1917
Jan. 24.

IN THE MATTER OF THE PETITION OF THE HONOURABLE JOSEPH DOHERTY, HIS MAJESTY'S ATTORNEY-GENERAL OF CANADA,

AND

IN THE MATTER OF THE PURCHASE BY HIS MAJESTY OF THE QUEBEC & SAGUENAY RAILWAY; THE QUEBEC, MONTMORENCY & CHARLEVOIX RAILWAY, AND THE LOTBINIERE AND MEGANTIC RAILWAY.

Railways—Acquisition by Government—6 and 7 Geo. V., ch. 22—"Subsidies"—"Actual cost"—Interest and charges on bonds.

The Court was required to fix the value of certain railways to be acquired by the Crown under the provisions of 6 and 7 Geo. V., ch. 22. By sec. 2 of such statute it was provided that the consideration to be paid for each of the said railways should be the value as determined by the Exchequer Court of Canada, "said value to be the actual cost of the said railways, less subsidies and less depreciation, but not to exceed four million, three hundred and forty-nine thousand dollars, exclusive of outstanding bonded indebtedness, which is to be assumed by the Government, but not to exceed in all two million, five hundred thousand dollars."

Held, that the word "subsidies" in the above section did not relate only to those granted by the Dominion Government, but extended to any subsidies granted by the Provincial Government to the railways in question.

2. The Court, in finding the "actual cost", ought not to proceed as if the matter were an accounting between the directors of the railways and the shareholders. The duty of the Court was to ascertain the value of the railways as between vendor and purchaser, and that value must be taken to be the actual cost of the railways, less subsidies and less depreciation.

3. Interest on bonds issued by the company and moneys paid on the flotation of bonds during the period of construction of the railways could not be included in "actual cost" as the term was used in the statute.

ACTION to determine the value of railways acquired by the Crown.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, December 11, 14, 15, 20, 27, 28, 1916.

A. Bernier, K.C., *F. E. Meredith,* K.C., and *E. E. Fairweather,* for Crown.

P. F. Casgrain, and *Louis Coté,* for railways.

CASSELS, J. (January 24, 1917) delivered judgment.

Since the conclusion of the hearing of these cases I have carefully perused the evidence and exhibits produced before me, and have also considered the questions to be determined. I think as the questions to be determined depend to such an extent upon the construction to be placed upon the statute as to the method by which the amounts payable are to be ascertained, and as the differences are so large between the method of valuation claimed by the railway companies and the views I entertain, it may be better before any further evidence is taken, that an appeal, if such is proposed (assuming the right of appeal exists), should be taken to the Supreme Court, in order that I may be set right, if I have taken an erroneous view.

I may say that I have given the matter a great deal of thought, and I must express my thanks to the counsel for all parties for the great assistance they have afforded me.

The statute pursuant to which the matters came before the Exchequer Court of Canada is ch. 22, 6-7 Geo. V., assented to on May 18th, 1916. This statute provides that the Governor-in-Council may authorize and empower the Minister of Railways and Canals to acquire, upon such terms and conditions as the Governor-in-Council may approve, the rail-

1917

ATTORNEY-GENERAL OF CANADA AND QUEBEC & SAGUENAY R. Co.

Reasons for Judgment.

ways described in the schedule hereto, together with such equipment, appurtenances and properties used in connection with such railways, as the Governor-in-Council may deem necessary for the operation thereof.

There are three railways mentioned in the schedule:

(a) The line of railway commonly known as the Quebec, Montmorency & Charlevoix Railway, extending from St. Paul Street, in the City of Quebec, to St. Joachim, a distance of about forty-three and one-fifth miles;

(b) The Quebec & Saguenay Railway, extending from its junction with the Quebec, Montmorency & Charlevoix Railway at St. Jacobim, in the County of Montmorency, to Nairn Falls, in the County of Charlevoix, a distance of about sixty-two and eight-tenths miles; and

(c) The Lotbinière & Megantic Railway, extending from Lyster, in the County of Megantic, to St. Jean Deschaillons, in the County of Lotbinière, a distance of about thirty miles.

