HER MAJESTY THE QUEEN ....APPELLANT ; 1890

AND *Mar. 21, 22.

ROBERT HENRY McGREEVY.....RESPONDENT. *Dec. 10.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Claim for extra and additional work done on Intercolonial Railway—31 V. c. 13 ss. 16, 17, 18, and 37 V. c. 15—Change of Chief Engineer before final certificate given—Reference of suppliant's claim to Engineer—Report or certificate by Chief Engineer recommending payment of a certain sum—Effect of—Approval by Commissioner or Minister necessary.

In 1879 the respondent filed a petition of right for the sum of $608,000 for extra work and damages arising out of his contract for the construction of section 18 of the Intercolonial Railway without having obtained a final certificate from F. who held at the time the position of Chief Engineer. In 1880 F. having resigned F. S. was appointed Chief Engineer of the Intercolonial Railway and investigated amongst others the respondent's claim, and reported a balance in his favor of $120,371. Thereupon the respondent amended his petition and made a special claim for the $120,371, alleging that F.S.'s report or certificate was a final closing certificate within the meaning of the contract, which question was submitted for the opinion of the court by special case. This report was never approved of by the Intercolonial Railway Commissioners or by the Minister of Railways and Canals under 31 Vic. ch. 13 sec. 18. The Exchequer Court, Fournier J. presiding, held that the suppliant was entitled to recover on the certificate of F.S. On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the Exchequer Court, 1st. Per Ritchie C.J. and Gwynne J., that the report of F. S., assuming him to have been the Chief Engineer to give the final certificate under the contract, cannot be construed to be a certificate of the Chief Engineer which does or can entitle the contractor to recover any sum as remaining due and payable to him under the terms of his contract, nor can any legal claim whatever against the Government be founded thereon.

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*PRESENT.—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

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2nd. Per Ritchie C. J., that the contractor was not entitled to be paid anything until the final certificate of the Chief Engineer was approved of by the Commissioners or Minister of Railways and Canals, 31 Vic. ch. 31 sec. 18 and 37 Vic. ch. 15 ; *Jones* v. *Queen* (7 Can. S. C. R. 570.)

3rd. Per Patterson J., that although F. S. was duly appointed Chief Engineer of the Intercolonial Railway, and his report may be held to be the final and closing certificate to which the suppliant was entitled under the 11th clause of the contract, yet as it is provided by the 4th clause of the contract that any allowance for increased work is to be decided by the Commissioners and not by the Engineer, the suppliant is not entitled to recover on F. S's. certificate.

Per Strong and Taschereau JJ. (dissenting) that F. S. was the Chief Engineer and as such had power under the 11th clause of the contract to deal with the suppliant's claim and that his report was "a final closing certificate" entitling the respondent to the amount found by the Exchequer Court on the case submitted.

Per Strong, Taschereau and Patterson JJ. That the office of Commissioners having been abolished by 37 Vic. ch. 15, and their duties and powers transferred generally to the Minister of Railways and Canals, the approval of the certificate was not a condition precedent to entitled the suppliant to claim the amount awarded to him by the final certificate of the Chief Engineer.

APPEAL from a judgment of the Exchequer Court of Canada (1)

The proceedings in this case were commenced in December, 1879, by a petition of right, by which the respondent claimed to recover a large sum of money under a contract made with him and the Commissioners of the Intercolonial Railway for the construction of section 18 of that railway.

In October, 1885, the respondent amended his petition of right by inserting paragraph 27*a*, which is as follows :

"27*a*.—The Chief Engineer of said railway on or about the twenty-second day of June, one thousand eight hundred and eighty-one, duly certified to the Minister of Railways and Canals that the extra and

(1) 1 Ex. C. R. p. 321.

additional works and other matters claimed for in the foregoing paragraphs hereinbefore contained, had been executed and done as extra and additional to the extent mentioned in Schedule "C" to this petition, and that the amounts in Schedule "C" hereto should be paid in respect thereof by your Majesty to your petitioner, and also certified that the original contract work had been executed, and that there should be paid by your Majesty to your petitioner in respect thereof the amount mentioned in said Schedule "C" and said Minister has not disapproved of said certificate, but has, as such Minister unduly, arbitrarily and improperly withheld his express approval of said certificate although a reasonable time for approving or disapproving thereof has elapsed, and your petitioner, not waiving but insisting upon his right to be paid the amount claimed in Schedule "B," submits and claims that in any event he is entitled to be paid the amount set forth in Schedule "C" as aforesaid, and that the want of an express approval in writing of said certificate by the said Minister, as aforesaid, should not under the circumstances alleged be permitted to be pleaded or to avail as a defence to the claim for payment of the amount mentioned in said Schedule "C."

"Your petitioner prays that his said claims may be adjudicated upon, upon the merits as to the facts, and that he be paid whatever amount upon inquiry shall be found due to him in respect thereof and interest and costs, and that if upon any defence of a purely technical or legal character pleaded herein, it is held that your petitioner cannot recover in respect of Schedule "B" hereto, then that your petitioner be paid the amount claimed in Schedule "C" herein and interest and costs."

Before proceeding upon the merits of the Petition of

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Right a special case was prepared for the opinion of the court and the following statement of admission signed by both parties :

" Statement of admission by both parties :

The only question to be argued, at this stage of the case, is as to whether the suppliant is entitled to recover on the certificate or report of Shanly referred to in clause 27*a* of the Petition of Right, reserving to the suppliant the right, if the court decide against him on that question, still to proceed on the other clauses of the petition for the general claim.

It is admitted :

1. That the contract alleged in petition, paragraph one, was entered into as therein alleged, copy of which contract is produced marked " A."

2. That the suppliant began and prosecuted the works, and executed a large amount of work in respect of the contract and section 18 of the Intercolonial Railway.

3. That Sandford Fleming was Chief Engineer of the Intercolonial Railway when the contract was entered into, and up to the month of May, 1880, when an order-in-council was passed on the 22nd May, 1880, which is herewith submitted marked " X."

4. That in 1879 the suppliant presented a large claim for balance of contract price and extras.

5. The said Fleming, as such Chief Engineer, from time to time furnished the said suppliant with progress estimates of the work done under the said contract, which were paid, but gave no final certificate in respect of said contract for section 18 as required by the statute. The work was finished in December, 1875.

6 An order-in-council and report are herewith produced marked " B." The effect and admissibility of such papers and Mr. Shanly's appointment are to be discussed.

