Privy Council Appeal No. 87 of 1930.

The Canadian Pacific Railway Company - - - - - *Appellant*

v.

The King - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH FEBRUARY, 1931.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD ATKIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

This appeal was brought against a judgment of the Supreme Court of Canada, which in part, dismissed the appellant's appeal, and in part allowed the respondent's appeal, from a judgment of the Exchequer Court of Canada in proceedings, in which the Crown, on the information of the Attorney-General of Canada, was plaintiff, and the Canadian Pacific Railway Company (the appellant here) was defendant.

The object of the proceedings was to obtain the removal from the roadway and lands of the Intercolonial Railway, of the appellant's line of telegraph poles and wires. The Intercolonial Railway forms part of the Canadian Government Railways system, and its roadway lies in the provinces of New Brunswick and Nova Scotia.

The appellant's telegraph line was, at the date of the filing of the information (the 15th September, 1926), substantially all erected upon and carried along the Intercolonial Railway's roadway. The telegraph line forms part of a telegraph system

worked by the appellant, and is of undoubted importance both to itself and to the public, inasmuch as it connects with the cable station at Canso, as well as with Halifax and other important points in the Maritime Provinces.

For the purpose of determining the rights of the parties the Supreme Court, in considering the case, divided the appellant's telegraph line into three sections. This appears to their Lordships to be a convenient course, and they propose to adopt it in this judgment. The three sections are as follows :—

(*a*) The "Main Telegraph Line," viz., from Coldbrook near St. John through Moncton and Truro to Fairview Junction near Halifax, and from Truro to New Glasgow. This was constructed in the years 1888, 1889 and 1890.

(*b*) The "Branch Telegraph Line," viz., from New Glasgow to Sydney. This was constructed in 1893, and

(*c*) The "Westville Telegraph Line," viz., from Westville to Pictou. This was constructed in 1911.

It will be necessary to consider the circumstances in which each of these sections was constructed, where the poles were placed, and how it came about that eventually substantially the whole system came to be situated on the lands of the Intercolonial Railway. But before doing so it will be advisable to state exactly what were the claims which were put forward by the Crown, and how each Court has dealt with those claims.

According to the information as it was filed and as it stood at the opening of the trial, the Crown's case was that the appellant was from the very start a trespasser in respect of its entire line. No other case was suggested. The allegation ran thus :—

> "(2) On or before or since the first day of January, 1890, the defendant in or upon the possession of the plaintiff of and in the premises, wrongfully and in violation of the plaintiff's rights, entered and intruded and constructed thereon, a line of poles and wires which the said defendant has ever since operated as part of a telegraph system."

The relief claimed was possession and mesne profits. At the trial leave to amend was asked for and granted, with the result that damages for trespass were claimed as an alternative to the claim for mesne profits, and, as alternative relief, a declaration was sought in the following terms :—

> "(*b*)—(1) In the alternative a declaration as to the rights, if any, of the defendant in said lands in respect of the said line of poles and wires."

The appellant had pleaded licence either irrevocable or, if revocable, unrevoked, and this no doubt was the reason why it was thought prudent by the Crown's advisers, to include a claim for a declaration as to the defendant's rights in the Crown lands, notwithstanding that such a claim would appear to be inconsistent with any claims founded upon trespass. It is, however, true to say that the Crown's primary contention throughout has been, that the appellant was and is a trespasser, and nothing else.

The action was tried by Audette J., and after a hearing which lasted for nine days, the learned Judge delivered his judgment on the 21st March, 1929. By his formal judgment, after making a declaration to the effect that the roadway in question of the Intercolonial Railway was owned by and in the possession of the Crown, he made an order in the following terms :—

> "And this Court doth further order, adjudge and declare that the property of the defendant now on the said lands and premises consisting of a line of telegraph poles erected thereon and carrying wires for telegraph purposes is and has, from the respective dates when the several portions thereof were originally placed thereon, been on the said lands and premises with the leave and licence of the plaintiff, but not an irrevocable licence.
>
> "And this Court doth further order that either party to this action have leave to apply, upon notice, for further directions.
>
> "And this Court doth further order and adjudge that the question of costs between the parties be reserved."

