[E.C.] 1877

May 21.

JONES, *et al.*, *v.* THE QUEEN.

Petition of Right—Intercolonial Railway contract—31 Vic., c. 13, s. 18—Certificate of Chief Engineer—Condition precedent to recovery of money for extra work—Petition of right against the Crown for tort, or fraudulent misconduct of its servants—Forfeiture and penalty—Liquidated damages.

On the 25th May, 1870, J. and S., contractors, entered into a contract with the Intercolonial Railway commissioners (authorized by 31 Vic., c. 13) to construct and complete section No. 7 of the said Intercolonial Railway for the Dominion of Canada, for a bulk sum of $557,750. During the progress of the work, changes of various kinds were made. The works were sufficiently completed to admit of rails being laid, and the line opened for traffic on the 11th November, 1872. The total amount paid on the 10th February, 1873, was $557,750, the amount of the contract. The contractors thereupon presented a claim to the commissioners amounting to $116,463.83 for extra work, &c., beyond what was included in their contract. The commissioners, after obtaining a report from the Chief Engineer, recommended that an additional sum of $31,091.58 (less a sum of $8,300 for the timber bridging not executed, and $10,354.24 for under-drain taken off contractor's hands) be paid to the contractors upon receiving a full discharge of all claims of every kind or description under the contract. The balance was tendered to suppliants and refused.

The contractors thereupon, by petition of right, claimed $124,663.33, as due from the Crown to them for extra work done by them outside of and beyond the written contract, alleging that, by orders of the Chief Engineer, additional work and alterations were required, but these orders were carried out only on the understanding that such additional work and alterations should be paid for extra ; and alleging, further, that they were

put to large expense and compelled to do much extra work which they were entitled to be paid for, in consequence of misrepresentations in the plans and the bill of works exhibited at time of letting.

On the profile plan it was stated that the best information in possession of the Chief Engineer respecting the probable quantities of the several kinds of work would be found in the schedules accompanying the plan, " but contractors must understand that these quantities are not guaranteed ;" and in the bill of works, which purported to be an abstract of all information in possession of the commissioners and Chief Engineer with regard to the quantities, it was stated, " the quantities herein given as ascertained from the best data obtained, are, as far as known, approximately accurate, but at the same time they are not warranted as accurate, and no claim of any kind will be allowed, though they may prove to be inaccurate."

The contract provided, *inter alia*, that it should be distinctly understood, intended and agreed that the said price or consideration of $557,750 should be the price of, and be held to be full compensation for all the works embraced in, or contemplated by the said contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not, upon any pretext whatever, be entitled by reason of any change, alteration or addition made in or to such works, or in the said plans and specifications, or by reason of the exercise of any of the powers vested in the Governor-in-Council by the said act, intituled " An Act respecting the construction of the Intercolonial Railway," or in the commissioners or Engineer by the said contract or by law, to claim or demand any further or additional sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and any such claim or pretension to all intents and purposes whatsoever except as provided in the 4th section of the said contract relating to the alterations in the grade or line of location ; and that the said contract and the said specification should be in all respects subject to the provisions of the act first cited in the said contract, intituled " An Act respecting the construction of the Intercolonial Railway," 31 Vic. c. 13, and also, in as far as they might be applicable, to the provisions of " The Railway Act of 1868."

The 18th section of 31 Vic. c. 13, enacts " that no money shall be paid to any contractor until the Chief Engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall

1877

JONES
v.
THE QUEEN.

have been approved of by the commissioners." No certificate was given by the Chief Engineer of the execution of the work.

Held, per Ritchie, J.—That the contract requiring that any work done on the road must be certified to by the Chief Engineer, until he so certified and such certificate was approved of by the commissioners, the contractors were not entitled to be paid anything. That if the work in question was extra work, the contractors had by the contract waived all claim for payment for any such work. If such extra work was of a character so peculiar and unexpected as to be considered *dehors* the contract, then there was no such contract with the commissioners as would give the contractors any legal claim against the Crown ; the commissioners alone being able to bind the Crown, and they only as authorized by statute.

That there was no guarantee, express or implied, as to the quantities, nor any misrepresentations respecting them. But even if there had been, a petition of right will not lie against the Crown for tort, or for a claim based on an alleged fraud, imputing to the Crown the fraudulent misconduct of its servants.

In the contract it was also provided that if the contractors failed to perform the work within the time agreed upon in and by the said contract, to wit, 1st July, 1871, the contractors would forfeit all money then due and owing to them under the terms of the contract, and also the further sum of $2,000 per week for all the time during which said works remained incomplete after the said 1st July, 1871, by way of liquidated damages for such default. The contract was not completed till the end of August, 1872.

Held, That if the Crown insisted on requiring a decree for the penalties, time being declared the essence of the contract, the damages attached, and the Crown was entitled to a sum of $2,000 per week from the 1st July, 1871, till the end of August, 1872, for liquidated damages.

The Crown subsequently waiving the forfeiture, judgment was rendered in favor of the suppliants for the sum of $12,436.11, being the amount tendered by the respondent, less the costs of the Crown in the case to be taxed and deducted from the said amount. See Can. S. C. R., vol. VII., p. 570.