

rent, which had become due in the meantime, and also, for three months' rent in advance under a clause in the lease providing that in the event of the lessee making an assignment the current rent and the next three months' rent should at once become due and payable.

Held, 1. Except as to one month's rent which was due when plaintiff came to take possession, the second warrant was not effective against the assignee and that the latter was entitled to recover the value of the goods.

2. The valuation by sworn appraisers was a fairer guide than the proceeds at a forced sale.

W. R. Tobin, for plaintiff. *Carroll*, for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] *ATKIN v. C. P. R. Co.* [May 5.

Railway—Obligation to fence right of way—Animal getting on track through open gate at farm crossing—Nonsuit.

If a gate in the fence at a farm crossing of a railway is left open by the person for whose use the crossing is provided or any of his servants or by a stranger or by any person other than an employee of the company, the company is relieved by s. 295 of the Railway Act, R.S.C. 1906, c. 87, from the liability imposed by sub-s. 4 of s. 294 to compensate the owner for the loss of an animal at large without his negligence or wilful act or omission getting upon the railway track through such gate and killed by a train. *Fluelling v. Grand Trunk Ry. Co.*, 6 Can. Ry. Cases 47, followed.

Per *PERDUE*, J.A.:—Some negligence or breach of statutory duty on the part of the railway company in respect of such gate would have to be shewn to render the company liable in such a case.

Per *HOWELL*, C.J.A.:—If railway fences or gates are torn down or get open by the action of the elements or by some accident or defect not caused by the act of man, and an animal thereby gets upon the track and is killed, none of the exceptions in s. 295 would apply and the company would be liable under sub-s. 4 of s. 294.