62/77

SUPREME COURT OF VICTORIA — FULL COURT

BRISBANE v CROSS

Young CJ, McInerney and Dunn JJ

16, 17, 21 March, 30 May 1977

[1978] VicRp 5; [1978] VR 49 (Noted 52 ALJ 485; 11 MULR 585)

CIVIL PROCEEDINGS – NEGLIGENCE – MOTOR CYCLIST INJURED WHEN HE COLLIDED WITH AN ANIMAL WHICH HAD STRAYED FROM THE OWNER'S LAND – ABSENCE OF DUTY OF CARE TO USERS OF HIGHWAYS BY OWNERS OF LAND ADJOINING SUCH HIGHWAYS FROM STRAYING ANIMALS (NOT KNOWN TO BE DANGEROUS) – *SEARLE v WALLBANK* (1947) AC 341 FOLLOWED.

A motor cyclist collided with an Angus vealer steer which was running on the highway – a country road. The complainant's claim was framed in negligence, alleging the collision was caused by the negligence of the defendant in failing to prevent the steer from escaping on to the roadway.

The Magistrate found that the defendant knew that the vealer had a propensity to break through the fence and that the defendant took insufficient precaution to see the fence was intact, and further that if a duty of care existed he was negligent. However after examining the authorities and particularly *Searle v Wallbank* (1947) AC 341, he held the defendant owed no duty of care and accordingly dismissed the claim. Upon Order Nisi to review—

HELD: Order nisi discharged.
1. The decision in *Searle v Wallbank* (1947) AC 341; [1947] 1 All ER 12; 176 LT 104; [1947] LJR 258; 63 TLR 24 is generally regarded as laying down two propositions, viz. (1) that the owner of land adjoining a highway is under no duty to users of the highway so to maintain his hedges and gates along the highway as to prevent his animals from straying on to the highway, and (2) that the owner of land adjoining a highway is not under a 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.

2. If the rule so enunciated in *Searle v Wallbank* is part of the law of Victoria today the Magistrate was clearly right in dismissing the complainant's claim.

3. Neither the By-law 19 of the Shire of Rodney nor either of the statutory provisions relied upon (s8(d) of the *Summary Offences Act* 1966 and s73(1) and (3) of the *Country Roads Act* 1958) gave a private right of action. Accordingly no reason was to be found in the existence of those provisions for concluding that the rule in *Searle v Wallbank* was not part of the law of Victoria. For these reasons the Magistrate was right in holding that the rule in *Searle v Wallbank* afforded the defendant a good defence and accordingly the order nisi was discharged.

4. Per McInerney J: The Magistrate did not find that there was any evidence of any special circumstances in this case which would impose on the defendant a duty to take reasonable care to prevent the vealer from straying on to the highway. There was no evidence that Toolamba Road was a freeway and the provisions of s97(2) of the *Country Roads Act* 1958 were not therefore applicable. No basis existed therefore for applying the reasoning which led Hutley JA to impose liability in *Kelly v Sweeney* (1975) 2 NSWLR 720, and there was no basis on which the Magistrate could have done otherwise than to hold that the rule in *Searle v Wallbank* was applicable.

YOUNG CJ: On 31 March 1975, James Andrew Brisbane (whom I shall call "the complainant") was riding a motorcycle along Toolamba Road, Toolamba. The motorcycle was travelling at about 50 miles per hour and at about 6.15 p.m. it collided with an Angus vealer steer which was running on the roadway. As a result of the collision the complainant's motor cycle was severely damaged and accordingly he instituted proceedings in the Magistrates' Court at Shepparton to recover damages from Peter Henry Cross (whom I shall call "the defendant").

Toolamba is a small country town some 12 miles south of Shepparton and the road upon which the accident took place was clearly what would ordinarily be called a country road. It was

described as a fairly wide road with a bitumen surface about 15 feet in width and with gravel edges. The complainant described it as a very busy road. As the complainant was riding along Toolamba Road he saw about 20 feet in front of him a black Angus steer running from his left to his right. He collided with it before he could take any evasive action. At the point where the accident took place the defendant's property adjoins Toolamba Road.

The complainant is a dairy farmer living at Murchison North which is only a few miles away from Toolamba. He said in evidence that Angus cattle are renowned for being a wild breed and that an Angus vealer is especially wild because it is not handled very much. He said that he travelled along Toolamba Road once or twice a week at least and occasionally saw cattle along the road although he had not noticed before the particular steer with which he collided. He also gave evidence that the defendant had admitted in conversation shortly after the accident that the steer in question was very wild and was a roamer and that it had got out of the paddock three or four times before. Another dairy farmer from Toolamba said that he had seen the steer grazing on the roadside on two occasions. When the defendant gave evidence, however, he said that he had no recollection of having said that the steer had escaped on two or three occasions but admitted that he had seen it "out" on one previous occasion. It had then returned to the paddock of its own accord. He knew that it was likely to get out again but did nothing to prevent that happening.

The complainant's claim was framed in negligence. In his Particulars of Demand he alleged that the collision was caused by the negligence of the defendant in failing to prevent the steer from escaping on to the roadway. The Magistrate found that the defendant knew that the vealer had a propensity to break through the fence and that he took insufficient precaution to see that the fence was intact and that if a duty of care existed he was negligent in respect of that duty of care, by which I understand him to mean that he was in breach of a duty. However, after examining the authorities and particularly *Searle v Wallbank* [1947] AC 341; [1947] 1 All ER 12; 176 LT 104; [1947] LJR 258; 63 TLR 24, the Magistrate held that the defendant owed no duty of care to the complainant and accordingly dismissed the claim. The claimant obtained an order nisi to review that decision and upon the return of that order it was, at the request of the parties, referred by Griffith J to this Court.

It is necessary at the outset to consider exactly what *Searle v Wallbank supra*, decided. The decision is generally regarded as laying down two propositions, viz. (1) that the owner of land adjoining a highway is under no duty to users of the highway so to maintain his hedges and gates along the highway as to prevent his animals from straying on to the highway, and (2) that the owner of land adjoining a highway is not under a 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. The formulation is largely taken from the headnote to the report of *Searle v Wallbank* in the Law Reports but it may be that the second proposition if it is truly a proposition of law comprehends within it all that is significant in the first proposition: see *Salmond on the Law of Torts* 16th ed. p350. If the rule so enunciated is part of the law of Victoria today the Magistrate was clearly right in dismissing the complainant's claim.

