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Jan. 15-26.
Mar. 21.

BETWEEN:—

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY ..... } DEFENDANT.

Crown—Information of intrusion—Estoppel—Revocable licence to occupy —Title—Alienation by the Crown

Held, that the old doctrine that the Crown is not bound by estoppels is so far modified by modern decisions that in a proper case the Crown may be held liable for acts or conduct of its responsible officers, which, if occurring between subject and subject, would amount to an estoppel *per pais.*

2. Where a railway company was permitted by responsible officers of the Crown to enter upon the right of way of a government railway and erect telegraph poles thereon and to maintain the same without hindrance or objection by the Crown for a period of some forty years, the railway company were held to be lawfully on the said right of way under a revocable licence from the Crown dating from the time of the erection of the telegraph poles.

3. That upon the facts the license in question was not an irrevocable one, which would be tantamount to an alienation of the Crown property (1).

INFORMATION of intrusion exhibited by the Attorney General of Canada to recover possession of certain parts of the right of way of the Canadian National Railway System now occupied by the defendant with its telegraph poles or, in the alternative, for a declaration as to the rights of the defendant, in said lands, if any.

The action was tried before the Honourable Mr. Justice Audette, at Ottawa.

I. C. Rand, K.C., and *W. P. Jones, K.C.*, for plaintiff.

W. N. Tilley, K.C., *W. L. Scott, K.C.*, and *E. P. Flintoft, K.C.*, for the defendant.

The facts and contentions of the parties are stated in the reasons for judgment.

AUDETTE J., now (March 21, 1929) delivered judgment.

This is an information of intrusion exhibited by the Attorney General of Canada, whereby it appears, *inter alia*, that the plaintiff seeks to remove a line of telegraph poles and wire erected by the defendant upon the right of way of the Canadian National Railway System—the plaintiff's property—under the circumstances hereinafter mentioned.

Besides claiming the possession of land upon which these poles are erected, the Crown further asks

(*b*) $713,408 for the issues and profits of the said lands and premises from the 1st January, 1890, till possession shall be given.

The conclusion of an action of intrusion. And by way of amendment, at trial:

or in the alternative damages for trespass to said lands in the sum of $100,000.

The conclusion of a common law action for damages.

(*b1*) In the alternative a declaration as to the right, if any, of the defendant in said lands, in respect of the said line of poles and wires.

This amendment, it will be seen, is in the nature of a material departure from what is usually understood would

(1) The information was one for intrusion, but by amendment at the trial the Crown asked for a declaration of the rights of the parties. The Court, after hearing the case, considered that the prime and controlling issue to be determined was as to the rights of the parties, but gave leave to the parties to apply for further direction in respect of other undetermined matters.

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be covered in an information of intrusion; but it has the great advantage of placing before the Court the whole controversy between the parties, in respect of this telegraph line built by the defendant on the right of way of the Government railway over an area of, in round figures, 500 miles.

The defendant company, by their amended statement in defense, avers, among other material things, that their entry upon the plaintiff's lands, was by leave of the proper officers of the Government railway, while the Crown, with that knowledge, stood by and acquiesced in this state of things for a great number of years, whereby an irrevocable license of occupation was impliedly granted. That the terms upon which the defendants were allowed on the right of way had been settled and that they are still ready and willing to carry out the same, as agreed upon.

It is thought unnecessary to develop into greater details the ground set out in the defense, which are fully spread on the record.

This controversy, complex in its legal aspects, extends, in the history of the facts controlling it, with all its ramifications, as far back as 1887, when negotiations originally started, the building by the defendant commencing in 1889.

At that time, in respect of the territory where the railway was then in operation, there were in existence agreements with telegraph lines, between the Crown and The Western Union Telegraph Company, The Great North Western Telegraph Company, and The Montreal Telegraph Company. See exhibits 6 and 290.

In this respect, it is thought unnecessary to say more than that the agreement (exhibit No. 6) with Montreal Telegraph Company gave them exclusive right over the territory covered by the agreement,—a matter upon which the Law Officers of the Crown have given considered opinion. An exclusive right was also given the Western Union Company from New Glasgow to Canso, but that agreement of 1880, it is contended by defendant, has been superseded by a later agreement (16th October, 1889, exhibit No. 290) without that exclusive right.

