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.*

RESPONDENTS' CASE.

CASE OF THE ATTORNEY-GENERAL OF CANADA.

1. This is an appeal by special leave given on the 28th day of July, 1930, from a judgment of the Supreme Court of Canada, pronounced on the 11th day of June, 1930, dismissing, save as hereinafter mentioned, an appeal of the Appellant Company and allowing, save as hereinafter mentioned, the Respondent's cross-appeal. RECORD. pp. 566, 567. pp. 545, 546.

2. Action was commenced by the Attorney-General of Canada by information of intrusion filed in the Exchequer Court of Canada on the 15th day of September, 1926. pp. 1–2.

3. In the said information it was alleged that on or before or since the first day of January, 1890, the Appellant had wrongfully and in violation of the Respondent's rights entered and intruded upon certain lands comprising the right-of-way, yards and station grounds of the Intercolonial Railway, the property of His Majesty, and constructed thereon a telegraph line which had ever since been operated as such. The Attorney-General claimed possession and $713,408 for the issues and profits from the first day of January, 1890, or, in the alternative, damages in the sum of $100,000, for trespass. Alternatively, the Attorney-General sought a declaration as to the rights, if any, of the Appellant in the said lands in respect of the telegraph line.

4. The Appellant pleaded a general denial, leave and license, a lost grant or grants, the Statute of Limitations and estoppel by conduct, laches and acquiescence. pp. 3–5.

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RECORD.

p. 485. 5. The action was tried before the Honourable Mr. Justice Audette and judgment was rendered on the 21st March, 1929, in which the Court declared that the lands described in the information were owned by and at all times material to the matters in question in the suit, had been and were in the possession of the Respondent and that the line of telegraph poles erected thereon was and had from the respective dates when the several portions thereof were originally placed thereon, been on the said lands and premises with the leave and license of the Respondent, but not an irrevocable license. Then there was a provision in the judgment for leave to apply for further directions and that the question of costs be reserved.

6. The question of damages was left to be dealt with after the rights of the parties had been determined.

p. 496, l. 17. 7. The Appellant appealed on the grounds—

(*a*) that the learned Trial Judge was in error in holding that the license referred to was not irrevocable,

(*b*) that on the facts as disclosed in the evidence and as found by the learned Trial Judge, the action should have been dismissed with costs.

p. 497. 8. The Respondent cross-appealed against the judgment of the Exchequer Court on the grounds that the Appellant was not upon the lands in question with the leave and license of the Respondent, or, in the alternative, that if the Appellant had such leave and license, the same had been revoked.

9. The Supreme Court dealt with the case as naturally divisible into three separate cases, namely, that which related to the telegraph lines between Saint John and Halifax, with a branch from Truro to New Glasgow, conveniently described as the "Main Telegraph Line"; the line from New Glasgow to Sydney, conveniently described as the "Branch Telegraph Line"; and the short line running from Westville to Pictou, conveniently described as the "Westville Telegraph Line."

10. As regards the claims in respect of the "Main Telegraph Line" and the "Branch Telegraph Line," the Appellant's appeal was dismissed and the Respondent's cross-appeal was allowed. As regards the "Westville Telegraph Line" the Appellant's appeal was allowed and the Respondent's cross-appeal was dismissed. It was ordered that the case be remitted to the Trial Judge to proceed with the trial thereof.

11. With reference to the "Westville Telegraph Line," Anglin, C.J., dissented, holding that with regard to this branch the Appellant's appeal should be dismissed and the cross-appeal allowed.

"MAIN TELEGRAPH LINE."

12. The so-called "Main Telegraph Line" is established on the right-of-way of the Intercolonial Railway from Saint John to Moncton, from Moncton

to Halifax and from Truro to New Glasgow, a total distance of 323 miles. These lines of railway were constructed long before 1890 and on the 22nd day of September, 1870, the Government of Canada, by agreement, gave to the Montreal Telegraph Company the exclusive privilege to construct and operate a good and sufficient line of telegraph on the right-of-way aforesaid, and when about 1888 the Appellant was contemplating the construction of its telegraph system east of Saint John and applied for permission to construct on the Intercolonial right-of-way, permission was refused, the reason given being that such permission would conflict with the aforesaid agreement with the Montreal Telegraph Company.

RECORD.

p. 224, Exhibit 6.

p. 254, Exhibit 23.

p. 258, Exhibit 28.

