1910
*Nov. 25, 28.
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*April 3.

HIS MAJESTY THE KING (DEFENDANT) ..... APPELLANT;

AND

EMIL ANDREW WALLBERG (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Public work—Work dehors contract—Acceptance by Crown —Payment—Fair value.

W. was contractor with the Crown for constructing a car and locomotive repair plant at Moncton, N.B., and was subject to the orders of the government engineer. By order of the engineer and with no contract in writing therefor he constructed sewers and a water system in connection with said works, and on completion of his contract the Crown accepted the additional work and agreed to pay its fair value, but not the amount claimed, which was deemed excessive. The Department of Railways referred the claim to the Exchequer Court and, by consent, it was referred to the Registrar of the court to have the damages assessed, the order of reference providing that "the amount to be ascertained shall be the fair value or price thereof allowed on a *quantum meruit*." The Registrar fixed the amount at $53,205, as the fair value of the work reasonably executed on a somewhat different plan. The judge of the Exchequer Court added $39,000 to this amount, holding that the Crown had admitted the authority of the engineer to order the work to be done, and that W. was entitled to the actual cost plus a percentage for profit. On appeal by the Crown:

Held, Anglin J. dissenting, that the judgment appealed against (13 Ex. C.R. 246) was not warranted; that the Crown had not admitted the authority of the engineer, but expressly denied it by pleadings and otherwise; that all W. was entitled to be paid was the fair value of the work to the Crown and the amount allowed by the referee substantially represented such value.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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APPEAL from a decision of the Exchequer Court of Canada (1) varying the report of the registrar on a reference to ascertain the amount due to the plaintiff for work done by him and accepted by the Crown.

The facts of the case are sufficiently stated in the above head-note.

Tilley and *Friel* for the appellant.

Nesbitt K.C. and *Harold Fisher* for the respondent.

THE CHIEF JUSTICE.—I agree with Mr. Justice Duff. No contractual relation existed between the parties when the works in question were executed and there was no liability in the Crown to pay for them when completed.

The power, except in certain cases, to make contracts which are binding upon the Crown is limited by section 36 of the "Public Works Act" (R.S.C. ch. 39), to such as are executed under the direction of the Governor in Council and it is not contended that any such contract was ever entered into between the parties, or that this case comes within the enumerated exceptions. The authority of the engineer to contract for the works, or any part of them, is expressly denied in the second paragraph of the statement of defence. It does not even appear that the Minister, or the Deputy Minister, sanctioned or was aware of the instructions given by the engineer.

The Crown, having profited by the work which was done upon property belonging to the Crown, the Minister of Railways agreed to refer the claim to the Exchequer Court under the powers conferred upon him by 50 & 51 Vict. ch. 16, sec. 23, and the important

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question we are asked to determine upon this appeal is: Assuming that the Crown avails itself of the statutory provision in question for the purpose of ascertaining what it is fair the Crown should pay for work done without its authority upon its property, and of which it has received the benefit, is it competent for the Court of Exchequer to measure the moral voluntary obligation of the Crown, without its consent, by what the work in question, proceeding by extravagant and unreasonable methods, has cost the person who did it, plus a profit thereon to that person, ignoring altogether the value of the work to the Crown, and declining to apply any measure which requires the reasonable and economical performance of the works?

To this question there can be but one answer. The Crown was under no legal liability, on the facts as proved, to pay for the work; and the measure of the voluntary obligation assumed by the reference to the Exchequer Court under the statute must be the value of the work to the Crown.

It has been argued that the scope of the inquiry was widened by the order of reference made by the judge to the registrar, and that the duty of the latter was under that order to ascertain the fair value or price of the works in question allowed on a *quantum meruit* basis. This contention cannot be maintained, I say it with all deference. The Minister referred the claim to the Exchequer Court for adjudication but without the admission contained in paragraph five of the statement of defence there would be no liability whatever on the part of the Crown and there should have been no reference to the registrar. The liability of the Crown is to be measured and the power of the judge to refer the claim is limited, therefore, by the scope of the admission which is to the effect that, the Minister

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of Railways, having accepted and taken over the works on behalf of His Majesty, is willing to pay the fair value of the same; and it is not to be presumed that the judge intended to exceed his authority or to add to the moral, voluntary obligation of the Crown without its consent. The registrar, giving to the terms of the reference their plain meaning when read with the defence, reported the fair value of the works to the Crown, if proceeded with economically and reasonably. Reversing this decision, the judgment appealed from(1) allows to the respondent the cost of the work, plus a profit, without regard to its value to the Crown. If the language used in the order referring the matter to the registrar was susceptible of the construction put upon it by the judgment of the Exchequer Court on appeal, then I am of the opinion that the learned judge, in making such an order, exceeded his jurisdiction, which was limited expressly by the reference under the statute and the defence and could not be extended by counsel for the Crown. To permit the basis of liability in cases referred by the Minister under the statute, 50 & 51 Vict. ch. 16, sec. 23, to be extended by consent of counsel would lead to abuses, which it is not difficult to foresee. For the reasons given by Mr. Justice Duff, I do not think that it was intended by the order of reference to substitute for the fair value to the Crown the amount expended by the respondent, plus a surplus to him.

I am of the opinion that the appeal should be allowed with costs.

DAVIES J.—It seems to me this appeal must be disposed of largely, if not altogether, upon the construc-

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tion put upon the order of reference made herein by the Court of Exchequer to the registrar of that court.

The action was brought by the plaintiff, respondent, for payment of certain works carried out by him in connection with the Intercolonial Railway property at Moncton.

These works comprised a main sewer, branch sewers, a water-system, all connected with certain buildings which the plaintiff, respondent, had contracted with the Crown to build for the railway.

No contract had been entered into or authorized by the Crown for the construction of the works in dispute, but the plaintiff claimed that they became necessary in connection with the construction of the buildings which he had contracts for, and that the chief engineer, Mackenzie, of the Intercolonial Railway, who had been appointed to supervise and control these contracted-for works on behalf of the Crown, had authorized him to construct the sewer and water system in question.

