

1882

*Coram TASCHEREAU, J.*Mar. 6. **PATRICK KENNEY.....SUPPLIANT;**

AND

HER MAJESTY THE QUEEN.....DEFENDANT.*Contract for carrying rails, breach of—Employment of persons other than contractor to do work covered by contract—Representations prior to formation of contract—Evidence—Measure of damages.*

On the 9th August, 1885, the suppliant entered into a written contract with the Dominion Government to remove and carry in barges all the steel rails that were then actually landed, or that might thereafter be landed, from sea-going vessels upon the wharves in the harbor of Montreal during the season of navigation in that year, and to deliver them at a place called the Rock Cut on the Lachine canal. Suppliant duly entered upon the execution of his contract, and no complaint was made on behalf of the Government that his performance of the work was not entirely satisfactory.

Sometime in the month of September, and when the suppliant had only carried a small quantity of rails, the Government, without previous notice to the suppliant, cancelled the contract and employed other persons to do the work that he had agreed to perform. Thereupon the suppliant filed a petition of right claiming damages against the Government for breach of contract.

It was alleged by suppliant that M., who had acted on behalf of the Government in making the contract with the suppliant, had represented to him that a very large quantity of rails, amounting to some 25,000 or 35,000 tons, would have to be carried by the suppliant as such contractor; and that it was upon this representation that he entered into the said contract and made a large outlay with a view to efficiently removing and carrying the rails and delivering them safely at their place of destination.

Held:—(1). The fact that no stipulation embodying such representation appeared in the written instrument was evidence that it formed no part of the contract.

(2). That although the suppliant could not import into the formal contract any representations made by M. prior to it being reduced to writing, yet under the terms of the written contract he was entitled to remove all the rails landed from ships in the port of Montreal during the year 1875, for the purpose men-

tioned in the contract, and should have damages for the loss of the profits that would have accrued to him if he had carried such portion of the rails as was carried by other persons during the continuance of his contract.

1882

KENNEY

v.

THE QUEEN.

STATEMENT
OF FACTS

PETITION OF RIGHT for damages arising out of a breach, by the Dominion Government, of a contract for the carriage of goods.

The suppliant in his petition alleged as follows:—

“ 1. That on or about the fourteenth day of July, in the year of our Lord one thousand eight hundred and seventy-five, there appeared in the issue of a newspaper published in the city of Montreal called *The Sun*, an advertisement in the words and figures following, that is to say:—

“ **MOVING OF STEEL RAILS.**

“ **TO BARGE OWNERS, FORWARDERS, &c.**

“ Tenders will be received by the undersigned until Monday noon, 19th July, for the removing, handling and piling of the steel rails of the Canadian Pacific Railway from the wharves of the harbor of Montreal to the Rock Cut at Lachine.

“ Full particulars can be obtained on applying at the office of

“ **MORIN & CO.,**

“ *Agent for the Minister of Public Works of Canada.*
“ 10 St. Nicholas St.”

“ 2. That in response to said advertisement your suppliant being, at the time of the publication of said advertisement the owner of barges and engaged to some extent in the forwarding business, applied at the office of said Morin & Co. for full particulars of the nature and extent of the work to be done in respect of said removing, handling and piling of steel rails as mentioned in said advertisement; and upon the strength of the information and particulars so obtained, in addition to that contained in the said advertisement, your sup-

1882 pliant tendered in writing to the said Morin & Co. for
KENNEY the execution of the work referred to in the said
v.
THE QUEEN. advertisement.

Statement
of Facts. "3 In the early part of the month of August of said year, your suppliant was duly notified of the acceptance of his tender for said work, and, in compliance with a notice to that effect from said Morin & Co., your suppliant at the said city of Montreal, before M. François Joseph Durand, a notary public for the Province of Quebec, entered into and executed a notarial deed of contract between your suppliant and said Morin & Co., representing in that behalf your Majesty's then Minister of Public Works for Canada, for the execution of said work, and which deed of contract was in the words and figures following, that is to say:—

"On this ninth day of the month of August, in the year one thousand eight hundred and seventy-five.

