THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFFS) ... } APPELLANTS;

AND

HIS MAJESTY THE KING (DEFENDANT) ..... } RESPONDENT.

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*Dec. 5.
*Dec. 11.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Appeal—Jurisdiction—Discretion of Governor in Council—Stated case—Railway subsidies—Construction of statute—3 Edw. VII. c. 57—Conditions of contract—Estimating cost of constructing line of railway—Rolling stock and equipment.

Where the jurisdiction of the Supreme Court of Canada to entertain an appeal was in doubt, but it was considered that the appeal should be dismissed on the merits, the court heard and decided the appeal accordingly.

(Cf. *Bain* v. *Anderson & Co.* (28 Can. S.C.R. 481).

The provisions of the Act, 3 Edw. VII. c. 57, authorizing the granting of subsidies in aid of the construction of railways are not mandatory, but discretionary in so far as the grant of the subsidies by the Governor in Council is concerned.

On a proper construction of the said Act it does not appear to have been the intention of Parliament that the cost of rolling stock and equipment should be included in the cost of construction in estimating the amount of subsidy payable to the company in aid of the "Pheasant Hills Branch" of their railway under the provisions of that Act, notwithstanding that the said Act did not specially exclude the consideration of the cost of equipment in the making of such estimate as had been done in former subsidy Acts with similar objects, and that the Governor in Council imposed the duty of efficient maintenance and equipment of the branch as a condition of the grant of the subsidy.

APPEAL from the judgment of the Exchequer Court of Canada, on a referred case ordering judgment to be entered in favour of the respondent, defendant, and that there should be no costs to either party.

A stated case was referred to the Exchequer Court by the Minister of Railways and Canals, under section

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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23 of the "Exchequer Court Act." It recited the Act, 3 Edw. VII. ch. 57; certain orders in council in respect of the Pheasant Hills branch of the company's railway mentioned in sub-section 72 of the second section of the Act and the agreement for its construction and operation.

The question to be decided was whether or not, on the proper construction of the said Act, contract and documents mentioned, the cost of the necessary rolling-stock and equipment of the line should be included in estimating the subsidy payable to the company under the Act.

By the judgment appealed from it was held that the Crown was under no obligation to pay subsidy estimated upon a basis including the cost of rolling-stock and equipment as part of the expense of constructing the line of railway.

The material parts of the documents mentioned and the questions discussed on the argument of the appeal are referred to in the judgments now reported. Objection was made to the jurisdiction of the Exchequer Court to review the discretion vested in the Governor in Council by the ninth section of the Act, 3 Edw. VII. ch. 57.

Lafleur K.C. and *Lewis* for the appellants.

Newcombe K.C., Deputy Minister of Justice, for the respondent.

GIROUARD J.—The appeal is dismissed with costs. I concur for the reasons stated by my brother Davies.

DAVIES J.—I entertain very grave doubts as to the jurisdiction of the Exchequer Court and consequently

of this court to decide the questions submitted by the special case agreed upon between the parties.

In view, however, of the firm conclusion I have reached upon the merits and that my doubts as to our jurisdiction do not appear to be shared by all the members of this court and that the point does not seem to have been taken before the Exchequer Court, but arises under a case stated between the parties, I will shortly state my reasons for coming to the conclusion I have reached.

The question is one to my mind purely of the construction of the Act, 3 Edw. VII. ch. 57, granting railway subsidies.

The Act is not mandatory, but discretionary so far as granting the subsidies are concerned. The discretion is vested in the Governor in Council and the second section enacts that he may grant a subsidy. That discretion is limited to the objects and purposes designated by the statute and it is, of course, within those alone that he can exercise his discretion. If the statute means that the subsidies are to be limited to the cost of the construction of the road and its language does not include the cost of rolling stock or equipment the Governor in Council could not exercise any discretion beyond the statutory limitation. In exercising such discretion he could, I have no doubt, impose such conditions as to the subsidized company providing rolling stock and equipment as he deemed fit to ensure that the road would be an efficient one and that the subsidy would not be thrown away. That is what has been done in this case in the order in council passed and the agreement entered into in pursuance of it. But the imposition of any such condition relating to rolling stock or equipment can have no

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bearing upon the true construction of the subsidy Act. I mention this because the provisions in the agreement and specification attached thereto relating to rolling stock was pressed upon us as indicating that it was a railway line in operation and as a going concern that was contemplated. This is no doubt perfectly true. Anything else or less than such a railway line would be a fraud upon the public. But it by no means follows that because the Government stipulated for provision being made by the company for

> sufficient rolling stock to accommodate and conduct properly and efficiently the traffic and business of the line

that they agreed that the cost of such rolling stock or its efficient maintenance should be added to the cost of the line for the purpose of increasing the statutory subsidy.

On the contrary by turning to the agreement entered into between the Crown and the company on the 14th January, 1904, it will be seen that after reciting the second section of the "Subsidy Act of 1903," and the 72nd paragraph designating this particular branch railway, the agreement went on to provide in clause 1 that

> the company should make, build, construct and complete the line of railway mentioned and described in paragraph 72 of the 2nd section of the "Subsidy Act" above set forth, and all bridges, culverts, works and structures appertaining thereto in all respects in accordance with the specifications hereto annexed marked A.

