GEORGE GOODWIN.....CLAIMANT; 1897
Jan. 11.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Public work—Contract—Progress estimate—Satisfaction of Engineer—How to be expressed—Dictum of Appeal Court followed.

By clause 25 of the claimant's contract with the Crown for the construction of a public work, it was, *inter alia*, provided: "Cash "payments, equal to about 90 per cent. of the value of the work "done, approximately made up from returns of progress measure- "ments and computed at the prices agreed upon or determined "under the provisions of this contract, will be made to the con- "tractor monthly on the written certificate of the engineer that "the work for, or on account of, which the certificate is granted "has been duly executed to his satisfaction and stating the value "of such work computed as above mentioned—and upon approval "of such certificate by the Minister for the time being; and the "said certificate and such approval thereof shall be a condition "precedent to the right of the contractor to be paid the said 90 "per cent. or any part thereof." The certificate upon which the claimant relied was expressed in the following words: "I hereby "certify that the above estimate is correct, that the total of work "performed and materials furnished by G., contractor, up to the "30th November, 1895, is three hundred and seventy-six thousand "nine hundred and seventy and $\frac{4}{100}$ dollars; the drawback to be "retained thirty-seven thousand six hundred and ninety and "$\frac{4}{100}$ dollars; and the net amount due three hundred and thirty- "nine thousand two hundred and eighty dollars, less previous "payments."

The terms of the clause and the form of the certificate above recited were the same as those discussed in the case of *Murray* v. *The Queen* (26 Can. S. C. R. 203), in respect of which the opinion was expressed in the judgment of the court that the certificate was not sufficient to maintain the action.

Held, (following the expressed opinion in the case cited) that the certificate in this case was not sufficient.

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Statement of Facts.

THIS was an action to recover certain moneys alleged to be due to the claimant upon a contract for the construction of a public work.

The claimant was the contractor with Her Majesty for the construction of certain works on Sections 4, 5, 6 and 7 of the Soulanges Canal under a contract dated the 9th of May, 1893, and the specifications and drawing annexed thereto or referred to therein.

By his statement of claim the claimant sought to recover ninety per cent. of the amount claimed to be payable under a progress estimate, alleged to have been given on the 28th of February, 1896, under the written certificate of the Engineer. It was alleged by the claimant that this progress estimate and certificate was given pursuant to, and in full compliance with, clause 25 of the contract.

The claim was referred to the court on the 7th of May, 1896, by the Minister of Railways and Canals, under the provisions of section 23 of *The Exchequer Court Act*, which enacts as follows: "Any claim against the "Crown may be prosecuted by petition of right, or may "be referred to the court by the Head of the Depart- "ment in connection with which the claim arises, and "if any such claim is so referred no *fiat* shall be given "on any petition of right in respect thereof."

Reference is directed to the reasons for judgment for a statement of all the material facts of the case; but the pertinent clauses of the contract, the progress estimate and certificate in dispute, and the report of the resident engineer in reference to such estimate and certificate are given in full below.

[EXTRACTS FROM CONTRACT.]

8. That the Engineer shall be the sole judge of work and material in respect to both quantity and quality, and his decision on all questions in dispute with regard to work or material shall be final, and no works or extra or additional works or changes shall be deemed to have been executed, nor shall the contractor be entitled to payment

for the same, unless the same shall have been executed to the satisfaction of the Engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor.

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

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

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

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

PROGRESS ESTIMATE AND CERTIFICATE.

Folio 658.

RAILWAYS AND CANALS.

No. of Estimate, 24.

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

AUTHORITY BY DEPARTMENT OF RAILWAYS AND CANALS.

Date of Letter.	Number of Letter.	Name of the person to whom the Letter authorizing the expenditure is addressed.	Amount Authorized.

	$	cts
	376,970	40
On extra work ordered to be proceeded with by letter No. dated		
On extra work ordered to be proceeded with by letter No. dated		
Less drawback, 10%, say.....	37,690	40
	$ 339,280	00
(In pencil)	266,020	00
	73,260	00

Less

Amount returned for pay-lists and accounts.....

Amounts returned for work done under other contracts, or for extra work authorized and not included in present summary.

Amount returned under present summary.....

Forming the total amount certified up to date against sum authorized.....

Dept. of Railways and Canals, FEBY. 28, 1896. Accountant's Office.

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

(Sgd.) THOS. MUNRO.

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

Signed by me subject to conditions stated in my letter of 26th Feb., '96.

T. M.

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

COLLINGWOOD SCHREIBER.

Certified as regards item No. 5 in accordance with letter of Deputy Minister of Justice, dated 15th Jan., 1896.

Ottawa, 27th Feb., 1896. *Chief Engineer.*

ENGINEER'S AUDIT OFFICE,
Department of Railways and Canals.
Examined and checked,
G. A. MOTHERSILL,
27-2-96.
Progress and final estimate sheet.

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[RESIDENT ENGINEER'S SPECIAL REPORT.]

SOULANGES CANAL, ENGINEER'S OFFICE, COTEAU LANDING, P.Q., 26th February, 1896.

SIR,—I have your letter of the 20th ult., with copies of correspondence respecting a claim of George Goodwin, contractor, in reference to the embankments on sections Nos. 4, 5, 6 and 7, of the Soulanges Canal.

There is no precise statement of this claim in my possession, but I understand that a decision has been given by the late Hon. Minister of Justice, to the effect that all the embankments on these sections must be paid for as water-tight throughout, and this decision must govern the preparation of the progress estimates.

The last of these was up to the 30th November, 1895. This shows the total earth excavation to be 1,103,713; water-tight banks 450,733. Should the whole be paid for as if made into water-tight embankments, the estimate would be as follows:—

Excavation as above 1,103,713 c. y. As all this went into the banks, the amount of the latter would be (with 10 per cent. deduction for shrinkage) 993,340 c. y. As a matter of fact, however, the balance of 542,607 c. y., now returned as water-tight, is spoil bank, made up partly of sand, sod, loam and other pervious materials standing upon the unmucked surface of the natural ground. It was merely designed to back up the water-tight lining of the inside slope of the prism, which was put in as specified. This amount of 542,607 cubic yards was not intended to be made water-tight, nor was it ordered to be made water-tight, nor has it been made water-tight in accordance with the agreements of clause No. 11 of the specification written by me for sections 4, 5, 6 and 7 of this canal.

