

1912
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 *March 1. THE GRAND TRUNK PACIFIC
 *March 4. RAILWAY COMPANY } APPELLANTS;

AND

JOHN Y. ROCHESTER AND OTHERS. .RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Construction—Route and location plans—Approval—Obstruction to navigation—Demolition of works—Jurisdiction of Board of Railway Commissioners—"Railway Act," R.S.C., 1906, c. 37, ss. 30 (h), (i), 230, 233.

Where a railway company, in the professed exercise of its powers as a railway company and without the approval of the route by the Minister and of the location plans and works by the Board of Railway Commissioners for Canada, has constructed a solid filling across navigable waters, the Board, under the provisions of sections 230 and 233 coupled with sub-sections (h) and (i) of section 30 of the "Railway Act," R.S.C., 1906, ch. 37 has jurisdiction to order the demolition of the works so constructed.

APPLICATION for leave to appeal from an order of the Board of Railway Commissioners for Canada, dated on the 2nd of January, 1912, by which the railway company was directed to remove a portion of a rock filling placed across the entrance of Market Cove, at Cameron Bay, B.C., in the construction of a portion of their line of railway.

A portion of the roadbed of the Grand Trunk Pacific Railway Company from Prince Rupert, in British Columbia, westerly, was constructed subsequent to the 31st of December, 1909, and John Y.

*PRESENT:—Mr. Justice Duff, in Chambers.

Rochester and others complained to the Board of Railway Commissioners for Canada that the railway company was about to construct a solid embankment, at Cameron Bay, B.C., across the entrance to Market Cove upon the shores of which they held leases of water-lots from the Government of British Columbia. The complainants asked that, on approval of the location plans, their rights should be protected. At the time of this complaint, 25th November, 1909, no route-map for this portion of the railway had been approved by the Minister, and the approval of the location plans and authority for the construction of the works had been withheld by the Board pending inquiries. Without obtaining such approval and authorization, the railway company actively proceeded with the construction of the railway along the route in question in the professed exercise of its powers as a railway company and, in doing so, blocked the entrance of the cove so that navigation of its waters was obstructed by a stone embankment which the railway company placed across its entrance. After hearing the parties interested the Board found, in effect, that the complainants had leases of lands abutting on the waters of the cove for the purpose of securing access thereto by water for their warehouses, etc., and that they were the owners of the riparian rights appurtenant to the possession of these lands; that the railway company had cut off all access by water from the harbour to all points around the cove; that at the time of the construction of the embankment the company had no title to the land across the entrance of the cove; that the company had no right to make the construction without approval of the route-map and of the location plans and works; that the lands and business of the complainants had been injuriously affected

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by the wrongful and illegal act of the railway company; and that there was no necessity for a stone embankment across the entrance to the cove and no reason why an opening should not be left there sufficient to enable vessels to pass in and out during high tide.

Upon these findings it was, on the 2nd of January, 1912, ordered by the Board that the railway company, on or before the 1st of May, 1912, should remove sufficient of the rock-fill to leave an opening at the deepest point of the entrance at least thirty feet in width, and that, before the 15th of February, 1912, the company should file with the Board and furnish the complainants with plans shewing the location of the opening, etc.

The opinion judgments of Chief Commissioner Mabee and Commissioner McLean, delivered upon the making of the order in question, appear at pages 294 to 299 of the Seventh Report (1912) of the Board of Railway Commissioners for Canada (Sessional Paper No. 20c), presented to Parliament in 1913.

On the hearing before Mr. Justice Duff, in Chambers, 1st March, 1912,

D'Arcy Tate K.C. appeared in support of the application.

N. G. Guthrie contra.

The application was refused for the following reasons by

DUFF J.—On the 4th of March, last, I dismissed an application made to me on the first day of the same month for leave to appeal from an order made by the Board of Railway Commissioners, on the 2nd of January, 1912, directing the railway company to remove

part of their rock-fill at Cameron Bay, B.C. I gave no reasons in writing for my decision, at the time, but it is now stated that an appeal from the order of the Railway Commission is pending before His Royal Highness the Governor in Council, and that it may be necessary to refer to the grounds upon which the company's application for leave to appeal was dismissed, and I have been requested, through the registrar, to state the grounds upon which I acted. I think it is reasonable, in the circumstances, to comply with the request.

An appeal lies to the Supreme Court from the Board of Railway Commissioners in two cases only, which are provided for by sub-sections 2 and 3 of section 56 of the "Railway Act." The application in question was made under sub-section 2, and the point to be determined was whether there was any arguable question of jurisdiction which the railway company ought to be permitted to bring before the Supreme Court.

Cameron Bay is a tidal water in which the public have rights of navigation. The Board of Railway Commissioners, in effect, found that the fill in question had been constructed by the railway company in professed exercise of their powers as a railway company, and that the requirements of section 233 of the "Railway Act" had not been complied with. These facts being found by the Board, the question of jurisdiction of the Board to make the order appeared to be obviously concluded by a reference to section 230 of the "Railway Act," coupled with sub-sections (h) and (i) of section 30 of the same Act, and I dismissed the application accordingly.

Application refused with costs.

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