

MURDOCK V. TORONTO CONSTRUCTION CO.—KELLY, J.—OCT. 5.

*Contract—Work and Labour—Action to Recover Payment for—Condition Precedent—Certificate of Engineer Withheld in Good Faith—Premature Action—Counterclaim.*—The plaintiffs, who had a sub-contract with the defendants in respect of the construction of the Transcontinental Railway, made three claims in this action: (1) for \$180 charged against them by the defendants for clearing the right of way, etc.; (2) for \$2,702.42, the cost of fighting forest fires on or near the right of way; and (3) for \$1,184.27 charged by the defendants as the plaintiffs' share of the cost of fire protection. The main ground of defence was, that the defendants' contract with the plaintiffs provided that the plaintiffs were to be paid only upon completion of the work covered by the contract to the satisfaction and subject to the acceptance of the chief engineer therein named; that the written certificate of the engineer and the approval of the Commissioners of the Transcontinental Railway were conditions precedent to the plaintiffs' right to payment; and that such certificate and such approval had not been obtained in respect of the items sued for. KELLY, J., who tried the action without a jury, said that this was a complete defence to the action at the present time. The position of the plaintiffs was a hard one. The engineer who had supervision over the work had not issued his final certificate in respect of the work of the plaintiffs, and was not likely to do so until the time should arrive for granting the final certificate for the whole work for which the defendants were contractors, and of which the plaintiffs' work was but a part. It was not shewn that the final certificate had been fraudulently or for any improper purpose withheld. The certificate not having been issued, the action was premature. There was a counterclaim for moneys alleged to have been overpaid to the plaintiffs. The plaintiffs must await the certificate of the engineer, and so must the defendants in respect of their counterclaim. Action dismissed with costs; counterclaim dismissed without costs; both without prejudice to the rights of the parties after final certificate. G. H. Kilmer, K.C., for the plaintiffs. R. McKay, K.C., for the defendants.