LEO FLEMING (*Defendant*) .....APPELLANT; 1958 *Oct. 16 17

AND 1959 Mar. 25

FLOYD ATKINSON (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Animals—Negligence—Cattle straying on highway—Pastured on road—Collision with motor vehicle—No by-law prohibiting straying—Liability of owner of cattle—Trespass—Whether law of England same as law of Ontario.

The plaintiff, while driving on a hilly country road, was injured and his vehicle damaged when he struck and killed two cattle, part of a herd of twenty owned by the defendant, all of which were grazing unattended on the highway. The plaintiff sued for damages and the defendant counterclaimed for the value of the cattle. The trial judge found the plaintiff 40 per cent. negligent and the defendant 60 per cent. He dismissed the counterclaim on the ground that the cattle were trespassers. This judgment was reversed in part by the Court of Appeal to the extent of maintaining the counterclaim. The defendant cattle owner appealed to this Court.

Held (Locke and Cartwright JJ. dissenting): The appeal should be dismissed.

Per Taschereau and Rand JJ.: The defendant was in the same position as a drover along the highway who, admittedly, is held to the exercise of reasonable care in driving cattle on to or along the highway. To put or drive animals on to the highway was not within the purely negative rules laid down in *Searle v. Wallbank,* [1947] A.C. 341.

Per Fauteux, Abbott and Judson JJ.: The historical basis for the rule in Searle v. Wallbank, supra, dependent as it was upon the peculiarities of highway dedication in England, has never existed in Ontario. The public right of passage on the highways of Ontario was never subject to the risk of straying animals for the historical reasons given in that case. The highways of Ontario for the most part did not result from dedication but were created when the province was surveyed. The fee remained in the Crown. The rights of adjoining owners were the same as of any other member of the public and no higher. There was therefore no reason for giving adjoining owners any special rights to permit the straying of animals. Furthermore, the other foundation for the rule was that until the advent of fast-moving traffic no cause of action could possibly have existed. This foundation must also be rejected. It was therefore open to this Court to apply the ordinary rules of negligence to the case of straying animals and the case of *Searle* offered no obstacle. That case had never been the determining factor in Ontario until the decision in *Noble v. Calder,* [1952] O.R. 577. With the exception of the latter case, there were no decisions in Ontario which hold that

*PRESENT: Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott and Judson JJ.

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the common law of England as defined in the *Searle* case was ever the common law of Ontario. The appeal should be dismissed because the duty rejected in *Serle v. Wallbank* existed in Ontario.

Per Locke J., *dissenting*: The proximate cause of the injury suffered by the plaintiff was his own negligence. The evidence disclosed a complete and reckless disregard by him of his duty to avoid injury to the animals and, even if they were trespassers upon the highway (which they were not), there was no liability: *Excelsior Wire Rope v. Callan,* [1930] A.C. 404. The principle upon which *Davies v. Mann* (1842), 10 M. & W. 546 was decided, applied. Upon the evidence the legal question referred to in the judgment of the Court of Appeal did not arise.

Per Cartwright J., *dissenting*: The duties of a cattle-owner whose property adjoins a highway are regulated by the common law of England except in so far as that law has been modified by statutes or by-laws: *Noble v. Calder, supra.* The English decisions appear to be based not on a supposed right of the owner to let his animals run at large on the highway but on the absence of any duty to users of the highway to keep his animals from straying therefrom. Accepting the law of Ontario as being the same as that laid down in *Searle v. Wallbank, supra,* it was impossible to say that the present case was removed from its application by the mere fact that twenty animals were involved. What was proved against the defendant was a case of non-feasance which neither his knowledge nor his indifference could transform into misfeasance. If, on the other hand, the presence of the cattle constituted a breach of a legal duty, the negligence of the plaintiff was the sole effective cause of the accident.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing in part a judgment of Moorhouse J. Appeal dismissed, Locke and Cartwright JJ. dissenting.

C. F. MacMillan, for the defendant, appellant.

R. A. Pringle, Q.C., for the plaintiff, respondent.

The judgment of Tashereau and Rand JJ. was delivered by

RAND J.:—Mr. MacMillan's case is rested on *Searle v. Wallbank*[2] which, in declaring the common law of England, decides two points: first, that there is no duty on an owner of land adjoining a highway toward a person driving a vehicle on the highway to maintain fences on his property against the escape of animals: and secondly, that such an owner owes no duty to a person so using that highway to exercise reasonable care to keep his animals off the highway. These are purely negative rules; the owner, in relation to an animal on his land bordering on a highway,

[1] [1956] O.R. 801, 5 D.L.R. (2d) 309.
[2] [1947] A.C. 341, 1 All E.R. 12.

intent on the ordinary husbandry of and on his own land and that alone, remaining wholly negative toward the use of the highway, incurs no liability for its escape; it is a case of pure non-feasance, total non-action and non-purpose in the absence of a duty. The judgment does not touch the question of a duty arising when he knows of the presence of his animals on the highways or when he does an affirmative act, the known or contemplated and inevitable consequence of which is that they go upon the highway. The direct and obvious act would be driving them there, but the act of being responsible for their presence is not limited to its being against or directive of the inclination of the animal; if it is turned out of the barn, for example, on to a roadway that leads to a gate opening on the highway and that gate is intended to be open or is thereupon opened and the owner knows that the cattle will, in the circumstances and of their own accord and inclination from use or other inducement, pass along on to the highway, there is more than negative conduct on his part. Turning them out in front of an open gate or opening the gate when they are turned out, with a mind aware of what they will do, without more, is an affirmative act intended to lead and leading to their being at large on the highway.

That was the factual situation here: the cows were milked in the barn in the mornings; the inference is clear that on the day in question they were not taken to the pasture, and in the ordinary course of feeding they ranged the highway daily from morning till night; to the question, "Where did he pasture the animals"?, Hartin, the farmhand of the appellant, in the latter's presence, answered, "Well, sir, they was running on the roads" and it remained unchallenged.

