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*Oct. 16, 17.
*Dec. 11.

GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANTS). } APPELLANT;

AND

BRITISH COLUMBIA EXPRESS COMPANY (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Damages—Navigation—Obstruction—Causation—Public nuisance.

The appellant was authorized to build a bridge on the Upper Fraser River, where the respondent was operating a steamboat service. The plans for the bridge were approved of by competent authority, "subject to and upon the condition that if at any time it is found that a passageway for steamboats is required, the applicant company should provide the same upon being directed to do so either by the Department of Public Works or by the Board" of Railway Commissioners. After the foundations of the bridge had been built, but before the superstructure had been erected, a letter was sent by the secretary of the Department of Public Works to the appellant, to say that he is directed to require the company to kindly submit plans for the swing spans necessary to provide passageways for boats. No attention was paid to the request and the bridge was completed without providing a passageway.

Per Fitzpatrick C.J., Davies, Duff and Anglin JJ.—Upon the evidence, the construction of the bridge was not the cause of the non-user of the river by the respondent's steamboat, Duff J. dissenting however on the ground that respondent was entitled to damages, because the steamer was prevented from making a trip by the presence of a cable which the appellant had placed athwart the river.

Per Idington J. (dissenting).—The order of the Board of Railway Commissioners must be held to have been conditional; and as, on the facts in evidence, leave to cross the river had been withheld by the Department of Public Works, there was an infringement of the respondent's rights.

PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

Note.—Leave to appeal to Privy Council granted, 30th July, 1917.

Per Duff and Anglin JJ.—The condition contained in the order of the Board of Railway Commissioners did not contemplate a judicial "finding" by the Board itself before becoming operative.

Per Anglin J.—The placing of the bridge across the river without a passageway was unlawful and rendered the appellant liable for any actual damages sustained by the respondent such as would support a private action in respect of a public nuisance.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Clement J. at the trial, by which the plaintiff's action was dismissed with costs. The material facts of the present case and the questions of law are fully stated in the above head-note and in the judgments now reported.

Before the institution of the present action in damages, an application was made, on behalf of the plaintiff company, for a mandatory injunction to compel the defendant company to cease obstructing the Fraser River, to remove the temporary bridge built across it and to make openings in two permanent steel bridges. This application for injunction was practically based on the same grounds as in the present action and was refused by Morrison J. (2).

D. L. McCarthy K.C. and *F. W. Tiffin* for the appellant.

S. S. Taylor K.C. for the respondent.

THE CHIEF JUSTICE.—The claim for damages put forward by the plaintiff respondent here involves the consideration of two questions: (1) the right of the defendant appellant to obstruct, in the year 1913 and 1914, by the erection of a fixed low level steel bridge, the navigation of the Upper Fraser River at the place

(1) 27 D.L.R. 497; 10 West W.R. 477, 583. (2) 20 B.C.Rep. 215.

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referred to in the factums as the Second Crossing Bridge; (2) whether in fact the construction of the bridge at the Second Crossing in August, 1913, was the real cause of the non-user by the plaintiff respondent of the Upper Fraser.

At the trial the action was dismissed by Mr. Justice Clement.

On appeal the plaintiff's claim was allowed except for the damages in respect of the year 1914; so that, we are concerned only with the claim for loss of the profits which might have been earned had the plaintiff's steamer "B. C. Express" continued to operate on the Upper Fraser beyond the second crossing bridge during the autumn of 1913.

The plans for the bridge in question were approved of by competent authority in May, 1912, subject to and upon the condition that

> if at any time it is found that a passageway for steamboats is required the company (defendant) shall provide the same upon being directed so to do either by the Department of Public Works for the Dominion of Canada or by the Board of Railway Commissioners.

The foundations for the bridge were built and the steel for the superstructure manufactured and ready for erection, when, on the 4th July, 1913, a letter was written by R. C. Desrochers, Secretary of the Department of Public Works, to say

> that he is directed to require the company *to kindly submit plans* for the swing spans necessary to provide passageways for boats in the bridge.

Apparently no attention was paid to this request, the bridge was completed on the original plans approved by the Governor-in-Council, and trains were operated over the bridge, presumably with the consent of the Department and the Railway Board, in August, 1913, and the bridge has ever since been used by the railway company for the passage of its trains.

In these circumstances, it is difficult to say that the letter of the 4th July, 1913, was intended as a direction that the work on the bridge should not be proceeded with until new plans for a swing span bridge had been submitted and approved of. The Department could have prevented the operation of trains over the bridge at any time after construction and it no doubt would have exercised its power had the railway company built the bridge in defiance of a departmental order to the contrary. In any event the view I take of the second question makes it unnecessary for me to say more on this point.

