THE QUEBEC, MONTREAL AND SOUTHERN RAILWAY COMPANY (SUPPLIANTS) ..... APPELLANTS;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

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*Feb. 7, 8.
*May 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Railway subsidies—Aid to construction—Purchase of constructed line—Construction of statute—Supplementary agreement—Rights of transferee—Obligation binding on the Crown.

The suppliant company was incorporated by Dominion statute, 6 Edw. VII., ch. 150, with power to hold, maintain and operate the railway of the S.S. Ry. Co. and became vested with the franchises and property of that railway company which had been sold in virtue of the statute, 4 & 5 Edw. VII., ch. 158. The S.S. Ry. Co. had constructed 6½ miles of its railway, between Yamaska and St. Francis River, for which it had not received subsidy aid as authorized by 62 & 63 Vict., ch. 7, and, by 7 & 8 Edw. VII., ch. 63, in lieu of the aid provided by the former statutes, subsidy was authorized to be paid to any company completing the construction of 70 miles of the railway from Yamaska on a location which included the 6½ miles of railway so constructed. Under the authority of this legislation the Crown and the appellant company entered into a supplementary agreement fixing the subsidy for the construction of this 70 miles of railway. The company completed the unconstructed portion of the railway and claimed subsidy for the whole length of the line including the 6½ miles acquired in virtue of the sale authorized by 4 & 5 Edw. VII., ch. 158.

Held, reversing the judgment of the Exchequer Court of Canada (15 Ex. C.R. 237), Idington J. dissenting, that the undertaking of the company to construct the railway was satisfied whether it actually constructed the whole line itself or purchased a constructed portion thereof to form part of the subsidized line; that the statute 7 & 8 Edw. VII., authorizing the subsidy together with the supplementary contract with the Crown constituted an obligation binding on the Crown and the company was, consequently, entitled to the amount of the subsidy applicable to the 6½ miles of the railway in question.

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

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APPEAL from the judgment of the Exchequer Court of Canada(1), dismissing the suppliants' petition of right with costs.

The circumstances in which the claim for subsidy was made are stated in the head-note.

Béique K.C. and *Aimé Geoffrion K.C.* for the appellants.

F. J. Laverty K.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal ought to be allowed.

The appellant had the usual subsidy contract with the Crown for the construction of a line of railway 70 miles in length. It utilized for the purpose of this line 6½ miles of the South Shore Railway, which it had previously purchased. If the purchase of these 6½ miles had been made subsequent to the contract and for the express purpose of forming part of the subsidized line I do not understand how any question could have arisen as to the right of the appellant to the proportion of the subsidy attributable to the 6½ miles so purchased; I cannot see what difference it makes that the purchase was made before the subsidy contract was entered into. It seems to me that the undertaking to construct a railway is equally satisfied whether the company actually construct the whole line or purchase a portion of it ready made. The Government itself in satisfaction of its statutory and contractual liability to construct the National Transcontinental Railway has recently purchased a short line of railway to form part of that line.

The Government is not being asked to pay any

(1) 15 Ex. C.R. 237.

subsidy twice over. Parliament was willing to grant a subsidy for a particular 70 miles of railroad and that is all the Government is being asked to pay. No doubt, the subsidy to the South Shore Railway having lapsed, advantage might have been taken to obtain for the country the 6½ miles of road that that company had constructed, without giving any subsidy in respect of this length. Parliament might have offered, in 1908, a subsidy for only 63½ miles, the portion left uncompleted by the South Shore Railway Co. That however is not what was done by the legislature or the Government. Provision was made for a subsidy for the whole 70 miles of railroad and the Crown entered into the usual subsidy contract with the appellant for this line. The appellants had already purchased 6½ miles of road which they could utilize as part of the line and they duly constructed the remainder so as to form a complete line of 70 miles in length as called for by the statute and the contract. I can see no valid reason under these circumstances why the courts should interfere and insist that the appellant is not to be paid the subsidy which Parliament provided and the Crown agreed to grant them.

