ANIMALS ON THE HIGHWAY

Liability for animals is a somewhat hackneyed topic, and a good deal has already been written about it,[1] nevertheless it is a branch of the law of continuing practical importance, especially in rural areas where grazing or general farming is carried on. Further it is a branch of the common law in which many rules are by no means settled, and in which there are significant differences of physical circumstance between Great Britain and Australia which may well cause Australian judges to be wary of some of the more recent English decisions or at least subject them to very careful scrutiny. It is, too, a subject in which some attention should be paid to the history of the growth of the highway system (or lack of it) in the United Kingdom and in Australia. The case of *Searle v. Wallbank*,[2] decided by the House of Lords in 1946, illustrated in a most graphic way the importance of highway history in relation to the duty to fence and the general common law duty to prevent animals straying. In that case Viscount Maugham's decision was based almost exclusively on a most scholarly account of the history of English roads, and I know of no Australian case where the history of the road system in this continent has been fully treated. Perhaps it is worthwhile to examine this development here, at least in outline.

This essay will fall into two chief parts, firstly a brief outline of the growth of highways, and highway law in the United Kingdom and Australia, and secondly some analysis of the existing rules governing animals on the highway.

I

What is a Highway?

A highway, including in that term any public way, is a piece of land over which the public at large possesses a right of way;

1. The leading text book on the subject of liability for animals is that of Dr. G. L. Williams, *Liability for Animals* (Cambridge 1939). See also Sir John Salmond, *Law of Torts* (11th ed. 1953) Ch. 17, Sir Percy Winfield *On Tort* (6th ed. 1954) Ch. 20, Professor J. G. Fleming, *The Law of Torts* (1957) Ch. 16, Dr. O. C. Mazengarb, *Negligence on the Highway* (2nd ed. 1957) Ch. 16, J. H. Ingham, *The Law of Animals* (Philadelphia 1900), especially Title III, Ch. 3, and Title IV, G. L. Williams, *The Camel Case* (1940) 56 L.Q.R. 354, and many other articles. In preparing this essay I have drawn heavily on Dr. Glanville Williams' work, and also on the judgment of Viscount Maugham in *Searle v. Wallbank* [1947] A.C. 341.
2. [1947] A.C. 341, [1947] 1 All E.R. 12.

it is "a way over which all the Queen's subjects have a right to pass and re-pass. An essential characteristic is that every person shall have the right to use it, subject however to any partial restrictions which may be imposed regarding certain classes of traffic".[3] A bridge may be part of a highway.[4] By statute this common law rule has been so far derogated from that many highways are now vested in municipal corporations or other corporate local authorities having the care and management of them. These statutes, however, have been so interpreted as to vest in the local authorities not the whole of the land on the highway, but only so much of it, above and below the surface, as is necessary for the efficient construction, care, and use of the highway. The sub-soil below and the space above the limitations so defined remain at common law in the owners of the adjoining land.[5] In New South Wales, however, the common law rule has been superseded by section 232 of the Local Government Act[6] which vests all "public roads" in municipal or shire councils, unless otherwise provided, and this fee simple vesting gives the council "the same estate and rights in . . . the site of the road as a private person would have if he were entitled to the site as private land held in fee simple, with full rights both as to the soil below and to the air above".

In New South Wales the term highway and "public road" would appear to be synonymous and public road is given a statutory definition. It is a "road which the public are entitled to use, and includes any road dedicated as a public road by any person or notified, proclaimed or dedicated as a public road under the authority of any Act . . ."[7]

Generally a public highway is not a thing that can be granted. The owner in fee simple may dedicate any portion of his land so as to make it a highway. He may do this by going on to the land and making a declaration to that effect which will operate immediately. He may build houses on each side of a slip of his land formed into a street and then, by letting those houses, constitute the land between them a public highway. He may, however, be estopped from denying against his grantee that a street exists where in a conveyance he has described the land as bounded by or abutting on such street. He may also lose his right over a portion of his soil by simply allowing the public to use it with-

3. Mazengarb, *op. cit.* p. 37.
4. See [1940] N.Z.L.R. at 315.
5. Salmond, *op. cit.* p. 300.
6. No. 41, 1919 as amended.
7. Local Government Act 1919 s.4.

out let or hindrance on his part as a public highway. The owner's exclusive right over the soil may be lost or abridged in any one of these modes.[8]

The History of Highways.

(*a*) *The United Kingdom.*

G. K. Chesterton suggested that "Before the Roman came to Rye or out to Severn strode . . . 'Twas the rolling English drunkard made the rolling English road." This is a pleasant conceit, but I think cannot be considered as a serious explanation of the growth of the highway system, although in the Australian context some support is given to it by the title of volume 10 of the Australian Digest—"Highways to Inebriates".

A rather more serious attempt to describe the historical development of highways was put forward by Lord Maugham in *Searle v. Wallbank*.[9] In that case, His Lordship, speaking of the duty to fence and to prevent animals straying, said, "Light will be thrown on both questions by a consideration of the history of the growth of our highways." Although he observed that no exhaustive history of English roads had yet been written, he then went on to give a very thorough account of this development, which throws light not merely on the questions immediately before him, but on the whole background of highway law.

