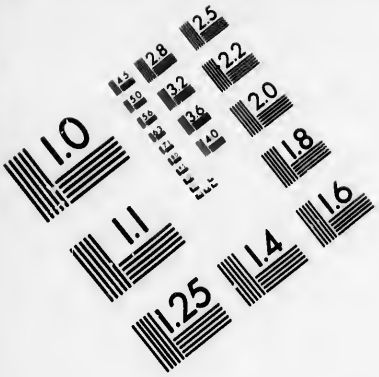

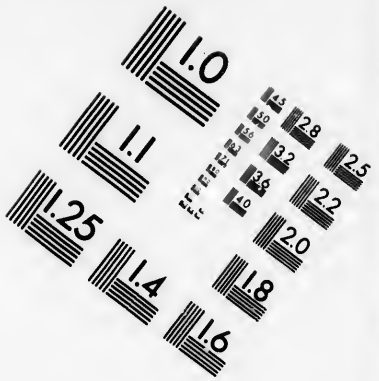

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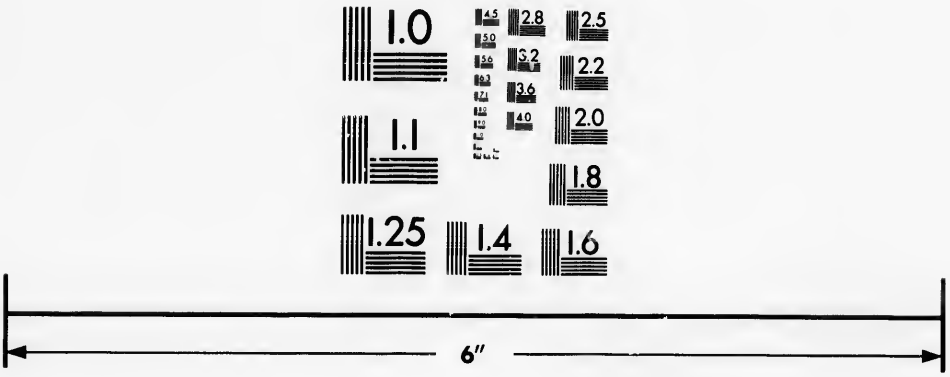

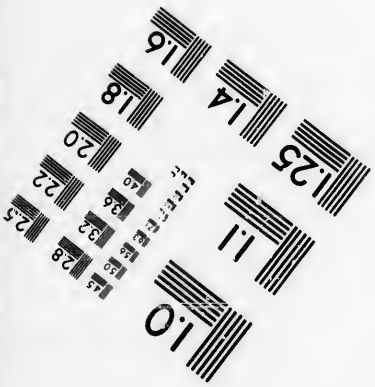

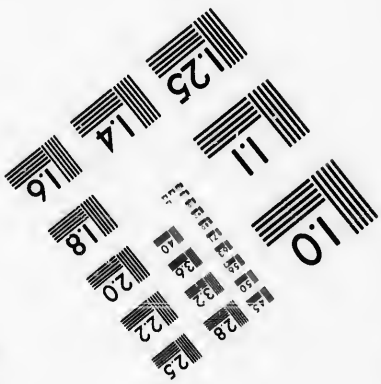

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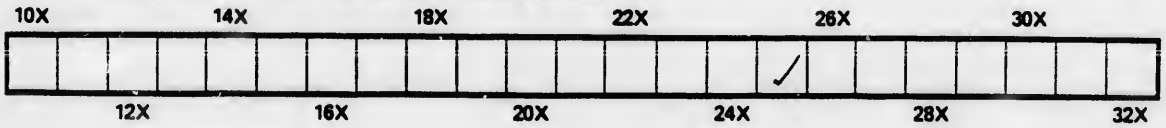

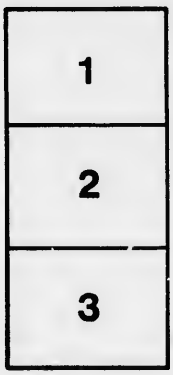

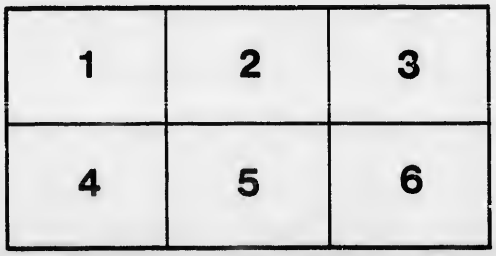

In the High Court of Justice

QUEEN'S BENCH DIVISION.

BETWEEN

CONMEE & McLENNAN,

AND *Plaintiffs,*

THE CANADIAN PACIFIC RAILWAY COMPANY,

Defendants.

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33 MILE CONTRACT
20 MILE CONTRACT
TIE CONTRACT

PLEADINGS

McCARTHY, OSLER, HOSKIN & CREELMAN,
PLAINTIFFS' SOLICITORS.

WELLS & MacMURCHY,
DEFENDANTS' SOLICITORS.

TORONTO:
PRINTED AT THE MAIL JOB DEPARTMENT
1889

INDEX.

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In the High Court of Justice

QUEEN'S BENCH DIVISION.

Writ issued the 5th day of October, 1885.

BETWEEN

CONMEE & McLENNAN,

Plaintiffs.

AND

THE CANADIAN PACIFIC RAILWAY COMPANY,

Defendants.

STATEMENT OF CLAIM.

1. The plaintiffs are contractors, resident at the Town of Port Arthur.

2. The defendants' railway company is a corporation duly incorporated by an Act of the Parliament of the Dominion of Canada, passed in the 44th year of the reign of Her Majesty Queen Victoria, and chaptered one.

3. The object of the said corporation was to construct a line of railway connecting the seaboard of British Columbia with the railway system of Canada.

4. In order the more easily and effectually to carry out the construction of the said railway, and for the purposes of the defendant corporation only, a charter was obtained by the defendant company for a corporation called the North American Railway Contracting Company, the name of which latter corporation was used by the said defendant railway company in entering into contracts for the construction and equipment of the said railway.

5. On or about the 3rd day of September, A. D. 1883, the said plaintiffs entered into a contract with the said "The North American Contracting Company," acting for and on behalf of the defendant railway company, which contract has subsequently been adopted, ratified, assumed

and acted upon by the defendant railway company, and which contract amongst other provisions (to which the plaintiffs for greater certainty beg leave to refer when produced to this Honorable Court) contained the following:—

That the specification annexed to the said contract marked "A," and the accepted tender annexed marked "B," and the several parts of the contract, should be taken together to explain each other, and to make the whole consistent; and should it be found that anything had been omitted or mis-stated, which was necessary for the proper performance and completion of any part of the work contemplated, the contractors should at their own expense execute the same as if it had been properly described, and the decision of the manager was to be final as to any such error or omission, and the correction of any such error or omission should not be deemed to be an addition to or deviation from the works thereby contracted for.

6. By such contract, the contractors (the plaintiffs) were to furnish all labor, machinery, plant, articles and things necessary for the execution of the work referred to in said specifications, and in the plans and profiles therein referred to as prepared or to be prepared for the purposes of the work.

7. The said work was by the said specification described as the work upon Magpie River Station, No. 5440, to the east end of division of that portion of the Canadian Pacific Railway between Nepigon and Michipicoten, a distance of thirty-three miles or thereabouts.

8. By the said contract the word "manager" wherever used should mean the manager of construction for the time being having control of the work, and should extend to and include any of his assistants acting under his instructions, and all instructions, directions or certificates given or decisions made by any one acting for him, or of the engineer, should be subject to his approval, and might be cancelled, altered, modified or changed by him.