The state of mind of the owner is made clear by his statement to the police officer that the cattle were his "property" and that he would "let them go where I like". The rules laid down in *Searle* are historical incidents of life in rural England arising from conditions relatively primitive, which the advent of the motor vehicle has revolutionized. There are to be noticed, also, as affecting the application of old rules to new social life, the special circumstances of the earliest days of Ontario to which Roach J.A.,

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speaking for the Court of Appeal[1], makes reference, such as the origin of highways by governmental action, their ownership in the Crown, and the series of statutes dealing with fencing and with animals running at large.

Assuming but not deciding that the rule so laid down was brought by the colonists to the province, its scope is to be confined strictly to the limits defined. To "let them go" implies, in the circumstances here, a removal of restraint or the acquiescence in their movement, the actual nature of which we do not know because the owner did not see fit to take the stand. The testimony of the farmhand and his wife who had lived and worked on the farm for about a year, unchallenged on cross-examination and uncontradicted by him, furnishes ample evidence for that inference. He is, then, in the same position as a drover along the highway who, admittedly, is held to the exercise of reasonable care in driving cattle on to and along the highway. In *Searle,* Lord Porter expressed the view that to put or drive animals on to the highway was not within the rules there laid down.

The judgment of the Court of Appeal[1] was placed on a failure in a duty of care in relation to the animals where they were, but it was based on the presence of a large number, 20, animals as distinguished from one. The validity of this distinction I do not find it necessary to inquire into, and I express no opinion upon it one way or the other.

I have had the privilege of reading the reasons of my brother Judson in which liability is put upon the duty of an owner to use reasonable care to keep his animals from trespassing on the highway. I agree that *vis-à-vis* the owner of the fee there is a trespass when the animals are not using the highway for the ordinary purpose of passage; I do not find it necessary, however, to go to the extent of finding such a duty in this case. There was here more than mere failure to use reasonable care; what the animals did was the virtually inevitable and foreseen consequence of turning them loose at the barn. Although I am inclined to agree with it, the rule of a positive or active duty extending, say, to reasonable inspection and maintenance of means used to

[1] [1956] O.R. 801, 5 D.L.R. (2d) 309.

contain the animals on the owner's land, goes beyond the necessities of what is before us, and I leave it for future decision.

I would, therefore, dismiss the appeal with costs.

LOCKE J. (*dissenting*):—This is an action for damages for personal injuries said to have been occasioned by the negligence of the appellant in permitting his cattle to graze upon a county highway in Ontario. As, in my opinion, the evidence demonstrates that, to adopt the language of Lord Sumner in *British Columbia Electric v Loach*[1], "the efficient, the proximate, the decisive cause" of the respondent's injuries was his own negligence, I would allow the appeal. Even had the cattle been unlawfully on the highway or in the position of trespassers, and I agree with Mr. Justice Roach that they were not, neither fact would, in my view, be any more material than was the fact that the child whose case was considered by the House of Lords in *Excelsior Wire Rope v. Callan*[2] was a trespasser.

By the statement of claim the respondent alleged that while driving east upon a highway in a Willys jeep, on going over a crest of a hill he was suddenly confronted by several head of cattle belonging to the defendant that were trotting towards him, that he thereupon stopped the vehicle and "was charged by three or more of the cattle", in consequence of which he suffered severe personal injuries. Particulars of the negligence complained of were: (*a*) that the defendant had knowingly permitted his cattle to be at large upon the highway without proper supervision; (*b*) that he failed to fence or maintain his fences adjoining the roadway in a reasonable state of repair and that they were inadequate to contain cattle; (*c*) that he had knowledge of "the vicious propensity of cattle that when confronted with a red coloured object, charge the object", that he failed to see that the cattle were kept in an enclosure strong enough to prevent them charging and attacking persons and property on the highway; (*d*) that the appellant had negligently left an opening in the fence through which the cattle strayed; and lastly, (*e*) that the cattle were followed by two bulls who were chasing them, thus constituting a nuisance on the highway.

[1] [1916] 1 A.C. 719 at 726. [2] [1930] A.C. 494.

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No attempt was made at the hearing to support any of the allegations in (*c*) and (*e*) above. Had they not been included, the defendant might well have objected that the statement of claim did not disclose a cause of action and set the question down for argument before trial under Rule 122 of the Supreme Court of Ontario.

The evidence given in support of the claim was both confusing and contradictory and it is necessary to examine it in detail.

The respondent was driving in a westerly direction upon a gravel road, accompanied by two men by name Asselstine and Stinchcombe. These three were the only eye witnesses of the accident. Atkinson was the driver of the conveyance which was owned by a third person and which he was driving in an endeavour to detect a defect in its mechanism. It was about 4 o'clock in the afternoon: the weather was fair and the road was dry and he had driven over it several times before. Atkinson said that he was driving between 30 and 35 miles an hour when he drove over a small hill or knoll and saw ahead of him some cattle, whereupon he reduced the speed of the car to 10 or 15 miles an hour. Proceeding at this rate driving through the cattle without mishap, he came to another knoll which, as he proceeded, fell sharply away in front of him. He did not say that he had thereafter increased the speed of the car. He said that this second hill was so steep "when coming over the top you have no vision to see until you get right down to the bottom" and said that it was when he reached the bottom "that there was three head of cattle coming towards me at a fair pace". According to him, he "could not see them until they were right on top of me, your view was obstructed", and he said that as soon as he saw them he put on the brakes and brought the vehicle to a stop but that, just as he was coming to a halt, the three cattle struck it. He said nothing about passing any cattle between the top of the knoll and the point of impact. When cross-examined, he said that he had not seen the three cattle approaching until they were the length of the jeep away, and this was shown to have been from 10 to 14 feet.

Asselstine, who was sitting on the extreme right of the front seat of the vehicle, said in direct examination that as soon as they came over the hill he saw 15 or 20 head

of cattle, some in the center of the road and some in the ditches, and that they were then about 20 or 25 feet away. In answer to a leading question he answered in the affirmative when asked if he had seen them after they had driven over a second knoll or hill. After the learned trial judge had pointed out the leading nature of the question, he directed that the witness give his account of the matter again. This reads as follows:

We just popped over the hill and there was the cows; there is kind of an opening through them, and threw the brakes on and started through them.

