IN THE MATTER of the Petition of Right of

1906
April 9.

M. A. PIGOTT AND J. C. INGLES DOING BUSINESS UNDER THE NAME, STYLE AND FIRM OF PIGOTT & INGLES .... SUPPLIANTS;

AND

HIS MAJESTY THE KING .... RESPONDENT.

Public work—Contract for widening canal—Change of plans—Extra work —Recovery for—Quantum meruit—Waiver.

The suppliants were contractors for widening and deepening the lower part of the Grenville Canal. Some portions of the work described in the specifications could not be done without unwatering the canal; other portions of it could not be very well done in the winter season; and nearly all of it could have been done more cheaply and conveniently during the open season. There was, however, nothing to prevent the work being done in the way the contractors did it, that is, by doing during the season of navigation such work as they could do with the water in the canal, by making the best use possible of the time in the spring after the frost was out of the ground and before the water was let into the canal for the purposes of navigation, and also by using in the same way any time that might be available after the water was let out of the canal in the autumn and before the severe weather set in, and with regard to the rest, by work done in the winter season. It was also a term of the specifications that "parties tendering should consider in submitting their prices for the various items of work; that they must include the cost of removing snow and ice, off dams, troughs, &c., and everything necessary to unwater the canal and weir pit during the progress of the work, and that navigation should not be interfered with."

A large part of the work was done either in the winter season or with the water in the canal.

Held: That there was no such change in the conditions under which the contract was to be performed as to make its provisions inapplicable to the work that was done, and that the case was not one in which the contractors were entitled to treat the contract as at an end and to recover upon a quantum meruit, as was done in the case of *Bush v. Trustees of the Port and Town of Whitehaven.* (See Hudson on Building Contracts, 2nd ed., vol. 11, p. 121.)

2. By the 33rd section of *The Exchequer Court Act* it is provided that "In adjudicating upon any claim arising out of any contract in writing, the court shall decide in accordance with the stipulations in such contract, and shall not allow compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein, nor shall it allow interest on any sum of money which it considers to be due to such claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown."

In this case an order in council was passed waving certain clauses of the contract,

Held, that the words in the first clause of the above section "the court "shall decide in accordance with the stipulations in such contract" may be treated as directory only, and that effect might be given to the waiver so far as it afforded relief from the clauses of the contract which would constitute a defence to the action if pleaded by the Crown, such as the absence of any written direction or certificate by the engineer with respect to the work done; but that the remaining clauses of the section were imperative, and that there could be no valid waiver which would enable a contractor to obtain compensation for a larger sum than the amount stipulated for in his contract, i.e., the contract prices for the different classes of work done must be applied to such work.

3. Where a contract has been entered into for the construction of certain works at schedule rates, and the work has been completed in accordance with the contract, the contract prices cannot be increased so as to give the contractor a legal claim for higher prices without a new agreement, made with authority, for a good consideration.

PETITION of Right to recover a sum of money from the Crown alleged to be due to the suppliants for works done in the improvement of the Grenville Canal.

The facts of the case are stated in the reasons for judgment.

May 19th, 1905.

The argument of the case was now heard at Ottawa.

G. H. Watson, K.C., for the suppliants.

F. H. Chrysler, K.C., and *W. Johnston*, for the respondent.

Mr. *Watson* contended that what the suppliants were claiming in this action were things done and provided

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extra and in excess of their original contract in deepening and widening the Grenville Canal. The conditions and circumstances under which the works here claimed for were executed were so changed from those contemplated by the parties to the contract at the time it was made that the contractors are entitled to treat the contract as at an end and to sue upon a *quantum meruit.* The plans were changed by the Crown, and the delays arising from such changes were prejudicial to the execution of the works by the defendants. Instead of the work being done in the open season and with the canal unwatered, the bulk of it was done either in winter or with the water in the canal. This was because of the changes in the plans made by the engineer, and for the acts of the engineer within his powers the Crown is responsible.

The order in council passed with reference to these particular proceedings waives any technical defences to the action "in so far as they would prevent a consideration of any claim on its merits." The Crown got the benefit of the work done, and is obliged in law to pay for it.

Mr. *Chrysler*, for the respondent, argued that the suppliants were confronted by a dilemma in prosecuting their claim here. If they relied on the contract, the evidence plainly shows that it was contemplated that the work should be done in the winter season, or after the close of navigation, and further, they were met with the schedule of prices; while if they rely on the order in council, that does not purport to waive the prices at all.

The case of *Henderson* v. *The Queen* (1) does not apply here, because it is a question of improvements upon land and not of obtaining the benefit of goods sold. *Munro* v. *Butt* (2).

(1) 28 S. C. R. 425. (2) 8 El. & B. 738.

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Furthermore, the evidence does not show that the suppliants lost money on their contract.

Mr. *Watson*, in reply, cited *The Queen* v. *St. John Water Commissioners* (1); *Weddell Dredging Co.* v. *The Queen* (2); *Jackson* v. *Union Marine Insurance Co.* (3); *Ross* v. *Barry* (4); *Hall* v. *The Queen* (5); *Starrs* v. *The Queen* (6); *Wallis* v. *Robinson* (7).

THE JUDGE OF THE EXCHEQUER COURT now (April 9th, 1906), delivered judgment.

The petition is brought by the suppliants to recover from the respondent the sum of $154,244.93, with interest, for work done by them in widening and deepening the lower part of the Grenville canal, and for damages sustained by them in doing that work. For the execution of this work the suppliants, on the 9th day of April, 1897, entered into a written contract with the Crown, whereby it was, among other things, provided that they should, in the manner therein set out, be paid for the works contracted for at certain prescribed prices. By a final estimate signed by Mr. Lynch, as resident engineer, by Mr. Marceau, as superintending engineer, and by Mr. Schreiber, as Chief Engineer, the suppliants were, on the 19th day of April, 1901, allowed in respect of such works the sum of $95,323.10, and that amount has been paid.

In the month of November, prior to the date last mentioned, the suppliants had made a claim against the Crown in respect of this work and for damages and interest, amounting in all to the sum of $191,360.16, against which they gave credit for $92,675.57 for cash received; leaving a balance as then claimed by them of $99,684.59. This claim was substantially that which is

(1) 19 S. C. R. 125.
(2) 7 Ex. C. R. 323.
(3) L. R. 8 C. P. 572.
(4) 19 S. C. R. 360.
(5) 3 Ex. C. R. 373.
(6) 1 Ex. C. R. 301.
(7) 3 F. & F. 307.

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now before the court with this difference, that the prices have since been increased to include a general average profit of about twenty-five per cent. That in the main accounts for the difference in the amount of the claim then made and that now in question here. The claim was considered before the final estimate of April, 1901, was given, with the result that by the latter the suppliants were allowed a sum of $3,647.53 in addition to the amount for which they had given credit in November, 1900. Of the latter amount the sum of $1,016.45 was allowed in respect of matters not included in the schedule of prices. The large difference between the amount which the Government engineers have allowed and that which the suppliants claim is principally due to the fact that the former in making their returns and estimates have adhered to the prices prescribed in the contract, while the latter have made up their claim at larger prices, which they say are fair and reasonable and such as they are entitled to under all the circumstances of the case. In short, the suppliants make their claim upon the *quantum meruit* and not upon the contract, and they contend that they are entitled to do that on two grounds, one of which existed at the time the final estimate was made, while the other has arisen since.

In the first place it is said that the circumstances under which the works in question were executed were so changed from those contemplated by the parties to the contract that the special conditions of the contract are inapplicable, and that the contractors are entitled to treat the contract as at an end and to recover upon a *quantum meruit*. It is contended that it was in the contemplation of the parties to the contract that the work should be done in the open season and with the canal unwatered, whereas with the exception of short periods in the spring after the frost was out of the ground and before the canal was opened to navigation, and shorter

periods in the autumn after navigation closed and before winter set in, the work was done either in winter or with the water in the canal. In support of that contention the suppliants rely upon certain provisions of the specification attached to the contract, which they allege show in the strongest possible way that the whole of the work was to be done in the open season. The provisions relied upon are as follows:—

"The works comprised under this specification will be divided in two sections A and B.