The learned Judge, it will be observed, drew no disinction in regard to the rights relating to any particular section of the telegraph line. His view of the result of the evidence was, that as regards the whole, the appellant had placed its poles and wires upon the Intercolonial roadway under licence from the Crown, and that such licence remained unrevoked at the date of the judgment.

If this correctly represents, as their Lordships think it does, the judgment of the trial Judge, the action was at an end, and nothing remained for decision or discussion except the question of costs.

Both sides appealed to the Supreme Court. The appellant appealed from the judgment, except in so far as it declared that the line of telegraph poles was and had been on the lands with the leave and licence of the Crown, upon the grounds : (1) That the trial Judge was in error in holding that the licence was not irrevocable, and (2) that on the facts found by him the action should have been dismissed with costs.

The Crown, by way of cross-appeal, asked that instead of the declaration hereinbefore set out, it should be declared that the appellant was throughout a trespasser, or, in the alternative, that if the appellant had any leave or licence, the same had been revoked before the commencement of the action.

On the 11th June, 1930, the Supreme Court made an order disposing of both appeals in the following terms :—

> "This Court did order and adjudge that as to (1) the line from St. John to Moncton, from Moncton to Halifax via Truro, and from Truro to New Glasgow and as to (2) the line from New Glasgow to Sydney the said appeal should be and the same was dismissed, and the said cross-appeal should be and the same was allowed.
>
> "And this Court did further order and adjudge that as to the line from Westville to Pictou the said appeal should be and the same was allowed, and the said cross-appeal should be and the same was dismissed."

After making certain provisions as to costs the Court further ordered that the case be remitted to the trial Judge in order that he might proceed with the trial thereof.

Inasmuch as the Supreme Court allowed the cross-appeal as regards the Main Telegraph Line and the Branch Telegraph Line, the trial of the action would have to proceed in relation to the claims for damages; but it must be pointed out that the order does not indicate upon which footing the cross-appeal succeeded, whether upon the footing that the appellant was a trespasser throughout, or upon the footing that the appellant was a licensee whose licence had been revoked before action. This was obviously a question of the first importance in considering the quantum of damages, and one, the answer to which, should have been made plain upon the face of the order. Without it the order is incomplete.

Their Lordships, however, gather from a perusal of the language used by the learned Judges in the Supreme Court, that the view which there prevailed was that, as regards the Main Telegraph Line, the appellant was a trespasser throughout, but that as regards the Branch Telegraph Line, the appellant "was at the beginning of this action in no better position than that of a licensee whose leave was terminated or exhausted."

In relation to these two sections of the telegraph line the five Judges were unanimous.

So far as concerns the Westville Telegraph Line, there was also unanimity in the view that the appellant was not a trespasser throughout, but had originally placed the telegraph line on the roadway under licence from the Crown. The Chief Justice of Canada, however, was of opinion that the bringing of the action of itself determined the licence. The other members of the Court (Duff, Newcombe, Rinfret and Lamont JJ.) considered that the licence had not been revoked.

Their Lordships now proceed to consider the facts disclosed by the evidence in relation to each of the three sections of the appellant's telegraph line.

(*a*) *The Main Telegraph Line.*

This section of the appellant's telegraph line was constructed in the years 1888–90.

On the 15th May, 1888, the appellant applied by letter, addressed to the Department of Railways and Canals, for permission "to construct an extension of its telegraph line along the Intercolonial Railway from St. John to Halifax via Moncton." This covers the whole of this section, except the portion from Truro to New Glasgow. Views were apparently entertained in the Department, that antecedent agreements with other telegraph companies made it doubtful whether the permission asked for could or should be granted. However that may be, renewed applications by letters dated the 30th August, 1888, were made to the Department and to the Minister of Railways and Canals by the appellant's solicitor, Mr. George M. Clark. The applications were refused and the appellant was so informed by a letter dated the 4th September, 1888. This document is not forthcoming

but from a reference to it in a departmental letter of the 15th November, 1889, it would appear that the reason given for the refusal was the existence of the said antecedent agreements.

