BETWEEN

1910
January 22.

EMIL ANDREW WALLBERG.....PLAINTIFF;

AND

HIS MAJESTY THE KING.....DEFENDANT.

Public work—Work done without contract in writing—Instructions of Government Engineer—Quantum Meruit.

By an order of reference, on consent of parties, to ascertain "the value of certain works executed by the plaintiff" under the direction of the Chief Engineer of the Intercolonial Railway (there being no written contract therefor) it was directed that "the amount to be ascertained shall be the fair value or price thereof allowed on a *quantum meruit.*" The referee having dealt with the case as if the market value of the works had to be ascertained under the order of reference, and having found that the works could have been executed for the sum much less than their actual cost as executed had a different plan of construction been adopted by the Chief Engineer, reported that judgment should be entered for the plaintiff for a much smaller sum than the alleged actual cost of the works as executed.

Held, that the referee should have found in favour of the plaintiff for the actual value of the works as executed under the direction of the Chief Engineer.

THIS was an appeal from the report of the Registrar of the Court, acting as Referee.

The facts of the case will be found in the report of the Referee and in the reasons for judgment.

The report of the Referee was as follows:—

This claim comes before this court on a reference by the Minister of Railways and Canals, under the provisions of Section 38 of *The Exchequer Court Act* (R.S.C. 1906 ch. 140.)

The plaintiff, by the pleadings, claims the total sum of $105,940.15 for the concrete sewer, branch sewers and water system, with interest thereon from the 26th January, 1909, and costs. He alleges, *inter alia,* that in the year 1906 :—

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"2. His Majesty the King, represented by the Minister of Railways and Canals of Canada, undertook the erection of a car and locomotive repair plant at Moncton, in the province of New Brunswick, and entered into contracts dated respectively September 18th, 1906, October 29th, 1906, January 18th, 1907, and October 22nd, 1907, with the said Emil Andrew Wallberg, for the execution of the whole of the said work at bulk sum prices, aggregating $682,975, and with provision for payment for a part of the said work in addition at prices set out in schedules contained in the said contracts, the total value of the said work being in the neighbourhood of $1,000,000.

"3. Each of the said contracts contained a provision that the Chief Engineer of the Department of Railways and Canals, or other officer for the time being appointed to inspect, supervise or control the work on behalf of His Majesty, should be at liberty at any time before the completion and acceptance of the work to order any extra work to be done, and to make any changes which he might deem expedient in the dimensions, character, nature, location or position of the works, or any part or parts thereof, or in any other thing connected with the works.

"4. Before the completion of the said works, it became necessary to construct a sewerage system, a water system and other work in connection with the same, and W. B. Mackenzie, the Chief Engineer of the Intercolonial Railway, being the officer for the time being, appointed to inspect, supervise and control the work on behalf of His Majesty, ordered the said Emil Andrew Wallberg to construct the said sewerage and water system as extra work.

"5. The said Emil Andrew Wallberg constructed the said sewerage system, the said water system, and the

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said other work to the satisfaction of the said W. B. Mackenzie and the Minister of Railways and Canals of Canada, and the said works have been accepted and taken over by the Minister of Railways and Canals of Canada. The said sewerage system was completed January 9th, 1908. The said water system was completed October 3rd, 1908. The said other work was completed September 11th, 1908.

"6. The said Emil Andrew Wallberg claims to be entitled to be paid for the said sewerage system, water system and other work as extra work under the said contracts or one of them, or in the alternative to be paid for the same as work and labour done, and materials supplied by him at the request of the Minister of Railways and Canals of Canada.

"7. The said Emil Andrew Wallberg has demanded the amount due him and payment has been refused."

The Crown by its defence states that:

"His Majesty did not in the year 1906, or at any time, represented by the Minister of Railways and Canals, or otherwise, enter into any written or other contract with the claimant for the execution of the work for which the claimant is seeking payment, nor for any part of the same.

"2. His Majesty did not authorize W. B. Mackenzie, the Chief Engineer of the Intercolonial Railway, to contract for such work or for any part of the same.

"3. The said Chief Engineer of the Intercolonial Railway did not order the claimant to construct the sewerage and water system as extra work under the contracts or any or either of them mentioned in the second paragraph of the claimant's statement of claim.

"4. The said sewerage and water system were not extra work under any of the said contracts.

"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.

" 6. His Majesty did not agree, nor is His Majesty liable to pay the interest sought to be recovered."

From the scope of the reference to the undersigned, it will obviously appear that it is unnecessary to decide as to whether or not, under the decisions of the cases of *Henderson* v. *The Queen* (1) ; *Wood* v. *The Queen* (2); and *Hall* v. *The Queen* (3), there existed a valid contract as between the plaintiff and the Crown for the construction of the works in question herein, or whether, under the circumstances, an implied contract could be asserted against the Crown. This is no more in question. We have gone far beyond the question of contract. The only question now to be determined, the Crown having accepted and taken over the works, is the fair and reasonable value, the market value, so to speak, of said works. 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.*

The Chief Engineer, on behalf of the Crown, in charge of the present works and of the works covered by the four contracts, Mr. Wm. B. Mackenzie, had nothing to do with the preparation of the plans and estimates for the four contracts above referred to for the erection of the shops and other buildings. These contracts, however, provided for drainage inside, but

(1) 6 Ex. C. R. 39 ; 28 S. C. R. 425. (2) 7 S. C. R 634.
(3) 3 Ex. C. R. 377.

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not outside, of the buildings to the edge of the buildings, but not for carrying the drainage away.

The site of the shops and other buildings covered by the four contracts was low ground, the ground being higher on three sides, the land swampy, holding a good deal of water near the surface, and it became manifest to the Chief Engineer at the very threshold, in 1906, that a drainage system was of paramount necessity to drain the area upon which these buildings were being erected. Mr. Mackenzie very reasonably contends that immediate drainage was absolutely necessary in order to save the buildings from destruction by frost during the incoming winter. Being familiar with the time it generally takes to ask for tenders, he says he did not think there was any time to call for tenders. It was a case of emergency.

