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UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

On Appeal from the Supreme Court of Canada.

J. F. ROSS, F. E. ROSS, J. V. F. VESEY FITZGERALD and A. ROSS . (*Suppliants*) *Appellants*

AND

HER MAJESTY THE QUEEN . . . . *Respondent.*

ADDITIONAL PAPERS

AGREED TO BE PUT IN BY THE PARTIES.

Coram FOURNIER, J.

ROBERT HENRY McGREEVY . . . . . *Suppliant*

AND

HER MAJESTY THE QUEEN . . . . . *Defendant.*

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Claim for balance of moneys due under contract—31 *Vic.*, *c.* 13, *ss.* 16, 17, 18—*Change of Chief Engineer before final certificate given—Approval of final certificate by Commissioners—Waiver.*

By the 16th section of the Intercolonial Railway Act (31 Vic. c. 13) the Commissioners of that railway were empowered to build it by tender and contract. By the 17th section thereof it was enacted that "the contracts to be "so entered into, shall be guarded by such securities, and contain such "provisions for retaining a proportion of the contract moneys, 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

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" performance of the contract." By the 18th section it was provided 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."

The Commissioners entered into a contract with the suppliant, which, while containing a stipulation that all the progress certificates of the Chief Engineer should be approved by the Commissioners, made no provision for the approval of the final certificates by them.

Held.—That under the provisions of the 17th section it was in the discretion of the Commissioners to insert in, or omit from, the contract a stipulation requiring their approval to the final certificate of the Engineer; and that, in the absence of such stipulation from the written instrument, it must be assumed that the Commissioners did not regard it as necessary for the protection of the public interest, or for securing the due performance of the contract.

The suppliant entered upon and completed his contract during the time that F. held the position of Chief Engineer, but did not obtain a final certificate from him before his resignation from office. S. was appointed by order-in-council to succeed F., and, having entered upon the duties of the office, it became necessary for him to investigate the suppliant's claim along with others of a similar character. Thereafter he made a report to the Department of Railways and Canals (the Minister of which Department then represented the Commissioners, whose office had been abolished) which did not certify that the whole work had been done and completed to his satisfaction, as required in the final certificate by the terms of the contract, but in general terms recommended that suppliant be paid $120,571 in full settlement of his claim. After receiving this report the Government allowed a long period of time to elapse before taking any further steps in the matter.

Held.—That S., being regularly appointed Chief Engineer, was competent to give the final certificate required by the contract; that his report was available to the suppliant as such final certificate; and that, had the approval of the certificate by the Minister, so representing the Commissioners, been necessary, such approval had been given by acquiescence.

After more than a year had elapsed since the report of S., as Chief Engineer, had been made, the Government appointed a Royal Commission to make enquiry into the suppliant's claim, along with others, and to report to the Governor-in-Council as to the liability of the Government upon such claims. Suppliant appeared before this Commission and produced evidence in support of his claim, but declared in writing to the Commissioners that he did so without prejudice to his right to insist on payment of the amount recommended to be paid him in the report so made by S. The Commissioners reported in favour of the suppliant for $84,075,—this amount being subsequently paid to the suppliant, for which he gave an unconditional receipt in respect of his claim. Prior to giving this receipt, however, he had written a letter to the Minister of Railways and Canals declining to accept such amount in full satisfaction of his claim.

Held.—That the receipt so given by the suppliant did not, under the circumstances, operate as a waiver of his right to claim for the balance due him upon the report of S.

PETITION of right for the recovery of $608,000, alleged to be due to the suppliant from the Dominion Government, for work under, and for damages arising out of, a contract for the construction of Section 18 of the Intercolonial Railway.

The contract was made on the 8th July, 1870. By the provisions thereof, payments were to be made to the suppliant upon certificates of the Chief Engineer of the railway to be given from time to time during the progress of the work, such certificates to be approved by the Commissioners of the railway appointed under the provisions of 31 Vic. c. 13. No mention was made in the contract of any approval being required from the Commissioners in order to entitle suppliant to be paid upon the final certificate being given by the said Engineer. Sandford Fleming, C.E., was the Chief Engineer during the performance of the contract, and gave suppliant progress certificates from time to time, which were duly approved by the Commissioners and paid. On completion of the work, some time in the year 1875, there was owing to suppliant a large balance under the contract, for which he demanded a final certificate from Mr. Fleming as such Engineer. This certificate was not given to the suppliant during the time Mr. Fleming held office, and payment was not made of the balance due.

On the 1st December, 1879, suppliant filed a petition of right, claiming a large sum as owing to him in connection with the work done by him under the said contract.

Before any proceedings on the petition of right were taken, Frank Shanly, C.E., was, by order of the Governor-in-Council of the 23rd June, 1880, appointed Chief Engineer of the Intercolonial Railway in the place of Mr. Fleming.

Suppliant's claim, with those of many other contractors for work done in the construction of the Intercolonial Railway, came before Mr. Shanly as Chief Engineer; and, after hearing the parties and their witnesses, and fully investigating the claims, he made a report to the Department of Railways and Canals, recommending that $120,371 be paid suppliant in respect of the works executed by him.

After the lapse of more than a year since the making of this report, nothing being done in the matter in the meanwhile, in July, 1882, a Royal Commission was appointed to investigate and report upon the claims arising out of the construction of the Intercolonial Railway. The Commissioners met and invited the suppliant, amongst other contractors, to come before them and give evidence, and he and other witnesses did so; but his counsel filed the following declaration in writing with the Commissioners before closing the evidence:—

> "The claimant, while appearing before the Commission to give any "assistance or information in the premises, does not thereby admit the "constitutionality of said Commission, and does not waive any right he

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" may have against the Government under the said contract or by reason " of the same, or anything connected with the same, or resulting from " the report or certificate of the Engineer-in-Chief, Mr. Frank Shanly, " upon the said contract, and the claim of the said claimant made under " it, or any other cause or causes whatsoever; the claimant reserving to " himself such recourse and remedy as to law and justice may appertain."

The Commissioners reported on suppliant's case, amongst others, in 1884, recommending payment to him of $55,313, principal, and $28,762, interest.

These sums were paid to suppliant on August 5th, 1884, and a receipt for them was given by him, preceded by a letter from him to the Minister of Railways and Canals, stating that he received the payment of a less sum than the amount certified to by Mr. Shanley only as a payment on account.

No further payment was made to the suppliant by the Government; and on October 1st, 1885, he amended his petition of right, alleging the existence of the Shanly certificate and claiming payment of the amount thereof if not entitled to recover upon the other general grounds alleged in the petition.

An answer was filed to the amended petition upon various grounds so far as the general claim was concerned; but, in so far as Mr. Shanly's report was relied upon by suppliant, the Crown denied that it was a final certificate under the contract such as to entitle the respondent to recover upon it, and that even if it was a final certificate of the Chief Engineer of the railway, that it had not been approved of by the Minister of Railways and Canals, and therefore was of no effect.

Issue was joined, and the parties agreed to have the question of the availability of Mr. Shanly's report as a final certificate under the contract, and the right to recover thereupon, tried in the first place, leaving the other grounds alleged in the petition to be subsequently disposed of if it were found necessary.

For the purposes of the trial of the issue upon such report, the parties agreed to a statement of facts substantially the same as the foregoing.

The case was heard before Mr. Justice FOURNIER.

GIROUARD, Q.C., and FERGUSON for the Suppliant;

ROBINSON, Q.C., and HOGG for the Respondent.

FOURNIER, J., now (December 3rd, 1888) delivered judgment.

Par sa pétition de droit, en cette cause, le pétitionnaire réclame, de Sa Majesté, la balance du prix et la valeur des ouvrages qu'il avait exécutés, pour la construction de la section dix-huit du chemin de fer International, en vertu d'un contrat à cet effet, entre lui et les Commissaires nommés par le Gouvernement de la Puissance, pour la construction du chemin de fer Intercolonial, en date du 8 juillet, 1870. Le contrat est dans la même forme et contient les conditions et stipulations générales, à peu près, que l'on trouve dans les contrats concernant la construction de ce chemin de fer.

Plusieurs de ces contrats ont déjà fait le sujet de discussion devant cette cour et devant la Cour Suprême. Leurs conditions sont tellement connues,

qu'il est inutile d'en citer d'autres que celles qui seront jugées nécessaires pour la décision de la présente cause.

Il n'est pas nécessaire, non plus, pour en arriver là d'analyser la pétition de droit, ses divers amendements, et la défense présentée par Sa Majesté; car les parties ont, de consentement, préparé un exposé des faits essentiels pour l'examen de la question de droit soulevée préliminairement.

La seule question, dont il s'agit à cet état de la procédure, est de savoir si le certificat de Frank Shanly, l'ingénieur en chef de l'Intercolonial, constatant l'exécution et la valeur des ouvrages faits, en vertu du contrat en question, est suffisant pour permettre au pétitionnaire d'exercer son recours contre Sa Majesté pour le paiement de la balance constatée en sa faveur par ce certificat.

A cause de son importance, je crois devoir citer en entier l'admission de faits des parties, elle est comme suit:

"Statement of admission by both parties:

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

"It is admitted:

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

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

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

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

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

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

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

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

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

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

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

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

" 13. And upon such report, on the 5th August, 1884, on the " authority of an order-in-council of the 10th April, 1884, a copy of " which is hereto annexed marked ' F,' the Government paid to the " suppliant the sum of $84,075·00, being composed of $55,313 principal, " mentioned in said report, and $28,762 interest.

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

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

" 16. It is also admitted that, on the 10th September, the Department " of Railways addressed a letter to the suppliant of which a copy is annexed " marked ' I,' and which the suppliant received.

" (Sgd.) C. ROBINSON,
" Counsel for Crown.

" (Sgd.) D. GIROUARD,
" For Suppliant.

" October 14th, 1887."

La principale difficulté en cette cause étant à propos des formalités requises pour le paiement des travaux, il est nécessaire de référer aux termes du contrat pour savoir qu'elle est, sous ce rapport, la position du pétitionnaire.

La clause 11 se lit comme suit :

" 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 com- " pletion 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."

Avant d'examiner la véritable signification de cette clause du contrat et d'en faire l'application au certificat de l'ingénieur en chef Shanly, il est nécessaire de savoir s'il possédait, en donnant ce certificat, la qualité officielle qu'il a prise ; car elle lui a été niée lors de l'argument. Malgré cela, je crois que, par leur admission de faits, les conseils de la défense se sont désistés de cette dénégation. Quoi qu'il en soit, je ne puis guère me dispenser de bien établir sa qualité d'ingénieur en chef autorisé à donner le certificat produit. Sans cela le pétitionnaire ne pourrait être admis à exercer son recours contre la Couronne.

Dès le commencement des travaux du chemin de fer Intercolonial, à l'époque du contrat en question, M. Sanford Fleming a été l'ingénieur en chef chargé de la direction de ces travaux et n'a cessé de l'être que par un ordre-en-conseil, en date du 20 mai, 1880. Le 23 juin de la même année, par un autre ordre-en-conseil, adopté sur la recommandation du Ministre des Travaux Publics, M. Shanly a été nommé, en remplacement de M. Fleming, comme ingénieur en chef du chemin de fer Intercolonial.

Cette nomination est un acte officiel qu'il est impossible de contester. A dater de cet ordre-en-conseil, M. Shanly a été autorisé à exercer et a, de fait, exercé toutes les fonctions attribuées par la loi et par le Gouvernement à l'ingénieur en chef de l'Intercolonial. Il avait, lorsqu'il a donné le certificat dont il s'agit, toute l'autorité et tous les pouvoirs que possédait M. Fleming, lorsque ce dernier exerçait les mêmes fonctions.

Pour quelles raisons son certificat n'aurait-il pas tout l'effet voulu par la loi ? Est-ce pour la raison donnée par les conseils de la défense—

" Qu'il n'était pas l'ingénieur désigné par les parties au contrat " comme arbitre devant décider de l'exécution et de la valeur des travaux ? "

Cet avancé est tout-à-fait incorrect, il n'est nullement question dans le contrat d'un ingénieur désigné et choisi. Le contrat fait souvent mention de l'ingénieur chargé de la direction et surveillance des travaux, mais sans en nommer aucun, oblige le contracteur à suivre ses instructions et à se conformer à ses ordres dans la construction des ouvrages du contrat. Il est vrai que lors du contrat, ces fonctions étaient remplies par M. Fleming, nommé durant bon plaisir, en vertu de la sec. 4 de 31 Vic., c. 13, pour agir sous la direction des Commissaires comme surintendant des travaux à être exécutés en vertu de cet acte ; mais son nom n'est pas même mentionné dans le contrat, pour la bonne raison que sa nomination pouvait être révoquée d'un jour à l'autre. Pendant la durée des travaux de construction, M. Fleming a exercé ses fonctions d'ingénieur en chef et fait de nombreux rapports au sujet de ces travaux ; mais lors du certificat final, dont il s'agit, il avait renoncé à ses

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fonctions et comme ni l'une ni l'autre des parties ne s'étaient engagées à en passer nommément par sa décision, la Gouvernement, en obéissance à la loi, a légalement nommé M. Shanly aux mêmes fonctions, comme il appert par l'ordre-en-conseil suivant :—

" Copy of a Report of a Committee of the Honourable the Privy Council,
" approved by His Excellency the Governor-General in Council, on
" the 23rd June, 1880.

" On a Report, dated 21st June, 1880, from the Hon. the Minister of " Railways and Canals, stating that a letter has been received from Mr. " Sanford Fleming, wherein he states that, for reasons given, he is under " the necessity of declining the positions of Chief Engineer to the Inter- " colonial 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 " 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 " five hundred and forty-one $\frac{66}{000}$ dollars ($541.66) a month, the engage- " ment being understood to be of a temporary character.

" The Committee submit the above recommendation for Your Excel- " lency's approval.

" Certified,
" (Sgd.) J. O. COTE, C.P.C."

Les termes de l'ordre en conseil :—

" The Minister recommends that authority be given for the appoint- " ment of Mr. Frank Shanly, C.E., as Chief Engineer of the Inter- " colonial Railway."

ne laissent pas de doute sur la qualité conféré à M. Shanly.

En vertu de cette nomination, il est devenu l'ingénieur mentionné dans l'article dix du contrat, où se trouve la définition suivante :

" The words 'the Engineer' shall mean the Chief Engineer *for the* " *time being* appointed under the said Act."

Cette nomination, rendue nécessaire par la retraite de M. Fleming, était encore indispensable pour l'ajustement des nombreuses réclamations faites contre le Gouvernement, par divers entrepreneurs, pour l'exécution des ouvrages de leurs contrats. C'est en 1879 que le pétitionnaire présenta, pour la première fois, sa réclamation. Il n'avait pas alors obtenu le certificat final mentionné dans l'article onzième du contrat, sans lequel il ne pouvait ni espérer un règlement final, ni même se porter pétitionnaire devant cette cour. La matière de sa réclamation ayant été depuis référée à M. Shanly, comme ingénieuer en chef, celui-ci adressa, le 22 juin, 1881, au Ministre des Chemins de Fer, dans son rapport sur cette réclamation, un certificat final constatant l'exécution du contrat pour la construction de la section dix-huit de l'Inter-

colonial et déclarant qu'il existait, en faveur du contracteur (le pétitionnaire), une balance de cent-vingt mille trois cent soixante-onze piastres, à laquelle il avait justement droit.

