

1895 JOHN T. ROSS AND OTHERS (SUP- } APPELLANTS ;
 *Oct. 1. PLIANTS)..... }
 *Dec. 9. AND
 HER MAJESTY THE QUEEN } RESPONDENT.
 (RESPONDENT)..... }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Contract—Public work—Final certificate of engineer—Previous decision—
 Necessity to follow.*

The Intercolonial Railway Act provides that no contractor for construction of any part of the road should be paid except on the certificate of the engineer, approved by the commissioners, that the work was completed to his satisfaction. Before the suppliants' work in this case was completed the engineer resigned, and another was appointed to investigate and report on the unsettled claims. His report recommended that a certain sum should be paid to the contractors.

Held, per Taschereau, Sedgewick and King JJ., that as the court in *McGreevy v. The Queen* (18 Can. S.C.R. 371) had, under precisely the same state of facts, held that the contractor could not recover that decision should be followed, and the judgment of the Exchequer Court dismissing the petition of right affirmed.

Held, per Gwynne J., that independently of *McGreevy v. The Queen* the contractor could not recover for want of the final certificate.

Held, per Strong C.J., that as in *McGreevy v. The Queen* a majority of the judges were not in accord on any proposition of law on which the decision depended, it was not an authority binding on the court, and on the merits the contractors were entitled to judgment.

APPEAL from a decision of the Exchequer Court of Canada (1) dismissing the suppliant's petition of right.

The circumstances of this case were precisely the same as those in *McGreevy v. The Queen* (2). The suppliants were contractors for construction of a portion of the Intercolonial Railway, and before the work

*PRESENT :—Sir Henry Strong C.J., and Taschereau, Gwynne Sedgewick and King JJ.

(1) 4 Ex. C.R. 390.

(2) 18 Can. S.C.R. 371.

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was completed the engineer, Mr. Sandford Fleming, resigned the position. Some time after Mr. Shanly, C.E., was appointed by the Crown to investigate unsettled claims in connection with the railway and report to the Government. He reported on the claim of the suppliants, recommending payment to them of a certain sum, but payment was refused, and in answer to a petition of right filed the Crown contended that there was no final certificate of the engineer, approved by the railway commissioners, as required by the Intercolonial Railway Act. The Exchequer Court judge dismissed the petition, holding that he was bound by the decision in *McGreevy's* case. The suppliants appealed.

Stuart Q.C. and *Ferguson* Q.C. for the appellants. In *McGreevy v. The Queen* (1) the judges were not in accord on matters of law, and the decision does not bind the court. See *Stanstead Election Case* (2); *Ridsdale v. Clifton* (3).

The merits were fully discussed in the former case, and we rely on the judgment of Strong J. therein.

Hogg Q.C. for the respondent, contended that the court could not but follow *McGreevy v. The Queen* (1), and on the merits cited *Cutter v. Powell* (4); *Munro v. Butt* (5).

THE CHIEF JUSTICE.—For the reasons stated in my judgment in the case of *The Queen v. McGreevy* (1), a case which involved precisely the same questions as those which are presented by the appeal now before the court, I am of opinion that this appeal should be allowed and judgment should be entered in the Exchequer Court for the suppliants.

(1) 18 Can. S.C.R. 371.

(3) 2 P.D. 276.

(2) 20 Can. S.C.R. 12.

(4) 2 Sm. L.C. 9 ed. 1.

(5) 8 E. & B. 738.

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The case of *The Queen v. McGreevy* (1) I do not consider a binding authority for the reason that a majority of the judges composing the court were not of accord on any proposition of law on which the decision of the appeal depended. The late Chief Justice and Mr. Justice Gwynne were of opinion that the certificate of Mr. Shanly was not the final certificate of the chief engineer. My brother Taschereau, my late brother Patterson and myself, in accord with the Exchequer judge, Mr. Justice Fournier, were of opinion that the certificate of Mr. Shanly was the final and closing certificate required by the contract. Mr. Justice Patterson, however, differing from the members of the court who in other respects agreed with him, thought that was not sufficient to entitle the suppliants to recover. Upon this latter point there was no concordance of a majority of the court. Under these conditions it is apparent that there was no agreement of a majority of the court on any distinct proposition of law. Upon authority, therefore, I consider the judgment in *The Queen v. McGreevy* (1) not to be a decision binding upon me, inasmuch as the judgment of the majority of the court proceeded upon no settled principle but upon different grounds.

