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May. 22.

JOHN THEODORE ROSS, FRANCES ELLA ROSS, JOHN VESEY FOSTER VESEY-FITZGERALD AND ANNIE ROSS..... } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Intercolonial Railway contract—31 Vict. c. 13—37 Vict. c. 15—42 Vict. c. 7—Chief Engineer's final certificate—Condition precedent.

By section 18 of 31 Vict. c. 13 (The Intercolonial Railway Act, 1867) it was enacted that no money should be paid to any contractor until the Chief Engineer should have certified that the work for or on account of which the same should be claimed had been duly executed, nor until such a certificate should have been approved by the Commissioners appointed under such Act. By 37 Vict. c. 15 the duties and powers of the Commissioners were transferred to the Minister of Public Works, and their office abolished. By 42 Vict. c. 7 the Department of Railways and Canals was created, and the Minister thereof became in respect of railways and canals the successor in office of the Minister of Public Works, with all the powers and duties incident thereto.

The suppliants claimed certain extras under two contracts made in pursuance of the statute first mentioned, for the construction of portions of the railway, but had never obtained any certificate as required by such statute from the Chief Engineer of the railway at the time of the execution of the work. After the resignation of F. the original Chief Engineer, S. was appointed to such office for the purpose of investigating "the unsettled claims which had arisen in connection with the undertaking, upon which no judicial decision had been given, and to report on each case to the Department of Railways and Canals." S. investigated the suppliants' claims amongst others, and made a report thereon recommending the payment of a certain sum to the suppliants. This report was not approved by the Minister of Railways and Canals, as representing the Commissioners, nor was it ever acted upon by the Government.

Held, following the case of *McGreevy* v. *The Queen* (18 Can. S. C. R. 371) that the report of S. was not such a certificate as was contemplated by the statute and the contracts made thereunder.

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SPECIAL CASE upon a claim for extras arising upon certain contracts for the construction of portions of the Intercolonial Railway.

The facts of the case and the contentions of counsel appear in the reasons for judgment.

The case was argued on the 26th January, 1895.

A. Ferguson, Q.C. and *G.G. Stuart*, Q.C. for suppliants;

The *Solicitor-General* and *W. D. Hogg*, Q.C. for the respondent.

THE JUDGE OF THE EXCHEQUER COURT now (May 22nd, 1895) delivered judgment.

The present suppliants are the legal representatives of the late John Ross, of the City of Quebec, who in 1876 became entitled by assignment to all the rights of Messrs. J. B. Bertrand & Co. in, or incident to, two contracts into which that firm had entered with the Crown for the construction of sections nine and fifteen of the Intercolonial Railway; and the only question to be now determined is as to whether or not the suppliants are entitled to recover against the Crown on a certificate or report made by Mr. Frank Shanly, civil engineer, on certain claims made by Mr. Ross in respect of the construction of the two sections of the railway referred to.

By an Act of the Parliament of Canada, 31st Victoria, chapter 13, provision was made for the construction of the Intercolonial Railway. By the third section of the Act it was provided that the construction of the railway and its management until completed should be under the charge of four Commissioners to be appointed by the Governor-General. By the fourth section provision was made for the appointment of a Chief Engineer, who, under instructions he might receive from the Commissioners, should have the general

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superintendence of the works to be constructed under the Act. The railway was to be built by tender and contract, and it was provided that no contract involving an expenditure of ten thousand dollars or more should be concluded by the Commissioners until sanctioned by the Governor-General in Council (section 16). By the eighteenth section it was enacted that no money should be paid to any contractor until the Chief Engineer should have certified that the work for or on account of which the same should be claimed had been duly executed, nor until such certificate should have been approved by the Commissioners.

The contracts made between Bertrand & Co. and the Crown, as represented by the Commissioners appointed under the Act 31st Victoria, chapter 13, were entered into on the 26th day of October, 1869, and the 15th day of June, 1870, respectively, the former for the construction of section nine of the railway, and the latter for the construction of section fifteen. By the second clause of the contract for the construction of section nine, it was among other things agreed that all the works were to be executed and materials supplied to the entire satisfaction of the Commissioners and engineer, and that the Commissioners should be the sole judges of the work and materials, and their decision on all questions in dispute with regard to the works or materials, or as to the meaning or interpretation of the specifications or the plans, or upon points not provided for or not sufficiently explained in the plans or specifications should be final and binding upon all parties. By the fourth clause of the contract, the engineer was given authority at any time before the commencement, or during the construction of any portion of the work, to make any changes or alterations which he might deem expedient, in the grades, the line of location of the railway, the width of cuttings or fillings, the