Whether the plaintiff respondent's steamer "B. C. Express" was prevented from navigating the waters of the Upper Fraser in the autumn of 1913, by reason of the construction of the second crossing bridge, is, in my opinion, a question of fact, the determination of which depends largely upon the weight to be given the evidence of the witnesses West and McCall, the representatives of the two companies, who chiefly directed their business operations at the time. The trial judge, who had both witnesses before him, tells us, that the impression left on his mind by the oral testimony, which was confirmed by a careful reading of the extended notes of the evidence, was that the construction of the bridge was not the cause of the non-user of the Upper Fraser by the "B. C. Express." He also refers to the correspondence exchanged between the representatives of the two companies at the time of the occurrences now in question and holds that those letters point to the conclusion "that the lowness of the water was explicitly given at the time as the reason for withdrawing the boat to the lower run," that is to the reaches of the Fraser River below Fort George. And to that extent McCall is corrobo-

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rated. It is not even suggested anywhere in that correspondence that the company respondent suffered any loss by reason of the construction of the bridge or that the appellant company was in any way to blame.

It also appears from the oral evidence that the Upper River was blocked by the bridge at the second crossing about the 31st August, 1913, and that between that date and the 20th September following the depth of water was too low for the purpose of navigating a steamboat of the size and draught of the "B. C. Express." Anticipating this change in the level of the water the boat was withdrawn from the Upper River and there is certainly nothing in the evidence, as I understand it, to justify the reversal of the trial judge's finding that the respondent company

did not then intend to resume operations even if water conditions improved.

In a letter written by Mr. West, 18th July, 1913, he says that

the upper part of the river between Tête Jaune Cache and Fort George is only navigable for about two and a half to three months in the year and when I was at the Cache the other day we had a large quantity of freight stored there for delivery to Fort George and it is doubtful if we would be safe in accepting any more shipments for delivery this year.

Tête Jaune Cache was apparently the head of navigation at that time. In a letter written by Mr. Lesueur, accountant of the respondent company, of date 11th September, 1913, he says:

Owing to the Upper River having such a low stage of water we were compelled to take our steamer off and she is now operating between Soda Creek and Fort George so that navigation on the Upper River is over for the remainder of the present season.

Moreover, prior to the blocking of the river by the bridge the defendant's railway line had been completed to mile 145 B.C., a point below the bridge where temporary accommodation was provided to handle all

freight from Tête Jaune Cache. It was more convenient for the respondent company to operate in conjunction with the railway at that point than to run the risks attendant on the navigation of the river above at that season of the year.

Mr. West admits that this company had in contemplation that year the carriage of freight by water "from the end of steel," *i.e.*, from the point at which the railway could deliver the freight. His complaint made at the trial was that the company refused to carry his freight below the second crossing bridge and this complaint is certainly not borne out by the evidence, and he is contradicted by McCall who is apparently believed by the trial judge who says "that there is not a hint that the defendant company was to blame."

But the most striking commentary on Mr. West's evidence is his own letter to Mr. Hinton, General Passenger Agent of the railway, written on the 27th September, 1913, when to Mr. West's own knowledge the water in the Upper Fraser had risen again. In this letter he says that the steamboat service "from Fort George to the 'end of steel' has practically closed," the "end of steel" then being below the bridge, and he asks if arrangements can be made for the interchange of traffic for the next season. This is a curious letter to write if the railway was at this time causing the company so much damage by blocking the river or refusing to deliver freight at mile 145 B.C.

It is significant that in all the correspondence exchanged, no complaint is made of improper interference by the railway with the right of navigation, and, in my opinion, this omission strongly supports the evidence of the witnesses that there was practically

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no business to be done on the Upper Fraser after the removal of the boat to the run from Soda Creek to Fort George in August. The constant effort of the respondent company even during the autumn and winter of 1912 was to keep down the amount of freight consigned to it at Tête Jaune Cache and they were in this so successful that after the steamer "B. C. Express" left Tête Jaune Cache on its last return trip to Fort George there remained at the Cache only three carloads of freight and this was taken by rail to the end of steel below the bridge whence it was taken in August by boat. And thereafter there was no freight lying at Tête Jaune Cache consigned to consignees in care of the plaintiff respondent. There was practically no other through freight offering and the local freight was a negligible quantity; it was a mere incident not a factor in the operations of the company respondent. The freight coming in and consigned to the Fort George District would naturally go the end of steel where it could be more advantageously handled by respondent company as is not denied, but no attempt was made to that end.

