

HON. SIR WM MULOCK, C.J.Ex.:—The plaintiff is a farmer, residing on his farm, and the company's line of railway runs westerly along its south side. His house is in a clearing which is fenced on all sides. At the west side of this clearing is his stable, the west door of which opens into another portion of the plaintiff's land, which portion is unfenced and extends down to the defendants' line of railway. The plaintiff permitted the horse to pasture on this unfenced portion of this land.

At about five o'clock in the afternoon of the day when it was killed, the horse was pasturing near this stable on the plaintiff's land. A passenger train went westerly past the farm at about 7.30 p.m. It was then quite dark. Shortly thereafter the horse was found at the south side of the track with one front leg broken and with serious injuries to his right jaw and right hind leg, and had to be destroyed. There was hair and blood on and along the south rail near which the horse was found.

Shortly before the arrival of the train, Isaac Karila, one of the plaintiff's witnesses, saw the horse uninjured on the north side of the track, grazing almost up to the rails. About an hour after the train had passed, going westerly, he again saw the horse, but at this time it was injured and was at the south side of the track within about twenty feet of where he had previously seen it. The plaintiff swears that the horse could not have been injured except by the train, as the ground was all even and level where it was.

The evidence shews that there were two other horses grazing along the track in addition to the plaintiff's horse. The defendants' engineer in charge of the train swore that he was on the right side of the cab, and, when approaching the siding where the horse was injured was looking out, and that the fireman called to him to look out for a horse, and that at that moment the horse crossed the track from the south or left side to the north, passing about twenty feet in front of the engine, when it disappeared. He said he saw but one horse. From his position in the cab, his view of the south side of the track was obscured by the engine. He said that there might have been other horses on the left side of the track, but "hardly thought" he could have struck a horse on the left side of the track without seeing it. He admits, however, that he did not see the horse that crossed the track until it was actually upon the track, and if, there-