" Leaving a balance in favour of the contractor of one hundred and " twenty thousand three hundred and seventy-one dollars, as shown on " schedule ' D,' to which sum, I think, he is fairly entitled."

Ce certificat a fait le sujet d'un amendement qui a eu l'effet de permettre au pétitionnaire de se présenter devant la cour comme ayant justifié, à première vue, de l'exécution de la condition préalable au sujet du certificat de l'ingénieur en chef.

Après réception de ce rapport, le Gouvernement paya, en vertu d'un ordre-en-conseil, la somme de quatre-vingt-quatre mille et soixante quinze piastres, dont cinquante-cinq mille trois cent treize piastres à compte du principal et vingt-huit mille sept cent soixante-deux piastres pour intérêt— pour laquelle le pétitionnaire a donné un reçu déclarant qu'il la recevait :

" Respecting certain claims arising out of the construction of the " Intercolonial Railway."

Ce reçu n'est pas final et ne compromet nullement son droit de réclamer la différence entre le montant qui lui a été payé, viz.: cinquante cinq mille trois cent treize piastres, et celui de cent-vingt mille trois cent soixante-onze piastres rapporté et certifié par Shanly, laissant en sa faveur une balance de soixante-cinq mille et cinquante-huit piastres. La question de responsabilité, si elle est affectée par ce paiement, c'est plutôt en faveur que contre la légitimité de la réclamation. Le reçu, donné et accepté par le Gouvernement, laisse les parties dans la même position qu'auparavant.

Cette position n'a pas été non plus modifiée par la référence, faite par le Gouvernement, de plusieurs réclamations du même genre à une commission chargée d'examiner ces réclamations et de faire rapport à ce sujet. Celle du pétitionnaire se trouve parmi celles qui ont été ainsi référées, mais ce n'est ni à sa demande ni avec son consentement. Bien au contraire, il n'a comparu devant cette commission que pour enregistrer son protêt contre la juridiction qu'elle pourrait assumer à l'égard de sa réclamation et sous la réserve suivante :

" The claimant, while appearing before the Commission, does not " waive any right he may have against the Government under the said " contract, or by reason of the same, or anything connected with the same, " or resulting from the report or certificate of the Engineer-in-Chief, Mr. " Frank Shanly, upon the said contract, and the claim of the said claimant " made under it, or any other cause or causes whatsoever, the claimant re- " serving to himself such recourse and remedy as to law and justice may " appertain."

Cette protestation fait voir clairement que les procédés de la commission, quels qu'ils soient, ne peuvent nullement affecter la position fait au pétitionnaire par la production du certificat de Shanly. Cependant cette position lui est contestée par la défense qui prétend que ce certificat seul est insuffisant

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pour lui donner droit d'action contre la Couronne pour le montant certifié, alléguant qu'il lui faut en outre produire l'approbation des Commissaires ou du Ministre des Chemins de Fer qui les a remplacés. Elle appuie cette prétention sur la sec. 18 du c. 13 de la 31 Vic., déclarant que :

" No money shall be paid to any contractor until the Chief Engineer " shall have certified that the work, for and 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."

Le pétitionnaire répond à cela que cette formalité ne lui a pas été imposée par son contrat.

Pour donner à cette section dix-huitième sa véritable signification, il faut la lire en se reportant aux deux clauses qui la précèdent, les seizième et dix-septième sections, adoptées dans le même but de protéger les intérêts du public pendant la construction du chemin de fer Intercolonial.

La section seizième pourvoit au mode de donner les contrats.

La section dix-septième, à cause des grands pouvoirs discrétionnaires qu'elle accorde aux Commissaires, doit être citée en entier :

" 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 moneys, 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."

Cette disposition donne aux Commissaires des pouvoirs discrétionnaires très considérables pour faire les conditions des contrats ; la seule limite qui leur est assignée est la protection de l'intérêt public et la due exécution des ouvrages du contrat. Sans doute que pour assurer cette exécution, il était nécessaire de prendre certaines précautions pour empêcher que le montant du prix du contrat ne fût épuisé avant la fin des travaux, et c'est, sans doute, dans ce but qu'est décrétée la section dix-huitième exigeant pour tous paiements d'ouvrages,

" For or on account of which the same (money) shall be claimed,

le certificat de l'ingénieur approuvé par les Commissaires ; mais cette disposition n'enlève pas aux Commissaires l'exercice des pouvoirs qui leur sont conférés par la section précédente ; ils n'en conservent pas moins la liberté entière de faire telles conditions qui leur paraîtront nécessaires pour la protection du public et pour assurer la due exécution du contrat.

" 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."

Si les Commissaires ont jugé à propos, dans l'exercice de leurs pouvoirs, de n'appliquer les termes rigoureux de la section dix-huitième qu'aux paiements faits durant la construction, c'est, qu'en vertu de la section dix-septième, ils en avaient le droit tout en prenant les précautions nécessaires,

" For securing the due performance of the contract."

Et c'est ce qu'ils ont fait dans ce cas, en établissant les conditions du contrat avec le pétitionnaire. Ils avaient, sans doute, en vue la section dix-huitième et les pouvoirs en vertu de la section dix-septième, lorsqu'ils ont fait, avec lui, la convention contenue dans l'article onzième du contrat, citée plus haut, en exigeant pour les paiements partiels (*progress estimates*), pendant l'exécution des ouvrages du contrat, le certificat de l'ingénieur approuvé par les Commissaires, suivant la section dix-huitième, que les ouvrages, dont le paiement en partie était demandé, avaient été duement exécutés. Ayant ainsi pourvu aux moyens de les contrôler dépenses des deniers, de manière à assurer l'exécution entière des ouvrages du contrat, ils étaient entièrement libres de pourvoir, par une autre convention spéciale, au mode de constater le règlement final de l'entreprise et à la décharge de toute responsabilité de la part du contracteur. Cette partie de la convention est comme suit :

" 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 the " specification."

Cette convention, relative au mode de constater la terminaison des ouvrages, est bien différente de celle règlant les paiements partiels (*progress estimates*). Il n'y est aucunement fait mention de l'approbation des Commissaires exigée pour les paiements partiels. En effet, il n'y avait plus aucune raison pour cela, l'ouvrage devant être alors entièrement exécuté, il n'y avait plus d'intervention à exercer de leur part pour en assurer l'exécution. Comme, après la fin des travaux, il ne devait plus rester qu'à constater s'ils avaient été duement exécutés suivant la spécification, ce devoir devait tout naturellement retomber sur l'ingénieur en chef comme étant l'autorité la plus compétente et celle indiquée par le contrat. C'est sans doute pour cette raison que les Commissaires, qui avaient stipulé leur approbation pour les *progress estimates*, n'ont pas jugé à propos d'imposer cette condition pour le certificat final. On ne pourrait maintenant l'importer dans cette partie de la clause du contrat sans violer la convention des parties.

Cette convention, qu'il était certainement au pouvoir des Commissaires de faire, ils l'ont faite d'une manière toute spéciale et parfaitement suffisante pour protéger les intérêts publics, comme il était de leur devoir de le faire. En n'exigeant pas pour le certificat final (*the final and closing certificate*) leur approbation, les Commissaires ont sans doute interprété la loi comme leur donnant le pouvoir de dispenser de cette formalité. Cette interprétation, ils en ont fait le sujet d'une convention avec le pétitionnaire et cette convention a maintenant force de loi. Il faut donc en arriver à la conclusion, que le certificat seulement de l'ingénieur en chef est nécessaire et que son approbation par les Commissaires n'est pas nécessaire.

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Tel qu'il est, le certificat produit est suffisant pour autoriser le pétitionnaire à réclamer la balance constatée en sa faveur. Il lie également les deux parties, comme le dit *Emden* ("The Law relating to Buildings, &c.," 2nd ed., p. 133) :—

> "It will be observed that the architect's certificate when given, will, "in the absence of fraud, be binding upon the employer under the same "circumstances, and to precisely the same extent, as it is conclusive upon "the builder. ('Goodyear *v.* Weymouth (Mayor, &c.),' 35 L.J.C.P. 12)."

On ne peut pas non plus, pour soutenir la nécessité de l'approbation des Commissaires ou du Ministre des Chemins de Fer, invoquer la clause douzième du contrat déclarant qu'il serait sujet à l'Acte concernant la construction du chemin de fer Intercolonial et aussi à l'Acte des Chemins de Fer de 1868, parce que cette clause contient la réserve que ce ne serait qu'en autant que ces actes seraient applicables (*in so far as they may be applicable*). On ne peut donc pas, pour détruire les conventions arrêtées entre les parties contractantes, se fonder sur les dispositions de ces deux actes. Car c'est évidemment pour éviter tout conflit entre ces actes et le contrat, que les parties sont convenues d'en limiter l'application de manière à ce que leurs conventions n'en puissent être ni affectées ni modifiées en aucune manière quelconque. On ne peut donc considérer comme faisant partie du contrat aucune disposition de ces deux lois qui aurait l'effet de porter atteinte au contrat qui est devenu la loi des parties.

Ce certificat qui ne pourrait être attaqué, comme je l'ai dit plus haut, que pour cause de fraude, doit donc avoir toute sa force à l'égard des parties en cette cause sur la présente contestation. Il pourrait sans doute faire plus tard la matière d'une autre contestation, mais il n'est maintenant nullement question de cela, la présente audition étant en droit seulement. Bien que je pense avoir démontré que l'approbation des Commissaires n'était pas nécessaire, je pourrais encore, si toutefois le contraire était reconnu, invoquer leur défaut de protestation et leur silence, à l'égard du certificat, comme une approbation tacite. La section du statut à cet égard doit être assimilée à une condition potestative, qui est censée accomplie lorsque celui qui l'a stipulée ne peut justifier d'aucune cause de mécontentement (Laurent, Vol. II., No. 650).

Le rapport au certificat dont il s'agit, en date du 22 juin 1881, a été reçu par le Ministre des Chemins de Fer qui avait été, par 31 Vic. c. 15, substitué aux Commissaires. Depuis cette date, aucune plainte ni protestation n'a été faite contre ce certificat. Cependant d'après le contrat, deux mois après avoir terminé ses travaux, le contracteur avait droit à un certificat final de leur exécution et au paiement de leur prix. Cette limite de temps est fixée par la section onzième du contrat déjà citée. Elle devait, en l'absence de toute convention à cet égard, être la même pour son approbation ou son rejet par les Commissaires ou le Ministre. Au moins n'auraient-ils pas dû prendre action sur ce certificat aussitôt après sa réception et faire connaître leur décision? Loin de là, il se passe des années pendant lesquelles rien n'est fait à ce sujet. Ce long silence et cette inaction ne doivent-ils pas faire présumer une approbation tacite, ou, mieux encore, la conviction du Ministre que son approbation n'était pas nécessaire d'après le contrat? Le statut, ni le contrat, n'indiquent

nullement la manière de constater cette approbation, c'est évidemment le cas de faire application de la maxime *Eadem vis est taciti atque expressi consensus*, parce que celui qui a gardé le silence était obligé de répondre (Laurent, Vol. XV., No. 482). Si, en important dans le contrat la section dix-huitième, au sujet de l'approbation des Commissaires, qui en est exclue par la convention des parties, on prétendait que cette approbation est nécessaire, je répondrais qu'elle a eu lieu par l'opération de la loi, comme je viens de le dire.

Quant au témoignage de Sir Charles Tupper tendant à établir qu'il a refusé, comme Ministre des Chemins de Fer, son approbation au certificat en question je crois que cette preuve orale a été illégalement faite. Le silence que lui et ses successeurs ont si longtemps gardé sur ce sujet avait produit son effet légal ; si elle était nécessaire, cette approbation était acquise au pétitionnaire et il n'était plus au pouvoir du Ministre de changer sa position. Cette preuve est en outre certainement illégale, comme contraire au principe, en matière de preuve, qu'on ne peut prouver par témoins contre et outre le contenu des contrats par écrit et en forme solennelle, comme celui dont il s'agit. Admettre cette preuve, ce serait introduire dans le contrat une condition qui ne s'y trouve pas au sujet de cette approbation.

Il ne me reste qu'une dernière observation à faire. C'est, qu'à première vue, on pourrait croire que j'exprime une opinion contraire à la doctrine consacrée par plusieurs décisions déjà rendues par cette cour, et entre autre par celle de *Jones* vs. *la Reine* (7 Can. S. C. R. p. 570), qui a plusieurs fois reçu l'approbation de la Cour Suprême. Au contraire, je soutiens dans cette cause la même doctrine, et je considère que la production d'un certificat de l'ingénieur en chef est une condition préalable (*condition precedent*) à l'exercice du droit de recouvrer le prix des ouvrages en question en cette cause. Cette condition a été faite par le contrat même et doit être exécutée. C'est parce qu'elle l'a été dans le présente cause que les décisions, auxquelles je fais allusion, n'ont aucune application au cas actuel. Dans celle de *Jones* vs. *la Reine* (Cited *ante)* il n'avait été donné aucun certificat final constatant l'exécution des ouvrages. Sir W. J. Ritchie, qui a prononcé le jugement, fait à ce sujet l'observation suivante sur la position de Jones :

> " The petition is conspicuous for the absence of any direct or inferen-
> " tial averment that any such certificate, as indicated by the contract or
> " law, was ever obtained, or that there has been such approval by the
> " commissioners."

Sur la nature du certificat qui fut produit dans cette cause, constatant l'exécution de certains travaux, l'honorable juge en chef dit à ce propos :

> " This so far from being the certificate contemplated, that the work
> " has been duly executed to the satisfaction of the chief engineer, is
> " directly to the contrary."

Dans le présente cause, au contraire, le certificat de Shanly, contenu dans son rapport spécial fait en vertu d'un ordre du gouverneur-en-conseil, constate l'exécution finale de tous les ouvrages conformément au contrat, et certifie de

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plus la balance du prix revenant au pétitionnaire. La différence des faits, entre les deux causes, explique suffisamment la différence de la conclusion à laquelle j'en suis venu. Le certificat produit est suffisant pour donner au réclamant le droit de se porter pétitionnaire devant cette cour, pour obtenir la balance qui lui est due suivant le certificat, déduction faite de ce qu'il a reçu depuis.

Après avoir donné oralement un exposé sommaire des raisons qui m'ont amené à la conclusion de considérer le certificat de Shanly comme suffisant, le conseil du pétitionnaire ayant déclaré qu'il renonçait à cette partie de la demande qui n'était pas fondée sur le dit certificat, je déclare en conséquence que le pétitionnaire a droit d'obtenir de Sa Majesté, pour les raisons ci-dessus énoncées, le paiement de la somme de soixante-cinq mille et cinquante-huit piastres avec dépens, et je renvoie sa demande pour le surplus.

*Judgment for suppliant with costs.**

* On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the Exchequer Court (Strong and Taschereau, JJ., dissenting) that the report of S., who succeeded F. in the office of Chief Engineer of the railway, was in no sense of the term the final certificate contemplated by the contract or the statute, and that even had such final certificate been given, under the provisions of the statute it would not have been available to the suppliant until it had received the approval of the Minister of Railway and Canals who represented the Commissioners in that behalf. This approval by the Minister had been expressly withheld from S.'s report, and a Royal Commission appointed to examine into suppliant's claim, along with others.

Solicitors for Suppliant: A. FERGUSON.

Solicitors for Respondent: O'CONNOR & HOGG.

