1918
Nov. 23.

CANADIAN VICKERS, LIMITED,

PLAINTIFF;

VS.

THE STEAMSHIP "SUSQUEHANNA,"

DEFENDANT.

Admiralty law—Agreement for repair of ship—Quantum meruit—Witnesses—Evidence—Registrar proceeding on wrong principle.

The plaintiff's claim was for work done and material supplied to the defendant's ship, amounting to $53,190, at Montreal in July and August, 1917, there being no definite contract between the parties. A bond was given for $55,000 for the release of the ship and liability was admitted, but the amount claimed was denied and $35,000 was offered in full settlement, which the plaintiff refused to accept. The matter was referred to the Deputy-Registrar to ascertain and report the amount due to the Court, which the Deputy-Registrar did, fixing the amount at $52,983.34.

Held on a motion of defendant to vary the Deputy-Registrar's report that as there was no price for repairs fixed between the parties that the plaintiffs were entitled to recover the fair and reasonable value of the work done and material supplied, or, in other words, what is the fair market value of the repairs made by plaintiffs to ship, and that in determining the value of the said repairs the principles laid down by Dr. Lushington in the *Iron Master,* Swab. 443, as to the best evidence of the value of the ship are equally applicable to the value of repairs in this case, and that the Deputy-Registrar proceeded on a wrong principle, and that defendant's offer of $35,000 was sufficient.

APPEAL from report of the Deputy District Registrar at Montreal on references had on January 30, February 16, 18, 22, March 5, May 14, June 18, August 1 and September 16, 1918.

Registrar's report made and filed October 5, 1918.

Heard before the Honourable Mr. Justice Maclennan at Montreal, October 18, 1918.

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F. H. Markey, K.C., for plaintiff.

A. R. Holden, K.C., for defendant.

MACLENNAN, J. (November 23, 1918) delivered judgment.

This case comes before the Court on a motion of the defendant to vary the report of the Deputy District Registrar, by which the latter found $52,983.34, with interest from December 4, 1917 and costs, to be due to plaintiff by defendant.

The plaintiff's cause of action and the nature of its claim endorsed on the writ of summons, filed on November 2, 1917, is a claim for the sum of $53,190 for work done and materials supplied to the ship "Susquehanna" at the Port of Montreal during the months of July and August, 1917. The defendant gave a bond for $55,000, obtained the release of the ship and then admitted liability for the work done and materials supplied, but denied the amount claimed and offered to settle for $35,000. The plaintiff refused to accept this and defendant thereupon moved that the case be referred to the Deputy District Registrar in order that the necessary claims, statements and vouchers be filed and such proof as may be necessary produced and that the Registrar be ordered to report to the Court the amount that he may find due to the plaintiff. Upon the order of reference the Registrar reported as above stated and the defendant appeals from the report by its motion to vary the finding of the Registrar.

The S.S. "Susquehanna", which had been engaged in the lake trade, in the early summer of 1917 was cut in two at Buffalo, N.Y., in order to be brought to Montreal, where certain repairs were required to be made and the ship joined together. Certain of

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these repairs were made at Montreal by the plaintiff; the ship was joined together at Levis, and finally taken to New York, where the repairs were completed and the ship made ready for sea. Plaintiff's action is for the value of work done and materials supplied and for nothing else.

After the work was done the plaintiff sent the owner of the ship a memorandum (Exhibit D-1) reading:

To labour and material repairing S.S. "Susquehanna" as per specification attached $53,190.00

The specification referred to is a list of repairs to the ship containing over 180 items. No other particulars of the plaintiff's claim, although asked for, were furnished or supplied until the case came before the Registrar on the reference, when plaintiff's manager produced a statement or summary as Exhibit P-2, which is in the following terms:

NAVAL CONSTRUCTION WORKS,
MAISONNEUVE.
Montreal, P.Q., December 3rd, 1917.

Mr. Frank Auditore,
44 Sacket Street,
Brooklyn, N.Y.

Bought of Canadian Vickers, Limited.

