down and injured, and prevented from attending to his business, &c. Special damage claimed.

Plea not guilty.

The plaintiff was examined as a witness, and stated that about 14th September last a horse, with a boy on his back, ran against him while walking in a lane in the town of Peterborough; and he detailed the injury he suffered from being knocked down. On cross-examination he said he did not know whose the horse was that struck him.

Robert Romane was with plaintiff at the time he was knocked over; the lane was a public thoroughfare; the horse was galloping; the boy was riding him barebacked, keeping him in. And he further said, on cross-examination, that it was purely an accident; boy doing his best to keep him in.

James Cullan, sworn.—I was last September in defendant's employment, (defendant was a butcher) carrying meat round; had been in his employment before that about six weeks; had had the mare all the time; she was about five years old; was riding bareback when accident happened; generally rode with a saddle; mounted at the west market door. Defendant gave me a basket of meat and put it on the shoulder of the mare; she baulked and would not go, and defendant took a whip and, I think, struck her; tried my best to hold her and turn her off the lane, but could not; she struck plaintiff and knocked him down. The mare never ran away before; once in a while baulked. Pulled her in at Ormond's Corner.

Cross-examined.—I meant to go up the main street; could not keep the mare out of the lane; had been accustomed to horses, riding with saddle and bare-back too; had regularly used the mare for about six weeks; had no difficulty but once before, when I managed her.

Re-examined.—It was a week before, that I had had the trouble; she only turned her head round; did not run away.

William Spence.—Defendant tried to start the mare up the main street; he took a whip out of a waggon and struck the mare, or struck at her; believe what defendant did, made the mare run away. The mare, I think, was only playing, not baulky.

Cross-examined.—Defendant treated the mare properly under the circumstances. I would call it simply an accident. The boy did all he could; cried out to give warning. The lane is narrow; a good many waggons pass through it. I am with Winch (a butcher in the market). Quite common for boys (butchers) to ride bare-back.

Re-examined.—I think defendant tried to lead the mare before he got the whip.

John Kelly was examined as to special damages (plaintiff was a barber), and Dr. Harvey as to amount of injury.

At the close of the plaintiff's case, the defendant's counsel moved for a non-suit on the ground that there was no case to submit to the jury, as the evidence only showed that an accident had happened, and the learned judge being of that opinion, the plaintiff was non-suited.

In Term the plaintiff's counsel moved for a rule nisi, to shew cause why the non-suit should not be set aside and a new trial had.

Dennistoun, Co J. — Feeling strongly that such a rule would not be made absolute, I reserved the application, requesting plaintiff's counsel to cite any cases he relied on in support of his own view that the non-suit was improper, and I have been referred to the following :—

Peters v. *Devinney*, 6 U. C. C. P., 389, where the injury was caused by the erection of a dam; plaintiff's evidence giving him a right to a verdict.

Robinson v. *Bletcher et al.*, 15 U. C. Q. B., 159, where, for anything that appears, plaintiff may have made out a *primâ facie* case; but the judgment of the Court shews that on such evidence as the plaintiff gave in the present suit, he is not entitled to recover.

Ridley v. *Lamb*, 10 U. C. Q. B., 354. The defendant herein was guilty of an improper act and plaintiff suffered damages. In the present case the evidence of Cullan and Spence shews defendant not to have been guilty of an improper act.

Goodman v. *Taylor*, 5 C. & P., 410. In this case two of the plaintiff's witnesses stated that the pony and chaise that caused the accident were standing on the street with no one to look after them, and the case went to the jury on contradictory evidence.

Rex v. *Timmins*, 7 C. & P., 500. There was here evidence to shew that defendant was racing on a highway, and so doing an improper act.

I do not think that these authorities sustain the plaintiff's contention that the case should have gone to a jury; on the contrary, the view I took at the trial seems to be sustained by the cases I shall now refer to.

In *Deverill* v. *G. T. R. Coy.*, 25 U. C. Q. B., 517, Hagarty, J., said, "We have to consider the motion for a non-suit, and are at once met by the difficulty which the cases present as to what shall be considered sufficient evidence for a jury. It is not enough that there was some evidence or a mere surmise that there may have been negligence on the part of the defendants, that clearly would not justify the judge in leaving the case to the jury." And the learned judge also quoted from the judgment in *Cotton* v. *Wood*, 8 C. B. N. S., 573, where it is said that, "There is another rule of the law of evidence which is of the first importance, and is fully established in all the Courts, viz., that when the evidence is equally consistent with either view—*with the existence or non existence of negligence*—it is *not competent* for the judge *to leave the matter* to the *jury*. The party who affirms negligence has altogether failed to establish it. That is a rule which should never be lost sight of." In the case of *Cotton* v. *Wood*, Erle, C. J., says, "Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of care on the one side or the other, the party who founds his claim upon the imputation of negligence fails to establish his case."

Hammack v. *White*, 11 C. B. N. S., 588, and *Jackson* v. *Hyde*, 28 U. C. Q. B. 294 are to the effect. In the latter case, Wilson, J., remarks, "It is notorious, there are many cases in which jurors are not the most dispassionate or most competent persons to try the rights of parties, and an action of this kind comes within the class to which I have alluded. In such actions the