In the Privy Council.

No. 87 of 1930.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN :

THE CANADIAN PACIFIC RAILWAY COMPANY
(Defendant) - - - - - - - - - *Appellant*

AND

HIS MAJESTY THE KING on the information of
the Attorney-General of Canada (Plaintiff) - - *Respondent.*

APPELLANT'S CASE.

Record.

1. This is an Appeal by special leave, from a Judgment of the Supreme Court of Canada, delivered on the 11th June 1930, in part dismissing the Appellant's appeal and in part allowing the Respondent's cross-appeal from a Judgment of the Exchequer Court of Canada delivered on the 21st March 1929. p. 545. p. 485.

2. The action was commenced by the Crown on the 5th September 1926, to compel the removal by the Appellant of a line of telegraph poles and wires about 500 miles in length, which with the exception of a small part had been in operation since between 1888 and 1893 and was at the date of commencement of the action situated almost entirely upon the 100-foot right of way of that part of the Canadian Government Railways System known as the Intercolonial Railway. The Respondent also claimed $718,408 for issues and profits or in the alternative damages and a declaration of the Appellant's rights. p. 1. p. 2, l. 19.

3. The Appellant's telegraph line, as shown on Exhibit 1, extends from Saint John in New Brunswick, via Moncton and Truro, to Halifax in Nova Scotia, with a branch line from Truro via New Glasgow to Sydney, p. 484.

S.L.S.S. Ltd.—WL657B-4069

500
35
17500 poles

Cape Breton, where it connects with the Atlantic cables. Another branch line, about 10 miles in length extends from Stellarton (or Westville) to Pictou.

pp. 3-5. 4. The Appellant by its defence alleged, inter alia, leave and licence, that such licence was irrevocable or had not been revoked, acquiescence, a lost grant and estoppel.

5. The following provisions of the Department of Railways and Canals Act (Revised Statutes of Canada 1927, Chapter 171) were relied upon by the Respondent :—

* * * * * * *

"7. The Minister shall have the management, charge and direction of all Government railways and canals, and of all works and property appertaining or incident to such railways and canals, also of the collection of tolls on the public canals and of matters incident thereto, and of the officers and persons employed in that service.

* * * * * * *

"15. No deed, contract, document or writing relating to any matter under the control or direction of the Minister shall be binding upon His Majesty, unless it is signed by the Minister, or unless it is signed by the Deputy Minister, and countersigned by the Secretary of the Department, or unless it is signed by some person specially authorised by the Minister in writing for that purpose. Provided that such authority from the Minister to any person professing to act for him, shall not be called in question except by the Minister, or by some person acting for him or for His Majesty."

* * * * * * *

p. 486. 6. In the Exchequer Court Mr. Justice Audette dealt only with the p. 495, l. 8. question of law leaving the question of damages to be subsequently determined. He held that the Appellant's telegraph lines were and had been from the beginning on the Respondent's right of way by the Respondent's licence and with full knowledge of the Canadian Government railway officials, but that such licence was revocable.

p. 496. 7. The Appellant appealed to the Supreme Court of Canada on the ground that the licence was irrevocable and that the action ought p. 497. to have been dismissed. The Respondent cross-appealed contending that the Appellant's telegraph lines had been placed on the right of way without leave or licence and that the Appellant was a trespasser or in the alternative that the licence, if any, had been revoked.

By the judgment of the Supreme Court delivered by Mr. Justice Newcombe, and concurred in by Anglin, C.J., Duff, Rinfret and Lamont, JJ., it was held that the conduct of the Respondent's officials did not bind the Crown and that, except in regard to the Pictou Branch, the Appellant was bound to remove its line and to make payment for past occupation or pay damages. p. 547, l. 31.

8. The circumstances under which the different parts of the Appellant's telegraph lines were constructed are shortly as follows :—

The main line from Saint John to Halifax (280 miles), as well as a branch line from Truro to New Glasgow (43 miles) was originally constructed in 1888, 1889 and 1890. Owing to the exclusive rights supposed to have been granted to the Montreal Telegraph Company, permission to build the line upon the Respondent's right of way was not readily obtainable at that time, and the Appellant accordingly built the line, with some exceptions, upon its own right of way outside, but close to or adjoining the Respondent's railway property. For the transport of materials, workmen and other services the Appellant from time to time made substantial payments to the Intercolonial Railway. p. 264, l. 15.

9. In 1890 the Respondent, for the purpose of protecting the supposed exclusive rights of the Montreal Telegraph Company, brought an action in the Exchequer Court against the Appellant to compel the removal of such of the Appellant's poles as were on the Respondent's right of way. p. 290.

The general manager of the Appellant's telegraph line, Mr. Hosmer, thereupon communicated with Mr. H. P. Dwight, the Vice-President and General Manager of the Great North West Telegraph Company (which had acquired the rights of the Montreal Telegraph Company) asking whether his Company had any objection to the Appellant's poles being on the Respondent's right of way and received a reply dated 16th September, 1890, in part as follows :—

> " We have made no complaint whatever as to the location of your poles, and you may consider yourself welcome, so far as we are concerned, to any such accommodation of the kind as you may need anywhere along the route. I think we have both reached a period in our experience when we may consider it scarcely worth while to take any action simply for the purpose of annoying each other." p. 291, l. 16.