I am, therefore, of opinion that the appeal should be allowed and judgment entered in the Exchequer Court in favour of the suppliants.

TASCHEREAU J.—Whatever may have been the reasons given by each of the judges who concurred in dismissing the suppliants' claim in *The Queen v. McGreevy* (1), the decision in that case is that upon a certificate such as the one upon which the suppliants here rely, the Crown is not liable. By that decision we are bound, and the appeal must be dismissed. It would

(1) 18 Can. S.C.R. 371.

be a blot on the administration of justice in this country if the present appellants succeeded upon a case precisely similar to that in which McGreevy failed.

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GWYNNE J.—Upon the 26th day of October, 1869, two persons doing business together as contractors in partnership under the name, style and firm of J. B. Bertrand and Company, entered into a contract by deed with Her Majesty represented by the Intercolonial Railway Commissioners appointed under the Dominion statute 31 Vic. ch. 13, for the construction of a portion of the Intercolonial Railway, known as section nine of that railway, according to certain plans and specifications annexed to and made part of the said contract.

Upon the 15th day of June, 1870, the same contractors in like manner entered into a similar contract with Her Majesty for the construction of another portion of the said railway known as section fifteen thereof. By the said respective contracts the said contractors covenanted with Her Majesty that the said section number nine should be finally and entirely completed in every particular to the satisfaction of the said commissioners and their engineer on or before the first day of July, 1871, at and for the price or sum of \$354,897 to be paid as in the contract for that section was provided, being at the rate of \$16,899.86 per mile of that section, and that the said section number fifteen should in like manner be finally and entirely completed to the satisfaction of the said commissioners and their engineer on or before the first day of July, 1872, for the price or sum of \$363,520.59, to be paid as in the contract for that section was provided, being at the rate of \$30,000 per mile on that section. The said contractors by the said respective contracts further covenanted with Her Majesty—

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That all the works should be executed and materials supplied in strict accordance with the plans and specifications, and to the entire satisfaction of the commissioners and their engineer, and that the commissioners should be the sole judges of the work and material, and that their decision on all questions in dispute with regard to the works or materials, or as to the meaning or interpretation of the specifications or plans, or upon points not provided for, or not sufficiently explained in the plans or specifications, should be final and binding upon all parties. By paragraph no. 3 of said respective contracts, it was covenanted that the times before mentioned for the final completion of the works embraced in the respective contracts should be of the essence of the said respective contracts, and that in default of such completion on the respective days for that purpose limited by the contracts the said contractors should forfeit all right and claim to the sum or percentage by the said respective contracts agreed to be retained by the commissioners, and also to any moneys whatever which at the time of such failure of completion as aforesaid might be due or owing to the contractors; and that the contractors should also pay to Her Majesty as liquidated damages and not by way of fine or penalty the sum of two thousand dollars for each and every week, and the proportionate fractional part of such sum for every part of a week, during which the works embraced in the said respective contracts, or any portion thereof, should remain incomplete, or for which the certificate of the engineer approved by the commissioners should be withheld, and the commissioners might deduct and retain in their hands such sums as might become due for liquidated damages from any sum of money then due or payable, or to become due and payable there-

after to the contractors. By paragraph numbered 4 in the said respective contracts it was provided that :

The engineer should be at liberty at any time before the commencement or during the construction of any portion of the work to make any changes or alterations which he might deem expedient in the grades, the line of location of the railway, the width of cuttings or fillings, the dimensions or character of structures, or in any other thing connected with the works whether or not such changes increased or diminished the work to be done, or the expense of doing the same, and that the contractors should not be entitled to any allowance by reason of such changes, unless such changes consisted in alterations in the grades or the line of location, in which case the contractors should be subject to such deductions for any diminution of work, or entitled to such allowance for increased work, as the case may be, as the commissioners might deem reasonable, their decision being final in the matter.

