

*Judgement of the Lords of the Judicial Committee on the Appeal of The Grand Junction and the Midland Railways of Canada v. The Corporation of Peterborough, from the Court of Appeal at Ontario; delivered 3rd December 1887.*

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Present :

LORD FITZGERALD.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

The numerous questions which present themselves in this intricate case have been argued very fully during the space of several days. Not that they have been treated at too great length; on the contrary, their Lordships consider that the Counsel on both sides have done as much as their cases required, and no more; and they wish in especial to acknowledge the way in which the gentlemen of the Canadian Bar have aided the argument by their experience in Canadian law and their candour in imparting it. But from the completeness with which all the questions were threshed out, their Lordships have formed opinions on the most important ones during the argument, and are now justified in expressing them very briefly.

On four of these questions their Lordships' opinions were indicated before the close of the argument, and may now be repeated. First, it is impossible to give due effect to the Ontario Act of 1871, without holding that the Grand Junction

Company, which was then in fact carrying on business under a charter invalid in law but not known to be so, was empowered to receive money in order to construct and equip the railway, and to do any of the works authorized by that charter, and this implies incorporation. Secondly, if the Company had not been incorporated by that enactment, they would be so by the Act of 1874; and the effect of the two Acts is to give to the Plaintiffs, who are the Grand Junction Railway Company so incorporated, all the benefit of the byelaw which was voted on by the ratepayers of Peterborough, and which provided a bonus for the *de facto* Grand Junction Railway Company. Thirdly, the effect of the Act of 1871 is not only to charge the rates and to cure the lack of a third reading, but to make that byelaw which the ratepayers voted on, legal, valid, and binding on the Corporation. Fourthly, that the refusal of the prerogative writ of mandamus cannot be pleaded as *res judicata* in bar of this suit; because, first, the jurisdiction exercised in such a refusal is a discretionary jurisdiction, and, secondly, if the mandamus had been granted it would not have bound the other side to anything except to make a return to it.

Their Lordships are further of opinion that the Plaintiffs' works were completed in time. The Act of February 1876 enlarged the time for completing "the Grand Junction Railway" till the 1st of May 1881. There is no reason for cutting down the generality of this expression as the Respondents urge. In fact it would be very unlikely that in February 1876 an extension of time should be required for that part of the railway which need not be completed till May 1880, and not for that part which was to be completed by May 1876.

It was earnestly contended by the Defendants that the railway has not been con-

structed in accordance with the conditions of the byelaw. Those conditions were, that "the said Grand Junction Railway" shall be completely graded to the town of Peterborough, that the iron of "the said railway" shall be completely laid to the town of Peterborough, that the line shall cross the river Trent at a certain point, and proceed between certain villages. All that has been done, and apparently upon land acquired in the usual way by the Company, except for the last two miles or so nearest Peterborough, where the Plaintiffs have availed themselves of an unused tract and station grounds, formerly belonging to another Company, called shortly the Cobourg Road.

The Plaintiffs hold this unused tract under a written agreement confirmed by the Legislature. By the agreement, the Cobourg Road demise and grant to the Plaintiffs the right to use the unused tract and grounds for ever, free from rent, on two conditions. The first is that the Plaintiffs shall, at their own cost, repair and put in efficient working order so much of the tract and premises as they require to use, and so keep the same; and the second is that, in a certain event, the Cobourg Road shall have the right to use the road and premises so used by the Plaintiffs, upon terms to be agreed upon or settled by arbitration. It is argued that this right of the Cobourg Road prevents the Plaintiffs from saying that the railway, which has been constructed by them according to the terms of the byelaw, is their railway. Their Lordships think that the grading is the grading of the Grand Junction Railway, and the iron is the iron of that Railway, none the less because they hold the land only under a grant of perpetual use, or because another Company may claim privileges often accorded to one Company over the works of another.