The history of this case involves so many facts and such a mass of evidence both oral and documentary, that it is thought unadvisable to recite them all in detail. Sufficient

is it to mention only those that have a specific controlling effect. And with regard to the above mentioned agreement with these three companies, and the exclusive right over certain area, reference will be hereafter made in the final adjudication.

The right of way of a railway, it may be said *en passant,* has always been regarded as the proper place to build a telegraph line; the line is thereby unobstructed and can be easily inspected from a train. And in both the Government Railway Act and the General Railways Act provisions are made to meet such eventuality. See secs. 45 and 46, ch. 38, R.S.C., 1886, The Government Railways Act; The Railway Act, 51 Vic., ch. 29, secs. 265 and 266.

The first negotiations between the parties started in 1887 when the C.P.R. asked that no exclusive right be given any company to erect a line between Canso and Sydney (exhibits 8, 9, A, 14, 15, 39-29) when Mr. Schreiber, the Chief Engineer and General Manager of the Canadian Government Railways at the time, advised that

> we are quite prepared to negotiate an arrangement by which your company would be permitted to build and operate a line along this railway; and under such conditions (exhibit No. 15) as the Government may see fit to impose.

Must it not be deemed that his power was properly exercised in allowing the defendant to proceed with building in the meantime? *Omnia praesumuntur rite et solemniter esse acta.*

At that time the defendants were approaching the completion of their "Short Line," there was the Cable at Canso and the agitation in the public for an *All Red Route,* i.e., a domestic telegraph company on exclusive Canadian soil.

According to witness Richardson, who was in charge of the C.P.R. Telegraph lines at the time, the defendant company began building their line, between St. John and Halifax, outside the right of way in 1889 and completed the work in 1890. This witness adds that it was all built outside the right of way, excepting in a few cases. He thinks only in one case, probably less than half a mile, just a small detour. He consulted Mr. Archibald, with this question of boundary, who granted him leave. Here the I.C.R. supplied an experienced man, familiar with the running of trains, to control and handle the hand-cars used in building the line.

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This part between St. John and Halifax was built outside the right of way, after the C.P.R. had tried to get leave to build inside, and had been met with the exclusive right of the Montreal Telegraph, set up by the Justice Department, but no objection was set up as far as the Government was concerned. Finally as the company could not wait any longer, they built outside. Witness Grant, an employee of the Western Union, further testified that when the C.P.R. were building on the right of way between New Glasgow and Mulgrave, he called it to the attention of Gray, the Roadmaster, who told him that he had instructions from headquarters to allow them to build on the right of way.

Richardson also built the line between Truro and New Glasgow, outside the right of way, in 1889; before reaching Halifax.

In 1893 he built the line between New Glasgow to Sydney on the right of way. Before commencing work on that area, under instructions of Mr. Hosmer, he first went to see Mr. Pottinger, the officer in charge of the whole I.C.R. as Chief Superintendent (p. 116) and consulted him about the construction of the line. Mr. Pottinger brought in the engineer of the railway, Mr. Archibald, and Mr. Wallace, the freight agent, and they all discussed the whole question. What the witness wanted to know was if they had any special instruction in regard to the construction of this line on their right of way, so that he could meet their wishes. Finally Mr. Pottinger turned him over to the department that handled that work and the engineer, Mr. Archibald, who told witness to build it the same as he would build the C.P.R. line, placing no restriction upon the manner he would build (pp. 243, 244).

The work was done openly. The poles were distributed from the cars and the transportation paid for.

This witness had nothing to do with the building from Westville to Pictou.

Now with respect to this section between New Glasgow and Sydney, it appears, from exhibits Nos. 116, 117, 118, 302, 125, 127 and 129, that permission or leave to build was given by Mr. Schreiber, subject to agreement similar to the one with the Western Union Telegraph; that the Crown drew up such an agreement, submitted it to the

General Manager of the Government Railways and transmitted it to the defendant for execution, and that, after being duly executed by the C.P.R., it was returned to the Crown with request to also execute the same and return one copy.

This document was lost while in the possession of the Crown. In view of all this, it cannot be said that the C.P.R. was a trespasser on that section anyhow. The defendant is bound by that document and through its counsel at trial it declared its readiness to do everything they thereby agreed to; they built from New Glasgow to Sydney upon the terms asked for by the Crown.

With respect to the line from Westville to Pictou, the Board which had, at the time, the full control and management of the Government Railways, by a resolution of the 10th March, 1911, as shown by exhibit No. 185, granted the request of the C.P.R. for permission to string their wires on that area on the right of way, and to give the Crown the use of the line and to put the same into their stations at Westville and Pictou. See exhibits 188, 189, 193 and 195.

