THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS) } APPELLANTS;

AND

WILLIAM CARRUTHERS (PLAINTIFF) ..... } RESPONDENT.

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*May 20.
*June 24.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Negligence—Railway Act, 1903—3 *Edw. VII. c.* 58, *s.* 237—*Animals at large—Construction of statute—Words and terms—"At large upon the highway or otherwise"—Fencing of railway—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. R. 323), that, under the provisions of the fourth sub-section of section 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.

APPEAL from the judgment of the court of appeal for Manitoba (1), affirming the judgment of His Lordship Mr. Justice Richards, at the trial, by which the plaintiff's action was maintained with costs.

The circumstances of the case are sufficiently stated in the head-note and the questions raised on the appeal are discussed in the judgments now reported.

*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

(1) 16 Man. R. 323.

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Blackstock K.C. for the appellants.

J. Edward O'Connor for the respondent.

THE CHIEF JUSTICE.—This appeal is dismissed with costs. I agree in the opinion of Mr. Justice Maclennan.

DAVIES J.—I agree that the findings of the trial judge on the question of the plaintiff's negligence should not be disturbed.

I also agree that the meaning of the rather ambiguous words of the four sub-sections of section 237 of the "Railway Act, 1903," "Animals at large upon the highway or otherwise" must be construed to mean "otherwise at large," that is, at large otherwise than upon the highway and not as suggested by Mr. Blackstock "at large or otherwise upon the highway." This latter suggestion would put a limitation upon the meaning of the section never contemplated by Parliament. Properly construed the section covers the case of the cattle of the plaintiff killed on the railway track.

Since the revision of the Statutes in 1906 the question has ceased to be of importance as the revisors have changed the language so as to make it express what I think was the real meaning of Parliament. It now reads in the Revised Statutes "At large whether upon the highway or not."

IDINGTON J.—The questions raised in this appeal turn upon the interpretation of the 4th sub-section of section 237 of the "Railway Act, 1903," which reads as follows:—

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4. *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 any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any court of competent jurisdiction, unless the company, in the opinion of the court or jury trying the case, establishes that such animal got at large through the *negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent;* but the fact that such animal was not in charge of some competent person or persons shall not, for the purposes of this sub-section, deprive the owner of his right to recover.

It is first claimed that the horses which were killed on appellant's railway track had

got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent,

and, therefore, no action can be maintained.

The case was tried by Mr. Justice Richards without a jury and he has found the facts to be against this contention.

It seems to me if he placed implicit reliance on the evidence of the respondent he could not well find otherwise.

The question then remains, what is meant by "animals *at large upon the highway or otherwise*" getting upon the property of the company and being killed or injured by a train?

A good deal of ingenuity was shewn during the argument to put upon the words "at large upon the highway or otherwise" some meaning other than the plain, ordinary, grammatical meaning the words bear and thus let the appellants free from liability in cases such as this.

Reasons to support these other meanings were sought for in the past history of the legislation bearing on the duty to fence a railway track, and the interpretation thereof by the courts.

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It was urged that behind all that was the common law, which cast the burthen of the care of cattle upon the owner and had to be considered.

Bearing that in mind it was said we must treat all the statutory law on the subject as an invasion thereof, and, therefore, give such statutes a restricted meaning.

The principle appealed to is theoretically sound, but how far is it applicable here?

I doubt if having due regard to the nature of the title the railway company has acquired, and reason for its acquisition, a full examination of the question from the point of view urged would avail the companies much.

I will not labour with it, however, for the reason that the language of the statute is so explicit I do not require to; and for the further reason that the long line of cases so much relied upon and the manifest hardship they wrought, in very many instances, seemed to demand a remedy for cases such as the one now in hand.

To any one conversant with the history of the struggle that had gone on in the courts for half a century over the nature of the obligations resting upon a railway company to fence its track, there is nothing surprising to find a radical change in regard thereto in "The Railway Act of 1903."

Finding that radical change in the language of the legislature relative to the nature and extent of the obligation to fence, I see no reason for restricting or straining the meaning of the words.

The word "otherwise" does not mean the same, but a something different from that preceding it. I cannot find anything more aptly different, from being at

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large on the highway, than just the case the facts here present.

I do not think it necessary for this case to attempt to determine the limits of the obvious change introduced by this Act, as I have observed, relative to the duties of railway companies to fence.

One would expect to find the duty to fence and the liability to compensate for losses suffered through want of proper fencing, generally speaking, correlative.

It seems as if we had here a duty to fence created, but when we come to consider the right of action, it seems doubtful, to say the least, whether the action rests on that statute or the section 4, quite independently of what precedes it.

If it remain without amendment, many cases may be found necessary to settle what it does mean.

The appeal should be dismissed with costs.

MACLENNAN J.—The question in this appeal depends on the true construction of section 237 of the "Railway Act."

The horses which were killed strayed from the plaintiff's field, which lay on the south side of a highway, which, running east and west parallel to the railway, crossed the highway, entered a field adjacent to the railway, passed thence upon the track through an opening, which had never been provided with a gate by the company and were killed.

The field adjacent to the railway was not the property of the plaintiff.

The first question is whether the highway crossed by the animals is such a highway as is referred to in

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section 237, or at all events in sub-section (4) of that section.

I think it is clear that the highway referred to in the first three sub-sections, is one crossing, or intersecting, the railway, and not one running parallel to it, as did the highway in question.

The first sub-section forbids animals to be at large upon any highway, within half a mile of the intersection of *such highway* with a railway at rail level unless, etc.

Sub-section (2) provides for the impounding of cattle found at large contrary to the provisions of the section, plainly meaning at large upon an *intersecting* highway.

Sub-section (3) deprives the owner of animals killed at the *point of intersection* of any right of action.

Then follows sub-section (4) which is relied upon by the plaintiff, and it gives an action to the owner of animals at large upon *the highway or otherwise* which get upon the property of the company, and are killed or injured by a train, unless under certain specified conditions.

I think the kind of highway here mentioned is the same as that mentioned in the preceding sub-sections, that is to say, an *intersecting* highway. It is not a highway, or *any* highway, but *the* highway, that is, the same highway mentioned before.

There is no evidence that the highway crossed by the animals was an intersecting highway, and unless the words "or otherwise" make the sub-section applicable to the present case I think the plaintiff cannot recover.

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I think, however, that those words require us to uphold the judgment.

In my opinion those words, reasonably and fairly construed, mean *at large upon the highway, or at large in any other way or place*. They widen the meaning so as to embrace the circumstances in which these animals were. They were at large, first upon the highway parallel to the railway, and afterwards in the neighbouring field, from which they passed upon the company's line.

There is no evidence that they got at large through any negligence or wilful act of the plaintiff or his agent, or of their custodian or his agent, and the subsection makes the fact that no one was in charge of them immaterial.

The appeal should be dismissed with costs here and below.

DUFF J. concurred with Maclennan J.

Appeal dismissed with costs.

Solicitor for the appellants: *J. A. M. Aikins.*

Solicitor for the respondent: *Gregory Barrett.*