Appeal Cases

BEFORE THE

SUPREME COURT OF CANADA.

THE QUEEN (DEFENDANT)..... .....APPELLANT;

AND

JAMES N. SMITH, *et al.*, (SUPPLIANTS)..RESPONDENTS.

1882
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*Dec. 2.
1883
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*June 19.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Government Contract—Clause in—Construction of—Assignment—Effect of—Damages.

On 2nd August, 1878, *H. C. & F.* entered into a contract with Her Majesty to do the excavation, &c., of the Georgian Bay branch of the Canadian Pacific Railway. Shortly after the date of the contract and after the commencement of the work, *H. C. & F.* associated with themselves several partners in the work, amongst others *S. & R.* (respondents,) and on 30th June, 1879, the whole

*PRESENT Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

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contract was assigned to *S. & R.* Subsequently on the 25th July, 1879, the contract with *H. C. & F.* was cancelled by Order in Council on the ground that satisfactory progress had not been made with the work as required by the contract. On the 5th August, 1879, *S. & R.* notified the Minister of Railways of the transfer made to them of the contract. On the 9th August the Order in Council of July 25th was sent to *H. C. & F.* On the 14th August, 1879, an Order in Council was passed stating that as the government had never assented to the transfer and assignment of the contract to *S. & R.*, the contractors should be notified that the contract was taken out of their hands and annulled. In consequence of this notification, *S. & R.*, who were carrying on the works, ceased work, and with the consent of the then Minister of Public Works, realized their plant and presented a claim for damages, and finally *H. C. & F.* and *S. & R.* filed a petition of right claiming $250,000 damages for breach of contract. The statement in defence set up *inter alia*, the 17th clause of the contract which provided against the contractors assigning the contract, and in case of assignment without Her Majesty's consent, enabled Her Majesty to take the works out of the contractors' hands, and employ such means as she might see fit to complete the same; and in such case the contractors should have no claim for any further payment in respect of the works performed, but remain liable for loss by reason of non-completion by the contractor.

At the trial there was evidence that the Minister of Public Works knew that *S. & R.* were partners, and that he was satisfied that they were connected with the concern. There was also evidence, that the department knew *S. & R.* were carrying on the works, and that *S. & R.* had been informed by the Deputy Minister of the department that all that was necessary to be officially recognized as contractors, was to send a letter to the government from *H. C. & F.*

In the Exchequer, *Henry*, J., awarded the suppliants $171,040.77 damages. On appeal to the Supreme Court of *Canada* it was

Held, reversing the judgment of *Henry*, J. (*Henry*, J., dissenting,) That there was no evidence of a binding assent on the part of the Crown to assignment of the contract to *S. & R.*, who therefore were not entitled to recover.

2. That *H. C. & F.*, the original contractors, by assigning their contract put it in the power of the government to rescind the contract absolutely, which was done by the Order in Council of the 14th August, 1871, and the contractors under the 17th clause could

not recover either for the value of work actually done, the loss of prospective damages, or the reduced value of the plant.

APPEAL from the judgment of *Henry*, J., in the Exchequer Court of Canada.

The petition of right, the pleadings and the facts are set out at length in the judgment of *Henry*, J., in the Exchequer Court and in the judgments delivered in the Supreme Court.

The suppliants were represented in the Exchequer Court by the Hon. Mr. *McDougall*, Q.C., and Mr. *A. Ferguson*, and the respondent by Mr. *Lash*, Q.C, and Mr. *Hogg*.

The following is the judgment of the Exchequer Court delivered by

HENRY, J.:

The suppliants claim to recover damages under an agreement entered into by three of the suppliants, namely, *John Heney*, *Alphonse Charlebois* and *Thomas Flood*, on the 2nd of August, 1878, with Her Majesty the Queen, represented by the Minister of Public Works of *Canada*, for "the excavation, grading, bridging, fencing, track-laying and ballasting of that portion of the *Canada* Pacific railway known as the Georgian Bay branch and consisting of 50 miles, extending between section O of location of 1877 on the west of *South* river near *Nipissingan* post office to the head of navigation on *French* river"—the works to be performed as set out or referred to in the specifications annexed to said contract and set out or referred to in the plans and drawings then prepared, and thereafter to be prepared for the purpose of the works, the contractors to execute and fully complete the respective portions of such works and deliver them to Her Majesty, on or before the 1st day of July, 1880.

The petition alleges that the total sum agreed to be

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paid for the performance of said work was about eight hundred and fifty thousand dollars.

From the petition and evidence it appears that the site of the railway in question was through an almost inaccessible wilderness, and that it was only accessible during a part of the year, and that in order to put on the ground the necessary supplies of plant, food and other things required the contractors were obliged to spend large sums of money in building and providing a tram railroad, steam and other boats, and other means of communication. That shortly after the contract was entered into they commenced works in that direction and carried them on in such a manner that they were enabled the following spring to proceed with the actual work contracted for. That they had procured and had on the ground in the summer of 1879 large quantities of supplies, horses, machinery and materials necessary for the works and a large number of men employed, and had made a large expenditure in the construction of steam mills, houses, steamers and boats of different descriptions, which, from the rescinding of the contract by the acting Minister of Railways in August, 1879, resulted in a heavy loss to them.

The suppliants pray to be paid for all damages arising directly or indirectly in consequence of the cancellation of the contract, as set forth and referred to in the 10th, 11th and 14th paragraphs of their petition, and also for all profits which they were thereby prevented from earning and deriving in respect of the works to be by them performed under the contract, with interest, and also all moneys payable in respect of unpaid estimates in their favor: and they claim two hundred and fifty thousand dollars.

The statement in defence put in by the Attorney-General on behalf of Her Majesty in the second para-

graph admits the contract as set out in the first, second and fourth paragraphs of the petition.

The third paragraph of the statement in defence has no bearing on the case.

The fourth, fifth and sixth paragraphs of the statement have reference to the fourteenth clause of the contract, which provides that in the event of the works not being diligently continued to the satisfaction of the engineer for the time being, after six days' notice in writing, to be given by the engineer, Her Majesty might take the works out of the contractors' hands and employ such means as she might see fit to complete the work. No proof was given under the allegations in these paragraphs. In fact, it was shown that no such notice was given, and that at the time of the cancellation of the contract the engineer was fully satisfied with the progress of the works. He himself, in his evidence, says so.

The seventh and eighth paragraphs of the defence allege that the cost of the works contracted for would be about $850,000, and that they were to be completed on or before the 1st August, 1880—that for a long time previous to the 30th of June, 1879, the contractors had made default in advancing the works and up to that time had performed work upon the railway only to the amount of $24,800.90 or thereabouts, whereby it became and was impossible for the said contractors to complete the work within the time limited by the contract, and that owing to the default of the contractors in the execution and performance of their said work and the impossibility of their completing it within the time specified in the contract, and time being of the essence of the contract, Her Majesty rescinded the contract on Her part and notified the contractors that it had been cancelled and annulled, and took the work out of their hands. It further alleges that up to the time of the giving of that notice, or soon after, a certain sum was due under the

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engineer's certificates to the contractors on account of which payments had been made, leaving a balance due them of $13,807.94, which Her Majesty's Attorney was willing to pay and thereby tendered, provided the same should be accepted in full of all demands against Her Majesty in respect of the said contract.

The suppliants, as to the last, as also to the sixth, ninth and fourteenth statements of defence, reply that the said contract was not cancelled, or the works taken out of the contractors' hand, for the reasons stated in said paragraphs, or for any of said reasons, but that the contract was so cancelled and annulled and the works taken out of the contractors' hands because of the determination of Her Majesty, long before said cancellation took place, to abandon and proceed no further with the works contemplated and contracted to be done under and by virtue of the contract in question herein.

I am of opinion that the grounds stated in the paragraphs in question are not an answer in law to the suppliants claim in their petition, unless indeed government contracts are to be construed upon principles wholly different from those between non-governmental parties, which I cannot admit. The contract itself contains no provision for the cancelling of it for the reasons stated. All the contractors bound themselves to do was to complete the contract by a certain time; until that time elapsed there was no breach. The contractors had given security for the due performance of the contract, they had the legal possession of the roadway for the purposes of their contract, and, in the absence of any provision in it to allow of its cancellation and the taking away from them of the road bed during the running of the contract for the particular reason assigned, any person interfering with that possession, even if authorized by the government or the

Minister of Railways, would be a trespasser. At the request of the learned counsel who conducted the case on behalf of the defence, and in the absence of any objection from the counsel of the suppliants, I admitted evidence to be given upon the issue raised. A large number of witnesses were examined on both sides as the possibility of the contractors being able to complete the contract within the prescribed time. Most of those for the defence had never been on the ground, or seen the works, or the preparations made to perform the balance undone, and there was hardly any of them went so far as to say that it was impossible to finish the contract by the specified time. It seemed from the language they used that they considered it not impossible with the proper means and appliances to finish the work within the prescribed time, but that it was their opinion that it was doubtful if it could be done. On the other side evidence was given by competent contractors and others who had inspected the works, who had seen the amount of work done and the means and arrangements that were apparent on the ground for the completion of it, that the work could have been fully completed by the specified time, and I feel bound to find in favor of the latter.

The ninth paragraph of the defence alleges: "that by the seventeenth section of the said contract it is provided that the contractors shall not make any assignment of the contract or any sub-contract for the execution of the works thereby contracted for, and in any event no such assignment or sub-contract, though consented to, shall exonerate the contractors from liability under the contract for the due performance of all the works thereby contracted for, and in the event of any such assignment or sub-contract being made without such consent, Her Majesty might take the work out of the contractors' hands and employ such means as she

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might see fit to complete the same, and in such case the contractors should have no claim for any further payment in respect of the works performed, but should nevertheless remain liable for all loss and damage which might be suffered by Her Majesty by reason of non-completion by the contractors of the works."

The tenth, eleventh, twelfth and thirteenth paragraphs of the defence allege that certain assignments of the contract and individual interests therein were made at different times, by the last of which, dated the 30th of June, 1879, the sole interest therein became vested in the suppliants, *James N. Smith* and *Josiah D. Ripley*, subject to the terms thereof and of the several preceding assignments to them.

The fourteenth paragraph of the defence alleges "that the said several assignments above recited were made without the consent of Her Majesty and in violation of the provisions of the seventeenth clause of the said contract above set out, and Her Majesty, under the powers contained in the said seventeenth clause, took the work out of the said sub-contractors hands by reason whereof the suppliants have no claim against Her Majesty in respect of the works performed, as alleged in the said petition."

The paragraphs of the defence from nine to fourteen, both inclusive, have reference to the suppliants' claim for the balance due for work done and certified by the engineer. They are, as I read them, inapplicable to the damages claimed for the cancellation of the contract.

The fourteenth paragraph is but a statement of the legal result of the statements and allegations contained in the five preceding ones. The defence embodied in the sixth paragraph in question is in substance this: that the assignments were made without the consent of Her Majesty and that for that reason Her Majesty took the work out of the contractors' hands.

In construing that clause of the contract it is necessary, first, to consider its object. Any one letting a contract for work has a right to prescribe against an assignment or sub-letting of it without the consent of the party so prescribing—many reasons may actuate such a party. He may have confidence in particular persons capable and willing to perform the work contracted for, whilst at the same time he would not deal at all with others. The right to veto an assignment or sub-letting of the contract is often provided for in agreements. The contractors in this case took the contract with the condition that if they assigned or sub-let it without her consent Her Majesty should have the right to take the works off their hands, and employ such means as she might see fit to complete the same, "and in such case the contractors should have no claim for any further payment in respect of the works performed."

The suppliants reply to this fourteenth paragraph of the def nce, "that the said assignments were not made without the consent of Her Majesty, but that Her Majesty had full notice and knowledge before said assignments were made and also immediately thereafter, and before said order in council of the 25th day of July, 1879, was passed, and gave her consent thereto; and after such notice and knowledge Her Majesty recognized the said assignees as contractors under the said contract and allowed them to go on with the work thereunder and to incur a large outlay and expenditure thereupon, on the faith of such assignments, and the recognition thereof by Her Majesty; and the suppliants further say that Her Majesty did not, under the powers and for the reasons alleged in the fourteenth paragraph take the said work out of the contractors' hands."

If Her Majesty, through the minister of the proper department, or those acting for him, either agreed to

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the assignments before they were made, or recognized and dealt with the assignees subsequently as the contractors for the completion of the works contracted for, and in that relation allowed them to go on with the work and to incur a large outlay and expenditure thereupon, in the belief that they had been recognized as the contractors instead of the original ones, there is I think no defence under the paragraph in question. If the last assignment, which vested the sole interest in the contract in the suppliants *Smith* and *Ripley*, was recognized by the Minister of Railways, or those from time to time acting for him, that virtually recognizes the previous ones, and, if agreed to before such last assignment, the defence must fail under the 17th clause of the agreement. If, however, such was not the case, but subsequently the suppliants last named were recognized by the Railway Department as the contractors instead of the original ones, and were thereby induced to spend large sums of money in the work contracted for, it would be unjust to them to set up that provision of the 17th clause of the contract, and Her Majesty would be estopped from setting up such a defence. It would in this case be inequitable. The evidence shows plainly that the cancellation of the contract was not in the slightest degree decided upon because of the alleged assignments of the contract. The route of the Canada Pacific Railway, of which the work contracted for formed a portion, was decided upon and the contract entered into by one government and the work favorably progressing when a change of government took place. After the formation of the new government it was decided by it to change the route of the railway and abandon the line contracted to be built. An order in council was passed to stop the further progress of the work and to take the same out of the hands of the contractors, and a notice, directed to the original contractors,

of the order in council was served upon the agent and manager of the works of and under Messrs. *Smith & Ripley*, which had the effect of stopping the work on the contract. It is not a little singular that neither the notice nor the order in council should assign any reason for cancelling the contract, and it is but reasonable to assume that if any legitimate reason existed within the terms of the contract the contractors would have been notified of it. It may therefore be fairly concluded that, if at that time there existed any legal excuse for cancelling the contract, such would have been stated, and it is but reasonable therefore to conclude that none existed. I have no reason to say that the policy of the government in changing the route was not a wise one, and I am not called upon to give any opinion on the subject. Assuming, however, that the change was in the public interest, who should bear the cost? No private individual or company should be made to bear the consequences of a mere change of policy of the government; and if it became necessary to make the change solely on the question of route, independently of the position of the contractors as assignees or otherwise, common honesty and equity would call for the necessary contribution from the interests to be benefitted and not from those in no way immediately interested in the route. Whatever may be the legal questions involved and upon which the rights of the parties must be ascertained, there is little doubt that the contractors were induced to go on with the work, and but for the matter of the change of route they would no doubt have been permitted to finish it, and as far as reliable evidence goes would have made a handsome profit from it. It is, therefore, by the decision to change the route and the consequent stoppage of the work that the damage was done to and the loss occasioned to the contractors. Should they be called

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upon to bear it? or should not the public, who we must assume to have been benefitted by the change of route, bear the cost? Apart from questions as to the legal right of the contractors to recover, they are, in my opinion, equitably entitled to compensation for the losses sustained by the cancelling of the contract. It is therefore necessary to ascertain what under the evidence are their legal rights.

The evidence bearing upon the issue in question is chiefly that of Mr. *Ripley*, one of the suppliants, who says:

In September, 1878, I purchased for myself and *Smith* an interest in the contract from *Charlebois, Flood & Co.*, within 30 days after I saw Mr. *McKenzie*, Minister of Public Works. He expressed satisfaction that we had become interested with them as he had known us previously, and that there was additional capital and experience added to the contract. I acquainted him with the fact that I had gone into the contract and he expressed pleasure.

The work on the contract was commenced after that interview, and some time afterwards he (*Ripley*) visited *Ottawa* and saw Mr. *Trudeau*. He came, as he states, to see the government for the purpose of "getting a larger interest so that we might make better progress with the work" He inquired for the Minister, but he was absent, and he says:

I saw the Deputy Minister, Mr. *Trudeau*, in his office. I stated to him my views with regard to the work and what I proposed to do at that time. He answered, that the government were very glad to add strength to any contract that they had with any party either by capital or skill. I asked the commissioner *Trudeau* what would be necessary for me to be recognized by the government. He stated that a simple letter from my partners, Mr. *Charlebois* and Mr. *Flood*, who were recognized by the government, would place me the same as themselves with the Government.

Witness adds:

That a simple letter from Mr. *Charlebois* and Mr. *Flood* who were recognized by the government would invest me with all the rights they had with the government. I understood him to say that

distinctly. In answer to this question, what did you tell Mr. *Trudeau* was your specific object in coming to visit him on that occasion? the witness said, "That I had in view the buying out of these parties, I spoke more particularly of Mr. *Charlebois*. I do not remember the words, but he gave me the impression emphatically that it would be agreeable to the government.

The witness returned to *Collingwood* and bought out for himself and *Smith* the interest in the contract of *Charlebois*, *Flood* and others.

