

Reports and Notes of Cases.

Province of Saskatchewan.

SUPREME COURT.

Full Court]

[35 D.L.R. 473

ANDERSON V. CANADIAN NORTHERN RY. CO.

Railways—Injury to animals at large—Wilful act—Negligence.

"Wilful" in sec. 294 (4) of the Railway Act, ch. 37 R.S.C. 1916, means "intentional," and an owner who intentionally turns his animals at large cannot recover damages if they stray to a railway right of way and are killed thereon by a train.

G. E. Taylor, for appellants; J. N. Fish, K.C., for respondents.

ANNOTATION ON ABOVE CASE FROM 35 D.L.R.

In *Greenlaw v. C.N.R. Co.* (Man.) 12 D.L.R. 402, the plaintiff had purposely turned cattle at large to graze, relying on a municipal by-law which permitted it, and the Court distinctly held his "intentional" act was neither "negligence" nor a "wilful" act within the meaning of sec. 294 (4) of the Railway Act. The latest decision of the Saskatchewan Court, *en banc*, adopts a diametrically opposite view, and, it is submitted, the correct one, upon the meaning of the word "wilful."

In *Early v. C.N.R. Co.* (Sask.) 21 D.L.R. 413, the plaintiff was held guilty of a "wilful" act in allowing his cattle to run at large, but Haultain, C.J., intimated plainly that if a by-law had been proven, permitting cattle to run at large, he would have adopted the decision in the *Greenlaw* case. It is worthy of note that he concurred in the judgment of Newlands, J., in *Anderson's* case (*supra*), and it would have been illuminating if he had given his reasons for his latest and soundest view on this point.

In *Koch v. G.T.P. Branch Lines Co.*, 32 D.L.R. 393, the plaintiff had done what a prudent man would to keep his cattle in an enclosure, and there was no intentional "turning at large," so that the meaning of "negligence" or "wilful act or omission" did not have to be decided, and the effect of a by-law had not to be considered; but Lamont, J., held, nevertheless, that "it is not negligence to do that which is authorized by law," and in this Newlands, J., concurred. This case has been reported as though the full Court agreed with Lamont and Newlands, JJ., and so it was treated by Elwood, J., in *Anderson's* case (see 33 D.L.R., at p. 421), but, in fact, Brown and McKay, JJ., while agreeing in the result in the *Koch* case, did not express any opinion as to the effect a by-law would have.