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Dec. 2.

IN THE MATTER OF THE PETITION OF RIGHT OF

THE GILBERT BLASTING & DREDGING COMPANY (LIMITED).. } SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public work—Contract—Breach of—Contractor's duty to press claims—Extra work—Loss of profits—Damages.

By a clause common to the several contracts of the suppliants with the Crown for the construction of a public work, it was, in substance, stipulated that if the contractors had any claims which they considered were not included in the progress certificates it would be necessary for them to make and repeat such claims in writing to the engineer within fourteen days after the date of the certificate in which such claims are alleged to have been omitted; and by another clause it was stipulated that the contractors in presenting claims of this kind should accompany them with satisfactory evidence of their accuracy, and the reasons why in their opinion they should be allowed; and unless such claims were so made during the progress of the work and within the fourteen days mentioned, and repeated in writing every month until finally adjusted or rejected, it should be clearly understood that the contractors would be shut out and have no claim against the Crown in respect thereof. The suppliants did not comply with these provisions.

Held, that a petition of right for moneys claimed to be so due to contractors could not be sustained.

2. By one of the clauses of the contracts it was provided that the engineer might, in his discretion, require the contractor to do certain work outside of his contract.

Held, that there was no implied contract on the part of the Crown that work outside of the contract which the engineer might, under the authority so vested in him, have required the contractor to do, should be given to the contractor; and where this was not done by the engineer, and such outside work was given to others, the contractor is not entitled to the profits that he would have made on the performance of such work.

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Argument of Counsel.

3. Where, by a change in the plan of the works, certain works were abandoned and others substituted therefor, and the contractor was paid the loss of profits in respect of such abandoned works, he is not entitled to profits upon the substituted works.

PETITION OF RIGHT for damages for an alleged breach of certain contracts for the improvement of certain sections on the Cornwall Canal.

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

May 4th and June 13th, 1900.

E. L. Newcombe, K.C. for the respondent, moved for a non-suit at the conclusion of the suppliants' case:

Section 34 of the contract reads: "It is distinctly "declared that no implied contract of any kind what-"soever, by or on behalf of Her Majesty, shall arise or "be implied from anything in this contract contained, "or from any position or situation of the parties at any "time, it being clearly understood and agreed that "the express contracts, covenants and agreements "herein contained and made by Her Majesty, are and "shall be the only contracts, covenants and agreements "upon which any rights against Her are to be founded." I submit that this clearly and insuperably prevents any contract for the performance of the works claimed by the suppliants arising by implication. (He cited *Stewart* v. *The Queen* (1)).

Besides these considerations of law, upon the facts the suppliants have no right to complain. The works that are claimed by the suppliants were properly of a sort to be done by the contractors to whom they were given by the Government. There are, therefore, no merits in the suppliants' case.

A. B. Aylesworth, K.C. for the suppliants, contended that the works in respect of which the suppliants

(1) 7 Ex. C. R. 55.

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claimed damages for not being allowed to execute them were such as were necessitated by a change in the plans by the Government authorised by the contract, and that the altered works should be given to the suppliants. If the works were substituted for works originally called for by the contracts, then we are clearly entitled to do them. It is submitted that the evidence shows that the works were merely a deviation or variation from the original plan for the most part, and that in other particulars the works were rather a substitution. But all claimed by us should clearly have been given to us under the contract. Because the Crown has seen fit to abandon certain works originally called for, that has no effect upon our rights under the contracts.

N. A. Belcourt, K.C. followed for the suppliants. The plain intention of the four contracts entered into by the suppliants is that they should get all the work involved in the undertaking.

We further contend that where work was abandoned and new work substituted therefor which we were compelled to do, we still are entitled to the profit on the work that was abandoned.

THE JUDGE OF THE EXCHEQUER COURT now (December 2nd, 1901), delivered judgment.