The first roads in Britain were the ancient trackways of Celtic times, running along bare downs and ridges to link the centres of civilization of the time, otherwise separated by wide morasses and long leagues of forest. Then with the Romans came the great broad arrows of the imperial roads north and south from London, the only hard roads to be built in England until the eighteenth century turnpike movement and the work of Telford and Macadam. The Anglo-Saxon invaders and their immediate descendants were better served with roads than the English of Stuart times. For the great Roman roads were, for the most part, allowed to decay and by the middle ages had become mere tracks, or, at best, little better than riding ways, rutty and dusty in the summer, quagmires in the winter where packhorses sank up to the girth and waggons could not move.[10]

In mediaeval England such roads as existed were for the most part uninclosed and in a loose way the responsibility of

8. See Martin, C.J., in *Butchart v. Dodds* (1874) 12 S.C.R. (N.S.W.) 371; *Miller v. McKeon* (1905) 3 C.L.R. 50; Local Government Act 1919 (N.S.W.) ss. 220-225.
9. [1947] A.C. 341, [1947] 1 All E.R. 12.
10. See generally G. M. Trevelyan, *History of England*, especially p. 263.

local parish councils. So much is established by Chapter 5 of Edward I's Statute of Wynton,[11] which runs: "Highways leading from one market town to another shall be enlarged . . . so that there may be neither dyke, tree, nor bush whereby a man may lurk to do hurt, within two hundred feet of the one side and two hundred feet of the other side of the way." This statute, though it probably became obsolescent after Elizabethan times, was not repealed until 1767,[12] and its continued existence stresses the slowness of the process by which the great forests and chases of England were disafforested, fens and marshes drained, and lands inclosed.

The building of roads was dependent upon inclosures, since until inclosure was effected landowners or those with common rights could object. Inclosure in its turn was an integral part, and an important factor in, the break up of the feudal economy—a process extending from the fourteenth to the seventeenth centuries. Statutes of Henry III[13] and Edward I[14] empowered landlords to inclose lands provided they left enough pasture for those with grazing rights, and as the wool trade steadily grew in importance these powers were frequently exercised. Yet even as late as 1700 about half of the arable land of England was farmed on the ancient open field system of strip holding with the benefit of rights of common in pasture and waste.[15] Many open fields and commons continued to exist even after an Act of 1793 was passed to deal with the matter and after a further Inclosure Act of 1801 was passed consolidating the provisions generally inserted in private inclosure Acts—the usual instrument of inclosure in eighteenth and nineteenth century England.

As inclosure took place much road making and fencing became not merely desirable, but essential. The Act of 1801 and an amending Act of 1845 contained provisions for governmental officers to make public roads, to order interested individuals to fence them, and then to entrust the upkeep of the roads (the fences are not mentioned) to the local inhabitants, provided two justices of the peace certified the roads had been sufficiently formed and completed.

Eighteenth and nineteenth century interference in relation to roads was not confined to inclosures and the making of public

11. 13 Edw. I (1285) c.5.
12. 7 Geo. III c.42 (s.57).
13. 20 Hen. III c.4.
14. 13 Edw. I, c.46.
15. See *Historical Geography of England before* 1800, edited by H. C. Darby, p. 469.

roads at governmental expense: the legislature was also active in relation to roads constructed, or at least kept, for private profit. The first turnpike trust was established in 1663 by an Act of Charles II;[16] by 1760 many turnpike roads, upon which tolls had to be paid, were in operation, and in the forty years that followed, over a thousand turnpike Acts were passed. Whatever the demerits of the turnpike system may have been, it was due in large measure to the enterprise of the turnpike men that the English road system expanded so rapidly to cover the land, though in a most haphazard manner, which frequently cannot have been for the real benefit of a rapidly developing community. In 1864 Parliament stepped in and gave a Select Committee of the Commons power to refuse the renewal of turnpike Acts. Exercise of this power led to an average of one thousand five hundred miles of road being dis-turnpiked each year. The maintenance of dis-turnpiked roads was made a local responsibility, though in keeping with the robust feeling of the countryside no duty to fence was imposed.

It is hardly surprising that from this piecemeal development of the highway system in the eighteenth and nineteenth centuries a sturdy but most inelegant series of rules grew up governing highway law in general, including liability for injuries done by, and to, animals.[17] By the nineteenth century it had been established that in a broad sense members of the public used roads at their peril and this led to the rule that those whose land adjoined the highway were not liable for harm caused by animals straying on to the road, except in negligence or nuisance, although the old action of cattle trespass would be available for damage caused through trespass to adjoining land. Those whose premises adjoined a road must also take the risk of damage due to inevitable accident, for instance damage done by animals which stray off the road. The ancient right of distress damage feasant was available to those who found animals trespassing on their land. Local authorities were liable for misfeasance in the upkeep of roads, but not for a mere failure to repair, or nonfeasance.

Viewed against their historical background these sturdy rules seem commonsense enough, but the advent of modern motor

16. 15 Car. II c.1.

17. The remote origin of many rules governing liability for animals has been seen to lie in the primitive notion of identifying a man with his animals. See Williams, *Liability for Animals* Ch. 15; Holdsworth in 55 L.Q.R. p. 890; Holmes, *The Common Law* pp. 15-24; Pollock and Maitland, *History of English Law* vol. II p. 473; Fleming, *Law of Torts* p. 335.

traffic has tested them severely, and few would suggest that the present rules are wholly satisfactory.[18]

(*b*) *Australia.*

Historically the Australian scene is a rather different picture. By the time that white settlers first came to this continent agricultural and economic feudalism were largely dead in the home country, and rights of common had very largely ceased to be of importance. The feudal agricultural system never grew in Australia, any more than the feudal political system. On the other hand the vast, unconquered and unoccupied spaces of Australia must have posed to the settler and the road maker much the same problems as faced Englishmen in the home country in the Middle Ages, although the Australian problems were, and still are, on a very much larger scale geographically.