A consideration of the question whether the rule is part of the law of Victoria can in some circumstances appear the more difficult because the rule is in the nature of an exception from liability for negligence. The difficulties appear when hypothetical cases more appropriate to the Australian than the English scene are imagined. Even in England difficulties have been encountered because the rule emanated from rural England where there were few fences. Cf. by way of example only, *Gomberg v Smith* [1963] 1 QB 25; [1962] 1 All ER 725 and *Fitzgerald v ED and AD Cooke Bourne (Farms) Ltd* [1964] 1 QB 249; [1963] 3 All ER 36; [1963] 3 WLR 522. But whatever difficulty may be encountered in considering the applicability of the rule in Victoria in situations where the extent of the rule is also involved, no such difficulty arises in this case. The facts in this case are sufficiently similar to the facts in Searle v Wallbank itself to make it unnecessary to consider the scope or extent of the rule. In each case the accident occurred on a part of the highway adjoining the defendant's land; in each case the animal was not known to be dangerous; and in each case the damage complained of was caused by the animal obstructing the path of a cyclist on the highway making a collision with the animal inevitable. It would be difficult to imagine facts which more clearly raised the question of the applicability of the rule.

The decision of the House of Lords in *Searle v Wallbank* is not technically binding on this

Court but, of course, as Mason J (as he then was) said in *Hill v Clark* (1969) 91 WN (NSW) 550 at p561; [1969] 2 NSWR 733 at p741, it is a decision of great authority. We should unquestionably follow it unless the rule which it expresses does not form part of the law of Victoria. In *Public Transport Commission of NSW v J Murray-More (NSW) Pty Ltd* [1975] HCA 28; (1975) 132 CLR 336; (1975) 6 ALR 271; 49 ALJR 302 at p305; Barwick CJ, said that where there was no relevant decision of the High Court, a State Supreme Court both at first instance and on appeal should follow the decisions of the English Court of Appeal. *A fortiori*, we should follow decisions of the House of Lords.

The rule in *Searle v Wallbank* is part of the common law of England and therefore part of the law of Victoria unless that law has been altered by statute or by the course of authority in Australia. There is, of course, a logical difficulty in treating a decision of an English court given at any time since 1828 as declaring the common law in Victoria, for as Windeyer, J, pointed out in *Skelton v Collins* [1966] HCA 14; (1966) 115 CLR 94, at p134; [1966] ALR 449; (1966) 39 ALJR 480, to suppose that the common law brought to this country was a body of rules waiting to be declared and applied overlooks the creative element in the work of courts. The passage may be quoted:

> "Our ancestors brought the common law of England to this land. Its doctrines and principles are the inheritance of the British race, and as such they became the common law of Australia. To suppose that this was a body of rules waiting always to be declared and applied may be for some people satisfying as an abstract theory. But it is simply not true in fact. It overlooks the creative element in the work of courts. It would mean for example, that the principle of *Donoghue v Stevenson* [1932] UKHL 100; [1932] AC 562; [1932] All ER 1; [1932] SC (HL) 31; [1932] SLT 317; (1932) 37 Com Cas 350; (1932) 48 TLR 494; (1932) 147 LT 281; [1932] Sol Jo 396; (1932) 101 LJPC 119; (1933) 4 DLR 337; 533 CA 47; [1932] SC 31; [1932] WN 139, decided in the House of Lords in 1932 by a majority of three to two, became law in Sydney Cove on 26 January 1788 or was in 1828 made part of the law of New South Wales by 9 Geo. IV c.83, s25. In a system based, as ours is, on case law and precedent there is both an inductive and a deductive element in judicial reasoning, especially in a court of final appeal for a particular realm or territory."

But courts in Australia have had no difficulty in treating the principle of *Donoghue v Stevenson*, *supra*, as part of the common law applicable in this country. It does not appear to have been suggested, for instance, in *Australian Knitting Mills Ltd v Grant* [1933] HCA 35; (1933) 50 CLR 387; [1933] ALR 453, reversed on appeal *sub nom. Grant v Australian Knitting Mills Ltd* [1935] UKPCHCA 1; (1935) 54 CLR 49, that the principle of *Donoghue v Stevenson* was not part of the common law of South Australia. In applying the principle of *Donoghue v Stevenson* in Australia the courts have no doubt been conscious of the great weight to be given to decisions of the House of Lords and of the desirability, where possible, of the common law developing along similar lines in England and Australia. "A full consideration of the theoretical problem of reconciling a common heritage of doctrine with the development of differing doctrines" (to use Windeyer, J's words in *Skelton v Collins*, *supra*, at CLR p135) does not yet seem to have been necessary. Nor do I think it is necessary in this case. I cannot regard the decision of the House of Lords in *Searle v Wallbank* as an example of what Windeyer J described in the passage I have quoted above as "the creative element in the work of the courts". In the speeches in *Searle v Wallbank* there are several references to the antiquity of the doctrine being applied (see, for instance, the speech of Lord du Parcq (at p358) where his Lordship says: 'We are here dealing with ancient doctrines of the common law") and, indeed, the decision of their Lordships has been criticized because, in substance, it was conservative and not creative: see Fleming, *The Law of Torts*, 4th ed p309. Moreover it endorsed as correct a number of decisions to the same effect: see, e.g. *Hadwell v Righton* [1907] 2 KB 345; *Higgins v Searle* (1909) 100 LT 280; *Ellis v Banyard* (1911) 106 LT 51; *Jones v Lee* (1911) 106 LT 123; *Heath's Garage Ltd v Hodges* [1916] 2 KB 370; *Fraser v Pate* [1923] SC 748; *Hughes v Williams* [1943] KB 474; [1943] 1 All ER 535. The statute, 9 Geo. IV, c.83 passed in 1828 and given the short title of the *Australian Courts Act* 1828 by the *Short Titles Act* 1896, provided in s24 that all laws and statutes in force within the realm of England at the time of the passing of the Act "shall be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied in the said Colonies." As the High Court pointed out in *Delohery v Permanent Trustee Co of NSW* [1904] HCA 10; (1904) 1 CLR 283 at pp310-11; 10 ALR (CN) 37 the test prescribed by that section is not whether a rule or principle of the common law is suitable or beneficial to this country, but whether it can be applied. If it can be applied, it is part of the law of Victoria

and it is not for the court to say whether or not it is suitable or beneficial. That is a question for the legislature. There seems to be no difficulty in applying the rule in Victoria and accordingly I would reach the conclusion that the rule is part of the law of Victoria unless binding authority or statute were to compel an opposite conclusion.

There is no binding authority which requires this Court to hold that the rule is not part of the law of Victoria although there are some decisions of persuasive authority to which we were referred. The question of the applicability of the rule has arisen in four States within recent years and we have the advantage of decisions of the Full Court of the Supreme Court of two of those States. In another we have the decision of the Supreme Court at first instance and in the fourth the decision of a judge of the District Court. We also have the decision of Murphy J in this Court in *May v Meyer* (20 October 1973, unreported) in which his Honour indicated his opinion that *Searle v Wallbank* should be followed in Victoria although that opinion was not necessary to his decision of the case before him.

