

see that under the circumstances the fact that the animals were cows and not horses, as in the above case, makes any difference." But my learned brother is not saying that there is no difference in cows and horses in respect of the proper manner of handling and managing them—he goes on to say, "The point is, that they were left unattended." . . . Mr. Justice Osler . . . (further) says (p. 460): "The boy left some of the cattle standing on the road while he went to recover the one which had run off in a direction where no danger was to be anticipated. How can he be said to have been in charge of the others, within the meaning of the Act? He had got so far away from them that it was impossible for him to prevent them from reaching the track and loitering upon it or to drive them off it when he saw them there before the train could arrive at the point of intersection. As was said in the Thompson case (18 U. C. R. 92), the boy foolishly took it for granted that they would stand still on the road, but they went on, as they were very likely to do, toward the crossing." And it was under these circumstances that the words referred to above were made use of by the learned Judge. After using the words already mentioned, he goes on to say: "The servant's plain duty was to have driven those which had not escaped, up the road into the field, before going after the heifer. The others were at large on the highway. His attention was withdrawn from them, and while he was absent, and thus unable to control their movements, they cannot, in my opinion, be said to have been in charge of any one, within the meaning and for the purpose of the Act." It will be seen that the facts of that case led the Court to hold that the cows were not "in charge."

The Railway Act of 1903 made a slight change, 3 Edw. VII. ch. 58, sec. 237; and this is brought forward in the revision in the form set out in the early part of this judgment.

I find nothing to shew that it must be held as a matter of law that these cattle were not in charge of a competent person. The boy swore that, had the whistle blown or the bell rung, he could and would have got the cattle over the track in time; the jury saw fit to believe him; and, while I might not have found in the same way had I been trying the case, I cannot say that his story was incredible. The cows were being driven in the manner in which cows are usually driven in this country; and the same precautions which should be taken in the case of horses would be ludicrous in