7. The claim of suppliant, with those of other contractors on said railway, came before said Shanly.

8. That said Shanly made, and duly forwarded to the Minister of the Department of Railways and Canals, the certificate or report, a true copy of which is produced by the crown marked " C."

9. That the said certificate or report duly reached the Minister of Railways and Canals on or about its date.

10. Subsequently, by order-in-council of the 28th July, 1882, a copy of which is hereto annexed marked " D," the suppliant's claim, with others, was referred to three Commissioners to inquire and report thereon.

11. The suppliant was called upon by the Commissioners to appear before the said commission and give evidence, and was examined with other witnesses in reference to his said claim ; but such appearance and examination was without prejudice to his rights, as expressed by his counsel in paper marked " E." herewith submitted.

12. The Commissioners made their report, herewith submitted, which is to be found in the sessional papers for 1884, vol. 17, No. 53.

13. And upon such report, on the 5th August, 1884, on the authority of an order-in-council of the 10th April, 1884, a copy of which is hereto annexed marked " F," the Government paid to the suppliant the sum of $84,075.00, being composed of $55,313 principal, mentioned in said report, and $28,762 interest.

14. A copy of the receipt given by the suppliant for the amount of such payment is hereto annexed, marked " G."

15. On the 18th April, 1884, the suppliant addressed a letter to the Minister of Railways, marked " H," which was received. This is admitted as a fact, but the admissibility and effect of such letter is denied.

16. It is also admitted that, on the 10th September,

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the Department of Railways addressed a letter to the suppliant of which a copy is annexed marked " I," and which the suppliant received.

(Sgd.) C. ROBINSON,
Counsel for Crown.
(Sgd.) D. GIROUARD,
For Suppliant.

October, 14th, 1887."

Clause 11 of the contract reads as follows :

" And it is further mutually agreed upon by the parties hereto, that cash payments, equal to eighty-five per cent. of the value of the work done, approximately made up from returns of progress measurements, will be made monthly on the certificate of the Engineer that the work for or on account of which the sum shall be certified has 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 will be given ; but the final and closing certificate, including the fifteen per cent. retained, will not be granted for a period of two months thereafter. The progress certificate shall not in any respect be taken as an acceptance of the work, or release of the Contractor from his responsibility in respect thereof, but he shall, at the conclusion of the work, deliver over the same in good order according to the true intent and meaning of this contract and of the said specification."

The following is a copy of the report or certificate of Mr. F. Shanly, marked " C " in the above statement of admission :—

INTERCOLONIAL RAILWAY.

" C."

CHIEF ENGINEER'S OFFICE,
OTTAWA, June 22nd, 1881.

F. BRAUN, ESQ.,
Secretary Department of Railways.

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Re R. H. McGREEVY. SECTION 18.

SIR,—Herewith I submit my report upon the claim made by Mr. McGreevy, for extra and additional work done by him under his contract, in the years 1870-1-2-3-4 and 5, which has been referred to me for investigation.

The original lump sum for which he contracted to complete the work was $648,600, being at the rate of $32,430 per mile for 20 miles, subject, however, to certain additions or deductions as the case might be, and as set forth in the contract.

The contract was entered into in July, 1870, and was to be completed in July, 1872, but owing to various causes, amongst others, as alleged, the difficulty in procuring men, it was not finally brought to a close until the end of 1875, and even then, not being quite completed, the Government after that date expended some $7,500 in addition to the payments previously made, as reported by Mr. Brydges in 1877.

Mr. McGreevy in May, 1877, filed a petition of right, by which he claimed a sum of $603,000 for extras; subsequently, in 1879, by schedule "B," a copy of which is attached hereto (sheet "A"), he makes a claim for $839,557.40 for extra work over and above the lump sum of his contract, and including a sum of $45,000 as an alleged balance due on the contract proper.

After carefully investigating the nature and foundation for the claim, and going fully into the evidence produced on behalf of the claimant and of the crown respectively, the full report of which as taken down in shorthand marked "E," Nos. 1, 2, 3, 4 and 5, is herewith submitted, I have come to the conclusion, owing to various unforeseen difficulties, and in view of the contract being for a lump sum, where the contractor was to assume all risks from weather, increase in the cost and scarcity

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of labor, the great difficulty in such a country of ascertaining previous to tendering the real nature of the material to be excavated, or the facilities for the procuring of stone, timber, &c., for building, most of which had to be brought from a great distance, that the deductions and additions provided for by the contract should be waived, and the lump sum on a final settlement be adhered to and allowed, together with certain items claimed by Mr. McGreevy as extra to and not properly belonging to the contract, and as set forth in sheet "A" herewith numbered 10, 11, 12, 18 and 19 respectively. All the other items mentioned in sheet "A," except 20 and 21, afterwards referred to, I consider to be clearly covered by the contract and specification, and that no allowance should be made for them.

Item 10. Second-class masonry built as first-class.

From a personal examination of nearly all the structures referred to, as well as from the weight of the evidence produced in support of the claim, and given by skilled engineers and mechanics, most of whom were in the employment of the Government at the the time the work was being carried on, I am inclined to think that the claim is fairly established, in so far as the quantity so built is concerned ; the price, however, should be only $6, not $9, per cubic yard, the former being the difference in the schedule rates, between first and second-class masonry ; see sheet "C" attached hereto. I therefore recommend payment as follows of this item : 4,617 cubic yards, at $6, $27,702.

Item 11. Portland cement used as ordered instead of hydraulic cement. This claim is fully supported by the evidence as to the fact, and it generally agrees that the additional cost was $1.50 per cubic yard ; I would therefore pronounce it proved, and recommend payment therefor : 8,892 cubic yards, built in Portland cement, at an extra cost of $1.50 per cubic yard, $13,338.

Item 12. Crib wharfing. Claim based upon the fact that the plans were entirely changed and enlarged from those exhibited at the time the tender was put in, and in fact that double the material then called for had to be used ; that is, I think, fully proved in evidence, and I therefore recommend that payment be made proportionally at the rate of 75 cents per cubic yard, which is equivalent to $3 per lineal foot as tendered (see sheet " C " attached hereto) on the original plan. The total quantity is proved at 160,000 cubic yards, or say 20,000 lineal feet, containing 8 cubic yards per foot, less estimated and allowed in final estimate 80,600 cubic yards —79,400 cubic yards at 75 cents per cubic yard, $59,550.