HER MAJESTY THE QUEEN . . . . . *Appellant*;

AND

ROBERT HENRY McGREEVY . . . . . *Respondent.*

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

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*1890.
March 21, 22;
Dec. 10.

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

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

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

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

3rd. Per Patterson J., that although F. S. was duly appointed Chief Engineer of the Intercolonial Railway, and his report may be held to be the final and closing certificate to which the suppliant was entitled under the 11th clause of the contract, yet as it is provided by the 4th clause of the contract that any allowance for increased work is to be decided by

* Present: Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne, and Patterson, J.J.

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the Commissioners and not by the Engineer, the suppliant is not entitled to recover on F. S.'s certificate.

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

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

APPEAL from a judgment of the Exchequer Court of Canada (1 Ex. C. R. p. 321).

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

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

"27*a*.—The Chief Engineer of said railway on or about the twenty-second "day of June, one thousand eight hundred and eighty-one, duly certified to "the Minister of Railways and Canals that the extra and additional works and "other matters claimed for in the foregoing paragraphs hereinbefore con- "tained, had been executed and done as extra and additional to the extent "mentioned in Schedule 'C' to this petition, and that the amounts in "Schedule 'C' hereto should be paid in respect thereof by your Majesty to "your petitioner, and also certified that the original contract work had been "executed, and that there should be paid by your Majesty to your petitioner "in respect thereof the amount mentioned in said Schedule 'C' and said "Minister has not disapproved of said certificate, but has, as such Minister "unduly, arbitrarily and improperly withheld his express approval of said "certificate although a reasonable time for approving or disapproving thereof "has elapsed, and your petitioner, not waiving but insisting upon his right to "be paid the amount claimed in Schedule 'B,' submits and claims that in any "event he is entitled to be paid the amount set forth in Schedule 'C' as "aforesaid, and that the want of an express approval in writing of said "certificate by the said Minister, as aforesaid, should not under the circum- "stances alleged be permitted to be pleaded or to avail as a defence to the "claim for payment of the amount mentioned in said Schedule 'C.'

"Your petitioner prays that his said claims may be adjudicated upon, "upon the merits as to the facts, and that he be paid whatever amount "upon inquiry shall be found due to him in respect thereof and interest and "costs, and t at if upon any defence of a purely technical or legal character

" pleaded herein, it is held that your petitioner cannot recover in respect of " Schedule ' B ' hereto, then that your petitioner be paid the amount claimed " in Schedule ' C ' herein and interest and costs."

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

" Statement of admission by both parties:

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

" It is admitted:

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

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

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

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

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

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

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

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

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

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

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

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

"13. And upon such report, on the 5th August, 1884, on the authority "of an order-in-council of the 10th April, 1884, a copy of which is hereto "annexed, marked 'F,' the Government paid to the suppliant the sum of "$84,075,00, being composed of $55,313 principal, mentioned in said report, "and $28,762 interest.

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

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

16. "It is also admitted that, on the 10th September, the Department of "Railways addressed a letter to the suppliant of which a copy is annexed "marked 'I,' and which the suppliant received.

"(Sgd.) C. ROBINSON,
"Counsel for Crown.

"(Sgd.) D. GIROUARD,
"For Suppliant.

"October 14th, 1887."

Clause 11 of the contract reads as follows:

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

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

"INTERCOLONIAL RAILWAY.

"'C.'

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

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

" *Re* R. H. McGREEVY. SECTION 18.

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

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

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

" Mr. McGreevy in May, 1877, filed a petition of right, by which he " claimed a sum of $603,000 for extras; subsequently, in 1879, by schedule " 'B,' a copy of which is attached hereto (sheet 'A'), he makes a claim for " $839,557·40 for extra work over and above the lump sum of his contract, " and including a sum of $45,000 as an alleged balance due on the contract " proper.

" After carefully investigating the nature and foundation for the claim, " and going fully into the evidence produced on behalf of the claimant and of " the crown respectively, the full report of which as taken down in shorthand " marked 'E,' Nos. 1, 2, 3, 4 and 5, is herewith submitted, I have come to the " conclusion, owing to various unforeseen difficulties, and in view of the " contract being for a lump sum, where the contractor was to assume all risks " from weather, increase in the cost and scarcity of labour, the great difficulty " in such a country of ascertaining previous to tendering the real nature of the " material to be excavated, or the facilities for the procuring of stone, timber, " etc., for building, most of which had to be brought from a great distance, " that the deductions and additions provided for by the contract should be " waived, and the lump sum on a final settlement be adhered to and allowed, " together with certain items claimed by Mr. McGreevy as extra to and not " properly belonging to the contract, and as set forth in sheet 'A,' herewith " numbered 10, 11, 12, 18 and 19 respectively. All the other items mentioned " in sheet 'A.' except 20 and 21, afterwards referred to, I consider to be clearly " covered by the contract and specification, and that no allowance should be " made for them.

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

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

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" Item 11. Portland cement used as ordered instead of hydraulic cement. " This claim is fully supported by the evidence as to the fact, and it generally " agrees that the additional cost was $1·50 per cubic yard; I would therefore " pronounce it proved, and recommend payment therefor: 8,892 cubic yards, " built in Portland cement, at an extra cost of $1·50 per cubic yard, $13,338.

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

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

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

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

" This claim is not disputed, it having been recognized by Mr. Schreiber " in his final estimate of November 1875. There seems to have been 219 lin. " feet, 10 inches say 220 feet, left on the ground and taken by the Government. " This would make as nearly as possibly 100,000 lbs. which I have valued at " 4 cents per lb.

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

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

" Item 20. Damage and delay at Millstream Bridge.

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

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

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

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

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

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

" Items 18 and 19 not disputed. Evidence documentary.

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

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

" I am, sir,
" Your obedient servant,
" (Signed) F. SHANLY,
" Chief Engineer, I. C. R."

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

The Exchequer Court of Canada, Fournier J. presiding, held that the certificate or report of Mr. F. Shanly was sufficient to entitle the suppliant to proceed before the Court in order to recover the amount awarded to him by said certificate or report.

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

The crown then appealed to the Supreme Court of Canada.

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

The statutes and clauses of the contract which bear upon the case are referred to at length in the report of the case in the Exchequer Court Reports, Vol. 1, p. 321 *et seq.*, and in the judgments hereinafter given.

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

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

The suppliant does not seem to contend that he was not bound to have, under the contract, a final certificate of the Chief Engineer, but he alleges that the certificate given by Mr. Shanly was such final certificate and that he was not bound to obtain the approval of the Minister, standing in the place of the Commissioners with whom the contract was made, as to the certificate of Mr. Shanly. This, in my opinion, cannot be considered, in any sense of the term, such a certificate as the contract and the statute contemplate and which the Crown, on a strict legal interpretation of the contract, has a right to insist upon. Mr. Shanly, as his report or certificate shows, has come to the conclusion, for certain reasons such as "owing to various unforeseen difficulties, and in view "of the contract being for a lump sum where the contractor was to assume all "risks from weather, increase in the cost and scarcity of labour, the great "difficulty in such a country of ascertaining previous to tendering the real "nature of the material to be excavated, or the facilities for the procuring of "stone, timber, etc., for building, most of which had to be brought from a great "distance, that the deductions and additions provided for by the contract should "be waived."

And at the conclusion of the report he says:—

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

What does the contract require?

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

And section 18 of the Intercolonial Railway Act provides that—

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

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

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

Unless I am prepared to go back on the case of *Jones* v. *The Queen* (7 Can. S.C.R. 570) and to hold that was wrongly decided, which I am by no means prepared to do, I must hold that the suppliant has failed to establish his case and that this appeal must be allowed.

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

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The Order in Council of the 23rd June, 1880, was made upon the report of the Minister of Railways and Canals, stating that Mr. Sanford Fleming declined the appointment and recommending that Mr. Shanly be appointed to be Chief Engineer of the Intercolonial Railway. The Order in Council by which the recommendation of the Minister of Railways and Canals was approved by the Governor General constituted the instrument of appointment by virtue of which Mr. Shanly held the office and exercised the authority and performed the duties appertaining to it. This Order in Council certainly states that "the engagement should be understood to be of a temporary character," but it is not suggested that Mr. Shanly's appointment had been revoked or his tenure of office in any way interfered with at the time he made the certificate or report of the 22nd June, 1881. This Order in Council therefore, in my opinion, invested Mr. Shanly with all the powers which, as was provided by the contract between the crown and the Suppliant were to be exercised by the Chief Engineer of the Intercolonial Railway, at least so far as the same remained unperformed by his predecessor in office. Had the Engineer originally appointed died it cannot be doubted that it would have been competent for the Governor General in Council to appoint a successor who could properly perform such functions remaining unperformed as the contract assigned to the Engineer, and I can see no reason why there should be any difference in this respect between a vacancy so caused by death and that which was actually caused by the resignation of Mr. Fleming. There is nothing in the appointment of Mr. Shanly which is not in strict conformity with the provisions of the Act respecting the construction of the Intercolonial Railway, (31 Vic. c. 13) sec. 4 of which is as follows:

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

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

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

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

> "No money shall be paid to any contractor until the Chief Engineer "shall have verified that the work for or on account of which the same

" shall be claimed has been duly executed, nor until such certificate shall " have been approved of by the Commissioners."

The eleventh clause of the contract is as follows :—

" And it is further mutually agreed upon by the parties hereto that " cash payments equal to eighty-five (85) per cent. of the value of the " work done approximately made up from returns of progress measure- " ments will be made monthly on the certificate of the Engineer that the " work for, and on account of, which the sum shall be certified has been " duly executed and upon approval of such certificate by the Commissioners. " On the completion of the whole work to the satisfaction of the Engineer " a certificate to that effect will be given, but the final and closing " certificate including the fifteen per cent. retained will not be granted for " a period of two months thereafter. The progress certificates shall not " in any respect be taken as an acceptance of the work or the release of " the contractor from his responsibility in respect thereof, but he shall at " the conclusion of the work deliver over the same in good order according " to the true intent and meaning of the contract and of the said " specifications."

It will be observed that this clause makes mention of three different certificates, first those which are called "progress certificates," to be given by the Engineer during the continuance of the work, being based on an approximate estimate of the work done and which, subject to a deduction of 15 per cent. were to be paid at once on the approval of the Commissioners. With these Mr. Shanly had, of course, nothing to do. Then there was a certificate which was to be given upon the completion of the whole work, a certificate that it had been so completed to the satisfaction of the Engineer. And lastly, there was a third certificate to be given by the Engineer, which is denominated the "final and closing certificate" and which was to include the 15 per cent. retained from the progress estimates. This last mentioned certificate is clearly a separate and distinct certificate from that secondly mentioned, for it is expressly provided that it is not to be granted for a period of two months after the completion of the works, while the second certificate is to be granted immediately upon completion. There is no reason, however, why these two certificates should not be blended in one, provided two months have elapsed after the completion of the works. I can see, therefore, no reason why we should not consider Mr. Shanly's report as embracing both these certificates. As regards the completion of the works the report of Mr. Shanly is not very formal, but no one who reads the third paragraph of it can doubt that what he says implies that the works had been wholly completed to his satisfaction some years prior to the date of his report, and therefore much longer than two months before he gave his "final and closing" certificate, which, in my opinion, is also to be found in this report.

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

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What then was this "final and closing certificate" to contain? It could not have been intended to relate to the completion of the work, for that was to be dealt with by the second certificate which it was for the Engineer to give as soon as the work was completed, whilst the final and closing certificate was not to be given until two months after completion. It would have been entirely unnecessary and superfluous for the purpose of ascertaining the balance due to the contractor if the contract price was to be strictly adhered to and that was to be the sole measure of the contractors' remuneration, for that price being what is called a lump sum was written in the contract itself, so that the balance due to the contractor would have been ascertainable by a mere deduction of the aggregate of the payments made on progress certificates from the contract price, and no certificate from the Engineer would be required for that purpose there being no measurement or quantities to be taken, and such a calculation could be more appropriately and easily made by the officers who had charge of the accounts of the works than by the Engineer. We must, therefore, find some other object for the certificate in question than any of these purposes. Now the words "final" and "closing," even strictly construed, indicate that this certificate was to put an end to some matters which might remain open or in dispute after all questions relating to the completion and sufficiency of the work had been concluded by the other certificate as to final completion, and when the ascertainment of the balance remaining due in respect of the contract price was reduced to a mere matter of calculation, a simple sum of addition of the amounts paid from time to time in progress certificates and of the subtraction of the result from the fixed contract price.

Then what could possibly remain open or in dispute between the contractor and the crown but claims made by the former in respect of additional or extra work performed by him in excess of that required by the specifications? This is the only possible object or purpose for which a "final" and "closing" certificate could have been required, the bringing to an end and closing claims for work performed *extra* the contract. And when we consider that as the contractor was not entitled to be paid a dollar even of the unpaid residue of the contract price until he procured a certificate of the Engineer which (as many cases decided in this court relating to contracts on this same Intercolonial Railway have established) was an indispensable condition precedent to his being paid, it was not unreasonable or unfair, more especially when we remember that the Engineer's certificate was originally to be approved by the Commissioners, that the contractor should have the benefit of a conclusive determination of claims made by him, just as the crown reciprocally had the right to have any complaints which it might make of defaults on the part of the contractor adjudicated upon in the same way by the Engineer before he gave his certificate respecting the completion of the works. Moreover, such a clause is of such universal use in building and railway construction contracts that a contract which did not contain a similar provision would be out of the usual course. I should, therefore, if this clause eleven stood alone, having regard to the fact that the contract price was a fixed sum and not one to be ascertained by the measurement of quantities and

work, have considered that it was intended to give to the Engineer (subject to the approval of the Commissioners) the most full and absolute power to determine what claims of the contractor should be admitted and what should be rejected. It is, however, suggested that inasmuch as claims for extra work are expressly excluded by clause nine of the contract it was impossible that the final and closing certificate of the Engineer could have any reference to such claims. I cannot, however, accede to this view. No doubt the ninth clause is framed in terms which would, if there was nothing more in the contract, disentitle the contractor to make any claim for what was strictly "extra work," that is work incidental to that which was called for by the specifications, not, however, to work which was entirely additional, but if there had been added to that clause an exception in express words of such claims for extras as the Chief Engineer by his final and closing certificate (to be approved by the Commissioners) might allow, there could have been no doubt but that a claim like the present would not be excluded by the ninth clause.

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

As this contract was to be performed in the Province of Quebec I am of opinion that it should properly be construed according to the law of that Province. Having, however, satisfied myself that this would be the strict and proper construction of the contract according to the rules applied by English

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

It is, however, provided by the 18th section of the Act (31 Vic. c. 13) that no money shall be paid except upon the certificate of the Chief Engineer "nor "until such certificate shall have been approved of by the Commissioners," and it is objected that there has been no such approval in the present case. Of course, the first and obvious answer to this objection is that there were no Commissioners to give their approval when Mr. Shanly made his certificate. It is, however, said that by the statute 37 Vic. ch. 15, the Minister has been substituted for the Commissioners. It is true that the powers of the Commissioners are generally transferred to the Minister, but according to well understood principles of statutory construction a statute will never be interpreted as having the effect of varying a contract and imposing new obligations and conditions on a contracting party unless such an intention is indicated by express words. Moreover the object of the approval of the Commissioners seems to have been to ensure financial control by them of the moneys voted by parliament for the construction of the railway, and this purpose would be subserved by other general provisions relating to all public works after the work came under the control of the Department.