Before the interview with *Trudeau*, the witness stated that he had heard a rumor at *Collingwood*, and also after he came to *Ottawa*, that the government had some idea of stopping the works. He stated to Mr. *Trudeau* what he had heard and "wanted to know if the government had any thought of stopping the work? He (*Trudeau*) said there was no foundation for the rumor. That reply satisfied the witness and relying on it, he bought out the whole interest in the contract for himself and *Smith*. That was in the spring of 1879.

It appears in evidence that Messrs. *Smith & Ripley* had been previously very successful railway contractors, possessing capital, credit and means abundantly sufficient for the purposes of the contract, while the original contractors seem to have been wanting in that respect; and these facts being known, it is not strange that the railway authorities were, not only not opposed to the assignment of the contract, but pleased with it, as the assignees of the contract were so much better able and more likely to complete it satisfactorily than the original parties. The foregoing statements of Mr. *Ripley*, if not true, could have been contradicted by Mr. *Trudeau*, but as he was not called for that purpose I feel bound to accept them as reliable.

In that evidence there is sufficient to show the consent of the railway department to the assignments to Messrs. *Smith & Ripley*, and the payment subsequently to them of between $10,000 and $11,000 on account of

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work done was also evidence of the ratification of the assignment and the recognition of them as the substituted contractors.

I think the issue raised upon the point in question must be found in favor of the suppliants.

It appears to me, too, that the object of the provision was to assure the completion of the works by the prescribed time, and it was made to enable the government to secure that result. It is, to my mind, very questionable if the contract could be legally cancelled when the government had decided to stop the works and change the route.

The merits of the case I consider wholly with the suppliants, and the defence, to be effectual, should establish a clear, legal right to avoid the contract within its provisions, which I think it has failed to do.

The remaining statements of defence do not raise any issue of importance, and I have now only to consider the question of damages.

The evidence as to the total expenditure on account of the contract up to the date of its cancellation is not very satisfactory, but rather confused. Statements were given by the book keepers of the suppliants *Smith* and *Ripley*, and the latter also gave evidence as to the expenditure. I have endeavoured to dissect the statements made, so as if possible to obtain a satisfactory result. It appears the whole expenditure for cost of plant and everything was $120,144.04, on account of which the government paid $10,050, and for the plant sold there was got $10,053.27. That would leave a balance of $100,040.77.

It is shown that of this balance there was included the cost of the purchase of the assignments of the contract, $29,000.00.

The balance for work done and unpaid for therefore is $71,040.77.

If entitled to recover at all, it seems clear to me that the suppliants are entitled to be paid this sum under any circumstances. If the government illegally ended the contract, as I think it did, I am of opinion the question of profit and loss on the whole contract does not necessarily arise and that the suppliants to recover that amount need not show how the whole contract would have resulted. It would be only necessary I think to show the balance expended above payments and receipts. That question, however, does not arise in this case, for the evidence largely preponderates to show that had the suppliants been permitted to finish the contract there would have been a profit instead of a loss. There is therefore no reason that the suppliants should not recover that amount. They however claim damages for the loss of the profit they allege they would have otherwise made, and sustained their allegations by a great many witnesses. Those witnesses were all well acquainted with the works done and to be done. They are experienced contractors, the most of them, and capable of estimating the cost of such works. They state that a profit would undoubtedly have resulted, and some estimated it as high as $220,000.

It was shown by three or more witnesses that a reliable railway firm (Messrs. *Loss & McRae*), after a careful inspection of the works, and shortly before the cancellation of the contract, made an offer to Messrs. *Smith & Ripley*, to take the works off their hands and finish them as required by the contract and pay them a profit of ten per cent. on the work to be done. This would be equal to about $75,000. That offer was refused by *Smith & Ripley* because, as they allege, they believed they would have made a larger profit by doing the work themselves. Evidence was, however, given on the other side by five witnesses, all of whom are engineers, but only two had been contractors, none of them

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but one had been on the ground, and their evidence was founded on estimates made from the working plans. Having heard the examinations of all the witnesses I feel that the evidence of the large number of witnesses capable of estimating the cost of the works, and who made the estimates referred to by them from actual and careful personal inspection, who gave evidence on the part of the suppliants, is entitled to much more weight than that of four gentlemen who had never seen the works or the appliances and means at hand for completing them. While some of the suppliants' witnesses estimated the profit on the contract would have been over $200,000, the five witnesses for the defence give it as their opinion that there would have been none. I have no doubt but that the witnesses on both sides gave their opinions on the point conscientiously. I think I could not be expected to trust to the opinion of gentlemen who never saw the locality of the works, in preference to that of double the number who had a thorough knowledge of them. It is not so much a question of credibility as of reliability in the judgment of the witnesses. The evidence taken altogether has left me impressed with the firm belief that a large profit would have resulted, and I am of opinion that the sum of $100,000 is not too high a sum at which to put it according to the weight of the evidence. That sum, added to the sum expended on the works, would amount to $171,040.77, and I assess the damages to the suppliants at the latter named sum and give judgment in their favor for that amount with costs.

From this judgment the respondent appealed to the Supreme Court of *Canada*.

Mr. *Lash*, Q.C., for appellant:

The contractors were informed of the exact effect

of the order in council of the 25th July, 1879, and although the words "cancel and annul" are not to be found in the order in council, the effect of the order in council, which was enclosed in a letter, was plainly to inform the contractors that they were to stop work. Upon receipt of this notice the contractors simply stopped work and discharged their hands. The defence raised the point that one of the terms of the contract was, that if contractors made default and continued for a number of days in default, the government could take the contract out of their hands. By clause 14 of the contract this power is given to the government. True, the evidence failed to establish notice in writing, but, in addition to this, the contract provided that the work had to be completed by the 1st July, 1880, and although *Smith & Ripley*, after the assignment, made large preparations and went to great outlay and could have performed their contract within the delay, still, at that time, the contractors, *Heney, Charlebois & Flood*, had practically abandoned the contract, they had sold out and by themselves would have been unable to complete it before the time, and, therefore, I submit that the contractors having made default, the Crown had the right to rescind the contract. Then, if my proposition is correct, this contract came to an end on 9th August, 1879, when the Department of Railways notified the contractors, and if at an end, then no action can be brought upon an executory contract, and as it is only upon an executory contract that the suppliants can succeed, the judgment cannot stand. Their answer to this contention is, that the original contractors had the right to assign and did assign their contracts to *Smith & Ripley*, and the evidence showing that they (*Smith & Ripley*) had incurred large expenditure to prosecute the work, there was no default by *Smith & Ripley*, and, therefore, the notice of

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the 9th August did not cancel the contract. If their premises be correct their conclusion is correct.

[THE CHIEF JUSTICE. Do *Heney, Charlebois & Flood* set up that they were carrying out their contract through the instrumentality of *Smith & Ripley ?*]

No, my lord, and if they did it could not be supported by the evidence.

This brings me to the main point of the defence, viz., the effect of the transactions which took place between the original contractors and *Smith & Ripley.* [The learned counsel then read clause 17 of the contract.]

Now, what the Crown says is this: "You made an assignment of this contract without the consent of the Crown, and, therefore, Her Majesty had the right to take the contract out of your hands and cancel it." Their answer is two fold:

1st. That the assignments to them of the contract were assented to by the Crown.

2nd. Even though it were assigned without having obtained the assent of the Crown, clause 17 of the contract does not give the right to Her Majesty to take the contract out of their hands, unless it is with the intention of completing the work, and that as in this case the true reason for taking the work out of the contractor's hands was not on account of the assignment, therefore clause 17 cannot be relied on.

The first question is: Did Her Majesty assent to the assignment?

The first notice which the Crown received of these assignments was by letter of the 5th August, 1879, written by Messrs. *Smith & Ripley's* attorney. This was answered by a letter dated August 11, 1879.

Now the order in council ordering the stoppage of the works was passed on the 25th July, and was communicated to them on the 9th August.

The evidence relied on by suppliants as proving the

Crown's assent is contained in the evidence of Mr. *Ripley*. The first interview by Mr. *Ripley* with Mr. *McKenzie* was in September, 1878. It appears that Messrs. *Smith & Ripley* had tendered for this work, and, as their tender was too high, they afterwards made overtures to the successful tenderers Messrs. *Heney, Charlebois & Flood* and took an interest in this contract. On the 14th September, 1878, by a notarial deed a partnership was formed, comprising the original contractors and some others, for the purpose of carrying out the contract, and on the same day Mr. *Ripley*, one of the suppliants, and others were admitted into the partnership by notarial deed.

By this instrument there was no assignment of the contract. Under the terms of the contract there could be no objection to the contractors taking in associates for the purpose of getting capital. Mr. *Ripley*, therefore, having obtained this interest in the contract came to *Ottawa* and had this interview, and it is on this interview they rely as bearing out the contention that the government assented to the assignment. [The learned counsel then read part of the evidence which is referredto in the judgments.] Now, this conversation had only reference to the partnership agreement and not to the assignment of the contract, as provided in the 17th clause of the contract.

The next interview relied on as containing the assent of the Crown took place between Mr. *Ripley* and Mr. *Trudeau*, the Deputy Minister of Public Works, in the spring of 1879. This was when Mr. *Ripley* came to *Ottawa*, not for the purpose of taking an assignment of the whole contract, but for the purpose of getting a larger interest in it.

On the cross-examination some reference is there made to this conversation.

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[THE CHIEF JUSTICE: What does Mr. *Trudeau* say on this point?].

He was not called. There is no doubt that what Mr. *Ripley* states there is correct. At this interview, also, he only refers to getting a larger interest and not a total assignment. That is all the respondents can rely upon as proving an assent on the part of the Crown to the assignment upon which they now base their claim. I submit it cannot have that effect, and if it could be construed to mean an assent or a promise to give an assent, it cannot bind the Crown. Mr. *Trudeau's* position as Deputy Minister of Public Works did not qualify him to bind the Crown. If he had any authority at all, it was in virtue of his position, and that position, it cannot be denied, does not authorize him to alter a written contract. But it is far better to hold that Mr. *Trudeau* never did anything of the kind.

[THE CHIEF JUSTICE—If you rely on this, it would have been far better to have the oath of Mr. *Trudeau.*]

If *Ripley* had proved anything at variance with the contract, it might have been the duty of the Crown to call him as witness, but I submit he did not.

I now come to the titles of Messrs. *Smith & Ripley* whereby all interest in this contract became vested in them. The first instrument is a release by *John Heney*, dated 2nd August, 1878, to the other original contractors *Charlebois* and *Flood*, by which the former releases his interest to the latter gentlemen.

Then, on the 16th May, 1879, *Flood*, together with others, assign their interest to *Smith & Ripley*, and finally, on the 30th June, 1879, *Charlebois* and others assign their interest to *Smith & Ripley*. At that time the suppliants had obtained the control of all interests in the contract, but inasmuch as there might be some complications in consequence of the numerous transfers, they all joined together; and by a further instrument,

made on the 30th June, 1879, the suppliants obtained a complete assignment of the contract. Now, how can it be successfully contended that the conversation which took place with the Minister of Public Works in 1878, constitute the Crown's assent by anticipation to all these transactions?

They also allege that because the government had given notice to the original contractors that the work should be stopped, they were debarred from the right of relying upon the covenant in the contract, and of refusing their assent to an assignment.

If the notice given had not the effect of cancelling the contract, then the contract remained as it was, and one of the terms of the contract is that if the contractors assigned without the consent of the Crown, it should be null and void. But in addition to this, I also rely upon evidence which, I say, disproves that the Crown knew of this arrangement.

The notice was given on the 9th August, 1879, and all payments up to that date had been made to the original contractors by cheques payable to their order, but to the bank of *Montreal*, who had a power of attorney to receive all moneys coming to these contractors under that contract, and which power of attorney had not been revoked. Then, on the 13th Aug., 1879, the contractors write to the government, showing that they at that time considered themselves the proper parties to be notified.

[THE CHIEF JUSTICE:—When was the notice of the assignment given to the government?]

By letter dated 5th August, 1879. But it is said Messrs. *Heney, Charlebois & Flood* are suppliants, also, and therefore the suppliants are still entitled to recover.

I will now deal with the petition, as a petition of the original contractors. I submit, so far as Messrs. *Heney, Charlebois & Flood* are concerned:

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(*a.*) That they cannot recover for balance of work done, because under the terms of the contract they forfeited their claims by assigning the contract.

(*b*) That they cannot recover anything under the contract as an executory contract, because:—

1. It was rescinded on account of being assigned.

2. It was rescinded on account of the contractors' default in going on with the work and of their inability to complete the contract on their part.

3. If not rescinded, there was no breach of any of its terms by Her Majesty by the giving of the notice relied on as such breach.

Dealing as between *Smith & Ripley* and the Crown, I contend:

(*a.*) That they cannot stand in any better position than their assignors, the contractors, and that if the contractors cannot recover, neither can their assignees.

(*b.*) That *Smith & Ripley* have not any right against the Crown, because:—

The contract attempted to be assigned to them was one which could not be assigned so as to give them any rights against the Crown under it unless with the consent of the Crown.

(*c.*) Any executory rights (if any,) which they may have acquired through the assignment to them expired upon the cancellation of the contract.

The statute of *Ontario* passed in relation to *choses in action* is not binding upon the Crown, and cannot be relied on in a contract between the Crown and a subject.

I will now come to another branch of my argument under another clause of this contract, to wit: That the letter of August the 9th, 1879, and the order in council relied upon as being a breach of the contract, did not constitute any breach on the part of Her Majesty. This is a unilateral contract by which the contractors bind

themselves to do certain work, for which, when done, they are entitled to receive certain monies. This raises practically the same point as in *MacLean* v. *The Queen* (1). There is, I submit, no express contract on the part of the Crown that the work will be given, the contract only says there shall be certain moneys paid when work done. I admit there would have been an implied contract to give the suppliants the work, in order that they might perform the work and earn the consideration, but for clause 34 of the contract. By this clause:

> It is distinctly declared that no implied contract of any kind whatever by or on behalf of Her Majesty shall arise or be implied from anything in this contract or from any position or situation of the parties at any time, it being clearly understood and agreed that the express contract, covenants and agreements herein contained and made by Her Majesty, are and shall be the only contracts, covenants and agreements upon which any rights against her are to be founded.

Now, the only contract of which the letter of the 9th August, 1879, constitutes a breach, must be an implied contract and that contract is expressly excluded by clause 34

As to the damages, the learned judge who tried the case gave judgment in favor of the suppliants for $100,040 anticipated profits. and $71,040 outlay incurred in preparing to go on with the works, in all $171,000. I do not find fault with the mode adopted for arriving at this amount, but the evidence does not sustain the amount awarded.

[The learned counsel then commented on the evidence.] Under these circumstances I submit that the judgment of the Exchequer Court is wrong in awarding to the suppliants $171,040, as the evidence does not sustain such a finding and the suppliants are not in law entitled to it.

(1) 1 Can. S. C. R. 210.

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Mr. *Hector Cameron*, Q.C., for respondents :

I will not take up the question of damages, as Mr. *McDougall*, who was engaged in the case in the court below, will discuss this matter more at length.

Now, assuming this contract to have been made between a private individual and a corporation to build fifty miles of a railway, it would strike one at first view as strange to find that, on a question of assignment of the contract, the assignees, who at first had been taken in as partners in order to increase the working capital, and afterwards had been induced by the corporation to take a larger interest, and had, as in this case, expended some $70,000, should be met with this answer: "You are not entitled to any remuneration at all, and, although we gave you work to do, and induced you to put your money in this contract and buy out your co-contractors, now we have changed our minds, we will not pay." Such a defence on behalf of a corporation, I say, would almost shock one's ideas of justice, but that such a defence should be put forward by the Crown, because the Crown subsequently refused to consent to the assignment, is, to say the least, singular. Of course there is no merit in such a defence First, it is admitted that Messrs. *Smith & Ripley* had a perfect right to go in as partners in this contract. They did so, and afterwards, being encouraged by the officers of the Crown to take a larger interest, they brought out their co-contractors, and then they are told: "Oh! you have taken an assignment of this contract, now, because you have done so, we will not pay you one cent." If, I repeat, a corporation came into any court with a defence like that, there would be some very hard language used, and the corporation would be estopped from putting forward such a defence. However that may be, that seems also to have been the view taken by Mr. *Sandford Fleming*, the Chief Engineer for Government

Railways, for, it appears, he advised the Government and reported that Messrs. *Smith* and *Ripley's* claim should be considered and be referred to some one in order to decide what compensation should be offered to him ; but this course was not adopted, and afterwards, due to some afterthought, the Crown was advised to put in this defence, and finding it there, I must stigmatise it as a dishonest defence.

The appellant contends, that under the provisions of the seventeenth clause of the contract, and by reason of the alleged transfers of the interests of the original contractors to the suppliants *Smith* and *Ripley* by various assignments, the contract was cancelled and taken from the contractors.

