COPIES

(53*m*)

OF Orders in Council, appointing three Commissioners to Investigate and Report on Claims arising out of the Construction of the Intercolonial Railway, &c.

CERTIFIED COPY *of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor General in Council on the 28th July,* 1882.

On a Report, dated 26th July, 1882, from the Minister of Railways and Canals, submitting that certain claims arising out of or connected directly or indirectly with the construction of the Intercolonial Railway, have been pressed upon his attention from time to time.

That some of the claims have been before the courts, and some have been reported upon by Frank Shanly, Esq., C.E., and others, or no action has been taken with regard to the rest of them.

That it is advisable that three Commissioners be appointed to make enquiry into the matter of these claims, and upon consideration of the evidence already taken, and upon such further investigation as to them shall seem necessary, shall report thereon to Your Excellency in Council, for the information of Council, that they may be well advised as to the liability of Her Majesty in regard to these claims.

That the Commissioners shall first, and as preliminary to the investigation of the several claims, upon being satisfied as to the facts exclude from their consideration all claims coming within any of the six following classes:—

1. Any claim made by a person between whom and Her Majesty there is no privity of contract.

2 Any claim that has been before a court of justice, and decided adversely to the claimants, except where the adverse decision was given on the following ground only, namely, that the Chief Engineer has not certified that the work has been duly executed.

3. Any claim which by agreement between the parties or their attorneys or counsel, and the persons then acting for Her Majesty, was to abide the result of a case before the courts, where the latter was decided adversely to the claim, and with the same exceptions as set out in the last class of cases.

4. Any claim arising out of, or connected with a contract, the performance of the work under which was legally taken out of the hands of the contractors, and in regard to which the work was completed at a loss to Her Majesty.

5. Any claim which has been settled and adjudicated on by the Commissioners of the Intercolonial Railway, or by the Public Works Department, or by the Department of Railways and Canals.

6. Any claim in regard to which the claimant has given a receipt in full.

The Minister, therefore, recommends that three Commissioners be appointed for the purpose of investigating the said claims and reporting to the Governor in Council their opinions as to Her Majesty's liability in regard to each of the said claims, first excluding all such as come within any of the six classes herein enumerated.

That they may use evidence taken by any court, person or persons, who have had, or may have, to do with the examination or investigation of the said claims, and may, if they deem it desirable, make further investigation and enquiry in regard to the said claims.

That an officer of the Department of Railways and Canals be appointed Secretary of the said Commissioners, and that his duties be to assist the said Commissioners, and, in that connection, to investigate the said claims.

The Committee submit the above recommendation for Your Excellency's approval, but they recommend that the duties of the Secretary be not defined as herein stated.

JOHN J. McGEE.

CERTIFIED COPY *of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor General in Council, this 28th day of July*, 1882.

On the recommendation of the Minister of Railways and Canals, the Committee advise that Messrs. George M. Clark, George Laidlaw and Frederick Broughton be appointed Commissioners to consider evidence, investigate and report on certain claims connected with the construction of the Intercolonial Railway, and that Mr. Louis K. Jones be the Secretary of the said Commissioners.

Hon. Minister Railways and Canals. JOHN J. McGEE.

CERTIFIED COPY *of a Report of the Honorable the Privy Council, approved by His Honor the Deputy of His Excellency the Governor General in Council, on the 7th October*, 1882.

On a Memorandum, dated 6th October, 1882, from the Minister of Railways and Canals, recommending that D'Arcy E. Boulton, Esq., of Cobourg, be appointed to take the place of Mr. George Laidlaw as one of the three Commissioners appointed under Order in Council of the 28th of July last, to investigate and report upon certain claims connected with the construction of the Intercolonial Railway, and that the Order in Council of 14th September, substituting for Mr. Laidlaw, Col. C. S. Gzowski, who, having expressed himself as unable to undertake the duty, be cancelled.

The Committee submit the above recommendation for Your Excellency's approval.

JOHN J. McGEE.

COMMISSION appointing George Mackenzie Clark, Frederick Broughton, D'Arcy Edward Boulton, Esquires, Commissioners to investigate certain claims connected with the construction of the Intercolonial Railway. Dated 7th October, 1882; recorded 25th November, 1882; Liber "E," Folio 290.

A. A. CATELLIER, *Deputy Registrar General of Canada.*

CANADA.

By the Honorable Sir William Johnston Ritchie, Knight, Deputy of His Excellency the Right Honorable Sir John Douglas Sutherland Campbell, commonly called the Marquis of Lorne, one of Her Majesty's Most Honorable Privy Council, Knight of the Most Ancient and Most Noble Order of the Thistle, and Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Governor General of Canada, and Vice Admiral of the same.

To George Mackenzie Clark, Esquire, Judge of the United Counties of Northumberland and Durham, in the Province of Ontario, in the Dominion of Canada; Frederick Broughton, of the City of Hamilton, in the said Province of Ontario, Gentleman; and D'Arcy Edward Boulton, of the Town of Cobourg, in the said Province of Ontario, Barrister-at-Law; and to all to whom these presents shall come—

GREETING:

Whereas, upon a Report of the Minister of Railways and Canals, bearing date the 26th day of July, in the year of Our Lord 1882, submitting that certain claims arising out of, or connected directly or indirectly with, the construction of the Intercolonial Railway, have been pressed upon his attention from time to time.

That some of the claims had been before the courts and some had been reported upon by Frank Shanly, Esq., C.E., and others, or no action had been taken with regard to the remainder of them; and that it was advisable that three Commissioners should be appointed to make enquiry into the matter of those claims, and upon consideration of the evidence already taken, and upon such further investigation as to them should seem necessary, should report thereon to His Excellency the Governor General in Council, for the information of the Council, in order that they might be well advised as to the liability of Her Majesty in regard to those claims; and that the Commissioners should first, and as a preliminary to the investigation of the several claims, upon being satisfied as to the facts, exclude from their consideration all claims within any of the six classes enumerated in the said report of the said Minister of Railways and Canals, His Excellency the Governor General in Council was pleased to approve of the said report, on the 28th day of July, in the year aforesaid, and was further pleased to order and direct that three Commissioners should be appointed for the purpose of investigation of the said claims and reporting to the Governor General in Council their opinions as to Her Majesty's liability in regard to each of the said claims, first excluding all such as come within any of the six classes herein and hereinafter enumerated, and that they might use evidence taken by any court, person or persons, who have had, or might have, anything to do with the examination or investigation of the said claims, and might, if they deemed it desirable, make further investigation and enquiry in regard to the said claims.

Now, therefore, know ye, that reposing trust and confidence in your loyalty, integrity and ability, I, the Honorable Sir William Johnston Ritchie, Knight, the Deputy of His Excellency the Governor General, by and with the advice of the Queen's Privy Council for Canada, and in pursuance of the authority of the hereinbefore in part recited Order in Council, have nominated, constituted and appointed, and by these presents do nominate, constitute and appoint you the said George Mackenzie Clark, Frederick Broughton, and D'Arcy Edward Boulton, to be Commissioners for the purpose of investigating the said claims arising out of or connected, directly or indirectly, with the construction of the Intercolonial Railway, as set forth in the said Report of the Minister of Railways and Canals, and the said Order in Council bearing date respectively the 26th and 28th days of July, in the year of Our Lord 1882, and upon such investigation you are authorized to use evidence taken by any court, person or persons, who have had, or may have, anything to do with the examination or investigation of the said claims, and may, if you deem it desirable, make further investigation and enquiry in regard to the said claims, provided always that as such Commissioners you shall first, and as preliminary to such investigation of the said several claims upon being satisfied as to the facts, exclude from your consideration all claims coming within any of the following classes, namely:—

1. Any claim made by a person between whom and Her Majesty there is no privity of contract.

2. Any claim that has been before a court of justice and decided adversely to the claimants, except where the adverse decision was given on the following grounds only, namely, that the Chief Engineer has not certified that the work has been duly executed.

3. Any claim which by agreement between the parties or their attorneys or counsel, and the persons then acting for her Her Majesty, was to abide the result of a case before the courts where the latter was decided adversely to the claim, and with the same exceptions as set out in the last class of cases,

4. Any claim arising out of, or connected with a contract, the performance of the work under which was legally taken out of the hands of the contractors, and in regard to which the work was completed at a loss to Her Majesty.

5. Any claim which has been settled and adjusted by the Commissioners of the Intercolonial Railway, or by the Department of Public Works, or by the Department of Railways and Canals.

6. Any claim in regard to which the claimant has given a receipt in full.

And I do further order and direct that you the said George Mackenzie Clark, Frederick Broughton and D'Arcy Edward Boulton, as such Commissioners' as aforesaid, shall, from time to time, report to His Excellency the Governor General in Council, the result of such investigation and your opinion as to Her Majesty's liability in regard to each of the said claims so authorized to be investigated by you, as aforesaid.