The plaintiff contended that the works as completed by him had been accepted and taken over by the Minister of Railways and Canals of Canada, and he claimed payment for the same either as extra work done by him under his contracts with the Crown, or, in the alternative, for work and labour done and materials supplied by him at the request of the Minister of Railways and Canals.

It seems quite clear that the claim for payment as extra work under the contracts could not be maintained, and no question arises on this appeal on that ground.

It was also equally clear under the evidence that the only authority which the plaintiff had for doing the work sued for was that of the chief engineer.

The Crown, in its statement of defence, denied having entered into any written or other contract with the claimant for the execution of the work sued for; and also denied having authorized the chief engineer, Mackenzie, to contract for the same.

The fifth paragraph of the defence reads as follows:

> The Minister of Railways has accepted and taken over the said works on behalf of His Majesty and is willing to pay the fair value of the same, but not the amount claimed, which is considered excessive.

After issue was joined on these defences, an order was made by consent of counsel for both parties,

> that it be referred to the registrar of this court for inquiry and report to ascertain the value of the works executed by the plaintiff referred to in the statement of claim, and in respect of which this action is brought.

And,

> that the amount to be ascertained shall be the fair value or price thereof on a *quantum meruit*.

The registrar entered upon the inquiry and took an immense mass of evidence. In reaching his conclusion he stated in his report that

> the only question now to be determined, the Crown having accepted and taken over the works, is the fair and reasonable value so to speak of the said works.

After a very full and careful review of the evidence, the registrar reported in favour of allowing the plaintiff $53,205.65, which he held was

> not only a fair and reasonable value, but a very liberal price to any ordinary contractor.

On appeal to the Exchequer Court from the report of the referee, the learned judge held that the registrar had proceeded upon a wrong principle in reaching his findings. The learned judge held as follows:

> There being no written contract making Mackenzie the sole judge, the Crown is not bound by his report as to the amount due. But

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the *Crown does admit his authority in ordering the works.* To my mind it would be manifestly unfair to the contractor in the face of what has taken place and in the face of this judgment to act on the evidence of other engineers who endeavour to shew that Mackenzie might have adopted a different plan which would have cost less. It seems to me the case must be viewed *from the standpoint of the works being executed on the plans of Mr. Mackenzie* and *accepting his plans then a quantum meruit.*

Now, if I could reach the conclusion that the reference meant an admission of Mackenzie's authority to order the works and an acceptance of his plans, I should have no hesitation in agreeing with the learned judge's conclusions. The plaintiff, once he proved that he had obeyed the orders of a person authorized by the Crown to give them, and had, in doing so, expended a certain amount of money in the completion of the works, would be entitled to rely upon those facts as the best evidence of what he was entitled to receive, namely, the full amount of his expenditure plus 15 per cent. for his contractor's profit in terms of Mackenzie's orders to him.

There might, of course, be some deduction from this for improvidence or recklessness or extravagance in carrying out the orders if such were clearly proved, but apart from that, nothing remained for the referee to do but ascertain what the works Mackenzie ordered the plaintiff to do cost him and report that as the amount he should recover, plus 15 per cent. contractor's profit.

The finding of the learned judge was the logical outcome of his construction of the order of reference. He says, p. 282:

> I think on the evidence as a whole the plaintiff *should be paid the amount found as due by Mr. Mackenzie.*

I am not able, however, to agree in his construction of this order of reference. It places the Crown in the

position of "admitting Mackenzie's authority in ordering the works," that is, of admitting that which upon the record the Crown distinctly denied, and on which denial the Crown's claim to reduce the plaintiff's demand largely depended.

The Crown in its pleadings denied that the works were done under any written or other contract with the plaintiff, or that Mackenzie had authority to order them to be done.

But the Crown went further and said in its fifth plea, that, as the Minister of Railways had accepted and taken over the works, the Crown was

> willing to pay the fair value of the same, but not the excessive claim of the plaintiff.

It was under this plea that I take it the consent to the reference was given, and it is with respect to the admitted willingness of the Crown to pay the fair value of the works because of their acceptance and because of that only, that the terms of the reference must be construed.

In construing the order of reference I do not think we should either ignore the plea of the Crown consenting to the payment of the fair value of the work because the Crown had accepted it and taken it over, or the plea specifically denying Mackenzie's authority to order the works to be done. Nor are we justified in ignoring the fact that the works in question were constructed by the plaintiff in direct defiance of the provisions of the statute relating to public works. The sole and only ground upon which the Crown in its plea consented to pay the fair value of the works was that they had been accepted and taken over. To read into the order of reference an admission of Mackenzie's authority to order the works is really to give away the

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Crown's defence altogether and reduce the reference down to one of mere form.

The work sued for was done without any contract and in fact in direct violation of the provisions of the statute law. That fact must have been perfectly well known to such an experienced contractor as the plaintiff, and he was equally responsible with Mackenzie for the illegality of the entire proceedings and construction of the works. He knew there was no tender and that not even the sanction of the Department of Public Works had been obtained for these works.

The Crown did not agree to a reference because the contractor had carried out works which its chief engineer had authority to order. In fact it denied explicitly any such authority, and on the record before us it must be taken that Mackenzie had not any such authority.

The Crown agreed to the reference because, as said in its plea, it had accepted and taken over the work, and was willing to pay the fair value of the same. It was this fair value of the works which was intended to be referred and nothing else.

It was certainly not such fair value estimated on the assumption that Mackenzie had authority to order them and to direct the manner and mode in which they should be constructed.

I can quite understand the equity of position taken by the defence in saying, it is true the Crown did not order or authorize these works for which you claim payment to be constructed, and it is equally true that their construction has taken place in direct violation of the provisions of the statute requiring tenders to be called for, but the Crown is in the position of a person who finds his property improved by works

which he did not order, and for which he did not agree to pay. The Crown, under the circumstances, however, has accepted the work. It might be said that the Crown had hardly an alternative choice between acceptance and rejection. It was under the circumstances almost obliged to accept. But having so accepted and taken the benefit, it was just that payment should be made of the fair value of the work. But such a consent cannot involve an obligation to pay more for the unordered work than its fair value to the Crown so accepting. The reference was not to find out what, under the peculiar circumstances of the case, the works did cost the contractor, but what their fair value was if they had been constructed as they should have been.

