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CANADIAN PACIFIC RAILWAY COMPANY (*Plaintiff*) ..... APPELLANT; *Dec. 11, 13

AND

THE TOWN OF ESTEVAN (*Defendant*) ..... RESPONDENT. Apr. 12

CANADIAN PACIFIC RAILWAY COMPANY (*Plaintiff*) ..... APPELLANT;

AND

THE RURAL MUNICIPALITY OF CALEDONIA No. 99 (*Defendant*) RESPONDENT.

CANADIAN PACIFIC RAILWAY COMPANY (*Plaintiff*) ..... APPELLANT;

AND

THE RURAL MUNICIPALITY OF SWIFT CURRENT No. 137 (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Railways—Exemption from taxation—Special agreement—Construction—Properties on branch lines "required and used for the construction and working" of main line.

By clause 16 of an agreement dated October 21, 1880, between the Government of Canada and the proposed builders of the Canadian Pacific Railway, it was provided that the railway "and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof" should be exempt from taxation by the Dominion, by any Province, or by any municipal corporation. Clause 14 of the agreement provided for the construction of branch lines. In 1951, the Supreme Court of Canada, on appeal from the judgment on a reference under *The Constitutional Questions Act,* now R.S.S. 1953, c. 78, held that the exemption did not apply to properties of the kind enumerated used for the working of branch lines "except such properties, if any . . . as are entitled to the benefit of the exemption from taxation as being required and used for the construction and working of the railway described in sections 1, 2 and 3 of the Act 37 Vict. cap. 14". No specific properties were considered on the reference and the railway now sued three municipalities for declarations that properties within those municipalities were exempt from taxation under clause 16.

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*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Locke, Cartwright and Nolan JJ.

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Held: The action must fail. The properties in question, all situated on branch lines, were not "required and used for the construction and working" of the main line of the company, which was "the railway" described in the Act of 1874. It could not be said that the functions of the branch lines were so related to the main line as to be embraced within the expression "Canadian Pacific Railway" in clause 16 of the contract, which clearly distinguished between the main line and branch lines and granted the exemption from taxation to the main line only.

Judgments and orders—Effect of judgment on reference—The Constitutional Questions Act, R.S.S. 1953, c. 78—The Supreme Court Act, R.S.C. 1952, c. 259, s. 55.

Per Kerwin C.J. and Taschereau, Locke and Cartwright JJ.: The judgment of the Court on the reference referred to above was not binding on the parties to this litigation, since matters referred to the Court of Appeal for Saskatchewan under *The Constitutional Questions Act* did not differ from references to the Supreme Court under what was now s. 55 of the *Supreme Court Act*.

APPEALS by the plaintiff from the judgments of the Court of Appeal for Saskatchewan (1), varying the judgments of Davis J. (2), in three actions tried together.

C. F. H. Carson, Q.C., Allan Findlay, Q.C., and *H. M. Pickard,* for the plaintiff, appellant.

E. C. Leslie, Q.C., and *Roy S. Meldrum, Q.C.,* for the defendants, respondents.

THE CHIEF JUSTICE:—I agree with Mr. Justice Locke and Mr. Justice Nolan.

TASCHEREAU J.:—I agree with Mr. Justice Locke and Mr. Justice Nolan.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.:—The facts of this controversy are set out in detail in the reasons of my brother Nolan; I agree with his conclusion but I desire to add a few paragraphs on the general contention of Mr. Carson.

It is conceded that all of the branches were constructed as independent lines of railway, each serving its own territory and in the course of it carrying products, chiefly grain, to the main line for furtherance to many points in Canada and abroad. The proposition is that by reason of the particular activities on the branch lines described in the

(1) 17 W.W.R. 497, 2 D.L.R. (2d) 166, 73 C.R.T.C. 279.
(2) 15 W.W.R. 673.

evidence the latter have become facilities—"other things required and used"—of the main line, auxiliary adjuncts which, so long as those activities continue, and for the purposes of clause 16, are embraced within the expression "Canadian Pacific Railway" or the main line.

Both the main line and the branch lines are expressly dealt with in the charter and are specifically distinguished from one another. With a full appreciation of this distinction the tax exemption was limited to the main line. The items mentioned in clause 16 are merely a detailed enumeration of what, besides the right-of-way, roadbed and trackage of the main line, are its ordinary and necessary facilities. That they are required to be contained within the normal right-of-way is not suggested. Joint facilities may present questions of some nicety; they will, in any event, call for an appreciation of their particulars, and their inclusion in any degree will depend upon considerations which we are not called upon here to deal with.

That the same scope of property on the branch lines, that is, right-of-way, trackage, etc., can, in the manner claimed, be brought within clause 16 as mere facilities of the main line and thus effect the exemption of virtually the entire branch-line system throughout Saskatchewan and Alberta seems scarcely to call for serious comment. Nothing that has been brought up in the argument could have been absent from the minds of those who drafted the clause as well as the charter and the legislation bringing the enterprise into existence. It was contemplated that these subsidiary lines would be the instrumentalities for opening up the prairies; that there would necessarily be associated operation over both divisions of the railway system; and that there would be interrelated functioning. Foreseeing all this, the negotiators agreed that the trunk line should be exempt and the branch lines not exempt. Once a branch line is constructed as such and so long as it retains the functions which it was designed to perform, it is subject to taxation as all other property within the Province.

