

The Canadian Electrical Association and others - - - *Appellants*

v.

The Canadian National Railways and others - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 12TH JULY, 1934.

Present at the Hearing :

LORD BLANESBURGH.
LORD WARRINGTON OF CLYFFE.
LORD ATKIN.
LORD MACMILLAN.
LORD ALNESS.

[*Delivered by* LORD BLANESBURGH.]

This is an appeal by special leave from a majority judgment of the Supreme Court affirming the legality of a regulation of the Board of Railway Commissioners of Canada propounded by a majority vote of that Board. The difficulty of the question raised may be properly gauged, in this instance, by the divergence of administrative and judicial opinion already manifested with reference to it. Its widespread importance to electrical power companies and similar organisations throughout Canada on the one hand and to the Dominion railways on the other may in like manner be judged by the widespread and representative interests of the parties to the dispute. There are ranged on one side as appellants, first, the Electrical Association of Canada, with a membership comprising public utility companies engaged in the production and transmission of electrical power for commercial and private consumption throughout the whole Dominion, all of them whether incorporated under Dominion or Provincial legislation having full charter or statutory

powers to erect and maintain the overhead transmission lines necessary for the distribution of their power. As second appellants there appear the Hydro Electric Power Commission of Ontario, a provincial government commission similarly engaged in the production and transmission of electrical power. Against these appellants are to be found as respondents the Canadian National Railways, the Canadian Pacific Railway Company, the Michigan Central Railroad Company and the Railway Association of Canada. The contest, indeed, is one between two sets of public utility organisations, Dominion wide in their operations, and it concerns the adjustment of rights and liabilities between them in respect of a matter of great importance to both: that is to say, in respect of the wires for the transmission of electricity for light, power or other purposes carried by the appellants and other like undertakers along or across the lines of the Dominion railways.

Under the Dominion Railway Act it is the Railway Commissioners to whom is assigned the duty of dealing with applications by power companies and others for licences to carry their wires along or across the lines of the railways under their jurisdiction. Without such a licence and in the absence of such agreement as is permitted by the Act no such wires may be lawfully so carried. It has been the practice of the Commissioners to issue general orders containing regulations with reference to this matter. One such general order—No. 231— was promulgated by them in 1918. This order was in 1920 amended by another, numbered 230; and on the 20th February, 1931, was further amended by general order, numbered 490, containing the regulation with reference to which the present question arises. The strongest exception to this new regulation is taken by the appellants. The Commissioners have thereby, they complain, sought to impose upon every successful applicant for a licence to carry overhead electrical wires across or along a railway a liability to the railway company concerned both oppressive and exceptional. The question they raise is whether the imposition of such a liability by such a regulation can legally be justified by reference to any powers of the Commissioners under the statute.

The appellants questioned the legality of the regulation when its publication was under consideration. On its promulgation they were given leave by the Commissioners to refer the question of its legality to the Supreme Court to which in due course this question was propounded

“As a matter of law had the Board jurisdiction to make general order No. 490 dated the 20th of February, 1930?”

To that question as has already been indicated the Supreme Court in a judgment delivered on the 31st March, 1932, by a majority returned an affirmative answer. Hence the present appeal.

It will be found that although the question put to and answered by the Supreme Court was quite general in its terms, the particular regulation of the order which has already been referred to and is set forth below, was then and is now alone in question. The competence of the Board in regard to the other provisions of a very elaborate general order has not been challenged.

Until another view was suggested in the course of the argument at their Lordships' Bar, it has been generally assumed that the existing powers of the Railway Commissioners in this matter are derived exclusively from section 372 of the Railway Act, 1919. That section with modifications, here immaterial, has had its place in all Railway Acts for many years, and, as it is certainly the main source of the Commissioners' powers, it is convenient, if only for facility of reference, to set forth its provisions at once :—

" 372. Lines, wires, other conductors, or other structures or appliances for telegraphic or telephonic purposes, or for the conveyance of power or electricity for other purposes, shall not, without leave of the Board, except as provided in subsection five of this section be constructed or maintained

- (a) along or across a railway by any company other than the railway company owning or controlling the railway ; or
- (b) across or near other such lines, wires, conductors, structures or appliances, which are within the legislative authority of the Parliament of Canada.

