at p. 301, followed; Canadian Northern Ry. Co. v. Can. Pac. Ry. Co. (Kaiser Crossing Case), 11 Can. Ry. Cas. 432, distinguished.]

Erie & Ontario Ry. Co. v. Niagara, St. Catharines & Toronto Ry. Co., 18 Can. Ry. Cas. 29.

[Distinguished in Midland Ry. Co. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 80.]

SENIOR AND JUNIOR—CROSSING NOT AUTHORIZED—APPORTIONMENT OF COST.

Under the senior and junior rule the junior respondent interfering with the tracks of the senior applicant, should pay all the cost of constructing the crossing and operating and maintaining the protective appliances, but where the track to be crossed was not authorized by the Board to be laid, and both parties acted improperly, the applicant should bear the cost of constructing the crossing, and the respondent the cost of maintaining and operating the protective appliances.

Can. Pac. Ry. Co. v. Winnipeg Elec. Ry. Co., 18 Can. Ry. Cas. 31.

SENIOR AND JUNIOR—FLAGMAN—EXPENSE—RESPONSIBILITY.

The junior railway company permitted to cross with its line the tracks of the senior should bear all the expense and responsibility of such crossing, and should employ and pay the flagman at the crossing and not merely reimburse the senior company for the wages of a flagman carried on the pay roll of the latter company.

Winnipeg Elec. Ry. Co. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 36.

Street railway crossing — Diamond — Construction or operation of railway—Limitation of action.

Grand Trunk Ry. Co. v. Sarnia Street Ry. Co., 21 Can. Ry. Cas. 160, 37 O.L.R. 477.

Senior and junior rule—Ownership of land—Location—Prior construction.

Ownership of a block of land and approval of a plan of railway located thereon do not give seniority at the place of crossing over another railway whose location plan was approved and line built prior to the construction of the first mentioned railway upon a new location on another portion of the same block of land. The Assistant Chief Commissioner, dissenting, was of opinion that the ownership of the land with the right to build a railway thereon gave seniority. [Can. Northern Ry. Co. v. Can. Pac. Ry. Co. (Kaiser Crossing Case), 7 Can. Ry. Cas. 297; Grand Trunk Pacific Ry. Co. v. Can. Pac. Ry. Co. (Nokomis Crossing Case), 7 Can. Ry. Cas. 299; Can. Northern Ry. Co. v. Can. Pac. Ry. Co., 11 Can. Ry. Cas. 432; Edmonton v. Calgary & Edmonton Ry. Co., 16 Can. Ry. Cas. 420 at p. 423 (affirmed 53 Can. S.C.R. 406 at p. 415, 22 Can. Ry. Cas. 182); South Ontario Pacific Ry. Co. v. Grand Trunk Ry. Co. (Junction Cut Case), 20 Can. Ry. Cas. 152, followed; Grand Trunk Ry. Co. v. United Counties Ry. Co. (St. Hyacinthe Crossing Case), 7 Can. Ry. Cas. 294; Erie & Ontario Ry. Co. v. Niagara, St. Catharines & Toronto Ry. Co., 18 Can. Ry. Cas. 29, distinguished.]

Midland Ry. Co. v. Grand Trunk Pacific Ry. Co. (St. Boniface Crossing Case), 23 Can. Ry. Cas. 80.

Steam railway crossing street railway—Senior and junior rule—Seniority as to operation—Highway traffic—Interurban electric lines on highways—Dominion or provincial incorporation—Seniority.

An electric railway using a highway as a right-of-way is to be treated as an ordinary highway occupant, and therefore where it crosses a steam railway, the traffic of the steam railway should have priority, though the steam road, if junior, should pay the cost of construction and maintenance of the necessary crossing. The fact, that an electric railway operating along the highway, not only as a street railway, but also as an interurban or radial line, is in competition with a steam railway which crosses it, does not affect their respective rights as to seniority at the crossing. Its use of the highway is an extension of the ordinary highway user and the traffic of the steam railway should have priority. Whether a street railway is incorporated by the Dominion or by a Province does not affect its right as to seniority as against another steam railway crossing it.

Lake Erie & Northern Ry. Co. v. Brantford Street Ry. Co., 16 Can. Ry. Cas. 244.

[Followed in Midland Ry. Co. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 80.]

RAILWAY SUBSIDY.

A. Government Subsidy.
B. Municipal Bonus.

See Sale (A).

A. Government Subsidy.

Misappropriation of subsidy moneys by order in council.

Where money is granted by the Legislature and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right. The appellant railway company alleged by petition of right that by virtue of 51 & 52 Vict. c. 91, the Lieut.-Governor in Council was authorized to grant 4,000 acres of land per mile for 30 miles of the Hereford Ry.; that by an order in council dated 6th August, 1888, the land subsidy was converted into a money subsidy, s. 9 of said c. 91 of 51 & 52 Vict., enacting that it shall be lawful," etc., to convert; that the company completed the construction of their line of railway, relying upon the said subsidy and Order in Council, and built the railway in accordance with the Act 51 & 52 Vict. c. 91, and the provisions of the Railway Act, 1888, and they claimed to be entitled to the sum of $49,000, balance due on said subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded inter alia, that the money had been paid by Order in Council to the subcontractors for work necessary for the construction of the road; that the president had by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties, and signed a receipt for the balance of $6,500 due on account of the first subsidy. The petition of right was dismissed:—Held, that the statute and documents relied on did not create a liability on the part of the Crown to pay the money voted to the appellant company enforceable by petition of right (Taschereau and Sedgewick, JJ., dissenting), but assuming it did, the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy, and payment by the Crown of the subcontractors' claim out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy.

Hereford Ry. Co. v. The Queen, 24 Can. S.C.R. 1.

[Applied in R. v. Lavery, 5 Que. Q.B. 326; distinguished in Qu'Appelle, Long Lake & Sask. Ry. Co. v. The King, 7 Can. Ex. 115; referred to in Universal Skirt Mfg. Co. v. Gormley, 17 O.L.R. 114.]

Cost of construction—Rolling stock and equipment.

The provisions of the Act, 3 Edw. VII. c. 57, authorizing the granting of subsidies in aid of the construction of railways are not mandatory, but discretionary in so far as the grant of the subsidies by the Governor in Council is concerned. On a proper construction of the said Act it does not appear to have been the intention of Parliament that the cost of rolling stock and equipment should be included in the cost of construction in estimating the amount of subsidy payable to the company in aid of the "Pheasant Hill Branch" of their railway under the provisions of that Act, notwithstanding that the said Act did not specially exclude the consideration of the cost of equipment in the making of such estimate as had been done in former subsidy Acts with similar objects, and that the Governor in Council imposed the duty of efficient maintenance and equipment of the branch as a condition of the grant of the subsidy. Judgment of Exchequer Court, 10 Can. Ex. 325, affirmed.

Can. Pac. Ry. Co. v. The King, 38 Can. S.C.R. 137.

[Approved in Re Ontario Voters' Lists Act, West York, 15 O.L.R. 303.]

Statutory contract—Bonds of railway company—Government guarantee.

The Government of Canada, in a contract with the G.T.P. Ry. Co., published as a schedule to and confirmed by 3 Edw. VII. c. 71, agreed to guarantee the bonds of the company to be issued for a sum equal to 75 per cent of the cost of construction of the Western division of its railway

By a later contract (sch. to 4 Edw. VII. c. 24), the Government agreed to implement its guarantee, in such manner as might be agreed upon, so as to make the proceeds of said bonds a sum equal to 75 per cent of such cost of construction:—Held, that this second contract only imposed upon the Government the liability of guaranteeing bonds, the proceeds of which would produce a defined amount and not that of supplying, in cash or its equivalent, any deficiency there might be between the proceeds of the bonds and the said 75 per cent.

Re Grand Trunk Pacific Bonds, 42 Can. S.C.R. 505.

[See [1912] A.C. 204.]

BOND GUARANTEE.

The Dominion Government by contract with the appellants in 1903 (confirmed by 3 Edw. VII. c. 71), guaranteed to the extent of 75 per cent of the cost of construction of a certain section of their railway, the appellants' first mortgage bonds charged on their whole undertaking; the balance of cost to be raised by second mortgage bonds guaranteed by the Grand Trunk Ry. Co. By a supplemental contract in 1904 (confirmed by 4 Edw. VII. c. 24) the Government agreed to implement their guarantee so as to make the proceeds of the guaranteed bonds which had proved to be deficient equal to the said 75 per cent of the cost of construction. The Supreme Court held that under this contract the appellants were bound to issue additional first mortgage bonds to the extent of the deficit and that the Government should guarantee them:—Held, by the Privy Council, reversing the decision of the Supreme Court of Canada on a reference made by Order-in-Council, that the appellants had no power to issue bonds other than those authorized by the original contract, and that it would be a breach of faith with the second mortgagee to do so if they could. The Government were bound to implement their guarantee by cash or its equivalent so as to discharge their liability as defined by the first contract and confirmed by the second, without imposing any further liability on the company.

Grand Trunk Pacific Ry. v. The King, [1912] A.C. 204.

ACTION OF CROWN OFFICERS—COMPROMISE AND PART PAYMENT OF SUBSIDY —PETITION OF RIGHT.

(1) The grant by a statute of a subsidy "to aid in completing and equipping a railway, throughout its whole length for the part not commenced and that not finished, about eighty miles going to or near Gaspé Basin," with a proviso that it shall be payable to a person or persons, etc., establishing that they are in a position to carry out the work, applies exclusively to the eighty miles of the road ending at or near Gaspé Basin. (2) A different construction of the statute by officers of the Crown, the effecting of a compromise in consequence and even a part payment of the subsidy, afford no grounds to recover the balance from the Crown by petition of right.

De Galindez v. The King, 15 Que. K.B. 320.

[Affirmed in 39 Can. S.C.R. 682.]

SUBSIDY—LAND GRANT—WHETHER MINERALS INCLUDED.

[33 Can. S.C.R. 673, affirming 8 Can. Ex. 83, reversed.]

Calgary & Edmonton Ry. Co. v. The King, [1904] A.C. 765.

GRANT OF LANDS—MINERAL CLAIMS.

The legislative intent of the Railway Aid Act (B.C.) was, that the interest of the Crown in lands (already located as mineral claims), which are comprised in a greater block of lands granted as a subsidy to a railwayy company under the Act, may pass to the railway company, subject to existing and future rights of the persons who prior to the subsidy had made such locations.

Farrell v. Fitch, 7 D.L.R. 657, 22 W.L.R. 517, 17 B.C.R. 507.

[Railway Aid Act, B.C. Statutes, 1890, c. 40, construed; Osborne v. Morgan (1888), 13 A.C. 227; Nelson & Fort Sheppard Ry. Co. v. Jerry (1897), 5 B.C.R. 396; Re Demers, 1 B.C.R., pt. 2, 334; Staffordshire Banking Co. v. Emmott, L.R. 2 Ex. 208, referred to.]

Lands granted for right-of-way—Transfer track.

There is a marked distinction between lands granted for right-of-way and other railway purposes and those granted as subsidies; the latter are in the same position as a cash bonus, and part of the remuneration for the building of the railway. The respondent should be ordered to pay their proportion of the cost of the land required for the construction of a transfer track. [Montreal Tramway and Montreal Park & Island Ry. Co. v. Lachine Jacques Cartier, etc., Ry. Co., 50 Can. S.C.R. 84, at p. 92, 18 Can. Ry. Cas. 122; South Ontario Pacific Ry. Co. v. Grand Trunk Ry. Co. (Junction Cut case), 20 Can. Ry. Cas. 152, followed.]

Can. Pac. Ry. Co. v. Grand Trunk Pacific Ry. (Subsidy Lands Case), 21 Can. Ry. Cas. 95.

Rights of transferee completing work.

A statute authorizing the payment of a subsidy for completing the construction of a line of railway, entitles a company, as the successor of another company who had commenced the work, to receive subsidy in respect of that portion of the road forming part of the subsidized line which had been constructed by the other company. [Quebec, Montreal & Southern Ry. Co. v. The King, 15 Can. Ex. 237, reversed.]

Quebec, Montreal & Southern Ry. Co. v. The King, 29 D.L.R. 466.

Extent of government's power to retain proceeds in payment of indebtedness—Subcontractors.

The preceding part of s. 18 of the Railway Subsidy Act (N.B.), 4 Geo. V. c. 10, as it stood prior to its repeal by s. 6 of Act, 5 Geo. V. c. 9, and substituted by s. 12 of the latter Act, providing for the retention by the government, out of the proceeds of bonds authorized thereunder, amounts sufficient to cover "all outstanding indebtedness due contractors or others employed in the actual work of constructing the railway, and for materials, wages and supplies, that have gone into the construction," refers only in respect of indebtedness by the company itself and does not cover indebtedness of subcontractor or others.

St. John & Quebec Ry. Co. v. Hibbard Co., 26 D.L.R. 519.

B. Municipal Bonus.

Bonus—Grant to railway in aid of construction—Mandamus to enforce.

By 18 Vict. c. 33, the Grand Junction Ry. Co. was amalgamated with the Grand Trunk Ry. Co. The former railway, not having been built within the time directed, its charter expired. In May, 1870, an Act was passed by the Dominion Parliament to revive the charter of the Grand Junction Ry. Co., but gave it a slightly different name, and made some changes in the charter. After this, in 1870, a by-law to aid the company by $75,000 was introduced into the county council of Peterborough. This by-law was read twice only, and, although in the by-law it was set out and declared that the ratepayers should vote on said proposed by-law on the 16th November, it was on the 23rd November that the ratepayers voted on a by-law to grant a bonus to the appellant company, construction of the road to be commenced before the 1st May, 1872. At the time when the voting took place on the by-law, there was no power in the municipality to grant a bonus. On the 15th February, 1871, the Act 34 Vict. c. 48 (Ont.) was passed, which declared the by-law as valid as if it had been read a third time, and that it should be legal and binding on all persons as if it had been passed after the Act. On the same day of the same year, c. 30 was passed, giving power to municipalities to aid railways by granting bonuses. In 1874 the Act 37 Vict. c. 43 (Ont.) was passed, amending and consolidating the Acts relating to the company. In 1871 the company notified the council to send the debentures to the trustees who had been appointed under 34 Vict. c. 48 (Ont.). In 1872 the council served formal notice on the company, repudiating all liability under the alleged by-law. Work had been commenced in 1872, and time for completion was extended by 39 Vict. c. 71 (Ont.). No sum for interest or sinking fund had been collected by the corporation of the county of Peterborough, and no demand was made for the debentures until 1879, when the company applied for a mandamus to issue and deliver them to the trustees:—Held, affirming the decision of the Court below, that the effect of the statute 34 Vict. c. 48 (Ont.), apart from any effect it might have of recognizing the existence of the railway company, was not to legalize the by-law in favour of the company, but was merely to make the by-law as valid as if it had been read a third time, and as if the municipality had had power to give a bonus to the company, and, there being certain other defects in the said by-law not cured by the said statute, the appellants could not recover the bonus from the defendants. Per Gwynne, J., Fournier and Taschereau, JJ., concurring:—As the undertaking entered into by the municipal corporation contained in by-law for granting bonuses to railway companies, is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated in the by-law, the only way in Ontario in which delivery to trustees on behalf of the company can be enforced, before the company shall have acquired a right to the actual receipt and benefit of them by fulfilment of the conditions prescribed in the by-law, is by an action under the provisions of the statutes in force then regulating the proceedings in actions, and not by summary process by motion for the old prerogative writ of mandamus which the writ of the mandamus obtainable on motion without action still is. Per Henry, J.: That if appellants had made out a right to file a bill to enforce the performance of a contract ratified by the Legislature, they would not have the right to ask for the present writ of mandamus. 45 U.C.R. 302, reversed.

Grand Junction Ry. Co. v. Peterborough, 8 Can. S.C.R. 76, 6 A.R. (Ont.) 339.

[Commented on in Moulton v. Haldimand, Re., 12 A.R. (Ont.) 503; distinguished in Brussels v. Ronald, 11 A.R. (Ont.) 605; followed in Canada Atlantic Ry. Co. v. Cambridge, 14 A.R. (Ont.) 299; referred to in Re Brandon Bridge, 2 Man. L.R. 17; Canada Atlantic Ry. Co. v. Ottawa, 8 O.R. 201; Jenkins v. Central Ontario Ry. Co., 4 O.R. 593.]

BONUS—GUARANTEEING COSTS OF EXPROPRIATION.

Under 44 & 45 Vict. c. 40, s. 2 (Que.) passed on a petition of the Quebec Central Ry. Co., after notice given by them, asking for an amendment of their charter, the town of Lévis passed a by-law guaranteeing to pay to the company the whole cost of expropriation for the right-of-way for the extension of the railway to the deep water of the St. Lawrence River, over and above $30,000. Appellants, ratepayers of the town of Lévis, obtained an injunction to stay further proceedings on this by-law, on the ground of its illegality. The proviso in s. 2 of the Act, under which the town of Lévis contended that the by-law was authorized, is as follows: "Provided that within thirty days from the sanction of the present Act, the corporation of the town of Lévis furnishes the said company with its valid guarantee and obligation to pay all excess over $30,000 of the cost of expropriation for the right-of-way." By the Act of Incorporation of the town of Lévis, no power or authority is given to the corporation to give such guarantee. The statute 44 & 45 Vict. c. 40 was passed on the 30th June, 1881; and the by-law forming the guarantee was passed on the 27th July following:—Held, reversing the judgment of the Court of Queen's Bench, and restoring the judgment of the Superior Court, that the statute in question did not authorize the corporation of Lévis to impose burdens upon the municipality which were not authorized either by their Acts of incorporation or other special legislative authority, and therefore the by-law was invalid, and the injunction must be sustained.

Quebec Warehouse Co. v. Lévis (1885), 11 Can. S.C.R. 666.

[Referred to in Pointe Gatineau v. Hanson, 10 Que. K.B. 371.]

BONUS TO RAILWAY—VALIDITY OF BY-LAW.

A by-law was submitted to the council of the city of O., under 36 Vict. c. 48, for the purpose of granting a bonus to a railway then in course of construction, and after consideration by the council it was ordered to be submitted to the ratepayers for their vote. By the notice published in accordance with the provisions of the statute such by-law was to be taken into consideration by the council after one month from its first publication on the 24th September, 1873. The vote of the ratepayers was in favor of the by-law, and on 20th October a motion was made in the council that it be read a second and third time, which was carried, and by the by-law passed. The mayor of the council, however, refused to sign it, on the ground that its consideration was premature; and on 5th November the same motion was made and the by-law was rejected. Nothing more was done in the matter until April, 1874, when a motion was again made before the council that such by-law be read a second and third time, which motion was, on this occasion, carried. At this meeting a copy only of the by-law was before the council, the original having been mislaid and it was not found until after the commencement of this suit. When it was found it was discovered that the copy voted on by the ratepayers contained, by mistake of the printers, a date for the by-law to come into operation different from that of the original. In 1883 an action was brought against the corporation of the city of O., for the delivery of the debentures provided for by the by-law, in which suit the question of the validity of the whole proceedings was raised:—Held, affirming the judgment of the Court below: (1) That the vote of 20th November, 1873, was premature, and not in conformity with the provisions of s. 231 of the Municipal Act; that the mayor properly refused to sign it, and that without such signature the by-law was invalid under s. 226. (2) That the council had power to consider the by-law on 5th November, 1873, and the matter was then disposed of. (3) That the proceedings of 7th April, 1874, were void for two reasons: One, that the by-law was not considered by the council to which it was first submitted as provided by s. 236, which is to be construed as meaning the council elected for the year and not the same corporation; and the other reason is, that the by-law passed in 1874 was not the same as that submitted, there being a difference in the dates. Semble, that the functions of a municipality in considering a by-law after it has been voted on by the ratepayers are not ministerial only, but the by-law can be confirmed or rejected irrespective of the favourable vote. 12 O.A.R. 234, 8 O.R. 201, affirmed.

Canada Atlantic Ry. Co. v. Ottawa, 12 Can. S.C.R. 365.

[The Privy Council granted leave to appeal in this case, but the appeal was not prosecuted to a termination: 11 Can. Gazette 394; approved in London Street Ry. Co. v. London, 9 O.L.R. 439; distinguished in Re Dewar and East Williams, 10 O.L.R. 463; followed in Canada Atlantic Ry. Co. v. Cambridge, 11 O.R. 392, 14 A.R. (Ont.) 299; referred to in Bickford v. Chatham, 14 A.R. (Ont.) 32.]

BONUS—AGREEMENT BY MUNICIPAL CORPORATION TO TAKE STOCK AND TO PAY FOR IN DEBENTURES.

The corporation of the county of Ottawa under the authority of a by-law undertook to deliver to the M.O. & W. Ry. Co. for stock subscribed by them 2,000 debentures of the corporation of $100 each, payable twenty-five years from date and bearing six per cent interest, and subsequently without any valid cause or reason, refused and neglected to issue said debentures. In an action brought by the company against the corporation solely for damages for their neglect and refusal to issue said debentures:—Held, affirming the judgment of the Court below, that the corporation, apart from its liability for the amount of the debentures and interest thereon, was liable under Arts. 1065, 1073, 1840, 1841, C.C. (Que.) for damages for breach of the covenant. Ritchie, C.J., and Gwynne dissenting. M.L.R. 1 Q.B. 46, 26 L.C.J. 148, affirmed.

Ottawa v. Montreal, Ottawa & Western Ry. Co., 14 Can. S.C.R. 193.

[Applied in Coghlin v. Fonderie de Joliette, 34 Can. S.C.R. 158; referred to in Gignac v. Woodburn, 29 Que. S.C. 438; Zurit v. Great Northern Ins. Co., 29 Que. S.C. 468.]

BONUS—MUNICIPAL DEBENTURES—FUTURE CONDITIONS.

A debenture being a negotiable instrument, a railway company that has complied with all the conditions precedent stated in the by-law to the issuing and delivery of debentures granted by a municipality is entitled to said debenture, free from any declaration on their face of conditions mentioned in the by-law to be performed in future, such as the future keeping up of the road, etc. Art. 962, Mun. Code. [M.L.R., 2 Q.B. 160, affirmed.]

St. Césaire v. McFarlane (1887), 14 Can. S.C.R. 738.

BONUS—AGREEMENT WITH MUNICIPAL CORPORATION.

A municipal corporation entered into an agreement with a railway company by which the latter was to receive a bonus on certain conditions, one of which was that the company "should construct at or near the corner of Colborne and William streets (in Toronto) a freight and passenger station with all necessary accommodation, connected by switches, sidings, or otherwise with said road" upon the council of the town passing a by-law granting a necessary right-of-way:—Held, (1) that such condition was not complied with by the erection of a station building not used, nor intended to be used, and for which proper officers, such as station master, ticket agent, etc., were not appointed. Strong, J., dissenting. (2) Per Strong, J.:—That the condition only called for the construction of a building with the required accommodation and connections, and did not amount to a covenant to run the trains to such station or make any other use of it. (3) The words "all necessary accommodation," in the condition, required that grounds and yards sufficient for freight and passenger traffic in case the station were used should be provided.

Bickford v. Chatham, 16 Can. S.C.R. 235, 14 A.R. (Ont.) 32, 10 O.R. 257.

[Leave to appeal in this case was refused by the Privy Council, see Can. Gazette, Vol. XIV., p. 153; discussed in Nottawasaga v. Hamilton, etc., Ry. Co., 16 O.A.R. 52; followed in Georgetown v. Stimson, 23 O.R. 33; Kingston v. Kingston, etc., Ry. Co., 28 O.R. 399.]

MUNICIPAL AID TO RAILWAY COMPANY—DEBENTURES.

A municipal corporation, under the authority of a by-law, issued and handed to the treasurer of the Province of Quebec $50,000 of its debentures as a subsidy to a railway company, the same to be paid over to the company in the manner (and subject to the same conditions) in which the Government provincial subsidy was payable under 44-45 Vict. c. 2, s. 19 (Que.) viz., "when the road was completed and in good running order to the satisfaction of the Lieut. Governor-in-Council." The debentures were signed by S.M. who was elected warden and took and held possession of the office after the former warden had verbally resigned the position. In an action brought by the railway company to recover from the treasurer of the Province the $50,000 debentures after the Government bonus had been paid and in which action the municipal corporation was mise en cause as a codefendant, the provincial treasurer pleaded by demurrer only, which was overruled, and the County of Pontiac pleaded general denial and that the debentures were illegally signed:—Held, (1) affirming the judgment of the Court below, that the debentures signed by the warden de facto were perfectly legal. (2) That as the provincial treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the Lieut. Governor-in-Council the onus was on the municipal corporation, mise en cause, to prove that the Government had not acted in conformity with the statute. Strong, J., dissenting.

Pontiac v. Ross, 17 Can. S.C.R. 406.

[Referred to in Re Trecothic Marsh, 38 N.S.R. 28.]

BONUS—CONDITION IN BOND FOR REPAYMENT.

The county of H., in 1874, gave to the H. & N.W. Ry. Co. a bonus of $65,000 to be used in the construction of their railway, and the company executed a bond, one of the conditions of which was that the bonus should be repaid "in the event of the company, during the period of twenty-one years, ceasing to be an independent company." In 1888 the H. & N.W. Ry. Co. became merged in the G.T. Ry. and, as was held on the facts proved by the trial Judge and the Divisional Court, ceased to be a independent line:—Held, affirming the decision of the Court of Appeal for Ontario, 19 A.R. (Ont.) 252, that there had been a breach of the above condition and the county was entitled to recover from the G.T. Ry. the whole amount of the bonus as unliquidated damages under said bond. Appeal dismissed with costs.

Grand Trunk Ry. Co. v. Halton (1893), 21 Can. S.C.R. 716.

BONUS—CONSTRUCTION OF STREET RAILWAY—VALIDATING ACT.

The corporation of the town of Port Arthur passed a by-law entitled "a by-law to raise the sum of $75,000 for street railway purposes and to authorize the issue of debentures therefor," which recited, inter alia, that it was necessary to raise said sum for the purpose of building, etc., a street railway connecting the municipality of Neebing with the business centre of Port Arthur. At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the ratepayers and passed, but none was submitted ordering the construction of the work. Subsequently an Act was passed by the Legislature of Ontario in respect to the said by-law which enacted that the same "is hereby confirmed and declared to be valid, legal and binding on the town . . . and for all purposes, etc., relating to or affecting the said by-law, and any and all amendments of the Municipal Act . . . shall be deemed and taken as having been complied with":—Held, that the said Act did not dispense with the requirements of ss. 504, 505 of the Municipal Act requiring a by-law providing for construction of the railway to be passed, but only confirmed the one that was passed as a money by-law:—Held, also, that an erroneous recital in the preamble to the Act that the town council had passed a construction by-law had no effect on the question to be decided. 19 A.R. (Ont.) 555, reversed.

Dwyer v. Port Arthur, 22 Can. S.C.R. 241.

[Referred to in Bell v. Westmount, 15 Que. S.C. 585.]

BONUS—SUBSCRIPTION FOR SHARES—DEBENTURES.

An action en reddition de comptes does not lie against a trustee invested with the administration of a fund, until such administration is complete and terminated. The relation existing between a county corporation under the provisions of the Municipal Code of Quebec and the local municipalities of which it is composed, in relation to money by-laws, is not that of agent or trustee, but the county corporation is a creditor, and the several local municipalities are its debtors for the amount of the taxes to be assessed upon their ratepayers respectively. Where local municipalities have been detached from a county, and erected into separate corporations, they remain in the same position, in regard to subsisting money by-laws, as they were before the division, and have no further rights or obligations than if they had never been separated therefrom, and they cannot either conjointly or individually institute actions against such county corporation to compel the rendering of special accounts of the administration of funds in which they have an interest, their proper method of securing statements being through the facilities provided by Art. 164, and other provisions of the Municipal Code. 3 Rev. de Jur. 559, affirmed.

Ascott v. Compton; Lennoxville v. Compton (1898), 29 Can. S.C.R. 228.

BONUS—PERMANENT EXEMPTIONS—DEBENTURES AND EXEMPTION IN SAME BY-LAW.

By-law No. 148 of the city of Winnipeg, passed in 1881, exempted for ever the C.P.R. Co. from "all municipal taxes, rates and levies and assessments of every nature and kind":—Held, that the exemption included school taxes. The by-law also provided for the issue of debentures to the company, and by an Act of the Legislature, 46 & 47 Vict. c. 64, it was provided that by-law 148, authorizing the issue of debentures granting, by way of bonus to the C.P.R. Co., the sum of $200,000 in consideration of certain undertakings on the part of the said company; and by-law 195, amending by-law No. 148 and extending the time for the completion of the undertaking . . . be and the same are hereby declared legal, binding and valid. . . .:—Held, that notwithstanding the description of the by-law in the Act was confined to the portion relating to the issue of debentures, the whole by-law, including the exemption from taxation, was validated. [12 Man. L.R. 581, reversed.]

Can. Pac. Ry. Co. v. Winnipeg, 30 Can. S.C.R. 558.

[Considered in Balgonie Prot. School v. Can. Pac. Ry. Co., 5 Terr L.R.

132; Re Toronto School Board, etc., 2 O.L.R. 727; distinguished in Pringle v. Stratford, 20 O.L.R. 246; followed in North Cypress v. Can. Pac. Ry. Co., 35 Can. S.C.R. 556; referred to in Toronto School Board v. Toronto, 4 O.L.R. 468.]

BONUS—MUNICIPAL BY-LAW—CONDITION PRECEDENT.

An action to annul a municipal by-law will lie although the obligation thereby incurred may be conditional and the condition has not been and may never be accomplished. Where a resolutory condition precedent to the payment of a bonus under a municipal by-law in aid of the construction and operation of a railway has not been fulfilled within the time limited on pain of forfeiture, an action will lie for the annulment of the by-law at any time after default, notwithstanding that there may have been part performance of the obligations on the part of the railway company and that a portion of the bonus may have been advanced to the company by the municipality. In an action against an assignee for a declaration that an obligation had been forfeited and ceased to be exigible, on account of default in the fulfilment of a resolutory condition, exception cannot be taken on the ground that there has been no signification of the assignment as provided by Art. 1571 C.C. (Que.). The debtor may accept the assignee as creditor and the institution of the action is sufficient notice of such acceptance. [Bank of Toronto v. St. Lawrence Fire Ins. Co., [1903] A.C. 59, followed.]

Sorel v. Quebec Southern Ry. Co., 36 Can. S.C.R. 686.

BONUS—DEBENTURES—COMPLIANCE WITH CONDITIONS—CERTIFICATE OF ENGINEER.

Under Ontario Act 34 Vict. c. 48, the Grand Junction Ry. Co. was recognized as an incorporated company, otherwise that it was actually incorporated by Act 37 Vict. c. 43 (Ont.); the effect of the two Acts being to give to the company so incorporated the benefit of a by-law of the respondent corporation, which, under certain conditions, provided a bonus for the railway. Under the Act of 1871 the said by-law was legal, valid and binding on the corporation, but that the railway company had not, on the evidence, complied with the conditions precedent. The stipulated certificate of the chief engineer had not been produced, and, although under par. 8 of the by-law, debentures might be delivered to trustees without a certificate that applied to a time when the debentures or their proceeds were to be held in suspense, not to a time when the trusts were spent and the payment, if made at all, should be made direct to the company. [Judgment of the Court of Appeal, 13 A.R. (Ont.) 420, affirmed.]

Grand Junction and Midland Railways v. Peterborough, 13 App. Cas. 136.

BONUS—BOND OF PROVISIONAL DIRECTORS—LIABILITY TO PERFORM—AMALGAMATION WITH OTHER COMPANIES.

By the bond of a railway, executed by its provisional directors in consideration of a bonus in aid of the railway, the company agreed to erect and maintain workshops in a certain town during the operation of the railway. The company, after certain changes of name, amalgamated with other companies, and formed a larger one under another name, which latter company, although it had agreed to do so, ceased to so maintain the workshops. This last-mentioned company subsequently amalgamated with and became part of the defendants' system, and by the amalgamation the defendants become responsible for all the liabilities of the other companies:—Held, that the bond of the provisional directors was a corporate act binding on its successors, and, by consequence, on the defendants, who had acquired the road; that the road, though it formed part of a larger railway connection represented by the defendants, was still in operation, and as the contract was to maintain the workshops during the operation of the railway, it remained a binding engagement, and a reference to ascertain the damages, if any, for breach of the covenant, was directed.

Whitby v. Grand Trunk Ry. Co., 1 Can. Ry. Cas. 265, 32 O.R. 99.

[Reversed in 1 O.L.R. 480, 1 Can. Ry. Cas. 269; distinguished in Hamilton v. Hamilton Street Ry. Co., 10 O.L.R. 575, 595, 5 Can. Ry. Cas. 206, 223.]

Bonus—Bond—Recital.

By its Act of Incorporation a railway company had power to receive and take grants and donations of land and other property made to it, to aid in the construction and maintenance of the railway, and any municipality was authorized to pay, by way of bonus or donation, any portion of the preliminary expenses of the railway, or to grant to the railway sums of money or debentures by way of bonus or donations to aid in the construction or equipment of the railway. The railway company, in consideration of a bonus by a municipality, agreed to keep for all time its head office and machine shops in the municipality:—Held, that the recital of the agreement in a bond signed by the railway company amounted to a covenant on their part to observe its terms, but that such an agreement was not justified by statutory provisions, and was not enforceable. Judgment of Boyd, C., 32 O.R. 99, reversed.

Whitby v. Grand Trunk Ry. Co., 1 Can. Ry. Cas. 269, 1 O.L.R. 480.

Bonus of municipality—Compensation for lands expropriated.

A municipality passed a resolution by which it agreed to pay for lands required for the right-of-way, station grounds, sidings and other purposes of a railway as shewn upon a plan filed under the provisions of the general Railway Act. At the time of the resolution there were four such plans filed, each shewing a portion of the land proposed to be taken for these purposes, and including, in the aggregate, a greater area than could be expropriated for right-of-way and station grounds under the provisions of the Acts applicable to the undertaking of the railway company. The Legislature passed an Act confirming such resolution. To an action by the owner of the land taken, on an award fixing the value of that in excess of what could be so expropriated, the corporation pleaded no liability on account of such excess, and also, that there was no specific plan on file describing the land:—Held, affirming the judgment appealed from, that the first defense failed because of the Act confirming the resolution, and, as to the second, that the four plans should be read together and considered to be the plan referred to in such resolution. 38 N.S.R. 76, 6 Can. Ry. Cas. 105, affirmed.

Inverness v. McIsaac, 37 Can. S.C.R. 765, 6 Can. Ry. Cas. 109.

Bonus—Sending money on condition—Breach of—Terms and conditions of aid.

The W. & L.E. etc., Co. gave a bond to the town council of Woodstock, reciting that the council had agreed to lend them £25,000 to assist in constructing their railway, and conditioned that the company should not expend the loan, nor begin to construct their road, until the whole sum necessary to complete it from Woodstock to Port Dover should be obtained:—Held, that there was nothing in 19 Vict. c. 74 (the provisions of which are set out in the case) to relieve defendants from liability for a previous breach of this condition.

Woodstock v. Woodstock & Lake Erie Ry. Co., 16 U.C.Q.B. 146.

Bonus—Statutory powers to make conditions—Siding and flag station.

By 33 Vict. c. 36, s. 7, municipalities were authorized to aid the Hamilton & Erie Ry. Co., subsequently incorporated with defendants, by way of bonus, subject to such restrictions and conditions as might be mutually agreed upon between the municipality and the directors of the railway; and by 34 Vict. c. 41, amending this Act, the county were authorized, on the petition of certain townships and villages of the county, to grant such aid, and issue the debentures of the county payable by special rates and assessments in such townships, etc.:—Held, that the powers given by the first Act to agree as to the conditions on which such aid should be granted, would apply to aid granted under the subsequent Act. The conditions agreed upon in this case were, that the defendants should grant and continue to the Great Western Ry. Co., the Grand Trunk Ry. Co., and the Canada Southern Ry. Co., equal privileges as to working and using defendants' railway; that defendants should have a siding and flag station at or near to two named villages on their line, and should cause or procure the Grand Trunk Ry. Co. to erect a station at or near a named point of intersection:—Held, that these conditions were all legal and valid; and that defendants, having received the debentures for the bonus, could not object that such agreement was ultra vires.

Haldimand v. Hamilton & North Western Ry. Co., 27 U.C.C.P. 228.

[See St. Thomas & Credit Valley Ry. Co., 7 O.R. 332, 12 A.R. (Ont.) 273; Re Grand Junction Ry. Co. and County of Peterborough, 8 Can. S.C.R. 76, 6 A.R. (Ont.) 339.]

Bonus—Tax exemptions—Subsequent repeal of by-law.

The corporation of the township of North Cayuga, having power by 33 Vict. c. 33, s. 18 (Ont.) "an Act to incorporate the Canada Air Line Ry. Co.," to exempt the property of the company from taxation, passed a by-law providing that all the real property of the company in the township should be rated at $12 per acre (the then average rate) for fifty years. This by-law was subsequently repealed, but it did not appear that upon the faith of it the applicants had in fact altered their position, or done anything which they otherwise would not have done, and the railway was being constructed through the township before it was passed:—Held, on the application to quash the repealing by-law, that the Court under the circumstances could not interfere.

Re Great Western Ry. Co. and North Cayuga, 23 U.C.C.P. 28.

Bonus.

In 1880, before the passing of 46 Vict. c. 18 (Ont.) a municipal council, with the view of granting a bonus to a railway company, caused to be submitted to the vote of the ratepayers a by-law to raise money for that purpose. At the voting thereon the votes for and against it were equal, and the clerk of the municipality, who also acted as returning officer, verbally gave a casting vote in favour of the by-law:—Held (reversing the judgment of the C.P.D., 11 O.R. 392), that s. 152 of the Municipal Act, R.S.O. (1877), c. 174, is not applicable to the case of voting on a by-law, and, therefore, the casting vote of the clerk was a nullity, and the by-law did not receive the assent of the electors of the municipality within the meaning of R.S.O. (1877), c. 174, s. 317, as such a defect could not be cured by promulgation of the by-law:—Held, following Canada Atlantic Ry. Co. v. Ottawa, 12 A.R. (Ont.) 234, and 12 Can. S.C.R. 377, that the by-law was bad for noncompliance with s. 330 of the Municipal Act, R.S.O. 1877, c. 174, the section corresponding with s. 248 of 36 Viet. c. 48. Per Burton, J. A.—The provisions of s. 248 of the Municipal Act of 1873 (36 Viet. c. 48), do not apply to by-laws for granting bonuses to railways, and the judgment of the Supreme Court of Canada in Canada Atlantic Ry. Co. v. Ottawa, 12 Can. S.C.R., p. 377, does not so decide.

Canada Atlantic Ry. Co. v. Cambridge, 14 A.R. (Ont.) 299, 15 Can. S.C.R. 219.

Bonus.

The railway company were bound by their origingal charter to commence within three years, and to finish the road within eight years, which they failed to do within the specified time:—Held, affirming the decision of the Chancery Divisional Court, 8 O.R. 201, and of Proudfoot, J., ib. 183, that the plaintiffs were not in a position to enforce the delivery of the debentures after the lapse of nine years from the passing of the by-law, when a total change of circumstances had taken place, and when the period fixed by the plaintiffs' charter for the completion of the railway had expired.

Canada Atlantic Ry. Co. v. Ottawa, 12 A.R. (Ont.) 234.

Bonus—Condition—Breach—Change of circumstances.

A railway company having obtained a bonus from the plaintiffs upon condition that its machine shops should be "located and maintained" within the city limits, did so erect and maintain them for some years, until authorized by legislation it amalgamated with and lost its identity in another company, all the engagements and agreements of the amalgamating companies being preserved. The amalgamated company was afterwards leased in perpetuity to a much larger railway company, who removed the shops outside the city limits:—Held, that, although all the engagements and agreements made by the original company were preserved, the amalgamation and leasing in perpetuity by the larger company of the smaller, under the authority of Parliament, imposed new relations upon the amalgamated road which worked a change in the policy as to the site and size of the machine shops, and that the engagement had been satisfied by the maintenance of the said shops by the original company during its independent existence.

Toronto v. Ontario & Quebec Ry. Co., 22 O.R. 344.

Bonus—By-law—Majority of electors.

A "majority" of the electors referred to in the Railway Act of 1859 (ss. 75, 76), and the Municipal Act of 1866 (s. 196, subs. 6), required to assent to a by-law, is not an absolute majority of all the existing qualified electors, but a majority of those coming forward to vote for the same.

Jenkins v. Elgin, 21 U.C.C.P. 325; Erwin v. Townsend, ib. 330.

[See, also, McAvoy and Sarnia, 12 U.C.Q.B. 99.]

Bonus—Conditional debentures—Grading of railway—Mandamus.

A township corporation passed a by-law that the reeve should make out debentures not exceeding $5,000, which should be sealed by the corporate seal, and signed by him and the treasurer; and that, provided the grading of defendants' railway should be completed to a certain point by a day mentioned, the reeve should subscribe for shares in defendants' company to the extent of $5,000, on behalf of the corporation, and deliver said debentures to the company in payment therefor. By 36 Vict. c. 98 (Ont.) the by-law was confirmed. On application for a mandamus to the reeve to make such subscription and delivery:—Held, unnecessary to shew an agreement by the municipality to take the stock, or a written subscription, or to make the treasurer or the corporation parties to the application; and on the affidavits set out below the mandamus was granted with costs.

Re Canada Central Ry. Co. v. Brown, 35 U.C.Q.B. 390.

Bonus—Conditional debentures—Mandamus.

A railway charter provided that on receiving certain petitions the corporation of the county, etc., should submit to the electors a by-law to aid the company by a bonus, and should deliver to trustees the debentures for any such bonus when granted. The company, as an inducement to the passing of such a by-law, gave a bond conditioned to build their road within a certain time, and to repay the bonus to the county in the event of their ceasing within twenty-one years to be an independent company. Under the facts of this case, set out in the report, the Court refused a mandamus to compel the corporation to hand over the debentures to the trustees appointed to receive them, there being ground for apprehension, owing to the delay, that the bond could not be performed; but the rule was discharged without costs, and without prejudice to a further application.

Re Hamilton & North-Western Ry. Co. and Halton et al., 39 U.C.Q.B. 93.

Bonus—Conditional debentures—Restraining delivery.

Under 31 Vict. c. 4, a township municipality passed a by-law granting a bonus to a railway company, upon the express condition that the debentures securing such sum should be deposited with the treasurer of the Province as custodian for the company, but the same were not to be delivered to the company, unless and until the railway should within two years be fully completed and in running order, and regular trains had passed over the road, and the company had performed certain other stipulated works; in all of which the company made default. In a suit by the municipality seeking to restrain the treasurer from delivering up the debentures to the company:—Held, that time was of the essence of the transaction, and that the company having, no matter from what cause, failed to complete the work in the manner stipulated for, the plaintiffs were entitled to receive back the debentures.

Luther v. Wood, 19 Gr. Ch. 348.

Bonus—Conditional debentures—Restraining disposition.

A municipal corporation having passed a by-law giving a certain sum in debentures by way of bonus to a railway company, the company executed a bond to the township reciting that the township had agreed to give the bonus on condition (amongst other things) that sixty continuous miles of the road should be built within two years; that the debentures should not be disposed of by the company until the contracts had been let and the work commenced; and that if the road were not commenced and built as mentioned, the debentures should be returned to the municipality; and the condition of the bond was, that in case of failure the company would, on demand, pay over to the township the sum of $50,000, or return the debentures. The contracts having been let and the work commenced as stipulated:—Held, in view of the whole instrument, that the company should not be restrained from disposing of the debentures before the completion of the work.

Brock v. Toronto & Nipissing Ry. Co., 17 Gr. Ch. 425.

Bonus—County and municipal aid—Validity of by-law.

S. 2 of the Act under which the by-law in question was passed by the County of Bruce to aid the Wellington, Grey & Bruce Ry. Co., 31 Vict. c. 13, was wide enough to include county municipality, and that the by-law was therefore not ultra vires.

Re Gibson and Bruce, 20 U.C.C.P. 398.

Bonus—County debentures—Failure to construct railway.

The county of Simcoe had, under a by-law, passed in pursuance of 35 Vict. c. 66, s. 15, issued debentures to the amount of $300,000 to aid in the construction of the Hamilton & North Western Ry. (see 20 Gr. Ch. 211), but by reason of the neglect of the company to commence the construction of the railway within the time limited their charter had become forfeited, and the by-law under which the debentures had been issued had therefore become void and of no effect, whereupon one of the townships which had joined in the petition for the passing of the by-law filed a bill against the railway, the county and trustees of the debentures, seeking to restrain the trustees from selling or parting with the debentures and to have the same handed back to the county:—Held, on demurrer by the county, (1) That the township had no interest to maintain such a suit, and (2) that the corporation of the county was the proper party to institute proceedings.

West Gwillimbury v. Hamilton & North Western Ry. Co., 23 Gr. Ch. 383.

Bonus—Debentures—Lien on.

By 16 Vict. c. 22 and c. 124, and 18 Vict. c. 13, certain municipalities were authorized to issue debentures under by-laws of the corporations to aid in the construction of a railroad. The contractors for building the road agreed with the company to take a certain amount of their remuneration in these debentures, and the work having been commenced, certain of these debentures were issued to the company. The contractors afterwards failed to carry on the works, and disputes having arisen between them and the company, all matters in difference were left to arbitration, and an award thereunder was made in favour of the contractors for the sum of £27,645, payable by instalments. One of these instalments having become due, and been left unpaid, the contractors filed a bill to have the debentures delivered over to them in the proportion stipulated for according to the terms of the contract:—Held, although the contractors would have been entitled to a specific lien on these debentures under their original agreement, the fact that they had referred all matters in difference to arbitration, and had obtained an award in their favour for a money payment, precluded them from now obtaining that relief; and a demurrer for want of equity was allowed.

Sykes v. Brockville & Ottawa Ry. Co., 9 Gr. Ch. 9.

Bonds—Debentures—Mandamus.

A county by-law was passed on the 12th December, 1873, to aid a railway company by a bonus of $80,000, and to issue debentures therefor, under the clauses of the Municipal Act of 1873 then in force. The by-law required that the debentures should not be delivered to the trustees appointed to receive them until the company should have agreed that the amount thereof should be wholly expended upon the construction of the line within the county; that seventy-five per cent of the amount should be advanced as the work progressed on the engineer's certificate, and the balance on completion of the road; and that the portions of the railway within the county should be commenced within one and finished within three years from the passing of the by-law. On application for a mandamus to the county to deliver these debentures to the trustees, it appeared that on the 24th of November, 1874, the company, by agreement with the county, after reciting the by-law, covenanted to commence that part of the road within the county in one and complete it in three years from the passing of the by-law; and that they would only ask for the proceeds of the debentures, as to seventy-five per cent thereof "to pay for work done and expenses incurred during the progress of said work within the county, and as to twenty-five per cent thereof to pay for work done and expenses incurred on finally completing said railway within the county; and that the whole proceeds of the debentures should be expended in the construction of the said railway within the county, and not otherwise or elsewhere." This agreement was handed to the warden on the 7th of December, 1874 (within five days of the time limited by the by-law for commencing the work), but was not executed by the county, and on the same day the debentures were demanded. The company had in that month made some purchases of rights-of-way. On the the 4th of December they entered into a contract with one C. for the construction of fourteen miles of the road within the county, to be begun within five days and completed by 1st of September, 1875, but it contained a clause enabling the company to suspend the work at any time without being liable for damages. C. began work on the 10th of December, and continued till the 15th of February, 1875, for which he received about $800. He was told that he must begin by the 12th of December in order to enable the company to get the debentures. The company had not filed their plans and survey as directed by the Railway Act, C.S.C. c. 66, without which they had no authority to begin their work, and were bound to no particular route:—Held, in the Queen's Bench, that the company were not entitled to the mandamus, for they had not legally located their line, and were bound to no route: they had no power to begin the work as they had done; and from all the facts, more fully stated in the case, it appeared that they had not done so in good faith. Semble, that there was not a sufficient variance between the agreement required by the by-law and that executed by the company to have alone furnished an answer to the application, though they were not clearly identical. Per Harrison, C.J.:—The whole matter was one of contract, and the company, if entitled to the debentures, had another remedy, either at law or in equity, which would be more convenient and appropriate than a writ of mandamus. The company had a line of one hundred miles to construct, which would cost $1,500,000. Their capital stock was only $50,000, of which not quite ten per cent had been paid up; and including the whole stock, and the bonuses granted, they had only $160,000. Quaere, per Wilson, J., whether before ordering the debentures to be handed over, the Court could have required more stock to be called in. Semble, not; but it was suggested that the by-law should provide for this: and that to carry such by-laws a certain proportion of the whole number of votes of the locality should be required.

Re Stratford & Huron Ry. Co. and Perth, 38 U.C.Q.B. 112.

Bonus—Debentures—Preferential bonds.

A proposed by-law for granting a bonus of $44,000, was assented to by the ratepayers of the township of Eldon; and to induce the council afterwards to ratify the by-law, the company entered into a bond, that if certain other townships should deliver to the company certain debentures expected from them, the company would give to Eldon $6,000 of preferential bonds of the company; the company having a limited statutory authority to issue preferential bonds "for raising money to prosecute the undertaking." One of the townships failed to give the debentures expected from it, and the company, instead of giving its preferential bonds to Eldon, gave to the municipality an ordinary bond for the $6,000:—Held, that the company had no authority to give its preferential bonds in order to carry out its bargain with the municipal council; that the default of one of the other townships to give the debentures expected from it disentitled Eldon to demand preferential bonds from the company, even if the company had had authority to grant them; and that the giving of the bond which the company did give was no waiver of the objection, as an answer to the municipality's demand of preferential bonds.

Eldon v. Toronto & Nipissing Ry. Co., 24 Gr. Ch. 396.

Bonus—Delivery of debentures—Mandamus.

Upon an application for a mandamus to a township corporation to make and deliver to trustees certain debentures for $25,000 authorized by two by-laws of the corporation granting aid to a railway company, it was argued that the company had lost all claim to $18,000, if not to the whole of the bonus, by noncommencement of their road. On the other hand, the company contended that, by certain agreements with the corporation, and by several statutes, extending the time for commencement, their right to the debentures was preserved:—Held, that such right, depending upon matters of contract, should not be determined upon such an application, but by suit in the ordinary way; and the application was discharged with costs.

Re London, Huron & Bruce Ry. Co. and East Wawanosh, 36 U.C.Q.B. 93.

[See, also, Re North Simcoe Ry. Co. and Toronto, 36 U.C.Q.B. 101.]

Bonus—Discontinuance of operation—Liability of stockholders.

Where a township municipality advanced a large sum of money to a railway company under the provisions of the consolidated Municipal Loan Fund Act, and some of the stockholders of the company were afterwards released from their liability by an Act of the Legislature passed nearly eighteen months after the works on the road were stopped for want of funds, and new companies were formed under that and subsequent Acts of the Legislature, which released the new corporations from the construction of the original line of road, until a new line had been constructed, and it appeared that there was no immediate prospect of such a result:—Held, reversing the judgment of the Court below, that the municipality was not released from their liability to the Crown.

Norwich v. Attorney-General, 2 E. & A. 541.

Bonus—Dominion railway.

Under s. 559, subs. 4, of the Municipal Act, R.S.O. 1877, c. 174, a grant by way of bonus may be made to a Dominion railway. [Canada Atlantic Ry. Co. v. Ottawa, 8 O.R. 201, 12 A.R. (Ont.) 234, followed.]

Canada Atlantic Ry. Co. v. Cambridge, 11 O.R. 392.

Bonus—Erection of stations—Specific performance.

In consideration of a bonus granted by the plaintiffs, the Wellington, Grey & Bruce Ry. Co. covenanted "to erect and maintain a permanent freight and passenger station" at G. Shortly afterwards the road was leased, with notice of this agreement, to the defendants, who discontinued G. as a regular station, merely stopping there when there were any passengers to be let down or taken up:—Held, affirming Spragge, C., 25 Gr. Ch. 86, that the mere erection of station buildings was not a fulfilment of the covenant, and that the municipality was entitled to have it specifically performed. The decree, which enjoined the defendants from allowing any of their ordinary freight, accommodation, express, or mail trains, other than special trains, to pass without stopping for the purpose of taking up and setting down passengers, was varied by limiting it to such trains as are usually stopped at ordinary stations.

Wallace v. Great Western Ry. Co., 3 A.R. (Ont.) 44, 25 Gr. Ch. 86.

Bonus—Grant to individual—Validity.

A by-law granting $1000 to an individual in consideration of his having at the instance of the corporation advanced the amount in aid of a railway was held bad, for it was not a grant to a railway, and it had not been assented to by the electors. Quaere whether without such assent the corporation could grant a bonus to a railway out of surplus founds in hand.

Re Bate and Ottawa, 23 U.C.C.P. 32.

Bonus—Illegal issue of debentures.

The Court has jurisdiction to restrain a municipal corporation from obtaining the vote of the ratepayers in favour of a by-law which if passed would be illegal without legislative sanction, and which sanction such vote was intended to aid in obtaining in an informal and unauthorized manner. Where, therefore, the corporation of the town of Port Hope were about submitting to the vote of the ratepayers a by-law authorizing the harbour commissioners of that town to issue debentures to the amount of $75,000 to aid in completing a railway, but which debentures the corporation had not legally the power of directing to be issued, the Court restrained the corporation from proceeding to take such vote.

Helm v. Port Hope, 22 Gr. Ch. 273.

Bonus—Illegality—Jurisdiction to restrain.

The Court has jurisdiction to restrain a municipal corporation from obtaining the vote of the ratepayers in favour of a by-law which, if passed, would be illegal without legislative sanction, and which sanction such vote was intended to aid in obtaining in an informal and unauthorized manner.

Helm v. Port Hope, 22 Gr. Ch. 273.

Bonus—Insufficiency of lands to make grant.

The legislature of Canada, by an Act, set apart a certain quantity of land along the line of a projected railway running through Quebec and Ontario, to be granted to the company on completion of the railway; and a proportionate part of such land on the completion of 20 miles of the railway. The company having completed a portion of the line of railway in Ontario to an extent of more than 20 miles, applied for a grant of the proportion to which, under the Act, they claimed to be entitled, which was refused. The company thereupon presented a petition of right against the province. It was alleged that the Province of Ontario had not along the line of the road sufficient lands to make the grant desired:—Held, that this formed no ground for the province of Ontario insisting that the Province of Quebec should have been made a party to the proceeding.

Canada Central Ry. Co. v. Regina, 20 Gr. Ch. 273.

Bonus—Invalid by-law—Quashing.

A by-law of a county council, in aid of a railway, to the extent of $20,000, which had not been submitted to the ratepayers under the Municipal Act of 1866, was on that ground quashed.

Clement v. Wentworth, 22 U.C.C.P. 300.

Bonus—Municipal aid—Taking stock in railway company.

A by-law to take stock in the Bytown & Prescott Ry. Co. was quashed: (1) Because it appeared not to have been concurred in by a majority of the assessed inhabitants, as required by 13 & 14 Vict. c. 132. (2) Because no sufficient rate was imposed for the payment of the debt and interest, as required by 12 Vict. c. 81. The defendants did not support their by-law, and the Court refused to hear counsel on behalf of the railway company as the rule was not directed to them.

Re Billings v. Gloucester, 10 U.C.Q.B. 273.

Bonus—Municipal aid—Mandamus to enforce.

The North Simcoe Ry. Co. is incorporated by 37 Vict. c. 54, (Ont.), s. 23 of which enacts that any municipal corporation "which may be interested in securing the construction of the said railway, or through any part of which, or near which, the railway or works of the said company shall pass or be situate," may aid the company by giving money by way of bonus: Provided that no such aid shall be given except after the passing of a by-law for the purpose and the adoption thereof by the ratepayers. By s. 24 the proper petition, as prescribed in that section, shall first be presented to the council, expressing the desire to aid the railway, and stating in what way and for what amount, "and the council shall within six weeks after the receipt of such petition by the clerk of the municipality, introduce a by-law the effect petitioned for, and submit the same for the approval of the qualified voters." The company were empowered to construct a railway from Barrie or some other point on the line of the Northern Ry., passing through certain named townships, to Penetanguishene, and to extend it from some point in the township of Vespra to connect with the Northern, or with the Toronto, Grey & Bruce Ry. A by-law to aid the company by a bonus of $100,000, reciting that the city of Toronto was interested in securing a railway connection with the townships through which the line would pass, was introduced, on a proper petition, and read twice in the council; but on motion to go into committee on the by-law it was resolved, by a vote of fourteen to seven, that it would be unwise, in view of the large increase of the city debt, to incur further liability to aid a railway totally disconnected with the city and more than sixty miles from it; and that the council in the interest of the citizens, felt it to be their duty to refuse to submit it to the ratepayers:—Held, affirming the judgment of Gwynne, J., that the council should not be compelled to submit the by-law; and a nisi for a mandamus was discharged with costs. Semble, that it was for the council to decide whether the corporation were "interested in securing the construction of the railway;" but that if it was a quesion for the Court, the materials before them would not warrant a decision in the affirmative. Quaere, per Gwynne, J., whether the provisional directors of the company had any status to warrant their application for such writ. Semble, that at all events, the by-law submitted should contain proper conditions as to the expenditure of the money, etc., as contemplated by the statute.

In Re North Simcoe Ry. Co. and Toronto, 36 U.C.Q.B. 101.

Bonus—Municipal loan—Mortgage of railway equipment.

The municipality of B., being interested in the completion of a railway, by a by-law agreed to lend the company, in municipal loan fund debentures, £100,000, for securing the repayment of which the company executed to the municipality a mortgage on all their property, which, by a statute, was declared to be valid and binding as well against all the property of the company already owned by them as that which they might afterwards acquire; and which by a subsequent agreement made for the settlement of certain suits pending between the parties, it was agreed should be advanced to the company in certain proportions as the work progressed. In compliance with a requisition of the company for funds, "for work done, and material furnished, and right-of-way, etc., for the use of the railway," the municipal council directed their bankers to hand over to the company an amount of the debentures, which, upon their being handed over, were immediately seized by the sheriff, under an execution at the suit of the bankers. Upon a bill filed for the delivery up of the debentures:—Held, that so far as the debentures were required for the payment of the right-of-way, rolling stock ready to be delivered, and other materials not yet become the property of the company, they were impressed with a trust to be applied by the company to the payment of those demands.

Brockville v. Sherwood, 7 Gr. Ch. 297.

BONUS—NOTICE OF BY-LAW—BRIBERY.

In giving notice submitting a by-law, granting aid to a railway company for the approval of the ratepayers, the officers whose duty it was to give such notice had not posted up the clauses of the Municipal Act in reference to bribery, in the manner required by the Act:—Held, no ground for quashing the by-law.

West Gwillimbury v. Simcoe, 20 Gr. Ch. 211.

BONUS—NOTICE OF BY-LAW—FAILURE TO SEAL.

The notice of a by-law for the granting of aid by a municipality to a railway company should be published in accordance with the provisions of the Municipal Acts.:—The objection to a by-law that it was not sealed when submitted to the electors, was untenable.

Jenkins v. Elgin, 21 U.C.C.P. 325.

BONUS—NOTICE OF BY-LAW—IRREGULARITY.

14 & 15 Vict. c. 51, s. 18, directs that a copy of the by-law (to take stock in a railway) shall be inserted at least four times in each newspaper printed within the limits of the municipality; but the Court refused to quash a by-law under which a large sum had been borrowed, because it had been published three times only in one of two papers. A full copy of the by-law was no published, but at the time of passing a clause was added appointing a day on which it should come into operation, and directing that the debt should be payable within twenty years from that day, while in another clause the debentures were made payable in twenty years from their dates. The Court, however:—Held, that whether 14 & 15 Vict. c. 51, s. 18, subs. 3, or 16 Vict. c. 22, s. 2, subs. 4, were to govern, this was an irregularity for which they were not bound to quash.

Boulton v. Peterborough, 16 U.C.Q.B. 380.

BONUS—PUBLIC AID—DEBENTURES—MANDAMUS.

A writ of mandamus to compel the issue of debentures by a municipal corporation under a by-law in aid of a railway, will not be granted upon motion, but the applicant must bring his action. [Re Grand Junction Ry. Co. v. Peterborough, 8 Can. S.C.R. 76, followed.]

Re Canada Atlantic Ry. Co. v. Cambridge, 3 O.R. 291.

BONUS—RAILWAY NOT IN EXISTENCE.

The Act incorporating the municipality of Shuniah, gave it all the powers of townships under the general municipal law, and in other sections authorized the council to make assessments for necessary expenses, and for the establishment of a lockup house, and the salary of a constable:—Held, that this language did not prohibit the council from passing a by-law granting a bonus to a railway company, as the right of doing so when exercised rendered the payments under it necessary expenses. The fact that the railway intended to be benefited was not named, and was really not in existence when the vote on the question was to be taken, constituted no objection to the passing of a by-law for the purpose.

Vickers v. Shuniah, 22 Gr. Ch. 410.

BONUS—REFUSAL—BRIBERY.

Right of corporation to refuse to pass a by-law granting aid to a railway company, where the assent of the electors has been procured by bribery.

Re Langdon and Arthur Junction Ry. Co., 45 U.C.Q.B. 47.

[Carried to appeal but apparently never reported.]

BONUS—REFUSAL TO GRANT—MANDAMUS.

Before the Court will grant a mandamus to a municipal corporation to pass or submit a by-law to the electors granting a railway bonus, a distinct demand upon and refusal by the corporation to pass or submit the by-law must be shewn. P., a member of defendants' council, presented a petition for a by-law and granting such a bonus, on the 20th June, and on the 21st the committee to which it was referred reported favourably, adding that they had a legal opinion going to shew that it was imperative on them to submit the by-law. The Council refused to adopt this report, and on the same day P. moved that a by-law in accordance with the petition be then read a first time, which was lost, but it did not appear that the by-law was drawn up or presented to the council, and it was not before the Court. On the 25th, P. applied for a mandamus:—Held, not a sufficient demand and refusal; for the Council were not bound to adopt the report, or assent to the legal opinion embodied in it, or to pass the motion for the first reading of a by-law not before them; and they were entitled to some time to consider the nature of the by-law they were required to pass and submit; and, semble, they should have had reasonable notice of the intention to make this application.

Re Peck and Peterborough, 34 U.C.Q.B. 129.

BONUS—RESTRAINING PASSAGE OF BY-LAW.

Where a municipality has legally a right to pass a by-law granting a sum of money, it would seem premature to apply to restrain the by-law being submitted to the ratepayers, as they might refuse to approve of the by-law. [Helm v. Port Hope, 22 Gr. Ch. 273, distinguished.]

Vickers v. Shuniah, 22 Gr. Ch. 410.

DAMAGES—BREACH OF CONTRACT—DISCONTINUANCE OF RAILWAY SERVICE.

Where a railway company in breach of a contract entered into by them to run trains from the eastern part of the city of St. T. to the western part, ceased to run such trains:—Held, on a reference as to damages, that though the actual depreciation of property in the western part of the city resulting therefrom was a matter pertaining to the property owners, and not to the city yet the lessened taxation resulting from such depreciation was not too remote a fact for consideration on the reference, and such a loss in taxation which could be traced to or reasonably connected with the company's default formed a yearly standard which might be capitalized so as to fairly represent the money compensation to which the plaintiffs were entitled. Stated broadly the enquiry was how much less benefit had been received by the municipality by reason of the railway service at one station being discontinued. Constat, that the personal loss or inconvenience suffered by travelers or citizens from the abandonment of the station, or the actual depreciation in value of the land individually owned in that neighbourhood could not be reckoned as constituents per se of the damages suffered by the corporation:—Held, also, that if the railway company admitted that they were never again going to run trains to the western end of the city, the damages should be assessed once for all, which might be done either by fixing one solid sum, or by directing a yearly payment.

St. Thomas v. Credit Valley Ry. Co., 15 O.R. 673.

RAILWAY TIES.

See Timber Licenses.

RATES.

See Tolls and Tariffs; Tickets and Fares; Street Railways.

REBATES.

See Tolls and Tariffs.

RECEIVERS.

Annotations.

Receivers upon foreclosure; Rights of mortgagees; Working expenses for operation of road. 2 Can. Ry. Cas. 283.

Powers of receivers. 3 Can. Ry. Cas. 367.

Appointment of receiver on behalf of bondholders and their powers. 5 Can. Ry. Cas. 431, 2 Can. Ry. Cas. 283, 285.

FORECLOSURE SUIT—REPAIRS TO ROAD—AUTHORITY TO ISSUE RECEIVER'S CERTIFICATES.

In a debenture holders' suit to enforce their security, which was against all the property of a railway company, receivers appointed to operate and manage the railway and business of the company, and maintain the road and rolling stock, were empowered to borrow a limited sum on receivers certificates made a first charge on the company's property, in priority to the debenture security, to pay expenses incurred by them in necessary repairs and in operating the road.

Sage v. Shore Line Ry. Co., 2 Can. Ry. Cas. 271, 2 N.B. Eq. 321.

AUTHORITY TO CONSTRUCT PORTION OF LINES—OBJECTION OF BONDHOLDERS—ORDER FOR SALE OF ROAD.

The Court will not grant to the receiver and manager of a railway authority to proceed with the construction of a small portion of the incompleted part of the line of railway, where it is questionable whether such construction will be of any real benefit to the undertaking, and in the face of the opposition of these of the bondholders whose interest is largely in excess of those desiring it, and in the face of a judgment directing a sale of the road.

Ritchie v. Central Ontario Ry. Co.; Weddell v. Ritchie, 3 Can. Ry. Cas. 357, 7 O.L.R. 727.

APPOINTMENT—PROVINCIAL JURISDICTION.

The High Court of Justice, at the instance of a creditor of a railway company, has power to appoint a receiver, both where the company, being situate within the province, is under provincial legislative jurisdiction and where it is under Federal legislative jurisdiction, if there is no Federal legislation providing otherwise.

Wile v. Bruce Mines Ry. Co., 5 Can. Ry. Cas. 415, 11 O.L.R. 200.

[Referred to in Crawford v. Tilden, 13 O.L.R. 169.]

REFRIGERATOR CARS.

See Cars.

REFUND.

See Tolls and Tariffs.

RELEASE.

Release by servant for injuries caused by negligence of master, see Employees.

REPAIRS.

Repairs of crossings, see Farm crossings; Highway Crossings; Railway Crossings; Fences and Cattle Guards.

Repair of bridge, see Bridges.

REPORTS.

See Accident Reports.

Production of reports, see Discovery.

RES IPSA LOQUITUR.

See Carrier of Goods; Carriers of Passengers; Crossing Injuries; Employees; Negligence; Street Railways.

Annotation.

Application of rule as relating to negligence. 23 Can. Ry. Cas. 305.

RESPONDEAT SUPERIOR.

See Agents; Employees.

RIGHT OF ACTION.

See Negligence; Pleading and Practice.

RIGHT-OF-WAY.

See Expropriation; Farm Crossings; Highway Crossings; Railway Crossings.

Right to cattle passage in drainage culvert, see Drainage.

PRIVATE WAY IN STATION GROUNDS—EASEMENT—PRESCRIPTION—IMPLIED GRANT.

The defendant claimed a right-of-way through the plaintiff's station grounds, at M., by virtue of open, continuous, and uninterrupted user for more than 30 years:—Held, that the right must rest upon the presumption of a grant, and if an actual grant would have been illegal and void, a grant implied from 20 years' user could not be valid. The user on which the defendant relied began in 1872. At that time the Northern Ry. Co., through whom the plaintiffs derived title, had no power to make a sale or grant of any of their property otherwise than for the benefit and account of the railways: 12 Vict. c. 196 (D.). In 1868 the Northern Ry. was declared to be a work for the general advantage of Canada, but none of the general Railway Acts passed by the Dominion Parliament was made applicable to it until the passing of the Railway Act, 1888, ss. 3, 5; and by s. 90 (d) the power of a railway company to sell and dispose of lands and other property was limited to so much thereof as was not necessary for the purposes of the railway. The land in question was acquired for use by the company as a railway station, and the area was within the quantity which they were authorized to acquire for the purpose:—Held, that neither at the time when the user on which the defendant relied began, nor since, was there power in the railway company to make a grant of such a right; it was not for the benefit of the railway; neither was it of lands not required for its purposes; and the defendant had, therefore, failed to establish his right. Between the lot owned by the defendant and the station grounds there was a strip of land laid out as a street which he was occupying as part of his premises:—Held, that, even assuming that he had acquired title to the strip by possession, that did not carry with it any right to a way, of necessity or otherwise, over the plaintiffs' lands in order to give him an outlet. Judgment of Boyd, C., 1 O.W.R. 695, reversed; Osler, J.A., dissenting.

Grand Trunk Ry. Co. v. Valiear, 3 Can. Ry. Cas. 399, 7 O.L.R. 364.

[Distinguished in Leslie v. Pere Marquette Ry. Co., 13 Can. Ry. Cas. 219, 24 O.L.R. 206.]

RIVERS.

See Drainage; Waters.

ROADBED.

See Rails and Roadbed; Street Railways; Railway Crossings.

SALE.

A. Sale of Railway.
B. Sale of Securities.

Appointment of receiver upon foreclosure, see Receivers.

Rights of bondholders and mortgagees, see Bonds and Securities.

Insolvency and scheme of arrangement, see Insolvency.

A. Sale of Railway.

SALE OF TRAMWAY BY SHERIFF—LIEN FOR PRICE OF CARS.

A company operating an electric tramway, by permission of the municipal corporation, on rails laid on public streets vested in the municipality, to secure the principal and interest of an issue of its debenture bonds hypothecated its real property, tramway, cars, etc., used in connection therewith, to trustees for the debenture holders, and transferred the movable property of the company and its present and future revenues to the trustees. By a provincial statute, 3 Edw. VII. c. 91, s. 1 (Que.), the deed was validated and ratified. On the sale, in execution, of the tramway, as a going concern:—Held, that whether, at the time of such sale, the cars in question were movable or immovable in character, the effect of the deed and ratifying statute was to subordinate the rights of other creditors to those of the trustees, and, consequently, that unpaid vendors thereof were not entitled, under Art. 2,000 of C.C. (Que.) to priority of payment by privilege upon the distribution of the moneys realized on the sale in execution. In the result, the judgment appealed from, 18 Que. K.B. 82, was affirmed.

Ahearn & Soper v. New York Trust Co., 42 Can. S.C.R. 267.

MORTGAGE—FIXTURES—ROLLING STOCK—EXECUTION.

An electric street railway company, incorporated under the Ontario Joint Stock Companies Letters Patent Act, R.S.O. 1887, c. 157, and subject to the provisions of the Street Railway Act, R.S.O. 1887, c. 171, gave to trustees for holders of debentures of the company a mortgage upon the real estate of the company, together with all buildings, machinery, appliances, works and fixtures, etc., and also all rolling stock and all other machinery, appliances, works and fixtures, etc., to be thereafter used in connection with the said works, etc. The by-laws of the directors of shareholders (who were the same persons and only five in number) authorizing the giving of the mortgage directed it to be given upon all the real estate, plant, franchises, and income of the company, and the debentures stated that they were secured by mortgage of the real estate, franchises, rolling stock, plant, etc., acquired or to be acquired:—Held, that s. 38 of R.S.O. 1887, c. 157, does not restrict the power of mortgaging to the existing property of the company and that a company is invested with as large powers to mortgage its ordinary after acquired property as belong to a natural person; that the mortgage in terms covered after acquired property, and even if not authorized in this respect upon a strict reading of the by-laws had been acquiesced in and ratified and was binding. Judgment of a Divisional Court affirmed:—Held, also, that the rolling stock, poles, wires, etc., formed an essential part of the corpus of what must be regarded as an entire machine, and were therefore fixtures and not seizable under execution to the prejudice of the mortgagees. Judgment of Armour, C.J., affirmed.

Kirkpatrick v. Cornwall Elec. Street Ry. Co.; Bank of Montreal v. Kirkpatrick, 2 O.L.R. 113 (C.A.).

SEIZURE AND SALE—STRIP OF LAND NOT INCLUDED IN FIRST SEIZURE.

A railway was seized and sold by sheriff's sale to the present opposant. It was described as fifty feet in width, but the greater part of the line was actually sixty-six feet wide. The present plaintiff now caused the line to be seized again, but stated exceptions from the seizure, which exceptions really included the entire road less the surplus width:—Held, that the seizure was irregular and illegal, the adjudication by the sheriff being of a specific object, fenced at the time of the sale, and known as consisting of the property so enclosed. The error as to the width was immaterial, unless it were to give a ground of action by the defendant to have the sale set aside. Moreover, a railway can only be seized as an entirety, which had not been done in the present case.

Carter v. Montreal & Sorel Ry. Co., 23 Que. S.C. 3.

BONDS—MORTGAGE—DEFAULT IN PAYMENT.

A railway incorporated by provincial legislation, and which is afterwards declared to be a work for "the general advantage of Canada," can be validly sold as a going concern, where the sale is under the provisions of a mortgage, or at the instance of holders of bonds secured by a mortgage on the railway, or under any other lawful proceeding. Bonds of the railway were issued, and as security for their payment a mortgage of the railway was made to a trust company, containing a provision that in default in payment of the principal of the bonds, and on request of three-fourths of the bondholders, the trustee should immediately elect and declare the bonds to be due and payable and take proceedings for enforcing payment:—Held, that the Railway Act, 1886, ss. 14, 15, 16 (re-enacted by the Railway Act, 1888, s. 278), although passed subsequently to the date of the mortgage, applied, and that a sale of the railway could be validly made. A consent judgment directing a sale of the railway was, under the circumstances of the case, vacated, and the defendants allowed to come in and defend. [Petro v. Welland Ry. Co. (1862), 9 Gr. 455, and Galt v. Erie Ry. Co. (1868), 14 Gr. 499, distinguished.]

Toronto General Trusts Corp. v. Central Ontario Ry. Co.; Ritchie v. Blackstock; Central Ontario Ry. v. Blackstock, 2 Can. Ry. Cas. 274.

[Affirmed in 4 Can. Ry. Cas. 328; 8 O.L.R. 342.]

BONDS—MORTGAGE—DEFAULT IN PAYMENT—SALE OF RAILWAY.

A railway incorporated by provincial legislation, and which has been declared to be a work for "the general advantage of Canada," can, since the passing of the Railway Act, 1888, ss. 14, 15, 16, be validly sold as a going concern, where the sale is under a mortgage, or at the instance of holders of bonds secured by a mortgage on the railway, made before or after the passing of that Act, or under any other lawful proceeding. Judgment of Boyd, C., 6 O.L.R. 1, 2 Can. Ry. Cas. 274, affirmed.

Toronto General Trusts Corp. v. Central Ontario Ry. Co., 4 Can. Ry. Cas. 328, 8 O.L.R. 342.

[Affirmed in 4 Can. Ry. Cas. 340; 21 T.L.R. 732; [1908] A.C. 576.]

MORTGAGE—CHARGE ON LAND AND RAILWAY—POWER OF SALE.

A railway which is subject to the legislation of the Dominion of Canada can be sold in a suit by trustees for bondholders to enforce a mortgage on the railway company's railway, lands, and franchises. Semble, a railway which is subject exclusively to the law of the Province of Ontario cannot be sold in a suit to enforce such a mortgage. Decision of the Court of Appeal for Ontario (8 O.L.R. 342, 4 Can. Ry. Cas. 328), affirmed.

Central Ontario Ry. Co. v. Trusts & Guarantee Co., 4 Can. Ry. Cas. 340, 21 T.L.R. 732, [1908] A.C. 576.

INSOLVENCY—SALE TO A COMPANY BY ITS PROMOTERS.

A syndicate of four persons procured a Quebec Act incorporating a railway company which they had promoted and subscribed for $300,000 of the company's shares (being all that were issued), and were, with others whom they had qualified, elected directors. They then purchased a railway themselves, and the incorporated company, being empowered so to do by their Act, purchased the said railway from them for $648,000, paying for it by taking credit for the said subscription and acknowledging indebtedness to the said four persons of the balance of $348,000 in equal shares. On the insolvency of the said incorporated company and of another company with which it had been amalgamated, their railways were sold, and the respondent company, to whom the syndicate's claim had been assigned, claimed to rank as creditors against the proceeds of sale:—Held, that the claim must be allowed. The incorporating Act authorized the purchase, and, whether or not the price was excessive, every one interested in the capital of the company concurred in the purchase with full knowledge of all the circumstances. Salomon v. Salomon, [1897] A.C. 22, followed. Judgment of the Supreme Court of Canada, which affirmed the decision of the Exchequer Court, sub. nom. Minister of Railways v. Quebec Southern Ry., 10 Can. Ex. 139, affirmed by the Privy Council.

Attorney-General for Canada v. Standard Trust Co. of New York, [1911] A.C. 498.

SALE UNDER SPECAL ACT.

By 4–5 Edw. VII. c. 158, respecting the South Shore Ry. Co. and the Quebec Southern Ry. Co., the Parliament of Canada, among other things, provided that the Exchequer Court might order the sale of the railways mentioned and their accessories as soon as possible and convenient after the passing of the Act, and that such railways and their accessories, respectively, should be sold separately or together as, in the opinion of the Exchequer Court, would be best for the interests of the creditors of the said companies. An order for such sale was made and tenders received in accordance therewith:—Held, that in respect of the tenders so received, the statute left it to the Court to determine which of them it was in the best interests of the creditors to accept. (2) That, inasmuch as if the property were sold in part to one purchaser and in part to another, two new and diverse interests would arise, and it would be necessary to divide the property both real and personal, and to make two transfers instead of one, it was in the best interests of the creditors, as well as of the public, to accept a tender for the property as a whole, although such tender was for a less sum, by some $3,000, than the aggregate of two separate tenders for distinct portions of the whole property.

Minister of Railways v. Quebec Southern Ry. Co., 10 Can. Ex. 139. [Affirmed by the Supreme Court of Canada.]

RIGHTS OF PURCHASER OF RAILWAY AT SALE—INCORPORATION OF COMPANY—DIRECTORS' SALARY—SET-OFF.

A purchaser of a railway does not acquire an absolute right to the railway. What he acquires is an interim right to operate the railway to be followed up by incorporation as provided by s. 280 of 51 Vict. c. 29. (See s. 299 of the Railway Act, R.S.C. 1906, c. 37.) (2) While an independent purchaser buying with his own money and selling at an enhanced price to a company, with full disclosure and without fraud, can claim his profit, promoters, who stand in a fiduciary relationship to the company, cannot take such profit. Hence, where prometers bought with the moneys of a company incorporated by themselves, to whom they turned over the property, they were not permitted to recover against the company any profits on the transaction. (3) A resolution of shareholders is necessary to authorize the payment of salaries to directors of a company. (4) Having regard to the provisions of arts. 1031 and 1187 C.C.P., creditors were allowed by the referee to set off the claims of certain debtors, officers of the company, for salaries taken by them without proper authority, and for expenditures made by them out of the company's funds for a purpose ultra vires of the company. No objection was taken to this ruling before the referee, and the Court, on appeal from his report, confirmed such ruling, but expressed some doubt as to the jurisdiction of the referee to set off such claims.

Minister of Railways and Canals v. Quebec Southern Ry. Co., Hodge's Claim, 12 Can. Ex. 11.

Judicial sale of railways — Interested bidder — Counsel and solicitors.

Solicitors and counsel retained in proceedings for the sale of property are not within the classes of persons disqualified as purchasers by art. 1484, C.C. (Que.). The Act, 4 & 5 Edw. VII., c. 158, directed the sale of certain railways separately or together as in the opinion of the Exchequer Court might be for the best interests of creditors, in such modes as that Court might provide, and that such sale should have the same effect as a sheriff's sale of immovables under the laws of the Province of Quebec. The Judge of the Exchequer Court directed the sale to be by tender for the railways en bloc or for the purchase of each or any two of the lines of which they were constituted:—Held, that the Judge had properly exercised the discretion vested in him by the statute in accepting a tender for the whole system, in preference to two separate tenders for the several lines of railway at a slightly increased amount, and that his decision should not be disturbed on appeal.

Rutland R.R. Co. v. Béique and Minister of Railways; White v. Béique and Minister of Railways; Morgan v. Béique and Minister of Railways, 5 Can. Ry. Cas. 421, 37 Can. S.C.R. 303.

Interpretation of contract—Balance of purchase price—Subsidies—Duty of government—Distribution of funds—Pending litigation.

A stipulation in a contract for the sale of a railway that the balance of the purchase price is to be paid from time to time to the extent of fifty per cent in Government subsidies points to the payment of the balance out of subsidies paid in respect of the residue over and above fifty per cent, not to the payment of the entirety of fifty per cent of the subsidies, as a condition precedent to a demand for payment of so much as has been paid and for an accounting thereof. [Judgment of Canada Supreme Court reversed; Irvine v. Hervey, 13 D.L.R. 868, 47 N.S.R. 310, affirmed.] A Provincial Government empowered by statute with the distribution of funds under a railway subsidy contract is not justified in making payments thereon pending an action for the determination of the respective rights relative thereto and of which the Government had full notice. The proper course to be pursued by the Crown in a case where it is charged with the distribution of certain funds under a railway subsidy contract that is being litigated and a receiver appointed is either to apply to the Court for a construction of the contract, and to pay accordingly, or to pay the whole amount over to the receiver to be paid out under orders of Court. [Judgment of Canada Supreme Court reversed; Irvine v. Hervey, 13 D.L.R. 868, 47 N.S.R. 310, affirmed.]

Eastern Trust Co. v. MacKenzie, Mann & Co., 22 D.L.R. 410.

B. Sale of Securities.

Railway bonds—Power of sale—Notice—Abortive auction sale—Subsequent private sale—Bona fide purchasers for value.

As collateral security to a promissory note the makers deposited with a bank certain railway bonds, and, by memorandum of hypothecation, authorized the bank, upon default, "from time to time to sell the said securities . . . by giving fifteen days' notice in one daily paper published in the city of Ottawa . . . with power to the bank to buy in and resell without being liable for any loss occasioned thereby." Default having been made, notice of intention to sell was duly published, and, pursuant to the notice, the bonds were offered for sale at public auction, after two postponements at the request of the pledgors, but no sale was made for want of bidders. The bank afterwards made a private sale of the bonds without any further advertisement:—Held, that the words "by giving" in the memorandum were equivalent to "after giving" or "first giving" or "giving," and the condition of publication of the notice having been performed, the power to sell arose and might be exercised afterwards without a fresh notice:—Held, also, that there was nothing upon the evidence to shew that the purchasers were not bona fide purchasers for value or that they had any reason to suppose that the bank were not authorized to sell: and under these circumstances the construction of the power of sale should not be strained against the purchasers.

Toronto General Trusts Corp. v. Central Ontario Ry. Co., 3 Can. Ry. Cas. 344, 7 O.L.R. 660.

[Reversed in 4 Can. Ry. Cas. 359; 10 O.L.R. 347.]

RAILWAY BONDS—POWER OF SALE—NOTICE—ABORTIVE AUCTION SALE—SUBSEQUENT PRIVATE SALE.

As collateral security to a promissory note the makers deposited with a bank 300 railway bonds, and, by a memorandum of hypothecation, authorized the bank, upon default, "from time to time to sell the said securities . . . by giving 15 days' notice in one daily paper published in the city of Ottawa . . . with power to the bank to buy in and resell without being liable for any loss occasioned thereby:"—Held, reversing the judgment of Street, J., 7 O.L.R. 660, 3 Can. Ry. Cas. 344, Osler, J.A., dissenting, that the power was to sell by auction and that the bank had no power to sell by private contract. Semble that, even if there was power to sell by private contract, the sale made to the respondents could not, upon the evidence as to the methods adopted, be supported, they having notice that the bank held the bonds as pledgees.

Toronto General Trusts Corp. v. Central Ontario Ry. Co., 4 Can. Ry. Cas. 359, 10 O.L.R. 347.

SALE OF LAND.

See Title to Land.
For the purpose of railway, see Expropriation.

SCHEME OF ARRANGEMENT.

See Insolvency.

SECTION MEN.

Regulation of section men, see Railway Board.

SECURITIES.

See Bonds and Securities.

SEIZURE OF RAILWAY.

See Sale.

SENIORITIES.

See Expropriation (Location); Highway Crossings; Railway Crossings; Wires and Poles.

SEPARATION OF GRADES.

See Highway Crossings.

Annotation.

Apportionment of Cost of Separation. 22 Can. Ry. Cas. 188.

SERVICE OF PROCESS.

See Pleading and Practice.

SHARES.

Annotation.

Transfer of shares and mandamus compelling same. 7 Can. Ry. Cas. 373.

DISTRIBUTION OF SHARES—HASTY PROCEEDINGS—"GENERAL ADVANTAGE OF CANADA."

Meetings of shareholders of a company called according to the distribution of shares for an hour named should not be proceeded with in haste as soon as such hour arrives, but a reasonable delay should be accorded to tardy representatives. Hence, a meeting called for twelve o'clock noon for the election of directors, which is opened by the shareholders present at one minute after twelve and proceeds with the election and constitution of a board of directors, the proceedings being terminated and the meeting closed at ten minutes past twelve, should be deemed, because of such precipitation, as made in fraud of the absent shareholders and should be declared illegal and null. When an Act of the Parliament of Canada declares a provincial railway a work for the general advantage of Canada, the Railway Act, 1903, applies as well to the railway as to the company constructing or operating it to the exclusion of incompatible provisions of the Provincial Act constituting such company, especially in matters respecting the mode of, and formalities for, raising the capital stock.

Armstrong v. McGibbon, 15 Que. K.B. 345.

TRANSFER ON COMPANY'S BOOKS—MANDAMUS TO ENFORCE TRANSFER.

The owner of two shares of stock in the defendants' railway, assigned them to the plaintiff, endorsing the assignment on the certificate. The plaintiff called at the head office and demanded that the necessary transfer should be made on the company's books, and also saw the president; and after some correspondence, the transfer not having been made, he procured a duplicate assignment of the stock, and placed the matter in the hands of his solicitor, who thereupon wrote the company demanding a transfer, and enclosed one of the duplicate assignments, and stated that he would attend on a named hour, ready to surrender the certificate, and have the transfer completed, and, on receiving a reply that it could not then be attended to, this action was brought, in which an order for a mandamus was claimed. An interlocutory order made by a Judge in Chambers directing a mandamus to issue, was, on appeal to the Divisional Court, set aside, and the matter left for decision at the trial.

Nelles v. Windsor, Essex & Lake Shore Rapid Ry. Co., 7 Can. Ry. Cas. 367, 16 O.L.R. 359.

LIMITATION OF ISSUE.

The provisions of the Railway Act as to the organization of railway companies and the amount of stock subscriptions are provisions made for the protection of the public and must be strictly followed.

Re Burrard Inlet Tunnel & Bridge Co., 10 D.L.R. 723, 15 Can. Ry. Cas. 289.

SHIPPING BILL.

See Bills of Lading; Carriers of Goods.

SHIPPING SYSTEM.

See Cars; Train Service; Stations; Interchange of Traffic; Tolls and Tariffs.

SHUNTING CARS.

Injuries received while shunting cars, see Employees; Crossing Injuries.

SIDINGS.

See Branch Lines and Sidings.

SIGNALS AND WARNINGS.

See Crossing Injuries; Street Railways; Negligence; Employees; Fences and Cattle Guards; Railway Crossings; Highway Crossings.

LOOKOUT—SIGNALS.

A number of railway cars which are connected and are forced backward by the concussion made in coupling will constitute a "train" before getting under way in a forward direction, and where there is a statutory obligation to station a brakeman on the last car of a train moving reversely, the railway must station the brakeman on the car last coupled, although the reverse motion is used only in the operation of taking on that car. [Hollinger v. C.P.R., 20 A.R. (Ont.) 244, 250, approved.]

Helson v. Morrisey, Fernie & Michel Ry. Co., 1 D.L.R. 33, 19 W.L.R. 835, 17 B.C.R. 65.

SIGNATURE.

See Contracts.

SLEEPING BERTH.

See Carriers of Passengers.

SMOKING CAR.

See Carriers of Passengers.

SPECIFIC PERFORMANCE.

Specific performance of order of Railway Board requiring protection of highways, see Highway Crossings.

Specific performance for the sale of lands for railway purposes, see Title to Lands.

Specific performance of agreements affecting street railways, see Street Railways.

Annotation.

Whether mandamus, injunction, specific performance or damages is the proper remedy for the enforcement of covenants by railway companies. 1 Can. Ry. Cas. 294.

SPUR LINES.

See Branch lines and Sidings.

STABLES.

See Warehouses, Yards and Workshops.

STATEMENT OF CLAIM.

See Pleading and Practice.

STATION AGENT.

See Stations.

STATIONS.

A. Facilities; Agents.
B. Bus Line; Hackmen; Transfer Companies.
C. Injuries at Stations.

Agreements respecting telephones in railway stations, see Telephones.

Injury to passenger crossing tracks at station, see Carriers of Passengers.

Expropriation of lands for station purposes, see Expropriation.

Injuries to employees at stations, see Employees.

A. Facilities; Agents.

FLAG STATION—AGENTS—ANNUAL EARNINGS—GRAIN SHIPMENTS.

Under ss. 30 (g), 258, 284 (1) (a) & (3) of the Railway Act, 1906, the Board has jurisdiction to require a railway company, to erect and maintain platforms or freight sheds or any other structures or works that may be deemed reasonably necessary for the protection of property or the public at stopping places on the railway (known as flag stations) used for unloading and delivering traffic. At such stations a suitable shelter or waiting room should be erected for both passengers and freight, provided with a door and windows, proper platforms and approaches. At stations where the total freight and passenger earnings amount to $15,000 per annum, the company should appoint and maintain permanent agents: at points where the business consists principally of shipping grain, and such shipments amount to at least 50,000 bushels, agents should be appointed and maintained during the grain shipping season; at points of shipment where a telegraph operator is located for the handling of trains he should be provided with the necessary equipment to handle all traffic thereat.

Winnipeg Jobbers, etc. v. Can. Pac. etc. Ry. Cos. (Flag station case), 8 Can. Ry. Cas. 151.

FACILITIES—FOREIGN RAILWAY—OPERATION IN CANADA—THROUGH TRAFFIC.