To combat these difficulties, however, were several salient factors. Australia was, as it were, a clean slate on which much could be written, unbedevilled by the remains of feudal subsistence agriculture, and aided by a knowledge of the more scientific and effective methods of road making evolved by Telford and Macadam, and on the legal side by legislation of a modern kind. Fortunately the problems of road making and administration in Britain were problems being faced by the British Parliament at the very time when the Australian Colonies were founded, and perhaps for this reason, among others, the provision and maintenance of highways has always been a largely governmental responsibility in Australia.

As in Britain, however, the growth of the highway system cannot be treated without considerable attention to the pattern of land development and land policy. A land policy, or at least the means of enforcing a consistent land policy, was for many years lacking in Australia. Sir Keith Hancock stresses this where he writes:

> "The continent has been peopled by a civilization ready made: the British have imposed themselves on it . . . their advance resembles the forward-scattering of a horde, and sometimes, like the onrush of a horde, it has been devastating."[19]

This appreciation is borne out by many other historians although it would perhaps be well not to blame contemporary administrators for failing to follow a consistent land policy because

18. See *infra* pp. 241-2.
19. W. K. Hancock, *Australia* (1930) p. 32.

firstly, there seemed to be no need of one in the early days of the settlement, and secondly, conditions in the new colony were such as to leave statesmen in doubt as to how the country might develop. Until 1831, huge land grants were made both to private individuals and to development corporations, *e.g.*, the grant of 500,000 acres to the Australian Agricultural Company, including coal mines in Newcastle.

The natural consequence of the failure to provide a land policy was the growth of "squatting". The landless went further and further afield despite attempted restrictions. Governor Gipp in 1840 wrote, "As well attempt to confine an Arab within a circle traced on the sand as to confine the graziers and wool growers of New South Wales within the bounds that can possibly be assigned to them."

The discovery of gold and the consequent gold rushes again led to fast material progress and development, but again not to system, so that until the close of the nineteenth century many of the roads of the continent were called into being by the wanderings of explorers, pioneering would-be squatters and gold miners.

It was unlikely that against this background a well-planned system of highways should grow up. Certainly it was not to be expected that the rules of highway law would be framed with any elegance or system.

It would be quite wrong, however, to suppose that the Imperial or early Colonial governments were unaware of the need for roads or of the need to regulate their construction and use. David Collins wrote in 1798:

> "There [*i.e.* at Rose Hill] also the Governor in the course of the month laid down the lines for a regular town. The principal street was marked out to extend one mile . . . On each side of this street, whose width was to be two hundred and five feet, huts were to be erected . . .
>
> "While these works were going on at Rose Hill, the labouring convicts at Sydney were employed in constructing a new brick storehouse, discharging the transports, and forming a road from the town to the brick-kilns . . ."[20]

W. C. Wentworth said in 1820:

> "The roads and bridges, which have been made to every part of the colony, are truly surprising, considering the short

20. David Collins, *An Account of the English Colony in New South Wales* (Colliers edn. 1798) p. 93.

period that has elapsed since its foundation. All these are either the work of, or have been improved by, the present Governor; who has even caused a road to be constructed over the western mountains, as far as the depot at Bathurst Plains, which is upwards of one hundred and eighty miles from Sydney. The colonists, therefore, are now provided with every facility for the conveyance of their produce to market; a circumstance which cannot fail to have the most beneficial influence on the progress of agriculture. In return for these great public accommodations, and to help to keep them in repair, the Governor has established toll gates on all principal roads. These are farmed out to the highest bidder, and were let during the year 1817 for the sum of £257."[21]

Dr. J. D. Lang wrote:

"One of the first duties of a governor in a new colony is to open practicable lines of communication between its different settlements, and to render its available territory easily accessible; and there is no colony in the empire so favourably circumstanced, in this important respect, as New South Wales undoubtedly was during the Government of Major-General Macquarie. . . .

"Governor Macquarie's exertions in this respect were above all praise. In all settled districts of the colony he formed excellent roads, and constructed substantial wooden bridges across all the rivers and creeks on the way."[22]

Governor Macquarie's own *Journal of his Tour in New South Wales,* written in 1810, contains frequent references to the construction of and marking out of new roads by the government.

The concern of the Legislative Council in New South Wales for the regulation of the Colony's roads found expression in the Roads Act of 1833, an Act passed because it was thought "expedient to provide for making, altering and improving the roads and ways of the colony of New South Wales and for opening and improving streets in the towns and villages thereof."[23] The Governor was granted power to gazette new public roads, to decide whether the local parish or the government should

21. W. C. Wentworth, *A Statistical Historical and Political Description of the Colony of New South Wales* (1820) pp. 43-44.
22. J. D. Lang, *An Historical and Statistical Account of New South Wales* (4th edn. 1875) p. 135.
23. Vol. I, Callaghan's Statutes p. 2060.

maintain the road. Certain provisions were made for fencing, the collection of tolls and a series of other matters. This Act was the forerunner of several passed between 1837 and 1840 dealing with roads in Sydney, in Cumberland Shire and with parish roads throughout New South Wales. Since that time the history of Australian roads has been closely linked with that of central and local government, a good deal more closely than in the United Kingdom. It has for long been recognised that "it is one of the first duties incumbent on the government of a new country to provide means of transport", as Griffith, C.J., pointed out in *Miller v. McKeon.*[24] Nevertheless, although, unlike many roads in the United Kingdom, Australian roads have been largely government built, owned, and controlled, most of the common law rules have been held to apply, even in relation, for instance to duties of repair and maintenance. For example in *Municipality of Sydney v. Bourke*[25] it was held that the Municipal Council of Sydney was not liable for non-feasance consisting in non repair of a road vested in it by statute, where as a result of the failure to repair a driver was thrown from his van and killed.

