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* May 29.
* Dec. 9.

HIS MAJESTY THE KING (RESPONDENT) ..... APPELLANT;

AND

QUEBEC CENTRAL RAILWAY COMPANY (SUPPLIANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Railway subsidies—Construction of a branch line—Time for completion "to be essential and of the essence of the agreement"—Claims for subsidies for portion of line constructed at the date fixed for completion—Claim for services (transportation for mails over portion of line receiving subsidies) pursuant to statute—The Railway Subsidies Act, 2 Geo. V, c. 48, ss. 8 and 11.

The respondent was incorporated by an Act of the legislature of Quebec with powers to construct a railway in that province. Some time prior to 1912, the respondent had begun the construction of a branch line from a point on its main line of railway for a distance of about 175 miles. By the *Railway Subsidies Act,* (1912) 2 Geo. V, c. 48, the Governor in Council was authorized to grant a subsidy to the respondent for an extension of this branch line "not exceeding 50 miles" in length, a distance of 40·34 miles in length having at that time been already constructed. In addition, the respondent and the Minister of Railways for Canada entered into two supplemental agreements in writing which provided for the construction of the railway extension, for payment of this subsidy in the manner and time therein set forth and in accordance with section 11 of the Act, for the completion of the whole extension by August 1, 1916, declaring time "to be essential and of the essence of the agreement" and providing that "in default of completion thereof within such time the company shall forfeit absolutely all right and title, claims and demands, to any and every part of the subsidy or subsidies payable under this agreement whether for instalments thereof at the

* PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin and Hudson JJ.

time of such default earned and payable by reason of the completion of a portion of the line, or otherwise howsoever." The respondent received $43,161.06 as payment on account of subsidy for the completion of ten miles of the road in the spring of 1915; and on August 1, 1916, 24·17 miles only of the line, in all, had been built, no further mileage ever having been constructed. The respondent, by its petition of right, claimed payment of the subsidy upon the line of railway so far completed, less the amount received on account; and it also claimed payment for services rendered in accordance with section 8 of the Act which provides that every company operating a railway, or portion of a railway, subsidized under the Act "shall each year furnish to the Government of Canada transportation for * * * mail * * * over the portion of the lines in respect of which it has received such subsidy and, whenever required shall furnish mail cars properly equipped for such mail service" and that in or towards payment for such charges the Government of Canada "shall be credited by the company with a sum equal to three per cent per annum on the amount of the subsidy received by the company under the Act." The Exchequer Court of Canada *held* that the respondent was not entitled to recover any subsidy whatever; and it also *held* that with regard to the payment for services rendered in accordance with section 8 of the Act, the continuous extensions of the respondent's branch line, upon which subsidies have been paid, must be treated as a single line of railway and as if constructed under one subsidy contract; and it *held* further that the annual credits of interest upon subsidy as provided for in the Act were not cumulative.

Held, affirming the judgment of the Exchequer Court of Canada in this respect, that all rights in respect of subsidies accrued or accruing were subject to a radical condition that, unless the work was completed on the prescribed date, they would be forfeited if they had not already been liquidated in money, and therefore the respondent is not entitled to recover the amount of subsidies claimed by its petition of right.

Per The Chief Justice:—The view upon which the Governor in Council acted apparently was that the statutory authority to pay came to an end on the prescribed date if the work had not then been completed; clause 5 of the subsidy contract which declares the effect of failure to complete the whole line by the first of August, 1916, was intended to give effect to that view of the statute. That condition was not overridden by the supplemental agreement: when the *Subsidy Act* is considered as a whole the conclusion must be that clause 5 had not the effect of defeating the intention of the statute. The enactment touching the date of completion cannot be regarded as directory merely and the Governor in Council did not exceed the discretion necessarily vested in him respecting the subsidiary terms of the contract in exacting conditions intended to secure the due and timely completion of the lines subsidized.

Held, also, varying the judgment of the Exchequer Court of Canada, that, for the purpose of construing section 8 of the Act, each section of the line was a separate "railway or portion of railway subsidized under the Act"; and, therefore, the credit of three per cent per annum on the amount of the subsidy received could only

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be applied towards the payment of charges for services rendered upon the section of railway in respect of which the subsidy was granted and paid.

Held further, affirming the judgment of the Exchequer Court of Canada, that the annual credits of interest upon subsidy as provided for in the Act were not cumulative.

