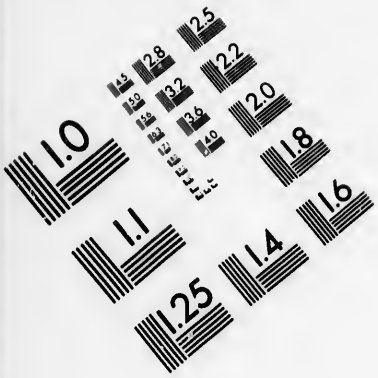

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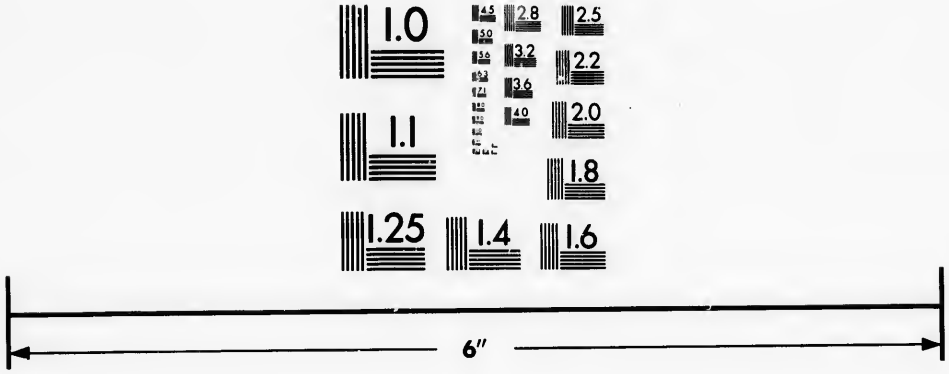

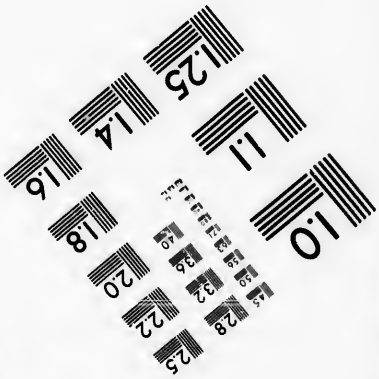

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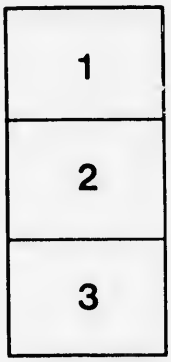

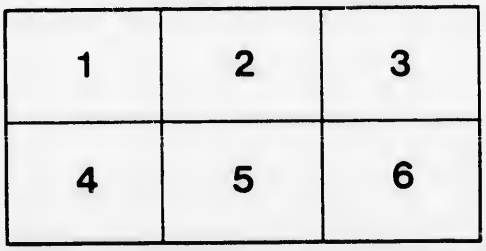

In the Queen's Bench.

APPEAL SIDE.

GRAND TRUNK RAILWAY COMPANY OF CANADA,

Appellants.

vs.

ROBERT FRASER, ET AL.,

Respondents.

RESPONDENTS' CASE.

In the Queen's Bench.

PROVINCE OF CANADA,
LOWER CANADA.

Court of Queen's Bench.

APPEAL SIDE.

GRAND TRUNK RAILWAY COMPANY OF CANADA,
Defendants in the Court below,
APPELLANTS.

vs.

ROBERT FRASER, ET AL.,
Plaintiffs in the Court below,
RESPONDENTS.

RESPONDENTS' CASE.

This is an appeal from a judgement of the Superior Court in the District of St. Francis. Respondents' action in Court below was upon a contract made with the St. Lawrence & Atlantic Railroad Company, to erect a number of Stations on the line of Railroad specified in the contract;—Appellants liable for obligations of that Company, by said Company's being merged in the Grand Trunk Railway Company of Canada.—See admission of Record. Demand is for damages, breach of Contract, £750, of which £380 was claimed to be due for work done under contract, and the remainder for delays interposed by said Company, and various hindrances occasioned to Respondents in the prosecution of their works, and for arbitrarily taking away from them the contract without cause. Respondents' Exhibit No. 4, is a statement of work done and payments made. In proof of Respondents' demande, the Court is referred to the evidence of Matthew Henry and James Chapman, both practical joiners, who were requested to examine portions of the work, as compared with the contract and specifications. The evidence of these witnesses is to be considered in conjunction with Respondents' Exhibit, No. 5. Contract price for Way Stations, £215; for Water Stations £95. Witnesses say that when contract was taken out of Respondents' hands the Water Station at Lennoxville could have been finished according to contract for £30 or 35,