Under such circumstances, having a contractor upon the premises, he turned to him and instructed him "to go ahead and build as quickly as he could the works in question herein and that he would see that he was paid the actual cost plus 15 per cent." Then further on, he is asked:—

"Q. Did you have any other reason for giving it to Mr. Wallberg?

A. Nothing but the desire to get it done in time to prevent the destruction of the buildings.

Q. Why could he do it more quickly, in your opinion?

A. Because he had the facilities for getting men quickly and rapidly, and he had some plant on hand, and it was close to his work, and some of it was, part of it was right in the middle of his work, so that it would have been a very difficult matter for an outside contractor to come in there with any amount of plant and carry those things on without coming into conflict, the

one with the other, and delaying the whole work, either one work or the other, or perhaps both. I have had experience with different contractors on the same work, and I know what I am talking about."

Then we have Mr. Wallberg's own version as to the circumstances under which these works were started and done. See page 32 of the evidence, which reads as follows:—

"Q. How did you come to do that work?

A. At that time the foundations for several buildings were built; the trenches were open for those, and also were open for further work on foundations, and there was no way of carrying off the rain water, the surface water off the building site. These trenches naturally filled up with water, and remained full, and in spite of any pumping that could be done they filled up again, because these buildings were in the lowest spot of a large area sloping down towards the site in which the buildings were built, and of course the reason the drains were built in that part was because they were in the lowest part, so that they could, when completed, take the surface water and carry it away; the foundations standing in water, it was very detrimental to them and in a dangerous condition for their permanent safety, because this water would soak into the soil and soften it, and naturally, when the load came on the foundations would sink unevenly and crack.

Q. With whom did you make the arrangement, or who made the arrangement with you?

[THE REGISTRAR. Under what circumstances did you do the work?]

MR. FISHER. Q. Under what circumstances did you commence the work?

A. I received plans and verbal instructions from Mr. Mackenzie, the Chief Engineer of the I.C.R.

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[THE REGISTRAR. Q. To do what?]

A. To proceed as quickly as possible to build these sewers and carry on the work as rapidly as I could carry it on, so as to relieve a large amount of water on the ground."

It is perhaps well to mention here, so as not to be misled by the plans mentioned by the witnesses that it appears from the evidence, outside of plan "G," which was in the possession of the Assistant Engineer, Mr. Torrens, during the construction of these works, most of the other plans, especially the cross-section plans, were prepared after the construction of the works, only in 1908.

Now it will appear from what has just been stated that Mr. Wallberg, the contractor, would reasonably be under the impression that he would recover the actual cost of these works, plus 15 per cent profit. It is indeed a very unfortunate thing that he should have thus been placed in such a position, standing between his duty and his interest. Without casting any insinuation, it will obviously appear that he had no interest to perform or execute the work with any economy. The higher the actual cost would be, the larger his profit, and he would in any case be refunded the actual cost. As in the consideration of all matters we have first to look where the interest lies, this element is an important one to bear in mind in approaching the serious question of a fair and reasonable cost.

A great deal of evidence has been adduced and time taken up on behalf of the plaintiff in proving, or attempting to prove, the actual cost of these works to the contractor.

It may perhaps be contended that the actual and honest cost of these works to the contractor, performed with usual skill and economy, might amount to the

quantum meruit we are now seeking. I fear, however, that the actual cost as attempted to be proved would not represent the value of the works.

There was practically no labour time kept by the Government, and with respect to the time kept by the contractor, it is a question whether we have the best evidence in face of the fact that the foreman's slips and the time books of the teamsters' time have been destroyed. There was neither no separate set of books kept by the contractor with respect to these works, notwithstanding the fact that the plaintiff at the time had under way, at the same place, besides the works in question in this case, the four contracts above mentioned, together with a sub-contract from the Rhodes, Currie & Co., for the erection of the planing mill, all of them involving a great deal of work and money which might have a tendency to create confusion in the distribution of the work.

The works were not carried on properly, and there was mismanagement somewhere, says Mr. Willis Chipman, an engineer of uncommonly wide experience respecting work of excavation, and sewers and water systems generally. And in that broad and sweeping assertion he is corrobated by the plaintiff's own witness C. D. Godfrey, a man of great experience and value, commanding quite a salary for one in his walk of life. Mr. Leblanc says he would not have done the work in that way, and gives his reasons. The following are a few excerpts from Mr. Godfrey's evidence.

"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.

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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. 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 hardpan or get through it; it was in sort of basins.

MR. FRIEL. 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 and 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. . . . . "

Then, to continue :—

"Q. And they had been using their horses there ?

A. They had been using them before I came.

Q. And this condition of pockets existed all the way along the line?

A. Yes, I could not tell you to the depth.

Q. When you took charge you had to contend with those pockets?

A. Yes, and drain it out and put it in shape.

Q. That is what you mean by saying that you would sooner start now if you were tendering?

A. Yes, with the exception of the clearing.

Q. The grubbing?

A. Yes.

[THE REGISTRAR. Q. How would you have taken the stuff out with a team? Would you have got in sideways?]

A. I would have kept it more level.

Q. All through?

A. I would not have worked the whole sewer; I would have worked it out from the lower end, and would have kept it so that it would have drained. . . . . "

And again,

["THE REGISTRAR. Q. Look at this sketch. Here is your excavation for the sewer. You said it was stripped from the top between two to four feet, and at the lower end there was this platform in the neighbourhood of 50 to 100 feet. Then you went on excavating in the same manner as the others were excavating?]

A. Yes.

Q. And you said that through the system prevailing before, you found there were holes in which the water had accumulated and the soft stuff had run in a liquid state, and you found fault with the knolls?

A. Yes.

Q. Show us where the knolls were?

A. We will say———

Q. There were knolls at different intervals?

A. Yes.

Q. Say how many feet apart, in a general way?

A. Probably 100 feet or 200 or 250.

Q. Where would the knolls be with respect to this?

A. There was scarcely anything taken out where the horses came out. . . . .

Q. What we are more concerned with, we want to know where the knolls stood. Did they stand right in the middle of the excavation to allow the horses to climb up to the side?

A. Well, it was a gradual rise from the lower side.

Q. In the centre of the excavation?

A. Oh, no.

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Q. Where?