Section A extends from Lock No. 4 to No. 5, and is about 4,750 feet in length.

Section B extends from immediately above Lock No. 5 to Station 95.20 and is about the same length as Section A.

The works to be executed on Sections A and B will be chiefly widening and deepening the prism of the present canal and of the tail-race of the waste weir; lining the slopes of the enlarged canal with dry masonry retaining walls wherever ordered; constructing embankments with the excavated materials at such places as may be directed, and grading the new tow-paths at such places where the old ones shall have been removed; building small wooden or stone culverts and a waste weir in the position shown on the plan; also in general, performing all the works necessary to complete both sections in accordance with the plans and specification."

* * * *

The price tendered for "earth excavation" shall cover the entire cost of excavating, hauling and forming into towing paths, embankments and spoil banks, all the various kinds of materials found in the prism of the canal, towing-path, roads, tail-race, off-take drains, and in the site of the various structures. This price shall include the cost of unwatering the canal or the pits of any structure and completing all the excavation required

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on the entire work to the satisfaction and approval of the Engineer.

"The price tendered for rock shall cover the entire cost of excavating, hauling and forming into embankments and spoil banks all rock found in the prism of the canal, towing-paths, roads, tail-race, off-take drains and in the site of the various structures. This price shall include the cost of unwatering the canal or the pits of any structure and completing all the rock excavation required in the entire work to the satisfaction and approval of the Engineer.

"The final measurements of all excavation shall be based on levels and measurements taken before the works have commenced and during their progress. The whole of the earth and rock excavation shall be computed from these data and paid for in the solid. The Contractor, where rock underlies clay, must entirely strip the earth from over it, before its excavation is commenced. All rock removed before the necessary levels and measurements have been taken shall be returned and paid for at the price of earth. It must be distinctly understood and agreed upon that no excavation below the specified grade line or outside the line or lines of slopes shall be paid for.

"Where the present embankments of the canal are cut into or entirely cut away by the widening at places where the adjoining ground is below the level of the water, a new embankment must be formed or the present one widened as the Engineer may direct.

"At all places where any part of the present towing-path and the road on the south side of the canal require to be partially or totally removed in widening the canal they shall be replaced by a new towing-path and road of the same width and height. The surface of the new towing-path and road shall be made level, even and hard with the best of material to be found in the excavation,

and shall have an outward inclination of twelve inches. If any material is required to form the towing-path or road, other than that taken from the excavation of the canal, it shall be paid for at the price in tender of the class to which it belongs.

"The new embankment shall be water-tight and made with the best material found in the excavation. The material shall be hauled on to the bank in carts or waggons and deposited in layers not exceeding nine inches in depth, if the Engineer considers it necessary each layer shall be well watered and then well rammed."

* * * * * *

"The prism or channel of the canal shall be enlarged to a bottom width of forty-five feet. The bottom shall be excavated for its entire width, to a uniform depth of ten feet below the low water mark, which is on Section A, nine feet above the lower mitre sill of lock No. 5 and in Section B, nine feet above the top of breast wall of the same lock."

* * * * * *

"The coping stones shall be the full width of the top of wall, twelve inches in thickness and not less than three feet long; their joints shall not be more than one-half an inch, and shall be kept full the entire with of the wall. For the seat of the side walls, the surface of the rock shall be stripped and cleaned off for the full width required and the material removed to the spoil bank. If the engineer so directs one or more of the top beds of the rock shall be removed, for which removal the price in contract of rock excavation shall be paid. The space in rear of the walls is to be filled with the best clay available in the excavation which shall be put in place as the wall is carried up, well rammed and watered if so directed."

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"In the rear of the wing walls of the weir a puddle bed three feet in thickness shall be carried up to the level of the coping; it shall be made of the best description of clay for the purposes that can be found within ten miles of the site of weir; it shall be laid in layers not exceeding eight inches in thickness, each of which shall be watered, pounded and rammed; it shall be carried up at the same time as the masonry. The space between it and the slopes shall be filled with the best material that can be found in the excavation and in the manner described under the head of embankments and tow-paths. If directed by the Engineer, for one foot in height around the foot of the walls, the filling shall be concrete instead of the puddle designated on the plans."

Now it cannot be doubted that some portions of the work described in these provisions could not be done without unwatering the canal; that other portions of it could not very well be done in the winter season; and that all or nearly all of it could be done more cheaply and conveniently during the open season. There was, however, nothing to prevent the work being done in the way the contractors did it, that is, by doing during the season of navigation such work as they could do with the water in the canal; by making the best use possible of the time in the spring after the frost was out of the ground and before the water was let into the canal for the purposes of navigation; and also by using in the same way any time that might be available after the water was let out of the canal in the autumn and before the severe weather set in; and for the rest it would of course be necessary to do the work in the winter season.

The contract, as has been seen, bears date of the 9th day of April, 1897, and the work was to be completed on or before the 1st day of May, 1899; and but for some delays of which they complain, the contractors doing the work in the way mentioned would in all probability have

finished it within the prescribed time. In any event there was nothing, I think, to prevent that being done. There are, however, other provisions of the specifications which appear to me to present an answer to the suppliants' contention. Under the marginal notes "unwatering" on the fifth page of the specification, and "navigation not to be interfered with" on the sixth page will be found the following:—

"Parties tendering should consider in submitting their prices for the various items of work, that they must include the cost of removing snow and ice, off dams, troughs, &c., and everything necessary to unwater the canal and weir pit during the progress of the work.

"In all matters connected with the prosecution of the works, or in the transportation, delivery, storage, or preparation of materials of any kind required for them, as well as in the course of carrying on the operations of forming and deepening the channel, or in the disposal of the rock or other material excavated, or in proceeding with any part whatever of the operations connected with the undertaking, the Contractor must be governed by the regulations of the navigation, and the interpretation put on them by the officer entrusted with that duty; he must further use every precaution to guard against interrupting, impeding, or in any way interfering with the passage of vessels, as he will be held strictly and legally liable for any damage, loss or detention that any vessel, when passing through the present locks or approaches to them, may sustain from any of his acts, whether such result from a desire to prosecute the works, inattention or any other cause."

This question of the right of the suppliants under the contract to have the water let out of the canal during the season of navigation was raised by the suppliants in a letter of the 5th day of October, 1897, addressed to Mr. Schreiber, the Chief Engineer. At that time they were

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doing some excavation by means of a steam shovel placed on a scow; and this work had been carried on in that way for some months before that date. The suppliants' letter and Mr. Schreiber's answer are as follows:—

"STONEFIELD, Oct. 5th, '97.

"COLLINGWOOD SCHREIBER, ESQ.,
"Chief Engr. Rys. & Canals,
"Ottawa.

"DEAR SIR,—We beg to ask you what arrangements have been or are being made by your department to enable us to prosecute the work on our contract here on Grenville Canal. The Canal up to the present time has been entirely monopolized in the interests of navigation, and to carry out our contract here, we should have such control of at least a section at a time and for a sufficient length of time to enable us to do this work. Therefore will you please advise us when you can have the water let out of that portion of canal comprising Section A of our contract, as the work there to do cannot well be done while navigation continues, and in order to complete our contract in the time specified this section should be completed by next spring, and as the time between now and then is short an early reply advising us of a reasonable arrangement will oblige.

"Yours truly,
"(Sgd.) PIGOTT & INGLES."

"OTTAWA, 12th October, 1897.