The construction of the first section proceeded accordingly upon the footing that the telegraph line would be constructed off the Intercolonial roadway. This is apparent from a letter of the 21st June, 1889, in which Mr. Schreiber (the General Manager of Government Railways) agreed with Mr. Hosmer (the manager of the appellant's telegraph system) to grant railway facilities in relation to "the construction of your line of telegraph between St. John and Halifax and Truro and New Glasgow outside and near to the I.C.R. fence." This, be it noted, covers the whole of the first section.

In the course of the construction, however, poles were at some points erected on the Intercolonial roadway, and by a letter from the Department to the appellant's secretary (dated the 7th January, 1890), the request was made that the poles be at once removed. Beyond an answer to the effect that the letter would be submitted to the Board of Directors, no reply was made by the appellant.

On the 10th September, 1890, an information was filed by the Crown against the appellant, claiming an order compelling the appellant to remove the offending poles.

In the meantime Mr. Hosmer had got into communication with a Mr. Dwight by letter, in which he stated that "the few poles we have on the Railroad cannot possibly be of any damage to your Company or the Western Union." Mr. Dwight represented the interests of those whose agreements had been supposed to debar the Crown from assenting to the placing of the appellant's poles on the Intercolonial roadway. Mr. Dwight wrote on the 16th September, 1890, to Mr. Hosmer to the effect that they made no complaint as to the location of the poles. "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."

Armed with this correspondence the appellant, through Mr. Van Horne, approached Sir John Macdonald, then Prime Minister and Acting Minister of Railways, who, on the 9th October, 1890, wrote to Mr. Van Horne a letter in the following terms :—

> "I have yours of the 22nd ult. and return you the papers therein enclosed, as you desire. The Government have not the slightest objection, so far as they are concerned, to the C.P.R. planting telegraph poles along the 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 is satisfactory enough, but it is not, I take it, binding on the Company, especi-

ally 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."

The legal proceedings by the Crown were not further prosecuted. In July, 1891, request was made, on behalf of the appellant, for leave to straighten the telegraph line by planting a few poles on the Intercolonial property; but the request was refused. A similar request in regard to about a mile of poles was made and refused in July and August, 1892. Notwithstanding these refusals the appellant's men seem to have placed poles to some extent upon the Intercolonial roadway. The policy or procedure adopted may be indicated by reference to a memorandum from the appellant's telegraph department at St. John, dated the 22nd September, 1892, in which the writer states :—

> "I hear the G.N.W. recently sent a man over the I.C.R. to make particular note of the number of poles we have on railway property with a view of bringing the matter up again to make us remove them. Have you heard anything about it? They are evidently getting ready for another kick. We have moved about 200 poles this summer in different places to straighten out line and I have ordered the men to keep on with the work unless they are stopped. If they leave us alone long enough we will have a moderately good line cast soon."

Proceedings were threatened by the Crown; but the idea seems to have been dropped upon representations that the matter was covered by Mr. Dwight's letter. Further, the evidence shows that in 1904 a Mr. Pottinger (then General Manager of the Intercolonial Railway) gave verbal permission for some 5 to 10 miles of poles being placed on the roadway between St. John and Moncton.

This statement covers the relevant facts relating to the original construction of the "Main Telegraph Line," and its maintenance down to the year 1905, when its rebuilding began. They may fairly be summed up by saying that while leave to erect the line on Crown property had been refused, the appellant had succeeded in placing a relatively small number of poles on Crown property, some with leave and some without.

In 1905 the rebuilding began, the first portion to be rebuilt being the section between Truro and Fairview Junction. Other sections were rebuilt from time to time, with the result that the whole of the "Main Telegraph Line" was reconstructed with all its poles, or substantially all its poles, set upon the Intercolonial roadway and property. With the exception of the section between Sussex and Moncton, this had been accomplished by 1914.

It was argued before their Lordships that in so acting the appellant had the consent of the Crown by virtue of Sir John Macdonald's letter of the 9th Octber, 1890. Their Lordships are unable to accept this contention; neither it, nor the Dwight correspondence, can properly be stretched to cover more than what was actually being discussed and dealt with at the time, viz., the question whether the "few poles" which had then been erected on the Intercolonial roadway should or should not be permitted to remain.

The evidence and documents in relation to the "Main Telegraph Line" appear to their Lordships to show that (with certain exceptions as to small portions thereof) it was, as it now stands, established on Intercolonial property, without any leave or licence from the Crown, and that the appellant was at the time of such establishment a trespasser in respect thereof.