This question appears to me to be one of fact only, and I therefore respectfully desire to state my firm adherence to the views which I have previously expressed on the matter. I have, however, prepared the accompanying estimate at your request, with the distinct understanding that my responsibility in reference to it does not extend further than what would attach to a mere statement of quantities.

I am, sir,

Your obedient servant,

THOMAS MUNRO,

M. Inst. C.E.

COLLINGWOOD SCHREIBER, Esq., C.M.G.,
Chief Engineer of Canals, Ottawa.

The case was tried before the Judge of the Exchequer Court on the 19th and 20th June, 1896; and at the

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conclusion of the hearing a preliminary judgment, under Rule 124, was ordered to be entered for the claimant, upon the merits, for $58,260; leave being reserved to the claimant to move to increase the amount of judgment to $73,260, and to the Crown to move to set it aside or to reduce it.

On the 27th and 28th of October, 1896, the motions upon the questions reserved to both parties were argued.

B. B. Osler, Q.C., in support of claimant's motion to increase amount of judgment:

We now press upon the court that we are entitled to recover herein the amount shown by the progress certificate, the amount forwarded by the Deputy Minister to the Audit Department for payment. This substantially is a motion to increase the finding of your lordship by the sum of about $15,000.

Now, acting upon the spirit, if not the letter of the 26th and 27th clauses of the contract, this claim was persistently brought before the Crown. True, the Crown never despatched, under the strict terms of clause 26, the estimate; but, nevertheless, we came to know of what was being allowed, and we made, as I think my learned friends will concede, a constant claim, and presented our evidence and argument why they should be allowed. By virtue of such a claim being made under the 27th clause of the contract, and there being a matter of law arising, in the view of the Department of Railways and Canals, it appears to have been referred to the Minister of Justice, and upon his opinion, the ultimate opinion formed, a certificate was given, properly signed by the Chief Engineer, approved of by the Minister, as shown by his affidavits and by the evidence of Mr. Schreiber, and forwarded to the Auditor's Department certified by the two letters of the

28th February, one to the Secretary of Railways and Canals by the Chief Engineer, the other by the Deputy Minister to the Auditor-General asking for the specific cheque, being the amount we sue for.

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Then, why should that not be treated as a definite action of the Crown under the contract? Why should not the Crown pay? It is a deliberate action of the Crown. No error can be charged. They had all the facts before them. Evidence had been taken before the Department—the evidence of the resident engineer. There was the strong view of Mr. Schreiber. These matters being such matters as my learned friends now urge, were urged before the Department. It is not as if they made any erroneous judgment from want of sufficient facts before them. The whole contention of my learned friend was vigorously put before the Department, and it was upon the weighing of the merits of the contention on both sides, that a conclusion was arrived at. Of course no wrong-doing can be, or is, suggested, on the part of any officer. But supposing the Department of Justice came to an erroneous conclusion, is it for this court to correct it? Can this court correct it? Can this court sit as an upper chamber over departmental decisions, where those departmental decisions are approved of by the Minister of the Department? Is the action of the Minister subject to review? Can this court say that the Minister was wrong, and that he ought not to have given such an opinion, that the Deputy Minister, acting on the knowledge of his Minister, should have stated such an opinion? Are these matters subject of review by the court, or are they only subject to review by the court of parliament and public opinion? So I submit with great confidence the proposition that all we have to do is to show that the requirements of our contract have been fulfilled; and that it is not competent for

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this court to say Mr. Munro's opinion was right, or Mr. Schreiber's original opinion was right, or that we will weigh the opinion given by one Minister of Justice against the opinion given by another Minister of Justice. I submit that such is no function of this court. This court has simply to be satisfied that the requirements of the contract have been complied with. Is there a certificate? What does it call for? Has it been approved by the Minister? Upon the answer to those questions, quite apart from the merits, entirely distinct from any merits, we may not be entitled to one farthing on your lordship's view of the facts, and if that was the case we were not entitled to a farthing, and if we have got the certificate by anything false, anything fraudulent on the part of the contractor, then the Crown could by its own suit review the certificate and set it aside, but that is not this case.

[*By the Court:* But possibly they might, in a proper action, have it reviewed where it had been issued through inadvertence, or through some error, without fraud on the part of any one?]

Well, it cannot be said, with the discussion and argument – the departmental discussion and argument —that has taken place here, that there was any improvidence or inadvertence in issuing the certificate. That is not the case made. The case counsel for the Crown make is this: Under this contract the proper construction does not give this item to the contractor. Supposing that was a legal question of nicety, and the Department had decided it in the opinion of this court wrongly, could the court review it? That brings us merely to the argument I presented a few minutes ago, that your lordship cannot say that because you have a different view of the law upon the facts that are disclosed in this case, therefore you are able to say

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the certificate was issued improvidently and should not have been given.

I might argue now that we have nothing to do with either the adverse or favourable opinions of any Minister of Justice; that our contract calls for a certificate by the Chief Engineer, and an approval by the Minister of Railways and Canals. That we say we have. We do not care how it was obtained. Now, the Crown has never repudiated or called back that certificate. On the contrary, the Crown passed it on to the Auditor-General for payment. The Crown has never instructed the Engineer and said, you have made a mistake, make up another document; but the Crown comes here and says the Engineer was wrong in certifying, and the Minister was wrong.

If this court can sit in review on the action of the Minister of Railways and Canals in allowing a payment on a contract, could not this court assume to itself the function of reviewing the propriety of each payment certified to the Auditor-General in any department? That is what the court is asked to do here. The Minister of the Crown acts for the Crown, the Crown has approved of the payment through its proper Minister, and now Her Majesty's judge, Her Majesty's court, is asked to say that Her Majesty was wrong in the departmental details upon which that certificate was founded. If money is obtained from the Crown by fraud or wrong, of course there is a method of getting it back through this court. But as this case stands, I simply propose to ask your lordship to come to the conclusion that a certificate has been given, which has been approved by the Crown, and there we rest, and we ask that effect should be given, full effect should be given, to that certificate.

Now does certificate "23" bar us in any way? We submit, having regard to the provisions of clauses

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26 and 27, it does not. We submit that the direction is to the contractor to keep pressing his claim until it has been adjusted, and that this matter has been now adjusted, and that the certificate is sufficient.