I would, therefore, dismiss the appeals with costs.

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LOCKE J.:—The matter to be determined is as to the construction of clause 16 of the agreement of October 21, 1880, which, so far as it is necessary to consider its terms, reads:

> The Canadian Pacific Railway, and all stations: and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof . . . shall be forever free from taxation by the Dominion, or by any Province hereafter to be established or by any Municipal Corporation therein.

The question as to whether this exemption extends not only to the railway as described in the Act 37 Vict., c. 14, or whether it extends to the branch lines constructed either under the powers conferred by clause 14 of the contract or by other authority, was not rendered *res judicata* as between the parties to this litigation by the decision of this Court upon the reference (1), or by the judgment of the Judicial Committee (2), dismissing the appeal taken by the Attorney General for Saskatchewan by special leave upon two of the questions involved in that reference. In so far as the defendant municipalities are concerned, they were not parties to and were not heard upon the reference and, in so far as the present appellant is concerned, even though it was represented on the hearing before the Court of Appeal for Saskatchewan when the matter was considered (3) and appealed to this Court from the judgment of the Court of Appeal and was represented in the proceedings before the Judicial Committee, I think it is not bound either by the opinions expressed by the Judicial Committee or by this Court. In this respect, matters referred to the Court of Appeal for Saskatchewan under *The Constitutional Questions Act* of that Province (now R.S.S. 1953, c. 78) do not differ from references to this Court under what is now s. 55 of the *Supreme Court Act*,

(1) *Canadian Pacific Railway Company v. The Attorney General for Saskatchewan*, [1951] S.C.R. 190, [1951] 1 D.L.R. 721, 67 C.R.T.C. 203, [1951] C.T.C. 26.

(2) *Attorney-General for Saskatchewan v. Canadian Pacific Railway Company*, [1953] A.C. 594, [1953] 3 D.L.R. 785, [1953] C.T.C. 281, 10 W.W.R. (N.S.) 220.

(3) *Re Taxation of Canadian Pacific Railway Company*, [1949] 1 W.W.R. 353, [1949] 2 D.L.R. 240, 63 C.R.T.C. 145.

R.S.C. 1952, c. 259. As to references under the last-mentioned statute, see *In re References by the Governor-General in Council* (1), *per* Duff J. at p. 588; *In Re Criminal Code* (2), *per* Duff J. at p. 451.

While upon the reference, by consent of the parties who were represented, a number of documents which came into being prior to the making of the contract in question were received in evidence as an aid to the interpretation of clause 16 and these documents were not put in evidence in the present actions, I remain of the opinion expressed by all of the members of the Court that the exemption, except to the extent hereinafter stated, does not extend to the branch lines of the Canadian Pacific Railway in the Province of Saskatchewan. The qualification to the answer to the first question excepted

> such properties, if any, real or personal, enumerated in clause 16, situate upon the branch lines in Saskatchewan as are entitled to the benefit of the exemption from taxation as being required and used for the construction and working of the railway described in sections 1, 2 and 3 of the Act 37 Vict. c. 14.

This answer, so expressed, was adopted by the majority of the members of the Court hearing the reference.

While it does not affect any of the questions to be determined upon the present appeal, I think it should be pointed out that question 1 was directed only to property of the nature referred to situate on the branch lines, and it was to this alone that the answer was directed. No opinion was expressed as to whether the right to the exemption might be asserted as to properties not situate upon a branch line such as the Milestone pumping-station but which might be, within the meaning of clause 16, required and used for the operation of the main line of the Canadian Pacific Railway.

In my opinion, the "stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working" of "the Canadian Pacific Railway" include property of the nature referred to, whether situate upon the main line or elsewhere, including branch lines. I am

(1) (1910), 43 S.C.R. 536, affirmed *sub nom. Attorney-General for Ontario et al. v. Attorney-General for Canada et al.*, [1912] A.C. 571, 3 D.L.R. 509.

(2) (1910), 43 S.C.R. 434, 16 C.C.C. 459.

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unable, with great respect for the differing opinions expressed in the Court of Appeal by Mr. Justice Gordon and by the learned trial judge, to agree that this enumeration applies only to properties of this nature situate upon the branch lines. While undoubtedly capable of that interpretation, my conclusion is that the enumeration was included for the purpose of making it clear that it was not merely the right-of-way of the main line but all of the properties and facilities needed for working it as an entity that were to be exempted from taxation.

At the hearing of the present matter, evidence was given of a fact that is self-evident—that, without the traffic supplied by the branch lines which connect with the main line of the Canadian Pacific Railway, the operation would be financially an impossibility. It is not, however, contended on the argument addressed to us that the exemption extends to any of the properties in question by reason of the fact that the traffic they provide is necessary in this sense for the operation of the railway. The ground advanced may be stated broadly as being that the various properties the taxation of which is in question are necessary and used for the physical operation of the main line.