For the debts of the South Shore Railway Co. it is not contended that the appellant is liable. The Intercolonial Railway had properly proved its claim in the liquidation of the South Shore Railway Co. and been collocated for its dividend. With that claim the appellant is in no way concerned.

IDINGTON J. (dissenting).—The appellant was incorporated in 1906, by 6 Edw. VII., ch. 150, wherein it was recited that the franchises, railway and property of the Quebec Southern Railway, as comprising the

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railways theretofore known as the South Shore Railway, the United Counties Railway and East Richelieu Valley Railway, had been sold pursuant to the provisions of chapter 158 of the statutes of 1905 and had been purchased by the Honourable Frederic L. Béique and that the purchaser bought and became vested with the said franchises, railway and property for the purposes of holding, maintaining and operating the said railway, its property and appurtenances, and that it was expedient to incorporate a company with all the powers and privileges necessary for the said purposes.

Section 7 of said Act is as follows:—

7. The company may acquire the railway mentioned in the preamble, and upon and after such acquisition the franchises rights and privileges heretofore possessed by the South Shore Railway Company and the Quebec Southern Railway Company shall vest in and may be exercised and enjoyed by the company, and the company may thereupon hold, maintain and operate the said railway.

The railway property bought at the sale referred to in the recital was transferred to the company thus incorporated, pursuant to said section 7.

Section 8 of said Act is as follows:—

8. The company may complete the railway which, by the statutes relating to the South Shore Railway Company, the latter was authorized to construct, or any portion thereof, within five years from the date of the passing of this Act; Provided that as to so much thereof as is not completed within that period the power to complete the said railway shall cease and determine.

This section, let it be observed, authorizes the completion of the work begun by the South Shore Railway Company but says nothing of the subsidies by which in part it had been built.

The said company had reaped some subsidies but failed to earn others and all it might have in that regard.

All possible claims in law which that company could conceivably have were thus put aside long before the Act I am about to refer to was enacted.

By 7 & 8 Edw. VII., ch. 63, intituled

an Act to authorize the granting of subsidies in aid of the construction of the lines of railway therein mentioned,

it was enacted, by section 1, as follows:—

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

There were 72 different enterprises subsidized by that section, and of these the appellant claims to recover, under item 14, which is as follows:—

14. For a line of railway from Yamaska to a point in the County of Lotbinière, in lieu of the subsidy granted by chapter 57 of 1903, section 2, item 12, not exceeding 70 miles; and for a line of railway from Mount Johnson to St. Grégoire station, in lieu of the subsidy granted to the United Counties Railway Company by chapter 7 of 1899, section 2, item 16, for 1 mile, not exceeding 1½ miles; and not exceeding in all 71½ miles.

The first part of the foregoing is what I think appellant bases its rights upon.

The subsidy granted by ch. 57 of the statute of 1903, sec. 2, item 12, is as follows:—

2. The Governor-in-Council may grant a subsidy of $3,200 per mile towards the construction of each of the undermentioned lines of railway (not exceeding in any case the number of miles hereinafter respectively stated) which shall not cost more on the average than $15,000 per mile for the mileage subsidized, and towards the construction of each of the said lines of railway not exceeding the mileage hereinafter stated, which shall cost more on the average than $15,000 per mile for the mileage subsidized, a further subsidy beyond the

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sum of $3,200 per mile of fifty per cent. on so much of the average cost of the mileage subsidized as is in excess of $15,000 per mile, such subsidy not exceeding in the whole the sum of $6,400 per mile.

12. For a line of railway from Yamaska to Lotbinière, a distance not exceeding 70 miles, in lieu of the subsidy granted by item 27 of section 2 of chapter 7 of 1899.

Item 27 just referred to of section 2, chapter 7, statute of 1899, had been granted as follows:—

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

Then follow 51 items, covered thereby, of which No. 27 is as follows:—

27. To the South Shore Railway Company, from Sorel Junction along the South Shore to Lotbinière, Quebec, a distance not exceeding 82 miles.

Such are the terms of the statutory authority upon which appellant's claim rests.

