

IN THE MATTER OF THE PETITION OF RIGHT OF

THE QUEBEC, MONTREAL and SOUTHERN
RAILWAY COMPANY, a body politic and
corporate having its head office at the City of
Montreal, in the said Province,

1914
Nov. 19.

SUPPLIANTS;

AND

HIS MAJESTY THE KING RESPONDENT.

Railway—Insolvency—4-5 Edw. VII, c. 158—Sale under Order of Exchequer Court—Effect of—7-8 Edw. VII, c. 63—Subsidy—Discretion of Governor in Council as to paying same—Order in Council and contract to pay subsidy based on mistake of fact—Invalidity.

The South Shore Railway, along with the Quebec Southern Railway, was sold under order of the Exchequer Court of Canada on the 8th November 1905. The suppliants, having acquired all the rights of the vendee under the sale, became incorporated by Act of Parliament in 1906 for the purpose of holding, maintaining and operating the said railways under the name of the Quebec, Montreal and Southern Railway Company. In 1899, by 62-63 Vict., c. 7, sec. 2, sub-sec. 27, the Governor in Council was authorized to grant a subsidy to the South Shore Railway Company from S. J. to L., "a distance not exceeding 82 miles." The South Shore Railway Company previous to January 1902, constructed some 18½ miles of the projected railway, and was paid a subsidy for 12 miles, but the subsidy for the balance so constructed, namely, 6½ miles, was never paid to any one, presumably because the statutory requirements were not fulfilled. In 1903, by 3 Edw. VII, c. 57, sec. 2, sub-sec. 12, the subsidy of 1899 was renewed, not in favour of the South Shore Railway Company in particular, but by way of a general grant towards the construction of a line of railway from Y. to L. (including the 6½ miles in question), a distance not exceeding 70 miles, "in lieu of the subsidy granted by item 27 of sec. 2 of ch. 7 of 1899". The South Shore Railway did not avail itself of this subsidy, and it lapsed. In 1908, by 7-8 Edw. VII, c. 63, sec. 1, sub-sec. 14, the subsidy last mentioned was renewed, the Act providing that "the Governor in Council may grant a subsidy" but it was provided that the railway subsidized was to be completed before 1st August, 1910. The suppliants built the railway so subsidized. Upon a petition of right filed by the suppliants to recover subsidy in respect of the said 6½ miles not constructed by them but by the South Shore Railway Company.

Held, that the language of 7-8 Edw. VII, c. 63, sec. 1 sub-sec. 14, must be read as permissive and not mandatory, and that a petition of right to recover

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- the subsidy would not lie where the same has not been paid by the Governor in Council. *Canadian Pacific Railway Co. v. The King*, 38 S. C. R. 137, followed.
2. A contract entered into between the Crown and the suppliants for the payment of the subsidy in question, founded on an order in council passed on the assumption that the suppliants had constructed the 6½ miles in question (which the suppliants had not in fact done) cannot be enforced; and if moneys had been paid under such contract they could have been recovered back by the Crown under Arts. 1047 and 1048, C.C.P.Q.
 3. The Crown is not bound by an order in council passed inadvertently and on mistake of fact. *De Galindez v. The King*, Q. R. 15 K. B. 320; 39 S. C. R. 682 followed.
 4. The South Shore Railway Company not being in a position to enforce payment of the subsidy in dispute, the suppliants as assignees of the said company could not recover the same.
 5. In disposing of public moneys under statutory authority, the Crown must adhere strictly to the terms of the statute, and neither by order in council nor by contract can the terms of the statute be enlarged or altered. *Hereford Ry. Co. v. The King*, 24 S. C. R. 1, followed.

PETITION OF RIGHT to recover a sum alleged to be due to the suppliants as a railway subsidy. The facts are stated in the reasons for judgment.

October 7th, 1914.

The case came on for trial at Montreal before the Honourable Mr. Justice Audette.

Honourable *F. L. Beique*, K.C., for the suppliants:—

As to the broad question of discretion in the Governor in Council to pay the subsidy, authority is given by Parliament to the Executive to do a given thing according to its discretion. Up to this point nothing is binding upon the Crown. But later on a contract is entered into between the suppliants and the respondent with respect to the payment of the subsidy—and under this contract the Crown is bound to pay the subsidy therein mentioned. Such contract was entered into under the statute. Referring to *The Hereford Railway Co. v. The King*, (1) much stress is laid upon the dissenting judgment of Sedgewick, J. but that case is distinguishable from the present case. In the

(1) 25 S. C. R. 1.

former there was no contract to pay the subsidy, and in the present one there is such a contract.

