Whether or not the pursuer may be able to establish what he avers is not a matter of concern at the moment, but I am clearly of opinion that he should have an opportunity of endeavouring to do so.

LORD ORMIDALE—I concur.

LORD HUNTER—I concur.

LORD ANDERSON—I concur.

The Court adhered.

Counsel for the Pursuer and Respondent—Robertson, K.C.—W. A. Murray. Agents—Wallace, Begg, & Company, W.S.

Counsel for the Defender and Reclaimer—Mackay, K.C.—Christie. Agents—Manson & Turner Macfarlane, W.S.

Friday, May 25.

SECOND DIVISION.

[Lord Ashmore, Ordinary.

FRASER *v.* PATE.

Reparation — Negligence — Road — Sheep Straying on to Public Road—Injury to Cyclist—Liability of Owner of Sheep.

Road — Sheep Straying on — Liability of Owner.

A motor cyclist was proceeding along a public road when a sheep, which had escaped from an adjoining field, suddenly ran across the road and collided with the bicycle, thereby causing serious injury to the rider. In an action of damages at his instance against the owner of the sheep, the pursuer averred that the fencing of the fields was defective, and that in any event the defender was in fault in allowing his sheep to be on the road. *Held* that no liability attached to the owner of the sheep, and action *dismissed* as irrelevant.

Observed (*per curiam*) that the law of Scotland in this matter did not differ from the law of England, and that the rule in *Heath's Garage, Limited* v. *Hodges*, [1916] 2 K.B. 370, fell to be applied.

William Fraser, 27 Barclay Place, Edinburgh, *pursuer*, brought an action against Robert Pate, farmer, Walstone, Penicuik, *defender*, for payment of £250 as damages for personal injuries.

The pursuer averred, *inter alia*—"(Cond. 2) On the evening of 20th September 1922 the pursuer was riding a motor bicycle from West Linton to Edinburgh. His son was riding on the back seat of the said motor bicycle. The pursuer uses the bicycle for the purpose of his business. (Cond. 3) About half-a-mile from Nine Mile Burn, towards Edinburgh, the road running from West Linton to Edinburgh forks, the right hand road going to Penicuik and thence to Edinburgh. The pursuer chose that road to return home. (Cond. 4) Certain fields belonging to the defender's farm are on the sides of said road at a little distance from the forks. There were sheep belonging to the defender grazing in one of these fields, but the gate and fences of the field skirting the road were insufficient to contain said sheep, and several of said sheep had escaped from the field and were grazing at the side of the said road. In any event the defender was negligent in having sheep belonging to him grazing on said road at the time of the accident. They had no right to be there, and the defender was in fault in keeping the gate and fences of said field in such a condition that they were able to escape from the field. (Cond. 5) Seeing said sheep on the road the pursuer drew up his cycle and proceeded with great caution, but when he came opposite where the sheep were grazing two of them suddenly rushed across the road from the north to the south side, and the second of them came into violent collision with the front wheel of pursuer's cycle. . . . (Cond. 7) The accident is entirely due to the fault of the defender in allowing sheep belonging to him to be grazing upon the road as stated. Also and further, he was in fault in keeping his fences in such a state that sheep from his fields were able to stray on the roads. These fences have been in that condition for a long time and their disrepair was well known to the defender. Also he was well aware that in consequence his sheep were in the habit of straying on the said road. In these circumstances he is liable to the pursuer for his loss and damage."

The defender pleaded, *inter alia*—"1. The pursuer's averment being irrelevant and insufficient to support the conclusions of the summons, the action ought to be dismissed."

On 4th January 1923 the Lord Ordinary (ASHMORE) sustained the first plea-in-law for the defender and dismissed the action.

Opinion.—[*After a narrative of pursuer's averments*]—"The defender repudiates liability on various grounds, and at the diet for adjusting the issue proposed by the pursuer for the trial of the case it was maintained for the defender that the pursuer's averments are wanting in specification, and are, moreover, fundamentally irrelevant, and that the action ought therefore to be dismissed at this stage.

