THE CANADIAN PACIFIC RAILWAY COMPANY..... } APPELLANTS;

AND

THE DEPARTMENT OF PUBLIC WORKS OF THE PROVINCE OF ONTARIO..... } RESPONDENT.

1918
*Dec. 7.

1919
*Feb. 4.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Statute — Construction— Ad proximum antecedens fiat relatio — 59 V. c. 11 (Ont.)—Railway crossing—Maintenance—Seniority.

An order-in-council passed by the Government of Canada in 1866 for survey of lands on the northerly shore of Lakes Huron and Superior, and to provide for roads while the district was unorganised, directed that "an allowance of 5% of the acreage be reserved for roads * * * also reserving the right of the Crown to lay out roads when necessary." By the Ontario Act, 59 Vict. ch. 11, the Government was authorised to transfer to the Dominion of Canada, by order-in-council, certain lands occupied by the Canadian Pacific Railway, and in 1901 the lands were so transferred and afterwards granted to the railway company subject to the condition in section 2 of the above Act, namely, that the order-in-council should not be deemed "to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof" in said lands. In 1917 the Board of Railway Commissioners made an order allowing the Ontario Government to carry a highway across the railway on a part of said lands, finding as a fact that there were no highways in the district prior to 1901, and ordered a crossing to be constructed and maintained at the expense of the company. On appeal from this latter part of the order:—

Held, Brodeur and Mignault JJ. dissenting, that in view of the finding that there were no highways in the district when the railway company acquired title the condition in section 2 of the Act must be construed as meaning "the rights of the public existing at the date hereof in common and public highways," and as including rights in highways to be laid out under the reservation for roads by the order-in-council of 1866. Therefore, as these potential highways existed before the crossing the company being the junior occupant was properly charged with the expense.

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*PRESENT: Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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APPEAL from an order of the Board of Railway Commissioners for Canada directing that a highway crossing over its railway in the Township of Kirkpatrick be constructed and maintained at the expense of the railway company.

The head-note states the facts on which the appeal depends. The orders-in-council and statutes invoked are contained in the opinions of the judges.

Tilley K.C. for the appellants.

Bayly K.C. for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the order of the Board of Railway Commissioners authorising the construction of a highway across the appellants' railway in the Township of Kirkpatrick, Ontario, and directing that the expense of construction and maintenance of the crossing should be borne by appellants.

The leave to appeal was granted by the Board upon the following question of law, namely,

> Whether upon the facts found by the Board the title of the railway company is subject to a prior right reserved in the Crown, to construct and maintain a public crossing over the railway company's right-of-way, as applied for by the Department of Public Works for the Province of Ontario herein.

The issue between the parties to the appeal is one confined to the expense of construction and maintenance of the crossing which the Board had in their previous order decided should be borne by the railway company.

The facts found by the Board, subject to which the question is to be answered are: (1) That the company's railway through the township in question was constructed in the year 1883, and the right-of-way in which it was constructed was conveyed to the railway company under and by virtue of an order-in-council

of the Province of Ontario made in 1901, and issued under the authority of the statute of the Province, 59 Vict., ch. 11; (2) that no highway was actually laid out across the said railway before title to its right-of-way was acquired and that under the terms of the said order-in-council such title was expressly made subject to the conditions and limitations contained in section 2 of the said provincial Act, which reads as follows:—

> Such transfer shall be deemed to be subject to any agreement, lease or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the order-in-council making the transfer, and the order-in-council shall not be deemed to have conveyed or to convey the gold or silver mines in the lands transferred, or to affect or prejudice the rights of the public with respect to common and public highways existing at the date thereof, within the limits of the land hereby intended to be conveyed.

(3) That under the terms of an order-in-council made by the Government of Canada, before Confederation, in 1866 relating to the surveying and patenting of lands on the northerly shores of Lakes Huron and Superior, which include those now in question and declaring, amongst other things,

> that many years will elapse ere the townships enjoy the benefits of municipal corporations and it is necessary to make provisions for the establishment of roads in the meantime,

it was provided

> that an allowance of 5% of the acreage of lands be reserved for roads * * * and that a clause be inserted in letters-patent for the land accordingly, also reserving the right of the Crown to lay out roads where necessary.