Asked by the trial judge to explain what he meant, he said:

There was a flock of cows all over the road, so we threw the brakes on and thought we would get through, and the closest I can figure it is we got through a few of them and just have hit some more where—

Following this, the transcript reads:

MR. RICHARDSON (the defendant's counsel): Got through a few and then hit one?

THE WITNESS: Yes, we threw the brakes on and were still sliding, and the closest I can figure it is one stepped out in front of us.

HIS LORDSHIP: Went through a few and hit one.

MR. RICHARDSON: Still sliding.

HIS LORDSHIP: Threw brakes on and still sliding.

Q. You were still sliding when you hit the one?

A. Yes, sliding through the gravel.

The witness said that their speed was about 30 miles per hour when they reached the top of the hill. He said nothing about a second hill.

The cross-examination reads in part:

Q. Well, now, then, as I understand your story you came over a knoll, hopped over a knoll to use your expression, and when you got to the top of the knoll you saw the cattle down in the valley, is that right?

A. Right.

Q. And immediately your driver applied his brakes and skidded?

A. Right.

Q. Is that right. Yes. And he skidded—missed some of the cattle and hit one or two?

A. Right.

The witness had not said that the cattle were down in the valley.

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Stinchcombe was seated between Atkinson and Asselstine and says that they were driving at about 30 to 35 miles an hour when they approached the first hill. He said:

> We went over two small hills after we passed Mr. Fleming's house, and about the third hill, it was a sharp hill, you couldn't see anything, we went over it and dropped right down and the cattle were right in the middle of the road.
>
> MR. PRINGLE (the plaintiff's counsel):
>
> Q. Speak up loudly, please.
>
> A. There was about 15 or 18 head of cattle in the middle of the road when we dropped over the third sharp hill.
>
> Q. Yes, and how far away were they from you when you first saw them?
>
> A. Well, about two or three lengths of the jeep, I think.
>
> Q. Where were they on the road?
>
> A. Well, approximately blocking the whole road.
>
> Q. And what did you observe happen then?
>
> A. Well, Mr. Atkinson applied the brakes and then I don't recall too much. We skidded into the cow.
>
> Q. And how far did you skid after you hit the cattle, do you know?
>
> A. Not too far, pretty well stopped us.
>
> Q. How many cattle did you run into and hit?
>
> A. I think we hit three of them, one was skinned up.

He said further that when they first saw the cattle the latter were facing the jeep and, asked if he had struck the animals, said:

> Well, one we hit her in the side, on the side, and I couldn't say where we hit the other one.

He said that, generally speaking, the herd was facing them and that, while some of the animals were moving around, the others were moving towards them. On cross-examination, he said that when they got to the hill, which presumably meant the third hill which had not been mentioned by the other witnesses, they saw the cattle about 25 to 30 feet distant and that Atkinson had reduced the speed to between 5 and 10 miles an hour when the animals were struck, and said that the brakes had been applied immediately the cattle became visible.

This is all the evidence that was given on behalf of the respondent to sustain the charges of negligence and the account of each of the witnesses differed materially, as will be seen. However, evidence given for the appellant by a disinterested witness is of some assistance in coming to a conclusion upon the facts.

Constable Bolyea of the London Township Police Force arrived at the scene at about 4.40 p.m. He found the jeep on the south travelled portion of the road and two dead cows, one lying to the rear of it on the shoulder of the road and one in a ditch to the north. He was able to determine the point of impact and, from that point, there was a skid mark 39 feet long to the west which had been made by the jeep. From the westerly end of this skid mark to the top of the hill the distance was 150 feet. Describing the road, he said that there were two sharp inclines and it was on the most easterly of these that the accident had occurred. He said that from the top of this hill the driver of a car had a clear view to the place where the cattle were struck, and that there was an unobstructed view for 500 yards to the east. He described the grade as being "a gradual grade down to where the cows are". He said further that the position of the jeep showed that it had continued to the east after striking the animals, a distance which, he thought, might be two or three lengths of the vehicle.

That there was a clear view from the brow of the second hill to the place of the collision was also proven by another distinterested witness, Joseph H. Yeomans, who helped the police officer in taking measurements on the road. His son, Clifford Yeomans, had been with him at the appellant's farm and had seen the jeep approaching the location where the accident occurred and estimated its speed as being at least 50 miles an hour.

It would have been of material assistance in dealing with this appeal if the learned trial judge had dealt rather more fully with the issues of fact upon which any finding of negligence must depend. In the reasons delivered by him he found that the respondent was driving at a reasonable rate of speed and that the distance from the brow of the hill "to the point of impact with several of an unattended herd of some 20 head of cattle" was established to his satisfaction as 189 ft. The learned judge did not say at what point, whether at the brow of the second hill or at some earlier stage, the speed of the jeep had been reasonable nor what he considered to be reasonable in the circumstances, or mention the fact that the respondent had said that, when he drove through the cattle on the road between the first and the second hills, he had reduced the speed to

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about 10 to 15 miles an hour. It was after doing this that he reached the brow of the second hill. The reasons further state that the witness Asselstine had said that they were travelling from 15 to 20 miles an hour when they came over the hill, but the witness had not said this. The only evidence given by him as to the speed was that, just prior to the accident, it was about 30 miles an hour.

The finding that the distance from the brow of the hill to the place where the cattle were struck was 189 feet, as stated by Constable Bolyea, shows that the learned trial judge found against the credibility of the respondent. While the latter had sworn that he could not see the three cows which, he said, ran into his jeep, until he reached the bottom of the second hill, he did not attempt to explain why this was and he was not called to give evidence in rebuttal to the constable's evidence that the view was unobstructed from the top of the hill to the point of collision and for more than 300 yards further to the east. The respondent's account, as I have shown, was that he had driven through the main body of the herd, which was between the first and the second hills, and he did not suggest that there were any other cattle on the road after he drove over the second hill, except the three which, he said, charged into the jeep. As to these, he said he did not see them until they were about 12 or 14 feet distant.