To joining together S.S. "Susquehanna" as per statement attached:

Material from stock ...	$5,517.57	
Material purchased ...	829.98	
		$ 6,347.55
Handling charges, 5%	317.88	
		$ 6,665.43

Labour	$14,905.73	
Overhead factor 90% on labour.	13,415.16	
		28,320.89
		34,986.32
Profit, etc.		16,554.89
		51,541.21
Tug services as per copy invoices attached		2,000.00
		$53,541.21

It can be stated at once that the plaintiff did not do the joining together of the ship, but that its work consisted principally of the completing of so-called odds and ends about the deck and fitting of doors and a small amount of engine-room work and caulking the bulkheads and tanks. Plaintiff's statement shows that the material supplied, with 5 per cent. added for handling charges, amounted to $6,665.43, and the labour to $14,905.73, and that the total claim as shown in this statement amounted to $53,541.21. The plaintiff in effect added over 138.9 per cent. to the amount charged for material and labour, or if labour alone is considered over 200 per cent. to the amount charged for labour in order to arrive at the total amount of the bill.

As there was no price for the repairs fixed between the parties, plaintiff is entitled to recover the fair and reasonable value of the work done and materials supplied. That was the nature of the claim endorsed on the writ. The plaintiff before undertaking the work gave an estimate of what the repairs would probably cost, but declined to enter into a contract for a fixed amount. There was no sug-

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gestion from either party that the repairs should be paid for on the basis of cost plus a percentage for profit. The plaintiff, in its factum filed before the Registrar, stated that its claim is based on a *quantum meruit,* and in its factum filed before the Court submitted that "the value of the work based upon a "*quantum meruit* must be determined by the fair "market value at the time and in the locality where "the work is done, and, further, by the conditions ex- "isting at such time and place. This can only be de- "termined by the evidence of witnesses who are com- "petent to give evidence relating thereto." Instead of endeavouring to prove the fair market value of the work by competent witnesses, the plaintiff endeavoured before the Registrar to establish his claim on the basis of the alleged cost to it of the work, plus a net profit of over 47 per cent. There was no contract to pay the cost and a percentage of profit, and plaintiff's action is not an action based upon any such allegation or implication.

The plaintiff could not change the nature of its action before the Registrar and the question for the Court therefore is: What is the fair and reasonable value of the work done and materials supplied, or in other words, as counsel for plaintiff puts it, what is the fair market value of the repairs made by plaintiff to the ship? In the case of the *Iron Master,*[1] where the question was the value of a ship at the time of a collision, Dr. Lushington made the following observations with reference to different kinds of evidence which might be adduced to establish such value:

"In this case the loss is confined to a single item, "the value of the ship destroyed. The evidence

[1] (1859), Swabey, 441 at 443.

"adduced is, as usual, of different kinds; and I think "it convenient here to state how the Court ranks "these different kinds of evidence in order of im- "portance, the question being the value of the ship "at the time of the collision.

"The best evidence is, first, the opinion of com- "petent persons who knew the ship shortly previous "to the time it was lost; that evidence is manifestly "entitled to most weight, because, assuming their "competency to form a just judgment, they had a "personal knowledge of the state and condition of "the vessel herself, whereas all other persons, how- "ever skilful, could only draw general inferences "from their acquaintance with the prices of vessels "somewhat similar about the same time. The second "best evidence is the opinions of persons such as I "have just described, persons conversant with ship- "ping and the transfers thereof."

The principles laid down by Dr. Lushington as to the best evidence of the value of a ship are equally applicable to the value of the repairs in this case. The plaintiff's case is based almost exclusively on the evidence of three witnesses: Temporary Commander James William Skantelbury, of Saltburn, England, and James Smith Bonnyman, of Landaff, Wales, consulting engineer, and its manager, Mr. Miller. Commander Skantelbury was in Canada representing the British Admiralty as an expert adviser in connection with Canadian ship construction, acting under the director of shipping in Canada, and had been in Montreal less than one year at the time of his examination. He was acting as an expert adviser in connection with construction of new vessels, drifters and trawlers, which were being built at the plaintiff's shipyard. He never saw

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the work done on the "Susquehanna" and had no idea how long the job took. He was not asked to testify what, in his opinion, would have been fair and reasonable compensation or the market value of the work done by plaintiff for defendant. Mr. Bonnyman, who is a consulting engineer in shipping, had arrived in Canada about one month before his examination, never saw the "Susquehanna" or the work done by plaintiff, and had no knowledge of local conditions in Montreal, except such as he had seen at plaintiff's shipyard from the early part of January to the time of his examination on February 16, 1918. He had been sent by the British Government to look after the building of merchant ships at the plaintiff's works. He admits in cross-examination that plaintiff asked him what was a reasonable price for doing the work on the "Susquehanna," but he declined to express an opinion on that question; and in re-examination explained that it was impossible without having seen the ship to make an estimate of the value of the work done. The witnesses Skantelbury and Bonnyman, while no doubt familiar with shipyards and shipping generally in Great Britain, had very limited knowledge of conditions on this side of the Atlantic, and in no part of their evidence do they undertake to give an estimate or express an opinion as to the value of the work done by plaintiff on the "Susquehanna." Mr. Miller, plaintiff's manager, had given an estimate of about $35,000 as the probable cost of the repairs, but at the reference he endeavoured to make it appear that these figures were quoted by him on a part only of the work done. He did not pledge his oath, as it would seem reasonable he should have done if he believed his firm's claim honest and proper, that the fair market value