Disagreeing, therefore, as I do, with the basic principle upon which the learned judge reached his conclusions, and agreeing substantially with that on which the Registrar proceeded and made his report and valuation of the work, I am unable to find anything in the record to justify interference with his findings of fact, and would allow the appeal with costs and confirm the report of the referee.

IDINGTON J.—The conflicting points of view taken by Mr. Justice Cassels and the Registrar of the Exchequer Court require us in this appeal to solve the question of which is right in the construction of the order of reference.

It is not pretended now, though it once was, that the appellant ever in fact authorized the works for which the respondent claims to be paid.

In the course of carrying out contracts, let to respondent for the erection of shops at Moncton for the

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Intercolonial Railway service, he and the chief engineer of that road conceived that a sewer and branches leading thereto and also water-pipes, might become serviceable for said shops.

Instead of bringing this under the notice of the Minister responsible for such expenditure as the execution of such works would involve, the chief engineer improperly and illegally took it upon himself to direct respondent to carry out the execution of such works. The contractor, from what we are told of him by his counsel relative to his knowledge, intelligence and wide experience, must have known of the need for, and entire absence of, authority to give such an order.

This proceeding attracted public attention before the unauthorized work was quite finished. Yet respondent never presented his claim till some months after these works were finished. This action is the result.

In answer to the statement of claim making a case for extras under said original contracts, the appellant pleaded denying any contract or authority in any one to direct such works and that they were not extras under said contracts.

Thereafter is the following plea:

> 5. The Minister of Railways has accepted and taken over the said works on behalf of His Majesty and is willing to pay the fair value of the same, but not the amount claimed, which is considered excessive.

Upon this plea issue was joined and an order of reference was made by consent as follows:

> 2. This court doth order that it be referred to the registrar of this court for inquiry and report and to ascertain the value of the works executed by the plaintiff referred to in the statement of claim, and in respect of which this action is brought.
>
> 3. And this court doth further order that the amount to be ascertained shall be the fair value or price thereof allowed on a *quantum meruit*.

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The costs were also left to the disposal of the registrar. The registrar has reported and therein said as follows:

> The Crown having accepted and taken over the works, stands in the position of a person who employs another to do work for him without any agreement as to his compensation, and in such a case the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit—*quantum meruit.*

In the result he has refused to allow for more than he has found as fact these works could have been executed in the place and within the time necessary for their construction and fixed the sum due on that basis at $53,205.65.

On appeal Mr. Justice Cassels has reached the conclusion, although as already stated absolutely and specifically denied in the pleading, that "the Crown does admit his" (*i.e.*, the engineer's) "authority in ordering the works." And as a consequence thereof he arrives at the conclusion that the engineer having directed, as he himself avows, that to be done which would comprehend each step taken, no matter how fruitless in value to the appellant, everything paid by respondent as part of such proceedings must be repaid him with fifteen per cent. profit added thereto, and has substituted the sum of $92,305.48 for that allowed by the registrar.

With great respect I am quite unable to accept any such conclusion.

I am unable to see how, when a party, as explicitly as is done here, denies authority, he can be held to have admitted it.

I am unable to draw any such admission by way of inference from the enforced or almost enforced occupation or possession by him of the works built without

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authority and an expressed willingness to pay for their fair value.

Nor am I able to see how when he has agreed to refer the question of value to any judicial officer to determine that value, he can be presumed to have, by adopting the language used here, implied in such adoption some technical meaning not necessarily involved in the language and which the attendant circumstances so clearly excluded.

If the Crown intended to pay for these works not what they are or were worth, but what they cost, I see no need for a reference.

I cannot impute to the law officers of the Crown on the motion for reference or at the trial of such an issue, such an obvious absurdity, or the bad faith it must imply towards the Crown entitled to be guarded against making any such admissions, lest doing so might lead to just such conclusions as reached by the learned judge.

In other words, the language is just that used where excess of authority may have happened, yet the proprietor ought to pay that which justice demands from him, thus driven by force of circumstances to accept results and use them.

The only implication of authority is that which the law implies in order that the fair value of that used, and only so far as used, may be paid for, but never extends to or reaches any abortive efforts in producing the thing used.

In this particular case, the paragraph, in addition to the preceding words, relative to ascertaining value, was clearly to express this idea, and to shew that no such refinement of meaning, as might in its absence be contended for, was to be implied. For example, on

the one hand, the works when disconnected from the building, might be held to be of little value, and on the other hand, their value when used in connection with the appellant's buildings might be almost inestimable, apart altogether from what it might have cost to have them properly constructed.

To deduce from the authority so plainly denied such consequences as appear in this case seems an absolute denial of justice.

Two illustrations may be given here of how far the learned judge's construction of the order of reference carries him.

Proceeding in a reckless way, indeed quite in keeping with the recklessness characteristic of the proceedings throughout, the chief engineer instructed the contractor to begin the main sewer through property neither had a right to enter upon, or so far as I can see either ever could have supposed he had a right to enter upon. The contractor says he spent thereon something over seven hundred dollars ($700) when one of the owners drove them off. Forced from that place the engineer and contractor abandoned that work and proceeding, and turned their attention elsewhere to the locality where the sewer was finally placed.

The expenses of this unwarranted work are included in the sum allowed in the learned judge's judgment.

Again the work was delayed in a most unwarranted manner if to be ended in 1906, as it might have been done.

The contractor having delayed beyond his instructions, began in September with a force entirely inadequate for the purpose of completing even a substantial

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part of the work before the winter frosts set in, which everybody is agreed forbid the prudent continuation of such work.

This feeble force dug out unevenly along the entire line of the proposed main sewer, leaving deep holes likely to catch water and produce cavings in here and there.