The suppliants, by their Petition of Right, claim damages in a very large sum for the alleged breach of contracts entered into between Her late Majesty and themselves for the deepening and enlarging of sections five, six, seven and eight of the Cornwall Canal. There were, in all, four contracts each bearing date of the second day of November, one thousand eight hundred and eighty-eight. By these contracts the suppliants agreed to complete all the dredging and other works connected with the deepening and widening of the

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four sections mentioned, not otherwise provided for by the first day of November, eighteen hundred and ninety, and the whole of the work embraced in the several contracts by the twentieth day of April, eighteen hundred and ninety-one. Among the works contemplated by the contracts relating to sections five and seven, were the substructures of two road bridges over the canal. For the work embraced in the four contracts Her Majesty covenanted to pay the several prices set out in schedules of prices forming part of such contracts respectively. The contracts were in the main expressed in the same terms, and each contained, among others, the following provisions:

"5. The engineer shall be at liberty at any time, "either before the commencement or during the con- "struction of the works or any portion thereof, to "order any extra work to be done, and to make any "changes which he may deem expedient in the dimen- "sions, 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 contrac- "tors shall immediately comply with all written "requisitions of the engineer in that behalf, but the "contractors shall not make any change in or addition "to, or omission, or deviation from, the works, and shall "not be entitled to any payment for any change, "addition, deviation, or any extra work, unless such "change, addition, omission, deviation, or extra work, "shall have been first directed in writing by the "engineer, and notified to the contractors in writing, "nor unless the price to be paid for any addition or "extra work shall have been previously fixed by the "engineer in writing, and the decision of the engineer "as to whether any such change or deviation increases

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" or diminishes the cost of the work, and as to the " amount to be paid or deducted, as the case may be, in " respect thereof, shall be final, and the obtaining of " his decision in writing as to such amount shall be a " condition precedent to the right of the contractors to " be paid therefor. If any such change or alteration " constitutes, in the opinion of the said engineer, a " deduction from the works, his decision as to the " amount to be deducted on account thereof shall be " final and binding.

" 6. That all the clauses of this contract shall apply " to any changes, additions, deviations, or extra work, " in like manner, and to the same extent as to the " works contracted for, and no changes, additions, " deviations, or extra work shall annul or invalidate " this contract.

" 7. That if any change or deviation in, or omission " from, the works be made by which the amount of " work to be done shall be decreased, no compensation " shall be claimable by the contractors for any loss of " anticipated profits in respect thereof.

" 8. That the engineer shall be the sole judge of " work and material in respect of both quantity and " quality, and his decision on all questions in dispute " with regard to work or material, or as to the mean- " ing or intention of this contract, and the plans, " specifications and drawings shall be final, and no " works or extra or additional works or changes shall " be deemed to have been executed, nor shall the con- " tractors be entitled to payment for the same, unless " the same shall have been executed to the satisfaction " of the engineer, as evidenced by his certificate in " writing, which certificate shall be a condition pre- " cedent to the right of the contractors to be paid " therefor.

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"26. It is intended that every allowance to which "the contractors" [are] "fairly entitled, will be em- "braced in the engineer's monthly certificates; but "should the contractors at any time have claims of "any description which they consider are not included "in the progress certificates, it will be necessary for "them to make and repeat such claims in writing to "the engineer within fourteen days after the date "of each and every certificate in which they allege "such claims to have been omitted.

"27. The contractors in presenting claims of the "kind referred to in the last clause must accompany "them with satisfactory evidence of their accuracy, "and the reason why they think they should be "allowed. Unless such claims are thus made during "the progress of the work, within fourteen days, as in "the preceding clause, and repeated, in writing, every "month, until finally adjusted or rejected, it must be "clearly understood that they shall be for ever shut "out, and the contractors shall have no claim on Her "Majesty in respect thereof.

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"33. It is hereby agreed that all matters of differ- "ence arising between the parties hereto upon any "matter connected with or arising out of this contract, "the decision whereof is not hereby especially given "to the engineer, shall be referred to the award "and arbitration of the chief engineer for the time "being having control over the works, and the award "of such engineer shall be final and conclusive; and "it is hereby declared that such award shall be a con- "dition precedent to the right of the contractors to "recover or to be paid any sum or sums on account or "by reason of such matters in difference.

"34. It is distinctly declared that no implied con- "tract of any kind whatsoever, by or on behalf of Her

"Majesty, shall arise or be implied from anything in "this contract contained, or from any position or "situation of the parties at any time, being clearly "understood and agreed that the express contracts, "covenants and agreements herein contained and made "by Her Majesty, are and shall be the only contracts, "covenants and agreements upon which any rights "against Her are to be founded."

