

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION.

OCTOBER 28TH, 1913.

PALO v. CANADIAN NORTHERN R.W. CO.

5 O. W. N. 176; O. L. R.

Railway—Horse Killed on Track—No Witness of Accident—Finding of Fact by Trial Judge—Evidence — Reversal on Appeal—Ry. Act R. S. C. 1906 c. 37, ss. 254, 294 (4), 295—9 & 10 Edw. VII. c. 50, s. 8—Absence of Fencing—Liability for—"At Large"—Meaning of—Onus —Satisfaction of.

Action against a railway company for damages on account of the alleged killing of plaintiff's horse by a train of defendants. Plaintiff had let out the horse into his pasture which ran down to the railway track, the right of way being unfenced. The accident was not witnessed by anyone.

O'LEARY, DIST. CT. J., *held*, that there was no evidence to establish the fact that the horse was killed by the train and dismissed the action with costs.

SUP. CT. ONT. (2nd App. Div.) *held*, that the evidence clearly shewed that the death of the horse must have been caused by a passenger train of defendants.

That Statute 9 & 10 Edw. VII. c. 50 s. 8, amending the Railway Act shifts the onus and in effect provides that the railway company to escape liability must prove that the animal was "at large" and "at large" through the owner's negligence or wilful act or omission.

That "at large" in the above section means elsewhere than on the land of its owner.

McLeod v. Can North. R.W. Co., 12 O. W. R. 1279, followed.

Appeal allowed with costs and judgment entered for plaintiff for \$275 and costs.

Appeal by the plaintiff from the judgment of HIS HONOUR JUDGE O'LEARY of the District Court of Thunder Bay, who dismissed the plaintiff's action with costs.

The plaintiff's claim was for damages because of injury to his horse by a train of the defendant company on the 27th of September, 1912, which strayed upon the defendant company's track because of their omission to fence.

The learned trial Judge held that there was no evidence that the injury was caused by the defendant company's train, and therefore dismissed the action. From that finding the plaintiff appealed.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON SIR WM. MULOCK, C.J. Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

H. E. Rose, K.C., for the plaintiff, appellant.

A. J. Reid, K.C., for the defendant, contra.