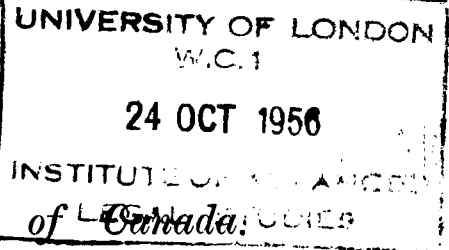


40, 1896

No. 27 of 1896.



In the Privy Council.

On Appeal from the Supreme Court of Canada.

29445

BETWEEN

JOHN THEODORE ROSS, FRANCES ELLA
ROSS, JOHN VESEY FORSTER VESEY-
FITZGERALD, and ANNIE ROSS
(*Suppliants*) *Appellants,*

AND

HER MAJESTY THE QUEEN (*Respondent*) *Respondent.*

THE CASE OF THE APPELLANTS.

1. This is an Appeal from a Judgment of the Supreme Court of Canada, delivered on the 9th day of December, 1895, dismissing an Appeal brought by the present Appellants against a Judgment delivered by the Exchequer Court of Canada on the 22nd day of May, 1895.

2. The said Appellants were Suppliants in a Petition of Right addressed to the Crown, which came on for hearing before Mr. Justice Burbidge in the Exchequer Court of Canada on the 26th day of January, 1895, under the following circumstances :—

Pp. 1-14 of
the Record.

3. On the 26th day of October, 1869, and on the 15th day of June, 1870,
10 Messrs. Jean Baptiste Bertrand and Francois-Xavier Bertrand, Railway Contractors of the City of Quebec, doing business as co-partners under the name and style of J. B. Bertrand & Co., entered into Contracts with the Crown for the construction respectively of Sections 9 and 15 of the Inter-colonial Railway.

4. The said Contracts were contained in deeds made and executed by the said J. B. Bertrand & Co. in Quebec and the Intercolonial Railway Commissioners, who were appointed under the Canadian statute, 31 Victoria, c. 13, as representing Her Majesty. The works done under the said Contract were done in the Province of Quebec.

5. The said Statute was an Act providing for the construction of the said Intercolonial Railway, and the said Railway Commissioners were appointed by the Governor-General of Canada under the 3rd Section thereof for the purpose of taking charge of the construction and management of the said Railway until its completion. The said Railway was by the 16th Section of the said Act to be built by Tender and Contract.

6. By the 4th Section of the said Act provision was made for the appointment by the Governor of a Chief Engineer, to hold office during pleasure, who, under instructions he might receive from the said Commissioners, was to have the general superintendence of the Works to be constructed under the Act. 10

7. By the 18th Section of the said Act it was enacted that no money should be paid to any Contractor until the Chief Engineer should have certified that the work, for or on account of which the same should be claimed, had been duly executed, nor until such certificate should have been approved of by the Commissioners.

8. The form of tender for the construction of a section of the said Railway is set out on page 41 of the Record. The form of the two said Contracts entered into between J. B. Bertrand & Co. and the said Intercolonial Commissioners, which may be regarded, for the purposes of this Appeal, as identical in terms, will be found set out at pages 34—41 of the Record. 20

9. Before the said Contracts were entered into, certain plans and profiles of the said two sections of the said Railway were exhibited in the office of the said Commissioners as a guidance to those who desired to tender for the construction of the said sections, and the said J. B. Bertrand & Co., in tendering therefor, based their calculations upon the said plans and profiles, and the bills of quantities prepared according to the instructions of the Chief Engineer.

10. The material terms of the said Contracts are as follows:—

Clause 2, which provides, *inter alia*, that—

30

“ The Contractors shall perform and execute all the works required
 “ 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 omitted 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 40
 “ 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 the 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 Plans, or from
 “ points not provided for or not sufficiently explained in the Plans or
 “ Specifications is to be final and binding on all parties.”

