same shall be in charge of some person. Against that the prohibition is positive, and we agree with the learned judge that the word "*permitted*" as used in the act, does not mean that the owner of the animal shall not voluntarily and designedly permit it to be on the highway, but that at his peril it must not be permitted to be there under such circumstances. It makes no difference that this plaintiff, who sues as having a special property in the horse, having charge of him at the time, did not turn him out on the road, or let him out of the stable, intentionally or carelessly, for he was bound to take care that the horse should not be suffered to get upon the highway near a railway crossing—in other words, it was his duty to *prevent it* for the safety of persons travelling along the line.

Then the statute, it is to be considered, amounts to a direct and positive prohibition against any such animal being found upon a road in such a situation without some one being in charge of him, and the plaintiff's horse clearly violated that prohibition, for he got from the road upon the railway at the crossing. Having so got upon the railway he was there unlawfully, and his owner must take the consequences of any accident that happened to him from the movement of the trains, where no wilful misconduct or negligence in managing the trains is complained of.

There is no room in this case for such doubts as were expressed by the judges in *Fawcett v. The York and North Midland R. W. Company* (16 Q. B. 610), as to whether the animal was or was not lawfully upon the highway from whence he got upon the railway.

If this horse had wandered from the road into an adjoining farm, and had got from thence upon the railway for want of a sufficient fence between the track and that farm (such farm not belonging to the owner of the horse), his owner would have been disabled from recovering, because the company would be entitled to say to him, "It is no excuse for you that we have no fence between our railway and that other man's farm. Such a fence would be required for keeping in his cattle, but was not necessary for protecting your horse at that point of our line, for he had no business to be where he was." It can be no stronger reason in support of the plaintiff's right to recover (to say the least), that if the company had had a perfect cattle-guard that could not have been passed, his horse could not have been killed just where he was, though he might have been killed at the point of intersection, if being left to his own guidance he had not continued to wander along the highway instead of taking to the railway track.

On the part of the defendants it may be urged that the cattle-guard was not made specially to confine the plaintiff's horses or cattle, but to keep the railway clear from any animal that might be passing lawfully or unlawfully along the road which crosses it: that the plaintiff's horse was unlawfully on the road, and must therefore have been unlawfully on the railway track, having gone upon it from the road. He had no business on any part of the track more than any person would have to go into his neighbour's yard because he sees the gate open, and the horse being on the railway, was not excused by any defect in the cattle-guards of which the plaintiff had a right to complain more than the rest of the public.

The ... aggression of the law, which brought the horse to the point of intersection, was not done away with by his having passed the cattle-guard, if the evidence had been clear to shew that he did so; that only enabled him to get further upon the road. If the horse had crossed from the plaintiff's field to the railway for want of a fence which the Company was bound to keep up between themselves and the plaintiff, then it might have been held that the horse was lawfully on the railway track as regarded the Company. But being first unlawfully in the road within half-a-mile of the crossing, where he had no right to be unattended, he got from that road to the Company's railway; and upon the principles of the common law, as laid down in the case of *Ricketts* v. *The East and West India Docks, &c., R. W. Co.* (12 C. B. 160), it could be no excuse to his owner, that if there had been a good cattle-guard, the horse could not have advanced to that part of the railway on which he happened to be killed. As was said in that judgment, "No man can be bound to repair for the benefit of those who have no right."

In the circumstances of this case, it appears to us that the language of the court in *Sharod* v. *The London and North Western Railway Company* (4 Ex. 580) is precisely applicable. In the latter part of Baron Parke's judgment he thus states the principle, "If in the present case the plaintiff's cattle *had a right to be on the railway*, the plaintiff has a remedy, by an action on the case against the Company for causing the engine to be driven in such a way as to injure that right.* * If the cattle were altogether wrong-doers, there has been no neglect or misconduct for which the defendants are responsible. If the cattle had an excuse for being there, as if they had escaped through defect of fences which the Company should have kept up, the cattle were not wrong-doers; they had a right to be there; and their damage is a consequent damage from the wrong of the defendants in letting their fences be incomplete or out of repair, and may be recovered accordingly in an action on the case."

If this was correctly said, then, *mutatis mutandis*, it determines the present case. If the horse was lawfully on the road at the point of intersection, and had strayed from there upon the railway because the cattle-guard was defective, his owner would have been in as favourable a position as he would have been if his horse had escaped from his own field upon the railway track for want of a fence between such field and the railway which it was the duty of the Company to keep up; but being in the road, and unattended at the point of intersection, in direct violation of an act of Parliament, and straying from thence upon the railway over the insufficient cattle-guard, his owner is in no more favourable position than he would have been if the horse had broken into his neighbour's farm and had wandered from thence upon the railway by reason of there being no fence kept up by the Company between their track and that neighbour's farm.

For all that it appears the railway was well inclosed from the adjacent lands. It is clear that the horse strayed on the track from the highway, where he had no right to be, and he could not have been on the track at all if he had not been first in the highway, contrary to the act of parliament.

We are of opinion, therefore, that the plaintiff has no right of action, not because the express words of the 16th clause extend to this case, where it says that the owner of an animal killed at the point of intersection shall not under such circumstances have an action, but because upon the principles of the common law that consequence follows, on account of the horse having got upon the railway from a place where he had no right to be, and had therefore no excuse for being on the railway at any point, and was as wrongfully there on one side of the cattle-guard as he would have been upon the other.

In our opinion, therefore, the judgment should be reversed, and a new trial granted without costs.

Judgment below reversed.

THE MUNICIPALITY OF THE TOWNSHIP OF SARNIA v. THE GREAT WESTERN RAILWAY COMPANY.

Injury to Highway—Action by Municipality—Pleading.

The plaintiffs, a township municipality, in their declaration alleged that they were proprietors of a certain public road between the fourth and fifth concessions of said township, and complained that the defendants, in constructing their railway, so negligently and unskilfully made certain drains that great injury was thereby occasioned to the plaintiffs' said road, and they were compelled to expend large sums of money in repairing the same.

Held good, on demurrer, as showing a special injury to the plaintiffs sufficient to sustain the action; for though as a municipality they were not proprietors of the road, yet it might have been purchased by them from some joint stock company, or otherwise.

The declaration alleged that the plaintiffs were the proprietors of a public road and highway, in the township of Sarnia, in the County of Lambton, and situate between the fourth and fifth concessions of the said township, and passing from the eastward to the westward, between the said concessions; and that the defendants were the proprietors of a certain railway, called the Great Western Railway, situate and extending also from the eastward to the westward, across, the said township, to the south of the said road of the plaintiffs: that there was a certain drain or water-course along the south side of the said railway, which was filled and supplied with water from the adjoining swamps: that there was a certain other drain or water-course made by the plaintiffs along and near the south side of the said road of the plaintiffs, by means of which the said road was, and of right should have continued to be drained, and rendered free of stagnant water: that there was certain swamps or pieces of land covered and overflowed with water be-