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WILLIAM DESMOND O'BRIEN.....APPELLANT; 1879  
 AND \*Feb'y. 4.  
 1880  
 THE QUEEN.....RESPONDENT. \*March 13.  
 ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Petition of right—Contract—Claim for extra work—Certificate of engineer—Condition precedent—31 Vic., ch. 12 (D).*

The suppliant engaged by contract under seal, dated 4th December, 1872, with the Minister of Public Works, to construct, finish and complete for a lump sum of \$78,000 a deep sea wharf at the *Richmond* station, at *Halifax, N. S.*, agreeably to the plans in the engineer's office and specifications, and with such directions as would be given by the engineer in charge during the progress of the work. By the 7th clause of the contract no extra work could be performed, unless "ordered in writing by the engineer in charge before the execution of the work." By

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\*PRESENT—Ritchie, C. J.; and Strong, Fournier, Henry and Tachereau, J. J.

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letter, dated 26th August, 1873, the Minister of Public Works authorized the suppliant to make an addition to the wharf by the erection of a superstructure to be used as a coal floor, for the additional sum of \$18,400. Further extra work, which amounted to \$2,781, was performed under another letter from the Public Works Department. The work was completed, and on the final certificate of the Government's engineer in charge of the works, the sum of \$9,631, as the balance due, was paid to the suppliant, who gave the following receipt, dated 30th April, 1875: "Received from the Intercolonial Railway, in full, for all amounts against the government for works under contract, as follows: '*Richmond* deep water wharf works for storage of coals, works for bracing wharf, rebuilding two stone cribs, the sum of \$9,681.' " The suppliant sued for extra work, which he alleged was not covered by the payment made on the 30th April, 1875, and also for damages caused to him by deficiency in and irregularity of payments. The petition was dismissed with cost; and a rule *nisi* for a new trial was subsequently moved for and discharged.

*Held*, affirming judgment of Court below: That all the work performed by the suppliant for the government was either contract work within the plans or specifications, or extra work within the meaning of the 7th clause of the contract, and that he was paid in full the contract price, and also the price of all extra work for which he could produce written authority, and that written authority of the engineer and the estimate of the value of the work are conditions precedent to the right of the suppliant to recover payment for any other extra work. (*Henry, J.*, dissenting.)

Per *Ritchie, C. J.*—That neither the engineer, nor the clerk of the works, nor any subordinate officer in charge of any of the works of the Dominion of *Canada*, have any power or authority, express or implied, under the law to bind the Crown to any contract or expenditure not specially authorized by the express terms of contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract.

**APPEAL** from a judgment of the Exchequer Court of *Canada*, discharging a rule *nisi*, for a new trial in a petition of right case tried before *Fournier, J.*

The suppliant filed a petition of right, claiming compensation for extra work performed in connection

with the building a deep sea wharf and coal floor, &c.,  
at the *Richmond* Station, at *Halifax, N.S.*

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The petition alleged as follows :—

“ That on the fourth day of December, in the year of our Lord, one thousand eight hundred and seventy-two, your suppliant by articles of agreement under seal and duly executed in duplicate, between your suppliant of the first part, and Her Majesty Queen *Victoria*, represented by the Honorable the Minister of Public Works of the Dominion of *Canada*, of the second part, bound and obliged himself to construct, complete and finish in every respect to the satisfaction of the said Minister, all the work required in and for the construction of a deep-water wharf at or near the *Richmond* Station of the *Nova Scotia* Railway in the said Province of *Nova Scotia*, and in accordance with certain plans and specifications also duly signed, remaining on record in the Department of Public Works for said Dominion of *Canada*, which said plans and specifications are respectively deemed and taken and read as part and parcel of said agreement, as by reference thereto will fully and at large appear. In consideration whereof Her Majesty Queen *Victoria*, represented by the said Minister aforesaid, agreed to pay the sum of seventy-eight thousand dollars, to be paid according to certain schedule of prices designated to be used to ascertain the approximate value of the work done. And it was further agreed that if any change or alteration, either in the position or details of any part of the work during the progress thereof, your suppliant, the contractor, was bound to make such alteration or change, and if such alteration or change should entail extra expense on him, the same was to be allowed him.

“ That your suppliant proceeded with the work. That in the summer of the year 1873, material alterations were made in the plans changing the original

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structure providing for a coal floor, &c., at an expense of eighteen thousand four hundred dollars as estimated by the Engineer. This alteration proving injurious to the structure, a further sum of two thousand seven hundred dollars additional was estimated by the Engineer for bracing the structure. On the completion of all the aforesaid works the Engineer required of your suppliant to perform a vast amount of extra work involving additional labor and expenditure of material not provided for in any former contract or estimates. That your claimant claimed extra payment therefor which the Engineer refused to allow, but obliged your suppliant to do the work which he did under protest, always claiming, however, that such work should be paid for as extra.

“That your suppliant alleges that the extra work for which he claims compensation consists of additional fenders, besides other works, extra ballasts, scarfing timbers, substitution of long for short timbers, labor and material occasioned by alteration of plan of elevation, alterations in site and level of elevation, additional piles required and furnished, extra bracing and framing to cribs, longitudinal framing for elevation, scarfing longitudinal timber, cutting ends of logs under low water for which marine divers were employed at great expense; extra fenders for cribs and floors; all these besides divers other additional work and labor were required to be done, and which compelled your suppliant to lay out and expend divers large sums of money in the employment of labor and purchase of material—for which he has received no compensation whatever.

Your suppliant alleges that the foregoing outlay and expenditure of labor and material was rendered absolutely necessary from the want of proper foresight in making the original plans, and for not providing for the additional strain or pressure on the work occasioned

by the alterations and additions hereinbefore set forth. 1880.  
 That this additional work was ordered by the engineer O'BRIEN  
 or officer in charge, was strictly performed as directed, <sup>v.</sup> THE QUEEN.  
 but has never been paid for.

"Your suppliant alleges that he sustained great damage and loss from inequality of payments, falling very far short of what he was strictly entitled to under the contracts and amount of work done; he also sustained heavy loss and damage from the great irregularity of payments which not only crippled his operations, but put him to loss and expense in procuring money which was long overdue him under his contract, and which, even if it had been paid, with reasonable punctuality, would have saved him a large amount of interest expended in obtaining money elsewhere.