Item 18. Iron pipes in place. This item is properly extra to the contract, and I treat it as such. A price per lineal foot is stated in the schedule to the tender, but no mention is made of it either in the specification or bill of quantities. The length laid down, as shown by Mr. Grant's final measurement, is 424 lineal feet, and the quantity of masonry and concrete used is, I think, admitted, as is also the quantity of masonry saved by the substitution of the pipes for stone culverts. The account will then stand thus :

424 lin. ft. iron pipes at $25.....	$10,600
352 c. yds. 1st class masonry at $14...	4,928
425 c. yds. concrete at $5.....	2,225
	$17,753
Less—2nd class masonry saved, 1,308 c. yds. at $8.....	10,464
Recommended to be paid.....	$ 7,286

Item 19. Iron pipes delivered but not used by the contractors.

This claim is not disputed, it having been recognized by Mr. Schreiber in his final estimate of November 1875. There seems to have been 219 lin. feet, 10 inches

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say 220 feet, left on the ground and taken by the Government. This would make as nearly as possible 100,000 lbs., which I have valued at 4 cents per lb.

100,000 lbs. iron pipes at 4 cts per lb...	$4,000
The foregoing items aggregate.....	$111,879
Lump sum of contract.....	648,600
Total amount with extras.....	$760,479

There now only remains to be dealt with items 20 and 21.

Item 20. Damage and delay at Millstream Bridge.

The evidence in support of this item, principally that of Mr. Grant and Mr. McGreevy himself, fails to make out, in my opinion, the case, and Mr. Bell and Mr. Fleming for the crown most emphatically deny that there were any grounds for such a claim, I cannot therefore recommend its being entertained.

Item 21. Two additional miles over the length (20 miles) tendered for.

It was so obvious that the lump sum of $648,600 was based on a distance of 20 miles, and not 18 as claimed, the mileage price, $32,430 being distinctly mentioned, that in an early part of the investigation Mr. McGreevy through his counsel consented to withdraw it.

The principal witnesses to the above items were for item 10, Messrs. J. D. Cameron, Charles Odell, A. L. Light, Peter Grant and R. A. McGreevy, in support; and Messrs. Bell and Fleming against.

For item 11, Messrs. Cameron, Lourie, Imlay, Grant, and McGreevy in support; and Messrs. Bell and Fleming against.

For item 12, Messrs. Michaud, Odell, Townsend, Grant and McGreevy in support; and Messrs. Bell and Fleming against.

Items 18 and 19 not disputed. Evidence documentary.

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On the general principles and interpretation of the contract, Mr. C. J. Brydges was called and examined by the crown. He referred chiefly to a report made by him on this case in June, 1877, in reply to the petition of right, recommending that the strict letter of the contract be adhered to, this doubtless is perfectly correct in law, but I cannot help thinking that the present is a class of case where a little equity may very properly be introduced.

I have nothing further to add, the claim for extras to the extent of $111,879 has I think, been satisfactorily proved, which sum added to the lump sum of the contract $648,600 which I have before recommended, should be retained makes a total of $760,479 from which must be deducted the sums already paid to the contractor, or otherwise expended by the Government on the works, amounting to $640,108, leaving a balance in favour of the contractor of $120,371 as shown on sheet "D," to which sum I think he is fairly entitled.

I am, sir,

Your obedient servant,

(Signed) F. SHANLY,

Chief Engineer, I. C. R."

The case having come on for trial, several witnesses were examined by the crown to prove that the report or certificate forwarded by Mr. Shanly had not been treated by the Minister of Railways and Canals, as a final certificate and that it had been repudiated and witnesses were adduced by the suppliant to show that Mr. Shanly's reports on other claims had been paid approved and the amount he had awarded had been paid.

The Exchequer Court of Canada, Fournier J. presiding, held that the certificate or report of Mr. F. Shanly was sufficient to entitle the suppliant to proceed

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before the court in order to recover the amount awarded to him by said certificate or report.

The parties having been heard subsequently before the judge, and the suppliant's counsel having declared that he renounced his claim for any surplus claimed by his petition over and above the amount certified to in the next report or certificate of Mr. F. Shanly, judgment was given for the suppliant for the sum of $65,058 and costs and the petition as to the excess was dismissed.

The crown then appealed to the Supreme Court of Canada.

C. Robinson Q C. and Hogg Q. C. for appellant, and Girouard Q.C. and Ferguson Q.C. for respondent.

The statutes and clauses of the contract which bear upon the case are referred to at length in the report of the case in the Exchequer Court Reports (1), and in the judgments hereinafter given.

Sir W. J. RITCHIE C.J.--The following is the statement of admission by both parties to this appeal:

"The only question to be argued at this stage of the case is as to whether the suppliant is entitled to recover on the certificate or report of Shanly referred to in the clause 27*a* of the petition of right, reserving to the suppliant the right, if the court decide against him on that question, still to proceed on the other clauses of the petition for the general claim."

The suppliant does not seem to contend that he was not bound to have, under the contract, a final certificate of the Chief Engineer, but he alleges that the certificate given by Mr. Shanly was such final certificate and that he was not bound to obtain the approval of the Minister, standing in the place of the Commissioners with whom the contract was made, as to the certificate of Mr.

(1) Vol. 1, p. 321 et seq.

Shanly. This, in my opinion, cannot be considered, in any sense of the term, such a certificate as the contract and the statute contemplate and which the crown, on a strict legal interpretation of the contract, has a right to insist upon. Mr. Shanly, as his report or certificate shows, has come to the conclusion, for certain reasons such as "owing to various unforeseem difficulties, and in view of the contract being for a lump sum where the contractor was to assume all risks from weather, increase in the cost and scarcity of labor, the great difficulty in such a country of ascertaining previous to tendering the real nature of the material to be excavated, or the facilities for the procuring of stone, timber, etc., for building, most of which had to be brought from a great distance, that the deductions and additions provided for by the contract should be waived."

And at the conclusion of the report he says :—

On the general principles and interpretation of the contract Mr. C.J. Bydges was called and examined by the Crown. He referred chiefly to a report made by him on this case in June, 1877, in reply to the petition of right recommending that the strict letter of the contract be adhered to. This, doubtless, is perfectly correct in law, but I cannot help thinking that the present is a class of case where a little equity may very properly be introduced.

What does the contract require ?

On the completion of the whole work to the satisfaction of the engineer a certificate to that effect shall be given.

