

[E.C.] 1882

SMITH *et al* v. THE QUEEN.

July 31. *Government contract—Clause in—Construction of—Assignment—Effect of—Damages.*

[S.C.] 1883

June 19.

On 2nd August, 1878, H. C. & F. entered into a contract with Her Majesty to do the excavation, &c., of the Georgian Bay branch of the Canadian Pacific Railway. Shortly after the date of the contract and after the commencement of the work, H. C. & F. associated with themselves several partners in the work, amongst others S. & R., and on 30th June, 1879, the whole contract was assigned to S. & R. Subsequently on the 25th July, 1879, the contract with H. C. & F. was cancelled by order-in-council on the ground that satisfactory progress had not been made with the work as required by the contract. On the 5th of August, 1879, S. & R. notified the Minister of Railways of the transfer made to them of the contract. On the 9th August the order-in-council of July 25th was sent to H. C. & F. On the 14th August, 1879, an order-in-council was passed stating that as the Government had never assented to the transfer and assignment of the contract to S. & R., the contractors should be notified that the contract was taken out of their hands and annulled. In consequence of this notification S. & R., who were carrying on the works, ceased work and with the consent of the then Minister of Public Works realized their plant and presented a claim for damages, and finally H. C. & F. and S & R. filed a petition of right claiming \$250,000 damages for breach of contract. The statement in defence set up, *inter alia*, the 17th clause of the contract which provided against the contractors assigning the contract, and, in case of assignment without Her Majesty's consent, enabled Her Majesty to take the works out of the contractors' hands, and employ such means as she might see fit to complete the same; and in such case the contractors should have no claim for any further payment in respect of works performed, but remain liable for loss by reason of non-completion by the contractors.

At the trial there was evidence that the Minister of Public Works knew that S. & R. were partners, and that he was satisfied that they were connected with the concern. There was also evidence that the Department knew S. & R. were carrying on the works, and that S. & R. had been informed by the Deputy Minister of the Department that all that was necessary to be officially recognized as contractors, was to send a letter to the Government from H. C. & F.

Held: (per Henry, J.) that the Crown had no legal right to avoid the

contract ; and that the payment by the Railway Department of between \$10,000 and \$11,000 to Messrs. S. & R., the assignees of the contract, on account of work done, was evidence of the Crown's ratification of the assignment, and the recognition of them as the substituted contractors. That the suppliants were entitled to the sum of \$171,040.77 as damages, together with their costs.

1883

SMITH

v.

THE QUEEN.

On appeal to the Supreme Court of Canada,—

Held, reversing the judgment of the Exchequer Court, that there was no evidence of a binding assent on the part of the Crown to the assignment of the contract to S. & R., who therefore were not entitled to recover.

2. That H. C. & F., the original contractors, by assigning their contract, put it in the power of the Government to rescind the contract absolutely, which was done by the order-in-council of the 14th August, 1871, and the contractors under the 17th clause could not recover either the value of the work actually done, the loss of prospective damages, or the reduced value of the plant. See Can. S.C.R., vol. X., p. 1.