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*Oct. 26, 27.

*Nov. 29.

THE DOMINION CONSTRUCTION COMPANY (DEFENDANT) ..... } APPELLANT;

AND

GOOD & CO (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract — Construction of railway — Certificate of engineer—Condition precedent.

Where the contract for construction of a railway provided that the work was to be done to the satisfaction of the chief engineer of a railway company, not a party to such contract, who was to be the sole and final arbiter of all disputes between the parties, the contractor was not bound by such condition when the party named as arbiter proved to be, in fact, the engineer of the other party to the contract.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Armour C.J. at the trial in favour of the plaintiffs

The facts of the case are thus stated by Mr. Justice Osler in the Court of Appeal.

The defendants, the Toronto, Hamilton and Buffalo Railway Company, were incorporated some years prior to the year 1889, for the purpose of constructing a railway, part of the main line of which was from Brantford to Welland, passing through the City of Hamilton. Soon afterwards a construction company, incorporated in the State of Illinois under the name of J. N. Young & Co., was organized for the purpose of building the road, one J. N. Young being the chief promoter of the concern.

J. N. Young & Co. became the owners of, or took up the greater part of, the stock of the railway company, putting up the 10 per cent required to be paid before its organization, and they created the local board of directors, qualifying the individuals who composed it by giving them the necessary shares.

They then entered into a contract, on the 2nd June, 1891, with the railway company through the medium of this board of directors for the construction of the line of railway or part of it. Into the particulars of this contract it is not necessary to enter, inasmuch as the financial operations of that corporation being unsuccessful they were unable to carry it out, and thereupon Young procured a new company, the defendants the Dominion Construction Company, to be incorporated under the laws of New Jersey, which acquired the rights and interests of the old one under their contract with the railway company, and succeeded in building the line. The new company, on

(1) 26 Ont. App. R. 133, sub nom. *Good* v. *Toronto, Hamilton and Buffalo Railway Co.*

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the 4th of September, 1894, entered into a contract with the railway company, the directors of which stood in the same position towards them as they did to the former, by which for a bulk sum of $35,000 per mile they agreed to survey, locate and construct the railway company's line of railway and telegraph from its present terminus east of Brantford to and through the City of Hamilton to a connection with the Canada Southern Railway at or near Welland, and form a connection with that railway at Hamilton to Toronto. They also agreed to construct a second main track between the latter points, if required, at a bulk sum of $20,000 per mile. The railway was to be constructed on such line as the chief engineer of the railway company should locate and adopt, and in accordance with the specifications attached to and forming part of the contract. The provisions of the contract for securing payment of the contract price need not be referred to further than to say that the whole of the assets of the railway company of every kind then owned or thereafter to be acquired were pledged and to be secured for that purpose in the manner set forth in this contract. It was stipulated that the railway company should appoint a chief engineer who should have entire charge of the engineering department of the railway company. His decision upon all questions that might arise in connection with the contract as to its true meaning and intent so far as the work of construction was concerned was to be final and binding on all parties, and his salary and compensation were to be paid by the construction company. It was provided that the construction company should have the right by its president, general manager, or any director, to be present at any directors' meeting of the railway company, and to discuss any resolution or motion before the meeting.

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On the 10th of July, 1895, the contract between the Dominion Construction Company and Good & Co, the plaintiffs, out of which the present litigation arises, was entered into. By it Good & Co. covenanted to build the eastern branch of the railway, viz., that part of the line between Hamilton and Welland, and to complete it "to the satisfaction and acceptance of the chief engineer of the Toronto, Hamilton and Buffalo Railway Co." The company covenanted to pay them for the work in accordance with the scheduled prices specified in the contract. Progress estimates, "to be judged of by the said chief engineer," were to be presented at the end of each month, and 90 per cent thereof to be paid by the 20th of the following month. "And when all the work embraced in this contract is fully completed agreeably to the specifications and in accordance with the direction, and to the satisfaction and acceptance, of the said chief engineer, there shall be a final estimate made of the character, quality and value of the work according to the terms of this agreement, when the balance appearing due to Good & Co., shall be paid to them within thirty days thereafter upon their giving a release in full to the company of all claims arising in any manner out of the agreement, and upon their procuring and delivering to the company full releases from mechanics, material men, etc., for work done and materials supplied under the contract." The procuring of such releases was to be a condition precedent to the right of Good & Co., to payment.

Good & Co. agreed not to sublet or transfer the contract or any part of it without the written consent of the chief engineer. By a further clause it was provided that the decision of the chief engineer was to be final and conclusive in any dispute which might arise between the parties relative to or touching the agree-

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ment, each party reserving any right of action by virtue of the covenants, so that the decision of the chief engineer should be in the nature of an award, and final and conclusive.