The contemporaneous record of events to be found in the correspondence together with the oral evidence taken at the trial convince me that the findings of the trial judge are right and should not have been interfered with by the Court of Appeal.

This appeal should be allowed with costs.

DAVIES J.—This action was one brought to recover damages for loss of business and profits, etc., by the plaintiffs in the latter part of the year 1913 and the year 1914, owing to the construction by the railway company of a bridge known as the second crossing bridge across the Fraser River, without providing a

passageway for steamboats and which bridge prevented the plaintiffs from carrying on their business as steamboat carriers on that river above and beyond the place where it was constructed.

The trial judge's finding dismissing the action for damages claimed during the navigating season of 1914 was sustained by the Court of Appeal and no question arises here as to these alleged damages there having been no cross-appeal on that point.

The learned trial judge found that he was

> unable to find as a fact that the construction of the bridge at mile 142 was the cause of the non-user of the Fraser above that point by the plaintiff company after such constructing and that the essential element of causation had not been made out to his satisfaction or indeed at all.

He therefore dismissed the action.

The Court of Appeal, except with respect to that part of the judgment dismissing plaintiff's claim for 1914, set aside this judgment and directed a reference to ascertain the plaintiff's damages for the season of 1913, caused by the construction of the bridge.

On the appeal to this court, Mr. McCarthy contended that the order of the Board of Railway Commissioners had duly authorized the construction of the bridge complained of and that the condition in that order making it

> subject to and upon the condition that if at any time it is found that a passageway for steamboats is required, the applicant company should provide the same upon being directed to do so either by the Department of Public Works or by the Board,

implied as a condition precedent to requiring the company to provide a passageway for steamboats there should be some finding either judicial or quasi judicial by some competent authority such as the Board itself before the company could be legally directed to provide such passageway, and that no such

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finding had been had or made. That the direction or order of the Department of Public Works requiring such passageway for boats was not given to the company until more than a year after they had built their foundation work in accordance with the plans approved of and did not profess to be the result of any such finding as the order of the Board of Railway Commissioners authorizing the construction of the bridge contemplated but on the contrary was a letter from the Secretary of the Department of Public Works expressed in these words:

> In view of the protests which have been received against the construction by the company of fixed bridges at mile 274 and mile 316 west of Wolf Creek, B.C., I am directed to state that it will be necessary for the company to provide passageways for boats in these bridges.

In the view, however, that I take of this case and the proper conclusion to be drawn from the evidence given at the trial, including the correspondence which passed between the officials of the litigants, I do not find it necessary to express any opinion upon the contention of the appellant above outlined and I mention it to shew that it has not been overlooked. I do not think there is any difference of opinion with respect to the legal right of the plaintiff company to recover damages if they had proved any to have been suffered by them and caused by the construction of the bridge complained of in the latter part of the season of 1913.

The question before us is purely one of fact to be determined on the reading and consideration of the evidence and the correspondence.

After such reading and consideration, I have come to the same conclusion as that reached by the trial judge, Clement J., and which I have above shortly epitomized. As that learned judge says:—

In the correspondence the lowness of the water was explicitly given at the time as the reason for withdrawing the (steamer) "B.C. Express" to the lower run, not a hint that the defendant company was in any way to blame, and the oral testimony has convinced me that the plaintiff company never intended to resume operations that season above the bridge at mile 142 and I cannot bring myself to find that they could have done so, even in the actual water conditions which afterwards developed.

In deference to the opinion of the learned judges of the Court of Appeal who reached a different conclusion, I have felt myself obliged to give the oral evidence and the correspondence the closest attention and study with the result I have stated.

I cannot see however that any good would result from a stated analysis of this evidence and correspondence which in the nature of the case would be very lengthy. Suffice it to say that I entertain no reasonable doubt as to the correctness of my conclusions.

I would therefore allow the appeal with costs in this court and in the Court of Appeal and would restore the judgment of the trial judge.

IDINGTON J.—I have considered the ingenious construction sought by counsel for appellant to be put upon the order of the Board of Railway Commissioners for Canada, but am unable to adopt the same.

I think the words in question therein must mean if it is in fact "found that a passageway for steamboats is required" then the conditions of the order must be complied with and that the order as a whole must be held to have been conditional.