They cannot be enlarged by any order-in-council or agreement professing to execute the purpose expressed in such enactments.

These subsidies granted to the South Shore Railway Company had failed to be as productive to it, as they might have been, by reason of its failure to earn same by the formal compliance with the language of the statute.

There was nothing in law owing that company when appellant acquired its assets and nothing due it by virtue of equity or any equitable considerations which could in law or common sense be assumed to have passed to appellant.

By virtue of such acquisition under and by virtue of the purchase of the assets of a bankrupt company, the appellant neither by express terms nor any implication involved in that transaction could pretend it had any moral or legal right to pose as the builder of that part of the road in fact built by the company whose assets it bought.

The terms of the enactment expressed in the grant clearly mean what they say and that is

> a subsidy of $3,200 per mile towards the construction of each of the undermentioned lines of railway.

If, using the very illustration put forward in argument by Mr. Béique, the appellant had for any good reason discarded the six-and-one-half miles now in question herein, and then already constructed by the bankrupt company, and constructed seventy miles of railway, it would have been competent for the Governor-in-Council to have recognized such a claim.

Or if for any valid reason it had been found necessary to diverge from the straight line and construct seventy miles of railway between the termination of that already constructed and an agreed point in the County of Lotbinière, it might also be competent for the Governor-in-Council to have recognized such a claim.

These suggestions or surmises cannot go far in helping us to interpret and construe this statute but we must recognize the world in which we live and what is apt to transpire therein or we will never correctly interpret anything, not even a statute.

One is reminded, in considering this class of legislation, of the language of Lord Cairns when speaking of a somewhat analogous sort of legislation, he said in

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The Directors of East London Railway Co. v. *Whitechurch*(1), at p. 89:—

> We all know how these clauses are inserted in an Act of Parliament of this kind. They are in the nature of private arrangements put into the Act at the instance of particular parties, who either act with greater caution than other parties, or act with a desire to make a better bargain for themselves than other parties have made. They are not put in by the legislature as part of a general scheme of legislation which it desires to express, but they are in the nature of particular contracts, and ought not to have any effect upon the construction of a general clause such as that which I have read to your Lordships.

I think we must realize that each item following each of these clauses we are concerned with herein may have been the result of much bargaining. And the curious features I have adverted to render some things therein ambiguous. I think in principle these ambiguities must be resolved against the appellant.

For such or other like reasons it is quite conceivable seventy miles of railway might have been agreed upon as within the phrase "towards the construction" of a railway but it is not within the purview of the Act to give a subsidy for anything that had been already constructed, by someone else who is not to obtain directly or indirectly the benefit, or any part of the benefit, of such a grant.

The words "in lieu of the subsidy granted by chapter 57 of 1903" etc., cannot override the obvious purpose of the legislation (which was to secure the construction of seventy miles of railway) and thereby make a pure gift to appellant for something it had no claim to either in law or equity. The moral or equitable obligations to and claims of the bankrupt company or its creditors for that granted by said Act of 1903, in regard to the construction of six-and-

(1) L.R. 7 H.L. 81.

a-half miles of railway, could not be thus compounded or compensated for by juggling of words in this fashion. No one can properly impute to Parliament the crass stupidity of imagining it was thus compensating the bankrupt company or its creditors of whom respondent was one by granting to appellant which had not fallen heir to, or done anything entitling it to reap such compensation.

It is to be observed also that the language is materially changed from that used in the two previous grants. In the first it was "from Sorel * * * to Lotbinière." In this it is "from Yamaska to *a point in the County of Lotbinière.*" Why was the change made? At whose instance? The enacting clause in each statute quoted above uses identical language, yet when it comes to the description of what the appellant urges is identically the same thing the language is changed. Why again I ask? Had someone knowing the facts pointed out that absolute identity would produce a wrong (in short an imposition on the country) by applying the subsidy to those six-and-a-half miles, and was the language then adroitly or stupidly, or both, amended as we see?