Despite wide geographical differences and differences in the pattern of land development, highway law and the law relating to liability for animals in Australia has remained very similar to that in force in the United Kingdom, and despite the primitive origin of many of the rules, for instance strict liability for cattle trespass and for damage done by dangerous animals, generally "they are not out of accord with modern views of policy."[26] Further thanks to the predominantly agricultural economy which was England's during the formative period of the common law and the comparatively late completion of inclosures and the making of a road system worthy of the name, many even of the recent decisions in relation to animals on the highway are as valid in the Australian context as in the English.

Strangely enough the recent House of Lords decision in *Searle v. Wallbank*[27] to the effect that there is no duty incumbent on an occupier of land to prevent animals not known to be dangerous from straying into the road, is a decision which can be much more easily defended in a country like Australia with her vast holdings of grazing land, than it can in heavily built up England. Even so Professor Fleming has recently attacked its

24. (1905) 3 C.L.R. 50. 25. [1895] A.C. 433.
26. See Fleming, *The Law of Torts* p. 335.
27. [1947] A.C. 341.

effect under modern conditions in this country as being "to subsidize graziers and pastoralists at the expense of the motoring public."[28] He goes on to suggest:

> "It might well have been left to the ordinary mechanism of negligence litigation to decide in each individual case whether, in a particular locality, a landowner should or should not be expected to adopt precautions against his cattle straying on the road, instead of adopting a hard-and-fast rule which, in many situations, is difficult to justify under modern conditions of traffic. Under such a flexible solution, it would have been possible to impose a duty on occupiers of land in a town or along a main road, such as the Hume Highway, but to relieve them in remote country districts where road-users might well be expected to adopt safeguards themselves so as to avoid collisions with straying livestock."[29]

Special State Legislation

Although the pattern of the old common law rules concerning animals on the highway has been fairly closely followed, nevertheless there is a series of statutes in each of the States concerning public roads,[30] fencing,[31] and distress damage feasant.[32] No attempt has been made, however, in the treatment that follows to deal with all of them. I have only tried to deal with the New South Wales legislation and give some references to special legislation elsewhere.

Apart from highway and fencing legislation, there is legislation in all the States, other than Queensland, dealing with damage done by dogs.[33] Where such legislation applies, it dispenses, to a varying extent, with the common law rule that in order to recover damages done by a dog the plaintiff must show that the dog had a previous mischievous propensity known to its owner.

II

The several heads of common law under which liability for animals may arise are:

28. Fleming, *op. cit.* p. 350.
29. *ibid.* For further discussion of this topic see *infra* pp. 241-2.
30. In New South Wales, the Local Government Act 1919.
31. The Dividing Fences Act 1951 (N.S.W.).
32. The distress damage feasant legislation is well set out in Williams, *Liability for Animals* Appendix II.
33. Dog and Goat Act 1898 (N.S.W.) s.19; Dog Act 1903-28 (W.A.) s.24; Dog Act 1934 (Tas.) s.13; Dog Act 1928 (Vic.) s.20; and see Fleming, *op. cit.* p. 344.

(1) Strict liability for injuries to the person or property by dangerous animals, including liability under the *scienter* rule.

(2) Liability for cattle[34] trespass.

(3) Liability for negligence.

(4) Miscellaneous heads of liability, *e.g.*, the liability of the occupier of premises to persons entering thereon, where the source of danger may be a dangerous animal—or liability for nuisance as in keeping pigs too near one's neighbour's fence.

It will now be necessary to inquire into the applicability of these common law actions—the *scienter* action, cattle trespass, negligence, and nuisance—to three sets of circumstances:

1. Where animals are brought upon the highway and cause damage to other road users, or to the road itself.
2. Where animals brought upon the highway cause damage to adjoining occupiers.
3. Where animals straying from private land adjoining the highway cause damage upon the highway.

1. DAMAGE CAUSED BY ANIMALS BROUGHT UPON THE HIGHWAY TO OTHER ROAD USERS, OR TO THE ROAD ITSELF.

(*a*) *The Scienter Action.*

Damage caused to person or property by a dangerous animal renders the owner, or person in possession and control of the animal, liable in damages to those injured by it while acting according to its savage nature, and this principle of strict liability applies to all the fact situations enumerated above.

It is often said that for the purposes of this branch of the law animals are divided up into two classes—animals *ferae naturae* and animals *mansuetae naturae* (*i.e.* wild and domestic animals)—and that for damage caused by the former the person in possession or control is held absolutely or strictly liable, whereas liability only exists in relation to domestic animals where such an animal has a dangerous propensity known to its owner. It is preferable to use the terms "dangerous" and

34. "Cattle" is a comprehensive category being synonymous with the old term *avers*, and includes not only oxen, horses, donkeys, sheep, goats, and pigs, but also fowls, ducks, geese, and possibly tame deer. See Fleming, *op. cit.* p. 337.

"harmless" animals as terms of art[35] since the *ferae/mansuetae* distinction does not coincide with the distinction in the law of property between animals *domitiae* and *ferae naturae*. For example rabbits, pigeons, and probably bees are regarded as *ferae naturae* in the law of ownership, yet they are not regarded as naturally fearsome in the law of *scienter*.

