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MADRAS RECORD OFFICE.

Government of Madras.

Public works DEPARTMENT.

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*Proceedings of the Madras Government, Public Works Department,
5th February 1866.*

No. 154. Read the following Proceedings of the Governor General of India in Council, Public Works Department (Railway), dated Fort William, 9th January 1866, No. 32 R :—

Amendment of Act XVIII. of 1854.

Read the following letter from Colonel W. KENDALL, R. E., Acting Secretary to the Government of Bombay, in the Public Works Department, Railway Branch, to the Secretary to the Government of India, Public Works Department, dated 27th November 1865, No. 2,629.

I am directed by His Excellency the Governor in Council to acknowledge the receipt of your letter No. 953R, dated 24th October 1865, and, as therein called for, to enclose copies of the enclosures to Despatch No. 38, dated 28th September last.

2. I am to observe that these papers were sent direct to the Secretary of State, as the case was one to be arranged with the London Board.

RESOLUTION,—By the Government of Bombay, in the Public Works Department, dated 26th April 1865, No. 897.

1. The Company should be called on at once to provide the level crossing at Kheirgaum.
2. As regards the liability, there appears to be no good ground for considering it otherwise than one belonging to the Railway Company, and coming under Section 19 of Act XVIII.
3. Should, however, the London Board make any objection, such objection would of course receive consideration.

From Captain S. OSBORN, R. N., Agent, G. I. P. Railway Company, to the Officiating Consulting Engineer for Railways, dated 23rd May 1865, No. 2,590.

With reference to the Government Resolution, communicated with your Memorandum No. 960, dated 29th ultimo, I have the honor to submit, for the information of Government, copy of an Opinion of Counsel which I have obtained as to the Company's liability to provide the proposed level crossing gates near Kheirgaum Station.

I will forward a copy of this Opinion with the correspondence for the instructions of the Board in London, by the Mail of the 24th instant.

CASE.

Government, without consulting the Railway Company, order the construction of a Railway feeder to cross the Railway near Kheirgaum Station, and then require the Company to provide level crossing gates.

The Railway Company say that the level crossing, being a contingent expense of the new road, its cost should be defrayed by Government.

Government differ from this view, holding that Railway Companies are bound by law to erect the gates to protect their line.

The law referred to appears to be that contained in Section 19 of the Railway Act XVIII. of 1854. This Section evidently assumes the prior existence of the public road and right-of-way across the line, such right-of-way does not exist at the point where this level crossing is required except for foot passengers, who are already provided for. Moreover, the section seems to apply only to roads crossed by the Railway, but the new road having never existed on the Railway land cannot have been crossed, it is itself the interloper, and wants to cross the Railway.

Counsel is requested to advise whether the Railway Company are bound to provide at their expense level crossing gates in such cases, for instance, suppose the Railway passes by a small village and there is only one road which it crosses; should this village in time grow into a large town, and additional roads be constructed which require to cross the Railway, can the Railway Company be called upon to provide level crossings for such roads?

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OPINION.

I think that the Company are not bound to provide at their own expense any level crossing gates, except where the Railway line crosses an existing road. The Courts of Westminster have always put a very strict and literal meaning on any clause of imposing liabilities in respect of, or conferring rights upon, third parties, in securing derogation from the absolute proprietary or professory right. I think that the opposite construction would be even at variance with the Section in juxta-position to that relied on, whereby the Company are required to pale and keep fenced all other portions of the open line. To hold that a road which crosses is itself crossed by a pre-existent Railway, is that species of construction which logicians call "*prepostera interpretatio*." I advise the Company to resist this demand.

T. C. ANSTEY.

No. 47, dated 18th July 1865.

OPINION.

I am of opinion that the liability of the Railway Company, under Section 19 of Act XVIII. of 1854, to erect and maintain level crossing gates, is limited to cases where the public carriage road was in existence at the time when the Railway was constructed, and was at the same time crossed by the Railway.

J. S. WHITE.

Acting Advocate General.

Enclosure No. 2 to Public Works Resolution Nos. 31-40 R of 1866.

From the Government of Bombay, to Her Majesty's Secretary of State for India, dated 28th September 1865, No. 38.

1. We have the honor to forward, for your information, the enclosed copy of opinions by the Advocate General and Mr. T. C. Anstey of the Bombay Bar, that the liability of Railway Companies by the Act, to erect and maintain level crossings, is limited to cases where the road was in existence at the time the Railway was constructed; and to point out that, from the small number of roads in existence in this country at the time the Railway was under construction, very serious inconvenience and complications are likely to arise.

2. The Officers of the Public Works Department will, as a matter of course, in designing new roads, consult the Railway Engineers, and use existing crossings as far as practicable, but many cases similar to the one that gave rise to the present reference, must occur, and we consider that a clear understanding should be come to with the London Board, and definite instructions be issued to the Railway authorities in this country for erecting and working gates and crossings which may have been constructed for the public, and at the public expense.

Enclosure No. 3 to Public Works Resolution Nos. 31-40 R of 1866.

Extract from a letter from Captain F. S. TAYLOR, R. E., Joint Secretary to Government of Bengal, in the Public Works Department, Railway Branch, to the Secretary to Government of India, Public Works Department, No. 1,824 G, dated 30th November 1865.

"5. I am also directed to request that the Agent's reply to the Government prohibition of the use of a certain form of carriage, may be prominently laid before the Governor General in Council. The Lieutenant-Governor is satisfied that life has been more than once jeopardized in these third class saloon carriages, but it is impossible to hold the Traffic Officers responsible for over-crowding, as the internal fittings are so ill-adapted to the peculiarities of the Native passenger traffic. His Honor recommends that a Clause be added to the Draft Bill of the amended Railway Act, empowering the Local Administrations to prohibit the use of any form of vehicle found to be unsafe, and providing a suitable penalty for neglect to comply within a reasonable period."

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Extract from a letter from Captain F. S. TAYLOR, R. E., Joint Secretary to Government of Bengal, in the Public Works Department, Railway Branch, to the Agent, E. I. Railway Company, No. 1,691 G, dated 30th October 1865.

"2. Lieutenant Luard has since reported two instances of over-crowding third class passengers, the details of which he gives in the accompanying letter, and Captain Taylor has reported another instance which came under the joint observation of Lieutenant Luard and himself at Bankipore Station on the 14th October.

All these cases occurred in old pattern saloon carriages, and it was found almost impossible, after the Natives had once crowded in, either to get them out, or to count the actual number of men in the carriage. While this pattern of carriage continues in use, the Lieutenant-Governor is convinced that it will be impossible to hold Station Masters or Guards responsible for proved instances of over-crowding, and His Honor deems it necessary formally to prohibit its use on the line, requesting that you will report by what date, using every expedition, the necessary alterations to the existing stock sanctioned in March last can be effected."

Extract from a letter from C. STEPHENSON, Esq., Deputy Agent, E. I. Railway Company, to the Consulting Engineer to the Government of Bengal, Railway Department, No. 10,344 G, dated 21st November 1865.

"12. With reference to your No. 1,691, I am not aware of any authority which empowers the Bengal Government to prohibit the running of any carriages the construction of which has been sanctioned by the Government of India. The Company has fully concurred in the Lieutenant-Governor's opinion of the necessity for altering the saloon carriages as the only means by which over-crowding can be prevented, and most of the carriages will be altered as soon as the materials for the purpose arrive from England. The remainder, for which provision has not yet been made, must await another indent on England, which will be sent home next mail."

Enclosure No. 4 to P. W. Resolution Nos. 31-40 R of 1866.

From J. GEORHEGAN, Esq., Officiating Junior Secretary to the Government of Bengal, to the Secretary to the Government of India, Public Works Department, dated 8th December 1865, No. 6,920.

I am directed to forward, for submission to the Government of India, with a view to its consideration in connection with the Bill for the

Letter from Assistant Secretary, Government of Bengal, Public Works Department, Railway Branch, No. 964 G, dated 26th June 1865, with enclosure.

Letter from Commissioner of Burdwan, No. 112, dated 6th September 1865.

Letter from Commissioner of Bhargulpore, No. 612, dated 25th August 1865.

Letter from Commissioner of Patna, No. 291, dated 28th August 1865.

Letter to Government Solicitor, No. 5,968, dated 26th October 1865.

Letter from Government Solicitor, No. 394, dated 13th November 1865.

Letter to Joint Secretary, Government of Bengal, Public Works Department, Railway Branch, No. 6,924 of this date.

amendment of the Railway Act XVIII. of 1854, now before the Council of the Governor General for making laws and regulations, a copy of the correspondence noted on the margin, on the subject of the cattle trespass on the line of rail.

2. It appears to the Lieutenant-Governor that though it is quite fair as between the Railway Company and the owners of the trespassing cattle that the enforcement of the provisions of Section 21 of the Railway Act should be made

to depend on the maintenance of a proper fence, the safety of the travelling public is not sufficiently guarded by this arrangement, and that it is quite as necessary to prevent the owners of cattle from suffering their cattle to trespass on the railway if the fence happens to be broken, as it is to compel the Railway Company to keep up the fence. The present state of the law offers a premium to the owners of cattle to injure or destroy the fence, as, if they can shew that the fence was broken down at the place where the trespass took place, they are exempt from penal consequences.

