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*Apr. 23, 24, 25.
*June 13.

GEORGIA CONSTRUCTION COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

PACIFIC GREAT EASTERN RAILWAY COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Railway construction—Method of doing work—"Extra haul" and "over-haul"—Meaning—Usage—When it forms an ingredient of the contract—Finding of the trial judge—Document filed at trial without objection—Exception to its admissibility taken on appeal.

The appellant had a contract with the respondent for a work on the respondent's line of railway, which work consisted of a cut and fill where the line crossed a deep ravine. The old line was carried on a trestle, and the new line was to be supported by a fill on a site adjacent to the trestle, which was to be made with the earth excavated from a bluff on the northerly side of the ravine through which the cut was to pass. The contract stipulated for unit prices including "overhaul per yard 1 cent"; and contained this clause: "12. The contract prices for the several classes of excavation shall be taken to include the cost of depositing the material in embankments, crib work, and all other expenses connected therewith except extra haul, which will only be paid for where it exceeds five hundred (500) feet, at so much per yard per additional one hundred feet * * *." The appellant in excavating the cut proceeded from the foot of the northerly slope of the bluff, and by a circuitous route encircling the bluff on its westerly, southwesterly and southerly sides carried the earth to the site of the embankment. The appellant contended that it was entitled to be paid for "overhaul" at the rate mentioned, that is to say, at the rate of 1 cent per cubic yard for every 100 feet of haul calculated by reference to the length of the route actually followed in excess of 500 feet. The view of the contract advanced by the respondent was that the contract phrases "extra haul" and "overhaul" have, by usage, in construction contracts, or at all events in railway construction contracts, a special and specific meaning; and that they signify that the length of the haul in respect of which the contractor was entitled to charge

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

for overhaul, was to be ascertained by taking the distance (measured along the centre line of the railway in process of construction) between the projections, first, of the centre of mass of earth, to be excavated in making the cut, and second, of the embankment, and deducting therefrom 500 feet; the projections being for this purpose the several points on the centre line nearest the respective centres of mass. The trial judge (40 B.C. Rep. 81) held that the usage alleged had not been established, and that the proper construction of the contract was that contended for by the appellant. The Court of Appeal ([1928] 3 W.W.R. 466) disagreed with this conclusion and accepted the view advanced by the respondent.

Held, reversing the judgment of the Court of Appeal ([1928] 3 W.W.R. 466), that the alleged usage had not been proven. It had been established that there was a practice widely followed of inserting in railway construction contracts a clause providing for the computation of payment for overhaul according to the method contended for by the respondent; but in the text books, engineering manuals and writings by engineers produced, there was no basis for the view that the effect of the words used in the present contract is, apart from such special stipulations, what is contended by the respondent. Usage, of course, where it is established, may annex an unexpressed incident to a written contract; but it must be reasonably certain and so notorious and so generally acquiesced in that it may be presumed to form an ingredient of the contract. *Juggomohun Ghose* v. *Manickchund* (7 Moore's Indian Appeals 263, at p. 282).

Held, also, that in substance, the question presented to the trial judge was whether there was evidence to satisfy him judicially that the alleged usage was, to quote the language of Banks L.J., in *Laurie* v. *Dudin* (95 L.J., K.B. 191, at 193), "so all pervading and so reasonable and so well known that everybody doing business" in railway construction "must be assumed to know" it, and to contract subject to it; and the finding of the trial judge should not have been disturbed by the appellate court.

At the trial, a report by the Deputy Minister of Railways and the Chief Engineer of the respondent, approving the appellant's system of handling the works, tendered by the appellant's counsel, was admitted and no exception to its admissibility was taken at any stage of the proceedings prior to the oral argument in this court. According to the record, counsel for the respondent was aware that the document could have been excluded if he had pressed an objection against it, and, moreover, he did not call either of the gentlemen who signed the report as a witness. If the objection had been pressed, the appellant's counsel would no doubt have felt obliged to call them as witnesses himself, as counsel for the respondent must have realized; but the latter seemed to have elected deliberately not to press the obvious objection to the document.

Held, that, in these circumstances, an exception to the admissibility of the report taken by the respondent's counsel before this court should be considered as being raised too late.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Morrison J. (2), and dismissing the appellant's

(1) [1928] 3 W.W.R. 466. (2) (1928) 40 B.C. Rep. 81.

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action to recover for work done under a railway construction contract.