2. Upon any application for such leave the applicant shall submit to the Board a plan and profile of the part of the railway or other work proposed to be affected, showing the proposed location and the proposed works.

3. The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.

4. Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.

5. Leave of the Board under this section shall not be necessary for the exercise of the powers of a railway company under section three hundred and sixty-seven of this Act, nor for the maintenance of works now authorised, nor when works have been or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes."

Before their Lordships proceed to a closer examination of this section in its relation to the problem presented by the new regulation, they may conveniently interpolate one or two general observations as to its structure. It will be noticed that the section, while including within its range applications for leave to construct and maintain across or along a railway electrical lines so diverse as a telephone wire at one end of the scale and a power cable at the other end, deals with all by a form of words made applicable to each indifferently, and whether the structure, be it what it may, is to be situate in a remote corner of the Dominion or in the midst of a crowded urban area.

The section nevertheless does not fail to discriminate in a way between what is serious and what is trivial. The railways, as was said in a judgment now over 20 years old, *Maritime Telegraph and Telephone Company v. Dominion Atlantic Railway Company*, 20 Can. Rwy. Cases 213, stretching, as they do, over the whole country, of necessity must be crossed from time to time by innumerable telephone and telegraph wires, and to a lesser extent by the wires of electrical power and light companies. It can hardly be doubted that the framers of the section recognised the existence of that state of things, and intended to provide for it. All public utilities must be served, railways not more than others, and the fact that under the section the Commissioners are not in set terms empowered to refuse an application made to them, seems at least to justify the judicial view expressed in the same report, that the issue on every such application must always be how the crossing can properly and safely be made in the particular circumstances of the case under consideration. This necessary distinction of circumstance between one application and another, a distinction to which it may be due regard has not always been had, is in the section revealed, as their Lordships think, by the contrast between "the terms and conditions" of sub-section 3, on which the execution of any particular proposed works may be permitted, and the "general orders, regulations, plans and specifications" which, under sub-section 5 are to be adopted and approved by the Board. The "terms and conditions" are those specifically appropriate to the particular case: the "general orders etc." such as are in their terms appropriate either to every case or to specified classes of cases. Accordingly, provided that the provisions of the general order applicable are recognised and observed, the section leaves it to the parties concerned, if they can agree, themselves to fix the terms and conditions upon which particular lines may be carried along or across a railway without either application to or intervention by the Commissioners.

Now is it possible to find in this any limitation relevant to the present inquiry in the permitted scope of these general orders? It is convenient to put and to seek to answer this question while the section itself is immediately under notice, for the regulation now challenged is contained in a general order promulgated by the Commissioners under this very section, a fact which their Lordships have verified by reference to a full print of the order with which they have been courteously supplied since the hearing.

The question is not easy to answer, so unqualified are the powers of the Commissioners in this matter. But it may perhaps be hazarded that the permission extended to the companies concerned to agree as to the terms and conditions referred to suggests that the general order, which overrides agreement, is not intended to deal *ex cathedra* with questions which the companies concerned

are in such matters left free to adjust for themselves. But is the question immediately relevant now, that of the liabilities *inter se* resulting from the placing of a company's wires along or across a railway one of the matters capable of being adjusted by agreement? There is much to be said for an affirmative answer. A railway company is permitted by subsection 1 (a) of the section to carry its own wires over its own lines without control or interference by the Commissioners. For these wires the liability must be exclusively its own. There is no one else on whom it can be laid. Again, under sub-section 5 the leave of the Board is not required for the exercise by a railway company of its powers under section 367 of the Act, and under that section the company may lease its own telegraph or telephone lines to any companies having telegraph or telephone powers. Quite obviously, it would seem all questions of liability in respect of such lines leased will fall to be regulated by the provisions of the lease and these are left at large. It is however only an inference or by way of analogy that a similar freedom of contract may be presumed to exist where under this subsection by consent the wires of a company are carried across a railway line, and even if apart from regulation this freedom does exist, their Lordships are not prepared to hold that it may not be controlled by regulations of the Commissioners if they are minded to make them.

