# UPPER CANADA REPORTS.

## QUEEN'S BENCH.

*(Reported by* C. Robinson, Esq., Q C., *Reporter to the Court)*

### Markham v. The Great Western Railway Company.

*Railway Act, sec. 147—Horse not "in charge."*

The plaintiff's son, as it was getting dark, was taking three horses along a road which crossed defendant's railway, riding one, leading another, and driving the third. This last horse, being from sixty to one hundred feet in front, attempted to cross the track as a train approached, and was killed—*Held*, upon a bill of exceptions tendered in the County Court and error thereon, that the horse was not "in charge of" any person within Consol. Stat. C., c. 66, sec. 147, and that the plaintiff could not recover.

[Q. B., T. T., 30 Vic., 1866.]

Error from the County Court of Essex.

Defendants were sued for killing the plaintiff's horse. The defence was rested on the provisions of Consol. Stat. C., c. 66, secs. 147, 148, 149.

It appeared from the plaintiff's evidence that, just as it was getting dark in the evening, the plaintiff's son, nineteen years old, was riding one horse, leading another, and driving a third horse in front, along a road crossing the railway.

The horse killed was from sixty to one hundred feet in front of the driver. He apparently heard the train and attempted to run across the track, but was killed when he got half way over. It was blowing so hard that the witness could not hear the train till it was close upon him, and heard no whistle till the train was right upon him; it had just commenced to rain; he said he did not take much notice about the train.

On this it was objected that the plaintiff must fail; that the horse was at large, and not "in charge of" any person, &c., under the statute.

The learned judge, however, left the question to the jury, who found for the plaintiff.

The defendants tendered a bill of exceptions, upon which error was brought to this court.

*Irving*, Q. C., for the defendants.

*Prince*, Q. C., contra.

The cases cited are referred to the judgments.

Hagarty, J.—The objection comes before us as if on a demurrer to evidence—whether, admitting the truth of the plaintiff's evidence, it was sufficient in law to entitle her to recover.

Was the horse killed "at large," or was it "in charge," within the meaning of the statute?

Cases have occurred under the act in our own courts nearly approaching to the present.

In *Thompson* v. *Grand Trunk Railway Co.* (18 U. C. Q. B. 94), a boy was driving four horses loose before him. He drove them through a gate on a road about sixty yards from the crossing. He tried to get ahead of the horses as he saw the train approaching, but they ran to the crossing and were killed. The late Sir *John Robinson* said: "There could be no stronger case against the plaintiff's recovering, even if there was no such statute in force as the 20 Vic., ch. 12, sec. 16; but with that statute in force, there can be not the slightest room for doubt, for we consider it clear that upon the facts proved these horses cannot be held to have been *in charge* of the boy within the meaning of the statute, so that he could prevent their loitering or stopping in the highway at the point of intersection with the railway. If he had had even one of the four horses secured by a bridle or halter, there would have been rather more pretence for admitting the horses to be in his charge, for the others would probably, though not certainly, have remained near the one he was leading."

In the next case in the same volume, *Cooley* v. *The Grand Trunk Railway Co.*, (p 96), the plaintiff's servant drove his three horses for them barn to the highway, and along the highway to a watering place existing close to the railway track. He used no halter nor did anything more than drive them loose before him. A train came, and the horses ran on and along the track, and one was killed. It was held that the plaintiff could not recover; the same learned judge saying it was clear that the plaintiff's horse when it got upon the railway was not in charge of any person within the meaning of the statute.

We cannot distinguish the case before us from those cited, unless the fact that the plaintiff's servant was riding one horse and leading the others, will enable us to say that the third horse allowed to go loose in front was in his charge.

In the first case cited the Chief Justice notices, without deciding, the aspect of such a state of facts. He says there would have there been rather more pretence for admitting the horse to have been in charge. We are unable to see how the horse driven from sixty to one hundred feet in front of the others, which doubtless were duly "in charge," can be said to have been properly under the man's control. The event shewed his utter inability to prevent the animal running on or across the track. Common sense would suggest that in the dusk of the evening a train rushing rapidly past the point that the witness was approaching, would startle a horse so driven, and render him quite unmanageable.

If animals usually driven—viz.: oxen, pigs or sheep—have to approach or cross a railway, we should naturally consider them as "in charge" when the person or persons driving them could readily head them off or turn them if necessary from the track; but a mounted man leading a second horse would be, as happened here, quite unable to stop a horse driven before him and allowed to be from fifteen to twenty-five yards in front. He would be at least equally helpless while he had to manage his own horse and that which he was leading, and at the same time prevent the animal some distance before him from rushing forward to the track, as if he were on foot with all three horses loose before him.

We had occasion in a former case of *McGee* v. *The G. W. R. Co.* 23 U. C. Q. B. 293, to notice the large object of public safety contemplated by the legislature in making this most salutary provision respecting cattle. See also *Studer* v. *Buffalo and Lake Huron Railroad Co.*, *ante*, p. 163. It should not be frittered away by such distinctions as are sought to be established between this and the decided cases.

We think the horse was not under that control and care which a due regard to the lives of the travelling public (if not to railway corporations) required its owner to have provided for it at the time it was killed by defendants' train; and that the appeal to this court must be allowed, and the judgment below be reversed.

Draper, C. J.—I agree in the views expressed by my brother Hagarty, and based upon the