The second section provides as follows:

"2. The consideration to be paid for each of the "said railways and for any equipment, appurten-"ances and properties that may be acquired as "aforesaid shall be the value thereof as determined "by the Exchequer Court of Canada; said value to "be the *actual* cost of said railways, less subsidies "and less depreciation, but not to exceed four mil-"lion, three hundred and forty-nine thousand dol-"lars, exclusive of outstanding bonded indebtedness "which is to be assumed by the Government, but not

"to exceed in all two million, five hundred thousand "dollars."

It is agreed by counsel for the railways and for the Crown, that the maximum consideration of $4,394,000 and $2,500,000 is the maximum price to be paid for the three railways. Pursuant to the statute, an agreement was entered into between the Crown and the Saguenay Company, the Quebec Railway, Light and Power Company, the Lotbinière & Megantic Railway Company, and the Quebec Railway, Light, Heat and Power Company. The different railways are referred to throughout the agreement: 1, as "The Saguenay Company"; 2, "The Quebec Railway Company"; 3, "The Megantic Company"; and 4, "The Quebec Power Company."

The railway referred to as (a) in the schedule to the statute, and commonly known as the Quebec, Montmorency & Charlevoix Railway, is what is referred to as "The Quebec Railway Company," in the agreement in question. The name was changed by statute.

The agreement requires a separate valuation for each of these three lines of railway. By the agreement the Crown assumes bonds of $2,500,000 secured by a trust mortgage. These bonds and the trust mortgage securing the same in addition to being a charge on the Quebec Railway Company, are also a charge on other railways and properties not taken over by the Crown. By the terms of the agreement this bonded charge of $2,500,000, while it is assumed by the Crown, forms part of the purchase money payable by the Crown under the statute. If the value placed by the court on the Quebec Railway Company, known as the Quebec, Montmorency &

1917

ATTORNEY-GENERAL OF CANADA AND QUEBEC & SAGUENAY R. CO.

Reasons for Judgment.

Charlevoix Railway, exceeds the $2,500,000 only the excess over the $2,500,000 and the value so found is to be paid by the Crown, the $2,500,000 being treated practically as a payment on account. If, on the other hand, the value placed upon the Quebec, Montmorency & Charlevoix Railway is less than the $2,500,000, then the difference between the value as ascertained and the $2,500,000 is to be deducted from any sums that may be found due in respect of the other two railways.

The agreement refers to it in the following language:

"It is understood and agreed by and between "all the parties hereto jointly and severally that "in case the Exchequer Court of Canada fixes the "value of the line of railway and other property "set out in schedule 'C' hereto at a sum less than "$2,500,000, the difference between the sum so "fixed and the sum of $2,500,000 shall be deducted "from the aggregate amount of the purchase "price to be paid for the lines of railway and other "properties set out in schedules 'B' and 'D' "hereto.

"The intention of this agreement being that in "no event shall His Majesty be liable to pay for "the said three lines of railway and other proper-"ties a greater amount than the value thereof as "fixed by the Exchequer Court, less the sum of "$2,500,000, the amount of the bonds to be assum-"ed by His Majesty as aforesaid."

There are other provisions in the agreement in question which it is unnecessary for me to refer to at the present time. There are provisions protecting and guarding the Crown against any charges or incumbrances on the properties or any defect in

regard to the titles to the right of way, etc.,—the intention of the agreement clearly being that His Majesty shall receive an absolute and clear title to all the properties in question.

On the opening of the case, I suggested that the duties of the Exchequer Court did not extend to an ascertainment of whether the various railways had good titles to the properties being transferred. These questions of title are questions provided for by the agreement, and it is a matter for the Crown attorneys and counsel to be satisfied upon. The view was assented to by the counsel for the railway companies, and for the Crown. The Court assumes that the railways are deeding the various properties with good title thereto, and the valuation is based on that supposition.

