

Falconbridge, C.J.K.B., Britton. J. Riddell, J.] [March 11.

YEATES v. GRAND TRUNK RY. CO.

*Railways—Accident—Injury to cattle—Crossing—Negligence—
Special agreement—Liability—Tenant—Railway Act 1903.*

Held, that on the proper construction of section 237, subsection 4, of the Canada Railway Act 1903, 3 Edw. VII. c. 58 D. which enacts that: "When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company, and are killed or injured by a train, the owner of such animals, so killed or injured shall be entitled to recover the amount of such loss or injury against the company... unless the company... establishes that such animals got at large through the negligence... of the owner or his agent... the reference is not to the case of animals getting upon the railway from and adjoining field or enclosure, but only to animals at large upon the highway, or otherwise at large. It can have no reference to animals escaped from an adjoining field where, apart from any defect in railway fencing, they were properly enclosed. The action was brought for the loss of cattle of the plaintiff, which escaped from the plaintiff's enclosure and got upon the defendant's railway and were killed. The plaintiff was a lessee of the said enclosure from the owner for one year, and his animals were therefore lawfully pasturing there, and got on the railroad owing to a defective gate at the farm crossing. It appeared that prior to the plaintiff's lease the owner had agreed with a servant of the defendants', that he the owner might put in the crossing, provided he did it himself and would keep his gates up, and that the defendants should not be responsible for anything he might lose on that crossing.

Held per BRITTON and RIDDELL, JJ., that this agreement exonerated the defendants, the plaintiff being bound by it whether he knew of it or not when he took his lease.

Semble, also per BRITTON, J., that were it not for the said agreement the defendants would have been liable. The plaintiff would not be disentitled to recover by reason of his continuing use of the faulty gate and its fastenings, for as between him and the defendants, it was the duty of the defendants to provide a proper gate and fastenings as provided by statute. Such knowledge as the plaintiff had, and such use as the plaintiff made, of the gate and fastenings as they were would not warrant the conclusion that the plaintiff had adopted them as sufficient.