

The October estimates . . . shew, in my opinion, when read in the light of clauses 18 and 19 of the contract, that the railway company owed to Bunyan the two sums of \$1,300.28 and \$1,083.84, which were presently payable, and the two sums of \$980.15 and \$1,128.11, which were not presently payable, because they were retained by the railway company as security for the performance of the contract, and were to be paid to the contractor only when he had completed it on his part.

The Master has not thought that the two sums of \$1,300.28 and \$1,083.84 were any the less money due on the contract because the calculations upon which their ascertainment was based were subject to revision when the final estimate should come to be made, and in this he was, in my opinion, right. . . .

I do not understand why the appellants were by the order treated as being assignees of the September estimates. There is no pretence that these were assigned to them. This is, however, unimportant. . . .

If I had been of a different opinion as to the effect of the assignment, the report must, nevertheless, I think, have been varied, for the appellants are entitled to invoke the doctrine of marshalling, and indeed, as between them and the lienholders, the Master has applied it.

The creditors having garnishee orders, except Downing, have as against the appellants no higher rates than Bunyan himself had, and therefore as to them the fund is to be marshalled so that any of the claimants whose assignments have been given priority to the appellants, who are entitled to be paid not out of some particular estimate, but out of what at any time might be or become due to the contractor, must first resort to that part of the fund which is not appropriated to the payment of the appellants' claim. . . .

The right of all the assignees who were given priority to the appellants to be paid out of the fund is not open to be questioned upon this appeal, and therefore, if the doctrine of marshalling is to be applied, it will be by subrogating the appellants to the rights of the prior assignees in as far as they were entitled to have the estimates subsequent to the October ones applied in satisfaction of their claims.

The appeal must, therefore, be allowed, and for the finding of the Master there must be substituted a judgment declaring that the appellants are entitled to rank on and be paid out of the fund as found by the first report. This is, of course, subject to any change or modification which may