Judgment of the Exchequer Court of Canada ([1938] Ex. C.R. 82) varied.

APPEAL and CROSS-APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the respondent was not entitled to recover subsidies from the Crown, but granting payment for services as to carriage of mails in accordance with provisions of the *Railway Subsidies Act,* 2 Geo. V, c. 48.

Aimé Geoffrion K.C. and *F. P. Varcoe K.C.* for the appellant.

W. N. Tilley K.C. and *D. I. McNeill* for the respondent.

THE CHIEF JUSTICE—The decision of this appeal is governed principally by section 11 of the *Subsidy Act* of 1912 (2 Geo. V, ch. 48) and of the supplementary contract of the 18th of January, 1915. The language of the statutory provision and of the contract is, of course, of cardinal importance and I reproduce them textually:

11. Whenever a contract has been duly entered into with a company for the construction of any line of railway hereby subsidized, the Minister of Railways and Canals, at the request of the Company, and upon the report of the chief engineer of the Department of Railways and Canals and his certificate that he has made careful examination of the surveys, plans and profile of the whole line so contracted for, and has duly considered the physical characteristics of the country to be traversed and the means of transport available for construction, naming the reasonable and probable cost of such construction, may, with the authorization of the Governor in Council, enter into a supplementary agreement, fixing definitely the maximum amount of the subsidy to be paid, based upon the said certificate of the chief engineer and providing that the company shall be paid, as the minimum, the ordinary subsidy of $3,200 per mile, together with sixty per cent of the difference between the amount so fixed and the said $3,200 per mile, if any; and the balance, forty per cent, shall be paid only on completion of the whole work subsidized, and in so far as the actual cost, as finally determined by the Governor in Council upon the recommendation of the Minister of Railways and Canals, and upon the report and certificate of the said chief engineer, entitles the company thereto: Provided always—

(*a*) that the estimated cost, as certified, is not less on the average than $18,000 per mile for the whole mileage subsidized;

(1) [1938] Ex. C.R. 82.

(*b*) that no payment shall be made except upon a certificate of the chief engineer that the work done is up to the standard specified in the company's contract;

(*c*) that in no case shall the subsidy exceed the sum of $6,400 per mile.

* * *

Supplemental agreement made this eighteenth day of January, one thousand nine hundred and fifteen.

Between His Majesty the King, represented herein by the Minister of Railways and Canals of Canada (referred to herein as the "Minister") acting under the authority of an Order in Council dated the fifth day of January, A.D. 1915, of the first part, and Quebec Central Railway Company, hereinafter called the "Company," of the Second Part.

Whereas under and by virtue of *The Railway Subsidies Act*, 1912, chapter 48, a subsidy contract was duly entered into between His Majesty the King and the Quebec Central Railway Company for the construction of a line of railway mentioned and set forth in paragraph 27 of the second section of the said Act, namely:—

"27. To the Quebec Central Railway Company, for the following lines of railway:

(*a*) * * *

(*b*) For an extension of its line of railway from a point (31·34 miles from St. George) in the parish of St. Sabine, county of Bellechasse, to a point in the township of Dionne, county of L'Islet; not exceeding 50 miles; not exceeding in all 51·34 miles.

as by reference to the said subsidy contract which is dated the seventeenth day of June, one thousand nine hundred and fourteen, and filed in the Department of Railways and Canals under the number 20825, will more fully appear.

And whereas by section 11 of the said Act it was enacted as follows:

(Here follows section 11 already quoted).

And whereas the Company having duly entered into the said subsidy contract, has requested that, in pursuance of the provisions of the said Act, 1912, chapter 48, it be permitted to enter into such supplementary contract or agreement fixing the maximum and the minimum amount of the subsidy payable under the said subsidy contract.

And whereas the Chief Engineer of the Government Railways has duly furnished his certificate as required of him by the said Act in that behalf, making the sum of $26,200 as the probable and reasonable cost of the construction per mile of the line of railway mentioned.

It is therefore covenanted and agreed by and between His Majesty the King (represented as aforesaid, and under and by virtue of an Order in Council dated the fifth day of January, 1915, and pursuant to the said Act of 1912, chapter 48), for Himself and His Successors and the Company for itself and its successors and assigns, as follows, namely:—

1. That the maximum amount of subsidy to which the Company shall be entitled under the said subsidy contract is hereby fixed at $6,400 for the said 50 miles.

