1930

*Feb. 28.
*Mar. 3, 4.
*June 11.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Railways—Telegraph lines planted by company on roadway of Government railway—Alleged permission to plant and maintain them—Evidence—Licence—Revocability—Absence of formal contract—Department of Railways and Canals Act, R.S.C., 1927, c. 171, ss. 7, 15.

The Crown took proceedings in the Exchequer Court against defendant, alleging that it had wrongfully planted and maintained its telegraph lines upon the roadway (belonging to the Crown) of the Intercolonial Railway. Audette J., [1930] Ex. C.R., 26, held that defendant was on the roadway by licence, but not an irrevocable licence, of the Crown. Defendant appealed, asserting an irrevocable licence, and the Crown cross-appealed, denying the existence of any licence. For purposes of its judgment, this Court considered the telegraph lines as in three sections, (1) the "Main Line" (between St. John and Halifax, with a branch from Truro to New Glasgow; built in 1888-1890), (2) the "Branch Line" (from New Glasgow to Sydney, built in 1893), and (3) the "Westville Line" (from Westville to Pictou, built in 1911).

Held (1) As to the "main line," on the evidence, the defence of leave and licence failed, and there was nothing to give rise to any equity in defendant's favour.

(2) As to the "branch line," on the evidence, there was no agreement (giving leave to defendant to use the roadway) proved; or, even if otherwise, the agreement, such as it may have been, had ceased to operate in any particular, unless to negative defendant's liability to remove its poles and wires; and defendant was, when the present action began, in no better position than that of licensee whose leave was terminated or exhausted.

(3) As to the "Westville line," from the evidence it appeared that defendant built it on the roadway by consent, the parties having mutually in view the negotiation of a contract, with adequate sanctions, to regulate their rights and obligations; and, with nothing more definite, defendant had ever since maintained and used the line without notice or warning of intention by the Government to withdraw the licence. The licence was revocable, but the right to revoke should be exercised reasonably; in the circumstances, an abrupt determination, without demand or notice, was unjustifiable. Therefore, as to this line, there was no cause of action when the proceedings were commenced, and the action must fail. *The King* v. *Inhabitants of Horndon-on-the Hill,* 4 M. & S., 562, at p. 565; *Cornish* v. *Stubbs,* L.R. 5 C.P., 334, at pp. 337-340; *Coleman* v. *Foster,* 1 H. & N., 37, at

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

pp. 39, 40; *Kerrison* v. *Smith,* [1897] 2 Q.B., 445, and other cases, cited. (Anglin, C.J.C., dissenting on this point, held that failure to give notice of revocation was not necessarily fatal to the action; on the contrary, inasmuch as defendant asserted that its licence as to this line was irrevocable and contested the Crown's claim to exclude it on the merits, the bringing of the action itself should be regarded as sufficient notice, subject only to the question of costs and allowance of a reasonable time to defendant to remove its poles and wires. *Cornish* v. *Stubbs supra, Coleman* v. *Foster supra,* and other cases referred to).

(4) As to all the lines generally, apart from other considerations, the contracts alleged by defendant were ineffective for non-compliance with statutory requirements (*Department of Railways and Canals Act,* R.S.C., 1927, c. 171, ss. 7, 15, referred to; *The Queen* v. *Henderson,* 28 Can. S.C.R., 425, discussed and distinguished). The telegraph rights claimed by defendant in perpetuity with respect to the railway lands in question could not be acquired for defendant's accommodation by the mere laches, acquiescence or tolerance of the executive officers and employees, charged under the Minister with the administration or working of the railway. It was contemplated that whatever concessions might be authorized should be contracted for by the Crown, represented by the Minister, and defendant knew, or is presumed to have known, the statutory requirements. Moreover, as to defendant's claim that it had acquired in perpetuity, and in the manner contended for, the right to use the Government railways for its telegraph lines, effect must be given to the principles expressed in *Ayr Harbour Trustees* v. *Oswald,* 8 App. Cas., 623 (see at pp. 634, 639). When planting its poles on the Government railway, defendant must have realized the facts of the case and the risks to be encountered, 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 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. (Reference also to Selwyn's Nisi Prius, 13th ed., p. 1086, and to *Blanchard* v. *Bridges,* 4 Ad. & El. 176, at pp. 194-195).

Judgment of Audette J. (*supra*) reversed in part in favour of the Crown.

APPEAL by the defendant (the Canadian Pacific Railway Co.) and cross-appeal by the plaintiff (the Crown) from the judgment of Audette J., of the Exchequer Court of Canada (1).

The Attorney-General of Canada, on behalf of His Majesty the King, took action by information of intrusion in the Exchequer Court, alleging that defendant wrongfully entered and intruded in or upon the plaintiff's possession of certain lands situate in the provinces of New Brunswick and Nova Scotia and comprising the right of

(1) [1930] Ex. C.R. 26.

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way, yards and station grounds of the Intercolonial Railway at and between certain points, and constructed and operated thereon a telegraph line; and (including amendments at the trial) claiming (1) possession, (2) a sum for the issues and profits of the lands, or, in the alternative, a sum for damages for trespass, and (3) "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."

Audette J. (1) concluded his judgment as follows:

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 and controlling issue to be determined by these proceedings is what right, if any, has the defendant 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.

The defendant appealed upon the grounds, that the trial judge was in error in holding that the licence was not irrevocable; and that on the facts as disclosed in the evidence and as found by the trial judge the action should have been dismissed with costs. The plaintiff cross-appealed, contending that the defendant had not been on the right of way under a licence, but was a trespasser, or, in the alternative, that the licence, if any, had been revoked.