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

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

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

TASCHEREAU J. concurred with Strong J.

GWYNNE J.—In this case the respondent, by petition of right, claimed to recover from the Dominion Government a large sum of money under a contract made with him under the Act respecting the Intercolonial Railway for the construction of section 18 of that railway. The question now before us arises

under the paragraph in the Petition of Right numbered 27A which is as follows (see p. 371).

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

" 4617 c. yards masonry at $6	$27,702
" 8892 do. do. in Portland cement, extra " price, $1.50	13,338
" 9400 c. yards crib work at 75c.	59,550
" Iron pipes in culverts	7,289
" Iron pipes not used	4,000
	$111,879
" Contract price, lump sum	648,600
" Total ...	$760,479
" Amounts deducted by Chief Engineer (in his " certificate referred to in paragraph 27A) " as payments on account according to " report of Mr. Brydges, 1877	640,108
" Balance ...	$120,371

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

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

" 4. The Engineer shall be at liberty at any time before the com- " mencement 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 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 contractor shall not be entitled to any allowance by reason of " such changes, unless such changes consist in alterations in the grades " of the line of location, in which case the contractor shall be subject to " such deductions for such diminution of work or entitled to such " allowance for increased work (as the case may be), as the Commissioners " may deem reasonable, their decision being final in the matter, &c., &c., " &c.

" 9. It is distinctly understood, intended and agreed that the said price " or consideration of $648,600 shall be the price of and be held to be " full compensation for all the works embraced in or contemplated by

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" this contract, or which may be required in virtue of any of its provisions " or by-law; and that the contractor shall not upon any pretext whatever " be entitled by reason of any change, alteration or addition made in or to " such works or in the said plans and specifications, or by reason of any of " the powers vested in the Governor in Council by the said act entitled: " An act respecting the construction of the Intercolonial Railway," or in " the Commissioners or Engineer by this contract or by-law, to claim or " demand any further or additional sum for extra work or as damages, the " contractor hereby expressly waiving and abandoning all and any such " claim or pretension to all intents and purposes whatsoever, except as " provided in the 4th section of this contract.

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

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

In the case before us the claim is that many alterations had been made within the provisions of the fourth paragraph of the contract, so that the certificate of the Chief Engineer that the work had been completed to

his satisfaction would not in itself entitle the contractor to recover any part of the amount claimed by him in his petition of right. He could only recover whatever sum, if any, should be ascertained as being due to him upon a calculation being made in accordance with the provisions of the fourth paragraph, and so far from anything having ever been found due to him under that paragraph in excess of what he has already received, it appears, incidentally, that the Commissioner, the late Mr. Brydges, in 1877, reported that he had been overpaid ; but, however this may be, the contention now is that the contractor, in June, 1881, became entitled in virtue of a report then made to the Minister of Railways by the late Mr. F. Shanly, then Chief Engineer of the Intercolonial Railway, to recover the sum of $120,371.

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

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

" OTTAWA, 21st June, 1880.

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

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

" Respectfully submitted,

" (Signed) CHARLES TUPPER,

" Minister of Railways and Canals."

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

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

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

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Assuming the Government to have been willing to accept Mr. Shanly's own calculation made in accordance with the provisions of the fourth paragraph of the contract in substitution for the approval and decision of the Commissioners as required by that paragraph, or that the Minister of Railways was competent to do what by that paragraph was submitted to the decision of the Commissioners, still Mr. Shanly never did, in point of fact, make any calculation such as was directed to be made by the above fourth paragraph. Indeed, from his report it is obvious that he never understood that he was appointed for the purpose of giving, and that in point of fact he never contemplated giving and never did give, any certificate for the purpose of entitling the respondent thereunder to recover any part of the amount claimed by him as being due to him under the terms and provisions of the contract. So far from contemplating giving a certificate either that the work had been completed by the respondent, or that there was any sum remaining due to him under and in accordance with the provisions of the contract, he shows upon his report that the work had never been completed by the respondent, but that the Government had completed it themselves; and further that his report upon the respondent's claim submitted to him for investigation is not based upon the provisions of the contract, but upon the assumption that those provisions are waived; thus showing the report to be intended as a confidential communication and suggestion to the Government, and not as a basis upon which any legal claim of the respondent under the terms of his contract could be rested. In that report, Mr. Shanly says:

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

He then proceeds—

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

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

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

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

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

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

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

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

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

The same objections might have been taken in case the Chief Engineer who had held that office during the whole progress of the works had died

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immediately after their completion without having certified that they had been completed to his satisfaction, and Mr. Shanly had been at once appointed.

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

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

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

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

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

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

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

But on the 25th of May, 1874, the Act 37 Vic., ch. 15, was passed. It repealed the third section of the Intercolonial Railway Act, which had declared

that the construction of the railway and its management until completed should be under the charge of four commissioners, with so much of any other part of the act as authorised the appointment of any commissioner or commissioners for the construction and management of the railway, or the continuance of any such commissioner in office, or as might be in any way inconsistent with that act. Therefore when the work was finished, in December, 1875, it had become impossible to procure the approval by the commissioners of the engineer's final certificate. If the act of 1874 had gone no further the necessity for any certificate except that of the engineer could not have been asserted. But the act went on to constitute the Intercolonial Railway a public work, vested in Her Majesty, and under the control and management of the Minister of Public Works, and to transfer to and vest in the Minister all the powers and duties assigned by the former act to the commissioners. Did this act substitute the Minister for the Commisioners for all purposes in relation to this contract? I think not.

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

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

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

The remaining question is whether he has a sufficient certificate.

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

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

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

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

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

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

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

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

Appeal allowed with costs.

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

Solicitor for Respondent: *A. Ferguson.*

"G."

SPECIAL REPORT.

Claim of J. B. Bertrand & Co. ... ... $601,852.00.

This Claim is made in relation to two contracts, entered into between Messrs. Bertrand & Co., of the one part, and the Commissioners of the Intercolonial Railway, of the other part, one dated 26th October, 1869, for the completion of Section 9 by the 1st July, 1871; the other, 15th June, 1870, for the completion of section 15 by the 1st July, 1872.

Including damages these Contractors demand $285,667.91 on matters relating to Section 9, and $316,184.61 to Section 15; in all, $601,852.52.

The particulars of this Claim as presented to us are set out in Schedule "A," appended hereto.

We have read and considered the evidence, oral and documentary, which is recorded as having been adduced before Mr. Shanly, and have heard the following witnesses:—

J. B. Bertrand.
F. H. Berlinquet.
John Ross.
W. Home.
Marcus Smith, C.E.
E. P. Hannaford, C.E.
P. A. Peterson, C.E.
Charles Odell, C.E.
— Jelly, C.E.

We have examined the extensive correspondence recorded in the Department of Railways and Canals concerning matters involved in this Claim, and have had the advantage of a large amount of documentary evidence in addition to that which was before Mr. Shanly.

The contract in this case is similar in form to that generally used on the Intercolonial Railway.

The first question we have to consider is whether this Claim is excepted from our inquiry by the terms of our Commission; one class excepted is, "any "claim arising out of or connected with a contract, the performance of the "work under which it was legally taken out of the hands of the contractors, "and in regard to which the work was completed at a loss to Her Majesty."

The work under both contracts was taken out of the hands of these Contractors; but it is argued by the counsel for the Claimants that it was illegally done, for the reason that there was then money due to the Contractors and

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improperly withheld; that the want of it caused them to fail in their progress of the works, stipulated for by the contracts; that such failure being thus caused by the wrongful omission of the Commissioners, the Contractors could not properly be visited with the punishment described in Clause 4, which was intended to be enforced only when the Contractors were in fault.

There is no provision in either of the contracts that payment of the moneys due under it shall be a condition precedent to such a rate of progress as would satisfy the Commissioners; that would have put an instrument in the hands of contractors by which the public chest might have been opened more readily than would be safe, each time a contractor's claim was not forthwith settled he could threaten to stop the works, and occasions would probably occur when demands ill-founded in whole or in part would be paid rather than delay the works during the time necessary for a full consideration of the matter.

Assuming, however, for the moment, that the contractors were not bound to proceed at the stipulated speed, unless all moneys due under their contracts were punctually paid, we have to say that no such moneys were in arrear; all had been fully paid as well as large additional advances to these claimants before the works were taken out of their hands. Their last request before that event was for the price of works alleged to be beyond those undertaken for the bulk price; in other words, for extras concerning which no provision had been made in the contract.

There is a provision in Clause 4 that the bulk price was to be increased or diminished according as changes of grade or location should increase or diminish the work. Upon its being pointed out to the Claimants' counsel that there was no room for a demand on that ground, he contended that whatever might be the nature of the extras claimed, the Commissioners and the engineers were bound to be ready forthwith to decide whether anything was due upon them, and if so to pay it immediately, that their not being so ready exculpated the Contractors from the charge of not proceeding with proper speed.

As a fact these claimants were at the time of their demand liable to be charged for diminution of work, and had received more than was due under the contract.

The following letter was written by the Contractors to the Commissioners just before it was decided to take the work out of their hands:—

"Ottawa, 28th May, 1873.

"To the Commissioners of the I.C.R.

"Gentlemen,

"Understanding from you that we are not likely to have any sums of "money paid to us immediately on account of the large claims submitted "to you for extras on Sections 3, 6, 9, and 15, we beg to inform you in "consequence, and without prejudice to those claims, that we are unable

" to continue the progress of the works as you have notified us that you " require.

" We are, Gentlemen,
" Your obedient servants,
" (Sgd.) F. X. BERLINQUET & Co.,
" For Sections 3 and 6.
" (Sgd.) J. B. BERTRAND & Co.,
" For Sections 9 and 15."

Though it was argued for the claimants that at times there was a want of necessary plans by which it was alleged they were delayed, it is plain that the reason they gave for not proceeding with sufficient speed was the non-payment of their demand for extras.

The letter last mentioned was followed the next day by an Order in Council authorizing the Commissioners to enter upon these sections and complete them, soon after which possession was taken and all further expenditure was made by them.

We have already said there was nothing due for extras because of any changes in grade or location; if these claimants were then entitled for other extras to an amount beyond what they had received, still there was no arrangement as to the manner or time or amount of payment. They were simply claims for work and materials which were to be collected in the ordinary way, where no bargain exists concerning the price or terms of compensation, and therefore they could not possibly affect the rights of parties under a contract which did not allude to them.

It is manifest from the tenor of their counsel's argument, and from the correspondence and other evidence, that these contractors could not and would not go on unless they were paid without delay a large sum of money, which was alleged but was not admitted or proved to be due, on works outside their contracts; the course of the Commissioners was, in our opinion, clearly justifiable, and therefore we find that the works on contracts 9 and 15 were legally taken out of the hands of Messrs. Bertrand & Co. This being the case, we have next to inquire if they were finished at a loss to Her Majesty, if they were we are not authorized by our commission to investigate or report anything further on the claim.

We understand the " finishing " mentioned in our commission to refer to the works covered by the contract and undertaken for the bulk price in each case. Therefore, if the money paid by the Crown, either to the contractors or to other persons, or to all of them, was compensation for works outside as well as inside the contract, it follows that the amount does not of itself show whether the works covered by the contract have been finished at a loss to Her Majesty; loss meaning, as we take it, a cost greater than the bulk price for which they were undertaken. The amounts paid in this case were on progress estimates which covered all kinds of work and materials, including, amongst others, works on which this present Claim is founded; therefore, though it is

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clear that the Government has paid for the works altogether on these sections a much larger amount than the two lump sums for which the contracts were made, we must nevertheless ascertain the value of the work, if any there be, which these Contractors have finished outside or independent of those contracts, and this will be virtually investigating all their demands for extras.

The bulk price of Section 9 was	...	$354,897.00
The bulk price of Section 15 was	...	363,520.00
Total	...	$718,417.00

This, however, was not necessarily the sum to be paid to the Contractors for completing all the works undertaken by them. There is, as before mentioned, an express stipulation in clause 4 that the bulk price may be increased or diminished according as the work should be increased or diminished by changes of grade or location ; we have to learn, therefore, how far, if at all, the specified price was so affected. There was in fact no change of location on either section, and this feature of the accounts will be determined according to changes of grade only.

In the particulars submitted to us, Messrs. Bertrand & Co. do not profess to state all the work due to changes of grade. They mention some which they claim to be in their favour ; but they say they kept no record of the rest, leaving the Government to look after that side of the account.

Almost all the evidence on this subject is derived from Government officials and their returns. In fact, the entries in books produced and relied upon by the claimants are copies made from official sources. Forming then our conclusions from all the available evidence, we have found the quantities in question to be as follows :—

On section 9 the diminutions were :—

In earth	18,425	yards.
In rock	10,001	,,

The increases were :—

In earth	4,705	,,
In rock borrowing	7,695	,,

As mentioned in our General Report, we have come to the conclusion that under the contract, the allowance for work saved or increased by change of grade or location is to be fixed according to its actual value, irrespective of the rates mentioned in the schedule accompanying the tender. The evidence showed that this value varied in different places. We have adopted rates which are intended to represent fairly the average at the different localities, they are on the diminutions lower than the rates asked by the Contractors for visiting works at those places, where they claim to have an excess (though in the printed argument of their counsel, 27 cents for earth is named on pages

21 and 30 of the Appendix), and inasmuch as the whole accounting on the changes is against the claimants, it is to their advantage to have these rates as low as possible; on the rock borrowing on which they are credited with an increase, we have put a price as high as the evidence most favourable to them would justify.

On this section we have fixed the value per yard as follows:—

Earth excavation	·30
Rock ,, ...	1·20
Rock borrowing	·80

Applying these rates to the quantities below mentioned, we have for diminutions:—

In earth	5527·50
In rock	12,001·20
In all	$17,528·70

and for increases:—

In earth	1411·50
In rock borrowing	6156·50
	$7567·50

The difference between these two sums, $9961, omitting cents, is to be charged, and reduces the amount due under the contracts from $718,417 to $708,456.

On section 15 the diminutions were:—

In earth	12,196 yds.
In rock...	563 ,,

and the increases were:—

In earth	388 ,,
In rock...	nil.

On the evidence we find for this section the proper allowance for earth to be 25 cents, and for rock $1 per yard. The result of this is $3612 to the contractors' debit, and $84·50 to their credit. The difference $3528, omitting cents, is to be charged, and reduces the amount due under their contract from $708,456 to $704,928.

The Government desiring after the execution of the contracts to substitute iron for wood in the superstructure of the bridges, the Contractors agreed in writing that iron might be used and erected without expense to them, the wooden structures to be in effect taken out of their contracts, and a deduction of its cost according to a specified rate being made from the amount which would be due to them under the original bargain.

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This deduction according to the stated rates amounted to :

On contract 9	$3456
On contract 15	42,500
In all	$45,956

which being taken from $704,928 the amount due as aforesaid, leaves a balance of $658,972 as the full price for the work under the two contracts.

The Commissioners paid to the claimants :—

On section 9	$346,668
On section 15	372,130

and after assuming control of the works they expended :

On section 9	35,988
On section 15	97,129
In all	$851,915

The claimants do not admit that the amounts thus spent by the Government were requisite to finish the work undertaken by them; but after inspecting the monthly pay-rolls and vouchers which were produced, they admitted that the moneys had been spent on the works.

