An exception is made by sub-sec. 3 of lands not improved or settled, not of importance to be considered here, as, if it be necessary for plaintiffs to negative the exception, I should allow it to be proved by affidavit.

In the factum for the appellants in Grand Trunk R. W. Co. v. McKay, 34 S. C. R. 81, will be found a history of the legislation in Canada concerning the duty of railway companies to fence, and English, Scottish, Ontario, and Manitoba cases are collected. I do not think it would serve any good purpose to retrace that history and review those cases here—the legislation is, I think, clear.

The obligation is, to "erect and maintain upon the railway." "Railway" is defined by the Act (sec. 2 (s)) as including "property real and personal connected" with "any railway which the company have authority to construct or operate." A fence built at any place on the company's property sufficient to keep out cattle, and of the required height, would satisfy the statute. There was, before the lease, no duty cast upon the railway company to fence so that animals might not get from their own land upon the line of rail—there was no duty to place a fence along the side of the railway line proper. A lease being made containing a provision that the lessee should himself build and maintain a fence—does that thereby create a duty on the company to build a fence themselves? I should think that to ask the question answers it in the negative.

But the case is not without authority. In Yeates v. Grand Trunk R. W. Co., in part reported in 9 O. W. R. 423, and in full in 14 O. L. R. 63, a Divisional Court . . . held that the owner of land adjoining a railway track who had agreed to keep up gates, etc., could not claim against the railway company for defect in such gates, and that his tenant was in no better position. My brother Britton points out that the knowledge of the tenant of such an agreement is immaterial, and that the right of the tenant is no higher than that of the landlord, even though he might be ignorant of the existence of the agreement. Unless I am prepared to overrule this decision, I ought to hold against the right of a tenant being higher than that of his landlord. I have re-read the cases cited in the Yeates judgment, and am of the opinion that the decision is right. There can be no difference in principle between the relative right of owner and