I confess that if I had to answer the question submitted to us without regard to the findings on the questions of fact of the Railway Board, I should hesitate a good deal before answering in the affirmative. The language of the section of the statute quoted above, under which the railway company acquired the title

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to their right-of-way, is open to two constructions neither of which would be unreasonable.

I do not, however, under the facts as found, have any difficulty in answering the question submitted to us in the affirmative.

The fact that the order-in-council of 1866 reserved out of the lands crossed in the township named by the company's railroad

an allowance of 5% for roads,

and that at the date when the statute under which the company acquired its title to the roadbed was passed there were no public or common highways actually laid out enables me to place a construction upon the statute which, I think, under the facts proved, is a reasonable and proper one.

If there were no public or common highways laid out at the date the statute was passed, it would be without meaning or effect unless it was held to apply to potential highways which might be opened from time to time under the reservation of the five per cent. area provided for in the order-in-council of 1866. If there are two meanings which may be given to the language of a public statute one of which would render the statute meaningless and ineffective for the purposes it was meant to cover and the other which would give effect to the statute, I take it the latter must be adopted.

I construe, therefore, under the proved facts, the language of the second section of the statute, 59 Vict., ch. 11, authorising the transfer from the Government of Ontario to that of the Dominion of any lands theretofore taken by the railway company for its roadbed, etc., to mean that such transfer

shall not affect or prejudice the rights of the public with respect

to the only common and public highways which were in existence at that time, namely, those potentially existing in the 5% acreage reserved in all Government lands by the order-in-council of 1866. If the language of the statute had been slightly transposed, as I submit in order to give it any meaning or effect at all it must be, it would read,

> shall not be deemed to affect or prejudice the rights of the public existing at the date hereof with respect to common or public highways within the limits of the lands, etc.

In the last analysis the question turns upon the meaning of the words, "existing at the date hereof," which, in the light of the facts that there were no actual highways then existing, I think must refer to potential highways which, up to the reservation of 5%, could be any day called into existence.

I answer the question in the affirmative and would dismiss the appeal with costs.

IDINGTON J.—I am of the opinion that the language of the statute in question, though of dubious import, is capable of the interpretation and construction put upon it by the majority of the Board appealed from, and therefore do not see my way to allow the appeal.

ANGLIN J.—The Board of Railway Commissioners has allowed the appellants, the Canadian Pacific Railway Co., to submit to the court under section 56 (3) of the "Railway Act" a question of law stated in these terms:—

> Whether upon the facts found by the Board, the title of the railway company is subject to a prior right reserved in the Crown, to construct and maintain a public crossing over the railway company's right-of-way, as applied for by the Department of Public Works for the Province of Ontario, herein.

The order of the Board recites its finding,

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That no highway was laid out across the said railway before its right-of-way was acquired under the order-in-council dated October 31st, 1901.

The Canadian Pacific Railway Co. acquired its title under a patent from the Dominion Government which made it subject to

the limitations and conditions and the reservations set forth in the order-in-council of the Lieutenant-Governor of our said Province of Ontario, dated the 31st day of October, 1901.

This order-in-council transferred the tract of land in question from the Province to the Dominion pursuant to the direction of the Ontario statute, 59 Vict., ch. 11 (1896),

subject to the limitations and conditions specified in section 2 of the said Act.

Section 2 of the statute reads as follows:—

Such transfer shall be deemed to be subject to any agreement, lease or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the order-in-council making the transfer, and the order-in-council shall not be deemed to have conveyed or to convey the gold or silver mines in the lands transferred, or to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

At bar there was not a little discussion upon the proper construction of this section, the appellant maintaining that the well-known grammatical rule "*ad proximum antecedens fiat relatio*" requires that the phrase "existing at the date thereof" should be read as qualifying "common and public highways," and the respondent, while conceding the force of this rule of grammar, contending that it is not so rigid or inflexible as a rule of construction that it should not, under the circumstances of this case, be held to yield to another principle of statutory construction, that a statute will not be held to operate so as to take away existing rights unless its terms expressly, or by necessary

implication, so provide, especially where such a construction would involve an unexplained and improbable change in the previous policy of the law and would entail consequences seriously inconvenient to the public.