An application was made to the Board for an order directing the G.N.R. Co. to construct a platform and station building. The N.W.S. a provincial railway, incorporated by an Act of British Columbia, had not been declared a work "for the general advantage of Canada." The trains of the G.N.R., a foreign railway used the line of the N.W.S. as connecting line between its line in the State of Washington and Vancouver in British Columbia. The latter company was not shewn to have any rolling stock or equipment, or so far as operation was concerned to be in any way a separate organization from the former:—Held, (1) that the G.N.R. a foreign railway, is subject to the jurisdiction of the Board in so far as it operates in Canada. (2) That the N.W.S., a provincial railway, although not declared to be a work "for the general advantage of Canada," but connecting with a railway subject to the jurisdiction of the Board, is, by s. 8 (b) as regards through traffic upon it, and all matters appertaining thereto, subject to the Railway Act. (3) That station facilities are matters appertaining to through traffic. (4) That proper facilities should be provided for the safety and convenience of the public using the trains of the G.N.R. (5) If the G.N.R. desires to apply for leave to appeal upon the question of jurisdiction, the issue of the order may be delayed for 30 days, but, if not, the size and location of the station and platform may be defined by an engineer of the Board.

Thrift v. New Westminster Southern and Great Northern Ry. Co., 9 Can. Ry. Cas. 205.

[Followed in Stewart, etc. v. Napierville Junction Ry. Co., 12 Can. Ry. Cas. 399.]

STATIONS—ACCOMMODATION OF TRAFFIC.

The Board has power to order a railway company whose line is completed and in operation to provide a station at any place where it is required to afford proper accommodation for the traffic on the road. Idington and Duff, JJ., dissenting.

Grand Trunk Ry. Co. v. Department of Agriculture, 10 Can. Ry. Cas. 84, 42 Can. S.C.R. 557.

STATIONS AND FACILITIES—FOREIGN RAILWAYS.

An application to direct the respondent to furnish adequate station accommodation and satisfactory train service on its line of railway. The respondent, a Canadian railway, incorporated by the Province of Quebec, was operated by the Delaware and Hudson Ry. Co., a foreign company, through its agent and subsidiary company, the Quebec, Montreal & Southern Ry. Co., another Canadian company:—Held, (1) that the respondent company was not a separate organization and that there was no separate management. (2) That under subs. 3 of s. 258 of the Railway Act, 1906, the Board has jurisdiction to direct the respondent, subsidized by the Parliament of Canada, to maintain and operate suitable stations with suitable accommodation or facilities. (3) That under s. 11 of 8 & 9 Edw. VII., Railway Act amendment, the Delaware & Hudson and Quebec, Montreal & Southern Ry. Cos. were both subject to direction to maintain proper train service and facilities upon this section of the line.

[Thrift v. New Westminster Southern and Great Northern Ry. Cos., 9 Can. Ry. Cas. 205, followed.]

Stewart and St. Cyprien v. Napierville Junction Ry. Co., 12 Can. Ry. Cas. 399.

Location—Distance apart— Sparsely settled locality.

Applications for an order directing the respondent to erect and maintain stations at Kitsumkalum and Stewart's Landing. The respondent proposed to locate stations at Littleton and Copper River, and if these applications were granted there would be four stations within less than eleven miles in a sparsely settled locality. The location of a station at Kitsumkalum would involve a yard on a grade with a bridge over a river at one end and a highway crossing in the neck of the yard, while a station at Stewart's Landing would be about three miles northerly from Littleton and about two miles southerly from Copper River:—Held, that the application must be refused, and the locations proposed by the respondent approved.

Eby v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 22.

[Followed in Forward Townsite v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 377.]

Regular and flag stations—Freight agent—Accommodation.

After stations with regular equipment had been maintained at French and Rutter, six miles apart, from 1908 to 1911, Rutter was made a flag station, part of the business was transferred to French, the agent removed and a night operator left in his place. Upon complaint by residents (representing that a population of 2,500 was dependent upon the station), the Board, upon the report of its inspector, ordered the railway company (1) to keep a caretaker to look after freight, express and mail matter at the station from 7 a.m. to 6 p.m. daily, except Sunday. (2) To see that its conductors sold tickets to people boarding trains at Rutter, and their baggage checked without charge, and condemned the practice of leaving freight and express matter in open sheds at flag stations. Per Commissioner McLean:—(1) The railway company had not justified the removal of the agent. (2) The general policy laid down in the Flag Station case, 8 Can. Ry. Cas. 151, has not been modified. (3) By Order No. 6242, railway companies are released from liability for goods unloaded at flag stations where there is no agent.

Rutter Station Patrons v. Can. Pac. Ry. Co. (Rutter Station Case), 14 Can. Ry. Cas. 1, 8 D.L.R. 711.

Station—Location of—Change in.

After approving the location of a station upon a certain lot, the Board will not approve another location of the same station upon a different lot when the railway company has refused to carry out its original contract with the owner of the first lot. The Board, on fixing the location for a railway station on the Transcontinental Ry. at one of two conflicting sites proposed by representatives of settlements closely situated to each other and bearing similar names, will not restrain the location of a second station at the other site on the application of the railway on a case for additional facilities being made out.

Kelly v. Grand Trunk Pacific Ry. Co. (Hazelton B.C. Townsite Case), 14 Can. Ry. Cas. 15, 5 D.L.R. 303.

Governmental control—Duty as to stations—Location—Unjust discrimination.

In deciding between conflicting applications for the location of a station, the Board should only intervene in the case of unjust discrimination between the railway company and the landowners. In deciding upon a location of a station, the Board should not deal with the possible growth of a new town, but should ensure that the patrons of the railway should be provided with proper facilities in the public interest.

Druid Landowners v. Grand Trunk Pacific Ry. Co., 14 Can. Ry. Cas. 20, 7 D.L.R. 884.

Stations—Location.

The Board refused an application for an order directing a railway company to establish a station at the crossing of another railway about two miles distant from its existing station, where a townsite had been located, elevators erected and a municipality organized, the usual distance between stations being eight or ten miles. [Eby et al. v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 22, followed.]

Forward v. Canadian Pacific Ry. Co. (Forward Townsite Case), 14 Can. Ry. Cas. 377.

Safety of stations, approaches and platforms—Railway—Breach of statutory duty—Neglect to furnish suitable accommodation for passengers at station—Absence of station house.

Morrison v. Pere Marquette Ry. Co., 4 O.W.N. 544, 27 O.L.R. 271, affirming judgment of Britton, J., 4 O.W.N. 186.

Duty as to depots—Stopping places—Board of Railway Commissioners—Regulation of location of stations and sidings—Railway exploiting townsite—Disregard of public convenience.

Re Cutknife Stations, 7 D.L.R. 844, 21 W.L.R. 382.

Governmental regulation—Location of station—Engineering difficulties—Public convenience.

Re South Hazelton, 8 D.L.R. 1036, 22 W.L.R. 445.

Stopping places.

The Board will not permit a railway company to change the place at which its predecessors in title were compelled to make stops where by its Act of incorporation the municipal by-laws granting franchises for the building of road and designating such stopping places were continued in force.

Re London & Lake Erie Transportation Co., 10 D.L.R. 11, 15 Can. Ry. Cas. 92.

Neglect to furnish accommodation for passengers at station—Exposure of passenger to cold.

Where a wrongful act has occasioned exposure to the weather, and illness has resulted from such exposure, such illness is not to be regarded as due to an intervening independent cause. The rule with regard to remoteness of damage is the same whether the damages are claimed in an action of contract or of tort. The inquiry is, what is the natural and probable consequence of the breach? [Hobbs v. London & South Western Ry. Co. (1875), L.R. 10 Q.B. 111, distinguished. McMahon v. Field (1881), 7 Q.B.D. 591, and The Notting Hill (1884), 9 P.D. 105, specially referred to:]—And held, in this case, affirming the judgment of Britton, J., 27 O.L.R. 271, that the plaintiff was entitled to recover for his loss of health occasioned by the defendants' default and neglect and breach of statutory obligation; and that the jury had rightly measured the full amount of his damage: ss. 284 (1) (a), (7), and 427 (2), of the Railway Act, 1906. The amendment to the Railway Act, by 7 & 8 Edw. VII. c. 60, s. 10, shews that, even if the Board had a right to interfere, the action of the person aggrieved was not taken away.

Morrison v. Pere Marquette Ry. Co., 12 D.L.R. 344, 15 Can. Ry. Cas. 406, 27 O.L.R. 551.

[Affirmed in 15 Can. Ry. Cas. 406, 12 D.L.R. 344, 28 O.L.R. 319.]

Failure to provide—Exposure of passenger to elements.

The failure of a railway company to provide a suitable station house at a regular stopping place, as required by s. 284 of the Railway Act, 1906, renders it liable for the resultant illness occasioned a passenger from exposure to the elements while waiting at night for a train. [Morrison v. Pere Marquette Ry. Co., 4 O.W.N. 544, 27 O.L.R. 551, affirmed.]

Morrison v. Pere Marquette Ry. Co., 12 D.L.R. 344, 15 Can. Ry. Cas. 406, 28 O.L.R. 319.

Unjust discrimination—Facilities for unloading, delivery and sale of goods.

Under the Railway Act, the statutory duties of the railway company to furnish facilities relate, in so far as the terminal station is concerned, merely to the unloading and delivery of the goods and do not include facilities for their sale; thus the prohibitions against undue preference or unjust discrimination in furnishing facilities do not apply to the failure or refusal of a railway company to allot space to a wholesale fruit firm in a building owned by it used by other fruit dealers as a market into which railway tracks run. [Re Western Tolls, 17 Can. Ry. Cas. 123, pp. 148 to 156; Twin City Transfer Co. v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 323, followed; Purcell v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 194; Donovan v. Pennsylvania Ry. Co., 199 U.S.R. 279; South Western Produce Distributors v. Wabash Ry. Co., 20 I.C.C.R. 458; Cosby v. Richmond Transfer Co., 20 I.C.C.R. 72; Perth General Station Committee v. Ross (1897), A.C. 479, at pp. 479, 482; Barker v. Midland Ry. Co., 18 C.B. 46, referred to.]

Cuneo Fruit & Importing Co. v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 414.

[Followed in Congreave v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 423.]

Closing—Revenue—Agent.

The Board has fixed an arbitrary amount of $15,000 as the revenue which a railway company should derive at a station to warrant it in ordering the maintenance of an agent.

Ozias v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 425.

Passengers—Arrival and departure—Facilities.

The obligations of a carrier are to provide proper facilities for the arrival and departure of passengers subject to regulations for the proper policing of its station premises. [Twin City Transfer Co. v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 323, followed.]

Twin City Transfer Co. v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 435.

[Followed in Congreave v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 423.]

Facilities—Convenience of public.

Notwithstanding continued failure of a railway company, as lessee, to meet its obligations to another railway company, as lessor, for existing privileges in connection with the joint use of station premises, the lessor may be required to extend further privileges to the lessee in such premises, if it be shewn that such further privileges are necessary to enable the lessee to afford proper convenience and facilities to the public.

Can. Northern Ry. Co. v. Grand Trunk Ry. Co., 20 Can. Ry. Cas. 67.

APPOINTMENT OF PERMANENT AGENT—EARNINGS.

Where the earnings at a station, apart from grain, from a considerable percentage of the total earnings, amounting to at least $15,000, a permanent agent should be appointed. The expression "principally" in section 5 of General Order No. 54, dated January 6, 1910, is not to be construed as meaning that in cases where the grain movement is the principal business, or even constitutes more than 50 per cent of the whole earnings, section 4 is not to apply.

Oakdale Grain Growers Assn. v. Grand Trunk Pacific Ry. Co., 20 Can. Ry. Cas. 70.

LOCATION—JURISDICTION.

The question of a location of a station, under s. 258 of the Railway Act, is entirely a matter for the Board's discretion, which can be exercised irrespective of apparent conflict of agreements and ratifying Acts. [Ottawa v. Canada Atlantic and Ottawa Elec. Ry. Cos. (Bank Street Subway Case), 33 Can. S.C.R. 376, 5 Can. Ry. Cas. 126, referred to.]

Vancouver v. Vancouver, Victoria & Eastern Ry. etc., Co., 20 Can. Ry. Cas. 72.

STATION AGENT—RAIL AND WATER—EARNINGS.

Under s. 333 (3) of the Railway Act, 1906, when a rail carrier subject to the jurisdiction of the Board owns, operates or uses a water carrier as a direct connection with the parent rail carrier, between any Canadian teminus of the rail carrier and another port in Canada, the earnings for the water portion should be considered as part of the through route and toll. Applying this principle to shipments of silver lead ore from New Hazleton to Vancouver, the earnings at the former station were found by the Board to justify the retention of a station agent at that point.

Grand Trunk Pacific Ry. Co. v. New Hazelton, 20 Can. Ry. Cas. 169.

FLAG STATION—DISCRETION—EARNINGS—AGENT.

The practice of the Board is not to direct that a flag station shall be made an agency point unless there is a business of $15,000 per annum at the point in question. Carriers, with a view to expanding business, have a wider discretion to make ventures in creating agency points than the Board. Where the earning power of a carrier at a station is low the matter to be considered is what accommodation it is reasonable for the public to expect.

Re Lower Argyle Station, 21 Can. Ry. Cas. 434.

LOCATION OF STATIONS—FLAG STATION—DISCRETION—REASONABLE FACILITIES.

The general intention of the Railway Act is that the initial discretion as to the location of stations shall be with the carrier. The Board is justified in intervening only when there has been an unreasonable exercise of this discretion, or when there are exceptional circumstances. In adjudicating on the location of stops the Board will take into consideration the average of convenience to the public and the obligation of the carriers to afford reasonable facilities, having in view the nature of traffic on the railway, and will give due regard to the effect of additional stops on the ability of the carriers to give efficient through service in competition with other lines.

Hartin et al. v. Can. Northern Ry. Co. (Twin Elm Flag Stop Case), 21 Can. Ry. Cas. 437.

STATION AGENT—ADEQUATE SERVICE—APPOINTMENT.

The Board refused an application for the appointment of an agent where it appeared that it was almost impossible for railways to obtain agents to man stations much more important than the 4th class station in question, and an agent could not be installed without depriving a more important station of adequate service.

Edmonton Board of Trade v. Can. Northern Ry. Co. (Legal Station Case), 24 Can. Ry. Cas. 7.

STATIONS—AGENTS.

The Board allowed the agents at five stations to be dispensed with and refused the application in the case of six others.

Re Quebec, Montreal & Southern Ry. Co., 24 Can. Ry. Cas. 229.

FLAG STATIONS—NECESSITY FOR APPROVAL OF BOARD.

When a railway company opens a station and appoints a permanent agent there, business in that locality is built up on the assumption that the station will continue to be a permanent station; and the Board should be consulted and the representatives of the public heard, before such a station is closed, or turned into a mere flag station.

Re Removal of Agents from Agency Stations, 27 W.L.R. 387.

FACILITIES—TRAFFIC—STATIONS—SIDINGS—EXISTING HIGHWAY—DISADVANTAGES—OFFSET.

The Board will not order a carrier to provide facilities for traffic, such as stations or sidings in order to offset existing highway disadvantages. The Board refused to order the construction of a freight shed, shelter and siding half way between two stations, eight miles apart. [Pheasant Point Farmers v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 13, 7 D.L.R. 887, followed.]

Kelly v. Grand Trunk Ry. Co., 24 Can. Ry. Cas. 367.

B. Bus Line; Hackmen; Transfer Companies.

CABMEN AND 'BUSMEN—DESIGNATION OF PLACES FOR VEHICLES TO STAND—DISCRIMINATION.

A cabman or 'busman carrying on a general business has no special rights in connection with traffic to or from a railway station. He has a general right to take his cab or 'bus to the station for the purpose of discharging passengers; and he has the same right to back his 'bus up to the station platform, at a convenient spot for receiving passengers. The railway company is under an obligation to see that passengers are not unduly importuned by cabmen or 'busmen at or on its platform; and in the discharge of that obligation, the railway company has the right to designate the points where the traveling public will be received from cabs and 'busses, and where they will go for such conveyances on the arrival of trains. [South Western Produce Distributors v. Wabash Ry. Co., 20 I.C.C.R. 458; Donovan v. Pennsylvania Ry. Co., 199 U. S. 279, distinguished.]

Purcell v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 194, 28 W.L.R. 689.

[Affirmed in 15 Can. Ry. Cas. 314.]

Station ground—Reasonable regulations.

An appeal from the judgment of the Board restraining the respondent from unjustly discriminating against the applicant, was dismissed with respect to the existing special circumstances, but without intending by such dismissal to cast any doubt upon the right of the appellants to take such steps as may be necessary to maintain order within the limits of its station ground. [Purcell v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 194, affirmed.]

Grand Trunk Pacific Ry. Co. v. Purcell, 15 Can. Ry. Cas. 314.

Hacks, carriages—Exclusive privileges—Discrimination.

The grant by a railway company to one transfer or bus company of the exclusive privilege of soliciting passengers on depot property is not an unjust discrimination against another transfer company within the inhibition of ss. 284, 317, of the Railway Act, 1906, which prevents discrimination between passengers, shippers and consignees of freight, but does not concern the agencies employed for receiving or delivering traffic, at, to, or from railway stations. [Purcell v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 194, distinguished.] Since a railway station is private property as between a railway company and the general public excepting persons who have occasion to use it for the purpose of transportation, the company may grant the exclusive privilege to a bus or transfer company of soliciting within its stations the carriage of passengers and baggage. A railway company cannot prohibit the receipt and discharge of passengers and baggage at station platforms by all but one bus or transfer company, although reasonable regulations may be imposed on the privilege: since the railway company's duty to its passengers requires that adequate and suitable accommodations be furnished for the arrival and departure of passengers and their baggage from stations by such means as the latter may desire to employ. [Purcell v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 194; Donovan v. Pennsylvania Co., 199 U.S.R. 279; South Western Produce Distributors v. Wabash Ry. Co., 20 Interstate Commerce R. 458; and Crosby v. Richmond Transfer Co., 23 Interstate Commerce R. 72, referred to.]

Twin City Transfer Co. v. Can. Pac. Ry. Co., 11 D.L.R. 744, 15 Can. Ry. Cas. 323.

[Followed in Twin City Transfer Co. v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 435; Cuneo Fruit, etc., Co. v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 414; Congreave v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 423; distinguished in City Transfer Co. v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 427.

Unjust discrimination—Transfer companies.

A carrier may rent space in its stations to transfer companies on different terms for each without coming within the inhibitions as to discrimination contained in ss. 284, 317 of the Railway Act, 1906.

Twin City Transfer Co. v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 435.

[Followed in Congreave v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 423.]

Unjust discrimination—Carriers—Stations—Transfer companies.

A carrier may allot space in its stations to transfer companies on different terms for each without coming within the inhibitions as to discrimination contained in ss. 284, 317, of the Railway Act, 1906. [Twin City Transfer Co. v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 435, followed.]

Banff Livery & Busmen v. Can. Pac. Ry. Co., 19 Can. Ry. Cas 425.

PASSENGERS—ARRIVAL AND DEPARTURE—FACILITIES—POLICE REGULATIONS.

The obligations of a carrier are to provide proper facilities for the arrival and departure of passengers, subject to regulations for proper policing of its station premises within which the allotment of space falls. [Twin City Transfer Co. v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 323, 16 Can. Ry. Cas. 435, followed.]

Banff Livery & Busmen v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 425.

UNJUST DISCRIMINATION—FACILITIES—PASSENGERS.

A carrier's obligation, at a station, to its passengers, is to provide proper facilities for their arrival and departure, but it is not permitted to discriminate between passengers so using its facilities by ss. 284 and 317 of the Railway Act, 1906. [Twin City Transfer Co. v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 323, 16 Can. Ry. Cas. 435; Cuneo Fruit & Importing Co. v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 414, followed.]

Congreave v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 423.

JURISDICTION—PUBLIC INTEREST—CONTRACT.

Where no public interest is involved, and no inconvenience results to the public by the operations at a railway station of two transfer companies, the Board will not interfere between them on the mere question of their contractual rights, which should be decided in the regular Courts. Complaint of breaches of contract to which the applicant and respondent are parties. [Twin City Transfer Co. v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 323, distinguished.]

City Transfer Co. v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 427.

C. Injuries at Stations.

STATION BUILDINGS—PLANKED WAY—INVITATION TO PUBLIC TO USE—DUTY OF COMPANY.

The approach to a station of the Grand Trunk Ry. from the highway was by a planked walk crossing several tracks, and a train stopping at the station sometimes overlapped this walk, making it necessary to pass round the rear car to reach the platform, J., intending to take a train at this station before daylight, went along the walk as his train was coming in, and seeing, apparently, that it would overlap, started to go round the rear, when he was struck by a shunting engine and killed. It was the duty of this shunting engine to assist in moving the train on a ferry, and it came down the adjoining track for that purpose before the train had stopped. Its headlight was burning brightly, and the bell was kept ringing. There was room between the two tracks for a person to stand in safety. In an action by the widow of J. against the company:—Held, Fournier and Gwynne, JJ., dissenting, that the company had neglected no duty which it owed to the deceased as one of the public:—Held, per Strong and Patterson, JJ., that, while the public were invited to use the planked walk to reach the station, and also to use the company's premises, when necessary, to pass around a train covering the walk, there was no implied guaranty that the traffic of the road should not proceed in the ordinary way, and the company was under no obligation to provide special safeguards for persons attempting to pass round a train in motion:—Held, per Taschereau, J., that the death of the deceased was caused by his own negligence. Decision of the Court of Appeal, 16 A.R. (Ont.), 37, affirmed.

Jones v. Grand Trunk Ry. Co., 18 Can. S.C.R. 696.

ACCOMMODATION STATION AT RAILWAY CROSSING—INJURY TO PASSENGER CROSSING TRACK.

A passenger aboard a railway train, stormbound at L., left the train and attempted to walk through the storm to his home, a few miles distant. Whilst proceeding along the railway, in the direction of an adjacent public highway, he was struck by a locomotive engine and killed. There was no depot or agent maintained by the company at L., but a room in a small building there was used as a waiting room, passenger tickets were sold and fares charged to and from this point, and, for a number of years, travelers had been allowed to make use of the permanent way in order to reach the nearest highways, there being no other passage way provided. In an action by his administrators for damages:—Held, Taschereau and King, JJ., dissenting, that, notwithstanding the long user of the permanent way in passing to and from the highways by passengers taking and leaving the company's trains, the deceased could not, under the circumstances, be said to have been there by the invitation or license of the company at the time he was killed and that the action would not lie.

Grand Trunk Ry. Co. v. Anderson, 28 Can. S.C.R. 541.

[Referred to in Burke v. British Columbia Elec. Ry. Co., 7 B.C.R. 88, followed in De Vries v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 375.]

STATION BUILDINGS—DANGEROUS WAY—INVITATION OR LICENSE.

The approach to a station from the highway was by a planked walk crossing several tracks, and a train stopping at the station sometimes overlapped this walk, making it necessary to pass around the rear car to reach the platform. J., intending to take a train at this station before daylight, went along the walk as his train was coming in, and seeing, apparently, that it would overlap, started to go round the rear, when he was struck by a shunting engine and killed. It was the duty of this shunting engine to assist in moving the train on a ferry, and it came down the adjoining track for that purpose before the train had stopped. Its headlight was burning brightly, and the bell was kept ringing. There was room between the two tracks for a person to stand in safety. In an action by the widow of J. against the company:—Held, affirming the judgment of the Court of Appeal, 16 A.R. (Ont.) 37, Fournier and Gwynne, JJ., dissenting, that the company had neglected no duty which it owed to the deceased as one of the public:—Held, per Strong and Patterson, JJ., that, while the public were invited to use the planked walk to reach the station, and also to use the company's premises, when necessary, to pass around a train covering the walk, there was no implied guaranty that the traffic of the road should not proceed in the ordinary way, and the company was under no obligation to provide special safeguards for persons attempting to pass around a train in motion:—Held, per Taschereau, J., that the death of the deceased was caused by his own negligence:—Held, per Patterson, J.:—In an issue of negligence, the jury should be asked, "What was the duty which you find to have been neglected?"

Jones v. Grand Trunk Ry. Co. (1889), 1 S.C. Cas. 262, 18 Can. S.C.R. 696.

[Referred to in Anderson v. Grand Trunk Ry. Co., 24 A.R. (Ont.) 672; Tabb v. Grand Trunk Ry. Co., 8 O.L.R. 203.]

APPROACH TO STATION—GUARDS—RATE OF SPEED—OBSTRUCTION.

When a railway train approaches a station, at the ordinary speed (twelve miles an hour) at which a train prepares to stop, at a place where the Board has not ordered guards to be put, and which is not shewn to be a populous part of a city, town or village, and where all the warnings required by law have been given, the company is not liable for an accident caused by the engine striking a carriage driven in an imprudent manner and at an excessive pace, even when freight cars, placed on a siding, have obstructed the view of the arriving train, the company having a right to utilize the sidings for the purpose of stationing such cars there.

Filiatrault v. Can. Pac. Ry. Co., 18 Que. S.C. 491.

DANGEROUS WAY TO STATION—SLOPING PLATFORM.

The plaintiff, a contractor for supplying milk to the defendant's dining cars, after having delivered the milk in the freight shed, was returning with the empty milk cans, as was his usual practice. He was proceeding around the south-west corner of the station, down a sloping platform, at a run, when just at that time a train on the shunting track, which he had to cross, arrived a short distance north of the sloping platform and the sidewalk which lead from it across the track. The plaintiff fell and the hind trucks of the nearest car passed over his foot:—Held, (1) that the sloping platform was a dangerous way under the circumstances and its structure in that way negligent. (2) The omission to ring a bell or blow a whistle or give some other proper signal to indicate the approach of the train, and that the engine was backing down the shunting track at an excessive and dangerous rate of speed, were acts of negligence. (3) The proximate cause of the accident was not the heedlessness of the plaintiff in running, but the dangerous character of the sloping platform, which prevented him from avoiding the accident when he perceived his danger.

Hansen v. Can. Pac. Ry. Co., 7 Can. Ry. Cas. 429, 4 West. L.R. 385.

[Affirmed in 40 Can. S.C.R. 194, 7 Can. Ry. Cas. 441; adhered to in Bird v. Can. Pac. Ry. Co., 1 S.L.R. 270, 8 Can. Ry. Cas. 314; distinguished in Isbister v. Dominion Fish Co., 19 Man. L.R. 443; relied on in Toll v. Can. Pac. Ry. Co., 1 Alta. L.R. 332.]

NONREPAIR OF ROADWAY IN STATION GROUNDS.

Where one is injured by the want of repair of a road in the station yard of a railway company, and the road is one which is used by the public openly and constantly as a road for teams, and there is no notice or other indication that it is not intended to be so used, the fact that the company has provided another road in good repair, which might have been used, is no defence, in the absence of contributory negligence, to an action for damages for such injuries.

Thompson v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 99, 5 D.L.R. 145.

FAILURE TO OPEN VESTIBULE DOOR AT STATION.

Where a railway company negligently omitted to open the vestibule door of a day coach on arrival at a passenger's destination, and the passenger, in his efforts to get off the train, went to the next coach to find an open vestibule from which to alight, and the train was, by that time, pulling away from the station at a speed of three or four miles an hour, there was nothing in the rate at which the train was proceeding to make it manifestly dangerous for the plaintiff to attempt to get off, and such course on his part was not contributory negligence. [Keith v. Ottawa & New York Ry. Co., 5 O.L.R. 116, applied.]

McDougall v. Grand Trunk Ry. Co., 8 D.L.R. 271, 14 Can. Ry. Cas. 316, 27 O.L.R. 369.

STATUTES.

See Constitutional Law.

STATUTES ADOPTED FROM ENGLAND—EFFECT OF ENGLISH DECISIONS.

A statute practically copied from an English Act is taken subject to judicial decisions upon it given in England. [Trimble v. Hill, 5 A.C. 342, referred to: Pettit v. Can. Northern Ry. Co. (No. 1), 7 D.L.R. 645, varied.]

Pettit v. Can. North. Ry. Co. (No. 2), 11 D.L.R. 316, 23 Man. L.R. 213, 15 Can. Ry. Cas. 272.

CONSTRUCTION OF STATUTES.

The articles of C.C.P. being derived from the English law, the terms and expressions used therein are to be interpreted according to English practice and jurisprudence.

Feigleman v. Montreal Street Ry. Co., 3 D.L.R. 125.

[Reversed in 7 D.L.R. 6, 22 Que. K.B. 102.]

CONSTRUCTION—LATER STATUTE TO CONTROL—ACTS OF SAME SESSION—REPUGNANCY.

If there be a repugnancy between two statutes passed at the same session of the Legislature, the later statute will prevail, and where there is no other mode of distinction as to date, the chapter of the annual statutes bearing the higher number may be presumed to be later in date. [R. v. Justices of Middlesex, 2 B. & Ad. 818, followed.]

British Columbia Elec. Ry. Co. v. Stewart, 16 Can. Ry. Cas. 54, [1913] A.C. 816, 14 D.L.R. 8.

SETTING OUT AGREEMENT—BINDING EFFECT.

An agreement set out in a schedule to a statute has the same effect as if it were a clause in the statute. [25 D.L.R. 28, 22 B.C.R. 247, affirmed.]

Can. Northern Pacific Ry. Co. v. New Westminster, 36 D.L.R. 505, [1917] A.C. 602.

CONSTRUCTION—HIGHWAY CROSSED BY RAILWAY—TRANSFER FROM ONTARIO TO DOMINION—POTENTIALLY EXISTING AT TIME.

The proper construction of s. 2 of 59 Vict. c. 11, authorizing the transfer from the Government of Ontario to that of the Dominion of any lands theretofore taken by the railway company for its roadbed is, that such transfer shall not affect or prejudice the rights of the public with respect to the only common and public highways which were in existence at that time, namely, those potentially existing in the 5 per cent acreage reserved in all Government lands by the order-in-council of 1866.

Can. Pac. Ry. Co. v. Ontario Department of Public Works, 24 Can. Ry. Cas. 231, 58 Can. S.C.R. 189, 45 D.L.R. 413.

STAY OF PROCEEDINGS.

See Pleading and Practice.

STOCK.

See Shares.

STOP-OVER.

Stop-over privileges in the regulation of tolls, see **Tolls and Tariffs**; Tickets and Fares.

STOPPING-PLACES.

See Stations.

STREET RAILWAYS.

A. Franchises; Construction.
B. Use of Streets; Wires; Poles; Rails; Snow.
C. Fares; Car Service.
D. Municipal Ownership; Bonus.
E. Regulation; Railway Board.
F. Negligence; Contributory; Ultimate.
G. Duty towards Passengers; Injuries to.
H. Ejection from Cars.
I. Injuries to Animals.

See Constitutional Law; Damages; Employees; Negligence; Notice of Action; Nuisance; Pleading and Practice.

Street railway crossing other railway, see Railway Crossings.

Injuries resulting from crossings of electric wires, see Wires and Poles.

Sale of street railway and equipment in satisfaction of bonds and securities, see Sale.

Regulation of street railways by Railway Board, see Railway Board.

Criminal liability for negligence endangering life, see Crimes and Offences.

Advertising contract with street railway, see Contracts.

Expropriation of lands for street railway purposes, see Expropriation.

Powers of provisional directors to contract under Electric Railway Act see Provisional Directors.

Powers of power company to erect poles on highways, see Corporate Powers.

Annotations.

Speed; Warnings; Negligence. 2 Can. Ry. Cas. 193.

Scope of conductor's authority. 2 Can. Ry. Cas. 201.

Right of municipality to stipulate for a percentage of the gross earnings for permitting exercise of franchise by street railway. 6 Can. Ry. Cas. 393.

Reciprocal duties of motorman and drivers of vehicles crossing tracks. 1 D.L.R. 783.

Contributory negligence of child injured while crossing highway. Hargrave v. Hatt, 9 D.L.R. 521.

A. Franchises; Construction.

Franchises—Conditions as to pavements.

The Toronto Street Ry. Co. was incorporated in 1861, and its franchise was to last thirty years, at the expiration of which period the city could assume the ownership of the railway and property on payment of the value, to be determined by arbitration. The company was to keep the roadway between the rails, and for eighteen inches outside each rail paved and macadamized and in good repair, using the same material as that on the remainder of the street, but if a permanent pavement should be adopted by the city, the company was not bound to construct a like pavement between the rails, etc., but was only to pay the cost price of the same, not to exceed a specified sum per yard. The city laid upon certain streets traversed by the company's railway permanent pavements of cedar blocks, and issued debentures for the whole cost of such works. A by-law was then passed, charging the company with its portion of such costs in the manner and for the period that adjacent owners were assessed, under the Municipal Act for local improvements. The company paid the several rates assessed up to the year 1886, but refused to pay for subsequent years, on the ground that the cedar block pavement had proved to be by no means permanent, but defective and wholly insufficient for streets upon which the railway was operated. An action having been brought by the city for these rates, it was held that the company was only liable to pay for permanent roadways, and a reference was ordered to determine, among other things, whether or not the pavements laid by the city were permanent. This reference was not proceeded with, but an agreement was entered into by which all matters in dispute to the end of the year 1888 were settled, and thereafter the company was to pay a specific sum annually per mile in lieu of all claims on account of debentures maturing after that date, and "in lieu of the company's liability for construction, renewal, maintenance and repair in respect of all the portions of streets occupied by the company's track so long as the franchise of the company to use the said streets now extends." The agreement provided that it was not to affect the rights of either party in respect to the arbitration to be had if the city took over the railway, nor any matters not specifically dealt with therein, and it was not to have any operation "beyond the period over which the aforesaid franchise now extends." This agreement was ratified by an Act of the Legislature passed in 1890, which also provided for the holding of the said arbitration, which having been entered upon the city claimed to be paid the rates imposed upon the company for construction of permanent pavements for which debentures had been issued payable after the termination of the franchise. The arbitrators having refused to allow this claim, an action was brought by the city to recover the said amount. Held, affirming the decision of the Court of Appeal, that the claim of the city could not be allowed; that the said agreement discharged the company from all liability in respect to construction, renewal, maintenance and repair of the said streets; and that the clause providing that the agreement should not affect the rights of the parties in respect to the arbitration, etc., must be considered to have been inserted ex majori cautela and could not do away with the express contract to relieve the company from liability:—Held, further, that by an Act passed in 1877, and a by-law made in pursuance thereof, the company was only assessable as for local improvements, which, by the Municipal Act, constitute a lien upon the property assessed, but not a personal liability upon the owners or occupiers after they have ceased to be such; therefore, after the termination of the franchise, the company would not be liable for these rates.

Toronto v. Toronto Street Ry. Co., 23 Can. S.C.R. 198.

TRACK RENTALS—INTEREST ON PAYMENTS IN ARREAR.

The Ontario Judicature Act (R.S.O. 1897, c. 51), s. 113, enacts that "interest shall be payable by law or in which it has been usual for a jury to allow it":—Held, that under the true construction of this section it is incumbent upon the Court to allow interest for such time and at such rate as it may think right in all cases where a just payment has been properly withheld, and compensation therefor seems fair and equitable. An order by the Court below that the appellant company should pay arrears of track rentals within the limits of the respondent city, over and above their periodical payments already made, and should pay interest thereon, was affirmed.

Toronto Ry. Co. v. Toronto, [1906] A.C. 117, 5 O.W.R. 130, 132.
[Affirmed in 19 Can. Ry. Cas. 323, 34 O.L.R. 456, 26 D.L.R. 581.]

CONTRACT WITH MUNICIPALITY—OPERATION OF STREET RAILWAY—SPECIFIC PERFORMANCE.

Specific performance of an agreement by a street railway company with a municipal corporation to construct, equip and operate a line of railway along certain streets in the municipality cannot be enforced, nor damages be awarded for nonperformance of the contract if the construction of the street railway has been rendered impossible through the action of the Railway Committee in refusing to sanction a crossing, or by reason of the occupation of the street by another railway company, whether with or without lawful authority; the duty of the municipality in the case of unlawful occupation being to restore the street to a condition to permit of the construction. When the obligor in a bond agrees, if required by the obligee, to perform certain works and subsequently by agreement between the successors in law of the obligor and the obligee an absolute obligation to do the work is substituted, the effect of the later agreement is to discharge the obligation created by the bond.

Ottawa v. Ottawa Elec. Ry. Co., 1 O.L.R. 377.

AGREEMENT BETWEEN MUNICIPAL CORPORATION AND ELECTRIC RAILWAY COMPANY—CONDITIONS IN AGREEMENT REPUGNANT TO STATUTE.

By an agreement dated the 20th of November, 1888, between the predecessors of defendants and the plaintiff; authority was given to establish a system of street railways in the city of Victoria; but clause 25 of the agreement provided that the cars to be used should be exclusively for the carriage of passengers. In 1894 the Legislature passed an Act, c. 63, consequent upon a petition reciting an agreement, the incorporation of the persons named therein as a company, and the passage of an Act, c. 52 of 1890, giving the company power to build and operate tramways through the districts adjoining Victoria, and to take, transport and carry passengers and freight thereon. The petition further prayed for an Act consolidating and amending the Acts and franchises of the company then in force, and declaring, defining and confirming the rights, powers and privileges of the company. S. 16 of said c. 63 provides that "in addition to the powers conferred by the agreement the said company are hereby authorized and empowered . . . to take, transport and carry passengers, freight, express and mail matter upon and over the said lines of railway . . . subject to the approval and supervision of the city engineer, or other officer appointed for that purpose by the said corporation as to location of all poles, tracks and other works of the said company":—Held, that the passage in the agreement being repugnant to the provision in the statute, the latter should prevail.

Victoria v. British Columbia Elec. Ry. Co., 15 B.C.R. 43, 13 W.L.R. 336.

MUNICIPAL FRANCHISE—OPERATION OF TRAMWAY—EARNINGS OUTSIDE MUNICIPAL LIMITS—PAYMENT OF PERCENTAGE.

The city of Montreal called for tenders for the establishment and operation of an electric passenger railway, within its limits, in accordance with specifications and, subsequently, on the 8th of March, 1893, entered into a contract with a company then operating a system of horse tramways in the city which extended into adjoining municipalities. The contract granted the franchise for the period of thirty years from the 1st of August, 1892, and one of its clauses provided that the company should pay to the city, annually, during the term of the franchise, "from the 1st of September, 1892, upon the total amount of its gross earnings arising from the whole operation of its said railway, either with cars propelled by electricity or with cars drawn by horses" certain percentages specified, according to the gross earnings from year to year. Upon the first settlement, on the 1st of September, 1893, the company paid the percentages without any distinction between earnings arising beyond the city limits and those arising within the city, but, subsequently, they refused to pay the percentage except upon the estimated amount of the gross earnings arising within the city. In an action by the city to recover the percentages upon the gross earnings of the tramway lines both inside and outside of the city limits:—Held, reversing the judgment appealed from, the Chief Justice and Killam, J., dissenting, that the city was entitled to the specified percentage upon the gross earnings of the company arising from the operation of the tramway both within and outside of the city limits.

Montreal v. Montreal Street Ry. Co., 4 Can. Ry. Cas. 114, 34 Can. S.C.R. 459.

[Reversed in [1906] A.C. 100, 5 Can. Ry. Cas. 287; followed in Hamilton Street Ry. Co. v. Hamilton, 38 Can. S.C.R. 106; distinguished in Hamilton v. Hamilton Street Ry. Co., 10 O.L.R. 575.]

CONTRACT WITH MUNICIPALITY—PAYMENT OF PROPORTION OF GROSS RECEIPTS—"GROSS RECEIPTS."

A covenant by the defendants to pay to the plaintiffs a certain proportion of the defendants' gross receipts was held, in the circumstances of the case, to be not beyond the powers of the plaintiffs, a city corporation, and the defendants, a street railway company. Upon the proper construction of the covenant, the term "gross receipts" was held to include fares paid by passengers without the corporate territorial limits of the plaintiffs, where these passengers began their journey upon the defendants' railway beyond such limits; and also to include traffic receipts not yet earned, such as receipts from the sale of passengers' tickets still outstanding.

Hamilton v. Hamilton Street Ry. Co., 4 Can. Ry. Cas. 146, 8 O.L.R. 455.
[Affirmed in 10 O.L.R. 575, 5 Can. Ry. Cas. 206, 38 Can. S.C.R. 106.]

CONTRACT WITH MUNICIPALITY—PAYMENT OF PERCENTAGE ON GROSS RECEIPTS—"GROSS RECEIPTS."

An agreement between the parties for the payment by the defendants to the plaintiffs of a certain percentage of the defendants' gross receipts was intra vires of both; that the term "gross receipts" includes fares paid by passengers outside the limits of the city of Hamilton. The term also includes moneys received from the sale of tickets which might possibly not be used in payment of fares. Judgment of Meredith, J., 4 Can. Ry. Cas. 146, 8 O.L.R. 455, affirmed.

Hamilton v. Hamilton Street Ry. Co. (No. 1), 5 Can. Ry. Cas. 206, 10 O.L.R. 575.

[Affirmed in 38 Can. S.C.R. 106.]

MUNICIPAL CORPORATION—AGREEMENT WITH STREET RAILWAY COMPANY—USE OF STREETS—PAYMENT FOR.

By agreement between the city of Hamilton and the Hamilton Street Ry. Co., the latter was authorized to construct its railway on certain named streets and agreed to pay to the city, inter alia, certain percentages on their gross receipts:—Held, following Montreal Street Ry. Co. v. Montreal, [1906] A.C. 100, that such payment applies in respect to all traffic in the city, including that originating or terminating in the adjoining township of Barton:—Held, also, that as, when the railway was extended into Barton, the company agreed with that township to carry passengers from there into the city at city rates, the percentage was payable on the whole of such traffic, and not on the portion within the city only:—Held, further, that the power of the company to construct its railway was not derived wholly from its charter, but was subject to the permission of the city corporation; the city had, therefore, a right to stipulate for payment of such percentages and the agreement was intra vires. The judgment of the Court of Appeal, 10 O.L.R. 575, affirming Meredith, J., at the trial, 8 O.L.R. 455, was affirmed.

Hamilton Street Ry. Co. v. Hamilton, 38 Can. S.C.R. 106.

Routes and speed—Ratio of track mileage to increased population.

The defendants passed a resolution authorizing certain extensions and changing some of the routes of the plaintiffs' railway, and the plaintiffs, relying upon a by-law being passed later to carry out the resolution, performed certain work and incurred expense. The by-law was subsequently passed, read a first, second and third time at one meeting of the defendants, signed by the clerk, sealed with the municipal seal, but not signed by the mayor. In an action to compel the mayor to sign it and the defendants to accept an agreement to carry it out:—Held, that the company took the risk of a by-law being passed, and that they were not misled; and that without the mayor's signature it was incomplete and invalid:—Held, also, that two by-laws, set out in the judgment of MacMahon, J., as to the routes and speed of the plaintiffs' cars were, under the circumstances, valid as being within the defendants' power and authority under 59 Vict. c. 105 (Ont.), which validated a by-law of the defendants and an agreement between plaintiffs and defendants under which the plaintiffs built and operated their railway. By the original by-law, under which the road was authorized to be built and operated, as set out in the judgment of MacMahon, J., the defendants were bound to establish new lines, as might be directed by by-law of defendants, in the proportion of one mile of track to every 2,000 inhabitants of the city then existing or thereafter extended, the population to be ascertained as mentioned in the by-law, and that in the event of any local municipality being annexed, the railways of the company within the annexed municipality, and the company in relation thereto should have all the rights and be subject to the terms of the by-law. A local municipality was annexed to the defendants' municipality in 1898, and at the time of annexation had a street railway trackage of 5,900 feet. The population of the city in 1901 was 39,183 being an increase of 4,183, and the proportion of additional trackage to population was 11,043 feet. By a subsequent by-law defendants were directed to construct 7,380 feet of additional track:—Held, Maclennan, J.A., dissenting, that under the original by-law the mileage of the local municipality must be added to the mileage of the lines in the city at the time of the annexation, and the amount deducted from the amount required by the last-mentioned by-law, which was consequently bad as being in excess of the mileage the defendants could require.

London Street Ry. Co. v. London, 4 Can. Ry. Cas. 171.

Percentage on gross earnings—"Whole operation of its railway."

By art. 1018 C.C. (Que.) "all the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire Act." The appellant company having contracted with the respondent city to pay annually certain specified percentages on the total amount of their gross earnings arising from the whole operation of their railway, and it appearing from the rest of the contract that the city considered territories of outside municipalities were not included within its scope, and that it could only deal with streets within its jurisdiction, and that the company had to make separate arrangements with outside municipalities in respect of the operation of the railway within their limits:—Held, that by the true construction of the contract the city was only entitled to percentages on the gross earnings arising from the whole operation of the lines within its own limits.

Montreal Street Ry. Co. v. Montreal, 5 Can. Ry. Cas. 287, [1906] A.C. 100.

[Followed in Hamilton Street Ry. Co. v. Hamilton, 38 Can. S.C.R. 106; distinguished in Hamilton v. Hamilton Street Ry. Co., 10 O.L.R. 575.]

Statutory grants.

Where the Legislature requires that privileges shall be granted by by-law, they cannot be granted or acquired in any other manner, e.g., by overt act, waiver or acquiescence either by a committee of the council or by the whole municipal council itself.

Montreal Street Ry. Co. v. Montreal, 3 D.L.R. 812.

Current—Municipal consent—Restrictions as to importation.

A company empowered to operate a street railway and to supply electricity for light, heat and power, over poles and wires erected in the streets and public places of a city, may, without first obtaining the consent of the city, transmit thereon electricity generated and developed beyond the city limits.

Winnipeg Elec. Ry. Co. v. Winnipeg, 4 D.L.R. 116, [1912] A.C. 355.

Franchises—Switches—Use of highways.

A stipulation in an agreement between a county corporation and the railway company which deals in several respects with the entire line of an electric railway, that the company may construct, put in, and maintain such switches, and turn-outs, as may from time to time be found necessary for the operating of the company's line of railway on a named street, is to be construed as of general application to the whole of the line upon the street named and not merely to the line of extension of the railway on that street which the agreement authorizd. It is within the jurisdiction of the Chairman of the Ontario Railway and Municipal Board to construe an agreement between a county corporation and a railway company granting power to enlarge the number of switches operated by the railway company upon a highway.

Re Waddington and Toronto & York Radial Ry. Co., 9 D.L.R. 81, 15 Can. Ry. Cas. 82.

Municipal franchises—Validity—Intervention of Attorney-General.

A municipal corporation cannot attack the validity of a contract between it and an electric railway company because the by-law authorizing its execution was not submitted to the electors for approval as required by s. 64 of the B.C. Municipal Act of 1897, where the company had made large expenditures as a direct consequence of its execution, if not pursuant to the contract. In an action by a municipal corporation to obtain a declaration that a contract between it and an electric railway company is void because a portion of its conditions were ultra vires, the Court will not, on such general claim, make a selection of such of its provisions as are ultra vires, but will leave that to be settled in concrete cases questioning the validity of specific clauses of the agreement. The Attorney-General should be made a party to a proceeding to question the power of an electric railway company to operate its road notwithstanding informalities in obtaining the municipal franchise, where, after due notice to the municipality, an authorization of certain crossings had been made by the Board on the footing of the electric railway having the requisite franchise. [Re Point Grey, 16 B.C.R. 374, distinguished.]

Burnaby v. British Columbia Elec. Ry. Co., 12 D.L.R. 320.

CONTRACT FOR CONSTRUCTION—SANCTION OF CONTRACT BY SHAREHOLDERS.

Action for damages for breach of contract for construction of electric railway. Plaintiff proved execution of the contract under corporate seal signed by president and secretary. The contract was never carried out:—Held, that R.S.O. (1897), c. 209, s. 17, had enacted that no such contract should be of any force or validity until sanctioned by a resolution passed by the votes of the shareholders, in person or by proxy, representing two-thirds in value of the paid-up stock, at a general meeting specially called, and not having been complied with action should be dismissed, but under the circumstances without costs.

Thomas v. Walker, 1 O.W.N. 1094, 16 O.W.R. 751.

MUNICIPAL ORDINANCE—BY-LAW—VALIDITY—APPROVAL BY RATEPAYERS—SPECIAL PRIVILEGE CONFERRED BY LEGISLATURE.

A municipal by-law directing the execution of an agreement between the municipality of Point Grey and an electric railway company consenting to the construction of a tramway on certain streets of the municipality and also imposing terms on which cars should be operated, does not confer such particular privilege, right or franchise as to require the submission of the by-law to the ratepayers for approval under s. 64 of the Municipal Clauses Act, B.C. Stat. 1906, where the railway company was empowered by c. 55 of the B.C. Stat. of 1896, to construct and operate a tramway in that and other municipalities subject to the consent of the municipal council being first obtained and to the latter's designation of the streets upon which the tramway should be built, although the permission of the municipal council was further specified by statute to be upon such conditions as to plan of construction and for such period as might be agreed upon between the company and the council; the purpose of the proviso requiring the consent of the municipality is restrictive and not donative in character, and its function is to circumscribe, or impose conditions upon the exercise of the rights already conferred by the Legislature. [Re Point Grey Elec. Tramway By-law, 16 B.C.R. 374, reversed.]

British Columbia Elec. Ry. Co. v. Stewart, 16 Can. Ry. Cas. 54, [1913] A.C. 816, 14 D.L.R. 8.

ESTOPPEL—MUNICIPALITY—WAIVER OF RIGHT TO ASSERT FORFEITURE OF FRANCHISE.

Mere forbearance on the part of a municipality in asserting a forfeiture of a street railway company's franchise for noncompliance with its requirements, does not amount to a waiver of or acquiescence in the default of the company.

Brantford v. Grand Valley Ry. Co., 16 Can. Ry. Cas. 408, 15 D.L.R. 87.

COURTS—RAILWAY COMMISSION—FORFEITURE OF RAILWAY FRANCHISE.

Since the Railway Act, 1906, does not confer jurisdiction on the Board to declare or relieve from a forfeiture, it being clothed only with such powers as are conferred by the Act, or by some special Act, or suc has relate to the enforcement of orders, regulations and directions made thereunder, the Courts are not deprived of jurisdiction to declare the forfeiture of a street railway franchise for substantial breaches of its terms. [Waterloo v. Berlin, 7 D.L.R. 241, and in appeal, 12 D.L.R. 390, distinguished.]

Brantford v. Grand Valley Ry. Co., 16 Can. Ry. Cas. 408, 15 D.L.R. 87.

INJURY TO ADJOINING PROPERTY OWNER—RESTRICTING ACCESS.

A property owner on the street affected who would sustain special damage because of restricted access to his property if an electric railway line were extended along the adjoining street may sue the railway company to restrain the construction, although authorized by the municipality if no permission has been obtained from the Ontario Railway and Municipal Board by the company subject to its authority under the Ontario Railway Act, 3 & 4 Geo. V. c. 36, s. 250.

Mitchell v. Sandwich, Windsor & Amherstburg Ry. Co., 19 Can. Ry. Cas. 300, 32 O.L.R. 597, 22 D.L.R. 531.

EXCLUSIVE RIGHTS, SUBJECT TO FRANCHISES OF OTHER RAILWAYS—REMOVAL OF RESTRICTIONS.

A municipal corporation granting a street railway company the exclusive right to operate surface street railways in the city, for a term of years, subject to certain restrictions, effected by the franchises of other railways, cannot, after the removal of restrictions upon the termination of the other franchises, within the period of the grant, withhold its consent to the right to operate upon the portion of a street vacated by another franchise, in the same manner as upon the other streets of the city. [Toronto Ry. Co. v. Toronto, [1906] A.C. 117, followed, 5 O.W.R. 130, 132, affirmed.]

Toronto Ry. Co. v. Toronto, 19 Can. Ry. Cas. 323, 34 O.L.R. 456, 26 D.L.R. 581.

[Affirmed in 20 Can. Ry. Cas. 115, 29 D.L.R. 1, [1916] 2 A.C. 542.]

EXCLUSIVENESS UPON TERMINATION OF ANTECEDENT RIGHTS.

An agreement granting an exclusive franchise for a period of years over a defined area, and, so far as the grantor can, over another area in which a third party has existing rights, will take effect so as to confer on the grantee an exclusive franchise within the second area when the antecedent rights terminate. 26 D.L.R. 581, 34 O.L.R. 456, affirmed.

Toronto v. Toronto Ry. Co., 20 Can. Ry. Cas. 115, [1916] 2 A.C. 542, 29 D.L.R. 1.

JURISDICTION—REPAIR OF ROADWAY—AGREEMENT WITH MUNICIPALITY—"KEEP CLEAN AND IN PROPER REPAIR"—NEW PAVING—"TRACKS."

Under the Ontario Railway and Municipal Board Amendment Act, 1910, the Board has no jurisdiction to require the appellants operating a street railway along certain streets in Toronto to pave the part of the road used by the railway or to do works which would give the roadway a new character when the agreement with the municipality under which the appellants operate (clause 6) provides that the appellants should "keep clean and in proper repair that portion of the traveled road between the rails and for eighteen inches on either side thereof."

Toronto Suburban Ry. Co. v. Toronto, 20 Can. Ry. Cas. 260, [1915] A.C. 590, 24 D.L.R. 269.

Alteration of route—Municipal consent.

The Toronto & York Radial Ry. Co., by the terms of its franchise and by legislation, is authorized to deflect its lines from Yonge street in the city of Toronto, to a private right-of-way owned by it; the deflection is for the purpose of enabling it to operate the railway already located and constructed, and therefore the consent of the municipal council is not necessary.

Toronto & York Radial Ry. Co. v. Toronto, 21 Can. Ry. Cas. 167, 31 D.L.R. 627.

Agreement with corporation—Construction—Liability.

A railway company which is obligated under a by-law granting it the right under certain conditions to construct, maintain and operate an electric railway, to pay an agreed rate for every mile or pro rata for a portion of a mile of railway operated, is liable to pay only for the portion of railway actually operated; if, however, the effect of the by-law is that the whole railway is to be operated, the company is liable in damages for nonperformance of this condition, the damage being equal to the amount the company would have had to pay had the whole line been operated.

Wentworth v. Hamilton Radial Elec. Ry. Co., 41 D.L.R. 199.

Agreement with corporation—Construction—Operation—Former action—Cause of action not the same—Same question not in issue—Res adjudicata—Estoppel.

A railway company which is obligated under a by-law granting it the right under certain conditions to construct, maintain and operate an electric railway, to pay an agreed rate for every mile or pro rata for a portion of a mile of railway operated, is liable to pay only for the portion of railway actually operated; if, however, the effect of the by-law is that the whole railway is to be operated, the company is liable in damages for nonperformance of this condition, the damage being equal to the amount the company would have had to pay had the whole line been operated. Where the cause of action is not the same as a former action (County of Wentworth v. Hamilton Radial Elec. Ry. Co., 28 D.L.R. 110, 31 O.L.R. 659, 33 D.L.R. 439, 35 O.L.R. 434, 54 Can. S.C.R. 178), and the same question was not in issue and was not raised or decided, there can be no application of the doctrine of estoppel or res adjudicata.

Wentworth v. Hamilton Radial Elec. Ry. Co., 23 Can. Ry. Cas. 209, 41 O.L.R. 524, 41 D.L.R. 199.

Location and plans—Approval.

Clause 5 of the agreement between the Metropolitan Street Ry. Co. and the municipal council of the County of York, in schedule A of 56 Vict. c. 94 (Ont.), setting out that the location of the line of the railway in the said street or highway shall not be made until the plans shewing the positions of the rails and other works have been submitted to and approved by the warden, county Commissioners and engineer, and clause 3 of the agreement in schedule A of 60 Vict. c. 92, setting out that before the work is commenced upon any section of such extension, the plans setting forth the proposed location of the company's tracks shall be approved by the committee, form the very basis of all the work to be afterwards undertaken and the production of the plans so approved cannot be dispensed with by the Ontario Railway and Municipal Board. [Toronto & York Radial Ry. Co. v. Toronto, 15 D.L.R. 270; Toronto v. Metropolitan Ry. Co., 1 Can. Ry. Cas. 63, 31 O.R. 367, applied.]

Re Toronto & York Radial Ry. Co. and Toronto, 26 D.L.R. 244.

OPERATION ON CITY STREETS—CONSENT OF MUNICIPALITY.

The provisions of s. 235 of the Railway Act, 1906, requiring the consent by by-law of the municipal authority of a city or incorporated town before any company can carry its lines upon the highway, only applies to a street railway or a railway operated as such.

Re London Railway Commission, 32 W.L.R. 224.

B. Use of Streets; Wires; Poles; Snow.

GRADING STREET—DAMAGE TO LAND ADJOINING—SUPPORT.

A street railway company, in grading a street in Vancouver, in accordance with an agreement entered into with the corporation, pursuant to the Vancouver Incorporation Act and Amendment of 1895, is not liable for damages for loss of support caused to lands adjoining the street.

Macdonell v. British Columbia Elec. Ry. Co., 9 B.C.R. 542.

REGULATION OF USE OF HIGHWAYS—FINES AND PENALTIES.

(1) The Recorder's Court for the city of Montreal has jurisdiction to try an action for the recovery of a fine imposed for a breach of the conditions in a by-law to grant a street railway company certain privileges. The fact that a contract is entered into by the city and the company, to carry out the by-law, does not alter the nature of the duties prescribed by the latter, so as to convert them into contractual obligations. (2) When a municipal by-law has a proviso to be carried out upon an order to be given by the council, the adoption by the latter of a report of one of its committees empowered to deal with the matter, recommending performance and that instructions be given for the purpose, amounts to a substantive order, as required by the by-law. (3) A clause in a by-law imposing a penalty, that its enforcement shall devolve upon an officer named, makes it his duty to initiate and carry on proceedings, but does not mean that he must do so in his own name. (4) A covenant in a contract between a city and a street railway company, that the latter, in case of annexation by the former "of any of the outside municipalities, shall extend its system" thereto, is binding only as to the outside municipalities that were, at the time of the contract, contiguous to and adjoining the city. (5) A company cannot be compelled to execute a covenant into which it has no power to enter under its charter. (6) When a contract between a city and a street railway company, to build and operate a railway, designates the streets in which this is to be done, and a covenant is added that in case of the annexation of neighbouring territory, the company shall extend its railway to it, when ordered to do so, the order to be effective, must designate the streets in the new territory to which it is meant to apply. (7) A covenant to extend a railway into "outside municipalities" thereafter to be annexed, does not apply to "parts of outside municipalities" which are annexed. (8) Nor can the company be compelled to carry it out, until the city has complied with subsequent legislative enactments of a public nature, for the protection of interested parties.

Montreal Street Ry. Co. v. Recorder's Court, 37 Que. S.C. 311 (Davidson, J.).

[See Quebec Ry., etc., Co. v. Quebec, 41 Can. S.C.R. 145, affirming 17 Que. K.B. 256, 32 Que. S.C. 489.]

Use of streets—By-law—Penalty.

The city enacted a by-law granting the company permission to use its streets for the construction and operation of a tramway, and, in conformity with the provisions and conditions of the by-law, the city and the company executed a deed of agreement respecting the same. A provision of the by-law was that "the cars shall follow each other at intervals of not more than five minutes, except from eight o'clock at night to midnight, during which space of time they shall follow each other at intervals of not more than ten minutes. The council may, by resolution, alter the time fixed for the circulation of the cars in the different sections." For neglect or contravention of any condition or obligation imposed by the by-law, a penalty of $40 was imposed to be paid by the company for each day on which such default occurred, recoverable before the Recorder's Court, "like other fines and penalties." An amendment to the by-law, by a subsequent by-law, provided that "the present disposition shall be applicable only in such portion of the city where such increased circulation is required by the demands of the public":—Held, that default to conform to the conditions and obligations so imposed on the company was an offence against the provisions of the by-law, and that, under 29 & 30 Vict. c. 57, s. 50 (D.), the exclusive jurisdiction to hear and decide in the matter of such offence was in Recorder's Court of the city of Quebec. Quebec Ry. v. Recorder's Court, 17 Que. K.B. 256, 32 Que. S.C. 489, affirmed.

Quebec Railway, Light & Power Co. v. Quebec, 41 Can. S.C.R. 145.

[See Montreal Street Ry. Co. v. Recorder's Court, 37 Que. S.C. 311.]

Duty and care of street railway.

Apart from statutory enactment, a street car and other vehicles have equal rights of the same kind to the concurrent use of the streets, the rights and duties of both are reciprocal and mutual, and each is bound to the exercise of reasonable care in self-protection and in avoiding harm. [Jones v. Toronto & York Radial Ry. Co., 25 O.L.R. 158, specially referred to.]

Carleton v. Regina, 1 D.L.R. 778, 20 W.L.R. 395, 5 S.L.R. 90.

[Referred to in Balke v. Edmonton, 1 D.L.R. 876, 4 Alta. L.R. 406.]

Franchises—Rights in and to use of streets—Duty to pave between and outside of rails.

Where the predecessor of a street railway company, on being granted a long term franchise by the predecessor of a municipal corporation to build a street railway in a public highway in close proximity to a large and rapidly growing city, agreed that the traveled portion of the highway between the rails and for eighteen inches outside thereof should be kept clean and in proper repair by the railway (such agreement being confirmed by 63 Vict. (Ont.) c. 124), the company is bound to pave between its rails and for eighteen inches outside thereof at its own expense on the highway becoming a city street and being subsequently paved by the municipality, notwithstanding the highway was but an unpaved "mud road" when such agreement was entered into. The Ontario Railway and Municipal Board, under s. 3 of 10 Edw. VII. (Ont.) c. 83, which provides that the Board may require the making of changes, repairs, improvements or additions which ought reasonably to be made in the tracks used by any railway company in connection with the transportation of passengers, freight or property, in order to promote the security or convenience of the public, has power to require a street railway company, at its own expense, to pave between its rails and for eighteen inches outside thereof on the subsequent paving by a city of the highway on which the tracks were laid, notwithstanding the fact that when the company acquired its franchise and laid its tracks on such highway it was a mere "mud road" lying beyond but in close proximity to the limits of a large and rapidly growing city; since the word "tracks" as used in s. 3 must be given its widest meaning so as to include not only the rails thereof, but also that part of the highway occupied by the railway itself. The power of the Board, under s. 3 of 10 Edw. VII. (Ont.) c. 83, to require a street railway not constructed under an order of the Board, to pave between its rails and outside thereof, is not affected by c. 54 of 1 Geo. V. (Ont.), which is applicable only to such railway as may have been constructed under an order of such Board. On requiring a street railway company to pave between and outside of its rails, the Board should prescribe the materials to be used, and not leave it to the determination of the engineer of the Board in the event that the city and the railway company cannot agree in respect thereto. [New York v. Harlem Bridge, etc., Ry. Co., 186 N.Y. 304, followed.]

Re Toronto and Toronto & Suburban Ry. Co., 13 D.L.R. 675, 29 O.L.R. 105.

USE OF STREETS FOR POLES AND WIRES CARRYING ELECTRIC CURRENT—AGREEMENT TO KEEP POWER HOUSES WITHIN CITY LIMITS.

It was a term of the agreement between the plaintiffs and the Winnipeg Elec. Street Ry. Co. that the company would place and keep within the city limits all their engines, machinery, power houses, etc., for their street railway system, and the agreement further provided that, in so far as its terms and conditions related to the operation, conduct and management of the railway system, the same and the fulfilment of same should be conditions precedent to the continued enjoyment of the privileges and rights of the company. In 1904 the above-named company amalgamated, under the name of the defendants, with the Winnipeg General Power Co., which had, under its charter powers, constructed a hydro-electric plant at Lac du Bonnet, on the Winnipeg river, and a line of poles and wires for the transmission of the electric current to the city. The power company's Act of incorporation gave it the right to erect poles and wires in the streets of the city for the purpose of conveying electric current for lighting, heating or supplying motive power with the consent of the council. No such consent was ever given or asked for, but after the amalgamation the defendants discontinued the use of their steam power plant in the city, and operated their street railway system by power derived from the alternating current brought into the city from the power plant at Lac du Bonnet and changed at a transforming station in the city into the direct current used for propelling the cars:—Held (Richards, J.A. dissenting), that there had been no breach of the term of the agreement first above referred to, that there was nothing in the agreement requiring the defendants to generate their own power for the purpose of operating their cars, that they would have the right to purchase power for that purpose from any other company, and that the power used in propelling the cars was, in fact, generated within the city limits. Per Mathers, J., in the Court below:—There was a distinct breach of the agreement for which an action for damages would lie, but the keeping of the power house within the city was not a condition or term relating to the "operation, conduct and management" of the railway system, and, therefore, there was no forfeiture of the rights and privileges of the defendants. Moreover, if the agreement had fully provided for such forfeiture, the city had waived it by afterwards passing by-laws fixing schedules for the running of the cars, by calling on the company to proceed at once with the construction and operation of new lines, which were accordingly built and subsequently operated at great expense to the company, and by accepting five per cent of the gross earnings of the company payable under the agreement, all these things having been done after the plaintiffs had full knowledge of the alleged breach of the agreement. The defendants, through the amalgamation with the power company, had also acquired the right to develop electric energy outside the city and to distribute it in the city through poles and wires for lighting and commercial power purposes, but only with the consent of the city council; and their own act of incorporation empowered them to furnish light and power and use the streets for those purposes, but only when authorized by a by-law of the city:—Held, (1) as no such consent had been given or by-law passed, the plaintiffs were entitled to an injunction to prevent the defendants from erecting, maintaining or re-erecting poles or wires on the streets, lanes or highways of the city for the transmission of electric energy for any purpose other than for their street railway and requiring the defendants, upon due notice, to remove all such poles and wires now used by them for any such other purpose. (2) The city was not estopped from applying for the injunction by having applied for, taken and paid for power transmitted with its knowledge, over the poles and wires objected to, from the plant outside the city without its consent and against its protest. (3) The issue by the city engineer of a permit for the erection of the poles and wires objected to, intended only to authorize the use of them for electric lighting purposes, did not obviate the necessity of the consent of the city being obtained for the transmission of current for power purposes. Such a permit amounted to no more than a license to erect the poles and wires which might be revoked at any time. The Manitoba Electric & Gas Lighting Co., incorporated in 1880 by special Act of the Legislature, had power to use the streets of the city for carrying on the business of electric and gas lighting within the city with the authority of the council and upon obtaining permits from the city engineer. It carried on this business with the necessary authority until 1898, when it conveyed by deed its systems of gas and electric light works and also "all franchises, rights, powers, assets, plant and appliances" to the Winnipeg Electric Street Ry. Co. The Gas Company's Act gave it power to alienate "any of its personal property, lands, tenements, rights and franchises or interest therein as it might see fit." The defendants had also, in 1900, acquired by deed from the North-West Electric Company, which had been incorporated by letters patent under the Joint Stock Companies Act, its system of electric lighting and power works, which it had been operating in the city under conditions similar to those of the gas company, and also all its "franchises, rights, powers," etc.:—Held, that neither the gas company nor the electric company had power to alienate its corporate powers, and that the defendants had not, by said deeds, acquired any right to erect or maintain poles and wires in the streets of the city for purposes of electric lighting, heating or power, unless authorized to do so by by-law of the city, although those companies which were now defunct, had formerly acquired and exercised such rights:—Held, also, that the Attorney-General was not a necessary party to the action. [Fenelon Falls v. Victoria Ry. Co., 29 Gr. 4, followed; Wallasey Local Board v. Gracey (1887), 36 Ch. D. 593, distinguished.] The ratification by Act of the Legislature of the by-law of the city providing for the agreement between it and the company gave the terms of the by-law the force of a statute, and thereafter the plaintiffs could not by any action of theirs lose their right to insist upon the company's complying with the terms of the statute and the by-law, or give the defendants any additional rights by estoppel, waiver or acquiescence. [Pembroke v. Canada Central Ry. Co. (1883), 3 O.R. 503; Port Arthur v. Fort William (1898), 25 A.R. (Ont.) 522, and Toronto v. Toronto Ry. Co. (1906), 12 O.L.R. 534, distinguished.] The parties being unable to agree on settling the minutes of the judgment to be entered, the matter was afterwards brought before the Court, when counsel for defendants for the first time pointed out that the relief granted went beyond that asked for by the statement of claim:—Held, that the statement of claim should not be amended at this stage, although asked for by the plaintiffs, but that, under all the circumstances, the judgment should stand.

Winnipeg v. Winnipeg Elec. Ry. Co., 20 Man. L.R. 337, 16 W.L.R. 62.

Municipal by-law regulating erection of wires and poles in streets —Compensation—Removal of poles and wires.

A by-law of the city of Winnipeg, passed to regulate the erection and maintenance of electric poles and wires, specially provided that it should not be applicable to poles or wires erected or required to be erected for the purpose of operating an electric street railway system, and that as to other poles and wires it purported to regulate their erection or maintenance only upon streets and public places vested in or under the control of the city. Subject to these limitations, paragraph 1 of the by-law provided that no pole or wire should be erected without a permit from the city; paragraph 3, that every permit should be subject to revocation by the city at any time, in the absence of an agreement ratified by by-law, without compensation, that the acceptance of a permit should constitute an agreement, and that upon revocation poles and wires should be removed within 14 days after notice, etc.; and paragraph 4, that the officers of the city were authorized and directed to cut down poles and wires not removed after notice of revocation, etc. Upon a moton to quash the by-law:—Held, having regard to the provisions of the Winnipeg charter, and especially s. 703, subs. 123, that the provisions of the by-law were not ultra vires, unreasonable, or oppressive:—Held, also, that the by-law did not interfere with the vested interests of the applicants under the various statutes incorporating them and granting them certain powers and privileges and under agreements made pursuant to these statutes. [Winnipeg v. Winnipeg Elec. Ry. Co., 13 W.L.R. 21, 16 W.L.R. 62, referred to.]

Re Winnipeg Elec. Ry. Co. and Winnipeg, 16 W.L.R. 654.

Jurisdiction of Ontario Railway and Municipal Board—Order for repair and renewal of tracks—"Construct," meaning of.

(1) The Ontario Railway and Municipal Board had power, under ss. 63, 64 of the Ontario Railway and Municipal Board Act, 1906, to make an order requiring the Toronto Ry. Co. to repair, renew, and restore to a suitable and satisfactory condition the tracks and substructure in use upon a certain street in the city of Toronto formerly in the town of Toronto Junction, over which the company operated its tracks; and there was jurisdiction to make the order notwithstanding the absence from the record of the Toronto Suburban Street Ry. Co. Construction of the agreement between the corporation of the town of Toronto Junction and the Toronto Suburban Street Ry. Co., of the 11th November, 1899, validated and confirmed by 63 Vict. c. 103 (Ont.) and set out in schedule B., thereto; and of the agreement between the town of Toronto Junction, the To-

ronto Ry. Co., and the Toronto Suburban Street Ry. Co., of the 6th October, 1899, validated and confirmed by the same statute, and set out in schedule D. "Construct," in clause 12 of the first-mentioned agreement, requiring the company to construct the tracks and superstructure according to the best modern practice from time to time in general use, is not confined to original construction, but includes necessary reconstruction,—the meaning is "construct from time to time" or "construct and maintain":—Held, also, that the railway was a street railway, within s. 2 (21) of the Ontario Railway Act, 1906; s. 164, which provides for the case of a railway becoming dangerous from lack of repairs or renewals, applies to street railways; and the Board had power, under that Act, to deal with such a situation—that is, of danger to the public—independently of the agreements between the municipality and the railway company. Semble, also, that the Ontario Railway and Municipal Board Amendment Act, 1910, passed while the proceedings before the Board were pending, but before the hearing, under which the powers of the Board were enlarged, also applied—the effect of certain sections of the new Act being to modify the general rule that pending proceedings are not to be affected by new legislation.

Re West Toronto and Toronto Ry. Co., 25 O.L.R. 9, 20 O.W.R. 271.

ERECTION OF POLES—BY-LAW FOR REMOVAL.

A city that has, under a general by-law, granted permits to a company to erect poles in its streets and public places cannot, after such permits have been acted upon, require the removal of such poles on the ground that the permits were void because issued without the adoption of a by-law in each instance. [Winnipeg v. Winnipeg Elec. Ry. Co., 20 Man. L.R. 337, 16 W.L.R. 62, reversed.]

Winnipeg Elec. Ry. Co. v. Winnipeg, 4 D.L.R. 116, [1912] A.C. 355.

ERECTION OF POLES—TRANSMISSION OF ELECTRICITY.

Power granted under 43 Vict. (Man.) c. 36 to a company to "break up, dig, and trench so much and so many of the public streets, roads, squares, highways, and other public places in any municipality . . . as may at any time be necessary or required for laying down or erecting [or repairing] the mains, pipes or wires to conduct" gas or electricity, will permit the erection of poles therein to carry wires necessary for the conveyance of electricity. [Winnipeg v. Winnipeg Elec. Ry. Co., 20 Man. L.R. 337, 16 W.L.R. 62, reversed.]

Winnipeg Elec. Ry. Co. v. Winnipeg, 4 D.L.R. 116, [1912] A.C. 355.

ERECTION OF POLES AND ELECTRIC WIRES.

All doubt as to the power of a company to erect poles to carry electric wires through the streets and public places of a city is concluded by the fact that the city agreed to grant the company permits, under certain conditions, to erect poles therein, and requiring that it should permit the use thereof by other companies, and also by the city for wires of its fire alarm system, or for heat and light.

Winnipeg Elec. Ry. Co. v. Winnipeg, 4 D.L.R. 116, [1912] A.C. 355.

COST OF REPAIRS—MAINTENANCE OF ROADWAY.

A corporation obliged to maintain a public road which enters into a contract authorizing a company to construct and operate a tramway on said road on condition of maintaining it and keeping it in repair does not acquire a privilege on the tramway for the cost of repairs which it was obliged to make owing to the insolvency of the company.

Morse v. Levis County Ry. Co., 30 Que S.C. 353.

OBSTRUCTION OF STREET—ACCUMULATION OF SNOW.

An action was brought against the city of Toronto to recover damages for injuries incurred by reason of snow having been piled on the side of the streets, and the street railway company was brought in as third party. The evidence was that the snow from the sidewalks was placed on the roadway immediately adjoining by servants of the city and snow from the railway tracks was placed by servants of the railway company upon the roadway immediately adjoining the track without any permission from the city, thus raising the roadway next to the track, where the accident occurred, to a height of about twenty inches above the rails. The jury found that the disrepair of the street was the act of the railway company, which was therefore made liable over to the city for the damages assessed. The company contended on appeal that the verdict was perverse and contrary to evidence:—Held, affirming the decision of the Court of Appeal, that under the evidence given of the manner in which the snow from the track had been placed on the roadway immediately adjoining, the jury might reasonably be of opinion that if it had not been so placed there the accident would not have happened, and, that this was the sole cause of the accident.

Toronto Ry. Co. v. Toronto, 24 Can. S.C.R. 589.

[Commented on in Mitchell v. Hamilton, 2 O.L.R. 58.]

AGREEMENT FOR REMOVAL OF SNOW.

A covenant or agreement in a contract between a city municipality and a tramcar company, pursuant to a by-law granting the privilege to operate tramcars on certain conditions, that the company shall pay the city one-half the cost of the removal of snow from the entire street surface, in the streets where the tramcars pass, is not an agreement of a commercial nature, within the meaning of art. 421 C.C.P. Hence, a trial by jury cannot be had in an action brought under the agreement by the city against the company, to recover the cost of removal of snow.

Montreal Terminal Ry. Co. v. Montreal, 19 Que. K.B. 216.

RIGHT TO CLEAR ICE AND SNOW INTO THE STREETS—ELECTRIC SWEEPER.

The City Council of Montreal being bound as the road authority to remove the ice and snow on the streets from curb to curb, including the snow thrown or falling thereon from the roofs of houses and removed thereto from the sidewalks:—Held, that the respondent street railway company, having contracted with the city to keep their track free from ice and snow, did not, having regard to the surrounding circumstances, and in the absence of words expressly or impliedly forbidding it, commit a nuisance by sweeping their snow into the street. [Ogston v. Aberdeen District Tramways Co., [1897] A.C. 111, distinguished.] Held, also, that the city having granted to the company all rights and privileges necessary for the proper and efficient use of electric power to operate cars in the streets in the manner successfully in use elsewhere, the latter could not be prevented from using the electric sweepers. 11 Que. K.B. 458, affirmed.

Montreal v. Montreal Street Ry. Co., [1903] A.C. 482.

[Distinguished in Bell v. Cape Breton Elec. Co., 37 N.S.R. 303; Mader v. Halifax Elec. Tramway, 37 N.S.R. 548.]

Removal of snowfalls—Electric sweeper—Construction of agreement.

The agreement with the plaintiffs under which the defendant's railway is operated provides that the track allowances shall be kept free from snow at the expense of the defendants, so that the cars may be in use continuously; and that if the fall of snow is less than six inches at any one time, the defendants must remove the same from the tracks, and shall, if the city engineer so directs, evenly spread it on the adjoining portions of the roadway, but should the quantity of snow at any time exceed six inches in depth, the whole space occupied as track allowances shall be at once cleared of snow, and the snow removed and deposited at such points on or off the street as may be ordered by the city engineer. 55 Vict. c. 99, s. 25 (Ont.), passed to construe the above, enacts that the defendants shall not deposit snow on any street, square, highway or other public place in the city of Toronto without having first obtained the permission of the city engineer:—Held, that there was nothing in the above to prevent the defendants from sweeping the small snowfalls or the large to the sides of the road by means of an electric sweeper, and the purpose of the application being to prevent the use of the sweeper altogether, the appeal should be dismissed.

Toronto v. Toronto Ry. Co., 16 O.L.R. 205.

Removal of snow from tracks.

By the provisions of a municipal by-law, to which a street railway company were bound to conform, the company were obliged to remove snow from their tracks in such manner as not to obstruct or render unsafe the free passage of sleighs or other vehicles along or across the street. After a heavy snow-fall the company removed the snow from their tracks, the result being that there was a bank of several inches at each side of the tracks to the level of the snow-covered portions of the street:—Held, that the company had not discharged their obligation and that they were liable to indemnify the city against damages recovered against the city by a person who had in consequence of the bank been upset while driving along the street. Judgment of Rose, J., affirmed.

Mitchell v. Hamilton, 2 O.L.R. 58 (C.A.).

Excessive speed—Nuisance caused by depositing snow on street.

The defendant company removed from their tracks snow which accumulated there during a heavy snow storm, and deposited it upon the highway in such a way as to make it impassable to waggons, which were forced, in consequence, to make use of the company's track, of which the company had notice. Plaintiff's horse and waggon, while proceeding along the track, was overtaken by one of defendant's cars, and, before it could escape, was run into and the horse, waggon and harness, and the contents of the waggon injured. The evidence showed that the car, at the time, was being driven at an excessive rate of speed, and that the driver of the waggon made repeated efforts to attract the attention of the motorman, but failed to do so although there was sufficient light and there was an unobstructed view of the place where the waggon was at the time of the accident for a distance of four hundred yards:—Held, in an action claiming damages for negligence, the plaintiffs were entitled to recover. Held, that the blocking of the highway by defendant constituted in fact as well as in law a nuisance, and, the common law having been infringed, there was no burden cast upon plaintiff to show a requirement by the local authorities to level the snow to a certain depth over a certain area, and that such requirement had not been complied with. Held, also, that if contributory negligence was relied on, the case was one in which defendants must not only prove such negligence, but, also, that it was of such a character that they could not by the exercise of ordinary care and diligence have averted the mischief which happened. Held, also, that the restrictions in the company's charter in relation to the levelling of snow placed upon the highway, amounted to a condition.

Bell v. Cape Breton Elec. Co., 37 N.S.R. 298.

CARE OF STREETS—AGREEMENT WITH CITY—REMOVAL OF SNOW—NONFEASANCE.

The Saint John Ry. Co. acquired the Saint John Street Railway in 1894, subject to the obligations of keeping in repair the streets in which the railway ran, as provided by s. 10 of 50 Vict. c. 33, and also the obligation of removing the snow and ice as provided by s. 10 of 55 Vict. c. 29. In 1895 the Act 58 Vict. c. 72, was passed, s. 6 of which authorized the company to agree with the city of Saint John to pay the said city an annual sum to be agreed upon as a consideration for taking care, etc., of the streets and the removal of the snow thereon, relieving the company from all liability for the same during the continuance of the agreement. Acting under the authority of this section, the company and the city entered into a contract by which the city undertook to do what, by the section, it is authorized to do:—Held, (per Tuck, C.J., Hanington, Barker and McLeod, JJ.), in an action for damages caused by the defendants' negligence in not removing the snow in a street through which the railways ran, that s. 6, and the agreement made thereunder, imposes upon the city no greater liability in respect to the care of the streets than otherwise attaches to them as a municipal corporation, and neglect to remove the snow was a mere nonfeasance for which they were not liable at the suit of a private individual, and a nonsuit should be entered. Per Gregory, J. That there was a statutory obligation on the railway company to level the snow and keep safe in that respect for public travel the streets where the railway runs. That while the Act 58 Vict. c. 72 does not impose a duty on the city, it authorizes it in this instance to become a contractor for the performance of the work, and to stand in the place of the company in respect to all its liabilities in regard to the removal of snow, and the city is liable to a private individual for damages caused by its failure to do so.

McCrea v. Saint John, 36 N.B.R. 144.

NUISANCE—REMOVAL OF SNOW AND ICE FROM TRACK TO ADJACENT PORTIONS OF STREET.

Defendant company, operating a tramway line in H., was empowered by its Act of incorporation and the rules made thereunder to remove snow and ice from its tracks, to enable it to operate its cars, "provided" that, in case of such removal, it should be the duty of the company to level the snow and ice so removed to a uniform depth to be determined by the city engineer, and to such distance on either side of the track as the engineer should direct, or to remove from the street all snow and ice disturbed, ploughed or thrown out, etc., within 48 hours of the fall or disturbance, etc., if the city engineer should so direct. In exercise of the power conferred upon it the defendant company swept snow from its tracks and piled it up on either side of the road in such a way as to form a ridge or bank which caused a sleigh driven by plaintiff to slew, throwing him out and severely injuring him:—Held, that the removal by the company, under the powers conferred upon it, of snow and ice, and placing it upon other portions of the street, was not to be treated as a nuisance for which the company would be responsible in damages. Semble, that, irrespective of any directions given by the engineer, it was the duty of the company, in removing snow and ice from its track and throwing it upon adjacent parts of the street, to do so in a reasonably careful manner, and with a just regard to the rights and interests of the public, and that if the question had been left to the jury in this way a verdict for the plaintiff based upon sufficient evidence could not have been disturbed. Also, that the company would be responsible for the consequences of failure on their part to carry out the directions and determination of the city engineer, but, in the absence of such directions and determination, they were only bound to act in a reasonably careful manner, and the adequacy of their performance of the duty cast upon them was to be determined by the circumstances of the case.

Mader v. Halifax Elec. Tramway Co., 37 N.S.R. 546.

[Affirmed in 37 Can. S.C.R. 94, 5 Can. Ry. Cas. 434.]

ACCUMULATION OF SNOW ON TRACKS—DUTY OF REMOVAL—NEGLIGENCE.

Where a street car company has by its charter privileges in regard to the removal of snow from its tracks and the city engineer is given power to determine the condition in which the highway shall be left after a snowstorm, a duty is cast upon the company to exercise its privilege in the first instance in a reasonable and proper way and without negligence.

Mader v. Halifax Elec. Tramway Co., 5 Can. Ry. Cas. 434, 37 Can. S.C.R. 94.

[Referred to in Toll v. Can. Pac. Ry. Co., 1 Alta. L.R. 332.]

HIGHWAYS—OBSTRUCTION BY STREET RAILWAY—SNOW ON TRACKS.

The failure of an electric railway company on removing snow and ice from its tracks into a highway, to level it to a uniform depth, as required by R.S.N.S. 1900, c. 71, s. 194, is negligence rendering it liable for injuries sustained as a result of such neglect. The onus rests on an electric railway company, in an action against it for injuries sustained from snow removed from its railway tracks and left heaped up in a highway, to shew that it was levelled off to a uniform depth as required by R.S.N.S. 1900, c. 71, s. 194. An electric railway company is not entitled to the verdict on an answer of a jury, under proper instruction as to the duty of the company, in an action against it for injuries caused by the heaping up of snow by defendant company when removing same from its tracks, where the answer was to the effect that such accumulation of snow caused or contributed to the plaintiff's injury, although there was no express finding that the snow was negligently left in the highway, since the answer was sufficient to shew that the conduct of the defendant was inconsistent with due care, and that the snow was not levelled to a uniform depth as required by R.S.N.S. 1900, c. 71, s. 194.

Wright v. Pictou County Elec. Co., 11 D.L.R. 443, 15 Can. Ry. Cas. 394, 47 N.S.R. 166.

FRANCHISES—DUTY TO PAVE BETWEEN AND OUTSIDE OF RAILS.

Where the predecessor of a street railway company, on being granted a long term franchise by the predecessor of a municipal corporation to build a street railway in a public highway in close proximity to a large and rapidly growing city, agreed that the traveled portion of the highway between the rails and for eighteen inches outside thereof should be kept clean and in proper repair by the railway (such agreement being confirmed by

63 Vict. (Ont.) c. 124), the company is bound to pave between its rails and for eighteen inches outside thereof at its own expense on the highway becoming a city street and being subsequently paved by the municipality, notwithstanding the highway was but an unpaved "mud road" when such agreement was entered into. [New York v. Harlem Bridge, etc., Ry. Co., 186 N.Y. 304, followed.]

Re Toronto and Toronto & Suburban Ry. Co., 16 Can. Ry. Cas. 65, 29 O.L.R. 105, 13 D.L.R. 674.

FRANCHISES—USE OF STREET—PAVING BETWEEN AND OUTSIDE OF RAILS—POWER OF ONTARIO RAILWAY AND MUNICIPAL BOARD—MATERIALS.

The Ontario Railway and Municipal Board, under s. 3 of 10 Edw. VII. (Ont.) c. 83, which provides that the Board may require the making of changes, repairs, improvements or additions which ought reasonably to be made in the tracks used by any railway company in connection with the transportation of passengers, freight or property, in order to promote the security or convenience of the public, has power to require a street railway company, at its own expense, to pave between its rails and for eighteen inches outside thereof on the subsequent paving by a city of the highway on which the tracks were laid, notwithstanding the fact that when the company acquired its franchise and laid its tracks on such highway it was a mere "mud road" lying beyond but in close proximity to the limits of a large and rapidly growing city; since the word "tracks" as used in s. 3 must be given its widest meaning so as to include not only the rails thereof but also that part of the highway occupied by the railway itself. The power of the Ontario Railway and Municipal Board, under s. 3 of 10 Edw. VII. (Ont.) c. 83, to require a street railway not constructed under an order of such Board, to pave between its rails and outside thereof, is not affected by c. 54 of 1 Geo. V. (Ont.), which is applicable only to such railways as may have been constructed under an order of such Board. On requiring a street railway company to pave between and outside of its rails the Ontario Railway and Municipal Board should prescribe the materials to be used, and not leave it to the determination of the engineer of the Board in the event that the city and the railway company cannot agree in respect thereto.

Re Toronto and Toronto & Suburban Ry. Co., 16 Can. Ry. Cas. 65, 29 O.L.R. 105, 13 D.L.R. 674.

DANGEROUS PLACING OF POLE—WANT OF LIGHTS—COLLISION—LIABILITY—NEGLIGENCE.

A street railway company is not liable for injuries resulting from a collision of an automobile driven at night with a wire pole erected between the tracks, where the placing of the pole was done in pursuance of a municipal by-law and under the supervision of the city engineer, and there being no municipal regulation as to lighting the pole. [Weir v. Hamilton Street Ry. Co., 32 O.L.R. 578, 22 D.L.R. 155, reversed.]

Hamilton Street Ry. Co. v. Weir, 19 Can. Ry. Cas. 233, 51 Can. S.C.R. 506; 25 D.L.R. 46.

OPERATION BY MUNICIPALITY—GROOVED RAIL—NEGLIGENCE—NUISANCE.

The use of a grooved rail at street intersections by a municipal corporation authorized by statute to build and operate a street railway, is not negligence, such a rail being in common use and necessary for its purpose. Neither, in the use of such a rail, can the corporation be deemed to maintain a public nuisance, for the legislature, in authorizing the construction and operation of the railway, must be taken to have authorized the use of such rails as were necessary for its reasonable operation.

Regina Cartage Co. v. Regina, 29 D.L.R. 420.

Tracks—Alteration of grade—Municipal regulation—Specification.

Where the pattern of rails laid by a street railway company is approved by the municipal authorities, a removal of the tracks by the municipality for the purpose of altering the grade of the street does not give it authority to order the company to replace them with rails of a different pattern, but it may require the company to keep its tracks level with the altered grade on a sufficient foundation although it cannot require the use of any particular foundation.

St. John Ry Co. v. St. John, 24 D.L.R. 596.

Agreement with city—Construction—Claim of corporation to recover moneys expended in removing snow and ice from railed streets —Liability of street railway company—Jurisdiction of Court— —Exclusive jurisdiction of Ontario Railway and Municipal Board.

The Court has jurisdiction to entertain an action to recover a sum which the city was compelled to expend in removing snow and ice from certain streets in consequence of a breach of contract and negligence on the part of the company. The Ontario Railway and Municipal Board has not exclusive jurisdiction, under s. 22 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, c. 186. The city is not compelled to make an application to the Board, under s. 21, for redress in respect of something that the company ought to have done and failed to do. S. 5 of "An Act respecting certain matters pertaining to the City of Toronto," 63 Vict. c. 102 (Ont.) is not repealed by the Ontario Railway and Municipal Board Act.

Toronto v. Toronto Ry. Co., 42 O.L.R. 603.

Agreement with city corporation—Neglect of railway to remove snow and ice.

Under ss. 21, 22 of the Ontario Railway Municipal Board Act, R.S.O. 1914, c. 186, the defendant company is liable for expense incurred by the plaintiff in removing snow and ice from the streets of the city, which it was the duty of the defendant company to remove. The refusal of the plaintiff's engineer to instruct the defendant company as to where such snow should be deposited does not release it from its liability for nonremoval.

Toronto v. Toronto Ry. Co., 46 D.L.R. 435, 24 Can. Ry. Cas. 255, 44 O.L.R. 308.

C. Fares; Car Service.

Extension of railway—Time tables—Open cars—Heating—Night cars.

Under the agreement between the plaintiffs and defendants, which is set out in 55 Vict. c. 99 (Ont.), the right to determine what new lines should be established and laid down is vested in the city, and applies as well to the streets within the city as it existed at the time of the making of the agreement, as to the streets in the territory from time to time brought within it; and for the company's failure to establish and lay down such new lines, the city is not limited merely to the right provided for in the agreement of granting such privilege to others. The right, under such agreement to settle the time tables and to fix the routes of the cars, to determine when open cars should be taken off in the autumn or resumed in the spring, and as to when and how cars should be heated, is for the city engineer, subject to the approval of the city council. The city have no power to compel the company to continue to run after midnight any car which, having started before midnight, cannot in due course finish its route by that time. On a special case stated in an action only such questions will be answered as must necessarily arise in the action. The Court, therefore, in view of 63 Vict. c. 102, ss. 1 and 5 (O.), being made applicable to the city declined to answer a question raised in a special case as to the right of the city to have specifically performed those provisions of the agreement herein found in its favour: and an expression of opinion previously given against granting such specific performance, following Kingston v. Kingston Elec. Ry. Co. (1898), 25 A.R. (Ont.) 462, was withdrawn.