of the work done and materials supplied was the amount claimed in the action. He admitted that there was a list prepared of the work to be done, and, instead of producing that list, he produced and filed as plaintiff's Exhibit P-5 a list headed: "Repairs to S.S. 'Susquehanna,' job No. 1790." This latter list contains over 180 items. It is not the original list of repairs prepared by the plaintiff. Mr. Miller swore that the original list contained only 65 items and that afterwards, at some date or dates which he does not specify, 122 additional items were added. His motive in making this statement appears to have been to escape the consequence of an estimate by his works manager and by himself that the work which his firm was asked to do would cost in the vicinity of $35,000. When the ship arrived in Montreal, with Captain Barlow in charge, Mr. Cameron, plaintiff's works manager, and Mr. Burns, one of plaintiff's sub-superintendents, went on board the ship, where they were met by Captain Barlow, by Mr. Smith and Mr. Auditore. The latter gentleman called the attention of Messrs. Cameron and Burns to the work that was to be done, of which Cameron took note at the time. Captain Barlow also put the items down in a little work-book which he carried, and he swears that he afterwards got the repair list made by Cameron, compared it with the notes in his own book, found they agreed and that he re-copied the list into a private book for future reference. Captain Barlow swears that the ship was subsequently stranded, when he lost a considerable amount of personal property, clothing and this little note-book, but he produced and filed before the Registrar, as defendant's Exhibit D-7, the list of repairs which he had copied in his private book. This list is dated July 15, and

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contains over 150 items. There is no doubt it is a duplicate of the list of repairs made by Cameron and Burns three days before, on which both Cameron and Miller made their estimate of $35,000. A comparison of Captain Barlow's list with Mr. Miller's list (P-5) shows that the latter contained some 30 additional items, mostly small wooden jobs. Captain Barlow swears that his list (D-7) includes the work discussed with Cameron and Burns, and on which Cameron was to figure on the cost. The additional items to be found in Exhibit P-5 were ordered in writing by Captain Barlow as extra work and the original orders were delivered to the plaintiff. Plaintiff produced neither the original list made by Cameron and Burns, nor the orders for the extra work, and Captain Barlow's evidence, that the extras were not worth more than $1,000 or $1,200, is uncontradicted. After the examination of the ship by Cameron and Burns, Mr. Miller wrote a letter to the owner in the following terms (P-1):

"July 12, 1917.

"Frank Auditore, Esq.,
"Windsor Hotel,
"Montreal, Que.

"Dear Mr. Auditore:

"Mr. Cameron has been thoroughly through the "'Susquehanna' and finds it absolutely impossible, "in the incomplete state in which the various items "are, to figure a definite price. He estimates, and, "judging by the description I think he is correct, "that this work will cost in the vicinity of $35,000, "apart from joining together.

"We are prepared to quote you a firm price for "joining together of $22,000, including dock dues,

"but not including any repairs to damage done in "coming through the canal.

"We would, however, much prefer that you take "the ship to New York for completion, as I am "fully confident that, notwithstanding the condition "of the yards in New York, you are more likely to "get a quicker job from your friend Mr. Todd than "from us, as we cannot possibly afford to draw a "large number of men off present work.

"We will be glad to let you know as soon as we "ascertain the extent of the damage to the 'Singa-"pore' when your ship can get on the dock.

"I am sorry we cannot quote you a firm price, but "you will understand the conditions.

"Yours faithfully,

"(Sgd.) P. L. MILLER."