Apart from the ambiguous language used in the order it must be borne in mind that the Board had no jurisdiction to impose upon any navigable stream a barrier to the navigation thereof without the authority of the Government.

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Such is my interpretation and construction of the "Railway Act" and that the several provisions giving powers to the Board designed to aid in the details to be adopted for the facilitating of crossing such streams by railways are all subservient to that paramount power entrusted to the Governor-in-Council relative to the ultimate decision of granting or refusing permission and the terms and compliance with the terms upon which such leave to cross may be granted.

That never was given, but on the contrary, through the Department of Public Works, seems to have been withheld.

As in that view there was on the facts in evidence an infringement of the respondent's rights and a clear deprivation in one instance at least by reason of the conduct of the appellant's servants, of the respondent's rights, I fail to see why the action cannot be maintained.

It is not open to us on this appeal to determine the matters in dispute further.

Much of the argument in the appellant's factum designed to uphold the position that there was no infringement is much more applicable to the question of the measure of the damages, than to what is involved in the appeal.

If there were any damages in fact suffered no matter how small, by reason of a legal wrong done, the appeal fails.

It would, therefore, serve no good purpose for us to enter upon the many apparently cogent reasons put forward bearing upon the measure of damages.

These reasons, of course, are properly put forward in order if possible to demonstrate that there was no damage suffered.

In my opinion they fall short of complete demonstration that there was no damage in fact of any sort.

I agree in the reasoning of Mr. Justice Galliher, relative to the main issue presented and need not repeat the same here.

The appeal should be dismissed with costs.

DUFF J.—I concur in the view of the learned trial judge that the claim for damages in respect of the interruption of navigation at mile 142 during the later season of high water in 1913, that is to say, from the 20th Sept. onward, must fail. The presence of the bridge, although it made navigation in fact impossible, had nothing to do with the discontinuance by the respondents of their operations above mile 142. Before the recurrence in September of conditions making navigation possible above the site of the bridge the "B. C. Express" had been withdrawn for service elsewhere and I agree with the trial judge that she had been withdrawn with the settled intention on the part of the respondent company not "to resume operations that season above mile 142." That interruption, therefore, however illegal, was not in the juridical sense the cause of any actual loss to the respondents.

Mr. Justice Galliher appears to suggest that the doctrine of *Lyon* v. *Fishmongers Co.* (1), applies since he appears to assume there was an invasion of the rights of the respondents as riparian owners in virtue of their wharf and warehouse at Tête Jaune Cache. Such riparian rights are rights incidental to proprietorship or rather perhaps rights of proprietorship, *Kensit* v. *Great Eastern Railway Company*(2), at p. 133, *Esquimalt Water Works* v. *Victoria* (3), at pp. 320 and 322, and

(1) 1 App. Cas. 662. (2) 27 Ch.D. 122.
(3) 12 B.C. Rep. 302.

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invasion of them without legal justification or excuse gives rise to a right of action even in the absence of actual pecuniary loss. Such an invasion is in the fullest sense *injuria*. It appears to be suggested as mentioned above, that the respondents have been wronged in respect of their riparian rights. With respect, that could not, I think, be sustained. There was an obstruction of the navigation of the river at "mile 142" and in that respect an interference with the public right; but there was not infringement of the private rights of the respondents incidental to the ownership or occupation of a property nearly 100 miles away; and the respondents could therefore only succeed by shewing that in consequence of the violation of the public right, they had suffered some loss peculiar to themselves. In this I agree with Clement J. in holding that they have failed as I have said.

There is evidence, however, that during the continuance of the earlier season of navigation, that is, during the second half of August, the passage of the "B. C. Express" up the river was actually stopped—a trip to Tête Jaune Cache on which she was bound being actually prevented by the presence of a cable athwart the river at mile 142 which the appellants had placed there. My conclusion from the evidence is that the presence of this obstruction is proved and that there is sufficient evidence of actual loss in consequence of it to establish a right of action. If the appeal were to be disposed of in accordance with my notions I should direct a reference to ascertain the amount of damages properly awardable in reparation for this interference with respondents in their use of the river.

The view just expressed involves, of course, a decision against the appellants of the point raised by Mr. McCarthy's contention that the appellants are

not chargeable with illegality but that their act in constructing the bridge as and where they did, was done strictly under the sanction of law, and that point must be briefly noticed.

