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 09	61,758 00
14	Neilson & McGaw	26,538 00	41,797 00
7	E. A. Jones & Co	18,654 00	30,033 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 $148,705.89, 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

(53*n*)

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

July, 1872, for the bulk price of $245,475. The agreement contained the usual provision for increasing or diminishing that price, as the work might be increased or diminished by changes in grade or location, and also one, which in most cases was in a separate agreement, for deducting the price of the wooden superstructure of bridges at specified rates, should the Government decide to substitute iron.

At the end of 1872, most of the work was done; the remainder, including the Amqui bridge, was completed afterwards by Mr. McGaw alone, the partners having, between themselves, agreed upon a dissolution. He has at times claimed compensation for what he thus did, as if it could be dealt with irrespective of the contract with his firm; but the claim is made before us upon the basis of the original contract, as far as the whole work covered by it is concerned.

The wooden superstructure of the bridges was not supplied by these contractors, and the clause by which the bulk price was to be thereby reduced requires us to diminish that price to $237,075. The original design included four bridges of one span each: one of 100 feet, one of 80 feet, and two of 30 feet. The prices named in the schedule were as follows:—100 feet, $4,000; 80 feet, $3,200; 60 feet, $2,100; 40 feet, $1,200. There was no price for a 30 feet span. We assume the two 30 feet spans to be equivalent, at the least, to one of 40 feet, and on this basis we deduct, for superstructure, $8,400, leaving $237,075 as the price, under the contract, for the whole work, subject, of course, to further variation for increase or decrease by changes of grade or location.

Starting with this price, we take up, *seriatim*, the items in the claim submitted to us, the particulars of which are given in Schedule A, hereto attached:

Item 1.

4,400 yards earth to raise grade between Stations 994 and 1,009, a distance of 1,500 feet, on an average, 3 feet above original grade, at 25 cents per yard..... $1,100

The grade was raised near this locality to the average height alleged; the maximum was about 3 feet, and the average about 1½.

Evidence was offered to show the increased quantity to be as here stated, but the witness had not the figures with him, and depended principally upon his memory. He said, however, that his calculation was based on what the profiles showed, and that from them the correct quantity could be again ascertained as accurately as he could give it.

From the profiles, we have ascertained that between Stations 970 and 985, there was a raise of grade which increased the earth excavation by the quantity here claimed; and as no charge is made for this place, we assume it to be the one to which this item alludes.

On the principle explained in our general report, we allow, for increases or decreases caused in this way, what we consider their actual value, irrespective of the price named in the tender schedule; and for this increase we allow 25 cents per yard, which is $1,100 on Item 1. This brings up the whole price from $237,075 to $238,175.

Item 2.

One cattle-guard constructed above number in bill of works, occasioned by Government building new road across the railway, when finished, from Sandy Bay to Metapedia Road..... $400 00

Item 3.

One extra cattle-guard constructed above number in bill of works, occasioned by change of alignment at Sayabec..... $400 00

These cattle-guards were clearly made necessary by changes of location. The only question is as to their value. Mr. McGaw testified that they were worth as much as those of which he estimated the value when he was tendering, and that his

tender price was a fair one. He could not describe how $400 could be arrived at, but said his judgment now was based on the single fact that the schedule annexed to his tender named $400 per pair for cattle-guards.

As a fact, it named $100 a pair, and there is no reason to believe that these were worth any more. We allow, on Items 2 and 3, $200, which increases the whole price from $238,175 to $238,375.

Item 4.

Station 280 to 290:		
By earth-work dispensed with, 8,000 yards, at 25 cents, on original line	$2,000	
To earth-work executed on changed line, 19,824 yards at 25 cents		$4,956
Station 90 to 70:		
By earth-work dispensed with, 1,900 yards, at 25 cents, on original line	475	
To earth-work executed on changed line, 6,400 yards, at 25 cents		1,600
Station 62 to 48:		
By earth-work dispensed with, $1,550 yards, at 25 cents, on original line	387 50	
To earthwork executed on changed line, 4,260 yards, at 25 cents		1,065
Extra wages paid 150 men for 75 days, at 10 cents per day beyond what men could have been got for on original line		1,125
Extra cost of 40 horses for 75 days at 20 cents per day beyond what they could have been got for on original line		600
Stations 361, 87, 195:		
Making three roads for purposes of getting in materials on changed line		3,500
Station 225:		
To 250 yards rock executed on new line on rock on original line, at $1.30		325

There was an extensive change of alignment. About seven miles of the line was located farther inland than at first intended. This distance included the places for which the increases for earth and rock are here charged, and also the St. Pierre bridge, which is the subject of the next item.

This item, now under consideration, is made up by showing first the alleged quantity of these increases, and the value at a rate proper for the original location, and then unusual expenses which were peculiar to the new location.

The quantities may be taken as approximately correct. There is no conflicting evidence about them. They are established principally by the evidence of of Mr. Taylor, who had been an assistant engineer on this section in the Government employ. He measured these quantities afterwards at the instance of the claimants.

Mr. Carr, who had been resident engineer at the time of the change, gave evidence before Mr. Shanly. He spoke of some increases of work caused by the new location, and said that with these exceptions he considered the whole work about equal on the two lines. There is no reason to think that changes in grade or location caused any diminution of work in other places which could be set off against these increases. Mr. McGaw testified that neither in earth nor in rock was he saved work anywhere, that he knew of. It is true the final return of the whole section shows less work, both in earth and rock, than was stated in the bill of works; but the contractors cannot be charged with that decrease, because it does not appear to be due to change of grade or location.

We find, therefore, that the claimants are entitled to charge for the quantities mentioned in this item.

As to the value, there can be no doubt that the cost of the work was materially increased by the move that took place. The new alignment was, in some places, about three quarters of a mile away from the original location, and at the same time further from the river and the public highway. Four roads from this highway to the works had to be built for transportation of stone and other material for the bridges and culverts, and of supplies, &c., for the men. One was devoted almost exclusively to the St. Pierre bridge, and is charged in Item 5; the others are included in this item. They were principally corduroy roads; the available timber was very brittle, mainly dead burnt trees, which necessitated frequent repairs and renewals.

This work was not always done by separate gangs, and no accurate account of the cost was kept at the time; but several witnesses have given general evidence on the probable outlay. We consider the price charged for roads fairly supported. For the distance over which the change took place, the first location was on dry ground, a sort of ridge, and close to a travelled road—the Metapedia road; the new location was over low, wet ground. "It was wet all through there," and "brush of the heaviest kind."

The contractors found great difficulty in procuring laborers though they were supplied with rubber boots and paid extra wages—that is, more at this place than on other portions of the same section. One witness, Mr. Mothersill, a civil engineer interested in the contract on an adjoining section, testified that he continually got men who would not stay in this place for Neilson & McGaw; they had also to pay an extra price for horses, from 25 to 30 cents a day.

According to the evidence of Mr. McGaw, the charges for extra pay are based upon memoranda taken as the work was going on; and he gave us the approximate number of men and horses employed, and their time.

A substantial allowance ought to be made on the ground of increased cost to the contractors on the new location. On the whole, we think the claimants have made out a fair case for the sums mentioned in this item. We allow for:—

Net increase in earth-work, stations 280 to 290	$2,956 00
" " " 90 to 70	1,125 00
" " " 62 to 48	677 00
Extra wages of men	1,125 00
Extra pay of horses	600 00
Making and maintaining three roads	3,500 00
Rock excavated	325 00
In all	$10,308 00

This increases the whole price from $238,375 to $248,683.

Item 5.

St. Pierre River Bridge—

By masonry dispensed with for construction of bridge on original line, 320 yds. at $12	$3,840	
To masonry executed in construction of bridge on changed line, 770 yds. at $12		$9,240 00
To building road to get in material to build bridge occasioned by change of location		1,000 00
To extra cost of haulage, 770 yds. of stone, occasioned by change of location, at 35c		269 50
To extra cost of haulage, sand and lime		75 00
To cost cost of pumping, temporary dams, to enable abutments to be constructed, occasioned by extra depth of water on new location		700 00

This item is made up on the same method as the last, charging, first, the alleged increase in masonry at rates claimed to be fair (in fact they are the schedule rates) for the first location, and then adding the expenditure due to this particular place.

First, as to the quantity. The evidence is to the effect that 640 yards would have been required on the old location, and 770 yards were finished on this; that entitles the claimants to the difference (130 yards), but they claim 320 yards more, because they say the bill of works did not name enough for the old location.

That claim is certainly not based on a change of location, and we could not recognize any inaccuracy in the bill of works, however it occurred, as a reason for adding to the bulk price, without ignoring the principle laid down in that document as well as in the contract, namely, that the quantities were not guaranteed and that no extra price would be paid if they proved to be inaccurate. As a fact, these contractors built on the whole section very much less masonry than the bill of works indicated. We allow on this bridge, 130 yards at $12, equal to $1,560.

Much of what we said concerning roads in Item 4 applies to the charge of $1,000 in this item. We think the evidence justifies us in allowing that, as well as the charge for hauling, except $75 for the lime and sand, which was included in the contents of masonry and is covered by 770 yards.

This bridge was on the new location above mentioned, and about half a mile from its site, according to the first design. The new alignment was made at the suggestion of the resident engineer (Mr. Carr). In giving evidence on this item before Mr. Shanly, he said: "The new location was at a lower level, a longer interval, that would be flooded with high water than in the old one."

Mr. Taylor testified that there was a good deal of extra labor at the bridge on the new location; that "the foundations would not have been nearly so bad (judging) from the testing they had at the crossing on the old line. There was a larger body of water at the new alignment."

Mr. McGaw's evidence explains the particulars, showing that pumping, &c., was required on the new location, and as far as we can judge from all the information that had been obtained concerning it, would not have been necessary on the old one. On Item 5, we allow:—

For increased masonry	$1,560 00
" road	1,000 00
" hauling material	270 00
" pumping, &c	700 00
In all	$3,530 00

This increases the whole price from $243,683 to $252,213.

Item 6.

Crib-work for protection of embankment not required by original bill of works, 500 feet long, at $12 per foot. $1,000 00

This crib-work was near the St. Pierre bridge. A ditch by which a large swamp was drained into the river was continually giving away, and this cribbing was made to protect it. It was undoubtedly due to the change of location, and, on the evidence, the quantity and the rate charged are fairly established. We allow $1,000, which increases the whole price from $252,213 to $253,213.

Item 7.

Tobegote River Bridge—

Increase of 100 yards masonry over quantity shown in original bill of works (300 yds. being built instead of 200), at $12	$1,200 00
Earth-work executed over original quantities, caused by raise of grade, an average of 2 ft. for 1,200 ft., 1,860 cubic yds., at 25 cents	475 00

Crib-wharfing, 300 ft., to protect the embankment from the washing of the lake, not shown on bill of works, at $2	600 00

Some of the work charged for in this item was caused by raising the grade about 3 feet. For that portion the claimants are entitled to have their bulk price increased. The remainder was not due to a change, either of grade or location, and was part of the work undertaken at the lump sum named in the contract.

The bridge over the Tobegote was 3 feet higher than originally intended. The size of the masonry work at the top was not altered, but the increased height would make it of larger dimensions at the bottom, for which we allow the rate charged, making $575.

The rest of the increase in masonry over the quantity given in the bill of works was due to the foundations being deeper than was expected. That was one of the risks undertaken for the bulk price, and on the principle stated in our general report, as well as in several of our special reports, we do not consider the Crown liable to protect the contractor against it.

The earth-work included in this item was an increase due to the change of grade (about 3 feet at this point). The quantity and the rate are supported by sufficient evidence, and we allow the amount charged, $475.

The charge for crib-wharfing is on the ground that it is not mentioned in the bill of works. There was no quantity given there for crib-wharfing, but after stating the estimated quantity in earth, rock, masonry, and other principal classes, the bill of works contained the following notice:

"In addition to the quantities herein given the attention of contractors is drawn to other services mentioned underneath, for which all allowances must be embraced in the tender." Amongst those underneath and under the head "Contingencies," we find the following: "For all works of protection required for slopes of embankments and cuttings."

Inasmuch, therefore, as this crib-work was not the result of any change of grade or location, it cannot be allowed.

On Item 7, we allow altogether:

For masonry	$ 575 00
" earth-work	475 00
In all	$1,050 00

This raises the whole from $253,213 to $254,263.

Item 8.

Amqui River Bridge—

Piles not required on original bill of works, 2,500 lin. ft., at 30c	$ 750 00
Caps and platforms, 12,600 ft., B.M., at $15 per thousand, not shown on original bill of works	189 00
Concrete, 100 yds., at $7, above what is shown on the original bill of works	700 00
Additional masonry at Amqui bridge from the original bill of works, which showed 550 yds., and work done being 770 yds., at $12	2,400 00
Extra work caused to get foundation, over quantities shown on original bill of works, and extra expenses through having to purchase pumps, engines and extra labor	3,000 00
	$7,039 00

We think all this work was undertaken for the bulk price. We have several times, in reporting on other claims, and also in our general report, explained the principle on which we have concluded that the Crown is not liable to reimburse the contractor for such outlays as this, caused, not by change of grade or location, but because the quantities submitted in the bill of works were not accurate. The bargain was speculative; the claimants got, on this section, the advantage of unexpected decreases of work, which are not chargeable to them, and, according to the bargain, they must take with that advantage the disadvantage of finishing the Amqui bridge at a lower foundation than was expected.

But irrespective of the terms of the contract, there are other circumstances which, on this charge, would put the claimants out of any court.

The principal portion of this item is for work and material supplied, because an artificial foundation was resorted to instead of the natural one contemplated by the original design.

Mr. McGaw was very positive, in his evidence before us, that he had never been informed that he might adopt the new design, or follow the old one, at his option, on the understanding that if he adopted the new one he should make no charge on account of it.

The following letter was put into his hands:—

"1st May, 1874.

"DEAR SIR,—You can proceed with the foundations of the Amqui bridge, on Section No. 14 of the Intercolonial Railway, at any time, upon the original design, or if you consider it to your advantage you will be permitted to introduce a pile foundation, as per plan furnished, it being quite understood that nothing extra will be allowed on the pile system of founding.

"I am, yours truly,

"COLLINGWOOD SCHREIBER.

"ALEX. MCGAW, Esq.,

"P. S.—The piles on one side will probable be about 12 feet long, and on the other side 22 feet.—C. S."

On 5th May, 1874, the receipt of this letter was acknowledged by Mr. Stewart, his book-keeper.

We allow nothing on Item 8.

Item 9.

Additional earth-work required to make up bank at intersection (and on Section 17, outside of contract) and occasioned by change of grade, 2,500 yards at 25 cents $625 00

This was work outside the contract. After that had been finished, it was discovered that the grade of this and the adjoining section did not coincide: and this was ordered upon the understanding that it was not covered by the bulk price. The evidence supports the charge as to quantity and price. We allow $625, which brings the whole price from $254,263 to $254,888.

Item 10.

Clearing out ditches after the road was accepted by Mr. Hazlewood, District Engineer..... $500 00

This section was not formally taken off the hands of Messrs. Neilson & McGaw, as completed under contract, until after Amqui bridge was built; but we gather from the evidence, that before that was done Mr. Hazlewood went over the works and said they were then up to the requirements, except in some specified places, the Amqui bridge amongst them. In our judgment this did not relieve the contractors from their undertaking, to deliver over the works in good order when the whole

were completed. The last clause of the bill of works give notice that the bulk price was to cover "upholding and maintaining the whole of the works until their final acceptance at the close of the contract."

We allow nothing on Item 10.

Item 11.

Rock ditching in cuts after line was accepted by Mr. Hazlewood, not shown in bill of works, 5,000 feet at 50 cents..... $2,500 00

As just mentioned, the evidence does not show that the line was formally accepted by Mr. Hazlewood as completed under the contract, but it supports the opinion that he was willing to relieve the contractors from making the ditches through the rock cuttings, according to their specification and contract; and they left them in a shape that satisfied him at the time. Afterwards, however, and before the whole work was finished, his superior officer insisted on the ditches being made as originally intended. It appears that putting them in the proper shape then cost, per yard, about twice as much as if it had been done before the contractors left them in the first instance. The whole outlay was about $2,500, and, under the circumstances, we think the extra cost, that is, half the outlay, ought to be allowed. We allow $1,250, which increases the whole price from $254,888 to $256,138.

Item 12.

First-class masonry built instead of second class, as per specification (first-class being at $12 per yard and second-class at $9), 5,000 yds., at $3, being excess in cost $15,000 00

The bill of works gave for Section 14, 1,500 yards of first-class, and 5,220 yards of second class masonry, in all 6,720 yards. All that was built was finally estimated at 1,834 yards, first-class, and 2,688 yards, second-class, in all 4,522 yards, so that the quantity, at all events, is much exaggerated in this demand. Mr. McGaw, in his evidence, alleged that the whole masonry was not substantially diminished by changes of design, and this led us to procure a new estimate on the subject.

We give, in Schedule B, the result of a fresh measurement of the whole masonry, made in October, 1883, showing the total to be about 4,458 yards, or a saving of 2,262 yards—one-third of that originally designed.

Compensation for improvement is, of course, claimed only on that which was intended to be inferior—that is, the minor structure, designed at first to be of second-class masonry. Those structures contained, according to the evidence, about 3,000 yards, instead of 5,000 yards, as here stated.

According to the original design, all the bridge work was to be of first class; and as bridge work was increased from causes other than changes of grade and location, it follows that the first-class masonry was increased to some extent, at all events, without thereby entitling the contractors to extra pay.

The minor structures (culverts) were designed at first to be of second-class masonry, except in the arches and other specified places. The claim in this item is based, as aforesaid, upon improving the class of masonry in those minor structures.

Upon the whole evidence, we think a considerable portion of this work was made at greater expense than the specification called for, but it was not made equal to first-class. One of the claimant's witnesses described it as about half way between first and second-class.

The difference in value between those classes was stated in the tender schedule at $3 per yard, so that if the claimants were allowed $1.50 per yard, that is half the said difference, on all the masonry that could have been improved beyond the original design, they could not get more than about $4,500.

Whether they are entitled to anything, depends on the proper interpretation of clause 4 of the contract, which is as follows:—

"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 line of location, in which case the contractors shall be subject to such deductions for any diminutions 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."

These contractors, like all others who have spoken to this question before us, contend that whenever any particular piece of work was made more expensive to them by a change of plan, then the increased cost should be borne by the Crown, no matter how much was by change of plan saved to them in other places, either in the same or other classes of work.

On the Crown side it is argued that no matter how much the cost is so increased, the contractor must by the terms of the bargain, bear it without relief or reimbursement from the Government.

We feel satisfied that this contention of the contractors is not sound or reasonable. Courts of justice construe contracts so as to give effect, if possible, to every part of them; but to accede to the contractors' proposition, would be treating the language of this clause as idle words, and it would also be inconsistent with the spirit as well as with the letter of the bargain.

We have no hesitation in rejecting the interpretation proposed by the contractors, but we are not prepared to say that the very letter of the clause would be followed by courts of justice, in view of other parts of the document as well as of the surrounding circumstances and of common sense, which is sometimes appealed to, to throw light upon the intentions of parties.

We feel that there is some limit to the changes which engineers could call for within the bulk price. We cannot say, however, that we have no doubt where that limit is, and we do not wish to assume the responsibility of describing it in any instance more closely than is necessary for the decision of the particular case under consideration.

We refer to the question at greater length in our general report.

In this case the contractors offered and agreed, for the bulk price, to build, amongst other things, all the structures of masonry mentioned in the bill of works. The quantities given were—

1st class	1,500 yards.
2nd class	5,220 "

And they intimated that they had valued the work at $12 per yard for first-class, and $9 per yard for second-class.

According to these figures, they undertook masonry worth, in the aggregate, $64,980.

There is no evidence to show that the works originally designed were worth less than this sum. On the contrary, the claimants have proved that some of the foundations were deeper, and required more masonry than was expected. Such contingencies were within the bulk price and, therefore, increased the quantity undertaken by the claimant. But assuming it to be worth no more than $64,980, the evidence shows that these claimants were, by the changes of design, required to do only what would amount to $54,288, at the prices asked by them.

In February, 1874, just before Mr. McGaw undertook to complete the section, and when there was no masonry to speak of left unfinished, except the Amqui bridge, Mr. Hazlewood returned an official estimate of all the masonry done and to be done on the section. It was 1,800 yards of first-class and 2,688 of second-class, in all 4,488 yards. That estimate included 716 yards of first-class for the Amqui bridge. The

claimants, however, say that they did at this place 750 yards, or thirty-six more. This would make the total 4,524 yards; and assuming that the contractors made it all equal to first-class masonry, at their price, $12 a yard, their whole case would amount to this: that instead of calling upon them to do, 6,720 yards, worth $64,980, which the engineers could clearly have done within the bulk price, they required them to build 4,524 yards, worth $54,288.

We do not hesitate to say that the engineers might direct such a change as this, without giving the contractors a claim to an increased amount. We allow nothing on Item 12.

Item 13.

Extra work in foundation of culvert at Cedar Hall, 1,000 ft. timber, at 30 c. ($300), and extra work and pumping ($100), in all.....	$400 00

This charge is not based upon a change of grade or location. The evidence in support of it goes to show that the claimants were ordered to build one culvert at Cedar Hall, which, by diverting a stream, was made to answer the purpose of two, intended by the first plan, and that the foundation was more expensive than was to be expected from the information given by the bill of works; but that information was given with the express notice that its correctness was not guaranteed. It is not attempted to prove that this culvert cost more than the two would have cost, had the first design been carried out.

We allow nothing on Item 13.

The whole price to which the claimants are entitled, including extras, is, therefore:

According to our judgment	$256,138
On which has been paid	238,000
Leaving a balance due, of . .	$18,138

This work was finished in August, 1874, Mr. Neilson, one of the contractors, is dead, and Mr. McGaw now makes the claim as his surviving partner.

In Schedule C we show the allowances made by us and the effect of them on the account with the contractors.

In our judgment the Crown was, on 1st September, 1874, liable to pay Messrs. Neilson & McGaw, for works on Section 14, the sum of $18,138.

GEO. M. CLARK.
FREDERICK BROUGHTON.
D. E. BOULTON.

Hon. J. A. Chapleau, Secretary of State.
Ottawa, 7th March, 1884.

P.S.—Since the above was signed we have been instructed to report also the liability as it would be should the Government waive the right to charge for the diminution of work caused by the omission of the wooden bridge superstructure.

In this case the liability would be thereby increased from $18,138 to $26,538.

GEO. M. CLARK.
D. E. BOULTON.

Ottawa, 20th March, 1884.

SCHEDULE A.

INTERCOLONIAL RAILWAY—NEILSON & MCGAW, Contractors.

Details of Claim for Extras on Section 14.

Station.		$ cts.	$ cts.
	To Contract price		245,475 00
	Item 1.		
994 to 1009	To 4,400 yards of earth required to raise grade for a distance of 1,500 feet, on an average 3 feet above original grade, at 25c. per yard		1,100 00
	Item 2.		
1054	To one cattle-guard constructed above number in original Bill of Works, occasioned by Government building new road across the railway when finished, such road being from Sandy Bay to Metapedia Road		400 00
	Item 3.		
	To one extra cattle-guard constructed above number in original Bill of Works, occasioned by change of alignment from original line laid down to be constructed		400 00
	Item 4.		
280 to 290	By earth-work dispensed with, 8,000 yards, at 25c., on original line	2,000 00	
	To earth-work executed on changed line, 19,824 yards (owing to change of alignment), at 25c.		4,956 00
90 to 70	By 1,900 yards earth-work dispensed with (owing to change of alignment), at 25c.	475 00	
	To 6,400 yards earth-work executed on changed line, at 25c.		1,600 00
62 to 48	By 1,550 yards earth-work dispensed with (owing to change of alignment), at 25c.	387 50	
	To 4,260 yards executed on changed line, at 25c.		1,065 00
	To extra wages paid 150 men for 75 days, at 10c. per day beyond what men could have been got to work for on original line, as the changed line was wet and distant from the Metapedia Road		1,125 00
361, 87, 195	To extra cost of 40 horses for 75 days, at 20c. per day beyond what they could have been got to work for on original alignment, owing to the changed line being distant from the road, and wet and difficult to haul in		600 00
	To making three roads for purposes of getting in material to changed line		3,500 00
225	To 250 yards of rock-work executed on changed line (no rock being on original line), at $1.30		325 00
	ST. PIERRE RIVER BRIDGE.		
	Item 5.		
301*e*	By masonry dispensed with for construction of bridge on original line, 320 yards, at $12	3,840 00	
	To masonry executed in construction of bridge on changed line, 770 yards, at $12		9,240 00
	To building road to get in material to build bridge occasioned by change of alignment		1,000 00
	To extra cost of hauling 770 yards of stone, occasioned by change of alignment, at 35c.		269 50
	To extra cost of hauling sand and lime		75 00
	To cost of pumping temporary dams, &c., to enable abutments to be constructed, occasioned by extra depth of water beyond what would have been at original line		700 00
	Item 6.		
280	To crib-work for protection of embankment, not required by original Bill of Works, 500 feet long, at $2 per foot		1,000 00

SCHEDULE A—*Continued.*

Station.		$ cts.	$ cts.
	TOBEGOTE RIVER BRIDGE.		
	Item 7.		
	To increase of 100 yards masonry over quantity shown in original Bill of Works (300 yards having been built, instead of 200 yards, as shown), at $12		1,200 00
294 to 308	To earth-work executed over original quantities, occasioned by raise of grade, an average of 2 feet for 1,200 feet, 1,860 cubic yards, at 25c		475 00
	To crib-wharfing, 300 feet, in order to protect the embankment from the washing of the lake, not shown in the original Bill of Works, at $2 per foot		600 00
	RIVER AMQUI BRIDGE.		
	Item 8.		
490	To piles not required in original Bill of Works, 2,500 lineal feet, at 30c		750 00
	To caps and platforms, 12,600 feet, B.M., at $15 per 1,000 feet (not shown in original Bill of Works)		189 00
	To concrete, 100 cubic yards, at $7 (above that shown in original Bill of Works)		700 00
	To additional masonry at Amqui Bridge, from original Bill of Works (original Bill of Works showing 550 yards, and work done being 750 cubic yards), at $12		2,400 00
	To extra work occasioned to get foundation at Amqui Bridge, over quantities shown in original Bill of Works, and extra expenses through necessity of purchasing engines and pumps, and extra labor		3,000 00
	Item 9.		
540	To additional earth-work required to make up bank at intersection (and on Section 17 outside of contract, and occasioned by change of grade), 2,500 cubic yards, at 25c		625 00
	Item 10.		
	To clearing out ditches after road accepted by Mr. Hazlewood, District Engineer		500 00
	Item 11.		
	To rock ditching in cuts after line accepted by Mr. Hazlewood, not shown in Bill of Works, 5,000 lineal feet, at 50c		2,500 00
	Item 12.		
	To first-class masonry built instead of second-class, as per specification (first-class being at $12 per yard, and second-class at $9), 5,000 yards, at $3, being excess of cost of second-class		15,000 00
	Item 13.		
218*e*	To extra work in foundation of culvert at Cedar Hall, 1,000 feet timber, at 30c. ($300), and extra work and pumping, $100		400 00
		6,702 50	
	By amount received from Government	238,000 00	
		244,702 50	299,469 50
	Less		224,702 50
	Amount still due		54,767 00

SCHEDULE B

SHOWING Approximately Quantities of Masonry in Culverts and Bridges on Section 14, Intercolonial Railway, measured by W. B. Mackenzie, 14th and 15th October, 1883.

NOTE.—For the following quantities, the data, viz., thickness of walls, depth of foundation and design (other than appearing on the surface) has been assumed. The standard Intercolonial Railway lithographed drawings of culverts, &c., were used, however, as far as they seemed to apply.

Mile Post.	Length.	Character of Structure.	Lime and Cement Masonry.	Dry Masonry.
	Feet.		Cubic yards.	Cubic yards.
107 × 403	48	2 × 2 box culvert	52·33	52·33
107 × 1020	50½	2 × 2½ do	.....	59·69
107 × 1955	75	2½ × 3 do	94·26	
107 × 2167½	79	2 × 2 do	.....	82·18
107 × 3315	37	2¾ × 3 do	51·41	
107 × 4165	47	1¾ × 2 do	.....	50·09
107 × 4505	29	1¾ × 2 do	.....	33·23
107 × 4887½	21½	1 × 1½ do	.....	21·50
108 × 382½	38½	1 × 1½ do	.....	34·60
108 × 2125	31	1 × 1¼ do	.....	28·91
108 × 4335	18½	7½ feet beam culvert	55·82	
109 × 425	26	2½ × 2¾ box culvert	.....	35·73
109 × 1827½	19	18½ feet beam culvert	56·17	
109 × 2295	23½	2 × 2 box culvert	.....	28·50
109 × 2677½	24	2 × 2¾ do	.....	34·51
109 × 3400	34	2¼ × 2½ do	.....	42·98
110 × 765	.....	Plate girder bridge	96·32	
110 × 2082½	32	4½ × 1¾ box culvert	52·47	
111 × 255	18½	7½ feet beam culvert	54·52	
111 × 3527½	20	8½ do do	58·26	
112 × 1275	.....	Plate girder bridge	163·50	
113 × 1955	.....	Lattice bridge	477 37	
114 × 467½	19	7½ feet beam culvert	86·65	
114 × 3867½	31	4 × 5½ box culvert	61·57	
115 × 1402½	29½	2½ × 2½ do	38·14	
115 × 4037	27½	4 × 4 do	48·15	
116 × 255	23½	3 × 3 do	35·66	
116 × 2125	18	7 feet beam culvert	54·92	
117 × 2167½	.....	Plate girder bridge	136·81	
117 × 4122½	18½	11 feet beam culvert	110·18	
118 × 892½	18¼	5½ do	54·74	
118 × 2932½	32	2 × 2 box culvert	.....	36·92
119 × 637½	18½	7 feet beam do	80·16	
119 × 2932½	18¼	14 do do	111·84	
119 × 3995	36	2½ × 3 box do	49·47	
119 × 4845	18½	11½ feet beam culvert	56·00	
120 × 2252½	33	3 × 3 box culvert	47·28	
120 × 3867½	19	7½ feet beam culvert	80·16	
121 × 467½	42	2½ × 2¾ box culvert	54·50	
121 × 977½	18½	6¾ feet beam culvert	39·00	
121 × 1955	47	2½ × 2½ box culvert	56·94	
121 × 3825	41	2½ × 2¾ do	52·36	
121 × 514½	33	3 × 3 do	47·28	
122 × 1785	60	3 × 3 do	80·28	
123 × 212½	47½	3½ × 5½ do	90·28	
123 × 1785	33	2½ × 2½ do	42·58	
123 × 3017½	35	3 × 3 do	53·39	
124 × 977½	19	17¾ feet beam culvert	80·16	
124 × 3012½	.....	Plate girder bridge	209·14	
125 × 1997½	18½	7½ feet beam culvert	55·39	
126 × 467½	41	2½ × 2¾ box culvert	53·36	
126 × 1232½	24	2½ × 2½ do	.....	32·75
126 × 2507½	34	2½ × 2½ do	43·68	
126 × 3442½	34	3 × 3 do	48·50	

SCHEDULE B—*Concluded.*

Mile Post.	Length.	Character of Structure.	Lime and Cement Masonry.	Dry Masonry.
	Feet.		Cubic yards.	Cubic yards.
122 × 255	24	3 × 3 feet box culvert	36·28	
122 × 3570	18½	8½ feet beam culvert	54·41	
128 × 1020	100	Lattice girder span, Amqui Bridge	471·71	
128 × 2975	31	3 × 3 box culvert	44·83	
129	46	2½ × 2½ do	59·05	
129 × 858	.....	South end of Section 14		
		Total cubic yards	3,884·92	573·92

SCHEDULE C.

Showing the allowances made by us and effect of them on the account with the contractors:

Contract Sum	$245,475
Item:	
1. Earth to raise grade, 4,400 yds., at 25c	1,100
2 and 3. Two cattle-guards, at $100	200
4. Earth-work on changed line	10,308
5. Extra masonry, &c., St. Pierre bridge	3,530
6. Crib-work to embankment	1,100
7. Extra masonry, &c., on Tobegote bridge	1,050
9. Earth-work at intersection with No. 17	625
11. Rock ditching in cuts	1,250
	$264,538
Less bridge superstructure	8,400
	$256,138
Less payments made, as per particulars	238,000
Balance due	$18,138

COPY OF SPECIAL REPORT ON CLAIM OF MR. DUNCAN MACDONALD, $366,403.

This arises out of three separate transactions, on which the contractor claims the following amounts:—

1. On construction, Section 8	$ 60,098 61
2. " " " 10	251,873 74
3. " track-laying and ballasting, Sections 10, 16 and 20	54,430 72
	$366,403 07

We take them up in this order:—

SECTION 8.

Mr. Macdonald, by a contract in the usual form, dated 1st November, 1869, undertook to construct this section, and to finish it on or before 1st July, 1871, for the bulk price of $100,000, which he has received in full. His claim concerning Section 8 is entirely for extras, as set out in Schedule A, page 67. We deal with the items of it *seriatim*, and find that the Crown is not liable on any of them.

Item 1.

200 ft. of fencing, at $9 per 100 ft..... $18 00

The fencing done was nearly this much in excess of the quantity named in the bill of works, but by the bargain the quantity to be covered by the bulk price was not in any class of work confined to that named in the bill of works. On the contrary, the agreement was that no extra pay would be given, though such quantities should be exceeded.

Item 2.

Earth in excess of bill of works, 7,550 yds., at 25c..... $1,887 50

This demand, as it is shaped, is answered by our remarks in Item 1, for it does not allege that the excess was due to change of grade or location, whereby alone the bulk price could, under the contract, be increased. It is described here, and in Mr. Macdonald's evidence, as the alleged excess from all causes over the quantity mentioned in the bill of works. He testified, however, that in some places change of grade did lead to increased work.

The contractor employed Mr. Blackie, an engineer, to take measurement over Section 8, for the purpose of making up this claim, but in his instruction to that gentleman, he ignored all diminutions. No evidence was offered on the part of the contractor to show whether changes of grade and location caused, on the whole, an increase or a saving of work. We have, however, a statement of 1st of February, 1875, prepared by Mr. Schreiber, with the assistance of Mr. Hazlewood, which shows all such savings and increases, amongst them 8,450 yards of increase in earth excavation. This, however, does not help the contractor, for taking both decreases and increases, the balance is $1,291 against him.

The items are as follows :—

Diminutions.

Earth excavation, 5,600 yds. at 16c.....		$ 896 00
Rock " 2,400 yds. at 80c.....		1,920 00
Masonry, 3 yds. at $8		24 00
Paving, 1½ yds. at $2.....		3 00
In all.....		$2,843 00

Increases.

Earth excavation, 8,540 yds. at 16c.....	$1,352 00	
Masonry, 25 yds. at $8.....	200 00	
		1,552 00
Net diminutions.....		$1,291 00

Mr. Macdonald was chargeable with this sum under the terms of his contract, but he admits, in his particulars, that he has received the bulk price ($100,000) without any deduction, and the Government having paid him in full, without making the charge, it is not necessary further to allude to it.

Item 3.

To earth and haul to cover peat embankment, 5,260 yds. at 15c..... $789 00

This charge is based entirely on extra haul. The evidence of the claimant shows that the "work was done in order to protect the embankment from the immediate danger caused by the fires in the neighborhood."

The material close at hand was peat; and the safer material, sand, was got only by going farther away.

The resident engineer gave another reason for the use of sand, namely, that the contractor preferred to haul it rather than to work in the wet bog next the line; but assuming the reason given by the contractor to be the true one, still the use of sand was for his own benefit, because the bulk price, as pointed out in the bill of works, was to cover "completing, upholding, and maintaining the whole of the works until their final acceptance, and the close of the contract." And his contract expressly stated (in clause 2) that "the contractor shall alone suffer loss * * * from, and shall run all risks of accidents or damages, from whatever cause they may arise, until the completion of the contract."

Using sand, then, as was done, instead of the inflammable material on the spot, was but a prudent act on his part, and whether it was more expensive or not than other available material, it certainly did not increase the liability of the Government.

The following is a report to Mr. Schreiber, concerning the work, from Mr. Hazlewood, the resident engineer (now deceased), dated 29th January, 1875:

"DEAR SIR,—Duncan Macdonald's agent, on Section 8, represented to me that owing to the wet nature of the peat bog on part of the section, and difficulty of finishing the bank with stuff from the side ditches, he would prefer borrowing from sand hills near the line, and finishing the bank up to grade by hauling it on by horses. I allowed him to do this, but I gave him no order to do it; he did it simply to suit himself."

Item 4.

To extra costs of cattle-guards, masonry instead of timber, 130 yds., at $12..... $1,560 00

The evidence before us on this item, by the claimant and his foreman, were so vague as to be quite useless, if not misleading. They did not seem to know what kind of cattle-guards had been originally designed for the places where these were put. The production of the original plans and profiles showed that they had done only what had been laid down from the beginning as part of the work.

Item 5.

Masonry, made first class, 3,441 yds., at $9..... $30,969 00

The bill of works for this section mentioned the total masonry at 4,700 yards, and gave in the schedule of structures, the respective sizes of those expected to be built. The specifications pointed out the different sizes for which the different classes would be required. These documents, taken together, showed that of the whole quantity (4,700 yards) 1,920 yards would be first, and 2,780 second-class. As a fact, the whole quantity built was 3,571 yards The contention of the claimant is that a better class of work was put into the culverts than was requisite under the contract; but he admits that "in looking over the profiles of the work, when the drawings were not ready, he was under the impression that ordinary box culverts would suit the purpose, and it was on that he based his prices."

This contract was taken in ignorance of the features of the country, and the claimant stated that when tendering for the work he expected to find suitable stone on the section. In this he was disappointed, and it had to be fetched from a distance, at considerable expense. Then it became evident that it was not of a kind to permit of hammer dressing, which would have satisfied the specifications of second-

class masonry, but had to be dressed by chisel, and this, no doubt, made the work, in some cases, smoother than that which would have answered the contract.

This contractor seeks, as several others do, to throw upon the Government the unexpected cost which he was put to in furnishing masonry of any kind. He does not confine himself to the difference in cost to himself, if there was any, between that which he was bound to provide and that which he did provide, but if any change in the preparation or construction has taken place, and sometimes without it, he endeavors to make the Government liable for the value of the whole, as finished, less his tender rate for what he had undertaken to give. This is palpably unfair. Suppose, for illustration, that a contractor names in his tender $8 for first-class and $6 for second-class (as this one did) and that local difficulties make it cost him $12 for first-class and $9 for second-class, he could not, by putting in the second-class structures additional work worth $1 a yard, become entitled to receive the whole cost of this to him (*i. e.* $9 + $1 = $10) less $6 a yard. If he did, he would be getting $4 a yard, simply because he had laid out $1 a yard.

In deciding on his right, even under the interpretation of the contract, as generally urged by contractors, it would be necessary to learn first, the cost at which he could have complied with his undertaking, and then the value of the improvement, if any, which was supplied at the instance of the Government. This is speaking of a single structure, but if changes should take place in two structures, making one more expensive and the other less so, he could not be proverly allowed the improvement in the one without setting off the saving in the other, and so on with any larger number.

In other words, a change of design in the masonry could give him no claim unless, at the least, the masonry of the section, as a whole, became thereby more expensive to him than it otherwise would have been. By this test Mr. Macdonald has no case in this item.

The engineer required him to build only 3,572 yards instead of 4,700 yards, as stated in the bill of works; but the difference, 1,128 yards, was not fully saved to him, because, instead of masonry for three culverts he provided iron pipes on timber foundations. It is apparent, however, that omitting these places, the changes of plan over the section brought the quantity below that named for all other places in the bill of works, and in our judgment, saved to Mr. Macdonald more than enough to compensate for any improvement in the class of masonry supplied, and this is after giving him the benefit of any doubt as to whether there was any appreciable improvement.

That there are grounds for such a doubt may be gathered from a report of the Chief Engineer to the Commissioners, dated 24th January, 1872, and made with special reference to this demand by Mr. Macdonald, in which he says:

"The contractor on this section was not called upon, and has not built a better class of masonry than that specified. None of the masonry, in my opinion, on this section, is quite up to the specifications and contract, though it is generally of a fair character."

Item 6.

To additional public road crossing..... $250 00

The bill of works specifies seven public road crossings, and only seven were built. This one was a private crossing, a farm crossing, but is not so charged: that would have shown it to be plainly within the contract.

It seems to have been at one time taken for granted, on the part of the Government, that this crossing was an extra one. Mr. Fleming, in reporting to the Commissioners in 1873, admitted the item in favor of Mr. Macdonald, though he guarded himself by saying: He reported "quite irrespective of the question as to whether any of the works executed under the contract should be considered or allowed for as extras."

The evidence before us made it apparent that this crossing was covered by the contract. The bill of works had the following: "Road crossings and diversions, including seven public road crossings, with cattle-guards, &c., complete. Also, all farm crossings," &c., &c.

Mr. Chisholm, who built it, testified that "it was seven miles east of Rimouski; it is not a public crossing; it is a private road crossing." And again he said: "It was what was known as a farm crossing."

Item 7.

To 40,000 lbs. iron pipes, in concrete $10,000 00

Mr. Macdonald presented his claim concerning this section and Section 10, to the Minister of Public Works, in February, 1874. This item then appeared as "40,000 lbs. iron pipes at 7 c., $2,800."

The pipes were used for building culverts near St. Luce, where the ground was soft and the foundation bad. These culverts, under the original design, were to be of stone, and in order to save expense, the were changed, and iron pipes were substituted, supported by timber platforms, surrounded with concrete and with wing-walls at the ends.

We have no doubt that this mode of doing the work was less costly than that originally designed, though cases have been before us where the contrary was the fact, and special arrangements as to the price have been made in the tender. In this case there was no such provision, which, however, makes no difference in the result, as the claimant does not attempt to show that the new plan was more costly than the first one would have been.

Item 8.

Extra work on Metapedia Arch Culvert—	
Piles driven, 12,954 lineal ft., at 75 c.	$ 9,716 00
Flatted timbers, 2,609 lineal ft., at 25 c.	652 25
Cement, 169 yds., at $10	1.690 00
Excavation in foundations	1,014 00
Pumping	1,000 00
Wrought iron, 937 lbs., at 10 c.	93 70
Cast iron, 188 lbs., at 7 c.	13 16
Extra timber in superstructure	134 00
	$14,313 11

These charges are far above what could be allowed if the work was to paid for as outside the contract, but as we think it is clearly covered by the bulk price, it is not necessary to give our views concerning the true value.

This was, no doubt, a difficult foundation, and was more expensive than the information given by the bill of works and plans would lead one to expect, but it was not more expensive than was absolutely necessary for the stable construction of the work.

A bill of works and plans and specifications were laid before intending contractors, but they were expressly warned that they must satisfy themselves as to the foundations of structures and the nature of the material to be handled; and they were further told that the contract "will provide that all changes deemed necessary shall be made by the contractor, without any extra charge." To hold the Government liable now, for a contingency of this kind, would be to ignore the conditions so carefully notified before tenders were made, as well as the substance of the contract itself.

The claimant has urged, amongst other arguments, that this item might be allowed on change of grade, but there is no evidence to support that; in fact, no part of the expense was caused by any such change.

The cost of this structure was certainly increased, as alleged by an unforeseen contingency—the absence of a natural, solid foundation at the depth at which it was expected; and that fact was, probably, used as a reason for paying the full bulk price to the contractor, though it was then known that there were diminutions of work which would justify some reductions, had the Commissioners thought proper to insist upon it.

The contract was speculative, entailing loss in some cases and giving gain in others. The contractors lost in this foundation, but, besides the gain in masonry before mentioned, there were other substantial diminutions in work not chargable to him and of which he got the full advantage.

In fact returns by the engineers have been made, upon more than one occasion, for the purpose of comparing the value of the work of all kinds actually done with those originally estimated for this section, and which were to be covered by the bulk price of $100,000.

These statements agree in the main fact, that the works were deminished much to the advantage of the contractor.

The only difference is as to the amount of the gain by those changes; that varies between $10,000 and $16,000, according to the difference of opinion on the value of the several kinds of work.

But, notwithstanding this saving by change of plan, there is no reason to believe that the contract was not a profitable one. Mr. Macdonald's rights, however, are not affected by any of these views, correct or incorrect. He was entitled to his bulk price, less the deduction aforesaid, which was not made.

SECTION 10.

This section was originally let to McBean & Robinson at the bulk price of $362,083, but by mutual agreement between them and the Commissioners their contract was cancelled, and in August, 1870, fresh competition was invited by advertisement; after which the tender of this claimant, at $400,000, being accepted he entered into a contract dated 1st December, 1870, undertaking to construct and complete the section on or before the 1st July, 1872.

The first question concerning the claim is the proper price to be allowed for the work undertaken, for although the contract names $400,000, and contains no provision for altering it, it was not meant by the Commissioners to be signed in that shape.

The tenders were invited and received by the Commissioners and the contract was awarded, first by them and aftewards by the Governor General in Council, all upon the express condition that there would be deducted from the amount of the accepted tender a percentage sum equivalent to the percentage of the whole work which the Chief Engineer should report to have been executed by the first contractors; but this part of the arrangement was inadvertently omitted in filling up the printed form used for the contract.

The advertisement gave notice, very plainly, that the tenders would be received upon the basis of the quantities specified in the original bill of works for the section, the price named on that basis to be reduced by the same proportion that the whole work had been reduced by McBean & Robinson, not the sum actually earned by that firm, for the price under which they had been working might be higher or lower than that of the contractor, but such a percentage as would be fair to the new contractor. For instance, if his bulk price should be lower than that of McBean & Robinson, then the deduction would be less than they had earned; if higher, more.

In this case it was higher. Their bulk price had been a little over $362,000, this contractor's was $400,000. The proportion of the work done by McBean & Robinson was afterwards finally estimated to be worth, under their contract, nearly $31,000, and the Chief Engineer, in pursuance of the arrangement, reported that proportion of the work to represent about $34,080, when measured by the new price.

All the officials treated the bargain with Mr. Macdonald as one at $365,920. The accounts were kept and the progress estimates made on that basis.

Nearly a year after the date of the contract, Mr. Macdonald formally communicated to the Commissioners the fact that he was relying on the contents of the contract as it stood. He wrote the following letter:—

"MONTREAL, 14th November, 1871.

"GENTLEMEN,—In reply to your letter of the 8th inst., enclosing copy of letter which, you say, was written to me in awarding contract No. 10, and in which you refer me to the conditions thereof, I beg to say I never received the original letter, of which that professes to be a copy.

"I also beg to acknowledge the receipt of the printed notice therein enclosed, and by which you observe that I will see what the real contract was.

"I would beg to observe that I have the executed copy of the agreement, under which I am performing the work with your Board, and to which I look for the conditions under which the work is to be performed.

"I beg, further, to state that the progress payments required by the contract has not been made, as therein provided, nor have I been treated as other contractors, under similar circumstances, and should these payments be longer delayed, the responsibility of any delay in the progress of the work must rest with your Board.

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

"DUNCAN MACDONALD.

"The Chairman, Commissioners of the Intercolonial Railway."

The transaction, however, was still treated by the Government officials as if the $400,000 was to be diminished in proportion to the work done by McBean & Robinson.

Nearly two years after this (18th October, 1873), Mr. Macdonald wrote Mr. Walsh the Chairman of the Commissioners, with the view of "arranging some differences that had arisen with respect to my Contract 10," and professing to give an account of his intentions, and understanding when making his offer. He said: "At the time of making up my tender for Section 10, I was at Sydney, Cape Breton, where I made up my estimate. The original memoranda are now in my possession, which shows that I deducted the amount done by McBean & Robinson from the amount of my tender, namely, $35,000. My calculations amount to $439,000, amount done by McBean & Robinson being deducted, and to make it an even amount, I made it $400,000 as by my tender."

This version could not be the true one, for though he mentions approximately the amount that some time after the contract was signed, was proposed to be deducted from his bulk price of $400,000, he could not have had a memoranda made before his tender on 2nd October, 1870, showing that he had then deducted $35,000 for work done by the previous contractors, for the simple reason that they had not then done work that could be represented by such a sum, neither had there been up to that time any suggestion of that amount as the sum to be deducted. McBean & Robinson went on with the work for about six weeks after Macdonald had sent in his tender. On the 16th November, 1870, their work up to the 12th November was officially estimated at $30,849, and it was some time after that, that a sum spoken of in round numbers as $35,000; but really $34,080 was set down in the accounts as a reduction from the nominal price ($400,000) of the new contract, and this reduction was upon the theory aforesaid, namely, that 34,080 was the same percentage or proportion of $400,000, as that which the work completed by McBean & Robinson ($30,849) bore to their old price, $362,083.

Mr. Macdonald alleges that the deduction of a percentage sum from the amount of his tender was an idea new to him, some time after his contract was signed, in December, 1870, but he admitted that before he made his offer he had seen the advertisement for tenders, in which that deduction was, as aforesaid, plainly stated as a condition to the contract. The bills of works, too, which were issued from the different Government offices on that occasion, contained the original quantities for the whole section, and had pasted on them printed notices, that though the offers were

to be based on the whole original quantities, a reduction would be made for the proportion (percentage), done by the previous contractors.

On 2nd November, 1870, the following telegram was received, addressed to Mr. Walsh, Chairman of the Commissioners:

"SYDNEY, B.C.

"Is Section 10, awarded to me? Shall ship plant.

"D. MACDONALD."

He was answered by telegraph on the same day, that the contract had been awarded "on the conditions specified in the advertisements." Mr. Macdonald testified before us that before the contract was signed he did not see either this letter or telegram, but supposed he did afterwards.

Another statement, offered by way of explanation, in Mr. Macdonald's letter, only leads to more confusion. He says his calculations amounted to $439,000, meaning that the prices which he adopted, when applied to the stated quantities of the work, gave that sum.

We called his attention to this letter, and discussed the method by which he had come to the conclusion to tender at $400,000. He gave us to understand that the prices on which he based his calculations were the rates named in the schedule attached to his tender. These figures gave no such result as $439,000, but strange to say, a total so far above it that they could not have been used in any way in connection with his bulk price of $400,000.

We give, in Schedule B, hereto attached, page 68, the quantities and items stated to tenderers, and the rates named in the schedule attached to his tender. The result is not $439,000, but $573,611. (See Schedule B).

Mr. Macdonald intimated to us his contempt for a bulk sum system. He said, while giving his evidence, that it was "exploded twenty years ago," and he explained his meaning to be, that if quantities were exhibited to tenderers, they became thereby entitled to be paid for all work over those quantities, no matter what the contract said. The simple interpretation of this view is, that if the quantities are reduced a contractor gets his bulk price, if they are increased, he gets more.

He also said that he made up his mind to offer at $400.000, while he was travelling on a railway train; he could not say what papers he had before him, or if he had any, but he had no doubt he had previously seen the advertisement asking for tenders.

The only solution of the affair which suggests itself to us is that he took $20,000 a mile for twenty miles, the assumed length of the section (*i. e.* $400,000) as a calculation, close enough to answer the requirements of the system for which he had so little respect, and that when he came to put down prices for the different classes of work, as he did in the schedule attached to his tender (they being stated there without quantities and without showing results), he put them high enough to answer his purpose if he should find it expedient afterwards, because of increased quantities, to free himself from what he believed to be the very weak bonds of the bulk sum system.

Mr. Macdonald has, in fact, improperly endeavored to use the rates named in the tender schedule as a ground for a large demand against the Crown. In a memorial presented, in 1875, to the Government, concerning this claim, he says: "Taking the prices mentioned in the schedule endorsed on tender and attached to the contract, in conjunction with the certificate of the engineer to the quantity of work, it will be seen that the value of the work done in the execution of the contract amounts to the sum of $500,106.46 (*sic*), exceeding the amount of the contract price by $100,196.46, as certified by the engineer in charge. Assuming, then the true basis of the contract to be $400,000, as its terms cannot be disputed, the extra work over the quantities furnished by the Government engineer, Walter M. Buck, amounts to $100,196.46."

It is here ingeniously suggested, though not openly asserted, that his schedule rates would give, on the expected work, no more than $400,000, and that because on the executed work they gave $500,106, therefore he had done extras to the amount of the difference, $100,196. The truthful way of putting the case was that the expected work gave, at these rates, $573,611; the executed work only $500,106, and therefore the contractor had done less work, by $73,505, than he had expected and undertaken

by his contract. The fact that part of the work was done by a previous contractor was not mentioned by Mr. Macdonald in his memorial; and, in fact, it makes no difference in the calculation, for if the value of it be deducted at all, it must be deducted from both of these amounts, which would leave the difference still $73,505 against him.

There may be some difference of opinion as to whether, making a comparison of the values of the work expected and the work done, the item of "contingencies," at the rate mentioned in the schedule attached to the tender, should not be included in each. Mr. Macdonald has not done so in his memorial above mentioned. If it be added, the work done would be (10 per cent.) $50,000 more than $500,106, named by him, and would leave the saving only $23,495.

It may be that when he put these rates to his tender schedule, Mr. Macdonald intended only that they should be the foundation for temporary advances to him in the progress estimates larger than the proper proportion of his bulk price. It was suggested in a note to the tender that the rate there named, might be used for progress estimates; but one of the first acts of the Government officials was to frame a schedule of rates for the several works on which to pay the progress estimates without exceeding Mr. Macdonald's price. Their quantities and his rates could not both be got into that sum, one or the other had to be made smaller, the quantities could not, and so the rates were cut to fit; those adopted by the Government being, throughout the work, less than his. In fact the final estimate of all the work done, shows that $400,000 is reached by quantities less than the original estimate and at rates less than he named in his tender.

The engineers and other officials continued, until the spring of 1875, to treat the contract with Mr. Macdonald as one for the bulk price of $365,920; and Mr. Schreiber in January, 1875, after the completion of the works, made up what he intended as his final estimate on that basis, but afterwards on a perusal of the contract itself, he considered it proper to make another based on $400,000, which he did on 17th April, 1875, but with that he submitted the following letter.

"St. John, 19th April, 1875.