The examination of the ship by Messrs. Cameron and Burns had been made on the morning of July 11 or July 12, before the foregoing letter was written by Mr. Miller, when the plaintiff had in its possession the original list prepared by Cameron containing over 150 items of repairs and agreeing with the list made by Captain Barlow. It is worthy of note that neither Cameron nor Burns were called as witnesses on behalf of the plaintiff. Mr. Miller's letter admits that Cameron had made a thorough examination of the ship. That agrees with the evidence of Captain Barlow. The letter further admits that Cameron estimated the cost of repairs in the vicinity of $35,000. Mr. Miller himself admits that he gave an estimate of $35,000, but says that the original list upon which he based that estimate contained only 65 items, and that 122 were afterwards added as extras. There is a serious contra-

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diction in Mr. Miller's evidence as to when the original list was prepared. He first swore it was made up about July 25 or 26, and then stated that he had it when he wrote the foregoing letter on July 12. As the original list of repairs was in plaintiff's possession and under the control of Mr. Miller, and he did not see fit to produce it, I am unable to accept his evidence that either Cameron's estimate or his own of $35,000 was based upon 65 items of repairs. It would have been an exceedingly easy matter for plaintiff to have established that the estimate given by Cameron and Miller was based on 65 items if such were the fact. The suppression of the written evidence showing the items on which the estimate of $35,000 was made, the failure to call Cameron and Burns as witnesses and the contradictions in Mr. Miller's own evidence, satisfy the Court that his testimony on this question cannot be accepted. The work commenced in the harbour on July 13, the ship arrived at the plaintiff's works on July 18, and was finished on August 15, 1917, when the two parts of the ship were towed to Quebec and there joined together by the Davis Shipbuilding and Repairing Co., Ltd., and the ship was then taken to New York. It is common knowledge in shipping circles that shipyards on the St. Lawrence have to tender for ship repairing in competition with shipyards in New York and other points on the Atlantic seaboard. It is proved in this case that shipyard labour at the time the work was done to the "Susquehanna" was lower at the plaintiff's works than in shipyards in New York. The defendant examined three witnesses who had examined the ship and the work done by plaintiff and were competent to give an estimate of the fair market value of the work. Fred. L. Worke,

of Brooklyn, N.Y., marine superintendent of the owner of the ship, had 19 years' connection with shipping, 10 years at sea, the greater part of that time as chief engineer, and 9 years as marine superintendent for two different companies, 5 years of the latter period being superintendent of a general ship repairing company. He examined the ship on her arrival in New York, in September, 1917, in company with Captain Barlow and two experts to whom I shall presently refer. The work done by plaintiff was gone over and examined in detail, and Worke's estimate of its value was around $23,500. James H. B. MacKenzie, of New York, consulting engineer and ship surveyor, who had been to sea for 7 years, part of the time as chief engineer, and who had been for 10 years in the employ of one of the biggest ship-repairing firms of the United States, for 5 years as outside foreman and for the last 5 years as assistant to the superintendent, and having a great deal to do with estimating for repair work, and for the last 6 years has been in business for himself as consulting engineer and ship surveyor, examined the "Susquehanna" two or three days after her arrival in New York. Worke and Captain Barlow were present and pointed out to him the repairs made in Montreal, and Mr. MacKenzie estimated the value of the work done by plaintiff at $25,000. When this estimate was made this witness was not aware of the purpose for which the estimate was wanted. The work described to this witness by Mr. Worke as having been done in Montreal is set out in a statement signed by the witness and filed as Exhibit D-5, and a comparison of the items contained in this statement with the plaintiff's list of repairs filed as Exhibit P-5 shows that the two documents

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correspond as far as detailed description of the work is concerned, and for that work Mr. MacKenzie's first estimate was $22,000, subsequently increased to $25,000. Charles E. Ross, of New York, naval architect, engineer and surveyor, who, since leaving the University of Pennsylvania in 1889, has been continuously employed in the ship construction and repair business, and who for some years has been in a consulting capacity associated with Frank S. Martin, of New York, chairman of the Board of Consulting Engineers and Survey of the United States Shipping Board, examined the "Susquehanna" in New York, in September, 1917, and signed defendant's Exhibit D-5. The nature, kind and description of the work which he examined on this occasion was explained to him by Mr. Worke, and his estimate of the value or market price of the work done in Montreal on the ship was $22,000, and he subsequently made a re-examination and a revised estimate of $25,000. When this estimate was made Mr. Ross had no knowledge of what plaintiff was attempting to collect. Messrs. MacKenzie and Ross have no connection whatever with the defendant or the owner of the ship; they were asked to examine the work done by the plaintiff and they gave their opinion as to its value after having seen and examined it. Unquestionably these gentlemen were competent persons to express an opinion on the value of the repairs and the weight to be attached to their testimony was in no way affected in their cross-examination.