The learned judge accepted the evidence of the constable that the accident happened on the eastern side of the second hill. He obviously did not believe the witness Asselstine who said nothing about a second hill but whose account was that they came over a hill and came suddenly upon the cattle on the road some 20 to 25 feet away, that the respondent put on the brakes and drove through the herd and, while the car was sliding, a cow stepped in front of it and was hit. This would place the scene of the accident as between the first and the second hills and bears no resemblance to the respondent's story in any respect.

As to Stinchcombe, he said that the accident occurred on a third hill which, as the constable's evidence shows, did not exist. He said that the cattle were blocking the road when they came over the hill and were then only about 20 or 30 feet away, whereupon Atkinson had promptly put on the brakes and the jeep had skidded into the herd at a

speed of from 5 to 10 miles an hour. The finding of the learned judge as to the place of the accident shows that he did not believe this witness: it is, indeed, impossible, in view of the evidence of the constable and of the length of the skid marks, that his evidence could be true.

No finding was made as to the truth of the respondent's evidence that the three cows had charged unexpectedly into the jeep. Neither Asselstine or Stinchcombe had said that this had occurred and, indeed, their evidence appears to contradict it. Asselstine had said that a cow had walked in front of the jeep while it was skidding and been struck. Stinchcombe, that the cattle were facing them when they first saw them and that he thought they had struck three, one being struck on the side: he was unable to say where the others were hit.

The reasons delivered at the trial do not mention the fact that the respondent had sworn that he had brought the jeep to a halt or practically to a halt (he said both) by the time the collision occurred and that it had not skidded, whereas the evidence of Constable Bolyea showed that the jeep had skidded 39 feet before hitting the animals and had continued to the east some two or three lengths of the vehicle.

The learned judge appears to me to have based his finding of liability against the appellant on what he considered to be the breach of a duty which is referred to in a passage from the judgment of Romer L.J. in *Deen v. Davies*[1]. It is there said that the owner of an animal who brings it upon a highway owes a duty to those using the highway to use reasonable care to prevent the animal damaging them and that this duty arose when an owner permitted cattle to pasture unattended on the highway. After considering at length a number of authorities, the learned judge found that the appellant's cattle were not lawfully upon the highway and that he ought to have anticipated that their presence there would create a dangerous situation.

Without discussing the accuracy of the statement relied upon, which I consider to be unnecessary, and with great respect for the opinion of the learned trial judge, he appears to have overlooked the fact that while, undoubtedly, without the presence of the cattle upon the highway the

[1] [1935] 2 K.B. 282, 295-6.

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accident would not have occurred, this does not decide the matter. Their presence was a *causa sine qua non* undoubtedly, but that is not the point. The judgment at the trial unfortunately did not deal with the real question to be determined on the issue of negligence.

The unanimous judgment of the Court of Appeal was delivered by Roach J.A. That learned judge did not agree with Moorhouse J. that the cattle were trespassing on the highway. With this I agree though I think, in view of the evidence which I have referred to, the matter is of no moment.

The findings of fact made by Roach J.A. read:

> The cattle were somewhere along the second hill and within 150 feet of its top. They were not visible to the persons in the jeep until, as one of those persons put it, the jeep "popped" over the top of the second hill. The cattle were strung out along the roadway of that second hill, some of them sufficiently close to the shoulders on either side that the plaintiff, by the exercise of some dexterity, was able to steer the jeep between them and avoided striking any of the cattle in the fore part of that herd. However, there were three stragglers at the far end of the herd and separated from the rest of it by a short distance. It was probably the commotion in the front section of the herd as the cattle beasts scampered in the direction of each side of the road, and the noise of the jeep, that bestirred these three stragglers. They were on a piece of the travelled portion of the road at each side of which the shoulder dropped off rather precipitously into a deep ditch. Almost abreast of each other these three stragglers suddenly started running up the road toward the jeep and collided almost head on with it.

I am unable, with respect, to agree that this correctly summarizes the evidence. The main body of the cattle were not strung along the roadway of the second hill, if the evidence of the respondent and Asselstine is to be believed. They say that it was when they drove over the first hill that they encountered the main body of the animals on and alongside the road, and the respondent said that it was after he had driven through this herd at the reduced speed of 10 to 15 miles an hour that he came to the second hill and that it was not until he got "right down to the bottom" of it that he first saw the three cows some 10 to 14 feet distant. He did not say, and there is no evidence, that there were any other cattle on or along the roadway between the top of the second hill and the point of impact. As the evidence shows, the "three stragglers" were over the second hill at the bottom of the grade and separated from

the main body by more than 189 feet. I can find nothing in the evidence to support the suggestion that the three cows were startled into running by any scampering by the other animals.

The reasons of the Court of Appeal say nothing about the speed of the vehicle as it drove down the second hill, a vital matter to be considered in determining liability in this case. The respondent's story that the vehicle had not skidded and that it had stopped or practically stopped at the time of impact was shown to be untrue by the constable's evidence and the skid marks on the road.

While the judgment at the trial appears to have been based on the ground that the cattle were trespassers upon the highway, Roach J. A. found that they were not. The judgment appealed from appears to proceed on the basis that while the presence of the cattle upon the highway was not unlawful, the appellant should have foreseen that their presence on this hilly road might result in their being struck by vehicles, the drivers of which were unaware of their presence, coming suddenly upon them.

Whatever there is to be said for this as a proposition of law, in my opinion, and with the greatest respect, it has no bearing upon the issue in this case.

While the Courts below have found that the appellant was partly to blame, they appear to have done so for different reasons and upon differing views as to what the evidence disclosed. As pointed out by Taschereau J. in delivering the judgment of this Court in *The North British and Mercantile Insurance Company v. Tourville*,[1] even were there concurrent findings upon the facts, it would be our duty to examine the evidence and come to our own conclusion as to where the liability rests. Other than that the appellant was guilty of some act of negligence which contributed to the occurrence of the accident, the findings in this matter do not appear to me to be concurrent. We are in equally as good a position as the learned judges of the Court of Appeal to determine the weight to be given to the conflicting evidence upon which this claim is based.

