

1885 THE CANADA SOUTHERN RAIL- } APPELLANTS ;
 *May 21, 22. WAY COMPANY (DEFENDANTS).. }

AND

1886
 *April 9. JAMES ERWIN (PLAINTIFF)... .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Farm crossing—Agreement for cattle pass—Construction of—Liability of railway company to maintain—Substitution of solid embankment for trestle bridge.

In negotiating for the sale of lands taken by the Canada Southern Railway Company for the purposes of their railway the agent of the agent of the company signed a written agreement with the owner, which contained a clause to the effect that such owner should "have liberty to remove for his own use all buildings on the said right of way, and that in the event of their being constructed on the same lot a trestle bridge of sufficient height to allow the passage of cattle the company will so construct their fence to each side thereof as not to impede the passage thereunder."

Held, reversing the judgment of the court below, Ritchie C. J. dissenting, that under this agreement the only obligation on the company was to maintain a cattle pass so long as the trestle bridge was in existence and did not prevent them from discontinuing the use of such bridge and substituting a solid embankment therefor without providing a pass under such embankment.

APPEAL from a decision of the Court of Appeal for Ontario (1) varying a decree of Mr. Justice Ferguson in the Chancery Division of the High Court of Justice.

The facts of the case are similar to those of *The Canada Southern v. Clouse*, and will be found set out in the reports of both cases in the courts below and in the judgment of Mr. Justice Gwynne.

This appeal was heard at the same time as the appeal

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

in Clouse's case, the same counsel appearing for the parties respectively.

1886

CANADA
SOUTHERN
RWY. CO.

v.

ERWIN.

Ritchie C.J.

Sir W. J. RITCHIE C.J.—I agree with Mr. Justice Patterson that the right of the plaintiff is to have the state of things which has existed for the last ten years maintained, unless and until the company shall proceed under the statute to acquire a right to do what they now propose to do.

I am of opinion that the appeal should be dismissed.

GWYNNE J.—This case differs from that of Clouse against the same defendants in this that an agreement was reduced to writing by the solicitor of the company which was witnessed by him and signed by Mr. Tracey at the time that Smith, the then owner of the land of which the plaintiff is now proprietor, executed a deed granting to the defendants the land taken for their railway on lot No. 12 in the 9th concession of Townsend, this agreement is as follows:—

The Canada Southern Railway Company by John Avery Tracey, their duly constituted agent for the purchase of right of way, do hereby agree with James H. Smith, the owner of lot twelve in the ninth concession of Townsend, his heirs and assigns as follows:—

The said Smith having sold to the said company the right of way over lot number twelve in the ninth concession of the Township of Townsend, containing four acres and seventeen hundredths of an acre at and for the price of one thousand six hundred and fifty dollars and having given a conveyance to the said company for the same, it is hereby, notwithstanding such conveyance, agreed between the said parties that for the period of five years from the date of this agreement the said Smith, his heirs and assigns shall have possession, undisturbed by the said railway company, of the woodshed and ground on which it is erected at the rear of his house and on the right of way so conveyed, and the fence of the said railway shall be so constructed as to leave a passage of at least five feet wide for the use of the said Smith, his heirs and assigns between the said woodshed and the railway fence and the said fence shall run from a point five feet south of the south-easterly corner of the said woodshed in a straight line to the south-easterly corner of a barn now standing

1886

CANADA
SOUTHERN
RWY. CO.v.
ERWIN.

Gwynne J.

on the fence line of the said railway and shall so remain during the space of five years as aforesaid, and it is hereby agreed that the said company shall give such further assurance as may be deemed necessary to carry out this agreement which is hereby declared part of the consideration for the said conveyance. Dated September 26th, 1871.

This instrument was signed by Tracey and witnessed by Mr. Kingsmill, the solicitor of the company. When the agreement was produced Smith objected to it as insufficient in not providing for a cattle pass and other things which he insisted had been agreed upon, accordingly Mr. Kingsmill wrote on the back of the said agreement a further clause which was also signed by Tracey and witnessed by Mr. Kingsmill, which is as follows:—

It is further agreed, and it is to be taken as part of the within agreement, that the within named Smith shall have liberty to remove for his own use all buildings on the said right of way and it is also further agreed that in the event of there being constructed on the said lot a trestle bridge of sufficient height to allow of the passage of cattle the said company will so construct their fence on each side thereof as not to impede the passage thereunder. Dated September 26th, 1871.

No case for the reformation of this agreement so as to make it an agreement for a perpetual cattle pass under the railway at the place in question, whatever might be the character of the superstructure, has been established in evidence. The plaintiff's right, therefore, to recover in this suit must depend upon the construction of the agreement as it stands. The parties to the agreement must be regarded as being the best judges of what it was they were intending to provide for. Now it is to be observed that the pass spoken of in the agreement is not a "farm crossing," which, as I have already said in Clouse's case, is, in my opinion, a convenience which, unless a proprietor of lands severed by a railway accepts pecuniary compensation for being deprived of, or voluntarily releases his right thereto, is

a necessity for the use and enjoyment of the severed lands which the law provides for apart from any contract. The language of the agreement is that—

In the event of there being constructed a trestle bridge of sufficient height to allow of the passage of cattle, the company will so construct their fences on each side as not to impede the passage thereunder.

All that such language can be construed as providing for is a passage for cattle only, and that conditional upon there being a trestle bridge of sufficient height to permit of such a passage. This agreement so conditioned cannot be construed as depriving the company of the right to discontinue the trestle bridge, which was erected as a temporary structure, and to construct an embankment in its stead unless they shall construct a cattle pass in the embankment. The agreement does not contemplate that there should be provided a cattle pass under an embankment. As, then, the "cattle pass" can only be claimed under the written agreement, the obligation of the company, which is to construct their fences so as not to impede the passage of cattle under a trestle bridge if such should be erected of sufficient height so as to permit of the passage of cattle under it, cannot have any binding effect if and when the trestle bridge shall no longer exist. The two things are very different, namely, constructing fences so as to permit cattle to pass under a trestle bridge, and constructing an arch, of sufficient dimensions to permit the passage of cattle under an embankment, the cost of which work might be in excess of the whole value of the severed lands. The plaintiff's statement of claim in this case should, in my opinion, have been dismissed with costs, but such dismissal would not operate against any claim, if any, which the plaintiff may have under the law for such farm crossings or farm crossing, as may be necessary

1886
CANADA
SOUTHERN
RWY. Co.

v.
ERWIN.
Gwynne J.

1886
CANADA
SOUTHERN
RWY. CO.
v.
ERWIN.
—
Gwynne J.

for the reasonable enjoyment of the severed lands. The appeal of the defendants therefore, in my opinion, in this case should be allowed with costs, and the statement of claim of the plaintiff be ordered to be dismissed in the court below with costs.

FOURNIER, HENRY and TASCHEREAU JJ.—Concurred.

*Appeal allowed, and cross appeal
dismissed with costs.*

Solicitor for appellants: *Kingsmill, Catanach and Symons.*

Solicitors for respondent: *Tisdale & Robb.*