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3. It is quite as much the business of owners of cattle to keep their cattle from trespassing on the line, as it is the business of the Railway Company to erect and maintain a fence to prevent it, and the fulfilment of either obligation is equally necessary for the safety of the public. Each obligation, therefore, should be made imperative and absolute, independently of the other: and while the Railway Company is strictly held to its obligation of erecting and maintaining the fence, the owners of cattle found trespassing on the line should be punished under the provisions of Section 21, whether the fence be properly maintained or not.

4. The existence of a civil remedy against the owners of cattle trespassing on a Railway is quite inoperative as a means of preventing trespass, and it seems to the Lieutenant-Governor the public must have that special protection against the dangers arising from cattle trespass on railways, which can only be afforded by making the offence criminally punishable irrespective of the due maintenance of the railway fence.

5. A special penalty seems to the Lieutenant Governor to be also required for the offence of wilfully destroying or damaging the Railway fence.

Memorandum from Major J. HOVENDEN, R. E., Assistant Secretary to the Government of Bengal, Public Works Department, Railway Branch, dated 26th June 1865, No. 964 G.

Transferred, in original, to the General Department, with the request that the Commissioners of Bardwan, Bhagulpoor, and Patna may be asked for their opinion on the points raised by the Agent, East Indian Railway Company.

Original paper to be returned when done with.

From C. STEPHENSON, Esq., Deputy Agent, E. I. Railway Company, to the Deputy Consulting Engineer to the Government of Bengal, Railway Department, dated 17th June 1865, No. 5,461 G.

I have the honor to acknowledge your No. 629 G of 10th May, forwarding a report by the Commissioner of Patna on the subject of the fencing in that District.

There can be no doubt that where the *cactus* has failed to grow, the mound, and ditch fence is scarcely sufficient to prevent the trespass of cattle, and measures will at once be adopted to remedy the defect by some sort of wire on the bank, if not by a permanent wire fence.

But there is a question of much greater importance now pending in connection with the iron-wire fences, which have been put up by the Company on the greater portion of the Bengal Division at a very great cost, and which, it is alleged, are insufficient for the purpose.

However this may be, they have been in use in England for many years, where they have always been found sufficient to restrain cattle, and they have, moreover, been approved by the Government of India.

From the correspondence and reports that I have seen from time to time on the subject of the fencing generally, it appears to me that the District Officers have, in many instances, adopted the theory, that the Railway Company, as a rule, desire *not* to keep their fences in repair unless they are compelled. Implying, as this does, the supposition that the risk of smashing the rolling-stock, and stopping the traffic, to say nothing of risk to life and limb, is deliberately preferred to the expenditure of a few Rupees on the fences, it seems almost superfluous to point out how unlikely this is, for indeed the warning of the Magistrate, that a fence is damaged is an absolute benefit to the Company, which no man of any sense would object to.

But it has resulted in a condition of affairs which renders it almost impossible for the Company in some Districts to keep any fence in order for 24 hours together. For some of the Magistrates appears to think that, because a fence is provided under the Act, they and the Police are entirely absolved from any sort of duty in protecting the Company's interests; that if any one can get through the fence, he is liable to no punishment; and that all they have to do is to give the Company warning to repair within fifteen days.

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The fact is notorious, that wherever the crops are standing without any fence at all, the villagers never fail to tend their cattle carefully, and find no difficulty whatever in restraining them, that is, as long as it is their interest to do so; but as soon as it suits them to leave, if not to lead, their cattle to where they can feed themselves without damaging their crops, immediately their cattle are to be found within the Company's boundaries, and the Magistrates seem to assume that the fences were already out of repair, or broken down by some process which does not appear, and that the owner's interest would on no account induce him to lend his assistance to his bullocks in reaching the Company's grass.

So long as the District Officers continue to assume that the Company do not desire to keep their fences in order, and that the Natives of this country are unwilling parties to the trespass of their cattle on the Company's ground, I do not see that any thing short of a six feet wall will meet the difficulty. Yet it is very difficult to understand why these assumptions should prevail—for the first is so utterly opposed to the Company's interest; and the last to our experience of the Native character.

In the middle of April last an Inspector of the Hollohur and Barrh Divisions sent to the Thanna five cows, which had been caught trespassing on the line, for which the owner was fined Rupees 5 each. He immediately made a counter-charge against the men who caught his cows, that they had driven the cattle on to the line; they were imprisoned for seven days, tried on the 3rd May, and fined Rupees 5 each. It is needless to say that these men will not attempt to seize cattle straying on the Railway again.

The following is copy of the Magistrate's decision:—

AKUL RAE, *versus* $\left\{ \begin{array}{l} \text{MEETUN, Chuppraissie.} \\ \text{RUJAT ALI.} \\ \text{JANKEE, Mistree.} \end{array} \right.$

“CHARGE.”

“*Illegal seizure of Cattle under Section 14, Act III. of 1857.*”

“It is clearly proved that plaintiff's cattle were seized on account of the enmity felt against him by Meetun, Gate-keeper, and that the seizure was abetted by the other prisoners, and probably also by their witnesses.

“The cattle have been restored to plaintiff, and I fine defendants Rupees 5 each for the illegal seizure, or in default seven days' rigorous imprisonment, if realized, the fine to be paid to plaintiff under Section 14, Act III of 1857.”

BARRH, 3rd May 1865.

E. H. WHINFIELD,
Joint Magistrate.

It may of course be argued that the owner of the cattle (who by the way has no difficulty in getting any number of witnesses) is as likely to be right as the Company's servants, but the doctrine of probabilities is very strongly in favour of the latter, as they have nothing to gain but a good deal of extra work in taking the cattle to the Thanna, whilst the owner of the cattle has a great deal to gain if he can feed them at the Company's expense.

The Commissioner of Patna endorses the opinion of the Assistant Magistrate, that the owners of cattle trespassing through inadequate fencing are not liable to punishment at all, and that the *onus* of prevention lies entirely with the Company. Does Mr. Cockburn mean seriously to assert that in the Mofussil, where there are scarcely any fences at all, the cattle belonging to one man are at liberty to devour the crops of another, and that the *onus* of restraining them lies on the owner of the crops, and not on the owner of the cattle. This is not the law in the Mofussil according to Section 2 of Act III. of 1857, and I submit that the Company is just as much entitled to the benefit of the law, which makes the owner responsible for the damage done by his cattle, as the rest of the community, and the circumstance of a Railway fence being provided under the Act is no bar whatever to the Company's right of protection under the Civil Law.

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The Magistrate of Hooghly, referring to two cows which had been run over on the 11th April, says—

“The Police Report states that the fencing is broken in that part of the Railway, I cannot therefore attribute any blame to the owner of the animals, &c. I do not think that the wire fencing, even when in good repair, offers any obstacles to cattle straying on the line. * * * I have myself seen a buffalo lift the middle wire with his horns and then get on to the line to graze without the smallest difficulty.”

Here is the same theory put forward again. Reduced to its logical conclusion, it is equivalent to a decision that if the doors or windows of a house are susceptible of being forced, or chance to be left open, no blame can be attributed to the burglar who may be caught on the premises.

Except for this bias which has been shown by so many Magistrates along the line, there can be no reason why the Company should so frequently fail to convict. Section 289 of the Penal Code is utterly ignored in these cases, and the Magistrates can see nothing but Clause 20 of the Railway Act.

Beyond the daily visits of the Plate-layers and the few Native workmen who may chance to be repairing the road there is no one between Station and Station who can keep watch over the fences, and all that the Company asks for is some sort of assistance, or at least co-operation from the District Officers.

If the provision of a fence under the Act is to bar the Company from all other assistance and protection, to what purpose, and for whose benefit, are they made to pay the Chowkedary Tax? The old wooden fences have been carried off night after night, almost wholesale, and the villagers have now commenced to steal the iron standards and wire of the iron fencing. How is it possible for the Company to maintain good and efficient fences if the encouragement which this theory involves is to be afforded to the Natives, whilst the Company can get nothing but notices to repair under the Act?

From C. F. MONTRESOR, Esq., Commissioner of the Burdwan Division, to the Secretary to the Government of Bengal, dated 6th September 1855, No. 112.

I have the honor to submit the Report called for in your Memorandum No. 4,180 of the 29th of June last.

2. The Deputy Agent of the East Indian Railway, in his letter under immediate consideration, touches on the following points:—

1st.—Whether owners of cattle found trespassing on the line of Railway through inadequate fencing are liable to punishment?

2nd.—The sufficiency of the new wire-fencing; and lastly, the difficulties which the East Indian Railway Company have to contend with in maintaining efficient fencing through the antagonistic feeling of the local District Officers.

3. With regard to the first point, I have no doubt whatever that, if any person wilfully allowed cattle to graze or trespass on the line of rail or its embankments, whether protected or not by fencing, he would be liable to punishment for mischief under Section 426 of the Indian Penal Code, or Section 21 of the Railway Act; but on the other hand, should the cattle of themselves stray or trespass on the line of rail, in consequence of the fencing not being in an efficient state, the owner would not be liable to be punished under either of the laws above quoted.

4. Mr. Stephenson, in making his remarks, appears to have overlooked the provisions of the latter Section, which renders the owner of cattle trespassing on the line liable to fine, except when the trespass has taken place “for want of the erection or maintenance of any fence or gate which the Company is bound to erect or maintain.”

