

GEORGE GOODWIN (CLAIMANT).....APPELLANT;

1897

AND

*Nov. 6, 8,

HER MAJESTY THE QUEEN (RE- }
SPONDENT) } RESPONDENT.

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*Mar. 8.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Contract, construction of—Public Works—Arbitration—Progress estimates
—Engineer's certificate—Approval by Head of Department—Final
estimates—Condition precedent.*

The eighth and twenty-fifth clauses of the appellant's contract for the construction of certain Public Works were as follows:—

- "8. That the engineer shall be the sole judge of work and material
"in respect of both quantity and quality, and his decision on all
"questions in dispute with regard to work or material, or as to
"the meaning or intention of this contract, and the plans, speci-
"fications, and drawings, shall be final, and no works or extra or
"additional works or changes shall be deemed to have been
"executed, nor shall the contractor be entitled to payment for
"the same, unless the same shall have been executed to the
"satisfaction of the engineer, as evidenced by his certificate in
"writing, which certificate shall be a condition precedent to the
"right of the contractor to be paid therefor;" but before the
"contract was signed by the parties the words "as to the mean-
"ing or intention of this contract, and the plans, specifications
"and drawings" were struck out.
- "25. Cash payments to about ninety per cent of the value of the
"work done, approximately made up from returns of progress
"measurements and computed at the prices agreed upon or deter-
"mined under the provisions of the contract, will be made to
"the contractor monthly on the written certificate of the engineer
"that the work for, or on account of, which the certificate is
"granted has been duly executed to his satisfaction, and stating
"the value of such work computed as above mentioned and
"upon approval of such certificate by the minister for the time
"being, and the said certificate and such approval thereof shall

*PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard
JJ.

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“be a condition precedent to the right of the contractor to be  
 “paid the said ninety per cent or any part thereof.

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A difference of opinion arose between the contractor and the engineers as to the quantity of earth in certain embankments which should be paid for at an increased rate as “water-tight” embankment under the provisions of the contract and specifications relating to the works and the claim of the contractor was rejected by the engineer, who afterwards, however, after the matter had been referred to the Minister of Justice by the Minister of Railways and Canals, and an opinion favourable to the contention of the contractor given by the Minister of Justice, made a certificate upon a progressive estimate for the amount thus in dispute in the usual form but added after his signature the following words:—  
 “Certified as regards item 5, (the item in dispute,) in accordance with letter of Deputy Minister of Justice, dated 15th Jan., 1896.”

The estimate thus certified was forwarded for payment, but the Auditor General refused to issue a cheque therefor.

*Held* that under the circumstances of the case the certificate sufficiently complied with the requirements of the twenty-fifth section of the contract; that the decision by the engineer rejecting the contractor’s claim was not a final decision under the eighth clause of the contract adjudicating upon a dispute under said eighth section and did not preclude him from subsequently granting a valid certificate to entitle the contractor to receive payment of his claim, and that the certificate given in this case whereby the engineer adopted the construction placed upon the contract in the legal opinion given by the Minister of Justice, was properly granted within the meaning of the twenty-fifth clause of the contract.

*Murray v. The Queen*, 26 Can. S. C. R. 203, discussed and distinguished.

**APPEAL** from the judgment of the Exchequer Court of Canada (1) rendered on the 11th January, 1897, by which the preliminary decision of that court at the time of the trial was set aside and the appellants claim upon the reference made, under the provisions of the Exchequer Court Act (2), by the Minister of Railways and Canals, was refused without costs.

(1) 5 Ex. C. R. 293.

(2) 50 & 51 V. c. 16, s. 23.

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The Minister of Railways and Canals under the provisions of the twenty-third section of the Exchequer Court Act, (50 & 51 Vict. c. 16) referred to the Exchequer Court of Canada for adjudication the claim of the appellant arising in respect to work done by him under a contract with the Department of Railways and Canals of Canada on the construction of part of the embankments of the Soulanges Canal. Under this reference the trial took place in the Exchequer Court at Ottawa and on 20th June, 1896, a preliminary judgment was rendered declaring the appellant entitled to recover \$58,260 for the work in question, subject to that amount being increased or reduced in accordance with such reference as might be directed upon the application of either party for the purpose of ascertaining, upon the basis of the said judgment, the exact amount to which he might be entitled, and granting the appellant costs of suit. Leave was reserved to the appellant to move to increase the amount to \$73,260 the full amount of his claim and to the respondent to move to set aside the judgment or to reduce the amount upon certain principles mentioned in the judgment. Motions on behalf of both parties were afterwards heard with the result that the judgment was set aside as above stated. The present appeal sought to have it declared that the appellant was entitled to be paid the full amount of his claim, or at least, that he was entitled to the amount declared to be due to him by the preliminary judgment rendered at the trial.

The chief points at issue in the case were as to the validity of the approval by the Minister of Railways and Canals of a certain certificate or estimate made by the Chief Engineer of the Department of Railways and Canals relating to amounts payable for work done in water-tight embankments, and as to the sufficiency of

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the certificate itself. The particulars of the case and circumstances under which the certificate in question was made are fully set out in the judgment of His Lordship Mr. Justice Sedgewick now reported. The clauses of the contract and specifications in question in the case are also quoted in the judgments reported.

At the close of the argument it was understood that, if the court should determine in favour of the Chief Engineer's certificate relied on by the claimant, the appeal should be allowed, and the case be at an end in this court, judgment being directed to be entered for the claimant for the amount claimed, and interest, if the court should so decide, after the parties were heard on the question of interest:—But that if the court should hold that the claimant was not entitled to recover upon the certificate, then that both parties should be heard upon the contentions before the Exchequer Court as to “alternative relief,” and that all objections to the jurisdiction of this court and of the Court of Exchequer should then be open to the respondent as if the appeal were being heard for the first time; and in the latter case that no judgment should be entered in this court until after the parties should have been so heard on that second branch of the case.

Osler Q.C. and *Ferguson Q.C.* for the appellant. The opinion expressed by Mr. Justice Sedgewick at page 212 of the report in *Murray v. The Queen* (1), is mere dictum and is not a binding decision and, in any case, does not declare that the want of an express statement that the work had been executed to the satisfaction of the chief engineer would be sufficient to defeat an action on such a certificate as he was discussing in that case. The expression of opinion, in that case, to the effect that the Minister of Railways and Canals must express his approval by counter-signing the certificate,

is not well founded nor binding as authority because the point with reference to which it was given was neither argued nor involved in the decision of that case. See *Elmes v. Burgh* (1); *Roberts v. Watkins* (2); *McGreevy v. The Queen* (3), at page 401; *Kane v. Stone Co.* (4).

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The certificate in this case shows sufficiently that the work was done in accordance with the contract and accepted, and the evidence shows it to have been done satisfactorily. See Hudson on Building Contracts (2 ed.) pp. 294, 299; *Harmon v. Scott* (5); *Clarke v. Murray* (6); *Galbraith v. Chicago Architectural Iron Works* (7); *Rousseau v. Poitras* (8); *Wykcoff v. Meyers* (9), at pages 145, 146; *McGreevy v. The Queen* (3), at page 405. The question before the court is a legal one as to the construction of the written contract and specifications annexed.

The engineer's position will appear on referring to Hudson on Contracts (2 ed.) p. 279, and the following cases. *In re Carus-Wilson v. Greene* (10), at pages 7, 9; *Sharpe v. San Paulo Railway Co.* (11), at page 609; *Ranger v. Great Western Railway Co.* (12) at page 115; *Farquhar v. City of Hamilton* (13).

If, in the opinion of the Minister of Railways and Canals, or in that of his legal adviser, the position taken by the appellant with reference to any additional claim or allowance, depending upon a construction of the contract, specifications or plans was well founded, the Chief Engineer was acting in accordance with his duty in certifying as he did in this case.

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| (1) 2 Hudson (2 ed.) p. 119.              | (7) 50 Ill. App. R. 247. |
| (2) 14 C. B. N. S. 592.                   | (8) 62 Ill. App. R. 103. |
| (3) 18 Can. S. C. R. 371.                 | (9) 44 N. Y. 143.        |
| (4) 39 Ohio, 1.                           | (10) 18 Q. B. D. 7.      |
| (5) 2 Johnstons New Zealand<br>Reps. 407. | (11) 8 Ch. App. 597.     |
| (6) 11 Vict. L. R. 817.                   | (12) 5 H. L. Cas. 72.    |
|                                           | (13) 20 Ont. App. R. 86. |

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Appellant is entitled to judgment for the \$73,260 upon the merits of the dispute, in view of the facts proved, whether his contention as to the construction of the contract, specifications and plans in regard to his right to payment for earth in water-tight embankments is or is not correct. The formal reference is sufficiently wide in its terms to include the reference of the claim upon its merits to the Exchequer Court, and the claim was before the Exchequer Court by virtue of that reference. The learned judge of the Exchequer Court had jurisdiction to adjudicate upon the merits, and ought to have adjudicated by his last judgment, in view of his findings, that the appellant was entitled to judgment upon the merits of the claim for the full amount of \$73,260.

There was error in the deduction, in the judgment of the judge at the trial, *provisionally* of 100,000 cubic yards for "mucked material, sand, &c.," which ought not, he thought, to be paid for as earth in water-tight banks as not being selected material, and in giving the respondent the right to a reference to show if possible a still larger quantity to be deducted under that head. The engineers considered the material all sufficiently good to put into the embankments, and rejected none of it as being unfit for that purpose, but passed it and directed or approved of putting it into the embankments, and the appellant is entitled to the price under item 5 of the schedule (1) for the whole of it. The engineer had no authority, under the contract or specifications, after the material has been put into the embankments under his directions and to his satisfaction, to say that it should not all be paid for under item 5 as "earth in water-tight banks."

The appellant also submits that he is entitled to interest and his costs in both courts.

(1) See p. 301.

*Ritchie Q.C.* and *Chrysler Q.C.* for the respondent. The dispute became subject to arbitration under the clause in the contract, and the engineer had no power to grant the amended certificate. He had full power to decide questions depending upon the construction of the contract, and having done so by the former certificate became *functus officio*. *Lloyd v. Milward* (1).

The Act respecting the Department of Justice does not apply, because the chief engineer was not acting as the head of the department, requiring to be advised upon a matter of law connected therewith, nor was he, as to the certificate in question, acting as a servant or officer of the Crown whose duty it was to sign any certificate that he was advised or directed to sign. In theory he was appointed by both parties as arbitrator to stand between the parties and do justice to both. The position of the chief engineer, under clause 25 of the contract, is incompatible with that ascribed to him by the Exchequer Court judgment, and he was not a person whose duty it was to seek and accept the advice of the Department of Justice, as upon a matter of law connected with the Department of Railways and Canals. See *Hudson, Building Contracts*, vol. 1 (2 ed.) p. 301. The discussion of the position of the engineer, in *Ranger v. Great Western Railway Company* (2) at page 91, is not a correct statement of the position of the engineer under the present and similar contracts. See also *Clements v. Clarke* (3), at page 221; *Sharpe v. San Paulo Railway Co.* (4); *Kimberly v. Dick* (5) at page 19; *Farquhar v. City of Hamilton* (6), and earlier cases there referred to, and *Peters v. Quebec Harbour Commissioners* (7).

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(1) 2 Hudson, Building Contracts, 454.

(2) 5 H. L. Cas. 72.

(3) 2 Hudson, p. 207.

(4) 8 Ch. App. 597.

(5) L. R. 13 Eq. 1.

(6) 20 Ont. App. R. 86.

(7) 19 Can. S. C. R. 685.

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The question was not wholly one of construction of the contract, but was partly a question of fact as to what had been laid out by the engineers as water-tight embankments, and how much of the banks had been constructed in accordance with the specification and of selected material. Upon both of these questions the determination by the Department of Justice, that the whole bank should be so paid for, was opposed to the views of the engineers as expressed in the certificate or therein included by reference. The certificate, as found by the learned judge himself, was in fact wrong, because upon the most favourable view for the contractor it included at least 100,000 yards of material not according to specification and was, upon the facts, given for at least \$15,000 too much. Thus it is very clear, that the giving of the certificate was not a pure question of construction of the contract, to be determined by the Department of Justice, overruling the Chief Engineer.