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dimensions or character of structures or in any other thing connected with the works whether or not such changes should increase or diminish the work to be done or the expense of doing the same, and it was agreed that the contractors should not be entitled to any allowance by reason of such changes unless such changes consisted in alterations in the grades or the line of location, in which case the contractors should be subject to such deductions for any diminution of work or entitled to such allowance for increased work (as the case might be) as the Commissioners might deem reasonable, their decision to be final in the matter. By the ninth clause of the contract it was further agreed that the sum of $354,897, for which the work was to be done, should be the price of, and be held to be full compensation for all the works embraced in or contemplated by the contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not upon any pretext whatever be entitled by reason of any change, alteration or addition made in or to such works, or in the said plans and specifications, or by reason of any of the powers vested in the Governor in Council by the said Act intituled "*An Act respecting the construction of the Intercolonial Railway*" or in the Commissioners or engineer, by this contract or by law, to claim or demand any further or additional sum for extra work or as damages or otherwise; the contractors thereby expressly waiving and abandoning all and any such claim or pretension to all intents and purposes whatsoever, except as provided in the fourth section of the contract.

By the eleventh clause of the contract it was further agreed that cash payments equal to eighty-five per cent of the work done, approximately made up from returns of progress measurements should be made monthly on

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the certificate of the engineer, that the work for or on account of which the sum should be certified had been duly executed and upon approval of such certificate by the Commissioners. On the completion of the whole work to the satisfaction of the engineer a certificate to that effect was to be given; but the final and closing certificate including the fifteen per cent retained was not to be granted for a period of two months thereafter. The progress certificates, it was agreed, should not in any respect be taken as an acceptance of the work or release of the contractors from their responsibility in respect thereof; but they should at the conclusion of the work deliver over the same in good order according to the true intent and meaning of the contract and of the said specifications.

And by the twelfth clause of the contract the parties stipulated that the contract and the specifications should be in all respects subject to the provisions of the Act 31st Victoria, chapter 13, and also to the provisions of *The Railway Act*, 1868, in so far as the latter might be applicable.

The contract for the construction of section fifteen of the railway was in like terms, except as to the twelfth paragraph which provided for the substitution, at the option of the Commissioners, of iron bridges for wooden bridges, the superstructure of such iron bridges to be procured at the cost of Her Majesty; but in every such case the value of the wooden superstructure and the reduction in quantity and value of masonry (if any) consequent upon such substitution was to be deducted, at the prices named for such descriptions of work in the schedule annexed to the contract, from the full amount mentioned in the contract as payable and to be paid for the performance of the work under said contract.

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Bertrand & Co. did not complete the work embraced in either of the two contracts. In both cases the work was taken out of their hands and completed by the Crown. That on section nine was finished in November, 1873, and that on section 15, in February, 1874.

In the latter year by the Act 37th Victoria, chapter 15, the 3rd section of 31st Victoria, chapter 13, respecting the appointment of Commissioners, was repealed from the 1st of June, 1874, and it was provided that thereafter the railway should be a public work under the control of the Minister of Public Works, to whom was transferred the powers and duties which had been previously vested in the Commissioners, or assigned to them. In 1879 the Department of Public Works was divided and the Department of Railways and Canals created. By the fifth section of the Act (42 Vict., chapter 7) by which this change was effected the Minister of Railways and Canals became in respect of railways and canals the successor in office of the Minister of Public Works, with all his powers and duties incident thereto.

During the progress of the work covered by the two contracts to which reference has been made Mr. Sandford Fleming was Chief Engineer of the Intercolonial Railway. He furnished the contractors with progress estimates of the work done under such contracts, the amount of which was paid, but he gave no final certificate in respect of either contract.

In December, 1876, as has been stated, Mr. Ross became entitled by assignment from Bertrand & Co. to their rights and interests in the two contracts and in any moneys that might be due to them thereunder. In December, 1879, he filed in this court a petition in which in respect of such contracts and the work done by Bertrand & Co. on sections nine and fifteen he claimed a sum of $576,904.02.

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There were at the time claims by other contractors for work done on the Intercolonial Railway, and in May, 1880, an order in council was passed, by which Mr. Fleming was "reappointed" Chief Engineer of the railway "to investigate the unsettled claims which had arisen in connection with the undertaking upon which no judicial decision had been given, and to report on each case to the Department of Railways and Canals." Mr. Fleming declined the position, and on the 23rd of June, 1880, Mr. Frank Shanly was appointed thereto.

On the 18th of July, 1881, Mr. Shanly, in a letter to the Secretary of the Department of Railways and Canals, made for the information of the Minister of that Department his report on the claims put forward by Mr. Ross.