This correspondence was then submitted by the Appellant to Sir John A. Macdonald, Prime Minister and acting Minister of Railways, who replied on the 9th October, 1890, in part as follows :—

> " The Government have not the slightest objection, so far as they are concerned, to the C.P.R. planting telegraph poles along the p. 293, l. 40.

line of the I.C.R. The trouble is that long ago, by an absurd agreement, the Montreal Telegraph Company was given the exclusive right to plant poles and wires along the line of the I.C.R. Such being the case, the Government Officials gave notice to your people not to plant poles but the warning was utterly disregarded. The proceedings were taken lest the Government might be held responsible by the Montreal Telegraph Company for breach of agreement and consequent damage. Dwight's letter to Hosmer (the letter of 16th September, 1890, above set out) is satisfactory enough but it is not, I take it, binding on the Company especially if under the control of Wiman. However, if the C.P.R. will stand between the Government and all harm in the event of proceedings being taken, we will not interfere with your telegraph poles."

p. 304, l. 25. An official consent signed by Mr. Dwight was afterwards obtained and
p. 305, l. 1. transmitted to the Deputy Minister of Justice and in pursuance of this arrangement the action in the Exchequer Court was discontinued.

Later, further proceedings having been threatened because of the
p. 316, l. 25. placing of poles upon another section of the right of way, Mr. Dwight's letter was brought to the attention of the Deputy Minister of Railways and Canals, whereupon the proposed proceedings were abandoned.

10. Telegraph poles normally require renewal about every 15 to 20 years and the Appellant from time to time, when renewing, straightening and repairing its lines, relying upon the understanding so arrived at between the Appellant, the Government and the Great North West Telegraph Company and the consent of the Government to the erection of the Appellant's telegraph line on other branches, hereinafter more particularly referred to, placed its poles upon the Respondent's right of way throughout the main line.

p. 318, l. 35. 11. The Appellant before constructing the telegraph line from New Glasgow to Sydney (163 miles) in 1893, applied to the Deputy Minister of Railways for permission to build the line upon the Intercolonial Railway's right of way. Upon this part of the line the Western Union Telegraph Company had a telegraph line but no exclusive rights. In reply the Appellant's Manager of Telegraphs was informed by a letter dated 10th March 1893, that :—

p. 319, l. 14. " There will be no difficulty about this, but it will be necessary for you to enter into a written agreement similar to the Western Union Telegraph Company."

An agreement was accordingly prepared by the Department of Railways and, after approval by the Government Railway Officials, was, on 27th May 1893, sent to the Appellant, apparently in duplicate, with the following request :— p. 324.

" Be pleased to return the same to this department as soon as they have been duly signed and sealed on behalf of the Company." p. 324, l. 15.

The agreement was duly executed by the Appellant and returned to the Department of Railways on the 25th July 1893, but it cannot now be found. Its terms were presumably similar to those contained in the agreement with the Western Union Telegraph Company which was produced and whereby the Telegraph Company was bound to provide certain facilities for the Intercolonial Railway. p. 325, l. 20. p. 326, l. 25.

This part of the line was, in accordance with the agreement, constructed throughout upon the Intercolonial Railway's right of way. The railway officials were consulted as to how the line should be built and facilitated its construction in every way.

12. Early in 1911 the Appellant, in compliance with a request made on behalf of the Town of Pictou to extend its telegraph system to that place, applied to the Managing Board, which at that time administered the Intercolonial Railway, for permission to build a short branch telegraph line upon the railway right of way from Westville or Stellarton (near New Glasgow) to Pictou, a distance of about 10 miles, representing that, owing to the small amount of telegraph business in Pictou, the project would not be feasible unless a free right of way could be obtained. p. 399.

The Managing Board on the 10th March 1911 passed a minute in the following terms :—

" The Board decided to grant the request; the Telegraph Company to give us the use of the line and to put the same into our stations at Westville and Pictou." p. 367, l. 13.

Later it was suggested that it would be difficult to arrange a suitable agreement, and that a rental of $1.00 per pole should be charged, but the Appellant refused to build on terms of paying any rental as the possible traffic would not justify it. In the end the Manager of the Intercolonial Railway on the 7th April 1911 wrote to the Appellant's Vice-President as follows :— p. 369, l. 32.

" As I told you verbally when in Montreal, it will be all right for you to go on and build this line and we will arrange about the agreement at a later period. p. 371, l. 21.