Again it clearly could not have been intended to be under the facts literally "in lieu of the subsidy granted by chapter 57 of 1903, etc." for the obvious reason that the donee, evidently intended to be aided thereunder, had by virtue of the Act of Parliament passed in 1905 been put out of existence. And the variation of the language I have just referred to could hardly have been so changed merely through inadvertence. Yet the change, if convenient to resort to now, surely was not designedly intended.

Reliance is however placed upon the two agree-

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ments made between the respondent and the appellant. The second I will not trouble with, for it is but a modification and adoption of the first.

The first of these is dated 25th February, 1909, and begins its recitals by the following:—

> Whereas the company was authorized to build the railway hereinafter mentioned by the Act or Acts following, namely:—Canada, 1906, Chapter 150.

There follow this recital of alleged facts I have already dealt with and the last recital is as follows:—

> AND WHEREAS the company has established to the satisfaction of the Governor-in-Council its ability to construct and complete the said railway; and the granting of the said subsidy to the company has been approved by the Governor-in-Council as will appear by reference to the order-in-council above referred to.

The first of these clearly contemplated a building of a railway and the last the construction and completion of a railway.

This language is strangely inapt for the purpose of expressing a bargain or agreement for the subsidizing in favour of the appellant which was a company that had no existence when the six-and-a-half miles of railway now in question had been constructed, if in fact that six-and-a-half miles was within the contemplation of the parties.

Again the first clause of the agreement is as follows:—

> 1. That the company shall well, truly and faithfully make, build, construct and complete the line of railway mentioned and described in paragraph 14 of the first section of the "Subsidy Act," as above set forth and recited, and all bridges, culverts, works and structures appertaining thereto, in all respects in accordance with the specifications hereto annexed marked "A," or with such amendments thereof as may from time to time during the progress of the said work be approved by the Governor-in-Council.

The six-and-a-half miles for which the subsidy is now claimed and this suit is brought had been built long before appellant had any existence.

How can it pretend to recover under a contract, so framed, for a subsidy that it had never earned yet so expressly given only for building 70 miles of railway and claim as part of it six-and-a-half miles of railway it never built and never in fact intended to build?

I cannot understand how this contract helps appellant. Nor can I understand why or how if the building of six miles and a half done by the predecessor in title was honestly believed to be a righteous foundation for an agreement for the payment of a railway subsidy in respect of the said six miles and a half, there was found so much difficulty in expressing the fact both in the recitals and in the operative clause I have quoted from.

They seem to coincide with the interpretation I have put upon the Act.

The resorting to such language as used is quite inconsistent with the interpretation now set up as a foundation for the claim herein.

It reduces the meaning of the ambiguous language used in item 14 of the "Subsidy Act" to the obvious purport of it when read in the light of the surrounding facts and circumstances as intended to cover so much of the part of the line indicated as in fact needed to be built by the appellant but in no event to exceed seventy miles so built.

There was a claim set up by the respondent's servants that if there was any grant due in respect of these six-and-a-half miles it was to the railway company which had built same and in that case the respondent was entitled to receive the benefit thereof as a creditor of that railway company.

On the facts before us that suggestion may not be in law maintainable but it expresses a thought which

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might well have been given expression to as in line with if not exactly in accord with what has been acted upon.

Parliament no doubt has revived and re-voted subsidies many times to the company building a railway and failing to complete it within the time specified, and possibly has considered or should have considered creditors of an embarrassed company in such a case. If this had been expressed as its purpose herein perhaps no one would have complained. But what right had appellant to claim to reap that which might righteously have been given for such a purpose but could not, without doing an exceptionally unrighteous thing, be given to the appellant?

It is to be observed that though appellant made its claim on the 17th May, 1909, unsuccessfully and the position of the Crown officers was reiterated in another form in February, 1910, yet it was only after three years' deliberation and consideration it summoned courage to assert the claim herein by the petition of right herein and then boldly claimed therein that it had in fact built that which it never built.

I am unable to hold that buying and building are identical and convertibly equivalent terms.

I think it matters not what the orders-in-council disclose if my interpretation and construction of the statute and the agreement, or of either, is maintainable.