By an order-in-council passed in 1866, under the authority of Con. Stat. Can., ch. 22, sec. 7, which had the force of a statute, it was provided in the case of lands on the northern shores of Lakes Huron and Superior that since road allowances had not been laid out, municipal corporations would not be established for many years and it was necessary to make provision for the establishment of roads in the meantime,

> an allotment of 5% of the acreage of lands be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters patent for the land accordingly, also reserving the right of the Crown to lay out roads where necessary.

This order-in-council has never been repealed. As existing law it was continued in force by section 129 of the "British North America Act." There is nothing to indicate that there was any intention on the part of the Legislature of Ontario in 1896 to depart from the policy which had been thus established. The lands in question admittedly lie within the territory to which it applied, and the 5% reservation has not been exhausted.

In my opinion the effect of this order-in-council was to render the lands covered by it subject to a reservation of 5% for the purpose of public highways to be located within them either by the Crown, or, when they should come into existence, by municipal authorities clothed with the right to do so. Such highways existed *in posse* from the date of the order-in-council making the reservation, and when duly located may, *quoad* the rights of subsequent grantees of the lands

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which they traverse, be deemed to have existed *de jure* from that date just as if they had been then shewn as road allowances on official surveys of those lands made under the system which prevailed in the older parts of Ontario.

In view of the finding of the Board, stated in its order-in-council, that no highway had been laid out across the right-of-way before its transfer to the appellant company in 1901, "the common and public highways" mentioned in section 2 of the Act of 1896 almost certainly mean such highways *in posse* as I have indicated. If not, the inference would seem to be irresistible that the phrase "existing at the date hereof" must be referable to "the rights of the public."

An omission to follow the direction for the insertion of a clause of reservation in any patent (or transfer) issued after 1866 would not relieve the land thereby granted from the reservation, whatever other rights the patentee might have as against the Crown, should a portion of his land be afterwards required for highway purposes.

It is almost inconceivable in face of such a declared policy as is evidenced by the order-in-council of 1866, that the Legislature of Ontario should have intended in 1896 to transfer to the Dominion, in order that it should become vested as a right-of-way in the Canadian Pacific Railway Co., a strip of land stretching across this entire territory wholly free from the reservation provided for by the order-in-council of 1866, with the result that rights of highway across it would have to be acquired from that company by the province, or by the municipal corporations which it should create, as they should be needed in order to open up roads for the public convenience. I agree with Mr. Bayly that any construction of which its language reasonably

admits should be placed on section 2 of the statute of 1896 that will prevent such a consequence—that will harmonise it with, and will obviate the necessity of implying a repeal *ad hoc* of, the order-in-council of 1866. See *In re Norman's Trusts* (1), *Eastern Counties and London and Blackwell Railway Co.* v. *Marriage* (2) at p. 64, *per* Pollock C.B., at p. 44, *per* Channel B. *Thellusson* v. *Woodford* (3), at pp. 392-3, *per* Macdonald L.C.B., and cases collected in Maxwell on Statutes (5th ed., pp. 3 and 30). That result will, in my opinion, be attained by treating the phrase "existing at the date hereof" as referable to "rights of the public" rather than to "common and public highways."

The facts that the grant is by the Crown and is gratuitous, and that owing to the non-existence of municipal organisation the right to open highways was reserved by the order-in-council of 1866 to the Crown itself, which was also the custodian of the rights of the public, afford additional reasons for a construction favourable to the respondent if the terms of the statute of 1896 admit of it, as I think they do.

I am, for these reasons, of the opinion that the question submitted should be answered in the affirmative and that the appeal should be dismissed with costs.

BRODEUR J. (dissenting)—This is an appeal from the Railway Board on a question of law, under the provisions of section 56 of the "Railway Act."

The question which the Board has given leave to submit reads as follows:—

Whether upon the facts found by the Board the title of the railway company is subject to a prior right reserved in the Crown to construct

(1) 3 DeG. M. & G. 965, 967-8. (2) 9 H.L. Cas. 32.
(3) 1 B. & P. N.R. 357.

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and maintain a public crossing over the railway company's right-of-way, as applied for by the Department of Public Works for the Province of Ontario herein.

In order to fully understand the bearing of that question, it is necessary to state briefly what are the facts and the circumstances which have given rise to the present appeal.

In 1883, the Canadian Pacific Railway was built in the north-western part of Ontario. When the Township of Kirkpatrick in which the crossing in issue in this case is situated was surveyed in 1884 no highways existed in that Township.

