1920
March 5.

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF THE PETITION OF RIGHT OF

GRANT, SMITH & COMPANY, AND McDONNELL LIMITED,

SUPPLIANTS;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Contract, Interpretation of — Evidence — Collusion — Progress — Estimates.

Suppliants contracted with the Crown for the building of two wharves and certain excavations at Victoria, B.C. They were to receive $9.10 per cubic yard for rock excavation and 52 cents for earth; and a certain sum per yard for filling. The Crown had soundings taken and test borings made; and maps showing the result of these measurements were filed. The contractor was to be paid rock prices for everything excepting material which could be removed with a dredge, which latter was to be classified as earth. The volume of all excavated material to be paid for, was that occupied by the material before its removal, to be determined by measurements taken before and after.

The total excavation is not questioned, but suppliants ask to be paid for some 19,000 cubic yards more of rock than the Crown's estimates show, and which the Crown says was material which should be classified as "earth."

Suppliants claim the material could not be dredged but had to be drilled and blasted; nevertheless their own records show that the drill went through it at a rate of between 100 and 336 feet per hour, which could not have been done in hard material; and an analysis of their records shows that as soon as they reached what the Crown admits was rock the rate of penetration falls to between 13 and 21 feet per hour which is a corroboration of the Crown's evidence and plans filed. The Crown also produced samples of material taken from the bottom and sides of the cut, which suppliants claim could not be blasted, yet they admit that some 6,000 yards of material was blasted which would be "earth."

Moreover, there were 51 men on the dredge and drill and not one was brought as a witness to establish the kind of material

excavated, and no evidence of the nature of the material taken out by dredge, was adduced.

Suppliants filed the "progress estimates" subject to objection, but the man who made them was not called, and by the Order-in-Council the Court is to determine the classification notwithstanding the findings or certificates of the engineer.

Held. On the facts stated, that the progress estimates did not in themselves make proof of their contents, and were not admissible in evidence unless the person who made them was called as witness; and that the material in question was not rock but earth within the meaning of the contract, and the estimates of the Crown were sufficient, and that part of suppliant's claim for the surplus should be dismissed.

2. That there was collusion between the resident engineer and the contractors and an attempted fraud was intended by him and the representatives of the contractors and that the estimates being certified by the resident engineer should be set aside.

3. Where the contract and specifications provide for the payment of a stated sum to the contractor for excavation and a stated sum for filling, and where the filling done was back filling and required no extra handling and was nearer than discharging into the open sea, such work will be considered as part of the excavating and removing operation and will not be deemed filling within the terms of the contract, and nothing will be allowed therefor.

PETITION OF RIGHT filed on behalf of the suppliants claiming against the Crown the sum of $292,110 for rock excavation, and the sum of $14,703 for earth excavation.

The suppliants also claim the further sum of $27,169.20 for filling the said works.

The facts are stated in the reasons for judgment.

The case was tried before the Hon. Mr. Justice Cassels, at Ottawa on the 17th, 18th, 19th and 20th days of June, 1919, and later on the 4th, 5th, 6th, 9th and 10th days of February, 1920.

Mr. Lafleur, K.C., and *R. A. Pringle,* K.C., for suppliants.

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Mr. Tilley, K.C., *Mr. Carter*, K.C., of Department of Public Works, and *F. E. Newcombe* for the Crown.

CASSELS, J., now (this 5th March, 1920) delivered judgment.

A petition of right filed on behalf of Grant Smith & Company, and McDonnell Limited, claiming against the Crown the sum of $292,110, for rock excavation, and the sum of $14,703 for earth excavation.

The suppliants also claim the further sum of $27,169.20 for material deposited as filling in the said works.

The case came on for trial at Ottawa on the 17th June, 1919, and continued during the 18th, 19th and 20th June. A considerable amount of evidence was taken, and on the 20th June, at the request of counsel for the suppliants the trial was adjourned to some day to be agreed upon by the parties.