A. It would lower all the way from this to the other side, to the other side where they went out. . . . ."

And again, at page 607:—

"Q. All the way across?

A. Not the whole way. There is a passage-way for water, but too narrow to carry that stuff that had blocked up and formed a basin there of mud.

Q. Where?

A. In these places.

Q. Between the knolls?

A. Between the ridges where the teams would come out.

Q. You mean knolls?

A. Yes. I suppose that the passage that had been left there to convey the water was too narrow and was blocked; it was soft and sticky; I could not tell you how it had been dug. . . . ."

MR. FISHER. How did you find it when you came in June? Was the ditch empty or full, or how?

A. I found it all water and mud."

At another place, 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: "The surface drainage was not kept out of the trench, "and the water came in, and you could not expect any- "thing else but slurry when you left the surface water "in."

Mr. Mackenzie tells us, 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. It was of great moment to get the water away from that area and of great benefit to the buildings; and it was a great relief

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and advantage to the contractor to get rid of this water and to place him in a position to proceed with his contract work on dry territory.

Adverse comments have been made respecting Mr. Mackenzie, because of his universal approval of the cost of the works. I may say that I have, all through the case, taken him to live up to his good reputation of honesty, and his conduct may be readily explained when one bears in mind with him that he has ordered these works to be done, pledging his word that he would see the contractor paid in the manner above mentioned. By his conduct he only shews he is living up to his word. That is all there is in it.

Without going into the minute details of the manner in which these works were executed, it will be sufficient to say that, besides what has already been said by two of the plaintiff's witnesses, trouble resulted from the fact that the sewer was open on its whole length from the creek to the railway track at the same time, and that the surface water was not taken care of in a satisfactory manner. The trenches were of course opened too wide, and after this opening of the sewer in 1906 it was next to impossible when they resumed work the following year, early in June, 1907, to start shoring. Quite a few witnesses speak as to the mode of excavating for a sewer with horses and scrapers, and say notwithstanding their long experience, they never knew or heard of that being done before. This view is especially impressed by Messrs. Leblanc, Chipman and Ker, most honest and knowing witnesses, whose evidence also will bear out the statement that there was nothing about the feature of these works which made them exceptional and took them from the ordinary run of excavation works of that class. The time engaged upon the work was also uncommonly long. Mr. Leblanc built at Moncton a

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sewer 2,400 feet long and 17 feet deep at places, in three months. Shoring should have been done by the plaintiff from the start, and not tried when the banks were in a state not to allow it.

Of course, we have also in this case, that class of evidence given in the usual supercilious manner, which invariably gives that blind, servile and cunning approval to all doings of a certain party,—even where his *modus operandi* is glaringly defective and at fault. That class of evidence can be had in every case; it is always available. However, the least said about it the better.

Under the evidence adduced I hereby find that the so-called actual cost the plaintiff has endeavoured to prove does not represent the fair and reasonable cost of these works executed in a proper manner.

The plaintiff's experience with works of this kind is very limited. It cannot be compared with that of men like Mr. Chipman, a gentleman of uncommon experience and ability who for a number of years has been engaged in that class of work, I might say all over Canada;—like Mr. Ker, the present Ottawa City Engineer, who has a very large experience in such works; like also the practical experience of Mr. Leblanc who gave his evidence in such an honest manner, but who, it must be admitted could not be taken from the actual practical work upon the ground to the reading of plans and explaining of the same. The latter work was too much for him, but it does not militate against that part of his evidence based on actual results.

We will now endeavour to arrive at a fair and reasonable price for the works in question, and deal *seriatim* with, 1st, the concrete sewer; 2nd, the branch sewers; and 3rd, the water system.

MAIN SEWER.

The question of the quantity of excavation and the price per cubic yard for the same, is the one which must be met with and ascertained at the very threshold.

The price charged by the plaintiff under Exhibit No. 5 is $1.13 for excavation, and 33/43 cents for back filling, making the total price for excavation and backfilling $1.46 43-100 exclusive of profit. Upon this point we have had all manner of testimony.

The most reliable evidence upon the subject, one backed by experience and knowledge in excavation for sewers of this kind, is certainly that of Messrs. Lablanc, Chipman and Ker. By referring to that evidence, it will be seen that Leblanc's experience is very large. Besides his numerous works and undertakings, he built between nine and ten miles of main sewer at Moncton, and he places the price of excavation at 75 cents a cubic yard, including back-filling and profit,—adding, further, that he never has had such a high price himself for it.

John Edington, the City Engineer at Moncton, says that on the sewer now under construction at Moncton the excavation runs from 50 to 55 cents for a depth of about ten feet, and under the contract Wallberg, the present plaintiff, had with the City of Moncton in 1908, for an average depth of nine feet, his estimate was in the vicinity of 60 cents, including backfilling and profit. And a fact which is well worth noting is that Leblanc had tendered for the same work and did not get it because Wallberg, with all his experience of the works in question in this case, was tendering lower than Leblanc. Why should the excavation be so much different at such a small distance?

Willis Chipman, Civil Engineer, who has had so much experience in matters of this kind, would call $1, including backfilling and profit, a fair price for

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material of this class. Mr. Ker shares that opinion. To this price of $1 both those gentlemen have added 10 per cent. for contingencies, making the price as high as $1.10.

To make the price of excavation, inclusive of back-filling and profit, not only fair and reasonable, but liberal, I will fix it for the purposes herein at $1.20 per cubic yard.

Now, this brings us to the quantity of excavation for this sewer. It is obvious that the quantities charged in Exhibit No. 5 are excessive; but that is due to the manner in which the works were proceeded with.

It is proven, and I think admitted, that the average depth of the main sewer is 15 feet. As to the reasonable width both at the top and bottom, the evidence is very conflicting; but the evidence of men like Messrs. Leblanc, Edington, Chipman and Ker must be adopted and followed in a case of his kind. Mr. Chipman who is in the habit of laying concrete on earth, would allow four and one half feet at the bottom and nine feet at the top. Mr. Ker, who follows this modern method, which he calls the standard way of doing it, also has the same width. Mr. Leblanc, on cross-examination makes it 8 feet at the bottom and 9 feet at the top.