9. The said manager was also by the said contract permitted at any time before the commencement of the work, or during its construction, to order any work to be done or to make any changes which he deemed expedient in the grades. The manager also to be at liberty to give any orders he deemed fit as to cuttings or fillings, dimensions, character, nature, location or position of work, the price to be according to the tender forming part of the contract where such class of work was specified.

10. The manager by the said contract was constituted the sole judge of work and material in respect of both quantity and quality; and his decisions as to work or material, or the meaning or intention of the contract, plans, profiles, specifications and drawings to be final.

11. The manager's decision was also made final and conclusive in reference to what work, labor, material, tools and plant were included in any price.

12. By the said contract it was further agreed the plaintiffs should be paid of the prices named in said tender, ninety per cent. in cash of the value of work done on the progress estimates of the manager, the balance to be paid on completion of the work to the satisfaction of the manager.

13. The contract further provided for the plaintiffs being dissatisfied with the manager's certificates, and for the method of appeal therefrom.

14. The work has within the time, intent and meaning of the said contracts, specifications, tenders, plans and profiles been long since completed, and the said manager has expressed himself as satisfied with the same, and has passed the final estimates of the plaintiffs for such work; but the defendants have restrained the said manager from granting his said certificate, and have wrongfully ordered the said manager not to sign or grant the same.

15. All things have happened other than the granting of such certificate aforesaid, and all times elapsed and all things been performed necessary to entitle the plaintiffs to be repaid for their work so done for the defendant railway company and accepted by them and now being used by them; yet the defendant railway company have for a long time wrongfully withheld from the plaintiffs large sums of money due under such progress and final estimate and the plaintiffs claim payment of the same, together with interest upon all sums from the date when properly payable and wrongfully withheld, amounting in all to the sum of $300,000, being $279,000 for unpaid principal and $21,000 for unpaid interest.

16. And for a further cause of action, the plaintiffs say that at the request, and upon the order and directions of the defendants' proper officer in that behalf, the plaintiffs built and completed a road from the base of supplies for the defendants' railway company to the line of railway which was taken over and accepted by the railway company and used by them, and upon which a balance remains payable to the plaintiffs of $1,600, of all of which sums and interest thereon the plaintiffs pray payment; and the plaintiffs further say that when the agreement was made for the building of this said road the said manager agreed with the plaintiffs that should the nature of the work be found to be such that a greater allowance should be made than that agreed upon, upon the nature of the ground based upon the representations as such were then made upon which the above balance is due, that he would go over the same and make such allowance. Upon this condition the plaintiffs carried on the said work to completion and the said manager went over it and inspected it and agreed to allow plaintiffs for same a sum of $16,000 further than that returned in the estimates, and the plaintiffs therefore claim payment of the said sum.

17. And for a further cause of action the plaintiffs say that the defendants, by their manager of construction and their officers duly qualified to make such an agreement, agreed with the plaintiffs over and beyond the contract referred to that they, the defendants, would furnish from time to time, and not later than the close of navigation for the fall of 1883, to wit, prior to the 1st day of November of that year, the necessary plant, provisions, tools and supplies for not less than 800 men for a term of twelve months, to enable the plaintiffs to carry on the said contract, and also agreed to supply, not later than the close of navigation, to wit, the 1st of November, 1883, and deliver at the Michipicoten River, on a dock to be erected by the defendants, 100 tons of bacon, 200 tons of hay and 30,000 bushels of oats, for the use of the said plaintiffs in and about the said work.

18. The plaintiffs say that the defendants did not deliver as agreed the said supplies during the season of navigation as aforesaid, to the great loss of the plaintiffs, causing them to expend large sums of money in obtaining such supplies, both from the fact that they had to pay exorbitant rates for such supplies, the season of navigation having closed, and also were unable to ship the same to the delivery points upon the line of work during the winter of 1884, and were put to an enormous expense in hauling said supplies to the line of work during the spring and summer of 1884, and also lost a great number of supplies endeavoring to get the same in after the close of navigation, including the cargoes of two barges, namely, the "Enterprise" and the "Kincardine," and lost a great number of horses owing to such non-delivery, the defendants having had notice, and well knowing that such losses would and were likely to occur; and the plaintiffs claim for the extra cost of hauling the necessary supplies, etc., the sum of $150,000, also for a reasonable portion of the cost of constructing a road which had to be built for the purpose of summer delivery, along the line of road, rendered necessary as aforesaid by the aforesaid non-delivery, and which the defendants would have had to make for other purposes

connected with their line and which they used continually, the sum of $3,500, and for the loss of supplies on said barges the sum of $8,000, in all the sum of $161,500.

19. The plaintiffs further say that the defendants agreed to maintain at the landing place at Michipicoten, a good and substantial dock for the landing of supplies during the continuance of the said contract.

20. The plaintiffs say that by reason of the non-erection and maintenance of a proper and sufficient dock for the unlading of supplies at Michipicoten as agreed by the defendants, the plaintiffs were obliged to and did incur large expense in the handling of goods to the extent of $8,000, and lost a large number of supplies which were washed away through the non-existence of such dock, to the extent of $6,000, which said sums the plaintiffs claim, in all the sum of $14,000.

21. The plaintiffs further say that during the continuance of the contract the defendants dammed up the waters of Dog Lake and Manitou Lake so as to create a serious flood, wrongfully and against the rights of the plaintiffs, whereby a number of camps, store houses, etc., of the plaintiffs were washed away and flooded, and whereby the line of railway was flooded, and the plaintiffs thereby prevented from working the said line, entailing a large amount of loss both for the said camps and store houses and the supplies contained therein, and loss caused by the flooding of the line as aforesaid, and the plaintiffs claim therefor the sum of $8,000 damages.

22. The plaintiffs further say that they at the request of the defendants supplied them with several tents for the use of the troops then being transported by the said railway company to the seat of the rebellion in the North-West Territories of Canada.

23. The plaintiffs say that for the supply of such tents the defendants are indebted to them in the sum of $300.

24. And the plaintiffs further say that the defendants further agreed to have the work on the line referred to in the said contract ready to be proceeded with by the first day of October, 1883, at the latest, and as an inducement to enter into the said contract, and as an agreement over and beyond the contract, that the total work upon such contract would amount to the sum of $1,750,000.

25. The plaintiffs further say that owing to the non-location of the said line, the plaintiffs were delayed for a long time in the commencement of the work, having prepared for such commencement at and before the said period as the defendants well knew, and had gathered together a large number of men, to wit, 600 or thereabouts, who were thereby kept idle for a long time, and under wages from the plaintiffs, and the plaintiffs were also by reason of the defendants' delay in location of said line, obliged to carry on the said work during the winters of 1884 and 1885, putting them at a great loss and extra expenses, among other items of extra expense, to large expenditures for the removal of ice and snow; and the plaintiffs further say that after the location of the said line in a number of places where fillings had been agreed upon, and after the work had proceeded for about nine months and the plaintiffs had made all preparations to carry it out as proposed and had sub-let the work so struck out, the defendants introduced trestle work, cutting down the amount of the said contract which the plaintiffs had at a much greater expense than would have been necessary prepared themselves for, upon the basis of the agreement for such gross expenditure of $1,750,000, and the defendants also at various places narrowed banks and cuts and lowered grade, thereby also reducing the work, entailing a very great loss of plant, and upon the extra materials and supplies, the plaintiffs having on hand on the faith of such agreement a much larger quantity of plant and supplies than was found necessary for the completion of the said work, and the plaintiffs claim for the

cutting down of such contracts reasonable profit upon the amount, namely the sum of $160,000, and for the loss of plant, supplies, etc., the sum of $50,000, and for the removal of snow and ice during the winter of 1884 the sum of $5,000.