"Dear Sir,—Since despatching my first certificate of the 17th inst., in favour of Mr. Duncan Macdonald, for works of construction on Section 10, of the Intercolonial Railway, it struck me that I should be wanting in my duty were I not to offer an explanation as to why I now draw up calculations based on a lump sum of $400,000, having previously drawn up a certificate based upon a lump sum of $365,920. My certificate of 18th January last, was drawn up on information received from the Chief Engineer, he evidently believing the lump sum to be $34,080, (the amount of the valuation of work done by McBean & Robinson), less than $400,000, being $365,920. I have since carefully read the contract, by which it is clear to me $400,000 is the contract lump sum, and upon this I have based my certificate of the 17th inst., which is intended to supersede my certificate of the 17th inst., which is intended to supersede my certificate of 18th January last, and trusting my explanation may be satisfactory to you,

"I am yours very truly,

"COLLINGWOOD SCHREIBER.

"C. J. Brydges, Montreal."

Mr. Macdonald had, in the meantime, made large claims for extras. After reports on them from the engineers, Mr. Brydges, then the sole Commissioner, submitted to the Minister of Public Works, his account of the position of the affair. The Minister in turn laid the matter before the Privy Council, on which an order dated 17th May, 1875, was passed as follows:—

"On a report, dated May 14th, 1875, from the Hon. the Minister of Public Works, stating that the contract of Duncan Macdonald, for the construction of Sec-

tion No. 10, Intercolonial Railway, has been completed, and that the account for the same is as follows, viz. :—

Contract price		$400,000 00
Increase of work caused by change of grade		18,877 80
		$418,877 80
Relieved of bridge superstructure and under drains	$ 13,075 00	
Diminution of work caused by change of grade	23,841 40	
Paid during progress of work	367,000 00	
		$403,916 40
Balance due contractor		$14,961 40

"The Minister, therefore, recommends that he be authorized to pay the balance of $14,961.40 to Mr. Macdonald accordingly, in full discharge of his claims in respect to said contract.

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

"Certified,
W. A. HIMSWORTH."

Under this authority, the balance here named ($14,961.40), was finally offered to this claimant, if he would accept it in full of his demands concerning Section 10. This he declined to do, but it was subsequently paid to him without any such acquittance.

We propose after this explanation to treat the contract price as $400,000, but we did not feel at liberty to do so without pointing out the above circumstances, so that His Excelleney may, if he wishes, be yet advised whether it is expedient to take any further notice of Mr. Macdonald's claim being treated according to the letter of the document, instead of the intention of the parties, and the Order in Council by which he was awarded the contract.

In this connection it may not be impossible for us to say, that on the whole evidence we think Mr. Macdonald not to be a gainer by his contract, though his price be called $400,000, instead of $365,920.

Mr. Macdonald claims on Section 10 a balance of $251,873.13, as follows :—

Contract price	$400,000 00
Extras	233,835 14
	$633,835 14
Received on account	381,961 40
	$251,873 14

The details of his extras are set out in Schedule C, hereto attached.

In opening this account we think it well that the bulk price should be at once varied according to the provision of the contract, which declared that it should be increased or reduced as the work should be increased or reduced by changes of grade or location, and we proceed to do so on the basis of $400,000 assumed as aforesaid.

The evidence on the subject leads us to say, that the quantities reported by Mr. Schrieber, and adopted by the Government, as due to these changes, are as correct as can now be ascertained, and inasmuch as they show a balance against the claimant, it is not to his interest that the rates should be high.

We take Mr. Schrieber's prices, though they are for most of the items, the low ones which the engineers had to use, in order to get the executed quantities into

the bulk price, there is no evidence to show that they are too low, but for the items which we hereinafter find due to the claimant, and in order to give him the benefit of every doubt, we adopt the higher rates of his tender schedule when there is no more direct evidence concerning the price.

The following is the account, as allowed by us, concerning the changes of grade and location:—

Diminutions.

Earth excavation, 75,890 yds., at 26c		$19,731 40
2nd class masonry, 477 yds., at $8		3,816 00
Paving, 98 yds., at $3		294 00
		$23,841 40

Increases.

Earth excavation, 49,530 yards, at 26 cents.	$12,877 80	
Rock excavation, 6,000 yards, at $1	6,000 00	
		$18,877 80
Balance to be charged contractor		$ 4,963 60

Deducting this balance from the $400,000, leaves $395,037, as the prices for work to be done under the contract.

This, however, is to be further reduced in pursuance of an agreement that if the Government desired to substitute iron superstructure for the bridges, it should be done, the contractor being relieved from furnishing the wooden superstructure first designed, and the price of it at the rate specified in the schedule attached to his tender, being deducted from what would be otherwise due him.

In this case an 80 feet span of wooden superstructure was omitted. The rates for superstructure given in the same schedule were:

For each 100 feet span	$4,000 00
" " 60 feet "	1,800 00
" " 50 feet "	1,500 00
" " 40 feet "	1,200 00

This leads us to suppose that an 80 feet span would be worth less than $4,000, but more than $1,800. However, as there is no rate given for it, we take the lower value, $1,800.

Deducting this from the above mentioned bulk price, $395,037, leaves $393,237, as the proper price for the whole contract work as finished, the question left is whether this is to be increased, and if so, how far by works independent of or outside the contract.

Item 1.

To extra grubbing, in widening cuttings and making side ditches not included in bill of works, 21 acres at $1,600 ..... $ 3,360 00

Item 4.

To extra ditching outside of line, by order of engineer, 40,520 c. yds. at 30c $12,156 00

Item 7.

To extra ditching, catch water drains, culvert pits outside of line, 1,201 c. yds., at $1.75 ..... $ 2,101 75

These items are connected with an extended and improved system of drainage, devised and directed after the contract was signed, in lieu of that originally designed.

The Chief Engineer, according to a printed memoranda issued by him dated 12th July, 1872, "attached great importance to the efficient drainage of this Railway."

He then described at some length the necessity for it, and the method by which he wished to secure it. The following is an extract from this Memorandum:—

"The general specifications describe how the under-drains were intended to be constructed. The contractors have, however, found it impossible, in many cases, to procure suitable gravel for the purpose specified within a reasonable haul, and too costly to break stone to the proper size. In view of these difficulties and the great importance of having the drainage done most efficiently, the Commissioners have, on the recommendation of the undermentioned, decided to relieve the contractors of this portion of the work, and to execute it by day's labor, when gravel can be brought forward by ballast trains. In the meantime, a charge for drainage is to form a deduction from the contract sums."

It will be seen that the under drains first designed and mentioned in the bill of works were done away with. This contractor testified that he did not consent to be charged with the saving so caused, and he asks to be paid in full for the new design. His consent is immaterial. It is quite plain that what he did was a substitution made by the authority of the Chief Engineer, for some work covered by his bulk price; if it was more expensive he may, under the particular circumstances of the case, be entitled to recover the difference of the cost. We do not say that he would be, under other circumstance, but, at all events, he cannot recover the whole value and allow nothing for what was intentionally omitted.

We proceed to credit him with the value first, and then to deduct the saving.

Preparatory to excavating the side ditches for the new drainage in open places, much extra grubbing was done; cuttings were widened, too, after they had been finished, in order to increase the size of the ditches. The grubbing at this stage of the work cost more per acre than if the whole surface had been undisturbed. Then, about $100 per acre would have been enough; but, according to the evidence, the price here charged ($160) is, under the circumstances, not unreasonable; the quantity and rate are fairly supported. We credit $3,360 on Item 1.

Item 4 is for other work—earth excavation, necessitated by the new system of drainage.

Mr. Buck (now deceased) testified before Mr. Shanly, that this work was outside the line, and was done for the proper drainage of the railway, by order of the Chief Engineer, so as to prevent water accumulating in the side ditches. "These outside ditches had to be dug out to a certain inclination, not as in the case of ordinary drainage, where you might ditch with any inclination; these had all to be carried to the outlet." He produced a statement of his own measurement of this work, which showed the quantity charged to be correct. The price mentioned is that in the tender for the average of the whole section, and, on the evidence is not too high. We allow Item 4 at $12,156.

Item 7 is for the excavation in rock outside the line, also done to carry out the new system of drainage. These quantities are also supported by Mr. Buck. He made them up from month to month, while he was resident engineer, and he explained that in some places the ditches were very deep. The average price over the section was $1.20 per yard in the schedule attached to the tender. In this case it was more expensive per yard than in ordinary cuttings, and we think the price charged not unreasonable. We allow this item at $2,102.

Thus, on the three items, 1, 4 and 7, relating to the new system of drainage, we allow the claimant's charges in full, amounting to $17,618, against which we set off the value of the under-drains orignally designed, adopting, in the absence of other evidence, the quantity given in the bill of works and the price in the schedule attached to the tender.

The former document stated 50,000 yards, of which McBean & Robinson did 1,000; the remainder, 49,000, at the tender rate, $25 per 100 feet, gives $12,250; this

deducted from $17,618, leaves $5,368 to the credit of the claimant, and increases his full price from $393,237 to 398,605.

Item 2.

To extra earth excavation, over and above contract amount, 88,895 yds., at 30c.....$26,668 50

Item 3.

To extra rock excavation, over and above contract amount, 51,155 yds., at $1.50.. ..... 76,732 50

These items are framed in such a way as not to show how much of the quantities charged is claimed as due to changes of grade or location. They are the totals taken from memoranda furnished by Mr. Buck, copies of which have been produced in evidence, and are based simply on the alleged fact, that they were over and above those estimated in the bill of works for this section. They are intended to state the whole of that increase, as well from changes of grade and location as from all other causes, except diversion of streams. The alleged increases from that cause are stated, as to earth, in Item 5, and as to rock, in Item 6. It is not necessary to repeat what we have already said in dealing with Section 8, that the bare fact of an increase over the quantities stated in the bill of works does not entitle the contractor to an extra price. Neither is it necessary for us to decide whether there was such an increase. We have already allowed for all the increases caused by changes of grade and location, and, therefore, on Items 2 and 3 nothing can now be allowed.

Item 5.

To extra excavation in earth, stream diversions outside of line of railway, 34,735 c. yds., at 40c.....$13,894 00

Item 6.

To extra excavation in rock, stream deversions outside of line of railway, 1,317 c. yds., at $1 75 . . . 2,304 75

These figures are also from statements furnished by Mr. Buck; and what we have said on Items 2 and 3 applies generally to these.

The quantities here claimed as due to diversion of streams seem to have been separated from others, upon the theory that they were not mentioned in the bill of works, and therefore are outside the contract; but though there is no attempt to give, in that document, the quantities for diversions in particular localities, the diversion of streams, whatever it may amount to, is there plainly indicated as a work to be covered by the contract.

After stating in detail, station by station, the quantities estimated for embankments and the other excavations, the bill of work says:—"Add for catch water drains, stream diversion, &c., &c., not included in above, say 15,000 yards." This quantity is less than that stated by Mr. Buck, but it must be remembered that diminishing the number of culverts and thereby the quantity of masonry, as was done on this section, is generally accomplished by conducting through one opening two or more streams originally intended to be taken through separate outlets; or, in other words, making more diversions than were included in the first plan. We have not enquired closely into the amount of work thus occasioned, because it is unquestionably covered by the contract. We allow nothing on Items 5 and 6.

Item 8.

Extra haul over over 1,600 ft., average haul 2,122 ft., 180,984 c. yds., at 21c. $38,006 64

There is nothing in the contract, or any document relating to it, which entitles the contractor to a price beyond his lump sum for haul of any length.

There are allusions in the bill of works and in the specifications to places from which and to distances within which contractors will be controlled by the engineers, and required or allowed, as the case may be, to supply material for embankments, but none of them alter or affect the agreement that all the requisite work for the section is to be completed for the bulk price. We allow nothing on this item.

Item 9.

To 1,500 yds. first-class masonry, additional cost for Portland cement, when Canadian was acceptable, and additional cost of tool dressing and chisel-drafts, when rock face work was acceptable under the contract, at $2 extra per yd.	$3,000 00
To 457 yds. extra first-class masonry above quantity in the bill of works, made as above at price of tender at $15 per yd.	6,855 00
To additional cost on above, for Portland cement, tool-dressing, and chisel drafts when rock face work was acceptable under the contract, at $2. . . .	914 00
In all.	$10,769 00

Item 10.

To 4898 yds. second-class masonry, turned into first-class, difference between second and first-class masonry:		
Tender price of first-class $15.		
Price allowed second-class $9.		
Difference. . .	$6 . . .	$29,388 00
Additional cost, chisel drafts, Portland cement, tool-dressing, &c., $2 per yd.		$9,796 00

The ground upon which these charges are made is not very clear from the above particulars, and judging from Mr. Macdonald's evidence, it is not very intelligible to him. It turns out that Mr. Buck, who had been the resident engineer for the Government during the work, was afterwards, during the summer of 1875, employed by the contractor to make up this claim. He stated the quantities to charge for and Mr. Macdonald added the price, though he fixed that for masonry, as he testified, by the advice of others. He said he had never made any calculation to ascertain what the extra cost had been or how it was made up, in fact, he could give us no information whatever, based on any knowledge or reason of his own.

Mr. Buck was examined at Quebec by Mr. Shanly in this case on the 30th and 31st March, 1881. A few days before that (March 27th) he prepared a memorandum headed "Explanatory remarks on the items contained in the bill of claims preferred by Duncan Macdonald, contractor, Section 10, Intercolonial Railway." For the items now under consideration his remarks were as follows:—

(9.) "This item is for extra price on first-class masonry, and the quantity includes all the arch masonry as first class, and its character being well known to all who have examined it as the best of its kind, the extra price will be considered fair.

(10.) "Has reference to second-class masonry, which is the best of its kind."

Mr. Buck had on another occasions prepared documents to help Mr. Macdonald. It is apparent from the evidence that as time went on Mr. Macdonald's rights grew in the estimation of Mr. Buck, while those of the public diminished accordingly. In June he prepared "a statement of arch masonry returned in engineer's estimates as second-class arch and face work being claimed as first-class by contractor, Section 10." He gives the respective quantity for each structure, which amounted to 1,705 yds. He supplied, subsequently, another statement, dated Quebec, 14th December, 1880;

that was headed "statement of total arch culverts claimed as first-class masonry," and in that he gave the same identical structures, but the amount for each was increased so as to make a total of 6,855 yards, instead of 1,705 yards.

No witness has been able to explain the principle on which the several charges are made; and after all that has been said in evidence and in argument we cannot be sure what the contention of the claimant is. The only thing not left in doubt is the demand of $2 a yard for Portland cement and chisel-drafting and tool-dressing on three seperate quantities 1,500+457+4,898 yards=6,855 yards in all.

No one could tell us how much of the $2 was on account of Portland cement, or how much on the chisel-drafting and tool-dressing.

As for Portland cement, we think it was the only kind admissable, for these portions of the masonry specified to be built with hydraulic cement. The specifications, clause 57 said: "The hydraulic lime or cement must be fresh ground, of the best brand, and it must be delivered on the ground, and kept there till used in good order. Before being used, satisfactory proof must be afforded the engineer of its hydraulic properties, as no inferior cement will be allowed."

Mr. Macdonald testified before us that Portland cement was the best brand.

Mr. Fleming testified before Mr. Sbanly that "speaking generally" he had found Canadian cement so bad that he would not allow it to be used. Mr. Light, the district engineer over this section, testified before us that by an imported machine made expressly for such purposes he had carefully tested the hydraulic properties of the Canadian cement, the kind replaced by the Portland cement, in this case, and he had found it unfit for use. It was in fact, only one-tenth of the strength of English cement, notwithstanding which, he said he had allowed Mr. Macdonald to use 500 barre's of it in unexposed portions of the masonry.

It is clear to us that the engineers would have neglected their duties and the letter and the spirit of the contract if they had not required this claimant to use Portland coment, which is admittedly the best brand and, as far as we can see, the only one fit for the work.

The claimant's evidence and argument on this matter were directed only to the question whether Quebec made hydraulic cement ought not to have been received as sufficient instead of obliging him to furnish the more expensive brand known as Portland cement. But he did furnish the latter in places where we think the specifications did not call for any hydraulic cement.

That document states that common lime may be used in the structures over streams above a line 2 feet higher than the water level. This was not done, but no testimony was given to show how much the cost was increased by the substitution of Portland cement. We feel satisfied that it was not so great as to effect our conclusions on these items, as hereinafter given.

As to the tool-dressing and chisel-drafts, the evidence supports the allegation that in some places the masonry was finished more expensively (there was more hand work put on it) than would have answered the specifications; but it is quite impossible to say to what extent this occurred, or whether it was done only because the engineers required it.

We feel quite sure that it did not increase the cost of the whole masonry $2 a yard.

Mr. Buck and Mr. Light were the witnesses, on whose evidence the claimant principally relied, in support of these items.

Mr. Buck was asked, before Mr. Shanly, concerning the quantity in Item 10, which had been built where second-class masonry had been originally designed, and which he gave at 4,898 yards: "Do you say they were ordered to be made first-class?" His answer was: "No; there was no order beyond the specification, but I say the work done on these culverts was of precisely similar character to that on the larger culverts, the only difference being the span."

It appears that the stone for the different structures came from some distance, which probably led to larger stone being transported and used than if it had been taken from some place close at hand. The size of the stones was one of the distinc-

tions in the specifications between first and second-class masonry—the first-class demanding large ones, the second permitting smaller ones.

Mr. Light, in his evidence before Mr. Shanly, said this second-class masonry was a good deal better than the specifications called for—$2 or $3 a yard better—counting, as we understand it in his evidence, the extra dressing, the value of the Portland cement and the cost of hauling the stone. He said it was better, because the "contractor found that, by going a distance, he could get stone that fitted the specifications better for first-class masonry." He preferred to go to this place, "and he added, that he considered the contractor responsible, in a great measure, for the change of masonry," because he would have considered it his duty "to have accepted second-class masonry under the specifications."

It must be borne in mind that, on this section, the bulk of the first-class masonry was intended for the arches and other portions of the larger culverts, the second-class for smaller culverts. Clause 55 of the specifications is as follows:—

"A distinction will be made between arches of 10 feet span and upwards, and those of 8 feet span and under. The former will be of first-class masonry, although they may be constructed on walls of second-class work. Arches of 8 feet span and under will be of second-class masonry. Arches of each class will be semi-circular."

Before us, the following question was put to Mr. Light in the presence of the claimant:—

"There were different sized structures there, I suppose (different sized culverts) from 10 feet upwards and 10 feet downwards; what kind of mason work did you require in the culverts under 10 feet? Did you require them of the same quality as the mason work in the larger culverts?"

His answer was as follows:—

"I did not; the contractor told me two or three times he considered the class of masonry was not good enough for the structures. I told him it was specified by Mr. Fleming; and he was strongly of opinion it was not strong enough, and he put in a superior class of masonry himself. He asked me at the time, 'will you give me an order to do it?' I said 'no.' He asked, 'would I oppose him doing it himself?' I said 'no, I will not do that either; but I shall return it as second-class masonry,' and he put it in himself."

In the face of such evidence as this, and even if no masonry was to be considered, except that which was thus improved, it would be difficult to decide that the contractor could, on account of it, recover any substantial sum from the Crown. But his rights cannot be settled without deciding a larger question—one which takes in, at least, the whole of the masonry, if not all the other work of the section. To that question our answer must be unfavorable to Mr. Macdonald.

The question is: "Were the changes from the original design in masonry such as to make it, as a whole, more expensive to the contractor?" If not, it appears to us useless for him to press his claim any further, for otherwise the change would not be to his advantage; and this covers all the component parts of Items 9 and 10.

The original design for masonry included structures which would require 2,000 yards of first-class and 9,000 yards of second-class masonry, or a total of 11,000 yards, which, according to Mr. Macdonald's tender rates, would be worth $138,000. But instead of that quantity the engineers, by changes in the plans, required of him only a total of 9,079 yards, which would, at the same rates, give but $136,185, if every yard of it was first-class. That, of course, is not pretended. Mr. Buck testified that, at all events, 1,739 yards were not better than second-class.

The advantage to the claimant by this change in masonry is established, not only by the figures but by all others which are supported by any evidence. Some give more, some less, gain to him, but they all go to show that the masonry, as he built it, cost him, on the whole, less than if he had been left to follow the original design exactly. We allow nothing on Items 9 and 10.

Item 11.

To extra work done in excavating foundations to arch culverts, water and pumping contingencies not in bill of works, 12,895 yds., at 40c..... $5,158 00

The only ground on which the claimant puts this charge is that it was an unforeseen contingency. He does not pretend that it was caused by change of grade or location, or even by change of design. He says it was "not in the bill of works," but we fine it there in this shape:—

"Foundations, including all excavation and concrete (see schedules), not included in the above, and all timber, planks, piles, draining, pumping, blasting, ballasting and everything else that may be found necessary."

If, however, the bill of works had omitted to call attention to this work in this explicit manner, it is quite clear that the contract work undertaken for the bulk price could not have been finished without it. We allow nothing on this item.

Item 12.

To loss and damage incurred in consequence of forty horses, men, foreman and manager sent to commence work at Government's request, but delayed two months, former contractors refusing to give up the work before they were paid..... $3,500 00

It is true that before the contractor was put in possession of Section 10 he moved some horses and men to the ground and kept them there until the works were handed over to him. This is a matter, of course, cost him something, but the time stated is much exaggerated.

About the end of October, when the contract was awarded to Mr. Macdonald, he was finishing some work in Nova Scotia; and instead of selling them, he decided to send his horses and plant to this seat of expected operations. The evidence shows that some time elapsed before he closed the transaction and commenced the work. This time, however, was not lengthened by any fault of the Government officials.

The claim was favored by Mr. Buck and Mr. Light. They were on the spot and know that Mr. Macdonald was at an expense on account of the horses and men.

Some years afterwards (8th May, 1875) Mr. Light wrote a letter to Mr. Macdonald, apparently to be used in support of this charge, in which he said: "This detention must have caused you some expense, as your agent, Mr. Roy Macdonald, arrived in Newcastle with a large number of horses and men, at least, I think, a month before the works were turned over to him."

Mr. Buck gave some general evidence in support of this charge before Mr. Shanly. He said: "I am aware that when the contractor was prepared to commence the work, towards the close of November, 1870, he found the former contractors, Messrs. McBean & Robinson, still in possession of the work, although they had abandoned the contract. They refused to deliver up the section to him until they were paid for what they had done, for a final settlement."

It appears that these witnesses came to their opinions from what they saw on the spot, without reference to the negotiations going on at Ottawa, between Mr. Macdonald, on the one part, and the Commissioners and McBean & Robinson, on the other; but without being aware of that, they could not possibly understand the true position of affairs.

Mr. Light, speaking of the period before Mr. Macdonald got possession, did not remember that he had been notified that Mr. Macdonald had got the contract. He said that he was not informed officially of the different stages of the negotiations, but had learned from hearsay that the contract had been given up by McBean & Robinson and had been let to Duncan Macdonald.

His subordinate, Mr. Buck, would, of course, have no more authentic information. As a fact, the matter was not closed properly by this claimant, nor the contract

signed, till the 13th December, 1870, and the claimant admitted, before us, that after it was signed he suffered no detention.

The whole case of the contractor is, that before he had any right to take possession of the works he was allowed to go upon the ground with some horses and men, and that he did not get entire control of the works until he signed the contract and furnished the requisite securities.

That could not give him a claim. There could be none except on some implied promise or covenant on the part of the Crown, for there was, certainly, none expressed, and not only does he fail to show, but on the other side, the evidence shows that he was permitted to move to the spot only as a favor, and because he considered it an advantage to be there, though the contract had not been actually closed; and further, that he could not conveniently get to Ottawa, to sign the contract, until the 13th December, after which, he got full possession on the following day.

On the 27th October his claimant was formally notified, by letter to his usual address, at Montreal, that his tender was accepted, and asked to send names of securities, so as to get the matter closed.

The following telegraphic correspondence throws some light on the subsequent actions of the parties:—

"SYDNEY, C. B., 2nd November, 1870.

"To A. WALSH:

"Is Section 10 awarded me? Shall I ship plant?

"D. MACDONALD."

This was answered, saying that the contract had been awarded to him, "on the conditions specified in the advertisement," no allusion being made to plant.

"MONREAL, 2nd November, 1870.

"J. C. R. CONNORS:

"Mr. Macdonald in C. Breton; expected here daily.

"J. O'DONNELL."

"SYDNEY, C.B., 24th November, 1870.

"J. C. R. CONNORS:

"Please send contract for Section 10, to Montreal, for signature.

"D. MACDONALD."

On the same day a telegram was sent, in answer to this, to the following effect:

"Cannot possibly allow commencement until contract is signed, but if important to you will do so. Plant on ground will be transferred at value to you, along with work done. On receipt of reply, engineer will be instructed."

On the following day (November 25th) Macdonald telegraphed: "Very important I should commence, as my horses and plant are there; will take plant on ground at valuation."

"MONTREAL, 8th December, 1870.

"A. WALSH:

"Just arrived, will go up to see you Monday morning.

"D. MACDONALD."

"OTTAWA, 9th December, 1870.

"D. MACDONALD:

"Come to-morrow morning and have matters closed. Robinson here waiting.

"C. S. ROSS."

"MONTREAL, 10th December, 1870.

"C. S. ROSS:

"Previous engagements prevent my leaving for Ottawa before Monday morning.

"D. MACDONALD."

On the 13th December, the contract dated 1st December was signed at Ottawa, and the following telegram sent to Mr. Light:—

"OTTAWA, 13th December, 1870.

"A. S. LIGHT:

"Give R. N. Macdonald, agent for Duncan Macdonald, immediate possession of Section 10. He will pay McBean's pay roll since last estimate. Work will be included in Macdonald's first estimate.

"C. S. ROSS."

And on the 19th, Mr. Light replied:—

"McBean gave up possession of Section 10, on Wednesday, 14th inst. Macdonald's agent has now some sixty men and twenty-three horses at work."

It is thus shown that the whole time between the date of the last request to be allowed to go on the ground, and which was sent from Cape Breton on November 25th, and the day on which full possession was given (December 14th), was eighteen days, including Sundays, of which a substantial part must have been occupied by Mr. Macdonald in making his way from Cape Breton to Ottawa, where the matter was to be closed by his signing the contract.

We see no ground for saying that the Crown is liable to reimburse the contractors for any part of the expense here charged.

Mr. Macdonald might well have been silent about McBean & Robinson's possession of Section 10. His tender (2nd October, 1870,) was, as he says, on the basis that his price was to cover the work to be done after that time. The Commissioners, however, expecting that his price was to be diminished by all that the previous contractors had done, and should do until he got possession, allowed them to go on and to draw the pay till the works were handed over to the new contractors. They were paid by the Government $30,850, for work done between the end of September and the time when Macdonald assumed the contract and the pay rolls.

That amount was a clear gain to the contractor, beyond what he was entitled to under his own interpretation of his $400,000 tender.

We allow nothing on Item 12.

The death of Mr. Buck has, we think, been no disadvantage to the claimant. His evidence before Mr. Shanly was very general, and a cross examination on the drainage, Items 1, 4 and 7, might have required us to reduce the amounts; but, as it is, we have adopted his evidence as it was given, and have allowed them in full, as aforesaid.

After adding our allowances, we find the whole price of the works to be $398,605, in which Mr. Macdonald has received, as admitted in his particulars, $381,961.

The following statement shows the debits and credits, which give the value of the work done at $398,605:—

Bulk price of contract		$400,000 00
Deduct net diminutions of work from change of grade and location	$4,963 00	
Deduct wooden superstructure	1,800 00	
		6,763 00
Add on Items 1, 4, 7		5,368 00
		$398,605 00
Payments		381,961 00
		$ 16,644 00

In our judgment, and assuming the contract price to be $400,000, there was and has been, since the 1st day of January, 1875, $16,644 due from the Crown to Mr. Macdonald on his works connected with Section 10.

N.B.—As mentioned in a postscript to this report, the liability concerning Section 10 would be increased from $16,644 to $23,407, should the Government waive the right to charge the contractor for diminutions of work, $6,763.

BALLASTING AND TRACK-LAYING.

Sections 10, 16 *and* 20.

Although this work was commenced early in 1873, no contract concerning it was signed till August, 1874; in fact, rock ballasting was done before the parties arrived at any understanding in relation to it.

Tenders up to noon, 31st January, were invited by advertisement in November, 1872. Mr. Macdonald sent in two offers for these three sections, which had been grouped under the name of Division No. 2.

The first offer dated 27th January, 1873, asked:—

For track-laying	$350 00 per mile.
For putting in switches	14 00 each.
For blanking crossings	20 00 per M. ft., B.M.
For ballasting	0 75c. per yd.

Measured in the pit.

A note in his handwriting said: "I have carefully explored No. 2 Division for ballast, and none can be had except broken stone.

He, however, made a second offer on the day of receiving tenders, in which he named the same rates for track-laying, switches, plank; but the last item was:

"For ballasting, 28c. per cubic yard of gravel measured in the pit; this price is intended to cover haul of five miles, if the haul be increased beyond that distance, the price to be increased at the rate of 1c. per mile."

Neither of these offers was accepted as it was made. On the 17th June, 1873, the Commissioners reported to the Privy Council "and recommended the acceptance of the tender of Duncan Macdonald, at the following rates:—

Track-laying	$350 00 per mile.
Putting in switches	14 00 each.
Plank in crossings	20 00 per M. ft., B. M.
Ballasting	0 28c. per c. yd."

It will be noticed that this contained no reference to the extra haulage, or rock (broken stone) ballast. On the same day an Order in Council was passed, accepting the tender in the terms recommended by the Commissioners.

On the 25th July, 1873, Mr. Macdonald wrote Mr. Jones, the Secretary of the Commissioners, saying that he had received notice of the acceptance of his tender, and giving the names of his sureties, adding that the prices were correct, "except the price of rock ballast, 75c., and extra of 1c. per yard," and he asks to have these particulars inserted in the contract. But no contract was prepared, and no further acceptance of his terms took place at that time.

On 23rd August, 1873, Mr. Jones answered this, saying: "The question of prices was fully considered * * *. Those contained in my letter of 4th July ult., are the prices awarded to you, and these and no others will be paid on the contract."

On 21st October, 1873, Mr. Walsh wrote to Mr. Macdonald, informing him that no authority had been given for using or preparing rock ballast, and reminding him that the contract was not awarded on that basis.

On 15th December, 1873, Mr. Fleming, Chief Engineer, wrote the Secretary of the Commissioners, saying that Mr. Light, the district engineer, had returned for this claimant 6,223 cubic yards of broken stone on Section 10. He referred to the Order in Council accepting the offer at 28 cents, and declined to certify at a higher rate, but he mentioned the necessity of making some arrangement for broken stone on that section which, he said would be worth at least 56 cents, double the price of

ordinary gravel ballast, and he suggested making an advance of $3,000 to Mr. Macdsnald till the matter was settled.

In the following year (18th March, 1874), the Cnmmissioners resolved that the contract made with Mr. Macdonald " be closed as follows :—

Track-laying	$350 00	per mile.
Switches	14 00	each.
Plank, &c	20 00	per M. ft., B. M.
Ballasting, if rock	0 75	per yd.
" if gravel	0 28	" "

With an allowance of 1 cent per yard for every five miles of haul beyond twenty miles.

The quantity of rock and gravel ballast to be determined by Mr. Schreiber."

Some months afterwards a contract was signed by Mr. Macdonald, but not by anyone on the part of the Crown. The date (23rd August, 1874), and several other of the most important parts of it, are in pencil. The specifications, as submitted to tenderers, are attached to it, as well as a new tender without date, naming 28 cents for gravel and 75 cents for rock ballast, " with 1 cent additional for every five miles haul over twenty miles," and for the other work, the same as before. Thes terms are, with slight variations, a combination of those in his two tenders of January, 1873, and are stated to be those on which the contract is based.

There was no Order in Council supporting the contract in this shape, and apparently the Commissioners did not think proper to sign it without that authority.

The two main questions to be decided in adjusting this claim are, first and principally, the quantities of ballast actually put on the line by the claimant; and, secondly, whether he is entitled to any, and if so, what extra price, for a portion of the work which he did with horses, instead of with engines and cars, as he expected. His particulars contained other items of a different nature, but as to most of them there is no dispute. The rest are unimportant.

The details of this demand as submitted to us, are set out in Schedule D, hereto attached, page 70.

Item 1.

Rock ballast put on with horses and carts, engines and cars not having been furnished by the Government, as per agreement, 15,386 yds., at $1.50..... $23,079 00

Item 11.

Loss and damage by delay in not having been furnished with engines and cars, from May, 1873, to end of August, 1874, 14 months..... $10,500 00

Out of a total of 73,851 yards of rock ballast, alleged to have been furnished by the contractor, he claims to be entitled, on this portion of it, as moved by horses and carts, to a higher rate than the contract price, on the ground that there was an implied promise by the Crown, that he should have the use immediately of Government engines and cars for his work, which he did not get, whereby he was driven to use this more expensive method. He explained in his evidence that though the absence of the engines and cars is named on the ground of complaint, the substantial difficulty was the want of ties, without which locomotives would be useless. Item 2 is for damages and delays for not getting the engines, &c., as aforesaid. The two items relate to each other, and may be properly considered together.

At the date of the written contract before mentioned, August, 1874, the Government had furnished ties and engines and cars, and everything necessary to facilitate the contractor's operations.

The claims in Items 1 and 2 are based entirely on matters prior to August, 1874.

The evidence shows that the contractor on whom the Government were depending for the supplies of ties, did not deliver them as soon as expected, and that until August, 1874, Mr. Macdonald proceeded with the ballasting by horses and carts.

The quantity here claimed was stated by Mr. Buck, the resident engineer, to have been put on the line by horses and carts, and for this work we think the contractor ought not, upon the facts, to be confined to his tender prices.

Considering the oral testimony as a whole, in connection with the several tenders, orders and other papers, complete and incomplete, the Commissioners appear to us to have refrained from entering into any positive contract which would even impliedly involve the providing of ties and cars and engines, until they saw that it could be done; and it seems that until the summer of 1874, they simply permitted Mr. Macdonald to go on with such work as he thought he could profitably do.

That, however, would be, between man and man, enough to entitle him, in our opinion, to a fair value of what he did. Most of the work was carried on virtually without any bargain as to price, and we think he should be paid, irrespective of one named, as we read the document, under the mutual expectation that the work would be done in a way that turned out to be impossible.

Under the circumstances, we think Mr. Macdonald should be paid, not damages as for the breach of contract, for there was none, but a reasonably liberal price for the work. On the value of this work a good deal of evidence was taken, which exhibited a wide diversity of opinion. The Government engineers generally thought the work could be done with horses and carts at no greater cost per yard than with the engines and cars. They say it is well understood among engineers and others having experience in railway construction, that for a short distance (1,000 yards was named by some of them) the method used here is quite as cheap as by locomotives.

The ballast in question was moved over a length of between 2,000 yards and 3,000 yards, from a deposit near the middle of it, or something over 1,000 yards each way. Other engineers, however, as well as the contractor and his partner, Mr. Chisholm, testified that in this case it was worth the price charged; and Mr. Macdonald said it was no more than the actual cost to him.

Under these circumstances, we have named, as a full compensation to Mr. Macdonald, the highest price spoken of by any witness on his side of the question, which is his demand in full on Item 1; but we add nothing on account of his not getting the use of engines and cars sooner than he did. On Items 1 and 11 together, we allow $23,079.

Item 2.

	Yards.		
Rock ballast from Newcastle pit, with engines and cars . . .	16,692		
Rock ballast from Greenbrook pit, with engines and cars . . .	37,923		
Rock ballast from Greenbrook rock cutting, with engines and cars	300		
Rock ballast, prepared Station 560	3,550		
In all	58,465	at 75c. =	43,348 75

Item 3.

	Yards.		
Sand and gravel ballast pit, east Miramichi bridge.....	58,500		
Sand and gravel ballast pit, Nipissiquit bridge.....	79,600		
In all.....	138,100	at 28c. =	$38,668

These two items cover all the ballast except that just disposed of under Item 1, and we deal with the two together, because they must both be decided at least by the adoption of one or the other of two systems of measurement which led to very

different results and which were respectively advocated for settling the dispute in 1876—one by alleged number of car-loads, and an assumed average quantity per car, the only method which, at that time, gave as much ballast as was claimed by Mr. Macdonald; the other by actual measurement, as prepared by the Government, such measurement being the cubic contents of the pits from which the material was taken, as well as of the material itself found upon the line.

Item 2 relates to rock ballast, Item 3 to sand and gravel.

The dispute still pending in this case arose before the contractor left the works. It seems to have been started by the resident engineer making his monthly estimates, not from actual measurement, but on the car-load theory before mentioned, and the quantities being once stated in that way the contractor contended that they were to be treated as definite, and that the amount finally due to him was to be calculated by that method. Even if that method had been carefully followed, we think his contention would not have been sound, for according to the contract and tender, payment was to be made at a price per yard on the ballast measured in the pit. But after giving the subject full consideration, we have to say that the monthly progress estimates were not approximately correct; it was not necessary to have them precise, but they were so far astray as to be misleading.

Mr. Buck was the resident engineer on Section 10 till the end of 1874. His return for the work by horses and carts (Item 1) are not disputed by either party, the difference of opinion being as to total balance, not the porportion of it moved in that way. After the engines and cars were provided in August, 1874, Mr. Buck based his returns, as aforesaid, upon the number of car-loads alleged to have been moved by the contractor, and upon an assumed number of yards as the average contents of a car. That seasons operations closed in November; at the beginning of the next season Mr. Smellie succeeded Mr. Buck, and adopted the figures previously returned, adding to them the quantities moved under his supervision, in which way the errors of the previous period were continued.

Early in 1875, Mr. Schreiber, his superior officer, after walking over the line and noting the dimensions of the ballast and other data, made a check calculation, and came to the opinion that the total quantity returned up to that time was higher than it ought to have been, especially in rock ballast, whereupon he instructed Mr. Smellie to examine these measurements and calculations.

This was done and then Mr. Smellie re-checked them, the result showing each time a serious discrepancy.

A full and careful measurement of the pits from which the ballast had been taken was made by Mr. Smellie, assisted by Mr. Mann, the resident engineer on Section 16.

The result of their investigation was as follows:—

	Yards.	Value.
Rock ballast, Section 20, by carts	3,740	
From Newcastle pit	12,650	
" Section 10, by carts	11,646	
" Greenbrook pit	28,653	
" Rock cuttings	300	
In all (at 75 cts)	56,989	$42,741 75
Sand ballast, North River pit	46,200	
Gravel ballast, Nipissiquit pit	50,657	
" by carloads	400	
" sides cast in	800	
Earth strippings, &c., used to make up embankments:		
Section 10	8,942	
Section 16	12,340	
In all (at 28c)	119,339	$33,414 92
Rock and gravel together, making		$76,156 67

In the spring of 1876, before any of the work was touched, Mr. Barclay, another engineer, under directions from Mr. Schreiber, measured the pits, and also the rock ballast in the road-bed.

	Yards.
In measuring the pits, he assumed the quantities returned by Mr. Buck, as done by horses and carts, to be correct (*i. e.*, 3,740 + 11,646)	15,386
And also the quantity from rock cuttings	300
His measurement of the other places gave from :	
Newcastle pit	12,063
Greenbrook pit	29,408
	57,156

Or 167 yards more than Mr. Smellie and Mr. Mann.

His measurement of rock ballast on the road was by taking cross sections every 100 feet, and plotting them on paper ; these are now on record, and show result of 57,302 yards, which is 313 yards more than Mr. Smellie and Mr. Mann returned as the contents of the pits from which that ballast was taken.

Mr. Barclay's measurement of the other quantities, namely, sand and gravel ballasting, and the earth for embankments, differed from that of Mr. Smellie and Mr. Mann, as follows :—

Sand ballast	246	yds. less
Gravel ballast	1,404	" "
Earth in embankments	645	" "

Thus, the measurement by Mr. Barclay, most favorable to the contractor, was, on the whole, about $400 less so than that of Messrs. Smellie and Mann.

The quantities claimed by the contractor are considerably larger than those arrived at by the several engineers who were employed, as aforesaid, by the Government, to investigate the matter. His are supported, principally, by statements made up by Mr. O'Brien, who was in his service during the progress of the works. He said he had been "in various capacities—time-keeper, assistant book-keeper, and assistant paymaster"—and that his estimates were based on the number of carloads set down at the time from day to day. It strikes us that while he was engaged in some of the capacities which he mentions, he must have depended on others for information, concerning the number of carloads carried from day to day, and in that way may have been misled.

Subsequently, in 1880, Mr. Grant, an engineer, was employed by Mr. Macdonald to make measurements, with a view to giving evidence in support of this claim before Mr. Shanly. He measured three pits, and exhibited plans and gave oral testimony, both before Mr. Shanly and this Commission.

Of the different estimates put forward by the contractor, that by Mr. Grant was the one most likely to be correct, for, though his measurements were made several years after the work was done, he attempted to make an estimate as accurate as was possible, which some others of Mr. Macdonald's witnesses evidently did not, but he was under this great disadvantage: he had not seen the pits before, and had no personal knowledge of their original shape. He explained before us that he had calculated as ballast the whole cubic contents of the Greenbrook and Nipissiquit pits just as he found them, allowing nothing whatever for earth or other material lying over the ballast or mixed with it. He said the gravel had been close to the surface—within an inch of it. And, concerning the other one measured by him, the Newcastle pit, he said he believed his measurement was reliable, because, though some material had been taken from it after Mr. Macdonald left, it was only stripping stuff, and was there yet, and he felt sure no ballast material had been taken by others, "because the men who had taken it ont for Macdonald were there with him."

Mr. Chisholm, in supporting a different item (charged by Mr. Macdonald for material moved, not as ballast, but for buildings, embankments), testified that 18,000 yards of material went out of this Greenbrook pit for that purpose. He said: "You will understand that it is not only this surface; sometimes we get into a seam of clay amongst this rock, or shaly soft stuff, that would not be allowed to be used as gravel, which we have to take out, and this we put in the sides to widen embankments." It is quite clear, therefore, that Mr. Grant made a mistake when he assumed the whole contents of that pit to have been rock ballast.

Mr. Chisholm admitted that Mr. Grant ought to have allowed something at the surface for earth. He said there were six inches of it. Mr. Smellie said there was a considerable quantity. The truth is, however, that there was not as much as 18,000 yards of earth taken for embankment out of this pit. Mr. O'Brien stated that something over that quantity had been so taken out, but it is evident that his estimate is too high. Much of the unfounded argument for the contractor is traceable to Mr. O'Brien's statements based on carload quantities.

Mr. Grant found the whole cubic contents of the Greenbrook pit to be 37, 923 yards, and Mr. Macdonald now claims this all as rock ballast at 75 cents. per yard.

Mr. Smellie's measurement gave for this pit 8,942 yards of earth for embankments and 28,653 of rock ballast, in all 37,595 yards, the variance on the total contents being thus only 328 yards. The principal difference between them is, that Mr. Grant assumed it to be all rock ballast; Mr. Smellie, who had been on the spot during the work, and had made his estimates in 1876, returned a considerable portion of it as earth used by the contractor for a purpose other than ballasting. In his evidence he attributed the incorrectness of Mr. Grant's estimates to the fact that he did not allow for the earth or stripping which had covered the ballast; and it must be remembered that this stripping was not moved without compensation. It was taken away and put into embankments, and appears in the present claim in Item 4. In that shape it is not disputed by the Government, and is paid for at 28 cents a yard, the price of gravel ballast.

In making up this claim before Mr. Shanly, the contractor adopted exactly the figures of Mr. Grant for the three places which he measured in 1880, namely:—

16,692 yds. rock ballast from Newcastle pit.
37,923 " " " " Greenbrook pit.
91,900 " gravel " " East Miramichi pit.

And although that covered the whole cubic contents of Greenbrook pit, he advanced a claim at 28 cents a yard for a considerable quantity of earth as taken from it and used in embankments. According to Mr. O'Brien's statement that earth was 18,190 yards, but it was not claimed to be so much before Mr. Shanly. Mr. O'Brien's estimate of rock out of the same pit was 44,920 yards.

It was in support of this earth item that Mr. Chisholm gave his evidence that we have already quoted. He gave evidence on most of the items. He had been the active manager on the works, and had got from the book-keeper and others figures concerning quantities which he had put down in a book. These figures he was able to state again, though not always with certainty, but he had no knowledge of his own as to quantities or amount.

This gentleman testified that he was a partner to the extent of one-fourth in the contract. He did the outdoor work, and he said that a son of Mr. Macdonald's looked after the accounts, &c., and had another fourth interest, the claimant holding the remaining half. Mr. Chisholm produced before us one carefully preserved document, which had been signed by Mr. Mann, then the resident engineer. This he put in for the avowed object of showing that after the true measurements were given on progress estimates, some one at Ottawa, or elsewhere, wrongfully lessened them, so that in the end the firm got credit for less than the correct amount of work.

The document read as follows:—

"*Estimate for August and part of July.*

	Yards.
July, ballast from Nipissiquit pit	1,500
August " " " "	26,000
" side casting	800
" material to lay	3,000
Cubic yds	31,300

"W. MANN, *Assistant Engineer.*

"NIPISSIGUIT, 30th August, 1875."

Concerning this certificate, Mr. Chisholm testified that Mr. Mann had arrived at the quantity by measuring the pit in his (Chisholm's) presence; that Mann then told him that the quantity up to that time was over 30,000 yards, after which he asked for a memorandum and got it. There is, however, another history of this paper. The authorities at Ottawa suspected that the quantities stated were in excess of the true ones, and required an explanation from Mr. Mann, and this is his story:

"RESTIGOUCHE DISTRICT, 13th September, 1875.

"DEAR SIR,—Yours of the 7th, from Montreal, received Saturday evening, and this morning went out to Nipissiquit pit, running levels all over the bottom, plotting levels, and the following is the result:—Total quantity out of pit up to 11th inst., 16,998 and 800 for side casting; total, 17,798 cubic yards. I took the quantities they returned me by car-loads in good faith, never supposing for a moment they would give me a wrong quantity. I do not see what could have been their object, for I told them the next return would be by cross-sections. At the rate they have worked, about 4,500 yards of the above have been done this month. * * * I am very much put out that the above has happened. For the future not a yard will be returned without being properly measured.

"I am, dear Sir, yours, &c.,

'C. SCHREIBER, Esq." "WM. MANN.

This version of the affair gives some ground for supposing that Mr. Chisholm, knowing the estimate forwarded by Mr. Mann to be higher than it ought to be, asked for and got a memorandum of its quantity, over the signature of the engineer, so that it might be used afterwards in support of a claim for more than was right.

We cannot feel sure that the estimates offered by the claimant in support of his case have been procured with the object of showing fairly both sides of the case; but assuming that they are advanced in good faith, we have to say that they are entirely unreliable.

The danger of trusting to those based on the alleged number of car-loads is shown by the fact that Mr. O'Brien could thereby get 44,820 cubic yards of ballast and 18,190 yards for material for embankments, in all 63,110 yards, out of the Greenbrook pit; which Mr. Grant, acting in the claimant's interest and measuring up to the very surface found to contain only 37,923 yards. The same method or wants of method misled Mr. Mann into returning, at the first measurement of the Nipissiquit pit, as taken up to the end of August, 1875, a quantity of 31,300 yards, which by his own actual measurement of the pit was afterwards reduced to 13,298 yards. Our conclusion is that in the face of the official estimates made by competent engineers with great care and without any pecuniary interest in the result, and recorded so circumstantially as they now appear, and in the face of the evidence of Mr. Schreiber and Mr. Smellie on the subject, it would be impossible to give effect to the estimates put forward by Mr. Macdonald. The best of all these estimates is, of course, not precisely correct, but the returns of Mr. Smellie and Mr. Barclay are manifestly much more reliable than any others now available.

Between those two Government returns we take that most favorable, as aforesaid, to the claimant, and report that he put on the line altogether 98,057 yards of gravel

or sand ballast, and 56,989 yards of rock, in addition to what went from Station 560, charged above at 3,550 yards. From the 56,989 yards just mentioned must be deducted what has been already allowed on Item 1, as moved by horses and carts.

The 300 yards from the rock cutting is included in this allowance, but the 3,550 is not as yet disposed of. Mr. Macdonald, as contractor for Section 10, made an embankment on it too low, lower than was required by the plan. A quantity of ballast (alleged by Mr. O'Brien to be 3,550 yards) was under this contract deposited there; after which the Government engineers insist on the level being raised to the proper grade, and some three feet of earth was added to the height. It was then ballasted again, so that the quantity now charged for, was lost to the Government. It formed a portion of the embankment below grade, which Mr. Macdonald, under his former contract had undertaken to complete for a bulk price.

The question is whether the claimant is entitled to any pay for the material thus thrown away, and if so, for what quantity

Mr. Buck, who is the resident engineer over Section 10, is dead. He gave evidence for the claimant before Mr. Shanly, but was not questioned on this matter. Mr. Chisholm testified before us that he heard Mr. Buck say that he had changed (lowered) the original grades at that place, on account of the long wet cutting, in order to get a better run for the water; and that he had an order from Mr. Fleming to do it. Mr. Chisholm's evidence, generally, failed to impress us with a high opinion of his memory; but in this case, the absence of any explanation would with us raise a presumption, that the road had here been finished as required by the Government agent on the spot, the resident engineer, in which case we think Mr. Macdonald should not lose the value of the ballast afterwards put in by him under a new contract. But we have no faith in the quantity stated by Mr. O'Brien; it is given as "355 cars at 10 yards." The evidence convinces us that he was not only inaccurate, but that his statements were very exaggerated. When the correctness of his figures could be tested, they had been from 50 to 100 per cent. higher than they ought to be. This ballast from Station 560 had been covered by the earth, and when the dispute arose could not be measured, so that there is now no satisfactory evidence concerning the quantity. In order to make some estimate, we assume two-thirds of the quantity stated by Mr. O'Brien as the true one, and we name 2,367 yards as allowable in this portion of the item, The result is to credit the claimant on Items 2 and 3, as follows:—

Rock Ballast.—

	Yards.		Value.
From Station 560	2,367		
From other places	56,989		
	59,356		
Less credited on Item 1	15,386		
Balance	43,970	(at 75c.)	$32,977 50
Gravel ballast	98,057	(at 28c.)	27,455 96
In all			$60,433 46

Item 4.

Widening and Grading,—

	Yards.		Value.
Section 10	8,942		
" 16.	12,340		
Total	21,282	(at 28c.)	$5,958 96

These are the quantities before alluded to as taken from the pits, but put into embankments instead of being used as ballast. They are fully established by the

evidence, being, in fact, the quantities returned by the Government engineers instead of those much larger ones certified by Mr. O'Brien under his car-load method. That gave over 46,000 yards as put into the embankments against 21,282, and against Mr. Barclay's estimate of 20,634 yards. We allow this item in full.

Items 5, 6, 7, 8 *and* 9.

(5). 44 miles track-laying, at $350	$15,400 00
(6). 18 sets points and crossings, at $14	252 00
(7). Lowering track by order of Engineers	75 00
(8). Plank furnished, 4,000 ft., at $45	180 00
	$15,987 00

The evidence supports these charges. They are all admitted and included in Mr. Schreiber's final certificate, and are allowed by us.

Item 10.

General account of work outside of contract . . $4,920 31

The details are given in nineteen separate charges, set out in Schedule E, hereto attached.

We think nothing is payable on the first twelve charges, amounting altogether to $93.75.

On charges thirteen and fourteen we think the evidence established a liability. We allow $1,201.56 as charged. On charges fifteen, sixteen and seventeen we allow $200 as a liberal compensation for the work done. Charge eighteen, "distributing 53,500 sleepers hauled out of the river at Miramichi, at 5 cents, $2,675," is altogether without foundation, and it ought never to have made its appearance in an account against the Government; in fact, the quantity was much smaller, and the work was done at 3 cents per tie, under a written agreement made directly with the tie contractor, and all this is ignored by the claimant. He and his partner testified that they knew nothing of such an arrangement, but it is established by documentary evidence, as well as by the receipt by the claimant's firm from the tie contractor, of the full pay for the services, except a small balance of $146.34.

On Item 10 we allow altogether $1,401.56.

Item 11 is already disposed of in connection with Item 1.

In addition to the sum of $88,531.30 paid to this claimant on these works, and admitted by him in his particulars, a further sum of $2,522.17 was paid to him in June 1879 (included in a cheque of $7,493.57), and repairs and other work was done for him at the Government expense for which he is chargeable with $910.20.

The liability on the ballasting, track-laying, &c., of Sections 10, 16 and 20 is therefore, in our opinion, as follows:—

Items.		$ cts.	
1 and 11.	Rock ballast by horses and carts	23,079 00	
2 and 3.	Remainder of ballasts	60,433 46	
4.	Widening, &c., embankments	5,958 96	
5, 6, 7, 8, 9.	Track-laying, &c	15,987 00	
10.	Sundries	1,401 56	
		$106,859 98	
Payments admitted		$88,531 30	
" in June, 1879		2,522 17	
Repairs, &c.		910 20	
		91,963 67	
Balance		$14,896 31	

In our judgment, on the claims submitted to us the Crown was liable to Mr. Macdonald, on the 1st day of January, 1875, on the construction of Section 10, in the sum of $16,644; and on the 1st January, 1876, on the track-laying and ballasting Sections 10, 16 and 20, in the sum of $14,896.31, and was not liable, in any sum, on the construction of Section 8. This is based on the assumption before mentioned, that the bulk price for Section 10 is $400,000, instead of $265,920, as it would have been if the contract had been drawn up according to the terms of the advertisement for tenders.

G. M. CLARK,
FRED'K BROUGHTON,
D. E. BOULTON.

Hon. J. A. CHAPLEAU, Secretary of State.
OTTAWA, 7th March, 1884.

P.S.—Since the above was signed, we have been instructed, by Order in Council, to report our view of the liability, not only as it is after charging, as we have, in this case, for diminutions of work caused by the omission of the wooden superstructure for bridges, and by changes in grade or location, but also, as the liability would be should the right to make such charges be waived by the Government.

In this case, notwithstanding such charges, in all $6,763 would vary the liability only so far as it relates to Section 10, it that it would be $23,407 instead of $16,644, as above mentioned.

GEORGE. M. CLARK,
D. E. BOULTON.

OTTAWA, 20th March, 1884.

SCHEDULE A.

SECTION 8, INTERCOLONIAL RAILWAY.

The Government of Canada, to Duncan Macdonald, Contractor.