2. That the minimum amount of subsidy to which the Company shall be entitled under the said subsidy contract shall be $3,200 per mile for the said 50 miles, together with sixty per cent of the difference between $6,400 per mile so fixed and the said $3,200 per mile.

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3. That the balance, forty per cent, shall be paid only on completion of the whole work for the said 50 miles, and in so far as the actual cost, as finally determined by the Governor in Council, entitled the Company thereto.

Provided always:

(*a*) That no payment shall be made to the Company under these presents and the Company shall not be entitled to any payment hereunder except in compliance with the provisions of the statutes in each case made and provided and upon the certificate of the Chief Engineer that the work done is up to the standard specified in the Company's contract no. 20825.

(*b*) That these presents shall be read with and taken to form part of the said subsidy contract no. 20825, and the line of railway therein mentioned shall be constructed, completed and operated by the Company and the subsidies authorized shall be paid by His Majesty subject to and in accordance with all the provisoes, covenants, agreements and conditions in such subsidy contract contained, except in so far as the said provisoes, covenants, agreements and conditions may be inconsistent with or varied by these presents.

In witness whereof, &c.

The first point to be noticed is that, by force of section 11 and of the contract executed under that section, the provisions of sections 2, 4 and 5 are in this case in great part superseded. It is evident that under section 11 it is on the footing of the report and certificate of the Chief Engineer

as to the physical characteristics of the country to be traversed and the means of transport available for construction and the reasonable and probable cost of construction,

sanctioned and acted upon by the Governor in Council, that the Company acquires the contractual right to the minimum subsidy of $3,200 a mile and 60% of the difference between that sum and the maximum fixed by the same authority on the basis of the Chief Engineer's certificate as to reasonable and probable cost. The provision of section 4 with regard to "actual, necessary and reasonable cost" does not come into operation in connection with this minimum subsidy.

Then, as to section 5, that section provides that the subsidies shall be payable out of the Consolidated Revenue Fund of Canada. There is nothing in section 11 or in the supplementary agreement which affects this provision. But the section proceeds to enact that the subsidies may be paid in three different ways which are enumerated in paragraphs (*a*), (*b*) and (*c*), at the option of the Governor in Council on the report of the Minister of Railways

and Canals, subject, however, to the important condition "unless otherwise expressly provided in this Act"; a condition which, obviously, has in view section 11 and a supplementary agreement under that section.

Now, when we look at these paragraphs we find that the first method of payment which the Governor in Council is authorized to adopt at his option is payment only upon completion of the work subsidized. That provision is incompatible with the nature of the contract authorized by section 11 under which the Company on the execution of the supplementary agreement "shall be paid" a minimum subsidy which (as section 11 and the contract obviously contemplate) is to be paid before the completion of the work subsidized.

Then, when we come to (*b*), the method of payment there designated which the Governor in Council may adopt at his option is:

> By instalments, on the completion of each ten-mile section of the railway, in the proportion which the cost of such completed section bears to that of the whole work undertaken.

Here it seems clear that the method of payment may well result in payment of the whole of the subsidy allocated in respect of the particular ten-mile section in question when that section is completed, a method, again, inconsistent with the provisions of section 11 which contemplates the deferment of the payment of 40% of the excess of the maximum subsidy over $3,200 a mile until the final completion of the railway, and generally the scale and conditions of payment are not consistent with the terms of s. 11.

Once more, subsection (*c*) imposes a condition which does not appear to be contemplated by section 11.

In truth, section 4 and these paragraphs of section 5 are enactments which would appear to contemplate a subsidy wholly calculated and conditioned as defined by section 2 and not one governed by the terms of section 11. By section 2, a subsidy is authorized (in respect of the "undermentioned railways") of $3,200 a mile for each mile of railway for railways not exceeding an average of more than $15,000 per mile to construct, that is to say, for the mileage subsidized; and a further subsidy towards construction of the same lines of railway which shall cost

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more than $15,000 a mile on the average for the mileage subsidized; and that further subsidy is to amount to 50% on so much of the average cost of the mileage subsidized as is in excess of $15,000 per mile, so that, however, the subsidy shall not exceed "in the whole $6,400 per mile."