And section 18 of the Intercolonial Railway Act provides that--

No money shall be paid to any contractor until the Chief Engineer shall have certified that the work for, or on account of, which the same shall be claimed has been duly executed, nor until such certificate has been approved by the Commissioners.

Assuming Mr. Shanly to have been the Engineer in Chief entitled to give the final certificate under the contract it is, in my opinion, quite impossible to suppose that Mr. Shanly could have thought that he was

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giving such a certificate. What right had he to waive the provisions of the contract? What right had he to depart from the strict letter of the contract which he, himself, says it was perfectly correct, in law, to adhere to? What right had he to introduce what he is pleased to term a little equity into the case? Or what right has any court to eliminate from this case the express provisions of instruments intended to protect the public revenues of the country and prevent the payment of any moneys to contractors until approved of by the commissioners or the Minister of Railways now representing the Commissioners? The contract must be read in connection with this provision which cannot, in my opinion, be ignored. So far from Mr. Shanly's report being treated as a final certificate and approved of, the evidence of the Minister of Railway, representing the Commissioners, is distinct and positive that so far from being approved of it was distinctly repudiated, and instead of being accepted a commissioner was appointed to enquire into and report on suppliant's claim with others before the commissioner. The suppliant appeared, and, with the crown, produced witnesses, and which Commissioner awarded the suppliant a certain sum which was paid him, and, in my opinion, this should have ended the matter.

Had it been expressly stipulated by the contract that the money should be paid on the final certificate without the approval of the Commissioners or Minister, &., would not this provision, being in direct violation of the statute, be void, and the contract be governed by the statute which gives them no power to dispense with this important stipulation?

Unless I am prepared to go back on the case of *Jones* v. *The Queen* (1) and to hold that was wrongly decided, which I am by no means prepared to do, I must hold

(1) 7 Can. S.C.R 570.

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that the suppliant has failed to establish his case and that this appeal must be allowed.

STRONG J.—The questions to be primarily decided on this appeal are : First, whether Mr. Frank Shanly was at the time he made his report or certificate of the 22nd June, 1881, the Chief Engineer of the Intercolonial Railway ; and secondly, whether that certificate is to be regarded as a final and closing certificate within the meaning of the contract. The learned judge who presided at the hearing of this petition of right in the Exchequer Court decided both these points in favor of the suppliant and I am of opinion that his decision was in these respects entirely right.

The Order in Council of the 23rd June, 1880, was made upon the report of the Minister of Railways and Canals, stating that Mr. Sanford Fleming declined the appointment and recommending that Mr. Shanly be appointed to be Chief Engineer of the Intercolonial Railway. The Order in Council by which the recommendation of the Minister of Railways and Canals was approved by the Governor General constituted the instrument of appointment by virtue of which Mr. Shanly held the office and exercised the authority and performed the duties appertaining to it. This Order in Council certainly states that "the engagement should be understood to be of a temporary character," but it is not suggested that Mr. Shanly's appointment had been revoked or his tenure of office in any way interfered with at the time he made the certificate or report of the 22nd June, 1881. This Order in Council therefore, in my opinion, invested Mr. Shanly with all the powers which, as was provided by the contract between the crown and the Suppliant were to be exercised by the Chief Engineer of the Inter-

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colonial Railway, at least so far as the same remained unperformed by his predecessor in office. Had the Engineer originally appointed died it cannot be doubted that it would have been competent for the Governor General in Council to appoint a successor who could properly perform such functions remaining unperformed as the contract assigned to the Engineer, and I can see no reason why there should be any difference in this respect between a vacancy so caused by death and that which was actually caused by the resignation of Mr. Fleming. There is nothing in the appointment of Mr. Shanly which is not in strict conformity with the provisions of the act respecting the construction of the Intercolonial Railway. (31 Vict. c. 13) sec. 4 of which is as follows :

> The Governor General shall and may appoint a Chief Engineer to hold office during pleasure who under the instructions he may receive from the Commissioners shall have the general superintendence of the works to be constructed under this act.

As I have said I see no reason why, in the case of the death of the original Chief Engineer during the progress of the works or after their completion, a Chief Engineer should not be appointed by whom the certificates required by sec. 11 of the contract might well be given. The fact that the works were not constructed under the superintendence of such secondly appointed Chief Engineer would not, as it seems to me, make any difference ; and if such a new appointment might be made in the case of the death of the original Engineer no reason can be suggested why the same course might not be followed in the case of his resignation or refusal to accept a re-appointment.

Next we have to inquire whether the report or certificate of Mr. Shanly dated the 22nd June, 1881, was a final and closing certificate such as is required by the 11th section of the contract. I am of opinion that it was.

The Intercolonial Railway Act (31 Vic. c. 13 sec. 18) provides that:—

No money shall be paid to any contractor until the Chief Engineer shall have verified that the work for or on account of which the same shall be claimed has been duly executed, nor until such certificate shall have been approved of by the Commissioners.

The eleventh clause of the contract is as follows:—

And it is further mutually agreed upon by the parties hereto that cash payments equal to eighty-five (85) per cent of the value of the work done approximately made up from returns of progress measurements will be made monthly on the certificate of the Engineer that the work for, and on account of, which the sum shall be certified has 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 will be given, but the final and closing certificate including the fifteen per cent. retained will not be granted for a period of two months thereafter. The progress certificates shall not in any respect be taken as an acceptance of the work or the release of the contractor from his responsibility in respect thereof, but he shall 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.

It will be observed that this clause makes mention of three different certificates, first those which are called "progress certificates," to be given by the Engineer during the continuance of the work, being based on an approximate estimate of the work done and which, subject to a deduction of 15 per cent., were to be paid at once on the approval of the Commissioners. With these Mr. Shanly had, of course, nothing to do. Then there was a certificate which was to be given upon the completion of the whole work, a certificate that it had been so completed to the satisfaction of the Engineer. And lastly, there was a third certificate to be given by the Engineer, which is denominated the "final and closing certificate" and which was to include the 15 per cent. retained from the progress estimates. This last mentioned certificate is clearly a

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separate and distinct certificate from that secondly mentioned, for it is expressly provided that it is not to be granted for a period of two months after the completion of the works, while the second certificate is to be granted immediately upon completion. There is no reason, however, why these two certificates should not be blended in one, provided two months have elapsed after the completion of the works. I can see, therefore, no reason why we should not consider Mr Shanly's report as embracing both these certificates. As regards the completion of the works the report of Mr. Shanly is not very formal, but no one who reads the third paragraph of it can doubt that what he says implies that the works had been wholly completed to his satisfaction some years prior to the date of his report, and therefore much longer than two months before he gave his "final and closing" certificate, which, in my opinion, is also to be found in this report.

