Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of John T. Ross and others v. *Her Majesty the Queen, from the Supreme Court of Canada; delivered 28th July* 1896.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The Appellants in this case are the legal personal representatives of Mr. John Ross who acquired by assignment the rights and interest of a firm of railway contractors trading as J. B. Bertrand & Co. in certain Government contracts for the construction of two sections of the railway which connects the River St. Lawrence with the City of Halifax and is known as the Intercolonial Railway. Mr. Ross claimed from the Government large sums of money as due to him in right of the contractors. Payment was refused and he then presented a petition of right to enforce his claim. This petition which was revived in the name of his representatives has now been dismissed by the judgment of the Supreme Court of Canada. The present appeal is brought by special leave from that decision.

The construction of the Intercolonial Railway was one of the terms of the agreement which resulted in the union of the Provinces of Canada, Nova Scotia, and New Brunswick. In order to give effect to that part of the agreement the

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British North America Act 1867 declared that it should be the duty of the Dominion of Canada to provide for the commencement of the Railway within six months after the union and for its completion with all practicable speed. Another Imperial Act known as The Canada Railway Loan Act 1867 authorized a guarantee by the Imperial Government of interest on part of the money required to be raised for the construction of the Railway.

Provision for the Intercolonial Railway as contemplated by the British North America Act 1867 was made by the Dominion Act 31 Vict. cap. 13 intituled "An Act respecting the con- "struction of the Intercolonial Railway." This Act declared that the Railway should be a public work belonging to the Dominion of Canada. It enacted that the construction of the Railway and its management until completed should be under the charge of four Commissioners to be appointed by the Governor. It also enacted that the Governor should appoint a Chief Engineer to have the general superintendence of the works under the Commissioners who were themselves to appoint the assistant engineers and other officials. The Commissioners were to build the Railway by tender and contract after due advertisement of plans and specifications. The contracts were to be guarded by such securities and to contain such provisions for retaining a proportion of the contract monies to be held as a reserve fund for such periods of time and on such conditions as might appear to be necessary for the protection of the public and for securing the due performance of the Contract. Section 18 enacted 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."

Commissioners were appointed in pursuance of the Act and they proceeded to advertise plans and specifications for the construction of the Railway in sections. At the foot of the specifications for each section there followed a printed form of contract and a printed form of tender.

It was a leading and prominent feature of the proposed contract in every case that the work should be done for a lump sum without extras of any kind. The printed form of tender contained an express recognition of that stipulation as well as an undertaking to complete the section for the sum named to the satisfaction of the Chief Engineer and Commissioners such sum being expressed to be "the full payment " without extras of any kind for the entire " completion of the section."

Messrs. J. B. Bertrand & Co. sent in tenders for the construction of Section No. 9 and Section No. 15 at the price of $354,897 and $363,520. 50 respectively, the date of completion in the one case being the 1st of July 1871 and in the other the 1st of July 1872. Their tenders were accepted and contracts for the construction of those Sections were duly executed on the 26th of October 1869 and the 15th of June 1870. For the purposes of this appeal the two Contracts are admitted to be identical in their terms.

The material clauses of the Contract of the 26th of October 1869 which was the Contract referred to in the argument are as follows :—

" 4. The Engineer shall be at liberty, at any time before the
" commencement or during the construction of any portion of
" the work, to make any changes or alterations which he may
" deem expedient in the grades, the line of location of the
" Railway, the width of cuttings or fillings, the dimensions
" or character of structures or in any other thing connected
" with the works, whether or not such changes increase or

" diminish the work to be done or the expense of doing the
" same, and the Contractors shall not be entitled to any
" allowance by reason of such changes, unless such changes
" consist in alterations in the grades or the line of location, in
" which case the Contractors shall be subject to such deductions
" for any diminution of work or entitled to such allowance
" for increased work (as the case may be) as the Commissioners
" may deem reasonable, their decision being final in the matter.

* * * *

"9. It is distinctly understood, intended and agreed, that
" the said price or consideration of three hundred and fifty-
" four thousand eight hundred and ninety-seven dollars
" ($354,897.00) shall be the price of, and be held to be full
" compensation for all the works embraced in or contemplated
" by this Contract or which may be required in virtue of any
" of its provisions or by law, and that the Contractors 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 specification, or by reason of the
" exercise of any of the powers vested in the Governor in
" Council by the said Act, intituled 'An Act respecting the
" 'construction of the Intercolonial Railway,' or in the Com-
" missioners or Engineer by this Contract or by law to claim
" or demand any further or additional sum for extra work or
" as damages or otherwise, the Contractors hereby expressly
" waiving and abandoning all and any such claim or pretension
" to all intents and purposes whatsoever, except as provided in
" the fourth Section of this Contract.

" 10. In this Contract . . . . . the words 'the
" 'Engineer,' shall mean the Chief Engineer for the time
" being, appointed under the said Act intituled 'An Act
" 'respecting the construction of the Intercolonial Railway.'