The lands on which the company built its line belonged to the Province of Ontario.

In 1896, the Legislature of Ontario passed an Act to authorise the transfer of the lands occupied by the Canadian Pacific Railway. By section 2 of that statute it was provided that the transfer should be made in such a way as not to

> affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

The transfer was made with the stipulation required by that statute concerning the highways.

Having found it necessary to open a highway in the Township of Kirkpatrick, the Department of Public Works of Ontario applied to the Railway Board for an order directing the Canadian Pacific Railway Co. to construct and maintain a public crossing over their right-of-way in connection with that highway.

The company agreed that the highway was necessary and should be opened but objected to being bound to construct and maintain the crossing.

The Board came to the conclusion that the company should build and maintain the highway crossing on the ground that the proviso contained in the law

of 1896 referred to the reservation for highways authorised by an order-in-council passed in 1866.

The question of law above quoted has been submitted to this court by way of appeal from the decision of the Board.

The first question which presents itself, according to my mind, is whether the statute of 1896 had reference simply to existing highways or to the reservation for highways mentioned in the order-in-council of 1866.

If we construe it according to the ordinary grammatical rule, "*ad proximum antecedens fiat relatio*," I should say that the words

> rights of the public with respect to common and public highways existing at the date hereof

mean, not rights then existing with respect to highways but rights of the public with respect to highways then existing. The participle "existing" qualifies not the substantive "rights" but the substantive "highways" because it is nearer the latter than the former.

It is true that there were no highways in the Township of Kirkpatrick; but nobody would suggest that from the District of Nipissing to the western boundary line of Ontario there were not hundreds of highways existing when the law of 1896 was passed.

I may, in that respect, refer to the revised statutes of Ontario of 1887, ch. 46, sec. 1 and secs. 45 and 48, and ch. 7, sec. 15, sub-secs. 79 and 80, which shew that the territory mentioned in that law of 1896 was organised for municipal and judicial purposes and formed part of two electoral districts.

The Dominion legislation then in existence referred also to the settlements of that region: R.S.C. 1886, ch. 6, sub-sec. 73 of sec. 2.

The legislation had in view the protection of the

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rights that the public had in the highways then actually existing in that territory.

If the legislature wanted to refer to the highway reservation provided in the order-in-council of 1866, it would certainly have expressed itself differently. It would have been so easy to mention specifically that order-in-council.

What is the meaning of that order-in-council? It is a recommendation or order to the executive authority having to deal with the Crown lands that

> an allowance of 5% of the acreage of the lands be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters-patent for the lands accordingly.

Perhaps, as there is a specific reference to the Lower Canada legislation, it might be of interest to see what that legislation contemplated.

It is embodied in an order passed under Lord Dorchester on the 30th of October, 1794. By his instructions, Lord Dorchester had the power, in laying out townships, to make reservations for public use (Constitutional Documents, Doughty and McArthur, 1791-1818, p. 21); and it is in execution of these powers that the order of the 30th October, 1794, was passed.

It provided that each lot in a township would contain 210 acres instead of 200, in order to provide for an allowance of 5% for highways. That legislation was the one in force in Lower Canada in 1866, when the order-in-council concerning Upper Canada was passed.

Those two orders-in-council are intended to oblige the settlers to give without indemnity 5% of their acreage for the use of highways. They have no reference to the rights-of-way of a railway company.

I fail to see then that the order-in-council of 1866 is referred to in the statute of 1896. I have come to

the conclusion that the question submitted to us should be answered in the negative.

The appeal should be allowed with costs.

MIGNAULT J. (dissenting)—The Board of Railway Commissioners for Canada has granted to the appellant leave to appeal to this court on a stated question of law, from its order No. 26,393, authorising the appellant to construct and maintain at its own expense a highway crossing over the railway on the line between lots 8 and 9, concession 5, in the Township of Kirkpatrick, District of Nipissing, and Province of Ontario. In this order the Chief Commissioner, Sir Henry L. Drayton K.C. and the Assistant Commissioner, Mr. D'Arcy Scott, concurred, while Mr. Commissioner S. J. McLean dissented. The order granting leave to appeal states the facts found by the Board and the question to be answered, and obviously, in answering this question, no facts other than those found by the Board can be considered.

