1877
Oct. 17.
1883
*Feb. 22.
*May 1.
1885
*Dec. 9, 10, 11 & 12.
1886
*Dec. 7.

F. X. BERLINQUET, *et al*, (SUPPLIANTS), APPELLANTS;

AND

THE QUEEN.....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of Right—Intercolonial Railway Contract—31 *V. c.* 13 *s.* 18—*Certificate of engineer a condition precedent to recover money for extra work—Forfeiture and penalty clauses—Setting down Exchequer appeal.*

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

The contract provided *inter alia*, that it should be distinctly understood, intended, and agreed that the said lump sum should be the price of, and be held to be full compensation for, all works embraced in or contemplated by the said contract, or which might be required in virtue of any of its provisions or by-laws, and the contractors should not, upon any pretext whatever, be

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ. (On the application to set down the appeal for hearing Strong J. was present.)

entitled, by reason of any change, alteration or addition made in or to such works, or in the said plans or specifications, or by reason of any of the exercise of any of the powers vested in the Governor in Council by the said Act intituled, "An Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineers by the said contract or by law, to claim or demand any further sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and every such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the contract relating to alteration in the grade or line of location; and that the said contract and the said specification should be in all respects subject to the provisions of 31 Vic. ch. 13; that the works embraced in the contracts should be fully and entirely complete in every particular and given up under final certificates and to the satisfaction of the engineers on the 1st of July, 1871 (time being declared to be material and of the essence of the contract), and in default of such completion contractors should forfeit all right, claim, &c., to money due or percentage agreed to be retained, and to pay as liquidated damages $2,000 for each and every week for the time the work might remain uncompleted; that the commissioners upon giving seven clear days' notice, if the works were not progressing so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors and complete the works at their expense; in such case the contractors were to forfeit all right to money due on the works and to the percentage returned.

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

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

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

The Crown denied the allegations of the petition, and pleaded that the suppliants were not entitled to any payment, except on the

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certificate of the engineer, and that the suppliants had been paid all that they obtained the engineer's certificate for, and in addition filed a counter claim for a sum of $159,982.57, as being due to the Crown under the terms of the contract, for moneys expended by the Commissioners over and above the bulk sums of the contract in completing said sections.

The case was tried in the Exchequer Court by J. T. Taschereau J., and he held that under the terms of the contract the only sums for which the suppliants might be entitled to relief were, 1st, $5,850 for interest upon and for the forbearance of divers large sums of money due and payable to them, and 2nd, $27,022.58, the value of plant and materials left with the government, but that these sums were forfeited under the terms of the clause three of the contract, and that no claim could be entered for extra work without the certificate of the engineer, and that the Crown were entitled to the sum of $159,953.51, as being the amount expended by the Crown to complete the work.

An appeal to the Supreme Court of Canada having been taken by the suppliant, it was

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

The circumstances under which this appeal was set down for hearing in 1883, although judgment in the Exchequer was delivered in 1877 appear in the judgment of Strong J. hereinafter given (1).

APPEAL from the judgment of J. T. Taschereau J., in the Exchequer Court of Canada. The petition of right, the pleadings, and facts are fully set out in the judgments hereinafter given.

(1) See also Cassels' Digest p. 393.

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The suppliants were represented in the Exchequer Court by *M. A. Hearn*, Q.C., *G. Irvine*, Q.C., *F. Langelier* Q.C., and the respondent by *A. McLennan* Q.C., *J. Bell* Q.C, *F. X. Lemieux*, *A. F. McIntyre* and *E. Lareau*.

The following is the judgment of the Exchequer Court delivered by

J. T. TASCHEREAU J.—"The petitioners, François Xavier Berlinguet, architect, and Charlotte Mailloux, his mother, associates and carrying on business under the name and firm of F. X. Berlinguet & Co., made on the 25th of May, 1870, with Her Majesty the Queen, represented by the commissioners appointed in virtue of the act of the parliament of Canada 31st Vic. ch. 13, two contracts for the building of sections Nos. 3 and 6 of the Intercolonial Railway, in consideration of the sum of $462,444 for section No. 3 and the sum of $456,946 for section No. 6. Section No. 3 is represented in the contract as having 24 miles in length or thereabout and section No. 6 as having a length of 21 miles.

"The petitioners having given up their contracts for the reasons mentioned in their petition, obtained from Her Majesty the permission to present this petition against the government of the Dominion of Canada. The indemnity they claim amounts to $523,000.

"Her Majesty, by and through her Attorney General for the Dominion of Canada, answered this demand by the pleadings which are contained in a document annexed to the present.

"The complaints of the petitioners are numerous, but they can be reduced to the following:—

"1. That there were no valid contracts between Her Majesty and the petitioners; that if ever such contracts existed, they were annihilated or modified by the fact that the petitioners had no communication of the plans

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and profiles nor of the bill of works; and, also, that the schedule of prices agreed upon was increased by orders in council;

"2. That the petitioners were compelled by the engineers employed by the commissioners to execute works quite different from those mentioned in the contracts, much more costly and much above the stipulations of the contracts:

"3. That the monthly estimates of progress made by the engineers were not carefully made and did not represent the quantity of work executed on the two sections, and that consequently their monthly payments were much below the amounts to which they were entitled;

"4. That they complained frequently to the Minister of Public Works and to the Commissioners and that in consequence of these complaints, the Minister of Public Works promised to indemnify them if they continued the works, assuring them that the abandonment of their works would be a great damage to the government as well as to the petitioners themselves;

"5. Moreover the petitioners claimed the said sum of $523,000 under the form of general *indebitatus assumpsit* for money advanced, materials furnished, labour supplied, &c., &c.

"In reply to the various complaints contained in the petition, Her Majesty produced the defence which has just been read and which can be reduced to a general denegation in fact and in law, with certain special allegations which I will mention later on, when I will discuss the complaints of the petitioners.

"1. The first question raised in the pleadings of the petitioners, and which I consider a very important one, is that of the existence or modification of the contracts, and also that of knowing whether without these contracts the petitioners have any right whatever against

Her Majesty. I do not see any difficulty in deciding these first points.

"2. In fact, without being formally admitted by the petitioners as the basis of their petition of right, these contracts are nevertheless mentioned several times in this same petition as having been signed by them and are not actually repudiated by them, but upon the principle that they have not signed the plans which they consider as forming an essential part of these contracts. They nevertheless signed these contracts on the 25th of May, 1870, in presence of witnesses; the principal petitioner, Mr. Berlinguet, examined under oath, acknowledges his signature and that of his mother. Besides this the petitioners, in the whole course of their correspondence with the commissioners and the executive, have never repudiated these contracts nor pretended to repudiate them; they have never complained that the plans had not been signed by them and the commissioners; on the contrary, reference is constantly made to these contracts and these plans in stating that more was exacted from them than these contracts and these plans required.

"3. In the receipts which they gave upon the increase of the monthly estimates, they acknowledged that what they received should not be considered as conferring upon them a right to a final amount exceeding the price mentioned in their contract. They accepted the orders in council to that effect, and touched the amounts without any protest or reservation whatever. All the officers, from Mr. Brydges in his capacity of one of the commissioners of the road, to the Minister of Public Works, the Hon. Mr. Langevin, Mr. Fleming, Chief Engineer, and others, agree in maintaining that it is out of the question to say that the contracts were extinguished or even modified, and that on the contrary they were always considered by themselves and

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by the petitioners as in full force.

"4. It is quite possible that the plans were not signed by the petitioners, or even by the commissioners. But this would not be a cause of nullity of the contracts; for it has been proved to my satisfaction by the evidence of Mr. Fleming himself, that these plans were lithographed and copied *in extenso* in Book B. Mr. Berlinguet himself testified that he used these lithographed copies to prepare his tender and acted accordingly. All these copies were distributed on the line deposited at the various stations and consulted by the petitioners. They (the petitioners) admit by their tender that they had seen those plans, the contracts they signed expressly mentioned that they signed them. They were bound to sign them, and if through negligence, forgetfulness or any other motive on their part, they have not done so, they have no right to allege this fact as voiding the contract.

"5. It is established that the originals of these plans were accidentally destroyed by fire in the office of the engineer-in-chief at the same time as many other public documents. By not signing the plans, the petitioners committed an act of negligence which they covered by accepting the lithographed copies of these plans, by consulting these copies and by using them not only to prepare their tenders and obtain their contracts, but also to execute the greatest part of their contracts. They formally overlooked this slight irregularity and have no interest nor right to take advantage of their own negligence. I therefore consider the contracts as in full force.

"6. If these contracts have been annulled, by what law, I ask, could the petitioners expect to succeed in the present case? The Public Works Act, 31st Vic. ch. 12, could not help the petitioners, for section 7 of this statute declares that "no deeds, contracts, documents or

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writings shall be deemed to be binding upon the department or shall be held to be acts of the said minister, unless signed and sealed by him or his deputy and countersigned by the secretary." The Act 31st Vic. ch. 13 secs. 16, 17 and 18 requires by a formal contract and 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."

"7. The few conversations that the petitioners or their agents and bondsmen may have had with the Hon. Mr. Langevin, Minister of Public Works, cannot be interpreted as constituting new contracts or as modifying the contracts already existing, and especially as confering a right to a claim in the form of *quantùm meruit*. I will refer further on to these conversations with the Hon. Mr. Langevin. The circumstances that at a certain time the prices of certain works were increased by an order in council cannot be considered as a renunciation to the same modification, because this increase was only made to come temporarily to the help of the contractors and not at all with the view of changing or modifying the contracts, for it is said in this order in council dated the 28th July, 1871, that the total price of the contracts cannot be affected by this apparent increase.

"8. To give to this order in council the signification which the petitioners give to it, would be to place myself in manifest opposition to the Intercolonial Railway Act.

"And I say that the Governor in Council, even with the consent of the commissioners, could not increase the schedule of prices of the contracts and that any order in council in this direction would be illegal and

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unconstitutional. In fact the object of these two statutes, the Public Works Act and the Intercolonial Railway Act, is to prevent any useless expense, to protect government against any possible fraud and to prevent government from binding themselves in any other way than by the observance of certain formalities. Under such conditions only is the opening of the public chest permitted.

"In consequence, I consider that I must decide against the petitioners this first point of the annulling of the contracts or even of their mere modification.

"9. The second question to be considered is whether the contractors were victims of prejudice on the part of the engineers of their ill-will, and of the fact that these engineers exacted from them not only extra but even useless works, and much above the conditions and provisions of the contracts, and if the petitioners were retarded in their works by the refusal on the part of the government officers and engineers to furnish them the plans and specifications of certain works.

"According to the evidence given by Mr. Berlinguet himself, and of several witnesses heard on his behalf, it would at first sight appear that the petitioners have, at least in equity, great reasons for complaint if this evidence is not contradicted, and if the recourse of the petitioners is not taken away from them by the severe stipulations of the contracts and by the law which must govern these matters. I was at first so much impressed by the equitable appearance of the case of the petitioners, and by the peculiar conduct towards them of the district engineer and of several others, that I found in the conduct of the latter something shocking which required refutation and even explanation. I thought that there had been committed against the petitioners what the writers call a tortious breach of contract, even in a case where Her Majesty is interested

as on a petition of right, such as refusing the plans, wilfully retarding the petitioners in the execution of the works, and exacting from them extravagant and useless works, and that was the reason why I refused to decide the case of the petitioners in as summary a manner as the defendant demanded by the motion of non suit presented to me nearly at the beginning of the case.

"10. I have not regretted the decision that I then gave, and do not regret it now. The authority which I followed in giving that decision is that which is to be found in the case of *Churchward* v. *Queen* (1), where Lord Cairns, representing Churchward in his petition of right, said: "The cause of action alleged is the "breach of the contract by refusing to employ, and is "not a mere tort, and the distinction is clear that though "for a tort, strictly so called, you cannot sue the crown, "yet for a tortious breach of contract a petition of "right may be maintained, and the cases of *Tobin* v. "*Regina* (2) and *Feather* v. *Regina* (3) are consistent "with this view. The distinction between tort and "tort founded on contract has always been kept up." To these remarks Sir Alexander Cockburn, Chief Justice, added that with the exception of all that the Attorney-General might say, the court did not wish any other argument on this question. Evidently Chief Justice Cockburn acknowledged by those words a distinction to exist between the action for tort and the action for unjust execution or violation of a contract.

"11 I have now to decide the question of the unjust exaction of works and the charges brought against all the engineers, and particularly against Mr. Marcus Smith, who, from 1870 to the month of March, 1872, was district engineer for the sections No. 3 and No. 6,

(1) 1 L. R. Q. B. p. 186. (2) 16 C. B. N. S. 310.
(3) 12 L. T. N. S. 114.

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which are the subject of this case.

I have studied the present case with great care in its minutest details, and I confess that I had at first against Mr. Smith a strong prejudice which was equalled only by the deep sympathy which I felt for the petitioners. To-day I am happy to say that in my belief the charges of flagrant partiality, of ill-will and of personal interest brought against Mr. Smith are not founded, or rather, that these charges are greatly exaggerated.

Marcus Smith is an old engineer, having in railway building an experience of thirty years, acquired in Europe, Africa and America. He is (according to an irreproachable witness, Mr. Fleming), and according to Mr. Brydges and several others, a clever engineer, enjoying the confidence of his chiefs and incapable of giving himself up to the base and shameful acts imputed to him. All the engineers heard in this case, and even those examined on behalf of the petitioners, agree on this point. He is represented as an irascible but good hearted man. "His bark is worse than his bite," said one of the witnesses. Marcus Smith denied with an appearance of truth which I could not forget, the accusations of ill-will and partiality brought against him.

"12. He had to fulfil a duty involving an immense responsibility and on the conscientious execution of the works under his superintendence depended not only his character as an honest man and his reputation as a clever engineer, but perhaps the lives of several hundred persons, and being under this impression he probably thought it his duty to have the stipulations of the contract in question in this case carried out to the letter. He was bound to obey the orders of his chief, Mr. Fleming, with regard to the execution of all the works, and I have remarked and seen with pleasure in the voluminous correspondence which passed between

him and his chief, Mr. Fleming, and his sub-engineers, the care which he took not only to foresee what work could be saved to the contractors, but also his desire to carry out the orders of his chief, Mr. Fleming, against whom, as I have already said, the petitioners have not a word of reproach. Mr. Fleming shows his appreciation of Mr. Marcus Smith, as follows: "A zealous, "faithful officer, as much so as any one in the service "of the government. I am aware he endeavored to "help the contractors as far as he legitimately could do. "His integrity is beyond question." And at page 51 D of his evidence Mr. Fleming, speaking of the difficulties between the contractors and Marcus Smith, says in substance: "He did not satisfy them, but he satisfied me. "I found no reason of complaint against him. I am "aware he endeavored to help them in many ways and "was not trying to oppress, destroy or break down the "contractors."

"13. It is established by the great majority of the engineers whether employed or not on these two sections, and by Mr. Brydges himself, that as a general rule contractors always complain that much more than what the specifications and contract require is demanded of them. There would be nothing wonderful that under the circumstances in which the contractors were placed during the first six months of their works with their expenditures exceeding their receipts, they should have thought that they were victims of the ill-will of Mr. Smith. Having no experience in such gigantic enterprises as that which they had just undertaken, they may have been blinded by fear when they began to realise their financial position and the losses they might incur on their contracts. Later on, on the 26th June, 1872, they sent to the commissioners a letter in which they completely made known their sad position I will by and by refer to this letter.

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"14. But as their reproaches from the commencement, were particularly directed against Mr. Smith, I must say that although it is pretty clearly established that Mr Smith had but little sympathy for the contractors, nevertheless the misunderstanding between them is not to be attributed to this lack of sympathy, but to quite another cause. My impression, or I should rather say my conviction, is that the cause of the lack of sympathy displayed by Mr. Smith towards the contractors may be attributed to the well settled opinion which he had formed of the inability of Mr. Berlinguet to execute two contracts undertaken by a man without practical experience and at a very low price. As an experienced engineer, he saw at a glance the false position occupied by Mr. Berlinguet. And as these same contracts had already been abandoned, he easily foresaw the impossibility for Mr Berlinguet to do better than his predecessors; he may have feared that in his capacity of district engineer the fault might be attributed to him Hence these frequent declarations of Mr. Smith: "The contracts will have to be re-let." If Mr. Smith exacted too much, the chief engineer and commissioners could and should have remedied this state of things.

"15. However, we see that Mr. Fleming and Mr. Brydges, who was more particularly charged with the superintendence, did not blame Mr. Smith, and agree in stating that the work was as well done as elsewhere, but is not better than on other sections; that in no way does the execution of the works by the contractors surpass what the contracts required, and Mr. Brydges states that several culverts are under what the specifications prescribed, and it is sufficient to say that the number of culverts was considerably reduced and modified, to the great profit of the contractors; to show that if Mr. Smith had wished to exercise an undue pressure on the contractors he only had to insist on the building

of all these culverts. And we see in a letter of Mr. Fleming's, dated the 23rd May, 1870, and addressed to Mr. Smith, that the latter should not suppress one single culvert without having the written permission of Mr. Fleming.

"16. Mr. Fleming swears that the contractors gained $178,000 by divers reductions. These figures are eloquent and show that the engineers desired to favor the contractors. It is proved by Mr. Fleming, page 47 of his evidence, that he ordered the culverts to be built which were mentioned in the bill of works and which Mr. Smith had suppressed With regard to the culvert called "Robinson's culvert," about which there was so much trouble, Mr. Fleming insisted several times that it should not be suppressed, although the appearances were against its necessity, and in speaking of this culvert Messrs. Fleming and Smith cited a precedent nearly similar, where the suppression of a culvert was the cause of a very lamentable accident. Mr. Fleming swears that he ordered this "Robinson's culvert" after mature reflection, and would never consent to its suppression, and gave as his reason for so doing that the nature and conformation of the ground, being a gentle slope, might, as in the case above cited, absorb all the water after a heavy storm and thereby produce a ground slide to the destruction of the road and the great danger of travellers.

The opinion of Mr. Fleming is to be accepted as law in this, as in any other similar case. There can be no appeal from his decision to the detriment of Her Majesty. The contractors submitted to this condition in their contract, where it is expressed in very clear words in section No. 2 of this contract.

If Mr. Fleming acted in bad faith, there might probably be a recourse against him, and against him alone. Having by their contract accepted Mr. Fleming as their

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judge in the last resort, they cannot, in the present case, invoke that bad faith as against Her Majesty.

Such a stipulation in a contract may appear at first sight exorbitant, but upon consideration it becomes evident that without such a stipulation for the building of a railway of the proportions and importance of the Intercolonial, it could never be brought to a conclusion, as it would be stopped every moment by a dispute of some sort or other. The authorities found in the books, and of which a list is annexed to the present judgment, leave no doubt on this point.

"17. Mr. Smith has also been reproached with having exacted from the contractors a finish of the work in the preparation of the stone for the foundation of certain culverts and other structures, of first class instead of second class, requiring that for these structures cut stone should be used instead of hammer dressed. I confess that on this head the evidence is conflicting and may, at first sight, appear unfavorable to the engineers. But the engineers have explained and proved that stone cutters often prefer to use the chisel rather than the hammer in dressing stone for second class masonry, and, also, that certain kinds of stone for second class masonry is dressed with more facility with the chisel than with the hammer, and that these modes of dressing stone may lead to believe that first class masonry was exacted when second class masonry only should have been required. All the engineers state that this reproach is not grounded and that they never required first instead of second class masonry, and that if, now it were possible to discover the difference, it is to the stone cutters employed by the contractors and under their exclusive control that this reproach should be made and not to the engineers. Mr. Fleming and the commissioners saw these works and neither considered nor declared them to exceed the quality or class

of work required by the contract—their opinion is law in this matter and must be accepted as such.

"18. Other subjects of reproach to the engineers have been their conduct in regard to the choice of the stone, the depth of the excavations necessary for the construction of arch-culverts and bridges, the inutility of break waters, the condemnation of the cement which the contractors desired to use, the building of fences, crossings and sideways; and a mass of more or less contradictory evidence is fyled in this case to prove how, in such cases, testimonial evidence can vary. On the one hand, we have seen the contractors with their friends and bondsmen supplying on these points testimony diametrically opposed to that of the engineers. Against the contractors, it may be said and believed that the immense interest they had in the final success of their case may have prejudiced and influenced them, while against the engineers it may be urged that they may have been influenced by the *esprit de corps* and the fear of being exposed to censure by their superiors. All things being equal, I must place more confidence in the testimony of educated men, having at heart the honor of their profession and, strictly speaking, no pecuniary interest at stake, than in that of the contractors and of their securities, however honorable these persons may be, for the most of them are interested, and it is well known that interest blinds the most honest and the most truthful.