25 (*a.*) And the plaintiffs say that owing to the changes made in alignment over the portion of the work covered by their said contract, after they had made all arrangements to commence work and employed men for same, the quantity of work was very considerably reduced from the said estimate of $1,750,000, thereby causing a reduction of some 100,000 yards of work and delaying the location of the line, thus throwing the plaintiffs' men idle and disorganizing their forces, thus causing great loss and damage to them, and the plaintiffs claim on account of the said reduction in amount of work, a reasonable profit on the amount of such reduction, for which, together with the loss suffered by reason of such delay, they now claim the sum of $20,000.

26. The plaintiffs further say that owing to the non-payment of the cash on the progress estimates as stipulated in the contract wrongfully and maliciously by the defendants, the plaintiffs were put to large expense in the raising of money for the purpose of buying supplies, and were largely damnified by strikes occurring upon the said works amongst the laborers, and were obliged to borrow money at high and exorbitant rate of interest, which the defendants well knew were likely to occur, and on account of which the plaintiffs claim the sum of $75,000.

27. The defendants allege that the certificates of the said engineers under the contract are not binding and conclusive upon them, and should the Court be of opinion that such was the case, and that the parties were at large upon the contract, the plaintiffs claim that the work done was worth on a classification, such as they always claimed, the sum of $232,500 more than the classification of the engineers in charge under the contract gives them by the said certificates, and in case the Court should hold that the said certificates were not binding, the plaintiffs claim the said amount of classification extra for the said work done.

28. By an order of the Divisional Court of the Common Pleas Division of this Honorable Court made on the 2nd day of January, 1886, in a certain action in the said Division, and wherein the parties hereto were parties thereto respectively, it was ordered, reinstating the order of the Master in Chambers made in said action on the 23rd of December, 1885, that the plaintiffs' said action be stayed and that they set up by way of defence, set off on counterclaim to an action in the Chancery Division of this Honorable Court brought by the said defendants against the said plaintiffs, which action has since been stayed, all their claim in said first mentioned action, and these plaintiffs for a further cause of action therefore say :—

29. Between the 13th of July, 1885, and 11th September, 1885, the plaintiffs supplied the defendants, at their request, with explosives, the delivery of which was as follows :—

July 13th, 1885	600 lbs. Dualin @ 40c	$240 00
	4 Coils Fuse @ 45c.	1 80
July 31st, 1885	2,400 lbs. Dynamite, 50% @ 40c	960 00
	200 lbs. Dynamite, 40% @ 35c	70 00
	500 lbs. Dynamite, 30% @ 30c	150 00
August 3rd, 1885	300 lbs. Dynamite, 30% @ 30c	90 00
August 31st, 1885	900 lbs. Dualin @ 40c	360 00
	2,100 lbs. Dynamite, 50% @ 45c	945 00
September 11th, 1885	300 lbs. Dualin @ 40c	120 00
		$2,936 80

30. The plaintiffs also in March last sold to the defendants a lot of camps and stables, etc., at and for the price of $200.

31. All of the above goods were received and accepted by the defendants on the dates above mentioned.

32. The defendants through their agents have always admitted, and never denied, the correctness of the above account and their liability for the amount of same, but they have always put off the plaintiffs and postponed payment of the above amount though frequently asked and pressed by plaintiffs to pay it.

33. The defendants have never paid any of the above amount, and the full sum thereof, namely, $3,136.80, is still due and payable to the plaintiffs.

34. The plaintiffs claim the said sum of $3,136.80, with interest from the dates of delivery of above goods, and costs.

35. And the plaintiffs further claim that should the Court hold that the payments made on account to the plaintiffs by the defendants, as above set out, do not cover and are not to be applied in liquidation of any amounts outside of this contract, and which the plaintiffs have so applied on the following amounts, which were payable at the time the payments were made, then the plaintiffs as a further claim say that they are entitled to the payment of the following amounts, viz. :—

I. On account of a certain supply road mentioned hereinbefore, which the plaintiffs agreed with the manager acting on behalf of the company to construct for the said company and for which they were promised payment by the said manager for the company, and which amount has as above been admitted by the said manager and the other officers of the company who had charge of the work to be done, the sum of $87,165,57.

II. On account of goods supplied to the Canadian Pacific Railway for their use and at their request at Red Rock, Michipicoten and Dog Lake, and accepted by them, and the bills for which were passed and certified to in their office by the proper officer in that behalf and thus admitted by the said company, the sum of $2,194.37.

III. On account of supplies, labor and cash furnished at the defendants' request to the Dog Lake Hospital, which hospital belonged to the Canadian Pacific Railway and was managed by them, and which goods were received and accepted by them and the bills for same admitted and certified to, the amount of $4,453.03.

IV. On account of orders given on the Canadian Pacific Railway and accepted by them by Boland & Savage for the sum of $1,175 ; by W. J. Connolly, the sum of $159.50 ; by Joseph Whalen, the sum of $200 ; by James Winstan, the sum of $461.75 ; by J. A. McRae, the sum of $101.63, in all the sum of $2,088.88.

V. On account of supplies furnished and labor performed by the engineering department of the Canadian Pacific Railway at their request, and the several amounts of which have always been admitted to be due by the said company, and the total amount of which is $12,641.31.

VI. On account of explosive and other goods delivered to David Ogilvy for the defendant company, at their request acting for the said company, and received and accepted by them for the said company, and the amounts of the bills for which have always been admitted by the defendants, a sum of $5,347.

VII. On account of explosives used in blasting hard pan on the work under the said contract, and the amount for which has been certified to and allowed by the proper officers of the company, the sum of $6,957.80.

VIII. On account of supplies and labor furnished and freight carried for the telegraph department of the defendant company at the request of the company, and which supplies and labor have been received and accepted by the defendant company, and the charge therefor admitted and certified to, as is also the charge for the said carriage of freight, the sum of $628.26.

IX. On account of goods and board furnished and freight carried for the employees of the defendant company working on construction of Dog Lake Hospital, and which were furnished and carried for said employees at request of defendant company, and the account for which has been admitted and allowed by them, the sum of $1,020.39.

X. On account of freighting done by the plaintiffs' tug "Silver Spray," for the said defendants at their request, and supplies delivered to her while used by the said defendants on the defendants' order, and the amount of which has been admitted by them to be due, the sum of $1,587.06.

XI. On account of overcharge on 11 carloads of goods carried from Dog Lake to Port Arthur by defendants for plaintiffs in August, 1885, the sum of $110.

The plaintiffs propose that this action be tried at Toronto.

STATEMENT OF DEFENCE AND COUNTERCLAIM.

1. The defendants admit the 1st, 2nd and 3rd paragraphs of the Statement of Claim.

2. The defendants say that by the terms and conditions of the contract and agreement mentioned in the said Statement of Claim, progress measurements and estimates of the work under the said contract were to be furnished monthly, with the written certificate of the manager that the work for and on account of which the certificate was granted had been duly executed to his satisfaction, and stating the value of such work computed at the prices agreed upon or determined under the provisions of the contract.

3. The defendants further say that no such certificates were ever made or granted by the manager, and that although certain papers purporting to be approximate measurements and estimates were from time to time presented to the manager, the same were never certified to by him in accordance with the terms and conditions of the said contract, and no proper or valid measurements and estimates of the work done by the plaintiffs as required by the said contract have ever been presented or received by the defendants.