Mr. Bertrand was employed by the Government overseeing the works after they had been taken out of the hands of his firm, and no question was ever raised on behalf of the Contractors as to the propriety of the expenditure or of charging them with it; we think the circumstances raised a presumption in favour of the expenditure covering no more than the work which these Contractors had undertaken, and there has been no evidence to weaken that presumption.

The total amount, $851,915, above shown to have been expended by the Government, is $192,943 more than the $658,972, before mentioned as the total amount to be paid these claimants for the work done under their contracts, and we proceed to show how far that balance is met by the value of extras furnished by them.

We take up first contract 9 :—

Item 1.—Changes at Armstrong's Brook, not included in the contract $7670

This change was taking a stream through an embankment by a tunnel, instead of by a culvert as originally designed. The railway crossed a mill-pond here. The first plan was to carry the stream through any diversion through a

culvert in the pond, but it was found that the bottom was of a soft movable material, and would necessitate a much more expensive foundation than had been expected. It was decided to take the stream through a point of rock that extended into the water, and to build the embankment solid across the pond, and the tunnel was made accordingly.

The embankment taking a much larger quantity of material than had been originally estimated, the claimants make up this item by charging the new design with all that increase, except the space that would have been occupied by the culvert. The evidence shows, however, that if the design had not been altered, a very large increase would have been necessary, owing to the bottom of the embankment spreading and sinking in the pond far more than had been anticipated. This is ignored by the claimants. The witnesses called by them failed to satisfy us of the main point, viz., that the new design created any cost beyond that necessary to carry out the first plan; while Mr. Marcus Smith, who had been district engineer over both sections, after taking time to look into the particulars and make calculations concerning the subject, testified that the new design saved the contractors a large sum of money—many thousands of dollars.

Mr. Smith's evidence is attacked because he does not allow anything for the slopes (of the embankment) being now 2 to 1 instead of $1\frac{1}{2}$ to 1, as mentioned in the bill of works. He should not allow anything. That increase was one of the risks assumed by the Contractors; it was due to the unfavourable character of the material at the bottom of the pond, not to the change of design. Some evidence was offered to show that the increase of the material would not have occurred to any serious extent under the first plan; but our conclusion upon all the testimony is in an opposite direction. We do not allow anything on this item.

Items 2 and 10 inclusive:—For rock instead of earth and rock borrowing ... ... $11,525·75

These are not all alleged to be for increase of work caused by change of grade or location, though in some of the localities a change of grade took place. The claimants do not profess to confine themselves to charges for increase of work provided for in clause 4 of the contract; but whenever they found, or allege that they found, in any particular spot, more rock than was mentioned in the bill of works, they charged the Government with the increase, entirely ignoring the fact that this was a bulk sum contract, and that the quantities mentioned in the bill of works were not guaranteed.

We have no hesitation in saying that the Contractors are not entitled to get more than their bulk sum price, merely because in some localities they had to excavate, borrow or haul more rock or more earth, or both, than the bill of works mentioned for those places; nor if the bi l of works named earth and it turned out to be rock instead of earth, or *vice versa*.

The claimants put in a statement by Mr. Jelly concerning these increases, but in our view of the matter it is not relevant.

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Having allowed to these items at an earlier stage of this report for all increases of work due to change of grade or location, we cannot give them a further credit on any of these items from 2 to 10 inclusive.

Item 2: Drain outside of railway, $1170.

The evidence supports this item so far as the quantities and prices are concerned; the only question is whether it is within the contract and covered by the bulk price.

The bill of works mentions catch water drains, steam diversions, outlets and inlets to culverts; but this is what is known as an off-take drain, and is not within the meaning of any of those descriptions. These drains were altogether outside the railway limits, and no part of the original design: and therefore without interfering with the Contractors' rights, anyone else might have been employed by the Commissioners to do the work. That test makes the work more properly independent of and outside the contract than within it, Ritchey *vs.* The Bank of Montreal, 4 U.C.Q.B., 459, consequently we allow the item. Giving credit for this $1170, reduces the balance against the Contractors from $192,943 to $191,773.

Item 12.—Granite covering to culvert ... ... $387.00.

Mr. Odell, who had been the resident engineer when this work was done, testified that there was no stone in that neighbourhood suitable for it, and Mr. Bertrand himself said there was nothing "but thin limestone which was unfit for the work."

It is evident that this charge has no basis unless it be that it cost more than the Contractors expected, and that a cheaper kind of stone would have answered the purpose if they had been able to get it. We think that not a sufficient reason for allowing it; their not being able to do so being a misfortune which they must bear themselves, the unexpected cost was incurred in the carrying out of the contract. We allow nothing on item 12.

Item 13.—Great change at bridge ... ... $1000.

This is known as the Belledune Bridge, and was originally designed with a single span. There were high sloping banks on each side of the stream. The opening was ample for all the purposes of a railway, and would not have been increased except for the object of saving money to the Contractors. The first plan involved high abutments of masonry near the stream, and embankments from them to fill up the slopes. It was decided to widen the opening, by which means the abutments commenced higher up on each slope and reach the top of the bank with much less masonry; the earth embankments were also shortened. These advantages were secured by placing a pier in the stream and making two spans instead of one in the superstructure. The cost of the whole bridge was in this way very much diminished without injuring the character of the work. The claimants say they made the change

principally because of the pier which was not in the original design, and they thought they might be entitled to claim that as an extra, irrespective of the fact that there was a great saving in work in the abutments and the banks annexed to them.

The evidence leaves no doubt that the change was adopted entirely in the interest of the Contractors, and that there was a saving to them of about $10,000. We allow nothing on this item.

Item 14.—Change of arched culvert to a bridge ... ... $6469.

This change was made on account of the difficulty of getting the arched stones as originally designed for the culvert, it was not caused by any physical feature of the country; but was a departure from the first plan because the engineers came to the conclusion that a different work would be required from that which was originally contemplated. The work at this particular spot was made more expensive to the Contractors than the original design would have been, and on this account they contend they are to be paid for it as an extra.

The question is whether the bulk price covers such changes as this, in other words whether the true interpretation of Clauses 4 and 10 prevented the Contractors being allowed any sum beyond their bulk price for work due to such a change of view as this was on the part of the engineers.

The principal effect of the change was a substitution of about 700 yards of such masonry as was used in bridges for 491 yards of masonry of the best kind used in culverts; both of these under the specifications would be first-class masonry, but when used in bridges, from the greater proportion of face work, and other reasons, it was more expensive than that used in culverts. There was also an increase in the cost of paving.

The account made up by the Claimants is based on the value of the masonry required for the first design being $9 and of the masonry used $15 per yard.

We think the difference higher than is supported by the evidence, and in our opinion, $3 per yard is a fair difference to allow; fixing then the value of the masonry in the first design at $12, we find $4996 to be the amount of extra cost occasioned by the change now under consideration, and this amount ought to go to the credit of the Claimants if their contention is right on the interpretation of the contract concerning the cases where the engineers from a change of view after the contract was made, directed an alteration in the character of the work, at an expense to the Contractors greater than would have been required by the original design. Messrs. Bertrand & Co. claim that in each case of this kind, they are entitled to recover the whole amount of the additional cost. On the other side it is argued that no matter to what extent the cost is so increased, the Contractors must, by the terms of the bargain, bear it without any relief or reimbursement from the Government. It may be

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that the true interpretation lies between these extreme views, but we do not deem it necessary in report on this claim to offer an opinion on the soundness of either argument, because the question towards the solution of which our investigation is a step, the liability of Her Majesty to these claimants, must be settled the same way whichever of the interpretations above-mentioned be followed.

If the question were, how much have these contractors been overpaid? then we would hesitate to place this item to their credit, until we should conclude that their interpretation of the contract is the right one, or at all events that the one advanced on behalf of the Crown is wrong. As it is, we give them credit for this $4996 in order to show how, under their interpretation, the account would stand according to the facts that we consider established. This credit reduces the balance against the Contractors from $191,773 to $186,777.

Item 15:—Change of 1051 yards of second-class masonry to 700 yards of first-class	$5600
Item 16:—Extra work to divert course of river, and building and demolishing one abutment	3890
In all ...	$9490

At the place here alluded to, it was originally designed to build a bridge of one span. After the abutments had been partly erected it was decided to build with a pier and two spans. In executing this change, the masonry in one abutment as far as it had gone was demolished and rebuilt, and the course of a stream which was at first intended to pass through the embankment by a culvert near the bridge was diverted; a public road was also diverted and carried through one of the openings instead of crossing over the embankment as originally intended. The Contractors claim that these changes increased their outlay in completing the works; on the other side it is argued that the alterations caused a saving in their expenditure.

Much evidence was taken concerning the relative cost of the two designs of this work. The first design would have been much more expensive than the claimants admit, when comparing its cost with that of the one executed, and they omit to give credit for some of the work that was saved by the substitution of the new plan. Mr. Marcus Smith's testimony, based upon an estimate of the value of masonry, rather lower than we are inclined to adopt, went to show that the Contractors saved about $2000; adopting, however, a higher rate, as we think the evidence justifies us in doing, and making some other corrections in favour of the Contractors, still leaves the new design in our judgment less expensive than the old one, and we allow nothing on these items.

Items 17, 18, 22, 23, and 25.—Damages by delay, expenses, &c. ... ... $85,730.

For the reasons mentioned in the early part of this report, we cannot now take up any claim or damages.

Items 19, 20, and 21.—Grubbing, close-cutting and cleaning, $.

There is some evidence to show that work of this kind was done to a slight extent, about nine acres of clearing beyond that estimated by the original bill of works. Whatever the exact increase may be, it is within the meaning of the contract, and is covered by the bulk price there agreed upon, and we allow nothing on items 19, 20, and 21.

Item 24.—Extra value of masonry executed in granite, $10,500.

Item 26.—6000 yards of second-class masonry replaced by first-class ... ... $50,250.

Speaking first of item 24, there is no doubt that a better class of stone was furnished than the specifications called for; that good sandstone or limestone would have been sufficient to fulfil the contract, but there was no good sandstone or limestone to be obtained, and the Contractors had therefore to use granite.

Mr. Bertrand, the principal and acting partner of the firm, who took these contracts, and who made this claim, says in substance that what he provided was a better value than what he was obliged to give by the contract; that the engineers were always willing to accept the stone called for by the specifications; that he often used larger stone than that specified for the work because it was sometimes cheaper to do so; but that the engineers understood that his using larger stone would give rise to a future claim by him. His language is, "They," meaning the engineers, "never refused when the work was according "to the specifications. The engineers did not object to the smaller stones, but "they recommended that I should use the larger ones."

Item 28 is not supported by any stronger evidence than item 24. Mr. Bertrand testified that he did not put this in the claim, and was not responsible for it; that he could give no reason why it ought to be allowed, and that in fact he had no claim on it.

We have heard much evidence and much argument concerning the substitution on this section of granite for stone more easily worked, and though it is apparent to us that the granite work was more expensive to the Contractors than other stone would have been, could they have provided it? We have heard nothing which enables us to say that the claimants are entitled to an extra price for it. It is apparent on the whole evidence that Messrs. Bertrand & Co. furnished granite only because there was no way less expensive to themselves in which they could carry out their contract, and we have allowed no part of the claim concerning it.

Item 26.—12,000 feet of fence built twice through widening the road ... ... $180·00

On the evidence, we think, making this fence a second time as they did, entitles the Contractors to a price beyond the bulk sum; it was a work independent of and outside the contract. We allow the amount claimed, $180·00, which reduces the balance against the Contractors from $186,777 to $186,597.

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Item 27.—Change in the specification of fencing $6000

The original design was to use posts for the fencing, but it became apparent that over a considerable distance that was not possible, owing to the difficulty of setting them the required depth in rock, and so another kind of fence was ordered and built, not only over the distances where making postholes was difficult, but over the whole section, and though some outlay was saved by the latter design, it is apparent that the fence built was on the whole better, more durable, and more expensive than the one originally intended, costing more principally because the material (cedar) was of larger dimensions.

There is nothing definite, however, as to the difference in cost, and we cannot fix accurately the amount to be allowed; we can only give an approximate estimate, $4550. That sum we place to the credit of the Contractors for the reasons which we give in allowing item 14. This reduces the balance against them from $186,597 to $182,047.

We now proceed to the items relating to section 15.

Item 1.—1300 yards rock instead of earth at $1·60 ...	$2080
Item 2.—15,000 yards extra excavation earth at $·40 ...	6000
Item 3.—10,000 yards extra excavation, change of grade, at $·20	2000
Item 6.—900 yards extra excavation rock instead of earth at $1·25	1125
22,000 yards extra excavation earth at $·55 ...	12,100
In all	$23,305

There is no evidence to show that on this section there was an increase of work due to change of grade or location beyond that for which we gave credit in an earlier part of our report. The disappointment to the Contractors, if any there was, in finding more material than they expected in any particular locality, or one kind instead of another, is, as before explained, clearly no ground for being paid an extra compensation beyond the bulk sum price. We think, moreover, that the evidence shows the actual work in those places where there was no change of grade or location, to be on the whole less instead of more than was anticipated. We allow nothing on items 1, 2, 3, and 6.

Item 4.—Overhead bridge ... ... $875·00.

Several witnesses gave evidence on this item, all to the effect that the bridge was a new feature in the plan, and increased the cost of the work. Mr. Marcus Smith testified that it was built because it was considered better on public grounds, and that the work itself cost more than the original design. The grade was lowered and the earth work was thereby diminished on each side of the bridge. Inasmuch, however, as we have heretofore taken into account against the Contractors, all the diminutions of work caused by changes of grade, we cannot set this diminution against the cost of the bridge.

According to the evidence the price is not unreasonable, and we allow the item at $1875 on the ground that it is for a work independent of and outside the contract. This decreases the amount of the balance against the claimants from $182,047 to $180,172.

Item 5.—Arched culvert replaced by box culvert ... $12,673·90

After some evidence taken before us this item was abandoned.

Item 7.—3872 yards second class masonry made first class at $2·50	$9,680·00
Item 11.—Extra value of masonry executed in granite, 16,100 yards at $15	241,500·00
In all ...	$251,180·00

As far as quantities are concerned, these two items are framed without any regard to the quantity actually done. The bill of works gave as an estimate to tenderers 12,100 yards of first class masonry, and 4000 yards of second class. The 16,100 yards mentioned in item 11 is evidently the aggregate of the quantities stated in the bill of works, while the whole work done on this section up to the end of February, 1874 (and there was very little, if any, done after that), amounted only to 9611 yards of first class, and 2024 yards of second class. These two items, numbers 7 and 11, seem to be made up on the theory that 3872 yards was the quantity proposed by the bill of works to be of second class; that all the masonry was built of first class, and therefore a claim is made for the difference in value in ordinary stone ($2·50 per yard) for all that was intended to be second class, and then in addition an extra demand is made for the usual value of the material throughout all the masonry, and in that way item 11 claims $15 per cubic yard extra on the whole masonry of the section, because it was of granite. As a fact the masonry was not all granite, a considerable quantity of sandstone was permitted to be used for backing in some structures because of the great strength of other parts.

These items raise the most important question to be decided concerning Section 15. A large portion of the masonry was of granite, and was no doubt much more expensive than the other stone suitable for the purpose would have been, if it had been found on the section as was expected. All the engineers, from the chief down, have agreed in describing this as magnificent work, and it is clear to us that if the bargain had been that the work was to be paid for at what it was worth, the Contractors' side of the account for masonry would be considered larger than it is when governed by the bulk price of the contract.