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5. The East Indian Railway Company have, however, a perfect right in all cases of cattle straying or trespassing on the line, with or without the cognizance of the owner, to cause them to be seized and conveyed to the nearest pound in accordance with Sections 2 and 15 of Act III. of 1857, from which they would not be released till payment of the prescribed fine.

6. This procedure is almost identical with that which would be adopted in cases of cattle straying or trespassing on cultivation (except that in such cases no remedy under Section 21 of the Railway Act could be obtained), and the Deputy Agent is altogether in error in supposing that, generally speaking, the same protection is not extended to the line of rail as to cultivated fields.

7. In the latter class of cases the trespass of cattle by deliberate act or intention of the owner would be only punishable under Section 426 of the Penal Code, and in all cases of cattle trespassing, or of themselves straying, the owner of the field on which the cattle are trespassing can only seize and send them to the pound under Act III. of 1857, and any damage sustained by him is recoverable by a civil action only.

8. It is true if any person turned out his cattle to graze next to a fine crop belonging to another person, that, on the cattle trespassing on the standing crop, if the whole circumstances of the case led the Magistrate to believe that the owner of the cattle knew well at the time of loosing his cattle that he was likely to cause wrongful loss or damage to his neighbour by reason of his cattle trespassing, the owner would be held to have committed “mischief” within the definition of the Section 425 of the Indian Penal Code, and would be liable to the punishment prescribed in the Section immediately following.

9. If, however, cattle strayed on the line of rail in consequence of the fencing being in an inefficient state of repair, the presumption that the owner knew that he was likely to cause wrongful loss or damage to the Railway Company would not arise, and necessarily a conviction of mischief would not result unless the intention of mischief by cattle trespass was susceptible of proof.

10. The cause of the difference between the two cases, apparently so similar, is that the owners of the crops are not compelled to maintain fences for the prevention of cattle; whereas, on the other hand, the Railway Company have imposed on them by an express enactment the duty of erecting and maintaining good and sufficient fencing along the line of rail, and consequently every person is justified presuming that the public duty imposed by the law is faithfully and scrupulously discharged.

11. With reference to the second point, viz., the sufficiency of the new wire fencing, I have no doubt whatever that it would prove sufficient, if the wire was kept regularly and properly stretched, and the variation from the straight line (with a view to enclosing land pertaining to the Company) was not so frequent.

12. In England the wire fencing is no doubt fully sufficient, but the manner in which it is laid out and adjusted is altogether a different thing to that which is to be seen on the line of the East Indian Railway.

13. And with reference to the third point, viz., the difficulty which the East Indian Railway Company have to contend with in maintaining the fencing in an efficient state, I have no doubt, from what I have seen, that the complaint of the Deputy Agent to the effect that the “old” wooden fences were constantly carried away, is in a measure correct; but I believe that the plunder of the rail is confined to what Mr. Stephenson terms the “old” fencing which is allowed to remain lying about in the ditches, and is not repaired directly it becomes loose, but since the iron fencing has been put up, I have heard of no complaints from the Railway authorities of iron standards or fencing being removed, and I am unable to gather from the Magistrates in this Division that any complaint has been made to them to that effect.

14. And in conclusion, I would merely notice the opposition that the Deputy Agent ascribes to the Magistracy in general.

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15. Allusion is made merely to the Magistrate of Hooghly within this Division, and I can do no better than submit "*in extenso*" Mr. Cockerell's reply to my reference on the subject, and to express my regret at the fact of Mr. Stephenson's having supposed that the Government Officers were backward in rendering every possible assistance to the Railway authorities, and reluctant to administer the law :—

"As regards the expression from my letter to the Agent, to which he seems to take exception, it appears to me that I was justified by the law in stating that blame could not be attributed to the owner of the cattle trespassing, when the fencing in that part of the line, where the trespass occurred, was shown to be in a defective state.

"It is scarcely necessary for me to remark that the analogy which Mr. Stephenson would draw between the above case, and that of a 'burglar' who may find a window open, will also hardly hold good, as there is no law exempting from liability to punishment a trespasser under the last-mentioned circumstances.

"Further, I cannot agree with the Agent of the East Indian Railway that, as far as I am concerned, any thing which I have said or written can lead to the inference that District Officers assume that the Company do not desire to keep their fences in order.

"There are very stringent orders from Government, that Magistrates shall enquire and report whenever the fencing on the side of the Railway is found to be defective; these reports have always been conveyed to the Agent in the most courteous manner, but I have noticed of late they seem to have been regarded as charges of neglect brought against the Company's Officers, and in some instances have met with flat contradictions, which I have ascertained that circumstances did not warrant.

"Magistrates desire only to carry out the orders they have received from Government, and, as I have pointed out to the Agent of the East Indian Railway, if their communications are regarded in the light of accusations against the Company's Officers, from which the latter are expected on each occasion to exculpate themselves, the object of Government in requiring Magistrates to make these reports is not likely to be gained.

"Regarding the theft of the railings, or destruction of the fences by the Ryots, I cannot call to mind that I have received any complaint on the subject from the Railway Company's Officers; but Mr. Stephenson may rest assured that any cases of the kind reported to me shall be strictly investigated."

From A. MONEY, Esq., C. B., Commissioner of Bhaugulpoor Division, to the Under Secretary to the Government of Bengal, in the Public Works Department, dated 25th August 1865, No. 612.

I have the honor to acknowledge the receipt of your Memorandum No. 4,181 of the 29th June last, forwarding for report a letter from the Deputy Agent, East Indian Railway Company.

2. Mr. Stephenson's letter discusses so many different subjects, that I do not feel quite certain as to which I am expected to submit a report.

3. I presume, however, that the main point at issue is the course which should be taken by Magistrates with regard to encroachments by cattle within the line of Railway fencing.

4. Mr. Stephenson thinks that the Company are entitled to the protection contemplated by Act III. of 1857, and by Section 289 of the Penal Code.

5. I am of opinion that there being a special Law for all trespass on the Railway, the two general Laws above mentioned, are not applicable to offences of that kind.

6. Nor do I understand Mr. Stephenson's object in wishing to go beyond Act XVIII. of 1854. That Act appears to me sufficient for all purposes in regard to the responsibility and punishment of cattle owners.

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7. Section 18 provides for the wilful driving of an animal on to the Railway, that is within Railway fencing. Section 21 imposes a fine on the owner of cattle straying within these limits.

8. In aggravated cases, such as the driving on to the Railway at night and keeping there a herd of buffaloes, Sections 25 and 28 may perhaps be held to apply.

9. The Railway Act therefore seems sufficient, but the real question is how it is worked, or in other words, on whom is thrown the *onus probandi*.

For example, cattle being found within the fencing, and an opening near, is the owner to be punished under Section 21, or is the Company to be held answerable for the opening.

10. I think the wording of Section 21 throws the *onus probandi* on the owner of the cattle, he is declared liable, "except, &c." It is for him to prove the exception, that is, it is for him to prove that the opening in the fence existed before his cattle went in, and was not made by them. The latter part of paragraph 7 of the Deputy Agent's letter implies that in cases within his knowledge, this process has been reversed, and that Magistrates have assumed unless the Company could disprove it, that the presence of cattle on the Railway shews a state of imperfect fencing. I am not myself aware of any such action on the part of the Magistrates.

11. The Railway Act clearly lays down two principles, one that the Company are bound to keep their fences in repair, the other that owners of cattle are bound to prevent their trespassing or straying on the Railway.

12. As Magistrate, I should enforce both responsibilities strictly, by fining the owners in every case of trespass, where the opening in the fence is not proved to be an old one, and by fining the Company in every instance of damaged fencing reported, unless in connection with a case of trespass.

13. As regards this latter point, I would submit a few remarks; Section 20 of the Act lays down two modes of procedure for the Magistrate's choice. When defective fencing comes to his knowledge, he may either fine for the offence, or allow time for repairs, and fine if they are not made. The second is the course generally adopted.

14. I think the first is the proper course. The adoption of the second, shifts the responsibility of looking after the state of the fencing from the Company's servants on to the Police, and removes that pressure which my experience of four years in this Division has shown me to be very necessary to ensure the fencing being kept in proper order. Moreover, the adoption of the second course is, in my opinion, unfair to the owner of cattle.

15. If we fine him for trespass, we are bound to mete out similar justice to the Company, and fine them for defective fencing. It seems to me absurd to recognize the fact that defective fencing is an offence, and yet, in every instance of its perpetration, to give warning instead of punishment.

16. Paragraph 5 of the Deputy Agent's letter implies that no punishment or pressure is needed to make the Company's servants do their best to keep the fencing in repair. I can only say that my own experience does not enable me to endorse this opinion.

17. As to the efficiency of iron wire-fencing, I consider that it mainly depends on the distance between the standards or posts. Where these are about ten feet apart and not more, I think the fencing as good as we have any right to expect.

From J. W. DARRINLE, Esq., Officiating Commissioner of Patna Division, to the Secretary to the Government of Bengal, dated 28th August 1865, No. 291.

I have the honor, as directed in your endorsement of the 29th June last, No. 4,182, to report on the points raised by the Agent East Indian Railway Company, in his letter No. 5,461, G., dated the 17th idem, to the Deputy Consulting Engineer to the Government of Bengal.

