

TEETZEL, J.

FEBRUARY 4TH, 1909.

TRIAL.

McCRACKEN v. CANADIAN PACIFIC R. W. CO.

Railway — Animals Killed on Track — Negligence — Railway Act, R. S. C. 1906 ch. 37, sec. 254, sub-sec. 3 — Fences — Inclosed and Improved Land — Damages.

Plaintiffs were butchers, and had the right of pasturage for their cattle over parts of lots 36, 37, 38, 39 and 40 in the 16th concession of the township of Ferris, in the district of Nipissing. The defendants' line of railway crossed the lots diagonally. On 16th October, 1907, the plaintiffs' cattle broke through the railway fence on lot 36, and a large number were killed, and this action was brought to recover damages for their loss.

G. V. Gould, North Bay, for plaintiffs.

W. R. White, K.C., for defendants.

TEETZEL, J:—In my opinion, relying chiefly upon the evidence of Richard Power, the fence was not "suitable and sufficient to prevent cattle and other animals from getting on the railway," as required by sub-sec. 3 of sec. 254 of R. S. C. 1906 ch. 37. It had been erected for about 23 years and, though some repairs had been made in the meantime, I find its unsuitability and insufficiency were owing to dilapidations.

I also find that it was by reason of the insufficiency of the fence that the cattle got upon the railway.

I further find that the plaintiffs were not guilty of negligence in the matter.

The chief defence was that the lands in question were "not inclosed and either settled or improved," and that therefore the defendants were not bound to fence under sub-sec. 4 of sec. 254, which reads: "Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates, and cattle-guards, unless the Board otherwise orders or directs."

The Railway Board had not been applied to for an order.