By paragraph 9 of the said respective contracts it was declared that—

9. It was distinctly understood, intended and agreed that the said prices or consideration of \$354,897 in the one case and of \$363,520.50 in the other shall be and shall be held to be full compensation for all the works embraced in or contemplated by the said respective contracts or which might be required in virtue of any of the provisions of the same, or by law, and that the contractors should not upon any pretext whatever be entitled by reason of any change or addition made in or to such works, or in the said plans and specifications, or by reason of the exercise of any of the powers vested in the Governor in Council by the Act intituled, "An Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineer by the said respective contracts, or by law, to claim or demand any further

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or additional sum for extra work or as damages or otherwise the contractors by the said respective contracts expressly waiving and abandoning all such claims or pretensions to all intents and purposes whatsoever except as provided in the fourth paragraph or section of the said respective contracts.

By the eleventh paragraph or section of the said respective contracts it was further mutually agreed upon by the parties thereto—

11. That cash payments equal to 85 per cent of the value of the work done approximately made up from the returns of progress estimates should be made monthly, on the certificate of the engineer that the work for or on account of which the sum should be certified had been duly executed, and upon approval of such certificate by the commissioners; that on the completion of the whole work to the satisfaction of the engineer a certificate to that effect should be given but that the final and closing certificate including the 15 per cent retained should not be granted for a period of two months thereafter; and that the progress certificates should not in any respect be taken as an acceptance of the works or release of the contractors from their responsibility in respect thereof, but that they, upon the conclusion of the works, would deliver over the same in good order, according to the true intent and meaning of the contract and of the specifications annexed to and made part of the said contract.

The contractors proceeded with the construction of the works under these contracts, and from time to time received progress certificates from Mr. Fleming, the engineer of the commissioners, and payment thereof, but they wholly failed to complete the respective works on the days limited by the contracts for the completion thereof, namely, the section 9 on the 1st

day of July, 1871, and the section 15 on the 1st day of July, 1872, and in the spring of 1873, by reason of such default continuing, the commissioners were obliged to take the completion of the said works into their own hands, and did complete the same under the terms of the contract at the cost of the Government.

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The statement in the suppliants' petition of right in relation to this matter is thus stated by the suppliants in 23rd, 24th, 25th and 26th paragraphs of the petition of right.

23. The said J. B. Bertrand & Co., under the aforesaid contract for section 9, had undertaken to finish and complete the same on or about the first day of July, one thousand eight hundred and seventy-one, and they did virtually complete the same on or about the month of May, 1873, and if any delay occurred in the completion of the same it is altogether attributable to the acts of the commissioners and engineers under their directions, to the alterations made in the grades and line of location, to changes in the works and to large quantities of extra and surplus work imposed upon the said J. B. Bertrand & Co. and for which they cannot be held responsible.

24. The said J. B. Bertrand & Co. under the aforesaid contract for section 15, had undertaken to finish and complete the same on or about the 1st day of July, 1872, and they did virtually complete the same on or about the month of May, 1873, and if any delay occurred in the completion of the same it is attributable to the acts of the commissioners and the engineers under their direction—to the alterations made in the grades and line of location—to changes in the works and to the large quantity of extra and surplus work imposed upon the said J. B. Bertrand & Co., and for which they cannot be held responsible.

25. That the said commissioners in the spring of the year 1873, under misapprehensions and without any reasonable cause, and at a time when a large amount of money was due to the said J. B. Bertrand & Co. for work done, assumed control of the said works upon the said sections, and without giving J. B. Bertrand & Co. any notice of their intention of so doing in writing or otherwise as required by contract, paid out money so belonging to the said J. B. Bertrand & Co. to some of the workmen on the said works, which position the said J. B. Bertrand & Co. were forcibly constrained to accept.

26. That in consequence of this action of the commissioners the said J. B. Bertrand & Co. suffered great loss from the fact that the said

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commissioners, after assuming control of the works, expended unnecessarily large sums of money which would not have been expended, and which the said J. B. Bertrand were not bound to expend, and which were for works not contemplated nor included in the contracts, and it is submitted that no portion of the same can be charged in deduction of the lump sum mentioned in the contracts for sections 9 and 15.

The allegations in these paragraphs of the petition are thus answered in paragraph no. 24 of the statement of defence filed by Her Majesty's Attorney General.