" 11. And it is further mutually agreed upon by the parties
" hereto, that cash payments equal to 85 per cent. of the value
" of the work done, approximately made up from the returns
" of progress measurements, will be made monthly, on the
" certificate of the Engineer, that the work for or on account
" of which the sum shall be certified, has been duly executed,
" and upon approval of such certificate by the Commissioners.
" On the completion of the whole work to the satisfaction of the
" Engineer, a certificate to that effect will be given, but the final
" and closing certificate including the 15 per cent. retained will
" not be granted for a period of two months thereafter. The
" progress certificates shall not in any respect be taken as an
" acceptance of the work or release of the Contractor from his
" responsibility in respect thereof, but he shall at the conclusion
" of the work deliver over the same in good order, according
" to the true intent and meaning of this Contract and of the
" said specification.

" 12. This Contract and the said specification shall be in all
" respects subject to the provisions of the herein first cited Act

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

The Contractors proceeded with the works comprised in the two Contracts. They did not however complete either section within the prescribed period. Ultimately in May 1873 the Commissioners under powers contained in the Contracts took the work into their own hands. Section 9 was completed by them in November 1873 and Section 15 in February 1874.

Progress certificates were given to the Contractors from time to time during construction by Mr. Sandford Fleming, C.E., the Chief Engineer appointed by the Governor, but that gentleman did not give a certificate to the effect that the whole works had been completed to his satisfaction nor did he give "the final and closing certificate" as provided by Clause 11. Claims upon the Government were made by Messrs. J. B. Bertrand and Company and also by other Contractors in much the same position in respect of other sections of the Railway. None of these claims however seem to have been admitted.

By an Act of the Dominion Parliament passed in 1874, 37 Vict. cap. 15 intituled "An Act to "amend the Act respecting the construction of "the Intercolonial Railway" it was declared that the Railway should be a public work vested in Her Majesty and under the control and management of the Minister of Public Works and it was declared that all the powers and duties vested or assigned by the Act 31 Vict. cap. 13 in or to the Commissioners appointed under it should be transferred to and vested in the Minister of Public Works.

In 1875 or 1876 Messrs. J. B. Bertrand and Company assigned their rights and interest under their contracts to Mr. Ross. The assignment was

duly notified to the Government on the 22nd of December 1876.

On the 10th of December 1879 Mr. Ross presented a Petition of Right to enforce his claims. There were many other claims arising out of the Contracts for the construction of the Intercolonial Railway then unsettled. In these circumstances it was proposed on the recommendation of the Minister of Railways and Canals that Mr. Sandford Fleming who was then Engineer-in-Chief of the Pacific Railway should be re-appointed Chief Engineer of the Intercolonial Railway. Mr. Fleming however declined the appointment and thereupon Mr. Frank Shanly, C.E., was appointed as Chief Engineer of the Intercolonial Railway "for the purpose of investigating and "reporting upon all unsettled claims in con-"nection with the construction of the line." His salary while so engaged was fixed at $541.66 a month "the engagement being understood to "be of a temporary character."

In 1881 Mr. Shanly reported on various unsettled claims and among others on the claims of Mr. Ross and the claim of one McGreevy who had a contract for the construction of Section No. 18.

In McGreevy's case Mr. Shanly reported that he had come to the conclusion "owing to various "unforeseen difficulties" and other matters which it is not necessary for their Lordships to refer to "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." Mr. Shanly thought that "it was perfectly correct in law" that the strict letter of the Contract should be adhered to "but I cannot help thinking" he

added "that the present is a class of case where a "little equity may very properly be introduced." Accordingly he recommended that McGreevy's claim for extras to the extent of $111,879 should be allowed.

Mr. Shanly dealt in a similar manner with Mr. Ross' claims under the Bertrand contracts. He reported that he had come to the conclusion "that the lump sums of these "contracts should remain intact and in addition "that certain items . . . outside the Contract "proper . . . should be allowed as well as "an increase in some of the principal item "prices." He could "find nothing," he said, "to warrant in the strict legal point of view "a departure from the terms of the Contract," but still he recommended payment of extras and an advance in price. "The Government," he said, "will get full value for its money and "I think" he added "the Contractors will have "a reasonable profit." In the result he recommended that Mr. Ross should be paid $231,806 in liquidation of his claim a sum which appears by the figures in his report to be $232,187 in excess of the aggregate of the lump sums mentioned in the two contracts.

The Minister did not approve of Mr. Shanly's report either in the case of McGreevy or in the case of Mr. Ross and the whole matter was referred to a Royal Commission on the 28th July 1882 before whom Mr. Ross appeared under protest. The Commissioners reported on the 12th of March 1884 that Messrs. J. B. Bertrand & Co. had been actually overpaid to the extent of $175,776 or if the Government thought fit to waive their claim for diminution of work due to changes of grade and location and by the omission of the wooden superstructure for bridges to the extent of $116,331. In the

case of McGreevy the Commissioners found that the sum of $84,079 was still due to him.

Mr. Ross died on the 10th of September 1887. By an order of the Exchequer Court of Canada the Petition of Right filed by him was revived in the name of the Appellants and was amended on the 12th of March 1894.

In the meantime McGreevy had presented a Petition of Right claiming the difference between the sum awarded by the Commissioners and the amount recommended by Mr. Shanly's report.

