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*Oct. 9, 10.
*Dec. 6.

THE CLOVER BAR COAL COMPANY..... } APPELLANTS;

AND

WILLIAM HUMBERSTONE, THE GRAND TRUNK PACIFIC RAILWAY COMPANY AND THE CLOVER BAR SAND AND GRAVEL COMPANY..... } 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. 26a, 226—(D.) 8 & 9 Edw. VII. c. 32, s. 1.

Notwithstanding provisions in an agreement under which a private industrial spur or siding has been constructed entitling the railway company to make use of it for the purpose of affording shipping facilities for themselves and persons other than the owners of the land upon which it has been built, the Board of Railway Commissioners for Canada, except on expropriation and compensation, has not the power, on an application under section 226 of the "Railway Act," (R.S.C., 1906, ch. 37), to order the construction and operation of an extension of such spur or siding as a branch of the railway with which it is connected. *Blackwoods Limited* v. *The Canadian Northern Railway Co.* (44 Can. S.C.R. 92) applied, Duff J. dissenting.

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 and operation of an extension to the appellants' private industrial spur or siding across their lands.

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*PRESENT: Davies, Idington, Duff, Anglin and Brodeur JJ.

The circumstances of the case are stated in the judgments now reported.

J. H. Leech K.C. and *W. L. Scott* for the appellants.

Chrysler K.C. for the respondents.

DAVIES J. agreed with Anglin J.

IDINGTON J.—The appellants had the usual agreement with the Grand Trunk Pacific Railway Company for a siding which was built pursuant thereto on the appellants' land. The agreement was terminable on two months' notice by either party to it.

The respondent, Humberstone, desired siding accommodation at a point beyond this siding built for the appellants.

The Board of Railway Commissioners, on his application, ordered the said railway company to construct, maintain and operate the said proposed extension of the appellants' siding across their lands, taken up thereby, to and upon the Humberstone Coal Company's lands.

Incidentally to such order and to enable the said railway company to execute it, the order provided that the strip of land required for the said extension, so far as owned by the appellants, should be expropriated.

The appellants claim that this order is beyond the jurisdiction of the Board of Railway Commissioners and rely on our decision in the case of *Blackwoods Limited* v. *The Canadian Northern Railway Co.*(1), which was given after this order, now questioned.

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Idington J.

I think the appellants are quite right.

The principle upon which that case was decided was that the Board of Railway Commissioners had no jurisdiction to enforce the construction of an isolated bit of railway which was entirely independent of and not connected with, or to be a branch of the main line or branch therefrom.

The principle is as clear as can be. The Board of Railway Commissioners, in this regard, can only act within the sections 221 to 226, inclusive, of the "Railway Act." These sections countenance nothing else than a piece of railway to be constructed in strict accordance with the terms of the said sections and what others are implied therein as applicable. It is idle to contend that this order can be maintained by virtue of a mere temporary private agreement such as invoked herein, even if the Grand Trunk Pacific Railway Company has a right thereby to use the temporary siding for its own purposes and to permit others to use it. Indeed, when closely examined, the order, whatever it may imply, says nothing as to operating that siding, then existent, and fails to declare this, with the extension, one complete branch line or siding.

It was because the Board of Railway Commissioners seemed confessedly to rely on analogous private or personal rights that I failed to find any jurisdiction for what they had ordered in the *Blackwoods, Limited* v. *Canadian Northern Railway Co.* (1).

And the majority of the court seemed to agree that the power to make such an order must be within the sections I refer to.

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The private right of a railway company to the use of the private siding was the basis, in each case, upon which the order rested.

An alleged equitable right by way of estoppel to supplement this was set up in *Blackwoods Limited* v. *Canadian Northern Railway Co.*(1), and here the terms of the private bargain of the railway company to permit others to use its acquisition of right is relied upon.

Both are entirely apart from the powers given relative to branch lines which give jurisdiction to the board in such cases to direct or authorize branch lines, and need no supplementing of the kind in question in these cases.

It was not suggested in argument, but I have since considered the possible question of whether or not authority might be found by implication in the wide powers of the board respecting accommodations or facilities for shipping, to direct as it has done.

I, however, fail to see how they can be used in aid, save by and through the sections I refer to.

The appeal should be allowed with costs.

DUFF J. (dissenting).—I entertain no doubt that, under article 6 of the agreement between the appellants and the railway company, the company is entitled to use the existing spur for the purpose of affording such facilities for shipping and taking delivery of freight as it may be their duty to give to persons other than the appellants. That being so, I can see no reason why, under the authority of section 226 of the "Railway Act," the Board of Railway Com-

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missioners may not order such facilities to be furnished by means of an extension of the spur. The case radically differs from the case of *Blackwoods Limited* v. *The Canadian Northern Railway Co.*(1). There (according to the state of facts presented to this court) the rights of the railway company in respect of the spur which it proposed to make part of its branch were limited to the use of it for the purpose of supplying facilities to the owners of the land on which it was constructed. The application was one by the railway company for approval of a branch line and the order of the Board of Railway Commissioners, consequently, if it was to be treated as an authority to construct a branch capable of being worked in connection with the railway had the effect of the imposing of an additional servitude upon the lands of the Blackwoods without compensation. That we thought the Act did not authorize. The order now before us leads to no such result; and I am unable, with great respect, to understand why it is not a valid exercise of the powers conferred by section 226 of the "Railway Act."

