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*June 4.
*Oct. 29.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANT)..... APPELLANT;

AND

SIMON JAMES (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway company—Fencing—Culvert—Negligence—Cattle on highway—
51 *V. C.* 29 *s.* 194—53 *V. C.* 28 *s.* 2.

A railway company is under no obligation to erect or maintain a fence on each side of a culvert across a water course 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. Taschereau J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Street J. at the trial (2) in favour of the plaintiff.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and Girouard JJ.

(1) 1 Ont. L. R. 127. (2) 31 O. R. 672.

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The question to be decided on this appeal is stated in the above headnote. The facts are set out in the judgment of Mr. Justice Gwynne.

Nesbitt K.C. and *H. S. Osler* for the appellant.

Teetzel K.C. and *Thompson K.C.* for the respondent.

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Sedgewick.

TASCHEREAU J.—I would dismiss this appeal. The respondent's horses, it is clear, got upon the railway line because it was not fenced, as required by the statute. The reasoning of the Court of Appeal seems to me unassailable.

GWYNNE J.—The railway of the defendant crosses a farm of one Burns, in the Township of Saltfleet, in the County of Wentworth, in the Province of Ontario, through which, in a low place about fifteen feet below the upper surface of the farm a natural stream runs, which during the spring and autumn freshets flows in a great volume and with considerable force insomuch that during their continuance no animal can pass along the bed of the stream from one side of the railway to the other, but in the summer season the water is low and then animals can pass along the bed of the stream from one field to another. The defendants in constructing their railway across the farm made their railway over the stream by a stone arch on a level with the general surface of the upper lands, the top of the arch being from 12 to 15 feet above the bed of the stream. They also constructed and have maintained fences on either side of their railway terminating at the walls of the arch across the stream so that no animal in a field on either side of the railway can get on to the railway at any place direct from

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such field. The whole of the space under the arch, constitutes the bed of the stream, and in point of fact no use whatever is made of such space by the defendants.

The plaintiff is the owner of horses which he had placed at pasture with Burns the owner of the farm. The evidence is that two of the plaintiff's horses passed from the field belonging to Burns on the south side of the railway along the bed of the stream into the field on the other side. How long they remained there does not appear, but it does appear that they escaped from that field through a fence bordering on a highway, by reason of the insufficiency of such fence and of the negligence of Burns or his servants in not keeping that fence in an efficient condition, and that they thence proceeded along the highway to a point where it is crossed on the level by the defendants' railway, from which point, crossing the cattle guards maintained by the defendants there, they got on to the railway track, and at some distance from the highway crossing were killed by a passing train. In an action by the plaintiff to recover the value of the horses so killed it clearly appears that the horses got on to the railway track from the highway by reason of the inefficiency of the cattle guards maintained by the defendants there, but the defendants rest for their defence upon this that the horses of the plaintiff which were killed were, as the defendants contend, contrary to the provision of sec. 271 of the Railway Act, 51 Vict, c. 29, at large upon the highway which is crossed on the level by the defendants' railway, and that being so at large they reached the place where the highway is crossed by the railway, and that although they get on to the railway outside of the line of the highway by reason of the insufficiency of the cattle guards main-

tained by the defendants there and were killed by a train of the defendants nevertheless the plaintiff is disentitled to recover for the value of the horses.

The plaintiff on the contrary contended, and his contention has been maintained by the courts in the Province of Ontario, that by the section 194 of 51 Vict., c. 29, as amended by 53 Vict., c. 28, it was the duty of the defendants to have fenced across the stream on either side of the railway, and to have so prevented all possibility of animals crossing along the bed of the stream under the railway, and that having neglected so to do, they cannot appeal to the fact of the horses having got on to the railway by reason of the insufficiency of the fence separating Burns's farm from the highway, nor insist that the horses were wrongfully on the highway.

The contention of the defendants on the contrary was that their fences as constructed were in perfect conformity with the provisions of the statute as they were sufficient to prevent any cattle from getting directly from either of the fields of Burns on to the railway, and that this was the object and intent of the sec. 194 which imposed on the defendants the obligation of fencing on either side of the railway, and they contended further that even assuming their obligation to fence on either side of the railway to have required them to fence across the stream in question, they were nevertheless entitled to insist as they did that their omission to do so was not, under the circumstances appearing in evidence, a matter of which the plaintiff could avail himself in support of the present action; for that it was clearly established that the negligence of Burns in not maintaining a sufficient fence alongside of the highway was the cause of the horses getting on to the highway and so that they were on the high-

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way at large wrongfully within the meaning of the sec. 271.