[1] (1895), 25 S.C.R. 177.

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Accepting the evidence of the respondent that the speed of the jeep was about 30 miles an hour when he first came upon the herd, that he reduced that speed to some 10 to 15 miles an hour before he came to the brow of the second hill, at that point, as was proven to the satisfaction of the trial judge, he had a clear and unobstructed view of the road down the hill to the place of collision. There were no other cattle on this part of the roadway. The skid marks which showed clearly on this gravel road did not commence for a distance of 150 feet from the summit, so that the brakes were not firmly applied until the jeep was within 39 feet of the cattle. The length of the skid marks and the fact that the jeep carried on to the east an appreciable distance after striking the cattle with such force that they died almost immediately is conclusive proof, in my opinion, that after driving over the top of the second hill the respondent had increased the speed to a very considerably higher rate before suddenly applying the brakes. As the approaching jeep would be plainly visible to the animals on the road for at least 189 feet, the evidence given, only by the respondent, that the cows charged headlong into it appears to me to be as manifestly untrue as his denial that the jeep had skidded. His evidence as to this would appear to have been given in order to support the admittedly groundless charges in the statement of claim that the animals were vicious, to the appellant's knowledge, and would charge a red coloured object and that they had been chased by two bulls. There was no red object and the respondent admitted that the presence of the bulls somewhere in the herd had nothing to do with the occurrence. Stinchcombe's evidence was that at least one of the animals was struck on the side, which would indicate that it had been trying to get off the road to avoid the oncoming car.

It is a common occurrence throughout Canada for drivers, both of horse-drawn vehicles and motor cars, to meet small numbers or herds of cattle upon country highways such as this. Cattle are slow-moving animals and readily frightened and persons encountering them in these circumstances are charged with knowledge of this fact and with the duty of driving with caution to avoid injuring them. No prudent person would drive a horse-drawn vehicle through cattle found upon the highway at a speed of 10 miles an hour since

to do so would be simply to court trouble. Drivers of motor vehicles charged with this duty are probably too often inclined to forget that a motor car in motion upon a highway is a dangerous machine, the management of which imposes upon them a high degree of care to avoid injury to others. It is to be noted that a special section of the *Highway Act of Ontario*, R.S.O. 1950, c. 167, s. 46, deals with the duty of such drivers to avoid frightening horses or other animals upon the highway.

The evidence in the present matter discloses, in my opinion, a complete and reckless disregard by the respondent of his duty to avoid injuring these animals. They were in plain view on the roadway ahead and yet he drove toward them at a speed which precluded him from stopping, and the animals from escaping.

In *Davies v. Mann*,[1] the owner of a donkey had left it upon the highway fettered in the fore feet and thus unable to get out of the way of the defendant's wagon which was going at a quick pace along the road. It was held that the jury at the trial had been properly directed that, although it was an illegal act on the part of the plaintiff to put the animal on the highway, he was entitled to recover. Lord Abinger C. B. said that while it was not denied that the animal was lawfully on the highway, were it otherwise it would have made no difference since the defendant might by proper care have avoided injuring the animal. Baron Parke, after referring to what he had said to the same effect in *Butterfield v. Forrester*[2], said that the judge at the trial had been right in telling the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action, unless its being there was the immediate cause of the injury and that if they were of the opinion that it was caused by the fault of the defendant's servant in driving too fast, the mere fact of putting the animal upon the road did not bar the plaintiff of his action. Although the donkey might have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief.

[1] (1842), 10 M. & W. 546, 152 E.R. 588.
[2] (1809), 11 East. 60, 103 E.R. 926.

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Locke J.

It is rarely, indeed, that in a traffic accident the facts are so similar to those in a leading case as the facts disclosed by the evidence in the present matter are to those in *Davies v. Mann*. It was, in my opinion, the reckless conduct of the respondent which was the sole cause of this accident. I would set aside the judgments of the Court of Appeal and at the trial and direct that judgment be entered dismissing the action and allowing the appellant's counterclaim, with costs in all courts.

This is an action and not a reference and it has not been the practice of this Court to express opinions on questions of law which are unnecessary for the disposition of the issues in the case before it. For this reason, I express no opinion as to whether the common law of Ontario, as it affects the liability of the owner of domestic animals who allows them to stray upon a country highway, differs from the law of England as stated in *Searle v. Wallbank*.[1]

I would allow this appeal and dismiss the action with costs throughout.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a unanimous judgment of the Court of Appeal[2], affirming the judgment of Moorhouse J. in favour of the respondent for $5,608.40 damages, and varying the judgment to provide that the appellant should recover $220 on his counterclaim.

The respondent suffered serious personal injuries and no complaint is made as to the amount of his total damages which the learned trial judge assessed at $9,347.34.

On the afternoon of August 2, 1952, the respondent, accompanied by two passengers, was driving easterly in a Willys jeep on a county road in the County of Hastings. The road was described as hilly. Its surface was gravelled. The appellant was the owner of a farm part of which was on the north and part on the south side of this road; he owned 18 cows and 2 bulls, most or all of which were on the road unattended at the time of the accident. The appellant's fields adjoining the highway were fenced but, according to the weight of the evidence, the fences were inadequate to prevent cattle straying onto the highway. The jeep came into contact with three of the cows, one on the front of the jeep and one on each side; two of the cows were killed.

[1] [1947] A.C. 341, 1 All E.R. 12.
[2] [1956] O.R. 801, 5 D.L.R. (2d) 309.

The respondent testified that the cow that "came along" the left side of the jeep "struck where the gas tank is and the weight of its stomach came out on my left leg." His evidence continues:

Q. How would it hit you on the knee? A. There is no door on the jeep, it is all open.
Q. And part of its body came in the door? A. Yes.
Q. And hit you on the knee? A. Yes, the pressure.
Q. What did it do to your knee? A. Well, the doctor said it broke it up into splinters, broke it off.