No.	——	Quantities.	Rate.	Amount.
			$ cts.	$ cts.
1	To 2,000 feet of fencing extra.....per 100 ft.	2,000	9 00	180 00
2	Extra earth-work, in excess of bill of works.....C. yds.	7,550	0 25	1,887 50
3	do extra haul, to cover peat embankments to protect them from fire .....C. yds.	5,260	0 15	789 00
4	Extra cost of cattle-guards, masonry substituted for wood, by order.....C. yds.	130	12 00	1,560 00
5	3,441 yards of second-class masonry, made first-class by order, and, as shown by plans, difference between second and first-class, including tool-dressing and chisel-drafts, when rock face work was acceptable under contract:— First-class masonry ..... $15 00 Second-class masonry 6 00	.....	9 00	30,969 00
6	One additional public road crossing	.....	.....	250 00
7	Extra 30-inch iron pipes, laid in concrete and masonry, built into three culverts, not included in bill of works.....40,000 lbs.	.....	.....	10,000 00
8	Metapedia arch culverts, extra works, as follows:—			
	Piles driven.....L. ft.	12,954	0 75	9,716 00
	Flatted timber ..... do	2,609	0 25	652 25
	Cement.....C. yds.	169	10 00	1,690 00
	Excavation in foundations	.....	.....	1,014 00
	Pumping do	.....	.....	1,000 00
	Wrought iron do ..... lbs.	937	0 10	93 70
	Cast iron do ..... do	188	0 07	13 16
	Extra timber in superstructure.....	.....	.....	134 00
				60,098 61

SCHEDULE A.—Section 8, Intercolonial Railway.—*Concluded.*

SUMMARY.

To amount of contract	100,000 00
do extras, as above	60,098 61
	160,098 61
By cash on account	100,000 00
To balance due	60,098 61

With interest from 1st December, 1874, on above balance.

SCHEDULE B.

QUANTITIES named to Tenderers for Section 10, monied out at rates named in Schedule of Duncan Macdonald's Tender.

Work performed.		Quantities	Rate.	Amount.
			$ cts.	$ cts.
Clearing	Acres.	310	25 00	7,750 00
Close cutting	"	15	25 00	375 00
Grubbing	"	15	100 00	1,500 00
Fencing	Lin. ft.	212,000	9 00	19,080 00
Rock excavation	C. yds.	61,000	1 20	73,200 00
Earth do	"	853,000	0 30	255,900 00
Under-drains	Lin. ft.	50,000	25 00	12,500 00
Rip-rap	C. yds.	1,000	1 50	1,500 00
Concrete	"	600	6 00	3,600 00
First-class masonry	"	2,000	15 00	30,000 00
Second do	"	9,000	12 00	108,000 00
Paving	"	800	6 00	4,800 00
Foundations. (No price is given in the schedule for foundations, it being apparently intended that the price named for masonry shall cover the foundation for it.)				
Howe Truss Bridge, 80 lin. ft. span				1,800 00
Beam Culverts, say 128 ft		14	10 00	1,280 00
Public Crossings		2	40 00	80 00
Over-bridge		1		
Farm Crossings		5	20 00	100 00
Omissions and Contingencies, 10 per cent. on all other works				52,146 00
				573,611 00

SCHEDULE C.

Section 10, Intercolonial Railway.

The Government of Canada, to Duncan Macdonald, Contractor.

Item.	Work performed.	Quantities.	Rate.	Amount.
			$ cts.	$ cts.
1	To extra grubbing in widening cuttings and making side ditches, not included in bill of works..... Acres.	21	160 00	3,360 00
2	Extra earth excavation over and above contract amount.....C. yds.	88,895	0 30	26,668 50
3	Extra rock excavation over and above contract amount..... "	51,155	1 50	76,732 50
4	Extra ditching outside of line by order of engineer.. "	40,520	0 30	12,156 00
5	Extra excavation in earth, stream diversions outside of line..... "	34,735	0 40	13,894 00
6	Extra excavations in rock, stream diversions outside of line ..... "	1,317	1 75	2,304 75
7	Extra rock ditching catch-water drains, culvert pits outside of line. ..... "	1,201	1 75	2,101 75
8	Extra haul (over 1,600 ft. average haul) 2,122 ft..... "	180,984	0 21	38,006 64
9	1,500 yards first-class masonry, additional cost for Portland cement when Canadian cement was acceptable, and additional cost of tool-dressing and chisel-drafts when rock face work was acceptable under contract, at $2 extra per yard..... $3,000 00			
	457 yards (extra) first-class masonry above quantity of bill of works made as above at price of tender, at $15 per yard 6,855 00			
	Additional cost on above for Portland cement, tool-dressing and chisel-drafts when rock face work was acceptable, at $2 per yard 914 00			
		.....	.....	10,769 00
10	4,898 yards of second-class masonry which were, by order and as shown by plans, turned into first-class—difference between second and first-class masonry—			
	Tender price for first-class masonry.... $15			
	Price allowed for second-class masonry 9			
	$6 00	$29,388 00		
	Additional cost for Portland cement when Canadian cement was acceptable and cost of tool-dressing and chisel-drafts when rock face work was acceptable, at $2 per yard.....	9,796 00	.....	39,184 00
11	Extra work in excavation, foundations to arch culverts, water and pumping contingencies, not included in bill of works	12,895 00	0 40	5,158 00
12	Loss and damages incurred in consequence of 40 horses, men, foremen and manager sent to commence work at Government's request, but delayed two months, former contractors refusing to deliver work to Government before they had been paid	.....	.....	3,500 00
				233,835 14

SUMMARY.

To amount of contract.....	$400,000 00
Amount of extras as above	233,835 14
	$632,835 14
By cash received on account of contract	381,961 40
To balance due on contract and for extras.....	$251,873 74

With interest from 1st December, 1874, on above balance.

SCHEDULE D.

SECTIONS 10, 16 AND 20—BALLASTING, &c.

The Government of Canada to Duncan Macdonald, Contractor.

Item.	Work performed.		Quantities.	Rate.	Amount.
				$ cts.	$ cts.
1	Rock ballast put in with horses and carts, engines and cars not having been furnished by the Government, as per agreement	C. yds.	15,386	1 50	23,079 00
2	Rock ballast from Newcastle pit with engine and cars	16,692 "			
	Rock ballast from Greenbrook pit with engines and cars	37,923 "			
	Rock ballast from Greenbrook pit, rock cutting	300 "			
	do prepared at Station 560	3,550 "			
			58,465	0 75	43,848 75
3	Sand and gravel ballast—				
	Pit, East Miramichi Bridge	91,900 "			
	Pit, Nipisiquit Bridge	51,857 "			
			143,757	0 28	40,250 16
4	Widening and grading Section 10	8,942 "			
	do do 16	12,340 "			
			21,282	0 28	5,958 96
5	44 miles track-laying	Miles.	44	350 00	15,400 00
6	18 sets points and crossings	No.	18	14 00	252 00
7	Lowering track by order of Engineer	L. yds.	300	.....	75 00
8	Plank furnished	B.M. Feet.	4,000	45 00	180 00
9	Plank for 4 road crossings, as per letter	No.	4	20 00	80 00
10	General account for work outside of contract, (see statement in detail appended hereto)		.....	.....	4,920 31
11	Loss and damage for delay, not having been furnished with engines and cars from May, 1873, to end of August, 1874—14 months		.....	.....	10,500 00
					144,544 18
	By Cash on account		.....	.....	88,531 30
	Balance due		.....	.....	56,012 88

With interest from the 1st December, 1875.

The quantities under Item 3 are to be charged as follows:—

Pit, East Miramichi Bridge	58,500	cub. yds.
" Nipisiquit Bridge	79,600	"
	138,100	"

The rates remaining the same, and the total amount to be altered accordingly.

A. McINTYRE,
Counsel for Claimant.

SCHEDULE E.

(Showing Details of Item 10, in detail.)

BALLASTING CONTRACTS, SECTIONS 16, 20 AND 10.

The Government of Canada, to Duncan Macdonald, Contractor.

No.	Date.	Work Performed.	Rate.	Amount.
	1875.		$ cts.	$ cts.
1	June	To Shimming track 16 miles, section 10, 7 days' men	1 25	8 75
2		Ditching, Blanchard cutting, section 16, 2 days	1 25	2 50
3		Shimming at beam culvert, bog, section 16, 4 days.....	1 25	5 00
4	July.....	Shifting sleepers out of way at bog, section 16, 7 days.....	1 25	8 75
5		Forwarding sleepers, first mile north of bog, section 16, 10 days.	1 25	12 50
6		Shimming culvert, north borrowing pit, section 16, 2 days.....	1 25	2 50
7		Forwarding sleepers for track, first 2½ miles north of Lawson's cutting, section 16, 25 days.....	1 25	31 25
8		Shimming culvert at little red pine, section 16, 2 days.....	1 25	2 50
9		Shimming at big red pine bridge, and cutting rails, section 16, 7 days.....	1 25	8 75
10		Shimming at first culvert north of big red pine bridge, section 16, 3 days	1 25	3 75
11		Bartibogue siding, section 10, 3 days.....	1 25	3 75
12		Chipping rails for red pine siding, section 16, 3 days.....	1 25	3 75
13	Sept.	503¾ day's labor trimming embankments, section 16.....	1 25	629 69
14	Oct.....	45½ do do	1 25	571 87
15		Hauling 10 carloads bricks to Bathurst, per order of Engineer.	.....	150 00
16		do 5 do iron for siding	.....	75 00
17		do lumber for station houses.....	.....	195 00
18		Distributing 53,500 sleepers, hauled out of River Miramichi....	0 05	2,675 00
	Nov. 30 ...	Water tanks and shanty for men.....	.....	530 00
19				4,920 31

Interest from 1st December, 1875.

SPECIAL REPORT ON CLAIM OF F. TURGEON, $2,225.

This claim is for the value of a number of ties owned by Mr. Turgeon, and alleged to have been taken by the railway officials for use on the road.

The evidence and documents before us show that Mr. Turgeon was a sub-contractor under Mr. Girouard, who had a contract for supplying ties for Sections 9 and 15 of the Intercolonial Railway, and that after Turgeon had delivered some 32,000 ties, they were gone over by the Inspectors and about 10,000 culled out. These were not accepted or paid for by the contractor, Mr. Girouard, but remained at the place of delivery as the property of Mr. Turgeon.

Some time after, in 1875, these culls were carried away from Section 9, by Mr. J. J. McDonald and the track-master, to make sidings elsewhere.

The matter was investigated, in the first instance, by Mr. Simard, one of the official arbitrators, when several witnesses were examined; it was also looked into by the late Mr. F. Shanly, and some evidence was given before him, including a declaration by Mr. Girouard, to the effect that about 10,000 were rejected by him out of the quantity supplied, and he had not paid for them, although they were afterwards taken by the Government and used for railway purposes. Mr. O. Turgeon, brother of the claimant, who was acquainted with the whole circumstances of the case, gave evidence before us concerning the claim, and from his testimony and the documents on record, we have come to the conclusion that the Crown was, on the 1st day of

January, 1876, and still is, liable to Mr. Turgeon for 10,000 ties, at 15 cents each, in all $1,500.

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

Hon. J. A. CHAPLEAU, Secretary of State.
OTTAWA, 13th March, 1884.

Special Report on Claim of Andrew Johnson & Co..... $506 60

This claim arises out of a contract to erect an engine house at Truro, and is for a balance alleged to be due and unpaid on extra work, under the circumstances hereinafter mentioned.

The claimants' tender for the erection of the said building was accepted by telegraph on the 15th May, 1872; no formal contract was signed, but plans and specifications were furnished to the claimants in the usual way, and the work was completed in 1873, after which, in September of that year, the contractors presented a claim for the value of work which they alleged to be outside their contract.

During the progress of the work they had frequently complained of being obliged by the Government officials, to build regular coursed, instead of random coursed masonry, as required by the specifications.

In their claim they charged for that, and for other work which was alleged to be altogether independent of that contemplated by the agreement, such as lining with wood-work the upper portion of the walls, also adding to their height so as to suit the particular construction of the roof, and also building pillars of masonry, &c.

The particulars of their demand for these extras, were given in three separate accounts, each dated 24th September, 1873, which we distinguish by numbers, as follows:—

No. 1. Was for the increased value of masonry, stated, in round numbers, as 500 yards, at $4 per yard, $2,000.

Across this paper Mr. Schreiber, under whose supervision the work had been done, wrote and signed a memorandum as follows: "Not admissable; nothing done more than required by contract." And the Chief Engineer wrote: "Not allowed.—S. F."

No. 2. Gave the details of the charge for wood-work and painting in lining the upper portion of the walls, amounting to $87.36.

This was disapproved in the same way as the last, by Mr. Schreiber, and then rejected by Mr. Fleming.

No. 3. Was as follows:—

Extras on Engine House, Truro.

(1). 3 brick pillars, 3 x 2, not on the plan tendered on requiring 1,900 bricks, at $15			$285 00
(2). 6 yds. stone foundation, at $10			60 00
(3). 5 brls. cement, at $5.50			27 50
(4). 5⅓ yds. of stone footings for iron pillars			38 33
(5). Railway freight on above			8 27
(6). Turning arches on doors and window—56¾ days of brick-layers, at $2.50	$141 87		
74 days of laborers, at $1.20	88 80		
11¾ days of foreman, at $3	35 25		
2 brls. of cement, at $5.50	11 00		
		276 92	
(7). 8 ft. additional length on five of the engine pits, at $17.50 each		87 50	
		$783 52	

At the foot of this account, Mr. Schreiber wrote as follows:—

"Item No. 1.—This work was performed. The plan you sent them to work by differing from the plan they tendered on with respect to these pillars.

"Item No. 2.—Ditto.

"Item No. 3.—This item is correct.

"Item No. 4.—Correct. The stone foundations for pillars were built as per plan, but found to be too small for columns, as sent from England.

"Item No. 5.—Ditto.

"Item No. 6.—Covered by contract.

"Item No. 7.—Know nothing of this."

And across the face of this account the Chief Engineer wrote and signed a memorandum, as follows:—"$506.60 chargeable to engine-house, Truro, Nov., 1873."

It will be noticed that the $506.60 was the whole amount of this particular account, except item No 6, $276.92.

The amount thus allowed by the Chief Engineer was paid to Messrs. Johnson & Co., on 13th December, 1873, whereupon they signed the following receipt:—

"($506.60.) "OTTAWA, 13th December, 1873.

"Received from the Commissioners appointed for the construction of the Intercolonial Railway, by Commissioners' cheque No. 2673, the sum of five hundred and six dollars and sixty cents, being in full payment of certificate for November, 1873, for extra work on engine house, Truro, Nova Scotia, and in full of all claims against the Commissioners for work in connection with the above said building.

"ANDREW JOHNSON & CO.

"P. S. ARCHIBALD."

A claim for the amount of the account Nos. 1 and 2 and Item 6, thus disallowed on account No. 3 (*i.e.* $2,000 + $87.36 + $276.92), in all, $2,364.28, was immediately afterwards (January, 1874) pressed by these claimants on the attention of the Chief Engineer; but as Mr. Schreiber, to whom the matter was again referred, retained his former opinion, nothing was paid on it.

It was, however, from time to time, pressed upon the Department, and finally was referred for investigation to Mr. Compton, an official arbitrator, in the following shape:—

Item 1.—531 c. yds. of masonry, in addition to the $6.50 paid to contractors.....	$2,160 00
Item 2.—Lining the inside walls of upper roof, not provided for in specification.....	87 56
Item 3.—Additional brick-work in raising the walls of building on side sufficiently high to receive the roof.....	327 92
	$2,575 48

Mr. Compton took evidence on the matter from several witnesses, at Truro, in April, 1880. Mr. Andrew Johnson, one of the claimants, then testified, amongst other things, that he had received the $506 aforesaid, through Mr. Murphy, a paymaster, and though he at first objected to the form of the receipt, he had signed it at last, because Mr. Murphy told him that "no advantage would be taken of the particular wording." Mr. Compton reported that in equity the claimants were entitled to be paid the amount of their demand.

The facts above stated give us the impression that no part of any of the items on which the $506 was paid, as aforesaid, is included in the claim subsequently made by Messrs. Johnson & Co. That claim was for the items of the three accounts before mentioned, not allowed by Mr. Fleming, but slightly increased. The masonry was

charged at 541 yards, which Mr. Johnson testified before Mr, Compton to be the accurate quantity, instead of 500 yards first stated, in round numbers, in account No. 1, and $51 was added to the item $276.92, making it $327.92, by which means the balance disallowed on the first three accounts, rendered in September ,1873, was increased from $2,364.28 to $2,575.48.

Mr. Compton's report was not acted on by the Government, and it appears by the correspondence on record between the contractors and the Department, that the claim in this shape, $2,575.48, was referred to Mr. Frank Shanly for investigation, and that he considered the full amount to be allowable to Messrs. Johnson & Co. He reported, on the 10th February, 1881 that he agreed with the conclusions of Mr. Compton, that he considered that the work on which the demand was based was "fully proved" to be extras; and he added "I therefore recommend that they be paid the sum of $2,575.28 less $506.60 already paid. The claim for interest will, of course, rest with the Government to deal with." On February 14th, Mr. Shanly officially communicated the substance of this report to F. A. Laurence, Esq., solicitor for the claimants, who, on 28th February, 1881, notified the Secretary of the Department as follows:

"I understand that Mr. Shanly has filed his report *in re* claim of Andrew Johnson & Co., recommending payment of $2,578.48 in full of claim. This amount claimants will accept in full. When it comes to be understood by Messrs. Johnson & Co., that the $2,575.48 allowed by Shanly was proposed to be reduced by the $506 paid as aforesaid, they brought the mistake to the notice of the Government, and Mr. Shanly was then asked to say whether he felt confident that the $506 was really part of the $2,575.48, to which he answered in the affirmative. After this the Government declined to pay the claimants more than the balance, which was stated at $2,068.99.

On April 27th, 1881, the following letter was written:—

Re *Andrew Johnson & Co.*

INTERCOLONIAL RAILWAY, CHIEF ENGINEER'S OFFICE,
OTTAWA, 27th April, 1881.

"DEAR SIR,—In consequence of absence, your letter of the 14th inst. only now received. In my award in this case, I dealt only with the papers laid before me.

"The account you now furnish, of $506.60, which you claim as extra to the $2,575.48, I never saw before. The former sum, for which you appear to have signed a receipt, was understood by me and, I understand, also by the official arbitrator, to be so much on the claim laid before us.

"As the matter now stands, I can take no further action or make any further report until it is again referred to me officially, through this Department, to which you had better apply.

"Yours truly,

"F. A. LAWRENCE, Truro, N.S." "F. SHANLY, *Chief Engineer.*

After the case was referred to us, we proposed to the solicitor of the claimants that he should send us a statutory declaration by Mr. Andrew Johnson, concerning the facts bearing on the points in dispute. This we have received, and we think it entirely corroborates the effect of the documents on record, showing, beyond doubt, that no part of the work for which the $506.60 was paid was included in the work on which Mr. Compton and Mr. Shanly made their reports.

We see no reason for withholding from the claimant $506.60, a portion of the amount awarded to him by Mr. Compton, as well as by Mr. Shanly. It has been hitherto withheld under an impression which is clearly erroneous.

By Order in Council, dated 17th March, 1884, we are directed to exclude no claim from our enquiry because of a receipt in full, unless, in our judgment, it was given under such circumstances as make it just and proper to hold the claimant by it. In our judgment, the claimant ought not to be bound by the terms of any receipt

heretofore given, so as to prevent his receiving an amount which, though ascertained to be due to him, he has never been paid. We find that on the 1st July, 1874, Her Majesty was and still is liable to the claimants in the sum of $506.60 on the claim referred to us.

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

To Hon. J. A. CHAPLEAU, Secretary of State.
OTTAWA, 5th April, 1884.

SPECIAL REPORT ON CLAIM OF ALEXANDER McDONELL & Co., $138,485.

This claim is based on two transactions—the first, the construction of Section 5 of the Intercolonial Railway under a written contract, between this firm and the Commissioners, dated 25th May, 1870, by which the work was to be finished on or before the 1st July, 1871, for a bulk price of $533,000.

This contract was subject to the usual provisions for altering the price, according to the increase or diminution of work by changes of grade or location. Before it was signed, the contractors were promised by the Commissioners that the time for completion would be extended by a period equal to that which had elapsed between the previous contractor giving up his contract and the letting to these claimants, which was about fifteen months.

The second transaction was widening and levelling grounds for stations at St. Fabien and Bic, in pursuance of an arrangement with Mr. Hazlewood, the District Engineer, acting under the instructions of the Chief Engineer and the Commissioners, by which the work was to be done at rates agreed on between them.

The following are the particulars of the claim on both transactions as submitted to us:—

IN THE MATTER OF ALEXANDER McDONELL & CO., *vs.* THE GOVERNMENT OF CANADA.

Bill of Particulars.

No. of Item.	Station.		$ cts.	$ cts.
.....	.....	To Amount of contract price for Section 5, Intercolonial Railway	.....	533,000 00
.....	.....	Work done at Bic Mountain, 67,000 cubic yards excavation, at 32 cents	21,440 00	
.....	.....	42,000 cubic yards embankment, at 32 cents	13,440 00	
.....	.....	42,784 cubic yards rock excavation, at $2.50	106,960 00	
.....	.....	Less 388,800 cubic yards embankment dispensed with, at 32 cents	124,416 00	17,424 00
2	1018 to 1004	Extra rock cutting, 4,283 cubic yards, at 90 cents	3,854 70	
		Less price for earth, 25 cents	1,070 75	2,783 95
3	1018 to 1004	9,631 cubic yards wasting, at 25 cents	.....	2,407 75
4	921	18,000 cubic yards excavation and embankment, caused by division of stream and bridge, at 40 cents	.....	7,200 00
.....	.....	Building flumes and dams, and bridge for highway	.....	1,700 00
5	588	18,466 cubic yards wasting rock and blue clay cutting, at 25 cents	.....	4,616 50
6	588	Difference between rock and clay, 6,534 cubic yards rock, at $1.75	11,434 50	
		Less price for earth	1,633 50	9,801 00
7	586	4,000 cubic yards excavation deposited by Haycock, at 25 cents	.....	1,000 00
8	729	16,442 cubic yards excavation wasted, at 25 cents	.....	4,110 50
9	612	10,260 cubic yards rock and earth excavation, wasted and borrowed, at 25 cents	.....	2,565 00
10	487	15,000 cubic yards rock and clay cutting, wasted and borrowed, at 25 cents	.....	3,750 00
11	370	8,631 cubic yards, wasted and borrowed, at 25 cents	.....	2,157 75
12	29	4,377 cubic yards rock as above, at 25 cents	.....	1,094 25
13	130	5,360 cubic yards rock wasted, at 25 cents	.....	1,340 00
14	100	4,927 cubic yards rock wasted, at 25 cents	.....	1,231 75
15	304	Rock Slide, days labor per check roll, with percentage added	.....	2,524 50
16	281	50 days' labor per check roll, with percentage added	.....	834 00
17	310	Trimming up work done by Haycock, 1,319 do., with percentage added	.....	1,978 50
18	637 and 642	475 cubic yards rock excavation bottom, Bic Mountain, through "Error Engineer," at $2.50	.....	1,187 50
19	600	2,500 cubic yards rock excavation, at 90 cents	.....	2,250 00
20	144	1,200 cubic yards excavation and ditch, at 25 cents	.....	300 00
21	.....	Difference in quantity of stone purchased, as per accompany statement	.....	332 25
22	.....	Extra excavation for foundation of bridge at Rimouski; pumping, labor, timber, masonry	.....	11,880 00
				617,479 20
		Cr.		
.....	.....	By Cash received per sundry payments	.....	526,000 00
				91,479 20

Bic, 13th September, 1873.

IN THE MATTER OF THE CLAIM OF ALEX. McDONELL & CO., *vs.* THE GOVERNMENT OF CANADA.

Bill of Particulars.

STATEMENT of work done on the Intercolonial Railway in widening and levelling the ground at St. Fabien and Bic Stations up to the end of July, 1873.

Stations.	Description of Work.		Quantities.	Rate.	Amount.	Total Amount.
				$ cts.	$ cts.	$ cts.
	ST. FABIEN STATION.					
	Rock excavation	C. yds	19,082	1 50	28,623 00	
994	Earth do	"	5,607	0 30	1,682 10	
to	Rock foundation in culvert	"	43	1 50	64 75	
1012	Taking down masonry in culvert and rebuilding same	"	19	10 00	190 00	
						30,559 85
	CEDAR BOX CULVERT.					
	Rock excavation foundation	"	18	1 50	27 00	
684	Timber in parapets	"	10	0 30	3 00	
	Putting Government ties in walls and covering	L. ft.	176	0 07	12 32	
						42 32
471	GRADING STATION GROUNDS AT BIC.					
to	Earth excavation	C. yds	49,000	0 30	14,700 00	
487	Removing and rebuilding fence	L. ft.	735	0 05	36 75	
						14,736 75
487	Grading public road from Bic to station	C. yds	3,600	0 30	1,080 00	
	Earth excavation and earth foundation culvert	"	88	0 30	26 40	
to	Flatted cedar in culvert	L. ft.	620	0 15	93 00	
	Rip-rap stone, end of culvert	C. yds	2	2 00	4 00	
497	Putting Government ties for covers	L. ft.	430	0 07	30 10	
	Gate for station ground	.....	.....	.....	25 00	
	Building fence	"	860	0 08	68 80	
						1,327 30
	FARM CROSSING.					
443	Plank, F.S	B.M.	648	15 00	10 26	
						10 26
	REPAIRS OF FENCE.					
291	Repairing fence removed by tide	.....	.....	.....	10 00	
						10 00
	CEDAR BOX CULVERT.					
	Excavation of foundation	C. yds	25	0 30	7 50	
277	Flatted cedar	L. ft.	100	0 15	15 00	
	Filling in earth on culvert	C. yds	60	0 30	18 00	
						40 50
	EXTENDING BOX CULVERT AT RIMOUSKI.					
	Excavation in foundation	"	30	0 30	9 00	
1754	Second-class masonry	"	20	13 00	260 00	
	Paving	"	2	5 00	10 00	
						279 00
						47,005 98

We take up, first, the claims connected with Section 5.

Item 1.

To work done at Bic Mountain :		
67,000 cubic yds.	excavation, at 32c	$ 21,440 00
42,000 "	embankment, at 32c	13,440 00
42,784 "	rock excavation, at $2.50	106,960 00
		$141,840 00
Less—338,800 c. yds.	embankment dispensed with, at 32c	124,416 00
		$17,424 00

After the contract was let, it was decided by the engineers to shorten the line by going through a portion of Bic Mountain, instead of around it. The evidence of Mr. John J. Macdonell, one of the claimants, is that the work done on the new alignment was, by agreement, to be in lieu of, and as an equivalent for, the work originally designed, and it is only in consequence of a question having been raised whether the savings to the contractors, by the change, were not so great as to give him an undue advantage, that this item is now presented in its present shape, so that if desired by the Government, the rights of the contractors may be settled on the basis of charging them with the savings and crediting them with the increase according to the fair value of the respective works.

This question concerning the effect of the change at Bic Mountain was raised upon the suggestion of Mr. Chandler, who had been for a time the resident engineer. According to his contention, these claimants having received $526,000, which they admit were really overpaid, and it was alleged that the change was contemplated and planned before the contract was entered into.

The Select Standing Committee of Public Accounts, in 1873, felt it to be their duty to take evidence in reference to the expenditure on this section, after which that evidence and their proceedings were reported, without conclusions, to the House of Commons.

The contention of Mr. Chandler seems to have proceeded mainly on the supposition that contractors were bound to accept, as compensation for any work caused by a change of location, the rates for the same class of work given in the schedule attached to their tender. That erroneous impression was not uncommon amongst engineers on the Intercolonial Railway.

As pointed out in our general report, the schedule attached to the tender is given on the express understanding that it shall not affect the right of the parties under the contract, but merely for use, if so desired, in fixing periodical advances, to be based on progress estimates of work done; while clause 4 of the contract states plainly that for the work due to any such change the contractors shall get a reasonable allowance. This we take to mean a fair price at the time and under the circumstances under which it is executed.

The excavation in rock on the new location through Bic Mountain was unusually difficult and expensive. The evidence leads us to say that the cost averaged the contractors $2 per yard, and that under all the circumstances $2.50 is a fair rate to allow for it. The schedule to the tender mentioned only 90 cents for rock work.

Again, the excavation in rock was estimated, before the change in location took place, at 21,500 cubic yards, but, on the evidence, we find that it exceeded 40,000 cubic yards. The insufficiency of the credit thus proposed to be given to the contractors at the time accounts for the erroneous view, that they had been over-paid 21,500 yards, at 90 cents=$19,350. This is mentioned by Mr. Brydges in a report to the Privy Council, dated 4th February, 1874, but he states, unequivocally, that the price (that of the schedule) is too low.

Mr. Chandler prepared a statement, which was laid before the Public Accounts Committee, in which this item appeared as 21,500 yards, at 95 cents=$20,225.

We think it ought to be not less than 40,000 yards, at $2.50, or $100,000.

As to the time at which the change at Bic Mountain was decided on, Mr. Fleming, the Chief Engineer, gave evidence before the Committee on Public Accounts, on the occasion already referred to. He made his statement in the form of a letter (printed at page 48 of the report of that Committee, in which, amongst other things, he says: "Section 5 was originally placed under contract, in the spring of 1869. The first contractors took the work at extremely low rates. He soon discovered that only the softest excavations and easiest work could be executed by him without heavy loss at the price which he was allowed. * * * *

"It was the 15th December, 1869, before the first contractor finally ceased operations; winter had then commenced, and the ground remained covered with snow until the middle of May following. By this time the work on the section was re-let to Alexander McDonell & Co. The following month a careful study of the ground led to the discovery that a desirable change could be made. It was not, and perhaps could not have been discovered before, for the reasons above given. In this case, as in hundreds of others, so soon as it was found possible to make a change in any account desirable, it was at once authorized."

After considering this item, as if there had been no special arrangement concerning it, we have come to the conclusion that there would be no balance against the contractors if they were credited a fair allowance for the work occasioned by the change of location, and debited with any savings from the same cause; and, inasmuch as they have stated, before us, their willingness that the work executed at Bic Mountain should be treated as equivalent to that originally designed, we allow nothing in this item.

Item 2.

To extra rock-cutting—	
4,283 c. yds., at 90c	$ 3,854 70
Less, price for earth, at 25c	1,070 75
	$ 2,783 95

Item 6.

To difference between rock and clay—	
6,534 c. yds. rock, at $1.75	$11,434 50
Less, price for earth	1,633 50
	$ 9,801 00

Item 19.

To rock excavation—	
2,500 c. yds., at 90 cents	$ 2,250 00
Altogether	$14,834 95

These three charges are for the increase of work in particular localities over that indicated by the bill of works, and are made because the claimants, as they allege, were misled by that inaccuracy into making an offer at a lower price than it would otherwise have been.

To allow these charges, or any portion, of them, would be to say that no binding bargain could be made for a bulk sum price. The bill of works, in this instance, as in others, gave notice to intending tenderers:

"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."

It seems to us clear beyond question that the spirit as well as the letter of the bargain made with these contractors, excludes any claim for such increases as these, and we allow nothing for them.

Item 3.	
9,631 c. yds. wasting, at 25c	$2,407 75
Item 5.	
18,466 c. yds. wasting, rock and blue clay, at 25c	4,616 50
Item 8.	
16,442 c. yds. excavation wasted, at 25c	4,110 50
Item 9.	
10,260 c. yds. rock and earth excavation wasted and borrowed, at 25c	2,565 00
Item 10.	
15,000 c. yds. rock and clay cutting wasted and borrowed, at 25c	3,750 00
Item 11.	
8,631 c. yds. wasted and borrowed, at 25c	2,157 75
Item 12.	
4,337 c. yds. rock, as above, at 25c	1,094 25
Item 13.	
5,360 c. yds. rock wasted, at 25c	1,340 00
Item 14.	
4,927 c. yds., as above, at 25c	1,231 75
Altogether	$23,273 50

Uncontradicted evidence shows that these contractors were induced, by the engineers in authority over them, to adopt a more speedy method of finishing the work on Section 5 than would have been necessary in fulfilling their contract. It was to waste excavated material in many localities, instead of hauling it to distant places for the embankments; and then to supply the requisite quantity for those embankments from new excavation or borrow pits. By this course the contractors moved *pro tanto* double the quantity which would have been necessary had they followed their own course (the usual one) of making the cuttings supply the fillings as far as possible.

Mr. Macdonald, one o fthe contractors, testified that when going over the works the Commissioners gave them to understand that if the work was pushed through in this way an extra allowance would be made for it. The division engineer, Mr. Roderick McLennan, in his evidence before Mr. Shanly, supports this position. He says:—

"There were one or two cases in which the contractors wasted some material and borrowed in other places, and that was done to enable them to put on more men and expedite the work. They were pressed very hard to do that, because that was the key to the road between Rivière du Loup and St. Flavie. There was a good deal of the country that was light, and that being the heaviest part of the work, it formed

the key to the opening of the road. Consequently, there was a great deal of pressure upon them to clear their way as speedily as possible, and that compelled them to put on more men by wasting from the cut and borrowing in some other places."

Mr. Brydges, who gave evidence in April, 1873, concerning this item, before the Committee of the House of Commons, above mentioned, also supported this view. He then intimated that in his opinion, these claimants were entitled to something like $20,000 for moving and wasting the material now under consideration.

Upon the whole evidence, we think the claimants are entitled to an allowance on this item, on the ground that at the request of the Commissioners, or of duly authorized engineers, they departed from their own method of finishing their contract work and adopted a method more expeditious and more expensive. The rate charged, 25 cents per yard, is no higher than the evidence supports, and the quantity, 93,094 yards, is satisfactorily established.

We allow these items at the aggregate of $23,273.50.

Item 4.

18,000 cubic yards excavation and embankments caused by diversion of stream and bridge, at 40c.....	$7,200 00
Building flumes and dams and bridge for highway.....	1,700 00
	$8,900 00

The work charged for in this item was done under a design different from that originally prepared for this locality, which was a bridge with two piers, two abutments and three 40 feet spans of superstructure. The bill of works named only 816 yards for the masonry in this design, but in fact it would have required about 1,000 yards more. When the contractors were preparing the stone for the work it was discovered that what they were getting out would not be nearly enough. Mr. Hazlewood, the district engineer, upon his attention being called to the matter, admitted that there was a mistake of 1,000 yards in the quantity stated in the bill of works. In order to obviate the necessity of getting out a much larger quantity of stone for the additional masonry, it was decided to have only two abutments with about the same quantity of masonry as named in the bill of works. To accomplish this a deviation was made in the alignment, by which it became possible to cross the stream with one span of 80 feet, instead of with three of 40 feet each, as originally planned. But though this reduced the masonry, it increased the length of the embankment, the height of which was also increased by a change of grade. The claimants base their claim for this item, in all $8,900, upon the fact that there was at this locality a change both in grade and location, and they contend that under clause 4 of the contract they would be entitled to a fair allowance for all the work done; but an examination of the circumstances connected with this change shows that the whole amount of this work is not due to the change of grade and location, a portion of it at all events, being caused by the attempt to rectify the said error in the bill of works. Upon that matter the contractors argue that they ought not to bear the consequences of the error; that if the quantity had been correctly stated in the bill of works their tender would have been higher than it was by an amount sufficient to meet the proper, that is, the increased quantity. They name, in the schedule attached to their tender, $12 a yard for this class of masonry, and they say that but for this mistake their tender would have been $12,000 higher than it was. They contend that if it has cost $8,900 to rectify that error they ought to be indemnified for the whole sum, instead of that portion only due to change of grade and location.

We think, however, that we cannot allow them for the whole value of the work, on the ground that the Government must bear the consequence of this error, without ignoring what we have already decided to be a main feature of the contract in this and in similar cases, namely, that the contractors must themselves bear the cost of any work beyond that mentioned in the bill of works, in the same way that they get the gain, if in the fulfilment of their contract they are not required to execute so

much as was indicated in that document. This was one of the inaccuracies alluded to in the opening clause of the bill of works, and tenderers were there informed "that no claim of any kind will be allowed, though they may be proved to be inaccurate."

It is manifest, however, that they are entitled to some allowance, because of the change of grade and location, but it happens that no separate account was kept of the quantities there increased, apparently because it was at the time supposed that no allowance would be made to these contractors for the whole of this work, in consequence of the clerical error in stating the quantity of masonry. The result of no separate account being kept, as before stated, is that we are not able to settle accurately the increase of work due to the change of grade and location. But the change in this place, we think, entitles the contractors to favorable consideration upon another ground.

By an agreement subsequent to the contract, and signed by Messrs. Alexander McDonell & Co., it was arranged that the wooden superstructure for bridges might be eliminated from their work and the value thereof charged against their bulk sum price, according to rates mentioned in the schedule attached to their tender. If the change made in this locality as before described, had not taken place, the Government would have been obliged to supply three spans of iron superstructure, covering the whole distance, 120 feet. Inasmuch, however, as the embankment was lengthened and the span reduced to 80 feet, it follows that they saved 40 feet of iron superstructure, and that this saving was obtained really at the expense of the contractors, who were obliged to lengthen their embankment to the same extent, and the opening for a bridge in another locality was shortened about 20 feet. A feature of the new agreement concerning bridges was, that the Government should provide the substituted iron work without any expense to the contractors; and as the whole length of the wooden superstructure, according to the first plan, is charged by us to these contractors, we think it is proper to allow them something for the increased length of the embankments, by which a corresponding length of iron superstructure was saved to the Government. But there is now no evidence to be had which will show accurately the quantity or value of the increased work, either in this additional embankment or in the changes of grade and location, and we are obliged to adopt an approximation.

We allow $5,000 on this item.

Item 7.	
Excavation deposited by Haycock, 4,000 yards, at 25cts.	$1,000 00
Item 15.	
Rock slide, days' labor, per check roll, with percentage added	2,524 50
Item 16.	
50 days' labor per check roll, with percentage added	834 00
Item 17.	
Trimming work done by Haycock, 1,319 yards, percentage added	1,978 50
Altogether	$6,337 00

Mr. Haycock was the first contractor who undertook the construction of this section. The work was taken out of his hands and re-let to the present claimants in May, 1870, at which time certain portions of the whole distance were, according to the allegation of these claimants, finished, and no expense concerning them was provided for in their tender. They claim, in short, that they merely undertook to finish these portions of the section which were left incomplete by Mr. Haycock, and that though their contract was to hand over the whole distance in good order to the

Government, they ought, in fairness, to be compensated beyond their bulk price for any cost they were put to in keeping in a proper state for delivery, at the end of the time those portions which had been completed before the present contract was entered into. Should we agree with this contention we would be ignoring an important feature of the written contract, viz., that these claimants undertook to construct and complete that portion of the railway known as Section No. 5, and therein more particularly described, and that they should run all risk of accidents or damage, from whatever cause they might arise, until the completion of the contract. As a fact, these charges are based upon slides or displacements of material over those portions which had been originally constructed by Mr. Haycock, such displacements having occurred during the time when these contractors had control of the whole section. In our opinion there is no ground for holding that the Crown is liable to bear the loss occasioned by these accidents, and we allow nothing on the item.

Item 18.

Rock excavation bottom, Bic Mountain (error of engineer), 475 yards, at $2.50..... $1,187 50

According to the evidence, the work was laid out for these claimants through Bic Mountain in such a way that, working as they did, from opposite directions, when the cutting was completed the grades were not on the same level; and to rectify this error, it became necessary to excavate the quantity of rock here named. This could be done only at a much higher rate per yard than ordinary excavation.

We think the evidence shows the rate charged to be a reasonable one, and we allow the item.

Item 20.

Excavation and ditch,—1,200 yds., at 25c . . $300 00

This is for work in making a ditch in lieu of one previously made by these same contractors. The first one had been laid out by the engineers as sufficient for the purposes of the railway, but in the next season it became apparent that a new one was required, in a different locality and, under the directions of the engineers, was made accordingly. We think this is a work which might have been let to any other party instead of to these contractors if the Commissioners had been so disposed, which, according to the ruling in Ritchey *vs.* Bank of Montreal, 4 U. C. Q. B. 459, makes it a work independent of, rather than a change from, that covered by the contract.

We allow the item.

Item 21

Difference in quantity of stone purchased as per statement $332 25

No witness has been called who could, from his own knowledge, give satisfactory evidence concerning this item, and finally it was abandoned by the claimants.

Item 22.

Extra excavation for foundations of bridge a Rimouski, pumping, labor, timber and masonry..... $11,880 00

This work became necessary because, after entering into the contract, facts were discovered concerning the physical features of the locality, which made it apparent that an extra depth was required for the safety and permanence of the bridge at Rimouski. We have no doubt that, according to the spirit as well as the letter of this contract, this work was undertaken to be done within the bulk sum price. The bill of works and notice given to tenders, before they made their offers, contain the language:—

"The constructures proposed (over stream crossing the line of railway) are, from all the information obtained, believed to be the most suitable, but should circumstances require any change in the number, position, water-way or dimensions, the contract

will provide that all the changes shall be made by the contractor without any extra charge. The schedule gives the probable quantities in the structures now proposed, and the data upon which those quantities are ascertained. Much, however, depends upon additional information to be obtained with regard to the freshet discharge of streams, as well as to the nature of the foundation, but with respect to the latter, accurate information can only be had during the progress of the work."

In the schedule there mentioned this bridge is referred to. The specification, also a portion of the contract, in clauses 28, 29 and 36, indicate that no such structure should be commenced until the proper foundation had been reached and approved of by the engineers. In our judgment, this work was covered by the terms of the contract as well as by the meaning of the different documents which were preliminary to, and which led up to it.

We allow nothing on Item No. 22.

The aggregate of our allowance to these claimants is .	$ 29,761 00
Their contract price was	533,000 00
Making altogether	$562,761 00
They have been paid	$526,000 00
And the value of the wooden substructure to be charged to them, as aforesaid, is . . .	19,600 00
Making altogether	$545,600 00

The difference, viz., $17,161, was, in our judgment, due to them on the 1st December, 1872, before which time the works had been taken out of their hands by Mr. Hazlewood, district engineer, as fully completed under their contract.

We proceed now to the work done at St. Fabien and Bic Stations.

Upon the evidence, there is no ground for doubt that the work has been done as stated in the particulars of the claim. There has been no serious contention at any time, on the part of the Government or the engineer, that the quantities named are too high, or that the prices named are not those intended to be given by the agreement between the claimants and Mr. Hazlewood.

Indeed we have discovered no reason for delaying the payment of any portion of this claim, except that at one time in 1873, a question was raised as mentioned in our report on Section 5, whether these claimants had not been overpaid upon the contract for that section, which question, so far as we can learn, has never been definitely settled up to this time.

The evidence before us having now cleared up that question, and shown that there is a balance due to the claimants on account of Section 5, we are of opinion that the amount claimed for work at St. Fabien and Bic Stations, viz., $47,006 was due to them on 1st August, 1873.

Our conclusion, therefore, is that Her Majesty is liable to pay these claimants on the two transactions before mentioned the sum of $64,167, irrespective of interest.

We give below a schedule showing the items allowed, for and against Messrs. Alex. McDonell & Co.

Should the right to charge the contractors with the omission of the wooden superstructure for bridges be waived this liability would be increased by $19,600, making it for Section 5, $36,761 instead of $17,161, but for the work at St. Fabien and Bic Stations it would remain as above stated.

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

Hon. J. A. Chapleau, Secretary of State.

Ottawa, 20th March, 1884.

SCHEDULE

SHOWING the items allowed for and against Messrs. Alex. McDonell & Co.

No. of Item.	Particulars of Claim.	Amount.	Total.
		$ cts.	$ cts.
	Amount of contract, Section 5	533,000 00	
	Cash paid on account	526,000 00	
	Balance		7,000 00
3, 5, 8, 9, 10, 11, 12, 13, 14	Wasting earth and rock, as per bill of particulars		23,273 50
4	Excavation, change of grade and location		5,000 00
18	Removing rock, etc.		1,187 50
20	Ditch, outside of contract		300 00
	Section 5, total allowance		36,761 00
	Deduct bridge superstructure		19,600 00
	Due 1st December, 1872		17,161 00
	St. Fabien and Bic Stations.		
	Amount of claim as per bill of particulars, due 1st August, 1873		47,005 98
	Total		64,167 00

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

SPECIAL REPORT ON CLAIM OF EBENEZER HICKS, $150.

This claim is for hay supplied to the Agent of the Government while completing the construction of Section 10, after it had been abandoned by the contractors, Messrs. King & Gough.

The following are the particulars of the demand:—

1872.
April 12.—To 12 tons hay (delivered to Alex. McDonald, the Agent of the Government of Canada), at $12 ..... $144 00
Amount paid weigh bill (agreed to by Alex. McDonald) 6 00
$150 00

The evidence shows that after the Government had taken possession of the work as aforesaid, and was finishing it by days' labor, Mr. Alexander McDonald was superintending the construction, at which time he ordered from the claimant twelve tons of hay, which were delivered "at the Government House (Red Pine) during the months of March and April in that year (1872)." The price agreed on, $12 per ton, has not been paid.

The claimant testified also that he "delivered the said hay within the time and according to the terms of the above contract, and in addition thereto was obliged to pay a bill for weighing," amounting to $6.

In our judgment Her Majesty, on the 1st day of April, 1872, was, and still is indebted to this claimant in the sum of $150, on account of the claim submitted to us for investigation.

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

Hon. J. A. CHAPLEAU, Secretary of State.
OTTAWA, 9th April, 1884.

SPECIAL REPORT ON CLAIM OF DONALD FRASER & CO., $10,174.

This firm, composed of Donald Fraser, William Stewart and James H. Fraser, executed a contract with the Commissioners appointed to contruct the railway, dated 13th February, 1872, by which they undertook the track-laying and ballasting of sections 4, 7 and 12 in the best and most complete manner and in accordance with the specifications. No time was named for the completion of the works, but the Contractors convenanted that they would diligently prosecute them to the entire satisfaction of the Commissioners and the Engineers, both as regards the rate of progress and the character of the work. The compensation to be at the rates for different classes of the work as mentioned in a schedule attached to the contract.

The portion of the line embraced on these three sections was, that between the towns of Amherst and Truro about 75 miles.

Before the contract was made with these claimants, another firm had undertaken the same work, and had laid the track over a portion of it, about three and a quarter miles at the Amherst end. The ballasting of this was done by these claimants. In the Fall of 1872, some nine months after the date of the contract, the progress of the work not being satisfactory to the Commissioners, they decided upon taking it out of the hands of these claimants, and notified them accordingly. Whereupon, an arrangement was come to between them, on the one part, and Mr. Schreiber, acting on behalf of the Commissioners, on the other part, by which it was agreed that the contract should be cancelled, these claimants doing no more work on the line itself, but should load the cars at specified ballast pits, and give the use of, as well as repair, shift, man, fuel, oil and run steam shovels to be employed in the subsequent ballasting, the rate for all this to be fourteen cents per yard. It had been twenty-six cents per yard for the whole work of ballasting under the contract. The Commissioners intended to carry on by their own laborers the work on the line which had not been completed by these Contractors, and part of the new arrangement was that they should take over and pay for a portion of the plant which the Contractors had then on hand.

After this new bargain the work was carried on under it for the remainder of the season of 1872. Mr. Stewart, one of the firm of contractors, being engaged at specific wages ($200 a month) to look after the interests of the Government over the three sections.

There is no dispute concerning the work done under the original contract, which ended on 10th Nov., 1872; nor for the work during the remainder of the year under the new bargain. Item 32 of this claim is intended to cover a balance admitted by the Government. It does not name the correct amount; but we deal with the inaccuracy when we take up that item.

Nearly three-fifths of the claim (about $5,600) is a balance demanded on work after 1872; about $1,000 is for plant taken by the Government, and the rest is principally for work and materials alleged to be extras.

The following are the details of the claim, as laid before us:—

To balance due for filling 64,400 cubic yds. of ballast, in spring of 1873, at 5c. per cubic yd	$3,220 00
Balance due for filling ballast at Truro end of sections.	2,386 85
60 shovels at $1.00. 40 picks. $1.25	110 00
20 crowbars, $1.50. 24 spike hammers, $2.00	78 00
10 lifters, iron mounted	20 00

6 winches, at 75c. 6 gauges, at $1.00	10 50
2 sledge hammers, at $3.00	6 00
12 steel chisels, at 75c	9 00
6 axes	6 00
2 setts small waggons, at $25.00	50 00
2 setts large waggons, at $35.00	70 00
2 pumps and tanks	75 00
160 lbs waste	24 00
1 brl. car oil	16 20
1 brl. lard oil	40 50
½ brl. tallow	13 75
Boss and five men on track at Truro end	30 00
Blacksmith, half time, do	22 50
Key cap for lifter	1 50
¾ mile of track lifted and re-laid with steel rails at Truro end	400 00
Two sets of truck waggons for iron	60 00
Centring, lining, surfacing, removing unsound ties and replacing them with new ones on 3¼ miles of track at Amherst, $180 per mile	585 00
Building temporary wooden bridge at Athol station	100 00
Keeping in repair bridge at Macau	60 00
Building the approaches to Forks Bridge	150 00
Damages and expenses in removing slurry from under the ties when lowering the grade, after the rails were laid, in seven of the cuttings	750 00
20 days' wages paid to 40 men, while waiting for rails and finishing iron bridge at River Phillip, at $1.25	1,000 00
8 days' wages paid to men (40) while waiting for rails and fish-plates at Greenville, at $1.25	400 00
Sleepers for Spring Hill siding	20 00
1 car of coal	24 00
Coal to freight trains	14 00
Balance due for work done under contract in 1872, not paid	422 00
	$10,174 80

Petitioners also claim interest on the sum of $10,174.80 from the time the same became due until payment.

SAM. G. RIGBY, *Attorney of Petitioners.*

Item 1.

To balance due for filling 64,400 c. yds. balast in spring of 1873, at 5c. per c. yd. $3,220 00

Item 2.

To balance due for filling ballast at Truro end of sections $2,386 85

These contractors claim 5 cents a yard on all the ballast used after 1872, but they distinguished between 64,400 yards, the quantity used on Nos. 4 and 7, the two westerly sections, and 47,737 yards used on the seasterly section (No. 12), because between themselves they had agreed to separate the work in that way, Donald Fraser and James H. Fraser being alone interested in Sections 4 and 7, and William Stewart in section 12.

There is no dispute about these quantities. They are as returned by the Government engineer, and it is admitted by the claimant that they have received 9 cents a yard on these quantities moved in 1873. The question is, whether they are entitled

to more than 9 cents, and, if so, how much more per cubic yard. The evidence establishes beyond a doubt that, at the time of cancelling the original contract, an agreement was made by which these claimants were to get 14 cents a yard for loading ballast, &c., after that time; but there is a dispute as to whether that agreement extended beyond the season of 1872, if not there is no evidence to show that any higher price than 9 cents was agreed upon for the work done in 1873, or that it was worth any more.

As far as concerns Sections 4 and 7, those in which the Frasers were interested, the evidence on the part of the claimants is strong and almost uncontradicted. It is not alleged by any witness that any one of the firm assumed to make any arrangement concerning that portion of the line for the remainder, only, of 1872, while Donald Fraser testified that Mr. Schreiber's offer was to cancel the first contract and to give them the finishing of the ballast at 14 cents, the balance of the work that was to be done. And that offer was accepted; that he never understood that there was any agreement by which the 14 cents was to apply only to work done in 1872, and that Mr. Schreiber did not, nor did any one else, on the part of the Government, make, or attempt to make, any arrangement with him, by which such price was to be for any thing less than the remainder of the ballasting. The bargain relied on by the Government, if there was any, was made by Mr. Schreiber, but he was not able to say that he remembered distinctly the particulars of any arrangement, except one which he thought was reduced to writing, and he said he did not remember discussing the subject, as to the 14 cents rate being applied only to 1872, with any of the firm except Stewart.

A copy of a document, a proposition alleged to have been signed by Wm. Stewart, and accepted by Mr. Schreiber, was produced in evidence, but that relates only to the ballasting on the section at the Truro end (No. 12), and does not purport to have been made on behalf of the firm or any one but Stewart himself.

The original document was enclosed to the Secretary of the Commissioners by the Chief Engineer, in a letter of the 12th March, 1873, and there is evidence that it has been on record, but it has been removed, and has not been found, though a thorough search has been made for it. A copy of it, in these words, is produced before us:—

"TRURO, 10th November, 1872.

"To the Commissioners appointed to construct the Intercolonial Railway.

"I hereby offer and agree to load upon the cars, with my steam shovel, at the Truro and Folly Lake gravel pits, all the ballast that may be needed from the pits this season, at the rate of 14 cents ($0.14), per cubic yard. The service to embrace the use of repairs to shifting, manning, fuelling, oiling and running of the steam shovel; in fact, to embrace all the pit service, except the shifting of the main siding, this understanding to extend over next season, if approved by the Commissioners.

"WILLIAM STEWART.

"Witness to Signature—JOHN MCGOWAN.

"Accepted and approved for the present season.

"COLLINGWOOD SCHREIBER.

"Witness to Signature—JOHN MCGOWAN, *Commissioners Agent.*"

William Stewart testifies that he never signed that document; that he believed at the time that the arrangement extended positively beyond the year 1872, and did not depend upon the subsequent approval of the Commissioners. That acting on that belief, he took his steam shovel away from the works in the winter of 1872-73, and had it repaired, at considerable expense, and he said he did not know such a person as John McGowan, whose name appears as a subscribing witness to this document. He waited at Ottawa two days, so as to meet Mr. Schreiber, while he was giving his evidence on the subject before us. We have no doubt Mr. Stewart was conscientious in testifying as he did; but we have to take the responsibility of saying whether his memory is now reliable.

Mr. Schreiber testified that John McGowan was a foreman for the Government, "the leading man under Mr. Stewart. He remembered that the document covered only the season of 1872; and after the copy was shown to him he testified that, seeing it to be in his own handwriting, he had no hesitation in saying it was word for word as signed by Stewart; and he said that irrespective of the contents of the document, his mind told him that the application of the bargain to no more than the season of 1872, was talked over and discussed between him and Stewart.

In the spring of 1873, at the commencement of the ballasting, Mr. Archibald, the resident Government engineer, informed Mr. Stewart that the Commissioners would not allow him to go on with the work at 14 cents, but offered that he might do it for 9cts. After some contention for higher rate, he said "I will take that and look for the balance after the work is finished." There is no reason to think that either of the Frasers ever heard of the written agreement with Stewart until it was brought up during the enquiry before Mr. Shanly. For all the work in 1873, the pay was given to and the receipts taken in the name of William Stewart alone for Section 12, and in the name of the Frasers, or one of them, for the other sections, thus treating the work as no longer a joint transaction by the present claimants. The understanding which existed as aforesaid between themselves, had evidently been communicated to and recognized by the Government officials.

