1910

*Dec. 2.
*Dec. 9.

THE BLACKWOODS LIMITED, AND THE MANITOBA BREWING AND MALTING COMPANY. } APPELLANTS;

AND

THE CANADIAN NORTHERN RAILWAY COMPANY AND THE CITY OF WINNIPEG..... } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Private siding—Construction of statute—"Railway Act," R.S.C. (1906) *c.* 37, *ss.* 222, 226, 317—*Branch of railway—Estoppel—Res inter alios.*

The Board of Railway Commissioners for Canada has not the power, (except on expropriation or consent of the owner,) to order that a private industrial spur-track or siding, constructed and operated under an agreement between a railway company and the owner of the land upon which it is laid and used only in connection with the business of such owner, shall be also used and operated as a branch of the railway with which it is connected.

APPEAL, by leave of a judge of the Supreme Court of Canada, upon the question of the jurisdiction of the Board of Railway Commissioners for Canada to order the construction of a railway siding extending from the extremity of an existing spur-track or siding upon the property of the appellants.

The circumstances of the case are stated in the judgment of Mr. Justice Duff, commencing at page 96 of this report.

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

1910

BLACKWOODS LIMITED v. CANADIAN NORTHERN RY. CO.

W. L. Scott for the appellants.
Chrysler K.C. for the respondents.

THE CHIEF JUSTICE and GIROUARD and DAVIES JJ. concurred in the opinion stated by Anglin J.

IDINGTON J.—The appellants and respondents agreed that a siding or industrial spur, purely of a private character, should be put down over the railway company's land and part of appellants' property to serve the latter's use.

It seems the agreement was reduced to writing, but that writing does not appear on the record. Save by statements and admissions which do appear of record we know nothing of it.

These make it, however, quite clear that the respondents never acquired any permanent rights of property in appellants' land; that the work of construction, so far as grading and ties, was either done by or at the expense of appellants, and the iron placed thereon at the expense of respondents; that the appellants pay a rental for the use of the iron; that the respondents had the right to shunt cars from their track over this siding; and that the whole arrangement is terminable at any time by either party.

The appellants gave the following letter to agents now alleged by some one, but not proven, to be part owners of land to which it is now proposed to extend said siding.

Messrs. Berry & Bond, June 22, 1908.
City.

Dear Sirs,—With reference to your application for right-of-way over our land, on the C.N.R. spur, we are perfectly willing to grant this.

Arrangements can be made later.

Yours very truly,
THE BLACKWOOD'S LIMITED,
(*per* N. W. B.).

1910

BLACKWOODS LIMITED v. CANADIAN NORTHERN RY. CO.

Idington J.

It was stated before the Board, and not denied, that the party who was about to buy at the time when this letter was written failed to complete the expected purchase.

The party who has since acquired the property and moved the respondents to make the application now in question, did so in 1909, sometime not exactly stated, but as result of negotiations begun in the early part of said year, 1909.

The Board made an order giving leave to extend the said siding or spur from the point where it ends on the appellants' property to another point on the said property, acquired as just stated and as shewn on a plan

> for the purpose of furnishing railway facilities to the owner of the said last mentioned lot.

The appellants by leave appeal against said order on the ground that the Board had no jurisdiction to make the said order.

The Board finds as a fact that the party who bought last mentioned land as an industrial site and upon whose behalf or for whose benefit the application now in question was made, relied upon the said letter in making his purchase.

It is quite clear that the Board founds its jurisdiction upon that fact.

Two clear implications spring from this.

One is that the siding or spur was not in the view of the Board part of the railway. If it had been, then the Board needed no such authority to provide for and direct an extension, but could and would have rested solely on the "Railway Act."

The other is that but for the said letter the Board did not conceive it had, on the facts, any jurisdiction.

1910

BLACKWOODS LIMITED v. CANADIAN NORTHERN RY. CO.

Idington J.

The first implication just stated, is what I would have been inclined to infer, notwithstanding Mr. Chrysler's ingenious suggestion, that the siding being used by the respondents, must be taken or presumed to have been constructed under the Act and to have formed part of the railway.

But the first of said implications rebuts if necessary any such presumption and effectually disposes of its results.

In the second implication I cannot think that the Board had any jurisdiction over the parties to enforce specific performance, as it were, of rights springing from the letter, however much that might or might not bear upon the compensation to be fixed in case of expropriation.