It will be seen at once that this section contemplates a method differing radically from that contemplated by section 11 under which a minimum subsidy is fixed by the Governor in Council on the basis of the report and certificate of the Chief Engineer as to the nature of the country to be traversed and the facilities that will be available and the reasonable and probable cost of construction of the railway subsidized. The maximum and minimum subsidies are fixed in advance and the minimum subsidy is to be payable prior to the completion of the whole of the line.

The line with which we are concerned is defined in subsection 27 (*b*) of section 2 of the statute of 1912 which is in the following words:

> 27. To the Quebec Central Railway Company, for the following lines of railway:—
>
> (*a*) * * *
>
> (*b*) for an extension of its line of railway from a point (31·34 miles from St. George) in the parish of St. Sabine, county of Bellechasse, to a point in the township of Dionne, county of L'Islet; not exceeding 50 miles; not exceeding in all 51·34 miles.

By section 6 of the statute it is provided that the construction of the lines subsidized shall be commenced by the 1st of August, 1912, and completed within a reasonable length of time, not to exceed four years from the 1st of August, to be fixed by the Governor in Council

> and shall also be constructed according to descriptions, conditions and specifications approved by the Governor in Council on the report of the Minister of Railways and Canals, and specified in each case in a contract between the company and the said Minister, which contract the Minister, with the approval of the Governor in Council, is hereby empowered to make.

Under this section a contract was duly entered into between the respondents and the appellant on the 17th day of April, 1914, in respect of the work described in subsection 27 (*b*) pursuant to an Order in Council of the same date. By the Order in Council the time for completion was fixed at the 1st of August, 1916. The first

ten miles of the work in question were completed by the spring of 1915 and the sum of $43,161.06 was paid to the Company under the subsidy agreement on or about the 17th of May, 1915. A further 13·8 miles of the extension were completed some time prior to June, 1916; and before the 1st of August, 1916, additional construction had increased it to 24·17 miles.

The Crown relies upon the terms of this contract of 1914, which contains three rather important clauses, 5, 8 and 9. These clauses are as follows:

5. That the Company shall commence * * * the construction of the said line of railway within two years from the first day of August, 1912, and * * * shall complete the same on or before the ninth day of March, one thousand nine hundred and sixteen (1916) * * * time being declared to be material and of the essence of this agreement; and in default of completion thereof within such time the Company shall forfeit absolutely all right and title, claims and demands, to any and every part of the subsidy or subsidies payable under this agreement, whether for instalments thereof at the time of such default earned and payable by reason of the completion of a portion of the line, or otherwise howsoever.

8. That the Company shall in all respects comply with and abide by, and the said line of railway shall be subject to, all the provisions of the *Subsidy Act*, and of any other Acts of Parliament applicable thereto, as fully and to the same extent as if such provisions were set out at length herein.

9. That upon the performance and observance by the Company, to the satisfaction of the Governor in Council, of the foregoing clauses of this agreement, His Majesty will, in accordance with and subject to the provisions of sections two, four and five of the *Subsidy Act*, pay to the Company so much of the subsidy or subsidies, hereinbefore set forth or referred to, as the Governor in Council having regard to the cost of the work performed shall consider the Company to be entitled to, in pursuance of the said Act.

* * *

As to the first of these clauses, it is contended on behalf of the respondents that it is inoperative because the date, the 9th of March, is not the date fixed by the Governor in Council for the completion of the subsidized work. I am unable to accept this contention because I think for the purpose of construing the contract we must look at the Order in Council (which, as above mentioned, fixed the date of completion as August 1st, 1916) and correct the obvious slip in the fifth paragraph; especially in view of the fact that after the execution of the contract all parties acted on the date formally fixed by the Governor in Council as the governing date.

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It is also contended that the Governor in Council is not entitled to exact from the Company the terms and conditions of clause 5 because such terms and conditions are not contemplated by the statute. After the most careful consideration, I am unable to agree with this contention to which I shall refer later.