2. Mr. Stephenson complains that in some districts, through which the Railway passes, it is almost impossible to keep any fence in order for 24 hours together, in consequence of the

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Magistrates appearing to think that "because a fence is provided under the Act, they and the Police are entirely absolved from any duty in protecting the Company's interests; that if any one can get through"—I presume Mr. Stephenson means if any one's cattle can get through—"the fence, he is liable to no punishment, and all they have to do is to give the Railway Company warning to repair within 15 days;" and he proceeds to say, that the Magistrates seem to assume that the fences were already out of repair or broken down by some process which does not appear, and that the owner's interest, would on no account induce him to lend his assistance to his bullocks in reaching the Company's grass. Mr. Stephenson protests against such assumptions as being entirely opposed to probabilities.

3. With regard to this complaint, I would observe that the law is very clear on the subject of cattle-trespass on Railways. Section 20 of Act XVIII. of 1854, prescribes that the Railway Company is to erect and maintain "good and sufficient" fencing along the line. Section 21 declares that the owner of any animal trespassing on a Railway, "except for want of the erection of maintenance of any fence or gate which the Company is bound to maintain," to be liable to fine. Magistrates are, therefore, bound in every case, where the charge of wilful trespass is denied, to determine, not according to surmise, but according to the evidence adduced, whether the fencing at the place where the trespass took place was good and sufficient or not. I have no doubt that in many cases the villagers break down the fencing to admit their cattle, but in many others the trespass is the result of the fence having been accidentally broken, or allowed by the Railway Company to get out of repair, or of the Railway Company having delayed to repair it, and in such cases no penalty can be inflicted under the Act.

4. Mr. Stephenson, in support of his complaint, refers to the case tried by Mr. Whinfield, Joint-Magistrate of Barrh. Regarding it Mr. Whinfield remarks:—

"As to the case of Akul Rai, which the Agent has pressed into the service of his argument, that did not involve any question of the state of the fences. The complaint (which was investigated and reported true by the Police) was that the gate-keeper has seized the cows at the crossing because plaintiff had refused to make him a present as some of the other villagers had done. It is notorious that these gate-keepers do levy contribution of this sort, and that their powers of seizing cattle are a source of gain to them in this way." This case evidently is not to the point.

5. In respect to the action of the Police in these cases, they have received stringent orders to prevent wilful damage being done to fencing.

6. Mr. Stephenson's next complaint is, that it has been erroneously held that the Company is not entitled to the benefit of Act III. of 1857,—the Cattle-trespass Act. I am of opinion that a right construction has been put on the law, and that it was not intended that Act III. of 1857 should over-ride Section 21 of Act XVIII. of 1854. Mr. Stephenson says, that Section 89 of the Penal Code is utterly ignored in these cases, but that Section is inapplicable to cattle-trespassing on a Railway. It appears to me to refer to savage and dangerous animals only; but any how it could not be applied to cattle-trespass on a Railway, as there is a special law on that subject, and by Section 5 of the Penal Code no provision of that Code can affect any special law.

7. The next point noticed by Mr. Stephenson is the Magistrate of Hooghly's statement, that the new wire-fencing is not sufficient to prevent animals straying on the line. There can be no doubt that this is a correct opinion. I have examined the iron fencing close to the Bankipoor Station, and within a distance of a few yards I found it had been broken in several places. I enquired of the gate-keeper, and he said that two of the injuries had been caused by buffaloes, and one by a bullock; they had put their heads through the wires to graze, their horns got entangled, and the result was the wire broke; he further added, that the cattle had strayed and not been driven to the line to feed.

8. Mr. Stephenson, in the next place, represents that beyond the plate-layers and a few chance workmen there is no one between station and station who can keep watch over the fences,

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and asks for some sort of assistance, or at least co-operation, on the part of the District Officers. I have already stated that in my opinion Mr. Stephenson's view of the existing law is incorrect, and that Railway cattle-trespass can only be punished where it has taken place in spite of good and sufficient fencing having been maintained; but, looking to the great difficulty of proving such cases, I think that it would be advisable to amend the law, and that all cases whatsoever of cattle-trespass on a Railway should be made punishable.

From J. GEOGHEGAN, Esq., Officiating Junior Secretary to the Government of Bengal, to the Government Solicitor, dated 26th October 1865, No. 5,968.

The Agent East Indian Railway Company having represented to Government certain difficulties encountered by the Railway authorities in dealing with the trespass of cattle upon the line of rail, I am to request that you will obtain, for the information of the Lieutenant-Governor, the opinion of the Advocate General upon the following points:—

(a.) Can the Railway Company's servants, instead of proceeding against the owners of cattle trespassing upon the line under Section 21, Act XVIII. 1854, (*an Act relating to Railways in India*) elect to proceed under Act III., 1857, (*the Cattle trespass Act*)?

(b.) By Section 20 of the former Act every Railway Company is bound to erect and maintain "good and sufficient fences on each side of their Railway," and by Section 21, owners of animals trespassing on the Railway *except for want of the erection or maintenance of any fence which the Company is bound to erect and maintain* are liable to fine. Under this latter Section it will not be enough for the Company to shew that the fences erected are of a kind approved by the Government of India, and of a quality, and in a state of repair, deemed good and sufficient by the Government Inspecting Officers? Or will proof of an accidental breach in the fence be held to justify the trespass? Or, to go further, can the fact of the trespass be held to raise a presumption of non-maintenance of the fence, so as in all cases to throw the *onus probandi* on the Company and its Officers?

From R. F. STACK, Esq., Solicitor to Government, to the Officiating Junior Secretary to the Government of Bengal, dated 13th November 1865, No. 394.

With reference to your No. 5,968 of the 26th ultimo, I have the honor to forward copy of the Officiating Advocate General's opinion on the points submitted:—

OPINION.

(a.) From the preamble and 2nd Clause of the Cattle Trespass Act, I do not think the Railway Company can proceed under it in ordinary cases of trespass, or unless the straying cattle are found doing "damage to land, or the crop, or produce of land." The Acts in question provide statutory remedies differing from the ordinary legal remedies in cases of trespass, and those Acts must, therefore, be carefully construed.

(b.) It will not be conclusive proof for the Railway Company to show that the Government Officer was at some time or other at his last inspection, or that is at any time in question satisfied with the state of repair. But it will be *prima facie* some evidence of the proper state of repair, on the other hand no legal presumption arises from the fact of trespass that the fences have not been kept in proper repair. The strict legal course of proof by the Railway Company would be proof that the trespass had been committed by the cattle of the defendant, and some general evidence (to negative the exception in Section 21) to the effect that the fences were kept up in good order, and then the burden will be cast on the defendant to show that particular fences were wanting at or about the spot where the cattle passed through. If the defendant should bring forward clear evidence of this kind, he will be excused from the penal consequences under the Railway Act, but might still be liable to the ordinary remedies at law for trespass.

J. GRAHAM.

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From J. GEORGE, Esq., Officiating Junior Secretary to the Government of Bengal, to the Joint Secretary to the Government of Bengal, in the Public Works Department, Railway Branch, dated 8th December 1865, No. 6,924.

With reference to the Assistant Secretary Major Hovenden's letter No. 964 G, dated the 26th

Letter from Commissioner of Burdwan, No. 112, dated 8th September 1865.

Letter from Commissioner of Bhargulpore, No. 612, dated 25th August 1865.

Letter from Commissioner of Patna, No. 291, dated 23th August 1865.

trespass on the line of rail. I am also desired to forward, for communication to the Agent, a copy

Letter to Solicitor to Government, No. 5,968, dated 26th October 1865.

Letter from Solicitor to Government, No. 394, dated 13th November 1865, with enclosure.

nion has been forwarded for the information and guidance of the Commissioners and Magistrates through whose jurisdiction any Railway passes.

2 The Inspector General of Police, Lower Provinces, has been requested to draw the attention of the Police authorities on the line of the Railway to the importance of the fences along the line being frequently looked after by the Police with a view to the detection and prevention of wilful damage.

3. With reference to the 15th paragraph of the Deputy Agent's letter, I am desired to observe that Section 289 of the Indian Penal Code is not applicable to cases of trespass by cattle on the line of the Railway.

4. A copy of this correspondence will be laid before the Government of India for consideration with the Bill for the amendment of the Railway Act, with a view to remedying the defect in the law in regard to the punishment for cattle trespass, and to the provision of a special penalty for the offence of wilfully destroying Railway fencing.

Enclosure No. 5 to P. W. Resolution Nos. 31-40 R of 1866.

From Colonel W. KENDALL, R. E., Acting Secretary to the Government of Bombay, Railway Department, to the Secretary to the Government of India, Public Works Department, dated 13th December 1865, No. 2,766.

I am directed by His Excellency the Governor in Council to take the opportunity, now that the Railway Act of 1854 is coming before the Legislature for revision and amendment, to bring to notice Clause 21 which requires proof of the fencing being in good order before owners of cattle can be punished for allowing them to trespass on the Line, and to enquire whether the Government of India would concur in the wish of this Government that the Clause be amended by omitting the words "except for want of the erection or maintenance of any Fence or Gate which the Company is bound to erect or maintain."

2. At present, the onus of proof, that not a gap exists along the whole Line, lies with the Company, it is difficult to prove, and offers a very strong inducement for breaking in gaps by which owners secure themselves immunity from any penalties if their cattle are found on the Line.