Toronto v. Toronto Ry. Co., 4 Can. Ry. Cas. 159, 9 O.L.R. 333.

[Varied in 10 O.L.R. 657, 5 Can. Ry. Cas. 239; reversed in 37 Can. S.C.R. 430, 5 Can. Ry. Cas. 250; varied, [1907] A.C. 315; approved in Toronto v. Toronto Ry. Co., [1910] A.C. 312; followed in Toronto v. Toronto Ry. Co., 11 O.L.R. 103; Montreal Street Ry. Co. v. Recorder's Court, 37 Can. S.C.R. 317; Toronto v. Toronto Ry. Co., 12 O.L.R. 534; referred to in Can. North. Ry, Co. v. Robinson, 43 Can. S.C.R. 410; relied on in Toronto Ry. Co. v. Toronto, 19 O.L.R. 396; Robinson v. Can. Northern Ry. Co., 19 Man. L.R. 316.]

TIME TABLES—ROUTES—OPEN CARS—NIGHT CARS.

Upon an appeal by the defendants and a cross-appeal by the plaintiffs the judgment of Anglin, J., reported 9 O.L.R. 333, 4 Can. Ry. Cas. 159, as to the construction in certain respects of the agreement between the City of Toronto and the Toronto Ry. Co. was affirmed except as to the running of night cars, the Court of Appeal being of opinion, reversing the judgment below on this point, that a car which starts on its route before midnight must finish its route even if it has to run after midnight to do so.

Toronto v. Toronto Ry. Co., 5 Can. Ry. Cas. 239, 10 O.L.R. 657.

[Reversed in 37 Can. S.C.R. 430, 5 Can. Ry. Cas. 250.]

USE OF HIGHWAYS—CAR SERVICE—TIME TABLES.

Except where otherwise specially provided in the agreement between the Toronto Ry. Co. and the City of Toronto set forth in the schedule to c. 99 of the statutes of Ontario, 55 Vict., in 1892, the right of the city to determine, decide upon and direct the establishment of new lines of tracks and tramway service in the manner therein prescribed, applies only within the territorial limits of the city as constituted at the date of the contract. Judgment appealed from (10 O.L.R. 657, 5 Can. Ry. Cas. 239), reversed, Girouard, J., dissenting. The city, and not the company, is the proper authority to determine, decide upon and direct the establishment of new lines, and the service, timetables and routes thereon. Judgment appealed from affirmed, Sedgewick, J., dissenting. As between the contracting parties, the company, and not the city, is the proper authority to determine, decide upon and direct the time at which the use of open cars shall be discontinued in the Autumn and resumed in the Spring, and when the cars should be provided with heating apparatus and heated. Judgment appealed from reversed, Girouard, J., dissenting. Upon the failure of the company to comply with requisitions for extensions as provided in the agreement, it has no right of action against the city for grants of the privilege to others; the right of making such grants accrues—ipso facto, to the city, but is not the only remedy which the city is entitled to invoke. Judgment appealed from affirmed, Sedgewick, J., dissenting. Cars starting out before midnight as day-cars may be required by the city to complete their routes, although it may be necessary for them to run after midnight or transfer their passengers to a car which would carry them to their destinations without payment of extra fares, but at midnight their character would be changed to night-cars and all passengers entering them after that hour could be obliged to pay night-fares, Sedgewick, J., dissenting.

Toronto Ry. Co. v. Toronto, 5 Can. Ry. Cas. 250, 37 Can. S.C.R. 430.

Operation of cars—Fender—"Front" of motor car—Penalty.

By 1 Edw. VII. c. 25, s. 1 (Ont.) it is provided that a street railway company, when operating any portion of their line by means of electricity, shall use "in the front of each motor car a fender":—Held, that what is meant by the "front" of the car is that end of it which when the car is in motion is the furthest forward, that is to say, furthest forward, in the sense that it would first meet a person or an object moving in the opposite direction; and the defendants operating a car for a distance of twelve hundred feet with the fender at the back instead of the front, as so defined, were liable to the penalty prescribed by the statute. Judgment of the County Court of York, affirmed.

Toronto v. Toronto Ry. Co., 5 Can. Ry. Cas. 234, 10 O.L.R. 730.

Newly annexed territory—Stopping places—Right to fix—Determination of engineer.

By s. 14 of the agreement entered into between the plaintiffs and defendants, set out in 55 Vict. c. 99 (Ont.), the defendants are required to establish and lay down new lines and to extend the tracks and street car service on such streets as may be from time to time recommended by the city engineer and approved by the city council within such period as may be fixed by by-law to be passed by a vote of two-thirds of all the members of the council; and all such extensions and new lines shall be regulated by the same terms and conditions as relate to the existing system, etc. A recommendation was made by the city engineer to the city council that a double line of tracks should be laid down and the car service extended on the continuation of one of the streets in the city, and a by-law was passed duly approving thereof and fixing the date for such service, of which the defendants were duly notified. The continuation of said street was in territory brought into the city subsequently to the entering into of the agreement:—Held, that the agreement applied as well to streets brought within the city subsequently to the entering into of the said agreement as to those then within its limits. [Toronto v. Toronto Ry. Co. (1904), 5 O.W.R. 130, affirmed by Privy Council, 42 C.L.J. 237; Toronto v. Toronto Ry. Co. (1904), 9 O.L.R. 333, 10 O.L.R. 657, followed.] Held, also, that it was not essential that the city should pass a by-law as required by s. 16 of 2 Edw. c. 27 (O.) which provides that prior to the passing a by-law authorizing any electric railway company to lay out or construct its railway on, upon or along any public highway, road, street, or lane, notice must be given similar to that required by s. 632 of the Municipal Act, for that section only applies to those electric railways which come within R.S.O. 1897, c. 209, and had no application to the defendants. The by-law for the laying out and construction of the extension was passed on the 10th April, 1905, while the statute for the annexation of the territory in question was not passed until the 25th of May, 1905; but the Lieutenant-Governor's proclamation annexing the territory was issued on the 3rd March to take effect on the 10th March, 1905, to which no objection was ever taken. Held, that the by-law was valid. By sec. 5 of 63 Vict. c. 102 (Ont.) it is provided that if the railway company neglect or fail to perform any of their obligations under the Act and the agreement, and an action is brought to compel performance the Court before whom the action is tried shall, notwithstanding any rule of law or practice to the contrary, enquire into the alleged breach, and in case a breach is found to have been committed, shall make an order specifying what things shall be done by the defendants as a substantial compliance with the Act and agreement; which shall be enforcible in the same manner, etc., as a mandamus. Held, that an order could be made specifying what was necessary to be done to constitute a substantial compliance with the agreement. [Kingston v. Kingston & Cataraqui St. Ry. Co. (1893), 25 A.R. (Ont.) 462, specially referred to.] Held, also, that the corporation could enforce the laying out of such extension notwithstanding the option given by s. 17 of the agreement to grant to another person or company the right of laying down lines on streets, after failure of the defendants, though duly notified, to do so. Held, also, that the engineer for the time being and not the engineer who held office when the agreement was entered into is the one referred to therein, and that he does not act in a judicial capacity but as the executive officer of the corporation, to whom he must make his recommendation, which the council may approve or reject as they see fit. By s. 26 of the agreement it is provided that the speed and service necessary on any main line, part of same or branch is to be determined by the city engineer and approved of by the council; and by s. 39 it is provided that the cars shall only be stopped clear of cross streets, and midway between streets, where the distance exceeds 600 feet. Held, that the regulation of the places at which cars are to stop to take on and let off passengers is part of the service within s. 26, and, therefore, subject to the limitations of s. 39, the defendants might be required to stop wherever the city engineer and city council might agree in requiring them to do so. The engineer reported to the council recommending that the cars should be required to stop at certain specified points, and his report was adopted by resolution of the council. Held, that this was a determination and not merely a recommendation of the engineer, for it must be assumed that before making his recommendation he had determined the matter so far as he could; and that it was not essential that the adoption of such recommendation should be by by-law.

Toronto v. Toronto Ry. Co., 5 Can. Ry. Cas. 278, 11 O.L.R. 103.

[Affirmed in 12 O.L.R. 534, 6 Can. Ry. Cas. 381; followed in Black v. Winnipeg Elec. Ry. Co., 17 Man. L.R. 84, 6 W.L.R. 238.]

NEWLY ANNEXED TERRITORY—STOPPING PLACES—RIGHT TO FIX—DETERMINATION OF ENGINEER.

S. 14 of the agreement entered into between the plaintiffs and defendants, set out in 55 Vict. c. 99 (Ont.) whereby the defendants are required to establish and lay down new lines and to extend the tracks and street car service on such streets as may be, from time to time, recommended by the city engineer and approved by the city council, does not apply to territory which was not within the limits of the city at the date of the agreement: but has subsequently been annexed to and become part thereof. [Toronto Ry. Co. v. Toronto, 37 Can. S.C.R. 430 (reversing the judgment of the Court of Appeal, 10 O.L.R. 657), followed.] By s. 26 of the agreement the "speed and service" necessary on each main line, part of same, or branch, is to be determined by the city engineer and approved by the city council; and by s. 39 the cars shall only be stopped clear of cross streets and midway between streets, where the distance exceeds six hundred feet:—Held, subject to the limitation of section 39, that the regulating of the places at which cars shall be stopped came within condition 26 relating to the speed and service, and was therefore to be determined by the city engineer and approved of by the council. The engineer made a report to the council recommending that cars should be required to stop at certain specified points, which was adopted by resolution of the council. Held, that the engineer did not occupy a judicial or quasi-judicial position between the parties to the agreement, and was not bound to consult with the defendants before determining what service should be supplied, and that such report, though somewhat informally expressed, was a sufficient determination on the part of the engineer, and that the adoption by resolution was sufficient, it not being essential that such adoption should be by by-law. Held, also, that the plaintiffs were entitled to an order restraining the defendants from running the cars upon their railway, except in accordance with the determination of the engineer as to the stopping places.

Toronto v. Toronto Ry. Co., 6 Can. Ry. Cas. 381, 12 O.L.R. 534.

Equipment of cars.

A street railway company is obliged to use the best known appliances to conduct its business with safety to the public, and the use of the ratchet brake instead of the more modern electric air brake is of itself a fault.

Edmunds v. Montreal Street Ry., 8 D.L.R. 772, 15 Can. Ry. Cas. 19.

Contract with municipality—By-law—Intra vires—"Workmen's tickets"—"School children's tickets."

Upon the proper construction of the defendants' Act of incorporation, 36 Vict. c. 100 (Ont.) the amending Act, 56 Vict. c. 90 (Ont.), and the contract and by-law contained in the schedule to the latter Act, the defendants were bound to sell the tickets called "workmen's tickets" upon their cars to the public, and to receive them in payment of fares at the hours mentioned in the by-law, not from working men only, but from the public generally; and that the provision of the by-law in that behalf was not ultra vires of the plaintiffs. 2. The aforementioned contract was modified, in accordance with a subsequent by-law of the plaintiffs, by requiring the defendants, in addition to the other limited tickets, to "give to any child between 5 and 14 years of age, when going to school, a ticket to go and return on the date of issue, for five cents." Held, that there was nothing in this amendment to prevent children, when going to school, from paying their fares by using workmen's tickets, within the prescribed hours. 3. The plaintiffs could maintain an action for mandamus or mandatory injunction to compel the defendants to continue to sell workmen's tickets, without adding the Attorney-General as a party representing the public. 4. The defendants, having refused to sell certain classes of tickets upon their cars, or to accept them from persons from whom they were bound to accept them in payment of fares, were restrained from running cars upon which these tickets were not kept for sale, and this restraint was coupled with a declaration that they were bound to sell them on all their cars to all persons desiring to buy them, and to receive them for all persons in payment of fares during the hours mentioned in the by-laws. [Kingston v. Kingston, etc., Elec. Ry. Co. (1897-8), 28 O.R. 399, 25 A.R. (Ont.) 462, distinguished.]

Hamilton v. Hamilton Street Ry. Co., 4 Can. Ry. Cas. 153, 8 O.L.R. 642.

[Affirmed in 10 O.L.R. 594, 5 Can. Ry. Cas. 223, 39 Can. S.C.R. 673; followed in Re Sandwich East and Windsor & Tecumseh Elec. Ry. Co., 8 Can. Ry. Cas. 125, 16 O.L.R. 641.]

Contract with municipality—"Workmen's tickets."

Held, affirming the judgment of Street, J., 8 O.L.R. 642, 4 Can. Ry. Cas. 153, that the agreement of which the enforcement was sought in this action was intra vires; that by the terms of the agreement the defendants were bound to sell on their cars tickets known as "workmen's tickets" or "limited tickets," and to receive them from all persons tendering them as fares during certain specified hours of the day; that the plaintiffs could maintain the action without the aid of the Attorney-General; and that performance of the contract could be enforced by the Court by injunction. [Kingston v. Kingston, etc., Elec. Ry. Co. (1898), 25 A.R. 462, distinguished.]

Hamilton v. Hamilton Street Ry. Co. (No. 2), 5 Can. Ry. Cas. 223, 10 O.L.R. 594.

By-law of municipality—Passenger fares—School children—Reduced rates.

Under a municipal by-law governing a street railway, it was provided that the ordinary cash fare should be 5 cents, children under five years of age, not occupying a seat and accompanied by its parent, to be carried free; and for every child under twelve years of age, except as aforesaid, the fare should not exceed 3 cents. Tickets were to be issued and sold at the following rates: Ordinary tickets, six for 25 cents, each ticket to be taken for an ordinary 5 cent cash fare; children's and school children's tickets, ten for 25 cents, each ticket to be taken for a 3-cent fare, as above provided; working men's special tickets, eight for 25 cents, to be taken for a 5-cent fare:—Held, reversing the order of the Ontario Railway and Municipal Board, that the children entitled to school children's tickets were those under the age of twelve years, and not those under twenty-one, even though the latter were actually attending school.

Re Sandwich East and Windsor & Tecumseh Elec. Ry. Co., 8 Can. Ry. Cas. 125, 16 O.L.R. 641.

Fares—Approval of tariff by park commissioners.

The Ontario Railway and Municipal Board, upon an application by the Board of Trade above-named, made an order compelling the International Ry. Co., owning and operating an electric railway along the bank of the Niagara River from Queenston to Chippawa, and incorporated by 55 Vict. c. 96 (Ont.) to comply with s. 171 of the Ontario Railway Act, 1906, by accepting a five cent cash fare for conveying passengers for any distance not exceeding three miles, etc.:—Held, reversing the order of the Board, that the company came within subs. 5, of s. 171, providing that "this section shall not apply to a company whose tariff for passenger fares is subject to the approval of any commissioners in whom are vested any park or lands owned by the Crown for the use of the public of the Province of Ontario;" and, s. 171 being thus excluded, that the Board has no power, on an application such as was made in this case, to direct what fares the company should charge. The effect of the incorporation into the company's Act of s. 31 of the Railway Act of Ontario, R.S.O. 1887, c. 170, was not to abrogate clause 32 of the agreement with the Commissioners for the Queen Victoria Niagara Fall Park, set out as sch. B to the company's Act. They should be read together in such a way as to give effect to both; and reading them as subjecting the company's tariff to the approval of both the commissioners and the Lieut. Governor in Council (or the Board substituted therefor) was not inconsistent with the intention of the parties.

Re Niagara Falls Board of Trade and International Ry. Co., 10 Can. Ry. Cas. 63, 20 O.L.R. 197.

Passenger fares—Agreement as to special rates—Unjust discrimination.

A company operating, subject to Dominion authority, a tramway through several municipalities adjacent to the city of Montreal, and having connections and traffic arrangements with a provincial tramway in that city, entered into an agreement under statutory authority with one of the municipalities whereby, in consideration of special privileges conceded in regard to the use of streets, etc., lower rates of passenger fares were granted to persons using the tramway therein, for transportation to and from the city, than to denizens of the adjoining municipality with which there was no such agreement. On the hearing of a complaint, alleging unjust discrimination in respect to fares, the Board refused to take the agreement into consideration when tendered in evidence to justify the granting of the special rates and ordered the company, appellants, to furnish the service to persons using the tramway in both municipalities at the same rates of fare. On an appeal, by leave of the Board, in respect of the propriety of overlooking the contract, submitted as a question of law:—Held, Davies and Anglin, JJ., dissenting, that, as the existence of the contract was one of the elements bearing upon the decision of the question of substantial similarity in circumstances, the Board should have admitted the evidence so tendered in regard to the agreement in consideration of which the special rates of fares had been granted.

Montreal Park & Island Ry. Co. v. Montreal, 11 Can. Ry. Cas. 254, 43 Can. S.C.R. 256.

[Referred to in Can. Pac. Ry. Co. v. Regina Board of Trade, 13 Can. Ry. Cas. 203, 45 Can. S.C.R. 321.]

OPERATION—THROUGH CARS—TERMINAL AND INTERMEDIATE POINTS.

Neither the Act of Incorporation of the defendants, 39 Vict. c. 87 (Ont.), nor the agreement with, and the by-law of the city of Hamilton, contains any limitation upon the right of the defendants to operate through cars between terminal points without stopping, and in the absence of any regulation by the Ontario Railway and Municipal Board under the Ontario Railway Act, 3 & 4 Geo. V. c. 36, the defendants have the same right as steam railways to run trains or cars from one point on its line to another without making any intermediate stops.

Fielding v. Hamilton & Dundas Street Ry. Co., 18 Can. Ry. Cas. 82.

ORDER OF ONTARIO RAILWAY AND MUNICIPAL BOARD TO PUT ON ADDITIONAL CARS—FAILURE TO COMPLY—WAR CONDITIONS.

It is no answer to an order made by the Ontario Railway and Municipal Board to a street railway company to place additional cars upon its system, that the company had made all possible efforts to do so, but that owing to the war and other conditions compliance was impossible, where the company has not applied to the Board under s. 25 of the Railway and Municipal Board Act (R.S.O. 1914, c. 186) to rescind or vary the order or under s. 42 for an extension of time for compliance.

Re Toronto Ry. Co. and Toronto, 46 D.L.R. 547.

ONTARIO RAILWAY AND MUNICIPAL BOARD ORDER TO PUT ON ADDITIONAL CARS—FAILURE TO COMPLY—WAR CONDITIONS—ORDER RESCIND OR VARY.

It is no answer to an order made by the Ontario Railway and Municipal Board to a street railway company to place additional cars upon its system, that the company had made all possible efforts to do so, but that owing to the war and other conditions compliance was impossible, where the company has not applied to the Board under s. 25 of the Railway and Municipal Board Act (R.S.O. 1914, c. 186) to rescind or vary the order or under s. 42 for an extension of time for compliance.

Re Toronto Ry. Co. and Toronto, 24 Can. Ry. Cas. 278, 44 O.L.R. 381, 46 D.L.R. 547.

INCREASE OF FARES—BY-LAW—SUBMISSION TO ELECTORS.

The city council has power under s. 39 of the Consolidated Railway Company's Act, 1896 (B.C.), to enter into an agreement with the street railway increasing the amount of fares to be paid by passengers, and may pass a by-law authorizing the same without submitting the by-law to the electors. The power of the Council under s. 39 to make or vary an agreement as to fares is not affected by subs. 15 of s. 125 of the Vancouver Incorporation Act, 1900, as amended by B.C. Stats. 1912, c. 59, s. 5.

Vancouver v. British Columbia Electric Ry. Co., 26 B.C.R. 162.

D. Municipal Ownership; Bonus.

MUNICIPAL OWNERSHIP OF RAILWAY—ARBITRATORS.

The Q.S. Ry. Co. were authorized under a by-law passed by the corporation of the city of Quebec and an agreement executed in pursuance thereof to construct and operate in certain streets of the city a street railway for a period of forty years, but it was also provided that at the expiration of twenty years (from the 9th February, 1865), the corporation might, after a notice of six months to the said company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of the said railway upon payment, etc., of its value, to be determined by arbitration together with ten per cent additional:—Held, reversing the judgments of the Courts below, Fournier, J., dissenting, that the company were entitled to a full six months' notice prior to the 9th February, 1885, to be given within the twelve months preceding the 9th February, 1885, and, therefore, notice given in November, 1884, to the company that the corporation would take possession of the railway in six months thereafter was bad. Per Strong and Henry, JJ. That the Court had no power to appoint an arbitrator or valuator to make the valuation provided for by the agreement after the refusal by the company to appoint their arbitrator. Fournier, J., contra.

Quebec Street Ry. Co. v. Quebec, 15 Can. S.C.R. 164.

FRANCHISES—ASSUMPTION OF OWNERSHIP BY MUNICIPALITY—PRINCIPLE OF VALUATION—VALUE OF FRANCHISE.

R.S.O. 1897, c. 208, s. 41 (1) provides that "No municipal council shall grant to a street railway company any privilege under this Act for a longer period than twenty years, but at the expiration of twenty years from the time of passing the first by-law which is acted upon, conferring the right of laying rails upon any street, or at such earlier date as may be fixed by agreement, the municipal corporation may, after giving six months' notice prior to the expiration of the period limited, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of the value thereof, to be determined by arbitration." Arbitrators were appointed under the Street Railway Act, R.S.O. 1897, c. 208, to determine the value of the appellants' railway and all real and personal property in connection with the working thereof, the ownership of which had been assumed, under the provisions of s. 41 (1) of the Act, by a town corporation, part of the railway being laid within the town. The arbitrators in their award fixed on a certain sum as "the actual present value of the railway and of the real and personal property in connection with the working thereof," and stated that in arriving at that value they had "valued the railway as being a railway in use and capable of being used and operated as a street railway," and that they had "not allowed anything for the value of any privilege or franchise whatsoever," in either of the municipalities in which the railway was laid. They further stated that they had not been able to assent to the contention of the company that the proper mode of valuation should be to capitalize the amount of the permanent net earning power of the railway, and that they had not reached their valuation in any way on that basis, but had "considered only the actual present value":—Held, Moss, C.J.O., dissenting, that the arbitrators had erred in their method of valuation, and that in the case of a railway producing, as the appellant's railway did, a considerable permanent profit, the proper method of valuation was to take its net permanent revenue and capitalize that, the result representing its real value. [Stockton and Middlesbrough Water Board v. Kirkleatham Local Board, [1893] A.C. 444, distinguished.] Right of owner to allowance of 10 per cent as for compulsory taking discussed. Judgment of Britton, J., reversed, and award remitted to the arbitrators for reconsideration.

Berlin & Waterloo Street Ry. Co. v. Berlin, 9 Can. Ry. Cas. 271, 19 O.L.R. 57

[Reversed in 42 Can. S.C.R. 581, 10 Can. Ry. Cas. 181.]

FRANCHISE—ASSUMPTION BY MUNICIPALITY—PRINCIPLE OF VALUATION.

By s. 41 of the Ontario Street Railway Act, R.S.O. 1897, c. 208, no municipal council shall grant to a street railway company any privilege thereunder for a longer period than twenty years, and at the expiration of a franchise so granted, or earlier if so agreed upon, it may, on giving six months' previous notice to the company, assume the ownership of the railway and all real and personal property in connection with the working thereof on payment of the value of the same to be determined by arbitration:—Held, reversing the judgment of the Court of Appeal, 19 O.L.R. 57, 9 Can. Ry. Cas. 271, that the proper mode of estimating the value of the "railway and all real and personal property in connection with the working thereof," was not by capitalizing its net permanent revenue and taking that as the value, but by estimating what it was worth as a railway in use and capable of being operated, excluding compensation for loss of franchise. Held, also, that in view of the provisions in the Street Railway Act authorizing the municipality to assume ownership of a street railway operating in two or more municipalities the company in this case whose railway was taken over by the town of Berlin was not entitled to compensation for loss of its franchise in the municipality of Waterloo. On the expiration of its franchise the company executed an agreement extending for two months the time for assumption of ownership by the municipality, but did not relinquish possession until six months more had elapsed. During the extended time an Act was passed by the legislature reciting all the circumstances, ratifying and confirming the agreement for extension and authorizing the municipality to take possession on payment of the award subject to any variation in the amount by the Court. Held, that though this Act did not expressly provide for taking possession on the same footing as if it had been done immediately on the expiration of the franchise its effect was, not to confer on the municipality a new right of expropriation in respect of an extended franchise, but merely to extend the time for assumption of ownership under the original conditions. The rights of the company to compensation are defined by statute, and there is no provision for an allowance of ten per cent over and above the actual value of the property.

Berlin v. Berlin & Waterloo Street Ry. Co., 10 Can. Ry. Cas. 181, 42 Can. S.C.R. 581.

Municipal aid—Construction beyond limits of municipality—Validating Act.

The town of Port Arthur passed a by-law to raise the sum of $75,000 for street railway purposes, and to authorize the issue of debentures therefor, which recited, inter alia, that it was necessary to raise said sum for the purpose of building, etc., a street railway connecting the municipality of Neebing with the business centre of Port Arthur. At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the ratepayers and passed, but none was submitted ordering the construction of the work. Subsequently an Act was passed by the Legislature of Ontario which enacted that the said by-law "is hereby confirmed and declared to be valid, legal and binding on the town . . . and for all purposes, etc., relating to or affecting the said by-law, and any and all amendments of the Municipal Act . . . shall be deemed and taken as having been complied with":—Held, reversing the decision of the Court of Appeal, Taschereau, J., dissenting, that the said Act did not dispense with the requirements of ss. 504, 505 of the Municipal Act requiring a by-law providing for construction of the railway to be passed, but only confirmed the one that was passed as a money by-law. Held, also, that an erroneous recital in the preamble to the Act that the Town Council had passed a construction by-law had no effect on the question to be decided. 19 A.R. (Ont.) 555, reversed.

Dwyer v. Port Arthur, 22 Can. S.C.R. 241.

[Referred to in Bell v. Westmount, 15 Que. S.C. 585.]

E. Regulation; Railway Board.

Regulation by city by-law.

A requirement of a city by-law that a street railway company should keep and maintain its engines, machinery and power houses within the city limits, is complied with by the maintenance therein of a sub-station containing apparatus for the reduction of the voltage of electricity generated beyond the city limits and also for transforming into a direct current.

Winnipeg Elec. Ry. Co. v. Winnipeg, 4 D.L.R. 116, [1912] A.C. 355.

Approval of plans—Conditional approval.

(1) Notwithstanding the provision of s. 472 of the Winnipeg Charter that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for," the approval by the city council of the construction by defendants of a loop line on certain named streets of the city may be given by resolution. [Toronto v. Toronto Ry. Co. (1906), 12 O.L.R. 534, followed.] (2) It is not a valid objection to such a resolution that it was one approving a report of the Board of Control even if such Board had no power to deal with such a matter. (3) The council had power to give an approval coupled with a condition that the company should also construct another loop line on certain other streets, although the council might be unable afterwards to enforce the condition. (4) Under the law governing such construction the approval of the detailed plans by the City Council is not required, so that the making of a change in the plans by the city engineer which had not been approved by the council was no ground for an injunction.

Black v. Winnipeg Elec. Ry. Co., 17 Man. L.R. 77.

Breach of by-law—Intervention of Attorney-General.

In an action by the Attorney-General on the relation of a city and its building inspector and by the city in its own right against an electric railway company to restrain the breaches of certain city by-laws concerning the erection of buildings and of any gas works or gas holders within the city, in which action the company claimed that by virtue of the powers derived from another company that it was not subject to the by-laws and also denied their validity, and at the opening of the trial applied to amend its defence by pleading that the plaintiffs, by the judgment of the Privy Council in the company's favour in a former action which the city alone brought against the company and in which the issues were similar to those in the present action, were estopped from denying that the latter possessed all the powers of its predecessor, the Attorney-General is not estopped by the judgment in the former action and as against him the application to amend should be refused. [St. Mary Magdalene v. Attorney-General, 6 H.L.C. 189; People v. Halladay, 93 Cal. 241, 29 Pac. R. 54, writ of error dismissed, 159 U.S. 415, distinguished.]

Attorney-General v. Winnipeg Elec. Ry. Co., 5 D.L.R. 823, 22 Man. L.R. 761.

BREACH OF MUNICIPAL BY-LAW—INTERVENTION OF ATTORNEY-GENERAL.

In an action by a city in its own right and by the Attorney-General on the relation of the city and its building inspector against an electric railway company to restrain the breaches of certain city by-laws concerning the erection of buildings and any gas works or gas holders within the city, in which action the company claimed that by virtue of the powers derived from another company it was not subject to the by-laws and also denied the validity of the by-laws, and at the opening of the trial applied to amend its defence by pleading that the plaintiffs, by the judgment of the Privy Council in the company's favour in a former action which the city alone brought against the company and in which the issues were similar to those in the present action, were estopped from denying that the company possessed all the powers of its predecessor, the amendment was allowed as against the city and an opportunity given the company of proving it.

Attorney-General v. Winnipeg Elec. Ry. Co., 5 D.L.R. 823, 21 W.L.R. 906.

ACTIONS AGAINST ELECTRIC RAILWAYS—INTERVENTION OF ATTORNEY-GENERAL.

The right of the Attorney-General to take action on behalf of the public for the violation by an electric railway company of a by-law forbidding the erection of gas holders within the city without first obtaining the permission of the city council, cannot be taken away by the city consenting to the erection of a gas holder by a company in breach of the city's own by-law. [Yabbicom v. King, [1899] 1 Q.B. 444, followed.]

Attorney-General v. Winnipeg Elec. Ry. Co., 5 D.L.R. 823, 21 W.L.R. 906.

BREACH OF CITY BY-LAWS.

The only party who can sue for the protection of the public right is the Attorney-General of the province in an action to restrain the breach of three city by-laws, one of which forbade the erection of any gas works or gas holders within the city without first obtaining the permission of the city council, another prohibiting the erection of buildings within the city without a permit from the building inspector, and the third prescribing an area within the city within which no gas works should be erected or continued. [Devonport v. Tozer, [1903] 1 Ch. 759; Attorney-General v.

Wimbledon, [1904] 2 Ch. 34; and Attorney-General v. Pontypridd, [1908] 1 Ch. 388, referred to.]

Attorney-General v. Winnipeg Elec. Ry. Co., 5 D.L.R. 823, 21 W.L.R. 906.

TORONTO RAILWAY AGREEMENT—ONTARIO RAILWAY BOARD.

An order in council in pursuance of the judgment of the Privy Council, [1907] A.C. 315, ordered that subject to certain conditions contained in their agreement it was for the respondents and not the appellants to determine what new lines should be laid down on streets within the city of Toronto. Thereafter an order was made by the Ontario Railway and Municipal Board that the respondents construct between ten and fifteen additional miles of single track, and the company selected certain streets for that purpose. Subsequently the Court of Appeal for Ontario affirmed a decision of the said Board that the company had the right to select:—Held, that the judgment in [1907] A.C. 315 was perfectly clear and that the order in council thereon was unaffected by the Ontario Act, 8 Edw. VII. c. 112, s. 1. 19 O.L.R. 396, 1 O.W.N. 5, affirmed.

Toronto v. Toronto Ry. Co., [1910] A.C. 312.

ONTARIO RAILWAY AND MUNICIPAL BOARD JURISDICTION—AGREEMENT BETWEEN MUNICIPALITIES—POSSESSION OF RAILWAY.

Under an agreement made between two municipalities and confirmed by the statute 8 Edw. VII. c. 80 (Ont.), one of the municipalities was, on payment of the amount of an award, to become the owner of a part of an electric railway which theretofore had been owned by the other although operated in both municipalities and the whole road was to be operated and managed by a board of commissioners constituted in the manner provided for in the statute and agreement. The amount awarded having been paid, and the appellants, a Board of commissioners who had been operating the railway for the municipality which owned it, retaining control, management, and possession of the railway, and refusing to permit compliance with the provisions of the agreement and enactment in regard to its operation and management. The Ontario Railway and Municipal Board was applied to, and such compliance was enforced by its order:—Held, that the Board did not thereby exceed the powers conferred upon it by the Ontario Railway and Municipal Board Act, 1906.

Re Port Arthur Elec. Street Ry., 18 O.L.R. 376.

ONTARIO RAILWAY AND MUNICIPAL BOARD—FRANCHISE FOR ONLY SINGLE TRACK—NO POWER TO ORDER DOUBLE TRACK.

Waddington v. Toronto & York Radial Ry. Co., 18 O.W.R. 621.

CONSTRUCTION AND OPERATION—MUNICIPAL ASSENT—RAILWAY BOARD.

In the case of a street railway or tramway or of any railway to be operated as such upon the highways of any city or incorporated town, the consent of municipal authority required by s. 184, Railway Act, 1903, must be by a valid by-law, and in the absence of such by-law, the Board has no jurisdiction to enforce an order respecting the construction and operation of such railway.

Montreal Street Ry. Co. v. Montreal Terminal Ry. Co., 4 Can. Ry. Cas. 373, 36 Can. S.C.R. 369.

[Adhered to in Essex Terminal v. Windsor etc., Ry. Co., 40 Can. S.C.R. 625; referred to in Can. Pac. Ry. Co. v. Grand Trunk Ry. Co., 12 O.L.R. 320.]

MUNICIPAL STREET RAILWAYS—ACCOUNTING FOR PROFITS.

The Courts will not entertain a suit for an accounting of profits from the operation of a railway by two municipalities under a formal agreement executed not voluntarily but in conformity to an order of the Ontario Railway and Municipal Board, since the matter was one exclusively within the jurisdiction of the Board. 7 D.L.R. 241, 28 O.L.R. 206, affirmed.

Waterloo v. Berlin, 12 D.L.R. 390, 28 O.L.R. 206.

[Referred to in Malone v. Hamilton, 10 D.L.R. 305.]

F. Negligence; Contributory; Ultimate.

See also Negligence.

INJURY TO DRIVER CROSSING TRACK—IMPROPER CONSTRUCTION OF TRACK.

The plaintiff, a driver employed by the Montreal Brewing Co., while crossing the track of the defendants on Place d'Armes, opposite the church of Notre Dame, was, thrown out of the waggon which he was driving by the breaking of the rear axle, breaking his leg and sustaining other severe injuries. He brought an action of damages alleging that the accident had occurred by the fault of the defendants, owing to the improper construction and bad order of the track. The Superior Court for Lower Canada (Torrance, J.) found that the track was in bad order, the switch being three inches above the level of the road, contrary to law, and that this caused the accident without any fault on the part of the plaintiff, whose damages he assessed at $2,500. The Court of Queen's Bench for Lower Canada (appeal side) reversed this judgment, being of opinion that the rails, as well as the part of the roadway the defendants were bound to maintain, were lawful and sufficient; that the defendants were not in fault, and that the plaintiff had not exercised the necessary caution and prudence to which he was bound, and might, by the exercise of reasonable caution and prudence, have avoided the accident. On appeal to the Supreme Court of Canada:—Held, that the questions to be decided were purely matters of fact, and the judgment of the Court of first instance should not have been disturbed. Strong, J., dissenting, on the ground that the judgment of the Court of Queen's Bench on the facts was correct. Appeal allowed with costs.

Parker v. Montreal City Passenger Ry. Co. (1885), Cass. Can. S.C. Dig. 1893, p. 731.

[In this case the Privy Council refused leave to appeal. 6 Can. Gaz. 474.]

DERAILMENT.

A street railway company is liable, in addition to actual damage suffered, for the diminution in value of an immovable situate at the foot of, and adjoining a steep hill down which the cars run where they are frequently derailed and precipitated on the immovable to the great peril of any persons who may be on the spot.

Amyot v. Quebec Ry., Light & Power Co., 36 Que. S.C. 141.

ACCIDENT TO PERSON ON STREET RAILWAY TRACK—GUARD RAIL—IMPROPER HEIGHT OF RAIL.

Chisholm v. Halifax Tram. Co., 9 E.L.R. 201 (N.S.).

LIABILITY FOR PROTRUDING RAILS.

Where a city by-law declared that a street railway company should be responsible for all damages occasioned by the construction, maintenance, and operation of its railway, it is answerable for injuries sustained by the plaintiff who was thrown from a vehicle by the striking of a wheel against a rail that was four inches above the surface of the street, notwithstanding the rail had originally been laid flush with the street, and its elevation was due to acts of the city in repairing the street.

Montreal Street Ry. Co. v. Bastien, 12 D.L.R. 342.

[Alldred v. West Metropolitan Tramway Co., L.R., [1891] 2 Q.B. 398; and Howit v. Nottingham Tramway Co., 12 Q.B.D. 16, distinguished.]

Nuisance—Erection of dam to obtain power—Obstruction of mill.

Where the proprietors of land on opposite banks of a river enter into an arrangement with respect to the ownership of a dam erected for the purpose of obtaining power, touching both banks and extending across the stream, it is competent for them to do so, and owners further down the stream have nothing to say as to the terms of the arrangement where the quantity of water passing down is not diminished. Where the owners below by means of a dam erected by them cause the water to flow back and to obstruct the operation of a mill above them they will be liable in damages for the obstruction so caused. In the action claiming damages for such obstruction and an injunction to restrain the continuance of the injury both the owner of the fee and the tenant operating the mill are properly joined although the former will only be entitled to recover nominal damages. And where the amount of damages awarded by the trial Judge is found to be excessive in view of the evidence and a reduction is ordered and the judgment varied in other respects no order will be made as to costs.

Crosby v. Yarmouth Street Ry. Co., 45 N.S.R. 330.

Excessive speed—Gong not sounded—Contributory negligence.

A passenger on a street car going west alighted on the side farthest from the other track and passed in front of the car to cross to the opposite side of the street. The space between the two tracks was very narrow and seeing a car coming from the west as she was about to step on the track, she recoiled, and at the same time the car she had left started and she was crushed between the two, receiving injuries from which she died. In an action by her father and mother for damages the jury found that the company was negligent in running the east bound car at excessive speed and starting the west bound car and not sounding the gong in proper time. They found also that deceased was negligent, but that the company could, nevertheless, have avoided the accident by the exercise of reasonable care:—Held, that the case having been submitted to the jury with a charge not objected to by the defendants and the evidence justifying the findings the verdict for the plaintiffs should not be disturbed. The plaintiffs should not have had the funeral and other expenses incurred by the father of deceased allowed as damages in the action.

Toronto Ry. Co. v. Mulvaney, 38 Can. S.C.R. 337.

[Referred to in Jones v. Toronto, etc., Ry. Co., 20 O.L.R. 71.]

Use of controller—Duty of motorman.

Rule 212 of the rules of the London Street Ry. Co. provides that "when the power leaves the line the controller must be shut off, the overhead switch thrown and the car brought to a stop. . . ." A car on which the lights had been weak and intermittent for some little time passed a point on the line at which there was a circuit breaker when the power ceased to operate. The motorman shut off the controller but, instead of applying the brakes, allowed the car to proceed by the momentum it had acquired and it collided with a stationary car on the line ahead of it. In an action by the motorman claiming damages for injuries received through such collision:—Held, that the accident was due to the motorman's disregard of the above rule and he could not recover. 10 O.W.R. 302, affirmed.

Harris v. London Street Ry. Co., 39 Can. S.C.R. 398.

CROSSING—UNDUE SPEED—SOUNDING GONG.

Appeal from the judgment of the Court of King's Bench, appeal side (14 Que. K.B. 355), affirming the judgment of the Superior Court, District of Montreal, entered upon the verdict of a jury, in favour of the plaintiff. The plaintiff was a passenger on a tramcar operated by the company, and on approaching a crossing, signalled the conductor to stop the car and, when it slowed down, but before it reached the crossing, stepped of the car and attempted to cross to the other side of the street by passing in rear of the car on which he had been traveling. He was struck and injured by a car coming at a considerable speed from the opposite direction without, it was alleged, giving notice according to running regulations, by sounding the gong as it was meeting and passing the other car. The jury found generally for the plaintiff, without specifying any particular act of negligence, but that the plaintiff was also negligent and assessed the damages at $3,500, for which judgment was entered at the trial. By the judgment appealed from it was held that, upon the contradictory evidence, there was sufficient ground to support the verdict. On the appeal to the Supreme Court the company contended that there was misdirection, irregularity in the verdict and that the verdict was against the weight of evidence. After hearing counsel on behalf of the appellants and without calling upon the respondent's counsel for any argument, the Supreme Court of Canada dismissed the appeal with costs. 14 Que. K.B. 355, affirmed.

Montreal Street Ry. Co. v. Deslongchamps, 37 Can. S.C.R. 685.

[Referred to in Wallingford v. Ottawa Elec. Ry. Co., 14 O.L.R. 383.]

PRECAUTIONS.

An electric tramway company should avoid everything which, not being absolutely necessary for the service, is a source of danger to the public, and if it does not do so it is guilty of imprudence for which it is responsible. The fact that a cause of danger could only be avoided by increased labour and expense is no excuse for allowing it to remain.

Mattice v. Montreal Street Ry. Co., 20 Que. S.C. 22.

INJURY TO PEDESTRAIN—EXCESSIVE SPEED—BURDEN OF SHOWING MEANS OF ESCAPE.

Plaintiff was proceeding along the track of the defendant company, on a public street in the city of Sydney, when he was overtaken, struck, and severely injured by an electric car, which was being driven at an excessive and dangerous rate of speed. At the time of the accident, plaintiff was prevented from escaping by a car of another line, which was obstructing the crossing in front of him, and by banks of snow, which had been thrown up by defendant's plow, at the side of the track upon which he was standing:—Held, setting aside the judgment for defendant, and ordering a new trial, that the burden of showing that plaintiff had means of escape, was upon the defendant company. Also, that plaintiff having the right to be where he was, and the whole event, from the moment he discovered his danger to the time he was struck, having happened in the course of a few seconds, he was not to be held to the obligation of selecting the best possible means of escape.

Ricketts v. Sydney & Glace Bay Ry., 37 N.S.R. 270.

INJURY TO PERSON RISKING HIS LIFE TO SAVE THAT OF ANOTHER.

A statement of claim alleging, in effect, that a child about two years of age had fallen on the track of the defendants' street railway on a public street in the city; that one of the defendants' cars was approaching the child at a high rate of speed, and that, owing to the negligence of the motorman in charge of the car in not stopping it, the child's life was endangered without negligence on her part; that the plaintiff, observing this, necessarily rushed in front of the car in an attempt to save the child, and that, owing to the motorman's negligence in not stopping the car or reducing its speed, he was struck and injured by the car, discloses a good cause of action.

Seymour v. Winnipeg Elec. Ry. Co., 19 Man. L.R. 412, 13 W.L.R. 566.

COLLISION—MOTOR CAR STRUCK BY TRAMCAR.

Plaintiff's motor car, proceeding along the highway, got partly between the rails of the defendant company, but owing to the condition of the road, was unable to get out of the way of an approaching tramcar. On seeing his difficulty, the driver signalled to the motorman of the tramcar to stop, which he endeavored to do, but was unable to avoid a collision, in which the motor car was damaged. The trial Judge gave judgment for plaintiff on the ground of negligence on the part of the defendant company in not having a car of the size which caused the collision equipped with air brakes, which would, he held, have enabled the motorman to have stopped in time to prevent the collision:—Held, on appeal, on the evidence, that there was no negligence on the part of the motorman. Per Martin, J.A., that there was no evidence to support the finding of negligence in the company's not having the car equipped with an air brake.

Winter v. British Columbia Elec. Ry. Co., 15 B.C.R. 81, 13 W.L.R. 352.

EXCESSIVE SPEED—DUTY OF DRIVER TO HAVE HIS CAR UNDER CONTROL.

Where plaintiff alighted from one of the defendant's cars at night time, at a point where the street was torn up for purposes of repair, and the bell on a car immediately behind that from which he alighted, was clanging; and going between the two cars, and looking up and down a parallel track before crossing, but seeing no car approaching, was nevertheless struck and injured by an approaching car, running at an excessive speed on such parallel track:—Held, that he was entitled to recover, as it was the duty of the driver to have his car under control.

Morton v. British Columbia Elec. Ry. Co., 15 B.C.R. 187.

ACCIDENT TO PEDESTRAIN—UNDUE SPEED OF CAR.

Poisson v. Sherbrooke Street Ry. Co., 5 E.L.R. 388 (Que.).

DARK NIGHT—NEGLECT TO GIVE NOTICE BY BELL—CONSENT TO REDUCTION OF DAMAGES.

The plaintiff, traveling by electric railway along a country road on a dark night, got off at a regular stopping place. He then turned back along the road, and after he had walked some distance along it, and was moving towards the railway track, the car by which he had traveled, backing up, struck him. There was a light at both ends of the car, which was traveling at the rate of three or four miles an hour, but the current was very weak and the light slight, and the motorman came within four or five feet of the plaintiff before seeing him, and he did not sound the gong or give any other warning of his approach:—Held, that there was evidence of negligence on the part of the defendants, and the appeal from the trial judgment was dismissed and a new trial refused, on the plaintiff consenting to reduce his damages.

Ford v. Metropolitan Ry. Co., 2 Can. Ry. Cas. 187, 4 O.L.R. 29.

INTERSECTIONS—ULTIMATE NEGLIGENCE—INJURY TO PERSON CROSSING TRACK —NEGLECT OF MOTORMAN TO SHUT OFF POWER.

Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is "ultimate" negligence when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously but for such disabling negligence. [Scott v. Dublin & Wicklow Ry. Co. (1861), 11 Ir. C.L.R. 377, approved; Radley v. London & North Western Ry. Co. (1876), 1 App. Cas. 754, applied.] The plaintiff in crossing a city street in front of an approaching motor-car of the defendants was admittedly guilty of negligence or contributory negligence, but, on the evidence, would have crossed safely if a moment more had been allowed her. As it was, she was struck by the corner of the car fender and injured. There was evidence of a rule of the defendants that motormen were to shut off power at a certain distance between reaching a crossing, and that the motorman on this occasion did not do so, and in an action for the defendants' negligence causing the plaintiff's injuries the trial Judge in his charge to the jury withdrew the evidence of this rule from their consideration:—Held, that the place where the plaintiff attempted to cross was a crossing being opposite a street running at right angles to the street upon which the car was being operated, though not an intersecting street; and the withdrawal of the evidence as to the rule was misdirection, and misdirection which might have affected the result; the jury might, upon the evidence, have found that, but for the motorman's failure sooner to shut off power, or to reduce speed, the momentum of the car would have been so lessened that he could with the emergency appliance at his command, have avoided running down the plaintiff; and this failure, though anterior to the plaintiff's negligence, would be "ultimate" negligence, within the meaning of the rule which makes a defendant liable, notwithstanding contributory negligence of the plaintiff, if in the result he (the defendant) could by the exercise of ordinary care have avoided the mischief.

Brenner v. Toronto Ry. Co., 6 Can. Ry. Cas. 261, 13 O.L.R. 423.

[Reversed in 15 O.L.R. 195, 7 Can. Ry. Cas. 210, 40 Can. S.C. R. 540, 8 Can. Ry. Cas. 108, commented on in Snow v. Crow's Nest Pass Coal Co., 13 B.C.R. 155; followed in Burman v. Ottawa Elec. Ry. Co., 21 O.L.R. 446, 10 Can. Ry. Cas. 353; Loach v. British Columbia Elec. Ry. Co., 17 Can. Ry. Cas. 21, 16 D.L.R. 245; referred to in Hinsley v. London Street Ry. Co., 16 O.L.R. 350; Wallingford v. Ottawa Elec. Ry. Co., 14 O.L.R. 383; approved in British Columbia Elec. Ry. Co. v. Loach, 20 Can. Ry. Cas. 309.]

NEW TRIAL—MISDIRECTION—CHARGE TO JURY—OBJECTION AT TRIAL.

Appeal allowed from the judgment of the Divisional Court, reported 13 O.L.R. 423, 6 Can. Ry. Cas. 261, granting a new trial. Per Osler, J.A.:— There is no hard and fast rule which absolutely prohibits the Court from entertaining an objection on the ground of misdirection when the party has omitted to take it at the trial.

Brenner v. Toronto Ry. Co., 7 Can. Ry. Cas. 210, 8 Can. Ry. Cas. 100, 15 O.L.R. 195.

[Affirmed in 40 Can. S.C.R. 540, 8 Can. Ry. Cas. 108.]

CHARGE OF JUDGE—CONTRIBUTORY NEGLIGENCE.

A rule of the Toronto Ry. Co. provides that "when approaching crossings and crowded places where there is a possibility of accidents the speed must be reduced and the car kept carefully under control. Go very slowly over all curves, switches and intersections; never faster than three miles an hour . . ." A girl on the south side of Queen Street wished to cross to University Avenue which reaches but does not cross Queen. She saw a car coming along the latter street from the east and thought she had time to cross, but was struck and severely injured. On the trial of an action for damages the Judge in his charge said: "It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do." The jury found that defendants were not guilty of negligence; that plaintiff by the exercise of reasonable care could have avoided the injury; and that she failed to exercise such care by not taking proper precautions before crossing. The action was dismissed at the trial; a Divisional Court ordered a new trial on the ground that the Judge had misdirected the jury in withdrawing from their consideration the rules of the company; the Court of Appeal restored the judgment at the trial:—Held, affirming the judgment of the Court of Appeal, 15 O.L.R. 195, 7 Can. Ry. Cas. 210, which set aside the order of the Divisional Court for a new trial, 13 O.L.R. 423, 6 Can. Ry. Cas. 261, that the action was properly dismissed:—Held, per Girouard and Duff, JJ.:—The Judge's charge was open to objection but, as under the findings of the jury and the evidence plaintiff could not possibly recover, a new trial should be refused. Per Davies, J.:—There was no misdirection. The jury were not led to believe that the rules were not to be considered, but only that they should not be the standard as to what was or was not negligence, which question should be decided on the facts proved. Per Maclennan, J.:—The place at which the accident occurred, where University Ave. meets Queen Street, is not a crossing nor intersection within the meaning of the rules and they do not apply in this case.

Brenner v. Toronto Ry. Co., 8 Can. Ry. Cas. 108, 40 Can. S.C.R. 540.

CONTRIBUTORY NEGLIGENCE—NEW TRIAL.

In an action for damages against the appellants for loss of life occasioned by the negligent management of their tramcar by their servant employed to drive it, the jury found that the servant was guilty of negligence in causing the accident and that the deceased was not guilty of contributory negligence, and judgment was accordingly entered for the plaintiffs:—Held, reversing 8 O.W.R. 507, that the Court in appeal from that judgment was in error in setting it aside and ordering a new trial, there having been evidence on both issues properly submitted to the jury. It is not valid ground for ordering a new trial that the Judges differ from the conclusion at which the jury have arrived or consider that the findings shew that the defendants had not had a fair and unprejudiced trial. Special leave to the respondents to cross appeal against the order for a new trial granted, nunc pro tunc; the appeal praying that the action should be dismissed.

Toronto Ry. Co. v. King, 7 Can. Ry. Cas. 408, [1908] A.C. 260.

[Commented on in Brenner v. Toronto Ry. Co., 40 Can. S.C.R. 552; followed in Tinsley v. Toronto Ry. Co., 17 O.L.R. 74; referred to in Berthelot v. Salesses, 39 N.B.R. 149; White v. Victoria Lumber, etc., Co., 14 B.C.R. 374; distinguished in Milligan v. Toronto Ry. Co., 17 O.L.R. 530.]

EXCESSIVE SPEED—CONTRIBUTORY NEGLIGENCE.

The deceased in attempting to cross over one of the streets of a city on which there were street car lines, passed behind one of the cars, and was just stepping on to the track on which cars coming in the opposite direction ran, when she fell and was struck by an approaching car and killed. In an action brought to recover damages therefor, the jury, while finding that there was negligence on the defendants' part in running at too high a rate of speed, and that there was contributory negligence on the plaintiff's part in not taking proper precautions before attempting to cross, also found that the defendants could have avoided the accident had the car been running at a reasonable rate of speed. Upon their answers judgment was entered for the plaintiff:—Held, Garrow, J., dissenting, that on these findings, the judgment could not be supported, and a new trial was directed.

Hinsley v. London Street Ry. Co., 7 Can. Ry. Cas. 419, 16 O.L.R. 350.

[Distinguished in McGraw v. Toronto Ry. Co., 18 O.L.R. 154.]

CROSSING—ACCIDENT—CONTRIBUTORY NEGLIGENCE.

The plaintiff, intending to take a street car going westerly, so as to reach his house, on arriving, shortly after midnight, at the southerly side of the street on which the particular car line was, saw a car coming westerly about 300 feet off, and without again looking for the car he attempted to cross over the street in a westerly diagonal direction, so as to reach a street corner, where he expected the car would stop, it being, as he said, the usual practice for all cars to stop there, though it appeared there was no rule requiring them to do so, and because he saw two persons standing at the corner apparently waiting for the car, and who had signalled it to stop, but of this he was not aware. The car, however, ran past the corner, knocking down the plaintiff and severely injuring him. The motorman had seen the plaintiff when the car was about 150 feet off. It was claimed that the motorman was intoxicated and incapable of knowing what he was doing, and that the car was going at an excessive rate of speed. The place was well lighted and nothing to obstruct the view:—Held, that the accident was attributable to the plaintiff's own want of care in attempting to cross over the street as he did, and that the case, therefore, should have been withdrawn from the jury. Magee, J., dissented on the ground that it was a question for the jury. Judgment of Britton, J., at the trial reversed.

Tinsley v. Toronto Ry. Co., 8 Can. Ry. Cas. 69, 15 O.L.R. 438.

[Reversed in 17 O.L.R. 74, 8 Can. Ry. Cas. 90; distinguished in Milligan v. Toronto Ry. Co., 17 O.L.R. 530.]

INJURY TO PERSON CROSSING IN FRONT OF CAR—OMISSION TO STOP—STOPPING PLACE—CONTRIBUTORY NEGLIGENCE.

The plaintiff intending to take a street car going westerly, on arriving, shortly after midnight, at the southerly side of the street on which the particular car line was, saw a car coming westerly very rapidly, being then about 300 feet off. He saw two persons standing at the corner signal the car to stop, and believing that it would do so, it being the usual and customary practice to stop at the corner, when persons wished to get on or off the car, he without again looking to see where the car was, attempted to cross in front of it, so as to get on it, when, instead of stopping, it ran past the corner, knocked down the plaintiff and injured him:—Held, that it could not be said that there was inexcusable negligence on the plaintiff's part in attempting to cross the street in front of the car, for he might reasonably assume that the car would stop at the corner in pursuance of the signal to do so, and that the case therefore could not have been withdrawn from the jury; and was properly submitted to them. Judgment of the Divisional Court (1907), 15 O.L.R. 438, 8 Can. Ry. Cas. 69, reversed.

Tinsley v. Toronto Ry. Co., 8 Can. Ry. Cas. 90, 17 O.L.R. 74.

DRIVER OF VEHICLE—CROSSING IN FRONT OF APPROACHING CAR—CONTRIBUTORY NEGLIGENCE.

The plaintiff was driving easterly in his carriage and pair of horses, at a moderate pace, along one of the streets of a city, and on arriving within thirty feet of a cross street, on which there was a street car line, he saw a car coming from the north, where there was a down grade, approaching at a rapid rate, the car being then about 300 feet distant. The plaintiff admitted that he could easily have stopped his carriage and horses before reaching the track. He consulted with his coachman, and, both being of the opinion the speed of the car was not so great as to prevent their crossing in safety, he attempted to do so, when the carriage was struck by the car, and damaged, and he, himself injured. No attempt was made by the motorman to slow down the car. On questions submitted to the jury, they found that the accident was caused through the defendants' negligence, such negligence consisting in the car not being under proper control and that there was no contributory negligence on the plaintiff's part:—Held, that it could not be said, in all the circumstances, the plaintiff acted so recklessly as to preclude the submission to the jury of the question whether or not he acted with reasonable care; and a finding by the jury in the plaintiff's favour was upheld. Judgment at the trial and of the Divisional Court affirmed, Moss, C.J.O., and Meredith, J.A., dissenting.

Milligan v. Toronto Ry. Co., 8 Can. Ry. Cas. 434, 17 O.L.R. 530.
[Leave to appeal refused in 18 O.L.R. 109, 17 O.L.R. 370.]

DUTY OF COMPANY TO PUT ON WHEEL GUARDS.

1. It is negligence in a company operating electric cars on the streets of a city not to have such guards for the front wheels as will prevent persons falling on the tracks from being run over, and the company will be liable in damages to any person injured in consequence of such negligence, unless there is sufficient contributory negligence on the part of such persons to constitute a defence. 2. No such contributory negligence could be attributed to a child under six years old. 3. A verdict for $8,000 damages in such a case, where one of the child's legs was cut off, is not so excessive as to warrant the Court in ordering a new trial.

Wald v. Winnipeg Elec. Ry. Co., 9 Can. Ry. Cas. 126, 18 Man. L.R. 134.
[Affirmed in 41 Can. S.C.R. 431, 9 Can. Ry. Cas. 129.]

INJURY TO PERSON CROSSING TRACK—EXCESSIVE SPEED—FAILURE TO GIVE WARNING—FAILURE TO LOOK.

The plaintiff, who was somewhat hard of hearing, attempted to cross from the east to the west side of a highway on which the defendants' single track was laid. Before he began to cross he observed a car of the defendants standing upon a siding about 550 feet north of him, and, from his knowledge of the practice of the defendants, inferred that it was waiting there for a car from the south to pass it. He, therefore, just before crossing the track, looked south for a car, but did not look north, and had almost passed over the track when he was struck by a car coming from the north, and injured. There was evidence that the gong was not sounded nor the whistle blown nor the speed of the car slackened as he approached the track. He could have seen the car approaching had he turned and looked, and the motorman must have seen him approaching the track. Had the brakes been applied and the car delayed for a second or two, he would have escaped. There was evidence that it was going at from 16 to 18 miles an hour:—Held, that there was some evidence of negligence on the part of the motorman which should have been submitted to the jury; and a nonsuit was set aside. Per Mulock, C.J., that the plaintiff was not to assume that the motorman would start his car from a point enabling him to see the plaintiff walking in a direction that would soon bring him upon the track, and, nevertheless, that the car would be driven at such a speed as to overtake him, and that without giving any warning of its approach. Per Clute, J., that there was evidence to submit to the jury of negligence on the part of the motorman in not sounding the gong, in not exercising more care in keeping a look-out, and in not applying the brakes before the car struck the plaintiff. He could not but see that the plaintiff was approaching the track, and it was to be inferred from the evidence that he ought to have known that the plaintiff was oblivious of the approaching car. [Brill v. Toronto Ry. Co. (1903), 13 O.W.R. 114, distinguished.]

Jones v. Toronto & York Radial Ry. Co., 10 Can. Ry. Cas. 361, 20 O.L.R. 71.

[Affirmed in 21 O.L.R. 421, 10 Can. Ry. Cas. 368.]

INJURY TO PERSON CROSSING TRACK—CONTRIBUTORY NEGLIGENCE.

In an action for damages for injuries sustained by the plaintiff, owing, as he alleged, to the negligence of the defendants, whereby he was struck by a car operated by their servants, while crossing a highway on foot:—Held, that there was, at the close of the plaintiff's case, some evidence proper to be passed upon by the jury both of negligence on the part of the defendants and of contributory negligence on the part of the plaintiff; and that a nonsuit was properly set aside and a new trial directed. Judgment of a Divisional Court, 20 O.L.R. 71, 10 Can. Ry. Cas. 361, affirmed. Per Garrow, J.A., that it is the well-established rule that, where reasonable evidence is given of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff, these issues must be determined by the jury. The cases which at first sight seem to qualify this rule are cases in which the Court was able to reach the conclusion that the negligence of the plaintiff was the sole cause, or that the conduct of the plaintiff was per se negligent, or the evidence so clear and undisputed that only the one inference could be reasonably possible.

Jones v. Toronto & York Radial Ry. Co., 10 Can. Ry. Cas. 368, 21 O.L.R. 421.

[See 23 O.L.R. 331, 12 Can. Ry. Cas. 436.]

INJURY TO PERSON CROSSING TRACK—CONTRIBUTORY NEGLIGENCE—ULTIMATE NEGLIGENCE.

Upon the second trial of this action, such trial being directed by the judgment of a Divisional Court (20 O.L.R. 71, 10 Can. Ry. Cas. 361), affirmed by the Court of Appeal (21 O.L.R. 421, 10 Can. Ry. Cas. 368)—the action being for damages for injuries sustained by the plaintiff owing to the alleged negligence of the servants of the defendants in charge of an electric tram-car which struck the plaintiff when crossing the defendants' track upon a public highway—the jury, in answer to questions, found: (1) That there was negligence on the part of the defendants which caused or helped to cause the collision; (2) that that negligence was, that "with the evidence given the car should have been stopped in a shorter distance;" (3) that there was negligence on the part of the plaintiff which caused or helped to cause the collision; (4) that that negligence was, that "he might have exercised a little more care;" (5) that, notwithstanding the negligence of the plaintiff, the defendants could by the exercise of reasonable care have prevented the collision; (6) that the motorman should have seen the man sooner and sounded his gong continuously:—Held, reversing the judgment of Riddell, J., that upon these findings (which were sufficiently sustained by the evidence) judgment should be entered for the plaintiff. Per Boyd, C.:—The rule of law applicable is that expressed by Lord Penzance in Radley v. London and North Western Ry. Co. (1876), 1 App. Cas. 754, 759: "Though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." The jury here, upon the evidence, find an ultimate want of care on the part of the motorman after the danger to the plaintiff had become apparent, and after the plaintiff appeared to be unconscious of the danger. This is to be regarded as the decisive cause: the approach of the plaintiff was only the condition under which this injury became imminent, and was not the ultimate determining cause. [Reynolds v. Thomas Tilling (1903) 19 Times L.R. 539, 20 Times L.R. 57, and Rice v. Toronto Ry. Co. (1910), 22 O.L.R. 446, distinguished.] Statement of the matters to be considered in weighing the degree of care required as between footpassengers and men in charge of a street car operating in a public highway. Per Middleton, J.:—The principle which governs this case is, that where a person or corporation is permitted to operate a dangerous vehicle upon a highway, that permission carries with it a corresponding duty of great care and incessant watchfulness to avoid injury to others using the highway. The user of the highway for rapid transit purposes, though lawful and expressly sanctioned by the Legislature, is, nevertheless, so perilous to the wayfarer that those in charge of the rapidly moving vehicle ought at all times to watch for the unwary and negligent footpassenger, and they cannot escape from this duty by asserting that they did not in fact perceive the plaintiff's danger. Adapting the language of Davies v. Mann (1842), 10 M. & W. 546, they are bound to go along the highway at such a pace and with such vigilance as to prevent mischief; and the answer of the jury to the 6th question brings the case within this rule. Per Middleton, J., also:—By the 3rd and 4th answers of the jury they found contributory negligence.

Jones v. Toronto & York Radial Ry. Co., 12 Can. Ry. Cas. 436, 23 O.L.R. 331.

[Reversed in 25 O.L.R. 158, 13 Can. Ry. Cas. 107.]

EXCESSIVE SPEED OF CAR—CROSSING BEHIND CAR WITHOUT LOOKING—ULTIMATE NEGLIGENCE.

R. alighted from an east-bound car of the defendants on the south side of Gerrard street, and in attempting to cross the north track of the defendants, opposite the gate of the Toronto General Hospital, which he was about to visit, he was struck by a westbound car and so injured that he died. In an action by R.'s executors to recover damages for his death, the jury, in answer to questions, found: that R.'s injuries were caused by the negligence of the defendants, which consisted in excessive speed; that R. could by the exercise of reasonable care have avoided the accident; that R. was negligent "by not looking for approaching car:" that the motorman of the west-bound car, after he became aware, or, if he had exercised care, ought to have been aware, that R. was in a position of danger, could have prevented the accident by the exercise of reasonable care; and that in that respect the motorman's negligence consisted in "too great a speed:"—Held, that, as the primary and ultimate negligence of the defendant were one and the same—excessive speed—and as that negligence was concurrent with the negligence of the deceased, there could be no recovery. No question of ultimate negligence arose upon the findings of the jury. Upon the findings of the jury, the action was dismissed, but without costs. Per Boyd, C.:—At places like the Hospital the cars should not be driven at such a rate as to imperil those who have to cross the track in the visitation of the sick.

Rice v. Toronto Ry. Co., 12 Can. Ry. Cas. 98, 22 O.L.R. 446.

DUTY AS TO PERSONS ON OR NEAR TRACK.

A motorman seeing a vehicle driving at right angles to his track, as if to cross, is justified in not reversing his controller until he sees that the driver of the vehicle does not intend to stop at the track and allow the car to pass, but the moment he perceives that there is danger it is his duty to act as promptly as he can to avert the danger.

Carleton v. Regina, 1 D.L.R. 778, 20 W.L.R. 395, 5 S.L.R. 90.

[Referred to in Balke v. Edmonton, 1 D.L.R. 876, 4 Alta. L.R. 406.]

INJURY TO DRIVERS OF VEHICLES.

It is contributory negligence for the driver of a horse-drawn vehicle not to look immediately before attempting to cross a street railway crossing to see that he has plenty of time to cross in safety and before any properly operated car can approach dangerously close to him.

Carleton v. Regina, 1 D.L.R. 778, 20 W.L.R. 395, 5 S.L.R. 90.

[Referred to in Balke v. Edmonton, 1 D.L.R. 876, 4 Alta. L.R. 406.]

CARS PASSING STREET CROSSING.

It is the duty of a motorman in taking his car over a crossing to keep a reasonable lookout for pedestrians and vehicles using the same crossing.

Carleton v. Regina, 1 D.L.R. 778, 20 W.L.R. 395, 5 S.L.R. 90.

[Referred to in Balke v. Edmonton, 1 D.L.R. 876, 4 Alta. L.R. 406.]

EXCESSIVE SPEED—PERSON CROSSING TRACK.

Where a street car approaches a stopping place at an excessive speed, and there are persons waiting to board the car, and the car slackens speed as though to stop, but does not stop, and the highway is in such a condition as to demand the close attention of any one making use of it, an attempt to cross in front of the car does not necessarily constitute contributory negligence, but the question must be left to the jury.

Slingsby v. Toronto Ry. Co., 3 D.L.R. 453, 3 O.W.N. 1161.

EXCESSIVE SPEED AT STREET INTERSECTION—INJURY TO PERSON CROSSING.

A verdict against a street railway company in favour of the plaintiff for injuries sustained by being struck by a street car will not be disturbed where, from the evidence, the jury was justified in finding that the car was negligently operated at excessive speed in crossing a public street at a dangerous point where the view was obstructed, and that the plaintiff, who was driving a long waggon, exercised reasonable care in approaching and endeavoring to cross the track and took reasonable care to save himself from injury, and that the motorman in charge of the car had time to avoid the accident after he became aware that the plaintiff intended to cross the track.

Goodchild v. Sandwich, Windsor & Amherstburg Ry. Co., 4 D.L.R. 159, 3 O.W.N. 1252.

DUTY OF MOTORMAN—REVERSING OF POWER—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE—"LAST CLEAR CHANCE"—ULTIMATE NEGLIGENCE.

Harnovis v. Calgary, 7 D.L.R. 789.

[Affirmed in Harnovis v. Calgary (No. 2), 11 D.L.R. 3.]

RATE OF SPEED—MUNICIPAL BY-LAW.

Where a municipal by-law fixes a limit of speed, e. g., eight miles an hour for the street cars of a company, such company is not thereby authorized to run its cars at such maximum speed regardless of conditions and circumstances; hence a speed of not more than five or six miles an hour may be imprudence on a dark, rainy night on slippery rails and on a dimly lighted street, and if such car causes injury to a person crossing at the intersection of streets the company will be liable in damages.

Montreal Street Ry. Co. v. Conant, 14 Can. Ry. Cas. 305, 7 D.L.R. 261.

USUAL STOPPING PLACE—NEGLIGENTLY RUNNING PAST STATIONARY CAR.

A passenger who had just alighted from a street car which was being met on a parallel track by another, at a point where cars usually stopped to discharge and receive passengers, and where, to the knowledge of the railway company, it was the custom or habit of persons alighting from cars to cross a parallel track in order to reach another street, is not necessarily guilty of contributory negligence, where the fact that another passenger warned the plaintiff, a woman, to look out for the car, might well have flurried and perturbed her, as witnesses said, and led her to lower her head in the face of a strong wind, as she went around the rear of the car from which she had just alighted, and attempted to cross the parallel track, where she was struck by a car which was negligently run past the stationary car at an unusually high rate of speed. [Cooper v. London Street Ry. Co., 14 Can. Ry. Cas. 191, 5 D.L.R. 198, affirmed.] 2. The negligence of the defendant street railway company was sufficiently shewn so as to prevent the withdrawal of such question from the jury, where the evidence disclosed that sufficient caution was not observed in running a street car towards a car standing on a parallel track discharging passengers at a street crossing where they were regularly discharged and received, and where, to the knowledge of the company, it was the habit or custom of passengers to cross a parallel track in order to reach another street, and that the car struck and injured the plaintiff, who had just alighted from the stationary car, and without noticing the car approaching from the opposite direction, passed around the rear of the standing car and stepped upon the parallel track. [Cooper v. London Street Ry. Co., 14 Can. Ry. Cas. 191, 5 D.L.R. 198, affirmed.] 3. Where there is no reasonable evidence upon the whole case whether adduced by the plaintiff or the defendant upon which the jury could find in the plaintiff's favour in an action of negligence, the case should be withdrawn from them and the action dismissed; it is not necessary to go through the form of directing the jury to find a verdict for the defendant and of having such verdict recorded. (Dictum per Meredith, J.A.)

Cooper v. London Street Ry. Co., 15 Can. Ry. Cas. 24, 9 D.L.R. 368.

[Followed in Ramsay v. Toronto Ry. Co., 17 Can. Ry. Cas. 6, 17 D.L.R. 220.]

LICENSEES AND PERMISSIVE USERS OF RIGHT-OF-WAY.

Where a railway company owning a tramway line leading to their railway station constantly permits the public to walk on the tracks of the tramway line without interference, it owes a duty to exercise reasonable care in the operation of the tramway to avoid running down a person walking on the tracks, to or from the station, as such circumstances create a leave and license to him to so use the tracks. [Grand Trunk Ry. Co. v. Anderson, 28 Can. S.C.R. 541, referred to.]

Andrews v. B.C. Elec. Ry. Co., 15 Can. Ry. Cas. 75, 9 D.L.R. 566.

AUTOMOBILES—DUTY WHEN APPROACHING STREET CROSSING.

It is the special duty of a person driving a motor vehicle to keep a good lookout while approaching a tramway crossing, and it is the duty of such person coming out from a cross-road into a main artery of traffic to wait and give way to that traffic, and not to throw himself headlong into the advancing traffic along the main traveled road. (Per Irving, J.A.). [Campbell v. Train (1910), 47 Sc.L.R. 475, applied.]

Monrufet v. B.C. Elec. Ry. Co., 9 D.L.R. 569, 18 B.C.R. 91.

CROSSING TRACK—FAILURE TO LOOK.

A railway company is not liable for injuries sustained by a person who crosses a street in front of a moving street car without keeping the car in sight until he has crossed the street, and trusts blindly to an opinion formed on leaving the sidewalk that there was ample time to cross.

Myers v. Toronto Ry. Co., 10 D. L. R. 754.

[Reversed in 18 D.L.R. 335.]

ACCIDENT AT STREET CROSSING—EXCESSIVE SPEED.

It is actionable negligence to run a tram car toward an intersecting street at an unlawful rate of speed without attempting to slacken speed on discovering an automobile on or near the track in a position of danger. Contributory negligence sufficient to prevent a recovery against a street railway company for a collision with the plaintiff's automobile, is not shown from the facts that, on approaching an intersecting street, the plaintiff reduced the speed of his automobile so as to avoid a slowly moving westbound car without discovering an eastbound car approaching at an unlawful rate of speed until his automobile was near or on the track, and in the emergency, he increased speed and attempted to pass in front of both cars, when his automobile was struck by the eastbound car, the speed of which was not slackened after the motorman discovered the plaintiff's danger.

Derry v. B.C. Elec. Ry. Co., 12 B.C.R. 258.

LIABILITY FOR INJURY TO PERSON CROSSING TRACK TO BOARD CAR.

A judgment against a street railway company for injuries sustained by the plaintiff by being struck by a street car while crossing a track to board another car, will not be disturbed on appeal on the ground that the plaintiff's negligence contributed to his injury, where, under all the circumstances of the case, the question of the defendant's negligence as well as the plaintiff's contributory negligence, were proper questions for the jury.

Ogle v. B.C. Elec. Ry. Co., 12 D.L.R. 261.

[Finigan v. London & N.W. Ry. Co. (1889), 5 Times L.R. 598; Ruddy v. London & S. W. R. Co. (1892), 8 Times L.R. 658; and Toronto Ry. Co. v. King, [1908] A.C. 260, followed.]

INJURY TO PERSON CROSSING TRACK—FAILURE TO LOOK FOR CARS.

Failure to look for approaching cars before crossing a street car track will defeat an action for the death of a pedestrian who, had he used ordinary care, would have seen the car that struck him, which could not have been stopped by the motorman after discovering the peril of the deceased in time to avoid striking him.

Ryder v. St. John Ry. Co., 13 D.L.R. 11.

[London Street Ry. Co. v. Brown, 31 Can. S.C.R. 642, applied.]

COLLISION WITH VEHICLE—EXCESSIVE SPEED—CONTRIBUTORY NEGLIGENCE.

Persons crossing the street railway tracks are entitled to assume that the cars will be driven moderately and prudently, and if an accident happens through a car going at an excessive rate of speed the street railway company is responsible. The driver of a cart struck by a car in crossing a track is not guilty of contributory negligence because he did not look to see of a car was approaching if, in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross. Gwynne, J., dissenting. 21 A.R. (Ont.) 553, affirmed.

Toronto Ry. Co. v. Gosnell, 24 Can. S.C.R. 582.

[Distinguished in O'Hearn v. Port Arthur, 4 O.L.R. 209; referred to in Halifax Elec. Tram. Co. v. Inglis, 30 Can. S.C.R. 258; Jones v. Toronto, etc. Ry. Co., 20 O.L.R. 71.]

COLLISION AT CROSSING—RATE OF SPEED—CONTRIBUTORY NEGLIGENCE.

A wagon in which plaintiff was proceeding from Sydney to Glace Bay was struck by an electric tram car owned and operated by the defendant company, while attempting to cross the defendant's track, at a place known as Grand Lake Crossing, and plaintiff was injured. The evidence showed that near the crossing there was a down grade for a distance of about 3,000 feet, and then an up grade for 1,000 feet, terminating at a siding near which the crossing at which the accident occurred was situated. On the down grade it was usual to run cars at a speed of from 20 to 25 miles an hour, but when half way down the power was shut off and the speed on reaching the siding was 10 miles an hour. When plaintiff's team was first seen it was at a distance of from 35 to 40 feet from the crossing, and the car was distant from 50 to 75 feet. The motorman in charge of the car acted promptly in applying the brakes and reversing the current, but was unable to avert the collision. The whistle had been blown when 300 yards distant from the crossing, and the car was provided with suitable appliances for stopping it within a reasonable time. The rate of speed at which the car was proceeding was reasonable considering the time and place. Plaintiff heard a whistle blown which he supposed to be that of a Sydney and Louisburg train but did not see the car until his horse's head was distant about 20 feet from the crossing. There was also evidence to show that he failed to exercise proper care in approaching the crossing as the reins were lying loose, and one witness called for plaintiff testified that, at the time, the horse was being whipped and was galloping:—Held, affirming the judgment of the trial judge and dismissing the action, that the proximate cause of the accident was negligence on the part of the plaintiff. Held, that a point not raised by the statement of claim, or at the trial where evidence might have been given to display the contention, should not be raised on appeal.

Livingstone v. Sidney & Glace Bay Ry. Co., 37 N.S.R. 336.

INJURY TO PERSON AND PROPERTY—COLLISION OF STREET CAR AND WAGGON—EVIDENCE—FINDINGS OF JURY—DAMAGES.

Williams v. Toronto Ry. Co., 2 O.W.N. 39, 20 O.W.R. 3.

COLLISION WITH CAB—NEGLIGENCE OF MOTORMAN—SPEED.

Plaintiff's driver, who was proceeding in the same direction as a tram car owned by the defendant company, stopped his cab to allow a passenger to alight. He then turned and attempted to cross the track upon which the car was running, about two car lengths ahead of the cab. The motorman, who had been ringing his gong when he saw the cab turn across the track, put on his brakes; then, seeing that he could not stop in time to avoid a collision, released the brakes and applied the current the reverse way. A collision having occurred, and an action having been brought by plaintiff, to recover damages for the injury done to the cab, the jury found that the car was running at too high a rate of speed, and that the motorman was negligent in failing to apply the brakes, or reverse the current in time to avoid the accident:—Held, dismissing the defendant's appeal, that the question of speed was one for the jury, and, there being evidence to support their finding, that the Court should not interfere.

Inglis v. Halifax Elec. Tram. Co., 1 Can. Ry. Cas. 352, 32 N.S.R. 117.

[Affirmed in 30 Can. S.C.R. 256, 1 Can. Ry. Cas. 360; applied in Robinson v. Toronto Ry. Co., 2 O.L.R. 18; distinguished in O'Hearn v. Port Arthur, 4 O.L.R. 209; referred to in Tinsley v. Toronto Ry. Co., 15 O.L.R. 438.]

ELECTRIC CAR COLLIDING WITH CAB—EXCESSIVE SPEED—CONTRIBUTORY NEGLIGENCE.

A cab driver was endeavouring to drive his cab across the track of an electric railway, when it was struck by a car and damaged. In an action against the Tramway Company for damages it appeared that the accident occurred on part of a down grade several hundred feet long, and that the motorman after seeing the cab tried to stop the car with the brakes, and that proving ineffectual reversed the power, being then about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident; that the driver was negligent in not looking more sharply for the car; and that notwithstanding such negligence on the part of the driver the accident could have been averted by the exercise of reasonable care:—Held, affirming the judgment of the Supreme Court of Nova Scotia (32 N.S. Rep. 117), Gwynne, J., dissenting, that the last finding neutralized the effect of that of contributory negligence; that as the car was on a down grade and going at an excessive rate of speed it was incumbent on the servants of the company to exercise a very high degree of skill and care in order to control it if danger was threatened to any one on the highway; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run.

Halifax Elec. Tramway Co. v. Inglis, 1 Can. Ry. Cas. 360, 30 Can. S.C.R. 256.

Collision of car with waggon—Contributory negligence—Duty to look.

The plaintiff, who was driving a horse and waggon very slowly along a street on the left side of a car track, turned to the right to cross the track and the waggon was struck by a car which had been coming behind. The plaintiff said that about one hundred feet from the point at which he tried to cross he looked back and that no car was to be seen, and he did not look again before trying to cross:—Held, that it was his duty to have looked, and that his not having done so constituted contributory negligence on his part, which disentitled him to recover damages. [Danger v. London Street Ry. Co. (1899), 30 O.R. 493, applied.] Judgment of Britton, J., reversed. Per Boyd, C.:—A driver of a vehicle moving along a street in which cars are running, and who knows when and where he intends to cross the car tracks, is bound to be vigilant to see before crossing that no car is coming behind him. A greater burden in this regard rests on the driver than on the motorman, who is not to be kept in a state of nervousness and apprehension lest someone may at any moment cross in front of the moving car.

O'Hearn v. Port Arthur, 2 Can. Ry. Cas. 173, 4 O.L.R. 209.

[Distinguished in Marshall v. Gates, 10 B.C.R. 155; inapplicable in Bell v. Winnipeg Elec. Street Ry. Co., 15 Man. L.R. 344; referred to in London & West. Trusts v. Lake Erie, etc. Ry. Co., 12 O.L.R. 28; Smith v. Niagara, etc. R. Co., 9 O.L.R. 158; Tinsley v. Toronto Ry. Co., 15 O.L.R. 438; relied on in Wallman v. Can. Pac. Ry. Co., 16 Man. L.R. 89.]

Collision—Rule of the road.

A street railway company has no exclusive right to that portion of a public street covered by its tracks. It has, however, a paramount and superior right, and others are bound to observe that right to the extent of avoiding collisions; but it also is the duty of those in charge of a car to exercise diligence and care, even though the person in danger of collision may himself be negligent. The rule of the road as applied to street cars discussed.

Balfour v. Toronto Ry. Co., 2 Can. Ry. Cas. 314.

[Affirmed in 5 O.L.R. 735, 2 Can. Ry. Cas. 325.]

Collision—Failure to ring bell—Snow at side of track—Contributory negligence.

The plaintiff, a telegraph messenger, was riding a bicycle in a southerly direction behind a street car of the defendants on the west track, and the car stopping, in order to avoid running into it, and because he found snow was piled up on the road on the right side he turned to the left side, and was struck by a car coming on the east track, and injured. It did not appear that the latter car had sounded the gong or given any other warning. The plaintiff however was nonsuited at the trial:—Held, that the defendants were bound to adopt reasonable precautions to prevent accidents by sounding a gong or otherwise, although there was no statutory obligation; and although the plaintiff may have put himself in a position of peril, this was not per se an act of negligence; and there being evidence which might have satisfied the jury that the accident was caused by omission on the defendant's part to ring the gong, and also evidence from which they might have found that it was attributable to the plaintiff's own negligence, the case should not have been withdrawn from them. [Dublin, Wicklow & Wexford Ry. Co. v. Slattery (1878), 3 App Cas. 1155, specially referred to.]

Preston v. Toronto Ry. Co., 5 Can. Ry. Cas. 30, 11 O.L.R. 56.

[Affirmed in 13 O.L.R. 369, 6 Can. Ry. Cas. 249; distinguished in Tinsley v. Toronto Ry. Co., 15 O.L.R. 438; followed in Brenner v. Toronto Ry. Co., 13 O.L.R. 423.]

Collision—Negligence of motorman.

The fact that the motorman and the conductor exchanged places on a street car in contravention of the company's rules, and that the conductor so permitted to drive the car allowed it to collide with another car either from negligence or incompetence, may form the basis of an action by a passenger for the resulting personal injuries he received.

Winnipeg Elec. Ry. Co., v. Hill, 8 D.L.R. 106, 46 Can. S.C.R. 654.

[Hill v. Winnipeg Elec. Ry. Co., 21 Man. L.R. 442, affirmed.]

Collision with vehicle—Ultimate negligence.

In a personal injury case arising from a street car colliding with a rig, where the trial Judge submits the question of ultimate negligence, but the jury did not deal with it (or there is doubt as to whether they did deal with it), even in a case where, upon unravelling confused jury findings, the effect may be that both were to blame and that the motorman after he saw the plaintiff in danger could not have stopped the car, but there is no finding by the jury as to whether the motorman could by reasonable diligence have avoided the accident after he should have known that the plaintiff was about to cross in front of the car, and where the finding at most is that the motorman could not have stopped the car after he saw (not might have seen) the plaintiff, such findings are incomplete and ground for a new trial to the plaintiff is there was evidence before the jury sufficient to support a finding, had there been one, of ultimate negligence on the part of the defendant.

Herron v. Toronto Ry. Co., 14 Can. Ry. Cas. 124, 6 D.L.R. 215.

[Reversed in 11 D.L.R. 697; 28 O.L.R. 59, 15 Can. Ry. Cas. 373.]

Collision with vehicle—Ultimate negligence.

In a personal injury action arising from a street car colliding with a rig, where both the plaintiff and the defendants' motorman were guilty of negligence, each in not seeing the danger and avoiding the injury of a collision, if it appears that when the motorman first saw the impending danger it was too late to prevent the injury, the plaintiff's action fails. [Herron v. Toronto Ry. Co. (No. 1), 6 D.L.R. 215, 14 Can. Ry. Cas. 124, reversed.] In a personal injury action arising from a street car colliding with a rig where the findings of the jury were in effect that the negligence of the defendants' motorman and that of the plaintiff were concurrent and simultaneous negligence of similar character by both parties and that there was not any new negligent act by the defendant in addition to its first act of negligence, verdict was properly for the defendant and will not in that respect be disturbed. [Herron v. Toronto Ry. Co. (No. 1), 6 D.L.R. 215, 14 Can. Ry. Cas. 124, reversed.]

Herron v. Toronto Ry. Co., 11 D.L.R. 697, 15 Can. Ry. Cas. 373, 28 O.L.R. 59.

Rear end collision—Failure by motorman to observe rules.

Where it appears from plaintiff's own evidence that he was familiar with a rule of the railway company calling for a five-minute interval between cars and he, as motorman of a car, failed to observe that rule, which failure on his part caused a collision with a car ahead, a verdict by the jury in his favour will be set aside and the action dismissed on appeal. (Per Macdonald, C.J.A., and Galliher, J.A.)

Daynes v. British Columbia Elec. Ry. Co., 14 Can. Ry. Cas. 309, 7 D.L.R. 767.

[Reversed in 18 Can. Ry. Cas. 146, 19 D.L.R. 266, 49 Can. S.C.R. 58.]

Injury to child—Contributory negligence—Ultimate negligence.

In submitting the case to the jury in an action for damages arising out of injury to a child by one of the defendant company's cars, five questions were submitted by the Judge, who also instructed the jury that they might if they chose, bring in a general verdict. The jury returned a verdict for the plaintiff in $300 damages. On the Judge asking whether they had answered the questions, the foreman replied that they had answered three: "(1) Was the company guilty of negligence? Yes. (2) If so, in what did such negligence consist? Overspeed. (3) Was the plaintiff guilty of contributory negligence? Yes." The trial Judge, on this, dismissed the action:—Held, that while it was probable that the jury intended to return a general verdict, yet the matter was not free from doubt, and should have been cleared up before the jury was discharged. There should, therefore, be a new trial. One of the question not answered was "Could the motorman, after it became apparent to him that the boy was going to cross the tracks, by exercise of reasonable care and skill, have prevented the accident if he had been running at a reasonable rate of speed?" The Judge said, in submitting this question: "I want you to consider that last element, because it is not: 'Could he have prevented the accident if running at an unreasonable rate of speed?'" Held, that this question was improperly framed, and the jury were not properly directed: that the original rate of speed was the original negligence, and after finding such negligence the jury had to consider whether, notwithstanding the unreasonable rate of speed, the motorman, after seeing the boy commit or about to commit a negligent act, could, by the exercise of reasonable care, have avoided the consequences of it. New trial ordered, costs of appeal to appellant, and costs of trial below to abide the event of the new trial.

Rayfield v. British Columbia Elec. Ry. Co., 15 B.C.R. 361, 14 W.L.R. 414.

Contributory negligence by injured child.

A boy of eleven years of age and of sufficient intelligence, in the estimation of the Court, to understand the probable consequence of his actions, is liable for contributory negligence in the case of an accident, while attempting to board a tramway car as a trespasser and in disobedience to orders of the school-masters in charge of him.

Normand v. Hull Elec. Ry. Co., 35 Que. S.C. 329.

[Followed in Champagne v. Montreal St. Ry. Co., 35 Que. S.C. 514.]

Injury to infant—Failure of motorman to take proper precautions

In an action brought in the name of an infant, claiming damages for injuries occasioned through the alleged negligence of the defendant company in the operation of their electric tramway, the evidence shewed that the infant, a child aged one year and eleven months, was seen approaching the track upon which one of the defendant's cars was moving slowly. The whistle was sounded and the child stopped for a moment and then moved quickly towards the car and was struck, and received the injuries for which the action was brought. Upon seeing the child stop when the whistle was blown, the motorman immediately applied speed without waiting to see whether the child was going to return or making any effort to remove it from its dangerous position:—Held, that this was a clear case of reckless conduct, for which defendant was responsible. Also, that the failure to take proper precautions to avert injury to the child was not to be excused by the alleged necessity of complying with the time table and preventing delay to passengers. Also, that the failure of defendant company to provide its car with a fender was clear evidence of negligence.

Lott v. Sydney & Glace Bay Ry. Co., 8 Can. Ry. Cas. 276, 41 N.S.R. 153. [Affirmed in 42 Can. S.C.R. 220, 9 Can. Ry. Cas. 359.]

CONTRIBUTORY NEGLIGENCE OF CHILDREN—PRESUMED JUVENILE DISCRETION.

A boy of eight and one-half years, possessing the ordinary intelligence of a child of that age, will be presumed to know enough to get out of the way of a moving street car if he saw it coming. In an action to recover for the alleged negligence of a railway company in running over a child eight and one-half years of age, where the testimony of the witnesses fails to bring out a material point as to the question of the contributory negligence of the child (ex. gr., why he failed to observe the approach of the car) it is error on the part of the trial Judge not to permit the child to testify either under oath or in the form of unsworn evidence received under the provisions of s. 39 of the Evidence Act, R.S.M. 1902, c. 57, where it appears that the child understood the duty of telling the truth.

Schwartz v. Winnipeg Elec. Ry. Co., 12 D.L.R. 56, 23 Man. L.R. 483.

[See Annotation to Hargrave v. Hart, 9 D.L.R. 521, on contributory negligence of child injured while crossing highway.]

CROSSINGS—CONTRIBUTORY NEGLIGENCE—LOOKING BOTH WAYS.

A person about to cross a railway track is under a duty not to be guilty of negligence, but what is the exercise of reasonable care is a question of fact to be decided by the jury, according to the facts of the case, and failure to look just before crossing a street railway track is not, as a matter of law, negligence per se. [Grand Trunk R. Co. v. McAlpine, 13 D.L.R. 618, [1913] A.C. 838, 16 Can. Ry. Cas. 186, explained.]

Ramsay v. Toronto Ry. Co., 17 Can. Ry. Cas. 6, 30 O.L.R. 127, 17 D.L.R. 220.

EXCESSIVE SPEED AND LACK OF WARNING—CROSSING STREET WITH REASONABLE CARE.

Where the substance of the jury's findings in an action against a street railway for running down and killing a foot passenger crossing the street, is that the death was caused by negligence in operating their car at an excessive rate of speed and in failing to give warning of the approach of the car, and that the deceased, having looked up and down the street and seen no car, had exercised reasonable care, judgment must be entered for the plaintiff, if there was evidence upon which reasonable men might find, as the jury did, that defendants were guilty of negligence and that the deceased had exercised reasonable care.

Ramsay v. Toronto Ry. Co., 17 Can. Ry. Cas. 6, 30 O.L.R. 127, 17 D.L.R. 220.

[Cooper v. London Street R. Co., 9 D.L.R. 368, 15 Can. Ry. Cas. 24, 4 O.W.N. 623, followed; Dublin, Wicklow & Wexford Ry. Co. v. Slattery, 3 App. Cas. 1155, 1166, distinguished.]

