

lessee and those claiming under him as aforesaid will forthwith clear the land . . . and that the lessee (and those claiming under him as aforesaid) will forthwith erect, and at all times during the term hereby mentioned maintain, around such lands hereby demised, fences suitable and sufficient to prevent horses, cattle, and other animals from getting upon the track." The original lessee assigned to the Victoria Harbour Lumber Company; the defendants did not in terms assent to this assignment, but they knew that the assignment had been made, and have not in any way interfered with the occupation of the property by the Victoria Harbour Lumber Co.

Upon this parcel, by whom or when erected does not appear, is a stable, and separating it for the most part from the railway track, is a fence, built by whom or when does not appear. The Victoria Harbour Lumber Co. permitted plaintiffs to have the use of this property, including the stable.

On the night of 12th January, 1907, a car load of horses arrived at defendants' station at Wahnapiatae, and, being taken out of the car into the stockyard at the station, were afterwards taken across the river Wahnapiatae on the ice, and finally a number of them escaped upon the line of defendants' railway at the point at which the fence had not been built. Five of these were killed upon the line of the railway by an engine of defendants; their value is admitted to be \$1,001.

Plaintiffs contend that they have a right to compensation, and plead the statute in their favour; the defendants say that they were not bound to fence as against these plaintiffs, and in any event they are protected by the fact that the animals escaped by the negligence of plaintiffs.

As this accident occurred before the coming into force of the R. S. C. 1906, the Act to be looked at is the Railway Act, 1903, 3 Edw. VII., ch. 58.

Section 199 of that statute provides that:

"The company shall erect and maintain upon the railway fences . . . as follows:

"(a) Fences of a minimum height of 4 feet 6 inches on each side of the railway. . . .

"2. Such fences . . . shall be suitable and sufficient to prevent cattle and other animals from getting on the railway."