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Torts—Liability of a Railroad

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determine damages to his property resulting from nearby highway construction. The petitioner alleged that in the construction of the highway the respondents caused streams and drains to be diverted from their natural courses and failed to provide adequate drainage facilities for carrying away the increased run-off of the surface waters thereby causing petitioner's land to be flooded. In reply, the respondent contended that it was the obligation of the City of Huntington and the petitioner to provide for proper drainage and that if any damaged was caused by the construction, the liability would fall upon the contractor and not upon the respondent, *Held*, writ of mandamus awarded. *State ex rel. Lynch v. State Road Commission*, 157 S.E.2d 329 (W. Va. 1967).

In holding for the petitioner the court stated that in such a proceeding in mandamus it is not the duty of the court to determine whether or not the respondent had actually caused damage to the petitioner's land. The court declared that if a showing of probable damage could be made then this would be sufficient to entitle the petitioner to have his grievance judicially determined in a proceeding in eminent domain.

Torts—Liability of a Railroad

P, an employee of the Weirton Steel Company, was injured when a boxcar connected to *D*'s train collided with a building on Weirton's property in which *P* was working. It was undisputed that the proximate cause of the collision was a defective track switch which *D*'s train passed over.

In 1927 *D*, the Pennsylvania Railroad, and the Weirton Steel Company had entered into a side track agreement whereby Weirton was to construct, own, and maintain all of the railroad tracks upon its property. The defective switch was located upon a side track covered in this agreement. The trial court held that the railroad's side track agreement, although a valid contract between the parties, did not relieve *D* railroad of its duty to maintain in a safe condition the tracks and switches with which it operates. *Held*, affirmed. *Sommerville v. The Pennsylvania Railroad*, 155 S.E.2d 865 (W. Va. 1967).

In reaching its decision the court relied partially on the holding in *Carrico v. West Virginia C. and P. Railroad Company*, 39 W. Va. 86, 19 S.E. 571 (1894), which decided that a railroad company

could not relieve itself from the duty of absolute liability owed to a *passenger* by delegating certain work to an independent contractor. The dissent pointed out that *P* in *Sommerville* was not a passenger and that there was no authority for the court to have held that the railroad owed this plaintiff anything other than a *duty of exercising due care*. The dissent further stated that whether due care had been experienced or not, regardless of the side track agreement, was a factual issue and should properly have been a jury question.

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