By that clause it is provided that the contractors shall not assign, and, even if they assign and government consent, such assignment shall not exonerate the contractors from liability, and, if assigned without Government's assent, then Her Majesty may take the work out of the contractor's hands and employ such means as she may see fit to complete the same.

It is a mere covenant, and what is the result ? The utmost power given to the appellant is that, upon certain events happening, the Crown may take the work out of the contractor's hands, provided it is " for the purpose of prosecuting it by some other means," and for no other purpose. There is no authority there given to cancel the contract, or permanently to put a stop to the work on account of an assignment. This clause must be construed strictly, and a forfeiture is never favored, and will not be assumed unless expressly declared. The object of this clause, evidently, was not to create a penalty for assignment, nor to provide an excuse for forfeiting the contract should the Government not wish to go on with it, even if it were being ably prosecuted, but to

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ensure its satisfactory completion by preventing the work from getting into the hands of weak or irresponsible contractors.

I submit therefore that an assignment without consent under this clause creates no forfeiture, but a mere breach of convenant at the most, for which, if the Crown could have any remedy, it would simply be by action on the covenant. See *Paul* v. *Nurse* (1); *Roe* v. *Harrison* (2); *British Waggon Co.* v. *Lea* (3)

Then I say the suppliants have the right to recover in the name of the original contractors.

Paragraph 5 of the petition alleges that the contractors procured *Smith* and *Ripley* to expend the amount for them. But the contract had been assigned, when the order to stop work and cancel the contract was communicated to the contractors on the 9th August. The passing of the subsequent order in council of the 14th August, 1879, alleging the assignments as a reason for the cancellation, could not validate a breach of contract already wrongfully committed. I say the second order in council was a farce. If the first reason given was right, there was no necessity for the second order in council. It was unfair, I contend, on the 14th August to set up this reason, when they had already cancelled it on the 25th July, because it was the policy of the government not to go on with the work. And inasmuch as the previous ground arose from no fault of the contractors, I say it is a technical reason which is now set up and ought not to prevail. The clause now inserted in government contracts is very differently worded, and shows that when the intention of the government to stop work is communicated to the contractor reasonable com-

(1) 8 B. & C. 486. (2) 2 T. R. 428.
(3) 5 Q. B. D. 149.

pensation is provided for. It is an equitable clause and the contractor goes in with his eyes open.

There is one case to which I wish to call the attention of the court, in which all the cases bearing on this point are thoroughly discussed, it is *McIntosh, et al.* v. *Samo* (1), and establishes clearly the principle that a clause of that kind will not be read to work a forfeiture unless expressly so provided. Then, again, this 17th clause does not provide for a consent to be in writing. It being a mere license under the contract, and not in any way a variation of the sealed instrument, a verbal sanction from the officer representing Her Majesty as Minister, or from the temporary head of the department, would be sufficient. It might be by acquiescence.

[THE CHIEF JUSTICE: Could there be a consent before there was an assignment?]

Yes, if a contractor came to the Minister of Railways and told him he was going to take an assignment of a contract, and the minister answered he was very glad, and the contractor then asked in what form should he do it, and the proper directions were given, assuming all that, would not the Crown be estopped from saying that the assignment must be treated as a forfeiture of the contract? The Deputy Minister of Public Works, who was then the departmental officer who could give the necessary information to the suppliants, told them what to do, and they complied with his directions. 31 *Vic.*, ch. 12, secs. 2, 4 and 7, specify the powers of the Deputy Minister.

As to the contention that the Crown was under no obligation to give the contractors the work to do, because there was no express covenant to that effect in the contract, and therefore Her Majesty committed no breach in stopping the work and cancelling the contract, I submit that there is no necessity on our part

(1) 24 U. C. C. P. 625.

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to establish that there existed an express or implied covenant, because the moment Her Majesty, through her officers, put the contractors in possession of the location of the work, gave them the requisite plans and bill of works for the execution of the contract, and directed them to commence operations, Her Majesty did all that she would have been obliged to do under an express covenant by her that the contractors would be given the work.

Although there are, in the general description of the subject of the contract above set forth, several different branches or classes of work required, yet they all constitute one entire and undivided undertaking; that is to say, the construction of fifty miles of railway known as the *Georgian Bay* branch in such a way as to make it complete and ready for traffic

This case differs entirely from the case of *McLean* v *The Queen*, lately decided in this court, and from the authorities upon which that decision was based.

In each of these cases it was necessary to establish, in order that the plaintiff should succeed, that there was an implied covenant on the part of the defendant to give the work in question therein, or to do some other precedent act, and to continue these acts from time to time, because the subject of contract did not consist as in this case of one entire work, but of several separate and distinct undertakings. See *McLean* v. *The Queen* (1); *Churchward* v. *The Queen* (2); *McIntyre* v. *Belcher* (3).

If, however, it were necessary in order to make the appellants liable in this case, that an implied contract on Her Majesty's part should be established, it is submitted on behalf of the respondents, that the thirty-fourth clause relied upon by the appellants would not prevent such being done.

(1) 8 Can. S. C. R. 210. (2) L. R. 1 Q. B. 184.
(3) 32 L. J. C. P. 255.

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That clause must be construed to mean only that no covenant or contract by Her Majesty should be implied inconsistent with, or further than is necessary to carry out, the intention of the parties to the written contract.

The object of the parties in making the contract must be kept in view in construing it, and as provided in the first part of the fourth clause the several parts of the contract must be taken together to explain each other. See *Mallan* v. *May* (1) and *Ford* v. *Beach* (2).

Then, as to the question of damages, the learned counsel for the appellants treated all the witnesses on behalf of the respondents as being interested. Now, not one of them had any interest left in this contract, but all of them, from their knowledge of the locality and experience in such matters, could speak with much more weight than any of the witnesses for the defence, not one of whom had been there, except Mr. *Lumsden*, and against his evidence we have the evidence of contractors who had examined the road and made a *bonâ fide* offer of ten per cent. profit on the bulk sum of the contract.

Then, as to the point whether the contract could have been completed within the time provided for in the contract, to begin with, it is in evidence that the government were themselves in default, and, under clause 29 of the contract, the contractors would have been entitled to further time, and then the evidence for the suppliants clearly proved that with the large outlay that had been made, and considering the position of the suppliants who were practical and experienced contractors with unlimited means, the work would have been completed. There is no doubt of the fact that the suppliants are out of pocket some $70,000, and that in addition to that they would have made a large sum of profits. These profits would have flown from this contract, and the

(1) 13 M. & W. 517. (2) 11 Q.B. 866.

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evidence fully sustains the amoun awarded See *Mayne* on Damages (1).

Hon. Mr. *McDougall*, Q.C., follows :—

As I had to do with the evidence, and have been engaged in the case since the commencement, I would ask your lordships to follow me in order to understand the *rationale* of the case.

The case is important, not only in regard to the amount involved, which is large, but also as regards the position of contractors generally in Government contracts, and will, therefore, justify a careful consideration.

This contract was made with the authority of parliament and was for the execution by the contractors of the work described as "the excavation, bridging, grading, fencing, track-laying, and ballasting of that portion of the Canadian Pacific Railway known as the *Georgian Bay* branch," consisting of fifty miles. Money had been voted by parliament, and I presume it was the lowest tender which was accepted. The contractors, therefore, became entitled to perform their contract and get their pay. I deny, as is contended for by the crown, that this is an unilateral contract.

The contract in this case is under seal, signed by both parties and is reciprocal. There are express covenants and agreements by both parties. The performance of the contract by the respondents was dependent upon, and impossible without, the previous performance of certain things by the appellants—such as location of the line, staking out the work, cross-sectioning the cuttings, supplying drawings and plans for bridges, &c.

The Crown notified the respondents (9th August, 1879,) to "cease all further operations," and, thereafter,

(1) P. 27.

refused to perform the covenants, &c., on its part. The Crown committed a wilful breach and made it impossible for the respondents to proceed with the work under the contract. As under the circumstances they could not compel specific performance, their only remedy was an action for damages.

It is a rule of the common, as well as of the civil law, that "if one man is to pay money to another upon an act being done, and the other is ready and offers to do the act, and the party hinders him, this is tantamount to performance." *Addison* on Contracts (1); *Domat* (2); *Jones* v. *Judd* (3). And the party hindered acquires a complete right to the money, as if the contract on his part had been performed. *Pedan* v. *Hopkins* (4); *Shaw* v. *Turnpike Co* (5).

The contract contains no provision for the suspension or abandonment of the work. The two clauses referred to by the appellants (14th and 17th) provide for the completion of the works by the respondents in certain events —not abandonment—and are evidently inserted *in terrorem*, and not to work a forfeiture.

"The law does not favour forfeiture. Strict proof of breach of condition or covenant working forfeiture is always required" (6).

The 14th clause requires six days' notice in writing to the contractors before it can be acted upon. The Crown admits that the required notice was never given. This admission disposes, also, of all that part of the defence which alleges "default or delay in diligently continuing to execute the works."

The 17th clause restrains the assignment "of this contract," *i.e.*, the entire contract, without consent. It

(1) 4th Ed. p. 880.
(2) Liv. 1, tit. 1, s. 4, p. 18.
(3) 4 Comstock N.Y. 411.
(4) 13 Searg. & Rawle, 45.
(5) 2 Penn. 461
(6) 1 William's, Saunders ed. 1871, p. 445, and cases there cited; Addison on Contracts, 4th ed., 383.

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does not, and was not intended to restrain the transfer of an interest to persons of means and skill, who might advance capital or supplies. The universal practice had been and still is, to admit partners to "strengthen the firm." The original contractors and their securities remained liable to the Crown up to the very moment of cancellation or abandonment. But assignment without consent does not work a forfeiture. This clause merely gives an option to the government to take the works out of the hands of the contractors and "complete the same" themselves. This is evident from the condition that the contractors shall remain liable for all loss sustained by the government in such case, and shall leave all materials, horses and plant, on the ground for the purpose of, and until, the work is so completed. The option was not availed of, nor was the work completed by the government. The 17th clause, therefore, cannot be invoked by the Crown.

The respondents proved an actual consent by the Minister of Public Works, and subsequently by the Deputy Minister, to the partnership arrangements between *Smith & Ripley* and the original contractors made prior to the 25th July, 1879, the date of the so called concellation.

They also proved notice to the Crown of their presence upon and interest in the work as partners of the original contractors. (Evidence of engineer *Brunel*, Report of *Sandford Fleming*, admitting that *Smith & Ripley* had received payments for work executed. Letter of *Brunel* to *Fleming* of June 30, 1879.

The recognition of respondents by the engineers in charge, by giving them directions as to the work, paying estimates to them instead of the original contractors, as well as the statements of Mr. *McKenzie* and Mr. *Trudeau* to Mr. *Ripley* when he visited *Ottawa*, before he had concluded negotiations with *Charlebois & Co.*,

amount in law to a waiver of the condition of clause 17, even if its breach should be held to work a forfeiture. The government misled the respondents and cannot take advantage of their own wrong. *Doe* v. *Rowe* (1); 1 *William's Saunders* (2) and cases there cited.

That is the character of the contract. While work was progressing, it was discovered on the one hand that some of the contractors had not sufficient capital, on the other that the Government were in default in omitting to do certain things, and a proposal was made by the suppliants to take an interest in this contract. These gentlemen had large capital, extensive plant and machinery and were practical and extensive contractors, and in fact few men were better able to do this work than they were, and labor being cheap, they had the hope of making a handsome profit. The Minister of Public Works, and he surely was capable of binding his department in matters of this kind, knew these gentlemen, and on hearing of their intention, said without hesitation, that he was glad to have such men in the contract. It was then a matter of public policy to build this road, and we can understand how readily the Government acquiesced in having Messrs. *Ripley* and *Smith* interested in this contract.

There never was, I contend, an assignment of the contract in the sense of the seventeenth clause. First of all Mr. *Ripley* became a partner of the original contractors. This did not require an Order in Council, nor was it an act of state; every day parties are added to contracts, even banks become interested; in fact public works, which require large outlay and expense, could not be carried on unless this were done, yet I find the Crown in this case objects to pay money justly due. I confess this seems to me unjustifiable. There is a case which came before the Privy Council, *Kirk* v.

(1) 2 Car. & Payne 246. (2) P. 445.

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The Queen (1), where it was held that the receipt of rents by the Government waived the clause of forfeiture. I refer your Lordships to that case, which shows how such a defence as the one here set up is regarded by the Privy Council. My contention is, that Messrs. *Smith & Ripley* became parties to this contract with the approval of the Government, and that they have never altered their character in that respect; they simply increased their interest, and that with the Government's assent, so far as was necessary, and therefore, I say, clause seventeen cannot be relied upon by the Crown. Then, if there is no ground for cancelling the contract, under clause seventeen, what is the position of the parties? The Government have assumed to cancel this contract, it may be in the public interest, but then they must pay; in matters of public policy, private individuals should not be made to suffer, the public can afford to pay: no one asks that these gentlemen should suffer, except the learned counsel representing some one behind him. Now, the contract being cancelled, what do these contractors—foreigners to us—do? They put in their claim, and finding they could not have it settled at once, but being still anxious to close up this transaction, they make a proposal to refer their claim to any one of three public officers. I happen to know there was a strong disposition in certain quarters to favor this mode of settlement, but some how or other the matter dragged along, and finally, these gentlemen had to come before the Exchequer Court and got there a verdict which I claim is in accordance with justice and right, and which I respectfully submit should be sustained by this court.

[The learned counsel then reviewed the evidence, and contended that it fully sustained the verdict.]

(1) 3 App. Cas. 115.

RITCHIE, C. J. :— 1883

The appeal in this case is on behalf of Her Majesty, THE QUEEN v. SMITH. from the judgment of the Exchequer Court of *Canada*, in the matter of the petition of right of *James N. Smith* and others, by which judgment the said petitioners are declared entitled to be paid by Her Majesty the sum of $171,040.00, for damages consequent upon the cancellation of a contract for the building of a portion of the Canadian Pacific Railway.

The contract in question was entered into on the day it bears date, between the petitioners, *Heney*, *Charlebois* and *Flood*, and Her Majesty, represented by the then Minister of Public Works of *Canada*, for the execution by the contractors of the work described as "the excavation, bridging, grading, fencing, track-laying and ballasting of that portion of the Canadian Pacific Railway known as the Georgian Bay Branch, and consisting of fifty miles, extending between Section O." of location 1877, on the west of South River, near *Nippissigan* Post Office, to the head of navigation on *French* River, in consideration of the covenant for payment on the part of Her Majesty set out in clause 24 of said contract.

There are numerous conditions, provisoes and powers mentioned in the contract, all of which are set out in full in the case.

The following clauses more immediately bear on this case:

17. The contractors shall not make any assignment of this contract, or any sub-contract, for the execution of any of the works hereby contracted for; and in any event no such assignment or sub-contract, even though consented to, shall exonerate the contractors from liability, under this contract, for the due performance of all the works hereby contracted for. In the event of any such assignment or sub-contract being made, then the contractors shall not have or make any claim or demand upon Her Majesty for any future payments under this contract for any further or greater sum or sums than the sum or sums respectively at which the work or works so

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assigned or sub-contracted for shall have been undertaken to be executed by the assignee or sub-contractor; and in the event of any such assignment or sub-contract being made without such consent, Her Majesty may take the work out of the contractors' hands, and employ such means as she may see fit to complete the same; and in such case the contractors shall have no claim for any further payment in respect of the works performed, but shall nevertheless remain liable for all loss and damage which may be suffered by Her Majesty by reason of the non-completion by the contractors of the works; and all materials and things whatsoever, and all horses, machinery, and other plant provided by them for the purposes of the works, shall remain and be considered as the property of Her Majesty for the purposes and accordiug to the provisions and conditions contained in the twelfth clause hereof.

18. Time shall be deemed to be of the essence of this contract.

24. It is distinctly declared that no implied contract of any kind whatsoever, by or on behalf of Her Majesty, shall arise or be implied from anything in this contract contained, or from any position or situation of the parties at any time, it being clearly understood and agreed that the express contracts, covenants and agreements herein contained and made by Her Majesty, are and shall be the only contracts, covenants and agreements upon which any rights against Her are to be founded.

25. Cash payments equal to about ninety per cent. of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of this contract, will be made to the contractors monthly on the written certificate of the engineer that the work for or on account of which the certificate is granted, has been duly mentioned; and upon approval of such certificate by the Minister of Public Works, for the time being for the Dominion of *Canada*, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractors to be paid the said ninety per cent. or any part thereof. The remaining ten per cent. shall be retained till the final completion of the whole work to the satisfaction of the chief engineer for the time being, having control over the work, and within two months after such completion the remaining ten per cent. will be paid. And it is hereby declared that the written certificate of the said engineer certifying to the final completion of said works to his satisfaction shall be a condition precedent to the right of the contractors to receive or be paid the said remaining ten per cent., or any part thereof

26. It is intended that every allowance to which the contractors

are fairly entitled, will be embraced in the engineer's monthly certificate; but should the contractors at any time have claims of any description which they consider are not included in the progress certificates, it will be necessary for them to make and report such claims in writing to the engineer within fourteen days after the date of each and every certificate in which they allege such claims to have been omitted.

