Supreme Court of Canada
Anderson and Eddy v. Canadian Northern Ry. Co., (1918) 57 S.C.R. 134
Date: 1918-06-25

James Anderson and Thorne Eddy (Plaintiffs) Appellants;

and

The Canadian Northern Railway Company (Defendant) Respondent.

1918: May 21, 22; 1918: June 25.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Railways—Animals at large—Wilful act of owner—Absence of cattleguards—"Railway Act" R.S.C., 1906, c. 37, s. 294, as amended by 9 & 10 Ed. VII., c. 50, s. 8:

Section 294 of the "Railway Act" 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 rail level, the owner takes the risk upon himself of any damage caused to or by them upon the intersection; but if such damage is 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."

Per Davies and Anglin JJ.—Section 294 is *intra vires* of the Parliament of Canada and is not in conflict with provincial legislation which permitted animals to be at large unless restricted by municipal regulations.

Section 294 is a code by itself and is not altered by section 254 which requires railway companies to maintain cattle-guards.

Per Idington and Brodeur JJ.—Sub-section 5 of section 294 is limited in its operation to the requirements of sub-section 1 imposing on the owner of animals the duty of providing some competent person to be in charge.

APPEAL from the judgment of the Supreme Court of Saskatchewan *en banc*[1], affirming the judgment of

[Page 135]

Elwood J. at the trial[2], which dismissed the plaintiffs' action for damages for horses killed on the railway tracks of the defendant company.

The facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Chrysler K.C. for appellant.

[1] 10 Sask. L.R. 325, 35 D.L.R. 473.
[2] 33 D.L.R. 418.

Tilley K.C. for respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

DAVIES J.—This is an appeal from the unanimous judgment of the Supreme Court of Saskatchewan *en banc* confirming the judgment of the trial judge dismissing plaintiff's action.

The action was brought to recover damages for the loss or injury caused to the plaintiff's herd of ponies which were killed upon the railway track either at the intersection of the railway and the highway at level or upon the track somewhat beyond that intersection.

The right of the plaintiff to recover depends in my judgment upon the construction given to section 294 of the "Railway Act" of Canada as amended in 1910.

A suggestion was made that the section was *ultra vires* of the Parliament of Canada and was in conflict with provincial legislation which permitted animals to go at large unless restricted by municipal regulations. I cannot for a moment entertain the suggestion of the section being *ultra vires* nor do I think that it is necessarily in conflict with the provincial legislation. It simply means that if animals

[Page 136]

are allowed by their owner to be at large within one-half a 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 for them unless it established that the animals

> got at large through the negligence or wilful act or omission of the owner or his agent, etc.

In the case before us I am strongly inclined to think the evidence shewed the animals to have been killed at the intersection of the railway and the highway. If so, the animals being at large contrary to the provisions of the section, the plaintiff by the express words of the sub-section 3 was deprived of any right of action for their loss.

If, on the contrary, the animals were killed not at the intersection but on the railway track beyond it, then the plaintiffs would have a right of action under the 4th sub-section for

damages caused by their loss unless the company proved that they were "at large" by "the negligence or wi ful act or omission" of the owner.

That this was proved is beyond doubt. The plaintiffs admitted that they allowed the ponies to be at large on a section adjoining that through which the railway track ran and that they must have wandered or strayed away till they had got upon the highway and then on to the intersection of the railway. The trial judge found these facts on, satisfactory evidence to have been proved. In my judgment the animals were beyond doubt at large by the plaintiffs' "wilful act." It was not "negligence" on the plaintiffs' part which allowed the animals to get "at large" but the intentional,

[Page 137]

deliberate act of the plaintiffs who allowed them to go at large. That was the plaintiffs' "wilful act" which when proved by the company deprived them under sub-section 4 of a right to recover damages for the loss of the animals. The result therefore in my opinion is that, if the animals being at large within half a mile of the railway and the highway crossing at level wandered or strayed on to the railway track and were killed on the intersection, the plaintiffs were deprived by sub-section 3 of their right of action and if killed beyond the intersection on the railway track were also deprived of their right of action by sub-section 4 for their loss, once it was established that the animals were at large by their "wilful act."

It was contended that as the cattle-guards had not been maintained at the intersection as required by section 254 the company was liable whether the animals were killed on the intersection or not and whether they were at large by the plaintiffs' wilful act or not. But I think clearly this is not so. Section 294 is in my opinion a code in itself, with respect to the rights and obligations of the Railway Company and of the owners of animals killed upon the company's track whether at the intersection of the railway and the highway level, or on other railway property beyond it. Section 254 is of general application but it cannot control or alter the operation of section 294 which deals with the particular case now before us and defines with particularity and care the respective obligations and rights of the company and the owners of animals at large in the neighbourhood of level crossings of railways and highways.

IDINGTON J.—The decision of this appeal ought to turn upon the effect to be given to section 294, sub-

section 5. The whole section reads, as amended by 9 & 10 Ed. VII., c. 50, sec. 8, as follows:—

> 294. 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 they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.
>
> 2. All horses, sheep, swine or other cattle found at large contrary to the provisions of this section may, by any person who finds them at large, be impounded in the pound nearest to the place where they are so found, and the poundkeeper with whom the same are impounded shall detain them in like manner, and subject to like regulations as to the care and disposal thereof, as in the case of cattle impounded for trespass on private property.
>
> 3. If the horses, sheep, swine or other 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.
>
> 4. When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company, and by reason thereof damage is caused to or by such animal, the party suffering such damage shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such damage against the company in any action in any court of competent jurisdiction, unless the company 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; Provided, however, that nothing herein shall be taken or construed as relieving any person from the penalties imposed by section 407 of this Act. (9 & 10 Ed. VII., c. 50, s. 8).
>
> 5. The fact that any such animal was not in charge of some competent person or persons shall not, if the animal was killed or injured upon the property of the company, and not at the point of intersection with the highway, deprive the owner of his right to recover.

The owner is given by section 4 a right of action unless the company prove that the animal got at large through negligence or wilful act or omission of the owner or his agent.

Does sub-section 5 dispense with this right of the company when its default causes the accident?

Or is it only limited in its operation to the requirements of sub-section 1, imposing the duty of providing some competent person to be in charge?

The common sense of sub-section 5 in depriving the company of a defence when animals not killed on the highway but on the railway track by reason of the company's default in not observing the law suggests it ought to have been made to apply to all such cases.

I incline, however, to think Parliament has failed to so express itself and that the latter or second class is only what is covered and not the former.

That would not prevent the operation of the exception in sub-section 4 in favour of the company.

The case of *Canadian Pacific Railway Co.* v. *Eggleston*[3], wherein it was decided that the owner of a band of horses, though in a sense in charge, which in 1902 strayed upon an unfenced railway track had no remedy for their slaughter by the defendant's train, I imagine led to this attempt to bring the law in harmony with due regard by railway companies for the rights of others.

I regret that the effort at amendment seems to have partially miscarried.

I cannot say the court below is wrong in the holding that an owner leaving his horses at large on an unfenced section of land falls within same.

I agree the legislation of the local legislature cannot invade the express declaration of parliament in a railway Act such as that in question.

The appeal should be dismissed with costs.

ANGLIN J.—I agree with Mr. Justice Davies.

BRODEUR J.—I agree with Mr. Justice Idington.

Appeal dismissed with costs.

Solicitors for the appellants: Seaborn, Taylor, Pope & Quirk.

Solicitors for the respondent: Fish & Ferguson.

[3] 36 Can. S.C.R. 641.