There remains, however, the question whether at the date of suit the appellant was a trespasser. The suit was not instituted until 1926. In the meanwhile discussion had arisen and correspondence was exchanged between the appellant's manager, Mr. McMillan, and Mr. Gutelius, the General Manager of Government Railways, in regard to a proposed agreement as to the terms of payment for transport along the railway of material and men for repairing the appellant's telegraph line. In the course of this correspondence Mr. Gutelius wrote on the 31st October, 1916, to Mr. McMillan a letter in which occurs the following passage :—

> "I find upon investigation that the Canadian Pacific Railway Telegraphs are trespassers with their poles on the right of way of the Canadian Government Railways to the extent of 452 miles. We feel, therefore, that effective at once you should pay a reasonable rental for this pole privilege by the execution of an agreement, which among other things, should cover the transportation of your linemen and workmen, the movement of construction trains and the joint use of such stations as St. John."

Mr. McMillan denied the suggestion of trespass, alleging permission from the Minister of Railways. In June, 1917, Mr. Gutelius resigned, and Mr. Hayes was appointed General Manager of the Canadian Government Railways, east of the River St. Lawrence.

In July, 1917, the matter was taken up between Mr. McMillan and Mr. Hayes. On the 3rd August, 1917, Mr. Hayes wrote to Mr. McMillan, stating the effect of a discussion which he had had with Mr. Pottinger and adding :—

> "The foregoing may take your company out of the class of trespassers on the railway property, but I cannot see it at all relieves you of paying reasonable compensation for the privilege you enjoy.
>
> "As the draft agreement that has been prepared does not seem to provide for these railways a sufficient consideration for the privileges you enjoy we shall be obliged to review and submit a revised proposition for your consideration."

A revised draft agreement was submitted and discussed for some months, but no agreement was ever completed. Accounts were sent to the appellant from time to time claiming pole rent, but these were never paid. The matter seems to have rested for six or seven years, until the 20th March, 1924, when Mr. Edwards (representing the Department of Justice of Canada) wrote to Mr. Beatty, the appellant's President, the following letter :—

> "I have been instructed by the Department of Railways and Canals to take up with you the question of certain lines of telegraph wires and poles belonging to you which are situate on the lands of the Canadian

Government Railway, and which lines extend from the City of St. John to the City of Halifax; from Truro to Sydney, and from Painsec Junction to Point du Chene. I am instructed to inform you that all offers of settlement or otherwise, heretofore made to the Canadian Pacific Railway Company or to the Canadian Pacific Telegraph Company by the Government, or anyone on its behalf are withdrawn and to say that the wires and poles must be removed from off the Government Railways' lands, and that otherwise the said poles and wires will be removed. No time has been fixed within which you must effect this removal, but unless you agree to act at once in the matter, a date will be fixed by the Department of Railways and Canals."

Some further negotiations took place, but without result, and on the 29th January, 1926, Mr. Edwards wrote to appellant's solicitor the following letter :—

"Referring to previous correspondence with regard to the demand of the Department of Railways and Canals that the lines of telegraph wires and poles operated by your Company on the lands of the Canadian Government Railways be removed therefrom, or satisfactory arrangements made with the department for the rental thereof, I understand that certain negotiations have taken place between officials of your Company and of the Government, but that it has not been found possible to reach an agreement, and I am instructed therefore to inform you that it is the intention of the department to at once proceed with the action outlined in my letter to Mr. Beatty of the 20th March, 1924."

On the 15th September, 1926, the present proceedings were instituted.

From a consideration of the foregoing facts their Lordships draw the following conclusions as regards the section under consideration :—(1) That although the placing of the poles upon the Intercolonial roadway was originally a trespass by the appellant, the poles have remained upon the roadway for long periods of years; (2) that the fact that substantially all the appellant's poles were on Intercolonial property must have been known to those who represented the Intercolonial Railway and whose duty it was to report the fact to their principals; (3) that for many years before action was brought the appellant's telegraph poles must be treated as being on the Intercolonial roadway with the leave and licence of the Crown; and (4) that consequently (subject to the question of revocation) the appellant was not at the date of suit a trespasser.