"DEAR SIRS,—I am in receipt of your letter of the 5th instant, asking what arrangements have been made or are being made by this Department to enable you to prosecute the work on your contract in connection with the Grenville Canal.

"In reply, I desire to say that all the facilities called for by your contract for prosecuting the work have been given you.

"Yours truly,

"(Sgd.) COLLINGWOOD SCHREIBER,

"Deputy Minister & Chief Engineer.

"MESSRS. PIGOTT & INGLES,

"Contractors, Stonefield, P. Q."

On this branch of the case it seems to me that there was no such change in the conditions under which the contract was to be performed as to make its provisions inapplicable to the work that was done, and that the case is not one in which the contractors are entitled to treat the contract as at an end and to recover upon a *quantum meruit*, as was done in the case of *Bush v. Trustees of the Port and Town of Whitehaven* (Hudson on Building Contracts, Vol. 2, p.121).

The second ground on which the suppliants contend that this matter is at large and that they are entitled to recover upon the *quantum meruit* is based upon an order in council that was passed in respect of the claim on the 27th of July 1903, and which is in these terms:—

"EXTRACT from a Report of the Committee of the Honourable the Privy Council, approved by His Excellency on the 27th July, 1903.

"On a Memorandum dated 4th June, 1903, from the Minister of Railways and Canals, representing that on the 9th of April, 1897, a schedule rate contract was entered into with Messrs. Pigott and Ingles for certain work of deepening and widening the lower part of the Grenville Canal, together with certain dry masonry walling, the works to be completed by the 1st of May, 1899.

"The Minister observes that towards the close of the year 1900 the final estimate was in the course of preparation, and under date the 3rd of November of that year, the contractors sent in to the Superintending Engineer a

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statement of claims itemized, amounting to $191,226.66, against which they credited the sum of $91,675.57 paid them, leaving the balance of claim $99,551.05 to which they added two additional items aggregating $135.50, making the total claim $99,684.71. This claim the Superintending Engineer reported on in detail on the 11th of March 1901, practically negativing the whole claim.

"Under date of the 15th of March 1901, he sent in his final estimate amounting to $95,323.10, which includes allowances for certain items of the said claim to the extent of $1,016.45. On the 19th of the same month the Chief Engineer signed the said final estimate. This estimate the contractors declined to accept as final.

"That under date the 18th January, 1902, they preferred claims for extras and otherwise, to the extent of $154,244.93 and have asked that they may be permitted to substantiate the same in the Exchequer Court, and that certain provisions of their contract which would act as a bar to the adoption of this course, be waived.

"The Minister further represents that the claims of the contractors are classified according to the grounds upon which they are based. These are as follows:—

"1. The contract and specifications contemplated that the work should be done in open season and unwatered, and require performance in such a way as could be done only during the summer season and could not properly be done during the season of frost. The contractors allege that they were nevertheless required to carry out the work in the winter season, and they claim that they should be allowed for the increased cost of its execution.

"2. The contractors claim that there was mutual error and misunderstanding in respect of a part of the material to be excavated, much of which was what is known as 'hard pan.' Had this been known they say a special price ought to have been and would have been fixed for

the excavation of this material, and the contractors claim that the contract ought to be reformed in this respect, or that they should have other relief so as to allow them such price.

"3. The specifications provide for a higher quality of stone and masonry in the walls of the weir than is required by them for side walls, the prices allowed by the contract for these respectively being $10 per yard and $4.37 per yard. The contractors allege that the engineer required them to furnish the higher quality of stone for the side walls and to execute that work in the same manner as the weir walls, and that they were allowed only $4.37 for this work instead of the higher prices which they claim they should have been paid.

"4. The contractors claim for delays and damages caused by reason of the fact that work had to be done during the season of frost and during winter, and by reason of mistakes, alterations and erroneous directions of the resident engineers.

"The Minister further represents that the Department of Railways and Canals does not consider that the contractors are entitled to any further payment than the amount contemplated in the final estimates, but is willing that no technical barrier should stand in the way of their obtaining a legal decision on this point.

"The Minister accordingly recommends that in the event of a petition of right being preferred and of a fiat being granted on the petition, authority be granted for the waiving of the provisions of the contract and specifications which would or might bar any of the claims aforesaid in so far, and in so far only, as they would prevent a consideration of any such claim on its merits aside from such provisions.

"The provisions of such waiver are as follows:—

"1. Clause 16 of the contract and so much of clause 31 as precludes any claim in respect of delays.

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"2. Any provisions prescribing limitations of time.

"3. Clauses 27 and 28 of the contract.

"4. Clause 35 of the contract.

"5. So much of the paragraph at the foot of page 5 of the specifications and of the next following paragraph as is inconsistent with the claim of the contractors that the work was to be done in the open season and unwatered.

"6. All provisions and conditions in respect of the fixing of prices by the engineer, the requirement of directions in writing and certificates from him and the finality of his decisions contained in clauses 5, 8, 9 and 26 of the contract and the 7th paragraph on page 3 of the specifications, and similar provisions and conditions, if any, in other clauses.

"The Committee submit the same for approval."

It is perhaps not quite clear how far this order in council was intended to go. The Minister of Railways and Canals, speaking for his Department, represents that it does not consider that the contractors are entitled to any further payment than the amount contemplated in the final estimates, but is willing that no technical barrier should stand in the way of obtaining a legal decision on this point. For instance, the fifth clause of the contract provides that the engineer may order extra work to be done and may make changes in the dimensions, character, nature, location and position of the works, but that the contractors shall not make any such change, and shall not be entitled to any payment therefor, or for any extra work, unless the same shall have been first directed in writing by the engineer, and notified to the contractors in writing, nor unless the price to be paid therefor shall have been previously fixed by the engineer in writing. Under that provision the contractors might, by the direction of the engineer, do extra work of which the Crown had the benefit, yet their claim or action might be barred because the direction was not

in writing, or because the price had not been fixed in writing. The absence of the writing would in such a case constitute what with propriety might be called a technical bar to the action. The same thing is true of the certificates in writing that the work has been executed to the satisfaction of the engineer which by the eighth and twenty sixth clauses of the contract are made conditions precedent to the contractors' right to be paid for his work. In the same way the provisions of the twenty-seventh and twenty-eighth clauses of the contract, whereby the contractors are required to make and repeat in the manner therein prescribed any claims that they consider they have and which have not been included in the progress estimates, do not go to the actual merits of such claims, but constitute what may well be described as technical barriers thereto. All of the provisions mentioned are in this case waived by the order in council cited. Such matters may, if the Crown sees fit, be set up as defences to any action the contractors may bring on the contract, but I do not see that the Crown is bound to set them up. It is true of course that they are stipulations in the contract, and the thirty-third section of *The Exchequer Court Act* provides that in adjudicating upon any claim arising out of any contract in writing the court shall decide in accordance with the stipulations in such contract. But that general provision may perhaps be treated as directory only and not as one that imposes on the court the obligation of giving effect to a defence disclosed by the contract which the Crown has not pleaded. That at least has been the practice that has hitherto prevailed in such cases both in this court and in the Supreme Court of Canada. The section, however, goes further and provides that the court shall not in adjudicating upon any such claim allow compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the