The method of procedure was one of considerable moment. I came to the conclusion that the only practical way of arriving at a result would be to adopt the method adopted in the arbitration in which I acted as counsel for the Canadian Pacific Railway Company, in regard to what was known as the Onderdonk sections of the railway in British Columbia. The same course of procedure used to be adopted in the administration of estates in Ontario. The counsel, both for the railways and for the Crown, acquiesced in my view as to the course of procedure to be adopted. I therefore directed the railway companies to file and furnish to the Crown, accounts showing in detail what they claimed to be the amount to which they were entitled under the agreement in question. I also directed that upon counsel for the Crown being furnished with these accounts they should investigate them, and such items as they were prepared

to admit, should be admitted, and such items as they were not prepared to admit, would then become the subject of inquiry, and evidence could be adduced in respect thereof. I also directed that the Crown counsel should furnish to the counsel for the railways a statement of the amount which the Crown claimed should be set off for depreciation in respect of each of the three railways. Pursuant to these directions the railway companies by their counsel filed and served a complete and detailed account of their claim.

Competent experts were employed by the Crown to make a minute examination of the three lines of railway, and to furnish in detail what they considered the proper amount to be deducted for depreciation. A large amount of time was occupied by these gentlemen in making this inquiry. Subsequently the railway companies, by their counsel, accepted as correct the amounts as found by the experts of the Crown. The amounts of the depreciation to be offset against the value of the railways has therefore been settled. The figures I will deal with later.

Another question of considerable importance is in regard to the offset referred to in the statute as subsidies. Before me it was conceded by counsel for the Crown that the only subsidies in contemplation at the time of the statute were subsidies granted by the Dominion Government. This view is, in my judgment, untenable. I have to follow the statute. The statute says "less subsidies." There is nothing in the statute which would limit the meaning of the word "subsidies" to subsidies granted by the Dominion Government only. The word "subsidy" as

1917

ATTORNEY-GENERAL OF CANADA AND QUEBEC & SAGUENAY R. Co.

Reasons for Judgment.

defined in Webster's International Dictionary, page 2070, is as follows:

"A grant of funds or property from a govern-"ment as of the state or municipal corporation to a "private person or company to assist in the estab-"lishment or support of an enterprise deemed ad-"vantageous to the public,—a subvention."

The manifest object of the statute is that any grants furnishd by the public towards the construction of the railways should be deducted. If in point of fact the statute and the agreement based upon the statute does not carry out what the parties intended, the only course in my judgment, open to the parties is to have the statute amended. I must take the statute as I find it, and, according to my view, subsidies include not merely Dominion but Provincial as well. This construction is of importance as the Quebec subsidies amount to something in the neighbourhood of $440,000, which, according to the view I entertain, must be deducted from the value as ascertained. *Inglis v. Buttery.*[1] In the *Dominion Iron & Steel Co. v. Dominion Coal Co.,*[2] Judge Longley rejected evidence tendered as to the communings preceding the agreement, and this view was upheld in the Appellate Court in Nova Scotia, and also in the Privy Council.[3] And in a late case, the *City of Toronto v. Consumers' Gas Co.,*[4] decided by the Privy Council, Lord Shaw, in delivering the judgment of the board, used the following language at p. 622:

"It is now expedient to see what are the powers "relied upon by the appellants as entitling them to

1 L.R. 3 App. Cas. 552.
2 43 N.S.R. 77.
3 [1909] A.C. 306.
4 30 D.L.R. 590, [1916] 2 A.C. 618.

"charge upon the Gas Company the cost necessarily "incurred by them of lowering the pipes of that "company. One ground is thus stated by the learned "trial judge, whose opinion is that the corporation "'has the paramount duty of providing for the "health of the citizens, with reference to the con-"struction of sewers on their streets, and that the "defendants have only the right to use the streets "for their own benefit, subject to the paramount "authority.' Certain decisions of courts in the United States reports in support of this doctrine of paramount right are quoted.

