

IN THE MATTER of the Petition of Right of

1908  
April 10.

SIMEON VIGER.....SUPPLIANT ;

AND

HIS MAJESTY THE KING.....RESPONDENT

*Government railway—Injury to the person — Trespasser — Obligation to fence between railway track and adjoining property in city—R. S. 1906, c. 36, secs. 22 & 23.*

The suppliant was injured by a train on the Intercolonial Railway in the city of Lévis, P.Q., he having inadvertently trespassed upon the right of way while engaged in work for the owner of property immediately adjoining such right of way. He alleged that the accident was due to the want of a fence between the railway and such adjoining property, and that it was negligence on the part of the Crown's servants in not having erected a fence there.

*Held*, that under the provisions of sec. 22, R. S. 1906, c. 36, there was no obligation to fence at the place in question as between the Crown and the suppliant, and that being so, the suppliant had no right of action under the provisions of section 23.

**PETITION OF RIGHT** for damages for an injury to the person on a public work alleged to be due to negligence of the Crown's servants.

By his petition the suppliant charged that on the 26th day of April, 1906, he was working as a stonemason in the construction of a house belonging to one Després, whose property adjoined the tracks of the Intercolonial Railway in the city of Lévis, P.Q. Certain stones that were being used in the construction of the house, were piled at the back of the house and close to the railway property. Owing to the absence of a fence the suppliant alleged that it was difficult to ascertain the boundary between the properties, and in going to the pile to fetch a piece of stone required for the house he was struck by the engine of a train which came suddenly around a curve

just at that place, and he was seriously injured. He claimed \$2,000 damages.

By its statement in defence the Crown denied that it had any obligation to fence its railway at the place in question. The Crown alleged that the suppliant was a trespasser on the property of the Crown when he was struck as alleged in his petition. If there was any obligation to fence it was upon the owner of the property where the suppliant was working.

April 9th, 1908.

The case was now argued on the points of law raised by the defence.

*E. L. Newcombe, K.C.*, for the Crown, argued that the theory of liability put forward by the suppliant depended wholly upon the obligation to fence the railway so that he might be kept off the track. If there is any obligation upon the Crown to fence it must be found in the twenty-second section of *The Government Railways Act*. The provisions of that section relate to fences against straying cattle, and by no implication can be applied to persons trespassing on the railway. Even in the case of animals there is no absolute obligation to fence, but the obligation arises only on the application of adjoining proprietors, who wish to protect their cattle. (He cited *Brown and Theobald's Railway Law* (1); *Buxton v. North Eastern Railway Company* (2).

*A. Lémieux, K.C.*, for the suppliant, contended that it was clearly the duty of the Crown to fence the railway for the prevention of just such accidents as this. The suppliant had a perfect right to do what he was doing, namely, prosecuting his work on adjoining property. Owing to the absence of a fence between the railway and the property where he was working, he had no knowledge that he was near enough to be struck by the train, and

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(1) 3rd ed. p. 306.

(2) L. R. 3 Q. B. 549.

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he could not see the train approaching as there was a curve at the place where he sustained the injuries complained of. The railway should not be operated to the detriment of the public, and it was negligence on the part of the Crown to allow the chance of an accident such as that which happened to the suppliant.

CASSELS, J. now (April 10th, 1908) delivered judgment.

The points of law raised by the defence were argued before me yesterday. I reserved judgment to consider the argument of Mr. Lemieux, but I am of opinion the points of law raised by respondent must be given effect to.

Section 22 of *The Government Railways Act* (Cap. 36, R. S. 1906) provides as follows:—

“22. Within six months after any lands have been taken for the use of the railway, the Minister, if thereunto required by the proprietors of the adjoining lands, shall erect and thereafter maintain, on each side of the railway, fences at least four feet high and of the strength of an ordinary division fence, with swing gates or sliding gates, commonly called hurdle gates, with proper fastenings, at farm crossings of the railway, for the use of the proprietors of the lands adjoining the railway.

“2. The Minister shall also, within the time aforesaid, construct and thereafter maintain cattle-guards at all public road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway.

“3. In the case of a hurdle gate fifteen inches longer than the opening, two upright posts supporting the gate at each end shall be deemed to be proper fastenings within the meaning of this section.

“4. Every railway gate at a farm crossing shall be of sufficient width for the purposes for which it is intended.”  
 R. S. c. 38, s. 16; 50-51 V. c. 18, s. 2.

Section 23 reads as follows:—

“23. Until such fences and cattle-guards are duly made, and at any time thereafter during which such fences and cattle-guards are not duly maintained, His Majesty shall be subject to the provisions of this Act relating to injuries to cattle, be liable for all damages done by the trains or engines on the railway, to cattle, horses or other animals on the railway, which have gained access thereto for want of such fences and cattle-guards.” R. S. c. 38, s. 17.

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The suppliant can hardly be classed as an “animal” within the meaning of this section. It provides for the damage in case of non-compliance with the provisions of section 22.

There is no allegation that even for the benefit of the proprietor of the adjoining land the duty of erecting a fence, as provided by section 22, was placed upon the Minister.

As against the respondent no such statutory duty is created, and I think the petition should be dismissed with costs, to be paid by the suppliant to the respondent.

*Judgment accordingly.*

Solicitor for the suppliant: *A. Bernier.*

Solicitor for the respondent: *E. L. Newcombe.*