The trial was resumed on the 4th February, 1920, and occupied the 4th, 5th, 6th, 9th and 10th days of that month. I mention the dates for the reason that before the adjournment of the June sittings, Mr. Davy had been examined, and the suppliants were fully aware of the line of defence proffered by the Crown, and in a position if they were able to do so, to have fortified their case by the production of whatever evidence could be procured. In view of Mr. Tilley's argument as to the failure of the suppliants to call Mr. Maclachlan, and some of the 51 men who were employed on the drill scows, this fact becomes important.

The contract in question was a contract entered into on the 9th March, 1914, between the suppliants of the one part, and His Majesty the King, repre-

sented by the Minister of Public Works of Canada, of the other part. It is a contract for the construction of two wharves at Victoria, and consisted among other works of excavation in earth and rock to a depth of 35 feet at low water over the slips at each side of the wharves, and to a depth of 36 feet over the area covered by the cribs. The contractors were to be paid 52 cents per cubic yard for earth excavation measured in place, and $9.10 per cubic yard for rock excavation measured in place.

Grant Smith & Company, the present suppliants, assigned this contract to one C. E. McDonald, on the 23rd April, 1915. By this assignment, C. E. McDonald was to be paid the sum of $7.00 per cubic yard for rock excavation to be drilled and blasted under the original contract entered into on the 9th March, 1914.

It would appear that C. E. McDonald was not in a position to do the work, and he sublet the drilling contract to McFee, Henry & McDonald, Limited, by a contract which bears date the 13th July, 1915. Under the contract McFee, Henry & McDonald were to receive for the rock excavation measured in place the sum of $4.00 per cubic yard.

The sub-contractors, who may be styled for the purpose of these reasons, the "drilling contractors" proceeded with the work, and claimed to be paid for 40,000 cubic yards of rock excavation.

The resident engineer, J. S. Maclachlan, allowed the drilling contractors a quantity amounting to 32,175 cubic yards of rock excavation, which would have yielded the contractors $9.10 per cubic yard. The Crown admitted that they were entitled to 13,060 yards. The suppliants claim in addition 19,040 yards. There is no contest between the parties as

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to the quantities of excavation. It is conceded that the total amounted to about 32,175 cubic yards. The suppliants on the one hand claim that the whole of this 32,175 cubic yards should be classified as rock excavation. The Crown contends that of the 32,175 yards of excavated material, only the 13,060 yards should be classified as rock excavation, and that the balance of 19,115 yards should be classified as earth. The difference is large as for the earth excavation, the contract only allowed 52 cents per cubic yard, whereas the rock excavation is to be paid for at the rate of $9.10 per cubic yard. I will deal later with the terms of the contract.

Under the terms of the contract the chief engineer was the sole judge, and had the Crown insisted upon their legal rights, Mr. St. Laurent's final adjudication would have been conclusive.

The question was dealt with at great length before the Public Accounts Committee of the House of Commons, in the year 1916. Subsequently an Order-in-Council was passed, bearing date the 19th September, 1918.

I am dealing only with the major claim in regard to this question of classification. There is a further claim which has to be dealt with later and which is provided for by a subsequent Order-in-Council, to which I will refer.

This Order-in-Council of the 19th September, 1918, recites the contract of the 9th March, 1914, and states: "that a conflict of opinion has arisen between "the Contractors, Grant Smith and Company and "McDonnell, Limited, and the engineer in respect of "the classification of material dredged and removed "by the contractors, the interpretation of the con- "tract and the specifications and the amount due by

"His Majesty to the contractors under the said con-
"tract, the contractors claiming that they are en-
"titled to be paid for a much larger quantity of rock
"excavation measured in place than the engineer has
"certified to in the final estimate;

"That the contractors allege that a large quantity
"of hard material has been drilled, blasted and exca-
"vated by them and that under the specifications and
"contract, this material should be classed as rock to
"be paid for at $9.10 per cubic yard and not as
"earth to be paid for at 52 cents per cubic yard.

