Coram HENRY, J.

1887

Oct. 10.

MICHAEL STARRS, JOHN HEBERT, AND JOHN LAWRENCE POWER O'HANLY (CLAIMANTS)..... APPELLANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Contract for construction of a public work—31 Vic., c. 12, s. 7—Material change in plans and specifications—New contract—Waiver.

The appellants entered into a contract with the Dominion Government to construct a bridge for a specified sum. After the materials necessary for its construction according to the original plans and specifications had been procured, the Government altered the plans so much that an entirely new and more expensive structure became involved. The appellants were then given new plans and specifications by the Chief Engineer of Public Works, the proper officer of the Government in that behalf, and were directed by him to build the bridge upon the altered plans, being at the same time informed that the prices for the work would be subsequently ascertained. They thereupon proceeded with the construction of the bridge.

Under the provisions of the written contract, the Chief Engineer was required to make out and certify the final estimate of the contractors in respect of the work done upon the bridge; and upon the completion of the bridge, a final estimate was so made and certified, whereby the appellants were declared to be entitled to a certain amount. The appellants, however, claimed to be entitled to a much larger amount, and their claim was ultimately referred by the Government to the Official Arbitrators, who awarded them a sum slightly in excess of that certified to be due in the final estimate.

On appeal from this award,

Held:—(1.) That sec. 7 of 31 Vic., c. 12, which provides "that no deeds, contracts, documents or writings shall be deemed to be binding upon the Department [of Public Works], or shall he held to be acts of the Minister [of Public Works] unless signed and sealed by him or his deputy, and countersigned by the Secretary," only refers to executory contracts, and does not affect the right of a party to recover for goods sold and delivered, or for work done and materials provided to and for another party and accepted by him.

1887

STARRS
v.
THE QUEEN.

(2.) That the Crown, having referred the claim to arbitration, having raised no legal objection to the investigation of the claim before the Arbitrators, and not having cross-appealed from their award, must be assumed to have waived all right to object to the validity of the second contract put forward by the claimants.

Reasons for Judgment.

APPEAL from an award of the Official Arbitrators allowing the appellants the sum of $44,279. as due by the Crown upon a contract for the construction of a bridge over the Ottawa River, at Des Joachims.

The facts of the case are fully set out in the judgment.

The appeal was heard before Mr. Justice Henry.

O'Gara, Q.C. for appellants ;

Hogg for respondent.

HENRY, J. now (October 10th, 1887,) delivered judgment.

This is a case brought by appeal from an award made by the Official Arbitrators, which, after certain necessary recitals, is as follows :—" Now therefore we the " said James Cowan, William Compton, Joseph Simard " and Henry Muma, the Official Arbitrators aforenamed, " having taken upon ourselves the charge of the said " arbitration, appraisement, determination and award, " and having heard and considered the allegations and " evidences of the parties and their witnesses, do hereby " make and publish this our award of, and concerning, " the said claim. We do adjudge and determine that " the said Michael Starrs, John Herbert, and John " Lawrence Power O'Hanly, claimants, be paid the " sum of forty-four thousand two hundred and seventy- " nine dollars, in full satisfaction of their claim, and we " do further adjudge that the respondent pay the costs " of this arbitration." From that award and finding the appellant appealed to this court. This award was construed differently by the counsel for the respective

1887

STARRS
v.
THE QUEEN.

Reasons for Judgment.

parties,—the counsel for the appellant contending that the award was made as for a balance due to the appellants, whilst the counsel for the respondent contended that it was no more than an award of the value of the work done by the appellants, from which payments on account thereof should be deducted. Such difference existing, it was agreed that an appeal should be taken by the claimants to this court.

An argument was had before me, and affidavits were read, made by the Official Arbitrators, stating that their intention was to award only as to the value of the structure in question, leaving it to the Department of Public Works to charge against it the amount of payments made.

Had it been an action on an award covered by a submission authorizing it, I do not see that I would have been justified in receiving the affidavits of the Arbitrators as to their *intention*; but, considering the whole case submitted to the Arbitrators was open to appeal, I felt bound to conclude that the award should not, under the circumstances, be sustained; and having adjudged the whole case under the evidence before the Arbitrators, which was argued subsequently before me, I now proceed to give judgment thereon.