While their Lordships are in agreement with the view entertained by the Supreme Court that the rebuilding of the telegraph line upon the Intercolonial roadway was a trespass by the appellant, they feel unable to accept the view that the appellant was a trespasser at the date of suit. The length of time during which the occupation by the appellant was known to and acquiesced in by the Crown, and in respect of which it was claiming to be paid rent, is ignored in the judgment of the Supreme Court. In their Lordships' view the Crown's knowledge, acquiescence and claim indicated above are destructive of the view that the appellant was a trespasser at the date of suit. Their Lordships are of opinion in regard to the "Main Telegraphic Line," that

before the institution of the suit the appellant's telegraph poles and wires were on the property of the Intercolonial Railway with the leave and licence of the Crown.

For the moment is reserved the consideration of the questions :

(i) Whether such licence was revocable or not ;

(ii) Whether, if revocable, it had been revoked before action or by the institution of the proceedings ; and

(iii) If revocable but unrevoked, how and in what circumstances the licence is revocable.

These questions can most conveniently be considered in relation to the whole telegraph line, after the special facts regarding the other two sections have been dealt with. This their Lordships now proceed to do.

(*b*) *The Branch Telegraph Line.*

This section was constructed in 1893. There had been in 1887 and 1888 some correspondence with the Government Railways when the railway between the Straits of Canso and Sydney was being built, and in March, 1893, the appellant, through Mr. Hosmer, returned to the charge, and applied to the Department of Railways and Canals for permission to build the contemplated telegraph line along the Intercolonial roadway between New Glasgow and Sydney. Mr. Schreiber replied on the 10th March, 1893 :—" 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." Mr. Hosmer, in answer, thanked him for his letter, and asked that the necessary contract be prepared.

A contract was prepared and agreed between the parties. It was executed by the appellant, as appears by a letter from the appellant's secretary to the Secretary of the Department of Railways and Canals, dated the 25th July, 1893, which runs thus :—

> " I beg to enclose agreement in duplicate, executed by this Company providing for the construction of a telegraph line on the Intercolonial Railway between New Glasgow and Sydney. Will you please return one copy to me when executed by the Minister of Railways."

There is no proof that the agreement was ever executed so as to bind the Crown. However that may be, this section of the appellant's telegraph line was constructed along the Intercolonial roadway.

Further, we are left in the dark as to the terms of the document which had been executed by the appellant, for it seems to have disappeared with other documents in a fire, and no copy or draft is forthcoming.

The agreement with the Western Union Telegraph Company is in evidence. It is dated the 16th October, 1889. Its duration was for a term of 20 years from the 1st July, 1889, and thereafter until the expiration of one year after written notice should have been given, after the close of the said term, by either party to the other of an intention to terminate the same.

It contained a clause (Clause 25) which ran thus :—

> "When this agreement expires, either by lapse of time or pursuant to notice terminating this contract as in the preceding clause stated, the Company shall not be required to remove its poles and wires erected under this agreement from the Railway property, but all other rights herein granted shall thereupon cease and determine."

It was contended by the appellant that in some way the rights of the parties as to this section were to be determined upon the footing that the provisions of the Western Union agreement applied *mutatis mutandis*, and that by virtue of clause 25 the appellant was secured in the permanent enjoyment of the poles and wires upon the railway property as part of an operative telegraph system.

Their Lordships are unable to accept this view. The stipulation for "a written agreement similar to the Western Union Telegraph Company," means no more than that the parties were to negotiate on the lines of that document. Even if the stipulation meant that a clause identical with clause 25 was to apply, their Lordships would feel unable to extract from it the permanent rights which the appellant claims.

The true position in regard to this section of the appellant's telegraph line would appear to be this : The appellant had, in strictness, no right to place the telegraph line upon any part of the Intercolonial roadway, before the stipulated agreement had been agreed upon, and executed by the parties. Nevertheless, the appellant did enter upon and occupy the roadway by means of the telegraph line. This action must, their Lordships think, be treated as having taken place with the leave and licence of the Crown, upon the footing that an agreement would be executed by the parties and in anticipation thereof. It being impossible to establish either that an agreement binding the Crown was executed, or (if any was executed) what were its terms, the appellant's occupation must, their Lordships think, be treated as continuing to be only that of a licensee.