The Order-in-Council recites, "the contractors
"further allege that, relying upon the progress re-
"turns of J. S. Maclachlan, resident engineer, the
"progress certificates of the engineer and the receipt
"of progress payments calculated on the said certifi-
"cates, they have paid to their sub-contractors large
"sums of money, and that the engineer has modified
"and varied the quantities of rock excavation men-
"tioned in said certificates; that the quantity of ma-
"terial in dispute as to classification approximates
"19,000 cubic yards."

The Order-in-Council further recites "that the
"contractors have submitted their claim in writing
"a copy of which is annexed to this report, and the
"Minister considers that the said claim may reason-
"ably be referred to the Exchequer Court of Canada
"for determination, subject to such modification of
"the contract or any of the provisions thereof as
"may be necessary to enable the Court to determine
"the proper classification of the excavated material
"certified by the engineer notwithstanding the find-
"ings or certificates of the engineer determining the
"quality or classification of the material excavated."

The Order-in-Council further recites: "The Min-

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"ister strongly recommends that in the event of a "Petition of Right being preferred and of a fiat be- "ing granted on the petition, authority be granted "for the waiving of the provisions of the contract "and specifications which would or might bar any "of the claims aforesaid, insofar, and insofar only, "as they would prevent a consideration of any such "claim on its merits aside from such provisions.

"The Minister, considering that the said claim "may reasonably be referred to the Exchequer Court "of Canada for determination, subject to such modi- "fication of the contract or any of the provisions "thereof as may be necessary to enable the Court "to determine the proper classification of the exca- "vated material certified by the engineer, notwith- "standing the findings or certificates of the engineer "determining the quality or classification of the ma- "terial excavated, recommends that he be authorized "for the purposes of the said reference to consent to "such modification of the contract as aforesaid.

"The Committee concur in the foregoing recom- "mendation, and submit the same for approval."

A question has arisen and was strongly urged before me by Mr. Lafleur, that under this reference and the petition of right, the suppliants have the right to put in as evidence and to rely upon the progress estimates furnished from time to time by the resident engineer, J. S. Maclachlan. I was of the opinion at the trial, and still adhere to the same view, that these certificates are not admissible in evidence as findings in favour of the suppliants. If the suppliant sought to rely upon statements made by the resident engineer Maclachlan, he should have been called as a witness. On the argument, Mr. Lafleur stated that

they had considered this question, and the view they had taken of the case was that if he were to be called, he should have been called by the Crown. I do not agree with this. It was for the suppliants if they could prove their case, to have proved it in the regular way.

At page 13 of the evidence as transcribed, evidence of statements of Maclachlan was tendered by Mr. Lafleur, Counsel for the Suppliants, and their reception as evidence was objected to by the Solicitor-General who states: "When these Orders-in-Council were "passed, my understanding of the matter was, that "anything that Mr. Maclachlan, the resident engi- "neer, had done, or said or written, or any certifi- "cates he had given, was to be excluded from the "consideration of the case."

"HIS LORDSHIP—What you say is that the whole "question is irrespective of what the engineer did, as "to the quantity (meaning classification).

"*The Solicitor-General*—Yes.

"HIS LORDSHIP—Is there any objection to it going "in subject to objection. I can see the force of your "point. You say the provisions of the contract have "been waived and it comes solely to the question "what the amounts were. The resident engineer's "certificate would not be evidence.

"*Mr. Lafleur*—I only want to fix on the date (re- "ferring to the letter that was tendered).

"HIS LORDSHIP—You could not utilize it for the "purpose of proving quantities.

"*Mr. Lafleur*—No. I only want to fix a date."

It was quite evident that at that time counsel took the same view as I had formed.

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Further on, after I had been complaining of the difficulty of dealing with the case, the following took place. It was during the examination of Mr. Mallory, at page 146 of the transcribed evidence.

Mr. Pringle states: "We are in a position to show, "I think with fair accuracy, the exact quantity of "hard material and rock removed out of the total "quantity of which there is no dispute of 60,000 "yards.