"19. As regards the choice of the stone in the quarries, the depth of the excavations required for the masonry works of bridges and arch-culverts, the inutility of breakwaters, and the condemnation of the cement which the contractors desired to use, I must in preference believe the man of art, the engineer, whose noble profession has placed him in a position better to appreciate the requirements of the execution of such works

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as to the durability and security of the road. Now what do these engineers say? They say that all the complaints of the contractors on these heads are groundless, and, according to me, the engineers have completely justified their opinion. Moreover, the 2nd clause of the contract is there to remind us that the judgment of the commissioners and engineer-in-chief, having approved of the execution of the works, is final. It appeared to me that the choice of the stone, the depth of the excavations, the quality of hydraulic cement, the necessity for the breakwaters, are matters of the highest importance, and are subject to the exclusive control of the engineers in charge of the different sections, acting under the instructions of the chief engineer: any deviation from their instructions might be fatal to the safety of the road, give rise to accidents, considerably increase the expense of repairs and occasion injurious delays to traffic.

"20. I understand that an engineer, rather rough, relying on his superior position, would not easily condescend to a discussion in order to convince a contractor of the necessity of such or such a work mentioned in the bill of works by the engineer-in-chief; on the contrary, he would give his orders in a peremptory manner, without appeal and almost in military style; hence, most probably, arose in the minds of the contractors, the idea that Mr. Smith wished to ruin them. I cannot deny that this man was overbearing and imperious in ordering even the most ordinary work, but there is a great distance between this and the guilty and well determined desire imputed to him of ruining poor contractors, and all because they were French-Canadians. There is no doubt that Mr. Smith was very hard towards the contractors as regards the building of the fences, cross-roads and avenues to the line. However, these fences, cross-roads and avenues were

not beyond the specifications of the contract, since neither the engineer-in-chief nor the commissioners listened with favor to the complaints of the contractors on these points, but declared that none of the works done were in excess of the specifications, and that, on the contrary, there were culverts the backing of which was built of stone of a quality inferior to that mentioned in the specifications. It is true that on some other sections of the Intercolonial section-engineers tolerated things which Mr. Smith and his subordinates would not accept, as regards fences, cross-roads and avenues of the line; this excess of liberality may have been justified by extrinsic circumstances; they may have been blamed. Therefore it may be said that Mr. Smith had not to take for his guidance what was done elsewhere, but that having to superintend the execution of a written contract, for which he was responsible to his superiors, he was justifiable in having it executed to the letter.

"21. The contractors have laid great stress on the fact that in consequence of their complaints to the Commissioners one Mr. Schrieber was appointed to enquire into them, and that this gentleman, after visiting the line, made a report, in consequence of which an Order in Council was passed to increase the schedule of prices of certain works and an additional sum of $20,000 above the preceding estimates was paid to the contractors, who inferred from that that Mr. Schrieber had decided in their favor. But they did not then see Mr. Schrieber's report, and it was only lately, after the publication of the printed correspondence, that they discovered their error, and that Mr Schrieber explains the cause of the disappointment of the contractors with regard to the difference between the outlay they incurred and the monthly estimates to which they were entitled.

Here is an extract from Mr. Schrieber's report, which

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is to be found at page 110 of the printed correspondence, dated the 11th March, 1871:—

"The contractors appear to be willing to do what "they can; but I fear unless they employ a thoroughly "experienced agent to manage the details for them, and "take general charge, they will plunge themselves into "difficulty. The work in the quarries, it is only too "transparent, is being carried on at an extravagant "cost, many men who are cutting stone evidently "having never before handled a tool, whereas others "whom I know to be good for stone cutters are em-"ployed upon granite and *vice versâ*. Besides this, there "are other irregularities, all tending to enhance the "cost of the work. This certainly is not an indication "of sound economical management. The certificates "of the cost of stone cutting and building masonry "upon these sections hereto attached are rather start-"ling documents and tend to explain in some measure "how it is the expenditure is so far in excess of the "engineers' monthly certificates. Unless all this is "changed I fear it would be vain to hope for the con-"tracts being carried through satisfactorily. There is "no margin in the price to allow for this management. "It is only by the most stringent economy the work "could be carried out. The contractors by stating they "can complete the work in time expose their want of "knowledge of such works, and, I think, lay themselves "open to the charge of want of experience in such "works. I, however, believe them to be thoroughly "honest in their intentions and ready to do all in their "power to complete the contracts; but, I repeat, they "need to employ a thoroughly competent honest man "as agent; one who is prepared to devote his whole "time and attention to their interest and conduct the "work with economy. It is a large piece of work, "requiring a man of considerable capacity to manage

"it."

The same opinions are again expressed by Mr. Schrieber in his letter of the 23rd of March, 1871, No. 255 of the printed correspondence, where he foresees that the contractors having neglected their works and masonry, will soon be embarrassed and that years must still elapse before they can complete their contracts.

"22. As can be seen, this report explains to a great extent the losses suffered and the expenses incurred by the contractors during the short period of six months, dating from the commencement of the works. If this report was not immediately communicated to the contractors, I say that it was a very regrettable omission; but it is hardly credible that the Commissioners did not do so. However, we see that after this report the contractors received pretty considerable sums without the formality of the certificate of the chief engineer, and these sums were over and above the monthly estimates.

"23. The contractors have also reproached the engineers with having compelled them three successive times to lay deeper foundations for a considerable and costly structure destined to support an immense weight. They make this reproach as if the engineer charged with the superintendence of the building of that structure could have at first sight finally determined the necessary depth. Common sense teaches that it is only by degrees and by feeling his way that the engineer can arrive at a degree of certainty with regard to the sufficiency of the depth of the foundations. I even say that if he had at first been mistaken, and believed that he had found a sufficient foundation and ordered the building of the structure on such foundation, he had a right to set his first decision aside, order the works done to be removed and the contractors to increase the depth. The stipulations of the contract justify this view and also justify the engineers. I may

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even say that the engineers were obliged to act in this manner if they were convinced that the depth was not sufficient. I find nothing in the evidence to induce me to say that the engineers acted in bad faith in this case. As professional men and as engineers, they had a right to act in this way with regard to such important structures. I say the same with regard to breakwaters, the building of which at some places, is by some of the witnesses considered as to be perfectly useless, and as putting the contractors to very great expense.

"24. With regard to the cement which the contractors desired to use for their works, a long, very contradictory, and for the court, a tolerably embarrassing investigation took place. On several works, the contractors were obliged to use a great quantity of hydraulic cement, an article which fills an important place in the construction of solid foundations destined to bear an immense weight. On its good or bad quality depends the security of those structures. Section 37 of the stipulations of the contract requires that this cement shall be "fresh ground, of the best brand, and must be "delivered on the ground and kept, till used, in good "order. Before being used, satisfactory proof must be "afforded the engineer of its hydraulic properties, as "no inferior cement will be allowed." The contractors submitted to all these conditions, and according to the contracts, the opinion of the engineers was to settle all difficulties between the contractors and the government with regard to the quality of the cement and to its use. Notwithstanding the conflict of evidence, I do not see that the engineers have in this regard committed any evident injustice. On one occasion the order, or rather the advice, given by the engineer to throw into the water a great number of barrels of this cement, appeared to me rather arbitrary

till I had heard the explanations of the defendant, tending to show that after trying several barrels of this cement the engineers were convinced of its bad quality and that notwithstanding the order not to use it, the contractors persisted in doing so, and that in consequence of this, in order to avoid any difficulty, it was suggested to them to throw away this cement, which was already old, having been brought to the spot by the former contractors, and that as an easy way to do it, these barrels of cement were thrown into the water by the contractors themselves. Let us remark that the cement so thrown into the water was not the property of the petitioners, but the property of their predecessors, who had given up their contract. In fact this cement might also be considered as the property of the government according to the stipulations of the contract.

The contractors desired to use this cement and purchase it at a cheap price and the government would have sold it, had it not been dangerous to use it. Strictly speaking, the petitioners did of their own accord follow the advice or order to throw away this cement. Nothing obliged them to cast it into the water; they could have put it outside of the line of neutral ground, with the right of using it later on, one way or another. By destroying it as they did, they justified the opinion which the engineers had formed of its bad quality It is proved that it is better not to use hydraulic cement at all than to use such cement of bad quality.

25 The petitioners have not forgotten to allege that they did extra works; but, besides the fact that I do not consider these extras as proved, there is against them on this point an insuperable obstacle found in sections 4 and 9 of the contract, which declare expressly that no extra shall be admitted in their favor, unless it was demanded in writing and certified and approved by

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the chief engineer: and there is no such certificate.

Legally they cannot claim these extras. They have expressly and unconditionally renounced them. How could I come to their rescue without placing myself in direct opposition to the law? But if the petitioners have not forgotten to put forward and claim extras, they have omitted to acknowledge the considerable reduction made in their works by the engineers, such as the suppression of culverts, the substitution of iron tubes for culverts, of wood for iron in the great masses of masonry, and it has been proved that these charges and suppressions were a cause of considerable gain to the contractors, who doubtless forgot these favorable circumstances.

The petitioners also forget to acknowledge that the few changes which they made in the height of the grades were compensated by the rock excavations which they would have been obliged to make to maintain the level of the road and that this apparent increase was evidently all to their advantage. Moreover the contract declares that to have a right to claim these extras, the petitioners must obtain, for this end, the certificate of the chief engineer; the engineer would not grant this certificate and the conclusion is that the petitioners had no right to such extras, at least legally speaking.

"26. According to the evidence given by Mr. Fleming, engineer-in-chief, the only cases in which the works required of the petitioners exceeded the quantities determined are those of the bridges on the Miramichi and Restigouche rivers; he says that every where else the quantities determined and required to be executed really exceeded what was done, and this was a great benefit for the contractors, as Mr. Fleming says page 540 of his evidence: "We wanted to err on the right side, in favor of the contractors."

The petitioners complained of having been delayed in their works in consequence of the engineers not supplying them with the plans of the various constructions. But Mr. Fleming and all the other engineers state that the general plans which the petitioners had to consult, and were at liberty to consult every day, were sufficient for the generality of cases, and that the plans only of structures requiring strong and deep foundations did not exist, and that in fact these latter plans should be prepared only after the excavations have been completed and the nature of the structure well determined, and that the engineer is satisfied when the contractors have materials in sufficient quantity to commence the structure. This is strictly enforced and is well established by several engineers, and it appears to me that there is much in this pretention of the engineers.

"27. I now come to the serious reproaches made by the petitioners against Mr. Smith, of having, in a conversation with Captain Armstrong and in another with Mr. John Home, behaved himself in a most singular manner, in a way calculated to throw much discredit on his own honor and honesty. According to Captain Armstrong, Mr. Smith told him in a conversation regarding the small amount of the monthly payments received by the contractors: "They got all they deserved or were entitled to." Upon Mr. Armstrong remarking to him (Smith) that it was very hard for the contractors to receive barely enough to pay their men, Smith replied: "I sent in a contract for this same section for my friends "in England, and if they had got it, they would have "had plenty of funds to carry on the business without "drawing on the government until it was finished." And Mr. Smith is said to have added: "These d——d "little Canadians are the cause of my not getting it" (the contract). Mr. Armstrong says that Mr. Smith did

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not mention to him the names of his friends. Mr. Armstrong asked him besides: "How could you have acted as engineer?" Smith replied: "I should have "resigned my situation and gone on with the works."

According to Mr. John Home, Mr. Smith addressed the following words to him, with regard to the advice he (Smith) gave to the petitioners of employing one Davey as superintendent: "If Davey is here, it is just "as easy for him to save you a half million dollars as 'anything at all and without any disparagement to the "government. The government will not have anything "to find fault with the road and you will get quit of the "Frenchmen that don't know anything at all about "building the road." He said "if they (Berlinguet) "want to get the credit of the work, let them go to salt "water and they would have the credit of the work, but "let them keep their tongue quiet. And he said: "I "will not sell myself to the Frenchmen."

It is only just to say that Mr. Smith denied energetically having used such words as these. It is also certain, as far as I can recollect the evidence, that no tender for these sections was sent out from England. But the accusation is serious, and it appears singular to me that Mr. Smith should have thus, deliberately, expressed such opinions, especially in presence of witnesses who were devoted friends of the contractors and employed by them.

"28. Moreover, he must have foreseen that his superiors would ask him for an explanation of his conduct and of his giving up the position of district engineer to take a contract. To suppose that this ignominious conduct on the part of Mr. Smith is possible, we must believe that he would have given up a good reputation of thirty years' standing and a lucrative situation in order to run the risk of certain ruin by such contracts. Such conduct can hardly be reconciled

with the highly honorable character which the engineers, Messrs Fleming, Brydges, Grant and other witnesses have given him. "His honesty is beyond doubt," said Mr. Fleming. The idea that an engineer could gain half a million dollars out of such an enterprise seems to me rather exaggerated. Mr. Smith, it is true, may be greatly interested in denying such accusations which affect his moral character if they are well founded. On the other hand, the circumstances which I had occasion to observe in this case led me to believe that Mr. Armstrong, who is a very old man, and Mr. Home may have been completely mistaken as to the bearing of the above mentioned conversations. The repeated reading of their evidence with attention convinces me that there was misunderstanding, although the honorable character of the witnesses is acknowledged.

"29. But supposing these conversations were reported verbatim by the witnesses, what do they prove? Undoubtedly they prove that Smith had no sympathy for the contractors; that the contractors had neither the experience nor the aptitude for carrying out this enterprise; that they ruined themselves on it; that an intelligent manager like Mr. Davey could alone have rescued them from their difficulty.

In spite of his ill-will, Mr. Smith gave a good advice to the contractors, that of employing Mr. Davey as superintendent and as the only one capable of saving them from shipwreck. Such was the opinion of Mr. Schrieber, which we have read a moment ago, and of more than twenty witnesses heard in the case There is a wide difference between lack of sympathy and a fixed determination to ruin the contractors. The evidence proves that Mr. Berlinguet and Mr. Smith were on the best and most intimate terms; they travelled together, met to spend the night together, exchanged

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courtesies, joked and laughed pretty frequently, it is true sometimes at Mr. Berlinguet's expense in regard to his capacity and experience in building railways, which Mr. Smith denied even in the presence of Mr. Berlinguet Mr. Bertrand, Mr. Berlinguet's partner, used to join in those jokes, saying that he, Bertrand built churches and that Berlinguet built the occupants thereof, that is to say the statues of saints which were to adorn the churches.

"30. The long correspondence between Mr. Smith and the chief engineer, Mr. Fleming, and other engineers, shows a desire to favor the contractors, instead of an intention of ruining them. I say the same of Mr Bell, who, in 1872, succeeded Mr. Smith as district engineer. I sincerely believe that the accusations of ill-will for the contractors on the part of Mr. Smith is groundless, except, as I have already remarked, that he may have been prejudiced against Mr. Berlinguet on account of his (Berlinguet's) absolute want of experience and of the conviction he had of Mr. Berlinguet's inability to carry out his contract.

The proof convinces me that Mr. Smith and his colleagues conceded many things to the contractors where they could do so without injuring the road, and that they exacted "the pound of flesh," as one of the witnesses said, that is the full and integral execution of the works, where they thought this full execution necessary. Moreover, they had to superintend the execution of a detailed contract; they were under a chief and a superintendent in the person of Mr. Fleming, chief engineer, and under as many masters as there were commissioners, who were four in number. All these high and learned authorities approved the conduct of Mr. Smith, and I would not dare to say that they acted wrongly, legally speaking.

"31 The engineers have been reproached with having

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obliged the contractors, without necessity and at considerable cost, to macadamise the crossings and sideways of the road. This is denied by the engineers in the most positive manner. The engineer-in-chief did not blame this use of broken stone for crossings if, at all events, it is true that the contractors were compelled to macadamize those crossings, and from this I infer: either that the engineers did not require these roads to be macadamised, or that it was rendered necessary, on account of the nature of the ground, for the solidity of the road, and in this case there might be no recourse against the government, unless the work was certified by the chief engineer.

The complaints which the contractors thought proper to prefer to the commissioners have all been considered and decided by the latter, according to the evidence given by Mr. Brydges, and redress was given when the complaints were well founded. Properly speaking, it was only about the month of March, 1872, that the contractors complained with bitterness of Mr. Smith, and it was in consequence of these complaints that the commissioners thought fit to recall Mr. Smith and replace him by Mr. Bell.

Having succeeded according to their wishes in obtaining the removal of Mr. Smith as district engineer, the contractors naturally inferred from this that the commissioners were disposed to render them justice, that their complaints were well founded, and that under an engineer more favorably disposed toward them their position and finances would be much improved in the form of monthly estimates. Let us remark, with regard to the recall of Mr. Smith, that on leaving he was promoted to a higher position on the Pacific Railway, with an increase of salary, a position which was inferior only to that of Mr. Fleming, the chief engineer.

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Therefore, if this was intended to cast blame on Mr. Smith and to punish him for his conduct towards the petitioners, I have reason to believe that such a punishment was not very hard upon him. The Hon. Mr. Langevin said he did not understand from the Commissioners that they had any reproach to make against him.

"3?. Mr. Smith having been replaced the contractors continued their works with new vigor. However, three months after, that is on the 26th of June, 1872, they addressed to the Commissioners a long memorial, which is found under No. 607 of printed documents, in which they describe in lugubrious language their financial position—I might almost say their bankruptcy and incapacity of continuing their works without a grant or increase of their monthly payments These must have been heard, for over and above their monthly estimates they received for the months of August and September, 1872, on account of sections 3 and 6, a sum of $65,000.

There is under No. 640 of printed correspondence a letter from the bondsmen of the contractors, Messrs. Glover & Fry and Dunn & Home, in which they complain of the feebleness of their estimates as compared to the quantity of works which they pretended to have considerably increased. Nevertheless, Mr. Smith had left the road over three months, and in order to give an appearance of reason to the contractors regarding this new deficit, we would have to suppose that all the engineers conspired against the contractors in making false returns and diminishing their monthly estimates. In consequence of this letter and of the complaints of the petitioners, an engineer (Mr. Fitzgerald) employed by the government, after visiting the works made, on the 17th of August, 1872, a report intended to establish the quantities of work done. According to this report,

in or about August, 1872, there remained only about 34 per cent. of the work to be done, and deducting in favor of the contractors the value of their materials, the work done could be estimated at 75 per cent The perusal of the evidence of Mr. Fitzgerald did not at all convince me of the exactness of his calculations. He made this report at the pressing solicitation of the government, who desired to come to the assistance of the contractors, and the consequence of this report was, 1st. An increase of his salary by the government; 2nd. The payment of a sum of $400 or $500 made to him by the contractors for his report.

"33. This engineer is thus paid not only by government who employed him, but also by the contractors, who were not obliged to pay him. There seems to be something irregular in this I think that by overhauling the accounts to date of August, 1872, and by comparing the receipts of the contractors with their estimates, it would be seen that even if there remained only 25 per cent. of the works to be executed, the contractors had already received over and above their monthly estimates. However the contractors, upon the calculations of Mr. Fitzgerald, demanded, on the 4th of September, 1872, a grant of $150,000. The government allowed them only $34,545 for section No. 3, $19,342 for section No. 6 and $12,689 for sections 9 and 10 which are not in question in the present case. These sums were granted upon the report of Mr. Fitzgerald, and despite of the fact that the government might and should have kept back $137,000 at least for the 15 per cent. mentioned in the contract. It is then impossible to admit that the contractors were ill-treated by the commissioners or by the government. On the contrary, they had all the sympathies of both, if I am to judge: 1o. By documents 97 and 98 to which I will refer in a moment and 2o. by the $160,000, which

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were paid to the contractors in 1871 and 1872 without the certificate of the chief engineer, Mr. Fleming, which was strictly required in virtue of the Intercolonial Railway Act.

"34. The petitioners have made an infinity of complaints against the engineers. It would be tiresome to enumerate them; there would be no end to the task. I have carefully examined these complaints, and I find that with very few exceptions, the proof of the petitioners was refuted by the proof made on the part of Her Majesty. But I state it with regret, the contract constitutes the law, the contractors submitted to all its clauses, they renounced every claim for extras, and all damages, they agreed to submit without appeal to all decisions of the commissioners and of the chief engineer, and it is my imperative duty not to make new contracts for the petitioners, but to see that those are executed which they signed, however severe their terms may be. For them as well as for me, *dura lex, sed lex*.

