

Friday, January 26.

FIRST DIVISION.

CORPORATION OF GLASGOW v.
POSTMASTER - GENERAL.

Process—Appeal—Competency—Railway and Canal Commission—Question of Law or Fact—Telegraph Act 1878 (41 and 42 Vict. c. 76), secs. 3, 4, and 5—Railway and Canal Traffic Act 1888 (51 and 52 Vict. c. 25), secs. 8 and 17.

By section 17 of the Railway and Canal Traffic Act 1888 it is provided—

“(1) No appeal shall lie from the Commissioners (*i.e.*, the Railway and Canal Commissioners) upon a question of fact, or upon any question regarding the *locus standi* of a complainant; (2) Save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior court of appeal.”

A corporation, on a demand from the Postmaster-General for leave to place certain lines of telegraph in their streets, consented subject to a condition. On the question being referred to them, the Railway and Canal Commissioners pronounced an order “that the said condition ought not to be attached to the consent of the Corporation.” In an appeal to the Court of Session, *held* that the question at issue was one of fact—whether the condition was reasonable—and the appeal was therefore incompetent.

Question—Whether the appeal for the decision of the Railway and Canal Commission provided by sec. 17 of the Railway and Canal Traffic Act 1888 applies to cases coming before the Commission in virtue of the provisions of the Telegraph Act 1878.

By section 3 of the Telegraph Act of 1878 it is enacted that where any body or person (within the meaning of the Telegraph Act 1863) having power under the Act to give or withhold their consent to the Postmaster-General placing telegraphs and posts in, under, upon, along, over, or across a street or public road, fail within twenty-one days after being required to do so by the Postmaster-General to give their consent, or attach to their consent any terms, conditions, or stipulations to which the Postmaster-General objects, a difference shall be deemed to have arisen between the Postmaster-General and such body or person, and that difference shall be determined in manner thereafter provided, and the authority by whom the difference is to be determined may, if after hearing all parties concerned they think it just, give their consent either conditionally, or subject to such conditions and stipulations as they may think just.”

By section 4 of the Telegraph Act 1878 it is enacted that “where any difference arises under that Act or the Telegraph Act 1863, between the Postmaster-General and any body or person having any power, jurisdiction, or control over or relating to a street

or public road, or having power under the last-mentioned Act to give or withhold a consent to the placing of telegraphs and posts in, under, upon, along, or across a street or public road, such difference shall in Scotland be referred to the sheriff having jurisdiction within the district within which the difference has arisen, and such sheriff is empowered and required to hear and determine such difference: Provided always that in case either the Postmaster-General or the body or person with whom the difference has arisen shall be dissatisfied with the award or decision of the sheriff, the party so dissatisfied may, within twenty-one days after the decision of the sheriff, require by a notice in writing given to the other party that the difference shall be referred to the Railway Commissioners.”

By section 5 of the Telegraph Act 1878 it is enacted that the differences so required to be referred by the last preceding section to the Railway Commissioners shall be referred to and shall be determined by the Railway Commissioners, and every difference referred to them under that Act shall be conducted by the Railway Commissioners in the same manner as any other proceeding is conducted by them under the Acts relating to these Commissioners, and that it shall be the duty of the Commissioners, and they are thereby empowered, to undertake and determine any difference referred to them under that Act.

By section 8 of the Railway and Canal Traffic Act 1888 there are transferred to and vested in the Commissioners appointed under that Act all the jurisdiction and powers which at the commencement of that Act were vested in or capable of being exercised by the Railway Commissioners, whether under the Regulation of Railways Act 1873, or any other Act or otherwise, and it is further enacted that any reference to the Railway Commissioners in the Regulation of Railways Act 1873 or in any other Act, or in any document, shall from and after the commencement of the Act (of 1888) be construed to refer to the Railway and Canal Commission established by that Act.

By section 17 of the last-mentioned Act it is enacted—“(1) That no appeal shall lie from the Commissioners upon a question of fact, or upon any question regarding the *locus standi* of a complaint, but that (2) save as otherwise provided by the Act, an appeal shall lie from the Commissioners to a superior court of appeal; and it is further enacted that (4) on hearing an appeal, the court of appeal may draw all such inferences as are not inconsistent with the facts expressly found, and are necessary for determining the question of law.”

