CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

THE HEREFORD RAILWAY CO.....APPELLANT; 1894

*May 14.

VS. *Oct. 9.

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

51 & 52 *Vic. ch.* 91. *secs.* 9, 14 *(P. Q.)—Interpretation Act sec.* 19 *R. S. Q. —Railway subsidy—Discretionary power of Lieutenant Governor in Council—Petition of right—Misappropriation of subsidy moneys by order in council.*

Where money is granted by the legislature and its application is prescribed in such a way as to confer a discretion upon the Crown no trust is imposed enforceable against the Crown by petition of right.

The appellant railway company alleged by petition of right that by virtue of 51 & 52 Vic. ch. 91, the lieutenant governor in council was authorized to grant 4,000 acres of land per mile for 30 miles of the Hereford Railway; that by an order in council dated 6th August, 1888, the land subsidy was converted into a money subsidy, the 9th section of said ch. 91, 51 & 52 Vic., enacting that "it

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*PRESENT:—Sir Henry Strong C. J., and Fournier, Taschereau, Sedgewick and King JJ.

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shall be lawful," &c., to convert; that the company completed the construction of their line of railway, relying upon the said subsidy and order in council, and built the railway in accordance with the act 51 & 52 Vic. ch. 91 and the provisions of the Railway Act of Canada 51 Vic. ch. 29, and they claimed to be entitled to the sum of $49,000, balance due on said subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded *inter alia*, that the money had been paid by order in council to the sub-contractors for work necessary for the construction of the road; that the president had by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties and signed a receipt for the balance of $6,500 due on account of the first subsidy. The petition of right was dismissed.

Held, that the statute and documents relied on did not create a liability on the part of the Crown to pay the money voted to the appellant company enforceable by petition of right; Taschereau and Sedgewick JJ. dissenting; but assuming it did the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy, and payment by the Crown of the sub-contractors' claim out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming a judgment of the Superior Court at Quebec, dismissing a petition of right brought by the Hereford Railway Company, whereby a sum of $42,500, balance of a subsidy voted by the legislature, was claimed.

This was a petition of right against Her Majesty the Queen (province of Quebec) concluding for a declaration by the Superior Court of the province of Quebec that the suppliants (appellants) are entitled to receive the sum of $42,500 as a part of a money subsidy due for constructing thirty miles of the Hereford Railway.

The facts and pleadings and the sections of the statutes and orders in council upon which the claim is

based, are fully stated in the judgments hereinafter given.

Brown Q.C. and *Stuart* Q.C. for appellants. The statute granting the subsidy in this case couples with the power to pay the duty to exercise that power so soon as the railway company has fulfilled its obligation, and there is no pretense here that the company has not earned the grant but simply that the lieutenant governor can exercise a capricious discretion. We take it to be a well established rule that no statute, which requires the action of the Crown, is written in imperative terms, but that none the less is the obligation imposed upon the Crown to act on every occasion when the public interest or the rights of a private individual require it. *Lapierre* v. *Rodier* (1); Cooley's Constitutional Limitations (2); Sedgewick on Statutory and Constitutional Law (3); Potter's Dwarris on Statutes (4); *Julius* v. *The Bishop of Oxford* (5).

The judgment of the Superior Court asserts the right of the company to the subsidy claimed, but holds it to have been determined by payment and subrogation by release and compromise. There was no authority given by the company to the payment by the Crown out of their subsidy of any moneys due to the sub-contractors for work of construction. No subrogations were produced from these sub-contractors against the company and the Crown cannot in law claim the benefit of any of these payments. Arts. 1155-1156 C.C.

Then again, the money was in the hands of the lieutenant governor in trust for the company, and we claim we are now entitled to the money, (which right has been recognized by the order in council of 16th August, 1888,) and can recover it by petition of right.

(1) Q.R. 1 Q. B. 515.
(2) P. 284.
(3) P. 438.
(4) P. 220, no. 27.
(5) 5 App. Cas. 244.

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This right is also impliedly recognized by 54 Vic. c. 88 (P.Q.) The lieutenant governor in council exercised his discretion, for warrants were issued and the money instead of coming into the hands of the company went into the hands of third parties to be used for debts for which there is no legal evidence that the company were liable. Then as to the ratification by the president we say he was not authorized to write such a letter by the board and he cannot bind the company in such a matter without a resolution of the board of directors, and his letter was not even acknowledged or acted on. See Art. 360 C.C.; *D'Arcy* v. *The Tanear, &c., Railway Co.* (1); *Kirk* v. *Bell* (2); Morawetz on Private Corporations (3).

If there was a liability on the part of the government for the payment of the subsidy now proceeded for that liability was not extinguished by an unauthorized offer of compromise, unaccepted by the Government and the terms of which have not been fulfilled.

Drouin Q.C. for respondent. The principal question to be decided on this appeal is whether a binding contract was entered into between the government of the province of Quebec and the suppliant company.

We submit first the following proposition: The words "is authorized to grant" used in the statutes 45 Vic. cap. 23, and 49 & 50 Vic. cap. 77 and others by which they were amended, are permissive and not imperative.

Article 19 of the R. S. P. Q. and the 4 s.-s. of section 7 of the Interpretation Act are too absolute in their meaning for any one to presume that the legislature intended that the courts should not be bound by the strict grammatical interpretation.

The grant of a railway subsidy in this case was a mere permission given to the lieutenant governor in

(1) L. R. 2 Ex. 158. (2) 16 Q.B. 290.
(3) Sec. 537.

council to apply for the building of that railway the lands or the money intrusted to him for that purpose. See 45 Vic. cap. 23, sec. 2.

And if a company is obliged to demand a subsidy it has no right to it; if the lieutenant governor in council can consider and declare that he is satisfied or not satisfied he has the discretionary power to do so; the right to receive, and the corresponding obligation to give this subsidy, are only created by the order in council asked for and passed after deliberation according to section 10 of 45 Vic. ch. 77, and to the act to which it refers 45 Vic. ch. 23.

So far there cannot be any doubt; the will to allow, to authorize, is exactly what the words express it; that conviction is forced upon one's mind.

The fact that the law does not specify who are the persons that are to profit by the subsidy and from the comparative quotations from the statutes cited by the appellant and other similar statutes; from the well understood intention of the legislator; from a sound consideration of the public interest; from the important distinction to be made between a statute admitting a vested right and a statute which creates one; it follows, that in the present case not only is there the doubt which, according to the learned Chief Justice of the Court of Appeal in the case *In re the Medical College and Palidès*, makes it a duty to adopt the natural meaning of the terms; but there is moreover absolute certainty on the parity of the grammatical and the legal senses.