"Your suppliant alleges that his claim for compensation does not come within the provisions of the Act of 31st *Vic.*, entitled, "An Act respecting the Public Works of *Canada*," or Acts in amendment thereof; because under the terms of the contract signed by suppliant, it is provided that the determination of any matter of difference arising out of or concerned with the same shall be decided by the Minister or Architect, or by an Engineer or Officer of the Department, and that his claim for compensation comes strictly within the provisions of the Act passed during the last Session of the Dominion of *Canada*, entitled, 'An Act to provide for the Institution of Suits against the Crown by Petition of Right, and respecting procedure in Crown suits.'

"Your suppliant therefore humbly prays that," &c.

The Attorney General on behalf of Her Majesty by his answer admitted the contract and said:

"2. I admit that the suppliant proceeded with the work mentioned in the said contract, and that certain alterations were made in the plan thereof, providing for

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a coal floor, and that the cost of such alterations was estimated by the engineer in charge, and agreed to by the suppliant at the sum of \$18,400.

"3. I admit that additional bracing was required in the work, and that the sum of \$2,781 was estimated by the engineer, and agreed to by the suppliant as the cost thereof.

"4. The price which the suppliant was to receive for alterations occasioned by the construction of the coal floor, and the extra bracing as aforesaid, was agreed to by the suppliant as aforesaid, before he did the work, and the suppliant was fully paid and satisfied, the original contract price of \$78,000, and also the other two sums of \$18,400, and of \$2,781, before the institution of this suit.

"5. Besides the last mentioned sums, the suppliant demanded and was paid before suit, a sum of \$400 as and for the cost of repairs of a crib or cribs in the said work of faulty construction, to which the suppliant had no just claim, inasmuch as by the terms of contract, he was bound to lay the same down in a proper and sufficient manner, without any extra remuneration beyond the contract price.

"6. After all the works in the said petition mentioned, were fully completed by the suppliant, to wit on the 30th day of April, A.D. 1875, there was a settlement of accounts between the suppliant and the engineer in charge of the said works, acting thereon on behalf of Her Majesty, when it was found that there was a balance due to the suppliant, in respect to the said works of \$9,681; and upon the last mentioned day, the said sum of \$9,681 was paid to the suppliant, and was received and accepted by him in full satisfaction and discharge of all demands against Her Majesty in respect of the said works.

"7. The suppliant performed none of the work men-

tioned in the said petition after the last mentioned settlement of accounts and payment, and I deny that the petitioner has any just claim against Her Majesty in respect of any of the matters mentioned in the said petition, and I plead the said settlement and payment as a complete bar thereto.

" 8. I deny that, with the exception of the extra works hereinbefore mentioned, and which have been fully paid for as aforesaid, any other work was performed by the suppliant, for which he was or is entitled to be paid, over and above the contract price.

" 9. Such of the works mentioned in the third paragraph of the suppliant's petition as were in fact done, were done in the proper construction and completion of the works comprised in the contract and to remedy defects therein, and to make the same conform to the terms of the contract and in fulfilment thereof and not otherwise.

" 10. I deny that the outlay and expenditure of labor and material mentioned in the third and fourth paragraphs of the said petition were rendered necessary by the want of foresight in making the original plans, or by not providing for the additional strain or pressure on the work occasioned by the alterations and additions in the said petition mentioned; and I say that, except the alterations hereinbefore mentioned, and which have been paid for as aforesaid, no alterations in, or additions to, the said work were ordered by the engineer or officer in charge, or were performed by the suppliant, except what was required to complete the work in a proper manner, according to the requirements of the contract.

" 11. I submit that the Honorable the Minister of Public Works having, through the engineer in charge, as the fact is, determined that the works mentioned in the said petition, other than those paid for as aforesaid, were within the terms of the said contract, and the

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plans and specifications, the said determination is final and conclusive upon the suppliant under the 9th clause of the said contract, and is a bar to this suit.

“12. The suppliant was bound, by the terms of the contract, to have the said work completed by the 30th day of April, 1873, but it was not finished until about the end of the year 1874, and Her Majesty might justly have claimed a large sum for damages for the said delay, and for expense of superintendence under the 11th clause of the said contract, but I submit that all matters in question between Her Majesty and the suppliant were finally settled by the payment of the 30th day of April, 1875, hereinbefore mentioned.

“13. I deny that the suppliant has any just ground of complaint by reason of delay or irregularity of payments as alleged in the 5th paragraph of the said petition. He was, at his special request, paid the sum of \$15,000 on account of materials before he had any part thereof on the ground. He was afterwards regularly paid on progress estimates given by the engineer, who on some occasions, however, necessarily and properly delayed giving the same until faulty work was done according to his directions, but which the suppliant for some time refused to do.

“14. I charge that the suppliant has been fully paid and satisfied for all the work comprised in the said contract, and for all the extra work he was authorized in writing to do, according to the terms of the 7th clause of the said contract, and that he is bound by the amount of the said extra work, as determined by the engineer in charge, as also provided in the said 7th clause.

“15. I pray, on behalf of Her Majesty, that the said petition may be dismissed with costs.”

The portions of the agreement which bear on the matters in controversy, are as follows;—

“ARTICLES OF AGREEMENT, entered into on the



fourth day of December, in the year of our Lord one thousand eight hundred and seventy-two, and made in duplicate between *William Desmond O'Brien* of the City of *Halifax*, in the Province of *Nova Scotia*, contractor, of the first part, and Her Majesty Queen *Victoria*, represented herein by the Minister or Public Works of the Dominion of *Canada*, of the second part: Witness, that the party of the first part hereby binds and obliges himself, his heirs and assigns, to and in favor of Her said Majesty, her heirs and successors, for and in consideration of the covenants, conditions and agreements hereinafter mentioned, to find all necessary tools, implements and materials whatsoever, and to construct, complete and finish, in every respect, to the satisfaction of the said Minister, in a good substantial and workmanlike manner, agreeably to the true intent and meaning of the specification hereunto annexed and duly signed, "*ne varietur*" by the parties hereto, and in accordance with the plans, also duly signed, remaining on record in the Department of Public Works, where reference thereto may be had:

"All the work required in and for the construction of a deep water wharf, at or near the *Richmond* Station of the *Nova Scotia* Railway, in the said Province of *Nova Scotia*.

"The whole to be completed and finished, and to be in every respect ready for use, on or before the thirtieth day of April, A. D. one thousand eight hundred and seventy-three.

