

track within 310 feet; the railway crossing lot 19 and not lot 18.

3. Plaintiff is neither owner nor occupant of lot 19. Reference to plan or sketch annexed to statement.

4. Township of Rolph is organized and surveyed for settlement.

5. There are no fences.

6. Plaintiff's cattle were killed on the railway, having got thereon from lot 19, having first come from 18 on to 19; accident occurred on 22nd October, 1888.

7. The value of the cattle, \$50.

8. Cattle were at the date of accident free commoners in Rolph; provided counsel for plaintiff files certified copy of by-law to the effect; not otherwise admitted.

9. No negligence either way.

Pursuant to the arrangement made, the questions of law were argued before me by Mr. Burrit for plaintiff, and Mr. White for the defendants.

Mr. Burrit at once conceded that if the law had stood as it was declared to be in the cases of *Conway v. C. P. R. Co.*, 12 Ont. App. Rep. 708, and *Davis v. C. P. R. Co.*, same vol. 724, the plaintiff would not be entitled to recover, as the cattle had gone upon the track from lot No. 19 of which he was not occupant, and to which he had no shadow of a claim—his own lot No. 18 not being in any part touched by the line of railway, and he being in no sense an adjoining proprietor. But he argued that by the effect of the 194th section of the Railway Act, 51 Vic. chap. 29, which reads as follows: "When a municipal corporation for any township has been organized, and the whole or any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, of the height and strength of an ordinary division fence with openings or gates or bars or sliding or hurdle gates of sufficient width for purposes thereof, with proper fastenings at farm crossings of the railway, and also cattle guards at all highway crossings, suitable and sufficient to prevent cattle and other animals from getting on the railway. (3) "Until such fences and cattle guards are duly made and completed, and if after they

"are so made and completed, they are not
"duly maintained, the company shall be
"liable for all damages done by its trains
"to cattle, horses and other animals not
"wrongfully on the railway, and having got
"there in consequence of the omission to
"make complete and maintain such fences
"and cattle guards as aforesaid."

The right of the plaintiff, and in fact of each private proprietor in the whole township, was enlarged beyond the limits of his own or the land occupied by him to the full extent of the limits of the township, and that he had a right to allow his cattle to roam at their free will and pleasure over the highways and unenclosed lands in the township, and of course go upon the railway line or track, if in their rambles they should meet with it; and in further support of this contention he put in a copy of a by-law of the municipality of Rolph, Buchanan and Wylie, providing for the allowing of cattle to be free commoners within the townships at certain seasons of the year, and with certain exceptions not applying to the cattle now sued for.

This by-law was passed as long ago as the 5th of June, 1875, and before the defendants' railway was built through these townships or even contemplated. Its provisions are somewhat peculiar. Sec. 1 provides, "That on and after the maturing and passing of this by-law it shall not be lawful for horses, bulls, stags, breachy or unruly cattle, oxen, cows, young cattle, pigs, sheep, geese and turkeys to run at large, or to be free commoners within the limits of the said townships of Rolph, Buchanan and Wylie, at any season of the year—proviso—that oxen, cows, and young cattle (not being breachy or unruly) shall be at liberty to run at large and be free commoners within the said townships between the 1st day of April and the 1st day of January in each year." But then section 2 provides that "any animal or animals mentioned in the first section of this by-law, found running at large contrary to the provisions of the by-law, shall be liable to be impounded in one of the public pounds of the said township, and being so impounded, the owner or owners of such animal or animals shall be liable to pay