Then we submit that 49 & 50 Vic. ch. 76, is only an act making it optional for the railway companies to ask for money in lieu of lands if the subsidies are granted to them. The proof of it is found in the fact that the legislation requires the companies to make two separate demands, one by which they ask the subsidy,

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and the second by which they apply for the conversion of the land subsidy into a money subsidy. Section 10, 49 & 50 Vic. ch. 77, previously quoted, enacts that:

> In the event of any company, having within the delay prescribed in subsection 1 of section 2 of the Act 45 Victoria, chapter 23, *applied for* any subsidy mentioned in the said act and furnished proof of its resources to construct its road, *the Order in Council may issue* at any time thereafter if the Lieutenant-Governor *is satisfied with the proof furnished.*

Neither this section nor the clause to which it refers has been repealed. To acquire a final right to a subsidy it is not sufficient for a company to apply for the conversion, and even after an order in council has acknowledged the application the company has no more right than previously. It is clearly seen that even after that another company with greater resources might come forward to which it would be in the public interest to grant the subsidy. According to the law, even after that conversion, the company must ask and obtain an order in council by which the lieutenant governor in council grants the subsidy to said company. Alone that order in council creates the right of a company to a subsidy.

It is a well known principle that the sovereign, like private individuals, is bound by the common law and according to common law there must be a fixed consideration for every contract. Now, as seen previously, the order in council upon which the claim of the appellant is based declares that the company has made the option, according to section 14, 51 & 52 Vic. ch. 91, and that section says:

> It shall be lawful for the Lieutenant Governor in Council to convert any subsidy in land * * by paying a sum not exceeding thirty-five cents per acre.

Is that a fixed measure? A real contract? Evidently no; for the Crown was limited to a maximum which

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was not to be exceeded; it could not pay more than thirty-five cents an acre but it could pay less. Where then is the operation which has fixed and determined this measure, and which would have finally created the right of the appellant? Nowhere, for it has never asked the order in council required by the clauses of the law above quoted. It would be a useless attempt to supply that missing link by the contention that 35 cents is the price inscribed in the books of the provincial treasurer. We would answer that the lieutenant governor in council has the right to fix that price, and that it is a well known principle that the Crown cannot be bound by the laches and the acknowledgments of the public officers, or even of the ministers. If again it was argued that there has been a defined practice of thus acting in the application of similar provisions we would reply that this practice, if it exists, resulting only from individual action, has no legal character and cannot bind the Crown. Morawetz on Corporations (1); Bryce on Ultra Vires (2).

THE CHIEF JUSTICE.—This petition of right has been presented for the purpose of obtaining from the Crown, as representing the province of Quebec, the payment of a subsidy granted by the legislature of that province in aid of the construction of the suppliants' railway.

The Crown insists that the subsidy in question, having been granted by the legislature in such terms as made the payment of it optional and discretionary with the lieutenant governor of the province, is not money recoverable by means of a petition of right. It is further set up on behalf of the Crown that so much of the money granted as was not paid over to the sup-

(1) Sec. 588. (2) P. 368.

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pliants was duly applied by the government in payment of certain claims against the contractors for the railway. And lastly, that by a certain receipt signed on behalf of the suppliants and by the terms of a certain application by the president of the railway company to the first minister of the province of Quebec, the suppliants renounced their present claim.

By the statute of Quebec 45 Vic. cap. 23, sec. 1 (a general subsidy Act), it is enacted as follows:

The Lieutenant Governor in Council is authorized to grant the following subsidies in and for the construction of the railways hereinafter designated.

And subsection *o* of the same section is as follows:

A quantity of four thousand acres of land per mile for a railway starting from a point on the frontier of the Province of Quebec, to effect a junction with the Boston, Concord and Montreal Railway to a point ten miles from Hall's stream, provided the length of such road does not exceed thirty miles.

51 & 52 Vic. cap 91, sec. 9, is as follows:

It shall be lawful for the Lieutenant Governor in Council to grant a subsidy of four thousand acres of land per mile to the Hereford Railway Company, for a railway starting from a junction with the Boston, Concord and Montreal Railway, or other railway on the frontier of the Province of Quebec, within ten miles of Hall's stream, thence to a junction with the International Railway, in the Township of Eaton, provided the length of such railway does not exceed thirty-five miles.

The 10th section of the same Act is in these words:

Paragraph *o* of section 1 of the act 45 Vic. cap. 23, is hereby repealed, the International Railway Company having by an instrument in writing passed in June last transferred to the Hereford Railway Company all its rights to the land subsidy granted by the said statute to the railway described in said paragraph *o*.

The 14th section of this Act is as follows:

It shall be lawful for the Lieutenant Governor in Council to convert in whole or in part any subsidy in land to which any company may be entitled in virtue of this act into a money subsidy by paying a sum not exceeding thirty-five cents per acre at the time the said subsidy becomes due, and another sum not exceeding thirty-five cents per acre when the lands allotted to the said company under this act shall

have been sold and paid for pursuant to the rules and regulations of the Department of Crown Lands and subject to such conditions to secure the construction of the road to which the said subsidy shall apply, as the Lieutenant Governor in Council may establish; provided that the Company entitled to any land subsidy under this act shall declare its option within the delay of two years after the passing of this act in favour of the said conversion of the said subsidy by a resolution of its board of directors duly communicated to the Government through the Commissioner of Public Works.

On the 2nd of August, 1888, an order in council was passed which is printed in the case, and which (after many long recitals which need not be set forth, and including one to the effect that the suppliants had declared their option for a conversion of the subsidy into money, and recognizing that the International Railway Company, which had become entitled to the subsidy granted by 45 Vic. ch. 23, had transferred its rights to the suppliants) proceeded as follows :—

L'Honorable Commissaire recommande qu'il soit donné acte à la dite Compagnie du chemin de fer de Hereford tant en son nom propre que comme étant aux droits et actions de la dite Compagnie de l'International des conversions en argent par elle ainsi effectuées, de la subvention en terres de 4,000 acres par mille ainsi accordée et mentionnée dans et par les dites clauses 9 et 10 pour la ligne de chemin de fer y décrite et que les dites conversions en argent soient ratifiées et confirmées en faveur de la dite Compagnie du chemin de fer de Hereford, pour toutes fins que de droit, sous l'autorité et en conformité de la clause 14 de l'Acte des subventions en premier lieu cité.

Certain persons who had contracted with the suppliants' principal contractor for the construction of their line of railway having absconded, leaving subcontractors under them and workmen unpaid, the government of the province of Quebec on the 17th of April, 1889, appointed John P. Noyes as a commissioner to inquire into and investigate the claims of the persons thus remaining unpaid. On the 28th August, 1889, Noyes made his report. Pursuant to the report the government paid the sum of $42,500, but a very

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small portion of which appears to have been applied for the benefit of the suppliants, or in discharge of debts or claims for which they were liable, this money having been paid to persons to whom the absconding contractors were indebted, debts for which the suppliants were in no way responsible.