To have, hold, exercise and enjoy the said office of Commissioners as aforesaid, unto you the said George Mackenzie Clark, Frederick Broughton and D'Arcy Edward Boulton, with the rights, powers, privileges, authorities and emoluments thereunto belonging and appertaining during pleasure.

Given under my Hand and Seal at Arms at Ottawa, this 7th day of October, in the year of Our Lord, 1882, in the 46th year of Her Majesty's reign.

By Command, W. J. RITCHIE, *Deputy Governor.*

A. W. McLELAN, Acting Secretary of State.

OTTAWA, 17th March, 1884.

SIR,—I have the honor to acquaint you, for the information of the Commissioners appointed to investigate claims arising out of the construction of the Intercolonial Railway, that His Excellency the Governor General in Council has been pleased to order:

1. That in cases now before such Commissioners, in which the claimant is under his agreement chargeable with diminution of work caused by change of grade or location or by the omission of wooden superstructure of bridges, the Commissioners be instructed to report their conclusions on the liability of the Crown, not only as it is after making such charge, but also as it would be should the right to make the charge be waived.

2. That such Commissioners be instructed to exclude no claim from their enquiry, because of a receipt in full, unless in their judgment it was given under such circumstances as make it just and proper to hold the claimant bound by it.

I have the honor to be, Sir, your obedient servant,

G. POWELL, *Under Secretary of State.*

G. M. CLARK, Chairman, Intercolonial Railway Claims.

GENERAL REPORT of the Commissioners appointed to enquire into the claims arising out of the construction of the Intercolonial Railway.

Our commission was not accompanied by any special instructions, and we have, therefore, endeavored to learn, from the document itself, the object and scope of our enquiry. We have construed it as directing us to ascertain and report, as fully as we should think fit, the facts material to a decision on the several claims, and to give our opinion on the liability of Her Majesty arising out of those facts, to the end that our conclusions, after being reviewed, might be rejected or adopted, in whole or in part, as should seem proper to His Excellency the Governor General; our judgment of itself binding neither the Crown nor the claimant.

We have thought that our proceedings would not be of much value unless we succeeded in collecting all, or as much as possible, of the evidence which was relevant to the several disputes. Our investigation of any particular claim would be in vain, if, in some future occasion, a state of facts could be established substantially different from that upon which we had based our opinion. In this view the completeness of the evidence in each case became, in our eyes, a matter of primary importance.

We were not restricted, however, to the consideration of evidence given before ourselves, for the commission authorized us to "use evidence taken by any court, person or persons, who have had or may have, anything to do with the examination or investigation of the said claims."

Most of the claims referred to us had been looked into by the late Mr. Frank Shanly while he was Chief Engineer of the Railway, and oral and documentary evidence concerning them had been laid before him. On communicating with claimants

whose cases had been presented to him, we did not find a general disposition to call witnesses again or to adduce testimony of any kind. Some were indifferent about it; some gave the expense as a reason for not doing so; and several, on learning that we were authorized to consider the evidence which he had heard, proposed to rest their case on that, and asked us to report without further testimony. We found, however, that what was recorded as having been adduced before Mr. Shanly, did not, in many cases, convey to us the information which we thought necessary to a proper understanding of the matters in question, and we decided to hear more before coming to a conclusion on the rights of the parties. Under these circumstances we offered to pay the expenses of persons who should attend and give material evidence.

We did this the more readily because it seemed to us unfair that any claimant should be asked to bear that outlay without being, and he was not, in a position to recover it back, as a matter of right, should our judgment be in his favor; the expenses to be so paid to be fixed, as nearly as possible, according to the tariff of fees for witnesses in the courts of justice.

We notified each claimant that, before reporting, we would consider the evidence taken before Mr. Shanly as fully as if it had been given before us, attaching such weight to it as it might seem to deserve; that we would hear all such witnesses as he or the Crown might desire to have examined, as well as any others whom we should think necessary; and that we would be ready to hear argument on all the evidence, whether given before us or not

This was followed, as a rule, by the respective claimants coming themselves, and bringing their witnesses to be examined; and generally, but not always, they were represented by counsel.

As might be expected, we have been met by conflicting evidence. Through this we have made our way as well as we could, leaning always, as we believe, to the side of the contractor. In finding our facts we have not followed the guide recognized in courts of justice. There the maxim is "*Potior est conditio defendentis.*" But we have acted on the opinion that to give the claimants the benefit of every reasonable doubt would serve the object of our commission better than to leave it questionable whether he could not get, before some other tribunal, a more favorable verdict. We think, therefore, that no claimant can, as far as facts are concerned, present a better case than we have assumed for him.

The difference of opinion, however, between the Crown and each claimant was not nearly so great on matters of fact as on the principles by which their respective rights should be determined. The main disputes were on the interpretation of contracts under which the construction of the railway, up to formation level, had been undertaken. This construction had been accomplished by dividing the railway in twenty-three sections, for each of which a separate contract was made. As to four of them, the contractor's claims were settled amicably by the Railway Commissioners; as to two, no claim was made beyond the amount paid to the contractors; as to one, the amount to be paid was decided by arbitration; the remaining sixteen gave rise to demands still unsettled, and which are amongst the cases referred to us.

The claims which relate to matters other than this construction are, comparatively, unimportant; and the principles on which they have been decided, having been sufficiently explained in the special reports relating to them, they require no notice here.

On the contract for construction, however, the claims are so large (in all, nearly $4,000,000) and the same questions have arisen so repeatedly, that, in addition to what we have said about each claim in its special report, we think it well to state here, in a collected form, the opinions which have governed us through all those cases, and the reasons on which the opinions are founded.

Each of these contracts was based on a bulk price for the work undertaken. It is needless to say that the Crown has not refused to pay the balance due to any contractor, according to the view of the Government on the agreement or agreements made with him. There are instances in which a portion of the price remains unpaid,

but, apparently, that is only because the contractor did not wish to take it until a final settlement could be had.

The dispute, in almost every one of these cases, relates exclusively to work which is claimed to be extra, that is, outside the contract and not covered by the bulk price; and it may be classed as follows, that is to say:—

1. Work entirely outside the contract and which, without infringing the rights of either party, might have been let separately to any other person as well as to the contractor.

2. Work beyond that originally designed and caused by change of grade or location.

3. Work beyond that originally designed and caused not by change of grade or location, but by some other departure from the first plan voluntarily adopted as an improvement and directed by the Government engineers.

4. Work beyond that originally designed and caused, not by change of grade or location, nor by any desire on the part of the Government or its officers to depart from the original plan, but because the physical features in the locality (being different from those anticipated) made a change unavoidable, and work was, therefore, done of a kind or a quantity different from that of the first plan.

We take up these classes in the above order:

1. "Work entirely outside the contract and which, without infringing the rights of either party, might have been let separately to any other person as well as to the contractor."

We have, without hesitation, allowed what, from the evidence, appeared to be a fair value for work of this kind. We have treated it as work independent of, rather than an addition to, or an alteration from, that covered by the contract; but we have found that most of the work claimed as being within this class was really within class 3 or 4, to which we refer at length hereafter.

2. "Work beyond that originally designed and caused by change of grade or location."

This is extra work in one sense, because it increases the bulk price; but it is not unprovided for in the contract. It is referred to in clause 4 of that document as work to be done, and for which a reasonable allowance should be made. Clause 4 contains the following:—

"The Engineer shall be at liberty, at any time before the commencement, or during the construction of any portion of the work, to make any changes or alterations which he may deem expedient in the grades, the line of location of the railway, the width of cuttings or fillings, the dimensions or character of structures, or in any other thing connected with the works, whether or not such changes increase or diminish the work to be done, or the expense of doing the same, and the contractors shall not be entitled to any allowance by reason of such changes, unless such changes consist in alterations in the grades or in the line of location, in which case the contractors shall be subject to such deductions for any diminution of work, or entitled to such allowance for increased work (as the case may be), as the Commissioners may deem reasonable, their decision being final in the matter."

This declares that the decision of the Commissioners on the amount to be allowed shall be conclusive; but in most cases there was no attempt to settle it in that way, and we have treated it as an open question, to be dealt with according to the evidence.

In arriving at the amount to be allowed in any case for this work, whether decided by the Commissioners in their day, or by any other tribunal in the present, or in the future, it is manifest that two distinct subjects must be taken into consideration, namely, the quantity of the work and the rate at which it is to be paid for.

