GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANT .... } APPELLANT;

AND

THE CITY OF CALGARY (PLAINTIFF) RESPONDENT

1917
*Feb. 16.
*June 22.

ON APPEAL FROM THE DISTRICT COURT JUDGE, DISTRICT OF CALGARY.

Municipal corporation—Assessment and taxation—Railway taxation—Acreage or mileage basis—"Roadway"—"Superstructure"—C.O. of the N. W. Territories, 1898, c. 71, s. 3—Crown lands—Equitable ownership—"B.N.A. Act, 1867," s. 125.

A railway company which, having purchased Crown lands and paid part of the price of sale is, by arrangement, entitled to possession and to complete the purchase later, the title remaining in the meantime in the Crown, is properly assessed as the equitable owner and actual occupant of the land.

Smith v. *Vermillion Hills* (49 Can. S.C.R. 563, [1916] 2 A.C. 569, and *Southern Alberta Land Company* and *The Rural Municipality of McLean* (53 Can. S. C. R. 151, followed.

Per Davies J.—The word "superstructure" is intended to mean only the superstructure constituting the line of railway and does not include any buildings or structures upon or adjoining the line of railway, which, though used for railway purposes alone, form no part of that line.

Per Idington J.—The "roadway and superstructure thereon" comprises all the acreage of trackage and superstructure of any kind in use for actual running of the railway and must be assessed on the mileage basis; and the land to be assessed on the acreage basis is the land not in use, but held for prospective use.

Per Duff J. and Brodeur JJ. *dissenting.*— "Roadway" means the continuous strip commonly known as the "right of way."

APPEAL from the judgment of the District Court judge, of the District of Calgary, confirming the assessment made upon the lands of the appellant by the respondent.

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

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The facts and the issues raised on the present appeal are fully stated in the above headnote and in the judgments now reported.

Geo. H. Ross K.C. for the appellant.

Clinton J. Ford for the respondent.

THE CHIEF JUSTICE.—I concur somewhat reluctantly in the conclusion reached by Sir L. Davies, and by my brother Anglin. My inclination would have been to include in the exemption the tracks running to the roundhouse and the other sidings used for ordinary terminal purposes. I defer, however, to what must be the better opinion of my brethren.

DAVIES J.—This is an appeal from the judgment of the District Court judge confirming the assessment made upon the lands of the appellant in the City of Calgary and occupied and used by them as terminals and station grounds.

The parcel of land in question consists of a large block situate almost in the heart of the city, and in near proximity to its business centre. It contains in all 25.5 acres of which quantity 3.64 acres are comprised in what was assessed as the "roadway" of the railway crossing, through this block or parcel of terminal lands.

This "roadway" was assessed separately at $1,000 per mile under section 3 of ch. 71 Consolidated Ordinances of the North West Territories, 1898.

This part of the assessment is not appealed against, the appeal being only as to the assessment of the remaining portion of the Terminal Block comprising 21.86 at $8,000 per acre.

The facts agreed to by the parties to the appeal were as follows:—

1. The property which forms the subject matter of this appeal is the same property as is specified in the Order-in-Council dated the 27th day of January, 1914, which is, by agreement, made part of the record on appeal herein.

2. The appellant purchased the land in pursuance of the Order-in-Council and has paid $125,000 on account thereof, being one-half the purchase price. The other half of the purchase price should have been paid in June, 1914, but by arrangement with the Dominion Government has been deferred upon the appellant paying interest on the unpaid balance.

The ordinance in question, upon the construction of which this appeal depends, is as follows:—

1. Every railway company whose railway is not exempt from taxation shall annually transmit on or before the first day of February to the secretary-treasurer of every municipality, and to the secretary or other officer of every public school district through which the company's railway may run, a statement to be signed by some authorized official of a company shewing:—

(1) The quantity of land other than the roadway owned or occupied by the company, which is liable to assessment.

(2) The quantity of land occupied by the roadway.

(3) Whether such statement on sec. 1 of this ordinance is placed in the hands of the assessor of any such municipality or school district or not, the assessor of every municipality or school district, as the case may be, shall assess the lands of such railway company and the roadway thereof, and the superstructure of such roadway, and give such notice as is required by sec. 2 hereof:—Provided that the roadway and superstructure thereon shall not be assessed at a greater value than $1,000 per mile.