The material facts of the case and the questions at issue are stated in the head-note and in the judgment now reported.

J. W. de B. Farris K.C. for the appellant.

Aimé Geoffrion K.C. and *R. W. Lane* for the respondent.

The judgment of the court was delivered by

DUFF J.—The controversies in this appeal relate to questions of fact turning to some extent upon the effect of documentary evidence, and in part upon an appreciation of the weight of oral evidence adduced at the trial; upon which the conclusions of the learned trial judge were set aside by the Court of Appeal.

The appellants had a contract with the respondents dated May 20, 1926, for a work on the respondents' line of railway, which work consisted of a cut and fill where the line crossed a deep ravine. The old line was carried on a trestle, and the new line was to be supported by a fill on a site adjacent to the trestle, which was to be made with earth excavated from a bluff, on the northerly side of the ravine, through which the cut was to pass.

The contract stipulated for unit prices including "overhaul per yard 1 cent"; and contained this clause:

> 12. The contract prices for the several classes of excavation shall be taken to include the cost of depositing the material in embankments, crib work, and all other expenses connected therewith except extra haul, which will only be paid for where it exceeds five hundred (500) feet, at so much per yard per additional one hundred feet. No allowance or compensation whatever shall be due or paid to the contractor for any temporary roads, bridges or trestles he may make to facilitate his work.

The appellants in excavating the cut proceeded from the foot of the northerly slope of the bluff, and by a circuitous route encircling the bluff on its westerly, southwesterly and southerly sides carried the earth to the site of the embankment. The substantive issue is whether or not the appellants are entitled to be paid for "overhaul" at the rate mentioned, that is to say, at the rate of 1 cent per cubic yard for every 100 feet of haul calculated by reference to the length of the route actually followed in excess of 500 feet.

The view of the contract advanced by the respondents is that the contract phrases "extra haul" and "overhaul" have, by usage, in construction contracts, or at all events in railway construction contracts, a special and specific meaning. They signify, according to this contention, to summarize it broadly, that the length of the haul in respect of which the contractor is entitled to charge for overhaul, is to be ascertained by taking the distance (measured along the centre line of the railway in process of construction) between the projections, first, of the centre of mass of the earth to be excavated in making the cut, and second, of the embankment, and deducting therefrom 500 feet; the projections being for this purpose the several points on the centre line nearest the respective centres of mass. The learned trial judge held that the usage alleged had not been established, and that the proper construction of the contract is that contended for by the appellants. The Court of Appeal disagreed with this conclusion and accepted the view advanced by the respondents.

If the learned trial judge was right, two further questions will require consideration. First, whether on the facts proved, the appellants have established their right to have their claim passed upon in the absence of a certificate by the engineer sanctioning it, and second, whether, assuming that to be so, the appellants' method of proceeding was an unnecessarily expensive one, or was dictated by the physical conditions of the work and by the terms of the contract as to the time of performance.

I shall consider these questions in the order in which I have stated them. And first, as to the construction of the contract. Usage, of course, where it is established, may annex an unexpressed incident to a written contract; but it must be reasonably certain and so notorious and so generally acquiesced in that it may be presumed to form an ingredient of the contract, *Juggomohun Ghose* v. *Manickchund* (1). In the Court of Appeal there was some disagreement with the view of the learned trial judge, that the respondents' contention as to the effect of the contract was based upon the alleged existence of usage or custom, both Martin J.A. and M. A. MacDonald J.A. expressing the opinion that they were confronted with a question of interpreta-

(1) 7 Moore's Indian Appeals 263, at p. 282.

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tion, merely. The respondents themselves alleged the practice they sought to prove as a custom controlling the effect of the contract; and I do not know that it is very material whether you describe the subject of inquiry as a question of the existence of a usage imparting a special meaning to particular words when employed in contracts of a given class, or as a question as to the existence of a usage annexing an incident to such contracts in virtue of the presence of such words. I am disposed to think that the latter is the more apt description of the question presented in this case.

