

Ex. Ct.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

any money due or percentage agreed to be retained and to pay as liquidated damage \$2,000 for each and every week for the time the work might remain uncompleted. That the commissioners upon giving seven clear days' notice if the works were not progressing, so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors, and complete the works at their expense; in such a case contractors were to forfeit all right to money due on the works, and to the percentage returned.

On 24th May, 1873, the contractors sent to the commissioners of the Intercolonial, a statement of claims showing that there was due to them a large sum of money for extra work, and that until a satisfactory arrangement be arrived at they would be unable to proceed and complete the works.

Thereupon, notices were served upon them, and the contracts were taken out of their hands and completed at the cost of contractors by the Government.

In 1876 the contractors by petition of right, claimed \$523,000 for money *bona fide* paid, laid out and expended in and about the building, and construction of said sections 3 and 6 under the circumstances detailed in their petition.

The Crown denied the allegations of petition, and pleaded that the suppliants were not entitled to any payment, except on the certificate of the engineer, and that the suppliants had been paid all that they obtained the engineer's certificate for, and in addition filed a counter claim for a sum of \$159,982.57, as being due to the Crown under the terms of the contract for moneys expended by the commissioners over and above the bulk sum of the contract in completing of said sections.

The case was tried in the Exchequer Court by TASCHEREAU, J., and he held that under the terms of the contract the only sum for which the suppliants might be entitled to relief, were 1st, \$5,850.00 for interest upon, and for the forbearance of divers large sums of money due and payable to them, and 2ndly, \$27,022.58, the value of plant and materials left with the Government, but that these sums were forfeited under the terms of the third clause of the contract; that no claim could be

entertained for extra work without the certificate of the engineer, and that the Crown were entitled to the sum of \$159,953.51 as being the amount expended.

An appeal to the Supreme Court of Canada having been taken by the suppliant, it was

Held (affirming the judgment of the court below), FOURNIER and HENRY, JJ., dissenting. 1. That by their contract the suppliants had waived all claim for payment of extra work; and 2. That the contractors not having previously obtained from or being entitled to a certificate from the chief engineer as provided in the 18th sec. 31 Vict. ch. 13, for or on account of the moneys which they claimed, the petition of the suppliants was properly dismissed. 3. Under the terms of the contract, the work not having been completed within the time stipulated, or in accordance with the contract, the commissioners had the power to take the contract out of the hands of the contractors, and charge them with the extra cost for completing the same, but that in making up that amount the court below should have deducted the sum awarded as being the value of the plant and materials taken over from the contractors by the commissioners in June, 1873.

Appeal dismissed with costs.

Irvine, Q.C., and *Girouard*, Q.C., for appellants.

Burbidge, Q.C., and *Ferguson*, Q.C., for respondents.

CHANCERY DIVISION.

Ferguson, J.]

[Nov. 8.]

JENKINS V. DRUMMOND ET AL.

Will—Devise to children—Period of division—Who entitled.

S. P., by her will, provided as follows: "Also I will and ordain that my said property, after the death of my before mentioned daughters, E. O. W. and S. A. W., be sold, . . . and the proceeds . . . be divided between the children of my daughters, E. O. W., M. K., and S. A. W. . . . one-third to the children of the said E. O. W., one-third to the children of the said M. K., and one-third to the children of the said S. A. W., share and