The relevant statutory provision is sec. 233 of the "Railway Act," ch. 37, R.S.C., which is in these words:—

Section 233:—When the company is desirous of constructing any wharf, bridge, tunnel, pier or other structure or work, in, upon, over, under, through, or across any navigable water or canal or upon the beach, bed or lands covered with the waters thereof, the Company shall, before the commencement of any such work,—

(a) in the case of navigable water, not a canal, submit to the Minister of Public Works, and in the case of a canal to the Minister, for approval by the Governor-in-Council, a plan and description of the proposed site for such work, and a general plan of the work to be constructed, to the satisfaction of such Minister; and

(b) upon approval by the Governor-in-Council of such site and plans, apply to the Board for an order authorizing the construction of the work, and, with such application, transmit to the Board a certified copy of the Order-in-Council and of the plans and description approved thereby, and also detail plans and profiles of the proposed work, and such other plans, drawings and specifications as the Board may, in any such case, or by regulation, require.

2. No deviation from the site or plans approved by the Governor-in-Council, shall be made without the consent of the Governor-in-Council.

3. Upon any such application, the Board may:

(a) make such order in regard to the *construction of such work upon such terms and conditions as it may deem expedient*;

(b) make alterations in the detail plans, profiles, drawings and specifications so submitted;

(c) give directions respecting the supervision of any such work; and,

(d) require that such other works, structures, equipment, appliances and materials be provided, constructed, maintained, used and operated, and measures taken, as under the circumstances of each case may appear to the Board best adapted for securing the protection, safety and convenience of the public.

4. Upon such order being granted, the company shall be authorized to construct such work in accordance therewith.

5. Upon the completion of any such work the company shall, before using or operating the same, apply to the Board for an order authorizing such use or operation, and if the Board is satisfied that its orders and directions have been carried out, and that such work may be used or operated without danger to the public, and that the pro-

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visions of this section have been complied with, the Board may grant such order. 3 Ed. VII., c. 58, s. 182.

The approval of the Governor-in-Council is expressed in an Order-in-Council dated 8th May, 1912, by which the appellant's plans for the construction of their bridge are

approved subject to the condition that should it be found at any time that passageways are required in these bridges for steamboats the Company shall provide the said passageways upon being requested to do so by the Department of Public Works.

The order of the Board of Railway Commissioners authorizing the construction of the bridge is dated 4th April, 1912, and the grant of authority is declared to be "subject to and upon the condition that if at any time it is found that a passageway for steamboats is required the applicant Company shall provide the same, being directed to do so either by the Department of Public Works for the Dominion of Canada or the Board." On July 4th, 1913, the Department of Public Works directed that a swing span should be provided to meet the requirements of navigation but the company proceeded with the construction of a low level bridge in accordance with the plans previously approved (by the order of 8th May, 1912) making no such provision, and the river seems to have been closed as a consequence of this about the 24th August, 1913.

At the time the notice of the Department's demand was received nothing had been done to obstruct navigation of the river, although much had of course been done in making and assembling parts. I think the direction of the Department does come within the four corners of the power reserved by the condition.

Mr. McCarthy argued that the condition required a "finding" by the Board of Railway Commissioners before becoming operative.

The argument is worthy of serious examination because the power reserved did not cease to be exercise-able upon the erection of the bridge; and indeed it must have been evident, if the matter was considered, that the exercise of it even before the erection of the bridge might prove costly and burthensome for the Railway Company, and we should naturally expect to find the decision of such a question hedged about by those guarantees which are usually afforded by a judicial inquiry.

Unfortunately the condition contemplates action by either the Department of Public Works or the Board; and in the case of the Department it is too clear that it is to act as an administrative department and it seems impossible to escape the conclusion that the question is left to the Department as a question of policy. If the Department had refused a hearing to the Railway Company a different question might have arisen.

Such a condition seems to be within the authority of the Board under sec. 233 (3-a); and at all events there can be no doubt of the power of the Governor-in-Council to exact such a condition in approving plans under sec. 233 (a). The stipulation once entered into gives rise to an obligation on the part of the Railway Company enforceable by the Crown on behalf of the public and when not performed and private loss is suffered in consequence of non-performance, to a right of action for reparation. *Rex* v. *Inhabitants of Kent* (1); *Rex* v. *Inhabitants of Parts of Lindsey* (2); *Rex* v. *Kerrison* (3); *Reg* v. *Ely* (4); *Hertfordshire County Council* v. *Great Eastern Railway Co.* (5); *Rex* v. *West-*

(1) 13 East 220.
(2) 14 East 317.
(3) 3 M. & S. 526.
(4) 15 Q.B. 827.
(5) (1909) 2 K.B. 403.