The evidence shewed that the assessor did not ascertain the number of miles of trackage laid down upon the terminal grounds, and the area of land necessary for the proper usage of such trackage lines to roundhouses, warehouses, etc., and assess such area on the basis of $1,000 per mile of trackage or other mileage rate, but that he assessed a 100-foot strip as shewn on the location plan *and that strip only* on the basis of $1,000 per mile. That strip contained 3.64 acres. Another 100-foot strip, running from the eastern boundary of the terminals property to the turntable, comprises an area of 3.64 acres, and is in actual use and still another strip running from the

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eastern boundary of the property to *the station* comprises an area of 4.08 acres.

The whole block of 25.5 acres had been purchased from the Crown in right of the Dominion for the sum of $250,000 of which $125,000 had been paid, and the remainder was still unpaid. The legal title still remains in the Crown, but the Grand Trunk Pacific Company is the equitable owner and the actual occupant.

Its liability, therefore, to be assessed as such equitable owner and actual occupant is under the decisions of this Court unquestionable. See *Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta* (1); *Smith* v. *Vermillion Hills*(2), affirmed on appeal to Privy Council(3); and *Southern Alberta Land Co. v. McLean*(4).

The contention therefore of the appellant that the assessment is void, because it does not assess the interest of the railway company apart from that of the Crown, and that the two interests cannot be separated must fail. The company is properly assessed as the equitable owner and the actual occupant of the land, and there is nothing to warrant a suggestion that any interest of the Crown has been assessed.

The other contention of the appellant that none of the land in question should be assessed as acreage, but only on a mileage basis reckoned, "(*a*) on the distance across the property from east to west; or (*b*) on the number of miles of trackage laid on the land; or (*c*) on the number of miles of trackage laid *or proposed to be laid* on the land" need, in my judgment, only be mentioned to be dismissed. They practically amount to total exemption of the whole block of 25.5 acres,

(1) 45 Can. S.C.R. 170.
(2) 49 Can. S.C.R. 563.
(3) [1916] 2 A.C. 569.
(4) 53 Can. S.C.R. 151.

from the assessment on an acreage basis, and affirm that it all should be assessed on the mileage basis reckoned on one or more of the three plans or bases above mentioned.

The appellants also contended that if the above contentions were rejected, the 4.08 acres comprised in a 100 foot strip of the rail track, running from the eastern extremity of the property to the station, and the 3.64 acres on which the track to the turntable runs, should not be assessed as acreage but only on a mileage basis.

There is much to be said for each and both of these contentions. I have considered carefully alike the English and American cases on this important question of railway taxation which were called to our attention. They are, in a sense, valuable as shewing the view the respective courts took upon the particular statutes authorizing the assessments they were dealing with.

The divergent views expressed in several of the American cases are not surprising when the different language of the statutes is considered.

We must, of course, be guided by the language of the North West Territories Ordinance above quoted, and the question in this appeal in the last analysis is reduced to this: What is the meaning and extent of the words used in that ordinance—"The roadway thereof and the superstructure thereon?"

I agree with the meaning put upon the word "superstructure" by Mr. Justice Scott in *In re Canadian Pacific Railway Co. and Town of Macleod*(1), where, at p. 197, he says:—

> I am of the opinion that the word "superstructure" as it is used therein is intended to mean and include only the superstructure constituting the line of railway, and that it is not intended to include, and

(1) 5 Terr. L.R. 192.

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does not include, any buildings or structures upon or adjoining the line of railway which, though used for railway purposes alone, form no part of that line of railway. In this view the term would include the ties, rails, turntables, bridges, culverts, etc., and (following the principle laid down in *South Wales Rly. Co.* v. *Swansea Local Board*(1), it would also include railway platforms, but it would not include station or office buildings, warehouses, storehouses, or dwellings or lodging houses for employees of the railway. Neither would it, in my opinion, include roundhouses.

I do not wish to be understood in adopting this meaning of the word "superstructure" to include *turntables*, and confess I cannot understand why the learned judge did include them.

I will not attempt any definition of the word "roadway" or what it comprises. I think to a large extent it is a question of fact to be decided in each case.

In the case before us the line of railway track forks as it enters the block of 25 acres of land in question, one fork running to the general station at the south-western corner of the block of land, and the other fork continuing on in a westerly direction through the city.