13. The Appellant thereupon constructed its pole line outside the said right-of-way and parallel thereto, but as early as 1889 began to place a few poles on the said right-of-way and about 1906 began to move its poles generally on to the said right-of-way until in 1917 or before the greater portion of the Appellant's pole line was wholly or partly on the said right-of-way.

Exhibit 35, p. 263, ll. 7–12; Exhibit 47, p. 277, ll. 12–16; Exhibit 53, p. 280, ll. 40–43; p. 281, ll. 1–5.

14. The Appellant now contends that the placing of the poles on the Government roadway was first under license, dated 9th October, 1890, given by Sir John A. MacDonald, Prime Minister of Canada and Acting Minister of Railways, and alternatively by express permission in 1904 given by Mr. D. Pottinger, then General Manager of the Intercolonial Railway.

Exhibit 66, p. 286, ll. 32–44.

15. With reference to the permission alleged to have been given by Sir John A. MacDonald, an examination of the request for leave, and his letter of the 9th October, 1890, in reply, shows that the request and permission related only to a few poles which the Appellant's Manager claimed it was absolutely necessary to put there, and had no relation to the replacing of the Appellant's line of poles generally on the Government's roadway; in any event the permission was subject to a condition which was never complied with.

p. 289, ll. 18–36, Exhibit 70; p. 291, ll. 10–25, Exhibit 72; p. 291, ll. 30–40; p. 292, ll. 1–4, Exhibit 73; p. 292, ll. 18–24. Exhibit 74; p. 293, Exhibit 77.

Newcombe, J., writing the judgment of the Supreme Court, concurred in by Duff, Rinfret and Lamont, JJ., said:—

> "I have referred, more fully perhaps than is necessary to the facts leading up to the Prime Minister's letter, because that letter is now put forward by the defendant most prominently as its justification for the removal, several years later, of substantially the whole of its main telegraph line from its original place to the roadway of the Intercolonial Railway, within the fences, the location now in controversy; and thus the conditional promise, given by the Prime Minister in 1890, not to interfere with what is described in Mr. Hosmer's application as 'a few poles which it was absolutely necessary to put there' is invoked, even though the condition was never expressly

p. 552, l. 14.

RECORD.

fulfilled, to justify the transplanting of the whole of the main line, for a distance of more than three hundred miles, I have no difficulty in reaching the conclusion, and I think it is obvious, that this contention utterly fails."

p. 97, ll. 4–40; p. 98, ll. 18–22, 31–33. p. 207, ll. 24–5. p. 208, ll. 1–38; p. 209, ll. 27–37.

16. With reference to the Appellant's contention that permission was given by Mr. D. Pottinger, the evidence of Mr. Mersereau, called by the Appellant, and Mr. Pottinger, called by the Respondent, shows that the only permission given was to replace, in the course of repair, poles on a short section, about eight miles, between Moncton and Saint John, the replacement to avoid difficulties of construction. Pottinger denied positively that any other permission had been given by him, and in any event Mr. Pottinger had no authority to grant any right or interest in the property of the Government. His duty was to preserve and operate the railway for the sole benefit of the Respondent.

Newcombe, J., said, with reference to this evidence:—

p. 555, l. 13.

"Mr. Pottinger was a most trustworthy, careful and capable officer and a successful administrator, as shown by his lifelong employment and promotion to the top in the service of the Government railways; and the suggestion that he, advised as he was, and well knowing that the Montreal Telegraph Company had exclusive privileges upon the main line, would permit, still less authorise, the use of the Intercolonial Railway, as the base of a competing line, thereby also reversing the policy to which the Government had deliberately committed itself and which he was directed to enforce, is too improbable for me to entertain. I have no hesitation to accept Mr. Pottinger's testimony as he gave it, and I do not see anything to the contrary in the findings of the learned Trial Judge."

17. It was also faintly urged by the Appellant that there were national considerations involved in the action of Sir John A. MacDonald, which has been mentioned.

Newcombe, J., said of this:—

p. 555, l. 38.

"Some ingenuity was manifested for the purpose of showing that there were local, or even national, advantages to be served which might have influenced the Government to adopt a more generous attitude, but for the reality of any such motive, there is not the least evidence."

18. Thus the evidence establishes that, while in one or two unimportant cases officers of the Government or of the Railway had seen fit to tolerate the placing of a few poles on the right-of-way to enable the Appellant to avoid some peculiar difficulty of location or construction in respect of its telegraph line, the Government had otherwise throughout consistently refused any concession to the Appellant to place its poles on the Respondent's property.