While in the action against the Town of Estevan, only some $2\frac{1}{2}$ miles of the roadway of the Portal subdivision and $1\frac{1}{2}$ miles of the roadway of the Estevan subdivision are involved, the appellant claims that the roadway of both of these subdivisions, from Roche Percee to Pasqua and from Estevan to Kemnay, is exempt. The various other properties at Estevan, which include the station grounds some 82 acres in extent, are claimed to be exempt on the footing that they are used for the various purposes of keeping the roadway and tracks of the two subdivisions in proper operating order, in handling the receipt and delivery of freight traffic, providing accommodation for section-men, maintaining and repairing locomotives used to haul coal from Roche Percee and Bienfait, storing coal other than lignite for locomotives operating in and around Estevan, or passing through Estevan on their way to and from the main line, and for switching and marshalling trains, including cars of coal, coming from Bienfait and Roche Percee.

As shown by the evidence of Mr. C. E. Lister, the general manager of the Prairie Region of the railway company, the Estevan subdivision was built in the year 1892 and the Portal subdivision in the following year. Neither of these subdivisions follows the most direct route to the main line, the Portal subdivision running in a northwesterly direction from North Portal at the border to Pasqua, while the Estevan subdivision runs for a considerable part of the route almost due east to Napinka in Manitoba, and thence in a northerly direction to Kemnay. It is not suggested that either of these branches was built for the purpose of securing lignite coal from any of the coal fields in the vicinity of Estevan for use by the railway company. The coal found at Bienfait and Roche Percee is lignite and unsuitable for use in locomotives. There was, however, a market in Winnipeg for this coal, commonly described as Souris coal, as early as 1887, and very large quantities have been supplied to that market as well as to other places in western Canada since the branches were built. The main line had been completed in 1885 and it was, according to Mr. Lister, not until about the year 1930 that this coal was used for company purposes at Winnipeg, which was one of the first places on the main line where it was so used. The coal has since been used in stationary boiler-plants in roundhouses on the main line from Fort William to Swift Current to produce steam power for its shops and heat for its railway cars and station buildings.

Of the lignite coal hauled from these fields over these two branches, about 9 per cent. is, according to Mr. Lister, carried for these uses on the main line: the remainder is carried for commercial purposes at the instance of others. Of the total traffic carried over these lines, the coal so carried for company purposes is an insignificant percentage.

The function discharged by the Portal and Estevan branches in carrying this coal for company service is the main basis of the claim for exemption. It will be apparent from the above statement of facts that no such claim could have been advanced between the years 1892 and 1893, when these branches were respectively built, and the year 1930, being the earliest date at which it is suggested that the coal was carried for these purposes. Presumably before 1930, the coal used in the roundhouses and stations on this

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portion of the railway was bituminous coal, of which there are great quantities in western Canada, obtained elsewhere. It is the action of the company itself in making the necessary changes in its stationary boiler-plants to enable lignite coal to be used, and the consequent demand for this fuel from Bienfait and Roche Percee which are the basis of the claim for the exemption. If the argument advanced were to be carried to its logical conclusion, then long after the construction of an extensive branch line connecting with the main line in Saskatchewan built for the usual purpose of obtaining profitable traffic for the company, the whole line could be rendered exempt from taxation by the utilization of timber at the point on the line furthest distant from the main line suitable for the production of railway ties, material in constant use upon the main line of the railway, and the transport of these to the main line. Similarly, the establishment of a small metal-fabricating plant at such a point, producing material required and used on the railway tracks on the main line, might be made the basis of a claim for exemption of the whole line. The contract should not, in my opinion, be construed in a manner which would result in upholding any such claim.

We have been told that these are in the nature of test cases but, while this may be so, it is undesirable, in my opinion, to attempt to lay down any rule applicable in all circumstances for the construction of clause 16. Speaking generally, the extension of the exemption granted to the main line to other properties required and used for its construction and working was, I think, designed to cover such situations as would result by the placing of railway shops or roundhouses off the principal right-of-way and connected by a spur line with the main line, or gravel pits or quarries situate at a distance from the main line from which material could be obtained for the construction and maintenance of the right-of-way. I agree with Mr. Justice Procter that, if the pumping-station at Milestone on Moose Jaw Creek had been built or was maintained in order to obtain a supply of water to be conveyed to the main line for use in locomotives or other company purposes, this would fall within the exemption, even though some of the water were diverted for use on the Portal subdivision.

The common and universal principle for the interpretation of an agreement is that it should receive that construction which its language will admit which will best effectuate the intention of the parties (Chitty on Contracts, 21st ed. 1955, p. 144) and, applying this rule to the construction of the contract in question, it is my opinion that the intention of the parties to this contract was that the exemption should extend only to stations, workshops and other properties of the nature referred to, the primary purpose of the acquisition or construction or maintenance of which was to be of use in the construction or operation of the main line as an entity. In the case of the right-of-way of these two branch lines, it is quite clear from the evidence that the purpose of bringing them into being was to obtain profitable traffic for the undertaking of the railway company, and the various stations, workshops and other buildings erected at various points along the subdivisions were designed to handle such traffic as should develop. Neither at the time the subdivisions were built nor at any time thereafter has the primary purpose of their operation or maintenance been to carry the comparatively small quantity of traffic resulting from the use of this lignite coal upon the main line.