First, as to quantity. It is an increase of work caused by a change of grade or location which is to add to the bulk price. Increase over what? It is plain that altering the grade or location on any particular portion of the line might diminish

or increase the work for that portion. Contractors have contended that the increase or diminution referred to in the contract was that over or under the work which would have been required for the same portion of the line on the original grade or location. The engineers have been accustomed, in their returns on this subject, to allow it over or under the work as estimated for that portion in the bill of works, whether that estimate was correct or incorrect. Such a decision would be plainly right if the agreement had obliged the contractor to furnish the quantities stated in the bill of works; but it did not. The practice may have been adopted by the engineers, because the question, as to the correctness of the method, was not raised before them.

In contracts known as schedule contracts, which these are not, the several classes of work are enumerated, and for each a rate is agreed on. The value of the work finished in each class can be calculated, and adding those values together gives the whole cost of the work; but these Intercolonial contracts were bulk sum contracts, the main characteristic being that in each case the whole work was undertaken for a single specified price.

It seems to us that the quantity named in the bill of works for any particular class cannot be used in ascertaining the contractor's rights without breaking the spirit as well as the letter of the contract itself, and of the notice given to him before the contract by the bill of works. He was informed in substance, before he tendered, that if in any locality the work should turn out to be less than that supposed to be then required there as to that locality, his bulk sum price would be earned by doing only what was actually requisite. On the other hand, if more should be required, he was to do it without extra payment.

If, for instance, the work actually necessary a any locality was less than estimated for in the bill of works, and if a change of location increased it up to the quantity named in the bill of works, it is plain that the contractor would lose one of the chances of gain given to him by the bargain, unless he should be paid for that increase as an addition to his bulk price: and increasing the work still further, that is beyond the quantity named in the bill of works, can make no difference in the principle. He must always be credited with the difference, if any, between the quantity actually requisite for that locality and the quantity estimated for it in the bill of works, or he does not get his full rights.

For these reasons we think the contractor is entitled to show, if he can, more accurately than the bill of works showed, the quantity which would have been necessarily executed on the original location of any link of the line for which a new location was adopted, and then to have this, which we may call first true quantity, compared with the other, the second true quantity, namely that executed on the substituted link, so as to show the increase for which he is to be paid, or the diminution with which he is to be charged.

Our rejection of the quantity given in the bill of works as a factor in the problem, made the solution much less simple than it otherwise would have been, for we had to take, in lieu of it, such other quantity as the evidence showed to be more accurate, and the door was opened to a great variety of evidence, much of it indefinite and unsatisfactory. Nevertheless, we felt it our duty to receive it, and to take the responsibility of forming a conclusion upon it.

Turning now to the value of this work, we find that the practice of the engineers has been to assume it to be the price mentioned for each class in the schedule attached to the tender. Whether this happened because the contractor in each case consented to that course, or not objecting to it, the engineer thought it unnecessary to ascertain the actual value, does not appear; but however that may be, we think, when either party declines to be bound by the schedule rate, the correct course is to allow the actual value of the work at the time it was done. It is, in fact, stipulated that the schedule rates cannot govern, for there is a note at the end of the tender in the following words:—

"And I hereby further supply solely for the purpose of informing the Commissioners * * and not in any way to affect the contract, the following schedule of prices for some of the principal items of construction."

The only exception to this understanding being a provision relating to iron cylinders, &c., in some of the schedules, by which it is arranged that in the event of iron cylinders or abordeaux or other specified substitutes being employed instead of masonry for culverts, an account would be taken of the work supplied and of the work omitted, on the basis of the schedule rates, and the difference charged or credited (as the case might be) to the contractor; while in the clause itself (No. 4 of the contract), under which the claim for increased work due to change of grade or location is made, it is provided, as hereinbefore set out, that for that increase the contractor shall be entitled to such allowance as the Commissioners may deem reasonable.

All this seems to us to make it plain that the schedule was intended not to be conclusive evidence of the rate to be paid for any increase or decrease in the work; and in the absence of any prescribed or other governing rate, we think the contractor is entitled to be allowed for the increase and liable to be charged for the dimunition in each locality the true value of the work.

If the Commissioners had adjudicated on such value, their decision would have been binding under the terms of the contract; but, as they did not, we have, as before mentioned, considered it our duty to hear evidence on the value and to decide accordingly.

3. "Work beyond that originally designed and caused, not by change in grade or location, but by some other departure from the first plan, voluntarily adopted as an improvement and directed by the Government Engineers."

Concerning this work, the contention of the contractors may be shortly stated as demanding an extra price in each instance where a voluntary change of design increased the cost to them of any portion of the work, though in other places, or in other respects, such changes of design may have saved them more than that increased cost.

This is the class of work upon which most of the claims arise and upon which the widest difference of opinion exists between the Crown and the claimant. Whether a piece of work is outside the contract, that is, not covered by the bulk price, involves, of course, the question whether it is within the contract, and that brings us to the contents of the written agreement.

These contracts are all in substantially the same form. There are cases of slight variation, but they create no exception to the general views which we are endeavoring to explain.

Clauses 1, 4 and 9 of the contract are those which we think necessary to keep in view in deciding whether any particular work is within the contract. The clause which is numbered 9 in some of the contracts is numbered 10 in others.

Clause 1 is as follows:—

"The contractor shall and will well, truly and faithfully make, build, construct and complete that portion of the railway known as section , and more particularly described as follows, &c.: and all bridges, culverts and other works appurtenant thereto, to the entire satisfaction of the Commissioners, and according to the plans and specification thereof, signed by the Commissioners and the contractor, the plans whereof so signed are deposited in the office of the Commissioners, in the City of Ottawa, and the specification whereof so signed is hereunto annexed and marked Schedule A, which specification is to be construed and read as part hereof, and as if embodied in and forming part of this contract. But nothing herein contained shall be construed to require the contractor to provide the right of way for the construction of the railway."

Clause 4 we have already quoted (page 6) while referring to the increases of work due to change of grade or location. Clause 9 is a follows:—

"It is distinctly understood, intended and agreed, that the said price or consideration of * * * * shall be the price of, and be held to be full compensation for, all the works embraced in, or contemplated by this contract, or which may be required in virtue of any of its provisions, or by law, and that the contractors shall not, upon any pretext whatever, be entitled, by reason of any

change, alteration or addition made in or to such works, or in the said plans and specification, or by reason of the exercise of any of the powers vested in the Governor in Council by the said Act, intituled: 'An Act respecting the construction of the Intercolonial Railway,' or in the Commissioners or engineer, by this contract or by law, to claim or demand any further or additional sum for extra work or as damages or otherwise, the contractors hereby expressly waiving and abandoning all and any such claim or pretention to all intents and purposes whatsoever, except as provided in the fourth section of this contract."

The language of clauses 4 and 9 seem to put the contractors very much in the power of the engineer, enabling him almost to make or mar their fortune, as he should choose, that is, if, instead of discharging his trust conscientiously, he should permit the work to be slighted for their gain, or direct a needless outlay for their ruin. The danger was, however, not a real one. The practical effect of leaving so much to the discretion of the engineer has not been to contribute to the loss of the contractors.

The existence of such a power has probably given rise to a strong feeling against the nature of the agreement, in the minds, first, of contractors themselves, then of their friends, and so on, of their advocates and others; for this right to make changes, without increasing the bulk price, has, at last, come to be described before us as a downright cruelty to the helpless contractors, and the cause of much loss to them; and it has been frequently argued that, in view of this particular hardship, we should favor their claims for extras.

From the frequency of this complaint and the stringency against contractors which we found to be a striking feature of the written agreement, we expected to find some instances, if not several, where the engineer had insisted upon the contractor following new designs for completing the work, which had made it as a whole, much more expensive than the first design would have been, and we gave much consideration to the question whether an engineer could do that, and if so, to what extent, without giving the contractor a right to additional compensation; but it has become evident that there is really no such question in any of the cases before us. The rigid terms of clause 4 seem to have raised such a cloud of prejudice as to interrupt the view of ordinary observers and conceal the true cause of contractors' losses.

We find that the action of the engineers, the Railway Commissioners, and the Government, has been to diminish the work as a whole, so that in every case where the contractor completed his contract he got his price for less work, in some cases very much less, than, at the beginning, he was expected to do for it; and where the contractors failed to finish the work, the Government finally paid a larger sum than the bulk price for less work than was originally expected to be furnished for that price.

This result of the bulk sum system under which these contracts were let, is so contrary to what is evidently the prevailing opinion, that we felt called upon to scrutinize with more than ordinary care the facts and figures which led to the conclusions just stated.

With the special object of making a comparison between the amount of work originally estimated as requisite and that actually done on each section, we have taken pains to ascertain, as accurately as we found to be now possible, the various circumstances which seemed to us relevant to that subject; and in Schedule A hereto appended we have stated the result in figures.