The case is one of no small difficulty. The circumstances and terms under which the bridge in question was built, are, to say the least, unusual and peculiar. During the year 1882, the Government determined to build a bridge across the Des Joachims rapids on the Ottawa River, and a contract, with plans and specifications, was entered into for its erection by the appellants on the 8th September of that year, for the sum of $25,300. During the following winter, the appellants got out and had ready all the materials and had entered into a sub-contract for the erection and completion of the bridge. The materials were procured at a cost

1887

STARRS v. THE QUEEN.

Reasons for Judgment.

of $15,000, and the sub-contractor agreed to complete the erection of the structure for $5,000, which, the appellants contend, would have left them a profit of $5,000. During the following month of August, the sub-contractor having commenced the work of erection, the Department of Public Works, on being notified, sent an engineer to locate the site of piers and abutments of the bridge. He ascertained that the original location, made by G. F. Austin, who was employed for that purpose by the said Department, was unsuitable and that the plans and specifications on his survey could not be acted on, and, having so reported, the Chief Engineer, with the sanction of the Department, changed them to such an extent that an entirely new and much more costly structure became involved. The contractors were given new plans and specifications by Mr. Perley, the Engineer-in-Chief, and were directed to build the bridge by them, and were informed that the prices for so doing would be subsequently ascertained. The contractors agreed to do so, and proceeded with the work with all reasonable despatch. The evidence of several witnesses, including that of Mr. Perley, shows most conclusively that it was agreed that the bridge should be built on the agreement thus made, and that the original agreement, plans and specifications should be abandoned. Had the contractors insisted upon the terms of the first agreement, which could not be carried out, and refused to build the bridge under the second contract, the evidence shows that they would have been entitled to recover damages to the extent of several thousand dollars ; but, having readily, at the instance of the Engineer, surrendered their legal rights in that respect, they are entitled to a fair and reasonable consideration of their claim. It was well known and understood, by all parties, that the new structure would be a totally

1887

STARRS
v.
THE QUEEN.

Reasons for Judgment.

different work from that at first agreed upon, and must necessarily cost a much larger sum of money. Under the agreement last entered into, I cannot see how the contractors can claim anything as damages for losses sustained by the failure of the Department to continue the original contract, for any claim of that kind was waived by their entering into the new contract; and, on the other hand, the continued reference to it by the Engineer and others is, to my mind, equally unjustifiable. The structure to be built was as essentially different from that originally agreed upon as if the one was to have been built with wooden pillars and wooden superstructure with pillars and spans of certain dimensions, and the other of a more costly material with different shaped and sized pillars, and with spans of different lengths.

Hamel, the engineer who laid out the work under the new plan, says:

There was evidently an error in the original plans. In September, 1883, I got orders to change the site of the piers. I found original plan would not do. Townson, was a competent man for Inspector. He is a curious man, but honest; a little contrary.

Perley says:—

In August, 1883, there was some difficulty as to finding centre line; I got Austin to go and pick up centre line and the work proceeded. When we found that Austin's soundings were wrong, we took fresh soundings, and revised the bridge and readjusted the spans to suit the altered circumstances. I never saw the work, but I was in the locality before the work was begun. The contractors were paid the progress estimates as the work went on. I never had such radical changes as there were in this contract. Before making out my final estimate, I asked the contractors for a detailed statement of their claim, but I did not get it before making final estimate.

The radical changes spoken of by Perley are proved, by others, to have been so unlimited as to be a total change from the first contract.

If then, such was the case, it appears to me that the

1887

STARRS v. THE QUEEN.

Reasons for Judgment.

conduct of Perley, adopted by the Department, in agreeing in the loose way he did with the contractors, is not to be commended. To agree with parties, as he did, to build the bridge according to plans not then made, but to be subsequently furnished (as they were from time to time) with the understanding they were to be paid fairly for the work, was, to my mind, not in the interests of the public, and, as it has so far turned out, not in the interests of the contractors. What, it appears to me, should have been done, when through Austin's negligence and grossly improper survey it was found that the first contract must be abandoned, was to have, as at first, plans and specifications of the substituted structure made and submitted to the contractors, and a price agreed upon for the whole work. In place, however, of adopting that course, Perley agreed with the contractors to build the bridge according to plans and specifications to be furnished from time to time, without having fixed any schedule of prices, or in any other way fixed the amount to be paid. An inspector, named Townson, was appointed by the Department, and the contractors had to do the work as he ordered; and, according to the evidence in the case, he unnecessarily caused a pretty large increase in the expenditure. To refuse to repay the contractors for the amount of their expenditure would, I think, be unjust. It is shown that he (the inspector) refused to accept birch timber, required for one or more purposes of the structure, which was provided in the neighbourhood at 50 cents a foot. The contractors tried to get tamarac, but after diligent search could not get it large enough; and the contractors were finally obliged to get birch timber from Kingston at a cost of $3.00 a foot. Subsequently it was decided on, and admitted, that the birch timber rejected by the inspector was as good—if not better—

1887

STARRS
v.
THE QUEEN.