"In consideration whereof, Her Majesty Queen *Victoria*, represented by the said Minister as aforesaid, doth hereby promise and agree to pay to the party of the first part, or to the heirs, assigns, or legal representatives of the party of the first part, the rates and prices hereinafter mentioned, which shall be computed in currency, and payment thereof will be made by Her said Majesty

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according to the provisions of the Act thirty-first Victoria, ch. twelve, that is to say :

“ For the full final and satisfactory completion of the said wharf agreeable to the plans in the Engineer's office and specification hereunto annexed, and with such directions as shall be given by the engineer or officers in charge during the progress of the work ; the party of the first part shall be paid by Her Majesty, represented by the said party of the second part, the sum of seventy-eight thousand dollars. And for the purposes of monthly certificates the following schedule of prices shall be used to ascertain the approximate value of the work done, but in no case shall the whole contract price of seventy-eight thousand dollars be exceeded, that being the total amount which the said party of the first part is to receive from the said party of the second part for the full and final completion of the said wharf.

“ And the said party of the first part and Her said Majesty, represented as aforesaid, do hereby declare, covenant and agree that the said contract and undertaking shall be and is further made and entered into by them, the said party of the first part and Her said Majesty, represented as aforesaid, under the express agreements, stipulations, covenants and conditions following, that is to say :—

“ *Firstly.*—That payments of the price hereinbefore mentioned, shall be made to the party of the first part within ten days after an estimate of the engineer or officer in charge shall have been received by the Minister, specifying the amount of work done, to the satisfaction of the said Minister or of his Engineer, during the month then ending ; but that, nevertheless, it shall be lawful for Her Majesty to withhold from the party of the first part and retain ten per cent. out of the amount of the estimates until the perfect completion of the work, and the acceptance of the same by the Minister, which

ten per cent., so withheld and retained, shall be paid with the last instalment, within ten days after the engineer or officer in charge shall have delivered to the Minister his final estimate of the work performed, and the materials furnished, in virtue of these presents, with detailed measurements, weights, &c., and his certificate of the work having been fully completed and finished, if the Minister shall so soon have accepted and approved of the work; and that in forming his final estimate, the engineer or other officer shall not be bound or governed by the preceding monthly estimates, which shall be taken and considered merely as approximate. Provided always, and it is further agreed, that Her said Majesty from time to time during the progress of the works, may pay to the party of the first part the whole or any portion of the ten per cent., so withheld and retained.

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*“Fourthly.*—That all materials for the said work shall be inspected and approved of, before being used, either by the Minister or such person as he may appoint, and any materials disapproved of shall not be used in the work, and if not removed by the party of the first part, when directed by the minister or his engineer or person in charge, then the rejected materials shall be removed by the Minister, his engineer or person in charge, to such place as he may deem proper, at the cost and charge, and at the risk of the party of the first part, but it is distinctly understood and agreed that the inspection and approval of materials shall not in any wise subject Her said Majesty to pay for the said materials, or any portion thereof, unless employed or used in the said works, nor prevent the rejection, afterwards, of any portion thereof, which may turn out unsound or unfit to be used in the work, nor shall such inspection be considered as any waiver of objection to the work on

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the account of the unsoundness or imperfection of the materials used.

*“Seventhly.*—That if any change or alteration, either in the position or details of any part of the work shall be required by the said minister during the progress thereof, the party of the first part is hereby bound to make such alteration or change, and if such alteration or change shall entail extra expense on the said party of the first part, either in labor or materials, the same shall be allowed to the said party of the first part, or should it be saving to the said party of the first part in either labor or materials, the same shall be deducted from the amount of this contract ; in either case the amount is to be determined by the estimate made by the Minister, his engineer or officer in charge. But no such change or alteration, whatever may be the extent or quality thereof, or at whatever time the same may be required to be made, *pending the said contract*, shall in any wise have the effect of suspending, superseding, annulling or rescinding this contract, which shall continue to subsist, notwithstanding any such change or alteration ; and every such change or alteration shall be performed and made by the said party of the first part, under and subject to the conditions, stipulations and covenants herein expressed, as if such a change or alteration had been expressed or specified in the terms of this contract ; and should the said party of the first part be required by Her Majesty, represented as aforesaid, to do any work, or furnish any materials for which there is not any price specified in this contract, the same shall be paid for at the estimated prices of the engineer in charge of the works ; but no change or alteration as aforesaid whatever, and no extra work whatever, shall be done without the written authority of the engineer in charge, given prior to the execution of such work, nor will any allowance or pay-

ment whatever be made for the same, in case it should be done without such authority.

*"Eighthly.*—That the party of the first part shall not in any way dispose of, sub-let or re-let any portion of the work embraced in this contract, except the procuring of materials.

*"Ninthly.*—Should any difference of opinion arise as to the construction to be put upon any part of the specifications or plans, the same shall be determined by the minister alone, and such determination shall be final and conclusive, and binding upon the parties to this contract, and every of them.

*"Fourteenthly.*—The specification hereunto annexed, together with the plans of the work herein agreed to be performed, shall respectively be deemed taken and read as parts and parcels of these presents as if the same were actually embodied herein."

The following clauses of the specifications were referred to:—

"4. On figure one are laid down three parallel lines of soundings taken on west side, centre and east side of wharf, but contractors are required to verify the same before tendering for the work; as soon as the work is commenced accurate soundings for each crib must be made by the contractor that the outline of the bottom may be known previous to their being founded, and provision must be made for the slope of the ground by stepping the bottom courses in the manner shewn on the plan, as each crib must be carried up perfectly level.

"5. The cribs must be placed in a straight line and at the proper distances apart, and if considered necessary by the engineer or officer in charge of the work, guide piles shall be driven to assist in founding each crib and preserving the alignment.

"13. So soon as it is considered by the engineer or officer in charge that a firm foundation has been obtained,

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and the cribs have settled to their position, they will be connected at the top both in a horizontal and transverse direction by three rows of timber, each row having two courses and being secured to the cribs by iron bolts  $\frac{7}{8}$  inch diameter; the timbers on the outside are to be squared to 12 inches on three sides, and the remainder flatted on the upper and under sides to 12 inches in depth.

"26. The contractor must exercise great care in sinking the cribs, and distribute the weight of stone over the whole area that they may strike the bottom when perfectly plumb.

"28. The work throughout must be executed in a substantial and workmanlike manner in accordance with the plan and specification, and to the satisfaction of the engineer or officer in charge, who shall have full power and authority to reject any materials or workmanship not in accordance with the true intent and meaning of this specification as expressed or understood.