This brings us to the very important question: What meaning is to be attached to these words "final and closing certificate?" No doubt they at first seem general and vague. but when taken and considered with reference to the other provisions of the contract I think they will be found not so vague as to be insusceptible of a reasonable interpretation.

What then was this "final and closing certificate" to contain? It could not have been intended to relate to the completion of the work, for that was to be dealt with by the second certificate which it was for the Engineer to give as soon as the work was completed, whilst the final and closing certificate was not to be given until two months after completion. It would have been entirely unnecessary and superfluous for the purpose of ascertaining the balance due to the contractor if the contract price was to be strictly adhered to and that was to be the sole measure of the con-

tractors' remuneration, for that price being what is called a lump sum was written in the contract itself, so that the balance due to the contractor would have been ascertainable by a mere deduction of the aggregate of the payments made on progress certificates from the contract price, and no certificate from the Engineer would be required for that purpose there being no measurements or quantities to be taken, and such a calculation could be more appropriately and easily made by the officers who had charge of the accounts of the works than by the Engineer. We must, therefore, find some other object for the certificate in question than any of these purposes. Now the words "final" and "closing," even strictly construed, indicate that this certificate was to put an end to some matters which might remain open or in dispute after all questions relating to the completion and sufficiency of the work had been concluded by the other certificate as to final completion, and when the ascertainment of the balance remaining due in respect of the contract price was reduced to a mere matter of calculation, a simple sum of addition of the amounts paid from time to time in progress certificates and of the subtraction of the result from the fixed contract price.

Then what could possibly remain open or in dispute between the contractor and the crown but claims made by the former in respect of additional or extra work performed by him in excess of that required by the specifications ? This is the only possible object or purpose for which a "final" and "closing" certificate could have been required, the bringing to an end and closing claims for work performed *extra* the contract. And when we consider that as the contractor was not entitled to be paid a dollar even of the unpaid residue of the contract price until he procured a certificate of the Engineer which (as many cases decided in this

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court relating to contracts on this same Intercolonial Railway have established) was an indispensable condition precedent to his being paid, it was not unreasonable or unfair, more especially when we remember that the Engineer's certificate was originally to be approved by the Commissioners, that the contractor should have the benefit of a conclusive determination of claims made by him, just as the crown reciprocally had the right to have any complaints which it might make of defaults on the part of the contractor adjudicated upon in the same way by the Engineer before he gave his certificate respecting the completion of the works. Moreover, such a clause is of such universal use in building and railway construction contracts that a contract which did not contain a similar provision would be out of the usual course. I should, therefore, if this clause eleven stood alone, having regard to the fact that the contract price was a fixed sum and not one to be ascertained by the measurement of quantities and work, have considered that it was intended to give to the Engineer (subject to the approval of the Commissioners) the most full and absolute power to determine what claims of the contractor should be admitted and what should be rejected. It is, however, suggested that inasmuch as claims for extra work are expressly excluded by clause nine of the contract it was impossible that the final and closing certificate of the Engineer could have any reference to such claims. I cannot, however, accede to this view. No doubt the ninth clause is framed in terms which would, if there was nothing more in the contract, disentitle the contractor to make any claim for what was strictly "extra work," that is work incidental to that which was called for by the specifications, not, however, to work which was entirely additional, but if there had been added to that clause an exception in express words of such claims for extras

as the Chief Engineer by his final and closing certificate (to be approved by the Commissioners) might allow, there could have been no doubt but that a claim like the present would not be excluded by the ninth clause.

Then in construing the contract we are not only entitled but bound to have regard to the whole of it, and not to adopt a narrow construction derived from a single clause; it is, therefore, according to sound rules of interpretation open to us to consider whether such an exception as I have just supposed is contained in some other part of the instrument under consideration. And we may be bound to read such an exception into the contract even though it is not contained in express words but is to be derived from clear and necessary implication. These are general principles of construction which no one can dispute, and the only difficulty (if any there be) which can arise here, is in their application to the instrument we have to construe. Now if we had found in the eleventh clause in connection with the provision for this "final and closing certificate," words indicating that it should be conclusive as regards claims for extra and additional work, we should have no alternative open to us but to construe them as an exception to the rigorous exclusion of any claim fo extras contained in the ninth clause. No one will deny that the ninth clause would in the case I put be thus controlled and cut down. Then if from necessary implication we find that the only reasonable and sensible meaning which can be given to these words describing the Engineer's certificate as one which is to be "final and closing" that is conclusive of some matters which were in controversy between the contractor and the crown, and if it is demonstrated that there could be no other matters to which this final certificate by the Chief Engineer could possibly apply we do shew by necessary implication that this certifi

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cate was by the plain intention indicated by the contract to be one embracing just such claims as have been dealt with by Mr. Shanly in his certificate and report, and consequently we are bound to read the eleventh clause as containing an exception to the ninth clause by expanding the words "final and closing," to mean just what would have been meant if it had been expressly said that the certificate was to be conclusive as to extras.

As this contract was to be performed in the Province of Quebec I am of opinion that it should properly be construed according to the law of that Province. Having, however, satisfied myself that this would be the strict and proper construction of the contract according to the rules applied by English courts in the construction and exposition of written instruments, I need not refer to the far wider and more liberal principles applied by courts administering French law in the interpretation of contracts and in arriving at the intentions of the parties when clauses of a harsh or unusual nature are under consideration. Therefore Mr. Shanly having been, as I have already said, "The Chief Engineer," within the contract and the statute I am of opinion that his certificate did not include matters beyond his jurisdiction, and that in all other respects the document in the form of a letter or report signed by him and dated the 22nd of June, 1881, complied with the requisites of a final and closing certificate as called for by the eleventh clause of the contract.

It is, however, provided by the 18th section of the act (31 Vic. c. 13) that no money shall be paid except upon the certificate of the Chief Engineer "nor until such certificate shall have been approved of by the Commissioners," and it is objected that there has been no such approval in the present case. Of course, the first and obvious answer to this objection is that there were

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no Commissioners to give their approval when Mr. Shanly made his certificate. It is, however, said that by the statute 37 Vic. ch. 15, the Minister has been substituted for the Commissioners. It is true that the powers of the Commissioners are generally transferred to the Minister, but according to well understood principles of statutory construction a statute will never be interpreted as having the effect of varying a contract and imposing new obligations and conditions on a contracting party unless such an intention is indicated by express words. Moreover the object of the approval of the Commissioners seems to have been to ensure financial control by them of the moneys voted by parliament for the construction of the railway, and this purpose would be subserved by other general provisions relating to all public works after the work came under the control of the Department.