On behalf of the Crown it is contended, and the learned trial judge has proceeded upon this view, that notwithstanding the supplemental agreement, clause 5 of the agreement of 1914 remains in full force and that it is a complete answer to the Company's claim. Before examining the question, it will be convenient to notice the proceedings in relation to the payment of $43,000 odd for the section of ten miles completed in 1914. First of all, the following paragraph of the Order in Council authorizing the supplemental agreement should be read:

> That application has been made by the Company for admission to a supplementary subsidy agreement, in pursuance of the said Act, section 11.
>
> That under date the 22nd December, 1914, the Chief Engineer of the Department of Railways and Canals has furnished a certificate, as called for by the said section, showing the estimated reasonable and probable cost of such construction to be $1,312,430 or $26,200 per mile, for the total distance, 50 miles, of the said railway. He points out that the average cost in excess of $15,000 per mile is $11,200 which is more than sufficient to produce full "Further Subsidy" of $3,200 per mile in addition to the ordinary subsidy, making a total of $6,400 per mile, and that the maximum amount of subsidy payable, namely, the ordinary subsidy together with 60% of the "further subsidy," is $5,120 per mile, the balance, 50% of the "further subsidy" to be payable as the final cost may be actually determined.
>
> The Minister recommends that authority be given for entry into a Supplementary Subsidy Agreement with the Company, accordingly.

The terminology of the Chief Engineer's certificate is rather confused, but both section 11 of the *Subsidy Act* and the operative parts of the supplemental agreement make it clear that what is here described as the "maximum amount of subsidy payable" is the minimum subsidy.

Some days after the execution of the agreement of the 18th of January, the Company applied for the minimum subsidy in respect of the ten miles completed amounting, as mentioned in the Order in Council, to $5,120 a mile, an aggregate of $51,200. The inspecting engineer in reply gave particulars of a calculation based partly on paragraph (*b*) of section 5 of the *Subsidy Act* and partly on

the supplemental agreement, with the conclusion that the amount of subsidy earned was $43,161.60. On the 24th of February, Mr. Bowden, the Chief Engineer, gave a certificate stating that the work already done "is up to the standard specified in the Company's contract" (a certificate it should be noticed which conforms to the condition prescribed by section 3 (*a*) of the supplemental agreement) and, further, that "the progress made justifies the payment of" $43,161.60. On the 30th of March the Company wrote to the Chief Engineer pointing out that they were entitled to the payment of the minimum subsidy under the supplemental agreement; but the Governor in Council did not proceed beyond the recommendation of the Chief Engineer and by Order in Council of the 4th of May, 1914, authorized the payment of the sum mentioned.

In my view, the claim of the Company was at that time a just and well founded claim. The Company had constructed a part of the subsidized line. There was a certificate by the Chief Engineer that the work done was up to the standard specified in the subsidy contract of 1914 as required by section 3 (*a*) of the supplemental agreement.

The supplemental agreement had the effect, as I have observed, of superseding paragraph (*b*) of section 5 of the *Subsidy Act* in so far as concerns the minimum subsidy. Section 11 of that statute enacts explicitly that the "supplementary agreement" is to provide "that the Company shall be paid as the minimum" the minimum subsidy and, as I have observed, it is evident that no part of the minimum subsidy is to be deferred until the actual cost of the line has been ascertained at completion. The supplemental agreement itself (clause 2) declares that

> the minimum subsidy to which the said Company shall be entitled * * * shall be $3,200 per mile * * * together with 60% of

what had been ascertained as $3,200 per mile. The minimum subsidy under the statute and the contract (as appears from the certificate of the engineer, notwithstanding the confused terminology) for the ten miles completed in November, 1914, amounted to $51,200. If proceedings had been taken at that time to recover the difference

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between that sum and the sum paid, $43,000 odd, there could have been, I think, no answer to the Company's claim.

As regards the balance of the Company's claim, there are several distinctions: First, as to the Company's claim for the minimum subsidy in respect of the ten-mile section completed in 1914 (or the amount of it), clause 5 of the subsidy agreement of 1914 could have had no application. Second, the Crown admitted the Company was entitled to the proper proportion of the subsidy for the ten-mile section, the only dispute being as to the quantum. Third, the Company had a certificate of the Chief Engineer under clause 3 (*a*) of the supplemental agreement. As regards the balance of the claim, on the other hand, clause 5 is operative unless displaced by the supplemental agreement and no cause of action had arisen prior to the 1st of August, 1916, because the Engineer's certificate that the work (subsequent to 1914) is up to the standard of the subsidy agreement was not obtained until after that date. And finally, the dispute is not merely as to the amount but as to the right of the Company to any part of the statutory subsidy which the Crown alleges has lapsed.