Then follows clauses two to eight inclusive relating to location, plans, character of the work, time of completion of work, the kind of steel rails to be provided, and compliance with all statutory requirements.

Not a single word said or reference made to rolling stock or equipment, but the language used

make, build, construct and complete the line of railway * * * and all bridges, culverts, works and structures appertaining thereto in all respects in accordance with the specifications

under well-known rules of construction would exclude rolling stock.

Then immediately follows section 9, providing that upon the performance and observance by the company *of the foregoing clauses* 1 *to* 8 of the agreement His Majesty would, subject to and in accordance with the provisions of sections one, two and four of "Subsidy Act," pay to the company so much of the subsidies, etc.

Then follows clause ten, an independent clause,

that upon, *from and after the completion of the said line of railway* the company would faithfully and continuously operate and run the same maintaining the said railway and all structures thereon, and equipment thereof, in good condition, etc.

This covenant relates to the subsequent operation and maintenance of the railway and its equipment, and is followed by other clauses relating to the details of the operation of the road.

And so while the specification attached to the order in council makes provision for rolling stock and equipment, the agreement explicitly provides for the payment of the subsidy upon the performance of the company's covenant to construct and complete the line of railway mentioned in the "Subsidy Act," together with other specific matters not having the remotest reference to rolling stock or equipment, the provision for and the maintenance of which are provided for in independent clauses.

Turning back then to the second section of the "Subsidy Act of 1903," we find it makes provision for the granting of $3,200 per mile for the mileage specified

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towards the construction of each of the undermentioned lines of railway

of which this branch under consideration is one and

towards the construction of each of said lines of railways which shall cost more on the average than $15,000 per mile for the mileage subsidized a further subsidy beyond the $3,200 per mile of 50% on so much of the average cost of the mileage subsidized as is in excess of the $15,000 per mile, but not to exceed in the whole $6,400 per mile.

Not a word is said about rolling stock or equipment. But it is said and probably the whole argument of the company rests upon the fact, that whereas in former subsidy Acts the cost of rolling stock and equipment was specially excluded under the words "the cost of equipping the railway" as was also the cost of terminals and the right of way to cities and towns from the cost upon which the subsidy was to be estimated, in this Act the words excluding the cost of equipping the railway have been dropped.

It is, therefore, argued that the change of language indicates a change of intention and that the dropping of these words shews Parliament intended their cost should be added to the cost of the line in estimating the subsidy payable.

I am utterly unable to adopt the argument. The rule invoked respecting the construction of statutes is only invoked where the language to be construed is ambiguous and doubtful. As said by Mr. Hardcastle in his third edition, at page 119:

> Sometimes if an enactment is not plain, light may be thrown upon it by observing that certain words "have been" as Brett L.J. said in *Union Bank of London* v. *Ingram* (1882) (1) "designedly omitted."

Just so, but here it cannot be successfully contended that the language of the Act is not plain; it

(1) 20 Ch. D. 465.

does not require any light to be thrown upon it in order to understand its meaning. The words may have been designedly omitted by the draftsman, but it was probably because they were unnecessary. If they had not been inserted and, as I venture to think, *ex abundanti cautelâ,* in the earlier statutes and then dropped out in this one I would say that no one would have had the boldness to claim to add the cost of rolling stock and equipment to the cost of the road so as to obtain the larger subsidy.

The language of the "Subsidy Act of 1903" is, to my mind, plain and clear, and the language of the agreement entered into between the Crown and the company if possible still more clear. Their construction cannot be radically changed because certain unnecessary words inserted in former Acts by certain draftsmen are omitted in the Act under consideration. The reason for their omission is to my mind obvious, namely, that they were unnecessary, and the meaning of the statute without them is not doubtful or uncertain.

During the argument I put this question to Mr. Lafleur: Suppose the company had made a contract with a sub-contractor for the construction of this line of railway in the very words used in the agreement between the Crown and the company in section one respecting the subsidy above recited, could he argue that such contract involved on the part of the contractor the equipping of the line with rolling stock, etc? He was, of course, obliged to fall back upon the argument arising out of the change in the wording of the "Subsidy Act," and the meaning of the specification attached to the agreement with which I have already dealt.

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I think the appeal should be dismissed with costs and question 7 of the stated case answered in the negative.

IDINGTON J.—The claim of appellants being referred to the Exchequer Court in the way it was, I incline to the opinion that the case submitted there is neither more nor less than a mode of trying the questions in issue between the parties, arising out of the claim so referred. The evidence is documentary entirely, and, as I read this submission, such inferences of fact may be drawn therefrom as is usually done in any submission not purely restricted to the statement of a point of law.

The question, in one sense, is simply whether subsidy or double subsidy is what appellants are entitled to.

