

British Columbia Express Company - - *Appellants*

v.

Grand Trunk Pacific Railway Company- - *Respondents.*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 15TH OCTOBER, 1918.

Present at the Hearing:

THE LORD CHANCELLOR.

LORD BUCKMASTER.

LORD ATKINSON.

[*Delivered by* LORD BUCKMASTER.]

In the view their Lordships take of this case, the only question that arises for determination is whether a bridge built by the Grand Trunk Pacific Railway Company (who are respondents on the appeal) over the Fraser River in the Cariboo District of British Columbia, known as Dome Creek Bridge, Mile 142, caused such special and peculiar injury to the appellants as to entitle them to maintain an action for an injunction and recovery of damages against the respondents. The appellants are a company incorporated by special Act of the Legislature of British Columbia, with, among other objects, that of conducting passenger and freight service on the Fraser River. In pursuit of this purpose they constructed, in the year 1912, at a cost of 65,000 dollars, a steamer specially designed for traffic on the upper part of the Fraser River between Fort George and Tête Jaune Cache, and built a warehouse for the goods at Tête Jaune Cache. The state of the river only permitted a seasonal use of these upper reaches. In ordinary circumstances the season would commence in May and end towards the latter part of August, and then again, in favourable conditions, would open towards the end of September and continue until the end of October. In 1913 the season opened on the 23rd May, and between that date and the 15th August ten trips had been made between Fort George and the Upper Point. The eleventh trip was started on the 15th August, and, on reaching Dome

Creek at a point known as the second crossing, the captain of the steamer was informed on behalf of the respondents that, as part of the work of constructing the bridge, the river would be closed by a cable, and the trip was accordingly abandoned. The cable was then put across the river and the construction of the bridge taken in hand, with the result that, first, owing to the existence of the cable, and, secondly, the character of the bridge, further navigation became impossible. The bridge was constructed by the respondents, who are a railway company incorporated under a Dominion Act as part of a trans-continental railway line which they were engaged in making from Tête Jaune Cache to Fort George and further westward. The railway line ran along the southern bank of the river, from Tête Jaune Cache to the second crossing, and it then crossed and proceeded north of the river to the third crossing, when it again crossed the river and continued on the southern bank to Fort George. The erection of the bridge was sanctioned by order of the Board of Railway Commissioners dated the 4th April, 1912 upon the condition that if at any time it should be found that a passage-way for steamboats was required, the company should provide the same on being directed to do so, either by the Department of the Public Works of the Dominion of Canada, or the Board of Railway Commissioners, and by a report of the Privy Council of Canada made on the 8th May, 1912, the building of the bridge was approved subject to the like condition.

On the 4th July, 1913, the Secretary of the Department of Public Works informed the solicitor for the respondent company that protests had been received against the construction by the company of the bridge at the second crossing, and one further down the river, and added: "I am directed to state that it will be necessary for the company to provide passage-way for boats in these bridges." This passage-way was never in fact made. The appellants allege that this omission on the part of the railway company caused them damage in their business, and they instituted proceedings to obtain a mandatory injunction to compel the respondents to make openings in the permanent steel bridge, both at the place known as the second crossing and at the third, and also claiming damages. The real gist of the plaintiffs' original complaint was in respect of loss occasioned during the year 1914, but this loss they were wholly unable to establish, probably for the reason that the railway being completed from Tête Jaune Cache along the river bank the carriage of goods by the railway was more expeditious and more certain than it could be by river. To use the words of Mr. Justice Clement, before whom the action was originally heard, "the claim in regard to the possible use of the upper river in the early part of 1914 really collapsed at the trial," and this view was concurred in by all the learned Judges in the Court of Appeal for British Columbia and in the Supreme Court.

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With regard to the claim for the damage during the season of 1913, Mr. Justice Clement's judgment was equally clear. He said :—

"Since the argument I have read carefully the extended notes of the evidence, with the result that the impression which the testimony had left on my mind has been very much strengthened, and I find myself 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 construction. In the correspondence the lowness of the water was explicitly given at the time as the reason for withdrawing the '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 would have done so even in the actual water conditions which afterwards developed."

But this view was not taken in the Court of Appeal, where all the learned Judges held that the obstruction in 1913 had caused the plaintiffs damages which they were entitled to recover. This judgment was reversed in the Supreme Court of Canada by a majority of three Judges to two, and from that judgment this appeal has been brought. Their Lordships are in agreement with the view taken by all the learned Judges, who have decided that if special damage could in fact be shown during the season of 1913 the appellants would be entitled to recover, but they are unable to accept the view that any such damage was established. It is probable that the appellants were quick to realise that, whatever the character of the bridge, river traffic on the upper reaches of the river would be unprofitable as soon as the railway was completed, and believing also that the state of the river would prevent resumption of work above the bridge during the latter part of the season, they had, before the bridge was built, taken down the warehouse and shipped it down the river. Further, on the 26th August they had written to the freight agent of the respondent Company saying that they did not think it advisable for shippers to send any freight for Fort George and district by way of Tête Jaune Cache at this time of the year. They continued :—

"Mile 129 is above the Grand Canyon, and as it is there that the bad conditions of navigation are met with, and as the water is liable to drop any day now, thus closing navigation, we would not care to have any more freight consigned to our steamer this season."

And on the 11th September they repeat the statement that owing to the low state of the water they had been compelled to take their steamer off, and concluding "so that navigation on the upper river is over for the remainder of this season." The correspondence continues through September, but there is no letter suggesting that the action of the railway company had stopped their traffic. There is nothing in their Lordships' opinion in the evidence to displace the view established by this

correspondence. Mr. West was director-superintendent and secretary-treasurer of the appellant Company. He said that he could have got lots of freight at Tête Jaune Cache to be handled in the fall of 1913. He said there was some freight left after the steamer ceased running, and that was brought down by the railway company. The last two trips that he made appeared to have been to a point west of the crossing, but when asked why he did not go right on, he said: "I understand because we had announced that we quit; we had thrown down our business, and we were not looking for any more business at the Cache," and he continues: "We had notified everyone that we had quit up there." There was other evidence given in favour of the appellants, but there is nothing in their Lordships' opinion that leads to the conclusion that Mr. Justice Clement was wrong in stating that the oral testimony had convinced him that the plaintiffs never intended to resume operations above Mile 142.

It is not necessary in this view of the case to consider whether the construction of the bridge was in fact lawful or not. In their Lordships' opinion the appellants fail in this appeal as they failed before Mr. Justice Clement, because they are unable to establish that the building of the bridge did in fact cause them any special damage. Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed with costs.

In the Privy Council.

BRITISH COLUMBIA EXPRESS
COMPANY

2.

GRAND TRUNK PACIFIC RAILWAY
COMPANY.

DELIVERED BY
LORD BUCKMASTER.

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1918.