It may be that a majority of the judges who have had to consider *Searle v Wallbank* in the courts in this country have formed the opinion that the rule has no application here, but that fact alone does not require this Court to reach a similar conclusion. Furthermore, as I shall endeavour to show, the reasoning of the various decisions does not, with all respect, require us to conclude that the rule is not part of the law of Victoria.

The first decision is that of Chambers J in the Supreme Court of Tasmania in *Jones v McIntyre* (6 February 1973, unreported). His Honour examined a number of authorities since *Searle v Wallbank* and concluded that in the light of developing trends in the law of negligence he was at liberty to accept the views of the majority of the Supreme Court of Canada in *Fleming v Atkinson* (1959) 18 DLR (2d) 81; [1959] SCR 513 and to hold that the ordinary rules of negligence apply to an adjoining landowner whose animal strays on to a highway. The majority of the Supreme Court of Canada took the view that it was open to that Court to apply the ordinary rules of negligence to the case of straying animals and that the decision in *Searle v Wallbank* provided no obstacle because it was founded upon historical reasons which had no relevance in Canada. Such a line of reasoning is however in my opinion not open to this Court. For reasons which I have endeavoured to state, the rule in *Searle v Wallbank* is part of the law of Victoria if it can be applied here.

The decision of Chambers J in *Jones v McIntyre*, *supra*, was agreed in and applied by Senior Judge Ligertwood of the District Court of South Australia in *Garry Willis Transport v WS Lock and Sons* (June 1973, unreported). His Honour thought that the propositions enunciated by Chambers, J, accorded with the thinking of "the man in the street" as revealed by the interrogation of the defendant.

Next is a decision of the Court of Appeal of New South Wales composed of Hutley, Samuels and Mahoney JJA in *Kelly v Sweeney* [1975] 2 NSWLR 720. In that case a number of cows strayed on to a highway from an adjoining property, a gate having been left open, and a passing taxi collided with them and was damaged. A majority of the Court held that the principles of *Searle v Wallbank* were not applicable to the case so that the taxi driver was entitled to recover. But divergent views were expressed for reaching this conclusion. Hutley JA based his decision on a provision of the Main Roads Act of New South Wales prohibiting a person from driving any loose sheep, cattle, horses or other animals on or along a motorway. The highway in question was a motorway. But for this statute his Honour would have held that the rule applied and his reasoning supports the view I have expressed above. Samuels JA found that there were sufficient reasons for not following *Searle v Wallbank* and not being technically bound to follow it, he declined to do so. Mahoney JA dissented and in a judgment which, if I may say so, accords closely with my own view, thought that the Court should follow *Searle v Wallbank*. Thus it can be seen that only one member of the Court of Appeal was prepared to hold that *Searle v Wallbank* was not part of the law of New South Wales and the case accordingly affords no reason for this Court to conclude that the rule is not part of the law of Victoria.

Finally, there is the decision of the Full Court of Western Australia in *Thomson v Nix* [1976] WAR 141. In that case a car driving along a highway through farming country at night collided with a black cow that had strayed on to the highway from an adjoining farm. The fences

were is disrepair and the magistrate before whom the case came at first instance found that the defendant failed to exercise reasonable care in the maintenance and repair of the fence. The principal judgment was delivered by Jackson CJ who declined to apply the principles in *Searle v Wallbank* because he thought that it was based on historical considerations applying over a long period to the conditions of the English countryside. "It followed," said his Honour (at p143) "that users of the road had to expect to meet not only a herd being driven along a road but also a stray beast, and to accept the risk of an occasional accident."

His Honour then went on to trace the history of certain legislation in Western Australia for the purpose of showing that from the early days of the Colony the enclosure of land by fencing was a matter of common policy and accepted as a necessary part of agricultural life. His Honour also traced the history of legislation requiring owners of property to fence land adjoining a public road. His Honour was at pains to point out however that none of the legislation to which he referred conferred a private right of action. But he thought that the differing local conditions made the decision in *Searle v Wallbank* inapplicable. With the greatest respect I cannot accept his Honour's approach to the problem. His Honour seems to me to have found the rule inapplicable in Western Australia because it was unsuitable to conditions there, but I do not think it is open to this Court to decline to apply an ancient rule of the common law unless it cannot be applied in Victoria. If the principle of the decision is applicable here, whether or not it is suitable here, it is our duty to apply it. Moreover, as Mahoney, JA, pointed out in effect in *Kelly v Sweeney*, *supra*, it is by no means beyond argument that the rule in its present form is unsuitable. Nor is it obvious what alternative rule would command general acceptance. These considerations show that any alteration of the rule is pre-eminently a matter for the legislature.

The decisions of the courts in other States therefore do not in my opinion require this Court to hold that the principles in *Searle v Wallbank* are not part of the law of Victoria. Nor does the decision of the Supreme Court of Canada in *Fleming v Atkinson*, *supra*, or the decision of the Court of Session in *Gardiner v Miller* [1967] SLT 29. The rule has been accepted as part of the law of New Zealand: *Ross v McCarthy* [1970] NZLR 449.

The remaining matter for consideration is whether there is any statutory provision in Victoria which bears upon the decision. Our attention was drawn to By-law 19 of the Shire of Rodney within which the accident took place and within which the defendant's land lies. That By-law adopted the 13th Schedule of the *Local Government Act* 1903, which is now with immaterial alterations the 15th Schedule of the *Local Government Act* 1958. The relevant clause of the 15th Schedule is CL41 which reads as follows:—

> "41. If any cattle are found without any person having charge of them—
>
> (a) in any street; or
>
> (b) upon any land (not being a common) which is not securely enclosed or fenced, and the openings (if any) in which fence are not secured and barred with gates or other fastenings of equivalent closeness and strength with the fence-- the proper officer of the council may seize such cattle and impound them, or place them at some neighbouring place of safe custody, and any person rescuing or attempting to rescue or interfering with cattle placed at any such place of safe custody or seized for the purpose of being placed at any such place shall be liable to a penalty of not more than $100 or to imprisonment for a term of not more than six months."

Section 8(d) of the *Summary Offences Act* 1966 was also relied on. It reads:—

> "8. Any person who— ...
> (d) turns loose or allows to wander any cattle or other beast upon a public road or thoroughfare;
> ...
> shall be guilty of an offence.
>
> Penalty: $50."