By a notice in writing dated 21st December 1898 the Postmaster-General required the consent of the Corporation of Glasgow “to the placing of a line or lines of underground telegraphs in, under, upon, over, along, or across certain streets or public roads in the said city and royal burgh as specified and set out in a schedule thereunder written and shown on a plan thereto annexed, and in, under, upon, over, along,

or across such other streets (if any) in the said city and burgh as lay on the respective routes, and between the respective points or places shown on the plan annexed to the said notice."

On 10th January 1899 the Corporation informed the Postmaster-General in writing that they were prepared to give their consent provided that such consent was not to be made applicable to the purposes of any private company or individual whose application if made direct to the Corporation could be refused by the Corporation without right of appeal.

On 17th February 1899 the Postmaster-General intimated in writing to the Corporation that he objected to the condition which the Corporation had attached to their consent.

The difference was referred to the Sheriff of Lanarkshire (BERRY), who on 22nd April 1899 pronounced an award whereby he, *inter alia*, ordered that "the said condition ought not to be attached to the consent of the Corporation of Glasgow."

On 5th May 1899 the Corporation gave notice that they were dissatisfied with the award of the Sheriff, and required that the difference between them and the Postmaster-General should be referred to the Railway and Canal Commissioners.

On 12th August 1899 the Railway and Canal Commissioners (Lord Stormonth Darling, Sir Frederick Peel, and Viscount Cobham) issued an order by which they determined that the said condition ought not to be attached to the consent of the Commissioners.

The following passage is taken from the opinion of Lord Stormonth Darling, with which the other Commissioners concurred—"It seems to me, therefore, that the Corporation had no right to clog their consent with the condition that the Postmaster-General was not to exercise his undoubted right of permitting a private company or individual to use his wires. I reach that result independently of the decision by this Court in the *Corporation of London* case. There the Corporation did not put their argument so high as that the company should not be allowed to use the wires at all, but only that it should not be allowed to use them unless it provided a better service. It was held that that was a stipulation which the Corporation were not entitled to make, because it did not concern them as street authorities. Perhaps the same might be said of the contention that the company should not be entitled to use the wires on any terms. But I prefer to rest my judgment on the ground that the Corporation were not entitled to make it a condition of their consent that the Postmaster-General should not permit his wires to be used in a particular manner authorised by the law."

The Corporation appealed to the Court of Session.

Argued for the appellants—The appeal was competent under section 17 of the Railway and Canal Traffic Act 1888, quoted *supra*, because the Railway and Canal Com-

mission, with the procedure appropriate to it, was now substituted for the Railway Commission under the Telegraph Act 1878. Questions regarding telegraphs were therefore now referred to the Commissioners, not merely as arbiters, but as a court from which there was an appeal on a point of law.—*North Eastern Railway Company v. North British Railway Company*, December 17, 1897, 25 R. 333. The present question was one of law, whether the Corporation could legally attach this condition to their consent.

Argued for the respondent—The appeal was incompetent. Under section 5 of the Telegraph Act 1878, quoted *supra*, the Railway Commissioners were made arbiters under that Act, and their decision was final. The change introduced by section 8 of the Railway and Canal Traffic Act 1888 substituted the Railway and Canal Commissioners for the Railway Commissioners, but did not alter their functions. They were still arbiters, and their decision was final. There was nothing in the Railway and Canal Traffic Act that could introduce an appeal in telegraph matters that did not already exist. An appeal on a question of administration from the administrative court was not easily to be referred without express provision.—*Strain v. Strain*, June 26, 1886, 13 R. 1029. (2) Even if an appeal under section 17 of the Act of 1888, quoted *supra*, was competent, it was only allowed on a question of law. Here the question was one of fact and of discretion.

At advising—

LORD PRESIDENT—[After quoting the sections quoted above]—The Corporation of Glasgow is a body within the meaning of the Telegraph Acts 1862 to 1892, having power under these Acts to give or withhold their consent to the placing and maintaining by the Postmaster-General of telegraphs under the streets of Glasgow, and by notice in writing dated 21st December 1898 the Postmaster-General required the Corporation, within twenty-one days, to give their consent to the placing of certain lines of telegraph in, under, upon, over, along, or across certain streets or public roads in Glasgow, as specified in a schedule thereto appended and shown on a plan thereto annexed, and in, under, upon, over, along, or across such other streets, if any, in Glasgow as lay on the respective routes and between the respective points or places shown on the plan annexed to the notice.

On 10th January 1899 the Corporation informed the Postmaster-General in writing that they were prepared to give their consent provided the consent was not to be made applicable to the purposes of any private company or individual whose application if made direct to the Corporation could be refused by them without right of appeal; and on 17th February 1899 the Postmaster-General intimated in writing to the Corporation that he objected to the condition which the Corporation had attached to their consent.