" Instructions have been given to our Track Department to permit the building of the line . . . ."

p. 378, l. 20 *et seq.*

13. In 1914 discussion arose in regard to charges payable by the Appellant for transport upon the Intercolonial Railway of cars, men and material in connection with the repair and maintenance of telegraph lines. During these discussions the Appellant's representative who had recently arrived from the West and was unfamiliar with the situation, suggested that any agreement should include a confirmation of the Appellant's right to maintain its poles on the right of way and thus for the first time and in an incidental manner was this question raised. Much of the correspondence and papers now available could not then be found, and there was confusion as to the origin of the Appellant's rights.

p. 434.

p. 491, l. 10.

The scope of the proposed agreement was accordingly enlarged, and in 1917 it was finally settled, initialed by the General Manager of the Canadian Government Railways and signed on behalf of the Appellant. Under this agreement the Appellant was required to make certain payments and render certain services to the Railway. The agreement as settled was forwarded to the Department of Railways but was not approved by the Minister and was never completed.

p. 1.

14. In these circumstances on the 15th September 1926 the action out of which this appeal arises was instituted by the Respondent in the Exchequer Court of Canada.

p. 491, l. 28.

Mr. Justice Audette, who tried the case, found as a fact that the Appellant's telegraph lines were placed on the Respondent's right of way with the consent and co-operation of the high officers of the Respondent's Railway and of the Prime Minister and Minister of Railways and that agreements for the working of the lines were placed in the hands of the Respondent duly signed by the Appellant upon the understanding that they would be executed on behalf of the Respondent.

p. 494, l. 24.

p. 495, l. 13.

In these circumstances the learned Judge held that the Appellant could not possibly be regarded as a trespasser and that it was a licensee but not an irrevocable licensee as that would amount to an alienation of the property of the Crown.

p. 547, l. 31.

p. 558, l. 5.

15. On appeal to the Supreme Court of Canada Mr. Justice Newcombe, who delivered the principal judgment, after reviewing the documents, came to the conclusion that in regard to the main part of the line (Saint John to Halifax and Truro to New Glasgow) the Appellant was a trespasser.

p. 558, l. 7.

p. 560, l. 28.

In regard to the New Glasgow to Sydney line the learned Judge considered that the agreement executed by the Appellant in 1893, not having been formally executed by the Crown, had not been proved and that at the time of the bringing of the action the Appellant was in no better position than that of a licensee whose leave was terminated or exhausted.

With regard to the short line between Westville or Stellarton and Pictou the learned Judge considered that the Appellant's licence, though revocable, had not been revoked and that the Respondent's action failed. p. 560, l. 37. p. 562, l. 7 *et seq.*

After referring to the provisions of the Railways and Canals Act set out in paragraph 5 above, the learned Judge came to the conclusion that the contracts which the Appellant alleged were ineffective for non-compliance with the Statutes and that, without an express grant from the Crown, the Appellant could not acquire a right to the use of the line in perpetuity. p. 563, l. 27 *et seq.*

The Chief Justice of Canada, while concurring with Mr. Justice Newcombe in regard to other matters, did not consider that failure to give notice revoking the Appellant's licence for the Westville to Pictou part of the line was necessarily fatal to this part of the Respondent's action. He thought the bringing of the action itself should be regarded as sufficient notice, subject only to the question of costs and to sufficient time being allowed to the Appellant to remove the poles and wires. p. 547, l. 1.

The case was accordingly remitted to the Exchequer Court for trial.

16. In the result therefore the Appellant has been held liable for issues and profits or damages for the occupation by the Appellant and for the removal of its telegraph lines on the Respondent's right of way for a distance of 486 miles, which occupation had been acquiesced in since the year 1893.

17. The Appellant submits that so much of the judgment of the Supreme Court of Canada as dismissed the Appellant's appeal and allowed the Respondent's cross-appeal from the judgment of the Exchequer Court as to (1) the line from Saint John to Moncton, to Halifax via Truro and from Truro to New Glasgow, and as to (2) the line from New Glasgow to Sydney, is wrong and should be reversed and that the said appeal should be allowed and the said cross-appeal should be dismissed as to the said lines, and that the said judgment of the Supreme Court dismissing the action as to this Pictou branch should be affirmed for the following, among other

REASONS.

(1) BECAUSE the telegraph lines were erected and maintained by leave and licence of the Crown and the officials of the railway.

(2) BECAUSE the Crown and the officials of the railway acquiesced in and encouraged the erection and maintenance of the telegraph lines on railway property and the Appellant in consequence incurred large expenditures,

assumed substantial obligations and abandoned valuable rights of way and the Respondent is now estopped from demanding the removal thereof.

(3) BECAUSE the telegraph lines or substantial parts thereof were erected under express grant or by express contract and for valuable consideration.

(4) BECAUSE in the circumstances a lost grant should, if necessary, be presumed.

(5) BECAUSE the Appellant's rights were not terminable at will.

(6) BECAUSE, if the rights were terminable, no reasonable notice of termination was given.

(7) BECAUSE the judgment of the Exchequer Court that there was leave and licence is right, but is wrong in declaring that the leave and licence is not irrevocable.

W. N. TILLEY.

GEOFFREY LAWRENCE.

E. P. FLINTOFT.

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