With reference to section nine of the railway, he recommended the payment of four items amounting to $12,277, "as being extra to the contract" and three sums amounting to $92,310, as "an advance in price" in "rock excavation and borrowing," and on "first-class and second-class masonry." With respect to section fifteen he recommended the payment of one item of $1,875, which he considered formed "no part of the original contract"; and as before he recommended that the rate or price for rock excavation and masonry should be increased. In all he recommended that the claimant should be paid $231,806 in excess of the lump sum agreed upon. Mr. Shanly's report or recommendation was never acted upon; but in July, 1882, a commission was appointed to investigate these Intercolonial Railway claims and to report thereon to His Excellency in Council to the end that he might be well advised as to the liability of Her Majesty in regard to such claims. The order in council under which the commission was constituted and the proceedings thereon, so far as the present claim is affected, are before the court; but it is

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not, I think, necessary for the disposition of the only question now to be disposed of to make any further reference thereto. The only question to be now decided, as has been stated, is: Are the suppliants entitled to recover against the Crown on Mr. Shanly's certificate or report? It is admitted that in this court the question is answered by the decision of the Supreme Court of Canada in the case of *The Queen* v. *McGreevy* (1), in which a like question arose. The certificates or reports in question in that case and this are not, it will be seen, in the same terms. They were, however, made by the same officer, under the same statutes and like contracts and under similar circumstances, and gave rise to like questions. There is some difference of opinion between the parties to this petition as to what was decided in *McGreevy's case*; but there is no contention that the report or certificate on which the present suppliants rely can be distinguished to their advantage from the certificate upon which the decision turned in the case to which I have referred. If the latter was not sufficient to sustain the petition in that case, the suppliants in this case and before this court must also fail.

McGreevy's case came first before Mr. Justice Fournier sitting in this court, upon a statement of admissions by both parties similar to that now submitted and for the determination, as I have already mentioned, of a like question, namely: Whether the suppliant was entitled to recover on Mr. Shanly's certificate or report?

To answer that question in the affirmative, it was necessary to come to the conclusion:

1. That Mr. Shanly was the Chief Engineer of the Intercolonial Railway within the meaning of the statutes and contracts, under which the Intercolonial Railway was built.

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2. That his report constituted a good and sufficient certificate under such statutes and contracts.

3. That the approval of the certificate by the Minister of Railways and Canals was not a condition precedent to the right of the suppliants to recover thereon, or that such approval had been given. In the Exchequer Court Mr. Justice Fournier held that Mr. Shanly was the Chief Engineer of the railway and competent to give a certificate; that his report constituted a good certificate, and that if the approval of the certificate by the Minister of Railways and Canals, as representing the Commissioners, were necessary, such approval had been given by acquiescence. On appeal to the Supreme Court, Mr. Justice Strong and Mr. Justice Taschereau were of opinion to answer the question submitted in the affirmative and to dismiss the appeal. They agreed that Mr. Shanly was the Chief Engineer of the railway; that he had authority to make the report in question; that it constituted a good final and closing certificate, and that the approval of the Minister was not necessary. Chief Justice Sir William J. Ritchie and Mr. Justice Gwynne took a different view. They thought that Mr. Shanly's report was not such a certificate as was contemplated by the statutes and contracts to which I have referred. Mr. Justice Patterson agreed with Mr. Justice Strong and Mr. Justice Taschereau that Mr. Shanly was Chief Engineer and competent to give a certificate and that the approval of the certificate by the Minister of Railways and Canals was not necessary. He agreed, however, with the Chief Justice and Mr. Justice Gwynne, but on a different ground, that the suppliant could not recover on the certificate. In his opinion the Chief Engineer had no power or authority to determine the amount or price to be paid for the work done. In the

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result the question submitted was answered in the negative, and the appeal was allowed.

Whatever my own view might be, it would, it seems to me, be incumbent on me, under these circumstances, to follow that decision and declare that the suppliants in this case are not entitled to the relief prayed for. But even if it were thought that the difference of opinion that existed in that case between the learned judges who constituted the majority of the court left it open for me to form and express my own view as to whether the Crown is liable on Mr. Shanly's report or not, I should still be of opinion that it is not liable.

In submitting a single question for the decision of the court the suppliants reserved the right, if the court decided against them on that question, "to proceed on other clauses of the petition for the general claim." In order, however, that a judgment might be entered on the answer to the question submitted from which an appeal could be taken, it was agreed by counsel that as the question was answered, so judgment on the petition should be entered, reserving to the suppliants the right to come before this court and ask to have that judgment set aside.

*Judgment for the respondent, with costs.**

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

Solicitors for respondent: *O'Connor & Hogg.*

*Affirmed on appeal to the Supreme Court of Canada.