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amount stipulated for therein; nor shall it allow interest on any sum of money which it considers to be due to such claimant in the absence of any contract in writing stipulating for payment of such interest, or of a statute providing in such a case for the payment of interest by the Crown. These negative enactments limiting, as they do, the power and authority of the Court, must be construed not as directory merely, but as imperative. And that consideration has, I think, an important bearing upon the question as to what effect should be given to some of the other waivers contained in the order in council and upon which the suppliants rely. By the operative part of the order authority was "granted for the waiving of the "provisions of the contract and specifications which "would or might be a bar of any of the suppliants claims' "in so far, and in so far only, as they would prevent a "consideration of any such claim on its merits aside from "such provisions;" and with reference to the provisions so waived we find in paragraph five the following:—"so "much of the paragraph at the foot of page 5 of the "specifications and of the next following paragraph as is "inconsistent with the claim of the contractors that the "work was to be done in the open season and unwat-"ered." These are the provisions that have already been set out in discussing the first ground on which the suppliants rely, and which are to the effect that parties tendering should consider in submitting their prices for the various items of work that they must include the cost of removing snow and ice off dams, troughs, &c., and everything necessary to unwater the canal and weir pit during the progress of the work; and that navigation should not be interfered with. The twenty-fifth clause of the contract by which the prices to be paid for the works contracted for are fixed, is not waived; but the suppliants contend that the provisions mentioned being waived the matter of price is at large; that the schedule

of prices contained in the contract is not binding; and that they are entitled to recover upon the *quantum meruit*. Any waiver having that effect could not, of course, be said to be a waiver of a technical bar or defence to the suppliants' action. It would go to the merits of the principal controversy existing between the parties, and it would constitute a substantial alteration in the existing contract. The reference in the order in council to the Minister's willingness "that no technical barrier should "stand in the way" of the suppliants' obtaining a legal "decision on the point" in issue would indicate that nothing ot that kind was really intended, but even if it were, I should doubt if it could be so done. And then so far as the court is concerned it would not be possible for it to give effect to any such contention even if it were thought to be well founded. The provision of *The Exchequer Court Act* that has been cited would stand in the way of that being done. I think similar considerations apply to the waiver of clause 35 of the contract respecting implied contracts, and of clauses 16 and 31 respecting delays.

The conclusion to which I have come is that the suppliants are not entitled to recover upon a *quantum meruit* for the work in question, and that the schedule of prices contained in the contract is, so far as it is applicable, binding on both parties. With regard to quantities there is not in respect of the work for which an allowance is made by the Government engineers any considerable difference between the quantities allowed and that claimed. There are, of course, some differences, but nothing has occurred to impugn in any way the accuracy and fairness of the final returns of quantities as made by the Government engineers; and as I think they had a better opportunity of ascertaining what such quantities were, I accept them as correct.

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That brings us to a consideration of the details of the suppliants' claim.

The first item of the claim has to do with "clearing, "grubbing and mucking" for which a bulk sum of $900.00 is fixed in the schedule of prices. That amount has been allowed and paid. The suppliants claim $1501.34 in addition for extra work of this class alleged to have been done by them. The claim as put forward cannot, I think, be supported. All of the work for which they claim was not extra work. Part of it they had contracted to do at their own expense. For example, a strip of land adjacent to the canal was during the progress of the work acquired at the contractors' expense for a spoil bank. From this piece of land they were required by the contract to remove at their own expense all standing and fallen trees, brushwood, etc.,—that is, they were to clear it. They were required by the resident engineer by verbal orders to grub and muck it as well, in order to reinforce the bank of the canal. The grubbing and mucking in this case was, I think, extra work, the clearing was not. Again with regard to the land along the tail-race from the weir it was necessary for the contractors to clear and grub for any excavation that had to be made, and for the rest it was sufficient to clear only. The resident engineer, by an order in writing, required the contractors to clear and grub this piece of land. That is the clearing and part of the grubbing was within the contract and had to be done at the contractors' expense, while part of the grubbing was extra work. I do not think that there is anything in the evidence to enable anyone to determine with accuracy the value of the work so done by the contractors in excess of that which they were bound to do. At best I can only make an estimate, and doing that I put the amount at four hundred dollars; but if there is a reference, as hereinafter mentioned, the question of what such amount

should be may also be referred at the instance of either party.

By items numbered 2, 3, 4, 5, 6, 7 and 8, the suppliants make the following claim for earth excavation:—

Item 2—5368 cubic yards at 27 cents per cubic yard........................	$ 1,449 36
Item 3—17,439 cubic yards at 50 cents......	8,719 50
Item 4— 4,000 cubic yards at $2.50......	10,000 00
Item 5— 3,670 cubic yards at 2.50......	9,175 00
Item 6— 2,301 cubic yards at 2.50......	5,752 50
Item 7— 4,450 cubic yards at 2.50......	11,125 00
Item 8—15,370 cubic yards at 1.00......	15,370 00
52598 cubic yards..............	$61,591 36
By the final estimate the suppliants have been allowed for 52,676 cubic yards of earth excavation at 27 cents per cubic yard, amounting to	14,222 52
The difference between the amount allowed and that claimed in respect of the items is	$47,368 84

It will be observed that the amount of earth excavation returned by the Government engineers exceeds the amount for which the claim is made in these items by 78 yards; but the difference is really greater than that, because the suppliants have included in their computation of earth excavation certain boulder walls and cement masonry that have been returned in the final estimate as rock excavation.

With regard to the classification of materials excavated during the progress of the work the specification provided that there should be recognized under the denomination of excavation only two classes of material, namely, earth and rock; and that earth should embrace material of every description and character except solid rock *in situ* and boulders measuring more than one-third of a cubic

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yard. The contract price for earth excavation was 27 cents per cubic yard.

The increased price for the 17,439 cubic yards mentioned in item 3 is claimed on the grounds that part of the work was done out of season, that is, that it was done in the winter season, and part by dredging, and the whole at an increased cost. But that can make no difference if the contract prices apply to this work, and for the reasons that have been given, I think, that they do apply.

The same grounds and others are relied upon for the increased price claimed in item 4 for the 4,000 cubic yards therein mentioned. The material excavated was hard pan or cemented gravel, and it is well known that it is difficult and expensive to remove such material. There can be no doubt however that its proper classification under such a contract as this is that of earth. Then some of this material is said to have been excavated below grade lines and beyond slope lines, as shown on the plans exhibited when tenders were asked for the work, and that raises the question as to whether the prices fixed by the contract are applicable to work so done. By the twenty-fifth clause of the contract the prices therein mentioned are to be paid for the works contracted for. By the first clause of the contract it is provided that the word "work" or "works" occurring therein, shall, unless the contract require a different meaning, mean the whole of the work and materials, matters and things required to be done, furnished and performed by the contractor under the contract. By the third clause of the contract the contractors agreed at their own expense to provide all and every kind of labour, machinery, and other plant, materials, articles and things whatsoever necessary for the due execution and completion of all and every the works set out or referred to in the specifications thereunto annexed, and set out or referred to in the plans and drawings prepared and to be prepared for the purposes of the work; that

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the said works were to be constructed of t' e best materials of their several kinds and finished in the best and most workmanlike manner, in the manner required by and in strict conformity with the said specifications and the drawings relating thereto, and the working or detail drawings which might from time to time be furnished (which said specifications and drawings were thereby declared to be part of the contract), and to the complete satisfaction of the Chief Engineer for the time being having control over the work. By the fourth clause of the contract it was provided that its several parts should be taken together to explain each other and to make the whole consistent, and that if it were 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 would at their own expense execute the same as though it had been properly described, and that the decision of the engineer should be final as to any such error or omission, and that 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. By the fifth clause of the contract the engineer was given power and authority at any time to order extra work to be done and to make any change which he might deem expedient in the dimensions, character, nature, location or position of the works, or any part or parts thereof, or in any other thing connected with the works, whether or not such changes increase or diminish the work to be done or the cost of doing the same, and the engineer was in such case to decide whether any such change or deviation increased or diminished the cost of the work and the amount to be paid or deducted, as the case might be, and his decision in respect thereof was to be final. By the sixth clause of the contract it was provided that all the clauses of the contract should apply to any changes, additions, deviations or extra work in