The residue of the subsidy remaining after the payments out of it made under Noyes's report amounted to $6,500. This amount was on the 8th of August, 1890, paid over to the suppliants pursuant to the warrant of the lieutenant governor, dated the 7th of August, 1890, when the suppliants by the agency of their president signed the receipt below. As the judgment of the Court of Queen's Bench is founded on this warrant and receipt I set it out *in extenso*. These documents are as follows:—

By His Honour

The Honourable Auguste-Réal Angers,

Lieutenant Governor of the Province of Quebec.

No. 511 on No. 1010, $6,500.

To the Honourable the Treasurer of the Province of Quebec.

You are hereby authorized and required, out of such monies as are in, or shall come to your hands, for defraying the expenses of the Civil Government of the Province of Quebec, to pay or cause to be paid unto The Hereford Railway Company, or to their assigns, the sum of six thousand five hundred dollars being on account of the balance of the first thirty-five cents per acre of converted land subsidy of 4,000 acres per mile, on 35 miles under O. C. No. 340 of July 31st, 1890, and chargeable to

Consolidated Railway Fund.

Railway subsidies, to be taken from 40 Victoria, chapter 2.

And for so doing this, with acquittance of the said Railway Co., or their assigns, shall be to you a sufficient warrant and discharge.

Quebec, this 7th day of August, 1890.

GUSTAVE GRENIER,

Deputy Lieutenant Governor.

Received this 8th day of August, 1890, from the Honourable Treasurer, the above mentioned sum.

THE HEREFORD RAILWAY CO.,

p. pro. W. B. IVES,

President.

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The suppliants went on and completed the construction of their line of railway, and on January, 1890, the same was duly inspected by the railway engineer of the Quebec government, and that officer, by his report in writing dated the 8th of January, 1890, certified to the commissioner of public works that the railway had been satisfactorily completed.

In a letter dated January 20th, 1890, written by the Hon. William B. Ives, president of the suppliants' company, to the Hon. Mr. Mercier, then minister at the head of the government for the province of Quebec, allusion is made to an additional subsidy for eighteen miles of the line of the suppliants' railway other than the thirty-five miles for which the first subsidy had been granted. The following extract from the letter referred to contains all that is material to the present question :

> I have to add that a subsidy of say $3,000 per mile upon this eighteen miles voted on condition that the Government retained and paid out of it the claims against Messrs. Shirley, Corbett & Company as established by Mr. John P. Noyes, would be acceptable to this company, and would put at rest all the difficulties that have arisen with regard to these claims.

This letter does not appear by the evidence to have been answered, but a grant of the amount mentioned for the eighteen miles referred to was subsequently made by the legislature of the province of Quebec to the suppliants, no reference, however, being made in the act granting the subsidy to the application or to the terms indicated in the president's letter.

Mr. Justice Caron, before whom the cause was heard in the Superior Court, dismissed the petition of right upon three grounds ; first, because the payment under Noyes's report was a due application of the subsidy *pro tanto ;* secondly, because the $54,000 granted as a subsidy for the eighteen miles must be presumed to have been so granted on the terms of the president's letter, and was thus in satisfaction of all claims arising

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out of the misappropriation of the first subsidy; and thirdly, because the receipt appended at the foot of the warrant was an express renunciation of all claims to any further payment on account of the grant.

The Court of Queen's Bench adopted as the reasons of its judgment the second and third only of these grounds.

I am of opinion that the Court of Queen's Bench were right in rejecting the first "considérant" of the Superior Court. If there was any legal obligation binding on the Crown to pay this money to the suppliants that obligation could not possibly be discharged by payments made without the assent of the railway company in liquidation of demands against Shirley, Corbett & Company, the absconding contractors, to whom it does not appear that the railway company were in any way indebted.

In favour of the two other grounds of the first judgment which were adopted by the Court of Queen's Bench more may be said, though I cannot agree in either of them. The receipt at the foot of the warrant does not, as it seems to me, amount to a renunciation. It does, it is true, refer to the $6,500 as being a balance of the subsidy, but I cannot say that it shows that it was the intention of the company to waive all further demand for the rest of the subsidy. The letter of the president, and the subsequent grant of the amount suggested by him, without more, cannot bind the company. No resolution of the board of directors authorized the writing of this letter, and the president had therefore no authority to bind the company. It cannot be pretended that the company in accepting the subsidy must be taken to have implicitly ratified the terms proposed by Mr. Ives, for it is not shown that these terms and conditions were ever brought to the notice of the directors, either when the letter was writ-

ten or when they accepted the second subsidy. It must therefore be taken as proved that the company had no knowledge whatever, at any time, of Mr. Ives's letter, or of the proposal which he therein made to the government. This, therefore, also appears to me to be an insufficient ground for refusing relief to the suppliants.

I am, however, of opinion that on a broader ground, that principally insisted on by the Attorney General, the petition of right was properly dismissed.

It is argued on the part of the appellants that by taking the order in council converting the subsidy from the land into money the Crown entered into a contract with the suppliants to pay them the subsidy.

I cannot accede to this proposition. I see nothing in the terms of the order in council itself indicating that the Crown intended thereby to do more than the statute under which it was passed authorized, namely, to provide for substitution of money for land in such a way that the government should be in the same position, and bound by no greater obligation as regarded the money than it was originally bound by as regarded the land.

Then, the suppliants' right to this money must depend altogether on the statute (1) granting the subsidy, and if this did not create a liability on the part of the government to pay the money no statutory liability in respect of this money ever existed.

The language of the act is permissive and facultative; it makes no direct grant to the railway company, but in using the words "it shall be lawful for the lieutenant governor to grant" it imports that the Crown is to exercise its discretion in paying over or withholding the money as it may think fit. In the case of *The Queen* v. *The Lords Commissioners of the Treasury* (2) Lord Blackburn says:

(1) 51 & 52 Vic. cap. 91. (2) L. R. 7 Q. B. 387.

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When the money has been voted and an appropriation act passed this act must be construed, when it comes before us, like any other act. The Appropriation Act regulates so far as it goes what is to be done with the money.

In the well known case of *Julius* v. *The Bishop of Oxford* (1), Lord Cairns speaking of the act in question there (which was not, it is true, a money act) says:

> And the words "it shall be lawful" being according to their natural meaning permissive or enabling words only it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power to show in the circumstances of the case something which according to the principles I have mentioned creates this obligation.

Section 19 of the Revised Statutes of Quebec (the Interpretation Act) is also directly applicable and so absolute in its terms as to preclude the possibility of interpreting these words as implying any obligation enforceable by petition of right or otherwise.

