The plaintiff's land did not come to the line of railway, but was 30 rods distant from it. There were cattle-guards at the crossing, but no gates. The road or concession line along which the ox was passing over the railway track lay in that point through unimproved land, not enclosed.

A by-law of the municipality of the township of Innisfil was put in, which enacted what should be the height of a lawful fence, and provided that any cattle coming from any other township for the purpose of pasturing at large in Innisfil should not be considered as free commoners, but should be liable to be impounded; that all horses, bulls, and breachy cattle, and hogs under forty pounds weight, should not be allowed to run at large; and that the owner of any animal not permitted to run at large by the regulations of the township should be liable for any damage done by it, notwithstanding the fences inclosing the premises might not be of the lawful height.

This by-law was passed in 1851, and was said to be still in force. The defendants' counsel contended that the ox was unlawfully on the highway, and no wilful misconduct shown in the defendants; that the want of gates could signify nothing, as the highway was not fenced, but lay open, and the ox consequently could have passed round the gates at either end if any had been placed there.

The jury were told, that as the by-law did not affirmatively authorize cattle to run at large, but only negatively provided that certain animals and under certain circumstances *should not run at large*, in the opinion of the learned Chief Justice the common law principle, that all persons were bound to keep their cattle from trespassing upon others, was in force, and not abrogated, and that the ox was therefore unlawfully on the track; and that on that account the defendants would not be liable for what happened to him, unless there was such a want of ordinary care on their part as amounted to recklessness, and in a manner to misfeasance, but unless there was misconduct on their part they were not responsible.

The jury found that the defendants were not guilty of negligence, and on that ground they acquitted them on the second count, which was founded entirely on alleged negligence in the defendants' management of the train; but they found a verdict for the plaintiff on the first count, giving him £4 damages, though the ox was sworn to be worth £15.

*McMichael* obtained a rule *nisi* for a new trial on the law and evidence, and because the verdict was contrary to the judge's charge; or to arrest judgment on the first count, on the ground that no liability of defendants is disclosed on the facts therein alleged, there being no duty incumbent on defendants to put up gates. He cited Dolrey v. Ontario, Simcoe & Huron Railroad Company, 11 U.C.R., 600; Dovaston v. Payne, 2 H. Bl., 527.

*M. C. Cameron* showed cause.

Robinson, C. J., delivered the judgment of the court.

I infer that the jury either considered that the defendants should have put up gates, or that the ox was lawfully at large; or, what is more likely, that it was an accident for which neither party was to blame, and so they would divide the loss between them, and estimate it moderately.

As to the motion to arrest the judgment on the verdict which has been given on the first count, it is averred that the ox at the time of the accident was lawfully on the highway, as he might have been, for he might have been then using the highway as a road, being driven along it at the time by his owner. The plaintiff also avers that the defendants, *by their negligence*, ran their train against the ox and killed it. This would give a good cause of action independently of what is stated in the same count, of its being the duty of the Company to keep up gates; for if the defendants by their negligence killed an ox of the plaintiffs which was then lawfully on the highway, they would be certainly liable in damages. The allegation that the ox was lawfully on the highway is traversible if untrue; and not being traversed, we must, in considering any question upon the sufficiency of the pleading, take it to be true. It may have been true, because the ox may lawfully have been on the highway, even in that part of it which is crossed by the defendants' railway, for we see that the law allows that, but of course due care must be taken by the driver of the animal to see that it crossed the railway, using due care to avoid collision. The driver of the ox in such a case must look out for the railway; and as the declaration asserts that the collision arose from the negligence of the defendants, we are not at liberty to assume that it was otherwise in merely pronouncing upon the pleadings.

It is true that the count charges also a breach of duty in not keeping up gates, but it states also, we think, a good cause of action on the ground of negligence in driving the cars against the ox; and it would be no objection to the count, especially after verdict, that it stated two causes of action, or rather stated a double title to compensation for the same injury.

The question now is, whether any ground of action is stated in the count, and in our opinion there is a cause of action substantially stated, whether the Company were or were not bound to put up gates.

We are disposed also to think that the breach of duty in not putting up gates is sufficiently assigned. If the defendants had pleaded what they assert in argument, but what we cannot judicially notice, that there were no railway commissioners, and that they had put up sufficient cattle-guards, and that gates would have been useless, as there was no fence along the side of the road in which to place the gates, and that it was not incumbent on them to have a fence there—we say if the Company had pleaded to that effect, that might possibly have been held sufficient to release them from the charge of breach of duty in not putting up gates; but that is quite another question. As the count stands we take it to be sufficient.

Then, as to a new trial: The plaintiff's premises did not join the Company's line, but were distant from it 130 yards. They were therefore certainly not bound to fence as against him. His ox then coming to the road and standing upon it, as was proved, came to a place where he had no right to be, unless he was driven along the road; that is, using it for travelling. He had no right to be wandering upon it. On the other hand, the Company's train had a right to pass across the road at that point; and as the jury acquitted them of negligent or improper conduct in the management of the train, could they possibly hold them liable in damages? We think not, for the plaintiff (as we see when the evidence is before us, as it is in the application for a new trial) cannot attribute his loss to the fact of there being no gate, since the ox could just as well have got on the track if there had been a gate, the concession line being uninclosed. We think therefore that defendants are entitled to a new trial.

Rule absolute for new trial.

## CHAMBER REPORTS.

*(Reported for the Law Journal and Harrison's Common Law Procedure Act, by* T. Moore Benson, Esquire.)

### Cataraqui Road Co. v. Dunn.

*Attachment of debts—194th section C. L. P. Act, 1856.*

The affidavit required by 194th section C L. P. Act 1856, for an order to attach debts, will not be dispensed with, and that affidavit must be positive and explicit. Under certain circumstances, however, an affidavit founded on belief will be sufficient.

Defendant had been examined orally pursuant to an order under 193rd section of the C. L. P. Act, 1856, and it appeared from the return of his examination that certain debts were then owing to him. Upon this return and an affidavit that their judgment is still unsatisfied, and that the parties owing defendant reside within the jurisdiction, plaintiffs applied *ex parte* for an order to attach such debts under 194th section.