(*c*) *The Westville Telegraph Line.*

This section, which is only some 10 miles in length, was built in 1911.

On the 20th March, 1911, Mr. McNicoll, the appellant's General Manager, wrote to Mr. Pottinger, then Assistant Chairman of the Intercolonial Railway, the following letter :—

> "I understand that Mr. E. M. Macdonald, M.P., has been in communication with you with regard to giving us right of way for building telegraph line from Truro to Pictou Junction, and that you have decided to grant us this permit on an agreement to be executed by us.
>
> "Will you kindly confirm this and let me have draft of agreement so that I may arrange for the building of the line."

To this Mr. Pottinger replied on the 7th April, 1911 :—

> "I duly received your letter dated March 20th, with reference to building a telegraph line from Truro to Pictou Junction. What was asked

by your telegraph officials was for right of way to build a line from Westville Station to Pictou, a distance of 10·59 miles.

"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.

"Instructions have been given to our Track Department to permit the building of the line. There is a long trestle bridge over a portion of Pictou Harbour, and there the wires will have to be attached to the bridge. The position of the poles of the telegraph line on the land and the position of the wires on the bridge can be arranged between the telegraph officials and our Roadmaster. There is a telegraph line of the Western Union Telegraph Company along that part of the Railway, and your line of course will be placed so as not to interfere with the Western Union line."

No agreement was ever negotiated, but the appellant proceeded with the construction of the telegraph line and erected it upon the Intercolonial roadway.

As regards this section it appears to their Lordships that the appellant was allowed to enter and construct the telegraph line upon Crown property pending negotiations which would result in an agreement defining the rights and liabilities of the parties. In these circumstances it is impossible to treat the appellant as having entered as a trespasser. The appellant entered and continued to be there by leave and licence of the Crown.

Their Lordships are accordingly of opinion that the correct view to be taken, as a result of the evidence, is that as regards all three sections of the telegraph line the appellant was, before action brought, in occupation by leave and licence of the Crown.

There remain for consideration the three further questions hereinbefore set forth, and with these their Lordships will now proceed to deal.

(i) Was the licence, under which the appellant was in occupation of Crown land, revocable ?

Various arguments in favour of irrevocability were presented to the Board. One, having special reference to the Branch Telegraph Line and the effect of clause 25 of the Western Union Agreement, has already been dealt with.

Others were of general application to all three sections of the telegraph line.

It was said that the Crown encouraged the appellant to build the telegraph line upon Crown property, and that thereby the appellant acquired the right to keep the telegraph line there and use it in perpetuity. In support of this proposition reliance was placed on the case of *Plimmer* v. *Mayor of Wellington* (9 App. Cas. 699).

As their Lordships understand that decision, it was based on contract inferred to have been made between Plimmer and the Government. As pointed out in the judgment, Plimmer in erecting his original works on Government land with Government permission, became an occupant of the land under a revocable licence. Later, by virtue of transactions for the mutual benefit of both sides, from which the Board drew the inference of a

contract, Plimmer's right to occupy ceased to be revocable and became a perpetual right to occupy and use the land in question for the purposes of a jetty.

In the present case the facts appear to be very different. As regards the Main Telegraph Line there was no encouragement and no mutual arrangement of any kind. There was nothing but original trespass, which, by dint of toleration over a period of time, became an occupation by leave and licence. As regards the other two sections of the telegraph line, the original occupation was permitted by the Crown, but only upon the footing that the rights of the parties would be defined by agreement thereafter to be negotiated. Unless and until such agreements had been negotiated and had become binding, the occupation continued by leave and licence only, and the appellant must be taken to have erected the telegraph line subject to the risk of the permission being withdrawn if no agreement was effected.

In their Lordships' view *Plimmer's* case is far removed in its facts from the present case, and is of no assistance to the appellant.