In substance, the question for the learned trial judge was whether there was evidence to satisfy him judicially that the alleged usage is, to quote the language of Banks L.J., in *Laurie* v. *Dudin* (1),

> so all pervading and so reasonable and so well known that everybody doing business

in railway construction "must be assumed to know" it, and to contract subject to it. I am not satisfied that the alleged usage has been established. There is no doubt that a practice widely prevails of inserting in railway construction contracts a clause providing for the computation of payment for overhaul according to the method contended for by the respondents; but in the text books, engineering manuals and writings by engineers produced, there is no basis for the view that the effect of the words used in the contract before us is, apart from such special stipulations, what is now contended. More than one of the witnesses called on behalf of the respondents admitted that he had never in his own experience encountered a case in which the earth excavated in making the cut had to be carried to the fill by a circuitous route, that is to say in which carriage along the line of railway was impracticable and the circuitous route was not adopted to serve the convenience of the contractor, where overhaul had not been calculated according to the length of the route actually traversed. Some said that they had never met a case in which carriage on that line was not practicable. Other witnesses gave instances in which overhaul had been calculated according to the rule advocated by the respondents, though a circuitous route had been followed for the con-

(1) 95 L.J. K.B. 191, at 193.

venience of the contractor, but not because a shorter route was impracticable. The engineer in charge, McMillan, admitted he had never known a case of carriage by a circuitous route being compensated for on the basis of measurement along the line of the railway. He had, he stated, adopted this course on one occasion when the earth had been taken from a borrow pit, that is to say, from an excavation entirely outside the line of the railway; in that case he had measured the distance from the point on the railway nearest the borrow pit, to the centre of mass of the fill, but he admitted that the alleged usage had no relation to such a case; and that in principle he had been wrong.

It was argued, that a method of computation of overhaul commonly in use, described as the method by "mass diagram," would be incapable of application to a case like the present unless the distance were measured along the centre line of the railway; and this, it is urged, is sufficient ground for treating that method of measurement as ordained by the contract. This argument involves obviously the proposition that the method of mass diagram is so essential to such computations, or at all events so universally employed as to require a direction to employ it to be implied as an incident of the contract. Taking the evidence as a whole, I do not think this has been established; but in any case there is evidence by witnesses called on behalf of the respondents which it was quite open to the learned trial judge to accept, that this method (by "mass diagram") is applicable or may be applicable for the purpose of computing compensation for overhaul where the material is taken from a place outside the line on the railway ("a borrow pit") where the distance taken is that of the actual haul; and one of the most important witnesses called on behalf of the respondents explicitly admits that such a case presents no distinction in principle from those cases where the earth is excavated on the line of the railway. Distinction in principle between the case of the "borrow pit" and the case before us is not suggested.

The appellants, on the other hand, called a number of engineers of long experience and high repute, who denied without qualification the existence of any usage such as that alleged. I refer particularly to the evidence of Mr.

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Hazen, the assistant chief engineer, of the Canadian National Railways. He stated that according to his experience, which had been chiefly in railway construction and which up to the time of the trial was of 39 years' duration, where it is impracticable to haul the excavated material from the cut to the fill along the line of the railway, and where a longer route is followed for this reason by the contractor, and not for his own convenience, the practice is to compute the compensation for overhaul by reference to the distance actually traversed, and not to the distance between the points on the centre line of the railway nearest the centres of mass measured along that line.

On this evidence the learned trial judge has held that the respondents failed to prove the alleged usage. I am unable myself to perceive any grounds, upon which, to quote the phrase of Scrutton L.J. in *Laurie* v. *Dudin* (1), the Court of Appeal could properly

> interfere with the learned judge who saw the witnesses and heard them cross-examined and heard the way in which they gave their evidence.

I may add that, with the learned trial judge, I am not satisfied by the evidence that there is any practice of measuring distance for computing overhaul in the manner contended for, so well recognized, so well known among persons engaged in railway construction, and so widely prevailing as to justify a presumption that everybody who enters into a contract for such work does so with the intention of being bound by that usage.

I do not doubt, I may add, that the learned trial judge, in considering whether such a widely prevailing and generally recognized usage had been established, took into account, as he was entitled to do, the fact that neither the Deputy Minister, a railroad engineer of a life time's experience, nor Mr. Randall, the company's chief engineer, was called as a witness to affirm the existence of such a usage; or that he did not fail to note the rather discreditable effort of the respondents to create the impression in Mr. Hazen's mind that he would be guilty of some impropriety in stating, as a witness on behalf of the appellants, his view that no such usage exists.