The final statutory provisions relied upon were those contained in s73(1) and s73(3) of the *Country Roads Act* 1958. These provisions read as follows:

> "73. (1) Any cattle which are on any portion of any State highway within any municipal district--

(a) without the consent (given with the permission in writing of the Board) under Division six of Pt XIX. of the *Local Government Act* 1958 of the council of the municipality of that district; or

(b) (whether or not such consent has been given as aforesaid) without some person in attendance— may be impounded by any officer of the Board under any law for the time being in force relating to the impounding of cattle as if the Board for the purposes of such law were the owner and occupier of such highway, but nothing in this subsection shall be deemed to authorise any such officer to impound any travelling cattle driven by a drover.

"(3) (a) The owner of any cattle which are on any portion of any State highway within any municipal district — without the consent (given with the permission in writing of the Board) under the said Division six of the council of the municipality of that district; or (whether or not such consent has been given as aforesaid) without some person in attendance-- shall be liable to a penalty of not more than $20 for a first offence and not less than $10 nor more than $40 for a second offence and not less than $20 nor more than $100 for a third or any subsequent offence; but nothing in this paragraph shall be deemed to render liable the owner of any such cattle if the same are travelling cattle driven by a drover.

"(b) Any member of the police force, or any officer of the Board appointed for the purpose either generally or in any particular case in writing by the chairman of the Board may prosecute for any offence against this subsection."

The By-law was perhaps more heavily relied upon than the *Summary Offences Act* and the *Country Roads Act*. It was said that it imposed on the owner or perhaps the occupier a duty to fence his land with the result that the whole basis of the decision in *Searle v Wallbank* was undermined, making the principle of that decision not a part of the law in Victoria. But an examination of the language of CL41 shows that it does not impose any duty to fence; it exposes certain cattle to liability to be impounded and CL42, which I have not transcribed, exposes the owner of such cattle to a penalty.

Neither the By-law nor either of the statutory provisions relied upon give a private right of action: *Cox v Burbridge* [1863] EngR 116; (1863) 13 CBNS 430; 32 LJCP 89; 143 ER 171 and *Heath's Garage Ltd v Hodges* [1916] 2 KB 370. Accordingly no reason is to be found in the existence of those provisions for concluding that the rule in *Searle v Wallbank* is not part of the law of Victoria. It was contended that the provisions showed that conditions in Victoria differed from those in England, just as the legislation referred to in *Thomson v Nix*, *supra*, showed that conditions in Western Australia differed from conditions in England. But for the reasons given for not following *Thomson v Nix*, *supra*, I could not accept that argument.

For these reasons I think that the Magistrate was right in holding that the rule in *Searle v Wallbank* afforded the defendant a good defence and I would accordingly discharge the order nisi.

McINERNEY J: I have had the advantage of reading, in draft, reasons for judgment prepared by the Chief Justice. Ordinarily it would, I think, be sufficient to say that I agree with those reasons and the conclusions expressed therein. In deference, however, to the doubts suggested by the late Holmes JA, in *Hill v Clark* (1969) 91 WN (NSW) 550; [1969] 2 NSWR 733, at p738, to the views expressed by Jackson CJ in *Thomson v Nix* [1976] WAR 141 that there were, in Western Australia, relevant differentiating local conditions which made the decision in *Searle v Wallbank*, [1947] AC 341; [1947] 1 All ER 12; 176 LT 104; [1947] LJR 258; 63 TLR 24, inapplicable in that State, and to similar views expressed in relation to Ontario by Judson J in *Fleming v Atkinson* (1959) 18 DLR (2d) 81, I feel I should set out the results of my own examination of the course of the relevant legislation in or appertaining to Victoria, and the conclusions I have reached on that examination.

From the beginning of British settlement in Australia, title to all land in Australia has been derived from the Crown by grants made in the first instance by Governors acting in pursuance of authority derived from their commission and from instructions of the Government in the United Kingdom. In the first instance, in New South Wales, grants of land seem to have been made without conditions as to cultivation or residence or fencing: a condition as to cultivation was prescribed on one isolated occasion in 1809 and was not introduced on a regular basis until 1812, after the advent of Macquarie—see Roberts *History of Australian Land Settlement*,

2nd ed. pp21 and 26, Note 12. But the development of the wool industry and the discovery of the lands beyond the Blue Mountains encouraged "squatters" to occupy "runs" without any title or authority from the Crown in these newly discovered areas. As a result and in an endeavour both to contain this expansion within the limits allotted for location by a government order of 14 October 1829 and to restrain unauthorized occupation of Crown lands under those limits, several Acts of Council were enacted in New South Wales—e.g. 7 Wm. IV No. 4 (29 July 1836) and 2 Vict. No. 19 (2 October 1838). (See *O'Callaghan's Acts of Council* vol.1 pp366, 367.)

Boundaries of squatters' "runs" were frequently, in the first instance, marked or delineated either by natural features (where possible) or, in other cases, artificially by marked trees or ploughed furrows. The squatter's sheep were yarded or folded at night, in the first instance by yards of roughly hewn logs but later by movable hurdles—see Roberts *History of Australian Land Settlement* (2nd ed.) (1968) pp179-80.

To quote Greenwood *Australia, A Social and Political History* (1955) p116:

> "Crazy brush and dog-leg fences were thrown up, to be replaced in due course with wire. After fenced boundaries came paddocks, served by well-built drafting and marking yards." Whether or not the runs should be fenced was a matter of which opinion among the squatters was divided. Following the wholesale desertion of shepherds to the goldfields in the early 1950's in Victoria it became a matter of necessity to provide some means other than movable hurdles to contain the sheep at night, and it became therefore more and more common to fence pastoral lands—see *Men of Yesterday* by Margaret Kiddle (1967) pp199-200.

Against this background it is perhaps not surprising that the attention of the legislature first in New South Wales and then in Victoria should have been turned to questions of fencing and of impounding of cattle. As early as 1828 the Legislative Council of New South Wales enacted an Act as to fencing (9 Geo. IV No. 12) (*O'Callaghan's Acts of Council* Vol 1 p539) providing procedures for procuring the construction or repair of dividing fences and for recovering contribution towards the cost of erecting or repairing dividing fences. In the case of a fence dividing privately owned unalienated Crown land, the private landowner was given a right of contribution from any future proprietor of the Crown land when subsequently alienated. Evidently even as early as 1828 the practice of constructing enclosing or dividing fences was regarded as deserving the assistance of the law.

A provision to the like effect was contained in s4 of the first Act relating to fences enacted by the Victorian Parliament, namely, *The Fences Statute* 1865 (Act No. 239). Another Act of the New South Wales Council (Act II Vict. No. 31 assented to 2 October 1847) empowered the trustees of commons to regulate the rights of settlers to depasture their cattle and other stock on the common (s3) and further empowered the trustee to distrain and impound cattle and other stock not belonging to settlers entitled to depasture their cattle on the common.

