

1891
 Mar. 24.

JOHN GILCHRIST.....SUPPLIANT ;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Injury to property on a Government railway—Negligence of servant of the Crown—R.S.C. c. 38 s. 23—50-51 Vic. c. 16 s. 16 (c).

A filly, belonging to the suppliant, was run over and killed by a train upon the Intercolonial Railway. It was shown on the trial that at the time of the accident the train was being run faster than usual in order to make up time, that it had just passed a station without being slowed, and was approaching a crossing on the public highway at full speed. The engineer admitted that he saw something on the track, which he did not recognize as a horse. He, however, paid no attention to it, and made no attempt to stop his train until after it was struck.

Held, that the engineer, as a servant of the Crown, was guilty of negligence, for which the Crown was liable under R. S. C. c. 38 s. 23 and 50-51 Vic. c. 16 s. 16 (c).

(*The City of Quebec v. The Queen*, 2 Ex. C. R. 252, referred to).

PETITION OF RIGHT for the recovery of damages against the Crown in respect of the killing of a filly on the Intercolonial Railway, and for injury done to two other horses belonging to the suppliant.

The facts of the case are fully stated in the judgment.

November 25th and 26th, 1890.

Pugsley, Q.C. for suppliant ;

Barker, Q.C., and *McLeod*, Q.C. for respondent.

BURBIDGE, J. now (March 24th, 1891) delivered judgment.

The suppliant brings his petition to recover 1st. the value of a two year old thorough-bred filly killed by an engine and train of cars on the Intercolonial Railway, and 2ndly. for injury alleged to have been occasioned to two other horses belonging to him by being "furi-

ously driven and chased by such engine and train of cars”.

On the second branch of his claim the suppliant has, I think, failed to make out a case. The first he seeks to support on two grounds:—

(1.) That the filly gained access to the railway from adjoining land in which he had a right of pasturage and which the railway authorities had, contrary to their duty in that behalf, left unfenced; and that the filly being so upon the railway was killed by a passing engine and train.

(2.) That the filly was killed through the negligence of the respondent's servants in charge of such engine and train.

The lands for the right of way, at the place on the Intercolonial Railway where the accident occurred, were acquired under the Act of the Legislature of the Province of New Brunswick, 19 Victoria, chapter 17, by which, in certain cases, the commissioners were directed to erect and maintain sufficient fences along the line of railway. At or near the place mentioned the railway crossed a brook and a public highway, and a small triangular piece of land, adjoining the highway and bounded by it and by the railway and the brook, was left unfenced and open to the highway. From this piece of land the filly and other horses gained access to the railway.

Now after the lapse of so many years, it appears to me that there is much to be said for the view that the owners of the land in question acquiesced in the arrangement of the railway fences that left this piece of land unenclosed; and, however that may be, I think it is very doubtful that, in the arrangement which the suppliant made for pasturing his horses on another part of the property, of which such piece formed part, he had it in mind to acquire, or the owner

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to give, a right of pasturage in such piece of land. The small area comprised therein, and its known dangerous proximity and exposure to the railway, render this I think improbable.

With reference to the second ground on which the case is rested, it appears that the accident happened about three o'clock on the morning of June 22nd, 1889, when, according to the engineer of the train, it was just coming on daylight. The train was behind time, and was being run at a speed of about twenty-five miles an hour to make up time. This was faster than was usual. The train had just passed a station without being slowed, and was approaching the crossing of the public highway mentioned at full speed, when the engineer noticed an object on the bridge, or beam-culvert, over the brook referred to. He says that it looked to him something like a large piece of brown paper lying on the track. When he saw it he was some ninety yards from the bridge, but he made no attempt to stop his train, and he did not even continue his observation of such object to ascertain what it was. To do so he would have had to cross his cab, and the fireman was at the time putting on coal, and he could not, he says, get over. By striking the filly one of the cylinder cocks of the engine was broken, and then he had to stop the train. Apparently the filly had attempted to cross the bridge and had fallen and become entangled in the beams and rails thereof. It seems altogether improbable that it would have remained lying thereon in the position described by the engineer if it could have got away. And if the fact that it was killed by the engine and train had not been admitted by the pleadings, I should have thought the matter open to a good deal of doubt. At the rate of speed at which the train was moving, the engineer could not, he says, after he saw the object on the bridge, have stopped

the train in time to prevent the accident. But the fact that the speed was unusual called, it seems to me, for the greater care and caution in passing the crossing of the highway mentioned, especially as at this point, for a distance of two hundred and seventy feet, there were no fences to prevent animals getting on the track of the railway. There is, it appears to me, some evidence of negligence both in respect of the rate of speed at which this crossing was approached, and in not attempting to stop the train when the object lying on the bridge was noticed; and for the negligence of its servants in such a case the Crown is liable (1).

There will be judgment for the suppliant both on the issues of law and of fact, and for five hundred dollars and costs.

Judgment for suppliant with costs.

Solicitor for suppliant: *W. Pugsley.*

Solicitor for respondent: *E. McLeod.*

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(1) R. S. C., c. 38, s. 23., 50-51 *Quebec v. The Queen*, 2 Ex. C. R. Vic. c. 16 s. 16 (c); *The City of* 252.