Therefore I shall not confuse what I have tried to make plain by an analysis of what seem to me to have been results of inadvertence and could not in my view bind respondent.

I think the appeal should be dismissed with costs.

DUFF J.—The appeal should be allowed with costs.

ANGLIN J.—The statute of 1906, chap. 150, which incorporated the suppliant company recited the sale by the Exchequer Court of the franchises, railway and property of the Quebec Southern Railway, comprising *inter alia* the South Shore Railway, to the Honourable Frederic L. Béique, and authorized the suppliant company to acquire and complete the said railway. At that time about 18¼ miles of the 82 miles of railway from Sorel Junction to Lotbinière, which the South Shore Railway Company had been authorized to construct, had been completed—12 miles from Sorel to Yamaska and about 6¼ miles from Yamaska to the St. Francis River. The South Shore Railway Co. had received the subsidy for the 12 miles section, but no subsidy had been paid for the 6¼ miles. On the 20th Jan., 1902, the Government inspecting-engineer reported the completion of the 6¼ miles from Yamaska to St. Francis River by the Quebec Southern Railway Company. In a report of the 31st January, 1908, he repeated that statement adding:—

> No subsidy was paid, however, the completed section being less than (10) ten miles in length.

(62 & 63 V., ch. 7, sec. 7.) It is only reasonable to suppose that Parliament was cognizant of these facts when, during the session of 1908 (7 & 8 Edw. VII., ch. 63, sec. 1, item 14), it authorized the grant of a subsidy for 70 miles of railway "from Yamaska to a point in the County of Lotbinière"—the balance of the 82 miles which were to have been built by the South Shore Railway Company (for which a subsidy had been first authorized in 1899 by item 27 of section 2 of chapter 7), excluding the 12 miles from Sorel Junction to Yamaska for which the subsidy had been

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paid to the South Shore Railway Company, but including the 6¼ miles from Yamaska to the St. Francis River built by the South Shore Railway Company for which no subsidy had been paid. The subsidy of 1908 is expressly granted

in lieu of the subsidy granted by chapter 57 of 1903, section 2, item 12,

which in turn had been granted,

in lieu of the subsidy granted by item 27 of section 2 of chapter 7 of 1899.

Under the authority of this legislation a subsidy contract (25th Feb., 1909), and a supplementary contract (17th Dec., 1909), fixing the amount of the subsidy under section 10 (7 & 8 Edw. VII., ch. 63), for 70 miles from Yamaska to a point in the County of Lotbinière, were duly entered into between the suppliant company and His Majesty the King, represented by the Minister of Railways.

The Government officials, however, withheld payment of $26,765.45 of the subsidy payable to the suppliant company on the ground that that sum was due to the Crown in respect of traffic balances between the Intercolonial Railway and the South Shore Railway prior to the sale of the latter by the Exchequer Court. In answer to the petition of right claiming this balance of $26,765.45 the Crown, by its statement of defence, also takes the position that the petitioner is not entitled to any subsidy in respect of the 6¼ miles of railway built by the South Shore Railway Company.

The learned assistant-judge of the Exchequer Court held that the Crown was not entitled to set off or compensation in respect of the traffic balance due the Intercolonial Railway because the sale to the Quebec Southern Railway had been made free of all charges, liens and incumbrances, and the subsidy

in question is claimed by the suppliant not as assignee of the rights of that company—its rights thereto having in fact lapsed, under the terms of its subsidy contract, owing to the non-completion of the undertaking within the time stipulated—but by virtue of the statute of 1908 and the contracts of 1909 above mentioned. Neither in their factum nor at bar in this court did counsel for the Crown controvert this holding of the learned trial judge. They rest their case in support of the judgment dismissing the petition of right on the ground, held in their favour in the Exchequer Court, that the suppliant company is not entitled to any subsidy in respect of the 6¼ miles from Yamaska to the St. Francis River because it did not actually construct that part of the railway, and also on an alleged estoppel arising out of the fact that the company had retained and cashed a cheque for $43,414.55 tendered it by the Crown as a balance due after deducting the Intercolonial Railway claim of $26,761.45.