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19. The evidence further establishes that the Management of the Intercolonial Railway only discovered in 1916 that the Appellant had transferred its telegraph line generally to the Government right-of-way and thereupon demand was made for compensation. Thereafter negotiations took place between the parties to determine the compensation for past and future user, which finally failed, and on the 20th March, 1924, the Appellant was notified that "the wires and poles must be removed from off the Government railway lands." p. 82, ll. 3–30; p. 398, ll. 13–40, Exhibit 228; p. 427, l. 17–p. 428, l. 15, Exhibit 238; p. 430, ll. 14–24, Exhibit 242; p. 478, ll. 4–21, Exhibit 286.

20. In the year 1917, during the course of the negotiations and without leave or license, the Appellant transferred the last remaining section of its pole line to the Government right-of-way, namely, along forty-six miles between Moncton and Sussex. p. 482, Exhibit 3; p. 445, ll. 1–11, Exhibit 253.

21. Newcombe, J., dealing finally with the claim as to the main line, said :—

> "As to the main line therefore the defence of leave and license fails, and I see nothing to give rise to any equity in favour of the defendant. There was no mistake of title, no misleading conduct on the part of the Government, nothing in the way of invitation or encouragement, nor even of acquiescence or tolerance, except, in the time of Mr. Gutelius during the period of negotiations for settlement." p. 557, l. 46.

"BRANCH TELEGRAPH LINE."

22. The so-called "Branch Telegraph Line" is established on the right-of-way of the Intercolonial Railway from New Glasgow to Sydney, a distance of 163 miles.

23. At the time of the construction of this telegraph line, the Appellant applied for leave to construct on the Government roadway. An agreement had previously been entered into between the Government and the Western Union Telegraph Company on the 16th October, 1889, whereby the latter Company had obtained such a concession and correspondence took place between the Government and the Appellant Company along the lines that a similar agreement might be made between the Government and the Appellant. A draft was prepared and executed by the Appellant, but was never approved by the Governor-in-Council, nor even submitted to him for approval by the responsible Minister, nor executed on behalf of the Government by any person. The draft executed by the Appellant was subsequently lost. p. 318, ll. 31–44, Exhibit 116. pp. 271–275, Exhibit 290. p. 319, ll. 6–30, Exhibits 117–118. p. 327, ll. 15–20, Exhibit 303.

24. Notwithstanding, the Appellant, although well knowing that an executed agreement was a condition precedent to the acquisition of any right to enter upon the lands of the Respondent and erect its poles thereon, nevertheless early in 1893, while the above mentioned correspondence was p. 184, ll. 24–40; p. 185, ll. 26–38; p. 186, ll. 15–32; Exhibit 3, p. 482.

RECORD. being exchanged, proceeded to construct its telegraph line on the Government's lands.

25. The Appellant argued before the Supreme Court that it was entitled to the benefit generally of provisions identical with those of the agreement made with the Western Union Telegraph Company mentioned and, in particular, of the clause reading as follows:

> "25. 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"

and that this clause stipulates for a perpetual privilege of the maintenance and operation of the telegraph line.

26. Though it does not directly appear in evidence why no agreement was made with the Appellant, it is obvious that a serious conflict would have arisen between the Appellant and the Western Union Telegraph
p. 5, ll. 1–14. Company if an agreement identical in terms had been executed. No agreement was pleaded by the Appellant nor was any agreement proved at the trial.

p. 367, ll. 2–15, Exhibit 185; p. 367, ll. 20–40, Exhibit 188; p. 370, ll. 25–40, Exhibit 192; p. 371, ll. 10–32, Exhibit 194.

"WESTVILLE TELEGRAPH LINE."

29. The "Westville Telegraph Line" is established on the right-of-way of the Intercolonial Railway from Westville to Pictou, a distance of about ten miles, and was constructed in 1911.

30. With reference to this branch, the Appellant applied for permission to construct and operate and the Managing Board of the Canadian Government Railways purported to grant the request, it being understood that an agreement would subsequently be executed, which was never done. The Appellant, however, was informed of the decision of the Managing Board and constructed the line upon this understanding.

31. The Supreme Court held that in the circumstances the Company at the time of the issue of the information enjoyed a revocable license, which had not been revoked, by the notice of the 20th March, 1924, or of the 29th January, 1926, by reason of the non-inclusion of its line in the said notice. Anglin, C.J.C., dissenting, took the view that the license had been revoked by the institution of the action.