"Their Lordships are of opinion that there is no "such doctrine of paramount right in the abstract, "and that, unless legislative authority, affirming it, "to the effect of displacing the rights acquired under "statute as above described by the respondents, ap-"pears from the language of the statute-book, such "displacement or withdrawal of rights is not sanc-"tioned by law. *In this, as in similar cases, the "rights of all parties stand to be measured by the "Acts of the Legislature dealing therewith; it is not "permissible to have any preferential interpreta-"tion or adjustment of rights flowing from statute; "all parties are upon an equal footing in regard to "such interpretation and adjustment; the question "simply is—what do the Acts provide?*"

I come now to the consideration of the accounts as filed by the railways. I will deal first with that relating to the Montmorency Division. The heading is as follows:

"Statement showing amounts expended yearly on "capital account, Montmorency Division, from the "date of the organization, viz., July, 1899, to the "30th June, 1916."

The first item is dated July 1st, 1898—"Road and "Equipment, Real Estate and Buildings, etc. Montmorency Division, $2,038,149.40."

This starting point is assumed by the railways to have been the cost of construction up to that date. At the date in question, namely, July 1st, 1898, according to Colonel Wurtele, the road had been constructed as far as St. Anne's. The mileage of this road was about 21 miles, and it may be that they were running a mile or two beyond. Even if it were granted, that 22 miles instead of 21 miles of the railway had been constructed at that date, the cost would be in the neighbourhood of $92,500 a mile. Colonel Wurtele puts it about $100,000. It seems a high figure. It is stated by counsel for the railway company that a certain portion of the right-of-way beyond St. Anne's had been procured. This may or may not be so. The proof before me is lacking on this point. Here there is a distinct difference between the views put forward by the counsel for the railway company and the counsel for the Crown. The counsel for the railway company contend that what the Court has to do, is to find the cost as if it were an accounting between the directors of the railway and its shareholders; and that this amount being shown by the books of the company as the amount expended at that date, should therefore be accepted as the cost. Numerous witnesses were called, gentlemen of good standing—accountants from Montreal—who gave evidence as to the custom in regard to the charging up of interest, etc., to capital account.

When I deal with the case of the Saguenay Railway, the absurdity of this contention put forward on the part of the railway company will be apparent.

The directors of a company might have to pay fifty per cent. commission for obtaining a loan of a million dollars. It would undoubtedly be quite right as between themselves and their shareholders to charge this fifty per cent. in their accounts. So also they might delay construction for a period of say 20 years, in the meanwhile paying interest on this bonded indebtedness. As between the directors and their shareholders, as a matter of book-keeping, it may be quite reasonable to charge up every item of expenditure. But the case before me is of a different character. I am not dealing with the accounts as between the shareholders and their directors. What I have to ascertain is the value as between the vendor and the purchaser, and that value must be the *actual* cost of the railways, less subsidies and less depreciation.

The railway company contend that owing to the fact of the books kept by Mr. Beemer being destroyed, there is no other proof available. There is no suggestion that there was any intention of destroying these books with the view of preventing enquiry. Colonel Wurtele's evidence is to the effect that he was the executor of Mr. Beemer, that it turned out that Mr. Beemer's estate was insolvent. He advised the heirs and next of kin to relinquish all claim to the estate. The books were retained by him for several years, and as he considered them of no value and they were occupying space required, he destroyed them. This may render it more difficult to arrive at the value. I suggested at the trial that it did not seem to me so impossible as counsel seemed to think. Two or three times I pointed out to them that it would be easy to have competent valuators go over this line of railway from Quebec to Ste.

Anne, and to value in detail the present railway. Of course it would not be by any means conclusive. The present values would probably be considerably higher than when the road was originally constructed. Under the agreement with the Crown, made pursuant to the statute, a good title has to be made to the right-of-way, and I would imagine that the title deeds conveying this right-of-way would show the price paid.