"29. This specification, together with the plan exhibited, are to be taken to give a general idea of the work required, and omissions in either are not to be considered as invalidating the contract, and parties tendering must embrace everything in their tender, whether mentioned or not, as they will be required to complete the work according to the true intent and meaning of the specification and plan at the contract sum.

"30. The bulk sum mentioned in the tender must include the entire cost of furnishing all labor, materials, tools and machinery, and every contingency connected with the work, and the contractor is to assume all risks, and make good, at his own cost, any damage which may result from loss of materials or otherwise by storms, or from any other cause whatsoever during the progress of the work, and up to its full and satisfactory completion.

“ 31. Contractors must prepare for themselves an estimate of the quantities of material required for the work, and shew the same in the schedule attached to the tender.”

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“ 34. Payments will be made as the work proceeds on the certificate of the engineer, less 10 per cent. to be retained until the completion of the contract.”

The case was tried in May, A.D. 1877, before the Hon. Mr. Justice *Fournier*, who delivered the following judgment:—

“The suppliant, a contractor, on the 4th day of December, 1872, entered into a contract with Her Majesty, represented by the Honorable the Minister of Public Works of the Dominion of *Canada*, to construct a deep-water wharf at or near the *Richmond* Station of the *Nova Scotia* Railway, in the Province of *Nova Scotia*. All the works mentioned and detailed in the said contract, in accordance with the plans and specifications, which are deemed and taken and read as part and parcel of the contract, were duly executed by the contractor and were (as admitted by suppliant) paid for. Suppliant avers that by a special agreement he bound and obliged himself to construct on the said wharf a structure providing for a coal floor, with additional trestle-work to support an elevated railway, for the sum of \$18,400, and that he also performed additional extra work to the amount of two thousand seven hundred and eighty-one dollars.

“He admits also to have been paid these two last mentioned sums. He does not therefore, make any claim for these works, which are only referred to for the purpose of better understanding the subsequent averments of his petition of right. Suppliant's actual claim is based on the fact that on the completion of all the aforesaid works, the engineer who was in charge of the works, required him to perform a vast amount of extra

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work involving additional labor and expenditure of material not provided for in any former contracts or estimates. The works for which he claims compensation are enumerated in the third paragraph of his petition, and are as follows:—

“ June, July and August, 1873—Divers and assistants employed in removing boulder stones and fixing ballast to sustain cribs on the outside.....		\$600 08
Ballast for same .....		160 00
“ October 6, 1873—25 and 30 feet timbers in front of 28 cribs, 345 tons at \$7.....		2,415 00
(Directed by Engineer, and insisted upon by contractor as extra.)		
“ October 22, 1873—Extra pay to <i>Graham Bros.</i> for change in plan of elevation after contract .....		300 00
“ May 4, 1874—First raising trestle work—cash paid.....		100 00
Timber for same—60 tons at \$8.....		480 00
“ July, 1874—Scarfig long timbers (ordered by Engineer, but not required by contract) .....		300 00
“ Sept., Oct. and Nov., 1874—135 fenders at \$7, not in specification.....		945 00
“ Nov. 1, 1874—72 extra fenders on 4 cribs, \$8		576 00
“ Nov. 10, “ —22 piles, 60 feet each, 1,320 feet, at 75c. per foot.....		990 00
“ Outside crib framing and bracing 2,000, board measure at \$40 .....		80 00
“ Inside cribs, framing and bracing, 6,500 board measure.....		260 00
“ Cutting off by divers of ends of logs to a depth of 20 feet under low water on all outside cribs.....		2,000 00
“ Damage and loss sustained by deficiency		



in, and irregularity of payment; expense incurred in procuring money elsewhere, when same due and payable under contract, interest, &c..... 1,500 00

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\$11,166 00

"Suppliant also claims interest on amount of claim from date of petition of right until judgment.

"It is also alleged that these extra works were rendered absolutely necessary from the want of proper foresight in making the original plans, and for not providing for the additional strain or pressure occasioned by the structure necessary for a coal floor and the trestle work erected on one side of the wharf.

"Another averment is for the damage and loss he sustained from the inequality of payments and insufficiency of the monthly progress estimates.

"And, lastly, it is alleged that suppliant's claim for compensation does not come within the provisions of the Act of 31st *Vic.*, ch. 12, entitled "An Act respecting the Public Works of *Canada*," but comes strictly within the provisions of the Act intituled "The Petition of Right Act of 1876."

"With reference to this allegation, it is as well to dispose of it at once by stating that the contract in question formally declared that it was entered into in accordance with the provisions of the Act 31 *Vic.*, ch. 12, respecting the Public Works of *Canada*. I will not therefore say anything further on this point.

"It will be seen by this summary of the petition of the suppliant that his claim can be stated in the following words: 1st, For extra works rendered necessary from the want of proper foresight on the part of the engineer in making the original plans for the construction of the wharf; 2nd, For extra works rendered necessary by not having previous-

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ly calculated what would be the consequences of altering the original plan in constructing a coal floor and a trestle-work for an elevated railway on the wharf.

"The defence produced in the name of Her Majesty by the Attorney General of the Dominion admits that the suppliant was entitled, 1st, to the sum of \$78,000 as the amount of the original contract; 2nd, to \$18,400, being the price of the coal floor and trestle work; 3rd, to a sum of \$2,781 for divers extra works ordered by the engineer; 4th, to a sum of \$400 for repairs, which amount, though not legally due, was admitted.

"Beside these admissions, it is also pleaded that a final settlement took place and payment was made. The defence is worded as follows :

After all the works mentioned in the said petition were fully completed by the suppliant on the 30th day of April, A. D. 1875, there was a settlement of accounts between the suppliant and engineer-in-chief of the said works, acting thereon on behalf of Her Majesty, when it was found that there was a balance due to the suppliant in respect of the said works of \$9,681; and upon the last mentioned day, the sum of \$9,681 was paid to the suppliant, and accepted by him in full satisfaction and discharge of all demand against Her Majesty in respect of the said works.

"By the 11th paragraph of the defence, the decision rendered on the suppliant's claim by the Minister of Public Works is invoked as being final and as being a peremptory answer to suppliant's demands, viz. :

I submit that the Minister of Public Works, having through the engineer-in-charge, as the fact is, determined that the works mentioned in the said petition, others than those paid for as aforesaid, were within the terms of the said contract, and the plans, specifications, the said determination is final and conclusive upon the suppliant under the 9th clause of the said contract, and is a bar to this suit.

