

"the fines and penalties following, that is to say, for each and every cow, ox, or young cattle running at large between the 1st day of April and the 1st day of January in any year, one dollar."

This part of section 2 directly contradicts the proviso in section 1, and renders it at least doubtful what the council really meant to do in regard to cows, oxen and young cattle.

I have carefully compared section 194 of the Act of 1888 with sec. 16 of the Act of 1883 for which it is substituted, and excepting only the provision in that sec. 16 as to the case of the company taking possession of a section or a lot of land for the purpose of constructing a railway thereon, and being required in writing by the occupant thereof, to fence, etc.—the obligation to fence in the other cases is as clear and imperative in one section as the other. The phraseology of sec. 194 is certainly different in some respects from that in the sec. 16 of which I have spoken; but unless it was to give the municipality as such some right to compel a general fencing of the line through the whole of the townships, I cannot satisfactorily determine what more, if anything, the parliament did intend. If it was intended to enlarge the right and privilege of each private proprietor to the extent contended for by Mr. Burrit, why were the words of limitation "not wrongfully on the railway" inserted in sub. sec. 3, and thereby in every case raising and presenting the issue as to whether the cattle were or were not wrongfully on the railway at the time of their being struck and killed. In the present case that issue is fairly and squarely presented—the cattle were either rightfully or wrongfully on the line on 22nd of October, 1888. Now, if rightfully, where was the right and how was it acquired? There is nothing in sec. 194 which speaks of private proprietors or occupants, or gives them any new rights or defines any old ones, in fact nothing touching them, except this sub. sec. 3 which contains the limitation just now mentioned.

If the right is given by the by-law upon which Mr. Burrit was candid enough to say he did not place very much reliance, then all I can say is, that I cannot make out from sections 1 and 2 of it (which contradict one

another) what the council really intended to do with respect to oxen, cows and young cattle being allowed to run at large as free commoners. But even if their by-law was ever so clear in its provisions it must be borne in mind that municipal councils could give no such right or authority over private lands or properties, and certainly not over any part of the railway track itself. Their by-law could only affect the streets, highways and public squares of their municipality—and even in regard to the highways, the 271st sec. of the Railway Act would limit their right (so far as allowing cattle to run at large was concerned), to such parts of them as were not within half a mile of the intersection of the highway with any railway at rail level. On the best consideration I have been able to give the matter, I cannot see how the plaintiff's cattle can be said to be rightfully on the track at the time, as they were undoubtedly trespassers on lot 19 from which they got upon the railway; and as the plaintiff has not shown any right for the cattle to be put or go there, I am forced to hold that they were wrongfully on the track of the railway when they were struck and killed; and adopting the language of Mr. Justice Patterson in the *Conway* case, at page 717, when speaking of the change effected by the sec. 16 then under consideration, it appears to me "there is no evidence of a change so great and so uncalled for as to extend the right to either owner or occupant of lands that did not adjoin the railway." And I think the language of Mr. Justice Osler in the same case, at page 721, is still, notwithstanding the change in the enactment, applicable to such a case as this. "In the absence of any statutory provision to the contrary, a railway company is under no obligation to fence its track. As a general rule, however, Railway Acts contain enactments more or less stringent requiring them to do so; but unless the duty created by the Act is general and the obligations imposed unlimited and unqualified, it is only the owners of adjoining lands and those in privity with them who can take advantage of it, and the company are not bound to make good damages to cattle which were trespassing upon lands which, when they escaped upon