It was further contended that the Crown was precluded from revoking the licence by reason of some equitable doctrine, which it was alleged was applicable to the case. The doctrine was not very clearly defined, but reference was made to *Ramsden* v. *Dyson* (L.R. 1 H.L. 129). In the course of the judgments in that case instances are given in which equity will intervene in favour of a litigant as against the legal owner of land. One such (see per Lord Cranworth at pp. 140–1) is the case where A builds on land which he thinks is his, but is really B's, and B knowing of A's mistake, encourages A to build either directly or by abstaining from asserting his legal right. In such a case equity will intervene for the protection of A. This, their Lordships understand to have been the equitable doctrine which was invoked by the appellant. It is a doctrine which is sometimes alluded to under the name of "equitable estoppel." Whether there can be any estoppel which is equitable as distinct from legal and whether "equitable estoppel" is an accurate phrase, their Lordships do not pause to enquire. The foundation upon which reposes the right of equity to intervene is either contract or the existence of some fact which the legal owner is estopped from denying. Thus in the case put, B's conduct is such that from it may be inferred a contract by B not to disturb A in the possession of the land, or it may amount to a statement by B that the land is A's, upon the faith of which A has acted and built.

Reference may properly be made to a case before this Board (*Beni Ram* v. *Kundun Lall*, 26 I.A. 58), in which the necessity for contract as a basis for this intervention of equity is made clear. In that case tenants of land had successfully resisted ejectment after the determination of their lease, upon the ground that the landowners by standing by and allowing buildings to be erected on the land by the tenants, were estopped from ejecting

the tenants. On appeal from the High Court of Allahabad this Board was of opinion that the judgments appealed from should be reversed and ejectment decreed. In the view of the Board in order to raise the estoppel which the Courts below had enforced against the owner of the land,

> "It was incumbent upon the respondents to show that the conduct of the owners, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation."

Upon the facts of the present case their Lordships can find no foundation for the application of any equitable doctrine in favour of the appellant. There was no mistaken belief by the appellant as to the ownership of or the rights over the Inter-colonial property, still less was there any such mistaken belief, which was known to the Crown. There was no conduct on the part of the Crown which induced the appellant to build in the belief that rights in perpetuity would be acquired. There was nothing upon which to ground any estoppel. The facts are all the other way. As already stated, the Main Telegraph Line came on the roadway by way of trespass, the other two sections came there upon the footing that the rights would be subject to and would be defined by written agreements to be negotiated between the parties.

Their Lordships are of opinion that the appellant's claim that the licence is irrevocable fails, and that the Crown was at liberty to revoke the licence, and so to put an end to the continued existence of the appellant's telegraph line upon the Crown property.

(ii) Was the licence revoked before action or by the institution of proceedings ?

So far as concerns the alleged revocation before action, this depends upon the construction to be placed upon two documents, viz., the two letters from Mr. Edwards, which are dated the 20th March, 1924, and the 29th January, 1926, and which have already been quoted in full. The first mentioned letter (which does not in terms cover the Westville Telegraph Line) does not, in their Lordships' view, purport to determine the licence. At most it amounts to an intimation that a date will in the future be fixed for the removal of the telegraph line, *i.e.*, it is an intimation that the licence will be put an end to at some future time. The second letter appears to carry the matter no further, as a determination of the licence. The alternative which is mentioned in the opening sentence, confirms the view that the first letter was not intended to be a notice determining the licence. All that the second letter does is to state the intention of the Department at once to proceed with the action outlined in the first letter, viz., fix a date. No date was ever fixed.

In these circumstances their Lordships are of opinion that the licence had not been determined before action brought.

The question next arises whether the institution of the proceedings *ipso facto*, determined the licence. The majority of the Supreme Court apparently thought not, because as regards the Westville Telegraph Line (which is included in the information) their decision was based upon the view that the Crown had no cause of action when the information was filed. The Chief Justice of Canada thought otherwise. The point does not appear to have been taken before the trial Judge ; at all events it is not referred to in his judgment. Neither is the point taken in the respondent's factum before the Supreme Court.

The determination of this point involves the consideration of the third question, viz. :—

(iii) If the licence is revocable but unrevoked, how and in what circumstances the licence is revocable ?