In order not to be harsh with the plaintiff, but to treat him as liberally as possible under the circumstances, consistent however with the idea that the works would have been done more economically under proper management, the excavation will be arrived at and ascertained in the most favourable manner for the plaintiff, taking it to be of a length of 2,880 feet, including the 80 feet at the cedar box,—the width to be 8 feet at the bottom and 9 feet at the top,—or an average of 8½ feet in width, with an average depth of 15 feet. This will give us a total excavation of 13,600 cubic

yards, which at $1.20 per cubic yard will amount to the total sum of $16,320.

It might be asked why the prices for excavation which are to be found in the schedules of the four contracts were not taken into account. Three prices are found in those contracts. Two are the same under two contracts, and in the other two contracts are different. This would give us three different prices, and for a depth not at all similar to the one in question.

Dealing now with the question of the price of concrete, it may be said that upon this point again the evidence is very conflicting, and it is thought that a price of $15.00 a cubic yard, inclusive of profit, would be fair and reasonable and liberal.

In the schedules attached to the four contracts, the price of concrete runs from $8.50 to $22. Again the witnesses are at variance as to the quantity, and the plaintiff's figures at 1,040 cubic yards will be accepted. Therefore 1,040 cubic yards of concrete at $15 a cubic yard will give us the total sum of.....$15,600 00

To which should be added eight manholes of
4½ cubic yards each..... 540 00
The labour and bolts in building the outlet,
the Crown having supplied the timber... 78 00
Steel reinforcing, as per claim..... 36 00
Supporting tracks, as per claim..... 33 00
Cast iron gates, setting, as per claim..... 41 00

Making a total of.....$32,648 00

There is a further claim made with respect to the main sewer, and that is the excavation of 1,222 cubic yards, which have been measured by the Assistant Engineer Mr. Torrens. It would appear that the plaintiff was ordered to build the sewer at another place on another site than the one in question, and that it had afterwards to be abandoned, the work having

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been started on land which was not owned by the Crown.

For the excavation on this false start, which was composed of only surface excavation so to speak in comparison with the depth of the sewer, the usual high price is claimed.

Under the order of reference recited above, the undersigned has no jurisdiction to entertain such a claim. The question as to whether this work could be construed to come within the works in connection with the case and could be considered in ascertaining the *quantum meruit* the plaintiff should be entitled to recover for the main sewer, is one not free from difficulty, and one which I fear could not be decided in the plaintiff's favour. It is a question which might be left to the mercy and bounty of the Crown. For this work, however, the plaintiff could very properly be paid at the price for excavation mentioned in two of the contracts, it being about similar work and of small depth. A rate of 58 cents per cubic yard would seem reasonable, making thus the total sum of $708.76.

It is taken that the amount is fairly ascertained, if the Crown sees fit to pay it.

BRANCH SEWERS.

The great bulk of the evidence has been adduced more with respect to the Main Sewer than the Branch Sewers and the Water System. When one comes to analyze the evidence with respect to the Branch Sewers, it is found to be rather meagre.

The price asked by the plaintiff is $1.19 for excavation, inclusive of backfilling, but without profit. The prices paid under the contracts for excavating at about the same place, but not quite as deep, runs from 39 cents to 78 cents per cubic yard. The price allowed by Messrs. Chipman and Ker is 80 cents,

plus 10 per cent. It is found that $1 per cubic yard for excavation and backfilling, inclusive of profit, would be liberal, fair and reasonable.

The quantity of excavation claimed is 7,647 cubic yards. The quantity allowed by Messrs. Chipman and Ker is 7,000 cubic yards, with the usual 10 per cent.

The quantity claimed, viz. 7,647 cubic yards, will be allowed at $1 per cubic yard, making the sum of ..... $ 7,647 00

The balance of the items as claimed, will be allowed, (with the exception of item No. 14, which is included in the sum allowed for excavation) viz:..... $ 775 56
3,529 07
29 52
23 63

Making a total sum of $12,004 78

WATER SYSTEM.

"The Water System" says Mr. Wallberg, in giving his evidence, "comprises in a general way a main "pipe leading from the water system and connecting "to the water system of the City of Moncton on "St. George Street, and running for a long distance "up along the railway track to the site of the works, "and then running into the power house, where it "connects with the big power pump of the shops, and "from that another pipe system leads out and extends "all around the outside of the whole grounds covered "by the works, all around the outside of the whole "plot.

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["THE REGISTRAR. What inch would you have to the power house.]

"A. Twelve inch.

"Q. And to the other?

"A. Round the outside of the works is ten inches, "and then from that main extending round the works "there are pipes leading inwards to hydrants in among "the buildings, where required for fire protection.

["THE REGISTRAR. For fire protection?]

"A. Yes, as well as water supply. These hy- "drants were put in for fire protection. Traps were "taken off these hydrants for water service."

The cast iron pipes and the lead were supplied by the Crown. The works consisted in the excavation and in laying the pipes, and all other work incidental thereto.

Mr. Wallberg tells us, that a small part of the works was done in winter time with the view of lessening the cost, assuming that in swampy land it could be done cheaper in a frozen state than in summer. This was also Mr. Mackenzie's view, who says, that it is easier to work in frozen than in boggy or wet ground. One would have thought, however, that very seldom in this country excavation work could be done to advantage in winter time.

Mr. Ker, states that it is practically all the same class of work in water systems. The depth in this climate very seldom varies in water-works trenches. The nature of the excavation alone may vary.

Here again the teams of horses and scrapers were put upon the work, a *modus operandi* unknown to all practical engineers. Here again this manner of proceeding had the effect of increasing enormously the quantity of excavation, without any justification.

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The claim made by the plaintiff in respect of this Water System is $18,488.93. His price for excavation and backfilling is $1.80, without profit. With the 15 per cent. claimed it would bring it up to $2.07 a cubic yard, where for similar work done in the City of Moncton is paid 50 to 60 cents a cubic yard, with an average depth of nine feet. It must be conceded that the nature of the soil was more difficult on account of the water; but all this again is because the contractor neglected to take care of the water and to shore. The price charged by the contractor for pipe laying and jointing is 10¼ cents per lineal foot.