During the progress of the work it was decided to strengthen and reinforce the south bank of the canal, which was adjacent to the Saint Lawrence River. As part of such work of strengthening that bank, and to hold in position the material by which it was proposed to reinforce it, it was decided to build a stone toe at the foot of the south side of the bank. By a letter of the 13th of February, 1890, the suppliants called the attention of the chief engineer to their facilities for building the stone toe in connection with their existing contract, and offered to do the work for a price mentioned in that letter. By a letter of the 22nd of the same month they called his attention to their "tender for the stone toe on the south bank of the Cornwall Canal." There does not appear to have been any acceptance in writing of this offer, or any written direction to the suppliants to do the work, but between the dates mentioned and June, 1891, when the work of constructing this stone toe was discontinued, they did a part of the work under direction of the chief engineer and were paid for it, and no question arises as to that. It appears, however, that in or before the year 1892, Wm. Davis & Sons, the contractors for section four of the canal (the adjoining section) built at the foot of the south side of the southern bank of the canal, for a distance of about three hundred and fifty feet within the limits of section five, a stone retaining wall which had the same object and answered the same

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purpose as the stone toe that has been mentioned, only it was, it seems, more substantially built. Wm. Davis & Sons also did the other work of reinforcing the south bank of the canal where the wall was constructed. The work of building the retaining wall and strengthening the canal bank at this point in the way in which it was done, formed no part of the work contemplated when the contracts mentioned were entered into. It was extra work. After large sums had been expended in executing in part the work covered by these contracts, and after the time therein limited for their completion had expired, another and a very fundamental change in the work as originally contemplated was made. That part of the old channel of the canal that was embraced within sections six and seven, and within the upper sixteen hundred feet of section five, and the lower thirteen and seventy-six feet of section eight was abandoned, with all the work that had been done thereon, and in place thereof the north channel of the Saint Lawrence River, the channel between the mainland and Sheiks Island opposite thereto, was utilized for the purposes of the canal. This was done by putting a dam across the north channel of the river at the head of Sheiks Island, and then at this point and below the dam cutting a passage or way from the old canal into the channel; and also by putting another dam at the foot of the Island, and then at a point above such dam cutting another passage or way from the channel into the old canal. In this way the north channel of the Saint Lawrence River opposite Sheiks Island was made a part of the Cornwall Canal. The work of making these dams and the ways or entrances from the canal to the channel was also given to Wm. Davis & Sons. The notice given to the suppliants that further work on sections six and seven would be abandoned, is

dated on the 24th of February, 1893. The notice of the chief engineer that the suppliants would not be required to do any more work on the upper sixteen hundred feet of section five, or on the lower thirteen hundred and seventy-six feet of section eight is dated on the 6th of March, 1893, and there is also a letter to the same effect, from the secretary of the Department of Railways and Canals to the suppliants, under date of the 8th of March of that year. The contract with Wm. Davis & Sons to make the dams mentioned bears date of the 19th of June, 1893. On the 20th of March of the same year the suppliants had, by a letter of that date to the Minister of Railways and Canals, stated that they would look to the Government for reasonable compensation for the delays, disbursements and loss of profits which would necessarily result from the course which his department had decided upon with reference to the sections of the canal in question. The matter having been considered, the Minister offered the suppliants to pay them, in settlement of their claim for loss of anticipated profits on the work so abandoned, a sum equal to fifteen per cent. on the estimated value thereof. The value of the work so abandoned was $195,663.62, and fifteen per cent. thereof would amount in even figures to the sum of $29,350. This offer was, on the 12th of March, 1894, accepted for the suppliants by Mr. Ferguson, their solicitor, in a letter in which he stated that the claims, if any, of the company in respect of or arising out of the works actually done would of course remain to be dealt with apart from the settlement. On the 28th of March an order in council was passed authorising the payment of this sum of $29,350 to the suppliants in full of the claim then made for loss of profits. The receipt for this amount was given on the 19th of April following and purported to be in full of all claims in respect of the