"35. I must not overlook one of the greatest grievances put forward by the petitioners, that is the reproach which they make to the government of Her Majesty with regard to the insufficiency of the quantities and the nature of the works to be executed. This grievance may be partially founded in fact, but it has no foundation in law. For if I am to believe the testimony of Mr. Fleming, the quantities mentioned in the bill of works were liberally calculated and this was in the interest of contractors who were to have the benefit of the excess, and it was proved to my satisfaction that with the exception of the works at the Ristigouche and Miramichi rivers, where the works actually executed exceeded the quantities given, which was to the great benefit of the contractors. At law, the contractors cannot demand the value of this excess; they in advance

renounced all claims of such a nature and nowhere in the contracts and stipulations do I find on the part of the commissioners any stipulation which would warrant such a claim; on the contrary, we find a formal denial of the right to any such extras.

I interpret these contracts as having to be executed for a block sum by the contractors, who were to benefit when the quantities should exceed the work and suffer from excess of the work without right to indemnify, should the work exceed the quantities. In order to justify this demand for indemnity on the part of the contractors, it would be necessary to find in the contract an express guarantee of the quantities. The plans, bill of works and specifications are there to attest that the government could and should guarantee no quantities, &c., &c.; they mention that the calculations are merely approximative and without guarantee. All this should have at first put the contractors on their guard. If they were mistaken they were willingly mistaken, and to them we can apply the maxim: *Volenti non fit injuria.*

"36 They must therefore blame themselves, and themselves alone, for the consequence arising from a surplus of quantities of the works to be executed, if such surplus did really exist, which I do not believe. Admitting, for a moment, that the contractors had to execute much more work than the bill of works mentioned and that they suffered damages on account of this, I must declare that I do not find any basis to estimate such damages. On this point the proof is vague and even of no value whatever. Supposing, moreover, that the proof was clear, all indemnity should be refused to the contractors in consequence of the clauses so onerous and so strict of the contract by which they (the contractors) renounced all damages, all extras, and even the balance due to them, if they gave up their contract or did not

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complete it in the time prescribed. These stipulations are excessively severe; they are the law governing the parties thereto, who submitted to them with their eyes open. *Dura lex, sed lex*, as I said above. Nevertheless, in the course of my deliberations the following question often presented itself to me:—

"37. "How is it that the petitioners have suffered so great a loss as they tell us they have experienced by the execution of their contract?" and I came to the conclusion that the record of the case explains this result:

I. The petitioners had no practical experience to guide them in their tenders to obtain the contracts, and subsequently in the execution of the works. One of the petitioners is a respectable lady having not the slightest knowledge of the building of a railway; the other, Mr. F. X. Berlinguet, is undoubtedly a man of great intelligence, of physical and mental activity, altogether exceptional, indefatigable, but without theoretical or practical experience of the construction of works so much out of his ordinary line.

"38. II. Before tendering Mr. Berlinguet had never been on the line, on the spot where the railway which he tendered was to be built, and had he visited the line he would have acquired only superficial knowledge of the works, as the road was covered with snow and the time for sending in his tender was comparatively very short. Mr. Fleming, page 9 D of his evidence, clearly explains that the shortness of the time prescribed for sending in the tenders deprived the parties who made them of any hope of reasonable calculations, and as to the possibility of completing the works in the time prescribed by the contracts, he says: "I think it ought "not to have been attempted. I am not prepared to "say it was impossible to do it, but it would have "required a lavish expenditure." Wherefore it was imprudent on the part of Mr. Berlinguet to have under-

taken such contracts on information so very uncertain. He, however, ran the risk, and the consequence is probably the present contestation.

"39. III. The petitioners themselves have taken the trouble to throw light on the causes of their want of success in the execution of their contract through their letter dated the 26th June, 1872 (Nos. 605, 607 of Printed Correspondence), which letter they addressed to the commissioners, and in which they attributed their losses: 1st. To an increase of wages, which in some cases amounted to 50 per cent., and this in consequence of the great demand for workmen in the United States and in Canada, which is an important item when we consider that the contractors had sometimes to employ and pay 2,500 men. 2nd. They attribute their losses, besides this increase of wages, to the inferiority of local workmen, who were inefficient and not accustomed to such works; they represent that these workmen left their work when the time for farming came round, and this at the time when the petitioners were in the greatest need of them, thereby increasing the expenditure by obliging the contractors to keep in continual employ and pay a larger number of workmen. 3rd. They attribute their losses to the fact that not finding skilful workmen in the country, they were obliged to import them at a great cost from without the province, and to pay for their passage hither; and that in many cases these workmen, whose passages they had paid, refused to work after their arrival.

IV. They attribute their losses to great expenditure incurred on account of shed building and other expenditures on which they were obliged to pay interest.

V. They attribute their great expenditure to the difficulty they had in finding quarries of good stone, for the great depth of the excavations required to lay

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the foundations of heavy structures.

VI. They say that they incurred a heavy loss in consequence of the failure of the crop in 1870, on the purchase of hay and grain required for their horses, which obliged them to import these articles from distances varying from 300 to 500 miles.

VII. They say that on account of the distance of the locality and want of easy communications, they were obliged to lay in a stock of provisions sometimes 3 or 8 months in advance, which involved a great loss of interest.

VIII. In this letter they acknowledge that having undertaken the contract during the winter season, they had no opportunity of examining the locality. Mr. Brydges, a man of great practical experience, says: "The works were carried on extravagantly and that "necessarily would account to a large extent for their "getting behind" *Vide* pages 201, 202 of his evidence. Other witnesses speak in plain words of the indolence, laziness and negligence of the foremen employed by the contractors. Walking bosses had to overlook tracts too extensive to enable them to do so efficiently, although they were competent men.

"40. We therefore have the important and irrefutable acknowledgment on the part of the petitioners that they suffered heavy losses for the reasons mentioned above and which might alone account for their want of success. It is true that the petitioners also impute their losses to the engineers and masonry inspectors, who, according to the pretentions of the former, exacted first class masonry from the contractors who were only bound to supply second class masonry. Well, we have seen that the chief engineer, the commissioners, a district and division engineers positively denied these ascertions, and I believe, gave sufficient explanation on this point. In virtue of his contract, Mr. Berlinguet was,

under heavy penalties, bound to complete his works and deliver them on the 1st of July, 1871. It is proved by Mr. Fleming that it was impossible to do so within the time prescribed without incurring a lavish expenditure. By the way, let us remark that Mr. Fleming had prepared for the information of the government, as his duty required him to do, an estimate of the probable minimum and maximum cost of 3 and 6. The minimum cost was $530,000 for section No. 3 and $493,666 for section No. 6, making a total of $1,023,666, and notwithstanding this, the tenders of the petitioners for these two sections amounted in the aggregate only to $819,390, so that the amount of their tenders was by $104,000 lower than the sum for which the chief engineer believed that the work could be executed, and we also see that the maximum cost was estimated at $1,320,000. I think these figures show the imprudence of the petitioners and account to a large extent for their failure. The petitioners, having no experience, it is true, but desiring to complete their contracts, incurred extraordinary expense and this also would account for their stoppage.

It appears to me that Mr. Berlinguet showed an unlimited want of foresight or rather very great ignorance of the cost and difficulty attending the building of a railway.

"41. I notice in document 606 the fact that the contractors relied much on the good will and sympathy of the government, and I believe that there is evident proof that neither the one nor the other was withheld from them, for, as we have already seen, upon the report of Mr. Schrieber, which was not at all favorable to the contractors, they succeeded in obtaining a sum of $160,400 without the certificate of the engineer, which was strictly required by the Intercolonial Railway Act. However Mr. Brydges and Mr. Fleming

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state that at the time of the abandonment of their contracts, the contractors had already received much more than the value of the works which they had executed, and this, notwithstanding the fact of a reduction of $178,000 in their favor, in all the works on sections 3 and 6, less an increase, however, on some bridges and culverts at Miramich and Restigouche rivers.

Now it is time to enquire to what extent and in what manner the petitioners have proved the amount of their expenditure to the date of the abandonment of their contracts. According to statements produced with their petition of right, the contractors show an expenditure for works on section No. 3 of a sum of $609,482.51, and on section No. 6 $596,022.63, making an aggregate of $1,205,565.14 expended, over and above $88,133.11 which they claim as due to them for interest on the difference between the sums which they monthly received and those which they would have had a right to get if the monthly estimates had been sufficient. As the contracts taken together were to have brought into the petitioners only $919,300. 23, and as it has cost the government the sum of $269,-082.60 to complete these contracts, it becomes interesting to know how the petitioners have proved their actual outlay.

"42. I must say that regarding the proof from a legal point of view, and without taking into consideration the respectability of the persons examined as witnesses to prove the correctness of these expenditures, the proof of these accounts would be insufficient to warrant me in accepting them as establishing the enormous amounts to which they figure up. This proof is vague and too general; the accounts for the time of workmen employed on the road are proved in block, if I may say so, without the precision required in such cases, particularly with regard to such a large amount. It appears

to me that the petitioners should have brought before the court the persons who were in direct contact with the workmen in order to verify the correctness of the accounts and of the payments. The foreman should have been examined. Mr. Blumhart and Mr. Turner could not alone complete the proof. Both of them had to rely too much on the reports of sub-officers and other interested parties who, without any inclination to be dishonest, may have said in presence of Messrs. Blumhart and Turner, what they would not have dared to testify under oath before a court of justice. In a word, the proof is insufficient; legally speaking, it lacks several important connections to deserve such a degree of credibility as the law requires

"43. The question here presents itself as to whether the petitioners might not have a right against the Government of Her Majesty in consequence of the numerous promises which, they say, were made to them by the Hon. Mr. Langevin, Minister of Public Works for the Dominion of Canada, in 1871 and 1872. The contractors and their bondsmen, their endorsers and some of their friends, swore before me that in several interviews with Mr. Langevin with regard to their financial embarrassment and their intention of giving up the contracts, Mr. Langevin "had told them not to give up "their contracts; that the government did not intend "to build the Intercolonial at the expense of private "parties, and that if they carried on the contract to "completion they would be eventually indemnified for "their losses." Mr. Ross, the advancer to the contractors, swore that "Mr. Langevin told him that he could "in all security continue his advances and that he would "be refunded." Messrs Dunn and Home, bondsmen for the contractors, swore the same thing. Mr. L. H. Huot swore that Mr. Langevin told him the same thing, viz.: "To tell the contractors not to give up their con-

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"tracts, that sooner or later their claims would be set-"tled one way or the other by government" Mr. Langevin, examined as witness, swore the contrary and merely admitted to have told them that "it was their "interest to complete their contracts, which would have "resulted in causing no delay in the completion of the "road and would better the chances of the contractors "to have their claims favorably considered and settled "by government." He denies having used the words cited by the above witnesses. He was right; he would have gravely compromised himself as a member of the government and a public man, and he says that he could not bind the government. We therefore see the immense difference existing between the meaning of Mr. Langevin's expressions and that of the expressions of the above named witnesses. In this case, as in all the cases where the witness is interested, his mind may be influenced by interest and induce him to attach to conversations a meaning far different from that which they were intended to bear by him who uttered them.

"44. But this question is quite useless at present. Mr. Langevin could not thus pledge the government, he formally declared it, and I confess that one would vainly seek in the Intercolonial Railway Act for legal means to indemnify the petitioners, although their claims might be equitable. This contradiction between the evidence of Mr. Langevin and that of the petitioners, of their advancers and bondsmen, clearly establishes what I said a moment ago about the uncertainty of the testimony of men. Here is a number of educated persons, deservedly enjoying a high reputation for respectability, swearing in a manner diametrically opposed to each other as to the result of their conversations. This can also explain the contradictions which I remark in this case with regard to what the engineer, Mr. Marcus Smith, is alleged to have said to Messrs. Berlinguet

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Home, Armstrong and others. We must accept with a certain degree of caution the evidence of an interested party.

"45. There is one point in the case on which the petitioners should succeed: It is that concerning the manner in which the engineers made their monthly estimates during the first four months following the beginning of the works, in 1870, as established by documents 97 and 98 produced with the official correspondence concerning the construction of the Intercolonial. According to this correspondence and the order in council of the 20th September, 1870, which settled the question, it would appear that the engineers committed errors resulting in a loss to the contractors, for interest, of $5,850.90 or thereabouts. In order to appreciate correctly the intention of the commissioners in their communication to the Privy Council (document 97) and the meaning and signification of the report of the Privy Council, I cite them verbatim, and I believe, although the chief engineer was not of the opinion of the Privy Council and of the commissioners on this point, that the engineers made grave errors in this occasion and that this sum of $5,850.90 should be credited to the petitioners in the final result of the case.

I must say that if the contractors suffered damages to this amount, which I allow them, they were well indemnified, if, as I have reason to believe, the report which I just read was followed to the letter. I also believe that in law and equity they should be credited with another sum of $27,023, representing the value of materials, (plant, &c.,) which they transferred to government when they gave up their contract in May, 1873. Deducting these sums from that of $159,988 which government paid to the contractors over and above their contract price, and as I see nothing in the proof to warrant me in believing that government deducted

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these $32,872.23 in making up that balance of $159,882, it follows that the real balance due to Her Majesty would be $127,110.

"46. If Her Majesty, in her answer to the petition of right, had demanded the application and the benefit of the section 3 of the contracts which stipulates a penalty of $2,000 per week, payable by the contractors from the 1st of July, 1871, to the day on which they gave up their contracts, I should condemn the petitioners to pay this penalty to Her Majesty under the form of liquidated damages, which penalty would amount to $216,000 for the 108 weeks during which the contractors were in default."

"But Her Majesty has not, by her written factum, demanded the execution of so severe a stipulation, but only a condemnation for $150,982.57 as a surplus paid by the commissioners to the contractors on their contracts and not at all under the form of penalty or damages. I think I would be adjudging *ultra petita* if I inflicted the penalty under the form of liquidated damages."

"On the other hand, if Her Majesty also demanded the execution of this part of the section of the contracts which stipulates that in case of giving up their contracts, the contractors would forfeit all right to any sum, percentage, or other moneys to which they would be entitled in virtue of these contracts, I should deduct these $32,872.23 which I am disposed to award them, and in this case I would give judgment in favor of Her Majesty for the sum of $159,982.54 with costs, in any event, against the petitioners."

"I shall wait for the advice of the Attorney General of Her Majesty for the dominion of Canada and for this purpose this case is adjourned to the 24th of October instant."

The formal judgment was as follows:—

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"The twenty-fourth day of October, in the year of our Lord one thousand eight hundred and seventy-seven."

"This court having heard the evidence and the pleadings of parties by their counsel, doth declare."

"That the said F. Xavier Berlinguet and Marie Charlotte Mailloux are entitled to the sum of five thousand eight hundred and fifty dollars and ninety cents, ($5,850.90) for interest upon and for the forbearance of divers large sums of money due and payable by Her Majesty's government to them the suppliants, and further to the sum of twenty-seven thousand twenty-two dollars and thirty-five cents ($27,022.35), for the value of certain materials to them belonging, and by them left to Her Majesty's government."

"But inasmuch as by section three of the contracts, the suppliants, having abandoned their said contracts, forfeit all right and claim to these two amounts, to wit, the total sum of thirty-two thousand eight hundred and seventy-three dollars and twenty-five cents, ($32,873.25) the said sum of thirty-two thousand eight hundred and seventy-three dollars and twenty-five cents is hereby declared forfeited;"

"And this court doth further order and adjudge that the said suppliants do pay to Her Majesty's Government of the Dominion of Canada the sum of one hundred and fifty-nine thousand, nine hundred and eighty-two dollars and fifty-seven cents ($159,982.57), as money overpaid to the suppliants by Her Majesty's government at the time of their abandoning their contracts;"

"And this court doth moreover order and adjudge that the said suppliants do pay to Her Majesty's government of the Dominion of Canada the costs of the present suit.

(Signed) NAPOLEON LEGENDRE,
Acting Registrar Court of Exchequer."

From this judgment the suppliants appealed to the Supreme Court of Canada, but no steps were taken by

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either parties to bring on the appeal until February, 1883, when an application was made to the full court on behalf of the appellants for an order directing the Registrar to set down for hearing the appeal the next session of the court.

Upon this application the following judgment was delivered by Strong J. on behalf of the court, on the 1st May, 1883, Sir W. J. Ritchie C.J. dissenting.

STRONG J.—This is an application for a direction to the Registrar to set down for hearing an appeal from a judgment of the Exchequer Court on a petition of right. This petition of right was a Quebec case and the judgment on it was pronounced at Quebec, where the cause was heard before Mr. Justice J. T. Taschereau on the 17th October, 1877. It has never to this day been drawn up or entered. At the time the judgment was pronounced, the exchequer rule No. 138, which requires that before an appeal can be taken from a judgment in the Exchequer Court, a motion for a new trial must be made to the judge who heard the cause and that the appeal must be from his decision on that motion, that is from the decision on the motion for a rule *nisi* if the judge refuses to grant the rule, or if he grants a rule *nisi*, from his decision on the application to make it absolute, did not apply to Quebec cases. On the 12th of February, 1878, exchequer rule No. 203 was passed, and by it rule 138 as well the rules immediately following, to 142 inclusive, were ordered and declared to be and to have been applicable to actions in which the cause of action shall have arisen in the Province of Quebec. On the 9th November, 1877, the deposit of $50 required by section 68 of the Supreme Court Act as security for costs was made with the Registrar.

On the 7th January, 1878, an application for a rule

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nisi to set aside the judgment was made to Mr. Justice Taschereau, who pronounced judgment refusing it on the 7th February following. Since then no step whatever has been taken in the cause, either as regards the appeal or otherwise, with the exception of some proceedings in the exchequer relating to a change of attorney by the suppliant and the taxation of costs between the suppliant's solicitor and his client, the transmission, pursuant to judge's order for the purpose of that taxation, of the papers to an acting Registrar of the court at Quebec, and the return of the same papers to Ottawa.

As I before stated the judgment was never drawn up or entered, and the Registrar has never set the appeal down for hearing according to the requirements of section 68. I am of opinion that the suppliant took every step it was obligatory on him to take to bring the appeal to a hearing. The deposit was made in due time. No subsequent deposit after the decision on the application for the rule was, in my view requisite, for I am of opinion that no *ex post facto* effect ought to be given to order 263, the power to make rules of procedure not authorizing the enactment of orders having a retrospective effect on proceedings already taken,—indeed I do not construe order 263 as intended to apply, so as to affect retroactively proceedings had in pending causes, but as applying to all future proceedings in pending Quebec causes. This being so, the question is whether the deposit for securing the costs having been made, as required by section 68 of the act, and the Registrar not having entered the judgment and not having set down the appeal to be heard as required by section 68, the suppliants appeal is now *ipso jure* out of court by the operation of rule 44 of the Supreme Court rules That rule provides that unless an appeal shall be brought on for hearing within one

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year after the security shall have been allowed, it shall be held to have been abandoned without any order to dismiss being required, unless the court or a judge shall otherwise order.

According to the procedure prescribed by section 68 it was impossible for the suppliant to take any step in the cause until the Registrar had set the appeal down to be heard, as required by said section 68. The next step to be taken by the suppliant according to that section was one, consequent on the setting down by the Registrar, and one which could not regularly be taken until the appeal had been set down; the words of the section, after providing for the deposit, being as follows:

> And thereupon the Registrar shall set the suit down for hearing before the Supreme Court on the first day of the next session, and the party appealing shall thereupon give to the party or parties affected by the appeal, or their respective attorneys, by whom such parties were represented in the Exchequer Court notice in writing that the case has been so set down to be heard in appeal as aforesaid.

Thus by the express words of the statute the notice was not to be given until after a certain step had been taken by the court or its officer.

In my opinion the suppliant is in strictness and of right entitled now to have this motion granted in order that he may proceed with his appeal; he is shown to be in no default, and he is within the equity of the rule that the act of the court can cause no prejudice.

It is true he might have made this motion earlier but I apprehend he is not to be prejudiced because he did not earlier invoke the aid of the court to enforce that which it was the statutory duty of the officer of the court to do of his own motion, immediately on receiving the payment of the deposit without any further application from the appellant.