Coming to the second point, it may be that the subsidies under the statutes of 1899 and 1903 have both lapsed; but under the conveyance of the Quebec Southern Railway to the *auteurs* of the suppliant, all subsidies had been sold to them, and they have this day a right to claim the same, that right being in the same position as if exercised by the Quebec Southern Ry. Co. itself.

Dealing with the third question, it may be said that the position of the Crown is untenable. In virtue of the deed of sale by the Exchequer Court of Canada to the Quebec Southern Ry. Co., under which the suppliants have acquired a title free from all hypothecs and privileges, having the same effect as a sheriff's sale under 4 & 5 Ed. 7, Cap. 158, the suppliants are liable for no debt incurred by the old Quebec Southern Railway Co.

The old Quebec Southern Railway Co. was indebted to the Crown for a certain amount, and the Crown filed a claim for the same before the Exchequer Court of Canada, and it was duly collocated according to its rank and privileges. It has no recourse whatsoever for any part of the claim against the suppliants in this case.

F. J. Laverty, K.C. for the respondent, contended that the suppliants' claim for the subsidy wholly failed because they had not constructed the six miles for which this subsidy was claimed. That was a condition precedent to earn the subsidy. The order in council which authorized the payment of the subsidy was issued in error of fact, and that being so the Crown is in no way bound by it. *Leprohon v. City of Montreal*, (1); Art. 1047 C.C.P.Q. The rule that

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(1) 17 R. L. 559.

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no one may enrich himself at the expense of another applies in favour of the Crown as wholly as in the case of a subject. If therefore the Government would have a right to recover back the amount now demanded by suppliants if it had been paid, clearly it has the right in the present proceedings to refuse payment of the subsidy.

The suppliants argue now, although their claim under the petition of right is not so shaped, that they are entitled to the subsidy because it was given to them by the Crown to encourage them to take up the construction of the railway and to facilitate their financial arrangements. But how can it be contended that the subsidy was intended to encourage the suppliants to build a railway when it had been built many years before?

The suppliants further contend that the Crown is estopped by the orders in council accepting the work and recommending payment. That proposition overlooks the fundamental rule that the Crown is not bound by the error, fraud, laches or negligence of its officers. He cited *Bank of Montreal v. The King*, (1); *Jones v. The Queen*, (2); *Black v. The Queen*, (3); *Brooms' Legal Maxims*, (4).

On the next point, which is of course the important point here, the Supreme Court in *Hereford Railway Co. v. The King*, (5) lays down the principle without qualification that where money is granted by the Legislature and its application is prescribed in the statute in such a way as to confer a discretion on the Crown no trust is imposed enforceable by petition of right. He cites *De Galindez v. The King*, (6).

(1) 38 S. C. R. 258.

(2) 7 S. C. R. 570.

(3) 29 S. C. R. 693.

(4) 8th Ed. p. 40.

(5) 24 S. C. R. 1.

(6) Q. R. 15 K. B., 320; 39 S.C.R. 682.

In the next place the suppliants set up the terms of the statute and deed under which these railways were sold, claiming that inasmuch as the sale was stated to have the effect of a Sheriff's deed this necessarily cleared the property of all debts, charges, and incumbrances thereon. I submit that the Sheriff's deed simply cleared the charges and incumbrances on the real estate in the nature of taxes, mortgages and privileges. It does not release the debtor from any of its personal debts, so that the suppliants cannot contend that the effect of the Sheriff's sale was to wipe out the indebtedness of the Québec Southern and South Shore Railway in such a way as to prevent the Crown from recovering its debt against them in the way it has undertaken to do.

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AUDETTE, J., now (November 19th, 1914,) delivered judgment.

On the 8th November, 1905, The Quebec Southern Railway and the South Shore Railway were sold, by the Exchequer Court of Canada, under the provisions of 4-5 Ed. VII ch. 158, to the Honourable F. L. Beique, K.C., who, on the 11th June, 1906, assigned his bid and rights under this sale, to one William S. Opdyke and one Charles A. Walker, who, in turn, on the 12th August, 1906, sold, transferred and assigned all their right to the suppliants herein to whom the deed of conveyance of the said railways was granted, and who were incorporated in 1906, by 6 Ed. VII ch. 150 for the purposes of holding, maintaining and operating the said railways so acquired.

In 1899, by 62-63 Vic. ch. 7, sec. 2, sub. sec. 27, the Governor in Council was authorized to grant a subsidy to: "*The South Shore Railway Company* from

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Sorel Junction along the South shore to Lotbiniere, Quebec, a distance not exceeding 82 miles.”