The Department of Justice did not, in fact, advise the giving of a certificate for the full amount, and it seems to have been signed under a misapprehension, as to the scope or effect of the advice contained in the letter from the Department. The letter of the Deputy Minister merely contained an intimation that the late Minister of Justice, who at the time had ceased to be such minister, and was no longer the responsible adviser of the Crown, had come to the conclusion that the contractor's claim should be entertained. The duty and power of the Chief Engineer under clause 25 of the contract, was not affected by the omission from clause 8 of the usual provision making his judgment upon questions of the construction of the contract final. The cases cited show that the claim of the contractor to recover upon this certificate is inconsistent with the



claim urged in the alternative, that the proceeding is a reference of a matter in dispute. Clause 33 of the contract was only intended to be made use of in cases where the work was finished, and the Chief Engineer had finally certified under clause 25, and has no application to work under a pending contract. It contemplates a special reference of a matter in difference, and the evidence shews that there was no matter in difference but that the question was, whether the claimant had a valid certificate capable of being enforced by action. The decision of the Exchequer Court Judge is that of an arbitrator and is final and not appealable to the Supreme Court.

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Upon the evidence it seems clear that the certificate is bad, on the grounds that it does not express the judgment of the engineer; that the parties agreed to accept his certificate; that he is the person designated by the contract, and the Crown are not bound by the decision or judgment of any other person. Clause 25 requires that two facts or findings by the Chief Engineer shall be stated in writing:—That the work has been duly executed to his satisfaction. The value of the work computed as therein above mentioned;—and this has not been done. The question as to how much earth was placed in the water-tight embankments, laid out and made up in accordance with the specification, was a matter peculiarly given to the engineer, and upon which the engineer's judgment was required; it was one of the things as to which his satisfaction had to be expressed under clause 25 of the contract. The certificate not only does not state that the work was done to the satisfaction of the engineer, but, by reference to the documents incorporated with it, expressly states the contrary. See *Eads v. Williams* (1) at page 686; *Ellison*

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v. *Bray* (1). Other cases are collected in *Redman on Awards*, p. 98, and *Russell on Awards* (7 ed.). 207. See also *In re Eastern Counties Railway Co. & The Eastern Union Railway Co., Arbitration* (2); *Jackson v. Barry Railway Co.* (3). The question is referred to incidently in *Peters v. Quebec Harbour Commissioners* (4) at page 696, by Strong J. and by Gwynne J. at page 698, and Patterson J. at page 700.

The certificate is also bad because it does not fulfil the requirements of clause 25 of the contract; *Murray v. The Queen* (5); *The Queen v. Starrs* (6). The certificate is invalid because the question was previously finally determined by the Engineer's decision. In regard to the classification of the same material in the former certificate or progress estimate, (no. 23,) is also final, and he had no power to revoke or recall his decision so given. Certificate no. 23 finally determined the rights of both parties, and the progress estimate now sued upon was void, as being made by an officer who had already given a final decision upon the same question, and was therefore *functus officio*, as to that question. The approval of the Minister, which should be in writing and is also a condition precedent to the right of recovery, was not established.

In any event, if the court assumes jurisdiction under clause 33, to determine the meaning of clause 11 of the specification, the judgment of the court should merely be a declaratory one, leaving the contractor to obtain a certificate under clause 25 of the contract, for the amount which may appear to be due to him, applying the principle of construction declared by the court.

TASCHEREAU J.—I have had communication of the elaborate notes of my brothers Sedgewick and Girouard

(1) 9 L. T. N. S. 730.

(2) 3 DeG. J. & S. 610.

(3) [1893] 1 Ch. 238.

(4) 19 Can. S. C. R. 685.

(5) 26 Can. S. C. R. 203.

(6) 17 Can. S. C. R. 118.

and I agree with them that this appeal should be allowed.

Without dissenting from any of the grounds upon which they have reached this conclusion, I deem it necessary to state concisely my views of the case. The claim referred to the Exchequer Court and now before us is the claim of the appellant for \$73,260, based upon the Engineer's certificate no. 24. I am of opinion that this certificate under clause twenty-five of the contract, approved of by the Minister as it has been, is sufficient to entitle the appellant to his claim. It is clearly a certificate that the work "for which it is granted has been duly executed to the satisfaction of the Engineer" in the terms of the contract. It is, coupled with Munro's certificate, a certificate that this money is due under the contract and he was the sole judge of it. We cannot go behind it, and take upon ourselves to ascertain whether or not this amount is due, after he has certified that it is. I concur fully in what is said upon this point by my brothers Sedgewick and Girouard. If I mistake not such would have been the judgment of the Exchequer Court, if it had not been for a misconception of *Murray v. The Queen* (1). I agree also that certificate no. 23 does not militate against appellant's claim. Clause twenty-five of the contract expressly says that the value certified to under these certificates given during the construction is merely approximate, and clauses twenty-six and twenty-seven indicate clearly that there is no final certificate at all, under the contract, but the one to be given at the final completion of the work, an event which has not yet occurred.

The Crown's contention that because by certificate number twenty-three the engineer had not the power to issue certificate number twenty-four for that part of

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(1) 26 Can. S. C. R. 203.

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the work in question, is equivalent to nullify entirely clauses twenty-five and twenty-six and render them meaningless. The chief engineer's certificate number twenty-four must, in my opinion, be read as if all the words under the signature "Collingwood Schreiber" were struck out. I understood counsel for the Crown at the argument to rely exclusively on those words, and on certificate number twenty-three, in support of their case.

The appeal is allowed with costs and judgment is ordered to be entered for the appellant for \$73,260 with costs, Mr. Justice Gwynne and Mr. Justice King dissenting. We will hear counsel as to the question of interest.

GWYNNE J —The question which is before us upon this appeal is whether or not the claimant is entitled to recover the sum of \$73,260, which upon the evidence in the case he claims to be entitled to recover under the terms and provisions of the contract set out in his statement of claim.

Upon the 9th May, 1893, the appellant entered into a contract with Her Majesty, represented by the Minister of Railways and Canals of Canada, for the performance of certain work upon sections 4, 5, 6 & 7 of the Soulanges Canal in the contract mentioned. For the determination of the present appeal it will be necessary to consider only a few of the clauses of the contract and of the specifications which are referred to therein, and made part thereof.

By the specifications which were made part of the contract it was provided among other things as follows:

5. There will only be two classes of excavation recognized or paid for, namely, "earth" or "solid rock."

6. The price tendered for "earth excavation" must cover the entire cost of excavating, hauling and forming into embankments, all kinds of materials found in the pits for lock, weirs or other structures, and

in the prism of the canal, raceways, side ponds or wherever excavation is necessary, except solid stratified quarry rock. This price shall include the cost of removing boulders of all sizes, indurated clay, hard pan, &c., for none of which will any extra or additional allowance be made. It is also distinctly understood and agreed upon that no excavation shall be paid for below the exact grade line of the bottom of the canal works, or outside the line of the slopes, unless the same be executed under the written instructions of the engineer.

7. No allowance whatever beyond the prices tendered for excavation will be made for haul. The surplus material arising from the prism, &c., on section no. 7 shall, after making up the banks on that section, be carried forward to widen the embankments of sections to the eastward; and the surplus on section no. 6 shall be dealt with in the same manner, so that all the excavation arising from the sections embraced in this contract west of lock no. 5, will be disposed of in making the embankments on each side of the summit level, between stations 180 and 460, filling around the various structures, &c. This distribution of material to be made as will be directed by the engineer without entitling the contractor to any extra allowance whatever. The attention of parties tendering is specially drawn to this section of the specification.

11. Wherever the surface level of the water in the canal is higher than the ground alongside, water tight banks shall be made when so directed. In these cases the top soil must be removed for such width and depth as may be considered necessary to form the embankment seats. The material arising from this mucking to be deposited where pointed out. It will be paid for as ordinary earth excavation. The seats shall also be well roughed up with a plough so as to make good bond with the first layer of earth forming the base of the embankment. Puddle walls or cut-offs to be made where required—the puddle to be prepared and laid as specified hereafter.

When the bank seats are properly prepared, inspected and approved, and not till then, the bank shall be carried up in layers of selected material, of about eight inches in thickness, well spread, the lumps broken, watered, trodden down or otherwise compacted and carefully shaped to the heights and slopes given by the engineer.

Only such portions of the embankments as shall be laid out by the engineer, and made up in strict accordance with the foregoing specifications, will be paid for as “earth in water tight banks.”

99. The plans now exhibited are only intended to show the general mode of construction adopted; but detail drawings which must be strictly carried out will be supplied for the guidance of the contractor as the work proceeds.

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By the contract it was specially covenanted and agreed by and between the parties among other things as follows :

Paragraph 3. That the contractor will at his own cost provide all and every kind of labour, machinery and other plant, materials, articles and things whatsoever necessary for the due execution and completion of all and every the works set out or referred to in the specifications hereunto annexed and set out or referred to in the plans and drawings prepared and to be prepared for the purposes of the work, and will execute and fully complete the respective portions of such works and deliver the same complete to Her Majesty on or before the day of (a day not material on this appeal) the said works to be constructed of the best materials of their several kinds and finished in the best and most workmanlike manner, in the manner required by and in strict conformity with the said specifications and the drawings relating thereto, and the working or detail drawings which may from time to time be furnished, (which said specifications and drawings are hereby declared to be part of this contract), and to the complete satisfaction of the chief engineer for the time being having control over the work.

Paragraph 8. That the engineer shall be sole judge of work and material in respect of both quantity and quality and his decision on all questions in dispute with regard to work or material shall be final, and no works or extra or additional works or changes shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same, unless the same shall have been executed to the satisfaction of the engineer as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor.

Paragraph 9. It is hereby distinctly understood and agreed that the respective portions of the works set out or referred to in the list or schedule of prices to be paid for the different kinds of work, include not merely the particular kinds of work or materials mentioned in the said list or schedule, but also all and every kind of work, labour, tools, plant, materials, articles and things whatsoever necessary for the full execution and completing ready for use of the respective portions of the works to the satisfaction of the engineer, and in case of dispute as to what work, labour, material, tools and plant are or are not so included, the decision of the engineer shall be final and conclusive.

Paragraph 24. And Her Majesty in consideration of the premises hereby covenants with the contractor that he will be paid for and in

respect of the works hereby contracted for and in the manner set out in the next clause hereof, the several prices or sums following :

* * * * *

earth excavation, per cubic yard, 20 cents, earth in water-tight embankments, per cubic yard, 15 cents.

Paragraph 25. Cash payments equal to about ninety per cent of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of this contract will be made to the contractor monthly on the written certificate of the engineer that the work for or on account of which the certificate is granted has been duly executed to his satisfaction, and stating the value of such work computed as above-mentioned and upon approval of such certificate by the Minister for the time being ; and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said ninety per cent or any part thereof. The remaining ten per cent shall be retained, &c., &c. (unimportant on the present appeal).

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As the work of construction progressed, the engineer gave to the contractor monthly progress estimates which at first were for earth in excavation only as no embankment had as yet been commenced, but in the month of August, 1893, he gave a progress estimate for July, 1893, in which he estimated for earth excavation at 20 cents per cubic yard 85,300 cubic yards and for earth in water tight embankments at 15 cents per cubic yard, 20,000 cubic yards. In September, 1893, he in like manner gave an estimate for the month of August, for earth excavation 121,700 cubic yards, and for earth in water tight embankments 30,000 cubic yards, and in like manner in October, 1893, he gave an estimate for September for earth excavation 169,800 cubic yards, and for earth in water tight embankments, 43,000 cubic yards, and in November, 1893, he gave an estimate for the month of October, for earth excavation 230,000 cubic yards, and for earth in water tight embankments 67,500 cubic yards. Payments were made to the contractor in accordance with all these progress estimates.

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In the month of November, 1893, the contractor made a complaint to the Minister of Railways and Canals as to the manner in which his contract was being dealt with by the engineer, in a long letter dated 16th November, 1893, which is before us, contained in eight pages of the printed case. It is unnecessary to enter into the lengthy argument offered by the contractor in support of his complaint; it is sufficient to say that it related to three specific items, namely :

First. The interpretation of the specifications as to whether the 15 cents per cubic yard should be paid for the whole of the embankments formed from the excavation.

Second. The blue clay on sections 6 and 7, &c. &c.