27. The contractors in presenting claims of the kind referred to in the last clause must accompany them with satisfactory evidence of their accuracy, and the reason why they think they should be allowed. Unless such claims are thus made during the progress of the work, within fourteen days, as in the preceding clause, and repeated, in writing, every month, until finally adjusted or rejected, it must be clearly understood that they shall be forever shut out, and the contractors shall have no claim on Her Majesty in respect thereof.

28. The progress measurements and progress certificates shall not in any respect be taken as an acceptance of the work or release of the contractors from responsibility in respect thereof, but they shall at the conclusion of the work deliver over the same in good order, according to the true intent and meaning of this contract.

The following are the dates respectively of the documents in evidence:

2nd August, 1878—Contract between *Heney, Charlebois & Flood* and *The Queen.*

14th September, 1878—*Jas. Ripley et al* obtain a third interest in the contract, *Charlebois & Co.* having one-third, and *Flood & Cooper*, the other third.

19th September, 1878—A new partnership is formed between *Charlebois, Flood & Co.*, and *Heney's* interest is purchased.

16th May, 1879—*Flood & Co.* and *Cooper* assign their third interest to *J. Ripley*, acting for *Smith & Ripley.*

30th June, 1879—*Charlebois & Co.* assign their third interest to *Smith & Ripley.*

On same day, 30th June, 1879, a dissolution of the previous partnerships takes places, leaving the Messrs. *Smith & Ripley* the sole interested parties in the contract.

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On the same day, 30th June, district engineer informs engineer in chief that *Ripley*, one of the principal contractors, intends pushing work and buying out minor partners.

On the 25th July, 1879, Order in Council passed recommending that the contractors be notified to stop work.

On the 5th August, 1879, *Smith & Ripley* notify the Minister of Railways of the transfer of the contract and their readiness to substitute their security for that given by *Charlebois*.

On the 9th August, the Order in Council of July 25th is forwarded to the original contractors.

On the 11th August, Acting Secretary of Department of Railways and Canals acknowledges receipt of Messrs. *Smith & Ripley's* letter, and informs them that the Crown does not consent to the assignment, and will not consent.

On the 13th August, 1879, the original contractors acknowledge the receipt of the letter of the 9th August, enclosing copy of Order in Council of July 25th, 1879.

On the 14th August, 1879, Order in Council cancelling the contract with *Heney, Charlebois & Flood.*

On the 27th August, *Smith & Ripley* acknowledge receipt of letter of 11th August, enclosing order in Council of July 25th, 1879, and state they only received it on 26th August, 1879.

Then follow letters by *Smith & Ripley* to the Minister of Railways, dated respectively 20th September, 1879, 30th September, 1879, December 15th, 1879, and November 22nd, 1880.

I cannot discover a tittle of evidence to show that either before or after the contract was assigned Her Majesty ever consented to such assignments, or had any knowledge of such assignments, or in any way directly or indirectly recognized the assignees as contractors under the said contract, but, as I read the evidence, the

very contrary was the case, from the commencement of the work and until the contract was put an end to, the original contractors continued to deal with the government and the government with the contractors under the contract, entirely independent of any third parties whatever. All the payments for work done under the contract before and after the alleged assignments were made to the original contractors, *Heney, Charlebois & Flood*, on the monthly certificates issued to them in accordance with the provisions of the contract, who, through their duly authorized attorney, received the same and gave receipts therefor, as follows :

PAYMENTS MADE ON ACCOUNT OF CONTRACT.

Official Cheque (for work done per estimate No. 1 to 31st ult., contract 37, Pacific Railway,) No. 1521, for $550, issued in favor of *Heney, Charlebois & Flood* and received by *A. Drummond*, manager of Bank of *Montreal*, on 20th December, 1878, under power of attorney granted to *A. Drummond*, manager of the branch of Bank of *Montreal, Ottawa*, to receive all sums due, or may hereafter become due by the Government of *Canada* to Messrs. *Heney, Charlebois & Flood.* The power of attorney is dated and signed 18th December, 1878.

Official Cheque (for work done per estimate, No. 20, contract 673, Pacific Railway,) No. 1985, for $880, in favor of *Heney, Charlebois & Flood*, received by Mr. *Drummond* on 20th December, 1878.

Official Cheque (for work done per estimate to 31st December, 1878, contract 37, Pacific Railway,) No. 2335, for $1,600, in favor of *Heney, Charlebois & Flood*, received by Mr. *Drummond* on 16th January, 1879.

Official Cheque (for work done per estimate to 31st January, Pacific Railway, contract 37, P. W. Cert. 878,) No. 2726, for $3,050, in favor of *Heney, Charlebois & Flood*, received by *J. W. de C. O'Grady*, for manager Bank of *Montreal*, 17th February, 1879.

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Official Cheque (for work done per estimate to 28th February, Georgian Bay branch, P. W. Cert. 979,) No. 3075, for $2,050, in favor of *Heney, Charlebois & Flood*, received by *J. W. de C. O'Grady*, for manager Bank of *Montreal*, on 15th March, 1879.

Official Cheque (for work done per estimate to 31st May, contract 37, *South River* to *Cantin's Bay*,) No. 4179, for $1,950, in favor of *Heney, Charlebois & Flood*, received by *J. W. de C. O'Grady* on the 16th June, 1879.

When notice that the contract was put an end to, such notice was by the government given to the said original contractors, and on the 13th August, 1879, these contractors (*Heney, Charlebois & Flood*) write to the Hon. Mr. *Pope*, acting Minister of Railways and Canals, as follows:—

Hon. John Pope,

Acting Minister of Railways and Canals.

SIR,—We have to acknowledge yours of the 9th instant covering a copy of an Order in Council of the 25th of July, authorizing you to cancel our contract for the construction of the Georgian Bay Branch of the Canadian Pacific Railway. Also your notice of August 9th to us to discontinue operations under said contract. In pursuance to your notice I immediately transmitted your order to discontinue operations to the parties temporarily in charge of the work by telegraph to *Collingwood*, the executive office of our firm. Should there be a failure of full compliance to your order by the parties temporarily in charge of the work, on account of certain efforts to negotiate with us, for the entire control of said work; we would hereby inform and notify you, that such negotiations were never completed or deemed sufficiently likely to become so, to cause us to ask your official sanction thereto. Therefore we shall only enumerate, subject to amicable settlement, such charges as have become chargeable to the work previous to the receipt of your notice to discontinue operations.

We have the honor to be, Sir,

Your obedient servants,

Heney, Charlebois & Flood.

Montreal, 13 August, 1879.

Thereby entirely repudiating by anticipation the rights

of any other parties, and stating why they had never asked any official sanction.

Nor can I find in the case the slightest evidence that *Heney, Charlebois & Flood* ever directly or indirectly sought the consent of the crown to an assignment by them, or ever intimated to the government that they had parted or desired to part with their interest in the said contract, or that the same had been assigned to *Smith & Ripley*, or to any other parties. All the transactions with reference to the different assignments and transfers which now appear to have taken place, so far as they actually did take place, were between the parties themselves, without the knowledge or consent of any person whomsoever authorized or empowered by the crown to give such consent. The only evidence relied on of any such consent is that of *Ripley* himself, which is as follows:

Q. Did you visit *Canada*, and, if so, when for the purpose of taking contracts for public works? A. In September, 1878.

Q. You came to what place? A. To *Montreal*.

Q. Was any one associated with you as a railway contractor at that time? A. Yes, Mr. *James N. Smith* was my partner at that time.

Q. And had been your partner for some time previously? A. Some ten years or more.

Q. When you visited *Canada* did you become aware of a public contract called the Georgian Bay branch of the Pacific Railway contract? A. Yes.

Q. Did you take any steps to obtain an interest in that contract or to obtain control of it? A. I purchased an interest at that time in the contract.

Q. From whom? A. From Messrs. *Charlebois, Flood & Co.*

Q. Is this document, now produced and fyled as suppliants' exhibit "B," signed by them and by you, in connection with that contract? A. I recognize that as the contract.

Q. Does this instrument set out the interest which you were to acquire in the contract? As. It does.

Q. After obtaining an interest in the contract with these parties, as shown in this instrument, did you visit *Ottawa*? A. I did.

Q. How long after this instrument was executed? A. I should say within thirty days: I do not remember the exact time.

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Q. What was your object in coming to *Ottawa*? A. To acquaint the government with the fact of my becoming interested in this work, more particularly to ascertain if the contract was all right and properly made.

Q. What was your object in coming to *Ottawa*, and did you accomplish that object? A. I did. It was to look over the contract and see if it was made as they stated with the government, and also to acquaint the Government with the fact of my having become interested.

Q. What member of the government did you see? A. I saw, amongst others, Mr. *McKenzie*, the Premier and Minister of Pubic Works.

Q. Did you state to Mr. *McKenzie* what your object was and what you had done? A. I did.

Q. What did you learn from him? A. He expressed satisfaction that we had become interested with them as he had known us previously.

Q. Satisfaction that you had done what? A. That we had become interested in the work—that there was additional capital and experience added to the contract.

Q. He made no objection, did he? A. Not at all. I had made efforts previously to obtain work and had failed, and now I acquainted him with the fact that I had gone into the contract, and he expressed pleasure.

Q. You had tendered, I suppose? A. Yes.

Q. Were your tenders too high? A. In all cases.

Q. Did anything further transpire between you with reference to it? A. Nothing that I remember at that time.

The witness then stated that he had seen Mr. *Trudeau*, the Deputy Minister of Public Works, three or four months afterwards—a different season of the year.

Q. Then, you visited *Ottawa* for what purpose on that occasion? A. To see the government with regard to other changes which I proposed making with regard to my partners.

Q. What were those changes for, speaking generally? For the purpose of getting a larger interest, or what? A. Getting a larger interest so that we might make better progress with the work.

Q. Did you see the Minister of Public Works on that occasion? A. I enquired for the Minister of Public Works and they stated that he was absent.

Q. You mean absent from *Ottawa*? A. Yes, I took it so. I could not see him.

Q. Who then did you see? A. I was recommended to see the Deputy Minister, Mr. *Trudeau*. I did see him. I was introduced, and had a conversation with regard to this work.

Q. Did he express any opinion or give you any answer to your inquiries on behalf of the government on that occasion? Did you see him in his office? A. I did. I stated to him my views with regard to the work and what I proposed to do at that time, and he answered me that the government always took pleasure in strengthening a contract—in adding strength to it (I think these were the exact terms that he used) and that they were always glad to see additional skill and capital contributed.

Q. (By Mr. *Lash*.) What was his reply? A. He answered that the government were very glad to add strength to any contract that they had with any party, either by capital or skill—that I would have no difficulty in satisfying the government with regard to that fact.

Q. Had you at that time been formally recognized by the government, in the contract, by any writing? A. Not by any writing.

Q. Were you anxious to be so recognized? A. I was. I asked Commissioner *Trudeau* what would be necessary for me to become recognized by the government. He stated that a simple letter from my partners, Mr. *Charlebois* and Mr. *Flood*, to the government would place me the same as themselves with the government.

Q. And that the assent of your co-partners would be sufficient to enable the government to recognize you, or that they would recognize you? A. He made that statement—yes.

Q. Did you make any further efforts to consummate that arrangement at that time? A. I did. I spoke to Mr. *Charlebois* and Mr. *Flood* about the letter.

Q. I am now speaking of your interview with Mr. *Trudeau*; what was the conclusion of that interview? Was there any definite statement as to your future relations with the government in connection with it, or any reason why he could not do so mentioned? I do not remember. I spoke to him about the stopping of the work at that time.

Q. What did Mr. *Trudeau* say to you as the concluding result of your interview with him? You have stated the purposes for which you came and the conversation; what was his final statement—his assurance to you as to your position? A. As I said before, that the government were very glad to strengthen their position in any contract by additional capital or skill.

Q. And that a simple letter from your partners would—what? A. That a simple letter from Mr. *Charlebois* and Mr. *Flood*, who were

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recognized by the government, would invest me with all the rights they had with the government. I understood him to say that distinctly.

Q. Did the interview end there? Did you have a second interview with him or any one connected with the Department on that occasion? A. No.

Q. What did you tell Mr. *Trudeau* was your specific object in coming to visit him on that occasion? A. That I had in view the buying out of these parties.

Q. Which parties do you mean now? A. I spoke more particularly of Mr. *Charlebois*.

Q. And you wished to know what? A. I wished to know if that would be satisfactory to the government, as I was not acquainted with their method of procedure.

Q. And was it in answer to that specific statement of yours that Mr. *Trudeau* made the observation which you have just mentioned? A. I do not remember the words, but he gave me the impression emphatically that it would be agreeable to the government.

The witness speaks of a visit to *Ottawa* in the spring of 1879:

Q. Did you return to the works after that visit? A. Yes.

Q. Without anything more definite in the way of writing or contract than you have mentioned? Was there anything put in writing? A. Nothing.

Q. After you returned to the works? A. Not that I remember.

Q. (By the Court). Was that before your last purchase of the interest? A. Yes, that was previous to my last purchase.

Q. You returned, then, under the impression that there was no difficulty whatever, you being strong and experienced capitalists, in securing the sanction of the government? A. Yes, I returned with that impression.

CROSS EXAMINED.

Q. You first visited *Montreal* in September, 1878? A. Yes.

Q. Had you at that time purchased the interest in the contract? A. I purchased it at that time.

Q. The exhibit is dated 19th September, 1878: was it before or after that you were in *Montreal?* A. Previous to that, I had been there several days. I think you will find the twentieth is the latter part of the contract.

Q. You stated here "I visited *Ottawa* within thirty days afterwards to acquaint the government that I had become interested in the contract." A. Yes.

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Q. You had become interested, then, before you visited *Ottawa?* A. Yes.

Q. In what way did you become interested before you visited *Ottawa?* A. By taking a third interest with *Charlebois, Flood & Co.*

Q. By this document of the 19th September? A. Yes, and assuming one-third of what they had paid out, or were supposed to have paid out.

Q. You saw Mr. *McKenzie?* A. Yes.

Q. Where did you see him? A. I saw him in the department.

Q. In his own room? A. In his own room, as I remember, I sent in my card and was admitted.

Q. What did you tell him? A. I had seen him previously about other work I had tendered for. He was acquainted with our firm.

Q. What did you state to him when you saw him in his room? A. I stated to him that I had finally secured work with the government by becoming connected with this firm of *Charlebois, Flood & Co.*

Q. You did not then produce any document to him? A. Not at all.

Q. What more did you say to him? Did you tell him the particulars of your agreement with the firm? A. I do not remember all the conversation that we had.

Q. Did you tell him the particulars of your agreement with the firm? A. I think I told him that I had taken a third interest with the firm.

Q. Did you tell him that Mr. *Smith* was with you? A. I did not state that fact—I presume not, I had always represented *Smith & Ripley* here.

Q. What did he say in answer to that? A. He expressed satisfaction that we were to be connected with the concern; I cannot give his language.

Q. Can you not state what he said at all? A. Simply that he was well satisfied that we had become connected with that concern from his knowledge of us.

Q. How long did your interview with Mr. *McKenzie* last? A. I think not over twenty minutes or half an hour.

Q. Was any one else present? A. I do not remember any one else being there. No.

Q. No writings passed between you at that time? A. No writings.

Q. You did not ask from Mr. *McKenzie* any letter consenting to your interest? A. No.

Q. This was some time after the 19th September, 1878? A. Yes; I do not remember the date?

Q. Was it in September or October? A. I have an impression it

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was immediately after. I have an impression it was within a few days afterwards, but I am not satisfied to swear to that.

As to his second visit:

Q. And when you came to *Ottawa* Mr. *McKenzie* was not in the city? A. Not that I know of.

Q. You did not see him on that occasion? A. No.

Q. You saw Mr. *Trudeau*? A. Yes.

Q. In his own room? A. Yes.

Q. Was anyone present besides yourself? A. Not at the time I was talking to him.

Q. Tell me what you first said to him? A. I could not give the words, I came for the purpose of explaining to him my position on the work there and what I was about to do.

Q. That was the purpose you came for: tell me what you said? A. Well, I said, I talked of buying out my partners and also asked him what was necessary in order to have us recognized by the government. I entered into those matters.

Q. You had not, at that time, bought out your partners? A. No, I had not.

Q. You contemplated doing so? A. Yes.

Q. And asked what was necessary to have you recognized? A. Yes.

Q. And what did Mr. *Trudeau* say? A. He said very emphatically that the government never objected to strengthening a contract those were the words he used, as I remember, either by capital or skill and that he should be glad to know that the contract had been made better and stronger, and that I would have no difficulty with the government on that ground.