The material facts of the case are sufficiently stated in the judgment of Newcombe J., now reported. As to the "Main Line" and the "Branch Line," the defendant's appeal was dismissed with costs, and the plaintiff's cross-appeal allowed with costs. As to the "Westville Line," the defendant's appeal was allowed with costs, the Court holding that, in the circumstances, the action must fail in this particular, but holding also that the licence with respect to the line was revocable; Anglin, C.J.C., dissenting as to the dismissal of the action with respect to this line.

(1) [1930] Ex. C.R. 26, at pp. 37-38.

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

W. P. Jones K.C. and *I. C. Rand K.C.* for the respondent.

The judgment of the majority of the court (Duff, Newcombe, Rinfret and Lamont JJ.) was delivered by

NEWCOMBE J.—The Attorney-General proceeded by information of intrusion, filed in the Exchequer Court of Canada, on 15th September, 1926, claiming to recover possession of lands acquired for railway purposes of the Crown in the provinces of Nova Scotia and New Brunswick; the intrusion alleged consisting in the wrongful planting and maintenance upon the roadway of the Intercolonial Railway by the defendant of its lines of telegraph from Saint John to Moncton (90 miles); from Moncton to Halifax by way of Truro (190 miles); from Truro to New Glasgow (43 miles); from New Glasgow to Sydney (163 miles); and from Westville, near New Glasgow, to Pictou (10 miles); in all a mileage of 496 or thereabouts.

The Attorney-General by his pleading, as amended by leave at the trial, claimed possession, issues and profits, and, in the alternative, a declaration as to the defendant's rights, if any. The defendant pleaded a comprehensive denial, and estoppel by laches and acquiescence, also leave and licence; and the latter constitutes the chief defence upon which the defendant relied at the hearing. There was considerable oral testimony and many exhibits, extending to nearly five hundred printed pages in the case. There is no dispute as to the Crown's title to the lands claimed, nor as to the defendant's occupation of these lands for the purposes of its telegraph lines.

The case was tried in January, 1929, by Audette J., and his findings and conclusion are expressed thus (1):

> 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.
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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.

The defendant appealed upon the grounds:

1. That the learned trial judge was in error in holding that the licence referred to was not irrevocable.

2. 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.

The Attorney-General cross-appealed against the finding which maintained an existing revocable licence, and he submitted that the defendant was a trespasser, or, in the alternative, that its licence, if any, had been revoked.

The telegraph lines in question naturally divide themselves into three sections or parcels, and they must necessarily be considered separately; namely, the lines between St. John and Halifax, with a branch from Truro to New Glasgow, which were constructed in 1888, 1889 and 1890, and which, for convenience, will be hereinafter described as the "Main Telegraph Line"; the line from New Glasgow to Sydney, known in the case as the "Branch Telegraph Line," constructed in 1893, and the short line running from Westville to Pictou, built in 1911, which I shall call the "Westville Telegraph Line."

The facts with regard to these present differences which should be realized, and, in the view which I take, the learned trial judge must have arrived at different results, if he had properly appreciated and applied the evidence in relation to each of these lines, respectively.

There are, as I have said, three separate cases, depending upon different considerations of fact, and I shall consider them separately in the order which I have mentioned.

THE MAIN TELEGRAPH LINE

The correspondence shows that, when, in 1887 or 1888, the defendant was contemplating to undertake the construction of its telegraph system east of St. John, it applied to the Government for permission to construct an exten-

sion of its telegraph line along the Intercolonial Railway from St. John to Halifax via Moncton. Upon considering this request, it was found that the granting of it would create conflict with exclusive rights already conceded by the Government to the Montreal Telegraph Company, a corporation which, along with the Great Northwestern Telegraph Company, was controlled by the Western Union Telegraph Company, then the principal operator of telegraphs in the maritime provinces. The application was refused, and the defendant, in consequence, built its line outside of the plaintiff's railway; having, as it claims, secured a right of way from the proprietors abutting upon the railway; but this location was, for obvious reasons, less advantageous and more expensive for construction and maintenance than that which would have been afforded by use of the Government roadway itself, and, in places where outside construction was difficult, the defendant, notwithstanding the absence of any permission, took the liberty of planting its poles on the roadway acquired and used by the Government, and even within the railway fences. These acts of trespass were discovered and led to complaints. Mr. Schreiber, the Chief Engineer of Government Railways, had written to Mr. Hosmer, the defendant's Superintendent of Telegraphs at Montreal, on 21st June, 1889, stating that in construction of the defendant's line of telegraph between Saint John, Halifax and New Glasgow, via Truro, "outside and near to the Intercolonial Railway fence," the Government would grant all reasonable facilities, as regards the distributing of poles and other materials, the movement of the defendant's boarding and supply cars, and the running of hand-cars; and Mr. Richardson, who was in charge of the construction for the defendant, had written to Mr. Hosmer, on 13th August, 1889:

> As there is no injunction could we not put our poles on the railway side of the fence on the quiet through some of these backwoods places, without any serious consequences? In many places they would not be noticed.

A subsequent example of the zeal displayed on behalf of the defendant in the establishment of its telegraph lines upon the railway reserve is to be found in the correspondence of 1892, when, on 4th July, Mr. Kent, the defendant's Superintendent of Telegraphs, wrote to Mr. Hosmer, requesting him to get permission from the Government

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to put up about one mile of poles on the Intercolonial Railway's right of way between Stellarton and New Glasgow. Our present route is along the highway and liable to frequent interruptions.

And Mr. Pottinger wrote Mr. Snider on 11th August, refusing this permission. But these poles had already been installed upon the railway; and, on 16th August Mr. Snider wrote Mr. Kent, saying:

> The line is there all the same, and we have a good job but I would not like to swear whose property we are on.