As to this I am not to be supposed as expressing any view much less that the letter should affect that compensation. I merely wish to point out the only conceivable result the letter in any way can by any possibility have on the questions involved herein.

This brings me to the crucial test of authority in the Board to make the order. The order is made for the express purpose of furnishing facilities. It would be no facility if its operation ended at a point ninety feet within the appellant's grounds.

The order clearly implies the giving of authority to run over the appellants' siding.

With great respect, I cannot read the letter above quoted as having any such consequences as thus implied even if as fact found by the Board which I must observe the purchaser of an industrial site bought on faith thereof.

His buying on faith thereof cannot confer upon the respondents any right to construct and operate a

1910

BLACKWOODS LIMITED v. CANADIAN NORTHERN RY. CO.

Duff J.

branch railway or spur over a mere private siding to serve the rest of the industrial community.

The doing so would be clearly *ultra vires*.

I think the appeal must be allowed with costs.

DUFF J.—The Blackwoods are owners of land adjoining the line of the Canadian Northern Railway Company at Winnipeg. In the year 1907, under an arrangement between them and the railway company, a spur-track was constructed upon their land connected with the railway; and by the terms of the agreement the railway company were to supply them and did supply them with facilities for receiving and delivering freight. The agreement is not in evidence, but from the uncontradicted statements made at the hearing it is clear that the expense of construction was borne by the Blackwoods with the exception of the actual laying of the rails which was borne by the railway company; that the railway company retained the ownership of the rails for which the Blackwoods pay an annual rental; that the spur was constructed for the purpose of providing facilities for the Blackwoods and that the railway company acquired no permanent rights in the land, and, indeed, no rights in it of any kind except such as might be implied in their obligation to carry out the provisions of the agreement.

It was not disputed on the argument that the spur-track was constructed solely under the authority of this agreement, and I think that is the necessary result of what occurred at the hearing. After the delivery of judgment it is true the Chief Commissioner stated that he would make no finding upon the question of fact whether in respect of this

1910

BLACKWOODS LIMITED v. CANADIAN NORTHERN RY. CO.

Duff J.

spur the provisions of section 222 of the "Railway Act" had been complied with, and he also expressly stated that he did not understand that any admission upon the point had been made. Since, however, the Blackwoods in their answer to the railway company's application expressly alleged the non-observance of the requirements of section 222 the onus of shewing that these requirements had been observed would appear to have been upon the railway company unless some presumption in their favour can be held to arise from the construction and use of the track since the year 1907. No such presumption does, in my opinion, arise because it appears to me to be clear that in such a case as this, reading sub-section 5 of section 317 with section 226, no warrant other than that of the arrangement between the parties themselves would be necessary to authorize the furnishing of such facilities as those provided under the agreement mentioned. Sub-section 5 indeed is perhaps little more than a confirmation by the legislature of the decision of this court in *Canadian Northern Railway Co.* v. *Robinson* (1), which affirmed the validity of such an arrangement in the absence of any special sanction by the Board of Railway Commissioners. Since, then, the authority of the Board under sections 221-223 was not in this case needed, there is no presumption arising from the construction and operation of the work that this authority was obtained. The spur-track upon the land of the Blackwoods is therefore to be treated as a private siding or private branch owned by them and worked so far as it is worked by the railway under the authority of a special agreement with the Black-

(1) 37 Can. S.C.R. 541.

1910

BLACKWOODS LIMITED v. CANADIAN NORTHERN RY. CO.

Duff J.

woods to provide them with shipping facilities. The question which on this state of facts comes before this court is this: Has the Board of Railway Commissioners the power to authorize the railway company to extend this spur-track from its present terminus on the Blackwoods's property into property situated beyond that of the Blackwoods for the purpose of providing others with the same sort of facilities as those which the Blackwoods enjoy without first acquiring, by expropriation or otherwise, from the Blackwoods the property or additional rights of user in the existing spur-track. The Board of Railway Commissioners has held the jurisdiction to exist and has exercised it. The assumed basis of jurisdiction is, I think, neatly put by the Chief Commissioner in the course of the discussion in these words: "We are treating this spur as the railway." If this spur can properly be treated as part of the railway for all purposes within the meaning of sections 221, 222 and 226 there is jurisdiction unquestionably to make the order the Board has made. On the other hand it seems to be equally clear that it is a condition of the jurisdiction that the spur should appear to be of this character. I am not able, with great respect, to agree with the opinion of the Chief Commissioner, although the question is certainly not free from difficulty.