The South Shore Railway Company constructed of this projected railway 18 and a fraction of a mile ($18\frac{1}{4}$ or $18\frac{1}{2}$) from Sorel Junction to St. Francis River, and was paid a subsidy for twelve miles, extending from Sorel Junction to Yamaska River,—and the subsidy for the balance of the 18 miles, i. e., the $6\frac{1}{2}$ from Yamaska River to St. Francis River, as shown on Exhibit No. 6, has never been paid to any one. These $6\frac{1}{2}$ miles were built by the South Shore Railway Co., but the subsidy earned therefor was not paid to them; and, it must be presumed, because it did not amount to a section of 10 miles, as provided by sec. 7 of 62-63 Vic. ch. 7. It is admitted that one of the conditions of this subsidy was that the railway subsidized was to be completed before the 1st September, 1903, and that otherwise all right to subsidy lapsed and was forfeited whether as to instalment already earned or otherwise. These $6\frac{1}{2}$ miles form the subject-matter of this controversy.

In the year 1903, by 3 Ed. VII, ch. 57, sec. 2, sub. sec. 12, the subsidy of 1899 was renewed, not to the South Shore or to any other company in particular, but towards the construction of “a line of railway “from Yamaska to Lotbiniere, a distance not exceeding “70 miles,—in lieu of the subsidy granted by item “27 of sec. 2 of ch. 7. of 1899.”

It will be noted that this subsidy is for 70 miles instead of 82, and is for a distance from Yamaska instead of from Sorel Junction,—because the 12 miles for which the South Shore Railway Company had been paid, were taken into account. Of this subsidy the South Shore Railway Company did not avail itself and it lapsed.

In the year 1908, by 7-8 Ed. VII ch. 63, sec. 1, sub-sec. 14, the subsidy of 1903 was again renewed for the 70 miles, but not to any company in particular. Sub. sec. 14 reads as follows: "For a line of railway "from Yamaska to a point in the County of Lotbiniere, in lieu of the subsidy granted by Chapter 57 "of 1903, sec. 2, item 12, not exceeding 70 miles. One of the conditions of the subsidy was that the railway subsidized was to be complete before the 1st August, 1910.

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It is further admitted by both parties that previous to the 30th April, 1909, the suppliants had built the railway in question from Yamaska to Lotbiniere, excepting, however, the above mentioned $6\frac{1}{2}$ miles which were built by the South Shore Railway Company previous to the 1st January, 1902.

As already mentioned, the Quebec Southern Railway and the South Shore Railway, were sold, by the Exchequer Court, as insolvent railways, and the proceeds of such sale were distributed among the creditors of the said railways, as appears by Exhibit No. 6, to the Referee's Report.

The Intercolonial Railway, the property of the Crown, had a claim against these insolvent railways, which was filed in this court. This claim is fully set forth, under No. 20, at p. 15 of the Referee's Report of the 25th May, 1908. (Part of Exhibit No. 6). The Intercolonial Railway was duly collocated in the distribution of the purchase price and the Registrar of the Exchequer Court transmitted to them, at different dates, the respective sums of \$1,507.60—\$3,939.50—and on the 3rd January, 1913, advised them of a further collocation for \$7,187.70 which would be transmitted to them upon receipt, making the total collocations the sum of \$12,634.70.

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However, on the 7th January, 1913, the last mentioned dividend of \$7,187.70 was refused by the Intercolonial Railway, and is now on deposit in the Bank of Montreal at Ottawa. Explaining the circumstances under which these monies were refused, the Comptroller and Treasurer of the Intercolonial Railway wrote the following letter, to wit:

“ Moncton, N.B., 7th January, 1913,
 File No. 66207

Charles Morse, Esq., K.C., D.C.L.,
 Registrar, Exchequer Court,
 Ottawa,
 Ont.

Dear Sir:

I have to acknowledge receipt of your communication of the 3rd inst. *re* Quebec Southern Railway enclosing form of receipt for collocation, and stating that upon this receipt being duly signed and returned to you, a cheque for \$7,187.60 will be sent me.

In March 1908, I received through your Court, the sum of \$1,507.60, and in November, 1910, a further sum of \$3,939.50, but in January, 1912, the balance of our account against the Quebec Southern Railway, namely \$21,808.64 was paid to us through the Department of Finance, being a deduction from the subsidy that was payable to that Railway, and consequently, we have no charges against this Railway on our books.