Similarly, on 22nd September, 1892, Mr. Snider telegraphed to Mr. Kent:

> * * * 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 east soon.

Mr. Hosmer had written to Mr. Bradley, the Secretary of the Department of Railways, on 18th September, 1889:

> You are I presume aware that owing to the exclusive contracts on the Intercolonial Railway our Company has been delayed in the construction of its lines, and we are now obliged to build them outside of the Railway right of way.

Nevertheless, by 14th October, 1889, some of the defendant's poles had been set upon the roadway, and, on that date, Mr. Hosmer wrote to Mr. Richardson:

> I might say privately that I have brought the matter to Mr. Van Horne's attention and have asked him to use his influence at Ottawa to try and get the Government not to disturb any poles that are now erected.

On 7th January, 1890, Mr. Bradley wrote to Mr. Drinkwater, the defendant company's secretary:

> By direction I have to call your attention to the fact that at certain points along the Intercolonial Railway between St. John and Halifax telegraph posts have been erected by your Company on the Government property.
>
> In view of the terms of the agreement at present existing between the Government and the Montreal Telegraph Company the concession of such a privilege as this would imply, were the posts in question allowed to remain, cannot be granted to your Company and I am accordingly to request that they be at once removed.

There was further correspondence; Mr. Hosmer called for a report from Mr. Richardson and was informed, by letter of 1st March, 1890:

> The number of poles we have erected upon I.C.R. property east of St. John is, to the best of my knowledge, as follows:

	Inside fence	Outside fence but in Ry. limits	Total
Between St. John & Moncton.....	12	214	226
Between Moncton & Truro.....	6	4	10
Between Truro & Halifax.....	29	...	29
Between Truro & New Glasgow.....	7	...	7
	54	218	272

Time passed, but nothing was done, although the Department was insisting upon the removal of these poles; proceedings were threatened to enforce their removal, and Mr. Hosmer, on 5th September, 1890, wrote Mr. Dwight, the General Manager of the Great Northwestern Telegraph Company at Toronto, explaining the situation, and saying:

We have inside the fence along the Intercolonial Railroad between St. John and Halifax and New Glasgow, a few poles which it was absolutely necessary to put there, and the Government are urging us to remove them, threatening us with legal action, etc.—I understand that the proceedings they are taking are being instigated by your Company, and I thought it but right to call your personal attention to the matter. The few poles we have on the Railroad cannot possibly be of any damage to your Company or the Western Union, and if we are forced to move them we must consider that it is done simply to annoy us. You know that your Company have several hundred miles of poles on Railroads owned by this Company (with which you have absolutely no contract rights) and that we have never sought to annoy you or obstruct you in their maintenance in any way. In fact, we have gone out of our way to instruct our men to render your repairers every possible assistance. I think, under those circumstances, you can well afford to treat us in a similarly liberal manner. I write you personally rather than officially, as I can understand that there may be reasons why you would not want a precedent established in a matter of this kind.

Five days later the Attorney-General filed an Information in the Exchequer Court for the removal of the defendant's poles, which had thus found their way to " the roadbed and right of way of the Intercolonial Railway." Mr. Dwight replied to Mr. Hosmer, on 16th September, that his company had made no complaint whatever

and 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. I think we have both reached a period in our experience when we may consider it scarcely worth while to take any action simply for the purpose of annoying each other.

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If there is anything you wish me to do respecting the matter to prevent any further annoyance please let me know. I will write to Superintendent Clinch, St. John, in regard to the matter, and see what he knows about it.

Then Mr. Van Horne, the President of the defendant company, sent a copy of the correspondence to Sir John A. Macdonald, the Prime Minister, and, on 24th September, Sir John sent a note to the Minister of Justice, saying:

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

The Minister of Justice called for a precis of the case from his Department, and returned it with the following endorsement:

Telegraph Suit vs. C.P.R. Let it go on.

Finally, on 9th October Sir John A. Macdonald replied to Mr. 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.

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 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.

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Then it is said upon evidence of a witness, named Mersereau, who, in 1904, was working for the defendant on its telegraph line between Saint John and Moncton, making repairs under the direction of Mr. Snider, the defendant's Superintendent of Telegraphs at Saint John, that he, Mersereau, found it convenient to move some of the poles, which were under repair, across the fence to the railway, and that he had been stopped by one of the Government's section foremen. He says he went to Moncton and spoke to Mr. Pottinger, who was then the General Manager of the Intercolonial Railway. This is the conversation, as stated by Mr. Mersereau:

Q. Well what did you state to him?—A. I told him we were stopped moving the poles over on the I.C.R. that Mr. Snider had informed me I could do, by a section foreman; and he listened until I was done, and he told me I could go back to my work, he would see that the man was informed to let the C.P.R. alone.

Q. That is practically the whole conversation?—A. The whole conversation.

Mr. Pottinger's testimony concerning this incident is as follows:

Q. Do you recollect at any time any requests being made to you with reference to putting poles on the right of way of the Government Railway?—A. There was once a request of that kind made to me.

Q. By whom, do you remember?—A. By Mr. Snider, who was Superintendent of the Canadian Pacific Telegraph Company.

Q. At Saint John?—A. His headquarters were Saint John, yes.

Q. You remember about what year that was in?—A. I am afraid I do not.

Q. Was it verbal or in writing?—A. It was verbal.

Q. What was it?—A. Well, he came to me one day and he said, I am rebuilding our line, and part of it runs through bush, and the trees have given me a great deal of trouble, and I would like to move a few of the poles which are outside of the railway fence inside the fence to get past this clump of trees. And I gave him my verbal permission.