That statement shows that the Government got for $6,573,193, the aggregate of the sixteen bulk prices, work worth $5,619,138, instead of specified work, which was originally expected to be done, and which would have been worth $6,819,835, thus paying about 22 per cent. more than if the work had been procured at schedule rates, fixed according to the views of the contractors at the time the works were let.

If, therefore, it be, and we think it may fairly be assumed, that at the time of letting these sixteen contracts each contractor would have willingly undertaken the quantities requisite in each class of work on his section at the rates named in his

schedule, and on which he led the Government to understand he had arrived at his lump price, it follows that if, instead of the bulk sum system, these Intercolonial Railway contracts had been let and had been carried out on the schedule system, the contractors, in the cases which have come under our notice, would, for the work actually done, have received, in the aggregate, very much less than has been paid for it.

Unfortunately, however, there is too much reason to say that great as were the savings to the contractors, by change of design on the several sections, they did not prevent, in many of the cases, serious, and, in some cases, ruinous losses.

As our enquiry was conducted only with the view of ascertaining the extent of the liability of Her Majesty, we gave no special attention to the amount or the cause of the loss sustained carrying a contract; but we could not hear as much as we have heard about the several transactions without being convinced that, as a rule, the contractor had made his offer on a very mistaken view of the value of the labor, not so much the amount of it as the rate at which it could be procured, whereby the price paid for constructing the railway was much less than would have been the case had it been built as a Government work, even under the most able and economical management, individual contractors or their sureties losing the difference.

On four contracts, undertaken by two firms jointly interested, hundreds of thousands of dollars were lost, because the rates for masonry included in the bulk price were entirely inadequate, owing mainly to the impossibility of finding suitable stone, as was expected, at or near the locality where it was to be used; and in another case the contractor lost more than $125,000 on a single item—crib-wharfing.

The diminution of work on each section, as shown in Schedule A, does not profess to be accurate. The calculations which have led to the results there given could only be approximate, but we have made them as closely so as possible, keeping in view the varying circumstances of each case, and that the main question to be answered was, whether the work expected to be done was more or less than that actually done instead of it.

Applying to the several classes of work any consistent set of prices would give the relative value of such work, and we took, in each case, the prices set out in the schedule annexed to the tender, as far as there were any items to which they would apply.

In some cases there was but little change in the class of work. In those the difference was principally in the quantities; in others, some of the work originally designed was entirely omitted and a different kind substituted, as, for instance, tunnel culverts instead of masonry culverts. There, in estimating the work done, we have taken what appeared a fair value for the tunnels, so as to compare it with what was first planned. In some cases the work was increased or diminished by change of grade or location, which, by the agreement, was to add to or take from the bulk price, and we made the proper allowances for that before giving a comparison.

Where the work had been taken out of the contractor's hands, we took into account both the expenditure in finishing the work by the Government and the amount finally overpaid. Where some of the work done has been paid for as extra, or outside of the contract, we deducted that from the whole work done, in order to see how much was furnished in lieu only of the contract work. In short, we endeavored, for each case, to get information as circumstantial as possible, and we think it has been accurate enough to show broadly the relative value of work originally estimated as requisite, and that actually done instead of it.

The schedule prices applied by us, as aforesaid, could not give, on some of the items, a strictly correct idea of the value of the work done; but neither do they give for those items the value of the work undertaken. If the price ought to be increased for the work as done, it ought likewise to be increased for the same work as undertaken, and that would only widen the distance between the estimated and the executed work; but if every rate should be doubled, or trebled, or multiplied to any extent, the relative value of the work intended to be done, and that actually done, would remain the same.

On behalf of the contractors, who would be naturally desirous of showing the work done at as high a value as possible, it might be suggested that wherever the estimated quantities happened to be exceeded in some particular class for which the schedule rate was too low, then the proper course would be to apply to that class, on both sides of this account, such a higher rate as the evidence shows to be the true value; even that method, we find, would do no more than diminish (and in most cases but slightly) the percentage by which our schedule shows the intended work to have exceeded the executed work.

By whatever method we endeavor to make the comparison, the main result is the same—the executed work is decidedly less than what was originally expected to be done.

Returning now to the contents of the written agreement, clauses 4 and 9 read as if there was no limit to the changes which the engineer could order and still keep the work within the bulk price; but that would not be common sense, and contracts are not interpreted contrary to common sense. However strong the language of the agreement, there would be some difficulty in holding that there was no limit to the bounds within which a contractor could, for a stated price, be required to furnish a property more expensive to himself and more valuable to the country than the Government intended to acquire, and than he intended to supply when that price was agreed upon.

We do not say that a valid contract could not be made, by which the contractor could, at the direction of the engineer, be forced for his bulk price to supply work which, on the whole, would be somewhat more costly to him than that contemplated by the original design, for agreements expressly providing for such a result are not uncommon.

In other countries, contracts for building railways are made, in which it is plainly declared that the engineers are authorized to make such changes as they may deem expedient, the contractor to bear the whole cost, though it should exceed that of the first design. It is usual, however, to limit the loss to a stated percentage beyond the cost of the first design.

"Vose's Manual for Railroad Engineers," a work much used in the United States, gives a form of specification which is stated to be "prepared from the specifications used in the construction of some of our largest railroads." In that form 20 per cent. is given as the limit beyond the cost of the first design, up to which the contractor is to bear the whole cost of any new design.

We have had the opportunity of seeing a form of contract (with specification) recently entered into for the construction of a railway in the State of Michigan (the Jackson, Lansing and Saginaw extension) embodying similar terms, and, in almost the same language as that of "Vose's Manual," and in which 20 per cent. was adopted as the limit, up to which the contractor was to bear all increase of cost over that of the first design. We have also received evidence from experienced engineers that a similar system is practised in Europe; though the percentage of increased work is not, generally, so great there as in the case to which we have just referred.

In the form adopted for the Intercolonial Railway, a limit is not named, probably with the intention of allowing the engineer to go as far, in changing the design, at the expense of the contractor, as common sense and his judgment of what was fair would permit him; but whatever the intention, a question might arise, and in our opinion, especially in view of the language of clause 1, it would be open to argument, whether omitting to state a percentage up to which the contractor should bear the loss would not have the effect of bringing down the limit of his outlay to the cost of the first design as a whole.

Inasmuch, however, as we have, as already stated, found no case where the engineering changes of design have entailed on the contractor an outlay greater than that, it follows that we need not decide whether exceeding that limit would, under the form of these contracts, cast any liability on the Crown.

Where the comparative cost of the first and the later designs is understood to be a material element in the transaction, as it would be under such contracts as those

above mentioned, carefully prepared records would probably be made during the process of the work, with the object of showing the different quantities, values, &c., to be considered; but no such practice was followed in the case of the Intercolonial Railway. On the Government side, it was apparently taken for granted that under the terms of the contract there could be no extras; and on the contractors, that every change gave a claim for extra pay, irrespective of the value of the work as it was first planned.

We have, therefore, had to form our conclusions concerning the comparative value of the first and later designs, upon evidence less circumstantial and much more indirect than if accounts had been kept with a view to such a comparison as we have pointed out. The consequence is, that we are not able to state accurately the difference in the cost to the contractor between the original and the executed designs; but the main question, that is, whether the first or the last plan was the less expensive, has not been involved in doubt. On that we have had no difficulty in reaching a conclusion.

The changes directed by the engineers in the cases investigated by us have, in our judgment, been of such a character as to leave them unquestionably within the fair meaning of the contract, and covered by the bulk price, except in a comparatively few instances, where work was supplied which we have considered altogether independent of the contract, and which we have allowed to the claimant as falling within class No. 1, already alluded to.

The most common demand arising out of a change of design is for alleged improvement in the quality of masonry, by using Portland cement, or by making some of the smaller culverts of larger stones or of more finished work than required by the specifications for second-class masonry, of which they were at first intended to be built, or in some other way; but it was generally shown that the engineers had earnestly tried, and had succeeded in the endeavor, to diminish the whole outlay on masonry, so that a comparison of the value of the quantity first planned, either according to the tender rates or its actual cost, with that of the quantity actually built, showed gain to the claimant.

The contractors, then, having contended that they are entitled to each saving by change of design as one of the contingent profits of their bargain, and that every instance of extra cost from a voluntary change of design is to be paid for as an extra, we have been obliged to disagree with them, except, in so far as this: that if, by setting off all the savings against all the losses due to voluntary changes of design, there is a decrease of the whole expenditure, the contractor is, nevertheless, entitled to his bulk price without deduction (this is, of course, irrespective of changes in grade or location, which are specially provided for), but we have held that a contractor is not entitled to recover the increased cost due to any one or more of such changes where all of them, taken together, have resulted in a saving to him; and we have followed this principle throughout.