"Before M. François Joseph Durand, the undersigned notary public, duly commissioned and sworn in and for the Province of Quebec, heretofore called Lower Canada, in the Dominion of Canada, and residing in the city of Montreal, in the district of Montreal, in the province aforesaid, came and appeared Louis Edouard Morin of the city of Montreal, broker, esquire, and herein acting as agent for the Minister of Public Works of the Dominion aforesaid in the said city of Montreal, for receiving, sending and shipping the rails for the Pacific Railway of Canada, of the one part; and Patrick Kenny of the same city of Montreal, wood-merchant and trader, of the other part; which parties hereto have agreed and covenanted between themselves as follows to wit: The said party of the second part hereby undertakes to remove and to carry for the Government of the Dominion of Canada all the steel rails that are actually, or that will be, landed from sea-going vessels on the wharves of the harbor of Montreal

during this season of navigation, and deliver and lay on the ground the said steel rails at the place commonly called the Rock Cut, on the Lachine Canal, subject to the terms and conditions hereinafter mentioned, to wit:

1882

KENNEY

v.

THE QUEEN.

Statement
of Facts.

" 1st. The contractor shall take and receive the rails within twenty-four hours after he shall have been notified to take the delivery of the same.

" 2nd. The said rails are to be taken either from ship's tackles or on the wharves, wherever they may have been landed.

" 3rd. Should the rails require to be drawn from the place of landing to the barge or vessel employed by the contractor of their transportation, the moving to be done entirely at the said contractor's expense.

" 4th. All canal dues, if any, to be at the expense of the said contractor.

" 5th. The ton for the purpose of regulating the price of the carrying of the said rails is to be for the long ton of 2,240 pounds each.

" 6th. The rails are to be delivered, as aforesaid, at the place called the Rock Cut, near Lachine. The locality where they are to be delivered and laid shall be pointed out by the agent of the Minister of Public Works of Canada, or his authorized representative.

" 7th. The rails are to be piled by the contractor in rows of 80 to 100 rails, piled chequered way" (as per diagram annexed to contract,) "the same having been first duly signed *ne variatur* by the parties hereto and the subscribing notary public; the foundation for receiving the rails to be supplied by the agent of the said Minister; the said rails to be so piled to the height that shall be indicated and ordered by the said agent.

" 8th. The price hereinafter agreed to for carrying the said rails will be considered and taken as including all labor for handling, receiving, delivering, piling, &c.,

1882 the said rails either in the harbour of Montreal, or at
KENNEY the place of delivery aforesaid.

v. "9th. Payments for the present contract are to be made
THE QUEEN. by the Minister of Public Works aforesaid on the pro-
Statement duction of the agent's or his representative's certificate,
of Facts. or receipt, that the quantity delivered in the harbor
of Montreal will have been delivered at the Rock Cut
aforesaid according to the present contract.

"10th. However, twenty per cent of the contractor's
money is to remain in the hands of the Minister of
Public Works, or his agents at Montreal, pending the
fulfilment of the contract.

"11th. The contracting party of the second part in
these presents to pay the expenses hereof as also of
two copies for the Minister of Public Works and his
agent.

"The price of the present contract, subject to all the
foregoing clauses, conditions, and stipulations, is to be
eighty cents per ton (80 cts.) of rails delivered and piled
as aforesaid at the Rock Cut above mentioned.

"This done and passed at the said city of Montreal,
in the office of the said F. J. Durand, on the day, month
and year hereinabove firstly written under the number
five thousand six hundred and forty-one of the Repertory
of the notarial deeds of the said F. J. Durand, who has
kept these presents of record in his office; and these
presents having been first duly read to the said parties
hereto, they have signed in the presence of the said
notary who has also signed.

"4. That it was represented to your suppliant by the
said Morin & Co., acting as the duly authorized agents
in that behalf of your Majesty's then Minister of Pub-
lic Works of Canada, as well in answer to your sup-
pliant's inquiries for the particulars referred to in said
advertisement for tenders, as after said contract had
been awarded to your suppliant as aforesaid, and both

before and after said notarial deed of contract had been executed by your suppliant, that your suppliant would have, as the contractor for the said works, the removing, carrying, handling and piling of all the steel rails belonging or consigned to the Government of Canada, or to anyone on their behalf, for the Canadian Pacific Railway that then were landed and lying on any of the wharves of the harbor of Montreal, or that would thereafter be landed at said harbor of Montreal during the season of navigation of said year of our Lord one thousand eight hundred and seventy-five, and that the same would amount in quantity to between twenty-five thousand and thirty thousand tons of said rails.