Testimony was given with a view of showing that in places a cheaper stone than was used was available, and ought to have been accepted. We have heard at great length all the evidence, and all the arguments offered concerning these items; but we feel bound to say that all the engineers who directed the

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work on those sections were actuated by a desire not to cause any unnecessary expense in any respect, and particularly not to compel the use of granite, when any stone answering the contract could be got at a smaller cost.

It was alleged that sandstone found on the section would have been sufficient and ought to have been accepted, but was not. The evidence shows that Mr. Peterson, the resident engineer, before rejecting that stone made a careful analysis of it and found it to contain a considerable percentage of clay. His report on the subject is printed (No. 419) in the correspondence under the date of 12th October, 1871. Though this sandstone was rejected for the exposed portions of the masonry, yet when granite was so placed as to give the structure the requisite strength, then it was permitted to be used inside as "backing." The engineers, under whose superintendence these works were carried on, were evidently under the impression that the contract price would not compensate for this splendid masonry, and probably said that if any recommendation on their part would be useful to the Contractors it would be given; this sympathy, however, did not lead the engineers to accept work or material below the specifications, and consequently the Contractors were driven to furnish granite, which they did, hoping that the increased cost to them, and as they alleged the increased value to the public, would be considered a sufficient reason for their being eventually granted an increased price.

But upon the whole evidence we have to say that the claimants were not then of the opinion that there had been any improper rejections of stone, or of any undue strictness as to the manner of building, or any other improper decision by Government officials, which would give them a claim for an extra price as a matter of right. Indeed, the evidence before us of Mr. Bertrand himself is entirely inconsistent with such an opinion.

In addition to the claim founded on the superiority of granite over other material, it was alleged that the workmanship in finishing it was unnecessarily expensive; our attention was called to a remark by Mr. Fleming, the chief engineer, to the effect that the masonry here had been "polished" more than was necessary under the specifications. That allusion, however, was proved to point only to a particular structure—the middle river bridge—which had not been polished in the ordinary sense, but merely worked to a finer surface than is usual with railway masonry. The extra cost of it was about $100. The work had been finished, however, in that way, not at the request of any government official, but by some workmen just out from the Old Country, for their own gratification, evidently with a desire to show how good work they could make.

We offer no opinion, whether for practical railway purposes, this granite masonry is really any more, and if so, how much more valuable to the public than masonry or other suitable stone would have been; because upon our finding of the facts, we think the Contractors have no right to an extra price for it. Our judgment is, that not being able to procure a cheaper, suitable stone, they could not supply the masonry called for by the contract at any less

expense than that which they did supply, and consequently we allow them nothing on items 7 and 11.

Item 8.—Grubbing, close-cutting, etc. $1240

There is nothing in the evidence to show that any work of this kind was done on Section 15 beyond what was called for by the contract.

Item 9.—1000 yards at Nipissiquit bridge, and 900 yards at Tete-au-Gauche bridge, backing made facing masonry at $6 ... ... $11,400

The contention of the claimants was that 1000 yards of masonry backing in the Nipissiquit, and 900 yards in the Tete-au-Gauche bridges had been prepared by the direction of the resident engineer in a way that was more expensive than the specifications required; that the beds and vertical joints were too well finished "just like the front ashlar work," and that they were not allowed to put inside two courses to match a corresponding single course outside; that if they had been allowed to do this they had a lot of stone which had been made for face work but "was not up to the mark" and would have been used for this inside work.

Mr. Peterson testified that in those places the backing was of granite with dressed beds, but not with dressed joints, unless it happened that some stones had been prepared at the quarry in that way, and being brought to the ground the masons had taken whatever came first; the vertical joints for the back had never been exacted, like those for facing; that if any such case occurred it was because they had "used the stones so prepared, finding it more convenient to "do so."

The specifications made a difference between the thickness of the stones to be used for backing in high piers and abutments, and that in other masonry; clause 48 points out what would be called for in high piers and abutments, as distinguished from that in other places.

In both these bridges the piers and abutments were high; in the Nipissiquit from 50 to 52 feet, in the Tete-au-Gauche about 60 feet.

It was urged on the part of the claimants that after this masonry had been built at the expense now complained of, by the direction of the resident engineer, Mr. Marcus Smith, the district engineer, had consented to their using for inside work some stone less expensively prepared, and this decision was dwelt on as evidence that the previous direction of Mr. Peterson was improper, occasioning unnecessary expense, and thereby supporting this demand for extra remuneration. Mr. Marcus Smith, however, explained that resident engineers have not the same discretion as their superior officers in relieving contractors from the strict requirements of the specifications, thus showing that his being more lenient than Mr. Peterson was no evidence that Mr. Peterson was wrong; in

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fact, on the attention of Mr. Bertrand being called to this clause 48, and on his reading it, he admitted that if he was bound by the specifications he had no claim on this item. He said "If you take the letter of the specifications, I was bound to do it the way it was done." We allow nothing on this item.

Item 10.—720 superficial feet, cutting in granite for steps, as foundation to abutment of Nipissiquit Bridge, at 30 cents	$216
820 feet granite prepared for above at 75	615
	$831
Damages	$3000

For this bridge steps were cut in the rock, and pieces of stone were dressed to fit them so as to make a firm foundation. After this the engineers decided to remove the steps and cut the rock down to a level. The change was carried out, and, in our opinion, the cost was about the amount here charged, $831. We place it to the credit of the claimants for the reasons given by us concerning the allowance of item 14, contract 9. This reduces the balance against the contractors from $180,172 to $179,341.

The latter part of this item, $3000, being for damages, we pass by until we see whether the works have been finished at a loss.

Item 12.—105 yards extra excavation in foundation of two piers at Tete-au-Gauche	$52·50
37 yards first-class masonry added to the foundations of the two piers at $20	740·00
Pumping coffer dams occasioned by the above change ...	475·00
In all	$1267·50

This work became necessary, because after entering into the contract facts were discovered concerning the physical features of the locality, which made an extra depth requisite for the safety and permanence of the bridge.

The bill of works, a notice given to tenderers before they made their offers, contains this language:

"The structures proposed" (over streams crossing the line of railway) "are, from all the information obtained, believed to be the most suitable; "but should circumstances require any change in the number, position, "waterway or dimensions, the contract will provide that all changes shall "be made by the Contractor without any extra charge. The schedule "gives the probable quantities in the structures now proposed, and the "data upon which these quantities are ascertained. Much, however, "depends upon additional information to be obtained, with regard to the "freshet discharge of streams, as well as the nature of the foundations; "but with respect to the latter, accurate information can only be had "during the progress of the work."

In the schedule there mentioned this bridge is referred to. The specifications, an acknowledged portion of the contract, indicate in Clauses 28, 29, and 36, that no such structure should be commenced until a proper foundation had been reached and approved of by the engineers.

This work is covered by the terms of the contract as well as by the meaning of the different documents, which were preliminary to and which led up to it. We allow nothing on item 12.

Item 13.—This is for damages, and for reasons before mentioned cannot now be taken up.

Item 14.—To plant as per inventory, Sections 9 and 15 ... $10,695

When the works were taken out of the hands of these contractors, a bill of sale of the plant described in the inventory attached hereto, was made by them to the Commissioners; but no prices were named for the whole, or any part of it; it is evident that these chattels were handed over to be used in finishing the work on these sections. They were composed principally of second-hand articles. After the transaction, prices were put by the claimants to the inventory by which the total value is made $10,695.

It is evident, however, that these prices are not correct, for the testimony of Mr. Berlinquet shows that they have charged the full cost price. We could get no evidence as to the value at the time of the transfer and are driven to adopt an approximation; we take two-thirds of the price charged, viz., $7130.

The works were carried on by the Government for two years or more, after which a sale was made of some of the plant for $704. We can get no list or other particulars of what was sold. We think it would be fair to charge the Contractors with the loss of such articles as were used up in completing the works, as well as with the deterioration of the others; but we have no means of learning accurately of what this was. We do not think that the price got for the articles at the close of the work established what the loss was because, as above-mentioned, we cannot ascertain precisely what was disposed of.

In order to close the account we adopt an approximate estimate of the loss and depreciation, calling it half the value at the time the articles were transferred, and we credit the Contractors with the other half, viz., $3565. This reduces the balance against them from $179,341 to $175,776.

We therefore report that the works under Contracts 9 and 15 were legally taken out of the hands of the Contractors, Messrs. Bertrand & Co., and were afterwards finished at a loss to Her Majesty.

For convenience of reference we show by Schedule "B" the classes of

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the items allowed on each side of the account, and at the request of the claimants' counsel we state in Schedule "C" the expenditure of his clients in support of this claim before Mr. Shanly and before us.

The effect of deciding that the works were legally taken out of the hands of the Contractors, and afterwards finished at a loss to the Crown, is under the terms of our commission to prevent our making any further report upon the claim of Messrs. Bertrand & Co. It is proper, however, to state that the only portion of the whole claim not already dealt with is that which relates to damages, and also to point out that the claim for damages amounts to $107,730, so that if the Contractors had a right to recover for any portion or even the whole of such damages, there would be according to our view still a larger balance against them.

As explained in the early part of this report, it was necessary for us to inquire into every item of the demand before we could decide whether the works were, or were not, finished at a loss. In doing so it happened that the witnesses called include those who could testify concerning damages, therefore we thought it expedient to put on record their testimony concerning those matters as well as others, and so save the necessity of recalling them in case it should be our duty after deciding the preliminary question to report on the claim generally.

Our report has been based on the opinion, that the contracts entered into by these claimants concerning sections 9 and 15, were in force and governed their rights, except in so far as those rights had been altered by the subsequent agreement concerning the wooden superstructure of bridges. It was urged, however, that the liability of the Crown rested on a very different basis.

The argument of the claimants has been printed in full, and is on record in book form. The substance of it is that the liability of the Crown is not now to be measured by the original contracts; they contend that the action of the government engineers, the railway commissioners, the Governor-General in Council, and even Parliament itself, sometimes towards other contractors on this railway, and sometimes towards the claimants themselves, has created for the decision of their rights a law higher than any in force in any Province; this law is invoked as "Canadian law," in contradistinction to Ontario and Quebec, or any other provincial law; and we are asked in effect to construe the conduct of these authorities as entitling Messrs. Bertrand & Co. to take from the public chest a sum larger than would be awarded to them in any court of justice either of law or equity.

The field of intercolonial railway contracts was widely explored by the learned counsel who appeared before us for these claimants. He presented in a lucid and exhaustive way a formidable array of facts and argument as justifying a report favourable to his clients; but after weighing all that was said, we see that his contentions were calculated to show reasons for giving to contractors generally something beyond the liability of the Crown, rather than to establish the liability of his clients at anything beyond what they have already got.

His main contentions are as follows :—

(1.) That though the schedule attached to each tender named rates for different classes of works, avowedly for the purpose of applying them to progress estimates, nevertheless the Government from time to time issued schedules with different rates, whereby the Contractors were paid on monthly progress estimates more than they would have been according to the tender rates ; and that the chief engineer has understood and stated that the issue of these schedules amounted to a new contract, and it was argued that this amounted to a promise to pay eventually for the executed works according to those schedules irrespective of the contract price.

(2.) That the Commissioners had virtually adopted a policy under which Contractors were to be paid finally without charging the value of diminutions of work caused by changes of grade or location, though such a change was contemplated by the contract, or the wooden superstructure of bridges, though that was arranged for by a subsequent agreement, and it was argued that we ought therefore to state the liability of the Crown to these claimants without taking into account any such diminutions.

(3.) That the Commissioners have advanced to these Contractors, with the consent of the Privy Council, sums of money, knowing that the effect of so doing was to pay them beyond the bulk sum price, and it was argued that this declared the intention to free the Contractors from the bulk sum bargain.

(4.) That certain other contractors, with the consent of the Government or the Commissioners, received sums beyond their bulk sum price for work claimed to be extra or outside the contract, but which work was no more outside the contract than that on which these claimants now demand an extra price, and it was argued that this amounted to a promise to contractors generally that extras would be allowed, though not allowed under the stringent clauses in the contract.

(5.) That Parliament, in the case of Murray & Co., voted money for extras awarded to them on principles more liberal than a literal reading of the contract would support, and it is argued that we should report the liability of the Crown on the principles which led to that award.

The learned Counsel's view of our jurisdiction differs from ours. He said to us—

> " I presume you are sitting here, having all the functions of the " railway commissioners, notwithstanding that Mr. Lash said to the " contrary in the case of McGreevy *v.* the Queen ; that, consequently, you " are going to consider this question of diminutions, and it seems to me " that in view of the great hardships of these cases, you are not going to " charge these diminutions."

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And again he said—

"True, at the beginning a very stringent contract was entered into "between the Commissioners on one side and the Contractors on the "other. It is true there is in that contract a provision which says that "this work shall be built for a specific sum of money; but could not that "price be changed afterwards by the same authority—the Privy Council? "Was it necessary that this contract should be changed, just as formally "it was made in the beginning? Could it not be changed in an indirect "manner like any other contract? I say yes; and when you find all "those new rates, which have been ordered, not by the engineer-in- "chief, not by the Commissioners—because they had not the power to do "it—but by the Privy Council who had the right from the beginning to "fix the price of these contracts, and who undoubtedly had the right to "change it afterwards so as to meet the emergencies of the situation, I "ask any reasonable man whether this conduct on the part of the Govern- "ment is not impliedly an alteration or a modification of the contract? I "say it is, and we can come to no other conclusion, so much so that the "engineer-in-chief, Mr. Fleming, considered the moment he was ordered "to apply new rates, as far as his estimates were concerned at least, that "it was a new contract. It is to be presumed that the contractors "(supposed to be experienced men like the engineer-in-chief) would come "to a different conclusion, especially when the reservation occasionally "made by the Privy Council as to the lump sum was not made known to "them. What is a new contract in a case of that kind, if it is not the "payment of the cost of the work done?"

In support of this view he laid stress upon the fact that Mr. Fleming, the chief engineer, had testified in a court of law that he considered the issue of those schedules to amount to a new contract.

Mr. Fleming has been questioned in courts before a parliamentary committee, and in private conversations, not only concerning the effect of these schedules, but on many other matters relating to the rights of contractors upon the Intercolonial Railway. Our attention was directed to several such instances; but we find that on these occasions he made it apparent that he did not give his view of the rights of the contractors as conclusive or binding on the Government.

Concerning this very claim, Mr. Fry, one of the sureties of Messrs. Bertrand & Co., wrote to him on the 12th October, 1875, stating that in a conversation between them on a steamboat, he, Mr. Fleming, had said "that he considered the fresh rates established to be a new arrangement, and "altogether apart from the contract." Mr. Fleming wrote an answer on the 30th of that month explaining that he had looked upon certain orders in Council to the effect that he might increase his certificates "in the light of new "contracts, as far as making out my certificates was concerned"; but he said unequivocally, "I had no authority to commit the Government to the payment "of anything, certainly not by any formal expressions such as I allude to."

There has been no evidence that the Government or the Commissioners had delegated to Mr. Fleming the right to decide whether in any instance the existing contract was cancelled, or that he ever assumed to do it.

A statement of the circumstances which led to the issue of the schedules in question, will, we think, answer the argument that they amounted to a new bargain or a cancellation of the old one.

On 24th August, 1870, Mr. Fry wrote to Mr. Langevin, the Minister of Public Works, complaining that the July estimates for Sections 9 and 15 were much under what they ought to have been, if a fair calculation had been made, and suggesting that a fair view be taken of the work done, and the preparation for further work.