Q. You did not at that time inform him of the nature of the arrangements which were to be made, of course, because you did not know what arrangements would be made? A. Except that I talked of buying them out.

Q. But you did not tell him of the nature of the arrangement at that time? A. No.

Q. How long, do you think, your interview with Mr. *Trudeau* lasted? A. I should say about an hour?

Q. There would be a good deal said, then, during the hour? A. Yes.

Q. Can you not tell us something more about it than what you have said? No; that was impressed, more particularly, on my mind.

Q. Was the whole hour taken up in just stating what you have told us? A. Oh no.

Q. What was the rest of the hour taken up in? A. I do not remember at all.

Q. You do not remember what happened besides what you have stated? A. No.

Q. Mr. *Trudeau* said that a simple letter from your partners would be all that was necessary—necessary for what? A. To place me with the government equal to my partners—to have me recognized in the contract.

Q. A simple letter from your partners to whom? A. From Messrs. *Charlebois & Flood* to the government.

Q. That would be all that would be necessary to have you recog nized as a partner? A. Yes, to the contract.

Q. Did that refer to your then position as a partner? A. Yes.

Q. So that up to that time you had not been recognized by the government as a partner. A. Not in writing.

Q. Was that letter sent? A. It was not—not that I am aware of.

Q. Did Mr. *Trudeau* tell you anything about what would be necessary in the event of your buying out your partners? A. I cannot remember distinctly but I know that he gave me to understand that I had better have my papers up with the government as soon as possible.

Q. What papers? A. Any new papers that I might have.

Q. With what object were they to be sent to the government? A. In order that we might be properly placed there, in this contract.

Q. In order that the assent of the government might be got? A. Yes.

Q. I find that the first agreement which you signed after leaving Mr. *Trudeau* is dated the 16th of May, 1879. That is the agreement whereby you bought them out. Now, will that fix your mind as to the date of your interview with Mr. *Trudeau?* A. No.

Q. Where was that agreement of the 16th of May signed? A. I could only tell by looking at the agreement, I see that it was drawn up and signed in *Collingwood.* (Document fyled as exhibit "C-1)."

Q. You say that this exhibit C-1, was signed in *Sandy Hill, New York* state? A. Yes.

All this, so far from establishing a consent by the government to any assignment, shows that no application was really ever made for such consent, and that no such consent was ever given. Who were the persons to apply for this consent and to whom to be given but the contractors themselves? And if there could be any doubt that consent was ever asked for or obtained,

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the letter of *Heney, Charlebois & Flood* of 13th August, 1879, before referred so, and the letter of *Smith & Ripley* to the Minister of Railways and Canals, dated 5th August, 1879, clearly establish no application was ever made by *Heney, Charlebois & Flood*, that the letter was the first and only effort made by them to obtain the consent or recognition of the crown to any assignment to them.

It is as follows :—

Ottawa, August 5th, 1879.

To the Hon. the Minister of Railways and Canals:

Sir,—We have the honor to inform you that we have purchased from the contractors for the "Georgian Bay Branch" of the Canada Pacific Railway, all their right, title and interest in said contract and in all monies and benefits payable or receivable and now accrued or to accrue thereunder and that in so far as said contractors had any power or authority to assign said contract and their interest thereunder or to substitute any other person or persons in their place with reference thereto we have been so substituted for said original contractors and have undertaken the burden and execution of said contract. The original contractors have transferred to us, as will be seen by the accompanying documents, all their respective interests in said contract and benefits thereunder, and we have been and now are engaged with a large force in the execution of the works under the contract in question. We beg to forward herewith (5) five original documents, denominated in a memo, endorsed hereon, which documents along with the assignment from *Heney*, one of the original contractors, to *Charlebois & Flood*, on file in your Department, shows clearly our title as assignees of the original contractors, and as the only parties now actually interested in the benefits of said contract, we desire to be recognized by your Department as the successors of the original contractors and to be dealt with as such by the Department, as well as to receive instructions in any matter relating to the said contract. You will observe on reference to the agreement "B" dated 30th June last, between *Charlebois & Co.* and ourselves that we undertook to replace the $20,000 cheque deposited by *Charlebois & Co.*, as part security on said contract with your Department, by a security of our own of a similar amount satisfactory to your Department and to get the cheque deposited by *Charlebois & Co.* released and given up to *Charlebois & Co.* on or by 1st August instant. In order to carry out our agreement in

reference to this matter we applied to your Department on 1st of August, for leave to substitute said security of *Charlebois & Co.* by security of our own for a like amount, and for the delivery up of said cheque deposited by *Charlebois & Co.*, but we were informed in reply that no answer could be given to our request on that day. We are so far without an answer to the above request and we understand the delay is owing to some change of policy either contemplated or resolved upon by the Government in respect of the works under the contract in question. We would respectfully suggest that in the meantime the return of the security deposited by *Charlebois & Co.*, as above mentioned, would relieve us from liability (if any) in respect of the return of said security, and also from double interest, that is to say, interest on the *Charlebois* cheque and our own security for a like amount which we are holding in readiness for substitution, and so far as we are concerned such return would not interfere with any future arrangements which may be in contemplation. We would request that if it is not absolutely necessary to retain the original documents sent herewith after recording them in the books of the Department, that they should be returned to us, we having no other copies.

We have the honor to be,

Very respectfully yours,

Ripley, Smith & Co.

By *A. Ferguson*, their Attorney.

Ottawa.

MEMO. OF DOCUMENTS.

30th June, 1879, agreement *A. Charlebois, et al & J. N. Smith, et al.*
" " " " " " " *J. D. Ripley, et al.*
19th Sept., 1878, Articles of Partnership.
16th May, 1879, agreement *Flood & Co.*, and *J. D. Ripley.*
30th June, 1879, Power of Attorney, *Heney & Co.*, to *Ripley.*

Ripley, Smith & Co.,
per *A. Ferguson.*.

On the 9th August the original contractors are informed that the contract is taken out of their hands.

Copy No. 12,191.

Ottawa, 9th August, 1879.

GENTLEMEN,

By direction of the acting Minister of Railways and Canals, I have to inform you that, by an Order in Council dated 25th July last, a copy of which is herewith enclosed, the contract made with you for the construction of that portion of the Canadian Pacific Railway known as the Georgian Bay Branch Railway was by virtue and in

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pursuance of the terms of the said Order in Council cancelled and annulled, and you are hereby notified that the said work is on behalf of Her Majesty taken out of your hands and you will accordingly cease further operations under or by virtue of said contract.

I have the honor to be, gentlemen,

Your obedient servant,

(Signed) *F. H. Ennis,*

Actg. Sec.

Messrs. *Heney, Charlebois & Flood.*

And on the 11th August, 1879, the consent is refused to *Smith & Ripley*, and they are notified of the cancelling of the contract.

Copy.

August 11th, 1879.

GENTLEMEN,

I am instructed by the Minister of Railways and Canals to acknowledge your letter of the 5th inst. with assignment to you by Messrs. *Heney, Charlebois & Flood*, contractors, of all their right, title and interest in their contract for the Georgian Bay branch of the Canadian Pacific Railway, and to inform you that the contract of Messrs. *Heney, Charlebois & Flood* had been cancelled before the receipt of your letter.

I am also to say that by terms of their contract Messrs. *Heney, Charlebois & Flood* are prohibited from making such assignment without the consent of Her Majesty, and that such consent has not been given nor will be given to any assignment of the said contract.

I have the honor to be, gentlemen,

Your obedient servant,

(Signed) *F. H. Ennis,*

Actg. Sec.

Messrs. *Smith, Ripley & Co.,*

Care of *A. Ferguson*, Esq., *Ottawa.*

We have seen by the letter of *Heney Charlebois & Flood* of 13th August, 1879, their acquiescence in such cancellation of the contract.

It is therefore abundantly clear, to my mind, that *Smith & Ripley* have not and never had any contract whatever with the Queen, nor is there the slightest evidence of any privity of contract between the suppliants *Smith & Ripley*, and the Crown, nor have *Smith*

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& Ripley established any claim against Her Majesty, that this or any other court can recognize; for, to my mind, it is impossible to conceive upon what principle *Smith & Ripley* can maintain an action against the Crown for plant and materials supplied by them to carry out in the future a contract of *Heney, Charlebois & Flood* with the Crown, or for anticipated profits by reason of a breach of that contract on the part of the Crown (assuming there has been any such breach). It is clear that at the time the first notice was given, though the government profess to act under the clauses of the agreement relating to the progress of the work which they could not sustain, still a good cause existed to justify the notice; but in this case it is not necessary to inquire whether, though the motive of the government in putting an end to the contract might be because they had determined not to proceed with the work, they could not now rely on a good, though different cause existing at the time, as in the case of a master dismissing his servant, when it is immaterial whether or not it was the best cause of dismissal, for if a good cause existed, though unknown to the master at the time, he would be justified; or as also in the case of a distress where a man may distrain for one cause and avow for another. For in this case, immediately after the notice of the 9th August, 1879, when knowledge of the assignment comes to the government for the first time through the Minister of Railways, the government immediately act and refuse consent, and notify *Smith & Ripley* that they had put an end to the contract; so that if the first order in council and notice did not do so, this last clearly did; but the original contractors, as has been shown by their letter, appear to have readily assented to a putting an end to the contract, and this equally cuts down and destroys any claim of *Heney, Charlebois & Flood*, and, indeed, the letter of

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the 13th August, 1879, assumes the right of the government to stop the work and repudiates anything like the claim now put forward by *Smith & Ripley*, and which the judgment appealed from adjudges to them, viz., $171,000, for they say—

> Should there be a failure of full compliance to your order by the parties temporarily in charge of the work on account of certain efforts to negotiate with us for the entire control of said work, we would hereby inform and notify you that such negotiations were never completed nor deemed sufficient or likely to become so, to cause us to ask your official sanction thereto.

There is no pretence for saying there was any outlay made for preparing to do the work by *Heney, Charlebois & Flood*, nor do they claim any by their petition, any such outlay is alleged to have been made by *Smith & Ripley*, which neither *Heney, Charlebois & Flood*, nor *Ripley & Smith* can recover—the former, because they did not make the outlay, and under the terms of the contract, after its termination, they cannot recover, if they had ; and the latter, for the simple reason that they had no contract with the Queen, justifying the outlay.

The case of *Robson* and *Sharpe* v. *Drummond* (1), shows that without any express stipulation, where a contract is a personal one, and one of the parties has by selling his interest in the contract and assigning it to another party become incapable of performing his part of it, the other party to the contract may on that ground treat the agreement as at an end.

> *A.*, a coach maker, entered into an agreement to furnish *B* with a carriage, for the term of five years, at seventy-five guineas a year. At the time of making the contract, *C.* was a partner with *A.*, but this was unknown to *B.*, the business being carried on in the name of *A.* only. Before the expiration of the first three years the partnership between *A.* and *C.* was dissolved, *A.* having assigned all his interest in the business, and in the contract in question to *C.*, and

(1) 2 B. & Ad. 303.

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the business was afterwards carried on by *C.* alone. *B.* was informed by *C*, that the partnership was dissolved, and that he (*C*) had become the purchaser of the carriage then in his (*B's*) service. The latter answered that he would not continue the contract with *C.*, and that he would return the carriage to him at the end of the then current year, and he did so return it. An action having been brought in the names of *A.* and *C.* against *B.*, for the two payments which, according to the term of contract, would become due during the last two years of its continuance, it was held, that the action was not maintainable, the contract being personal, and *A.* having transferred his interest to *C*, and having become incapable of performing his part of the agreement.

Lord *Tenterden*, C.J. :—

Here, after the partnership between *Robson & Sharpe* had ceased to exist, and after *Sharpe* had ceased to carry on the business of a coach maker, the defendant offered to continue the job with *Sharpe*, but he replied that that was impossible. Now the defendant may have been induced to enter into this contract by reason of the personal confidence which he reposed in *Sharpe*, and therefore agreed to pay money in advance. The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with *Sharpe* alone, and not with any other person.

Littledale, J. :—

I think this contract was personal, and that *Sharpe* having gone out of the business, it was competent to the defendant to consider the agreement at an end. He may have been induced to enter into the contract by reason of the confidence he reposed in *Sharpe;* and at all events had a right to his services in the execution of it.

* * * * * *

Parke, J. :—

This appears to me to be a very clear case. The defendant made his contract with *Sharpe* by name, and not knowing that any other person had an interest in the subject-matter; and although *Robson* had an interest in it so as to entitle him to sue jointly with *Sharpe*, the defendant has the same rights against *Sharpe* and his partner, and may make the same defence to this action brought by them as if he had contracted with *Sharpe* alone, and the action had been brought by him. The contract was to continue for five years. At the end of the third year there was a dissolution of partnership between *Sharpe* and *Robson*, and notice of that dissolution, and

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of *Sharpe* having assigned all his interest in the contract to *Robson*, was given to the defendant, who said he would not continue the contract with *Robson*. The very fact of *Sharpe's* having transferred his interest in the contract to *Robson* (a mere stranger as far as the defendant was concerned) was equivalent to saying (that which he did afterwards say) "I will not perform my part of the contract;" and that is an answer to the present action brought in the names of *Sharpe* and *Robson*; for the defendant had a right to have the benefit of the judgment and taste of *Sharpe* to the end of the contract, and which, in effect, he has declined to supply. It is true that the defendant will have an advantage which he would not have had if the contract had continued for the whole five years; for he will have had the use of the carriage during the first three, and will not be bound to keep it during the last two, when it must be worse for wear; but this arises from the default of one of the plaintiffs in not performing his part of the contract.

Patteson, J.:

This case appears to me to admit of no doubt. It is, in substance, a case where a person having made a contract in his own name, attempts to back out of it, and transfer it to a third person. That he had no right to do. The rule for setting aside the nonsuit must be discharged.

Under these circumstances I think *Smith & Ripley* have no *locus standi* whatever before this court, and therefore this petition should be dismissed. As to *Heney, Charlebois & Flood*, all they could reasonably ask from the favour of the Crown would be for the amount of work they had done up to the time when the contract was put an end to, and that, I understand, the Crown were willing to allow, and which I hope the Government will not now refuse.

STRONG, J.:—

Apart altogether from any objection founded on the 17th clause of the contract, it is plain, on elementary principles of the law relating to contracts, that the suppliants *Smith & Ripley* are not entitled to recover damages against the Crown for any breach of contract,

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for the simple reason that no contract ever existed between them and the Crown, unless indeed the evidence shews such an assent on the part of the Crown to their substitution for the original contractors *Heney, Charlebois & Flood* as was sufficient to constitute a new contract.

That a party who enters into a contract for the performance of work is not entitled by a mere assignment to another person to substitute the assignee for himself, so as to delegate to the assignee his own rights and liabilities under the contract, without the consent of the other party to the agreement, is a proposition of law so well established that it requires scarcely any authority to support it. In such a case there is no privity of contract—no contractual relation of any kind—between the assignee and the party for whom the work is to be performed. I will, however, refer to one or two cases which place the law on this head beyond dispute.

In the case of *Schmaling* v. *Thomlinson* (1), the defendants had employed *Aldibert, Becker & Co.* to transport goods to a foreign market, who, without the assent of the defendants, delegated the employment to the plaintiff, and the latter having, without the privity of the defendants performed the service contracted for, sued the defendants for the payment of the money which the defendants, had contracted to pay *Aldibert, Becker & Co.* It was held by the Court of Common Pleas that, there being no privity between the parties, the action would not lie, *Gibbs*, C.J., saying that the defendants looked to *Aldibert, Becker & Co.* only for the performance of the work, and *Aldibert, Becker & Co.* had a right to look to the defendants for payment, and no one else had that right. In the case of *Cull* v. *Backhouse*

(1) 6 Taunt. 148.

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(1) Lord *Kenyon*, at *nisi prius*, on a similar state of facts, determined the law in precisely the same way.

In Robson v. *Drummond* (2), *A.* and *B.* were partners as coachmakers. *C.*, who knew nothing of *B.*, entered into a contract with *A.* for the hire of a carriage for five years at so much a year, and *A.* undertook to keep the carriage in proper order for the whole five years. Before the five years were out, *A.* and *B.* dissolved partnership, and *A.* assigned the carriage and the benefit of the contract relating to it to *B.* *B.* gave *C.* notice of the dissolution and arrangement respecting the carriage, but *C.* declined to continue the contract with *B.*, and returned the carriage. An action was then brought by *A.* and *B.* against *C.* for not performing the contract, but it was held that the action would not lie, the contract having been with *A.* alone, to be performed by him personally, and he having disabled himself from continuing to perform it on his part.

This doctrine is a necessary consequence of the essential principle of all contracts that a man cannot be made liable *ex contractu* without his assent, and, as I have said, it is not in any way dependent on such a stipulation as that embodied in the 17th clause of the contract in the present case, since, without any express provision to the contrary, one contracting party has no right to delegate the obligations arising out of a contract made with him personally to another to whom he may think fit to transfer them. But the contract in the present case places the matter beyond all doubt or question, if doubt or question could be possible in so plain a case, by distinctly expressing in the 17th clause what the law would without it have implied.