Another condition of the byelaw is that unless the construction of the railway as to the portion within the county of Peterborough is commenced on or before the 1st of May 1872 the byelaw, so far as it provides for the issue of debentures for 75,000 dollars, shall be void. It is not disputed that to satisfy the condition the commencement must be a substantial commencement, followed up by substantial exertions to continue the work. Now some work was done on the land of a Mr. Johnson on the 17th of April 1872, but both the Secretary and the President of the Plaintiffs say that it was done formally, and in order to save the byelaw. Still if that formal commencement, though accelerated in order to save the byelaw, were followed up in good time by active and continued work, it might be sufficient. And the Plaintiffs' witnesses go on to show that some further work was done in Peterborough county, and that by November 1874 about 600,000 dollars was expended on the works of the line. On the other hand, it appears that on Johnson's land the work was discontinued after two or three days, and not resumed till the year 1880; that up to November 1874 not more than 24,000 dollars is even alleged to have been spent in Peterborough county; that the Plaintiffs did not make any contract for the work till the 25th March 1872; that they then handed over all the business to Brooks the contractor, but did not make any stipulation as to the time when he should commence the Peterborough works, or any works; that the plans required by law for the exercise of compulsory powers were not lodged till June 1873; that on the 28th of May 1872 it was brought before the Board of Directors that anxiety was felt by stockholders and by parties interested in consequence of the unexpected delay in commencing the work vigorously, and that the Board

resolved to ask the contractor to name as early a day as possible for the formal opening. On this evidence their Lordships are not satisfied that there was any substantial commencement of work in Peterborough county as early as the 1st of May 1872, so as to fulfil the condition of the byelaw.

There is yet another condition of the byelaw, viz., that payment shall be made only on the certificate of the Engineer of the Plaintiffs as to a portion of the work stipulated for. This condition has not been performed, but the Plaintiffs urge that it does not apply to the issue of debentures to trustees, and that they ought to have relief in that form. This part of the case requires to be stated in somewhat more detail.

The byelaw provides that the sum of 75,000 dollars shall be paid to the Plaintiffs in debentures, and that the Warden shall pay and deliver such debentures, as to 25,000 dollars when the railway has been graded, and as to 50,000 dollars when the iron has been laid, as before mentioned; "and then only upon the certificate of the Chief Engineer of the said railway of the performance of the said conditions." The 8th clause of the byelaw runs as follows:—

"That, in the event of any trustee or trustees being hereafter appointed by the Legislature for the receiving and holding of moneys or securities for moneys awarded by way of bonus towards the construction of the said Grand Junction Railway, the said Warden shall, within six weeks after the final passage of this byelaw, or within six weeks after the passing of such legislative enactment, whichever shall last occur, hand over and deliver such debentures, to the said amount of seventy-five thousand dollars, to such trustee or trustees, to be by them held and paid over and delivered to the said Company, in accordance with and subject to the provisos and conditions of this byelaw, and not otherwise.

By the Ontario Act of 1871 it is enacted that, when any municipality shall grant a bonus to aid the Company in making the railway, the

debentures therefor may, at the option of the municipality, within six months after the passing of the byelaw authorizing the same, be delivered to three trustees to be named, one by the Lieutenant Governor in Council, one by the Company, and one by the heads of municipalities granting bonuses, who were to meet and vote as therein prescribed. The trustees are to receive the debentures upon trust; first, to convert them into money; secondly, to deposit the money in a bank in the name of the "Grand Junction Railway Municipal Trust Account"; thirdly, to pay such money out to the Company on the certificate of their Chief Engineer, setting out the portion of the railway to which the money paid out is applied, and the total amount expended on such portion to the date of the certificate. These provisions are repeated in the Act of 1874. Trustees have been appointed in accordance with them, and such trustees still exist.

On the 21st of November 1879 the Plaintiffs obtained a rule Nisi for a mandamus commanding the Defendants forthwith to issue debentures for 75,000 dollars, and to deliver those debentures to the trustees appointed for receiving bonuses. At this date the work was not done. It was completed about the 27th of November 1880, and opened for traffic on the 6th December 1880. It is obvious therefore that at this time the Plaintiffs were not in a position to ask for any payment or delivery to themselves.