Yours truly,

(Sgd.) S. L. Shannon,
 Comptroller & Treas.”

It will be noted that the dividends for \$1,507.60 and \$3,939.50 were retained by the Crown, up to the present day.

On the 30th April, 1909, the Accountant of the Department of Railways and Canals, wrote the

following letter to the General Manager of the sup-
pliant company, to wit:

“Ottawa, April 39th, 1909

File No. 887.

SIR:

I enclose you herewith a cheque of the Finance Department, No. 18872, for \$43,414.55, drawn in favor of the Quebec Montreal & Southern Railway Co., being for a part of Progress Estimate on ordinary subsidy of \$3,200. for 70 miles of railway, from Yamas-ka to a point in the County of Lotbiniere, and from Mount Johnson to St. Gregoire, 1½ miles.

70 miles at \$3,200. per mile.....	\$224,000.00
32% of \$224,000.00.....	71,680.00
Less withheld on account of claims I.C.R.	
\$26,765.45	
Less withheld on account of Labour.	
1,500.00	28,265.45
	\$43,414.55

Be pleased to acknowledge receipt of this cheque,

I am, Sir,

Your obedient servant,

(Sgd.) W. C. LITTLE,
Accountant.”

D. I. Roberts, Esq.,

Gen. Mgr. Q.M. & S. Ry. Co.

Montreal.”

The suppliants bought the railways in question, under the provisions of 4-5 Ed. VII. Ch. 158, the sale to have the same effect as a Sheriff’s sale of immovables under the laws of the Province of Quebec, giving the purchaser a clear title, free from all charges, hypothecs, privileges and incumbrances whatsoever.

There is no contractual relation between the suppliants and the Crown with respect to the Interco-

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lonial Railway's claim, and the Crown cannot maintain the position taken by the letter of the 30th April, 1909, above recited. However, behind that position there is the question as to whether or not the present proceedings are not in substance an action against the Crown to recover a subsidy, and whether such a right of action exists against the Crown under the circumstances.

The pleadings on the record deal only with the situation created by the letter of the 30th April, 1909, above recited, but the Court, at trial, raised the substantial question, and there is no reason why the case could not be approached on its true merits. The question as to whether departure from such pleadings could be allowed was discussed by the learned counsel, and as suggested in the course of the argument by the Crown's counsel, if an action is taken for a debt and that the defendant, pleading the statute of limitations, discovers a receipt for such debt, he will obviously be allowed at all stages of his case to plead payment.

There cannot be any doubt that the present petition of right amounts to an action for the recovery of the subsidies above mentioned.

If the suppliants claim these subsidies as assignees under the purchase and conveyance, they cannot have more right to these subsidies than the South Shore Railway Co. itself had. The subsidies of 1899 have lapsed and the South Shore Railway Co. did not avail itself of the subsidy of 1903; therefore, neither the suppliants nor the South Shore Railway have now any right to this subsidy. The 1899 and 1903 subsidies have both lapsed. The simple transfer of a right cannot aggravate the debtor's position. The suppliants cannot succeed as assignees of the South

Shore Railway Co. whose right to such subsidies has entirely abated and disappeared.

Furthermore, it is admitted by both parties that the 6½ miles from Yamaska River to St. Francis River, were built by the South Shore Railway Co. and not by the suppliants, notwithstanding they are making claim therefor.

Now the suppliants contend that the subsidies retained by the Crown and for which they claim payment have been authorized by statute, by an order in council, based upon the report of the Chief Engineer of the Railways and Canals, and upon an agreement entered into between the Crown and the suppliants, and these facts are true.

There can be no doubt that the language of the statute "*the Governor in Council may grant a subsidy towards the construction.*" (Sec. 1, ch. 63 of 7-8 Ed. VII) is not mandatory, but simply permissive and facultative,—it makes no direct grant to the suppliants. The Act is discretionary in so far as granting the subsidies are concerned. The Supreme Court of Canada, passing upon a similar Act, the very one above referred to, i. e., 3 Ed. VII, ch. 57, which is practically in the same language as the one just cited, held that the provisions of the Act 3 Ed. VII ch. 57, authorizing the granting of subsidies in aid of the construction of railways was not mandatory, but discretionary in so far as the grant of the subsidies by the Governor in Council is concerned. *Canadian Pacific Ry. Co. v. The King.* (1)

It is true that before the passing of the order in council the Chief Engineer made his report, in compliance with sec. 10 of the Act of 1908, but his report is not made upon his personal inspection but that of

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(1) 38 S.C.R. 137.