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abandonment of parts of sections five and eight, and the whole of sections six and seven of the Cornwall Canal, in accordance with the letter and order in council mentioned. On the 24th of April, 1894, by a letter of that date, the suppliants submitted to the Minister of Railways and Canals a claim for extra work, damages, etc., in respect of the works executed by them on sections five, six, seven and eight of the Cornwall Canal, and it was thereby pointed out that this claim was separate and distinct from the claim paid to them for loss of anticipated profits on abandoned work. The particu ars of this claim are not in evidence, but I infer that it was to something of the kind that Mr. Ferguson referred in his letter of March 12th, already mentioned. Mr. Aylesworth, when putting in this letter of April 24th, 1894, in answer to a remark made by Mr. Newcombe, admitted that it did not refer to the claim now under consideration.

The next matter, in order of time, to which it is necessary to refer, is the correspondence in November, 1895, between Mr. Rubidge, the Superintending Engineer of the Canal, and Wm. Davis & Sons that led to the work of building the piers and abutments for a bridge over the canal, and within the limits of section five, being given to them. On the 20th of April, 1896, Mr. Rubidge gave the suppliants notice that they would be relieved from any further work on that part of section five west of the lower end of the east rest pier of the new Milleroches Bridge; that is, as I understand it, of the bridge, for the building of the substructure of which Wm. Davis & Sons had in November preceding been given the contract.

The claim for which the Petition of Right in this case is brought was presented by the suppliants to the Minister of Railways and Canals in a letter to him, dated the 29th day of June, 1897; the matters then

complained of being substantially those now put forward. The claim made is, that under a fair construction of their contracts in question, the suppliants were bound to do the work hereinbefore mentioned that was given to Wm. Davis & Sons to do, and that there was a corresponding obligation on the part of the Crown to give them the work to do; that the failure of the Crown to do so constituted a breach of contract for which they are entitled to damages, to be measured by the profits that they would have made had they been afforded an opportunity of executing the work. The Crown denies that it was under any obligation to give the suppliants any of the work to do that was done by Wm. Davis & Sons; and a number of special defences arising upon the several contracts in question are set up. The payment of the sum of $29,350 fo loss of profits on the abandoned works is also relied upon as a defence to the petition.

Now the same considerations are not in all respects applicable to the different branches of the suppliants' claim. Some are applicable to the claim as a whole, but others are not, and it will be convenient in the first place to discuss those considerations or matters that affect only a particular part of the claim. In regard to the retaining wall built by Wm. Davis & Sons at the lower end of section five and the strengthing of the canal bank there, it will be observed tha this work was not connected in any way with the principal change in the work that was made, and which, as we have seen, resulted in the abandonment of a large part of the work as originally contemplated, and for the loss of profits on which the suppliants have been paid. The case as to this part of the claim is that the work was not within the contemplation of the parties to the contract when it was entered into; that it was extra work, and that the chief engineer or

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engineer did not, as under the fifth section of the contract he might have done, require the suppliants to do the work. It was given to another contractor to do. There is some question as to whether this part of the claim is included in the petition as filed. The claim, if any, arose in 1892, and the petition is founded on acts that were done in 1893 and afterwards. It is a very old claim, and does not appear to have been put forward until 1897, and if an amendment of the petition were necessary to include it, it is not at all clear that any such amendment could or ought to be made. For reasons that will appear I do not think the claim to be well founded and there is no occasion to determine the question of amendment.

The second or main branch of the claim is for loss of profits on the dams at the head and foot of Sheiks Island and the work incidental thereto, such as the channels or ways that have been mentioned, between the old canal and the north channel of the River Saint Lawrence. This work was done opposite to or within the limits of sections five and eight of the canal for which the suppliants had contracts. I shall assume (without deciding) that the chief engineer or engineer was at liberty under the fifth sections of such contracts to require the suppliants to do this work. It is certain that he did not exercise that power. This part of the claim is also affected by considerations arising from the acceptance of the $29,350 in settlement of loss of profits on the abandoned work. If this work of making the dams and ways between the canal and north channel of the River Saint Lawrence had been given to the suppliants, if they had been required to do this work as a change in the character, nature, location or position of the works as originally contemplated, no question of loss of profits on the work abandoned in consequence of such change could