The judgment in the Exchequer Court ought also at once to be entered on the judgment book in the Ex-

chequer Court—of course this can and must be done, *nunc pro tunc.*

Rule 156 of the Exchequer Court is very explicit as to this. That rule says that every judgment shall be entered by the proper officer in the book to be kept for the purpose. This entry is the record of the judgment and the entering of it is to be the act of the court or officer and not of the parties.

The entry is to be by the Registrar without waiting for any application from the parties, and if the party in whose favor the judgment is, requires an office copy it is to be delivered to him

I think the motion to set the appeal down to be heard at the next session of the court should be granted, but without costs, as the point of practice involved in the motion is a new one.

The appeal was argued in the Supreme Court of Canada by *Irvine* Q. C. and *Girouard* Q. C. for the appellants, and *Burbidge* Q. C and *A. Ferguson* for the respondents.

Sir W. J. RITCHIE C.J.—The appellants were contractors, by virtue of two contracts under seal, for the construction of sections of 3 and 6 of the Intercolonial Railway, with Her Majesty represented for that purpose by Commissioners appointed under 31 Vic., cap. 13.

In view of the provisions of this Act, 31 Vic., cap. 13, sections 16, 17 and 18, which are as follows:

16. The Commissioners shall build such railway by tender and contract after the plans and specifications therefor shall have been duly advertised, and they shall accept the tenders of such contractors as shall appear to them to be possessed of sufficient skill, experience and resources to carry on the work of such portions thereof as they shall contract for; provided always, that the Commissioners shall not be obliged to accept the lowest tender in case they should deem it for the public interest not to do so; provided also, that no contract under this section, involving an expense of ten thousand dol-

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lars or upwards, shall be concluded by the Commissioners until sanctioned by the Governor in Council.

17. The contracts to be so entered into shall be guarded by such securities and contain such provisions for retaining a proportion of the contract monies, to be held as a reserve fund for such periods of time, and on such conditions, as may appear to be necessary for the protection of the public, and for securing the due performance of the contract.

18. 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 hall have been approved by the Commissioners ;

and of 31 Vic., cap. 12, an Act respecting the public works of Canada, by section 7, of which it is enacted that :—

No deeds, contracts, documents or writings shall be deemed to be binding on the department, or shall be held to be acts of the said minister, unless signed and sealed by him or his deputy, and countersigned by the secretary ;

and by virtue of the express terms of the contract as indicated in sections 2, 3, 4, 6, 9, 11 and 12, copies of which I have annexed hereto (1), I think the learned

(1) They, the contractors, shall and will, well, truly and faithfully make. build, construct and complete that portion of the railway known as "section No. 6," and more particularly described as follows, to wit:

Extending from the easterly end of "section No. 3" (number three) of said railway, being near Dalhousie, to the westerly side of the Main Post-Road near the forty-eight mile post easterly from Jacquet River, the said "section No. 6" being twenty-one miles, or thereabouts in length and within the province of New Brunswick, and all the bridges, culverts and other works appurtenant thereto, to the entire satisfaction of the commissioners, and according to the plans and specification thereof, signed by the commissioners and the contractors, the plans whereof so signed are deposited in the office of the commissioners in the city of Ottawa, and the specification whereof so signed is hereunto annexed and marked "schedule A," which specification is to be construed and read as part thereof, and as if embodied in and forming part of this contract. But nothing herein contained shall be construed to require the contractors to provide the right of way for the construction of railway.

(2) The contractors shall perform and execute all the works required

judge who tried this case could not have arrived at any other conclusion than he did; and therefore I think his

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to be performed by this contract and the said specification, in a good, faithful, substantial and workmanlike manner, and in strict accordance with the plans and specifications thereof, and with such instructions as may be from time to time given by the engineer, and shall be under the direction and constant supervision of such district, division and assistant engineers and inspectors as may be appointed. Should any work, material, or thing of any description whatsoever, be ommitted from the said specification or the contract, which, in the opinion of the engineer, is necessary or expedient to be executed or furnished, the contractors shall, notwithstanding such omission, upon receiving written directions to that effect from the engineer, perform and furnish the same. All the works are to be executed and materials supplied, to the entire satisfaction of commissioners and engineer; and the commissioners shall be the sole judges of the work and material, and their decision on all questions in dispute with regard to the works or materials, or as to the meaning or interpretation of the specification or the plans, or upon points not provided for, or not sufficiently explained in the plans or specifications, is to be final and binding on all parties.

3. The contractors shall commence the works embraced in this contract within thirty days from and after the date hereof, and shall diligently and continuously prosecute and continue the same, and the same respectively and every part thereof shall be fully and entirely completed in every particular and given up under final certificate and to the satisfaction of the Commissioners and engineer on or before the first day of July, in the year of our Lord one thousand eight hundred and seventy-one (time being declared to be material and of the essence of this contract), and in default of such completion as aforesaid on or before the last mentioned day, the contractors shall forfeit all right, claim or demand to the sum of money or percentage hereinafter agreed to be retained by the Commissioners, and any and every part thereof, as also to any moneys whatever which may be at the time of the failure of the completion as aforesaid, due or owing to the contractors, and the contractors shall also pay to Her Majesty, as liquidated damages, and not by way of fine or penalty, the sum of two thousand dollars ($2,000) for each and every week, and the proportionate fractional part of such sum for every part of a week, during which the works embraced within this contract, or any portion thereof, shall remain incomplete, or for which the certificate of the engineer, approved by the engineers, shall be withheld, and the Commissioners may deduct

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decision must be affirmed and this appeal dismissed. In the case of *Jones* v. *The Queen* (2) I discussed similar pro-

and retain in their hands the such sums as may become due as liquidated damages, from any sum of money then due or payable or to become due or payable thereafter to the contractors.

4. The engineer shall be at liberty, at any time before the commencement or during the constructions 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 cutting 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 contractors shall not be entitled to any allowance by reason of such changes unless such changes consist in alterations in the grades or the line of location, in which case the contractors shall be subject to such deductions for any 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.

(6) If at any time during the progress of the works, it should appear that the force employed, or the rate of progress then being made, or the general character of the work being performed, or the material supplied or furnished are not such as to ensure the completion of the said works within the time stipulated, or in accordance with this contract, the commissioners shall be at liberty to take any part or the whole works out of the hands of the contractors, and employ such means as may see fit to complete the works at the expense of the contractors, and they shall be liable for all extra expenditure incurred thereby, or the commissioners shall have power at their discretion to annul this contract. Whenever it may become necessary to take any portion or the whole works out of the hands of the contractors, or to annull this contract, the commissioners shall give the contractors seven clear days' notice in writing of their intention to do so, such notice being signed by the chairman of the board of commissioners, or by any other person authorized by the commissioners, and the contractors shall thereupon give up quiet and peaceable possession of all the works and materials as they then exist; and without any other or further notice or process or suit at law, other legal proceedings of any kind whatever, or without its being necessary to place the contractors *en demeure*, the commissioners in the event of their annulling the contract may forthwith, or at their discretion, proceed to re-let the same or any part thereof,

(2) 7 Can. S. C. R. 570.

visions, read in connection with these statutes, at great length, and as that case has stood unreversed, and as I

or employ additional workmen, tools and materials, as the case may be, and complete the work at the expense of the contractors, who shall be liable for all extra expenditure which may be incurred thereby, and the contractors and their assigns or creditors shall forfeit all right to the percentage retained, and to all money which may be due on the works, and they shall not molest or hinder the men, agents or officers of the commissioners from entering upon and completing the said works as the commissioners may deem expedient.

9. It is distinctly understood, intended and agreed, that the said price or consideration of four hundred and fifty-six thousand nine hundred and forty-six dollars ($456,946.00) 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, alterations or addition made in or to such work. or in the said plans and specification, or by reason of the exercise of any of the powers vested in the governor in council by the the said Act intituled, "An Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineer, by this contract or by the law, to claim or demand any further or additional sum, for extra work or as damages or otherwise, the contractors, hereby expressly waiving and abandoning all and any such claim or pretention to all intents and purposes whatsoever except as provided in the fourth section of this contract.

11. 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 certificates 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.

12. This contract and the said specification shall be in all respects

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am of the same opinion as I was when that judgment was given, I do not think it necessary to go over the same ground again.

FOURNIER J.—Le jugement soumis à la révision de cette cour a été rendu par l'honorable juge J. T. Taschereau, dans la cour d'Echiquier, le 17 octobre 1877. Ce jugement renvoie la pétition de droit par laquelle les Appelants réclamaient de Sa Majesté une balance de $528,000, comme leur étant due par le gouvernement du Canada, sur la construction des sections nos 3 et 6 du chemin de fer Intercolonial, au sujet desquelles ils avaient fait un contrat avec les commissaires nommés pour la construction de ce chemin. Les pétitionnaires s'étaient engagés à construire ces deux sections par contrat signé, le ou vers le 25 mai 1870, mais à la réquisition des commissaires nommés par le gouvernement pour diriger la construction du chemin de fer Intercolonial, l'ouvrage avait été commencé aussitôt après l'acceptation des soumissions des Appelants et avant même la signature du contrat. L'ouvrage fut continué jusqu'au 9 juin 1873, époque à laquelle les commissaires donnèrent avis aux Appelants que leur contrat avait été annulé, que le contrôle des ouvrages leur était enlevé et que les commissaires eux-mêmes en compléteraient l'exécution.

Après avoir exposé les circonstances dans lesquelles le contrat a été fait, la pétition entre dans une exposition détaillée des sujets de plainte des Appelants, dont les principaux peuvent se résumer comme suit:—

1o. That there were no valid contracts between Her Majesty and the Petitioners; that if ever such contracts existed, they were annihilated or modified by the fact that the Petitioners had no communication of the plans and profiles nor of the bill of works; and, also,

subject to the provisions of the herein first cited Act, intituled "An Act respecting the construction of the Intercolonial Railway," and also, in so far as they may be applicable to the provisions of "The Railway Act, 1868."

that the schedule of prices agreed upon was increased by orders in council;

2o. That the Petitioners were compelled by the engineers employed by the Commissioners to execute works quite different from those mentioned in the contracts, much more costly and much above the stipulations of the contracts; and that they were entitled to payment thereof under the order in council.

3o. That the monthly estimates of progress made by the engineers were not carefully made and did not represent the quantity of work executed on the two sections and that consequently their monthly payments were much below the amounts to which they were entitled;

4o. That they complained frequently to the minister of Public Works and to the Commissioners and that in consequence of these complaints, the minister of Public Works promised to indemnity them if they continued the works assuring them that the abandonment of their works would be a great damage to the Government as well as to the Petitioners themselves;

5o. Moreover the Petitioners claimed the said sum of $523,000 under the form of general *indebitatus assumpsit* for money advanced, materials furnished, labour supplied, &c., &c.

A cette pétition sont annexées des comptes détaillés des montants dépensés par les Appelants pour l'exécution des ouvrages sur les susdites deux sections, comprenant aussi un état des ouvrages extrà pouvant être réclamés en vertu du contrat.

La défense de Sa Majesté, en réponse à la pétition, consiste principalement dans une dénégation en fait et en droit des allégations des Appelants. En outre, la défense allègue au long le contrat qui a été signé le 25 mai 1870 pour la construction des dites sections 3 et 6. Les principales clauses de ce contrat à considérer pour la décision de cette cause sont les suivantes : [Reads sections 3, 4, 6, 11 (1)]

La défense allègue que les sujets de plainte des Appelants furent examinés avec soin et que, de temps en temps, dans le but de leur venir en aide, les commissaires recommandèrent des augmentations de prix, mais en ayant toujours soin de ne pas dépasser la somme en

(1) *Ubi supra.*

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bloc stipulée par le contrat pour la totalité des ouvrages.

Que vers le 24 mai 187 , les Appelants présentèrent aux commissaires une réclamation considérable pour des ouvrages *extrà*, en déclarant que s'ils n'étaient pas payés de cette somme, ils seraient obligés de suspendre les travaux, parce qu'ils ne pouvaient les continuer s'ils n'étaient point payés ; que les Appelants n'ayant pas droit à ces sommes, les commissaires leur signifièrent avis, conformément au contrat, que le contrôle des ouvrages leur était enlevé et le contrat annulé.

Qu'à l'époque de la signification de cet avis, il n'était dû aux contracteurs que $10,444 sur la section 3 et $73,946 sur la section 6, tandis qu'il restait de l'ouvrage à faire pour une somme beaucoup plus considérable.

Que pour terminer les ouvrages, les commissaires ont dépensé les sommes suivantes, savoir : sur la section 3, $107, 56.97, et sur la section 6, la somme de $136,915.60, ce qui fait que les Appelants ont reçu sur les deux contrats $159,983.57 de plus qu'il ne leur était dû, et cela sans tenir compte des pénalités pour lesquelles ils étaient responsables en vertu du contrat, pour retard dans l'exécution des travaux. Il y a une conclusion pour le remboursement de cette somme de $159,982.57.

La défense allègue que les Appelants n'avaient droit à aucun paiement, à moins d'avoir obtenu un certificat de l'ingénieur, et qu'ils ont été payés de tout ce qui a été ainsi certifié.

Sur cette contestation, un nombre considérable de témoins ont été examinés. Leurs témoignages imprimés forment deux énormes volumes. La correspondance entre les Appelants, le gouvernement et les commissaires a aussi été produite, avec un grand nombre de documents, qui forment encore plusieurs autres volumes très considérables.

C'est cette masse de témoignages et de documents que l'honorable juge a eu à examiner pour en arriver à

la conclusion de renvoyer la pétition. J'avoue que ce n'est pas sans beaucoup d'hésitations que j'ai abordé cette tâche difficile. Mais après avoir, comme l'honorable juge, fait un sérieux examen de cette preuve et de ces documents, j'ai été forcé d'arriver à une conclusion contraire à la sienne.

Un des premiers moyens invoqués par les Appelants étant qu'il n'y avait pas de contrat valable entre eux et Sa Majesté ; que s'il en avait existé un, savoir, celui qu'ils avaient signé le 25 mai 1870, ce contrat était incomplet, les plans n'ayant pas été signés ; de plus, qu'il avait, de fait, été mis de côté du consentement des deux parties ou du moins tellement modifié qu'il avait cessé de régler les obligations respectives des parties contractantes, il était tout naturel dans ce cas pour l'honorable juge de décider d'abord la question concernant la validité du contrat allégué par la Couronne. C'est aussi par l'examen des faits se rapportant à cette question que je commencerai l'étude de cette cause, après avoir toutefois fait sommairement allusion aux circonstances qui ont précédé la signature du contrat en question.

M Fleming, l'ingénieur en chef chargé par le gouvernement de la direction des travaux de construction du chemin de fer Intercolonial, et sous la direction duquel le devis des ouvrages a été préparé, constate (1) qu'une exploration de ces deux sections avait eu lieu et que les mesurages et quantités d'ouvrages avaient été établis approximativement, et imprimés et publiés afin de donner à ceux qui voudraient contracter pour la construction de ces deux sections 3 et 6, la connaissance des ouvrages qu'il y aurait à faire. Il ajoute qu'à cette époque les quantités ne pouvaient pas être données avec exactitude, que tout ce qu'il était alors possible de faire c'était d'en donner une information approximative.

Les plans de détail (*special plans*) n'étaient point pré-

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parés, mais les plans de presque toutes les structures l'étaient. Il n'y avait aucun plan de fondations. Il ne peut dire si les coupes transversales (*cross-sections*) avaient été faites; il croit cependant qu'elles n'étaient pas complètes. Quant aux quantités données dans le (*Bill of Works*) devis et aux profils indiquant la nature des ouvrages, ils étaient considérés aussi corrects qu'on peut les donner sans avoir fait un mesurage complet. Les profils n'indiquaient pas l'endroit de l'ouvrage, ni si c'était sur le penchant d'une côte ou sur un terrain plan; ils n'indiquaient que le contour général de l'ouvrage à faire. M. Fleming dit qu'il n'avait fait qu'à peu près (*rough estimate*) l'estimé du coût des travaux, fixant le maximum et le minimum des prix. D'après un document qui lui est attribué le minimum pour le n° 6 était de $493,666—et le maximum $615,000 pour la section 3, le minimum apparaît être $530,000 et le maximum $705,000.

Comme le fait voir ce témoignage, le gouvernement n'était pas dans la position d'offrir aux soumissionnaires pour ces contrats des informations suffisantes pour adopter le système de contrats à forfaits; il n'était pas en état de garantir les quantités d'ouvrage à faire. Les soumissionnaires n'avaient rien pour se guider puisque le gouvernement ne pouvait pas garantir les quantités d'ouvrage à faire et qu'il n'offrait que des données reconnues imparfaites sur la valeur et la quantité des travaux à faire. Mais le gouvernement pressé, pour des motifs d'intérêt public d'exécuter au plus tôt les grands travaux qu'il s'était engagé à faire en vertu de l'Acte de Confédération, n'avait pas eu le temps de se procurer de plus amples informations que celles qu'il avait mises à la disposition des contracteurs qui eurent à s'en contenter.

Berlinguet après avoir fait une étude très particulière des plans, profils et devis qui lui avaient été commu-

niqués, après avoir aussi obtenu beaucoup d'informations utiles de MM. Jobin et Cie, qui avaient abandonné le contrat qu'ils avaient eu de ces sections 3 et 6, —fit ses soumissions pour les mêmes travaux. On lui a fait à ce sujet le reproche de s'être lancé témérairement dans une entreprise pour laquelle il manquait d'expérience et on a prétendu expliquer son insuccès par cette considération. Je ne m'attacherai pas à refuter cette accusation, me contentant de referer à ce sujet au factum des appelants qui en démontre toute l'injustice. Toutefois le gouvernement par ses commissaires accepta ses soumissions et requit les contracteurs de se mettre immédiatement à l'œuvre, même avant la signature du contrat qui ne le fut que plus tard, le 25 mai 1870, mais les plans ne le furent jamais et furent détruits dans un incendie. Un contrat semblable fut signé pour la section No. 3.

Il est à peine nécessaire de dire que l'insuffisance des données fournies aux contracteurs n'est pas invoquée comme moyen de se soustraire à l'exécution du contrat. Mais il est important d'y référer pour faire voir que dans l'exécution d'ouvrages aussi mal définis que l'étaient ceux dont il s'agit, le gouvernement, aussi bien que les contracteurs, a dû bientôt s'apercevoir de la difficulté pour ne pas dire de l'impossibilité d'exécuter un pareil contrat. Aussi ce contrat n'a-t-il été considéré comme obligatoire que pendant un court espace de temps.

Presque toutes ses clauses ont été les unes après les autres annulées et mises de côté par les deux parties. On verra par les faits rapportés ci-après qu'il ne restait de ce contrat aucune autre obligation pour les contracteurs que celle de faire les travaux des deux sections et pour le gouvernement l'obligation de les payer aux prix déterminés par des ordres en conseil. Il y a eu renonciation de celui-ci à toutes les autres conditions, comme

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celle de l'obligation de terminer les ouvrages pour le 1er juillet 1871—le temps étant déclaré de l'essence du contrat ; celle comportant confiscation de toute somme d'argent ou percentage retenu comme garantie de l'exécution des ouvrages, et aussi de toutes autres sommes dues aux contracteurs au cas où ils ne termineraient pas les ouvrages dans le temps fixé ; celle comportant une pénalité de $2,000 pour chaque semaine de retard apporté à la livraison des ouvrages dans le temps fixé ; celle donnant aux commissaires pouvoir d'annuler le contrat en donnant aux contracteurs sept jours d'avis ; celle fixant le prix en bloc pour la section 6, à la somme de $456,946 et à celle de $462,444 pour la section n° 3 enfin la 4me section déclarant que les paiements mensuels ne seraient faits que sur des certificats d'ingénieurs. Ce sont toutes les conditions importantes du contrat, les autres le sont peu, ou ne sont que de pure forme.

Si, comme j'ai confiance de pouvoir le démontrer par l'exposition des faits il résulte un abandon ou une renonciation formelle de la part du gouvernement, à toutes ces conditions, que reste-il alors du contrat, sinon comme je l'ai déjà dit, l'obligation pour les contracteurs de faire les ouvrages, et pour le gouvernement celle de les payer conformément à ses ordres en conseil.

L'honorable juge Taschereau adoptant pour point de départ de son examen des faits de cette cause, l'existence du contrat signé le 25 mai 1870 y a subordonné tous les autres faits constatant les nombreux changements et modifications qui y ont été apportés, bien que ces faits amplement prouvés soient de nature à établir qu'il y a eu de la part du gouvernement une renonciation légale à la plupart des conditions du contrat. Sur un point seulement a-t-il donné gain de cause aux Appelants.