After Mr. William Stewart gave evidence before us, we received from him the following telegram:—

"NEW GLASGOW, N.S., 24th July, 1883.

"*To Judge Clark:*

"Have interviewed John McGowan. He states never wrought with me—neither knows me. I never met the man before. He knows nothing of the document in question. Was not in Nova Scotia until seventy-four. He worked with the Government on the north end of the line since he was on the pay list. Have him examined. He is in New Brunswick, at Memramcook, on the Intercolonial.

"(Signed) Wm. STEWART."

And shortly afterwards we received the following telegram, purporting to be signed by a Justice of the Peace:—

"MONCTON, N.B., 3rd August, 1883.

"*To Commissioners on Intercolonial Railway Claims:*

"McGOWAN'S STATEMENT.

"Were you at Folly Lake in 1873?—Was not there that year to my knowledge.

"Were you a foreman for me?—Not to my knowledge.

"Did you witness any document signed by me at Folly Lake or Truro?—Not to my knowledge or recollection.

"L. C. CHARTERS, J. P."

"Taken at Memramcook 2nd day of August."

This induced us to communicate with Mr. Charters, and we wrote, acknowledging receipt of telegram and asking him to send us the original document (or an attested copy of the original) concerning the examination of Mr. Gowan. To which he answered as follows:—

"MEMRAMCOOK, 7th August, 1883.

"SIR,—I am just in receipt of your favor of the 3rd inst., and notice contents, at which I am much surprised. I beg to say I never sent you any telegram on the 3rd inst. or authorized any person to do so or use my name, *Re* Fraser Stewart & Fraser, as I know nothing in the matter. Presuming your favor to refer to what took place between a Mr. Stewart and McGowan, on the 3rd inst., it is this: Mr. Stewart called on me and said he wanted to see John McGowan, who was working on the railway, and engaged me to go with him, being a J. P., as he said he wanted to

get a deposition from McGowan respecting his signature to a document or railroad contract with some parties of whom he knew nothing about, and was not interested. We ascertained where McGowan was working, and we proceeded there and met McGowan. After considerable conversation respecting the time and place, and what took place about that time, Mr. Stewart intimated he wanted McGowan to make a deposition, which McGowan refused to do, stating it was so long since the transaction took place that he would not feel justified in making any deposition without further consideration. He had a faint recollection of witnessing a document, but could not remember the name of the parties, but if he saw the document he would know his signature. Mr. Stewart then said he would put some questions for McGowan to answer, which I put down, as asked by Mr. Stewart and answered by McGowan. I think there were only three questions and three answers, which I signed as taken before me but not attested to. I did not keep a copy of the document, not considering it of much importance. We returned, Mr. Stewart taking the afternoon train to Moncton, stating he was going to Ottawa at once.

"I am yours truly,

"J. C. CHARTERS.

On the 17th March, 1874, William Stewart wrote a letter to Mr. Brydges, the Chairman of the Board of Commissioners, of which the following is a copy :—

"OTTAWA, 17th March, 1874.

"SIR,—In the autumn of 1872, I, under arrangement with your agent, excavated and loaded gravel on the ballast cars at Truro and Folly Lake, with my steam shovel, at the rate of 14 cents per cubic yard, measured in the pit. In the following spring I was requested to continue the work by Commissioner McLelan, which I did, and was paid at the rate of 9 cents. I told him the price was not sufficient to pay me. Not wishing to throw an obstacle in the way, I continued the work, fully assured that when everything was finally settled, justice would be done,

"Yours respectfully,

C. J. BRYDGES, Chairman Intercolonial Railway. "WM. STEWART."

We think the tenor of this letter is hardly consistent with a belief on the part of W. Stewart, at that time, that there was an existing agreement by which he was entitled to 14 cents a yard, after the fall of 1872. He makes no allusion to one saying only that the price paid for work in 1873 (9 cents) was too low, meaning, as we understand it, that he claimed it to be less than the work was worth, and that in the absence of any agreement for 1873, a higher price ought to be paid. On the whole evidence on these two items, we have come to the conclusion that William Stewart did understand and sign the document of 10th November, 1872, and that he agreed with Mr. Schreiber to take 14 cents for 1872, with the understanding that the work, after that year, should be paid for at the same rate only if the Commissioners approved of it; but we think Mr. Stewart has forgotten the facts. He mentioned (not in evidence) that he had a sunstroke, and had never quite got over the effects of it. It is not improbable that this has impaired his memory.

In the face of this agreement, we do not allow more than the 9 cents for the ballast at the Truro end; but for that on Sections 4 and 7, we see no reason for fixing a price below 14 cents, that named in the only agreement concerning those portions of the line which is established by evidence.

We, therefore, allow Item 1, at $3,220, and disallow Item 2.

Items 3 to 16 inclusive, and 19 and 21, are for plant and material alleged to have been taken by the Government, in pursuance of the agreement before mentioned, and at the price charged, amount to $990.45.

William Stewart was engaged, in November, 1872, to superintend the subsequent works in the interest of the Government, and he made the following return on the subject of this plant:—

"NEW GLASGOW, 22nd March, 1875.

"The following is a list of tools I received from J. H. & D. Fraser, for Railroad Commissioners, in the autumn of 1872, when the road was opened.

36 shovels (second hand), at 80c.	$ 28 80
15 picks (indifferent), at 60c.	9 00
10 crowbars, at $1.50	15 00
4 lifters, at $2.00	8 00
3 wrenches, at 75c.	2 25
2 gauges, at $1.00	2 00
8 spiking hammers, at $2.00	16 00
	$ 81 05

"The above is all that I can certify to.

"Yours respectfully,

"WILLIAM STEWART."

Force pumps and tanks at points between Amherst and Folly Lake	$ 75 00
	$156 05

The value of these articles was proposed to be credited at $156.05, in a settlement offered by the Government to these claimants. We think this a fair price for those covered by William Stewart's certificates; As to most of the others, the evidence gives a reasonable ground for believing that they were taken by the Government, and inadvertently omitted from the said certificate. This, however, only applies to four waggons instead of six, as charged.

Items 17 and 18 were withdrawn, giving the contractors the benefit of any doubt on the matter, and charging what we consider a fair price for the articles. We allow $492 on these items.

Item 20.

Three-quarters of a mile of track lifted and relaid at Truro end	$400 00

In order to make connection on the railway, the claimants were ordered to lay temporarily, iron rails over the distance in question, because the Government had not, at the time, the steel rails which were to be laid permanently; after their arrival the claimants substituted them for the iron ones first laid.

The contract price for track-laying was $300 per mile, but the evidence showed that the taking up of one set of rails and replacing them with others, and including haulage to and fro, was worth somewhat more; but this work is credited at $350.25 to the claimants in the final estimate for work done up to the end of 1872, and forms part of the whole amount on which they claim the $422 balance under Item 32. We set out some particulars of this amount in connection with Item 32, by which it will be seen that $350.25 for this work is there credited. We do not think there is any evidence to justify a higher allowance than the said credit for this work, and, therefore, we allow nothing now on this item.

Item 22.

Centring, surfacing, removing unsound ties, replacing with new ones, on three and a-quarter miles of track at Amherst end, at $180	$585 00

The portion of the line to which this item relates is the three and a quarter miles at the Amherst end, on which a track was placed by the previous contractors. They had been paid their contract price for this work, and it was never measured to these claimants, or treated in any way as within their contract, as far as the track-laying

was concerned. As before explained, they took the work on the agreement that they were to be paid at schedule rates for what they did.

The principal reason why this claim is now made is, that the previous contractors get, by their contract, only $120 per mile for track-laying, while these claimants got $300, and they seemed to think that a sufficient cause for demanding the difference ($180 per mile) for what their predecessors did. Another reason, however, is advanced, namely, that in carrying on the subsequent work over this distance, they were put to trouble and expense in removing slurry which had slipped down from the sides of the cutting so as to impede their operations.

Mr. Donald Fraser testified, however, that the trouble did not arise from defective work by McLellan & Co, the previous contractors, but from the action of the weather; that if they had done the work themselves the same trouble might have occurred; and that the expense of removing the slurry, &c., was incurred in order that they might proceed to filfil their contract on other portions of the line.

In our judgment the Crown is not liable to pay for this work, and we allow nothing for it.

Item 23.

Building temporary wooden bridge at Athol Station $100 00

At this place, after a stone culvert had been completed, the station grounds were laid off, and it became expedient to take down the masonry and erect it in another place. While this was going on the claimants, in order to carry on their work, were obliged to make a bridge of timber at the places were the two culverts were, the old one and the new one. Besides borrowing some ties belonging to the Government, they provided long timbers of their own, and the evidence showed that there was also about ten days' labor of five men in the work. We think the evidence supports the charge, and we allow it at $100.

Item 24.

Keeping in repair the bridge at Macan $60 00

This is in reality almost entirely for keeping up the approaches on either side of the bridge, from formation level on embankment to the finished rail height on the bridge. It was done by filling in with ballast material, which has been, as a matter of course, included in the quantities charged as ballast by these claimants. We allow nothing on this item.

Item 25.

Building approaches to Forks Bridge $150 00

This is similar to the last item, and we allow nothing on it.

Item 26.

Damages and expenses in removing slurry, after the rails were laid, in seven cuttings $750 00

This is for removing slurry from different portions of the line, including the three and a-quarter miles at Amherst end, for which the same work is included in Item 22, and concerning which we have given the effect of the evidence of some of the witnesses.

The material removed was brought down by the weather from the sides to the bottom of the cuttings, and the whole of it was accumulated in that way after the contract was let to these claimants. We think this was a contingency which, under the agreement, the contractors had to meet at their own expense. There is no evidence that the formation level was not properly shaped and ready for the ties at the time of the bargain, nor that the trouble afterwards was to any extent due to the action or omission of the Government officials.

An instance was given in evidence, and relied on, as a precedent in which a contractor was paid for removing slurry as an extra, but that was where it had

accumulated partly before the contract was let, and it was paid under a special bargain made before the material was removed. In our judgment the Crown is not liable to these claimants on this item, and nothing is allowed.

Item 27.

20 days' wages to 40 men while waiting for rails and finishing bridge at River Phillip, at $1.25..... $1,000 00

The claimants laid the track, as their contract required them, up to the west side of this bridge, as far as it was finished, but because a portion of it was not in a condition for them to proceed, they had to keep the men waiting idle. They could not discharge them, because there was no certainty, from day to day, that the cause of delay would be continued. It was their duty to proceed as soon as the obstacle was removed, and both Mr. Schreiber and the resident engineer named dates on which they expected the claimants could proceed, but they were disappointed. Indeed, one of the claimants testified that the engineers said "the bridge would be finished every day."

The contract proves that (clause 3) the contractor shall commence the work, &c., at such places and times, respectively, as the Commissioners may designate and direct, and shall diligently prosecute the same, &c. Clause 5. The contractors shall * * * faithfully carry on the works until completion, &c. Clause 7. The Commissioners shall have the right to suspend operations * * * but any such suspension shall not entitle the contractors to any claim for damages, &c. The stoppage of the works, as above described, was not, in our opinion, such a suspension as is contemplated by clause 7, and we think the proper interpretation of the contract implies a covenant that the road shall be in such a state that the contractors may proceed to fulfil their undertaking under the 3rd and 5th clauses, unless the works be suspended under clause 7.

In our judgment, therefore, the Crown is liable to reimburse the claimants their outlay caused by the road being so ready. This outlay is, according to the evidence, not less than the amount claimed, and we allow Item 27 at $1,000.

Item 28.

Eight days' wages for forty men while waiting for rails and fish-plates at Grenville, at $1.25. - - - $400 00

The circumstances on which this item is based are precisely similar to those of the last one, and for the reasons just given, we allow it at $400.

Item 29.

Sleepers for Spring Hill siding - - - - $20 00.

The contractors allege that these sleepers were furnished by the orders of one Sullivan, acting on behalf of the Government. He declares that he never ordered them, and that they were not furnished. We have to say that the item is not proved beyond a reasonable doubt, and we do not allow it.

Items 30 *and* 31.

One car coal - - - - -	$24 00
Coal to freight trains - - - - -	14 00
	$38 00

These items are proved, and we allow them at the amount charged, $38.

Item 32.

Balance due for work done under contract in 1872, not paid. $422 00

This is intended for $413, the balance between $72,362, mentioned in a memorandom by the Chief Engineer, as due on work up to the end of 1872, and $71,949, paid on account. That sum of $72,362 may be properly increased now to $72,546.15, as follows :—

Work under first contract, up to 10th November, 1872 -	$70,326 90
Work under first contract, for re-laying track and hauling rails - - - - - -	350 25
Work under new bargain, after 10th November, 1872, up to end of 1872 - - - -	1,862 00
Rent of shanty allowed by Mr. Schreiber - -	7 00
	$72,546 15
Paid on account - - - -	71,949 00
	$ 597 15

We, therefore, credit this sum, $597.15, under this item:

We set out, in Schedule A., hereto attached, the items allowed as above mentioned. In our judgment the Crown is liable to these claimants in the sum of $5,847 on the items above mentioned. Of this sum $1,089 was a debt due on 1st December, 1872; $3,258 on 1st December, 1873; the rest was unliquidated and unascertained until now.

Strictly speaking, only the amounts allowed on items 23, 27, 28, 30, 31 and 32, were due to the joint firm as originally composed. $120 for portions of the plant was due to William Stewart, and the remaider to James H. Fraser and Donald Fraser, but they expressed a desire that the claim should be treated as due to the joint firm, and said they would settle their respective rights between themselves.

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

Hon. J. A. CHAPLEAU, Secretary of State.
OTTAWA, 7th March, 1884.

SCHEDULE A

Showing Items allowed in this Claim.

Item		
1.	Balance of 5 cents per yard on 64,400 yards -	$3,220 00
3 to 16 and 19 to 21	Plant and material - - - - -	492 00
23.	Temporary bridge at Athol Station - - -	100 00
27.	Damages by delay at River Phillip - -	1,000 00
28.	" " Grenville - - -	400 00
30.	One car of coal - - - - -	24 00
31.	Coal to freight trains - - - - -	14 00
32.	Balance due for work in 1872 - - -	597 00
	Making a total in all - -	$5,847 00

Special Report on Claim of Martin Murphy, $21,511.

This claim arises out of the construction of the Restigouche bridge, at prices stated in the schedule of rates for the different classes of work:

To amount of Chief Engineer's estimate—		
1. Under contract at schedule rates		$220,752 00
2. On extra works		31,934 00
To amount subsequently allowed by Commissioners for hastening the work		4,000 00
		$256,686 00
By amount received on contract work	$204,041 00	
By amount received on extra work	31,934 00	
By amount received, allowance hastening work	4,000 00	
		239,975 00
		$16,711 00
To expenditure in opening Bourdeaux quarry by orders of the engineer in charge, which quarry was condemned by the same engineer		4,600 00
To cost of proving claim before Commission		200 00
		$21,511 00
Add interest		

The principal item, $16,711, is the difference between $220,752, the certified value of the whole contract work, and $204,041, received by the claimant on account of it. The particulars include some charges for extras, but show corresponding credits, so that the only question on the bridge work is concerning this balance.

This bridge was at first included in a contract, dated 15th June, 1870, by which Mr. S. P. Tuck took the whole work on Section 19, at the bulk price of $395,733.

Subsequently, with the assent of the Commissioners, the contract was assigned to and assumed by Messrs. Boggs & Co., who, on the 27th June, 1871, entered into a written sub-contract with Martin Murphy for the works connected with the Restigouche bridge, at the lump price of $116,000. He proceeded with his undertaking on that basis for more than a year, when unforseen difficulties concerning the foundations arose, which, according to the report of the Chief Engineer, rendered it necessary to carry out the bridge work at a schedule of rates and under a separate contract. Consequently, negotiations were opened between the Government, the contractors and Mr. Murphy, having for their object the separation of the existing bargain into two, giving the bridge work direct to Mr. Murphy and leaving the remainder of the section to be completed by Messrs. Boggs & Co.

At the request of Mr. Fleming, Mr. Murphy submitted lists of prices at which he was willing to carry on the bridge-work. The first two were not acceptable, but the third led to an agreement.

After several conversations between the parties, the terms of the proposed new agreement were reduced to writing. On the 8th February, 1873, Messrs. Boggs & Co. wrote a letter to Mr. Fleming, proposing that the contract for Section 19 should be divided, the bridge being taken out at the price of $116,000, and the remainder of the work left in their hands at the balance of their original price ($395,733—$116,000=$279,733), the arrangement to take effect as of 1st January, 1873. This was accompanied by one from Mr. Murphy, stating that he was prepared to contract for the bridge, and naming prices which were to apply retrospectively, as well as for the future. An agreement, under seal, bearing date 1st day of January, 1873, was also executed between Messrs. Boggs & Co. and Murphy apparently with the object of placing the whole bridge-work, done and to be done, on such a footing that

the Government could safely contract concerning it, directly with Murphy, and the document was lodged with the Secretary of the Railway Commissioners.

This agreement is between Boggs & Co. and this claimant alone, no one on behalf of the Government being a party to it.

By it, all the rights of Boggs & Co., concerning the bridge, were transferred to Murphy, with irrevocable authority to receive directly from the Government all monies due, or to grow due thereon, in the shape of drawbacks, then in the hands of the Government or otherwise. It was sufficient to permit the Commissioners to make, with Murphy, a new bargain about the bridge as freely and as effectually as they could have done with Boggs & Co. themselves.

Accordingly, one was made, under which the contract work has been certified to by the Chief Engineer, to the sum alleged in the particulars, namely:—

Contract work.....	$220,752 00
On which has been paid.....	204,041 00
Balance.....	$ 16,711 00

This balance is undoubtedly due the claimant by some one. The question is, whether the Crown is liable for the whole or any part of it.

Much, if not all, of this balance was paid by the Government to Boggs & Co. In fact, all the payments on bridge-work went to them, from the beginning up to January, 1874, inclusive; but they did not always pay over to Murphy as much as they received.

At one time, after the work was finished, Mr. Murray, one of the partners of Boggs & Co., and Mr. Murphy, had an interview, at which the latter understood that this balance was being retained for him out of moneys then due from the Government to Boggs & Co., and he telegraphed to the Chief Engineer as follows:—

"10th June, 1874.

"Mr. Murray is here. He shows me copy of statement of yours saying you had retained proportion payable to bridge out of contract No. 19, of which difference still due me is $16,711. Is this correct? Reply and oblige.

"SANDFORD FLEMING, Ottawa." "M. MURPHY.

To this Mr. Fleming sent the following answer:—

"OTTAWA, 18th June, 1874.

"MR. MURPHY,—I am sorry to say the reply to your telegram of 10th inst. has been neglected. According to statement made by Murray when here, you have not received the full amount paid by the Government on bridge account by the difference referred to.

"SANDFORD FLEMING."

The position of the parties changed once or oftener before the payments to Boggs & Co. were stopped; and the extent of the liability of the Crown will depend upon how far the existing circumstances, at the time of each payment, make it now a good answer to Murphy's demand.

The first period which we take up is that ending 1st January, 1873, when, according to the claimant's contention, he became the direct and sole contractor. During that period the Government paid to Boggs & Co., on bridge-work, a larger sum than reached Mr. Murphy. The amount so retained was spoken of in his evidence, in round numbers, as $8,000. We make it somewhat less, as shown hereafter.

Concerning this first period, the claimant contends that, in discussing his rights, we should credit the Crown with no greater amount than reached him; but that would make the Government pay the $8,000 twice—once to Boggs & Co., and again to him.

We must dissent from that proposition, unless the Crown has become liable to do so because of some new consideration or some new agreement.

Assuming that the claimant became the new contractor as of 1st January, 1873, and the rates upon which his bridge-work was to be valued were to be applied to the work which he had done while he was sub-contractor to Boggs & Co, as well as the subsequent works, and further, that the Government had notice that he had received $8,000 less than Boggs & Co. had received, we see nothing in these facts which would make the Crown liable to account to him for that portion of the price which had been previously paid to Boggs & Co., and properly paid, because they were the only persons entitled to receive it.

In the absence of some special arrangement, we know of no principle on which the new bargain with Mr. Murphy could be construed as promising him more than the whole value of the bridge, at schedule rates from the beginning, diminished by such amount as had already been properly paid to the contractors, for that had been paid by the Government specifically on this identical work, and the Crown had a right to insist on its being so applied.

The claimant suggested that there was a special circumstance which made it proper for the Crown to pay him the amount which Boggs & Co. had retained as aforesaid. He relied on the articles of agreement, before mentioned, as amounting to a transfer to him of a fund belonging to Boggs & Co., though then temporarily in the control of the Crown, namely, the drawback or percentage which had been deducted from the estimates of the work, and witheld from that firm. He contended that at the completion of the work this fund became released from the lien of the Government, and, therefore, payable to him under the said assignments.

It is true the document referred to does convey, amongst other things, the drawback on bridge-work; but if the claimant should receive that, and also the balance of the whole price of the bridge left, after deducting only the payments to Boggs & Co, the Government would be paying the drawback twice. The amount paid to Boggs & Co., on account of the bridge and the remainder of the price to be paid to Murphy, must together amount to the whole price, the drawback being, in fact, merged in that remainder.

It must be remembered that the agreement with Boggs & Co. (the transfer relied on by Murphy) is confined to bridge-work. If it had assigned some other fund, for instance, the drawback on the balance of the section, which, by the completion of the bridge, became eventually due to Boggs & Co., then there would have been in the hands of the Government, in addition to the value of this bridge, a further amount available towards the satisfaction of Boggs & Co.'s debt; as it is there was not. A paragraph in the agreement purports to show the state of accounts at that time on bridge work; but it was only as between Boggs & Co. and Murphy. Even it purported to show them between the Government & Boggs & Co., the Crown would not be bound by that statement, for it was not a party to it.

Whether Boggs & Co. and Murphy were intent only on having the severance of the contract carried out, and Murphy installed as a separate contractor, at rates largely increasing the price of the bridge, and so overlooked the state of accounts between the Government and Boggs & Co., or whether that subject was intentionally avoided, we have no means of ascertaining. For some reason it is nowhere alluded to as a material element in the new arrangement.

In our opionion the Crown is entitled to a credit, against this $16,711, of the amount which had been paid to Boggs & Co., on work done before the 1st January, 1873, beyond that which they had paid to Murphy on the same work. The precise amount of that credit is not made certain. We show hereafter what we assume it to be, and how we arrive at it.

We have now to deal with another period. In deciding whether the Crown is entitled to be credited with the full payments to Boggs & Co., for work done after 1st January, 1873—whether they reached the hands of Murphy or not—it will be necessary to settle on a date at which he became the new contractor. That date fixes the time when the Government could no longer bind him by payments on bridge-work made to any other person without his consent. As to this time, different views may be entertained—one giving effect to the letter of the law—which exempts the Crown

from liablity except under specified circumstances. Statute 31 Vic., cap. 13, sec. 16, declared 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." The other view, giving effect to such facts as would establish a liability between subject and subject, or in other words, if the Commissioners had been acting for individuals building this railway as a private undertaking.

In our general report we call attention to the statutory defence above alluded to, and there explain that, as it may not be considered expedient in all places, or perhaps in any, to set up such a defence, we adopt the course throughout of reporting on the liability of the Crown, irrespective of that enactment, leaving it to be decided hereafter whether the statute should be pleaded; and we deal with this case in that way, but we shall point out how far the statute would, in our opinion, affect Mr. Murphy's claim if it should be set up.

Going back to the negotiations for the new bargain, we think there is reason to say that not only Messrs. Boggs & Co. and Mr. Murphy, in their own interest, but the Government officials, in the public interest, were endeavoring to bring about a severance of the contract and a separate arrangement with Mr. Murphy.

The work at the bridge has been almost, if not entirely, stopped by formidable difficulties. The records of the Department show the following telegrams on 25th January, 1873:

"*To Peter Grant,*

"Oakes, Murray and myself here. Chairman and Fleming have agreed to transfer bridge contract. Have to await meeting of Commissioners next week; all looks well so far. Will go back from here direct to Metapedia.

"J. W. MURPHY."

"*To Peter Grant,*

"Murphy is here. I want to arrange prices for additional foundation work. Telegraph me what it has been costing and what it is worth, under the circumstances.

"S. FLEMING."

It was about the 8th February (a fortnight after these messages) that the agreement between Boggs & Co. and Murphy, dated 1st January, 1873, was signed, and their formal written proposals left with the Commissioners.

In the following week (February 15th), the Chief Engineer, reported, in writing on the matter, and recommended the Commissioners, to accept the proposals. Mr. Murphy was then in Ottawa and had several interviews with the Commissioners and the Chief Engineer. There was not then, nor indeed at any time since, a written acceptance of the proposals; but the new arrangement was, at that time, fully discussed and verbally approved of. He was given to understand that he was to proceed with the work on the new basis. He left Ottawa and did proceed and in good faith finished his job in a creditable manner.

The following is an extract from Mr. Fleming's final report:—

"It is only right that I should speak favorably of the manner in which Mr. Murphy has conducted the work. I have every reason to believe that his management has been excellent, and I have no hesitation in saying that no contractor on the whole line has carried out all the orders given him, or finished the work undertaken by him, in a more satisfactory manner."

Mr. Murphy testified that before sending in the (proposed) agreement, he had interviews with the Commissioners and the Chief Engineer, especially with the latter. At one of these Mr. Fleming said "he would very much rather the bridge would be severed, and I declared the contractor." He said, also, that at an interview with the Commissioners, the Chairman and the Secretary being present, it was then agreed that the third schedule of rates submitted by him was to be the one "for the work afterwards, and the severance was to be effected; they said it was an arrangement, but in order to conclude it properly, in the usual formal manner, it would

have to be put before the Council." But notwithstanding that he said that they then gave him to understand that they acted on the severance, "from that day, it was a schedule contract from that day forward." On being asked to described the fact which he relied on as accomplishing the severance of the whole contract and the commencement of a new one, Mr. Murphy testified that they separated it "by giving me instructions how to carry on the work which was then in abeyance, and could not be done; that, I refused to do until such an arrangement as this was made, and when this was made, they ordered me to go on, and I went on." These instructions were concerning concrete, piling, &c., things not included in his bargain with Boggs & Co.

On the evidence, we find that this claimant was, early in February, 1873, induced by the Commissioners, or some of them, and the Chief Engineer, to proceed immediately with the completion of the bridge in a way that he would not have proceeded under his bargain with Boggs & Co., and on the understanding that the Government would pay for the bridge-work from the beginning, at rates then specified, and that though some further formality would be required to make the bargain strictly legal, they would attend to that and see it accomplished, he evidently dismissed all matters of form from his mind and gave his attention to the practical accomplishment of the work he had undertaken. We think that, between man and man, these facts would entitle him to be considered a contractor from that time.

On 24th June, 1873, on a Report of 14th June, from the Commissioners, an Order in Council was passed, authorizing the separation of the contract for Section 19, "making the bridge across the Restigouche separate from the rest of the work, and that the price of the bridge be fixed with regard to the Order in Council as to the stone to be used, and also as to the extra price caused by the foundations proving so different from what was originally proposed."

This appears to us to give power to the Commissioners to fix the prices and other particulars of the new bargain and supplies the authority, the want of which might make the verbal directions of February insufficient to create a liability under the statute. We think, therefore, that the statute could not be set up as a reason for continuing the payments to Boggs & Co., after June, 1873.

The fact of this Order in Council was, without delay, communicated to Mr. Murphy; his mind was then completely set at rest; but the payments still went on to Boggs & Co., for the bridge-work, though it had been, since February, estimated by the resident engineer as separated from the rest of Section 19, and though Murphy was not a consenting party to such payments. Boggs & Co professed to pay over to him the sums which were, from time to time, paid them by the Government on this work, but did not do so fully.

We state hereafter what we consider to be the amount retained by them between 1st January, 1873, and the Order in Council in the June following.

On the 6th October, 1873, on a report from the Commissioners, dated 30th September, 1873, another Order in Council was passed approving, and adopting the schedule of rates recommended by the Commissioners. This Order seems to be confirmatory of their action under the one of June. We do not think this was necessary after the authority already given by the former one, if this Order did not lead to payments to Murphy.

The work at the bridge was still estimated each month as separated from the rest of the section, the form used in such estimates not then naming any contractor; but in December, 1873, and January, 1874, a new form was used, which did name the contractor, and in this case, named Mr. Murphy. Still, payments were continued to Boggs & Co., and it was only after repeated applications to the officials, and at last, a formal one, on 2nd January, 1874, addressed to the Minister himself, that Mr. Braun, the Secretary of the Public Works Department, answered, Mr. Murphy on the 25th February, 1874, saying: "From information furnished this Department by the Railway Commissioners, you are recognized as a separate contractor for said works,

and will be treated accordingly." From that time forward all payments on bridge-work were made to him, and nothing turns upon them.

The account put in by the Government, showing those payments meets the amount finally ascertained to be the price of the bridge work, by inserting as a first, item, the following :—

" 1874, March 1st To amount of Engineer-in-Chief's estimate of work done on the Restigouche bridge up to end of January, 1874, assumed having been paid to him by Thomas Boggs and John R. Murray, contractors, $137,000.00."

This charge the claimant with the value of the bridge work up to the end of January, 1874,on the assumption that Boggs & Co. had fully paid it to him—not that the Government had paid it to him, or even to Beggs & Co. As a fact it had not been fully paid to either.

The whole value of the bridge work up to that date had been returned by the engineers at $136,852, out of which sum the Government had retained as a drawback $2,055, and had paid to Bogg & Co. the balance, $134,797, so that even if that firm had paid Murphy all they had received, which they did not, still there was a sum of $2,055 then in the hands of the Government due to this claimant.

Having, as before explained, come to the conclusion that the $16,711 is to be reduced by the amount paid by the Government to Boggs & Co. on the work, down to 1st January, 1873,we proceed to show what we assume that amount to be. Until the proposition in February, 1873, for the severance of the contract, progress estimates on bridge work and on other work on Section 19 were not sent in by the resident engineers in separate documents. One estimate was made up for the whole section, but it stated the different classes of, so that the items for bridge-work could be extracted and the amount of them ascertained.

The amount of progress estimates, as returned by the resident engineer, was not adopted precisely by the Chief Engineer in the estimates which he reported to the Commissioners as the basis of the monthly advances to contractors. For this section his practice was to adopt larger amounts, and it so happened that when a percentage of 10 per cent. was witheld by the Government, as it was until the end of 1871, the amounts paid to the contractors were about the full amounts returned by Mr. Grant, the resident engineer. In Mr. Fleming's certificates, he gave usually a round sum, without distinguishing between bridge-work and other work; and one cannot learn from them exactly what proportion of his whole amount he intended for the bridge, consequently, we are unable to say positively that the payments by the Government were based upon any higher amounts than those given in the progress estimates of the resident engineer. Those amounts, however, are clearly proved, and we are safe in saying that the moneys paid from month to month were paid specifically on bridge work to the extent, at least, of the values stated by the resident engineer, less the percentage witheld by the Government from the amounts stated in the Chief Engineer's certificate. We might, perhaps, go further without being wrong, and assume that the resident engineer's estimates of the bridge-work were increased as well as the other work, when it came to be stated in the one sum named by the Chief Engineer, and that therefore the payments on bridge-work were more than nine-tenths of the estimates by the resident engineer; but, inasmuch as we are proposing to charge Mr. Murphy with payments to Boggs & Co., on the ground that they were made specifically, we think it proper to confine ourselves to such as were unquestionably on bridge-work.

With the exception of ½ per cent. drawback for the months of January and February, 1872, and 16⅔ per cent. in November, 1873, the Government paid the full estimates of the Chief Engineer after 1871.

From the several estimates and vouchers on record, we have compiled the schedule accompanying this report, showing for each month before February, 1874: (1.) The resident engineer's estimate of bridge work. (2.) The percentage (*i.e.* the drawback) from the Chief Engineer's certificate withheld by Government. (3.) The balance assumed by us to have been paid to Boggs & Co., specifically, on bridge-work; and (4.) The amount paid thereon by Boggs & Co. to Murphy.

Before adopting the amount shown by this schedule to have been paid to Boggs & Co., as a basis for our conclusions, we furnished a copy of it to the claimant, through his solicitor, requesting that he would, if he could, give us any other evidence more favorable to himself. His solicitor waited on us and admitted that there was no better evidence on the subject.

The result of this schedule is to show that before the new bargain, of February, 1873, Boggs & Co. received, at least, $7,784 on bridge-work more than they paid Murphy, and we diminished the claim of $16,711 to that extent.

Making this deduction leaves a balance of $8,927, for which we think the Crown is liable to the claimant.

If it should be decided to take advantage of the statutory defence before alluded to, then Mr. Murphy was not entitled to be treated as a separate contractor till the Order in Council, in June, 1873, and the Government were justified in paying Boggs & Co. on bridge work, up to that date. They had then received, since 1st January, 1873, $1,421 more than they handed over to Murphy. That would be a further deduction from his claim.

Assuming this defence not to be set up, we allow the claimant $8,927 on this item.

The next item is $4,600, for the expenditure in opening up the Bordeaux quarry.

This outlay took place while the claimant was a sub-contractor to Boggs & Co. He contends that, although there was no privity of contract between him and the Crown, he was bound to obey the orders of the Government engineers; and he alleges that, in this instance, the district engineer insisted on his opening the quarry in question, as one likely to yield suitable stone; that it failed to do so; that he should not bear the loss, because, from the beginning, he had no faith in the result, and so expressed himself. He evidently considered even a suggestion by a Government engineer equal to an imperative command, and he says he did not feel at liberty, under the circumstances, to exercise his own discretion.

Mr. Marcus Smith, the engineer to whom he alluded, was examined as a witness. He testified that all he had said to Mr. Murphy on the subject was in the nature of a friendly opinion, and that he took care never to use language of an official or imperative character, for he well understood at the time that he had no right to do so.

We think the cost of the attempt to find suitable stone at the Bordeaux quarry, and the consequences of its failure, ought to be borne as contingencies incident to the contractor's undertaking, and that even if Mr. Murphy had been the principal contractor, he would have no claim for this item; but he was a sub contractor, and we feel safe in saying that the Crown is not liable to him for the cost which he incurred in following the opinion, or even the directions, of the district engineer. We allow nothing on this item.

The last item, $200, is for costs in proving the claim before us.

No evidence was given on the subject, and we are, therefore, not able to say whether the amount is correct.

After the particulars of the claim, including this item, were handed in, Mr. Murphy was informed that his personal travelling expenses would be paid as witness' fees. He has received the amount of them, and, in our judgment, he is not entitled, as a matter of right, to recover his other expenses. In our general report we deal with the subject of the cost incurred in proving claims before us.

In this, as in other cases where it has been claimed, we report the amount demanded for such expenses.

In our judgment, Her Majesty is, and has been since 1st January, 1874, liable to Mr. Murphy, on the claims submitted to us, to the extent of $8,927, and no more.

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

Hon. J. A. CHAPLEAU, Secretary of State.
OTTAWA, 7th March, 1884.

SCHEDULE.

Estimated value of work on Bridge by Mr. Grant, Resident Engineer, for the months of		In paying Contractors on progress estimates for the whole Section, Government deducted this percentage.	Deducting the same percentage from Bridge estimate, this proportion assumed to have been paid by Government to Boggs & Co. on Bridge work.	Boggs & Co. paid Murphy.
	$		$	$
July, 1871	1,006	10 per cent.	906	1,000
August "	1,800	"	1,620	1,000
September "	2,584	"	2,325	4,400
October "	4,560	"	4,104	3,860
November "	1,790	"	1,611	1,390
December "	1,130	"	1,017	1,100
	12,870		11,583	
January, 1872	1,500	2½ per cent.		1,350
February "	2,150	"	3,559	1,890
March "	2,500	Nil.	2,500	2,250
April "	6,156	"	6,156	2,000
May "	5 614	"	5,614	5,000
June "	5,020	"	5,020	4,480
July "	3,650	"	3,650	3,100
August "	3,880	"	3,880	3,230
September "	5,080	"	5,080	4,318
October "	2,746	"	2,746	2,531
November "	4,000	"	4,000	3,500
December "	2,885	"	2,885	2,500
	58,051	"	56,673	48,889
January, 1873	2,591	"	2,591	2,500
February "	3,372	"	3,372	3,821
March "	4 286	"	4,286	3,643
April "	4,353	"	4,353	3,700
May "	5,219	"	5,219	4,736
	77,873		76,494	67,289
June "	7,210	"	7,210	6,200
July "	12,288	"	12,288	10,000
August "	6.277	"	6,277	5,400
September "	13,874	"	13,874	13,000
October "	7,269	"	7,269	7,000
November "	4 062	16⅔ per cent.	3,385	3,600
December "	4,000	Nil.	4,000	3,300
January, 1874	4,000	"	4,000	4,500
	136,852		134,797	120,229

Special Report on Claim of Messrs. Starr and De Wolfe.

On Section 11	$62,874 61
On Section 23	417,277 20
Total	$490,151 81

This claim relates to the work on two sections of the railway, namely, 11 and 23. Messrs. Starr and De Wolfe being the assignees of Messrs. Davies, Grant & Suther-

land, who contracted to build Section 11, and also of Messrs. Grant, Sutherland & Co., who contracted to build Section 23, Mr. Davis not being a partner in the last named firm.

Each of these firms being unable to meets its engagements, its affairs were administered under the Insolvent Act of 1869. Messrs. Starr and De Wolfe were appointed the assignees of Messrs. Davis, Grant & Sutherland, and assumed all their rights, concerning Section 11.

In August, 1876, the claimants passed their rights concerning Section 11, before the Court of Exchequer, demanding then $62,874.61 as due in February, 1873, and interest from that time. They made, before us, the same demand concerning that section, and the particulars of their claim are set forth in Schedule A, hereto appended.

We deal with this one before taking up the claim of Section 23. Messrs. Davis, Grant & Sutherland, by a contract in the usual form, dated 1st November, 1869, undertook to build Section 11, about 4½ miles long, for the bulk price of $61,713, and to finish it by the 1st July, 1870. The claimants contend that this did not include the superstructure of the bridge across the Missiquash River, the western limit of the section; in other words, that their work ended on the east side of that river; and Mr. Grant, one of the contractors, testified before us, that the latter part of the description of the work, as it now appears in the contract, and which shows that all the bridge, except the western abutment, was undertaken, was inserted in the document after he and his partners had signed it. We think the whole evidence on this matter points to the impossibility of any such alteration. The advertisement inviting competition, dated 3rd August, 1869, contained this notice:—

"Contract No. 11 will be in the Province of Nova Scotia, and will extend from the easterly end of the Eastern Extension Railway, to the westerly end of Section No. 4 (including the bridge across the Missiquash River, except the western abutment;" and in the contract itself, the first words in the description of the work, show it as "commencing at the easterly end of that portion of the Nova Scotia and New Brunswick (Intercolonial) Railway, which is known as the 'Eastern Extension Railway,' and on the westerly side of the River Missiquash."

Our conclusion is, that the contract was signed by the parties in its present shape, including the whole bridge, except the western abutment; but we think the contractors, when making up their tender, may not have understood that more than the eastern abutment was to be done, and so named their bulk price without including any amount for the superstructure; but before signing it in its present shape, they became aware of their mistake and decided, nevertheless, to enter into the agreement as it now appears.

Before proceeding with the enquiry of any claim, we have to see whether it is within any of the six classes, excepted from our jurisdiction by the terms of our Commission.

This claim is not within any of the exceptions, unless that one which is thus described: "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."

In this case the works were, as we find, legally taken out of the hands of the contractors and, as completed on Section 11, cost the Government more than the bulk price of the contract, the whole outlay being $70,381 or $3,668 more than the price to be paid to Messrs. Davis, Grant & Sutherland; but we have to ascertain the value of works, if there were any furnished, in addition to those required to fulfil the contract, before we can say whether the contract work was finished at a loss; that is, whether the contract works alone cost more than the bulk price, $61,713, and this necessitates at once the investigation of the claimant's whole case.

The wooden superstructure of the Missiquash bridge was finished by the Government after taking the work out of the contractors' hands, and the cost of it is included in the amount charged as aforesaid, expended by the Government.

We proceed to take up the several items of the claim, after which we show, in Schedule B, hereto appended, the effect of our decision on the state of accounts.

Item 1.

Is for the contract price, $61,713, and it is not necessary to mention it further at this stage of the report.

Item 2.

Grading and clearing station ground, $90, altered to . . $900 00

This was for clearing and grubbing the land for the Amherst station, about 200 feet extra width beyond the 100 feet required for the railway proper. The Amherst station ground extended about 850 feet, which would give an extra superficial area of four acres. According to schedule attached to the tender, the

Clearing was worth $20 per acre.	$ 80 00
Grubbing " $50 "	200 00

And on the evidence we think these values fair.

This work was not part of the design at the time the contract was entered into, and, in our judgment, without infringing the rights of either party, might have been let to any other person as well as to the contractor. In other words, it is work independent of that contemplated by the contract.

We allow $280 on Item 2.

Item 3.

Raising embankment from Fort Lawrence to Missiquash River, above original grade. $3,675 00

Mr. Schreiber testified before Mr. Shanly that this work was done, the grade having been raised on account of the floods. The price charged is 40 cents per yard, while the schedule price is 24 cents only. The evidence given before Mr. Shanly shows that the work was worth one-third more than the schedule, on account of the difficulty of getting the material upon the bank, after it was brought to the height at which it was supposed to be finished, but no evidence appears to have been given as to quantity, beyond Mr. Schreiber's certificate, which showed for this item, as follows :—

Earth, Missiquash bridge, 12,000 yds., at 25c. . . . $3,000 00

That the raising of the grade, after the embankment was completed, to the original height, would have been more expensive, is almost certain. Mr. Grant showed that the extra material was taken from the ditches, and Mr. St. George admitted that it was a longer haul.

We allow 12,000 yards, at 30 cents, $3,600.

Item 4.

Raising embankment from peg 40 to 150 (no details given)..... $3,513 00

This item is claimed on the allegation that the work was increased, as in the case of the last item; but the particulars of the alleged increase are not given.

Mr. Donald Sutherland gave evidence before Mr. Shanly, and said "that Mr. St. George and Mr. Creighton told him the extra work would be paid for by cubical quantities."

Mr. St. George said that this embankment was not raised all the way, the grades were altered at certain spots only, but the total quantities were not thereby increased. On the contrary, the quantities were, on the whole, thereby diminished.

Mr. Schreiber's evidence, given before Mr. Shanly, is that the grade remained about the same.

Taking the whole testimony, we are unable to allow anything on this item.

Item 5.

Widening cut at Chapman's..... $600 00

Mr. Starr, one of the claimants, appeared before us, but was unable to say anything in support of this item.

The evidence given before Mr. Shanly is that the earth was taken from this cutting for a heavy embankment, and Mr. St. George, engineer, stated that widening this cut was solely for the benefit of the contractors, who had a very heavy embankment below Chapman's, and it was less expensive to find the earth out of the cutting; that it was better material, and made an easier curve without, increasing the grade. Although a little longer haul, that it was easier to the contractors.

We are of opinion that nothing can be allowed on this item.

Item 6.

Widening station ground..... $450 00

No evidence whatever was given before us in support of this item, but before Mr. Shanly, it was admitted by the engineers that the work was done and the grounds widened for the purpose of a double track.

Mr. Schreiber produced, at that hearing, a profile on which the site of the station ground at Amherst was marked "Embankment, 30 feet wide at top," and on another item for culvert (18) it was shown that the ground was 300 feet wide when finished.

A provision was made in the bill of works, that certain surplus earth (stated at 31,691 yards) was to be employed in grading the station grounds at Amherst; but beyond that, no provision appears to have been made for the work covered by this item. After considering the large quantity of earth actually employed, and the extent of the station grounds, we think the excess may be treated as work independent of the contract, and might have been done by any other person as well as the contractors. For these reasons we treat it as an extra, and allow the sum of $450 on Item 6.

Item 7.

Widening cut at Moffat's, originally $240, said to be an error, and increased to $2,400 .....$2,400 00

This cutting was situated a few yards east of the site of the Amherst station, and after the earth from Amherst ridge cutting had been brought down, and the station ground widened, it was considered necessary to remove the remainder of this (Moffat's) cut, not only for the purpose of enabling sidings to be run out of the station, but for the purpose of making the ground more fitted for its purpose. The original amount to be taken from this cutting being the mere width required for the purpose of the line of railway was 924 yards. It was given in evidence before us that the actual amount was about 800 yards, and that the extra quantity moved was 2,000 yards. Considering the fact that this was no part of the original work, but was made necessary only in relation to the Amherst station, which was located after the contract was signed, we allow the following sums:—

One-half 1,000 yds. earth, at 35c., including carting. .	$ 350 00
One-half 1,000 yds. rock, at $1, including hauling . .	1,000 00
	$1,350 00

Item 8.

Excavation of stream diversion and sinking of embankment about peg 185 . . . . . $1,200

The evidence offered before us in relation to this item was by Mr. James Grant, one of the original contractors, and was not of a very convincing character. He first said it included the widening of Moffat's cut, and afterwards that the item was

claimed as an extra, on the ground that they did not contract to do it—that they never tendered to grade any station.

As regards the stream diversion, the witness first said it was for draining the Amherst station, but on cross-examination, admitted that he was wrong, and that it was a stream to supply a mill which had been cut off by the making of the railway, and that the engineers decided to make this good by bringing the water down a cutting nearly a mile long, and carrying it across the railway by a culvert, which he claims as extra work. It is true that there is no culvert shown on the profile, nor mentioned in the bill of works at this place, but the plans, exhibited before Mr. Shanly, on which Mr. Grant testified that the culvert was built, shows it to have been designed for station 173·75, which is in the middle of the Amherst station yard, and is fully dealt with in Item 18. At this point, it appears in evidence before Mr. Shanly, page 33, that the embankment was made in winter upon a soft, clay bottom, and after being brought up to grade, settled, forcing out the slopes of the ditches on either side. The contractors made it up in due course, as they were bound to do.

On the whole evidence we disallow the item.

Item 9.

Rock excavation at Fort Lawrence cut..... $600 00

Item 10.

Rock excavation at Amherst, ridge cutting..... $300 00

No evidence was offered to us on these items.

Before Mr. Shanly the statement was made that rock was met with though none was expected, as none was shown on profile or contract.

The fact that a small quantity of rock was found in this large cutting may have disappointed the contractors, but as he undertook the work for a bulk price, which we consider included all such contingencies, we allow nothing on these items.

Item 11.

Reducing embankment, caused by engineers forcing material to be put where not required..... $690 00

No evidence was offered to us in support of this item. Before Mr. Shanly, Mr. Grant stated that the embankment was raised 18 inches, which was afterwards ordered off, but the engineers proved that it was done by the contractors wilfully; that the grade pegs were removed, and that he had to re-grade the place three times.

We allow nothing on this item.

Item 12.

Hauling cattle-guard timber from way of embankment..... $5 00

It appears from the evidence given before Mr. Shanly that the timber had been laid ready for the cattle-guards where a road diversion was to cross the railway. The location of the crossing was afterwards changed and the timber had to be removed in consequence. The charge is simply for what it cost the contractor and we allow it.

Item 13.

Hauling stones from Gardner's Creek aboideau borrowing ground..... $152 00

Originally it was intended to build a bridge across Gardner's Creek, and some stone was taken there for the purpose. It was afterwards decided to build an aboideau there, and the stones, having become useless there, were carted away to the Missiquash bridge and used in that structure.

The evidence satisfies us that the substitution of the aboideau was a considerable saving to the contractors (see Item 22), though they had to transport this stone as above mentioned.

We allow nothing on this item.

Item 14.

Time, carpenters, laborers, putting addition to La Planche aboideau, &c. $121 25

This work was caused by lengthening the aboideau in question after it had been completed according to the requirements of the Government engineers. It was admitted that there was no iron in the original specification, but it had to be supplied in this addition. Mr. Schreiber was under the impression that it had been paid for. He said, before Mr. Shanly, that $39.50 had been allowed for the work, but, on the whole evidence, the fact is not well established, and we give the contractor the benefit of the doubt; and as we think the charge not excessive, we allow the full amount.

Item 15.

Removing sleepers at different times from borrow pits in embankments $15 00

There is no doubt that the sleepers (ties) were laid down by the contractors, as stated. It is more than likely that their work was supposed to be so far finished as to warrant the tie contractors in laying the ties where they did, for Mr. Grant stated before Mr. Shanly, that the ties had to be removed because the engineer ordered them to reduce the bank; and our conclusion on the lowering of this bank (Item 11) is, that it was raised by the contractor negligently, and as we do not allow for its being lowered, neither do we allow this item.

Item 16.

Excavation in large drain at Amherst ridge cutting . . $528 00

The evidence given before us was that of Mr. James A. Grant; and without suggesting that he had any desire to mislead, we are bound to express grave doubts as to his accuracy on many of these items. He had been seriously ill for a long time, and occasionally his memory seemed at fault. In his evidence he mixed up items, and had full confidence that he was correct when he said this one was for Hill's mill —that it was work not intended to drain the cutting, which could have been done by pole drains.

On the other hand, Mr. St. George, the engineer in charge, testified, before Mr. Shanly, that the drain was necessary on account of the cutting being so wet; that the contractors could not have worked otherwise. Mr. Henshaw, the district engineer, corroborated this evidence, though he said it was not contemplated and not in the bill of works, but he testified that it was "nothing but a temporary work to enable contractors to work in the cutting."

Mr. Fleming corroborated Mr. Henshaw's evidence, and Mr. Schreiber called it a surface ditch covered by the specification.

We think it was a drain necessary for the construction of the line, and its safety when constructed, and so covered by the bulk sum of the contractor.

We do not, therefore, allow anything on this item.

Item 17.

Bridge across Fort Lawrence cut, including excavation.. $1,640 00

No evidence was given before us on this item, but from that on record, it appears that it was originally intended to cross on the level and have cattle-guards at the spot. This intention was changed and an overhead bridge was ordered instead.

This seems to us to be a piece of work independent of the contract, and for which the claimant ought to be made a fair allowance.

The item includes "excavation," but it is evident this would be less than under the original design of a level crossing, which would have necessitated considerable approaches to the actual crossing. The contractor, by the change of design, would save $200, which, in making the cattle-guards, it would have cost, besides forming the approach road to the crossing.

On the evidence, we consider that nothing should be allowed for excavation. The bridge was valued by Mr. Schreiber at $1,043.93, which we allow, minus the value of the cattle-guards, say, $200, leaving to be passed to the credit of the claimants $843.93.

Item 18.

Small stone culvert at Station Bank, including excavation $415 00

This charge is made for a culvert 300 feet long, constructed through the Amherst station ground.

It was originally intended to build, near station 155, two 6 feet beam culverts to be used as cattle-guards, but in the course of the work it was found desirable to change the design.

Instead of these two culverts, one 4 feet beam culvert was built at 165, and one small box culvert at 171, to drain the Amherst station ground. The two cattle-guards of timber were built.

The evidence given before us was that of Mr. James Grant, one of the original contractors, who said that a small box culvert would have been required if no station ground had been there.

The question in this case seems to be, whether the change of design threw upon the contractors any additional burden, and, if so, whether he ought to receive a compensation for it.

After considering carefully the cost to the contractor of the first and last design concerning these particulars, we have to say than the change effected was a decided saving to him, and we allow nothing on this item.

Item 19.

Road crossings, cattle guards, including three box culverts, &c., about peg 150. . . . . $500 00

This is an extra road crossing, caused by a change in the location of the railway.

Mr. Schreiber's evidence before Mr. Shanly leads us to say that $294 is a fair value for it, and that we allow.

Item 20.

Road crossings, cattle guards, across marsh at peg 90.... $450 00

This is an additional road crossing, caused by the diversion of the railway, and valued by Mr. Schreiber at $410, which we allow.

Item 21.

Two wooden culverts at Christie's mill, including excavation. $60 00

The evidence given before us that there were two small culverts made to take water off the railway and coach road, and were not due to any change of grade or location.

The contractor claimed that they were not necessary, and demands this $60, because the engineer did not exercise wise discretion. We are of opinion that they were a necessary part of the work, but at all events the contract required the contractor to furnish, for his bulk price, all such work as this, according to the discretion of the engineer, and we allow nothing on the item.

Item 22.

Aboideau at Gordon's Creek. . . . $5,600 00

The original intention was to build here a large beam culvert requiring about 220 yards of masonry and an estimate of 15 yards of paving, besides about $800 worth of foundations. The contractors had hauled some stone for the purpose when the design was changed to an aboideau.

Mr. James Grant testified before us that the design was changed at the request of the Government in consequence of an agitation by the farmers, and that as this

aboideau was as large as that at La Planche the same allowance should be made for it, namely, $5,600.

But it was testified by several witnesses before Mr. Shanly that the contractors saved a large sum by the substitution.

Mr. James Bliss said that the aboideau was much cheaper than the bridge would have been.

Mr. St. George, the engineer in charge, said that the aboideau would cost two-thirds less than the bridge (culvert) would.

Mr. Henshaw, the district engineer, also testified that there was a large saving by not building the bridge (culvert).

Mr. Fleming, the Chief Engineer, corroborated both these witnesses, and thought the contractors wished the change made.

On the whole evidence we believe that the change resulted in a saving to the contractor, and disallow the item.

Item 23.

Erecting, furnishing material and completing temporary bridge across Missiquash $1,600 00

This Section 11, as mentioned early in this report, included the building of a bridge across the Missiquash river, except the westerly abutment.

Considerable confusion as to this bridge appears to have existed in the mind of Mr. James Grant, one of the original contractors. He stated in evidence before Mr. Shanly that it was not estimated in the bulk sum of the tender, and that he had refused to sign the contract when he discovered that it was included. He said that it was neither in the bill of works nor the tender, but in the margin of the contract. We have already explained that we think this contention has no foundation, and that the contract did cover the building of this bridge, excepting the westerly abutment.

It appears from the evidence that a bridge was originally necessary to connect with the Eastern Extension Railway, for the purpose of getting engines across; and that the contractors were ordered to build a temporary one, pending the decision of the Government as to wooden or iron superstructure.

