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*March 19.
*May 6.

CHARLES McCARRON *et al* (PLAINTIFFS) ..... APPELLANTS;

AND

THOMAS McGREEVY (DEFENDANT)....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Railway contract—Certificate of engineer—Necessity for—Laches.

McC *et al.* appellants entered into a contract with McG., (respondent) the contractor for the construction of the North Shore Railway between Montreal and Quebec to do and perform certain works of construction on a portion of the road, and by a clause in his contract agreed "to keep open at certain times and hours at his own cost and expense the main line for the passage of traffic or express trains run by McG. without any charge to the latter;" but there was a proviso that, "any time occupied on the road over and above what may be required by the hours hereinbefore mentioned, or any expense caused thereby, shall be paid by the contractor (McG.) on a certificate to that effect signed by the superintendent of the contractor."

*PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry and Taschereau JJ.

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On an action brought by appellants against respondent for damages caused by the interruption of the work on said road by the passing of respondent's trains;

Held, affirming the judgment of the court below, that it was the duty of the appellants to get the superintendent's certificate within a reasonable time, and not having taken any steps to obtain it until six years after the superintendent had left the respondents' employment, the failure to produce such certificate was sufficient ground for dismissing the appellants' action.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Superior Court in favor of the present appellants.

The respondent was the contractor for the construction of the North Shore Railway between Quebec and Montreal, under a contract with the Provincial Government, and on the 30th March, 1877, by notarial instrument entered into before Samuel J. Glackmeyer, notary public, between the appellants and the respondent, the appellants undertook, in consideration of the payments and covenants stipulated in the said notarial instrument, to finish the tracklaying and ballasting for the respondent on the said North Shore Railway from Quebec to Portneuf, and as far beyond as "Patton's Contract shall begin," and also to do and perform all the works, more particularly detailed in the schedule annexed to the said agreement, for the prices therein detailed.

Prior to the bringing of their present action the appellants had sued the respondent for the sum of $37,000, alleged excess of work done by them and damages they claimed to have suffered.

In that suit judgment was rendered against the respondent for $15,423, reserving to appellants their recourse, if any, for an item of $5,290 on the ground that they had not produced the certificate of the respondent's superintendent, as required by the contract.

The present action was brought in the Superior

(1) 14 Rev. Leg. 422; S. C. 12 Q. L. R. 373.

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Court at Quebec, by the present appellants against the respondent, to recover the sum of $7,970, $5,390 for the amount reserved, and $2,580 for alleged damages caused to the appellants by the interruption of the work upon their section by the passing in excessive numbers and at irregular intervals of appellants' trains. The declaration alleged that since the contract was completed the plaintiffs had demanded a certificate from one D D. MacDonald, the superintendent mentioned in the contract, but that the latter, at the instigation of respondent, had unjustly and fraudulently refused to deliver said certificate.

The other material facts and pleadings fully appear in the report of the case in 12 Q. L R. p. 373.

The ninth paragraph of the contract is the only one upon which any controversy between the parties arose, and is as follows:—

Ninth.—The said parties of the first part agree and bind themselves to furnish at their own costs and charges all labour and material to work the locomotive and cars; such as water, wood, oil, tools and implements of all kinds, except as otherwise stipulated, but that they will not have or exercise any control over the movements of trains except of those in use for track-laying and ballasting; on the contrary, will in all such movements be subject to the orders of the party of the second part. They shall also keep open at their own costs and charges the main line for the passage of traffic or express trains run by the said party of the second part, and all turnouts, sidings and switches, as well as the road bed, shall be kept in proper order for said traffic, and they will see that their trains are kept off the main line at the hours appointed by the time-table at the respective places, without any charge to the said party of the second part.

Nothing herein contained shall compel the party of the first part to take any precautions or means provided for passage of trains, except a train leaving Pont Rouge at or before seven o'clock in the morning, and Quebec at or after five o'clock and forty-five minutes in the afternoon; all special or trains required at different hours will be arranged for with the party of the first part and with their consent; any time occupied on the road over and above what may be required by the hours herein before mentioned and stipulated, or any expense caused thereby, shall be paid by party of the second part, on a certificate to that effect signed by the superintendent of

the party of the second part."