The contractor's own foreman speaks of this as follows:

> Q. How much of the main sewer was done when you took hold? A. How much had been done?
>
> Q. Yes? A. Well, they had done that much that if I had been taking the contract I would have taken it for less money than when I commenced.
>
> Q. Try that again? A. If you want to understand it more thoroughly, all the work they had done I considered a detriment at that time.
>
> The Registrar: Q. In what way? A. In this way, that as the stuff where they had scooped it out in holes had filled in with soft stuff off the banks, and slid right in there, there was no chance for the water to get away from that hard pan or get through it; it was in sort of basins.
>
> Mr. Friel: Q. You mean by using the teams? A. It had not kept it level.
>
> The Registrar: Q. By leaving a knoll? A. Yes, where they would go up over and down; that run in and was filled up with stuff, and you could not shovel it or do anything with it.
>
> Q. You would not have done it in that way? A. No, sir, I would not; I would have kept it so that it would have drained.

Counsel for respondent quite properly points out that all this 1906 expenditure in the proper place did not much exceed two thousand dollars ($2,000). And according to the lordly way in which it seems government engineers and contractors are entitled to look at things, that is a mere trifle. He forgets that it is not only the direct expenditure which is involved, but the wretched condition in which it left the entire work when spring came and the work had to be done over again.

Counsel overlooks the direct expenses of excavation and removal of this earth that is shewn elsewhere in the evidence to have caved in, and but for the condition created by bungling, would never have needed removal. Exactly how much that was, no one in the evidence in this case tells. He omits also to measure how much the results of this bungling hindered next year the prosecution of the work. No one can accurately tell that either.

It is, on the other hand, evident that a portion of the work done in 1906 could not have been rendered useless by the winter frosts. The best I can do is to say the amount of loss direct and indirect to cover this bungling far exceeds what counsel suggests and the problem is, if accuracy is to be reached, almost insoluble on the evidence before us. The respondent made no effort to solve it. Why should he if he has only to shew how much money he paid out and become thereby entitled to be repaid so long as the chief engineer says "yes"?

The rule laid down in the judgment appealed from relative to the *quantum meruit* to be applied, simplifies things and measures that by what the chief engineer may be supposed to have tolerated even though not specifically directed. It is, that whatever expenditure the chief engineer chooses to pass as in his opinion proper to be paid, must be paid, unless it is shewn he fraudulently passed it.

Respondent's counsel very prudently receded apparently from this position so far as to say that anything improvidently done could not be claimed.

His concession was more apparent than real, for he strenuously contended for the entire amount allowed and a good deal more including every dollar of all I have so far referred to.

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It comes back to this, that this improvident expenditure so severely condemned by respondent's own witness and foreman, has been allowed on the supposition that the chief engineer's orders, conduct and opportunity to object, yet not doing so, have to be taken just as if he were substituted for the appellant or His Minister. The result reached is quite logical if the learned judge's construction of the order of reference is correct.

These illustrations shew the absurd consequences of such interpretation. That, of course, can have no place if the order clearly means what the learned judge puts on it. But we are face to face with the fact that no one during the reference took that position. It is one thing to say that the evidence of value given by the engineer is well worth considering in estimating a *quantum meruit*. It is entirely another thing to say that the order means an admission of his authority. In the latter case there was no need for expert evidence or the long expensive inquiry joined in by both sides. I cannot think this would have ensued if the parties conceived that the order meant what the learned judge holds.

Nor can I accept such construction. I must, therefore, examine the whole case so far as to see if the referee's findings are or are not correct.

Roughly speaking the total discrepancy between the results arrived at by the learned judge and the referee amounts to thirty-nine thousand dollars ($39,000) and that, speaking again in the rough, is distributable over the several works as follows: Twenty-three thousand dollars on the main sewer. Three thousand five hundred dollars on the branch sewers, and twelve thousand seven hundred dollars on the put-

ting in of the water pipes, which were supplied or paid for by the appellant besides.

In other words, the branch sewers have had added to their estimated actual value, nearly thirty per cent., the main sewer seventy per cent., and the putting in of the water pipes nearly one hundred and fifty per cent.

It is to be remarked that the greatest discrepancy exists just where the greatest blundering or worse, according to the evidence, was made most apparent. These I will revert to in detail before concluding.

The water-works were over a mile long, and the main sewer over half a mile, according to respondent's evidence. The length of the branch sewers I am unable to fix as definitely.

This great excess of alleged cost over value in regard to a commonplace job of constructing a sewer only 2,880 feet long, of which eighty feet was a cedar box pipe at the outlet, is something so striking that I have been led to read and carefully consider every bit of evidence given by respondent or on his behalf, as well as the greater part of that given on behalf of appellant, to see if I could find any reasonable explanation for such results other than gross mismanagement or probable error on the part of all or some of those concerned in the execution of the work.

Q. I think you said the excavation was hard pan; is that correct? A. The excavation on top of the soil was a layer of peat, pretty nearly black, and that went down a foot or a foot and a half or two feet deep. Then below that was a clay for a few inches or so, a clay that seemed to be a little softer, and we got below that and got into a harder clay, and a large number of small pebbles and boulders; and you got deeper, and as you got deeper right straight along to the extreme depth, it grew harder, and the boulders grew larger, and more of them, and the soil grew harder to handle, harder to pick.

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Nothing very extraordinary one would say if permitted to use common knowledge.

And to make clear what is involved in the word "boulders" we find the foreman engaged in 1906 speaks as follows:

> The Registrar: Q. What sized boulders would they be, varying from what size to what size? A. Well, now, the boulders would be —I do not know as I—I never managed one, but there were some there that we chained out, and a great many the men took into the scrapers, and they would be quite a size.
>
> Q. Those that you chained out could be drawn by one team of horses? A. Yes, sir, any of them could be drawn by one team.

Next year's foreman speaks of sometimes four horses being used to pull one out, but he fails to say how often.

Some witnesses who never saw the work in its execution dwell on veins of sand, and others who worked at it, speak of occasional veins of sand, or pockets of sand, but are very indefinite as to the extent of all that.