As to the latter point the evidence shews that the cheque was cashed only after the company had protested against the deduction and had received some assurance from the Railway Department that the cashing of it would not prejudice its rights in regard to payment of the sum withheld. Under these circumstances the retention and cashing of the cheque affords no evidence of intent on the part of the company to abandon any right it might have to payment of the sum withheld. It does not raise an estoppel. *Day* v. *McLea*(1).

It is quite within the power of Parliament, if it should see fit to do so, to authorize the grant of a

(1) 22 Q.B.D. 610.

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subsidy for a portion of a railway already constructed by others to a company which assumes the burden of completing the undertaking. There is no reason to suppose that when the statute of 1908 was passed authorizing the payment of a subsidy in respect of a line of railway 70 miles long from Yamaska to a point in the County of Lotbinière, in lieu of a subsidy previously granted which had lapsed, Parliament was not fully aware that the Quebec Southern Railway Company had, before 1902, actually constructed 6¼ miles of the 70 miles from Yamaska to a point in the County of Lotbinière and that that 6¼ miles sold by the Exchequer Court had been acquired by the Quebec, Montreal and Southern Railway Co. under the express authority conferred by its Act of incorporation and formed part of the 70 miles in respect of which Parliament was then asked to authorize the payment of a subsidy. On the contrary, from the evidence afforded by its own statutes there is reason to believe that Parliament knew these facts and that, with that knowledge, it meant to authorize the payment to the Quebec, Montreal and Southern Railway Co. of a subsidy in respect of the 6¼ miles now in question. The contract and supplementary contract converted that authorization into a contractual obligation on the part of the Crown and, in my opinion, gave to the suppliant company, on completion of its undertaking, a right to payment according to the terms of those contracts which it is entitled to enforce by petition of right in the Exchequer Court.

I would, for these reasons, allow this appeal. The appellant should have its costs throughout.

BRODEUR J.—This is a petition of right by which the suppliant (now the appellant) seeks to enforce the

payment of a railway subsidy authorized by statute and provided for in the subsidy agreement between the Crown and the appellant.

It had been considered of public interest that a railway should be built on the south shore of the St. Lawrence from Sorel Junction to Lotbinière, a distance of 82 miles.

In 1899 a subsidy of $3,200 per mile had been granted by Parliament for the construction of that railway to the South Shore Railway Company.

The latter company started to build from Sorel Junction to the Yamaska River, a distance of 12 miles, and then from Yamaska to St. Francis River, a distance of 6½ miles.

The Government paid, in 1902, for the 12 miles covering the distance between Sorel and Yamaska but, as the section of the road from Yamaska to St. Francis was less than 10 miles, no subsidy was paid for the 6½ miles built.

One of the conditions of the grant was that the railway should be completed before the 1st of September, 1903, and, as that condition had not been fulfilled, Parliament in 1903 renewed the subsidy in the the following terms:—

for a line of railway from Yamsaka to Lotbinière, a distance not exceeding 70 miles, in lieu of the subsidy granted by item 27 of sec. 2 of ch. 7 of 1899.

The Minister of Railways who introduced that legislation knew that a part of the railway subsidized in 1899 had been built, namely from Sorel to St. Francis River, but as the payment of the subsidy had been made only for the section between Sorel and Yamaska he had Parliament to renew the subsidy from Yamaska to Lotbinière, a distance of 70 miles.

It is to be noticed also that this subsidy is not

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payable to the South Shore Railway Co., as provided by the Act of 1899, but to any company. That is likely due to the fact that changes were being made with regard to the ownership of the railway.

By an Act passed in 1900 by the Provincial Legislature a new company called the Quebec Southern Railway Company had been incorporated with power to acquire the railways of the United Counties Railway Company and the East Richelieu Valley Railway Company and with power to amalgamate the latter railways with the South Shore Railway.