3. Stray cattle have already been the cause of many serious and fatal accidents in this Presidency, and I am to observe that, in the opinion of this Government, without the Legislature interposes, and by fine or other punishment compels owners of cattle to look after them and keep them from the Line, the same as they would from a neighbour's field, the risk and consequent danger of travelling will certainly increase in proportion as the land about the Railway comes under cultivation.

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4. Already, in many of the richer districts of Guzerat, the Railway embankments are actually the only grazing grounds about, the cattle do not require to be driven on to the Line, they are naturally attracted by its carefully tended grassy slopes, and almost any fencing the Railway Company could put up would be cleared or broken through if the animals are allowed to roam without any one in charge of them.

5. This Government, I am to state, has no intention whatever to relax the present stringent rules regarding Railway fencing, but they consider it would conduce greatly to the public safety if the onus of restraining cattle should rest on the owners rather than that the Railway Company should be obliged to guard every point along their own Line, which is found in practice to be almost impossible.

OBSERVATIONS.—With the first letter now read, the Government of Bombay forwards copies of papers which have been sent to the Secretary of State for India by that Government, in view to an understanding being come to with the Railway authorities for erecting and working gates and crossings which may have been constructed for the public, and at the public expense.

2. Under the existing Law, a Railway Company is bound to erect, maintain, and work gates at level crossings over roads crossed by the Railway, *i. e.*, roads existing previous to the construction of the Railway. It seems desirable that the Law should be so amended as to give Government the power to carry new roads across an existing line of Railway wherever necessary, either on the level or otherwise, and to make it incumbent on the Company to employ proper persons for the opening and shutting of gates at such crossings, when on the level, in like manner as at crossings of pre-existing roads, it being provided that the works connected with such crossings must be of approved design, and that the expense of erecting, maintaining and working them is met by the party making the new road.

3. It is also a matter for consideration whether Clauses, similar to Nos. 68 to 75 of Cap. 8, Vic. 20, should be introduced, providing for accommodation works for the use of owners and occupiers of land adjoining the Railway.

4. The Lieutenant-Governor of Bengal recommends that Local Governments be empowered to prohibit the use of any form of vehicle found to be unsafe, that is, from the difficulty arising from their style of construction of preventing overcrowding, and of controlling the number of passengers travelling in them, as well as in any other respect, under a suitable penalty for neglect to comply within a reasonable period. A Clause to meet this might be introduced.

5. In the two letters last read, the two Local Governments most concerned with Railway Administration urge the desirability of checking cattle trespass on a line of Railway by making it obligatory on owners of cattle to exercise the same precautions to prevent cattle trespassing on a Railway as on a neighbour's field. There is, in the opinion of the Government of India in this Department, much force in the remarks of both the Governments of Bombay and Bengal on this subject, and the papers should be referred for consideration in the Legislative Branch of the Home Department. The suggestion of the Government of Bombay, to omit certain words in Clause 21 of Act XVIII. of 1854, would probably meet the case fully. A special penalty might also be introduced, as suggested by the Government of Bengal, for the offence of wilfully destroying or damaging the Railway fence, if the general Law does not provide for it sufficiently, but it is probable that it does.

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ORDER.—Ordered, that these Observations be communicated to the Legislative Branch of the Home Department, together with copies of the papers now read, for consideration, in conjunction with previous communications on the subject of the amendment of Act XVIII. of 1854.

Ordered also, that these Observations be communicated to the several Local Governments and Administrations in continuation, copies of the papers now read being forwarded to those Governments not in possession of them.

(Signed) C. H. DICKENS, Lieut.-Colonel, R. A.,
Secretary to the Government of India.

No. 155.

ORDER THEREON, 5th February 1866, No. 450.

RAILWAY, No. 11.

Communicated to the Consulting
Engineer for Railways.

(True Extract.)

(Signed) CHARLES A. ORR, Colonel, R. E.,
Secretary to Government.

To the Consulting Engineer for Railways.

Exd. S. T. Augustin.

Enclosure No. 2 to Public Works Resolution Nos. 31-40 R of 1866.

No. 38, dated 28th September, 1865.

From—The Government of Bombay,

To—Her Majesty's Secretary of State for India.

We have the honour to forward, for your information, the enclosed copy of opinions by the Advocate General and Mr. T. C. Anstey of the Bombay Bar, that the liability of Railway Companies by the Act, to erect and maintain level crossings, is limited to cases where the road was in existence at the time the Railway was constructed; and to point out that, from the small number of roads in existence in this country at the time the Railway was under construction, very serious inconvenience and complications are likely to arise.

2. The Officers of the Public Works Department will, as a matter of course, in designing new roads, consult the Railway Engineers, and use existing crossings as far as practicable, but many cases similar to the one that gave rise to the present reference, must occur, and we consider that a clear understanding should be come to with the London Board, and definite instructions be issued to the Railway Authorities in this country for erecting and working gates and crossings which may have been constructed for the public, and at the public expense.

Enclosure No. 3 to Public Works Resolution Nos. 31-40 R of 1866.

Extract from a letter from CAPTAIN F. S. TAYLOR, R. E., Joint Secy. to Govt. of Bengal, in the P. W. Dept., Railway Branch, to Secy. to Govt. of India, P. W. Dept.—No. 1824 G, dated 30th November, 1865.

"5. I am also directed to request that the Agent's reply to the Government prohibition of the use of a certain form of carriage, may be prominently laid before the Governor General in Council. The Lieutenant-Governor is satisfied that life has been more than once jeopardized in these third class saloon carriages, but it is impossible to hold the Traffic Officers responsible for over-crowding, as the internal fittings are so ill-adapted to the peculiarities of the Native passenger traffic. His Honour recommends that a Clause be added to the Draft Bill of the amended Railway Act, empowering the Local Administrations to prohibit the use of any form of vehicle found to be unsafe, and providing a suitable penalty for neglect to comply within a reasonable period."

Extract from a letter from CAPTAIN F. S. TAYLOR, R. E., Joint Secy. to Govt. of Bengal, in the P. W. Dept., Railway Branch, to Agent, E. I. Railway Company,—No. 1691 G, dated 30th October, 1865.

"2. Lieutenant Luard has since reported two instances of over-crowding third class passengers, the details of which he gives in the accompanying letter, and Captain Taylor has reported another instance which came under the joint observation of Lieutenant Luard and himself at Bankipore Station on the 14th October.

All these cases occurred in old pattern saloon carriages, and it was found almost impossible, after the Natives had once crowded in, either to get them out, or to count the actual number of men in the carriage. While this pattern of carriage continues in use, the Lieutenant-Governor is convinced that it will be impossible to hold Station Masters or Guards responsible for proved instances of over-crowding, and His Honour deems it necessary formally to prohibit its use on the line, requesting that you will report by what date, using every expedition, the necessary alterations to the existing stock sanctioned in March last can be effected."

Extract from a letter from C. STEPHENSON, Esq., Depy. Agent, E. I. Railway Company, to Cons. Engr. to Govt. of Bengal, Railway Dept.—No. 10344 G, dated 21st November, 1865.

"12. With reference to your No. 1691, I am not aware of any authority which empowers the Bengal Government to prohibit the running of any carriages the construction of which has been sanctioned by the Government of India. The Company has fully concurred in the Lieutenant-Governor's opinion of the necessity for altering the saloon carriages as the only means by which over-crowding can be prevented, and most of the carriages will be altered as soon as the materials for the purpose arrive from England. The remainder, for which provision has not yet been made, must await another indent on England, which will be sent home next mail."

Enclosure No. 4 to P. W. Resolution Nos. 31-40 R of 1866.

No. 6920, dated 8th December, 1865.

*From—J. GEOGHEGAN, Esq., Offg. Junior Secy. to Govt. of Bengal,
To—Secretary to Government of India, P. W. Dept.*

I am directed to forward, for submission to the Government of India, with a view to its consideration in connexion with the bill for the amendment of the Railway Act XVIII. of 1854, now before the Council of the Governor General for making laws and regulations, a copy of the correspondence noted on the margin, on the subject of the cattle trespass on the line of rail.

2. It appears to the Lieutenant Governor that though it is quite fair as between the Railway Company and the owners of the trespassing cattle that the enforcement of the provisions of Section 21 of the Railway Act should be made to depend on the maintenance of a proper fence, the safety of the travelling public is not sufficiently guarded by this arrangement, and that it is quite as necessary to prevent the owners of cattle from suffering their cattle to trespass on the railway if the fence happens to be broken, as it is to compel the Railway Company to keep up the fence. The present state of the law offers a premium to the owners of cattle to injure or destroy the fence, as, if they can shew that the fence was broken down at the place where the trespass took place, they are exempt from penal consequences.

3. It is quite as much the business of owners of cattle to keep their cattle from trespassing on the line, as it is the business of the Railway Company to erect and maintain a fence to prevent it, and the fulfilment of either obligation is equally necessary for the safety of the public. Each obligation, therefore, should be made imperative and absolute, independently of the other: and the Railway Company is strictly held to its obligation of erecting and maintaining the fence, and the owners of cattle found trespassing on the line should be punished under the provisions of Section 21, whether the fence be properly maintained or not.

4. The existence of a civil remedy against the owners of cattle trespassing on a Railway is quite inoperative as a means of preventing trespass, and it seems to the Lieutenant Governor the public must have that special protection against the dangers arising from cattle trespass on railways which can only be afforded by making the offence criminally punishable irrespective of the due maintenance of the railway fence.