"HIS LORDSHIP—The engineers are not here.

"*Mr. Pringle*—The reason it reached you was be- "cause of the difference of opinion between the chief "engineer and Mr. St. Laurent. Everybody is wiped "out—you are the sole judge."

Mr. Pringle was counsel for the suppliants in the long investigation before the Public Accounts Committee, and was also one of the counsel in the present case. I think he graphically puts the case in a nutshell, in the language I have quoted; and, his view and mine coincide on the question of the admissibility of these estimates of the resident engineer being utilized as evidence of the classification, in the absence of the engineer to give evidence supporting them. They might just as well adduce evidence of statements made by the resident engineer Maclachlan.

I have dealt with this question, as some stress was laid upon it at the trial, at the same time, in the view I take of the case, I do not think it an important question. The conclusion I have arrived at is that the resident engineer was in collusion with the contractors, and that anything he certified should be set aside. It is impossible, after a thorough consideration of the evidence to come to any other con-

clusion, than that an attempted fraud was intended by the resident engineer and those representing the contractors. I regret to have to use such strong language, but will give my reasons in detail for coming to that conclusion.

The parties interested in obtaining as large a claim as possible are first the resident engineer, J. S. Maclachlan. The present suppliants were represented by J. B. Maclachlan, a brother of J. S. Maclachlan. C. E. McDonald was represented by Gordon Mallory; and the drilling contractors were represented by one Wooley, a member of the firm of drilling contractors, and a witness in the case before me. C. E. McDonald is dead.

It is important in dealing with the case to refer to some clauses of the contract. Clause 23 of the specifications reads as follows:

23. *Excavation*—The materials to be excavated, "consist of earth and rock which shall be removed "separately by two operations of ordinary dredging "and blasting. All the earth overlaying the rock "must be removed first; any quantity of earth which "is supposed to be sand and clay that may be remov- "ed at the same time as the rock, shall be paid as "earth. Over the crib sites, the rock excavation "shall be carried to a depth of 36 feet below datum; "in the slips on each side of the wharf, a depth of 35 "feet shall be obtained. Wherever no rock is found "for the crib sites at elevation 36.0, the dredging "will be carried down to elevation 36.0, or lower if "found necessary, and rubble stone will be deposited "and levelled as a foundation for the cribs. All ma- "terials overlaying the rock that can be removed "with a dredge shall be considered as earth.

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"The volume of all excavated material for which "the Contractor will be paid, will be that occupied "by the material before its removal and will be de- "termined by measurements taken before and after "its removal. Cross sections will be taken over the "surface of the rock and these measurements will de- "termine the classification of materials.

"Any excavation performed deeper than one foot "below the prescribed grade shall not be paid for."

Clause 56 of the contract, reads as follows:

"56. This contract is made and entered into by the "contractor and His Majesty on the distinct under- "standing that the contractor has, before execution, "investigated and satisfied himself of every- "thing and of every condition affecting the "works to be executed and the labour and ma- "terial to be provided, and that the execution of this "contract by the contractor is founded and based "upon his own examination, knowledge, information "and judgment, and not upon any statement, repre- "sentation, or information made or given by, or "upon any information derived from any quanti- "ties, dimensions, tests, specifications, plans, maps "or profiles made, given or furnished by His Ma- "jesty or any of His officers, employees or agents; "and that any such statements, representation or "information, if so made, given or furnished, was "made given or furnished merely for the general "information of bidders and is not in anywise war- "ranted or guaranteed by or on behalf of His Ma- "jesty; and that no extra allowance will be made to "the contractor by, and the contractor will make no "claim against, His Majesty for any loss or damage "sustained in consequence of, or by reason of any

"such statement, representation or information be- "ing incorrect or inaccurate, or on account of unfore- "seen difficulties of any kind."

The schedule is to be found in clause 36 of the contract. The approximate quantities for rock excavation measured in place is stated in the schedule to be 4,300 cubic yards. This was a mistake arising from the fact that only 75 feet was estimated in lieu of 150 feet width of east and west slips, but the difference is not material.