The contention of the plaintiff was maintained upon the authority of *Sneesby* v. *The Lancashire and Yorkshire Railway Company* (1). In that case the negligence of the defendants' servants had caused a drove of cattle which were being driven along a road crossed by the defendants' railway to become so infuriated that they rushed furiously away from the control of the drover and in the course taken by them in their terror they got into a garden or orchard close to the railway, and in their fury broke down a fence separating the garden from the railway upon which some were found killed at the distance of about a quarter of a mile from the road where they had been terrified by the negligent conduct of the defendants, and it was held that as the defendants had been guilty of negligence which caused the drover to lose control over the cattle and caused the cattle to become infuriated it was no answer that if the fence of the garden had not been defective the accident would not have happened, and that consequently the damages were not too remote.

Between that case and the present there is no parallel; there the injury suffered by the cattle was the direct consequence of the act of negligence committed by the defendants which consisted in this that there was a steep incline from the level of the railway to the level of the road, and while the cattle were proceeding along the road across the railway track several trucks were by the negligence of the defendants' servants, allowed to run down between the cattle and the persons in charge of them and so separated the cattle from the persons in charge of them. There the defendants were held to be liable because the injury complained of followed directly in continuous sequence

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from the wrongful act of the defendants' servants. In the present case the omission to fence across the stream assuming it to constitute default in the discharge of the duty imposed upon the defendants did no injury to the plaintiff. His horses remained in the possession of and under the care of Burns, when in the field to which they removed by passing under the railway on the bed of the stream equally as they had been before. Between the omission to fence across the stream and the defect in Burns's fence alongside of the highway there is no connection whatever; none of cause and effect as there was in *Sneesby* v. *The Lancanshire and Yorkshire Railway Company* (1). The present case, therefore, can not be rested upon the judgment in that case, nor are the defendants estopped, by reason of anything appearing in evidence, from insisting that the cause of the horses getting on to the highway was the defect of Burns's fence, or from claiming the benefit of the said sec. 271.

That section which has been in force in virtue of (and without alteration since the passing of) the Act 20 Vict. c. 12, sec. 16 enacts that:

Sec. 271. No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway within half a mile of the intersection of such highway with any railway at rail level unless such cattle are in charge of some person or persons to prevent their loitering or stopping on such highway at such intersection.

By an unbroken series of decisions of the courts of Ontario and of that portion of the late Province of Canada constituting Upper Canada, from 1858 to the present time, it has been held that the mere fact of an animal being on a highway within the prescribed distance from a railway crossing without being in charge of some person, as required by the statute apart from all consideration of how it got there, constitutes being

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at large within the meaning of the statute, and that the statute takes away the right of action not only where an animal so at large is killed or injured at the very point of intersection of the railway with the highway, but also in case of its being killed or injured on the railway outside of the limits of the highway to which place it had gotten by reason of the insufficiency of the cattle guards of the defendants at the crossing. This ruling has been invariably maintained and although the statute in which the section originally appeared has since then been amended by the legislature no alteration has been made in this section.

The general rule so laid down is, however, I apprehend, like all general rules, subject to some exception, as for example, in case an animal should inadvertently escape from an enclosure in which it was kept and a person in charge should immediately go in search of it, or that an animal being led by a person on foot on a highway should escape from him and run away from the control of the person leading it and that such person should immediately follow in pursuit of it, but that in these cases the person in search of the one or in pursuit of the other should only succeed so far as to get up in time to see the animal cross from the highway on to the railway outside of the limits of the highway by reason of the insufficiency of the cattle guards of the railway, and that the animal should be killed or injured before the person following it could interpose and drive it away it would seem hard if in such a case the railway company should be held to be irresponsible for a loss so occasioned by the insufficiency of the cattle guards which they are required by statute to maintain.

However, the present case is not one of that nature but is of the class which is governed by an uninter-

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rupted series of decisions extending over a period of 43 years which I do not think should now be departed from especially in a case in which the plaintiff rests upon quite a different ground, and has not called in question the correctness of these decisions.