CONTRIBUTORY NEGLIGENCE—REASONABLE CARE—DIRECT AND PROXIMATE CAUSE.

L. started to cross a street traversed by an electric railway and proceeded in a north-westerly direction with his head down and apparently unconscious of his surroundings. A car was coming from the east and the motorman saw him when he left the curb at a distance of about fifty yards. Twenty yards further on he threw off the power and when L., still abstracted, crossed the devil strip and stepped on the track reversed being then about ten feet from him. The fender struck him before he crossed and he received injuries causing his death. On the trial of an action by his widow the jury found that the motorman was negligent in not having his car under proper control, that L. was negligent in not looking out for the car, but that the motorman could, notwithstanding, have avoided the accident by the exercise of reasonable care. A majority of them found, also, that L.'s negligence did not continue up to the moment of impact. Upon appeal from the judgment setting aside the verdict for the plaintiff at the trial and dismissing his action, the verdict at the trial was sustained on the ground that the jury were entitled to find that when the motorman first saw L. he should have realized that he might attempt to cross the track, and it was his duty then to have the car under control, and that his failure to do so was the direct and proximate cause of the accident for which the railway company was liable. (Davies and Anglin, JJ., dissenting.) [Long v. Toronto Ry. Co., 15 Can. Ry. Cas. 35, reversed; Tuff v. Warman, 5 C.B.N.S. 573; Radley v. London & N.W. Ry. Co., 1 App. Cas. 754; Walton v. London & Brighton & S.C. Ry. Co., H. & R. 424; The Bernina, 13 App. Cas. 1, 12 P.D. 58; Davies v. Mann, 10 M. & W. 546, followed.]

Long v. Toronto Ry. Co., 18 Can. Ry. Cas. 92, 50 Can. S.C.R. 224.

DUTY ON SEEING PERSON OR VEHICLE ON OR NEAR TRACK.

It is the duty of a street railway company to run its electric cars on city streets under such control and at such rate of speed and accompanied by such warning, that the motorman will be enabled to take reasonable precautions to avoid a collision when an emergency arises by a vehicle necessarily turning upon the tracks in a crowded street.

Durie v. Toronto Ry. Co., 16 Can. Ry. Cas. 334, 15 D.L.R. 747.

OPERATION—DERAILMENT OF CAR—PRIMA FACIE NEGLIGENCE—WAIVER.

Although proof of derailment of a railway car and its resultant injury generally establishes a prima facie case of negligence against the defendant company in a personal injury action, yet the plaintiff who goes further and undertakes without success to shew specially the cause of such derailment may thereby waive the prima facie case upon which he might otherwise have relied.

Curry v. Sandwich, Windsor & Amherstburg Ry. Co., 19 Can. Ry. Cas. 210, 18 D.L.R. 685.

SPUR TRACK—INJURIES CAUSED BY CARS RELEASED BY CHILDREN.

A street railway company, which is supplying material for a street construction company, and has for that purpose a spur line connecting with the main track by a knife switch, which allows cars upon the spur line to run down the grade and out on to the main line, is responsible for injuries caused by boys releasing the cars on the spur line, thus causing a collision with the car on the main line on which the plaintiff was traveling. [McDowall v. Great Western Ry. Co., [1903] 2 K.B. 331, distinguished.]

Green v. British Columbia Elec. Ry. Co., 19 Can. Ry. Cas. 240, 25 D.L.R. 543.

Protruding rails—Collision with automobile—Municipality.

A municipal corporation operating a street railway is liable for a collision of a street car with an automobile which had become stalled owing to rails protruding at a highway crossing.

Kuusisto v. Port Arthur, 20 Can. Ry. Cas. 335, 37 O.L.R. 146, 31 D.L.R. 670.

Accident at crossings—Private driveway—Collision with vehicle—Speed—Warnings.

The operating of an electric car at an excessive rate of speed and the failure to give proper warnings while approaching a private driveway crossing constitutes negligence at common law which renders the company answerable for injuries to a vehicular traveler resulting from a collision at the crossing. [Grand Trunk Ry. Co. v. McKay, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 527; Bell v. Grand Trunk Ry. Co. (1913), 15 D.L.R. 874, 48 Can. S.C.R. 561, 16 Can. Ry. Cas. 324, distinguished.]

Gowland v. Hamilton, Grimsby & Beamsville Elec. Ry. Co., 19 Can. Ry. Cas. 214, 24 D.L.R. 49.

Collision with automobile—Contributory negligence—Violating rule of road.

Driving an automobile contrary to the rule of the road as required by a municipal traffic by-law, particularly the reckless proceeding out from behind a street car in a diagonal course thereby hiding from view a street car approaching from an opposite direction, constitutes contributory negligence which will preclude recovery for injuries sustained in consequence of a collision with the street car. [British Columbia Elec. Ry. Co. v. Loach, 20 Can. Ry. Cas. 309, 23 D.L.R. 4, [1916] A.C. 719, considered.]

Tait v. British Columbia Elec. Ry. Co., 20 Can. Ry. Cas. 408, 22 B.C.R. 571, 27 D.L.R. 538.

[Appeal to Supreme Court of Canada quashed on ground of want of jurisdiction.]

Dangerous placing of trolley pole—Absence of guards—Collision.

A street railway company empowered by its Act of incorporation to erect poles on a street, so as not to impede public travel, will be liable in damages for injuries to a vehicular traveler resulting from a collision of a motor car with one of the trolley poles that had been shifted from its uniform position at the side of the street to the devil's strip, without any lights to guard it at night.

Weir v. Hamilton Street Ry. Co., 22 D.L.R. 155.

Boarding crowded car—Standing on step—Contributory negligence.

Standing on the lower step on the entrance platform of a crowded car and hanging on to the bar handle in an effort to board it amounts to contributory negligence which will preclude recovery for injuries sustained as a result of being thrown therefrom when the car is being started.

Clarey v. Ottawa Electric Ry. Co., 21 Can. Ry. Cas. 231, 38 O.L.R. 308, 33 D.L.R. 586.

Duty on seeing person near track—Warnings—Ultimate negligence.

A motorman approaching a crossing, who has given the statutory warnings, is not bound to give additional warnings to persons approaching it, unless he had reason to believe that they were oblivious of his presence and of danger in crossing the track; his failure to do so, in the circumstances, does not constitute ultimate negligence.

Honess v. British Columbia Elec. Ry. Co., 21 Can. Ry. Cas. 238, 23 B.C.R. 90, 36 D.L.R. 301.

NEGLIGENCE—CONTRIBUTORY—ULTIMATE—DEFECTIVE BRAKES—SPEED.

Defective brakes on a street car incapable of arresting its speed when approaching a highway crossing is negligence which will render the railway company liable for a collision, notwithstanding the plaintiff's contributory negligence. [British Columbia Elec. Ry. Co. v. Loach, [1916] 1 A.C. 719, 23 D.L.R. 4, 20 Can. Ry. Cas. 309, followed; Columbia Bitulithic v. British Columbia Elec. Ry. Co., 31 D.L.R. 241, 23 B.C.R. 160, reversed.]

Columbia Bitulithic v. British Columbia Elec. Ry. Co., 21 Can. Ry. Cas. 243, 55 Can. S.C.R. 1, 37 D.L.R. 64.

ULTIMATE NEGLIGENCE—EXCESSIVE SPEED.

Running a street car at an excessive speed can only become ultimate negligence, for which there is liability notwithstanding the plaintiff's contributory negligence, in cases where the motorman could, or should have, avoided the accident, but failed to do so.

Smith v. Regina, 21 Can. Ry. Cas. 270, 34 D.L.R. 238.

COLLISION—ULTIMATE NEGLIGENCE.

The failure of a motorman to avoid a collision, when he could have done so, after seeing that the plaintiff was about to cross, is the ultimate negligence and the proximate cause of the accident, despite the plaintiff's contributory negligence in failing to look. [Calgary v. Harnovis, 15 D.L.R. 411, 48 Can. S.C.R. 494, followed. See annotation, 1 D.L.R. 783.]

Banbury v. Regina, 21 Can. Ry. Cas. 285, 10 S.L.R. 297, 35 D.L.R. 502.

UNUSUAL JOLTING OF CAR—DUTY OF SERVANTS IN CHARGE.

If there is unusual jolting or bumping a street car it is the duty of the servants in charge of the car to ascertain why the bumping is going on. Failure to do this is negligence for which the company is liable in case of injury to a passenger, caused by the sudden stopping of the car, owing to the falling of a brakeshoe.

Scott v. Toronto Ry. Co., 48 D.L.R. 569.

LOOSE TROLLEY ROPE.

Allowing a rope attached to a trolley pole to hang loose, and capable of being blown out by the wind and entangling persons waiting for cars, is negligence, for which a person injured in consequence thereof may recover.

Wilkes v. Saskatoon, 32 D.L.R. 42.

BOARDING CAR WHILE IN MOTION—WARNINGS AGAINST—CONTRIBUTORY NEGLIGENCE.

Disregard of a warning prominently displayed at the point of entrance to a street car that persons should not get on the car while it is moving, may constitute contributory negligence on the part of the passenger which will prevent his recovering damages for injury to his foot by having it caught in the step riser which was defectively and improperly built, if it appears that the plaintiff's foot could not have slipped into the opening left in the riser had he boarded the car when it was stationary. [Newberry v. Bristol Tramways, 107 L.T.R. 800, referred to.]

Black v. Calgary, 24 D.L.R. 55, 31 W.L.R. 191, 8 W.W.R. 646.

Conductor stopping car suddenly when not at regular stopping place—Injury to passenger.

The stopping of a street car in the middle of a block, not being necessary or justifiable under the circumstances, a jury is justified in finding negligence, where the car was brought to a violent or sudden stop, which caused a passenger standing in the car to fall and sustain injuries.

Billington v. Hamilton Street Ry. Co., 34 D.L.R. 708, 39 O.L.R. 25.

Collision—Ultimate negligence—Failure to look—Defective brakes.

Columbia Bitulithic v. British Columbia Elec. Ry. Co., 31 D.L.R. 241, 35 W.L.R. 227.

Operation—Duty and care—Struck by step of car.

A plaintiff suing a street railway company for being hit by the step of a car while at the side of the track is not entitled to have the question of negligence submitted unless he has established by some reasonable proof want of due care by the company or its servants.

Dunham v. Cape Breton Elec. Co., 21 D.L.R. 38.

Hill—Loaded vehicle—Street car track—Right-of-way.

The driver of a loaded vehicle climbing a steep hill has no special right of way over a street car track and must use reasonable care in crossing. Blindly crossing the track without looking to see whether a tram car is approaching or not is negligence which disentitles him to damages for injuries sustained.

Davie v. Nova Scotia Tramways & Power Co., 41 D.L.R. 350.

Injury to passenger—Extending arm through window.

Unless a tramway company has been guilty of negligence in some other respect, a passenger who puts his arm on the sill of the car window in such a way that it projects beyond the side of the car, and is struck by a car going in the opposite direction, cannot recover damages for such injuries.

Montreal Tramways Co. v. Lefebvre, 24 D.L.R. 278.

Collision with automobile—Theatres—Speed.

Running a street car at a high rate of speed at a place where people were leaving a theatre, thereby colliding with an automobile proceeding out from thereabouts, is negligence for which the railway company is responsible; where both are at fault the company may be condemned to pay half of the damages claimed.

Fairbanks v. Montreal Street Ry. Co., 31 D.L.R. 728.

Collision—Negligence of jitney driver.

Where in the agony of imminent collision caused by a jitney driver's recklessness, a motorman increases speed, in the hope of avoiding an accident, the railway company is not liable for injuries occasioned thereby to a passenger of the jitney. [See Annotation in 1 D.L.R. 783.]

Moore v. B.C. Elec. Ry. Co., 35 D.L.R. 771.

Driver of motor car—Negligence of street car conductor proximate cause.

The negligence of the plaintiff in misjudging the speed of an oncoming street car will not prevent him from recovering damages for injuries caused by his car being hit by such street car, where the real proximate and decisive cause of the injury was that the motorman was running the car at such an excessive rate of speed that he could not stop the car within a reasonable distance and avoid the result of the plaintiff's negligence which might have been anticipated.

Parsons v. Toronto Ry. Co., 48 D.L.R. 678.

Collision with person crossing street—Signals—Proximate cause.

Sitkoff v. Toronto Ry. Co., 29 D.L.R. 498.

Negligence—Escape of electric current—Jurisdiction of commission—Appeals from—Constitutionality—Appointive powers.

Winnipeg Elec. Ry. Co. v. Winnipeg; Re Public Utilities Act, 30 D.L.R. 159.

Accident at street crossing—Excessive speed of car—Failure to sound gong—Collision with automobile.

That the driver of an automobile, when about to cross a street railway track at a street intersection where his view was obstructed by a fence at the edge of the sidewalk, erected about a building in course of construction, could have seen an approaching car had he looked a second sooner, does not establish contributory negligence sufficient to defeat a recovery for a collision with the car, which was running, in violation of a municipal regulation, at a high rate of speed without its gong being sounded. [Toronto Ry. Co. v. King, [1908] A.C. 260, applied: Toronto Ry. Co. v. Gosnell, 24 Can. S.C.R. 582; and Grand Trunk Ry. Co. v. Griffiths, 45 Can. S.C.R. 380, specially referred to.]

Simington v. Moose Jaw Street Ry. Co., 15 D.L.R. 94.

Person crossing track—Reliance on rules—Proper speed and operation—Scope of "stop, look and listen" doctrine.

Where the plaintiff, about to cross a street railway track, sees the car moving at such a distance away that he thinks it safe to venture across the short distance he has to go, he has the right to assume such safety and that the car is being operated properly and not at an excessive rate of speed. Where a person on foot is about to cross a street railway track having taken the precaution to look once and having reasonably formed the opinion that it is safe to cross the track because an approaching car is at such a distance that, if operated in a usual and proper manner, the pedestrian can safely cross; the trial Judge is in error, if he states the law as imposing a duty to look again, or continue looking and keeping the car in sight, as a condition precedent to any right of recovery. [Myers v. Toronto Ry. Co., 10 D.L.R. 754, reversed.]

Myers v. Toronto Ry. Co., 18 D.L.R. 335.

Injury to person alighting from car—Outward swing of rear steps—Proximate cause of injury—Duty of company to passenger.

The obligation of the defendant company to the plaintiff, as its passenger, did not end until she reached a place from which she might have safely passed from the point of debarkation to the place where she had to go to transfer to another line. The obligation of the company was greater towards a passenger who had not completed his journey, but in order to do that had to transfer to another line than it would be to a passenger who had completed his journey; but, even as to such a passenger, the company was bound to provide a stopping place at which the passenger could proceed to the sidewalk without having to pass through such a pool of water as existed at the usual place for crossing or subjecting him to the danger, before he had reached the sidewalk, assuming that he had not unnecessarily delayed in crossing, of being struck by a car when it was swinging around a curve such as existed at the stopping place. The plaintiff was still a passenger when she was struck by the rear end of the steps of the car as it swung outwardly in rounding the curve; the company owed her a higher duty than if she had been merely a traveler upon the highway; the servants of the company were guilty of negligence in starting the car without first making sure that the passengers who had left it were not still between it and the wagon; and that negligence was the proximate cause of the plaintiff's injury. Judgment of Middleton, J., 44 O.L.R. 232, 46 D.L.R. 722, affirmed.

Barr v. Toronto Ry. Co. and Toronto, 46 O.L.R. 64.

Collision upon highway of automobile and electric street car—Action brought by driver—Addition of owner as co-plaintiff—Judge's charge—Findings of jury—Operation of "backing" street car—Control from front—Question for Ontario Railway and Municipal Board—Negligence of conductor—"Misjudging course of automobile"—Failure of driver of automobile to give signal when turning.

O'Dell v. Toronto Ry. Co., 44 O.L.R. 350.

Injury to passenger—Fall caused by breaking of strap—Primâ facie negligence—Res ipsa loquitur—Absence of evidence of inspection—Finding of jury—Nondirection—New trial—Husband joined as co-plaintiff.

The fact that the strap by which the plaintiff was supporting herself, standing in the car, broke when called on to bear the strain, cast upon the company the burden of shewing that the breaking was not due to any negligence on its part. The case was one for the application of the rule res ipsa loquitur. [McPhee v. Toronto and Bulmer (1915), 9 O.W.N. 150; Sangster v. T. Eaton Co., 25 O.R. 78, 21 A.R. (Ont.) 625; T. Eaton Co. v. Sangster, 24 Can. S.C.R. 708, and Toronto Ry. Co. v. Fleming (1913), 47 Can. S.C.R. 612, followed.] The company adduced evidence for the purpose of rebutting the primâ facie presumption which arose from the breaking of the strap, but made no attempt to shew that the strap had been inspected or tested, or that any system of inspection or testing was in use, nor to shew how long the strap which broke had been in use. The jury should have been instructed that the burden of rebutting the presumption of negligence which arose from the breaking of the strap was upon the company, and that unless that burden had been satisfied the plaintiffs were entitled to succeed; and, the jury not having been so instructed, and their findings as to negligence being unsatisfactory, the ends of justice would be best served by setting aside the judgment and directing a new trial. [Judgment of Meredith, C.J.C.P. 44 O.L.R. 568, reversed.]

Brawley v. Toronto Ry. Co., 46 O.L.R. 31.

Res ipsa loquitur—Jerks and jolts.

A jerk or jolt of a street car while receiving passengers, resulting in a passenger being thrown off and injured while attempting to board the car, is primâ facie proof, without more, that the accident was caused by the negligence of the railway company, to which the principle of res ipsa liquitur applies. [See Imperial Tobacco Co. v. Hart (N.S.) 36 D.L.R. 63.]

Johnson v. Halifax Elec. Tramway Co., 36 D.L.R. 56.

Duties as to speed and signals—Agreement with municipality as to—Right of pedestrian to assume compliance.

When by an agreement between a municipal corporation and a company operating street cars, it is provided that the company will not run its cars at a greater rate of speed than ten miles an hour within city limits, without the permission of the corporation, and that a gong shall be sounded within fifty feet of each crossing. A person crossing the road where the street cars are operated has the right to assume that the drivers of the cars will comply with these regulations. [Simington v. Moose Jaw Street Ry. Co., 5 W.W.R. 759, followed.]

Brown v. Moose Jaw Elec. Co., 7 W.W.R. 695.

DUTY WHEN APPROACHING A CROSSING.

It is quite a frequent and expected practice for the public to cross a street behind a car stopped at a corner of a street. This crossing being dangerous on account of a car which may be coming in the opposite direction, it ought to be the object of special precaution on the part of the employees of the company. And a car passing another car at rest, discharging passengers, ought to go at such a speed as to enable it to be stopped almost instantly. And a motorman, at a moment when, by the presence of another car at rest, is unable to see persons approaching from the other side of the street, ought to keep his attention absolutely rivetted so as to be able to avoid any danger which might arise.

Burton v. Montreal Tramways Co., 51 Que. S.C. 74.

COLLISION WITH AUTOMOBILE —CONCURRENT NEGLIGENCE.

In an action for damages for negligence in the operation of a street car colliding with plaintiff's automobile, where it is found that the plaintiff was himself negligent and his negligence was concurrent with the negligence of the defendant which, e.g., excessive speed, was both primary and ultimate, the plaintiff cannot recover. [Rice v. Toronto Ry. Co., 20 O.L.R. 446, followed.]

United Motor Co. v. Regina, 10 S.L.R. 373, 3 W.W.R. 509.

G. Duty towards Passengers; Injuries to.

DESTINATION OF CAR—SIGN-BOARDS INDICATING—DUTY OF PASSENGER TO INQUIRE.

There is no obligation on the part of a railway company to carry a passenger through to his destination in any one particular car. The only contract on the part of the company is to carry passengers in accordance with the usual modes and methods of running its trains; and it is the passenger's duty to protect himself by making inquiry as to the destination of the car he enters.

O'Connor v. Halifax Elec. Tramway Co., 38 N.S.R. 212.

[Affirmed 37 Can. S.C.R. 523.]

ACCIDENT BY ALIGHTING FROM CAR—CROSSING TRACK.

Plaintiff in returning home at two o'clock in the morning on a west bound car on the north track of defendants' street railway alighted from the car and proceeded to cross the north and south tracks on the street in front of an approaching east bound car on the south track then about 100 feet away. There was evidence that the approaching car was going at the rate of 8 to 10 miles an hour, and that there was a bright electric light near by that the plaintiff, if careful, could have seen the car. The motorman did not apply the brakes or sound the gong before the plaintiff was struck:—Held, that a nonsuit was properly directed.

Gallinger v. Toronto Ry., 8 O.L.R. 698.

[Referred to in Preston v. Toronto Ry. Co., 13 O.L.R. 369.]

Injury to passenger after alighting from car—Contributory.

The plaintiff was a passenger on a crowded car of the defendants going westward. Being near the front end of the car when it stopped at the street where he wished to alight, he made his way past a number of people in the passage and in the front vestibule to the steps at that end, on which another man was standing, and stepped off the car in the direction of the parallel track of the railway. Almost instantaneously upon alighting, he was struck by another car of the defendants proceeding eastwards on the other track, knocked down and very seriously injured. The distances between the sides of two cars, when passing one another on the two tracks, was 44 inches, and the height of the lowest step of the car from the ground was 15½ inches. There was no rule of the company prohibiting passengers from alighting at the front entrance of cars, but a rule of the company required motormen, when approaching another car on that avenue, to slacken speed and ring the gong continuously until the car had been passed. It was the custom of the company to permit passengers to alight at the front entrance. The trial Judge found as facts that the motorman on the eastbound car did not sensibly slacken his speed or ring his gong as he approached the other car. The plaintiff was not aware of the approaching car until it struck him:—Held (1), that the motorman on the car by which the plaintiff was struck was guilty of negligence, rendering the defendants liable in damages for the injury done to plaintiff. (2) The plaintiff had not been guilty of such contributory negligence as to prevent his recovery of damages, as he had a right to expect that, as far as the acts of the defendants' servants were concerned he might alight in safety and would have a reasonable time after alighting to look about so as to guard himself against injury from other cars of the defendants, but was not given that time. [Oldright v. G.T. Ry. Co. (1895), 22 A.R. (Ont.) 286, and Chicago, M. & St. P. Ry. Co. v. Lowell (1894), 151 U.S.R. 209, followed.] (3) There is no binding authority for the proposition that, from the moment a passenger's foot touches the ground, a street railway's liability for injuries to him by their other car ceases.

Bell v. Winnipeg Elec. Street Ry. Co., 15 Man. L.R. 338.

[Affirmed 37 Can. S.C.R. 515. Referred to in Sayers v. B.C. Elec. Ry. Co., 12 B.C.R. 111.]

Protection of passengers alighting.

The conductor of a street car who, after stopping the car to permit a passenger to alight, gives the signal to start again before satisfying himself that the passenger has safely departed is guilty of negligence and his employers are liable for any injury that results therefrom.

Dupuis v. Montreal Street Ry. Co., 16 Que. K.B. 286.

Collision—Injury to passenger reading paper.

A street railway company is liable for the consequences of a collision caused by its curves being too sharp for the length of the cars. Passengers using the cars are not obliged to be on the lookout for accidents and the fact that a person injured was absorbed in reading a newspaper when the accident occurred was not evidence of contributory negligence.

Jago v. Montreal Street Ry. Co., 35 Que. S.C. 109 (Ct. Rev.).

Dangerous condition of car steps during storm—Duty of passenger to exercise more than ordinary caution.

The steps of an electric car owned and operated by the defendant company, were in a slippery condition in consequence of exposure, while in use, to snow followed by rain, sleet and cold. The evidence showed that the car had been thoroughly cleaned in the morning, before being sent out, and that it would not have been practicable to operate it in such weather as that which prevailed at the time and to send it back constantly to the barn to have the snow and ice removed:—Held, that passengers boarding and leaving the car at such a time were bound to exercise more than ordinary caution, and that it would not be reasonable to hold the company accountable for injuries sustained by plaintiff, a passenger on one of their cars, who, in getting off the car, slipped and fell.

McCormack v. Sydney & Glace Bay Ry. Co., 37 N.S.R. 254.

Street car conductor—Transfer of passenger at dangerous place.

Owing to fog disarranging the schedule time of defendant company's cars, they were not running on time. That which the plaintiff was riding in stopped on a bridge. There was another car immediately ahead which, in due course, would take plaintiff to her destination before that in which plaintiff was. The conductor asked or told her and another passenger to transfer to that car, and in doing so, she was injured by falling on the bridge in the darkness:—Held, that, in the absence of evidence to the contrary, it must be assumed that the conductor had authority to use his judgment in the circumstances to forward the passengers to their destination. The question of the scope of the conductor's authority having been twice brought to the notice of the Judge during the trial, yet he did not direct the jury on that point, and the case having been allowed to go to them without direction, and no objection taken to the charge on that account. Held, that this brought the case within Scott v. Fernie (1904), 11 B.C.R. 91, and therefore the effect of what was done was that the issues submitted were accepted on both sides as the only issues on which the jury was asked to pass.

Schnell v. British Columbia Elec. Ry. Co., 15 B.C.R. 378, 14 W.L.R. 586.

Injury to passenger—Collision of cars—Motorman abandoning controller—Conductor acting as motorman.

The plaintiff, a physician engaged and paid for a special electric car of the defendants to convey him from a place at a distance from his home after the regular cars had ceased running at night. While he was traveling in the car so furnished, another electric car of the defendants ran into it, and the plaintiff was injured. It appeared that the motorman of the car which was at fault had abandoned the controller to the conductor, and was himself acting as conductor, which was against the defendants' rules and unauthorized by them. The plaintiff's arrangement for the special car was made with the conductor of the car by which he went out to the distant place, and he paid the money for the car to this conductor, and found the car waiting for him when he was ready to return. In an action for damages for the plaintiff's injuries, the defendants raised the question that the conductor who chartered the car to the plaintiff was not shewn to have had authority to do so:—Held, that, by proving his contract with the conductor and that he paid for the car and was received in it and carried, the plaintiff made out a prima facie case of authority; and, in the absence of any evidence to the contrary, it must be assumed that the car was duly let; and, in any event, the plaintiff was, at the time of the collision, lawfully traveling on one of the defendants' cars operated by them on their line of railway, and had paid for the privilege of so traveling. At the trial, the jury found that the motorman in changing places with the conductor acted in breach of his duty; and to the question (4), "Was there negligence, and, if so, what did it consist in?"

answered: "The failure of the servants of the company in performing their duties":—Held, that the motorman's negligence in leaving the controller was the effective cause of the injury, and that the defendants were liable for the result of that negligence. [Engelhart v. Farrant, [1897] 1 Q.B. 240, followed.] Held, also, that the findings of the jury sufficiently established the negligence and the breach of duty on the part of the motorman, and also that his action, in conjunction with that of the conductor, caused the accident. The very fact of the collision was evidence of negligence causing the accident. Per Perdue, J.A.:—From another standpoint, the defendants' contract was, that their servants should use care and diligence so that no accident should happen; and, in order to make the defendant liable, it was enough to shew that the negligence which caused the plaintiff's injury was that of the defendants' servants. Per Richards, J.A.:—The exclusion from the evidence at the trial of the defendants' printed rules for the guidance of motormen, whether proper or not, did the defendants no wrong; the only object of putting in the rules would be to prove that the motorman was forbidden to delegate or abandon to others the performance of his duties; and that fact was otherwise well proved.

Hill v. Winnipeg Elec. Ry. Co., 21 Man. L.R. 442.

Duty to assist passengers—Scope of conductor's authority.

Plaintiff came to a platform station of the defendants and signalled an approaching car to stop. The car slowed down but did not stop, and as it was passing the conductor seized plaintiff's hand and while attempting to help her on board signalled to car to go on again which it did and she was injured. The jury found that the plaintiff was injured by the conductor seizing her hand and trying to pull her on the car, and that he acted negligently:—Held, that it was the duty of the conductor to assist people in getting on and off the car and that it might be within the line of his duty to assist those apparently about to get on a car while it was slowing up; that the scope of a conductor's authority is one of evidence; that there was evidence to go to the jury and that the effect of it was for them to consider and that it should have been left to them to pass upon the circumstances of the case as to the scope of the conductor's authority. Judgment of Street, J., at the trial, reversed.

Dawdy v. Hamilton, Grimsby & Beamsville Elec. Ry. Co., 2 Can. Ry. Cas. 196, 5 O.L.R. 92.

Negligence—Fright—Nervous shock.

Fright or a nervous shock from which a physical injury results, may be a ground for an action en responsabilite against the person through whose fault it happened. [Victorian Railway Commissioners v. Coultas, 13 App. Cas. 222, discussed.]

Montreal Street Ry. Co. v. Walker, 4 Can. Ry. Cas. 227, 13 Que. K.B. 324.

Injury to passenger alighting from car—Crossing behind car—Duty to sound gong—Regulations of crossing.

The plaintiff was a passenger on a car of the defendants, and stepped from it while it was in motion, as it reached a street crossing; the motorman had been signalled to stop, but failed to do so. The plaintiff alighted safely, but found himself in front of a horse and cab swiftly driven towards him. In order to avoid a collision with the horse, and also in order to cross to the west side of the street, the plaintiff turned behind the car he had just left and passed on towards the other track; as he reached it, he became aware of a car coming towards him at a rapid rate, and to avoid being run down he flung himself on the fender, thus saving his life, but he was seriously injured. In an action to recover damages for his injuries he was a witness at the trial, and said that it was impossible to get out of the way of the car: he did not hear the gong sound, although if it had been rung he would have heard it. By one of the regulations forming part of the agreement between the city corporation and the defendants, validated by 57 Vict. c. 76 (O.), under which the defendants operated their cars on the city's highways, it was provided that each car was to be supplied with a gong, to be sounded by the driver when the car approached to within 50 feet of each crossing. This was not brought to the attention of the Judge at the trial. The plaintiff, however, was aware that it was the usual practice to sound the gong at crossings, and he expected it to be done when a car was approaching a crossing:—Held, that, even if the regulation had not the force of a statutory requirement the proof of failure to comply with a precaution which the defendants had recognized as important for the safety of persons using the crossing on streets occupied by the railway, was evidence for the jury of negligence in the conduct of the car; and the question whether the gong was sounded was for the jury. Semble, per Moss, C.J.O., that the term "crossing" in the agreement, is intended to indicate any place on or along the streets occupied by the railway where there is a walk laid for the purpose of enabling foot passengers to cross from one side of the street to another, and where the cars would stop to take up or let down passengers; and is not confined to the crossing of an intersecting street. The Court declined to interfere with the discretion of the Court below in withholding costs from the plaintiff, in setting aside a nonsuit and granting a new trial. Order of a Divisional Court, affirmed.

Wallingford v. Ottawa Elec. Ry. Co., 6 Can. Ry. Cas. 454, 14 O.L.R. 383.

ACCIDENT—LEANING OVER TO EXPECTORATE—STRUCK BY POST.

The plaintiff, as a passenger, was, about midnight, standing on the back platform of one of the defendants' cars, smoking a cigar and leaning upon the railway gate or grating at the side, over which he leaned, from time to time, a distance from five to seven inches, and expectorated. Apparently while doing so, he was struck by something and received the injuries complained of. The plaintiff alleged, in his statement of claim, that he was struck by a post belonging to the defendants and used by them for their trolley wire, but gave no evidence as to this. As a matter of fact, there were trolley poles along the line of the defendant railway on the side where the plaintiff was struck, but there was no evidence given by the plaintiff of their position, and the evidence for the defendants placed them about two feet from the overhang of the car:—Held (reversing the judgment of the Divisional Court, 10 O.W.R. 33), that the plaintiff's action should be dismissed, as there was no evidence of what caused the injury; Meredith, J.A., dissenting. Per Riddell, J. (in the Divisional Court):—While it is impossible to lay down any specific rule for the guidance of railways or street railways generally, a railway operating in a country in which tobacco chewing or gum chewing is not uncommon must expect its patrons, or some of them, to be tobacco and gum chewers, and if it be the custom of such passengers to put their heads past the lines of the car to expectorate, the railway should be held to know of such custom, and should either remove all obstructions from the side of the track, a sufficient distance to avoid the probability of an accident, or prevent the passengers from projecting their heads over the side, or at least give proper warning as to the danger. And in every case the railway must take all reasonable precautions against an accident happening to one who is acting as in the ordinary course of affairs "in the vicinage" it may be expected that some will act. The Massachusetts rule that it is necessarily negligence for one riding in a railway car to project any portion of his person out of the window not followed by the Divisional Court.

Simpson v. Toronto & York Radial Ry. Co., 7 Can. Ry. Cas. 218, 16 O.L.R. 31.

Negligence—Injury to passenger in attempting to enter by front door.

In compliance with an order made by the Ontario Railway and Municipal Board, the front platform of the defendants' cars was enclosed by a vestibule having a swing door, fastened by a spring lock on the inside, capable of being opened by the motorman to permit the exit of passengers. The plaintiff, not being aware of this order, attempted to get on a car so equipped at the front, and while so doing, the car started and she was thrown to the ground and injured. She asserted that the motorman saw her standing on the step, and notwithstanding started the car. There was no notice on the door notifying the public of the nonadmission by that door. On a charge to the jury that they might find on one or all of the following grounds of negligence, namely (1) the omission of a nonadmittance notice (2) starting the car while the plaintiff was on the step, and (3) in not opening the door and letting the plaintiff in, they found that the defendants' negligence consisted in the omission to have a nonadmittance notice on the door, and did not make any finding as to the other alleged grounds of negligence. The Divisional Court, on appeal to it, while holding that the ground of negligence found by the jury was not tenable, in that the company was merely obeying the Board's order, which did not require any such notice, directed a new trial on the other alleged grounds of negligence. The Court of Appeal, while affirming the judgment of the Divisional Court as to the ground on which the jury found not constituting negligence, reversed the judgment granting a new trial, holding that the finding of the jury was tantamount to a finding negativing negligence on the other alleged ground.

McGraw v. Toronto Ry. Co., 9 Can. Ry. Cas. 97, 18 O.L.R. 154.

Injury to passenger—Premature starting of car.

The plaintiff, immediately after entering a car of the defendants, and before she had reached a seat, was, from some cause, thrown down backwards and injured. In an action against the defendants for damages, the negligence charged in the statement of claim as the cause of the fall was "the sudden jerking forward of the car," and this was supported by the evidence of the plaintiff herself and of two other eye witnesses of the occurrence. Evidence was called for the defence to shew that the car was new and in good condition, that only the lowest notch was used in putting on the power, and that there was no unusual jerk. The trial Judge in his charge practically withdrew from the jury the consideration of the alleged jerk as the cause of the fall, but told the jury to consider whether the conductor was negligent in starting the car before the plaintiff (an aged person) was seated. The jury found that the defendants' servants were negligent in starting the car before the plaintiff was in a position to save herself from falling; and the trial Judge directed judgment to be entered for the plaintiff. There was some mention in the evidence of the premature starting of the car, but it was not put forward as an independent cause of complaint until the Judge emphasized it in his charge. Neither party made any objection to the charge. The defendants appealed from the judgment, but the plaintiff did not, by cross-appeal or otherwise, raise an objection to the practical withdrawal from the jury of the chief cause of complaint:—Held, that the question of the jerk should not have been withdrawn from the jury; there was but one incident, made up of the conduct of the conductor in giving the signal and that of the motorman in obeying it; and it should have been left as one question to the jury. The finding actually made could not, upon the evidence, be supported. Held, also, that the circumstance that an objection was not taken at the proper time was not necessarily fatal. [Brenner v. Toronto Ry. Co (1907), 15 O.L.R. 195, 198, 7 Can. Ry. Cas. 210, and Woolsey v. Can. Northern Ry. Co. (1908), 11 O.W.R. 1030, 1036, followed.] Held, also, that it was to be inferred that the jury (influenced by the Judge's remarks) did not consider the evidence upon the question of the jerk, and that their finding did not imply that that question was determined in favour of the defendants. Held, also, that the real question in issue not having been passed upon by the jury, there was power to direct a new trial; Meredith, J.A., dissenting. [Jones v. Spencer (1897), 77 L.T.R. 536, followed.] Per Meredith, J.A.:—That the defendants' appeal should be allowed and the action dismissed; the case was the rare one of an accident for which no one could be justly blamed; and the Court had, in the circumstances, no power to direct a new trial.

Burman v. Ottawa Elec. Ry. Co., 10 Can. Ry. Cas. 353, 21 O.L.R. 446.

INJURY TO PASSENGER ALIGHTING FROM CAR—UNAUTHORIZED SIGNAL TO START—DEFECTIVE SYSTEM.

The plaintiff was a passenger upon a crowded open car of the defendants, who operated an electric railway upon the streets of a city. The plaintiff wished to alight at N. street, and the car stopped there, upon the signal of the conductor, who was upon the footboard, engaged in collecting fares. While the plaintiff was in the act of alighting, the car was started, upon a signal given by an unauthorized person who was standing on the rear platform, and the plaintiff was thrown down and injured. The car had previously, on the same trip, been started after a stop, by the same unauthorized person, and the conductor had not interfered or reprimanded him. The plaintiff alleged negligence in starting the car too soon and in overcrowding the car so that the conductor was not able to perform his duties, and claimed damages for her injuries. The facts were not in dispute, and the trial Judge withdrew the case from the jury, and gave judgment for the defendants:—Held, that it did not follow that, because there were no facts in dispute, the matter to be decided was a pure question of law; it might be for the jury to say what they found to be the true inference from these facts, e.g., whether there was negligence causing the accident; there was at least one question which should have been submitted to the jury, viz., whether there was any negligence of the conductor in failing to hear or to countermand the unauthorized signal for starting the car, in time to have prevented injury to the plaintiff, particularly in view of what had previously taken place. And semble, that there was at least one other question which might be submitted to the jury, viz., whether the defendants failed in their duty in not taking due precautions to prevent the starting of the car through the unauthorized act of a passenger in ringing the bell, which might involve the question (not raised by the pleadings) whether the system adopted by the defendants was defective. [Nichols v. Lynn & Boston Ry. Co. (1897), 168 Mass. 528, approved and followed.] Held, therefore, that there should be a new trial, with leave to the plaintiff to amend as she might be advised; Riddell, J., dissenting. Per Riddell, J., that the plaintiff had failed to establish a case of negligence as charged; and, if she wished to allege a defective system, could only be allowed to do so in a fresh action, or in this action upon amendment, payment of costs, and being confined to the new cause of action. Judgment of the County Court of the County of York, reversed.

Haigh v. Toronto Ry. Co., 12 Can. Ry. Cas. 111, 21 O.L.R. 601.

INJURY TO PASSENGER ALIGHTING FROM CAR.

A verdict for the plaintiff for injuries sustained by the starting of a car with a jerk as he was about to alight therefrom will not be disturbed where there was sufficient evidence, although conflicting, to go to the jury that the plaintiff had not time to alight in safety before the car started.

Jacob v. Toronto Ry. Co., 3 D.L.R. 818, 3 O.W.N. 1255.

RIDING ON STEPS OF CAR.

Although it was beyond the scope of the authority of a street car conductor to give the plaintiff, an intending passenger, permission to stand on the car step the jury may properly find that the intending passenger had the leave and license of the defendants, where it was shewn that the practice of standing on the car steps was so common at the particular time and place, and was followed under such circumstances, that the defendants must have known, or ought to have known of it.

Williams v. British Columbia Elec. Ry. Co. (No. 2), 7 D.L.R. 459. [Affirmed in 12 D.L.R. 770.]

INJURY TO PASSENGER—RIDING ON STEP OF CAR.

An intending passenger may recover for injuries sustained through the negligent operation of a crowded car, notwithstanding the fact that he was riding on the step of the car, where such was a practice commonly permitted by the company. [Williams v. British Columbia Elec. Ry. Co., 7 D.L.R. 459, affirmed.]

Williams v. British Columbia Elec. Ry. Co. (B.C.), 12 D.L.R. 770.

INJURY TO PASSENGER—EXPLOSION—CONDUCT OF MOTORMAN.

The plaintiff was a passenger upon an electric street car of the defendants, when an electric explosion occurred in the car, and the plaintiff was injured by being forced out of the car and thrown upon the ground by his panic stricken fellow passengers. In an action to recover damages for his injury, he alleged as negligence on the part of the defendants, among other things, that they had not properly inspected the controller. At the trial, which took place thirteen months after the explosion, the defendants called as a witness the foreman at one of their barns to shew that there had been a proper inspection. The witness could not, from memory alone, testify to an inspection shortly before the accident. Counsel for the defendants proposed to put into the witness's hands a report, signed by him in the usual course of his work, shewing that the car had been examined three days before the explosion. Upon objection by the plaintiff, the trial Judge ruled that the witness could not refresh his recollection by looking at the report, unless he had a recollection to refresh, which he did not profess to have; and, therefore, excluded the testimony. The jury found negligence on the part of the defendants in that: (1) The motorman was incompetent to handle a car in case of emergency; (2) had he used the air brake, the car could have been brought to a stop before the accident happened; and (3) that the car was not properly inspected; and judgment was entered for the plaintiff:—Held, upon appeal, that the testimony of the foreman was improperly rejected. Held, also, per Meredith, J.A.:—That the finding as to the incompetence of the motorman afforded, in itself, no cause of action; and that there was no reasonable evidence of negligence on the part of the motorman in failing to apply the brakes before seeking to reassure the passengers and to have the electric current cut off by the removal of the pole from the wire. A new trial was directed.

Fleming v. Toronto Ry. Co., 13 Can. Ry. Cas. 278, 25 O.L.R. 317.

Explosion—Defective controller.

Where a controller of a car is shewn to have been "overhauled" by the defendant carrier shortly before an explosion occurred resulting in injury to a passenger, the burden is upon the defendant to shew that it had been properly done.

Fleming v. Toronto Ry. Co., 8 D.L.R. 507, 15 Can. Ry. Cas. 17, 27 O.L.R. 332.

[Affirmed in 12 D.L.R. 249, 47 Can. S.C.R. 612, 15 Can. Ry. Cas. 386.]

Defective controller.

Whether there had been proper inspection and rebuilding of a defective controller of a car under the management of the defendant carrier so as to negative want of due care on its part in an action for resulting injuries to a passenger, are proper questions for a jury.

Fleming v. Toronto Ry. Co., 8 D.L.R. 507, 27 O.L.R. 332, 15 Can. Ry. Cas. 17.

[Affirmed in Toronto Ry. Co. v. Fleming, 12 D.L.R. 249, 47 Can. S.C.R. 612, 15 Can. Ry. Cas. 386.]

Explosion—Res ipsa loquitur.

Where an explosion occurs in the controller of a car, which controller was entirely under the management of the defendant carrier, and the resulting accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords of itself sufficient evidence that the accident arose from want of care, in the absence of explanation by the carrier. [Scott v. London Dock Co., 3 H. & C. 596, followed.]

Fleming v. Toronto Ry. Co., 8 D.L.R. 507, 15 Can. Ry. Cas. 17, 27 O.L.R. 332.

[Affirmed in 12 D.L.R. 249, 47 Can. S.C.R. 612, 15 Can. Ry. Cas. 386.]

Explosion of controller.

An explosion in the controller of an electric street car which would not have occurred in the ordinary course of events had proper care been used in inspecting it, is prima facie sufficient to shew negligence as regards a resulting injury to a passenger. A carrier is liable for an injury received by a street car passenger as the result of an explosion in the controller of the car due to a defect that should have been discovered by proper inspection. In an action for injury sustained by a street car passenger as the result of an explosion in the controller of the car due to defects that might have been discovered by proper inspection, it is for the jury to determine whether the carrier exercised due care in that respect.

[Fleming v. Toronto Ry. Co., 15 Can. Ry. Cas. 17, 8 D.L.R. 507, 27 O.L.R. 332, affirmed.]

Toronto Ry. Co. v. Fleming (No. 2), 47 Can. S.C.R. 612, 12 D.L.R. 249, 15 Can. Ry. Cas. 386.

RIDING ON PLATFORM—PLATFORM PART OF CAR.

Plaintiff's husband was a passenger on one of the defendant company's cars, riding on the front platform, where it was customary for passengers to ride. The doors were open and there was no projecting bar across the opening, or other measures of safety taken. On the car approaching a switch, at a speed of three or four miles an hour, he was jolted off the car and, falling under the wheels, was killed. A jury gave a verdict of $3,500, but the trial Judge entered judgment for the defendant company on the ground that there was no evidence of negligence on their part:—Held, on appeal, that there was evidence of negligence and that the verdict should stand.

Dynes v. British Columbia Elec. Ry. Co., 15 B.C.R. 429.

[See Dynes v. B.C. Elec. Co., 17 B.C.R. 498, 14 Can. Ry. Cas. 309, 7 D.L.R. 767.]

INJURY TO PASSENGER ALIGHTING.

In an action against a street railway company for personal injuries alleged to have been caused by starting the car while a passenger was getting off the rear platform, the fact that the conductor, who, by a rule of the company, was required to be on the rear platform when the car was stopped, was not called as a witness by the defendant company militates against the defence; and the jury may draw inferences against the defendants from the keeping back of evidence which is alone in their possession. [Euclid Avenue Trust Co. v. Hohs, 24 O.L.R. 447, applied.]

Schwartz v. Winnipeg Elec. Ry. Co., 9 D.L.R. 708, 23 Man. L.R. 60.

[Followed in Winnipeg Elec. Ry. Co. v. Schwartz, 17 Can. Ry. Cas. 1, 16 D.L.R. 681.]

INJURY TO PASSENGER ALIGHTING—SUDDEN STARTING OF CAR.

A passenger may recover damages for being thrown from a street car by its sudden starting as he was about to alight in compliance with the conductor's request that all passengers should disembark as the car was going no further.

Montreal Street Ry. Co. v. Marins, 12 D.L.R. 620.

CAR DOOR CLOSING ON PASSENGER'S HAND—VAGUENESS OF VERDICT.

A verdict finding the defendant street railway company negligent in the words "carelessness in handling the car" is too vague upon which to give a judgment in an action by a passenger for injuries sustained by the door of the car closing upon the passenger's hand; a more specific finding is necessary to establish liability on the basis of the car having been run at too high a speed and so jolted as to cause the door to close suddenly.

McGovern v. Montreal Street Ry. Co., 12 D.L.R. 628, 19 Rev. Leg. 356.

INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—USUAL INCIDENTS OF OPERATING—VERDICT CONTRARY TO DIRECTIONS OF TRIAL JUDGE SET ASIDE.

Plaintiff, a passenger, got on the lower step of one of the defendant company's tram cars, after having been warned by the conductor not to get off until the car stopped, and was thrown off, as she claimed, by a jolt of the car. Assuming such jolt to have occurred, there was nothing to show that it was not one of the ordinary incidents of operating the car, and no negligence on the part of the company was disclosed. Held, that the plaintiff was not entitled to recover damages for injuries sustained and that the verdict rendered by the jury in plaintiff's favour, contrary to instructions of the trial Judge, must be set aside. Per Chisholm, J.—The mere happening of the jolt which threw plaintiff off, while the car was in motion, did not of itself bespeak negligence of the company. It was necessary, therefore, for plaintiff to prove such negligence by affirmative evidence.

Whitford v. Nova Scotia Tramways, etc., Co., 52 N.S.R. 105.

STOPPING POINTS FOR BOARDING CAR—SIGNALS.

If a person desirous to get on a car signals a motorman to stop at a place other than at regular stopping point, this latter is not obliged to pay attention to him. But if the motorman returns the signal, and slackens the speed of the car, he thereby assumes the obligation of seeing that the passenger is safely embarked; if he starts the car before the passenger is safely aboard and the passenger sustain injury, the tramways company is liable for all damages suffered.

McGill v. Montreal Tramways Co., 49 Que. S.C. 326.
[Appeal quashed in 30 D.L.R. 487, 53 Can. S.C.R. 390.]

PREMATURE STARTING OF CAR—DUTY AS TO ALIGHTING—CONTRIBUTORY NEGLIGENCE—PERSON UNDER DISABILITY.

Starting a tram car before ascertaining that a passenger has safely alighted, even on the signal "all right" of a person on the rear vestibule, is negligence which will render the tram company liable for injuries sustained by the passenger falling off the car. [See Armishaw v. B.C. Elec. Ry. Co., 14 D.L.R. 393, 18 B.C.R. 152; Montreal Street Ry. Co. v. Chevandier (Que.), 24 D.L.R. 349; Black v. Calgary (Alta.), 24 D.L.R. 55; Dunham v. Cape Breton Elec. Co. (N.S.), 21 D.L.R. 38; Blakely v. Montreal Tramways Co. (Que.), 20 D.L.R. 643; Winnipeg Elec. Ry. Co. v. Schwartz (Man.), 16 D.L.R. 681; Schaffer v. The King, 14 Can. Ex. 403.] A passenger's failure to see, while alighting, that the car was in motion, is not necessarily contributory negligence, if the passenger is an old person with perceptive faculties less acute than those of youth.

Fraser v. Pictou County Elec. Co., 20 Can. Ry. Cas. 400, 50 N.S.R. 30, 28 D.L.R. 251.

OPENING DOOR WHEN NOT AT REGULAR STOPPING PLACE—INVITATION TO ALIGHT—SPEED OF CAR—QUESTION FOR JURY—NEGLIGENCE—NEW TRIAL.

The door of a street car being opened by the conductor when the car was not at a regular stopping place, it is a question of fact to be decided by the jury in an action for damages for injuries received by a passenger in alighting from the car, whether the car was moving so fast that the motion would be perceptible to any reasonable passenger, and so negative an invitation to alight which might be implied by the opening of the door. This question can not be summarily dealt with by the trial Judge. [Gazey v. Toronto Ry. Co. (1917), 38 D.L.R. 637; G.T.R. Co. v. Mayne (1917), 39 D.L.R. 691, applied.]

Jarvis v. London Street Ry. Co., 48 D.L.R. 61.

TRAM PASSENGERS—CONVENIENT MODE OF DESCENT—NEGLIGENCE OF TRAMWAY CO.—NEGLIGENCE OF PASSENGERS.

A tramway company is bound to procure for its passengers a convenient mode of descent, and if it has no station should provide some easy means of descending and indicate to passengers where they should descend, and the negligence of the passenger does not excuse the torts of the carrier.

Montreal Street Ry. Co. v. Chevandier, 24 D.L.R. 349.

Injury to passenger alighting—Terminal—Rush.

A street railway company is liable for an injury to a passenger while alighting from a street car at a terminal stopping place, occasioned by the on rush of passengers on both sides of the car, even though the terminus or stopping place was on land of a municipal corporation.

Williams v. Toronto & York Radial Ry. Co., 48 D.L.R. 346.

Measure of care required—Negligence—Discharging passengers at dangerous spot.

If the act of a third party, ex. gr. the city municipality, in reconstructing a street paving, has rendered dangerous an alighting place chosen by the street railway, the latter must, even at the risk of inconvenience to the passenger, choose another point of alighting for the time being at least; or it should take reasonable and prudent steps to cause the threatened danger for the time being to disappear or should warn of the danger a passenger who is about to alight.

Blakely v. Montreal Tramways Co., 20 D.L.R. 643.

Care and safety of passengers.

A tramway company is liable in damages for injury sustained by a passenger in one of its cars; if it permits an obstruction there; if it does not keep it in good condition; if, on the happening of an accident, its employees instead of calming the passengers order them to disembark, thus increasing their fright and causing a panic.

Montreal Tramways Co. v. McNeil, 25 Que. K.B. 90.

Passenger alighting—Stopping place—Conductor's inattention.

Where the conductor was in the forward part of the car talking to the motorman, instead of being in a position to warn passengers not to alight when the car slowed up to "take the points," at the corner at which the plaintiff had previously asked the conductor to let her off, the company was held liable.

Armishaw v. British Columbia Elec. Ry. Co., 14 D.L.R. 393.

H. Ejection from Cars.

Exposure to cold causing rheumatism.

In an action for damages from being wrongfully ejected from a street car, illness resulting from exposure to cold in consequence of such ejectment, is not too remote a cause for damages; and where the evidence was that the person ejected was properly clothed for protection against the severity of the weather, but was in a state of perspiration from an altercation with the conductor when he left the car and so liable to take cold, the jury were justified in finding that an attack of rheumatism and bronchitis which ensued was the natural and probable result of the ejectment, and in awarding damages therefor. Gwynne, J., dissenting, 21 A.R. (Ont.), 578, affirming 24 O.R. 683, affirmed.

Toronto Ry. Co. v. Grinsted, 24 Can. S.C.R. 570.

[Relied on in Delahanty v. Michigan Central Ry. Co., 7 O.L.R. 690.]

Refusal of conductor to change money.

By common law he who wants to pay to a conductor of a street car, the amount required for the passage on such a car, must offer an exact amount and not a coin or a bill of a much greater value and which the conductor has to change. Nevertheless the usage and the jurisprudence do compromise such a strict rule of the common law, on account of the inconvenience in which it may result for the public and the public carriers. The refusal of a conductor of a street railway to change a $5 bill, which was offered by a passenger to permit the latter to pay his fare, and at the same time warning the passenger that he should either pay or leave the car, does not constitute an injury which will give the passenger a right of action for damages against the company, as responsible for the act of its employees. The company will be held to change a reasonable amount not exceeding two dollars, but it will not be held to change $5 or any other bill of a greater amount which the passenger may offer in payment.

Cadieux v. Montreal Street Ry. Co., 18 Rev. de Jur. 42.

REFUSAL TO PAY FARE.

The Ontario Railway Act of 1906, 6 Edw. VII, c. 30, is, by s. 5, made applicable to street railway companies incorporated by the Legislature, but, by the same section, if provisions of the general and special Acts are inconsistent, those of the latter shall prevail. By s. 116 of the general Act, a passenger on a railway train or car who refuses to pay his fare may be ejected by the conductor; and by s. 17 of the Act incorporating the Toronto Ry. Co., a passenger in such case is liable to a fine only:—Held, that these two provisions are not inconsistent, and the conductor of a street railway car may lawfully eject therefrom a passenger who refuses to pay his fare. In this case the company was held liable for damages, the passenger having been ejected from a car with unnecessary violence.

Toronto Ry. Co. v. Paget, 10 Can. Ry. Cas. 481, 42 Can. S.C.R. 488.

UNAUTHORIZED BOARDING OF SPECIAL CAR—EJECTION—LIABILITY.

The conductor of a "special car" not receiving any passengers is not justified in throwing off a person while the car is in motion, after the latter had safely boarded the car in disregard of that fact, and his doing so will render the street railway company liable for injuries resulting therefrom.

Nolan v. Montreal Tramways Co., 26 D.L.R. 527.

I. Injuries to Animals.

RAIL ABOVE ROAD LEVEL—INJURY TO HORSE.

The charter of a street railway company required the road between, and for two feet outside of, the rails to be kept constantly in good repair and level with the rails. A horse crossing the track stepped on a grooved rail, and the caulk of his shoe caught in the groove, whereby he was injured. In an action by the owner against the company it appeared that the rail, at the place where the accident occurred, was above the level of the roadway:—Held, that as the rail was above the road level, contrary to the requirements of the charter, it was a street obstruction unauthorized by statute, and, therefore, a nuisance, and the company was liable for the injury to the horse caused thereby. Judgment of the Supreme Court of Nova Scotia, 24 N.S.R. 113, affirmed.

Halifax Street Ry. Co. v. Joyce, 22 Can. S.C.R. 258.

FAILURE TO STOP CAR—FRIGHTENED HORSE.

The motorman of an electric car is not necessarily guilty of negligence because he does not at once stop the car at the first notice that a horse is being frightened either at the car or at something else. All that can be expected is that the motorman shall proceed carefully, and it is in each case a question whether this has been done. Upon the facts in this case the majority of the Court held that there was no evidence to justify a finding of negligence and set aside a judgment in the plaintiff's favour. Judgment of Falconbridge, C.J., reversed.

Robinson v. Toronto Ry. Co., 2 O.L.R. 18 (C.A.).

COLLISION—INJURY TO HORSE.

In an action against a street railway company in which the plaintiff claimed that he had been obliged to shoot his horse injured by a car the action was properly dismissed at the trial on two grounds, one, that it was established by the witnesses called and the circumstances proved that at the moment when the collision took place plaintiff was driving his horse at a very fast gait in a place of danger, and the other, that he had failed to prove any negligence on the part of the company or its employees.

Montreuil v. Quebec Ry., Light & Power Co., 30 Que. S.C. 6.

ANIMAL KILLED ON TRACK—TRESPASSER.

The plaintiff sued for damages for the loss of a horse killed upon the defendants' track by one of their cars. The horse was admittedly a trespasser:—Held (Britton J., dissenting), that the defendants were not liable for the only negligence found by the jury, viz., that the motorman should have seen the horse on the track in time to enable him to stop the car. [Judgment of the County Court of Essex, reversed.] [Grand Trunk Ry. Co. v. Barnett, [1911] A.C. 361, followed.]

Bondy v. Sandwich, Windsor & Amherstburg Ry. Co., 13 Can. Ry. Cas. 57, 24 O.L.R. 409.

[Considered in Diplock v. Can. Northern Ry. Co., 20 Can. Ry. Cas. 356.]

INJURY TO DOG—CONTRIBUTORY NEGLIGENCE.

For the plaintiff suing an electric railway company for having run down and killed a valuable dog owned by him, to have allowed the dog to follow the rig in which he was driving along the street car track in a city at a distance of 100 feet or more is such contributory negligence as will disentitle him to recover where the jury has found that the plaintiff did not have his dog in proper control while on the street.

Lucas v. Toronto, 22 D.L.R. 601.

SUBSIDY.

See Railway Subsidy.

SUBWAY.

See Highway Crossings; Farm Crossings.

SUNDAY TRAFFIC.

See Constitutional Law.

FREIGHT TRAFFIC—UNDUE DELAY—THE LORD'S DAY ACT.

On an application to the Board for an order under par. (x) of s. 12 of the Lord's Day Act, R.S.C., 1906, c. 153, permitting it to do certain work on the Lord's Day in order to prevent undue delay to traffic:—Held, upon the evidence that in order to prevent undue delay to traffic the applicants may be permitted on the Lord's Day: 1. To unload grain carriers and load grain into cars at Ontario Lake ports between September 15th in every year and June 1st in the following year. 2. Between said dates do such work as may be necessary to furnish at such ports a continuous railway service for carrying grain from elevators and vessels. 3. Perform all work necessary for delivery to their destinations of freight cars in transit when the Lord's Day began. Other railways carrying grain from said ports are entitled to the like privileges.

Re Lord's Day Act and Grand Trunk Ry. Co., 8 Can. Ry. Cas. 23.

THROUGH FREIGHT PASSENGER TRAFFIC—UNDUE DELAY—LORD'S DAY ACT.

Application for an order under s. 3, and s. 12 subs. 1 (x) of the Lord's Day Act, R.S.C., 1906, c. 153, permitting certain work to be done on the applicant's steamers and trains at Owen Sound and Fort William, Ontario, on the Lord's Day, in order to prevent undue delay to through freight traffic upon its line of railway:—Held, upon the evidence that in order to prevent undue delay to traffic the applicant company may be permitted to do on the Lord's Day: "Any work necessarily incidental to the loading or unloading of freight and merchandise upon or from the said steamers or the trans-shipping of freight and merchandise between the said steamers and cars of the applicant company at Owen Sound and Fort William, Ontario, and the coaling of the said steamers at Owen Sound."

Re Lord's Day Act and Can. Pac. Ry. Co., 11 Can. Ry. Cas. 193.

OPERATION—SUNDAY LAWS—BINDING EFFECT OF PROVINCIAL ACT ON STREET RAILWAY COMPANY INCORPORATED BY DOMINION PARLIAMENT.

S. 193 of the Ontario Railway Act 1906, 6 Edw. VII. c. 30, respecting operation on Sunday is, by virtue of s. 9 of the Railway Act, 1906, binding upon an electric railway situate wholly within the Province of Ontario, which was incorporated by the Parliament of Canada in 1910, and declared to be a work for the general advantage of Canada. In order that a railway or part of a railway may form part of a continuous route or system within the meaning of subs. 5 of the said s. 9, respecting operations on Sunday, there must be a direct physical connection between it and the other through road of which it is to form a part, and proper facilities by way of sidings and accommodations for the transfer of traffic must exist, which should generally be sanctioned by the proper authorities. [Hammans v. Great Western Ry. Co., 4 Ry. & Canal Traffic Cas. 181; Great Central Ry. Co. v. Lancashire & Yorkshire Ry. Co., 13 Ry. & Canal Traffic Cas. 266; Black v. Delaware & Raritan Canal Co., 22 N.J. Eq. 402, referred to.]

Kerley v. London & L.E. Transportation Co. (Ont.), 14 Can. Ry. Cas. 111, 6 D.L.R. 189.

[Reversed in 13 D.L.R. 365, 28 O.L.R. 606, 15 Can. Ry. Cas. 337.]

LABOUR AND BUSINESS—OPERATING RAILWAY—PROVINCIAL JURISDICTION, HOW LIMITED.

A prosecution under the Sunday observance laws of Ontario against a railway company chartered by the Dominion Parliament with powers of operation beyond the limits of the province cannot be maintained merely upon the ground that the company has not actually exercised such powers outside of the province. 14 Can. Ry. Cas. 111, 6 D.L.R. 189, reversed.

Kerley v. London, & S.E. Transportation Co., 15 Can. Ry. Cas. 337, 28 O.L.R. 606, 13 D.L.R. 365.

SUPERSTRUCTURE.

Assessment and Taxation.

SWITCHES.

See Branch Lines and Sidings; Junctions; Railway Crossings; Street Railways.

As affecting tariffs, see Tolls and Tariffs.

SWITCHING.

See Tolls and Tariffs.

TANK CARS.

See Cars.

TAXATION.

See Assessment and Taxation.

TELEGRAPHS.

See Tolls and Tariffs (II)

Tax on telegraph companies, see Assessment and Taxation.

Marconi wireless system—Press and private messages—Excessive and discriminatory rates.

An application was made to the Board for an order directing certain telegraph companies to transmit press messages to the Marconi wireless station at Glace Bay at the same rate as to other points along the Atlantic coast of Canada from the city of Ottawa. It was alleged that the rates were excessive and discriminatory because the telegraph companies on messages to Glace Bay charged the higher private rate rather than the lower press rate:—Held, that the evidence did not establish that excessive or discriminatory rates were charged, the rates being lower from Ottawa to Glace Bay than from the same point to other Canadian Atlantic coast points and the application must be dismissed.

Times Publishing Co. v. Can. Pac. Ry. Co., G.N.W. and Western Union Telegraph Cos., 9 Can. Ry. Cas. 169.

Foreign corporation—Exclusive right—Restraint of trade.

The E. & N.A. Ry. Co. made an agreement with the W.U. Tel. Co., giving it the exclusive right for 99 years to construct and operate a line of telegraph over its road. The road was sold to the St. J. & M. Ry. Co., which leased it to the N.B. Ry. Co. for a term of 999 years. The telegraph line was constructed by the W.U. Tel. Co. under the said agreement. The C.P. Ry. Co. completed a road, a portion of which had running powers over the line of the N.B. Ry. Co., on which the W.U. Tel. Co. had constructed its line. The N.B. Ry. Co. having given permission to the C.P. Ry. Co. to construct another telegraph line over the same road, the W.U. Tel. Co. obtained an injunction to prevent its being built. On appeal to the Supreme Court of Canada. Held (1), the agreement between the E. & N.A. Ry. Co. is binding on the present owners of the road. (2) The contract with the W.U. Tel. Co. was consistent with the purpose of its corporation, and not prohibited by its charter or by the local laws of New

Brunswick, and its right to enter into such a contract and carry on the business provided for thereby is a right recognized by the comity of nations. (3) The exclusive right granted to the W.U. Tel. Co. does not avoid the contract as being against public policy, or as being a contract in restraint of trade.

Can. Pac. Ry. Co. v. Western Union Tel. Co., 17 Can. S.C.R. 151.

[Applied in Jacques-Cartier W. & P. Co. v. Quebec Ry. L. & P. Co., 11 Que. K.B. 546; Lynch v. Wm. Richards Co., 38 N.B.R. 180; discussed in Boyle v. Victoria, Yukon Tr. Co., 9 B.C.R. 228; followed in Birkbeck Northwest, etc., Co. v. Brabant, 8 Que. Q.B. 319; referred to in Hewson v. Ontario Power Co., 36 Can. S.C.R. 604; Merritt v. Copper Crown Mining Co., 34 N.S.R. 421.]

WIRES UNDERGROUND—JURISDICTION—STREET IMPROVEMENTS.

The Board has no jurisdiction under the Railway Act to direct that telegraph wires be put under ground with a view to effecting an aesthetic betterment or street improvement. [Grand Trunk Pacific Ry. Co. v. Fort William et al., [1912] A.C. 224, at p. 225, 13 Can. Ry. Cas. 187, followed.]

Woodstock v. Great Northwestern Telegraph Co., 19 Can. Ry. Cas. 427.

DELIVERY OF MESSAGES—LIMITATION OF LIABILITY.

A telegraph company which receives a message addressed to a person at Quebec is bound to deliver it as soon as it is received; if, by mistake, it delivers it to another person it is liable in damages which may be sustained by the person to whom it is addressed. The company cannot, by the insertion of an exculpatory clause, escape this liability; its obligation to deliver telegraphic messages being based upon statute and in the interest of the public.

Great Northwestern Telegraph Co. v. Dominion Fish & Fruit Co., 25 Que. K.B. 230.

MESSAGES—LIMITATIONS OF LIABILITY.

A telegraph company may validly stipulate in a contract for transmission of a message that it will not be liable in case of failure to transmit by fault of its employees for more than the price paid for its transmission unless the message is repeated at the expense of the sender. Such an agreement contains nothing unlawful nor contrary to public order.

Tanguay v. Great Northwestern Telegraph Co., 51 Que. S.C. 261.

TELEPHONES.

See Tolls and Tariffs (I.); Railway Board.
Injuries by wires and poles, see Wires and Poles (A.).
Wires crossing highway, see Wires and Poles (B.).

AGREEMENT BETWEEN RAILWAY AND TELEPHONE COMPANIES—MUNICIPAL TELEPHONE SYSTEM.

The towns of Fort William and Port Arthur having renewed their application for an order directing the railway company to allow the installation of telephone instruments in its stations (see 3 Can. Ry. Cas. 205):—Held, adopting the former judgment of a majority of the Board. (1) Compensation should be made to the railway company for the use of its stations and the interference with its property consequent upon such installation. [Railway Act, 1903, s. 193.] (2) Compensation should also be made to the telephone company for the loss of the exclusive privilege of telephone connection with such stations. [Railway Act, 1903, s. 193.]

(3) The effect on the exclusive agreement between the telephone company and the railway company, of installing such a municipal telephone system, must be determined by the law of the Province of Quebec where the contract was made. (4) The installation of such a municipal system does not rescind the exclusive contract between the telephone company and railway company. [C. C. (Que.), art. 1065; Dupuis v. Dupuis, R.J.Q. 19 S.C. 500.] (5) The evidence does not furnish a satisfactory basis for determining the compensation to be paid by the municipalities and suggestions are made as to its ascertainment hereafter by the Board or by arbitration. (6) Payment of such compensation or the giving of proper security therefor to both companies should be a condition precedent to the installation of the system in each town. (7) Leave was given to state a case for the opinion of the Supreme Court whether the installation of the municipal system entitles the telephone company to a rescission of its contract with the railway company.

Port Arthur, etc., v. Bell Telephone Co. and Can. Pac. Ry. Co. (Telephone Case), 4 Can. Ry. Cas. 279.

Railway stations—Agreements respecting telephones—Restraint of trade.

Two municipalities owning and operating a joint telephone system within their limits applied to the Board, under s. 193 of the Railway Act, 1903, for an order directing a railway company to allow the installation of telephone instruments in its railway stations and for leave to connect them with their telephone system. Prior to the enactment of s. 193, an agreement was made between the Railway Company and the Bell Telephone Co. whereby the Telephone Co., for valuable consideration, was granted for a period of ten years the exclusive privilege of placing telephone instruments, apparatus and wires, in the several stations, offices and premises of the railway stations in Canada, where the Telephone Co. had established or might, during the continuance of the agreement, establish telephone exchanges:—Held, per Blair, Chief Commissioner: That the said agreement was valid and not void or voidable as being in restraint of trade or against public policy, and that an order made under s. 193 should provide for payment of compensation upon just terms for all lawful rights and interests injuriously affected thereby. Per Bernier, Deputy Commissioner: While the agreement is valid and compensation should therefore be allowed, the question of compensation should be reserved for future consideration and determined after hearing any case that might be presented by the Canadian Pacific Ry. Co. or any other railway company in support of damages. Per Mills, Commissioner: That the agreement is in restraint of trade and against public policy, and that compensation should be awarded only for the use of the premises occupied by the applicants' telephones and the expense of operating them. Order suspended pending further argument as to the quantum of compensation. Upon questions of law the opinion of the chief commissioner prevails in case of a difference of opinion amongst the members of the Board under s. 10. [Nordenfelt v. Maxim-Nordenfelt Gun, etc., Co. (No. 1), (1893), 1 Ch. 630 (1894), A.C. 535; Rousillon v. Rousillon, 14 Ch. 351; Can. Pac. Ry. Co. v. Western Union Telegraph Co., 17 Can. S.C.R 151; London & North Western Ry. Co. v. Evans (1892), 2 Ch. 432 (1893), 1 Ch. 16; Re Cuno, Mansfield & Mansfield, 43 Ch. D. 12, and Wells v. London, Tilbury & Southend Ry. Co., 5 Ch. D. 126, referred to.]

Port Arthur, etc. v. Bell Telephone Co. (Telephone Case), 3 Can. Ry Cas. 205.

[Reconsidered in 4 Can. Ry. Cas. 279.]

CONTRACT—DIRECTORY OF SUBSCRIBERS—RIGHT TO.

D., a subscriber in Toronto, Ontario, to the telephone service of the respondent, applied to the Board for an order directing the respondent to furnish him with a copy of their official telephone directory, containing the list of their subscribers in the towns in Western Ontario. There was no provision in the contract between D. and the respondent entitling him to be supplied with such directories in or outside of Toronto, although it is the practice of the respondent to furnish their subscribers with directories in their own districts:—Held (1), that the Board has no jurisdiction under the Railway Act to grant the application. (2) Upon the evidence it is unreasonable that subscribers in certain districts should be furnished with directories printed for and furnished to subscribers in other districts.

Dignam v. Bell Telephone Co., 8 Can. Ry. Cas. 200.

INSTALLATION OF TELEPHONES IN RAILWAY STATIONS—PUBLIC CONVENIENCE—EXCLUSIVE CONTRACT.

Upon application to the Board by the P. and C. telephone companies for an order compelling certain railway companies to permit the installation and maintenance in railway stations of telephones:—Held (1) that, under s. 245 of the Railway Act, 1906, the Board has jurisdiction to grant the order applied for and may impose such terms as it deems best and expedient but should not take into consideration any contract giving exclusive privileges to any other telephone company. (2) That the only point to be considered by the Board is whether such telephone connection will be of benefit and convenience to the public having business with the railway company. (3) That telephone companies who may be entitled to such an order being usually incorporated by the province, and thus not subject to the jurisdiction of the Board should enter into a contract containing fair and reasonable conditions to be prescribed by the Board.

People's and Caledon Telephone Cos. v. Grand Trunk and Can. Pac. Ry. Cos., 9 Can. Ry. Cas. 161.

[Followed in Alberta United Farmers v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 104.]

CONTRACT—INTERPRETATION OF—CONVERSATIONS AND MESSAGES—NECESSARY EQUIPMENT.

On an application for the interpretation of a provision in an agreement between two telephone companies that the Bell (respondent) Co. permit an interchange of telephonic conversations and messages between the Byron (applicant) Co.'s system . . . and provide the necessary equipment at its office in the village of Byron. After the two systems were connected an enlarged switchboard was required to enable the subscribers of the applicant to converse with one another by switching through the respondent's office:—Held, that the respondent had performed its duty under the contract if the switchboard was large enough to carry the traffic between the two systems, and the application was refused.

Byron Telephone Co. v. Bell Telephone Co., 11 Can. Ry. Cas. 433.

EXCLUSIVE CONTRACT—APPROVAL—PUBLIC INTEREST.

The respondent entered into a contract providing (clause II.) for an exclusive connection. The applicant objected to this clause in the contract being approved by the Board. The applicant and the respondent, the Canadian Telephone Co., operated in Sherbrooke and formerly had a connection:—Held, that the clause should not be approved by the Board in the public interest.

People's Telephone Co. v. Bell and Canadian Telephone Cos., 12 Can. Ry. Cas. 19.

DOMINION AND PROVINCIAL COMPANIES—JURISDICTION—DISCRETION—UNJUST DISCRIMINATION—COMPETITIVE AND NONCOMPETITIVE—DUPLICATION—TOLLS—LONG DISTANCE—ORDER ON TERMS.

Under subs. (b) of the interpretation clause, s. 1 of 7 & 8 Edw. VII. c. 61, part 1, a provincial company cannot invoke the jurisdiction of the Board to prohibit, on the ground of unjust discrimination, a Dominion company from, in the exercise of its discretion, making an agreement with one noncompetitive provincial company and refusing it to another, which is alleged to be similarly situated, in order to prevent competition, or upon more correctly speaking duplication in telephone service. The scope of the Board's jurisdiction, under s. 5, being concerned with tolls, it is given power, under s. 4 (5, 6), to order one company, subject to its jurisdiction, to afford to another, whether subject to its jurisdiction or not, the use of a long distance system upon such terms as to compensation as it deems just and expedient. The Board has jurisdiction to make an order upon terms, but not to issue a declaratory order as to the status of the applicant or respondent.

Port Hope Telephone Co. v. Bell Telephone Co., 17 Can. Ry. Cas. 343.

SERVICE—JURISDICTION.

Under 7 & 8 Edw. VII. c. 61, s. 5, the Board has no jurisdiction to deal with the rearrangement of the respondent's telephone service between different exchanges the matter being one of internal management of its own business.

Tinkess v. Bell Telephone Co., 20 Can. Ry. Cas. 249.

[Followed in North Lancaster Exchange v. Bell Telephone Co., 21 Can. Ry. Cas. 220; Re Anderson and Bell Telephone Co., 24 Can. Ry. Cas. 224.]

JURISDICTION—TOLL—SWITCHING—SERVICES.

The Board is not given any power under 7 & 8 Edw. VII. c. 61, to direct that local telephone service shall be given to an applicant who is not a subscriber of a company subject to its jurisdiction and therefore has no juisdiction over the switching connected therewith.

Bell Telephone Co. v. Falkirk Telephone Co., 20 Can Ry. Cas. 256.

[Followed in Joliette Telephone Co. v. Bell Telephone Co., 21 Can. Ry. Cas. 443.]

JURISDICTION—CONNECTION AND COMMUNICATION—STATIONS—REMOVAL OF TELEPHONES—"FACILITIES CLAUSE"—PHYSICAL TRANSPORTATION AND ACCOMMODATION.

The Board has no jurisdiction under s. 245 of the Railway Act, 1906, to compel a railway company to continue the maintenance of telephonic connection and communication between its stations and the telephone system, already installed, of the applicants. The Board has no jurisdiction under ss. 284 and 317 of the Railway Act to prevent the removal (at the instance of the municipalities within whose limits railway stations are situate) of telephones installed at such stations. The "facilities clause," s. 284, refers to physical transportation and physical accommodation on the railway. Telephonic communication with a railway station to be acquainted with the movement of the passenger or freight trains is not a facility which railway companies are required to furnish to the public under s. 284. [Port Arthur, et al. v. Bell Telephone and Can. Pac. Ry. Cos., 4 Can. Ry. Cas. 279, at p. 284; People's and Caledon Telephone Cos. v. Grand Trunk and Can. Pac. Ry. Cos., 9 Can. Ry. Cas. 161, at p. 162, referred to.]

Manitoba v. Can. Pac. Ry. Co. (Telephone Connection and Communication Case), 21 Can. Ry. Cas. 445.

[Followed in Alberta United Farmers v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 104.]

JURISDICTION — TELEPHONES — TERMS — CONDITIONS — ROUTE — MONEY PAYMENT.

In approving the route on a highway of the Bell Telephone Co., the jurisdiction of the Board is confined to fixing such terms, conditions or limitations as refer to the lines, wires or poles within the municipality. The Board has no jurisdiction to require, as a condition, the payment of any money or the granting of free telephones to the municipality.

Windsor v. Bell Telephone Co.; Bell Telephone Co. v. Windsor, 22 Can. Ry. Cas. 416.

[Followed in Bell Telephone Co. v. London, 24 Can. Ry. Cas. 102.]

JURISDICTION—CONDITIONS—COMPENSATION—BRIDGE.

The Board is given no jurisdiction under s. 47 of the Railway Act, 1906, to make the payment of compensation a term of an order approving the location and construction of a telephone line upon a public highway or to impose any condition for which a municipality may contend in bargaining with a telephone company as a term or condition of such order. [Grand Trunk Pacific Ry. Co. v. Fort William Landowners, etc., [1914] A.C. 224, at p. 229, 13 Can. Ry. Cas. 187, followed.] It is not the function of the Board to decide upon the validity of Dominion or provincial legislation. Under its charter, 43 Vict. c. 47, s. 3 and the interpretation clause of the Railway Act, 1906, s. 2 (11), the Bell Telephone Co. has power to carry its lines along a bridge on which there is a public right of traveling. [Auger et al. v. Grand Trunk and Can. Pac. Ry. Cos., 19 Can. Ry. Cas. 401, followed.]

Bell Telephone Co. v. Ottawa and Carleton, 22 Can. Ry. Cas. 421.

[Followed in Bell Telephone Co. v. London, 24 Can. Ry. Cas. 102.]

SERVICE—PRIVATE BRANCH EXCHANGE—RESIDENTIAL LINES—SEPARATE LISTING TOLL.

Where the telephone service in connection with which publication by listing in the telephone directory is asked is not of the private branch exchange line, but of the separate residential ones, and entirely distinct from the contract covering the private branch exchange service, the service asked for is a distinct one, and is subject to the separate listing toll.

Irish & Maulson v. Bell Telephone Co., 23 Can. Ry. Cas. 19.

JURISDICTION—COST OF INSTALLATION AND MAINTENANCE.

Under s. 245 of the Railway Act, 1906, the Board has no jurisdiction to direct railway companies to bear the cost of installation and maintenance of telephones in their stations, but it has jurisdiction to direct them to permit municipalities or corporations carrying on a telephone business to install instruments without charge to the railway companies in their stations. [People's and Caledon Telephone Cos. v. Grand Trunk and Can. Pac. Ry. Cos., 9 Can. Ry. Cas. 161; Manitoba v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 445, followed.]

Alberta United Farmers v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 104.

Jurisdiction—Lines on highways—Conditions—Compensation.

The Board has no jurisdiction under ss. 247, 248, of the Railway Act, 1906, to make the payment of rent, as compensation, a term of an order approving the location and construction of telephone lines upon, along, across or under a public highway, or to impose any condition, for which a municipality may contend in bargaining with a telephone company, a term or condition of such order. [Windsor v. Bell Telephone Co., 22 Can. Ry. Cas. 416; Bell Telephone Co. v. Ottawa and Carleton, 22 Can. Ry. Cas. 421, followed.]

Bell Telephone Co. v. London, 24 Can. Ry. Cas. 102.

Increase in rates—Refusal to pay—Removal of instrument—Notice —Municipal powers—Nature of rental—Bailment—Duration of contract.

Edwards v. Edmonton, 25 D.L.R. 825.

Right to maintain poles and wires in streets—Company incorporated by charter under Ontario Companies Act—Consent of town to exercise of powers—Trespass to public lands—Rights under charter.

A telephone company has not the right to plant poles upon a highway without sanction derived from the Legislature or from Parliament. The municipality has no inherent legislative power to grant the right; and, unless there is to be found some authority emanating from Parliament, when the undertaking is under the jurisdiction of Canada, or from the Legislature, when the undertaking is under the jurisdiction of the province, or from the municipality, when the Legislature has given power to the municipality, this non-natural use of the highway is unlawful. [Domestic Telegraph Co. v. Newark (1887), 49 N.J. Law 344, 346, approved.] A charter creating a company confers upon it the powers of a natural person so far as such powers are enumerated. A company which has power under its charter to own and operate a telephone line has no right to exercise that power until it acquires it in accordance with the general law of the land. The Companies Act confers power upon the companies chartered; it gives no right to those issuing the charter to deal with the rights of the public upon highways or to interfere with the public domain. The provisions of the Municipal Franchises Act, R.S.O. 1914, c. 197, do not apply to a telephone company.

Temiskaming Telephone Co. v. Cobalt, 42 O.L.R. 385, 43 D.L.R. 724. [Reversed in 44 O.L.R. 366.]

Contract—Knowledge of condition—Cancellation—Liquidated damages.

The signer of a telephone contract is presumed to know all the conditions appearing therein, and is bound by a stipulation that in case of cancellation of the contract through the default of the subscriber the balance due for the unexpired term shall become payable as liquidated damages. [Bell Telephone Co. v. Duchesne, 21 D.L.R. 822, referred to.]

Bell Telephone Co. v. Zarbatany, 31 D.L.R. 641.

Power to grant use of street.

A resolution of a township council is not an authorized municipal method granting a telephone company the privilege under certain conditions of constructing its telephone line, a by-law being necessary. (Per Middleton, J.)

Howse v. Southwold, 5 D.L.R. 709, 27 O.L.R. 29.

MUNICIPAL TELEPHONE SYSTEM.

A municipality may establish a telephone system under 2 Geo. V., c. 38, upon being properly petitioned to do so, without giving effect to all the prayers of the petition, if the system complies with the Act in question.

Re Robertson and Colborne, 8 D.L.R. 149, 4 O.W.N. 274.

COMPULSORY SERVICE.

Notwithstanding the provisions of the Ontario Telephone Act, 1910, there is no jurisdiction in the Ontario Railway and Municipal Board to make an order directing "connection, intercommunication, joint operation, reciprocal use and transmission of business," involving the expenditure of money upon capital account, by the subscribers to a telephone system, constructed and installed under the provisions of the Ontario Local Municipal Telephone Act, 1908.

Brussels v. McKillop Telephone System; Blyth v. McKillop, 2 D.L.R. 843, 26 O.L.R. 29.

MUNICIPAL TELEPHONE SYSTEM—GOVERNMENTAL REGULATIONS.

The construction and installation of a telephone system under the provisions of the Ontario "Local Municipal Telephone Act, 1908" by an association of individual subscribers, even when operated under a certain name, does not constitute them a corporate body or legal entity, and their telephone system and equipment used in connection therewith become vested in the municipality in trust for the benefit of the subscribers.

Brussels v McKillop Telephone System; Blyth v. McKillop, 2 D.L.R. 843, 26 O.L.R. 29.

AGREEMENT BETWEEN TELEPHONE COMPANIES—JURISDICTION.

While the Ontario Railway and Municipal Board may "review, rescind, change, alter or vary any rule, regulation, order or decision,' made by it, it should not make an order having the effect of interfering with an agreement entered into between two telephone systems or companies to which the approval of the Board had already been given, except on a properly framed application for the purpose, and upon due notice to the parties interested to appear and state their objections; the Board has no power or jurisdiction to alter or vary such approved agreement except upon an application of which due notice has been given to the interested parties.

Brussels v. McKillop Telephone System; Blyth v. McKillop, 2 D.L.R. 843, 26 O.L.R. 29.

TEMPERANCE ACT.

Violation of Canada Temperance Act by express company transporting liquor, see Crimes and Offences.

THISTLES.

See Weeds.

TICKETS AND FARES.

Regulation of street car fares, see Street Railways.

Regulation of tolls and tariffs, see Tolls and Tariffs; Railway Board.

Annotation.

Conditions of ticket. 2 Can. Ry. Cas. 106.

RAILWAY TICKET—RIGHT TO STOP OVER.

By the sale of a railway ticket the contract of the railway company is to convey the purchaser in one continuous journey to his destination; it gives him no right to stop at any intermediate station. [Craig v. Great Western Ry. Co. (24 U.C.Q.B. 509); Briggs v. Grand Trunk Ry. Co. (24 U.C.Q.B. 516); and Cunningham v. Grand Trunk Ry. Co. (9 L.C.J. 57, 11 L.C.J. 107), approved and followed; 4 Can. Ex. 321, affirmed.]

Coombs v. The Queen, 26 Can. S.C.R. 13.

[Adapted in Emmerson v. Maddison, 36 N.B.R. 266; applied in Provident Savings Life Assurance Soc. v. Mowat, 32 Can. S.C.R. 156; explained Lamont v. Can. Transfer Co., 19 O.L.R. 291.]

RETURN TICKET—CONDITION OF IDENTIFICATION—NEGLECT TO COMPLY WITH —EJECTMENT FROM TRAIN.

Plaintiff purchased an excursion ticket from Indian Head, N.W.T., to Toronto and return, one of the conditions, which he signed, being that he should identify himself to the authorized agent of the railway in Toronto before he set out on his return journey, and obtain the agent's official signature, dated and stamped at Toronto. On production of his ticket he secured his sleeping berth, had his baggage checked and was admitted to the train and started on his return journey, but neglected to identify himself as required and was put off the train, after he had refused to pay his fare, although he offered to identify himself to the conductor. In an action for damages:—Held, that he could not recover. Judgment of Lount, J., affirmed.

Taylor v. Grand Trunk Ry. Co., 2 Can. Ry. Cas. 99, 4 O.L.R. 357.

TIMBER LICENSE.

Damage to timber licensees caused by fires, see Fires.

TIME TABLES.

See Train Service; Street Railways.

TITLE TO GOODS.

TROVER—POSSESSORY RIGHTS—WRONGFUL TAKING.

A person possessed of goods as his property has a good title as against every stranger, and one who takes them from him, having no title in himself, is a wrong doer and cannot defend himself by shewing that there was title in some third person, for as against a wrongdoer possession is title. [Jeffries v. G.W. Ry. Co., 5 El. & Bl. 802; The Winkfield, [1902] P. 42; Glenwood Lumber Co. v. Phillips, [1904] A.C. 405, referred to.]

Dutton v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 72, 23 D.L.R. 43.

TITLE TO LANDS.

Conveyance of lands for railway purposes, see Expropriation.

Jurisdiction of Magistrate's Court and County Court involving title to land, see Jurisdiction.

Annotation.

Restriction in Contract of Sale as to user of land, 7 D.L.R. 614.

Sale of land—Delivery of possession to agent.

S. T. brought an action to recover $3,200 as balance of the purchase money of certain lands in Quebec sold by him to the N.S. Ry. Co. To this action the railway company pleaded by temporary exception that out of 3,307 superficial feet sold to them, S. T. never delivered 710 feet, and that so long as the full quantity purchased was not delivered they were not bound to pay. To this plea S. T. replied specially that he delivered all the land sold to P. B. V., the agent of the company with their assent and approbation, together with other land sold to said P.B.V. at the same time. At the trial it was shewn that P. B. V. had purchased all the lands owned by S. T. in that locality but exacted two deeds of sale, one of 3,307 feet for the railway company, and another of the balance of the property for himself By the deed to P. B. V. his land is bounded by that previously sold to the company. P. B. V. took possession and the railway company fenced in what they required:—Held, affirming the judgments of the Court of Queen's Bench for L.C. that S. T. having delivered to P. B. V., the agent of the company, with their assent and approbation, the whole of the land sold to them together with other lands sold to the said P. B. V. at the same time, he was entitled to the balance of the purchase money. Per Taschereau, J.: That all appellants could claim was a diminution of price, or cancellation of the sale under arts. 1501, 1502, and that therefore their plea was bad.

North Shore Ry. Co. v. Trudel (1887), 24 C.L.J. 57.

Right of pre-emption—Lands reserved—Agricultural settlers.

By 47 Vict. c. 14, subs. (f), (B.C.), certain land conveyed to the E. & N. Ry. Co. was, for four years from the date of the Act, thrown open to the actual "settlers for agricultural purposes," coal and timber land excepted. H. and W. respectively claimed a right of pre-emption under this Act:—Held, affirming the decision of the Supreme Court of British Columbia, that the Act did not confer a right of pre-emption to lands not within the pre-emption laws of the province; that only "unreserved and unoccupied lands" came within those laws and the lands claimed had long before been reserved for a town site; and that the claimants were not upon the lands as "actual settlers for agricultural purposes," but had entered with express notice that the lands were not open for settlement

Hoggan v. Esquimault & Nanaimo Ry. Co.; Waddington v. Esquimault & Nanaimo Ry. Co., 20 Can. S.C.R. 235.

[Affirmed in [1894] A.C. 429; considered in Esquimault, etc., Ry. Co. v. McGregor, 12 B.C.R. 270; referred to in Esquimault, etc., Ry. Co. v. Fiddick, 14 B.C.R. 429.]

Rights of pre-emption.

Where the appellant claimed as "an actual settler for agricultural purposes," that by s. 23 of the British Columbia Act, 48 Vict. c. 14, he was entitled to a right of pre-emption over certain lands included in a government grant for the purpose of the respondent railway, and it appeared that the land in question had, prior to the Act, been reserved as a town site:—Held, that a settler means a person entitled to record land under the Land Act, 1875, by reason of compliance with its provisions; that the Act did not apply to reserved lands; that under 47 Vict. c. 14, no new right of pre-emption was given, nor was the word "settler" used in any new sense. Accordingly, the appellant's claim failed, since he was not a settler in the only sense known to the law of the colony.

Hoggan v. Esquimault & Nanaimo Ry. Co., [1894] A.C. 429.

LOCATION OF PERMANENT WAY—FENCING—LAYING OUT OF BOUNDARIES.