4. The defendants further say that the said pretended approximate measurements and certificates were and are false and fraudulent, and therein the measurements and classification of work pretended to have been done by the plaintiffs were largely overestimated and stated, and thereby it is made to appear that the plaintiffs had done and executed a much greater amount of work, and furnished a much greater amount of material than was actually the fact, having regard to the terms and conditions of the said contract; and that the plaintiffs were entitled to be paid much larger sums of money than, having regard to the terms and conditions of the said contract, they were justly and truly entitled to receive.

5. The said pretended measurements and estimates were and are false and fraudulent as aforesaid, to the knowledge of the plaintiffs, and they were made and furnished at their instance and by persons acting collusively and in connivance with the plaintiffs.

6. The defendants further say that they have paid the plaintiffs for all the work justly and truly performed, done and executed by them under the said contract or otherwise.

7. The defendants deny the allegations contained in the 14th, 15th and 16th paragraphs of the Statement of Claim.

8. The defendants further say that they crave leave to refer to the said contract, and to rely in their defence upon the terms and conditions thereof, when the same shall be produced and proved at the trial of this action.

9. The language of this paragraph and of the 17 next succeeding paragraphs hereof (Nos. 10 to 26 both inclusive) has been changed and the word "plaintiffs" shall now where it occurs in them be taken to mean, as it does elsewhere throughout the pleadings herein, the said Conmee & McLennan, and the word "defendants" the said the Canadian Pacific Railway Company.

10. By the said contract, which is in writing, bearing date the 30th day of September, A.D. 1883, and made between the plaintiffs James Conmee and John D. McLennan (hereinafter in some instances called the contractors) of the first part, and the North American Railway Contracting Company, acting by John Ross, their manager of construction, of the second part, and certain specifications and schedules annexed thereto and forming part thereof, the contractors agreed to execute and fully complete by day a therein named the work therein described.

11. The contractors were, by the said contract, to be paid for the said work according to a certain schedule of prices annexed thereto, namely: For solid trap rock excavations in cuttings under three feet, per cubic yard, $3.40; for solid trap rock excavations in cuttings over three feet, per cubic yard, $2.80; for mica schist, per cubic yard, $2.75; for granite, per cubic yard, $2.20; for loose rock, per cubic yard, $1.10; for earth, per cubic yard, 38 cents; for earth in muskeg, including cost of moving snow, ice, grub, etc., per cubic yard, 33 cents; for hard pan, per cubic yard, 80 cents; for cemented material, per cubic yard, 80 cents; for rock debris, per cubic yard, 80 cents; for borrowed boulder embankment, per cubic yard, 75 cents.

12. Subsequently to the execution of the said contract as aforesaid, the defendants, with the consent of the plaintiffs, assumed the said contract, and the rights and obligations of the said North American Railway Contracting Company thereunder, and the contractors agreed and undertook to perform the said work for the defendants upon the terms set forth in the said contract, specifications, and schedules, and in all respects the defendants and plaintiffs agreed that the defendants should be substituted for the North American Railway Contracting Company in the said contract, and that the same should be treated, considered and acted upon as if the defendants had been parties thereto from the beginning, and had executed the same instead of the said North American Railway Contracting Company.

13. After the assumption by the defendants of the said contract, the said John Ross became the defendants' manager of construction over that portion of the defendants' line then under construction, known as the "Lake Superior Section," comprising a length of about 300 miles of the line of railway, and embracing therein the portion contracted for by the plaintiffs Conmee & McLennan.

14. The said contract, among other things, provided: "8. That the manager shall be the sole judge of the work and material in respect of both quality and quantity, and his decision on all questions in dispute with regard to work or material, or as to the meaning or intention of this contract, and the plans and profiles, specifications and drawings shall be final; and no works, or extra or additional works or changes shall be deemed to have been executed, nor shall the contractors be entitled to payment for the same, unless the same shall have been directed in writing as hereinbefore provided, and executed to the satisfaction of the manager, as evidenced by his signature in writing, which certificate shall be a condition precedent to the right of the contractors to be paid therefor." And it is also provided that:

"23. Cash payments equal to 90 per cent. of the value of the work done, approximately made up from returns of progress measurements, and computed at the prices agreed upon or determined under the provisions of this contract, will be made to the contractors monthly, on the written certificate of the manager, that the work for or on account of which the certificate is granted has been duly executed to his satisfaction, and stating the value of such work computed as above-mentioned, and such condition shall be a condition precedent to the right of the contractors to be paid the said 90 per cent. or any part thereof. The remaining 10 per cent. shall be retained until the final completion of the whole work to the satisfaction of the manager; and within two months after the completion, the remaining 10 per cent. will be paid. And it is hereby declared that the written certificate of the manager, certifying to the final completion of said works to his satisfaction, shall be a condition precedent to the right of the contractors to receive or to be paid the said remaining 10 per cent., or any part thereof." And it is also provided that:

"26. The progress measurements and certificates shall not in any respect be taken as an acceptance of the work or release of the contractors from responsibility in respect thereof, but they shall at the conclusion of the work, deliver over the same in good order, according to the true intention and meaning of this contract."

15. Upon assuming the position of manager of construction, the said John Ross established an office at Port Arthur, being the western end of the said section, and from thence carried on his supervision and management of the said works; and for the purpose of carrying them on, the defendants from time to time furnished him with large sums of money, to be paid to the various contractors upon the said section, relying upon the performance by the said John Ross of the duties imposed upon him of ascertaining and certifying that all work on which payments were made by him had been executed to his satisfaction, and also ascertaining and certifying the value of such work. And that from and out of the moneys so remitted to him, the said John Ross paid to the plaintiffs Connee & McLennan the sum of $1,427,089.74; but as the defendants have since ascertained, and as the fact is, without having ascertained or certified to the character of the work alleged to be done, or to its value.

16. The defendants only discovered that the said John Ross had made the said payments to the said plaintiffs Connee & McLennan, and that he had done so without any verification or certificate being provided by him of the work done or of its value, after the termination of the engagement of the said John Ross, on the completion of the said work, to wit, in or about the month of August last, when the papers, accounts and documents were removed from his office at Port Arthur, and transmitted to defendants' head office at Montreal.

17. The said approximate estimates purport to show that the aggregate amount of work performed under the said contract, being the whole work contracted for as aforesaid, was:—

Solid trap rock excavations under three feet deep, 38,776 cubic yards, at $3.40 per cubic yard	$131,838.40
Solid trap rock in excavations over three feet deep, 179,855, at $2.80	503,594.00
Mica schist in excavations, 25,192 cubic yards, at $2.75	69,278.00
Granite in excavations, 19,383 cubic yards, at $2.20	42,642.60
Loose rock in excavations, 241,278 cubic yards, at $1.10	265,405.80
Earth, ordinary in excavations, 266,973 cubic yards, at 38 cents	101,449.74
Earth stripping, 11,774 cubic yards, at 42 cents	4,945.08
Earth in muskeg, including removal of snow, ice, grub, etc., 61,558 cubic yards, at 33 cents	20,314.14
Hard pan in excavations, 203,979 cubic yards, at 80 cents	184,783.20
Cemented gravel in excavations, 23,396 cubic yards, at 75 cents	17,547.00
	$1,341,797.96

18. The said approximate estimates, furnished to the defendants as aforesaid, appear to be certified to as correct, in some cases by one W. H. Holland, for the engineer in charge; in some cases by R. McLennan, engineer in charge, per W. H. Holland; in some cases by R. McLennan as engineer in charge. In no case are they certified to or signed by the manager of the construction personally, although in a few cases the name of John Ross, manager of construction, purports to be signed thereto by one Thomas H. Moffat, and in no case is there any certificate of the said John Ross that the said work, for or on account of which the said certificate purports to have been granted, had been duly executed to his satisfaction and stating the value of such work.