Next arises the question, is there evidence of assent

(1) Stated in a note in 6 Taunt. 148.

(2) 2 B. & Ad. 303.

on the part of the Crown to the delegation which the original contractors have assumed to make to the suppliants *Smith & Ripley*, or, in other words, does the evidence establish that there was a novation, a new contract, by which the Crown accepted *Smith & Ripley* in lieu of the original contractors and entered into a similar contract with them?

The elements necessary to constitute novation are thus stated by Mr. *Pollock* in his work on Contracts (1):

> Another branch of the same general doctrine which on principle is scarcely less obvious, is that the debtor cannot be allowed to substitute another's liability to his own without the creditor's assent. Some authorities which illustrate this are referred to in a subsequent chapter where we consider, from another point of view, the rule that a contract cannot be made except with the person with whom one intends to contract. When a creditor assents at the debtor's request to accept another person as his debtor in the place of the first, this is called a novation. Whether there has been a novation in any particular case is a question of fact, but assent to a novation is not to be inferred from conduct, unless there has been a distinct and unambiguous request.

Lord *Selborne*, L. C., in *Scarf* v. *Jardine* (1) thus describes novation:—

> In the court of first instance the case was treated really as one of what is called "novation," which, as I understand it, means this—the term being derived from the Civil Law—that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract.

Has it then been sufficiently proved that the Crown ever assented to the substitution of *Smith & Ripley* for the original contractors, and the discharge of the latter from the liabilities which they had undertaken by the contract? The only evidence which can be pointed to as affording the slightest foundation for such a proposition is that contained in the testimony of Mr. *Ripley*,

(1) Ed. 2, p. 210.

(1) 7 App. Cases, 351.

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one of the suppliants, who refers to two conversations which he had at *Ottawa*, one with Mr. *McKenzie*, the then Minister of Public Works, and the other with Mr. *Trudeau*, the Deputy Minister of that department. The first of these conversations with Mr. *McKenzie* is alleged to have occurred in September, 1878, and what passed between Mr. *Ripley* and Mr. *McKenzie* is thus stated by the former. After Mr. *Ripley* had said that he called on Mr. *McKenzie* at the department, and there saw him in his own room, the evidence proceeds thus:—

Q. What did you state to him when you saw him in his own room? A. I stated to him that I had finally secured work with the government by becoming connected with this firm of *Charlelois, Flood & Co.*

Q. You did not then produce any document to him? A. Not at all.

Q. What more did you say to him? Did you tell him the particulars of your agreement with the firm? A. I do not remember all the conversation we had.

Q. Did you tell him the particulars of your agreement with the firm? A. I think I told him I had taken a third interest with the firm.

Q. Did you tell him that Mr. *Smith* was with you? A. I did not state that fact. I presume not. I had always represented *Smith & Ripley* here.

Q. What did he say in answer to that? A. He expressed satisfaction that we were to be connected with the concern. I cannot give his language.

Q. Can you state what he said at all? A. Simply that he was well satisfied that we had become connected with that concern from his long knowledge of us.

Now, assuming for the present that Mr. *McKenzie* had power to bind the Crown by a mere verbal assent, there is clearly not sufficient in this evidence to establish the fact of a novation, that is, a consent by the Crown to a delegation by *Heney, Charlebois & Flood* to *Ripley & Smith* of their rights and liabilities under the contract entered into by them on the 2nd August, 1878. In point of fact, Messrs. *Ripley & Smith* did not acquire

a complete assignment of the whole interest in the contract in respect of which they now sue until some months afterwards, and it was impossible that, at the date of this conversation, Mr *McKenzie* could have assented to an arrangement which was not even proposed or suggested to him. Moreover, even had this conversation been subsequent to the final assignment of the contract by *Heney, Charlebois & Flood*, and had the Minister had authority to waive the rights of the Crown under the contract by a mere verbal assent, there is nothing to show that he ever intended to do so. It is not proved that the clause against the assignment was brought to Mr. *McKenzie's* notice, or that it was present to his mind, and before we could determine that there was either novation or waiver, we should have to be satisfied of this. In truth the evidence only shows that Mr. *McKenzie* received the information communicated to him by Mr. *Ripley*, that his firm had become interested in the contract, by some expression of common courtesy, and altogether falls short of showing that he intended by it to assume the responsibility of altering a solemn contract with the Crown, which had been entered into under the seal of the department and with the sanction of the Governor in Council.

The conversation with Mr. *Trudeau* took place in the spring of 1879. It is said that Mr. *Trudeau*, who was the Deputy of the Minister of Public Works, had power to bind the Crown under the provisions contained in the 4th section of the Public Works Act, 31 *Vic.* ch 12. That section is in these words :—

> It shall be the duty of the said deputy, and he shall have authority (subject always to the Minister) to oversee and direct the other officers and servants of the department; he shall have the general control of the business of the Department, and such other powers and duties which may be assigned to him by the Governor in Council, and in the absence of the Minister and during such absence, may

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suspend from his duties any officer or servant of the department who refuses or neglects to obey his directions as such deputy.

I am at a loss to conceive upon what construction of this clause it is contended that Mr. *Trudeau*, as Deputy of the Minister, has authority to enter into any verbal contracts binding on the Crown, or to alter by verbal agreement solemn formal contracts in writing entered into by the Minister under the official seal of the department, and authorized by order of the Governor in Council. There is no suggestion that any such power has ever been conferred on him by the Governor in Council. The authority to oversee and direct the officers, and to control the general business of the department, is to be subject to the directions of the Minister, and without that condition would be insufficient to empower him to bind the Crown by verbal contracts. The additional powers given to him to act in the Minister's absence are confined to the suspension of officers and servants. It is, therefore, out of the question to say that the Crown could in any way be affected by what Mr. *Trudeau* may have thought fit to assent to in derogation of the rights of the Crown derived under a formal contract entered into under the seal of the department, and approved by the Governor in Council, at a time, too, when for all that appears to the contrary the Minister of Public Works was present at the seat of government, and possibly in the department itself at the very time this conversation took place.

But a conclusive answer to the argument that there was novation founded on any verbal assent, either by the Minister, or the Deputy Minister, is afforded by the 7th section of the Public Works Act. That clause is as follows:

> No deeds, contracts, documents, or writings, shall be deemed to be binding upon the department, or shall be held to be acts of the said Minister unless signed and sealed by him or his Deputy and countersigned by the secretary.

If, therefore, the Minister of Public Works for the time being had written a letter expressly assenting to a substitution of Messrs. *Ripley & Smith* in the place of the original contractors, it would, by the express terms of this enactment, have been wholly ineffectual to bind the Crown, or to alter the rights or liabilities of the Crown, or the original contractors, under the formal contract.

As already stated, an assignment of the contract implies a novation, and novation means a new contract. Then, if such a new contract could not be validly entered into, so as to bind the Crown, by a writing under the signature of the Minister, it is surely idle to contend that an oral agreement of the Minister could have that effect. It is true the 17th clause of the contract implies (for it does not distinctly express it) that there might be an assignment by consent. There was no need for such a provision, for, of course, parties may always by consent alter and rescind their contracts; but although I am at present discussing the case on the general rules of the law of contracts without reference to the 17th clause, I think it right to refer to it here to point out that it does not contain any sanction or recognition of a mere verbal consent to be given by the Minister. The contract was entered into under the authority of the Public Works Act and was executed according to the requirements of that act, and it was beyond the powers of the Minister to provide, even by an explicit stipulation to that effect, that it should be in his power to supersede it by another contract executed without the formalities prescribed by the 7th section of the act. The consent referred to in the 17th clause of the contract must, therefore, mean a consent in writing executed in conformity with the law, and not the mere verbal assent of the Minister, which, in the face of the statute,

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could have been of no avail, even if the contract had expressly stipulated it should be sufficient.

I am, therefore, of opinion that on the general principles of law applicable to all contracts, and without reference to the 17th clause, the Crown is right in saying that it never entered into any contract with Messrs. *Ripley & Smith*, and never came under any liability or obligation to them, and that the petition of right, so far as it is the petition of the last named suppliants, wholly fails.

The original contractors, Messrs. *Heney, Charlebois & Flood*, have however been joined in the petition of right as co-suppliants with Messrs. *Ripley & Smith*, and even though it appears that the latter may be entitled to no relief, yet if the former can make out a right to recover damages, they are entitled to maintain the petition notwithstanding the joinder of the other suppliants having no interest. We have, therefore, next to enquire if a case is made entitling the original contractors to damages. I am of opinion that the answer to this enquiry must also be in favor of the Crown, and that the objections to the petition, regarding it as the suit of *Heney, Charlebois & Flood* exclusively, are quite as insurmountable as those which apply to the case made by the other petitioners. Had it not been for the 17th clause of the contract there would have been grounds for saying that the original contractors might have called upon the court to treat the assignment as in the nature of a sub-contract, and to have awarded them damages, upon the same principles as would have applied had they proceeded with the work personally. The general rule for the performance of contracts for work, such as that which is the subject of the contract in the present case, is that in the absence of any stipulation against assignments or sub-contracts, it may be performed by the agency of sub-contractors. If, in-

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deed, it appears that the personal skill or taste of the contractor for the performance of the work has entered into the consideration of the other party, or that he has been chosen for some other personal qualification, he must perform the contract personally. But in building and railway contracts such a *delectus personæ* is not presumed, and the substitution of a sub-contractor is, in the case of there being no stipulation to the contrary, considered unobjectionable. This is well shewn by the case of *Lea* v. *British Waggon Co.* (1), where it was held that a contract by a waggon company to furnish waggons for a term of years might be assigned to another company, and that on the performance of the contract, the original company, jointly with the assignee company, were entitled to recover the contract price. This decision, as is explained by *Cockburn*, C. J., in his judgment, proceeded upon the ground that in the absence of any special provision against assignment, it was to be presumed from the nature of the contract that actual performance by the first company was not contemplated.

The contractors in the present case are, however, expressly excluded from the right to perform the contract through the medium of assignees or sub-contractors by the 17th clause of the contract, which, as already shewn, in the observations before made on the question of novation, has never been effectually waived or dispensed with, and they are therefore precluded from recovering under the contract, unless they can show personal performance, and this, upon the evidence, is, of course, entirely out of the question.

Then it does not appear that these suppliants have suffered any substantial loss from the refusal of the Crown to proceed with the contract which entitles them to damages The damages awarded by the judgment

(1) 5 Q. B. D. 149.

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appealed from were made up of the value of work actually performed, the loss on the plant provided for the work and the loss of prospective profits, and I quite agree that, if in other respects the suppliants *Smith & Ripley* had been entitled to recover, the measure of damages adopted by the Exchequer Court was a correct one. But in respect of none of these items of damage can the original contractors pretend to have any right to recover. The work on the contract was not done by them, but by *Ripley & Smith*, or by the original contractors and several other persons whom they took into partnership with them immediately after the execution of the contract, and who are not before the court as parties to the petition of right, and for this work Messrs. *Heney, Charlebois & Flood* have been fully indemnified by the money which they received in consideration of the transfer of the contract by them to the other suppliants. As regards the plant, none of it belonged to them, it was the exclusive property of Messrs. *Smith & Ripley*, who were alone damnified by the loss resulting from its being re-sold or rendered useless by the refusal of the Crown to proceed with the contract. And for the loss of prospective profits, it is clear they can have no claim, since all right to these profits had been absolutely relinquished by them in favor of the assignees of the contract.

Another and distinct ground upon which the original contractors must be considered as incapacitated from claiming damages from the Crown is that they had themselves, by the assignment of the contract, voluntarily put it out of their power to proceed to perform their part of the obligations created by it. They could only entitle themselves to damages from the Crown by showing that they were personally ready and willing to proceed in the performance of the contract on their part. Then how can it be said that they have brought

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themselves within this indispensable condition and shown a readiness and willingness to carry out the contract, when they have entirely abandoned it to other persons.

Again, the 17th clause of the contract authorized the Crown, in the event, which had occurred, of an assignment by the original contractors, to rescind the contract absolutely, for, although rescission is not in terms provided for, such is beyond all doubt or question the legal effect of the stipulation on behalf of the Crown contained in that clause; and the order of the Governor in Council of the 14th August, 1879, passed pursuant to its terms, operated as a rescission accordingly. By this clause it was expressly provided, not merely that the Crown should, in the event of an assignment, have power to take the work out of the contractors' hands, but also that, in that case, the contractors should be entitled to no further payments in respect of work actually performed, and further, it was provided that the contractors' plant employed on the work should be liable to be forfeited to the Crown. The Order in Council of the 14th of August, 1879, therefore affords a conclusive answer to any claim for recovery in respect of the three heads under which the damages awarded by the judgment of the Exchequer Court are distributed —the value of work actually done, the loss of prospective profits, and the reduced value of the plant.

Lastly, there can be no right on the part of the original contractors to recover as upon an implied contract for the value of any work actually done by them arising from the benefit accruing to the Crown from work so performed; the case in this respect is exactly analogous to work done under a building contract which has been broken and abandoned by the default of the builder; in that case it has been distinctly held, and is settled law, that the possession of the land does

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not warrant an inference of acceptance so as to give rise to an implied promise by the landowner to pay on a *quantum meruit*, without some proof of positive assent or acquiescence (1). These cases are undistinguishable in all respects from the present in point of law, and it cannot be pretended there ever has been any actual assent or promise by the Crown to pay for any work left on the ground by the original contractors Moreover, the 17th clause by its express terms excludes any such pretence of an implied contract arising from the retention of the work by the government.

The case made by the petition of right is not that the contract had been absolutely assigned to Messrs. *Smith & Ripley*, but that the moneys to become payable under it had alone been so assigned, thus stating it as the case of an equitable assignment only of the payments to arise from the performance of the work by the original contractors. Had the proof borne out this case, and had it appeared that the assignment was so limited, the suppliants would have been undoubtedly entitled to recover in respect of work actually performed by the original contractors, for such an equitable assignment would have been entirely free from objection, either upon the general law, or upon any provision contained in the contract, and the record would have been properly framed for relief upon such a state of facts. The evidence, however, has disclosed that the assignment made was in fact of a totally different character.

The appeal must be allowed with cost, the judgment of the Exchequer Court reversed, and the petition of right dismissed with costs.

FOURNIER, J.:—

This is an appeal from a judgment of the Exchequer Court by which the suppliants, *J. N. Smith* and *J. D.*

(1) *Munro* v. *Butt*, 8 E. & B. 738, and cases collected in Leake on Contracts, P. 60.

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Ripley, were awarded $171,040.77 damages in consequence of the cancellation of the contract for the building and construction of that portion of the Canadian Pacific Railway, known as the Georgian Bay Branch.

By the agreement entered into by three of the suppliants, namely, *John Heney*, *Alphonse Charlebois* and *Thomas Flood*, on the 2nd of August, 1878, with Her Majesty the Queen, represented by the Minister of Public Works of *Canada*, the said *Heney*, *Charlebois* and *Flood* agreed and contracted to perform the works "of excavation, grading, bridging, fencing, track-laying and ballasting" of said Georgian Bay Branch Railway, in consideration of the fixed prices for said works as provided in the 24th clause of the agreement, and amounting to a total sum of $850,000. The works were to be performed as set out in the specifications, plans and drawings annexed to said contract, and the contractors were to fully complete the respective portions of such works and deliver them to Her Majesty on or before 1st July, 1880. The original contractors, for the purpose of being able to prosecute the works with greater vigor, and to assist them pecuniarily in purchasing the necessary supplies, associated with themselves in said contract other parties, and caused the works to be proceeded with and preparations to be made for the further prosetion thereof, and expended large sums of money, and while the work was so being proceeded with, several progress estimates, as provided by the contract, were made in favor of the said original contractors.

On the 30th June, 1879, the suppliants *Smith & Ripley*, who had made the largest advances on said works, took a transfer from all the parties to the said contract of all their interest, "*subject to the terms set out in the "said contract and in the said several assignments there-"of*;" and previous to this transfer and immediately after the said *Smith & Ripley* in their behalf as well as in

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that of the original contractors incurred large expenditure in respect of the construction of steam mills, houses and preparations for future works, and prosecuted the works vigorously and employed a large number of men. They had also made arrangements to complete the works within the time prescribed for the completion of the works by the contract, and had offered to the government good and valid security instead of that given by *Heney, Charlebois & Flood*, when the latter on the 12th August, 1879, received a notice from the Department of Public Works that the contract had been cancelled and annulled. The petition of right in this case is brought in the name of the original contractors as well as that of Messrs. *Smith & Ripley*, who had acquired the sole interest in the contract by the indenture of the 30th June, 1879, *subject to the terms of the contract.*

The first prayer of the petition is as follows:—

1. That it may be declared that the said contractors and your other suppliants claiming through or under them were entitled upon the cancellation of said contract by your Majesty to be paid by your Majesty all damages arising directly or indirectly in consequence of the cancellation of said contract such as are set forth and referred to in the tenth and eleventh paragraphs of this petition, and also for all profits which they, the said contractors, and your other suppliants claiming under them, were prevented from earning and deriving in respect of the works contemplated to be done under said contract and material therefor, and which were lost to them by reason of the cancellation thereof, and to interest upon both damages and profits.