The Plaintiffs obtained a rule absolute from the Court of Queen's Bench, which however was set aside by the Court of Appeal in Ontario, and that decision was upheld by the Supreme Court of Canada. In that Court, at least two of the Judges rested weight on the circumstance that in 1872, when they commenced working, the Plaintiffs had the same

right to ask for delivery to trustees as they had when they moved for a mandamus, and that if they were now right in saying they had completed the work they were in a position to insist upon payment to themselves.

The Supreme Court disposed of the case in 1883. The judgement was delivered in January 1883, and the case will be found reported in 8 Supreme Court Reports, p. 76. This action was brought in April 1884. The prayer is to the effect that the Defendants may be ordered to pay 75,000 dollars to the Plaintiffs, or that a mandamus may issue to compel the Defendants to issue debentures for that amount, and to deliver the same to the Plaintiffs. The Plaintiffs expressly averred that all conditions precedent had been performed, and that the Chief Engineer's certificate had been duly given in accordance with the terms of the byelaw. The Defendants insisted that the Plaintiffs shall prove strictly the performance of every condition precedent.

At the trial no certificate was forthcoming. The Plaintiffs' Counsel proposed to recall a witness, one of the statutory trustees, to prove that a certificate had been given, but that witness was not recalled. He also urged that, under paragraph 8 of the byelaw, debentures might be delivered to trustees without a certificate; that the statutory trustees were trustees within the meaning of the byelaw; but that if the Court thought otherwise, it could appoint trustees; and that the pleadings might be amended for the purpose.

It is clear that from the 27th November 1880, when the works were completed, until now, there has been no Engineer's certificate. It was suggested rather than argued at the Bar that the certificate was intended for the sole benefit of the Plaintiffs, and further that to give the certi-

ificate had become an impossibility, because the original engineer was dead, but those suggestions met with no acceptance from their Lordships. It certainly would seem that, after a railway has been at active work, a certificate that it has been completely graded and the iron completely laid would be a matter of course. Even then the Defendants expressly stipulated for it as a condition of their liability, and as it is not forthcoming they are not liable. But the necessity of it is, and must always have been, so obvious, and its absence is so unaccountable, as to point to the existence of some substantial difficulty, though its nature is not apparent.

As regards delivery to trustees, it was not argued at this Bar that the Court could appoint trustees, but it was contended that the pleadings might be amended by praying delivery to the statutory trustees, and that relief might be given in accordance with that prayer, for which the byelaw does not require a certificate. Such amendments at such a stage of the suit are quite exceptional; they are apt to be attended with great inconvenience, and should not be granted except in obvious cases, where it is clear no injustice would be done. In this case, their Lordships think it unnecessary to enquire whether an appointment by donees of powers conferred by the Legislature is an appointment by the Legislature such as the byelaw contemplates; or whether the trusts differ in such a way that the statutory trustees cannot lawfully receive debentures upon the provisos and conditions of the byelaw. The substantial objection to the Plaintiffs' request is that the trusts are spent. The time for acting through trustees is past, as was pointed out by Mr. Justice Gwynne in the Supreme Court, and as was clearly seen by those who framed this claim. Trustees were for the time when the debentures or their pro-



ceeds were to be held in suspense, not for the present time, when the Plaintiffs, if right in other respects, can claim the payment directly to themselves. If the trustees were to take the debentures either on the trusts of the Acts or on those of the byelaw, they would have no duty except to hand them over to the Plaintiffs upon the Engineer's certificate. Their Lordships are asked to use a purely illusory machinery for no purpose whatever except to relieve the Plaintiffs from the observance of a condition precedent, which, either by extraordinary neglect or from some unexplained difficulty in substance, they have left unperformed. They cannot do that. They will humbly advise Her Majesty that this appeal should be dismissed. And the costs must follow the event.

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