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like manner, and to the same extent as to the works contracted for, and that no changes, additions, deviations or extra work should annul or invalidate the contract. By the eighth clause of the contract it was provided that the engineer should be the sole judge of the work and materials in respect of both quantity and quality, and that his decision on all questions in dispute with regard to work or material should be final. By the ninth clause of the contract it was distinctly understood and agreed that the respective portions of the works set out or referred to in the list of schedule of prices (among which is earth excavation) should include not merely the particular kind of work or materials mentioned in said list or schedule, but also all and every kind of work, labour, tools and plant, materials, articles and things whatsoever necessary for the full execution and completing ready for use, of the respective portions of the works to the satisfaction of the engineer. And that in case of dispute as to what work, labour, material, tools and plant are or are not so included, the decision of the engineer should be final and conclusive. In the fifth paragraph on the first page of the specification the following provision occurs: "The Department of Railways and Canals reserves to "itself the right to change, either before the works are "commenced or during their progress, the position or "site of any or all of the various structures, also to "change the proposed lines of excavation both to such "an extent and direction as the engineer may deem "necessary, and such change shall not give cause for "any increase or decrease in the prices tendered for the "various items of the work." And at the end of the second paragraph on the second page of the specification will be found the following.—"It must be distinctly "understood and agreed upon that no excavation below "the specified grade line or outside the line or lines of "slopes shall be allowed for." Then by the first clause

of the contract the word "Engineer" was defined to mean the Chief Engineer for the time being having control over the work, and to extend to and include any of his assistants acting under his instructions, and it was also provided that all instructions and directions or certificates given, or decisions made by any one acting for the Chief Engineer, should be subject to his approval, and might be cancelled, altered, modified and changed as to him might seem fit. By the order in council of the 27th of July, 1903, hereinbefore set out, the finality of the engineer's decisions is waived.

The provision of the specification that no allowance would be made for excavation down below the specified grade line, or outside the line or lines of the slopes, has reference, obviously, to cases where such excavation occurs below or beyond such lines by necessity or accident, or by choice of the contractor. In such cases there is no question of price. Nothing can be allowed. The case is different, however, where the lines are changed by the engineer, or the work is done beyond or below such lines by his order and direction. There, subject to certain provisions of the contract, which in this case have been waived, the contractors are entitled to be paid for their work. And with regard to the question of price, I think the proper construction to be put upon the provisions of the contract and specification cited is that the contract price is applicable to such work. I am also of opinion that any waiver, after the completion of the contract, of the finalty of the engineer's decision would not make any difference or effect in any way the application of the schedule rates to this work.

Then it is said that this hard pan or cemented gravel was found at a place in the works where the plans exhibited showed rock. But as to that it was provided in the specifications that any party tendering must satisfy himself by personal examination of the ground as

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to the character and kind of material to be excavated. No doubt the plans of the works exhibited were intended to give persons who proposed to tender for such works the best information that the Minister and engineers of his department had at their disposal. But there was no warranty that such information was correct. On the contrary, the tenderer was to examine the ground and satisfy himself, and if he did not do so he took his chances. The fact that the contractors found at any place where excavation was done material different from that shown on the plans exhibited when tenders were invited would not justify the court in allowing them a price for excavating the same greater than that stipulated for in the contract.

It does not appear to me that the grounds on which an increased price is claimed for the 3,670 cubic yards of earth excavation raises any question that has not already been considered and disposed of. It is a question of changed lines and winter work. With regard to the lines to be worked to, that was a matter within the judgment of and subject to the decision of the engineer. The parties had so agreed. The earth excavation that was done under his direction was the earth excavation for which a price per cubic yard had been agreed upon. It was work contracted for, and the schedule of prices applies to it.

The claim made in respect of item 6 raises a new question. The increased price for the 2,301 cubic yards of waste weir excavation therein mentioned, including masonry and cement structures, is demanded on the ground, among others, that the Resident Engineer made the work more difficult and expensive by refusing to allow the contractors to cut down certain trees that in their opinion stood in the way of the proper setting up and working of their derricks. The Resident Engineer at the time was Mr. Stanton, and his competency and

fairness are strongly impugned. And perhaps, as this is the first time that I have had occasion to refer to this aspect of the case, it may be well to deal with it more at large than would be necessary for the disposition of the item now in question. Over Mr. Stanton was Mr. Marceau, the Superintending Engineer of the work, and Mr. Schreiber, the Chief Engineer, and, as has been seen by the reference that has been made to the first clause of the contract, both Mr. Stanton's and Mr. Marceau's directions and decisions were made subject to the approval of the Chief Engineer, and might be cancelled or modified by him. And, as a matter of fact and practice, Mr. Stanton's directions and decisions were subject to review by Mr. Marceau. Great complaint is made by the suppliants that Mr. Stanton by improper and unreasonable exactions made the whole work much more expensive than it otherwise would have been. He was in charge of the work from the commencement until some time in April, 1899. He was then succeeded for a short time by Mr. Pariseau, and subsequently Mr. Lynch was appointed and continued to act as resident engineer until the completion of the work. Mr. Stanton was not in Canada at the time this case was being heard. It is perfectly clear that he and the contractors did not get on well with each other. He was not accommodating, to say the least of it. He has not been before the court to give his version of the difficulties and differences that arose between him and the contractors. For that we have nothing but the correspondence that is in evidence. Parts of that were read to me as the case proceeded, but since then I have had an opportunity of reading it all carefully, and I think fair to add that this correspondence so far from strengthening any unfavourable impression derived from the evidence with respect to Mr. Stanton's fairness and capacity as an engineer, has in some measure removed any such impression. I think it is perfectly clear that he was

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not always the one that was in the wrong. That he made some mistakes in judgment, and that he looked more to the Crown's interests than to the contractors' may, I think, be conceded. But then none of his directions or decisions were final, and there was always an appeal to Mr. Marceau and to Mr. Schreiber. That perhaps would not afford a remedy altogether satisfactory in small matters occurring from day to day; but it would in respect of any matter of importance. And that in general was the course adopted.

With reference to the trees that the contractors wished to cut down, Mr. Marceau says that Mr. Stanton wrote to him, and that he answered him to the effect that he must not cut the trees unnecessarily; but that if any trees were in the way they must be cut, and that he insisted that they were not in the way. When Mr. Stanton was replaced by Mr. Pariseau, Mr. Pigott called the attention of the latter to these trees, and he allowed them to be cut down; and he thinks that if "Mr. Stanton had been nice he would have had them cut down at once," although he is "not prepared to say that Mr. Stanton did not act strictly within his right." The trees he says were more or less of an ornament, but he would have exercised his discretion differently had he been in Mr. Stanton's place. Mr. Pariseau was under the impression that the suppliants were allowed $50.00 for the inconvenience caused by these trees. I do not think it is clear that any allowance was made in that respect, but if the sum of $50.00 would cover any damage that they suffered on that account the question is not one of any considerable importance, and it would be very easy to make too much of it. It seems to me, however, to be very clear that the earth excavation that was then being taken out did not cease to be earth excavation for which the suppliants were to be paid at the contract price because permission was not given to cut down these trees. The suppli-

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ants' claim in that respect would be for damages for delays and extra expense incurred through the unwarranted, if it were unwarranted, action of the Resident Engineer. But that is another aspect of the case to which reference will be made later. Dealing with item numbered 6, I do not find in this dispute about cutting down the trees any reason for not applying the contract price to the work. But there are other grounds on which it is claimed that this price should be increased. It appears that there was some masonry and cement structures in this excavation But Mr. Stanton was directed that this should be returned as rock, and though it is not absolutely certain that that was done it is altogether probable that it was so returned. Part of the old masonry Mr. Pariseau says was not removed at all, and as to that the suppliants had, as I understand it, the double advantage of being paid for it both as excavation and as mascnry, although they did not as to that particular quantity have either to excavate the foundation or to build up the masonry wall. And as to other parts of it Mr. Pariseau says that he would have returned as clay all of it that was loose, because it was small stones and small masonry, but that he returned it as rock as he was trying to help the contractors as well as he could, and he thought he was justified in returning it as rock. This is a question of classification and as this excavation appears to have been returned at the higher price of rock excavation I see no reason for increasing the price allowed. It had under the contract to be returned either as earth excavation or as rock excavation. Then there is a complaint that the contractors were not permitted to do this excavation in the summer time, and that they had to do it when the frost was in the ground. So far as that is the general question of summer work as against winter work, it has already been dealt with. But the question as to this particular piece of dredging goes