Way Station at same place, for £10,	£ 65	00 0
Water Station at Waterville, for £8,	205	00 0
Water Station at Windsor, admitted to have been completed,	87	00 0
Allowed for alteration of Water Station at Windsor, as per Appellants' Exhibit. No. 1,	95	00 0
Respondents' claim for work on bridges at Windsor, and alterations, £27 00 0	7	10 0
Their clnim appears to have been allowed by Mr. Lawson, Company's Engineer. (See Respondents' Exhibit X.)		
Then add to £7 10 allowed by Appellants,	19	10 0
Respondents' claim also for tank made at Windsor,	7	10 0
Work and materials at Waterville, estimated by Matthew Henry and James Chapman, and not objected to by James Gordon, Company's Agent, as appears by evidence of Henry, Lowe, and Barber,	127	00 0
From the evidence of D. Lindsay, in conjunction with Respondents' Exhibit No. 2, and considering contract price and the progress of the work at Coaticook when contract was taken away, Respondents' charge in Exhibit No. 4 for materials and work at Coaticook, appears reasonable,	115	00 0
The charges for timber for Way Station at Waterville, and brick, &c., could not be accurately proved, but by evidence of Lindsay and Matthew Henry they are partially proved, £ 5 5		
9 15—15	00	0
Respecting damages for delays occasioned by the Company, Vide evidence of Charles Brooks, Jesse Pennoyer, D. Lindsay, Matthew Henry, and James Chapman, also Exhibit No. 2.	100	00 0
The damages for taking away contract are estimated by Barber, Lindsay, and Charles Brooks, as probable loss of profits 15 per centum upon the works contracted for and incomplete when contract was taken away,	200	00 0
Total,	£1043	10 0
Deduct amount of payments,	465	00 0
Balance,	£578	10 0

The Appellants pleaded that the works were proceeded with too slowly, and that work was not done in a workmanlike manner, and that Respondents were overpaid, and the Company were justified in taking away contract, and that the contract was not remmerative, and Respondents suffered no loss. Respondents' evidence is of a most convincing character. The witnesses had every opportunity to know the facts and are disinterested. It appears clearly from their evidence that Respondents were dealt with in a most arbitrary manner. Nothing but fickleness characterized the conduct of the Company's Engineers. No sooner was an order given and the work begun than a counter order was given, and by the constant changes of plans and want of method on the part of the Company, Respondents were put to great loss and inconvenience. The contract was taken away not because of slow progress of the work, but because the Company had determined to build Stations of brick instead of wood. Respondents' materials and manufactured lumber were taken by the Company without the formality of an inventory, or such thereof as the whims of the Company's men inclined them to use, and the rest was left to be trodden into the mud and be destroyed. It must be observed that Respondents made a thousand little changes and outlays expecting they would be dealt fairly with, and no account has been made of them.

One fact should be noted. Every witness, not an employee of the Company states that Respondents did their work in a workmanlike manner. Seven practical joiners were examined for Respondents, and Charles Brooks, Esquire, a dealer in lumber, and speaking from actual knowledge of the work say it was good. Hudon and Bryant, Appellants' witnesses, say Respondents, did the work, well and in good faith, but say some of the timber in the Station at Lennoxville, was not sufficiently seasoned.

James Gordon's evidence, it must be remembered, is that of a rival, who tendered for the original contract, and through whose advice it was taken away, and into whose hands the work came after taken from Respondents. As an instance of the unreliable character of his evidence, may be cited the fact that he valued the work and materials at Waterville, at only £40, while these are estimated by Henry and Chapman at £127, whose estimate is corroborated by Barber. Gordon testifies that this work was not according to plans and specifications. Barber and Lowe say when they went with him to value it he made no objection to the work, but requested them simply to value it. This was when an arbitration between Respondents and Appellants was in contemplation.

This is mainly a matter of evidence and figures, and can only be appreciated by examination of depositions, and exhibits. Respondents assert that the following propositions are well founded in law and evidence.