The question remains whether a regulation to the same effect may not also be a lawful term or condition imposed under subsection 3. To that question, to which on the appeal the main argument has been addressed, their Lordships will come in due course. They proceed now to a closer examination of the terms of the impugned regulation.

The general order in which it is to be found is a republication with amendments of the general orders already referred to. The frame of the original orders remains unaltered: and the only amendment of substance introduced into them is that to which exception is now taken. In order to appreciate the full effect of the amendment it will be convenient first to quote the introductory provisions, nos. 1 and 3 of the order, which have stood unaltered throughout:—

“ 1. That the conditions and specifications set forth in the schedule hereto annexed under the heading ‘ Rules for wires erected along or across Railways ’ be, and the same are hereby adopted and confirmed as the conditions and specifications applicable to the erection placing and maintaining of electric lines wires or cables along or across all railways subject to the jurisdiction of the Board, part 1 being applicable where the line or lines, wire or wires, cable or cables, is or are carried along or over the railway: part 2 being applicable where the line or lines, wire or wires, cable or cables is or are carried under the railway.

3. That any order of the Board granting leave to erect place or maintain any line or lines, wire or wires, cable or cables, along or across any railway subject to the jurisdiction of the Board shall, unless otherwise

expressed, be deemed to be an order for leave to erect place and maintain the same according to the conditions and specifications set out in that part of the said schedule applicable thereto, which conditions and specifications shall be considered as embodied in any such order without specific reference thereto, subject, however, to such change or variation therein or thereof as shall be expressed in such order."

It is made plain by these introductory provisions that the order applies to every kind of electric line wire or cable, and also, what is perhaps for present purposes more important, that while the order is of general application power is reserved to vary its provisions so as to meet the circumstances of any particular case.

The regulation now in question is inserted as condition 2 of Part I of the schedule relating to overhead wires in place of the same condition as it formerly stood. Conditions 1 and 2 prior to the amendment now challenged of condition 2 were as follows :—

"1. The applicant shall at its or his own expense, erect and place the lines, wires, cables or conductors authorised to be placed along or across the said railway and shall at all times at its own expense maintain the same in good order and condition and at the height shown on the drawing, and in accordance with the specifications hereinafter set forth so that at no time shall any damage be caused to the company owning, operating or using the said railway, or to any person lawfully upon or using the same, and shall use all necessary and proper care and means to prevent any such lines, wires, cables or conductors from sagging below the said height.

2. The applicant shall at all times wholly indemnify the company owning, operating or using the said railway of, from and against all loss, cost, damage, and expense to which the said railway company may be put by reason of any damage or injury to persons or property caused by any of the said wires or cables, or any works or appliance herein provided for not being erected in all respects in compliance with the terms and provisions of this order, as well as any damage or injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the applicant."

It is explained by the Commissioners in the judgment propounding their substituted regulation that the railway companies were dissatisfied with these conditions as not sufficiently protective. They complained that while power companies were required under condition 1 to maintain their lines in good order, they were not compelled to indemnify the railway companies against loss occasioned them by failure of the power companies to maintain the lines in such good order. The railway companies moreover had persistently put it forward as their view that the conditions should provide for their indemnification not only in the circumstances already provided for, but for loss or damage however caused. It then appears from the judgment that the railway companies having stated their position as just detailed would have been content with a regulation in place of condition 2, framed as follows :—

"2. The applicant shall at all times wholly indemnify the company owning, operating or using the said railway of, from and against any loss cost, damage and expense to which the said railway company may be put

by reason of any damage or injury to person or property caused by any of the said wires or cables or any works or appliances herein provided for not being erected *and at all times maintained* in all respects in compliance with the terms and provisions of this order as well as any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant."

As will be seen this is the original condition 2, with the addition of the words italicized "and at all times maintained," and had it been accepted by the Commissioners the present controversy could not have arisen. But it was not accepted and the explanation by the Commissioners of the condition finally promulgated by them is to be found in this concluding passage of their judgment.

"Regarding as vitally essential the safety of persons outside the circle of either company, and desiring to frame conditions most likely to ensure to them immunity from danger and loss, the Board is of opinion that this result can be best assured by placing upon the shoulders of the company carrying a dangerous load across the right of way, a primary obligation to bear it safely across the railway property, unless the negligence of the latter company should operate to cause the power wires to spill their load.