On 5th September, 1870, Messrs. Bertrand & Co. wrote fully to Mr. Smith, the district engineer, giving a statement of the outlay in preparation by Berlinquet & Co. and themselves for the four sections, 3, 6, 9 and 15, showing it to be over $50,000, and asking them to submit the state of affairs to the Commissioners.

There is no doubt in these letters that the applicants desire or expect the contracts to be cancelled; on the contrary the suggestion is that they will be able to carry them out. They ask merely for favourable consideration on the matter of monthly estimates.

On the 20th September, 1870, the Commissioners reported to the Governor-General that contractors for different sections on the Intercolonial Railway had complained that the estimated (progress estimates) upon which they were paid were insufficient and did not pay them fairly for the work done; and the system upon which they had been made out was then explained, showing that the Government retained under that system more of the price of the work done than was necessary for its security. This led to an Order in Council adopting a system less onerous to the Contractors. It directed that the engineers should be instructed to make the returns of quantities executed fully equal to the work actually done each month, and that the deduction of 10 per cent. from the prices which, up to that time had been made to protect the Government from errors, omissions, and contingencies should no longer be exacted. On 30th October, 1870, Mr. Ross, the Secretary of the Commissioners, notified Messrs. Bertrand & Co., to the effect of this order, and that they would have the benefit of it up to that time, on their October estimate which had not then been received.

On 24th May, 1871, an Order in Council, based on a memorandum from the Intercolonial Railway Commissioners, adopted a schedule of prices to be allowed in reckoning the monthly progress estimates for Contractors, amongst others for sections 9 and 15.

On the 13th June, 1871, another Order in Council was passed, adopting a schedule in lieu of that established on the preceding 24th of May. In

this it was stated : " The rates in these schedules are arrived at by applying " the contract lump sum to the total quantities as now ascertained of the " work to be executed on the several contracts," and schedules are then given for these contracts 9 and 15, as well as others.

Not only was the explanation thus given as to the basis on which the schedules were formed, but the schedules themselves contained both the rates to be advanced and the quantities then estimated for the whole work, and these were moneyed out in a separate column, of which the total amounted exactly to the bulk price, $345,987 for section 9, and $363,520 for section 15. This being accomplished only in fact, by lowering the rates of some of the classes of work below those mentioned in the schedule of the tender, and raising it for others, principally masonry, which was turning out more expensive than had been expected.

It is quite evident that these schedules were framed in careful view of the work yet to be done, and with the intention of securing their completion without exceeding the contract price for the whole.

In the following year, under authority from the Privy Council, new schedules were adopted, naming higher rates for progress estimates, and in considering their object or effect it must be borne in mind that it is the practice of such contracts as these to have progress estimates made, not with the view of establishing any amount as then due to the Contractors, but with the main object of reimbursing their current expenditure, as far as consistent with the security of the proprietors. A principal element to such a calculation would necessarily be the amount of work actually done, as compared with that yet to be done. In this instance that practice was followed, and so the rate for the different classes of work varied from time to time, according to changing circumstances.

There is not the slightest evidence to show that in this case the new schedule rates to be applied to the progress estimates were established for any object beyond that mentioned above. In the case of the Intercolonial Railway many of the Contractors were continually pressing for advances at higher rates than the terms of the contract, which were eighty-five per cent. of their tender schedules. They had in fact some ground for urging that their strict rights would leave them largely out of pocket, especially in the early stages of their undertaking, because their plant and other preparations were not represented by the certificates of the work actually done. This feature was reported by the chief engineer, and was apparently one of the reasons why the Government was willing to give them such relief as could be done with safety, and for the following reasons it became safe in the case of these Contractors and many others on the Intercolonial Railway, to raise from time to time the rates at which advances might be made on these progress estimates and still keep within the bulk price. The Government, the Commissioners, and the chief engineer, combined in their desire to omit from what had been undertaken by the Contractors all such portions as could be well dispensed

with. Diminutions or increases from change of grade or location were by the terms of the contract to be charged or credited to the Contractors, and the wooden superstructure of bridges was withdrawn from the contract by an agreement under which the value of it was to be deducted from the bulk sum price ; but the diminutions on all other works went unconditionally to the gain of the Contractors, and as time went on these became considerable, and in the case of these sections 9 and 15 made a marked difference in the total work ; as this total decreased of course the rate which could be advanced with safety on the executed work increased in a corresponding degree.

We have said that the diminutions were considerable. The following statement gives them in the principal classes : taking the executed work as approximately estimated by the government engineer after completion.

SECTION 9.

	Estimated in the Bill of Works on which Tender was made.			Finally executed.
Rock excavation, cubic yards	...	82,000	—	64,267
Borrowing	,,	... 60,000	—	50,203
Earth excavation	,,	... 422,000	—	351,224
Concrete	,,	... 300	—	nil.
Masonry, 1st class	,,	... 6,300	—	2,608
Masonry, 2nd class	,,	... 6,700	—	4,521
Paving	,,	... 880	—	690
Rip-rap	,,	... 800	—	210
Under-drains, lineal feet		... 5,400	—	nil.

SECTION 15.

	Estimated in the Bill of Works on which Tender was made.			Finally executed.
Rock excavation, cubic yards	...	7,600	—	5,507
Earth excavation	,,	... 607,000	—	587,906
Concrete	,,	... 600	—	100
Masonry, 1st class	,,	... 12,100	—	9,811
Masonry, 2nd class	,,	... 4,000	—	2,924
Paving	,,	... 700	—	492
Rip-rap	,,	... 750	—	192
Under-drain, lineal feet		... 15,000	—	885

As shown in an early part of this report, no more than a trifling proportion of the diminutions was chargeable to the Contractors ; the rest were positive gain.

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On 27th July, 1871, an Order in Council was passed amending the last-mentioned schedule by making the rate for rock one dollar, and for earth twenty cents, a little higher than that previously named. In this Order again there is reference to the bulk price as follows:—

> "The Commissioners will take care that such additions to the rates "upon which the progress estimates are made up, do not expose the "Government to the risk of the gross contract price being exceeded "before the work is completed."

On the 28th September, 1871, a further Order in Council authorized the Commissioners to make such advances to the Contractors on these and other sections "as they might think fit until a careful estimate be made of the work "yet to be done to complete the contract," after which estimate fresh schedules were to be prepared.

On 20th January, 1872, a new Order in Council authorized the prices then prevailing under the previous schedule to be increased by 20 per cent., "the "Commissioners taking care that the bulk sum of the contract be not exceeded."

On 10th February, 1872, an Order in Council adopted a new schedule of rates, higher than any previous one, to be paid to contractors on work to be done up to the end of preceding month, and directed that all work done after that should be estimated at the rates established in July, 1871, and that after the opening of the spring, when the work still to be done on such contract should be accurately ascertained, then the prices were to be again revised so as to keep the payments within the gross amount of the contract.

We see nothing in these orders intimating or even consistent with the cancellation of the existing contracts, and so far as concerns the argument that these orders amounted to the promulgation of a new rule, "a Canadian law," for the final settlement of claims, we feel safe in saying that the action of the Privy Council is not susceptible of any such interpretation, and that nothing connected with the schedules in question has increased the liability of the Crown beyond that established by the written contracts.

Perhaps, however, the most complete as well as the simplest answer to the schedule theory, is the fact that if these claimants were to be paid for all the work on their sections, according to the highest rates mentioned in any Government schedule, they would not get as much as the Government has already paid for that work.

The works were taken out of the hands of Messrs. Bertrand & Co. in the season of 1873. Section 9 was then much nearer completion than section 15, the latter having been let nearly a year later than the former. For section 9 the engineers continued to return in detail the work done each month up to the end of November, 1873, and the last of these returns covered the whole of the work that was done, both by the Contractors and the Government, except two items afterwards paid, one of $168·50 and another of $83·42, in all $251·92. That return is reproduced in schedule "D" hereto attached.

The works on section 15 took much longer to finish. The system of making the monthly returns of the quantities was here continued until they included all that was done up to the end of February, 1874. The last return is reproduced in schedule "E," attached hereto. After that date the works on section 15 were not described in progress estimates, and the only means of knowing now what was subsequently done is to take the pay rolls and vouchers, which show the cost to have been $27,212.

Applying therefore the rates of the most favourable schedule for the purpose of progress estimates to the works finished on section 9 up to the end of November, 1873, and on section 15 up to the end of February 1874, and adding to the product of these the $251, afterwards spent on Section 9, and the $27,212, afterwards spent on Section 15, the result must show the largest possible amount which these claimants could look for if their proposition were conceded to them, namely, that the bulk price should be put out of sight, and the whole executed work paid for at the last and most favourable schedule rates. The effect of this is given in Schedules "D" and "E," which show that the work would then cost no more than $348,190 for section 9, and $435,488 for section 15, in all $783,678, which is less by $63,237 than the Government has already paid.

The next contention is that the Commissioners had intended to deal leniently with all contractors on the Intercolonial Railway, Messrs. Bertrand & Co. amongst the rest, and had in fact adopted a policy of not charging either the savings made by the changes of grade or location, or the value of the omitted wooden superstructures.

The Counsel for the claimants says:—

"I maintain that the Commissioners, in order, no doubt, to induce the "Contractors to go on with their contract, and considering that they had been "entered into at very low rates, agreed that all reductions from whatever "causes, were to be for the benefit of the Contractors during the progress of "the works."

Much evidence has been given in other places on this subject, and considerable stress was laid upon it before us. It is, however, clear that the Commissioners always reserve to themselves the right of recommending this policy to be carried out or not in the final settlement with each claimant, and according to the circumstances of each case.

But if it had taken a more definite shape, and had been officially approved by the Privy Council, which of course was the only proper way in which it could be made available to contractors, and if it had been made applicable to every case, it would be now no advantage to these claimants, for taking all these savings out of the account against him would diminish the charges only by $57,322, leaving them still over-paid by $118,454.

Proceeding now to the argument based on payments beyond the contract price to the Contractors, we do not see how the fact that the commissioners advanced moneys to these claimants, as they did with the knowledge that the

bulk price would be thereby exceeded, shows any liability to pay still more than the claimants have already got; there was no pretence that it was done upon any understanding between the parties that it was to have the effect of cancelling the contracts, or that it was to be followed by further gratuities. The correspondence and other evidence together show that it took place because it was considered expedient on the part of the Government to sacrifice the excess then advanced, rather than suffer the delay and possibly the increased expense which would be occasioned by re-letting the works. There was no agreement or condition that the bulk sum was to be further exceeded in the future by similar favours.

Neither can we agree with the argument that because some other contractors were paid for extras beyond their bulk price, therefore the liability to these claimants is increased. If the payment in any such case was made because the Government believed at the time that the Crown was liable for the amount, then to make the analogy complete, a payment can be made in this case only under a similar belief; this investigation is instituted to learn whether there is a foundation for such a belief. On the other hand if the payment was made as a matter of grace, and under the belief that a liability did not exist, that can be no ground for our now reporting that there is a liability in this case. It cannot be necessary for the purpose of ascertaining the rights of Messrs. Bertrand & Co., to try the rights of other parties who have heretofore made successful claims for extras, not to inquire into the motives of the Crown in satisfying such claims.

As to the action of Parliament, the claimants' counsel referring to the case of Murray & Co., said to us:—

> "I merely ask that the principles laid down in this case with the "sanction of Parliament, be applied to all the cases which are now "before us."

There is a fallacy in the argument suggested by this remark. The principles which led to the award in favour of Murray & Co. were not laid down by the sanction of Parliament, but on his individual responsibility by the arbitrator, whose decision the Crown and the Contractors had agreed to be bound by, he acted on his own views, and the question submitted to Parliament was simply whether the money would be voted to enable the Crown to carry out its side of the bargain; that was no time to discuss the judgment of the tribunal which had been selected by both parties.

It would hardly be asserted that by voting the money to pay the Geneva award, the Parliament of Great Britain adopted the opinions on which it was based; or that the legislatures of the United States acknowledged the correctness of the Halifax award by applying the funds necessary to give effect to it. The only principle affirmed by Parliament in the Murray case was the familiar one that a bargain fairly made ought to be faithfully performed. That would not help the claimant. Another argument was advanced, not so much for the

benefit of Messrs. Bertrand & Co. as for that of Mr. Ross, who furnished the most if not all the money to carry on these contracts. Messrs. Bertrand & Co. were the Contractors for sections 9 and 15; Messrs. Berlinquet & Co. for sections 3 and 6. These two firms were associated for some purposes necessary to the completion of the four contracts; but not in the final profits of all. They were jointly interested in the purchase of a steamboat, and quarries, and some other properties, intended to be used in common between them. These firms had no capital for their undertaking, and applied to Messrs. Dun, Home, Glover and Fry to supply it, whereupon it was arranged that the four last-named gentlemen should be sureties, two for Berlinquet & Co., and two for Bertrand & Co., on the understanding that the four sureties should be really silent partners to each contract.

These gentlemen, however, had not themselves the requisite capital. They in turn applied to Mr. Ross for the necessary funds, and he agreed to advance them at 7 per cent. interest, with an additional bonus or commission at the rate of 5 per cent. per annum.

It is alleged that at a time when it was questionable whether Mr. Ross would make further advances or not, he, accompanied by Messrs. Bertrand, Berlinquet, Home, Glover and Fry, or some of them, had a conversation with Mr. (now Sir Hector) Langevin, the Minister of Public Works, in which Mr. Langevin gave them to understand that it would be safe for Mr. Ross to continue his advances and that he would be reimbursed by the Government, and on this allegation it has been contended that, irrespective of the contract price and even of the schedule rates, the "Government ought to pay these contractors "whatever they can show the cost of the whole works to have been, and that "the burden of proof is on the Government to show whether it was well "managed or mis-managed." We cannot coincide with any part of this contention even if the alleged conversation were not denied as it is; it was relied on before the Court of Exchequer as supporting the claim of Messrs. Berlinquet & Co., concerning sections 3 and 6. In that case Mr. Ross, Mr. Fry and Mr. Langevin were examined as witnesses concerning the conversation in question; Mr. Langevin denied it; Mr. Fry differed from Mr. Ross in saying that an advance of $200,000 was promised on the four contracts 3, 6, 9, and 15; Mr. Ross does not remember that promise, but as a fact such an advance was afterwards made.

Mr. Justice Taschereau, after touching upon the probable correctness of the respective persons, says in his judgment:—"But this question is quite "useless at present; Mr. Langevin could not thus pledge the Government."

The claimant appealed to the Supreme Court from that judgment, but not against that part of it. The appeal has not yet been heard. In their appeal book, the claimants in that case say (page 7):—

"Without pretending that a conversation with the Minister of Public "Works could be construed into a formal change of a contract existing

Additional Papers.

" between the suppliants and the Railway Commissioners, which would " evidently be absurd, it is nevertheless contended that it is strong " corroboration evidence to establish the fact that that change had already " been made in the manner above alleged."

We have not considered it proper to inquire further concerning this alleged conversation, because in our judgment the liability of the Crown is not affected by it.

On page 24 we have given $175,776 as the amount by which these claimants have in our judgment been overpaid. This is arrived at after charging them with $59,445 for diminution of work due to changes of grade and location, and by the omission of the wooden superstructure for bridges. If, therefore, the Government should waive the right to make this charge, the claimants would, according to our view, be still overpaid to the extent of $116,331, or $7601 more than the $108,730, the total amount of the items in their particulars claimed for damages.

