

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 section 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 a 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 section 16, then under consideration, it appears to me "there is no evidence of 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 the track ought, as between the land owner and the Company to have been fenced."

I have been favored with a perusal of the judgment recently delivered by Mr. Justice Brooks, of the Quebec Superior Court in *Morin v. Atlantic & Northwest Railway Co.*, and find that he takes the same view as I do of the recent sec. 194 of the Railway Act.

If Parliament intended making such an ex-

tensive change in the law as contended for it should have said so in plain terms and could have refrained from putting in any limitations of the right to recover.

A good deal of the language of the judges in *Douglas v. Grand Trunk Railway Co.*, 5 App. Rep. Ont. 585, is, I think, still applicable to the position of the plaintiff, even under this new enactment. As to the question of negligence or contributory negligence I do not touch upon it in view of the admission made in the statement, further than to say that I gathered from Mr. Burritt's argument that the absence of negligence as conceded did not include what might be deemed negligence in not having constructed the fences, and from Mr. White's that the want of negligence on the part of the plaintiff did not include what might be deemed negligence in allowing his cattle to roam at large over the lands not belonging to him and unattended and unrestrained.

I think my proper course is to direct a non-suit under the 114th section of the Act; and a non-suit is ordered accordingly.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

KENNEDY v. PIGOTT.

Arbitration—Progress estimate—Reference back.

This was an action by a sub-contractor against the contractor of public buildings in Galt, and for a wrongful dismissal. Case was referred to arbitration, and the learned arbitrator (Scott, Co.J.) found in favor of the plaintiffs on a *quantum meruit*, having based the award upon the last progress estimate delivered by the defendant to the Government.

It appeared in evidence that the progress estimate was wrong, and that it did not correctly represent the balance due upon the work. On appeal to the Court of Appeal, the Court unanimously referred the case back to the arbitrator, with directions as to the mode of estimating the amount due, not having regard to such progress estimate.