The strong point in favour of the Chief Commissioner's view appears to be that by sub-section 21 of section 2 of the "Railway Act"(1), "railway" is for the purpose of the Act defined in these terms:

(21) "Railway" means any railway which the company has authority to construct or operate, and includes all branches, sidings, stations, depots, wharves, rolling stock, equipment, stores, property

(1) R.S.C. (1906) ch. 37.

real or personal and works connected therewith, and also any railway bridge, tunnel, or other structure which the company is authorized to construct.

1910

BLACKWOODS LIMITED v. CANADIAN NORTHERN RY. CO.

Duff J.

If we are to treat the word "railway" wherever it appears in the Act as always and for all purposes denoting the whole and every part of this definition then the argument is *primâ facie* at all events a forcible one that this spur-track being a branch or siding connected with a "railway which the company has authority to construct or operate" is by the terms of this definition a part of the railway. The courts have often, however, taken occasion to observe that there is some danger that this method of applying an interpretation clause in an Act of Parliament dealing variously with a large range of subjects may lead to results out of conformity with the intention of the legislature and that the particular provision in respect of which it is proposed to apply the definition must be carefully examined to see whether such an application of it may not defeat the obvious purpose of the provision itself; and this is recognized in the main enacting clause of section 2. Coming to sections 221, 222 and 226, section 221 authorizes the construction of branch lines "from the main line of the railway or from any branch thereof." It is not open to doubt that what this provision contemplates is the construction of lines which are not only physically connected with the main line of the railway, but which may be operated in connection with the main line. In this view there would appear to be very little difference between a branch line so called which should be wholly *en l'air* in reference to the main line or any of its branches, and a branch (so called) which should connect itself with the main line only through an intervening link of

1910

BLACKWOODS LIMITED v. CANADIAN NORTHERN RY. CO.

Duff J.

track over which the proprietors of the railway should have no rights to run their trains. Nor do I see any substantial distinction between this latter case and the case in which, as in that before us, there are rights to use the intervening track for a limited purpose only which does not include that of passing traffic over it originating at or destined to points on the so-called branch. The same observations apply to section 226.

In the absence of consent by the Blackwoods it follows from this that the authority needful to sustain the order is lacking, unless, indeed, we are entitled to act upon the theory that the Blackwoods's rights in this spur-track and in the land upon which it is constructed (which include, of course, the right to exclude from the use of it all persons who have no legal title to use it) may under the authority of the "Railway Act" be taken from them without compensation. The Chief Commissioner in his opinion expressly states that the Act confers upon the Board no authority to assess compensation in respect of the rights of user which the order assumes may be exercised by the railway company and the persons for whom the railway company desires to provide facilities. Among canons of statutory construction none, I think, is more important than that which declares the legislature to be presumed not to intend to take away private rights without compensation; and I know of nothing in the "Railway Act" which excludes the application of it. It must, of course, yield where an intention to abrogate or limit the principle is clearly expressed or implied, but it may, I think, be taken to be a general principle of the "Railway Act" that a railway company governed by the Act can only acquire the property of private persons or

1910

BLACKWOODS LIMITED v. CANADIAN NORTHERN RY. CO.

Duff J.

rights of user in respect of such property either by putting in motion the machinery provided by the compulsory clauses of the Act or by agreement, and sections 222 and 224 seem to shew conclusively that this principle, as one would expect, applies to the construction and operation of branch lines as well as to the main line. I do not understand, therefore, on what principle it can be held that without proceeding under the compulsory clauses of the Act, and without the consent of the Blackwoods, the railway company can acquire the right to use this spur as a part of the proposed branch.