Q. Do you recollect anywhere near about the time that was?—A. I am afraid I could not say what time it was.

His LORDSHIP: Do you remember about what space that would cover, or how many poles?—A. No, but it was a definite request for a small concession as I understood, I imagine it would be about five, but not exceeding ten miles.

Mr. JONES: Do you recollect what section of the railway it referred to?—A. I do not know whether he mentioned any section or not, but I was under the impression that it was between Moncton and Saint John. I had seen their line there in a tree-covered area just outside of the railway fence, and I supposed it was that.

Q. Do you know whether or not he did put some poles in on the right of way?—A. I never thought about the matter again, and I never inquired whether he moved the poles or not.

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Q. Was that the only request made to you in reference to the matter of putting poles on?—A. That is the only one I remember, I do not think there was any other ever made.

* * * * *

Q. Did you ever at any time give permission to any one connected with the Canadian Pacific to place their line as a line upon the right of way?—A. I did not. I never was asked by any one for that permission.

Q. Or to rebuild their line upon the right of way?—A. No, excepting in that instance of Mr. Snider.

Q. Do you remember at any time when a Mr. Mersereau, David W. Mersereau, was working for the Canadian Pacific?—A. The name is familiar, but I cannot recall meeting him in any way.

Q. You do not recall having any conversation at all with him?—A. I do not remember any.

Q. Do you recollect any person asking you to see that certain section men on the railway did not interfere with the building of a telegraph line by the Canadian Pacific?—A. I have no recollection of that.

Q. I think you have already said you were not approached by Mr. Snider in connection with transferring their whole line to the right of way.—A. I was not.

Also a letter from J. McMillan, who had become the defendant's Manager of Telegraphs at Montreal, dated 28th December, 1916, to A. C. Fraser, the defendant's Superintendent of Telegraphs at Saint John, and Mr. Fraser's reply of 1st January, 1917, have been admitted into the record. Mr. Pottinger had retired from the railway service in 1913, and it was at the end of 1916, when he was living at his summer home at Cape Tormentine, that Mr. Fraser went to see him, at Mr. McMillan's request, and at the trial, Mr. Fraser, refreshing his memory by his letter, says:

I have seen Mr. Pottinger in connection with permission granted for any rebuilding to be made on the railroad property. He was approached by the late Mr. Snider in connection with the transferring of line to the right of way. Mr. Pottinger saw no objectionable features and permission was granted verbally. He was in Ottawa a few days later and advised the Minister of Railways and Canals that he had granted the Canadian Pacific Telegraph the right to do their rebuilding on the Intercolonial right of way. The Minister stated that it was quite right and that he could see no reason why the permission should not be granted.

With reference to the line between New Glasgow and Sydney, Mr. Pottinger is not quite clear as to why this line was permitted on the right of way. His recollection is that there was some kind of an agreement whereby the telegraph company, if called upon, were to perform a certain service gratis. He has a clear recollection, however, that the telegraph people had the necessary permission and that there was a *quid pro quo*, the nature of which he is unable to recollect.

Mr. Pottinger has no recollection of the Mersereau incident, but states that had the sectionmen interfered with the telegraph gang he would certainly have taken action, as the work was being prosecuted with his own and the Minister's consent.

Mr. Pottinger is emphatic in his denial. Mr. Fraser's letter is shown to Mr. Pottinger and he testifies:

A. Mr. Fraser evidently is mistaken in what he says here about my statement. It is a misunderstanding of some kind, because he states it in general terms here. The permission I gave was a specific one for a very small affair, to help out Mr. Snider in his difficulties in operating his line, and there was no general movement spoken of at all at any time.

He goes on to say that I was in Ottawa a few days later and advised the Minister of Railways. Well I never reported to the Minister, I reported to Mr. Schreiber. I mean any general business. He was the one I made all reports to. I made no report of this concession given to Mr. Snider, I did not think it was worth while mentioning, and I dismissed it from my mind after the interview was over with Mr. Snider. As for speaking to the Minister about it, I never had the slightest communication with any Minister in regard to it at all. He is mistaken in regard to that.

Q. I think you have said that you never even reported it to Mr. Schreiber?—A. I never reported it to Mr. Schreiber, but I may have said to Mr. Fraser that it was possible that I may have spoken to Mr. Schreiber about it when I saw him.

Q. But you never made any report whatever about anything to the Minister, you say?—A. Never. I never saw the Minister about anything unless he sent for me and wanted to speak to me.

Q. You will notice that Mr. Fraser says you told him that you advised the Minister of Railways and Canals that you had granted the Canadian Pacific Telegraph the right to do their rebuilding on the Intercolonial right of way.—A. Well he is entirely mistaken in regard to that.

Q. Then he goes on to say that you said that the Minister stated it was quite right, and that he could see no reason why the permission should not be granted.—A. Well he is certainly mistaken in what I said.

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 authorize, 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.

One easily perceives, upon reading the evidence, that the defendant coveted the right to place its telegraph fixtures upon the lands which the Government had acquired, appropriated and fenced for the Intercolonial Railway, because

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it was convenient and easy of inspection and access; also that, whether or not, in the absence of the Montreal Telegraph Company's agreement, the Government might have been willing to concede the liberty sought, upon terms to be stipulated, certain it is that the Government consistently throughout refused any concession, for the ostensible reason that it was precluded by the agreement, although in view of the considerations to which the Prime Minister alluded, it was not unwilling to tolerate occasional transgressions, upon terms of indemnity, where, by reason of the difficulties of the ground, it might otherwise, in what the Prime Minister not unnaturally characterized as an "unimportant matter," have been subject to an imputation of unneighbourly conduct. 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.