Then with reference to the approval by the Minister. Now while the Engineer must give a "written certificate," the word "written" precedes the word "certificate" of the Engineer; but no such word precedes the word "approval" of such certificate by the Minister. There is no pretence for saying that the Minister must approve in writing. Contrast the words "on the written certificate of the engineer," and "upon the approval of such certificate by the Minister for the time being."

We get the approval of the Minister by the formal action of his Department, if it is only formal, the forwarding for payment. The forwarding for payment is the approval of the Department of which the Minister is the head. We have it *vivâ voce* here from Mr. Schreiber, that the Minister did approve of this payment. We have it upon the affidavit of the then Minister, The Honourable Mr. Haggart; but, I submit, that the approval of the Deputy is necessarily the approval of the Minister. *The Interpretation Act* to which your lordship has been referred, the provisions of the Railways and Canals Act, show that the terms are interchangeable in the various functions to be performed by the Minister and by the Deputy. That would render a case for me to rest upon the Deputy's letter of the 28th of February to the Auditor-General as an approval. The approval of the Minister, upon such a letter, would be presumed. I submit that your lordship can neither amend Mr. Munro's measurements, or Mr. Schreiber's approval of them, by deducting 100,000 yards, or a yard; but that the certificate must stand for all that it calls for.

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That the certificate is sufficient in form we refer to *Hudson on Building Contracts* (1).

The principal case there quoted is *Harman* v. *Scott* (2). There is also reference to the case of *Wyckoff* v. *Meyers* (3). The contract in the latter case called for the work to be done "in a good workmanlike and substantial manner to the satisfaction and under the direction of the architect." "To the satisfaction, &c.," is the wording of our document. (In the American case the certificate is: "This is to certify that the last payment of $1,800 is due, etc., etc., as per contract," signed by the architect.) That was held sufficient. That covered satisfaction. And, generally, it may be laid down that if a certificate of payment and satisfaction is required a certificate for payment will imply a certificate of satisfaction. It necessarily must. Coleridge, C.J. in *Laidlaw* v. *Hastings Pier Co.* (4), speaking of the matters which are conditions precedent, says: "they are to be taken into account, it seems to me, by the engineer, the agent of the defendants, to protect them, and when a request is made for the sending in of an account, the right to which is to be ascertained by certificates, the engineer is to go into all these matters, is to satisfy himself that the conditions precedent to the rights of the defendants have been fulfilled, and he would have neglected his duty if he had certified for any work, if any of the stipulations of the contract which he, as the agent of the defendants, was to enforce, had not been complied with."

So that in that extract from the judgment of Lord Coleridge he gives the reason why a certificate for payment must necessarily be a certificate of satisfac-

(1) 2nd ed. vol 1, p. 294.
(2) 2 Johnston's New Zealand Reports 407.
(3) In 44 N.Y., 143.
(4) Jenk. & R. Arch. Leg. Hdbk. 4 ed. App. p. 238.

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tion. It must be borne in mind too in considering the nature of the certificate that should be granted, that this contract differs, and this certificate differs, from that class of progress certificate that is treated of in *Hudson*. A progress certificate upon a lump sum contract is a totally different thing to a progress certificate on a schedule of quantities and prices; and the cases must be carefully distinguished as to that. [Cites *Hudson on Building Contracts* (1).]

It is only 10 per cent of that which has gone before that can be the subject matter of the final certificate. Under this contract quantities cannot be corrected in the final certificate. The quantities given by the progress certificate are final. (Refers to clauses 26 and 27 of the contract.)

The authority or the jurisdiction of the Engineer in dealing with this matter, I submit, is perfectly clear upon the contract. The clause under which the Chief Engineer gets his authority to deal, apart of course from the payment clause, is clause 8 of the contract. That clause as originally constructed, and as it appears, I think, in almost all the contracts which have been passed or entered into by the Department of Railways and Canals, and in fact all the departments of the Government prior to some of the more recent works, such as the Soulanges Canal, embodies the lines which have been struck out in this contract.

Under that contract what the Chief Engineer had to pass his opinion upon was as to how much work has been done, and whether the quality of the work was according to the contract. That is to say, consistently with the power which he has under the other clause of the contract, of saying to the contractor, this work you have done is not up to what the contract calls for, it is bad material, or it is bad workmanship.

(1) 2nd ed. vol. 1, p. 288.

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He has a right, and he has the absolute right, to pass upon that matter. He has also the right to pass upon the question of quantity; but as to the question of classification, or as to the question of the construction of the contract or interpretation of the plans, drawings or specifications, he has no authority whatever under this contract.

He has dealt and did deal properly in this certificate with the question of quantity, and with the question of quality. He has no objection to make, he has no complaint to make, as to the way in which the contractor carried out the orders that were given to him. He carried out the work as he was told to do it. There is no pretence that he did not. As to the quantity there is no question and no dispute. The only question as Mr. Schreiber himself says, in his evidence, was one of the question of the construction of the contract or of the specification. That he says in so many words. That he says was the only dispute with reference to the matter. That being the case, upon whom did it devolve to settle that matter. It devolved upon the parties to agree upon it if they could; not upon Mr. Schreiber to agree with Mr. Goodwin about it; not with Mr. Schreiber to say I do not agree with you, and therefore you must come to the court. It is, in the event of a dispute, not between the Chief Engineer and the contractor, but under clause 33 it is agreed:—

"That all matters of difference arising between the parties hereto upon any matter connected with or arising out of the contract, the decision whereof is not hereby especially given to the Engineer, shall be referred to the Exchequer Court of Canada."

Now has that point ever arisen, or has that case ever arisen where it could be said there was a dispute between the proprietor, the Government in this case,

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and the contractor, that would necessarily drive us or refer us to this court? I submit not.

A. Ferguson, Q.C. followed for the claimant: I only wish at this time to put forward one branch of the case. I say the point had not arrived when the case could be taken out of the course that has been taken by the Crown. The time had not arrived when under clause 33 the case should have been referred to the court. The Engineer had given his certificate, and it was a matter properly within his jurisdiction under the contract.