Reasons for Judgment.

than that imported from Kingston at eight times the cost. I have no reason to doubt what Hamel said,— that the inspector is an honest man but a curious one, and "*a little contrary.*" He was, however, the agent of the Department, and, if by his means additional outlay was caused, his principal, and not the contractors, is to bear the loss; and these remarks apply to other parts of the works. I have read over and considered the evidence most carefully, and have had no little difficulty in arriving at a conclusion as to the amount the contractors should be awarded. I have the evidence of two of the appellants, as well as other witnesses, showing them entitled to more than the amount awarded by the Arbitrators; and there is but little, in my opinion, to invalidate it. It is shown and admitted that the locality where the bridge was built was very difficult of access, and that the cost of getting supplies and materials there was very great. Perley never saw the work, and knew nothing from personal inspection. He had merely Hamel's estimate of quantities to go by, and he (Perley), by a sort of comparative estimate with other sites, undertook to make up a final estimate. I cannot concede that any such estimate is reliable, or likely to do justice either to the public or to the contractors. Perley says that before making it up he applied to the contractors for a detailed statement of their claim, but that he made up the estimate before they furnished their statement. I have the right to conclude that such a statement was necessary to enable him to make up a fair estimate; and I think he was right in seeking some information to guide him, knowing nothing personally of the matter; but why did he not wait for the information he must have felt he required, instead of acting upon the idea that a comparison with works done under wholly different conditions would be a proper basis to make up an estimate? That an

1887

STARRS
v.
THE QUEEN.

Reasons for Judgment.

engineer sitting in his office can do justice in such cases is more than can be imagined or expected. By such an estimate an engineer is presumed to know, by personal inspection, or otherwise, the subject-matter he deals with. In a case where schedule rates have been agreed upon and measurements duly returned, the engineer has something like reliable data upon which he can estimate. In this case he had the report of quantities from Hamel, but what had he to go by as to the cost of the materials and work? Nothing whatever; and by the contract under which the bridge was built, where no prices had been agreed upon, how could he undertake to decide as to the sum the contractors were entitled to without getting any statement from them of the amounts paid for work and materials, and the value of them, upon which to base his estimate? It is possible that an engineer might come to a correct conclusion, but it is not necessarily so; and it cannot be considered of much value when it is shown, by a great amount of evidence, that it should not be so considered. The Arbitrators—nominees of the Government—did not consider themselves bound by the estimate, and awarded beyond the amount of it. How their conclusion as to the amount found by them was formed, or upon what basis they made up the amount in the award, I have no means of ascertaining. I have no reason to believe that they are engineers or bridge builders, or that any of them inspected the bridge so as to form any idea as to its actual cost of erection. Under the circumstances, they had, as I have, nothing but the evidence to be guided by. If they, as laymen, take a wrong view of the position of the appellants' claim, under the evidence, of the contract, and as to its fulfilment, it is my duty to correct it. If they had based their decision as to the claim of the appellants' solely on the second con-

1887

STARRS
v.
THE QUEEN.

Reasons for Judgment.

tract, I cannot see how, under the evidence, (and that is all we have to go by) they did not award a larger sum to the contractors; and I am of the opinion they must have considered the first contract and made some comparative estimate between it and the second one. As to that I can but conjecture, but under any circumstances I feel bound to decide as the evidence points:

According to it the work cost the contractors	$50,290.21
I think the contractors Starrs and O'Hanly are, in addition, entitled to be paid for their time while employed *i.e.*, nearly two years. I have no evidence as to the rate, but I think they should be awarded at least.....	3,000.00
	$53,290.21
From which deduct payments.....	41,896.50
And there is a balance of.....	$11,393.71

The fairness of the expenditure, as above, was not contested in any way, but it was assumed that the contractors were to be bound by a valuation of the Engineer estimated by a measurement of the works after completion.

I can find no evidence that such was the contract; but, on the contrary, the contractors were to be paid as might be subsequently settled on. No settlement of that kind was made, and, therefore, the work should be paid for according to its reasonable cost and value. No complaint is made that the contractors did not work economically; and, from the evidence on both sides, I conclude they did. It is admitted that they executed the work faithfully, and erected a first-class bridge of its kind, under circumstances of extreme difficulty and risk, and under peculiarly embarrassing conditions; and I consider them fully entitled to

1887

STARRS v. THE QUEEN.