The first *Pounds Act* to be enacted in New South Wales (Act 9 Geo. IV No. 11), assented to 24 July 1828) prefaced s11 thereof with the following preamble:—

> "And whereas it is expedient that an end be put to the practice of allowing horses, cows, oxen, sheep, goats, pigs, and other cattle to be at large in the public streets of the towns and villages in the said colony, to the public annoyance and to the personal danger, inconvenience and injury of private individuals."

The section went on to authorize the impounding of any cattle found at large in any town or village without being under the immediate guidance, protection and control of some one or more competent person or persons. S12 of the same Act made it an offence for horses or cattle, exceeding ten in number, to be allowed to graze or depasture on unenclosed land without having at least one herdsman or stockman on hand to prevent the cattle from trespassing on the lands of other persons.

Section 3 of the same Act prohibited the allowance of any claim for extraordinary damage for trespass committed on any ground under artificial cultivation unless that ground was at the relevant time "enclosed by a wall, fence or hedge equivalent, at the least, to a three railed fence of the height of four feet."

It is clear from these provisions that the legislature of New South Wales was concerned to put an end to any practice of turning cattle or other stock out to graze on roads, commons and unalienated Crown lands. When Victoria became a separate colony, its legislature likewise turned its attention to the problems of wandering cattle, pounds, and the construction, maintenance and management of roads. One of the earliest Acts—16 Vict. No.10, assented to 21 September 1852--fixed pound charges in respect of cattle and other animals trespassing on Crown lands.

The next *Pounds Act* (Act 18 Vict. No. 30, assented to on 15 May 1855) conferred on occupiers of Crown lands the right to impound cattle trespassing thereon but denied that right in the case of cattle travelling along or through a road or resting on the road or within a quarter of a mile thereof where the Crown lands through which the road passed were not enclosed.

This last-mentioned section led me to infer, in *Cook v Johnston* [1969] VicRp 63; [1969] VR 515, at p519; 22 LGRA 114 that "at least in 1855 and probably as late as 1865 there were in Victoria certain public roads whose route or portion of whose route lay through lands not enclosed by a fence, i.e. through unenclosed lands".

The section in question may be regarded as having foreshadowed the provisions of s78 of Act 145 (assented to on 18 June 1862)—the *Sale and Occupation of Crown Lands Act* 1862, commonly known as "Duffy's Land Act". That section accorded to a traveller the right to depasture his cattle for a period not exceeding twenty-four hours upon any unsold Crown land within one quarter of a mile of either side of any road or track commonly used as a track or thoroughfare. The provision was repeated through the various consolidations of the *Land Act* down to 1958—see s214 of that Act as amended by Act No. 8461 s37. Act No. 176, assented to 2 September 1863 – an "Act to Establish Roads Districts and Shires", – by s318 empowered councils of shires to exercise the powers conferred by Act 18 Vict. No. 30 in relation to pounds. Act 359 (assented to 29 December 1869) – the *Boroughs Statute* 1869--had (by s168) empowered borough councils to make by-laws adopting any of the subdivisions or parts of the 12th Schedule hereto, which included (under Pt I sub-division 9) the provisions now contained in Pt I, s9, CL41 to CL45 of the 15th Schedule to the *Local Government Act* 1958 prohibiting obstruction of streets by cattle--the provisions corresponding to those adopted by the Shire of Rodney as By-law No. 19 – see *Government Gazette* 5 July 1905 p. 2535, tendered in the Court below.

It may be inferred from these provisions that the legislature, so far from according to an occupier of lands adjoining a highway the right to graze his cattle on the highway, sought, on the contrary, to discourage, indeed to prohibit the practice, and that there was no scope for any doctrine that in Victoria roads were to be taken as dedicated for use as a highway subject to the right of adjoining landowners to graze their cattle thereon.

The policy that roads were a matter for governmental control rather than private management or private dedication was quickly evident in Victoria. Within two years of the separation of Victoria from New South Wales the legislature concerned itself with road construction and management, enacting Act 16 Vict. No. 40 (assented to 8 February 1853), whereby the Governor in Council was empowered to establish a Central Roads Board and District Roads Boards and was further empowered to proclaim main roads (s2). The Central Roads Board was empowered to form, construct, improve, manage and maintain new or existing main roads (s6). S31 to s33 of the Act conferred power on the Central Roads Board and on District Roads Boards to open or make new roads and to alter existing roads. If the course of a road was altered so as to pass through lands previously enclosed, those lands were to be fenced on both sides with a substantial fence before the road was opened to public use (s45). The policy was carried one stage further by Act 18 Vict. No. 15, assented to 29 December 1854, whereby the Governor in Council was empowered to proclaim municipal districts. S27 of that Act provided that the municipal council should have the care and management of roads in the municipal district—a provision repeated in all subsequent Roads Boards and Local Government legislation, from the *Local Government Act* 1863 (Act No. 176) onwards—see e.g. s1, s215, s219, s222, s226, s232 of the last-mentioned Act.

The *Local Government Act* 1874 (Act No 506) gave effect to the same policy, in that by s363 the Governor was given power to proclaim highways which thenceforth were, by force of s364, deemed to have been dedicated by her Majesty to the public as a public street and highway;

while, by s370, the absolute property in any land reserved or proclaimed under any Land Act as a road, street or highway was vested in the Crown. S380 entrusted the care and management of all public highways, streets and roads to the council of the municipality within whose district they were situate, and s383 vested the property in all materials in all public highways, streets and roads in the municipality of the district in which the same were. These provisions have been re-enacted in all subsequent consolidations of the *Local Government Act* down to the present day.

Two other provisions are perhaps worthy of remark. S379 of the 1874 Act (Act No. 506) required fencing on both sides of new roads opened or of roads altered (as the case might be) through any fenced land, and s382 provided that for the purpose of impounding cattle the municipal council was to be deemed to be the owner and occupier of all public highways, public or private streets and roads within the municipal district—cp. s546 of the 1958 Act.

The legislative policy favouring and in some cases requiring the construction of dividing fences and enclosing fences on land acquired from the Crown is evident from the various *Fencing Acts* enacted both in New South Wales and in Victoria. The provisions of the New South Wales Act of 1828 (9 Geo. IV No. 12) and of the Victorian *Fences Statute* 1865 (Act No. 239) have already been noted. The same policy is evident in the *Fences Statute* 1874 (Act No. 479, assented to 25 November 1873). S4 of that Act specified various types of fence which would be regarded as a sufficient fence. The heights prescribed ranged from three feet to four feet six inches. In subsequent years, proliferation of rabbits led to the enactment of legislation empowering the destruction of certain types of fences (e.g. brushwood) calculated to harbor rabbits—see s9 of *The Rabbit Suppression Act* 1880 (Act No. 683), or requiring the construction (in certain areas) of continuous wire-netting or other rabbit-proof or vermin-proof fences (see e.g. Pt II of *The Vermin Destruction Act* 1889 (Act No. 1028).