But though our conclusions on this subject have been, as we think, based upon uniform principles, we have, in some of the special reports, passed to the credit of a contractor an amount claimed for extra work, similar to that upon which we have at other times decided against one. But we have done so only where the Government had overpaid the claimant more than enough to cover the item; and we were careful to explain that it was solely to show that the balance must still be against him, even if his interpretation of the contract were conceded.

4. "Work beyond that originally designed and caused, not by change in grade or location, nor by any desire on the part of the Government or its officers to depart from the original plan, but because the physical features in the locality (being different from those anticipated) made a change unavoidable, and work was therefore done of a kind or a quantity different from that of the first plan."

Work of this kind has come under our notice principally in foundations for structures, and in excavations for the road bed. The complaint about foundations has generally been that they were deeper than was expected, but occasionally, either with or without an additional depth, it has been necessary to resort to an artificial founda-

tion or to some other expensive method of building the structure, which was not anticipated. There have been various complaints about excavation. Sometimes, where earth was expected rock was found, or shale or hard pan, any of them being more expensive to handle than ordinary earth. Sometimes borrow pits, relied on for the requiste material, were not found so near as was expected, whereby the length of the haul was increased. Sometimes, in particular localities the quantity of material moved was greater than that estimated for those places in the bill of works.

In several instances, where the features of the locality had required a treatment different from that originally intended, demands were made for the value of the new work as being more expensive than that first planned, but on investigation it turned out not to be so. In some particular places, however, the cost was actually increased by the development of difficulties not foreseen by the engineers, and, consequently, not especially provided for in calculating the outlay either by the Government or by contractors; and it is our duty to offer our opinion on the question, whether this increased cost creates a valid claim for an addition to the bulk price on which the contract is based?

This statement of the case almost suggests the answer, which we have held to be a good one, namely, that before the bargain the claimants were expressly notified, and at the bargain they expressly agreed that the bulk price would cover all requisite works, though they should include some which could not be and were not specifically provided for.

We have found that not only were plans, profiles, specifications and a bill of works exhibited to those who desired to see them, but attached to the specifications a printed form of the contract, as it was to be executed, was put into the hands of persons wishing to tender.

This form made it as clear as words could make it that the bulk price was to cover all the work necessary to complete the section of the railway to which it related; and each tender, after reciting that the plans, profiles, and the specifications had been seen, offered "to execute the contract, a form of which is printed at the end of the specifications, binding myself not to demand any extras of any kind whatever, for the sum of $, &c."

If the defence against demands for such work as this depended solely on the interpretation of the contract itself, we feel sure that every court of justice would declare it to be covered by the bulk price. We think, however, that the disallowance of such claims may be put on ground morally higher, than because the law is against them, namely, that the allowance of them would be contrary to the avowed intention of the parties. They mutually proposed to make, and then did make, a speculative bargain covering such contingencies. Courts have to decide according to principles applicable to all cases, and are sometimes constrained to give to documents a meaning which the losing party had no very good reason to expect. That cannot be said here, for besides the information contained, as aforesaid, in the printed draft of the contract, there were several paragraphs in the bill of works which, in a very marked and unmistakeable manner, put intending contractors on their guard as to the nature of the bargain about to be made; and particularly as to the uncertainty concerning the foundations for structures and concerning the material to be met with in excavation.

The following language is to be found in most of the bills of works, and in the others language to the same effect:

"The quantities herein given are ascertained from the best data obtained; they are, as far as known (approximately), accurate; but at the same time they are not warranted as accurate, and no claim of any kind will be allowed, though they may prove to be inaccurate. * * * * * * * * * * * Contractors must satisfy themselves on this, as well as on every point, as no addition or deduction will be made in the event of any excavation turning out more than, or different from what may be represented or supposed. * * * * The contractor is required to make every allowance which

he may deem necessary, to cover the risk of any of the quantities of work being increased in execution.

"A schedule of structures proposed for the passage of streams and general surface drainage across the line of railway is also furnished. The structures proposed are, from all information obtained, believed to be the most suitable; but should circumstances require any change in the number, position, waterway, or dimensions, the contract will provide that all changes shall be made by the contractor without any extra charge. This schedule gives the probable quantities in the structures now proposed, and the data upon which these quantities are ascertained; much, however, depends on additional information to be obtained with regard to the freshet discharge of streams, as well as the nature of foundations, and with respect to the latter, accurate information can only be had during the progress of the work."

After reading all the documents which led up to the bargain, and the contract itself, and after hearing all that has been urged before us by the different parties, the conclusion is irresistable that both parties entered into each transaction as a speculation—the contrrctor intending to take, and agreeing to take, upon himself the loss or gain, if any, which should be occasioned by the physical features of the country being different from what they were expected to be, and the Government promising to pay the bulk price, though the difference, if any, in such features should make the whole work less than was originally estimated to be requisite.

As a fact, the physical features of each section were such that a large saving in the work was generally found to be feasible, and was consequently made—sometimes by lessening the excavation, sometimes by omitting culverts and taking two or more streams through one opening, instead of through separate ones, as at first designed, and sometimes in other ways.

The nature of the bargain made these savings not chargeable to the contractor, for the same interpretation which gives him no extra price for the unexpected work which we are considering gives him the gain of these savings.

In the face of all the facts bearing on the question, we conclude that such work as we are now discussing does not increase the liability of the Crown beyond the bulk price named in the contract.

We must now notice an argument advanced before us on behalf of some of the claimants, namely, that Mr. Frank Shanly had been constituted an arbitrator between them and the Crown, and that if he made any written statement of his views on the liability of Her Majesty, in respect to any of the claims, it became a binding award, and that we ought to report according to that award. It was not made very clear to us why he was supposed to be clothed with this judicial authority, but the fact that he was at one time Chief Engineer of the railway was pointed out, and the allusion in the preamble of our commission, to an investigation of claims by him, was referred to as supporting the argument. It was urged that we should ask for his report, if there was any, on the claim, or claims in question, so that we might be guided by it.

We understood this contention to be based on the fact that, under the terms of the contract, the Chief Engineer, for the time being, has authority to decide definitely on some matters connected with the work; but we see nothing in this agreement or in the position of the Chief Engineer to give him any such power as is claimed for him in this argument. The opinion that he has some such right is probably derived from the following portion of clause 11, that is to say:—

"And it is further mutually agreed upon by the parties hereto, that cash payments equal to 85 per cent. of the value of the work done, approximately made up from returns of progress measurements, will be made monthly, on the certificate of the Engineer that the work for or on account of which the sum shall be certified, has been duly executed, and upon approval of such certificate by the Commissioners. On the completion of the whole work to the satisfaction of the engineer, a certificate to that effect will be given, but the final and closing certificate, including the 15 per cent. retained, will not be granted for a period of two months thereafter."

This impliedly provides that the contractor shall not be paid until after the engineer has certified that the work for which the payment is demanded has been done, and the courts have upheld that as a condition precedent to the liabilities of the Crown. That is a very different thing, however, from holding that the contract gives the engineer power to certify that the whole work, or any special work, has been done, and then to adjudicate on the amount which Her Majesty must pay for it. This clause makes the engineer, in some respects, a shield for the Crown against groundless demands by contractors; for he may withhold his certificate, and so ward off such attacks. His judgment on the physical features of the transaction is, in some respects, conclusive; but the contract gives him no jurisdiction over prices or value, or the extent of the liability consequent on the state of the works.

It was, doubtless, the practice of the authorities having charge over these matters, to obtain from engineers, and especially from the Chief Engineer, from time to time, statements known, not as "final certificates," but as "final estimates," which contained his views concerning the progress of the works, the completion of them, and generally, on the state of accounts between the Crown and the contractor; and this practice may have given rise to the view that such statements were the final certificates referred to in clause 11 of the contract, and, perhaps, to the further view that such a certificate became a binding judgment against the Crown. But these final estimates were not confined to the statement that the work originally designed had been done, or that it had been done with specified conditions or diminutions, which, probably, would have been as much information as was intended to be embodied in the final certificate referred to in clause 11 just quoted. On the contrary, they generally set out in all the different classes of work, the executed quantities, and rates were applied to those quantities invented by the engineers on such a basis as to reach the bulk price.

The the increase or diminutions of the work from changes of grade and location, if any, were valued, and the bulk price altered accordingly. If there was understood to be any other reason why the bulk price should be varied, as for instance, the omission of the wooden superstructure of bridges, that too was mentioned, and if payment had been made they were set out and a balance struck; in fact, the document professed to exhibit the state of the whole account according to the opinion of the engineer. In that shape they were, probably, very useful to the Commissioners, or the Minister of Railways; but they certainly dealt with subjects, concerning which the engineer's certificate was not, by the terms of the contract, made binging on the parties.