24. Her Majesty's Attorney General in answer to paragraphs 23, 24, 25 and 26 of the said petition says that the contractors having made default in the prosecution of the work required to be done under the said contracts, the said commissioners in strict accordance with the provisions of the said contracts and with the contractors' assent, finding the men employed by the contractors on the said sections of the said railway unpaid, notwithstanding that up to that time the contractors had been paid more than they were entitled to under the contracts, and finding the work upon the said sections stopped, took the work into their own hands and proceeded to complete the same in accordance with the terms of the said contracts; and the said Attorney General denies that the default of the contractors in not proceeding with their work upon the said sections was in any wise attributable to the said commissioners or the engineer of the Government.

Now after the completion of the work by the commissioners, and upon the first day of June, 1874, the said commissioners by force of an Act of the Dominion Parliament, 37 Vic. ch. 15, became *functi officio*, and thereupon all the powers and duties which had been vested in them became by the said Act transferred to and vested in the Minister of Public Works, and by the Act it was enacted and declared that all contracts entered into with the commissioners as such should enure to the use of Her Majesty and should be enforced and carried out under the authority of the Minister of Public Works as if they had been entered into under the authority of an Act passed in the 33rd year of Her

Majesty's reign entitled an Act respecting the Public Works of Canada.

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Although the commissioners by this Act ceased to have control over the contracts entered into with them for the construction of the works contracted for by the above named contractors, their engineer, Mr. Fleming, continued for several years to be the engineer in charge of the Intercolonial Railway under the Minister of Public Works; and he could have given to the contractors the certificate in the above 11th paragraph of their contracts mentioned if they had by fulfilment of their contracts to his satisfaction become entitled to such certificates; but he never did give to them and indeed never could have given to them any such certificates within the terms of the contracts in that behalf for, by the default of the contractors to complete the works within the times in that behalf provided by the contracts, and the commissioners having been obliged because of such default to take the works from the contractors and to complete them themselves, the contractors by the express terms of the above third paragraph of the contracts had absolutely forfeited all claim to all sums which then remained due to them under their contracts, and all claim to have a certificate given to them by the engineer to the effect that they had completed the works in the contracts specified to his satisfaction.

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In the month of September, 1875, all the rights, title, interest and demand of the said J. B. Bertrand & Co. against the Government of the Dominion of Canada, arising out of and connected with the construction of the said sections 9 and 15, were duly transferred to a Mr. John Ross, since deceased, whose representatives the present suppliants are. In the month of June, 1880, a Mr. Frank Shanly, C.E., was by an order in council dated the 21st June, 1880, ap-

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pointed chief engineer of the Intercolonial Railway “for the purpose (as stated in the order in council) of investigating and reporting upon all unsettled claims in connection with the construction of the line.” In the month of July, 1881, Mr. Shanly made a report to the government in relation to a claim of J. B. Bertrand & Co. in respect of their contracts for the said sections 9 and 15, and it is upon this report that the claim of the suppliants is wholly rested, their contention being that it constitutes the final and closing certificate of the engineer given under the provisions of, and within the meaning of, the above quoted 11th section of the contracts with the said J. B. Bertrand & Co., and that under it the suppliants as representing J. B. Bertrand & Co. are entitled to recover the amount mentioned therein as an amount due to J. B. Bertrand & Co. under their contracts. Now without saying that in 1880, when Mr. Shanly was so appointed chief engineer of the Intercolonial Railway, there may not have been contracts in existence for work upon that railway in such a position that Mr. Shanly could have given certificates as contemplated by, and provided for in, the contracts for such work, it is in my judgment quite impossible to say that his appointment “for the purpose of investigating and reporting upon all unsettled claims in connection with the construction of the line” gave him, or that any order in council could give him, authority to accept as completed, and to certify as completed, by the contractors to his satisfaction works which, like those on sections 9 and 15, had seven years previously been taken from the contractors for default in fulfilment of their contracts, and had been completed by the government through the said commissioners under the direction of their engineer, Mr. Shanly’s predecessor, who alone was the person who could have certified that the

contractors had completed the works contracted for, if they had completed them, to his satisfaction as provided by the contracts. The language of the order in council appointing Mr. Shanly plainly, in my opinion, indicates that in a case like the present Mr. Shanly could do no more than investigate and report to the Government any circumstances attending the default of Messrs. J. B. Bertrand & Co. in fulfilment of their contracts, which might appear to warrant the Government, notwithstanding the forfeiture by the contractors of all right to any payment under their contracts, in entertaining favourably and *ex gratiâ* any claim preferred on behalf of the contractors, altogether apart from the contracts, and this, in my opinion, is precisely what Mr. Shanly's report in relation to J. B. Bertrand & Co.'s contracts does, and nothing more