By the trust deed which was executed on June 11th, 1898, entered into after the passing of the statute, ch. 59, 58-59 Vic., dealing with the application of the proceeds of the stock and the bonds, it is provided that out of the proceeds of the bonds, the trustees shall pay off and redeem the present interim bonds, the whole as set forth in Schedule "A" to the deed; and also to pay the floating debt detailed in Schedule "B."

Now it is admitted that these two items of $500,000 referred to in Schedule "A," and also the item of $794,869.58 floating liabilities, comprise part of this item of $2,038,149.40. Crown counsel in their statement were of opinion that these two items of $500,000 and $794,869.58 should be taken as the cost up to that date, namely, July 1st, 1898. I do not agree with that contention. I fail to see how it can be assumed without further proof that the proceeds of these interim bonds, namely, $500,000, went into the construction of the railway. They may or may not. That is a question of proof. The bonds were held by the various parties, shown on page 15, as Schedule "A." They were held as collateral security by the various parties. What the nature of the debts due to these various parties is I would have thought susceptible of proof—at all events, before

1917

ATTORNEY-GENERAL OF CANADA AND QUEBEC & SAGUENAY R. Co.

Reasons for Judgment.

such an item can be allowed, further inquiry will be necessary, and so with regard to the liabilities. Unquestionably a considerable portion of them never went into the railway. Colonel Wurtele states as follows:

"Q. A lot of these items on their face do not ap-"pear to be items that went into the construction "of the road, how is that?—A. They may have "gone into the operation of the road, we were "operating the railway."

It would be impossible to accept Colonel Wurtele's evidence as proving the fact that these two particular items went into the construction of the railway. Other evidence would be required before I would be willing to accept those two sums of $500,000 and $794,689.58 as having been expended in the construction of this 21 miles of railway.

I have to determine the value of the railways, the actual cost of them,—and construing the statute, as I think it must be construed, I would be unable, upon the evidence at present before me, to come to the conclusion that this item of two million odd dollars should be taken as being the actual cost of the railway to that date.

I do not think, as I have stated before, that I am concerned with the manner in which, as between the directors and their shareholders, the company kept their books. What I have to ascertain, as well as I can, is the meaning of the words "*actual* cost and value" is.

I pointed out during the progress of the trial the course which I thought might be followed. My remarks will be found at page 102, and the following pages, of the transcript of the evidence.

I may call the attention of counsel to the fact, that in the trust deed, Schedule "D," at page 19, there is the estimate of cost of constructing certain extensions. The total is 11 miles, and the total estimate is $149,947, which would be under $14,000 a mile,—and while of course the main railway, previously built, may not have been built at that low figure, the contrast between the two figures, namely, $92,500 a mile and the $14,000 a mile, is striking.

There seems to be little controversy as to the expenditure after July 1st, 1898. At present it is unnecessary for me to deal with the expenditure between that time and November, 1916. It can be taken up later on.

After careful examination the Crown is willing to concede the main part of this expenditure. There are one or two items objected to, not of very much moment, and I think the evidence adduced has satisfied Crown counsel that these items should be allowed. However, it will be a matter for later consideration.

LOTBINIERE & MEGANTIC RAILWAY.

Dealing with the Megantic Railway, the amount involved in this railway is comparatively speaking not very large, but I think that further proof of a similar nature to that suggested in regard to the Montmorency Railway should be forthcoming. The only evidence given is that of Mr. Robbins, the manager of the railway, and it is a mere surmise. He may or may not be correct when he states that it would probably cost about $11,000 a mile. I think, however, some evidence by outside witnesses qualified to speak should be forthcoming.

THE SAGUENAY RAILWAY.

Mr. Matthews, the manager of the railway, was called as a witness. He states that the construction of the Quebec & Saguenay Railway was started in April or May, 1911. Previous to that he believes exploration surveys had been made. He points out that the main construction on this road stopped some time about September, 1912, but certain small constructions were continued for quite a while. He also states that as a matter of fact, on what is known as the branch spur line, from Murray Bay Wharf to Nairn Falls, very considerable work was done in 1915. That branch is 7.6 miles in length, he thinks. He goes on further and explains that this spur line was constructed for the purpose of handling pulp from a pulp-mill situate at **Nairn's Falls.** Referring to the main construction, he states as follows:

"Q. You say that it was financial trouble that "stopped you?—A. Financial trouble which stopped "us."