"5. That your suppliant, acting upon the representations of said Morin & Co., as agents of your Majesty's said Minister of Public Works, taken in connection with said notarial contract, and its being distinctly agreed to between your suppliant and said Morin & Co., that your suppliant was to have the removal, handling, carrying and piling of all the said rails then, at the date of said contract, landed, or to be thereafter during said season landed, at the port of Montreal, belonging or consigned to your Majesty's Canadian Government, for said Canadian Pacific Railway, your suppliant undertook the said work, and immediately after the execution of said notarial contract entered upon the execution of said work.

"6. That the said Morin & Co. were, for the purposes of the matters hereinbefore mentioned, the duly authorized agents of your Majesty's then Minister of Public Works for Canada, and as such advertised for tenders, made the above mentioned representations as to said work to your suppliant, and entered into the contract with your suppliant above set out and referred to, and the said contract was accepted, adopted and acted upon by the said Minister, and by your Majesty's

1882

KENNEY

v.

THE QUEEN.

Statement
of Facts.

1882 officers in that behalf, and payments were made thereunder from time to time on behalf of your Majesty to
KENNEY ^{v.} THE QUEEN. your suppliant, on account of said works contemplated in said contract.

Statement
of Facts.

"7. That in order to carry out the works contemplated by said notarial contract, as interpreted by the said representations of said Morin & Co. to your suppliant in reference thereto, your suppliant necessarily either abandoned or sub-let, at a great pecuniary loss to himself, several undertakings or contracts with other parties which he then had on hand, and engaged eight barges, with their crews, in addition to his own usual number of craft and men, of all which facts your Majesty's Minister of Public Works had due notice and knowledge through his said agents.

"8. That your suppliant, relying upon said notarial contract and upon the representations of, and agreement with, said Morin & Co., as agents as aforesaid of your Majesty's said Minister, as to the quantity of rails to be dealt with by your suppliant under said contract, incurred considerable extra expense in the erection of derricks on the Lachine Canal for the purposes of said work, which would have been unnecessary except for the large quantity of rails contemplated to be removed, handled and piled by him as aforesaid under said contract, and which, in consequence of the cancellation of said contract as hereinafter mentioned, were rendered useless, and the expense thereof lost to your suppliant.

"9. That your suppliant supplied all the necessary vessels, materials and men for the prosecution of said works contemplated under said contract, and continued to perform all the work required of him thereunder in a manner quite satisfactory to the said Morin & Co. as agents as aforesaid, and to the officers of your Majesty's then Minister of Public Works for Canada, having to do with the execution of said work; and was always

ready and willing during the whole of said season of navigation to carry out said contract if he had been allowed so to do; but in or about the latter end of the month of September of said year of our Lord one thousand eight hundred and seventy-five, and when your suppliant had removed, handled and piled only a small quantity of said rails, your Majesty's said Minister of Public Works for Canada, without any reason or ground whatsoever, and without any previous notice to your suppliant, summarily cancelled and put an end to the contract hereinbefore mentioned with your suppliant, and entered into a new contract with other contractors for the removal, handling and piling of the balance of the said steel rails contemplated to be done by your suppliant under his said contract.

" 10. That there were in addition to said quantity of said rails so removed, handled and piled by your suppliant, a very large quantity of rails landed at the harbor of Montreal during the season of navigation of said year of our Lord one thousand eight hundred and seventy-five, but the work in connection therewith which your suppliant was entitled under his said contract to do, namely, the removing, handling and piling of said rails was given to other contractors as mentioned in the last paragraph hereof, and your suppliant consequently lost the profits which he would have made on his contract prices in respect thereof if he had been allowed to do the whole of said work.

" 11. That through the cancellation of said contract your suppliant, in addition to the loss of profits above referred to, sustained pecuniary loss by eleven of his barges, with their crews, numbering about fifty men, employed specially for the purposes of said contract, and who had to be paid by your suppliant for the whole balance of said season of navigation, being thrown out of employment; and also in consequence of

1882
KENNEY
v.
THE QUEEN.
Statement
of Facts.

1882 the facts alleged in the seventh, eight and ninth paragraphs hereof.
KENNEY

v.
THE QUEEN. "12. That your suppliant never in any way signified to the said Minister any unwillingness on his part to continue said work, or any want of preparation so to do, but, on the contrary, was always ready and anxious to proceed therewith, of which said Minister was well aware, and up to the time of the cancellation of said contract had done and performed every act and thing necessary on his part of said contract to the entire satisfaction of said Minister and his officers in that behalf, and has always been ready and willing to continue to carry out said contract on his part.