The contract is entered into based upon the engineer's estimates. Mr. Davy, who was the engineer in the employment of the government gives his evidence, and produces maps showing the original soundings and the test borings. There has been no successful attempt to question the accuracy of Mr. Davy's work, and on the contrary, as I will point out, he is fully confirmed by the various witnesses. I will refer later to the evidence of Mr. St. George.

I have referred to section 23 of the specifications where it is provided that the volume of all excavated material for which the contractor would be paid, will be that occupied by the material before its removal, and will be determined by measurements taken before and after its removal. Cross sections will be taken over the surface of the rock, and these measurements will determine the classification of materials.

There is no evidence before me showing the nature of the material that was taken out by the dredge, nothing from which one can arrive at the class of material. There is evidence, however, which to my mind is almost conclusive, taken from the drill records of the drilling contractors themselves, and it is obvious unless one has to abandon all common sense,

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that if we take those drill records and consider the speed with which the drilling took place, it would be impossible that they should be drilling through material that could not be easily dredged. All the drill records are produced. They have all been carefully analyzed, and there is no dispute as to them. The manner in which they were taken as described by the witnesses, is as follows:

The moment the drill struck harder material, the whistle sounded and the depth below low water was taken. As soon as the drill reached the 35 or 36 feet, as required by the contract, the extent of the penetration of the drill was calculated and this amount was treated and classified as rock, thus bringing up the total. Wooley in his evidence states, as follows:

"Q. Now, if your drill records show you are going "15 to 20 feet an hour, it looks as if they were going "through soft material? A. I would call that rather "soft, yes.

"Q. And if they are going more than 15 or 20 feet "an hour? A. They are going through still softer "material.

"Q. When you can get to material that you can go "through 100 feet an hour? A. It is hardly rock.

"Q. And 250 feet an hour? A. That is earth."

Again:

"Q. I am talking of a dredge like the 'Ajax' or the " 'Puget Sound'. When you get to material that you "can go through at the rate of 40 or 50 feet an hour, "I expect them to scoop it up? A. No, I would not "say they could or could not.

"Q. My information is that any first class dredge "will take that up? A. How did you get that infor- "mation?

"Q. From an engineer. You will hear him before "the trial is over. That would be approximately "right? A. Approximately, I would say so."

In order to bolster up his contention, Wooley asserts that there was a weight of four tons resting on the drill, which would practically force it to penetrate. It would penetrate anything of compacted material.

Belcore also states that there was a weight on the drill of four and a half tons. Both Wooley and Belcore must have known that this weight did not rest upon the drill. The weight referred to was a weight on the drilling apparatus, but was not allowed to rest on the drill rods. This is shown by Donaldson's evidence, and by other evidence, and it is manifest from what the witnesses state that had that weight rested on a drill from 30 to 50 feet in length it would have buckled. I think both of these witnesses made these statements with a view as far as possible to try and explain away the indisputable evidence against them furnished by their own drill records.

The computations are given by Mr. Davy in his evidence, and also by Holgate. Mr. St. George, in his evidence, tabulates the rate of speed. He refers to a plan, Exhibit "A, B", which shows the rate of speed of penetration over all the sections.

For instance referring to the speed of penetration, taking section 37, it appears that the rate per hour was 96 feet, 117 feet, 36 feet, 154 feet, 295 feet, 162 feet, 147 feet, 151 feet, 190 feet, 215 feet, 186 feet, 103 feet, 103 feet, and then when it gets into what is material that ought to have been drilled it drops to 17 feet, 21 feet, 18 feet, 13 feet, 13 feet, and so on it goes through each of the sections.

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Taking up section 38, we find 191 feet, 153 feet, 232 feet, 235 feet, 152 feet, 347 feet, and so forth.

Then taking section 39, we find 158 feet, 199 feet, 230 feet, 290 feet, 312 feet, and 336 feet, and so with the other sections.