Then so far as the approval of the Minister is concerned, I really think it is only necessary to submit the principle that evidence of any sort, with reference to any matter, only requires to be in writing if it is provided by the contract or by statute that it must be in writing. Oral evidence is just as good as written evidence but for the provision of a statute, or but for the provision of a contract. There is nothing to prevent oral evidence being given in any case as well as written evidence except where it is distinctly provided that it shall be in writing. I would only refer to two authorities upon that which is with regard to the construction of a certificate being in writing. If a certificate need not be in writing, surely there is a greater reason why the approval of the Minister need not be in writing.

[Cites *Roberts* v. *Watkins* (1); *Kain* v. *Stone Company* (2).]

Then counsel for the Crown have in their notice of motion raised a question—I think it was contended also at the trial—that there was no right of action upon a progress estimate.

[*By the Court:* I am bound to hold that there is, in view of the *Murray case* (3).]

(1) In 14 C. B. N. S. 592. (2) 39 Ohio, 1.
(3) 26 Can. S. C. R. 212.

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And in view also of express English authority, I cite *Pickering* v. *Ilfracombe Railway Company* (1), which was relied on in the *Murray case*.

The Solicitor-General of Canada, against the motion to increase judgment:

Counsel for the claimant contend that in so far as the branch of the case with which we are now dealing is concerned, he must succeed for the whole of the amount of the certificate. That is to say, that the certificate substantially is conclusive as between the parties. Our argument will be that we concede the point that the Engineer's certificate is an essential requisite to enable the claimant to succeed, and we grant that he must succeed for the total amount of the certificate, so far as this branch of the case is concerned, or not at all.

My argument will be, therefore, first, that the Engineer's certificate is requisite, and in that respect I go with my learned friend, perhaps not altogether in the same direction, but so far as to say that if the certificate is good and valid, it is binding upon both the parties to the case.

I contend now that there is no certificate at all upon the record; and there being no certificate, of course there is no case, and the suppliant cannot succeed, not only as to the total amount of the certificate, but as to any portion of it.

The contract which determines the rights and duties of both the parties was made on the 9th of May, 1893, as my learned friend Mr. Osler said a moment ago. Under that contract it is provided that Goodwin, the claimant here, is to perform certain works in connection with the construction of the Soulanges Canal. He is to perform these works for the Government of

(1) L. R. 3 C. P. 235.

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Canada. The obligation on his part is to perform the works according to the plans and specifications, the plans and specifications being part of the contract entered into between them. By the contract, which is the law of the parties and which is the measure of the rights and liabilities upon both sides, it is provided that the works so to be done by this contractor for the Government of Canada are to be so done and performed, not only in accordance with its specifications, but in accordance, to a certain extent, with the directions of a man who is upon the ground for the purpose of seeing that Goodwin performed his duties under the contract. It is also provided that the Government of Canada is to pay him for the work so to be done at a certain price. As is customary, as is usual, it is provided that the amount to be paid to Goodwin for the work so to be done by him is to be ascertained and determined by a man chosen by consent by the two parties to the contract, and by whose finding both parties agree to be bound. There is nothing unusual in this contract. It is one of those contracts, it follows in the line of those which have been before the court a dozen times. Then I submit, as a matter of law, about which there can be no doubt that if the matter is not complicated by any other issue, as the contract provides that the certificate of the Engineer is to be final and binding between the parties and a condition precedent to the right to bring the action, then until such time as such certificate of the Engineer is obtained, there is no right of action at all in the first place, no right to bring the matter before the court, no money due and exigible under the contract; and, secondly, that by that certificate of the Engineer, final and conclusive as I contend, both parties are bound, the contractor as well as the Government.

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There is no necessity of citing authority upon that point. I have several to which I might refer, but the court is aware the matter is so well settled now it may be absolutely considered to be beyond the point of argument.

What are the conditions here? It is provided here, first, that the specifications annexed to the contract are part of the contract. Then, by section 8, the Engineer is to be the sole judge of the work. By section 35, payments are made on the certificate of the Engineer; the certificate is a condition precedent. Section 1 defines what is meant by the term "Engineer." The work is done under the contract, and a certificate is given by the Engineer under the contract on the 30th November, 1895. Subsequently, what I might call the classification of the work is altered, or the price to be paid for it is altered. The Engineer in the exercise of the undoubted powers conferred upon him by the contract, measures and ascertains the quantity of work done by the contractor, and says that quantity of work so done by you entitles you to receive from the Government a money payment of so much. That is the act of the Engineer practically chosen and selected by the parties, and that is the finding of this Engineer, uninfluenced, uncontrolled by anything except by that which appeals to his own individual judgment. Not being content with the view of the contract taken by the Engineer, an appeal is made to the Minister of Railways and Canals. He then refers the matter, acting for the Dominion of Canada, for one of the parties to the contract, to the Department of Justice and gets from the Department of Justice an opinion as to the construction to be put upon the contract. That is to say, he substitutes the Department of Justice, represented by the Minister of Justice, for the Engineer chosen by the parties to determine what were the rights and

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duties of the parties under the contract. I grant at once that authority will be found for the proposition that an Arbitrator may seek light outside of himself, and get information which will enable him to come to a conclusion upon the point submitted to him to be decided, provided that he adopts the information or adopts the opinion that he gets from the outside, makes it his own, and finds accordingly. The court's attention will no doubt be drawn to the case of *Rolland* v. *Cassidy* (1), a case decided in the Privy Council, a case which came from the province of Quebec. I may draw the court's attention to the fact that that case is not in point at all, because that was a case where the arbitrators acted, according to a well known rule with us, as *amiables compositeurs*, where they practically have the right to do anything they choose; but there is authority outside of that, where it is stated that it is open to the arbitrators to seek light. Let me draw your lordship's attention to the broad distinction between that case and the case that is before you. Whereas it is open to an arbitrator perhaps to seek for information elsewhere in order to enable him to come to a conclusion himself, provided he, taking that information, makes it his own and then acts as if the information had emanated from himself, yet mark the difference between that case and this, where the arbitrator, doing that which the contract says he had no right to do, persisting in the conclusion to which he comes at the suggestion or at the dictation of one of the parties to the contract, does that which in his own judgment he ought not to do. Not only does he not adopt the advice that is given to him by one of the parties to the contract, but rebels against it, protests against it, and says: "In defiance of what you say to me, I simply

(1) 13 App. Cas. 770.

act in this matter as if I did nothing further than simply perform a ministerial act."