A railway company purchased land from P., bounded by a non-navigable river, as "selected and laid out" for their permanent way. Stakes were planted to shew the side lines and the railway fencing, at the points in dispute, was placed, here and there, above the water-line, although the company could not have the quantity of land conveyed unless they took possession to the edge of the river. P. remained in possession of the strip of land between the fence and the water's edge and of the bed of the stream ad medium filum, and, after the registration of the deed to the company, sold the rest of his property including water rights, mills and dams constructed in the stream to the defendant's auteur, describing the property sold as "including that part of the river which is not included in the right-of-way, etc." The plaintiffs never operated their line of railway, but, immediately on its completion, under powers conferred by their charter, and the Railway Act, 14 & 15 Vict. c. 51, leased it for 999 years to another company and the railway has been ever since operated by other companies under the lease. On appeal the Supreme Court:—Held (1), that the description in the deed to the railway company included, ex jure naturæ, the river ad medium filum aquæ as an incident of the grant and that their title could not be defeated by subsequent conveyance through their vendor and warrantor, notwithstanding that they may not have taken physical possession of all the lands described in the prior conveyance. (2) That the possession of the strip of land and the waters and bed of the river ad medium filum by the vendor and his assigns, after the conveyance to the company, was not the possession animo domini required for the acquisitive prescription of ten years under art. 2251 C. C. (Que.) but merely an occupation as tenant by suffrance upon which no such prescription could be based. (3) That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the lands conveyed. (4) That the terms of the description in the subsequent conveyance by P. to the defendant's auteur were a limitation equivalent to an express reservation of that part of the property which had been previously conveyed to the company and prevented the defendant acquiring title by ten years' prescription, and further that he was charged with notice of the prior conveyance through the registration of the deed to the company. (5) That the acquisitive prescription of thirty years under art. 2242 C. C. (Que.) could not run in favour of the original vendor who had warranted title to the lands conveyed to the company because, after the sale, his occupation of the part of the property the possession of which he had failed to deliver, was merely on suffrance. The judgment of the Quebec Court of Kings Bench, appeal side, was reversed on the questions of law as summarized. On the question raised as to the right of action to recover the lands and for damages caused to the permanent way, it was held, affirming the judgment appealed from, that the lease to the companies which held and operated the railway, amounted to an emphyteutic lease assigning the domaine utile and all the plaintiffs' rights in respect of the railway reserving, however, the domaine direct.

Massawippi Valley Ry. Co. v. Reed, 33 Can. S.C.R. 457.

[Applied in Atty.-General of Quebec v. Fraser, 37 Can. S.C.R. 590; Atty.-General of Quebec v. Scott, 34 Can. S.C.R. 614; relied on in Tanguay v. Canadian Elec. Light Co., 40 Can. S.C.R. 6.]

Provincial grant to railway—Partition of land.

By agreement through correspondence the G. T. R. Co. was to tender for a triangular piece of land offered for sale by the Ontario Government, containing 19 acres and convey half to the C. P. R. Co., which would not tender. The division was to be made according to a plan of the block of land with a line drawn through the centre from east to west, the C. P. R. Co. to have the northern half. The G. T. R. Co. acquired the land, but the Government reserved from the grant two acres in the northern half. In an action by the C. P. R. Co. for specific performance of the agreement:—Held, affirming the judgment of the Court of Appeal, C. P. Ry. Co. v. G. T. Ry. Co., 14 Ont. L.R. 41, Maclennan and Duff, JJ., dissenting, that the C. P. R. Co. was entitled to one-half of the land actually acquired by the G. T. R. Co. and not only to the balance of the northern half as marked on the plan. The Court of Appeal directed a reference to the Master in case the parties could not agree on the mode of division:—Held, that such reference was unnecessary and the judgment appealed against should be varied in this respect.

Grand Trunk Ry. Co. v. Can. Pac. Ry. Co., 39 Can. S.C.R. 220.

Land subsidy in the N.W. Territories—Mines—Reservation in Grant—Dominion Lands Act.

By the Act 53 Vict. c. 4, the suppliant railway company, among others, was authorized to receive a grant of Dominion lands of 6,400 acres for each mile of its railway, when constructed. Under the provisions of s. 2 the grants were to be made in the proportion and upon the conditions fixed by the orders-in-council made in respect thereof, and, except as to such conditions, the said grants should be free grants, subject only to the payment by the grantees, respectively, of the cost of survey of the lands, and incidental expenses. The Act came into force on the 16th of May, 1890. On that date there were certain regulations in force, made on the 17th September, 1889, under the provisions of the Dominion Lands Act, which provided that all patents for lands in Manitoba and the Northwest Territories should reserve to the Crown all mines and minerals which might be found to exist in such lands, together with the miles of railway constructed. There was full power to work the same. Orders in council authorizing the issue of patents, for the lands in question, to the suppliant railway company were passed from time to time, according to the number of miles of railway constructed. There was no reference in these orders to the regulations respecting the reservation of mines and minerals of 17th September, 1889:—Held, that the regulations reserving mines and minerals applied to all grants of lands made under the provisions of the Act, 53 Vict. c. 54, and that the omission of reference to such regulations in the orders-in-council authorizing patents to be issued did not alter the position of the suppliant company under the law. Semble, that where Parliament grants a subsidy of lands in aid of the construction of a railway, and nothing more is stated, the grant is made under ordinary conditions, and subject to existing regulations concerning such lands.

Calgary & Edmonton Ry. Co. v. The King, 8 Can. Ex. 83.

[Affirmed in 33 Can. S.C.R. 673; reversed in [1904] A.C. 765.

PROVINCIAL GOVERNMENT—GRANT OF LAND—VALIDITY.

The Vancouver Island Settlers' Rights Act, 1904, defines a settler as a person who, prior to the passing of the British Columbia Statute, c. 14 of 47 Vict., occupied or improved lands situate within that tract of land known as the Esquimault and Nanaimo Railway land belt with the bona fide intention of living thereon, and s. 3 of said Act provides that upon application being made to the Lieutenant-Governor-in-council within twelve months from the coming into force of the Act, shewing that any settler occupied or improved land within the said land belt prior to the enactment of said c. 14 with the bona fide intention of living upon the said lands, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant in fee simple in such land shall be issued to him or his legal representative, free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler. The lands within the said belt had been conveyed by the province originally to the Dominion for the purposes of the railway, and by the Dominion transferred to the railway company, which in giving grants or conveyances of portions thereof, reserved the minerals. Defendant, who held from her predecessor in title, applied for and obtained a grant under said s. 3:—Held, on appeal, that the railway company was entitled to be heard upon such application. Held, further, that a grant issued without such opportunity being given to the railway company to be heard on the application, was a nullity, and that the defendant should be restrained from making use of it. Held, further, that one of the conditions in the statute was that the claims of applicants thereunder should be passed upon by the Lieutenant-Governor-in-council, and the absence of compliance with such condition was fatal, but held, further, that in the circumstances here the defendant should be permitted, on giving notice to the railway company, to proceed with her application and that the Crown need not be a party to the action.

Esquimault & Nanaimo Ry. Co. v. Fiddick, 14 B.C.R. 412.

SUPERSEDING GRANT OF RAILWAY LANDS—SETTLERS' RIGHTS ACT.

The British Columbia Vancouver Island Settlers' Rights Act, 1904, directed that a grant in fee simple without any reservations as to mines and minerals should be issued to settlers therein defined, and thereunder a grant was made to the appellant of the lot in suit. By an Act of the same Legislature in 1883, land which included the said lot had been granted with its mines and minerals to the Dominion Government in aid of the construction of the respondents' railway, and in 1887 had been by it granted to the respondents under the provisions of a Dominion Act passed in 1884:—Held, that the Act of 1904 on its true construction legalized the grant thereunder to the appellant, and superseded the respondents' title. Held, also, that the Act of 1904 was intra vires of the local Legislature. It had the exclusive power of amending or repealing its own Act of 1883. The Act, moreover, related to land which had become the property of the respondents, and effected a work and undertaking purely local within the meaning of s. 92, subs. 10 of the B.N.A. Act. 12 B.C.R. 257, reversed.

McGregor v. Esquimault & Nanaimo Ry. Co., [1907] A.C. 462.

[Commented on in Burrard Power Co. v. The King, 43 Can. S.C.R. 56; Esquimault & N. Ry. Co. v. Fiddick, 14 B.C.R. 413.]

MEANING OF WORD "LAND"—RESERVATION OF MINERALS.

The E. & N. Ry. Co. executed an agreement to sell certain lands to H., who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him which he refused to accept as it reserved the minerals on the land, while the agreement was for an unconditional sale. In an action by H. for specific performance of the agreement the company contended that in its conveyances the word "land" was always used as meaning land minus the minerals:—Held, reversing the judgment of the Supreme Court of British Columbia (6 B.C.R. 228), Taschereau, J., dissenting, that the contract for sale being expressed in unambiguous language, and H. having had no notice of any reservations, it could not be rescinded on the ground of mistake and he was entitled to a decree for specific performance.

Hobbs v. Esquimault & Nanaimo Ry. Co., 29 Can. S.C.R. 450.

[Relied on in Raymond L. & I. Co. v. Knight Sugar Co., 2 Alta. L.R. 163.]

EXECUTION AGAINST LANDS—EQUITABLE INTEREST—EFFECT OF EXECUTION—LAND TITLES ACT.

Plaintiff sold certain land to defendant S. under agreement for sale, whereby he became entitled to a transfer upon payment of the agreed purchase price and compliance with stated conditions. Subsequently the American Abell Co. recovered a judgment against S., and registered execution in the usual form against his land. S., after such registration, assigned his whole equitable interest in such land to the defendant T.J.S. The legal title during this time remained in the plaintiff. In an action by plaintiff under the contract, the American Abell Co. claimed a right to intervene as having an interest in the land under their writ of execution:—Held, (1) that, having regard to the provisions of the Land Titles Act, it was evidently the intention of the Legislature that writs of execution should bind only the interests of registered owners of land, and that the execution did not bind the equitable interest of the defendant S. 2. That no lien is created by an execution against land, only such rights being acquired as are given by the Land Titles Act, and which are not available as against equitable interests.

Can. Pac. Ry. Co. v. Silzer, 12 Can. Ry. Cas. 160, 3 S.L.R. 162.

SPECIFIC PERFORMANCE—PURCHASES WITHOUT NOTICE—PUBLIC HIGHWAY—WAY OF NECESSITY—LAND TITLES ACT.

On the 8th October, Vincent signed power of attorney authorizing the execution and registration of a plan of lands including two lots owned by him, shewing a street which occupied 33 feet in width of his two lots. On the 9th October, he himself agreed to sell the two lots to the Grand Trunk Pacific without any reservation of any street or right-of-way over the 33 feet mentioned in the power. Vincent's attorney, without notice of the sale to the Grand Trunk Pacific, executed a plan which was executed by others shewing the street, and the plan was registered without any of the signers of the plan being aware of the agreement with the Grand Trunk Pacific. The street shewn on the plan did not communicate at either end with, nor was there any outlet anywhere to, any highway. In an action by the Grand Trunk Pacific against Vincent for specific performance of the contract and against the other property owners for the cancellation of that portion of the plan affecting the two lots:—Held, 1. A parcel of land used by the public, terminating at one end as a cul-de-sac, can be a public highway. [Bourke v. Davis, 44 Ch.D. 110, 62 L.T. 34, 38 W.R. 167.] But a parcel of lands closed at both ends cannot be a public highway: [Attorney-General v. Richmond Corp., 89 L.T. 700, 68 J.P. 73, 2 L.T.R. 628, 20 T.L.R. 131; Bailey v. Jamieson, 1 C.P.D. 329, 34 L.T. 62, 24 W.R. 456.] 2. The registration of a plan approved by the municipality in which the subdivided land is situate which shews as a street a parcel of land closed at both ends and from which there is no outlet to any ordinary highway, does not constitute the parcel a highway, even though sales of land have been made accordingly to the registered plan. Such a street becomes merely a private right-of-way. Land Titles Act, s. 43 (g).—The land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to . . . (g).—Any right-of-way or other easement granted or acquired under the provisions of any Act or law in force in the province. 3. The mere right to a "way of necessity" until used or otherwise defined and located, cannot be said to apply to any particular place suggested for it. 4. The last clause of s. 188 of the Railway Act is intended to protect the railway company upon any agreement made by it with any owner, no matter what change of title may take place within a year and whether such change be with or without notice of the company's claim, and the railway company may enforce such an agreement as against any person, although he may be a purchaser for value without notice. 5. The words "set out and ascertained" (used in s. 188), are not restricted in their meaning to the filing of a plan, profile and book of reference by the railway company, which is necessary before expropriation proceedings may be taken; and where a railway company obtained an order of the Board authorizing the construction of a railway according to a plan attached to the order and shewing therein that portion of the land which was the subject of a contract made within one year before the order and which order and plan were registered within a year. 6. That the lands required were by such order and plan sufficiently "set out and ascertained" within the meaning of s. 188, and that the contract could therefore be enforced as against the subsequent purchasers for value without notice. Vincent's agreement for purchase of land provided that conveyance should be "subject to any streets or right-of-way that might thereafter be laid out on said lands in order to provide exit to streets south and east of the property." No right-of-way was laid out and no definite locality was determined for such right-of-way. 7. That this clause did not make the title subject to the implied reservation contained in s. 43 (g) of the Land Titles Act. The provision of that section is limited to a right-of-way already definitely located and fixed in some way both as to place and as to persons entitled to it.

Grand Trunk Pacific Ry. Co. v. Vincent, 12 Can. Ry. Cas. 465, 2 Alta. L.R. 393.

CONVEYANCE OF LANDS AFFECTED BY MORTGAGE.

The F. & St. J. Bridge Co., operating a work for the general advantage of Canada, and to which the Railway Act applies, obtained under a special Act a loan of $300,000 from the Crown, for which a mortgage was duly created under the said Act. Subsequently the company, under the pretence of disposing of surplus land, sold some of the land so mortgaged to one of the directors of the company. Held, that nothing passed under the said conveyance.

Hilyard v. The King, 16 Can. Ex. 36.

TOLLS AND TARIFFS.

A. Freight Rates; In General.
B. Reasonableness; Discrimination.
C. Continuous Route; Joint Tariffs.
D. Competitive Tariffs.
E. Interswitching; Demurrage.
F. Passenger Fares.
G. Electric Railways.
H. Telegraph Tolls.
I. Telephone Tolls.
J. Rebates and Refunds.

Jurisdiction of Railway Board, see Railway Board.
Lien for freight charges, see Carriers of Goods.
Regulation of shipping system as affecting tolls and tariffs, see Cars.
Misrepresentation rates, see Fraud and Deceit.
Regulation of telegraph rates, see Telegraphs.
Regulation of telephone rates, see Telephones.
Passenger tickets, see Tickets and Fares.
Continuous route, see Interchange of Traffic.
Street railway fares, see Street Railways.

Annotations.

Interchange of Traffic between steamship and railway companies as constituting a continuous route. 5 Can. Ry. Cas. 199.

Jurisdiction of Board respecting joint tariffs in connection with international through traffic. 12 Can. Ry. Cas. 66.

Discretion of carriers to fix rates to meet competition of other transportation agencies or markets. 13 Can. Ry. Cas. 182.

Regulation of rates and tariffs on through traffic. 13 Can. Ry. Cas. 556.

Business and residential tolls. 18 Can. Ry. Cas. 325.

Equalizing of rates to meet business conditions. 18 Can. Ry. Cas. 357.

Milling-in-transit toll. 18 Can. Ry. Cas. 414.

Authority of station agent to create special tolls. 19 Can. Ry. Cas. 165.

A. Freight Rates; In General.

DISCRIMINATION—LUMBER PRODUCTS.

Upon a complaint of discrimination on lumber, ties and poles made from cedar it appeared that an increase had been made in the rates on cedar products without any material change in the rate on common lumber and similar products. This increase was made by the railway company to retard the shipment of cedar products required for their own use:—Held, a discrimination within the meaning of s. 253, subs. 2. The railway company were ordered to cease from levying rates on cedar products in excess of the rates on other descriptions of lumber and their products. "Common carriers in making rates cannot arrange them from an exclusive regard to their own interests, but must have respect to the interest of those who may have occasion to employ their services and must subordinate their own interests to the rules of relative equality and justice."

Scobell v. Kingston & Pembroke Ry. Co. (Cedar Lumber Products Case), 3 Can. Ry. Cas. 412.

[See also Reynolds v. Western N.Y. & Penn. Ry. Co., 1 I.C. Rep. 685; referred to in Rideau Lumber Co. v. Grand Trunk and Can. Pac. Ry. Cos., 8 Can. Ry. Cas. 339.]

CARLOAD LOTS—DISCRIMINATION—OILED CLOTHING.

Oiled clothing when carried in carload lots is not given a carload rate in the Canadian Freight Classification. Upon an application by the T.O.C. Co. for a carload rating it appeared that carload shipments had been made from Toronto to Halifax for fishermen's use, and it is alleged that shipments might also be made to the Canadian North West for ranchers' use, if the application were granted:—Held, that although the discrimination involved in the difference between C.L. and L.C.L. rating has received tacit assent, a shipper has not thereby the right to demand a lower rate on carloads, unless possibly he can shew that the carload rate demanded would pay reasonably for the service and that a refusal would injure his business. Upon the evidence a third class rate for carloads of not less than 20,000 pounds from Toronto to Halifax, Winnipeg and Calgary and other points reached by applicants was ordered.

Tower Oiled Clothing Co's. Case, 3 Can. Ry. Cas. 417.

SPECIAL CONCESSION—SUBSEQUENT INCREASE.

A manufacturing company was granted a special low freight rate for the carriage of logs to its factory, upon condition that this raw material, when manufactured into finished product should be handed over for carriage to the same railway. After several years, the factory having in the meantime become sufficiently prosperous to pay a more suitable rate, the rate was increased from 3 cents per 100 lbs. to 4 cents for the same weight. Upon application by the company to the Board to have the old special rate restored:—Held, that since the increased rate is neither unjust, unreasonable nor contrary to some provisions of the Railway Act, the application must be refused.

United Factories v. Grand Trunk Ry. Co., 3 Can. Ry. Cas. 424.

CONCESSIONS IN RATES—CONSTRUCTION MATERIAL—MACHINERY OF INDUSTRIAL CORPORATIONS.

Certain railway companies, members of the Canadian Freight Assn., have been granting a reduction of 25 per cent in freight rates on the material for construction and machinery for equipment of new industrial plant. Leave is now asked from the Board to authorize the continuance of these reductions:—Held, that although the Board is prepared to give due effect to subs. 4 of s. 275 of the Railway Act, 1903, it must have a separate and distinct application in such case, so as to judge of the effect of its order upon other industries, shippers and dealers. Application refused.

Re Canadian Freight Assn. and Industrial Corporations, 3 Can. Ry. Cas. 427.

FREIGHT RATES ON FRUIT—CLASSIFICATION—CHARGES FOR ICING IN TRANSIT.

On a complaint by the Association, (1) that freight rates on fruits are unreasonable and excessive; (2) that the charges for icing in transit are too great. (1) By mutual agreement between the complainants and the railway companies, certain modifications were made in the classification and approved by the Board: (a) Apples in boxes in less than carloads, from second to third class. (b) Pears in boxes and barrels, L.C.L., from first to third class, and in carloads, from third to fifth class; also the following commodity rates. (c) On fresh fruits (small), from the fruit districts to points in Eastern Ontario, Quebec, and the Maritime Provinces, fresh fruit shall be carried at fourth class rates in carloads of not less than 20,000 lbs., instead of third class rates, and at second class rates in L.C.L., of 10,000 lb. and over instead of first class rates; (d) And from points in Ontario and Quebec to Winnipeg, Portage la Prairie, and Brandon, at fourth class rates in car loads of not less than 20,000 lbs., instead of third class:—Held (2), that the present system of making fixed charges for icing cars, irrespective of the actual cost of such service, is not based on sound principle, and must be discontinued; that the actual cost of the ice and the placing thereof in the cars should not be exceeded. Pending a decision of the Board as to a reasonable charge, a charge of not more than $2.50 per ton of 2,000 lbs. on the actual weight of the ice supplied was authorized.

Ontario Fruit Growers' Assn. v. Can. Pac. Ry. Co. (Fruit Growers' Case), 3 Can. Ry. Cas. 430.

RATES ON SPLIT PEAS—EXPORT RATES—RATES ON GRAIN.

Until 27th October, 1902, split peas for export were carried at the rate for grain products (flour, rolled oats, etc.). A milling company in Port Huron complained to the Inter-State Commerce Commission that railways in Michigan charged a higher rate, and the rate was then advanced on the Grand Trunk and other railways in Canada. On local shipments the rate on split peas is the same as the rate on flour. The Pea Millers' Assn. complained of the increased rate and consequent loss of the British market:—Held, that the former basis of rates must be restored.

Pea Millers' Assn. v. Canadian Railway Co's. (Pea Millers Case), 3 Can. Ry. Cas. 433.

DISCRIMINATION BETWEEN SHIPPERS—RATES ON COAL.

Application was made by the Grand Trunk Ry. Co. for authority under subs. 4, s. 275 of the Railway Act, 1903, to reduce the rate on bituminous coal to Cobourg used for manufacturing purposes by 10c. per ton below the published rate, as they have been in the habit of allowing in the past, on the ground that certain manufacturers were unable to pay the high rate and carry on business successfully:—Held, that the reduction could not be allowed. The allowance of a reduction in the freight rate on any article of merchandise to one class of shippers, and the refusal of the same rate to another class, is unjust discrimination, and forbidden by s. 252. [Castle v. B. & O. Ry. Co., 8 I.C. Rep. 333, approved.]

Re Grand Trunk Ry. Co. (Manufacturers' Coal Rates Case), 3 Can. Ry. Cas. 438.

[Referred to in Brant Milling Co. v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 259; followed in Manitoba Dairymen's Assn. v. Dominion, etc., Express Co., 14 Can. Ry. Cas. 142, 7 D.L.R. 868.]

ARBITRARY RATES—BRANCH AND MAIN LINE RATES—COAL.

Under certain conditions rates to a point on a branch or lateral line may be higher than to points on the main line, though at a less distance from the junction point; but such rates must not be unreasonable or disproportionately higher than to nearer points on the main line. The plaintiff complained that the rates on coal to Almonte from the Niagara and Detroit frontiers were unreasonably high as compared with the rates to Carleton Junction, Ottawa, and adjacent stations. The rate to Carleton Junction, Ottawa, and adjacent stations is $2 per ton from the Niagara frontier, and $2.25 from Detroit, while the rate to Almonte is 40c. higher, points on the lateral line from Carleton Junction being charged on arbitrary rate above the rate to Carleton Junction:—Held, that circumstances warrant a higher rate to Almonte than to Carleton Junction and Ottawa; but as to the arbitrary rate to Almonte on 10th class traffic was only 1c. per 100 lbs. (20c. per ton) it must not be exceeded on coal between the same points.

Almonte Knitting Co. v. Can. Pac. Ry. Co. and Michigan Central Ry. Co. (Almonte Knitting Co. Case), 3 Can. Ry. Cas. 441.

[Followed in Malkin & Son v. Grand Trunk Ry. Co., 8 Can. Ry. Cas. 183; Can. Portland Cement v. Grand Trunk, etc., 9 Can. Ry. Cas. 209; Fredericton Board of Trade v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 439; Hunting-Merritt Lumber Co. v. Can. Pac. and British Columbia Elec Ry. Cas. 20 Can. Ry. Cas. 181.]

TOLLS—SIMILAR CIRCUMSTANCES—REDUCTION FOR CARTAGE—SPECIAL TARIFFS.

The Railway Act, 1903, requires equality in the tolls charged under substantially similar circumstances and conditions, and forbids discrimination between individuals, persons, companies and localities. S. 252. No variation from the authorized tariffs of tolls can be made unless under circumstances or conditions specially provided for in such tariffs or by special tariffs of general application and not discriminating between different localities. Ss. 261-262. For many years prior to 1904 an allowance was made by the railway company to the owner of a mill distant one mile from the nearest railway station, for the cost of cartage of flour and feed shipped from his mill by the company's railway to distant points. This allowance was withdrawn after the Railway Act, 1903, came into force. The mill owner applied to have the allowance restored, alleging that its continuance was necessary to the existence of his business:—Held, that the application either for a continuation of the allowance previously made, or for a change in the authorized tariffs of tolls, in favour of the applicant alone, must fail. [Manufacturers' Coal Rates Case, 3 Can. Ry. Cas. 438, referred to; Stone v. Detroit, etc., 3 I.C. Rep. 613; Hazel Milling Co. v. St. Louis, etc., 5 I.C. Rep. 57; Re Division of Joint Rates, 10 I.C. Rep. 681, followed.]

Brant Milling Co. v. Grand Trunk Ry. Co. (Brant Milling Co's. Case.), 4 Can. Ry. Cas. 259.

[Referred to in Crow's Nest Pass Coal Co. v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 33; followed in Montreal Produce Merchants v. Grand Trunk, etc., 9 Can. Ry. Cas. 232; Michigan Sugar Co. v. Chatham, W. & L. E. Ry. Co., 11 Can. Ry. Cas. 354.]

RATES ON STONE—MILEAGE BASIS—EXISTING INDUSTRIES.

In the making of rates for the carriage of freight the question of the distance of haul while important to be considered is in many cases a minor consideration. Where large quarries have been established and capital invested for many years upon the faith of law rates for the carriage of stone being given; upon application by the railway companies for an increase of five cents a ton within certain areas, an application was made by the operators to establish new rates upon a mileage basis for points within a radius of fifty miles from the principal market:—Held, that as the adoption of such a rate would destroy many existing industries, and in no way reduce the price of stone to the consumer, but enure very largely to the benefit of the applicants, or some of them, the application should be refused, and a new scale of rates as recommended by the Chief Traffic Officer based upon the existing system was approved.

Doolittle & Wilcox v. Grand Trunk & Can. Pac. Ry. Cos., (Stone Quarry Rates Case), 8 Can. Ry. Cas. 10.

[Followed in Saint David's Sand Co. v. Grand Trunk and Michigan Central Ry. Cos., 17 Can. Ry. Cas. 279; Hagersville Crushed Stone Co.

v. Michigan Central Ry. Co., 22 Can. Ry. Cas. 84; distinguished in Provincial Stone & Supply Co. v. Can. Pac. Ry. Co., 22 Can. Ry. Cas. 411.

FREIGHT RATES—SHORT AND LONG POLES—DISCRIMINATION—SPECIAL, LOCAL AND JOINT TARIFFS.

On a complaint to the Board of unjust discrimination between the rates on telegraph, telephone and trolley poles and those on lumber and other forest products:—Held, (1) that the rates charged on poles loaded on one car shall not be greater than those on common lumber as provided in the special, local and joint tariffs of the railway companies. (2) That on poles so long as to require more than one car for their carriage the railways be authorized to charge 20 per cent higher than for one car. (3) That poles may be exported by Canadian railway companies with the concurrence of their United States connections under joint rail rates for general traffic at the lumber classification. [Scobell v. Kingston & Pembroke Ry. Co., 3 Can. Ry. Cas. 412, referred to.]

Rideau Lumber Co. et al. v. Grand Trunk and Can. Pac. Ry. Cos., 8 Can. Ry. Cas. 339.

EXPORT TRAFFIC—TERMINAL CHARGES—COMPETITION BETWEEN OCEAN PORTS—UNREASONABLENESS AND UNJUST DISCRIMINATION—REFUNDS.

Application (1) that the exporter of cheese in Montreal should be placed upon as favourable basis as to terminal charges at the port of Montreal on his export traffic as his competitor west of Montreal, (2) that freight tolls on cheese should be put on a parity with those on bacon, (3) complaining of alleged advances in freight tolls. It appeared that cheese may be shipped direct to transatlantic ports from Ontario points via Montreal on a joint rail and ocean bill of lading, or shipment might be made on a separate rail and ocean bill of lading to Montreal for storage and subsequent export. In the first case cheese shipments are switched direct to the steamship piers, the wharfage and Port Warden's fees being absorbed by the railway companies to meet the competition between Canadian and United States ports and carriers. In the second case the cheese is carted from the cars to the warehouse of the exporter and again from the warehouse to the steamship piers. The Montreal exporter is charged for inward cartage, i.e., from cars to warehouse, wharfage and Port Warden's fees, these two latter charges are absorbed in the case of his western competitor:—Held, (1) that the Montreal exporter should not be placed upon a more favourable basis than his western competitor. (2) That no comparison could be made between switching charges and inward cartage charges in order to reduce the latter, these cartage charges not shewn to be unreasonable and unjustly discriminatory; the portion of the complaint as to inward cartage charges should be dismissed. (3) But held, also that so long as the port charges are absorbed on shipments on joint rail and ocean bills of lading these charges should also be absorbed on shipments on separate rail and ocean bills of lading for subsequent export, as the services are identical in each case, and that a tariff embodying these provisions should be filed. (4) That the application to put cheese and bacon on a parity should be dismissed, this being a phase of the competition of markets, and the railway companies have it in their discretion whether or not to make tolls to meet the competition of markets. (5) That the complaint of the advance in freight tolls should be dismissed, the cartage charges being really attacked and it has been shewn to be due to increased cost of service which the shipper or consignee does not pay entirely but a portion is paid by the railway companies. (6) That the application for refunds should be refused, being only allowed when provided for in the tariffs, and the Board has no power of retroactive action. [Brant Milling Co. v. Grand Trunk Ry. Co. (Brant Milling Co.'s Case), 4 Can. Ry. Cas. 259; Lancashire Patent Fuel Co. v. London & North Western Ry. Co., 12 Ry. & C. Tr. Cas. 79, and Lasalle Paper Co. v. Michigan Central Ry. Co., 16 I.C.C. Rep. 149, followed.]

Montreal Produce Merchants' Assn. v. Grand Trunk and Can. Pac. Ry. Cos., 9 Can. Ry. Cas. 232.

[Followed in British Columbia Sugar Refining Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 169; Can. Oil Co. v. Grand Trunk, etc., 12 Can. Ry. Cas. 351; Graham Co. v. Canadian Freight Assn. 22 Can. Ry. Cas. 355.]

CONSTRUCTION TARIFFS—FILING.

This question of the powers of a railway company to carry traffic, under what are called construction tariffs, i.e., during the period of construction, arose on a complaint respecting the tolls that the railway company was charging on lumber from points in British Columbia to points in Saskatchewan, situated on branch lines, still under construction. The railway company submitted that these construction tariffs were a public convenience, and that since the operation of the branch lines had not been authorized by the Board, when the construction tariffs were issued, it would have been useless to file them, as the Board would have no authority to approve them:—Held, (1) that the tolls charged in the case in question were all illegally collected in violation of the express provisions of the statute. (2) That under s. 261 of the Railway Act, 1906, no railway, or portion thereof, without the leave of the Board, could be opened for the carriage of traffic other than for the purposes of construction of the railway. (3) That under s. 327 of the Act, standard freight tariffs must be filed, and subs. 4 of that section prohibits the company from charging any toll until the provisions of the section have been complied with. (4) That subs. 5 of s. 314 of the Act, prohibits the company from charging, levying or collecting any money for any service as a common carrier, except under the provisions of the Railway Act.

Baker, Reynolds & Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 151.

[Followed in Randall et al. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 252; Re Edmonton, Dunvegan & British Columbia Ry. Co., 19 Can. Ry. Cas. 395; Riverside Lumber Co. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 17.]

EQUALIZATION—TOLLS ON MANUFACTURED PRODUCTS—DISCRIMINATION—COMPETITION.

Application by Winnipeg and St. Boniface manufacturers of metallic shingles and siding for an order directing the railway company to equalize the tolls on those products as compared with the tolls on the unmanufactured product. The Western manufacturers submitted that they were subject to unjust discriminaton in competition with Eastern manufacturers of the said products from the fact that the tolls were higher on the unmanufactured product than on the manufactured product of Western Canada:—Held, that as conditions have changed and manufacturers of the said products have been established in Western Canada, order No. 653 dated July 5th, 1905, fixing the tolls complained of should be rescinded.

Kemp Manufacturing & Metal and Winnipeg Ceiling & Roofing Cos. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 161.

GRAIN TARIFFS—MILEAGE BASIS—EQUALIZATION.

On an application to direct the railway companies to equalize their tolls on shipments of grain from their Lake Huron and Georgian Bay elevators to interior points in Ontario and Quebec with those charged from Montreal to the same points. The railway companies have been, since the movement of grain from Manitoba commenced, charging special ex-lake tolls, mostly to grain mills in Ontario and Quebec and scaling them down on a mileage basis for a distance of 325 miles; while on ex-water shipments to the same points through Montreal, Kingston and other lower lake ports they have been charging the full domestic tolls:—Held (1), that the tolls on shipments of grain from vessels to cars between Depot Harbour and Montreal, inclusive, shall be the same for equivalent distances from all lake and river ports. (2) That on grain transhipped at ports west of Montreal to points east thereof, to which through tolls are based on arbitraries, the western portion of the tolls shall be based on St. Henry and Outrement mileage in the case of the Grand Trunk and Canadian Pacific respectively. (3) That railway companies shall give effect to the above two holdings by filing special tariffs.

Montreal Board of Trade v. Grand Trunk and Can. Pac. Ry. Cos., 10 Can. Ry. Cas. 319.

CARTAGE TOLL—RAILWAY AND TRANSPORT COMPANIES—CONTRACT.

Complaint that the charge for carting a marble slab to the freight sheds of the railway company from the premises of the consignor in Montreal was excessive. The Dominion Transport Co. by contract with the Canadian Pacific Ry. Co. had the sole and exclusive right to cart freight to the freight sheds of the railway company in the city of Montreal for outward shipment. The cartage was included in the railway company's freight bill aand paid by the consignee at Hamilton. The company's cartage tariff approved by the Board did not include any item covering a charge for carting marble slabs in Montreal:—Held, (1) that the charge for cartage was under the authority or consent of the railway company, and was a toll within the meaning of subs. 30, s. 2, Railway Act, amended by s. 9, c. 61, 8 Edw. VII. which must be included in a tariff filed and approved by the Board under subs. 5, s. 314, Railway Act, amended by s. 11, c. 61, 8 Edw. VII. (2) That the railway company had no legal right to collect the charge for cartage and an order should go declaring it to be illegal.

Stewart v. Can. Pac. Ry. Co., 11 Can. Ry. Cas. 197.

[Followed in Re Cartage Tolls, 19 Can. Ry. Cas. 389.]

CLASSIFICATION—CARTAGE TARIFFS—DIFFERENT WEIGHTS.

Complaint by reason of the note to Rule 12 in the Classification requiring safes of 1,000 lbs. each, or over, to be loaded and unloaded by the owners and the same exception appeared in the cartage tariffs. Rule 12 provided that freight weighing 2,000 pounds or more per package must be loaded and unloaded by the owners. The respondent submitted that special vehicles and appliances were required for moving such safes, that more men were necessary, that it was an unusual service and involved unusual expense:—Held, (1) that the note flavoured of different treatment to manufacturers of safes than that extended to manufacturers of machinery, and must be struck out of the classification and the cartage regulations amended accordingly.

Taylor v. Canadian Freight Assn., 12 Can. Ry. Cas. 8.

CLASSIFICATION—REDUCTION—CUT GLASSWARE—CHINAWARE.

An application to reduce the rating on cut glassware from double first-class to first-class as on chinaware:—Held, (1) that the application should be dismissed, the reduction not having been shewn to be in the public interest or of benefit to the consumer.

Cut Glassware Importers v. Canadian Freight Assn., 12 Can. Ry. Cas. 10.

CLASSIFICATION—MINIMUM WEIGHT—MIXED CARLOADS.

An application to change Rule 2 (c) of the Canadian Classification so as to permit the shipment of mixed carloads of trunks, valises and saddlery as 3rd class, subject to a minimum weight of 14,000 lbs. In Western Canada, the rating now in force in the East, but subject to a minimum weight of 20,000 lbs. The respondent objected to trunks and valises being placed in the saddlery list and subject to a minimum weight of less than 24,000 lbs. the minimum weight for saddlery alone:—Held, (1) that trunks and valises should be added to the saddlery list for shipment West of Fort William. (2) That the existing minimum weight of 24,000 lbs. should apply. (3) That the classification distinction under clause (c) of Rule 2 should remain in force. (4) That the existing arrangement, although a compromise and perhaps illogical, caused less dislocation of business and discontent among shippers than the following of a rigid principle and should not be disturbed.

Lamontagne v. Canadian Freight Assn., 12 Can. Ry. Cas. 291.

CLASSIFICATION—RATING—TOBACCO TOLLS.

An application for approval of Supplement No. 1 to the Canadian Classification No. 15, increasing the rating on L.C.L. and C.L. cut and plug tobacco. The applicant based the proposed increase on the value of the commodity, but did not present exact information regarding values or shew that other factors affecting classification would justify the increase. The respondents submitted that the damage claims were infinitesimal, the movements in and out were large and profitable, and that the risk, weight, and space concerned would not justify the proposed increase in the C.L. rating from 5th to 4th class, and in the L.C.L. rating of plug tobacco from 3rd to 2nd class:—Held, that while it was proper to modernize the terminology of the classification to harmonize with trade conditions, such changes should not veil increases which must be made upon their merits; that the proposed increase would mean a serious dislocation of business and the application should be dismissed.

Canadian Freight Assn. v. Tobacco Merchants, 12 Can. Ry. Cas. 299.

CLASSIFICATION—COMMODITIES—GASOLINE AND BLAUGAS—COMPETITION—EQUALIZATION.

An application to give the same rating in the classification to blaugas and gasoline on the ground that there was competition between the two commodities:—Held, (1) that the value of a commodity should justify its rating when compared with the value of a similar commodity. (2) That the ratio of the toll to the value is much higher on gasoline than on blaugas. (3) That the pressure of the freight toll is much less on blaugas, a much more valuable and claimed to be more efficient commodity than gasoline. (4) That the heavier container used was an increase in the cost of production which should not be equalized by the railway company when fixing the rating. (5) That the application must be dismissed.

Blaugas Co. v. Canadian Freight Assn., 12 Can. Ry. Cas. 303.

[Followed in Roberts v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 350; Waterloo v. Grand Trunk Ry. Co., 24 Can. Ry. Cas. 143.]

LOCAL AND EXPORT—EQUALIZATION—COMMODITY RATES—VOLUME OF TRAFFIC.

Application under s. 323 of the Railway Act, 1906, to disallow the proposed increase in the tolls on hay shipped from Ontario and Quebec to certain points in the United States. The respondent had increased the toll 2 cents per 100 lbs. making the local and export tolls equal. The respondent submitted that the old tariff was not fairly remunerative when the nature of the service and the conditions under which it was rendered was taken into account and that the following conspicuous peculiarities distinguish this from other traffic, (1) movement spasmodic, not capable of being foreseen and not occurring with any regularity as to volume; (2) movement affected by usages of the trade and lack of terminal facilities at the chief markets of the United States, resulting in extreme detention of cars and their diversion to remote places. It was also submitted that there had been a great and unforeseen increase in the cost of construction and operation:—Held, (1) that the points urged were factors that might properly be considered in making commodity rates but were not reasons for increasing the rates already established with the knowledge possessed by the framers of traffic conditions. (2) That the volume of general traffic had increased almost pari passu with the increase in the cost of construction and operation. (3) That the present tolls were fairly remunerative and all that the traffic can bear. (4) That all the traffic increases should be disallowed, the respondents not having justified them.

Montreal Hay Shippers' Assn. v. Canadian Freight Assn., 13 Can. Ry. Cas. 142.

TRAFFIC—ADDITIONAL TOLL—CLIMATIC CONDITIONS.

Application to restrain the respondent from making an additional charge of 50 cents per 100 lbs. for a service not always performed. During the winter season owing to climatic conditions traffic routed to Prince Edward Island was carried by steamer from Pictou either to Charlottetown or Georgetown. When the harbour of Charlottetown was blocked with ice the traffic was carried by steamer to Georgetown thence by rail to Charlottetown. For the latter service an additional charge of 50 cents per 100 lbs. was made, but the same charge was made when the traffic was carried by steamer to Charlottetown direct. The trouble only arose when the traffic was prepaid and the shipper not knowing by which route the traffic would move had to make the higher payment:—Held, (1) that the respondent must be restrained from collecting this additional toll on traffic moving to Island points via Pictou-Charlottetown route, and must file a tariff or tariffs to remove this anomaly, satisfactory to the Chief Traffic Officer.

Halifax Board of Trade v. Canadian Express Co., 13 Can. Ry. Cas. 432.

SEPARATE CORPORATIONS AND OFFICERS—UNIT IN CONTROL—FIXING RATES.

Where one railway company owning 51 per cent of its stock has de facto control of another railway company, although they are separate corporations with a separate set of officers, the two companies for the purpose of fixing rates, should be treated as one company.

Wylie Milling Co. v. Can. Pac. and Kingston & Pembroke Ry. Cos., 14 Can. Ry. Cas. 5, 8 D.L.R. 949.

[See Wylie Milling Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 8, 8 D.L.R. 953; Oliver-Serim Lumber Co. v. Can. Pac. and Esquimalt & Nanaimo Ry. Cos., 17 Can. Ry. Cas. 324.]

Tolls—Reasonableness—Decisions of interstate commerce commission.

The Board is concerned with the correction and not primarily with the initiation of rates. The Board must find its criteria of the reasonableness of Canadiaan rates within Canada and while appreciating the regulative work of the Interstate Commerce Commission (U.S.) and treating the findings of that Commission with great respect, will investigate for itself the special circumstances of all cases coming before it. [Manufacturers' Coal Rates Case, 3 Can. Ry. Cas. 438; Canadian Oil Cos. v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 350, at p. 355, followed.]

Manitoba Dairymen's Assn. v. Dominion & Can. North. Express Cos., 14 Can. Ry. Cas. 142, 7 D.L.R. 868.

[Followed in Riley v. Dominion Express Co., 17 Can. Ry. Cas 112; Re Telegraph Tolls, 20 Can. Ry. Cas. 1.]

Same commodity for different uses.

On further consideration of a former order allowing express companies to charge higher rates on cream for domestic use than on cream to creameries for butter making, the Board held that such dual rates are anomalous and inexpedient, and having already established uniform rates east of Port Arthur on cream irrespective of its ultimate use, the Board in this case directed the express companies to install a tariff west of Port Arthur on the same principle.

Manitoba Dairymen's Assn. v. Dominion and Can. Northern Express Cos., 14 Can. Ry. Cas. 142, 7 D.L.R. 868.

Classification—C.L. rating—Gramophones and graphophones—"Musical instruments."

Gramophones and graphophones should be classified with musical instruments and given a second-class carload rating.

Berliner Gramophone Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 175, 3 D.L.R. 496.

Tolls—Refining-in-transit.

The Board has no jurisdiction to regulate refining-in-transit rates except when such rates discriminate unjustly in favour of one point against another.

Dominion Sugar Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 188.

Relation of rates on raw material and finished product—Equalizing cost of production at various points.

Carriers are not required to adjust their rates (apart from the general question of reasonableness) in such manner as to equalize cost of manufacturing production in different sections; nor is it necessary that rates on raw material and finished product should be so related as to tend to that result.

Dominion Sugar Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 188.

Geographical advantage—Foreign rail routes.

In considering geographical advantage as an element in rate regulation the Board must recognize existing rail conditions in Canada as it finds them, and as, e.g., Wallaceburg and Montreal are practically equi-distant from Winnipeg by rail routes within Canada, Wallaceburg is not entitled to a lower rate than Montreal by reason of geographical advantage though over foreign roads its distance from Winnipeg is much shorter.

Dominion Sugar Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 188.

TOLLS FOR CARTAGE—INCREASE—JURISDICTION.

Although cartage companies per se are not under the jurisdiction of the Board, the charge made for cartage by railway companies is a toll under s. 2 (30) of the Railway Act, and must be approved by the Board. The tariff of tolls filed by the railway companies increasing the tolls for cartage to the shipping public from two cents a hundred and fifteen cents for smalls to three cents and twenty cents, respectively, was amended by the Board to two and a half cents a hundred, and the present toll on smalls continued. The increase was approved on account of the advance in the cost of horses, wages and feed during the last few years.

Re Cartage Tolls, 14 Can. Ry. Cas. 372.

CLASSIFICATION—COST OF TRANSPORTATION AND DISTRIBUTION—REDUCTION IN RATING.

The object of a freight classification is the distribution of the cost of transportation, but a refinement of it is impossible with the limited number of merchandise classes, and goods have therefore to be broadly grouped. A reduction in the rating of the dearer commodities that are able to bear higher carrying toll must necessarily tend to curtail the ability of the carrier to make lower tolls, without which cheaper commodities cannot move at a profit.

Montreal Board of Trade v. Canadian Freight Assn., 15 Can. Ry. Cas. 429.

CLASSIFICATION—C.L. AND L.C.L. TRAFFIC.

The Board refused an application to add flannelette sheets to the dry goods list of the Canadian Freight Classification at the same rating provided for "Cotton piece goods," viz., L.C.L. 2nd class, and C.L. 4th class, instead of a rating 1st class in any quantity with no C.L. rating as in United States Official and Western Classifications.

Montreal Board of Trade v. Canadian Freight Assn., 15 Can. Ry. Cas. 429.

CLASSIFICATION—C.L. RATING—GROCERY LIST.

Peanut butter, having been included in the grocery list, should be given a fourth class carload rating, with jams and jellies with which it is in competition.

Toronto Board of Trade v. Canadian Freight Assn., 16 Can. Ry. Cas. 442.

FULL TARIFF TOLLS—COMMODITY—CONNECTING CARRIER—UNREMUNERATIVE BUSINESS.

The Board ordered an express company to establish a commodity toll for carriage of milk by express for delivery to a connecting express company in the United States, and in so doing overruled the respondent company's objection that it did not want the business unless at its full tariff tolls, but suspended operation of the order pending proof that a toll had been agreed upon with the foreign connecting carrier which would permit the carriage of the commodity to its destination in the foreign country.

Farmers' Dairy and Produce Co. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 106.

PARITY OF TOLLS—COMMON POINT.

The tolls on lumber from Golden, on the main line of the Canadian Pacific Ry., to prairie destinations should be put on a parity with the tolls from corresponding points on the Crow's Nest Branch to the same destinations via the same common point.

Mountain Lumber Manufacturers' Assn. v. Can. Pac. Ry. Co. (Golden Toll Case), 17 Can. Ry. Cas. 285.

CLASSIFICATION—C.L.—TOLL—HIGHEST MINIMUM WEIGHT.

The provision in the respondent's tariffs, west of Lake Superior, that different commodities may be consolidated into C.L. lots at C.L. tolls, but when these commodities in such mixture take different ratings if shipped separately in straight C.L. lots, the entire mixed lot is charged the highest C.L. tolls and the highest minimum weight; (rule 2 (c)) follows the practically universal rule in freight classification and will not be disturbed by the Board.

British Columbia Central Farmers' Institutes v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 431.

OPEN FOR TRAFFIC—CONSTRUCTION TARIFF—JURISDICTION.

Under s. 261, of the Railway Act, 1906, a section of a railway is either open or not for the carriage of traffic, and the Board has no jurisdiction to enlarge the Act by allowing a railway company to charge tolls under construction tariffs during the period of construction. [Baker, Reynolds & Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 151, followed; Lenhart v. Can. Northern Ry. Co., 17 Can. Ry. Cas. 93, referred to.]

Riverside Lumber Co. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 17.

[Followed in Re Edmonton Dunvegan & B.C. Ry. Co., 19 Can. Ry. Cas. 395.]

SETTLER'S EFFECTS—C.L. LOT—SCOPE OF AGENT'S DUTIES—EXCESS CHARGES.

Excess freight charges collected at destination in respect of a carload lot of settler's effects over and above the amount quoted at the point of shipment and on the faith of which quotation the shipment was made may be recovered by the shipper who paid the same under protest; the contract by the railway agent for a lower rate than the ordinary one was within the apparent scope of the agent's authority and being in respect of settler's effects it was permissible under s. 341 of the Railway Act, 1906, for the railway to make a specific bargain to carry one lot of such goods at a reduced rate subject to the action which the Board may take under s. 341 to extend or restrict the railway's power in that respect, and the low rate quoted inadvertently was therefore not illegal as an unjust discrimination. [Toronto v. Grand Trunk and Can. Pac. Ry. Cos., 11 Can. Ry. Cas. 365; Toronto and Brampton v. Grand Trunk and Can. Pac. Ry. Cos. (Brampton Commutation Rate Case (No. 2)), 11 Can. Ry. Cas. 370, distinguished.]

Watson v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 161, 20 D.L.R. 472.

CONSTRUCTION OF TARIFF—INTENTION—LANGUAGE.

Tariffs are not to be construed by intention. They are to be construed according to their language. Where a tariff prescribing certain tolls is headed "machinery," although the articles contained in the item are those used in connection with tanning, the same tolls are available for machinery of other types such as for a pulp mill.

Spanish River Pulp & Paper Mills v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 381.

C.L.—PAPER TARIFF—GENERAL ORDER.

As a general order for milk in car loads (C.L.) would be practically ordering a paper tariff, and little or no milk would move under it, the Board will not fix a C.L. toll based upon a minimum number of cans of milk. The general order providing that shippers supply men to assist in unloading empty milk cans was affirmed.

Milk Shippers v. Grand Trunk, Can. Pac. etc., Ry. Cos., 19 Can. Ry. Cas. 383.

CLASSIFICATION—EXCEPTIONAL TOLL—GENERAL GOODS—ACTUAL POSSESSIONS.

General goods cannot be carried as settlers' effects; the exceptional toll only applies to the actual possessions of persons moving from the east to the west with a view of living there, and the present tariff is to be strictly enforced in this regard.

Re Settlers' Effects, 19 Can. Ry. Cas. 387.

COMMODITIES—CLASSIFICATION—TRAFFIC CONDITIONS.

In the case of two commodities, pulpwood and brick, which are both tenth class, moving at a commodity toll, identity of classification, rating and similarity of price justify a similar toll treatment, unless there are additional traffic conditions to be considered, such as loading and consequent earning power. [Canadian Freight Assn. v. Cadwell Sand & Gravel Co., 15 Can. Ry. Cas. 156; International Paper Co. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos. (Pulpwood Case), 15 Can. Ry. Cas. 111, followed.]

Auger et al. v. Grand Trunk and Can. Pac. Ry. Cos., 19 Can. Ry. Cas. 401.

FOREIGN COUNTY—JURISDICTION.

The Board has no jurisdiction over tolls charged by carriers in a foreign country (U.S.A.). The toll on steel via Minnesota Transfer (St. Paul), over the Soo Line to Moose Jaw, and thence by C.P.R. to Calgary being higher than via Winnipeg to Calgary, but there being no difference in the toll treatment in respect of movements in Canada as between similar movements into and out of Winnipeg and into and out of Moose Jaw, no relief can be given by the Board. Complaint against freight tolls on steel to be fabricated for bridge construction.

Saskatchewan Bridge & Iron Co. v. Sault Ste. Marie Ry. Co., 19 Can. Ry. Cas. 443.

LOWER COST OF PRODUCTION—EQUALIZATION—COMPETITION—MARKET—MINIMUM WEIGHT.

It is not part of the obligation of carriers to equalize the cost of production through lower tolls so that all may compete on an even keel in the same market. Carriers are not justified in imposing tolls on the same commodity differing according to the use to which it is put; the same inhibition attaches to a differentiation of minimum weights for the same reason, nor are they under obligation to so adjust minimum weights as to offset any inherent disadvantages of the business. [Western Retail Lumbermen's Assn. v. Can. Pac. Ry. Co. et al., 20 Can. Ry. Cas. 155, followed.]

Hay and Still Mfg. Cos. v. Grand Trunk and Canadian Pacific Ry. Cos., 21 Can. Ry. Cas. 43.

COLONIZATION LINES—BRANCH—MOUNTAIN SCALE.

A "Mountain" scale of tolls may be authorized by the Board where the railway is a colonization line with but little development traffic and bears to the transcontinental systems the relation of a branch line.

Re Edmonton, Dunvegan & British Columbia Ry. Co. (Mountain Scale Tolls Case), 22 Can. Ry. Cas. 1.

ICING IN TRANSIT—REFRIGERATOR CARS—ACTUAL COST—ANALYSIS—SALT.

Railway companies should not profit by shipments handled except as carriers. The tolls for in transit icing of refrigerator cars should be made up on the basis of the average actual cost of the ice and the placing thereof upon the cars. Upon an analysis of the different cost factors the proposed increase in the icing tolls is not justified. [Ontario Fruit Growers Assn. v. Can. Pac. Ry. Co. (Canadian Freight Assn.) (Fruit Growers case) 3 Can. Ry. Cas. 430, at pp. 431-2, followed.] The tolls on salt in refrigerator cars owing to the gradual development of its use in conection with the packing industry have been treated as an incident of its refrigeration and it is claimed is properly included in the icing toll therefor. The carriers have justified the toll for salt over and above a toll for icing in the tariffs of tolls now in force. [Ontario Fruit Growers Assn. v. Can. Pac. Ry. Co. (Canadian Freight Assn.) (Fruit Growers Case), 3 Can. Ry. Cas. 430, distinguished.]

Ontario Fruit Growers Assn. etc. Cos. v. Canadian Freight Assn. (Icing Refrigerator Cars Case), 22 Can. Ry. Cas. 98.

CLASSIFICATION—TOLLS—COST OF TRANSPORTATION—LUXURIES.

Classification must be arranged according to the ability of the various articles to bear their share of the cost of transportation to admit of cheaper goods being carried any distance; thus luxuries which move in comparatively small quantities, are given a higher classification than indispensables. While the present war conditions may affect tolls per se these should have no bearing on classification.

Horne Co. v. Canadian Freight Assn., 22 Can. Ry. Cas. 344.

CLASSIFICATION—WEIGHTS—MINIMUM—COMMODITY—TOLL.

Fibre board cheese boxes, rated in the classification as fifth class with a minimum weight in C.L. lots of 20,000 lbs., are entitled to the same rating as wooden cheese boxes with the same minimum weight, either by a change in the classification or by a commodity toll of general application.

Canada Cheese Box Co. v. Canadian Freight Assn., 22 Can. Ry. Cas. 347.

TERMINAL CARRIER—INDUSTRIAL RAILWAY—STATUS—UNJUST DISCRIMINATION—JURISDICTION.

Where no unjust discrimination is shewn among shippers, it is not the function of the Board to exercise its jurisdiction by inquiring into the status of connecting carriers, approving amendments and supplements to the tariffs of tolls of the line carriers engaged in international traffic for the purpose of removing a terminal carrier as a participator on the ground that it is of the character known in the United States as an industrial railway. The Essex Terminal Ry. Co. (incorporated 2 Edw. VII., c. 62), was found by the Board upon the evidence not to be an industrial railway within the terms of the Industrial Railways Case, 29 I.C.C.R. 212. Amendments to the tariffs of line carriers engaged in international traffic removing the Essex Terminal as a participating carrier therefrom were suspended.

Essex Terminal Ry. Co. v. Grand Trunk, Michigan Central et al. Ry. Cos., 22 Can. Ry. Cas. 301.

JURISDICTION TO VARY OR MODIFY U.S. CLASSIFICATION—C.L. TRAFFIC—EXPORT—PARITY—CLASSIFICATION.

The Board has no jurisdiction to vary or modify the U.S. official classification in the case of C.L. traffic moving from a Canadian point to a Canadian port, and, under s. 321 (2,3,4) of the Railway Act, 1906, the only jurisdiction the Board has is when such classification is used with respect to traffic to or from the United States, and the carriers, being under no statutory obligation to use the classification, may, in their discretion, with the leave of the Board, do so on export business from Canadian points to Canadian ports in order to assure a parity of treatment as to tolls and ports in the United States.

Graham v. Canadian Freight Assn., 22 Can. Ry. Cas. 355.

TARIFF—MISDESCRIPTION OF GOODS.

A common carrier cannot collect freight rates on "metal scrap" at a rate different from that established by the Board simply because the shipper innocently misdescribed the goods in the bill of lading, what was in fact "metal scrap" being described as "copper ingots."

Pere Marquette Ry. Co. v. Mueller Mfg. Co., 48 D.L.R. 468.

CLASSIFICATION—C.L. AND L.C.L.—VALUES—DISTRIBUTING POINTS.

Two L.C.L. classification ratings will not be granted on the same commodity differing in value. Where a C.L. classification rating from Wallaceburg, a manufacturing centre, to Winnipeg was voluntarily put in by the carriers, it is only reasonable that similar commodity tolls should be given from Wallaceburg to Toronto and Montreal, similar distributing centres in the east. [Ledoux Co. v. Canadian Freight Assn., 12 Can. Ry. Cas. 3 distinguished.]

Wallaceburg Cut Glass Works v. Canadian Freight Assn. (Cut Glass Classification Case), 22 Can. Ry. Cas. 408.

ICE CREAM CONES—CLASSIFICATION—RATING.

Ice cream cones should be given a C.L. rating of third class with a minimum of 16,000 lbs.

Canadian Manufacturers Assn. v. Canadian Freight Assn., 23 Can. Ry. Cas. 48.

CLASSIFICATION — COMPETITION — UNJUST DISCRIMINATION — C.L. — SHIPMENTS—MIXED.

It would be unjust discrimination to authorize the shipment of rubber boots and shoes in mixed carload lots at third class tolls in competition with manufacturers who have not the same privilege of mixing their leather or felt boots with other leather or felt commodities which are entitled to the same classification in C.L. lots. C.L. tolls are only given for the purpose of mixing on account of the varied nature of the goods that can be mixed. Solid rubber tires with a minimum weight of 24,000 lbs., and pneumatic rubber tires with a minimum weight of 16,000 lbs., were both rated third class.

Canadian Rubber Manufacturers v. Canadian Freight Assn., 23 Can. Ry. Cas. 50.

REASONABLE INCREASE—EASTERLY AND WESTERLY.

An increase in freight tolls on potatoes and turnips from points in New Brunswick to points in Ontario and Quebec was approved by the Board, with the exception that tolls west of Hamilton and Guelph should be reduced one cent upon the general basis of 8th class under the classification tapered downwards for the shorter easterly haul from New Brunswick in comparison with the longer haul from the Western Provinces.

New Brunswick Vegetable Growers v. Can. Pac. and Temiscouata Ry. Cos., 23 Can. Ry. Cas. 128.

INCREASE—COMPETITION—MISAPPREHENSION.

The respondent is justified in increasing the toll charged, through misapprehension, on asbestos cement in a plastic form, where it is in competition with stove putty used for the same purpose.

Sterne & Sons v. Canadian Freight Assn., 23 Can. Ry. Cas. 171.

Mileage basis—Blanketed tolls—Competition.

Where tolls are blanketed, a too rigid adherence to a mileage basis, thereby giving a sudden break in the middle of a coal shipping area between coal mines competing with each other in a common market, is undesirable. [Galbraith Coal Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 325, followed.]

Great West, Byers Mine Coal Cos. et al. v. Grand Trunk Pacific Ry. Co. 23 Can. Ry. Cas. 175.

Illegal tolls—Refrigerator cars—Refund.

Where the toll from the point of shipment to destination provided for a heated refrigerator car, and the transportation of a messenger, a charge made by the carrier for supplying additional heaters is not covered by the tariff or tolls, is illegal, and refund should be allowed.

Plunkett & Savage v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 178.

Increase—Separate tolls—Slack coal.

In the decision of the Board in the 15 per cent Increased Rates Case (22 Can. Ry. Cas. 49), allowing an increase on coal of 15 cents per ton, there is no separate toll for slack coal and no distinction can be made in the tolls on slack lump or run of the mine coal.

Twin City Coal Co. et al. v. Can. Pac., Can. Northern and Grand Trunk Pacific Ry. Cos., 23 Can. Ry. Cas. 181.

Stop-over privileges—Direct run—Extra distance.

Where a tariff provided specific freight tolls to apply to designated distances, but also provided that stop-over privileges, at a point out of the direct run between shipping point and destination, should be permitted on payment of a stop-over charge and an additional toll per mile of extra distance, the railway company was held entitled to enforce the latter provision, and the toll specified for the mileage between shipptng point and destination by the circuitous route was held not applicable.

Hannah v. Grand Trunk Ry. Co., 24 Can. Ry. Cas. 123.

Reshipment—Milling in transit or analogous privileges—Discrimination—Through rate arrangement—Ambiguous tariff.

The rates from point of reshipment chargeable on grain under tariffs allowing milling in transit or analogous privileges are those effective at the time of the original shipment, not those effective at the time of reshipment, unless the tariff under which the grain originally moved clearly provides otherwise. Milling, malting, storage and cleaning in transit are privileges accorded to shippers by the carriers in the sense that the Board cannot order them, except to prevent discrimination, but they become enforceable rights when set out in tariffs under which shipments are made. Tariffs when ambiguous are to be construed in the case of the shipper, when they can reasonably and properly be so read. Where the milling in transit or analogous privileges are exercised the inbound and outbound shipments are to be treated as part of the same movement, under the contract, and subject to a through rate arrangement.

United States Growers et al. v. Canadian Freight Assn. (Milling in Transit Case), 24 Can. Ry. Cas. 120.

INTERPRETATION—LITERAL—CONSTRUCTION.

Tariffs of tolls should be interpreted literally without reference to unexpressed intentions of carriers framing them. Upon the proper construction of the Tariff C.R.C.E. 3677, which specifically names Collingwood as a point taking Toronto tolls, a shipper at Collingwood is entitled to the same toll as a shipper at Toronto on nails for export to China and Japan via Pacific Coast ports.

Imperial Steel & Wire Co. v. Grand Trunk and Can. Pac. Ry. Cos., 24 Can. Ry. Cas. 150.

WEIGHT—UNIVERSAL BASIS—COMPARISON OF PRODUCT AND RAW MATERIAL.

The universal basis in fixing tolls is the weight of the product carried, a comparison therefore between the toll on a carload of the product and the quantity of raw material required to produce it is impracticable.

Adolph Lumber Co. v. Great Northern Ry. Co., 24 Can. Ry. Cas. 173.

COMMODITIES—CLASSIFICATION—ANALOGOUS.

Shell blanks being a transient article of commerce are not specifically provided for in the freight classification, but are covered where necessary by commodity tolls, these void the "analogous articles" rule of classification, even if blank billets are assumed to be analogous, the cutting and addition of ten per cent in value does not make the shell blank a billet and entitle it to the steel billet toll.

Imperial Munitions Board v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 169.

REPUBLICATION—REPARATION—REFUND—JURISDICTION.

The Board has no jurisdiction to order republication of tariffs of tolls for reparation purposes only, but has jurisdiction to declare tolls charged since to certain dates are excessive to the extent that they exceed the tolls in effect prior thereto and a refund may be ordered upon the respondents so undertaking.

Imperial Munitions Board v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 169.

B. Reasonableness; Discrimination.

See also (A) p. 741, and (D) p. 804.

DISCRIMINATION—SIMILAR CONDITIONS—LONG AND SHORT HAUL—HIGH COST OF OPERATION—WATER COMPETITION.

The Boards of Trade of British Columbia Pacific Coast cities complained that the rates levied on all classes of goods from Vancouver to interior points in British Columbia and the North-West Territories as far east as Calgary on the main line and to MacLeod on the Crow's Nest line were discriminatory as against them, as compared with the rates on west-bound traffic from Winnipeg to the same territory:—Held (1), that the evidence as to the cost of operation and maintenance upon different sections of the main line shewed that the rates from Pacific Coast points eastward were really lower than those from Winnipeg westward, than if they were based upon the proportionate expense, that the natural dividing line, or average points of meeting are as fairly situated, and the eastward rates lower as compared with similar railway companies in the United States, and that the traffic on the prairie lines being heavier than in British Columbia, lower rates can be charged thereon. (2) That low rates to the Pacific Coast are necessary to enable the railway companies to obtain traffic in competition with ocean carriers. Such a practice is distinctly authorized by the Railway Act, and does not involve unjust discrimination, unless the higher rates from eastern points to interior western are unjust or unreasonable. The mere fact that westbound rates from Winnipeg or any other point to an interior western point, are less than the rates formed by a combination of the rates from such eastern points to a Pacific point and from the latter to the interior points does not in itself constitute unjust discrimination or undue preference. (3) A mere comparison of distances upon different portions of a railway for the purpose of shewing that higher rates are charged for shorter distances over a line with small business or expensive in construction, maintenance and operation as compared with one with large business or inexpensive in construction, maintenance and operation does not establish a charge of unjust discrimination. To justify such a charge the nature of the particular lines must be shewn and that there is a material disproportion of rates as against the shorter line after making due allowance for the circumstances above-mentioned. (4) When the Act to authorize a subsidy for a railway through the Crow's Nest Pass, 60-61 Viet. c. 5, s. 1 (D.), was passed and the railway company agreed in return for such subsidy to charge lower tolls upon certain classes of goods from Fort William and all points east to all points west, the Railway Act, 1888, s. 232, then prohibited unjust discrimination between localities, and Parliament should not be considered as having authorized what would, if done otherwise, have produced unjust discriminaton between localities, accordingly the rates from Pacific points eastward should be proportionately reduced upon similar traffic carried under similar circumstances. Held, that the complaint should be dismissed, except in so far as it relates to classes of traffic on which reduced rates were given under 60-61 Viet. c. 5, s. 1 (D.).

British Columbia Pac. Coast Cities v. Can. Pac. Ry. Co. (Vancouver Interior Rates Case), 7 Can. Ry. Cas. 125.

[Followed in Atty-Genl. B.C. v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 346; referred to in Winnipeg Jobbers Assn. v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 173; Kerr v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 207; followed in Regina Board of Trade v. Can. Pac., etc., 11 Can. Ry. Cas. 381; Can. Oil Cos. v. Grand Trunk, etc., 12 Can. Ry. Cas. 350; Re Increase in Passenger and Freight Tolls, 22 Can. Ry. Cas. 49.]

Agreement—Reduced rates on coal—Discrimination—Similar circumstances.

By an agreement made in 1897 between the applicant coal company and the respondent railway company, the latter agreed for valuable consideration amongst other things to charge the former at the rate of not more than six tenths of its ordinary tariff rates on all "plant" shipped by the coal company over the lines of the railway company. The railway company ceased to comply with the provisions of the agreement as to rates on 1st May, 1907, on the ground of illegality. The coal company applied for an order to compel the railway company to file a tariff of such reduced rates and for a refund of all excesses charged to the applicant:—Held (1), that it was impossible to find that the consideration paid to the railway company was "adequate" for the favoured treatment. (2) That other persons and corporations under similar circumstances and conditions in the same district would be unjustly discriminated against by a continuance of the reduced rates and that the agreement in that respect constituted an undue or unreasonable preference or advantage contrary to ss. 315, 317 of the Railway Act, 1906. Assuming that the Board had jurisdiction to make the order asked, as to which there is grave doubt, the application must be refused. [Reference to Brant Milling Co. v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 259.]

Crow's Nest Pass Coal Co. v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 33.

[Followed in Regina Board of Trade v. Can. Pac. etc., 11 Can. Ry. Cas. 380; Re Increase in Passenger and Freight Tolls, 22 Can. Ry. Cas. 49; Can. Pac. Ry. Co., and Spanish River etc. v. Algoma Eastern Ry. Co., 22 Can. Ry. Cas. 381.]

Discrimination—New tariffs—Higher rates.

The Winnipeg Jobbers' Association applied to the Board for an order directing the railway company to restore the former Winnipeg westbound rates to the Kootenay district. After the judgment in the British Columbia Pacific Coast Cities v. Can. Pac. Ry. Co. (Vancouver Interior Rates Case), 7 Can. Ry. Cas. 125, the company removed the discrimination there found to exist between localities by raising the Winnipeg westbound rates:—Held, that the application must fail, there being no evidence that these rates were excessive.

Winnipeg Jobbers' Assn. v. Can. Pac. Ry. Co. (Kootenay Rate Case), 8 Can. Ry. Cas. 173.

Traders' tariff—Through rates—Discrimination—Short and long haul—Similar circumstances.

The Winnipeg Jobbers' Assn. applied to the Board for an order directing the C.P.R. Co. to restore the Traders' Tariffs previously existing in Western Canada, from Winnipeg, as a distributing centre (giving Winnipeg traders the benefit of the balance of the through rate on reshipments) instead of the new tariffs recently put in force by the railway company. Upon a complaint by the Portage La Prairie Board of Trade, the Board had held that this system of traders' tariffs was illegal as being an unjust discrimination and undue preference in favour of particular persons and between different localities, and the charging of higher tolls for a shorter than for a longer distance where the shorter distance is included in the longer. The railway company complying with the view taken by the Board had substituted the tariffs complained of by the applicants:—Held, that the application must fail, there being no evidence upon which the Board can reduce the rates charged in the existing tariffs to the same sums that were paid by the favoured few under the old traders' tariffs. The question of whether it would be possible to standardize the Ontario Town Tariffs, making them applicable to the Western Provinces, and whether the railway companies can or should be compelled to grant commodity rates out of Winnipeg were reserved.

Winnipeg Jobbers' Assn. v. Can. Pac., Can. Northern and Grand Trunk Pacific Ry. Cos. (Winnipeg Rate Case), 8 Can. Ry. Cas. 175.

Contract—Discrimination—Freight and passenger traffic—Reduced and higher tolls.

The Attorney-General for British Columbia applied to the Board for an order directing the C.P.R. Co., on the ground of undue or unjust descrimination to reduce the tolls on freight and passenger traffic over the main line of railway in the Province and thus place it upon the same favourable conditions in respect to such tolls as are other portions of Canada. The applicant contended that under the terms of union (see schedule to Imperial Order in Council, R.S.B.C. pp. 105 et seq., May 16th, 1871), whereby British Columbia entered Confederation, there was an implied contract that the railway company should charge no higher tolls in one section of territory than another through which the railway ran:

—Held (1), that the application must fail, the Board being unable to find any such contract expressed or implied, and there being no evidence of unreasonable rates or unjust discrimination. (2) That s. 17, subss. 6, 11 of the Railway Act, of 1879, and s. 315 of the Railway Act, 1906, allow different tolls to be charged in different localities where different circumstances exist justifying such treatment. (3) That the terms of the contract with the Dominion Government for the construction of the C.P.R. dated 21st October, 1880, schedule to 44 Vict. c. 1, have nothing to do with freight and passenger tolls in British Columbia; the only party who could make any complaint as to their nonobservance being the Government of Canada. [British Columbia Pacific Coast Cities v. Can. Pac. Ry. Co. (Vancouver Interior Rates Case, No. 104), 7 Can. Ry. Cas. 125, followed.]

Attorney-General for British Columbia v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 346.

COMPETITION—BLANKET RATES—DISCRIMINATION—CITRUS FRUITS FROM CALIFORNIA.

Complainants alleged that the rates charged by the respondents on shipments of citrus fruits from points in California, United States, to Regina were unreasonable as compared with the rates charged from the same points to Winnipeg and other points in Manitoba and Ontario. At the time the complaint was heard the rate to Regina on citrus fruits via Kingsgate, British Columbia, was $1.70 per 100 pounds made up of the full local rates in United States territory with a proportional rate over the C.P.R. Before the opening of the Kingsgate route the rate to Regina via Emerson and Winnipeg was $1.72, when the Kingsgate route was opened this rate was reduced to $1.60 via Kingsgate, and was afterwards raised to $1.70. On account of the competition of railways and markets in the United States the blanket rate to Missouri river common points from shipping points in California is $1.15, and the rate to Winnipeg is $1.25:—Held (1), that the advantage in rates of Winnipeg over Regina is not unreasonable. (2) That the former rate of $1.60 to Regina was fair and reasonable and should be restored. (3) That the respondents should be required to arrange for the publication of new tariffs with its connections from California shipping points to Regina via Kingsgate or Emerson on basis of $1.60 per 100 pounds on oranges in straight carloads, or on mixed carloads of oranges and lemons, and $1.45 per 100 pounds on lemons in straight carloads.

Stockton & Mallinson v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 165.

[Distinguished in Stockton, etc. v. Dominion Express Co., 13 Can. Ry. Cas. 459, 3 D.L.R. 848.]

SPECIAL MILEAGE TARIFF—COMPETITION—GRAIN GROWING TERRITORIES—THROUGH SHIPMENTS.

On a complaint to the Board that the rate on grain, grain products and vegetables for local consumption from Franklin to Winnipeg was unjustly discriminatory as compared with the rate from the same point to Fort William, a much farther distance on the same goods for eastern markets: —Held (1), that complaint should be dismissed. The conditions affecting through shipments at through rates are such that a division of through rates cannot be taken as a measure of the reasonableness of a local rate. (2) The competition of other grain growing territories fixes the rate on through shipments to eastern markets. (3) The rates are also affected by the Crow's Nest Pass Agreement: [See British Columbia

Pacific Coast Cities v. Can. Pac. Ry. Co. (Vancouver Interior Rates Case), 7 Can. Ry. Cas. 125.]

Kerr v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 207.

DISCRIMINATION—SIMILAR CIRCUMSTANCES—MAIN AND BRANCH LINE MILEAGE—LOW-GRADE TONNAGE.

Upon a complaint under ss. 315, 334 of the Railway Act, 1906, by the Cement Co. that the through toll of $1.50 per ton on bituminous coal from Black Rock, N.Y., to Marlbank, Ont., was unjustly discriminatory and unreasonable, because, (1) there should be no difference in the tolls on coal to the applicants competing with similar factories receiving more favourable treatment, (2) on the basis of mileage, (3) as compared with tolls to other points such as Belleville and Kingston. From Black Rock to Napanee, a distance of 237 miles, the coal moved over the Grand Trunk Ry. and thence to Marlbank, a distance of 36 miles, over the Bay of Quinte Ry. Out of the through toll the Grand Trunk received $1.05, or 70 per cent., and the Bay of Quinte the balance:—Held (1), and the "equality" clause of section 315 was not intended to equalize the cost of production between similar competing factories, but applies only when such factories were given more favourable treatment under similar circumstances and conditions of traffic. (2) That a comparison of mileage as if both hauls were on the same railway line was not a proper method of comparison, difference in traffic conditions being in general more important. (3) That the principle recognized in the Almonte Knitting Co. case that a higher toll may be charged to points on a branch line than to points on a main line, though at a less distance from the junction point, applies with greater force in favour of a light traffic and low-grade tonnage railway as compared with a heavy traffic and high-grade tonnage railway. (4) That the toll to Marlbank cannot be compared with compelled tolls to other points such as Belleville and Kingston, where there is not effective water competition to Marlbank on traffic important in amount. (5) That, upon the evidence, the toll charged is not unreasonable. (6) The Grand Trunk having stated its willingness to reduce its division of the through rate to $1.00 per ton, the Bay of Quinte to participate in such through rate, receiving thirty per cent, the Board approved a rate of $1.43 per ton. [Almonte Knitting Co. v. Can. Pac. and Michigan Central Ry. Cos., 3 Can. Ry. Cas. 441, followed.]

Canadian Portland Cement Co. v. Grand Trunk & Bay of Quinte Ry. Cos., 9 Can. Ry. Cas. 209.

[Followed in Dominion Sugar Co. v. Can. Freight Assn., 14 Can. Ry. Cas. 188; Imperial Rice Milling Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 375; Western Retail Lumbermens' Assn. v. Can. Pac., Can. Northern et al. Ry. Cos., 20 Can. Ry. Cas. 155; Dominion Millers Assn. v. Canadian Freight Assn., 21 Can. Ry. Cas. 83; Waterloo v. Grand Trunk Ry. Co., 24 Can. Ry. Cas. 143.]

MAIN AND BRANCH LINE TRAFFIC—SIMILAR CIRCUMSTANCES—DISCRIMINATION.

On a complaint that higher rates were charged from a point on a branch line for a shorter distance than from points on the main line to the same point thereby constituting unjust discrimination between different localities within the provisions of s. 315 of the Railway Act, 1906:—Held, that traffic originating on a branch line is not carried to a certain point under similar conditions to traffic originating on the main line carried to the same point until the junction of the branch line with the main line is reached. [Almonte Knitting Co. v. Can. Pac. and Michigan Central Ry.

Cos., 3 Can. Ry. Cas. 441, followed.] The rates complained of were equal for a group of common points on the main line. Held, that although group rates of necessity result in a certain amount of discrimination, so long as such discrimination is not undue it is not unreasonable. [Desel Boettcher Co. v. Kansas City Southern Ry. Co., 12 I.C. Rep. p. 222.] Held, also, that the difference in the rates complained of did not constitute undue discrimination within the different sections.

Malkin & Sons v. Grand Trunk Ry. Co. (Tan Bark Rates Case), 8 Can. Ry. Cas. 183.

[Followed in Fredericton Board of Trade v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 439; Hunting-Merritt Lumber Co. v. Can. Pac. and British Columbia Elec. Ry. Cos., 20 Can. Ry. Cas. 181.]

Lumber tariff—Reasonableness—Export and domestic tolls—Discrimination.

On an application to disallow the special tariffs on lumber which became effective May 1, 1908, and restore the tariffs previously in force, removing the anomalies in the latter without any increase of tolls. The railways submitted in justification of the increase in tolls, that these were as favourable as those charged by railways in the United States and compared favourably with those charged on other building material. Although lumber had increased greatly in value in the last ten years, the relative increase in tolls had been comparatively small, and the cost of operation and maintenance of railways had materially increased during the same period:—Held (1), that speaking generally of the new tariffs as a whole, the railways have justified the increase in the domestic tolls: these tariffs should remain effective, and the application should be dismissed. (2) That the decision in this matter would not preclude any one from laying a complaint against any particular toll, alleging unjust discrimination or undue or unreasonable preference. (3) That the railways should be ordered to file tariffs establishing export tolls to Montreal, on the whole, lower than the domestic.

Canadian Lumbermen's Assn. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos., 10 Can. Ry. Cas. 306.

[Referred to in Canadian Lumbermen, etc. v. Grand Trunk, etc., 11 Can. Ry. Cas. 344; followed in Graham Co. v. Canadian Freight Assn., 22 Can. Ry. Cas. 355.]

Discrimination—Mileage basis—Coal tolls.

On a complaint that the tolls on coal both east and westbound from Lundbreck unjustly discriminated against it and in favour of Lethbridge. The railway company submitted that its tolls were based upon Lethbridge, the eastbound basing point and Fernie, the westbound basing point. Taking Lethridge as the eastbound basing point the other coal mining and shipping points were given arbitraries over or under the Lethbridge toll according to their location. This tariff of tolls has produced the following anomaly as regards eastbound traffic: by a too rigid adherence to a mileage basis, thereby causing a sudden break in the toll a lower toll is given to Lethbridge than to Lundbreck in shipping to a common destination where the difference in mileage is very slight. In regard to westbound traffic the following anomaly exists although the distances from Lethbridge and Lundbreck to Cranbrook are respectively 200 and 126 miles the toll is only 5 cents in favour of Lundbreck and west of Cranbrook equal in amount which does not recognize the favourable geographical position of Lundbreck, and is not defensible:—Held (1), that the application should be dismissed; unjust discrimination not having been proven. (2) That more favourable geographical position and superior quality of coal are factors to be taken into consideration when alleging unjust discrimination. (3) That the railway company should thoroughly check its tariff and either explain or justify any departure from the basis of tolls it has established, and also correct the too rigid adherence to a mileage basis. (4) That the railway company should revise and reissue its special tariff from its Lethbridge, Crow's Nest, and Cranbrook section westward so as to make these tolls relatively reasonable to the special tariff tolls now in force or as they may be reduced from Lethbridge.

Galbraith Coal Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 325.

[Followed in Great West. Byers Mine Cos. et al. v. Grand Trunk Pacific Ry. Co., 23 Can. Ry. Cas. 175.]

JOINT TOLLS—DISCRIMINATION—REFUND.

Complaints have arisen that traffic has, when moving on a through toll been charged a higher toll than would have been obtained from a combination of the local tolls, an order was proposed declaring that (a) joint tariffs should not be filed which are in excess of the sum of the locals; (b) that joint tolls at present in existence should be disallowed when they exceed the sum of the locals:—Held (1), that it is a fundamental proposition, when a toll joint or limited to points situate on one line of railway has come into force under the Railway Act, it is the only legal toll in respect of the traffic and between the points mentioned. (2) That the reasonableness of a toll cannot be determined aside from the concrete conditions to which it is applicable. (3) That the charging of a joint toll in excess of the sum of the locals is prima facie unreasonable and unjustly discriminatory, and the onus of disproof should in individual complaints be on the railway or railways concerned. (4) That the Board whose jurisdiction is in no sense retroactive, cannot grant a refund where a toll has become legally operative. (5) That it is not necessary or expedient that the proposed order should be made.

Re Joint Freight and Passenger Tariffs, 10 Can. Ry. Cas. 343.

[Followed in Fullerton etc. Co. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 79; Montreal Board of Trade v. Can. Pacific, Ottawa & New York and Intercolonial Ry. Cos., 18 Can. Ry. Cas. 6.]

EXCESSIVE TOLLS—DISCRIMINATION—COMPETITION.

Complaint of unjust discrimination against the respondent for charging excessive tolls. The applicant made shipments, by the respondent's line, of ores and concentrates from Caribou to Skagway and from that port to destination. Skagway is an ocean port and Caribou an intermediate point, where the applicant's mine is located, a shorter distance from Skagway than White Horse, from which latter point the Atlas Mining Co. a competitor of the applicant, makes similar shipments. The applicant complained that the tolls on his shipments from Caribou to Skagway and the wharfage and ocean tolls at the latter point were so excessive that he could not operate his mine profitably, and would be compelled to shut it down unless the tolls were lowered. The respondent contended that on account of the large amount of traffic the Atlas Mining Co. had contracted to furnish their traffic was and would always be larger than that of the applicant and that the preferential rates given to the Atlas Co. by their contract could be justified under subs. 3, s. 315:—Held (1), that it had not been proved that the Atlas Co. shipments were and would always be larger than those of the applicant and the respondent had not discharged the burden placed upon it by s. 77 of proving that the rates in question did not constitute an unjust discrimination. (2) That the provisions of the respondent's contract with the Atlas Co. as to tolls constituted an unjust discrimination againt the applicant. (3) That every form of discrimination against the applicant must cease and he must be placed upon an absolutely equal footing with the Atlas Co. not only as to rail tolls, but as to wharfage and ocean tolls as far as the respondent is able to place him. (4) That the respondent must file within thirty days a tariff giving a toll of $1.75 per ton for the applicant from Caribou to Skagway as compared with the rate of $2.50 per ton for the Atlas Co. from White Horse to Skagway. (5) That tariffs covering the tolls charged by the respondent to the Atlas Co. must be filed within a reasonable time.

Conrad Mines v. White Pass & Yukon Ry. Co., 11 Can. Ry. Cas. 138.

[Referred to in Dawson Board of Trade v. White Pass & Yukon Ry. Co. (No. 2), 11 Can. Ry. Cas. 403.]

Rice—Discrimination—Import and domestic tolls—Through ocean-and-rail tolls—Competition—Joint tariff.

Complaint that the tolls charged on rice cleaned in the Province of Quebec and shipped from Montreal to other Canadian distributing points unjustly discriminated against the applicant and that preferential tolls were charged on rice cleaned in Great Britain or foreign countries, carried by ocean steamships to Montreal, and there reshipped in competition with the applicant. The railway companies maintained that the import tolls were proportionals of through-ocean-and-rail tolls from Great Britain and could not fairly be compared with domestic tolls on traffic carried under dissimilar circumstances and conditions: That such import tolls were kept down by competition with railways in the United States. It appeared that the import tolls via Montreal were lower than the lowest import tolls on competing railways in the United States for the purpose of diverting traffic to the St. Lawrence route and offsetting the higher marine insurance rates charged by that route:—Held (1), that there was no ground for complaint against domestic tolls on rice in carloads (C.L.) from Montreal to interior points. (2) That although Canadian railway companies have been entitled to charge higher domestic tolls than railway companies in the United States with heavier traffic, the tolls on rice in less than carloads (L.C.L.) were not proportionate to the differences in circumstances and conditions, and should be reduced. (3) That while full relief could be given by granting the applicant L.C.L. commodity tolls, such a change would disturb the equilibrium between west and eastbond traffic as provided for in the international and Toronto Board of Trade Rate Case, No. 3258, and complaints would follow. (4) That the domestic tolls on rice L.C.L. should be changed from the 3rd to the lower 4th class in the Canadian Classification.

Mount Royal Milling & Mfg. Co. v. Grand Trunk and Can. Pac. Ry. Cos., 11 Can. Ry. Cas. 347.

Sugar beets—Discrimination—Particular circumstances—Joint tariff—Proportional rate.

Complaint alleging that the tolls charged by the respondent on sugar beets were excessive and unjustly discriminatory compared with those charged to the Dominion Sugar Co. The applicant, a foreign company, purchased sugar beets from growers along the line of the respondent, agreeing to supply free seed, defray the freight charges on sound beets to its factory in Michigan, U.S., and pay therefor at a flat rate. The Dominion

Sugar Co. was engaged in the same business and purchased its sugar beets under an arrangement that the growers should pay the freight charges to the factory at Wallaceburg, Ontario, and be paid for the beets on the percentage of saccharine matter contained in them. This latter agreement resulted in a higher price for the beets than that paid by the applicant. The respondent charged a low toll on a mileage basis for beets carried to the factory of the Dominion Sugar Co. at Wallaceburg, but charged a higher toll to the same point on beets destined to the applicant's factory in Michigan. The respondent was only able to charge the low toll on inbound sugar beets by charging a higher toll on raw sugar imported for refining, and on the outbound refined sugar and by-products. The great portion of the freight revenue of the respondent was derived from this sugar traffic:—Held, (1) that there was no competition in the refined product between the two sugar companies, and the respondent was not limiting the market for such product. (2) That under the particular circumstances and conditions of this case there was not unjust discrimination in the tolls under s. 315 of the Railway Act, 1906. (3) That under s. 335 of the Act, where traffic moves from Canada to the United States, it must be covered by a joint tariff which could not be superseded by a proportional rate filed by one of the participating companies. [Brant Milling Co. v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 259, at p. 268, followed; Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire Ry. Co., 14 Q.D.B. 209; Pickering et al. v. London & North Western Ry. Co., 8 Ry. & C. Tr. Cas. 83, at p. 108; Texas & Pacific Ry. Co. v. I.C.C. 162 U. S. 197, at p. 217; Savannah Bureau of Freight & Transportation v. Louisville & Nashville Ry. Co., 8 I.C.C.R. 377, referred to.]

Michigan Sugar Co. v. Chatham, Wallaceburg & Lake Erie Ry. Co., 11 Can. Ry. Cas. 353.

[Followed in Hudson Bay Mining Co. v. Great Northern Ry. Co., 16 Can. Ry. Cas. 254; Re Telegraph Tolls, 20 Can. Ry. Cas. 1.]

Discrimination—Competition—Wholesale and distributing points—Special tariffs—Agreements.

Application by Regina Board of Trade under ss. 314, 339 of the Railway Act, 1906, for a reduction in the tolls on classes one to ten inclusive, from the head of the lakes to Regina, alleging that there was unjust discrimination against the applicant in favour of Winnipeg and other points in Manitoba. All tolls are fixed to the west at Fort William and Port Arthur, the basing points at the head of the lakes, in competition with Duluth and Minneapolis, similar points in the United States. The Canadian Northern Ry. Co. one of the respondents, entered into an agreement with the Government of Manitoba, providing that in consideration of the guarantee of certain bonds of the respondent it would reduce its tolls to about 15 per cent of its tariff tolls on all freight other than grain to Fort William and Port Arthur from points in Manitoba and vice versa. The Canadian Pacific Ry. Co., the other respondent, reduced its tolls in a similar manner through stress of competition. The last named respondent also reduced its tolls voluntarily between the Manitoba boundary and Canmore and the Crow's Nest; and in consideration of a subsidy to the Crow's Nest Pass line from the Dominion Government agreed to reduce its tolls from Fort William and points east to points west thereof. The respondents contended that the circumstances and conditions were not substantially similar and that they were justified in charging a higher toll per ton mile to Regina than to Winnipeg, and that under the agreements above-mentioned Regina was not entitled to the benefit of the reductions made by the respondents. It was also contended that the greater density of traffic from the head of the Lakes to Winnipeg and other Manitoba points than to Regina justified the lower toll basis. That Winnipeg being a wholesale and distributing point had a vested right to tolls on a lower basis than Regina:—Held, (1) that no agreements as to tolls could defeat the prohibitions and obligations imposed by ss. 77, 315 of the Railway Act. (2) That the reductions were brought about by the different agreements, and not because of a greater density of traffic. (3) That Regina as much as Winnipeg was a distributing point within its own zone. (4) That the special class freight tariffs of the respondents from Fort William and Port Arthur, unjustly discriminated in favour of Winnipeg and other Manitoba points to the prejudice and disadvantage of Regina and points west of the Manitoba boundary. [British Columbia Pacific Coast Cities v. Can. Pac. Ry. Co. (Vancouver Eastbound and Westbound Rate Case, or Vancouver Interior Rates Case), 7 Can. Ry. Cas. 125, at p. 146: Crow's Nest Pass Coal Co. v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 33, at p. 41, followed.]

Regina Board of Trade v. Can. Pac. and Can. Northern Ry. Cos. (Regina Toll Case), 11 Can. Ry. Cas. 380.

[Affirmed in 44 Can. S.C.R. 328, 12 Can. Ry. Cas. 369, 45 Can. S.C.R. 321, 13 Can. Ry. Cas. 203; followed in Edmonton Board of Trade v. Can. Pac. and Can. North. Ry. Cos., 11 Can. Ry. Cas. 395; British Col. Sugar, etc., Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 354; Re Increase in Passenger and Freight Tolls, 22 Can. Ry. Cas. 49.]

DISCRIMINATION—REDUCTION OF RATES.

The order made in the case of Regina Board of Trade v. Can. Pac. and Can. Northern Ry. Co., 11 Can. Ry. Cas. 380, is also to govern rates to Edmonton, and to comply with that order rates to Edmonton must be reduced as asked in the complaint.

Edmonton Board of Trade v. Can. Pac. and Can. Northern Ry. Cos., 11 Can. Ry. Cas. 395.

DISCRIMINATION—CIGARS—CARLOAD RATING—LUXURY—WHOLESALE DISTRIBUTING POINT.

Application for a carload rating on cigars shipped from Montreal to Winnipeg. The applicant manufactured cigars in Montreal and shipped to a distributing warehouse in Winnipeg. There was no evidence that any other manufacturer in the east would ship any number of carloads westward if the application was granted, but the bulk of the traffic would still move L.C.L. Cigars being a luxury should not be reduced from a reasonable L.C.L. first-class rating to a fourth-class C.L. as asked for:—Held (1), that if the application was granted other similar manufacturers would be unjustly discriminated against. (2) That other luxuries now rated first-class would contend for similar reductions in tolls. (3) That the application should be refused until the Board was satisfied that a C.L. rating would result in a substantial traffic movement.

Ledoux Co. v. Canadian Freight Assn., 12 Can. Ry. Cas. 3.

[Distinguished in Wallaceburg Cut Glass Works v. Canadian Freight Assn., 22 Can. Ry. Cas. 408.]

DISCRIMINATION—PERSONS OR LOCALITIES—DIFFERENTIALS.

Application to remove the differential toll of one cent per hundred pounds in favour of traffic carried to and from St. John or Portland as against Halifax:—Held (1), that under s. 3 of the Railway Act where its provisions and of any Special Act were in conflict, the provisions of the Special Act must prevail. (2) That although the Board had jurisdiction to prevent unjust discrimination against persons or localities, the provisions of the Special Act, 62-63 Vict. c. 5, prevailed and the application failed.

Halifax and Halifax Board of Trade v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 55.