5. A special penalty seems to the Lieutenant Governor to be also required for the offence of wilfully destroying or damaging the Railway fence.

No. 964 G, dated 26th June, 1865.

*Memorandum from MAJOR J. HOVENDEN, R. E., Assistant Secretary to the Government of Bengal,
Public Works Department, Railway Branch.*

Transferred, in original, to the General Department, with the request that the Commissioners of Burdwan, Bhagulpur, and Patna may be asked for their opinion on the points raised by the Agent, East Indian Railway Company.

Original paper to be returned when done with.

No. 5461 G, dated 17th June, 1865.

*From—C. STEPHENSON, Esq., Deputy Agent, E. I. Railway Co.,
To—Deputy Consulting Engineer to Government of Bengal, Railway Department.*

I have the honour to acknowledge your No. 629 G of 10th May, forwarding a report by the Commissioner of Patna on the subject of the fencing in that District.

There can be no doubt that where the *cactus* has failed to grow the mound, and ditch fence is scarcely sufficient to prevent the trespass of cattle, and measures will at once be adopted to remedy the defect by some sort of wire on the bank, if not by a permanent wire fence.

But there is a question of much greater importance now pending in connection with the iron-wire fences, which have been put up by the Company on the greater portion of the Bengal Division at a very great cost, and which, it is alleged, are insufficient for the purpose.

However this may be, they have been in use in England for many years, where they have always been found sufficient to restrain cattle, and they have, moreover, been approved by the Government of India.

From the correspondence and reports that I have seen from time to time on the subject of the fencing generally, it appears to me that the District Officers have, in many instances, adopted the theory, that the Railway Company, as a rule, desire *not* to keep their fences in repair unless they are compelled. Implying, as this does, the supposition that the risk of smashing the rolling-stock, and stopping the traffic, to say nothing of risk to life and limb, is deliberately preferred to the expenditure of a few Rupees on the fences, it seems almost superfluous to point out how unlikely this is, for indeed the warning of the Magistrate; that a fence is damaged is an absolute benefit to the Company, which no man of any sense would object to.

But it has resulted in a condition of affairs which renders it almost impossible for the Company in some Districts to keep any fence in order for 24 hours together. For some of the Magistrates appear to think that, because a fence is provided under the Act, they and the Police are entirely absolved from any sort of duty in protecting the Company's interests; that if any one can get through the fence, he is liable to no punishment; and that all they have to do is to give the Company warning to repair within 15 days.

The fact is notorious, that wherever the crops are standing without any fence at all, the villagers never fail to tend their cattle carefully, and find no difficulty whatever in restraining them, that is, as long as it is their interest to do so; but as soon as it suits them to leave, if not to lead, their cattle to where they can feed themselves without damaging their crops, immediately their cattle are to be found within the Company's boundaries, and the Magistrates seem to assume that the fences were already out of repair, or broken down by some process which does not appear, and that the owner's interest would on no account induce him to lend his assistance to his bullocks in reaching the Company's grass.

So long as the District Officers continue to assume that the Company do not desire to keep their fences in order, and that the Natives of this country are unwilling parties to the trespass of their cattle on the Company's ground, I do not see that any thing short of a six foot wall will meet the difficulty. Yet it is very difficult to understand why these assumptions should prevail—for the first is so utterly opposed to the Company's interest, and the last to our sense of the Native character.

In the middle of April last an Inspector of the Hulio Divisions sent to the Thanna five cows which had been caught trespassing on the line, for which the owner was fined Rs. 5 each. He immediately made a counter-charge against the men who caught his cows, that they had driven the cattle on to the line; they were imprisoned for seven days, tried on the 3rd May, and fined Rs. 5 each. It is needless to say that these men will not attempt to seize cattle straying on the Railway again.

The following is copy of the Magistrate's decision:—

AKUL RAE, *versus* { MEETUN, *Chupprassie*.
 { RUJAT ALL.
 { JANKEE, *Mistree*.

"CHARGE."

"*Illegal seizure of Cattle under Section 14, Act III of 1857.*"

"It is clearly proved that plaintiff's cattle were sized on account of the enmity felt against him by Meetun, Gate-keeper, and that the seizure was abetted by the other prisoners, and probably also by their witnesses.

"The cattle have been restored to plaintiff, and I fine defendants Rs. 5 each for the illegal seizure, or in default seven day's rigorous imprisonment if realized, the fine to be paid to plaintiff under Section 14, Act III of 1857."

E. H. WHINFIED,
Joint Magistrate.

Barrh, 3rd May, 1865.

It may of course be argued that the owner of the cattle (who by the way has no difficulty in getting any number of witnesses) is as likely to be right as the Company's servants, but the doctrine of probabilities is very strongly in favour of the latter, as they have nothing to gain but a good deal of extra work in taking the cattle to the Thanna, whilst the owner of the cattle has a great deal to gain if he can feed them at the Company's expense.

The Commissioner of Patna endorses the opinion of the Assistant Magistrate, that the owners of cattle trespassing through inadequate fencing are not liable to punishment at all and that the *onus* of prevention lies entirely with the Company. Does Mr. Cockburn mean seriously to assert that in the Mofussil, where there are scarcely any fences at all, the cattle belonging to one man are at liberty to devour the crops of another, and that the *onus* of restraining them, lies on the owner of the crops, and not on the owner of the cattle. This is not the law in the Mofussil according to Section 2 of Act III of 1857, and I submit that the Company is just as much entitled to the benefit of the law, which makes the owner responsible for the damage done by his cattle, as the rest of the community, and the circumstance of a Railway fence being provided under the Act is no bar whatever to the Company's right of protection under the Civil Law.

The Magistrate of Hooghly, referring to two cows which had been run over on the 11th April, says—

"The Police Report states that the fencing is broken in that part of the Railway, I cannot therefore attribute any blame to the owner of the animals, &c. I do not think that the wire fencing, even when in good repair, offers any obstacles to cattle straying on the line. * * * I have myself seen a buffalo lift the middle wire with his horns and then get on to the line to graze without the smallest difficulty."

Here is the same theory put forward again. Reduced to its logical conclusion, it is equivalent to a decision that if the doors or windows of a house are susceptible of being forced, or chance to be left open, no blame can be attributed to the burglar who may be caught on the premises.

Except for this bias which has been shewn by so many Magistrates along the line, there can be no reason why the Company should so frequently fail to convict. Section 289 of the Penal Code is utterly ignored in these cases, and the Magistrates can see nothing but Clause 20 of the Railway Act.

Beyond the daily visits of the Plate-layers and the few native workmen who may chance to be repairing the road there is no one between Station and Station who can keep watch over the fences, and all that the Company asks for is some sort of assistance, or it least co-operation from the District Officers.

If the provision of a fence under the Act is to bar the Company from all other assistance and protection, to what purpose, and for whose benefit, are they made to pay the Chowkeedary Tax? The old wooden fences have been carried off night after night, almost wholesale, and the villagers have now commenced to steal the iron standards and wire of the iron fencing. How is it possible for the Company to maintain good and efficient fences if the encouragement which this theory involves is to be afforded to the Natives, whilst the Company can get nothing but notices to repair under the Act?

No. 112, dated 6th September, 1865.

From—C. F. MONTRESOR, Esq., *Commissioner of the Burdwan Division*,
To—Secretary to Government of Bengal.

I have the honour to submit the Report called for in your Memorandum No. 4180 of the 29th of June last.

2. The Deputy Agent of the East Indian Railway, in his letter under immediate consideration, touches on the following points:—

1st.—Whether owners of cattle found trespassing on the line of Railway through inadequate fencing are liable to punishment?

2nd.—The sufficiency of the new wire-fencing; and lastly, the difficulties which the East Indian Railway Company have to contend with in maintaining efficient fencing through the antagonistic feeling of the local District Officers.

3. With regard to the first point, I have no doubt whatever that, if any person *willfully* allowed cattle to graze or trespass on the line of rail or its embankments, whether protected or not by fencing, he would be liable to punishment for mischief under Section 426 of the Indian Penal Code, or Section 21 of the Railway Act; but on the other hand, should the cattle of themselves stray or trespass on the line of rail, in consequence of the fencing not being in an efficient state, the owner would not be liable to be punished under either of the laws above quoted.

4. Mr. Stephenson, in making his remarks, appears to have overlooked the provisions of the latter Section, which renders the owner of cattle trespassing on the line liable to fine, except when the trespass has taken place "for want of the erection or maintenance of any fence or gate which the Company is bound to erect or maintain."

5. The East Indian Railway Company have, however, a perfect right in all cases of cattle straying or trespassing on the line, with or without the cognizance of the owner, to cause them to be seized and conveyed to the nearest pound in accordance with Sections 2 and 15 of Act III of 1857, from which they would not be released till payment of the prescribed fine.

6. This procedure is almost identical with that which would be adopted in cases of cattle straying or trespassing on cultivation (except that in such cases no remedy under Section 21 of the Railway Act could be obtained), and the Deputy Agent is altogether in error in supposing that, generally speaking, the same protection is not extended to the line of rail as to cultivated fields.

7. In the latter class of cases the trespass of cattle by deliberate act or intention of the owner would be only punishable under Section 426 of the Penal Code, and in all cases of cattle trespassing, or of themselves straying, the owner of the field on which the cattle are trespassing can only seize and send them to the pound under Act III of 1857, and any damage sustained by him is recoverable by a civil action only.

