but manifestly, provincial power, if it existed under the B.N.A. Act 1867, could not be limited by any such prohibition. "Permitted" is mere surplusage in sec. 294(1) which should be read as if it ran: No horse, etc., shall be at large.

The offence is not in permitting, but in being at large; it is not the owner who is at fault, by permitting, but the animal in being at large.

In arriving at this conclusion, Elwood, J., considered himself at liberty to disregard certain opinions upon this point expressed by the Saskatchewan Court of Appeal in *Early* v. *C.N.R. Co.*, 21 D.L.R. 413, and *Koch* v. *G.T.P. Branch Lines Co.*, 32 D.L.R. 393, upon the ground that those opinions were not necessary to the findings in the cases, and, therefore, were *obiter*. It is true that in the *Koch* case it was found as a fact that the owner had not been guilty of negligence, and therefore was entitled to damages, but it is also true that a by-law permitting animals to be at large was proven, and relied on, and that the Court based its judgment on this point as well as on the other. The opinion, therefore, cannot properly be considered as *obiter*, and the decision of Elwood, J., must be attributed to the very strong conviction he evidently felt that the Court of Appeal was wrong. Those who have read the annotation in 32 D.L.R., at p. 397, will notice that this is the opinion there expressed.

The remarks made by Elwood, J., himself in relation to injuries to animals which get upon a railway through a defective railway fence are clearly *obiter*, as the point was not in issue before him. They are based upon what appears to us a misapprehension of a remark made by Boyd, C., in *McLeod* v. *C.N.R. Co.*, 18 O.L.R., at 624, and are apparently intended to suggest a ground upon which *Greenlaw* v. *C.N.R. Co.*, 12 D.L.R. 402, could have been decided, but was not; a suggestion made, apparently, in order that the grounds given by the Manitoba Court of Appeal for its decision might also be treated by Elwood, J., as *obiter*, because he did not agree with them. In that case, the animals which were running at large got upon the railway from unenclosed lands, not by using a highway, but through a defective railway fence; but a municipal by-law permitted cattle to run at large, and the Manitoba Court held that because of the by-law the intentional act of the owner in turning his cattle at large was not "wilful," within the meaning of the Railway Act. Elwood, J., now comments that these animals were not "at large" within the meaning of sec. 294(4), and this rather amazing conclusion he deduces from the remark made by Boyd, C., that "cattle on the lands of the owners are not at large, but at home." So also, says Elwood, J., are cattle of other persons permitted by an owner to be on his land, or cattle there "by virtue of a statute or municipal by-law." In passing, it may be remarked that while it is possible that the rights of an owner of land against an adjoining railway may be attributed to the owner's licensee, it is difficult to conceive how they could be attributed to a trespasser who had no other defence than that a municipal by-law said that his cattle might run at large. It may also be pointed out that if the cattle in *Greenlaw* case were not "at large" within the meaning of sec. 294(4), their owner had no remedy under that section, and as the land was unenclosed, the railway was not bound to fence it (sec. 254), so that the railway would not be liable under sec. 427. The Manitoba Court saw this difficulty, and avoided it by finding that the municipal by-law had the effect of making an intentional