This evidence has not been in any way met by the suppliants, and there is but one possible conclusion to be deduced from it, namely, that Mr. Davy's original soundings and measurements are practically correct.

Mr. St. George points out what is a very significant fact, that if Davy's original soundings are taken, it will appear that if this material through which it is said the drill penetrated at these rapid rates per hour are treated as earth, they practically correspond with Davy's original soundings prepared with care for the letting of the contract.

Now these facts were all brought to the notice of the counsel for the suppliants at the early trial in June. There has been no attempt made to refute them, and, I think there is great force in Mr. Tilley's contention that considering there were 51, at least, employees on the drill and the dredge, some one or other of them could have been brought down to corroborate the petitioners' claim. None of them have been examined.

There is nothing to proceed on except these original soundings and borings of Mr. Davy, and the evidence derived from the drill records. In addition to all of this, samples have been produced after the excavation was finished. They are taken from the bottom of the excavations; and from the sides of the excavations, and they all corroborate the soundings and borings of Mr. Davy.

The evidence of Mr. Valiquet is not of any force in my judgment, when it appears how his report came to be made. He evidently assumed at that time that the resident engineer was honest and accepted his statements. Mr. St. Laurent's evidence as to his examinations are convincing. I do not see anything inconsistent between his statements at the trial and his report.

Considerable comment is made upon the impossibility of using dynamite in material of that class. The witnesses refer to it by the term powder. In point of fact it is the same thing, but they mean dynamite.

If fraud was intended, it was easy to get rid of a certain amount of dynamite, where the object is to obtain $9.10 instead of 52 cents a yard. Mr. Wooley admits that they drilled and blasted, at all events, about 6,000 yards that should have been classified as earth. He puts it in this way:

"We did drill and blast approximately 42,000 "yards out of a total of 60,000 yards, that was in "the areas to be excavated. And my own best judg- "ment being on the work from day to day, leads me "to the opinion that there was ten or fifteen thou- "sand, not to exceed 15% of the material should "properly be classified as earth. That is, roughly "about 15%—that is about 6,000 yards."

He states further on, at page 35, as follows: "I "think I stated a few moments ago that there was a "quantity of 6,000 cubic yards in my best judgment "that was drilled and blasted through, but on which "we were not entitled to rock prices but should have "been classified as earth."

If they could drill and blast 6,000 cubic yards of material which should have been classified as earth, I

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do not see why they could not have been able to drill and blast in a similar manner the balance.

Mr. Wooley's evidence as to how he arrived at his estimate before tendering for the drilling work, is of a very loose character. He made no tests, but drew his conclusions from the plans which had been prepared and which he saw in the government office. He went to the shore apparently and took a bird's eye view of the situation, and made a few tests along the shore from a rowboat. He did not attempt to make any classification, and he also states that he had nothing to do with the making up of the estimates.

The other witnesses called for the suppliants hardly afford them much comfort. For instance, Irvine, who was called, was one of the inspectors. He points out that there was no classification in any work returned by him. He says: "I had nothing to do with the classification itself. That was a matter for the engineer."

"HIS LORDSHIP—But there is nothing on record so "far as your returns go, which would show—from "which a classification could be made? A. No.

"*Mr. Lafleur*—Q. You were acting for a time as "assistant engineer, and I suppose as such you were "doing some classification? A. No, I did not classify.

"Q. You did not classify? A. That was a matter "for the resident engineer?

"Q. Do you know on what he based himself for "making the classification? A. No.

Smith, an inspector called for the suppliants, puts it:

"Q. And you were satisfied when you took the ele- "vation of the hard material or rock? A. I was not "satisfied.

"Q. Why did you make your return as to the cor-
"rectness of elevation of rock? A. By instruction of
"the engineer, Mr. Bolitho, and by Mr. Maclachlan.

"HIS LORDSHIP—You said you were not satisfied?
"A. He asked me was I satisfied that the drill was
"on solid rock.

"Q. Or hard material? A. I was not satisfied.