The price for excavation and laying the 12 inch pipe at a depth of from 6 to 6½ feet at Moncton, would, according to the City Engineer, Edington, run from 40 to 60 cents per lineal foot.

The quantities found by Messrs. Chipman and Ker from the plans supplied, will be accepted, but a different and higher price will be allowed for the excavation on account of the difficulties mentioned by the Chief Engineer, Mr. Mackenzie.

One must bear in mind that for excavation at about the same place for the foundation of the buildings a price ranging from 39 cents to 78 cents was allowed under the schedules for any extra work; but this may not be the correct manner of finding a reasonable price, because, as Mr. Ker puts it, contractors sometimes jockey with their prices, charging one very low and the other very high; charging low for such portions of the work of which they expect little to do, and high for the work they expect the most of. These prices are, however, an element to bear in mind.

Mr. Ker, for an excavation of this kind, would allow 75 cents a cubic yard, inclusive of the laying. A price of $1, considering the small depth, should

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be a very high and liberal price, and it will be allowed. We shall then take first the 12inch pipe, and the estimated quantities by Mr. Ker:—

Excavation, 12-inch main, 3 ft. wide by 7 ft. deep, length 2080 ft. at $1 per cub. yd.	$1,617	78
Laying, at 12 cents per lineal foot	249	60
Excavation, 10-inch main, 3 ft. wide by 7 ft. deep, length 4520 ft. at $1 per cub. yd.	3,515	56
Laying, at 10 cents per lineal ft.	452	00
Excavation, 6-inch main, 2½ ft. wide by 6½ ft. deep, length 1,500 ft. at $1 per cub. yd.	902	78
Laying, at 8 cents per lineal foot	120	00
Excavation, 4-inch main, 2½ ft. wide by 6½ ft. deep, length 600 ft. at $1 per cub. yd.	361	12
Laying, at 8 cents per lineal foot	48	00
Setting hydrants, 11 at $5 each	55	00
Setting gate valves and boxes, 27 at $5 each	135	00
Making valve boxes, as per claim	37	12
Supporting tracks, as per claim	147	42
Concrete valve boxes, at end of 12-inch pipe, 8 cub. yds. at $15 per cub. yd.	120	00
Gasolene, as per claim	13	96
Making a total of	$ $7,775	34
To cover any possible deficiency in the reckoning of the quantity of excavation of the Water System, 10 per cent will be added	777	53
	$ 8,552	87

RECAPITULATION

Main Sewer	$32,648.00
Branch Sewers	12,004.78
Water System	8,552.87
	$53,205.65
To this may be added the sum of	708.76

as representing the work done on the false start, and ascertained as above mentioned.

Making a total of $53,914.41

This sum represents the fair and reasonable value of these works, nay, it is not only a fair and reasonable value, but is a very liberal price to any ordinary contractor, and Mr. Wallberg tells us, at page 158, that he did say to Mr. Mackenzie he would be the proper person to execute these works, because he was on the ground performing contracts with respect to the same, and that he could do it cheaper.

Interest is asked upon the amount the plaintiff would ultimately recover, from the 26th January, 1909, which would, I take it, be the date the Government received this claim for $105,940.15, which is dated the 25th January, 1909, and is attached to the reference by the Minister. The Crown has made no tender, no amount was ever offered.

Can such interest be allowed? Much as I would like to find the law enabling me to do so, as I think the plaintiff is in equity entitled to the interest on his money, if not from the completion of the works, at least from the date of the reference to the court. I fear the law will not allow it.

Interest is payable by the Crown under contract and by statute. There is no statute in force outside of the Province of Quebec which would authorize the Court in a case such as this to allow interest.

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The Crown can do no wrong and is not liable in tort, except under special statute, and therefore awarding interest in the nature of damages cannot be allowed.

In the case of the *Algoma Central Railway Co.* v. *The Queen* (1), decided by the Exchequer Court of Canada, the Crown having been condemned to repay the sum of $3,500 it had collected for customs duties, the question arose as to whether this amount should be so repaid with interest. As there was no statute authorizing the Court in a case such as this to allow interest, it was refused. The learned Judge in discussing this question of interest (2), said:—

"Perhaps in passing one might point out that in that respect the statute law of Canada is not less liberal than that of other countries. In England there is no statute allowing interest to be recovered in such a case; and in the United States it is expressly enacted that no interest shall be allowed on any claim up to the time of the rendition of the judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. (Acts of the 3rd of March, 1863, R.S.U.S., s. 109; *Tillou* v. *The United States* (3).

"It is certain also that there was in this case no contract on the part of the Crown to pay interest. That being so, it only remains to ask the question whether or not damages in the nature of interest may be allowed for the wrongful exaction of the duties, or for the wrongful detention of the money. But that obviously cannot be done without making the Crown liable for a wrong done to the suppliant. And the Crown can in law do no wrong, and for the wrongs of its servants it is not answerable, unless expressly made liable by statute.

(1) 7 Ex. C. R. 239. (2) 7 Ex. C. R. at p. 269.
(3) 1 C. Clms. 232.

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"Then with regard to the wrongful detention of money, the case of *The London, Chatham and Dover Railway Co.* v. *The Southeastern Railway Co.* (*1893*, L.R. App. Cas. 429) is an authority that even as between subject and subject interest cannot at common law be given by way of damages for the detention of a debt, the law upon the subject, unsatisfactory as it was said to be, having been too long settled to be departed from.

"There are, of course, statutes such as the Acts of the Parliament of the United Kingdom, 3 and 4 Wm. IV, c. 42, ss. 28 and 29, which make interest or damages in the nature of interest recoverable in cases where it was not recoverable at common law. The provisions of that Act either by express reenactment here, or by reason of its application as part of the law of England, are in force in most of the provinces of Canada. (7 Wm. 4 (U.C.) c. 3, ss. 20, 21; C. S. U. C. c. 43, ss. 1, 3; R.S.O. (1877) c. 50, ss. 266, 268; R.S.O. (1897) c. 51, ss. 113, 115; R.S.N.S. 1st S. c. 82, ss. 4 and 5; R.S.N.S. 4th S. c. 94, ss. 231 and 232; 12 Vict. c. 39 (N.B.) ss. 27 & 28; C.S. (N.B.) c. 37, ss. 118 and and119; 28 Vict. (P.E.I.) c. 6, ss. 4 and 5.