Second, as to the absence of an engineer's certificate recognizing the appellant's claim. The pertinent clauses

(1) 95 L.J. K.B. 191, at p. 198.

of the contract may conveniently be set out together, they are these:

1.* * * The word "engineer" shall mean the chief engineer of the company (unless otherwise specified), or his duly authorized agents limited by the particular duties respectively entrusted to them. * * *

8. 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 thereto shall be final, and no work under this contract shall be deemed to have been performed, nor materials nor other things provided, so as to entitle the contractor to payment therefor, until the engineer is satisfied therewith, and has issued to the contractor his certificate in writing in respect thereof.

9. The work shall, in every particular, be under and subject to the control and supervision of the engineer; and all orders, directions or instructions, at any time given by the engineer with respect thereto, or concerning the conduct thereof, shall be by the contractor promptly and efficiently obeyed, performed and complied with to the satisfaction of the engineer. In particular, and without limiting the foregoing, the engineer shall have the right to control blasting operations, so as to protect the interests of the company, and to avoid injury or damage from excessive or improper blasting.

10. The respective descriptions of work and materials, or portions of the works referred to, in or covered by the individual items in the schedule of prices embodied in the proposal annexed to this contract, include not only the particular kinds of work or materials mentioned in the said items, but also all and every kind of work, labour, tools, plant, materials, equipment and things, whatsoever necessary for the full execution, completion and delivery, ready for use, of such descriptions of work and materials, or of such respective portions of the works, in accordance with the said drawings and specifications and to the satisfaction of the engineer. The said schedule as a whole is designed to cover not only the particular descriptions of work and materials mentioned therein, but also all and every kind of work, labour, tools, plant, material, equipment and things whatsoever necessary for the full execution, completion and delivery, finished and ready for use, for the entire work as herein contracted for, in accordance with said drawings and specifications, and the satisfaction of the engineer; in case of dispute as to what work, labour, tools, plant, materials, equipment and things are included in the works contracted for, or in the said schedule, or any item thereof, the decision of the engineer shall be final and conclusive.

* * *

27. The company covenants with the contractor, that the contractor having in all respects complied with the provisions of this contract, will be paid for and in respect of the works the various prices set out in the schedule of prices embodied in the accepted proposal of the contractor hereto annexed.

* * *

28. Cash payments equal to about ninety per cent of the value of the work done, approximately estimated from progress measurements and computed at the applicable schedule prices, or the prices fixed with respect thereto, as the case may be, under the provisions of this contract, will be made to the contractor monthly, on the written certificate of the engineer stating that the work for, or on account of which, the certificate is granted, has been done, and stating the value of such work computed

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as above mentioned; and the said certificate 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 until the final completion of the whole work to the satisfaction of the engineer, and will be paid within two months after such completion. The written certificate of the engineer, certifying to the final completion of the 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.

The contractors appear to have commenced work under the contract in the beginning of July, 1926. A gentleman named McMillan appears to have acted from the outset as engineer in charge of this particular work, and to have been recognized as such by the directors of the respondent, although as far as we can see he was not formally appointed until December of that year. Not until much later, apparently not earlier than the end of March, 1927, was there a chief engineer of the company who intervened in the contract. The minutes of the directors show that on the 20th of July, 1926, the board decided that all progress estimates of the engineer in charge "of the diversion at Mile 13·7" should be submitted each month to the Deputy Minister of Railways for checking and for certification. There is no suggestion that the Deputy Minister of Railways, who signs as chief engineer of the railways as well as Deputy Minister, was ever appointed chief engineer of this company, and the resolution indicates that it was in his capacity as Deputy Minister that he was to check and certify the progress estimates. The engineer, for the purposes of the contract, as appears from the extracts already quoted, must be the chief engineer of the company or an agent of the chief engineer. The respondents allege in the statement of claim that McMillan was the "engineer" within the meaning and for the purposes of the contract. It is not alleged that he was chief engineer of the company, or that he was an agent of the chief engineer; admittedly he was not chief engineer and obviously he was not an agent of the chief engineer, prior at least to March, 1927, as there was no chief engineer to appoint an agent. Further, it is clear that McMillan had no authority even as agent of the company to grant progress certificates, all of which, in compliance with the resolution of the 20th July, 1926, down to the appointment of the chief engineer in 1927, are in fact the certificates of Mr. Griffith, the Deputy

Minister. Authority under the contract, to give a binding decision as to the contractors' right to a certificate, McMillan had none.