"I will deal with the objection as to the want of specification, and for that purpose will refer more particularly to what is averred by the pursuer regarding the insufficiency of the fencing.

"The pursuer, after explaining that 'certain fields' belonging to the defender's farm are situated on the sides of the public road, proceeds to aver as follows:—'There were sheep belonging to the defender grazing in one of these fields, but the gate and fences of the field skirting the road were insufficient to contain said sheep, and several of said sheep had escaped from the field and were grazing at the side of the said road. In any event the defender was negligent in having sheep belonging to him grazing on said road at the time of the accident. They had no right to be there, and the defender was in fault in keeping the gate and fences of said field in such a condition that they were able to escape from the field.'

"Counsel for the defender in support of their objection regarding the want of specification in the pursuer's averments submitted the following considerations — (*a*) That the pursuer does not condescend on the particular field to which he refers, and does not specify what is the insufficiency or defect in the fencing of which he complains; (*b*) that the defender expressly avers as regards the field in which he had sheep grazing on and previous to the day of the accident that the gate and fences of that field were in a thoroughly sound state of repair, and were sufficient to contain, and did contain, the defender's sheep within the field. Moreover, the defender avers that the fences of the field consist of a dry stone dyke topped by a wire fence which had been re-wired and made thoroughly secure in June 1922, and that they are fully 4½ feet high on the inside; (*c*) that the defender in his pleadings expressly calls on the pursuer to specify at what points and in what respects the gate and fences of the field to which the pursuer refers were in a defective condition or were otherwise insufficient; and (*d*) that the pursuer has taken no notice whatever of the demand for further specification, neither giving the information desiderated nor explaining the failure to give the information.

"Now *prima facie* the pursuer is in a position to identify the field to which he refers and to specify what is the defect in the fencing, and that being so, I am of opinion that he is bound to make specific his averments on these matters, and is not entitled to have his case sent for trial unless his pleadings are satisfactorily amended. I refer to *Watherston* v. *Murray & Company*, 1884, 11 R. 1036, as bearing out the view which I have expressed.

"Assuming, however, contrary to my opinion, that the pursuer's averments can be regarded as they stand as sufficiently specific, I proceed in the second place to consider whether they disclose any actionable wrong on the part of the defender.

"The argument submitted by the pursuer's counsel on this the outstanding question in the case seemed to me to proceed on the erroneous assumption that if in point of fact the sheep escaped on to the road through the negligence of the defender in the fencing of this field, the defender must therefore be held legally responsible for the accident which, as the pursuer avers, happened to him. In other words, the argument as put by the pursuer's counsel ignored the primary necessity of basing the alleged negligence upon a duty, express or implied, owed by the defender to the pursuer.

"Negligence *per se*, however, does not infer legal liability. I refer to the opinion to that effect of Lord President Dunedin and Lord Kinnear in *Clelland* v. *Robb*, 1911 S.C. 253. In the words of Lord President Dunedin—'Negligence *per se* will not make liability unless there is, first of all, a duty which there has been failure to perform through that neglect.'

"In the present case the pursuer's counsel were unable to cite any precedent for the pursuer's claim, or any authority to the effect (*a*) that the defender was under a duty to the pursuer as a member of the public using the road to keep the defender's sheep from straying on the road, or (*b*) that the accident and consequent damage to the pursuer can be held to be the natural or probable consequence of the presence of the sheep upon the road to the effect of involving the defender in liability for the accident. The common law both in Scotland and England is substantially the same on the subject, and precedent and principle in both countries seem to me to be adverse to the pursuer's claim.

"In 1862 Lord Justice-Clerk Inglis in an action of damages for injuries done to the pursuer by a bull referred to the legal obligation on the owner of the animal as follows: —'I do not apprehend that there is any substantial difference between the laws of Scotland and England on the point. . . . The law of Scotland will not any more than that of England make a master responsible for injury done by a domestic animal unless it be an animal of unusually vicious habits and propensities and known to the owner to be so'—*Clark* v. *Armstrong*, 1862, 24 D. 1315, at p. 1320.