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He reports, first, that in May, 1873, neither of the sections was completed, and that the commissioners then took the works into their own hands and finished them. He then proceeds to say that he could find nothing to warrant, in a strict legal point of view, a departure from the terms of the contracts, which provide for all contingencies arising out of the increase or decrease of quantities shown in the bill of works and schedule of prices upon which the contracts were based; that it did not appear that the quantities were increased in the aggregate, but on the contrary they were decreased.

He thus reports to the government that the commissioners were justified in taking the works off the contractors' hands and in completing them themselves. Now, in this state of facts, the contracts provided in the above third paragraph thereof, that the contractors should forfeit all moneys whatsoever which at the time of their failure of completion of the works as provided in the contracts should be due or owing to them.

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The facts as above reported also showed that nothing was claimed by or on behalf of the contractors under the 4th paragraph of the contracts, and that being so, the 9th paragraph of the contracts expressly provided that upon no pretext whatsoever should the contractors be entitled to claim or demand any sum in excess of the respective above mentioned contract lump sums, for extra work or as damages or otherwise howsoever, the contractors hereby expressly waiving and abandoning all such claims or pretensions to all intents and purposes whatsoever except as provided in the fourth section of the contracts.

Having thus reported and shown that the contractors had no claim under the terms of their contracts, Mr. Shanly in his report proceeded to recommend an allowance in excess of the lump sums agreed upon in the contracts to be made, namely, of \$104,587 on section 9, and of \$127,600 on section 15. Of the lump sum or contract price agreed upon for section 9, namely, \$354,897, he reported that the contractors, when the work was taken off their hands in May, 1873, had been paid \$346,658, leaving only a balance of \$8,239 of the contract price for completion of that work, and as to section 15 he reported that the contractors had been paid the sum of \$372,130, or the sum of \$8,610 in excess of the contract price agreed upon for that section, and adding the \$8,239 to the \$104,587, making \$112,816, he recommended that this sum should be allowed by the government on section 9, and deducting the above \$8,610 from the \$127,600 recommended in excess of the contract price of section 15, making the sum of \$118,990, he recommended should be allowed on section 15. These sums he recommended should be allowed, not as being due under the contracts for his report clearly shows they were not, but because the evidence furnished to him disclosed great difficulties and cost incurred by the contractors in carrying out the heaviest portions of the

work, and he closes his report by saying that he thought the increased amounts he recommended would be equitable to the contractors and to the Government; that he thought that if the Government should adopt his recommendations the contractors would have a reasonable profit and that the Government would have full value for its money.

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I confess that I am utterly unable to understand how these sums so recommended can be claimed to be sums recoverable under the terms of the contracts or how Mr. Shanly's report can be claimed to be a certificate within the meaning of the 11th paragraph of the contracts.

The appeal must in my opinion be dismissed with costs.

As it was argued that in a case of *McGreevy v. The Queen* (1) where a similar question arose there was not a concurrence of a majority of the court in the reasons upon which the judgment in that case was founded and that it therefore should be considered an open question I have thought it best, without entering into any question as to the correctness of that argument, to state anew my views in this case irrespective of the judgment in that case, the court being now differently constitute

SEDGEWICK J.—I am of opinion that in this case it is our duty to follow the decision of this court in *McGreevy v. The Queen* (1). I am also of opinion that although Mr. Shanly was an engineer capable of giving the certificate required by the statute yet the documents relied on as such certificate did not come up to the requirements of the Act. It was not, nor was it intended to be such a certificate.

(1) 18 Can. S. C. R. 371.

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KING J.—I am of opinion that in this case we should follow the decision of the court in *McGreevy v. The Queen* (1).

*Appeal dismissed with costs.**

King J.

Solicitors for the appellants: *Pentland & Stuart.*

Solicitors for the respondent: *O'Connor & Hogg.*

(1) 18 Can. S. C. R. 371.

*The Judicial Committee of the Privy Council has granted leave to appeal from this decision.