The appeal from the judgment given upon the demurrer the court were inclined to think was not in time, according to the statute (see *Ru'tan* v. *Vandusen*, 10 U. C. R. 620), and they therefore dismissed the appeal, with costs, remarking that the failure of the appeal from that judgment was of no consequence as regarded the merits of the case, for that the same point that was presented by the demurrer came up also upon the rule.

The facts, as proved at the trial, are thus stated by the learned judge of the county court in his judgment: "The plaintiff, as a constable, seized the horse in question for school rates, under a warrant issued against the personal property of one Jabez Wills, and removed the animal to the stable of a public innkeeper, where it was secured in the usual manner, and remained until the day following. On the latter day it was discovered that the animal was gone, and the plaintiff went in search, and on the next day after missing the horse his dead body was found on the defendants' railway, about one-quarter, or one-third of a mile to the westward of the intersection of the town line between Louth and Clinton townships, which town line runs north and south, and the railroad east and west. Two legs of the horse were broken, and the body was fifteen or twenty feet from the track, down a small embankment.

"The cattle-guards, at the intersection of the town line road with the railroad, at the east and west sides of the public road, were not sufficient, particularly on the west side, and cattle could cross from the main road to the railway track, in consequence of earth recently excavated by labourers in the work, which covered the cattle-guard, and made a passable track for persons and cattle. No foot track appeared of any animal on this crossing or earth track, but the marks of horses' feet were followed up near to it.

"The animal escaped from the stable of the innkeeper, and was not at large by any act of his, or of the plaintiff, but had broken away.

"Cattle and horses are not allowed to run at large in Louth, but are prohibited by municipal regulations."

"In the declaration it is not charged that the accident arose from any wilful misconduct or negligence of the defendants in driving their railway train; but the complaint is, that the defendants neglected to comply with the duty imposed upon them by the statute, of fencing in their track, and making proper cattle-guards to prevent cattle straying from the highway upon the railway track at the point of intersection, and that in consequence of that omission the plaintiff's horse escaped from him "without his permission or default, and being then lawfully upon the said highway, without th[illegible]intiff's permission, near to the defendants' railway at the point aforesaid (*i. e.*, at the point of intersection), strayed and escaped from the said highway upon the line of defendants' railway off the said crossing and point of intersection of the railway with the highway, and was, whilst on the line of the said railway beyond the said point of intersection, run against and over, and killed by the locomotive and carriages of the defendants then passing on and along the said railway."

The defendants pleaded—1. Not guilty.

2. That the plaintiff was not possessed of the horse.

3. That the plaintiff's horse was not at the time lawfully upon the highway at or near the point of intersection, but was then unlawfully at large upon the highway at the point of intersection, and not in charge of any person to prevent his loitering and stopping upon the highway at the point of intersection, contrary to the provisions of the statute in that behalf—namely, the 20 Vic., ch. 12, sec. 16.

The plaintiff joined issue upon these pleas.

It was objected by the defendants' counsel at the trial, that the plaintiff, being merely in charge of the horse as bailiff, and having no interest in the horse, was not the person who should have sued for t[illegible] injury: that Miller, the owner of the horse, should have bro[illegible] the action. And the plaintiff's counsel objected, that the evidence shewed that the plaintiff did not *permit* the horse to be at large on the highway contrary to the statute, for that the horse got out of the stable in the inn without his knowledge, and without any negligence on his part, wherefore he contended the plea was not proved.

The judge overruled both these objections. He said he should for the time determine that when the statute 20 Vic., ch. 12, sec. 16, provided "that no horses, &c., shall be permitted to be at large upon any highway," it did not merely mean that no one should designedly turn his horse loose upon a highway near a a railway crossing, or should knowingly allow him to go there; but that the act made it his duty to take care that his horse should not be permitted—that is, *suffered*—to get upon the highway. And as to the plaintiff's right to bring the action, he considered that the horse being by the plaintiff's seizure of him in his custody and possession, he had a special property in him sufficient to entitle him to sue.

The learned judge of the the county court, *Mr. Campbell*, then, *in an elaborate judgment, which is before us*, took a view of the case upon the merits; and, with a degree of care and ability which entitles his opinion to much weight, reviewed the many cases which have been decided in England, and in this country, arising out of injuries received by horses or cattle upon railways; and his examination of the several decisions brought him to the conclusion, that, unless they were protected by the recent statute 20 Vic., 12, sec. 16, the defendants, under the circumstances of the case, must clearly be liable, on the principle affirmed in the English case of *Lawcett* v. *The York and North Midland R. W. Co.* (16 Q. B. 610), and acted upon in several cases in our courts; namely that the defendants not having fenced in their track from the highway, and not having constructed proper cattle-guards at the crossing, the horse was on the road lawfully as against the company, and escaped thence in consequence of their neglect of the duty which the law had imposed upon them.

He considered, therefore, that the only question he had to determine was whether the statute placed the defendants in any better situation, and he held that the 16th clause of the statute would not protect them, because it applied only to cases where the cattle, &c., *are killed at the point of intersection*. This was the view he took of the effect of the statute, having only its language to guide him, for it is a peculiar provision in our Railway Act, and no decision had yet taken place on it; and taking such view he determined that the defendants were liable, and he sustained the verdict.

We believe the learned judge was correct in supposing that the question he had to deal with was a new one, though the same point as to the effect of the late statute 20 Vic., ch. 12, in cases of this kind had been presented to us in the case of *Ferris* v. *The Grand Trunk Railway Company*, in this court, which was argued in the same term, and in which we have given judgment against the plaintiff's, and for reasons which equally apply in the present case.

We do not take the question to be merely whether the statute 20 Vic., 12, sec. 16, deprives the plaintiff of his right of action by these words, "And no person, any of whose cattle so at large shall be killed by any train at such point of intersection, shall have any action against any railway Company in respect to the same being so killed." It is necessary, we think, to look further. The whole object of the act was to secure the public as much as possible against accidents that might happen to Railway trains from collision or otherwise. It could be of no consequence in a case like the present, if the train had been thrown off the track by meeting the plaintiff's horse, whether the animal was met upon the track at the point of intersection or elsewhere upon the line. The legislature, when they were passing the act, were no doubt aware that at every intersection of a highway with a railway track there would be cattle guards, because the law had provided for that, and they would naturally infer that if an animal getting on a railway from a highway should be caught by a train, it would be upon the road at the point of intersection; and we dare say they used the words which we have just quoted from the act, meaning no more by them than this—that if any animal shall be permitted to be at large upon a highway near a railway crossing, and not being in charge of any person, shall get from the road upon the railway at a crossing, and be killed, the owner shall have no action. On the other hand the language of the clause in this part is perfectly plain and explicit, so much so that we do not think it can be said to take away the right of action in terms, except in the case where the animal is killed at the point of intersection.

But that, it seems to us, is not the whole question, for still the statute has the effect of making it unlawful for cattle to be permitted to be at large upon any highway within half a mile of the intersection of such highway with a railway or grade, unless the