This section 19 is in these words:

> Whenever it is provided that a thing "shall" be done or "must" be done, the obligation is imperative, but if it is provided that a thing "may" be done, its accomplishment is permissive.

Then, there is no reason here why the words should be read in any other than their primary meaning. The grant of the subsidy was pure bounty on the part of the legislature. No advantages, privileges or benefits in the case of the railway to be constructed were stipulated for in favour of the government, and there was no reason why the control of the money by the lieutenant governor should not be retained down to the last moment before payment. It is said that the suppliants relied on receiving the money and were thus induced to construct their railway at a great expenditure of their own moneys, but they had no right to rely on the act any further than its terms warranted them in doing so. Then, no statutory obligation was cast upon the Crown either as regards the money or

(1) 5 App. Cas. at p. 223.

the land. I cannot read section 4 of 49 & 50 Vic. cap. 76 as imposing an absolute obligation to pay when a railway shall be completed; this is apparent from the 5th section which authorizes the lieutenant governor to impose terms. The words we have to look at are the words of the 51 & 52 Vic. cap. 91, for the 4th section of 49 & 50 Vic. cap. 76, does not apply to grants under the subsequent act, and these words, as I have shown, are not obligatory. Therefore, neither on the ground of contract nor on that of statutory obligation are the suppliants entitled to succeed. There remains the ground of trust. Can it be said that the Crown is by the statute made a trustee or *quasi* trustee of this money to hold it until the railway should be completed and then pay it over to the company? Several cases have been before the English courts where moneys have come into the hands of the Crown for the purpose of being distributed amongst a certain class of persons. Such were the cases of *Kinloch* v. *The Queen* (1), and *Rustomjee* v. *The Queen* (2), in both of which it was determined that money so held by the Crown could not be considered as subject to a trust enforceable by means of a petition of right. I see no reason why the principle of these cases should not apply here. If no enforcible trust is to be considered as imposed when money to be applied to a particular designated purpose is placed in the hands of the Crown under treaty or otherwise than by act of parliament, why should the conclusion be different where the money is granted by the legislature and its application is prescribed in such a way as to confer a discretion upon the Crown? No reason can be suggested for such a difference.

I am of opinion that the appeal must be dismissed.

(1) Weekly Notes 1882, p. 164; reported. Ibid. 1884, p. 80. Not elsewhere

(2) 1 Q.B.D. 487; 2 Q.B.D. 69.

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FOURNIER J. concurred.

TASCHEREAU J.—I agree with my brother Sedgewick, whose notes I have read, that this appeal should be allowed.

On the only question that can, it seems to me, give rise to any controversy in the case, and the only one upon which we do not agree, that is to say the question whether the appellant company has a right of action or not, the appellant has, in its favour, the judgment of Mr. Justice Routhier upon the demurrer, and, though not in express terms, the judgments of both the Superior Court and of the court of appeal, which, as I read them, both concede his right of action. I take it for granted now that the payment to the contractors' men cannot be invoked against the appellant, and that Mr. Ives's letter cannot in any way militate against them. It is clear that a payment to B. of what is due to A. cannot prejudice A. and as to Mr. Ives's letter there is not a word of evidence, leaving aside the want of authorization proved by himself in the case, that it was ever acted upon, or taken into consideration, or even given communication of to the legislature. Then the subsidy granted in 1890, 54 Vic. c. 88, is for an extension line of this railway and not for the same line subsidized previously. We are unanimous in rejecting that part of the defence based on these two facts, and upon which the two courts below came to a conclusion adverse to the appellant. So that, if I mistake not, on each question raised in the case the appellant has in its favour the majority of the judges who in the different courts have had to adjudicate upon it, though they lose their case. This subsidy, I may preliminarily remark, is not to be considered as a gratuity. It is a grant for consideration. The government desiring to see a railway in

that locality, and, it must be assumed, no company being willing to build such a railway, in a comparatively new and unsettled part of the country, without the assistance generally given by the government to such enterprises under such circumstances, gets from the legislature the power to subsidize any company that will come forward to build it. The increase which must result from the construction of such a railway in the value of the government's own lands in that vicinity, for it appears to be township lands, is, undoubtedly, also a consideration that induces the government to take that step.

Now, upon the consideration of this subsidy so offered to the world at large, and only because they are offered this subsidy, this company is formed and comes forward, disburses a large capital, constructs a road in a manner which the government's own engineer reports as "très satisfaisante," yet the government would now say that they never contracted an obligation to pay them a single cent. And this after sanctioning by an order in council the conversion of this land subsidy into a cash subsidy, (which, I take it, is, by itself, an admission of liability and a promise to pay) after admitting in so many words in an order in council of 19th December, 1883, that this company had performed all the conditions precedent required by the statutes, and that it consequently had then the right to demand from the government that the land it was then entitled to as a subsidy be located and set apart, as required by section 2 of 45 Vic. ch. 23. I cite the very words of this order in council (as recited in the order in council of 1888 as found in the case) to show that there is no ambiguity in its terms, and that the Quebec government's advisers of that date did not dispute in any way this company's claim:

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-Considérant * * * que la dite Compagnie avait fourni des preuves suffisantes des ressources à sa disposition pour la construction du dit embranchement et qu'en conséquence elle avait droit de demander la location des terres ainsi accordées par le statut plus haut cité.

Now, if the company had then, in 1883, a right to the lands, as this order in council admits, they have now a right to the cash subsidy. By admitting that the company had a right the government admitted an obligation on its part, a contract to pay; and if the company have a right they have an action to claim it. And this very order in council of 1888 admits that they have the same right to the cash subsidy that they had to the land subsidy. It admits that the International Company has ceded to the appellant company "tous ses droits et actions," all its rights and actions in the said subsidy, and recognizes it as substituted to the International Company. Then, an order in council of September, 1889, authorizes the payment of Noyes's expenses "out of the $49,000, being the subsidy at 35 cents per mile granted to this company," and the orders in council, one of March, 1890, and two of June, 1890, also admit that the payments thereby authorized are to be taken from the subsidy payable to the said company "*afférente à la dite compagnie.*" The very order in council of April, 1889, appointing Noyes as commissioner, had in the same terms decreed that his fees were to be paid out of the "subvention afférente à la compagnie"; and in the order in council of 3rd September, 1890, is another admission that the company had a right to $49,000,

Total de la subvention de $4,000 par mille, à laquelle la dite Compagnie *avait droit.*

In fact this right of the company would only be forfeited according to section 2 of 49 & 50 Vic. ch. 77, upon their not performing the works required by them, which event, it is conceded, has not happened.