In the meantime, another set of pressures was assisting in the development of a pattern of rural development altogether different from that described in Viscount Maugham's speech in *Searle v Wallbank*, *supra*.

Dissatisfaction with existing procedures as to the sale of Crown lands (see e.g. the New South Wales Act 5 and 6 Vict. c.36 assented to on 22 June 1842), and the development of the movement to "unlock the land" had resulted in the introduction of a series of Land Acts (first in New South Wales and then in Victoria), beginning, in this State, with the *Sale of Crown Lands Act* 1860 (Act No. 117—"Nicholson's Act") to permit and regulate alienation of Crown lands for agricultural and pastoral purposes to selectors whose interest was in the first instance usually only that of a licensee, capable, on fulfilment of certain prescribed conditions, of maturing into that of a Crown lessee, and, eventually, a Crown grantee of a freehold interest.

The licence or lease was liable to be terminated (avoided) in the event of non-compliance with any of the covenants or conditions thereof—e.g. as to residence, or fencing. See e.g. *The Sale and Occupation of Crown Lands Act* 1862 (Act No. 145—"Duffy's Land Act"), s36, s110, 126; *The Amending Land Act* 1865 (Act No.237—"Grant's Act") s24; *The Land Act* 1869 (Act No 360) s20 (III) and s20(V); and *The Land Act* 1884 (Act No 812) s27(5), s28, s38(5), s41, s44(4).

In general, the selector-occupier – whether as licensee or lessee – was required to enclose his land with a fence and to keep that fence in good and sufficient repair. He was given the rights of a possessory owner with the qualification that the right to impound trespassing cattle (though conferred in New South Wales by Act 14 Vict. No. 42, assented to on 2 October 1850, on all persons in occupation of Crown lands pursuant to lease, licence or other authority) was withheld in Victoria until the land was enclosed with a fence—see s24 of the *Amending Land Act* 1865 (Act No. 237—"Grant's Act") re-enacted as s30 of *The Land Act* 1869, s120 of the *Land Act* 1884 (Act No. 812) and s124 of the *Land Act* 1890.

This examination of the relevant legislation discloses nothing inconsistent with the conclusion that at the date of the coming into operation on 1 March 1829 of the Act 9 Geo IV s83 (variously cited as the *Australian Courts Act* 1828 or the Constitution Act 1828) the rule in *Searle v Wallbank*, *supra*, was part of the common law to be applied by the courts in New South Wales and therefore in Victoria when it was founded. If, or in so far as Jackson CJ in *Thomson v Nix* [1976] WAR 141 expressed a view inconsistent with the conclusion just stated, that view does not accord with those expressed by at least two and perhaps all three Judges of the Court of Appeal

in New South Wales in *Kelly v Sweeney* [1975] 2 NSWLR 720, at pp725-6 and 729 (Hutley, JA), at p732 (Samuels, JA), and (semble) also by Mahoney, JA In the circumstances I prefer the view that the rule in *Searle v Wallbank* was part of the common law to be applied in the courts of New South Wales, and therefore now in Victoria—see *Acts Interpretation Act* 1958 s8.

The general pattern of the land tenure, land settlement, control of roads and of impounding legislation in New South Wales, Victoria, Western Australia and New Zealand is, in substance, the same. It would appear to be not dissimilar to the pattern of such legislation in Ontario. Indeed the impounding legislation in New Zealand, New South Wales and Victoria and in particular the legislation adopted by By-law 19 of the Shire of Rodney (of which the relevant clause is set out in the judgment of the Chief Justice), is not dissimilar to the provisions of the English legislation (s74 of the *Highways Act* 1835 (5 and 6 Wm. IV c.50), repealed and replaced by s25 of the Highway Act 1864 (27 and 28 Vict. c.101)) which have been held to confer no right of action for damages at the suit of any person suffering damages as a result of injury by cattle brought on to or present on the highway in infringement of that legislation.

The argument that s74 of the *Highway Act* 1835 gave rise to a right of action for damages at the suit of any person suffering damages as a result of that infringement was expressly put in *Cox v Burbidge* [1863] EngR 116; (1863) 13 CBNS 430. It was rejected by Erle CJ (at p436). His *dictum* was accepted as correct by Lord du Parcq in *Searle v Wallbank* [1947] AC 341 at p362; [1947] 1 All ER 12; 176 LT 104; [1947] LJR 258; 63 TLR 24. The argument referred to above was also rejected in *Higgins v Searle* (1909) 100 LT 280, and in *Heath's Garage Ltd v Hodges* [1916] 1 KB 206 at p215, Lush J considered that it was not open to a Divisional Court to accept it. On appeal in that case, all members of the Court of Appeal (Cozens-Hardy MR, Pickford LJ and Neville J [1916] 2 KB 370, at p376, p381 and pp383-4, respectively) held that the *Highway Act* conferred no right of action for damages in respect of an infringement of that section.

A similar conclusion has been expressed in New Zealand—see *Millar v O'Dowd* [1917] NZLR 716; *Simeon v Avery* [1959] NZLR 1345 and *Ross v McCarthy* [1969] NZLR 691. Notwithstanding the view to the contrary taken in Ontario—see *McMillan v Wallace* (1929) 3 DLR 367 and *Direct Transport Company v Connell* (1938) 3 DLR 456, I am of the opinion that the view taken in the English and New Zealand cases mentioned above is to be preferred.

I am therefore of the view that the provisions equivalent to CL41 and CL45 of subdivision 9 of Pt I of the 15th Schedule to the *Local Government Act* 1958, adopted by the Shire of Rodney by By-law 19, do not confer on any person injured or suffering damage as a result of a collision on any highway with cattle straying from adjoining land on to that highway a right to recover damages from the owner of such cattle. The provisions adopted by By-law 19 relate to the impounding of cattle and do not on the face of them purport to confer any right of action in a civil proceeding for the recovery of damages.

It was also argued before us that the provisions of s8(d) of the *Summary Offences Act* 1966 (Act No. 7405) conferred a private right of action for damages on any person injured as a result of a collision with any cattle allowed to wander on a public road in breach of that section. A similar argument, based on the corresponding provisions of s4(1)(i) of the *Police Offences Act* 1927 of New Zealand was put to and rejected by Hutchinson ACJ in *Simeon v Avery* [1959] NZLR 1345. That decision was followed and approved by Richmond J in *Ross v McCarthy* [1969] NZLR 69, and by the Court of Appeal in the same case, [1970] NZLR 449. Those decisions appear to me to be plainly correct and I would follow them. Accordingly I reject the argument based on s8(d) of the *Summary Offences Act* 1966.

