

eye on the law *an open question*. Changing, then, the situation by the single circumstance of the ordinance, the argument is that leaving the issue of negligence or otherwise to the jury would enable them to find for the defendant which would mean that it was a prudent thing for him to violate the ordinance; that it is "consistent with ordinary prudence for an individual to set his own opinion against the judgment authoritatively pronounced by constituted public authority." It follows, of course, that on this point of view such issue should not be submitted.

The first objection that I have to make to this reasoning is that, in one aspect at least, it is illogical. The writer at the outset speaks of the confusion arising from the judicial diversity of opinion as to a breach of a criminal statute, some judges holding that it is negligence *per se*, others that it is only evidence of negligence. He apparently leaves it an open question, yet the above reasoning.

My next objection is that the reasoning is based on a wrong view of the legislation which is treated as if it dealt in some way with the civil rights of persons using the highway. Thus when the writer says that exonerating the defendant whose unhitched horse has caused injury from the consequences, is equivalent to saying that it is "consistent with ordinary prudence for an individual to set his own opinion against the judgment" of the legislature he implies that the legislature has declared that leaving an unhitched horse on the highway is not "consistent with ordinary prudence." Now where does he find such declaration in the ordinance he deals with? He says it is found in the evil at which the ordinance is aimed, namely, the peril to persons using the highway from horses at large. But the ordinance does not create the peril. Leaving a horse free from control is a danger to persons using the highway whether forbidden by law or not and is none the more dangerous because forbidden. Mr. Thayer's reasoning must then lead to this conclusion, that in a case where the act causing injury is necessarily negligence, whether it was or was not forbidden by law, the issue of negligence or no negligence should not be left to the jury.

As to the position that breach of the statute constitutes