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By sec. 6, 49 & 50 Vic. ch. 76, every railway company to which a subsidy of 35 cents per mile is granted, and which accepts the same, falls *ipso facto* under the government's control and *surveillance*. Here is a railway which by the law is under the government control, because it is subsidized, but to which, however, the government will not pay the amount of the subsidy, and which, though it actually receives no subsidy, is nevertheless under government control.

(Secs. 9, 10 and 14 of 51 & 52 Vic. ch. 91, recognize the present suppliant's title in lieu of the International Company, and a revote of the subsidy, extending it to 35 miles instead of 30 miles.)

On the 16th July, 1888, four days after the coming into force of the 51 & 52 Vic. ch. 91, the department of railways in Quebec wrote a letter to this company saying that as soon as the department would receive the company's option of a money subsidy instead of lands, the government engineer would be ordered to make the inspection required by law of any completed portion of the road, and that upon such report the proportion of the money subsidized accrued in virtue of the statute, would be paid by the treasurer of the province.

Immediately, on the 19th, the company's option is declared, and sent to the government, as acknowledged in the order in council of the 2nd August following. This order in council approves and grants the demand of these companies, ratifies and confirms, " pour toutes fins que de droit," in favour of the suppliants the said conversion of a land subsidy into a cash subsidy in conformity with sec. 14 of 51 & 52 Vic. ch. 91, and this sec. 14 enacts that this money shall be paid when the subsidy becomes due. Is not that again a legislative declaration that this money is due when the railway is built to the satisfaction of the lieutenant governor

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in council? And further, why was the government engineer sent to inspect the railway, as it appears he was, by his evidence and by his report of January 8th, 1890, filed in the case? Did not the government thereby submit again, or admit *de novo* its obligation, to pay this subsidy if its engineer reported that the company had performed its duties? When this engineer reports that the company had fulfilled all its obligations can the government repudiate its own acts, and be allowed to contend that it is not bound to pay this subsidy? I would call this a breach of faith and nothing else if such a contention, under similar circumstances, was enunciated in a court of justice by any private corporation.

The contention that the company has, by receiving $6,500 on account, discharged the government of this liability for the balance is untenable, and, on this point we are also, I believe, unanimous. A payment on account is not a payment in full satisfaction. It is, if anything at all, an admission of liability as specially pleaded in suppliant's replication? Then, there is no plea to that effect, not a word in the defendant's pleas of this payment of $6,500. The only allegation of ratification, could any question of ratification have arisen, is in paragraph 12 of the pleas, which is and remains struck out by the court by the judgment of May 20th, 1892, and, as to the amended pleas, of March 6th, 1893. The order in council itself, of July 21st, 1890, upon which these $6,500 were paid, says that this sum is paid " en déduction d'autant sur la balance lui afférant sur la montant de la dite subvention." To contend that by accepting these $6,500 the company renounced all its rights to the balance of the subsidy would be equivalent to contending that the government's officers surreptitiously or smartly obtained from the company a discharge of the govern-

ment's obligations. But, as I have said, no contention on this head is open to the respondent on this record, as there is no plea to support it.

The respondent's contention based upon the fact that the statutes authorized a money subsidy without mentioning any amount besides saying that it should not exceed 35 cents per acre is, on the evidence, untenable. All the documents, their very payment sheets to the contractors, all the orders in council, show that it was mutually always understood that the full amount of 35 cents per acre was the amount this company was entitled to when they optioned for the cash subsidy.

If this receipt for $6,500 I have alluded to establishes anything, it is that the government acknowledges that it had fixed at 35 cents per mile the cash subsidy authorized by the statutes, besides admitting its liability therefor.

SEDGEWICK J.—In my view the principal question involved in this appeal is as to the existence of a contract between the company and the Crown. If a contractual relationship existed between them the suppliants are entitled to their demand, and if not the appeal must fail.

It is clear that when an Act of Parliament by a supply bill or otherwise authorizes the Crown to appropriate public money or lands for any specific purpose, or to any particular individual or company, such an Act is facultative or permissive only. It of itself imposes no obligation on the Crown to make the appropriation, much less does it give to any one a legal right to demand it. To create such right there must be a subsequent actual appropriation by the Crown communicated to the person for whom it is intended and acceptance by him of the appropriation. There must, in short, be a contract. Nor is it absolutely

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necessary that the contract be under seal, or even in writing. It may be created without writing, without spoken words even, its existence being sometimes conclusively proved solely by the acts or dealings of the parties involved.

Now in the present case there was no formal contract executed between the government and the company by which the company became bound to build the railway and the government to pay the subsidy. It was admitted at the argument that at that time such was not the practice in the province of Quebec; formal contracts were never entered into in reference to the payment of provincial railway subsidies, although an express statute on the subject has since been passed. But notwithstanding the want of it in the present case, I have come to the conclusion that as a matter of fact there was an actual contract, a contract completely performed by the company and capable of being enforced against the Crown. The salient facts which have led me to this conclusion are as follows: By 51 & 52 Vic. cap. 91, sec. 9, the lieutenant governor was authorized to grant a subsidy of 4,000 acres of land to the Hereford Railway Company for the purpose of aiding the construction of its railway, the length not to exceed 35 miles. By the same Act it was provided, in effect, that the governor and council might upon application of the company convert the land subsidy into a money subsidy, by paying a sum not exceeding 35 cents per acre when the subsidy should become due, and a like further subsidy when the lands were sold, the company to declare its option in favour of conversion within two years from the passing of the Act. This Act was passed in July, 1888, and afterwards on the 16th of July the following letter was sent from the public works department, the department charged by statute with the

administration of railway subsidies, to the president of the company:

DEPARTMENT OF PUBLIC WORKS, PARLIAMENT BUILDINGS,
GOVERNMENT RAILWAY OFFICE,
QUEBEC, 16th July, 1888.

To W. B. IVES, Esq., Q.C. & M.P., Sherbrooke.

SIR,—In reply to your favour of the 13th instant, I beg to enclose you, at your request, a copy of the railway subsidies act passed at the last session of the Quebec legislature, and sanctioned on the 12th instant.

In answer to your question: "Whether it will be necessary for the directors of the Hereford Railway Company to pass a resolution declaring their option to take money instead of land, and notify the commissioner, or if the former declaration will suffice;" I beg to state that such additional resolution will not be required *in toto*, and that the one actually in my hands coming from the International Railway Company, and declaring their option in favour of the conversion into money of the land subsidy granted to the Hereford branch, under the act 45 Vic. chap. 23, section 1, paragraph 0, for a distance of 30 miles, will be sufficient to enable me to operate such conversion in favour of your company for that distance only. But it will be necessary that you should send me a certified copy of a resolution passed by the board of directors of your company, declaring their option in favour of the conversion of the additional land subsidy granted you by section 9 of the railway subsidies act, passed at the last session (bill 192) for the additional length of 5 miles in excess of the 30 miles already subsidized. As soon as I shall be in possession of this last copy of resolution, I will get an order in council passed for the purpose of approving the declarations of option so made, as well by the International Railway Company as by your own, in such a way as to entitle your company to receive the full converted land subsidy according to law.

