lature allowing them to do so before the arbitration had been proceeded in, or at any time before it was closed; but here, it may be urged, there has been no such change of intention, the same land being specified in the second notice as in the first.

Still that is no argument that we can accede to, for the 16th sub-section, whis we are considering, expressly allows a new notice be given "with regard to the *same or other* lands." There is no doubt on that point.

Another ground on which it might seem just to allow the first notice to be recalled, and a new one given, would be when the company might, on more mature deliberation, desire to increase their offer, which might perhaps supersede the necessity of going on with the arbitration, and might save them costs.

Here there is just a semblance, and that is all, of the defendants having proceeded on that ground, for they do specify in their new notice a value a few pounds higher than they had offered in their first. We can have little doubt, however, that this slight difference does not account for the steps taken by them. They desired no doubt, and have not disavowed it, to submit the matter to other arbitrators, because they were not content with those who had been chosen.

Can they then, as a matter of right, and under a fair application of the statute, attain that object? I do not think that we can decide otherwise. The position in which the 16th sub-section stands in the 11th clause makes it evident, I think, that it was meant the discretion might be used after all the arbitrators had been appointed, and they had entered upon their duties.

And I can only look upon the notice of desistance from the first notice as a discontinuance of all further proceedings under it. This I think is shewn by the provision that the company shall be liable to the other party for any costs incurred by him in consequence of the first notice. And indeed, without that consideration I do not see what we could hold to be the meaning of desisting from the notice, which the company is in express terms allowed to do, if all might still go on under the notice desisted from as it would have done otherwise.

In the absence of any explanation in the statute to the contrary I can only understand by the 16th sub-section that all future proceedings under the notice *desisted from* are to cease, and that a new arbitration is to be entered upon under the new notice.

Therfore in my opinion, according to the terms of the case submitted to us, a *nolle prosequi* is to be entered, for according to the view which I take of the clause submitted to us, the act of the arbitrators in going on and making an award after the notice had been "*desisted from*," to use the phraseology of the statute, was a void act.

I do not think that the legal question raised here is at all affected by the fact of the defendants having erected and constructed their road, and being now in possession of the plaintiff's land. That is not necessarily wrongful, because the statute allows them to take possession in certain cases before an award made, and when no agreement has been come to. If this is not one of those cases, it would only follow that the right to take and keep possession is subject to be questioned:—it could have no influence on the legal construction of this clause.

McLean, J.—The Railway Clauses Consolidation Act, section 11, establishes a mode by which a railway company may obtain any lands necessary for the construction of their road, and the manner of proceeding by arbitration, to ascertain the value of such lands, when there is a difference of opinion upon that subject. A part of the plaintiff's property being required by the defendants for their railway track, they offered to the plaintiff £433 15s as compensation for the land they desired to obtain, at the same time accompanying their proposition with the certificate of a sworn surveyor, in the form prescribed by the seventh sub-section of the section referred to. The plaintiff promptly rejected the amount proposed, and named an arbitrator to act in his behalf, with one previously appointed by the defendants, to settle the question of value. They appointed a third arbitrator, and all met, at a time appointed, for the purpose of deciding upon the matter submitted to them, on the 26th of June, 1856. At the request of the arbitrator named by the defendants the meeting was adjourned from that day till the 3rd of July following of which due notice was given before the arbitrators met on the 3rd July, a notice was served on the plaintiff, by direction of the defendants, under the 16th sub-section of the same clause, "that the defendants did not desire to proceed any further under the notice served upon the plaintiff on the 14th of March last past, and that the same was in pursuance of that sub-section desisted from, and that any damages or costs sustained or incurred by the plaintiff in consequence of such notice, and of the defendants' *desistment* (the term used in the act) would be promptly paid by defendants After the giving of such notice the arbitrator appointed by defendants refused to attend, or to go on with the reference under the notice of the 14th of March.

On the 3rd of July the Defendants gave to the plaintiff a new notice, and offered £150, the only variance between it and the former notice being a slight variance in the amount which they were willing to pay; and they at the same time notified the plaintiff to appoint an arbitrator on his behalf, to act with the *same* arbitrator for the defendants, in reference to the valuation of the land, in the event of the last proposition not being accepted.

The plaintiff not considering that the defendants could legally abandon the first reference, and so require him to enter into another, did not again appoint an arbitrator, but two of the arbitrators previously appointed proceeded to make an award in the absence of the third, and allowed by such award to the plaintiff the sum of £3,116 5s. 9d. as the value of his land and damages—upon which award this action is brought. The statement of the case shews that the plaintiff not having appointed an arbitrator to act with the arbitrator named in the second notice of the defendants, an application was made to George M. Boswell, Esquire, judge of the county court, to appoint a sole arbitrator between the parties, and that on such application a sworn surveyor was appointed, in pursuance of the 9th sub-section of the 11th clause of the statute, who duly made his award in the matter.

The questions now submitted in the special case agreed upon, are—1st. Whether under the facts stated the award made by two arbitrators after notice of the defendants desisting to act on the first notice, and in the absence of the arbitrator who refused to act, is a valid and good award, and binding on the defendants. 2ndly. Whether under the facts stated the defendants had power to desist, in the manner mentioned, from proceeding under the first notice, so as to put an end to the arbitration thereunder.

The answer to each of these questions depends upon the view taken of the offer, for if the award be held valid, then the defendants must be held to have had no right, by desisting from their first notice, to put an end to all proceedings under it; and if they had that right, then the award cannot be maintained.

The 15th sub-section referred to, certainly confers an extraordinary authority on a railway company, in giving them the power to desist from or stay proceedings on any notice such as that served on the plaintiff on the 14th of March, and to give a new notice to the same party, with regard to the same or other lands, at any time before award, when it may suit the convenience or caprice of the agents of a company. The exercise of this power in this case can scarcely be regarded as otherwise than a vexatious proceeding, for the defendants could scarcely have desisted from their first notice for the purpose of adding so paltry a sum as £16. 5s. to their former offer, as a temptation to the plaintiff to accept their proposition, and at the same time ask the plaintiff to appoint an arbitrator to meet the very same individual, who having taken upon him the duties at the first meeting subsequently refused to attend or to act under the original notice.

No doubt some object was expected to be gained by the defendants in desisting from their first notice, or they would not have done so; but it certainly bears the appearance of trifling with the plaintiff, and it may have been that the defendants desired to get rid of some one of the arbitrators, whose decision was likely to be less favourable than suited their views. While the plaintiff was bound to submit to the award, whatever it might be, and had no means of getting rid of any of the arbitrators, the defendants could avail themselves of the very unusual authority referred to, to dissolve the reference whenever they had reason to think the award was likely to exceed to any extent their ideas of the value of the plaintiff's land.

But the question is not whether the power which they have exercised in the case was rightly or wrongly conferred: the only question is whether in fact they have it, and on this I must say that I can scarcely think there is any doubt