Reasons for Judgment.

get at least the remuneration I propose to decree to them,—and I think they have given good value therefor.

At the argument before me, however, it was contended on the part of the respondent that the appellants could not recover,—

1st—Because there was no contract in writing;

2ndly—No certificate of the Engineer.

To these objections many answers might be given. The first objection is, however, an admission of the abandonment of the first contract, and that the work was all done under the second. This is not a claim for damages on an executory contract, but one under an alleged contract for work and labor and materials, done, performed and provided and accepted. Now sec. 7 of 31 Vic., 12, provides that

> No deeds, contracts, documents or writings shall be deemed to be binding upon the Department [of Public Works] or shall be held to be acts of the said Minister [of Public Works], unless signed and sealed by him or his deputy and countersigned by the Secretary.

This I construe, in respect of the contracts, to mean that mere executory contracts cannot be enforced unless they conform to the requirements of the statute; but, in my judgment, that provision does not affect the right of a party to recover for goods sold and delivered, or for work, labor and materials done, found supplied and accepted.

But, under the circumstances in this case, I think the objections come too late.

Let us consider what was done after the last estimate was made by the Chief Engineer. The contractors, being dissatisfied with the sum mentioned in it, offered to refer the matter to him as an arbitrator. He declined to act as such, and recommended that the claim should be referred to the Official Arbitrators. That recommendation was adopted by the Minister of Public Works,

1887

STARRS v. THE QUEEN.

Reasons for Judgment.

and on his recommendation an order-in-council was passed to carry it out. The whole of the papers in the Department were referred to the Arbitrators for their information and guidance. The Arbitrators met, and both parties produced their witnesses, who were heard and examined and the evidence taken in writing. It is not suggested that any objection to the submission was made; but, on the contrary, as shown by the minutes, the claim was fully considered and disposed of by the Arbitrators without any such objection being made. No cross-appeal is made from the award on the part of the respondent, and, in the absence of any such appeal, I consider that all I have to do is to review the finding of the Arbitrators; and, as empowered by the statutes, to decide the matter in controversy as they did. The law, to my mind, is well settled that any provision of a statute favourable to a party as to his civil rights may be waived. It is so laid down in *Park Gate Iron Co.* v. *Coates* (1), and other cases. If the Minister claimed to defend an action, such as this brought in this court, on the grounds that the contract was not in writing, not properly executed, or the absence of the Engineer's certificate, he must have pleaded such as a defence; but so far from making such objections in this case, he waived any such defences, and, on his own recommendation and that of the Engineer, procured the reference to the Arbitrators; and, by counsel representing him, appears before the Arbitrators, and contests the claim as filed in his Department and submitted to the Arbitrators with all the accounts and documents to be dealt with. He is, therefore, in my opinion, estopped as to these objections.

By sec. 35 of 31 Vic., c. 12, the Minister is authorized to refer such claims to the Official Arbitrators, and it provides that the award so made shall be binding

(1) L. R. 5 C. P. 634.

1887

STARRS v. THE QUEEN.

Reasons for Judgment.

unless appealed from. Had there been no appeal, the award, as construed by the counsel for the respondent, would have been binding; and I conclude that a decision of this court on an appeal must be equally binding.

For the reasons given, I am of the opinion that under the evidence the appellants are fully entitled to the amount to be awarded them. My only doubt is whether I have done right in not according a higher amount; but the whole affair was so loosely conducted, and the evidence not being as minute as it might have been, I feel no little difficulty in deciding that amount.

I am, however, of the opinion that the appellants have shown themselves entitled to recover the sum of fifty-three thousand two hundred and ninety dollars and twenty-one cents, and I give judgment in their favor for that amount with the costs before the Arbitrators and this court*.

Appeal allowed with costs.

Solicitors for appellants : *O'Gara & Remon.*

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

* On appeal to the Supreme Court of Canada by the Crown,—

Held, reversing the judgment of Henry, J. in the Exchequer Court, (Fournier, J. dissenting,) that the claim came within the contract and the provisions thereof which made the certificate of the Chief Engineer a condition precedent to recovery ; and, it appearing that such certificate had not been obtained, the claim must be dismissed. But the Crown having referred the claim to arbitration, instead of insisting throughout on its strict legal rights, no costs should be allowed.

See the case on appeal in 17 Can. S. C. R. 118.