As has already been pointed out, plaintiff at the reference before the Registrar attempted to change the basis of its action and to establish the liability of the defendant on the basis of the cost of the work

to the plaintiff plus a net profit of over 47 per cent. on such cost. In considering the cost of the repairs consideration must be given to the cost of the material supplied definitely ascertained and the direct labour definitely ascertained, and a further sum necessarily indefinite in amount representing a proportion of the general expenses of the company doing the work. In this case, plaintiff sought to add to the cost of the material, plus 5 per cent. added for handling charges, and the amount paid out for direct labour a further item called overhead factor, 90 per cent. on labour, and to the total so obtained added 47.3 per cent. for net profit. Mr. Miller, when asked to explain this overhead charge, stated: "The overhead covers all items which, according to our method of keeping our books, are not directly charged to the cost of doing any particular job." He then explains that other firms make up their overhead in a different manner according to their method of keeping their books. The attempt to include in the bill against the defendant an overhead factor of 90 per cent. on labour has introduced endless confusion and controversy in this case, and if it were necessary to digest the evidence relating to what properly constituted overhead charges a large mass of contradictory evidence would have to be referred to.

The principal items of the overhead charge on which differences of opinion exist are: Work supervision, depreciation, liability insurance, administration expenses and interest. It was established before the Registrar and subsequently admitted by counsel for plaintiff that there were amounts exceeding 41 per cent. overcharged in connection with the items of works supervision and liability insurance; depreciation at the rate of 50 per cent. per

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annum was charged on new buildings of a substantial and permanent character and fixed plant, without due regard to the reasonable life of the property; excessive amounts were charged for administration expenses and a large amount of interest on loans which, according to the most reliable evidence in the record, including an admission of one of plaintiff's experts, does not form part of the cost of the work and should not be included in overhead charges. The plaintiff's repair shop is only a small part of the plant, and it is proved that, according to a schedule produced to defendant's expert accountant when he examined the plaintiff's books in its office, the repair shop overhead was 38 per cent., and if the deductions which were proved at the reference were taken off, that percentage would be considerably reduced. The plaintiff's plant is undoubtedly well equipped from the point of view of buildings, machinery and management. The work on the "Susquehanna" was a comparatively small repair job. One of plaintiff's experts, Commander Skantelbury, in speaking of the shipyard and the repairs in question, swore: "It is equipped for a navy yard and it is over-equipped for small work of that description." The impropriety of attempting to inflate the overhead charges against defendant for the work done because plaintiff's yard was over-equipped for small work of that description must be apparent. The general result of the evidence on the items making up the overhead charge, in my opinion, shows that if this were a case where overhead charges should be taken into consideration, plaintiff has charged nearly twice as much for that item as the evidence justifies.

The plaintiff's bill before the Registrar includes an item of 47.3 per cent. net profit. It is important to bear in mind that Mr. Miller swore that the profit charged includes absolutely nothing for interference with other work, for war conditions or for any special or unusual purpose. He claims only what he designated as normal profits under the climatic conditions in Montreal. Notwithstanding the stand so taken by plaintiff's manager, counsel for plaintiff endeavoured to justify the large profit claimed by evidence and argument, that men had to be withdrawn from other work which was consequently delayed and that the country was at war, and therefore plaintiff was entitled to take advantage of these special circumstances in the form of higher charges than would be justified under normal conditions. Such contentions are entirely without force in face of the manager's admission. It is proved that the number of workmen employed in plaintiff's yard at the time the reference was heard was substantially the same as were employed when the repairs were made to the "Susquehanna." It is quite true that repairs cannot be carried on to the same extent in winter as in summer, but other work, no doubt equally profitable to plaintiff, was under way in the winter season, engaging the services of substantially an equal number of workmen. Commander Skantelbury swore that having regard to local conditions in Montreal, in his opinion, 30 per cent. would be a fair profit to add to the cost of the work, and then in answer to leading questions by plaintiff's counsel, which should have been rejected on the objections made, permitted himself to be led to state that having regard to conditions at the plaintiff's shipyard (and no doubt influenced by the fact that the yard