The amalgamation took place; but on account of difficulties, mostly financial, a receiver was appointed and, in 1905, Parliament authorized the sale of the railway.

The sale took place through the Exchequer Court and the registrar sold to the new company which was formed, which is now the appellant company, on the 4th January, 1907, the property of the South Shore Railway Co., together with all and singular rights-of-way, improvements, franchises and property of every kind of the said company including

> subsidies and privileges in connection with said railways, excepting, however, the subsidy granted by the Quebec Government in connection with the Yamaska and the St. Francis bridges.

In 1908, Parliament renewed the subsidy which had been voted in 1903 in the following words:—

> for a line of railway from Yamaska to a point in the County of Lotbinière in lieu of the subsidy granted by chapter 57, 1903, section 2, item 12, not exceeding 70 miles.

It is pretty evident, by this new legislation, that Parliament intended to give a subsidy not only from St. Francis River but also from the Yamaska River in order to cover the part which had been built for some years. The Governor-in-Council was em-

powered by the "Subsidy Act" to make a subsidy agreement with any company which would build the railway between Yamaska and Lotbinière and, as the appellant company was the only one authorized at the time to build a railway in that locality, a subsidy agreement was passed between the appellant company and the Government by which a subsidy would be paid to them from Yamaska to Lotbinière.

The Government paid from time to time subsidies which covered the six miles built by the South Shore Railway Co.

The Government then considered the contract and the "Subsidy Act" as covering that section which had been built by the South Shore Railway Company.

It is claimed now by the Government that the "Subsidy Act" contemplated a railway to be built and not one already built.

It seems to me that such a construction could not be put on the Act and on the agreement. It was well known at the time by the Department, it was in evidence in 1903 and in 1908 that the section of the railway between Yamaska and St. Francis had been built. However, the Minister of Railways asked Parliament that a subsidy should be paid for not from St. Francis River but from Yamaska.

When the matter was before Parliament, there was also some discussion as to subsidized railways being partially built (p. 13482 Debates, 1907–8). So it seems to me very clear from the language of the statute and from the language of the subsidy agreement that Parliament intended to vote a subsidy not only for the section to be built but for the part which had already been constructed.

It is claimed further by the respondent that the authority to grant a subsidy under the statute is not

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mandatory but purely discretionary; and the cases of *The Hereford Railway Company* v. *The Queen*(1), *De Galindez* v. *The King*(2); *Canadian Pacific Railway Co.* v. *The King*(3), are quoted in support of that contention.

It is to be noticed that in those cases the action was based on the statute and not on the contract and subsidy agreement passed between the Government and a railway company.

I fully recognize that the Governor-in-Council would be absolutely within its discretion in refusing to pass any contract with the appellant company; but when they decide to pass such a contract, when they have exercised their discretion, then the contract and the statute become binding on the Crown and the Crown is obliged to carry out the obligation which it contains, the same way as the railway company is obliged also to carry out the obligation therein contained; otherwise, it would be rather serious that the company would undertake under such agreement to construct a railway and, when the time would come to make the payment, that the Government could say: Well, we are not bound to pay you.

I may say further that that question was raised in the case of the *Grand Trunk Pacific Railway Co.* v. *The King* before the Privy Council(4), and the learned counsel for the Government claimed in his factum that it is open to the Government to evade their liability by refusing to come to an agreement or abstaining from coming to an agreement; but those representing the Government did not think it advisable to argue it

(1) 24 Can. S.C.R. 1.
(2) 39 Can. S.C.R. 682.
(3) 38 Can. S.C.R. 137.
(4) (1912) A.C. 204.

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before the Privy Council and Lord Macnaghten, at page 210, suggests that the point did not commend itself very much to him.

For these reasons, I think the Government must pay the railway subsidy which the company appellant seeks to recover from the Government and that the judgment of the Exchequer Court dismissing the petition should be reversed.

It is recommended that the Crown should pay the costs of this court and the court below.

Appeal allowed with costs.

Solicitors for the appellants: *Béique & Béique.*

Solicitors for the respondent: *Blair, Laverty & Hale.*