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beyond that. It was work that might have been done in the open season of 1898, without interfering with navigation, by building a dam either in front of or behind the site of the weir. If a dam had been built outside the weir across the tail-race the work could have been done by dredging, and if it had been built inside the weir site the material to be excavated could have been taken out dry. The water at the place was about ten feet deep and a dam of some considerable strength would have been necessary. However that was the contractors' affair, as the temporary dam would have had to be constructed at their expense. Mr. Pigott says that they proposed to put in a dam and to do this excavation by dredging during the summer of 1898, but that the engineer would not stake out the work and kept putting it off until the season ended. I suppose that Mr. Stanton is meant when he speaks of the engineer, but if so, it is a case, I think, in which Mr. Stanton was not, so far as appears, at fault. For the excavation of this work it was necessary for the Crown to acquire additional land and that was not done until the 8th day of September, 1898. The plan, by the filing of which this piece of land was acquired, was signed by Mr. Marceau on the 31st day of August 1898, and was registered in the proper registry office on the 8th day of the following month. Mr. Pariseau's view of this matter is that a temporary dam could not have been put in front of the weir site because the dam would have obstructed the canal; that a dam could have been put back of it, but that the cost would have been altogether prohibitive, as the ground there was a spoil bank and one could not know how far in the bank he would have to go before making it water tight, and that the most practical way of doing the thing was to do it the way Mr. Pigott did it, wait until the winter. I mention Mr. Pariseau's views of this matter without either adopting or rejecting them, but for this reason. The evidence as a whole leaves on my mind the impression that this

matter was not really pressed by the contractors, that they did not urge upon Mr. Marceau or Mr. Schreiber as they ought to have done if they had really been in earnest, the advantage and desirability of doing the work in the way proposed, and that the acquisition of the additional land was a matter of urgency, and Mr. Pariseau's views, if they are correct, show how that might happen. The difference in cost in doing the work in the one way and in the other was not such as to make the matter one of any considerable importance. Assuming, however, for the moment that suppliants' contention on this point is in whole or in part well founded, their claim would rest either upon a breach of an implied contract on the part of the Crown to put them in possession, when required, of the land necessary for the execution of the work and to lay out the same, or upon the right to damages for the delays arising therefrom. But clauses thirty-five and sixteen of the contract would, except for the order in council waiving them, have stood in the way of the maintenance of any such claim, and the only amount to which the suppliants would have been entitled would have been the sum allowed at the contract prices. But how is that position altered by the passing of the order in council? Before it was passed the Crown was not liable. How does it become liable because the order is passed? Does the passing of the order in council create a new contract, and, if so, where is the consideration or the parliamentary authority to support it? And, apart from that, is it not a case in which the court is asked to allow the suppliants compensation on the ground that they expended a larger sum of money in the performance of their contract than the amount stipulated for therein? It seems to me that it is such a case, and that it is within the prohibition contained in the thirty-third section of *The Exchequer Court Act* referred to.

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Items numbered 7 and 8 raise, I think, no question that has not already been dealt with. The result is that in my opinion there is no ground in law for allowing any part of the claim mentioned in items numbered 2, 3, 4, 5, 6, 7 and 8 beyond the amount already allowed and paid to the suppliants.

In items 9 and 10 a claim is made for excavating silt that has not been included in the final returns of earth excavation. The claim and the grounds on which it is put forward are as follows:—

Item No. 9. Silt excavation on section "A" for three years, 5,475 cubic yards at 40 cents per cubic yard..$2,190 00

Item No. 10. Silt excavation on section "B" for five years, 9,200 cubic yards at 40 cents per cubic yard.. 3,680 00

$5,870 00

The claim is made upon the hypothesis that the average width of the canal through these two sections is 40 feet; that the annual accumulation of silt would average four inches in depth over the entire surface; that this silt accumulated in section A for three years from 1895, when the cross-sections were made, until 1898, when the work on this section was completed; and in section B for five years, from 1895 to 1900. By special agreement the contractors were allowed in the final estimate for 261·60 cubic yards of silt removed. But otherwise there has been no allowance made therefor. There are in respect of these items two questions as to which the parties are at issue: first, as to the contractors' legal right to recover anything; and, secondly, as to the quantity for which the claim is made. As to the latter question, it is denied that there is in fact any such annual deposit of silt in the prism of the canal as the suppliants contend for. It is admitted that the streams

that flow into sections A and B of the canal bring in some material each spring and that this is deposited at the mouths of the streams. But this it is said is removed each spring by the men employed on the canal, and that this course was followed in the present instance, until the contractors were put in possession of the work, after which and during its progress it was for them to remove such deposits. Is was also conceded that while the work was going on there might be some deposit of silt in the channel of the canal caused by the dredging operations and the falling of the banks that were being excavated. But this too, it is contended, is something that the contractors were bound under the contract to remove without any special allowance therefor. But apart from what has been mentioned the Crown's contention, supported by the evidence of its engineers, is that there is no considerable deposit of silt in the channel of the canal. With respect to the question of the right of the contractor, under the contract, to recover for removing silt deposited in the channel of the canal after the cross-sections for the plans were made and before the work was commenced, and also for silt so deposited during the progress of the work, it is provided in the specification that the final measurements of all excavation should be based on levels and measurements taken before the works were commenced and during their progress, and that the whole of the earth and rock excavation should be computed from those data and paid for in the solid. And by the fifteenth clause of the contract it was provided that the contractors should be at the risk of, and should bear all loss or damage whatsoever, from whatsoever cause arising, which might occur to the works or any of them until they were fully and finally completed and delivered up to and accepted by the Minister. By the contract the contractors were to be paid for the number of cubic yards excavated, as shown

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by the cross-sections. The space actually excavated was to be measured and allowed, and if by some accident, or from natural causes, it became necessary to excavate the same space more than once the cost of that fell, it seems to me, upon the contractors. The risk of that contingency was upon them. I make no allowance as to these items.

I think item numbered 11 for filling roadways and back filling tow-path should be allowed. The contractors were required by the Resident Engineer to excavate below grade, and the space excavated had to be filled in, and they have had no allowance either for the excavation or the filling. It was a mistake, but it is one that should be paid for as an extra. The contract price for excavation is charged, and the price of twenty-five cents per cubic yard for filling is reasonable. The claim is made for 600 cubic yards of excavation at 27 cents per cubic yard, and then 25 cents per cubic yard for filling up the space so excavated, making in all $312. That amount will be allowed.

With regard to the 12th, 13th, 14th, 15th, 16th and 18th items of the claim, I think that some allowance should be made, but I shall not attempt at present to fix the amount of such allowance. I shall try and settle the principle to be applied, and then perhaps the parties may be able to agree upon the quantities.

