

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

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

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

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

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

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

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

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