If it was open to the Department of Justice to advise, not the arbitrator but the Department of Railways and Canals, so as to influence them to do that which in this case may be construed as favourable to one of the parties to the contract, and if that is conclusive and binding, what becomes of the position of the party who contracts with the Government, and who feels that notwithstanding that he accepts a contract under which a third party who is acceptable to him is to be an arbitrator between them, that that third party, whatever may be his own judgment and his own conclusion, would be forced to come to an entirely different conclusion at the dictation of an employee of one of the parties to the contract?

My learned friend has argued very strenuously that this progress estimate was not in truth what is generally known as a progress estimate, but that is practically a final estimate, that it was to be dealt with as such. I say that in my judgment that contention is correct, because the classification of the work, or the scheduling of the prices of the work, was conclusive and could not be altered, under the authority of *Murray* v. *The Queen* (*supra*), by any subsequent action, in case anything had been paid to him to which he was not entitled. If that be the case, if this in reality was a final estimate, if under the authority of the *Murray case* it was a final estimate, was the Engineer when he gave his estimate not *functus officio*, and had he the right, having given an estimate in that way, to subsequently alter and change the circumstances under which he did alter it, that is to say, at the dictation of the Department of Justice? He certified the certificate simply because he is made to do

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so in consequence of instructions received from the Department of Justice.

To what extent is a certificate given under these conditions a compliance with section 25 of the contract? I say that it is no compliance whatever; that it does not in any way comply with the terms of that section; and it affords no relief, it affords no grounds to the contractor upon which he can rely to obtain payment from the Government, because if it is open to the Government to force the Engineer in consequence of advice obtained in this way to do that which he has done in this particular instance, it would be again open to them to force this arbitrator, to influence him in a direction hostile to the contractor, and to take from him, to dispossess him of, the character of arbitrator which the parties clothed him with at the time they signed the contract.

We are, therefore, reduced to the point that the only question to be dealt with by your lordship is whether or not that certificate is a good certificate within the meaning of the terms of the contract. Upon this point I refer to *Goodyear* v. *The Mayor of Weymouth* (1); *Roberts* v. *The Bury Improvement Company* (2).

C. H. Ritchie, Q.C., followed, against the motion:

The argument in respect of the certificate may be summarized shortly in this way:—

First, it is not a binding certificate, because at the time the Engineer gave the certificate he was *functus officio* in respect to the classification referred to therein inasmuch as he had, in a prior certificate, No. 23, dealt with the same matter and disallowed the claim of the contractor.

What I particularly desire to direct your lordship's attention to is that estimates Nos. 23 and 24 deal with just the same amount of work. In other words, esti-

(1) 35 L. J., N. S., 13. (2) L. R. 5 C. P. 310.

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mate No. 23 deals with the amount of the work done up to a certain date, viz. up to the 30th November, 1895. In that estimate the Engineer allows the total quantity of excavation as 1,103,713 cubic yards, and he allows as earth in water-tight banks 450,733 cubic yards. Then after that the matter was again pressed by Goodwin upon the Department of Railways and Canals, and, as my learned friend pointed out, after it was then pressed, a reference was made to the Minister of Justice, who, on the 15th of January, 1896, expressed his view to the Railways Department, or the Minister of Railways and Canals, that the claim was one that ought to be entertained. Then we have certificate No. 24 given. No. 24, if your lordship will look at it, is a certificate given on the 28th February, 1896, and is an estimate of work done up to the 30th November, 1895. In other words, dealing with exactly the same amount of work, because there is no pretence there was anything else embraced in this certificate; dealing with the same thing. Then we find the Engineer, on that date, making a different classification.

We have then to discuss the question in this aspect: Was it a matter that the Engineer was entitled to deal with under the terms of the contract and specification? Was the matter of classification one that came within his province under the contract and specification? If so, and if both parties assented that he, owing to his peculiar knowledge and skill as an Engineer, should determine that, and there I agree with my learned friend, that it is a progress estimate that must be final. It is not dealing with a contract for a lump sum, but dealing with a contract in respect of schedule rates, and to that extent I agree with my learned friend, that where he gives a progress estimate it must be treated as final.

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If it came within the scope of the duty of the Engineer, under the contract, to decide it, and he had decided it, then I say that certificate No. 23 is final, and the matter could not be reopened. I will go further and say, even supposing the Engineer, after reconsideration, had changed his own opinion, I submit it would be still final; but that is not the case presented here. The case presented here is not that the Engineer, the person to whom the contracting parties agreed should be, by reason of his special knowledge, the judge—not that he was saying that his prior certificate was wrong, that is not pretended for one moment, it is admitted on all hands that the Engineer did not change his opinion, but he undertook in deference to the view of the Minister of Justice to cancel, if I may use that expression, cancel his former certificate and give a certificate entitling the contractor to something like 500,000 cubic yards more than he had formerly allowed as earth in water-tight banks.

Who determined the prices under the provisions of the contract? The Engineer, the moment he decided that was earth in a water-tight bank, determined that that was the price to be paid for it. It would not be necessary to put in the word "determined" at all. They say: "at prices agreed upon." It is the prices agreed upon determined under the provisions of this contract. The moment the Engineer, who was the judge, says there is only so much earth in water-tight banks, as soon as he has determined the quantity, he determines the prices, because there is a certain price for earth in water-tight bank.

Now, I submit, that in computing he has first to determine under what head this work will come, and having determined the class of work, the contract fixes the price, and then it is for him to compute the

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amount; and, I submit, that on these two documents together it was clearly the intention of the contracting parties that the Engineer should be the judge as to that.

The Resident Engineer signs the certificate subject to the provisions existing in a certain letter. Then the Chief Engineer signs it, and in the classification, as I pointed out to your lordship, on the 2nd page, there is a foot note reference to item No. 5 saying that is classified in accordance with the Minister of Justice, see letter of 15th of January, 1896, signed by T. M. Now Mr. Munro signs it in accordance with the decision. Then when Mr. Schreiber comes to sign it, he signs underneath Mr. Munro and he says: "Certified as regards item No. 5. in accordance with letter of Deputy Minister of Justice, dated 15th of January, 1896."

