MERRIMAN v. PACIFIC GREAT EASTERN RAILWAY COMPANY

(1922), 30 B.C.R. 457 (also reported: [1922] 1 W.W.R. 935)

British Columbia Court of Appeal, Macdonald C.J.A., Galliher and McPhillips JJ.A., 10 January 1922

Railway--Indian reserve--Animals--Gap in fence--Cow killed by train-- Enclosed land adjoining--Subletting--Trespass--When "at large"-- R.S.C. 1906, Cap. 37, Sec. 294; Can. Stats. 1910, Cap. 50, Sec. 8-- R.S.B.C. 1911, Cap. 194, Sec. 210 (4).

The plaintiff's cow which was pastured on an enclosed area within an Indian Reservation and adjoining the defendant Company's right of way, made its way through the fence onto the right of way and was killed by a passing train. The cow was pasturing on the enclosed area by reason of a bargain made by the plaintiff with an Indian who had no authority to deal with the property. An action for damages was dismissed.

Held, on appeal, affirming the decision of CAYLEY, Co. J. (MCPHILLIPS, J.A. dissenting), that the cow was a trespasser on the enclosed area and "at large" within the meaning of section 210(4) of the British Columbia Railway Act and being at large by the willful act of the plaintiff he cannot recover.

APPEAL by plaintiff from the decision of CAYLEY, Co. J., of the 4th of August, 1921, in an action for damages for the loss of a cow on the railway track adjoining the Capilano Indian Reserve. The facts are that one John Nesbit claimed to have leased an enclosed pasture within the reserve and [Statement] adjoining the railway right of way from an Indian named Joe. Nesbit kept his cattle there and the plaintiff under arrangement with Nesbit paid him rent for the right to pasture his cow within the enclosure. The plaintiff's cow appears to have made its way through a hole in the fence on the south side of the enclosure onto the railway right of way where it was killed by a passing train. There was no evidence to shew that Indian Joe had any authority to lease or deal in any way with property within the Indian Reservation. The learned trial judge dismissed the action.

The appeal was argued at Vancouver on the 21st and 24th of October, 1921, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

J. Wilson, for appellant: The cow got through a hole in the fence and the Railway Company must keep it in repair: see section 172 of the British Columbia Railway Act. As to sections 210 and 211 dealing with cattle we do not come within them. We say the cow was not "at large" within section 210: see *Sporle v. Grand Trunk Pacific Ry. Co.* (1914), 17 Can. Ry. Cas. 71; *McLeod v. Canadian Northern R.W. Co.* (1908), 9 Can. Ry. Cas. 39 at p. 43. We say we were licensees as Indian Joe leased to us and said he owned the enclosure: see *Littleton v. M'Namara* (1875), 9 Ir. C.L.R. 417; *Robinson v. Vaughton* (1838), 8 Car. & P. 252; *Hupp v. Canadian Pacific Ry. Co.* (1914), 20 B.C. 49; *Parks v. Canadian Northern R. Co.* (1911), 14 Can. Ry. Cas. 247. If the animal is under physical restraint in an enclosure it is not "at large." [Argument] There is no willful omission or neglect on our part: see *Krenzenbeck v. Canadian Northern R.W. Co.* (1910), 13 W.L.R. 414. Even if we are not adjoining owners that is no defence: see *Carruthers v. Canadian Pacific R.W. Co.* (1906), 6 Can. Ry. Cas. 15. As to the maintenance of the fence by the railway

see *Palo v. Canadian Northern R.W. Co.* (1913), 29 O.L.R. 413; *Krenzenbeck v. Canadian Northern R. Co.* (1910), 14 Can. Ry. Cas. 226.

W. C. Brown, for respondent: He bases his case on the fence. The mere fact that there was a fence there creates no liability on us to keep it in repair. There was no liability to fence: see *McLeod v. Canadian Northern R.W. Co.* (1908), 9 Can. Ry. Cas. 39 at p. 46. This was not a properly enclosed ground. What they call fences were merely a lot of brush and logs thrown together: *Cortese v. The Canadian Pacific Ry. Co.* (1908), 13 B.C. 322. The case of *Dreger v. Cana- dian Northern Railway Co.* (1905), 15 Man. L.R. 386 is overruled by *Schellenberg v. Canadian Pacific Railway Co.*(1906), 16 Man. L.R. 154; see also *Bugg v. Canadian Northern Railway* (1917), 3 W.W.R. 458. The cow was tres- passing. Indian Joe had no authority whatever and no person had the right to be on the reserve without permission. They were "at large": see *Anderson and Eddy v. Canadian Northern Rway. Co.* (1918), 57 S.C.R. 134; *Fraser v. Canadian Northern Railway* (1918), 3 W.W.R. 962. The learned trial judge found the cow was trespassing and it must follow she was "at large" in which case there is no liability: see *Ferris v. Cana- dian Pacific Ry. Co.* (1894), 9 Man. L.R. 501. On the liability to fence see *Westbourne Cattle Co. v. Manitoba & N.W. Ry. Co.* (1890), 6 Man. L.R. 553. There is no evidence the hole was in the fence before the cow got through. In case [Argument] of bad fencing as to animals being at large see *Clayton v. Canadian Northern Railway* (1908), 17 Man. L.R. 426 at p. 437; *Becker v. Canadian Pacific R.W. Co.* (1906), 7 Can. Ry. Cas. 29 at p. 33; *Bourassa v. Canadian Pacific R.W. Co., ib.* 41; *Murray v. Canadian Pacific R.W. Co.* (1907), 7 W.L.R. 50; *Biddeson v. Canadian Northern R.W. Co.* (1907), 7 Can. Ry. Cas. 17.; see also Abbott's Railway Law of Canada 403.

Wilson, in reply, referred to *Quinn v. Canadian Pacific R.W. Co.* (1908), 8 Can. Ry. Cas. 143 at p. 146; *Dunsford v. Michigan Central R.W. Co.* (1893), 20 A.R. 577; *Studer v. Buffalo and Lake Huron R.W. Co.* (1866), 25 U.C.Q.B. 160. *Cur. adv. vult.*

10th January, 1922.

MACDONALD, C.J.A: John Nesbit claims to have rented the land in question from Indian Joe, and to have given the plaintiff the right to pasture his cow there for a consideration. The cow got through a hole in the railway fence and was killed on the railway track by the defendant's train.

This land which Nesbit claims to have rented from Indian Joe was part of the Indian Reserve, and Joe had no authority to lease or deal with it in any way. The plaintiff's cow was therefore a trespasser upon this land, and I do not think the Railway Company were bound to fence for her protection.

According to the evidence, neither Nesbit nor the plaintiff had any right to have cattle on the Indian Reserve. The cattle were therefore "at large" within the meaning of the British Columbia Railway Act, Sec. 210, Subsec. (4), and as they were so at large by the willful act of the plaintiff, he cannot recover in this action.

Said section 210, subsection (4), is the same in effect as section 294, subsection (4) of the Railway Act, R.S.C. l906, Cap. 37, which was interpreted by us in*Hupp v. Canadian Pacific Ry. Co.* (1914), 20 B.C. 49, where we held under similar circumstances that the plaintiff could not succeed. I would, therefore, dismiss the appeal.

GALLIHER,J.A.: I would dismiss the appeal.

McPHILLIPS,J.A. would allow the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *McGeer, McGeer & Wilson.*

Solicitors for respondent: *Ellis & Brown.*