If, therefore, an accident or disability occur due to an escape of electric power and for any reason its cause cannot be definitely located as between the railway company and the power company, the latter should be held responsible, for the reason that the loss suffered will have been occasioned by the passage of the power company's wires over or along those of the railway company. If they had not been there the occurrence would not have taken place. The conditions of carrying the power companies' lines across or along the railways should be framed in accordance with what is above stated, that is to say, except in cases where loss or damage to the railway company is directly attributable to any act, default or negligence on the part of such railway company, its agents or employees, the applicant shall at all times wholly indemnify the company owning, operating or using the railway, from and against all loss, cost, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property caused by any of the said applicant's wires or cables or any of the works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere.

In result, therefore, paragraph 2 of the

STANDARD CONDITIONS AND REGULATIONS FOR WIRE
CROSSINGS.

PART I.

Over-Crossings

'Conditions'

will be amended to read as follows":

And then follows the condition, the legality of which is now impugned:—

"2. The applicant shall, at all times, wholly indemnify the company owning, operating or using the railway from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property caused by any of the applicant's

wires or cables or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere."

It will be noticed that this condition, as actually promulgated while in other respects reproducing textually the words of the oral judgment introducing it, omits the words of exception which their Lordships have underlined above. It is a striking omission, not easy to account for in view of the attitude before the Commissioners of both parties to the dispute and it derives an added importance from the fact that the concluding words of the condition, "unless the cause of such loss cost damage injury or expense can be traced elsewhere," words which possibly have some relation to the subject-matter of the exception, may themselves on a strict construction be quite otiose. For by the condition an applicant is only made liable for damage or injury "caused" by any of his wires or cables and, literally read, the concluding words say no more than that he is not to be liable if the damage or injury is not so "caused." It will be noted also that although in the course of the judgment it is made clear that the amendment of the original condition as asked for by the railways was confined to the wires and cables of power companies and its acceptance was justified by the Commissioners with reference to their wires and cables only, still the condition, as promulgated, extends to all wires covered by the section, that is to say, to telegraph and telephone wires, as well as the wires of the power companies.

It does not seem however that the legality of the condition as actually amended,—the aspect of it with which their Lordships are alone concerned,—is affected by either of these things. It must remain with the Commissioners, should they deem it necessary, to expound its meaning or by amendment to clarify its terms if and when the occasion arises for their so doing.

The construction placed by the appellants upon the new condition is very far reaching. The amended condition, they say in their printed case,

"purports to create in the place of a mere liability for damage caused either by breach of the terms and conditions of the Order or by negligence of the power companies a liability in the nature of insurance to the world in general for damage brought about by the mere existence of the power lines."

"A burden," they add later, "which the power company is not called upon to bear under the general law in force in any of the Provinces of Canada with respect to responsibility for damages."

As has been seen the appellants need not have confined this statement of theirs to power companies and power lines. The condition, as has been observed, extends to all applicants and to all their electric lines. Can it as so construed

be justified as one of the "terms and conditions" by which the acceptance of a particular application may be accompanied. Upon this their Lordships would say at once that the dispensing power reserved to the Commissioners by clause 3 of the General Order already quoted, so that the condition may or may not be made applicable in any particular case, enables them to treat it as a "term" or "condition" within the meaning of the section. As such then is it legal?

Now the words "terms and conditions" are in constant use throughout the Act. In some instances, as *e.g.*, sections 39, 202, 256 (3) (a), they are qualified by words of explanation or limitation. Here they are quite general. In such a case their true construction must be arrived at by reference to the principles thus enunciated by Romer, L.J., in *West Midlands Joint Electricity Authority v. Pitt* [1932], 2 K.B. 1, where he says:—

"But there are an almost infinite variety of terms and conditions and the question whether or not these words include in any particular case some particular kind of term or condition must depend upon the context in which they are used."

And similarly by Lord Macmillan when delivering the judgment of the Board in *C.P.R. v. Toronto Transportation Commission* [1930], A.C. 686, where at p. 697, he says that—

"where the matter is left so much at large, practical considerations of common sense must be applied especially in dealing with what is obviously an administrative provision."