"The other paragraphs of the defence deny specially each and every allegation of the said petition.

"The principal question which arises in this case is, whether the suppliant has established his right to be paid the value of the extra works he alleges to have

performed. In order to answer this question it is necessary that reference should be made to the agreement entered into between the suppliant and Her Majesty. Towards the end of the year 1872, the Honorable the Minister of Public Works, wishing to have a deep water wharf constructed as before stated, ordered plans and specifications of the works to be prepared, in order to receive tenders for the work. The suppliant's tender having been accepted on the 4th of December of the same year, a contract duly signed by the suppliant and the Honorable the Minister of Public Works, and countersigned by the Secretary of Public Works and sealed with the official seal of the Department of Public Works, was executed in conformity with the provisions of ch. 12, 31 *Vic.* By this contract the suppliant bound and obliged himself to construct and complete, on or before the 30th April, 1873, to the satisfaction of the Minister of Public Works, and in accordance with the specifications annexed to the said contract, all the works required in and for the construction of the said deep water wharf; and as a consideration for the complete execution of the said work in accordance with the plans and specifications and directions to be given to him by the engineer who would be in charge of the said works, the suppliant was to receive from Her Majesty the sum of \$78,000, payable by monthly instalments on the certificate of the engineer stating the quantity of work done during the month.

"By the 7th clause of the contract, which provides for alterations which the Minister of Public Works may deem necessary during the progress of the work, and for any increase or diminution of price which these alterations might cause, it was expressly agreed and declared that, in either case, the amount was to be determined by the Minister, his engineer or other officer in charge, and that such alterations would be made subject

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to the provisions of the contract, and in the same manner as if said alterations and changes were inserted and specified in the said contract.

— “This clause concludes as follows:—

But no change or alteration as aforesaid whatever shall be done without the *written authority* of the engineer in charge, given prior to the execution of such work, nor will any allowance or payment whatever be made for the same, in case it should be done without such authority.

“According to the terms of the contract no extra work can be performed, except as provided for, that is to say:

If ordered in writing by the engineer in charge before the execution of the work.

“Has this condition, under which alone the suppliant can have the legal right of being paid for his alleged extra work, been complied with? Does the suppliant produce in support of his claim any written authority signed by the engineer? No.

“On the contrary, when he is questioned he declares he has received no such authority and does not produce any. He refers, however, to a letter from engineer *McNabb*, dated 10th November, 1874, as a written authority for certain items of his claim. This letter is produced, but on reading it, it is evident that the works therein mentioned were ordered as works within the terms of the contract. It is in the following terms:—

It is necessary that the following works (reported upon by the clerk of works) should be performed by you under your contract for the construction of the *Richmond* wharf, and I beg to request that you will lose no time in their execution.

“In a letter of a later date, 19th January, 1875, in answer to a demand of payment for extras, the engineer, referring in the following words to what he had answered him in his letter of the 10th November, says: ‘You will observe that no payment will be allowed for the four first items named in my letter of

the 19th November, they forming part of the work mentioned in your contract as stated therein.' 1880

"It is clear to my mind from the admissions of the suppliant and from his correspondence with the Engineer that *no written authority* was ever given to the suppliant to perform the said work. He is necessarily bound by the clauses of the contract he has signed, and which furnish a direct answer to the case, viz: that he shall be refused payment for any extra work done without a written authority. Can he now complain of his position and address himself to a Court of Justice in order to have his contract set aside and be relieved of his obligations? Certainly not.

"It is an elementary principle, that agreements made between parties are binding in law on those who make them, and that Courts of Justice have no other power than to enforce the execution of the agreements. A Judge must also respect them, and it is only when the terms of the agreements, are uncertain or doubtful that he should intervene, in order to interpret the agreement in such cases in accordance with the intention of the parties, but he has no power to make a contract other than the one they mutually agreed upon. This is certainly not a case in which the Judge can exercise his power. The clause above cited and which has reference to extra work is so clear and precise that it does not admit of a doubt. Such a clause is binding. It has been decided frequently by Courts of Justice in a number of cases of which I will give a list later on. It would not be necessary for me to add anything further, and I might dispose of that part of the suppliant's claim which has reference to extra work without examining the evidence offered in support of this portion of the petition; but I think it is as well to ascertain if the work done is really *extra* work for which the suppliant would be entitled to recover, had he complied with

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the condition or formality of obtaining a written authority from the engineer; or if it is work done, as stated by the engineer within the terms of the contract; or again, if it is work done in consequence of the unskilfulness of the contractor, or as one of the risks he undertook when he signed his contract.

"This I will endeavor to ascertain by going over the items of the suppliant's claim, not in the order given in his bill of particulars, but as classed by the suppliant himself when giving his evidence. The first two items of his bill, which, as he states, refer to the said work, are for works which he was required to do in consequence of a want of proper foresight on the part of the engineer and of the insufficiency of information given as to the nature of the soil or bottom on which he was to rest the foundations of the wharf. The work consisted in removing boulder stones which prevented him from fixing his cribs on a level on the bottom on which they were to rest, and also in fixing ballast to sustain cribs on the outside.

"He admits having executed the work without being directed to do so, and that he did so in order to protect the work already done, and which would have been otherwise endangered.

"The works were in jeopardy because the ground beneath the water was very steep and irregular, and the cribs, constructed in what they call "steps" according to the plan, had no firm hold on the bottom, and the result was they had a tendency to step.

"He says he placed his cribs in accordance with the plan, and the work was done to protect the cribs, which were in danger from the unevenness of the bottom. This was no fault of his. It is true the plan, in order to give a general idea of the way in which the cribs should be placed, shows that the lower parts of the cribs to have a firm hold on the bottom, should be con-

structed like the steps of a stairs. The plan does not exactly correspond with the unevenness of the bottom, and the suppliant concluded that the work claimed under these two items was necessitated in consequence of the insufficiency of the plan, and want of proper foresight on the part of the engineer. However, after giving this explanation in the first part of his evidence, he states afterwards that it was only after the shifting of some of the cribs that he employed divers to examine the foundations, and that it was only through his own experience, that he was able to know what the bottom was like, and to ascertain that the engineer was as ignorant as himself on this point. Now, whose duty was it more especially to make the necessary soundings to know the outline of the bottom?