Third. The difficulty and expense of bringing building for concrete to the site of the proposed lock, &c.

It is only with the first that we have to deal, and as to this it is sufficient to say that the whole of the contractor's argument in relation to it was to the effect that the contract and specifications afforded no warrant whatever for the action of the engineer in estimating for part only of the earth put into the embankments as to be paid for at 15 cents per cubic yard; and that by his contract and the specifications he was entitled to be paid 15 cents per cubic yard for every cubic yard of material put into the embankments in addition to the 20 cents per cubic yard on earth measured in excavation, and he added that even if the work should be done under the most favourable conditions these combined sums made but a moderate price for the work for which he claimed them, and he prayed that this his interpretation of his contract should be accepted as final and conclusive as to his right to the 15 cents for every cubic yard in embankments, or that he should be released from his contract upon certain

terms proposed in his letter. The Minister of Railways and Canals submitted this letter to the late Sir John Thompson, then Minister of Justice, for his opinion, and his opinion was, by a letter from the Department of Justice dated 28th February, 1894, communicated to the Minister of Railways and Canals, which in short substance is that the specifications do not admit of the construction contended for by the contractor; which opinion was communicated to the contractor in a letter from the Department of Railways and Canals, wherein the contractor was informed that in view of such opinion the Department must decline to entertain his claim.

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In the meantime, while this complaint of the contractor was before the Minister of Justice for his opinion, and subsequently to that opinion having been given, the engineer continued to give to the contractor monthly progress estimates distinguishing as before between earth in excavation at 20 cents per cubic yard, and earth in water tight embankments, at 15 cents per cubic yard, until the 13th December, 1895, when the engineer gave to the contractor a progress estimate numbered 23 for the month of November, 1895, containing among other things as follows:

Earth excavation—1,103,713 cb. yds. at 20c...\$220,742 60
 Earth in water tight

embankments..... 450,733 cb. yds. at 15c... 67,609 50

These two sums together make.....\$288,352 10

In the month of March, 1895, however, the contractor had renewed his complaint to the Minister of Railways and Canals in a letter dated March 22nd, 1895. This complaint was referred to the engineer, who after hearing the contractor upon the subject made his report to the Minister of Railways and Canals upon the matter adversely to the contractor's claim. The

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letter of the 22nd March together with various supplemental arguments supplied by the contractor between that date and the 10th December, 1895, was also submitted to Sir Charles Hibbert Tupper, who had succeeded the late Sir John Thompson as Minister of Justice, for his opinion.

The contention of the contractor as laid before Sir Charles Hibbert Tupper is substantially the same as that which had been laid before the late Sir John Thompson, although expressed in a more elaborate argument which is contained in thirty pages of the printed case laid before us. This elaborate argument, however, resolves itself simply into the contention that the question submitted is wholly one of law involving simply the legal construction of the contract, with which the engineer has nothing to do but to conform to it, and that such legal construction is: That it is apparent from the drawings upon which the contractor tendered for the work; that what was contemplated was one continuous embankment along each side of the canal to be constructed; that the position of the embankments indicated plainly that they must be made water tight, and that the contract gave to the contractor 15 cents for every cubic yard of earth put into these embankments within the dimensions assigned to them by the specifications; that the contract does not contemplate any such thing as a portion of the embankments respectively being made water tight, or authorise the engineer to estimate for a portion of the embankments as being water tight for the purpose of thereby limiting the allowance of 15 cents per yard to such part only; and that all that the contract excludes from the allowance of 15 cents per cubic yard is such part of the embankments, if there should be any, constructed by the contractor outside of the limits of the embankments as designed by the engineer and in excess

of the dimensions assigned to them by him in the specifications and drawings relating thereto.

In this is contained the whole substance of the elaborate argument presented on behalf of the contractor.

We have not the reasons for the conclusion at which the Minister of Justice arrived, but of his conclusion we are informed by a letter dated the 15th January, 1896, addressed by the Deputy Minister of Justice to the Secretary of the Department of Railways and Canals which is as follows :

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SIR,

Referring to your letter of the 4th October last, enclosing additional correspondence and the report of your Chief Engineer with regard to Contractor Goodwin's claim as to payment for the construction of water tight embankments on the Soulanges Canal, I have the honour to state that Sir Charles Hibbert Tupper while Minister of Justice, gave the matter very careful consideration and heard Mr. Goodwin in support of his claim. The Minister came to the conclusion that the claim was one which should be entertained by your Department, but he resigned his office before that advice could be communicated to you. He desired me, however, to inform you that he had reached the conclusion which I have stated.

The question now arises : Which of those opinions should prevail ? If that of the late Sir John Thompson, which by the letter from the Department of Justice, dated the 28th November, 1894, of which only the result is given above, appears to have been identical with that of the engineer in accordance with which all his monthly progress estimates up to and including that of the 13th December, 1895, for the month of November of that year were given, then it is manifest that the matter was one which by the contract was submitted to the final judgment of the engineer whose decision has been adverse to the claimant.

The question arises before us in this manner : The claimant in his statement of claim filed in the Ex-

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chequer Court under the provisions of section 23 of ch. 16 of 50 & 51 Vict. rests his claim upon what he contends is a certificate of the engineer, dated the 28th February, 1896, given in accordance, as he alleges, with the provisions of the contract in that behalf.

The respondent in the statement of defence sets out the material part of the contract and specifications as already given above, and in short substance and effect, insists that the document dated the 28th February, 1896, and relied upon by the claimant was not given, nor does it upon its face purport to have been given, as expressing the judgment or decision of the engineer as contemplated by the contract, but was given as shewn upon its face in deference to the opinion given by the Minister of Justice, Sir Charles Hibbert Tupper, as to the true construction of the contract, and did not express the judgment of the engineer, whose judgment and decision in the matter is contained in the certificate given by him dated the 13th December, 1895, which alone, as is contended, is binding, and that the claimant had received the amount so certified and that therefore his present claim should be dismissed.

To this defence the claimant filed a replication which is in substance and effect a renewal of his contention and the argument in support thereof submitted to the respective Ministers of Justice as already mentioned, and he insists that the certificate of the 13th December, 1895, was erroneous, inasmuch as it reported only 450,733 cubic yards as for earth in water tight embankments, and that the certificate of the 28th February, 1896, was given by the engineer to correct the error in his former certificate by giving credit to the claimant for 993,340 cubic yards as earth in water tight embankments instead of 450,733 cubic

yards, as had been erroneously certified in the certificate of December 13th, 1895.

The first point thus raised is whether the certificate of the 13th December, 1895, was erroneous as alleged, and this is precisely the question which had been submitted to the respective Ministers of Justice for their opinion, namely: Does the contract entitle the claimant to be paid 15 cents for every cubic yard of material put into the embankments constructed under the contract, or only for the earth put into such portions of those embankments as were laid out by the engineer for the purpose of being made, and as were required by him to be made, water tight and as should be certified by him as having been so made?

Now it cannot be disputed that as insisted by the claimant in his argument presented to the Ministers of Justice and urged before us on this appeal, that the drawings upon which the claimant made his tender, clearly shew that the embankments proposed to be constructed were two, namely, one continuous embankment (with which as extending from station 180 to station 460 on each side of the canal, proposed to be excavated, we alone have to deal); but the specifications upon which the claimant tendered also very clearly shew that for the earth to be deposited in a portion only of these embankments was the contractor to receive a sum per cubic yard to be agreed upon, and that for the earth deposited in all the residue of the embankments he was to be paid per cubic yard measured in excavation.

The 11th section of the specifications which provides for the construction of water tight banks can have relation to nothing else than to certain portions of these embankments on each side of the canal. It is in these embankments that the water tight banks are to be made when directed by the engineer, and the

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mode of constructing these water-tight banks (as they are called) is specially described thus :

The top soil must be removed for such width and depth as may be considered to be necessary to form the embankment seats.

These words "embankment seats" here used, plainly mean the seats of the portions to be made water-tight, and the material taken therefrom, that is, from the seat of the water tight portions, is to be removed from such seats and deposited where pointed out by the engineer, and wherever placed is to be paid for as earth measured in excavation only. From this direction it is obvious that the material so removed is to be deposited outside of the "water tight banks," as they are called, which are to be constructed in the embankments. Then the seats themselves from which such material shall be removed shall be roughed with a plough so as to make good bond with the first layer of earth forming the base of the embankment. This layer of earth plainly means that one first laid on the part so prepared by the plough. That all this applies to the portions only of the embankments which portions are designated in the specification "water tight banks," is very apparent from the whole tenor of the 11th specification, which goes on to provide that when the bank seats (already spoken of), and being to be constructed as the seats of water tight banks *in the embankments* are properly prepared, inspected and approved, and *not till then*, the bank shall be carried up (on the bank seats so prepared, inspected and approved) in layers of selected material of about eight inches in thickness, well spread, the lumps broken, watered, trodden down, or otherwise compacted, and carefully shaped to the heights and slopes given by the engineer, only such portions of the embankments as shall be laid out by the engineer and made up in strict accordance with the foregoing

specifications will be paid for as "earth in water-tight banks." This clause in plain language limits the right of the contractor to 15 cents per cubic yard to the earth put into those portions of the embankments which shall be laid out and so prepared as and for the water-tight banks in the embankments.

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Then by the evidence we see that the portions so intended by the engineer to be made water tight were laid out by him and plainly indicated by stakes planted in a line at the distance in sections 5, 6, 7, of 112 feet from a line staked to mark the centre line of the prism of the canal, and in section 4 at the distance of 101 feet from such centre line except for the distance of 600 feet where the line was staked at the distance of 112 feet from such centre line. The spaces between these lines on either side of the canal and the southern and northern limit respectively of the prism of the canal were so laid out by the engineer as the portions of the embankments required to be made water tight, and were prepared with the plough for that purpose as directed by the specifications, and the material removed from such portions was as directed by the specifications removed by the claimant and placed by him by direction of the engineer outside of the portion so staked for the purpose of being made water tight, but within the base of the embankments, the outside limit of which was marked at such distance from the stakes planted to indicate the limit of the water tight portions on one side of the canal as would enable the top of the embankment to be fifty feet in width and on the other side thirty feet only. This disposition of the material so removed from the base or seats of the portions intended to be made water-tight plainly indicated that the part of the embankments in which such material was deposited, was not within the parts designated by the specifications as being required to be made water-

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tight, and while the contract and specifications expressly provide that the contractor shall receive 15 cents per cubic yard *only for such portions* of the embankment as should be laid out by the engineer for the purpose of being made water-tight, the contractor by the adoption of the construction put upon the contract by Sir Charles Hibbert Tupper would receive 15 cents per yard for the earth removed from the seats prepared as the base of the water-tight portions as directed by the engineer and for which by an express provision in the contract and specifications he is to be paid only, wherever it should be placed, as earth measured in excavation, and by the evidence it appears that there is on a rough calculation 100,000 cubic yards so removed amounting to \$15,000. It was argued further that the portions required by the engineer to be made water-tight, being so made the whole of the embankments were made water-tight; but the contract is very express that the 15 cents per cubic yard is to be paid only for earth in "portions of the embankments" and there cannot be any doubt that such portions are those only which were so as aforesaid required by direction of the engineer to be made water-tight and staked out by him for that purpose. This appears to be the plain construction of the contract and section 34 provides that:

No implied contract of any kind whatsoever by or on behalf of Her Majesty shall arise or be implied from anything in this contract contained.

I can therefore come to no other conclusion than that the opinion of the late Sir John Thompson was correct and that the contractor is by his contract entitled to the 15 cents per cubic yard, only for the earth placed in the portions of the embankments so as aforesaid staked out by the engineer for the purpose of being made water-tight, and prepared for that purpose as prescribed

by the specifications. It was objected in argument that there was no slope given for the rear line of these portions, and that there was a variance in the mode adopted by the sub-engineers for the measurement of the earth in these portions in section 4 from that adopted in sections 5, 6 and 7, but as these portions were laid out as being well within the area of the whole of the respective embankments there could be no such rear slope. In such case the rear line of the portions laid out to be made water-tight would naturally seem to be a line drawn perpendicularly from the rear line of the base of such intended water-tight portions to the top of the embankments, and as to any variance in the mode of measuring the earth in such portions, hitherto there has been no controversy between the contracting parties upon that point; if any should arise the engineer is not only competent to correct any error if such there be, but is by the contract made final judge upon such a question. Neither of these objections, however, have any weight whatever upon the question raised by this appeal, which is simply as to the construction of the contract, namely whether it gives to the contractor 15 cents per cubic yard for all the earth in both of the embankments, the area of one of which is two-fifths larger than the area of the other, or only for the earth placed in the portions staked out by the engineer for the purpose of being made water tight, the areas of which in both embankments are equal.