Mr. Fleming's recollection when giving evidence before Mr. Shanly was that he delayed the building of all wooden bridges until it was decided about building iron ones, but this temporary bridge was necessary to have the line opened between Moncton and Amherst.

There is no doubt that the temporary bridge was built, and that the permanent bridge was also built, the latter by the Government, the moneys expended on it being charged in the $70,381, debited by us to the contractors, as aforesaid.

As a fact the permanent bridge cost $7,201, as follows:—

Superstructure	$5,577 41
Rip Rap	1,011 28
Masonry, east abutment	137 75
Land damages	475 05
	$7,201 49

The facts are not clear to us concerning the necessity of the two bridges. There is some reason for saying that this temporary one was supplied to enable the Government to take time before deciding that the Howe truss should be built, and not one of iron superstructure. We have decided, but not without some doubt, to credit the contractors with $1,600 on this item.

Item 24.

Fencing borrow pits $234 00

No evidence was offered to us upon this item, Before Mr. Shanly, Mr. Grant testified that the borrow pits were ordered by the Commissioners, and contended that,

as the contractors had to fence them, they should be paid for the work beyond the bulk price of the contract.

We cannot agree with this reasoning. The bill of works showed that earth would have to be taken from side cuttings, and the public safety required the borrow pits to be fenced.

It appears to us that this work was a necessary part of executing the contract. We do not, therefore, allow it.

Item 25.

Sinking foundation of west wall and arch culvert at Moffat's, and lifting and laying masonry $340 00

This charge is made because the engineers ordered some of the work to be taken down for the inspection of the foundation. From the evidence of Mr. St. George, the engineer in charge of the works, the contractors were ordered to have the foundation inspected before commencing the masonry; and Mr. Grant testified that the foundation had been approved of by Mr. Henshaw, Mr. St. George, and Mr. Sutherland, Inspector of masonry.

Mr. St. George and Mr. Henshaw both denied before Mr. Shanly that the foundation had been inspected, and that was the cause of a corner of the masonry having to be pushed down.

We think that Mr. Grant was mistaken, and that the building of the masonry was commenced, contrary to the contract, before the engineers had had the opportunity of inspecting the foundation.

It is in evidence that there was a bad feeling between Mr. Grant and Mr. Henshaw, but nothing leads us to believe that he would have had the masonry removed if the foundation had been previously inspected.

We do not allow the charge.

Item 26.

Amount claimed for damages, as described in prayer of petition, fifthly to tenthly, not less than 50 per cent. of the contract..... $30,856 50

No evidence was offered to us upon this item, except by Mr. Starr, one of the claimants, who said that all we could take from him would be hearsay.

Before Mr. Shanly it was stated by Mr. Grant that considerable delay occurred in setting out the work, and that he or his partner lost the opportunity of obtaining cheap labor. That their financial reputation was injured by statements made by Mr. Henshaw, the District Engineer, and others; and that upon their representations that gentleman was removed to another district.

We have already had to remark on the contradictory evidence given by Mr. Grant in several cases, and the impression left on our minds was, that independently of the defect of memory resulting from his illness, he was essentially an impracticable man, who was apt to magnify every little grievance, of which he had many, owing to his not fully appreciating the nature of the obligation into which he and his partner had entered.

There is no evidence which would justify us in reporting any liability on this item.

Item 27.

Ditching from Douglass' land to Arch culvert, from 1,600 to 2,000 yards, half rock, at 75c. - - - $1,200 00

This charge is made for digging ditches along the station ground for the purpose of drainage. From the evidence it appears that the site of the station was not settled when the contract was let, and that it was in a wet place, rendering drainage necessary. To have turned the water on to the neighboring land would have been objectionable, and it was decided to carry it to the culvert near peg 190.

The price charged would not be too much if the ditching had been half rock, as stated; but Mr. St. George, the Engineer in charge, testify before Mr. Shanly, tha there was very little rock, not half of it.

Under the circumstances, as the evidence is so vague, we allow the whole quantity charged, but at 50 cents per yard—$1,000.

Item 28.

Widening approach to Christie's mill, lengthening wooden box culvert and raising above grade - - - $50 00

Item 29.

Raising Mr. Moffat's road crossing above grade and making too much ridge - - - - $29 00

These charges arose in consequence of the ditching referred to in Item 27.

It appears that at the foot of the Amherst ridge cutting there was a level crossing, where a wooden culvert was laid down for the carrying away of the water referred to in Item 27. The ground here was sandy, and the sand got into the culvert and choked it. It had consequently to be raised and lengthened, which made it necessary to raise and widen the road. Where the ditch for carrying the water from the station ground to the culvert intersected the road to Moffat's crossing it became necessary to lay down two small wooden culverts. The facts are not clear upon the evidence, but giving the contractors the benefit of the doubt, and so, assuming that the work was independent of that covered by the contract, we allow on these items $50 and $29.

Item 30.

Removing fence at station ground - - - - $27 00

This charge is made because the fencing of the line was completed before the Amherst station was fixed upon, and at that place it had to be removed. No dispute arose as to the facts, but as to the price.

The claimants stated that they had charged as for new fence, instead of merely for the labor, but this is evidently an error, and we think the moving of the fence on both sides of the railway for the length of the station ground fully worth the price charged, and we allow the $27.

Item 31.

Continuation of brook diversion from peg 198. . . $39 00

So far as this appears from the evidence this is a necessary part of the drain, charged for in Item 16, which we disallowed, and we do not allow this item.

Item 32.

Culvert at ridge, 45 yds., at $15 . . . . . $675 00

Item 33.

Excavating foundation, at ridge, half rock, 102 c. yds., at $1..... 102 00

Item 34.

Inlet and outlet to ridge 690 00

$1,467 00

There is no question about this work having been done, and very little as to the price. Mr. Schreiber valued it at $601 and $190. In his report of 30th November, 1871, to Mr. Fleming, and in preparing the defence to the claim, he puts on record the following remarks: "Item 32. Building beam culverts in the Amherst ridge cutting. There was no culvert shown in the bill of works. The ditch charged for in Item 31 was designed to carry off the water to Christie's 10 feet arch culvert. It

subsequently appeared that by diverting the stream through the arch culvert, the water was cut off from Hill's chair and furniture factory, and the machinery stopped. In due course he entered a complaint, with a bill for damages. After considerable correspondence, a culvert was ordered to be built. First, a stoneware pipe culvert was built. This did not please the district engineer. He reported to the Chief Enginer, who ordered the pipe culvert to be torn up, and the beam culvert to be built. The quantity of the work in this culvert does not bring the total quantity of work executed up to the bill of works quantity." This, however, appears to have been the result of the works as done interfering with private rights and rendering necessary this culvert, which was made according to the evidence after the works, as laid out, were finished, and in that light may be considered as work independent of the contract. The contractors had to bring their men back from Moncton and re-open their quarries for the making of this culvert.

As regards the Item 34, one of those under discussion, forming the third charge of this work, there is a conflict of opinion even among the engineers. Mr. Henshaw said: "If the culvert was extra, this was extra as well." Again he said: "Thinks it was nothing but a catch-water drain, and provided for in the contract." Mr. Schreiber said: "Certainly a part of the contract." The evidence given in support of this item is very meagre. It was given before Mr. Shanly as follows:—

"Q. Is that still the same culvert?—That outlet had to be carried down nearly a mile to Hill's mill. It refers to the diversion at Hill's mill. But it is manifest from what we have stated that this work was found necessary to carry water to Hill's factory, of which it had been deprived by the water from the Amherst ridge cutting being taken to McKinnon's, and we are of opinion that the work was part of the system of water works designed to supply water to that factory, and that these items should be allowed at $675 + 102 + 690, in all, $1,467.

Item 35.

Brook diversion from McKinnon's shanty, peg 203 to 223,
518 yds., at 30c. $155 40

This work was in connection with the last three items, to furnish water for Hill's factory. Mr. Grant, one of the original contractors, stated that the statement of Mr. Henshaw that there was a sort of catch-water drain, was not correct, but it was a brook diversion for the purpose of fetching water from a pond some distance away. That it was, in fact, another branch of the same works, designed to satisfy Mr. Hill's demand for water, one of several branches to the stream to Hill's mill.

We think the circumstances attending the cutting off of the supply and the works undertaken to make it good from other sources, make it probable that the claimant is right, and that this is an extra work following in the wake of the last three items.

We therefore allow the item $155.40.

Item 36.

Embankment and widening 3 ft. more than specified,
over arch culvert, 2,500 yds., at 25c..... $625 00

The embankment was finisbed at the specified width of 18 feet, and was required to be widened 3 feet, for the purpose of laying a double track.

No evidence was given in contradiction, but Mr. Schreiber stated that "the bank was only 18 feet wide when they called it finished," and that it was ordered to be increased 3 feet. He recommended that it should be allowed as an extra.

On the evidence, we think this ought to be treated as work independent of the contract, and we allow $62.50.

Item 37.

Box drain, 2,000 feet, at $40 per hundred..... $800 00

The evidence does not show that this work was done under such circumstances or in such a locality as would enable us to treat it as independent of the contract.

We think it is covered by the bulk price, and allow nothing for it.

Item 38.

Main drain, extra, through rock, partly at Fort Lawrence cut and Amherst ridge, 7,000 ft., less 2,000 ft., charged in Item 37, 5,000 ft., at $30 per 100 ft.. $1,500 00

The evidence shows that in this work 4,164 yards were moved beyond the quantity estimated in the bill of works, but there is no other reason why it should be allowed as an extra, and we think for reasons stated in our general report, that the quantities executed being more or less than the quantities originally estimated is no reason for adding to or taking from the bulk price. A different rule would work much to the disadvantage of these and all other claimants, because, in fact, the work was finished at quantities which, on the whole, were less than the bill of works stated.

We allow nothing on this item.

We set out in Schedule B, hereto appended, the items allowed by us, and show how the account stands with those items credited to the claimants.

In our judgment, Her Majesty was, on the 1st day of February, 1873, indebted to Messrs. Davis, Grant & Sutherland, and is now indebted to the claimants, in the sum of $3,077 for work connected with the construction of Section 11 of this railway, and should the right to charge the contractors with the omission of the wooden superstructure for bridges be waived, this liability would by increased by $5,578, making it altogether $8,655.

We now take up the claim concerning Section 23. Messrs. Sutherland, Grant & Co. were the contractors for this section, 27½ miles long, Mr. Davis, one of the partners in the construction of Section 11, not being interested. The contract, which was dated 1st December, 1870, provided for the completion of the work by the 1st July, 1872, at the bulk price of $276,750.

The contractors, as a business firm, failed, as before mentioned, and went through the Insolvent Court, this claim being advanced by Messrs. Starr and DeWolf as their assignees. Before taking up the claim for full investigation, we have to learn whether it is within any of the classes which, by the terms of our Commission, are excluded from our enquiry. We find it is not, unless it is a "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."

The works being far from finished a year after the time specified, the Commissioners, in due form, and as prescribed by the contract, notified the claimants of their intention to take the work out of their hands and complete it themselves; and in September, 1873, they took possession and carried forward the construction and completed the section about 1st November, 1874.

We have, therefore, no difficulty in deciding that the work was legally taken out of the hands of the contractors, but whether it was "completed at a loss to Her Majesty" involves a more lengthy investigation.

The contractors had been paid $244,000 on work done before the section was taken out of their hands; and after that, the Government expended the further sum of $124,950, bringing the total cost of building the section to $368,950, or $92,200 in excess of the contract price.

This fact, however, does not, of itself, show that the work was finished at a loss, for we understand that the work alluded to in the 4th exception of our Commission is the work which the contractors were to do for the bulk price. If, therefore, the money paid to them, while in charge of the construction, and by the Government afterwards, covered work beyond what the contract called for, or materials or property, if any, which the contractors were not bound to finish for the bulk price, the value of that additional work and materials and property must be deducted from the

whole sum paid, in order to see what the cost was of the contract work alone, and that necessitates our enquiring, at least, into all those items of the present demand, which are claimed for any such extra work, materials or property.

Although the propriety, as well as the fact, of this expenditure ($368,950) is disputed by the claimants, and although Mr. Woodgate, a civil engineer, whom they employed to measure the work and examine the state and condition of it, as left by them at the time of the assumption of it by the Commissioners, reported to them that an expenditure of only $43,310 would fulfil the contract, we have to say that, after a full enquiry into the matter, we consider the alleged expenditure by the Commissioners fully established by the evidence before us. This includes the payment of a considerable sum for wages overdue by the contractors to their workmen, and which, under the facts as they existed, and under the terms of the contract, was properly paid by the Commissioners and charged to the contractors.

It includes, however, some things, also, which must be credited to the claimants as outside the contract work, and which we point out more circumstantially, as we deal hereafter with the several items of the claim; but the result of crediting those items is not to turn the balance in their favor—it merely reduces it from $92,200, as before mentioned, to a smaller sum against them.

The particulars of the claimants' demand concerning Section 23 are set out in Schedule C, hereto appended. To dispose of the 59 items there specified, one by one, would lengthen this report unnecessarily, and we deal with some of them in classes.

The whole claim concerning this section is stated in the particulars at - - - - - -	$643,602 00
This includes the contract price - - - -	276,750 00
Remainder - - - -	$366,852 00

This remainder, $366,852, is for extras and for damages. We have just explained, that before deciding whether the work was finished at a loss we must consider the value of the extras, if any, supplied by the contractors, but we must not take into account the damages claimed by them; and, therefore, it by excluding the items relating to damages, and such others as we think are not supported by the evidence, those which remain amount to less than $92,200, then, according to our views, it will be demonstrated that the works were finished at a loss.

We proceed, in the first place, to show that there are items which must be excluded, whereby the claim for extras is reduced below $92,200.

Items 3, 18, 19, 23, 35, 40, 44, and $2,760, part of Item 45, amounting in the aggregate to $111,564.20, are virtually for damages; they are for savings which it is asserted might have been effected by altering the line or grade at different points, or by other changes which the contractors either suggested at the time or have since decided on as improvements to the plan on which the work was completed.

The shape of these items suggests that it was the duty of the Government to build this section according to the designs of the contractors and not those of the Chief Engineer, and that whereas the contractors' design would have cost them less than that which was actually followed, they are entitled to be paid the saving which they would have made, but have not made, owing to the stupidity or obstinacy of the Government engineers. This theory is so contrary to the plain bargain made between the parties, that it would be at once rejected, irrespective of the fact that it is one sounding entirely of damages. Indeed, the claimants' counsel before us virtually abandoned these items, and they are disallowed. This reduces the claim now under discussion from $366,852 to $255,288.

We now go to Item 52, for advance in price of labor and materials, &c., $70,000.

Mr. Grant testified that "the Government took the next section to us, and immediately raised the wages and took our men from us, though we had got them there at great expense, &c.," and he added, "iron also increased 50 per cent. after we took

the contract—the prices of picks, shovels, rails, &c." This explanation shows how this claim has been made to assume such formidable proportions.

We reject Item 52 without hesitation, and the claim for extras, &c., is reduced from $255,288 to $185,288.

Item 55.

Contingencies—Cutting and making roads, portages, all along line, building, &c. - - - - - $25,000 00

Mr. Grant gave the following evidence in support of this item:—

"That it is an item in the contract for omissions and contingencies. The section was through an unbroken forest, and there was not a house on it, and we were obliged to cut portaging roads from different points to get in supplies and plant to the different cuttings. We had not a house or a road leading to the section; we had to make portage roads and haul all our provisions in summer on sleds until we could get a line graded, and there was great difficulty in getting men and their families in, for the very many unforseen difficulties we had to contend with. I think that the amount charged is but a fair allowance for it, to say nothing of the mental anxiety we had to undergo.

This item must be rejected, and reduces the claim under discussion from $185,288 to $160,288.

Item 58.

Loss and damage from malicious reports by engineers...$40,000 00

This item is for damages caused by the alleged wrongful, and, in most cases, malicious action of the Government officials, and it must be rejected, thus reducing the claim under discussion from $160,288 to $120,288. There are other items relating entirely to alleged damages, and which we should be obliged to exclude from the preliminary question of jurisdiction, even if they were supported by evidence, but we have seen no reason to think that they could be allowed, in whole or in part, if we were called upon to report upon their merits. They are: Item 14, damage to masonry, $450, and Item 57, loss for delays, &c., $6,000; in all, $6,450.

The exclusion of these reduces the claim now under discussion from $120,288 to $113,838.

Item 54.

Stock of plant and material taken possession of by the Government..... ..... $25,000 00

Mr. Grant gave evidence, before us, in support of this item, and confidently described the property covered by it, such as horses, dump cars, carts, waggons, shanties, stores, blacksmiths' shops, &c., all of which he declared had been taken possession of by the Government and used without any compensation, and one of the present claimants stated to us that he had made a bargain for the hire of this property to the Government at a large figure and had got nothing on account of it; but at the hearing these witnesses were confronted with the following documents:

1. A letter dated 31st December, 1873, from Starr and De Wolfe, authorizing Mr. Grant, as their agent, to sell and dispose of such of the plant as he thought fit.

2. A bill of sale, dated 13th January, 1874, from Mr. Grant to Her Majesty, of a list of "railway plant now on Section 23, and being used and in use by James Pitblado, manager, from the time of his taking charge of the section," with a receipt in full of "the purchase money, $1,399.66."

3. A receipt signed by both claimants in the following words:—

"Received from the Commissioners appointed for the construction of the Intercolonial Railway, by cheque No. 2980, the sum of eighteen hundred and eighty dollars and ninety cents, being for account of Messrs. Sutherland, Grant & Co., contractors for Section 23, and in full payment for use and purhase of plant, and in full of all demands in connection with said plant on Section 23.

"CHARLES DE WOLF,
"JOHN STARR.

"THOMAS C. DU PLESSIS, Witness."

This demand was urged before us in spite of facts which disprove it, and which ought to have been well known to the claimants and their witness, Mr. Grant. Indeed we must say that the evidence in corroboration of the claimants' allegations concerning Section 23, was generally of a very vague and unsatisfactory character. Mr. Grant and Mr Sutherland, two of the original contractors, were witnesses, as well as Messrs. Starr and De Wolf, the present claimants.

Mr. Sutherland was a stone mason, and had given his attention principally to building the structures. He was not able to throw much light on the main features of the transaction. Mr. Grant, who had taken the more active management of the firm's affairs on the section, had, for some time before his giving evidence before us, been suffering from a severe illness which, coupled probably, with his having lost all pecuniary interest in the subject, left his memory apparently unretentive and manifestly a very unsafe guide, while Messrs. Starr and De Wolf, not having taken a part in the practical part of the work, had been obliged to rely largely on the statements of others concerning the matters in dispute. We must, however, say not only was there a marked absence of convincing testimony in favor of the demand, but that what was given showed most of the claim to have been framed without much regard to the facts, or even the probabilities of the case. The rejection of this Item 54, reduces the claim now under discussion from $113,838 to $88,838, a sum below the balance of $92,000, shown to be against the contractors as aforesaid, and this state of the account is not altered by the fact that the Government obtained some of the plant, because the $244,000, with which we started as the total outlay by the Government, was all paid out before 1874, and was, irrespective of the two sums, $1,399 and $1,880, paid, as aforesaid, to Grant, and to Starr and De Wolf.

The effect of what we have said is, that the works were finished at a loss, and under the language of our Commission, it is not absolutely necessary for us to report further on this claim. Inasmuch, however, as we did not proceed with the preliminary enquiry by the method now taken to show the results, but heard evidence as it was offered, from item to item, and after considering that we have formed opinions on what could be allowed on the various demands for extras, it may be well not to leave the balance of the claim, $88,838, altogether unexplained. The effect, however, of stating our views on the items not yet taken up, can only be to show by what amount the loss was, in our opinion, reduced below $92,200. A large part of this $88,838 yet to be disposed of, finds no support in the evidence.

Items 2, 20, 21, 22, 24, 25, 26, 27, 36, 41, and $2,460, part of Item 45, and which amount, in the aggregate, to $10,542, are, in substance, claimed for hauling rails, furnishing sleepers and laying track on different portions of the line, intended to be, used, and of which most were used by the contractors in the prosecution of their contract. The rails were of iron, and were loaned by the Commissioners, entirely for the benefit of the contractors, but since the works were taken out of their hands they have claimed compensation for this outlay, on two grounds. They say that a portion of the track thus laid became eventually the permanent way, and that as such, the work done by them was of advantage to the Government, and entitles them to be credited with the saving thereby effected. The evidence does not show such a positive advantage, in this respect, as would enable us to credit them with any substantial amount.

In many of the places referred to in these items, there never was any permanent way, for they were off the main line, and in those on the line, these iron rails were taken up and replaced by steel. It may be, that if a strict account were possible, it would show that after the work of construction was completed some of the sleepers were still so useful as to be more than a set off to the depreciation of the rails while used in construction, but without such an accounting, and that is not now feasible, we cannot say that the contractors are entitled to any allowance on this track-laying, &c., because of its value to the permanent way.

They further contend, that all events, the Government, while finishing the work, reaped the benefit of this labor and material supplied by them, and that on that score they should be paid something. It is true that, but for these facilities, the

the cost of finishing the work would, probably, have been more than it was, but if it had been, then that increase would have been chargeable to the contractors. As it is, the Government charges no more than was expended in finishing the road after these facilities were furnished.

We next take up a series of items, which are based on changes of design, alleged to have been made after the contract was signed, and which relate, principally, to structure of masonry. The items are: Nos. 8, 9, 10, 11, 12, 13, 15, 16, 17, 30, 31, 32, 33, 34, 37, 39, 46, 48 and 56, and amount in the aggregate to $19,768.

As in other cases, these contractors claim, in effect, that in every instance and for each structure where there was a change of design, which cost them more than the first design would have cost, they are entitled to be paid the increase, though in other places similar changes may have saved them more than enough to counterbalance all the increases.

The language of the contract, particularly clause 4, is a very strong answer to this kind of demand, and it is not unlikely that a court of justice would hold that, under the wording of the agreement, changes of design directed in good faith by the Engineer, as necessary to the completion of the work undertaken for the bulk price, were to be followed by the contractor, without compensation, even though this should increase the cost to the contractors of the work, as a whole, beyond that of the original plan.

But, at all events, as we have explained at some length in our general report, we have come to the conclusion that, though by taking some isolated piece of work the contractor might be able to show that it had been made more expensive to him than it would have been if the original design had been followed, yet, when the changes of design do not, on the whole, increase the cost of the work to him, he cannot recover, as a matter of right, any compensation beyond his bulk price. And it is not necessary to go further than this to see that there is no good reason to pay these claimants any extra compensation for increase of masonry due to changes of design; for, after a full investigation, we find that the masonry on the whole section, as finished, including the first and second-class of the work and the accompanying items of concrete, paving and cement, was less valuable, or, at all events, no more valuable than what was expected to be done and was in the bill of works stated as requisite. So that, unless there be some special circumstance in addition to the increase of masonry in any one of these structures, we should hold that the contractors were obliged, for the bulk price, to finish it as it was finished. This view of the case obliges us to strike out of each of the items that portion which relates solely to the increased quantity, if any, in masonry, leaving the items to be then disposed of on other considerations, and there are, in some instances, such special circumstances as enable us to credit the claimants with portions of the demand.

We proceed to deal with each item of this class.

Item 8.

Alteration in culvert, Station 90—increased size, &c..... $425 00

This change is based on the fact that the size of the culvert referred to was increased after the contract was signed, and it is explained in the evidence that the amount claimed includes the value of some masonry beyond what would have been required in the original design. For the reasons just given, we allow nothing for that increase, but after the contractors had drawn to the spot, in winter, all the stone that would have been necessary to carry out directions which had been given by the engineers, the size of the culvert was increased, and they had to draw additional stone in summer, when transportation was more expensive than in winter. Circumstances of this kind were not taken into consideration by us, in comparing the value of the whole masonry as done on the section with that originally designed, for we applied uniform rates to the work as first intended and as finally executed in each class; therefore, we think something ought to be allowed for this transportation and for other work, but the evidence is so loose that we can do no more than adopt a rough approximation, and we credit the claimants with $100 on Item 8.

Item 9.

Alteration in centre line in cut and embankment, from Station 120 to 140..... $100 00

Although this item, like most others of the class, is based upon a change of plan, it differs from them in not relating to a structure of masonry.

The widening of the embankment at this place was to do away with a curve in the original plan. It was virtually a change of location to that extent; and on the evidence, we think the contractors should be allowed their charge, which, according to Mr. Grant's evidence, is the actual cost of the increased work at schedule rates. We allow $100.

Item 10.

Altering span of culvert, Station 155, from 8 to 10 ft.. $2,000 00

The facts on which this charge is made are somewhat similar to those relied on in support of Item 8, but in this case the cost to the contractors was much more seriously increased by the change of design, and irrespective, too, of the larger quantity of masonry, which was considerable, that, according to the evidence of Mr. Blackwell, the resident engineer, was increased at least 50 per cent. After the culvert at this point had been partly constructed on the original design, Mr. Light, the district engineer, judging from the action of the stream in that neighborhood, after the contract was let, decided that the culvert for this place should be enlarged, and that such portion of the masonry as was necessary to be removed should be taken down and rebuilt. The arch of the new design being on a larger circle than the first one, the stones prepared for the original culvert had to be recut, at some expense. The masonry foundation below the wall, which was removed, was altogether lost to the contractors, for it was left where it was first put. These special circumstances, we think, entitled the contractors to some allowance. The difficulty is, at this length of time, to procure such evidence respecting the details as would enable any one satisfactorily to name the proper amount.

We think it clear, for the reasons already given, that if the work, as finally executed in this locality, had been ordered, in the first place, by the engineer, these contractors would have no claim; but inasmuch as they obeyed the official directions and partly constructed such a culvert as was deemed sufficient, and were afterwards obliged to furnish another and a different one for the same place, they ought to be paid something extra. The difference between their views and ours is that they think it is the whole value of the new one and of the work in removing the former one, so far as that exceeds what would have been the value of the one first designed, while we think it was only what was expended on what proved to be the useless portion of the first culvert, together with the outlay in cutting the arched stones and the labor in removing the material which was in the way of the new structure. An attempt was made, about the time of this change, to fix the proper allowance to be made to the contractors, and the engineer estimated $851. Without feeling sure that our conclusions are more correct than theirs, we have decided that, on the evidence, the claimants ought to be credited with $1,140 on this item.

Item 11.

Loss through size of culvert being increased..... $1,000 00

Item 13.

Amount of extra building in structure..... $1,000 00

Item 48.

Buctouche bridge, Station 1,169—increased size; cement instead of mortar..... $ 150 00
Cut stone in structure 1,200 00

There is no special circumstance connected with any of the work here mentioned that takes it out of our general conclusion already given concerning masonry, or enables us, for any reason, to allow anything extra.

We allow nothing on Items 11, 13 and 48.

Item 12.

Difference of building culvert with cement instead of lime mortar $500 00

Under the specifications, we think the cement used was properly insisted on by the engineers, in such portions of the masonry as were to be built with hydraulic cement, and as to those portions where ordinary lime might have been permitted, we have taken the use of cement into consideration before deciding that the changes of design did not make the masonry, as a whole, more expensive than it would have been as first planned, and we allow nothing on this item.

Item 15.

Culvert, Station 224—alteration in size..... $1,000 00

Item 16.

Extra building on same..... $3,000 00

Item 17.

New centring $100 00

These items are based, partially on the increase of masonry caused by change of design, and partially on facts somewhat similar to those mentioned in our remarks concerning Items 8 and 10.

As far as the increase of masonry is concerned, for reasons already stated, we allow nothing, but the special circumstances induce us to credit the claimants on the three items, with centring at $100, and the extra expense, by doing some of the other work twice, $240, in all $340, on Items 15, 16 and 17.

Item 30.

Station 556, North River—plan of structure altered three times..... $1,600 00

Item 31.

Making centres, not used..... $200 00

Item 32.

Building with cement instead of lime mortar..... $700 00

Item 33.

Extra masonry, raising abutment..... $300 00

Item 34.

Extra masonry, raising abutment, dry..... $1,235 00

Concerning this locality, the evidence shows circumstances somewhat similar to those on which we have made allowances on Items 8 and 10, as aforesaid.

In this case, after the stone had been cut to suit the first design, additional stone had to be quarried and hauled in summer, and cut to suit the new design, the structure having been changed from a 12 feet arch culvert to a bridge of 50 feet span, with two abutments.

For the reasons already mentioned, we can allow nothing on Item 32 for the cement, nor on Items 33 and 34 for increased masonry, but on Items 30 and 31, for the work really done twice, we think the contractors ought to be compensated beyond the bulk price; and on the evidence, we fix $540 as the proper allowance, crediting that sum on Items 30, 31, 32, 33 and 34.

Item 37.

Station 695, South Locamie structure, plan of bridge altered, &c.....	$1,300 00
Extra quantity of cement, $1,560; temporary bridge, $150.....	1,710 00

For reasons already given, we can allow nothing for the alleged increase of masonry. A temporary bridge, however, was built, not as part of the contract, but for the convenience of the contractors in carrying on their work, and it was used by the Government while finishing the adjoining section No. 22, after it was taken out of the hands of Messrs. Cummings & Co., the contractors, and on that account we think something should be allowed for the use of the bridge. In fact, in the progress estimates, an amount was mentioned by the engineers to cover this claim, but in a later item (No. 50) these claimants make a charge, which we think, covers the use of this and all other portions of the work on Section 23. In dealing with that item, we allow a bulk sum for all these places, and allow nothing on this item.

Item 46.

Canaan cut, increase in size.....	$1,568 00

For reasons already given, we can allow nothing for the alleged increase in masonry, though the structure was enlarged from a 6 feet to an 8 feet culvert, but the changes of design caused some work to be done twice and some was done that turned out to be useless and unnessary for the work, as completed. The amount claimed, however, on account of these special circumstances, is not substantially supported by the evidence. That leads us to say that $80 is a sufficient allowance, and we credit that sum on Item 46.

Item 39.

Cement condemned by engineers, used by Government in structures, but not allowed.....	$ 80 00

Item 56.

Purchase of lime and hauling same, not used	$600 00

All claims connected with the change from lime to cement have been considered by us, before we decided that the whole masonry as built was no more expensive to the contractors than if the first design had been strictly adhered to, and, therefore, we allow nothing on this item.

This finishes the class of charges which we mentioned as based principally on an alleged change of design, and a consequent increased cost to the contractor.

It will be noticed that out of the $19,768 claimed on this class of items, we have allowed $2,300; of the remainder disallowed, $7,863 was for masonry and $9,605 for demands on other grounds.

Item 6.

Temporary road used by Government for hauling water pipe, &c., for water supply from Station 15 to 147—total cost, $1,250; one-half	$625 00

Item 7.

Keeping in repair and grading line when damaged by teaming on same.....	$330 00

Item 28.

Use of temporary bridge at North River.....	$200 00

Item 43.

Temporary bridge about peg 940.....	$50 00

Item 49.

Expenses levelling and trimming grades after being finished, between Barry's Mills and North River... $1,700 00

Item 50.

Expenses—Damages to grading and cutting up roadway for supplies for Section 22..... ..... $4,000 00

As already intimated in our remarks on Item 37, there is ground for the contractors' allegation that they were put to some extra expense in keeping their works, roads, bridges, &c., in proper shape, owing to the use of them by the Government for the transportation of supplies, &c., to and from Section 22, which had been taken out of the hands of Messrs. Cummings & Co., and was completed by the Crown. Mr. Grant testified that his firm and Messrs. Cummings & Co. had made a mutual agreement, by which the latter firm was to have the use of the works on Section 23, as a road, and to pay therefor the sum of $4,000. No part of this $4,000 was actually paid though Cummings & Co. travelled over the works for some time before they left Section 22.

In the present demand Messrs. Starr and De Wolf seek compensation, first, in separate items, for the use of separate places as roads, and then (in Item 50) $4,000 in a lump sum, principally because Cummings & Co. had, as aforesaid, promised that amount for the use of the whole of Section 23, for the purpose of transportation during the construction of Section 22.

The evidence shows that though Messrs. Grant, Sutherland & Co. were using the same roads and had necessarily to expend moneys in repairs, &c., their expenditure was somewhat increased by the additional traffic to and from Section 22, and we think that that the Government is, on the evidence, liable to pay a fair price for the privileges of using Section 23 as a road, as aforesaid, and though the period was only part of that promised to Messrs. Cummings & Co., we fix the price at $4,000, as charged in Item 50, but disallow the minor Items 6, 7, 28, 43 and 49.

Item 51.

Ballast, &c, taken from cuttings by Government, and some borrowing $12,000 00

This charge is made on the allegation that rock, after it was excavated and ready for use in embankments, was, at the request of the engineers, reserved and measured, and left piled in heaps, in cuttings, in order that it might afterwards be used by Government for ballast, and that this made it necessary for the contractors to borrow, for the embankments, an equivalent quantity of earth. These facts are fairly established by the evidence. The questions for decision are the quantity so borrowed and the rate to be allowed for it. Although not clearly established, we think, on the evidence, we have no course but to call the quantity 10,000 yards of rock, and we think this, if placed in the embankment, would have saved the excavation of about 20,000 yards of ordinary earth. A cubic yard of rock taken from its original position, broken up and placed in an embankment, occupies an increased space. The increase varies in different places according to the nature of the rock moved, the size of the pieces into which it is broken, &c., but it may be said that generally the space is increased by 50 per cent., in addition to which the slopes of an embankment of rock are much steeper than one of earth, whereby an embankment of any given width at the top contains, on the whole, less cubical contents of rock than of earth, and on this account we have to make an allowance beyond the one and a-half before mentioned.

We credit the contractors with 20,000 yards of earth borrowed as an equivalent to the 10,000 yards of rock. This, at their schedule rate, is $4,800, which we allow on Item 51.

The next class of items which we take up relates to various increases of work over that required to carry out the original design, alleged to be done, and under such circumstances as to make them not covered by the bulk price of the contract.

Item 1.

Extra mileage measurement in embankment near station at Moncton in consequence of widening and spreading same $15,000 00

Item 4.

New ditch, cut from Station 27 to 55 ..... $116 00

Item 5.

Ditch altered, Station 38 to 68, and cross-ditch $500 00

Item 38.

North Cocamie in hands of Government, two sites laid out, extra excavation in consequence, re-excavating embankment $300 00

Item 42.

Bog at Station 920, poled and brushed, not on plan or contract $5,000 00

Item 47.

Extra grubbing in ditches, borrow-pits, widening cuts, and flattening slopes $5,000 00

Item 53.

Increase in earth-work caused by raising many of the embankments $6,000 00

Mr. Grant, one of the contractors, explained that Item 1 was charged on the theory that though the bill of works called for making a Y at Moncton station, it did not call for the grading, levelling and spreading which actually took place; but Mr. Grant's memory was as we have already mentioned, very defective, for this is the language of the bill of works concerning the material which was used at this place: "This surplus excavation to be employed in grading a Y, and as may be directed, in levelling and grading Monction station."

It may be that the contractors did not fully understand what they were undertaking when they made their tender, and seriously supposed this work would be an extra, but we incline to the opinion that this item appears in the claim in deference to the view of Mr. Woodgate, before mentioned. He was an engineer employed by Messrs. Starr and De Wolf to examine the work then done on this section and, as we gather from a perusal of his report, dated September, 1873, mainly with the object of formulating a demand against the Government. We have already mentioned that he had estimated the cost of finishing the work by the Government at $43,310. This result was arrived at, as he explains, by taking amounts for which he thought certain portions of the work could be done, if such changes were made in the design as he thought might be made with advantage, but which the Government engineers were not adopting.

Concerning this work in Item 1, he says: "The filling in of the Y at Moncton is claimed by the contractors as an extra, it necessitating the spreading of the earth by means of many waggon roads. Though there is a clause in the specification providing for this work, I have returned this as an extra in the general summary."

We allow nothing on Item 1.

Items 4 and 5 are for work which we think is clearly covered by the contract. As to Item 38, it appears that a portion of the embankment was removed after it had been made up according to the directions of the Government engineers, and for this we think the contractors are entitled to some credit in the accounts, but it is difficult, from the vagueness of the evidence, to fix upon a proper amount. For want of any better opinion, we allow the whole charge concerning the embankment—$300 on Item 38.

The use of any bridge by the Government is covered by our allowance on Item 50.

At the North Cocamie (the place here mentioned) a 20 feet bridge was built, no change being made in the design, and the evidence does not justify any allowance on account of the stone laid down as alleged.

As to Item 42, the evidence shows that the contractors had to build the road through a bog which was deeper than they supposed it to be, and their work was no doubt increased by this unexpected difficulty. Mr. Blackwell, the resident engineer, in his evidence before Mr. Shanly, thought he had estimated the increased work to be worth $2,000, but we do not see how we can say the Crown is liable to pay for this increase of work without ignoring a principle which, as stated in our general report, has governed us throughout the investigation of these cases, and which we there formulated as follows:—

"A contractor is not entitled to additional compensation because, in the progress of the work, the physical features in a locality (being different from those expected) made a change of design, other than in grade and 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."

We think this work was covered by the contract price.

Item 29.

Extra rock taken from North River cutting..... $4,627 00

This is for rock alleged to be excavated at the place named, beyond what was estimated and given in the bill of works as requisite, but the quantities thus given were expressly stated to be not guaranteed; and on the principle just quoted in our remarks on the last item, we must disallow this one.

As to item 47, the evidence does not show that any such work was done beyond what the contract covers. Mr. Grant testified in effect that Item 53 is based, not on any change of grade, but on the fact that the embankment built up to the level, originally planned, did not subside as much as was expected, whereby the contractors have really furnished a permanently higher embankment than was intended; the principal explanation being that the use of the works, as a road, by the contractors themselves, by Messrs. Cummings & Co., and afterwards by the Government, had made the earth more compact than it otherwise would have been, and, therefore, the expected shrinkage did not take place. Neither the contractors nor the engineers foreseeing this result, the contractors put into the work more earth than would have probably answered the purpose. We do not, however, think that a good reason for declaring the Crown liable to pay the contractors a price beyond the bulk sum. If the contractors urge that the use of the embankment as a road by the Government helped to compress it, so as to require more earth to reach the level of the original grade pegs, the answer is, for that use the Crown is charged $4,000 in Item 50.

Item 59.

Interest on moneys advanced..... $27,675 00

The last item to be considered is No. 59 for interest.

As, in our view, these contractors are not entitled to recover any principal money, there is no necessity to discuss the question whether the Crown is liable to pay interest as damages for the detention of a sum overdue and unpaid.

We show in Schedule D, hereto appended, the items concerning Section 23, allowed, as aforesaid, by us, and the result of our findings is that the claimants are entitled to be credited, as extras, with $11,100 against $92,200, chargeable to them for money spent beyond their bulk price in finishing the work, leaving them overpaid by $81,100.

In our judgment, the work on Section 23 was legally taken out of the hands of the contractors and completed by the Government at a loss.

We have already, at page 28, reported our conclusion concerning Section 11.

GEO. M. CLARKE,
FREDERICK BROUGHTON,
D. E. BOULTON.

Hon. J. A Chapleau, Secretary of State.
Ottawa, 6th March, 1884.

SCHEDULE A.

The Commissioners of the Intercolonial Railway, or Department of Public Works of the Dominion of Canada. DRS.

To JOHN STARR, and CHARLES DE WOLF, Assignees of DAVIS, GRANT & SUTHERLAND.
(*For the Construction of Section No.* 11, *of the Intercolonial Railway.*)

ITEMS.		
1.	Amount of contract	$61,713 00
	Extra work on same.	
2.	Grubbing and cleaning station ground.....	90 00
3.	Raising embankment from Fort Lawrence cut to Missiquash River, above original grade.....	3,675 00
4.	Raising embankment from peg 40 to 150...	3,513 00
5.	Widening cut at Chapman's.....	600 00
6.	Widening station ground.....	450 00
7.	Widening cut at Moffat's.....	240 00
8.	Excavation of stream diversion and sinking of embankment, about peg 105.....	1,200 00
9.	Rock excavation at Fort Lawrence cut.....	600 00
10.	Rock excavation, Amherst ridge cutting.....	300 00
11.	Reducing embankment caused by engineers forcing material to be put where not required.....	690 00
12.	Hauling cattle-guard timber from way of embankment below foundry..... ..	5 00
13.	Hauling stones from Gordon's Creek, abiodeau, borrowing ground.....	152 00
14.	Time, carpenters and laborers putting addition to La Planche aboideau sluice, including iron bolts, timber, brass bolts and hinges.....	121 25
15.	Removing sleepers at different times from borrow pits and embankments.....	15 00
16.	Excavation on large drain at Amherst ridge cutting	528 00
17.	Bridge, &c., across Fort Lawrence cut, including excavation.....	1,640 00
18.	Small stone culvert at station house, including excavation.....	415 00
19.	Road crossing cattle-guards, including three box culverts, &c., about peg 150.....	500 00
20.	Road crossing cattle-guards across marsh at peg 90	450 00
21.	Two wooden culverts at Christie's mill, including excavations.....	60 00
22.	Aboideau at Gordon's Creek.....	5,600 00
23.	Erecting furnishing material and completing temporary bridge across Missiquash River.....	1,600 00
24.	Fencing borrow pits.....	234 00
25.	Sinking foundation of west wall of arch culvert at Moffat's and lifting and laying masonry.....	340 00
26.	Amount claimed for damages, as described in prayer of Petition from fifthly to tenthly, not less than 50 per cent. of amount of contract	30,856 50
27.	Ditching from Douglass, land to arch culvert, from 1,600 to 2,000 yds., half rock 75c.....	1,200 00
28.	Widening approach road near Christie's mill and lengthening wooden box culvert and raising ditto above grade.....	50 00

ITEMS.		
29.	Raising Mrs. Moffat's road crossing above grade and making two small bridges	29 00
30.	Moving fence at station ground	27 00
31.	Continuation of brook diversion from peg 198	39 00
32.	Culvert at ridge, 45 c. yds., $15	675 00
33.	Excavating foundation of ditto, half rock, 102 c. yds., $1	102 00
34.	Inlet and outlet to ditto, excavating large boulders and clay, 2,300 yds., 30c	690 00
35.	Brook diversion from McKinnon's shanty, from peg 203 to 223, 518 yds., 30c	155 40
36.	Embankment and widening 3 ft. more than specified over arch culvert, 250 yds., 25c	62 50
37.	Box drain, 2,000 ft., $40 per 100 ft	800 00
38.	Main drain, extra, through rock, partly at Fort Lawrence cut and Amherst ridge, 7,000 ft., less 2,000 ft. charged in item 37, 5,000 ft., $30 per 100 ft	1,500 00
		$120,917 65

1870.		Cr.		
Feb.	19.	By Cash	$1,891 00	
March	12.	"	1,442 00	
April	13.	"	1,349 00	
May	12.	"	1,890 00	
June	15.	"	3,060 00	
July	7.	"	3,539 00	
Aug.	8.	"	6,016 00	
Sept.	10.	"	9,342 00	
Oct.	12.	"	10,150 00	
Nov.	14.	"	4,824 00	
Dec.	13.	"	1,350 00	
1871.				
Jan.	14.	"	904 00	
March	16.	"	5,000 00	
Aug.	16.	"	2,250 00	
Nov.	25.	"	1,500 00	
				54,507 00
		Balance due Jany. 1st, 1872		$66,410 65
		Interest on Balance to Feb. 7th, 1873		5,132 20
				$71,542 85
1873.				
Feb. 7th.		By Cash		8,668 24
		Balance due as Cash, Feb. 7th, 1873		$ 62,874 61

Interest to date of payment.

E. & O. E.

HALIFAX, 12th April, 1876.

JOHN STARR,
CHARLES F. DEWOLF.

SCHEDULE B.

SHOWING THE EFFECT OF OUR DECISION ON THE STATE OF ACCOUNT.

Contract sum		$61,713 00
ITEM.		
1. Grubbing and cleaning station ground		280 00
2. Raising embankment near Missiquash River		3,600 00
6. Widening station ground at Amherst		450 00
7. Widening cut at Moffat's		1,350 00
12. Hauling cattle guard timber		5 00
14. Addition to La Planche aboideau		121 25
17. Bridge across Fort Lawrence cut		843 93
19. Road crossing cattle-guards, &c., peg 150		294 00
20. Road crossing cattle-guards, &c., peg 90		410 00
23. Temporary bridge at Missiquash River		1,600 00
27. Ditching around station ground		1,000 00
28. Widening approach road at Christie's mill		50 00
29. Raising crossing at Moffat's		29 00
30. Removing fence at station ground		27 00
32. Culvert at ridge 33. Excavation of culvert at ridge 33. Inlet and outlet of same culvert		1,467 00
35. Brook diversion from McMinnon's		155 40
36. Widening embankment over culvert		62 50
		$73,458 08
Less payments on account of contract and building Missiquash bridge		70,381 00
Balance due		$3,077 08

SCHEDULE C.

BILL OF PARTICULARS OF CLAIM.

For construction of Section 23 of the Intercolonial Railway.

Amount of contract		$276,750 00
Extra Work Beyond Contract.		
ITEM.		
1. Extra mileage measurement in embankment near station at Moncton, in consequence of widening and spreading the same, equal to one mile		15,000 00
2. Hauling rails on embankment next to Moncton and through cut, to peg 48, including double roads in cut, 350 tons, at 50c.	$175 00	
2,000 sleepers, at 20c	400 00	
Laying track, lifting and packing 1½ miles, 354 yds	942 00	
		1,517 00
3. Embankment from station 134 to 166, 175, 35,785 c. yds., half of which could have been saved by changing line short distance to eastward, 17,892 c. yds., at 30c		5,367 60
4. New ditch cut from Station 27 to 55		116 00
5. Ditch altered, Station 38 to 68, and cross-ditch		500 00

ITEM.	
6. Temporary road used by Government for hauling water pipes, &c., for water supply, from Station 15 to 147; total cost, $1,250; one half.....	625 00
7. Keeping in repair and grading line when damaged by teaming on same.....	330 00
8. Alteration in culvert, Station 90, increased size, causing extra expense hauling stone in summer, instead of winter on snow roads, when quarry was open.....	425 00
9. Alteration in centre line in cut and embankment, from Station 120 to 140.....	100 00
10. Altering span of culvert, station 155, from 8 to 10 ft. re-cutting arch, taking down arch, raising and re-building abutments, taking out and lowering centre walls.....	2,000 00
11. Size of culvert being increased twice, involved opening of quarries, removing plant, tools, &c., and making new centrings, causing loss at least.	1,000 00
12. Difference of building with cement instead of lime mortar, as ordered.....	500 00
13. Amount of extra building in structure.....	1,000 00
14. Damage to masonry of culvert Station, 155, and re-building, being exposed to wet weather on Sabbath day, having been displaced by bars or levers.....	450 00
15. Culvert Station 224, size altered twice, causing extra expense opening quarries and hauling stone in summer.....	1,000 00
16. Extra building on same.....	3,000 00
17. New centring.....	100 00
18. From station 193 to 242, 100,000 c. yds., of which fully three-fourths of this quantity could have been saved by keeping to the eastward, 75,000 c. yds., at 30c.....	22,500 00
19. Also, two-thirds of 610 yds. masonry, 407 c. yds., at $11.....	4,477 00
20. Hauling rails for embankment No. 35, and cutting No. 35 from about peg 225 to 270, including double road and sidings, 280 tons, four and a half miles, at 40c.....	504 00
21. 1,800 sleepers for above, at 20c.....	360 00
22. Laying track, lifting and packing one and a half miles, at 35c.....	942 00
23. Cutting from station 242 to 275, 5,400 c. yds., could have been reduced one half, 2,700 c. yds. at 30c.....	8,100 00
24. Hauling rails from Moncton to North River cut and embankment, from peg 523 to 560, including double roads, 140 tons, ten and a half miles, at 40c.....	588 00
25. Laying track, lifting and packing 1 mile, 354 yds.	616 00
26. 2,000 sleepers for ditto.....	400 00
27. Use of wood track, North River cut, not previously included.....	600 00
28. Use of temporary bridge at North River.....	200 00

ITEM.		
29. Extra rock taken from North River cutting	4,627 00	
30. Station 556, North River, plan of structure altered three times, re-cutting stone, loss of time on same, including alteration of parapet walls.....	1,600 00	
31. Making centres not used.	200 00	
32. Building with cement instead of lime mortar in structure, difference.....	700 00	
33. Extra masonry, raising abutment	300 00	
34. " " " dry . . .	1,235 00	
35. Catamount cut, Station 670. If the line had been moved about 150 ft. or 200 ft. eastward one-half of the quantity of the rock cut could have been saved, and half the quantity could have supplied the alteration in embankment, quantity shown on profile, rock 10,256, earth 4,121=14,377 c. yds. The above quantity shows slopes ¼ to 1 but they were made 1 to 1 which increases the quantity to 1,8477 c. yds. rock at $1=$18,477, less half of original quantity shown on profile, 7,188 c. yds at 30c.=$2,156	16,320 60	
The above shows that had the altercation been made $16,320.60 could have been saved. The price shown, 30c. per yd. for earth material, which could have filled the embankment, as no other kind was required, doing away with all rock excavation		
36. Expenses furnishing rails, hauling and laying from Station 665 to 695, including siding and double road, 1,500 yds., at 25c.....	375 00	
Lifting and packing, &c., $420; 1,500 sleepers at 20c., $300.....	720 00	
37. Station 695, South Cocamie structure, plan of bridge altered, extra cement instead of mortar.....	1,300 00	
Extra quantity, $1,560; temporary bridge, $150	1,710 00	
38. North Cocamie in hands of Government, two sites laid out, extra excavation in consequence; re-excavating embankment.....	300 00	
Amount of stone laid down.....	2,100 00	
Temporary bridge.....	180 00	
39. Cement condemned by engineers used by Government in structures, but contractor not allowed.	80 00	
40. Gallagher ridge cut. If site had been put 1,200 ft. westward, difference of level at that point would be about 20 ft. lower, saving in embankment between Stations 772 and 805, 3,100 c. yds., and bank from 828 to 848, 3,500 c. yds., including about 9,000 c. yds. rock, fully one-half of which might have been saved, including the rock, say.		
earth 3,900 c. yds. at 30c.....	11,700 00	
Rock, 9,000c. yds, at $1.....	9,000 00	
41. Gallagher ridge cut expenses, furnishing rails, hauling and cutting from peg 808 to 848, including siding and double road, 200 yds. laying, at 25c. $500 00		
Lifting and packing..... 200 00		

ITEM.			
	Hauling and cutting	360 00	
	2,000 sleepers, at 20c	400 00	
			1,460 00
42.	Bog at station 920, poled and brushed, not on plan or contract		5,000 00
43.	Temporary bridge about peg 940		50 00
44.	Canaan cut, alteration to survey would have saved at least three-fourths of quantity of material, 84,700 c. yds., of which one-tenth was rock, say:		
	8,470 c. yds. rock, at $1	$ 8,470 00	
	76,230 c. yds. earth, at 30 c	22,869 00	
			31,339 00
45.	Canaan cut, hauling rails from Moncton,		
	2 miles, 140 tons, at $45	$700 00	
	2,000 sleepers, at 20c	400 00	
	Lifting, laying and packing	660 00	
	Wood road previously cut	700 00	
	Saving in masonry, 230 c. yds., at $12	760 00	
			5,220 00
46.	Canaan cut increase in size, causing more quarrying and more centring	$500 00	
	Extra building in structure	768 00	
	Extra cement in increased masonry	300 00	
			1,568 00
47.	Extra grubbing in ditches, borrow pits, widening cuts and flattening slopes		5,000 00
48.	Buctouche bridge, Station 1169, increased size, cement instead of mortar	$ 150 00	
	Cut stone in structure	1,200 00	
			1,350 00
49.	Expenses: levelling and trimming grades after being finished, between Berry's mills and North River, by order of engineer		1,700 00
50.	Expenses: damages to grading and cutting up roadway for supplies for section No. 22, materials and keeping in repair		4,000 00
51.	Ballast: rock excavation taken from cuttings by Government to be used as ballast, when it could have been put into embankment, and some borrowing		12,000 00
52.	Advance in price of labor, materials, &c., since contract was taken, equal to 25 per cent. of amount of contract. This was caused principally by Government undertaking works in the neighborhood and offering larger wages to laborers, thus inducing them to leave contractors' employ		70,000 00
53.	Increase in earth-work caused by raising many of the embankments		6,000 00
54.	Stock of plant and material taken possession of by the Government		25,000 00
55.	Contingencies: cutting and making roads, portages, all along line, building, &c		25,000 00
56.	Purchase of lime and hauling same to structures when required, but not used, as it was changed for cement, as ordered		600 00

ITEM.		
57. Loss sustained by delays in supplying plans of masonry and profile of section		6,000 00
58. Loss and damages owing to malicious report by the engineer in charge, Mr. Blackwell, to the bank and business men of the neighborhood, that our sureties had failed, and that our credit was ruined		40,000 00
		$643,602 20
CR.		
1871, March 10. By cash	$ 3,600 00	
Feb. 28. By cash	4,500 00	
April 14 to July, 1873. Cash at dry dates	235,900 00	
		244,000 00
		$399,602 20
59. Interest on moneys advanced, payments not being in proportion to work done. In July, 1871, when about $70,000 had been expended and 25 per cent. of the work completed, the payments were only $14,400, or about 5 per cent. of the contract. 10 per cent. on the amount of the contract would not be an equivalent for damages sustained by withholding payments, equal to		27,675 00
Balance due as cash, 1st October, 1873		$427,277 20

SCHEDULE D.

SHOWING THE ITEMS ALLOWED ON SECTION 23, AND THE EFFECT ON THE ACCOUNTS.

Allowed.

Contract sum		$276,750 00
ITEM.		
8. Alteration in culvert at station 90	$100 00	
9. Alteration in centre lines, stations 120 to 140	100 00	
10. Alteration in span of culvert, station 155.	140 00	
16. Altering culvert station 224	340 00	
32. Altering plan of structure—North River	540 00	
46. Canaan cut, increase in size	80 00	
50. Expenses: damage to roadway by Government carrying supplies over it for Section 22	4,000 00	
51. Ballast taken by Government from cuttings, &c	4,800 00	
		11,100 00
		$287,850 00

Deductions.

Cash paid to contractors	$244,000 00	
Cash spent by Government	124,950 00	
		368,950 00
Balance against contractors		$81,100 00

UNTS.

Special Report on Claim of E. A. Jones, $95,141 34.