(Signed) Gu. M. Clark,
Fredk. Broughton,
D. E. Boulton.

Ottawa, 12th March, 1884.

To the Hon. J. A. Chapleau,
Secretary of State.

SCHEDULE "A."

Bill of Particulars of Claim as Amended and Proved by the Commission.

Contract No. 9.

Stations.

11	50	At Armstrong's Brook, a tunnel substituted for an arch of culvert			$7,670·0
		Rock instead of Earth.			
		B.W.			
128		Gravel, 6659	½ rock	3,328 yards	
160		,, 8775	⅓ ,,	2,925 ,,	
230		,, 1341	¾ ,,	900 ,,	
430		,, 3926	⅔ ,,	2,616 ,,	
520		,,	,,	1,400 ,,	
535		,, 8210	¾ 4000 rock	7,560 ,,	
535	to 569	,, 1357		1,000 ,,	
810	819	,, 6000	⅔ rock	4,000 ,,	
		Rock instead of earth ...		23,729 yards	
At $1·75 extra					41,426·0

Earth Borrowing.

				Brought forward ...		$49,096·00
			B.W.			
	233	243	13,141	Full	13,141 yards	
	286	313	8,752	½	4,376 ,,	
	313	440	53,439	⅓	17,613 ,,	
	440	478	15,869	½	7,934 ,,	
	519	569	31,056	⅓	10,000 ,,	
	819	845	8,788	¼	2,000 ,,	
10	845	953	36,971	½	18,485 ,,	
	953	1001	19,373	½	9,682 ,,	
	1000	1020	3,805	All	3,805 ,,	
	1020	1109	36,981	½	18,491 ,,	
					105,527 yards	
			Extra borrowing from the distance at 45c. per cubic yard			$47,487·90
	1050	1100	1300 cubic yards earth work on open drain outside of railway line, extra, ·90			1,170·00
	222	30·126	linear feet granite covering to this culvert ...			387·00
	226		Great change at bridge which occasioned extra			
20			work			1,000·00
	590	50	Change of an arch culvert to a bridge of 700 cubit yards, extra cost of which and extra work occasioned thereby			6,469·00
	780	808	Change of 1051 cubic yards of 2nd class masonry to 700 yards 1st class masonry, extra cost and value, 8·00			5,600·00
	805	807	Extra work to divert course of the river, 3200 yards excavation, ·50			1,600·00
			98 cubic yards paving extra required on account			
30			of the above change, 5·00...			490·00
		807	Building and demolishing one of the abutments of bridge after completion necessitated by change at station 807 ordered in works, 120 cubic yards, 18·00			1,800·00
			Expenses and damages occasioned by default of the Government to deliver right of way to commence clearing			3,000·00
			Expenses and loss and delay during 7 months occasioned by Government not furnishing any			
40			engineer to proceed with work during winter of '69 & '70			19,000·00
			Carried forward			

Additional Papers.

		Brought forward ...	
		Abandoned.	
		Expenses and damages by cement wrongfully condemned and refused by engineer, loss of cement and freight	5,000·00
		Expenses and damages occasioned by refusal by engineer to accept stone of Grand Anse Quarry, delay occasioned thereby, 60 men at $2·50 per day for 50 days, which stone was afterwards acknowledged to be good ...	7,500·00
		Expenses and damages incurred by being improperly prevented to continue quarrying of stone of Grand Anse, 50 men at $1 per day for 100 days	5,000·00
		30 horses at $1 per day for 100 days	3,000·00
		Steamer towing above stone, 130 days at $67 ...	8,710·00
		2 large scows, 130 days at $5 each	1,300·00
		3 small ,, 130 ,, $2 ,, ...	1,040·00
		Opening of 20 quarries at Grand Anse in a space of 8 miles...	10,000·00
		1800 yards of stone, paid to proprietors, left at Grand Anse and lost, at $4	7,200·00
		Superintending clerks and sundries	2,000·00
		Extra value of masonry executed in granites as ordered by engineer instead of sandstone and limestone, receivable under contract and specification, 700 cubic yards, $15	10,500·00
		6300 cubic yards 1st class masonry; deduct 700 yards granite and 2740 yards at Armstrong Brook; balance 2860 cubic yards worth $6 extra	17,160·00
		Expense, damage and cost of opening of road, building material necessary for opening of Bass River quarry, improperly condemned by district engineer and subsequently found good by Mr. Schreiber on his inspection during winter, 1871	3,000·00
775	835	12,000 linear feet of fence made twice on account of widening of right of way ordered by Commissioners at $1·50 per 100 feet ...	180·00
		Change in specification of fencing rendered more expensive	6,000·00
		6700 cubic yards of 2nd class masonry replaced by 1st class; extra cost and value thereof, 7·50	50,250·00
			$277,439·00

Summary of Section 3.

Amount of contract	354,897·00
Amount of extras, damages and expenditures as about ...	277,439·00
	632,336·00
Received on account of contract and on account of extra work, damages and expenditure as above	346,668·00
	285,667·91

And interest since 1st July, 1873.

(Claim on Contract 15.)

Stations. From	To			
175	185	1300 cubic yards rock instead of earth, extra $1·60		2,080·00
197	208	15,000 cubic yards extra earth excavation 40c....		6,000·00
277	295	Change of grade.		
		10,000 cubic yards, extra excavation, 20c. ...		2,000·00
285		Bridge overhead extra, 22,000 B.M. timber workmanship, included at $50 per M.	$1,100·00	
		850 lbs. iron nails, &c., at 15c. ...	127·50	
		36 cubic yards masonry at $18 ...	648·00	
				1,875·00
325.20		Abandoned.		
		900 cubic yards extra rock excavation instead of earth at $1·25 ...	1,125·00	
		22,002 cubic yards extra earth excavation at 55c....	12,100·00	
				13,225·00
		3,872 cubic yards 2nd class masonry made 1st class, $2·50		9,680·00
		5 acres extra grubbing at $104 ...	520·00	
		4 „ close cutting extra 25 ...	100·00	
		31 „ extra clearing at 20 ...	620·00	
				1,240·00
		1000 cubic yards at Nipissiquit Bridge, and 900 cubic yards at Tete-au-Gauche of backing made as a facing masonry 1st class extra cost, 1900 cubic yards, $6·00		11,400·00
		720 super feet of cutting in granite for steps to be used as foundation to abutment of Nipissiquit Bridge, extra work, 30c.		216·00
		820 feet granite stone cut and prepared to suit in steps, extra work, 75c.		615·00
		Carried forward ...		

Additional Papers.

Brought forward ...	
To amount of expenses and damages caused by the above changes, and extra work at Nipissiquit Bridge, which prevented the completion of the same in the fall of 1871	3,000·00
Extra value of masonry executed in granite, as ordered by engineer, instead of sandstone, receivable under contract and specification, 16,100 cubic yards $15·00	241,500·00
105 cubic yards extra excavation in foundation of two piers at Tete-au-Gauche Bridge, 50c. ...	52·50
37 yards first-class masonry added to foundation of the two piers, $20·00	740·00
Pumping and working coffer dams, occasioned by above change	475·00
To loss sustained in not receiving payments in warrants promptly in years 1870, 1871, 1872, and 1873, causing frequent visits to Ottawa, and forcing contractors to procure money at a heavy rate of interest. This matter was on several occasions brought to the notice of Commissioners. Loss sustained, at least for sections 9 and 15, and also delay caused in execution of work, by plans not being made—furnished in time	20,000·00
To plant as per inventory, sections 9 and 15 ...	10,695·79
	$324,794·79

B. The Government has not proved that the amount paid on this section was necessarily spent, and how it was spent. Government account must be wrong. See infra, page 30.

Summary of Section 6.

Amount of contract...	$363,520·50
Amount of extras, damages, and expenditure, as above ...	324,794·49
	688,314·99
Received on account of contract, and on account of extra work, damages, and expenditure, as above	372,130·38
Balance	$316,184·61

And interest since 1st July, 1873.

GENERAL SUMMARY.

Contracts 9 and 15.

Contract No. 9.—Amount contract...		$354,897·00
Amount of extras, damages and expenditure		277,439·00
		632,336·00
Contract No. 15.—Amount of contract	363,520·50	
Amount of extras, damages, and expenditure...	324,794·49	
		688,314·99
Total ...		1,320,650·99
Contract No. 9.—Received on account of contract and on account of extra work, damages and expenditure	346,668·09	
Contract No. 15.—Received on account of contract and on account of extra work, damages and expenditure	372,130·38	
		718,798·47
Balance due ...		$601,852·52

And interest since 1st July, 1873.

Additional Papers.

SCHEDULE "B."

Showing by Classes Items allowed for and against the Claimants.

			Dr.	Cr.
Contract 9, bulk sum				$354,897
„ 15, „				363,520
Diminutions of work, Section 9, earth			$5,527·50	
„ „ „ rock			12,001·20	
			17,528·70	
Increase of work, earth		1,411·50		
„ „ rock borrowing ...		6,156·00	7,567·50	
			9,961	
Diminutions of work, Section 15 ...		3,612·00		
Increase „ „ ...		84·50		
			3,528	
Bridge superstructure charged by agreement to Contractors, Section 9, $3,456; Section 15, $42,500			45,956	
Cash paid Claimants, Section 9... ...			346,668	
„ „ „ 15... ...			372,130	
„ by Government to complete Sec. 9			35,988	
„ „ „ „ 15			97,129	
			911,360	718,417
			718,417	
Balance overpaid Contractors			192,943	
On Section 9: Item 11.—Drain outside railway ...				1,170
„ 14.—Changing culvert to bridge				4,996
„ 26.—Moving fence				180
„ 27.—Change in fencing ...				4,550
On Section 15: Item 4.—Overhead bridge ...				1,875
„ 10.—Levelling steps at Nipissiquit				831
„ 14.—Plant				3,565
			192,943	17,167
			17,167	
Balance against the Claimants			$175,776	

SCHEDULE "C."

SHOWING COSTS ALLEGED TO HAVE BEEN INCURRED BY MR. ROSS, ON THE INVESTIGATION BEFORE MR. SHANLY, AS REGARDS SECTIONS 9 AND 15.

Sept.—Sending parties over the sections with Mr. Shanly ...	$90·00
Mr. Odell's time	60·00
Bertrand's and Berlinquet's time	60·00
Oct.—Mr. Home's time for services assisting in preparing the case, attendance at Ottawa, Montreal, Bathurst, and during examinations	250·00
Mr. Bertrand's ditto	1215·80
Mr. Odell, witness and board	100·00
Mr. Buck, witness and board	77·00
Sundry journeys to Ottawa, and hotel bill	1·00
Mr. Peterson, witness and expenses	75·00
Nov.—Sundry expenses to Montreal to examine Mr. Brydges, hotel bill, &c.	125·00
G. and A. Holland, evidence copied	21·50
Joseph Mossman ,, ...	120·00
Dec.—Sundry journeys to Ottawa to examine Mr. Schreiber and Mr. Smith	190·00
Hon. A. R. Angers' fees	520·00
G. and A. Holland, evidence copied	18·00
Hon. W. A. Ross, fees	520:00
	$3542·30

Ottawa, 7th March, 1883. (Signed) JOHN ROSS.

BEFORE THE COMMISSIONERS IN OTTAWA, SECTIONS 9 AND 15.

1882-83.	
Dec.—Paid D. Girouard, Esq., legal expenses	3000·00
Jan.—Paid Hon. W. A. Ross ,, ...	1500·00
Feb.—Paid F. J. Berlinquet, and expenses	79·76
Paid copying documents	37·65
Paid G. and A. Holland for copy of evidence, &c. ...	140·00
	$4757·41

Ottawa, 7th March, 1883.

Additional Papers.

SCHEDULE "D."

SHOWING WHAT THE PRICE OF WORK DONE WOULD BE IF THE HIGHEST SCHEDULE RATES FIXED BY THE GOVERNMENT WERE APPLIED TO ALL SUCH ITEMS AS THOSE RATES REFER TO.

SECTION 9.

Total quantities up to November 30th, 1873.	Description of Work.	Government Rate, 10th February, 1872.	Total.
450 acres	Clearing and close-cutting, grubbing (1 acre = 8 acres clearing) ...	$17·00	$7650·00
223,000 lineal feet	Fencing	6·00	13,380·00
64,267 cubic yards	Rock excavation	1·10	70,693·70
351,424 ,,	Earth excavation... ...	·30	105,427·20
50,203 ,,	Rock borrowing	·66	33,133·98
lineal feet	Under drains	13·00	
210 cubic yards	Rip-rap	2·00	420·00
,,	Concrete	5·00	
2,608 ,,	1st class masonry... ...	17·00	44,336·00
4,521 ,,	2nd ,, ...	13·00	58,773·00
690 ,,	Paving	5·00	3,450·00
			$337,263·88
	For the following items of comparative small values no rate is given in Government Schedules, the values certified by the engineers in their progress estimates are therefore applied.		
	Beam culverts, bulk sum		681·00
	Foundations ,, ...		450·00
19 1/2 prs.	Cattle guards		1,852·00
43	Farm crossings		2,580·00
1,080 lineal feet	Wooden culverts...		130·00
20	Sign posts		310·00
	Special works		
186 lineal feet	Tunnel		4,650·00
11 square feet	Crib work...		22·00
	Spent by Government after taking works out of hands of Contractors, and subsequent to 30th November, 1873		251·90
			$348,190·78

SCHEDULE "E."

SHOWING WHAT THE PRICE OF WORK DONE WOULD BE IF THE HIGHEST RATES, FIXED BY GOVERNMENT, WERE APPLIED TO ALL SUCH ITEMS AS THOSE RATES REFER TO.

SECTION 15.

Total Quantities up to Feb. 7th, 1874.	Description of Work.	Gov. Rate Feb. 10th, 1872.	Total.
152 acres ...	Clearing and close-cutting grubbing (1 acre = 8 acres clearing)	17·00	2,584
102,776 lineal feet	Fencing	6·00	6,166
5507 cubic yards	Rock excavation	1·20	6,608·40
587,906 cubic yards	Earth excavation	·30	176,371·80
885 lineal feet	Underdrains	15·00	127·50
192 cubic yards	Rip-rap	2·00	384·00
100 „ ...	Concrete	6·00	600·00
9811 „ ...	First class masonry... ...	17·00	166,787·00
2926 „ ...	Second class masonry ...	13·00	38,012·00
492 „ ...	Paving	5·00	2,460·00
			$400,100·70
	For the following items of comparative small values, no Rate is given in Government Schedules, the values certified by the Engineers in their progress estimates are therefore applied.		
	Foundations, bulk sum		$3,000·00
	Bridge superstructures, bulk sum ...		2,296·00
	Road crossing and diversions		2,670·00
	Special work		210·00
			$408,276·70
	Spent by Government after taking the works out of hands of Contractors, and subsequent to 29th , 1874...		27,212·15
			$435,488·85

In the Priby Council.

On Appeal from the Supreme Court of Canada.

J. F. ROSS, F. E. ROSS, J. V. F. VESEY FITZGERALD and A. ROSS . (*Suppliants*) *Appellants*

AND

HER MAJESTY THE QUEEN *Respondent.*

ADDITIONAL PAPERS

AGREED TO BE PUT IN BY THE PARTIES.

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