It was further contended before us that whether the opinion of Sir Charles Hibbert Tupper was right or wrong mattered not, that is to say that whether the contract according to the true construction of it did or did not entitle the contractor to the 15 cents per yard for all the earth in the embankments as maintained by that opinion mattered not, for that the document upon

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which the claimant relied as the certificate of the engineer given under the provisions of the contract having been approved of by the Minister of Railways and Canals, the right of the claimant to the amount claimed was now incontrovertible. I do not think we need upon this appeal decide whether, if an engineer should ever intentionally or in error, give a certificate for an amount in violation of the terms of a contract, such amount could ever be recovered in an action founded upon the contract. In the present case the certificate no. 23, the amount certified by which was paid to the contractor, equally required the approval of the Minister before it could have been paid, and the difference between that certificate and the one numbered 24 required explanation. The statement of defence filed in the present case opened an inquiry into the whole of the circumstances under which that certificate was given, and distinctly disputes the intent (as construed by the claimant) and the validity of that document. The claimant by his replication rests his support of that document upon the allegation that it was given by the engineer to correct an error alleged to have existed in no. 23, and has thus raised the specific issue: Did such error exist in no. 23?

Now, that alleged error consisted in this, that the engineer only estimated for the earth placed in the portions of the embankments laid out by him for the purpose of being made water tight, as the earth for which the 15 cents per yard was to be paid instead of certifying (as is contended by the claimant he should have certified) for all of the earth in the embankments as entitled to be paid for at such price, and the correction relied upon by the claimant is the statement which is made in no. 24 of the amount which would be due to the claimant assuming the opinion of Sir Charles Hibbert Tupper to be correct as the claimant

contends that it is. If, however, that opinion cannot be sustained, there was no error in no. 23 to be corrected, and so the issue raised by the claimant in support and justification of certificate no. 24 must fail and that certificate must therefore also fail.

Now the evidence plainly shews that certificate no. 24 does not represent and was not given for the purpose of representing the engineer's own opinion as to what the claimant was entitled to under his contract, which opinion is still as is stated in no. 23, but merely to show the quantity of all the earth in the embankments and the amount which would be due to the claimant if in accordance with the opinion of Sir Charles Hibbert Tupper he was upon the true construction of his contract entitled to be paid 15 cents for every cubic yard of earth in the embankments instead of as had been estimated by the engineer only for the earth placed in those portions of the embankments which had in point of fact been laid out and prepared for that purpose and required by him to be made watertight. The certificate no. 24 moreover shows upon its face that it is intended to be qualified by reference to other specified documents which must be referred to, and which being referred to, show that the certificate no. 24 was given for no other purpose than as just stated. Under these circumstances it appears abundantly clear that whatever force might be given to the certificate no. 24 if the opinion of Sir Charles Hibbert Tupper as to the true construction of the contract could be supported, as that opinion cannot be maintained no. 24 cannot have no force to invalidate certificate no. 23 which is in accord with the true construction of the contract, nor can its approval by the Minister of Railways and Canals which must be intended also to be based upon the opinion of the Minister of Justice and must therefore fail with it, give it any force whatever.

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For the above reason I must say that I am of opinion that this appeal should be dismissed with costs.

SEDGEWICK J.—Prior to the month of May, 1893, the Government of Canada had adopted the policy of so improving the navigation of the River St. Lawrence that there should be continuously fourteen feet in depth of navigable water between the great fresh water lakes of the Dominion and the Gulf of St. Lawrence. As a part of this scheme the construction of the Soulanges Canal, a canal on the north side of the River St. Lawrence to be used in substitution for the Beauharnois Canal, a canal on the south side of the river, was undertaken. The proposed work was divided into sections, and on the 9th of May, 1893, a contract was entered into between the Crown and the present appellant for the construction of four of these sections. The clauses in the contract and specification especially affecting the questions involved in this appeal are as follows :

Clauses of contract :

3. \* \* \* The said works to be constructed of the best materials of their several kinds, and finished in the best and most workmanlikemanner, in the manner required by and in strict conformity with the said specifications and the drawings relating thereto, and the working or detail drawings which may from time to time be furnished (which said specifications and drawings are hereby declared to be part of this contract), and to the complete satisfaction of the chief engineer for the time being having control over the work.

8. That the engineer shall be the sole judge of the work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material, shall be final, and no works or extra or additional works or changes shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same, unless the same shall have been executed to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor.

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24. And Her Majesty, in consideration of the premises, hereby covenants with the contractor, that he will be paid for and in respect of the works hereby contracted for, and in the manner set out in the next clause hereof, the several prices or sums following, viz :

| No. of Item. | Description of Items.                                                         | Rate.   |
|--------------|-------------------------------------------------------------------------------|---------|
|              |                                                                               | \$ cts. |
| *            | * * * * *                                                                     | *       |
| 4            | Earth excavation, §§ 5, 6, 7, 9, 11, 15, 19, 21, 63, 64, 70, 76.....Perc. yd. | 20      |
| 5            | Earth in water-tight embankments, §§ 5, 7, 11.. do                            | 15      |

\* \* \* \* \*

N.B.—All materials to be measured in the work, and all cement used in the works of sections Nos. 4, 5, 6 and 7 will be furnished by the Department of Railways and Canals on the conditions set forth in section No. 89 of the specification. The figures placed after the various items in the above form of tender refer to the sections of the specification wherein they are described.

25. Cash payments equal to about ninety per cent of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of this contract, will be made to the contractor monthly on the written certificate of the engineer that the work for, or on account of, which the certificate is granted has been duly executed to his satisfaction and stating the value of such work computed as above mentioned, and upon approval of such certificate by the Minister for the time being, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said ninety per cent or any part thereof. The remaining ten per cent shall be retained till the final completion of the whole work to the satisfaction of the Chief Engineer for the time being, having control over the work, and within two months after such completion the remaining ten per cent will be paid. And it is hereby declared that the written certificate of the said engineer, certifying to the final completion of said works to his satisfaction shall be a condition precedent to the right of the contractor to receive or to be paid the said remaining ten per cent or any part thereof.

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26. It is intended that every allowance to which the contractor is fairly entitled, will be embraced in the engineer's monthly certificates; but should the contractor at any time have claims of any description which he considers are not included in the progress certificates, it will be necessary for him to make and repeat such claims in writing to the engineer within thirty days after the date of the dispatch to the contractor of each and every certificate in which he alleges such claims have been omitted.

27. The contractor in presenting claims of the kind referred to in the last clause must accompany them with satisfactory evidence of their accuracy, and the reason why he thinks they should be allowed. Unless such claims are thus made during the progress of the work, within thirty days, as in the preceding clause, and repeated, in writing, every month, until finally adjusted or rejected, it must be clearly understood that they shall be for ever shut out, and the contractor shall have no claim on Her Majesty in respect thereof.

33. It is hereby agreed, that all matters of difference arising between the parties hereto upon any matter connected with or arising out of this contract, the decision whereof is not hereby especially given to the engineer,—shall be referred to the Exchequer Court of Canada and the award of such court shall be final and conclusive.

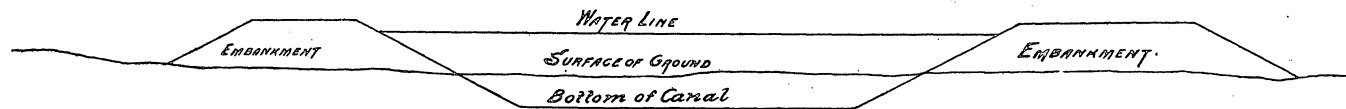
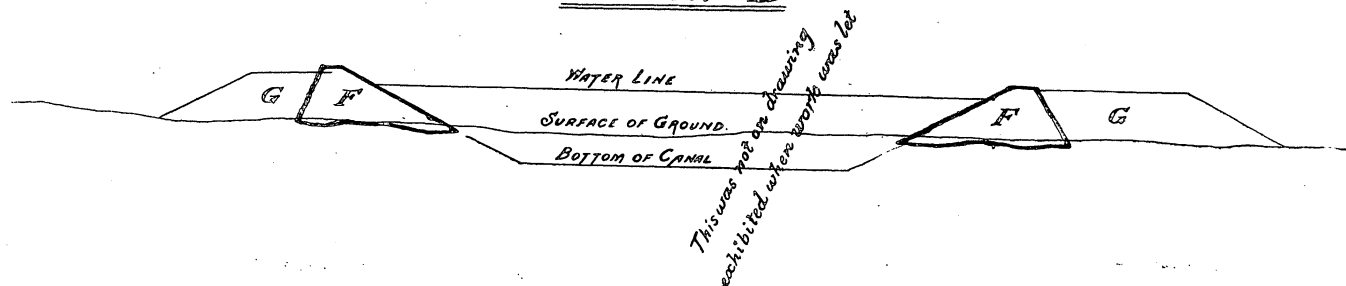
### Clauses of the Specification :—

The canal will be generally 100 feet wide at bottom  
 3. Dimensions of canal. with slopes in excavation of 2 to 1 throughout. The embankments forming the sides shall be of such top widths as will be directed, and be carried up to the height of 161 feet above datum on the summit level. Below lock no. 5, the top bank shall be 143 feet above datum or such other height as may be directed.

5. Classification of materials. There will only be two classes of excavation recognized or paid for, namely, "earth" or "solid rock."

6. Earthwork. The price tendered for "earth excavation" must cover the entire cost of excavating, hauling and forming into embankments, all kinds of materials found in the pits for lock, weirs or other structures, and in the prism of the canal, raceways, side ponds or wherever excavation is necessary, except solid stratified quarry rock. The price shall include the cost of removing boulders of all sizes, indurated clay, hard pan, &c., for none of which will any extra or additional allowance be made. It is also distinctly understood and agreed upon that no excavation shall be paid for

SKETCH "D"



CROSS SECTION AT STATION

240

SCALE 30 FEET = 1 INCH.

(To face page 303)

below the exact grade line of the bottom of the canal works or outside the line of the slopes, unless the same be executed under the written instructions of the engineer.

7. No allowance for haul. No allowance whatever beyond the prices tendered for excavation will be made for haul. The surplus material arising from the prism, &c., on section no. 7 shall, after

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making up the banks on that section, be carried forward to widen the embankments of sections to the eastward; and the surplus on section no. 6 shall be dealt with in the same manner, so that all the excavation arising from the sections embraced in this contract west of Lock no. 5, will be disposed of in making the embankments on each side of the summit level between stations 180 and 460, filling around the various structures, &c. This distribution of material to be made as will be directed by the Engineer without entitling the contractor to any extra allowance whatever. The attention of parties tendering is specially drawn to this section of the specification.

11. Watertight banks. is higher than the ground alongside, water tight banks shall be made when so directed. In these cases the top soil must be removed for such width and depth as may be considered necessary to form the embankment seats. The material arising from this mucking to be deposited where pointed out. It will be paid for as ordinary earth excavation. The seats shall also be well roughed up with a plough so as to make good bond with the first layer of earth forming the base of the embankment. Puddle walls or cut offs to be made where required—the puddle to be prepared and laid as specified hereafter.

When the bank seats are properly prepared, inspected and approved—and not till then—the bank shall be carried up in layers, of selected material, of about eight inches in thickness, well spread—the lumps broken—watered—trodden down or otherwise compacted and carefully shaped to the heights and slopes given by the engineer.

Only such portions of the embankments as shall be laid out by the engineer, and made up in strict accordance with the foregoing specification, will be paid for as “earth in water-tight banks.”

The plan shown to the contractor at the time of the execution of the contract, and which formed part of it, so far as the question involved in this case is concerned, is as follows: (1) This plan shows the surface of the ground

(1) See opposite.



