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 inference to draw from the evidence is that the horse was injured by some part of the defendants' train, not necessarily the engine; and this seems to have been the view of the trial Judge, who says in his judgment, "It might be possible to have the train hit a horse without their (the engineer and fireman) knowing it."

But it is argued that the plaintiff was guilty of negligence, and, therefore, is not entitled to recover.

Sub-section 4 of sec. 294 of the Railway Act, R.S.C. 1906 ch. 37, as enacted by 9 & 10 Edw. VII. ch. 50, sec. 8, repealing the former sub-sec. 4, is as follows: "When any horses . . . at large, whether upon the highway or not, get upon the property of the company, and by reason thereof damage is caused to or by such animal, the party suffering such damage shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such damage against the company in any action . . . unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent," etc.

This section, like sec. 237 of the Railway Act, and the repealed sub-sec. 4 of sec. 294, shifts the onus and renders the company liable unless it establishes that the animal got at large through the negligence or wilful act or omission, etc., of the owner, etc. Thus the company, in order to succeed, must establish two things: (a) that the animal got at large; (b) that it got at large through the owner's negligence or wilful act or omission, etc. Failing to establish both of these conditions, the company's defence fails.

Of what negligence or wilful act or omission has the plaintiff been guilty? This is aquestion of fact. The horse is not shewn to have been elsewhere than on the plaintiff's land, and on the defendant company's right of way. It was the duty of the defendant company, not of the plaintiff, to maintain a fence between the plaintiff's land and the company's right of way. This the defendants omitted to do, but such omission could not deprive the plaintiff of the right to use his land; and, as such owner, he was within his legal rights in allowing the horse to