EDOUARD GUILBAULT (PLAINTIFF).... APPELLANT ; 1890

AND *May 16.
*Dec. 11.

THOMAS McGREEVY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Railway contract—Sub-contract—Engineer's certificate—Condition precedent.

A sub-contract for the construction of a part of the North Shore Railway provided *inter alia* that, "the said work shall, in all particulars, be made to conform to the plans, specifications and directions of the party of the second part, and of his Engineer, by whose classifications, measurements and calculations, the quantities and amounts of the several kinds of work performed under this contract shall be determined, and who shall have full power to reject and condemn all work or materials, which, in his opinion, do not conform to the spirit of this agreement, and who shall decide every question which may or can arise between the parties relative to the execution thereof, and his decision shall be conclusive and binding upon both parties hereto. The aforesaid party of the second part hereby agrees, and binds himself, that upon the certificates of his Engineer that the work contemplated to be done under this contract has been fully completed by the party of the first part, he will pay said party of the first part, for the performance of the same in full, for materials and workmanship. It is further agreed, by the party of the second part, that estimates shall be made during the progress of the work on or about the first of each month, and that payments shall be made by second party upon the estimate and certificate of his engineer, to the party of the first part, on or before the 20th day of each month, for the amount and value of work done, and materials furnished during the previous month, ten per cent. being deducted and retained by the party of the second part until the final completion of the work embraced in this contract, when all sums due the party of the first part shall be fully paid, and this contract considered cancelled."

*PRESENT : Sir W. J. Ritchie C.J. and Strong, Fournier, Gwynne and Patterson JJ.

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Upon completion of the contract the engineer made a final estimate fixing the value of the work done by the sub-contractor at $79,142.65, and after deducting the money paid to and received by the sub-contractor, and a clerical error appearing on the face of the certificate, a sum of $4,187.32 remained due to the sub-contractor. Upon an action brought by the sub-contractor to recover the sum of $36,312.12, the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, granted the plaintiff the amount of $4,187.32 with interest and costs.

On appeal to the Supreme Court.

Held, affirming the judgment of the court below, that the estimate as given by the engineer was substantially such a certificate as the contract contemplated, but if not the plaintiff must fail as a final certificate of the engineer was a condition precedent to his right to recover.

APPEAL and CROSS-APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) affirming the judgment of the Superior Court.

This was an action brought by the appellant to recover the sum of $36,312.12, alleged to be due to him under a sub-contract entered into at Quebec, and executed before Glackemeyer, notary public, on the 11th September, 1877, between the appellant and George Leprohon of the one part, and the respondent on the other, for the construction of certain portions of the North Shore Railroad, the respondent having a contract with the Government of the Province of Quebec to build said road. The engineer valued the work done by the appellant at $79,142.65 and gave him a final estimate for that amount. The provisions of the contract and other facts material to the consideration of the case will be found in the headnote and judgments.

The Superior Court, holding that the said certificate bound the parties, adopted the sum therein mentioned as being the only one due, and crediting the defendant with the $74,500 paid by him condemned him to pay the balance $4,642.65 with interest from the date

of the summons and costs, and the parties proceeded to trial on these issues.

This judgment was affirmed by the Court of Queen's Bench.

Casgrain Q.C. for appellant, cited Redfield on Railways, (1), and contended that the certificate relied on by the respondent was not the certificate required by the contract.

Pentland Q. C. for respondent, cited and relied on *O'Brien* v. *The Queen* (2); *Hill* v. *South Staffordshire Railway Co.* (3); *Sharpe* v. *San Paulo Railway Co.* (4); *Kimberley* v. *Dick* (5); *Goodyear* v. *Mayor of Weymouth* (6); *McGreevy* v. *McCarron* (7.)

Sir W. J. RITCHIE C. J.—The respondents having entered into a contract with the Government of Quebec for the construction of the North Shore Railroad gave to Guilbault and Leprohon a sub-contract, the 7th September, 1887, a sub-contract for part of the work, viz.: 108 to 135. The work under the sub-contract was to be completed 1st February, 1878.

The important provisions of the contract affecting the present case are (8) :

The 3rd April 1879, the respondent's engineer gave the following as the final estimate.

(1) P. 306.
(2) 4 Can. S. C. R. 529.
(3) 11 Jur. N.S. 192 ; 12 L. T. N.S. 63.
(4) L. R. 8 Ch. App, 597.
(5) L. R. 13 Eq. p. 1.
(6) 35 L. J. C. P. 13.
(7) 13 Can. S. C. R. 387.
(8) See head note.