The claim to exemption of the roundhouses, stations and other buildings referred to is made upon the ground that they are required and used for the working of the main line since they are used variously for the maintenance of the roadway of the two subdivisions, the servicing of rolling stock required and used for the working of the main line, to provide facilities for company employees who perform the work of billing the traffic and the marshalling of trains which are destined for the main line, work which must be done, it is said, on the subdivisions in order to avoid congestion, delays and confusion on the main line.

In my opinion, none of these claims can be sustained. The services referred to are made necessary not by reason of the operation of the main line as an entity but by reason of the operation of that line and of the subdivisions in question and of traffic coming on to them from other sources, such as the Soo Line and the Neptune and other branches. The primary purpose of the construction and maintenance of these facilities was and is the handling of

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traffic of the nature thus referred to and of incoming traffic brought to places upon the subdivisions from elsewhere.

As to the Municipality of Caledonia, the claim to exemption for that part of the railway line of the Portal subdivision within its boundaries should, in my opinion, fail for the reason I have stated. As to the water-supply site and pump-house, the water made available is not used by locomotives operating upon the main line and these facilities were not constructed nor are they maintained for the purpose of its operation as such, but rather of the Portal subdivision.

As to the basis of the claim for exemption advanced against the Rural Municipality of Swift Current, while the Empress subdivision and, to a lesser extent, the Vanguard and Shamrock subdivisions are used as alternate routes for main line traffic, it is perfectly plain from the evidence that this was not the primary purpose for the construction of these branches, nor is it of their maintenance as branch lines of the railway described in the statute of 1874. The Empress branch, according to the evidence, is one of the best producers of profitable traffic in the western system of the railway company and the fact that at times main line trains are routed over its right-of-way, or that a particularly fine variety of sand required for use generally upon the main line is found and transported to that line from one of the places upon the branch, cannot justify the claim for exemption, in my opinion, for the reasons I have stated.

I would dismiss these appeals with costs.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brothers Locke and Nolan and would dispose of the appeals as they propose.

NOLAN J.:—The Canadian Pacific Railway Company, as plaintiff, brought three actions against the respondent municipalities, which were tried together, and the Company now appeals from the judgments of the Court of Appeal for Saskatchewan, which, by a majority (Gordon J.A. dissenting), dismissed the appeals of the Company from the judgments of the trial judge and allowed the cross-appeals of the respondents the Town of Estevan and the Rural Municipality of Caledonia.

In each of the actions the Canadian Pacific Railway Company (hereinafter sometimes referred to as "the Company") claimed exemption from assessment and taxation for the years 1948 to 1953 inclusive in respect of certain railway properties situate within the boundaries of the respondent municipal corporations. The basis of the claim was that such property was exempted from taxation by reason of the provisions of clause 16 of the agreement entered into between the Government of Canada and George Stephen and others dated October 21, 1880, and ratified by the Parliament of Canada in 1881 by 44 Vict., c. 1, which agreement will be hereinafter referred to as "the contract".

The appellant further claimed an injunction restraining the respondent municipalities from levying, or attempting to levy, any taxes in respect of certain properties situate in the respondent municipalities and claimed repayment from the Rural Municipality of Swift Current of sums of money paid in respect of taxation levied against it during the years in question. The relief sought by way of injunction applied to the years 1948 to 1953, as well as to subsequent years.

Clause 16 of the contract provides as follows:

16. The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

Before dealing with the reasons for judgment in the Courts below it should be pointed out that in 1948, by order in council, the Government of Saskatchewan referred to the Court of Appeal for Saskatchewan (1) four questions concerning the exemption of the Company under clause 16 of the contract and its application in the Province of Saskatchewan.

(1) *Re Taxation of Canadian Pacific Railway Company*, [1949] 1 W.W.R. 353, [1949] 2 D.L.R. 240, 63 C.R.T.C. 145.

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On appeal to this Court (1) the first question and the answer given by the majority were as follows:

1. Does clause 16 of the contract set forth in the Schedule to Chapter 1 of the Statutes of Canada, 44 Victoria (1881), being an Act respecting the Canadian Pacific Railway, exempt and free from taxation the stations and station grounds, work shops, buildings, yards, and other property, used for the working of the branch lines of the Canadian Pacific Railway Company situated in Saskatchewan?

Answer: No, except such properties, if any, real or personal, enumerated in clause 16, situate upon the branch lines in Saskatchewan as are entitled to the benefit of the exemption from taxation as being required and used for the construction and working of the railway described in sections 1, 2 and 3 of the Act 37 Vict. cap. 14.

The third question and the answer given by the majority were as follows:

3. Are the provisions of the said *The Village Act, 1946, The Rural Municipalities Act, 1946, The Local Improvement Districts Act, 1946, The City Act, 1947,* and *The Town Act, 1947,* all as amended, relating to the assessment and taxation of the real estate of railway companies, operative in respect of branch lines of Canadian Pacific Railway Company in the Province of Saskatchewan constructed pursuant to clause 14 of the said contract?

