

would have been able to control both horses, but they were further terrified by the rumbling sound of the car as it entered on the bridge, and they dragged him in a south-westerly direction across the railway tracks to the top of a bank six feet high, when he had to let go, and the waggon and horses went over into the ditch. The Judge below held that plaintiff was not guilty of negligence; that the neglect of duty, if any, of the railway company would not excuse defendants for not properly guarding the highway: *Hill v. New River Co.*, 9 B. & S. 303; and that the highway was out of repair by reason of there not being a guard rail along the bank, thus bringing this case within *Toms v. Whitby*, 34 U. C. R. 195.

C. C. Robinson, for defendants.

J. H. Moss for third parties, the Metropolitan Railway Company.

W. Cook, for plaintiff.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by—

BRITTON, J.:— . . . It is true the horses were uncontrollable, but from a cause which the corporation might expect, and so should reasonably guard the highway at such a spot. I think the plaintiff acted carefully and prudently. Had he remained in his waggon, it would have been said he should have got out, and gone to the horses' heads. In *Atkinson v. Chatham*, 31 S. C. R. 61, the horses were uncontrollable and ran against a telephone pole, but the pole did not occasion any damage; it rather, as suggested by the Court, by separating the horses from the vehicle, saved further damage: *Foley v. East Flamborough*, 26 O. R. 43, covers this case. Appeal dismissed with costs.

LOUNT, J.

FEBRUARY 19TH, 1902.

WEEKLY COURT.

GRAHAM v. BOURQUE.

Contract—Breach by Non-payment of Note—Absolute Refusal to Perform—Necessity of, before Other Party can Rescind in Such Case.

Furth v. Barr, 9 C. P. at pp. 213, 214, referred to.

Appeal by defendants from report of the County Judge of Carleton, to whom the matters in dispute were referred under R. S. O. ch. 62, sec. 29, in action for price of goods sold and delivered. The contract was for delivery of a quantity of bricks subject to approval of engineer of city of Ottawa, and to requirements of defendants. The Judge below found that defendants had made default in payment of a promissory note for \$1,750, which fell due on July 17th, 1900, and which had been given by defendants for bricks delivered under the