The case of *McGreevy* v. *The Queen* (18 Sup. Co. Rep. 371) raised the same questions that are raised in the present case. It was agreed there as it has been agreed here that the only question to be argued in the first instance was whether the suppliant was entitled to recover on the certificate or report of Mr. Shanly reserving his right to proceed on other clauses of the petition for the general claim.

The question before the Court was argued under three heads:—

1. Was Mr. Shanly chief engineer of the railway within the meaning of the construction contract?
2. Was Mr. Shanly's report a "final and closing certificate" within the meaning of Clause 11.
3. Was the approval of the Minister who was substituted for the Commissioners necessary?

McGreevy v. *The Queen* came on to be heard in the Exchequer Court of Canada before Mr. Justice Fournier on the 3rd of December 1888. He decided all questions in favour of the suppliant. On appeal to the Supreme Court the learned Judges were divided in opinion. Ritchie, C.J., and Gwynne, J.

held that Mr. Shanly's report was not a final certificate. Strong and Taschereau, JJ., held that Mr. Shanly was the Chief Engineer of the Railway within the meaning of the Contract and that as such he had power to deal with the suppliant's claim and that his report was the final and closing certificate entitling the suppliant to the amount found due to him by the Exchequer Court. Strong, Taschereau, and Patterson JJ. held that as the office of Commissioners had been abolished and their duties and powers transferred to the Minister of Railways and Canals no approval of the certificate by anybody was required. Patterson J. held that although Mr. Shanly was Chief Engineer and his report might be considered as the final certificate as it involved in it and was a certificate that the whole work had been completed to his satisfaction yet the suppliant was not entitled to recover because the contract price and allowances in respect of alterations of grade were not left to the arbitrament of the Engineer; if the extra cost arose from alteration of grade the claim fell to be decided by the Commissioners and not by the Chief Engineer.

In this divergence of judicial opinion the Appellants brought on their Petition of Right. The case was heard by Burbidge J. on the 20th of January 1895. Judgment was delivered on the 22nd of May following when the petition was dismissed the learned Judge holding that he was bound by the decision of *The Queen* v. *McGreevy* but stating that independently of that decision his own view was that the Crown was not liable.

On appeal to the Supreme Court Sir Henry Strong C.J. held that owing to the diversity of opinion in *The Queen* v. *McGreevy* the decision in that case was not binding upon him and he adhered to his former view. Taschereau J. held that the judgment in

The Queen v. *McGreevy* was a decision binding on the Court. Gwynne J. with whom Sedgewick and King JJ. agreed held that Mr. Shanly's appointment did not authorize him to give a final certificate in the particular case of the Bertrand contracts and that he " could do no more " than investigate and report to the Government " any circumstances attending the default of " Messrs. J. B. Bertrand & Co. in fulfilment of " their contracts which might appear to warrant " the Government notwithstanding the forfeiture " by the Contractors of all right to any payment " under their contracts in entertaining favourably " and *ex gratia* any claim preferred on behalf of " the Contractors altogether apart from the " contracts." That in his opinion was precisely what Mr. Shanly's report in relation to the Bertrand contracts did and it did nothing more.

Having now reviewed the circumstances of the case at some length their Lordships do not think it necessary to do more than state briefly the conclusions at which they have arrived.

Assuming that Mr. Shanly's appointment constituted him Engineer in Chief of the Intercolonial Railway for the purpose of giving the final and closing certificate in the case of the Bertrand contracts (a point which it would not be proper for their Lordships to determine as the Respondent has not been heard) their Lordships are of opinion that Mr. Shanly's report was not either in form or in substance the final and closing certificate within the meaning of Clause 11. It was nothing more than a recommendation to the effect that certain allowances should be made to the Contractors as a matter of fairness grace and favour. It was for the Government to consider and determine whether they would act upon that recommendation or not. The report conferred no legal right on the contractors or their assignee.

In their Lordships' opinion the construction of

the Contract is perfectly clear. It would be impossible to state in plainer language that the Contract was to be a lump sum contract and that no extras were to be allowed. Their Lordships are unable to follow the reasoning of the learned Chief Justice in his opinion delivered in *The Queen* v. *McGreevy*. His view seems to be that the expression "final and closing" as applied to the certificate mentioned in Clause 11 imports that some matters would necessarily be in controversy between the Crown and the Contractors. The only matters that could be in controversy were he thinks claims for extras. His conclusion therefore is that it would be too narrow a construction of the Contract to give effect to the express stipulation that no extras were to be allowed and that that stipulation is to be read as if it contained an exception of such extras as might be allowed by the final and closing certificate.

Their Lordships are further of opinion that Section 18 of the Act 31 Vict. cap. 13 applies to the final and closing certificate as much as to any other certificate on which money might be claimed and therefore they consider that no money would be payable on a certificate given as the final and closing certificate unless such certificate had been approved of by the Minister substituted for the Commissioners by the Act 37 Vict. cap. 15. The Minister never did approve of Mr. Shanly's report. He rejected it and refused to act upon it.

Their Lordships will therefore humbly advise Her Majesty that the appeal must be dismissed. The Appellants will pay the costs of the appeal.