It seems clear to us, that under the agreement, the Chief Engineer is given no jurisdiction over values. His final certificate, alluded to in clause 11, establishes nothing more than that the work has been done; it was not required to state the values of any work, or even the quantity of that covered by the bulk price. Under that clause, we think, the duty required of the engineer was, to say whether the work was done; it was the duty of others to say whether any, and if so, how much, money became thereby payable. If, however, the bulk price was affected by change of quantity in any work, as it would be by an increase or diminution caused by a change of grade or location, then, inasmuch as other officials had, by the agreement, to name the amount by which the bulk price was to be thereby varied, the engineer might, properly enough, state the extent of that increase or decrease, so that they who were responsible for fixing the amount might have it as part of the groundwork for fixing their decision.

We cannot, therefore, agree with the claimants when they contend that Mr. Shanly, or any other Chief Engineer, was, by the agreement, for the time being, an arbitrator authorized to decide finally on the extent of the liability of the Crown.

The Commissioners or the Government, without affecting the rights of the contractor, or in any way contravening the spirit of the contract, might well ask the opinion of the Chief or any other engineer on matters that had come under his notice, or might direct him to obtain information on any other matters and report the result; and we have no hesitation in saying that this would not fix the liability according to

the views which he should express. And if the engineer has not, by virtue of the agreement, authority to arbitrate concerning the value of work covered by the contract, still less could he have any concerning extras—that is, work altogether outside the bargain.

The written agreement shows, not only by this absence of authority in the Chief Engineer, but also by an express provision, that a different tribunal, namely, the Board of Commissioners, was nominated to decide the rights of the parties; for, besides the reference in clause 4 to the right of the Commissioners to decide on any allowance for increased work, due to change of grade and location, the latter part of clause 2 declares as folows:—

"And the Commissioners shall be the sole judges of the work and material, and their decision on all questions in dispute, with regard to the works or materials, or as to the meaning or interpretation of the specification or the plans, or upon points not provided for or not sufficiently explained in the plans or specifications, is to be final and binding on all parties."

We must also refer to a contentionof some of the claimants, that before the completion of the work it became the policy and intention of the Commissioners and their engineers, and through them of the Government, to allow the contractors to reap the full advantage of the diminution of work caused by changes of grade or location, though the contract specially provided that the value of the work saved by such changes should be charged against the contractor, and they also contended that this policy of relief extended to waiving the right to charge contractors with the omission of the wooden superstructure of bridges, which, under an agreement made subsequent to the contract, was to be deducted from their bulk price; in other words, that all reductions should enure to the benefit of the contractors. The Counsel for one of the claimants alleged, "that it was the settled policy of the Commissioners throughout to allow the contractors fair remuneration for any work they actually did in excess of what was anticipated, as it was also their uniform theory and practice that deductions should not be made against the contractors owing to a reduction in quantities due to a change in grade or line." This puts the case for the claimant more strongly than the facts warrant, though there is no doubt that during the progress of the works some such policy concerning the diminution was foreshadowed by the Commissioners, and by the Chief Engineer, for it had become apparent to them that carrying out the respective contracts at the bulk prices would entail great loss upon many of the contractors. Individual Commissioners spoke of it at different times as a policy which they might adopt or not at their option, reserving to themselves the right of making, or not making, as they saw fit, a charge for these diminutions of work, according to the circumstances of each case, when the final settlement took place. It happened, however, that no more that four out of the twenty-three cases were finally settled by the Commissioners, and we have not attempted to learn whether any of them called for any specially favorable consideration towards the contractor.

At a sitting of the Privy Council, in May, 1871, Sir Hector (then Mr.) Langevin, had a conversation with Mr. Fleming, the Chief Engineer, the result of which was an official letter from the latter to the former on the 26th of May, from which the following is an extract. Of course the whole letter should be referred to, to see the full object and bearing of Mr. Fleming's remarks:

"There are several ways in which contractors may be assisted. I shall enumerate them:—

"1. The contract provides that 15 per cent. of the value of the work is to be retained in the hands of the Commissioners as the security of the performance of the contract. This percentage is altogether too heavy a reduction; it may be made merely nominal or wholly relinquished.

"2. Since the sections were placed under contract, more careful examination of the ground, especially on the rough sections, has enabled us, in many instances, to lessen the quantity of work to be done by changing slightly the location without in any way lowering the engineering features of the line. Wherever this appeared pos-

sible it has been done, and in several instances the quantities of work had been reduced very largely, in one case to the value of, perhaps, not less than $100,000. The contract provides that deductions are to be made from the contractors in all such cases; but the contractors may be allowed all the benefit arising from the saving in the work effected, and if the Government so decide, I will recommend that they receive all the benefit at once.

"3. A considerable saving in masonry has been effected by the substitution of iron for wooden bridges throughout the line; deductions are to be made from the contract sums of all masonry so saved, calculated at the contractor's schedule prices; but the contractors might now be allowed all the saving in masonry so effected, and it would be of material advantage to them.

"4. In many cases we have been enabled to form tunnels for the passage of streams instead of culverts, thus relieving the contractors of a certain quantity of masonry in each case. On some sections very important reductions in this heavy kind of work had been thus made, and I think the contractors should have the full benefit of them."

In 1873 the Select Standing Committee on Public Accounts made some enquiry into the expenditure on Section 5 of the Intercolonial Railway, and before them Mr. Brydges, one of the Railway Commissioners, said:

"Not long after the date at which this and other contracts were let, it became evident that the work was going to be seriously embarrassed if the contractors were not assisted, as far as possible, in the carrying out of the works."

He said, also, in the latter part of his answer to question 409:

"I considered, and I consider now, that the whole question was to be left open for decision at the end of the contract."

Mr. Fleming also gave evidence before the same Committee, and in his answers to the 14th and following questions, said, that "it was generally understood that the contractors should get the benefit of the reductions to help them to finish their contract."

Our special report in each case treats the liability of the Crown as not affected, strictly speaking, by any intention which existed in the minds of the Railway Commissioners while the works were in progress; and we have stated, as our principal finding what we thought to be the amount of the liability, after charging the contractors with the value of the wooden superstructure, if any was omitted from the work undertaken by him, and the diminution, if any, of the work due to change of grade or location.

By special instructions we are directed to state, also, the liability, as we think it would be, should the Crown waive the right to charge these diminutions, and in each special report we have done that.

We have also, for convenience of reference, appended hereto Schedule B, in which we give for the sixteen construction contracts investigated by us, a summary of the whole diminutions charged to the claimants, and the effect which waiving the right to charge them would have on the whole liability of the Crown, for it does not follow that withdrawing all the charges would increase the liability to the extent of this total amount. It happens that several of the claimants have already been overpaid more than has been charged for the diminutions. In those cases, withdrawing the charge would only decrease the overpayment without creating any liability.

The aggregate of the diminutions charged, as aforesaid, is $302,992, while giving all the contractors the benefit of those diminutions adds to the liability only $105,291, irrespective of interest.

It will be seen that the liability is increased only in seven cases; in two no diminutions were charged, and in the other seven the Government has long ago virtually waived the right to charge the diminutions by over paying the contractors larger amounts.

We have not endeavored to learn, actually, the cost of the respective works to the contractors; but the facts elicited by our enquiry show that, waiving the right to

charge any of those diminutions, and so giving partial effect to the policy of relief suggested by the Chief Engineer soon after the real nature of the work was understood, and subsequently held out by the Commissioners as a possibility, if not a probability, would still fall far short of paying for the whole construction the price that would have been inevitable had it been carried out as a Government work.

Some of the claimants have furnished us with particulars of expenses incurred by them in supporting their demands before Mr. Shanly and before us, with a request that we should report a liability to reimburse them. We cannot say that there is, strictly speaking, such a liability; but we suggest, for consideration, whether it would not be proper to treat the costs as following the event, and to add to each claim established such a sum for expenses as would follow the recovery of a similar amount in a court of justice.

There are several defences available to the Crown which would have ended our enquiry at the threshold of most of the cases if we had gone no further than to learn that the Government could successfully and legally resist the demand, but we have understood our commission as requiring us not to stop there. The defences alluded to are of different kinds—by statute, by agreement, and by prerogative; and if it was intended, as a rule, to set them up, the certainty with which some one or more of them would defeat almost every claim, even if taken at its full amount, would make it unnecessary to enquire carefully into the particulars of the demand. The issue, therefore, of our commission, gave us the impression that His Excellency the Governor General would use the defences in question, or any of them, if at all, only in such cases as he might, in his discretion, hereafter select. In that view we thought it safer to report our conclusions on the merits of each case, without regard to any of the said defences. The facts elicited might, at all events, help to show which claim, if any, ought to be met with one or more of such defences.

