

that what provoked the bringing of this action was the enclosure by the defendant of the land in question where the plaintiffs' line crosses the road, I think I must deal with the action as it is at present constituted; and, looking at the matter from the defendant's standpoint, I think I would also be bound to hold that one of two tenants in common is entitled to defend the land from trespass, if the railway has no title.

An application was made to the Dominion Railway Board by the railway, which had located its line immediately to the west of the land occupied by the Canadian Pacific Rwy., for permission to cross "the public road between lots 16 and 17, . . . as shewn on the plan and profile on file with the Board;" and on the 7th of February, 1911, an order was made by the Board, giving the permission sought. Upon the hearing before the Board, Mr. Billings was present. Some discussion took place as to whether he was present in his capacity as property owner or as municipal officer. I do not think this makes any difference, as the order of the Board is in its nature a judgment *in rem*, and is binding upon all.

I am, however, unable to follow the plaintiffs' counsel when he asks me to read into this order an adjudication by the Railway Board that this 15 feet constituted part of the public road. The order itself deals only with the public road between lots 16 and 17. The description is not particularly apt, as the road is not between 16 and 17. The road, as shewn on the registered plan, was originally part of lot 17. The private road in question is entirely part of lot 16.

The plan is said to be drawn on a scale of 400 feet to the inch; and an engineer, applying his scale, states that the road as shewn upon the sketch or plan scales forty feet. From this I am asked to build up an adjudication that the 15 feet had become a public road.

The plan, although no doubt substantially correct, is not correct in other matters when tested by a scale. Stanley avenue, for example, is shewn as of much greater width than it is upon the ground or upon the registered plan.

I think the fair test as to what is concluded by the order of the Board, is to consider precisely what was before the Board for adjudication. The railway, before it can enter upon private lands, must take proper expropriation proceedings. Before it can cross a public road, it must obtain the