Par son jugement du 17 octobre 1877, il reconnait qu'il y a de la part du gouvernement violation de la

condition concernant le mode de paiements et déclare à ce sujet :

That the said Mr. Xavier Berlinguet and Marie Charlotte Mailloux are entitled to the sum of five thousand eight hundred and fifty dollars and 90 cents for interest upon and for the forbearance of divers large sums of money due and payable by Her Majesty's Government to them the Suppliants.

A l'appui de cette partie de son jugement l'honorable juge a exprimé comme suit les motifs qui l'ont induit à adopter cette conclusion :

XLV. There is one point in the case on which the Petitioners should succeed : it is that concerning the manner in which the engineers made their monthly estimates during the first four months following the beginning of the works, in 1870, as established by *Documents* 97 and 98 produced with the official correspondence concerning the construction of the Intercolonial. According to this correspondence and the order in council of the 20th September 1870, which settled the question, it would appear that the engineers committed errors resulting in a loss to the contractors, for interest, of $5,850.90 or thereabouts. In order to appreciate correctly the intention of the Commissioners in their communication to the Privy Council (Document 97) and the meaning and signification of the report of the Privy Council, I cite them verbatim, and I believe, although the chief engineer was not of the opinion of the Privy Council and of the Commissioners on this point, that the engineers made grave errors in this occasion and that this sum of $5,850.90 should be credited to the Petitioners in the final result of the case.

Dans cette partie de son jugement on voit que l'honorable juge donne raison aux Appelants, sur un des griefs importants de leur pétition, le 17me, dans lequel ils se plaignent que les estimés mensuels de l'ouvrage fait étaient incorrects et que les paiements faits sur ces rapports injustes étaient insuffisants pour couvrir leurs légitimes dépenses. Cette partie du jugement étant favorable aux Appelants, ils n'en mettent pas en question la légalité ni le bien jugé.

L'Intimée seule aurait pu le faire, mais elle n'a pas jugé à propos de prendre un contre-appel pour soumettre cette partie du jugement à la revision de cette cour. Les délais d'appel sont expirés depuis plusieurs années,

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et cette partie du jugement étant passée en force de chose jugée, il faut, de toute nécessité, considérer comme un point réglé, que, dès les premiers mois de l'exécution des travaux, le gouvernement lui-même, par ses agents, mettait de grands obstacles à l'avancement des travaux en retardant le paiement de sommes considérables dues aux contracteurs.

La renonciation du gouvernement au droit d'exiger que les travaux fussent terminés dans le délai fixé par le contrat du 25 mai, savoir, au 1er juillet 1871, ainsi qu'aux pénalités et confiscations stipulées pour inexécution de cette condition, résulte nécessairement des diverses transactions qui ont eu lieu entre les contracteurs et le gouvernement après l'expiration du délai fixé par le contrat.

Avant de citer quelques-unes de ces transactions, il est bon de faire observer que l'ingénieur en chef, M. Fleming, dont le témoignage est cité par l'honorable juge, a déclaré que le délai fixé pour l'exécution des travaux était trop court; il dit à ce sujet:

I think it ought not to have been attempted.

I am not prepared to say it was impossible to do it, but it would have required a lavish expenditure.

La conclusion qu'en tire l'honorable juge, c'est que Berlinguet a été imprudent d'entreprendre avec des informations aussi incertaines et qu'il doit en subir les conséquences. Bien que cette condition soit reconnue comme impossible d'exécution, l'honorable juge n'hésite pas à tenir rigoureusement les Appelants à l'obligation de l'exécuter. Cette conclusion ne peut s'expliquer que par le fait que l'honorable juge a complètement omis de prendre en considération les faits nombreux par lesquels le gouvernement s'est désisté de cette condition. Quelle autre conclusion tirer de l'ordre en conseil du 27 juillet 1871, après l'expiration du terme fatal mentionné dans le contrat, accordant aux Appelants, pour les mettre en

état de continuer les travaux, une augmentation de 20 pour cent par verge cube sur les travaux en terre et d'une piastre par verge cube sur les ouvrages en maçonnerie. Plus tard, le 28 septembre de la même année, un autre ordre en conseil s'exprimait ainsi :

Having reference to the expediency of extending to the Contractors on the line every reasonable facility in the prosecution of their work' &c., &c., advise that the recommendation submitted on the said memorandum be approved.....

Le rapport ainsi approuvé accordait aux Appelants une avance de $25,000 par chaque section et cela près de trois mois après l'expiration du délai dans lequel les ouvrages devaient être finis.

Sur un rapport en date du 18 janvier 1872, signé par tous les commissaires et adressé au gouvernement représentant sur la recommandation de l'ingénieur en chef M. Fleming—

That these Contractors have pushed forward their work since last winter with a great deal of energy, having accomplished a great deal more than was expected, and that the character of the work generally is quite satisfactory ;

That he is quite satisfied from the statement both of the Contractors and Engineers in charge, that the work has been executed at a heavy loss ;

That from all he can learn the certificates fall far short of the actual expenditure, and unless they be increased the work must stop ;

That the work could not come to a stand without resulting in serious difficulties, and in all probability very large additional cost and, therefore, should be avoided if possible ;

un ordre en conseil fut adopté le 20 janvier 1872 approuvant et adoptant la suggestion des commissaires d'augmenter encore le prix du contrat.

Un autre ordre en conseil en date du 10 février 1872 rendu sur le rapport des commissaires approuve leur suggestion de faire les paiements aux taux augmentés par des ordres en conseil précédemment rendus.

Le 5 avril 1872 un ordre en conseil au même effet

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que le précédent est rendu pour le paiement des ouvrages faits jusqu'à la fin du mois de mars 1872.

Afin de permettre aux contracteurs de continuer les travaux, le gouvernement rendit encore le 11 juin 1872 un ordre en conseil continuant les paiements aux mêmes taux jusqu'à la fin de juin.

Beaucoup d'autres documents que ceux ci-dessus cités constatent de la manière la plus positive qu'après le 1er juillet 1871, le gouvernement a consenti à la continuation des travaux sans égard à la stipulation qui faisait de l'époque de leur terminaison une condition essentielle. Mais ceux mentionnés plus haut sont certainement plus que suffisants pour faire voir que le gouvernement s'est volontiers départi de cette condition et constituent une preuve légale d'une renonciation au droit de s'en prévaloir. Lorsque l'on se rappelle le témoignage de M. Fleming déclarant qu'il était impossible de faire ces travaux dans le délai fixé, on comprend de suite le sentiment de justice qui a porté le gouvernement, sur les recommandations de son ingénieur et celle des commissaires, à laisser les contracteurs continuer l'ouvrage après l'expiration du délai fixé. En présence de ces faits il eût été plus logique et certainement plus légal, comme le feront voir les autorités citées ci-après, de conclure que cette condition avait été mise de côté.

Une autre conséquence inévitable de ces faits c'est qu'il en résulte que la condition donnant aux commissaires le pouvoir d'annuler le contrat en donnant aux contracteurs sept jours d'avis a aussi été abandonnée (*waived*) comme les précédentes. On a vu par tous les documents ci-dessus cités que les travaux ont été continués pendant tout près de deux ans après l'expiration du délai fixé pour leur exécution. Il n'était plus possible alors au gouvernement de se prévaloir du privilège d'annuler le contrat. Un privi-

lège aussi exorbitant ne pouvait plus être exercé, après une prolongation de délai aussi considérable, sans qu'il en résultât une grave injustice contre les contracteurs. Les circonstances dans lesquelles il a été exercé font voir que le gouvernement s'en est servi pour se constituer seul arbitre du différend survenu entre lui et les contracteurs, et après des délais et des rapports d'affaires qui justifiaient ceux-ci de croire que le gouvernement avait renoncé au bénéfice de cette clause. Les contracteurs ayant alors présenté aux commissaires leur présente réclamation se montant à la somme de $543,540 et ne recevant pas de réponse, informèrent le gouvernement qu'à moins qu'ils ne fussent payés de leurs avances les travaux ne pourraient pas être conduits avec autant de vigueur que le désiraient les commissaires. Sur cette réponse les commissaires demandèrent l'autorisation d'annuler le contrat (Voir ordre en conseil, p. 24) et donnèrent en conséquence un avis à cet effet. Cet ordre en conseil démontre que le contrat n'a pas été volontairement abandonné, mais fait voir qu'il a été enlevé aux contracteurs qui, faute de paiement de leur réclamation, déclaraient ne pouvoir procéder au gré des commissaires. Pour décider si les commissaires avaient droit d'en agir ainsi, il n'est pas nécessaire d'entrer maintenant dans le mérite de la réclamation qui leur était présentée ; la seule question à décider dans le moment est de savoir si le pouvoir d'annuler le contrat pouvait être exercé après l'expiration du délai fixé par le contrat, savoir le 1er juillet 1871. Je soumets qu'il n'était plus alors au pouvoir du gouvernement d'exercer ce privilège. Il est de principe qu'une condition aussi rigoureuse ne peut être exercée que dans le délai fixé, et comme c'est près de deux ans après son expiration que les commissaires ont donné l'avis requis par le contrat, il était alors trop tard pour s'en prévaloir. Cette condition avait alors cessé d'avoir aucun effet et il s'ensuit que les rapports entre les

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parties contractantes doivent se régler comme si cette stipulation n'avait pas été insérée au contrat. Ce point est établi par l'autorité suivante qui s'applique également au cas où il y a des stipulations de confiscation et de pénalité comme dans le contrat dont il s'agit. Elles doivent aussi être mises en force avant l'expiration du délai fixé.

Dans la cause de *Walker and others* v. *The London and North Western Railway Company* (1), où des difficultés se sont élevées au sujet de l'interprétation de clauses analogues à celle dont il s'agit en cette cause, déclarant que si les ouvrages n'étaient pas terminés dans le délai fixé, ou conduits à la satisfaction de l'ingénieur qui en avait la direction, le contrat serait à l'option de la compagnie considéré comme nul pour tout ce qui resterait à faire, et que toutes les sommes alors dues aux contracteurs, ainsi que tous les matériaux et l'outillage et toutes sommes stipulées comme pénalités pour l'inexécution du contrat seraient forfaits en faveur de la compagnie, si les ouvrages n'étaient pas terminés avant le 31 avril 1873. Ils ne le furent point. Le sommaire de la décision est comme suit :

Held, upon the true construction of the contract the clause above set forth, with reference to the evidence of the contract and the forfeiture of the contractor's implements and materials, could only been forced before the time originally fixed for the completion of the works had expired.

Archibald, J., fait au sujet du délai dans lequel une telle clause peut être mise en force, la remarque suivante :

The clause in our opinion can only be acted on and enforced within the time fixed for the completion of the works, for the time is clearly of the essence of contract, and it is only with reference to the time so agreed that this rate of progress can be determined. If, as happened, the time has been extended, there may be a new contract to complete in a reasonable time ; but to give the clause in question any application to a reasonable time after the time

(1) 1 C. P. Div. p. 518.

originally fixed has expired, would be, without any express provision, to make the company judge in their own case of what was a reasonable time, and to enable them in their own favor to avail themselves of a most stringent and penal clause.....

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Here there was a disregard of the time of completion by mutual consent, and a negotiation was on foot for allowing a longer time and enhanced prices to the contractor, but we do not decide the case on that ground, but upon what we consider to be the legal construction of the clause which could only be enforced before the time originally fixed for completion of the work had expired, and we therefore think the notice of the 22nd January 1874, was not effectual for all or any of the purposes mentioned in the question put to us, and that the contract was not avoided.

We think the defendants were not justified in point of law in taking possession of the plaintiffs implements and materials.

Emdens, dans son ouvrage intitulé "Law of Building" (1), fait au sujet de cette décision les observations suivantes approuvant la doctrine qui y est énoncée.

When there is a clause similar to that in *Walker* vs. *London* and *North Western Railway*, providing for the avoidance of the contract, and the forfeiture of the Contractor's implements and materials if he fails to proceed with the work at the rate of progress required in order to complete the works within the period limited for the purpose, or upon certain other events, such a clause can only be acted on, and enforced, before the time originally fixed for the completion of the works has expired. And the exercise of the right of election to rescind a building contract, on the ground of delay, or that the works cannot be completed within the given time, must be signified in an unqualified manner, and at all events, not after the builder has gone to expense in the belief that the right of election not being exercised, or has altered his position to his prejudice.

It follows, therefore, that as courts of law always lean against forfeitures, whenever it is intended to take advantage of any breach of covenant or condition in a building lease, or contract, so that it should operate as a forfeiture, the land owner or employer must take care not to do anything which may be deemed to be an acknowledgment of the continuance of the tenancy, or contract, and so operate as a waiver of the forfeiture.

Dans la cause de *Holmer* vs. *Guppy* (2) dans laquelle

(1) P. 124 (ed. 1882). (2) 3. M. & W. 381.

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s'est aussi élevée la question de savoir dans quel délai devait être exercé le droit de forfaiture stipulé au cas d'inexécution d'ouvrages dans le temps fixé par le contrat, Parke B fait les remarques suivantes :

Then it appears that they were disabled by the act of the Defendants from the performance of that contract; and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default. It is clear, therefore, that the plaintiffs were excused from performing the contract contained in the original contract, and there is nothing to show that they entered into a new contract by which to perform the work in four months and a half, ending at a later period. The Plaintiffs were therefore left at large, and consequently they are not to forfeit anything for the delay.

Dans la cause de *Westwood and others* vs *The Secretary of State for India* (1), où il s'agissait d'opposer en compensation des pénalités stipulées pour défaut de livrer les ouvrages dans le délai fixé par le contrat, la cour déclara :

As to the set-off for penalties, they were clearly of opinion that it could not be sustained, because it must be taken, on the demurrer, however it might be disproved in point of fact, that the Defendant's engineers had ordered additions and alterations which has rendered it impossible to complete the work within the time and that he knew that they could not be so completed. That being so, it would be unjust and unreasonable to allow the Defendant to claim penalty for the delay.

J'ai cité les ordres en conseil prouvant de la manière la plus positive que la condition du délai fixé pour la terminaison des ouvrages avait été abandonnée, que des prolongations de délais avaient eu lieu de consentement mutuel après le 1er juillet 1871, et que le gouvernement n'a jamais eu un seul instant l'intention de mettre à exécution cette condition, non plus que d'exiger les confiscations et pénalités dont il n'a jamais été question dans leur correspondance. Mon but en faisant ces citations n'était pas seulement de prouver comme question de

(1) 11 Weekly Rep. pp. 261-2.

fait qu'il y avait eu un abandon volontaire (*waiver*), de ces conditions ci-dessus énumérées, mais je tenais aussi à faire voir que les parties contractantes avaient toujours été en excellents rapports jusqu'à la présentation de la réclamation des Appelants qui a fourni aux commissaires le prétexte de demander l'annulation du contrat.

Indépendamment de la renonciation volontaire résultant des faits ci-dessus rapportés, toutes les conditions de délai, de confiscations, de pénalités et d'annulation du contrat sont devenues caduques et sans effet par l'expiration du délai du contrat, suivant les autorités citées plus haut établissant clairement qu'elles ne peuvent être mises en force qu'avant l'expiration du délai convenu.

Sentant toute la force de l'argument sur la question de l'annulation du contrat après l'expiration du délai, on a essayé d'y trouver une réponse en prétendant qu'il y avait entre la troisième clause du contrat, au sujet de la confiscation et des pénalités que la loi décrète, au sujet de l'annulation du contrat et de la prise de possession des travaux, une différence essentielle, consistant en ce que dans la première, le délai est absolu et fatal— et que dans la dernière, le privilège d'annuler le contrat et de prendre possession des travaux est facultatif, et peut être exercé indistinctement soit avant soit après l'expiration du délai passé. En comparant les deux clauses on voit clairement que cette distinction n'est pas fondée et que dans l'une comme dans l'autre l'expiration du délai doit produire le même effet. La clause 6me, après avoir pourvu au droit de faire suspendre les travaux, s'exprime au sujet du droit d'annulation et de prise de possession, dans les termes suivants :

If at any time during the progress of the works, it should appear that the force employed, or the rate of progress then being made, or the general character of the work being performed, or the material supplied or furnished are not such as to ensure the completion of the said works *within the time stipulated*, or in accordance with this

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contract, the commissioners shall be at liberty to take any part of the whole works out of the hands of the contractors, and employ such means as they may see fit to complete the works at the expense of the contractors, *and they shall be liable for all extra expenditure incurred thereby;* or the commissioners shall have power at their discretion to annul this contract. Whenever it may become necessary to take any portion or the whole work out of the hands of the contractors, or to annul this contract, the commissioners shall give contractors *seven clear days' notice* in writing of their intention to do so, such notice being signed by the Chairman of the Board of Commissioners, or by any other person authorized by the commissioners, and the contractors shall thereupon give up quiet and peaceable possession of all the works and materials as they then exist; and without any other or further notice or process or suit at law, other legal proceedings of any kind whatever, or without its being necessary to place the contractors *en demeure*, the commissioners in the event of their annulling the contract may forthwith, or at their discretion, *proceed to* re-let the same *or any part thereof*, or employ additional workmen, tools and materials, as the case may be, and complete the works at *the expense of the contractors, who shall be liable for all extra expenditure which may be incurred thereby*, and the contractors and their assigns or creditors shall forfeit all right to the percentage retained, and to all money which may be due on the works.

Cette faculté ne peut être exercée, comme le dit la clause, que si les commissaires ont lieu de croire que les ouvrages ne seront pas complétés dans le délai convenu :

Not such as to ensure the completion of the said works *within the time stipulated;* or the commissioners shall have power, at their discretion, to annul their contract.

Le pouvoir est donné dans l'alternative, et le délai dans lequel il doit être exercé, *within the time stipulated*, s'applique également à l'exercice soit de la faculté de prendre possession soit de celle d'annuler le contrat.

Il ne se trouve aucun terme dans cette clause qui puisse permettre de l'interpréter comme si elle avait dit que cette faculté pourrait être exercée en tout temps, soit avant, soit après le délai fixé ; elle dit, tout au contraire qu'elle ne pourra l'être que *within the time*

stipulated.

Cette clause est d'un caractère tout aussi pénal que le 3me, au sujet de la confiscation et des penalités ; elle comporte la peine de payer toutes les dépenses extra que les commissaires pourront encourir en faisant terminer les travaux. Il n'y a donc pas de différence à faire entre l'interprétation à donner à ces deux clauses. Ce serait aller directement contre les termes du contrat que de dire que ces pouvoirs pouvaient être exercés après le délai.

D'ailleurs c'est l'interprétation donnée à cette clause par les commissaires eux-mêmes, et par le gouvernement, comme le font voir les documents cités ci-après. Après la présentation de la réclamation des appelants (p. 320, vol. de correspondance) sur laquelle il n'a jamais été fait de rapport, ni statué en aucune manière par le gouvernement, les appelants dans leur lettre accompagnant cette réclamation et demandant un prompt règlement pour éviter la nécessité de suspendre les travaux, ajoutent :

Our securities have already made sacrifices and incurred liabilities beyond any precedent in their desire to aid us in having the works contracted for faithfully carried out. Nothing further can be done by them or us without any action on your part to afford us the substantial relief sought for.

Cette réclamation ayant été transmise pour examen à M. Fleming, l'ingénieur en chef, il fit rapport qu'il n'avait pas en sa possession les informations nécessaires *to enable him to make an immediate or early report thereon.* C'est sur cette réponse que les commissaires se basèrent pour demander l'autorisation d'annuler le contrat et prendre possession des travaux—ce que le gouvernement leur permit de faire par son ordre en conseil du 30 mai 1873, dans ces termes :

On a report dated 29th May, 1873, from the commissioners appointed to construct the Intercolonial Railway, stating in reference to the work upon Sections Nos. 3, 6, 9 and 15 of the Intercolonial

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Railway, that the contractors of these sections, fyled with the commissioners on the 24th inst., statements of works executed, claimed to be extra, amounting in the aggregate to $543,554;

That these statements were submitted to the Chief Engineer for examination, but that he had not the information in his possession to enable him to make an immediate and early report thereon;

That the contractors upon being informed that payments could not be made upon these claims until the same should have been reported on and approved, informed the commissioners that in the absence of such payments they could not proceed with the works with as much vigor as the commissioners require;

The commissioners therefore recommend that they be authorized to take these respective sections out of the contractors' hands, and as the advertising and re-letting of the work remaining to execute would involve the loss of the greater part of the present working season, the commissioners also recommend that they be authorized (in terms of the contracts) to "employ such means as they may see fit to complete the works at the expense of the contractors."