As regards the objection that the suppliant waived his rights by going before the Commissioners of inquiry, I cannot assent to that. He appeared before that board under a most emphatic and distinct protest which was amply sufficient to protect him in that respect.

The acceptance of the money awarded by the Commissioners amounting to $84,075 cannot, in the face of the protest already mentioned, taken in connection with the letter of the suppliant to the Minister of Railways, dated the 18th of April, 1884, and the terms of the receipt of the 5th of May, 1884, signed by him upon the payment of the money, constitute any waiver or abandonment of his right to maintain this petition of right.

I am of opinion that this appeal should be dismissed and the judgment of the Court of Exchequer affirmed with costs.

TASCHEREAU J. concurred with Strong J.

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GWYNNE J.—In this case the respondent, by petition of right, claimed to recover from the Dominion Government a large sum of money under a contract made with him under the act respecting the Intercolonial Railway for the construction of section 18 of that railway. The question now before us arises under the paragraph in the Petition of Right numbered 27*a*, which is as follows (1).

The work mentioned in this schedule "C," and the amount claimed in respect thereof are, and the schedule itself is, as follows:—

4,617 c. yards masonry at $6	$27,702
8,892 do do in Portland cement, extra price, $1.50	13,338
9,400 c. yards crib work at 75c	59,550
Iron pipes in culverts	7,289
Iron pipes not used	4,000
	$111,879
Contract price, lump sum	648,600
Total	$760,479
Amounts deducted by Chief Engineer (in his certificate referred to in paragraph 27*a*) as payments on account according to report of Mr. Brydges, 1877	640,108
Balance	$120,371

Now, the only right in virtue of which the respondent could assert any claim against the Dominion Government is the contract set out in his petition of right for the construction of the portion of the Intercolonial Railway therein mentioned. Three paragraphs in that contract, namely, the 4th, 9th and 11th are material. The contract was for the complete construction of section 18 according to specifications thereto annexed for the lump sum of $648,600.

Then it was provided by the above paragraphs as follows:—

(1) See p. 371.

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4. The Engineer shall be at liberty at any time before the commencement or during the construction of any portion of the work, to make any changes or alterations which he may deem expedient in the grades, the line of location of the railway, the width of cuttings or fillings, the dimensions or character of structures, or in any other thing connected with the works whether or not such changes increase or diminish the work to be done or the expense of doing the same, and the contractor shall not be entitled to any allowance by reason of such changes, unless such changes consist in alterations in the grades of the line of location, in which case the contractor shall be subject to such deductions for such diminution of work or entitled to such allowance for increased work (as the case may be), as the Commissioners may deem reasonable, their decision being final in the matter, &c., &c., &c.

9. It is distinctly understood, intended and agreed that the said price or consideration of $648.600 shall be the price of and be held to be full compensation for all the works embraced in or contemplated by this contract, or which may be required in virtue of any of its provisions or by-law ; and that the contractor shall 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 entitled : "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, the contractor hereby expressly waiving and abandoning all and any such claim or pretention to all intents and purposes whatsoever, except as provided in the 4th section of this contract.

11. And it is further mutually agreed upon by the parties hereto that cash payments equal to 85 per cent. of the value of the work done, approximately made up from returns of progress measurements, will be made monthly on the certificate of the Engineer that the work for and on account of which the same shall be certified has 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 will be given, but the final and closing certificate including the fifteen per cent. retained will not be granted for a period of two months thereafter. The progress certificates shall not in any respect be taken as an acceptance of the work or the release of the contractor from his responsibility in respect thereof, but he shall at the conclusion of the work deliver over the same according to the true intent and meaning of the contract and of the said specifications.

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It is obvious, I think, from this contract that the certificate of the Chief Engineer on the completion of the whole work, that the work had been completed to his satisfaction, implied that it had been accepted as completed in accordance with the provisions of the contract. Such a certificate could operate so as to entitle the contractor in virtue of it alone to recover whatever balance of the lump sum agreed upon remained unpaid only in case no alterations whatever should have been made under the above fourth paragraph. In that case the balance due was easily ascertainable by deduction of the amounts paid under the progress estimates from the bulk sum for which the whole work had been agreed to be completed ; but, in case any alterations had been made under the fourth paragraph nothing would be payable to the contractor in virtue of such a certificate of the Chief Engineer, nor until the calculations necessary to be made and approved in accordance with the provisions of the fourth paragraph should be made and approved as therein provided, for it is expressly agreed that the contractor shall have no claim whatever in such a case except under the provisions of the said fourth paragraph, and that the "final and closing certificate" shall not be granted until the expiration of two months after the Engineer shall have given his certificate that the work has been completed to his satisfaction.

In the case before us the claim is that many alterations had been made within the provisions of the fourth paragraph of the contract, so that the certificate of the Chief Engineer that the work had been completed to his satisfaction would not in itself entitle the contractor to recover any part of the amount claimed by him in his petition of right. He could only recover whatever sum, if any, should be ascertained as being due to him upon a calculation being made in accord-

ance with the provisions of the fourth paragraph, and so far from anything having ever been found due to him under that paragraph in excess of what he has already received, it appears, incidentally, that the Commissioner, the late Mr. Brydges, in 1877, reported that he had been overpaid; but, however this may be, the contention now is that the contractor, in June, 1881, became entitled in virtue of a report then made to the Minister of Railways by the late Mr. F. Shanly, then Chief Engineer of the Intercolonial Railway, to recover the sum of $120,371.

Now, Mr. Shanly became Chief Engineer of the Intercolonial Railway under the circumstances and for the purpose hereinafter stated.

In the month of June, 1880, the Minister of Railways presented to his Excellency the Governor General in Council a report in the terms following :—

OTTAWA, 21st June, 1880.

The undersigned has the honor to report that a letter has been received from Mr. Sandford Fleming wherein he states that for reasons given he is under the necessity of declining the position of Chief Engineer of the Intercolonial Railway and Consulting Engineer of the Canadian Pacific Railway to which by Order in Council of the 22nd May last he has been appointed.