"13. That your Majesty's then Minister of Public Works, as your suppliant is informed, gave as a reason for his cancellation of said contract that it had been determined by him shortly before said cancellation to have the balance of said rails carried to and piled at Kingston, in the Province of Ontario, instead of at Rock Cut, Lachine, as contemplated under said contract; and that, therefore, a new contract was made with other contractors. But your suppliant submits that before a contract was entered into with other contractors for said work, as changed, your suppliant should have been requested to transport to, and pile, said rails at Kingston, according to said new determination of said Minister, which your suppliant would have done after being remunerated fairly in addition to his prices under said contract, and upon also being reimbursed his loss and damages sustained by breach of said notarial contract; but your suppliant was never requested or given an opportunity so to do.

"14. That the moneys necessary for the payment of your suppliant for the execution of the said contract, as originally contemplated to be done, and at the prices therein mentioned, had been duly voted by Parliament,

and your suppliant has been paid from time to time 1882
under said contract for work actually done by him KENNEY
thereunder. v.
THE QUEEN.

"15. Your suppliant submits that he was entitled to
the work of removing, carrying and piling, in the
manner and at the prices mentioned in said notarial
contract, of all the steel rails belonging or consigned to
the Government of Canada, or to any one on their
behalf, for the Canadian Pacific Railway, lying on the
wharves of Montreal harbor, on the day of the date
of said contract, or delivered or landed at any place in
said harbor, after said date, during the season of navi-
gation of the year of our Lord one thousand eight
hundred and seventy-five; and that by reason of the
cancellation of said contract by your Majesty's said
Minister, before all said rails had been so removed by
your suppliant, and by your Majesty's said Minister
giving said work to other contractors, your suppliant
has sustained serious actual loss and damage; and has
besides been thereby wrongfully deprived of his profits
in said work, for all which he is entitled to be paid
by your Majesty.

"16. That in all the matters aforesaid in which your
Majesty's said Minister of Public Works for Canada
acted or dealt with your suppliant, either directly or
through his said lawfully authorized agents, in refer-
ence to said contract and work to be done thereunder,
the said Minister acted on behalf of your Majesty, and
as representing your Majesty in that behalf.

17. That your suppliant has made several appli-
cations to your Majesty's Government for the Dominion
of Canada, through the proper department in that
behalf, for a settlement of his claim above mentioned,
and has furnished particulars thereof and asked that
the same should either be paid or submitted to your
Majesty's Official Arbitrators for the Dominion of

1882 Canada for award thereupon, but he has been unable
KENNEY to obtain compliance with any of his requests.

THE QUEEN. "Your suppliant therefore humbly prays:—

Statement
of Facts. 1. That it may be declared that your suppliant was under the circumstances set forth in this petition, by virtue of the said notarial contract, entitled to do and perform all the work of removing, carrying, handling, and piling the steel rails mentioned in the 15th paragraph of this petition, at the prices, upon the terms, and in the manner in said notarial contract set forth.

"2. That it may also be declared that in consequence of the cancellation of said contract, as in the 9th paragraph of said petition set out, your suppliant is entitled to be paid the actual damages sustained by him directly and indirectly in consequence of the breach of said contract by your Majesty's said Minister of Public Works, and also the profits which your suppliant would have earned had said contract not been cancelled and put an end to as aforesaid.

"3. That the sum of ten thousand dollars, or such other sum as may be found proper under the circumstances, may be paid to your suppliant by your Majesty for the direct and indirect loss and damages, as in this petition set forth, sustained by him by reason of the said breach and cancellation of said contract on behalf of your Majesty, and for loss of profits which your suppliant would have earned upon said work, and for interest on both damages and profits from the first day of October in the year of our Lord one thousand eight hundred and seventy-five.

"4. That, if necessary, an account may be taken of said damages, and of the profits which your suppliant would have earned if said contract had not been cancelled, and also of interest upon both damages and profits from the date above mentioned.