1. By the contract it is stipulated that in the event of the works progressing too slowly, or not being done well, the Company had one of two courses upon which to make their option. They could take away the works and relet them to others, or put on men and complete them, at Respondents' expense. They did neither, but simply refused to allow Respondents to complete the contract and changed their plans, and subsequently had the Stations constructed of brick. Supposing a necessity to exist to take the work out of Respondents' hands, if the Company made option to relet the completion by tenders, the relation of the parties, whether there were a gain or loss would be at once apparent. If on the other hand, the Company had put on men and completed the work at Respondents' cost, the Respondents would be entitled to the contract prices for the whole work, and if the cost of completion exceeded the prices stipulated, Respondents would have been liable for the loss. If it had fallen short, Respondents would have been entitled to the difference. In either case the Company were bound to furnish an account. Failing to do this, and having taken a course the contract does not warrant, they cannot with reason appeal to the clause of the contract giving them power to take away the works from the Respondents, as affording them justification for the course adopted by them, even were it proved that Respondents were in default.

2. Respondents say that the evidence proves that the Company, by their delays and changes of plans, prevented Respondents from completing the works within the time specified by the contract, and consequently had no right to exact that this part of the contract should be fulfilled.

3. That respondents were not put *en demeure* to proceed more rapidly or in a different manner from what they were proceeding.

4. That the pretence that the work was not done in a workmanlike manner is negatived by the weight of evidence on both sides.

5. That the plea of Appellants that the contract was not a remunerative one and was *mercifully* taken out of Respondents' hands against their will, to prevent their ruin, can scarcely be considered a legal defence, if true. To be consistent with such a plea, the Company should ask that Respondents be interdicted, for it proceeds on the assumption that they are incapable of appreciating their own interests.

6. It devolved upon the Appellants to shew that causes existed from non-compliance with the contract, which gave them the right to take away the works, that these causes did not arise from their own acts, and that having taken them away, they took the course respecting them which the contract permitted in such contingency. Respondents pretend that they have failed in all these particulars, and that so far as relates to damages directly growing out of contract that Respondents are entitled to reasonable presumptive profits, which are variously estimated from ten to twenty-five per centon upon the contract prices.

The following is the judgment of the Honorable Edward Short, holding the Superior Court on the 27th March, 1858:

"The Court having heard the parties by their respective Counsel, examined the proceedings and proof of record in this cause filed, and upon the whole deliberated, doth consider that inasmuch as by the evidence adduced, it is among other things established that at the time said Plaintiffs were dismissed by the Defendants from the work specified in the contract, mentioned and referred to in Plaintiffs' declaration, they had performed in a good and workmanlike manner, under the direction, inspection and superintendence of the Engineers and agents of the said Defendants, a considerable amount of the said work, and had found and provided divers materials and necessary things for the said work, the whole of the value of six hundred and thirty-one pounds, seven shillings and eleven pence currency, that whatever delay had accrued in the execution of the said work, had been caused by the Defendants themselves, and that they the said Plaintiffs were then proceeding with the said work well and with reasonable celerity, and inasmuch as it appears by the evidence that the said contract would have yielded to the said Plaintiffs a profit of from ten to twenty per cent, they the said Plaintiffs, are entitled to recover from the said Defendants, as well the sum of six hundred and thirty-one pounds seven shillings and eleven pence currency, as the further sum of seventy pounds, currency, as damages, equal to ten per cent of the price of the work remaining to be done under the said contract, after deducting therefrom the sum of four hundred and sixty five pounds currency, paid by the said Defendants, and doth in consequence adjudge and condemn the said Defendants to pay to the said Plaintiffs the sum of two hundred and thirty-six pounds seven shillings and eleven pence, with interest on the said sum from the day of the *demande* judiciare and costs of suit, *distrait* to Plaintiffs' Attorneys."

It will be seen that the Respondents have been allowed no damages for delays occasioned by Appellants during the progress of the work, although such delays are admitted to have occurred. The reason assigned by the learned Judge was, that no protest was served at the time by Respondents upon the Company. By parity of reasoning, the Company should have protested Respondents, if the works did not proceed satisfactorily.

Dated 20th May, 1858.

SANBORN & BROOKS,
for Respondents.