

meant by sec. 294 (4), it is no answer that when it exists in fact its effect can be escaped by saying its result in enabling the cattle to be at large was permitted by a by-law or provincial statute, for breach of law is not the essence of the "negligence," but lack of care to keep animals from straying.

The "negligence" referred to in sec. 294 (4) of the Railway Act is not a narrow, thin-skinned legal conception; it is negligence in fact, that is, the careless as distinguished from the wilful act or omission of the owner. "Negligence is the absence of the care, skill and diligence which it is the duty of the person to bring to the performance of the work which he is said not to have performed" (*per* Willes J., *Grill v. General Iron Colliery Co.*, 35 L.J. C.P. 330). Sec. 294 (4) assumes that—it is the duty of the owner of animals, towards the railway, to prevent them from getting at large by his negligence or his wilful act or omission; it does not say "legally" at large, but at large in fact—and while on the one hand it is no proof of negligence or wilful act or omission, that the animals are in fact at large in violation of sec. 294 (1), it is equally no answer to proof of negligence or wilful act or omission under sec. 294 (4) that any provincial statute or municipal by-law permitted animals to be at large. The owner, in other words, who carelessly or intentionally enables his cattle to get at large, relying upon such a statute or by-law, takes the risk that he cannot recover damages against a railway if his animals are killed upon a right-of-way.

In reality, neither a violation of sec. 294 (1), nor permission accorded by by-law or provincial statute, has anything whatever to do with "negligence or wilful act or omission" under sec. 294 (4). The former prohibits under a penalty, and the provincial statute permitting animals at large merely means that being at large is not unlawful *per se*. The statute (ch. 32, Sask.) expressly says that nothing therein shall "in any wise affect rights or remedies at common law or otherwise for the recovery of damages *by any animals*." Surely it was equally not meant to affect liability to the owner of animals at large. If this be so, what in the world has this statute to do with the question whether an owner has been guilty of "negligence" in allowing his animals to get at large?

Lamont, J., says that sec. 294 of the Railway Act is to be construed as saying that if an owner deliberately (*i.e.*, intentionally) allows his animals to be at large, and they are killed, he has no remedy. That is good law; is it not equally so to say that if his carelessness enables them to get at large he has no remedy? How can it reasonably be said that sec. 294 (4) penalizes "intention" and not "inattention?"

In the *Koch* case (32 D.L.R., at p. 394), Lamont, J., very concisely said: "Negligence (in sec. 294 (4)) means that the plaintiff did not take the precautions to prevent his animals getting at large which an ordinarily cautious and prudent man would," but later in the same case he says (p. 396): "Where there exists a valid by-law permitting animals to run at large, an owner cannot be held guilty of negligence in permitting them to so run." In relation to the duty the owner of animals owes to the railway, or, to put it another way, in relation to the basis of the railway liability (*i.e.*, that the animals shall not have got on the railway by default or act of the owner), what difference does it make that the owner's default or act was the exercise of a legal privilege?