Clause 3.—

10 “ 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
 “ 1st day of July, A.D. 1871, time being declared to be material and of
 “ the essence of this Contract, and in default of such completion as afore-
 “ said on or before the last-mentioned day, the Contractors shall forfeit all
 “ right, claim, or demand to the sum of money or percentage hereinafter
 20 “ 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
 “ (\$2000·00) 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 in-
 “ complete, or for which the Certificate of the Engineer, approved by the
 “ Commissioners shall be withheld, and the Commissioners may deduct
 30 “ and retain in their hands such sums as may become due as liquidated
 “ damages from any sum of money then due or payable, or to become due
 “ or payable to the Contractors.”

Clause 4 provides, *inter alia*, that the Engineer shall be at liberty—

“ At any time during the commencement or during the construction
 “ of any portion of the work, to make any changes or alterations which
 “ he may deem expedient in the grades, the line of location of the railway,
 “ the width of cuttings or fillings, the dimensions or characters of struc-
 “ tures, 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
 40 “ doing the same, and the Contractors shall not be entitled to any allow-
 “ ance 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.”

Clause 6.—

“ The Commissioners shall have the right to suspend operations at
 “ any particular point or points, or upon the whole of the works, and in
 “ the event of such right being exercised so as to cause any delay to the
 “ Contractors, then an extension of time equal to such delay or detention
 “ shall be allowed them to complete the contract, but any such delay shall
 “ not vitiate or void this Contract, or any part thereof, or the obligations
 “ hereby imposed, or any concurrent or other bond or security for the
 “ performance of this Contract, nor shall the same entitle the Contractors
 “ to any claim for damages unless the Commissioners shall otherwise 10
 “ determine, and then only for such sum as they may think just and
 “ equitable. If at any time during the progress of the works it should
 “ appear that the force employed, or that 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 they may see fit to complete the works at the expense of the
 “ Contractors, and they shall be liable for all extra expenditure incurred 20
 “ 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 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 posses-
 “ sion of all the works and materials as they then exist, and
 “ without any other or further notice, or process, or suit at law, or 30
 “ any other legal proceedings of any kind whatever, or without its
 “ being necessary to place the Contractors *en demeure*. The Com-
 “ missioners, 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,
 “ and they shall not molest or hinder the men, agents, or officers of the 40
 “ Commissioners from entering upon and completing the said works as
 “ the Commissioners may deem expedient. If at any time it shall appear
 “ to the Commissioners that the security of the works is endangered, or
 “ the peace of the neighbourhood is likely to be disturbed, or any other
 “ difficulty likely to arise by reason of the men being left unpaid, the
 “ Commissioners may pay any arrears of wages so far as they can ascertain

“ the same to be due on the best information they can obtain, and charge
 “ the same as a payment on account of this contract.”

Clause 9.—

“ It is distinctly understood, intended, and agreed that the said price
 “ or consideration of Three hundred and fifty-four thousand eight hundred
 “ and ninety-seven dollars (\$354,897.00) 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 pro-
 “ visions or by law, and that the Contractors shall not upon any pretext
 10 “ whatever be entitled by reason of any change, alteration, or addition made
 “ in or to such works 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 said Act intituled ‘ An Act respecting the Construction of the
 “ Intercolonial Railway,’ or in the Commissioners or Engineer by this
 “ contract or by law to claim or demand any further or additional sum for
 “ extra works, or as damages or otherwise, the Contractors hereby expressly
 “ waiving and abandoning all and any such claim or pretension to all intents
 “ and purposes whatsoever, except as provided in the 4th Section of this
 “ contract.”

20 Clause 11.—

“ And it is further mutually agreed upon by the parties hereto that
 “ cash payments equal to 85 per cent. of the value of the work done
 “ approximately, made up from the 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 15 per cent. retained, will not be granted for a period of
 30 “ 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.”

11. By the terms of the Contract for the construction of Section 15 of
 the said Railway, the said J. B. Bertrand & Co. were to receive a lump sum of
 Three hundred and sixty-three thousand five hundred and twenty dollars and
 fifty cents (\$363,520.50c.) for the said construction, and the work was to be
 completed by the 1st day of July, 1872.

40 12. The said J. B. Bertrand & Co. proceeded with the work under the
 two said Contracts, and from time to time under the 11th Clause thereof
 received progress certificates from the Chief Engineer, Mr. Sandford Fleming.
 The said Mr. Fleming was Chief Engineer of the said Railway when the said
 Contracts were entered into, and up to the month of May, 1880.