In a letter from Mr. Pottinger to Mr. McNicoll, Vice-President C.P.R., exhibit No. 194, Mr. Pottinger says:—

> As I told you verbally when in Montreal, it will be all right for you to go on and build that line and we will arrange at a later period.

There is further what was called the Mersereau incident in 1904. The latter, at that date, was in charge of the building, maintenance and repair between St. John and Moncton, and arrived at a given place, for better convenience, some poles were placed on the right of way and objected to by the section man. The matter was referred to the Manager, Mr. Pottinger, who allowed them to maintain and place their poles on the right of way, on a distance of between 5 to 10 miles on that division.

From that date the work of repairing and maintenance was converted into rebuilding. It is perhaps well to say here that it was mentioned at trial that the life of those telegraph poles was between 15, 20 and 25 years, according to the nature of the soil. This rebuilding, by the defendant, resulted in transferring all their poles on the right of way. According to witness McNeil, the poles were brought on the right of way to conform with the other lines,

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concluding that the C.P.R. should be in the same and in no better position.

At one time an action of intrusion was taken before this Court, against the C.P.R., and instruction was also given to issue a similar action in Halifax; but the whole matter was stopped by Sir John A. Macdonald, then Premier of Canada and Minister of Railways and Canals at the time, who then defined the Crown's policy in respect of this matter.

As will appear by exhibit 75, on the 24th September, 1890, Sir John A. Macdonald wrote to Sir John Thompson, the Minister of Justice, as follows:—

> Please stay proceedings. It won't do to have any further difficulties with the C.P.R. just now. This is an unimportant matter.

And the suit in the Exchequer Court was abandoned and the costs paid by the Crown.

Furthermore, on the 9th October, 1890, Sir John A. Macdonald, wrote to W. C. Van Horne, the President of the C.P.R. as follows:—

> Dear VAN HORNE:—
>
> 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 Co. 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, 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.
>
> Yours faithfully,
> JOHN A. MACDONALD.
>
> W. C. Van Horne, Esq.,
> Montreal.

See in this respect sect. 5, 6 ch. 38, R.S.C., 1886, defining the Minister's power, without Order in Council.

Then later on, in 1915, when the poles were all on the right of way, Mr. McMillan, the General Manager of the C.P.R. Telegraph, and Mr. Gutelius, then in charge of the Government Railways, as manager, met and discussed the whole matter seeking the solution of the problem in an agreement whereby the C.P.R. could give certain services

or render certain services to the I.C. Ry. in exchange for an arrangement whereby they could maintain their telegraph lines on the right of way.

A draft of such agreement was prepared by Mr. Gutelius, exhibit No. 239a. It was brought to a mutual conference at Montreal; changes were made and finally resulted in the agreement filed as Exhibit 245a—which was again duly executed by the C.P.R. and transmitted to the Crown. It was marked O.K. by Mr. Gutelius, under his own signature, and every page was initialed by him—the draft had also been marked O.K. and corrected by Mr. Gutelius.

This document, Mr. McMillan testified, never came back into his possession and the document turns up at trial as coming from the hands of the Crown.

Then Mr. Hayes, who succeeded Mr. Gutelius, proposed a new agreement. That was followed in 1924 with a letter of the Department of Justice advising that proceedings would be taken, but not assigning any special delay within which to remove the poles.

Hence the present action.

Having so set forth out of the mass of the evidence such of the important facts that were thought necessary, I shall now approach the consideration of the controversy on its merits.

It would seem that the poles were placed on the right of way with the consent and co-operation of the high officers of the railway and the Prime Minister and Minister of Railways at the time, and conjectured that these agreements that were placed in the hands of the Crown, after being duly signed by the C.P.R. would be executed. As a matter of fact they were not executed by the Crown, but on the other hand, the Crown retained the documents in its possession after they were marked with the approval of its responsible officers, and the right of the defendant to regard them as satisfactory to the Crown thus becomes apparent. Surely the equitable right of the defendant to remain upon the property under the terms of the proposed agreement cannot be disputed.

The land upon which the poles are erected belongs to and is vested in the Crown. There is here no question of parting with land or entering into a lease for which the authority of Parliament or an Order in Council would be required.