On the recommendation of the Honorable the Minister of Public Works, the Committee advise that the authority requested be granted.

Se fondant sur cette autorisation les commissaires donnèrent aux Appelants l'avis requis par la section 6 du contrat (Voir p. 327, Vol. de Corr.), en invoquant les motifs suivants :

And whereas the force employed, the rate of progress being made, the general character of the work being performed, and the materials supplied and being furnished, are not such as to insure the completion of the works *within the time stipulated*, and are not in accordance with your contract.

Si les commissaires avaient considéré qu'ils avaient en tout temps le pouvoir d'annuler le contrat, auraient-ils invoqué le motif que l'ouvrage n'avait pas été terminé dans le délai fixé, lorsque ce délai était expiré depuis près de deux ans. Ils n'ont donc, dans tous les cas, voulu qu'exercer et n'ont de fait, exercé que la faculté stipulée, se trompant toutefois sur l'époque à laquelle ils auraient dû agir pour se prévaloir de ce droit. On a préféré ce procédé au lieu d'ajuster la réclamation des Appelants pour extras.

Ces explications me paraissent suffisantes pour faire voir que la clause 6 ne diffère pas de la 3me quant au délai dans lequel les pouvoirs stipulés devaient être exercés d'après la jurisprudence.

Faisant application au jugement de l'honorable juge Taschereau du principe que les forfaitures ne peuvent être prononcées après le délai fixé, qui était dans ce cas, le 1er juillet 1871, son jugement prononçant la confiscation de la somme de $5,850.90 représentant l'intérêt sur les sommes qui n'ont pas été payées aux époques où elles auraient dû l'être, est évidemment contraire à la jurisprudence et doit en conséquence être réformé.

En outre des $5,850.90 dus pour intérêt le jugement qui a maintenant force de chose jugée pour la partie favorable aux Appelants, déclare le gouvernement leur débiteur pour la valeur de l'outillage et des matériaux leur appartenant et au sujet desquels l'honorable juge s'exprime ainsi :

I also believe that in law and equity they (plff.) should be credited with another sum of $27,023, representing the value of materials which they transferred to Government when they gave up their contract in May 1873.

Mais il en prononce aussi la confiscation au bénéfice du gouvernement parce que les ouvrages n'ont pas été terminés dans le temps voulu. Cette confiscation doit nécessairement tomber comme la première, parce que l'honorable juge n'avait aucun pouvoir de la prononcer après le 1er juillet 1871. Ainsi, au lieu d'adjuger au gouvernement le bénefice de la somme de $32,873.90 qu'il enlevait aux Appelants, c'est le gouvernement qu'il aurait dû condamner à leur payer cette somme, et le jugement doit encore être réformé sur ce point.

L'effet des autorités ci-dessus est donc d'abord d'annuler la partie du jugement prononçant la confiscation ; d'annuler la condition du délai pour l'exécution des ouvrages—comme étant de l'essence du contrat—

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de rendre caduque et sans effet la condition comportant confiscation du percentage retenu et aussi de toutes autres sommes dues aux contracteurs, ainsi que la pénalité de $2,000.00 pour chaque semaine de retard, d'annuler aussi les procédés adoptés par les commissaires et le gouvernement pour faire considérer le contrat comme annulé, tels procédés ayant été adoptés après le 1er juillet.

Comme on le voit le contrat est réduit à peu de chose, et si comme j'espère le prouver la seule clause importante qui reste encore debout, celle fixant le prix en bloc des sections No 3 et 6, doit disparaître sur le principe qu'elle a aussi été abandonnée par le gouvernement, il en résultera que le contrat signé a été mis de côté en entier et remplacé par celui qui résulte de l'acceptation des soumissions des Appelants et de toutes les modifications qui ont été faites du consentement des parties dans le cours des ouvrages pour en déterminer la quantité et le prix.

Dans le but d'établir qu'il y avait eu abandon des conditions de délai, de confiscations et de pénalités, j'ai déjà donné des citations des ordres en conseil adoptés au sujet de l'exécution des travaux des deux sections Nos 3 et 6; mais je n'en ai donné que les parties faisant voir qu'il y avait eu abandon de certaines conditions; je vais maintenant référer aux parties de ces mêmes ordres en conseil, portant particulièrement sur la modification du prix stipulé par le contrat signé. Je référerai aussi à la correspondance et aux témoignages dans le même but.

Le plus important de tous ces ordres en conseil est sans contredit celui du 20 septembre 1870, ainsi conçu :

The Committee of Council have had under consideration the communication dated 20th September, 1870, from the Intercolonial Railway Commissioners, representing the hardships to the contractors of the present system upon which the monthly estimates of work done on the several sections are made up, and the heavy per-

centage unnecessarily retained from them, and recommending that the Engineer be instructed to make the returns of quantities actually executed fully equal to the work actually done each month, and that no deduction of 10 per cent. from the schedule prices be made for errors, omissions and contingencies.

The Committee, on the recommendation of the Hon. the Minister of Public Works, advise that the foregoing recommendations be approved and acted on ; and that in the certificate required to be given by the Chief Engineer, that officer be at liberty to state that the percentage is relinquished in compliance with instructions from the Commissioners.

Cet ordre d'un caractère général et permanent autorise l'ingénieur à faire rapport des quantités d'ouvrages actuellement exécutés, sans déduction de 10 p. c. de la cédule de prix, pour erreurs, omissions ou autres circonstances. C'était une dérogation manifeste aux prix du contrat, introduisant le système de payer la valeur des travaux exécutés et revêtant ainsi les contracteurs de l'autorisation du gouvernement pour tous les ouvrages faits, sans égard aux conditions du contrat. Il n'est guère possible de lui donner une autre interprétation. C'est d'ailleurs ainsi que l'ont compris les parties intéressées qui s'y sont conformées jusqu'au moment du différend qui a amené la suspension des ouvrages. Les ordres en conseil subséquents au lieu de révoquer ce nouvel arrangement n'ont fait que le confirmer en faisant d'autres changements d'une nature encore plus favorable aux Appelants.

Comme on l'a vu par le jugement de l'honorable juge les Appelants avaient eu raison de se plaindre de l'insuffisance des rapports des ingénieurs au sujet des quantités d'ouvrage exécutés devant servir de base au paiement. L'absence de plans devant servir de guide aux contracteurs pour déterminer les quantités et la qualité des ouvrages entrepris, fut la cause que les difficultés continuèrent entre les ingénieurs et les contracteurs ; ces derniers se plaignaient que les premiers exigeaient des ouvrages plus dispendieux que ceux qu'ils eussent été

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obligés de faire d'après les plans qui devaient faire partie du contrat. Afin d'en arriver à un règlement de ces difficultés, M. Fleming, à la demande de plusieurs contracteurs et entre autres les Appelants, représenta au gouvernement que les certificats mensuels étaient insuffisants pour payer les dépenses actuellement encourues, et s'exprimait ainsi dans sa lettre du 27 septembre 1871 :

With regard to the monthly certificates not furnishing the Contractors with sufficient funds to pay current expenses, I may observe that as these certificates are made up by computing the actual quantities of work executed at prices established by Order in Council, I have no power to vary them in any manner, and the only way to increase the certificates is for the Government to increase the prices which govern them. I reported at some length on the whole subject on 26th May last and again on 26th July, to which letters I beg to refer. Some assistance was then granted to the Contractors, and this assistance has undoubtedly been of great service in enabling them to push on the work with much greater vigor than previously, and I have much pleasure in stating that the work executed so far has, with very few exceptions indeed, been done in a satisfactory manner. In the letters referred to, I submitted the reasons why I thought it would be much better, under all the circumstances, for the Government to come to the assistance of the present contractors than to take the work out of their hands and re-let it to others. I am still very much of the same opinion, and in order to secure the completion of the railway with the least difficulty and delay having regard at the same time to economy, I would recommend still further aid to those Contractors who have special difficulties to contend with.

Se fondant sur cette lettre les commissaires firent rapport au Conseil Privé sur les réclamations des contracteurs et représentèrent qu'une grande partie des travaux se faisaient dans un pays peu habité et difficile d'accès ; que plusieurs de ces contrats avaient été donnés lorsque les prix du travail et des matériaux étaient beaucoup plus bas ; que les dépenses préliminaires, bâtisses, outillage, etc., avaient été considérables ; qu'ils avaient discuté complètement les questions avec l'ingénieur en chef ; qu'il était clair que si les contrats étaient donnés de nouveau ils coûteraient beaucoup plus que

les contrats actuels, sans compter les longs délais qui s'ensuivraient; que l'ouvrage avait été fait d'une manière satisfaisante et recommandait une nouvelle aide aux contracteurs qui avaient à lutter contre des difficultés particulières.

Les commissaires, après mûre considération, recommandèrent que pour les contrats entre Metis et Bathurst et la section n° 12, il serait préparé avec soin un estimé de l'ouvrage qu'il restait encore à faire pour terminer les entreprises; et que d'après les quantités ainsi vérifiées une nouvelle cédule de prix serait faite pour les quantités. Le lendemain de ce rapport, le 28 septembre 1871, le Conseil Privé adopta un ordre en conseil confirmant ce rapport et accordant l'autorité demandée en ces termes: "Having reference to the expe- "diency of extending to the contractors on the line "every reasonable facility in the prosecution of their "work, advised, &c."

En conséquence de cet ordre en conseil une nouvelle cédule augmentant considérablement les prix fut préparée pour servir de base aux paiements qui devaient être faits. De temps en temps de nouvelles augmentations de prix furent décrétées par d'autres ordres en conseil, que l'ingénieur en chef mit à exécution en informant le gouvernement que la conséquence nécessaire de ces augmentations auraient pour effet d'excéder la somme totale mentionnée au contrat. Dans son témoignage (p. 20 et 21) M. Fleming dit à propos des nouveaux prix :—

I think they were continued from the date of an Order in Council to that of the other without any reduction. I believe so. I acted upon the Orders of Council in every case so far as I can remember.

La demande des contracteurs pour les augmentations de prix, recommandée par l'ingénieur en chef et les commissaires et acceptée par l'ordre en conseil du 23 septembre 1871 et ceux qui ont été rendus après cette

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époque, dans le but de permettre aux contracteurs d'exécuter leurs entreprises et d'éviter des délais, ne forme-t-elle pas un contrat complet qui doit lier le gouvernement ? C'est comme le dit M. Fleming, l'inévitable conséquence de l'adoption de cet ordre en conseil au sujet duquel il s'exprime ainsi :—

Question.—Did you not yourself inform those contractors that you considered this new payment as a new basis, or new departure, as intended to increase the bulk sum of the contracts ?

Answer.—The moment the Order in Council was passed, without knowing its legal effect, I felt that in the common sense point of view it entirely altered the contract.

Question.—It practically altered the contract then ?

Answer.—Yes, and so far as I was concerned in making out the certificates, it was an entirely new contract to me.

Question.—Do you know yourself, or have you any means of knowing whether these additional payments made the contractors, was an inducement to them to go on with the work at the period when they were on the point of giving it up ?

Answer.—The increase was undoubtedly to induce them to go on.

Dans une lettre adressée par lui à M. John S. Fry, l'une des cautions des Appelants, il dit encore : " I " invariably acted on those Orders in Council consider- " ing them in the light of new contracts as far as mak- " ing out my certificates were concerned."

Les prix augmentés par les ordres en conseil furent communiqués aux Appelants sans aucune restriction et ils avaient le droit d'interpréter cette action du gouvernement comme un acquiescement absolu à leur demande. Les ordres en conseil eux-mêmes ne leur furent point communiqués, comme le dit positivement M. Berlinguet, de sorte qu'ils ne furent jamais en position de s'assurer si l'un de ces ordres, en date du 27 juillet 1871 et l'autre du 20 janvier 1872, contenait la réserve que l'augmentation des prix n'aurait cependant pas l'effet de dépasser la somme totale du contrat. Celui du 28 septembre 1871, qui avait fait droit à leur demande, ne contenait aucune restriction de ce genre. A moins d'en

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informer les Appelants, le gouvernement ne pouvait pas changer la position qu'il leur avait faite. Il eut été contraire à la bonne foi de les laisser continuer les travaux sous l'impression qu'on avait fait droit à leurs demandes, tandis que les ordres contenaient une condition qui n'aurait pas été acceptée, si elle eût été communiquée. Ce serait faire injure au gouvernement que de supposer qu'il eût voulu tendre un piège à des contracteurs, qu'il avait, dans son intérêt, encouragés à continuer leurs travaux. Bien que cette réserve se trouve dans les ordres du 27 juillet 1871 et du 20 janvier 1872, le gouvernement n'en ayant jamais donné communication aux Appelants, il faut en conclure qu'il s'est désisté de cette réserve comme étant contraire à sa détermination de venir au secours des contracteurs. Tous les ordres changeant les prix doivent donc recevoir leur plein et entier effet comme si cette réserve n'y eût jamais été insérée. S'il en était autrement, le gouvernement, après avoir empêché les Appelants de renoncer à leur entreprise pour éviter une ruine complète, se trouverait à bénéficier de sommes considérables par un moyen contraire à la bonne foi. Il me semble que la seule conclusion à tirer de ces documents et de l'action du gouvernement, c'est que les prix ont été modifiés, comme le comporte les ordres en conseil, en vertu d'engagements obligatoires et qui doivent être exécutés comme un contrat. L'honorable juge Taschereau objecte à cette conclusion comme contraire à l'acte 31 Vic., chap. 13, réglant la manière de faire les contrats pour la construction de l'Intercolonial; mais le gouvernement s'y est conformé autant qu'il lui a été possible. Si les circonstances l'ont forcé d'adopter certaines modifications au contrat passé conformément à l'acte en question, n'est-il pas prouvé, comme justification, par la correspondance, par les ordres en conseil et par le témoignage de M. Fleming, que ces modifications étaient indispen-

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sables dans l'intérêt public; qu'il eût été plus dispendieux de chercher d'autres contracteurs que de laisser continuer ceux qui, d'après les nombreux rapports de l'ingénieur et des commissaires, donnèrent une si grande satisfaction; qu'un tel changement aurait entraîné des délais considérables dans l'exécution d'une entreprise que le gouvernement considérait comme du plus grand intérêt public de réaliser le plus tôt possible. Si la nécessité a forcé le gouvernement de déroger aux prescriptions du statut, qui en doit être responsable? Ce n'est certes pas les contracteurs. N'est-ce pas le gouvernement plutôt que les contracteurs qui n'ont fait qu'exécuter ses ordres?

De plus ces travaux ont continué pendant plusieurs années et le parlement chaque année en votant les sommes payées aux contracteurs a bien et duement approuvé ces modifications au contrat passé conformément au statut.

Les Appelants ont fait entendre plusieurs témoins pour prouver que sir Hector Langevin, alors ministre des travaux publics, avait, dans différentes entrevues avec les Appelants, MM. Dunn et Home, MM. Glover et Fry, leurs cautions, en réponse aux représentations qu'ils lui firent sur leurs embarras financiers, recommandé aux Appelants de ne pas abandonner leur contrat, que le gouvernement n'avait pas l'intention de construire l'Intercolonial aux dépens des particuliers, et que s'ils terminaient leur contrat, ils seraient indemnisés de leurs pertes. M. John Ross qui avançait les fonds aux Appelants jure positivement que sir Hector Langevin lui a dit qu'il pouvait en toute sûreté continuer ses avances et qu'il en serait remboursé. Ce témoignage est confirmé par au moins cinq autres témoins.

Sir Hector, entendu comme témoin, a nié cette conversation et en a donné la version suivante,—il reconnaît avoir dit seulement qu'il était de l'intérêt des

contracteurs de finir leurs contrats, ce qui éviterait des retards dans l'exécution des ouvrages et augmenterait les chances de voir leur réclamation favorablement accordée et réglée par le gouvernement. Tous les témoins qui ont rapporté la déclaration ainsi contredite sont de la plus haute respectabilité et auraient dû, par leur nombre, faire pencher la balance de la preuve en faveur des Appelants. Mais peu importe. Ceux-ci ne prétendent pas que si l'autre version prévalait, elle établissait un contrat. Pour servir leur objet, la version de sir Hector leur suffit, car ils ont principalement en vue de prouver que les changements faits par les ordres en conseil n'étaient pas seulement une aide temporaire, mais un règlement des difficultés sérieuses qui étaient soumises au gouvernement. L'admission de sir Hector confirme cette manière de voir, en faisant connaître les dispositions du gouvernement à l'égard des Appelants. Tout ce qui précède me porte à conclure que l'exécution des travaux devaient être réglée d'après le contrat qui résulte des ordres en conseil.

Mais, en supposant que le contrat signé le 25 mai 1870, doive déterminer les obligations respectives des parties, ne faudrait-il pas au moins prouver que les ingénieurs et autres agents du gouvernement chargés de la surveillance et de la conduite des travaux, n'ont point systématiquement commis d'infractions à ce contrat dans le but de nuire aux Appelants. Une des clauses du contrat donne à l'ingénieur en chef la direction des travaux, et oblige les Appelants à se soumettre à sa décision, ainsi qu'à celle de tous ceux qui agissent d'après ses ordres. On conçoit qu'en l'absence de plans, et lorsque, comme il est amplement prouvé, les plans des principales structures n'étaient faits que pendant la construction et souvent livrés aux contracteurs qu'après bien des demandes réitérées et de longs délais, il était facile à un ingénieur hostile aux contracteurs de leur

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rendre impossible l'exécution de leur contrat. Il est reconnu qu'à moins qu'un ingénieur ne soit d'une grande impartialité, les contracteurs sont toujours à sa merci et peuvent être facilement ruinés par lui.

Les Appelants se plaignent que M. Marcus Smith, ingénieur en charge des deux sections Nos 3 et 6, a, dès le début, fait preuve à leur égard de sentiments hostiles et de violents préjugés qui se sont manifestés par de continuelles injustices, constituant une violation systématique et volontaire du contrat (*tortious breach*), rendant le gouvernement responsable des conséquences qui en sont résultées. Malgré une preuve complète, je puis dire, de ces griefs, l'honorable juge a décidé cette question de faits contre les Appelants, bien que la direction des travaux eût été enlevée à Smith, en conséquence de leurs justes plaintes. Après examen de la preuve, je suis forcé d'en venir à la conclusion que l'honorable juge n'a pas donné à cette preuve l'importance qu'elle méritait et qu'il a basé son opinion sur une preuve générale, insuffisante et d'un caractère moins désintéressé que celle faite par les Appelants.

L'ingénieur M. Smith, qui est prouvé être d'un caractère très irascible, avait une cause toute particulière d'animosité contre les Appelants, parce que ceux-ci, en prenant les contrats des sections 3 et 6, qu'il avait voulu faire avoir à quelques amis d'Angleterre, étaient la cause qu'il avait éprouvé un grand désappointement qu'il manifesta devant le témoin C. Lorgie Armstrong, qui rapporta une conversation avec M. Smith à ce sujet à l'occasion d'une observation faite par Armstrong sur l'insuffisance des paiements dont se plaignait Berlinguet :

Answer.—He said they had got all they deserved or entitled to. I remarked, it is rather a hard case; they scarcely get money enough to pay their hands. He observed—I sent in a contract for that same section for my friends in England, and if they had got it they would have had plenty of funds to carry on the business without drawing on

the Government until it was finished. He added—these d——d little Canadians are the cause of my not getting it.

Question.—Did he tell you the names of his friends in England?

Answer.—No; I asked, how could you act as an engineer in that case? He answered—I should have resigned my situation and gone on with these works.

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Ce témoin, qui est âgé et d'une grande respectabilité, ne saurait être accusé d'avoir inventé de toute pièce une conversation de ce genre. Un autre témoin en rapporte une autre d'un genre différent, mais démontrant que Smith n'oubliait pas son désappointement :

Question.—Did you ever hear Marcus Smith say anything regarding these contractors?

Answer.—Yes—that they were nothing but d——d French fools that would not be long on the works?

Question—Where did you hear him say this?

Answer.—In Dan Delaney's, in a private room, it was in company with John Hamilton of Dalhousie, and a few more.

