

"(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 and engines 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."

That 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.

In support of this contention the plaintiff 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. Section 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 seasons 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."

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 animals shall be liable to pay the fines and penalties following, that is to

say, for each and every cow, ox, or young cattle running at large between the first day of April and the first day of January in any one year, one dollar."

The latter part of clause 2 of this by-law directly contradicts the proviso in clause 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 sec. 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 section 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, etc., in the other cases is as clear and imperative in one sec. as the other. The phraseology of sec. 194 is certainly different in some respects from that in 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 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. Burritt was candid enough to say he did not place very much reliance, then all I can say is that I cannot make out from section 1 and 2 of it (which contradict each other) what this 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