I suspect respondent knows a great deal more of the subject than all these other witnesses put together, yet he fails to put the stress they try to do upon that point of nature of soil.

And when any of those knowing better than he by reason of having done the work, come to speak definitely or as definitely as they could be induced to, we find one serious spot 1,100 to 1,200 feet from the lower end of the sewer.

When this point was reached the banks by reason, it is said, of this sand and gravel, began to give way and induced the men to try shoring, in which they failed. Regarding that question of shoring I will deal later on.

I am only now trying to describe the character of the soil as the evidence gives it.

In addition to what I have stated there are a good many general allusions to sand mixed with clay forming a part of the soil, but definite or exact statement is hard to find save that when water touched the mixed soil it was difficult to handle, and to this I will refer when I come to speak of the water question.

I desire first to call attention to the proofs of cost.

As to whether these entire works actually cost what the respondent claims, I have the gravest doubt.

The main works executed under the contracts were going on at the same time (save in winter, when much of the water-system was done) and some six hundred men were employed thereon at times.

The men on these works now in question were liable from time to time to be called off to parts of the contract works. There was no time-keeper specially detailed for these works. There was no superintending staff of any kind, specially set apart to look after them. The division of time and material was, by reason of the want of system that prevailed, liable to become at many stages badly done. I do not say it was with one common staff impossible, but there occur at many stages of the doing so with this staff many chances for gross mistakes.

When we are told there never was an account opened in the ledger for these works during the two years they were in progress, and that the accounts which afterwards were made up and are now submitted were of such tracing as could be done from the invoices as marked at the time and the time sheets, it is impossible not to feel it was a most unbusinesslike way for handling the expenditure of so much money.

When we find the original slips on which the time was entered were kept until after each pay-day, and

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then destroyed, how can we have implicit confidence in what was done? If it was necessary to keep a check of that kind on file to meet the labourer and any of his possible objections, surely it was quite as important to have done so to satisfy the final paymaster.

Again as to the method, sometimes we find an alleged checking over with the foreman from day to day, yet we have not all the foremen called.

We have a foreman saying he kept a book and returned it into the office. Why so, if the time-keeper had taken it?

And when we find the respondent claiming one-fifth or one-fourth of the salary of his superintendent as against these works, though they only formed of the whole a twelfth part or less; claiming to be paid 20 per cent. of profit in face of a bargain with the chief engineer for 15 per cent. profit; claiming for weather wear on a concrete mixer standing over two years for works that should not have taken more than six months, at the outside; claiming for work done in Winter at rates involved in so doing it in excess of what it would have cost in Summer, according to an overwhelming weight of testimony, when there existed no necessity for doing it in the Winter time at all, and we find so doing it might have been for his indirect advantage in keeping men there, although work ceased on the contracts, I am not disposed to place unbounded confidence in the loose methods I have referred to as sure to result in the greatest attention having been paid by all concerned to save the pockets of the ultimate paymaster.

There were three time-keepers, of whom the first is said to have since died. The two others were examined. Jones, the next, says he came in June, 1907, and his evidence is very unsatisfactory.

He hesitates and seems not to understand many questions so simple that if the man had been doing the work for months he should easily have answered. He does not strike me as dishonest, but as just the sort of man to make a bad bungle of his work of keeping and distributing time so kept in the way we are asked to believe it was kept and distributed. His self-contradictions in this regard do not tend to my putting implicit confidence either in what he is got finally to say or results derived from such a source. Yet it must have been he who kept time if it was kept during the summer of 1907, in which the greater part of the main sewer-work was done.

Gass, the next in order, came on the 11th of November of that year. He seems to have been, though inexperienced and a lad of only nineteen at the time he entered, of a brighter stamp than Jones. He had to depend in a way not quite clear upon one Manuel, who also kept time of some Italians employed. And Manuel is not called.

The whole system, if it can be called so, was at the mercy of the honesty of the foremen, and we have only the evidence of some of these engaged on the main sewer, but none of those on the other work.

We have that of Kitchen, under whose handling of the work in 1906 we have seen something.

Then we have the evidence of Godfrey, who was in charge of the main sewer-work in 1907, until the 20th of October of that year, when he left.

We have the evidence of a stable boss and a carpenter on the same work, all of which is not very important.

On such evidence and such methods I could not give with confidence I was right, any such award as

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the judgment appealed from if I were to adopt the cost to the contractor as the basis for payment.

But it is said the chief engineer is honest and he approves.

It is not necessary to enter upon this issue further than to point out that he is human, that he made a tremendous mistake in so far forgetting his duty and loyalty to those he served as to presume to make a bargain he had no authority or colour of right to make. If he by any possibility could have supposed this was an extra within the ambit of the execution of the contracts he had the supervision of, then the schedule prices ought to have governed him.

If the schedule prices were not appropriate he had no right to substitute anything else. The moment he made a bargain he had no authority to make, he placed himself in a situation where his duty and his interest conflicted.

Whether from that cause or from other causes he certainly was mistaken either in his former evidence with which he was confronted, or in what appears herein.

He is not to be taken as a disinterested witness in this case.

He no doubt is a busy man and liable to err through want of time to investigate details. And I am quite sure, on the evidence, he never had personal knowledge of all these details, or investigated them.

He assumed and erroneously supposed till a late period some one on behalf of appellant kept time, and then suggested it being done with results not very clear, or at all to be relied upon.

Then we are asked to take the evidence of other experts, because eminent in their profession, who are

called by respondent and say these expenses are reasonable.

For myself an expert has no more weight when speaking of matters within the range of ordinary human reason and apprehension as the subject-matter here is, than any other man when he fails to bring home to my mind as probably correct the reasons he gives and the explanation he offers relative to the matter he speaks of.

I need not enter into detail why such evidence as referred to, given on respondent's behalf, does not appeal to me herein, further than to say a close examination of the grounds therefor and reasons given for it fails to convince me that they are right or ever got seized of the actual facts in detail of which they spoke, or from which they pretended to make the deductions they presented.