Answer: Yes, except in respect of such real estate, if any, situate upon branch lines constructed pursuant to clause 14 of the contract as is entitled to the benefit of the exemption from taxation under clause 16 as being required and used for the construction and working of the railway as described in sections 1, 2 and 3 of the Act 37 Vict. cap. 14.

Questions 2 and 4 related to questions of business tax and are irrelevant to the matters under discussion.

On the appeal to this Court on the reference it was unnecessary to consider particular properties and the present actions instituted by the appellant were in an endeavour to have the answers of this Court applied to particular properties of the appellant.

On appeal before this Court the appellant did not contend that all of its properties within the respondent municipalities were entitled to exemption as coming within the words "required and used" for the working of the Canadian Pacific Railway. It thus becomes necessary to discuss the particular properties in detail.

(1) *Canadian Pacific Railway Company v. The Attorney General for Saskatchewan,* [1951] S.C.R. 190, [1951] 1 D.L.R. 721, 67 C.R.T.C. 203, [1951] C.T.C. 26.

The Portal subdivision of the appellant extends from Pasqua, on the main line near Moose Jaw, to the Canada-United States border, where it connects with the Soo Line. It runs through the town of Estevan.

The Estevan subdivision runs from Estevan to Kemnay, on the main line near Brandon.

The evidence discloses that large quantities of lignite coal come from the Souris Valley coal fields at Roche Percee and Bienfait near Estevan. This coal is hauled over the Portal and Estevan subdivisions for use in stationary boiler-plants in roundhouses at Fort William, Ignace, Kenora, Winnipeg, Brandon, Broadview, Regina, Moose Jaw and Swift Current, all situate on the main line of the Company. It is not used at Estevan or at any station on the Estevan or Portal subdivisions. These stationary boiler-plants generate steam power for railway shops and steam heat for railway cars, stations and other railway buildings. The plants are adapted to the use of lignite coal, which is the most economical available and obtainable only in the Souris area.

Coal from the Bienfait and Roche Percee coal fields, which is to be delivered to main line points to the west of Broadview, comes into Estevan and moves north over the Portal subdivision to Pasqua and then along the main line to its destination. Coal from these fields, which is to be delivered to main line points east of Broadview, moves over the Estevan subdivision to Kemnay, on the main line, and then to its destination.

The appellant contends that the roadway of the Portal and Estevan subdivisions is exempt as being required and used for the working of the main line.

The Company also contends that 2.55 miles of roadway of the Portal subdivision and 1.51 miles of roadway of the Estevan subdivision, together with the station, station grounds, work shops, buildings, yards and other properties situate in and assessed by the respondent Town of Estevan are required and used for the working of the main line and are, therefore, exempt from taxation under the provisions of clause 16 of the contract.

The Company also contends that 8.333 miles of roadway situate in and assessed by the respondent Rural Municipality of Caledonia are required and used for the working

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of the main line and are, therefore, exempt. A claim for exemption on the same grounds is made in respect of the Milestone water-supply site and pumphouse, an area of 26.98 acres on Moose Jaw Creek, from which water is pumped approximately 2 miles into a water tower alongside the tracks in the town of Milestone, which is the last watering place before Moose Jaw and is used by all locomotives proceeding to the main line of the Company.

The Empress subdivision commences at Java on the main line of the Company west of Swift Current and runs in a north-westerly direction to Empress, Alberta. At that point it connects with the Bassano subdivision and runs to Bassano, Alberta, thus forming a single-track loop with the main line of the Company. It is submitted by the Company that the Empress subdivision is exempt as being required and used for the working of the main line.

The Company also contends that 8.707 miles of the roadway of the Empress subdivision, together with the station and station grounds, the section, tool and bunk houses at Cantuar, situate in and assessed by the respondent Rural Municipality of Swift Current, are required and used for the working of the main line and are, therefore, exempt from taxation.

The Vanguard subdivision runs southerly from the city of Swift Current to Meyronne and the Shamrock subdivision runs east from Hak on the Vanguard subdivision to Archive on the Expanse subdivision, which runs northerly to the main line of the Company near Moose Jaw. The Company contends that the roadway of the Vanguard subdivision north of Hak, consisting of 17.539 miles of roadway within the respondent Rural Municipality of Swift Current, together with the roadway of the Shamrock subdivision, consisting of 3.504 miles of roadway, and the station and station grounds, section, bunk and tool houses at Wymark and the station and station grounds at Dunelm, situate in and assessed by the respondent Rural Municipality of Swift Current, are also exempt from taxation as being required and used for the working of the main line.

The learned trial judge dismissed the action against the respondent Rural Municipality of Swift Current and held that none of the property enumerated in the statement of

claim in the action against that respondent was required and used for the construction and working of the Canadian Pacific Railway, as that railway is defined in the contract. The learned trial judge further held in the action against the respondent Town of Estevan that all the properties claimed by the appellant to be exempt from taxation, other than the roadway consisting of 4.5 miles, were not presently subject to taxation and were not so subject during the years 1948 to 1953 inclusive. The learned trial judge also held in the action against the respondent Rural Municipality of Caledonia that the water-supply site and the pump-house were exempt from taxation, but that the roadway of the appellant within the respondent municipality consisting of 8.333 miles was subject to taxation.

