a trespasser on lot six from whence she got upon the track, she was then wrongfully there as alleged in the plaintiff's declaration, and that the evidence seemed to establish the facts set forth in the plea, and to entitle the defendants to a verdict. The jury found, nevertheless, for the plaintiff, and £20 damages.

Becher moved for a new trial on the law and evidence, and because the verdict was perverse.

J. Duggan, shewed cause.

The cases cited are noticed in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that we are bound in this case to grant a new trial without costs. We can draw no distinction between this case and that of Dolrey *v.* The Ontario, Simcoe & Huron Railway Company in this court, (11 U. C. R. 600,) which was decided in accordance with English authorities.

This declaration does not charge the defendants with causing the death of the plaintiff's mare by any negligence or want of skill in conducting their railway train, but rests the right to recover wholly on the defendants' breach of duty in not fencing in their track, in consequence of which the mare got on the track and was killed. The duty, it has been determined, or rather the breach of it, cannot give a right to recover to the owner of an animal which was at the time trespassing on the adjoining lands, the obligation being to fence in each case between the railway track and the adjoining close. The late case in the Court of Common Pleas in England, Wallis et al. *v.* The Manchester and Lancashire Railway (18 Jur. 268.) confirms the former decisions on this point. The defence is that the animal killed was not lawfully where she was at the time of the accident, but was wrongfully there; so that the allegation in that respect in the plaintiff's declaration was disproved, and that in the plea supported. And it follows, that when, as in this case, no negligence in the manner of using the railway track is charged upon the defendants, the action fails.

Rule absolute, without costs.

WICE *vs.* HEWSON ET AL.

(Reported by C. Robinson, Esq., Barrister-at-Law.)

Trespass q. c. f.—Verdict 45s.—Certificate for full costs, application therefor being made at the trial when may be granted by Judge—*Quære*, whether 22 & 23 Car. 2, c. 9—8 & 9 Will. 3, c. 11, sec. 4, are virtually repealed by 16 Vic. c. 175, sec. 26. (a)

[CHAMBERS, Nov. 1851.

BURNS, J.—The action is trespass to the plaintiff's freehold, and the plea is—Not Guilty.

The jury gave a verdict for £2 5s., and the Judge, before whom the cause was tried, has certified that the defendant's act was wilful and malicious, and that it was a proper case to be tried in the Superior Court. The certificate, it seems, was not granted until the plaintiff was about to enter judgment, though asked for at the trial. The master, in taxing, has allowed the plaintiff full costs. The defendant now moves to revise the taxation on the ground that the plaintiff was only entitled to costs on the scale of the Division Court, and that defendant would have a right to set off the difference of his costs between the two Courts, or that all proceedings should be stayed to give the defendant an opportunity to move to rescind the Judge's certificate, because he contends that the Judge should have granted his certificate before the expiration of the first four days of the term after the trial. (b) The defendant relies upon the cases of Thompson *vs.* Gibson et al, 8 M. &. W. 281; and Whalley *vs.* Williamson, 5 Bing. N.C. 202.

The last point must be decided first, that is, whether it is proper to stay proceedings to give the defendant an opportunity to move the Court to rescind the Judge's certificate, because not granted within proper time. The case of Thompson *vs.* Gibson does not support the defendant's argument, because in this case the plaintiff did apply for the certificate at the trial, and the Judge delayed until he could consider it. Neither does the case of Whalley *vs.* Williamson apply, for that was a case where the Judge had rescinded his certificate, and the question was whether it had been rescinded in proper time.—C. J. TINDAL said: "The question within what time a Judge may revoke his certificate is altogether different from the question within what time he may grant it." The argument used in favor of the defendant's position, that the certificate should be granted within the first four days of the term, so that he may be advised whether or not to move for a new trial, has no force when it is considered that it is merely the judgment of the Judge, who tried the cause which is suspended, not the application for the certificate. If the latter were the case, there might be more reason in the defendant's objection, but the plaintiff, having at the trial asked for the certificate, did all he could in the matter; and if the defendant is to be guided in his intentions about moving for a new trial contingent upon the judgment as to costs, he should ascertain from the Judge what judgment on that point he intends to give. If I entertained any doubt about the right of the Judge to reserve the consideration of the question whether he will certify, though he take a longer period to determine it than beyond the first four days of the succeeding term, I would afford the defendant an opportunity to take the opinion of the Court. Reid *vs.* Gardner, 8 Ex. 651.

Then as to the amount of costs which the plaintiff should recover, I have as little doubt as upon the other question. The verdict is over 40s., therefore the case does not come within the provision of the recent stat. 16 Vic. ch. 175, sect. 26; and because it does not come within that provision, and as it is contended the stat. 22 & 23 Car. 2, ch. 9 is not repealed, therefore the plaintiff is entitled, it is said, to no more costs than damages, the verdict being under 40s. sterling. It is not material to the decision of this case to enquire whether the stat. of Charles is virtually repealed, because, supposing it is not, then it is equally clear that the stat. 8 & 9, Will. 3, ch. 11, sect. 4, is not repealed. The latter stat. enabled a Judge to certify that the trespass was wilful and malicious, and when he did so the case was taken out of the operation of the stat. of Charles. If both of the English statutes be considered as repealed virtually by our statute, then the verdict being over 40s. the plaintiff required no other certificate than to take the case out of the jurisdiction of the Court (and that he has obtained in proper time), and this is always a matter for the discretion of the Judge who tried the cause. If the statute of Charles is to be considered as not repealed, then the statute of William must be treated so also, and in such case the plaintiff has the certificate which entitles him to full costs. Wooley *vs.* Whitby, 2 B. & C. 580.

(a) On this latter Act, viz.: 16 Vic. ch. 175, sec. 26, the following case, T.T. 18 Vic., is lately reported.—[*Ed. L. J.*]

The certificate under the 16th Vic. ch. 175, sec. 26, does not necessarily entitle the plaintiff to full costs, but only to such costs as might otherwise have been recovered, and this statute does not interfere with the 21st Jac. 1, ch. 16.

Where, therefore, in an action of slander (no special damage being laid) the verdict was for 1s. damages, and the Judge certified, under 16 Vic., that the grievance was wilful and malicious, the plaintiff was restrained by the 21st Jac. from obtaining more costs than damages.—Pedder *vs.* Moore, 1 Rob. Prac. Rep. 117.

(b) The English cases shewing the legal construction which has been placed generally by the Courts there upon the word "immediately" (which occurs in the 16 Vic. c. 175, sec. 26, taken from the English Act 3 and 4 Vict. c. 24, sec. 2) are fully collected in KIME'S PRACTICAL HINTS, a useful work, reviewed by the *Law Times* as a "learned and truly practical labour."—[*Ed. L. J.*]