As to the other point I am of opinion that the erection of fences on either side of the railway terminating at the walls of the arch constructed over the stream, as was done in the present case, constituted complete fulfilment of the obligation imposed by the statute on the appellants.

The appeal must therefore be allowed.

SEDGEWICK J.—The defendant company's line of railway between Hamilton and Niagara Falls crosses the farm of two brothers named Burns in the Township of Saltfleet, Wentworth County, Ontario.

Through the farm and substantially at right angles to the railway track runs a wide natural watercourse with high banks on either side which watercourse the railway crosses by means of two culverts or bridges each twenty feet in width and fifteen feet in height. For the most part during the year the stream is so filled with water as to prevent animals from fording it or passing under the culverts, but sometimes in the autumn it is dry enough for this purpose. That was the case in September, 1899, when the accident happened which is the foundation of the present actio

On the south side of the track there is a pasture and upon the north side a field used for pasture after the spring crops are taken off. The plaintiff by agreement with the owners of the land was pasturing a number of horses on the lower field. At the time in question the stream under the culverts between the two fields having become so small or shallow, the horses in the lower field were enabled to pass up

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stream to the upper field. That field had all summer been surrounded by fencing erected on three sides by the proprietors, the fourth side being the fencing and bridging of the railway, but through the negligence or mistake of some one unknown, a panel on the northern fence separating the field from a highway had been left open and the plaintiff's horses escaping through the opening to this highway which crosses the railway track at right angles and on the level a short distance therefrom, wandered upon the road-bed of the railway. Two were struck by a train passing westward and were killed. There was some question raised at the trial as to whether the cattle guards on each side of the highway crossing were in proper condition, but I will deal with this later on.

There is no complaint as to the condition of the fences on each side of the railway track; they were in perfect repair. The company had not, however, maintained a fence across the watercourse running under the culverts although about ten years before it had by request made some sort of a barricade under one of the culverts where the water was dry. The fences, however, on each side of the track were firmly attached to the perpendicular walls of the culverts and there was no possibility, as things stood at the time of the accident, for cattle in any way to obtain access to the road-bed or railway tracks, except by means of the highway some distance from the stream. The respondent contends that the company were bound not only to maintain fences in such a way as to prevent cattle from straying upon its tracks but were equally bound to erect such fences or other structures and adopt such other measures as would prevent them from going under the track through the culverts from one side of the railway property to the other.

The trial judge, Street J., decided in favour of this contention and that view was upheld by the Court of Appeal.

It is elementary to say that a railway company is under no common law liability to build such fences as are claimed here. The burden imposed upon it in that regard is wholly legislative and to place liability upon it the case must be brought within the four corners of a statute. The statute upon which the defendant's liability is here claimed is the Railway Act of 1888, (51 Vict. c. 29, sec. 194,) as amended by the Act of 1890, (53 Vict. c. 28, sec. 2). I cite some of the sections relied upon.

Section 194.—When a municipal corporation for any township has been organised and the whole or any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, of the height and strength of an ordinary division fence with openings or gates or bars or sliding or hurdle gates of sufficient width for the purposes thereof with proper fastenings at farm crossings of the railway and also cattle guards at all highway crossings suitable and sufficient to prevent cattle and other animals from getting on the railway.

Sub-section 3, (as amended by the Act of 1890). If the company omits to erect and complete as aforesaid any fence or cattle guard, or if, after it is completed, the company neglects to maintain the same as aforesaid, and if, in consequence of such omission or neglect, 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 no animal allowed by law to run at large shall be held to be improperly 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.

Section 271 of the Railway Act, which also affects the case is as follows:

Sec. 271. No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway within half a mile of the intersection of such highway with any railway at rail level, unless such cattle are in

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charge of some person or persons to prevent their loitering or stopping on such highway at such intersection.

* * * * * * * * * * *

3. If the cattle of any person, which are at large contrary to the provisions of this section, are killed or injured 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 so killed or injured.

The plaintiff, as I have said, contends that under this legislation the railway company is bound to erect and maintain a fence on each side of the culvert across the watercourse and upon the dividing line between the railway property and that of the adjacent owners.

The company, on the other hand, asserts that it is not bound to maintain fences across watercourses at all or to build them on the boundary line, but that so long as it erects and maintains fencing sufficient in character to fulfil the statutory condition and which prevents cattle from straying upon the railway tracks, it has wholly fulfilled its statutory obligation.

