

On referring to the sketch forming part of the deed, it is clear that neither of these farm crossings corresponds with the line of railway laid down by defendants.

But Mr. Douglas contended that the reservation was not limited either by the covenant, schedule, or plan, and "the right of way as now enjoyed" meant the right to use any of the arches under the viaduct for any purpose, including that of a railway, just as the owner would have the right to do prior to the sale.

I do not think that is the meaning of the reservation. The deed must be read as a whole, and so reading it, the meaning is, I think, plain. "As now enjoyed" means "as now used," i.e., for farm purposes. The covenant on the company's part ensures that the right of way will be maintained at all times in an efficient state of repair; the schedule shews that the crossings are for farm purposes, and the plan clearly locates the same at points entirely different from the way located for the railway. This reservation was subject to the company's right to fill up such part of said bridge as may be done without interfering with the privilege reserved. There would be no sense in this if the vendors, reserved the right under the whole length of the bridge.

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[Dand v. Kingscote, 6 M. & W. 174, and United Land Co. v. Great Eastern R. W. Co., L. R. 17 Eq. 158, 10 Ch. 586, considered and distinguished.]

Here, I think, the right reserved is controlled by the express terms of the deed, which, on my construction, limits its use to that of a farm crossing.

Defendants fail, in my opinion, on this branch of the case, because the user claimed is at a point other than that reserved, and for a purpose different from that intended.

Then we come to the effect to be given to the order of the Board of Railway Commissioners dated 5th January, 1905.

The order authorizing defendants to make the changes and extensions asked, approves and ratifies the construction, maintenance, and operation of the sidings already laid.

Whatever may have been the effect of this ex parte order in the first instance, plaintiffs having moved against it under