

[E.C.] 1877

BERLINGUET, *et al v.* THE QUEEN.

Oct. 24.

[S.C.] 1886

Dec. 7.

*Petition of Right—Intercolonial Railway Contract—31 Vic. c. 13 s. 18—
Certificate of engineer—Condition precedent to recover money for extra
work—Forfeiture and penalty clauses—Failure of Performance.*

The suppliants agreed, by contracts under seal, dated 25th May, 1870, with the Intercolonial Railway Commissioners (authorized by 31 Vic., c. 13) to build, construct and complete sections three and six of the railway for a lump sum,—section three for \$462,444, and section six for \$456,946.43.

The contract provided, *inter alia*, that it should be distinctly understood, intended, and agreed that the said lump sum should be the price of, and be held to be full compensation for, all works embraced in or contemplated by the said contract, or which might be required in virtue of any of its provisions or by-laws, and 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 or specifications, or by reason of any exercise 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 engineers by the said contract or by law, to claim or demand any further sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and every

such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the contract relating to alteration in the grade or line of location ; and that the said contract and the said specification should be in all respects subject to the provisions of 31 Vic. c. 13 ; that the works embraced in the contracts should be fully and entirely complete in every particular, and given up under final certificates and to the satisfaction of the engineers on the 1st of July, 1871, (time being declared to be material and of the essence of the contract), and, in default of such completion, contractors should forfeit all right, claim, &c., to money due or percentage agreed to be retained, and to pay as liquidated damages \$2,000 for each and every week for the time the work might remain uncompleted; that the commissioners upon giving seven clear days' notice, if the works were not progressing so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors and complete the works at their expense ; in such case the contractors were to forfeit all right to money due on the works and to the percentage retained.

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On the 24th May, 1873, the contractors sent to the commissioners of the Intercolonial Railway a statement of claims showing there was due to them a large sum of money for extra work, and that until a satisfactory arrangement was arrived at they would be unable to proceed and complete the work.

Thereupon notices were served upon them, and the contracts were taken out of their hands and completed at the cost of the contractors by the Government.

In 1876 the contractors, by petition of right, claimed \$523,000 for money *bond fide* paid, laid out and expended in and about the building and construction of said sections three and six, under the circumstances detailed in their petition.

The Crown denied the allegations of the petition, and pleaded that the suppliants were not entitled to any payment, except on the certificate of the Engineer, and that the suppliants had been paid all that they obtained the Engineer's certificate for, and in addition filed a counter-claim for a sum of \$159,982.57, as being due to the Crown under the terms of the contract, for moneys expended by the commissioners over and above the bulk sums of the contract in completing said sections.

The case was tried in the Exchequer Court by J. T. Taschereau, J., and he held that under the terms of the contract the only sums for which the suppliants might be entitled to relief were, 1st, \$5,850 for interest upon, and for the forbearance of, divers large sums of

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money due and payable to them, and 2nd, \$27,022.58, the value of plant and materials left with the Government, but that these sums were forfeited under the terms of clause three of the contract, and that no claim could be entered for extra work without the certificate of the Engineer, and that the Crown was entitled to the sum of \$159,953.51, as being the amount expended by the Crown to complete the work.

On appeal to the Supreme Court of Canada by the suppliant,—  
*Held*, affirming the judgment of the court below, (Fournier and Henry, JJ., dissenting), 1st. That by their contracts the suppliants had waived all claim for payment of extra work. 2nd. That the contractors not having previously obtained from, or been entitled to, a certificate from the Chief Engineer, as provided by 31 Vic. c. 13, s. 18, for or on account of the money which they claimed, the petition of the suppliant was properly dismissed. 3rd. Under the terms of the contract, the work not having been completed within the time stipulated, or in accordance with the contract, the commissioners had the power to take the contract out of the hands of the contractors and charge them with extra cost of completing the same, but that in making up that amount the court below should have deducted the amount awarded for the value of the plant and materials taken over from the contractors by the commissioners in June, 1873, viz.: \$27,022.58.

See Can. S.C.R., vol. xiii, p. 26.