I now turn to the critical question raised by the appeal: whether clause 5 of the subsidy agreement of 1914 remained operative in respect of the minimum subsidy after the execution of the supplemental agreement. It was not argued that the Company is entitled to relief against the clause as a penalty or forfeiture. In the view expressed above of the effect of section 11 and the supplemental agreement in respect of the "minimum subsidy" that might, perhaps, have been contended on the authority of *Steedman* v. *Drinkle* (1); but the circumstances which in that case gave the plaintiff a title to equitable relief have no parallel here (see the judgment of Farwell J. in *Mussen* v. *Van Diemen's Land Realty Co.* (2)) and I have not considered whether the Exchequer Court has power to grant such relief. However that may be, no such question arises.

Since we are only concerned with the minimum subsidy it is, perhaps, convenient to consider first the question of the effect of the supplemental agreement in relation

(1) [1916] 1 A.C. 275. (2) [1938] Ch. 253 at 266.

to its application to the minimum subsidy for the ten miles completed in November, 1914, in respect of which, as I have already said, the Company had a valid claim in 1915. If the clause applies to and excludes that claim, obviously, the Company must fail on the residue of its claim in respect of which, by reason of the absence of a certificate under clause 3 (*a*) of the supplemental agreement, no cause of action had been constituted on the 1st of August, 1916.

Clause 5 declares the effect of failure to complete the whole line by the 1st of August, 1916, is to extinguish any right to any part of a subsidy payable under the agreement whether for instalments thereof at the time of such default earned and payable by reason of the completion of a portion of the line or otherwise. "Instalments . . . earned and payable" include, I think, sums to which there is a valid claim enforceable by petition of right. The clause, therefore, embraces in its scope the Company's claim in respect of the ten miles mentioned.

The question to be examined is whether the application of the clause is excluded, first, by section 11 and, second, by section 3 (*b*) of the supplemental agreement.

I shall first consider the effect of the supplemental agreement. The precise point is whether clause 5 is "inconsistent with or varied by" the stipulations of the supplemental agreement. The latter document recites section 11 which enacts, as we have seen, that the agreement under it is to provide "that the Company shall be paid" the minimum subsidy without qualification; nevertheless, it is made plain in the supplemental agreement that its foundation is the subsidy contract of April, 1914. The subsidy contract is recited and the recital proceeds

> the Company has requested that, in pursuance of the provisions of the said Act, 1912, chapter 48, it be permitted to enter into such supplementary contract or agreement fixing the maximum and the minimum amount of the subsidy payable under the said subsidy contract.

By clause 1 of the agreement it is stipulated that

> the maximum amount of subsidy to which the Company shall be entitled under the subsidy shall be $6,400 per mile.

By clause 2 it is agreed that

> the minimum amount of subsidy to which the Company shall be entitled under the subsidy contract

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shall be $3,200 per mile and 60% of the excess of the maximum subsidy over that figure. By clause 3 (*b*) it is provided that

> * * * these presents shall be read with and taken to form part of the subsidy contract * * * and the subsidies authorized shall be paid subject to and in accordance with all the provisoes, covenants, agreements and conditions in such subsidy contract contained except in so far as (they) may be inconsistent with or varied by these presents.

The intention, as we have seen, of section 11 and the supplemental agreement is to fix the amount of the minimum subsidy payable before completion of the whole work, the right to which is in no way left to the discretion of the Crown and the provisions of clause 9 of the subsidy contract cannot, therefore, stand together with clause 2 of the later agreement. Clause 8 of the subsidy contract must be read in light of the fact that section 11 of the statute has become operative and, consequently, that the options given by section 5, subject to the condition "unless otherwise expressly provided in this Act," are largely nullified.

But clause 5 stands in a different category. It says nothing as to the conditions under which the subsidies may be earned during the progress of the work prior to the date fixed for completion. It does say that if the Company have earned and are entitled to be paid the minimum subsidy, that right will be extinguished if they are not paid before August 1st, 1916. In effect it declares that any rights acquired or in process of being constituted before and at that date come to an end if the line is not then completed.

The effect is that all rights in respect of subsidies accrued or accruing are subject to a radical condition that, unless the work is completed on the prescribed date, they shall be forfeited if they have not already been liquidated in money.