"The Act in force in the Province of Ontario goes further than the English Act and provides that interest shall be payable in all cases in which it was payable by law, or in which it has been usual for a jury to allow interest. (See the following cases: *Michie* v. *Reynolds* (1), and *McCullough* v. *Newlove* (2). But the rights and prerogatives of the Crown are not affected by these statutes, it not being provided therein that the Crown shall be bound thereby.

(1) 24 U. C. Q. B. 303. (2) 27 Ont. R. 267.

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"If the action were against the Crown's officer, he would be bound, and his liability to damages in the nature of interest would depend upon the law in force in the province in which the cause of action arose; but it is not so with respect to the Crown.

It has been held by the Supreme Court of Massachusetts that where taxes, assessed without authority are recovered back, interest may also be recovered; (*The Boston & Sandwich Glass Co.* v. *The City of Boston* (1); but the Crown stands in this respect in a wholly different position from a civic or municipal corporation.

"Then there is a class of cases in which where administration on behalf of the Crown to the estate of a person dying intestate without leaving any known next of kin is taken out, and the proceeds are paid into the treasury; if thereafter the next of kin obtains a decree in his favour interest is allowed on such proceeds (2).

"But in these cases the action was brought against the Crown's nominee or representative, not against the Crown itself, by petition of right. They stand upon a footing of their own and cannot be considered as authorities for the proposition that the Crown is liable for damages in the nature of interest." (See also Audette's Exchequer Court Practice, 2nd Ed. pp. 87, 88, 89 and following).

If the action had originated in the Province of Quebec and were to be decided according to the law of that Province, it would be different, as Taschereau, J. says, at page 434, 28 S.C.R., in the case of *The Queen* v. *Henderson*:—"The law of the Province of Quebec

(1) 4 Metc. 181.

(2) *Turner* v. *Maule*, 18 L. J. Ch. N. S. 454; *Edgar* v. *Reynolds*, L. J. 27 L. J. Ch. N. S. 562; *Attorney-General and Reynolds* v. *Kohler*, 9 H. L. C. 655; *Baur* v. *Mitford*, 3 L. T. N. S. 575; *Partington* v. *The Attorney-General*, L. R. 4 E. and I. App. 101.

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"rules the case, and according to that law, such interest must be allowed upon a claims of this nature. "This is not a case upon a written contract, so that "Section 33 of The Exchequer Court does not apply". (1) This might at first sight appear as an anomaly, but the same thing occurs with respect to the doctrine of common employment which is no part of the law of the Province of Quebec, while it is in force in all the other provinces.

THEREFORE, the undersigned has the honour to submit and report that the plaintiff is entitled to recover from His Majesty the King the sum of fifty three thousand two hundred and five dollars and sixty five cents ($53,205.65) in full satisfaction for the works in question herein, with the costs of the action and of the reference, after taxation thereof.

The question of the payment of this sum of $708.76, as representing the value of the excavation in connection with the false start, is one which is left to be adjusted between the parties herein, the undersigned having no jurisdiction to pass upon the same.

The plaintiff appealed from this report.

December, 20, 1909.

The appeal from the report of the Referee now came on for argument.

W. Nesbitt, K.C., and *H. Fisher* for the plaintiff; and *J. Friel*, for the defendant.

Mr. Nesbitt: Our principal contention is that the Referee has erred in applying the principle of *quantum meruit* to the case. We say that we are entitled to be paid what our services and materials are worth as the work was executed by us. In the absence of fraud, and the evidence wholly negatives that,

(1) See also upon this point Audette's Exchequer Court Act Practice, 2nd ed., pp. 99 and 92.

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we are entitled to what we reasonably expended in carrying out the instructions of the Chief Engineer. It is not a question of whether the work was done on the most economical plan that might have been devised; we have nothing to do with that. It was for the Engineer to lay out the plan, and for us to obey his instructions. The evidence establishes that that is what we did to the letter. If the Crown finds fault with their engineer, that is not a matter for us. It is a very simple question in issue between the parties; it is merely to ascertain what the contractor is entitled to on a *quantum meruit*. Not only was the work laid out by the Chief Engineer, but the execution of it was under the superintendence of the officials of the Crown. The work was done under the particular supervision of Mr. Torrens, who took his orders from the Chief Engineer.

The Referee misconstrues the scope of the reference under the consent order, and undertakes to find what the work could be done for under a different and supposedly more economical plan. We submit that that is not the method that he should have adopted under the order of reference; but it was his duty to find the fair value of the work and materials as they were performed and used in carrying out the instructions of the Chief Engineer. It is no part of the referee's duty to sit in judgment on the manner in which the Chief Engineer has conducted himself with reference to the works in question. There is no charge of fraud or collusion between the Chief Engineer and the contractor, and all considerations as to extravagance or unsuitable plans have nothing to do with the issue raised between the parties here. (*Bush* v. *Whitehaven* (1),

(1) Hudson on Building Building Contracts, vol. 2, p. 121 ; 52 J. P. 392.

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The Referee has refused to allow the contractor for the work done on the " false start." This false start was made on the instructions of the Engineer, and as the contractor honestly performed the work he is entitled to be paid for it.

We also claim that we are entitled to fifteen per cent. profit as promised by the Chief Engineer. Fifteen per cent. profit is a regular thing in contracts performed in the West and in Ontario for force work. It is perfectly proper to allow such a percentage in this case. In addition to this the contractor has to find the money to carry on the work, and bank interest has to be included in the fifteen per cent.

With regard to the character of the cement put into this work, the evidence shows that it was a richer cement than was generally used in buildings. It is submitted that the court, under the order of reference, has no discretion to review the decision or judgment of the Chief Engineer; that is not in question here. We are prepared to accept the Chief Engineer's figures, and we submit that upon the evidence they are fair to the Crown in every way.