This claim arises out of the construction of Section 7 of the railway, which the claimant and Mr. James Simpson, by a contract dated 25th May, 1870, for the bulk sum of $557,750, undertook, as partners, to complete by the 1st day of July, 1871. The rights of the firm have been duly assigned to Mr. Jones, who now makes the claim on his own account. The particulars of the demand are set out in Schedule A hereto appended.

The contract was in the form usually adopted for the Intercolonial Railway. After the completion of the works, the contractors, in September, 1872, presented to the Railway Commissioners a claim of $124,633 for works which they alleged to be not included in their contract, against which they allowed a credit of $8,200 for the wooden superstructure of bridges omitted by them.

On 28th May, 1873, the Chief Engineer, not having sufficient information to enable him to report on the claim, was asked by the Railway Commissioners to refer the matter to Mr. Schreiber, who had been charged with the supervision of the works while they were being completed, "with instructions to report all the facts" bearing on the cases, and if he found any of the works named in such claims have been executed, to affix a value therefor, irrespective of the question whether such work shall be called extra.

On July 29th, 1873, Mr. Schreiber made a report, purporting to be correct, of the quantities and prices stated in the contractor's claim. It reduces the valuation from $124,633, as alleged by the claimants, to $88,633.

The Chief Engineer did not feel at liberty to recommend any payment on this account to the contractors. We gather, from the correspondence on record, that there had been a difference of opinion between him and the Railway Commissioners on the expediency of letting these contracts under the bulk sum system. He thought it was not, under the circumstances, a desirable system; but, at all events, he did not wish to assume the responsibility of interpreting the contract or stating his conclusions on the rights of the parties.

The Commissioners, after giving further consideration to the subject, instructed Mr. Schreiber to place values on certain classes of work selected and specified by them, which they were willing to allow as extras. This he did, reporting them to be worth $31,091.

On the 5th February, 1874, Mr. Brydges, on behalf the Railway Commissioners, made a recommendation to the Privy Council, that the matter should be settled according to a statement, which he then submitted, showing the allowance of this $31,091 to Messrs. E. A. Jones & Co., but charging them with two items, which left only $12,427 in their favor. The following is a copy of that statement:—

Original amount of contract		$557,750 00
Less wooden bridges, not executed	$ 8,300 00	
Less under-drains, not executed	10,354 24	
		18,654 24
		$539,095 76
Add amount (for extras) as above		31,081 85
		$570,177 61
Amount already paid		557,750 00
Balance due		$12,427 61

This balance was offered to the claimants in settlement of their demands, but they refused to take it on those terms, and in September, 1876, they laid their claim

before the Court of Exchequer by petition of right. Their demand is stated in the judgment of the court as follows :—

1. For culverts built under the order of the Chief Engineer after grading was completed.....	$ 42,853 07
2. For iron pipes, in substitution of masonry.....	3,556 00
3. For additional rock in cuttings.....	44,285 50
4. For sundry errors in bill of works.....	11,311 70
5. For rebuilding sundry works.....	5,378 00
6. For River Philip bridge	9,980 53
7. For difference in currency on iron pipes.....	7,493 33
	$124,663 33

This is identical with their summary of the claim, as at first submitted to the Government in 1872.

The decision of the Court of Exchequer was adverse to the claimants. The judgment delivered by Chief Justice Ritchie showed that the absence of the engineer's final certificate was a bar to the whole claim, and that irrespective of that, most of the demand must be disallowed as contrary to the spirit and letter of the contract.

There was some increase of work due to change of grade or location embraced in their demand, and concerning this class the only questions to be decided were the quantity and the rate to be allowed, but up to the time of that decision the claimants had demanded, on this score, only one item, about $1,990, of which $1,773 had been allowed by Mr. Schreiber, and it was part of the $31,091, tendered by the Government as aforesaid.

The Chief Justice, however, after pointing out that the judgment must, on strict grounds, be adverse to E. A. Jones & Co., stated he was prepared to award the amount found due *in foro conscientiæ* and tendered as aforesaid, but on the condition that the petitioners should pay the costs, whereupon the amount admitted ($12,427.61) less those costs, was paid to the claimants. They were thus driven to accept a sum smaller than they believed to be due to them, the indirect reason being that the engineer had given them no final certificate for the work done.

Understanding the spirit of our Commission to be that no demand is to be rejected or diminished by us, because the claimant had not got the final certificate referred to in clause 11 of the contract, we feel it our duty to treat the present claim as not affected by the judgment of the Exchequer Court, and inasmuch as by Order in Council we are expressly instructed to exclude no claim from our enquiry because of a receipt in full, unless in our judgment it was "given under such circumstances as make it just and proper to hold the claimant bound by it," and as by that test we find any acquittance hitherto given by the claimants not binding, we proceed to deal with the claim as if such acquittance had been given.

Subsequent to the decision of the court and the payment of the admitted balance as aforesaid, some memoranda concerning the work done and which had been in the possession of one of the engineers on this section, came to the notice of the Department They showed that a further sum ought properly be credited to the contractors, and in February, 1880, the Minister of Railways reported that fact to the Privy Council. He stated that, in addition to what had been previously credited, the contractor's work had by change in grade and location, in some places, been increased to the extent of $11,824.78, and in others decreased to the extent of $6,767.39, leaving a balance in their favor of $5,057.39, and also that in some structures not previously taken into account, changes of design had increased the cost to the contractors by $2,037, whilst on the other hand, the use of tunnels had saved them, in masonry, the amount of $1,476 on which there was a balance of $561 in their favor, and he recommended that these two balances $5,057.39 and $561, in all $5,618.39, should be be paid to Mr. E. A. Jones. This recommendation was adopted and the amount was paid accordingly.

The claimant was, however, still dissatisfied, and has, at various times, pressed for further compensation, alleging that he did some work, outside the contract, for which he has been allowed nothing, and some on which he has been allowed too little. His demand, as submitted to us, is $95,141, as before mentioned, of which we find that $57,262 is the balance of the whole amount stated in Mr. Schriber's report as the value of the several works (irrespective of the question whether they were extras) after deducting from that value the $31,091 credited to the contractors, as before mentioned. The remainder is made up of the five items, numbered in Schedule A, as 1, 10, 11, 12, 13.

Upon more than one occasion the claimant has appeared before us, by council, Mr. McIntyre, who has discussed with us the bearings of the principles laid down by Chief Justice Ritchie, in the Exchequer case, on various portions of this demand, as well as the rules which we have adopted for our guidance throughout our inquiry; and after consideration, Mr. McIntyre has formally notified us by letter, to the following effect:

"In view, therefore, of the uncertainty that your Board would report any substantial increase in the liabilily of the Crown, for work done or materials delivered by my client, and the great expense and difficulty that would attend the bringing of our witnesses from such a great distance as we should be compelled to bring them, I have decided to say that Mr. Jones will produce no further evidence in support of his claim for extras beyond the contract work."

This makes it unnecessary to dwell on more than the first item in the particulars of the claim laid before us, $18,654.

This covers the two sums $8,300 and $10,354, which were ducted from the $31,091 credited in February, 1874, by the Railway Commissioners, as before mentioned.

As far as the $8,300 is concerned, we are of the opinion that the claimant is not entitled to it, as a matter of right. He agreed that the wooden superstructure for bridges might be withdrawn from his contract and that his bulk price should thereby be reduced at specified rates which, on the work omitted, amount to $8,300. Therefore, he cannot well complain if the Government insists on giving effect to that agreement.

We have, in our general report, pointed out the contention which, during our inquiry, was urged by contractors, to the effect that, during the progress of the works it became the intention of the Railway Commissioners to avoid the right to charge for this and other diminutions, and we have also pointed out our reasons for saying that, strictly speaking, the liability of the Crown is not now affected by any intention of that kind, which once existed in the minds of those gentlemen. On this portion of the demand, our conclusion is, that the claimant can recover, if at all, only as a matter of grace, not as a matter of right.

On the residue of the item $10,354, we come to the opposite conclusion. There was no agreement on this subject consequent to the signing of the contract, and there is nothing in that, or any of the documents connected with it, which gives the Government the right to charge the contractor with such diminution of work as this.

It is true that after the commencement of the work on this section the original design, concerning under-drains, was so changed as to diminish very much that class of work, and the saving at the rate mentioned in the schedule which accompanied the tender amounted to the sum sought to be debited to these claimants, $10,354; but in some other classes of work these contractors were forced to do larger quantities than the bill of works had indicated as requisite, notably so in the most costly kind of work—rock excavation.

As pointed out in our general report, and in several of our special reports, the bargain for the construction of each section of this railway was intended to be and was speculative. Indeed, its main characteristic was the expressed provision that the work should involve more or less than the quantities for the several classes of work stated in the bill of works. The bulk price should, nevertheless, remain the same, except concerning one or two matters on which the agreement contained specific

stipulations. But, of course, this would be subject to alterations by any subsequent mutual agreement. In the absence, however, of any such exception, and any subsequent agreement to the contrary, we have acted on the principle that the requisite quantities in any class of work being higher or lower than those given in the bill of works, did not, of itself, add to or diminish the bulk price to be paid for the completed work.

The contract mentions that the contractors should be chargeable with diminutions of work due to change of grade or location; and in the schedule attached to the tender, as in most other cases, there was, in this case, a memorandum concerning the substitution of iron cylinders or other structures for culverts, and subsequent to the signing of the contract a special agreement was made, as aforesaid, about the wooden superstructure of bridges. But none of these provisions for varying the lump sum concern under-drains any more than concern earth excavation, or masonry, or fencing, or other ordinary work.

As already mentioned, these contractors excavated more rock than was originally estimated as requisite, because in several places the material to be moved turned out to be rock instead of earth, as was expected. This cost the contractors about $44,000, but it led to no increased compensation, nothing, on account of it having been included in the aforesaid allowance of $31,091. Nor has such an increase ever been allowed as an extra by any court or by us. It could not be allowed without violation of the spirit, as well as the letter, of the contract; and in this connection it is only fair to add that the documents on record give much reason for believing that the unexpected increase of rock on the section diminished, to a great extent, the necessity of under-drains at first designed.

Shortly after the commencement of the works, the Chief Engineer designed for the whole railway system of drainage different from that which he had originally planned; and in July, 1872, he issued a circular to his subordinates, concerning the new system, explaining its object and the mode of accomplishing it, in which he said:—

"In view of these difficulties and the great importance of having the drainage done most efficiently, the Commissioners have, on the recommendation of the undermentioned, decided to relieve the contractors of this portion of the work and to execute it by day's labor, when gravel can be brought forward by ballast trains. In the meantime a charge for drainage is to form a deduction from the contract sum."

From that time forward the practice was to make up the accounts at the end of the work on each section, with a charge for diminution of under-drains wherever it occurred.

The suggestion of the Chief Engineer, in the pamphlet before mentioned, was, "in the meantime," to make a charge against the contractor; but that may not have been intended as an opinion on the question whether the rights of the contractor should be finally settled in that way, for, as before mentioned, he was evidently desirous throughout all these transactions to avoid expressing his views upon the final rights of parties under the contract.

In one instance, where the system for drainage first designed was abandoned altogether in obedience to the aforesaid circular from the Chief Engineer, which the contractors carried out, and for which they charged an extra price, we thought it proper to allow for the whole work executed only the excess over that which would have been requisite to complete the original design, but in all instances where the under-drains were merely diminished in quantity or omitted to the saving thereby as one of the contingencies of the contract, and have reported accordingly.

On the whole we see no propriety in the charge against these contractors for the diminution in under-drains, whereby a portion of the amount ascertained and admitted to be due to them was withheld.

In our judgment, Her Majesty was, on the 1st day of February, 1874, and still is, indebted to the claimant in the sum of $10,354 on account of the claim submitted to us.

Should the Government waive the right to charge this contractor with the omission of the wooden superstructure of bridges, the liability would be increased by $8,300, making it altogether $18,654.

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

Hon. J. A. Chapleau, Secretary of State.
Ottawa, 5th April, 1884.

SCHEDULE A.

Showing the Particulars of the Demand.

ITEM.			
1.	Balance on original contract price, being $8,300, deducted for wooden bridges, iron being substituted therefor; and $10,354.24 deducted for under-drains, which amounts, under the terms of the contract be deducted		$18,654 24
2.	Balance for extra work done in completing section, masonry in culvert at Station 282		486 00
3.	" " " 290		567 00
4.	" " " 341		4,630 50
5.	" " " 508		396 00
6.	" " " 369		760 00
7.	" " " 666		414 00
	In every case a diversion of the streams at these various stations was made under orders of the engineer in charge before the culverts were ordered to be put in. (See Mr. Jones' memorandum, 22nd June, 1880, No. 24554, Railways and Canals).		
8.	To work performed in excess of that returned in construction of culvert at Station 241 :—		
	3,523 yds. earth, at 30c	$1,056 90	
	1,363 " rock, at $2.	2,726 00	
	2,654 " re-filling, at 28c	743 12	
	4 " masonry, at $14	56 00	
	51 " concrete, at $6	306 00	
	69 " dressed stone, at $10	690 00	
			5,578 02
9.	To amount for masonry done in excess of quantity returned in building culvert at Station 145, 10 yds., at $14.50		145 00
10.	To amount due on account of substitution of iron pipes for culverts over and above the sum of $2,037, allowed for same		1,319 00
11.	To amount due for tunnels, when substituted for culverts		1,476 00
12.	Balance due for excess of work in constructing River Phillip bridge over and above the sum allowed for		4,305 60
13.	Difference in currency on iron pipes allowed for		7,493 73
14.	Amount of rock work done in excess of that shown by bill of works, the rock work having been misrepresented upon the same, 42,225 yds		44,285 50

ITEM.			
15. Change of grade and location:			
Rock at Rashton's, 10,907 yds., at $1.25	$1,362	50	
Rock at 535 to 560, 185 yds., at $1.25	231	25	
Rock at 374 to 354, 1,556 yds., at $1.25	1,945	00	
Original work at Rashton's—			
Piles estimated at 3,000, at 26c....	780	00	
Piles at Folly Lake, 1,200, at 26c.	312	00	
			4,630 75
Total.....			$95,141 34

Special Report on Claim of J. M. Blaikie, $1,799 53.

This is a claim for alleged expenses incurred while acting as agent for the Intercolonial Railway Commissioners, and for timber and material for foundations and walls of De Bert station, as set out in Schedule A, hereto attached.

It appears from a letter of the Hon. Mr. McLelan, addressed to Sir Charles Tupper, and dated 4th July, 1880, that the erection of the buildings had been undertaken by a Mr. McKay, who obtained some of his necessary timber for the work from a person named McCulloch.

At that time Mr. McLelan was one of the Commissioners, and while inspecting some of the sections in that district, requested Mr. Blaikie to "look after these buildings and urge forward their construction," as it was necessary they should be speedily completed for the opening of that portion of the road.

In the middle of 1872, some difficulty arose, which caused McCulloch to hesitate about supplying McKay with any more timber, and the work was consequently very much delayed.

About the same time Mr. Brogden, contractor for the walls, abandoned that work.

The claimant, in his petition, dated 22nd June, 1830, says:—

"I, acting upon this general instruction, or expressed wish of the Commissioner, told Mr. McCulloch to deliver the timber for use, and arranged with him to complete the foundation wall." And again: "This responsibility I incurred * * * feeling warranted in so doing by the anxiety expressed frequently by the Commissioner," and he proceeds to show that the outlay mentioned in the particulars of his demand actually took place.

We find that the action of Mr. Blaikie, which led to that outlay, and for which he now asks to be reimbursed, was taken, as he believed, entirely in the public interest, and to further the wishes of the Railway Commissioners, in undoubted good faith, and without any expectations of advantages or reward to himself. In some respects it exceeded the exact instructions which were given to him, but did not exceed what he thought was best to do at the time to further the interest of the Government. Concerning this petition or statement, Mr. McLelan, in his letter of the 4th July, 1880, to the Minister of Railways and Canals, uses the following language:

"The statement itself very fully explains his claim, and my personal knowledge of Intercolonial construction in Nova Scotia enables me to say that in all material points it is correct."

We are of the opinion that for the amounts stated in the particulars as paid to McCulloch and to Chambers for masonry and for plant, the claimant made himself personally responsible, because he understood the request of the Commissioner as equivalent to appointing him an agent, and we only think it fair that he should be indemnified for the necessary consequences of that liability, but we do not consider the costs which he incurred in improperly defending the demands against him are

necessary consequences, and therefore we disallow $108 claimed for those costs, allowing the remainder.

In our judgment, there was, on the 1st May, 1873, and still is, due by Her Majesty to Mr. Blaikie, the sum of $1,126.73.

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

Hon. J. A. CHAPLEAU, Secretary of State.
OTTAWA, 12th March, 1884.

SCHEDULE A.

1872—November.		
1. To pay James McCulloch for timber and lumber, De Bert station		$710 00
2. To pay same for masonry for station house		770 00
3. To pay same for plank for platforms and floor of freight house, and pine lumber		95 86
4. To discount on note—part payment		10 87
		$1,586 73
5. Expenses: lawsuit, Chambers *vs.* Blaikie, attendance at Truro, Consulting Attorney, arranging defence and allowance at Windsor	$40 00	
To pay F. A. Lawrence, Esq., Truro, Attorney	58 80	
To pay Weatherbee, Attorney, Windsor	10 00	
		108 80
To pay Chambers in settlement		40 00
6. To balance of interest		564 00
		$2,299 53
CR.		
1873—May.		
By cash from Commissioners		500 00
Balance		$1,799 53

SPECIAL REPORT ON CLAIM OF JOHN RUSSELL, $20 00.

This is for land taken for the use of the railway and for damages done to other land, but the claimant has never stated any amount. We have named what we finally allow.

Near the Belledune River the railway crosses land belonging to the claimant, and take a strip of 36 feet wide from the south end of his lot, No. 311, the residue, 164 feet wide, being taken from the north end of a lot owned by William and Robert Roherty. It appears that in settling for the right of way Messrs. Roherty were paid on the 14th April, 1880, about $18, which was at the rate of $4 per acre, and as if all the land required between the side lines of these lots had been taken from the one owned by them. The length of the railway land across lot 331 is 990 feet, which makes the quantity taken from the claimant about four-fifths of an acre.

In October, 1880, Mr. P. S. Archibald, after looking into this claim, recommended that $10 should be offered to Mr. Russell in compensation, and he prepared a plan to accompany a deed of the strip in question, which plan is hereto appended for convenience of reference.

The dispute has evidently been brought about to some extent by the unusual width of the land here taken for railway purposes, 200 feet, and when stones were

piled on this Russell strip (more than 64 feet away from the centre of the line) it was not clear whether they were wrongfully there or whether the land covered by them was to be paid for as part of the railway property.

The first definition of the claim of Mr. Russell, which we find on record, is dated 6th November, 1879, though from its language we think he must previously have made some complaint. This is a letter addressed to Mr. George Haddon, and it has apparently been forwarded by him on behalf of the claimant, it says:

"I received a letter stating I owned no land where the railway runs. My lot is No. 59, and granted at Fredericten, the 22nd day of December, 1837, and there is a strip of my land held by the railway, and stones and rubbish piled on it, and I want the said rubbish taken away or pay for the damage done, or if the railway claims a piece of my land, I want to be paid for it now, as I never received one cent from Government for one single inch.

"If the railway keeps the money I will keep my land, and if I have to take away the stones and rubbish I will sue for damages done, and every day I spend on it is a dollar.

"JOHN RUSSELL."

A later letter to the Minister of Railways, written apparently by some one in Mr. Russell's name and on his behalf, in February, 1881, says: "There are several acres of valuable land all covered with stones, besides a large quantity of wood destroyed. I would suggest, if you will cause the stones to be cleared off the land I will be satisfied.

We have endeavored to get further information concerning the facts necessary to show what damage, if any, Mr. Russell has suffered in addition to the loss of his strip of land, but have not succeeded.

We proposed to pay the expenses of Mr. Russell as a witness if he would attend us and give testimony on the matter in dispute, but he answered that he was too old to come, and that his property had been transferred to his daughter and his grandson, John Allan Simard, who would settle all claims due to him.

We have learned, in investigating another claim, that owners of land lost sometimes not only the strip taken for the railway, but, to some extent, the enjoyment of adjoining land, owing to the accumulation of snow next the fences, and prolonged moisture in the spring, &c. And that for such reasons the value of the land expropriated is not always a sufficient compensation to the proprietor.

Mr. Russell's claim was at first treated as entirely without foundation, owing, probably, to the belief that the Roherty land covered the whole width staked off for the railway, and the Government officials in his neighborhood gave him no satisfaction, denying, in fact, that he had owned any land inside the railway limits. On the whole, we think he ought to be paid something beyond the value of the strip taken, and we fix $20 as a proper compensation.

In our judgment, Her Majesty was, on the 14th day of April, 1870, and still is liable to pay the claimant $20 on the claim submitted to us.

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

Hon. J. A. CHAPLEAU, Secretary of State.
OTTAWA, 15th March, 1884.

SPECIAL REPORT ON CLAIM OF ALPHONSE MATTE, $1,985 19.

This arises out of a contract entered into by the claimant for the erection of tank houses and fuel sheds, at Isle Verte, Trois Pistoles, Bic, Rimouski, and Metapedia Road; and also on other works connected with the grading of the yards at Rimouski and Metapedia Road.

The price demanded for the whole is $13,652. Payments amounting to $11,666.81 are admitted, the difference of $1,985.19 being the amount now claimed. In the summer of 1872, competition was invited, by the Railway Commissioners advertising for tenders for the construction of buildings, tank houses and fuel sheds, at different places along the line of railway. A bulk price was to be named separately for the work

at each station, and out of the whole list sent by each tenderer the Commissioners accepted his offer for such of the stations as they thought fit.

In the case of Mr. Matte, his tender for the places aforesaid was accepted and he was notified to that effect by a letter dated 8th August, 1872. No formal contract was entered into, the agreement being contained in the written offer and the written acceptance of it.

Each tender was made in the following language: "The undersigned undertakes to provide all material for the undermentioned buildings, on St. Lawrence district of the Intercolonial Railway and to erect and complete the same thoroughly by the 1st day of October next, according to the plans and specifications and conditions exhibited at the Railway Office at Ottawa, Rivière du Loup, and Rimouski, without any additional charge, or extra of any kind, for the sum set opposite each of said buildings."

The details of this claim are set out in column No. 1 of Schedule A, hereto attached, not exactly in the wording used in the particulars submitted to us, but substantially the same. The contract price for the work is the first item in the particulars for each place, and the evidence shows that for the work at each station the contractor has received more than that price. After the work had proceeded some length, foundations in some cases completed, and buildings framed or further advanced, it was decided to place the erections further away from the track than was originally planned, and this necessitated taking down some of the foundation walls and putting up others, besides which, the buildings or frames had to be moved to their new foundations, and additional work was also required for the walls.

Most of the claim arises out of this change, but some of it is for improvements in the buildings and new work not contemplated by the original agreement, extra braces, boarding up ends of sheds, &c., &c.

Shortly after the work was completed Mr. Matte sent in a claim for additional compensation, very much in the same shape as it now appears. That was referred to Mr. Schreiber, who made a detailed report on the subject, in which he gave his estimate of the value of each separate piece of work now claimed as extra by Mr. Matte, and we show, in the second column of our Schedule A, the quantities and values adopted by Mr. Schreiber as proper to be allowed.

The claimant has never been satisfied to accept that estimate, and the question has remained open.

There is a slight difference in the quantities claimed by Mr. Matte and those allowed by Mr. Schreiber, but in the masonry, the principal item, it amounts to no more than a few yards. Mr. Matte had no independent measurements to guide him and the quantities which he relied on were, he said, given to him soon after the work was done by some of the subordinate engineers, who had been connected with the work. He was a witness before us and explained how he had preserved a record of these quantities, producing scraps of paper, &c., &c. We have come to the conclusion that the evidence requires us to adopt, as the most reliable authority on all the quantities, the final estimate by Mr. Schreiber, before mentioned.

As to the value of the work, and concerning which the main difference of opinion exists, we think that Mr. Schreiber's estimate ought, on some of the items, to be slightly increased, but on others, the contention of the claimants is not reasonable. We have given, in the third column of our Schedule A, for each item of this demand, the highest value which we consider warranted by the evidence of Mr. Matte himself, and the documents on record. This shows our estimate for the whole to be $11,963.50, of which the claimant has received $11,666.81, and the balance is still unpaid.

In our judgment, Her Majesty was, on the 1st day of January, 1874, and still is, liable to pay to Mr. Alphonse Matte the sum of $297, on account of his claim submitted to us.

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

To Hon. J. A. CHAPLEAU, Secretary of State.
OTTAWA, 12th March, 1884.

SCHEDULE A.

Showing (column 1) claim by Matte, (column 2) allowance by Schreiber, and (column 3) our allowance.

1.—RIMOUSKI WOODSHED AND TANKHOUSE.

Service.	Column 1.			Column 2.			Column 3.	
	Matte's quantities.	Matte's prices.	Amount	Schreiber's quantities.	Schreiber's prices.	Amount	Price we allow.	Amount allowed by Commis'rs
		$ cts.	$ cts.		$ cts.	$ cts.	$ cts.	$ cts.
Contract sum	.....	....	1,400 00	.....	.....	1,400 00	.....	1,400 00
Extra masonry in cement.	35	10 00	350 00	35	7 00	245 00	7 00	245 00
Pulling down wall	20	70 00	14 00	20	0 50	10 00	0 70	14 00
Rebuilding do	22	9 00	198 00	22	4 00	88 00	5 00	110 00
Earth filling	713	0 30	213 90	713	0 25	178 25	0 25	178 25
Sinking well	40	3 00	120 00	40	2 00	80 00	2 27	90 80
Drain in front of house	12	1 00	12 00	.....	.....	12 00	1 00	12 00
Outlet drain	40	0 30	12 00	} 95	0 25	23 75	0 30	28 50
Inlet drain	95	0 30	28 50					
Cedar plank	200	0 25	50 00	200	0 25	50 00	0 25	50 00
Nails	.....	.....	9 00	.....	.....	.....	.....	.....
Extra braces	8	.....	24 00	8	2 00	16 00	2 50	20 00
Boarding ends	.....	.....	36 00	.....	.....	25 00	.....	30 00
Pumping	.....	.....	20 00	.....	.....	20 00	.....	20 00
Boarding back	200	0 60	120 00	{ F.B.M. 2,800 }	25 00	70 00	.....	70 00
Shed for hand-car	.....	.....	50 00	.....	.....	50 00	.....	50 00
Culvert at bridge	.....	.....	20 00	}	.....	30 00	.....	30 00
Cedar for culvert	.....	.....	10 00					
Totals	.....	.....	2,687 40	.....	.....	2,298 00	.....	2,348 55

2.—ST. FLAVIE WOODSHED AND TANKHOUSE.

Service.	Column 1.			Column 2.			Column 3.	
	Matte's quantities.	Matte's prices.	Amount.	Schreiber's quantities.	Schreiber's prices.	Amount.	Prices we allow.	Amount allowed by Commis'rs
		$ cts.	$ cts.	$ cts.		$ cts.	$ cts.	$ cts.
Contract sum	.....	.....	1,500 00	.....	.....	1,500 00	.....	1,500 00
Borrowing	992	0 30	297 60	992	0 25	248 00	25 00	248 00
Extra masonry	46	10 00	460 00	46	7 00	322 00	7 00	322 00
Sinking well	30	3 00	90 00	30	2 00	60 00	2 50	75 00
Walling well	17	2 50	42 50	17	2 50	42 50	2 50	42 50
Pumping	.....	.....	20 00	.....	.....	20 00	.....	20 00
Extra braces	8	3 00	24 00	8	2 00	16 00	2 50	20 00
Large braces	16	3 50	56 00	16	3 50	56 00	3 50	56 00
Boarding back	200 00	0 60	120 00	{ F.B.M. 2,800 }	28 00	70 00	28 00	70 00
do ends	.....	.....	36 00	.....	.....	25 00	.....	30 00
Totals	.....	.....	2,646 10	.....	.....	2,359 50	.....	2,383 50

SCHEDULE A.—Showing (column 1) claim by Matte, (column 2) alllowance by Schreiber, and (column 3) our allowance.—*Continued.*

3.—ISLE VERTE WOODSHEDS AND TANKHOUSES.

SERVICE.	COLUMN 1.			COLUMN 2.			COLUMN 3.	
	Matte's quantities.	Matte's prices.	Amount.	Schreiber's quantities.	Schreiber's prices.	Amount.	Price we allow.	Amount allowed by Commis'rs
		$ cts.	$ cts.	$ cts.	$ cts.	$ cts.	$ cts.	$ cts.
Contract sum			1,600 00			1,600 00		1,600 00
Masonry foundations	49	10 00	490 00	45	7 00	336 00	7 00	336 00
Pulling down masonry	23	0 70	16 10	20	0 50	10 00	0 70	14 00
Rebuilding masonry	25	9 00	225 00	22	4 00	88 00	5 00	110 00
Sinking well	36	3 00	108 00	22	2 00	44 00	2 27	0 50
Drain in front of house	45	1 00	45 00	47	0 50	23 50	0 60	28 20
Cedar plank			30 00			30 00		30 00
Cleaning well			15 00			15 00		15 00
Boarding ends			36 00			25 00		30 00
Extra braces	20	3 00	60 00	20	2 00	40 00	2 50	50 00
Moving shed			15 00			15 00		15 00
Totals			2,640 10			2,226 50		2,278 20

4.—TROIS PISTOLES WOODSHED AND TANKHOUSE.

Contract sum			1,550 00			1,550 00		1,550 00
Extra masonry	45	10 00	450 00	45	7 00	315 00	7 00	315 00
Pulling down masonry	22	0 70	15 40	20	0 50	10 00	0 70	14 00
Rebuilding masonry	24	9 00	216 00	20	4 00	80 00	5 00	100 00
Sinking well	60	3 00	180 00	60	2 00	120 00	2 27	136 00
Drain in front of house	40	1 00	40 00	40	0 30	12 00	0 60	24 00
Cedar plank			40 00			40 00		40 00
Moving tankhouse			36 00			10 00		20 00
Braces, extra (bottom)	29		75 00	27	1 50	40 50	1 50	40 50
Boarding ends			36 00			25 00		30 00
Braces, extra (top)	20	3 00	60 00	20	2 00	40 00		50 00
Total			2,698 40			2,242 50		2,319 50

5.—BIC WOODSHED AND TANKHOUSE.

Contract sum			1,500 00			1,500 00		1,500 00
Extra masonry	105	10 00	1,050 00	105	7 00	735 00	7 00	735 00
Sinking well	70	3 00	210 00	199	1 25	248 75	1 25	248 75
Excavating earth	200	0 30	60 00					
Extra braces	8	3 00	24 00	8	2 00	16 00	2 50	20 00
Boarding ends			36 00			25 00		30 00
Hauling timber			100 00					100 00
Total			2,980 00			2,524 75		2,633 75

SCHEDULE A.—Showing (column 1) claim by Matte, (column 2) allowance by Schreiber, and (column 3) our allowance—*Concluded.*

SUMMARY.

	Mr. Matte.	Mr. Schreiber.	Commissioners.
	$ cts.	$ cts.	$ cts.
1. Rimouski	2,687 40	2,298 00	2,348 55
2. St. Flavie	2,646 10	2,359 50	2,383 50
3. Isle Verte	2,640 10	2,226 50	2,278 20
4. Trois Pistoles	2,698 40	2,242 50	2,319 50
5. Bic	2,980 00	2,524 75	2,633 75
Total	13,652 00	11,651 25	11,963 50

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SPECIAL REPORT ON CLAIM OF R. H. MCGREEVY, $826,452 00.

This claim, by the contractor for Section 18, comprises twenty distinct charges, some for work and materials covered by the contract, and which, by express terms in it, were to be paid for in addition to the bulk price or lump sum, others for works and materials alleged to be in addition to what the contract called for, and therefore, the ground for an additional price; one for a balance, said to be unpaid on the contract price, and one for damages.

After the preliminary inquiry into the facts bearing on the question, we have come to the conclusion that this is not within any of the six classes of claims exempted from our inquiry by the terms of our Commission.

On the next page are the particulars of Mr. McGreevy's claim, as laid before us.

CLAIM as amended before Commission.

INTERCOLONIAL RAILWAY—SECTION No. 18.

No. of Items.	—	Quantity.	Rate.	Amount.
			$ cts.	$ cts.
1	Rock in cuttings	20,349 cub. yds.	2 50	50,872 50
3	Hard-pan in cuttings, (lower chainage, 520 to 530) additional rate over earth	17,096 "	0 60	10,257 60
4	Extra haul	92,000 "	0 10	9,200 00
5	First-class masonry, additional depth Mill Stream Bridge	429 "	22 00	9,438 00
6	Excavation to Mill Stream Bridge	1,000 "	1 50	1,500 00
7	Special rip-rap to pier abutment	8,500 "	3 00	25,500 00
8	Stone bottom under bank on east side of Metapedia River at Bridge	10,300 "	1 50	15,450 00
8a	Hand packed bank stone, as per sheet annexed to Statement N	7,980 "	1 00	7,980 00
9	Coffer-dams, underwatering five foundations, extra depth, 2 feet each	.....	2,000 00	10,000 00
10	Second-class masonry, built equal to first, and different from specification attached to contract	4,617 "	9 00	41,553 00
11	Portland cement used instead of Canadian	8,463 "	1 50	12,694 50
12	Crib-wharfing as protection to the embankments filled with stone, packed and hand laid to outside. 20,150 lineal feet. Add 225 l. f., omitted in Grant's return, the whole equal to. Quantity provided in bill of works is 87,316.	163,999 "	3 00	491,997 00
12a	Intermediate pieces to sketch 26	133,620 lin. ft.	0 17½	23,383 50
13	Rock stream, widening and deepening	1,800 cub. yds.	5 00	9,000 00
14	Earth do do	35,000 "	0 75	26,250 00
17	Road diversion in rocks opposite stations 395 to 400 west sub-division	.....	.....	1,000 00
18	Iron pipe culverts in lieu of other culvert. See detailed statement appended to Petition of Right	.....	.....	8,000 00
19	Iron pipes delivered on the line of railway as per bill of quantity furnished by engineer, but not used in work, 249 feet	.....	24 00	5,976 00
20	Damage by delay in the erection of Mill Stream Bridge, non-payment of monthly estimates, taking possession of the work, and other delays	.....	.....	20,000 00
				779,752 10
	Balance due upon contract	.....	.....	46,400 00
				826,452 10

The most of this claim, as now made, together with an item of $51,900, which Mr. McGreevy abandoned before us, was laid before Mr. Shanly and inquired into by him. That item of $51,900 had been charged because the contractor alleged that he had built two miles of railway more than his contract called for.

We have considered and read the evidence, oral and documentary, which is recorded as having been adduced before Mr. Shanly, and have heard the following witnesses:—

R. H. McGreevy, the claimant,
Samuel Keefer, C. E.,
Marcus Smith, C. E.,
Peter Grant, C. E.,
Charles Odell, C. E.,
W. E. Thomson, C. E.,
C. Schreiber, C. E.,
J. Gosselin, and
W. Imlay.

We have looked through the extensive correspondence which we found on record in the Department of Railways and Canals, concerning the matters involved in this claim, of which correspondence a small portion only had been brought to the notice of Mr. Shanly, and we have had the advantage of a large amount of other documentary evidence in addition to that which was before him.

The contract in this case is in form similar to that generally used on the Intercolonial Railway and concerning which we remark at some length in our general report. It was dated the 8th July, 1870, and named the 1st July, 1872, for the completion of the work. The lump sum or bulk price agreed on was $648,600.

The first three items of this claim are for an alleged excess in separate classes of work executed by the contractor, and caused by changes from the original design, either in grade or location of the roadbed, over the quantities, which, but for those changes, would have been sufficient, and which excess by the terms of clause 4 of the contract, was to be paid for in addition to the specified bulk price. They are:—

(1). 20,349 yds. rock in cutting, at $2.50 per yd.....	$50,872 50
(2). 17,096 yds. of hard-pan in cutting, at 60c. per yd.	10,257 60
(3). 92,000 yds. extra haul, at 10c. per yd.....	9,200 00
Total.....	$70,330 10

The changes of grade and location on Section 18, taken together, resulted in considerable saving of work. In some particular localities they increased it; in some places there was a saving of earth, but an increase of rock and *vice versa*. On the whole, these changes had the effect of increasing the work in rock and diminishing it in earth. Mr. McGreevy's claim, now under consideration, is made up by charging for the alleged increase in the rock, without giving credit for the diminution in earth.

According to the rule which, in our general report, before mentioned, we adopt as a proper one to govern our inquiry concerning increase or diminution of work, caused by the changes of grade and location, we have permitted this claimant to show, if he could, more accurately than the bill of works shows, the quantities in earth or in rock which would have been requisite on any original location for the distance as to which a new location or a new grade was adopted, in order that a comparison might be made between those quantities and the quantities actually executed on the new locations, because we did not consider that he was confined to the difference between the executed work and that estimated in the bill of works as requisite on the orignal location.

The claimant's contention in this case involves two propositions; one, that the Government returns, according to which the credits to him had been heretofore given for excess in rock work, did not show correctly the difference between the original estimates of work to be done and that which was actually done in these localities. The other, that those original estimates from which the bill of works purported to have been compiled, were really too high for such localities, whereby the excess for which he ought to be paid was made to appear less than was correct.

Two of the principal engineers employed by the Government in locating this Section 18, Mr. Odell and Mr. Grant, were witnesses before us. Whilst in the employ of the Government they had ascertained and furnished data from which the bill of works was compiled, and Mr. Odell had also taken part in framing that bill of works.

Though these gentlemen were called on behalf of the claimant, with the object of showing the inaccuracy of the original estimates, they both explained the allowance made, as is usually done, for the probable shrinkage and compression of the several embankments, according to the character of the material to be placed in them, but each testified that he had no instructions, and had not endeavored to make the quantities there stated higher than the natural features of the country indicated as necessary. This evidence raised a presumption in favor of the general correctness of the calculations which were the basis of the bill of works and therefore the bill of works itself, and so, threw upon Mr. McGreevy the burden of proof that smaller quantities were, if they were, sufficient for the original location.

Mr. Odell was employed by the claimant, some years after the completion of the works, to find out the quantities necessary, to show amongst other things the increases and diminutions resulting from the changes in grade or location. For this

purpose he visited this section and, in addition to what he could see, he got from persons, who had been engaged on the works, some hearsay evidence as to what had taken place during the construction. After this inspection, he took the plans and, as he described it, shifted the original cross sections upon cross sections of the work done. That is, he laid down on plans the outline and cross sections for the same distance, one as originally planned for the work on the old location, and the other of the work as actually executed on the new location, and from what was thus shown he calculated the increase or diminution of the work caused by the changes which had been directed and made in each case. The result, according to this mode of investigation, is given by Mr. Odell in a tabulated comparative statement, which was submitted, as evidence, before Mr. Shanly, and upon which he (Mr. Odell) has been cross-examined before us. This statement gives each section over which any of these changes took place and, for that distance, his calculations of the different quantities. The effect of it was to indicate that changes of grade and location caused a net increase of rock work on the whole section to the extent of 20,349 yards, and a net saving in earth of 82,828 yards. This increase of rock work is identical with item No. 1 in the present claim.

Mr. Grant, while he was resident engineer, had made a return to the Government, a tabulated statement somewhat similar to that of Mr. Odell, showing a comparison between the bill of works and the executed work, with the increases and diminutions due to the same changes, and he had also returned to the Government, during the progress of the work, monthly estimates of what had been done. These gave a result concerning the quantities in question very different from that shown by Mr. Odell, viz.: an increase in rock of 8,980, instead of 20,349 yards, or 11,369 yards less than Mr. McGreevy claims, and a saving in earth of 119,366, instead of 82,828 yards, or 36,538 yards to be charged to Mr. McGreevy more than Mr. Odell showed. The difference on these two points in the statements of Mr. Odell and Mr. Grant involved, at the rate for rock claimed by Mr. McGreevy, an amount approaching $40,000.

The earnestness with which Mr. McGreevy's side of the question has been pressed, together with the amount thus involved in the comparative accuracy of these rival statements, induced us to investigate, very carefully, the foundation for each of them, and, under the circumstances, we think it proper to report at some length the method we have adopted for this purpose.

We have said that Mr. Odell's statement purported to show the comparison between the executed work and that indicated by the cross-sections for the original location, while Mr. Grant's gave it between the executed work and the estimated quantity mentioned in the bill of works. Inasmuch, however, as the estimate in the bill of works was supposed to show correctly the effect of the cross-sections, the discrepancy between these two engineers was not to be explained by the fact that, in their calculations one used the cross-sections themselves and the other the bill of works; our attention was, therefore, given to the discovery of some other reason for that serious discrepancy. It turned out that Mr. Odell did not calculate from the identical, that is, the official cross-sections from which the bill of works was compiled, but that two assistants of his prepared, for the purpose of his calculation, a new book of cross-sections, in which they professed to lay down, for each spot, a copy of the official cross sections for the first location of the line, and upon it, or over it, a copy of the official cross-sections of the work as executed on the substituted location. The return of Mr. Odell being based on the difference of the two areas shown by this mode of delineating the respective cross-sections, he did not "take out," as it is technically called, first the area of one whole cross-section and then of the other, and arrive at the difference in each spot by subtraction or addition.

Mr. Odell, in his evidence, drew attention the most marked instance of the difference between himself and Mr. Grant, concerning items chargable to Mr. McGreevy, which was on a saving of earth between two points, Stations 685 and 730. He made it only 1,999 yards; Mr. Grant, 9,760 yards. This startling difference for such a distance, and his going to the cross-sections themselves, the fountain-

head of information on the subject, as was alleged to have been the case, were dwelt upon and urged as reasons for our giving credit to his statement of results, rather than to that of Mr. Grant.

We have had the cross-sections for that locality used by Mr. Odell for this and other calculations tested and compared with the official ones, and after a close scrutiny, it appears that the book of cross-sections prepared by him did not give correct copies of the official cross-sections for the locations in question; and errors were shown sufficient to account entirely for the discrepancy which had been dwelt upon, as aforesaid.

The most marked discrepancy on the other side of the account between Mr. Odell's return and the Government return was, at the instance of the claimant, also submitted to a similar close and thorough scrutiny. In another locality, between Stations 528 and 564, Mr. Odell gave the increase in rock due to changes of grade and location, at 6,573 yards, while the official statement gave 262 yards, or a difference of 6,311 yards, equivalent, at the rate charged by Mr. McGreevy, to $15,777.

A fresh plotting of all the cross-sections over the distance between these stations, and a re-calculation of all the quantities so shown, has indicated that the quantity is 288 yards instead of 262, as shown by the Government returns, and instead of 6,573, as shown by Mr. Odell.

The entire failure of the claimant to establish any substantial errors in the official returns upon the quantities now under discussion, or to establish the correctness of Mr. Odell's statement, which he had advanced with so much confidence, induces us to rely upon the Government returns rather than upon any other, when it becomes necessary to ascertain the difference in the quantities of work as finally executed, and as originally estimated, either in the bill of works or in the cross-sections, from which that document was compiled. We are not able, however, to proceed at once to dispose of Mr. McGreevy's claim on the question of changes of grade and location, by comparing the quantity of executed work with the quantity so mentioned in the bill of works, or in the data from which it was prepared, because Mr. McGreevy contends, as before mentioned, that these original estimates, including the cross-sections themselves, were erroneous and gave larger quantities than would have been really required in the original locations, for which new locations were finally adopted. He relied upon evidence to the general effect that the cross-sectioning of the line had been done by the engineers with a view of making the quantities liberal, that is, larger than were considered requisite, this course being adopted, as he said, in order to prevent disappointment afterwards, and so that the contractors would eventually complete the work without exceeding or even reaching the quantities suggested by the bill of works. He said they wished to "give the lump sum system a fair trial."

We have, therefore, had to learn as best we could whether there was any more reliable guide than the bill of works to the true quantities which would have been removed by the contractor in the respective original locations. For the purpose of testing this matter, we adopted, in addition to others, the following method:—We have taken portions of the line upon which there was no change of grade or location, and have endeavored to ascertain how the original estimate of quantities for those distances, as shown on the bill of works, agreed with the quantities of work executed on the very same places. This test had not been previously applied. It seems a simple problem, but there are some circumstances connected with it which prevent a perfectly accurate solution. The final official returns of the executed work are not always made for the distances between exactly the same stations as those mentioned on the bill of works. This is one obstacle; and again, in the execution of the work it frequently happens that the proportions of rock and earth vary from those anticipated before the ground was broken. When the proportion of rock increases, the quantities to be executed diminish, because the slopes may be steeper, and *vice versa*.

The aggregate of the several portions of the line on which no change of grade or location took place is about eight and a half miles of the twenty included in this

contract. Mr. Grant, a witness called, as before stated, by Mr. McGreevy, and who had been engineer in charge of the works, during their construction, being requested to make the calculations necessary to show how the quantity originally estimated in the bill of works compared with that actually executed on any such portion of the eight and a-half miles as he should select as a fair illustration, took as a sample a length of about two miles, and also another short distance selected by Mr. McGreevy. For these distances he worked out in detail from the original cross-sections all the quantities so as to make a correct comparison between the work originally estimated and that finally executed. For these portions of the line, and on which no change of grade or location took place, his investigation showed that in rock-work the bill of works was too low by something under 400 yards, and in earth-work too high by something like 5,000 yards. It happened frequently in the execution of work of this sort that a cutting will turn out more of one kind of material and less of the other than was expected, without showing that the original estimate was wrong as to the aggregate quantities, and in order to ascertain some percentage or rate by which the bill of works in this case was in error, if at all, we have reduced rock-work and earth-work to a common measure. This, we think, makes the result more plain than if the difference in rock and in earth were stated separately.

The evidence throughout our enquiry concerning this claim leads us to conclude that work in rock was worth six times as much as the same quantity of work in earth. In order, then, to see the percentage by which the bill of works, for these tested distances, was wrong, we have to multiply the deficiency in rock by six and deduct the product from the earth, above mentioned, as having been stated too high in the bill of works. This process shows that the whole executed work, equivalent there to about 406,000 yards of earth-work, was about 2,400 yards less than the quantity estimated in the bill of works. In other words, the bill of works was about six-tenths of one per cent. in error.

The claimant endeavored to show that, in a particular instance, several hundred yards of earth were mentioned in the bill of works to be "wasted" more than was necessary, but the evidence was not convincing, and upon the whole, we feel that we are not justified in adopting, as a rule, any percentage more favorable to the contractor than that shown as above, and in our opinion this is sufficiently supported to induce us to take it as the best available guide to the true quantities of the original locations.

In each instance, therefore, where it becomes necessary to define Mr. McGreevy's rights by stating the difference between the executed work on any particular locality in which a change of grade or location took place, and that which would have been requisite on the original location for the same locality, we have not only to learn the difference between the quantity stated in the bill of works and the executed quantity, but we have also to get another factor, namely, the percentage to be taken off the bill of works in order to show the true requisite quantity, or if we do not go through this process in respect of each locality, we must, in some other way, give Mr. McGreevy the advantage of this percentage, as a deduction from the whole quantity stated in the bill of works for those localities in which a change of grade or location took place.

Now, it appears to us it would be more simple, at the outset, to allow a credit in one item to Mr. McGreevy of this percentage for all the quantities named in the bill of works for places where changes of grade and location took place, and after that to adopt the quantity mentioned in the bill of works as correct, making the comparison between that and the quantity of the executed work. We proceed, therefore, at once, to give him credit for the value of this percentage.

As mentioned in our general report, we are of the opinion that in estimating the value of any of the work under clause 4 of the contract, concerning work saved or increased by changes of grade or location, neither party is bound by the price mentioned in the schedule attached to the tender, but is entitled to charge for, or liable to pay for, the increase or saving, as the case may be, a fair value for the work at the time and irrespective of the offer upon which the contract was based.

The evidence leads us to say that $1.80 is a fair average price to allow for the rock-work on these portions of the line where the changes of grade or location took place. The total rock work for these distances was about 94,500 yards. The percentage above named gives 567 yards, which, at $1.80, produces $1,020. The total earth work for the distance in question was about 910,000 yards. The percentage is 5,460 yards, and earth excavation was in our judgment, worth 30 cents a yard. This makes $1,638, and added to our allowance for rock just mentioned, makes a total of $2,658. We treat this as a credit to Mr. McGreevy in the calculations concerning these changes of grade and location and on this subject it stands for the present as a credit to him.

This, opening the way as it does, for our adopting the bill of works for the purposes of comparison with the executed work, we find that the quantity of rock increased by changes of grade and location to be further credited to Mr. McGreevy is 8,980 yards, and at the rate above mentioned it amounts to $16,164. Upon the same principle we charge him with 119,366 yards of earth saved by similar changes of grade and location, and at 30 cents a yard, the rate above mentioned, we find him, under the terms of the contract, clause No. 4, to be chargeable with the sum of $35,809. The two credits just allowed him, $16,164 and $2,658, together amount to $18,822, being deducted from this charge against him leaves a balance of $16,987, by which his bulk price of $648,600 must be reduced according to the terms of the contract for a diminution of work in rock and earth, taken together, caused by change of grade and location. This leaves his bulk price $631,613.

While on this subject it will be proper to point out that there are other ways in which the work of the contractor was diminished by changes of grade and location. The line of the railway through this section was at first located near the banks of the river, and whenever an opportunity offered it was moved away from the river. This had the effect of saving, in some places, the protection in the shape of crib-wharfing, which would have been necessary had the original location been retained. Upon the evidence of the official returns of the Government resident engineer, we find that in consequence of changes in this respect a saving of 2,390 lineal feet of crib-wharfing was effected. It is not disputed by the contractor that some saving in lineal frontage took place. This crib-wharfing in the schedule attached to the tender, is rated, not according to its cubical contents, but by the lineal foot frontage alone. The rate there given is only $3 per lineal foot, but the evidence makes it plain that this was far too small a sum, and that in reality the work would cost very much more than that price. The contractor testifies that it was worth $2.50 or more per yard, and that each lineal foot took more than four cubic yards. According to our judgment on the evidence, it was worth about $8 a lineal foot, and on the principle which we have adopted already, at the suggestion of the contractor, viz., that the work to be charged for or credited under clause 4 should be valued at its real value, and not at the price named in the schedule we apply to this length of crib-wharfing so saved, the rate of $8 per foot, which makes a further charge of $19,120 against Mr. McGreevy, and reduces his bulk price from $631,613 to $612,493.

The evidence also shows that changes of grade or location caused a diminution of the number and size of culverts which were to have been built of second-class masonry; the movement of the line landward made it unnecessary to provide for a waterway through the embankment so frequently or so extensively as would have been the case if it had retained its original position further down the ravines and nearer the river. According to the evidence on this subject, the official return of the resident engineer, we have come to the conclusion that the proper quantity of masonry to be charged under this head is 731 yards, and in our judgment, $9 is a fair price per yard to allow for it. This is a further charge of $6,579 against Mr. McGreevy, and reduces his bulk price from $612,493 to $605,914. The quantity here charged is irrespective of that saved by the use of iron pipe culverts, which is hereinafter dealt with.

A small amount of paving has been saved to the contractor in the same way. Upon the evidence, we find it amounts to 172 yards, and is worth $5 per yard. A charge of $860 for this further reduces his bulk price to $605,054.

The next item of Mr. McGreevy's claim, No. 3, is for moving hard-pan. There was no excavation of this material, caused by a change of grade or location, except at one locality. Here the length of the deviation was about 500 feet, and it was not at the greatest distance, from centre to centre, more than 15 feet away from the original line. The width of the road bed was 22 feet, so that where the substituted line was farthest away from the former one, there was still a width of about 7 feet of the original road-bed common to the new and the old location. This common width increased each way towards the points of deviation. Where this hard-pan occurred the line ran near the bank of the river, and the change was landward. The bed of the hardpan was gradually thinner as it approached the water. These circumstances enabled the engineer to form a fairly correct opinion of the quantity which would have occurred on the original line and a precise opinion of what was really moved.

About the time the work was done the engineer in charge returned 4,200 yards as the whole quantity of this material moved, and a fair reduction for the portion that was common to the old and new location would make the excess caused by the change about 3,000 yards. Without remembering that he had formerly made any such return, Mr. Grant, before us, worked out the quantity as well as he could from his recollection of the distances, depths, &c., and made it 2,900 yards. On the whole evidence concerning this quantity, we adopt 3,000 yards as proper to be allowed to the claimant.

Hard-pan was much more expensive to move than ordinary earth, and sometimes cost as much as rock, and on the evidence, we think it worth the price charged by Mr. McGreevy, namely, 60 cents per yard, over and above ordinary earth. We allow a credit, therefore, to the claimant for this work of $1,800, which increases his bulk price from $605,054 to $606,854.

Item No. 4 is for extra haul. The evidence shows that the increase of work caused by change of grade and location did, in particular localities, make a longer haul requisite than 800 feet, which is mentioned in the bill of works as the estimated average length of the haul, and it is admitted by the contractor that in other places similar changes caused a great decrease in the material used, and with it a corresponding decrease of haul. He contends, however, that he is not liable to be charged with a diminution of haulage so caused, for the reason that a minimum haulage is nowhere specified or bargained for, and that, therefore, whenever a haul beyond the average aforesaid occurs, on account of a change, he is to be paid for it. We cannot coincide with this view. We do not read the contract as entitling him to extra haul in any event. Nowhere in the bargain is the value of haulage separated from that of excavation. It is stated that where the embankments cannot be made up by haulage of 1,600 feet at most, then the contractor may be obliged to resort to widening the cuttings in order to supply material, but in the papers pertaining to the contract we see no provision for the contractor being paid extra for haulage. If such work could be separately taken into account between the parties it would not be to the claimant's advantage, for the well-known clause 4 of the contract declares that he is to be charged with any diminution of work caused by change of grade or location. The evidence shows, beyond doubt, and we have already reported that changes of grade and location caused a great decrease in the whole material moved on this section. If a price were to be fixed for the haulage of material, independent of other work in it, then when we charge Mr. McGreevy with a saving in earth-work, as we did, we ought to have debited him also with some haulage. We think, however, that it is more proper, because more in accordance with the whole bargain, to make but one price per yard for the material moved, including haulage, and on both sides of the account we have dealt on this basis with the value of work in earth and in rock. No charge for haulage is allowed for or against Mr. McGreevy. His bulk price, therefore, stands at $606,854.