The view on which the Governor in Council acted apparently was that the statutory authority to pay came to an end on the prescribed date if the work had not then been completed; clause 5 of the subsidy contract is, I think, intended to give effect to this view of the statute.

After much hesitation I have come to the conclusion that this condition is not overridden by the supplemental agreement. When the *Subsidy Act* is considered as a

whole, I do not think clause 5 has the effect of defeating the intention of the statute. The enactment touching the date of completion cannot, I think, be regarded as directory merely and I think the Governor in Council does not exceed the discretion necessarily vested in him respecting the subsidiary terms of the contract authorized by section 6 in exacting conditions intended to secure the due and timely completion of the lines subsidized.

As to section 11, I do not think that section properly understood in its relation to the other enactments of the *Subsidy Act* precludes the Governor in Council from insisting upon such a condition even as applied to the minimum subsidy.

The learned trial judge seems to think that the documentary evidence discloses an intention on the part of the Company to agree that section 5 (*b*) remained in full operation after the execution of the supplemental agreement. I cannot agree with this. The Company insisted in January and February, 1915, upon their right to the full minimum subsidy as defined by that agreement and section 11. It was the Government which insisted on acting under section 5 against the demand of the Company and in contravention of the terms of the supplemental agreement.

The remaining questions arise under section 8 which is in the following words:

> 8. Every company receiving a subsidy under this Act, its successors and assigns, and any person or company controlling or operating the railway or portion of railway subsidized under this Act, shall each year furnish to the Government of Canada transportation for men, supplies, materials and mails over the portion of the lines in respect of which it has received such subsidy, and, whenever required, shall furnish mail cars properly equipped for such mail service; and such transportation and service shall be performed at such rates as are agreed upon between the Minister of the department of the Government for which such service is being performed and the company performing it, and, in case of disagreement, then at such rates as are approved by the Board of Railway Commissioners for Canada; and in or towards payment for such charges the Government of Canada shall be credited by the company with a sum equal to three per cent per annum on the amount of the subsidy received by the Company under this Act.

As to the first point raised, it seems to me to be clear that the credit of three per cent per annum on the amount of the subsidy received can only be applied towards the payment of charges for services rendered upon the section

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of railway in respect of which the subsidy is granted and paid. I think, for the purpose of construing section 8, each of "the undermentioned lines of railway" enumerated by section 2 is a separate "railway or portion of railway subsidized under the Act."

As to the question whether the credits are cumulative, I find the point a difficult one but I think it is a reasonable construction of the statute to read "such charges" as referring back to "such transportation and service" which, again, refers back to the obligation by which the Company "shall each year furnish to the Government * * * transportation, etc." This seems to point to the conclusion that the enactment has in view a service performed in each one of a series of years and the charges for an annual service against which the three per cent credit is to be set off.

The last point, again, is not free from difficulty. As I have explained, by clause 5 of the subsidy contract the completion of the whole line is regarded as the consideration for every part of the subsidy; having regard, however, to the manner in which the ten-mile section was treated by the Chief Engineer and the Governor in Council, I am disposed to think that it may be taken, for the purposes of section 8, as a segregated unit.

The appeal should be dismissed and on the cross-appeal the judgment of the Exchequer Court varied in accordance with the views above expressed. The respondent Company should have the costs of the appeal and the cross-appeal.

The judgment of Rinfret, Kerwin and Hudson JJ. was delivered by

KERWIN J.—I agree with the judgment of the President of the Exchequer Court and, generally speaking, his reasons therefor, in all respects save one. Section 8 of *The Railway Subsidies Act*, 2 Geo. V, chapter 48, provides:—

> 8. Every company receiving a subsidy under this Act, its successors and assigns, and any person or company controlling or operating the railway or portion of railway subsidized under this Act, shall each year furnish to the Government of Canada transportation for men, supplies, materials and mails over the portion of the lines in respect of which it has received such subsidy, and whenever required, shall furnish mail cars properly equipped for such mail service; and such transportation and

service shall be performed at such rates as are agreed upon between the Minister of the department of the Government for which such service is being performed and the company performing it, and, in case of disagreement, then at such rates as are approved by the Board of Railway Commissioners for Canada; and in or towards payment for such charges the Government of Canada shall be credited by the Company with a sum equal to three per cent per annum on the amount of the subsidy received by the company under this Act.