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was over-equipped for repair work) the account should have been for about $80,000, and later reduced the percentage of profit to about 60 per cent. on the cost. Such evidence is not reliable. Mr. Bonnyman was impressed by the severity of the Canadian winter weather and put the percentage of profit at about 40 per cent. on the cost in order to enable plaintiff's business to exist. He had no knowledge of summer conditions here or of the work done on the ship, and refused to state what the work was worth. It was proved that seven other ships were under repair at plaintiff's yard while the work was under way on the "Susquehanna," but plaintiff offered no evidence of the profit or overhead charged for such repairs. There is, however, evidence that within the year preceding the repairs on the "Susquehanna" plaintiff made varying charges on a number of other ships as follows: 40 per cent. overhead on drifters, 45 per cent. against the Electrical Boat Co., 55 per cent. overhead and 10 per cent. profit to the British Admiralty for jobs on over 60 vessels for work done partly in the harbour and partly at plaintiff's yard, and 65 per cent. overhead on trawlers. Plaintiff appears to have had different prices for different owners, and there was no uniformity of charges to other ships so far as such charges were disclosed. Counsel for plaintiff in his factum or written argument before the Registrar says in reference to the work done for the Admiralty that "the "allowance of 55 per cent. for overhead and 10 per "cent. profit practically gave the plaintiff a clear pro- "fit of 65 per cent. upon the cost to it of the work." Part of the plaintiff's work on the "Susquehanna" was done in the harbour before the ship reached the shipyard and to that extent the conditions were

similar to the work done for the Admiralty, and if plaintiff's claim for 90 per cent. overhead and over 47 per cent. profit were maintained, it is apparent plaintiff would make a most exorbitant profit on the job. None of these rates were disclosed to the owner of the "Susquehanna" before he entrusted his ship to the plaintiff. The manager of the plaintiff has sworn that as no price was fixed in advance he thought he was entitled to charge any price he liked, provided it was fair and reasonable. The burden was upon plaintiff to establish that its account represented the fair market value of the repairs. If the cost were definitely ascertained a net profit of 10 per cent. or at most 12½ per cent, would have been fair and reasonable under the circumstances and in view of the evidence in the case. If the average of the overhead charges to others as just stated were added to the charges for labour and a net profit of 12½ per cent. added to the cost of material, labour and overhead so ascertained, the total would be under $35,000, the approximate estimate given by the plaintiff's works manager, and manager before the work was undertaken.

This is an ordinary *quantum meruit* action, but plaintiff sought to change its nature on the reference and endeavoured to prove its case as if the action were based upon a contract to pay the cost of the repairs, plus a profit. The Registrar proceeded upon a wrong principle and granted the plaintiff everything that it asked on the reference. His report contains no finding on the fair market value of the work done and the materials supplied. The defendant's witnesses, Worke, MacKenzie and Ross, were competent witnesses within the rule laid down by Dr. Lushington, and the principle put forward by

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plaintiff's counsel, to give an opinion on the value of the repairs. They had seen the work and examined it, and, in my opinion, their evidence is the best evidence on the value of the work done and the materials supplied. It is true their estimate was based on New York prices, but labour at plaintiff's yard was lower than in New York, and the defendant was willing to pay several thousand dollars more for the purpose of avoiding the trouble and expense of protracted litigation. There is an item of $2,000 in the account for towage which is not disputed. The plaintiff's estimate of $35,000 was well over the mark and exceeded the value of the repairs. I find that defendant's offer was sufficient and the amount due to the plaintiff by defendant is $35,000.

Before the reference was applied for, the defendant, through its solicitors, filed an admission of liability for the work done and materials supplied, offered to settle for $35,000 in order to avoid further litigation, denied liability for any greater sum and notified plaintiff that if it persisted in its refusal to accept said sum defendant would ask for costs on the reference. The defendant had furnished a bond for $55,000 as security for the plaintiff's claim and, under the circumstances, there was no necessity for a tender or payment in Court, and the costs of the reference should have been avoided. The defendant is therefore entitled to the costs of the reference, *The Reading*.[1]

There will be judgment for the plaintiff for $35,000, with costs up to the filing of the admission of liability, and the defendant's offer to pay that amount, the plaintiff will have to pay the defendant

[1] (1908), 77 L. J. Adm. 71.

the costs of the motion for the reference, the costs of the reference and of the present motion to vary the Registrar's report and the report will be varied accordingly.

Judgment accordingly.

Solicitors for plaintiff: *Markey, Skinner, Pugsley & Hyde.*

Solicitors for defendant: *Meredith, Holden, Hague, Shaughnessy & Heward.*