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The Crown is not divested of its fee. The defendant is found in occupation only of such portions of the surface of the lands as was necessary to erect their poles upon, with the consent, permission and authority of the railway officials. The permission is given by the Prime Minister and the Minister of Railways, and by the officer, who under the Order in Council appointing him (exhibit No. 293) is given

the duties and powers of General Manager, such powers as are usually vested in the executive of a railway Corporation.

Executive is

l'ensemble des personnes qui exercent l'autorité politique.

The poles are erected openly with here and there a confirmation of the leave or permission to do so.

The operation of the railway is confided onto this manager, and a telegraph system or telegraph systems would seem to be a necessary part for the operation of a railway. He could not give perpetual rights which would amount to alienation of property, but could it be said he could not grant a licence of occupation? Indeed, a revocable licence is nothing but a personal privilege to do certain acts upon the land of another, but creates no estate therein, and is revocable at will and may rest in parol. See also *Plimmer et al* v. *Mayor, etc., Wellington* (1). A licence could be implied as resulting from both the negotiations and the conduct of the minister and the managers of the I.C.R. And while this licence was being enjoyed by the defendant, the plaintiff, so to speak, stood by with full knowledge.

The leave given by the manager and others, was an act of interim nature, subject to arrangement. How can we find fault with such a sane act of administration? A foreign telegraph company was already on the right of way. Why any discrimination against a Canadian, a domestic company, which has a system of telegraphs extending from the Pacific to the Atlantic and a cable at Canso? Should not state messages, which might be conflicting with American interest, be in preference placed in the hands of a Canadian company, than in that of a foreign company? Should not this be doubly true if some trouble were arising with respect to the fisheries rights, in the Maritime Provinces, as between the Canadian and American Governments?

(1) (1884) L.R. 9 A.C. 699.

This is not a case where it is sought to protect the Crown's prerogatives, and it would seem that no claim of right could be made good against the defendant, under the circumstances. The case should not be approached in a narrow view of the prerogative rights, but it should be dealt with broadly as the issues demand. It is of utmost importance in the administration of justice that even the appearance or what might appear unjust and unfair should be avoided, if possible.

Under the circumstances of this case, were the Civil Law resorted to—although it is not the law under which the issues are to be determined here—there would be assumed a contract *sui generis,* whereby it would be presumed proper authorization was given. There would be presumed in favour of the occupant a sort of right to a certain superficies. *Tremblay* v. *Guay* (1); *Beaudry Lacantinerie et Chauveau* (2); Fuzier-Herman Rep. vo. Superficie. The Common Law closely approaches in spirit the above doctrine of the Civil Law where it restrains the actual owner of land, who has stood by and allowed another under mistake of title to improve it, from ejecting the latter from the land without compensation for his improvements. The equity inherent in that doctrine is of much the same spirit as that arising upon the facts of the case before me. Furthermore, it is a rule of the Common Law that a licence enables the person to do a thing which without such licence would be a trespass. And while a licence without consideration is revocable, if granted for a valuable consideration it is irrevocable. *Taylor* v. *Caldwell* (3). In *Hurst* v. *Picture Theatres Limited* (4), it was held that a man may become a licensee without a formal grant in writing.

Kay J., in *McManus* v. *Cooke* (5), cites many authorities which support the equitable right of the defendant in the case before me. It is useful to quote his remarks at p. 695:

> In the well known case of *Dann* v. *Spurrier* (6), the doctrine is thus stated: "This Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement; a lessor knowing and permitting those

(1) (1929) S.C.R. 29, at p. 34.
(2) Biens. No. 372.
(3) (1863) 3 B. & S. 826.
(4) (1915) 1 K.B. 1.
(5) (1887) 35 Ch. D. 681.
(6) (1802) 7 Ves. 230, at p. 231.

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acts, which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment."

In *Powell* v. *Thomas* (1), this doctrine was applied to a case in which the plaintiff had made a railway over the defendant's land without objection from the defendant, the only dispute being on the question of price, and the Court of Equity restrained the defendant from prosecuting an action of ejectment. So, in the case of *Duke of Devonshire* v. *Eglin* (2), the defendant allowed the plaintiff to make a watercourse under his land to convey water to a town. The watercourse was made at the plaintiff's expense, and this easement was enjoyed for about nine years, and although there was no grant the defendant was decreed to execute a proper deed, and a perpetual injunction was granted to restrain his interference with the watercourse. *Hewlins* v. *Shippam* (3); *Wood* v. *Leadbitter* (4), and other authorities at Common Law, were cited, and it was argued that the right claimed could only be granted by deed, and that therefore the licence was revocable; but this common law doctrine was not allowed to prevail in equity.