“Do not the specifications oblige the contractor to perform certain work in reference to these soundings? Yes, most certainly. The work is distinctly specified, and he must have entirely forgotten that he was obliged to perform it, for there can be no other reason why he makes a claim for these two items. To settle this point it is sufficient to refer to the specifications. By the 4th clause the party who tenders is notified that soundings made at the places marked by three parallel lines on the plan, should be verified “before tendering for work.” Thus, even before putting in his tender, suppliant was cautioned as to the foundations. He is told that he must verify the soundings made by the engineer. The reason for this, no doubt, was because the Government did not care to cause disappointment to contractors, or wish to incur any responsibility in consequence of the insufficiency of these soundings. Thus notified, was it not the duty of every person who desired to tender to ascertain most precisely what the nature of the foundations were, in order to ask a price calculated on difficulties which did not appear by the

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soundings made by the engineer, but which by the terms of the contract he was bound to include in his estimate.

“Not only is the party who tenders cautioned to be prudent, but once he becomes the contractor his first duty is :

As soon as the work is commenced, accurate soundings for each crib must be made by the contractor, so that the outline of the bottom may be known previous to their being founded, and provision must be made for the slope of the ground by stepping the bottom courses in the manner shown on the plan, as each crib must be carried up *perfectly level*.

“This certainly seems sufficient to leave no doubt as to the duty of the contractor with regard to the foundations, but sections 13 and 16 of the specifications prove in a more positive manner, if it is possible, the necessity for the contractor to comply with this obligation, by stating that the contractor shall not brace together the cribs until the engineer in charge shall be satisfied that the contractor has got a solid foundation, and that the cribs have settled to their position. The 16th clause is as follows :—

The contractor must exercise great care in sinking the cribs, and distribute the weight of stone over the whole area, that they may strike the bottom when perfectly plumb.

“Now, if the suppliant did not deem it necessary to make soundings before making his tender; if he did not complete the soundings, as it was his duty to do when he commenced the work; if he did not protest the engineer in order to ascertain if the foundation was firm; if he did not ask his opinion, or exact a report, as to whether the cribs had settled to their position in order to continue without any danger his works; if after neglecting to take the necessary precautions, it was only after an accident that he perceived the foundations were bad, who should be responsible for the consequences? Is it not the party who had neglected to



take the necessary precautionary means which were imposed on him in his interest by his contract? Most assuredly, he alone is responsible. The Crown could not, without injustice, be made responsible for what it has so positively guarded against.

“Moreover, whatever might be the consequences, it is one of those risks which the suppliant has assumed in virtue of the 30th clause of the specification, viz:—

The bulk sum mentioned in the tender must include the entire cost of furnishing all labor, materials, tools and machinery, and every contingency connected with the work, and the contractor *is to assume all risk and make good at his own cost any damage which may result from loss of materials or otherwise by storms or from any other cause whatsoever*, during the progress of the work and up to its full and satisfactory completion.

“I must also add that the suppliant admits that, previous to the filing of his petition of right, he did not ask payment for these two items. He relied so little upon this part of his claim, that he only made it known for the first time, four years after the works were completed, when he prepared the bill of particulars annexed to the present petition.

“Would it not have been better for him not to include these two ill-founded items in his claim?

“For the above reasons I do not hesitate to declare, that the work included in items 1 and 2 were rendered necessary in consequence of want of foresight on the part of the suppliant, and because he did not comply with the conditions of the contract and of the specifications in regard to the foundations. On this part of his demand he cannot even rely on equity.

“The third item of suppliant's claim is \$2,415 for having placed 25 and 30 feet timbers in front of twenty-eight cribs by order of the engineer. By the specifications the shore cribs are smaller than the outer cribs which were to be sixty by twenty-five feet. The 22nd

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clause of the specifications refers to these outer cribs in the following words:

In building the three large cribs both logs and square timber are to break joint at least eight feet.

"If no specification of the length the logs and square timber to be used in building the smaller cribs is given, it is because the plan sufficiently shows that the timber must be of the same length as the cribs, viz. : 25 to 30 feet without *breaking joint* ; the *break joint* in section 22 refers to the large cribs only in order to show that they may be different from the others.

"In this paragraph of the specifications the suppliant deemed there was a singular contradiction and that he would be guilty of an error of architecture in *not breaking joint*. True, it does appear strange at first to say that it is necessary to employ timber of a greater length for building smaller cribs than you would for large cribs ; but the engineer, in accordance with the specification in his correspondence, as well as in his evidence, explains this in a satisfactory manner.

"In his letter of the 2nd October, 1873, in answer to suppliant's contention, the engineer in charge says:

The clause in the specifications referring to joints broken at eight feet, refers to the sides of the long cribs 60 x 25 but not to the end, as it would not be possible to get them of the former length unless at great expense. The sides of the large cribs are treated in a manner similar to solid, or continuous crib work, which necessitates the joints to be broken at a proper distance.

"In the same letter he insists on his using timber of the same length as the short cribs. I will cite his words:

I regret that I cannot withdraw the objection made to your using short pieces of square timber for the cribs. There can be no difficulty whatever in your procuring timber 30 and 25 feet long, and even if such were the case, it is of the first importance that such difficulty should be met and overcome when it has so direct a connection with the strength and durability of the work, not to speak of the workmanship.

“I am of opinion that the engineer has thus correctly interpreted the specifications and the plan. It must also be borne in mind that in such cases his opinion is to determine, for the suppliant has so covenanted by the 28th clause of the specifications which form part of the contract, and is as follows :

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The work throughout must be executed in a substantial manner *in accordance* with the plan and this specification, and to the satisfaction of the engineer or officer in charge, who shall have full power and authority to reject any materials or workmanship, not in accordance with the true intent and meaning of this specification as expressed or understood.

“This clause, as well as that referring to the payment of extras, is binding, provided bad faith is not imputed to the arbitrator agreed upon. The law on this point is as well settled as on the first ; this was a matter over which the engineer had entire control, and which he decided in accordance with the meaning of the contract. I am, therefore, compelled to dismiss also this item of suppliant's claim.