So far we have been dealing with the state of the accounts between the claimant and the Government under the terms of the contract, and before proceeding to take up any of the claimant's charges, either for damages or extras—that is, work beyond the contract for which no price was agreed on—we think it advisable to take

up other items as to which the parties had been in accord, and for which the price has been either specified or a method for reaching it has been agreed upon.

A review of these and the payments made by the Government would enable us to point out, as a distinct feature, the state of the accounts concerning all the matters on which there has been an agreement between the parties.

The contract contemplated wooden superstructures for the bridges. Before this was commenced on Section 18, the Government decided to substitute iron superstructure when it could be done by the consent of the contractors, and an agreement was prepared and executed by all but one of them, the present claimant among the rest, in which it was agreed on the part of the contractors that when considered desirable the Commissioners might furnish and erect spans of iron free of cost to the contractors, and that a deduction should be made from the amount payable at the close of contract equal to the value of the wooden spans and masonry saved by such substitution, calculated at the rates given in the schedule to the contracts.

On this section iron spans were substituted for those of the original design, and at the schedule rates the value of those saved to the contractor is $20,200. It is proved, however, before us, that this substitution had the effect of increasing the height of the masonry of the mill stream bridge, whereby the contractor was obliged to do 86 yards more than would have been necessary for wooden spans, and in a place where the work was of a most expensive character. On the evidence, we value this masonry at $20 per yard, and we deduct $1,720 from the $20,200 before charging the saving of the wooden spans; the balance, $18,480, being taken from $606,854, Mr. McGreevy's bulk sum price is reduced to $588,374.

There is a charge made by Mr. McGreevy as item No. 18 of his claim for iron pipe culverts furnished to him in lieu of other culverts. This is a matter provided for early in the negotiations—in fact, it has to be settled according to the terms of the schedule which accompanied the tender, and is the single exception where schedule prices were to bind the parties. The item relates entirely to iron pipe culverts constructed in lieu of some of the open ones originally designed.

These pipes passed through the embankment which support the road-bed, but instead of requiring masonry all the way through, as did the culverts' first design, they were surrounded and supported at each outlet by masonry, which extended into the embankment only for a short distance. For the rest of the distance the pipes were protected by concrete. The effect of this change in the design was to diminish very much the quantity of masonry, but we have come to the conclusion that what was used ought to be allowed as first instead of second-class, which would have been employed in the culverts according to the original plan. By the terms of the tender and the schedule attached to it, prices were there fixed for the work necessary to be taken into account, should such a change as this be carried out. The following language is found in the schedule :—

This simplifies the decision on this item ; the schedule gives the following prices :—

"In the event of iron cylinders being employed, the contractor will be allowed for them as well as for the concrete used, at the prices in the schedule, and a deduction will be made for the saving effected in masonry and other work."

Iron pipe cylinders in place, per foot	$25 00
Concrete, per yard	5 00
First-class masonry, per yard	14 00
Second-class masonry, per yard	8 00

The following quantities were supplied by the contractor, and we apply to them the schedule rates, as follows :—

Iron pipes, 424 ft., at $25	$10,600 00
Concrete, 425 yds., at $5	2,125 00
First-class masonry, 397 yds., at $14	5,558 00
Total	$18,283 00

The saving was 1,318 yds. of second-class masonry, at $8..... $10,544 00

The difference between these two sums, viz., $7,739, is to be credited to the claimant, and the bulk price is thereby increased from $588,374 to $596,113.

The Commisioners paid Mr. McGreevy $602,200 on his work. This is not disputed by him, and the effect of it is that he received $6,087 more than was due to him under his contract, and the subsequent agreement concerning wooden superstructure of bridges.

In the summer of 1875 the Government, under a clause of the contract, undertook the payment of wages in arrear to the contractor's laborers, and from that time forward disbursed all sums necessary to carry on and complete the works contracted for by Mr. McGreevy. They spent altogether $41,897, and always contended that he was chargeable with the whole of it. He does not dispute that the most of it is properly chargeable, but objects to some portions.

We have heard such evidence as is now available on the subject, and we have come to the conclusion that $2,356 of it was spent in 1876, for work on embankments, which Mr. McGreevy testifies was not to be done by him, and concerning which we have some doubt. It was also proved that the expenditure covered about 2,500 yards of rip-rap placed around the piers of the Mill stream bridge, in 1876. The evidence leaves some doubt as to whether this was part of the claimant's work under his contract, or was due to a new view of the engineers, at the close of the work for making the foundations of the piers safer than they would be by the original design. The evidence showed the work to be worth about $1 a yard. Therefore, we think the disbursement for this rip-rap equal to $2,500, and the $2,356 above mentioned; in all, $4,856 should be deducted from the $41,897 so spent by the Government as aforesaid, and the balance only, namely, $37,041, charged to the claimant.

In the account, as shown by the books of the Commissioners, the charge for the moneys thus disbursed had been diminished by an allowance for the value of the iron pipes brought upon the works by the claimant, but which, not being there required, were taken by the Commissioners for another place, on the understanding that he should be paid for them. He offered them at the time for cash, at $22 per foot. They were taken, however, without paying him that, or any other price, a credit being given to him against these advances by the Government to the extent of $3,888, or at a rate of $18 per foot. Mr. McGreevy now claims a credit at the rate of $24 per foot. The evidence leads us to say that the price claimed by him is not too high. The total length of them was 219 feet 10 inches, which, at $24, makes $5,276. This being deducted, instead of the $3,888 above mentioned, from the Government expenditure, $37,041, as allowed by us, leaves the balance, $31,765, to be charged to him.

This added to $6,087, the balance already shown against him, increases it to $37,852.

We now proceed to that portion of Mr. McGreevy's claim which stands upon some foundation other than an agreement between the parties. It may be divided into two principal branches: One, charges for work alleged to be beyond that covered by the contract, and for which the claimant seeks compensation, in addition to his bulk price; the other, for damages which, the claimant alleges, he has suffered by wrongful breach of contract on the part of the Commissioners.

Item 5.

429 yds. first-class masonry, additional depth, Mill stream bridge, at $22 per yd..... $ 9,438 00

Item 6.

1,000 yds. excavation for the same, at $1.50 per yd.... 1,500 00

Item 9.

Coffer-dams, unwatering five foundations, for the same, at $2,000 each	10,000 00
Total	$20,938 00

We deal with these three items together, because they must be disposed of on one and the same principle.

The railway bridge over the Metapedia River was built close to the mouth of a creek known as the "Millstream," and is indifferently called the "Metapedia" bridge, or the "Millstream" bridge. These three charges are based on the fact that this bridge was built on a foundation 2 feet lower than was supposed to be necessary when tenders were received, and when the plans were originally made out. It included three piers and two abutments. The position of each of these was moved about 20 feet further west than originally intended. These items, however, 5, 6, and 9, have no connection with that change of location.

After the new location was adopted, the contractor sunk caissons and prepared to carry out the work on the original plan. He commenced his work for the foundations without making any provision for the possibility of a greater depth being required than was originally contemplated. Before the masonry was commenced, the engineers found it necessary, for safety, that the foundations should go 2 feet deeper, and directed the contractor accordingly. The caissons not being suitable for this, the contractor had to drive piles several feet below the bottom of his caissons, so placed side by side as to form a protection against the water and the surrounding material while he was excavating and building the additional depth. In carrying out this change he furnished work of the kind charged in these three items, and he claims that this work is not within that which he undertook for his bulk price, and that he is therefore entitled to be paid extra for it. If his claim were a good one, we think, upon the evidence, that he should be paid something less than $10,000, but we have not examined minutely the details of the charge, sufficiently to state it accurately, for the reason that in our judgment there is no liability to him on any of these three items, and we come to this conclusion, whether we look at the letter of the contract as signed and sealed by the parties or at the spirit of the understanding between them before, the contract was drawn up, and which both parties intended to be embodied in that document.

Speaking, first of the letter, the specifications which were attached to and which, by express agreement, formed part of the contract, containing the following language:—

"28. Foundation pits must be sunk to such depth as the engineer may deem proper for the safety and permanence of the structure to be erected.

"29. No masonry shall be commenced in any foundation pits before they have been inspected and approved by the engineer.

"36. The masonry shall not be started at any point before the foundation has been properly prepared, nor till it has been examined and approved by the engineer."

Clauses 4 and 10 of the contract, before mentioned, declare that the bulk price is to be full compensation for all works contemplated by the contract, or required in virtue of any of its provisions, and that all changes or increases in the work to be done, unless due to changes of grade or location, may be made by the engineer without giving the contractor a right to extra price.

The evidence leaves no doubt in our minds, that after entering into the contract facts were discovered concerning the physical features of the locality which made it apparent that an extra depth was required for the safety and permanence of the bridge.

As far as concerns this bridge, the main object of the contract in the contemplation of both parties, was to make a sufficient structure on a safe foundation, and holding the contractor to the attainment of this object without extra price is, we think,

a fair and reasonable interpretation of the document. It is true the contractor, before closing the bargain, took no pains to inform himself of the nature of the material, where it was at first proposed to place the foundations; and he probably was ignorant of what would be required, but we think he cannot relieve himself from the unexpected outlay caused by getting to such a foundation as would secure the object of the contract by pleading his ignorance, or by saying that the information furnished to the other party by their own engineers was not full or accurate. The fact that this information was imparted to him does not alter the rights of the parties, especially as it was given avowedly for no more than it might be worth to him, and he was expressly invited and cautioned to use means of his own to get a better knowledge of all material facts. Thorn *vs.* Loudon, L.R.I., app. ca. 120.

But we do not think that our decision need rest only upon the literal form of the contract, nor on the general liability of a contractor to attain, at his own risk, the object of a bargain, for in this case Mr. McGreevy had express notice, before making his offer, that as far as structures over streams were concerned, the contract would require him to supply, without extra price, such additional work and materials as might, during the progress of the work, be shown to be necessary, in order to complete each structure upon a sufficient foundation. The bill of works says:—

"The structures proposed (over streams crossing the line of railway) are, from all the information obtained, believed to be the most suitable, but should circumstances require any change in the number, position, waterways, or dimensions, the contract will provide that all changes shall be made by the contractor without any extra charge. The schedule gives the probable quantities in the structures now proposed, and the data upon which those 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 the foundations, and with respect to the latter, accurate information can only be had during the progress of the work."

In the schedule referred to the two bridges on this Section 18, one over McKinnon's brook, and this one over the Metapedia River, are specially mentioned, with estimated quantities of masonry, excavation, &c.

Uncontradicted evidence shows that up to, and including the time of the execution of the contract, it was the mutual and concurrent intention of the parties to embody in that document the agreement arrived at by the acceptance of Mr. McGreevy's tender, based as it was, beyond question, amongst other things, on the contents of the notice to tenderers, known as the bill of works. If, therefore, it should be necessary to re-shape the formal contract so as to make it more fully or more plainly in accordance than it is with the bargain on this matter, it would be proper to insert in it any portion, or even the full text, of the bill of works. Indeed, it was urged by the claimant before us, through his counsel, that the bill of works was a material part of the bargain, and that the bargain should be construed accordingly. Under all the circumstances, the language of the documents, the notice to tenderers, and the expressed intention of the parties, we have come to the conclusion that the claimant ought not to be allowed for any of the works mentioned in Items 5, 6 and 9.

Item 7.

8,500 yds. special rip-rap to pier abutment, at $3 per yd. $25,500 00

Although this quantity, 8,500 yards, is mentioned in the claim, the contractor does not seriously contend that any such quantity should be allowed to him. The bill of works estimated 11,000 yards as the quantity of rip-rap necessary to complete the works according to the original design. As a fact, no more than this quantity claimed by Mr. McGreevy, 8,500 yards, has been executed altogether.

The only quantity for which the evidence gives a shadow of a claim by Mr. McGreevy is that placed round the piers of the Millstream bridge, in all about 2,500 yards. In the summer of 1876 this was done, not by him but by the Government, after they had taken upon themselves the expenditure necessary to complete the works

contracted for by Mr. McGreevy, but the cost of it was, as before mentioned, charged against the contractor.

If the whole of the moneys expended by the Government in the completion of the works had been allowed by us to stand against Mr. McGreevy, then it would be our duty to decide whether this quantity of 2,500 yards was or was not within his contract, and whether it should be allowed to him now as an extra to be paid for beyond his bulk price. But, inasmuch as we have already taken out of the moneys expended by the Government what we believe to be the cost of this particular work, namely, $1 dollar per yard, in all, $2,500, and have charged Mr. McGreevy only with the balance of the moneys expended by the Government, it is apparent that at this place we can make no allowance to the claimant for this item, and the state of the accounts before mentioned is not altered.

Item 8.

Stone bottom under embankment east of Millstream bridge, 10,300 yds., at $1.50 per yd..... $15,450 00

This east abutment was finally located in the river some 20 feet farther from the bank than was originally planned. The railway embankment for some 700 feet eastward from this abutment was built upon a stone foundation. This, however, was only according to the original design, and we find, in the bill of works, a notice to tenderers that this was to be done. In fact, a place on the opposite side of the river is there mentioned, from which the necessary material was to be got. The quantity given in the bill of works for this foundation is 13,765 yards, but the contractor was fortunate enough to complete it with 10,300 yards.

On the attention of the contractor being called by us to this notification in the bill of works, he said that only a small proportion of the material used was actually taken from the place so specified, because it was found that the stone excavated there would be required close by, and that it was deemed better to take it for this foundation from other localities on the east side of the river, one of them a quarry opened by him within the line of the railway. He said, however, that no one, engineers or others, acting on behalf of the Government, had prevented his furnishing this material from the place specified in the bill of works. It is clear upon the evidence that he chose not to follow the original design, and this fact, we think, disposes of the claim, unless it be as to the increased length of the foundation, about 20 feet, which was caused by the movement of the bridge westward; as to that piece, the evidence leads us to say that the movement saved to the contractor about the same quantity of stone foundation on the west side of the river, as it increased it on the east side. Therefore, we do not allow anything on item No. 8.

Item 8*a*.

Hand packed bank stone, 7,980 yds., at $1 per yd.....$7,980 00

The work here charged for was for a stone protection to a portion of the work made to save it from the wash of the river. According to the original plan it was intended that in many places along the river a protection should be made in the shape of crib-wharfing, and sketch No. 26, a general plan for this work, was given to tenderers. The bill of works estimated that the aggregate length of crib-wharfing would be about 22,000 feet, and that it would comprise 96,000 cubic yards of stone, gravel and timber combined, but it was intimated also in the bill of works that rip-rap would be used between various other points, as well as such other protection as might be deemed necessary to thoroughly secure the embankment from the wash of the river and other streams.

Early in the progress this contractor suggested to the Government, that instead of resorting to crib-wharfing as frequently as was at first intended, he should be allowed to substitute for it in some places a protection formed entirely of stones carefully placed and packed so as to make the work secure and permanent. The suggestion was acceded to and, as a consequence, the length of the crib-wharfing pro-

per was reduced to about one-half the lineal frontage, indicated in the bill of works. In fact the length of this very work mentioned in Item 8*a* is included in the length of the bank protections designated generally as "crib-wharfing" in the returns by the Government engineers, and in the statements put in before us by Mr. McGreevy, but he claims that dealing with this as ordinary crib-wharfing will not sufficiently compensate him, because the stones were here placed in position with more than usual care and expense, for which he claims $1 a yard.

Upon the whole evidence, we have to say that his contention concerning this item is not well founded; that at the best this can be considered only as so much of the length of crib-wharfing undertaken by him in the contract. It is, by no means, clear to us that it was more expensive than ordinary crib-wharfing would have been if made of timber, rock and gravel, according to the original design, and if it were, we think the "other protection" mentioned in the bill of works would cover it; therefore, we allow nothing for it.

We treat it as a part of the crib-wharfing furnished by the contractor, and for which he has made a claim of $491,970 in Item No. 12. This we deal with by itself further on.

Item No. 9 was disposed of in conjunction with Nos. 5 and 6.

Item 10.

4,617 yds. of second-class masonry, built different from specifications and equal to first-class, at $9 per yd.. $41,553 00

The bridges, the larger culverts, and the arches of some of the smaller ones were, from the beginning, intended to be and were built of first-class masonry. This claim relates entirely to those portions of the smaller culverts which were originally designed to be of second-class masonry, but which the claimant alleges to have been built of first-class masonry, and it is exclusive of those culverts in which iron pipes were substituted for masonry.

Concerning this item, there is a wide divergence of opinion amongst the witnesses, including the claimant. There is no doubt that the great desideratum in all the culverts was compact work with close joints. They were to be subject to the pressure of hill-side streams, which at times would be torrents, and against which it was thought no masonry would stand unless it was equal to the specifications for second-class.

The claimant testified, that from the stone which was on the section he could have built masonry equal to that second-class, and at an expense much less than that which was furnished; that owing to the requirements of the resident engineers he put into the work masonry of a character which was more permanent, more valuable to the public and more expensive to him than he would have done if he had been allowed to supply merely that which the specifications called for.

It is urged on the part of the Crown, that what the specifications called for would have been fully sufficient for the portions of the work now in question, and would have been accepted if the contractor had been able to furnish it; but that, from the fact of his bringing the stone in large pieces to the section, and from the difficulty of hammer-dressing joints close enough to answer the specifications for the second-class, it became expedient for him to make, and he did make, without extra expense to himself, the work which was actually furnished.

The specifications, part and parcel of the contract, described at some length the characteristics of first and second-class masonry. The distinctions necessary to be noticed in judging of this item are, as follows:—

The first class required:—

(1) Large well shaped stones.
(2) Regular courses.
(3) Quarter inch joints.
(4) Vertical joints dressed back square 9 inches.

The second-class:—

(1) Smaller stones.
(2) Random work, or broken course rubble.
(3) Half inch joints.
(4) Vertical joints not dressed.

It is clear, upon the evidence, that suitable stone for the work could not be had on the section, and the contractor was forced to bring it from a distance. Some of the witnesses declared that what was used was of such a character that it could not be hammer dressed smooth enough for ½-inch joints, that the only way to get such a joint was to chisel-dress the stone, and then it was no mose expensive to make the joints as close as they were made than it would have been to make ½ inch joints. Others say that it might have been hammer dressed so as to make ½-inch joints, but only at an expense equal to that of chisel-dressing it for ¼-inch joint, so that if the closer joints were supplied, they were, under the circumstances, no more expensive to the contractor than ½-inch ones would have been. And evidence was given by some witnesses, that in consequence of the necessity of transporting this stone from a distance, the cost of handling large pieces did not exceed that of the smaller stones necessary to make the same cubic contents of masonry. In fact, they doubt if large stones were not less expensive than small ones would have been, among other reasons, because the large pieces being brought to the ground, it was more economical to put in good sized blocks than to break them up and increase the number of courses and the number of beds to be worked.

Mr. Schreiber testified that he had seen much of the masonry in dispute, and that in a considerable portion of the work, when finished, it really fell short of the specification requirement for even second-class masonry, in this, that the joints were left more open than ½ inch, but he said that notwithstanding that fact, some of it was up to first-class masonry in all respects other than joints, and that it was very much better than the contractor need have built under the specifications that an inferior kind would have complied with the specifications.

Mr. Hogan, who had been in charge of the works for Mr. McGreevy, and who was called by him as a witness before Mr. Shanly, testified that "a couple of the culverts, one in particular, a large open culvert, were built of first-class masonry;" adding that he did not know that the others were much better than good second-class masonry.

Mr. Grant, who had been resident engineer during the construction of the work, testified that he ordered a better class of masonry than that of the second-class, but gave, after much examination, as a reason for so doing, the fact that the contractor could not furnish stones of such a nature and so prepared as to leave only ½-inch joints, and finally he testified that he would not have objected if they had built up to the specifications, meaning the second-class specifications.

According to the evidence, the result has been, at all events, that the work has had the benefit of large stones and, generally, of regular courses, instead of small stones and random work, whereby the claimant has furnished in some culverts, work of a character more expensive to him and somewhat more valuable to the public than this contract called for. From the tenor of the evidence, as a whole, we get the impression that in some places this better work was furnished because of the pressure of the engineers, rather than because the contract could not be filled at less expense.

It is difficult for us to fix, satisfactorily to ourselves, the quantity of the masonry which was thus furnished by the contractor at a greater cost to himself than the contract called for, and that he would have furnished if he had been required to do no more than supply work equal to the second-class of the specifications.

Making our way as well as we can through the conflicting and embarrassing testimony on this subject, and giving the contractor the benefit of every reasonable doubt, we have adopted 2,000 yards as the closest approximation which we can make; and upon the evidence, we fix the difference in value between what he was obliged by his contract to furnish and what he did furnish, at $4 a yard. This is equal to $8,000, which sum ought to go to the claimant's credit, if his contention is right, on the interpretation of the contract concerning cases where the engineer, from a change of view after the contract was made, directed an alteration in the character of work, which was carried out at an expense to the contractor greater than would have been required by the original design. Mr. McGreevy claims that

in each case of this kind he is entitled to recover the whole amount of the additional cost. On the other side, it is argued that no matter to what extent the cost is so increased, the contractor must, by the terms of the bargain, bear it without any relief or reimbursement from the Government. It may be that the true interpretation is to be found between these extreme views, but we do not deem it necessary, in reporting on this claim, to offer an opinion on the soundness of either of these arguments, because the question towards the solution of which our investigation is a step—the liability of Her Majesty to this claimant—must be settled the same way, which ever of the interpretations before mentioned be followed.

If the question were, how much has this contractor been overpaid, then we would hesitate to place this item to his credit, unless and until we should conclude that his interpretation of the contract is the right one, or, at all events, until we should decide that the one advanced on behalf of the Crown was wrong.

As it is, we give him credit for this $8,000, in order to show how, under his interpretation, the account would stand, according to the facts which we consider established by the evidence. This credit reduces the balance against him, from $37,852 to $29,852.

Item 11.

8,463 yds. of masonry, built with Portland cement, instead of Canadian, at $1.50 per yd..... ..... $12,694 50

The quantity here stated is about the whole that was built upon this section, including the first and second classes.

Under the head "Masonry," the specificatons have the following language:

"(37). Hydraulic lime mortar will be used, unless otherwise directed, in building all masonry, from the foundations up to a line 2 feet above the ordinary level of the stream. It will be used, also, in turning arches, in laying girder-beds, copings, coverings of walls generally, in lipping and pointing. The hydraulic lime or cement must be fresh ground, of the best brand, * * * * Before being used, satisfactory proof must be afforded the engineer, of its hydraulic properties, as no inferior cement will be allowed.

"(38). Lime mortar must be made of the best common lime, and will be employed in all masonry (except dry) where cement is not directed to be used.

"(54). In all walls built in common lime, the exposed faces will have a 4 inch lipping of cement."

By command of the Government engineers, the contractor supplied Portland cement, for all the masonry, except one lot of Quebec cement, which had been brought on the ground before the Portland cement was ordered, and which was therefore, allowed to be used.

Some attempt was made to show that Quebec, or other Canadian hydraulic cement, was good enough for this work, and that the contractor ought to have been allowed to furnish Canadian cement, which was less expensive than the Portland brand. The effect of the whole evidence, however, is to satisfy us that the Portland was "the best brand," and, that though some of the Quebec cement was good, the quality of the different lots of it was very uncertain, so much so, that, in order to secure the work being up to the standard indicated by the specifications, the only safe and proper course of the engineers was to reject the Canadian make. Therefore, we allow nothing on the claim, so far as it relates to the use of Portland hydraulic cement, instead of Canadian hydraulic cement; but the tenor of the specifications amounted, in our opinion, to an intimation to the tenderers, that from a line two feet above the ordinary level of each stream, the masonry would be built, not with any hydraulic cement, but with common lime, except those portions such as turning arches, laying girder-beds, copings, coverings of walls, lipping and pointing, as were specially mentioned; and we think, the demand for Portland cement throughout, instead of common lime, for this portion of the masonry, was an alteration in the character of the work, caused by a change of engineering views, after the

contract was made, and that the cost of that alteration may now be passed to the credit of the claimant, for the reasons which we gave concerning the allowance of the last item.

The evidence is not conclusive as to the quantity of masonry which, by the specifications, was intended to be built with common lime, but leaning as far in favor of the contractor as the evidence will permit, we adopt 4,300 yards as the highest quantity which could be allowed. To this we apply the rate of $1 50 per yard as proper for the difference between building masonry with common lime and with Portland cement. This adds $6,450 to Mr. McGreevy's side of the account, and leaves the balance against him $23,402.

Item 12.

Crib-wharfing as protection to embankment, 163,999 c. yds., at $3 per yd..... $491,997 00

Mr. McGreevy makes a claim for the whole of this amount, on the ground that he should be paid for all the crib-wharfing built on Section 18, inasmuch as crib-wharfing is not mentioned in his contract or the specifications attached to it.

He testified before us, that when reading the bill of works previous to tendering, he understood that crib-wharfing and all the other special works there mentioned would be included in the contract at the bulk sum price, but that immediately after signing the document he came to a different conclusion, and then "took it" that none of the special works were embraced in the contract, and he says he has remained of that opinion ever since.

The bill of works points out that crib-wharfing would be made, and gives an estimate of the probable quantity. Mr. McGreevy admits, and indeed urges before us, that the bill of works ought to be read as part of the contract, and the rights of the parties decided accordingly.

His tender was accompanied by a schedule, which names a rate for crib-wharfing, and contains a memorandum that the rates there given might be used for the purpose of progress estimates while the work was under construction ; and his tender stated that he had seen the plans of work.

The plans are again mentioned in clause 2 of the contract, and it was according to them that he undertook to complete the work. They showed crib-wharfing both on the profiles and on the location plans, and localities were there specified at which it was then intended to have such work.

The contention that his bulk price does not cover any crib-wharfing is so unreasonable that it may be dismissed without further consideration, and we proceed to discuss the item, with a view of showing whether crib-wharfing was supplied by him of such a character, or to such an extent, as would justify an allowance therefor beyond the price named in the contract for the whole works undertaken by him.

The claim on this item is advanced by his counsel in the following language. He says :—

"Item 12. This work is not mentioned in the specifications. The bill of works calls for 22,000 lineal feet, equal to 96,000 cubic yards ; and sketch 26, which may fairly be considered as forming part of the contract, shows a special class of crib-wharfing. Considering the intention of the parties at the time of tendering, it may reasonably be inferred that the contractor undertook to build about 96,000 cubic yards of crib-wharfing, to be according to plan 26, but certainly it cannot reasonably be supposed that the contractor intended, and really contracted for double the quantity, and for a class of work much more heavy and expensive."

It is true that the bill of works named 22,000 lineal feet as the probable length of crib-wharfing, and the contents for that distance was stated at about 96,000 cubic yards, but in the first clause of that document tenderers were expressly warned, as follows :—

"The quantities herein given * * * * are not warranted as accurate, and no claim of any kind will be allowed, though they may prove to be inaccurate."

We think it clear beyond argument, from the contents of the different documents which were preliminary to, and led up to the contract, as well as from the language of that document itself, that both parties at the bargain expected it and intended it to be speculative, and therefore, that with the chance of the work being to his advantage sometime, substantially diminished below those stated in the bill of works, as in several instances on Section 18, as they actually were, the contractor took the risk of their being occasionally increased to his disadvantage. If this leading feature of the transaction is ignored, the advertisement, the bill of works, the plans, the tenders, the specifications, and the sealed contract, were merely waste paper.

We cannot give effect to what we believe to be the real intention of the contracting parties, as evinced by the contract itself, as well as by all the documents in which they took part, without saying that the claimant has no right to an increased price, merely because in the execution of the work the lineal frontage or the cubic contents of the crib-wharfing was increased beyond the estimates given in the bill of works. It must be for some better reason than that, if there is a liability on the part of the Crown to pay him for any alleged excess.

Some stress has been laid on the fact that the section of crib wharfing on the sketch No. 26, alluded to in the bill of works, and which was framed for general use on the Intercolonial Railway, did not show so large an area as that of some of the crib-wharfing, or perhaps the average of it, actually built on Section 18 by this claimant. He said that after looking at that sketch he supposed he was contracting to build crib-wharfing that would never be deeper in the water than 2½ feet, the depth indicated by that sketch. It was not stated on the sketch that that was to be the depth, but according to the scale on which it is made, the depth of the water at summer level would be 2½ feet. The sketch does not show, however, that the crib-wharfing was to be built on a slope from the bed of the river up to a level of from 4 to 5 feet above the high water line.

It is so unreasonable that it may be said to be absurd to suppose that a single printed sketch as this was could be made for the whole line, or even for one section of it, which would give precisely the depth from the summer water level to the bed of the river at every locality in which crib-wharfing would be needed. From the circumstances of the case, therefore, as well as from the evidence of engineers on the meaning attached to such sketches, we conclude that this one was furnished and was received, not to bind the Crown concerning quantities, but merely to convey a general idea of the mode of construction; and that it was understood that in carrying out the work the crib-wharfing was to be of such dimensions as would suit each locality where it would be employed.

In the schedule attached to the tender the price given is only that for each lineal foot of the frontage, irrespective of cubic contents; and as a fact, that portion of the crib-wharfing which was heaviest and most expensive in proportion to length was completed without any progress estimate being made, except on the basis mentioned in the schedule, namely, the lineal frontage of what was built. Up to the time that Mr. Thompson, the first engineer, left the works, in 1871, his returns ignored cubic contents. His last one stated simply 1,901 lineal feet of frontage, and this, though the work classed now by Mr. McGreevy as crib-wharfing had then been built for a distance of 850 feet through the large salmon pool, a portion of the river 16 feet deep in places, with a current of from 7 to 8 miles an hour. This is mentioned because we think it shows an understanding, up to that time, that the cubic contents of crib-wharfing was not an element in the accounts concerning the works on Section 18.

There is a view, however, concerning the work through this salmon pool which, we think, will justify us in taking a portion of the structures there erected out of the class of crib-wharfing, and in allowing the contractor for it as an independent work; but before touching that subject, we think it well to deal further with the whole claim of the contractor for works under the name of crib-wharfing.

The term "crib-wharfing" was adopted throughout the negotiations previous to the contract and in the bill of works, in order to describe a particular kind of struc-

ture combining timber and stone, to be used as a protection to the embankments against the wash of water, but it is clear that in the design submitted to the tenderers, and undertaken by contractors, it was not to be the only protection used for that purpose. Places were indicated where it would be employed, but it was also intimated that there would be other places where different protections would be resorted to in the shape of rip-rap, or in such other shape as should be deemed necessary. The following is a clause in the bill of works :—

"*Special Works.*

"(1.) Protection to slopes of the embankment: Crib wharfing of round cedar logs filled with stone and coarse gravel, as per sketch (see general drawing, No. 26) will be constructed between the various points shown on the profile; aggregate length about 22,000 lineal feet and comprising about 96,000 cubic yards of stone, gravel and timber combined. Rip-rap will be used between various other points (approximate quantity given in bill) and such other protection as may be deemed necessary to thoroughly secure the embankment from the wash of the river and other streams."

Thus it was never intended that the distances for which crib-wharfing was specified should limit the length of the embankments to be protected artificially against the wash of the water. The claim, however, on this Item 12 is made up and advanced in such a way as to put out of sight the protections other than crib-wharfing which, under the contract, were to be furnished without extra price. In fact, every foot of protection against the water, built on this Section 18, whether of crib-wharfing or rip-rap, or other protection, is collected together in the claim under the name of crib-wharfing.

The resident engineers had so described it, from time to time, in the progress estimates, but the error there was immaterial, the object of such estimates being merely to show approximately the current expenditure of the contractor, so that he might be reimbursed a large proportion of it as the work went on, such temporary reimbursement not being intended in any way to effect the ultimate settlement of the accounts on the basis of the bulk sum price; but continuing the error now while the claims are being investigated with a view of final adjustment is a different matter and requires notice.

Some of the stone protection to embankments may be properly allowed to the contractor as a fulfilment of his undertaking to supply crib-wharving, because early in the progress of the work he proposed in writing to put in some places a protection of stones carefully placed according to a sketch agreed to by him in lieu of the ordinary crib-wharfing, and his proposal was accepted. This resulted in his making crib-wharfing—that is protection with timber in it—for only about half the distance named in the bill of works, in other places he used the stone alone. The acceptance of his proposal probably led to the practice before mentioned of calling all kinds of protection crib-wharfing, but as we have said, continuing the practice has the effect of diverting the attention from those places where, according to the original design, there would be some protection other than crabbing, and gives to the contractor an apparent credit for furnishing crib-wharfing to an extent greater than he really did.

The clause above quoted from the bill of works shows that in addition to protecting embankments, with structures of timber and stone combined, it was, from the beginning, intended to protect them in some places solely by rip-rap, and in others by protections not specially described, 11,000 yards of rip-rap is mentioned in the bill of works as the probable quantity to be employed on the section in protection to embankments. The contractor has furnished no more than 6,000 yards under that name; it would be 8,500 had he been charged with the 250 put round the bridge piers by the Government, in 1876, but as mentioned in an earlier stage of this report he was not; and if all his protection to embankments is crib-wharfing, then he has really supplied 5,000 yards of rip-rap less than mentioned in the bill of works.

He has offered evidence to show that he has supplied crib-wharfing to about 160,000 yards in cubic contents, but this includes, as before mentioned, every kind of

protection which he has made in the embankments, as well as much other work which we consider to be portions of the embankments rather than crib-wharfing to protect them, and which represent a considerable portion of the cubic contents claimed by him.

We deal with these portions of the embankments later on, but in the meantime we feel constrained to say that according to the fair construction of the contract, and as we would interpret the bargain actually made had it been between man and man, this claimant is not entitled to charge for crib-wharfing, though the length of it and the contents of it exceed those suggested by the bill of works, unless such excess was due to the change of grade or location, of which there is no pretence.

There were two difficult places in the river known as salmon pools, across which the railway embankment was built. One is the place, before mentioned, where the depth of water was for a short distance 16 feet or more, with a swift current. This was the more formidable of the two pools. Through this one the embankment was built for a length of 850 feet, upon timber cribbing, next the river, filled with stones. This work was rectangular, not sloping, according to the design for crib-wharfing in sketch No. 26. At one point in this work the cribbing went all the way through the embankment and into the pool still left between it and the mainland, supporting an iron pipe through which the water on either side of the embankment found the level of that on the other side. Next to this, which we may call the centre piece, and on either side of it, more cribbing was built, which went a considerable distance into the embankment, and again on each side of these a farther stretch was built, but not so far into the bank. These cribs being filled with stones, and the embankment completed at the back of them and over, then crib-wharfing proper, that is, according to the design in sketch No. 26, was placed as a separate work above them to the height required as a protection to the embankment. Before completing the roadbed it was discovered that the foundation of this vertical cribbing was endangered by the scour of the river, and large stones were then dumped into the water as a protection.

Mr. McGreevy testified that he protested to Mr. Thompson, the resident engineer, against being obliged to furnish this square cribbing for the foundation of the embankment, on the ground that his contract did not call for it. The answer was: "Whether your contract calls for it or not, you must do it," and he did it.

If left to his own judgment it was unquestionably Mr. McGreevy's duty to build a safe and sufficient embankment through that salmon pool, and the question arises, whether he did not, at the last, build it at as small an expense to himself as possible, consistently with maintaining the efficiency and permanence of the work.

He described to us, in his evidence, how he would have done this without resorting to the expense of timber cribbing. The depth of the water and the rapidity of the current rendered it useless to deposit only the ordinary gravel to be had in that locality, but he said he would have advanced his work gradually from the shores, always selecting large stones from the river side of the embankment, and dumping them into the water, so making a wall several feet thick on that side; that this protection to the rest of the work during the progress of construction would have been necessary, but would have been sufficient to protect the embankment from being washed away by the swift, deep river; and he explained, that simultaneously with this work, he would have extended the remainder of the embankment with small stone, gravel, &c.

This makes it evident that a large portion of the work brought to our notice by Mr. McGreevy, under the name of crib-wharfing, was really a portion of the embankment, exclusive of the true crib-wharfing finally placed above it as a separate work, and would have been put there under Mr. Thompson's directions, if no such thing as crib wharfing, according to sketch No. 26, had ever been mentioned.

Mr. Grant, who succeeded Mr. Thompson, allowed the embankment through the other, the smaller salmon pool, to be built on the design mentioned, as aforesaid, by Mr. McGreevy, as the one he would have followed in the absence of express directions by the Government engineers; and, upon the evidence, there is every reason to believe that it was a good piece of work, fully sufficient for the purposes of the railway.

Mr. Marcus Smith was examined by us, with a view of ascertaining whether the plan suggested by Mr. McGreevy was feasible, also, for the larger salmon pool and sufficient for the purposes of the railway, and whether it was less expensive, and if so, how much less than that furnished under protest at the request of Mr. Thompson, the resident engineer. Mr. Smith, after hearing the evidence of Mr. Grant concerning the physical features of the locality, and all other matters necessary to be taken into account, took some time to consider the questions submitted to him, after which he gave evidence and prepared statements which lead us to the conclusion that Mr. Thompson's plan for the work through the larger salmon pool cost the contractor about $16,000 more than his own plan would have cost him, and that his own plan would have been amply sufficient.

Through the smaller salmon pool Mr. McGreevy built, as before mentioned, the embankment in his own way; but, as in the case of the larger pool, he includes in his claim for crib-wharfing the contents of the lower rock-work there, as well as its superstructure of timber and crib-wharfing, though it is plain that no suitable embankment at that place could have been built without such lower rock-work, or some substitute equally if not more expensive.

The question now remains whether the claimant is entitled to a credit for the extra cost of the work through the larger salmon pool, occasioned by the demand of the resident engineer. After a close inquiry into the details of the different designs for this work, and the cost of such details, we have come to the conclusion that $16,000, the amount named in the increased cost due to the Thompson design, represents about the value of the timber-work by itself. This timber occupied a certain space in the embankment, and so saved the necessity of supplying stone for that same space. The cost, however, of the other stone, was somewhat increased by the necessity of hand-laying a portion of it in the cribs. This circumstance makes the value of the timber cribbing alone about equal to the whole increased cost of the Thompson design.

We have come to the conclusion that this square timber cribbing may be properly treated as a work independent of and outside the contract, rather than a change from it; and so, within the decision of "Ritchey *vs.* Bank of Montreal," (4 U.C., Q.B. 459), in which case Chief Justice Robinson laid down the principle that "such works as the defendant might consistently, with the contract, have employed any one else to do were not so properly alterations or deviations from the work specified as work independent of and beside the contract, and in that sense not properly additions to it."

In this case, though it might have worked some inconvenience, we do not think it would have interfered with the rights of the present claimant if the Commissioners had given a contract to some other party to furnish these cribs in position as, and when they were wanted, and had directed Mr. McGreevy, under clause 6 of the contract, to suspend operations from time to time to allow this to be done, and afterwards to proceed to fill the cribs with the materials available for that purpose.

We have no hesitation in saying that this vertical cribbing was not a part of the original design. The bill of works professes to mention all the special works, crib-wharfing included, and makes no allusion to this kind of structure.

On the whole, we think it is not straining the construction of the contract in favor of the claimant further than would be permitted in a court of justice to allow him, in this case, the value of the timber-work used as a foundation for the embankments through the larger salmon pool, and we find that value to be $16,545. We allow 110,300 feet of cedar finished, and in place at 15 cents per lineal foot, a credit of that sum leaves him overpaid on his contract price by $6,857.

Item 12*a*.

Intermediate pieces to Sketch 26, 133,620 ft. at 17½c. per ft..... $23,383 00

This is claimed because, in constructing crib-wharfing, a short piece of cedar log, in addition to any shown on Sketch 26, was introduced between the horizontal face logs of the work at a distance of 6 feet apart, in order to make the structure effective.

This change found no place in the particulars attached to the petition of right, which Mr. McGreevy laid before the Court of Exchequer, concerning his work on Section 18, nor in his claim before Mr. Shanly, nor in his claim as at first submitted to us. It has developed itself during our investigation.

Though this circumstance is not a conclusive answer to the demand, it is, we think, some evidence to show that from the time of his tender until now, the claimant understood that such a change might be made in the design for crib-wharfing, without in any way violating the contract, or giving him a right to charge it as an extra, to be paid for in addition to his bulk sum price.

The evidence of engineers leads us to believe that if nothing had been stated in the contract or in the negotiations concerning such changes as this, plans like Sketch 26 are made and received only for the purpose of showing the general features of the work to be done, and that when it comes to be carried out further details may be directed for the guidance of the contractor, so long as they are not inconsistent with the general design.

In this case Mr. Marcus Smith, as district engineer, decided that the crib wharfing would not be strong enough without a short piece of cedar inserted at certain distances between the horizontal ones of the general design, in addition to those there shown, and he directed it to be built in this way, which was done.

It is well understood that in the general plans and designs furnished to tenderers before they make their offers for railway works, omissions of necessary details will occur, and that these omissions will be afterwards rectified; consequently, in this case, they were invited, as they generally are, to include in the amount of their tender such a sum as they might fix on, as sufficient to cover omissions and contingencies.

In the bill of works for Section 18 there is an item for omissions and contingencies, amongst others, "for all alterations in structures that may be found inadequate in strength;" and in the schedule of his tender, Mr McGreevy inserted such an amount, as he chose then to name, in order to cover these risks.

In our judgment, it is according to the contract and the intention of the parties, that changes in detail, such as this, should not entitle the contractor to any additional price, beyond the bulk sum for which he undertook to complete the works, and we allow nothing for it.

Item 13.

1,800 yds. of rock, widening and deepening the stream, at $5 per yd $9,000 00

Item 14.

35,000 yds. of earth, widening and deepening the stream, at 75c. per yd. $26,250 00

The contractor, while making this claim, admits that it was provided for by the bill of works, as a portion of the work covered by his tender, and that his only ground for the demand is, that there is no direct allusion to it, nor to the bill of works, in the contract or in the specifications.

The bill of works gave notice that this stream widening and deepening was to be done, and estimated it at 3,000 cubic yards of rock and 19,000 cubic yards of gravel. The quantities returned at the time, by the resident engineer, as executed, were considerably less than those named in the bill of works.

As before intimated, the rights of the parties must, in our opinion, be settled as if the whole tenor and substance of the bill of works, the offer based on it, and the acceptance of that offer, had been originally, or was now set out in the original

contract. This being so, we have to say that the claimant is not entitled to anything on Items 13 and 14.

Items 15 and 16, in the particulars originally presented to us, were concerning culvert masonry and paving, but the evidence not supporting either of them, the claimant withdrew them, and the formal claim, as finally submitted to us, had no item between numbers 14 and 17.

Item 17.

Road diversions, in rock, opposite Stations 395 to 400....$1,000 00

At a bend in the Metapedia River, the railway embankment was built in the water, across the curve, and would have narrowed the stream considerably, had not a point of land been removed from the opposite side. On this point was a travelled road. The contractor widened the stream, as required, and made a new road, to take the place of that which had so formerly passed over the point, as aforesaid. He notified the engineers that he disputed his liability to make this road, and called upon them, or their superiors, to do what was necessary to provide a public highway, in lieu of the one which would be destroyed by the removal of the said point of land. Nothing was done by the Government, and he made the new road now charged for.

In our judgment, the Commissioners ought to have done what was necessary to enable the contractor, without personal liability on his part to the public, or in any other liability, to remove land on which they had laid out his work, just as much as it was their duty to procure the right of way over any land which the contractor undertook to break into or move, and that in making this new road he was satisfying a liability to the public, which he had incurred at the request of, and for the benefit of the Commissioners. Much of the work was in rock, and the evidence shows that the price charged is not unreasonable. We allow $1,000 on this item, which makes the balance overpaid to Mr. McGreevy, $5,857.

Item 19.

Iron pipes, 249 ft., at $24..... $5,976 00

According to the evidence, the true quantity was 219 ft. 10 in., which at $24 a foot, makes $5,276. We have disposed of this item in an earlier part of our report, by deducting it from the advances made by the Government, between the summer of 1875 and of 1876, in finishing the work, and so reducing those advances from $37,041 to $31,765, which was the balance charged by us against Mr. McGreevy.

Item 20.

Damages by delay in the location of Millstream bridge, non-payment of monthly estimates, taking possession of the work, and other delays..... $20,000 00

In Mr. McGreevy's claim before the Court of Exchequer, before Mr. Shanly, and at first before us, this claim was only for the delay in the erection of Millstream bridge. During our proceedings, however, he furnished a statement purporting to give the details of the item as it now appears. He there states :—

" 1. The details of his loss at $944 for stoppage of the works from the 3rd to the 16th of October, for payment of men who did not work at any other places ; for loss on time of masons who did work at other places, but without the full value to him of the pay he was giving them, and for superintendence, contingencies, general disorganization, &c.

" 2. For having to work nights and Sundays at a late cold season of the year to get the abutment out of water and make up for delay, and he gives the pay list of the force employed, amounting to $2,177.25.

" For fuel, contingencies and deterioration to machinery. $1,300 00
" For shifting caisson and unwatering cofferdams . . 1,200 00

" In all $5,621 25

"3. Damage by non-payment of estimates from and after April, 1875, taking a legal possession of work, loss of reputation, higher wages and greater cost in finishing the work, owing to the impression by the men that they were employed by the Government, $10,000.

"4. Loss by cribbing being carried away, owing to its not being laid out in time to make connection with the land to keep it safe, $2,800."

In 1873, after the contractor had commenced work for some of the foundations of the Metapedia bridge, it was decided to change the location about 20 feet westward. This was done because it was believed by the contractor and the engineers, that the western abutment would, at that place, reach a rock foundation at much less depth than where it was first designed to be built; that this would be a saving to the contractor without any detriment to the structure. Before the move was decided on, Mr. Bell, the district engineer, wrote to his superior officer that Mr. McGreevy asked for the change, and he recommended it to be granted; there was no loss occasioned by this move, except the cost of some work which had been done by Mr. McGreevy; he gives it in round numbers at $1,200. On the evidence, we would say it was between $900 and $1,200.

Mr. McGreevy does not agree with Mr. Bell's version of the matter, that is, that the change was made at his request, but in giving his evidence he would not be positive that he had not requested the change, in a conversation with Mr. Bell. Looking at the correspondence, the oral evidence, and the object of the move, we have come to the conclusion that the contractor, expecting to be benefited by it, asked for it on his own account, and that he has no right to charge the cost of his previous preparations to the Government. It is evident to us that he expected to be more than compensated for them by the saving of work on the new location of the west abutment, and that it was on this understanding, either tacit or expressed, that the change of location was authorized. The cost of these preparations as "shifting caissons of one pier, $600; unwatering cofferdam, $600; in all, $1,200," erroneously appears in the particulars of this item. In fact, these things have no connection with the delay in completing the Millstream bridge, caused by the stoppage of work from the 3rd to the 13th or 16th of October, 1873; that stoppage was subsequent to the change of location and shifting the caissons, &c., and it took place, as follows:—

The excavation for the west abutment on the new location did not reach rock where it was expected. This caused a great disappointment to the contractor and engineers. The only rock developed was a small point or "toe" extending towards the river from the high bank, so small that it could not add strength to the foundation, and it was deemed advisable to avoid it and build the masonry entirely on other bottom.

On reaching the depth at which the masonry was finally commenced, a question arose whether the material there found a strong clay, was sufficient to justify the engineers in permitting Mr. McGreevy to proceed with the building of the abutment. Mr. Grant, the resident engineer, thought it was, but Mr. Bell, his superior officer, thought not, and it was decided that the question should be referred to the Chief Engineer, who was expected there in a few days, a period not clearly defined by the evidence; but somewhere between ten and fourteen days passed before Mr. Fleming arrived, during which time Mr. McGreevy, though ready to go on, was not allowed to proceed with the masonry. At the end of this time Mr. Fleming saw the foundation and decided that after removing about a foot of the clay, which had become tramped over and softened after exposure, the masonry might be proceeded with, on the condition that afterwards some protection, in the shape of rip-rap, should be placed around the foundation of it in addition to what had been previously designed. This is the delay for which the claimant is now charging.

There is no pretence that the question about the sufficiency of the foundation was not raised in good faith, and, in our judgment, the fact that the Chief Engineer finally agreed in the main with the resident engineer, is no reason for saying that the district engineer was not justified in keeping the question open for the Chief

Engineer before proceeding with the work; indeed, considering the importance of this foundation, we think he was bound to take the course he did.

There is, in our opinion, no ground for saying that in this matter the Commissioners, or their subordinates, were guilty of any wrongful breach of the contract, or of any promise to be implied from it, and if the contractor's claim depends on any wrong of any kind being done, we should have to say that he could be allowed nothing.

There is, however, a clause in the contract which, perhaps, is open to such a construction as to give him some compensation for this stoppage. Clause 6 declares that the Commissioners shall have the right to suspend operations at any particular point, or stop the whole of the works, and then an extension of time, equal to the delay, shall be allowed to the contractor in the completion of the work, such delay not to entitle the contractor to any claim for damages, unless the Commissioners shall otherwise determine, and then only for such sum as they may think just and equitable.

We do not feel sure that the stoppage under consideration, resulting, as it did, from a proper enquiry by the engineer, concerning the sufficiency of a foundation under the express terms of the specifications, is of the kind aimed at by clause 6, or that it is not rather one of the contingencies against which he must provide when fixing a bulk sum at which he would undertake to complete the works. But, giving the contractor the benefit of our doubt, we credit him with his whole disbursements and damages on that occasion, viz., $941. This reduces the balance against him from $5,857 to $4,913.

The next portion of the item charged as a consequence of this delay, includes really the whole cost to Mr. McGreevy for the work which was done later in the season by the force mentioned in his claim. It is manifest that paying for the time his men lost during the delay, and also for the time afterwards spent on a work, amounts to the Government paying him twice for a portion of the work included in the contract—once to reimburse Mr. McGreevy for what he spent in getting it done, and again in his bulk sum price for the whole works. The Crown is not liable to do this; indeed, though it is apparent that pushing some of the work, as he did, late in the fall, made it more expensive to him than it would have been earlier in the year, we cannot say that this is due to the fault of the Government or their officers. The truth is, Mr. McGreevy expected to find stone on the section for his masonry, and was disappointed, and, upon the evidence, we find that he delayed unnecessarily and longer than was reasonable in procuring quarries or supplies at other places; and, as a consequence, the commencement as well as the completion of his masonry was delayed to the disadvantage of himself and of the public, and we think his being obliged afterwards, at expensive periods of the year, to disburse larger sums than otherwise would have been necessary, is to be attributed to his own delay from the beginning, rather than any omission or improper conduct on the part of the Government officials.

Mr. Grant, then the resident engineer, was called by the claimant as a witness, before Mr. Shanly. His sympathies throughout were largely with Mr. McGreevy. He gave his evidence as much in the claimant's favor as was consistent with the integrity which we think actuated him throughout the investigation of this contractor's claim.

He said "the getting of stones was the first hindrance" in the completion of the work; that it was the contractor's business to do this, and that he thought that was one of the main causes of the four years' delay in the finishing of the structure.

Though it does not now appear in the particulars of his claim for damages, the claimant at one time contended before us that the absence of plans was the cause of serious delay in building the Metapedia bridge. The matter was fully inquired into, and Mr. Grant was examined at some length upon it. It becomes apparent that the delay was really attributable to other causes. Mr. Grant testified that the contractor having in his possession the plans earlier than he did, would not have prevented the delay, of which the main cause really was, that no quarry of stone of a

proper quality, was found near the work. The claimant failed to convince us that he did not get, from time to time, all such plans as were necessary, and as were to be reasonably expected.

The next portion of the item relates to the non payment of estimates from April, 1875, and what is called the taking illegal possession of the work, &c. In clause 6 of the contract there is a provision for paying arrears of wages to the contractor's men, if it should appear to the Commissioners that any difficulty was likely to arise by reason of the men being left unpaid.

In the spring of 1875, the time mentioned here by the claimant, it did appear to the Commissioners that some difficulty was likely to arise from that cause, and after some hesitation they proceeded to pay such arrears instead of giving the amounts of the progress estimates directly to the contractor. Under the terms of the contract, we do not think that the soundness of the judgment of the Commissioners, on the probability of difficulty in any way affects their right to pay the men instead of the contractor, if in good faith they came to the conclusion that the specified difficulty was likely to arise, then under the contract and in the public interest it was their duty to avoid it, so far as that could be done, by payment of the overdue wages. On that occasion there was a serious discontent among the labourers, and it is manifest that a strike was threatened, if it had not really commenced, owing to the wages being in arrear. It is clear now, after a full investigation into the accounts as they then stood, that if the Commissioners had paid the amount of the progress estimates direct to Mr. McGreevy, as he wished, and if he had failed to give it to the men to whom wages were overdue, the completion of the work would have been delayed longer than it was, and probably accomplished at a greater cost.

Believing the state of the account to be as we have reported, we must necessarily say that the claimant suffered no damage by not getting moneys which he demanded, but which were not due to him.

The last portion of this item was never advanced till a late stage of our investigation. After considering the evidence on the subject, we cannot see any ground for saying that the damages, arising from the accident to which he alludes, were the direct or natural consequences of the delay in laying out the work for some of the crib-wharfing, nor, indeed, can we say that there was any such delay as amounted to a wrongful breach of any agreement expressed or implied between the Government and the contractor. Therefore, we do not allow anything further on Item 20. The balance over paid to the claimant stands at $4,913.

The last item of his claim, "balance due on contract $16,400," is of course disposed of in our view of the accounts already given.

Upon the facts which we find established by the evidence, our final conclusion is, that Her Majesty is not indebted to Mr. McGreevy in any sum whatever on account of the works performed by him on Section 18 of the Intercolonial Railway.

Though this completes the report of our opinion on the details of the account between the Crown and the claimant, yet, after the lengthened and thorough investigation which we have made into all the transactions concerning Section 18, so far as Mr. McGreevy took a part in them, we feel called upon also to point out some of the prominent features of those transactions, as well as the bearing of our views upon the claim as a whole.

The learned counsel who advocated the rights of this contractor before us contended, that inasmuch as the work was to be performed in the Province of Quebec, the disputes concerning it ought to be decided according to the laws there in force. He argued, that an agreement to follow whatever changes from the first plans an engineer in his discretion might dictate is too indefinite to be valid; that the clause 4 and other *clauses de rigeur* of the contract would, in Quebec, be held to be void, on the ground that the object of the obligation must be something determinate, at least as to its kind, quoting the Civil Code, article 1060;* and he contended that if

* "An obligation must have for its object something determinate at least as to its kind. The quantity of the thing may be uncertain, provided it be capable of being ascertained."

such clauses are ineffective, then the contractor should recover the full value of his work, irrespective of his bulk sum price, or any other agreement embodied in the contract concerning it.