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before any work was done, the intended bottom of the canal, the water-line when completed, and the embankments on each side, the northern embankment having a top fifty feet wide and the southern embankment thirty feet. The work, for payment of which the appellant has made the claim in controversy upon this appeal, has connection solely with the embankments on each side of the canal, and the only question is as to the amount which he is entitled to receive for the construction of these embankments. The work in question was to be done at places where the surface level of the water in the canal, when completed, would be higher than the ground alongside, and section 11 of the specification provided that in that particular case water-tight banks should be constructed on each side, but that before commencing these banks the top soil should be removed for such width and depth as might be considered necessary to form the embankment seats, the cost of removing this "muck" as it was termed, to be paid for as ordinary earth excavation, at 20 cents per cubic yard; (clause 24 of the contract); and that the ground where this mucking was taken from should be well roughed up with a plough so as to make good bond with the first layer of earth forming the base of the embankment. Further, that when the bank seats were properly prepared, inspected and approved—and not till then—the bank should be carried up in layers of selected material of about eight inches in thickness, well spread—the lumps broken, watered, trodden down or otherwise compacted and carefully shaped to the heights and slopes given by the engineer, and that only such portions of the embankments as should be laid out by the engineer and made up in strict accordance with the specification would be paid for as "earth in water-tight banks," at 15 cents per cubic yard.

(Clause 24 of the contract). It was further understood that the material of which the water-tight embankments on each side of the canal were to be made was to be taken from the excavation of the prism, if such material were suitable for the purpose, so that in effect it was provided that the contractor was to receive 20 cents per cubic yard for all earth excavation, and that in so far as this earth excavation was suitable for, and was used in, the construction of the water-tight embankments in pursuance of the terms of the specification, 15 cents per cubic yard in addition was to be paid. When the contractor entered upon his work the engineers of the government had laid out the line of the canal, indicating by stakes its central thread and the northern limit of the north embankment and the southern limit of the south embankment; indicating, too, that portion of the bed from which the top soil had to be removed in order to form the embankment seats; but there was nothing shown either upon the ground or upon any specification or plan, or by any verbal or other direction given to the contractor, that the position, height and width of the embankments themselves were to be other than indicated on the plan forming part of the contract and upon the faith of which the work was executed by the contractor. The embankments were built substantially according to the plan. The removal of the mucking or top soil to form the embankment seats was done, and the material deposited as provided by section 11 of the specification. Selected material of the character therein specified, taken from the prism of the canal, was, under the direction and with the approval of the Government engineers, and substantially in the manner specified in the clause last mentioned, used in the construction of the embankments and they were eventually completed as originally intended and as described in the original specifications and

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plans. There has never been any question or controversy between the Crown and the contractor, or between the Government engineers and the contractor, as to the work upon the embankments or the material of which they were composed, whether in respect of quantity or quality. All parties are satisfied that, so far as these matters are concerned, the appellant has fulfilled in every respect his contractual obligations; but it happened that after the completion of this particular work a dispute arose as to whether the contractor was entitled to be paid for the whole of the selected material used in the construction of the embankments, or only for a portion thereof. Sketch "D" in evidence at the trial clearly indicates the contention of the Government engineers. A line is drawn between "G" and "F" in each embankment, the bottom of the line indicating that portion of the bottom of its bed to which from the prism of the canal the top soil was to be removed and the seats prepared so as to make a good connection with the first layer of earth forming the base of the embankment, and the Government engineers claim that they have a right to draw from that point to the top of the embankment—each engineer upon the different sections having a different angle—and to say that only that portion of the embankments marked as "F" is a "water-tight embankment" within the meaning of the specification, the remaining portion of the embankments marked as "G" forming no part of such embankments, and that the contractor is not entitled to payment for that portion of them. As I have stated, there is no dispute as to the amount of material either in "F" or "G," whether as regards quantity or quality. The lines drawn as in the sketch through the embankments are purely imaginary ones. There

(See cut opposite page 303).

is no difference in any respect between the work or material in "F" and in "G" (except as to the foundations), nor was there anything communicated to the contractor nor any indication given to him, but that the whole of the embankments as originally planned and as eventually constructed were to be otherwise than indicated in the plan forming part of the original contract. It was admitted at the argument, and the evidence showed, that had the embankments been built in the shape indicated in "F" they would have been altogether insufficient for the purpose; that they might possibly last for a season or so, but that they could not be considered as permanent or as properly constructed water tight embankments. Notwithstanding this, however, the engineers insisted that they had a right of their own motion, without reference to the contractor, to divide by an imaginary line the completed embankment, and to say that only a small portion of it (I have not been able to ascertain what particular portion or the dimensions of that portion) should be paid for by the Crown.

Upon the completion of the embankments a progress estimate, purporting to be under section 25 of the contract, was made by the Chief Engineer of Government Railways, based upon this view of the engineers upon the ground, and the contractor was allowed for earth in water-tight embankments 450,733 cubic yards, amounting in price at 15 cents per cubic yard to \$67,609.95. As a matter of fact the quantity of earth in those embankments, being selected material used in construction, was 1,103,713 cubic yards, the price for which, after deducting 10 per cent for shrinkage, at 15 cents per cubic yard, would be \$149,001, making a difference in price of the amount claimed by the appellant on this appeal (less the 10 per cent deduction). The date of this progress estimate was 13th

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December, 1895. It appears that before this progress<sup>s</sup> estimate or certificate was given by the chief engineer there had, as was natural, been differences and arguments between the contractor and Mr. Schreiber, who was Chief Engineer and Deputy Minister of Railways and Canals as well, as to whether the basis upon which the measurements for the material composing the water-tight embankments was correct in principle under the terms of the contract. The question was referred to the then Minister of Justice by the Department of Railways and Canals, and he gave an opinion based upon the statements then submitted to him as facts, that the contention of the engineers was the sound one, and it was acting upon that opinion as well as upon his own view that the chief engineer gave the limited certificate to which I have referred, of the 13th December, 1895. The contractor was dissatisfied with this action on the part of the chief engineer. He prepared a new statement of his case, presenting additional evidence and urging its re-consideration. This new statement, together with all the papers in connection with the case, was again referred by the Department of Railways and Canals for opinion to the then Minister of Justice (Sir John Thompson having in the meantime died). In replying to this reference the law officers of the Crown advised the Department of Railways and Canals, in effect, that the appellant's contention was correct, and that his claim should be considered by the chief engineer as a legal one under the terms of the contract. Influenced by that opinion the Minister of Railways and Canals authorized the issue of a progress estimate in order to entitle the appellant to payment of his money, and thereupon the certificate in question upon this appeal was issued. That certificate is as follows :

## FORM No. 7.

TO THE ENGINEER MAKING THE ESTIMATE,  
INSERT AT

1. Progress or final.
2. Date up to which this estimate is made.
3. Name of contractor.
4. Contract or extra.
5. and 7. Number of the letter from the department to the engineer ordering the work to be proceeded with.
6. Name of person to whom this letter is addressed.
8. Date of this letter.
9. Maximum of expenditure authorized by letter.
10. The nature of the work for which the sum is granted.

Make an estimate for contract work alone, and a separate one for each order for extra work. The several estimates to be tied together with the summary of the whole at the end.

## RAILWAYS AND CANALS.

No. of Estimate—24. Date of Contract, 9 May, 1893.

Name of work—Soulanges Canal, Section Nos. 4, 5, 6, and 7.

Name of Contractor—George Goodwin.

Number of Contract—11,518,

(1) Progress estimate of work done and materials delivered from the beginning of the work to the (2) 30th November, 1895, by (3) George Goodwin, contractor, on (4) work done by letter No. (5).....

The works, the details of which are given in this estimate, were proceeded with under the order of the Department of Railways and Canals to (6).....No. (7)..... dated (8).....189 , authorizing an expenditure of (9) \$..... to (10).....

| No. of Item. | DESCRIPTION OF WORKS AND MATERIALS.                                    |            |  | Quantity.   | Prices. | Amount.    | Totals.      |
|--------------|------------------------------------------------------------------------|------------|--|-------------|---------|------------|--------------|
|              |                                                                        |            |  |             | \$ cts. | \$ cts.    | \$ cts.      |
| 1            | Clearing and grubbing .....                                            | Acres      |  | 8,34        | 20 00   | 166 80     |              |
| 2            | Fencing. ....                                                          | 100 L. ft. |  | 328         | 15 00   | 4,920 00   |              |
| 4            | Earth excavation on section .....                                      | C. yds.    |  | 1,103,713   | 20      | 220,742 60 |              |
| 5            | Earth in water-tight banks—Excn. as above....                          | 1,103,713  |  |             |         |            |              |
|              | Less 10 per cent shrinkage, say .....                                  | 110,373    |  |             |         |            |              |
|              |                                                                        | 993,340    |  | [*] 542,607 |         |            |              |
|              | Materials delivered—                                                   |            |  |             |         |            |              |
|              | Woven wire for fence.....                                              | L. ft.     |  | 24,000      | 0 06    | 1,440 00   | 374,830 40   |
|              | Posts, boards, etc .....                                               | Bulk sum   |  | \$700       |         | 700 00     | 2,140 00     |
|              | [*] Classification in accordance with decision of Minister of Justice. |            |  |             |         |            |              |
|              | See letter of 15 January, 1896.                                        |            |  |             |         |            |              |
|              | T. M.                                                                  |            |  |             |         |            |              |
|              | Progress and final estimate sheet.                                     |            |  |             |         |            | \$376,970 40 |

[\*] Added in red ink.

PROGRESS ESTIMATE AND CERTIFICATE.

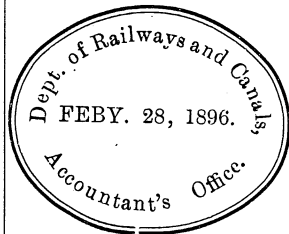
Folio 658.

RAILWAYS AND CANALS.

No. of Estimate, 24.

SUMMARY of the Estimates in favour of George Goodwin, Contractor, for work done and materials delivered up to 30th November, 1895, at Sections Nos. 4, 5, 6 and 7, Soulanges Canal.

| AUTHORITY BY DEPARTMENT OF RAILWAYS AND CANALS.                                                                              |                   |                                                                                 |                                                                  |                             |            |
|------------------------------------------------------------------------------------------------------------------------------|-------------------|---------------------------------------------------------------------------------|------------------------------------------------------------------|-----------------------------|------------|
| Date of Letter.                                                                                                              | Number of Letter. | Name of the person to whom the letter authorizing the expenditure is addressed. | Amount Authorized.                                               | \$                          | cts.       |
|                                                                                                                              |                   |                                                                                 |                                                                  | 376,970                     | 40         |
|                                                                                                                              |                   |                                                                                 | On extra work ordered to be proceeded with by letter No. — dated |                             |            |
|                                                                                                                              |                   |                                                                                 | On extra work ordered to be proceeded with by letter No. — dated |                             |            |
| LESS.                                                                                                                        |                   |                                                                                 |                                                                  |                             |            |
| Amount returned for Pay-lists and accounts ....                                                                              |                   |                                                                                 |                                                                  |                             |            |
| Amounts returned for work done under other contracts or for extra work authorized, and not included in present summary ..... |                   |                                                                                 |                                                                  |                             |            |
| Amount returned under present summary .....                                                                                  |                   |                                                                                 |                                                                  |                             |            |
| Forming the total amount certified up to date against sum authorized.                                                        |                   |                                                                                 |                                                                  |                             |            |
|                                                                                                                              |                   |                                                                                 |                                                                  | Less drawback, 10% say..... | 37,690 40  |
|                                                                                                                              |                   |                                                                                 |                                                                  | \$                          | 339,280 00 |
|                                                                                                                              |                   |                                                                                 |                                                                  | (In pencil.)                | 266,020 00 |
|                                                                                                                              |                   |                                                                                 |                                                                  |                             | 73,260 00  |



I hereby certify that the above estimate is correct, that the total value of work performed and materials furnished by Mr. George Goodwin, Contractor, up to 30th November, 1895, is three hundred and seventy-six thousand nine hundred and seventy and  $\frac{40}{100}$  dollars; the draw-back to be retained thirty-seven thousand, six hundred and ninety and  $\frac{40}{100}$  dollars; and the net amount due three hundred and thirty-nine thousand, two hundred and eighty dollars, less previous payments.