19. The defendants then determined to make inquiry into the accuracy and *bona fides* of the said approximate certificates, and with this object they caused a careful examination and remeasurement of the said work to be made by persons of skill and experience, and they find and the fact is, that the said estimates show about 200,000 cubic yards more than the said work actually contained, and that there were errors of the most serious character in the classification of the work. The particulars of the said errors in so far as the defendants are aware being shown by Schedule "A" to the particulars served upon the plaintiffs' solicitors, on the second day of September, 1886.

20. The amount shown by the said approximate estimates as payable to the contractors, in respect of the work described in the 10th paragraph of this Statement of Defence, is $1,341,797.96 which sum the said John Ross has paid to the plaintiffs Connee & McLennan, out of the money furnished to him by the defendants as hereinbefore stated, while the amount justly and truly payable to them in respect thereof is only $787,567.29, or thereabouts, a difference of $554,230.67. And even if the said estimates were not fraudulent as hereinbefore and hereinafter stated, the same were and are grossly wrong and inaccurate, and through error and mistake on the part of the plaintiffs' and the defendants' said engineers and employees, were made to show amount of work done by and moneys payable to the plaintiffs far in excess of the actual amounts, and the defendants submit that they are entitled to be relieved therefrom.

21. The said R. McLennan, who certified as engineer in charge to the said approximate estimates and other charges above enumerated, is the father of the said John D. McLennan, a fact which was unknown to the defendants until a short time before the completion of the said work. He was a district chief engineer, and as such had the superintendence of the plaintiffs' contractors' work; but the defendants charge and the fact is, that he had no personal knowledge of the accuracy of the said progress estimates, and he and his subordinates certified to them fraudulently and with the knowledge that the same were false, or at all events without knowing them to be true, and that the said John Ross paid the contractors thereon without taking any steps to ascertain the accuracy thereof, or that the said work was performed to his satisfaction; and the plaintiffs Connee & McLennan received the said payments, well knowing that the said progress estimates were false and fraudulent, and that they were not entitled to be paid or receive the amounts paid to them as aforesaid.

22. The plaintiffs well knowing the confidence reposed by the defendants in the said John Ross, determined to take advantage thereof to defraud the defendants, and in pursuance of such determination, and in furtherance thereof, procured the said false and fraudulent progress estimates to be furnished as aforesaid, and under color thereof the plaintiffs Connee & McLennan have received an amount greatly in excess of the whole sum which they have properly earned and become entitled to under the said contract; and the defendants submit that an account should be taken of the amount so overpaid, and the plaintiffs ordered to refund the same to the defendants.

23. The said contract provided that : "Roads constructed for the convenience of the contractors, for the conveyance of materials or otherwise, must be at their own risk, cost and charges."; whereas the said approximate estimates embrace, and the said contractors have been allowed and paid for supply roads made solely for their own convenience, at least the sum of $40,000, and for repairs to same about $9,000, and for docks built at portages along the said roads $5,490, and for tugs for the conveyance of contractors' supplies $15,382, and for repairs to the said tugs $2,831, and also large sums for making dams, building warehouses and building scows, all of which work, amounting to over $90,000, as the contractors well knew, was for their sole convenience in the conveyance of their supplies, and should, under the express terms of the said contract, have been made at their own "risk, cost and charges." and the particulars of which, so far as the defendants are aware, appear in Schedule "B" to the particulars referred to in the 19th paragraph hereof.

24. In addition to the items above enumerated, the contractors have in the same way been allowed for and paid large sums for clearing away snow and ice from ground to be occupied by embankments, contrary to the express provisions of the said contract, and for freight on their own supplies, and for the cost of running the said tugs, and upon all of these improper and unauthorized charges, even upon the said freight, they have also been allowed a profit of fifteen per cent.

25. The said contract also provides that the contractors will, at their own expense, provide all and every kind of labor, machinery, and other plant, materials, articles and things whatsoever necessary for the due execution or completion of the said work, whereas the said progress estimates include a charge of over $10,000 for explosives used by them in the said work.

26. The said John Ross has recently, and since the said remeasurements were made, admitted to the defendants that he had no personal knowledge of the accuracy of the said approximate estimates, but nevertheless the defendants are apprehensive that the plaintiffs will, unless restrained by this Court, obtain from the said John Ross final certificate as required by the said contract.

The defendants by way of counterclaim claim :

1. That the plaintiffs may be ordered to deliver up for cancellation the said duplicate approximate estimates now in the possession of them, or either of them, and that the same may be cancelled.

2. That the said contractors may be restrained from procuring from the said Ross any further certificates, and more particularly the final certificate required by the said contract.

3. That an account may be taken of the value of the work for which the plaintiffs Conmee & McLennan are justly and truly entitled to be paid under the said contract, and that the plaintiffs may be ordered to repay to the defendants the over-payment made as aforesaid.

4. And that for the purpose aforesaid all proper enquiries may be made and accounts taken.

5. And that the plaintiffs may be ordered to pay the defendants' costs.

27. The defendants deny the allegations contained in the plaintiffs' amendments to their Statement of Claim, the same being comprised within the paragraphs 15 to 35 thereof, both inclusive.

28. In reply to paragraphs numbers 16, 17, 18, 19, 20, 24, 25, 25 (a), 26 and 35, the defendants say that they never entered into the agreements and contracts therein set out, and that the officers with whom the same are alleged to have been respectively made had no power or authority to enter into the same on behalf of the defendants.

29. And for a further reply to the paragraphs of the amended Statement of Claim in last paragraph referred to, the defendants say that the various agreements and contracts therein set up relate to the execution and construction of a portion of the defendants' railway, that the contract between the plaintiffs and the defendants in relation thereto is in writing, and that by the 13th section thereof it is distinctly declared that the said writing should be understood to contain the whole agreement between the parties, and that the express contracts, covenants and agreements therein contained should be the only contracts, covenants and agreements upon which any rights against the defendants should be founded.

30. And for a further defence to paragraphs 15 to 35, both inclusive, of the amended Statement of Claim, the defendants say that by the 24th section of the written contract herein- 10
before referred to, it is provided that every allowance to which the contractors might fairly be entitled should be embraced in the manager's monthly certificates, but that should the contractors at any time have claims of any description which they considered were not included in the progress certificate, it would be necessary for them to make and repeat such claims in writing to the manager within 14 days from the date of each and every certificate in which they allege such claims to have been omitted, and the defendants say that the progress certificates issued under the said written contract do not contain the said claims, nor were the same made in writing to the manager as provided by the said contract, nor were such claims accompanied with satisfactory evidence of their accuracy, or repeated from month to month during the progress of the work, in consequence whereof under the provisions of the 25th section of the said written 20
contract the same became forever barred.

31. And for a further defence to paragraphs 16, 17, 18, 19 and 20 of the amended Statement of Claim, the defendants say that by the 9th section of the said written contract it is provided that the prices mentioned in the schedule of rates thereto annexed should include all and every kind of work, labor, tools and plant, materials, articles and things whatsoever necessary for the full execution and completion of each class of work.

32. In reply to paragraph 21 of the amended Statement of Claim, the defendants further say that the plaintiffs' claim, if any, is barred by the Statute of Limitations, and also that by section 15 of the said written contract, it is provided that the contractors shall be at the risk of all loss or damage whatsoever from whatsoever cause arising until the work is fully completed 30
and delivered to and accepted by the company.