"5. That your suppliant may be paid what, upon said account being taken, shall be found due to your suppliant, and interest as aforesaid." 1882
KENNEY
v.
THE QUEEN.

"6. That your suppliant may be paid his costs of this suit." Statement
of
Facts.

"7. That your suppliant may have such further and other relief as in the premises may seem just."

"The following defence was pleaded by the Attorney-General for the Dominion of Canada, on behalf of Her Majesty, to the petition of right:—

"1. The facts set forth in the first and second paragraphs of the suppliant's petition of right are believed to be true.

"2. The suppliant entered into a written contract of the character mentioned in the third paragraph of the said petition, but for greater particularity leave is asked to refer to the said contract at the trial of this cause.

"3. The said Morin & Co. had no authority to make the representations alleged to have been made by them in the fourth paragraph of the said petition; they did not make such representations to the suppliant, and it is submitted that even if such representations were made by the said Morin & Co. they would not affect the terms of the written contract between the suppliant and Her Majesty, nor control the rights of either party thereunder.

"4. The said Morin & Co. had no authority to enter into any agreement other than the written agreement mentioned in the third paragraph of the suppliant's petition of right; no such agreement as that referred to in the fifth paragraph of the said petition of right was made or entered into between the suppliant and the said Morin & Co.

"5. The said Morin & Co. were not the agents of Her Majesty's Minister of Public Works for any purpose other than to receive tenders and enter into the written

1882 contract for the execution of the work therein specified.
KENNEY They had no authority from Her Majesty's said Minister of Public Works to make any representations with respect to such work, as alleged in the sixth paragraph of the said petition of right.
THE QUEEN.

Statement
of
Facts.

"6. Her Majesty's Attorney-General knows nothing of the facts set out in the seventh and eighth paragraphs of the suppliant's petition of right, and therefore denies the same.

"7. As to the ninth paragraph of the suppliant's petition of right, Her Majesty's Attorney-General believes that the suppliant performed his work under the said contract in a satisfactory manner. He denies that the said contract was cancelled and put an end to as alleged, and that a new contract with other contractors was entered into for the removal, handling and piling of the balance of the said rails contemplated to be done by the suppliant under the said contract, and he says that the suppliant was allowed to perform all work under said contract which he was entitled to perform thereunder.

"8. Her Majesty's Attorney-General denies the facts and statements set forth and alleged in the tenth paragraph of the said petition.

"9. Her Majesty's Attorney-General has no knowledge of the facts set out in the eleventh paragraph of the suppliant's petition of right, and denies the same.

"10. As to the thirteenth paragraph of the said petition, Her Majesty's Attorney-General says that subsequently to the making of the contract in the third paragraph mentioned and set out, it was found necessary in the public interests that certain steel rails which arrived at the harbor of Montreal during the navigation season of the year 1875, intended for use upon the Canadian Pacific Railway, should be carried to and piled at Kingston in the Province of Ontario;

that the said rails were carried to and piled at Kingston 1882
aforesaid, by persons employed by Her Majesty's then ~~
Minister of Public Works, or his agent ; but it is denied THE QUEEN.
that in so doing Her Majesty committed any breach of v.
the said contract with the suppliant, and no obligation Statement
rested upon the said Minister of Public Works to re- of Facts.
quest the suppliant to transport to and pile the said
steel rails at Kingston, as the said rails formed no
portion of the rails that it was contemplated or in-
tended by the said contract should be carried and re-
moved by the suppliant.

" 11. As to the fifteenth paragraph of the suppliant's petition of right, Her Majesty's Attorney-General says, that the suppliant was not entitled under the terms of the said contract to remove, carry and pile any steel rails belonging, or consigned, to the Government of Canada from the wharves of the harbor of Montreal, other than such steel rails as the suppliant was notified to take and remove ; and it is denied that the suppliant was entitled to remove, carry and pile all the steel rails which were delivered or landed at any place in the said harbor during the season of navigation of the year 1875.

" 12. With the exception that the said contract in writing was entered into on behalf of the said Minister of Public Works for Her Majesty, the statements contained in the sixteenth paragraph of the said petition are denied."

The suppliant joined issue upon these pleas.

The case was heard before Mr. Justice Taschereau.

Ferguson and Hall for the suppliant ;

Davidson Q.C. and Hogg for the respondent.