In the Court of Appeal Martin C.J.S., with whom McNiven J.A. and Culliton J.A. concurred, dismissed the appeals of the appellant and allowed the cross-appeals of the respondents the Town of Estevan and the Rural Municipality of Caledonia and held that the properties in question were not required and used for the construction and working of the Canadian Pacific Railway, as that railway is defined in the contract, and that the appellant was, therefore, not entitled to the benefit of the exemption provided in clause 16 thereof. With this view Procter J.A. agreed. Gordon J.A. would have allowed the appeals and dismissed the cross-appeals and was of the opinion that a station on the main line of the railway of the appellant would be entitled to the exemption even if no longer required and used for the construction and working of the main line. The learned judge further held that the stations and station grounds, buildings, yards and other properties referred to in clause 16 of the contract refer to those on the branch lines and, when required and used for working of the main line, are exempt from taxation. With regard to the roadbed and right-of-way of the branch lines themselves, Gordon J.A. held that they were exempt from taxation, under whatever authority they were built, if required and used in the working of the main line.

The appellant contended before this Court that all of the properties indicated above, situate within the respondent municipalities, together with the roadway of the branch lines, were required and used for the working of the

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Canadian Pacific Railway, as that railway is defined in the contract, and came within the exemption in clause 16.

As has been set out above, questions 1 and 3 on the reference to the Court of Appeal for Saskatchewan, *supra,* and to this Court, *supra,* pertain particularly to clause 16 of the contract. In answer to question 1 this Court and the Court of Appeal for Saskatchewan both stated that the station and station grounds, work shops, buildings, yards and other property used for the working of the branch lines of the Canadian Pacific Railway Company situate in Saskatchewan were subject to taxation. This Court, however, went on to make an exception of those properties, if any, real or personal, enumerated in clause 16, situate upon the branch lines in Saskatchewan, which are entitled to the exemption as being required and used for the construction and working of the railway as described in ss. 1, 2 and 3 of the Act 37 Vict., c. 14. A similar exception was included by this Court in the answer to question 3.

On appeal to the Privy Council (1), the judgment of the Judicial Committee was largely limited to the constitutional aspect of the matter and to the application of the exemption to business taxes.

The judgment of this Court was affirmed and the answers given by this Court were in no way varied by the judgment of the Judicial Committee.

It will be seen that, while the judgment of the Judicial Committee is, in the main, irrelevant to the issues involved in this appeal, nevertheless the judgment of this Court was affirmed and it remains to be decided what specific property of the Company falls within the exception set out in the answers given by this Court to questions 1 and 3.

By the Statutes of Canada 1874, 37 Vict., c. 14, the Parliament of Canada passed *An Act to provide for the construction of the Canadian Pacific Railway.* The preamble refers to the agreement with the Province of British Columbia with respect to the construction of the railway and also to a resolution of the House of Commons that the railway should be constructed and worked by private enter-

(1) *Attorney-General for Saskatchewan v. Canadian Pacific Railway Company,* [1953] A.C. 594, [1953] 3 D.L.R. 785, [1953] C.T.C. 281, 10 W.W.R. (N.S.) 220.

prise, assisted by such liberal grants of land and such subsidy in money, or other aid, as the Parliament of Canada should thereafter determine.

Section 1 provides that a railway, to be called the "Canadian Pacific Railway", shall be constructed from some point near to and south of Lake Nipissing to some point in British Columbia on the Pacific Ocean, both of the points to be determined and the course and line of the railway to be approved by the Governor in council.

Section 2 provides that the whole of the said railway, for the purpose of its construction, shall be divided into four sections; the first section to begin at a point near to and south of Lake Nipissing, and to extend towards the upper or western end of Lake Superior; the second section to begin at some point on Lake Superior, to be determined by the Governor in council, and connecting with the first section, and to extend to Red River, in the Province of Manitoba; the third section to extend from Red River, in the Province of Manitoba, to some point between Fort Edmonton and the foot of the Rocky Mountains, to be determined by the Governor in council; the fourth section to extend from the western terminus of the third section to some point in British Columbia on the Pacific Ocean.

Section 3 provides for the construction of two branch lines:

First.—A branch from the point indicated as the proposed eastern terminus of the said railway to some point on the Georgian Bay, both the said points to be determined by the Governor in Council.

Secondly.—A branch from the main line near Fort Garry, in the Province of Manitoba, to some point near Pembina on the southern boundary thereof.

Section 4 provides that these two branch railways shall be considered as forming part of the Canadian Pacific Railway, and as so many distinct sections of the said railway, and shall be subject to all the provisions thereafter made with respect to the said Canadian Pacific Railway, except in so far as otherwise provided by the Act. It is to be observed that the branch railways referred to in s. 3 of the Act, *supra,* are not in the Province of Saskatchewan.

By the Statutes of Canada 1881, 44 Vict., c. 1, an Act was passed respecting the Canadian Pacific Railway. By s. 1 of the Act the contract, appended thereto as a schedule, was

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approved and the Government was authorized to carry out the conditions contained in the contract.