Dans une autre circonstance rapportée par L. H. Honoré Huot, témoin de la plus grande respectabilité, M. Smith s'est laissé aller contre Berlinguet à de tels excès de paroles que les personnes présentes furent obligées d'entrer dans la maison. Il s'agissait d'une visite que M. Davey désirait faire des sections 3 et 6. Le témoin rapporte ainsi la scène.

M. Smith voulait que ce fut M. Berlinguet lui-même qui lui fit visiter ces sections. M. Berlinguet lui répondit que c'était le capitaine Armstrong qui devait lui faire visiter ces sections et qu'une voiture était prête pour cela. M. Smith s'est alors fâché, et s'est servi de telles expressions que nous avons été forcés de rentrer dans la maison et nous avons laissé M. Berlinguet vider seul la querelle avec M. Smith.

Ajoutez à toutes ces manifestations violentes le témoignage de M. John Home qui prouve des faits tels qu'on hésiterait à les croire, si l'honorabilité de ce témoin n'était pas si généralement connue. Il n'y a rien de prouvé qui puisse diminuer la foi due à son témoignage. C'est un homme très intelligent, versé dans les affaires et possédant la confiance d'hommes de la plus haute

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responsabilité dans Québec. Il rapporte que dans un entretien chez lui avec Smith, celui-ci lui dit :

If Davey is here it is just as easy for him to save you a half a million dollars as anything at all, says he, and without any disparagement to the Government. The Government will not have anything to find fault with the road, and you will get quit of the Frenchmen that don't know anything at all about building roads.

Smith a nié cette conversation, et l'honorable juge, il est vrai, a préféré croire la dénégation de Smith qui a également nié ses conversations avec Armstrong et autres témoins qui ont fait preuve de ses dispositions hostiles à l'égard des contracteurs. Est-il possible d'ajouter foi à ses dénégations, lorsque tant de témoins irréprochables affirment ce qu'il a dit.

Il est inutile d'entrer dans de plus grands détails sur ce sujet, car la lecture de la preuve fera voir que ces reproches contre Smith sont prouvés de la manière la plus satisfaisante. Ces dispositions qui ont inspiré Smith dans sa conduite à l'égard des contracteurs, l'ont porté à des exigences de nature à amener leur ruine. On comprend mieux après cela sa lettre du 23 août 1870, donnant des instructions à l'ingénieur de section, Lawson, et se terminant par les lignes suivantes :

"You must, however, do all that is necessary, regardless of quan-
" tities, as there is a large amount for contingencies, and, anyhow,
" the contract will probably have to be re-let."

Plus loin, il fait rapport aux commissaires qu'il n'avait été fait aucun progrès dans les ouvrages de maçonnerie, et qu'en proportion du progrès fait, cela prendrait vingt et un ans pour terminer la maçonnerie des sections 3, 6 et 9, et que les contrats ne peuvent être exécutés—"*the contract must fail.*" Cependant, les rapports des commissaires et les ordres en conseil dont de nombreux extraits ont été cités plus haut, constatent à plusieurs reprises que les travaux progressaient d'une manière satisfaisante. De nombreux témoins entendus de la part des Appelants ont aussi prouvé ce fait,

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Etait-il possible de contredire plus positivement les assertions de Smith. Si son hostilité ne se fut manifestée qu'en paroles, il n'y aurait que peu de chose à en dire, mais elle se traduisait par des faits de la plus haute gravité, soit en ne faisant pas faire rapport correctement des quantités de travaux exécutés, ainsi que le jugement le reconnaît en accordant une indemnité en se basant sur ces motifs, soit en faisant faire des travaux beaucoup plus dispendieux que ceux voulus par le contrat, ou même des ouvrages inutiles, en négligeant de fournir les plans des ouvrages et causant ainsi des retards très préjudiciables, en condamnant des carrières de pierre, approuvées plus tard, en rejetant le ciment et d'autres matériaux pour des motifs futiles. Il y a à ce sujet une preuve considérable dans les énormes volumes qui contiennent les témoignages en cette cause. Lors de l'audition, les conseils des Appelants ont déclaré qu'ils n'entraient pas dans les détails de cette preuve, et déclaré aussi qu'ils ne considéraient pas la Cour obligée pour le présent d'en faire une étude particulière. En effet, cet examen ne peut devenir nécessaire que dans le cas où la cour serait d'avis, soit que le contrat a été mis de côté ou modifié du consentement des parties, ou qu'il y a eu *a tortious breach* donnant aux Appelants droit d'être indemnisé de leurs travaux. Il y a encore une autre raison pour ne pas entrer maintenant dans ces détails, c'est que la preuve a établi positivement qu'il n'a jamais été tenu compte des travaux extrà qui ont été ordonnés pour les déviations ou changements de niveau de la voie et au sujet desquels il faudra, dans tous les cas, ordonner une référence à experts.

Au sujet de ces extrà, le jugement de la cour d'Echiquier contient une erreur si palpable et d'une conséquence si importante pour les Appelants que seule, elle suffirait pour le faire infirmer.

L'honorable juge dans le parapraphe 34 de son juge-

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ment dit :

But I state it with regret : The contract constitutes the law, the contractors submitted to all its clauses, they renounced every claim for extras, all damages, &c.

Au paragraphe 36, l'honorable juge répète cette assertion en disant :

Supposing moreover that the proof was clear, all indemnity should be refused to the contractors in consequence of the clauses so onerous and so strict of the contract by which they (the contractors) renounced all damages, *all extràs*, and even the balance due to them if they gave up their contract or did not complete it in time prescribed.

L'honorable juge n'a pu en venir à cette conclusion que parce que son attention n'a peut-être pas été suffisamment attirée sur l'effet que la continuation des travaux, après le délai fixé par le contrat, avec l'approbation du gouvernement et la promesse réitérée du gouvernement d'en payer la pleine valeur comme le démontre les rapports et les ordres en conseils devait avoir sur les clauses concernant la confiscation et l'annulation du contrat. On ne trouve pas à ce sujet une seule observation dans son jugement. Après avoir vu par les autorités ci-dessus, que le gouvernement n'ayant pas dans le délai fixé par le contrat exercé les pouvoirs que lui conféraient ces clauses, il n'était plus en son pouvoir de le faire, il faut en arriver à une conclusion contraire à celle de l'honorable juge. L'annulation ayant été illégalement prononcée, après le délai convenu, elle ne peut produire aucun effet, elle ne peut opérer ni confiscation ni renonciation aux extrà. Comme le démontrent les autorités citées, le délai passé, le gouvernement ne pouvait plus annuler le contrat et s'emparer des travaux comme il l'a fait. Il ne lui restait plus que le recours ordinaire aux tribunaux pour faire ordonner aux contracteurs que les travaux seraient terminés dans un délai raisonnable que, dans les circonstances où se trouvaient les parties, la cour avait seule alors le pou-

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voir de fixer.

Ainsi, la renonciation prétendue aux *extras* n'ayant aucun effet, les Appelants avaient droit à tous les *extras* que la clause 4 du contrat permet de réclamer. Après avoir autorisé certains changements qui ne devaient pas donner lieu à réclamer des indemnités, la clause continue :

And the contractors shall not be entitled to any allowance by reason of such changes unless such changes consist in alterations in the grades or the line of location, &c., &c.....

La confiscation prononcée par le jugement étant illégale, il faut examiner la preuve faite au sujet du changement de niveau et de location de la ligne du chemin de (*change of grade and location of the line*). La preuve de ces changements et leur estimation d'après le devis (*bill of works*) constate qu'il y en a eu pour environ $23,000 auxquelles les Appelants auraient droit d'après la stipulation du contrat. On peut vérifier cette estimation en référant aux appendices A, p.p. 2 et 8 ; B, p. 2 ; C, p. 1 ; D, 1, *Book of correspondence*, p. 271*a*, p. 323, et aux témoignages suivants :

APPELLANT'S EVIDENCE,—Berlinguet : p. 5, l. 5 ; 27, l. 22 ; Fleming : pp. 46*d*, l. 30 ; 47*d*, l. 20 ; Fitzgerald : pp. 59*d*, l. 30 ; 60*d*, l. 1, 26 ; 61*d*, l. 4, 32 ; 62*d*, l. 1 ; 63*d*, l. 1, 12 ; Report. Cor. 271a, No. 3. Martineau : pp. 66*e*, l. 20 ; 70*e*, l. 10 ; 71*e*, l. 5, 25. Gagnon : p. 116*e*, l. 19, 122, 123, 132, 133, 137. Townsend : p. 334*e*, l. 18, 364.

RESPONDENTS' EVIDENCE,—Smith : pp. 22, l. 20 ; 63, l. 20. Harris : pp. 91*a*, l. 1 ; 95*a*, l. 35 ; 96*a*, l. 1. Bell : p. 311*a*, l. 10. Carmichael : p. 351*a*, l. 8.

Mais comme il n'appert pas d'après la preuve que les changements de niveau et de location de la ligne du chemin ont été mesurés séparément des ouvrages du contrat et qu'il en a été tenu compte par les commissaires ou leurs agents, et comme il est aussi prouvé d'après le témoignage de l'ingénieur Ruttan (1), que pendant l'hiver on ne mesurait pas l'ouvrage, je crois que je devrais adopter sur cette partie de la cause la

(1) Corr., p. 226, 23, 234.

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conclusion à laquelle je suis arrivé dans la cause de *Muray* vs. *Queen*, rapportée dans les Journaux de la Chambre (1879), et ordonner une expertise. La Couronne, dans cette cause, a acquiescé à mon jugement, et comme les faits sont semblables dans la présente cause, je suis d'opinion que les pétitionnaires ont le même droit d'obtenir une expertise.

Mais comme il est en preuve qu'il n'a été tenu par les ingénieurs aucun compte de ces *extras*, qu'ils ont fait rapport des travaux exécutés sans jamais faire la distinction entre ceux du contrat et ceux qui étaient des *extras*, concernant les changements de niveau et de location de la ligne, la valeur de ces travaux se trouve avoir été payée à même le prix du contrat, au lieu d'avoir été en outre de ce prix. La défense a essayé de faire une preuve générale qu'il y avait eu dans le cours des travaux une compensation d'opérée en tenant compte des augmentations et des diminutions ; mais cet avancé n'a été imaginé qu'après coup par certains ingénieurs pour pallier l'injustice et l'irrégularité de leur conduite. Ils sont tous forcés d'admettre qu'ils n'ont jamais, dans leurs rapports, fait la distinction entre les travaux qui devaient être payés extrà et ceux qui devaient l'être à même le prix du contrat. Il est évident que leur explication est fausse et qu'ils n'ont pas à cet égard rendu justice aux contracteurs.

Au sujet de ces prétendues diminutions qui auraient compensé les augmentations, un avancé de M. Fleming mérite une attention particulière. Se fondant sur son témoignage, le juge a pris pour avéré qu'il y a eu en faveur des contracteurs une diminution d'ouvrage qu'ils auraient dû faire en vertu de leur contrat, se montant à la somme de $178,000. Le témoin ne s'est pas clairement exprimé, et il a été cause de l'erreur commise par l'honorable juge. Quoique un peu longue, je citerai une partie de son témoignage à ce sujet.

Question.—So in this instance the operation consisted in not charging the contractors with the occasional deductions?

Answer.—That is a matter of fact. The changes were with scarcely an exception, in the shape of deductions, and not of increase, and for the benefit of the Contractors. There is no exception to the rule in the case of these two sections. With regard to the reductions we succeeded in making in the works, I can only refer to what may be called works, such as masonry, clearing, grubbing, fencing, rock excavations and so on; the original *schedule of quantities*, moneyed out at certain prices made these works amount in all to $380,659 on Contract 3. The same works actually executed, and moneyed out at the same prices, comes to $265,659, in other words there was a saving effected, at those prices, of $115,000.

Question.—That shows the difference between the work that the Bill of Works called for and the amount performed.

Answer.—Assuming these calculations correct, it shows a very considerable reduction. On Contract 6 the reduction is not so great, but still it amounts to $63,000 arrived at in the same way.

Question.—So the saving by these reductions would be about $178,000.

Answer.—Yes. The last returns of quantities I received, dated July '70. There may have been some changes since that would affect the amounts named, but to what extent I can't tell.

On voit que M. Fleming a basé cette assertion sur la cédule des *quantités*, estimées à des prix qui donnaient en tout la somme de $380,659 pour le contrat n° 3. Ces ouvrages exécutés, estimés aux mêmes prix, ne se montent qu'à la somme de $265,659. Pour se faire bien comprendre, M Fleming aurait dû faire ici une distinction essentielle, et dire que les *quantités* estimées par lui n'ont pas été la base des contrats. Les contracteurs ne se sont nullement obligés de remplir les quantités qu'il avait, comme il le dit lui-même, estimées à peu près :—

We could not pretend to give exact quantities. In most cases, they were a good deal greater than strictly necessary.

Leur contrat était de construire 45 milles de chemin de fer, suivant les plans et devis, sans aucune obligation de se conformer au (*bill of works*) à la cédule des *quantités*. Ainsi, la prétendue réduction n'est pas faite sur les

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ouvrages du contrat, mais elle est simplement la différence entre l'estimé probable des *quantités* fait (*bill of works*) par M. Fleming, et les quantités qui ont été trouvées nécessaires pour la construction du chemin de fer d'après les plans et devis. M. Fleming savait mieux que qui que ce soit que les contracteurs n'étaient pas obligés de remplir ces *quantités*; que, par conséquent, ce qu'il prétend être une réduction de $178,000 n'en est pas une sur les ouvrages du contrat. Il aurait dû dire plus clairement que cette somme de $178,000 ne représentait que le surplus de son estimation, c'est-à-dire l'erreur qu'il avait commise en voulant *errer du bon côté.* M Brydges a commis la même erreur. Ainsi, cette prétendue réduction n'est qu'un leurre et ne représente pas une diminution d'un centin. Cependant, cette assertion a produit un grand effet sur l'honorable juge qui a pensé qu'il y avait eu une réduction réelle de ce montant, et en a conclu qu'il devait y avoir compensation des réclamations des Appelants jusqu'au moins à concurrence des $178,000. Cette erreur évidente dans le jugement doit être reformée, et les Appelants déclarés avoir droit au prix de leurs ouvrages *extras.*

Le gouvernement ayant illégalement annulé le contrat, comme il a été démontré plus haut, pour s'emparer des travaux, aurait dû tout au moins prendre les précautions qu'exigeait de lui la prudence la plus ordinaire. Même si cette annulation eût été régulière, la plus simple justice demandait encore que l'on fît dans ce cas un état exact des travaux jusqu'alors accomplis par les contracteurs, afin de constater avec exactitude ce qui restait à faire pour terminer le contrat; rien de cela n'a été fait. Il n'a pas même été tenu compte des ouvrages qui ont été faits sous la direction de M. Brydges pour terminer le chemin tel qu'il l'a été par le gouvernement. Un état détaillé des ouvrages ainsi faits,

n'ayant jamais été donné, il est tout à fait impossible de savoir s'ils sont conformes au contrat. Il n'a été fait aucune preuve légale des ouvrages et de leurs prix.

L'honorable juge s'est contenté du seul témoignage de M. Brydges qui a donné son estimation du coût des ouvrages, sans avoir aucune connaissance personnelle de leur exécution et sans avoir pris aucun des procédés nécessaires pour s'assurer de leurs quantités.

Question. Have you got a statement of the amount of money that was paid by the Government to complete it?

Answer. It is in the book, I think. I think it is $197,000.

Question. Altogether 3 and 6?

Answer. The Government expended on No. 3, $107,556.97, and on section 6,136, $915.60.

Question. That was besides what had been paid to the contractors?

Answer. Yes.

Question. What is the amount then expended by the Government over and above the contract price?

Answer. Including sums paid to the contractors and what the Government expended in finishing the excess over the lump sum of the contract on section 3, $197,127.60, and on No. 6, $62,959.60.

Il est prouvé par un document dans la cause que les contracteurs, le 30 septembre 1872, huit mois avant la prise de possession des travaux, par les commissaires ont fait faire un estimé des ouvrages qui restaient à faire d'après le contrat. Cet estimé a été préparé sur des quantités fournies par le gouvernement et déterminées en la présence des commissaires Walsh et Brydges et de l'ingénieur, M. Bell et d'après cet estimé il restait des ouvrages pour un montant de $200,000. Il est vrai que dans le livre de correspondance (p. 303) on trouve un autre document produit par la défense, constatant qu'un estimé des quantités a été fait en décembre 1872, et qui contredit le premier état, mais on n'a pas pris la peine de prouver par qui il a été fait. Bell dit bien qu'il a été fait par ses employés mais il ne peut jurer s'il est correct. Ses employés n'ont pas été entendus comme témoins, et on ne peut dire s'il a été fait d'après les mesurages nécessaires pour s'assurer des quantités. Les contracteurs

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n'en ont certainement pas eu connaissance.

Il est aussi en preuve que du moment que les commissaires ont pris possession des travaux, on a cessé de faire des rapports (comme ci-devant) des quantités d'ouvrages exécutés et de l'endroit où l'ouvrage se faisait. Il était suffisant pour ordonner les paiements de recevoir la feuille de paye certifiée par un conducteur. Ajoutez à cela que les témoins Stevenson, Townsend, Carmichael et d'autres s'accordent tous à dire que la dépense faite par le gouvernement à partir de cette date a été on ne peut plus extravagante.

Dans ces circonstances et malgré le fait que les contracteurs répudient toute responsabilité pour aucun paiement fait par le gouvernement, l'honorable juge a déclaré, après avoir prononcé la confiscation des montants qu'il reconnaissait être dus par le gouvernement aux contracteurs, que ces derniers étaient endettés envers Sa Majesté en la somme de $159,000. Je n'hésite pas à déclarer que je suis d'avis qu'il n'y a aucune preuve légale qui puisse justifier une telle condamnation et par conséquent son jugement sur ce point important devrait être infirmé, et une expertise ordonnée, pour s'assurer par des procédés réguliers, des quantités d'ouvrage qui restaient à faire sur les travaux d'après le contrat, le 11 juin 1873.

L'honorable juge a été plus difficile sur la nature de la preuve que les Appelants devaient faire de leur réclamation. Il me semble avoir exigé d'eux plus que la preuve ordinairement suffisante pour justifier une réclamation de ce genre. Les Appelants ont fait preuve de leurs paiements par MM Blumhart, Turner, Bosteed, Woodside et par toutes les autres personnes qui ont payé le prix des ouvrages et matériaux qui forment le montant de cette réclamation. Tous ces témoins en ont attesté l'exactitude. Il est impossible d'entrer dans plus de détails et d'être plus précis que l'ont été les Appelants dans cette preuve à laquelle, d'ailleurs, il n'a été fait

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aucune objection de la part de la couronne. La preuve me paraît complète. La conclusion contraire de l'honorable juge est une erreur évidente. Mais comme je suis d'avis qu'il doit y avoir, pour opérer un règlement complet, une référence à experts sur certains points, je ne conclus pas maintenant à une adjudication finale.

Un des principaux chefs de la défense est ainsi formulé :

29. The Suppliants are not entitled to any payment, except on certificate of the Engineer, and they, the Suppliants have been paid all that they have obtained the Engineer's certificate for.

Quoique cette condition de fournir préalablement le certificat de l'ingénieur n'est pas obligatoire pour ce qui peut être dû pour dommages (*breach of contract*) ou pour la valeur des outillages, elle serait obligatoire pour une partie de la demande (*condition precedent,*) si le gouvernement, par la prise de possession illégale des travaux, n'avait lui-même rendu impossible l'exécution de cette condition préalable En outre il a été fait un rapport par l'ingénieur qu'il lui était impossible de certifier le montant dû aux contracteurs, parce qu'il n'avait pas d'information suffisante. Cependant il est pourvu par le contrat que les contracteurs ont droit à un certificat basé sur des mesurages des ouvrages faits, ces mesurages n'ayant pas été faits n'était-il pas du devoir du gouvernement de les ordonner? De plus, je suis encore d'opinion comme je l'ai déjà dit dans les causes de *Isbester* vs. *La Reine*,(1) que lors de la production de la présente pétition de droit, le gouvernement s'était mis dans l'impossibilité d'insister sur la production d'un certificat final de l'ingénieur en chef, par le fait d'avoir aboli cet office par statut.

Dans la cause de *Jones* vs. *Queen*, citée pour établir la nécessité de la production d'un tel certificat, il a été prouvé que le contrat avait été exécuté en entier par le contracteur, qui avait produit sa récla-

(1) 7 Can. S. C. R. 696.