A *dangerous animal* may be, firstly, an animal of an obviously dangerous nature (*e.g.* a tiger or a gorilla) although individuals may be more or less tamed, or secondly, an animal belonging to a generally domestic species (*e.g.* horses, cows, sheep) which has in individual cases given signs of the development of a vicious disposition. The test of viciousness or dangerousness is danger to mankind, as was decided in *Buckle v. Holmes*.[36]

He who keeps an animal belonging to a dangerous class is liable at his peril for permitting such an animal the opportunity of doing harm, and is liable for direct harm caused by the animal, irrespective of negligence. *May v. Burdett*[37] is authority for this proposition, a case in which the plaintiff was bitten by a pet monkey. The House of Lords has described this strict rule as a "special rule of practical common sense".[38] It is not, however, the act of keeping the dangerous animal that is unlawful; this would seem to be a rightful act, but if harm ensues from it, even through inevitable accident, it is the ground of legal liability. An American case, *Scribner v. Kelly*,[39] seems to give the lie very clearly to the old view that keeping a dangerous animal was itself unlawful. In that case a horse bolted at the sight of an elephant that was being led along a road. It was held that the defendant was not liable because the baleful result flowed, not from a vicious propensity on the part of the elephant, but merely from its appearance. In *Knott v. L.C.C.*[40], Lord Wright supported the *Scribner v. Kelly* approach when he said, "It is not unlawful or wrongful to keep such an animal; the wrong is in allowing it to escape from the keeper's control with the result that it does damage."

When the damage done by an animal from a savage species is natural to the species, then the defendant's liability is independent of any prior knowledge of vicious tendency, and not excluded by an honest and well founded belief that the animal

35. See G. L. Williams, *The Camel Case* (1940) 56 L.Q.R. 354.
36. [1926] 2 K.B. 125.
37. (1846) 9 Q.B. 101 and see *Rands v. McNeil* [1954] 3 W.L.R. 905.
38. *Read v. Lyons* [1947] A.C. 156 at 171 *per* Lord Macmillan.
39. (1862) N.Y. 38 Barb. 14. See Ingham, *The Law of Animals* p. 238.
40. [1934] 1 K.B. 126 at 138.

was tame, as was decided in *Filburn v. The People's Palace*.[41] Such a belief may go to mitigate damages but not to exclude liability.

On the other hand, where the damage is not natural to the species, then the plaintiff must give affirmative proof that the defendant knew of the mischievous tendency in the particular animal involved. In the case of prima facie dangerous animals knowledge (*scienter*) is presumed in the defendant; in the case of normally domestic animals it must be proved. It is not sufficient technically to prove merely means of knowledge where a "harmless" animal is involved, nor to prove a certain tendency on the part of the animal to do damage of the kind complained of. Both of these, however, may well establish a *separate* cause of action in negligence, and, though not conclusive evidence of *scienter* itself, go towards proof of *scienter*. Further, in giving proof of *scienter* it is not necessary to prove that the animal has on any other occasion actually done harm of the kind complained of: showing a tendency to do such harm and the defendant's knowledge of this is enough.

The law relating to the previous vicious act may be summed up as follows:

(i) The act relied on must show viciousness.

(ii.) The act must show the particular kind of viciousness complained of.[42]

(iii) An isolated act of viciousness is enough.

(iv) The act relied on may have taken place at any time prior to the act complained of—or possibly even subsequent to it.

(v) Attempts are sufficient — merely baring the teeth and growling by a dog was held sufficient in the Canadian case of *Wood v. Vaughan*.[43] But this would seem to be only a glimmer of evidence, and it is doubtful if this case should be followed.

Despite the technicality of the *scienter* action and the complex rules just enumerated, the actual working of the action, especially before juries, seems to have accorded fairly well with common sense. Even Dr. Glanville Williams, who criticises the action, points out that in only two of the many cases that he cites

41. (1890) 25 Q.B.D. 258.
42. *Pacy v. Field* (1937) 81 S.J. 160. See Williams, *Liability for Animals* p. 302.
43. (1888) 28 N.B.R. 472.

in his treatment of it, in which the jury were given an opportunity to find a general verdict in favour of the plaintiff, did they fail to do so. In all other cases, however slender the evidence of *scienter,* if the defendant won the case it was due to judicial intervention at first instance, or on appeal.

Nevertheless, despite a certain readiness on the part of juries, and it is suggested, judges also, to find in favour of injured plaintiffs where there is scant evidence of *scienter,* the classification of animal species into savage and harmless—the one requiring no proof of *scienter,* the other having this as an essential characteristic to ground an action—is important, and was reaffirmed in *McQuaker v. Goddard,*[44] a case in which camels were classed as domestic animals in Britain, a decision in accord with the Western Australian case of *Nada Shah v. Sleeman.*[45] Whether a particular kind of animal is to be classed as savage or harmless is a matter of law for the Court. "It is not competent to the courts to reconsider the classification of former times and to include domestic animals of blameless antecedents in the class of dangerous animals even when wandering on the roadsides."[46] Rules of law, not of fact, govern the status of animals. Legally, it is natural for an elephant to attack humanity, not a camel, or a bull.[47] Further, as a matter of law the animal must, it seems, do some positive act. The case of *Higgins v. Searle*[48] gives an example of this doctrine—though one that is open to considerable criticism. There a sow escaped from its sty, lay in the roadside waste, and rose suddenly as a horse and van approached. This frightened the horse which ran in front of an oncoming car and damaged it. The owner of the sow was held to be not liable to the car owner, as the jury found the defendant not negligent. It is difficult to find the ratio of this case. Heuston, Salmond's editor, says, "In order to make him liable it would be necessary to show that the sow did some act beyond merely being where it was."[49] Surely by getting up it did do a positive act? This would hardly seem to be a *scienter* case at all. The New Zealand Supreme Court found for the plaintiff in very similar circumstances where a sow was involved,[50] on the ground that it was unreasonable to allow animals to stray on much frequented roads.

44. [1940] 1 K.B. 687.
45. (1917) 19 W.A.L.R. 119.
46. *Heath's Garage Ltd. v. Hodges* [1916] 2 K.B. 370 at 383 *per* Neville, J.
47. *Hudson v. Roberts* (1851) 6 Ex. 697.
48. (1909) 100 L.T. 280.
49. Salmond, *Law of Torts* p. 653.
50. *Turner v. August* (1909) 11 G.L.R. 715.