Section 2 authorized the Government to incorporate the persons named in the contract with the corporate name of the "Canadian Pacific Railway Company" and to grant to them a charter conferring upon them the powers contained in the contract.

Under s. 4 the Government was authorized to permit the admission, free of duty, of steel rails and other material to be used in the original construction of the Canadian Pacific Railway, as defined in 37 Vict., c. 14.

Clause 1 of the contract, annexed as a schedule to the Act, after defining Eastern, Lake Superior, Central and Western sections, concludes as follows: "And that the words 'the Canadian Pacific Railway', are intended to mean the entire railway, as described in the Act 37th Victoria, chap. 14." Clause 1 of the contract is also declared to be "for the better interpretation of this contract" and it seems clear that wherever the words "Canadian Pacific Railway" occur in the contract they must be construed to mean the main line, consisting of the four sections referred to above, together with the two branch lines described in 37 Vict., c. 14, unless the language used in any clause plainly indicates some other construction.

The construction of branch lines is referred to in two clauses of the contract, namely, clauses 11 and 14. In clause 11 the Company is authorized to locate a part of the land grant "on each side of any branch line or lines of railway to be located by the Company" in substitution for sections found to be "not fairly fit for settlement".

Clause 14 provides that the Company shall have the right, from time to time, to construct branch lines of railway and that the Government shall grant to the Company the lands required for the roadbed of such branches and for the stations, station grounds, buildings, work shops, yards and other appurtenances requisite for the efficient construction and working of such branches. Clause 14 contains no obligation on the part of the Company to construct any branch lines, nor is such an obligation contained in any other part of the contract.

It should be observed at the outset that s. 24 of the *Saskatchewan Act,* 1905, 4-5 Edw. VII (Can.), c. 42, provided that the powers granted to the Province established thereby "shall be exercised subject to the provisions of section 16 of the contract set forth in the schedule to chapter 1 of the statutes of 1881, being an Act respecting the Canadian Pacific Railway Company".

I have made no reference to the provisions of the various taxing statutes of the Province of Saskatchewan, empowering the respondent municipalities to assess and to impose the taxes in question. I assume that it is not in dispute that the respondent municipalities have the power to make the assessments and levy the taxes in question, assuming that the exemption is not applicable.

It is clear that for the purposes of these appeals the relevant words of clause 16 of the contract, in part, are:

> The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the . . . working thereof . . . shall be forever free from taxation . . .

Before this Court the points which were presented in support of the claim for exemption were:

(a) the carriage of materials or supplies originating at a point on a branch line and used for the operation of facilities on the main line;

(b) furnishing supplies at points on the branch lines to enable rolling stock to carry on their operations on the main line;

(c) branch lines furnishing alternative routes for running trains between points on the main line, either because of breakdowns or for the more efficient dispatch of traffic.

Before dealing with the specific properties or roadways for which exemption is claimed, it should be stated that it is conceded that the branch lines of the Company are lines of railway primarily serving their own territory and, in the course of their own operations, carrying traffic, both freight and passenger, to the main line, to be transported to points in Canada and elsewhere. The proposition is that the functions of the branch lines are so related to the main line that they have become subordinate facilities and are "other property" which, so long as these functions continue, are embraced, for the purposes of clause 16 of the contract, within the expression "Canadian Pacific Railway", meaning the main line of the system.

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By the Act of 1874, providing for the construction of the Canadian Pacific Railway, and the subsequent legislation of 1881 with the contract annexed, both main line and branch lines are expressly dealt with and distinguished one from the other. With a full appreciation of this distinction, the tax exemption was limited to the main line and the branch lines named in s. 3 of the statute. As has been shown, the words "the Canadian Pacific Railway" are stated in clause 1 of the contract as being intended to mean the entire railway as described in the Act of 1874.

Nothing that has been brought up in the argument could have been absent from the minds of those who drafted the legislation bringing the enterprise into existence. It must have been contemplated that branch lines would be the instrumentalities opening up the vast prairie region and that there would necessarily be integrated operation over both portions of the railway and interrelated functioning. With all this in mind the negotiators agreed that the main line would be exempt and that once a branch line was constructed as such, and so long as it functioned for that purpose, it would be subject to taxation.

It is plain on the appeal to this Court on the reference, *supra,* that there was nothing in the statute 1874, c. 14, which could be taken to include branch lines and that the words "Canadian Pacific Railway" are restricted in their meaning to include only the main line and the branch lines named in s. 3 of the statute.

The remaining matter for determination is the meaning of the words "required and used for the . . . working" of the railway described in ss. 1, 2 and 3 of the Act 37 Vict., c. 14, a question which arises by reason of the limitation placed by this Court in the answers to the questions on the reference with respect to properties, if any, real or personal, situate on branch lines in Saskatchewan.

The appellant contends that by clause 7 of the contract the Company is obligated to work and run the railway efficiently and that any property which would assist the Company in efficiently operating the railway should be exempt. It was further contended that the property which might be required for such efficient operation must largely be a matter of judgment and the judgment must be that of the Company; also it was said that the test of what is

required is not what is absolutely necessary or indispensable, but what is reasonably required, and that good faith is a necessary element. Reliance was placed by the appellant on *City and South London Railway Company v. London County Council* (1). In my view this authority may be distinguished on the ground that it involved an original taking of land, which is not the case here.