8. It is true if any person turned out his cattle to graze next to a fine crop belonging to another person, that, on the cattle trespassing on the standing crop, if the whole circumstances of the case led the Magistrate to believe that the owner of the cattle knew well at the time of loosing his cattle that he was likely to cause wrongful loss or damage to his neighbour by reason of his cattle trespassing, the owner would be held to have committed "mischief" within the definition of the Section 425 of the Indian Penal Code, and would be liable to the punishment prescribed in the Section immediately following.

9. If, however, cattle strayed on the line of rail in consequence of the fencing being in an inefficient state of repair, the presumption that the owner knew that he was likely to cause wrongful loss or damage to the Railway Company would not arise, and necessarily a conviction of mischief would not result unless the intention of mischief by cattle trespass was susceptible of proof.

10. The cause of the difference between the two cases, apparently so similar, is that the owners of the crops are not compelled to maintain fences for the prevention of cattle; whereas, on the other hand, the Railway Company have imposed on them by an express enactment the duty of erecting and maintaining good and sufficient fencing along the line of rail, and consequently every person is justified presuming that the public duty imposed by the law is faithfully and scrupulously discharged.

11. With reference to the second point, *viz.*, the sufficiency of the new wire fencing, I have no doubt whatever that it would prove sufficient, if the wire was kept regularly and properly stretched, and the variation from the straight line (with a view to enclosing land pertaining to the Company) was not so frequent.

12. In England the wire fencing is no doubt fully sufficient, but the manner in which it is laid out and adjusted is altogether a different thing to that which is to be seen on the line of the East Indian Railway.

13. And with reference to the third point, *viz.*, the difficulty which the East Indian Railway Company have to contend with in maintaining the fencing in an efficient state, I have no doubt, from what I have seen, that the complaint of the Deputy Agent to the effect that the "old" wooden fences were constantly carried away, is in a measure correct; but I believe that the plunder of the rail is confined to what Mr. Stephenson terms the "old" fencing which is allowed to remain lying about in the ditches, and is not repaired directly it becomes loose, but since the iron fencing has been put up, I have heard of no complaints from the Railway Authorities of iron standards or fencing being removed, and I am unable to gather from the Magistrates in this Division that any complaint has been made to them to that effect.

14. And in conclusion, I would merely notice the opposition that the Deputy Agent ascribes to the Magistracy in general.

15. Allusion is made merely to the Magistrate of Hooghly within this Division, and I can do no better than submit "*in extenso*" Mr. Cockerell's reply to my reference on the subject, and to express my regret at the fact of Mr. Stephenson's having supposed that the Government Officers were backward in rendering every possible assistance to the Railway Authorities, and reluctant to administer the law:—

"As regards the expression from my letter to the Agent to which he seems to take exception, it appears to me that I was justified by the law in stating that blame could not be attributed to the owner of the cattle trespassing, when the fencing in that part of the line, where the trespass occurred, was shown to be in a defective state.

"It is scarcely necessary for me to remark that the analogy which Mr. Stephenson would draw between the above case, and that of a 'burglar' who may find a window open, will also hardly hold good, as there is no law exempting from liability to punishment a trespasser under the last-mentioned circumstances.

"Further, I cannot agree with the Agent of the East Indian Railway that, as far as I am concerned, any thing which I have said or written can lead to the inference that District Officers assume that the Company do not desire to keep their fences in order.

"There are very stringent orders from Government, that Magistrates shall enquire and report whenever the fencing on the side of the Railway is found to be defective; these reports have always been conveyed to the Agent in the most courteous manner, but I have noticed of late they seem to have been regarded as charges of neglect brought against the Company's Officers, and in some instances have met with flat contradictions, which I have ascertained that circumstances did not warrant.

"Magistrates desire only to carry out the orders they have received from Government, and, as I have pointed out to the Agent of East Indian Railway, if their communications are regarded in the light of accusations against the Company's Officers, from which the latter are expected on each occasion to exculpate themselves, the object of Government in requiring Magistrates to make these reports is not likely to be gained.

"Regarding the theft of the railings, or destruction of the fences by the ryots, I cannot call to mind that I have received any complaint on the subject from the Railway Company's Officers; but Mr. Stephenson may rest assured that any cases of the kind reported to me shall be strictly investigated."

No. 612, dated 25th August, 1865.

From—A. MONEY, Esq., C. B., Commissioner of Bhargulpore Division,
To—Under Secretary to Government of Bengal, in the P. W. Dept.

I have the honour to acknowledge the receipt of your Memorandum No. 4181 of the 29th June last, forwarding for report a letter from the Deputy Agent, East Indian Railway Company.

2. Mr. Stephenson's letter discusses so many different subjects, that I do not feel quite certain as to which I am expected to submit a report.

3. I presume however that the main point at issue is the course which should be taken by Magistrates with regard to encroachments by cattle within the line of Railway fencing.

4. Mr. Stephenson thinks that the Company are entitled to the protection contemplated by Act III of 1857, and by Section 289 of the Penal Code.

5. I am of opinion that there being a special Law for all trespass on the Railway, the two general Laws above mentioned, are not applicable to offences of that kind.

6. Nor do I understand Mr. Stephenson's object in wishing to go beyond Act XVIII of 1854. That Act appears to me sufficient for all purposes in regard to the responsibility and punishment of cattle owners.

7. Section 18 provides for the wilful driving of an animal on to the Railway, that is within Railway fencing. Section 21 imposes a fine on the owner of cattle straying within these limits.

8. In aggravated cases, such as the driving on to the Railway at night and keeping there a herd of buffaloes, Sections 25 and 28 may perhaps be held to apply.

9. The Railway Act therefore seems sufficient, but the real question is how it is worked, or in other words, on whom is thrown the *onus probandi*.

For example, cattle being found within the fencing, and an opening near, is the owner to be punished under Section 21, or is the Company to be held answerable for the opening.

10. I think the wording of Section 21 throws the *onus probandi* on the owner of the cattle, he is declared liable, "except, &c." It is for him to prove the exception, that is, it is for him to prove that the opening in the fence existed before his cattle went in, and was not made by them. The latter part of paragraph 7 of the Deputy Agent's letter implies that in cases within his knowledge, this process has been reversed, and that Magistrates have assumed unless the Company could disprove it, that the presence of cattle on the Railway shews a state of imperfect fencing. I am not myself aware of any such action on the part of the Magistrates.

11. The Railway Act clearly lays down two principles, one that the Company are bound to keep their fences in repair, the other that owners of cattle are bound to prevent their trespassing or straying on the Railway.

12. As Magistrate, I should enforce both responsibilities strictly, by fining the owners in every case of trespass, where the opening in the fence is not proved to be an old one, and by fining the Company in every instance of damaged fencing reported, unless in connection with a case of trespass.

13. As regards this latter point, I would submit a few remarks; Section 20 of the Act lays down two modes of procedure for the Magistrate's choice. When defective fencing comes to his knowledge, he may either fine for the offence, or allow time for repairs, and fine if they are not made. The second is the course generally adopted.

14. I think the first is the proper course. The adoption of the second, shifts the responsibility of looking after the state of the fencing from the Company's servants on to the Police and removes that pressure which my experience of four years in this Division, has shown me to be very necessary to ensure the fencing being kept in proper order. Moreover the adoption of the second course is, in my opinion, unfair to the owner of cattle.

15. If we fine him for trespass, we are bound to mete out similar justice to the Company and fine them for defective fencing. It seems to me absurd to recognize the fact that defective fencing is an offence, and yet, in every instance of its perpetration, to give warning instead of punishment.

16. Paragraph 5 of the Deputy Agent's letter implies that no punishment or pressure is needed to make the Company's servants do their best to keep the fencing in repair. I can only say that my own experience does not enable me to endorse this opinion.

17. As to the efficiency of iron wire-fencing, I consider that it mainly depends on the distance between the standards or posts. Where these are about ten feet apart and not more, I think the fencing as good as we have any right to expect.

No. 291, dated 28th August, 1865.

From—J. W. DALRYMPLE, Esq., *Offg. Commr. of Patna Division,*
To—Secretary to Government of Bengal.

I have the honour, as directed in your endorsement of the 29th June last, No. 4182, to report on the points raised by the Agent, East Indian Railway Company, in his letter No. 5461 G, dated the 17th idem, to the Deputy Consulting Engineer to the Government of Bengal.

2. Mr. Stephenson complains that in some districts, through which the Railway passes, it is almost impossible to keep any fence in order for 24 hours together, in consequence of the Magistrates appearing to think that "because a fence is provided under the Act, they and the Police are entirely absolved from any duty in protecting the Company's interests; that if any one can get through"—I presume Mr. Stephenson means if any one's cattle can get through—"the fence, he is liable to no punishment, and all they have to do is to give the Railway Company warning to repair within 15 days;" and he proceeds to say, that the Magistrates seem to assume that the fences were already out of repair or broken down by some process which does not appear, and that the owner's interest would on no account induce him to lend his assistance to his bullocks in reaching the Company's grass. Mr. Stephenson protests against such assumptions as being entirely opposed to probabilities.