"Then in 1915 Lord Justice-Clerk Scott Dickson expressed an opinion to the same effect — *Milligan* v. *Henderson*, 1915 S.C. 1030, at pp. 1035-6.

"Stated generally, the law as to the owner's responsibility for a domestic animal is the same in Scotland and England, and in both countries there is a great body of authority to the effect that the owner is not liable on the ground of negligence for allowing such an animal to be at large unless he had reason to anticipate some vicious or dangerous or mischievous habit or propensity.

"The cases illustrate the clear distinction which the law has established between, on the one hand, domestic animals of a mild nature, *e.g.*, sheep, fowls, pigs, dogs, cattle, and horses not known to have shown any vicious, dangerous, or mischievous habit or propensity, and on the other hand animals fierce by nature, *e.g.*, elephants, monkeys, boars, or animals of vicious, dangerous, or mischievous habits or propensities or easily infuriated.

"As regards the former class the owner is not responsible for injuries of a personal nature done by them, but as regards the latter class the man who keeps them must keep them secure at his peril—Lord Esher in *Filburn* v. *People's Palace Company*, 1890, 25 Q.B.D. 258, at p. 260.

"The present case, taking the pursuer's own averments, comes within the class of which the following are examples: — (1) The sheep case, *Heath's Garage, Limited* v. *Hodges*, 1916, 2 K.B. 370; (2) the fowls case, *Hadwell* v. *Righton*, 1907, 2 K.B. 345; (3) the sow case, *Higgins* v. *Searle*, 1909, 100 L.T.R. 280; (4) the cattle case, *Ellis* v. *Banyard*, 1911, 28 T.L.R. 122; (5) the bull case, *Clark* v. *Armstrong*, 1862, 24 D. 1315; (6) the dog case, *Fleming* v. *Orr*, 1855, 2 Macq. 14; (7) the horse cases, (*a*) *Cox* v. *Burbidge*, 1863, 13 C.B. (N.S.) 430, 134 R.R. 586; and (*b*) *Jones, &c.* v. *Lee*, 1911, 106 L.T.R. 123.

"The present case (again accepting the pursuer's averments) falls to be distinguished from the group of cases of which the following are examples:—(1) The elephant case, *Filburn* v. *People's Palace Company*, 1890, 25 Q.B.D. 258; (2) the monkey case, *May* v. *Burdett*, 1846, 9 Q.B. 101, 72 R.R. 189; (3) the boar case, *Hennigan* v. *M'Vey*, 1881, 9 R. 411; (4) the mischievous ram case, *Jackson* v. *Smithson*, 1846, 15 M. & W. 563, 71 R.R. 763; (5) the fierce bull case, *Hudson* v. *Roberts*, 1851, 6 Ex. 697, 86 R.R. 438; (6) the easily infuriated cow case, *Phillips* v. *Nicoll*, 1884, 11 R. 592; (7) the kicking horse case, *Clelland* v. *Robb*, 1911 S.C. 253; (8) the vicious, dangerous dog cases—(*a*) *Gordon* v. *Mackenzie*, 1913 S.C. 109; (*b*) *Fraser* v. *Bell*, 1887, 14 R. 811; (*c*) *Burton* v. *Moorhead*, 1881, 8 R. 892; (*d*) *Renwick* v. *Von Rotberg*, 1875, 2 R. 855; (*e*) *Macdonald* v. *Smellie*, 1903, 5 F. 955; (*f*) *Baker* v. *Snell*, 1908, 2 K.B. 825.

"The foregoing classified summary of decisions, although by no means exhaustive, accurately reflects the distinction which with reference to such cases as the present the law has consistently drawn between the two classes of animals—the one class including those which according to the experience of mankind are not dangerous to man, and the other those which are dangerous.

"In the present case the animal is a sheep—a type of the class of animals harmless to man—and therefore from a legal standpoint whether the sudden rush across the road which was made by the sheep into the pursuer's motor bicycle was the result of sudden fright at the approach of the bicycle, or must be attributed to the supposed natural stupidity of the animal, in either case the unfortunate accident which resulted in the injury of the pursuer must be regarded as one of the ordinary risks to which persons using the public road are exposed, and which they must accept as one of the accidents for which no one can be blamed.

