

a public highway. Pending this litigation, and with a view to facilitating a suggested settlement, a strip of land leading from the defendants' premises along the plaintiffs' railway to Aberdeen avenue has been secured. But this would afford a very poor and inconvenient mode of egress to the defendants, owing to a depression, some 60 feet deep, occurring upon it between the defendants' premises and Aberdeen avenue. Moreover, having regard to the circumstances under which this strip of land was acquired, a settlement not having been effected, I think the defendants are entitled to have this action disposed of as if they did not control this strip, although, in the view which I take, their control of it does not affect the right which they assert and defend.

In the present case it may be unnecessary to inquire what would be the purely statutory rights of the defendants or obligations of the plaintiffs, in the absence of any agreement respecting the right of crossing at the point in question. I assume—as the authorities seem to establish—that no prescriptive right of crossing, and no such right by estoppel, can arise after the railway company have acquired their right of way, because it is apparently *ultra vires* of a railway company by express grant to confer such an easement: *Canada Southern R. W. Co. v. Town of Niagara Falls*, 22 O. R. 41. Apart from agreement and excluding highway crossings and crossings which the Railway Commission may now order, the only rights of crossing to which the right of way of a railway constructed under the Railway Act of 1888 (51 Vict. ch. 29) is subject, are those provided for by sec. 191 of that statute. But I know of nothing to prevent a railway company, when acquiring their right of way, taking the land required from their grantor, subject to reservations in his favour of such rights of crossing or other easements as may be agreed upon, and which are not inconsistent with the use of the right of way for railway purposes: *McKenzie v. Grand Trunk R. W. Co.*, 14 O. L. R. 671, 9 O. W. R. 778. An agreement for a crossing contemporaneous with the deed of the right of way to the railway company, is, I think, equivalent to a reservation in the deed itself. Here the vendors made such an agreement, and the character and extent of their right of crossing the plaintiffs' railway must be determined by the terms of that agreement, which is in the form of a covenant by the railway company to provide and keep in repair "a farm crossing," &c., at a specified point. The crossing claimed by the defendants is at this point.