"Q. How long has it been stopped—ever since?— "A. Yes.

"Q. Since 1912?—A. September or October, "1912."

No further work was done, with the exception of repairing cribwork on the spur line, but on the main part of the line, from St. Joachim to Murray Bay, nothing has been done since October, 1912, and the work had to be stopped on account of the lack of money.

It is well to bear this fact in mind when we come to consider the claim made by and on behalf of the Saguenay Railway. There appears to have been two flotations of bonds, and to float these bonds a

discount had to be allowed of $833,600. There were fees paid, according to the statement in connection with the listing of the bond issue amounting to $63,465.09. Counsel on behalf of the Crown objected to these items.

It would also appear that in making up their claim of $5,543,260.89, there is an item charged of interest on the bond issue of $1,012,950. This item is also objected to by counsel for the Crown. I think the objection taken by Crown counsel is well founded. I am of opinion that this item of $1,012,950 interest, payable right up to 1917, is not a charge that can be allowed under the terms of the statute. The work of construction, as I have pointed out, with the exception of that small spur line, so to speak, from Murray Bay to Nairn Falls, stopped in October, 1912, and has never been gone on with, so far as the company is concerned. While, as I have stated before, as between the directors and shareholders it may be right to put in all items of cost, I do not think that as between the vendor and the purchaser, having regard to the wording of the statute, they are proper sums to be allowed. The statute, as I have pointed out, is precise and, to my mind, unambiguous.

The consideration to be paid is the value of the railways, the said value to be the *actual* cost of the said railways, less subsidies and less depreciation.

I cannot bring my mind to the concluson that it was ever in contemplation that the actual cost should be what is represented on the books of the company as the outlay as between the directors and shareholders of the company. Some meaning must be given to the word "actual." The word "actual," according to Black's Law Dictionary, at page 28,

1917

ATTORNEY-GENERAL OF CANADA AND QUEBEC & SAGUENAY R. Co.

Reasons for Judgment.

means "Real; substantial; existing presently in act; "having a valid objective existence as opposed to "that which is merely theoretical or possible."

"Actual cost" excludes interest on money borrowed. *Re Old Colony Railroad Company.*[1]

"Actual cost" means real cost as distinguished amongst other things from "estimated cost". *Lanesborough v. County Commissioners,*[2] or from market price which may include matters which do not enter into the real cost. *Alfonso v. United States;*[3] *United States v. 26 Cases of Rubber Boots.*[4]

"The word 'cost' is of limited significance, much narrower than 'damages'." *Massachusetts Central R.R. v. Boston & Clinton R.R.*[5]

In *Re Lexington & West Cambridge R.R. v. Fitzburg R.R.*[6] the term "actual cost" of running trains was held not to include interest on cars and to mean money actually paid out.

Story, J., in construing a revenue Act in *United States v. Sixteen Packages of Goods*[7] says:

"It is apparent that the terms 'actual cost,' 'real "cost' and 'prime cost,' used in these sections are "phrases of equivalent import, and mean the true "and real price paid for the goods upon a genuine "*bona fide* 'purchase'."

In *Re Mayor and Aldermen of Newton,*[8] the Supreme Court of Massachusetts construed the term "total actual cost of the operations" used by certain railroad commissioners in a report made under

[1] 185 Mass. 160.
[2] 6 Met. 329.
[3] 2 Story, C.C. 421.
[4] 1 Cliff, 580.
[5] 121 Mass. 124.
[6] 9 Gray 226.
[7] 2 Mason, Rep. 48 at 53.
[8] (1897) 172 Mass. 5.

statute in that behalf. The railroad corporation claimed to be allowed the cost of a new station, new rails outside the area in question and other matters, representing an investment return upon the moneys expended. The Court said: "In construing "the statute, regard is to be had to the nature of "the subject matter, the various interests, public "and private, which are to be affected."