PETROLEUM—DISCRIMINATION—COMPETITION—RAIL AND WATER—MILEAGE DISTANCES—REMISSION OF CUSTOMS DUTIES.

Application directing the respondents to cease unjust discrimination by reducing the tolls from 66 cents to 56 per hundred pounds on shipments of petroleum and its products, in C.L. lots all rail from Petrolia, Ont., to Winnipeg, Man., to enable the applicants to complete successfully with their competitors in the United States and at Sarnia, Ont., who were shippers of the same commodity to the same point by all rail and rail and water, and on the ground that the tolls were unreasonable. The chief object of the application was to reduce the tolls so as to place the applicants in as advantageous position as they had been in competition with the Kansas shippers of the same commodity, who had been practically prohibited from coming into Canada until the remission of the customs duties of 2½ cents a gallon:—Held (1), that a mere comparison of mileage distances without consideration of the peculiar circumstances affecting the traffic was not the final criterion of unjust discrimination. [British Columbia Pacific Coast Cities v. Can. Pac. Ry. Co. (Vancouver Interior Rates Case), 7 Can. Ry. Cas. 125, at pp. 142, 143; Lincoln Creamery v. Union Pacific Ry. Co., 5 I.C.C.R. 156, at p. 160; Dallas Freight Bureau v. Missouri, Kansas & Texas Ry. Co., 12 I.C.C.R. 427, followed.] (2) That railways were not required by law and could not in justice be required to equalize natural disadvantages such as location, cost of production, and the like. [Black Mountain Coal Land Co. v. Southern Ry. Co., 15 I.C.C.R. 286, followed.] (3) That it was in the discretion of the railway whether it should or should not meet the competition of markets and other railways. [Montreal Produce Merchants' Assn. v. Grand Trunk and Canadian Pacific Ry. Cos., 9 Can. Ry. Cas. 232, at p. 233; British Columbia Sugar Refining Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 169, at pp. 171, 172; Lancashire Patent Fuel Co. v. London & North Western Ry. Co., 12 Ry. C. Tr. Cas. 79; National Refining Co. v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 20 I.C.C.R. 649, followed.] (4) That it was in the discretion of the carriers, whether they would meet the alleged keen competition resulting from the remission of the customs duties, but this competition did not create a presumption of unreasonableness in the tolls, which must be proved. [Chicago Board of Trade v. Atlantic City Ry. Co. and New York Produce Exchange v. New York Central & Hudson River Ry. Co., 20 I.C.C.R. 504, at p. 518, followed.] (5) That the through toll complained of was made up of a basing toll on Fort William, and a toll which arose in the case of both Canadian Pacific and Canadian Northern Ry. Cos. from the mutual inter-relations of government agreements and competition arising therefrom, and was not equal to the sum of the locals. (6) That a railway has in its own interest the privilege of meeting water competition, but this does not entitle a shipper to demand less than normal tolls because of competition which the railway in its own interest did not choose to meet. [Plain & Co. v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 222, at p. 223, followed.] (7) That the burden as to unjust discrimination had therefore been withstood and the complaint as to unreasonableness of tolls had not been established.

Canadian Oil Cos. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos., 12 Can. Ry. Cas. 350.

[Affirmed in 14 Can. Ry. Cas. 201; followed in Manitoba Dairymen's Assn. v. Dominion & Can. North. Express Cos., 14 Can. Ry. Cas. 142, 7 D.L.R. 868, followed in Re Cartage Tolls, 20 Can. Ry. Cas. 1; Western Retail Lumbermen's Asso. v. Can. Pac., Can. Northern and Grand Trunk Pacific Ry. Cos., 20 Can. Ry. Cas. 155; Nanaimo Board of Trade v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 224; Graham Co. v. Canadian Freight Assn., 22 Can. Ry. Cas. 355.]

Petroleum—Joint tariff.

The Board has power upon an application by the shipper to make a declaratory order as to what is the proper tariff of tolls applicable to a certain class of goods although no consequential relief was granted to the complainant on the application. The tariffs of tolls applicable to shipments of petroleum and its productions from the United States into Canada is the "joint tariff" of January, 1907, filed with the Board to the exclusion of subsequent tariffs filed, but not sanctioned by the Board. [Canadian Oil Cos. v. Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos., 12 Can. Ry. Cas. 350, affirmed.]

Grand Trunk and Canadian Pacific Ry. Cos. v. Canadian and British American Oil Cos., 14 Can. Ry. Cas. 201.

[Affirmed (sub. nom. Can. Pac. Ry. Co. v. Canadian Oil Cos.), 17 Can. Ry. Cas. 411.]

Discrimination—Export and local tolls—Proportional tolls.

Complaint of unjust discrimination against the respondent, alleging that the tolls for export from Routhier and other points north of Nomining to Montreal are excessive and bear a higher proportion to the locals from points north of Nomining than from points south of it:—Held, that the export tolls to Montreal from Loranger, Hebert and Campeau must be reduced to 5 cents and from Routhier and Mont Laurier to 6 cents and a tariff to that effect filed. [Canadian Lumbermen's Assn. v. Grand Trunk and Canadian Pacific Ry. Cos. (Export Tolls on Lumber (No. 2)), 11 Can. Ry. Cas. 344, referred to.]

Cox & Co. v. Can. Pac. Ry. Co., 13 Can. Ry. Cas. 20.

Discrimination—Commodity or fifth-class rates—Competition.

Application that the tolls charged were unjustly discriminatory and that they should be reduced, being unreasonable per se. The applicant submitted that the existing commodity or fifth-class rate from Auburn in the United States to points in Canada, less two cents, should be the maximum subject to the qualification that when the rates from Welland, Ontario, to shorter distance points were less than the Auburn rate they should apply as maxima. It was alleged by the respondent and admitted by the applicant that there was no movement of binder twine from Auburn into Canada:—Held (1) (Commissioner McLean), that since the rate from Auburn was only a paper rate there could be no competition and no unjust discrimination. (2) Held, however (the Chief Commissioner and Commissioner Mills), that the toll was unreasonable and the Auburn rates less two cents should be applied.

Welland v. Canadian Freight Asso. (Plymouth Cordage Co.'s Case), 13 Can. Ry. Cas. 140.

[Followed in Consumers' Cordage Co. v. Grand Trunk, etc., Ry. Cos., 14 Can. Ry. Cas. 222.]

DISCRIMINATION — COMPETITION — COMMODITY RATES — INTERNATIONAL CLASSIFICATION—INCREASE IN WEIGHT.

Application to withdraw and cancel s. "D" of Canadian Railway Classification (C.R.C.) No. 2, on the ground that shippers of other classes of commodities were unjustly discriminated against in favour of the shippers of commodities under s. "D" and application by the respondents that s. "D" should be extended to any weight up to $10 in value. The applicants framed s. "D" of C.R.C. No. 2 to meet the competition of the Post Office Department upon a large quantity of commodities. The respondents submitted that s. "D" should apply to any weight up to $10 in value although the Post Office Department competed only up to five pounds in weight. By conference between officers representing the express companies of Canada and the United States s. "D" was placed in the International Classification applying to traffic carried to common points between Canada and United States and vice versa:—Held (1), that the said section should remain in the classification and should not be eliminated. (2) That the discrimination was not undue because it was not caused by any initiative of the express companies. (3) That under the exceptional circumstances, the scale of rates should not be removed without affirmative evidence that it was not profitable to the express companies carrying that class of traffic. (4) That if s. "D" was eliminated, shippers in Canada might be injured by very much lower rates being charged on traffic originating at points in the United States coming to Canadian common points and in the same car. (5) That it was optional with the express companies to meet the reduced rates introduced by the Post Office Department or not, and the Board had no jurisdiction to order them to carry traffic in competition with the department.

Express Traffic Assn. v. Canadian Manufacturers Assn. et al., 13 Can. Ry. Cas. 169.

[Followed in British Columbia News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 176.]

AGREEMENT FOR SPECIAL RATES—DISCRIMINATION—PRACTICE.

In virtue of an agreement with the Government of Manitoba, validated by statutes of that province and of the Parliament of Canada, the Canadian Northern Ry. Co. established special rates for the carriage of freight, etc., to points in Manitoba, and the Canadian Pacific Ry. Co. reduced its rates, which had been in force prior to the agreement, in order to meet the competition resulting therefrom. The complaint made to the Board by the respondent was, in effect, that as similar proportionate rates were not provided in respect of freight, etc., to points west of the Province of Manitoba there was unjust discrimination operating to the prejudice of shippers, etc., to and from the western points. On questions submitted for the consideration of the Supreme Court of Canada:—Held, that the facts mentioned are circumstances and conditions, within the meaning of the Railway Act to be considered by the Board in determining the question of unjust discrimination in regard to both railways; that such facts and circumstances are not, in law, conclusive of the question of unjust discrimination, but the effect, if any, to be given to them is a question of fact to be considered and decided by the Board in its discretion. [Cf. Montreal Park & Island Ry. Co. v. Montreal, 43 Can. S.C.R. 256; Regina Board of Trade v. Can. Pac. and Can. Northern Ry. Cos. (Regina Toll Case), 11 Can. Ry. Cas. 380, affirmed.]

Can. Pac. and Can. Northern Ry. Cos. v. Regina Board of Trade (Regina Toll Case), 13 Can. Ry. Cas. 203, 45 Can. S.C.R. 321.

DISCRIMINATION—FREIGHT AND PASSENGER TRAFFIC—COMPETITION.

By s. 317 of the Railway Act, 1906, the respondent is prohibited from unjust discrimination in favour of its contractors by carrying their supplies for sale in competition with other merchants. The respondent should cease unjust discrimination, subject to a fine of $100 for any and every case of default or continuation. The Board has no jurisdiction to compel the respondent to open its railway for traffic; but if it applied for permission to do so it must carry freight and passengers under the provisions of the statute.

British Columbia and Alberta Municipalities v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 463.

DISCRIMINATION—MERCHANDISE AND EXPRESS ORDER SCALES.

Application complaining that a charge of sixty-five cents for return C.O.D. collection from Vancouver to Napanee, of $27 was excessive, and alleging unjust discrimination. For some years the agent at the delivery office of the express company, instead of, as formerly, remitting and carrying back the cash on a C.O.D. return collection, issued an express order and posted it direct to the shipper, applying the merchandise scale of charges instead of the lower express order scale:—Held (1), the charge was excessive and constituted unjust discrimination against the C.O.D. shipper. (2) The respondent should frame tariffs based upon other than the merchandise scale of tolls.

Boyes v. Dominion Express Co., 13 Can. Ry. Cas. 517.

CONTRACTOR'S SUPPLIES—DISCRIMINATION.

The fact that the officers of a railway company that gave a contractor, who was building it, a preference in the transportation of freight over the road before it was opened for traffic to the public by an order of the Board under s. 261 of the Railway Act, 1906, did not have knowledge that the goods transported were being sold by the contractor for his own benefit, or that they were not camp and contractor's supplies necessary for the construction of the road, will not relieve the company from the charge of giving an unlawful preference under s. 317 of the Act, where no attempt was made by them to ascertain if the goods transported were actually necessary to the construction of the road.

Re Grand Trunk Pacific Ry. Co., 3 D.L.R. 819.

DISCRIMINATION—COMPETITION—DISSIMILAR CONDITIONS.

It constitutes an unlawful preference and discrimination, under s. 317 of the Railway Act, 1906, for a railway company to carry for an independent contractor over a road he is construing which had not yet been opened to the public for traffic by an order of the Board under s. 261 of the Act, camp and contractor's supplies other than those actually necessary for the construction of the road, to be sold by the contractor for his own benefit.

Re Grand Trunk Pacific Ry. Co., 3 D.L.R. 819.

DISCRIMINATION—SIDE-HAUL TOLL.

It is not unjust discrimination for a railway company to charge a side-haul toll to points where there is no competition, although no such toll is charged to points where competition exists.

Wylie Milling Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 8, 8 D.L.R. 953.

[See Wylie Milling Co. v. Can. Pac., etc., Cos., 14 Can. Ry. Cas. 5, 8 D.L.R. 949.]

INCREASE—COMMODITY RATES—DISCRIMINATION.

The Board allowed tariffs which had the effect of cancelling commodity rates less than 5th class theretofore enjoyed for many years on rope in carload lots out of Montreal upon its appearing that Montreal was the only point in Canada where a less than 5th class rate applied and that there had, therefore, been unjust discrimination in favour of Montreal against other Canadian points. [Welland v. Canadian Freight Assn. (Plymouth Cordage Co's. Case), 13 Can. Ry. Cas. 140, followed.]

Consumers' Cordage Co. v. Grand Trunk and Can. Pac. Ry. Cos., 14 Can. Ry. Cas. 222.

DISCRIMINATION—STOP-OVER PRIVILEGES—CANNERS—DIFFERENT LOCALITIES.

It is unjust discrimination to grant stop-over privileges to canners in one locality and refuse them to canners in another locality.

British Canadian Canners v. Grand Trunk Ry. Co., 14 Can. Ry. Cas. 346.

DISCRIMINATION BETWEEN LOCALITIES—TOLLS—COMMODITY—FIFTH CLASS—HIGHER BASIS—COMPETITION.

The fifth class tolls on wire fencing from Montreal, westbound being on a higher basis than the commodity tolls, on shipments moving from Ontario points east bound, there was unjust discrimination against the Montreal manufacturer in competition with the Ontario manufacturer. The application of Montreal manufacturers for a reduction in tolls below the fifth class on shipments to points on the branches north of the main line of the Canadian Pacific, Montreal to Toronto, and north of the Grand Trunk main line, Toronto to Sarnia, was refused because all manufacturers shipping to the Northern localities were subject to the fifth class and the Board was not dealing with the reasonableness of the tolls, but with unjust discrimination against Montreal. The tolls to points midway between Montreal and Toronto and to certain points at the same distance from Montreal as others from Toronto, were placed on a parity, but to points immediately west of Montreal a reduction below fifth class was refused because the advantage of the shortness of the haul against the long haul of the competing Ontario manufacturers would result in equalizing the tolls.

Montreal Board of Trade v. Canadian Freight Assn., 14 Can. Ry. Cas. 347.

DISCRIMINATION—MILEAGE BASIS—DIFFERENT COMMODITIES.

Putting the tolls on cornmeal on a mileage basis by reducing them from 17½ to 15c per 100 lbs., from Montreal to New Brunswick points, would be unjust discrimination against the Maritime millers, and these tolls should not be disturbed. It did not appear that there was any such essential difference between the commodities corn and wheat and oats as would justify a higher toll basis in the case of corn. It has not been shewn that either in point of water competition, or in point of conditions affecting carriage, there was such a difference of condition as to justify the discrimination between the ex-lake toll on corn and that on wheat, oats, and barley and corn should, therefore, be given the same treatment as the latter, where an ex-lake toll on it was in effect.

Montreal Board of Trade v. Grand Trunk and Can. Pac. Ry. Cos., 14 Can. Ry. Cas. 351.

DISCRIMINATION BETWEEN LOCALITIES—TOLLS—REDUCTION—COMPARISON—TOLL BASIS—EAST AND WESTBOUND—COMPETITION.

An application that the alleged unjust discrimination in favour of Eastern refineries be removed and for lower freight tolls from Vancouver to all points in Alberta and Western Saskatchewan, raises the point: Is the difference in rate basis eastbound over the mountains from the Pacific Coast justifiable as compared with the rate basis from Montreal and from the head of the lakes westbound? which is part of the pending Western Rate Investigation, and a ruling will not be given on this particular case in advance of the ruling on the general case. [Regina Board of Trade v. Can. Pac. and Can. Northern Ry. Cos. (Regina Toll Case), 11 Can. Ry. Cas. 380, referred to.]

British Columbia Sugar Refining Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 354.

REASONABLENESS OF TOLLS—INCREASE—VOLUME OF TRAFFIC—COST OF OPERATION.

A toll established in the first instance by a carrier of its own volition having remained some time in force, is presumptively reasonable, and the onus is on the carrier to shew, with reasonable conclusiveness, that changed conditions or increased cost of operation justified an increase. [Laidlaw Lumber Co. v. Grand Trunk Ry. Co., 8 Can. Ry. Cas. 192, at 194; Montreal Produce Merchants' Assn. v. Grand Trunk and Can. Pac. Ry. Cos., 9 Can. Ry. Cas. 232, at 238; Canadian Manufacturers' Assn. v. Canadian Freight Assn. (Interswitching Rates Case), 7 Can. Ry. Cas. 302, at 308, followed; Cadwell Sand & Gravel Co. v. Canadian Freight Assn. 14 Can. Ry. Cas. 172, re-heard and reversed.]

Canadian Freight Assn. v. Cadwell Sand & Gravel Co., 12 D.L.R. 48, 15 Can. Ry. Cas. 156.

[Followed in Auger et al. v. Grand Trunk and Can. Pac. Ry. Cos., 19 Can. Ry. Cas. 401.]

REASONABLENESS—JURISDICTION.

Under 7 & 8 Edw. VII. c. 61, s. 9, the jurisdiction of the Board is confined to a consideration of the reasonableness of the tolls charged for the services rendered.

Kelowna Board of Trade v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 441.

REASONABLENESS—THROUGH TARIFFS—AGREEMENT—TRANSPORTATION BY WATER.

Where a railway company transports cars from the end of its line by means of barges, and the cars are unloaded at the dock by a winch, and then hauled by horses over spur tracks, leading to warehouses, proper delivery is made at the dock, and a further charge for hauling and placing cars under an agreement is reasonable, although under the tariff filed with the Board through tolls are quoted from the point of shipment to destination, including water transportation.

Kelowna Board of Trade v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 441.

REASONABLENESS—MEASURE—CONDITIONS OF OPERATION—COST OF CARRIAGE—VOLUME OF TRAFFIC—DISCRETION OF CARRIERS—RESULTANT TRAFFIC—RATE OF PROFIT.

It is entirely within the discretion of a carrier to meet the competition of another carrier or not, and if it chooses to do so, when tolls are attacked as to their measure of reasonableness, not simply mileage, but conditions of operation, cost of carriage and volume of traffic, should be compared. Dominion Sugar Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 188, at p. 192, followed. The right of a carrier to consider the resultant traffic as a reason for a lower toll on the original commodity, where hauled to points of manufacture on its own line, is well established, and it does not appear justifiable to take the said toll as a measure of the reasonableness of what should be charged by the respondent. [Michigan Sugar Co. v. Chatham, Wallaceburg & Lake Erie Ry. Co., 11 Can. Ry. Cas. 353, at p. 363, followed.]

Kelowna Board of Trade v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 441.

TOLLS—REASONABLENESS—COST OF PRODUCTION—JURISDICTION.

The Board is not concerned with equalizing costs of production. It is concerned with the reasonableness of the toll, not with the rate of profit the applicant is making. [Imperial Rice Milling Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 375, followed.]

Hudson Bay Mining Co. v. Great Northern Ry. Co., 16 Can. Ry. Cas. 254.

[Followed in Dominion Millers Assn. et. al. v. Canadian Freight Assn, 21 Can. Ry. Cas. 83; Thorold v. Grand Trunk Ry. Co., 24 Can. Ry. Cas. 143.]

TOLLS—BASIS—COMMODITY—DIFFERENCE IN VALUE.

Where the tariff in force recognized the difference in value of ore as a basis of tolls a minimum toll on all ore of a value of $25 or less was held to be unreasonable and an order was made requiring the carriers to differentiate as to values under $25, by fixing new tolls for ore valued at $15 or under and $20 or under.

Hudson Bay Mining Co. v. Great Northern Ry. Co., 16 Can. Ry. Cas. 254.

UNJUST DISCRIMINATION—HIGHER TOLLS—MILLING IN TRANSIT—COMMON MARKET.

It is unjust discrimination to charge a higher milling-in-transit toll on the same commodity moving from different localities by different routes under similar circumstances and conditions to a common competing market. [Ontario & Manitoba Flour Mills v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 430, at p. 431, referred to.]

Dominion Millers Assn. v. Canadian Freight Assn. (Milling-in-Transit Case), 22 Can. Ry. Cas. 125.

SPECIAL TOLL—REASONABLE—REFUND—JURISDICTION.

The Board refused to give a ruling that a special toll which had already expired was unreasonable, where no further shipments will be made, and the ruling was desired solely for the purpose of claiming a refund from a higher toll charged on the shipment in question. [British American Oil Co. v. Can. Pac. Ry. Co., 12 Can. Ry. Cas. 327, at p. 333, followed; British American Oil Co. v. Grand Trunk Ry. Co. (The Stoy Case), 9 Can. Ry. Cas. 178; Canadian Condensing Co. v. Can. Pac. Ry. Co., 12 Can. Ry. Cas. 1, referred to.]

St. Lawrence Pulp & Lumber Corpn. v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 107.

INCREASE—EFFECT ON EXISTING CONTRACTS—NATURE OF TRAFFIC.

Notwithstanding the provision in the Railway Act that tolls may be increased on thirty days' notice, the Board, in sanctioning an increase, will take into consideration the effect such increase is likely to have upon existing long-term contracts between consignors and consignees, and will, when necessary, suspend the increase for a reasonable period so that it shall not fall unfairly upon the shipper in such cases. The Board, in dealing with an application to increase tolls, will consider the character of the railway, the nature of the traffic carried by it, average haul, average tonnage per train, and other conditions affecting its traffic, as well as, the tolls charged and sanctioned upon the lines, and the traffic conditions of the latter. [International Paper Co. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos. (Pulpwood Case), 15 Can. Ry. Cas. 111, referred to.]

Eastern Townships Lumber Co. v. Temiscouata Ry. Co., 16 Can. Ry. Cas. 260.

UNJUST DISCRIMINATION—MILLING IN TRANSIT—PARTICIPATING CARRIERS.

The abrogation of milling-in-transit privileges, formerly allowed in respect of shipments milled at points on the respondents' line in Canada destined to points on or via participating lines and their connections, was held not to be unjust discrimination, as it was shewn that the participating carriers did not grant the privileges in question to millers on their own lines under similar conditions.

Empire Flour Mills v. Michigan Central Ry. Co., 16 Can. Ry. Cas. 425.

UNJUST DISCRIMINATION—MILLING IN TRANSIT—CANADIAN AND FOREIGN MILLERS—COMPETITION.

Unjust discrimination in favour of United States milling points as against Canadian milling points is not established by proof that, (in order to meet the toll of United States lines and participate in the business), milling-in-transit privileges and tolls are allowed over Canadian lines in respect of shipments milled at the former points, and not to shipments milled at the latter, where it appears that the Canadian milling points can enjoy similar tolls and privileges by an alternative route through the United States to the same destinations so that there is no actual disadvantage in practice. Unjust discrimination is not a matter of tolls in the abstract, and the Board is not justified in interfering on that ground without an affirmative shewing that there is actual detriment resulting from the existing toll adjustment.

Empire Flour Mills v. Michigan Central Ry. Co., 16 Can. Ry. Cas. 425.

REDUCTION—FURTHERANCE—COMPETITION—UNJUST DISCRIMINATION.

An express company may reduce its tolls for furtherance to meet the market competition of another company, but it must at the same time answer any allegation of unjust discrimination as to traffic received under substantially similar circumstances, at points to which the reduced tolls do not apply.

Aylmer Condensed Milk Co. v. American Express Co., 17 Can. Ry. Cas. 100.

DUAL TOLLS—UTIMATE USE OF COMMODITY.

Dual tolls, charging a higher toll on cream for domestic use than on that for butter making are anomalous and inexpedient. [Manitoba Dairymen's Assn. v. Dominion and Can. Northern Express Cos., 14 Can. Ry. Cas. 142, followed.]

Riley v. Dominion Express Co., 17 Can. Ry. Cas. 112.

[Followed in Western Retail Lumbermen's Assn. v. Can. Pac., Can. Northern & Grand Trunk Pacific Ry. Cos., 20 Can. Ry. Cas. 155]

REASONABLENESS—SIMILAR CIRCUMSTANCES.

Tolls as arrived at in the United States are not the criteria of reasonable tolls in Canada unless the circumstances in both cases are on all

fours. [Manitoba Dairymen's Assn. v. Dominion and Can. Northern Express Cos., 14 Can. Ry. Cas. 142, followed.]
Riley v. Dominion Express Co., 17 Can. Ry. Cas. 112.

JUSTIFIABLE TOLL—RETURNED EMPTIES.

The toll for a returned empty is a charge for a service distinct from that of handling the incoming package and the existence of this toll is justifiable.
Riley v. Dominion Express Co., 17 Can. Ry. Cas. 112.

EXCLUSIVE OR INCLUSIVE OF DELIVERY SERVICE—RULES.

In dealing with the question whether the rules as to carriage of cream should provide for delivery, the Board follows the principle of "all or none" since it is unfair and inexpedient to make the use of delivery service at a given point optional with individual consignees.
Riley v. Dominion Express Co., 17 Can. Ry. Cas. 112.

TOLLS—UNREASONABLE—THROUGH—DIVISION.

A through toll of $1 per ton on moulding sand from Fonthill to Toronto, a distance of 78 miles, whereof the Grand Trunk Ry. Co. receives 78 cents and the Niagara, St. Catharines & Toronto Ry. Co. 22 cents, was held not unreasonable. [Canadian Manufacturers Assn. v. Canadian Freight Assn. (General Interswitching Order), 7 Can. Ry. Cas. 302, followed.]
Fonthill Gravel Co. v. Grand Trunk and Niagara, St. Catharines & Toronto Ry. Cos., 17 Can. Ry. Cas. 248.

UNJUST DISCRIMINATION—UNDUE PREFERENCE—QUESTION OF FACT—COMPETITION BY WATER AND FOREIGN CARRIERS—COMPARISON—OVERHEAD OR CAPITAL CHARGES.

The Railway Act does not forbid all discriminations and preferences, but only forbids unjust discrimination or under preference, and whether either one or the other exists in any particular case is a question of fact to be decided. Discrimination between the tolls in Eastern and Western Canada is not unjust, but is justified by effective water competition, and by the competition of U.S. Railways throughout Eastern Canada (The International and Toronto Board of Trade Rate Case). Tolls cannot be based upon consideration of the position of anyone of three existing lines of Railway either completed or partially completed. The question is what tolls are fair, irrespective of the financial position of any of such companies. Rates cannot be made on the basis of cost plus a fixed percentage to cover overhead or capital charges [Boileau v. Pacific & Lake Erie Ry. Co., 22 I.C.C.R. 640, at p. 653, followed.] Where the local passenger business is conducted at a loss, no reduction in the rates is justified until the result is ascertained of the improvements in railway grades and operating facilities, which the Ry. Co. is at present making. [Pea Millers' Assn. v. Grand Trunk and Can. Pac. Ry. Cos., (Pea Millers' Case), 3 Can. Ry. Cas. 433; Rideau Lumber Co. et al. v. Grand Trunk and Can. Pac. Ry. Cos., 8 Can. Ry. Cas. 339; Montreal Board of Trade v. Grand Trunk and Can. Pac. Ry. Cos., 10 Can. Ry. Cas. 319; Mount Royal Milling Co. v. Grand Trunk and Can. Pac. Ry. Cos., 11 Can. Ry. Cas. 347; Montreal Board of Trade v. Canadian Freight Assn., 14 Can. Ry. Cas. 347; International Paper Co. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Co., (Pulpwood Case), 15 Can. Ry. Cas. 111; Liverpool Corn Traders' Assn. v. Great Western Ry. Co., 8 Ry. & Ca. Tr. Cas. 114; Pickering, et al. v. London & Northwestern Ry.

Co., 8 Ry. & Ca. Tr. Cas. 83; Castle Trawlers v. Great Western Ry. Co., 13 Ry. & Ca. Tr. Cas. 145; Desel-Boettcher Co. v. Kansas City Southern Ry. Co., 12 I.C.R. 222; Malkin v. Grand Trunk Ry. Co. (Tan Bark Rates Case), 8 Can. Ry. Cas. 183; Commercial Club v. Hattiesburg v. Alabama & Great Southern Ry. Co., 16 I.C.C.R. 534, at p. 545; Elder, Dempster Steamship Co. v. Grand Trunk and Can. Pac. Ry. Cos., 10 Can. Ry. Cas. 334, referred to; Great Western Ry. Co. v. Sutton, L.R. 4 H. L. 226, at p. 237; Niagara, St. Catharines & Toronto Ry. Co. v. Grand Trunk Ry. Co. (Stamford Junction Case), 3 Can. Ry. Cas. 256 at pp. 259, 260; Re Canadian Freight Assn. and Industrial Corporations, 3 Can. Ry. Cas. 427, at p. 428; Wegenast v. Grand Trunk Ry. Co. (Brampton Commutation Rate Case), 8 Can. Ry. Cas. 42; Toronto and Brampton v. Grand Trunk and Can. Pac. Ry. Cos., (Brampton Commutation Rate Case (No. 2)), 11 Can. Ry. Cas. 370; Almonte Knitting Co. v. Can. Pac. and Michigan Central Ry. Cos. (Almonte Knitting Co.'s Case), 3 Can. Ry. Cas. 441; Canadian Oil Cos. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos., 12 Can. Ry. Cas. 350, at p. 351; Blind River Board of Trade v. Grand Trunk and Can. Pac. Ry., Northern Navigation and Dominion Transportation Cos., 15 Can. Ry. Cas. 146; Montreal Produce Merchants Assn. v. Grand Trunk and Can. Pac. Ry. Cos., 9 Can. Ry. Cas. 232; British Columbia Sugar Refining Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 169, at p. 171; Lancashire Patent Fuel Co. v. London & North Western Ry. Co., 12 Ry. & A. Tr. 79; Kerr v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 207; Michigan Sugar Co. v. Chatham, Wallaceburg & Lake Erie Ry. Co., 11 Can. Ry. Cas. 353; Regina Board of Trade v. Can. Pac. and Can. Northern Ry. Cos., (Regina Toll Case), 11 Can. Ry. Cas. 380, affirmed 45 Can. S.C.R. 321, 13 Can. Ry. Cas. 203; British Columbia Pacific Coast Cities v. Can. Pac. Ry. Co. (Vancouver Interior Rates Case), 7 Can. Ry. Cas. 125, followed.]

Re Western Tolls (Western Freight Rates Case), 17 Can. Ry. Cas. 123.

[Followed in Bowlby v. Halifax & S. W. Ry. Co., 20 Can. Ry. Cas. 231; West Virginia Pulp & Paper Co. et al. v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 153.]

EXPRESS—DELIVERY—LIMITS—ZONES—GRADUATED SCALE.

Municipal boundaries may usually be taken as suitable limits for free express delivery service, in villages towns and small cities, but not in large cities where municipal boundaries are enlarged from time to time. The Board established a central zone in Toronto with free pick up and delivery service. Outside of the central zone, additional areas, as a toll zone, were established in and about Toronto comprising any place within half a mile from the nearest free zone limit, except the southern limit on the water front. A graduated scale of charges, according to weight, was fixed for delivery of parcels in the toll zone. After a year's operation a report is to be made to the Board, upon which a revision of conditions may be made if deemed necessary by the Board.

Toronto and Citizens Committee v. Express Traffic Assn., 22 Can. Ry. Cas. 375.

TOLLS—GROUP ARRANGEMENT—DISTANCE—MILEAGE BASIS.

A group toll arrangement endeavours to average distance and public convenience. If each point of a group is to be singled out for special treatment on a mileage basis, then the group disappears and the points with the shortest mileage get an advantage in marketing, therefore the

Board cannot lightly interfere with a grouping arrangement simply on a presentation as to one portion of the arrangement.

Fullerton Lumber & Shingle Co. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 79.

UNJUST DISCRIMINATION—DISTRIBUTING—REFUND.

It is unjust discrimination to refuse to grant distributing tolls to a point within the Regina zone on the ground that the respondent had no direct route to the point in question, but the Board cannot order a refund of the excess toll charged.

Lehnhart v. Can. Northern Ry. Co., 17 Can. Ry. Cas. 93.

DISCRETION—UNJUST DISCRIMINATION—COMPETITION.

A toll obtaining on one railway cannot be claimed to be unjustly discriminatory simply because a toll on another which is put into effect for competitive reasons is lower, it being within the discretion of a carrier whether it shall meet competition or not.

Edmonton, Clover Bar Sand Co. v. Grand Trunk Pacific Ry. Co., 17 Can. Ry. Cas. 95.

[Followed in Re Passenger Tolls, 20 Can. Ry. Cas. 223; Graham Co. v. Canadian Freight Assn., 22 Can. Ry. Cas. 355.]

REASONABLE—LOW—HIGH.

A toll is unreasonable where it is too low just as much as where it is too high. Tolls must be reasonable, having regard to the carrier just as much as to the traveling public.

Burlington Beach Commission et al. v. Hamilton Radial Elec. Ry. Co., 24 Can. Ry. Cas. 39.

UNJUST DISCRIMINATION—DIFFERENT SYSTEMS—LOCAL AND IMPORTED PRODUCTS.

The difference in toll treatment between two points does not necessarily create an unjust discrimination since they are on different systems of railways. Upon comparing the toll on imported wood pulp with the toll on the local product, and taking into consideratiion the mileage involved and the terminal charges on the imported product, the Board found that the toll on the imported product was reasonable.

Howell Co. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos., 17 Can. Ry. Cas. 97.

UNJUST DISCRIMINATION—MILEAGE—TRAFFIC—SWITCHING AND HANDLING—COMPETITION.

When it appears that, at a large number of places in Ontario, under more or less similar circumstances and conditions, no extra charge is made for switching traffic from sidings located between stations, it is unjust discrimination to make an extra charge of $3 per car for switching traffic of the applicant, a brick maker, from a siding 2½ miles distant from a station, C., who is in competition with brick makers at said station. [Christie, Henderson & Co. v. Grand Trunk Ry. Co., 9 Can. Ry. Cas. 502, followed.]

Pilon v. Grand Trunk Ry. Co., 16 Can. Ry. Cas. 433.

[Followed in Hepworth, etc., Brick Co. v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 9.

UNJUST DISCRIMINATION—COMPETITION.

It is not unjust discrimination to charge too low a toll to one market as compared with that to another market, when no competition exists between them.

Guest Fish Co. v. Dominion Express Co., 18 Can. Ry. Cas. 1.

Unjust discrimination—Completion of construction—Standard tariffs.

Upon a section of railway being completed and taken over by the operating department the railway company should file and put in force standard tariffs under s. 327 of the Railway Act, 1906. There is unjust discrimination where an unreasonably long time elapses after completion before lumber mileage tolls are put in force on such section.

Riverside Lumber Co. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 17.

[Followed in Re Edmonton Dunvegan & B. C. Ry. Co., 19 Can. Ry. Cas. 395.]

Change of destination—"C.L." traffic in transit.

Common carriers under the jurisdiction of the Board will be allowed to make a uniform charge of $3 a car, as a reasonable toll for changing destination of C.L. traffic in transit.

Hyde et al. v. Canadian Freight Assn., 18 Can. Ry. Cas. 40.

Unremunerative tolls—Excessive or unfair.

The Board cannot order railway companies to put in an unremunerative toll so low as to be unfairly out of line with tolls which are necessary to be maintained in order to permit the continuance of satisfactory operation of railways, due regard being had to proper consideration of the value of the commodities shipped and the services performed; it cannot take into account matters of business policy and railway administration, but can only inquire whether tolls are excessive or unfair.

Western Ontario Municipalities v. Grand Trunk, Michigan Central and Pere Marquette Ry. Cos., 18 Can. Ry. Cas. 329.

Reduction—Increase—Flat blanket C.L.—Average revenue.

The annual statistical returns made by railway companies shewing the average revenue per ton per mile of all freight movements will not justify a reduction of tolls by the Board. In every case the traffic moved must be of sufficient volume and the hauls of sufficient length to insure proper remuneration. Without prejudice to a pending application for increased tolls a flat blanket C.L. toll of 50 cents per ton for any distance up to and including 50 miles on gravel was voluntarily conceeded under s. 341 of the Railway Act, 1906, by railway companies concerned to aid municipalities in Western Ontario in prosecuting the "good roads" movement.

Western Ontario Municipalities v. Grand Trunk, Michigan Central and Pere Marquette Ry. Cos., 18 Can. Ry. Cas. 329.

Joint tariff—Jurisdiction—Through tariff.

The Board has jurisdiction by virtue of the Railway Act, 1906, s. 26, to make a declaratory order as against the carrier that rates exacted by it between certain dates were illegal, although by reason of a subsequent change in the authorized tariff no executive order was necessary nor was any made by the Board. [Canadian Pacific and Grand Trunk Ry. Cos., v. British American and Canadian Oil Cos., 47 Can. S.C.R. 155, 14 Can. Ry. Cas. 201, affirmed.] S. 321 of the Act applies to all tariffs whether standard, competitive or through tariffs.

Can. Pac. Ry. Co. v. Canadian Oil Cos., 17 Can. Ry. Cas. 411, [1914] A.C. 1022, 19 D.L.R. 64.

UNJUST DISCRIMINATION—SAME CIRCUMSTANCES AND CONDITIONS.

A claim of unjust discrimination, between the tolls charged for delivery of freight at different points, some of which have and others have not, further railway communication before finally delivery is made, cannot be supported where the same circumstances and conditions do not and cannot exist.

Kelowna Board of Trade v. Canadian Pacific Ry. Co., 15 Can. Ry. Cas. 441.

UNJUST DISCRIMINATION—MILLING IN TRANSIT.

The Board, in the exercise of its jurisdiction to prevent unjust discrimination has power to order that milling in transit be allowed to flour mill owners applying therefor, upon proof that circumstances and conditions with respect to the traffic from the applicants' mill are substantially similar to those of mills already enjoying such rate.

Ontario & Manitoba Flour Mills v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 430.

[Followed in Sudbury Brewing etc., Co. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 410.]

REASONABLE—COST OF PRODUCTION—EQUALIZATION.

The Board has no right to attempt to equalize geographical, climatic or economic conditions affecting cost of production, but is only concerned with the reasonableness of the toll which the carrier is seeking to collect for the transportation of a given commodity.

Canadian China Clay Co. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos., 18 Can. Ry. Cas. 347.

[Followed in Roberts v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 350; Thorold v. Grand Trunk Ry. Co., 24 Can. Ry. Cas. 143.]

C.L.—UNIT OF WEIGHT—DISADVANTAGES OF SHIPPERS—EQUALIZATION—COST OF PRODUCTION.

Railway companies are not obliged to equalize the disadvantages of the shippers from the standpoint of the costs of production. The basis of toll making so far as the unit of weight is concerned is 100 lbs., and the tolls vary with the weight. The Board will not require seasoned and unseasoned wood to be carried at the same C.L. toll, irrespective of weight, in order to equalize the disadvantage arising to shippers without capital as compared with shippers having capital, to do so would create unjust discriminatory conditions. [Canadian Portland Cement Co. v. Grand Trunk and Bay of Quinte Ry. Cos., 9 Can. Ry. Cas. 211; Blaugas Co. v. Canadian Freight Assn., 12 Can. Ry. Cas. 303, at p. 304; British Columbia News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 176 at p. 178; Canadian China Clay Co. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos., 18 Can. Ry. Cas. 347, followed.]

Roberts v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 350.

[Followed in Thorold v. Great Trunk Ry. Co., 24 Can. Ry. Cas. 143.]

UNJUST DISCRIMINATION—COMBINED TOLLS—THROUGH SHIPMENTS.

It is not unreasonable that the combined tolls on shipments from the east contracted to Fort William, delivered and stored there, and subsequently shipped west should exceed those charged from the same eastern shipping point to the same western destination, for the transshipping of which the carrier must necessarily provide facilities at Fort William, as in the latter case there is but one transaction or contract, whilst in the former there are two, therefore it is not unjust discrimination against

Fort William to impose a wharfage toll on shipments to that point and not to exact it on through shipments.

Fort William Board of Trade v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 401.

UNJUST DISCRIMINATION—STANDARD FREIGHT MILEAGE TARIFF—GROUPS—DENSITY—MAIN AND BRANCH LINES.

Difference in density of traffic as between main and branch lines does not affect the application of a standard freight mileage tariff, therefore, all points whether on a main or branch line, within the same mileage group, should be given the same toll and it is unjust discrimination to make a different toll against one point of the group.

Two Creek Grain Growers' Assn. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 403.

POULTRY—C.L.—CLASSIFICATION—FINISHED PRODUCT.

Live poultry in car loads is not entitled to the same classification and the same tolls as live stock, and in making a freight toll reshipment of the finished product is always taken into consideration. Poultry shipments move under a lower classification in Canada than in the United States, and third-class rating for live poultry in car loads is not unreasonable.

Warrington, et al. v. Canadian Freight Assn., 24 Can. Ry. Cas. 155.

UNJUST DISCRIMINATION—STORAGE TOLLS—COMPETITION.

The practice of railway companies in granting lower forwarding storage tolls than the local storage tolls is not unjust discrimination, because tolls which otherwise of necessity might be charged on a parity may differ one from the other as a result of competitive conditions.

Port Arthur and Fort William Boards of Trade v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 406.

MILLING-IN-TRANSIT PRIVILEGE—BY-PRODUCT—UNJUST DISCRIMINATION.

No instance can be found where a milling-in-transit privilege on the by-product has been granted, apart altogether from the main product: a brewing company, therefore, is not entitled to a milling-transit privilege on the offal of malt grain carried by the respondent on its line from Fort William to Sudbury, and there brewed in the applicant's brewery. Shippers are not entitled to a milling-in-transit privilege as a matter of right, and its allowance in the public interest by carriers to shippers in one section must be without unjust discrimination to shippers in another section served by its line. [Koch v. Pennsylvania Ry. Co., 10 I.C.C.R. 675; Ontario & Manitoba Flour Mills v. Can. Pac. Ry. Co., 16 Can. Ry. Cas. 430, followed.]

Sudbury Brewing & Malting Co. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 410.

BLANKET TOLLS—COMPETITION—LONG AND SHORT HAULS.

Dried fruit is carried eastward from the Pacific Coast under tariffs giving a blanket toll of $1.10 from San Francisco to, e.g., St. Paul, Duluth, Buffalo and New York. The same toll is applied to junction points adjacent to the international boundary, and there is the same toll to Winnipeg. The toll to Toronto is the same as to Buffalo, while Montreal has the same toll in competition with New York. The toll to Fort William is the toll to Duluth, plus the by-water toll from Duluth to Fort William, and wharfage charges at Fort William. Competition is thus more effective in favour of Toronto than Fort William. There being no movement of dried fruit via Winnipeg and Fort William to Toronto—the traffic moving through United States points only—therefore, there is no violation of the long and short haul clause, s. 315 (5) of the Railway Act, 1906, and the existing toll adjustment has not been shewn to work detrimentally to Fort William.

Mathias v. Can. Pac., Can. Northern and Grand Trunk Pacific Ry. Cos., 19 Can. Ry. Cas. 410.

Cost of service—C.L.

Upon the evidence of cost of service the Board fixed $1.75 per car as the proper toll for handling carload freight traffic between car barge and land team tracks or private sidings at Kelowna, B.C. [Kelowna Board of Trade v. Can. Pac. Ry. Co., 15 Can. Ry. Cas. 441, referred to.] Complaint against the toll of $2.50 per car made by the respondent for handling cars from the dock at Kelowna to and from the various warehouses.

Kelowna Board of Trade v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 414.

Unjust discrimination and preference—Traffic movement—Actual detriment.

A mere statement as to difference of tolls is not conclusive as shewing the existence of unjust discrimination or undue preference; there must be evidence of the traffic moving and the effect thereon, and the discrimination must be one creating actual detriment to complainants to make it unjust.

London Board of Trade Express Traffic Assn., 19 Can. Ry. Cas. 420.

Inhibition—Differentiation of weights.

A carrier is not justified in imposing tolls on the same commodity differing according to the use to which it is put, and the same inhibition attaches to a differentiation of minimum weights based on the use to which the commodity is put. [Riley v. Dominion Express Co., 17 Can. Ry. Cas., 112, followed.]

Western Retail Lumbermen's Assn. v. Canadian Pacific et al. Ry. Cos., 20 Can. Ry. Cas. 155.

[Followed in Hay and Still Mfg. Cos. v. Grand Trunk and Can. Pac. Ry. Cos., 21 Can. Ry. Cas. 43.]

Obligations — Reasonable toll — Reduction — Profits — Minimum weights.

The obligation of carriers is to charge a reasonable toll, and they are not called upon, through the reduction of the toll, to guarantee that a shipper will always be able to carry on business at a profit, nor are carriers under any obligation to so adjust their minimum weights as to offset any inherent disadvantages of a business. [Canadian Portland Cement Co. v. Grand Trunk and Bay of Quinte Ry. Cos., 9 Can. Ry. Cas. 209, at p. 210; Canadian Oil Cos. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos., 12 Can. Ry. Cas. 350, at p. 356; British Columbia News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 176, at p. 177, followed.]

Western Retail Lumbermen's Assn. v. Can. Pac. et al. Ry. Cos., 20 Can. Ry. Cas. 155.

[Followed in Hay and Still Mfg. Cos. v. Grand Trunk and Can. Pac. Ry. Cos., 21 Can. Ry. Cas. 43; referred to in Dominion Millers Assn. et al. v. Canadian Freight Assn., 21 Can. Ry. Cas. 83; followed in Crushed Stone etc. v. Grand Trunk Ry. Co., 23 Can. Ry. Cas. 132.]

Higher basis for branch and lateral line points.

A slightly higher toll basis is justifiable from branch and lateral line points than from adjacent main line points. [Almonte Knitting Co. v.

Can. Pac. and Michigan Central Ry. Cos. (Almonte Knitting Co. Case), 3 Can. Ry. Cas. 441; Malkin & Sons v. Grand Trunk Ry. Co. (Tan Bark Rates Case), 8 Can. Ry. Cas. 183; Oyler et al. v. Dominion Atlantic Ry. Co., 20 Can. Ry. Cas. 238, followed.]

Hunting-Merritt Lumber Co. v. Can. Pac. and British Columbia Elec. Ry. Cos., 20 Can. Ry. Cas. 181.

DISCRETION—TOLLS—UNREASONABLE—TERMINAL—COMPETITION BY WATER —UNJUST DISCRIMINATION.

If a carrier does not choose to meet water competition, the Board's whole right to interfere with a toll is confined to a case where the toll charged is unreasonable for the services rendered, therefore, where a carrier changes the route of its car ferry it is not unjust discrimination for it to charge a reasonable toll for the rail haul necessitated, instead of the former terminal toll only. [Plain & Co. v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 223; Canadian Oil Cos. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos., 12 Can. Ry. Cas. 350; Blind River Board of Trade v. Grand Trunk, Can. Pac. Rys., Northern Navigation and Dominion Transportation Cos., 15 Can. Ry. Cas. 146 at p. 156, followed.]

Nanaimo Board of Trade v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 224.

[Reheard and affirmed in 23 Can. Ry. Cas. 93.]

CONTRACT—OBLIGATION OF CARRIER—ADEQUACY OF CONSIDERATION.

The Board will not consider adequacy of consideration in a contract as any justification for favoured treatment by a carrier of a shipper in respect of tolls. [Crow's Nest Pass Coal Co. v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 33, at pp. 40, 41, followed.]

Lake Superior Paper Co. v. Algoma Central & Hudson Bay Ry. Co., 22 Can. Ry. Cas. 361.

REASONABLENESS—TRAFFIC MOVEMENT—MAIN AND BRANCH LINES.

In dealing with the reasonableness of tolls charged on a slight traffic movement, the Board has recognized that under certain conditions tolls to or from a point on a branch line may be higher than in the case of a main line movement. [Almonte Knitting Co. v. Can. Pac. and Michigan Central Ry. Cos. (Almonte Knitting Co. Case), 3 Can. Ry. Cas. 441; Malkin & Sons v. Grand Trunk Ry. Co. (Tan Bark Rates Case), 8 Can. Ry. Cas. 183, followed.] A somewhat higher toll basis is justifiable, where, on account of the urgency of the grain movement, leave is given before completion to a branch line to engage in the carriage of traffic. In general standard mileage tolls may properly be charged to the junction point where the special mileage tolls become effective on the branch line.

Oyler et al. v. Dominion Atlantic Ry. Co., 20 Can. Ry. Cas. 238.

[Followed in Hunting-Merritt Lumber Co. v. Can. Pac. and British Columbia Elec. Ry. Cos., 20 Can. Ry. Cas. 181.]

PERIOD OF CONTINUANCE—CAPITAL—INVESTMENT—COMMITMENTS.

While it is proper to take into consideration the period a toll has been established, the investment of capital made in the belief that such toll would continue and the further commitments made, there is no property in a toll, mere continuance is only one factor, its general reasonableness must be considered. [International Paper Co. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos. (Pulpwood Case), 15 Can. Ry. Cas. 111, followed.]

Lake Superior Paper Co. v. Algoma Central & Hudson Bay Ry. Co., 22 Can. Ry. Cas. 361.

BLANKET TOLL—DEVELOPMENT OF TRAFFIC—RESULTANT PROFIT—OBLIGATION —UNDULY LOW BASIS.

A blanket toll put in for development of traffic, with but little attention to the resultant profit, does not create an obligaion to continue an unduly low toll basis. [International Paper Co. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos. (Pulpwood Case), 15 Can. Ry. Cas. 111, followed.]

Lake Superior Paper Co. v. Algoma Central & Hudson Bay Ry. Co., 22 Can. Ry. Cas. 361.

REASONABLENESS — JURISDICTION — COST OF PRODUCTION — WEIGHTS — INCREASED EFFICIENCY OF ROLLING STOCK—CLASSIFICATION—CARRYING POWER OF CAR.

The Board is not concerned with equalizing costs of production; its jurisdiction relates only to reasonableness of tolls. [Hudson Bay Mining Co. v. Great Northern Ry. Co., 16 Can. Ry. Cas. 254, at p. 259; Canadian Portland Cement Co. v. Grand Trunk and Bay of Quinte Ry. Cos., 9 Can. Ry. Cas. 209, at p. 211, followed.] In fixing a C.L. minimum, it is in the general interest to increase loading wherever reasonably possible and thereby increase the efficiency of the rolling stock. In matters of classification and tolls established trade conditions or obligations, while not of necessity and conclusive obstacles in the way of change, must be considered; it is a question of judgment what is a fair mean between the physical carrying power of the car and the public interest as affected thereby and the conditions under which business is carried on. [Western Retail Lumbermen's Assn. v. Can. Pac., Can. Northern and Grand Trunk Pacific Ry. Cos., 20 Can. Ry. Cas. 155, referred to.]

Dominion Millers Assn. et al. v. Canadian Freight Assn., 21 Can. Ry. Cas. 83.

UNJUST DISCRIMINATION—JURISDICTION—REFUND.

It is unjust discrimination, other things being equal, to charge a higher toll from one point of origin as compared with another, at practically the same distance from the same point of destination. The Board has no jurisdiction to direct a refund of a portion of a toll charged and collected under a tariff legally in force. [Montreal Board of Trade v. Grand Trunk and Can. Pac. Ry. Cos., 14 Can. Ry. Cas. 351; Dominion Sugar Co. v. Grand Trunk, Can. Pac., Chatham, Wallaceburg & Lake Erie and Pere Marquette Ry. Cos., 17 Can. Ry. Cas. 240, at p. 247, referred to.]

Midland Lumber Shippers v. Grand Trunk Ry. Co., 22 Can. Ry. Cas. 387.

[Followed in Nanaimo Board of Trade v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 92.]

UNJUST DISCRIMINATION—DISCRETION OF CARRIERS—COMPETITION OF MARKETS—EXPORT—PARITY OF PORTS.

Subject to the provisions of the Railway Act with respect to unjust discrimination, it is entirely within the discretion of carriers whether they shall or shall not fix tolls to meet the competition of markets. When export tolls have been installed the Board has directed their continuance or re-establishment to maintain a parity of ports, but the Board will not direct export tolls to be put into force where no such tolls have existed. [Montreal Produce Merchants Assn. v. Grand Trunk and Can. Pac. Ry. Cos., 9 Can. Ry. Cas. 232; British Columbia Sugar Refining Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 169 at p. 172; Canadian Lumbermen's Assn. v. Grand Trunk, etc. Ry. Cos., 10 Can. Ry. Cas. 306 at p. 319; Canadian Oil Cos. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos., 12 Can.

Ry. Cas. 350 at p. 356; Edmonton Cloverbar Sand Co. v. Grand Trunk Pacific Ry. Co., 17 Can. Ry. Cas. 95 at p. 97, followed. British American Oil Co. v. Grand Trunk Ry. Co. (Stoy Oil Case), 9 Can. Ry. Cas. 178 at p. 184; Dominion Millers Assn. v. Grand Trunk and Canadian Pacific Ry. Cos., 12 Can. Ry. Cas. 363, referred to.]

Graham Co. v. Canadian Freight Assn., 22 Can. Ry. Cas. 355.

Competition by water—Unjust discrimination.

It is not unjust discrimination nor undue or unreasonable prejudice or disadvantage under ss. 315 (5), 318 of the Railway Act, 1906, for a carrier to charge lower than normal toll from the point of shipment to a destination point owing to effective water competition, than on shipments from the same point to an intermediate point where such competition is not effective.

Chatham et al. v. Can. Pac. Ry. Co., 22 Can. Ry. Cas. 391.

Increase — Justification — Basis — Reasons — Inadequate returns —Parity—Competition.

Notwithstanding that standard tariffs of toll have heretofore been filed with and approved by the Board as required by s. 327 of the Railway Act, 1906, and that the increased tolls proposed by the applicants to be imposed under special tariffs of tolls are lower than those set out in such standard tariffs of tolls, the onus is nevertheless upon the applicants to shew cause for the increase of tolls under the present special tariffs of tolls which must primâ facie be considered to have been fixed as fair and reasonable. To justify increase in tolls under special freight tariffs of tolls the applicants must shew that the existing tolls have been found to be unremunerative; that costs have increased; or that conditions or exigencies of traffic have changed; and only such increase will be authorized as are just and reasonable under existing conditions. The Board found that railway operating expenses had necessarily increased both per mile of line and per train mile and that the percentage of increase of cost per train mile between 1899 and 1914 greatly exceeded the increase of earnings per train mile notwithstanding greatly increased traffic and many economies effected by increased locomotive power, better grades and more effective loading. Having taken into consideration the position of the three chief railways respectively which are subject to the Board's jurisdiction in Eastern Canada, the Board found that no injustice could be done the shipper by selecting the actual results of the earnings of the Grand Trunk Railway Co. as a basis of tolls; but, in so doing, the Board refused to take the capital cost of the line as carried on the company's books as a criterion, holding that traffic could not move under tolls fixed with reference to that cost, which included reconstruction charges, made inadequate allowance for depreciation and was excessive in comparison with the cost of lines recently constructed. Freight tolls in Eastern Canada should not be called upon to support investments by the Grand Trunk in the Grand Trunk Pacific or deficits upon operation of subsidiary lines in the United States, notwithstanding that these subsidiary lines supplied a large tonnage to be carried over the compaany's lines in Canada. In the interest of shippers and the public, railway companies should be allowed to charge tolls which will yield a return sufficient to provide facilities and rolling stock. The Board found that economies had been forced upon the Grand Trunk which must result in inferior accommodation and service and which could not continue without great loss and inconvenience to the shipping and traveling public. Taking for comparison the capital cost respectively of certain lines recently built and allowing 6 per cent as a fair interest return, the Board found that the earnings per mile of the Grand Trunk under existing tolls and conditions fell considerably short of the earnings required to provide adequate returns with reference to these standards. Tolls in Eastern Canada and in Western Canada should be brought to a parity, so far as this can reasonably be done. Loss of traffic by reason of competition of new lines, or the need of new lines themselves for traffic returns which would make them self-supporting, does not in itself justify increase of tolls. Advances in tolls cannot be allowed simply because the carriers require money; nor can percentage increases be authorized simply to augment revenue; each toll must be determined with regard to its reasonableness for services performed. On the facts presented, the Board found that in general a case for increase of tolls in Eastern Canada had been made out and that increases should be made where the different industries could fairly and reasonably bear such increases.

Re Eastern Tolls, 22 Can. Ry. Can. 4.

[Followed in Dominion Millers Assn. v. Grand Trunk, Can. Pac. Ry. Cos., 22 Can. Ry. Cas. 393; West Virginia Pulp & Paper Co. et al. v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 153.]

INCREASE—JURISDICTION—WAR MEASURES—LIMITATION—GENERAL ADVANTAGE OF CANADA—DISCRIMINATION—UNREMUNERATIVE—COST OF MAINTENANCE AND OPERATION.

The War Measures Act, 5 Geo. V. c. 2, does not confer on the Board any jurisdiction to increase tolls, or to advise the Governor-in-Council to increase them, in aid of the finances of carriers; the Board's jurisdiction in that regard is that given by the Railway Act. The Act 60-61 Vict. c. 5, (D.) providing for a subsidy to the C.P.R. Co. in respect of the "Crow's Nest line" and for a limitation of freight tolls on lines then in operation between Fort William and points to the west thereof, is a special Act within the meaning of s. 3 of the Railway Act, 1906. It therefore over-sides any provisions of the Railway Act inconsistent with it and limits the general jurisdiction of the Board as to tolls. The Board has no power to advance tolls on the C.P.R. within that territory beyond the maximum fixed by the special Act. The Manitoba statute (1901, c. 39) limiting tolls to be charged over lines of the C.N.R. System within that province is ultra vires as regards the C.N.R. Co., a Dominion corporation; and as regards subsidiary companies incorporated by the province and subsequently declared to be the general advantage of Canada; it is superseded by the Railway Act in so far as the two are inconsistent, and also by 1 Edw. VII. c. 53, s. 3 (D.), so that the Board's general jurisdiction under the Railway Act as to tolls is not limited or affected thereby. The Board in considering tolls to be authorized declined to give effect to an agreement to limit tolls made between a railway company and a province and confined by provincial legislation, where the company had afterwards passed under Dominion jurisdiction, and the agreement if observed would either have prevented an increase of tolls necessary in the public interest, or resulted in discriminatory lower tolls in that province as compared with other provinces with similar conditions. [Crow's Nest Pass Coal Co. v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 33, at p. 41; Regina Board of Trade v. Can. Pac. and Can. Northern Ry. Cos. (Regina Toll Case), 11 Can. Ry. Cas. 380, at p. 391, followed.] The Board can neither order nor enforce tolls which are unremunerative to the carriers without infringing the principle of the Railway Act by denying carriers a fair and just toll. An unduly low rate constitutes an unreasonable rate just as much as an unreasonably high one and the question whether a rate is unduly low or unduly high can only be determined with a knowledge of the cost entailed by the service. An agreement to limit tolls entered into by a railway compaany will not be enforced or regarded by the Board unless made binding upon the Board by valid enactment, if it is found that the tolls agreed upon are unremunerative and improvident, so that the railway cannot be properly maintained and operated. In the public interest, when tolls reserved by contract prove unreasonably low in the face of changed conditions and increased costs, the tolls must be made reasonable notwithstanding the contract. [British Columbia Pacific Coast Cities v. Can. Pac. Ry. Co. (Vancouver Interior Rates Case), 7 Can. Ry. Cas. 125, at p. 146, followed.] Holding that under 60-61 Victoria, c. 5, it could not increase rates beyond the maximum rates thereby fixed on lines of the C.P.R. Co. in operation when that Act was passed, the Board also held that to prevent discrimination the same maximum should be applied to the whole system of that company as now operated; and that similar rates must be applied to other railways in the territory affected. The Board, having regard to increased cost of maintenance and operation and finding the tolls therefore charged had been unremunerative and insufficient to ensure a proper service, authorized the railway companies concerned to submit new standard freight and passenger tariffs providing for a general increase of maximum mileage tolls on a percentage basis, subject to the Crow's Nest Pass agreement and statute (60-61 Victoria, c. 5), and to certain provisions and exceptions set out in the judgment of the Board.

Re Increase in Passenger and Freight Tolls (Increase in Rate Case), 22 Can. Ry. Cas. 49.

[Followed in Montreal & Southern Counties Ry. Co. v. Greenfield Park et al., 23 Can. Ry. Cas. 106; Hamilton Radial Electric Co. v. Hamilton, 23 Can. Ry. Cas. 114.

Measure of toll—Different schedules—Reasonableness.

The toll charged by one carrier is not necessarily a measure of what another should charge. Conversely it would appear that where different schedules are voluntarily adopted the higher toll existing on one railway is no conclusive measure of the toll properly chargeable for the same distance by the other carrier. [Dominion Sugar Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 188, at p. 192, followed.] A consideration of the tolls in themselves, as well as a comparison with those the Board has found reasonable, shews that a toll from Hagersville to Windsor on a 65 cent basis is out of line, therefore a toll not exceeding 75 cents from Hagersville to Windsor is reasonable. [Doolittle et al. v. Grand Trunk and Can. Pac. Ry. Cos. (Stone Quarry Tool Case), 8 Can. Ry. Cas. 10, followed.]

Hagersville Crushed Stone Co. v. Michigan Central Ry. Co., 22 Can Ry. Cas. 84.

Water competition—Local movement—Terminal charges.

A tariff quoting a toll from Sorel to Montreal on steel forgings "issued to meet water competition," but which does not limit the movement under it, covers either a local movement to Montreal or to the ship-side at

Montreal for export, and a further charge to cover "terminal charges" at Montreal cannot be supported under it.

Munitions & Machinery v. Quebec, Montreal & Southern Ry. Co. (Shell Forgings Case), 22 Can. Ry. Cas. 90.

INCREASE—REASON FOR—"SPREAD" BETWEEN COMPETITORS—ALL-RAIL AND RAIL AND WATER TOLLS.

The Board will not authorize an increase of remuneration in lake and rail tolls for the purpose of lessening a prohibitive "spread" between them and all-rail tolls of the same and other carriers between the same points, in order to induce part of the traffic to move all rail and so to prevent the all-rail tolls from being "cut" by a carrier having no lake and rail route and desiring to participate in the traffic. Having regard to the decision in the Eastern Rates Case (Re Eastern Tolls, 22 Can. Ry. Cas. 4), allowing an increase in general freight tolls east of Fort William and the reasons for that decision, the Board held that reasonable increases in the tolls on grain and grain products east of Fort William should be allowed, and approved revised tolls accordingly.

Dominion Millers Assn. v. Grand Trunk and Canadian Pacific Ry. Cos., 22 Can. Ry. Cas. 393.

COMPARISON—MOVEMENT—LARGE.

Tolls for crushed stone of $1.10 and 70 cents per ton from Burritts, Ontario, to Montreal, 121 miles, and to Ottawa, 34 miles, respectively, were found not to be unreasonable in comparison with other tolls in force in the same territory and the large movement of crushed stone thereunder. [Doolittle et al. v. Grand Trunk and Can. Pac. Ry. Cos. (Stone Quarry Toll Case), 8 Can. Ry. Cas. 10, at p. 13, distinguished.]

Provincial Stone & Supply Co. v. Can. Pac. Ry. Co., 22 Can. Ry. Cas. 411.

[Followed in Crushed Stone etc. v. Grand Trunk Ry. Co., 23 Can. Ry. Cas. 132.

JURISDICTION—TOLLS—INCREASE—MUNICIPAL AGREEMENTS—BY-LAW.

Where, under the Act of incorporation of a railway company, municipalities are given power to enter into franchise agreements and pass franchise by-laws, and by special Act, 7 & 8 Edw. VII., c. 117 (D), declaring such railway to be a work for the general advantage of Canada, it was enacted that the provisions of any municipal by-law relating to the company, or agreement between it and any municipality, were not to be affected, the company is bound by them, and the Board has no power to increase the tolls contrary to the terms of such agreements and by-laws. [Increase in Rates Case, 22 Can. Ry. Cas. 49, at pp. 57-60, followed.]

Hamilton Radial Elec. Co. v. Hamilton, et al., 23 Can. Ry. Cas. 114.

TRAFFIC MOVEMENT—SHORTER ROUTE—MILEAGES—DISCRETION—COMPETITION—COMMON DISTRICT.

It is the duty of a rail carrier in the interest of the shippers to take the shorter, more direct, more economical tariff movement route, but since under the present toll situation the whole of the economy is obtained by the rail carrier, the mileage via the Ladysmith transfer ought to be reduced to the mileage via the Esquimalt transfer to Nanaimo, and the mileages of stations served by the Ladysmith transfer reduced in the same manner plus the mileage from Ladysmith to destination. The main question in this case relates to the terminal toll which represents the toll quoted from points in eastern territory to those in western and vice versa, where the movement is open by water, or where the distance from water is so short that the combination rail and water toll is lower than the regular all rail toll, the Board has invariably held that carriers, in their discretion, may or may not meet water competition or competition of any form, and may elect to attempt to get business at small remuneration or do without it altogether, subject to the qualification that when competition is met the competitive toll should be extended to all points in a common district where similar operating and traffic conditions obtain. The volume of traffic moving by water into Nanaimo being very small as compared with that into Victoria, conditions are dissimilar, there is no unjust discrimination. [Nanaimo Board of Trade v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 224, reheard aand affirmed; British Columbia News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 176; Midland Lumber Shippers v. Grand Trunk Ry. Co. (Pine Lath Refund Case), 22 Can. Ry. Cas. 387, followed.]

Nanaimo Board of Trade v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 92.

DISCRIMINATION—UNDUE PREFERENCE.

A toll of 22 cents per 100 pounds on newsprint paper from Thorold, Ontario, to Chicago, Illinois, U.S.A., was not found to constitute an unjust discrimination or undue preference in favor of competitors in the Chicago market.

Ontario Paper Co. v. Grand Trunk Ry. Co., 24 Can. Ry. Cas. 177.

JURISDICTION—AGREEMENTS—LEGISLATION—APPROVAL OF BOARD.

Agreements between municipalities and a railway company do not oust the jurisdiction of the Dominion Parliament and the Board in their administration of the Railway Act and in the fixing of tolls. Inasmuch as the agreements in question have not been validated by legislation and submitted to or approved by the Board, and in view of the greatly increased costs of transportation, the Board finds the increased tolls desired by the applicant to be just and reasonable. [Re Increase in Passenger and Freight Tolls (Increase in Rate Case), 22 Can. Ry. Cas. 49; Lyons Fuel & Supply Co. v. Algoma Central Ry. Co., 23 Can. Ry. Cas. 146, followed.]

Montreal & Southern Counties Ry. Co. v. Greenfield Park, et al., 23 Can. Ry. Cas. 106.

UNJUST DISCRIMINATION—CONTRACT FIXING LOW TOLLS.

The Board will give no effect to a contract fixing a toll so unreasonably low and so out of proportion to the general scale, that it constitutes in effect unjust discrimination in favour of one shipper as against other shippers on the respondent carrier's line. The Board ordered the respondent to remove such unjust discrimination by filing tariffs providing for a fair and reasonable toll.

Lyons Fuel & Supply Co. v. Algoma Central & Hudson Bay Ry. Co., 23 Can. Ry. Cas. 146.

[Followed in Montreal & Southern Counties Ry. Co. v. Greenfield Park, et al., 23 Can. Ry. Cas. 106.

LOWER TOLLS—COMPETITION—HAULS—TERMINAL POINTS.

Under s. 315 (5) of the Railway Act, 1906, where traffic moves under substantially similar circumstances and conditions, carriers are justified in charging lower tolls to Victoria, B.C., an ocean terminal point, for the longer haul than for the shorter haul to Sidney, B.C., an intermediate point, where Victoria is, and Sidney is not, subject to competition.

Sidney Board of Trade v. Great Northern Ry. Co., 23 Can. Ry. Cas. 173.

DISCRETION — JURISDICTION — REASONABLE — COMMODITY TOLLS —MILEAGE SCALE.

The jurisdiction of the Board as to tolls concerns only their reasonableness; no matter how much the development of an industry may be in the public interest, the Board is not authorized to be an arbiter of industrial or public policy and cannot strike a low toll basis, independent of its reasonableness, but carriers may in their discretion install development tolls. [British Columbia News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 178; Massiah v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 88, at p. 90; Western Retail Lumbermen's Assn. v. Can. Pac., Can. Northern and Grand Trunk Pacific Ry. Cos., 20 Can. Ry. Cas. 155, at p. 158, followed.] Comparing the commodity mileage scale on agricultural limestone with the special commodity tolls on crushed stone, and taking into consideration that the volume of traffic of agricultural limestone to large consuming points is not comparable with crushed stone, and that the latter commodity has been granted low commodity tolls by the carriers in their discretion, it has not been established that the existing toll basis is unreasonable. [Provincial Stone & Supply Co. v. Grand Trunk Ry. Co., 22 Can. Ry. Cas., 411, at p. 413, followed.]

Crushed Stone, etc. v. Grand Trunk Ry. Co., 23 Can. Ry. Cas. 132.

C. Continuous Route; Joint Tariffs.

CONTINOUS ROUTE—JOINT TARIFF—LINE OF RAILWAY AND WATER LINE.

A line of steamships operated by a railway company running to ports reached by the line or lines of another company does not constitute therewith a continuous route within the meaning of ss. 266, 267 of the Railway Act, 1903. An application by the first-named company to compel the second company to enter into a joint tariff with it under these sections was dismissed. Ss. 253, 271 relate solely to railway traffic, and not to traffic between a line of railway and water line.

Algoma Central & Hudson Bay Ry. Co. v. Grand Trunk Ry. Co., 5 Can. Ry. Cas. 196.

INTERCHANGE OF TRAFFIC—BRANCH LINE—CONTINUOUS ROUTE.

Grand Trunk Ry. Co. v. Can. Pac. Ry. Co. and London (London Interswitching Case), 6 Can. Ry. Cas. 327.

[See note of this case under Branch Lines and Sidings.]

INTERCHANGE OF TARIFF—GENERAL INTERSWITCHING ORDER—PUBLIC INTEREST.

Application for the rescission of the judgment and order of the Board of July 20 and 25, 1905, respectively (Grand Trunk Ry. Co. v. Can. Pac. Ry. Co. and London, affirmed by the Supreme Court, 6 Can. Ry. Cas. 327), and to substitute the tolls chargeable under the General Interswitching Order of July 8, 1908:—Held, (1) that the application should be refused. (2) That since the applicant was given greater facilities than it would be entitled to under the General Order it should continue to pay the tolls now in force. Commissioner Mills concurred with the Chief Commissioner. The Assistant Chief Commissioner, dissenting, that railway companies who had special facilities at certain points might then be justified in applying to the Board for exemption from the General Order, but that such a course would be detrimental to the public interest and would weaken the benefits to the public from uniformity of practice. [Grand Trunk Ry.

Co. v. Can. Pac. Ry. Co. and London (London Interswitching Case), 6 Can. Ry. Cas. 327, affirmed.]

Can. Pac. Ry. Co. v. Grand Trunk Ry. Co. (London Interswitching Case), 13 Can. Ry. Cas. 435.

[Followed in Fergus v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 42.]

Joint tariffs—Reasonableness—Through rates—Continuous route.

The Algoma Central & Hudson Bay Ry. Co. applied to the Board for an order directing the Grand Trunk Ry. Co. to make a joint tariff with them. The steamers of the applicant railway wished to obtain a joint tariff with the Grand Trunk so as to compete for traffic from points in Ontario reached by the lines of the Grand Trunk and carry such traffic from lake ports by their steamers to ports in Northern Ontario and vice versa reached by their steamboats and railways. The Grand Trunk Ry. Co. has now a similar joint tariff arrangement with the Northern Navigation Co.:—Held, (1) that the applicant has not proved that there is a public interest involved, or (2) that the existing rate arrangement is unreasonable.

Algoma Central & Hudson Bay Ry. Co. v. Grand Trunk Ry. Co., 8 Can. Ry. Cas. 46.

Classification—Joint tariff—Continuous route—Through rate—Foreign and Canadian carriers—Refund.

Application to the Board under ss. 317, 321 (Subss. 2, 3, 4), 323, 333, 334, 336, 338 of the Railway Act, 1906, to ascertain the legal rate on crude oil from Stoy, Indiana, to Toronto. The Indianapolis Southern Ry. Co. on whose line Stoy is a station, filed with the Board on December 19th, 1906, a joint tariff making the joint fifth-class rate twenty cents per hundred pounds from Stoy to Toronto. Prior to January 1st, 1907, crude oil had no classification, but on that date the official classification coming into force in the United States placed it in the fifth class this classification being used by the G.T.R. Co. Prior, however, to the coming into force of this classification the G.T.R. Co. on November 30th, 1906, issued and filed with the Board an "exception" refusing to honour on petroleum and its products the fifth-class rate from points in the United States to points in Canada, and provided that on such traffic from frontier or junction points the local or special commodity rates would govern. The G.T.R. Co. admitted that the joint rate was not unreasonable or unprofitable to them and that the local rate was intentionally made excessive to keep out oil from the United States:—Held (1), that the "exception" filed by the G.T.R. Co. had no effect and the procedure provided by the Railway Act, 1906, s. 338, must govern. (2) That if a railway company in the United States without the approval of the connecting carrier in Canada files a joint tariff in which the latter does not desire to participate, the Canadian company should apply under s. 338 to have it disallowed, and if this is not done then the tolls provided in such joint tariff are the only tolls that can be charged until such tariff is superseded or disallowed by the Board. (3) That if the Canadian railway company desires any change to be made in any classification used in the United States for such joint tariff, it should apply under subs. 4, s. 321. (4) That the legal rate chargeable on the shipments in question is twenty cents per hundred pounds and that the G.T.R. Co. should be at liberty to refund the difference between such rate and the sum collected by it.

British American Oil Co. v. Grand Trunk Ry. Co., 9 Can. Ry. Cas. 178.

[Affirmed in 43 Can. S.C.R. 311; 11 Can. Ry. Cas. 118; referred to in British American Oil Co. v. Can. Pac. Ry. Co., 12 Can. Ry. Cas. 327; Can. Oil Co. v. Grand Trunk, etc., Ry. Co., 12 Can. Ry. Cas. 334.]

THROUGH TRAFFIC—JOINT INTERNATIONAL TARIFFS—FILING BY FOREIGN COMPANY.

Under s. 336 of the Railway Act, 1906, tariffs filed by foreign railway companies for rates on through traffic originating in foreign territory, to be carried by continuous routes owned or operated by two or more companies from foreign points to destinations in Canada, are effective and binding upon all Canadian companies participating in the transportation, although not expressly assented to by the latter, and may be enforced by the Board against such Canadian companies. Anglin, J., contra. Per Anglin, J. (dissenting): The Railway Act requires concurrence by the several companies interested as in other joint tariffs on through traffic mentioned in the Act. British American Oil Co. v. Grand Trunk Ry. Co., 9 Can. Ry. Cas. 178, affirmed.

Grand Trunk Ry. Co. v. British American Oil Co., 11 Can. Ry. Cas. 118, 43 Can. S.C.R. 311.

[Followed in Great Northern v. Can. Northern Ry. Co., 11 Can. Ry. Cas. 425; referred to in British American Oil Co. v. C.P.R. Co., 12 Can. Ry. Cas. 327; Can. Oil Co. v. Grand Trunk, etc., Co., 12 Can. Ry. Cas. 334.]

THROUGH TRAFFIC—JOINT TARIFF—FREIGHT AND PASSENGER TOLLS—CLASS AND COMMODITY TARIFFS—RAIL AND WATER ROUTE—DISCRIMINATION.

Complaint alleging that the tolls in the joint freight tariff C.R.C. No. 9, filed by the respondent for transporting traffic by a rail and water route (known as the White Pass and Yukon Route) from Skagway in Alaska, a foreign port, through a portion of British Columbia to White Horse in the Yukon Territory, by rail, and thence by water to Dawson were unreasonable and excessive. The respondent's rail and water route had four months of profitable traffic during the season of navigation from about June 1st to October 1st. It was alleged that when navigation closed the local traffic did not meet the operating expenses and the business was practically all through traffic inbound. For the purpose of relevant comparison the grades are on the whole more favourable on the Canadian Pacific Railway's Mountain Division than on the respondent's railway and the tolls on that division are the next highest to those on the respondent's railway. In both cases the business was almost all through traffic, and it was alleged that the local traffic did not pay operating expenses. The Canadian Pacific carried through traffic throughout the year on the Mountain Division. It was found impossible to ascertain upon the evidence or by an investigation of the respondent's records the true cost of the railway. The respondent offered no evidence of physical valuation of the undertaking in its present condition or of the cost of reproduction:—Held, (1) that the tariff C.R.C. No. 9, was unreasonable and excessive. (2) That through joint tariff tolls must be prepared and substituted for C.R.C. No. 9, shewing a reduction of 33⅓ per cent on passenger and freight traffic, these tolls to be a maximum to intermediate points, between the international boundary and White Horse, lower tolls to or from the said points not to be affected. (3) That the Board has only dealt with the class tariff, but will not allow a commodity tariff on ores or concentrates unjustly discriminatory against White Horse. (4) That it is equally the duty of the Board to protect capital invested in the railway by its stockholders as to protect the public against unjust tolls being charged by those operating the railway. (5) That the tolls enforced upon a railway should not be reduced if only sufficient revenue is produced to pay the proper expenses of maintenance of way and equipment, transporting of traffic, general expenses, fixed charges and a fair dividend upon the capital invested. (6) That while the ton-mile toll is not an infallible measure of the reasonableness or otherwise of a toll, it should be given due weight. [Dawson Board of Trade v. White Pass & Yukon Ry. Co., 9 Can. Ry. Cas. 190, and Conrad Mines v. White Pass & Yukon Ry. Co., 11 Can. Ry. Cas. 138, referred to.]

Dawson Board of Trade v. White Pass & Yukon Ry. Co. (No. 2), 11 Can. Ry. Cas. 402.

[Reversed in 13 Can. Ry. Cas. 527.]

Joint tariff—Freight and passenger tolls—Reduction—Earnings and operating expenses.

Application for rescission of the order of January 18th, 1911, reducing the tolls charged by the respondents by one-third. By that order the respondents were directed, upon through traffic from Skagway to White Horse, and upon local traffic between points on the portion of the railways in Canada, to substitute for their existing class and passenger tariffs new joint tariffs of freight and passenger tolls reduced by at least one-third in each case, on the rail division of their undertaking. The respondents shewed, by reference to statistics of their earnings and operating expenses, that if the proposed reduction took effect they would be unable to pay interest upon the bonded indebtedness, that no dividend could be paid upon the stock and the railway would pass into the hands of a receiver. The respondents undertook voluntarily to make some reduction in certain of the tolls charged on the freight and passenger traffic upon the rail and water divisions of the undertaking. The applicants contended that during the "boom" period the stockholders had been repaid in stock and cash dividends all the moneys originally invested:—Held (1), that the reduction in tolls directed by the said order should not be made. (2) That although it was of great importance that the public should be protected from extortionate or unreasonable transportation charges, it was equally important that capital invested in transportation companies should be permitted to earn fair and reasonable dividends. (3) That carriers should have the opportunity of earning not only enough to pay the interest upon their bonds but also a fair return upon the actual capital invested in their railways. (4) That if the stockholders had been repaid in dividends the whole of the original investment that was no reason why they should not continue to receive a fair return upon the capital invested. (5) That the voluntary changes in the tolls might be put into effect in order to see what the result would be, upon which any further intervention by the Board would depend, after the next year's operations. [Dawson Board of Trade v. White Pass and Yukon Ry. Co., 9 Can. Ry. Cas. 190, referred to; Dawson Board of Trade v. White Pass and Yukon Ry. Co., 11 Can. Ry. Cas. 402, reheard and reversed.]

Dawson Board of Trade v. White Pass and Yukon Ry. Co. (No. 3), 13 Can. Ry. Cas. 527.

Foreign railway companies—Joint tariff—Continuous route—Through traffic—Traffic by water.

The complainants alleged that the respondents, the White Pass & Yukon Ry. Co., were charging excessive tolls for transporting traffic by a land and water route (known as the White Pass & Yukon route) from Skagway in Alaska through a portion of British Columbia to White Horse in the Yukon Territory and thence by water to Dawson. The respondents were incorporated in England and holding all the stock of, owned, controlled and operated the Pacific & Arctic, the British Columbia, Yukon and the British Yukon Ry. Cos., the first incorporated by the State of West Virginia, the second by the Province of British Columbia, and the third by the Dominion of Canada, and also the British Yukon Navigation Co., authorized to operate steamers on the Yukon river leading from White Horse to Dawson:—Held (1), that under s. 336 of the Railway Act, 1906, the Board had power to order the various railway companies and the controlling railway to file a joint tariff for the land portion of the route from Skagway to White Horse. (2) That the British Yukon Ry. Co. could be called upon to file a joint tariff for the continuous route from Skagway to White Horse. (3) That the British Columbia Yukon, a provincial railway connecting with the British Yukon, a Dominion railway, is by s. 8 (b), as regards through traffic carried over it, subject to the Railway Act. (4) That the Board had jurisdiction under s. 336 to call upon the White Pass & Yukon Ry. Co. to require the Pacific & Arctic Ry. Co., a foreign railway, to enter into the necessary agreements for filing a joint tariff for the said route. (5) That the Board itself under the amendment to the Railway Act, 8 & 9 Edw. VII. c. 32, s. 11, might require the Pacific & Arctic to enter into such agreements. (6) That the respondents as controlling and operating the two Canadian Ry. Cos. (authority to construct or operate not being required) are by the said amendment made subject to the Railway Act. (7) That the Board had no jurisdiction over the tolls of traffic delivered to the respondents at Skagway destined to Dawson, the water route between White Horse and Dawson not being part of a "continuous route in Canada" under s. 333. (8) That under s. 338, subs. 2, the Board had power to disallow or otherwise deal with the tolls in such joint tariff. (9) That the question of reasonable rates should be dealt with after the joint tariff has been filed.

Dawson Board of Trade v. White Pass & Yukon Ry. Co. et al., 9 Can. Ry. Cas. 190.

[Referred to in Dawson Board of Trade v. White Pass & Yukon Ry. Co., 11 Can. Ry. Cas. 402, 13 Can. Ry. Cas. 527; distinguished in Residents of Massett v. Grand Trunk Pacific Steamship Co., 23 Can. Ry. Cas. 121.]

TOLLS ON WOOD PULP—INCREASE IN TOLLS—REFUND.

On a complaint that the tolls on wood pulp should be reduced from three cents per hundred pounds in carloads to two cents the latter rate having been in force for many years, and for a rebate of tolls paid under the former tariff. The railway company submitted that the increase was justified on account of the increased cost of operation and that the former toll did not give sufficient revenue to pay operating expenses:—Held, upon the evidence that the increased toll should be disallowed; the two cent toll being fair and reasonable. Held, that the increased toll being lawful according to the tariff in force when the complainant's shipments moved, the Board had no jurisdiction to grant a refund.

Davy v. Niagara, St. Catharines & Toronto Ry. Co., 9 Can. Ry. Cas. 493. [Reversed in 43 Can. S.C.R. 277, 11 Can. Ry. Cas. 109.]

INTERNATIONAL THROUGH TRAFFIC—REDUCTION OF JOINT RATE.

On a complaint in respect to a joint tariff, between the appellant company and the Michigan Central Railroad Co., under which a rate of three cents per hundred pounds was charged on pulpwood in car lots for carriage from Thorold, in Ontario, to Suspension Bridge, in the State of New York, the Board decided that the rate should be reduced and ordered the appellants to restore a joint rate which had previously existed of two cents per hundred pounds for carriage of such goods between the points mentioned. The Michigan Central Co. over whose railway the goods had to be carried from the point where the appellants' railway made connection with it at the international boundary to the foreign destination, was not made a party to the proceedings before the Board. On appeal by leave of a Judge to the Supreme Court of Canada:—Held, per Fitzpatrick, C.J., and Idington and Duff, JJ., that the Board had no jurisdiction to make the order. Per Girouard, Davies and Anglin, JJ.: As the Michigan Central Co. was not a party to the proceedings, it was not competent for the Board to make the order. The appeal was allowed without costs. [Davy v. Niagara, St. Catharines & Toronto Ry. Co., 9 Can. Ry. Cas. 493, reversed.]

Niagara, St. Catharines & Toronto Ry. Co. v. Davy, 11 Can. Ry. Cas. 109, 43 Can. S.C.R. 277.

[Followed in Davy v. Niagara, St. Catharines, etc., 12 Can. Ry. Cas. 61.]

JOINT TARIFF—INCREASE IN TOLLS—FOREIGN RAILWAYS.

A renewal of the former application that the tolls on pulp should be reduced from three cents per hundred pounds in carloads to the former rate of two cents (see 9 Can. Ry. Cas. 493). The N. St. C. & T. Ry. Co. submitted that the increase was justified because of the increased cost of maintenance and operation, that when the present proprietors took over the railway changing the motive power from steam to electricity, it was in a bankrupt condition, and the increase in this pulp toll, along with increases of other tolls, were necessary to put it on a paying basis, but a complete statement shewing a comparison of cost of operation during the periods before and since the increase of tolls and other necessary information as to increase in the volume of traffic was not given, and the Chief Traffic Officer reported that the pulp tariff was the only one that seemed to have been revised. The M.C. Ry. Co. submitted that it was only getting one cent of the three cent toll for a twelve-mile haul, and that its revenue should not be further reduced. The applicant submitted that pulp had gone down in value since last year, when the toll was increased, and that on his shipments of pulp consisting of 50 per cent water, he would be charged freight for 2,000 lbs., only getting paid for 900 lbs. of pulp:—Held (1), that the Board had no jurisdiction to grant the application; the portion of the toll charged by the M.C. Ry. Co. for services in the United States being under the sole control of the Interstate Commerce Commission. (2) That if the Interstate Commerce Commission was of opinion that the toll charged by the M.C. Ry. Co. should be reduced, then orders might be made by the two Commissions establishing a proper joint tariff, and the applicant should bring complaint before the Interstate Commission. (3) That the N.St.C. & T. Ry. Co. had not justified the increase in the toll for the Canadian portion of the carriage and the former rate should be restored. [Niagara, St. Catharines & Toronto Ry. Co. v. Davy, 43 Can. S.C.R. 277, 11 Can. Ry. Cas. 109, followed.]

Davy v. Niagara, St. Catharines & Toronto and Michigan Central Ry. Cos. (No. 2), 12 Can. Ry. Cas. 61.

[Followed in Dominion Sugar Co. v. Can. Freight Assn., 14 Can. Ry. Cas. 188.]

JOINT TARIFF—COMPETITION—INTERMEDIATE POINT—CONTINUOUS ROUTE.

On a complaint that the Great Northern Ry. Co. charged higher tolls from Nelson to Gateway, B.C., than from the same point to Fernie, B.C., or Spokane, in the United States, the distance from Nelson to Fernie, via Canadian Pacific short line being 197 miles, by Great Northern 476 miles. The goods were shipped from Nelson (the basing point) at a toll based on a combination of tolls on Spokane, thereby making a joint tariff and through toll by a continuous route over Canadian and foreign lines. A joint tariff at a through rate over a continuous route between Gateway and Nelson, B.C., had not been filed as required by s. 335 of the Railway Act, 1906:—Held, that under s. 315 (5) of the Act, although Gateway is an intermediate point, Fernie is a competitive point; the charging of a higher local toll to Gateway than the through toll to Fernie was not a violation of this subsection. Held, that under ss. 314 (5) and 335 of the Act, the failure to file a joint tariff with the Board, rendered the collection of tolls illegal.

Bonners' Ferry Lumber Co. v. Great Northern Ry. Co., 9 Can. Ry. Cas. 504.

Export and domestic traffic—Through rate—Competition—Rail and water toll—Long and short haul.

The applicant, operating a line of steamers from St. John and Halifax, in winter, and Montreal, in summer, to Puerto, Mexico, thence via the Tehuantepec National Ry. Co., across the Isthmus to Salina Cruz, and thence by the Canadian Mexican Steamship Line to British Columbian points, applied for an order directing the respondents to apply the established export tariff basis to cover shipments of general merchandise and commodities from eastern Canadian points via Montreal, Halifax and St. John to British Columbian points and that the export, or, in the alternative, the furtherance tolls, should be applied in order to enable the applicants to compete more successfully with respondents on all rail traffic across the continent to points in British Columbia and that respondents should not charge the higher domestic toll to further their own interest on shipments from eastern Canada to the said ocean ports. A joint tariff has not yet been prepared between the applicants and the railway across the Isthmus for freight from the said ocean ports to British Columbia, but the tolls over this route require to be approved by the Mexican Government, which owns a half interest in the said railway. The applicants submitted that unless the lower export toll was applied to their Canadian traffic for British Columbia then that and the all-rail traffic of the respondents would go via New York, and would be lost to the respondents as well as the applicants. The respondents submitted on the contrary, that if a lower export toll was granted they would lose their all-rail long haul across the Continent to British Columbian points, and that export tolls are only granted on shipments destined for British and foreign markets, and not for a Canadian market:—Held (1), assuming, but without deciding that the Board has jurisdiction, that the application should be refused, with leave to any one interested to apply for relief, upon a different state of facts being presented.

Elder, Dempster Steamship Co. v. Grand Trunk and Can. Pac. Ry. Cos., 10 Can. Ry. Cas. 334.

[Followed in Great Northern Ry. Co. v. Can. Northern Ry. Co., 11 Can. Ry. Cas. 425.]

Discrimination—Joint tariff—Through traffic—Continuous route—Local tolls—Refund.

An application to declare that the respondent had unjustly discriminated against crude-oil shipments from Stoy, Illinois, to Toronto, by refusing to carry them at the legal rate of twenty cents in accordance with the published tariff and Official Classification, that the respondent had overcharged the applicants, and that Order No. 7093 made upon the complaint of the applicants against the Grand Trunk Ry. Co. was binding upon the respondent. See 9 Can. Ry. Cas. 178. The Indianapolis Southern Ry. Co. a United States carrier connecting with the respondent, published a 5th class toll of twenty cents, and named the respondent as a party participating in this joint tariff, effective January 20th, 1907, it then filed a

Supplement effective October 18, 1907, and a further Supplement, effective May 14, 1908, providing that the tolls named in the above described joint tariff did not apply on petroleum and its products to Canadian points, but that the tolls would be on a basis of lowest combination to and from Canadian gateways, and that no through tolls were in effect. The applicants asked a declaration as to what was the legal toll during the period that their shipments moved. The respondent alleged that the only claim made was for a refund of the difference between the twenty-cent toll and that actually charged:—Held (1), that the Supplement filed by the United States carrier had not the effect of destroying the joint tariff with its through joint twenty cent rate which was in force on and subsequent to January 20, 1907, and applied to the shipments in question. (2) That to change a joint tariff it must be superseded by another. (3) That the Board had no power to order any refund, it can only declare what the legal rate was or should have been, leaving the parties to whatever redress they are entitled to under the circumstances. [British American Oil Co. v. Grand Trunk Ry. Co., 9 Can. Ry. Cas. 178, and Grand Trunk Ry. Co. v. British American Oil Co., 43 Can. S.C.R. 311, 11 Can. Ry. Cas. 118, referred to.]