As I have told you in my office, in the course of last week, I will be ready to issue instructions to the government engineer to get his inspection and report on any completed section of the Hereford Railway, as soon as the honourable the commissioner of public works shall have received due communication therefor from the president, or secretary of your company. When such a report is made by the engineer, an order in council will be passed to authorize your company to receive from the treasurer here, the proportion of said converted land subsidy, which your company may be entitled to, under such report and in virtue of the laws in force.

I have the honour to be, sir,

Your obedient servant,

E. MOREAU,

Director of Railways.

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As suggested in that letter, in the same month the following resolution was passed by the company's directors:

Moved by director Pope, seconded by director Learned, and resolved: "That whereas by an act passed at the session of the legislature of the Province of Quebec held in the present year of our Lord 1888, a subsidy of four thousand acres of land per mile was voted to the Hereford Railway Company, for their railway, for a distance not exceeding thirty-five miles, and provision was made in the same Act for the conversion of such subsidy into a money subsidy, and whereas, under the said Act it is necessary that the option of the Hereford Railway Company in favour of such conversion should be declared by resolution of the board of directors, the directors hereby declare their option and that of the Hereford Railway Company in favour of the conversion of the said subsidy into a money subsidy under the provisions of and in accordance with the said act.

This resolution being communicated to the government of Quebec, an order in council was passed of which the following is a copy:

L'honorable commissaire des travaux publics, dans un rapport en date du vingt-six juillet dernier 1883, expose: qu'il est décrété par les clauses 9 et 10 de l'acte relatif aux subventions des chemins de fer, sanctionné à la dernière session de la législature.

Qu'il est loisible au lieutenant gouverneur en conseil d'accorder à la Compagnie du chemin de fer de Hereford, une subvention de quatre mille acres de terre par mille, pour une ligne de chemin de fer partant d'une jonction avec le chemin de fer de Boston, Concord et Montréal, ou tout autre chemin de fer sur la frontière de la province de Quebec, à dix milles du ruisseau Hall, et se prolongeant à une jonction avec le chemin de fer International, dans le canton d'Eaton, pourvu que la longeur de ce chemin de fer n'excède pas trente-cinq milles; le paragraphe *o* de la sec. 1 de l'acte 45 Victoria, chap. 23, étant par les présent abregé la Compagnie du chemin de fer International ayant par écrit daté du mois de juin dernier, transferé ses droits aux actrois de terre accordés par le dit statut au chemin de fer désigné dans le dit paragraphe.

Considérant que par l'ordre en conseil no. 59, du 19 Décembre, 1883, il a été déclaré que la Compagnie du chemin de fer International avait été autorisé par l'acte 45 Victoria, chap. 23, clause 1, par. *o*, à construire un embranchement à sa ligne principale devant relier celle-ci au chemin de fer de Boston, Concord et Montréal, à ou près de la

frontière provinciale, le dit embranchement ayant nom "The Hereford Branch" ne devant pas excéder trente milles en longueur, et que la dite compagnie avait fourni des preuves suffisantes des ressources à sa disposition pour la construction du dit embranchement, et qu'en conséquence elle avait droit de demander la location des terres ainsi accordé par le statut plus haut cité.

Considérant que la dite compagnie a communiqué une copie certifié d'une résolution adoptée par son bureau de direction, le 19 octobre, 1887, à l'effet de demander et de déclarer son option en faveur de la conversion en argent de la subvention en terres accordées au dit embranchement Hereford, et ce sous l'autorité de l'acte 49 & 50 Vict., chap. 76, clause 1 ;

Considérant que le parlement fédéral, par deux actes adoptés durant les deux dernières sessions, a constitué en corporation distincte, la Compagnie du chemin de fer Hereford, et amendé sa charte dans ce sens, pour la construction du susdit embranchement ;

Considérant que le dite compagnie d'International a passé une résolution à une séance de son bureau de direction tenue à Montréal, le 7 de juin dernier, à l'effet d'autoriser ses présidents et secrétaires à signer et exécuter, en faveur de la dite Compagnie du chemin de fer Hereford. un acte par lequel la première compagnie céderait transporterait tous les droits, actions et intérêts qu'elle, la dite Compagnie de l'International, avait et possédait dans la susdite subvention en terres, et dans sa conversion en argent par elle deffectuée le dit jour, le 19 octobre, 1887 ;

Considérant que sous l'autorité de la dite résolution en dernier lieu mentionnée il a été fait et signé le 12 juin dernier, un acte ou instrument, aux termes dequel le président et le secrétaire de la dite Compagnie de l'International ont fait cession et transport à la dite Compagnie de Hereford de tous les droits et actions acquis et possédés par la première compagnie dans la subvention en terres susdite, et dans sa conversion en argent, en conformité des résolutions precitées, ce transport ayant été fait pour valeur recue, suivant qu' établi dans la résolution en dernier lieu mentionnée ;

Considérant que la dite Compagnie de Hereford a communiqué une copie certifiée d'une résolution adoptée par son bureau de direction, le 19 juillet dernier à l'effet de demander et déclarer son option en faveur de la conversion en argent de la subvention en terres à elle ainsi accordée et mentionée dans les clauses 9 et 10 de l'acte relatif aux subventions des chemins de fer, en premier lieu cité ; et

Considérant qu'il est opportun d'accorder les demandes de ces deux compagnies, l'honorable commissaire recommande qu' il soit donné acte à la dite Compagnie du chemin de fer de Hereford, tant en son

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nom propre que comme étant aux droits et actions de la dite Compagnie de l'International des conversions en argent par elle ainsi effectuées, de la subvention en terres de 4,000 acres par mille ainsi accordée et mentionnée, dans et par les dites clauses 9 et 10 pour la ligne de chemin de fer y décrite et que les dites conversions en argent soient ratifiés et confirmées en faveur de la dite Compagnie du chemin de fer de Hereford, pour toutes fins que de droit sous l'autorité et en conformité de la clause 14 de l'Acte des subventions en premier lieu cité.

Certifié,

GUSTAVE GRENIER,
Greffier, Conseil Exécutif.

On the 6th August the department of public works sent this order in council to the company accompanied by the following letter :—

DEPARTMENT OF PUBLIC WORKS,
PARLIAMENT BUILDINGS,
QUEBEC, 6th August, 1888.

To W. B. IVES, Esq., Q.C., M.P.,
Sherbrooke.