Dated COTEAU LANDING, P.Q.,  
26th February, 1896.

(Sgd.) THOS. MUNRO.  
[\*] Signed by me subject to conditions stated  
in my letter of 26th Feb., '96. T.M.

[\*] Total amount certified on this contract \$376,970.  $\frac{40}{100}$

COLLINGWOOD SCHREIBER.  
[\*] Certified as regards item No. 5 in accordance with letter of  
Deputy Minister of Justice, dated 15th Jan., 1896.  
Ottawa, 27th Feb., 1896. Chief Engineer.

ENGINEER'S AUDIT OFFICE,  
Department of Railways and Canals.  
Examined and checked,

G. A. MOTHERSILL. 27-2-96.  
Progress and final estimate sheet.

[\*] Added in red ink.

This certificate was sent to the office of the Auditor-General, accompanied by the following letter :—

Form D. 30.  
Application No. 345.

EXHIBIT 5.

DEPARTMENT OF RAILWAYS AND CANALS.

\$73,260.

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OTTAWA, February 28th, 1896.

*To the Auditor-General :*

SIR,—I have the honour to request the issue of a cheque in favour of George Goodwin, for the sum of seventy-three thousand, two hundred and sixty dollars, being for work done as per Est No. 24 to Nov. 30th, 1895.

Secs. 4, 5, 6, 7.

Total payments, \$339,280.

Chargeable to Appropriation ; Soulanges Canal Cap.

I am, Sir, your obedient servant,

COLLINGWOOD SCHREIBER,

*Deputy Minister.*

LEONARD SHANNON,

*Accountant.*

But for some reason or other not disclosed by the evidence and not known to us, except from proceedings which form no part of the record, the Auditor General refused to issue the cheque, and thus the matter stands.

The matters in difference between the contractor and the Department of Railways and Canals was referred by the Minister of that Department to the Exchequer Court of Canada under section 23 of "The Exchequer Court Act." When the case was first heard before that court judgment was ordered to be entered in favour of the claimant, but upon a re-hearing that judgment was reversed and the claim dismissed, the court, however, still being of opinion that on the merits the claimant was entitled to recover, but out of deference to what was supposed to be a decision of this court in the case of *Murray v. The Queen* (1), the learned judge



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gave judgment in favour of the Crown; hence the appeal to this court.

Only one question has so far been fully argued before us, namely, the question of the validity of the certificate of the 27th February, 1896, but the merits of the case were necessarily involved in that question and were therefore incidentally touched upon, and it was understood at the close of the argument that if we were of opinion that the certificate was good the appeal should be allowed, and that no further argument as to the merits of the claim would be necessary.

It was contended at the argument before us that the certificate was bad, first, because it was not in the form prescribed by clause 25 of the contract, inasmuch as it did not specifically state that the work had been done to the satisfaction of the engineer; secondly, that it was bad because there had been a decision by the engineer upon the question in dispute, and that by section 8 of the contract such decision was final and irreversible; and thirdly, that it was bad because the certificate of the engineer was his certificate in form only; that in substance it was the certificate of a "third party," namely, the Minister of Justice, upon whose opinion it was said to have been issued, and that such a certificate was no certificate within the meaning of section 25 of the contract.

Upon the first of these points I am of opinion that the certificate sufficiently complied with section 25 of the contract, when taken in connection with the evidence and the circumstances of the case. The clause requires a certificate that the work for, or on account of, which the certificate is granted, has been duly executed to the engineer's satisfaction, and that it should state the value of such work computed at the prices agreed upon or determined under the provisions of the contract. The schedule part of the certificate which

has been set out states that it is a progress estimate of work done and materials delivered from the beginning of the work up to the 30th November, 1895 ; and it then states the price, the items, and the different kinds of work done up to that date. The chief engineer's letter to the secretary of his Department, enclosing the estimate, states that he encloses therewith *duly certified for payment* the estimate in question for work done and materials delivered in connection with the sections in question. The following is a copy of the letter above referred to:—

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EXHIBIT 4.

OFFICE OF THE CHIEF ENGINEER OF RAILWAYS AND CANALS.

OTTAWA, 28th February, 1896.

SIR,—I enclose herewith duly certified for payment an estimate, in favour of Mr. Geo. Goodwin for work done and materials delivered in connection with sections Nos. 4, 5, 6 and 7 on the Soulanges Canal up to the 30th November, 1895.

Gross Estimate, \$376,970.40.

I am, Sir,

Your obedient servant,

COLLINWOOD SCHREIBER,

Chief Engineer.

Per L. K. JONES.

To the Secretary,

Department Railways and Canals,

Ottawa, Ont.*

In these documents constituting the certificate there is, therefore, over the signature of the Chief Engineer the statement that the "estimate is correct," that the amount of money "mentioned is due," and that the estimate has been "duly certified." Having in view these statements it appears to me that it cannot be successfully contended that the certificate does not show that the work thereby certified for had been

*This letter bears on its face office, "Dept. of Railways and the dating stamp of the secretary's Canals, February 28th, 1896, 11 a.m."

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duly executed to the engineer's satisfaction. If the work was done as he certifies, it must mean—done in accordance with the contract—which means done to his satisfaction. When he said, as he did in the certificate, that the money was due, did it not necessarily mean that the work had been done to his satisfaction as the contract required? It necessarily meant this, otherwise he could not say that any money was due in respect of it. And if he said as he did, that the estimate was duly certified for payment, he, the chief engineer, knowing the requirements of clause 25, must be taken to have said that the work had been executed to his satisfaction, otherwise the requirements of the clause as to the certificate had not been duly complied with, and the estimate had not been duly certified. As a matter of fact that the work was done to the satisfaction of the engineer is proved beyond dispute. The evidence of Mr. Schreiber, conspicuously free as it was from impartiality or bias, is clear upon this point, as well as that of Mr. Coutlée, one of the engineers upon the ground, and others. There are no judgments of any court whose decisions we are bound to follow directly bearing upon the question, but such opinions or decisions as there are are all in favour of the validity of the certificate.

In *Hudson on Building Contracts*, second edition, page 294, that author states that it is his opinion on the authorities cited that

if a certificate of payment and satisfaction is required, a certificate for payment will imply a certificate of satisfaction.

In *Harman v. Scott* (1) the contract provided for progress payments, and also that the balance of the stipulated price

should be paid by the proprietor to the contractor within fourteen

(1) 2 Johnston's New Zealand Reports 407.

days from the architect's certificate being given that the works are completed to his satisfaction.

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The architect gave a certificate in this form :

I hereby certify that Messrs. S. Brothers are entitled to the sum of £135 13s 5d, being balance of amount due to them on account of extras for your house at S. Sedgewick J.

The New Zealand Court of Appeal held that this was a sufficient certificate by the architect under the contract that the works were completed to his satisfaction. Sir George Arvery, in delivering the judgment of the court, composed of himself and three other judges, said, at page 418 :

In the present case the certificate of the architect implies the approval of the work done. He certifies the balance of amount due to the builder by the employer on account of the contracts on which his certificate was based, and in pursuance of which he issued that certificate which he knew he had no power to give except and until the works were completed to his satisfaction. Assuming therefore that the certificate was honestly given, it is not consistent with any other supposition than that the architect was satisfied with the manner in which the works had been completed.

In *Clarke v. Murray* (1) the contract provided that percentage payments should be made to the contractor at intervals during the progress of the works at the discretion of the architect upon certificates in writing under his hand, and the balance when the whole work was completed to his satisfaction and his certificate given to that effect. The architect certified that the contractor was entitled to receive the sum of £64 19s 9d, this being the final certificate in full. The Supreme Court on a case reserved for the opinion of the full court held that that was a certificate to the effect that the whole of the work was completed to the architect's satisfaction, though the fact of satisfaction was not in terms expressed in the certificate.

(1) 11 Victoria L. R. 817.

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In *Galbraith v. Chicago Architectural Iron Works* (1), where the building contract provided as a condition precedent for payment that the architect should certify that the work had been done to his satisfaction, and upon the completion of the work the architect made his certificate omitting any reference to "his own satisfaction," the Court of Appeal held that the certificate that the work was completed implied that it was done as the contract required and to the satisfaction of the architect.

The New York Court of Common Pleas, in 1894, in *Snaith v. Smith*, reported in 27 New York Supplement 379, held that an architect's certificate that "there is now due to 'the contractor' the final payment of his contract," specifying the amount sufficiently complies with a contract requiring final payment within thirty days after completion provided that the architect should certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction.

These decisions confirm me in the opinion which I hold that the certificate, so far as this point is concerned, is sufficient in form and that the appellant's contention in this respect is the right one.

As to the second objection, namely, that the certificate of December 13th, 1895, had the effect of *res adjudicata* under clause 8 of the contract, I entertain no doubt whatever. This contention is based upon the assumption that there was a dispute within the meaning of clause 8; that there was an adjudication of such dispute, and that the certificate was the evidence of that adjudication. Now the evidence establishes conclusively that there never was in connection with this case any decision or adjudication at all by the engineer in a matter which under the contract he had

authority or jurisdiction to decide. The question in dispute, as I have already indicated, was not a dispute as to the quantity or quality of the work or material, but as to the construction of the contract, the point being as to whether the embankment, as a whole, was to be paid for so far as it consisted of selected material, or whether it was competent for the government engineers after it was completed to divide it into two portions by an imaginary line and declare that only one of these portions was to be paid for and not the whole. That was a legal question, not a question of fact, the decision whereof was not given to the engineer but was a question to be settled by process of law, or as provided for by clause 33 of the contract, by a reference to the Exchequer Court. The decision of the engineer had no legal effect whatever so far as the legal question was concerned, whether that opinion was based upon advice of the law officers of the Crown or not. But even if it were so, the certificate of the engineer is not a decision within the meaning of the contract. The only office of the certificate under the contract is that it is a voucher to the department charged with the disbursement of public moneys that the claim is due, and at the same time the existence of such a certificate is a condition precedent to enable the contractor to obtain any money at all. That is its only purpose. It may of course be used by the claimant against the Crown in an action brought for the recovery of the money therein referred to as evidence in support of his claim, although even that in ordinary cases may be questioned. In the present case the certificate signed by Mr. Schreiber as chief engineer, in connection with the letter above set out from him to the Auditor General, writing in his capacity of Deputy Minister of Railways and Canals, does, in the absence of anything to the contrary, furnish conclusive evi-

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dence of the suppliant's claim. It may too be of service as evidence of a decision under clause 8 of the contract in a case where the engineer has jurisdiction, but even that is doubtful, as I think that the contract as a whole contemplates a written decision.

Mr. Goodwin in the present case is called a contractor because he has entered into a contract with the Crown. He is employed to do mechanical work for the Government. He is a contractor in the same way as any other employee is, and is entitled to be paid for his work when it is done. All parties are at liberty to make any stipulation they please as to the time and manner of compensation. It has been agreed in the present case that the contractor shall be paid for his monthly labour at the end of each month, subject to a reduction of ten per cent as security for good faith and as a guarantee that the whole contract will be completed; but it is further provided that a certificate of the kind specified must be produced before payment can be exacted. The certificate is nothing more, as I have said, than an instrument required to be signed by responsible officers of the Crown as evidence that the money demanded has been duly earned.