British American Oil Co. v. Can. Pac. Ry. Co., 12 Can. Ry. Cas. 327.

[Followed in St. Lawrence Pulp & Lumber Corp. v. Can. Pac. Ry. Co., 24 Can. Ry. Cas. 107.]

FOREIGN RAILWAYS—LONG AND SHORT HAUL—JOINT TARIFF—CONTINUOUS ROUTE.

On an application directing the respondent to agree and concur in a joint tariff of \$2.50 per ton on coal from Duluth to Winnipeg. The applicant, a foreign railway company, had been transporting coal from Duluth via Emerson in Manitoba and the Canadian Northern Ry. Co. to Winnipeg at a joint tariff of \$3.00 per ton. It now desires to reduce this tariff to \$2.50 per ton to enable it to divert the coal traffic from Fort William and Port Arthur, the Canadian lake ports, to Duluth, a similar foreign port, and thus secure the long haul from the latter port to Emerson confining the Canadian Northern to the short haul from Emerson to Winnipeg. The respondent had expended large sums of money in establishing a plant at Port Arthur, and the Canadian Pacific Ry. Co. at Fort William, to handle coal, and if this traffic was diverted it would seriously injure these cities. The respondent contended that it would lose the long haul of coal cars to Winnipeg, and haul instead empty grain cars:—Held (1), that if the applicant filed the proposed tariff it would be disallowed. (2) That there was already a reasonable through route and toll. (3) That the Board, if it has jurisdiction, would only interfere in the public interest to establish more than one route with a joint toll between two points. (4) That the Board will not allow the Railway Act to be used to divert traffic from the lines of the respondent to those of the applicant, so that the applicant may obtain the revenue earned by the respondent from such traffic without any benefit to the public. [Grand Trunk Ry. Co. v. British American Oil Co., 43 Can. S.C.R. 311, 11 Can. Ry. Cas. 118; Can. Northern Ry. Co. v. Grand Trunk and Can. Pac. Ry. Cos., 7 Can. Ry. Cas. 289; Elder, Dempster Steamship Co. v. Grand Trunk and Can. Pac. Ry. Cos., 10 Can. Ry. Cas. 334, followed; Didcot, Newbury & Southampton Ry. Co. v. London & South Western Ry. Co., 10 Ry. & C. Tr. Cas. 9; In re Through Passenger Routes, 16 I.C.C.R. 310; Baer Brothers v. Missouri Pacific Ry. Co., 17 I.C.C.R. 225; Spring Hill Coal Co. v. Erie Ry. Co., 18 I.C.C.R. 508, referred to.]

Great Northern Ry. Co. v. Can. Northern Ry. Co., 11 Can. Ry. Cas. 424.

Discrimination—Overcharge—Joint tariff—Continuous route.

An application directing the respondents to cease unjust discrimination in overcharging on shipments of petroleum and its products from certain points in the United States to Toronto, and for an order prescribing proper tolls at fifth-class rates in accordance with the United States Official Classification No. 29, effective January 1, 1907. Prior to that date petroleum and its products had no classification, but by this classification they were given a fifth-class rating. The respondents and their connections in the United States had filed supplements to prevent the fifth-class rate from applying to these commodities and had framed a joint tariff consisting of the sum of the local tolls charged by the several carriers intending (1) either that the Canadian carriers should be protected from the lower oil tolls prevailing in the United States, or (2) that the Canadian refiners should be protected against the importation of crude oil from the United States:—Held, (1) that the latter object was illegal; while railway companies were entitled to fair and remunerative tolls they had no right to so adjust them as to protect or assist any one industry or section of the public such as oil refiners. (2) That under s. 336 of the Railway Act, 1906, the traffic should be covered by a joint tariff. (3) That when an initial carrier had filed a tariff under s. 336 it became a joint tariff even if composed of the sum of the locals and could not be changed unless superseded by another or disallowed by the Board under s. 338. (4) That the supplements to the various tariffs could not have the effect of a joint tariff because any of the tolls could be changed by the participating carriers at their option. (5) That since the United States Official Classification No. 29 was used, without any order or direction of the Board, contrary to the provisions of subs. 4 of s. 321 of the Railway Act it was binding on the respondents until superseded or disallowed as above stated (3). (6) That petroleum and its products should have been given a fifth-class rating at the time the shipments in question moved. [British American Oil Co. v. Grand Trunk Ry. Co., 9 Can. Ry. Cas. 178, and Grand Trunk Ry. Co. v. British American Oil Co., 43 Can. S.C.R. 311, 11 Can. Ry. Cas. 118, referred to.]

Canadian Oil Co. v. Grand Trunk and Can. Pac. Ry. Cos., 12 Can. Ry. Cas. 334.

Discrimination—Commodity rate—Through traffic—Foreign carriers.

Application directing the respondents to reduce their commodity rate on oil and its products from 35 cents per hundred pounds to 22 cents from basing points in the United States, St. Paul, etc., to Winnipeg or a proportionate reduction to points beyond Winnipeg in Manitoba, Saskatchewan and Alberta not to exceed the rates from Fort William to the same points. The commodity rate from the basing points in the United States, St. Paul, etc., and from those in Canada, Fort William and Port Arthur to Winnipeg, is 35 cents per hundred pounds, through competition, but from the Canadian basing points to other points in Manitoba, Saskatchewan and Alberta it is lower than from those in the United States. The applicants submitted that the commodity rate from St. Paul should be lowered or the rate from Fort William raised so that a proportionate reduction would result in their favour to western points beyond Winnipeg as against traffic via Fort William, presumably in competition with oil refiners in eastern Canada. The respondents submitted that such a reduction or raising of rates to Winnipeg and points west thereof would be unjust discrimination in favour of the applicants and would divert the traffic to foreign competing railways. The respondents further submitted that they were enabled to lower these rates because a single-line haul for substantially similar distance has advantages over a two or more line haul, its net revenue is a unit coming to it alone, while in the latter case the net revenue must be subdivided between the participants in the carriage:—Held, that the Board had no jurisdiction to order a reduction in rates from initial points in the United States and the application must be dismissed. [Can. Northern Ry. Co. v. Grand Trunk and Can. Pac. Ry. Cos. (Muskoka Rates (No. 2)), 10 Can. Ry. Cas. 139, at pp. 147, 148, followed.]

Continental, Prairie & Winnipeg Oil Cos. v. Can. Pac., etc., Ry. Cos., 13 Can. Ry. Cas. 156.

[Followed in Shippers by Express v. Can. North., etc., Ry. Cos., 14 Can. Ry. Cas. 183; Fullerton, etc., Co. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 79; Saint David's Sand Co. v. Grand Trunk and Michigan Central Ry. Cos., 17 Can. Ry. Cas. 279; West Virginia Pulp & Paper Co. et al. v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 153.]

Through traffic—Foreign express companies—Initial carrier—Local and through tolls—Joint through tariffs.

Application for a joint through tariff of tolls from points in the United States contiguous to Spokane to Regina, Sask., of $2 per 100 lbs. on berries, small fruit, and vegetables:—Held (1), that under s. 336 of the Railway Act, 1906, the Board had no jurisdiction to order the initial foreign carrier to file or concur in joint tariffs at the request of the applicant. (2) That while the Board could not require the foreign carrier to either file or concur in filing joint tariffs, it might require the respondent to file same if the foreign carrier concurred and vice versa if such joint tariffs were thought by the Board to be fair and reasonable. (3) That since the foreign carrier had not concurred, and the difference in toll was such that it would be unfair to require the Canadian carrier to accept all the shrinkage necessary to bring the toll down to $2; this application must be refused: [Stockton and Mallinson v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 165, distinguished.]

Stockton et al. v. Dominion Express Co., 13 Can. Ry. Cas. 459, 3 D.L.R. 848.

Latitude in regulating rates—Board—Express tolls over two or more lines—Sum of the locals.

Traffic handled by two or more companies over connecting lines may well bear a heavier toll than if handled by one only and where two companies charged tolls equal to the sum of the locals over their respective lines, the Board refused to interfere in the absence of proof that the charges were excessive, notwithstanding that a lower through rate had formerly been charged when one express company operated over both lines.

Shippers, etc. v. Can. Northern, etc., Ry. Cos., 14 Can. Ry. Cas. 183.

Through tolls—Increase—Joint tariffs.

Joint tariffs increasing the through tolls on pulpwood from shipping points in Eastern Canada to manufacturing points in the Eastern States of the United States were authorized by the Board. The proposed through tolls on pulpwood which were not attacked as unreasonable per se through being held down by water competition, and being lower than the tolls between the same points on other rough forest products (in force some time without complaint) may fairly be considered reasonable. The right of the carrier to consider the resultant traffic as a reason for the lower toll on the original commodity where hauled to points of manufacture on the carrier's line is well established. [Michigan Sugar Co. v. Chatham, Wallaceburg & Lake Erie Ry. Co., 11 Can. Ry. Cas. 353, followed.] Where the carrier reduced the local tolls on the raw material even lower than on firewood, having the assurance of the second haul of the pulp or paper products, and under the schedules in force prior to September 2, 1912, the proportions accruing to the Canadian carriers from through shipments to the United States are lower than the tolls paid by Canadian manufacturers, there is no unjust discrimination against their foreign competitors, the tolls for Canadian delivery being based on the resultant traffic. In the apportionment of the through tolls between two or three and, in some cases four carriers, it is reasonable that the joint through tolls should be on a higher basis than for similar distances on the line of a single company. [Continental Prairie & Winnipeg Oil Cos. v. Can. Pac. et al. Ry. Cos., 13 Can. Ry. Cas. 156, followed.] No attention need be paid to the consideration that the toll charged upon the raw material should be such as would conserve the resources of the country. If the toll is an improper one, with which the Board is alone concerned, there is no reason why it should be allowed to stand because the foreign manufacturer absorbs the increase instead of the Canadian producer.

International Paper Co. v. Grand Trunk, etc., Ry. Cos. (Pulpwood Case), 15 Can. Ry. Cas. 111.

[Referred to in Eastern Townships Lumber Co. v. Temiscouata Ry. Co., 16 Can. Ry. Cas. 260; followed in Auger et al. v. Grand Trunk and Can. Pac. Ry. Cos. 19 Can. Ry. Cas. 401; West Virginia Pulp & Paper Co., et al. v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 153.]

Superseding tariff—Commodity—Mileage.

Under s. 338 of the Railway Act, 1906, the Board is not a mere recorder of supersession, but has the right to exercise discretion based upon its judgment of the facts, and thereupon to disallow a superseding tariff, and declare the former joint tariff to be still in force.

Robertson v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 108.

Joint tolls—Reasonableness.

The Board, following the General Interswitching Order, approved a joint toll of 50 cents per ton on sand over a distance of 12.3 miles (3 miles over M.C.R. and 9.3 miles over G.T.R.) from the sand pit to Merritton, subject to a minimum weight of 60,000 lbs. [Doolittle et al. v. Grand Trunk and Can. Pac. Ry. Cos. (Stone Quarry Toll Case), 8 Can. Ry. Cas. 10, at p. 13; Continental, Prairie and Winnipeg Oil Cos. v. Can. Pac. Ry. Co., 13 Can. Ry. Cas. 156, at p. 159; Canadian Manufacturers' Assn. v. Canadian Freight Assn. (General Interswitching Order), 7 Can. Ry. Cas. 302, followed.]

Saint David's Sand Co. v. Grand Trunk and Michigan Central Ry. Cos., 17 Can. Ry. Cas. 279.

Difference in tolls or quantities—C.L. and L.C.L. traffic—Train load.

While it is justifiable to base differences in a toll on quantity as between C. L. and L.C.L. traffic movement, it is not justifiable to make a difference in a toll based on the distinction between car-load and train-load movements.

Saint David's Sand Co. v. Grand Trunk and Michigan Central Ry. Cas. 17 Can. Ry. Cas. 279.

Connecting carriers—Joint, local and net tolls.

The Board refused to reduce the tolls on the respondent power company's line, on account of its extraordinary operating conditions, but made a reduction in the respondent railway company's toll by following the practice in Eastern Canada, where connecting carriers having no joint tolls, each takes one cent from its local toll, subject to a minimum net toll. [Fullerton Lumber & Shingle Co. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 79, distinguished.]

Stoltze Mfg. Co. v. Can. Pac. Ry. and Western Canada Power Cos., 17 Can. Ry. Cas. 282.

CONNECTING CARRIERS—SEPARATE LEGAL ENTITIES—CONSTRUCTION TOLL—THROUGH BILL OF LADING.

When two connecting carriers are separate legal entities, and the former operates and tariffs the latter as a separate property, the latter is under no obligation to put a construction toll of the former into effect on its line, but the shipper is entitled, on a through bill of lading to the benefit of the through toll to the point of delivery. [See Wylie Milling Co. v. Can. Pacific and Kingston & Pembroke Ry. Cos., 14 Can. Ry. Cas. 5.]

Oliver-Serim Lumber Co. v. Canadian Pacific and Esquimalt & Nanaimo Ry. Cos., 17 Can. Ry. Cas. 324.

THROUGH LOCAL AND JOINT TOLLS—DIVISION—UNREASONABLE—JURISDICTION.

The Board has no jurisdiction over the tolls for the transportation of commodities by carriers in a foreign country, and a joint toll in excess of the sum of the locals being prima facie unreasonable, it is within its jurisdiction to direct that a Canadian carrier should not, as its division of a through toll, exceed its local. [Re Joint Freight and Passenger Tariffs, 10 Can. Ry. Cas. 343; Continental Prairie and Winnipeg Oil Cas. v. Can. Pac. et al. Ry. Co., 13 Can. Ry. Cas. 156 at p. 161, followed.]

Fullerton Lumber & Shingle Co. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 79.

[Distinguished in Stoltze Mfg. Co. v. Can. Pac. Ry. and Western Canada Power Cos., 17 Can. Ry. Cas. 282.]

JOINT—LOCAL—LEGAL.

It is a fundamental principle that when a toll, joint or limited to points situate on one line of railway, has come into force under the Railway Act, it is the only legal toll in respect of the traffic and between the points mentioned.

Montreal Board of Trade v. Can. Pac. Ottawa & New York and Intercolonial Ry. Cos., 18 Can. Ry. Cas. 6.

JOINT—SUM OF THE LOCALS—UNREASONABLE—UNJUST DISCRIMINATION.

To change a joint toll in excess of the sum of the locals is primâ facie unreasonable and unjustly discriminatory, and the onus of disproof should, in individual complaints be on the carrier or carriers concerned. [Re Joint Freight and Passenger Tariffs, 10 Can. Ry. Cas. 343, followed.]

Montreal Board of Trade v. Can. Pac., Ottawa & New York, and Intercolonial Ry. Cos., 18 Can. Ry. Cas. 6.]

INTERCHANGE OF TRAFFIC—INITIAL CARRIER—LONG HAULS.

The general principle followed by the Board in dealing with applications for interchange of traffic is that the initial carrier is entitled to the long haul on its lines subject to the limitation that the resultant route is reasonable and practical, and involves no back haul on increased cost to the public. North Bay is a point at which the respondent should interchange traffic with the applicant. [Can. Northern Ry. Co. v. Grand Trunk and Can. Pac. Ry. Cos. (Muskoka Rates Case, Nos. 1 and 2), 7 Can. Ry. Cas. 289, 10 Can. Ry. Cas. 139, followed; Great Northern Ry. Co. v. Can. Northern Ry. Co., 11 Can. Ry. Cas. 424, referred to.]

Can. Northern Ry. Co. v. Grand Trunk Ry. Co. (North Bay Case), 20 Can. Ry. Cas. 84.

JOINT TOLLS—SINGLE LINE.

A joint toll of 47 cents per ton (3 cents over the single line haul toll) was established on coal over the Michigan Central and Niagara, St. Catharines & Toronto Ry. Cos. from the Niagara frontier to St. Catharines and adjacent points, in the proportion of 27 cents to the Michigan Central and 20 cents to the Niagara, St. Catharines & Toronto Ry. Co.

Niagara, St. Catharines & Toronto Ry. Co. v. Canadian Retail Coal Assn., 21 Can. Ry. Cas. 28.

THROUGH TRAFFIC—JOINT TOLLS—SPECIAL FREIGHT TARIFFS—DISCRIMINATION.

The scheme of the Act is that traffic moving over the lines of two or more carriers shall be considered and carried as through traffic on one bill of lading; and not that local tolls shall be filed as proportionals and the traffic moved under separate bills. The duty is cast upon the carriers to establish joint tolls for such traffic. This duty can be enforced under s. 334 of the Railway Act, 1906, and the Board will not approve special freight tariffs in contravention of this principle made for the purpose of carrying out special arrangements between carriers and individual shippers. Special freight tariffs and commodity tolls permitted by the Act are just as much subject to the provisions relating to equality and to joint toll movements as are the original standard tariffs. Artificial or unjustly discriminatory tolls must not be made in order to take away from distributing points or manufacturing centres the natural advantages of their geographical situation; nor to favour a manufacturer in one locality against his competitor in another. Traffic must be moved on the tariffs filed—no more and no less; and these tariffs must be free of unjust discrimination and comply not only with the general sections, but, in cases where applicable, with the joint traffic sections of the Act. The Board disallowed as contrary to ss. 326(3), 333 and 337 of the Act a special freight tariff filed by a carrier to cover carriage of a specified commodity over its own lines, Toronto to Regina only, where the toll was made applicable only to shipments originating at Sarnia (on another railway), and was less than the toll by standard tariff from either Sarnia or Toronto to Winnipeg, an intermediate point. The Board will not give effect to an application to compel a railway company to file a tariff fixing lower rates than the tariff in force, unless the existing tariff be shewn to be unreasonable. The principle that larger quantities may be carried at tolls proportionately lower than those for smaller quantities of the same commodity is properly recognized in the lower toll approved for C.L. as against L.C.L. shipments; but it should not be extended, as any further application of it would handicap the smaller dealer in competition with the larger.

Imperial Oil Co. v. Canadian Freight Assn., 20 Can. Ry. Cas. 171.

JOINT TOLLS—SUM OF THE LOCALS—INCREASE—TRAFFIC.

The railway companies having filed cancellations of a large number of joint tariffs, the effect being to increase tolls by substituting the sum of the local tolls for the joint tolls formerly in force, the Board intimated that the action was objectionable and would not be allowed. Subsequently, after a hearing, it directed that the joint tolls and service be maintained and that the companies should file joint tariffs setting out tolls based upon the increase authorized by the Board in Re Eastern Tolls, 22 Can. Ry. Cas. 4.

Can. Freight Assn. v. Montreal Board of Trade, 22 Can. Ry. Cas. 88.

Division of through Toll—No test of reasonableness—Local toll.

The through toll or the division of the through toll between two points is not necessarily a test of the reasonableness of the local toll to an intermediate point.

Lake Superior Paper Co. v. Algoma Central & Hudson Bay Ry. Co., 22 Can. Ry. Cas. 361.

[Followed in Can. Pac. Ry. Co. and Spanish River, etc., 22 Can. Ry. Cas. 381.]

International Traffic—Joint—Through—Local—Continuous Route.

The rule that a joint or through toll between any two points properly filed is the only legal toll in respect of the particular traffic between such points, applies also to international traffic, where a joint tariff of tolls for a continuous route has been filed for part of the distance, the through toll for the continuous route plus the local toll to the point beyond the end of the continuous route is the only toll that can be charged.

General Traffic Service Co. v. Can. Pac. Ry. Co., 22 Can. Ry. Cas. 372.

Joint tolls—Local—Mail order business—Distributing points.

Lower or joint tolls will not be granted to a retail dealer, in a distant point (such as Winnipeg), seeking to do a mail order business (L.C.L. lots) through a well-established distributing point (such as Edmonton, 848 miles from Winnipeg), into territory tributory thereto (the Peace River Country), which would give the shipper a toll lower than the local toll at the distributing point (Edmonton). [Re Western Tolls (Western Tolls Case), 17 Can. Ry. Cas. 123, at p. 156; Re Edmonton, Dunvegan & B.C. Ry. Co. (Mountain Scale Tolls Case), 22 Can. Ry. Cas. 1, referred to.]

Newman v. Edmonton, Dunvegan & B. C. Ry. Co. (Winnipeg-Edmonton Mail Order Case), 22 Can. Ry. Cas. 399.

Joint tariff—Continuous route traffic—Movement—Foreign country—Reduction—Refund.

Under s. 336 of the Railway Act, 1906, a joint tariff of tolls must be filed covering a continuous route traffic movement from a point in a foreign country into Canada where a through toll is attacked as being unreasonable because it is in excess of the sum of the locals the Board has jurisdiction only so far as to direct a reduction for the future, but possesses no power to direct a refund of a portion of the toll charged.

Security Traffic Bureau v. Can. Northern Ry. Co., 22 Can. Ry. Cas. 414.

Initial Carrier—Routing—Lowest combination.

A shipment of household goods, originating at Kingsville, consigned to Bridgeburg, Ontario, was delivered by the Windsor, etc., Co. to the C.P.R. Co. at Lake Shore Junction, and by that line delivered to the G.T.R. Co. at London—the initial carrier, without instructions from the owners having chosen a route at a higher toll than that available via Michigan Central Ry. from Lake Shore Junction to Bridgeburg, and being under obligation, in the absence of specific instructions as to the routing of its own lines, to send the goods forward on the lowest toll combination available, should make adjustment accordingly.

Sinclair v. Windsor, Essex & Lake Shore Rapid Ry. Co., 18 Can. Ry. Cas. 344.

CONCURRENCE—SUPERSEDED OR DISALLOWED TOLL.

Under s. 338 (1) of the Railway Act, 1906, no joint toll can be disregarded by the carriers until it has been superseded or disallowed by the Board. If the carriers desire to get relief from concurrence in joint tolls they must apply to the Board making out a case justifying the extension of such relief.

Re Joint Tolls and Concurrence, 19 Can. Ry. Cas. 379.

JURISDICTION—INTERNATIONAL JOINT TARIFFS—MOVEMENTS.

As a matter of practice the Board in the past has dealt with international joint tariffs having regard to the outward movement only, and speaking generally it has not interfered in any way with any tariff properly filed under the practice prevailing in the United States directly applying to a joint movement into Canada.

Auger et al. v. Grand Trunk and Can. Pac. Ry. Cos., 19 Can. Ry. Cas. 401.

[Followed in West Virginia Pulp & Paper Co. et al. v. Can. Pac. Ry. Co. 23 Can. Ry. Cas. 153.]

CONNECTING CARRIERS—SHORTEST ROUTES.

Connecting carriers should route shipments of vegetables and fruit via the shortest possible mileage routes and file appropriate tariffs of tolls.

Similkameen Farmers Institute v. Can. Pac. and Great Northern Ry. Cos., 24 Can. Ry. Cas. 125.

CONNECTING CARRIERS—THROUGH TOLLS—DIVISION—RESHIPMENT.

The division of the through toll as between connecting carriers on hauls over two or more lines is a matter of domestic concern, and so long as the through toll is not unreasonable, it does not matter to the public how it is divided. [Continental, Prairie & Winnipeg Oil Cos. v. Can. Pac. Ry. Co. et al., 13 Can. Ry. Cas. 156 at p. 159; Manitoba Dairymen's Assn. v. Dominion and Can. Northern Express Cos., 14 Can. Ry. Cas. 142 at p. 148; International Paper Co. v. Grand Trunk, Can. Pac. and Can. Northern Ry. Cos. (Pulpwood Case), 15 Can. Ry. Cas. 111; Blind River Board of Trade v. Grand Trunk, Can. Pac. Ry., Northern Navigation and Dominion Transportation Cos., 15 Can. Ry. Cas. 146; Re Western Tolls (Western Tolls Case), 17 Can. Ry. Cas. 123 at p. 203; Dominion Sugar Co. v. Grand Trunk, Can. Pac. Chatham, Wallaceburg & Lake Erie and Pere Marquette Ry. Cos., 17 Can. Ry. Cas. 231, at p. 239 (reheard, 17 Can. Ry. Cas. 240 at p. 244); Auger & Son, and D'Auteuil Lumber Co. v. Grand Trunk and Can. Pac. Ry. Cos., 19 Can. Ry. Cas. 401; Re Eastern Tolls (Eastern Tolls Case), 22 Can. Ry. Cas. 4, followed.] Considering the tolls approved on analogous forest products on single line hauls, where the two Canadian carriers have no reshipment advantages and revenues accruing therefrom, an increase in tolls of 1 cent per 100 lbs. on pulpwood from territory west of Montreal via Ottawa or St. Polycarpe Jct. to Rouse's Point is not unreasonable.

West Virginia Pulp & Paper Co. et al. v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 153.

D. Competitive Tariffs.

See also (B) p. 757.

SPECIAL RATES ON BOTTLES IN CARLOADS—FOREIGN COMPETITION—REDUCTION.

Bottles in carloads were formerly carried from Wallaceburg to Toronto, Hamilton, Berlin and Montreal at special rates less than the regular basis of fifth-class. Upon the Railway Act, 1903, coming into force on 1st February, 1904, these special rates were increased. The Sydenham Glass Company applied for the restoration of the former special rates. It appeared that at the present rates the Glass Company cannot maintain its position in the home market against foreign competition:—Held, that the rates should be reduced to the following scale, viz., to London 8 cents, to Toronto, Hamilton and Berlin 13 cents, to Montreal 23½ cents.

The Sydenham Glass Company Case, 3 Can. Ry. Cas. 409.

COOPERAGE STOCK LOCAL DELIVERY AND EXPORT—LUMBER—MILEAGE TARIFFS—COMPETITION.

The complainants object to the increase in the rates on cooperage stock between points in Eastern Canada, and more especially to the increase from Wallaceburg and other Western Ontario points to Montreal for local delivery and for export:—Held, that rates on cooperage stock should not exceed rates on common lumber according to the mileage lumber tariffs of the railways, but such rates when specially reduced on account of water competition, etc., need not necessarily apply to cooperage stock. From points in Western Ontario to Montreal, the maximum rate for local delivery was fixed upon the evidence at 16½ cents, and for export, including "terminal," at 18 cents per hundred pounds.

Sutherland—Innes Co. et al. v. Pere Marquette, Michigan Central, et al. Ry. Cos. (Cooperage Stock Rates Case), 3 Can. Ry. Cas. 421.

EXCESSIVE TOLLS—WATER COMPETITION—SHORTER AND LONGER DISTANCES.

On a complaint to the Board under s. 315 (5) of the Railway Act, 1906, that the rate on a shipment of apples from Picton to Smith's Falls was excessive as compared with the rate from Picton to Ottawa; Smith's Falls being an intermediate point located on the Rideau Canal and the distance from Picton to Smith's Falls being shorter than the distance from Picton to Ottawa:—Held (1), that the complaint should be dismissed, the rate to Ottawa being a compelled rate based on water competition. (2) That a shipper could not demand less than normal rates on account of water competition which a railway company, in its own interest, did not choose to meet.

Plain v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 222.

[Followed in Can. Oil Co. v. Grand Trunk, etc., 12 Can. Ry. Cas. 351; Nanaimo Board of Trade v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 224, 231.]

SUGAR TOLLS—COMPETITION—EQUALIZATION.

Application for an order directing respondents to reduce the tolls on sugar from Vancouver to Winnipeg and other Manitoba points, so as to equalize them with the tolls charged by the Pere Marquette Ry. Co. on the same commodity from Wallaceburg, Ontario, to the same points:—Held, that it is entirely within the discretion of one railway company whether it will meet the competition of the tolls charged by another, and the application must be refused. [Montreal Produce Merchants' Assn. v. Grand Trunk and Can. Pac. Ry. Cos., 9 Can. Ry. Cas. 232, at p. 240; Lasalle Paper Co. v. Michigan Central Ry. Co., 16 I.C.C. Rep. 149, at p. 150;

Lancashire Patent Fuel Co. v. London & North-Western Ry. Co., 12 Ry. & C. Tr. Cas. 79, followed. Written arguments were submitted by the complainant and the railway company.]

British Columbia Sugar Refining Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 169.

[Followed in Can. Oil Cos. v. Grand Trunk, etc., 12 Can. Ry. Cas. 351; Dominion Sugar Co. v. Freight Assn., 14 Can. Ry. Cas. 188; Graham Co. v. Canadian Freight Assn., 22 Can. Ry. Cas. 355.]

Tolls—Export—Domestic—Water competition.

Complaint of noncompliance with order No. 10528 directing the respondents to file tariffs of tolls on lumber to Montreal for export "which in general shall be lower than the tolls on lumber to Montreal." The tolls in dispute were those from Ottawa district and certain points in the Province of Quebec. The former Ottawa domestic toll was proportionately lower than some of the other tolls in the Province of Quebec on account of water competition. The former export toll from that district was, generally speaking, one cent lower than the domestic toll. Under the new tariff these tolls were made the same except in two cases. The respondents explained that the tolls for export from points in the Province of Quebec not controlled by water competition were controlled by market conditions in Montreal which were regulated by shipments from the Ottawa district:—Held (1), that the words "in general" were put in Order No. 10528 intentionally because the Board could not in every case require the export toll to be lower than the domestic, even if, in certain individual cases, the former tolls might, or might not, have been reasonable. (2) That the tolls from the Ottawa district were low in comparison with other tolls and the respondents should not be required to make a still lower toll for export than the domestic toll. (3) That from points in the Province of Quebec north and east of Montreal not affected by water competition of the Ottawa river the tolls for export should be reduced so that the same difference should exist between the present as existed between the former domestic and export tolls. [Canadian Lumbermen's Assn. v. Grand Trunk et al. Ry. Cos., 10 Can. Ry. Cas. 306, referred to.]

Canadian Lumbermen's Assn. v. Grand Trunk and Can. Pac. Ry. Cos. (Export Tolls on Lumber (No. 2)), 11 Can. Ry. Cas. 344.

[Referred to in Cox & Co. v. Can. Pac. Ry. Co., 13 Can. Ry. Cas. 20.]

Carload rating—Commodity tolls—Light and bulky commodities—Competition.

An application for a reduction in the minimum carload weight of toasted corn flakes from London to points west of Port Arthur and Fort William. The applicant's shipments to points in Eastern Canada were covered by a special tariff on the basis of a minimum weight of 20,000 pounds per car. On western shipments the applicant made no complaint as to the class rating, but contended that the minimum carload weight should be reduced from 30,000 to 24,000 lbs. per standard 36-foot car. The applicant dealt only in toasted corn flakes, a light and bulky commodity which never goes above 15,000 lbs. per car, contended that he was subject to unfair competition with regard to similar dealers in grain products and cereals, who by mixing other commodities brought the carload weight up to 30,000 lbs., but still remained under the same class rating as the applicant. The respondent submitted that a minimum carload weight was fixed to correspond with the loading capacity of a standard car and provided for a uniform rating to all kindred articles; that carload rating and minimum weight were inseparably connected, and the combination of the two would result in a fair and equitable carload toll. In cases of this kind the respondent established a commodity toll at a higher class or toll with a minimum approximating to the actual carload weight, thus insuring to the carrier the same earnings as would be obtained from the carriage of commodities of the same class. The applicant stated that his western shipments were nearly all C.L., but the Chief Traffic Officer of the Board reported that in practice there was no C.L. rating, the L.C.L. rating applying on any quantity shipped to Western Canada:—Held, that without changing the rating the minimum carload weight for a standard car of flaked or cooked cereals should be reduced so as not to exceed 24,000 lbs.

Battle Creek Toasted Corn Flake Co. v. Canadian Freight Assn., 12 Can. Ry. Cas. 11.

TOLLS ON GAS HOUSE COKE—INCREASE—COMPETITION.

An application complaining of an advance in the freight tolls on gas house coke from Black Rock to Hamilton, and other Ontario points. The respondent increased the tolls on coke on the Canadian end of the haul from 50 cents per ton to 80 cents and from 80 cents to $1.00 from Black Rock to Hamilton and Toronto respectively. The Consumers' Gas Co. claimed that on account of having to pay 53 cents per ton duty and 60 cents freight tolls from the Suspension Bridge to Toronto on bituminous coal from which coke is manufactured, they were at a disadvantage of $1.13 per ton in competition with the Buffalo Gas Co. They had therefore asked that the tolls from Toronto to Hamilton and Brantford be lowered to meet the tolls of the Buffalo Gas Co. from Buffalo to the same points. Instead of complying with this request the respondents had increased the Buffalo-Hamilton coke toll by 30 cents per ton:—Held, that nothing was shewn justifying this increase, and these increases must be cancelled and the old tolls restored.

Myles v. Grand Trunk Ry. Co., 12 Can. Ry. Cas. 289.

TOLLS ON GRAIN—DISCRIMINATION—SPECIAL JOINT TOLLS—COMPETITION.

A complaint that the increase in the tolls in the special and competitive joint freight tariffs on grain and grain products in C.L. lots to points in the Maritime Provinces, were unjustly discriminatory. The railways stated that there were three kinds of tolls in these tariffs which might be denominated as (a) Special joint tolls or "normal" tolls. (b) Competitive joint tolls. (c) Competitive joint "furtherance" tolls. The so-called "normal" tolls are lower than the other class tariffs and cover the bulk of the rail points in the Maritime Provinces. The present basis of the "normal" tolls develops from the arrangement arrived at between the railways and the Dominion Millers' Assn. in 1905. The Chief Traffic Officer reported that the normal tolls were in accordance with this agreement:—Held (1), that the increase in the competitive joint tolls and competitive joint "furtherance" tolls was due to lessened competition, and that it was within the discretion of the railways to vary these tolls within the limits fixed by the "normal" tolls provided such increases were not unjustly discriminatory, which had not been shewn in this case. (2) That in shipments east of Montreal of grain products the same arbitraries should be applied from Montreal as are applied by the Canadian Pacific in arriving at through rates from Fort William. (3) That if competition forces the tolls of a railway below its normal basis, it follows that when the competition is less effective the railway may bring its tolls up more closely to such basis.

Dominion Millers' Assn. v. Grand Trunk and Can. Pac. Ry. Cos., 12 Can. Ry. Cas. 363.

[Followed in Dominion Sugar Co. v. Can. Freight Assn., 14 Can. Ry. Cas. 188; Bowlby v. Halifax & S. W. Ry. Co., 20 Can. Ry. Cas. 231; Regina Board of Trade v. Can. Pac. Ry. Co., 22 Can. Ry. Cas. 315.]

MAGAZINES AND PERIODICALS—COMPETITION—DISCRIMINATION.

Application directing the respondent to establish a flat toll of one cent per pound on magazines and periodicals from Vancouver to out-of-town dealers in competition with the Post Office Department. The respondent submitted and the applicant admitted that at the present time there would not be very much profit to the carrier in the experimental toll applied for:—Held (1), that it was entirely in the discretion of the respondent whether competition should be met or not. (2) That the Board had no jurisdiction to require the respondent to enter into any such competition. (3) That the right to a reasonable profit to the carrier as well as to the shipper must be recognized. (4) That it is the policy of the Railway Act that, subject to the prohibition of unjust discrimination there should, in the public interest, be elasticity in toll making. (5) That the Board was not justified in ordering the fixing of experimental tolls since it has not been established that the tolls charged are unreasonable. [Express Traffic Assn. v. Canadian Manufacturers Assn. and Boards of Trade of Toronto, Montreal and Winnipeg, 13 Can. Ry. Cas. 169; Florida Fruit and Vegetable Co. v. Atlantic Coast Line Ry. Co., 17 I.C.C.R. 560, followed.]

British Columbia News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 176.

[Followed in Massiah v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 88; Roberts v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 350; Western Retail Lumbermen's Assn. v. Can. Pac., Can. Northern and Grand Trunk Pacific Ry. Cos., 20 Can. Ry. Cas. 155; Southern Alberta Hay Growers v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 226; Nanaimo Board of Trade v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 92; Crushed Stone, etc. v. Grand Trunk Ry. Co., 23 Can. Ry. Cas. 132; Waterloo v. Grand Trunk Ry. Co., 2[illegible] Can. Ry. Cas. 143.]

TOLLS ON LUMBER—COMPETITION—REDUCTION.

Application directing the respondent to charge the same tolls on the applicants' shipments from Fort William to Vancouver as were charged their competitors in British Columbia shipping in the opposite direction. The applicants alleged that some commodities such as pine, clear cedar, sash, doors, etc., bearing a 55 cent Vancouver-Fort William toll came into competition with them in the Fort William market. They claimed that the Vancouver-Fort William toll of 45 cents per 100 lbs. on the cheap soft lumber such as fir, hemlock, larch, spruce, and common cedar should be applied to hardwood lumber and flooring from Fort William to Vancouver which now was charged 80 cents per 100 pounds. The respondent submitted that the normal lumber toll was the clear cedar toll of 55 cents per 100 pounds:—Held (1), that hardwood flooring should not have the same rating as cheap soft lumber, being a more valuable commodity with the exception of fir. (2) That this, however, did not justify so great an existing difference and a toll of 55 cents per 100 pounds should be established from Fort William to Vancouver common points.

Seaman, Kent Co. v. Can. Pac. Ry. Co., 13 Can. Ry. Cas. 420.

REASONABLENESS—INCREASE OF PREVIOUSLY EXISTING RATES—ONUS.

Where special circumstances have operated for a time, e.g., effective water competition, to induce a carrier to give a low rate, the burden of disproving unreasonableness is not necessarily upon the carrier when the rate is subsequently increased.

Dominion Sugar Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 188.

FOREIGN ROAD—TOLLS AND RATES—REASONABLENESS.

A carrier is not obliged to meet a lower rate made by a competing foreign road, and failure to meet it is not necessarily evidence of the unreasonableness of the higher rate. [Davy v. Niagara, St. Catharines & Toronto and Michigan Central Ry. Cos., 12 Can. Ry. Cas. 61; Dominion Millers' Assn. v. Grand Trunk and Can. Pac. Ry. Cos., 12 Can. Ry. Cas. 363; Canadian Portland Cement Co. v. Grand Trunk & Bay of Quinte Ry. Cos., 9 Can. Ry. Cas. 209; British Columbia Sugar Refining Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 169, followed.]

Dominion Sugar Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 188.

[Followed in Hudson Bay Mining Co. v. Great Northern Ry. Co., 16 Can. Ry. Cas. 254; Hagersville Crushed Stone Co. v. Michigan Central Ry. Co., 22 Can. Ry. Cas. 84.]

ALL RAIL AND LAKE AND RAIL—ROUTES—COMPETITION—DISCRIMINATION—EAST AND WESTBOUND.

The tolls for the lake and rail route being on a competitive basis and the all-rail route eastbound having the advantage of one cent over the rail portion of the route westbound to Winnipeg there was no unjust discrimination. The Board is concerned with seeing that tolls are on a relatively equal basis. It is not its function to equalize costs of production and upon the evidence a case for reduction in tolls was not made out. [Canadian Portland Cement Co. v. Grand Trunk and Bay of Quinte Ry. Cos., 9 Can. Ry. Cas. 209, followed.]

Imperial Rice Milling Co. v. Can. Pac. Ry. Co., 14 Can. Ry. Cas. 375.

[Followed in Hudson Bay Mining Co. v. Great Northern Ry. Co., 16 Can. Ry. Cas. 254.]

COMPETITION BY WATER.

In the case of a compelled toll based on water competition, it is the privilege of a carrier, in its own interests, to meet water competition, but it is not the privilege of the shipper to demand less than normal tolls because of such competition which railway in its discretion does not choose to meet. [Plain v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 223; Canadian Oil Cos. v. Grand Trunk Can. Pac., and Can. Northern Ry. Cos., 12 Can. Ry. Cas. 350, followed.]

Blind River Board of Trade v. Grand Trunk, etc., Cos., 15 Can. Ry. Cas. 146.

[Followed in Dominion Sugar Co. v. Grand Trunk, etc., Ry. Cos., 17 Can. Ry. Cas. 231; Nanaimo Board of Trade v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 224; Bowlby v. Halifax & S. W. Ry. Co., 20 Can. Ry. Cas. 231; Boards of Trade of Montreal and Toronto et al. v. Canadian Freight Assn., 21 Can. Ry. Cas. 77; West Virginia Pulp & Paper Co. et al. v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 153.]

CARRIERS—DISCRETION—COMPETITION BY WATER—UNJUST DISCRIMINATION.

The Board has on many occasions decided that the extent to which carriers may meet water competition, as long as there is no unjust discrimination, is within their own discretion. [Canadian Lumbermen's Assn. v. Grand Trunk, et al. Ry. Cos., 11 Can. Ry. Cas. 306, followed.]

Canadian Lumbermen's Assn. and Montreal Board of Trade v. Grand Trunk, et al. Ry. Cos., 17 Can. Ry. Cas. 102.

CARRIERS—DISCRETION—REDUCTION OF TOLLS—COMPETITION BY WATER—UNJUST DISCRIMINATON.

Carriers may, in their discretion, meet effective water competition from one point to other points by reducing their tolls, and it is not unjust discrimination for them to charge higher tolls from another point having a limited efficiency in such competition to these points. [Blind River Board of Trade v. Grand Trunk et al. Cos., 15 Can. Ry. Cas. 146, followed.]

Dominion Sugar Co. v. Grand Trunk, Can. Pac., Chatham, Wallaceburg & Lake Erie and Pere Marquette Ry. Cos., 17 Can. Ry. Cas. 231.

[Followed in West Virginia Pulp & Paper Co. et al. v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 153.]

TOLLS—REDUCTION—COMPETITION BY WATER—UNJUST DISCRIMINATION.

A carrier by rail may be justified in reducing tolls from one point to another to meet effective water competition between those points, notwithstanding that the lowered toll appears discriminatory as against a third point, which is not affected by such competition, and which is therefore subject to higher tolls, but a continuance of the competitive toll, after the water competition ceases or is suspended (e.g., in winter), constitutes unjust discrimination against such third point. [Dominion Sugar Co. v. Grand Trunk, et al. Ry. Cos., reheard and reversed; Montreal Board of Trade v. Grand Trunk and Can. Pac. Ry. Cos., 14 Can. Ry. Cas. 351; Blind River Board of Trade v. Grand Trunk et al. Cos., 15 Can. Ry. Cas. 146, followed.]

Dominion Sugar Co. v. Grand Trunk, Canadian Pacific et al. Ry. Cos., 17 Can. Ry. Cas. 240.

[Followed in West Virginia Pulp & Paper Co. et al. v. Can. Pac. Ry. Co., 23 Can. Ry. Cas. 153.

UNJUST DISCRIMINATION—COMPETITION BY WATER.

Where the underlying principle of competition by water affects the whole toll structure, a point unaffected by such competition is not unjustly discriminated against in not receiving as favourable tolls as points that are affected.

Cowichan Ratepayers Assn. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 395.

THROUGH—IMPORT—COMPETITION—FOREIGN PORTS AND CARRIERS.

Where china clay from Cornwall, England, for Canadian delivery, moves under through bills of lading at a through toll to the point of destination, any change advancing the rail carriers' import toll representing part of the through movement would result in the Canadian carriers not being able to hold the business in competition with foreign ports and rail carriers quoting a lower through toll, and where the point of production of the Canadian product is from 60 to 80 miles further than Montreal from the majority of the western destinations, and a two line haul has to be employed as against one, the Board will not make the local joint toll from the point of Canadian production equal to the Montreal import toll to the same points of destination.

Canadian China Clay Co. v. Grand Trunk, Canadian Pacific and Can. Northern Ry. Cos., 18 Can. Ry. Cas. 347.

[Followed in Roberts v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 350.]

DISCRETION—COMPETITION BY WATER—NORMAL TOLLS.

It is in the carrier's discretion whether it will meet water competition, and it is not the privilege of the shipper to demand less than normal tolls because of such competition, which the carrier in its own interest does not choose to meet. [Plain v. Can. Pac. Ry. Co., 9 Can. Ry. Cas. 222; Blind River Board of Trade v. Grand Trunk et al. Cos., 15 Can. Ry. Cas. 146, followed.] Where the carrier is subject to effective water competition in varying degree, and also to potential water competition it is in its discretion whether it shall meet it and the fact that it has met the competition at one point does not place it under any obligation to meet it at another point nor is the toll as it is put in to meet such competition to one point a necessary measure of the toll to another. [Dominion Millers' Assn. v. Grand Trunk and Canadian Pacific Ry. Cos., 12 Can. Ry. Cas. 363, at p. 368; Re Western Tolls (Western Tolls Case), 17 Can. Ry. Cas. 123, at pp. 161, 162, followed.]

Bowlby v. Halifax & South Western Ry. Co., 20 Can. Ry. Cas. 231.

DISCRETION—ROUTES—WATER COMPETITION.

Rail carriers engaged in the business of transportation via a rail and water route in competition with an all-water route may, in their discretion, meet water competition if they see fit, and may also determine the extent to which they shall meet it, and the Board cannot interfere with the tariff of tolls filed. [Blind River Board of Trade v. Grand Trunk et al. Cos., 15 Can. Ry. Cas. 146, followed.]

Boards of Trade of Montreal and Toronto et al. v. Canadian Freight Assn., 21 Can. Ry. Cas. 77.

WATER COMPETITION—EFFECTIVE AND LESS EFFECTIVE.

It is not contrary to the Railway Act that carriers should meet water competition in a measure when it is effective and afterwards meet it in a less degree when it is less effective.

Dominion Canners et al. v. Canadian Freight Assn. (Canned Goods Tolls Case), 22 Can. Ry. Cas. 312.

DISCRETION—WATER COMPETITION.

Carriers may in their discretion meet water competition by reducing tolls; they may also in their discretion restore tolls to a normal basis when water competition ceases. [Dominion Millers Assn. v. Grand Trunk and Can. Pac. Ry. Cos., 12 Can. Ry. Cas. 363, at p. 368, followed.]

Regina Board of Trade v. Can. Pac. Ry. Co., 22 Can. Ry. Cas. 315.

REDUCTION—WATER COMPETITION—INCREASE TO NORMAL.

Tolls reduced by a railway company to meet water competition may, at the discretion of rail carrier, be brought up more closely to the normal level when water competition becomes less effective. [Dominion Millers Assn. v. Grand Trunk and Can. Pac. Ry. Cos., 12 Can. Ry. Cas. 363, at p. 368; Re Western Tolls (Western Freight Rates Case), 17 Can. Ry. Cas. 123, at pp. 123, 124, 159, 166, followed; Canadian Oil Cos. v. Grand Trunk et al. Ry. Cos., 12 Can. Ry. Cas. 350, at p. 351; Blind River Board of Trade v. Grand Trunk et al. Cos. 15 Can. Ry. Cas. 146; Boards of Trade of Montreal and Toronto and Canadian Manufacturers Assn. v. Canadian Freight Assn., 21 Can. Ry. Cas. 77, referred to.]

Boards of Trade of Western Cities and Canadian Manufacturers' Assn. v. Canadian Freight Assn., 22 Can. Ry. Cas. 324.

WATER COMPETITION—DISCRETION—REASONABLE—UNJUST DISCRIMINATION —C.L.—TEMPORARY REDUCTION.

A carrier is not obliged to meet water competition, and is free in its discretion to take out low competitive tolls provided there is no unjust discrimination, and the tolls made effective are reasonable in themselves. The Board refused to restore a toll on rice in carloads (60,000 lbs. minimum) of 65 cents per 100 lbs. from Vancouver and Victoria to Toronto and Montreal points, in place of a toll of 75 cents (30,000 lbs. minimum), temporarily reduced on account of water competition.

Martin & Robertson and Imperial Rice Milling Co. v. Canadian Freight Assn., 24 Can. Ry. Cas. 141.

E. Interswitching; Demurrage.

See also (B) p. 757; Interchange of Traffic.

DEMURRAGE CHARGES—STANDARD TARIFF—REASONABLENESS.

By the tariff of tolls approved by the Governor-in-council under the Railway Act, 1888, railway companies were authorized to charge higher tolls than by a special tariff filed under the Railway Act, 1903, which specifically provided for car service or demurrage charges. The latter were also recognized by the classification rules authorized by the Board and in force at the time in question:—Held, that the company not having sought to charge the maximum tolls approved by the Governor-in-council (of the nature of a standard tariff), must be understood as having accepted the goods for carriage at lowest rates conditional upon its right to make a charge for demurrage. Held, that the rate charged was prima facie reasonable and that no order should be made against the railway company.

Duthie v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 304.

[Approved in Robinson v. Can. Northern Ry. Co., 19 Man. L.R. 306.]

COMPETITIVE AND NONCOMPETITIVE TRAFFIC—INTERSWITCHING—JOINT TARIFF—REFUND.

Upon complaints by shippers and consignees at various points as to the practice of adding to the tariff rates of the railway company carrying to a particular place the switching charge of another company to which the traffic is transferred for carriage and delivery at another point in or near the same place, and in cases of such tansfer absorbing these extra charges where the traffic originates at competitive points (i.e., competitive traffic), while adding the charges when the point of origin is noncompetitive (i. e., noncompetitive traffic):—Held (1), that a railway company's tariffs to and from particular places should, in the absence of indication to the contrary, be read as covering only traffic originating at and for delivery upon its own tracks and connecting sidings within its own terminals, and not as including traffic originating at or for delivery at or near the same places upon the lines of another carrier. (2) That a reasonable additional rate should be payable for switching (i.e., the service for the short carriage on receipt or delivery). (3) That while the company carrying such traffic for the long distance should not be obliged to absorb the whole of such switching charge, it may not necessarily be debarred from absorbing the whole of such charges, provided this does not involve unjust discrimination or preference and in case of competitive traffic it may do so. (4) Held, also, that two such companies may be required to treat such traffic as joint traffic and to establish traffic therefor under the Railway Act, 1906, s. 333, and the joint rate may be less than the sum of the two rates, and each or one of the companies required to accept less than its full rates. It had long been the practice of two railway companies to absorb switching charges in respect of traffic upon their respective lines to and from Toronto received or delivered on the line of the other (in respect of noncompetitive freight). Without any change of tariffs this practice was recently abandoned and the switching charges added to the regular tariff rates. This practice, it was shewn, originated upon the construction of the junior company's lines into Toronto, when it had to receive or deliver its traffic wholly or mainly upon the tracks of the senior company and was practically compelled to bear the switching charges therefor. As the junior company established and enlarged its terminals, and acquired industrial sidings, the senior company followed the same practice. Upon complaint being made of this change and an application for a refund of such charges:—Held, that although the continuance of the practice afforded some evidence of its reasonableness it was not conclusive, that an exception could not be made in the case of Toronto, that the two companies were not bound to continue the practice and all claims for refunds should be disallowed. [Laning-Harris Coal & Grain Co. v. A. T. & S. F. R. Co., 12 I.C.C. Rep. 479; Leonard v. C.M. & St. Pr. Co., 12 I.C.C. Rep. 492; London Interswitching Case, 6 Can. Ry. Cas. 327, followed.] Upon the report of the Chief Traffic Officer the Board fixed the basis of such joint switching rates and ordered, dividing noncompetitive traffic into two classes, that (1) for switching performed upon orders of the shipper or consignee after the shipment has reached the terminal of the contracting carrier, the additional toll should not be more than 20 cents per ton for any distance not over 4 miles, with a minimum of $3 and a maximum of $8 per car, the whole of such charge being paid by the shipper or consignee; and (2) where the traffic is so consigned by the shipper as to indicate and involve switching service by another company at the time of shipment then the consignee or shipper should only be charged with 50 per cent of such charges. An order of the Board defining "Interswitching" and "Contracting Carrier" and embodying the above basis was issued.

Canadian Manufacturers Assn. v. Canadian Freight Assn. (Interswitching Rates Case), 7 Can. Ry. Cas. 302.

[Followed in McMahon v. Canadian Freight Assn., 16 Can. Ry. Cas. 230; Fonthill Gravel Co. v. Grand Trunk, etc. Ry. Cos., 17 Can. Ry. Cas. 248; St. David's Sand Co. v. Grand Trunk and Michigan Central Ry. Cos., 17 Can. Ry. Cas. 279; Re General Interswitching Order, 19 Can. Ry. Cas. 376; referred to in Laidlaw Lumber Co. v. Grand Trunk Ry. Co., 8 Can. Ry. Cas. 192; distinguished in Anchor Elevator, etc. v. Can. North., etc. Ry. Cos., 9 Can. Ry. Cas. 175; inapplicable in Red Mountain Ry. Co. v. Columbia & West. Ry. Co., 9 Can. Ry. Cas. 224.]

INTERSWITCHING CHARGES—REFUND.

Charges for interswitching collected prior to 1st September, 1908, although paid under protest, cannot be recovered back. [Canadian Manufacturers' Assn. v. Canadian Freight Assn., 7 Can. Ry. Cas. 302, referred to. Dominion Concrete Co. v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 514, followed.]

Laidlaw Lumber Co. v. Grand Trunk Ry. Co., 8 Can. Ry. Cas. 192.

INTERSWITCHING CHARGES—THROUGH RATE—STOPOVER PRIVILEGE—INTERMEDIATE AND TERMINAL POINTS—REFUND.

Upon a complaint to the Board that excessive interswitching charges were made by the C.P.R. Co. for the transfer of cars from the line of the C.N.R. Co. to the elevators of the complainants. The complaints arose with reference to traffic originating upon the lines of the C.N.R. to be carried by them at a through rate to Fort William or Port Arthur when delivered in transit to the elevators of the complainants upon the stop-over privilege of 1 cent per 100 pounds:—Held (1), that the interswitching order of July 8th, 1908, did not apply, that the charge of $5.00 per car made by the C.P.R. for interswitching was reasonable and tariffs should be filed accordingly. (2) That the C.N.R. could not be called upon to absorb any of this charge, the provisions of the interswitching order of July 8th, 1908, only applying to terminal and not to intermediate points. (3) That refunds in excess of the charge of $5.00 already paid could not be directed, the railway companies charging the tolls called for in their tariff. [Canadian Manufacturers' Assn. v. Canadian Freight Assn. (Joint Switching Rates Case), 7 Can. Ry. Cas. 302, distinguished.]

Anchor Elevator & Warehousing and Northern Elevator Cos. v. Can. Northern and Can. Pac. Ry. Cos., 9 Can. Ry. Cas. 175.

[Followed in Taylor and Canadian Flour Mills Co. v. Canadian Pacific et al., Ry. Cas., 19 Can. Ry. Cas. 264.]

INTERSWITCHING CHARGES—THROUGH FREIGHT TRAFFIC—REDUCTION OF TOLLS—HIGHER GRADE ORE.

The R.M. Ry. Co. applied to the Board for a variation of its order fixing the tolls to be paid them for interswitching services performed on through traffic of ore from the Le Roi Mines to the "transfer track" of the C. & W. Ry. Co. The Board had on the application of the Columbia and Western fixed at $3.50 and subsequently reduced to $3.00, per carload, the tolls for interswitching paid to the Red Mountain. The variation to raise the tolls was sought on the ground that higher grade ore should pay a higher toll and a less movement of cars was not so profitable as a larger:—Held (1), that the application should be refused, the conditions not having changed and the car movement considered when the order was made. (2) That the order must be held to have been properly made and the tolls to be fair and proper until the contrary was conclusively shown. (3) Held, further that the application could not be entertained because the proprietors of the Le Roi Mines who were interested parties, had not been notified. (4) That the Columbia and Western should absorb any increase in the tolls charged for interswitching. (5) That the general interswitching order of 8th July, 1908, Canadian Manufacturers' Assn. v. Canadian Freight Assn (Joint Switching Rates Case), 7 Can. Ry. Cas. 302, does not cover the present case.

Red Mountain Ry. Co. v. Columbia & Western Ry. Co., 9 Can. Ry. Cas. 224.

THROUGH RATE—DEMURRAGE CHARGE—STOP-OVER CHARGE—REASONABLE RATE.

Upon a complaint against a charge of one cent per hundred pounds made by the Canadian Pacific Ry. Co. on grain and grain products in carload lots consigned to Cartier "for orders" and a like charge made by the Grand Trunk Ry. Co. on lumber and forest products in carloads from British Columbia consigned to Sarnia Tunnel "for orders." It appeared that the railway companies had previously made no charge for this stop-over privilege, except a per diem charge of 25 cents a day for the first 48 hours' delay and the usual charge for demurrage of $1 per day on cars delayed over 48 hours, and shippers were allowed to ship freight at a through rate to a certain intermediate point and there await further instructions from the consignee as to final point of destination:—Held (1), that the tariff imposing the additional stop-over charge of 1 cent per hundred pounds should be disallowed. (2) That this stop-over privilege was originally taken into consideration as an element in fixing a reasonable per diem rate and that a stop-over charge of 25 cents per diem per car for the first 48 hours, and the car service toll of $1 a car for each additional 24 hours be substituted for the charge complained of.

Montreal Board of Trade and Fullerton Lumber Co. v. Can. Pac. and Grand Trunk Ry. Cos. (Cartier Stop-over Case), 9 Can. Ry. Cas. 227.

SWITCHING AND HANDLING TRAFFIC—COMPETITIVE PLANTS—EQUALITY.

Application of the railway company to fix the toll for switching and handling traffic to and from the respondents' spur, two and a half miles north of Hespeler. The applicants relied on a similar order made in the case of the Pilon spur on the Canada Atlantic Ry. near Casselman, where an additional charge of $3.00 per car was allowed, on the increased cost of construction, on the increased cost of operation on account of grade, and that the $3.00 per car which the respondents had paid under protest did not cover cost of operation. The respondents contended that they were not bound by the Pilon order, of which they had no notice, there was a discrimination of $6.00 per car as compared with free service to competitive plants between stations on the line from Guelph to Galt:—Held, that under s. 315 (4) of the Railway Act, 1906, it is required that all competitive industries should be treated alike. Held, that the railway company were not entitled to make an extra charge for switching services.

Grand Trunk Ry. Co. v. Christie, Henderson & Co., 9 Can. Ry. Cas. 502.

[Followed in Pilon v. Grand Trunk Ry. Co., 16 Can. Ry. Cas. 433, Hepworth Silica Pressed Brick Co. v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 9.]

INTERCHANGE SWITCH—INTERSWITCHING CHARGES.

An application by the town of Brampton for an order directing the railway companies to provide and construct an "interchange switch" at the intersection of the lines of the said railway companies. The traffic officers of the Board reported that the railway companies had very few joint tariffs, so that if a firm located on the tracks of one company, desired to ship or receive traffic to or from points on the line of the other, it had either to team the traffic to the station of the other or pay the two local rates to the nearest junction point where the interchange could be made, that although this traffic originated at a common point the railway companies refused to absorb the tolls charged for interswitching competitive traffic, but if the interchange switch was established the traffic in question would then necessarily become strictly competitive and the provisions of the General Interswitching Order, 7 Can. Ry. Cas. 302, would apply automatically; the traffic which might be interchanged if the connection was made was estimated at from 150 to 200 cars:—Held (1), that the business situation justifies the order for this connection. (2) That it is the duty of railway companies, within reason, to furnish interchange facilities to shippers at the point of intersection of their respective lines.

Brampton v. Grand Trunk and Can. Pac. Ry. Cos. (Brampton Interchange Case), 10 Can. Ry. Cas. 173.

PRIVATE SIDING AND WAREHOUSE—FREIGHT SHEDS—TOLL FOR SWITCHING—REFUND.

A railway company after placing a carload of freight at the consignee's warehouse desired to inspect its contents, but this was objected to by the consignee. The company then returned the car to its freight sheds and after inspection notified the consignee that the car was ready for delivery at its own teaming track, or would be placed at his warehouse upon payment of the toll for switching or "new delivery." The consignee having paid the toll applied for its refund, contending that inspection should take place before delivery, that it was inconvenient for inspection to be made at his private warehouse and the company had no right to use his property for its own purposes. The company submitted that inspection of carloads at private warehouses was recognized in the classification and was a practice followed for the protection of shippers, that it was also a saving of time and enabled the company to make quick delivery:—Held (1), that no definite rule could be laid down as to the point at which inspection should take place. (2) That although a railway company, under subs. 2 of s. 400 of the Railway Act, 1906, has the right to make inspection, it has no right to use private property for that purpose to the detriment or inconvenience of the owner. (3) That if a carload of freight after having been placed at a private warehouse, or on a private siding, is removed by a railway company for the purpose of inspection, it should be returned without any toll being charged to the consignee for the movement.

Cottrell v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 349.

INTERSWITCHING CHARGES—SPECIAL COMMODITY TARIFF—GENERAL INTERSWITCHING ORDER.

An application to direct the respondent to absorb the interswitching charges collected by the C.N.R. Co. for the transfer of cars of pig iron within its yard at Port Arthur to the lines of the respondent. The applicant submitted that under s. 2 of the General Interswitching Order of 8th July, 1908 (7 Can. Ry. Cas., p. 332), the entire interswitching charge should be absorbed. The respondent alleged that the low toll given by the special commodity tariff of 14th October, 1909, was on condition that the applicant would ship summer and winter by its lines, that when such tariff was arranged nothing was said about the question of switching, and the respondent was not aware that the applicant's plant was located on the line of the C.N.R. and that such switching would be necessary:—Held (1), that the special commodity tariff went into force subject to the terms of the General Interswitching Order, and no silence on the question of switching could take the traffic out from under its provisions. (2) That the traffic fell under ss. 4 and 8 of the General Order and the respondent should absorb one-half of the Port Arthur interswitching charge.

Atikokan Iron Co. v. Can. Pac. Ry. Co., 12 Can. Ry. Cas. 6.

FRUIT COMMODITIES—COMPLETION OF CARLOADS—STOP-OVER PRIVILEGES—THROUGH RATES—JOINT ROUTE.

For a number of years carriers carried a certain fruit commodity to concentration points for storage, inspection or completion of carload and reshipment at a reduction of one-third of the local tolls, the combination of these tolls in and out not to be less than the through toll from the first shipping point to final destination plus 2 cents per 100 lbs., and if to the concentration point a joint route had to be used, the reduction applied only to the portion of the earnings that the carrier received from the second haul or reshipment from that point, the railways not having satisfactorily justified withdrawing the completion of carload concession and restricting the storage and inspection privileges to carloads, an order should be made directing that the former arrangement should be re-established.

Simcoe Fruits and Ontario Fruit Growers' Assn. v. Grand Trunk and Can. Pac. Ry. Cos., 14 Can. Ry. Cas. 370.

Demurrage—Adjustment—Long and short haul.

The long and short haul clause, s. 315 (5) of the Railway Act, 1906 is superior to any toll in any tariff approved by the Board which conflicts therewith. Where freight tolls demanded by a carrier are proved to be incorrect, the consignee is not properly charged demurrage because he refuses to unload until the freight tolls are adjusted. A toll which violates a provision of the Railway Act is unlawful even if shewn on a filed tariff. Where, therefore, a toll of 12 cents per 100 lbs. was charged on a carload of logs from Warren, Mich., to Tilbury, Ont., and at the same time there was a special toll of 5½ cents from Utica, Mich., to Tilbury, Warren being an intermediate point, the toll of 12 cents is illegal by the long and short haul clause, s. 315 (5).

Canadian Handle Mfg. Co. v. Michigan Central Ry. Co., 21 Can. Ry. Cas. 12.

Car service rules—Demurrage tolls—Retroactive—Refund—Unjust discrimination.

Tariffs are not retroactive, and carriers can only collect for the transportation of traffic the tolls authorized and in force at the time of shipment. No charge for demurrage as such is included in any ordinary transportation toll, consequently the car service demurrage toll in force at the time of arrival of cars at destination may be charged by the carrier. Under the car service rules, demurrage tolls in force in 1912-13, where the consignee was in default from December 15, 1912, to March 31, 1913, he was subject to the penalty fixed by the filed tariff of demurrage tolls effective December 15, 1912, to March 31, 1913 (higher than $1 per day), but demurrage tolls on cars on and after March 31, 1913, must be reduced to the $1 per day toll basis, irrespective of the date transportation commenced or when the right to collect demurrage first accrued.

Security Traffic Bureau v. Canadian Freight Asso., 21 Can. Ry. Cas. 57.

Demurrage—Switching orders—Traffic—Jurisdiction—Comity of nations.

Contracts made in the United States for the carriage of C.L. Traffic passing from one point to another in the United States through Canadian territory are under the control of the Interstate Commerce Commission, and the Board (having regard to international comity) will not make an order as to demurrage charged for delay of such traffic in Canada, when no Canadian interest is involved, where the effect of such order would be to nullify a previous order of the Interstate Commerce Commission on the same subject-matter.

American Coal & Coke Co. v. Michigan Central Ry. Co., 17 Can. Ry. Cas. 256.

[Affirmed in 21 Can. Ry. Cas. 15.]

Operation—Movements—Long and short—Tolls.

Under the General Interswitching Order No. 4988 (July 4, 1908) (see 7 Can. Ry. Cas., p. 332), the carrier that has the right or obligation to perform the interswitching service is entitled to the interswitching toll applicable to any distance within four miles, however short it may be, so long as the toll is not graduated according to distance.

Brampton Milling Co. v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 337.

Zones—Redistribution.

It is a principle of tariff making to break the toll groups at flag stations or unimportant points as far as practicable. Acting upon this principle, the Board refused an application to distribute the zones in respondents' City of Hamilton terminals, within which interswitching tolls of 1 ct. and 1½ cts. per 100 lbs. respectively prevailed.

Steel Co. of Canada v. Toronto, Hamilton & Buffalo Ry. Co., 18 Can. Ry. Cas. 339.

Stop-over privileges—Furtherance orders—Extra toll.

A stop-over privilege of 72 hours after arrival at Cartier is sufficient time for a trader to decide where to send his grain, and an extra toll should be paid for cars remaining on hand waiting for furtherance orders after the expiration of that period.

Can. Pac. Ry. Co. v. Montreal Corn Exchange Assn., 19 Can. Ry. Cas. 257.

Interswitching—Milling in transit privilege.

The toll for the milling in transit privilege does not include the toll for interswitching necessary to take the traffic from the line of one railway company to another. [Anchor Elevator Warehousing and Northern Elevator Cos. v. Can. Northern and Can. Pac. Ry. Cos., 9 Can. Ry. Cas. 175, followed.] Complaint against the charge made by the respondent, Pere Marquette R.R. Co., for interswitching from the transfer track between the lines of the respondents to the complainants' mills in addition to the charge for milling in transit privilege made by the respondent Canadian Pacific Ry. Co.

Taylor and Canadian Flour Mills Co. v. Can. Pac. and Pere Marquette Ry. Cos., 19 Can. Ry. Cas. 264.

General interswitching order—Regulative order.

The General Interswitching Order is not a mandatory order requiring interswitching wherever possible, but merely a regulative order fixing tolls to be charged when interswitching service is performed.

Re General Interswitching Order, 19 Can. Ry. Cas. 376.

Cartage equalization—Substitution for interswitching.

Cartage equalization, and the substitution of cartage for interswitching are not wholly prohibited by par. 11 of the General Interswitching Order (No. 4988, July 8, 1908, 7 Can. Ry. Cas. p. 332), but are permissible so long as the carrier complies with its obligations under s. 315 of the Railway Act, 1906, to observe equality in its treatment of shippers, and also sets out the free service in a clear and definite tariff published in accordance with the Act. [Canadian Manufacturers Assn. v. Canadian Freight Assn., General Interswitching Order, 7 Can. Ry. Cas. 302, followed.]

Re General Interswitching Order, 19 Can. Ry. Cas. 376.

Demurrage—Inspection—Delay—Canada grain act.

Carriers are entitled to recover demurrage tolls for detention of equipment owing to delay in inspection of grain by Government officials, and the shipper has the right under the Canada Grain Act, 2 Geo. V. c. 27, s. 71, to recover from the inspector for neglect or refusal to inspect. The latter are liable to shippers under s. 71 for neglect or refusal to make such inspection.

Toronto Board of Trade v. Canadian Freight Assn. (Grain Inspection Case), 22 Can. Ry. Cas. 93.

SWITCHING—SPECIAL—GENERAL—SPURS.

The Board disallowed a toll of $2 for switching and spotting movements on spurs more than 1,000 feet in length of cars loaded with coal, without expressing any opinion on the general question of fixing a limit for free switching service.

Premier Coal Co. v. Canadian Freight Assn. (Switching Tolls Case), 22 Can. Ry. Cas. 123.

AGREEMENT—SPUR—CARS—UNREMUNERATIVE—INTERSWITCHING.

The Board is not bound, nor may the provisions of the Railway Act be defeated, by an agreement between two railway companies respecting tolls. A provision in an agreement made in 1901 between two railway companies, whereby the former in consideration of the latter undertaking to build a spur from its line to a pulp mill, agreed to build a connection between the two lines and switch loaded and empty cars for the latter company at $1.50 per loaded car, was abrogated by the Board in 1917, the tolls being found unremunerative, and the regular interswitching charge of 1 cent per 100 lbs. applied under the General Interswitching Order No. 4988. [Crow's Nest Pass Coal Co. v. Can. Pac. Ry. Co., 8 Can. Ry. Cas. 33; Lake Superior Paper Co. v. Algoma Central & Hudson Bay Ry. Co., 22 Can. Ry. Cas. 361, followed. Fergus v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 42, distinguished.]

Can. Pac. Ry. Co. and Spanish River Pulp & Paper Mills v. Algoma Eastern Ry. Co., 22 Can. Ry. Cas. 381.

SWITCHING—WHARFAGE.

Upon complaint made against a charge of one per cent per 100 lbs. with a minimum of $5 per car for switching from boat to rail at Port Arthur, the carrier pointed out that the toll was the usual one for interswitching, except that the minimum was $5 instead of $3, also, that there was a greater service provided because in ordinary switching the carrier that does the work merely takes a loaded car from one point to another, whereas in the case under discussion the carrier must place its empty car, load it, and then switch it to destination. The Board held that the charge was reasonable whether taken by itself or in connection with a wharfage charge of 2½ cents per 100 lbs., imposed for other services and facilities.

Fort William Board of Trade v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 392.

CARTAGE—SERVICE OF FACILITY—LINE HAUL.

Under the Railway Act, 1906, cartage is not a railway service or facility, although by the interpretation clause, s. 2 (30), "toll" includes charges for cartage, it is not included in any tariff of tolls approved by the Board for line haul. The question of who should pay cartage is a matter of contract between the consignor and consignee and the Board should not attempt to interfere between them. [Sowerby v. Great Northern Ry. Co., 60 L.J.Q.B. 467, 65 L.T. 546; Stewart v. Can. Pac. Ry. Co., 11 Can. Ry. Cas. 197, followed.]

Re Cartage Tolls, 19 Can. Ry. Cas. 389.

[Reheard and affirmed in 24 Can. Ry. Cas. 80.]

DELIVERY—SWITCHING—DESTINATION—REFUND.

A carrier is bound to have a place of delivery for traffic destined to a point to which it has quoted a tariff of tolls free from the imposition of a switching toll on shipper or consignee, therefore, an order may go permitting the respondent to refund the moneys it has collected under their switching conditions at the point in question.

Grain Grower B.C. Agency v. Can. Northern Ry. Co., 23 Can. Ry. Cas. 169.

INTERSWITCHING—PUBLIC INTEREST—JUSTIFICATION—TOLLS—COMMODITY AND CLASS—COMPETITION—USE OF TERMINALS—LINE TRAFFIC—INTERCHANGE.

The only justification for subjecting the facilities of one carrier to the business of another is the public interest, and orders as to interswitching should not be used for the purpose of enabling one carrier to take from another not only the use of its terminals but line traffic. Where therefore the shipper expressly requires interswitching from team tracks, and the interswitching carrier is equipped and actually ready, in accordance with its published tariffs of tolls to carry to destination and to afford the same delivery and facilities itself, or through its connections, or by interswitching, at the same toll as the competing carrier, the interswitching carrier should be allowed to charge, instead of an interswitching toll, the appropriate toll of its published class or commodity tariff to the point of interchange, which toll should be made an additional charge against the shipment, provided however, that in case of failure to place cars within a reasonable time, ordinary interswitching tolls only should apply.

Re Interswitching Service, 24 Can. Ry. Cas. 324.

F. Passenger Fares.

RATES AND ACCOMMODATION.

Two questions must be found in favour of the applicant before the writ of prerogative mandamus can issue: First, has the applicant a specific legal right to the performance of some duty by the respondent; and, second, will the applicant without the benefit of the writ be left without effectual remedy? Where the applicant sought a mandamus to compel the Grand Trunk Ry. Co., pursuant to s. 3 of their Act of Incorporation, 16 Viet. c. 27 (D.), to run a train containing third-class carriages, and to permit the aplicant to travel therein on payment of a fare not exceeding one penny a mile:—Held, that the applicant had an adequate remedy under the provisions of the Railway Act, 1903 (ss. 8, 23, 25, 44, 214, 294, being specially referred to), and that remedy could be more conveniently applied and executed under the direction and supervision of the Board than by the Court; and the application was refused.

Re Robertson and Grand Trunk Ry. Co., 6 Can. Ry. Cas. 490, 14 O.L.R. 497.

[See Robertson v. Grand Trunk Ry. Co., 6 Can. Ry. Cas. 494.]

THIRD-CLASS PASSENGERS—TWO CENT (PENNY) FARE.

S. 3 of the Act of Incorporation of the Grand Trunk Ry. Co., 16 Viet. c. 37 (D.) enacting that the fare or charge for each third-class passenger by any train on the said railway, shall not exceed one penny currency per each mile traveled, and that at least one train having in it third-class carriages, shall run every day throughout the length of the line, has not been repealed either expressly or by implication by subsequent general railway legislation, and is still in force. Upon an application under s. 26 of the Railway Act, 1906, the Board made an order requiring the company to run every day throughout the length of its line between Montreal and Toronto at least one train having in it third-class carriages, and forbidding it to charge third-class passenger fares at more than two cents per mile, and directing it to amend its special tariffs accordingly.

Robertson v. Grand Trunk Ry. Co., 6 Can. Ry. Cas. 494.

[See Re Robertson and Grand Trunk Ry. Co., 6 Can. Ry. Cas. 490, 14 O.L.R. 497; affirmed in 39 Can. S.C.R. 506, 7 Can. Ry. Cas. 267.]

THIRD-CLASS FARES.

The legislation by the late Province of Canada and the Parliament of Canada since the enactment of s. 3, c. 37, 16 Vict. (D), in 1852, has not expressly or by implication repealed the provisions of that section requiring third-class passenger carriages to be run every day upon the line of the G.T.R. between Toronto and Montreal, on which the fare or charge for each third-class passenger shall not exceed one penny currency for each mile traveled. 6 Can. Ry. Cas. 494, affirmed.

Grand Trunk Ry. Co. v. Robertson, 7 Can. Ry. Cas. 267, 39 Can. S.C.R. 506.

SPECIAL RATES—DELEGATES TO CONVENTION—STANDARD PASSENGER TARIFF —RECOVERY OF AMOUNT OVERPAID.

A railway company agreed with a lodge to give reduced excursion rates, provided a certain number took advantage of them; but these rates were not approved by the Board under the Railway Act, 1906, s. 331. On the return trip the railway company refused to grant the reduced rate and collected full fare. In an action to recover the amount overpaid:—Held (following Lees v. Ottawa & New York Ry. Co., 31 O.R. 567), that notwithstanding the absence of approval of the rate under s. 331 of the Railway Act, the amount overpaid could be recovered.

Grand Lodge of Knights of Pythias v. Great Northern Ry. Co., 7 Can. Ry. Cas. 263, 6 West. L.R. 425.

THROUGH RATES—JOINT TARIFFS—CONTINUOUS ROUTE—COMPETITIVE AND NONCOMPETITIVE POINTS.

The C.N.R. Co. applied to the Board for an order under s. 317 of the Railway Act, 1906, directing the Grand Trunk and the Canadian Pacific Ry. Cos. to provide facilities for passengers desiring to travel from or through points on lines of the respondent companies, or either of them, to points on the lines of the applicant and its connections and to issue tickets at through rates accordingly, the application covering points in Canada and the United States. The object of the application was to oblige the respondent companies to transfer to it at Toronto passengers desiring to reach the Muskoka district which is served by the lines of the three companies. The applicant has no connections east or west of Toronto, but Toronto may be reached from the United States by steamer from the Niagara frontier during the summer months. As to competitive points:—Held (1), that it has not been shewn that any "obstruction is offered to the public desirous of using such railways as a continuous line of communication" within subs. 4 of s. 317. (2) That the arrangement between the respondents has not been shewn to constitute an undue or an unreasonable preference as against the applicant nor to be the public disadvantage. (3) That a change for the pecuniary benefit of the applicant is not, of itself, a sufficient reason for granting the application. Without deciding that s. 317 applies only to noncompetitive points:—Held (1), that joint fares and rates should be established on joint traffic from noncompetitive points destined to points common to the applicant's and respondents' lines. (2) That the other requests in the application should be refused.

Can. Northern Ontario Ry. Co. v. Grand Trunk and Can. Pac. Ry. Cos. (Muskoka Rates Case), 7 Can. Ry. Cas. 289.

[Referred to in Can. Northern Ry. Co. v. Grand Trunk, etc. Ry. Cos., 10 Can. Ry. Cas. 139; followed in Great North. Ry. Co. v. Can. Northern Ry. Co., 11 Can. Ry. Cas. 425; Can. Northern Ry. Co. v. Grand Trunk Ry. Co. (North Bay Case), 20 Can. Ry. Cas. 84.]

COMMUTATION TICKETS—UNJUST DISCRIMINATION.

Upon an application to the Board for an order directing the G.T.R. Co. to issue commutation tickets as well between Toronto and Brampton as between the same point and Oakville, Brampton being within $^4/_{100}$ of a mile of the distance from Toronto to Oakville, but on a different line; it was contended that the passenger fares between the said points constituted an unjust discrimination or undue preference in favour of Oakville and against Brampton, and that the onus lay on the railway company by s. 77 of the Railway Act, 1906, to show that it did not exist:—Held (1), that under s. 341 the railway company was within its rights in issuing such reduced fare tickets between Toronto and Oakville. (2) That the application must be refused, Oakville not having profited at the expense of Brampton. (3) A railway company has the right under the Railway Act to discrimination between points and is only required to prove itself free from unjust discrimination or undue preference.

Wegenast v. Grand Trunk Ry. Co. (Brampton Commutation Rate Case), 8 Can. Ry. Cas. 42, 168.

[Followed in Toronto and Brampton v. Grand Trunk, etc. Ry. Cos., 11 Can. Ry. Cas. 370.]

COMMUTATION TICKETS.

The Board under s. 55 of the Railway Act, 1906, stated for the opinion of the Supreme Court the following question: Is s. 341 of the Act controlled, modified or affected by s. 77, or any other section of the Act, and if so to what extent?—Held, Davies, and Anglin, JJ., dissenting, that the provisions of s. 77 of the Act do affect the issue of commutation tickets under s. 341.

Toronto and Brampton v. Grand Trunk etc. Ry. Cos. (Brampton Commutation Rate Case, No. 2) 11 Can. Ry. Cas. 365.

[Followed in Massiah v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 88; Wood v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 365; Re Telegraph Tolls, 20 Can. Ry. Cas. 1; distinguished in Watson v. Can. Pac. Ry. Co., 19 Can. Ry. Cas. 161.

UNJUST DISCRIMINATION—COMMUTATION TOLLS—PERSONS OR LOCALITIES—FIXED RADIUS.

Application by the town of Brampton under ss. 315, 318, 323 of the Railway Act, 1906, for orders directing the G.T.R. Co. to cease unjust discrimination between Brampton and other localities in commutation tolls, to provide proper commutation tolls and to disallow the present toll. Application by the city of Toronto under ss. 77, 315, 323 of the Act for orders directing the G.T.R. and C.P.R. Cos. to cease unjust discrimination between the city of Toronto and surburban municipalities in regard to commutation tolls, and fix commutation tolls within a certain radius of the city. Counsel for the town of Brampton relied upon the proceedings upon the former application reported in Wegenast v. Grand Trunk Ry. Co. (Brampton Commutation Rate Case), 8 Can. Ry. Cas. 42. Counsel for the city of Toronto contended that the Board should be guided in fixing the radius to which commutation tolls should apply by the distances of surburban points which now have them from Toronto; that there is unjust discrimination in certain suburban points further away being granted these tolls and others nearer being refused them and in the distance from Montreal to suburban points to which such tolls are now extended. The railway companies contended that the granting of commutation tolls was within their discretion, being authorized by the Railway Act to discriminate between persons or localities:—Held (1), that affirmative evidence must be presented to shew unjust discrimination between persons or localitites, although the onus is on the railway companies to disprove it. (2) That the application of the town of Brampton must be refused for the reasons given in Wegenast v. Grand Trunk Ry. Co., 8 Can. Ry. Cas. 42. (3) That unjust discrimination not having been shewn, the application of the city of Toronto must be refused. (4) That no evidence was given of the stations in the vicinity of Montreal to which commutation tolls were granted, or of traffic in the case of either city. [Wegenast v. Grand Trunk Ry. Co. (Brampton Commutation Rate Case), 8 Can. Ry. Cas. 42, followed.]

Toronto and Brampton v. Grand Trunk and Can. Pac. Ry. Cos.(Brampton Commutation Rate Case (No.2)), 11 Can. Ry. Cas. 370.

[Followed in Massiah v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 88; Wood v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 365.]

THIRD-CLASS FARES.

S. 3 of 16 Vict. c. 37 (Province of Canada) is not inconsistent with or impliedly repealed by the Dominion Railway Act, 6 Edw. VII. c. 42. Accordingly the appellants are bound to carry third-class passengers for the fare of a penny per mile, and to provide one train every day with third-class carriages between Toronto and Montreal.

Grand Trunk Ry. Co. v. Robertson, 9 Can. Ry. Cas. 149, [1909] A.C. 325.

STANDARD PASSENGER AND SPECIAL FREIGHT TARIFFS—DEFICIENT CAR SERVICE —PASSENGER FACILITIES.

Complaint that the respondent corporation charged excessive passenger, freight and express tolls, and did not furnish sufficient car service and passenger facilities. The respondent corporation operate a railway and collieries; own large areas of irrigated lands and towns lots, and is the result of amalgamation of the Alberta Ry. & Coal, Canadian North West Irrigation, St. Mary's River Ry. Alberta Railway & Irrigation Companies. Counsel for the respondent contended that the tolls should not be reduced and greater facilities furnished, because the railway and irrigation works did not pay, and the land and coal areas covered the deficits. The Canadian Pacific Ry. Co. recently acquired a controlling interest in the respondent corporation, and will probably operate its railway:—Held (1), that there was no evidence that the railway did not pay. (2) That the respondent corporation be required to file within a specified time (a) standard passenger tariffs charging three cents per mile and one-sixth less for round trip tickets. (b) special tariffs of freight rates between all the stations on a basis that shall not exceed those of the Canadian Pacific for the same or similar distances and on the same commodities, (c) a special tariff of class rates not higher than the same tariff of the Canadian Pacific Ry. for the same or the nearest equivalent distances, and (d) express tariff of tolls as required by s. 350 of the Railway Act, 1906. (3) That the complaints relating to the respondent's express service and charge should stand for disposition until the general express enquiry is dealt with. (4) That the complaint as to deficient car service and passenger facilities may be renewed if necessary at the expiration of six months.

Cardston Board of Trade v. Alberta Ry. & Irrigation Co., 9 Can. Ry. Cas. 214.

THROUGH TOLLS — JOINT TARIFFS — CONTINUOUS ROUTE — INTERNATIONAL BOUNDARY.

After the judgment of the Board on a previous application (Can. Northern Ry. Co. v. Grand Trunk and Can. Pac. Ry. Cos., 7 Can. Ry. Cas. 289), for the granting of facilities under s. 317 of the Railway Act, 1906, whereby the applicant and respondent companies were directed to issue joint tariffs of passenger tolls upon joint traffic interchanged between said companies from noncompetitive points to points common to applicant's and respondents' lines, a further application was made for the filing by the respondent companies of tariffs from frontier points in the United States to noncompetitive points on the applicant's line:—Held, refusing the application (1), that the Board has no jurisdiction over rates charged by railways from points in the United States up to the International boundary. (2) That the Board has jurisdiction the very moment the traffic crosses the International boundary, whether it is a dividing point on land or water.

Can. Northern Ry. Co. v. Grand Trunk and Can. Pac. Ry. Cos. (Muskoka Rates Case), 10 Can. Ry. Cas. 139.

[Followed in Continental, etc. Oil Co. v. Can. Pac., etc., Ry. Co., 13 Can. Ry. Cas. 156; Can. Northern Ry. Co. v. Grand Trunk Ry. Co. (North Bay Case), 20 Can. Ry. Cas. 84.]

UNJUST DISCRIMINATION—TRANSPORTATION OF PASSENGERS—EXCURSION FARES.

Application to prohibit the respondent from charging 25 cents for viséing railway certificates entitling persons attending meetings to return to their homes without payment of a return fare and to reduce the number of persons entitled thereto from 300 to 250 or 200. To avoid confusion, errors and more serious faults, the principal railway and steamship companies operating in Canada formed the respondent association with an office in Montreal, maintained in part by this 25-cent charge; and officials being sent to the different society meetings for the purpose of viséing the certificates of the members. In the tariff filed with the Board the statement appeared that a fee of 25 cents was charged to defray the expenses of the special agent viséing the certificates—it was shown that there was a yearly deficit in the expenses of the office which was made up by contributions from the railway companies, members of the respondent association. The applicant contended that the charge of 25 cents was not a toll under s. 9 of c. 61 of 7 & 8 Edw. VII., and that members traveling a short distance were unjustly discriminated against in favour of those traveling a longer distance by being compelled to pay such charge:—Held (1), that such charge was a toll or charge made in connection with the transportation of passengers and that it was covered by the tariff filed by the respondent. (2) That the Board has no jurisdiction to compel the respondent to issue excursion rates or fix the number or persons entitled thereto. Commissioner McLean, dissenting in part: The 25 cent charge as described in the tariff did not fall within the definition of tolls in c. 61, s. 9 of 7 & 8 Edw. VII.

Canadian Fraternal Assn. v. Canadian Passenger Assn., 13 Can. Ry. Cas. 178.

[Followed in Roy v. Canadian Passenger Assn., 17 Can. Ry. Cas. 320.]

JURISDICTION—TOLLS—REDUCTION.

Under ss. 77, 315, 341 of the Railway Act, 1906, the Board has no jurisdiction to compel a railway company to issue reduced tolls to farmers attending agricultural conventions, or to any other class of the community. It is entirely within the discretion of the carriers whether they will do so or not, and for the Board to do so would be unjust discrimination against other classes of the community. [Canadian Fraternal Assn. v. Canadian Passenger Assn., 13 Can. Ry. Cas. 178, followed.]

Roy v. Canadian Passenger Assn., 17 Can. Ry. Cas. 320.

UNJUST DISCRIMINATION—TRAFFIC POLICY—COMPETITION.

It is unjust discrimination for the respondent, from considerations of traffic policy, to extend the advantage of the competitive toll to points where competition does not exist.

Fredericton Board of Trade v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 433, Reversed 17 Can. Ry. Cas. 439, 21 D.L.R. 790.

UNJUST DISCRIMINATION—THROUGH TICKET—MILEAGE BASIS—COMPETITION—INTERMEDIATE AND TERMINAL POINTS.

Under s. 315 of the Railway Act, 1906, unjust discrimination does not exist where there is actual competition at the initial and terminal points reached by railway lines, and the potential choice of a passenger at an intermediate point whereby he may elect to buy a through ticket for the whole distance between the initial and terminal points, cheaper than one on a mileage basis from such intermediate point to the terminal point, spreads the effect of competitions over the whole journey. The general scope of s. 315 makes it clear that the Board is empowered to recognize the existence of competition and its effects, therefore, when it is satisfied that such competition exists, it may allow a lower toll on the section of railway where the dissimilar circumstances and conditions created by such competitions exist. [Malkin v. Grand Trunk Ry. Co. (Tan Bark Tolls Case), 8 Can. Ry. Cas. 183, at pp. 186, 187; Almonte Knitting Co. v. Can. Pac. and Michigan Central Ry. Cos. (Almonte Knitting Co. Case), 3 Can. Ry. Cas. 441, followed; Fredericton Board of Trade v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 433, reheard and reversed.]

Fredericton Board of Trade v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 439, 21 D.L.R. 790.

DISCRETION—COMMUTATION—UNJUST DISCRIMINATION.

Within the limits of the standard passenger toll per mile, railway companies have discretion to vary the toll under certain conditions, that discretion may be exercised by the granting of commutation tolls to one point and not to another, such difference in the treatment of different places is not necessarily unjust discrimination, and in the absence of affirmative evidence of actual discrimination, resulting in the positive detriment to a place to which such tolls are refused, the Board will not interfere. [Wegenast v. Grand Trunk Ry. Co., 8 Can. Ry. Cas. 42; Toronto and Brampton v. Grand Trunk and Can. Pac. Ry. Cos., 11 Can. Ry. Cas. 370, at pp. 374, 375; British Columbia News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 178, followed.]

Massiah v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 88.

COMMUTATION—CANCELLATION—STANDARD PASSENGER TOLLS.

For many years the respondent company sold ten trip tickets between Quebec and St. Catherine station for $4 and similar tickets to other suburban points. Upon these tickets being cancelled the Board refused an application for their re-establishment. No contract was shewn with any of the applicants who built summer cottages at St. Catherine, that if these were established on the line of the railway they would forever give these ten trip tickets. It is a well-settled principle that a railway company will not be ordered to establish passenger tolls less than its standard toll unless it can be shewn that an undue or unreasonable preference or advantage has been given to any particular description of traffic or that unjust discrimination has been shewn to exist between different localities under substantially similar circumstances and conditions.

Brown v. Quebec & Lake St. John Ry. Co., 18 Can. Ry. Cas. 342.

SHORT LINE COMPETITION—DISCRETION.

The Railway Act does not require carriers to meet short line competition if they do not desire to do so. [Edmonton Clover Bar Sand Co. v. Grand Trunk Pacific Ry. Co., 17 Can. Ry. Cas. 95, followed.]

Re Passenger Tolls, 20 Can. Ry. Cas. 223.

G. Electric Railways.

PASSENGER FARES—APPROVAL OF TARIFF BY PARK COMMISSIONERS.

The Ontario Railway and Municipal Board, upon an application by the Board of Trade above-named, made an order compelling the International Railway Co. owning and operating an electric railway along the bank of the Niagara river from Queenston to Chippawa, and incorporated by 55 Vict. c. 96 (Ont.) to comply with s. 171 of the Ontario Railway Act, 1906, by accepting a five cent cash fare for conveying passengers for any distance not exceeding three miles, etc.:—Held, reversing the order of the Board, that the company came within subs. 5 of s. 171, providing that "this section shall not apply to a company whose tariff for passenger fares is subject to the approval of any commissioners in whom are vested any park or lands owned by the Crown for the use of the public of the Province of Ontario;" and, s. 171 being thus excluded, that the Board had no power, on an application such as was made in this case, to direct what fares the company should charge. The effect of the incorporation into the Companies Act of s. 31 of the Railway Act of Ontario, R.S.O. 1887, c. 170, was not to abrogate clause 32 of the agreement with the Commissioners for the Queen Victoria Niagara Falls Park, set out as schedule B to the Companies Act. They should be read together in such a way as to give effect to both; and reading them as subjecting the company's tariff to the approval of both the commissioners and the Lieut. Governor-in-council (or the Board substituted therefor) was not inconsistent with the intention of the parties.