In the years 1905, 1906 and 1907, it had become necessary to rebuild, and the defendant moved 59 miles of its telegraph line, between Truro and Halifax, from the outside to the inside of the railway fences. There was no communication with the Government respecting this rebuilding. Mr. Pottinger says it was done without his knowledge. In 1910, the defendant, in rebuilding portions of its line between Moncton and Truro, transferred its line to the Government roadway for a distance of 23 miles; in 1911, it similarly rebuilt 59 miles, and in 1912, 43 miles. This is shown by the defendant's exhibit No. 3, at page 482 of the case. No permission for any of these encroachments is disclosed, and it was apparently not until 1915, when Mr. Gutelius was General Manager of Government Railways, that it was discovered that the defendant had substantially rebuilt its main line upon the Government roadway.

After 5th May, 1913, when Mr. Gutelius became General Manager, in substitution for the Managing Board, of which Mr. Pottinger had been a principal member, discussion arose as to the terms of transport upon the Intercolonial Railway of the defendant's boarding cars, men and material, and it was then that Mr. Gutelius appears to have ascertained the fact, which had not previously been realized on

the part of the Government management, that the defendant had transferred its line of telegraph generally to the Government roadway. This was one of the matters which Mr. Gutelius considered with Mr. McMillan, the manager of the defendant's telegraphs at Montreal, on or before 6th March, 1916, when Mr. McMillan passed to Mr. Gutelius a memorandum signed by the former, in which he said:

> After careful checking I find that the Canadian Pacific have along the line of the Canadian Government Railway in New Brunswick and Nova Scotia, pole line on the Government Railway for a distance of 499 (437) miles, leaving a gap of 46 miles where the line is built outside of the right of way, close to the fence, where when having all this rebuilt, we would like to transfer to the side of the right of way. From what I understand from the members of the staff now in Montreal, there was some agreement or understanding between the former Manager of Telegraph and some of your officials that this line would be permitted along your right of way, rent free. Regarding this, I would be glad if you would let me have further information, as it is hardly likely that the line would have been permitted to be placed on your right of way without some mutual understanding.

After enquiry Mr. Gutelius wrote to Mr. McMillan, on 31st October, 1916:

> 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.

And he sent a copy of his letter to the Minister of Railways, who answered:

> I have yours of November 14th enclosing copy of your letter to the Manager of C.P.R. Telegraphs in reference to their poles, wires, etc., on our right of way and the joint use of the station for telegraph purposes at St. John.
>
> I trust you will not permit this matter to drop, and, if they do not give you an answer within a reasonable time, I wish you to follow it further and keep me advised.

Some interesting correspondence followed, but it is unnecessary to quote it here; it was in this connection that Mr. Fraser made the enquiry of Mr. Pottinger, to which I have already alluded. There were negotiations for settlement, and Mr. McMillan submitted to Mr. Gutelius a draft proposal, and, finally, a formal agreement was prepared under date of 29th May, 1917, between the King, represented by the Minister of Railways and Canals of Canada, of the one part, and the Canadian Pacific Railway, of the other part. This draft was initialed by Mr. Gutelius and by Mr. Beatty, the defendant's General Counsel, and executed on behalf of the defendant company. Mr. Gutelius resigned his office a day or two afterwards, on 1st June,

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1917, and, by Order in Council of 5th *idem*, his resignation was accepted and Mr. Hayes, the General Traffic Manager of the Intercolonial Railway, was promoted to the office which Mr. Gutelius had quitted. The Minister was not satisfied with the initialed agreement, which had evidently been sent forward for his consideration, and he wrote Mr. Hayes upon the subject, to which Mr. Hayes on 11th June sent the following significant reply:

> Yours 6th June.
>
> It will be necessary for me to have a little time to enquire into this matter.
>
> My general understanding of the situation is that the Telegraph Co. had been enjoying for a long period all of the privileges granted them by the proposed agreement but without there being any agreement in existence outlining the privileges granted or defining the obligations of either party and Mr. Gutelius had simply endeavoured to get a written undertaking to more clearly define the status of both parties.
>
> You ask "Why should they have these privileges for nothing." I will consider that suggestion although it is my impression the poles of the Telegraph Co. are quite generally placed just outside our right of way line although there are some spots where they encroach on the railway property.

On 17th July, 1917, Mr. Hayes informed Mr. McMillan personally at Montreal, that the Minister had declined to approve the agreement. The correspondence was prolonged. On 3rd August, 1917, Mr. Hayes wrote Mr. McMillan:

> 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.

And, on 29th September, he wrote again, enclosing a revised draft; but this, although considered, was not accepted, and, on 20th March, 1924, the Assistant Deputy Minister of Justice notified the president of the defendant company that

> the wires and poles must be removed from off the Government Railways' lands.

This intimation was repeated by Mr. Edwards' letter to Mr. Flintoft of 29th January, 1926, although the action was not instituted until 15th September of that year.

As to the main line, therefore, the defence of leave and licence 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.

If there be evidence of any of these things, I have failed to appreciate it. The defendant's occupation began in trespass, and I see no reason to doubt that it so continued and remains.

THE BRANCH TELEGRAPH LINE

When the defendant began to construct its line from New Glasgow to Sydney, it applied for leave to use the Government roadway. On 9th March, 1893, Mr. Hosmer wrote to Mr. Schreiber, the Deputy Minister of Railways:

> The Canadian Pacific contemplate the construction of a telegraph line between New Glasgow, N.S., and Sydney, C.B., and desire to know if the Government are free to allow the line to be built along the Intercolonial Railway right of way between these two points. I understand that when the contract for the existing lines was entered into between the Government and the Western Union Telegraph Company the Government reserved the right of allowing another line to be built having in view the fact that our system would be extended between these points.