The undersigned accordingly recommends that authority be given for the appointment of Mr. Frank Shanly, C.E., as Chief Engineer of the Intercolonial Railway for the purpose of investigating and reporting upon all unsettled claims in connection with the construction of the line, and that his salary while so engaged be fixed at $541.66 a month, the engagement being understood to be of a temporary character.

Respectfully submitted,

(Signed) CHARLES TUPPER,
Minister of Railways and Canals.

This report was approved by His Excellency in Council on the 23rd June, 1880, and thereupon Mr. Shanly became Chief Engineer of the Intercolonial Railway for the purpose above stated.

At this time the only question pending between the

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respondent and the Government was whether there was any, and if any what, amount remaining due by the Government to the respondent under his contract for the construction of the Intercolonial Railway which had been in possession of and operated by the Government for some time.

A mere certificate given by Mr. Shanly that the work had been completed to his satisfaction would have had, as already shewn, no operation in itself, nor would it have been of any use for the purpose of determining the point in difference between the respondent and the Government, namely, whether there was any, and if any what, sum still remaining due to the contractor under and in accordance with the provisions of his contract.

Assuming the Government to have been willing to accept Mr. Shanly's own calculation made in accordance with the provisions of the fourth paragraph of the contract in substitution for the approval and decision of the Commissioners as required by that paragraph, or that the Minister of Railways was competent to do what by that paragraph was submitted to the decision of the Commissioners, still Mr. Shanly never did, in point of fact, make any calculation such as was directed to be made by the above fourth paragraph. Indeed, from his report it is obvious that he never understood that he was appointed for the purpose of giving, and that in point of fact he never contemplated giving and never did give, any certificate for the purpose of entitling the respondent thereunder to recover any part of the amount claimed by him as being due to him under the terms and provisions of the contract. So far from contemplating giving a certificate either that the work had been completed by the respondent, or that there was any sum remaining due to him under and in accordance with the provisions of the contract, he shews upon his report that the work had

never been completed by the respondent, but that the Government had completed it themselves; and further that his report upon the respondent's claim submitted to him for investigation is not based upon the provisions of the contract, but upon the assumption that those provisions are waived; thus showing the report to be intended as a confidential communication and suggestion to the Government and not as a basis upon which any legal claim of the respondent under the terms of his contract could be rested. In that report, Mr. Shanly says:

> Herewith I submit my report upon the claim made by Mr. McGreevy for extra and additional work done by him under his contract, in the years 1870-1-2-3-4 and 5, which has been referred to me for investigation.

He then proceeds—

> The original lump sum for which he contracted to complete the work was $648,600, being at the rate of $32,430 per mile for 20 miles, subject however to certain additions or deductions as the case might be set forth in the contract. The contract was entered into in July, 1870, and was to be completed in July, 1872, but owing to various causes (amongst others as alleged, the difficulty in procuring men,) it was not finally brought to a close until the end of 1875, and even then not being quite completed the Government after that date expended some $7,000 in addition to the payments previously made as reported by Mr. Brydges in 1877.

Now, it is to be observed that the contractor could substantiate no claim whatever for any extras, nor for any alterations by way of addition to the work as described in the contract, except under the provisions of the above fourth paragraph, which required that an estimate should be made of the value of any alteration which caused a diminution of the work as contracted for, and that the amount thereof should be deducted from the value of any increase or addition in order to arrive at the final amount payable under the contract. No calculation of such a nature was ever made by Mr. Shanly. On the contrary, he suggested that, for

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reasons stated in his report, "the deductions and additions provided for by the contract should be waived," and in accordance with this suggestion he makes a recommendation that sums of money, named in his report, should be paid to the contractor, composed partly of items claimed by the contractor for increased work under paragraph four, without any calculation of, and deduction for, diminution of work caused by alterations as provided by that paragraph, and partly of items which Mr. Shanly pronounces to be for work which he calls extra to and outside of the contract, although the contract expressly provides that no extra whatever shall be charged or claimed for otherwise than under the provisions of the said paragraph four, and he explains why he makes this recommendation in the following paragraph at the close of his report:—

> On the general principles and interpretation of the contract Mr. C. J. Brydges was examined by the Crown. He referred chiefly to a report made by him on this case in June, 1877, in reply to the petition of right, recommending that the strict letter of the contract be adhered to; this doubtless is perfectly correct in law, but I cannot help thinking that the present is a class of cases where a little equity may very properly be introduced.

In this report, which has never been adopted or approved by the Government or by the Minister of Railways, assuming him to be competent by his approval of such a report to give it any binding effect under the contract, Mr. Shanly very clearly shows that he never contemplated giving, and never did give, the contractor any certificate for the purpose of entitling him to recover from the Government any sum of money as remaining due to him under the terms of his contract, but that his report was simply a recommendation or suggestion to the Government that they should for the reasons stated by him, waive the contract altogether, and pay the contractor the sum named by Mr. Shanly in his report, not as being found to be due to the contractor under his

contract, but as an act of grace and favor on the part of the Government.

Such a report, it is obvious, cannot be construed to be a certificate of the Chief Engineer which does or can entitle the contractor to recover any sum as remaining due and payable to him under the terms of his contract, nor can any legal claim whatever against the Government be founded thereon.

The respondent's claim, therefore, as asserted in his Petition of Right, which is and only could be founded upon the terms of his contract, wholly fails.

The appeal, therefore, must be allowed and with costs.

PATTERSON J.—I think Mr. Shanly was Chief Engineer of the Intercolonial Railway for the purposes of the contract. He came literally within the terms of the statute, 31 Vic. ch. 13, s. 4, and I see no reason, in the lapse of time between the completion of the contract work and his appointment, or in the fact that he had not personal cognizance of the work during its progress, for reading any qualification into the language of the statute or of the order-in-council of the 23rd of June, 1880, by which he was appointed Chief Engineer of the Intercolonial Railway.

The same objections might have been taken in case the Chief Engineer who had held that office during the whole progress of the works had died immediately after their completion without having certified that they had been completed to his satisfaction, and Mr. Shanly had been at once appointed.

I do not think it was necessary in order to entitle the contractor to payment of the amount of the final certificate that the certificate should have the approval of the Minister of Public Works or of the Minister of Railways and Canals.

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If I should attempt, as we have been invited to do by counsel on both sides, to form a judgment as to the importance of that certificate, either absolutely or more particularly in comparison with the progress certificates, I should undertake a task for which I confess my incompetence. I can only construe to the best of my ability the contract and the statutes.