No express authority is given to the engineer by the contract, to pass on any question as to the construction of the contract. As the engineer is to certify to the performance of the work contracted for as a condition precedent of the contractors' right to be paid, he is necessarily obliged to read the contract and understand it, but it is his duty to, and it is the right of the contractor, that he shall give effect to the provisions of the contract according to their proper legal construction; and his only authority to pass upon that construction arises from, and is incidental to his authority to grant or withhold a certificate. It may perhaps be right to observe, although it adds nothing to what has already been said, that McMillan, having no authority to grant certificates, or to decide upon the contractors' right to a certificate, was endowed with no authority, even incidentally, to bind anybody or affect anybody's rights under the contract, by his views as to its meaning.

The learned trial judge held that the

> board of directors assumed the functions of the engineer under the contract.

That appears to be an inference fairly warranted by the correspondence and the resolutions passed by the board of directors; especially when read in light of the fact that for nine months after the signing of the contract, no engineer was appointed. In order of date these are as follows:

July 13, 1926.

Mr. D. McMILLAN,
Engineer,
Bridge 13·7,
Lillooet, B.C.

Referring to our conversation on Sunday last in connection with the overhaul claimed by the contractor, write me by return mail full particulars of this, together with their reason for claiming it.

T. KILPATRICK,
General Manager.

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Mile 13·7, Lillooet Sub-Div.,
July 14, 1926.

T. KILPATRICK, Esq.,
General manager,
P.G.E. Railway Co.,
Vancouver, B.C.

In answer to your letter of July 13, the contractor purposes and is making preparation to take out the cut north of the fill at 13·7 by hauling out of the north end of the cut around by the P.G.E. Railway track to the fill south of the cut in question.

In a short talk with him he said he expected to be paid overhaul on this route, as it is the only way to take the cut out given as reason why he should be so paid.

He was told that overhaul is a constant, the same as the number of cubic feet in a yard and that his contention could not be supported. Not much was said but he still had his idea in mind.

The route to be used lengthens the distance over a centre line direct haul by from 3,000 to 3,500 feet.

D. McMILLAN,
Engineer in Charge of Diversion.

Copy of resolutions in minute book of defendant.

July 20, 1926.

It was decided by the board that *all the progress estimates of the engineer in charge of the work of the diversion at mile 13·7* should be submitted each month to the Deputy Minister of Railways, *for checking and for certification.*

Moved by Mr. W. Kitchen and seconded by Mr. C. Spencer that with reference to the question of overhaul, the engineer in charge of the work at diversion at mile 13·7 be instructed that the board cannot consider any other than the shortest haul or nearest way.

July 21, 1926.

Mr. D. McMILLAN,
Engineer,
Mile 13·7,
Lillooet, B.C.

With reference to the question of overhaul, I am instructed to advise you that the board of directors cannot consider any other than the shortest haul or nearest way.

T. KILPATRICK,
General Manager.

September 10, 1926.

T. KILPATRICK, Esq.,
General manager, P.G.E. Ry.,
Vancouver Block.

Re contract overhaul.

Your engineer Mr. McMillan informs me he has instructions to the effect that overhaul on our contract at mile 13·7 Lillooet, is not to be

measured over the length of the dinky track but over a straight line from the point where the material originally lies to the fill.

You will recollect that when the writer was looking over the ground with yourself and others that I proposed the present method of doing the work and again on the day of signing the contract I was asked how I proposed to do the work, when I again proposed the present route for hauling as being the only feasible one. If it was the intention to allow overhaul by a direct line I should have been so advised at that time. I contend that the work cannot be effectively done by steam shovel in any other way and I am willing to submit the question to any practical two steam shovel men and abide by their decision.

For the above reasons I contend that overhaul must be allowed over the route the material has to be hauled and not over the direct line. If you decide otherwise, we may be compelled to close down the steam shovel part of the work. Please advise at your earliest convenience, and oblige,

GEORGIA CONSTRUCTION CO., LTD.
Per T. R. Nickson.

September 14, 1926.

A letter was read from the Georgia Construction Company Limited protesting the decision of the directors that they could not consider any other than the shortest haul or nearest way and on motion, duly seconded, it was resolved that they be advised that we expect them to carry out the terms of their contract and that our interpretation of its conditions regarding overhaul is as previously advised.

September 15, 1926.

GEORGIA CONSTRUCTION CO., LTD.,
Bank of Toronto Building,
Vancouver, B.C.