3. With regard to this complaint, I would observe that the law is very clear on the subject of cattle-trespass on Railways. Section 20 of Act XVIII of 1854, prescribes that the Railway Company is to erect and maintain "good and sufficient" fencing along the line. Section 21 declares that the owner of any animal trespassing on a Railway, "except for want of the erection or maintenance of any fence or gate which the Company is bound to maintain," to be liable to fine. Magistrates are, therefore, bound in every case, where the charge of wilful trespass is denied, to determine, not according to surmise, but according to the evidence adduced, whether the fencing at the place where the trespass took place was good and sufficient or not. I have no doubt that in many cases the villagers break down the fencing to admit their cattle, but in many others the trespass is the result of the fence having been accidentally broken, or allowed by the Railway Company to get out of repair, or of the Railway Company having delayed to repair it, and in such cases no penalty can be inflicted under the Act.

4. Mr. Stephenson, in support of his complaint, refers to the case tried by Mr. Whinfield, Joint-Magistrate of Barrh. Regarding it Mr. Whinfield remarks:—

"As to the case of Akul Rai, which the Agent has pressed into the service of his argument, that did not involve any question of the state of the fences. The complaint (which was investigated and reported true by the Police) was that the gate-keeper has seized the cows at the crossing because plaintiff had refused to make him a present as some of the other villagers had done. It is notorious that these gate-keepers do levy contribution of this sort, and that their powers of seizing cattle are a source of gain to them in this way." This case evidently is not to the point.

5. In respect to the action of the Police in these cases, they have received stringent orders to prevent wilful damage being done to fencing.

6. Mr. Stephenson's next complaint is, that it has been erroneously held that the Company is not entitled to the benefit of Act III of 1857,—the Cattle-trespass Act. I am

of opinion that a right construction has been put on the law, and that it was not intended that Act III of 1857 should override Section 21 of Act XVIII of 1854. Mr. Stephenson says, that Section 89 of the Penal Code is utterly ignored in these cases, but that Section is inapplicable to cattle-trespassing on a Railway. It appears to me to refer to savage and dangerous animals only; but any how it could not be applied to cattle-trespass on a Railway, as there is a special law on that subject, and by Section 5 of the Penal Code no provision of that Code can affect any special law.

7. The next point noticed by Mr. Stephenson is the Magistrate of Hooghly's statement, that the new wire-fencing is not sufficient to prevent animals straying on the line. There can be no doubt that this is a correct opinion. I have examined the iron fencing close to the Bankipoor Station, and within a distance of a few yards I found it had been broken in several places. I enquired of the gate-keeper, and he said that two of the injuries had been caused by buffaloes, and one by a bullock; they had put their heads through the wires to graze, their horns got entangled, and the result was the wire broke; he further added, that the cattle had strayed and not been driven to the line to feed.

8. Mr. Stephenson, in the next place, represents that beyond the plate-layers and a few chance workmen there is no one between station and station who can keep watch over the fences, and asks for some sort of assistance, or at least co-operation, on the part of the District Officers. I have already stated that in my opinion Mr. Stephenson's view of the existing law is incorrect, and that Railway cattle-trespass can only be punished where it has taken place in spite of good and sufficient fencing having been maintained; but, looking to the great difficulty of proving such cases, I think that it would be advisable to amend the law, and that all cases whatsoever of cattle-trespass on a Railway should be made punishable.

No. 5968, dated 26th October, 1865.

From—J. GROOMER, Esq., *Offg. Junior Secy. to Govt. of Bengal,*
To—Government Solicitor.

The Agent, East Indian Railway Company, having represented to Government certain difficulties encountered by the Railway Authorities in dealing with the trespass of cattle upon the line of rail, I am to request that you will obtain, for the information of the Lieutenant Governor, the opinion of the Advocate General upon the following points:

(a.) Can the Railway Company's servants, instead of proceeding against the owners of cattle trespassing upon the line under Section 21, Act XVIII, 1854, (*an Act relating to Railways in India*) elect to proceed under Act III, 1857, (*the Cattle trespass Act*)?

(b.) By Section 20 of the former Act every Railway Company is bound to erect and maintain "good and sufficient fences on each side of their Railway," and by Section 21, owners of animals trespassing on the Railway *except for want of the erection or maintenance of any fence which the Company is bound to erect and maintain* are liable to fine. Under this latter Section it will not be enough for the Company to shew that the fences erected are of a kind approved by the Government of India, and of a quality, and in a state of repair, deemed good and sufficient by the Government Inspecting Officer? or will proof of an accidental breach in the fence be held to justify the trespass; or, to go further, can the fact of the trespass be held to raise a presumption of non-maintenance of the fence, so as in all cases to throw the *onus probandi* on the Company and its Officers?

No. 394, dated 13th November, 1865.

From—R. F. STACK, Esq., *Solicitor to Government,*
To—Officiating Junior Secretary to Government of Bengal.

With reference to your No. 5968 of the 26th ultimo, I have honour to forward copy of the Officiating Advocate General's opinion on the points submitted:—

OPINION.

(a.) From the preamble and 2nd Clause of the Cattle Trespass Act, I do not think the Railway Company can proceed under it in ordinary cases of trespass, or unless the straying cattle are found doing "damage to land, or the crop, or produce of land." The Acts in question provide statutory remedies differing from the ordinary legal remedies in cases of trespass, and these Acts must, therefore, be carefully constructed.

(b.) It will not be conclusive proof for the Railway Company to show that the Government Officer was at some time or other at his last inspection, or that is at any time in question satisfied with the state of repair. But it will be *prima facie* some evidence of the proper state of repair, on the other hand no legal presumption arises from the fact of trespass that the fences have not been kept in proper repair. The strict legal course of proof by the Railway

Company would be proof that the trespass had been committed by the cattle of the defendant, and some general evidence (to negative the exception in Section 21) to the effect that the fences were kept up in good order, and then the burden will be cast on the defendant to show that particular fences were wanting at or about the spot where the cattle passed through. If the defendant should bring forward clear evidence of this kind, he will be excused from the penal consequences under the Railway Act, but might still be liable to the ordinary remedies at law for trespass.

J. GRAHAM.

No. 6924, dated 8th December, 1865.

From—J. GREGG, Esq., *Offg. Junior Secy. to Govt. of Bengal*,
To—*Joint Secretary to Government of Bengal, in the P. W. Dept., Railway Branch.*

With reference to the Assistant Secretary Major Hovenden's letter No. 964 G, dated the 26th June last, I am directed to forward to you copies of the reports received from the Commissioners of Burdwan, Bhaugulpore, and Patna, on the communication from the Deputy Agent, East Indian Railway Company, regarding cattle trespass on the line of rail. I am also desired to forward, for communication to the Agent, a copy of the correspondence noted on the margin, containing the Advocate General's opinion on the legal questions raised in the Deputy Agent's letter. A copy of the Advocate General's opinion has been forwarded for the information and guidance of the Commissioners and Magistrates through whose jurisdiction any Railway passes.

2. The Inspector General of Police, Lower Provinces, has been requested to draw the attention of the Police Authorities on the line of the Railway to the importance of the fences along the line being frequently looked after by the Police with a view to the detection and prevention of wilful damage.

3. With reference to the 15th para. of the Deputy Agent's letter, I am desired to observe that Section 289 of the Indian Penal Code is not applicable to cases of trespass by cattle on the line of the Railway.

4. A copy of this correspondence will be laid before the Government of India for consideration with the Bill for the amendment of the Railway Act, with a view to remedying the defect in the law in regard to the punishment for cattle trespass, and to the provision of a special penalty for the offence of wilfully destroying Railway fencing.

Enclosure No. 5 to P. W. Resolution Nos. 31-40 R of 1866.

No. 2766, dated 13th December 1865.

From—COLONEL W. KENDALL, R. E., *Acting Secy. to Govt. of Bombay, Railway Dept.*
To—*Secretary to Government of India, P. W. Dept.*

I am directed by His Excellency the Governor in Council to take the opportunity, now that the Railway Act of 1854 is coming before the Legislature for revision and amendment, to bring to notice Clause XXI which requires proof of the fencing being in good order before owners of cattle can be punished for allowing them to trespass on the Line, and to enquire whether the Government of India would concur in the wish of this Government that the Clause be amended by omitting the words "except for want of the erection or maintenance of any Fence or Gate which the Company is bound to erect or maintain."

2. At present, the onus of proof, that not a gap exists along the whole Line, lies with the Company, it is difficult to prove, and offers a very strong inducement for breaking in gaps by which owners secure themselves immunity from any penalties if their cattle are found on the Line.

3. Stray cattle have already been the cause of many serious and fatal accidents in this Presidency, and I am to observe that, in the opinion of this Government, without the Legislature interposes, and by fine or other punishment compels owners of cattle to look after them and keep them from the Line, the same as they would from a neighbour's field, the risk and consequent danger of travelling will certainly increase in proportion as the land about the Railway comes under cultivation.

4. Already, in many of the richer districts of Guzerat, the Railway embankments are actually the only grazing grounds about, the cattle do not require to be driven on to the Line, they are naturally attracted by its carefully tended grassy slopes, and almost any fencing the Railway Company could put up would be cleared or broken through if the animals are allowed to roam without any one in charge of them.

5. This Government, I am to state, has no intention whatever to relax the present stringent rules regarding Railway fencing, but they consider it would conduce greatly to the public safety if the onus of restraining cattle should rest on the owners rather than that the Railway Company should be obliged to guard every point along their own Line, which is found in practice to be almost impossible.

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*The Consulting Engineer for
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Grant St George
5th Feb 1866



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