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wood (1) at page 92; *Mayor of Lyme Regis* v. *Henley* (2), at p. 355.

The judgment under appeal ought, therefore, in my opinion, to be varied by directing a reference as to damages in respect of the actual obstruction caused by the cable placed across the river in August, but subject to that, dismissed.

ANGLIN J.—Mr. McCarthy, appearing for the appellants, presented to us a view of the order of the Board of Railway Commissioners, under which the bridge in question was constructed, which was not submitted to the provincial courts. Apart from the objection to its being entertained based upon that fact, I cannot agree with Mr. McCarthy's contention that, on the proper construction of the order of the Board, it was necessary, before a request binding on the company to provide a passageway in its bridge could be validly made by the Department of Public Works, that there should be a finding by the Board of Railway Commissioners that such a passage was necessary. As I read the order the request might be validly made at any time either by the Board itself or by the Department of Public Works upon its appearing to either of them that a passageway was required.

Moreover, the approval of the plans for the bridge by the Governor-in-Council, prescribed by sec. 233 of the "Railway Act," was expressly made subject to the condition that the company should furnish passageways for boats upon being requested to do so by the Department of Public Works if it should be found at any time that such passageways were required. The Department having notified the company before the

(1) 7 Bing. 1.

(2) 2 Cl. & F. 331.

bridge in question was constructed that it would be necessary for it to provide a passageway for boats, the placing of a bridge across the river without such a passageway and so constructed that it caused an obstruction to navigation in contravention of sec. 230 of the "Railway Act" was, in my opinion, unlawful and rendered the company liable for any actual damages sustained by the plaintiffs such as would support a private action in respect of a public nuisance.

On the other hand, however, after carefully considering all the evidence, particularly the correspondence read in the light of the oral testimony, I think the conclusions reached by the learned trial judge

> that the plaintiff company never intended to resume operations that season (*i.e.*, in 1913) above the bridge at mile 142,

and would not

> have done so even in the actual water conditions which afterwards developed

were correct and should not have been disturbed. It is very significant that, although the alleged interruption to navigation took place in August, 1913, there appears to have been no complaint about it on the part of the plaintiffs until the following year. On the contrary, correspondence between representatives of the parties in September, 1913, appears to be inconsistent with an intention on the part of the plaintiffs to prefer a claim for damages in respect of interruption of their business in that year.

On the 18th of July, 1913, in answer to a request by the defendant company for information as to the plaintiff's intentions with regard to the route in question in order to inform their representatives in the east as to the routing of freight, Mr. West, Superintendent of the plaintiff company, wrote

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Under the difficult conditions which we have had to operate this summer we think it advisable not to advertise the route or encourage shippers to send their goods by the Cache unless they are prepared to handle the same in scows from that point to Fort George.

Earlier in the same letter he said:

The upper part of the river between Tête Jaune Cache and Fort George is only navigable for about 2½ to 3 months in the year * * * and it is doubtful if we would be safe in accepting any more shipments for delivery this year.

Acting upon this information the defendant company notified its agents on the 30th of July that:

Until further notice we will decline to accept freight consigned to the British Columbia Express Company at Tête Jaune Cache for Fort George.

Though aware of this notice having been sent out the plaintiffs took no exception to it. On the evidence of Mr. Boucher, the plaintiffs' agent at Tête Jaune Cache, I incline to think that, as a result, immediately before traffic was interrupted by the construction of the bridge they had only two loads of freight left above the bridge, one at Tête Jaune Cache, the other at mile 129. The latter they took away themselves on the day when traffic closed; the former was brought for them to a point below the bridge by the defendant company and was taken away by them. Any other freight which came to Tête Jaune that season was consigned, I should infer from Mr. Boucher's evidence, for shipment to Fort George by scows. This evidence further strengthens the view taken by the learned trial judge that the plaintiffs had no intention of resuming navigation of the route in question after the water conditions in August interrupted it.

On the whole case, while the plaintiffs may have sustained some *injuria* at the hands of the defendants, it appears to have been *injuria sine damno*. The making of a claim in respect of loss of business in 1913

would seem to have been an afterthought and action in respect of it would in all probability never have been taken had proceedings not been instituted in connection with the business of 1914, for which it has been held by the British Columbia courts that the plaintiffs have not an actionable claim.

I would, for these reasons, allow this appeal with costs in this court and the Court of Appeal of British Columbia and would restore the judgment of the trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Tiffin & Alexander.*

Solicitors for the respondent: *Taylor, Harvey, Grant, Stockton & Smith.*