There has been a licence or permission given in fact and upon apparent authority, and why should it not be binding? This seems inherently justified by the acts of the managers of the Railway and the Minister of the Crown. The defendant's rights are only questioned after years of its overt acts of occupation and enjoyment. In other words, the conduct of the parties carries against the granting of the remedy asked by the information of intrusion. Upon no fair consideration, under the circumstances of the case, could an order of ejectment be made against the defendant company who were not trespassers.

The plaintiff has acquiesced, by its conduct, during a long period of time, to the occupation of this land. *McGreevy* v. *The Queen* (5); *The Queen* v. *McCurdy* (6); *The Queen* v. *Yule* (7). This acquiescence has led the defendant to believe that the occupation was assented to; it would otherwise work out an injustice. *Rochdale Canal Co.* v. *King* (8). See also exhibit No. 51 in respect of the construction by the Justice Department upon the facts that if the poles are suffered upon the right of way it would support evidence that poles had been placed there by permission of the plaintiff.

(1) (1848) 6 Hare, 300.
(2) (1851) 14 Beav. 530.
(3) (1826) 5 B. & C. 221.
(4) (1845) 13 M. & W. 838.
(5) (1888) 1 Ex. C.R. 321, at p. 322.
(6) (1891) 2 Ex. C.R. 311, at p. 320.
(7) (1899) 30 S.C.R. 24 at pp. 34, 35.
(8) (1853) 16 Beav. 630, at p. 636 (*c*).

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Upon the facts of the case, it is clear that the plaintiff has no right to treat the defendant as a trespasser. The defendant from the beginning was upon the property of the plaintiff as a licensee with the consent and acquiescence of the plaintiff, and has ever since been continuously in that capacity upon the property. See also *Peterson* v. *The Queen* (1); *Davenport* v. *The Queen* (2); *Attorney-General* v. *Ettershank* (3).

Now, there is a difference between estoppel by deed, and estoppel in pais or equitable estoppel, arising from acts and conduct. And while it may be readily conceded that the Crown is not bound by estoppel by deed, by recital in his patent (Robertson, On Civil Procedure), yet it is held in the case of *Attorney-General* v. *Collom* (4), that the Crown is bound by estoppel in pais. See also *Queen Victoria Niagara Falls Park Comm'rs.* v. *International Railway Co.* (5); *City of Montreal* v. *Harbour of Montreal* (6); *Attorney-General* v. *Holt & Co. Ltd. et al* (7). Under the circumstances of the case, as above mentioned, it must be found the defendant had a right to believe they were along the right of way by leave and permission open or implied.

Estoppels in pais are called equitable estoppels because they arise upon facts which render their application in the protection of rights equitable and just. Words and Phrases, vol. 2, pp. 340 et seq. Estoppel is the shield of justice interposed for the protection of those who have acted improvidently. It is the special grace of the Court, authorized and permitted to preserve equities that would otherwise be sacrificed. Idem 345.

The trial was proceeded with only upon the question of law, or, at any rate, leaving the question of damages to be dealt with after the rights of the parties had been determined, and hope was then expressed by counsel that once the rights were determined the terms and conditions could be agreed upon by the parties.

In the result, the prime controlling issue to be determined by these proceedings is what right, if any, has the defend-

(1) (1889) 2 Ex. C.R. 67.
(2) (1877) L.R. 3 A.C. 115.
(3) (1875) L.R. 6 P.C.A. 354.
(4) (1916) L.R. 2 K.B. 193, at at 204.
(5) 63 Ont. L.R. 49, 66, 67.
(6) (1926) A.C. 299 at p. 313.
(7) (1915) A.C. 599.

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ant on the right of way? Answering the same I find that the defendants are and have been on the right of way from the beginning by the licence of the plaintiff—but not an irrevocable licence, which would be tantamount to an alienation of the property of the Crown.

I do not think that I should be called upon in my judgment to determine more than that; but if I can assist the parties to a full and complete settlement of their difficulties I shall be glad to have them, or either of them, apply, upon notice, for further directions.

There will be judgment accordingly. The question of costs is reserved.

Judgment accordingly.