

IN THE MATTER of the Petition of Right of

1908
 April. 10.

SIMON VIGER.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Railways—Government Railways Act—R. S. 1906, c. 36, secs. 22, 23—Fences
 —Trespasser—Injury—Liability.*

Where not required by the adjoining proprietors to fence its line of railway, there is no duty, in favour of a trespasser, cast upon the Crown by the provisions of secs. 22 and 23 of *The Government Railways Act* to fence as aforesaid.

2. The suppliant, while working on a property adjoining the Intercolonial Railway within the City of Levis, P.Q., was injured while innocently trespassing on the right of way, there being no fence erected, or other means taken, by the Crown to mark the boundary between the adjoining property and the railway. It was not alleged that the adjoining owner had requested the Crown to fence.

Held, that the suppliant had made no case of negligence against the Crown under sub-sec. (c) of sec. 20 of R. S., c. 140.

PETITION OF RIGHT for damages arising out of bodily injury alleged to have been caused by the negligence of the Crown's servant on a public work.

By his petition the suppliant alleged that on the 22nd day of August, 1906, he was employed as a mason in the construction of a building on Commercial Street in the City of Levis. The property of the owner of the house in course of construction adjoined the right of the Intercolonial Railway, but there was no fence between such property and the railway, nor anything to indicate the line of demarcation between them. While engaged in his work, it became necessary for the suppliant to go to the rear of the property on which the house was being built for the purpose of selecting some stones for the foundation which had been piled there. While doing this he was struck by a train passing on the railway, and was seriously injured. He claimed that the Dominion Gov-

ernment was guilty of negligence in not having fenced between the railway and the said property, or in failing to take some means to indicate the line of demarcation.

The Crown, by its statement of defence, objected that the petition was bad in law, *inter alia*, because there was no duty on the part of the Crown, towards suppliant, to erect a fence or otherwise indicate the line of demarcation between the said property and the line of railway; and because the suppliant was a trespasser, and himself guilty of negligence which resulted in the injuries sustained by him.

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The objections in law now came on for argument.

A. Lemieux for the suppliant;

E. L. Newcombe, K.C., for the respondent.

CASSELS, J. now (April 10th, 1908,) delivered judgment.

The points of law raised by the defence were argued before me yesterday. I reserved judgment to consider the forcible argument of Mr. Lemieux, but I am of opinion the points of law raised by respondent must be given effect to.

Section 22 of *The Government Railways Act* (Cap. 36, R. S. 1906) provides as follows:—

“ 22. Within six months after any lands have been taken for the use of the railway, the minister, if thereunto required by the proprietors of the adjoining lands, shall erect and thereafter maintain, on each side of the railway, fences at least four feet high and of the strength of an ordinary division fence, with swing gates or sliding gates, commonly called hurdle gates, with proper fastenings, at farm crossings of the railway, for the use of the proprietors of the lands adjoining the railway.

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2. The minister shall also, within the time aforesaid, construct and thereafter maintain cattle-guards at all public road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway.

3. In the case of a hurdle gate fifteen inches longer than the opening, two upright posts supporting the gate at each end shall be deemed to be proper fastenings within the meaning of this section.

4. Every railway gate at a farm crossing shall be of sufficient width for the purpose for which it is intended. R. S. c. 38, s. 16; 50-51 V. c. 18, s. 2.

Section 23 reads as follows:—

“ 23. Until such fences and cattle-guards are duly made, and at any time thereafter during which such fences and cattle-guards are not duly maintained, His Majesty shall, subject to the provisions of this Act relating to injuries to cattle, be liable for all damages done by the trains or engines on the railway, to cattle, horses or other animals on the railway, which have gained access thereto for want of such fences and cattle-guards. R. S. c. 38, s. 17.”

The suppliant can hardly be classed as an “animal” within the meaning of this section. It provides for the damage in case of non-compliance with the provisions of section 22.

There is no statement that even for the benefit of the proprietor of the adjoining land the duty of erecting a fence, as provided by section 22, was placed upon the minister.

As against the respondent no such statutory duty is created, and I think the petition should be dismissed with costs, to be paid by the suppliant to the respondent.

Judgment accordingly.

Solicitor for suppliant: *A. Bernier.*

Solicitor for respondent: *E. L. Newcombe.*