Mr. Fisher, following for the plaintiff, contended that the contractor should get the fair value of the work done. Engineers taken on the ground as experts after the work was done, and the nature of the difficulties of excavation covered up, could not be expected to give the fair value of the work actually executed. We have nothing to do with the hypotheses of experts; the order of reference requires the court to allow us the fair value of the work *as executed.*

Mr. Friel, for the defendant, argued that the Chief Engineer had no authority from the Department of Railways and Canals to give the contract in question to Wallberg. Further than that, he did not at the

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outset, as was his duty, prepare plans showing the character of the work that the contractor was required to do. True, plans are in evidence; but it is submitted on behalf of the Crown, as the evidence is, that they were prepared after the event. Then again we have not the original time sheets in evidence. The evidence offered by the plaintiff is to the effect that the foreman's time-sheets were destroyed.

[*Mr. Nesbitt.* The best evidence as to the time is before the court. We have the original time-sheets.]

The evidence shows that the work was begun at the worst time of the year for meeting difficulties. They began it late in the fall. The whole evidence bears upon its face the suggestion of extravagance and want of care. Then again there were no progress estimates, and the Department was kept wholly in the dark as to the character of the work that was being done.

We contend that the Referee was absolutely right in his application of the principle of *quantum meruit* to this case. It was his duty to find what the work could be reasonably done for, and this he has reported. To place any other interpretation upon the order of reference would do violence to the intention of the Crown in referring the case to the court.

Mr. Nesbitt replied citing *Murray and Cleveland* v. *The Queen* (1).

CASSELS, J. now (January 22, 1910) delivered judgment.

This is an appeal from the report of the Referee dated the 30th October, 1909.

The appeal was argued before me on the 20th December, 1909.

(1) 5 Ex. C. R. 19; 26 S. C. R. 203.

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The action was instituted by the plaintiff Wallberg claiming payment for certain works performed by him in connection with the property of the Intercolonial Railway at Moncton.

Wallberg had contracts for the erection of certain buildings for the Intercolonial Railway at Moncton. The cost of these erections was in the neighbourhood of of $1,000,000.

The facts connected with these contracts are detailed in the very carefully prepared report of the Referee.

It appears that in the preparation of the plans for the buildings in question no provision had been made for drainage or water connection. The contracts are in writing.

Mr. W. B. McKenzie, who has been the Chief Engineer of the Intercolonial Railway since 1897, was entrusted by the Government with the supervision of these works. Mr. McKenzie has been in employ of the Government since 1872.

Throughout the whole of the prolonged enquiry no suggestion has been made that Mr. McKenzie was not thoroughly competent to perform the duties imposed upon him, nor is there the slightest slur cast upon his integrity or good faith.

With the view to procuring the buildings being erected by the contractor Wallberg, and to obtain the necessary water supply and drainage, Mr. McKenzie directed Wallberg to proceed with the works in question. They comprise what are called:—

1. The main sewer;
2. Branch sewers;
3. Water system.

He undertook with Wallberg that the Government would pay him the actual cost of the works and an additional sum of 15 per cent. contractor's profit. No

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written contract was entered into. The works in question were commenced in 1906 and completed about 1908. Wallberg was not paid for the works and applied to the Government after their completion for payment.

The Government, represented by the Minister of Railways, acting with fairness agreed to pay him; but being dissatisfied with the amount claimed directed a reference to the Exchequer Court to ascertain the amount properly due. Thereupon a statement of claim was filed by Wallberg setting out his claim. The defendant filed a defence. The fifth paragraph of the 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 defendant denied that the claim in question could be claimed as extras under the contracts referred to.

Counsel for the plaintiff and also for the defendant both agreed that the case was one for a reference under the provisions of the *Exchequer Court Act* and the Rules of Court, and thereupon an order was made as follows:—

"2. This Court doth order that it be referred to the Registrar of this Court for enquiry 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 ascetained shall be the fair value or price thereof allowed on a *quantum meruit*."

The trial was proceeded with before the Registrar and an enormous amount of evidence adduced, followed

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up by the report in question by which the plaintiff was allowed the sum of $53,205.65, without interest.

The Referee has expended a great deal of time on consideration of the case and the preparation of his report.

The case on appeal was presented to me by Mr. Nesbitt, K.C., in an aspect, as I was informed by counsel on the appeal, not presented before the Referee.

Since the argument I have perused and considered the mass of evidence and documents, and in my opinion the Referee has not adopted a correct method of dealing with the case.

The Referee has dealt with the case as if the market value of the work had to be ascertained, and adopting the views of Messrs. LeBlanc, Chipman and Ker, has concluded that the works could have been executed at a much less cost than the actual cost, had a different plan of construction been adopted than the plan adopted by Mr. McKenzie. Even on this view of the case, for reasons I will give later on, I would not be prepared to accept the conclusions of Messrs. LeBlanc, Chipman and Ker as against the views of Messrs. Holgate, St. George and Archibald. All these gentlemen, Messrs. LeBlanc, Chipman and Ker, Holgate, St. George and Archibald are men of eminence in their profession. They are expert witnesses no doubt intending honestly to put forth their different views, and I see no reason for any reflection being made against any of them. Some of them, notably Mr. St. George, had personal knowledge of the locality in question, and was much better qualified to give evidence by reason of his intimate knowledge of the character of the locality and soil than the others accustomed to deal with sewerage works in other localities.

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In the first place, to consider the question of how the case should be approached: The statement of claim sets out the cost of the works including the cost of excavation for what is called the " false start."

It has to be borne in mind, as stated, that McKenzie was the trusted employee of the Government. Wallberg is a trusted contractor under the Government. No imputation of bad faith is made against him. He was under the strict orders of Mr. McKenzie who directed the method of carrying on the work. How can any question of self-interest as against duty arise? It is proved conclusively that all sums claimed for wages have been paid. The vouchers are produced from which this fact is clear. Every precaution seems to have been taken to have the correct time of the men ascertained. The vouchers were satisfactory to those in charge representing the Government. The men received their pay as shown by the time-sheets. Is it to be assumed that for the paltry sum of 15 per cent. on the wages Wallberg would pay the men sums in excess of the amount to which they were entitled ? I think such a presumption should not be entertained. Now, we have the works proceeded with directed by Mr. McKenzie. The width of the ditch is marked. His evidence is clear that in his opinion it was not too wide. Torrens acting under McKenzie was superintending the work. Rhindress also, in charge of the cement, was seeing that the contractor did his work properly. All are agreed that the work as completed is well done. It is true that the plans shewing details were prepared after the work was completed, no doubt with the view to a record being kept. These plans shew the works as completed. Nevertheless the work was done under the direction and as ordered by the Chief Engineer. This being the case the consent judgment was pronounced.