It is contended, however, and the contention has been accepted by the Board, that the Blackwoods are by reason of their conduct precluded from denying that rights of user over this spur have been acquired by Mr. Hugh Sutherland for whose benefit the proposed extension is now applied for. A certain letter written by the Blackwoods, on the 22nd of June, 1908, was held by the Chief Commissioner to have been reasonably relied upon by Mr. Sutherland as containing a representation by the Blackwoods of their willingness to permit the use of their spur for the purpose of affording the facilities desired and that Mr. Sutherland purchased the property in respect of which it is proposed to grant the facilities on the strength of this letter. It was held that the effect of this was to preclude the Blackwoods from objecting to the order applied for. In so far as this conclusion of the Chief Commissioner involves a finding of fact, I do not think it is open to be questioned in this court. In so far as it involves a conclusion upon a question of law which was made the foundation of the Board's jurisdiction it is, I think, subject to be reviewed; the Board can-

1910

BLACKWOODS LIMITED v. CANADIAN NORTHERN RY. CO.

Duff J.

not acquire jurisdiction through an erroneous decision upon a point of law. I am unable to agree with the Chief Commissioner that the legal effect of these findings of fact is such as to preclude the Blackwoods from opposing the application. I repeat that I take the findings to be that the letter in question was communicated to Mr. Sutherland and that he reasonably acted upon it in purchasing the property mentioned. The legal effect of this upon the position of the Blackwoods appears to me to be absolutely nil. The letter is not addressed to Mr. Sutherland, but I shall assume—as I think we must in view of the finding of the Board assume—that it might reasonably be taken to have been given to the agents for the information of intending purchasers of the property.

The argument on this assumption is that this letter contains representations that the Blackwoods will not insist on their legal rights in respect of this spur and that these representations they are bound to make good to the person who acted on the faith of them. Now, that contention can only be sustained upon one of two views respecting the construction of the letter. One of these alternatives is that the letter contains some misrepresentation as to some state of facts alleged to exist at the time it was written upon which Mr. Sutherland acted. If such be the construction of the letter then equities in Mr. Sutherland's favour might arise. But where is the representation of fact? The only representation of fact actually existing relates to the then existing state of the Blackwoods's intentions. Nobody suggests that there is any misrepresentation here—that is to say, nobody suggests that the Blackwoods in writing the letter did not sincerely express the state of their minds in the matter

—that in other words, they were committing a very stupid and motiveless fraud.

We may then put aside any suggestion that the appellants can rest upon estoppel or misrepresentation of fact. What is left? The construction put upon the document by the Board and by Mr. Sutherland was that it was a representation that the Blackwoods "were," to quote the words of the Chief Commissioner,

> perfectly willing to grant an application for the right-of-way for the extension of this spur.

Now, that is a representation of intention *de futuro* which juridically can only take effect *ex contractû*. It is binding as a promise or not at all. I shall not labour the authorities which shew that the supposed equitable doctrine of making representations good has, apart from estoppel or contract, no place in English law. *Jorden* v. *Money*(1); *Maddison* v. *Alderson*(2), at pages 472, 473, 487, 491, 492; *Chadwick* v. *Manning* (3).

The Board has not found a contract between the parties and there appear to be insuperable difficulties in the way of doing so. It is necessary in this connection to call attention to one point only. The letter plainly indicates that the terms of any arrangement entered into pursuant to it are to be left for further settlement; and there could, of course, be no completed *vinculum juris* until these terms had been agreed upon. I think, therefore, that this supposed foundation of the Board's jurisdiction fails in point of law.

(1) 5 H.L. Cas. 185. (2) 8 App. Cas. 467.
(3) [1896] A.C. 231.

1910

BLACKWOODS LIMITED v. CANADIAN NORTHERN RY. CO.

Anglin J.

ANGLIN J.—The material facts are fully stated in the opinion of my brother Idington in whose conclusions I concur.

Unless the order in appeal authorizes the use of the existing siding in connection with the extension of it for which it provides the new construction would be merely of a detached piece of railway. At bar the order was treated (I think properly having regard to the statement that the extension authorized was "for the purpose of furnishing railway facilities" to the applicant) as involving the taking by the respondents for the purposes of their railway of the appellants' existing siding, without their consent and without expropriation or compensation.

The letter in evidence neither expresses nor implies a consent to this being done.

It has, I think, been clearly shewn that the existing siding is the private property of the appellants. Neither authority for its construction as part of, nor an order for its connection with, the respondents' railway has been produced. The case has proceeded on the assumption that no such authority or order exists.

The order in appeal is, in my opinion, beyond the jurisdiction of the Railway Board.

Appeal allowed with costs.

Solicitors for the appellants: *Elliott, Macneil & Deacon.*

Solicitors for the respondents: *Clark & Sweatman.*