Now, in their Lordships' judgment the powers of the Commissioners under this section are, at least primarily, purely administrative. As already observed, it is not without significance that in the section—differing from, for example, section 151 and section 373 (4) of the Act—the Commissioners are not in set terms given power to refuse applications made to them: the works they are empowered to authorise are from their nature as necessary in the interests of the public as is the working of the railways themselves, and the implication of the section appears, not obscurely, to be that if by the imposition of appropriate terms and conditions in regard to the execution of the works such ends as the safety of persons using or being upon the railway and the convenience of its working can be secured or safeguarded, then the works are to be authorised. All the specific provisions of the section are in accord with this view of it. These show it to be a construction section. Every applicant is to submit a plan of the location showing the proposed works: the Commissioners by their order are to prescribe the extent to which these works may be executed, by whom, when, and under whose supervision; while, most significant, perhaps, of all in its relation to the present question, is the enactment of subsection 4 that after the Commissioners' order is made the works may be constructed and maintained subject to and in accordance therewith.

Is there or is there not an implication that so constructed and maintained, the rights and obligations of all parties in relation to these works are left to be regulated by the ordinary law ?

And more general considerations are not without their bearing on the proper answer. It is no doubt true that the Parliament of Canada, for the purpose of securing effective railway administration, may encroach upon the provincial legislative domain in respect of property and civil rights. Nowhere is this more clearly enunciated than in the case of *Toronto Corporation v. C.P.R.* [1908], A.C. 54, 58. But a reference to the Railway Act shows how sparingly this power has there been exercised by that Parliament, while no instance of a delegation of this legislative power to the Commissioners, a purely administrative body, has been shown nearer than section 34 (3), if indeed that be such an instance. To discover this delegated power disguised in the authority given to the Commissioners to impose the terms and conditions referred to in this section is as matter of construction a difficult quest. Nor is such a delegation readily to be presumed from the nature of the case. The particular section of a wire or cable to which the Commissioners' authority is limited is in most cases a mere fraction of its entire length even when carried along a railway ; it is probably always so when carried across. Moreover, there are or may be in immediate juxtaposition to the wire or cable in question other similar wires or cables to which the Commissioners' terms and conditions have no application—the cables and wires of the railway company itself, for example. It is perhaps not an easy presumption that the Commissioners are by these indecisive words empowered to innovate upon the common law with reference to the fractions of wires or cables authorised by them and constructed and maintained in accordance with their order, leaving to be governed by that common law *simpliciter*, these very wires and cables throughout the rest of their course and even as they pass along and across the railways those other wires and cables over which they have no power.

And in this connection the consideration of another section of the Railway Act, analogous in its provisions to section 372, and referred to in the minority judgment of the Supreme Court is not irrelevant.

By section 273 the Commissioners may, upon the application of any landowner, order the railway company to provide and construct a suitable farm crossing across the railway wherever, in any case the Board deems it necessary for the proper enjoyment of his lands, and the Board may order and direct—the words are in substance identical with those of section 372—“ how, when, where, by whom and upon what terms and conditions such farm crossing shall be constructed and maintained.” Mr. Justice Rinfret in his judgment, concurred in by Mr. Justice Cannon, asks with force whether it could be suggested that by

these expressions Parliament intended to empower the Board to impose conditions of civil liability upon the farmer as a result of using the farm crossing. The negative answer is in the case of that section reinforced by the fact that Parliament itself in specific terms, and not by delegation, prescribed the extent of that civil liability (*see* section 386). In the case of the cables and wires referred to in section 372, Parliament apparently considered that no special enactment as to liability was necessary.

As already suggested one instance of delegated authority may possibly be found in section 34. If it be one, it is useful to note the terms in which it is conferred and the qualification to which it is subject.

“Section 34 (3).—The Board may by regulation or order provide penalties when not already provided in this Act to which every company or person who offends against any regulation or order made by the Board shall be liable.

(4). The imposition of any such penalty shall not lessen or affect any other liability which any other company or person may have incurred.”