As before mentioned, most of the demands are for work claimed to be outside or independent of the contract. In many instances we have thought them covered by the contract; in some, however, they were not. In these the values of the work would, between man and man, be recoverable, whatever the amount of it might be, but the Statute under which this railway was constructed (31 Vic., cap. 13) has been construed as making a contract which involves an expense of over $10,000 invalid unless entered into with the sanction of the Governor in Council; and as these extras were furnished almost invariably, not under an Order in Council, but by direction of the Railway Commissioners, or the Chief Engineer, or his subordinates—generally the subordinates—it follows that when the value is over $10,000 the Crown would not be liable if the said interpretation is correct.

Section 16 of this Act enacts:

"The Commissioners shall build such railway by tender and contract after the plans and specifications therefor shall have been duly advertised, provided that no contract under this section involving an expense of $10,000 or upwards, shall be concluded by the commissioners until sanctioned by the Governor in Council.

In a case of E. A. Jones, in the Exchequer Court of Canada, Chief Justice Ritchie referred to this section, and gathered from it a declaration by the Legislature that the liability of the Crown, concerning the construction of this railway, is limited to transactions carried out strictly according to the letter of section 16. He says:

"It is obvious, then, that the engineers had no right to dispense with any of the provisions either of the law or the contract, or to make or substitute any contract in lieu thereof, or to involve the Crown in any liability in addition to or outside the contract, and that neither the engineer nor the Commissioners themselves could dispense with any of the provisions of the law. If this or other court undertook to dispense with the certificate of the engineer, the approval of the Commissioners and the sanction of the Governor in Council and adjudged to those suppliants $124,663.33 as due from the Crown to them as extras, outside of and beyond the written contract, without tender or contract, or any conditions or sureties for the protection of the public, and without sanction of the Government, it would be simply to set at naught

all the securities provided for the due performance of the contract and to abrogate all the checks and guards solemnly imposed by law for the public safety and security, and enable parties to do and obtain what Parliament has expressly forbidden to be done or had."

Whether on a fuller argument this section might be held to be no more than directory to the Commissioners, and so not affecting the rights of the claimants for work and materials furnished and accepted and used under a new bargain, is a question upon which we need offer no opinion since we have taken the course of reporting on the claims as if there were no such question.

Among the contract defences, to which we have not given effect, the one best known is that which in the Court of Exchequer has already been fatal to some of the contractors, the absence of the final certificate of the Chief Engineer, as required by Section 11.

Our Commission expressly states that the omission of this certificate was not to prevent our investigating any claim which had been defeated in a court solely on that ground, and though we are not distinctly told how to treat the omission when dealing with claims which have not been in court, we think the desire of the Government to ignore that defence is sufficiently plain to make it proper for us to report on the claims as fully as if it did not exist.

Another defence under the contract is the right of the Crown to set off against a claimant the amount of liquidated damages which in clause 3 he had promised to pay at the rate of $2,000 a week for the period between the completion of the contract and the time which had been named for it.

In more than one case presented to the Court of Exchequer on claims arising out of the construction of this railway, and on the generally prevailing form of contract, it has been held that if Her Majesty should demand the benefit of the promise contained in section 3, it would be the duty of the court to grant it.

A demand, therefore, by the Government for the amount due under this promise would, in almost every case, overwhelm the claimant so easily that it becomes simply an option with the Crown to pay or not to pay the amount otherwise due. We have thought, however, that we were called upon to enquire and to state what amount, if any, would be otherwise due.

Clause 4 provides that when the work is increased by changes of grade or location, the contractor shall be "entitled to such allowance (beyond the bulk price) as the Commissioners may deem reasonable, their decision being final in the matter,"

Clause 6 provides for a stoppage or suspension of the works at the will of the Commissioners, and that it should give no claim for damages "unless the Commissioners shall otherwise determine, and then only for such sums as they may think just and equitable."

It has been suggested that under this wording a contractor could not recover, on a claim for such an increase of work, or for such damages, unless the Commissioners had first exercised their judgment on the matter and had awarded in his favor, and that, therefore, when there had been no such decision we should, without going further into the question, report no liability.

We assume that the Government desires to have now such full information concerning all the material facts as would have enabled the Commissioners then, or would enable any other tribunal now, to decide a claim under either of these sections, and we have, consequently, stated the facts and our opinion on the liability, though there may have been no previous adjudication, either by the Commissioners or their statutory successor, the Minister of Railways.

The amounts to which these claimants are entitled have been so long overdue that the question of interest is to them a very serious one.

As a matter of strict right we think they could not recover interest in a court of justice. It has been added, however, to the petitioners demand, in some cases, in the Court of Exchequer in this country, and on claims similar to those which we have been investigating. In the Kenny case it was included in the judgment, but only from the commencement of the suit. In the Berlinquet case it was adjudged,

in 1877, that the suppliants were entitled to $5,850.00 "for interest upon and for the forbearance of large sums of money due, &c.," the amount being apparently allowed as damages, suffered because the progress estimates had been made out on what the learned judges decided to be an erroneous basis, whereby the contractor lost the use of moneys which he would have received if the estimates had been correct.

In England, in 1880, the question was raised whether the Crown was bound to pay interest on a sum received by it while in possession of some property to which petitioners proved themselves entitled, and Malins, V.C., held that it was recoverable. The case was taken to the Court of Appeal, where in 1881, his decision was reversed. The judgment, as reported, is so short that we insert it in full :

"*In re* GOSMAN, L.R., 17 Ch., Div. 771.

"Jessel, M.R.: 'There is no ground for charging the Crown with interest; interest is only payable by statute or by contract.' Bagally & Lush, J.J, concurred." The contract here referred to being, as we take it, a contract to pay interest.

Understanding that the practice of the Canadian Government is to pay interest on sums overdue for any considerable period, we have, in our special reports, mentioned the respective dates at which any money found due was, in our opinion, payable to this claimant, and in Schedule D hereto appended we show for all the claims on which we have reported any liability; first, the amount without interest, and then, as it would be, should interest be allowed, up to 1st April, 1884.

As far as we are able to judge, our conclusions have been the same as if we had been appointed independent arbitrators to settle between man and man, disputes, arising out of bargains and under circumstances, similar to those which we take to have been proved before us. We have construed the language of all documents pertaining to the different claims as much, according to the spirit, and as little, according to the letter, as we believed they would be construed in any court of justice, whether of law or equity; and we have assumed that some defences which exist would not be raised by the Crown.

We have, therefore, adopted the following as rules of decision in cases where there was a question to which any of them would apply, that is to say:—

1. Work which is entirely outside the contract, and which, without infringing the rights of either party, might have been let separately to any other person, as well as to the contractor, should be treated as independent of, rather than as an addition to, or an alteration from, the contract work, and should be paid for as an extra, at its real value.

2. The bulk price should be increased by the actual value of any increase of work caused by change of grade or location, without reference to the estimated quantity in the bill of works or the rate named in the schedule attached to the tender, and in the same way the bulk price should be decreased for any diminution of work from that cause.

3. A contractor is not entitled to any additional compensation because a voluntary change of design by the engineer, other than in grade or location, made the work in one place, or in one respect, more expensive than that originally designed, if in other places, and in other respects, such change of design made the work so much less expensive than that originally designed, as to counter-balance the said increase of cost; nor is he liable to be charged with any saving of expenditure by such a change of design.

4. A contractor is not entitled to additional compensation, because in the progress of the work, the physical features of a locality (being different from those expected) made a change of design, other than in grade or location, unavoidable, though the expense was thereby increased beyond that of the first design; nor is he liable to be charged with any saving where the locality required a less expensive design than that first planned.

5. The Chief Engineer is not, by the contract, made an arbitrator between the parties, so as to bind either of them by his conclusion on the value of contract work, or extra work, or the state of the accounts.

6. The contractor cannot, as a matter of right, recover from the Crown interest on money over due to him.

We have made a special report on each claim which we have investigated, in all fifty-four, and we set out in Schedule C a list of those claims, and (without interest) the respective amounts demanded, in all $4,146,207.06, and the amounts, if any, allowed, in all $148,705.62.

GEO. M. CLARK,
FRED. BROUGHTON.
D. E. BOULTON.

Hon. J. A. Chapleau, Secretary of State.
Ottawa, 26th March, 1884.

SCHEDULE A.

Showing for each section (1.) The bulk price diminished or undiminished as the case was, by changes of grade or location, and omission of bridge superstructure. (2.) The work expected to be done for it. (3.) The work actually done for it. And (4.) The net diminution in favor of the contractor.