"In order to exemplify the practical application of the general rules of law to which I have been referring, I will select out of the long series of cases the English case of *Heath's Garage, Limited* v. *Hodges* (1916, 2 K.B. 370, decided by the Court of Appeal), and I select it because more than any other it resembles the present case in its facts, as will appear from the following statement of them. The plaintiffs' motor car was being driven along a highway in the daylight when the driver saw a number of sheep in front of him unattended. He put on his brakes, and almost immediately thereafter two sheep jumped from a bank on the side of the road, and one of them ran into the car causing it to overturn. It was proved in fact that the sheep had escaped on to the highway from the defendant's field through gaps in a defective hedge, but there was no evidence of a vicious or mischievous propensity on the part of the sheep. In these circumstances it was held that the defendant was under no duty to the plaintiffs as members of the public using the road to keep his sheep from straying upon it, and that the accident was not the direct and natural consequence of the breach of any such duty.

"The facts in that case and in this (accepting the pursuer's averments) are substantially similar, and I think that the same legal principle is applicable in each case.

"For the reasons which I have given I am of opinion that the pursuer's averments are irrelevant.

"I will accordingly sustain the first plea-in-law for the defender, and disallow the issue proposed by the pursuer and dismiss the action, and I will find the defender entitled to expenses."

The pursuer reclaimed, and argued—The English case of *Heath's Garage, Limited* v. *Hodges*, [1916] 2 K.B. 370, was wrongly decided, and in any event was not binding on this Court. Where animals were allowed to stray on to a public road their owner was responsible for any damage or injury they caused—*M'Ewan* v. *Cuthill*, 25 R. 57, 35 S.L.R. 58; *Smith* v. *Wallace*, 25 R. 761, 35 S.L.R. 583 (horse bolting into street while being yoked); and *Milligan* v. *Henderson*, 1915 S.C. 1030, 52 S.L.R. 813. Further, the defender had been guilty of negligence in failing to keep the gate and fences of his field in a sufficient state of repair to prevent his sheep from straying on to the public road.

Counsel for the respondent were not called on.

At advising—

LORD JUSTICE-CLERK—This is an action of damages brought by a rider of a motor cycle against a Penicuik farmer. The ground of action is that while the pursuer was riding his motor cycle on the public road in the vicinity of Edinburgh, two sheep which belonged to the defender and which had strayed upon the public road collided with his cycle, knocked him off, and caused him serious injury. The pursuer avers two faults against the defender—(first) defective fencing whereby the sheep were allowed to stray from the field on to the public road; (second) that in any event the defender was in fault in allowing the sheep to be on the road at all.

The Lord Ordinary in a very careful and elaborate judgment has dismissed the action as irrelevant, and I agree with the conclusion at which his Lordship has arrived. The English case of *Heath's Garage, Limited* v. *Hodges* ([1916] 2 K. B. 370), to which his Lordship refers, decides in terms (first) that there is no duty upon the part of a defender to a pursuer in circumstances such as the present, and that in any event, even if there is, and if an accident occurs, it is not a natural and probable result of that negligence. Mr Ingram admits, as I understood, that that decision is conclusive against him if it be sound, but he has invited the Court, for reasons which he has stated, to hold that it is bad law.

I have during the time at my disposal had the opportunity of looking at that judgment, and I respectfully agree with the conclusions at which the English Judges arrived and also the grounds upon which they reached these conclusions. The case,

as I read it, was not decided upon any specialities of English law which do not apply to Scotland, but was based upon a common sense view of the situation—a situation which, I may add, their Lordships carefully reviewed in light of the motor traffic which to-day takes place upon public highways. I am unable to find any hint anywhere to the effect that the law of Scotland in this matter is different from the law of England. Mr Ingram was able, so far as I remember, to point to two passages only which even suggest that discrimination, the one a sentence in a dissenting judgment by Lord Johnston (*Milligan* v. *Henderson*, 1915 S.C. 1030, at p. 1045), which merely expresses a doubt in the matter, and the other a sentence in a judgment by Lord Benholme — *Clark* v. *Armstrong* (1862) 24 D. 1315, at p. 1320. In that judgment Lord Benholme was dealing with the case of a bull—a very different animal from a sheep. And while it is true that in one sentence his Lordship uses the word "cattle," I see that in the sentence before and the sentence after that in which he uses that word he carefully confines his observations to the case with which he was dealing, namely, the case of a bull. In any event I can find no case decided in Scotland in the sense which Mr Ingram suggests.