I ought, perhaps, to refer to the point made by Mr. Scott, that the use of the appellants' spur for the purpose of affording facilities to the respondent is necessarily incompatible with the observance by the company of the condition prescribed by article 6 of the agreement that the use of the siding by or for the benefit of other persons "shall not interfere with the proper use" of it "for the business" of the appellants.

It may be observed in this connection that, under

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section 26 (*a*) (8 & 9 Edw. VII. ch. 32, sec. 1), the Board of Railway Commissioners is invested with the fullest powers respecting the enforcement of such contractual stipulations. Whether there is any incompatibility between the order under appeal and the provisions of article 6 of the agreement appears to me to be peculiarly a question of fact for the board.

I may say, further, with reference to the construction of article 6, that the construction now put forward was not relied upon at the hearing before the Board of Railway Commissioners, and, indeed, seems to be an afterthought suggested by the decision of this court in the case of *Blackwoods Limited* v. *The Canadian Northern Railway Co.*(1).

ANGLIN J.—Assuming the respondents' construction of the agreement between the appellants and the Grand Trunk Pacific Railway Company to be correct, I think this appeal should, nevertheless, be allowed upon two grounds — the first, that the spur, of which an extension has been ordered, is not part of the Grand Trunk Pacific Railway, but is a mere private siding or branch; the second, that the order of the Board of Railway Commissioners either purports unlawfully to deprive the appellants of the right of removing this spur or siding reserved to them by the agreement under which it was constructed, or, if this be not its effect, that the order directs the construction of a branch or siding not itself connected with the Grand Trunk Pacific Railway, and which can only be reached by using the appellants' spur, which, under their agreement with the railway company, the appel-

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lants may remove at any time upon giving two months' notice. Upon the former construction of the order there has been an unwarranted interference with the appellants' contractual rights; upon the latter, no permanent or sufficient provision is made for connecting the extension of the siding or branch line directed to be constructed and operated with the Grand Trunk Pacific Railway.

As I read the agreement under which the appellants' siding was built, it does not contemplate any extension of it. It contains several provisions inconsistent with the idea of an extension, notably that authorizing the removal of their spur by the appellants, and that reserving to them a paramount right to make any proper use of the siding at all times for their business. In view of these terms of the contract, the provision for the use of the siding by the railway company and that for its use by third parties on payment of compensation to the appellants must, I think, refer to such uses as may be made of it as constructed under the agreement and without extension. Several such uses were suggested in the course of the argument. It was practically conceded that, if this be the proper construction of the agreement, this appeal should succeed.

But, if the provisions for use of the appellants' siding by the Grand Trunk Pacific Railway Company and by third parties should be held, as Mr. Chrysler contended, to have been made in contemplation of an extension of the siding and, therefore, to preclude objection by the appellants to a proper order for such extension being made, they do not suffice to uphold the jurisdiction of the Board of Railway Commissioners to make the order now before us. As pointed out

in the case of *Blackwoods Limited* v. *The Canadian Northern Railway Co.*(1) — more particularly in the judgment of my brother Duff, at pages 96 *et seq.* — the appellants' spur, constructed solely under the authority of their agreement with the Grand Trunk Pacific Railway Company, must be treated as a private siding or branch, not in any sense part of the Grand Trunk Pacific Railway. Its connection with the railway, because lawful without authorization by the Board of Railway Commissioners, raises no presumption that such authorization was obtained. As a private siding the board, in my opinion, had not jurisdiction to order its extension, unless it first provided in a proper and legal manner for its becoming part of the Grand Trunk Pacific Railway. This it might have done by directing the expropriation by the railway company of the land on which the siding is constructed. That would, of course, involve compensation to the appellants.

If the order of the board deprives the appellants of their contractual right upon notice to remove their siding, it in effect makes that siding part of the Grand Trunk Pacific Railway without any provision entitling the appellants to compensation for the land thus taken. If, notwithstanding the unqualified order for the construction and operation of the extension, the appellants still have the right to remove their spur and thus to destroy the connecting link with the Grand Trunk Pacific Railway, upon their exercising that right the extension would have no connection with the Grand Trunk Pacific Railway, and, without some further order or provision, its operation by the railway company would be practically impossible.

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For these reasons, I am of opinion that, in making the order in appeal the Board of Railway Commissioners exceeded its jurisdiction and that the appeal should be allowed with costs.

BRODEUR J.—I concur with the opinion expressed by Mr. Justice Anglin.

Appeal allowed with costs.

Solicitors for the appellants: *Leech, Leech & Co.*

Solicitors for the respondents: *Emery, Newell, Ford, Bolton & Mount.*