According to my view the company's contention is the correct one.

The court below, in order to support the plaintiff's view, had recourse to the interpretation clause in the Railway Act, section 2, (*q.*), which provides that the expression "railway" means any railway which the company has authority to construct and operate, and includes all stations, depots, wharves, property and works connected therewith, and also any railway bridge or other structure which any company is authorized to construct under a special Act, and they hold that the word "railway" in section 194, (fifth line,) is therefore equivalent to railway property, and that it thus becomes obligatory on the railway company to erect its fences on the dividing line between its land and that of the adjacent proprietor. In other words, that the section, in fact, calls for a division, line, or boundary fences. Is this the proper construc-

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tion? There is sufficient, I think, in the section itself to shew that it is not. Its object seems to me clear and express, namely, the securing of protection for adjoining proprietors. If parliament had intended to insist upon the erection of and maintainance of *boundary* fences, it would have said so.

On the contrary, the phrase of the section leads to the inference that a boundary fence was not intended but only a fence on each side of the track of the height and strength of a line fence.

Again, in the proviso at the end of sub-section one of section 194, there is an indication that the object is to protect, not the railway, but the owners of improved and occupied lands on each side of it. So long as such protection is afforded by a fence of the prescribed character there is no liability.

Again, by the same subsection, provision is made for cattle guards at highway crossings and the only kind of cattle guard required is one suitable and sufficient to prevent cattle from going on the railway, another clear indication that the object of the section was the prevention of injury to the property of the adjacent owner.

Subsection three strongly indicates the same motive. The only penalty for breach of the requirements in regard to fences and cattle guards is that in the event of the company's neglect, the company shall be liable to the owner, not for all damage which may happen to him or to his property, but only for the damage which he may suffer on account of animals killed or injured by the company's trains or engines.

If it was the duty of the company to erect its fences on the exact limit of its "right of way," there would, I think be a clear indication of such intention and there would have been some penalty imposed for failure to perform such duty. All this, it seems to me,

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goes to shew that the intention of the legislature was not in any way to provide for the safety of the company's property or the company's servants, or for the delimitation of the respective lands of the company and the adjacent proprietor, but solely for the latter's protection in so far as the animals claimed by him or under him might be damaged through lack of the statutory requirements.

It seems to me that it is not necessary to look at the interpretation clause to ascertain the meaning of the word "railway" here. When it uses that word the presumption is that it uses it in its primary, ordinary sense. Everyone knows what the word "railway" ordinarily means; ("a way on which a train passes by means of rails," a learned English judge described it in 1883; *Doughty* v. *Firbank* (1)); and it must receive that meaning unless there is some all-powerful necessity compelling a departure from it and justifying the addition of one or more or all the entities also specified. Besides, if the rules of interpretation compel us here to add the word "property" converting the substantive "railway" into an adjective, qualifying the word "property" are we not equally bound to add all its neighbouring words, and to conclude that the obligation of fencing extends to stations, depots, wharves, bridges, and all other structures the building of which is within the company's powers.

To enlarge; if the plaintiff's contention is the correct one, all the company's property wheresoever situate, whether there is a railway track on it or not, and irrespective of the purposes for which it may be used, must be fenced. This burden will cover the depots and station houses, freight sheds and all other erections upon its lands no matter how inconvenient or detrimental to the public such fencing may be. It

(1) 10 Q. B. D. 358.

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will cover its magnificent Victoria Bridge and all bridges across streams and lakes whether navigable or not navigable as well. What has generally been supposed to be the paramount right of a ship-owner, the right of navigation through navigable waters, must give way, as well as those rights over floatable streams which, in Ontario at least, have been secured to the public by other statutes. Tunnels too must come within the operation of the rule as well as those enormous structures of masonry high above the adjacent houses which one sees in large cities both in the old world and the new, upon the crown of which the railway tracks are laid and the railway operations carried on.

I say the railway Act cannot be construed so as to give colour to a demand involving such a useless and insensate expenditure. The true view as to the use to be made of the interpretation clauses is, I think, well stated in Hardcastle, (2 ed.) at page 236, as follows:

> An interpretation clause * * * is not to be taken as substituting one set of words for another, or as strictly defining what the meaning of the term must be under *all* circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be comprehended. If therefore, an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that, if the word is used more than once in the Act, it is on each occasion used in the extended meaning, and it may always be a matter of argument whether or not the interpretation clause is to apply to the word used in the particular clause of the Act which is under consideration.

