

titled to maintain this action, and this appeal should be allowed.

The plaintiff in his statement of claim stated the value of the horse to be \$275. At the trial he said he would not have sold it for less than \$300. This is not saying it was worth \$300. Another witness for the plaintiff spoke of the horse as worth about \$300. In the face of this rather indefinite evidence I think the amount of the judgment should be limited to that claimed in the statement of claim, viz., \$275; and judgment should be entered for that amount, and costs below and here.

HON. MR. JUSTICE RIDDELL:—The plaintiff is a settler along the line of the P. A. D. & W. owned and operated by the defendant railway company, and this railway runs through his property. The railway company did not fence their right of way but left it wholly open. The plaintiff had a fence surrounding his land, but about two years ago it was destroyed by fire and he has been too poor to rebuild it. About 600 yards from the west side of his lot runs through his land a forced winter road used for drawing out wood, ties, etc. In September, 1912, the plaintiff had some horses outside of his stable not far from this road; they apparently went upon the road down to the railway and wandered along the railway property grazing as they went. One of them was injured so seriously that it had to be killed. The plaintiff sued the railway company and at the trial in the District Court of Thunder Bay, before His Honour Judge O'Leary without a jury, that learned Judge dismissed the action. The plaintiff now appeals.

The learned Judge finds it not proved that the horse was struck by a train of the defendants.

There is no more salutary rule than that laid down by Lord Loreburn, L.C., in *Lodge Hales Colliery Co. v. Mayor, etc.*, [1908] A. C. 323 at page 328; "when a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury except that a jury gives no reasons." But an appellate Court "does not and cannot" abdicate its right and its duty to consider the evidence "and if it appears from the reasons given by the trial Judge that he has misapprehended the effect of the evidence or failed to consider the material part of the evidence and the evidence which has been believed by him when