If they had confined themselves to saying it was possible or even probable such expenditure might be reasonably made, I could understand their position, though it might not have been very definite in its results.

And we have this further crucial test that when called in rebuttal after hearing Mr. Chipman and Mr. Ker, Mr. Holgate did not condescend to tell the court wherein the plan or method of construction these gentlemen suggested was impossible of execution, though he admitted it an ideal method under some conditions or circumstances. And when he says the work was impossible of construction by such methods, I prefer to believe Mr. Chipman, whose experience in this class of work vastly exceeded anything he seems able to pretend to. He has chosen another field for his professional ability.

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Mr. St. George did give a reason and only one reason relative to the main part of the work, and that was that the ground was wet. And on a minor point as to the putting in of the concrete, he suggests the width of the trench rendered Mr. Chipman's plan impossible to put it in without frames.

In this he overlooked Mr. Chipman's theory that the trench should never have been so wide. The referee has allowed for the excavation to a greater width than Mr. Chipman deemed necessary, and assuming he has allowed the work for frames used, that part of this expert's evidence is thereby answered so far as bearing on the issue of *quantum* before us.

It seems to me the entire issue as between the experts is thus reduced to a question of the wetness of the ground where the main sewer was constructed.

The difficulty from this cause of handling the work is what all the witnesses dwell upon.

Mr. Chipman explained that if there was water it had to be taken care of. He told how. He explained why it did not seem difficult.

The railway embankment cut off the water from the large area of lowland on which the shops were being erected and it could not get across till reaching a certain culvert at a distance from the main sewer.

The chief part of the sewer was thus out of reach of water from that source. It seems highly improbable (I infer from what he says), that any underground condition so existed as a conductor under the railway track. It would, I suppose, affect its stability. At least his explanation of the situation is unchallenged.

Then, if water came from other sources it had to be drained away, and if need be pumped away. He

did not seem to expect this, but properly assumed the possibility, though improbable, of need for much pumping.

Not a word from either of these experts of respondent to shew that was impossible unless at an expense of say twenty thousand dollars, which this work cost beyond what it is said to be worth.

They deal in generalities. Face to face with this simple, or at least apparently simple, problem, they give no reason to shew why it was insurmountable at a moderate cost.

I find, further, on this subject of water the following from the report of the referee:

At page 338 witness Godfrey further states he would not *let the water go down the ditch.* And Mr. Peter Archibald, a well-known civil engineer of great experience, heard on behalf of the plaintiff, tells us also at page 256:

> The surface drainage was not kept out of the trench, and the water came in, and you could not expect anything else but slurry when you left the surface water in.

Mr. Mackenzie tells us, at page 256, that "the first thing that had to be done in doing that work was to get the water off from the vicinity of the buildings." And that seems to explain a great deal.

Then as to the shoring of the ditch, when dried by proper drainage, however provided, they fail utterly to shew why shoring could not have succeeded. The evidence shews it was only tried at one place, although a witness who could tell little about it says two places.

At this one place already referred to as 1,100 to 1,200 feet from the lower end of the sewer it was tried when, I infer, evidently too late, as the bank had shewn signs of breaking. It was done by men without ex-

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perience. The problem does not seem to have engaged the attention of respondent or the chief engineer or others of experience.

The foreman, who tells of this attempt, says:

> Q. During the work were any of the railway officials there? A. I think Mr. Mackenzie was there occasionally.

The truth seems to be that the best plan never was considered by any one of experience.

There is not one of the entire outfit employed directly to do so and who had the execution of the work in charge that had experience of the kind necessary to do it economically.

Respondent and the chief engineer do not seem to have turned their minds in that direction.

Mr. Chipman is a man evidently of that wide experience in this class of work that lends weight to his evidence. It reads as that of one who knows whereof he speaks, and who is perfectly candid. It appeals to one's reason and common sense in a way that the evidence of some others does not.

The referee saw and heard all these men giving their evidence, and I think he evinced the experience needed to appreciate it correctly. And I think he has done so.

As to the other work there was evidence relative to the cost of sewer building in Moncton, and of excavating for and laying water-works pipes that shews the cost thereof in that locality does not exceed what Mr. Chipman estimates it should, and is well within what the referee has allowed.

Respondent's own contract there for the city confirms this.

The doing of the work in winter was inexcusable on all the evidence. To allow for that increased cost

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is what there can be no excuse for unless we substitute Mr. Mackenzie for the Minister who is responsible therefor.

The evidence of Mr. Edington, the local engineer for Moncton, relative to the cost of executing work there for either water-pipes or sewers, is that of a man who knew the local conditions better than any one else unless respondent, and probably than he also. Compare what he states and Mr. Chipman and others say as to necessary cost of such work, and it seems impossible to accept as reasonable the gross extravagance, to put it mildly, involved in the enormous price by which respondent's charges exceed every estimate given upon or in relation to a common every day sort of work.

As the referee says the evidence bearing on the branch sewers work is most meagre.

There occur to me only two possible things the referee may not have allowed for. One is the question of interest during the execution of the work. Interest after its execution he has dealt with on a proper legal basis, and the learned judge agrees therein. But in executing any such work as this no doubt the contractor is usually paid by progress estimates which save him some outlay of interest. Mr. Chipman's figures probably proceeded on such conditions.

Again, the carpenter work involved in making frames for cement or putting in shoring according to Mr. Chipman's plan may have been overlooked. I am in doubt whether these elements of cost are covered by his allowances or by Mr. Chipman's estimates if the nature of the soil needed heavier timbers than under usual conditions.

The strength of timber needed for shoring a small part of the main sewer might have exceeded the usual

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thing. If the experts had directed their minds to this point one could have understood them. To say it was impossible is entirely another story.

I incline to think what the referee allowed beyond Mr. Chipman's estimates would cover all these minor things I refer to.

If there has been any oversight of them I have no doubt they will be readily rectified. If not respondent's case is to blame.

The evidence maintains the referee's findings and should not now be disturbed for any such doubts as I may have.

