

TOWNSHEND, C.J.:—The defence to this action is that the gate broken down by defendant was across a public highway on which he had the right and was in the habit of travelling over to get to a part of his own land. The fact is admitted that the gate was across an old road and not now generally used by the travelling public, as another road more convenient has been made. No legal steps, however, had been taken by the municipal council to close this road to the public and it was therefore competent for the defendant to use it for all such purposes as he required. He was therefore justified in removing anything which obstructed his right to travel over it. Plaintiff's lands along this road were not enclosed with a fence, and in consequence it is claimed that defendant's cattle came on his land committing trespass. There was some question as to whether the cattle were defendant's or his sons, and also whether they came in from the road or through the defective fence dividing plaintiff's and defendant's lands. On the whole I am convinced that some of the cattle at least belonged to the defendant and on some occasion strayed on to plaintiff's land from the road. The land, however, was only in rough pasture not at that time cultivated and the cattle were removed by the defendant as soon as he was aware of it. The damages therefore would be merely nominal, which I fix at five dollars; for which plaintiff will have judgment without costs. I decline to give costs in view of the trifling character of the trespass and because the real cause of action was for pulling down gate, on which plaintiff failed.

The following is the judgment in the second action:—

TOWNSHEND, C.J.:—This is an action for breaking and entering and committing trespasses on plaintiff's lands. The trespass consisted in taking down a portion of plaintiff's fence and crossing with teams and carriages to lands of defendant in the rear. The defence is that defendant had gained a right of way over the lands in question by user for more than twenty years.

It is clearly proved that defendant in assertion of the right did remove certain panels of plaintiff's fence which blocked the right of way claimed. The defence of a public right of way was also set up, but in my opinion wholly failed.

It has been satisfactorily established that defendant for the period claimed and longer has made use of this road