The facts of the case are fully stated in the judgment

TASCHEREAU, J. now (March, 6th 1882) delivered judgment.

1882 On the 14th of July, 1875, the Government of Canada,
KENNEY through one Louis Morin, whose agency in the matter
v.
THE QUEEN. is admitted, advertised for tenders for the removal of
Reasons
for
Judgment. Canadian Pacific Railway rails from the harbor of
Montreal to the Rock Cut at Lachine in the following
terms :—

MOVING OF STEEL RAILS.

To Barge Owners, Forwarders, etc.

Tenders will be received by the undersigned until Monday noon, 19th July, for the removing, handling and piling of the steel rails of the Canadian Pacific Railway, from the wharves of the Harbour of Montreal, to the Rock Cut at Lachine.

Full particulars can be obtained on applying at the office of

MORIN & CO.,

Agents for the Minister of Public Works of Canada.

10 St. Nicholas Street.

The suppliant put in a tender according to the said advertisement, and, his tender having been accepted, entered into and executed a notarial deed of contract with the Government of Canada, represented in that behalf by the said Morin, for the removal of the said rails.

This contract is in the following words :—

On this ninth day of the month of August, in the year one thousand eight hundred and seventy-five ;

Before M. François Joseph Durand, the undersigned Notary Public, duly commissioned and sworn in and for the Province of Quebec, heretofore called Lower Canada, in the Dominion of Canada, and residing in the city of Montreal, in the district of Montreal, in the province aforesaid, came and appeared Louis Edouard Morin, of the said city of Montreal, broker, esquire, and herein acting as agent for the Minister of Public Works of the Dominion aforesaid in the said city of Montreal for receiving, sending and shipping the rails for the Pacific Railway of Canada, *of the one part* ; and Patrick Kenny of the same city of Montreal, wood merchant and trader, *of the other part* ; which parties hereto have agreed and covenanted between themselves as follows, to wit :—

The said party of the second part hereby undertakes to remove and carry for the Government of the Dominion of Canada, all the steel rails that are actually, or that will be, landed from sea-going vessels on

the wharves of the harbor of Montreal during this season of navigation, and deliver and lay on the ground the said steel rails, at the place commonly called the Rock Cut, on the Lachine Canal, subject to the terms and conditions hereinafter mentioned, to wit :—

1st. The contractor shall take and receive the rails within twenty-four hours after he shall have been notified to take the delivery of the same.

2nd. The said rails are to be taken either from ships' tackles, or on the wharves, wherever they may have been landed.

3rd. Should the rails require to be drawn from the place of landing to the barge or vessel employed by the contractor for their transportation, the moving to be done entirely at the said contractor's expense.

4th. All canal dues, if any, are to be at the expense of the said contractor.

5th. The ton for the purpose of regulating the price of the carrying of the said rails is to be the long ton of two thousand two hundred and forty pounds each.

6th. The rails are to be delivered as aforesaid at the place called the Rock Cut, near Lachine. The locality where they are to be delivered and laid shall be pointed out by the agent of the Minister of Public Works of Canada, or his authorized representative.

7th. The rails are to be piled by the contractor in rows of eighty to one hundred rails, piled chequered way [as per diagram annexed to contract], the same having been first duly signed *ne variatur* by the parties hereto and the subscribing notary public ; the foundation for receiving the rails to be supplied by the agent of the said Minister ; the said rails to be so piled to the height that shall be indicated and ordered by the said agent.

8th. The price hereinafter agreed to for carrying the said rails will be considered and taken as including all labor for handling, receiving, delivering, piling, etc., the said rails either in the harbor of Montreal or at place of delivery aforesaid.

9th. Payments for the present contract are to be made by the Minister of Public Works aforesaid, on the production of the agent's, or his representative's, certificate, or receipt, that the quantity delivered in the harbor of Montreal will have been delivered at the Rock Cut aforesaid according to the present contract.

10th. However, twenty per cent. of the contractor's money is to remain in the hands of the Minister of Public Works, or his agents at Montreal, pending the fulfilment of the contract.

11th. The contracting party of the second part in these presents to pay the expenses thereof, as also two copies for the Minister of Public Works and his agent.

1882

KENNEY

v.

THE QUEEN.

Reasons
for
Judgment.