In answer to the suppliants *Heney, Charlebois & Flood's* claim, the Crown sets up that the contract has been cancelled, because they have assigned it to suppliants *Smith & Ripley* in violation of the provisions of the seventeenth clause of the contract; 2nd, because they did not proceed diligently with the work, and were unable to complete it; 3rd, that the notice given by the Government of the cancellation of the contract was not a breach of the contract; 4th, without admitting

any liability to the said contractors, that they had tendered them the sum of $13,807.94, provided the same should be accepted in full of all claims and demands against Her Majesty in respect of the said contract.

In answer to the suppliants *Smith & Ripley's* claim, the Crown alleges that they can be in no better position than the contractors who assigned to them; that the said suppliants have no claim against the Crown under the transfer, because the Crown has refused to consent to such an assignment; if they have acquired any rights under said transfer, they have been forfeited by the cancellation of the contract.

Admitting that the suppliants *Smith & Ripley* are not entitled to recover by petition of right the moneys sought to be recovered by them, because the Crown has not consented, as provided for in the 17th clause of the contract, to the assignment of the said contract by the original contractors to said suppliants *Smith & Ripley*, are not the original contractors, also suppliants, entitled to recover, and should not the first prayer of the petition be granted?

The 17th clause of the contract, which is relied upon by the Crown is as follows:

17. The contractors shall not make any assignment of this contract, or any sub-contract, for the execution of any of the works hereby contracted for; and in any event no such assignment or sub-contract, even though consented to, shall exonerate the contractors from liability, under this contract, for the due performance of all the works hereby contracted for. In the event of any such assignment or sub-contract being made, then the contractors shall not have or make any claim or demand upon Her Majesty for any future payments under this contract for any further or greater sum or sums than the sum or sums respectively at which the work or works so assigned or sub-contracted for shall have been undertaken to be executed by the assignee or sub contractor; and in the event of any such assignment or sub-contract being made without such consent, Her Majesty may take the work out of the contractors' hands, and employ such means as she may see fit to complete the

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same; and in such case the contractors shall have no claim for any further payment in respect of the works performed, but shall nevertheless remain liable for all loss and damage which may be suffered by Her Majesty by reason of the non-completion by the contractor of the works; and all materials and things whatsoever, and all horses, machinery, and other plant provided by them for the purposes of the works, shall remain and be considered as the property of Her Majesty for the purposes and according to the provisions and conditions contained in the twelfth clause hereof.

Now, in order to construe this clause correctly, it is necessary that we should read it very attentively to ascertain what was the real intention of the contracting parties, and the effect which should be given to it.

It first contains a stipulation that there shall be no assignment of contract or sub-contract of the work to be performed. "The contractor shall not make any assignment of this contract, or any sub-contract, for the execution of any of the works hereby contracted for." What penalties have been stipulated in reference to this provision? There are several, but nowhere can I discover that the contract shall be cancelled for having been assigned. One of the penalties provided is that the contractors, in the case of an assignment, even with the consent of the government, shall not be exonerated from liability: "And in any event, no such assignment or sub-contract, even though consented to, shall exonerate the contractors from liability, under this contract, for the due performance of all works hereby contracted for."

Then it is provided that there shall be no claim for the payment of any further sums than the one stipulated in the assignment. "In the event of any such assignment or sub-contract being made, then the contractors shall not prove or make any claim or demand upon Her Majesty for any future payments under this contract for any further or greater sums than the sum or sums respectively at which the work or works so

assigned or sub-contracted for shall have been undertaken to be executed by the assignee or sub-contractor." This portion of the clause cannot be said, any more than the first part, to provide for the cancellation of the contract in the event of an assignment of the contract or the giving of a sub-contract.

To my mind it is conclusive that the government, knowing that transfers and assignments and sub-contracts were inevitable, took the necessary precautions in order that the due performance of the work should not suffer thereby. It was well known by experience that large public works cannot be completed by the original contractors themselves, and that they must get the services of other contractors to perform certain portions of the work. There is such a variety of work to be performed in the building of a railroad that it must be difficult to find a contractor who can perform all these works. It would almost be necessary for him to be a man proficient in all trades. For this reason, when there is masonry to be done, he will sub-contract with a mason, and if he has stations to put up, he will employ a carpenter or master builder, and thus with the different and varied works which have to be done in completing a railway.

The Government has admitted this necessity, but, in order to avoid all inconvenience, has stipulated that in cases of assignments or sub-contracts the Government should only deal with the original contractors. Thus there is a provision, that the contractors shall not be exonerated from liability ; that the contractors shall not receive more for the work done than what they get it done for, and this was no doubt in order to prevent parties tendering for public works with the view of speculating by assigning the contract. These provisions therefore, instead of providing for the cancellation of the contract, have, in reality, admitted that transfers

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and sub-contracts would necessarily take place, and have declared what would be the consequences of such transfers.

The 17th clause contains a third and last stipulation in reference to the assignment of the contract, or a sub-contract being made, without such consent, and that is, that Her Majesty may take the works out of the contractors' hands (not cancel the contract), and employ such means as she may see fit to complete the same. And in such a case the contractors shall have no claim for further payment, but shall nevertheless remain liable for loss and damage which may be suffered by Her Majesty by reason of the non-completion of the contract. This is certainly not a stipulation that the contract shall be put an end to and cancelled, in the event of an assignment, or of a sub-contract being given subject to the terms of the contract, one of which is the consent of the Government, without having obtained the previous consent of the Government. Then can it be said this option was given to the Government in order that they might arbitrarily cancel the contract, and stop the construction of a public work which had been ordered by statute? For it must be here remarked, that in construing this clause of the contract, this court must take judicial notice of the statute authorizing the construction of this public work, viz.: 37 *Vic.*, ch. 14, and that this branch railway formed part of the Canadian Pacific Railway, and that the only power which was left with the governor in council, after the work had once commenced in reference to this branch of the Canadian Pacific Railway, was to suspend the progress of the work until the then next session. The sections relating to this work are the following:

37 *Vic.* ch. 14, sec. 13:

The branch railways shall be constructed as follows, that is to

say: That section of the first branch extending from the eastern terminus of the first section of the said railway to some point on the *Georgian Bay* to be fixed as aforesaid, &c., under such contract as may be agreed upon and sanctioned by the Governor in Council.

Sec. 20:

The Governor in Council shall have the power to suspend the progress of the work until the then next session of parliament.

The option of taking the work out of the hands of the contractors was evidently inserted with the intention of giving to the government and the public further security that the works would be completed with all possible despatch.

Therefore, if the works are to be taken out of the hands of the contractors at all, after they have given good and satisfactory security for their due completion, it can only be for the purpose "of employing such means as the Crown may see fit to complete the same," and not with the intention of stopping the work altogether.

The proper construction to be put on this seventeenth clause, is, in my opinion—1st. That the prohibition to assign the contract, or give sub-contracts, is not absolute, but is restricted or qualified as I have stated; 2nd. That in such a case the contractors are not exonerated from liability for the due performance of all the works contracted for; 3rd. That the contractors are not entitled to receive any further or greater sum from the government than they agreed to pay their assignees or sub-contractors; 4th. That Her Majesty may take the works out of the hands of the contractors and complete the same. No words in this clause give Her Majesty the arbitrary right of taking the works out of the hands of the contractors and to cancel the contract. To take the works out of the hands of the contractors and stop the construction of work for other public or private reasons

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than those provided for, would be contrary both to the spirit and letter of the contract as well as of the statute authorizing the construction of said work. Although adopting this view of the contract, I have no hesitation in saying that the suppliants *Smith & Ripley*, having taken an assignment *subject to the terms and conditions of the contract*, one of which was that the consent of the government should be obtained, and another that the security given by the original contractors *Heney, Charlebois & Flood*, for the due performance of the works, should be replaced by their own security, did all in their power to comply with their agreement. They were led to believe by the principal officers of the department, as well as by the engineer in charge of the works, that the consent of the Crown had been given. Under these circumstances it was not unreasonable for them to think that privity of contract between Her Majesty and themselves existed, but the Crown having denied the giving of said consent, and there being no legal evidence of such consent I must come to the conclusion that no assignment binding on the Crown has been effected. The *condition* of obtaining the *consent* of the Crown having failed the transfer must be considered as void and of no effect. The parties thereto are in consequence reinstated in the position in which they stood before such transfer. The contract, therefore, must be considered as having always been and as being still in force, and the original contractors as entitled, not only to be paid for the works done by themselves, but also the price and value of those executed by *Smith & Ripley* in their stead. At the time of the stoppage of the works and cancellation of the contract, the work was being proceeded with vigorously in accordance with the plans and specifications, and under the direction of the government by the Messrs. *Smith & Ripley* for and on behalf of the original contractors.

This stoppage has not been justified either by the contract or by the evidence of any neglect on behalf of the contractors, and must be treated as a breach of contract on the part of Her Majesty.

After a careful perusal of the evidence I think the amount awarded by the learned judge of the Exchequer Court for work done and received by the government for the benefit of the people of *Canada*, and also the amount of damages should be paid to the suppliants Messrs. *Heney, Charlebois & Flood.* The judgment appealed from should, therefore, be varied by awarding the amount to the suppliants *Heney, Charlebois & Flood*, contractors, reserving to the other suppliants Messrs. *Smith & Ripley* whatever legal rights they may have against the original contractors under the transfers made to them.

HENRY, J. :

Having given judgment in this case in the Exchequer Court, I have very little to add. The law which has been propounded by the Chief Justice and my brother *Strong* as to contracts I have never for a moment doubted, but as regards novation I think the evidence in this case was such as would be a proper question of fact to be left to a jury to ascertain whether or not the Department knew of this transfer, had acted on it, and by its action adopted it. It is in evidence, that the head of the department under which this public work was being constructed knew that, after a certain date, the suppliants, *Smith* and *Ripley*, were doing all the work ; it was known by the chief engineer, under whose immediate direction the works were being carried on ; and it is in evidence that it was officially communicated by him to the department, and he, with the knowledge and sanction of the department, continued to superintend the works done by them. Under these

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circumstances, the law would assume, if such an assumption was necessary, that what was known to these officials was known to the Government. It was perfectly well known that *Smith* and *Ripley* were carrying on the works, and although there is no express agreement in writing to show that they had been adopted by the Government as the contractors of that public work, still there is sufficient evidence in the case for a jury to assume that the Government not only knew of the transfer but had adopted it.

It is true one man cannot assign work which he has contracted to perform to another man without the consent of the party with whom he has contracted, but if *A.* transfer to *B.* work he has contracted to do for *C.* and *C.*, having been informed of it, allows *B.* to complete and finish the work *A.* contracted to do, and makes payment to *B.* on account of work done by him, would not *C.* be estopped from saying: "I have never consented to this transfer, and will not pay B or A.?" This was exactly the point in this case, and I think that not only law but common sense tells us that in such a case the party is estopped.

Then the question has been raised as to whether there ever has been an assignment? It must be admitted that no legal transfer could be made without the assent of the government, but if it was withheld, then the original contract remains in force. How, then, do these parties stand? Instead of *Heney, Charlebois & Flood* doing the work, it was done for them by *Smith & Ripley*, with the knowledge of the department; for it is in evidence that they knew that Messrs. *Smith & Ripley's* plant, machinery, supplies, &c., were being put on the ground and the work being done by them. The department must either say, "we have withheld our assent, and *Smith & Ripley* are but sub-contractors," or we adopt

the transfer. It cannot lie in the mouth of the department to say two things. First, to the suppliants, *Smith & Ripley*, "the contract has not been legally transferred, therefore you have no claim;" second, to the suppliants, *Heney, Charlebois & Co.*, "you have assigned without our consent, therefore you have no claim."

Would such a defence be considered honorable on the part of an individual? Would a jury say to a defendant, "you have allowed this work to "be done, you have accepted it as far as it was "performed, but you need not pay for it?" Such a finding could not be sustained, nor would you find a jury so to decide. The contract was not to be affected by an order in council to the extent contended for. The contract was with Her Majesty, represented by the Minister of Public Works. It was with him, as such representative, that the contractor had to deal, and not immediately with the government.

My brother *Strong* has expressed the opinion that the consent of the Minister to the assignment could only be valid when under seal. The order in council authorized the Minister of Public Works to make the contract, and in that contract all I find is that it shall not be assigned without the consent (it does not say in writing) of the Government. It therefore cannot be said it must be in writing and under seal. Reference has also been made to the repudiation of the transfer of the contract by *Heney*, *Charlebois* and *Flood*, after the contract had been cancelled by the Government. The first Order in Council put an end to the contract. This Order in Council was passed on the recommendation of the Minister under whose control the works were being carried on. By comparison of dates, it will be found that the Department of Public Works was aware of this assignment before the Order in Council was passed to determine the contract; still,

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it was not given as a reason that the transfer of the contract had been made. Now, if the Government had power at all to cancel this contract, the first order took effect, and the second was not necessary or called for. In the first order the reason given is not because the contract had been assigned, nor, indeed, any other, because the Government had come to the conclusion to abandon the line altogether. The reason given in the second order in Council cannot avail, as the contract had already been put an end to by the first order.

All the equities of the case are certainly in favor of the suppliants. The law certainly entitles some one to be paid for the work done for and received by the Goverment. How can it be said, under these circumstances, that there has been no novation, and that no payment should be made for these works, or for consequential damages?

I maintain that if the Government did not assent to the transfer, then *Charlebois & Co.* are entitled to recover for the work done by *Smith* and *Ripley*—and also entitled to recover damages.

I have listened very attentively to the reasons given by my brother Judges for reversing the judgment, but I have heard nothing to alter my view of the case, and therefore think the appeal should be dismissed.

TASCHEREAU, J.:—

I find it impossible, for the reasons given at full length by the Chief Justice and by my brothers *Strong* and *Gwynne*, to sustain the judgment given by the Exchequer Court in favour of the respondents, or to give judgment in favour of *Charlebois, et al.*, the former contractor, as suggested by my brother *Fournier*. I have come to this conclusion with great reluctance, for I see that an injustice is done to the respondents by such a judgment. I am sure, however, that the govern-

ment will not avail itself of this judgment and of the strictness of the law to refuse to the respondents the justice they are entitled to at their hands.

GWYNNE, J.:—

The construction which I put upon the pleadings in this proceeding and upon the matters put in issue thereby is different from that put upon them by some of my learned brothers, but nevertheless leads to the same conclusion.

The petition of right filed in this case is presented by *James N. Smith* and *Josiah D. Ripley* as the sole persons beneficially interested in the several amounts claimed to be recoverable from the government in respect of the matters set forth in the petition, the other persons joined as co-suppliants, being so joined only as being persons through whom *Smith & Ripley* claim, and because of an apparent doubt in the mind of the pleader whether the claim of *Smith & Ripley*, being through the other suppliants *Heney, Charlebois & Flood*, could be sustained unless those original contractors should be joined as co-suppliants with *Smith & Ripley*.