Larue Q.C. for appellants.

The appellants were entitled, under their contract, to charge for every train that went beyond Pont Rouge, even the regular train, and they had also a right to charge for every train between Quebec and Pont Rouge, except a train leaving Pont Rouge at or before seven o'clock in the morning, and Quebec at or after five o'clock and forty-five minutes in the afternoon.

The passage of all these trains imposed upon the appellants a very large increase of work not included in their contract.

On behalf of the respondent it is contended that the appellants cannot claim from the respondent, without a certificate of the superintendent, and that they could not demand nor obtain said certificate after the works were finished, or after the superintendent had left McGreevy's employ. We did all we could to obtain it, and we cannot be held responsible for the neglect of duty of respondent's employee.

Such an excuse cannot be held sufficient to enable the respondent to get rid of a legitimate debt.

Redfield Amer. Rly. Cas. (1); *Scott* v. *Liverpool* (2).

Irvine Q.C. for respondent.

It cannot be held that this is any such demand on the superintendent, Macdonald, for a certificate as would excuse the appellants from making the proof which the contract required of them. Macdonald could not be expected after that lapse of time, and whilst engaged in other work at a great distance from the place referred to in the contract, to certify to work of which he could then have had only a very imperfect recollection. No demand had ever been previously made upon him for such certificate, although an action had been brought and had been pending for a number of years covering these same items. The requirement of this certificate is peremptory, and no action can be maintained with-

(1) *Herrick* v. *Belknap's Estate* 305. (2) 28 L. J. Ch. 236.

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out it, and indeed it would not be possible for the respondent otherwise to obtain reliable information as to claims of this nature.

The greater part of the apppellant's claim is in the year 1878. Their contract binds them to complete the works in 1877. There is nothing in the record to show on what terms the time was extended, or whether it was extended at all otherwise than by tacit consent. The right of the respondent to use the railway for the running of his trains without compensation to the appellants, could not be taken away without some express agreement.

Lastly:—The respondent refers the court with confidence to the evidence, and asserts that there is no proof whatever to justify the appellant's demand. There is no evidence of any particular detention causing any particular damage. The majority of the special trains of which complaint is made were run on Sundays, when presumably the appellants were not at work. Others were run at night, and generally there is no particular case shown causing damage to the appellants. This absence of proof without any attempt within any reasonable period to obtain the certificate of the superintendent, should be sufficient to dismiss the appellants' action

SIR W. J. RITCHIE C.J.—There is a very small question in this case. To enable the plaintiff to recover he was bound to produce the certificate of the engineer as to the correctness of his accounts. He never obtained these certificates nor did he attempt to obtain them until years afterwards when the party had left the employment, and then he did not take, even at that time, what I should consider the necessary steps to enable him to get the certificate.

Therefore I think the plaintiff in the suit cannot recover, and in looking at the evidence even if I thought he could recover, I should be greatly puzzled

to determine, if any amount, how much. I think the appeal should be dismissed.

STRONG J.—Concurred.

FOURNIER J.—I think the appeal should be dismissed. I agree with the judgment of the Court of Queen's Bench. The evidence shows that during all the time the work was going on the plaintiff never made any effort to obtain the certificate of the engineer, and six years afterwards they ask him for it when they are told that it cannot be supplied. I certainly think they have not complied with the condition and they have, therefore, no claim against the defendant.

HENRY J.—The parties appellant in this case cannot, I think, succeed on their appeal. When a party is to receive compensation consequent on the certificate of a certain engineer, it is to be assumed that the certificate will be obtained within a reasonable time, that is, when the party is employed and when the work is going on, and that a person should not wait five or six years when the memory of the engineer cannot be expected to serve him. Here were men making a claim for damages they claim to be entitled to several years before any claim was made by them. If their right to recover depends upon a certificate they cannot sustain the claim by other evidence without production of that certificate. I think the court below was perfectly right and this appeal should be dismissed.

TASCHEREAU J.—I am of the same opinion, and I also think that this is a frivolous appeal.

Appeal dismissed with costs.

Solicitors for appellant: *Larue, Angers and Casgrain.*

Solicitor for respondent: *George Irvine.*