Before leaving the *scienter* action, perhaps an interesting New South Wales statute should be mentioned. The Dog and Goat Act, 1898 (N.S.W.), s. 19 provides: "The owner of every dog shall be liable in damages for injury done to any person, property, or animal by his dog, and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner."[51] Similar legislation exists in the other States of Australia, with the exception of Queensland.[52]

To sum up, when dangerous animals, whether they be *ferae naturae* or *mansuetae naturae* but shown to their owner's knowledge to be dangerous, are brought upon the highway and other highway users are injured thereby, the animal's owner is strictly liable unless he can prove one of the following:—

(1) Contributory negligence (*e.g.* irritation of the animal).[53]

(2) Act of God—although in *Nichols v. Marsland* Bramwell B. expressed doubts on this when he said, "If a man kept a tiger and lightning broke its chain and it got loose and did harm, I am by no means sure that the man would not be liable."[54] Presumably in this particular situation the tiger would be dead, but that hardly affects the importance of the Baron's statement in law.

(3) The plaintiff was a trespasser, provided the dangerous animal is a "deterrent" danger, not a "retributive" danger.[55]

(4) *Volenti non fit injuria.* Patting a dangerous animal after a warning might well ground such a defence.

The act of a third person is probably not a defence.

(*b*) *Cattle Trespass upon the Highway*

The presumption of modern common law is that the soil of a highway is owned by the landowners or landowner on either side *ad medium filum* or altogether, as the case may be; for

51. As to the statutory liability under the Dog and Goat Act (N.S.W.) see *Simpson v. Bannerman* (1932) 47 C.L.R. 378, where although the plaintiff was technically a trespasser yet he was still allowed to recover from the defendant, whose dog, not hitherto known to be vicious, bit him on the arm. The New South Wales Act is wider in the extent to which *scienter* is dispensed with than the corresponding English, South Australian, and Victorian Acts.
52. See note 33 *supra.*
53. See *Baker v. Snell* [1908] 2 K.B. 352 and Sir Frederick Pollock, *The Dog and the Potman; or Go it Bob!* (1909) 25 L.Q.R. 318-19.
54. (1875) L.R. 10 Ex. 255 at 260.
55. See Salmond, *Law of Torts* p. 585.

Bracton, however, the King's Highway meant what it said—*regia via*—and it was not until 1343 that highways were held to be private fees, the King's only rights in them being the right of passing and re-passing for himself and his subjects.[56] Now, however, by statute many highways are vested in the Crown or in local authorities, and they have in many instances the same rights as private owners.

As has been seen, in New South Wales under the Local Government Act, 1919, s. 232, public roads as defined in the Act are vested in fee simple in the municipal and shire councils of New South Wales. It would seem therefore that a shire council or municipal council could successfully bring an action for cattle trespass where cattle brought upon a road are doing any damage to the road, or where there is intentional depasturing of the road.[57] An action for trespass at common law would, probably, lie in these circumstances or a distress damage feasant could be made. On the other hand, when cattle are lawfully being driven along the highway, and, in passing, without negligence on the drover's part, they nibble the grass of the highway or crops growing along it, the plea of inevitable accident would, I think, as in Great Britain, be a good defence.

Turning from common law to statute, there are in New South Wales penalties for the straying of animals on public roads, and power is given to councils by the Local Government Act, 1919, s. 426 to impound[58] animals wandering at large in public places. So far as shires are concerned, the power to impound does not apply except—

(1) when tick fever is prevalent or expected, or

(2) in villages, towns, or urban areas, or

(3) in respect of public places, other than roads, which are sufficiently fenced.

The statutory powers clearly add to the common law powers which would otherwise be enjoyed by councils.

56. Williams, *Liability for Animals* p. 368.

57. See *Burke v. Perry Shire* [1918] Q.W.N. 10; *Shire of Fitzroy v. Hayes* [1913] Q.W.N. 21; *Edwards v. Wallarobba Shire* (1913) 1 L.G.R. (N.S.W.) 173.

58. The right to impound is a very ancient one in origin. It occupies a place not merely in law but also in literature. In Shakespeare's *King Lear*, Kent mentions it, and as Viscount Maugham pointed out, readers of Dickens will remember that Mr. Pickwick was at one time removed by Captain Bolding to the village pound under the imputation of being a "drunken plebeian".

(*c*) *Nuisance and* (*d*) *Negligence on the Highway in connection with Animals brought upon the Highway.*

Leaving aside the *scienter* action, the action for cattle trespass, and statutory penalties, liability for damage done on the highway is not a strict one. The plaintiff must in all cases prove negligence and it seems he cannot shift this burden by suing in trespass.[59] There may be liability in nuisance and negligence but everything depends on particular circumstances. Whether a defendant is liable in nuisance or negligence largely depends on whether the animal which caused damage was brought on the highway, or merely strayed there. If the animal was brought upon the highway by the defendant he will be liable; if it merely strayed on to the road he will not. In *Deen v. Davies*,[60] a pony was ridden to a market-town, tethered insecurely in a stable contiguous to the road, broke away, and trotting home knocked down the plaintiff. The defendant owner was held to be liable. In *Wright v. Callwood*,[61] Cohen, L. J., commented that the correct basis on which *Dean v. Davies* can be upheld is as authority for the proposition "that it is the duty of those who bring or drive animals on to the highway to take reasonable care that they do no damage to the person or property of others. It is a question of fact in each case whether the transit along the highway, and therefore the duty, has come to an end, and in *Deen v. Davies* the transit was still notionally in progress, for the stable was contiguous to the highway."[62]

Lastly the keeper of animals will be liable in *nuisance*, where he brings upon the road sufficient numbers of them to cause an obstruction, and it is necessary to rely on nuisance where there is no escape, or no negligence or where the animal is not dangerous.