Now can it be said that that is a certificate upon which the suppliant here is entitled to any cause of action? Is it not, reading the whole thing together, the same as if Mr. Collingwood Schreiber had said, I entirely agree with Mr. Munro, I approve of what he has done. Mr. Schreiber certifies, formally certifies, but says while he attaches his name as evidencing a certificate, that the contractor is not entitled to the amount, because it is not earth in water-tight bank.

I submit that the certificate of the Chief Engineer goes no further and cannot be construed as going any further, so that we have a cause of action presented by the claimant based upon a certificate signed, it is true, by the Chief Engineer, signed it is true also by the Resident Engineer, but signed with this modification, with this qualification, that while we sign that, we do not sign it as evidencing our judgment or opinion; our judgment and opinion is just the reverse. What I urge is this; that when we have the Resident

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Engineer signing it—supposing he had stated in that note, at the foot, I certify this, but I desire to add that this certificate is not given by me in the exercise of my judgment, but is given by me in deference to an expression of opinion by somebody else. Ought we not read it as saying: "I certify that my view is that the contractor is not entitled to that amount." Is not that what it amounts to?

I say if an inference can arise from the certificate, that inference must be in the entire absence of evidence indicating that the Engineer was not perfectly satisfied; whereas, in this case, the court has before it evidence to show that he was not satisfied, that it was not the expression of his opinion, that he ought not to be paid upon that. So, I submit, your lordship must not read out of the contract the words which were put there for the protection of the Crown, and that it is only reasonable and fair in these cases that the Engineer should be forced to say that it was entirely to his satisfaction.

The case of *Wyckoff* v. *Meyers* (1) cited by the other side does not apply.

Counsel for claimant referred to sections 26 and 27 and said that under these sections certificate No. 23 would not be a bar to the claimant's recovery in this action.

Now what does section 27 mean? Does it not mean, beyond all question, that the moment that these claims are considered and adjudicated upon, and once adjusted or rejected, that that is final? Surely they could not, after they had brought the whole matter to the Department where witnesses had been examined and an adjudication made, either allowing the claim or rejecting it—surely they could not open the matter

(1) 44 N. Y. 143.

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up and make it the subject of a future reference. They are to do so up to the time it is adjusted or rejected.

There is another position I think that the Crown is entitled to take, and it is this:—I submit that that certificate is one upon which the claimant in this case cannot succeed for this reason, that it was recalled long before it was ever acted on. All that was done was this:—It was not a certificate given to the contractor upon the faith of which he altered his position in any form, but in deference to the view of the Minister of Justice, an officer of the department, the Chief Engineer sends over this certificate to the Auditor-General's office and there it stops; it is still within the control of the Crown. It is produced in this case from the custody of the Crown.

The moment the Auditor-General gets it, he declines to pay it. A certificate had already been given upon which payment had been made; certificate No. 23 was accepted by Goodwin, and the money was paid upon the faith of it. When the Auditor-General finds another certificate issued dealing with and embracing the same amount of work, nothing beyond that, he says, this cannot be done. What right have you to defer to the opinion of the Minister of Justice? I, Auditor-General, decline to pay it. It has never been issued to him. It has never been delivered in the sense of delivery to him. Is the claimant in this case entitled to come into court and ask us to produce a document that passed between one officer of the department and another? Counsel for the claimant says the estimates must be delivered to him. I say, unless there is a delivery, it can be recalled.

B. B. Osler, Q.C. in reply, on motion to increase: Where an Engineer makes a mistake, then it is within his jurisdiction to correct it. The court cannot revise

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that, unless it is a mistake touching his jurisdiction. [Cites *Peters* v. *The Quebec Commissioners* (1).]

[*By the Court:* But suppose it was a mere clerical error. Suppose he intended to certify for 125,000 yards, and certified for 100,000, and he discovers it?]

I think he could correct it then.

[*By the Court:* I understand you to concede that?]

Yes, but the court will not correct mistakes in fact, or mistakes in law of an engineer within his jurisdiction.

The next question raised by counsel for the Crown is the recall of the certificate. (Reads clause 25 of contract.) There is no necessity, in the wording of section 25 of the contract, for the delivery of a certificate. The Engineer had published it; he communicated it formally to the Secretary of the Department who has statutory functions, one of which is to receive just such an estimate and take notice of it. In the Department of Railways and Canals, the Secretary has a statutory position, and it was with regard to that statutory position he had that the formal notice was sent to him by the Chief Engineer. Then, furthermore, that very letter, the letter written by the Secretary of the Department, is in itself a final certificate. It is a certificate of satisfaction.

Further, I would submit that the mere fact that an officer continues in his own personal opinion, but has come to some conclusion in deference to the opinion of the proper officer, that nevertheless, that is his certificate.

Now apart from certain *dicta* of one of the learned judges in the *Murray case* (2), that case does not help us, and this court cannot be bound by that expression of opinion which was given on the point and not argued,

(1) 19 Can. S. C. R. 685. (2) 26 Can. S. C. R. 203.

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and which goes to the root of the whole of the certificates that had been issued and acted upon from time to time, probably since Confederation.

Now, just in connection with the document the claimant relies on as his certificate, and adding to that the approval of the Minister, verbal or otherwise, it is important to draw attention to what is said in *Hudson on Building Contracts* (1):—"If you employ an architect who does not know his business, and who certifies that he is satisfied when he ought not to express satisfaction, you must be bound by his mistake. [Citing *Goodyear* v. *Weymouth* (2).] But where the architect's certificate overrides some other provision in the contract for the certificate to be conclusive, it must be clear that the certificate was intended to be final and binding on both parties."

Now, is that not this case? Was it not intended, whether there was power or not - was it not intended by the action of the Engineer, by the action of the Minister, that what was done should be final and binding between the parties? They close the matter up. Now, even if it overrides the contract, even if it was to some extent outside the contract, nevertheless if that which was done was intended to be final and binding between the parties, then the *Goodyear case* applies.

The motion, on behalf of the Crown, to set aside the preliminary judgment of June 20th, 1896, was then argued.

Mr. *Ritchie*, Q.C. and Mr. *Chrysler*, Q.C. for the motion;

Mr. *Osler*, Q.C. and Mr. *Ferguson*, *contra*.

THE JUDGE OF THE EXCHEQUER COURT now (January 11th, 1897) delivered judgment.

(1) 2 ed. p. 304.

(2) 35 L. J. C. P. 12.