13. The construction of the said two sections of the said railway was not completed by the said J. B. Bertrand & Co. on the dates mentioned in the said Contracts, but was completed in or about the month of May, 1873. The delay in the construction of the said sections as aforesaid was attributable to the act of the said Commissioners and the said Engineers under their directions, to the alterations made in the grades and the line of location, to changes in the works, and to the large quantity of extra and surplus work imposed upon the said J. B. Bertrand & Co., and for which they could not be held responsible.

14. In the spring of the year 1873 the said Commissioners, under 10 misapprehensions and without any reasonable cause, and at a time when a large amount of money was due to the said J. B. Bertrand & Co., assumed control of the works upon the said sections, and without giving the said J. B. Bertrand & Co. any notice of their intention of so doing in writing or otherwise, as required by the said Contracts, paid out money so belonging to the said J. B. Bertrand & Co. to some of the workmen on the said works.

15. In consequence of the said action of the said Commissioners the said J. B. Bertrand & Co. suffered great loss, inasmuch as the said Commissioners, after assuming control of the said works, expended unnecessarily large sums of money, and which were for works not contemplated nor included in the 20 said Contracts.

16. Subsequently the said Commissioners also took possession of the plant belonging to the said J. B. Bertrand & Co., an inventory of which was made, and the value of which was at the time duly fixed at the sum of \$10,695.79, but the said Commissioners have not, nor has the Government of Canada, paid this sum or any part thereof.

17. By reason of the premises the Government of Canada was on the 1st day of July, 1873, justly and truly indebted to the said J. B. Bertrand & Co. in the sum of \$576,904.02 for goods sold, work done, materials supplied, and money advanced in connection with the construction of the said two sections 30 of the said railway. The said J. B. Bertrand & Co. in the year 1875 presented claims against the said Government in respect of its said indebtedness to them.

18. On the 28th day of September, 1875, all the rights, title, and interest of the said J. B. Bertrand & Co. arising out of the said contracts against the Government of Canada were legally assigned to the late John Ross, and on the 10th day of December, 1879, the said John Ross filed a Petition of Right in the Exchequer Court of Canada, on which he claimed from the Crown the said sum of \$576,904.02 under and by virtue of the said assignment to him of the said rights of the said Messrs. J. B. Bertrand & Co. 40

19. On or about the 10th day of September, 1887, the said John Ross died, and the present Appellants, as his legal representatives, became entitled

to all his rights under the two said contracts. By an Order of the Exchequer Court of Canada the said Petition of Right filed by the said John Ross was revived in the name of the Appellants.

20. The hearing of the said Petition of Right came on before Mr. Justice Burbidge in the said Exchequer Court of Canada on the 26th day of January 1895, and the learned Judge gave judgment against the Suppliants, the present Appellants.

21. The Suppliants appealed to the Supreme Court of Canada, which on the 9th day of December, 1895, affirmed the judgment of the Exchequer Court
10 —Sir Henry Strong, Chief Justice, dissenting from the rest of the Court.

22. The ground upon which Mr. Justice Burbidge, in the Exchequer Court, and Mr. Justice Taschereau, in the Supreme Court, decided against the Appellants was that they were bound by a previous decision given by the said Supreme Court in the year 1889, in the case of "The Queen v. McGreevy,"
hereinafter referred to, and reported in 18 Canada Supreme Court Reports, at page 371. Additional
Papers, pp.
16-36.

23. By virtue of the Canadian Act, 37 Victoria, C. 15, the said Intercolonial Railway Commissioners became in 1874 *functi officio*, and their powers and duties became vested in the Minister of Public Works, and it was provided
20 by the said Act that all contracts entered into with the said Commissioners as such should enure to the use of Her Majesty, and should be enforced and carried out under the authority of the Minister of Public Works as if they had been entered into under the authority of an Act passed in the 33rd year of Her Majesty's reign, entitled "An Act respecting the Public Works of Canada." By the fifth section of the Canadian Act, 42 Victoria, C. 7, the department of Public Works was divided, and the Minister of Railways and Canals became in respect of railways and canals the successor in office of the Minister of Public Works, with all powers and duties incident to that office.