have arisen. There would have been no breach of the contract, and no consequent claim to damages. There was no breach of any contract in the Crown abandoning the work that was abandoned. It had a right to do that. The breach, if any, consisted in giving the substituted work, the new work incident to the change in plan, to another contractor. If that had not been done the suppliants would, it is certain, have had no cause of action. It is not necessary to decide whether what was done really did constitute a breach of the contracts in question and give a cause of action. The Crown accepted that position and paid the damages agreed upon. Such damages if reasonable might, if they had not been settled, have been assessed with reference to loss of profits on the work that was actually done under the change that took place, and not with reference to the profits that might have been made on the execution of the work as originally contemplated. But it is not possible, it seems to me, that the suppliants can keep in their pockets the profits on the work that was abandoned and at the same time recover profits on the work that was substituted therefor. By accepting the profits on the former, they put it out of their power to recover the latter. They are not entitled to both. These considerations apply only to such work done by Wm. Davis & Sons as was reasonably incident to and connected with the change in the work that has been mentioned. They do not apply to the building of the piers and abutments for the Milleroches Bridge. As to that the facts, some of which have not been alluded to, are these: The work contemplated by the contract for section five, as has been stated, embraced the substructure for a road bridge over the canal within that section. The substructure, the abutments, piers and foundations, of another bridge, were included in the contract relating

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to section seven. A large part of the work on the foundations of the bridge within section five was done when work on that part of that section was abandoned. For the work so done the suppliants were paid, and on the value of what was not then done the suppliants received as part of the $29,500 mentioned, a profit of fifteen per cent. The work on the road bridge contemplated within the limits of section seven formed part of the work of that section, the estimate for which, at the suppliants' prices, amounted to $141,280. Other work on this section not contemplated in this contract brought the estimate up to $156,927.80. The value of the work done on the section at the date when work thereon was abandoned was $86,947.87. Whether this included any work on the foundations of this bridge is perhaps not clear. But it was either included therein or in the work on that section then remaining to be done, the value of which was $69,979.93. On the latter sum the suppliants were paid a profit of fifteen per cent. as part of the $29,350 mentioned. That is with respect to the work that the suppliants contracted to do in connection with these two bridges, they were paid for all the work that was done according to the prices agreed upon; and they were also in 1894 paid in respect of the work not done a profit of fifteen per cent. on the value thereof. They now claim that they ought, in addition, to have a profit on the work done by Wm. Davis & Sons on the bridge that was subsequently in 1895 or 1896 constructed across the canal, on the ground that the site of the bridge is within the limits of section five of the canal. The two bridges embraced in the contracts were settled for. The claim is for profits on work on a third or extra bridge that was not done by them. That does seem somewhat unreasonable. But the question is not

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whether it is reasonable or unreasonable, but whether the suppliants are entitled to what they claim.

By reference to the third paragraphs of these contracts it will be seen that the works to be executed are those mentioned and "not otherwise provided for." The works in respect of which the present claim is made were "otherwise provided for," and would apparently fall within that exception, unless it were limited to works not otherwise provided for at the date of the contracts. It seems to me that it is fairly arguable that these words have reference to works otherwise at any time provided for. Their presence in these contracts would of themselves be sufficient to distinguish this case from cases in Canada in which it has been held that where a contractor is by a contract with the Crown required to do anything, there is a corresponding obligation on the Crown to give him that thing to do; and one would be free to follow the English cases which have been decided in a different way. But I do not rest my judgment on that view of the case.

The fifth and sixth paragraphs of these contracts should be read together, and in construing them the thirty-fourth paragraph should be kept in mind. The latter paragraph declares that no implied contract of any kind whatsoever, by or on behalf of Her Majesty, shall arise or be implied from anything in the contract contained or from any position or situation of the parties at the time. By paragraph five the engineer is at liberty at any time to order any extra work to be done by the contractors; and to make any changes which he may deem expedient in the dimensions, character, nature, location or position of the works, or any parts thereof, or in any other thing connected with the works; and the contractors are bound to comply with any written requisition of the engineer in that behalf.