I think the appeal should be allowed with costs.

DUFF J.—On the proper construction of the order of reference I think the question referred for investigation was the "fair value" of the completed sewerage and water-systems mentioned in the pleadings. By that I think is meant the value to the Crown, but the value estimated with regard to the circumstance that the construction of these systems was a necessary work; in such circumstances the completed work would be worth to the Crown just what it would cost to reproduce them in the usual way, that is to say, to have them constructed under a contract entered into after a proper opportunity had been given for the presentation of competitive tenders. I do not know any other way of ascertaining such cost than estimating the reasonable cost of such works when executed in a provident way.

I disagree with the learned trial judge's construction of the order, for several reasons. In the first place the statement of defence shews that the Crown disputes liability, and denies that the works were exe-

cuted under its authority. It then proceeds (par. 5) as follows:

5. The Minister of Railways *has accepted and taken over the said works on behalf of His Majesty and is willing to pay the fair value of the same, but not the amount claimed, which is considered excessive.*

It is under this paragraph, and this paragraph alone, that the reference was directed. It is, of course, clear that what the Minister declares his willingness to pay for, is the works "accepted and taken over," What were the works "accepted and taken over"? Surely the completed sewerage and water-systems. I do not think any other meaning can fairly be attributed to the paragraph. Then turning to the order of reference; paragraphs 2 and 3 are as follows:

2. This court doth order that it be referred to the registrar of this court for inquiry and report and to ascertain the value of the *works executed by the plaintiff referred to in the statement of claim, and in respect of which this action is brought.*

3. And this court doth further order that the amount to be ascertained shall be the fair value or price thereof allowed on a *quantum meruit.*

What are the "works executed by the plaintiff referred to in the statement of claim"? Can there be any doubt that these works are the "sewerage and water-system" referred to in paragraphs 4, 5 and 6, in which the foundation of the claim is set forth? Then the "works" of which the value is to be ascertained being the sewerage and water-systems as completed by the respondent and taken over by the Minister, it appears to me that *quantum meruit* must be construed as applied to this finished production, and not necessarily to the energy expended and materials used wastefully or otherwise in attaining the result. If I am right in these views the judgment of the learned trial judge cannot be sustained on the ground upon

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which he has placed it, and it is necessary, therefore, to consider the question whether the conclusions of the registrar are supported by the evidence before him.

It is, of course, undeniable that it would be a circumstance of great importance if it appeared that the work done was really done under the direction of Mr. Mackenzie, the chief engineer of the Intercolonial Railway. Neither Mr. Mackenzie's general competence nor his good faith has been directly impugned; and we may take it that both Mr. Mackenzie and the respondent are for the purposes of this case free from any imputation of dishonest collusion. No such charge was directly made, and for my part I decline to give any countenance to the motion that litigants may get the benefit of suggestions of indirect dealing without taking the responsibility of making their charges in plain, unmistakable terms. I was strongly impressed on the argument with the idea that the learned registrar had failed to give due weight to the contrast between an opinion attested by actual approval of the work as done on the ground by an engineer in a position of responsibility and opinions given by experts necessarily resting upon an assumed state of facts which they could not in the nature of things verify for themselves. A careful examination of the whole evidence has, however, convinced me that there are many circumstances detracting from the importance which might normally be attached to Mackenzie's connection with this work. The arrangement between Mackenzie and the respondent was according to the both of them that Wallberg was to be paid his actual expenditure plus 15 per cent. as profit. This arrangement was not only unauthorized, but in

direct contravention of a public statute as Mackenzie knew. No specifications were prepared and no plan (except one of grades) until after the completion of the works. No provision was made for checking expenditures. No accounts were given or asked until the work was complete. The respondent was left entirely with regard to all these matters to his own devices and no information of the arrangement was given to the Department until the respondent's account was sent in. The supposed supervision by Mackenzie indeed as regards everything required to safeguard the interests of the Department becomes—when one examines the evidence—a myth. In face of these facts I do not think Mackenzie's approval of the respondent's methods mainly given *ex post facto* can be regarded as carrying that weight to which in happier circumstances it might have been entitled. I repeat, I suggest no dishonesty or conscious wrongdoing, but I cannot credit him with such an appreciation of his responsibilities arising out of the transaction with the respondent as might have been expected.

The learned registrar is, I think, fully justified in his conclusion that there was quite sufficient evidence of mismanagement to lead to the conclusion that the actual expenditures as presented by the respondent could not be accepted as reliable evidence of the fair cost of the work executed according to proper methods. The respondent's foreman, Godfrey, says that when he came to the work in June, 1907, what had already been done was in such a state that it was actually a detriment. The chief difficulty to be encountered was the presence of water in the excavations; and the evidence is overwhelming that the course adopted was obviously calculated to aggravate, as it did aggravate,

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that difficulty; and there was, moreover, ample evidence to shew that the methods of construction were needlessly expensive.

As to the amount allowed by the registrar, although on some particular points one might, if one were treating the question as *res nova* have taken a different view, I am not satisfied that on the whole or in any important particular he has failed to do justice to the respondent's claims.

ANGLIN J. (dissenting).—The principal question for determination in this appeal is whether the basis on which the learned judge of the Exchequer Court has dealt with the plaintiff's claim, or that adopted by the registrar upon the reference to him, is correct. Having regard to the fact that the plaintiff's rights rest entirely upon the consent of the Crown, that question must, in my opinion, be determined by a proper interpretation of the terms in which that consent is couched. It is contained in two documents—the plea of the Attorney-General, and the order of reference. The material paragraph of the statement of defence is as follows:

> 5. The Minister of Railways has accepted and taken over the said works on behalf of His Majesty, and is willing to pay the fair value of the same, but not the amount claimed, which is considered excessive.

The order of reference contained these provisions:

> 2. This court doth order that it be referred to the registrar of this court for inquiry and report, and to ascertain the value of the works executed by the plaintiff referred to in the statement of claim and in respect of which this action is brought.
>
> 3. And this court doth further order that the amount to be ascertained shall be the fair value or price thereof allowed on a *quantum meruit*.