24. After the final completion of the said Intercolonial Railway in 1875,
30 a number of contractors, including the said Messrs. J. B. Bertrand & Co., presented claims as hereinbefore alleged, against the Government of Canada, for extra work and damages, arising out of their several contracts for the building of the railway. The Respondent in the said case of "The Queen v. McGreevy," one Robert H. McGreevy was one of such claimants. Record, p. 99.

25. In or about May, 1880, the said Mr. Sandford Fleming, who had been, as aforesaid, Chief Engineer of the said Railway, was proposed for re-appointment to that office in a report made by a Committee of the Canadian Privy Council to the Governor-General in Council, and was actually re-appointed,
but on the 21st day of June, 1880, the Minister of Railways and Canals made the following report— Record, p. 47.

Record, p. 48.

“ Ottawa, 21st June, 1880.

“ MEMORANDUM.

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

“ The undersigned accordingly recommends that authority be given
 “ for the appointment of Mr. Frank Shanly, C.E., as Chief Engineer of 10
 “ the Intercolonial Railway, for the purpose of investigating and reporting
 “ upon all unsettled claims in connection with the construction of the
 “ line, and that his salary while so engaged be fixed at \$541.66 a month,
 “ the engagement to be understood to be of a temporary character.

“ Respectfully submitted,

“ (Signed) CHARLES TUPPER,

“ *Minister of Railways and Canals.*”

26. In consequence of the report contained in the above Memorandum,
 in the place of the said Mr. Sandford Fleming there was appointed as Chief
 Engineer of the said Railway, Mr. Frank Shanly, C.E., as set forth in the 20
 following report of a Committee of the Canadian Privy Council, approved
 by the Governor General in Council on 23rd June, 1880.

Record, pp.
48, 49.

“ On a Report dated 21st June, 1880, from the Honourable the
 “ Minister of Railways and Canals, stating that a letter had been received
 “ from Mr. Sandford Fleming, wherein he states that for reasons given
 “ he is under the necessity of declining the position of Chief Engineer of
 “ the Intercolonial Railway and Consulting Engineer of the Canadian
 “ Pacific Railway, to which by Order in Council of the 22nd May last he
 “ had been appointed.

“ The Minister accordingly recommends that authority be given for 30
 “ the appointment of Mr. Frank Shanly, C.E., as Chief Engineer of the
 “ Intercolonial Railway, and that his salary while so engaged be fixed at
 “ \$541.66 a month, the engagement being understood to be of a temporary
 “ character.”

“ The Committee submit the above recommendation for your
 “ Excellency’s approval.

“ (Certified) J. O. Coré, C.P.C.”

27. The said Mr. Shanly was duly appointed, and in pursuance of the
 duty devolving upon him as Chief Engineer as aforesaid, investigated and
 reported *inter alia* upon the claim made by the late John Ross, and on the 40
 18th day of July, 1881, in a letter addressed to the Secretary of the Department
 of Railways and Canals, and signed by him as Chief Engineer, he certified and
 reported that there should be paid to the said John Ross by the Crown \$231,806

Record, pp.
49-53.

in excess of the lump sums agreed upon in the said Contracts, being in respect of Section 9 of the said railway a sum of \$112,816, and in respect of section 15 a sum of \$118,990.

28. In the case of the said Robert H. McGreevy, the said Mr. Shanly had made a similar report to the Minister of Railways, awarding the said claimant a sum of \$120,371. Additional Papers, p. 19.

29. Neither of the said reports so made by the said Chief Engineer of the said railway in favour of the said John Ross and the said Robert H. McGreevy were ever acted upon by the Government of Canada, but Additional Papers, pp. 37-64.
 10 in the month of July, 1882, the said Government appointed three Commissioners to reinvestigate *inter alia* the claims of the said John Ross and the said Robert H. McGreevy, and the said Commissioners reported in the case of the said John Ross that no sum was due to him, but the said claimant protested against the jurisdiction or right of the said Commissioners to deal with his claims. The said Robert H. McGreevy was awarded by the said Commissioners and accepted a sum of \$84,075.