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The claimant is the contractor for the construction of sections numbered 4, 5, 6 and 7 of the Soulanges Canal. On the 26th of February, 1896, a progress estimate or certificate in his favour for $376,970.40, for work done under his contract, was signed by Mr. Thomas Munro, the engineer in charge of the work. On the 27th of February, Mr. Schreiber, the Chief Engineer of the Department of Railways and Canals, also signed the certificate, which was given in pursuance of the provisions of the twenty-fifth clause of the contract. That clause provided that cash payments equal to about ninety per cent. of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of the contract, would be made to the contractor monthly on the written certificate of the engineer that the work for, or on account of, which the certificate is granted, has been duly executed to his satisfaction, and stating the value of the work computed as above mentioned; and upon approval of such certificate by the Minister for the time being. It also provided that such certificate and such approval thereof should be a condition precedent to the right of the contractor to be paid the said ninety per cent. or any part thereof. The certificate added to the estimate of the 26th of February, 1896, is as follows:—

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

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"thirty-nine thousand two hundred and eighty dollars, "less previous payments."

Mr. Munro signed this certificate, subject to conditions stated in his letter of the 26th of February, 1896, and Mr. Schreiber signed in accordance with a letter of the Deputy of the Minister of Justice, dated 15th of January, 1896. By the fifth item of the schedule of prices the contractor was entitled to be paid fifteen cents per cubic yard for "earth in water-tight embankments," and the contractor claimed that this price should be applied to all the earth in any embankment that had to be made water-tight, while Mr. Munro and Mr. Schreiber were of opinion that it applied only to the earth in that part of the embankment that was made water-tight. That was, I understand, their contention, though Mr. Munro's previous certificates failed, I think, to give the contractor all that he was entitled to under that view of the matter. The question in controversy depended upon the true construction of the contract, and that was a matter that had not been left to the Engineer. The usual provision in contracts of this kind has been that the Engineer shall be the sole judge of work and material in respect of both quantity and quality, and that his decisions on all questions in dispute with regard to work or material, or as to the meaning or intention of the contract and the plans, specifications and drawings, shall be final. By the eighth clause of the present contract the Engineer is made the judge of the work and material in respect of both quantity and quality, but not of the meaning and intention of the contract. On a reference of the question in dispute to the Minister of Justice, the contention of the contractor was in the end upheld, and the words added by Mr. Munro and Mr. Schreiber to the signatures to the progress estimate or certificate of the 26th of February,

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1896, were intended to indicate, and indicated, that they signed in deference to the opinion of the Minister of Justice as to the proper construction to be placed upon the contract.

If this certificate is a good certificate under the contract, the claimant is entitled to judgment for seventy-three thousand two hundred and sixty dollars, the amount certified for, less the drawback, and less previous payments.

In the first place it is argued for the Crown that the certificate is not good because it was given in deference to the opinion of the Minister of Justice, and does not give expression to the views of the Chief Engineer, by whose decision the parties to the contract had agreed to be bound. But by reference to the contract it will be seen that it was only in respect of the quality and quantity of the work done that the parties had agreed to be bound by his judgment. There was no question as to the quality of the work. It had admittedly been done to the satisfaction of the engineer in charge of the work and of the Chief Engineer. Neither was there any dispute as to the quantity of work done. The question in controversy was as to whether or not, for certain work done to the satisfaction of the Engineer, the contractor was, under the schedule of prices embodied in and forming part of the contract, entitled to be paid fifteen cents per cubic yard as "earth in water-tight embankments." That was a question of law arising upon the construction of the contract. It might have been referred, as we shall see, to the Exchequer Court. But that was not the only course open to the parties. By *The Revised Statutes*, chapter 21, section 3, it is, among other things, made the duty of the Minister of Justice to advise the Crown upon all matters of law referred to him by the Crown; and, by the fourth section, as Attorney-General of Canada,

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to advise " the heads of the several departments of the Government upon all matters of law connected with such departments." The question to which I referred arose upon a contract between the claimant and the Crown, represented by the Minister of Railways and Canals. It was a question connected with the Department of which the Minister was the head; and it was, I think, as much his duty to seek the advice of the Minister of Justice as it was the latter's duty to give advice. Not only was there no objection to adopting that course, but it was in every way fitting and constitutional to adopt it. The advice of the Minister of Justice having been given, it was equally proper that the Minister of Railways and Canals, and the Chief Engineer of the Department should follow such advice. With regard to the quantity of work done there is no contention that the certificate does not give expression to the views of the Engineer by which the parties have agreed to be bound.

It is also contended that the certificate is not sufficient to sustain the action in this case for the reasons stated in the judgment of the Supreme Court in *Murray* v. *The Queen* (1).

By the twenty-fifth clause of the contract, to which reference has been made, three things are, as will have been observed, made conditions precedent to the right of the claimant to recover:—

1. There must be a certificate of the engineer that the work for, or on account of, which the certificate is granted, has been duly executed to his satisfaction.

2. The certificate must state the value of such work computed according to the prices stated in the contract.

3. The certificate must be approved of by the Minister for the time being.

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

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The approval of the Minister of the certificate has been proven; and there is nothing in the contract requiring it to be given, or evidenced by any writing. Mr. Justice Fournier, in *McGreevy* v. *The Queen* (1), appears to have been of opinion that the approval of the Minister could in a like case be given by acquiescence. Here we have more than that. We have the actual approval of the Minister to the Chief Engineer giving the certificate, and the letter of the Deputy Minister transmitting the certificate, in the usual course of business, to the Auditor-General, and requesting that a cheque for the amount due thereon should be issued to the claimant. If, however, it is necessary for the Minister's approval to be evidenced by some writing under his hand either on the certificate or on some other document, the claimant has not made out any case here. I say if, because I am not sure that the Supreme Court in *Murray* v. *The Queen* (*supra*) intended to decide that it was necessary.

Then the certificate states the value of the work done computed according to the prices stated in the contract. The only possible objection on that score is that it gives the value of all the work done up to that date, from which are to be deducted "previous payments," instead of giving the amount of work done since the last estimate or certificate. But why is that an objection? For what reason is the certificate bad because it gives the total value of the work done, the rest being the simplest matter of account for the Auditor-General, or whoever else may have to give effect to the certificate?