And on the following day, Mr. Schreiber replied:

> I have yours of the 9th inst. in which you state that the C.P. contemplate the construction of a telegraph line between New Glasgow and Sydney, and asking if the line can be built along the Intercolonial Railway right of way between these two points.
>
> 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.

On 20th March, 1893, Mr. Hosmer wrote the Superintendent of the Commercial Cable Company at Canso:

> I might say to you privately that we intend constructing a telegraph line from New Glasgow, N.S., to Sydney, C.B., this summer and that we expect to get permission from the Intercolonial Railway to build along the line of their road between these two points.

Copy of the Government's agreement with the Western Union Telegraph Company, dated 16th October, 1889, is in evidence, also an amending agreement of 12th January, 1891. Apparently a draft contract with the defendant company was prepared, by or under instructions of the Department of Railways, submitted for Mr. Pottinger's consideration, and, on 27th May, 1893, duplicate copies were despatched to the defendant by the Department, with a request:

> Be pleased to return the same to this Department as soon as they have been duly signed and sealed on behalf of the Company.

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By letter of 25th July, 1893, the defendant wrote to the Department:

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.

On 27th August, Mr. Richardson, in charge of the construction, wrote to Mr. Kent, then the defendant's Superintendent at Montreal:

Offices should be decided upon immediately including our right to enter Railway stations as it is very unsatisfactory building line without knowing where offices are to be located.

Mr. Kent wrote to Mr. Richardson on 19th September:

The Government has not yet signed their agreement and of course until this is done we cannot enter the stations.

Meantime the following telegrams had passed between Mr. Pottinger at Moncton and Mr. Schreiber at Ottawa:

August 9th, 1893.

Dated Moncton
To C. Schreiber,
Ottawa, Ont.

The men in charge of construction of C.P.R. Telegraph line in Cape Breton ask to be allowed to put wire into Mulgrave station is this to be done.

D. Pottinger.

Ottawa, August 10th, 1893.
D. Pottinger, Moncton.

Message received—Council has not yet been asked to authorize the Minister to sign agreement permitting Canadian Pacific Telegraph Co. to place their line between New Glasgow and Mulgrave.

C. Schreiber.

In fact, no recommendation was, at any time, submitted to Council, and the agreement was not authorized or executed on behalf of the Government. The draft which the defendant had executed and returned was sent by the Department to Mr. Pottinger at Moncton for consideration, where it was lost with the file relating to it, probably destroyed in a fire, and now the evidence of its contents is sought to be derived from the Western Union agreement, by reason of Mr. Schreiber's letter of 10th March, already quoted, in which he says:

* * * it will be necessary for you to enter into a written agreement similar to the Western Union Telegraph Company.

Now the Western Union Telegraph Company's agreement extends to five printed pages and contains twenty-seven clauses, not counting the amending document, and it is not

reasonable to suppose that either Mr. Schreiber or the company meant to adopt all these stipulations and details, or that an agreement with the defendant would become definite until the terms to be applied were defined and assented to by both parties. On behalf of the Government, the party to the Western Union agreement was Her Majesty the Queen, represented by the Minister, and it must have been assumed that the agreement in contemplation with the defendant company would require the sanction of the Government. This was, in fact, never obtained; moreover, the Western Union agreement was, by express limitation, to continue in force for twenty years, and afterwards

until the expiration of one year after written notice shall have been given after the close of said term by either party to the other of an intention to terminate the same,

a period which I take to have been terminated by the notices and facts in proof.

The defendant relies upon clause 25 of the Western Union agreement, which, it contends, must presumptively have been incorporated in the lost draft. This clause provides:

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 the defendant urges that it must, therefore, be deemed to have a perpetual franchise; but I do not so interpret the meaning. Assuming that, upon expiry of the agreement, the Government could not compel the company to remove its poles and wires, nevertheless the company can no longer maintain or operate them, or successfully resist their removal by the Government, whose proprietary rights remain unaffected. The purpose of the clause was, if I do not misunderstand it, that, as the parties had contracted substantially for the life of the poles, it should be optional with the company to remove or abandon the salvage.

Therefore, there is, in my opinion, no agreement proved; or, even if otherwise, the agreement, such as it may have been, has ceased to operate in any particular, unless to negative the defendant's liability to remove its poles and wires; and the defendant was, at the beginning of this action, in no better position than that of licensee whose leave was terminated or exhausted. Evidently the advantages which the defendant enjoyed by use of the roadway,

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and the prospect that somehow it would not be disturbed, led it to disregard the consequences of the risk which, failing an authorized concession, it seems to have been willing to assume.

THE WESTVILLE TELEGRAPH LINE

There was some preliminary correspondence, and, on 10th March, 1911, at a meeting of the Government Railways Managing Board held at Moncton, the following Minute was recorded:

Minute 1185. Request from the Canadian Pacific Railway Telegraph Company for permission to string their wires from Westville to Pictou on our right of way. Question as to whether we can permit this on account of our contract with the Montreal Telegraph Company. The Department of Justice advise that there is nothing to prevent us from granting this request.

The Board decided to grant the request; the Telegraph Company to give us the use of the line and to put the same into our stations at Westville and Pictou.

On 20th March, 1911, Mr. McNicoll, Vice-President of the defendant company, wrote Mr. Pottinger:

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.

And, on 7th April, Mr. Pottinger replied:

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.