The claim, so far as I think it can be sustained, arises in this way. The contract price for earth excavation was, as has been seen, twenty-seven cents per cubic yard, and it was agreed that the price mentioned should cover the entire cost of excavating, hauling and forming into tow-paths, embankments and spoil banks, all the various kinds of material found in the prism of the canal, towing-path, roads, tail-race, off-take drains and in the site of the various structures. Where the excavated material was used to make tow-paths and embankments, without any-

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thing more being done than to excavate it and put it in the tow-path or embankment, the contractors were not entitled to more than the price agreed upon for excavation; and they were also entitled to that price where such material was deposited in a spoil bank or wasted. With reference to any new embankment it was further provided that it should be water tight and made with the best material found in the excavation; that such material should be hauled on the bank in carts or wagons and deposited in layers not exceeding nine inches in depth; and if the engineer considered it necessary, each layer should be well watered and then well rammed. For work of this kind a price was fixed by the contract, namely :—"Rammed filling behind side walls and in "embankments, per cubic yard 25 cents." As a large part of the excavation was done in the winter season the material excavated being frozen was not in a condition suitable for use in making tow-paths and embankments, and it had to be put in a spoil bank or wasted. Afterwards, when the frost was out of it, and the material fit to be used, some of it was taken from the spoil banks and formed into tow-paths and embankments. Where it was so used for rammed filling the contractors have had an allowance at the price agreed upon; but otherwise no allowance has been made to them for the rehandling of this material. I think some allowance should be made. They earned the contract price of twenty-seven cents per cubic yard when they put the material excavated in a spoil bank; and if that prevented the Crown from using it to make tow-paths or embankments without additional expense, it was a necessary incident of the work being done in winter. To take this material from the place where it had been deposited and to use it in making tow-paths and embankments was the same as taking it from any other place from which it was necessary to borrow material. It was not, it seems, contemplated that it

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would be necessary to borrow material. It was, no doubt, thought that the excavation would afford all the material required for these purposes, and it did ; but the material as excavated was not fit to use, and had to be wasted instead of being used to form tow-paths and embankments. The suppliants contend in respect of these items that they are entitled in addition to the price of excavation to a price for re-excavating the material, and also to a price for forming it into two-paths and embankments. That contention cannot, it seems to me, be sustained. Where it was used for rammed filling they are entitled to a price for it as rammed filling and nothing more. Where it was used otherwise for making tow-paths and embankments they are entitled to be paid for it as an extra. There is no contract price for work of that kind ; but it appears that twenty-five cents per cubic yard for any part of the tow-paths or embankments that were made with this material in the manner mentioned would be a fair price; and it will be allowed for at that rate. I hope the parties may be able to come to an agreement as to quantity in respect of which such an allowance ought to be made, or if not, that they may agree upon a special referee to whom the question may be referred. If they fail to come to any agreement, I will, on the application of either party, name a special referee to whom the question of quantity will be referred for enquiry and report.

By item numbered 17 a claim is made for additional filling behind walls. The water was in the canal when this work was going on and it flowed back of the wall where the filling was done. And it is alleged that for this reason a considerable proportion of the material was wasted, that is, that it took more material to fill the space than would have been the case if the canal had been unwatered at the time. The allegation is disputed and is in issue. But apart from that it was, I think, an incident

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of the work, done as it was under this contract. By the terms of the contract the filling had to be measured in the work. The extra cost arising from any sinking or shrinkage or waste of the materials used fell upon the contractors. I do not allow anything in respect of this item.

In the items of the claim numbered 19, 20 and 21, a price for rock excavation higher than the contract price therefor is demanded by the suppliants. The contract price was 55 cents per cubic yard. The prices demanded are for part 80 cents per cubic yard, and for the remainder $1.55 per cubic yard. With regard to the season when, and the general conditions under which, the work was done, the demand raises questions similar to those that have been disposed of in dealing with earth excavation; and there is no need to go over them again. The same is true with respect to work done below or beyond the lines shown on the plans exhibited when tenders were asked for. There is however a question that arises in this connection which has not as yet been discussed. It was provided in the specification that for the seat of the side walls the surface of the rock should be stripped and cleaned off for the full width required and the material removed to the spoil bank; and that if the engineer so directed, one or more of the top beds of the rock should be removed, for which removal the price in the contract for rock excavation should be paid. Where that happened there is no ground for complaint or reason for allowing any rock excavation as an extra. But it appears that in approaching the seats for the wall it was necessary to proceed with the work carefully so as not to shatter or destroy the rock on which it was proposed to build the wall; and that the care and precautions taken increased the cost of the work. Of that, too, the contractors had, it seems, no good reason to complain in working to the lines first given for the wall seats. But it happened

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in some cases that after using the necessary precautions in excavating to the lines given, it was found that the rock was unfit for a wall seat; and then a new line was given which had to be worked to with the same care and precaution, and with the same increase of expense as had been used or incurred in the first place. It is not denied —I think I may add that it is conceded—that the working to a second line in this way was extra work for which the contractors ought to be paid a fair price. If the parties can agree as to the quantity of work so done, and the price therefor, the amount so agreed upon will be allowed. If not, the question of what would be a fair allowance therefor will be referred as hereinbefore mentioned with respect to items 12, 13, 14, 15, 16 and 18.

In item numbered 22 of the claim the suppliants ask to be allowed for 12,191·87 cubic yards of dry masonry walling at $8.50 per cubic yard, amounting in all to $103,630.89. For this they have been allowed in the final estimate for 11,857 cubic yards at the contract price of $4.37 per cubic yard, amounting to $51,815.09, leaving the large difference between the amount claimed and that allowed of 51,815.80. This difference arises principally from a higher price being demanded than the price agreed upon for this class of work. A number of the grounds on which that higher price is asked are similar to those which have already been discussed in dealing with the other items of the claim, and which have not been thought to justify any increase of the contract price. There are, however, two grounds that are applicable to this item only. It was provided in the specification that the dry masonry walls should be built of approved sound and durable gray limestone The requirements respecting the stone to be used for the masonry of the waste weir were that the walls of the weir should consist throughout of a sound durable gray limestone, free from seams and other defects and laid in

full mortar on their natural beds. As a matter of fact the dry masonry wall was in the main built of stone taken from the same quarry as that from which the stone for the masonry of the waste weir was procured. Not that stone from this quarry free from seams and other defects was insisted upon, but this stone was approved while other stone that the contractors wished to use, and which could be procured nearer to the works, was not approved, but was rejected, except as to a small part of the wall. This question was settled by Mr. Marceau, the Superintendent Engineer, not by Mr. Stanton, the Resident Engineer. For the suppliants it is said that the local stone was good enough for work of this class. That is denied, and the matter is still in dispute. But I do not find it necessary to determine the question either way. There is no doubt that it was one of the matters as to which the contractors had agreed that the engineer should be the judge, and that his decision should be final. The finality of his decision is now waived by the Crown, but I am not able to see that the waiver makes any difference so far as the question is one of law; and I have nothing to do with any other aspect of the case. The decision of the engineer has, according to the agreement of the parties, found expression in the work that has been finished. What is meant by now waiving the finality of that decision? What effect can any such waiver have? After all is said and done the dry masonry wall that is to be paid for is the dry masonry wall that the suppliants agreed to build for a given contract price. And it seems to me that the price agreed upon cannot now be increased without a new contract made with authority for a good consideration. As I have already intimated the order in council upon which the suppliants rely falls short in my opinion of constituting such a new contract. In other particulars the question as to whether this dry masonry wall is better or

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worse than the specification called for is in controversy between the parties. That raises again the question that has just been discussed. It is said that Mr. Stanton required the suppliants to make better joints and otherwise do better work than was required by the specification. That is disputed. But subject to review by Mr. Marceau, the Superintendent Engineer, or by Mr. Schreiber, the Chief Engineer, the matter was within the judgment of the Resident Engineer, Mr. Stanton. The parties had so agreed, and even if his exactions were severe (which was denied), that fact would not give the suppliants a legal right to a higher price for the work than that agreed upon. If the contractors thought that the resident engineer was requiring better work to be done than the specifications called for they should have appealed to Mr. Marceau or to Mr. Schreiber. If doing that they failed to get relief, I do not see that under a contract such as that in question here there was any other remedy for the situation. In my opinion the court has no authority to increase the price stipulated for by the parties for these dry masonry walls.