33. In reply to paragraphs 24, 25, 25 (a), of the amended Statement of Claim, the defendants say that by the 4th section of the said written contract it is provided that the location theretofore exhibited upon the profile was not final, and that the various kinds of work were only approximate, and that both the location and the said quantities might vary or be changed, and that by the 6th section of the said written contract it is provided that the manager should be at liberty at any time before the commencement or during the construction of the works to make any changes which he might deem expedient in the grades, the width of cuttings and fillings, the dimensions, character, nature, location or position of the works.

34. In reply to paragraph 26 of the amended Statement of Claim, the defendants further 40
say that the plaintiffs' cause of action, if any, is barred by the Statute of Limitations.

35. With reference to the supply road mentioned in paragraph 35 (2) of the amended Statement of Claim, the defendants for a further defence say that it was provided by the said written contract, that the same should be at the risk, costs and charges of the contractors.

36. The defendants further say that the several agreements set up in the said amended Statement of Claim, and the various orders for extra work therein alluded to, are not in writing, as provided by the said written contract.

37. The defendants further say that the prices agreed to be paid to the plaintiffs for work done under the written contract, as shown by the list or schedule thereto annexed, were much larger than the prices usually allowed for similar work, and the defendants further say that the said large prices were so agreed upon to cover every possible contingency, such as the difficulty of getting supplies and the building of roads and other matters set up in the said amended Statement of Claim.

38. The defendants further say that the said written contract bars and precludes any recovery by the plaintiffs in respect of the claims sued on in the said amended Statement of Claim and the defendants crave leave to refer to the several provisions of the said written contract applicable to the said claims as if specifically pleaded thereto respectively.

39. And by way of counterclaim to the plaintiffs' amendments to their Statement of Claim, the defendants say that in and by the said written contract it is provided that the plaintiffs should execute and construct the works therein referred to in a good and sufficient workmanlike manner ready for use by the defendants, yet the plaintiffs failed to perform the said contract, and constructed the said works in a careless and improper manner, and did not complete the said works, but abandoned and left the same in an incomplete condition, unready for use by the defendants, and the defendants aver, as the fact is, that they were put to great expense in completing the said works and making the same ready for use as provided by the said contract, and the defendants claim in respect thereof the sum of $100,000.

40. And for a further counterclaim the defendants say that in and by the said written contract it is provided that should material be wasted from cuttings or borrow pits, without special permission in writing, the value of such wasted material should be deducted from the amount of the estimates, and the defendants aver, as the fact is, that the plaintiffs without such permission did waste enormous quantities from cuttings and borrow pits, and the defendants claim in respect thereof the sum of $25,000.

41. And for a further counterclaim the defendants say that the plaintiffs improperly and in collusion with the defendants' officers procured the said officers or some of them to issue to the plaintiffs estimates or certificates for work alleged to have been done by the plaintiffs under the said written contract and otherwise, but which said work had not been done, as the defendants will show, whereby the defendants were obliged to re-measure and re-classify the excavations upon the said works, in order to ascertain the actual work done, and were thereby put to much damage and expense, and the defendants claim in respect thereof the sum of $20,000.

REPLY.

1. The plaintiffs join issue upon the amended Statement of Defence of the defendants.

2. And by way of reply to the said Statement of Defence and Counterclaim of the defendants the plaintiffs say:—

3. That they entered into the contract with the North American Railway Contracting Company, who, as the plaintiffs allege, were merely the agents of the defendants in making the said contract, the said John Ross being at such time manager of construction of the defendants.

4. The plaintiffs say that in the said contract it is provided that where the word manager is used the same shall mean the manager of construction for the time being having control over the works on behalf of the company, and shall extend to and include any of his assistants acting under his instructions, and that the said assistants by reason of the large amount of work necessary to be done under such contracts, did in fact act for and on behalf of the said Ross as manager in the greater portion of the work.

5. The said contract further provides that the meaning or intention of the contract, or any question arising out of same, should be solely under the judgment of the said manager in the sense above used, and the said plaintiffs say that the said assistants, acting as managers, also issued progress certificates from time to time upon which payments were made, and the same were treated as properly complying with the said contract by the said manager. And the plaintiffs say that they were not at any time in a position to know whether such certificates as between the company and the said manager were granted or not, but relied upon the said progress estimates and went on and completed the work on the faith of the same being certified to by such manager, and the plaintiffs submit that the defendants cannot now, if any such details as are required by the contract have been neglected by the manager, take advantage of the same as against the plaintiffs.

6. The plaintiffs further say that it is provided by the contract that at the time the progress certificates were issued the plaintiffs if dissatisfied with such progress certificates had the right to appeal in the manner provided by the said contract, and the plaintiffs say that the said progress certificates were issued after due consideration and discussion between the parties and were arrived at as a proper estimate of the work done; and they submit that the defendants cannot now say that such estimates were not the proper estimates, the same being made under the contract, and being made by the parties who were the sole judges of the work as to quantity and quality of material, and submit that the said defendants are estopped from any such contention now.

6. (*a*) And the plaintiffs further say that the said company, the defendants, by accepting the said progress certificates and paying under the same, are unable to rescind same now, as the position of the plaintiffs has been greatly altered by relying upon such progress certificates being accepted and passed, and the said plaintiffs therefore say that the defendants are debarred from taking any such objection.

7. The plaintiffs deny all allegations of fraud made in such Statement of Defence and Counterclaim.

8. The plaintiffs say that the matter alleged in the 15th and 16th paragraphs of the said Statement of Defence and Counterclaim is a mere matter of book-keeping between the defendants and the said John Ross, of which the plaintiffs had no notice, and for which they cannot now be held responsible.

9. The plaintiffs say that the measurement referred to in the Statement of Defence and Counterclaim of the defendants is wholly incomplete, and that it is impossible to arrive at even an approximate estimate by any such measurement, and say that the original measurements referred to in said progress certificates were correct, and the defendants should be bound by them.

10. The plaintiffs further say that the road referred to in the said progress certificates was not made for the convenience of these plaintiffs; but was made for the general convenience of the contractors along the road and of the company, and to push forward the work, and was made entirely at the request of the said John Ross, outside of the contract referred to, and was done solely upon the understanding that the same was not to be included in the contract, or in any way to be included under the tender, and the same was a necessity for the said railway of which the said company obtained the benefit, and the plaintiffs claim that payments made were properly made by the said Ross.

11. The plaintiffs repeat the allegations contained in the preceding paragraph in relation to the barges and tugs mentioned in the said statement, and other work referred to in the 23rd paragraph of the Statement of Defence and Counterclaim.

12. The plaintiffs state in reference to the statement contained in the 24th paragraph of the Statement of Defence and Counterclaim, they were allowed nothing of the nature mentioned therein except upon the distinct orders of the said Ross, and after inspection by him, and after he had passed his judgment that the same was not included in the contract, and that the plaintiffs were entitled therefor, from which judgment under the said contract there is no appeal, and the plaintiffs submit the defendants cannot now be heard to say that there are such items, if any exist, which the plaintiffs should not be paid.

13. The plaintiffs say that the items of explosives referred to were allowed by the said Ross after a full discussion, and to induce the plaintiffs to push on the said work in using same for frozen earth, and was specially agreed to be outside of said contract by said Ross, from whose judgment the plaintiffs say the defendants cannot now appeal.

REPLY TO AMENDED STATEMENT OF DEFENCE.

1. The plaintiffs join issue upon the Statement of Defence herein to the amendments delivered.

(This has reference to paragraphs 27 to 38, both inclusive, of the Statement of Defence as printed in this book).