It may be useful to apply the arguments of the appellant to the properties in question situate within the respondent municipalities.

It is contended by the appellant that the coal required for stationary boiler-plants is hauled to the main line in substantial quantities from the Souris area over parts of the roadway of the Portal and Estevan subdivisions, which runs through Estevan, and that consequently the roadway of the Portal and Estevan subdivisions is "required and used" for the working of the main line and is exempt.

The evidence discloses that the main line boiler-plants have been adapted to the use of lignite coal, which is produced in the Souris area and is an economical form of fuel. The haulage of coal over the Portal subdivision represents a small proportion of the total freight traffic over that branch line. Nevertheless a large tonnage is hauled. The evidence discloses that the Portal subdivision was built in 1893 and the principal purpose of its construction was to give the Company the shortest route between the cities of Minneapolis and St. Paul and the Pacific north-west. A secondary purpose was to carry coal commercially from the developing Souris coal field. As early as 1887 coal from that field was being carried down the Souris River to Winnipeg, but it was not until 1930 or 1935 that coal from this field was first used by the Company in its main line boiler-plants.

I am unable to agree with the contention that the Portal and Estevan subdivisions are "required and used" for the working of the main line because lignite coal is carried over those branch lines to provide fuel for stationary boiler-plants on the main line. To agree would be to extend the argument for exemption to other branch lines transporting

(1) [1891] 2 Q.B. 513.

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material and supplies to main line points. Neither do I agree with the contention that the roadway in the Portal and Estevan subdivisions, together with the stations, station grounds, houses and other buildings located in the respondent Town of Estevan, can be said to be exempt. Clearly they are used for the convenience of passengers, for the maintenance of the roadway of the two subdivisions and for the servicing of rolling stock, but, in my view, it cannot be said that they are also required and used for the working of the main line.

What I have said regarding the roadway of the Portal subdivision applies equally to the roadway in the respondent Rural Municipality of Caledonia, which roadway is part of the Portal subdivision. Milestone water-supply site and pumphouse, situate in this respondent municipality, although the last watering point before Moose Jaw, are, in my view, not entitled to exemption as being required and used for the working of the main line.

As has been pointed out, in the Rural Municipality of Swift Current an alternative route for main line traffic was built in 1914 between Java, near Swift Current, and Bassano in Alberta. It is used to take care of overflow main line traffic and transports a special kind of subsequently discovered sand from the Empress area to the main line. This alternative route is some distance from the main line. The evidence is that it was constructed as a branch line and, in my opinion, is not a part of the Canadian Pacific Railway which the contractors were obligated to build under the contract and is not required and used for the working of the main line.

What I have said regarding the liability to taxation in respect of properties in the town of Estevan applies equally to those properties in the Vanguard, Shamrock and Stewart Valley subdivisions in the respondent Rural Municipality of Swift Current and, in my view, they are not exempt. The reasoning which I have applied to the Empress subdivision applies equally to the roadway of the Vanguard and Shamrock subdivisions, running south from Swift Current to Hak, then east to Archive, then north to Curle, which, while it is not a regular alternative route to the

main line, is used as an emergency route when there are breakdowns in the main line. It is a branch line and is not entitled to exemption from taxation.

I would dismiss the appeals with costs.

Appeals dismissed with costs.

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Solicitor for the plaintiff, appellant: E. H. M. Knowles, Regina.

Solicitors for the defendants, respondents: MacPherson, Leslie & Tyerman, Regina.

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*Dec. 15, 19
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Apr. 12

ELVEN J. BERKHEISER (*Defendant*) ..APPELLANT;

AND

GLADYS BERKHEISER AND FLORENCE GLAISTER (*Defendants*) .. } RESPONDENTS;

AND

LEONARD B. THOMSON, RAY NEWSON AND DOUGLAS CAMPBELL (*Plaintiffs*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Mines and minerals—Petroleum and natural gas "lease"—Terms and effect of document—Ademption of legacy.

A document whereby the owner of land "doth grant and lease . . . all the petroleum and natural gas . . . within, upon or under the lands . . . together with the exclusive right and privilege to explore, drill for, win, dig, remove, store and dispose of, the leased substances", with special terms as to duration, operations and payments, is not an out-and-out conveyance of the minerals *in situ*, and does not have the effect of adeeming *pro tanto* a devise of the land. *McColl-Frontenac Oil Company Limited v. Hamilton et al.*, [1953] 1 S.C.R. 127, distinguished.

Per Rand and Cartwright JJ.: The document under consideration in this case had the effect that the title to the oil and gas remained in the owner subject to the incorporeal right of the "lessee", which right was extinguished on the termination of the lease. The rents and royalties were obviously profits and, like rent from a leasehold, were embraced in the devise. The instrument created either a *profit à prendre* or an irrevocable licence to search for and to win the substances named. It was unnecessary in this case to decide whether petroleum and natural gas *in situ* were to be classed as corporeal hereditaments and sold as land.

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*PRESENT: Rand, Kellock, Locke, Cartwright and Nolan JJ.