I am of the opinion that the contention of the appellant is right as to this track to the station being part of the "roadway" and not being assessable as acreage, but on a mileage basis. I cannot see on what reasonable ground it can be excluded, and held not to be part of the roadway. It is the track which conveys all passenger traffic to and from Calgary. I would accept the evidence of Graves, the engineer of the Grand Trunk Pacific Company, as to the necessary width of the roadway. He says:—

> The necessary area you have to have each side of your lead track or your yard tracks, whichever it is, I have figured it here about twenty feet outside of the track.

I understand the acreage comprised in that strip would amount to 4.08 acres, which, in my opinion, has been wrongly assessed on the acreage basis.

(1) 24 L.J.M.C. 30; 4 El. & B. 189.

I do not accept the contention of the appellant as to the tracks running to the roundhouse being similarly treated, or the other sidings on this block of land which are being used for ordinary railway terminal purposes.

The result, in my opinion, is that the judgment below should be varied by substituting the assessed value of the roadway or line to the station upon a mileage basis of $1,000 a mile, instead of an acreage basis of $8,000 an acre at which it has been assessed, and that such judgment should otherwise be confirmed; the Registrar will make the necessary calculations.

As the area of this part of the roadway comprises 4.08 acres, and the plans filed shew its mileage, there should be no difficulty in making the necessary variation in the judgment by substituting the mileage assessment under the ordinance for the acreage assessment adopted by the judgment appealed from of this line to the station.

There should be no costs, as the appellant, in my view, obtains a small, though a material, modification of the judgment appealed from.

IDINGTON J.—This appeal raises the puzzling question of what is the meaning of that part of the provision in ch. 71, C.O. of the Territories, 1898, intituled "An Ordinance respecting the Assessment of Railways," which reads as follows:—

> Provided that the roadway and superstructure thereon shall not be assessed at a greater value than $1,000 per mile, C.O.C. 71, s. 3.

The appellant has been assessed for some 25.5 acres of land in Calgary, of which a strip of a hundred feet wide has been assessed on the basis of $1,000 a mile, and the remainder at $8,000 an acre.

The strip of a hundred feet wide is supposed to

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represent the roadway within the meaning of the words of the provision just quoted.

The Railway Act of Canada then in force, which would seem to be the only one the North West Council could have had in view in enacting as above, provided for railway companies taking for use of railways a width of thirty-three yards, which at stations could be increased to one hundred yards for the length of six hundred and fifty yards. And I imagine such spaces were what the legislation in question probably had in view.

I further imagine they had a wider vision of things than the view which the assessor stands for in his long narrow strip of unvarying width, and that the valuation of $1,000 a mile was intended to cover the varying or various widths so used for the railway.

The nearest I can approach that which was intended to be thus comprehended seems to be to allow the acreage of trackage and superstructure of any kind in use for actual running of the railway, at the point now in question as covered by this low but fixed value, to be applied for assessment purposes.

I would exclude from the benefit thereof, land not in use, but held for prospective use.

There is no principle to guide us in the interpretation of this Act.

A mere arbitrary value is fixed for what common knowledge tells us is probably worth ten times the value fixed.

Roughly speaking the land taken is possibly now, in fact, of the value which was then arbitrarily or as matter of expediency, universally fixed for each twelve acres, yet I imagine far beyond what it was generally speaking likely to be worth at the time of the enactment.

I cannot hold roadbed and roadway as interchangeable terms in this connection. Nobody ever dreamt of assessing the land alongside the actual roadbed within the lines of the right of way.

Nor can I adopt the words "right of way" as convertible into the word "roadway."

Nor can I imagine that the universal exemption of highways from taxation, as we find them now without private ownership, is to be taken as a guide.

The most ardent advocate of the single tax principle, which is possibly right, would not think of taxing such a highway. Then why a railway should be taxed no doubt puzzled some people, and why it should be exempt puzzled more, and hence a mere arbitrary expedient or compromise was resorted to and we have to make the best of the curiosity.

I understood in argument ten acres would cover what I indicate as reasonable interpretation of what is presented.

In other words, seven acres more than the assessor allowed should come under the statutory valuation.

The appeal should therefore be allowed by the reduction of the assessment by $56,000. I doubt if costs should be allowed either party.

DUFF J.—I have not been able to arrive at a conclusion entirely satisfactory to my own mind in this appeal, but on the whole I think the balance of argument inclines in favour of the view that "roadway" means the continuous strip commonly known as the "right of way."

In this view the appeal should be dismissed with costs.