1882 The price of the present contract, subject to all the foregoing clauses, conditions and stipulations, is to be eighty cents per ton (80 cents) of rails delivered and piled as aforesaid at the Rock Cut above mentioned
KENNEY
v.
THE QUEEN. This done and passed at the said city of Montreal, in the office of the
Reasons
for
Judgment. said F. J. Durand, on the day, month and year hereinabove firstly written, under the number five thousand six hundred and forty-one of the repertory of the notarial deeds of the said F. J. Durand, who has kept these presents of record in his office ; and these presents having been first duly read to the said parties hereto, they have signed in the presence of the said notary, who has also signed.

Upon a breach of this contract by the Crown, the suppliant bases the claim for damages contained in his petition of right.

There are counts in the petition wherein the suppliant alleges that the said Morin, acting for the Crown, represented to him that a quantity of not less than 25,000 to 35,000 tons would have to be removed under the said contract ; and that, acting under such representations, the suppliant entered upon the said contract and made a large outlay in preparing to execute the same, which he would not have done if such representations had not been made to him. He also alleges that he removed and carried only a small proportion of the quantity so represented by Morin ; and that he consequently suffered damages, which he now claims from the Crown.

On this part of the case, I am against the suppliant ; and I hold that the representations alleged to have been made by Morin, (had they been proved, which is more than doubtful as I view the evidence,) were unauthorized, and do not bind the Crown. The parties having entered into a written contract, the written instrument must be held to contain a complete record of their conventions and agreement. If the suppliant desired from the Crown a covenant or stipulation that not less than 25,000 or 35,000 tons would have to be removed, he should have seen that it was inserted in the written instrument. The fact that such a stipulation

is not to be found in the instrument is evidence that it was not made part of the contract. Again, if, as the suppliant alleges, this condition that not less than a certain given quality of rails should be removed by the suppliant had formed part of the negotiations between the parties antecedent to the execution of the deed of contract, and was, consequently, present to the mind of the suppliant at the time of the said execution, it must be presumed that such a condition has been left out of the instrument embodying the obligations and covenants of the parties either because the suppliant thought that if he mentioned it then the Crown would not consent to the contract at all, or because he, of his own accord, abandoned the condition, or because he tried to get it inserted in the deed and the Crown refused to agree to it.

On the other part of the case, I am with the suppliant. I do not attach much importance to the verbal evidence produced in the case, except, of course, as to the amount of damages. I am of opinion that the written instrument in its very terms supports the contention of the suppliant, and that under it he was entitled to have the removal of *all* the rails landed in Montreal in 1875 for the Canadian Pacific Railway. The Government having taken away from him the removal of a part of the said rails, is answerable in damages for this breach of contract on their part. The very first clause of the contract shows this clearly, in my opinion. The contention on the part of the respondent is that after the removal of, say, only ten tons of rails, and after only twenty-four hours work, the Crown could have cancelled the contract with the suppliant and have given the work to any one else ; the Crown even going so far as to say that a new contract in precisely the same terms as that of the suppliant, that is to say, a contract to carry the rails to Lachine, might

1882
KENNEY
v.
THE QUEEN.
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Reasons
for
Judgment.
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1882 have been entered into with third persons, notwithstanding the fact that it is admitted that the suppliant performed his work satisfactorily. I cannot adopt this interpretation of the contract.

KENNEY
v.
THE QUEEN.
—
Reasons
for
Judgment.
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Now, as to the question of damages. It is proved that the suppliant carried 11,000 tons of rails (in round numbers), and that 17,000 tons is the quantity that arrived in 1875, besides what had been sent to Thunder Bay and Duluth before the contract was made with the suppliant, the right to have carried which, of course, cannot be claimed by him. Out of these 17,000 tons, one thousand tons never were landed at Montreal, but were delivered at Quebec for the Intercolonial Railway; leaving 16,000 tons landed at Montreal during the season for the Canadian Pacific Railway, the removal of which the suppliant had a contract for. This leaves 5,000 tons (in round numbers) in respect to the carriage of which the suppliant can claim damages. By the evidence in the case these damages are established at 30 cents per ton, making \$1,500.

Accordingly, I give judgment for the suppliant for \$1,500, with interest from the seventh day of April, 1881, and costs.

Petition allowed with costs.

Solicitor for supplicants : *A. Ferguson.*

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