Clause 7 of the submission puts that in the foreground, but ends by these words

according to the true interpretation and proper construction of the "Dominion Subsidy Act of 1903," and of the contract *and other documents herein mentioned.*

I think the words leave the matter open to the view the learned trial judge has taken, and I do not dissent from the view he has expressed.

The rule 111, under which the submission is, on its face, made, makes it abundantly clear that such inferences, if the proper ones to draw, can in law be drawn by us on this appeal, as well as by the judge below, so far as the documents call for.

I prefer, however, to express my opinion on the construction of the "Subsidy Act," as I have, as the result of much consideration, formed a much more

decided opinion thereon than upon the ground taken in the judgment appealed from.

The following is section 2 of the "Subsidy Act" in question, followed by the grant now in question:

2. The Governor in Council may grant a subsidy of $3,200 per mile towards the construction of each of the undermentioned lines of railway (not exceeding in any case the number of miles hereinafter respectively stated) which shall not cost more on the average than $15,000 per mile for the mileage subsidized, and towards the construction of each of the said lines of railway not exceeding the mileage hereinafter stated, which shall cost more on the average than $15,000 per mile for the mileage subsidized, a further subsidy beyond the sum of $3,200 per mile of fifty per cent. on so much of the average cost of the mileage subsidized as is the excess of $15,000 per mile, such subsidy not exceeding in the whole the sum of $6,400 per mile: * * *

72. To the Canadian Pacific Railway Company, for a branch line from a point on the main line between Moosomin and Elkhorn, northwesterly to a point in the neighbourhood of the Pheasant Hills, not exceeding 136 miles * * *.

Section 4 directs what fund the subsidy is to be payable from, and that it "be paid as follows:

(*a*) Upon the completion of the work subsidized; or

(*b*) By instalments, on the completion of each ten-mile section of the railway, in the proportion which the cost of such completed section bears to that of the whole undertaken; or,

Sub-sections (*c*) and (*d*) are mere detail and needless to refer to for our present purpose.

What is the plain, ordinary meaning of the words "construction of a line of railway?" I would not, nor do I believe any ordinary person would, take them to include not only the construction of the railway line, but also the equipment thereof when constructed.

They might by reason of the context in a document imply the equipment. Such a case is conceivable. It is not the case here. We have daily use for these words, in speaking of the contractors building such roads; in

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the construction of branch lines as here; in the building of a railway line to be run by some other body than the constructing parties; in the leasing of lines of railway, and, in short, in such a variety of ways that it seems a waste of words to try to make clear words that every intelligent man in this country, in the discussion of these very subsidies, is supposed to have understood (and I venture to think did understand), and that only in their primary meaning.

Used in relation, as here, to the building of a short branch line, to be run by a great railway corporation like appellants that could furnish equipment for running, they are, if possible, more clear.

It is true the executive power had a duty cast upon it to see that security was given for the use of the road when built, and power was given to contract in that regard, but no power was given to pay for the equipment or any part of it.

The rights of appellants as to the amount of subsidy were fixed by the "Subsidy Act," and not by the contract.

The executive could make many stipulations, but had no power to go beyond the very words I have quoted.

It is to be remarked, however, that these words, "lines of railway" seem to be used throughout the contract in many ways so as to distinguish them from anything implying equipment. The one or two parts of the contract, where a different meaning might be raised, arise from and are attributable to the future safeguards for running, rather than construction.

The two-fold purpose of the contract, to secure first construction and then running over it, must be borne in mind in reading the contract, so far as it may be of any value in interpreting the "Subsidy Act."

An independent equipment in this case, as distinct from that to be used in the branch line, is not likely to have been in the eyes of the contracting parties in this case a very vital matter.

In regard to the exclusion of the words as to equipment, which had appeared in section 1 of previous Subsidy Acts, it can be of no importance where the meaning is plain and no connection between this subsidy and others.

In the legislative history of the appellants there is such a wealth of illustration of the meaning of "constructing a line of railway," as distinct from and not implying the equipment thereof, that it is hardly possible the parties here concerned misunderstood it in relation to this branch line, in the sense the appellants contend for. The case of *In re Branch Lines of the Canadian Pacific Railway; Canadian Pacific Railway Co.* v. *The James Bay Railway Co.*(1), furnishes much of it, and the key to a great deal more. The language of the contract, held to have become law, on which the appellants exercised the right to build the very branch line in question here, is to be found in the statutes referred to in that case, and it clearly distinguishes the meaning of the words "construct, equip and maintain."

I think the appeal should be dismissed with costs.

MACLENNAN J.—I agree in the opinion of my brother Davies.

DUFF J.—In my view of the merits of the questions submited for determination, it is unnecessary to decide—and, therefore, I express no opinion upon—

(1) 36 Can. S.C.R. 42.

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the point argued respecting the jurisdiction of the Exchequer Court.

In other respects, I agree with the judgment of my brother Davies.

Appeal dismissed with costs.

Solicitors for the appellants: *Lewis & Smellie.*

Solicitor for the respondent: *E. L. Newcombe.*