In the statement of claim the respondent alleged in part:

He (the plaintiff) was proceeding in a lawful and prudent manner, having regard to the hilly condition of the road. While going over a crest of a hill he was suddenly confronted by several head of cattle belonging to the Defendant, that were trotting towards the jeep. These cattle were owned by the Defendant but were not under the care and control of the Defendant, his servants or agents.

4. The Plaintiff stopped his vehicle and was charged by three or more of the cattle, one of the animals colliding with the left side of the vehicle causing severe injury to the left leg of the Defendant, the other animals struck the jeep causing damage to the vehicle.

* * *

7. The Plaintiff states and the facts are that the injuries sustained by the Plaintiff to his person and the vehicle were caused by the negligence of the Defendant, in that:—

(1) He knowingly permitted his cattle to be at large upon the Highway without proper supervision;

(2) He failed to fence in or in the alternative, he failed to maintain his fences adjoining the roadway in a reasonable state of repair. The said fences were in a poor and rundown condition, and totally inadequate to contain cattle;

(3) He had knowledge of the vicious propensity of cattle that when confronted with a red coloured object, charge the object. He failed to see that the cattle were kept in an enclosure strong enough to prevent them charging and attacking persons and property on the Highway.

(4) The Defendant had negligently left an opening in the fence through which the cattle were straying on the Highway.

(5) The cattle were being followed by two bulls who were chasing the cattle, thus constituting a nuisance on the Highway which was the duty of the Defendant to prevent.

There was no evidence to support the allegations in subparas. (3) and (5) of para. 7, or to suggest that the appellant had knowledge of a tendency on the part of any of his cattle to run into or blunder into vehicles or persons on the highway.

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The respondent's evidence, which appears to have been accepted by the learned trial judge, was to the effect that he was driving at a reasonable speed, that as he came over the top of a hill he was confronted by a number of cattle, that he slowed down to between 10 and 15 miles per hour, that he passed these cattle without mishap, that he then dropped over a second and sharper hill and was confronted by the three cows that came in contact with the jeep, that they were coming towards him "at a fair pace", that he proceeded to bring his vehicle to a stop and that just as he was coming to a halt the three cows struck the jeep.

The learned judge found that from the point at which the three cows came into the respondent's vision to the point of impact was 189 feet. He also found that the appellant's cattle were allowed to run at large and graze upon the highway, that this was a usual occurrence and must have come to the attention of the appellant.

After a careful examination of the relevant authorities the learned judge summed up his conclusions as follows:

> Applying the principles to be deduced from the aforesaid cases as I interpret them, I find the defendant did owe a duty to the plaintiff and that he failed in that duty. His cattle were unlawfully upon a hilly highway traversed by motor vehicles to his knowledge and he ought reasonably to have anticipated that this would create a dangerous situation.
>
> * * *
>
> The plaintiff was himself negligent in that under all the circumstances, he was not keeping such a lookout and did not have his vehicle under such control that he could stop if his way was impeded, as it was in the depression in the highway. I find the percentage of negligence attributable to the plaintiff is 40% and to the defendant 60%.

It would seem from the last-quoted passages that the learned trial judge was of the view that the respondent had not brought his jeep to a stop at the moment of impact, and that his failure to do so was negligent and was an effective cause of the accident, the other effective cause being the existence of a dangerous obstruction to traffic (i.e. the three cows or the one cow the contact with which caused the respondent's injury) allowed by the appellant to be upon the highway in breach of his duty to users of the highway.

In my view the judgment of the Court of Appeal in *Noble v. Calder*[1] correctly decides that the duties of an owner of cattle whose lands adjoin a public highway are

[1] [1952] O.R. 577, 3 D.L.R 651.

regulated by the common law of England except so far as that law has been modified by relevant statutes or by-laws. With the greatest respect to those who entertain a contrary view, I can find no sufficient reason in the historical differences between the ways in which highways came into existence in England and in Ontario to warrant the formulation in the two jurisdictions of different rules of law as to the duty of the owner of a field abutting a highway. The English decisions reviewed and approved in *Searle v. Wallbank*[1] appear to me to be based not on a supposed right of the owner to let his animals run at large on the highway but on the absence of any duty to users of the highway to keep his animals from straying thereon. I think I am right in saying that in every Ontario case in which such a duty was held to exist there was a prohibition against permitting unattended animals to be on the highway contained in either a statute or a by-law.

It is true that the rule affirmed in *Searle v. Wallbank* grew up before the advent of fast moving traffic on the highways and there is much to be said for the view that with the coming of such traffic a duty which had not hitherto existed should have been imposed upon the owners of animals. But that view was carefully considered and definitely rejected by the House of Lords in *Searle v. Wallbank*. As was pointed out by Viscount Maugham, the suggested duty would be onerous. The reasons urged in favour of its imposition would seem to me to have greater force in England than in Ontario as, if one may take notice of matters set out in Year books and almanacs, there are far more domestic animals and far more motor vehicles to the square mile in the former than in the latter.

I take it then that the law of Ontario is the same as that laid down in *Searle v. Wallbank* and correctly summarized in the head-note to that case as follows:

> The owner of a field abutting on the highway is under no prima facie legal obligation to users of the highway so to keep and maintain his hedges and gates along the highway as to prevent his animals from straying on to it nor is he under any duty as between himself and users of the highway to take reasonable care to prevent any of his animals, not known to be dangerous, from straying on to the highway.

[1] [1947] A.C. 341, 1 All E.R. 12.

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Accepting this as an accurate statement of the applicable law, I find myself unable to say that this case is removed from its operation by the circumstance that the appellant owned a total of twenty animals all of which frequently strayed onto the highway.

If the proper inference to be drawn from all the evidence was that the appellant had not merely failed to take any steps to keep the animals from the highway but had actively placed them thereon, different considerations might well arise; but it appears to me that what is proved against the appellant is a case of non-feasance which neither his knowledge nor his indifference can transform into misfeasance. In my opinion the appeal succeeds.