Whether any and what restrictions exist on the power of a licensor to determine a revocable licence must, their Lordships think, depend upon the circumstances of each case. The general proposition would appear to be that a licensee whose licence is revocable is entitled to reasonable notice of revocation. For this proposition reference may be made to *Cornish* v. *Stubbs*, L.R. 5, C.P. 334, and *Mellor* v. *Watkins*, L.R. 9, Q.B. 400, in the latter of which cases Blackburn J., states that a person giving a revocable licence " is bound to give the licensee reasonable notice."

When the exercise of the rights conferred by the licence involves nothing beyond, there can be no reason to urge against the existence of a power to determine the licence *brevi manu* at the will of the licensor.

But the exercise of the rights may have involved the licensee in obligations in other directions, which the determination of the licence would disable him from fulfilling, unless the licence were determined after a notice sufficient, in point of time, for the making of substituted arrangements. In such circumstances the licensee would, their Lordships conceive, be entitled to breathing space sufficient for this purpose. The case before the Board would appear to be peculiarly a case in which grave injustice might ensue if the Crown were at liberty by the mere initiation of legal proceedings to determine summarily the rights of the appellant, and turn the appellant's occupancy into trespass. For the appellant is not the only one concerned ; the telegraph line is part of a system in the existence and continuance of which the public has a very considerable interest. It appears to their Lordships that this is a case in which the licence can only be effectively ended, after notice has been served upon the appellant determining the licence on such a specified date in the future, as will give the appellant an interval of time between the service of the notice and the specified date, sufficient not only to allow the removal of the poles and wires from off the property of the Crown, but also to enable the appellant to make arrangements for the continuance of the telegraph line by the erection of poles and wires elsewhere than on Crown property. Their Lordships are accordingly of opinion that the appellant's licence was not determined by the institution of the proceedings.

In the result, therefore, the position is, that the appellant is in occupation as a licensee whose licence is revocable, but unrevoked. Inasmuch as the Crown, by amendment, asked for a declaration of the appellant's rights, a proper declaration of those rights should be made; but in all other respects the action fails and is at an end. There is nothing left to try.

Their Lordships feel little doubt that as between the Canadian Pacific Railway Company and the Crown, suitable contractual arrangements will be made which will obviate further litigation. If, however, this anticipation proves to be ill-founded, it will be for the Crown to determine the licence by service of a notice the sufficiency of which, if called in question, will have to be decided, upon proper evidence, in subsequent proceedings. It will be for the Crown, at its risk, to fix the length of notice.

Inasmuch as their Lordships are of opinion that no irrevocable licence exists, and that no permanent interest was vested in the appellant, other points raised by Mr. Rowell in his careful argument for the Crown, do not appear to call for comment or decision.

The result of the appeal may now be stated. It succeeds in part and fails in part. It succeeds in so far as it has established that the appellant is not at the present time a trespasser in respect of any section of the telegraph line: but it fails in so far as it sought to establish that as regards the whole telegraph line the licence was irrevocable. Neither the order of the Supreme Court, nor the order of the trial Judge can stand. The order of the Supreme Court should be discharged and the order made by the trial Judge should be varied as hereafter indicated.

As regards costs their Lordships feel that although the action has been fruitful to the extent of a declaration defining the appellant's rights, yet the main costs of the trial were incurred in relation to the Crown's principal contention, viz., that the appellant was and always had been, a trespasser. Upon that issue the Crown has failed. Their Lordships think that justice will be done by ordering the Crown to pay four-fifths of the appellant's costs of the action. As regards the costs of the appeal to the Supreme Court and before the Board, their Lordships are impressed by the fact that the appellant's primary claim, which necessarily occupied much of the argument, was for a right in perpetuity, and that this claim has failed. They are of opinion that there should be no costs of the appeals to the Supreme Court or of the appeal here.

For the reasons above appearing their Lordships are of opinion that the order of the Supreme Court should be discharged, and the order of the trial Judge varied in manner following: (1) By omitting from the second declaration the words "and has from the respective dates when the several portions thereof were originally placed thereon been"; (2) by omitting the last two paragraphs thereof; and (3) by ordering that the plaintiff do pay to the defendant four-fifths of the defendant's costs of action to be taxed. There will be no costs of the appeals to the Supreme Court or of the appeal before this Board. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE CANADIAN PACIFIC RAILWAY COMPANY

v.

THE KING.

DELIVERED BY LORD RUSSELL OF KILLOWEN.

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