“Items 4, 5 and 6 refer to a change made by the Government in the original plan of the works contracted for by the suppliant. In the month of May, 1874, a short time after the works were commenced, the Honorable the Minister of Public Works availing himself of the 7th clause of the contract, which authorizes him on certain conditions therein specified to make such alteration or changes in the work contracted for, directed the engineer to get information as to building on the said wharf a coal floor and a trestle work for an elevated railway. Engineer *McNabb* had an interview with the suppliant and explained to him the nature of the work that was wanted. In order to be well understood he showed him as a model a similar structure erected on an adjoining wharf, with this difference, that it should be more elevated. On this occasion a fixed sum of \$18,400, was agreed upon, but the authority of the

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Minister of Public Works was still wanted to complete the agreement. Before it was given the suppliant transferred this new contract to Messrs. *Graham* Brothers. One of them (*James*) thereon interviewed engineer *McNabb*, who repeated to him what he had already explained to the suppliant, and directed him not to commence work until he got the plans of the work. These plans were afterwards furnished. By the evidence of *McNabb* it appears the work was executed on the model that was given, with this difference, that it was slightly more elevated and somewhat larger, but in accordance with the plans. It is in consequence of this difference that suppliant claims as extra the price of these three items; alleging that the change took place after his verbal contract with engineer *McNabb* was concluded. It is evident there was an agreement passed as to this work, but at what date? Certainly not when suppliant interviewed *McNabb*, and was told by him that he had no authority to make the contract unless authorized by the Minister, and that he was not to commence work before he had been furnished with the plans. The agreement was not therefore binding until this authorization was obtained, and this was given by telegram on the 1st of September, after the plans had been furnished. On that date the contract came into force. *Graham*, in his deposition admits that it was only after he had received the plans he made a binding contract with *O'Brien*. It is also proved that no alteration was ordered after he had received them. But it appears that the suppliant, in his eagerness to dispose of the new contract to *Graham*, with whom he was making a large profit (as *Graham* executed the work for \$6,000 for which suppliant was getting \$18,400) did not give him sufficient information as to the size of this new building. He was consequently obliged to pay him \$300, which he now claims under

item 4, and to personally incur the expense which forms items 5 and 6. This expense was incurred because the work was commenced before the plans were furnished, and evidently must be paid for by the suppliant. The engineer, by obliging the contractor to increase the height of the building in accordance with the plan of the works, only did his duty.

"For these reasons I declare and adjudge his claim under these items, ill-founded.

"Items 9, 10, 12, 13 and 14, may be considered together; they proceed from the one cause (as suppliant himself says) which was above mentioned, a change made in the original plan. He claims these works were rendered necessary because the building of the coal floor and the elevated railway on trestles on one side of the cribs weakened very much the wharf.

"At pp. 32, 33 and 34 of his evidence he explains in the following words the effect of the change:—

To make this new class of work, the strength of the works was weakened very much. Owing to that and the nature of this super-incumbent work, the elevated railway on trestles being placed on one side of the cribs caused a lodgement on that side, and when the work was completed by agreement, it was found the work sank with it, and it did not present a perfectly level front, Mr. *McNabb* ordered it to be lifted up, which was a costly operation to do, and to be protected underneath.

Q. You say those two items became necessary in consequence of the yielding of the work under the original plan? A. Under the altered plan. Had the original work been kept in its entirety as I signed the contract for, it would not have yielded. The alteration of the coal yard required the wharf to be lowered some six feet on one side, and the binding was thereby broken up. The binding was broken and weakened the wharf very much.

"*Graham*, sub-contractor, of these works, when examined by the suppliant as one of his witnesses, corroborates this statement; he says:—

I think the coal floor had the effect of settling the seaside of the inner row of cribs, the east side—the furthest out into the harbor. Cribs that form the coal floor settled towards the east. I think it was the effect of the superstructure.

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"This witness is not an engineer and his position of sub-contractor of the suppliant for the same work, naturally prejudiced him in his favor. It will be seen that in this respect he goes much further than *Keating*, the engineer, who was also examined as a witness on behalf of the suppliant, and who, while declaring that: The effect of lowering part of the wharf for that floor was bad, as it cut the top timbers which run from side to side of the wharf, points out, however, that the bad foundations were the principal cause of the settling of the wharf, of the leaning over of certain cribs and of the yielding of others. He corroborates on this point *McNabb*, the engineer, and to show this I will cite a part of his evidence. When asked what caused the yielding of the cribs he answered :—

The bottom must have been soft to begin with, and of course the weight of the superstructure made it settle.

"Another question being put to him as to whether the weight of the trestle would cause the difference he answers :—

It is the *additional* weight of any thing that may be put on it in connection with its use, the condition of the bottom and everything taken together. I have referred to the structure as a whole.

"Further on he adds :—

Shore end cribs were canted a great deal. The top was bent towards the sea. Pretty nearly all of them. \* \* \* This is owing to a *soft* bottom in one instance, *their own weight* and any additional weight that may have been put on the top of them.

"Again, in answer to a subsequent question, he explains in a more precise manner the principal cause of the setting of the works. I will cite the passage.

Q. These cribs were put down upon a soft bottom and they necessarily had some weight of their own and they were intended to be used for putting heavy weights upon them, how do you conceive they should have been put down? A. I think provision should have been made for them to rest upon a level bottom, on a solid bottom of

some kind or other. \* \* \* If this had been done the work would not have canted.

Q. The canting, in your opinion, then, was not occasioned by the change from the original structure to the coal floor. A. No. It may have been assisted by the additional weight of that structure put on top of it.

Q. If the cribs had been properly put down, the placing of the trestle work would have canted them? A. If a proper provision had been made for the bottom it would not.

Q. I suppose the trestle work was not heavy enough to crush the cribs? A. No.

Q. Then if it was on a proper foundation it would not disturb the cribs? A. No, certainly not.

"It is clear that in this engineer's opinion, one of the suppliant's witnesses, if the foundations had been made in accordance with the specifications, the suppliant's work would not have suffered any damage. But in addition to this witness, we have the evidence of engineer *McNabb*, who proves beyond all doubt what really rendered necessary the additional works comprised in the different items now under consideration. I think it necessary, in order to clearly establish this all important fact, to give an extract of his evidence on this point. The following question was put :

Q. It has been said that the change in the plan of structure necessarily weakened the structure and produced injurious effects to it, what is your opinion? A. My opinion is the alteration did not weaken it. There were more struts beyond the timber than called for in the original contract, and therefore the tendency, in my opinion would be to protect the structure. There were more timbers spanning the western and centre rows of cribs than originally.