2. Where animals brought upon the highway cause damage to adjoining occupiers

(a) The *scienter action* applies to the escape of a dangerous animal and damage caused as a direct result of it, to the person and property of adjoining occupiers.

59. See Winfield and Goodhart in 49 L.Q.R. 359.
60. [1935] 2 K.B. 282.
61. [1950] 2 K.B. 515.
62. *Id.* at 526. There is a whole series of cases dealing with the duty of care incumbent upon those who bring animals upon the highway. Some of the more important are: *Tucker v. Hennessy* [1918] V.L.R. 56; *Brackenborough v. Spalding U.D.C.* [1942] A.C. 310; *Heenan v. Iredale* [1901] N.Z.L.R. 387; *Catchpole v. Minster* (1913) 109 L.T. 953; *Aldham v. United Dairies* [1940] 1 K.B. 507; *Lathall v. Joyce* [1939] 3 All E.R. 854. And see Mazengarb, *Negligence on the Highway* pp. 64-68.

(b) *Cattle Trespass from the Highway.*

Here can be posed the question, where cattle brought upon the highway are being lawfully driven along it and stray into land of an adjoining owner and cause damage, what rights has he? May he make a distress damage feasant? May he bring an action for cattle trespass? And how far has statute affected his position?

There are three possible answers to the general question of liability.[63] (1) The ordinary rules of trespass and distress damage feasant could apply, thus making the owner of beasts strictly liable for transit. (2) This rule could be modified by a duty to fence against the highway based on prescription or statute. (3) The escape of cattle from the highway could be regarded as inevitable accident, provided it occurs without negligence.

Leaving aside the question of statute for a moment, the common law has come down in favour of the third answer. *Goodwyn v. Cheveley*[64] decided as much by establishing that there was no general duty to fence against the highway, while at the same time the owner of the cattle was not a trespasser until he refused to remove them within a reasonable time after notice. The reason why inevitable accident is a good defence in such cases was well set out by Blackburn., J., in *Fletcher v. Rylands*:[65]

> "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger . . . In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident."

The *Goodwyn v. Cheveley* principle was notably applied and extended in *Tillett v. Ward*,[66] where the injured plaintiff, an ironmonger, whose shop was damaged by an ox, was held to have no remedy although, firstly, the affair happened in the street of a town and, secondly, the ox came through a door normally left open for business purposes; and in *Gayler and Pope v. Davies*,[67] where the animal, a pony, broke through a shop window.

63. As Dr. Glanville Williams points out: *Liability for Animals* p. 375.
64. (1859) 4 H. & N. 631.
65. (1866) L.R. 1 Ex. 265 p. 286.
66. (1882) 10 Q.B.D. 17.
67. [1924] 2 K.B. 75.

The law requires the defendant to use due care, but the landowner or occupier must run the risk of trespass by inevitable accident. The principle seems clear and has been applied in Victoria in the case of *Bourchier v. Mitchell.*[68] However, for the defendant to escape liability certain conditions must be fulfilled. (1) The animals must have been lawfully on the highway—and not merely have been straying there. If they are merely straying the right to sue in trespass and the right to levy a distress damage feasant exist. (2) The drover must not have been guilty of negligence. (3) The drover must have made a fresh pursuit—otherwise damages may be obtained in respect of the delay.

Difficult problems could arise where cattle escape not merely to lands adjoining the highway, but to lands of a different owner, removed some distance from the highway. There seems to be no modern authority in relation to this question, which as Glanville Williams points out could be given any one of three possible answers.[69] Firstly the rule as to inevitable accident might be held to apply *ad infinitum,* secondly it might be taken to apply only to land substantially adjoining the highway, or thirdly only to land actually adjoining the highway. It is submitted with respect that the second solution would be the most workable since courts would not be tied to a hard-and-fast rule, but could employ the idea of *substantial* adjoinment as a flexible criterion to be used to meet the facts of particular cases.

So much for the common law position. By statute in New South Wales cattle found at large or trespassing in a public place may be impounded,[70] and goats or swine which trespass by entering enclosures which are sufficient for horses and cattle may be destroyed.[71] Further where a municipal or shire council has served an order to fence against the road on an owner or occupier under s. 249 (i) or (h) of the Local Government Act and cattle trespass upon his land from the highway this would, it is submitted, preclude his action even for negligence, as it would itself be contributory negligence.

(c) *Negligence and* (d) *Nuisance from the Highway.*

It is, I think, unnecessary to say more under this heading except that where a trespass from the highway takes place due to the defendant's negligence, the adjoining owner or occupier will

68. (1891) 17 V.L.R. 27. 69. Williams, *Liability for Animals* p. 375.
70. Local Government Act (1919) s.426.
71. Local Government Act (1919) s.438.

have a good cause of action. Liability might also be grounded in nuisance, for instance where the defendant permits his animals on the highway to obstruct the plaintiff occupier's right of ingress and egress to and from his premises.[72]

3. The Liability of those whose animals stray upon the highway towards highway users.

(a) The *scienter action* will of course be available for damage caused to other highway users by the escape or straying of dangerous animals, provided the damage caused is a direct result of the animals' vicious propensity. The mere blocking of a highway, for example, would not give a cause of action under this rule.

(b) The action for *cattle trespass* in this situation has already been considered.