Since writing the above I have had the advantage of reading the reasons of my brother Locke. If I had formed the opinion that the presence of the cattle on the highway constituted a breach of a legal duty owed by the appellant to the respondent I would for the reasons given by my brother Locke have agreed with his conclusion that the appeal should be allowed on the ground that the negligence of the respondent was the sole effective cause of the accident.

I would allow the appeal, set aside the judgments below and direct that judgment be entered dismissing the action and awarding the appellant $550.00 on his counterclaim, with costs throughout.

The judgment of Fauteux, Abbott and Judson JJ. was delivered by

JUDSON J.:—The accident which gives rise to this litigation happened on a country road in the Province of Ontario on a summer afternoon between the plaintiff, the driver of a motor vehicle, and three cows, part of a larger herd belonging to the defendant which was grazing on the side of the road. Both the learned trial judge and the Court of Appeal[1] have found that there was nothing unusual in the presence of these animals on the highway and that their owner made no effort to keep them within the boundaries of his property, the fences of which were in a state of very poor repair. The defendant's appeal to this Court raises squarely the question whether an adjoining owner owes a duty of reasonable care

[1] [1956] O.R. 801, 5 D.L.R. (2d) 309.

to users of the highway to prevent domestic animals, not known to be dangerous, from straying on to the highway. *Searle v. Wallbank*[1], followed in Ontario in *Noble v. Calder*[2], both deny the existence of any such duty. The judgment under appeal has found the defendant, the owner of the animals, partly responsible for this accident, a distinction having been drawn on the facts between the present case and *Noble v. Calder*. I think it desirable now when the matter is in this Court for the first time to examine further into the nature of the obligation, if any.

There were two reasons implicit in the judgment in *Searle v. Wallbank* for the rejection of the duty. The first is based upon the history of the highways of England, which came into being largely as a result of dedication by adjoining owners, who gave to the public no more than a right of passage which had to be exercised subject to the risk of straying animals. The second is based upon the facts as they existed until the advent of fast moving traffic. It is put in this way by Maugham L. C., at p. 353:

> No facts in my opinion have been established which would tend to show that farmers and others at some uncertain date in our lifetime became subject for the first time to an onerous and undefined duty to cyclists and motorists which never previously existed.

It is beyond dispute that for centuries straying animals on the highway did not present any risk to slow moving traffic. The only risk in the situation arose when an animal *mansuatae naturae* showed a vicious propensity, and for this the owner was only liable on proof of scienter.

I am in complete agreement with the reasons of Roach J. A. in the judgment under appeal when he says that the historical basis for the rule in *Searle v. Wallbank*, dependent as it is upon the peculiarities of highway dedication in England, has never existed in Ontario. This seems to me to be of the greatest significance when considering the rights of the public on these highways. The public right of passage on the highways of Ontario was never subject to the risk of straying animals for the historical reasons given in *Searle v. Wallbank*. For the most part the highways of Ontario did not come into being as a result of dedication by adjoining owners. They were created when the province

[1] [1947] A.C. 341, 1 All E.R. 12.
[2] [1952] O.R. 577, 3 D.L.R. 651.

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was surveyed. The fee remained in the Crown and it is now vested either in the Crown in right of the Province or in the municipalities. This distinction between the legal position in England, where the ownership of the fee in the highways still remains in the adjoining owners, and that in Ontario, where the fee is in the highway authority, was traced in detail by Boyd C. in *Ricketts v. Markdale*.[1] How, in these circumstances, can an adjoining owner acquire any right to permit his animals to stray on the highway? Against the highway authority, his animals are trespassers. His right is the same as that of any other member of the public and no higher, namely, the right of passage for himself and his animals, the right of access to his property and special rights which are of no significance in this inquiry, such as the right of purchase when highways are closed and the right to occupy unopened road allowances. There is therefore no reason for giving adjoining owners any special rights to permit the straying of animals. This alone is sufficient to distinguish the law of Ontario from the law of England and to render the principle stated in *Searle v. Wallbank* inapplicable here.

The other foundation for the principle of immunity in favour of the adjoining owner was that until the advent of fast moving traffic no cause of action could possibly have existed. There was in fact no real risk worthy of judicial consideration from the mere presence of straying animals on the highway. There was nothing that called for the interference of the law in this situation. But does it follow as a consequence of this that there can be no cause of action today when the facts are entirely different and when there has been a developing law of negligence for the last 150 years? As was pointed out by the learned editor in 66 L.Q.R. 456, the real objection to the decision in *Searle v. Wallbank* is that a conclusion of fact has hardened into a rule of law when the facts upon which the original conclusion was based no longer exist:

> As long as the conclusion of fact and the rule of law were not in conflict, this shift from the one to the other passed unnoticed but now that the "experience of centuries" is no longer valid under the changed conditions of modern motor traffic it is not surprising that the law on this point is subject to criticism.

[1] (1900), 31 O.R. 610.

A rule of law has, therefore, been stated in *Sarle v. Wallbank* and followed in *Noble v. Calder* which has little or no relation to the facts or needs of the situation and which ignores any theory of responsibility to the public for conduct which involves foreseeable consequences of harm. I can think of no logical basis for this immunity and it can only be based upon a rigid determination to adhere to the rules of the past in spite of changed conditions which call for the application of rules of responsibility which have been worked out to meet modern needs. It has always been assumed that one of the virtues of the common law system is its flexibility, that it is capable of changing with the times and adapting its principles to new conditions. There has been conspicuous failure to do this in this branch of the law and the failure has not passed unnoticed. It has been criticized in judicial decisions (including the one under appeal), in the texts and by the commentators.

The anomalous nature of the rule is emphasized by comparison with the rights and obligations existing between adjoining owners. In this situation the owner of the animals must keep them upon his land under control and is liable for trespass if they escape and do such damage as it is in their nature to commit. The right of action for trespass exists also in the owner of the soil of a highway if cattle depasture his herbage. An owner may only drive his animals on to the highway for the purpose of passage and if he does so he must exercise reasonable care while they are using the highway for this purpose. By contrast, the rule is said to be one of non-liability if the animals are permitted to stray. Further, what difference is there between driving the animals on to the highway and turning them loose on the property when it must be apparent, as in the present case, that sooner or later they will be on the highway?