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But they are not to make any change in, or addition to, or omission or deviation from, the works, unless they are first so directed in writing by the engineer; and without such direction in writing they are not entitled to any payment for any change, addition, deviation, or extra work. When in paragraph six it is provided that all the clauses of the contract shall apply to any changes, additions, deviations, or extra work in the like manner and to the same extent as to the works contracted for, and that no changes, additions, deviations or extra work shall annul or invalidate the contract, the meaning no doubt is, that such clauses shall apply to changes, additions, deviations and extra work directed in writing by the engineer as provided in the preceding paragraph, and that these shall not annul or invalidate the contract. Now it seems certain that the contractors were not under any obligation to do any extra work or any work involved in any change without the written requisition or direction of the engineer, and without such written requisition or direction they were not entitled to any payment therefor. No such requisition or direction was made or given; and the contractors being under no obligation no question of a correlative obligation on the part of the Crown arises. To hold the Crown liable for not giving the work in question to the suppliants one would have to imply a contract on behalf of Her Majesty that whenever there was extra work to do, or whenever there was by reason of some change, addition or deviation, other work to do, the engineer would give such extra or other work to the contractors. But in view of the thirty-fourth paragraph no such contract can be implied.

By the twenty-sixth and twenty-seventh paragraphs of the contracts the contractors agreed that they should have no claim on Her Majesty for anything not included

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in the progress estimates, unless the claim was made and supported by satisfactory evidence, and repeated every month. Nothing of the kind was done with respect to the present claim. Sometimes one feels that there may be some hardship in the Crown invoking these provisions against a contractor's claim. But perhaps one ought not to have that feeling where the contractor during the progress of the work lies back, and does not give any intimation that he thinks himself entitled in any way to that for which afterwards he puts forward a claim. At all events it is for the Crown to say when these provisions shall be invoked against a claim, and when they may be waived. In the present case the Crown relies upon them, and they constitute, I think, a bar to the whole claim.

Then, by various provisions of these contracts, the engineer, that is, the chief engineer and his assistants, acting under his instructions, is made the judge of divers matters, and his certificate is necessary to the payment of any money thereunder; and by the thirty-third paragraph it is provided that all matters in difference arising between the parties upon any matter connected with or arising out of such contracts, the decision whereof was not thereby specially given to the engineer, should be referred to the award and arbitration of the chief engineer, whose award should be final, and that his award should be a condition precedent to the right of the contractors to receive or be paid any sum or sums on account or by reason of such matters in difference. In view of these provisions also it is difficult to see on what ground the petition in this case can be sustained. The suppliants have no decision or certificate of the engineer in their favour and no award of the chief engineer; and there has been no waiver by the Crown of any of these matters. These considerations, as well as those aris-

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ing upon the provisions that require any such claim to be made and supported in the manner pointed out in the twenty-sixth and twenty-seventh paragraphs of the contracts, apply not only to the extra work and to the substituted work done by Wm. Davis & Sons, but also to any work done by them which may have been embraced within the contracts themselves. For instance, where the suppliants and Wm. Davis & Sons were working over the same ground, or adjacent to each other, there may be some difficulty in determining what work was entrusted to the latter as extra or substituted work; and what work the former were entitled to under the contracts. The culvert on which Wm. Davis & Sons did some work affords an instance of this kind, and perhaps also the widening, or part of the widening, of the canal on section eight to get a borrow pit for material to be used on the upper dam. But the claim not having been made in the way provided in the contract, and there being no decision, certificate or award of the chief engineer in the suppliants' favour, and no waiver by the Crown of any such defence, the petition, it seems to me, must fail.

At the conclusion of the suppliants' case Mr. Newcombe, for the Crown, submitted that no case had been made out. That question was then argued and reserved, on the understanding that if it were thought that a case had been made out, an opportunity would be given to the Crown to answer. That, in the view I take of the case, is not necessary.

There will be judgment for the respondent, and a declaration that the suppliants are not entitled to any portion of the relief sought by their petition.

Judgment accordingly.

Solicitors for suppliants: *Belcourt & Ritchie.*

Solicitor for respondent: *E. L. Newcombe.*