These facts are:—

1. The company's railway through the township in question was constructed in the year 1883, and the right-of-way on which the said railway was constructed conveyed to the railway company, by an order-in-council made by the Lieutenant-Governor-in-Council of Ontario, dated October 31st, 1901, and issued under the authority of a statute of the province, 59 Vict., ch. 11.

2. No highway was laid out across the said railway before title to its right-of-way was acquired under the said order-in-council.

3. The company's title was, under the terms of the said order-in-council dated October 31st, 1901, made expressly subject to the conditions and limitations contained in section 2 of the said provincial Act, which said section provides * * * (see text further on).

4. Under the terms of the order-in-council made on the recommendation of the Commissioner of Crown Lands, dated August 6th, 1866, it was provided that an allowance of 5% of the acreage of lands be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters-patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

The question to be decided is as follows:—

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Whether upon the facts found by the Board, the title of the railway company is subject to a prior right reserved in the Crown, to construct and maintain a public crossing over the railway company's right-of-way, as applied for by the Department of Public Works for the Province of Ontario herein.

The question before the Board was who should bear the cost of the crossing. According to the established practice, this liability for cost is determined by reason of the "seniority" either of the railway or of the highway. Where the railway is senior, that is to say, where it was established before the highway, the expense of the crossing is borne by the municipality or other public authority opening the highway. Conversely, if the railway comes after the highway, it must pay for the crossing. In the present case the majority of the Board, Mr. McLean dissenting, decided the question of seniority in favour of the highway.

As the statement of facts shews, the question submitted involves the construction of section 2 of the Ontario statute, 59 Vict., ch. 11, and in connection with this section it is proper to consider the provisions of the order-in-council of the 6th August, 1866, passed by the Government of Canada before Confederation.

The statute in question, 59 Vict., ch. 11, sanctioned the 7th April, 1896, is entitled

An Act to authorise the transfer of certain provincial lands occupied by the Canadian Pacific Railway.

The first section authorises the Lieutenant-Governor-in-Council in his discretion to transfer to the Dominion of Canada any lands theretofore taken and occupied by the Canadian Pacific Railway for the road-bed, stations, station grounds, and other purposes of the railway, and included in its plans, the same being so transferred to enable the Government of Canada to fulfil its obligations to the said company in that behalf with respect to the railway.

Section 2, the construction of which is in question, reads as follows:—

Such transfer shall be deemed to be subject to any agreement, lease or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the order-in-council making the transfer, and the order-in-council shall not be deemed to have conveyed or to convey the gold or silver mines in the lands transferred or to affect or prejudice the rights of the public with respect to common and public highways *existing at the date hereof*, within the limits of the lands hereby intended to be conveyed.

The italics are mine.

The final section of the statute declares that such transfer shall be as binding on the Province of Ontario as if the same were specified and set forth in the Act of the legislature.

The lands mentioned in this statute were transferred to the Government of the Dominion of Canada by an order-in-council adopted by the Government of Ontario on the 31st October, 1901,

subject to the conditions and limitations specified in section 2 of the said Act.

Subsequently, the Dominion of Canada granted a patent of the lands to the Canadian Pacific Railway Company, subject to the same conditions and limitations.

The order-in-council of August 6th, 1866, referred to in the statement of facts of the Railway Board, was adopted by the Government of Canada, comprising then Upper and Lower Canada, and is in the following terms:—

On a report, dated 2nd instant, from the Honourable the Commissioner of Crown Lands, stating that, in surveying the lands on the northerly shore of Lakes Huron and Superior, the United States system of meridianal lines has been adopted, as it possesses the decided advantage of uniformity, regularity and economy.

That by this system the townships are laid out six miles square, a more convenient size for municipal purposes than that of the older townships, which are generally ten miles square.

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That the township boundaries are drawn on the true meridian, and at right angles thereto, each township being subdivided, by lines drawn parallel at its outlines, into thirty-six sections of one mile square containing 640 acres each. These sections are subdivided into quarters by posts planted on the outlines.