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mation devant les commissaires, que ces derniers après avoir obtenu le rapport et le certificat de l'ingénieur recommandèrent qu'il fut payé au contractenr une somme, en sus du prix en bloc mentionné dans le contrat, pour extra, de $31,091.85 et firent rapport que le certificat de l'ingénieur avait été refusé pour le surplus. Dans ce cas le gouvernement s'est conformé en tout point aux termes de son contrat et je concours volontiers dans la décision qui a été rendue en cette cause par l'honorable juge en chef.

Mais dans la présente cause les faits sont bien différents, il est prouvé 1° que le contrat a été annulé par le gouvernement après le délai fixé ; 2° que le gouvernement avant et après l'expiration du délai pour terminer le contrat a autorisé le paiement en plein de la valeur des ouvrages exécutés par les appelants et qu'ils ont été en partie payés sans faire la distinction des ouvrages qui pouvaient être considérés comme faisant partie du contrat et ceux qui étaient des ouvrages *extrà* ; 3° qu'avant que le contrat fût annulé les appelants ont produit une réclamation pour ouvrages exécutés et non payés, y compris les ouvrages *extrà* sur lesquels d'après les termes mêmes du contrat ils avaient le droit d'avoir la décision de l'ingénieur ; 4° que par le fait du gouvernement ils ont été mis dans l'impossibilité d'obtenir ce certificat ; et 5° que le gouvernement a admis en n'appelant pas de la décision de l'honorable juge Taschereau qu'ils étaient responsables pour *breach of contract.* Dans ces circonstances, je ne crois pas être en contradiction avec la décision de l'honorable sir W. J. Ritchie dans la cause de *Jones vs. La Reine* en déclarant que dans mon opinion la pétition des Appelants devrait être admise.

En résumé, je crois avoir démontré qu'il y a dans le jugement soumis à la revision de cette cour des erreurs qui en rendent l'infirmation inévitable ; le juge n'avait pas le pouvoir, après le délai du contrat expiré, de pro-

noncer la confiscation des sommes suivantes: 1° de $6,040 pour outillage vendu au gouvernement sur la section 3; 2° la somme de $20,982, aussi pour outillage et matériaux vendus sur la section 6; 3° celle de $5,850.90 qu'il avait accordée comme indemnité pour les retards injustes que les Appelants avaient éprouvés dans la réception de leurs paiements. Ces diverses sommes donnent un total de $32,873.25, auquel les Appelants ont un droit incontestable.

2° Il y a eu aussi erreur en considérant le contrat comme légalement annulé par le gouvernement, faute par les contracteurs d'avoir terminé les travaux dans le délai fixé. Cette annulation prononcée après l'expiration du délai fixé par le contrat aurait dû être déclarée illégale et sans aucun effet quelconque.

3° Il y a encore erreur en déclarant que la réduction illusoire de $178,000 a dû opérer la compensation des réclamations des Appelants et en particulier des *extras*, tandis que les Appelants avaient droit à certains *extras*. dont le compte n'a jamais été fait.

4o. Il y a une erreur manifeste dans l'adjudication de la somme de $159,000 comme étant le montant dépensé par le gouvernement pour terminer les travaux, en sus des sommes d'argent qui devaient être au crédit des contracteurs lors de l'annulation du contrat, tandis qu'il n'en a été fait aucune preuve légale.

5o. Une autre erreur évidente c'est la déclaration de l'honorable juge que les Appelants n'ont pas fait une preuve satisfaisante des items détaillés de leur réclamation, tandis qu'il était impossible d'en faire une plus directe et plus complète.

6o. Qu'enfin il y a erreur dans le jugement dont il est appel parce qu'il n'ordonne pas une référence pour déterminer la quantité d'ouvrages *extra* faits pour changement de location, et de niveau dont il n'a été tenu aucun compte mais dont la valeur s'élève d'après la preuve faite en cette cause à environ $28,000.

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En conséquence je suis d'avis que l'appel devrait être alloué, que les appelants ont droit à une adjudication en leur faveur, de la somme de $32,873.25 ; qu'une référence à experts devrait avoir lieu 1o pour s'assurer, après que les quantités auront été vérifiées par mesurages, des paiements qui ont été faits en à compte des ouvrages compris dans le contrat, 2o. pour déterminer la quantité d'ouvrages extrà faits d'après les ordres des ingénieurs et dont le paiement avait été autorisé par l'ordre en conseil ordonnant le paiement de la valeur de tout ouvrage exécuté, 3o. pour déterminer le coût extrà des ouvrages faits sur l'ordre des ingénieurs que les contracteurs n'étaient pas tenus de faire sans rémunération, et 4o. enfin pour déterminer la valeur des ouvrages qui restaient à faire pour compléter le contrat lors de l'annulation du dit contrat par le gouvernement en juin 1878, le tout avec dépens.

HENRY J.—I concur in the views just expressed in this case by Mr. Justice Fournier, having had the opportunity of reading his notes, which are very exhaustive.

Some of the enactments referred to by the learned Chief Justice I do not think apply. Where the government receives value in work done and they get it done after they were informed that they could not get it so done unless the fair value was paid, and subsequently accept it and use it, it is hardly necessary to say that I think the government ought to be made answerable for it. In the position we occupy here, it is known as matter of fact, that there was a great deal of looseness in the construction of the Intercolonial railway. The contractors were called upon through the engineers relying on the power given to them through the contract to do a great deal of extra work and the parties were bound to perform it. In this case we have reason to know it caused a great deal of injury to the contractors. I have carefully read over the evidence bearing on the circumstances under which the government

finally took possession of the works, and I am of opinion that there was no power to forfeit any moneys then due to the contractors. The government had the power up to a certain time to enforce the forfeiture clause of the contract, but by their action they waived it. When the time for completion arrived, they said "go on, we "will increase your rates," and they did go on and suddenly the government say, "we will not pay you for "any extra work, because you did not complete the "contract within the time specified." Under such circumstances, I am of opinion that to exact forfeitures would be doing a serious wrong, and such a conclusion is not warranted by authority. The parties were entitled to have their works measured and reported upon. True, estimates were made, but I cannot presume, after reading the evidence, that they were in favour of the contractors or in any way reliable, as measurements were not made.

I think with my brother Fournier that it is a fair case for an *expertise*, and that therefore the appellants are entitled to a judgment of the court, but to what extent I am not prepared to say.

I concur in the conclusions arrived at by Mr. Justice Fournier.

TASCHEREAU J.—I agree in the judgment to be read by my brother Gwynne.

As to section four of the contract which has been referred to, I think there is no doubt that under that clause the contractors were entitled to no allowance.

His Lordship read section 4 (1).

There is no contention that the contractors have ever obtained any certificate of the engineer for which they have not received money. On the contrary Mr. Berlinguet in his evidence admits that Mr. Noël, their agent at Ottawa, had received all moneys coming to them under the certificates of the engineer.

(1) See p. 74.

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Then under section 6 of the contract the commissoners were authorised (whenever it became necessary) to take any portion of the whole work out of the hands of the contractors and to complete it at the cost of the contractors. Now the suppliants seem to say "because you "have not taken the works out of our hands in 1871 "you have no right to do so in 1873." How long would they then have to complete the works, two years, three, five, ten? I do not think this correct. In my opinion the commissioners had a perfect right to do what they did; they gave the contractors more delay than they were entitled to, and I cannot see how they can now complain. I find that they themselves in May, 1873, sent a letter to the commissioners stating that they were unable to proceed with the work. I have never heard it contended during the argument that the contractors complained that the contract had been unduly taken out of their hands, and I cannot see how they could have had any reason to complain. This being so it follows that the government have expended a large amount, and it was never objected that the monies paid out had been unduly paid. The evidence on this point being uncontradicted, I think it is sufficient, and therefore the judgment of the court below, finding that it cost, over the contract price, a sum of $159,000, should be affirmed. I have, however, no objection to agree with Mr. Justice Gwynne and vary the judgment by deducting from the amount awarded to the Crown the value of the plant.

As to the question of forfeiture, granting the suppliants are right in saying there can be no forfeiture under clause 3 of the contract, I think that under clause 6 the government are entitled to be paid whatever amount they paid out in order to complete the works.

The appeal should be dismissed with costs.

GWYNNE J.—The gist of the suppliants' petition of right is that certain orders in council passed during

the progress of construction by the suppliants for the Dominion Government of sections three and six of the Intercolonial Railway, under a contract which had been executed by the suppliants, constituted a new contract, and wholly did away with and set aside the previous contract which had been executed by the suppliants.

After referring to the orders in council relied upon, and the circumstances under which the suppliants alleged they came to be made, the petition of right proceeds, paragraph 28:—"That the said orders in council constituted a new basis of contract, were a fresh departure as explained to your suppliants by the chief engineer appointed by your Majesty for the building of the said Intercolonial railway, and that the said orders in council were, with the consent and under the instructions of your Majesty's government, communicated to your suppliants to give them an inducement to the prosecution until completion of the works of the said section.

"29. That owing to the persistence of the Queen's own engineer to harass and obstruct your suppliants in the execution of the works, and owing tohis determination to drive off your suppliants, Her Majesty's representatives, the said commissioners, in justice to your suppliants, did finally remove the said district engineer.

"30. That your suppliants were induced to continue the prosecution of the said works by the declaration aforesaid of your Majesty's chief engineer; that the advances and increase in prices provided by the said orders in council, were a departure from what he styled your suppliants contract, and not a mere change in the progress estimates or a mere temporary arrangement.

"31. That your suppliants were further induced to proceed with the said works by the assurance of your Majesty's Minister of Public Works, and of the members of your Majesty's government of the time being, to the effect that your Majesty's government were very

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anxious, in the public interest, that your suppliants should go on with the execution of the said works, and that should your suppliants complete the execution of the said works, your Majesty's government should see that your suppliant was paid in full their past and future advances for the said work.

"32. That there is now due and owing to your suppliants by Her Majesty's government, for money *bonâ fide* paid, laid out, and expended, in and about the building and constructing of the said sections three and six, under the circumstances above mentioned, a sum of five hundred and twenty-three thousand dollars."

The petition contained a count wherein the suppliants claimed the said sum on a *quantum meruit* for work and labor.

The Attorney General by his answer to the above petition of right, set out a contract executed by the suppliants, whereby they bound themselves to complete the said section number three for the bulk sum of $462,444 dollars, and said section number 6 for the bulk sum of $456,946.23 dollars. The answer further alleged that: On the 24th May, 1873, the suppliants addressed a letter to the Commissioners claiming for extra work large sums therein specified and stating that without receiving those sums they must stop all works, as they could not proceed any further, and the suppliants not being entitled to any such sums, and declaring that unless they received them immediately they could not proceed with the works, notices were served upon them in terms of the contract that the completion would be taken out of their hands, in which notices they acquiesced; that at the time of serving this notice, namely, on or about the 9th June, 1873, so generously had the suppliants been treated that there was unpaid on the contract price of section 3 the sum of $10,444 only, and on the contract price of section 6 the sum of $73,946 only, while on the other

hand a large amount of work remained to be done far exceeding what those sums would pay for.

That the Commissioners thereupon proceeded to complete the said works under their own engineers and foremen, and necessarily expended in doing so the following sums, namely: On section 3, $107,556.97, and on section 6 the sum of $136,915 60, the result being that the suppliants have been overpaid in the two contracts the sum of $159,982.57.

The answer then denies the several special charges of wrong and injustice in the petition of right alleged to have been committed upon and obstruction caused to the suppliants in the petition of right alleged, or that any new contract had been entered into by the Government with the suppliants, and concluded by denying that there is now due and owing to the suppliants by Her Majesty's Government any sum whatever for any works executed, money paid out or otherwise, with respect to the said sections 3 and 6, but that on the contrary the suppliants have been overpaid the sum of $159,982.57, for which, under the terms of their contract, they are liable and chargeable, and the Attorney General claimed that the said sum is justly due to Her Majesty under the terms of the said contract, and that the suppliants should be ordered to pay the same.

The Attorney General also submitted and contended that the suppliants were not entitled to any payment except on the certificate of the engineer, and alleged that they had been paid all sums for which they had obtained the engineer's certificate. After a most patient and thorough investigation of every charge and complaint made by the suppliants in their petition of right, the learned judge before whom the case was tried in the Exchequer Court found every item of their complaint against the suppliants, and in a most exhaustive judgment, pronounced judgment for the Crown in the sum of $159,982.57 From this judgment the sup-

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pliants have appealed.

Mr. Girouard, one of the learned counsel for the appellants, in his argument before us, thus put the case: 1st. That a new contract had by the Orders in Council been made and substituted for the old one; and 2nd, he claimed for changes in grade and location as extra work.

As to the first of these claims he admitted that unless decided in the suppliants' favor the petition of right could not be sustained, but if decided in his favor then he claimed a reference as to the amount due.

In the very elaborate judgment of the learned judge who tried the case, to the effect that the claim, as asserted in the petition of right, is without foundation, I entirely concur. Indeed the claim that a new contract was in the manner stated substituted for the old contract could not be entertained without an utter disregard of the provisions of the Dominion Statutes 31 Vic. ch. 12 and 13. If, therefore, a counter claim had not been set up in the answer of the Attorney General the only judgment which would have been warranted by the evidence upon the claim as made in the petition of right would have been that it should be dismissed with costs. But the answer of the Attorney General required that the counter claim, set up by him on behalf of the government, should be adjudicated upon.

The claim was simply for the difference between the full contract price for which the suppliants contracted to execute the works and the amount which, in excess of that sum, they cost the government, who completed them under a provision in the sixth paragraph of the contract, which provided that:

The learned judge read the 6th paragraph (1).

The contractors, having refused to proceed with the works unless a wholly unjustifiable demand for payment to them of a sum of about $540,000 should be

(1) *Ubi. Supra.*

complied with, repudiated their contract and refused to proceed to completion of the works in accordance with their contract; it, therefore, became necessary in the language of the above 6th paragraph of the contract, to take the works out of the hands of the contractors, upon giving the seven days' notice as required by the contract, and to proceed to complete the works at the cost of the contractors. Such notice was given, the contractors acquiesced therein and, as provided in the contract, gave up to the commissioners peaceable possession of the works and of all materials, plant, &c., which they had on the ground for proceeding with the work. There is, I think, no intention expressed in this clause of the contract under which the government proceeded to complete the works, contracted for by the suppliants that they should forfeit their plant in addition to paying the increased cost of the works

It was the contractors' interest to let the government have the use of their plant, for otherwise the government must have themselves supplied all necessary plant, the cost of which the contractors in the terms of their contract must have paid. But there is, I think, no provision made that the contractors should forfeit their plant in addition to paying the increased cost of the works. When, therefore, the works were completed, what I think the contractors entitled to in the absence of any other special contract relating to the plant, was the return of their plant in its then condition, or in such condition as it should be by a reasonable use and care of it during the progress of the works to completion.

The only forfeiture spoken of in this sixth paragraph of the contract, is a forfeiture of the percentage retained, and of all moneys which might be then due on the works. The question whether these sums could be insisted on as forfeited, the works having been carried on without the interference of the government for about two years after the 1st July, 1871, which in the third

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paragraph of the contract was named as the day by which the works should be finally completed, does not arise in the present case, for as to the percentage which was by the contract agreed to be retained the government made no claim, in fact there was none, for the contention of the government is, and has been established, that they had not insisted on this term of the contract made in their interest, but on the contrary had paid largely in excess of what they were entitled to under the contract, and indeed almost the whole of the contract price not retaining the percentage, as they might have done under the contract, and in fact there was no money due to the contractors under the contract when they abandoned the works and refused to proceed further with them, so that no question arises here as did in *Walker* v. *L. & N. W. Co.* (1), whether such sums, if any there were, could be claimed as forfeited in addition to the liability of the contractors to pay the cost of the completion of the works, in excess of the contract price.

The learned judge in his judgment finds that the contractors are entitled to the sum of $5,850.90 for interest upon and for the forbearance of divers large sums of money due and payable to them, and further, the sum of $27,022.35 the value of the materials by them left to Her Majesty's government. But, he adds, that inasmuch as by section three of the contract the suppliants having abandoned the contract, forfeit all right and claim to these two amounts, to wit: $32,873.25 the said sum is hereby declared forfeited; and he further adjudged, that the suppliants do pay to Her Majesty's government of the Dominion of Canada, the sum of $159,982.57, as money overpaid by Her Majesty's government to the suppliants, at the time of their abandoning their contract. Now as to these items with reference first to the $5,850.90, the learned judge in his *motivé* accompanying the above judgment says

(1) 1 C. P. Div. 518.

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that it arises in this way:

"There is one point in the case in which the petitioners should succeed. It is that concerning the manner in which the engineers made their monthly estimates during the first four months following the beginning of the works in 1870, as established by documents 97 and 98, produced with the official correspondence, concerning the construction of the Intercolonial. According to this correspondence and the Order in Council of the 28th September, 1870, which settled the question, it would appear that the engineers committed errors resulting in a loss to the contractors for interest of $5,850.90, or thereabouts. In order to appreciate correctly the intention of the Commissioners in their communications to the Privy Council document 97, and the meaning and signification of the Privy Council, I cite them verbatim, and I believe, although the chief engineer was not of the opinion of the Privy Council and of the Commissioners on this point, that the engineer made grave errors on this occasion and that this sum of $5,850.90 should be credited to the petitioners on the final result of the case.

"I must say that if the contractors suffered damages to this amount which I allow them, they were well indemnified, if, as I have reason to believe, the report which I just read was followed to the letter.

"I also believe that in law and equity they should be credited with another sum of $27,023, representing the value of materials (plant, &c), which they transferred to the Government when they gave up their contract in May, 1873."

As to the first of the above items of $5,850.90, it will be observed that the learned judge admits that if the contractors had suffered the damages it was fully indemnified to them by the report of the Privy Council, which he says he has reason to believe was followed up

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to the letter. But, besides having been thus indemnified, the item does not come within the claim of the suppliants as presented in their petition of right. Their claims as there presented are, that the document relied upon by the Government, as the contract was wholly abandoned and set aside by the Orders in Council, relied upon in the petition as constituting a wholly new contract upon which, as the only contract existing or upon a *quantum meruit* the suppliants wholly rest their claim, whereas $5,850.90 is allowed as for errors, said by the learned judge to have been committed injurious to the right of the suppliants under the contract which the Government rely upon, but which the suppliants repudiate; while under the contract the suppliants can recover nothing except upon the certificate of the engineer which the suppliants have not to warrant the allowance of this $5,850.90, but on the contrary, as the *motivé* of the learned judge shews, the chief engineer repudiates the justice of the imputation of the errors which the learned judge has imputed to his subordinates and for which the learned judge has allowed this $5,850.90.

Then as to the $27,023 which I take to be wholly for plant to be used in carrying on the works to completion, other than material to be used in the work, as to which latter no deduction should be made, but taking it to be the fair value of the plant used for carrying on the works apart from materials used in the work, in the absence of a special agreement to the effect, I think the Government would not be entitled to retain the amount and at the same time to charge the suppliants with the full cost of the work in excess of the contract price. In view of the frame of the petition of right and the claims there asserted, it can only be by way of reduction of the amounts of the Government's counter claim that any allowance can be made to the contractors in respect of this sum of $27,023 as for value of

plant placed in the hands of the Government to enable them to complete the work.

However as to this plant the contractors when they abandoned their contract and gave it up to the Government to be completed by them, sold and transferred this plant to the Railway Commissioners by deed executed 11th June, 1873, in consideration of their agreeing to pay certain arrears of wages due to the laborers which had been employed by the contractors on the work. There is, however, a clause in that deed, the conditions of which appear to me to be that the contractors should be credited the value of the plant, on a final settlement to be made on the completion of the work by the Government, under the sixth paragraph of the contract, so that inasmuch as the learned judge has not deducted this sum from the $159,982.57 which he has found to be due the Government, as he would have done if he had not considered it to be forfeited under the terms of the contract, which I think it is not, it should now be deducted and the result will be to vary the judgment of the learned judge by reducing the sum found by him to be due to the Government of Canada to $132,959.

The form of the judgment should, in my opinion, be varied and should be to dismiss the petition of right with costs and to render judgment for the Crown on the counter claim for the sum of $132,959 as for money expended by the Government in completing the works in excess of the price for which the suppliants contracted to complete them, and this appeal must be dismissed with costs.

Appeal dismissed with costs. Judgment of the Exchequer Court varied.

Solicitors for appellants: *D. Girouard.*

Solicitors for respondents: *A. Ferguson.*