Section.	Name of Contractor.	Bulk price diminished by deductions for grade and location, and omission of Bridge Superstructure.	Specified work expected to be done for the diminished price in addition to any covered by the item of "Omissions and Contingencies."	Work actually done for it exclusive of Extras.	Diminutions.
		$	$	$	$
3	Berlinquet & Co	451,340	434,433	266,892	167,541
4	Smith & Pitblado	435,125	406,511	389,924	16,587
5	Alex. McDonell & Co	513,400	499,741	455,226	44,515
6	Berlinquet & Co	412,946	429,506	295,820	133,686
7	E. A. Jones & Co	549,450	525,041	488,921	36,120
8	Duncan Macdonald	98,709	111,064	100,652	10,412
9	Bertrand & Co	341,480	339,394	234,044	105,350
10	Duncan Macdonald	393,237	514,702	497,293	17,409
11	Grant, Davis & Sutherland	61,713	72,013	65,055	6,958
12	Sumner & Somers	560,100	689,524	651,224	38,300
13	W. E. McDonald & Co	919,653	894,558	751,810	142,748
14	Neilson & McGaw	237,075	235,683	186,798	48,885
15	Bertrand & Co	317,440	299,279	147,401	151,878
17	S. P. Tuck	416,400	470,179	370,541	99,638
18	R. H. McGreevy	588,374	622,521	524,083	98,438
23	Grant & Sutherland	276,750	275,686	193,454	82,232
		6,573,193*	6,819,835	5,619,138	1,200,697

* In addition to this specified work, some not specified was, in almost every case, expected to be done, and was covered only by the item Omissions and Contingencies—for this the respective contractors named in their tender schedules sums or percentages, which in the aggregate amount to $277,422. We take no notice of this undefined work on either side of the account, which in our judgment has the effect of making the comparison more favourable to the executed work than it should strictly be.

SCHEDULE B.

SHOWING the net diminutions charged by us to claimants on changes of grade and location, and the wooden superstructure of bridges, and the increased liability if the right to make such charge be waived.

Section.	Claimant.	Amount. charged.	Remarks.	Increase of Liability.
		$		$
18	R. H. McGreevy	60,226	Overpaid $4,913	55,313
5	Alex. McDonell & Co.	19,600		19,600
14	Neilson & McGaw	8,400		8,400
7	E. A. Jones & Co.	8,300		8,300
10	Duncan Macdonald	6,763		6,763
11	Starr & DeWolf, assignees of Davis, Grant & Sutherland	5,578		5,578
4	Smith & Pitblado	3,200	Overpaid $1,863	1,337
12	Sumner & Somers	37,500	Overpaid a larger sum	
17	S. P. Tuck	23,600	do do	
3	Berlinquet & Co	11,100	do do	
6	do	44,000	do do	
9	Bertrand & Co	13,417	do do	
15	do	46,028	do do	
13	W. E. McDonald & Co	15,280	do do	
23	Starr & DeWolf, assignees of Davis, Grant & Sutherland	Nil.		
8	Duncan Macdonald	Nil.		
	Total	302,992	Total	105,291

SCHEDULE C.

SHOWING the Claims referred and (without interest) the amount demanded in each case, and the amount allowed, if any.

Name of Claimant.	Amount Claimed.	Amount allowed by Commissioners.	Under the terms of our Commission this is excluded from our enquiry for the reason below mentioned.
	$ cts.	$ cts.	
Alex. McDonell & Co.	91,479 20	17,161 00	
do	47,005 98	47,005 98	
D. Macdonald	60,098 61	....	
do	251,873 74	16,641 00	
do	54,430 72	14,896 31	
Bertrand & Co.	285,667 91	....	Finished by the Crown at a loss.
do	316,184 61	....	do do
Starr & DeWolf	62,874 64	3,077 08	
do	427,277 20	....	do do
Sumner & Somers	254,251 00	....	do do
W. E. McDonald	199,430 00	....	do do
Neilson & McGaw	54,767 00	18,138 00	
R. H. McGreevy	826,452 00	....	
McBean & Robinson	12,709 00	3,055 00	
J. G. Fraser	4,252 03	....	No privity of contract.
Donald Fraser	10,174 00	5,847 00	
M. Murphy	21,511 00	8,927 00	
McCarron & Cameron	27,712 00	....	
Smith & Pitbaldo	78,013 85	....	
E. A Jones	95,141 34	10,354 00	
S. P. Tuck	117,420 00	....	Finished by the Crown at a loss.
Berlinquet & Co.	363,980 71	....	do do
do	363,720 98	....	do do
Elliott, Grant & Co.	59,289 00	....	do do
H. B. Higginson	20,128 36	....	No privity of contract.
H. Clark	450 00	....	
Mrs. Barbarie	244 00	....	
G. C. Sutherland	4,318 08	....	do
F. Turgeon	2,225 00	1,500 00	
Wm. Muirhead	2,651 27	....	do
E. P. Ellis	51 50	....	do
A. Duval	104 55	....	do
W. S. Bateman	125 50	....	do
M. Cowhig	1,601 36	....	do
D. Begin	500 00	....	
J. M. Blaikie	1,799 53	1,126 73	
K. F. Burns	831 36	....	do
Alphonse Matte	1,985 19	297 00	
F. Meahan	810 00	....	do
J. Russell	20 00	20 00	
Sylvain & Lepage	8,644 00	....	
Finnihan & Hawk	184 50	....	do
J. D. Fraser	1,560 00	....	do
John Calligan	867 00	....	
A. Johnson & Co	506 60	506 60	
J. T. Smith	9,373 37	....	do
J. H. Patton	601 00	....	do
J. McDonald	Not named.	....	do
H. D. Murray	110 00	....	do
David Murray	100 00	....	do
Wm. Murray	300 00	....	do
E. Hicks	198 00	150 00	
Geo. Langille	150 00	....	do
Ed. Shea	50 40	....	do
	4,146,207 00	148,705 62	

N.B.—It wil be noticed that most of the cases excluded from our enquiry were on the grounds of "no privity of contract," which in itself is a complete answer to the claim. In each one mentioned as "finished by the Crown at a loss," the whole demand for extras was fully investigated, but those allowed by us did not reach the amount overpaid to the claimant on the contract work.

SCHEDULE D.

SHOWING the total liability, with and without interest.

Section.	Claimants.	Without Interest.	If Interest be added from the day the amount was due to the 1st April, 1884.
		$ cts.	$ cts.
18	R. H. McGreevy	55,313 00	84,075 00
5	Alex McDonell & Co	36,761 00	61,758 00
14	Neilson & McGaw	26,538 00	41,797 00
7	E. A. Jones & Co	18,654 00	30,032 00
10	Duncan Macdonald	23,407 00	36,397 00
4	Smith & Pitblado	1,337 00	2,279 00
11	Starr & DeWolf, assignees of Davis, Grant & Sutherland	8,655 00	14,453 00
	Donald Fraser & Co	5,847 00	9,472 00
	Martin Murphy	8,927 00	14,417 00
10, 16, 20	D. Macdonald	14,896 31	22,769 00
10	McBean & Robinson	3,055 00	5,483 00
	John Russell	20 00	36 00
	Alphonse Matte	297 00	479 00
	J. M. Blaikie	1,126 73	1,865 00
	F. Turgeon	1,500 00	2,242 00
	Alex. McDonell & Co	47,005 98	77,689 00
	Ebenezer Hicks	150 00	240 00
	A. Johnson & Co	506 60	817 00
		253,996 62	405,209 00
	If the right to charge the claimants with the diminutions of work be insisted on, the liability in the first seven cases would be as follows, instead of as above stated, and the total liability, without interest, would be reduced to $148,705.59, or, including interest, to $239,494.		
18	R. H. McGreevy	Nil.	Nil.
5	Alex. McDonell & Co	17,161 00	28,830 00
14	Neilson & McGaw	18,138 00	28,567 00
7	E. A. Jones & Co	10,354 00	16,669 00
10	Duncan Macdonald	16,644 00	25,881 00
4	Smith & Pitblado	Nil.	Nil.
11	Starr & DeWolf, assignees of Davis, Grant & Sutherland	3,077 00	5,138 00

SPECIAL REPORTS

(53n)

Of the Commissioners on the claims, viz., of Neilson & McGaw, Duncan Macdonald, Frederick Turgeon, Andrew Johnson & Co., Alexander McDonell & Co., Ebenezer Hicks, Donald Fraser & Co., McBean & Robinson, Martin Murphy, Starr & DeWolf, E. A. Jones & Co., J. M. Blaikie, John Russell, Alphonse Matte, R. H. McGreevy and Smith & Pitblado.

SPECIAL REPORT ON CLAIM OF NEILSON & MCGAW, $54,767.

This claim arises out of the construction of Section 14, which, by contract, dated 25th May, 1870, Messrs. Neilson & McGaw undertook to complete on or before 1st