That in these surveys no road allowances are laid out on the surveyed lines as formerly, the rugged and broken nature of the ground making them unfit for sites of roads. That the intention being to follow the American system with regard to the roads as well as the subdivisions of the lands, the roads there are laid out by the municipal authorities in the most suitable sites, and the proprietors of the lands over which they pass receive such compensation for the lands taken as the authorities consider just and reasonable. That, owing to the inferior quality of the lands generally on the northerly shore of Lakes Huron and Superior and the large blocks which have been taken up as mineral locations, many years will elapse ere the townships enjoy the benefits of municipal corporations, and it is necessary to make provisions for the establishment of roads in the meantime, he, the Commissioner, therefore recommends that an allowance of 5% of the acreage of lands be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

The committee submit the recommendation of the Commissioner of Crown Lands for Your Excellency's approval.

The recommendation of this order-in-council, adopted by the Government, was that an allowance of 5% of the acreage of lands be reserved for roads, and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

Mr. Tilley, for the appellant, argued that this order-in-council merely adopted a policy which should govern grants of lands on the northerly shores of Lakes Huron and Superior, which policy was to be given effect by the insertion in letters patent of any of these lands of a reservation of 5% of the acreage of the land for roads, and also of the right of the Crown to lay out roads where necessary.

Upon due consideration, I do not think this construction an unreasonable one, for if a grant of lands were made by the Crown without this reservation I fail

to see how the order-in-council could be relied on to restrict an absolute and unqualified grant.

No letters-patent were issued for the lands in question, which were transferred by the Government of Ontario to the Government of Canada by the order-in-council of the 31st October, 1901, without any other instrument of title, and this order-in-council does not contain a reservation of 5% for roads, or a reservation of the right of the Crown to lay out roads where necessary. The only reservation made—excluding one concerning Indian reserves and concerning previous grants made without a reservation of the right-of-way, stations, station grounds, and other purposes of the Canadian Pacific Railway, which is not pertinent to the present inquiry—is to subject the transfer to the conditions and limitations of sec. 2 of 59 Vict., ch. 11. The construction of this section, therefore, determines the answer that should be given to the question submitted. To repeat the language of the statute, the order-in-council making the transfer shall not be deemed

> to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof, within the limits of the lands hereby intended to be conveyed.

The expression, "rights of the public" (there is no reservation of the rights of the Crown as distinguished from those of the public) is extremely vague. Giving this expression, however, full effect, the "rights of the public" seem to be those with respect to common and public highways *existing* at the date of the order-in-council.

It is suggested that what was intended was to reserve the existing rights of the public with respect to common and public highways, and not merely their rights to existing highways. This seems to be a forced construction, for if it was intended to reserve existing

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rights and not rights to existing highways, if really the public can be said to have existing rights to non-existing highways, the legislature could have used apt language to make this intention clear, and in the absence of anything plainly indicating such an intention, I would not feel warranted in giving to the language of the statute any other construction than the natural and grammatical one. It therefore appears to me that the rights of the public are reserved merely as to highways which existed on the 31st October 1901. The statement of facts of the Board is that no highway was laid out across the railway before title to its right-of-way was acquired under the order-in-council.

It is also suggested that no highways existed across the lands transferred by virtue of the statute, and that therefore the language of section 2 would be meaningless if it be restricted to the then existing highways. This fact, however, is not among the facts found by the Board as applied to the large tract of land transferred under the statute, which is described as being

> the lands lying between the terminus of the Canada Central Railway near Nipissing, known as Calander station, and the western boundary of the Province of Ontario, near Rat Portage (Kenora), and between the junction at Sudbury on the main line of the Canadian Pacific Railway for the Algoma Branch and the River Saint Mary.

I cannot therefore assume that there were no existing highways in this large tract of land covering several hundred miles—the contrary assumption would be much more reasonable—and therefore the construction which I feel constrained to place on the language of section 2 does not, in my opinion, render this language meaningless.

I would further think that if existing rights of the public to highways are to be considered as being protected by the statute, the order-in-council of the 6th

August, 1866, standing by itself, and in the absence of a reservation of 5% of the acreage for roads in the order-in-council of the 31st October, 1901, or of the right of the Crown to lay out roads where necessary, would not vest any such rights in the public with respect to highways then not laid out or planned. The language of the order-in-council of 1866 would indicate that at least some roads had been then laid out by the municipal authorities, but the Board has found as a fact

> that no highway was laid out across the said railway before its right-of-way was acquired.

I therefore think that the question submitted should be answered in the negative. I would consequently allow the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *E. W. Beatty.*
Solicitor for the respondent: *E. Bayly.*