The Court further said:

"If the railroad corporaton is entitled to an in-"vestment return upon the portion of its road out-"side the commissioners' lines that was used in "transporting the material, we do not see why it is "not entitled to a like return upon that portion "which was within the commissioners' lines, and "also upon the capital invested in locomotives, cars, "etc. But we think that by the words 'actual cost' "it was intended to exclude anything in the nature "of a profit, or return upon the investment. . . . . . "The object of the provision was . . . to exclude "in the accounting between them any profit, and "everything except what fairly might be reckoned "as a part of the real cost of the alterations; and "it appears like a contradiction of terms to speak "of an advance upon the actual cost as constituting "a part of that cost. . . . Though in a sense "the return on capital which one would have re-"ceived for work done may be said to be a part of "the cost, we do not think that in ordinary usage "the term of 'real cost,' or 'actual cost,' includes "a return upon the capital invested. "After allow-"ing all the actual expenses of doing the work, that "seems to us more in the nature of profit than of "cost."

1917

ATTORNEY-GENERAL OF CANADA AND QUEBEC & SAGUENAY R. Co.

Reasons for Judgment.

In the case of *Richards v. Bussell,*[1] the Supreme Court of Washington Territory, in construing a statute which used the words, "the actual cost of "filling in, etc.", limited the term "actual cost" as follows: "The word 'cost' as used in this section "manifestly means cost to the contractor aside from "any profit to him."

Reference again may be had to the above case *Re Old Colony Railroad*[2]: "Unless 'actual cost' and " 'expense' are to be taken as equivalent in mean-"ing to the expression, full compensation for any "and all expenses in whatever form they may be "sustained, which is a construction that in view of "the language used and the general purpose of the "Act for the abolition of grade crossings cannot be "adopted, it must be held that these words have the "limited definition given to them by the statute, and "cannot be extended to include the claim of the "petitioners."

In the case of *Lynch v. Union Trust,*[3] the Court said in construing a statute:

"When Congress employed the expressions 'act-" 'ual value' and 'clear value' it very evidently in-"tended to convey the idea of definite or certain "value—something in no sense speculative."

The case of *National Telephone Co. v. Postmaster-General*[4] came before the Railway and Canals Commission in England,—Lawrence, J., Mr. Gathorne-Hardy and Sir James Woodhouse constituting the tribunal which heard the case. There Lawrence, J., Mr. Gathorne-Hardy concurring, decided that the value of the plant of the National Telephone Co.

[1] 127 Pac. 198.
[2] 185 Mass. 160 at 165.
[3] 164 Fed. R. 161 at 167.
[4] 29 T.L.R. 190.

taken over by the Postmaster-General was to be arrived at by taking the cost of construction, less depreciation, and that every expense which was necessary to construct the plant was an element to be considered, including in such expense (*inter alia*) reasonable cost of obtaining subscriptions, agreements which were in force at the date of the transfer, and also the cost of raising capital necessary to construct the plant. Sir James Woodhouse wrote a vigorous dissenting opinion in which he reached the same conclusion as the American courts in the cases I have collated above. He says at p. 196: "Those "expenses, forming the actual cost of construction, "having been ascertained, represented the value. "That value had then to be expressed and paid in "the current coin of the realm. How, or where, that "current coin was obtained, or what was paid for "obtaining it, had nothing in the world to do with "the value of the thing which was the subject mat- "ter of the payment. If it were otherwise, the cost "of construction, and equally, the value of the thing "constructed, would differ according to the finan- "cial standing of the person who constructed. . . . "It was, in fact, making the value of the thing con- "structed vary with and be dependent on the finan- "cial ability or credit of the constructor. . . . "Again, the cost of raising capital was not the cost "in the sense that the vendor was saving any- "thing to the buyer, because the buyer had to raise "his capital when he came to pay for what he ac- "quired. He would develop this a little. The com- "pany in this case said they incurred so much in "raising the money to pay for what they construct- "ed, and therefore the value must include that cost. "Let him assume that another company, instead of

