

it sees fit otherwise to cross. If the land belongs to the Grand Trunk Co., or if it has a lease of it, the James Bay Co. can proceed in the method required by the Railway Act. So far as the Canadian Pacific Co.'s application is concerned, it does not seem to me that any order should be made. The company did not apply within the time provided in sec. 32; the line has been there for years; it does not affect the track of the C. P. R.; it goes under it; and, so far as we have any reason to believe, it cannot affect it in any way. There does not seem to be any ground on which to make any further order in that respect. The application of the James Bay Co. is granted; the application of the C. P. R. Co. is dismissed."

There is no doubt that defendants have built their railway upon and across plaintiffs' right of way under this viaduct.

Defendants contend that they had a right to do so and to continue the same there—(1) under the reservation contained in the deed conveying the right of way to plaintiffs, defendants claiming title through Robert Davies, who claims through plaintiffs' vendors, the Taylors; and (2) under the order of the Board of Railway Commissioners dated 5th January, 1905.

Plaintiffs' deed reserves "to the said vendors, their successors and assigns, the right of way under the said bridge as now enjoyed by the vendors, subject to the right of the said company at any time to fill up such part of the said bridge as may be done without interfering with the privilege hereby reserved."

The company covenant "that they will forthwith carry out and execute or cause to be carried out and executed the accommodation works particularly specified in the second schedule hereunder written, and will at all times hereafter maintain the same in a good and sufficient state of repair."

The second schedule, in so far as it affects the question, is as follows:—"Two under-crossings for farming purposes, one near the boundary line between lots 12 and 13 in said 2nd concession, and the other about midway between the Denison line of lots 13 and 14 in said 2nd concession, and as shewn on the sketch thereof hereto annexed."