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The form of judgment is incorrect if it is open to be construed as a reference to the Registrar as an arbitrator, or *persona designata*, without appeal (1).

What really took place was an agreement that the case was one proper for a reference, the terms of reference being agreed upon, and then I made the order. It was intended the reference should be the ordinary one with right of appeal as usual. No question against the right to appeal has been raised before me.

Bearing in mind that the claim as presented by the statement of claim is for the works as executed under the directions of McKenzie, the judgment directs an inquiry "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 proceeds to direct "that the amount to be ascertained "shall be the fair value or price thereof allowed on a "*quantum meruit*".

There being no written contract making McKenzie the sole judge the Crown is not bound by his report as to the amount due. But 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 show that McKenzie 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. McKenzie and, accepting his plans, then a *quantum meruit*.

If during the execution of these works extra expense was incurred through the negligence of the contractor, this amount of course would not be allowed, but what is fair and reasonable in carrying out the particular

(1) See *Fraser* v. *Fraser* (1904) 1 K. B. 56.

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works should be allowed. If McKenzie is incompetent, and might have adopted a better and cheaper method, why should the contractor suffer? I do not think the evidence shows that he was incompetent. I think a careful analysis of the evidence proves that he knew what he was about.

It is said the market value should be the test. I do not so view it. *Quantum meruit* is thus defined in the books:—

"When a person employs another to do work for him, without any agreement as to his compensation, 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" (Bouvier's Law Dictionary, p. 801).

"The value is the 'reasonable' value." (1).

"*Quantum meruit* is the reasonable amount to be paid for services rendered for work done, when the price therefor is not fixed by contract." (2).

Now, suppose I instruct a contractor to build me a house of ordinary size, say rentable at about $400 per annum. A brick wall of the thickness of 1½ bricks would be sufficient for all practicable purposes. There is no written contract. I have a whim that I would like a wall about three feet thick, and I tell the contractor to so build the house. The contractor follows my instructions and gets paid on a *quantum meruit*. The extra thickness of wall would have little or no effect on the market price, but is not the contractor to be paid for the work?

It appears from the evidence of Mr. McKenzie and of Mr. Torrens that peculiar difficulties were encountered in the performance of the work. McKenzie

(1) 12 Ency. of Laws of Eng., p. 1635, citing 3 Black Com. 161; 153. *Cutter* v. *Powell*, 6 T. R. 320; *Sumpter*

(2) Stroud's Judicial Dictionary, v. *Hedges*, (1898) 1 Q. B. D. 673.

gave the directions as to the width of the cut. According to some of the evidence even this width was insufficient to allow the banks to stand. According to Holgate the slope should have been greater. The material is peculiar. It is a question of paying for a greater amount of excavation with a greater width, or a smaller amount for getting rid of the material falling in. I think the evidence shows that the width of the cutting was not too great. Greater reliance should be placed on the evidence of those who were present on the ground and saw the actual state of affairs, than on expert testimony given by witnesses testifying after the completion of the work. See *Gareau* v. *Montreal Street Ry. Co.* (1), where the head-note in part reads as follows:—

"HELD (Taschereau, J., dissenting): That notwithstanding the concurrent findings of the Courts below, as the witnesses were equally credible, the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations."

Moreover, Mr. St. George and Mr. Archibald have knowledge of the locality and the character of the soil and the difficulties to be encountered, and they were both in accord with the manner of doing the work adopted by Mr. McKenzie. If the soil is as described I do not think Mr. Leblanc's idea of a proper slope very feasible.

Both Mr. Chipman and Mr. Ker give in the main theoretical evidence. The Referee in his report referring to branch sewers, states:—"The quantities found by Messrs. Chipman and Ker from the plans supplied will be accepted, but a different and higher price will be allowed for the excavation on account of

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the difficulties mentioned by Chief Engineer Mr. McKenzie."

It would appear from this finding that in the opinion of the Referee, neither Mr. Chipman nor Mr. Ker was cognizant of the difficulties.

In dealing with the main sewer, the Referee refers to the excavation. He states it is obvious that the "quantities charged in Exhibit No. 5 are excessive but that is due to the manner in which the works were proceeded with."

He allows for a length of 2,880 feet, the width to be 8 feet at the bottom and 9 feet at the top, with an average depth of 15 feet. I have endeavoured to point out that in my opinion this was not the proper method of arriving at what the contractor is entitled to. It is also obvious that a sewer 15 feet in depth and 8 feet wide at the bottom and 9 feet at the top must require a greater slope. The evidence as to shoring in streets of a city has but little application.

Then as to wages, neither Mr. Chipman nor Mr. Ker seem to be cognizant of the peculiar difficulties surrounding this work and the difficulty of procuring labour.

I hesitate at overruling the Referee, who has great experience in cases of this nature, and has given very full consideration to the case, but after the fullest consideration of the evidence I have formed the opinion I have expressed.

I think the plaintiff is entitled to the amount expended for the work on the so-called false start. The sum found by the Referee is $708.76. I think it is covered by the Reference and no reason exists why the contractor should not be paid.

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

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McKenzie, but not any amount for accidents to workmen, loss of horses, or wear and tear of machinery. He is entitled to the fifteen per cent. profit. I do not think he can recover interest.

If there is any difficulty in arriving at the amount on the basis of this judgment the matter can be referred back to the Referee to settle the amount.

Costs of this appeal to the plaintiff.

*Judgment accordingly.**

Solicitor for the plaintiff: *Harold Fisher.*

Solicitor for the defendant: *J. Friel.*

*REPORTER'S NOTE.—This judgment was reversed on appeal to the Supreme Court (3rd April, 1911), judgment being ordered to be entered for the plaintiff in the amount reported by the Referee.