

DISTRICT COURT OF THE DISTRICT OF NIPISSING.

POWELL, DIST. CT. J.

JULY 10TH, 1918.

YOUNG v. CANADIAN PACIFIC R.W. CO.

Railway—Animals Killed by Train—Defective Cattle-guards and Fences at Level Highway Crossing—Notice—Failure to Repair—Cattle Lawfully on Highway Getting on Railway Tracks—Proximate Cause—Liability—Railway Act, R.S.C. 1906 ch. 37, sec. 294 (4)—9 & 10 Edw. VII. ch. 50, sec. 8.

Action to recover the value of a cow and two heifers belonging to the plaintiff, killed on the 29th May, 1917, by a passing train on the defendants' line of railway in the township of Humphrey, in the district of Parry Sound.

The action was tried without a jury.

W. L. Haight, for the plaintiff.

J. D. Spence, for the defendants.

POWELL, DIST. CT. J., in a written judgment, said that the animals got on the railway lands within a short distance of the plaintiff's property, at the north side of a level crossing of a highway, by reason of the broken condition and nonrepair of the cattle-guards and of the defective condition of the portion of the east fence turned in towards the cattle-guards or railway track; the animals were killed on the railway track at a considerable distance north of this crossing.

The defects were such as to allow the cattle to pass easily upon the railway strip, and had continued for some weeks; the defendants had ample notice and ample time for making the necessary repairs, but had failed to perform their manifest duty, as required by sec. 254 of the Railway Act, R.S.C. 1906 ch. 37, and the amendments thereto, 9 & 10 Edw. VII. ch. 50, sec. 5, and 1 & 2 Geo. V. ch. 22.

The animals were not breachy, and would not have got on the railway if the cattle-guard and fence had been in proper repair. The defective condition plus the neglect to repair was the proximate cause of the cattle being on the railway lands and of their being killed. Under sec. 427 (2) of the Railway Act, the defendants were liable to the plaintiff for the value of the cattle killed, unless relieved by the provisions of sec. 294 or 295 of the Act.

The defendants relied on sub-sec. 4 of sec. 294, as amended and re-enacted by 9 & 10 Edw. VII. ch. 50, sec. 8, that is to say, the