2. The plaintiffs further say that the claims referred to as being within the contract are contracts made outside of the written contract referred to and were executed contracts upon which certificates were granted and payments made, and the same were adopted by the defendants.

3. The plaintiffs say that the matters pleaded to as coming within just allowances under the contract are in no sense within the contract, but should same be so held, then the plaintiffs say the defendants' officers waived any such appeals as referred to, and the plaintiffs further say that under clause 31 of such contract they were entitled to the sums referred to for change in line, reduction of work and other causes complained of.

Delivered this 17th day of December, 1886, by Messieurs McCarthy, Osler, Hoskin & Creelman, of the City of Toronto, in the County of York, Plaintiffs' Solicitors.

DEFENCE TO AMENDED COUNTERCLAIM.

1. The plaintiffs deny the statements contained in the defendants' second counterclaim herein filed with the defendants' defence to the plaintiffs' amendments to Statement of Claim.

(This has reference to paragraphs 39, 40 and 41 of the Statement of Defence as printed in this book).

2. As to the 39th paragraph the plaintiffs say that the defendants accepted the said work from the plaintiffs as properly completed.

3. In the 40th paragraph the plaintiffs say that the wasting, if any, occurred through the express directions of the defendants' officers.

Delivered this 17th day of December, 1886, by Messieurs McCarthy, Osler, Hoskin & Creelman, of the City of Toronto, in the County of York, Plaintiffs' Solicitors.

In the High Court of Justice

QUEEN'S BENCH DIVISION.

Writ issued on 2nd December, A.D. 1885.

BETWEEN

CONMEE & McLENNAN,

Plaintiffs,

AND

THE NORTH AMERICAN RAILWAY CONTRACTING COMPANY AND THE CANADIAN PACIFIC RAILWAY COMPANY,

Defendants. 10

STATEMENT OF CLAIM.

1. The plaintiffs are contractors, resident at the Town of Port Arthur.

2. The defendants' railway company is a corporation duly incorporated by an Act of the Parliament of the Dominion of Canada, passed in the forty-fourth year of the reign of Her Majesty Queen Victoria, and chaptered one.

3. The object of the said corporation was to construct a line of railway connecting the seaboard of British Columbia with the railway system of Canada.

4. In order the more easily and effectually to carry out the construction of the said railway and for the purposes of the defendant railway corporation only, a charter was obtained by the defendant railway company for the above contracting corporation, the name of which was used 20 by the defendant railway company in entering into contracts for the construction and equipment of the said railway.

5. In or about the year 1882, the said plaintiffs entered into a contract with the said defendants' contracting company, acting for and on behalf of the defendant railway company (which contract has been subsequently adopted, ratified, assumed, and acted upon by the defendant railway company), to build and construct part of the defendant railway company's line, viz., that portion between the twenty-eighth mile east of Port Arthur and the forty-eighth mile east inclusive.

6. By such contract the plaintiffs were to furnish all labor, machinery, plant, articles and things necessary for the execution of the work referred to in specifications annexed to the contract, and in plans and profiles therein referred to as prepared or to be prepared for the purposes of the work.

7. By the said contract the word "manager" whenever used should mean the manager of construction having control over the work, and all directions or certificates given or decisions made by any one acting for or under him should be subject to his approval, and might be cancelled, altered, modified or changed by him.

8. The manager by said contract as above defined was constituted the sole judge of work and material in respect of both quantity and quality; and his decision as to work or material or the meaning and intention of the contract, plans, profiles, specifications and drawings to be final.

9. The manager's decision was also made final and conclusive in reference to what work, labor, material, tools and plant were included in any price.

10. The plaintiffs in pursuance of said contract proceeded to perform the work undertaken under the supervision of the officers of the company, there being one district engineer named Gordon, and two assistants named Howard and Robins. The assistant engineer measured the work as it progressed and returned such measurements to be revised by the district engineer Gordon. The plaintiffs claim that this engineer did not allow them sufficiently large amounts for work done, but cut down the amounts returned by the sub-engineers, and they say that the manager of construction, then one John Ross, agreed to investigate such contention of the plaintiffs, but he has not yet done so, he having been restrained by the defendants from so doing, who have thus prevented the plaintiffs from obtaining the final revised certificate called for by the contract from said John Ross.

11. After the expiration of about three months the said Robins was replaced by one McLeod, notwithstanding the objection of the plaintiffs, who claimed that McLeod could not thus deal with the final estimates. Also, before the completion of the contract Howard became insane and Gordon died, the result to the plaintiffs being that they were unable to get a final estimate from the men who measured the work and who, though making certain monthly progress estimates, had agreed to reconsider the question of classification in drawing up the final estimates whereby the plaintiffs say the said progress estimates are in no way binding nor were intended to be such upon them.

12. The defendants then made up a final estimate from the progress estimates solely, though the manager repeatedly applied to by the plaintiffs had agreed to go over the work and reconsider the classification previously to final estimate being given and had not so done, and the certificate of correction of such final estimate was made by one W. H. Holland, a clerk under Mr. Ross, and payment offered by defendants to plaintiffs thereon. The plaintiffs received such payments and gave receipts therefor on the express understanding with one Moffat, who acted for the Canadian Pacific Railway Company and made the payment and who has admitted same, that such receipt was not to debar the plaintiffs having an examination by the manager which had been long promised and the right to protest against such alleged final certificate upon which payment was made as aforesaid.

13. The plaintiffs say that Howard agreed as progress estimates were made that certain further allowances were to be made when final estimate was made up, and both Gordon and Howard on classification, their returns having been disputed, agreed to reconsider same on preparation of final estimate.

14. The plaintiffs say that owing to the circumstances above set out and of which the defendants have taken full advantage, notwithstanding the agreement of their manager to reconsider the returns of the sub-engineers, they have not received payment for the work they have well and properly done for defendants under the above contract work to the amount of $369,618.45, for which they have been paid the sum of $298,199.40, thus leaving a balance claimed due by plaintiff's of $71,429.05.

The plaintiffs therefore claim that the defendants have improperly and unjustly prevented the said manager from giving over the said progress estimates and measurements and classification as agreed, and from giving up on such consideration the proper final certificate to which the plaintiffs are entitled, and that the plaintiffs have under the said contract performed work as aforesaid upon which the balance as aforesaid is due and payment of such sum.

The plaintiffs propose that this action should be tried at Toronto.

Delivered this 24th day of April, A.D. 1886, by Messrs. McCarthy, Osler, Hoskin & Creelman, of 23 Toronto Street, Toronto, Plaintiffs' Solicitors.

PROPOSED AMENDMENT TO STATEMENT OF CLAIM.

1. The plaintiffs further say, that by reason of the changes in the method of excavation and in the size and width of the bank on the Canadian Pacific Railway Company's line of railway in the section covered by the plaintiffs' said contract, and which changes were properly ordered by the manager himself, or by his assistants for him, and which are over and above the said contract, they were put to much extra expense.

1. On account of their having to return to cuttings after having removed gullets and remove the necessary material to slope the bank, thus increasing the expense of moving plant and of extra haul; and

2. On account of the extra haul of material excavated from cuttings which used to make the bank, and which extra haul was the result of the narrowing of the bank ordered by the engineers.

The manager agreed on several occasions to allow the plaintiffs for the amount of such work, but the defendants have refused to allow him to do so and have thus broken the contract as to same and have relieved the plaintiffs from the necessity of procuring the certificate which the contract requires.

On those accounts, the plaintiffs claim the sum of $15,000 and pray that the manager may be allowed and directed to make such allowances and classification and to give the necessary certificate therefor.