With regard to the quantity of dry masonry wall built, there is a difference of 331.87 cubic yards between the contractors' measurement or estimate and the quantity returned in the final estimate; and as to that the further quantity, if any, to be allowed, may be settled by agreement, if the parties can agree, or if not it may be referred with the other matters mentioned for a reference.

In item numbered 23, a claim for the sum of $66.00 for stone quarried for two culverts as ordered but not used and left in the quarry, is made. It is conceded that this should be paid for if it has not already been included in the amount returned. That question as to whether it has not been so included will, if the parties cannot agree, be referred in connection with the last item.

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In item numbered 24 a claim for $150.00 is made for "walling recut to wind and splay and different batter to "that specified, 150 cubic yards at $1.00 per cubic yard." And in the final returns an allowance of $75.00 has been made for "walling recut 150 yards at 50 cents." I find the allowance made to be sufficient.

Item numbered 25 of the claim has reference to the masonry in the waste weirs. There is no dispute as to the quantity of this masonry. The quantity is 233 cubic yards. The contract price was $10.00 per cubic yard, and that has been allowed and the amount paid. An allowance has also been made in this connection for margin drafts. Apart from this a larger price than that stipulated for is demanded because of the greater expense of doing the work at the season when it was done, and the difficulties from the presence of water. The latter element is in reality a claim for damages and similar to other claims of like character that will be referred to. There are, I think, no good legal grounds for increasing the price agreed upon for the waste weir masonry.

The contract price for concrete was $4.50 per cubic yard. In item numbered 26 the suppliants ask to be paid for 22 cubic yards at a price of $6.50 per cubic yard. There is no good ground for allowing any such increase.

The contract price for clay puddle was $1.45 per cubic yard. The quantity returned in the final estimates is 643 cubic yards, making $932.35. The suppliants, for reasons that appear to have been satisfactory to the Superintending Engineer, claimed an additional 20 cents per cubic yard, and that has been allowed and paid. It is not in question here.

In items numbered 28 and 29 the sums of $73.50 and $60.00 respectively, are claimed for puddle because there was some settlement and some wasting of the materials used. It was provided by the agreement made between the parties that all material should be measured in the

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work, and that the work should, until completed, be at the risk of the contractors. It is also urged that this work was done in a narrow trench with insufficient room. But I see in none of these grounds any good reason for departing from the price agreed upon.

In items number 30, 31, 32, 33 and 34, various sums are demanded in the nature of damages for the changing of labour and plant to suit changed lines given by the engineer, for breakages and for delays consequent upon such changes. I have already in another connection discussed this question of changing lines and the right that was reserved in the specification to make them. But apart from that such claims must be sustained, if sustained at all, on the grounds that some actionable wrong had been committed, or that there had been some breach of the contract. Now as to the first, it is clear of course that even if the Resident Engineer had committed some wrong for which he personally would be liable, the Crown would not be answerable for the wrong unless it were made liable by some statute, and there is no such statute. Then with regard to any question of a breach of contract, it is clear that in that connection there has been no breach of any express term of the contract. On the contrary, there was, as has been seen, an express provision in the contract that the Crown should not be liable for any damage the contractors might sustain by reason of any delay arising from any acts of any of the Crown's agents. The breach then, if any, would of necessity be of some implied contract. But it was an express term of the contract that no implied contract should arise or be implied from anything therein contained, or from any position or situation of the parties at the time. The clause of the contract negativing liability on the part of the Crown for delays caused by its agents, and the provision that nothing should be implied has, as we have seen, been waived under the authority of the

order in council hereinbefore set out. But that waiver, for reasons that have been stated, does not in my opinion create a liability on the part of the Crown enforceable in this court, there being at the time the order was passed no such liability.

Then there are a number of items in the claims respecting damages and losses alleged to have been sustained by the suppliants because of hindrance and delays in prosecuting the work arising from the acts of the engineer, from flooding, and from having to unwater the works and to remove ice and snow. Some of these items have been allowed in whole or in part, and the amount allowed has been paid. That applies to items numbered 35, 38, 48, 49 and 50. The claim made in items numbered 36, 37, 39, 40, 41 and 52 (in part) are in the main based on some act or omission of the resident engineer that the suppliants complain of, but for reasons already given these considerations, even if founded on fact (and as to that I express no opinion one way or the other) do not give rise to claims that can as a matter of law be sustained against the Crown under the contract now in question.

Items numbered 42, 43, 44, 45, 46, 47, 51 and 52 (in part) relate to hindrances, difficulties and delays arising from the presence of water and snow and ice while the work was going on. But as we have seen it was provided in the specification that parties tendering should consider in submitting their prices for the various items of work that they must include the cost of removing snow and ice, off dams, troughs, etc., and everything necessary to unwater the canal and weir pit during the progress of the work. And although authority has also been given to waive this provision, and it has been waived so far as that is now possible, the legal effect of the waiver is not to relieve the suppliants from the cost or expense of the work arising from such causes and to throw such expense

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or cost on the Crown. As has been said that could not, in my opinion, be done, except by a new contract made with authority for a good consideration.

The following items of the claims for material supplied and work done have been allowed in whole or in part, and the several amounts so allowed have been returned in the final estimate and paid, that is to say, items numbered 53, 54, 55, 56, 57, 58, 60, 61 and 62. With regard to some of these items there is a question as to whether or not the allowance made was sufficient, and with regard to item 59 whether anything has been allowed or not. The amounts in difference are small, and possibly the parties can agree whether anything additional should be allowed or not. There ought, I think, to be no difficulty in coming to an agreement, but, if that is not possible, any reference that is made will include an enquiry as to what additional allowance, if any, should be made in respect of these items, namely, items numbered from 53 to 62, both inclusive, and also with respect to the claim that there was no good grounds for the deduction in the final estimates of the sum of $24.13 for materials supplied and work done.

The remaining items of the claim, that is to say, items numbered 63 to 65 inclusive, are for interest on amounts alleged to have been due to the contractors and not paid when due, or in the nature of damages for delays. The small amount of $76 has been allowed in the final estimates under this head and has been paid. The court, however, is precluded from allowing interest in such a case. The Crown is not liable for interest, except where it is payable by contract or by statute. The provision respecting interest in the thirty-third section of *The Exchequer Court Act*, to which reference has been made, is also to the same effect.

The allowances to be made to the suppliants are as follows:—

With respect to item numbered 1, a sum of $400, or, in case of a reference at the request of either party, such sum as may be ascertained to be just.

With respect to item numbered 11, the sum of $312.

With respect to items numbered 12, 13, 14, 15, 16 and 18, twenty-five cents per cubic yard for making embankments (not already returned as rammed filling behind side walls and in embankments) and tow-paths with material hauled from the spoil banks, after having been first deposited there, the quantity to be ascertained by agreement or by a reference, as hereinbefore mentioned.

With respect to items numbered 20 and 21, such an allowance above the contract price already allowed as may be fair and just for excavating rock to a second line for the seat of walls, as heinbefore mentioned, the amount to be determined by agreement or reference.

With respect to item numbered 22, an allowance for any quantity of dry masonry walls at $4.37 per cubic yard may be ascertained by agreement, or reference, to have been built in excess of the quantity already allowed for.

With respect to item 23, a fair allowance (if it appears that none has been made,) to be ascertained in the manner mentioned.

With respect to items numbered 53 to 62, both inclusive, and the claim that the deduction of $24.13 for materials and work made in the final estimates ought not to have been made, such further allowances as may be ascertained by agreement or reference, to be fair and just.

And otherwise the suppliants' claims are dismissed.

The question of costs will be reserved, and may be spoken to if either party so wishes.

Judgment accordingly.

Solicitors for suppliants : *Chrysler & Bethune.*

Solicitors for the respondent : *Watson, Smoke & Smith.*