A difference thus arose between the Postmaster-General and the Corporation, and the difference was, under the Telegraph

Act 1878, referred to the Sheriff of Lanarkshire, and heard and determined by him. By his award, dated 22nd April 1899, he awarded and ordered that the condition above mentioned ought not to be attached to the consent of the Corporation, and he further awarded, ordered, and consented that the Postmaster-General should be at liberty to place a line or lines of underground telegraphs in or under the streets or public roads mentioned in the notice dated 21st December 1898, and along the routes therein specified and shown on the plan annexed thereto.

On 5th May 1899 the Corporation gave notice in writing to the Postmaster-General that they were dissatisfied with the award of the Sheriff, and they thereby required that the difference which had arisen between the Postmaster-General and the Corporation should be referred to the Railway and Canal Commissioners.

In the reference to the Railway and Canal Commissioners the Postmaster-General contended that the condition attached by the Corporation to their consent was an unreasonable and improper condition, and that the order and award of the Sheriff that the condition ought not to be attached to the consent of the Corporation was reasonable and just, and further that the consent given in the Sheriff's award was reasonable and just.

In the reference to the Railway and Canal Commissioners the Corporation submitted that the consent given in the Sheriff's award was unreasonable and unjust, on account of the facts and reasons which they set forth in detail in their pleadings and evidence.

By order dated 12th August 1899 the Railway and Canal Commissioners determined that the condition demanded by the Corporation ought not to be attached to the consent of the Corporation, and further ordered and consented that the Postmaster-General should be at liberty to place lines of underground telegraphs under the streets therein mentioned.

By note of appeal dated 25th August 1899 the Corporation appealed to this Court against the order of the Railway and Canal Commissioners, and the Postmaster-General maintains that the appeal is incompetent.

It may be a question whether the appeal from the Commissioners to a superior Court of Appeal allowed by section 17 of the Railway and Canal Traffic Act 1878 applies to cases arising under the Telegraph Acts, but assuming that it does, I am of opinion that the appeal is incompetent, because it is not upon a question of law, but of the reasonableness or unreasonableness of the condition which the Corporation seek to have attached to the consent—a matter not depending upon law but upon fact and opinion upon fact.

It was contended by the Corporation that the question is one of law, because Lord Stormonth Darling, the *ex officio* Commissioner, in delivering the judgment of the Commissioners, expressed the opinion that the Corporation "had no right to clog their consent with the condition" above men-

tioned, and "were not entitled" to attach that condition to their consent. It does not, however, appear to me that in using the words "had no right" and "were not entitled" his Lordship intended to decide or did decide any legal right, or to indicate that any question of legal right was raised for decision. I think that he only meant to say that the Corporation had no right, and were not entitled, to prevail in insisting on the condition being annexed to the consent, because it (the condition) was unreasonable. In a similar case between the Postmaster-General and the Corporation of London, Mr Justice Wright, the English *ex officio* Commissioner, in delivering the opinion of the Commission, said—"I think that we ought to hold that the condition sought to be imposed is not a reasonable one, and not one that ought to be sanctioned by the Court;" and it appears to me that Lord Stormonth Darling intended in the present case to express the same view.

The best test however of what the Commissioners decided is the formal order which they made, and it is "that the said condition ought not to be attached to the consent of the Corporation." This does not involve any statement that either the Corporation or the Sheriff or the Commissioners had no power to attach the condition, but merely that the condition was unreasonable, and therefore ought not to be attached.

I therefore consider that the question brought before us by this appeal is not one of law, and consequently that we have no jurisdiction to entertain it.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Appellants—Shaw, Q.C.—Craigie. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent—Solicitor-General (Dickson, Q.C.)—H. Johnston, Q.C.—Fleming. Agent—John S. Pitman, W.S.

Friday, January 26.

FIRST DIVISION.

RUSSELL v. MACKNIGHT'S TRUSTEE.

(*Ante*, November 7, 1896, 34 S.L.R. 73; 24 R. 118.)

Process—Jury Trial—Order for New Trial—Failure to Proceed—A.S., February 16, 1841, secs. 41 and 46—Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 40.

Section 41 of the Act of Sederunt 16th February 1841 provides—"All regulations as to notices of trial, as to abandonment of the suit, as to not proceeding to trial, and as to not appearing and proceeding with evidence at the trial, and all other matters and things herein provided for regulating the conduct of parties as to trials, shall be the same in