As the latter document defines with some particularity the basis on which "the fair value" is to be ascer-

tained, for which in the former the Crown expressed its willingness to pay, I think that, if there be a difference between them, the basis on which the plaintiff's claim is now to be dealt with must be sought in the terms of the order of reference, rather than in those of the plea. As a consent order, the order of reference is binding on the Crown as a party defendant. No step has been taken to set it aside. No attack has been made upon it as having been procured by fraud or misrepresentation, or as the result of mistake, nor has there been any repudiation of the authority of counsel for the Crown to consent to it in the very terms in which it issued. As I view it, the only question open on this appeal is—under the order of reference on what basis should the registrar have disposed of the plaintiff's claim.

The Crown, seeking to uphold the finding of the registrar, maintains that the actual value of the completed work *in sitû,* constructed in the most economical method feasible, is the basis of compensation contemplated; the plaintiff contends that the fair cost of the works in the circumstances in which they were in fact executed, plus a reasonable profit, is what the order of reference required the registrar to ascertain. If the former view be correct, I am quite unable to understand why the clause of the order numbered 3 was inserted. Its presence in the order, in my opinion, renders the position taken by the learned counsel for the Crown quite untenable, and fully supports the view of the learned judge of the Exchequer Court that "the fair value or price" should be determined on the basis of the fair cost of the works as executed (excluding extra expense incurred through any negligence or fault of the contractor), plus a reasonable

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profit to him. I agree in the learned judge's appreciation of the relative value of the evidence of experienced men "who were present on the ground and saw the actual state of affairs," and that of expert "witnesses testifying after the completion of the work." In the absence of any evidence of fraud or collusion on his part with the contractor, the testimony of an engineer occupying Mr. Mackenzie's position is certainly entitled to the greatest weight, and it would require strong proof against it to justify putting it aside. The registrar has expressly found that there was neither fraud nor collusion on the part of Mr. Mackenzie; and the fact that he is still retained as chief government engineer adds not a little to the value of his evidence.

So far as the course taken by the contractor was determined by the plans furnished him by the engineer, or by his directions, no fault or negligence should, in my opinion, be attributed to him. So far as the manner of carrying on the work was left to his own judgment and discretion, the contractor must be answerable for any excess in cost owing to the adoption of improper or extravagant methods.

An attempt was made in argument to impugn the reliability of the evidence as to the time-keeping upon the work. I think that attempt failed.

It was also contended that the respondent should be disallowed the sum of $708.76 "expended for the work on the so-called false start." This work was done by the contractor under the instructions of Mr. Mackenzie, but was discontinued and abandoned under similar instructions, because the Crown's title to the land upon which it was done was challenged. It forms no part of the works "accepted and taken over" on

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behalf of His Majesty, and if the plaintiff's right were dependent upon that fact, this item must be disallowed. But although it is not separately and specifically mentioned in the statement of claim, the cost of it is included in the expenditure for labour and materials which go to make up the sum of $105,940.15 claimed by the plaintiff. As one "of the works executed by the plaintiff referred to in the statement of claim and in respect of which this action is brought," I agree with the learned judge of the Exchequer Court that the work on this false start is covered by the order of reference.

Much stress was laid in argument upon the extravagant cost of the work done by the plaintiff. On the evidence in the record, and especially that of Mr. Mackenzie, the responsibility for any excess in the cost of the work properly done under his directions—if there be any—must rest with him and not upon the contractor. I agree with the learned judge of the Exchequer Court that it would be manifestly unfair to the latter to hold that he must suffer for having carried out plans and followed the instructions of the government engineer. This consideration, I think, having regard to the terms of the order of reference, determines in the plaintiff's favour the claims made on behalf of the Crown for deductions from the cost of the works on account of an alleged excessive width of the excavations.

As to the prices per yard to be allowed for the various portions of the works, I find myself unable to say that the view of the learned judge of the Exchequer Court is erroneous.

But the evidence of Godfrey, a witness for the plaintiff and his own foreman, discloses a somewhat

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serious mistake made by the plaintiff in opening up too great a length of excavation at once instead of excavating in short sections. This appears to have much increased the difficulties in handling the surface water —serious enough under most favourable conditions— and to have resulted in some work being rendered useless and in the subsequent taking out of material being made more troublesome and costly. The method of excavating was apparently left entirely to the judgment of the contractor. For this mistake responsibility cannot be placed on Mr. Mackenzie's shoulders. The learned judge of the Exchequer Court appears to have overlooked this matter; at all events he does not seem to have taken it into account.

From the report of the registrar it is not possible to gather what would be a fair deduction to make from the amount allowed to the plaintiff by the learned judge, to cover the cost of labour of which the benefit was actually lost because of the plaintiff's mistake in excavating for too great a length of sewer at once, and the increase in the cost of subsequent work due to the same cause. I think it would not be satisfactory to attempt to fix this amount by a study of the voluminous evidence before us without the assistance of argument. Unless the parties can agree upon the amount by which the sum fixed in the judgment of the Exchequer Court should be reduced in respect of these matters, the case should go back to the registrar in order that he may inquire and report upon it. If the parties can agree, the finding of the Exchequer Court may be varied accordingly; if not, it should be varied by deducting from it the amount which shall be ascertained to be proper upon the reference to the registrar.

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Having regard to the 5th paragraph of the statement of defence, to the order of reference, and to the terms of the memorandum of the Minister of Railways under which the claim of the plaintiff was referred to the Exchequer Court "for adjudication," I cannot accede to the contention of counsel for the appellant that the learned judge erred in directing a judgment declaratory of the plaintiff's right to recover from the Crown the amount which the Crown had formally expressed its readiness to pay and had asked to have determined. With the effect of this adjudication we are not concerned.

Neither can I accept the view of the appellant's counsel that the registrar's report was not appealable.

Appeal allowed with costs.

Solicitor for the appellant: *Jas. Friel.*

Solicitor for the respondent: *Harold Fisher.*