These considerations help us to come to a conclusion upon the third objection to the certificate, viz.: that it is not Mr. Schreiber's certificate, but the certificate of Sir Charles Hibbert Tupper, the then Minister of Justice. I am not prepared to say that even if Mr. Schreiber had under the contract authority to make a decision upon a question of law as the present is, he would not be perfectly justified in applying to the law officers of the Crown for advice and of following that advice even if he, a layman, were of opinion that such advice was erroneous. A judge in investigating a question which he is called upon judicially to decide may endeavour to obtain light from any source. He

may consult books, the opinions of his brother judges whether verbally expressed or forming part of written jurisprudence generally, and he may act upon the opinions which he has heard or read, even though they may not at first commend themselves to his judgment. But in the present case it was clearly Mr. Schreiber's duty to seek legal advice from the authority appointed by statute to give it, (see R. S. C. ch. 21, secs. 3 and 4), upon the legal question to be settled, before he could give a certificate at all. The contractor had been already paid, as I understand, for the work as originally allowed. Whether he should be paid the balance of the claim depended upon the conclusion to which the department came as to the merits of the legal controversy. It was only upon the settlement, so far as the Railway Department was concerned, of that legal question that any certificate could be given in respect to the remainder of the claim, and upon the settlement of it by the department upon the advice of the Minister of Justice it then became the clear duty of the chief engineer to measure the work and to compute the price for it under the provisions of the contract in that regard. It must be borne in mind that neither Sir John Thompson nor Sir Charles Hibbert Tupper expressed or was asked to express an opinion upon the quality, quantity or price of the work in question. They in no way sought to influence or did influence the engineer in his conclusions upon these points. In regard to them he exercised his jurisdiction and delivered his judgment solely upon his own responsibility and upon the information furnished him by his subordinate officers. The effect of the certificate so far as this point is concerned is that Mr. Schreiber has adopted the law as laid down by the law officers of the Crown and has made the measurements and fixed the price, assuming that opinion

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to be correct. I do not think the certificate can be objected to upon that ground. Further, I think it is reasonably clear from the special provisions of the contract, namely, clauses 26 and 27, which are above set out, that the monthly certificate was not a decision upon any legal question. Doubtless the contractor complied with the provisions of these two clauses and this claim was made and repeated in pursuance thereof.

One other point remains to be considered, viz., how far the decision in *Murray v. The Queen* (1) affects this case. We are all of opinion that it does not, notwithstanding the perhaps just criticism of the learned Exchequer Court Judge upon the phraseology of certain portions of it. In that case there was no question as to the form of the certificate, because all such objections were, at the instance of the court, formally waived, and the statement upon which the learned judge relies was a statement, not made in the course of a discussion of law involved in the case, but merely in a statement of the reasons which moved the court to insist upon a specific waiver. Inasmuch then as it was not a point in controversy in the argument of that case as to what form a certificate like the one in question must necessarily take, any statements of law upon that point were *obiter dicta*, and therefore, though entitled to consideration, not binding upon other tribunals.

It was further argued before us that the judgment in that case was conclusive upon the contention to which I have already referred, that the first certificate was an adjudication and that the engineer was *functus officio* at the time he made the second certificate, but the contract in that case was in this particular essentially different from the contract in the present case.

By its express terms it was there provided that the engineer should not only have the authority which he has in the present case, but that all matters in dispute whether of fact or law might be decided by him, and that his decision was to be final. In this contract his power to decide is of a much more limited and restricted character. He can decide and only decide upon disputes as to quantity or quality.

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I would have dealt at greater length with some of the questions involved, had they not been most fully and satisfactorily discussed by my brother Girouard.

In consequence of the agreement come to at the close of the argument, there must be judgment for the appellant, we being of opinion that the certificate of the 27th February, 1896, is sufficient in form to comply with the provisions of clause 25 of the contract, and that its production satisfies the condition precedent therein specified, and that so far as it is concerned the appellant is entitled to judgment. The original judgment of Mr. Justice Burbidge enlarged unconditionally to the amount of the certificate stated upon the reference will stand to take effect from its date, the appellant being entitled to all costs in this Court and the Exchequer Court.

The parties will be heard on the question of interest.

KING J.—The works contracted for were, in the main, of the kind “where the surface level of the water in the canal was higher than the ground alongside.” The price for earth excavation—20 cents per cubic yard—covered the hauling and forming of it into embankment, as well as the excavating, but it was provided that, in the case of such portions of the embankment as might be made water-tight under clause

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11 of the specifications, there was to be a further allowance of 15 cents per cubic yard of embankment.

Clause 11 is as follows :

Wherever the surface level of the water in the canal is higher than the ground alongside, water-tight banks shall be made when so directed. In these cases the top soil must be removed for such width and depth as may be considered necessary to form the embankment seats. The material arising from this mucking to be deposited where pointed out. It will be paid for as ordinary earth excavation. The seats shall also be well roughed up with a plough so as to make good bond with the first layer of earth forming the base of the embankments. Puddle walls or cut offs to be made where required—the puddle to be prepared and laid as specified hereafter. When the bank seats are properly prepared, inspected and approved—and not till then—the bank shall be carried up in layers, of selected material, of about eight inches in thickness, well spread—the lumps broken—watered—trodden down or otherwise compacted and carefully shaped to the heights and slopes given by the engineer. Only such portions of the embankments as shall be laid out by the engineer, and made up in strict accordance with the foregoing specification, will be paid for as “earth in water-tight banks.”

The plans exhibited at the time, and forming part of the contract, showed the general embankment, but did not in any way distinguish the water-tight portion. Detail drawings as the work proceeded were, however, provided for, but so far as regards the water-tight banks no detail drawings were at any time given to the contractor. Certain things, however, were done on the ground and certain directions given which, it is claimed, sufficiently indicated what was to be done.

The centre line of the canal, as also the inner and outer side-lines of the general embankments, were shown upon the ground by lines of stakes. Between these latter, and at a distance from the centre line of the canal of from 101 to 112 feet, another line of stakes was set by the engineer. These were called mucking stakes, and their clear and understood purport was to indicate that the top soil was to be removed from the area of the general embankment as far back as this

line of stakes with a view to the forming of the seats of the water-tight embankments.

This top soil was accordingly removed by the contractor, and deposited by direction of the engineer upon the adjacent embankment area lying immediately outside of the line of mucking stakes. Here also was deposited the top soil taken from the prism of the canal, and also that from an outer space required for a ditch. The effect of this was to accumulate upon that part of the area of the general embankment lying outside of the mucking stakes, a considerable body of loose and porous top soil which, *ex hypothesi* of the specification, was not deemed suitable for the formation of water-tight bank. The stripped portion of embankment area was then roughed up with a plough in order that it might form a good bond with the first layer of earth which, when deposited, would form the base of the water-tight embankment.

This completed the preparation of the seat of the water tight embankment, and, when inspected and approved, the bank, *i.e.* the water-tight portion of the embankment, was then to be carried up,—by which is meant that it was to be carried up upon its base, the layer of earth in contact and bond with the prepared seat,—in layers of selected earth of about eight inches in thickness, well spread, the lumps broken, watered, trodden down, or otherwise compacted, and carefully shaped to the heights and slopes given by the engineer.

The excavated material taken from the prism of the canal after removal of the surface soil was of a kind peculiarly well suited for the making of water-tight bank, and, in the opinion of the engineer, it was possible to dispense with the special requirements for compacting mentioned in the specification. The evidence shews that the minimum of labour was put upon it.

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Then inasmuch as about all the excavated material was of this select quality, it was used in the formation of the entire embankment, the only difference in the treatment of it being, (as stated by Mr. McNaughton), that more care was taken in the spreading of it as far back as the mucking stakes. As completed, the front and the rear portions of the embankment differed then in this :—that the front portion was composed of the select material from top to bottom, and its base rested on and formed a bond with the prepared seat, while the rear portion was composed, above, of the select material, but below it was an accumulation of discarded and porous surface soil, resting on other surface soil in a natural and unprepared state, and therefore manifestly, and upon the evidence, not impervious to water that might reach it.

The omission of plans shewing the exterior slope of the front portion of the embankment, and the omission in point of fact to give to it an independent shaping, were not material, considering the uniform good quality of the material (apart from the top soil) used throughout the entire formation. To require this could only have involved the contractor in unnecessary expense, and, like the dispensing with the requirements for compacting, was advantageous to the contractor.

It was suggested that, in the absence of plans of water tight banks, the whole embankment is to be taken as having been laid out by the engineer as such. But it seems to me that neither could the engineer have intended to lay out for water-tight embankment the area upon which he directed the discarded porous surface soil to be deposited, nor could the contractor reasonably have supposed, from anything done or omitted to be done by the engineer, that it was so intended. Of course the question is not whether the embankment was or was not water-tight in fact, nor

whether it needed to be kept in position by the support of other material, but whether it was laid out and directed to be constructed as for water-tight embankment having regard to the description of it contained in the contract.

When, therefore, the chief engineer had occasion early in the execution of the contract to estimate the quantity of earth formed into water-tight embankment, he correctly treated such embankment as limited to what was carried up upon the prepared seats.

On the 16th November, 1893, the contractor, in a letter addressed to the Minister of Railways and Canals, objected to this, and claimed that "according to the contract the whole of the embankment should be paid for at 15 cents per yard," alleging that the whole had been laid out by the engineer as water-tight embankment.

This claim, although renewed, was as often rejected by the chief engineer, in successive estimates. In March, 1895, the contractor presented to the Minister a fully reasoned statement in favour of his view. This appears to have been submitted to the chief engineer, who, after full inquiry and hearing the contractor, decisively rejected the claim, both in departmental communications, and by his certificate number 23 covering all work down to and including the month of November, 1895. In this the total of earth excavation was given at 1,103,713 cubic yards, and the total of earth in water-tight embankments at 450,733 cubic yards. The amount found to be due on this estimate was paid to the contractor less amounts paid on previous certificates.

The contractor continued notwithstanding to press his views upon the department, and in the result, in consequence of an opinion from the Justice Department to the effect that the contractor's claim ought to

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be entertained, another estimate (no. 24) was prepared to give effect to this view covering the same work and period as that of no. 23. In this the number of cubic yards of excavation was given, as before, at 1,103,713, but the quantity of earth in water-tight embankment at the full quantity of excavated earth with deduction for shrinkage, making 993,340 cubic yards instead of 450,733, as before, that is to say, the entire canal embankment was treated as water-tight bank under the contract.

In certifying this the chief engineer, in words inserted by him between the signature of his name and that of his office, declared that as regarded item No. 5, *i. e.*, as to the earth in water-tight embankment, he certified in accordance with the letter of the Deputy-Minister of Justice dated 15th January, 1896.

Before the money was paid upon this, the department reverted to the opinion of the chief engineer, and in these proceedings questions the binding character of the certificate.

Under this contract the engineer was impliedly empowered to determine, at least provisionally, all questions that might require decision in order to enable him to make his certificate, but he was (amongst other things) to compute the value of the work according to the prices named. His position was similar to that of the surveyor in *McDonald v. Mayor of Workington* (1), of whom Lord Esher said:

He is an independent person. His duty is to give the certificate according to his own conscience, and according to what he conceives to be the right and truth as to the work done, and for that purpose he has no right to obey any order or any suggestion by these people who are called his masters. For that purpose they are not his masters.

But the works owner may waive a certificate to the extent that it makes for him, or to such end may dis-

(1) Hudson on Building Contracts, 2 ed. vol. 2, p. 222; 9 Times L. R. 230.

charge the certifying engineer from the obligation to exercise his own judgment. This in effect is what was done here. The department in effect says to him: "Never mind your own opinion. We know what you think, but we think differently, and we desire you to act on our opinion and not upon your own." And to show that his own mind did not go with his act the chief engineer was careful to explain how he came to add his signature. Such a certificate may be evidence of an admission of liability on the part of the works owner, or some evidence tending towards proof of waiver, but it is not, as it seems to me, the certificate contemplated by the contract.

Further, if the certificate had purported to express the mind of the chief engineer, and there had been no assent to it, it would have been open to objection by the works owner as being *ultra vires* inasmuch as the engineer had previously rejected the claim. By clauses 26 and 27 it is provided that in case claims of the contractor are not included in the progress certificate he may, until such claims are finally adjusted or rejected, repeat them in writing to the engineer within thirty days after the date of the despatch to the contractor of each and every certificate in which he alleges such claims to have been omitted. Claims might be of such a nature that their omission from a progress certificate would not imply their rejection, but the claim here made by the contractor was such that the determination in certificate no. 23 that the total quantity of earth excavation was 1,103,713 cubic yards, and that the quantity of earth in water-tight banks was but 450,733 cubic yards, was a rejection (after a full hearing) of the contractor's claim to be allowed, as for earth in water-tight embankment, the quantity of earth in the entire embankments, and it was not com-

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petent for the engineer afterwards to reverse this determination.

The consent of the works owner to this being done did not amount to a contract, but was a bare assent to the engineer doing something, or rather a direction to him to do something which under the contract it was not competent for him to do. Under the contract a certificate of the engineer made within its provisions would, if approved by the Minister, create a debt due; and in relation to matters within the competence of the engineer to decide, I am inclined to think that an assent of the works owner adopted by the engineer as his own conclusion could not be retracted after the making of the certificate. But here the effect sought to be given to the certificate in question is to give to it a validity which, without such assent, it could not have, and this in two respects, viz. : in reversing his own determination expressed after hearing the contractor, and secondly, in computing the value of the work otherwise than according to the contract, as for example, in the allowance of more than 20 cents per cubic yard for top soil removed in the process of mucking.