I am in receipt of your letter of 10th inst. which was submitted to the board of directors at a meeting here yesterday and I am instructed to advise you that we expect you to carry out the terms of your contract and that our interpretation of its conditions regarding overhaul is as previously advised you by our Mr. D. McMillan, engineer in charge.

T. KILPATRICK,
General Manager.

November 23, 1926.

MESSRS. GEORGIA CONSTRUCTION CO., LTD.,
Bank of Toronto Building,
Vancouver, B.C.

I beg to advise you that your letter of 12th instant was submitted to the board of directors at a meeting here yesterday and I was instructed to advise you that the board can see no reason for changing the decision made, which was communicated to you, at their meeting on July 20, namely, that no other than the shortest haul or nearest way would be considered.

T. KILPATRICK,
General Manager.

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These resolutions and communications all point to the conclusion at which the learned trial judge arrived and expressed in the sentence quoted above.

On behalf of the respondents, it was argued that the directors did nothing more than accept the decision of McMillan. The learned trial judge, while accepting McMillan's statement in his letter, as the expression of his own opinion, did not accept the view advanced by the respondents as to the conduct of the directors; it was his view that the directors had taken the matter into their own hands, and had issued instructions to McMillan as their own agent concerning the interpretation of the contract. The oral evidence adduced by the respondents in support of their allegations that the board had treated McMillan as an independent umpire and had deferred to his decisions as such, was not regarded by the trial judge as of sufficient weight to overbear the inferences arising from the tone and substance of the documents and from the undisputed facts.

I am not convinced that the learned trial judge was wrong; especially in view of the fact that neither Mr. Griffith, the Deputy Minister, who for nine months certified to the progress estimates, nor Mr. Rindal, who was appointed chief engineer, apparently in March, 1927, was called as a witness, although both of them must have had not a little knowledge of the relations between the board of directors and the company's engineers.

But the matter does not rest there. If McMillan had possessed power to certify under the contract, it is at least questionable whether he had not already disqualified himself, before the time came to grant a progress certificate, from passing upon the construction of the clause in question. At the trial he avowed without hesitation, that from the outset he had formed an opinion as to the effect of the clause, an opinion based upon his own experience, which had not, it appears, embraced a similar case, that is to say, any case in which compensation for a circuitous haul had been based upon the distance measured along the centre line of the railroad. This opinion was in accordance with the respondents' contention; he declared with emphasis that he had decided the question finally, without consulting other engineers, and that his mind was not open to influence from argument upon it.

The following is a passage from McMillan's evidence.

Q. Let me put it to you this way: You told me in discovery—I don't want to need to refer to it—that you had never known a case of this kind before?—A. Yes.

Q. And you also told me on discovery that so far as your experience was concerned you had never known a case where material was measured any other way than the way it was actually hauled?—A. Yes.

Q. Yes, so this was the first time in all your experience where you were confronted with the problem of saying whether you should measure overhaul in a way other than it was hauled?—A. Yes.

Q. Yes, and at that time you had read no authorities on it, had you? —A. Only in so far as I have followed the method used by the railway companies I was employed with.

Q. But that didn't deal with this special case. Don't nod your head? —A. No.

Q. So that you hadn't any experience then to help you on this special case, had you?—A. No.

Q. And you at that time had no opportunity, or took occasion to read any authorities to post yourself on the question?—A. No.

Q. Nor had you sought the advice of any independent engineer to advise you in it?—A. No.

Q. No. Well now, acting as a judge between the bodies, you would, at that time, with your limited experience, be quite open to receiving further information as authority, wouldn't you?—A. No, I didn't consider my experience limited.

Q. You did not; and yet you tell me that you never have had experience to meet the case?—A. No.

Q. And you say that your mind was so settled then that if authorities had been shown you dealing with such special case that you would not have given them consideration?—A. I didn't think authorities could be shown showing anything different.

Q. I see, so your mind was settled on this thing which you have never had any experience with right from the start, you hadn't an open mind to consider any authorities if they were suggested to you?—A. My mind was settled.

Q. Your mind was settled, you were not open to any argument on the matter?—A. No.

Q. So that if the Manual of Engineering had been produced and stated contrary, it would not have had any effect on you?—A. No.

Q. If authorities like Mr. Hazen of the Canadian National Railway had been quoted to you, or if you had seen him personally and he had told you that in his experience—that he had experience in special cases of this kind—that it should be paid for, that would have had no effect on you?—A. No.