STATEMENT OF DEFENCE.

1. The defendants admit the 1st, 2nd and 3rd paragraphs of the plaintiffs' Statement of Claim.

2. The defendants, the Canadian Pacific Railway Company, admit that the plaintiffs entered into the within contract with the defendants, the Canadian Pacific Railway Company, bearing date the 1st of October, A.D. 1882, for the construction of twenty miles of their railway, and being that portion thereof between the 20th and the 41st miles thereof, and not that portion between the 28th and 48th miles thereof, as stated in said Statement of Claim.

3. The defendants, the North American Railway Contracting Company, were not parties to the said contract, and this action in any event ought to be dismissed as against them with costs.

4. The plaintiffs performed the work embraced in the said contract, and were paid in full therefor, and the defendants say that they are not indebted to them for anything whatever in respect thereof.

5. The defendants, the Canadian Pacific Railway Company, deny that the men who measured the said work agreed to reconsider the question of classification, in drawing up the final estimate, as stated in the 11th paragraph of the said Statement of Claim, or that they had any power to bind the defendants to any such agreement.

6. The defendants, the Canadian Pacific Railway Company, deny the allegations contained in the 12th and 13th paragraphs of the said Statement of Claim, and say that the said Moffat, Howard and Gordon, had no power or authority to bind the defendants, the Canadian Pacific Railway Company, by the agreements or promises therein stated to have been made by them.

7. The defendants, the Canadian Pacific Railway Company, deny that the said John Ross agreed to reconsider the returns of the said engineers, after the final settlement with the plaintiffs for the said work, as alleged in the 14th paragraph of the said Statement of Claim, or that he had any power or authority to re-open the said matter after it had been finally settled as aforesaid, without the authority of the defendants, the Canadian Pacific Railway Company.

8. The said contract amongst other things contains the following provisions:—

> 24. It is intended that any allowance to which the contractors are fairly entitled will be embraced in the manager's monthly certificates, but should the contractors at any time have claims of any description, which they consider are not included in the progress certificates, it will be necessary for them to make and repeat such claims in writing to the manager within 14 days from the date of each and every certificate in which they allege such claims to have been omitted.
>
> 25. The contractors, in presenting claims of the kind referred to in the last clause, must accompany them with satisfactory evidence of their accuracy, and the reason why they think they should be allowed. Unless such claims are thus made during the progress of the work within 14 days as in the preceding clause, and repeated in writing every month until finally adjusted or rejected, it must be clearly understood that they are for ever shut out, and the contractors shall have no claim on the company in respect thereof.

9. The defendants say that the plaintiffs never complied with the provisions of the said contract as lastly above recited, and say that if any such claims ever existed, which they deny, they were shut out, and that the plaintiffs have no claim on the said company in respect thereof.

10. The plaintiffs have never made any claim or demand upon the defendants, the Canadian Pacific Railway Company, in respect of the matters herein complained of, although they are alleged to have existed ever since the year 1882, nor did they the defendants ever hear of any such claims until the beginning of this action, and they believe that the plaintiffs have some other purpose or object in now asserting them than a *bona fide* expectation of establishing them, and they plead the laches of the plaintiffs in a matter of this nature as a bar to the said action.

11. The plaintiffs have brought three other separate actions against the defendants, all in respect of matters arising out of the contracts with the defendants, the Canadian Pacific Railway Company, for the construction of their railway, and the said defendants charge that they have done so vexatiously, and that all of the said actions ought to be consolidated.

12. The defendants submit that this action should be dismissed against each of them respectively with costs.

Delivered the 5th day of May, 1886, by R. M. Wells, of No. 110 King St. West, Toronto, Defendants' Solicitors.

JOINDER OF ISSUE AND REPLY.

The plaintiffs join issue upon the defendants' Statement of Defence herein.

And for a reply to the ninth paragraph of the said statement, the plaintiffs say that the said provisions were merely for guidance, and were waived by the defendants, and were construed by the manager, as he is authorized to do under the contract, as not referring to such progress estimates as were issued.

Delivered this 10th day of May, 1886.

McCARTHY, OSLER, HOSKIN & CREELMAN,
Plaintiffs' Solicitors.

In the High Court of Justice

QUEEN'S BENCH DIVISION.

Writ issued the 2nd day of December, 1885.

BETWEEN

CONMEE & McLENNAN,

Plaintiffs,

AND

THE CANADIAN PACIFIC RAILWAY COMPANY,

Defendants.

STATEMENT OF CLAIM.

1. The plaintiffs are contractors, resident at the Town of Port Arthur.

2. The defendants' railway company is a corporation duly incorporated by an Act of the Parliament of the Dominion of Canada, passed in the 44th year of the reign of Her Majesty Queen Victoria, and chaptered one.

3. The object of the said corporation was to construct a line of railway connecting the sea-board of British Columbia with the railway system of Canada.

4. In or about the month of October, 1882, the plaintiffs entered into a contract with the said defendants to supply to the said defendant railway company ties, at the rate of 32 cents per tie, for the construction of some 67 miles of their line, beginning at Port Arthur and running east, to the number of 2,640 ties for each of the said number of miles, such ties to be subject to inspection by the company.

5. In pursuance of this agreement the plaintiffs proceeded to supply said ties, and they arranged with the said defendant company to carry at plaintiffs' cost the ties for the first few miles from the place where they were stocked up, to the part of the line where they were required. The said defendant company then sent up their inspector, one Myles, to such place where ties were stocked, and he inspected same, and those which were passed were brought down to places where required, and the plaintiffs paid their sub-contractors for such ties so passed upon the faith and strength of such inspection, to the knowledge of the defendants.

6. During the progress of the work on the contract herein, for the first four months, ties were received by the defendant company from plaintiffs and inspected by the company's inspector and progress estimates returned to the plaintiffs for the same, and the said plaintiffs paid their sub-contractors on such progress estimates, but subsequently one Sims was appointed inspector and he reinspected said ties, throwing out a lot of same and reduced the said estimates, in spite of the protest of the plaintiffs, who were forced to replace such ties thrown out by others. These said ties were afterwards taken by the defendant company, who used same for their line in that and the other portions of the road, and the plaintiffs now claim that they should be paid by the said defendant company previously to being inspected the second time and if not then accepted, they were subsequent to the said second inspection as aforesaid, and used by the defendants.

7. The plaintiffs have under said contract supplied to the defendant company ties which have been accepted and used by said defendants to the number of 225,000, and they have only received from the defendants on account thereof the sum of $35,920.96, thus leaving a balance due plaintiffs of $36,079.04, which they hereby claim with interest from the 1st January, 1884.

The plaintiffs propose that this action should be tried at Toronto.

Delivered the 24th day of April, 1886, by Messieurs McCarthy, Osler, Hoskin & Creelman, of the City of Toronto, Plaintiffs' Solicitors.

STATEMENT OF DEFENCE.

1. The defendants admit the first, second and third paragraphs of the Plaintiffs' Statement of Claim.

2. The defendants deny the allegations contained in the said Statement of Claim.

3. The defendants deny that they are indebted to the plaintiffs in any sum whatever in respect of the matter complained of.

4. This action should be dismissed with costs.

Delivered this 22nd day of May, A.D. 1886, by R. M. Wells, Solicitor, number 110 King St. West, Toronto, Defendants' Solicitor.

JOINDER.

The plaintiffs join issue upon the defendant' Statement of Defence herein.

Delivered this 24th day of September, A.D. 1886, by Messrs. McCarthy, Osler, Hoskin & Creelman, 23 Toronto St., Toronto, Plaintiffs' Solicitors.