30. Upon the above facts the following questions which came up for decision in the said Case of "The Queen v. McGreevy" were and are also in issue in the Case now under Appeal:—

20 (1) Was the said Mr. Shanly on and after the 23rd day of June, 1880, the Chief Engineer of the said railway within the meaning of the Statutes and Contracts under which the said Intercolonial Railway was built, and was he, as such, competent to give certificates as contemplated by the 11th Clause of the said Contracts?

(2) Did reports made by the said Mr. Shanly to the Department of Railways and Canals constitute good certificates under the said Statutes and the said Contracts?

30 (3) Was the approval of the Minister of Railways and Canals, as representing the Commissioners of the said Intercolonial Railway, necessary to give validity to the said certificates?

(4) If such approval was necessary had it been given by acquiescence?

31. In the said case of "The Queen v. McGreevy," which was tried in the Exchequer Court of Canada by Mr. Justice Fournier, the learned judge decided all the above questions in the affirmative, and gave judgment in favour of the suppliant, the said Robert H. McGreevy. An Appeal was taken to the Supreme Court of Canada, and in March, 1890, Judgment was given by a majority of the Court, allowing the appeal and reversing the decision of Mr. Justice Fournier. A Report of the Proceedings in the said Supreme Additional Papers, Pp. 1-14.
 40 Court will be found at pp. 15—36 of the Additional Papers forming part of the Record.

32. The Supreme Court of Canada for hearing the said appeal was composed of Sir W. J. Ritchie, Chief Justice, and Strong, Taschereau, Gwynne and Patterson, Justices. Ritchie, Chief Justice, Gwynne and Patterson, Justices, disagreed with the judgment of Fournier, Justice, but Patterson, J., on a ground quite different from those adopted by Ritchie, C. J., and Gwynne, J. For while Ritchie, C. J., and Gwynne, J., were of opinion that the Report made by the said Mr. Shanly to the Governor-General in Council that there was a balance due from the Government of Canada to the said McGreevy was not a certificate within the meaning of a contract similar to the said contracts in issue in this Appeal, Patterson, J., held, on the contrary, that the said report was a "final and closing certificate" within the 11th clause of the said contracts, but that inasmuch as it was provided by the 4th clause of the said contracts that the amount of any allowance for increased work was to be decided by the Intercolonial Railway Commissioners and not by the Chief Engineer, the said Robert H. McGreevy was not entitled to recover by virtue of the said Mr. Shanly's certificate. 10

33. Strong and Taschereau, Justices, were in favour of affirming Fournier, Justice, on all points, holding that the said Mr. Shanly was the Chief Engineer, and as such had power under the 11th clause of the said contracts to settle the Suppliants' claim, and that his said report as aforesaid in the said Suppliants' favour was a "final and closing certificate," entitling the said Robert H. McGreevy to the amount claimed by him. 20

34. They further held, and on this point Patterson, Justice, agreed with them and not with Ritchie, Chief Justice, and Gwynne, Justice, that the office of the Commissioners of the said Intercolonial Railway having been abolished by the Canadian Act, 37 Victoria, c. 15, and their duties and powers transferred generally to the Minister of Railways and Canals, approval of the certificate by the said Minister was not a condition precedent to entitling the said Suppliant to claim the amount awarded to him by the final certificate of the Chief Engineer. 30

35. It will thus be seen that in the case of "*The Queen v. McGreevy*," although the Supreme Court of Canada decided against the suppliant, the three judges forming the majority did not agree upon the real questions at issue, namely, whether the said Mr. Shanly was the duly appointed chief engineer of the said railway, and was as such competent to, and did actually give a "final and closing certificate" in favour of the suppliant.

36. When the hearing of the Petition of Right, lodged by the present Appellants, came on before Mr. Justice Burbidge in the Exchequer Court of Canada on the 26th day of January, 1895, the learned Judge gave judgment in favour of the Crown, on the ground that the case of the present Appellants was identical, both as to fact and law, with that of the said Robert McGreevy, and that he was bound by the decision of the Supreme Court of Canada in the 40

case of "The Queen v. McGreevy," adding, however, though without giving any reasons, that he would be in any case of opinion that the Crown was not liable. When the Appeal from that decision of Mr. Justice Burbidge came on for hearing before the Supreme Court of Canada, on the 1st day of October, 1895, the said Court was composed of Sir Henry Strong, C.J., and Taschereau, Gwynne, Sedgewick and King, Justices.