The short material contents of the petition are that by an indenture dated the 2nd of August, 1878, a contract was entered into between *Heney, Charlebois & Flood* as contractors with Her Majesty, represented therein by the Minister of Public Works for *Canada*, for the construc- of certain public work therein mentioned. That the said contractors, for the purpose of being able to prosecute such work with greater vigor, and to assist them pecuniarily in carrying on the works required to be done under the said contract, associated with themselves the suppliants *James N. Smith* and *Josiah D. Ripley* to assist them by advancing large sums of money for the purposes of said works, &c., &c. That after considerable work had been performed under

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the contract, and upon the 12th August, 1879, the said contractors received from the Department of Public Works a letter of the date of the 9th August, informing them that by an order in council of the 25th July then last, a copy of which was enclosed, the contract made with the contractors was annulled, and the contractors were thereby notified that the work was taken out of their hands, and that they should accordingly cease all further operations under the said contract. The petition then alleges, in paragraph 11, that the said contractors and the other suppliants on their behalf sustained very heavy damages by the cancellation of the said contract, that of several progress estimates made both before and after the receipt of said notice of cancellation there remained still unpaid, in respect of work done prior to the receipt of such notice, the sum of $13,874.94; that under the said contract there would have been realised by the contractors and the other suppliants large profits, if the said contract had not been cancelled, amounting to $100,000 or thereabouts. The petition then, in the 15th paragraph, sets forth the foundation upon which the claim of the suppliants *James N. Smith* and *Josiah D. Ripley* to the relief claimed is rested, as follows: "That your suppliants, the said *Smith & Ripley*, being at the time of the receipt by said contractors of the said notice (above mentioned) heavily interested in the said contract under the said contractors, and in the profits to be made therefrom, by virtue of the money advances and pecuniary liabilities incurred by them in respect of the said works, did, for valuable consideration, procure to be assigned and transferred by the said contractors, by an instrument in writing duly executed and dated on or about the 25th day of October, 1879, all their claims, demands, rights, debts and choses in action against Her Majesty in respect of the said contract, together with all moneys

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payable by or recoverable from Her Majesty in respect thereof, including moneys payable according to estimates made by Her Majesty's engineers in respect of work actually done under said contract, and also all moneys owing by or recoverable from Her Majesty to said contractors for damages and loss of profits in consequence of the cancellation of said contract, to which they, the said contractors, or any person claiming under them, ever were, or could be entitled against Her Majesty, and that they, the said *Smith & Ripley*, are now solely in equity, if not in law, entitled to said demands, rights, debts and choses in action and to the moneys payable or recoverable in respect thereof." Then, in paragraph 16, it is submitted that the suppliants, *Smith* and *Ripley*, are entitled to be paid all sums payable to or recoverable by said contractors according to estimates made under said contract, and still unpaid, and also to all damages and loss of profits and interest thereon to which the said contractors, or any of them, or any one claiming under them, ever were or could be entitled in respect of the matters aforesaid; and the petition prayed 1st, that it might be declared that the said contractors and the other suppliants claiming through or under them, were entitled upon the cancellation of said contract by Her Majesty to be paid all damages arising directly or indirectly in consequence of the cancellation of said contract, and also for all profits which the said contractors and the other suppliants claiming under them were prevented from earning in respect of the works contemplated to be done under said contract and material therefor, and which were lost to them by reason of the cancellation thereof, and to interest upon both damages and profits, and 2nd. That the suppliants, the said *Smith* and *Ripley* might be declared entitled to be paid, and may be paid all moneys payable by and recoverable from Her

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Majesty in respect of the matter aforesaid, &c., &c. 3rd. That the sum of $250,000, or such other sum as might, upon a reference for that purpose, be found payable to the suppliants, the said *Smith* and *Ripley*, in respect of said matters, and 4th. That, if necessary, a reference might be directed to ascertain the amount of damages caused to the said contractors and the other suppliants claiming under them, arising in any manner, directly or indirectly, in consequence of the cancellation of the said contract, and also to ascertain the amount of profits which could have been earned and realized by said contractors and the other suppliants claiming under them, if the said works contemplated under said contract had been gone on with, and which were lost to said contractors, and the other suppliants claiming under them, in consequence of the cancellation of said contract, and for costs and further relief.

Now, upon this petition, it is apparent that the foundation upon which the claim of *Smith & Ripley* is based is the instrument of the 25th October, 1879, executed after the cancellation of the contract for the purpose of assigning to *Smith & Ripley* all the rights, debts and choses in action of the original contractors *Heney, Charlebois & Flood* under the contract; in order, therefore, that *Smith & Ripley* should succeed it was necessary that they should aver and prove what the rights, debts and choses in action of *Heney, Charlebois & Flood* so assigned, were, but such rights, debts and choses in action are only averred as subsidiary to the right of *Smith & Ripley* to recover to their own use whatever they may be able to establish such rights, debts and choses in action to be.

Before alluding to the answer of the Attorney General for the Dominion filed to this claim, it will be necessary to draw attention to certain matters constituting a portion of the defence set up in such answer.

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By a letter dated the 5th August, 1879, addressed to the Minister of Railways by *Smith & Ripley* by their attorney, *A. Ferguson*, they inform the minister that they had purchased from the contractors for the Georgian Bay branch of the Canadian Pacific railway all their right, title and interest in said contract, and in all moneys and benefits payable or receivable and now accrued or to accrue thereunder,

And that in so far as said contractors had any power or authority to assign said contract and their interest thereunder, or to substitute any other person or persons in their place with reference thereto, we have been so substituted for said original contractors and have undertaken the burthen and execution of said contract. The original contractors have transferred to us, as will be seen by the accompanying documents, all their respective interests in said contract and benefits thereunder, and we have been and now are engaged with a large force in the execution of the works under the contract in question. We beg to forward herewith five original documents, which documents, along with the assignment from *Heney*, one of the original contractors, to *Charlebois* and *Flood*, on file in your department, show clearly our title as assignees of the original contractors, and to be dealt with as such by the department as well as to receive instructions in any matter relating to the said contract. You will observe on reference to the agreement "B," dated 30th June last, between *Charlebois & Co.* and ourselves, that we undertook to replace the $20,000 cheque deposited by *Charlebois & Co.* as part security on said contract with your department by a security of our own of a similar amount satisfactory to your department, and to get the cheque deposited by *Charlebois & Co.* released and given up to *Charlebois & Co.*, on or by 1st August instant. In order to carry out our agreement in reference to this matter, we applied to your department on 1st of August for leave to substitute said security of *Charlebois & Co.*, by security of our own for a like amount, and for the delivery up of said cheque deposited by *Charlebois & Co.*, but we were informed in reply that no answer could be given to our request on that day.

We are, so far, without an answer to the above request, and we understand the delay is owing to some change of policy either contemplated or resolved upon by the government in respect of the works under the contract in question. We would respectfully suggest that in the meantime the return of the security deposited by *Charlebois & Co.*, as above mentioned, would relieve us from liability (if any) in respect of the return of the said security, and also from

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double interest; that is to say, interest on the *Charlebois* cheque and our own security for a like amount, which we are holding in readiness for substitution, and so far as we are concerned such return would not interfere with any future arrangements which may be in contemplation. We would request that, if it is not absolutely necessary to retain the original documents sent herewith, after recording them in the books of the department, they should be returned to us, we having no other copies.

We have the honor to be, &c.,

Ripley, Smith & Co.,

By *A. Ferguson*, their attorney.

It is unnecessary to refer to all the points of defence raised in the answer of the Attorney General, for it was admitted, after the argument, that the evidence failed to establish that the contractors had made such default in proceeding with the work as justified the taking the contract out of their hands under a clause in the contract to that effect, and the defence was rested upon the fact of the assignment of the contract by the original contractors to *Smith & Ripley* contrary to an express provision of the contract. The defence upon this point commences at paragraph 9 of the answer, wherein the Attorney General alleges—that by the seventeenth section of the contract it is provided that the contractors should not make any assignment of the contract or any sub-contract for the execution of any of the works thereby contracted for, and in any event no such assignment or sub-contract, even though consented to, should exonerate the contractors from liability under the contract for due performance of all the works thereby contracted for, and, in the event of any such assignment or sub-contract being made without such consent, Her Majesty might take the work out of the contractors' hands and employ such means as she might see fit to complete the same, and that in such case the contractors should have no claim for any further payment in respect of the works performed, but should nevertheless remain liable for all loss and damage which

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might be suffered by Her Majesty by reason of the non-completion, by the contractors, of the works. The tenth paragraph then alleges the execution of the indenture under seal, dated the 2nd day of August, 1878, the day upon which the contract was entered into, whereby *Heney* assigned, transferred and set over unto *Charlebois* and *Flood* all his interest in the said contract. In the eleventh paragraph the Attorney General alleges that by an instrument or agreement which the Attorney General cannot particularly set forth the said *Flood* assigned and transferred to *George Shannon, Daniel M. Monty, John C. Monty* and *William B. Cooper*, some part or interest in the said contract, and that by the indenture bearing date the 15th of May, 1879, the said *Flood, Shannon, Daniel M. Monty, John C. Monty* and *William B. Cooper* assigned and transferred to the suppliant *Josiah D. Ripley* all their interest in the said contract, and all right, title and interest in the benefits and advantages to the derived thereunder. In the twelfth paragraph it is alleged that by some instrument or agreement, the particulars whereof Her Majesty's Attorney General has been unable to ascertain, the said *Alphonse Charlebois*, assigned and transferred to *Edward Shanly* and *Louis Théophile Mallette* some part or interest in the said contract, and by an indenture bearing date the 30th day of June, 1879, the said *Charlebois, Shanly* and *Mallette* transferred and assigned to the suppliants *Smith & Ripley* all their right, title and interest in the said contract, together with all powers, privileges and emoluments derivable or to be derived from the said contract. In paragraph 13 it is alleged that by certain agreements, the particulars of which Her Majesty's Attorney General has been unable to ascertain, the said *Charlebois, Flood, Heney, Shanly, Mallette, Shannon, Dl. M. Monty, John C. Monty* and *William B. Cooper* did assign and transfer to the suppliants *James N.*

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Smith and *Josiah D. Ripley* all their respective rights and interests in the said contract, and to further evidence and define the rights and interests of all parties with respect to the said contract the said contractors, that is to say, *Heney*, *Charlebois* and *Flood*, and the said *Shanly*, *Mallette*, *Shannon*, *Dl. M. Monty*, *John C. Monty* and *William B. Cooper* did by indenture, dated the 30th June, 1879, among other things in effect declare that the sole interest in the said contract was then, at the date of the said indenture, absolutely vested in the suppliants *James N. Smith* and *Josiah D. Ripley*, subject to the terms of the said contract. Then, in the 14th paragraph, the Attorney General alleges that the said several assignments were made without the consent of Her Majesty, and in violation of the provisions of the 17th section of the said contract, and Her Majesty, under the powers contained in the said 17th section, took the work out of the said contractors' hands, by reason whereof the suppliants have no claim against Her Majesty in respect of the works performed, as alleged in the petition. The answer then admitted that,according to the estimates of the engineer, the work done prior to the work being taken out of the contractors' hands amounted to $24,807, of which $11,000 had been paid to the contractors, leaving a balance of $13,807.94, which, however, the Attorney General insisted was not, under the circumstances, payable to the contractors. However, notwithstanding that he insisted it was not recoverable, he thereby offered on behalf of Her Majesty, and without prejudice to Her Majesty's position and defence to the said petition, and without admitting any liability in the premises, to pay, provided it should be accepted in full of all claims and demands against Her Majesty in respect of the said contract.

To this answer, besides joining issue upon the statements by way of defence therein alleged, the suppliants

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reply that the contract was not cancelled, or annulled, or the works taken out of the contractors' hands, for the reasons stated in the answer, or for any of such reasons, but that the said contract was cancelled and annulled and the work taken out of the contractors' hands because of the determination of Her Majesty, long before said cancellation took place, to abandon and proceed no further with the works,contemplated and contracted to be done under the contract ; and for a further replication, the suppliants say that the said assignments were not made without the consent of Her Majesty, but that Her Majesty had full knowledge before said assignments were made and also immediately thereafter, and before the said Order in Council of the 25th July, 1879, was passed, and gave her consent thereto, and after such notice and knowledge Her Majesty recognised the said assignees as contractors under the said contract, and allowed them to go on with the work thereunder and to incur a large outlay and expenditure thereupon on the faith of such assignments and the recognition thereof by Her Majesty ; and the suppliants further say that Her Majesty did not under the powers and for the reasons alleged in the fourteenth paragraph, take the said work out of the contractors' hands.

Issue was joined upon these replications.

This replication displays a singular departure from the claim as set up in the petition. There the claim of *Smith* and *Ripley* is based upon an assignment of the rights, debts and choses in action, whatever they were, of the original contractors executed to *Smith* and *Ripley*, in October, after the cancellation of the contract which is complained of, whereas in this replication the claims of *Smith* and *Ripley* are based upon an absolute assignment of the contract itself, together with the rights of the original contractors thereunder,

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coupled with an averment that such assignment was assented to by Her Majesty, who accepted *Smith* and *Ripley* as the contractors in lieu of *Heney*, *Charlebois* and *Flood*, long before the alleged cancellation, and so that the cancellation did not take place for the reason alleged in the 14th paragraph of the statement, by way of defence, namely, the assignment to *Smith* and *Ripley* without the consent of Her Majesty.

Now, as to all of the assignments spoken of in the statement by way of defence and in the evidence, it may be here observed that it is not necessary to refer to any of them except that to *Smith* and *Ripley*, perfected by the indentures of the 30th June, 1879, for, upon production, it appeared that none of the others purported to assign the contract itself, but merely to transfer to the assignees thereof certain shares and interests in the profits and loss of the work in partnership together with the original contractors ; but as to the assignment to *Smith* and *Ripley* in June, 1879, there can, I think, be no doubt that it was such an assignment as is pointed at in the 17th paragraph of the contract, in the event of which being made without the consent of Her Majesty, it became competent for Her Majesty to take the contract out of the contractors' hands, and that thereupon the provision that in such case the contractors should have no claim for any further payment in respect of work performed would come into operation. Upon the assignment becoming known it was competent for the government to assent thereto or under the provision of the 17th section to take the contract out of the contractors' hands, and to annul it in so far as to deprive them of all benefit thereunder, while their liability to the government for all loss or damage, if any, which might be occasioned to the government by reason of the non-completion of the works by the contractors would still remain.

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The evidence, I think, leaves no doubt that the fact of the assignment of the 30th June, 1879, first became known to the government by the letter of the date of the 5th August, 1879, addressed to the Minister of Railways by Mr. *Ferguson* as attorney of *Smith & Ripley*. Then it appears that on the 9th of August the acting Minister of Railways, the minister himself being absent, laid a report before the Privy Council of the Dominion in which he alleges that subsequently to the passing of the order in council of the 25th July, 1879, referred to in the petition of right, it came to his knowledge that prior to the said 25th July, namely, on the 30th June, 1879, the contractors *Heney, Charlebois & Flood* had without the knowledge or consent of Her Majesty, or of the Minister of Railways and Canals acting in that behalf for Her Majesty, assigned and transferred the said contract to Messrs. *Smith, Ripley & Co.* That he was not aware when he recommended the order in council of the 25th of July that such assignment had been made in contravention of the 17th article of the contract, that on the 5th of August he was notified by letter purporting to be signed by the said Messrs. *Smith, Ripley & Co.*, that said assignment had been made to them, and at the same time a paper purporting to be an assignment of the said contract duly executed was deposited in the Department of Railways and Canals. That such assignment was never assented to by Her Majesty, or by the Minister of Railways and Canals, acting for Her Majesty, and he, therefore, recommended that the contractors *Heney, Charlebois & Flood* should be notified that the said contract is taken out of their hands and annulled. Upon this report action was taken by the Council on the 14th August, and an order in council was passed in pursuance thereof authorizing the taking the contract out of the hands of the contractors accordingly. It was contended upon the part of

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the suppliants that this assignment to *Smith & Ripley* was not in fact the true cause for the passing of this order in council, and that the true cause was that the government had changed their policy with respect to the work in progress, and intended to go no further with it. With the motive of the government in passing the order we have nothing to do, and cannot inquire into it. The fact of the assignment, of which the government were not aware at the time of the passing the order in council of the 25th July, when it came to their knowledge, authorized them, in the terms of the contract, to rest upon it as affording sufficient ground for taking the contract wholly out of the contractors' hands, notwithstanding the passing the previous order; and the assignees of the contract who, without the consent of the government, can derive no benefit from the assignment, can have no *locus standi* to call in question the motives of the government, so neither could the original contractors, who, for valuable consideration, had parted voluntarily with all their interest therein. There can, therefore, I think, be no doubt that the government can, as a defence to this petition, rest upon the assignment without their consent, as terminating all interest of the contractors, and of *Smith & Ripley* as claiming through them, under the contract.

It is, however, not improper, I think, that we should say that the evidence seems to establish the most perfect integrity and good faith upon the part of these gentlemen, and such as to entitle them to expect and to receive the most favorable consideration of their claims by the government—unless, indeed, good faith upon their part may be said to be the cause of the loss occasioned to them by the consent of the government to the assignment to them being withheld; that they were influenced in taking the assignment by encouragement held out to them, or what they not unreasonably

believed to be encouragement held out to them, in conversation with persons supposed by them to have authority, there is reason, I think, to believe, and that they *bonâ fide* believed that by taking the assignment they were promoting the objects the government had, or were believed to have in view, as well as securing their own interest there can, I think, be no doubt; so that, in view of all the circumstances attending their acquiring the assignment, and their frankness and good faith in communicating it to the government, which they did in the hope, and not unreasonable expectation, that it would be without hesitation assented to by the government, although they cannot succeed upon their petition in this case by the judgment of the court, they certainly appear to be entitled to the most favorable consideration of their claim out of court.

The Attorney-General, in his answer upon behalf of the Government, has, without admitting any liability, submitted to pay $13,807.94, the unpaid balance of the progress estimates, up to the time of the contract being taken out of the contractors' hands. We might award this sum to be paid upon this submission, but that would be only on the condition of its being accepted as tendered in satisfaction of all claims. The suppliants may, perhaps, prefer to urge their whole claims upon the favorable consideration of the Government unembarrassed by the acceptance of the above sum on such conditions. If, however, the suppliants should be willing to accept the amount as tendered in the answer a decree, in my opinion, may be made for that amount, but it would have to be without costs.

Appeal allowed with costs.

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

Solicitor for respondent: *A. Ferguson.*