It is true, however, that the certificate does not in terms state that the work for which it was given had been executed to the satisfaction of the Engineer, and, if that is a requisite, this certificate is bad, undoubt-

(1) 1 Ex. C. R. 321.

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edly. It is contended, however, that the satisfaction of the Engineer is to be implied from the giving of the certificate in the terms, for the purposes, and under the circumstances existing in this case. I should, so far as my own view goes, have been inclined to accede to that contention but for the expression of opinion to the contrary that occurs in the judgment of the court in *Murray* v. *The Queen* (1). In that case, in which the clause of the contract and form of certificate in question were the same as they are in this, I was of opinion that the claimants could not succeed because they had no certificate of the Engineer stating the value of the work done computed according to the contract. They had been paid all that the Engineer had certified for. There was no other or further certificate that the Minister could approve of, and of course there was and could be no approval of the Minister. These objections which the Crown insisted upon in the Exchequer Court made it impossible, in my opinion, for the claimants to recover an amount that otherwise I thought they were entitled to. In the Supreme Court the Crown waived the objections to the certificate that had been relied upon in the court below, and the claimants had judgment. The objections to the certificate having been waived, it was not perhaps necessary to express any opinion as to whether it was good or bad. But the question was discussed, and the opinion expressed that the certificate, though good for the purpose of audit, did not comply with the contract and was not sufficient to maintain an action. One of the reasons given was that it did not state in terms that the work had been executed to the satisfaction of the Engineer. The certificate in this case is open to the same objection. It is argued that under the circumstances I am not bound by the expression of opinion occurring in the

(1) 26 Can. S. C. R. 212.

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judgment of the Supreme Court. But however that may be, it is fitting, I think, that I should follow it, leaving to that court on appeal to modify or qualify the opinion expressed, if upon principle or in view of the authorities that have been cited it thinks there is any occasion for any modification or qualification.

That brings me to the question as to whether or not the claimant may in this case, without a certificate of the Engineer approved of by the Minister, recover what the court thinks him entitled to upon the merits. The contention that he may is rested upon the thirty-third clause of the contract, which provides that all matters in difference arising between the parties thereto upon any matter connected with or arising out of the contract, the decision whereof is not thereby especially given to the Engineer, shall be referred to the Exchequer Court of Canada, and the award of such court shall be final and conclusive. Is the present reference made in pursuance of that provision? I think not. The contingency on which a reference could be made has not arisen. The parties to the contract are the claimant and the Crown, represented by the Minister of Railways and Canals. At the time the reference in this case to the court was made there was no such matter in difference between such parties. There had been a matter of difference between the claimant and the Government engineers as to the construction of the contract, but that question had been decided in the contractor's favour by the Minister of Justice and the Minister of Railways and Canals, and the Chief Engineer had accepted that decision, as no doubt it was proper to do, and had acted upon it. There was at the time of the reference a matter in difference between the claimant and the Auditor-General. But the Auditor-General was not a party to the contract, and he did not as to the matter in controversy represent

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the Crown. The provision that the matters in difference mentioned in the thirty-third clause of the contract shall be referred to the Exchequer Court, and that the award of such court shall be final and conclusive, is, so far as I know, new. This is the first contract that has come before me in which the provision occurs. How it is to be worked out, whether there may be references from time to time while the contract is pending, or whether the reference must be made after the work embraced in the contract is finished, need not at present be discussed. All I need now say is that I do not think the question that arose as to the construction of the contract, and which was in the end determined by the Minister of Justice in the contractor's favour, is now properly before me for decision under that provision. Not being before me for decision, I cannot in entering upon the final judgment in this case give effect, without the consent of the parties, to the views I hold as to that question. The parties do not consent, and the judgment must be entered for the full amount of the certificate given by the Chief Engineer, or for nothing. But as I have already, at the hearing, expressed my view as to the merits of the question in controversy, it may not be out of place now to add a word or two to the opinion I then expressed, and which I see no reason to change. On the one hand I do not agree with the view that the claimant is entitled to be paid fifteen cents per cubic yard for all the earth in the water-tight embankments. From the total quantity there must, I think, be deducted, as I said at the hearing (1), the earth that came from the mucking; (2), any sand or material that would not class as "selected material;" and (3), any material that was not laid in substantial accordance with the specification. On the other hand I do not agree with the engineers that they had prior to the certificate in

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controversy in this case allowed the contractor for all the "earth in water-tight embankments" for which he was entitled to be paid under the contract. That is now practically conceded by the Crown. The two assistant engineers adopted under Mr. Munro's instructions different methods of ascertaining the quantity of such earth to be paid for at the prescribed rate. Both methods, under the circumstances, cannot be right. Both may be, and are, I think, wrong. The least sum to which the claimant would be entitled, under the facts proved in this case, would be represented by the value at fifteen cents per cubic yard, less previous allowances, of all the earth in the water-tight embankments lying above that portion of the base of the embankment that was mucked. I adhere, however, to the view I expressed at the hearing that the placing of the mucking stakes, without more, was not on the part of the engineers in charge of the work a sufficient compliance with the provision of the specification that made it their duty to lay out the portion of the embankment that was to be made water-tight, giving the heights and slopes of such portions. If, in addition to placing the mucking stakes, the contractor, or some one properly representing him, had been clearly given to understand that the water-tight portion of the embankment was to be built above the portion of the base of the embankment that had been mucked, there would be some reason to accept that as the equivalent of what the contract and specification called for in that behalf. There is, it is true, some evidence in the case of something of that kind having been done. But it is not, I think, satisfactory. It is the evidence of the engineers who neglected in the present case to indicate upon the plans in use the portion of the embankment that was to be made water-tight. That was a simple, easy and obvious way to

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avoid all disputes. And that not having been done, and disputes and difficulties having arisen in consequence thereof, the evidence of those in fault must, I think, be taken with some reserve. At least I should like, before coming to a conclusion adverse to the claimant on that point, to hear what his superintendents or overseers have to say as to what was done and said by the Government engineers. There is no pretence that there was any notice or communication of the kind to the claimant himself.

In the result the preliminary judgment entered in this case on the 20th of June last will be set aside and judgment entered for the defendant, but under all the circumstances of the case, without costs.

Judgment accordingly.

Solicitor for the claimant: *A. Ferguson.*

Solicitors for the respondent: *O'Connor & Hogg.*