37. The learned Chief Justice adhered to the views held by him as Strong, Justice, in "The Queen v. McGreevy," and was of opinion that the Appellants were entitled to recover, and that the judgment of Burbidge, Justice, in favour
10 of the Crown, should be reversed. Mr. Justice Gwynne retained his opinion as expressed in the said case of "The Queen v. McGreevy," that the said Mr. Shanly was not properly qualified to give a certificate such as to entitle the Appellants to recover. Taschereau, Justice, held himself bound by the decision of the Supreme Court in the said case of "The Queen v. McGreevy," while Sedgewick and King, Justices, concurred with the majority in dismissing the Appeal, though without giving any reasons. The learned Chief Justice added that "he did not consider
20 " McGreevy's case was a binding authority, for the reason that a majority of " the Judges composing the Court were not of accord on any proposition of " law on which the decision of the Appeal depended." This was an allusion to the difference of opinion hereinbefore explained between Patterson, J., and the two other Judges who formed the majority of the Court in the said case.

38. The contention of the Appellants in the said Exchequer Court, and the said Supreme Court of Canada, and their respectful submission now is that by virtue of the Order in Council of the 21st June, 1880, Mr. Frank Shanly duly became the "Chief Engineer for the time being" within the meaning of the 10th Clause of the said Contracts entered into between J. B. Bertrand & Co., and the Intercolonial Railway Commissioners.

39. That as such Chief Engineer he was qualified to give "the final and "closing certificate" mentioned in the 11th Clause of the said Contracts.

30 40. That the Report made by the said Mr. Shanly in July, 1881, to the Minister of the Department of Railways and Canals was in fact and in law a "final and closing certificate" within the said 11th Clause of the said Contracts, which entitled the Appellants to recover from the Government of Canada the sum which such certificate awarded to the Claimant.

40 41. That the Commissioners of the said Railway, whose approval of any such certificate was required by the 18th Sec. of 31 Vic., c. 13, had on the completion of the railway become *functi officio*, and that no approval by the said Minister of the said certificate was required by any law or was necessary to its validity, but that if it was, the said report by the said chief engineer was tacitly and impliedly approved of and was treated as a "final and closing
40 certificate" by the said Minister, and that the tacit consent so given was by the law of Quebec, if not by the law of England, sufficient to satisfy the contract.

42. The admissions made by both parties to this Appeal will be found at pages 94 and 95 of the Record.

43. The Appellants submit that the judgment of the Supreme Court of Canada was wrong and should be reversed for the following amongst other

REASONS.

1. That Mr. Frank Shanly was the Chief Engineer of the Intercolonial Railway.
2. That by virtue of the provisions of the Canadian Act 31 Victoria, c. 13, and of the said contracts entered into between the Intercolonial Railway Commissioners and Messrs. J. B. Bertrand & Co., the said Mr. Shanly was 10
duly qualified to give a final and closing certificate for balance due to the Appellants in respect of work done by the said J. B. Bertrand & Co. under the said contracts.
3. That the said Mr. Shanly gave such a final and closing certificate in favour of the late John Ross.
4. That the rights of the parties are governed by the law of Quebec.
5. That by virtue of the said certificate the Appellants became entitled to recover from the Crown the sum of \$231,806. 20

HERBERT H. COZENS-HARDY.

J. V. VESEY FITZGERALD.

F. COLERIDGE MACKARNES.

In the Privy Council.

*On Appeal from the Supreme Court of
Canada.*

BETWEEN

JOHN THEODORE ROSS, FRANCES
ELLA ROSS, JOHN VESEY
FORSTER VESEY-FITZGERALD,
and ANNIE ROSS

(Suppliants) Appellants

AND

HER MAJESTY THE QUEEN

(Respondent) Respondent.

APPELLANTS' CASE.

HARWOOD & STEPHENSON,
31, Lombard Street, E.C.,

Appellants' Solicitors.