

fore, he did not actually see it before it got upon the track, he may also have failed to see other horses close enough to the south rail to be injured.

John Barden, the fireman, was on the left side of the cab, and "thinks if he had struck a horse he would have seen it;" but on being further questioned by the defendants' counsel he said that if the engine had struck a horse he would have seen it.

The facts established on behalf of the plaintiff are not controverted, and an Appellate Court is in as good a position as the trial Judge to draw the correct inferences from admitted or proved set of facts, and is free to do so.

From the plaintiff's evidence the inference is, I think, irresistible that the horse was struck by the passenger train in question, and this inference has not been rebutted by the evidence for the defence. The learned trial Judge, however, seems to have misapprehended the evidence of the engineer and fireman, for he says "no one saw the train strike the horse, and the engineer and fireman both testify that this did not happen."

A careful perusal of the evidence of these two witnesses fails to satisfy me that they so testified. It is clear from a perusal of the engineer's evidence that he saw nothing of any occurrences at the left side of the track; and as the plaintiff's evidence leads to the conclusion that the horse was struck by the left side of the train, the engineer's evidence is irrelevant and valueless; nor can any weight be attached to the fireman's evidence. He was, it is true, on the left side of the cab; but when asked by the defendant's counsel if he could have seen a horse if he had struck it he said he "thought so," and explained, evidently in justification of his doubt, that it was quite dark but he could see the front of the engine. When further pressed by the defendants' counsel he said he would certainly have seen it if the engine had struck a horse; and finally he said he was positive, but both of these witnesses, however, only testify to the engine not having struck the horse; but the accident might have been occasioned by another part of the train; as at times happens where an animal standing alongside of a passing train turns away, and in turning comes in contact with the train. Such an occurrence here is reconcilable with the whole evidence; and, with all respect to the finding of the trial Judge, I think the proper infer-