Q. So that you are prepared to say that you had decided without authority and without seeing any?—A. No, I had the authority of my experience.

Q. Well, tell me any case in your experience that touched the case? —A. I had no experience that touched the case.

Q. No, so that the authority of your experience, being none, that was sufficient for your purpose?—A. The authorities of my experience taught me that in no other way was overhaul calculated.

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There is high authority for the proposition that an engineer or architect, who has lapsed into that attitude of mind, is disqualified from acting as umpire under such a contract as this. (Per Lindley L.J. in *Jackson* v. *Barry Railway Co.* (1).)

At a later stage a chief engineer was appointed, Mr. Rindal, and the appellants having in April, 1927, requested that the points in difference should be submitted to arbitration, a report was made by him in which he expressed an opinion which accorded with that expressed by the board of directors in its instructions to McMillan. But the board of directors long before that had assumed the function of chief engineer; they had thereby placed themselves in a position in which they were precluded from insisting on the observance of the stipulations of the contract requiring a certificate by an engineer clothed with authority under the contract.

The last question to be dealt with is that which arises upon the respondents' allegation that it was quite practicable to make the cut through the bluff by proceeding from the southerly slope, and in such a manner that the material excavated could be hauled to the fill by the direct route, that is to say, along the centre line of the railway.

The evidence is overwhelming that Nickson, the manager of the appellants, proceeded with the cut under the belief that this course was not practicable, and that the only practicable method was that adopted by him. He says that before the execution of the contract, he informed Kilpatrick, the respondents' superintendent, of his plan, and Kilpatrick, although he says he cannot remember this communication, will not deny that it took place. It is admitted that at no time did McMillan or Kilpatrick or any other person on behalf of the respondents, suggest to the appellants that their method was an unnecessarily expensive one. Indeed, it is not open to dispute that according to the view of the officials of the respondents, the appellants were proceeding in a proper and workmanlike manner. A report by Mr. Griffith, the Deputy Minister and chief engineer of the respondents on the 23rd of July, 1927, contains this paragraph:

(1) (1893) 1 Ch. at 244 and 245.

In view of the knowledge we now have of the material in the bottom of the cut, we believe that the system chosen by the contractors of handling the work is the only way in which the contract could be completed anywhere near the time allotted for the work and there is no doubt that the material placed in the embankment has been placed there at a loss.

An objection was raised on the argument as to the admissibility of this report, which I shall discuss presently. In a practical sense this expression of opinion seems to be conclusive. Mr. Griffith, as already mentioned, had for nine months been responsible for progress certificates, and was no doubt fully acquainted with the work in every detail. It was the duty of the contractors to endeavour to complete the work within the time specified by the contract, and if in order to accomplish that object they adopted what they conceived to be the only practicable means of doing so, and if their view was based upon reasonable grounds and they acted in entire good faith, they are entitled to be paid for what they did according to the terms of the contract. This report seems to be conclusive upon the point that their plan was reasonable and that they were right in adopting it. Even if one were convinced by considerations *ex post facto,* that another course would have proved less expensive, that is not a ground for depriving them of the compensation, when it appears that the measures they adopted were reasonable and necessary not only in their own view, but in the view of the officials of the railway company as well.

As to the admissibility of the report. The document was tendered by Mr. Farris, and although no objection was taken to its admissibility, counsel for the respondents remarked that the letter was " without prejudice." The document was admitted and no exception to its admissibility was taken at any stage of the proceedings prior to the oral argument in this court. Obviously, counsel for the respondents was aware that the document could have been excluded if he had pressed an objection against it. And there appears to be not a little reason for thinking that he had his clients' interest in view in not doing so. I have already noticed the fact that the respondents called neither of the gentlemen who signed this report as a witness. Whatever be the explanation of that, no doubt the appellants had some good reason for not doing so. If the objection had been pressed, Mr. Farris would no doubt

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have felt obliged to call them as witnesses himself, as counsel for the respondents must have realized. He seems to have elected deliberately not to press the obvious objection to the document. In these circumstances, the objection comes, I think, too late.

The appeal should be allowed and the judgment of the learned trial judge restored, with costs in all the courts.

Appeal allowed with costs.

Solicitors for the appellant: *Farris, Farris, Stultz & Sloan.*

Solicitors for the respondent: *Mayers, Locke, Lane & Thomson.*