It was further argued that a private right of action for damages was conferred on the appellant by the provisions of s73, subs(1) and subs(3) of the *Country Roads Act* 1958 which are set out in full in the reasons for judgment of the Chief Justice. No right of action for damages is expressly conferred by those subsections. Subs(1) confers a power to impound cattle, and correlatively imposes on the owner of the cattle a liability to have his cattle impounded. The power is exercisable only by an officer of the Country Roads Board irrespective of whether he has suffered damage as a result of the presence of the cattle on the highway. The circumstance that some person (not being an officer of the Board) has suffered damage by reason of the presence of those cattle on a State highway does not confer on such person a power to impound those cattle.

Subs (3) imposes on the owner of cattle which are on a State highway without the consent of the municipal council a liability to be fined. If as in so far as the subsection creates an obligation on the owner of the cattle to keep them off a State highway, the manner (and, on the face of it, the sole manner prescribed by the statute) of enforcing that obligation is by criminal proceedings, and there is no indication that breach of that obligation gives rise to civil claim for damages. Furthermore the obligation is one imposed for the benefit of the public at large rather than for a particular class of persons. In *Dennis v Brownlee* (1963) 80 WN (NSW) 1239; (1963) 9 LGRA 415; [1964] NSWR 544 at p546; [1963] SR (NSW) 719; 80 WN (NSW) 1239, Sugerman J referred to "the long-established reluctance to concede a right of action on the statute to the injured individual where the statutory duty has been imposed in the general public interest and has relation to the use of the highway for traffic." In so far as the reluctance mentioned above is attributable, as Sugerman J suggests ([1964] NSWR at p546), to the existence of an adequate remedy at common law for injuries sustained on the highway, that explanation would not fit the present case. The denial of a right of action for damages in such a case is the result of the application of principles discussed in authorities such as *O'Connor v SP Bray Ltd* [1937] HCA 18; (1937) 56 CLR 464 (especially at pp477-8 per Dixon J; [1937] ALR 461); *Henwood v Municipal Tramways Trust (SA)* [1938] HCA 35; (1938) 60 CLR 438; [1938] ALR 312; *Dennis v Brownlee*, *supra*, and *Abela v Giew* [1965] NSWR 913; 82 WN (Pt 2) (NSW) 435.

Applying the principles stated in those authorities, it does not seem to me that any private right in the appellant to sue the respondent for damages can arise from the provisions of s73. That conclusion derives support, I consider, from the English and New Zealand cases referred to in connection with By-law 19 and s8(d) of the *Summary Offences Act* 1966.

One other matter may here be mentioned. In *Searle v Wallbank* [1947] AC 341; [1947] 1 All ER 12; 176 LT 104; [1947] LJR 258; 63 TLR 24 counsel for the appellant relied on the provisions of s74 of the *Highway Act* 1835 and s25 of the *Highway Act* 1864 only in so far as they gave an indication of the measure of care required from owners of land adjoining the highway and of their duty not to let cattle stray thereon (AC at p343). If, however, the duty stated does not exist, no measure of care becomes relevant.

It is also to be borne in mind that although I have, in these reasons, discussed the statutes and case law in terms of cattle and other stock, the rule in *Searle v Wallbank* is not thus limited, and extends indeed to all domestic animals, such as cats, dogs, poultry.

Whether any and if so what effect flows in the present case from the system of land tenure and of conditions as to fencing attached to grants by the Crown of occupation licences or of leases or of Crown grants of freehold title, is impossible to say. In the first place there is, in the present case, no evidence as to the history of the title to the land occupied by the defendant Cross. Nor is there, so far as I have been able to ascertain, any case in which it has been held that the effect of such a condition or covenant in an occupation licence or Crown lease or Crown grant is to impose of the licensee, lessee or grantee or on the occupier for the time being, a duty towards users of the highway to keep the boundary fences in repair. In a continent where so much of the rural land is fenced, the absence of any such decision is, in itself, a remarkable thing, even allowing for the fact that the question of liability to users of the highway was one which has come to the forefront only in this century. Nevertheless motor vehicles have by now been with us in great numbers in Australia for at least the past 30 to 40 years, to speak conservatively.

There is more substance in the view that since in Australian States, as in New Zealand and Ontario, in the case of highways and roads proclaimed or reserved under the provisions of the Land Act or proclaimed under the various statutes instituting highway or road construction authorities or under various Local Government Acts, the property in the highway and roads remains in or is vested in the Crown, there is no basis for inferring that the dedication of the land for a highway or a road was subject to the right of cattle to graze thereon: especially when account is taken of legislation prohibiting cattle from straying or pasturing on highways or roads. To that extent the rationale advanced in England (by Lord Goddard in *Carmarthenshire County Council v Lewis* [1955] UKHL 2; [1955] AC 549, at p561; [1955] 1 All ER 565; [1955] 2 WLR 517; (1955) 119 JP 230), for the rule in *Searle v Wallbank* is not sustainable in Australia, even though our own legislation has permitted a traveller a limited right to depasture his cattle on roads. But if that rationale is unsustainable in this country it by no means follows that the rule itself is not

part of the law of Australian States, or, at all events, of Victoria.

If, as appears to be now accepted, the House of Lords in *Searle v Wallbank* finally declared a common law immunity of occupiers of lands adjoining the highway from any duty to fence their adjoining boundary or from liability for injury (occasioned by an animal straying on to the highway) to persons on the highway, the conclusion appears inescapable that such immunity was part of the law of England to be applied in Australian Courts from 1829 onwards. There has been no express universal abrogation of such immunity by New South Wales legislation prior to the separation of Victoria from New South Wales, nor by Victorian legislation since that separation. Nor do the provisions of the *Pounds Act*, the *Fences Act*, the *Local Government Acts*, the *Country Roads Act* (save perhaps in the case of freeways—see *Kelly v Sweeney*, s*upra*), nor the covenants or conditions annexed (under the various Land Acts) to licenses and leases under the selection-purchase legislation of the last century warrant the conclusion that a duty to erect fences or maintain fences along boundaries of land adjoining highways was cast on all occupiers or that any duty to take care to prevent cattle straying from lands adjoining the highway was by necessary inference from that legislation and in the absence of any further facts cast on the occupiers of such lands or on the person in control of such cattle.