We have not found that there is any difference in the principles which govern the courts of Ontario and Quebec in deciding the rights of parties under such a contract as this. Though this contract did not enable the claimant to see exactly what he might be called upon to do under it, it contained a provision for making that certain, and *certum est quod certum reddi protest*.

It would hardly be urged that an agreement to refer a dispute to arbitration must be void, because the particulars of the award that the arbitrator was to give were not mentioned. The clauses of this contract objected to on the ground of uncertainty virtually amounted to an agreement that all questions concerning changes from the original design should, as they arose, be referred to an arbitrator, the engineer, whose decision should be binding on both parties. As soon then as the decision was given it related back to the agreement, became part of it, and removed the element of uncertainty.

For the convenience of reference, we give the following Schedule A, showing the classes of the items allowed on each side of the account:—

SCHEDULE A.

SHOWING by classes the items allowed for or against the Claimant.

	Dr.	Cr.	Dr.	Cr.
			$	$
Bulk sum price				648,600
	Dr.	Cr.		
Arising out of changes in grade or location—				
Excess in bill of works over true quantities		$ 2,658		
Increase in rock excavation		16,164		
Diminution earth do	$35,809			
do crib-wharfing	19,120			
do masonry	6,579			
do paving	860			
Increase in hard-pan		1,800		
	$62,368	$20,622		
	20,622			
Net diminutions	$41,746*		41,746	
Prices fixed by agreement—				
Wooden superstructure, balance on			18,480	
Iron pipe culverts				7,739
Payments by Government—				
Paid to claimant			602,200	
Spent by Government	$41,897			
Less—In trimming banks, not contractors' work		$2,356		
" Rip-rap		2,500		
	$41,897	$4,856		
	4,856			
	$37,041			
			37,041	
Iron pipes sold to Government				5,276
			699,467	661,615
			661,615	
Balance against contractor on matters covered by agreement			37,852	
Extras beyond contract—				
Masonry improved in its class				8,000
Portland cement				6,450
Extra work through Salmon Pool				16,545
Road diversion				1,000
Expenses during stoppage at Millstream Bridge				944
			37,852	32,939
			32,939	
Balance against the claimant			4,913	

*N.B.—If the rates of the schedule attached to the tender, instead of the actual value under clause 4 of the contract, be applied to these increases and diminutions, this difference would be $36,898.75. (See Schedule C, page 84.)

This schedule shows that we have charged the contractor with the value of the wooden superstructure of bridges not supplied by him, according to the agreement between him and the Commissioners, made subsequent to the contract—and also that under the explicit language of clause 4 we have charged him with the net diminutions of work caused by changes of grade and location. In doing this we have applied rates to the works so saved at their actual value, though that was higher than the rates mentioned therefor in the schedule attached to the tender, and upon which he may have calculated his bulk sum price.* This principle of applying the rates at the actual value of the work saved or increased, as the case may be, is the one contended for by this claimant and all others who have yet appeared before us, and is, as explained in our first general report, the proper principle, in our judgment, to be applied to a decision of the rights of the parties under the contract. The effect of it, in this instance, is to make the contractor pay a higher rate for the work that was saved to him by changes of grade and location than he gets in his bulk price for the works which he finished: and we have declined to credit him with sinking the foundations of the Metapedia bridge 2 feet deeper than was shown to be requisite by the plans submitted to tenderers. Against these disadvantages, however, the evidence shows the elimination or diminutions of works from the original design due to causes other than changes of grade and location, which resulted largely to his advantage. They saved to him considerable sums of money, which, under the contract, are not chargeable to him and are not charged by us.

*See note to Schedule A.

Taking these things into consideration, the whole enquiry leads us to the opinion that if his bulk sum price was a sufficient one, neither the changes which took place in the design from new engineering views, or from facts discovered in the progress of the work, nor the application to his claim of the principles we have followed, would make his bargain a losing one.

He testifies, however, that he has spent on the works more than $200,000, beyond the amount which he has received. We have no means of knowing whether any of this loss is due to want of judgment, efficient management, or ample capital, but he gives, in evidence, a fact which makes plain the whole or much of the loss. He says that his section being the centre one of several, over all of which there was a great demand for labor, he had to pay, for so much of it as percolated through them to his, a price higher than would have been otherwise necessary; that this circumstance and a general rise in the price of labor over the country obliged him to give to his workmen wages from 50 to 60 per cent. higher than he estimated when making his tender, and then prevailed when he entered into the contract.

The claimant has laid before us a statement of the expenses to counsel and witnesses incurred by him during the investigation of his claim by Mr. Shanly and by us. We set them out in Schedule D, hereto appended.

In Schedule B, without grouping the items into classes, we show, in a simple debit and credit account, the separate amounts which we have allowed for or against Mr. McGreevy.

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

Hon. J. A. CHAPLEAU, Secretary of State.

P. S.—Since the above was signed we have been instructed, by Order in Council, to report, in all cases, our view of the liability, not only as it is after charging, as we have done in this case, for diminutions of work caused by the omission of the wooden superstructure for bridges, and by changes in grade or location, but also as the liability would be should the right to make such charges be waived by the Government.

In this case, withdrawing such charges would show a liability of $55,313 on and since 1st August, 1875.

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

Hon. J. A. CHAPLEAU, Secretary of State.

OTTAWA, 20th March, 1884.

SCHEDULE B.

Dr. SHOWING Findings for or against the Claimant. Cr.

Particulars.	Amount.	Particulars.	Amount.
	$ cts.		$ cts.
To Cash paid Mr. McGreevy	602,200 00	By Amount of contract	648,600 00
Decrease in earth	35,809 00	Percentage of excess on bill of works	2,658 00
Crib-wharfing saved	19,120 00	Increase of rock	16,164 00
Masonry do	6,579 00	do hard-pan	1,800 00
Paving do	860 00	Extra masonry on bridge	1,720 00
Bridge superstructures saved	20,200 00	Iron pipes and laying	18,283 00
Second-class masonry do	10,544 00	Government expenditure allowed	4,856 00
Amount spent by Government in completing the contract	41,897 00	Iron pipes taken by Government	5,276 00
		Second-class masonry equal to first	8,000 00
		Cement instead of mortar	6,450 00
		Crib-work through salmon pool	16,545 00
		Road diversion	1,000 00
		Delay in settling foundation of bridge	944 00
		Balance overpaid	4,913 00
	737,209 00		737,209 00

SCHEDULE C.

SHOWING the effect of applying the Tender rates, instead of the actual value, to the increases and diminutions caused by changes in grade and location.

	Diminutions.	Increases.
	$ cts.	$ cts.
Rock excess in bill of works, 567 yds., at $1.15		652 05
Earth do do 5,460 yds, at 30c		1,638 00
Increase of work in rock, 8,980 yds., at $1.15		10,327 00
Decrease of work in earth, 119,366 yds, at 30c	35,809 80	
do crib-wharfing, 2,390 lin. ft., at $3	7,170 00	
do masonry, 731 yds., at $8	5,848 00	
do paving, 172 yds, at $4	688 00	
*Work in hard-pan, 3,000 yds., at —		
	49,515 80	12,617 05
	12,617 05	
	36,898 75	

NOTE.—There is no rate for this material in the schedule to the tender. This quantity is included in the earth quantities on which there is the difference above mentioned,

SCHEDULE D.

SHOWING the Claimant's disbursements to Counsel, Witnesses, &c., during the investigation before Mr. Shanly, and before this Commission.

	$ cts.	$ cts.
Before Mr. Shanly.		
To Hon. George Irvine, counsel	400 00	
Holland Bros., copy of evidence	42 10	
H. Townsend, witness	52 90	
Martin Murphy do	64 00	
Peter Grant	80 00	
James Lowrie	108 84	
Germain Michaud	5 00	
		752 74
Expenses incurred in measurements, statements, and attendance at investigation—		
C. Odell, time and expenses	622 00	
Assistant's do	699 98	
		1,321 98
		2,074 72
Before the Commission.		
To J. A. McDonell, counsel	75 00	
D. Girouard do	1,697 00	
Holland Bros., copy of evidence	220 00	
Printing factum, &c	40 00	
S. Keefer, C.E., witness*	58 00	
Hon. George Irvine (22nd Nov.), counsel	120 00	
		2,210 00
		4,284 72

*This is in addition to witness' fees as the ordinary tariff which were paid by us to Mr. Keefer.

G. M. CLARK.
FREDK. BROUGHTON.
D'ARCY E. BOULTON.

SPECIAL REPORT ON CLAIM OF SMITH & PITBLADO, $78,013 85.

This demand is for work alleged to be outside a contract, under which Messrs. Smith & Pitblado constructed Section 4, extending from Amherst to River Phillip, about 24½ miles.

This section was originally let to Messrs. Elliott, Grant & Whitehead for $297,000, but the Government took the work out of their hands early in 1870, after which it was re-let to the present claimants for the lump price of $438,325. The contract dated the 25th day of May, 1870, containing a covenant on their part to complete it by the 1st July, 1871.

As originally laid before us, the demand amounted to $76,875.75, and was then in the same shape in which it was claimed by the contractors soon after the completion of the work, but in the course of our enquiry it was increased by adding Item 49 ($1,000) and by changing Item 3 from $135 to $-73.50, which after rectifying some errors in the addition, makes the whole amount claimed before us $78,013.85, of which the particulars are set out in Schedule A, hereto attached. The work under this contract was, in the spring of 1872, advanced far enough to permit of track-laying and ballasting, and the Section was opened for traffic about the end of the year. The original claim, amounting as aforesaid to $76,870.75, was in May, 1873, referred for consideration to Mr. Schreiber, who had been in charge of the section as district engineer, and in August, 1873, after visiting the section and inspecting the works, he made a report to Mr. Fleming, the Chief Engineer, which he said was "simply a statement of the value, in his opinion, of the works they (the claimants) enumerated,

and was not intended as any expression of opinion as to the propriety of the claims themselves." Mr. Fleming not being willing to recommend any course in regard to the claim, the Commissioners selected items which, according to the said valuation of Mr. Schreiber, amounted to $9,233 65, and they recommended the Government to settle with Messrs. Smith & Pitblado by adding that amount to the bulk price, and deducting from the whole the value of the wooden superstructure of bridges which, under an agreement subsequent to the contract, had been omitted by the contractors, on the understanding that they were to be charged with the value of it, at the rates mentioned in the schedule attached to their tender. The account in that shape showed a balance due to the contractors of $5,988.65, after taking credit for $438,070 previously paid to them on account. In their recommendation to the Government the Commissioners stated the account, as follows :—

Contract sum	$438,325 00
Less work not executed (wooden superstructure)	3,500 00
	$434,825 00
Add amount allowed by Commissioners	9,233 65
	$444,058 65
Deduct amount paid	438,070 00
Balance due	$5,988 65

We set out, in Schedule B, hereto attached, the items comprised in the $9,233 65 thus placed to the credit of these contractors.

The balance above shown was offered to the claimants on condition of their giving a receipt in full of all demands, which they refused to do, and in February, 1877, they laid their claim ($76,875), by petition of right, before the Court of Exchequer. The Attorney-General, on behalf of Her Majesty, demurred to the petition, on the ground that the contractors did not allege that a final certificate had been given by the Chief Engineer, as provided for in clause 11 of the contract, without which there could be no valid claim (as a fact it had never been given). The demurrer was at first overruled; but, on appeal, the Supreme Court reversed that decision and sustained the demurrer, dismissing the petition with costs. Matters remained in this state until June, 1879, when the Minister of Railways and Canals made a recommendation to the Privy Council, in this and several other cases, "that in all cases where the statement (accompanying his recommendation) shows a balance to be admittedly due to the contractors, authority be given to pay such sums as therein appears to their credit, the said sums being paid without the signing of a final receipt on the part of the contractor." An Order in Council giving effect to this recommendation was passed and, in accordance with its terms, the sum of $5,988 was paid to Messrs. Smith & Pitblado on their giving an ordinary receipt for the amount, without any further acquittance, the costs of the demurrer and hearing being paid by them out of the $5,988.65.

The claimants having refused to adopt the settlement proposed by the Railway Commissioners, as above mentioned, and the Government having consented that they should receive the sum offered, without discharging any portion of their whole demands not covered by that amount, we conclude that we should treat both sides of the account as now open for investigation, crediting the contractors with such amounts as we consider to be properly allowable, and debiting them with the said $5,988.65 paid as aforesaid, as well as the $438,070 previously paid.

We proceed to take up the items of the demand *seriatim*, and it may be here stated that throughout our enquiry the claimants adopted, with a few trifling exceptions, the quantities and measurements given by Mr. Schreiber in his report above mentioned.

Item 1.

Alteration of alignment after completion of road bed.....	$800 00

The claimants have furnished particulars of this item, as follows :—

Clearing	$ 63 56
Earth, 2,672 yds.....	721 44
	$800 00

Clause No. 4 of the contract provided that the bulk price should be altered, and an addition made to it by the value of an increase caused by a change of location; therefore, this work is of a class upon which a contractor may properly base a claim. The only question concerning it must be the quantity, if any, and the value to be allowed.

The change in this case was at the east end of the section, and was made after some work had been done on the original location. The alignment was altered because the crossing of River Phillip (on the adjoining section, No. 7) was to be at a point different from the first planned, and a short curve to the north, not originally designed, was made on Section 4.

In ascertaining the amount to be allowed on this item, one must consider not only the work done on the original location and abandoned, but also the increase, if any, on the new location, beyond what would have been necessary if the first one had been adhered to.

When this claim was submitted to Mr. Schreiber, in 1873, as aforesaid, he communicated with Mr. Archibald, an engineer, on the spot, and asked him to report upon the case, in answer to which Mr. Archibald wrote that 250 yards had been abandoned on the old location.

Acting upon this information, Mr. Schreiber valued the work on Item 1 at—

Earthwork, 250 yds., at 26c.....	$65 00
Clearing 2 acres, at $20.....	40 00
Grubbing half an acre, at $100.....	50 00
	$155 00

The evidence before us leads to the conclusion that this allowance of 250 yards was insufficient.

The claimant expected to support this item by the evidence of an engineer who had been engaged to make measurements independently of the Government officials, but it was ascertained that he had not done so, and had depended on them for his figures; therefore he was not called. Mr. Pitblado, one of the claimants, stated that they had excavated, on the new location, 2,670 yards, in addition to any quantity which had been moved on the old location and abandoned. Mr. Henshaw, who was in charge of the works as Government engineer, during the construction, was a witness before us; but, though he remembered the circumstances generally, he was unable to speak with certainty as to quantities. He made calculations as well as he could at this distance of time, and his evidence leads us to think that the report of Mr. Archibald omitted ditching and some other work which was necessitated by the change over and above the work which was, strictly speaking, "abandoned," and in that way did not communicate to Mr. Schreiber the full particulars upon which the claim of the contractors ought to be decided. The ground fell away from the original location on the north side, and therefore the new embankment was higher than it would have been on the old line. It was proved that the 2,670 yards were moved on the new location, but the plans produced and the evidence of the witnesses failed to show satisfactorily the quantities which would have been moved on the first alignment. Mr. Henshaw was clear that the work was increased by the change of location. On the whole, we think that the change in question increased the earthwork

about 1,000 yards, which we allow to the claimant, and we credit altogether, on this item:—

Clearing 2 acres, at $20	$ 40 00
Grubbing half an acre, at $100	50 00
Earthwork, 1,000 yds., at 27c.	270 00
	$360 00

Item 2.

Delay and expenses attending alteration of alignment metioned in Item 1, and forming drain	$200 00

Made up as follows:—

Outlet ditch	$ 20 79
Detention expenses	179 21
	$200 00

In Mr. Schreiber's report, above mentioned, he says that while the report was being prepared Messrs. Smith & Pitblado were ordered to stop work, but he was unable to learn that it cost them anything. Mr, Pitblado testified before us that he made one payment of $50 to a sub-contractor, entirely because of this stoppage, but he would not be positive that he paid any more.

The evidence shows clearly that a delay did occur, during which the men might have to be paid without rendering any service, and we think this is within the meaning of clause 7 of the contract, which permits the Commissioners to stop the progress of the works over the whole or any part of the line, as to them may seem proper and, if they think fit, to make some compensation therefor to the contractors. We think it proper to allow the $50 paid by Mr. Pitblado, not the $179.21 claimed by him. The remainder of this item ($20 79) for the outlet ditch, is for work really done on a portion of 6 and 7, beyond that to which the contract referred. It was fully substantiated by evidence, and being work independent of that covered by the contract we allow it, giving credit to these claimants on Item 2 for $70.79.

Item 3.

Alteration of post-road crossing after having completed it—	
Earth excavation, 50 yds., at 26c	$ 13 50
Rock, 260 yds., at $1	260 00
	$273 50

This item appeared in the contractors' claim when it was referred to Mr. Schreiber, as aforesaid, and in its original shape before us as a claim for 500 yards of earth-work at 27 cents, $135, but that form was abandoned and it was put into its present shape. The evidence showed that the original public post-road was for a time kept open at an angle across the railway, but proving impracticable for some purposes, hauling spars among others, a detour on each side was ordered, so as to make the crossings square across the line. This necessarily lengthened the approaches and made the work more expensive to the contractor than if he had been permitted to continue the shorter line first used, as aforesaid. It was soon found that the earth on the new road would not answer permanently without a stone covering, which was ordered by the engineers and supplied by the contractors.

The bill of works for this section pointed out, that for the bulk sum the contractors would be required to furnish road crossings and diversions and "also all excavation in approaches not already included in common excavation and every

thing else required to complete all road crossings and road diversions," and the language of the contract itself is in keeping with that understanding.

We are of the opinion that this whole work was covered by the contract price and we allow nothing on Item 3.

Item 4.	$ 8 00	Item 24.	$425 00
" 4.	181 50	" 24.	367 50
" 8.	22 50	" 24.	16 00
" 8.	351 00	" 25.	42 00
" 8.	100 00	" 26.	4 50
" 10.	30 00	" 27.	40 50
" 10.	174 00	" 27.	558 00
" 10.	81 00	" 27.	108 70
" 21.	145 00	" 28.	52 50
" 21.	1,035 00		
" 22.	98 25		$3,947 95
" 24.	106 50		

The particulars of these items are given in Schedule A, as hereinbefore referred to. They are all of a class claimed by Messrs. Smith and Pitblado, as well as by all the other contractors whose cases have come before us, for the construction of the railway up to formation level. The work for which these items are demanded was occasioned by a change of design during the progress of the works. In our general report we have explained our views concerning this class of work at some length, and we there describe it as 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. It will be noticed that some of these items contain no charge for masonry, but in most of them a claim is made for increased masonry, and generally for other work in connection with it.

We do not give any opinion as to the value of the work mentioned in any of these items, for we think none of them is allowable. If it were otherwise we should have to say that the evidence does not establish that value as anything like the amount charged.

The contention of the contractors, concerning the class of work, may be shortly described as claiming for each change of design, of whatever description it may be, and for every structure for which it occurs, the increased cost to them over the cost of that structure according to the first design, though the change of design over the whole section may have, in some places omitted, structures altogether, and in some made them less expensive than they would have been under the first plan. They claim, in short, to profit to the full extent of every saving in every spot caused by any change of design, and to be paid extra for every increase of work in every spot caused in the same way. Nothing short of this sweeping demand would help them; for should they admit, that in deciding their rights the effect of all the change of design should be considered together, their claim would disappear, inasmuch as they were invariably permitted to finish the work on a design which, as a whole, was less expensive to them than the first would have been. In the case of these contractors, they were called upon to open up some embankments that had been finished by their predecessors to the satisfaction of the engineers for the time being, and to introduce culverts which, at first, had been thought not necessary. For such work as this they claim Items 6, 8, 23 and 30, which we take up hereafter. On those they are allowed what we consider proper for that kind of work, but at present we are dealing with work which was part of their own contract—masonry and other things connected with structures of which the design was altered, more or less, during the progress of the work. As far as the claim of these contractors on these items is concerned, it is not necessary to resort to the savings which were effected in all the classes of the work over the contract, as an answer to their demand concerning this increased work in structures of masonry, because the changes in such structures alone, as we

think, made the new design, as a whole, less expensive to them than the first one would have been. Mr. Pitblado was, as before mentioned, a witness before us. He produced a copy of the original bill of works, showing each structure originally planned, and the quantity and class of masonry of which it was to be built together with paving, concrete, &c., and on this document he had marked those structures which were built, and some which were omitted and replaced by aboideaux, and he had also recorded the quantity of masonry by which each structure, as built, had exceeded or fallen short of the quantity originally estimated for it. If his views were admitted to be unquestionably correct, his examination disclosed the following state of affairs. The bill of works stated the total masonry as follows :—

First-class	6,550 yds.
Second-class	9,320 "
	15,870 yds.

Mr. Pitblado said that second-class masonry was worth $8.50 per yard more than that. The schedule, attached to his tender, gave the rate as $12.50 for first-class, and $8.50 for second-class, or 50 cents per yard for first-class more than stated in his evidence.

Taking only the lower rates, the original design included :

6,550 yds., first-class, at $12	$ 78,600 00
9,320 yds., second-class, at $8.50	79,222 00
	$157,822 00

He said he actually built of first-class masonry in the structures originally intended to be of that class, 5,942 yards, and a further quantity, by improving some of those originally intended to be of second-class, of 683 yards—in all, 6,625 yards of first-class and of second-class, a total of 4,685 yards—in all, 11,310 yards of masonry. The quantities thus built at the above rates were worth :—

6 625 yds., first-class, at $12	$ 79,500 00
4,685 yds., second class, at $8.50	39,823 00
	$119,323 00

This shows a saving in masonry, by the changes of design, of $38,499, but that was not all gain.

Some of the savings in the second-class masonry was effected by doing away with culverts and conducting two or more streams through one, instead of through separate openings, as originally intended, which involved making ditches for the diversion of some of those streams.

Mr. Pitblado was asked to give us an estimate of the cost to him of making these diversions, but he could not do so with anything like accuracy, because he had never before tried to make such an estimate. He said, however, that he was satisfied to have it called 40,000 yards, at 35 cents, or $14,000. That reduces the saving to $24,499, but to get this, he built, also, some aboideaux, instead of culverts. A general description of aboideaux is given by Mr. Fleming in his historical sketch of the Intercolonial Railway, as follows :—

"In the meadow lands or marshes, which would be covered by the high tide, aboideaux have been built across the embankments to keep back the rising tides. They are square wooden culverts, generally about 3 feet 6 inches wide, each side made of three square logs, laid transversely to the railway, the top and bottom being of square logs, laid at right angles to the sides;" and he proceeds to give further details concerning the mode of their construction. In our investigation it was not possible to get any precise evidence of the value of the particular aboideaux so sub-

stituted for culverts, as aforesaid, because no account had been kept of the cost of their construction, but in the bill of works, and in the schedules upon which tenders were to be made, it was intimated to persons desiring to contract for these works that in some instances aboideaux might be substituted for masonry culverts, and they were asked to give for particular localities (numbered stations) the prices which they estimated as the value of aboideaux, and these claimants did so. In the absence of any better evidence, we think it may be assumed that the values given by them are approximately correct, concerning the aboideaux to which they relate. They are given for six separate places, viz., at Stations 201, 237, 288, 355 and 400, for which the claimants named $500 as the value of each station, and at Station 418, for which they named $650. Culverts were omitted at three out of four of the $500 stations above mentioned, and at one other station which is not clearly shown to be one of those above mentioned. For the whole aboideaux actually built, Mr. Schreiber, in a final estimate, states the aggregate value to be $2,000, so that there is strong reason to believe that the value of the four built in place of the omitted culverts would be about $2,000. Deducting that from the savings already mentioned, would leave the balance in favor of the new design, $22,499.

Of course, we are not able to say whether this is accurate or very nearly so, but even taking Mr. Pitblado's version of the whole transaction concerning masonry, and the extent to which it was altered by changes of design, we have no hesitation in saying that the change, as a whole, was to the advantage of the contractors. That version, however, was not altogether correct; it estimated the cost of the first design too low. The bill of works did give, as he mentioned, the totals above mentioned, that is 6,550 yards first-class, and 9,320 yards second-class, but that was plainly an error, for one of the large sized structures, requiring 1,215 yards of masonry at Station 508, was mentioned without showing the double asterisk which denotes first-class masonry, and apparently for that reason it was included in the addition of second-class masonry, which showed the total of that as 9,320 yards, instead of 8,105 yards, and the same error gave the first-class as 6,550 yards, instead of 7,765 yards, as it ought to have been.

The specifications, however, which were attached to the contract and formed part of it, showed that a structure of that size was to be built of first-class masonry, and Mr. Pitblado, in his evidence, always spoke of the culvert at Station 508 as a first class structure; but in making his calculations leading to the results which we have before shown, he inadvertently dealt only with the totals mentioned in the summary at the end of the document, which contained the error already pointed out. Rectifying that error would add to his saving $3.50 per yard on 1,215 yards, or $4,252, making it $26,751 instead of $22,499, as before mentioned.

On the other hand, Mr. Pitblado stated that he built first-class structures with 806 yards of masonry less than was originally estimated for those identical structures, intimating that he could have carried out the first design, valuing it still at $12 a yard, for $9,672 less than we have assumed as its probable cost to him. If this be correct, then his saving by the change of design over the whole masonry would be $19,079, instead of $26,751, as above stated. Of this 806 yards, however, which he speaks of as a saving in masonry, a quantity between 400 and 500 yards was saved at the Little Forks bridge by using a pile foundation instead of masonry, as was originally intended. Mr. Pitblado stated, in his evidence, that the whole work connected with that pile foundation was about $5,000, which would be, in round numbers, about the value of the masonry thereby saved. There is another matter connected with the savings to the contractors by change of design, which is not always considered in comparing the cost of the structures in masonry originally designed with the work of that kind actually done, and which ought to be noticed to give a correct idea on the subject; that is to say, the value of the excavation for the foundations, and of the paving and concrete for the different structures. In this case the cost of the concrete, masonry, paving and foundations alone was something over $13,000, basing these amounts upon the quantities given in the bill of works and the rates mentioned in the tender schedule.

Thus about 8 per cent. of the whole cost of the structures was due to these minor items. We have made no calculation concerning the cost of the excavation, paving or concrete, which would have been actually required for the structures which were omitted or diminished, nor have we the information which would enable us so to do; but assuming that on this section the relative cost of the paving, concrete and foundations was over the whole work proportionate to the masonry, we would have to add 8 per cent. to the value of the masonry saved, in order to show the whole saving effected by the change of design in masonry structures, and this would bring up the amount from $19,079 to $20,605.

The evidence of Mr. Pitblado included those structures completed by his predecessors, and which took 545 yards; but it makes no difference in the result, whether that quantity be included or omitted on both sides of the account.

However much the details to which we have alluded may vary the difference in value between the first and the last design, the answer to the main question seems to us to be always the same. The last one was the least expensive to the contractors, and we allow nothing on the items now under consideration, amounting altogether to $3,947.95.

Item 5	$1,641 50
" 5	5,062 50
" 5	36 00
" 5	549 00
	$7,289 00

This item is for work of the same class as is mentioned in Item 4, and the others which we have just discussed, and must be disposed of in the same way, with this exception: Item 5 contains a charge for loss on cutting stone, occasioned by the enlargement of an arch culvert after the stones had been prepared for it according to the size at first designed, the change requiring some of them to be cut and dressed over again so as to suit the larger arch. In Mr. Schreiber's report, before mentioned, this loss was estimated at $150, and on this, Item 5, we allow that amount.

Item 29.

Extra timber superstructure for culverts, not originally contemplated, 365 c. ft. $54 00

This item is also for work of the same class as Item 4, and must be disposed of in the same way, with this exception, that it contains a charge for timber furnished in consequence of an enlargement of a culvert. The evidence is not complete enough for us to say, satisfactorily to ourselves, whether this is, properly, an extra, but it was valued by Mr. Schreiber at $5,475 and allowed by the Commissioners at that sum, and the facts not being clear, we give the contractors the benefit of the doubt, and credit them with $5,475 on Item 29.

Item 6.	$ 348 00	Item 23.	$ 45 00
" 6.	120 00	" 23.	556 00
" 6.	1,197 00	" 30.	37 50
" 6.	40 00	" 30.	450 00
" 6.	318 00	" 30.	48 00
" 9.	249 00	" 30.	5 40
" 9.	100 00	" 30.	12 00
" 9.	1,026 00		
" 9.	172 00		$4,732 90
" 9.	30 00		

The particulars of these items are set forth in Schedule A, before mentioned.

The work was done by the present claimants after the embankment in each case had been completed by their predecessors. It was conceded by the Commissioners

and the engineer, at the time of reporting on this claim, as aforesaid, and we agree in the opinion that Messrs. Smith & Pitblado ought to be paid a fair value for the work on which these items are based. We have, therefore, to consider whether the amount allowed for the work is fair, under the circumstances.

The evidence shows that moving the earth, as it was done, would be much more troublesome and costly than taking it from an ordinary cutting and placing it in the embankment, for the embankment in these cases was opened after it was completed, the material carried along for some distance and deposited on the sides with more care and labor than would be requisite in making the embankment originally, and after the culvert mentioned in the item had been reconstructed, the material was again moved up from the sides of the embankment to the top, and after being carried along, it was deposited in the opening.

On the evidence, we think 30 cents a yard for the excavations of foundations equally reasonable. Therefore, we allow those rates for the quantities given, as aforesaid, by Mr. Schreiber. The schedule rates for masonry were $8.50 for second, and $12.50 for first-class. If $8.50 was a reasonable price for ordinary second-class masonry (and, upon the evidence, we think it was not too high), there is strong reason for saying that, under the circumstances in which this work was done, it would be worth as much as claimed by these contractors, viz., $9 a yard, and we allow it at that rate.

For the paving and other details of these items, including the timber, &c., we adopt Mr. Schreiber's prices and quantities, the latter being admitted as correct by the claimants.

Acting on these opinions, we credit the claimants with the following sums:—

Item 6.

Excavation in embankment, 1,160 yds., at 30c.....	$ 340 00
" foundation, 160 yds., at 50c.....	80 00
Masonry, 133 yds., at $9.....	1,197 00
Paving, 7 yds., at $4.....	28 00
Replacing embankment, 1,060 yds., at 30c.....	318 00
	$1,971 00

Item 9.

Excavation in foundation, 332 yds., at 50c.....	$ 166 00
Laying timber in foundation, 800 ft., at 10c.....	80 00
Second-class masonry, 114 yds., at $9.....	1,026 00
Paving, 43 yds., at $4.....	172 00
Bridge on post-road, outlet of culvert, $80.....	80 00
	$1,524 00

Item 23.

Excavation, culvert foundation, 58 yds., at 50c.....	$ 29 00
Masonry, 60 yds., at $9.....	540 00
Paving, 4 yds., at $4.....	16 00
	$585 00

Item 30.

Excavation, culvert foundation, 70 yds., at 50c.....	$ 35 00
Masonry, 37 yds., at $9.....	333 00
Paving, 7 yds., at $4.....	28 00

Rip-rap, 4 yds., at $2	8 00
Excavation, inlet and outlet, 10 yds., at 30c	3 00
Timber superstructure, 45 ft., at 18c	8 10
	$415 10
Making on the four items	$4,495 10

Item 7.

Stone box-drain across road bed $75 00

This was for work which contractor said he had not anticipated as necessary, and that seems the only reason he could give for making claim on account of it. As a fact, it was necessary, because water appeared in the cutting that was not expected. He admits that the engineers adopted the least expensive way to him to carry it off, and being rendered necessary by the natural features of the place, we have to say that it was fairly and properly within the intention of the parties and within the meaning of the contract which was entered into between them, by which the bulk price was to cover all works necessary for completing the contract.

We allow nothing on the item.

Item 11.

Stone box-drain across road bed $75 00

This is a case exactly similar to the one upon which the last item is based, and we allow nothing on Item 11.

Item 12	$ 28 50	Item 35	$ 21 00
" 13	213 75	" 36	132 00
" 14	45 00	" 39	33 00
" 15	63 00	" 40	39 71
" 16	559 50	" 41	139 50
" 17	30 00	" 43	189 75
" 18	21 00	" 47	16,200 00
" 19	95 25	" 48	5,400 00
" 20	42 00		$23,357 96
" 33	22 50		
" 34	82 50		

The particulars of these items are set out in Schedule A, before mentioned.

These items are all admitted to be based upon the fact that in carrying out the work the contractors met with material in the foundations mentioned, or in other excavation, of a kind or a quality different from that which they expected to find, judging from the information contained in the bill of works; or, if the material was the same, the quantities moved were greater than they anticipated.

We have given our views at some length concerning this class of work in our general report. It is there mentioned as clause 4, and as 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 quality differing from that of the first plan.

We have not examined closely the extent or the value of the work in this class done by these claimants, for we think it was clearly within the meaning of the parties to be covered by the bulk price of the contract.

If the cost of the work was diminished because the material was not so expensive as was expected when the bulk price was named, the contractor gets the benefit of the saving; if it was more expensive, he must bear the loss.

We allow nothing on these items.

Item 31.

Removing and rebuilding masonry, "Little Forks," consequent upon alteration of plan.....	$ 300 00
Piling and concrete required for foundation.....	5,000 00

Item 32.

Extra expense attending do, purchase of engines, pumps, &c., and loss sustained, &c.....	$15,000 00
	$20,300 00

The bridge at this place, "Little Forks," could not be built upon a foundation so near the surface as was expected. Instead of finding rock, where the bill of works indicated it as possible, it was ascertained that the contractors would have to go deeper, in order to get a satisfactory foundation.

The engineers on the spot, Mr. Henshaw and Mr. Tremaine, thought that a silt foundation, which was reached a short distance below what they at first supposed to be a solid rock foundation, but which turned out to be only a shell of rock, would be sufficient, and upon the strength of their own judgment, they directed these contractors to prepare square timber for the foundation upon which to erect the masonry and, consequently, they brought to the place a quantity of this material. But Mr. Tremaine came to the conclusion that it would not be safe to adopt it finally without appealing to Mr. Fleming. Upon this being done, the Chief Engineer decided that a pile foundation should be made.

It is admitted by the contractors, as we understand the argument of their counsel, that if Mr. Fleming's decision was a proper one, they would have no claim; but they disputed that. Mr. Henshaw, who was a witness on their behalf, said he was convinced that if Mr. Fleming had known the facts as well as he, being on the spot, knew them, the timber foundation would have been considered sufficient, and that under the circumstances, Mr. Fleming's judgment was wrong. We do not think it necessary to offer any opinion upon the question whether Mr. Henshaw's judgment or Mr. Fleming's was the more correct one, because, by the contract, the parties agree that the decision of the Chief Engineer shall be binding upon both of them; that having been given in good faith, and notwithstanding the opinion of Mr. Henshaw, we assume it to have been given, also, for good reasons. We think it cannot enter into the discussion, therefore, we must treat the matter as if there was no question about Mr. Fleming's decision being a good one, as well as a binding one; and it follows that the main claim of the contractors on these items could not be allowed under the terms of the contract, because, as we have already mentioned at much greater length, in our general report, work of this kind, occasioned only because the physical features of the locality made a change unavoidable, must be held to be covered by the bulk price. Indeed, we could not hold the contractors to be entitled to be paid for work of this kind, as an extra, without treating, as idle words, the very plain language of different portions of the contract, as well as of the notices contained in the bill of works and in other documents which led up to the contract. The only matter connected with this foundation which we think could be urged as giving rise to a claim beyond the bulk price, was not dwelt upon by the claimants, viz., the timber brought to the place by the contractors at the direction of the resident engineers, and which they were forbidden to use for the purpose for which it was intended. We have no evidence upon the value of this timber, or whether it entailed any loss upon the contractors. It may have been used in other places, or sold for as much as it cost them, or they may have realized, in some other way, the whole value of it. At all events they did not consider it expedient to adduce any special testimony on this matter, and, therefore, upon the evidence, and on our reading of the contract, we do not think the claimants are entitled to any allowance on Items 31 or 32.

Item 37.

Alteration of cattle guards after completion..... $40 00

This item is for work which we consider altogether independent of the contract, and which might have been let to any other person as well as to the contractors. After the work was completed under the direction of the engineer, the cattle-guard in question was shifted to another place, involving an outlay, according to the valuation of Mr. Schreiber, of $40, which amount we allow on Item 37.

Item 38.

Timber for Skew bridge superstructure, aftewards abandoned.....	$250 00
Extra excavation of foundation, 200 c. yds., at 75c.....	150 00
	$400 00

The timber mentioned in this item was sold by the contractors to Mr. Higginson, for a firm in England, who had undertaken to furnish the superstructure of the bridges, and before us the claimants withdrew this demand for it. The remainder of the item is of the same class as Item 39, and others on which we have allowed nothing.

Item 42.

Building road bridge for road to Roache's Landing..... $1,060 00

This overhead bridge was not in the bill of works, and the claimants contend that it was not covered by the contract. It was certainly required only under a change of design at this place. Whether it should be treated as work independent of the contract is questionable, but the Commissioners having passed it to the credit of the claimants at the valuation made by Mr. Schreiber, we give them the benefit of the doubt concerning the facts which are not clearly proved, and we let the value, $800, stand to the credit of the claimants on Item 42.

Item 44.

Removing and re-building masonry to suit altered plan.. $100 00

At the Napan bridge a portion of the masonry required by the first plan was removed and re-built to suit the new design of iron instead of wooden superstructure.

The agreement by which the value of the omitted wooden superstructure was to be deducted from the bulk price (as it has been in this case) expressly provided that in respect to masonry the contractor should be at no loss.

We think the spirit of that agreement requires the claimants to be indemnified as far as concerns this masonry. The value of it is established by Mr. Schrieber at $100, which we allow.

Item 45.

Extra height of aboideau protection at Napan bridge, and filling bed of stream between abutments with stone. $8,000 00

The bed of the stream between the abutment of the Napan bridge was filled with stone which was not mentioned as work to be done in the bill of works, nor was it specially provided for by the tenders or any of the other documents, such as plans or specifications and a further change was adopted by making what is called aboideau protection instead of crib-work, which was at first designed, to protect the foundations of the bridge at this spot. Filling the bed of the stream with stone was, according to the evidence, a very necessary part of the work at this place. Without it the foundations of the abutments would not have been sufficiently protected and we think it was one of those contingences which are fairly within the meaning of the contract when it declares that the engineer may require from the contractor such

changes or such additions to the work originally designed as he may consider expedient, and that all such work shall be covered by the bulk price, unless caused by change of grade or location.

The aboideau protection, which was adopted instead of the stone-filled crib-work of the first design, is, in our judgment, also within the contract; but even if it were not, we could not say that its cost to the contractor was so much more than the cost of the first plan would have been, as to create any liability on the part of the Crown, beyond the amounts already paid to these contractors. Under the original design, the bill of works said: "The foundations will be protected by crib-work and stone-filling, 15 feet wide, placed round the sides and faces of the abutments to the height of 6 feet above low water, the solid being previously levelled off to re-receive it."

Before this design was carried out, it was decided to adopt aboideau protection instead of crib-work, as being more effective against the "scour" of the river. This work is composed of brush, carefully placed and fastened down with rough poles. Mr. Henshaw, the engineer under whose supervision it was done, said: "The brush is very small and the clay permeates it." This witness was examined upon the comparative cost of the two designs, yard for yard, up to the level first named (6 feet above low water). He said he did not "think there is a hair's difference between them;" and again he said he believed the first design, "if anything would have been cheaper."

The manner of building two kinds of protection has been fully described to us, and though Mr. Henshaw gives his opinion, as we have mentioned, we must say that a consideration of the materials employed, and the work to be done on each kind of protection, leads us to a different conclusion. We think the stone-filled crib-work would have been considerably more expensive, yard for yard.

Assuming, however, that, up to the level of 6 feet above low water, the two designs were equivalent, then the claimant's right to extra compensation would depend on whether the aboideau work above that was, or was not, within the meaning of the contract. Mr. Schreiber, after visiting this place and inspecting the work, with the special object of reporting on the claim, fixed $1,000 as the value, in his judgment, of this increased height of the work, and if we had to name a price, we could not state a higher sum.

According to the evidence, however, of Mr. Henshaw, this particular portion of the work was intended as a protection from the thrust from the land side of the embankment against the masonry, rather than to the foundations of the abutments.

The embankment which extended out to the masonry was not so likely to be moved in that direction, if held together by brush.

The embankment was, no doubt, a better piece of work, made as it was, than if the brush had not been placed in it, and was apparently somewhat more costly to the contractor; but we cannot say that all the changes of design taken together made the work, as a whole, more expensive to the claimants than if the first plan had been rigidly adhered to, and we think that, unless the change of design goes at least that far, the contractor must follow it without any addition to his bulk price.

We conclude, therefore, that we can allow nothing on this item.

Item 46.

Extra under-drains on Section, 15,000 ft., at 12c. per s. ft. $1,800 00

This is for an increase in the quantity of drains beyond that mentioned in the bill of works; but in the contract, the claimants agreed in effect that the quantities mentioned in the bill of works should not be binding on either side, and that if they should be exceeded by the necessity of the case, they would be furnished for the bulk price. There is no attempt to show that these under-drains were the result of any new or changed design, or caused by change of grade or location, or that for any other reason they ought to be allowed to the contractors.

As a fact, they did furnish under-drains to an extent beyond that mentioned in the bill of works as likely to be requisite, but in some classes of work they furnished less

than the bill of works stated, and all this uncertainty in quantities was a characteristic of the written contract, and of the speculative bargain which both parties intended to make.

We allow nothing in Item 46.

Item 49.

Pipes aboideau..... $1,000 00

This work was done in order to enable the salt water from the Bay of Fundy to pass through the embankment to the land of Mr. Pipes, upon which it was accustomed to flow. Unless some means had been provided for that purpose the embankment would have shut off the supply of water, and perhaps have given this gentleman a claim against the Government for injuries to his property.

It is evident that it was not built for any engineering reason, and was not a necessary part of the railway works. It was not designed until some time after the work had been commenced under the contract.

We think, under the circumstances, that it was altogether independent of the agreement made by these claimants, and should be construed as work not intended to be covered by the bulk price. We consider the amount charged a fair value for it, and therefore credit $1,000 on this item.

We give in Schedule C, the items which we allow to the claimants, and a statement of the whole account according to our views which shows the balance of $1,863 against Messrs. Smith & Pitblado.

Before leaving the subject, we think it proper to point out a feature of the transaction between the Crown and the claimants, which has not yet been taken into account.

The tender made by Messrs. Smith & Pitblado, and in which is endorsed a schedule of rates for the several classes of work, shows at the foot of that schedule the following memorandum:—

"In the event of aboideau, iron cylinders, or other structures being substituted at any points for the masonry structures mentioned in the schedule, a deduction to be made for the saving in quantities effected thereby, and an allowance made for the substituted structure at the price in the schedule."

This understanding was apparently by oversight, not embodied in the contract before signature. We have already shown, that four of the structures intended to be made of masonry, were replaced by aboideau, and Mr. Pitblado stated that he had thereby saved 1,474 yards of first-class masonry, for which his schedule named $12.50 per yard; and in addition to the masonry itself there is always, as we have before pointed out, a proportionate quantity of excavation in the foundations, and of paving and concrete for each culvert. Thus the value of the work omitted from the original design, in order that its place should be taken by aboideaux, would amount to over $18,000.

The evidence upon the value of the aboideaux, as well as the rates named for them in this schedule by the claimants themselves, show that their total value would be as aforesaid, about $2,000, so that in fact according to the intention of the parties at the time of making the bargain, the bulk price would be diminished by something like $16,000, more than it has been diminished in considering the rights of these claimants.

In our judgment, there is no liability from the Crown to Messrs. Smith & Pitblado on account of the construction on Section 4 of the Intercolonial Railway.

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

Hon. J. A. CHAPLEAU, Secretary of State.
OTTAWA, 7th March, 1884.

P.S.—Since the above was signed, we have been instructed by Order in Council to report in all cases our view of the liability, not only as it is after charging for the

diminution, if any, of work, by omitting the wooden superstructure of bridges, or by changes of grade or location, but as it would be should the right to make such charge be waived.

In this case, waving that right would leave a liability from Her Majesty to these claimants of $1,337, due on the 1st day of July, 1872.

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

OTTAWA, 20th March, 1884.

SCHEDULE A.

Detailed statement of work done and expenses incurred, beyond original estimate of engineers and not embodied within the terms of the contract, for Section 4, Intercolonial Railway.

Black River Sub-Division.

STATION			
1—	0-10	Alteration of alignment after completion of road bed.....$	800 00
2—		Delay and expenses attending do., forming drain on Section 7, &c.....	200 00
3—	85	Alteration of post road crossing—	
		Earth excavation, 50 yds., at 27c.....	13 50
		Rock excavation, 260 yds., at $1.....	260 00
4—	91 x 90	Enlargement of arch culvert from 6 to 8, span pairing, 2 c. yds., at $4.....	8 00
		Extra excavation of foundation, 415-173-242 c. yds., at 75c.	181 50
5—	110	Enlargement of culvert from 8 to 12 span; loss on stone...	200 00
		Change in class of masonry from 2nd to 1st class, 469 c. yds., at $3.50.....	1,641 50
		Extra masonry (874-469), 405 c. yds., at $2.50	5,062 50
		Extra paving, 9 c. yds., at $4.00.....	36 00
		Extra excavating of foundation (900-168), 732 c. yds., at 75c.	549 00
6—	130 x 76	Excavation of embankment, completed by Whitehead, and building additional culvert, embankment excavation, 1,160 c. yds., at 30c.....	348 00
		Excavation of foundation, 160 c. yds., at 75c.....	120 00
		Culvert masonry, 133 c. yds., at $9.00.....	1,197 00
		Paving and rip-rap, 10 c. yds., at $4.00.....	40 00
		Replacing embankment, 1,060 c. yds., at 30c	318 00
7—	151	Stone box drain across road bed.....	75 00
8—	161	Excavation of foundation for extra culverts, 30 c. yds., at 75c.	22 50
		Culvert masonry, 39 c. yds., at $9.00.....	351 00
		Culvert paving and rip-rap to outlet drain, 25 c. yds., at $4.	100 00
9—	172	Box culvert substituted for small beam at grade after the completion of embankment foundations excavated, 332 c. yds., at 75c.....	249 00
		Laying 800 ft. timber in foundation.....	100 00
		Masonry, 114 c. yds., at $9.00.....	1,026 00
		Paving and rip-pap, 43 c. yds., at $4.00.....	172 00
		Bridge on post road over outlet from culvert.....	30 00
10—	187	Culvert, in cutting excavation of foundation, 40 c. yds., at 75c.	30 00
		Masonry, 18 c. yds. at $9.00, $162; paving 3 c. yds., at $4.00, $12.00	174 00
		Outlet ditch from do., 300 c. yds., at 27c.....	81 00
11—	192	Stone box drain across road bed.....	75 00
12—	201	Extra excavation, culvert foundation (70-32)=38 c. yds. at 75c.....	28 50

13—224 x 40	Extra excavation, culvert foundation (500-215) 285 c. yds., at 75c	213 75
14—238	Extra excavation, culvert foundation (92-32)=60 c.yds.at 75c	45 00
15—253 x 70	" " (137-53)=84 c yds., at 75c.,	63 00
16—264	" " (1359-613)=746 c. yds.,at 75.	559 50
17—310 x 96	" " (65-35)=40 c. yds., at 75c....	30 00
18—332 x 70	" " (82-54)=28 c. yds., at 75c.	21 00
19—341	" " (529-402)=127 c. yds., at 75c.	95 25
20—355	" " (100-44)=56 c. yds., at 75c..	42 00
21—381	Arch culvert enlarged from 4 to 6 feet span; extra excavation of foundation (450-256)=194 c. yds., at 75c.	145 50
	Extra masonry (354-239)=115 c. yds., at $9.00	1,035 00
22—450	Beam culvert enlarged from 8 to 10 feet span; extra excavation of foundation (205-74)=131 c. yds., at 75c.	98 25
23—462 x 66	Excavation of culvert foundation, 60 c. yds., at 75c	45 00
	Masonry, 60 c. yds. at $9.00, $540.00; paving, &c., 4 c. yds., at $4.00, $16.00	556 00
24—471	Beam culvert enlarged from 8 to 10 feet span and from second to first-class; extra excavation of foundation (200-58)=142 c. yds., at 75c	106 50
	Extra masonry (139-105)=34 c. yds., at $12.50	425 00
	Change in classifications, 105 c. yds., at $3.50	367 50
	Paving and rip-rap 4 c. yds., at $4	16 00
25—526	Beam culvert altered from 6 to 8 feet span; extra excavation of foundation (114-58)=56 c. yds., at 75c	42 00
26—563	Extra excavation of foundation (64-58)=6 c. yds., at 75c...	4 50
27—585	Beam culvert; excavation of foundation, 54 c. yds., at 75c.	40 50
	Beam culvert masonry, 62 c. yds., at $9	558 00
	Paving, &c., 13 c. yds., at $4, $52; outlet ditch, 210 c. yds., at 27c., $56.70	108 70
28—670 x 90	Extra excavation, culvert foundation (210-140)=70 c. yds., at 75c	52 50
29—161x585	Extra timber superstructure for culverts not originally contemplated, or enlarged after delivery of timber, 365 c. ft	54 00
	Total on Black River sub-division	$18,213 45

Macan Sub-Division.

30—703 x 86	Beam culvert excavation of foundation, 50 c. yds., at 75c..$	37 50
	Beam culvert masonry, 50 c. yds., at $9	450 00
	Beam culvert paving and rip-rap, 12 c. yds., at $4	48 00
	Excavation of inlet and outlet, 20 c. yds., at 27c	5 40
	Timber superstructure for inlet and outlet, 70 c. ft	12 00
31—674	Removing and rebuilding masonry, "Little Forks," consequent upon alteration of plan	300 00
	Piling and concrete required for foundation	5,000 00
32	Extra expense attending piling and concrete, purchase of engines, pumps, &c., and loss sustained by stoppage of work in cuttings	15,000 00
33—657	Extra excavation of foundation (62-32)=30 c. yds., at 75.	22 50
34—647 x 74	" " " (190-80)=110 c. yds., at 75c.	82 50
35—549	" " " (60-32)=28 c. yds., at 75c...	21 00
36—508	" " " (720-544)=176 c. yds., at 75c.	132 00
	Alterations in masonry from 2nd to 1st class, 1,225 c. yds., at $3.50	4,287 50

37—426	Alteration of cattle-guards after completion	40 00
38—335 x 50	Timber for Skew bridge, superstructure afterwards abandoned	250 00
	Extra excavation of foundation (400-200)=200 c. yds ,at 75c.	150 00
39—315	" " " (76-32)=44 c. yds., at 75	33 00
40—256	" " " (85-32)=53 c. yds., at 75c	39 75
41—237	" " " (218-32)=186 c. yds., at 75c.	139 50
42—220	Building road bridge for road to Roache's Landing	1,060 00
43—201	Extra excavation of foundation (338-85)=253 c. yds., at 75c,	189 75
44—152	Removing and rebuilding masonry to suit altered plan	100 00
45	Extra height of "aboideau protection" at Napan bridge and filling bed of stream between abutments with stone	8,000 00
46	Extra under-drains on section, 15,000 ft., at 12c. per s. ft.	1,800 00
47	Extra rock excavation in excess of quantity for test pits, 18,000 c. yds., at 90c	16,200 00
48	Extra earth excavation, widening cuttings after completion, &c., amounting over whole section to 20,000 c. yds., at 27c	5,400 00
	Total	$58,800 40
	Amount brought down (Black River sub-division)	18,213 45
	Total upon entire section	$77,013 85
49—172	Pipes' aboideau	1,000 00
		$78,013 85

SAM. G. RIGBY, *Attorney of Petitioners.*

SCHEDULE B.

SHOWING the details of $9,233 65 proposed by the Railway Commissioners to be credited to Messrs. Smith & Petblado, on a final settlement.

ITEM.		
1.	Alteration of alignment after completion of road	$ 155 00
5.	Enlargement of arch culvert from 8 to 12 ft., after stone had been cut and dressed	150 00
6.	The completing of an additional culvert, and an excess of embankment on a portion of the work completed by the previous contractors, but subsequently ordered to be altered	1,717 20
9.	Box culvert substituted for small beam, after completion of the embankment	1,326 80
23.	New culvert put in after embankment had been completed	519 20
29.	Extra timber for superstructure of culvert which had been enlarged	54 75
30.	New beam culvert put in after embankment had been completed	370 70
31.	Removing and re-building masonry at Little Forks bridge, in consequence of change of plans	300 00
31.	Also, extra cost of foundations of Little Forks Bridge, which was shown on the plan to be rock close to the water, whereas it proved to be a very bad foundation, requiring piling, concrete, &c., being the excess of cost of this foundation	3,700 00

37.	Alteration of cattle-guard after completion.....	40 00
42.	Building a road bridge over a cutting at Roache's Landing. (This was an entirely extra piece of work, not at all contemplated when the contract was let).....	800 00
44.	Removing and building masonry to suit altered plans.	100 00
	Total.....	$9,233 65

SCHEDULE C.

SHOWING the items which are allowed by us; and a statement of the whole account.

	Contract sum.....	$438,325 00

Extras.

ITEM.		
1.	Alteration of alignment after completion of road bed.....	360 00
2.	Delay and expenses attending ditto, forming drain on Section 7, &c.....	70 79
5.	Enlargement of culvert, from 8 ft. to 12 ft. span...	150 00
6.	Excavation and building additional culvert.....	585 00
9.	Change of culvert, after embankment completed...	1,524 00
23.	Excavation and building additional culvert.....	585 00
29.	Extra timber, superstructure for culverts.....	54 75
30.	Extra beam culvert.....	415 00
37.	Alteration of cattle-guards.....	40 00
42.	Building road bridge at Roache's Landing.....	800 00
44.	Removing and rebuilding masonry.....	100 00
49.	Pipes' aboideau, extra.....	1,000 00
		$445,395 54

CR.

Payments on account of contract sum.....	$438,070 00	
Wooden bridge superstructure not executed.....	*3,200 00	
Payments made by Commissioners on Mr. Schreiber's report.....	5,988 65	
		447,258 65
Balance against claimants.....		$ 1,863 11

*In the account upon which the settlement was offered to the contractors this amount was stated at $3,500, as mentioned in our report.