

[E.C.] 1878

ISBESTER *v.* THE QUEEN.

Dec. 23.

Petition of Right—Tender for work on Intercolonial Railway—Acceptance by Commissioners—Contract, liability of Crown for breach of—Extra work, claim for—Damages—31 Vic., c. 13—37 Vic., c. 15, effect of—Works completed after 1st June, 1874—Certificate of engineer—Condition precedent, waiver of—Demurrer.

In January, 1872, the commissioners of the Intercolonial Railway gave public notice that they were prepared to receive tenders for the erection, *inter alia*, of certain engine houses according to plans and specifications deposited at the office of the Chief Engineer at Ottawa. J. I. tendered for the erection of an engine house at Metapedia, and in October following he was instructed by the

commissioners to proceed to the execution of the work, according to his accepted tender, the price being \$21,989. The work was completed and delivered to the Government in October, 1874. The specification provided as follows : " The commissioners will provide and lay railway iron, and will also provide and fix cast-iron columns, iron girders, and other iron work required for supporting roof." In September, 1873, J. I. was unable to proceed further with the execution of his work, in consequence of the neglect of the commissioners to supply the iron girders, &c., until March following, owing to which delay he suffered loss and damage. During the execution of the work, J. I. was instructed and directed by the commissioners or their engineers to perform, and did perform, certain extra works not included in his accepted tender, and not according to the plans, drawings and specifications.

By his petition of right, J. I. claimed \$3,795.75 damages in consequence of the delay on the part of the commissioners to provide the cast-iron columns, &c., and \$8,505.10 for extra works.

The Crown demurred and also traversed the allegation of negligence and delay, and admitted extra work to the amount of \$5,056.60, and set up the 18th sec. of 31 Vic., c. 13, which required the certificate of the Engineer-in-Chief as a condition precedent to the payment of any sum of money for work done on the Intercolonial railway. By 37 Vic., c. 15, on the 1st June, 1874, the Intercolonial Railway was declared to be a public work vested in Her Majesty and under the control and management of the Minister of Public Works, and all the powers and duties of the commissioners were transferred to the Minister of Public Works, and sec. 3 of 31 Vic., c. 13, was repealed, with so much of any other part of the said act as might be in any way inconsistent with 37 Vic., c. 15.

Held, per Fournier, J. (in the Exchequer Court)—that the tender and its acceptance by the commissioners constituted a valid contract between the Crown and J. I., and that the delay and neglect on the part of the commissioners, acting for the Crown, to provide and fix the cast-iron columns, &c., which were, by the specifications, to be provided and fixed by them, was a breach of the said contract, and that the Crown was liable for damages resulting from such breach.

2. That the extra work claimed for being for a sum less than \$10,000, the commissioners had power to order the same under the statute 31 Vic., c. 13 s. 16, and J. I. could recover by petition of right for such part of the extra work claimed as he had been directed to perform.
3. That the 18th sec. 31 Vic., c. 13, not having been embodied in the agreement with J. I. as a condition precedent to the payment of any sum for work executed, the Crown could not now rely on

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4. That the effect of 37 Vic., c. 15, was to abolish the office of Chief Engineer of the Intercolonial Railway, and, for work performed and received on or after the 1st June, 1874, to dispense with the necessity of obtaining, as a condition precedent to the payment for the same, the certificate of said Chief Engineer, in accordance with sec. 18 of 31 Vic., c. 13.—See Can. S.C.R., vol. VII., p. 696.