SIR,—Agreeably to your request I beg to enclose you herewith copy of an order in council, sanctioned under no. 481 by his honour the lieutenant governor, on the 2nd of August instant, and by which the declaration of the option made by the International and the Hereford Railway Companies in favour of the conversions into money of the land subsidy granted by the act 45 Vic., chap. 23, section 1, paragraph *o*, and subsequently by the railway subsidies act of 1888, section 6, to the railway therein described, for a distance not exceeding 35 miles, have been ratified and confirmed by the executive council to all intents and purposes. It remains now with the Hereford Company to deposit into this department (railway office) a duplicate plan and book of reference of the constructed as well as of the projected line of their railway, as described in the above last mentioned statute, the whole in accordance with section 8 of the Quebec consolidated railway act of 1880; said plan and book of reference will be examined here, and if found correct and identical one with the other they will be duly certified and a copy thereof will be sent back to the president or secretary of the company, to be deposited in the registry office of the county traversed by said railway. According to law a similar certified copy of said plan and book of reference must be made at the cost of the company, and deposited by them in each county through which passes the railway. When such deposit shall have been so made

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we will be ready at the request of the president or secretary of the company to send our engineer on the spot to inspect and report upon the extent and value of the works already done on said railway, provided the length of the completed portion thereof should not be less than 10 miles.

I have the honour to be, sir,
Your obedient servant,
E. MOREAU,
Director of Railways.

So far there may not be sufficient evidence of a contract, but there is surely a near approach to it. There is an act of the Crown subsequent to the act of the legislature indicating an intention on the part of the governor in council to act upon his statutory authority and to give a money subsidy, and to give it to this company. There is a written statement communicated to the company by the properly qualified government department to the effect that the order in council would "entitle the company to receive the full converted land subsidy according to law" and that upon inspection and approval of the work by the government engineer an order in council would be passed authorizing payment of such portions of the subsidy as might from time to time be earned. There is a further statement from the same public department suggesting to the company to prepare a plan and book of reference under the provisions of the railway Act of 1880, and that subsequently government officers would perform their statutory duties in the matter of inspection, and that too for the purpose, the only purpose, of enabling the company to receive its subsidy. So far there was no suggestion, not the scintilla of a suggestion, that a written contract was necessary, that a formal order in council should be passed authorizing the minister of public works to enter into a formal contract providing for the construction of the works or the payment of the subsidy. Had the question been

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raised, had this course been deemed necessary, doubtless it would have been done, but it never had been done; it had never been imagined in the administration of Quebec affairs that it was necessary to be done. What was done, so far, amounted at least to this: an invitation by the government that the company should proceed with its work, and a promise that it should eventually obtain (all conditions being performed) the statutory subsidy.

Acting upon the belief that nothing further remained to be done in the matter of legal instruments, or formal contracts, the company made its surveys, prepared and duly filed its plan and books of reference of the line of railway, had these plans and books approved in the usual way by the public works department, expended its money (exceeding I doubt not a hundred thousand dollars) in the construction and completion of the work, thoroughly finished it, had it finally inspected, examined and approved by the proper officer of the Quebec government, and, as stated by Mr. Moreau, director of railways, in his evidence, complied with all the conditions of the law in order to entitle itself to the subsidy ("La compagnie s'est-elle conformée à toutes les conditions de la loi pour se mettre en droit de recevoir sa subvention?") and it was so declared in the order of the governor in council of the 31st of July, 1890.

During the progress of the work, however, serious difficulty arose. The contractors who at an early stage were engaged upon it, after receiving some $30,000 from the company, following several notable precedents in other parts of Canada, absconded without paying the labourers and other persons having dealings with them. There was of course great public dissatisfaction and the usual application to government for redress. A commissioner was thereupon appointed by the gov-

ernment, Mr. J. P. Noyes, who made a report as to the actual amount due to the contractors' creditors, that indebtedness being determined by him to amount to the sum of $39,297.05. That indebtedness, it must be observed, was in no way a liability of the company. So far as the evidence goes there was no legal or even moral claim against the company. But some scheme must be devised to meet the difficulty, and settle discontent in the eastern townships. The scheme was an easy one—pay the labourers from the public exchequer, and charge the money, as well as all the expenses of the commission, against the company's subsidy. That was the mode adopted and put in execution. And it is for us to determine whether, as between the government and the company, that payment was legal.

These payments were all made under orders in council from time to time, the order for the payment of the principal sum being that of the 24th of December, 1889. the warrant therefor being as follows:—

By His Honour
The Honorable Auguste-Réal Angers,
Lieutenant Governor of the Province of Quebec.

No. 1675. $36,208.34.

To the Honourable the Treasurer of the Province of Quebec.

You are hereby authorized and required, out of such moneys as are in or shall come to your hands for defraying the expenses of the civil government of the Province of Quebec, to pay or cause to be paid unto

The Hereford Railway Company, represented by the hon. commissioner of public works or to their assigns, the sum of thirty-six thousand two hundred and eight dollars and thirty-four cents, being to carry out the provisions of O. C. no. 651, of December 24th, 1889, and being on account of converted land subsidy on 35 miles under 51 & 52 Vic. cap. 91, out of the said sum of $36,208.34, the sum of $16.85 to be paid to L. A. Vallée, engineer, and $60 to the treasurer for engineers' fees.

Consolidated railway fund.

Railway subsidies, 40 Victoria, chapter 2.

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And for so doing, this, with acquittance of the said railway company, or their assigns, shall be to you a sufficient warrant and discharge.

GUSTAVE GRENIER,
Deputy Lieutenant Governor.

Quebec, this 27th day of December, 1889.

Received this 16th day of January, 1890, from the honourable the treasurer, the above mentioned sum by three cheques, viz., $36,131.49, favour Honourable P. Garneau, comm. of public works, $16.85 favour L. A. Vallée, and $60 favour assistant treasurer.

P. GARNEAU,
Commissioner Public Works.

It will be noted that in this warrant, as in most of the other ones, it is stated that the payment is to the company, but the company represented by the commissioner of public works. Now, it must be admitted that the honourable commissioner was *not* the representative or agent of the company. The company never authorized this payment, it always repudiated the charging of the money in question against its subsidy, and the commissioner had no semblance of right to take the money as the agent of the company. The orders in council, too, contain words intimating that the payments are *to the company*. They further indicate the amount of the subsidy, that it is to be upon the basis of 35 cents per mile of the original land grant. Look at this warrant under which the sum of $6,500 was paid direct to the company, and see what admissions are contained in it.

By His Honour
The Honourable Auguste-Réal Angers,
Lieutenant Governor of the Province of Quebec.

No. 511 on No. 1010. $6,500.

