

It is regrettable, perhaps, that certain of the Saskatchewan Judges in the *Anderson* case should have expressed opinions upon the meaning of "negligence" in sec. 294 (4) of the Railway Act, for the Court was unanimous in its decision that the act of the plaintiff in turning his cattle at large was "wilful," and it was, consequently, unnecessary to define "negligence." The definition was given, however, and was manifestly wrong, we submit.

In the *Greenlaw*, *Early* and *Anderson* cases the cattle were intentionally turned at large, and, therefore, no question of "negligence" properly arose, for the acts of the plaintiff were clearly "wilful." In the *Koch* case, the animals got at large through a broken gateway, and it was held that the plaintiff had not been remiss in relation thereto. The opinion expressed by Lamont, J., that "where there exists a valid by-law permitting it, an owner cannot be held guilty of negligence in allowing animals to run at large," was, therefore, *obiter*; he repeated it, however, in the above reported judgment, and it was concurred in by all the Judges, except Brown, J.

A Saskatchewan statute says that it shall be lawful to allow animals at large unless the municipality prohibits it. Section 294 (4) of the Railway Act says that no animals shall be permitted to be at large upon any highway, within half a mile of any railway crossing, unless in charge of a competent person. In the *Anderson* case the cattle got from the highway to the railway at a crossing. Assuming the constitutionality of both statutes, surely the Saskatchewan statute, the later of the two, should be read to mean that animals may be at large *where not by law prohibited*. If so, no "valid by-law" or statute permitted *Anderson's* cattle to be at large upon the highway at the point where they left it to go upon the railway, and consequently *Anderson's* conduct in allowing them to be there was both negligent and unlawful. The only effective answer which can be made to this is, that sec. 294 (1) is *ultra vires* the Dominion Parliament, and Judges in *Anderson's* case gave indications that they might hold this, if necessary, but they did not do so, and until a decision to that effect has been made the sub-section stands as law. Lamont, J., points out, however (*supra*), that being at large in violation of sec. 294 (1) of the Railway Act is not *per se* the "negligence" meant in sec. 294 (4), for despite the fact that animals were at large in violation of sec. 294 (1) the owner can recover under sec. 294 (4) unless the railway company can show that they were so at large by reason of the owner's "negligence" or "wilful act or omission." But while this is quite true, it is not a good answer for the purpose to which Lamont, J., put it, for he had said that there could be no negligence in letting cattle at large where a *valid* law permitted them to be, and the defendants had replied that no by-law could *validly* permit the cattle to be upon the highway at a railway crossing, unless in charge of competent persons; in other words, sec. 294 (1) was a good answer to the argument that the by-law (or provincial statute) was valid for the purpose of permitting the cattle to be on the highway at the point from which they got upon defendants' property. What Lamont, J., meant was, that breach of the duty imposed by sec. 294 (1) was not *per se* the "negligence" meant by sec. 294 (4); that is, that mere breach of a legal obligation to keep the animals from being at large is not the "negligence" meant. That is quite right, but what Lamont, J., seems not to have realized is, that if "carelessness" is the kind of negligence