at p. 694, per Bowen, L.J.; Le Lievre v. Gould, [1893] 1 Q.B. 491, per Lord Esher, at p. 497: "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence."

What duty then did the defendants owe to the plaintiff in respect of his straying horse?

That the defendants were rightly upon the locus in quo is beyond question. They owned some of the land at least, and had obtained the legal right to use the remainder, if any; it was, therefore, in that respect, in law the same as if they were upon their own land.

The plaintiff could not complain against the owners of the highway—the township—for (say) want of repair. It is only to those who are rightly upon the highway that the township owes the duty to keep in repair. This right may depend upon a variety of causes, but the right to be upon the highway must be found to exist in the person complaining, or no liability will be placed upon the corporation for want of repair.

There have been many cases upon this: it will be sufficient to cite two in our own Courts. In Ricketts v. Village of Markdale, my Lord the Chief Justice held that a child upon the highway playing had no right to complain of nonrepair. The Divisional Court reversed this decision, but solely upon the ground that the child had a right to be upon the highway playing: 31 O.R. 180, 610. If this were conclusive of the present case against the defendants, it would become necessary to consider how far we should hold it well-decided. As at present advised, I should, being untrammelled by authority, hold that the judgment of the trial Judge was the better view. But I do not think we need attack here the question, as in either view the result would be the same.

In Breen v. City of Toronto my brother Latchford held the plaintiff not entitled to recover for want of repair of a boulevard, as a by-law of the city forbade any one going upon a boulevard: the Divisional Court reversed this, solely upon the ground that the path upon which the plaintiff was walking was habitually used by the public to the knowledge of the defendants—and that with this knowledge, without notice, they made it dangerous for the public to continue to use the path, thereby creating a trap: ante 87, 690. No doubt was cast or intended to be cast upon the law as laid down in Dean v. Clayton, 7 Taunt. 489, cited by Mr. Justice Latchford: "We must ask in each case whether the man or animal which suffered had or had not a right to be where he