"HIS LORDSHIP—But you returned according to
"that? A. No, I returned according to my instruc-
"tions."

And he explains how he went to Maclachlan to explain to him why he was dissatisfied, and he got his orders.

Jones, another inspector, refers to the manner in which the work was done. Referring to the question put to him, that they were blasting stuff that need not be blasted, he says: "Of course I kept my mouth shut."

"Q. In your opinion were they drilling and blast-
"ing where there was no necessity for it? A. They
"were.

"Q. And to what extent? A. To a considerable extent, etc."

These are witnesses called on behalf of the suppliants. There is considerable evidence to show that in point of fact during a portion of the work, a drill preceded the dredge.

It is useless for me to go further into details. It would practically mean a repetition of nearly all the evidence adduced at the trial.

The importance of the case, and the length of time that was occupied, has occasioned me to perhaps give more detailed reasons than I otherwise would have done. As I said before I do not think any reliance can be placed upon the progress estimates furnished by the resident engineer.

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I think the allowance made by Mr. St. Laurent of 13,060 cubic yards for rock excavation is ample and liberal, and I so find.

If figures have to be arrived at in order to ascertain what amount in dollars and cents on these findings should be allowed, counsel can agree among themselves.

The other claim is a claim made for back filling deposited in the cribs. That has been referred to in a similar manner by the Order-in-Council of the 29th November, 1918, and the claim made for this filling is for the sum of $27,169.20 for material deposited as filling for the works.

At the trial I was under the impression that this filling was filling for the cribs, and that it required extra handling in order to get the material from the scow into the cribs. I find, however, I was mistaken.

The filling in question is back filling and required no extra handling, the scow merely entering the place where the filling was to be deposited, and discharging the material from the scow in precisely the same manner in which it would have been discharged into the open sea had the material been taken to the sea.

The fact that the contractor was allowed to deposit this filling where he did, saved the contractor from taking it further away, and I think Mr. St. Laurent's view under these circumstances is correct, and that nothing can be allowed on this item.

The suppliants must pay the costs of the action.

Solicitors for Suppliants: *Pringle, Thompson, Burgess & Côté.*

Solicitor for the Crown: *The Hon. Hugh Guthrie,* K. C., Solicitor-General.

IN THE EXCHEQUER COURT OF CANADA

1920

March 15.

IN THE MATTER OF THE PETITION OF RIGHT OF

PIERRE EDOUARD EMILE BÉLANGER,

NOTARY, OF THE CITY OF QUEBEC,

SUPPLIANT;

AND

HIS MAJESTY, THE KING,

RESPONDENT.

Expropriation—Title to land—Alienation of Public Domain—Power of King of France under French regime—Compensation—Inflated value.

The original title to the land in question dates back to the 10th March, 1626, under the hand of the Duc de Vantadour, on behalf of the King of France, which was subsequently revoked under an Edict of the King of France with all previous concessions, with the object of transferring such titles to La Compagnie de la Nouvelle France. This Company, however, on January 15th, 1637, conveyed the same lands, to the suppliant's representatives, which conveyance was on the 12th January, 1652, confirmed by a title by M. de Lauzon, then Governor of New France; and finally these primordial three grants were further confirmed on May 12th, 1678, by Louis XIV., King of France, granting total *amortissement* of the said land.

This title was attacked on the ground that it was beyond the right of a King of France to alienate the public domain under the *Ordonnance de Moulins* of February, 1566.

Held, That the power to alienate at that time, when the laws of the Princes were supreme, resided in the King of France who could in derogation of the said *Ordonnance de Moulins* thus alienate the public domain.

2. While the sale of property in the immediate neighborhood of the property expropriated is cogent evidence of the market value thereof, yet if such neighboring property has changed hands under special circumstances and at prices that are not established as market prices, such transfer of property cannot be taken as a criterion of the value of the property.

3. Where the value placed upon a property by certain witnesses is inflated in view of the uses to which it can be applied, but only upon the expenditure of very large sums of money which