So far from the law of Scotland differing from the law of England, I find, on the contrary, in the case of *Milligan* v. *Henderson* mentioned by the Lord Ordinary, where a lady riding a bicycle on the public road was injured by a dog which ran out and collided with her bicycle, that the Judges are at pains to state that the law of Scotland and the law of England are the same. That doctrine is fully developed in several passages, and I observe that there was in that case a full citation of English law before the Court.

Accordingly the law of England being clear and being fatal to the pursuer's contention, and there being no reason why it should differ from the law of Scotland—the indications being the other way—I have no hesitation in reaching the conclusion that the Lord Ordinary was right in dismissing this action, and I suggest to your Lordships that this reclaiming note should be refused.

LORD ORMIDALE—The law of England would appear to be that the owner of sheep which have strayed on to the high road and by their presence there cause damage to users of the highway is not liable for the damage so caused. A Scots case is cited to us which affirms that there is no difference between Scots and English law in this matter, and Mr Ingram referred to no case in which there was even a suggestion that there was any distinction of importance between English law and our own. The principle seems to be that in the case of a sheep, which is an animal of a mild and peaceable nature, the owner is not bound to anticipate, if it should stray on to the public highway, at any rate in daylight, that it will, by obstruction or in any other way, bring about the downfall of a member of the public to his injury and loss, the reason being that that is not a natural consequence of a sheep being upon the public road. Therefore I entirely agree with what your Lordship has said, and also think that this reclaiming note should be refused.

I confess that I thought that there might have been some assistance to be got from the case of *Clelland* v. *Robb* (1911 S.C. 253), but apparently in the Inner House opinions were not delivered upon the general question, the decision depending entirely upon the view the Court took regarding the particular facts of the case.

LORD HUNTER—I concur.

LORD ANDERSON—I agree. I take it that nothing we are deciding in this case is to be taken as encouraging carelessness on the part of farmers in the discharge of their duty of taking all proper precautions to ensure that their gates and fences are sufficient to confine bestial to their grazings. And I do not think we are laying down any general rule applicable to all possible circumstances, because, speaking for myself, it seems to me that the result might have been different if this accident had occurred in the darkness by reason of the presence of a sheep on the highway; but that is not the case we have before us. The conclusion I reach in this case—and we are dealing with the averments in this case alone—is that assuming any duty on the part of the defender to prevent his bestial being on the highway, it is, I think, obvious on the pleadings that the accident was not the direct consequence of the breach of any such duty.

The Court refused the reclaiming note.

Counsel for the Pursuer and Reclaimer—Mitchell, K.C.—Ingram. Agent—George Meston Leys, Solicitor.

Counsel for the Defender and Respondent—Wilson, K.C.—Mackintosh. Agent—R. Cunningham, S.S.C.

Friday, May 25.

FIRST DIVISION.

[Sheriff Court at Glasgow.

CONNELL *v.* JAMES NIMMO & COMPANY, LIMITED.

Reparation — Master and Servant — Employers' Liability Act 1880 (43 & 44 *Vict. cap.* 42), *secs.* 1 (1) *and* (2), 2 (1), *and* 8—*Failure to State that Person Entrusted with Superintendence was not Ordinarily Engaged in Manual Labour—Averments—Relevancy.*

In an action by a workman against his employer for damages at common law, or, alternatively, under the Employers' Liability Act 1880, in respect of injuries resulting from an explosion of gas in a pit, the pursuer, *inter alia*, averred that the explosion was caused by a dangerous accumulation of inflam-