For these reasons I think the appeal should be dismissed.

GIROUARD J.—Besides the reasons which have been advanced by Mr. Justice Sedgewick, I propose to offer a few remarks upon the validity of the engineer's certificate, which is the only point submitted for our determination.

The principal, and I may say the only, serious objection raised by the Crown to the form of the monthly estimate of the engineer of the 26th of February, 1896—which it is sufficient to examine independently of the reservations made by the resident superintendent

engineer—is that it has been certified by the chief engineer on the 27th of the same month “in accordance with letter of Deputy Minister of Justice, dated 15th January, 1896.” Taking for granted that he was sole judge of all matters in dispute under the contract, did he agree to the views embodied in that letter? Undoubtedly he did and deliberately so. He had ample time to consider the matter, the letter having been written more than a month previously. We must suppose that he is an intelligent, competent, firm and fair man as he is represented to be the sole arbiter between the parties, though in Her Majesty’s service in the double capacity of Chief Engineer and Deputy Minister of the Department of Railways and Canals. He did not remonstrate nor resist, but very properly, in my opinion, accepted the final decision of the Minister of Justice, the law adviser of the Crown designated by statute, upon a point which was considered by him and both the Crown and the contractor as one of construction of contract, and a legal question. Naturally, he certified the estimate in accordance with that decision, thereby concurring in it. No threat or coercion was used to induce him to sign. I am inclined to apply here the general rules which govern consent in contracts; error, fraud, violence or fear alone vitiate such consent. Nothing of the kind is suggested.

The estimate of the 26th of February, 1896, was certified by the chief engineer on the 27th as above stated, but on the following day, the 28th, he despatched by letter his certificate to the Department of Railways and Canals without any qualification whatever, enclosing at the same time the estimate “duly certified for payment”; and on the same day that Department likewise requested, in the usual form, the Auditor General to pay the appellant without any reservation. The Crown informs us in its statement of defence that the

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Auditor General refused to do so. It is conceded, however, that this refusal has no importance to the determination of the case.

The letter of the 28th of February clearly shows that the chief engineer never intended that his signature of the 27th "in accordance with letter of Deputy Minister of Justice, dated 15th January, 1896," should be regarded as qualifying the certificate; in doing so, he properly thought—and says so in his evidence—that upon a question of this kind, he should express that he was guided by the opinion of the Minister of Justice; and it seems to me no better authority could be consulted or quoted so far as the Crown is concerned. At all events, his letter of the 28th establishes beyond doubt that on that day at least he considered the estimate as "duly certified for payment."

On the same day the engineer's certificate was approved in writing, without any qualification, by the Deputy-Minister of Railways and Canals, duly authorized to do so under the provisions of the Act respecting the Department of Railways and Canals (1), and it is further proved that, as a matter of fact, this approbation was given with the express sanction of the Minister personally; so both the Minister, Mr. Haggart, and his Deputy, Mr. Schreiber, declare under oath. Mr. Haggart—and the respondent had an opportunity to cross-examine him—says in his affidavit:

2. That I was fully aware long before the fifteenth of January last, of the nature of the claim of the claimant in question herein, and it was with my approval that the questions raised by said claim were referred to the Minister of Justice for opinion.

3. That I read the opinion of the Minister of Justice of the 15th of January last, in reference to said claim shortly after said date, and before the progress estimate of February last in question herein was given.

(1) R. S. C. ch. 37, ss. 9 and 23.

4. That I approved of the said estimate being given by the chief engineer and of the action of the Deputy-Minister in requesting by his letter of the 28th of February last the Auditor General to pay the same.

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It is contended that Sir Charles Hibbert Tupper, Minister of Justice, referred to in the statement of defence, for reasons I do not appreciate, as "a third party," although not named, had no power to interfere, as the matter had already been disposed of by Sir John Thompson, his predecessor in the Department. But the statute, creating the Department of Justice, imposes upon its Minister the duty to "advise the Crown upon all matters of law referred to him by the Crown," and as Attorney-General, to advise "the heads of the several departments of the Government upon all matters of law connected with such departments" (1), no matter how many times they are referred to him. Sir Charles Hibbert Tupper came to a conclusion different from that of Sir John Thompson, but after a new hearing and the production of fresh evidence, and more particularly of an exhaustive and elaborate statement from the claimant, a report from the resident superintendent engineer and three letters from his assistants, who moreover were examined orally.

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The main objection to the validity of the certificate is, that by considering the claim of the appellant in the first instance the engineer has put an end to his authority and is *functus officio*. But even if he had jurisdiction in the matter his certificate was not the final one; the contract directs that monthly certificates will be issued by the engineer, and expressly provides that the contractor may repeat any claim or claims omitted "until finally adjusted or rejected." The following are the clauses in the contract upon this point;

(1) R. S. C. ch. 21, ss. 3 & 4.

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26. It is intended that every allowance to which the contractor is fairly entitled, will be embraced in the engineer's monthly certificates; but should the contractor at any time have claims of any description which he considers are not included in the progress certificates, it will be necessary for him to make and repeat such claims in writing to the engineer within thirty days after the date of the despatch to the contractor of each and every certificate in which he alleges such claims to have been omitted.

27. The contractor in presenting claims of the kind referred to in the last clause must accompany them with satisfactory evidence of their accuracy, and the reason why he thinks they should be allowed. Unless such claims are thus made during the progress of the work, within thirty days, as in the preceding clause, and repeated in writing every month, until finally adjusted or rejected, it must be clearly understood that they shall be forever shut out, and the contractor shall have no claim on Her Majesty in respect thereof.

On the 16th of November, 1893, in due time and form, the appellant first presented his claim to the Department of Railways and Canals for a certain increase of the certificate for work relating to earth and water-tight banks, contending that a true interpretation of the specifications justified the same. It was considered by Sir John Thompson, Minister of Justice, and by him rejected for reasons which are fully set forth in his written opinion of the 28th of February, 1894; but his decision was given or communicated only to the Department of Railways and Canals, and not to the contractor, who was merely advised by the Secretary of Railways and Canals on the 28th of August, 1894, that in the opinion of the Minister of Justice, "the specifications do not admit of the construction placed on them by you," and that "the department therefore in view of such opinion must decline to entertain these claims." From that date, that is the 28th of August, 1894, as before, his claim was simply ignored in the monthly estimates or certificates, which moreover were never "despatched" to him as directed in clause 26 of the contract, except at the time of the institution of the present proceeding or

reference, when he was allowed to have a copy of the same; until then cheques only for their respective amounts were given to him from time to time.

The chief engineer did not reach any conclusion until the 20th of August, 1895, when the matter had been re-opened and was still pending before the Minister of Justice at the request of the contractor and by the direction of the Minister of Railways and Canals. His decision was never delivered, or communicated or even mentioned to the contractor except after the commencement of the present proceeding.

Therefore, so far as the contractor was concerned, his claim stood at all times as having been simply "omitted" in the monthly certificates. As I read clauses twenty-six and twenty-seven of the contract, even claims coming within the exclusive jurisdiction of the engineer, and repeated by the contractor, but simply "omitted" in the progress certificates, may be considered and reconsidered by the engineer till his authority is exhausted by the completion of the work and the despatch of his final certificate, and he may do so as often as he pleases, "until finally adjusted or rejected;" and even if finally adjusted or rejected, I am inclined to think that he may reconsider his decision by and with the consent of the parties; (see Amer. & Eng. Encycl. of Law, vo. "Arbitration and Award," 2 ed. pp. 790, 791, 808); but it is not necessary to decide that question this case—which is very different from *Murray v. The Queen* (1), where the revision was made by a succeeding engineer at the request of the Crown only. It is sufficient to say that no previous adjustment or rejection, no adjudication in fact, as contemplated by the contract was ever made; and consequently the certificate of the 27th of February, 1896, purporting to adjust the claim of the appellant, ap-

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proved by the Minister of Railways and Canals, and accepted by the contractor, is valid, final and binding. Finally, and this seems to be the decisive argument, it must be borne in mind that the engineer is not, as in *Murray v. The Queen* (1), the sole judge and arbitrator of all matters and differences which may arise under the contract. Under clause 8, he is the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material shall be final.

But the question involved is not one of work and material, quantity or quality; there is no dispute as to that; it is one of construction of the contract, or, to speak more correctly, of the specifications which are declared to form part of the contract; it is a legal question, and was so considered by the engineer, the Crown and the contractor, and also by Sir John Thompson, Sir Charles Hibbert Tupper and the trial judge; all agree as to that point, and it is admitted in the statement of defence of the Crown:

9. The said engineer was not, under said contract, authorized to decide any question as to the meaning or intention of the contract, specifications and drawings, and the respondent will contend that in so far as the certificate referred to in the statement of claim determined or purported to determine a question of construction of said contract or specifications, it is not binding.

Under clause thirty-three of the contract, a question of such a nature must be determined, not by the engineer as formerly under Government contracts, but by the Exchequer Court of Canada.

33. It is hereby agreed that all matters of difference arising between the parties hereto upon any matters connected with or arising out of this contract the decision whereof is not hereby especially given to the engineer, shall be referred to the Exchequer Court of Canada, and the award of such court shall be final and conclusive.

It is difficult to understand how this clause of the contract can be worked out fairly to both parties. Of

(1) 26 Can. S. C. R. 203.

course, it is not sufficient to confer jurisdiction on the Exchequer Court; it contemplates a reference under section twenty-three of the Exchequer Court Act. But what will be the remedy of the contractor if the Minister of Railways and Canals refuses or neglects to refer the special case to the Exchequer Court? Perhaps he would be entitled to a Petition of Right. It is not necessary to examine this point, as the present claim has been duly referred to that court.

Clause thirty-three shews beyond doubt that legal differences do not fall within the exclusive province of the engineer; they are in fact excluded from it by the very terms of the contract. If any should arise, he should call the attention of the parties to it, if not known to them, and wait till a binding decision be reached by them; and finally, by framing his certificate in accordance with the legal decision he receives from them, he merely performs a ministerial duty, so as to comply with clause twenty-five of the contract which requires the engineer's certificate as a condition precedent.

That decision may be reached in two ways; first, judicially, by obtaining the award of the Exchequer Court of Canada; or secondly, by coming to a mutual solution. It is not supposed that the opinion of the Minister of Justice is binding upon the crown any more than it is upon the contractor; but if carried out by the engineer in his certificate and accepted by the parties, as undoubtedly it was in this case, namely, by the contractor and the Minister of Railways and Canals representing the Crown in the contract under powers conferred upon him by the statute (1), upon what ground of law or equity can the Crown now object to the engineer certifying upon that advice, and appeal to the Exchequer Court? None can be set up

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(1) R. S. C. ch. 37, ss. 1, 2, 6, 7.

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seriously; and it seems to me the Crown is estopped from doing so.

As long as the parties consider that a just decision has not been reached in respect of such legal or any other exceptional matter, not coming within the exclusive province of the engineer, it is competent for, and indeed the duty of, the Crown, acting by its duly constituted representatives, to rectify that decision and direct at any time, either before or after a reference to the Exchequer Court, the engineer to issue a certificate according to law and justice, and thus avoid useless and expensive litigation before the Exchequer Court and this court. Unless such a course can be adopted the Department of Railways and Canals never can legally settle a claim like the present one, and in every instance an award of the Exchequer Court will be the only remedy, a conclusion utterly untenable in my opinion. Such a rule would seriously impede the administration of a great department like that of Railways and Canals.

I consider, therefore, the certificate of the Chief Engineer of the twenty-seventh of February, 1896, approved by the Minister of Railways and Canals, as perfect and final and binding upon the Crown and the contractor; and judgment should be entered in favour of the appellant for the amount of the same, in principal and costs as prayed for; the question of interest being reserved in pursuance of agreement between the parties.

Appeal allowed with costs.

Solicitor for the appellant: *A. Ferguson.*

Solicitor for the respondent: *F. H. Chrysler.*