32. The Court held further that the license could be reasonably revoked.

GENERAL. RECORD.

33. It is not disputed that the lands in question are the property of the Crown. They were acquired by the Government under legislative authority for the construction, maintenance and operation of Dominion railways. A large part thereof belongs strictly to the railway which Canada was required to construct by Section 145 of the British North America Act, which provides as follows :—

> " Sec. 145. Inasmuch as the Provinces of Canada, Nova Scotia and New Brunswick have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that Provision should be made for its immediate Construction by the Government of Canada; Therefore, in order to give effect to that Agreement, it shall be the duty of the Government and Parliament of Canada to provide for the Commencement within Six Months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the Construction thereof without intermission, and the Completion thereof with all practicable Speed."

34. Throughout the period to which this claim relates, the following provisions of the Statutes of Canada, namely, Sections 7 and 15 of the Railways and Canals Act, R.S.C., 1927, Chapter 171, applied :

> " 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 . . . . 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 authorized 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."

35. The Appellant pleads that a formal document, embodying the terms, negotiated between the Appellant and Gutelius, General Manager of the Intercolonial Railway, was executed by the Appellant and transmitted to the said Gutelius, and that the Appellant has always been ready and willing to carry out the terms thereof.

It is not claimed by the Appellant that this agreement is binding on the Respondent and it is clear, upon the evidence, that it cannot bind the Respondent.

RECORD. It is further clear, on the evidence, that no authority was given by the Minister for the erection of any poles on the Government right-of-way and that no deed, contract, document or writing was signed as required by Section 15 of the Railways and Canals Act.

36. Reference is made to Section 45 of Chapter 38, R.S.C., 1886, which provides that:—

> "All Government railways are and shall be public works of Canada."

and the sale or leasing of public works was subject to the following provision:— 10

> "Notwithstanding anything in this Act, or in any other Act contained, any public work not required for public purposes may be sold or leased, under the authority of the Governor in Council; and the proceeds of such sale or lease shall be accounted for as public moneys:
>
> "Provided that such public work shall be so sold or leased by tender or at auction after public advertisement, unless it is otherwise authorized by the Governor in Council." (R.S.C. 1906, c. 39, s. 39; 1895, c. 36, s. 1).

It is not claimed by the Appellant that this provision was complied 20 with.

37. Referring generally to the Appellant's claim, Newcombe, J., said:—

p. 564, l. 39.

> "The situation which exists seems to have been brought about deliberately by the defendant Company, realizing, as it must have done, the facts of the case and the risks to be encountered by the planting of its telegraph lines upon the Government railway, and the desirability of securing permanent concessions, if possible or if they could or would be granted by the executive authorities; and there was no foundation upon which to apply the doctrine of 30 estoppel. In so far as any contract competent to the parties could answer the purpose, the defendant neglected entirely the most elementary requirements as to the ascertainment of the terms, and the statutory essentials of form and sanction."

38. It is submitted, on behalf of the Attorney-General, that judgment of the Supreme Court of Canada with reference to the Main Telegraph Line and the Branch Telegraph Line is right and should be affirmed, but that if, with respect to either of the said lines the Appellant enjoyed a license, the said license was revocable and has been revoked.

With reference to the Westville Telegraph Line, the Attorney-General 40 submits that the Supreme Court was in error in deciding that the Appellant had a license and submits in any event that the said license is revoked.

REASONS.

1. The evidence shows that the Appellant entered upon the lands of the Respondent and constructed and operated telegraph lines without permission.
2. To the extent that any permission was given, it was done without authority.
3. No valid grant or license of occupation could have been given without compliance with section 15 of The Railways and Canals Act, and there was no such compliance.
4. No valid grant or license of occupation could have been given without compliance with Section 1 of Chapter 36 of the Statutes of Canada, 1895 (R.S.C. 1906, Chapter 39, Section 39) and there was no such compliance.
5. No facts were disclosed which would raise any equitable defence in favour of the Appellant.
6. If the Appellant ever enjoyed any right in respect of the lands of the Respondent, such right has been duly terminated.

N. W. ROWELL.

I. C. RAND.

F. P. VARCOE.

In the Privy Council.

No. 87 of 1930.

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AND

HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (*Plaintiff*) *Respondent.*

CASE OF THE ATTORNEY-GENERAL OF CANADA.

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