To the Honourable the Treasurer of the Province of Quebec :—

You are hereby authorized and required, out of such moneys as are in, or shall come to your hands, for defraying the expenses of the civil government of Quebec, to pay or cause to be paid unto

The Hereford Railway Company, or to their assigns the sum of six thousand five hundred dollars, being on account of the balance of the

first 35 cents per acre of converted land subsidy of 4,000 acres per mile on 35 miles, under O. C. no. 340 of July 31st, 1890, and chargeable to consolidated railway fund.

Railway subsidies, to be taken from 40 Victoria, chap. 2.

And for so doing this, with the acquittance of the said Railway Co., or their assigns, shall be to you a sufficient warrant and discharge.

Quebec, this 7th day of August, 1890.

GUSTAVE GRENIER,
Deputy Lieutenant Governor.

Received this 8th day of August, 1890, from the honourable treasurer the above mentioned sum.

THE HEREFORD RAILWAY CO.,
p. pro. W. B. IVES,
President.

It is there, I think, unquestionably admitted by the lieutenant governor himself, the immediate and direct representative of the sovereign in all purely provincial affairs, as decided by the Privy Council in the *Maritime Bank Case* (1), that the company is entitled to a railway subsidy, that this subsidy has been converted from land to money, that it was to be calculated at the rate of 35 cents per acre (a question perhaps debatable until then) and that the whole 35 cents per acre had been fully earned. Reading the warrant with the order in council upon which it was based and these conclusions become inevitable. I may here, in a word, dispose at once of the contention that the receipt above set out, given by the president of the company, is a full and final acquittance of the government's liability. It is the very reverse. It is an admission that there is a "balance" still due and that the $6,500 is paid on account of that balance.

In my judgment the facts set out, and I have not gone into the details as fully as I might, lead to the conclusion that there was what in law must be deemed to be a contract between the government and the com-

(1) [1892] A. C. 437.

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pany. As already suggested, agreement or no agreement is a question of evidence. Speaking generally no rule as to mode of proof can be laid down. Each case must depend upon its own facts. In this case the evidence has satisfied me of the existence of the agreement and the consequent liability of the Crown.

It has been put forward that the orders in council and warrants to which I have referred, if they are to be considered in any way as evidence of an existing contract, must be taken with all qualifications or limitations therein expressed; that these instruments, if they are evidence of a contract between the government and the company at all, must be deemed at the same time to be a declaration on the part of the government that it had a right to make payment as therein expressed. I do not so understand the law of evidence. That may be the case where the only evidence of the facts in issue are the documents produced, but where, for example, in an action for work done and materials for the same provided, the plaintiff brings evidence to prove that the work was done and the materials were provided all of which the defendant in his evidence denies, but at the same time the defendant's letter is put in evidence, a letter in which he admits the doing of the work and the providing of the materials, but at the same time asserting that he had paid what was due, a jury would be justified in accepting his statement on the first point and rejecting it on the other. That is common sense as well as common law. The human mind is so constituted that it cannot help believing the truth of an admission against interest, although rejecting at the same time some exculpatory or other asseveration coupled with it.

Another point has been urged, viz., that the suppliants while admitting there was no contract contend

that the government by its conduct is estopped from disputing it; and that there is no estoppel against the Crown. I do not propose to inquire whether in matters of contract there may not be estoppel against the Crown. That here is not the question. The question, as already pointed out, is a matter of contract or no contract. Has the existence of a contract been proved? I have come to the conclusion that the course of dealing between the parties as shown in evidence has indubitably proved that it did exist. See Pollock on Contracts (1).

There is one other ground upon which the Crown succeeded in the courts below, viz., that the company by its president has exonerated the government under the following circumstances. On 20th January, 1890, after the subsidy in question had been earned (if earned at all), and the company had been pressing for its payment, Mr. Ives, the president, wrote to the Hon. Mr. Mercier, as "premier" of Quebec asking for a subsidy of $3,000 per mile upon 18 miles of road recently constructed, concluding his letter as follows:

I have to add that a subsidy of, say, three thousand dollars per mile upon this eighteen miles, voted on condition that the Government retained and paid out of it the claims against Messrs. Shirley, Corbett & Co., as established by Mr. John P. Noyes, would be acceptable to this company, and would put at rest all the difficulties that have arisen with regard to those claims.

This, of course, without prejudice to the claims and pretensions of the company, should this petition not be granted.

The legislature was then in session, closing on the 2nd of April following. Nothing was done at that session. In the following session, however, an Act was passed by which it was made lawful to grant a subsidy.

Sec. 1. To the Hereford Railway Company, as assistance in the cost of building the extension of its line from its junction at Cookshire, to the

(1) 3 ed. p. 9.

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place known as "Lime Ridge," in the county of Wolfe, on a length not exceeding 18 miles, a subsidy of $3,000 per mile, and not exceeding in all $54,000.

This subsidy the company was subsequently paid without reference to the letter of Mr. Ives, of the 20th January, 1890. Now, there is no evidence on the part of the Crown that the subsidy was voted in consequence or by reason of the letter; there is no evidence that the legislature knew anything of it. Evidence (if admissible) might have been given; Mr. Mercier, or some official seized of the facts, might have been examined as to whether at all, and if so in what way, the letter was acted upon. Mr. Ives himself, a witness for the Crown, testified that his proposition was not accepted or acted upon, or made a condition to the granting of the subsidy, and there is not a word of testimony the other way unless what may be gathered from the subsidy Act itself and it, I think, points to the opposite conclusion. I do not adopt the argument that Mr. Ives acted without authority in writing the letter. If, after having written it, the legislature had acted upon it, granted the subsidy subject to the conditions mentioned in it, and the company had afterwards received the money, then it would be out of the question for the company to set up want of authority on his part. But the statute itself shows that it was not granted on the conditions stated by Mr. Ives. Absolute power in the matter was left with the executive; they could grant or withhold as they thought fit. If Mr. Ives's letter was considered binding it was their duty to see that the condition was inserted in the order in council, or agreement under which the company obtained the second subsidy. Besides, as I understand it, the rules of legal draughtsmanship require that if there are conditions under which a statutory power of granting money is to

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be exercised these conditions must be expressed in the statute itself, not left to be afterwards found out by oral or other testimony. And therefore, as a general rule, evidence is properly inadmissible upon grounds of public policy, for the purpose of showing the reasons or conditions or influences that moved parliament or members of parliament in passing particular enactments. The statute itself must speak.

I conclude, therefore, that the defence in the case has wholly failed, and that the suppliant company is entitled to be paid the balance of the subsidy, together with interest from the date of the last order in council mentioned, with costs of the appeal in the courts below.

KING J. concurred with the Chief Justice that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Caron, Pentland & Stuart.*

Solicitor for respondent: *F. X. Drouin.*