The plaintiffs proceeded with their contract, and it was, within what may be called a reasonably short time after the date fixed for its completion, finished to the satisfaction and acceptance of the chief engineer of the railway company. The plaintiffs were by consent relieved of some part of the work of ballasting the line, and no question arises about that. The road was also accepted by the engineer as completed as between the construction company and the railway. But when it came to the question of procuring the final estimate required by the plaintiffs' contract, difficulties arose respecting the classification of certain portions of the work which the plaintiffs contended should be classified as loose rock, for which the engineer was prepared to allow no more than 98 M cubic yards, while the plaintiffs claimed 150 M. The difference between the two figures the engineer thought should be classified as earth excavation only, although in his original estimate for the purpose of the contract he had put the whole at the large figure which the plaintiffs asserted had been found as a matter of actual work on the ground as shown on the progress estimates to be nearly right. There were also differences between the parties as to the plaintiffs' claim for extras, and in respect of a claim for what is described in the specifications as the "force" account—differences which by the terms of the contract were doubtless required to be decided by the engineer, but which the parties endeavoured, but without success, to settle between themselves after the contract had been completed and the works accepted by him.

On the 17th of March, 1896, the engineer gave the plaintiffs a qualified or conditional final estimate as to quantities and character of the work, but not "moneyed out," and upon the understanding, as he stated in his letter accompanying it, "that an amicable settlement is made between Good & Co. and the construction company upon items under consideration," *i.e.*, the extras and force account. It was not intended as a final estimate upon which the plaintiffs could obtain judgment, and on their part they were not prepared to accept it because of the alleged improper classification. With regard to this classification the plaintiffs' contention was that the chief engineer had never, by actual inspection of the ground while the work was being proceeded with, acquired a knowledge of the ground and of the character of the work, which justified him in making, in the final estimate, so radical a change in the classification which had from time to time been made in respect of it in the progress estimates based on the reports of the sub-engineers who saw the work while it was being done.

It appeared that not long after the plaintiffs had commenced their work on the contract they were informed, as they said, by the engineer, but which he denied, that he was "interested" in the contract, in what way they did not know, but they assumed in the profits. They did not, however, object to his acting, and they received some seven progress estimates certified by him. It was proved that he was not in fact so interested, and that he was not a member of the construction company. During the attempt at a settlement, and while the plaintiffs were endeavouring without success to obtain the final estimate, they were also complaining that Wingate, the engineer, owing to his long connection with Young, was not in a position to deal fairly with them.

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It may be noticed here that the plaintiffs sublet several portions of the works they had contracted to execute. There was no written consent on the part of the railway company's engineer to their doing so, but he was aware that it was done either at the time or shortly afterwards, and no objection was ever made by him. These contracts required that a final estimate should likewise be obtained by the sub-contractors from the railway company's engineer. These he refused to give at the instance of Young, acting on behalf of the Dominion Construction Company.

At the trial before Armour C.J. judgment was given against all the defendants except the railway company. This judgment was affirmed by the Court of Appeal, but varied by a direction that as against Wingate, the engineer, the action should be dismissed, but without costs.

D'Arcy Tate for the appellant.

Aylesworth Q.C. for the respondents.

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—At the conclusion of the argument of the counsel for the appellant I was of opinion that the judgment of the Court of Appeal was right and the appeal ought to be dismissed.

Mr. Wingate was certainly in such a position, and his conduct was such, that the learned Chief Justice was, on the evidence, entirely right in absolving the contractors Good & Co. from the necessity of obtaining his certificate. The authorities on this head are so numerous and so conclusive as to make it unnecessary to refer to them after the references already made in the judgment of the Court of Appeal. The Court of Appeal have treated Mr. Wingate with great leniency in dismissing the action against him without costs. I

should have preferred to have retained him as a defendant and have ordered him to pay costs as Chief Justice Armour's judgment did, but this is a mere matter of costs, and the respondents have not asked by way of cross-appeal to have the order varied.

Under the judgment as it stands nothing is said about releases, and as the provision in the contract requiring them seems to be only by way of a condition precedent to obtaining a certificate, and as there is now to be no certificate, there is strictly no reason why there should be any direction respecting them. The appellants may, however, if they elect so to do, have an inquiry as to whether there are any mechanics' liens or other charges affecting the monies payable under the contract. In all other respects the original judgment as varied by the Court of Appeal will stand. Subject to such variation, if the appellants elect to take the direction for an inquiry, the appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Carscallen & Cahill.*

Solicitor for the respondents: *S. F. Washington.*