The actions of (c) *negligence* and (d) *nuisance* will often be available to those upon the highway who suffer damage from animals which stray upon it from adjoining land, but it is here that the rules of residuary liability in negligence though of great importance are very difficult to apply, and the law itself most unsatisfactory. Professor Fleming attributes this to the continued existence of the rule that an owner or occupier of land is under no duty to prevent animals not known to be dangerous from straying into the road.[73] Dr. Glanville Williams has taken trouble to expose the difficulties and inconsistencies of three lines of cases dealing with straying animals, where, firstly, they cause damage to pedestrians, secondly, where they scare horses, and thirdly where they obstruct traffic. In almost all the cases which he cites the defendant was found not liable.[74]

The cases which have attracted the most criticism are perhaps *Heath's Garage v. Hodges*,[75] *Deen v. Davies*,[76] *Searle v. Wallbank*[77] which reaffirmed the old principle, and *Brock v. Richards*.[78] In *Heath's Case*[75] while the plaintiff's car was being driven slowly in daylight two sheep—the stragglers from the defendant's flock—jumped from a bank, one running in front of the plaintiff's car, as a result of which the driver lost control and the car was damaged. The defendant was held by the Court of Appeal not to be liable either in nuisance or negligence, since

72. *Cunningham v. Whelan* (1917) 52 I.L.T. 67.
73. Fleming, *Law of Torts* p. 351.
74. Williams, *Liability for Animals* p. 381 and ff.
75. [1916] 1 K.B. 206 and 370.
76. [1935] 2 K.B. 282.
77. [1947] A.C. 341.
78. [1951] 1 K.B. 529.

he was under no duty to keep his sheep from straying. In *Deen v. Davies*,[79] as has been seen, the defendant was held liable for damage caused by the escape of his pony, which was not a vicious animal, from a roadside stable in a market town. This decision provides an exception to the immunity rule but the ground of the decision is by no means clear. In *Brook v. Richards*[80] the other exception to the immunity principle was stated as existing where the animal which strays is known to have dangerous propensities, but it was held that a mere special proclivity towards straying was not sufficient to create a duty to prevent the animal straying. Hence the motor cyclist injured by reason of being jumped upon by the defendant's horse had no claim against the defendant.

The present state of the law is certainly unsatisfactory, but as Mazengarb points out, "it would be quite impracticable for the law to specify the particular type of domestic animals which must be kept off the road," fencing would be costly and in any case, even if erected, "the occupier would be at the mercy of every person . . . who left the gate open."[81] Professor Fleming's suggestion of a flexible solution, however, would seem to be worthy of consideration. It was possibly such a solution, to depend on the facts of each individual case and the application of the general rules of negligence to them, that the Court had in mind in *Deen v. Davies*[82] where it drew a distinction between the degree of care to be exercised in urban and rural areas.[83]

Criminal penalties may arise out of the straying of animals upon the highway. The old mediaeval courts-leet frequently made it an offence for certain animals (*e.g.* swine) to wander in the streets of a town, but in country districts until the 19th century no restriction on straying animals is recorded, and this was so until in Britain a series of Acts[84] provided for the establishment of public pounds, the impounding of animals for straying in public places, the fining of the owners of such animals, and so on, and these provisions were made to apply to rural as well as urban areas.

In New South Wales the most important piece of legislation in this respect is the Local Government Act, 1919. Like the English legislation, this Act creates criminal penalties for breach of its provisions: *e.g.* s. 249A imposes a £5 fine upon the owner

79. [1935] 2 K.B. 282. 80. [1951] 1 K.B. 529.
81. Mazengarb, *Negligence on the Highway* p. 61.
82. [1935] 2 K.B. 282.
83. But *contra Brackenborough v. Spalding U.D.C.* [1942] A.C. 310.
84. e.g. Town Police Clauses Act 1894.

of an animal straying in a public road unless the defendant can show that he was not negligent. Because of the criminal nature of the penalties involved, doubt exists as to whether civil remedies are available also for breach of its provisions.

Damage done to animals

Until the coming of the motor car, highway accidents were rare. Most injuries to animals at the present time are caused by cars. A motorist is entitled to assume that dogs, cats, and fowls will get out of his way, but he will be liable if he deliberately runs into them, negligently fails to anticipate their movements, or negligently fails to avoid them. In the case of horses, cattle, and sheep, however, which are neither so agile nor so intelligent, their owners are entitled to a high standard of care from motorists. But the owners or those in control of animals must not themselves be guilty of contributory negligence.[85]

Quite apart from motor accident cases, however, there are a number of interesting Australian decisions dealing with injuries to animals caused by local authorities engaged in road works, or the spraying of roadside weeds.[86] In so far as any principles emerge from the cases it seems that the test of a highway authority's liability for injury caused to an animal is the likelihood of harm being caused to animals by road work. Liability for damage caused by the spraying of prickly pear and other roadside weeds would appear to be avoided by giving sufficient warning to the owners of animals, although where a statutory provision exists prohibiting the depasturing of animals on roadside waste then the authority will not be liable in negligence if animals take the poison and die.

R. W. Bentham*

85. See Mazengarb, *Negligence on the Highway* p. 64.
86. See *Butterworth v. Montgomery* (1924) 20 Tas. L.R. 50; *McLarty v. Hannon* [1914] V.L.R. 526; *Shire of Benalla v. Cherry* (1911) 12 C.L.R. 642, [1912] V.L.R. 98; *Burke v. Perry Shire* [1918] Q.W.N. 10; *Shire of Fitzroy v. Hayes* [1913] Q.W.N. 21; *Edwards v. Wallarobba Shire* (1913) 1 L.G.R. (N.S.W.) 173; *McIntyre v. Hams* [1911] S.A.L.R. 16

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