These are the circumstances in which the defendant constructed and maintains and operates the Westville line. The plaintiff's answer is that the request was for a revocable licence, and that nothing more is implied by the Minute of the Managing Board and the letter from Mr. Pottinger to Mr. McNicoll. There is, however, no dispute that the defendant used the Government railway from

Westville to Pictou by consent, the parties having mutually in view the negotiation of a contract, with adequate sanctions, to regulate their rights and obligations.

> 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,

writes Mr. Pottinger to Mr McNicoll; and the defendant, with nothing more definite, built its line in 1911, and has ever since maintained and used it, apparently without any notice or warning of intention on the part of the Government to withdraw the licence so granted. It is true that this line of telegraph, or most of it, is included in the Information under the words:

> * * * between the following points, namely * * * Stellarton, in the said province, and Pictou, in the said province, a distance of 10·15 miles.

But I am not sure that this did not happen by inadvertence, because there seems to have been no preliminary discussion or disclosure of any points of difference, and the Westville to Pictou line is not mentioned or included in the demand for removal evidenced by the letters from the Department of Justice of 20th March, 1924, and 29th January, 1926. I do not think, therefore, that the Government had a cause of action to enforce the removal of this line when the Information was filed, although I agree with the learned trial judge that the licence is revocable. The defendant saw fit to proceed with its construction, leaving everything about the agreement at loose ends; nevertheless, it presumably anticipated that there would be no difficulty in negotiating the terms, and it seems unjustifiable, in these circumstances, to attempt abruptly to terminate the permission without demand or notice. Consequently I think the action must fail in this particular; although, if the parties be unable to conclude an agreement, I do not doubt that the licence may be reasonably revoked. I refer to the following authorities: *The King* v. *The Inhabitants of Horndon-on-the-Hill* (1); *Coleman* v. *Foster* (2); *Cornish* v. *Stubbs* (3); *Mellor* v. *Watkins* (4); *Aldin* v. *Latimer Clark, Muirhead & Co.* (5); *Kerrison* v. *Smith* (6); *Lowe* v. *Adams* (7).

(1) (1816) 4 M. & S., 562, at p. 565.
(2) (1856) 1 H. & N. 37, at pp. 39, 40.
(3) (1870) L.R. 5 C.P., 334, at pp. 337-340.
(4) (1874) L.R. 9, Q.B. 400, at pp. 404-406.
(5) [1894] 2 Ch. 437, at p. 448.
(6) [1897] 2 Q.B., 445.
(7) [1901] 2 Ch. 598, at pp. 600, 601.

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ALL LINES

What remains to be said applies generally to the three lines or groups of lines which have been separately considered.

The lands in question were acquired by the Government under legislative authority for the construction, maintenance and operation of Dominion railways, and are devoted to that purpose—a large part of the mileage at least belonging strictly to the railway which Canada was required to construct under the terms of Confederation, as provided by section 145 of the *British North America Act,* 1867; and the defendant's case assumes that the telegraph rights, which the defendant claims in perpetuity with respect to these railway lands, can be acquired for the defendant's accommodation by the mere laches, acquiescence or tolerance of the executive officers and employees, charged under the Minister with the administration or working of the railway, and, moreover, that it is unnecessary to comply with statutory provisions. It is provided by section 7 of the *Department of Railways and Canals Act,* R.S.C., 1927, chapter 171, that:

> 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.

And, by section 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.

With respect to the telegraph lines from New Glasgow to Sydney and from Westville to Pictou, and also as to the main line, so far as concerns the settlement recommended by Mr. Gutelius, it was contemplated that whatever concessions might be authorized should be contracted for by the Crown, represented by the Minister, and the defendant knew, or is presumed to have known, the statutory requirements, and yet there was no pretence of compliance. When, in 1898, section 23 of R.S.C., 1886, chapter 37, which

corresponds with the above quoted section 15, was considered by this Court in *The Queen* v. *Henderson* (1), there was a difference of opinion as to its application, and their Lordships, by a majority of three to two, held that the section did not apply in the particular circumstances of that case. Taschereau, J., who pronounced the judgment of the majority, saying, at page 432:

> The word "contract" therein, means a written contract. Here the lumber claimed for was delivered under verbal orders from the Crown officers, and the statute does not apply to goods actually sold, delivered and accepted by the officers of the Crown, for the Crown.

But I find nothing in the learned Judge's reasons which would recognize, as a contract, terms which, if accepted, were intended to be stipulated expressly and formally with His Majesty in writing, and which were never signed or sealed by anybody for the Crown; never authorized by the Governor in Council, and which, as the case shows, the Minister was unwilling to recommend for approval. Therefore, I think that, apart from the other considerations which I have mentioned, the contracts which the defendant alleges are ineffective for non-compliance with the statute.

Moreover, as to the defendant's claim that it has acquired in perpetuity, and in the manner for which it contends, the right to use the Government railways for its telegraph lines, effect must be given to the principles expressed in *Ayr Harbour Trustees* v. *Oswald* (2). Lord Blackburn says at page 634:

> I think that where the legislature confers powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are entrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void. This is, I think, the principle on which this House acted in *Staffordshire Canal* v. *Birmingham Canal* (3), and on which the late Master of the Rolls acted in *Mulliner* v. *Midland Ry. Co.* (4). In both those cases there were shareholders, but, said the Master of the Rolls, at p. 619, "Now for what purpose is the land to be used? It is to be used for the purposes of the

(1) (1898) 28 Can. S.C.R. 425.
(2) (1883) 8 App. Cas. 623.
(3) (1866) L.R. 1 H.L. 254.
(4) (1879) 11 Ch. D. 611.

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Act, that is, for the general purposes of a railway. It is a public thoroughfare, subject to special rights on the part of the railway company working and using. But it is in fact a property devoted to public purposes as well as to private purposes; and the public have rights, no doubt, over the property of the railway company. It is property which is allowed to be acquired by the railway company solely for this purpose, and it is devoted to this purpose."