Re Niagara Falls Board of Trade and International Ry. Co., 10 Can. Ry. Cas. 63, 20 O.L.R. 197.

AGREEMENT AS TO SPECIAL RATES—UNJUST DISCRIMINATION.

A company operating, subject to Dominion authority, a tramway through several municipalities adjacent to the city of Montreal, and having connections and traffic arrangements with a provincial tramway in that city, entered into an agreement under statutory authority with one of the municipalities whereby, in consideration of special privileges conceded in regard to the use of streets, etc., lower rates of passenger fares were granted to persons using the tramway therein, for transportation to and from the city, than to denizens of the adjoining municipality with which there was no such agreement. On the hearing of a complaint, alleging unjust discrimination in respect to fares, the Board refused to take the agreement into consideration when tendered in evidence to justify the granting of the special rates and ordered the company, appellants, to furnish the service to persons using the tramway in both municipalities at the same rates of fare. On an appeal, by leave of the Board, in respect of the propriety of overlooking the contract, submitted as a question of law:—Held, Davies and Anglin, JJ., dissenting, that, as the existence of the contract was one of the elements bearing upon the decision of the question of substantial similarity in circumstances the Board should have admitted the evidence so tendered in regard to the agreement in consideration of which the special rates of fares had been granted.

Montreal Park & Island Ry. Co. v. Montreal, 11 Can. Ry. Cas. 254, 43 Can. S.C.R. 256.

[Referred to in Can. Pac., etc. Ry. Cos. v. Regina Board of Trade, 13 Can. Ry. Cas. 203, 45 Can. S.C.R. 321.]

UNDERTAKING—VALUE—OPERATION—CHANGE IN SYSTEM—COST—INCREASE—CAPITAL CHARGES—REVENUE.

The London & Port Stanley Ry., a steam railway recently operated by electricity in a densely populated part of Ontario, may be taken as shewing in the highest degree, the economies of electric railway operation. To provide for capital charges on the value of the undertaking, and cost of change in the system of operation, as well as for the large increases in wages of employees and costs of supplies, an increased revenue is necessary in order to operate the line as a commercial venture, without loss to the owners or depreciation in the property. Accordingly the passenger toll of 2½ cents per mile was increased by 15 per cent, and the toll on coal by 15 cents per ton, as in the case of steam railways. The Board will extend similar relief to any other electric line whose operation and financial condition require it. [Re Eastern Tolls (Eastern Toll Case), 22 Can. Ry. Cas. 4; Re Increase in Passenger and Freight Tolls (Increase in Rates Case), 22 Can. Ry. Cas. 49, followed.]

Re London & Port Stanley Ry. Co., 24 Can. Ry. Cas. 160.

H. Telegraph Tolls.

FILING TARIFFS—UNJUST DISCRIMINATION—PRESS DESPATCHES.

Application by the Western Associated Press for reduction of rates charged by the respondents for press despatches, alleging an unjust discrimination in favour of the respondents' customers. The rates charged from points in Eastern Canada to respondents' customers were one cent per word for day service and one-half cent per word for night service, subject to a rule that those rates are "special for publication at point addressed in one newspaper only." The rates charged to the applicants for the same service were one and one-half cents for day and three-quarters of a cent for night despatches:—Held (1), that the rate made for one class, a single newspaper, should not be arbitrarily applied to another class, an association of newspapers; the different rates not being in themselves unreasonably high. (2) That telegraph companies are brought under the jurisdiction of the Board by 7-8 Edw. VII. c. 61, Part 1, and their tariffs must be approved by it under s. 314 (5) of the Railway Act, 1906. (3) That these tariffs must be so framed as not to work unjust discrimination against the applicants, or any other person or association, engaged in like work. (4) That s. 315 would have no application whatever, unless the traffic (press despatches) in question passed over the same portion of the telegraph line from start to finish. (5) That under s. 9 of 7-8 Edw. VII. c. 61, the definition of "toll" or "rate" has equal application to railway, telegraph and telephone companies.

Western Associated Press v. Can. Pac. Ry. and Great Northwestern Telegraph Cos., 9 Can. Ry. Cas. 482.

UNJUST DISCRIMINATION—"PRESS SPECIALS."

The Board held that an increase from 25 to 50 cents per 100 words in telegraph tolls for "press specials" in the Maritime Provinces, while the former rate of 25 cents was continued in Ontario and Quebec was prima facie an unjust discrimination against the Maritime Provinces and in the absence of evidence of special circumstances justifying the difference in rate ordered the former rate to be restored.

Canadian Press v. Great Northwestern, etc., Telegraph Cos., 14 Can. Ry. Cas. 151.

UNREMUNERATIVE BUSINESS—PRESS SERVICE.

The Board refused to order telegraph companies to provide special tolls for press service similar to tolls provided by another telegraph company under special agreement when it appeared that the objecting companies had not sought the press business or provided the necessary facilities for it, and that it would be unremunerative.

Canadian Press v. Great Northwestern, etc. Telegraph Cos., 14 Can. Ry. Cas. 151.

REASONABLE—SERVICE—SIMILAR—COMPARISONS—INFORMATIVE—NOT CONCLUSIVE.

In determining what are reasonable tolls for telegraph messages in Canada, the tolls charged for similar services in the United States may be taken into consideration, but these comparisons are merely informative, not conclusive. [Canadian Oil Cos. v. Grand Trunk etc. Ry. Cos., 12 Can. Ry. Cas. 355; Manitoba Dairymen's Assn. v. Dominion and Canadian Northern Express Cos., 14 Can. Ry. Cas. 142, followed.]

Re Telegraph Tolls, 20 Can. Ry. Cas. 1.

STATUTORY OBLIGATION—UNJUST DISCRIMINATION—ZONES—ANOMALY.

The Great Northwestern Telegraph Co. is under statutory obligation (45 Vict. c. 93, s. 14), not to exceed a toll of twenty-five cents for ten words, and one cent for each additional word, on all messages between points in Ontario, Quebec, Nova Scotia aand New Brunswick. The continuance, under statutory obligation, of a twenty-five cent telegraph toll within Ontario, Quebec, Nova Scotia and New Brunswick, while higher tolls are charged in other zones, is no evidence of undue discrimination or undue preference; nor does the anomaly created, by these uniform low tolls within a very large zone, justify the Board in establishing the same tolls, or equally large zones, elsewhere.

Re Telegraph Tolls, 20 Can. Ry. Cas. 1.

UNJUST DISCRIMINATION—TEST IS INJURY TO INDIVIDUAL OR LOCALITY.

The ultimate test of discrimination is to be found, not in a difference of tolls, but in the question whether as a resalt of this difference injury is caused to an individual or a locality. [Michigan Sugar Co. v. Chatham, Wallaceburg & Lake Erie Ry. Co., 11 Can. Ry. Cas. 353; Wegenast v. Grand Trunk Ry. Co. (Brampton Commutation Rates Case), 8 Can. Ry. Cas. 42, affirmed; Toronto and Brampton v. Grand Trunk and Can. Pac. R. Cos. (Brampton Commutation Rates Case, No. 2), 11 Can. Ry. Cas 370, followed.]

Re Telegraph Tolls, 20 Can. Ry. Cas. 1.

DISTANCE—BASIS—FREIGHT—POLE AND WIRE LINES—MILEAGE—ZONES.

The element of distances is a much less important factor in fixing telegraph tolls than in fixing tolls for freight, though the cost of the pole line mileage and wire line mileage has some influence. In Railway transportation, increase of distance means increase of hauling cost, whereas telegraph transmission is practically instantaneous, the increase of plant investment is localized and the cost factor does not vary (so far as actual transmission is concerned), with the movement of the particular message. Therefore freight tolls generally speaking may properly be made on a distance basis (the zone system being adopted only under special circumstances as a result of competition of markets or water competition); but it is more convenient and is in fact a matter of practical necessity to adopt a zone system in fixing telegraph tolls. [Western Ontario Municipalities v. Grand Trunk, Michigan Central & Pere Marquette Ry. Cos., 18 Can. Ry. Cas. 329, at pp. 332, 334, referred to.] Though distance is not so directly nor so largely a factor in the cost of telegraph service as of railway transportation it is by no means entirely negligible; it should be considered in fixing zone areas and tolls should be based on distance to a greater extent than they have been in the past.

Re Telegraph Tolls, 20 Can. Ry. Cas. 1.

[Followed in Town of the Pas v. G.N.W. Telegraph Co., 22 Can. Ry. Cas. 402.]

THROUGH TOLLS—REASONABLENESS OF TOLLS CHARGED.

The division of a through toll as between companies is primarily an inter-company matter and does not directly concern the public; provided the total toll is reasonable. The value of a telegraph service, as evidenced by the extent to which it receives public patronage, is not a safe criterion of the reasonableness of the tolls charged for it, though the public may be willing to pay these tolls rather than be deprived of it. In a general enquiry into the tariff of tolls of telegraph companies the Board took into consideration, so far as available, the value of the plant employed, the cost of construction or reproduction and equipment of the several telegraph lines, the right-of-way and the facilities afforded them by railway companies, the proportion of railway business to commercial business over lines owned or operated by railway companies, the relations generally between telegraph companies and railway companies, the distances covered, the volume of business done in the past, the prospects for future business, the probability of increased competition, the cost of operation and the gross and net returns and promulgated an amended table of reasonable maximum tolls upon the zone system based on a transcontinental toll of $1. [British Columbia News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 176, at p. 177, referred to.]

Re Telegraph Tolls, 20 Can. Ry. Cas. 1.

[Followed in The Pas v. G.N.W. Telegraph Co., 22 Can. Ry. Cas. 402.]

GENERAL SCHEME—DEVELOPMENT STAGE—ISOLATION—PARTICULAR SECTION.

The Board has recognized that while in general telegraph tolls must be looked at from the standpoint of a general scheme, yet where business is in a development stage the isolation of the telegraph line and the particular facts of the particular section should be considered. [Re Telegraph Tolls, 20 Can. Ry. Cas. 1, at pp. 18, 21, 31, 58, 59, followed.]

The Pas v. G.N.W. Telegraph Co., 22 Can. Ry. Cas. 402.

I. Telephone Tolls.

BUSINESS TOLL—RESIDENTIAL TOLL.

Complaint that a toll of $45 for the rental of a telephone in a nurses residence, used also as her office, was excessive and not justified by the amount of user. The complainant used the telephone at her residence for the purposes of her business or profession as a nurse and was charged the higher or business toll rather than the lower or residential toll. It appeared that her business use of the telephone averaged about once a week:—Held (1), that the complainant was not in the same position as a subscriber who has a telephone at his place of business and another at his residence, and the complaint must be dismissed. (2) That a telephone in the residence of a business or professional man who has no office telephone is properly charged the business toll, irrespective of the amount of user.

Bayly v. Bell Telephone Co., 11 Can. Ry. Cas. 190.

[Followed in Medico-Chirurgical Society v. Bell Telephone Co., 16 Can. Ry. Cas. 267; Newman v. Bell Telephone Co., 17 Can. Ry. Cas. 271.]

Long distance connection—Outbound and inbound traffic.

An application under subs. 5 of s. 4 of 7 & 8 Edw. VII. c. 61, Railway Act amendment, directing the respondent to provide long distance connection with the systems of the applicants:—Held (1), that it is the duty of the Board in granting the application to protect invested capital of the respondent. (2) That the connection desired should be provided by the respondent at the expense of the applicants for one year. (3) That for outbound traffic (i.e., calls originating on local lines) the applicant shall pay the respondent fifteen cents for each long distance call in addition to the regular long distance tariff of the respondent, and that there shall be no charge upon the inbound traffic (i.e., the calls originating upon the respondent's system).

Rural Telephone Cos. v. Bell Telephone Co., 12 Can. Ry. Cas. 319.

Increase—Proper basis for fixing.

Valuable as cost of replacement may be under certain conditions as a basis of toll regulation, nevertheless, the company being in an admittedly satisfactory position financially, it would be unnecessary for it, in order to justify an increase of tolls in specified territory, to shew that the exchanges operating in the territory affected had not contributed their proper proportion to the general revenues and reserves of the company and failing such proof application for leave to increase was refused. The burden being on the party attacking the existing toll to make out an affirmative case, an attack upon the reasonableness per se of existing tolls failed where it appeared that the return earned under them was apparently about 8.28 per cent on the book value of the plant. Preparation for future needs and readiness to serve are requisites of proper management of a public utility corporation, and advantageous to present as well as to prospective users of the service, and it is proper to consider these elements in fixing tolls, when determining whether the value of idle plant shall be included in the amount on which fair return should be allowed. With regard to depreciation, the percentage or composite life basis as compared with the setting aside of an arbitrary annual amount per instrument has both the sanction of business experience and the approval of regulative tribunals, and either the straight line or the sinking fund method may be used. A scientific basis for distribution of long distance revenue as between the lines originating or terminating the message within a city, and the lines transmitting it beyond, is at present unattainable, and to the extent of the undefined costs outside the city, it is unfair in fixing tolls to attribute to city territory as revenue the total long distance business of the company originated and terminated in the city regardless of such additional costs. There is no necessary connection between free exchange limits and civic limits; when untrammelled by arrangements already made by the company it is a question of distance and of particular facts; and where the company had extended its flat toll applicable within the city, to certain territory outside, it was in the absence of circumstances to justify the discrimination ordered to extend the same toll to all territory within an equal distance from its main exchange. The existence of excess mileage does not in itself constitute unjust discrimination, but where the conditions of telephone transmission up to the limit of the free area of an exchange are the same, it is unjust discrimination to treat the man living beyond this area and within the exchange territory in a different manner, from the man living inside this area; that is to say, he should have the same free mileage allowed, and excess mileage should be charged only on the portion of the subscriber's line located beyond the boundary of the free mileage zone. [Winnipeg Jobbers' & Shippers' Assn. v. Can. Pac., Can. Northern and Grand Trunk Pacific Ry. Cos., 8 Can. Ry. Cas. 175, at p. 182, followed.] It is not the function of the Board to order that specified apparatus should be continued or discontinued unless the efficiency of the service is involved.

Montreal v. Bell Telephone Co., 15 Can. Ry. Cas. 118.

[Followed in Newman v. Bell Telephone Co., 17 Can. Ry. Cas. 271.]

ANNEXATION—EXCHANGE LIMITS—EXTRA MILEAGE.

Upon the annexation of the district of North Toronto on 1st January, 1913, to the city, application was made to have the tariff of telephone tolls in force within the Toronto Exchange limits (i.e., the limits of the city on 1st January, 1911) extended to the annexed territory. Subscribers outside said limits were charged extra mileage of $5.00 per quarter mile or fraction thereof, computed from a point three-quarters of a mile distant from the nearest exchange. The nearest exchange to North Toronto is the North Exchange in the city, one and three-quarter miles south of the southern boundary of North Toronto, with which telephones in North Toronto continued to be connected. The circumstances and conditions affecting the telephone service in North Toronto were found to be dissimilar from those existing within the Toronto Exchange limits, and the application was refused except as to the computation of extra mileage, which was changed to commence at what was the limits of the city on 1st January, 1911, instead of at a point three-quarters of a mile from the North Exchange of the city, following the Montreal Telephone Tolls Case, 15 Can. Ry. Cas. 118.

Toronto v. Bell Telephone Co. (North Toronto Telephone Tolls Case), 15 Can. Ry. Cas. 142.

[Reheard and affirmed in 17 Can. Ry. Cas. 263.]

BUSINESS TELEPHONE—SPECIAL TOLL.

A telephone company is justified in charging a business toll for a telephone used by a doctor at his residence. The Board approved the discontinuance of a special toll intermediate between the residence and business toll subject to the completion of existing contracts. [Bayly v. Bell Telephone Co., 11 Can. Ry. Cas. 190, followed.]

Medico-Chirurgical Society of Montreal v. Bell Telephone Co., 16 Can. Ry. Cas. 267.

SERVICE—CIRCUMSTANCES AND CONDITIONS—NEW EXCHANGE—VOLUME OF BUSINESS.

Where it appeared that certain changes with regard to the territory in question had taken place since the previous hearing, including an increase in population from 6,300 to 7,500, an increase in the number of telephones from 273 to 439, the establishment of special deliveries by the post-office and an increase in the number of places of business, the Board found that the evidence was not sufficient to warrant it in coming to any other conclusion than that previously reached that to be entitled to the city toll, the circumstances and conditions of the telephone business in the territory in question should be such as to warrant the establishment of a new exchange, and that the telephone business in the territory in question was not yet sufficiently large to warrant the Board in ordering this to be done. [Toronto v. Bell Telephone Co. (North Toronto Telephone Toll Case), 15 Can. Ry. Cas. 142, reheard and affirmed.]

Toronto v. Bell Telephone Co. (North Toronto Telephone Toll Case), 17 Can. Ry. Cas. 263.

LONG DISTANCE CONNECTION—COMPENSATION.

The Board, under 7 & 8 Edw. VII. c. 61, s. 4 (5), fixed the terms of compensation upon which an independent local telephone company should have leave to establish a connection with the respondent for long distance service as follows: An annual charge for (1) companies having not exceeding 250 subscribers, $100; (2) companies having exceeding 250 subscribers and not exceeding 600 subscribers, $200; (3) companies having exceeding 600 subscribers, $300; and a special charge of ten cents each way in addition to the long distance charge of the respondent, of which charge the latter shall receive 7 cents and the applicant 3 cents.

Independent Telephone Co. v. Bell Telephone Co. (Telephone Connections Case), 17 Can. Ry. Cas. 266.

[Affirmed in Ingersoll Telephone Co. v. Bell Telephone Co., 22 Can. Ry Cas. 135, 31 D.L.R. 49.]

BASE TOLL—INCREASE—PRIMARY TOLL AREA—PARTY LINE—EXCESS MILEAGE.

Where it has been the custom to allow party line subscribers, so situated that they must pay excess mileage tolls, a reduction of one-fifth on the base toll, a discontinuance of this reduction is not justified on the ground that a change of tolls in the primary toll area ordered by the Board rendered obsolete party line service within that area. On order of the Board extending the primary toll area is not sufficient justification for an increase in mileage tolls to subscribers situated beyond that area. [Montreal v. Bell Telephone Co. (Montreal Telephone Toll Case), 15 Can. Ry. Cas. 118, followed.]

Newman v. Bell Telephone Co., 16 Can. Ry. Cas. 271.

[Followed in Notre Dame des Anges v. Bell Telephone Co., 17 Can. Ry. Cas. 277.]

BUSINESS—RESIDENCE—AMOUNT OF USER.

A telephone in the house of a religious community is properly charged the business toll. [Newman v. Bell Telephone Co., 16 Can. Ry. Cas. 271, followed.]

Notre Dame des Anges v. Bell Telephone Co., 17 Can. Ry. Cas. 277.

BUSINESS TOLL—RESIDENCE.

Under the provisions of s. 315 of the Railway Act, 1906, a clergyman is entitled to be charged the residence toll and not the business toll for the use of the telephone installed in his residence.

Desroches v. Bell Telephone Co., 18 Can. Ry. Cas. 322.

BUSINESS AND RESIDENTIAL TOLL—AMOUNT OF USER.

A telephone in the residence of a market gardener and fruit raiser, who has no office telephone, is properly charged the business toll irrespective of the amount of user. [Bayly v. Bell Telephone Co., 11 Can. Ry. Cas. 190, followed.]

Newman v. Bell Telephone Co., 16 Can. Ry. Cas. 271.

[Followed in Notre Dame des Anges v. Bell Telephone Co., 17 Can. Ry. Cas. 277.]

OTHER LINE—MUTUALITY—AGREEMENT.

Under an agreement between telephone systems imposing "another line" charge in addition to the long distance tolls of the Bell Co. "each party to receive its own charge and the party on whose line the call originates shall collect and be responsible for such charge, provided, however, that the Bell Co. shall not be obliged to collect and be responsible for the proprietor's charge if the proprietor fails to collect a like charge on messages originating on the proprietor's system," the obligation in respect of the "other line" charge is mutual, that is to say, if the Bell Co. is asked to collect the charge of the applicant company in respect of the message originating on the Bell Co's. line the applicant company must similarly collect in respect of a message originating on its own line and this obligation attaches to all calls.

Ernesttown Rural Telephone Co. v. Bell Telephone Co., 18 Can. Ry. Cas. 325.

[Followed in Joliette Telephone Co. v. Bell Telephone Co., 21 Can. Ry. Cas. 443.]

JURISDICTION—TOLLS—CONNECTIONS—LONG DISTANCE—LOCAL.

The Board has jurisdiction to order connection and fix tolls for long distance business, but it has none in the case of connection for local business. [Bell Telephone Co. v. Falkirk Telephone Co., 20 Can. Ry. Cas. 256, followed.] In the case of connecting telephone companies it is the duty of both companies to collect the full amount for long distance tolls and the company should not absorb its share of the through long distance toll. [Ernesttown Rural Telephone Co. v. Bell Telephone Co., 18 Can. Ry. Cas. 325, followed.]

Joliette Telephone Co. v. Bell Telephone Co., 21 Can. Ry. Cas. 443.

JURISDICTION—ADDITIONAL TOLLS—USE OF LONG DISTANCE CONNECTION—COMPETITION.

The Board has power under the Railway Act, 1906, and amendments, to authorize an additional toll to the established tolls of a telephone company for the use of its long distance lines; to order compensation for loss in local exchange business occasioned by giving independent companies long distance connection; to authorize payment of a special toll by competing companies obtaining long distance connection, though not subjecting noncompeting companies to a like toll. [Independent Telephone Co. v. Bell Telephone Co., 17 Can. Ry. Cas. 266, affirmed.]

Ingersoll Telephone Co. v. Bell Telephone Co., 22 Can. Ry. Cas. 135, 53 Can. S.C.R. 583, 31 D.L.R. 49.

MAXIMUM TOLLS—SEMI-PUBLIC TELEPHONES—AGREEMENT.

An agreement between a municipality and a telephone company fixing the maximum tolls to be charged for a residence or business telephone does not prevent the telephone company, subject to the provisions of the Railway Act, from filing its tariff of tolls with the Board covering the tolls to be charged for other forms of telephone service, such as semi-public, and giving such service to the public.

Mace and Ottawa v. Bell Telephone Co., 23 Can. Ry. Cas. 137.

EQUALIZATION—BASE AREA—COIN-BOX OR ATTENDED—UNJUST DISCRIMINATION.

It is unjust discrimination for a public utility company, whose tolls should be equalized according to the services rendered, to charge double the toll at the attended station for local calls compared with the toll at the coin-box booth, both being public telephones. The Board ordered the respondent to equalize its tolls for local calls by fixing a toll for local messages on a "two-number basis" from public telephones inside the base toll area at five cents, and outside thereof at ten cents.

Lemieux v. Bell Telephone Co., 23 Can. Ry. Cas. 141.

J. Rebates and Refunds.

See also Branch Lines.

RATES ON CONCRETE BLOCKS—STANDARD TARIFFS.

The Dominion Concrete Co. complained to the Board that there was an unjust discrimination in favour of bricks as against concrete blocks in the freight rates charged. After these rates had been satisfactorily adjusted and those on concrete blocks reduced the company applied to the Board for a refund of the difference between the higher and the reduced rate:—Held, that under ss. 323, 327, 401 of the Railway Act, 1906, the Board has no power to make a retroactive alteration in a tariff and grant rebates and refunds of tolls which have been charged.

Dominion Concrete Co. v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 514.

[Followed in Laidlaw Lumber Co. v. Grand Trunk Ry. Co., 8 Can. Ry. Cas. 192.]

TOLLS FOR CARRIAGE OF GOODS—BY-LAW FIXING RATES—REASONABLENESS.

An action by plaintiff as liquidator of the Canada Coal & Ry. Co., to recover an amount claimed from the defendant campany for car rental, etc. Defendant pleaded by way of offset, a claim for repayment of overcharges for the carriage of coal made by the company in liquidation. The evidence shewed that the Joggins Ry. Co., predecessors in title of the Canada Co., passed a by-law which was approved by the Governor-in-council fixing the rate per ton for the carriage of coal over their line, and that the Canada Co. subsequently passed a by-law increasing the rate, and that the defendant company were charged tolls as fixed by the latter by-law, although it had never received a sanction of the Governor-in-council and they claimed to be entitled to recover the difference between the two amounts:—Held, that the by-law passed by the Joggins Co. relating to the tolls to be taken by that company, was not a regulation affecting the road and running with the property, and was not binding upon their successors in title. Held, also, that the Canada Co. was not liable to refund moneys paid to them for the carriage of goods simply because they had failed to secure the approval of the Governor-in-council to the by-law fixing the rates. Held, nevertheless, that the trial Judge should have allowed an amendment applied for on the trial, intended to raise the question of the reasonableness of the rates taken, and that the appeal must be allowed and a new trial ordered on this ground.

Rodger v. Minudie Coal Co., 8 Can. Ry. Cas. 424, 32 N.S.R. 210.

SEIZURE FOR UNPAID TOLLS—TERMINATION OF CARRIER'S LIEN—DEMAND—CONVERSION.

By s. 345 of the Railway Act, 1906, a railway company may, instead of proceeding by action for the recovery of tolls upon goods carried, "seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof," etc:—Held, that a railway company are not, by this enactment, given a lien on property carried, to such an extent and of so general and wide an application as to allow them to retake goods which have been delivered, and as to which the ordinary carrier's lien has terminated; the section does nothing more than confirm and establish the carrier's lien; there is the right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee. Semble, that in this case there was not a sufficient demand for the tolls due to the defendants, on account of which they seized goods which they had previously delivered to the consignee, the demand being for a gross sum, including a sum for tolls. Held, also, that the defendants, having converted the goods, were liable for damages; and the measure was the value of the goods.

Clisdell v. Kingston & Pembroke Ry. Co., 9 Can. Ry. Cas. 73, 1 O.L.R. 169.

CONTRACT—CARRIER BY WATER—COMPULSORY PAYMENT.

An agreement was completed in Canada with an American steamship company to carry oats from a port in Ontario to one in the United States, "at the rate of 2½ cents per bushel," and the master of the vessel, as agent of the steamship company, accepted the cargo as measured by weight on the Canadian standard of 34 pounds to the bushel, and so indicated on the bills of lading signed by him at the port, which stated "rate of freight as per agreement":—Held, (Magee, J., dissenting), that the Canadian standard and not the American standard of 32 pounds to the bushel was to be applied to the contract. Where, on delivery by vessel of cargo, freight in excess of the amount due was paid as demanded, without protest Held, that nevertheless such payment was not voluntary, since, if it had not been made, expenses for storage, with possibly demurrage and loss by reason of nondelivery to purchasers, would have been incurred; and the excess paid was recoverable by action. A contract by telegram is made at the place where the telegram of acceptance is sent from.

Melady v. Jenkins Steamship Co., 9 Can. Ry. Cas. 78, 18 O.L.R. 251.

WRONG-BILLING—EXCESSIVE TOLLS—REFUND.

On an application to recover damages for the company's alleged negligence in way-billing a skiff to the wrong address, and charging excess tolls for sending it in a roundabout course to its proper destination, it being in dispute who was responsible for the erroneous way-billing:—Held, that the Board had no jurisdiction to entertain the complaint; the complainant must be left to her rights in the Courts. Held, that the Board could only investigate the error in computing the express tolls of the company, but as the company offers to refund the excess the Board should not interfere.

Rogers v. Canadian Express Co., 9 Can. Ry. Cas. 480.

REFUND—MISTAKE—PUBLISHED TARIFFS—UNJUST DISCRIMINATION.

Application for a refund for an overcharge on a carload shipment of evaporated milk, alleged to be due to a mistake of the respondent's agent. The applicants, under the impression that there was a special commodity tariff of 95 cents per hundred pounds on a minimum basis of 30,000 pounds per carload, paid the freight as estimated by the respondent's agent on that basis. Subsequently the applicants received a debit note for $91.67 from their consignees in Vancouver making with what they had already paid, $380 according to the published special commodity tariff of 95 cents per hundred pounds on a minimum basis of 40,000 pounds per car:—Held, (1) that the application for a refund must be refused, the applicants having made the initial error of assuming that the minimum carload weight was 30,000 pounds, which they could have avoided by examining the published tariffs. (2) That if the shipment had moved at the lower toll it would have been an unlawful variation from the published tariff. (3) That the granting of a refund would also be unlawful and might constitute unjust discrimination in favour of the applicants as against other shippers paying upon the basis of the published tariffs.

Canadian Condensing Co. v. Can. Pac. Ry. Co., 12 Can. Ry. Cas. 1.

OVERCHARGE—MISTAKE—REFUND.

Application for a refund of an overcharge on the transportation by water of a shipment of carbide from Vancouver to Alberni, B.C., and for a reimbursement of expense in obtaining redress:—Held (1), that the Board had jurisdiction under s. 7 of the Act, over the charges for transportation by water when such transport is under the control of a railway company. (2) That the Board could only declare the overcharge illegal, having no jurisdiction to order a refund in a case of mistake. (3) That the Board has not set a precedent by ordering reimbursement of expense in obtaining redress, but that means should be adopted by railway companies to rectify plain and palpable errors leading to overcharges and that if this is not done it may be necessary for the Board to compel railway companies to reimburse those incurring expense in similar cases.

Currie v. Can. Pac. Ry. Co., 13 Can. Ry. Cas. 31.

FREIGHT TOLLS—REBATE AGREEMENT—BY-LAWS TO FIX TOLLS APPROVED BY LIEUTENANT-GOVERNOR-IN-COUNCIL.

The rebate agreement upon freight charges between a railway company and a forwarder, made in the absence of a by-law or of a resolution of the shareholders of the company at a general meeting and approved by the Lieutenant-Governor-in-council, violates the prohibition embodied in art. 6607 et seq. R.S.Q. 1909, is consequently null and void and leaves the forwarder without redress.

Kennedy v. Quebec & Lake St. John Ry. Co., 14 Can. Ry. Cas. 153, 39 Que. S.C. 344.

[Reversed in 21 Que. K.B. 85, 14 Can. Ry. Cas. 161; affirmed in the result, Quebec & Lake St. John Ry. Co. v. Kennedy, 17 Can. Ry. Cas. 291, 15 D.L.R. 400.]

PROVINCIAL RAILWAYS—FREIGHT TOLLS—REBATE AGREEMENT—POWER OF DIRECTORS.

An agreement between a provincial railway company and a shipper whereby a rebate is allowed upon freight tolls is not a violation of Art. 5172, R.S.Q. 1888, (Art. 6607 et seq. R.S.Q. 1909), unless it entails an undue preference or advantage. Hence, if entered into for special reasons e.g., the obligation of the forwarder to ship all his products over such railway, to himself pay the cost of loading and unloading, etc., the agreement is presumed to be lawful, until it is shewn to conceal an injustice. (2) The directors of the company, without being specially authorized thereto by the shareholders, have the power and capacity to enter into the aforesaid agreement.

Kennedy v. Quebec & Lake St. John Ry. Co., 14 Can. Ry. Cas. 161, 21 Que. K.B. 85.

[Affirmed in the result, Quebec & Lake St. John Ry. Co., 17 Can. Ry. Cas. 291, 15 D.L.R. 400.]

PROVINCIAL RAILWAYS—FREIGHT TOLLS—REBATE AGREEMENT—ANTI-REBATE ACT (QUE.).

An agreement between a provincial railway company in Quebec and a shipper, whereby a rebate is allowed upon freight tolls, is not necessarily a violation of the Anti-Rebate Act, Que. 1906 (art. 6607 et seq., R.S.Q. 1909), although it stipulates that the shipper is to give the railway all his shipments, where the rebate is granted in respect of other valuable considerations moving from the shipper, such as the assumption of the task of loading and unloading: and a railway company which has received tolls paid to it on the faith of such an agreement made prior to the passing of the Anti-Rebate Act cannot set up the statute in answer to the shipper's action for recovery of rebates where the rebates are not shewn to constitute an unjust discrimination, particularly where the tolls paid had not been authorized by any provincial order-in-council. [Kennedy v. Quebec & Lake St. John Ry. Co., 14 Can. Ry. Cas. 161, 21 Que. K.B. 85, affirmed in the result.]

Quebec & Lake St. John Ry. Co. v. Kennedy, 17 Can. Ry. Cas. 291, 48 Can. S.C.R. 520, 15 D.L.R. 400.

RAILWAY DIRECTORS—REBATE AGREEMENTS WITH SHIPPERS.

The directors of a provincial railway in Quebec, without being specially authorized thereto by the shareholders, have the power to enter into an agreement with a shipper to grant him rebates upon freight charges in return for valuable consideration rendered on his part, where no unjust discrimination results therefrom. [Kennedy v. Quebec & Lake St. John Ry. Co., 14 Can. Ry. Cas. 161, 21 Que. K.B. 85, affirmed in the result.]

Quebec & Lake St. John Ry. Co. v. Kennedy, 17 Can. Ry. Cas. 291, 48 Can. S.C.R. 520, 15 D.L.R. 400.

REFUND—JURISDICTION—CANCELLED TARIFF.

The Board has no power to authorize a refund from a toll properly quoted under a tariff duly filed. However, under s. 338 of the Railway Act, a joint tariff cannot be cancelled without a new one being filed in substitution thereof, and a railway who charged a toll under a cancelled joint tariff, was authorized to make a refund of the difference between such toll and that chargeable under the substituted tariff.

Quebec Central Ry. Co. v. Dominion Lime Co., 19 Can. Ry. Cas. 281.

CARRIAGE OF TRAFFIC BEFORE OPENING OF RAILWAY—REFUND.

The carriage of traffic (other than for construction purposes) before the railway has been authorized to be opened therefor, under s. 261 of the Railway Act, 1906, is illegal, and no legal toll or tariff applies to such traffic. Refunds apply where the railway company, performing a legal service, charges a greater toll than allowed by appropriate tariff on file with the Board. [Baker, Reynolds & Co. v. Can. Pac. Ry. Co., 10 Can. Ry. Cas. 151, followed.]

Randall et al. v. Can. Pac. Ry. Co., 17 Can. Ry. Cas. 252.

[Followed in Re Edmonton, Dunvegan & B.C. Ry. Co., 19 Can. Ry. Cas. 395; Ogilvie Flour Mills Co. v. Can. Pac. Ry. Co., 25 Can. Ry. Cas., 47 D.L.R. 226.

TRACK.

See Rails and Roadbed.

TRAFFIC.

See Sunday Traffic; Interchange of Traffic.

Traffic agreements, see Carriers of Goods.

Opening road for traffic, see Railway Board.

CONSTRUCTION PERIOD—DUTY TO TRANSPORT GENERALLY.

A railway company cannot lawfully carry passengers over a road that has not been opened for traffic by an order of the Board under s. 261 of the Railway Act, 1906, except labourers employed in the construction thereof.

Re Grand Trunk Pacific Ry. Co., 3 D.L.R. 819.

TRAIN.

Definition of train, see Signals and Warnings.

TRAIN SERVICE.

See Cars; Street Railways.

PASSENGER SERVICE—CONTRACT WITH GOVERNMENT—BREACH—WAIVER.

By an agreement the plaintiffs were to lease their line of railway to the defendants upon the condition, inter alia, that the defendants would run a passenger train each way each day between stations A and B. The lease was not executed, but the defendants went into possession of and operated the line. The plaintiffs alleged in their bill that at the time of the agreement, as was known to the defendants, they were under contract with the Government of New Brunswick to run a passenger train each way each day between A and B, but the contract was not set out in full. In 1897 a lease was executed by the plaintiffs and defendants by which it was provided that the defendants would run a passenger train one way each day between A and B, "and if and whenever it may be necessary to do so in order to exonerate the [plaintiffs] from its liability to the Government of New Brunswick then the [defendants] will run at least one train carrying passengers each way each day." On July 31, 1899, the Attorney-General of New Brunswick gave notice to the plaintiffs that their contract with respect to running a passenger train each way each day between A and B must be enforced, but no further proceedings with respect to the matter were taken by the Government, though the defendants continued to run a passenger train but one way each day. It did not appear whether the notice of the Attorney-General might not have been given at the plaintiff's instance. On a motion for an interlocutory mandatory injunction in this suit which was brought to compel the defendants to run a passenger train each way each day between A and B.:—Held, that no case was made out for relief by mandatory injunction, which will only be granted where necessary for the prevention of serious damage, and that the question raised was merely one of pecuniary damages between the plaintiffs and defendants, for which the defendants were well able to account to the plaintiffs, and which by the lease of 1897 the plaintiffs had agreed to accept in event of their liability, if any, to the Government, and that it did not appear that such liability had arisen.

Tobique Valley Ry. Co. v. Can. Pac. Ry. Co., 1 Can. Ry. Cas. 282, 2 N.B. Eq. 195.

SECOND-CLASS PASSENGER—ACCOMMODATION—SMOKING CAR.

A railway passenger holding a second-class ticket is entitled to reasonable accommodation of the kind usually furnished to passengers of that class and cannot be compelled to travel in a smoking car. Judgment of Britton, J., affirmed, Osler, and Garrow, JJ.A., dissenting as to the conclusions of fact.

Jones v. Grand Trunk Ry. Co., 4 Can. Ry. Cas. 418, 9 O.L.R. 723.

WANT OF AIR BRAKES—PASSENGER TRAIN.

There is no common-law liability for negligence on the part of a carrier by reason of a train not being furnished with air brakes as required by the Railway Act, 1903, s. 211, where the train is not a passenger train, and the accident not occurring through the want of brakes, but by reason of the engine driver's failure to see and act on the conductor's signal.

Muma v. Can. Pac. Ry. Co., 6 Can. Ry. Cas. 444, 14 O.L.R. 147.

DANGEROUS PLATFORM.

Where passengers are impliedly invited by a railway company to make use of a platform as a means of access to the railway cars, it is the duty of the railway company to have the platform in a reasonably safe condition at all points, or parts where such passengers are entitled to be or stand; consequently where the plaintiff sustained injuries by attempting to board a passenger car of the defendant railway company by falling over the unprotected end of the platform, the night being dark and the platform bady lighted, without any carelessness or contributory negligence on her part:—Held, by Stuart, J., that the company were liable for negligence in not having the platform in a reasonably safe condition; and semble, that it made no difference whether the platform were well lighted or not. Circumstances to be considered in estimating damages for personal injuries, etc., discussed. Per Curiam:—While an act or a circumstance under ordinary conditions may not constitute negligence, under other circumstances or in other conditions it may amount to negligence, or in other words that there may be negligence in the combination:—Held, therefore, that the combination of circumstances in this case, namely, a long night train drawn up at a short platform inadequately lighted, so that passengers attempting to board the train were not free from danger of accident, constituted actionable negligence on the part of the railway company. Judgment of Stuart, J., affirmed.

Swan v. Can. Northern Ry. Co., 9 Can. Ry. Cas. 251, 1 Alta. L.R. 427.

RAILWAY IN COURSE OF CONSTRUCTION.

Upon an application for an order to compel the railway company to institute and operate an adequate daily first-class passenger service on its line between Winnipeg and Edmonton during the period of construction:—Held (1), that under s. 261 of the Railway Act, 1906, the Board has no jurisdiction to open a railway for the carriage of traffic or other than for the purposes of construction, until application has been made therefor by the railway company. (2) That since the Government by the provisions of the special Act incorporating the Grand Trunk Pacific Ry. Co. (4 & 5 Edw. VII. c. 98), has power to fix by order-in-council the date of the completion of the railway, it may be that the Board cannot open the railway until such order is issued, the special Act overriding the Railway Act under s. 3 of the latter Act.

Central Saskatchewan Boards of Trade v. Grand Trunk Pacific Ry. Co., 10 Can. Ry. Cas. 135.

[Referred to in Hamilton v. Toronto, Hamilton & Buffalo Ry. Co., 17 Can. Ry. Cas. 353.]

TIME TABLES—REGULAR STATIONS—IMMEDIATE HANDLING OF MARKET PRODUCE.

Complaint by the New Westminster and Surrey Boards of Trade that the respondent railway company started its morning train at 8 A. M. instead of 7 A. M., as formerly, and did not stop at all regular and flag stations and other stopping places on the Guichon Branch or transfer cars containing market produce from its main line to the market place immediately upon the arrival of its train at New Westminster. The respondent made the changes complained of so that its trains should arrive at New Westminster and Vancouver on schedule time. The applicants contended that farmers living on the Port Guichon Branch by these changes were either compelled to stop daily shipments of milk and other farm produce to the New Westminster market or, if able to do so, their shipments arrived too late:—Held (1), that upon the evidence and the report of the Chief Operating Officer the respondent should be required to start its trains from Port Guichon at 7 a. m., stopping as formerly at all regular and flag stations and other stopping places between Port Guichon and Cloverdale. (2) That its yard engine should be used to transfer cars containing market produce to the market immediately on the arrival of respondent's train at New Westminster.

New Westminster and Surrey Board of Trade v. Great Northern Ry. Co., 11 Can. Ry. Cas. 324.

DUTY TO OPEN VESTIBULE DOORS AT STATIONS.

It is the duty of a railway company operating a vestibuled passenger train to open the vestibule door of the day coach at which passengers may expect to alight at their points of destination, or to direct the passengers as to the mode of exit, so that they may get off the train while it is standing at the station. Where a railway company negligently omitted to open the vestibule door of a day coach on arrival at a passenger's destination and the passenger, in his efforts to get off the train, went to the next coach to find an open vestibule from which to alight, and the train was, by that time, pulling away from the station at a speed of three or four miles an hour, there was nothing in the rate at which the train was proceeding to make it manifestly dangerous for the plaintiff to attempt to get off, and such course on his part was not contributory negligence. [Keith v. Ottawa & New York Ry. Co., 5 O.L.R. 116, 2 Can. Ry. Cas. 26, applied.] Where a railway company negligently closes a passenger's natural means of getting off a train, without notice to him, such company is guilty of negligence in starting the train before the passenger has sufficient time to get off by the means he adopts, provided such means be reasonable. Where the negligence of a railway company, operating a passenger train, forced a passenger into an emergency as to getting off the train at his destination, the fact that the means or method of exit which he, in such emergency, adopts, is not the wisest possible under the circumstances, does not necessarily imply contributory negligence on his part.

McDougall v. Grand Trunk Ry. Co. (Ont.), 14 Can. Ry. Cas. 316, 8 D.L.R. 271.

PASSENGER AND FREIGHT EARNINGS.

In answer to complaints that a railway company during a period of depression has decreased and impaired the passenger service upon one of its local lines forming part of its system, the company submitted figures showing a deficit as a result of the operations of its system as a whole within the province. It appeared, however, that the earnings of the local line in question shewed a decrease in the passenger traffic but there had been an increase in its freight earnings, resulting in net increase, the Board held that the local line should not be blamed for the deficit on the system generally (due to the operation of lines which could hardly be said to have passed beyond the construction stage) that the former passenger service should be restored, and it so ordered.

Re Trenton, Maynooth & Bancroft Line, 19 Can. Ry. Cas. 268.

OBLIGATION TO RUN TRAIN—UNREMUNERATIVE EARNINGS—BY-LAW—BONUS.

Where the total freight and passenger earnings on a section of railway are unremunerative, the Board will not order the former train service to be restored, but where, under a by-law of the municipality, in consideration of a bonus of $5,000, the railway company's predecessor in title undertook to run a train from Sydenham to Harrowsmith in the forenoon and one back in the afternoon every week day, and if the company should at any time hereafter "fail to . . . run said train, they can only do so upon repaying said bonus of $5,000 to said municipality," it was held that this obligation was not met by running a train leaving Sydenham at 1.59 a.m. and arriving at Harrowsmith at 2.09 a.m., and that the bonus must be repaid unless the morning service was restored.

Loughboro v. Can. Northern Ry. Co., 19 Can. Ry. Cas. 276.

UNREMUNERATIVE SERVICE—VOLUME OF TRAFFIC.

Ordinary local trains should stop at stations where there is a sufficient volume of traffic to call for additional train service, as the operating conditions and control of operations are entirely different and distinct from through express trains. It is no answer to such a claim that the existing service is unremunerative.

La Salle v. Can. Pac. and New York Central Ry. Cos., 20 Can. Ry. Cas. 190.

[Followed in Oakville v. Grand Trunk and Can. Pac. Ry. Cos., 22 Can. Ry. Cas. 433.]

EARNINGS—AVERAGE.

Where the gross earnings per passenger train mile on a passenger train between Lachute and Montreal are not only much below the average return of the whole system, but are also below the average costs of the system, the Board would not be justified in directing that an additional passenger train should be put into service between the same points.

Massiah v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 358.

[Followed in Crushed Stone etc. v. Grand Trunk Ry. Co., 23 Can. Ry. Cas. 132.]

TIMETABLE—CHANGE—PUBLIC CONVENIENCE.

Public convenience does not demand the restoration of a former timetable, where the railway company has justified the change in it by shewing that the early mail arrives at the point in question, as usual, early in the morning; and its trains by leaving the point of departure, later, in the morning, serve the convenience of the traveling public by enabling them to make close connections from various points with the later morning trains.

Picton Board of Trade v. Can. Northern Ontario Ry. Co., 18 Can. Ry. Cas. 363.

UNJUST DISCRIMINATION—PERSONS OR LOCALITIES—PASSENGER EARNINGS.

The Board is not justified in directing additional passenger service where the passenger train mile earnings would be one-half of the passenger train mile cost of operation in the absence of any evidence of similarity of conditions and of affirmative evidence that the difference in passenger train service has resulted that persons and localities located on one section of railway have profited at the expense of those on another section so as to shew unjust discrimination. [Toronto and Brampton v. Grand Trunk and Can. Pac. Ry. Cos. (Brampton Commutation Rates Case) (No. 2), 11 Can. Ry. Cas. 370, followed.]

Wood v. Can. Pac. Ry. Co., 18 Can. Ry. Cas. 365.

MILK TRAFFIC—CONGESTION—UNJUST DISCRIMINATION.

The Board refused to direct the previously existing passenger train service to be restored where a change made in such service upon the opening of a new station at North Toronto relieved the congestion of traffic at the Union Station, but incidentally involved unloading milk at West Toronto instead of Parkdale, in the City of Toronto, the change appearing to be in the public interest and to involve no unjust discrimination or unfairness in the treatment of the particular interests prejudicially affected.

Harris v. Can. Pac. Ry. Co., 21 Can. Ry. Cas. 31.

CONNECTIONS—DISRUPTION—INCONVENIENCE.

Upon an application for better train service, the Board declined to make an order where it appeared that the proposed change would disrupt the existing schedule of connections, cause longer waits at some junction points, break connections at others, and result in increased inconvenience to persons using the line who were not parties to the application.

Massena Springs v. Grand Trunk Ry. Co., 21 Can. Ry. Cas. 34.

MILK TRAFFIC—MIXED TRAINS.

The Board refused to order a carrier to give passenger train service on a milk train when it appeared that the milk traffic had originally been carried on a mixed train, No. 81, and had been transferred to a special milk train in order that No. 81 might run as a passenger train only and the passenger service be thereby improved.

Massena Springs v. Grand Trunk Ry. Co., 21 Can. Ry. Cas. 34.

ELECTRIC RAILWAY—SUBURBAN SERVICE.

Suburban populations, usually dependent on electric railways for ingress and egress to and from large cities, should have a satisfactory train service. Where no train stopped at Greenfield Park, a station on an electric railway (9.46 miles from Montreal) between 8.16 a.m. and 3.18 p.m.

the Board ordered another train, passing at 10.15 a.m. for Montreal, to stop at Greenfield Park.

East Greenfield Park v. Montreal & Southern Counties Ry. Co., 21 Can. Ry. Cas. 208.

STEAM AND ELECTRIC LINES—BUSINESS.

Where respondent steam lines have been paralleled by electric lines, which have taken practically all the business, and ordering the respondent to give an increased service, might secure a better service from the electric line, such an order would not be justified in the public interest, where this could only be done at an unjustifiable cost and entail a continuing loss to the respondent.

Hamilton v. Grand Trunk Ry. Co. (Burlington Beach Case), 21 Can. Ry. Cas. 211.

COMPETITION—LOSS OF REVENUE—DIVERSION OF TRAFFIC—REASONABLE—CIRCUITOUS ROUTE—JOINT ROUTE.

It would not be reasonable to compel a carrier to operate its train service in connection with a competing carrier and thus lose revenue by the diversion of its traffic to its competitor, if it can handle it as well, or reasonably as well, over its own lines. When a carrier is not giving a reasonable train service, owing to its route being circuitous and unnecessarily long, the traffic must move on the joint route unless the lines of the single route afford a reasonable and practicable one, especially when the time allowed between trains is insufficient to do business at a distributing centre and return the same day to the point of departure.

Cole et al. v. Can. Northern Ry. Co., 22 Can. Ry. Cas. 429.

AGREEMENT—JOINT SECTION—TRAFFIC—THROUGH—PASSENGER AND FREIGHT—LOCAL—STATION—INTERMEDIATE—JURISDICTION.

By agreement between the Grand Trunk and Canadian Pacific Ry. Cos., May 13, 1896, confirmed by 59 Vict. c. 6 (C), the Canadian Pacific were given a lease for a period of 50 years of the joint use of the Grand Trunk line between Hamilton Junction and the city of Toronto, known as the "Joint Section." By the 16th clause of the agreement, the Canadian Pacific agreed to do through passenger and freight business over the joint section, but not local business between either Hamilton or Toronto and an intermediate station on the joint section. Oakville is a town on the joint section, with a population of over 3,000 inhabitants, about 21 miles west of Toronto. Many of its residents have their offices or places of business in Toronto. For many years the Grand Trunk Ry. Co. gave a fairly satisfactory suburban service between Oakville and Toronto, until in January, 1917, the 11.45 p.m. train out of Toronto was discontinued to economize fuel, and the Canadian Pacific voluntarily agreed to stop its 7.15 p.m. train out of Toronto for Buffalo. In June, 1917, the Grand Trunk reestablished its 11.45 p.m. train and discontinued it again in September, 1917. The Canadian Pacific being unwilling, the Board ordered its 7.15 p.m. train out of Toronto to stop at Oakville. Assistant Chief Commissioner:—The confirmatory Act is not a special Act within the meaning of s. 3 of the Railway Act, but merely validated a private arrangement between two railway companies and does not make any enactment affecting the general public. Commissioner McLean:—The confirmatory Act is a special Act within the meaning of s. 3 of the Railway Act, but there is no such repugnancy between the provisions of the special Act and the Railway Act as to oust the jurisdiction of the Board in matters of train service. [Grand Trunk and Canadian Pacific Ry. Cos. v. Toronto (Viaduct

Case), 11 Can. Ry. Cas. 38, at p. 39; La Salle v. Can. Pac. and New York Central Ry. Cos., 20 Can. Ry. Cas. 190, at pp. 192, 193, followed.]

Oakville v. Grand Trunk and Can. Pac. Ry. Cos. (Hamilton Joint Section, Oakville Case), 22 Can. Ry. Cas. 433.

[Reheard and reversed in 25 Can. Ry. Cas.]

RUNNING TIME—RESTORATION—FURTHER TRAINS—SUFFICIENT ACCOMMODATION FOR PASSENGERS.

In view of the fact that it has been found impossible to set back the running time of train G.T.R. No. 89, leaving Toronto at 5.45 p.m. and that train G.T.R. No. 7 formerly leaving Toronto at 11.45 p.m. has been restored, the Board cannot consistently order any further train service to or from Oakville, as the trains are reasonably spaced and sufficient for the accommodation of passengers and the previous order to stop the C.P.R. train should be rescinded. [Oakville v. Grand Trunk and Can. Pac. Ry. Co., 22 Can. Ry. Cas. 433, reheard and reversed.]

Can. Pac. Ry. Co. v. Oakville and Grand Trunk Ry. Co., 24 Can. Ry. Cas. 375.

ADEQUATE—TRAFFIC REQUIREMENTS—AGREEMENT.

A Dominion Act declaring a railway company's undertaking to be a work for the general advantage of Canada does not discharge its covenant to maintain a railway service sufficient and adequate for the requirements of traffic under an agreement with the Crown as represented by the Province of Nova Scotia or discharge or affect the rights of the province to enforce it, the Board has jurisdiction under s. 26 A of the Railway Act, 1906, to entertain a summary application by the province to enforce the agreement, or in the alternative the province may bring an action in the provincial Courts.

North Queens Board of Trade v. Halifax & South Western Ry. Co., 20 Can. Ry. Cas. 187.

OBLIGATION TO FURNISH SERVICE WHICH TRAFFIC DEMANDS.

The obligation of carriers is to furnish such service as the traffic demands, but not to treat it as special train movement and require a guarantee of a certain number of cars to be handled.

Oyler et al. v. Dominion Atlantic Ry. Co., 20 Can. Ry. Cas. 238.

COSTS OF OPERATION—EARNINGS—LIMITED SERVICE.

Where the costs of operation between two points are much higher than the earnings the Board will limit the train service to a movement of traffic not more than once a week.

New Westminster Board of Trade v. Great Northern Ry. Co., 23 Can. Ry. Cas. 58.

INCREASE IN TRAFFIC—CURTAILMENT—"CARRY ON BUSINESS."

As traffic increases, train service must be increased, but even where business is decreasing, such minimum train service as will enable the necessary and ordinary business of the country to be carried on should be given.

Lethbridge Board of Trade et al. v. Can. Pac. Ry. Co. (Alberta Train Service Case), 24 Can. Ry. Cas. 34.

REVENUES—REMUNERATIVE—JURISDICTION—MUNICIPAL AGREEMENTS—BY-LAWS.

Under the established practice, train service without such cash remunerative revenues as will enable the carrier to continue its operations cannot be ordered by the Board under the Railway Act, but in view of municipal by-laws and agreements confirmed by s. 10 of 7 & 8 Edw. VII. c. 117 (D.), the Board can only exercise in the present instance the jurisdiction which enables it to order that the by-laws should be carried out by furnishing the train service stipulated for therein, even though such service cannot be furnished except at a loss to the company. [Hamilton Radial Elec. Ry. Co. v. Hamilton et al., 23 Can. Ry. Cas. 114, followed.]

Burlington Beach Commission v. Hamilton Radial Elec. Ry. Co., 24 Can. Ry. Cas. 39.

STOP—TOLLS—COMMUTATION—EARNINGS—INCONVENIENCE—CONNECTIONS.

The applicant having accepted on its express train in question the respondent's tickets issued at specially low commutation tolls to Oakville, out of which it only receives a fraction of the earnings, and the emergency which justified the previous order having ceased, it is inequitable that the applicant should be forced to continue the train service stop, or that larger numbers of passengers who pay for their transportation at a higher toll should be inconvenienced and their connections jeopardized.

Can. Pac. Ry. Co. v. Oakville and Grand Trunk Ry. Co., 24 Can. Ry. Cas. 375.

TRANSFER COMPANIES.

See Carriers of Goods; Limitation of Liability.

TRAUMATIC NEURASTHENIA.

Damages for injuries causing nervous disorder, see Damages.

TRESPASS.

See Trespassers.

Trespass to lands in consequence of construction of raliway, see Expropriation.

Annotations.

Damage resulting from the exercise of corporate powers, and the right of recovery. 6 Can. Ry. Cas. 365.

Measure of special damage, see Damages (F).

SURVEYORS CUTTING TREES—ACTION FOR DAMAGES IN RUNNING TRIAL LINE.

If damages are occasioned to a landowner by the exercise of the powers conferred on a railway company by the Railway Act and there is no negligence in the mode of exercising such powers, the person injuriously affected is limited to the provisions of the Act for compensation. But if there is negligence in such exercise of statutory powers, or if damages are unnecessarily inflicted, then an action will lie and the complainant is not limited to the remedy given by the arbitration clauses of the Act. The plaintiff's claim was for damages for cutting down trees in his grove through which the defendants were making a survey for a trial line for a proposed branch of their railway, but the possibility of running the trial line through the grove without cutting down the trees by making a rectangular detour around it was not raised at the trial and the trial Judge did not pass upon it:—Held, per Richards and Mathers, JJ., that the plaintiff, who had been nonsuited at the trial, was entitled to a new trial to determine whether the line could not have been run in the manner suggested. At the new trial ordered the County Court Judge again nonsuited the plaintiff who appealed to the Court of Appeal. Held, that the evidence shewed that it was unnecessary to cut down the trees for the purpose of running the required trial line and that the plaintiff was entitled to recover in the action, and that judgment should be entered for him for $250 damages and cost of both trials and both appeals.

Barrett v. Can. Pac. Ry. Co., 16 Man. L.R. 549, 558, 6 Can. Ry. Cas. 356, 364.

KNOWLEDGE OF REASONABLE USER OF LAND—NOTICE PRESUMED.

A trespasser on lands is to be dealt with as having notice or knowledge that the owner of the land will try to use it in any reasonable and usual way which may be profitable to him, and is accountable for damages accordingly. [10 Halsbury's Laws of England 317, discussed; Lloy v. Dartmouth, 30 N.S.R. 298, specially referred to.]

Marson v. Grand Trunk Pac. Ry. Co. (Alta.), 14 Can. Ry. Cas. 26, 1 D.L.R. 850.

[Followed in Lavallee v. Can. Northern Ry. Co., 4 D.L.R. 376.]

TRESPASSERS.

Animals, see Fences and Cattle Guards.

Persons generally, see Carriers of Passengers; Crossing Injuries; Fences and Cattle Guards; Street Railways.

TRIAL.

See Pleading and Practice.

ULTIMATE NEGLIGENCE.

See Negligence; Employees; Street Railways; Carriers of Passengers.

UNDERPASS.

See Farm Crossings.

UNJUST DISCRIMINATION.

As affecting classification of tariffs, see Tolls and Tariffs.

In supplying cars, see Cars.

VENUE.

See Pleading and Practice.

VERDICT.

See Pleading and Practice.

VESTIBULE CAR.

See Carriers of Passengers.

VIADUCT.

See Bridges; Highway Crossings.

VOLENS.

See **Employees**; **Pleading and Practice**.

WAREHOUSES, YARDS AND WORKSHOPS.

Municipal bonus on condition of nonremoval of workshops, see **Railway Subsidy**.

Liability of company as warehouseman, see **Baggage**.

RAILWAY YARD—INJURY TO VISITOR—LICENSEE—DAMAGES.

The plaintiff's son was given leave by a yardmaster of the defendant's to learn in the railway yard the duties of car checker, with the expectation that if he became competent he would be taken into the employment of the defendants in that capacity, and he was free to devote as much or as little time to acquiring the necessary knowledge as he saw fit. While he was in the railway yard a few days after this permission had been given he was killed by an engine of the defendants which was running through the railway yard without the bell being rung though the rules of the defendants required this to be done:—Held, that the deceased was a licensee and not a trespasser; that the defendants were bound to exercise reasonable care for his protection; and that the omission to give the warning was negligence which made them liable in damages for his death. The Court being of opinion, however, that damages of $3,000 allowed by the jury were excessive, ordered that there should be a new trial unless the plaintiff should consent to accept $1,500.

Collier v. Michigan Central Ry. Co., 27 A.R. (Ont.) 630.

[Referred to in Renwick v. Galt Street Ry. Co., 11 O.L.R. 158, 12 O.L.R. 35.]

STATUTORY OBLIGATION—ENFORCEMENT BY MUNICIPALITY—PROHIBITION AGAINST REMOVAL OF "WORKSHOPS."

Upon a motion made by the plaintiffs, pursuant to leave given in the judgment reported in 1 O.L.R. 480, for leave to amend by claiming a remedy against the defendants by virtue of the prohibition contained in s. 37 of 45 Vict. c. 67 (Ont.), providing that "the workshops now existing at the town of Whitby, on the Whitby section, shall not be removed by the consolidated company (the Midland Ry. Co. of Canada) without the consent of the council of the corporation of the said town":—Held, that this section imposed an obligation upon the Midland Ry. Co. for the benefit of the plaintiffs, who were entitled to maintain an action thereon in their own name; and by virtue of 56 Vict. c. 47 (D.), amalgamating the Midland Co. with the defendants, and clause 3 of the agreement in the schedule to that Act, the plaintiffs could maintain an action against the defendants for damages for any breach of the obligation committed by the Midland Ry. Co. before, or by the defendants since, the amalgamation; and the plaintiffs should be allowed to amend and to have judgment for such damages as they were entitled to. Held, also, that "the workshops now existing" meant the buildings used as workshops; and damages could not be assessed on the basis of the prohibition being against the shutting down of or reducing the extent of the work carried on in the workshops.

Whitby v. Grand Trunk Ry. Co., 1 Can. Ry. Cas. 276, 3 O.L.R. 536.

DUTY AS TO SAFETY AND CARE.

The obligation resting upon a railway company as the owner or occupier of a building to which the public is invited to commit themselves or their property is to have the structure in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so. [Pollock on Torts, 8th ed., pp. 508, 512, referred to; see also Underhill on Torts, 9th ed., p. 171.]

Gunn v. Can. Pac. Ry. Co., 1 D.L.R. 232, 48 C.L.J. 153, 22 Man. L.R. 32.

STABLE ACCOMMODATION FOR HORSES.

Where a railway company is the owner or occupier of a stable, and supplies stable accommodation and feed for horses at a fixed sum per day, but without giving the exclusive use of any part of the stable, it is under obligation to see that the stable is in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so and this obligation subsists notwithstanding that the horses were fed and cared for by their owner. [Francis v. Cockrell, L.R. 5 Q.B. 501; and Stewart v. Cobalt, 19 O.L.R. 667, applied; see also annotation to this case.]

Gunn v. Can. Pac. Ry. Co., 1 D.L.R. 232, 48 C.L.J. 153, 22 Man. L.R. 32.

LIABILITY AS WAREHOUSEMAN—GOODS IN CAR ON SIDING—DEGREE OF CARE.

A railway company is in the position of a warehouseman in respect of a carload lot in bond held on a siding after arrival at destination where the holding of the car is subject to demurrage charges until the consignee shall remove the contents; the onus is upon the railway to shew affirmatively that it had exercised reasonable care in an action for nondelivery of the goods which were lost from the car while under demurrage and had probably been stolen.

Great West Supply Co. v. Grand Trunk Pacific Ry. Co., 19 Can. Ry. Cas. 347, 23 D.L.R. 780.

WAREHOUSEMEN—CONSIGNEE—BREACH OF CONTRACT—THEFT.

Where it was a part of the contractual obligation between the consignee of a car load of cement and the railway, in respect of its warehousing duties, that the railway should keep the car on the bonded spur line, as in fact it was bound under customs regulations to do until the customs duties were paid, but the railway, without authority, removed the car to another track, from which its contents were stolen, the railway company is liable for the loss. [Lilly v. Doubleday, 7 Q.B.D. 510, followed.]

Great West Supply Co. v. Grand Trunk Pacific Ry. Co., 20 D.L.R. 774.

WAREHOUSEMEN—BREACH OF CONTRACT—LOSS OF GOODS—OPERATION OF RAILWAY—LIMITATION OF ACTION.

Where the railway company, in breach of its contract as a warehouseman, used its rolling stock and its employees to put the goods warehoused with it in a place where, under the terms of the contract, they should not have been put, the resultant loss is not one occasioned by "the operation of the railway" within s. 242 of the Railway Act, 1906, and is not barred by failure to bring suit within one year. [Can. Northern Ry. Co. v. Robinson, [1911] A.C. 745, referred to.]

Great West Supply Co. v. Grand Trunk Pacific Ry. Co., 20 D.L.R. 774.

WATCHMEN.

See Highway Crossing; Railway Crossings; Crossing Injuries.

WATER PIPES.

See Wires and Poles.

WATERS.

Power of Dominion Parliament to regulate Provincial foreshore and harbour, see Constitutional Law.

Damage caused by waters, see Nuisance.

Navigable river—Rights of riparian owners—Obstruction—Damages.

(1) A riparian owner on a navigable river is entitled to damages against a railway company although no land is taken from him, for the obstruction and interrupted access between his property and the navigable waters of the river, viz., for the injury and diminution in value thereby occasioned to his property. (2) The railway company in the present case, not having complied with the provisions of 43 & 44 Vict. (Que.), c. 43, s. 7, subs. 3 & 5, the appellant's remedy by action at law was admissible. 12 Q.L.R. 205, reversed.

Plon v. North Shore Ry. Co., 14 Can. S.C.R. 677.

[In this case the Privy Council affirmed the judgment of the Supreme Court. See 14 App. Cas. 612. At p. 614, it is stated that Strong, J. dissented from the judgment of the Court. This is an error: Strong, J. concurred with the majority of the Court in allowing the appeal. See Bigaouette v. North Shore Ry. Co., 17 Can. S.C.R. 363. Applied in Montreal v. Montreal Brewing Co., 18 Que. K.B. 405; referred to in Audet v. Quebec, 9 Que. S.C. 342; Ontario & Quebec Ry. Co. v. Vallières, 36 Que. S.C. 358; relied on in Sandon Water Works and Light Co. v. Byron N. White Co., 35 Can. S.C.R. 321; applied in Chaudière Machine & Foundry Co. v. Canada Atlantic Ry. Co., 33 Can. S.C.R. 14; The Queen v. Barry, 2 Can. Ex. 348; Saunby v. London Water Commissioners [1906] A.C. 110; Vancouver v. Can. Pac. Ry. Co., 23 Can. S.C.R. 17; Water Commissioners of London v. Saunby, 34 Can. S.C.R. 650; approved in Arthur v. Grand Trunk, 22 A.R. (Ont.) 89; distinguished in Clair v. Temiscouata Ry. Co., 37 N.B.R. 614; followed in Barter v. Sprague's Falls Mfg. Co., 38 N.S.R. 216; Bigaouette v. North Shore Ry. Co., 17 Can. S.C.R. 363; Smith v. Public Parks Board, 15 Man. L.R. 258; referred to in Bannatyne v. Suburban Rapid Transit Co., 15 Man. L.R. 19; Barter v. Sprague's Falls Mfg. Co., 38 N.B.R. 216; Can. Pac. Ry. Co. v. Parke, 6 B.C.R. 14, 16; McArthur v. Northern & Pacific, etc., Ry. Co., 17 A.R. (Ont.) 86; Wood v. Atl. & N.W. Ry. Co., 2 Que. Q.B. 355; relied on in The King v. McArthur, 34 Can. S.C.R. 577; Winnipeg v. Toronto Gen. Trusts, 19 Man. L.R. 427.]

Diversion of water—Order of railway commission.

The direction by the Board of work to be done and its approval of plans and of the tariff of rates as provided by the Railway Act, 1906, is a condition precedent to the right to maintain an action confessoire by the owner of higher lands against a railway company with a federal charter, owner of the lower lands, to compel it to receive water diverted thereto and for damages for its refusal to do so.

Blais v. Grand Trunk Ry. Co., 39 Que. S.C. 236.

Access to harbour—Construction of embankment—Riparian rights.

Application by landowners that in case the respondents' plans were filed for approval, authorizing the respondent to construct a solid embankment across the entrance to Market Cove, the rights of the parties located thereon should be protected. The respondent had already by the construction of a solid embankment cut off all access from the harbour of Prince Rupert to all points around the cove or bay:—Held (1), that these applicants by taking leases of lots abutting on the cove acquired access to the water and riparian rights. (2) That the statement of the respondent when withdrawing the location plans that the embankment was constructed on their own lands was untrue, but even if the respondents had title to the said lands it had no right to construct its railway without approval of the route map by the Minister and the location plans by the Board. (3) That the applicants' lands and business had been damaged and injured by the wrongful and illegal acts of the respondent. (4) That there was no necessity for the embankment and no reason existing why a means of access inward and outward should not have been left. (5) That the respondent must leave an opening in the embankment at least 30 feet wide.

Rochester v. Grand Trunk Pac. Ry. Co., 13 Can. Ry. Cas. 421.
[Affirmed in 15 Can. Ry. Cas. 306.]

ROUTE AND LOCATION PLANS—OBSTRUCTION TO NAVIGATION.

Where a railway company, in the professed exercise of its powers as a railway company and without the approval of the route by the Minister and of the location plans and works by the Board, has constructed a solid filling across navigable waters, the Board, under the provisions of ss. 230, 233, coupled with subss. (h) and (i) of s. 30 of the Railway Act, 1906, has jurisdiction to order the demolition of the works so constructed. [Rochester v. Grand Trunk Pacific Ry. Co., 13 Can. Ry. Cas. 421, affirmed.]

Grand Trunk Pacific Ry. Co. v. Rochester, 15 Can. Ry. Cas. 306, 48 Can. S.C.R. 238.

SURFACE WATER—DEFLECTING AND DIVERTING—INJURY TO ADJOINING LANDS.

A defendant railway company is liable for damage caused to the plaintiff, an adjoining owner, by deflecting and diverting the course of the surface water so as to make it flow over the plaintiff's land, and for bringing water on the defendant's own lands and then discharging it on to the plaintiff's land, to his injury; and the statutory powers, in furtherance of the objects for which the defendant company was incorporated, do not, by implication or otherwise, empower it so to carry on its operations as to cause damage to adjoining owners by deflecting or diverting such surface waters to the injury of adjoining lands. [Rylands v. Fletcher, L.R. 3 H.L. 330, applied.]

Niles v. Grand Trunk Ry. Co., 15 Can. Ry. Cas. 73, 9 D.L.R. 379.

WATER AND WATER RIGHTS—DAMS.

Statutory powers of expropriation in the incorporating statute of a power company are to be strictly construed so as not, by mere general words authorizing expropriation for the damming of a river, to deprive the public of rights theretofore existing unless a clear legislative intention to abrogate public rights is disclosed in the statute. (Per Ritchie, J.)

Miller v. Halifax Power Co. (N.S.), 13 D.L.R. 844.

NATURAL WATERCOURSE—DEFECTIVE CULVERT—OBSTRUCTION OF FLOW.

The construction of a culvert by a power company in a negligent manner, whereby it interferes with the flow of a natural watercourse, giving rise to the flooding of the abutting lands, will render the company liable for damages occasioned thereby. [L'Esperance v. Great Western Ry. Co., 14 U.C.Q.B. 173, distinguished.]

McCrimmon v. British Columbia Elec. Ry. Co., 19 Can. Ry. Cas. 329, 24 D.L.R. 368.

NONTIDAL STREAM—OBSTRUCTION OF NAVIGATION—RAILWAY BRIDGE.

The Fraser River in its upper waters, although nontidal, is a common and public highway, which the public has the right to freely use the watercourses thereof for the purpose of navigation, an obstruction of which by the erection of a bridge by a railway company will render the latter liable in damages.

Fort George Lumber Co. v. Grand Trunk Pacific Ry. Co., 24 D.L.R. 527.

WEEDS.

As causing fires on railway, see Fires.

Weeds causing injury to employee working on track.

For a railway company to permit grass and weeds to grow on a side track is not such negligence as will make it liable to compensate an employee who is injured in consequence of such growth while on the side track in the course of his employment. 6 B.C.R. 561, affirmed.

Wood v. Can. Pac. Ry. Co., 30 Can. S.C.R. 110.

[Applied in Hill v. Granby Consol. Mines, 12 B.C.R. 125; Jamieson v. Harris, 35 Can. S.C.R. 639; referred to in Canada Woollen Mills v. Traplin, 35 Can. S.C.R. 448; Center Star v. Rossland Miners' Union, 11 B.C.R. 205; Warmington v. Palmer, 8 B.C.R. 349.]

Liability of railways to remove combustible material from right-of-way.

It is the duty of a railway, under c. 91 of R.S.N.S. 1900, to clear from off the sides of its roadway, where it passes through woods, all combustible material, such as grass, ferns, bushes, or other material, by careful burning at a safe time, or otherwise, whenever they become combustible.

Schwartz v. Halifax & S.W. Ry. Co., 14 Can. Ry. Cas. 85, 4 D.L.R. 691.

[Affirmed in 11 D.L.R. 790, 47 Can. S.C.R. 590.]

WHARVES AND FERRIES.

Wharf insufficiently lighted—No gate or chain—Ferry.

Grand Trunk Ry. Co. v. Boulanger, 1886. See Can. S.C.R. Dig. 1893, p. 733.

Ferryman—Liability as common carrier.

To render a person liable as a common carrier he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire as a business, not merely as a casual occupation. Therefore, the owner of a boat propelled by oars and rowed for hire across a river from time to time, by employees usually occupied in other ways, does not fall within the definition of a common carrier.

Roussel v. Aumais, 18 Que. S.C. 474.

Negligent management of ferry—Injury to passenger.

Where a ferry was under the control and management of a municipal corporation and accepted, in payment of the fare of a traveler M, a coupon attached to his railway ticket, the corporation was held liable for injuries to M. caused by the negligence of the officers of the boat where, finding the mooring chain down on approaching the wharf, and thinking it safe to land, M. fell through the space between the wharf and the boat, which was not then moored. M. was held not guilty of contributory negligence. 25 N.B.R. 318, affirmed.

Mayor, etc., of St. John v. McDonald, 14 Can. S.C.R. 1.

[Observed in Collins v. St. John, 38 N.B.R. 92; referred to in Shaw v. Winnipeg, 19 Man. L.R. 243.]

WIRELESS TELEGRAPHY.

See Telegraphs.

WIRES AND POLES.

A. Injuries by Wires and Poles.
B. Erection; Crossings.

See Street Railways.

Powers of companies to erect poles on highways, see Corporate Powers; Street Railways.

Annotations.

Practice of Board as to Senior and Junior Rule. 22 Can. Ry. Cas. 188.
Wires crossed by railways. 22 Can. Ry. Cas. 188.
Taxation of wires and poles. 24 D.L.R. 669.

A. Injuries by Wires and Poles.

ACCIDENT RESULTING FROM CONTACT OF ELECTRIC WIRES.

A street railway company is not guilty of negligence in failing to take steps to prevent telephone wires crossing above its trolley wire from coming in contact, if broken, with the trolley wire, unless it be at some place known to be especially dangerous. Per Dubuc, C.J. Such failure by a street railway company is evidence of negligence to go to the jury. The escape of electricity from wires suspended over streets through any other wires that may come in contact with them must be prevented so far as it can be done by the exercise of reasonable care and diligence, and the defendants should have put up guards such as were shewn to be in use very generally in the United States and England to prevent such accidents. Per Mathers, J. The Court being equally divided the appeal from the County Court jury's verdict in favour of the plaintiff was dismissed.

Hinman v. Winnipeg Elec. Street Ry. Co., 16 Man. L.R. 16.

POWER COMPANY—RAILWAY LANDS—PUBLIC HIGHWAYS—INDEMNITY.

A power company applied under s. 194 of the Railway Act, 1903, to place wires for the transmission of electric power of high voltage across the lands of a railway company:—Held, that the power company should indemnify the railway company from all loss or injury arising from the placing of such wires across its right-of-way or the transmission of electric power thereon, except where the loss was directly attributable to the negligence of the railway company, its agents or employees. Upon it subsequently appearing, however, that the transmission lines were constructed along highways under provincial authority in respect of which highways the railway company had merely the right of crossing. Held, that the power company stands in the position of a telephone company, as in National Telephone Co. v. Baker (1893), 2 Ch. 186, and the tramway company referred to in Eastern & South African Telegraph Co. v. Capetown Tramway Cos. [1902], A.C. 381. Held, also, that the power company should be required to be responsible only for injuries arising from the negligence of itself or its servants or agents, and in respect thereof the railway company needs no protection by an order of the Board.

Can. Pac. and Can Northern Ry. Cos. v. Kaministiquia Power Co., 6 Can. Ry. Cas. 160.

ELECTRIC RAILWAY—POWER LINE—PROTECTION.

A company incorporated by provincial statute to construct an electric railway through the town of Essex built its line on a street under the authority of a municipal by-law which provided that its poles and wires should not interfere with any then existing poles or wires of any other person or company. The railway works were, by Dominion Act, declared to be for the general advantage of Canada. The company's wires and poles when constructed interfered with existing telegraph, telephone and electric light poles and wires (the latter belonging to one N. erected under an agreement with the town) and created danger by the escape of electrical current therefrom:—Held, that if the railway and power line were constructed before the passing of the Dominion Act no order was necessary to authorize their subsequent maintenance and use, but if not, then leave was required under ss. 235, 237. Quære, if part only of the work was done before the Act and part afterward. Assuming that the work was lawfully done before the passing of the Dominion Act the Board has power under s. 238 to require the company to execute such works or take such measures as appeared to the Board best adapted to remove or diminish the danger. An agreement having been made with the approval of the Board for the use by N. of the company's poles for carrying his wires, order accordingly, the company being ordered to pay the costs of the proceedings.

Naylor v. Windsor, Essex & Lake Shore Rapid Ry. Co., 8 Can. Ry. Cas. 14.

CONSTRUCTION OF TELEPHONE LINES—INJURY TO TREES—RIGHTS OF PRIVATE PROPERTY OWNERS.

That the ownership of lands adjoining a highway extends ad medium filum viæ is a presumption of law only which may be rebutted, but the presumption will arise though the lands are described in a conveyance as bounded by or on the highway. Gwynne, J., contra. In construing an Act of Parliament, the title may be referred to in order to ascertain the intention of the Legislature. The Act of the Nova Scotia Legislature, 50 Vict. c. 23, vesting the title to highways and the lands over which the same pass in the Crown for a public highway, does not apply to the city of Halifax. The charter of the Nova Scotia Telephone Co. authorizing the construction and working of lines of telephone along the sides of, and across and under, any public highway or street of the city of Halifax, provided that in working such lines the company should not cut down nor mutilate any trees:—Held, Taschereau and Gwynne, JJ., dissenting, that the owner of private property in the city could maintain an action for damages against the company for injuring ornamental shade trees on the street in front of his property while constructing or working the telephone line, there being nothing in the evidence to rebut the presumption of ownership ad medium, or to shew that the street had been laid out under a statute of the province or dedicated to the public before the passing of any expropriation Act. 23 N.S.R. 509, reversed.

O'Connor v. Nova Scotia Telephone Co., 22 Can. S.C.R. 276.

[Referred to in Washington v. G.T. Ry. Co., 28 Can. S.C.R. 188.]

TELEPHONE POLE—INJURY TO PERSON RIDING ON HIGHWAY.

A person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away, and that their violent, uncontrollable speed was the proximate cause of the accident. In an action against the city corporation for damages in such a case the latter was ordered to pay the costs of the telephone company brought in as a third party, it being shewn that the company placed the pole where it was lawfully, and by authority of the corporation.

Bell Telephone Co. v. Chatham, 31 Can. S.C.R. 61.

[Referred to in Everitt v. Raleigh, 21 O.L.R. 91; Holden v. Yarmouth, 5 O.L.R. 579.]

EXCAVATION ON PUBLIC STREET—INSUFFICIENT LIGHT AND PROTECTION.

The defendant company made an excavation across a sidewalk on a public street, in the city of Halifax, for the purpose of laying cables underground. The excavation was protected after working hours by a number of barrels with plank laid across the tops from one to another. Plaintiff, while passing along the sidewalk, after dark, in the absence of the watchman, fell into a portion of the excavation, from which the barricade had been removed after it had been placed in position, and was severely injured. The evidence given at the trial shewed that the barrier erected was of a frail and insufficient character, and that the place was insufficiently lighted, and that if it had not been for the want of care on the part of defendant in these particulars, the accident would not have happened:—Held, that plaintiff was entitled to a verdict, and that defendant's appeal must be dismissed with costs.

Cox v. Nova Scotia Telephone Co., 35 N.S.R. 148.

INJURY BY ELECTRICITY—CONTACT OF TELEPHONE WIRE WITH POWER WIRE.

A telephone company empowered to erect its poles and wires on a street upon which the poles and wires of an electric power line are already strung is under a duty to string the telephone wires at a safe distance from the power wires, and where a telephone lineman is killed by the telephone wires with which he was working becoming charged by contact with an electric wire which had sagged low by the settlement or bending of the electric company's poles not resulting from any negligence on the part of the electric company, the proximate cause of the injury is the negligence of the telephone company and not of the electric company, although the latter had taken no precautions to guy wires or otherwise to obviate the effect of such sagging. [Englehart v. Farrant, [1897] 1 Q.B. 240; McDowell v. Great Western Ry. Co., [1902] 1 K.B. 618; Dominion Natural Gas Co. v. Collins, [1909] A.C. 640, and Lothian v. Richards, 12 C.L.R. 165, referred to.]

Roberts v. Bell Telephone, etc., Co., 10 D.L.R. 459, 25 O.W.R. 428.

HIGHWAY—LOW WIRES—OBSTRUCTION—NUISANCE.

Rural telephone wires so placed that a person driving on to the highway with a load of hay has to stoop when passing under them, constitute an obstruction in the highway and amount to a nuisance; where the position of the wires is the proximate cause of an accident the owner or trustee of the system is liable for damages under the Fatal Accidents Act; the fact that the line was erected and continued under statutory authority is no bar to the action.

Magill v. Moore, 41 D.L.R. 78.

INJURY BY WIRES IN STREETS.

The effect of conferring statutory authority upon an electric power company to erect poles and power wires on a highway is that, apart from negligence, the company is obsolved from the rule that any one who, for his own purposes, collects or keeps anything likely to do mischief if it escapes, is primâ facie answerable for all the damages which are the natural consequence of its escape. [Fletcher v. Rylands, L.R. 1 Ex. 265, and Rylands v. Fletcher, L.R. 3 H.L. 330, considered; National Telephone Co. v. Baker, [1893] 2 Ch. 186, and Eastern & South African Telegraph Co. v. Capetown Tramways Co., [1902] A.C. 381, referred to.]

Roberts v. Bell Telephone Co. and Western Counties Elec. Co., 10 D.L.R. 459, 24 O.W.R. 428.

B. Erection; Crossings.

TELEPHONE WIRES CROSSING ELECTRIC RAILWAY—PROTECTIVE WORKS—JUNIOR AND SENIOR COMPANY.

The Board has no jurisdiction under ss. 237, 238 of the Railway Act, 1906, to order the junior company at a crossing, where the wires of a telephone company are carried over an electric railway, to bear the cost of certain changes in the construction of the lines of the senior company and of certain protective appliances rendered necessary by reason of the construction and operation of the railway of the junior company, where such alterations were made by the senior company without having previously obtained an order from the Board for the making of the same.

Bell Telephone Co. v. Windsor, Essex & Lake Shore Rapid Ry. Co., 8 Can. Ry. Cas. 20.

WIRES BENEATH TRACKS—QUESTION OF LAW—LEAVE TO APPEAL.

On an application for leave to appeal to the Supreme Court from an order of the Board permitting the Montreal Light, Heat & Power Co. to erect, place and maintain its wires beneath the tracks of the Montreal Terminal Ry. Co.:—Held, that, as only a question of jurisdiction and not of law was involved, the application must be refused.

Montreal Terminal Ry. Co. v. Montreal Light, Heat & Power Co., 10 Can. Ry. Cas. 133.

TELEPHONE WIRES—LEAVE TO CROSS—PROTECTIVE MEASURES.

Application by the Bell Telephone Co. under s. 246 of the Railway Act, 1906, and s. 5 of 7-8 Edw. VII. c. 61, for an order restraining the Nipissing Power Co. from crossing the wires of the applicant between Powassan and North Bay along the highway, known as the Nipissing road, with their high tension wires, until permission of the Board shall have been obtained:—Held (1), that the order should be granted; the provision for protective measures being in the public interest. (2) That under s. 246 of the Railway Act, power companies are required to obtain leave from the Board, before crossing railways with their wires, in order that the wires may be properly guarded. (3) That under the broad provisions of s. 5, of the amending Act, 7-8 Edw. VII. c. 61, it is reasonable that the provisions of s. 246 should apply to a telephone system, as well as to a railway line. (4) When a provincial company desires to cross with its line, the line of a Federal company, subject to the jurisdiction of the Board, it must obtain leave from the Board before it will be allowed to do so.

Bell Telephone Co. v. Nipissing Power Co., 9 Can. Ry. Cas. 473.

TELEPHONE WIRES—INSTALLATION IN SUBWAY—GRADE SEPARATION AT RAILWAY CROSSING.

Where a grade separation has been ordered and a city street is lowered in the public interest, so as to go under the railway line by subway, a telephone company having overhead wires on the street is not entitled to receive compensation from the railway or the municipality for the expense of moving and relocating the telephone line.

Bell Telephone Co. v. Can. Pac. Ry. Co., Grand Trunk Ry. Co. and Toronto (Brock Avenue Subway Case), 14 Can. Ry. Cas. 14, 5 D.L.R. 297.

ELECTRIC LIGHT AND TELEPHONE WIRES—INSTALLATION IN SUBWAY.

Where grade separation has been ordered and city streets are lowered, in the public interest, so as to go under the railway lines by subways, public utility companies having telephone and electric light overhead wires on the streets should bear the entire expense of putting these wires underground except their long distance telephone wires which may be carried overhead. [Bell Telephone Co. v. Grand Trunk, Canadian Pacific Ry. Cos. and Toronto (Brock Avenue Subway Case), 14 Can. Ry. Cas. 14, 5 D.L.R. 297, followed.]

Toronto Electric, etc. v. Can. Pac. Ry. Co. et al. (North Toronto Grade Separation Case), 15 Can. Ry. Cas. 309.

ELECTRICITY—TESTS AND INSPECTION.

An electric power company stringing its wires by statutory authority upon the public streets at a time when no other wires were there, is under no duty to inspect the wires periodically for the purpose of seeing that no other wires had subsequently been placed in too close proximity to their own wires and so avoiding injuries which might result to persons handling the dead wires of another company should the latter become charged by close contact with the power wires.

Roberts v. Bell Telephone, etc., Cos., 10 D.L.R. 459, 24 O.W.R. 428.

DESTRUCTION OF BUILDING BY FIRE—LACK OF SAFETY DEVICES.

Negligence sufficient to render an electric company liable for the destruction of a building from fire originating from an electric current of abnormally high voltage being carried upon wires leading into the building, may properly be inferred from the fact that several hours before the fire the company's high voltage wires became crossed with low potential service wires on the same poles, which trouble had been corrected prior to the fire; where it also appeared that the use of a simple safety device by the electric company on the pole nearest the building would have prevented the abnormally high current entering it, and that the electrical installation for the service of the burned building was not defective.

McElmon v. British Columbia Elec. Ry. Co., 12 D.L.R. 675.

SENIOR AND JUNIOR—CONSTRUCTION—HIGHWAY CROSSINGS—RIGHT-OF-WAY.

Where the wires of a telephone company crossing the line of a railway company, which is changing its system of operation from steam to electricity, require to be raised, the railway being senior in construction, the telephone company must bear the cost of raising its wires where the fee of the property crossed is in the railway company, but at highways where the only right of the railway company is to cross with its tracks, the telephone company is senior with its construction to the railway company's new overhead wires and the latter must bear the cost of raising the telephone wires. [Hamilton Street Ry. Co. v. Grand Trunk Ry. Co. (Kenilworth Avenue Crossing Case), 17 Can. Ry. Cas. 393, followed.]

London Railway Commission v. Bell Telephone Co., 18 Can. Ry. Cas. 435.

EASEMENT—OVERHEAD AND UNDERGROUND—WIRES AND PIPES.

The practice of the Board has been to allow the right-of-way of railway companies to be crossed by the construction overhead or underground of lines of wires or water-pipes and other pipes without compensation, the Board's order merely creates an easement which can be cancelled or varied as occasion may require from time to time.

Maritime Telegraph & Telephone Co. v. Dominion Atlantic Ry. Co., and Baird v. Can. Pac. Ry. Co., 20 Can. Ry. Cas. 213.

JURISDICTION—POWER WIRES CROSSED BY HIGHWAY.

Under s. 247 of the Railway Act, 1906, the Board has no jurisdiction to authorize a highway to be constructed under the wires of a power company.

Coleman v. Toronto & Niagara Power Co., 20 Can. Ry. Cas. 258.

ERECTION OF POLES ON STREET—COMPLIANCE WITH ACT OF INCORPORATION—"ALONG THE SIDE" OF THE HIGWAY.

Where a pole was erected as required by the Act of incorporation of the company under the direction and supervision of the proper municipal authorities, and did not interfere with the public right of traveling on or using the street, its erection between the drain or gutter and the centre line of the street is a compliance with the statutory requirment that the pole must be erected "along the side" of the highway.

McIsaac v. Maritime Telegraph & Telephone Co., 50 N.S.R. 331.

WIRES ALONG HIGHWAYS—UNDERGROUND—PUBLIC UTILITY COMPANY—JURISDICTION.

Under s. 247 (g) of the Railway Act, 1906, the Board only has jurisdiction to direct that wires be placed underground and to abrogate the right of a public utility company to carry its wires along highways on poles. The Board cannot order that poles and wires be moved from one street to another or that wires be placed in cables or upon a designated line of poles. Such a company, however, has at all times the right to remove its pole line from a street and an order from the Board to place its wires underground does not prevent it from exercising such right.

Chatham v. G.N.W. Telegraph and Bell Telephone Cos., 21 Can. Ry. Cas. 183.

TELEGRAPH WIRES—UNDERGROUND CONSTRUCTION—URBAN DEVELOPMENT.

Where urban development has reached such a stage that the city wires and poles are being placed underground, the Board will order telegraph companies to adopt underground construction for their wires at their own expense, or where the work is done by the municipality, and ducts may be rented from it, then upon such terms or rental as may be agreed upon between the parties.

Montreal v. Can. Pac. and G.N.W. Telegraph Cos., 24 Can. Ry. Cas. 226.

WITNESS.

See Pleading and Practice.

EXAMINATION—LEADING QUESTIONS.

In examining one's own witness, leading questions must not be put to the witness on material points, but are proper on points that are merely introductory and form no part of the substance of the inquiry. The rule against leading one's own witness will be relaxed where nonleading questions fail to bring the mind of the witness to the precise point on which his evidence is desired, and where it may fairly be supposed that this failure arises from a temporary inability of the witness to remember. (Dictum per Beck, J.)

Maves v. Grand Trunk Pacific Ry. Co., 16 Can. Ry. Cas. 9, 14 D.L.R. 70.

WORKMEN'S COMPENSATION.

See Employees.

WORKS FOR GENERAL ADVANTAGE OF CANADA.

See Constitutional Law; Expropriation; Railway Crossings.

WORKSHOPS.

See Warehouses, Yards and Workshops.

YARDS.

See Warehouses, Yards and Workshops.