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the engineer E. Johnson, filed herein as Exhibit No. 9. And this report states that on the 20th January, 1902, he had reported a section of the road, then the South Shore Railway, from Yamaska to the St. Francis River, $6\frac{1}{4}$ miles, as completed, and that no subsidy was paid, the completed section being less than ten miles in length. And he adds at the end of this report, which is dated 31st January, 1908, that the estimate he is making includes so much of the old work, done by the South Shore Railway Co. as will remain and form part of the completed railway. The Chief Engineer is not so explicit and clear in his own report which is reproduced in the Minister's recommendation to Council, and the order in council of the 6th April, 1909, practically embodies the recommendation.

However, before the passing of this order in council the suppliants had entered into a contract with the Crown to "*make, build, construct, and complete*" the line of railway mentioned in Item No. 14 of the Act of 1908,—and the Crown upon the performance and observance by the suppliants, to the satisfaction of the Governor in Council of the clauses of the agreement, in *accordance* with and subject to the provisions of sections 1, 2 and 4 of the Subsidy Act, undertook to pay the suppliant *so much* of the subsidies as the Governor in Council, *having regard to the cost of the work*, shall consider the suppliants to be entitled to, *in pursuance of the said Act*.

By this agreement the suppliants undertook to *make, build and construct* the line of railway in question, and they did not make build and construct the $6\frac{1}{2}$ miles in question, as admitted—and the Crown by that agreement undertook to pay the subsidy upon the performance by the suppliants of the covenant to

make, build and construct the line of railway in accordance with the statute. The suppliants never complied with that agreement in regard to the 6½ miles in question, which had been constructed, and therefore it was a physical impossibility for the suppliants to do so. The subsidy is payable to the party constructing the railway,—the contract itself makes against the suppliants contention. The subsidy is neither due to nor exigible in favour of the suppliants in any event. Paying the same would be acting contrary to the statute, and no contract or order in council going beyond the statute can grant any right enforceable by petition of right against the Crown. The primary and paramount meaning of the controlling words of the statute is that a subsidy may be granted towards the construction of a railway. The suppliants did not construct the 6½ miles, and are not therefore entitled to the subsidy for the same. Granting the subsidy would be giving the suppliants something for which they are giving no consideration, the Crown does not owe anything to the suppliants with respect to the 6½ miles in question. There exists no debt due to the suppliants in respect of these 6½ miles,—there is no consideration given by them for such claim,—and had the Crown paid the same through error of law or of fact, it would have recovered the same back under the provisions of Arts. 1047 and 1048 C.C.P.Q.

The order in council cannot go beyond the statute which says that the subsidy *may be paid towards the construction*, and if the order in council directs payment to the suppliants for a part of the railway which they did not construct, it goes beyond the statute and is *pro tanto ultra vires*. The discretion to pay is limited to the object and purpose designated by the

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statute, and it is only within the statute that such discretion can be exercised, i.e. towards the construction of the railway. (1)

Therefore, using the words of the Chief Justice *in re Hereford Railway Company v. The Queen* (2) neither on the ground of contract nor on that of statutory obligation are the suppliants entitled to succeed. It was further held in that case that when 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 statute granting the subsidy did not create a liability on the part of the Crown to pay the same. Where there is a discretionary power, there is no legal remedy.

The Crown is not bound by the laches of its officers. The orders in council in question were passed under misapprehension and error of facts, and it must be held, following the case of *De Galindez v. The King*, (3) that the Crown is not bound thereby (4).

The error and misapprehension of facts having been discovered by the officers of the Crown before payment made, the Crown moved by the sound consideration of public interest stayed its hand and the payment was stopped. It would even seem, as above stated, if such payment had been made under the circumstances, a right of action would exist for the recovery of the same.

The authority to grant a subsidy under the statute, is not mandatory but purely discretionary, and essentially a matter of bounty and grace on behalf of the Crown, creating no liability to pay the same enforce-

(1) See *Qu'Appelle, etc., Ry. Co. v. The King*, 7 Ex. C. R. 118.

(2) 24 S.C.R. 1.

(3) Q.R. 15, K.B. 320; 39 S.C.R. 682.

(4) See also *Bank of Montreal v. The King*, 38 S.C.R. 258, and *Black v. The Queen*, 29 S.C.R. 693.

cible by petition of right. Moreover, under the facts of the case the suppliants are not entitled to the relief sought herein.

There will be judgment in favour of the respondent.

Judgment accordingly.

Solicitors for suppliants: *Beique & Beique.*

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

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