Their Lordships have dealt at length with the construction placed on the condition by the appellants because much of the argument was directed to the matters which have so far been alluded to. But it is not necessary for them to determine in this case whether if the amended condition had to be construed as the appellants seek to construe it, it would be one beyond the Commissioners' powers. It is enough for their Lordships to say that in their judgment the construction placed upon the condition by the appellants is not its true construction: its true effect raises different questions altogether, and it is upon them that the decision of the Board must depend.

Condition 2 does not, they think impose upon applicants, as is contended by the appellants, a liability in the nature of insurance to the world in general for damage brought about by the mere existence of the authorised works. The condition imposes no liability to the outer world at all. It is a clause of indemnity to the railway company only against any loss or damage that company may sustain and against any expense to which it may be put in meeting any claim against it by third parties by reason of the existence of the authorised works, such claim being maintainable against the company by the general law. The question is whether a condition, so construed, for such their Lordships think is its true construction, is within the competence of the Commissioners.

It having been strongly contended during the attack on the condition that the expression “terms and conditions” in section 372 does not extend to conditions pecuniary or compensatory in character, it was thrown out by one of their Lordships in the course of the argument that that difficulty might possibly be met, if there were read into

section 372, section 39 of the Act, where " terms and conditions " are actually so described. And the suggestion was taken up by counsel on both sides.

The section is as follows :—

" 39. When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, equipment, works, renewals or repairs to be provided, constructed reconstructed, altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality, or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision the same shall be provided, constructed, reconstructed, altered, installed operated, used and maintained.

2. The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals or repairs or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order shall be paid."

Their Lordships are struck by the possibility of reading the two sections together—that is to say, treating section 39 as supplementary to section 372. But not being, as they find, required to take that course in order to reach the conclusion at which, on the whole case, they have arrived they refrain on the present occasion from expressing any opinion upon the question whether it is open to them. Two compelling reasons actuate them in their reserve.

First of all, section 39 has not been relied upon or even referred to in the proceedings as in any way affecting the present question, either by the Commissioners or by the majority of the Supreme Court or even by the respondents. On the contrary, both by the Commissioners and by the learned Chief Justice of Canada in his judgment section 372 is treated as the only section of the Railway Act in which the relevant powers of the Commissioners are to be found and the one reference to section 39 is made by Mr. Justice Rinfret in his dissenting judgment in the Supreme Court, where treating the section as clearly having no application to cases under section 372 he relies upon the difference in the phraseology of the two as a justification for his view that the result which might follow where as in section 39 the relevant words are " terms and conditions as to payment of compensation or otherwise " does not follow in cases under section 372, where the words " terms and conditions " are used alone. But further, the question of the relation of section 39 to other sections of the Act—to section 272 already referred to, for example—raises considerations of wide importance as well as of difficulty upon which their Lordships would, unless so compelled, hesitate to pronounce until after these topics had been raised and fully considered in the Canadian Courts. Except with such assistance they would, for example, hesitate to express any opinion upon the question arising under this very section 372

namely, whether by the inclusion in that section of so many of the provisions of section 39 with variations appropriate, as may be suggested, to the particular subject being dealt with, the Legislature has not " otherwise expressly provided " for these matters so as to exclude with reference to them the application altogether of section 39.

But, their Lordships, without any reference to section 39, have reached the conclusion that treating the amended condition as a term or condition within the meaning of section 372, alone it is not beyond the powers of the Commissioners. The condition, as they read it, amounts to no more than this, that it is to be a term of permission granted to an applicant to carry his wires and cables along or across a railway that he shall save the railway company harmless from their presence there. It is a provision which their Lordships think would in a serious case, quite naturally be embodied in a contract between the two parties where the works resulted from agreement between them, and they see no sufficient reason why, within their powers under the section the burden should not, where the Commissioners think fit, be imposed by them upon a successful applicant. Its propriety in any particular case is a question for them. It is with its legality when imposed that their Lordships are alone concerned ; and when construed as they have construed it, their Lordships think that to the legality of the condition no effective objection is forthcoming.

In the result, therefore, their Lordships are in accord with the answer returned by the Supreme Court to the question propounded for its consideration.

They will accordingly humbly advise His Majesty that this appeal be dismissed.

There will be no order as to its costs.

In the Privy Council.

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DELIVERED BY LORD BLANESBURGH.

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