And Lord Watson, at page 639, referring to specific provisions of the Ayr Harbour Act, and the purposes for which the land in question was to be used, says:

> The Lord Advocate ingeniously argued that these enactments are permissive, and not imperative, and consequently that the powers which they confer might be waived by the trustees; but the fallacy of such reasoning is transparent. Section 10 is permissive in this sense only, that the powers which it confers are discretionary, and are not to be put in force unless the trustees are of opinion that they ought to be exercised in the interest of those members of the public who use the harbour. But it is the plain import of the clause that the harbour trustees for the time being shall be vested with, and shall avail themselves of, these discretionary powers, whenever and as often as they may be of opinion that the public interest will be promoted by their exercise.

It is laid down in Selwyn's Nisi Prius, 13th Ed., at p. 1086, that

> A licence from A. to B. to enjoy an easement over the land of A.; e.g., to enjoy the use of a drain (*Cocker* v. *Cowper* (1)), or a pew (*Adams* v. *Andrews* (2)), or to come upon his land for any other purpose (See *Roffey* v. *Henderson* (3)), is countermandable at any time, although it has been acted upon, or a valuable consideration paid for it, which has not been returned (*Wood* v. *Leadbitter* (4)). Although a parol licence may be an excuse for a trespass, until such licence is countermanded; yet a right and title to have a passage for water over another's land, being a freehold interest (or rather being an incorporeal hereditament), requires a deed to create it (*Hewlins* v. *Shippam* (5)).

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 estoppel. In so far as any contract competent to the parties could answer the purpose, the defendant neglected entirely the

(1) (1834) 1 C.M. & R. 418.
(2) (1850) 15 Q.B. 284.
(3) (1851) 17 Q.B. 574.
(4) (1845) 13 M. & W. 838.
(5) (1826) 5 B. & C. 221.

most elementary requirements as to the ascertainment of the terms, and the statutory essentials of form and sanction.

The following observations of Patteson, J., pronouncing the judgment of the Court of Queen's Bench in *Blanchard* v. *Bridges* (1), are apt for this occasion.

> It is far more just and convenient that the party, who seeks to add to the enjoyment of his own land by any thing in the nature of an easement upon his neighbour's land, should first secure the right to it by some unambiguous and well understood grant of it from the owner of that land, who thereby knows the nature and extent of his grant, and has a power to withhold it, or to grant it on such terms as he may think fit to impose, than that such right should be acquired gradually as it were, and almost without the cognizance of the grantor, in so uncertain a manner as to create infinite and puzzling questions of fact to be decided, as we daily see, by litigation.
>
> If a party, who has neglected to secure to himself rights so important by previous express licence or covenant, relies for his title to them upon any thing short of an acquiescence for twenty years, we think the onus lies upon him of producing such evidence as leads clearly and conclusively to the inference of a licence or covenant. It is difficult, perhaps impossible, to define the necessary amount of such evidence; but we are of opinion that the amount in the present case is clearly insufficient.

I would, therefore, as to the main line and the branch line, dismiss the appeal and allow the cross appeal with costs, and remit the case to the learned trial judge, so that he may proceed with the trial; but, as to the Westville line, the appeal should be allowed with costs, to be set off. The plaintiff also should have the costs heretofore incurred in the Exchequer Court, except with respect to the Westville line, as to which the defendant should have its costs, also to be set off.

ANGLIN C.J.C. (dissenting in part).—I have had the advantage of reading the elaborate and carefully prepared judgment of my brother Newcombe. I entirely agree with the views expressed by him as to the "main line" and the "branch line." As to the Westville branch, however, while I accept his conclusion that the appellants were, at the highest, holders of a revocable licence to erect and maintain their telegraph lines on the right of way of the railway

(1) (1835) 4 Ad. & El., 176, at pp. 194-195.

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company (*Kerrison* v. *Smith* (1)), I cannot accept his further conclusion that failure to give notice of such revocation is necessarily fatal to this branch of the plaintiff's action. On the contrary, it seems to me that, inasmuch as the defendants asserted that their licence in respect to this particular part of their line was irrevocable and contested the claim of the Crown to exclude them on the merits (*Coleman* v. *Foster* (2)), the bringing of the action itself should be regarded as sufficient notice, subject only to the question of costs and to a reasonable time being allowed the defendants to remove their poles and wires from the right of way. (*Cornish* v. *Stubbs* (3); *Aldin* v. *Latimer Clark, Muirhead & Co.* (4)).

It seems to me entirely reasonable that this view should prevail, since, under a judgment dismissing the plaintiff's action as to the Westville branch on the ground of want of notice, the result would be the giving of formal notice and the bringing of another action for the same relief which, according to the judgment of Newcombe J., must necessarily succeed. The better course seems to me to be to allow to the defendants their costs of defence so far as the intrusion upon the Westville branch line is concerned, to be set off against the other costs, just as my brother Newcombe has done, and in addition, to direct the trial judge to fix a reasonable time within which the poles and lines of the defendant should be removed from the right of way of the Westville branch.

Appeal dismissed with costs and cross-appeal allowed with costs, as to "Main Line" and "Branch Line." Appeal allowed with costs as to "Westville Line."

Solicitors for the appellant: *Ewart, Scott, Kelley & Kelley.*

Solicitor for the respondent: *W. P. Jones.*

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(1) [1897] 2 Q.B. 445.
(2) (1856) 1 H. & N. 37.
(3) (1870) L.R. 5 C.P. 334.
(4) [1894] 2 Ch. 437, at p. 448.