Vide also cases there cited.

Other sections of the Railway Act aid us, I think, in coming to the conclusion that the legislature never contemplated the imposition of the burden referred to.

Section 90 specifies certain general powers which the company may exercise, and among them, it has the

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right;—(*g*), to construct across or over any river, stream or watercourse, permanent embankments, acqueducts, bridges, arches, etc.;—(*h*), to divert or alter, as well temporarily as permanently, the course of any stream, river or watercourse, in order to carry the same under the railway.

Section 91 provides that, if in the course of the construction of a railway, a river, stream or watercourse has been diverted or altered, it shall be restored as nearly as possible to its former state so as not materially to impair its usefulness.

Sections 178 and 179, the one providing that no company shall cause any obstruction in or impede the free navigation of any river or stream across which its railway is carried, and the other in substance, that where the railway is carried across any navigable river, the company shall leave open certain spaces between the bridge piers and shall erect such swing or other bridges over the river's channel as the Governor General in Council may direct, both indicate that in such cases the idea of fencing was wholly foreign to the mind of the legislature.

These provisions of the Railway Act and the considerations to which I have referred lead, I think, to the inevitable conclusion that fencing is necessary only upon each side of the company's road-bed where such fencing will protect the land owners from danger or injury by the engines or trains of a railway to any of the land owner's cattle which, otherwise, might stray thereon, and that where the fence is properly attached to the piers of a bridge crossing a watercourse so as effectually to prevent access of the cattle to the roadway above, the bridge piers and the bridge itself must be deemed to be sufficient fencing, and that in case of navigable streams at least, no fencing at all was ever contemplated or was necessary.

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If this view of the case be the correct one, then the plaintiff's right to recover wholly fails. No negligence or breach of statutory duty can be imputed to the railway company, and the plaintiff's remedy, if any, must be against his lessors, or the persons through whose negligence the accident happened.

It may be advisable, however, that I refer to another point to which reference was made at the argument. The plaintiff rested his whole case according to the statement of claim upon the company's neglect to erect and maintain proper fences across the watercourse on both sides of the culverts. No claim was made by reason of the alleged defective cow-catchers on each side of the highway where it crosses the railway track. Leave was, however, given at the trial to add a paragraph setting up the insufficiency of these guards. During the course of the trial, counsel for the defendant contended that the company's liability depended upon the correctness of the plaintiff's claim as to the fencing across the watercourse, admitting that, if that contention was right the company was liable, and it was thereupon, as I read the case, admitted in substance that the horses got through the south field to the north field through a culvert, and that there was no one in charge when they got upon the highway, aud it was thereupon agreed that no evidence should be given as to the sufficiency or insufficiency of the cattle guards. Evidence was, however, given subsequently upon that point.

The learned trial judge did not, I suppose, in view of the admission that was made, pass upon that question, but as there might be some question as to this, it is, I think, well here to state, which I think counsel for the plaintiff admitted at the trial, that in my view the question as to the cattle guards cannot be raised. This, I

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think, necessarily follows from section 271 above cited. The horses in question were admitted to be at large upon the highway within half a mile of its intersection with the line of railway. They were in charge of no one so as to prevent their loitering or stopping on the highway at the point of intersection. It was at that point they were killed and the owner has not therefore any right of action by reason of such killing. This point was expressly decided in the case of *Nixon* v. *The Grand Trunk Railway Co.* (1), and as I understand the judgment of the court below the soundness of the judgment of the late Mr. Justice Rose in that case was not called in question.

The result is that the appeal is allowed and judgment shall be entered for the defendant with costs incurred in the courts below. Pursuant, however, to the undertaking contained in the order of the court below allowing this appeal, the respondent is entitled to the costs of this appeal, each party to have the right of set-off and the party in whose favour the balance of costs is found to have execution therefor.

GIROUARD J.—Concurred.

Appeal allowed with costs to respondent as directed.

Solicitor for the appellant: *John Bell.*

Solicitors for the respondent: *Teetzel, Harrison & Lewis.*

(1) 23 O. R. 124.