ANGLIN J.—I concur with Mr. Justice Davies.

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BRODEUR J.—The questions at issue in this appeal are:—(1) Whether the yards of the appellant company in the limits of the city of Calgary are liable to taxation; (2) If they are liable to taxation, whether they should be assessed on the mileage or acreage basis.

On the first point, the appellant claims that the property belongs to the Crown in right of the Dominion, and that under the provisions of the "B.N.A. Act" those lands cannot be taxed.

The appellant has purchased from the Dominion Government the lands in question and, as the purchase price has not been entirely paid, the legal title is still in the Crown; but the property has been occupied by the appellant company, which has in the lands such interest as may be assessed, and taxed. It does not appear that any attempt has been made to assess the interest of the Crown in respect of those lands, and it has been decided by this Court in the following cases: *Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta* (1), *Smith* v. *Vermillion Hills*(2), affirmed on appeal to the Privy Council (3), and in *McLean* v. *South Alberta Land Co.*(4), that the provincial legislature could authorize the assessment of a person in respect of his occupation of lands of which the bare legal estate is vested in the Crown.

Applying those decisions to the present case, I see that we have nothing before us to shew that the appellant is assessed for the interest of the Crown in the said land; but that assessment simply covers the interest which the appellant company possesses.

On the second point raised by the appellant, *viz.*, that the assessment should be made on the mileage

(1) 45 Can. S.C.R. 170.
(2) 49 Can. S.C.R. 563.
(3) [1916] 2 A.C. 569.
(4) 53 Can. S.C.R. 151.

basis, we have to examine and to construe the provisions of the Ordinance respecting the assessment of railways, ch. 71, "Territories' Act, 1898."

By the provisions of that Act, the railway companies are bound to give to every municipality an annual statement shewing—

1st, the quantity of land other than roadway owned or occupied by the company which is liable to assessment, and 2nd, the quantity of land occupied by the roadway;

and then the assessor of the municipality assesses the lands of those railway companies, and the roadway and the superstructure; and the Ordinance contains a proviso that

the roadway and superstructure thereon shall not be assessed at greater value than $1,000 per mile.

As we see, there is a distinction between the assessment to be placed on the land of a railway company and on its roadbed.

The appellant contends that the roadway would include, not only the one hundred feet right of way mentioned in the "Railway Act," sec. 177, but would include also the land used for sidings, station grounds, yards, freight tracks, freight sheds, turntables, etc., in other words, everything that goes to make up what is strictly railway property.

On the other hand, the City of Calgary contends that the property of a railway company to be assessed on a mileage basis should include simply the right of way.

The word "roadway" in the North West Territories Ordinance is not defined, and it is not defined either in the "Railway Act." Section 177, however, of the "Railway Act" determines what constitutes the right of way, and what property could be acquired by a railway for works, for stations, yards, warehouses, etc. For the right of way proper, 100 feet in breadth is generally allowed to be taken by the railway company,

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In cases, however, where land should be required for stations, depots and yards, one mile in length by 500 in breadth, including *the width of the right of way*, could be taken.

These provisions of the "Railway Act," and that determination of what is the right of way should help us in determining what the North West Legislature intended when it spoke of the roadway.

I think that the term "roadway" should be applied to that part of the railway leading from one place to another, and should include the whole right of way where it is used for no other purpose than as a right of way for the railway track. It would not include the yards and the stations, and when the statute speaks of superstructure, it refers, in my opinion, not to the buildings which could be erected, but to the ties and the rails which constitute the railway property.

Bouvier in his dictionary says that the roadway is the right of way which has been held to be the property liable to taxation. That is the interpretation which has been generally accepted in the North West, and which was made the subject of several decisions, *viz.*, in the cases of *Canadian Pacific Railway Co. and Macleod* (1), at p. 197; *In re Edmonton and Canadian Pacific Railway Co.*(2), *Canadian Northern Railway Co.* v. *City of Edmonton.*(3).

I would therefore consider that the assessment made upon the property occupied by the appellant was a proper assessment and that the appeal should be dismissed with costs.

Appeal allowed without costs.

Solicitors for the appellant: *Short, Ross, Selwood, Shaw and Mayhood.*

Solicitor for the respondent: *Clinton J. Ford.*

(1) 5 Terr. L.R. 192. (2) 6 West L.R. 786.
(3) 5 West W.R. 1088.