The terms of the 11th section of the contract require the approval of the commissioners to the engineer's certificate for payment of the progress estimates, and entitle the contractor to payment of the final estimate, with the 15 per cent. retained from the progress estimates, on the certificate of the engineer, as doubtless the engineer's certificate is meant when it is said, "on the completion of the whole work to the satisfaction of the engineer a certificate to that effect will be given," nothing being said of the commissioners.

The need for the approval by the commissioners depends on the Intercolonial Railway Act, 31 Vic. ch. 13, s. 18, which enacts that

> No money shall be paid to any contractor until the Chief Engineer shall have certified that the work for or on account of which the same shall be claimed has been duly executed nor until such certificate shall have been approved of by the commissioners.

My brother Fournier has given, in his judgment in the Exchequer Court, his reasons for holding that section 18 ought not to be read as affecting this contract, at all events, so far as to require the commissioners to approve of the engineer's final certificate as an essential to the contractor's right to payment. I do not think he goes so far as to consider that the engineer's certificate is not essential though it is not declared in direct and express terms to be essential in section 11 of the contract. Those express terms are only found in section 18 of the statute.

I appreciate the force of my learned brother's reason-

ing while I am not able entirely to adopt it. I think section 18 must be read as governing all payments to contractors for work in the construction of the Intercolonial Railway. It would probably have applied to money payable on progress certificates as well as on final certificates, but, inasmuch as its language is better fitted to final certificates, speaking of *the work* for or on account of which the money is claimed *having been duly executed*, it was prudent in drafting the contract to make it clear that the progress estimates were not to be paid unless the engineer's certificate was approved of by the commissioners, and I should not infer from that that the commissioners intended when they made the contract, or deemed they had power, to dispense with their approval of the final certificate.

But on the 25th of May, 1874, the Act 37 Vic. ch. 15 was passed. It repealed the third section of the Intercolonial Railway act which had declared that the construction of the railway and its management until completed should be under the charge of four commissioners, with so much of any other part of the act as authorised the appointment of any commissioner or commissioners for the construction and management of the railway, or the continuance of any such commissioner in office, or as might be in any way inconsistent with that act. Therefore when the work was finished, in December 1875, it had become impossible to procure the approval by the commissioners of the engineer's final certificate. If the act of 1874 had gone no further the necessity for any certificate except that of the engineer could not have been asserted. But the act went on to constitute the Intercolonial Railway a public work, vested in Her Majesty, and under the control and management of the Minister of Public Works, and to transfer to and vest in the Minister all the powers and

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duties assigned by the former act to the commissioners. Did this act substitute the Minister for the Commissioners for all purposes in relation to this contract? I think not.

To make the Minister's approval of the engineer's certificate a condition precedent to the right of this contractor to demand his money would be to vary the contract. The contractor could properly say *non hæc in fœdera veni*, and it will not be assumed that the legislature intended to add a term to an existing contract without a plain legislative declaration to that effect. There is nothing in this statute of 1874 to indicate such an intention. On the contrary it can much more reasonably be held to be the intention that the provisions of section 16 of the Public Works act, 31 Vic., ch. 12, should afford a sufficient check upon the payment of money on account of the railway as well as on account of other public works. Why should two systems be looked for in the same department? Section 16 provides that no warrant is to be issued for any sum of the public money appropriated for any public work under the management of the Minister, except on the certificate of the Minister or his deputy that such sum ought to be paid to any person named in the certificate in whose favor a warrant may then issue.

This enactment seems to be in the nature of a departmental administrative regulation which does not touch the legal existence or validity of any claim or the claimant's right to be paid. It may not be beyond question that section 18 of the Intercolonial Railway Act, properly construed, was anything more, though, referring as it did to the engineer as well as to the commissioners, while the contract in its turn is expressed to be in all respects subject to the provisions

of the act, the argument for reading the section into the contract appears to me insuperable.

I agree with my brother Fournier, though I may not reach the conclusion by precisely the same process of reasoning, that the contractor is entitled to be paid on the final certificate of the Chief Engineer without approval of the certificate by the Minister.

The remaining question is whether he has a sufficient certificate.

The certificate is to be to the effect that the whole work has been completed to the satisfaction of the engineer. That is the provision of the 11th clause of the contract, and it is merely repeated without addition by the words of the 18th section of the statute, " duly executed " meaning executed according to the contract, or to the satisfaction of the engineer.

I hold without hesitation that Mr. Shanly's report involves in it, and is, a certificate to the effect that the whole work has been completed to his satisfaction.

By the whole work I do not understand that specified in the contract without omissions or diminution. I mean all that by the contract the contractor undertook to do, which was the specified work varied as it might be under the 4th clause of the contract which provided as follows :—

4. The engineer shall be at liberty at any time before the commencement, or during the construction of any portion of the work, to make any changes or alterations which he may deem expedient in the grades, the line of location of the railway, the width of cuttings or fillings, the dimensions or character of structures, or in any other thing connected with the works, whether or not such changes increase or diminish the work to be done, or the expense of doing the same, and the contractor shall not be entitled to any allowance by reason of such changes, unless such changes consist in alterations in the grades of the line of location, in which case the contractor shall be subject to such deductions for such diminution of work, or entitled to such allowance for increased work (as the case may be) as the commissioners may deem reasonable, their decision being final in the matter.

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But while the certificate thus satisfies the terms of the contract what does it entitle the contractor to receive? The contract price and the allowances in respect of alterations of grade are not left to the arbitrament of the engineer. His final certificate, whether we look at the 11th clause of the contract or the 18th section of the statute, deals solely with the execution of the work. He does not settle the price to be paid.

Mr. Shanly's report relates principally, and as far as fixing prices is concerned may be said to relate altogether, to extra work and materials outside the contract. I do not know that any of the extra cost arose from alteration in the grades of the line, but if it di the commissioners and not the engineer were charged with the duty of settling the allowance for it.

This aspect of the question does not appear, as I gather from perusing the judgment delivered in the Exchequer Court, to have been pressed there, and I do not think it was made prominent on the argument before us. But it cannot be overlooked when we are asked to say if the suppliant is entitled to recover on Mr. Shanly's certificate or report, which is the question submitted to us.

I believe, as I think I have shown, that on the other points discussed I substantially agree with my learned brother, but the question submitted should, in my opinion, for the reason last given, be answered for the crown, and I therefore think we should allow the appeal.

Appeal allowed with costs.

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

Solicitor for respondent: *A. Ferguson.*