"the Postmaster-General, was the purchaser of the "undertaking, and that the purchase-price at cost "included, say £500,000, as the amount paid by the "vendor company for raising its capital to pay for "the structure. The value of the thing constructed "stood in the books of the purchasing company "therefore with this £500,000 as part of it, for which "there was, in fact, no actual asset corresponding "to the item. Now the purchasing company must "also raise its capital to pay the vendor company "this price, and the cost of raising this money must, "in turn, equally become to it an element in the "value of the thing bought. Thus in the case of the "second company, precisely the same asset would "stand in its books enhanced in value by the amount "it spent on raising its capital, and they had only "to imagine a series of similar sales to perceive "what an enormous value this same original asset "would ultimately attain.

"This point, again, could not be stated in better "or more convincing language than that used by the "learned Judge in answering Mr. Gill's contention, "at page 244, when he said: 'The buyer has to raise " 'his capital also.' According to that, you see, if "the cost of raising the capital is an element of "value in a plant, the second time the plant changes "hands there have been two costs of raising capital, "and so it would go on every time it changes hands. "The plant would be increasing in value by reason "of the cost of raising the capital necessary to pur-"chase it. That, in his opinion was the sound view, "and the only logical conclusion from the premises "underlying the company's contention. He had "heard no argument and could find none which dis-"placed it. It was the view taken by the only ex-

1917

ATTORNEY-GENERAL OF CANADA AND QUEBEC & SAGUENAY R. Co.

Reasons for Judgment.

"perienced men of business who gave evidence about "it, *viz.*, by Sir William Peat, the eminent account-"ant, and Sir George Gibb, who, they all knew as a "railway lawyer and manager, had had a very large "professional experience in valuations. He did not "see his way to regard this item as one which they "could rightly include in the value to be ascertained. "If, however, he was wrong in his opinion, he had "no objection to the amount of £247,189 which his "colleagues allowed for it."

An appeal was taken from the decision of the Railway and Canal Commission in this case to the Court of Appeal, but it was settled between the parties before the appeal was called for hearing; and so we have not the advantage of a judgment of that court upon the question raised by the tribunal below.

In *Kirby & Stewart v. The King*,[1] a case tried before me, I refused to allow the contractor interest which he had paid to the bank for moneys required for the purpose of the construction of the work. That case was appealed to the Supreme Court of Canada, and my ruling sustained. There is a difference between that case and the present in this respect; the claim there made was by the contractor, and he had been allowed the usual contractor's profits. The words of the reference, by the Order-in-Council in that case, were that he was to be allowed the "actual and reasonable cost".

To my mind, to allow these charges for obtaining money and the interest for a period of years might make the matter almost farcical. The railway might have laid dormant for a period of another 20 years, meanwhile the interest on the bonds would have to

1 Unreported.

1917

ATTORNEY-GENERAL OF CANADA AND QUEBEC & SAGUENAY R. Co.

Reasons for Judgment.

be paid, amounting to 2 or 3 more million dollars, all of which, assuming the company paid the interest, would be charged up in their books to the shareholders,—and if the argument put forward is correct in that case the Crown when paying what is defined by the statute to be the *actual* cost of the railways, would be paying some 3 million dollars odd for interest for which no value is given in return.

The views of the various accountants seem to vary. Some of them apparently were rather shocked at the length to which their evidence would lead, and came to the conclusion that the interest could only be a proper charge during a reasonable period of construction.

It will be easy when the case is concluded to arrive at the amount which in my judgment ought to be allowed. There will have to be deducted the allowance for depreciation, which has been settled. There will also have to be deducted the amounts received from the Dominion and Provincial subsidies. These sums are not in dispute. There will also have to be deducted these items that I have just been referring to in connection with the Saguenay Railway, and any amounts that should be deducted from the Montmorency & Charlevoix Railway, and the Megantic Railway on a proper valuation being proved.

Judgment accordingly.