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Ritchie C.J.

MESSRS. GUILBAULT & LEPROHON

SUB CONTRACTORS.

FINAL ESTIMATES.

All works, section 18 to section 135, both inclusive,
All masonry " 108 " 117 " "

DESCRIPTION OF WORK.	QUANTITIES.		RATES.		AMOUNT.	
			$	cts.	$	cts.
Clearing acres	46	9/10	20	00	938	00
Grubbing "	10	1/2	65	00	682	50
Excavation dams and stream diversion, cub. yds	8299			12	995	88
Road bed and farm crossing	204655			17	34,791	35
In foundation cub. yds	9308			30	2,792	40
Road diversion at l'Assomption cub. yds	1064			14	148	96
Platforms of timber in foundations, feet B. M.	56764		20	00	1,135	28
Piles driven, lin. feet	7489			30	1,946	70
Concrete cub. yds	296		4	00	1,184	00
1st class masonry in cement cub. yds	2240	1/10	10	50	23,521	05
2nd " " " "	290	1/2	6	50	1,888	25
2nd " " dry "	1168	1/10	5	00	5,840	50
Paving	70	2/5	2	00	140	80
Cattle guards, timber, cub. feet	2640			15	396	00
Farm bridges, feet B. M.	86295		15	00	* 1,294	42
Wooden box drains, feet B. M.	16284		12	00	195	40
Brush under embankment, lin. rods	697		1	00	697	00
Squared timber delivered at Chaloupe, feet B. M.	6324		8	00	505	92
Piles delivered at Chaloupe River, lin. ft.	603			08	48	24
					$79,142	65

CHAS. ODELL,
Contractor's Engineer

Quebec 30th April, 1879,

* Note farm bridges. I am not aware whether clause ten in the contract in reference to the above has been complied with.

C. O.

This is either a final estimate or it is not.

I think it is substantially such as the contract contemplates and therefore the appellant is bound by it, but if it is not, then by the terms of the contract the appellant is only bound to pay upon the certificate of his Engineer that the work contemplated to be done under the contract has been fully completed and wanting this the plaintiff must fail as such certificate is a condition precedent to his right to recover.

I therefore think the plaintiff must fail in this appeal.

STRONG J.—It would be impossible to give the appellant the relief he asks by this appeal without overruling

many previous decisions of this court and disregarding innumerable other authorities. The respondent was a contractor for the construction of a part of the North Shore Railway and the appellant and one Leprohon entered into a sub-contract to perform a portion of the work included in the respondent's contract.

This sub-contract was in writing and it expressly provided that the respondent should upon the certificate of his Engineer "that the work contemplated to be done under this contract has been fully completed by the party of the first part" (the appellant and Leprohon) pay said party of the first part for the performance of the same in full at certain specified rates contained in a schedule immediately following.

And it was further provided by the second clause of the contract that as regards extra work the Engineer should either before the work should be performed fix such prices as he should consider just and equitable and the parties should abide by such prices provided the party of the first part should enter upon and commence the work with a full knowledge of the prices so fixed by the Engineer, or if the extra work should be done before such prices should have been fixed for such work then the Engineer should estimate the same at such prices as he should deem just and reasonable and his decision should be final.

The work was completed and on the 30th April, 1879, Mr. Odell, the contractor's engineer, made his final estimate by which he found the price and value of the work done by the appellant and his partner Leprohon amounted to $79,142.65. Previously to this Leprohon, who was associated with the respondent in the performance of the work as a partner and co-contractor, had ceded and transferred all his interest in the contract and in the monies arising therefrom to the respondent. Of this amount fixed as the price of

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the work $74,500 had been paid to the appellant, which after allowing to the respondent a deduction of $455.53, the amount of a clerical error appearing on the face of the certificate, a sum of $4,187.32 remained due for which amount with interest the Court of Queen's Bench have given judgment.

According to the terms of the contract both parties are bound by the engineer's certificate just as firmly as they would have been if they had entered into a formal and authentic deed, fixing the amount due to the appellant for the work done at the amount ascertained by the final estimate. Then there being no dispute whatever between the parties as regards the payment and the error in the certificate it must follow that the judgment appealed against is unimpeachable.

Both this appeal and the cross-appeal must therefore be dismissed with costs.

FOURNIER, GWYNNE and PATTERSON JJ. concurred that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Casgrain, Angers & Lavery.*

Solicitors for respondent: *Caron, Pentland & Stuart.*