A similar provision is found in the other Subsidies Acts. The suppliant furnished to the Crown adequate transportation for mails at the rates in effect from time to time over the various sections of railway in connection with which subsidies have been paid. The contention of the Crown is that in computing the credit provided for by the last part of section 8 and similar sections, all the subsidized extensions of the suppliant's branch line are to be treated as a single line. The judgment appealed from gives effect to this contention but I am unable to agree that the proper construction of the statutory provisions leads to that conclusion.

Section 8 and each of the corresponding provisions appears in separate Acts relating to separate and distinct sections of the line, and each section of the line is dealt with in a separate contract. Each section of the line is a separate "portion of the lines in respect of which it has received such subsidy." I am not convinced that such a construction involves a cumbersome method of accounting, as the learned President seemed to suggest, but even if that were so, it would, in my opinion, be no valid reason for construing the statutory provisions in the manner adopted by the judgment *a quo*. Perhaps I should add that although on this one point I find myself in disagreement with that judgment, I am still satisfied that the annual credits are not cumulative.

In the result, therefore, the judgment should be varied by striking out paragraph 4 and substituting the following therefor:—

This Court doth further order and adjudge that in calculating the amount to be paid the suppliant each year for the carriage of mails over each extension of railway referred to in paragraphs 2, 3, 4 and 9 of the Petition of Right, each extension is to be taken separately for the purposes of such calculation, and His Majesty is entitled only to apply in or towards payment of the amount owing, an amount equal to one year's interest at three per cent. on the subsidy paid in respect of each such extension.

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THE KING v. QUEBEC CENTRAL RAILWAY COMPANY.

Kerwin J.

His Majesty fails on the appeal and it should be dismissed with costs. The cross-appeal succeeds to some extent but not with reference to the claim for subsidy. As it was His Majesty who first appealed, the railway company should be awarded its full costs of the cross-appeal. In this way it would be compensated to some extent for not securing any costs in the Exchequer Court.

CROCKET J.—I agree with the conclusion of the learned President of the Exchequer Court that under the express terms of the subsidy contract for the construction of the 50-mile extension of the respondent's line of railway from Ste. Sabine to a point in the Township of Dionne, in the County of L'Islet, it must be held that in default of completion of the whole work contracted for by the date fixed therefor, the railway company forfeited any claim or demand for any unpaid instalments of subsidy then earned in respect of the completion of any portion of the proposed extension. Time having been expressly declared to be material and of the essence of the contract, that is the unfortunate result. Though it may seem hard, in view of the fact that the respondent had actually completed 24·17 miles of the proposed extension up to the standard specified in the subsidy contract, as certified by the Government engineers, for which upon the basis of those certificates the suppliant would have been entitled to receive as the minimum subsidy $5,120 per mile or $123,750.40 on completion of the whole work, and on the construction of the first 10-mile section of which the Crown had actually paid $43,161.06 on account, that the Crown should, in the circumstances in which the work had to be abandoned, refuse to pay any part of the agreed subsidy on the last 14·17-mile section or of the 40% balance retained by it in respect of the construction of the first 10-mile section, and insist upon the application of the rigid rules of law to such a case, there seems to be no other alternative, so far as courts of law are concerned, than to give effect to the defence which the Crown has now put forward.

As to the effect of s. 8 of the *Subsidy Act* in relation to the right of the Crown to "apply in or towards payment for" the respondent's charges against it for the carriage of mails over the subsidized extensions a sum equal to

3% per annum on the amount of the subsidy received by the company, I think also that the learned President was right in holding that the credit of 3% upon subsidies received is only to be applied annually against the sum payable annually for the mail services, which the railway "shall each year furnish," and that the annual credit of interest upon subsidy was not intended to be cumulative as contended by the Crown. I concur, however, in the view of my Lord the Chief Justice and my brother Kerwin that in computing the credit provided for by that section the several sections upon which subsidies had been paid must be treated separately and not as one single line, as held by the learned trial judge, and I agree that paragraph 4 of the formal judgment should be varied accordingly and the appeal dismissed with costs. I think, for the reasons stated by my brother Kerwin, that the respondent also should have its full costs on the cross-appeal.

Appeal dismissed, cross-appeal allowed in part, cost of appeal and cross-appeal to respondent.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondent: *Ewart, Scott, Kelley, Scott & Howard.*