The insistence in the *Land Acts* and other legislation on the erection and maintenance of fences was referable, it would seem, to matters such as the need to provide evidence of occupation of the selection applied for or granted, the need to prevent cattle trespass with the consequent intermingling of herds or flocks, the desire to control stock breeding, to prevent or minimize the spread of disease among stock, to prevent stock being stolen or killed by thieves or marauders, rather than to the prevention of collision on the roads or highways. Such collisions undoubtedly could and did occur but the incidence thereof is unlikely to have been such as would have dictated a legislative policy of imposing on landowners the expense of erecting and maintaining boundary fences. It is only in this century that such an objective would have assumed major importance. In the last century in a predominantly rural colony a traveller using the highway could reasonably have been expected to accommodate his travel to the likelihood of cattle straying from lands adjoining the highway.

Nowadays, however, the speed at which motorists travel on country roads is such as to make a collision with stock on the highway a serious matter, but (freeways apart) a prudent motorist driving along roads passing through pastoral or agricultural areas ought still to be alert to the possibility of encountering stock on the highway.

Whether the rule in *Searle v Wallbank* is in truth suitable to the conditions of life and traffic in rural areas of Australia is a matter on which opinions may and do differ. As Mahoney JA observed in *Kelly v Sweeney*, *supra*, (at p740), it is not to be assumed that the balance of utility is all one way. And there is in Victoria, no less than in England, "substantial force in the observations made in Searle v Wallbank concerning the burden which would be placed upon landowners of rural property if a different principle were adopted." What social utility is to prevail is, it would seem, a matter for the legislature, not for the courts.

From this point of view the problem before this Court is not one of whether a decision of the House of Lords is a decision of such strong persuasive authority as to require that it be followed by this Court. (It was never suggested that it was imperatively binding.) The problem is rather whether that rule of the common law has been abrogated by the course of legislation in this State. Examination of the relevant legislation persuades me that it has not.

The Victorian legislation to which I have referred is paralleled in most, if not all of the other States of Australia. It may in the future fall to the lot of the High Court to consider whether it is possible to formulate a ruling authoritative for the whole of Australia on the matter here considered. It may be, of course, that the course of legislation and pastoral occupation in places such as Queensland, South Australia and the Northern Territory has been so different from that prevailing in Victoria, Tasmania or New South Wales as to make it impossible even for the High Court to formulate any such uniform rule for the whole of Australia.

As an alternative to the main argument so ably presented by him, Mr Riordan argued that even if the rule in *Searle v Wallbank* is to be regarded as applicable in England, that rule

did not preclude the appellant from recovering damages if he could show that the collision was due to a failure on the part of the defendant respondent to take reasonable care to prevent the occurrence of some reasonably foreseeable risk of injury. He relied in this context on the speech of Lord Atkin in *Fardon v Harcourt-Rivington* [1932] All ER 81; (1932) 146 LT 391; 48 TLR 215 with which may be coupled the remarks of Lord Wright in *Brackenborough v Spalding* UDC, [1942] AC 310 at p321, and of Lord Parker and Lord du Parcq in *Searle v Wallbank* AC at pp356 and 357 and pp359-60, respectively. Accepting that the occupier of land adjoining the highway is under no duty to fence or, in ordinary circumstances, to take reasonable care to prevent his cattle from straying on to the highway, a number of judges have, since *Searle v Wallbank* stated that liability in negligence for damage caused by cattle straying on to the highway may exist in "special circumstances" as indicated by Lord du Parcq in *Searle v Wallbank* at [AC] p359. Instances of such statements are to be found in *Wright v Callwood* [1950] 2 KB 515; [1950] 3 All ER at (KB) pp527 and 529 per Cohen LJ, and pp529-530 per Asquith LJ; *Brock v Richards* [1951] 1 KB 529, at pp535 and 536 per Lord Evershed MR; [1951] 1 All ER 261; *Gomberg v Smith* [1963] 1 QB 25, at pp36-37 per Harman LJ; [1962] 1 All ER 725; *Ellis v Johnstone* [1964] 2 QB 8, at pp20-1 per Ormerod LJ, at p25; per Donovan, LJ [1963] 1 All ER 286. Recognition of the possibility of liability in negligence is to be found in the judgment of Lord Greene MR in *Hughes v Williams* [1943] KB 574, at p575; [1943] 1 All ER 535; by Denning LJ (dissenting) in *Wright v Callwood*, *supra* at (KB) pp531-2; by Pearson LJ in *Ellis v Johnstone*, *supra* at (QB) p28; by all members of the Court in *Fitzgerald v ED and AD Cooke (Bourne) Farms Ltd* [1964] 1 QB 249, at pp261-3 per Willmer LJ: at pp266-7 per Danckwerts LJ, and (with much more doubt) at p272 per Diplock LJ; [1970] 1 All ER 332; by the Bridge J in *Bativala v West* [1970] 1 QB 716; [1970] 1 All ER 332; [1970] 2 WLR 8, and by all members of the Court in *Draper v Hodder* [1972] 2 QB 556; [1972] 2 All ER 210; [1972] 2 Lloyds Rep 93; [1972] 2 WLR 992, though the latter was not, indeed, a highway case.

The difficulty is to formulate the special circumstances or the circumstances other than the failure to keep fences in repair which will result in liability in negligence. The mere fact of proximity of the occupier's land to a highway cannot in my view be such a special circumstance—per Lord Evershed MR in *Brock v Richards*, *supra*, though reservations on this point have been expressed by Ormerod LJ (at KB pp20-21) and by Donovan LJ (at KB p25) in *Ellis v Johnstone*, *supra*. Nor is a mere proclivity towards straying—see per Lord Evershed MR in *Brock v Richards* (*supra*) (at [1951] 1 KB p36).

The learned Magistrate has not found that there were nor can I find any evidence of any special circumstances in this case which would impose on the defendant a duty to take reasonable care to prevent the vealer from straying on to the highway. There is no evidence that Toolamba Road was a freeway and the provisions of s97(2) of the *Country Roads Act* 1958 are not therefore applicable. No basis exists therefore for applying the reasoning which led Hutley JA to impose liability in *Kelly v Sweeney*, *supra*, I can see no basis on which the Magistrate could have done otherwise than to hold that the rule in *Searle v Wallbank* was applicable. The consequence is that the decision of the learned Magistrate was correct in law. The grounds assigned in the order nisi for impeaching his decision are not made out. The order nisi should therefore be discharged, with the usual consequences as to costs.

DUNN J: I agree that the order nisi should be discharged, with costs. There is nothing I can usefully add to the reasons of the Chief Justice and of my brother McInerney, which I have had the advantage of reading in advance. Order nisi discharged.

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Solicitors for the defendant: Molomby and Molomby.