My conclusion is that it is open to this Court to apply the ordinary rules of negligence to the case of straying animals and that the principles enunciated in *Searle v. Wallbank,* dependent as they are upon historical reasons, which have no relevancy here, and upon a refusal to recognize a duty now because there had been previously no need of one, offer no obstacle. The course of judicial decision in Ontario indicates that until the decision in *Noble v. Calder,* the principles of *Searle v. Wallbank* have never been the determining

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factor. This, I think, can be said with certainty although it is not always easy to trace a consistent line of reasoning. The cases have turned largely upon a consideration of local by-laws where the highway authority is the municipality, and statutory prohibitions where the province is the authority. They are fully reviewed both on fact and law in the reasons of Roach J. A. in the Court of Appeal.

This accident happened on a county road and there was no municipal by-law prohibiting the straying of animals. In *Patterson v. Fanning*,[1] there was such a by-law and the judgment of Armour C. J. O. was founded on this fact and led him to the conclusion that the animal was unlawfully at large. The judgment of Osler J. A., however, was founded on negligence and nothing more, and he held that there was liability because the damage was such as might reasonably be expected to follow the negligent act.

I have some difficulty with the deduction of the learned Chief Justice drawn from *Ricketts v. Markdale* that, had it not been for the by-law, the animals would have been lawfully at large upon the public highway. The Court of Queen's Bench as early as 1877 in *Jack v. Ontario, Simcoe and Huron R. R. Union Co.*[2], had denied the right of anyone to have his animals wander at large upon the highway. Moreover, *Ricketts v. Markdale* merely held that children had a right to play upon the highway if there was no general law or by-law against it. It is difficult to see how a by-law against children playing on the highway could, in itself, prevent anyone from recovering on behalf of an injured child against a wrongdoer, or how the conclusion follows that if there is no prohibitory by-law, animals may be permitted to stray on the highway.

The next two decisions, *McMillan v. Wallace*[3] and *Direct Transport Ltd. v. Cornell*[4], were both decided under a section in *The Highway Improvement Act* which imposed a penalty upon owners of certain animals who permitted them to run at large upon the King's Highway. This was held to involve a statutory prohibition and the imposition of something very close to absolute liability. In the second of these two

[1] (1901), 2 D.L.R. 462.
[2] 14 U.C.Q.B. 328.
[3] (1929), 64 O.L.R. 4, 3 D.L.R. 367.
[4] [1938] O.R. 365, 3 D.L.R. 456.

cases, the court stated the proposition in slightly different terms following the decision in *Lochgelly Iron and Coal Co. Ltd. v. M'Mullan*[1], which held that the breach of the statutory duty was in itself negligence and entailed liability for damage caused to the plaintiff since the statute in effect prohibited the presence of the cattle on the highway. In consequence of these two decisions, *The Highway Improvement Act* was amended in 1939 and the amendment is now to be found in R.S.O. 1950, c. 166, s. 86(3), in these terms:

> . . . this subsection shall not create any civil liability on the part of the owner of horses, cattle, swine or sheep for damages caused to the property of others as a result of the horses, cattle, swine or sheep running at large within the limits of the King's Highway.

The amendment helps very little in the clarification of this problem. It appears to leave untouched claims for personal injury and it is at least arguable whether the section in itself had ever imposed any civil liability. The liability was imposed in the two cases because the Courts, using the statute as a guide to the conduct expected of a keeper of animals, imposed an absolute duty to prevent them from straying, an imposition which to me seems just as objectionable as the failure to impose any duty at all. It was held in *Noble v. Calder* that the 1939 amendment to *The Highway Improvement Act* meant a return to the common law of England as expressed in *Searle v. Wallbank*. I can gather an intention to abolish the use of the statutory standard without more to decide the case, but does it follow that the amendment was meant to introduce the common law of England as expressed in *Searle v. Wallbank?* The alternative inference is that the Courts were left to decide the matter untrammelled by the statutory prohibition and not that animals were free to stray upon the highway and that their keepers were under no duty to guard against such straying.

The last case to which I wish to refer is *Wyant v. Welch*[2]. This was a county road accident and there was a by-law declaring it unlawful for any person to suffer or permit certain animals to run at large on county highways. The case was tried by a jury and the jury found in answer to two questions that the defendant did not fail to observe the duty imposed upon him by the by-law and was not guilty

[1] [1934], A.C. 1.
[2] [1942] O.R. 671, [1943] 1 D.L.R. 13.

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of any negligence which caused or contributed to the accident. The finding of the Court of Appeal was that the by-law did not contemplate the creation of a cause of action beyond what was given by the common law but there was no definition of what right of action the common law did give and there was, in addition, the jury's finding that there had been no negligence.

My conclusion is that there is nothing in this line of authority, with the exception of *Noble v. Calder,* which holds that the common law of England as defined in *Searle v. Wallbank* was ever the common law of the Province of Ontario. I would dismiss the appeal, not, however, for the final reason stated in the Court of Appeal, which depended upon the number of animals involved, but rather because, in my opinion, the duty rejected in *Searle v. Wallbank* does exist in the Province of Ontario. As pointed out by Roach J. A., there can be no difficulty in the application of the ordinary rules of negligence to the facts in this type of case and the matter should be left to the tribunal of fact to determine, with due regard to all the circumstances, including the nature of the highway and the amount and nature of the traffic that might reasonably be expected to be upon it, whether or not it would be negligent to allow a domestic animal to be at large.

The appeal should be dismissed with costs. The learned trial judge's apportionment of responsibility has been sustained by the Court of Appeal and I do not think that this is a case where this Court should take another view.

Appeal dismissed with costs, Locke *and* Cartwright J.J. *dissenting.*

Solicitors for the defendant, appellant: Richardson & MacMillan, Toronto.

Solicitors for the plaintiff, respondent: Pringle & Pringle, Belleville, Ontario.