Q. Now what was the cause of that? (The canting of the crib.) A. It made a serious bend or bow in the wharf.

Q. How did it happen? A. The difficulty was in the bottom in my opinion.

Q. I see by the specification, it says, in the first section, that it was the duty of the contractor to ascertain carefully the nature of the bottom and place his cribs down in such a way that they would be adapted to the formation of the bottom and come up square? A. Yes.

Q. Now if that had been done would this canting have occurred?

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A. I consider if the cribs had touched the solid foundation of the bottom they would not have canted.

Q. Would the trestle work which was built upon the *cribs*, or any other reasonable weight have canted the cribs, if that had been done?

A. I don't think it would have been possible for them to have done so.

Q. What did the soundings show the formation to be? In what direction did it slant? A. It slanted seawards and it slanted towards the centre of the structure.

Q. That is longitudinally? A. Yes, and cross-wise also.

Q. So, each crib had to be stepped in two ways? A. Yes, in two directions.

Q. Would there have been any greater weight upon the cribs if the wharf had been constructed according to the original design than according to its present construction? A. I think not because they were reduced in height five feet.

Q. And that was all heavy structure? A. Yes, it was similar in character to the balance of the crib.

"On this point, as well as on many others, engineer *McNabb's* opinion is directly opposed to that of suppliant. *McNabb* declares that the yielding and settling of the wharf, which rendered necessary the works mentioned in the above items, is not due to the change from the original plan, but to the bad foundations.

"I have already stated what were the contractor's obligations with regard to the foundations and the placing down of the cribs, and I only refer to them to show that the items now under consideration must also be dismissed for the same reasons as the first item.

"It cannot be doubted, according to the opinions above cited, that had the suppliant taken the precautionary measures which his contract had imposed upon him, he would not have been obliged to execute works to repair the effects of his negligence or his imprudence and which he now claims as extras. I also am of opinion that this was the reason why the wharf and the trestle-work yielded, and why other changes took place. It was to make it *substantial and workmanlike* work (as has been said), in accordance with the plans



and specifications, that the works mentioned in these items were deemed necessary.

"For these reasons I cannot admit the suppliant's contention with respect to these items.

"I now come to items 7, 8 and 15, which should be separately considered, because they are of a different category, and are based on different grounds. Item 7 refers to scarfing long timbers (ordered by engineer, but not required by contract.) The contract, it is true, does not specify any particular mode of scarfing or joining the long pieces of timber; but in this case, as in the former, it is a matter of difference of opinion between the engineer and the contractor as to the right mode of executing the work (scarfing long timbers.) In such cases, by virtue of the contract, the engineer is to determine and his opinion is final. For this reason, and for the reasons given at length when considering item 3, I am of opinion that he is not entitled to recover anything under this item.

"As to item 8, amounting to \$945.00, claimed also as an extra, and which is for having put fenders to the wharf, the suppliant contends that they are not mentioned in the specifications, and that they were not indicated on the plans furnished to him. If the first part of this contention is well founded the second is certainly not so. It is true that the fenders are not mentioned in the specifications, but there can be no possible mistake as to their being marked on the plan. The plan produced by the suppliant at the trial shews the position of these fenders. The original produced by the Crown is exactly the same. The fenders are marked on figure No. 3, and they are shewn in other places by dotted lines. The plan is in exactly the same condition as when the suppliant signed his contract. The size of these fenders and the manner in which they should be attached to the wharf is even shewn on the plan. It is more than

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sufficient to prove that the suppliant's claim for this item is ill-founded. I deem it again necessary to refer to item 14 which has already been considered. The suppliant claims under this item \$2,000 for having employed divers to cut the ends of the ties or logs which hold together the two sides of the wharf. I find a still more complete answer to the suppliant's contention on this point than the one I have before given. It is to be found in the 8th paragraph of the specification, which is as follows: 'The logs are to be notched  $2\frac{1}{4}$  inches on the underside at their intersection, and the ends are to project *eight* inches beyond the face of the crib.'

"Instead of complying with this condition, the suppliant allowed the ends of the ties to project much more than eight (8) inches, and that against engineer *McNabb's* and superintendent *Walsh's* directions. It was only when the engineer refused to certify to the payment of the work, that the suppliant executed this work. He has tried to justify his refusal to do the work as part of the contract, by contending that the projection was increased and became dangerous only when (resulting in his opinion on account of a change in the plan) the cribs canted. I have already shown that the cause was quite different. These cribs, according to *McNabb's* evidence, canted in a body, so that the ends of the ties could not project more afterwards than when they were put into position; the altered position of the cribs cannot have increased or lessened this projection. If the cribs had been built with logs projecting eight inches at first, there would have been nothing to cut off. The suppliant has therefore no one to blame but himself if this work, the cost of which was greatly increased because executed in winter, had to be done. Had he complied with the conditions of the specifications and the directions of the engineer, he would not have incurred this expense.

“The suppliant also complains in his correspondence that he was tyrannically treated by engineer *McNabb*. It seems to me, on the contrary, that this last gentleman on many occasions shewed a great deal of indulgence towards the contractor. With reference to this last item, he is far from having exacted what he might have under the specifications.

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“In accordance with the specifications, he could have ordered that the projecting ends be cut as far down as the foundations to their proper dimension—whilst he was satisfied with their being cut to only twenty feet below the low water mark. Neither did he exact that they should project but eight inches as stated in the specifications, but allowed them to project as much as the fenders alongside of the wharf that are twelve inches thick. This work was rendered necessary in order that vessels be not damaged by these projections. No vessel could have otherwise moored alongside of the wharf. *McNabb* in his evidence uses the following words:—

No vessel would have dared to approach the wharf while those projections remained as they were.

Q. Her sides would have been staved in, in a few minutes?

A. Yes.

“We now come to the last item of \$1,500, which the suppliant claims for damages suffered by reason of the insufficiency of the monthly progress estimates and irregularity of payments. The insufficiency of the estimates has not been proved. The work omitted in the engineer's estimates was the work claimed by the suppliant as extra, and which the engineer determined to reject, as being either work within the terms of the contract, or work rendered necessary by the contractor's negligence.

“It is true payments were not made in every month, but there is no proof of any negligence or delay in granting the certificates on which the payments were made. Engineer *McNabb* in his evidence satisfactorily

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explains these delays. The first payment of \$15,000 was made on the engineer's certificate given by a telegram dated the 13th of April, 1873, before the contractor had brought materials on the ground or had commenced work. This amount was advanced in order to allow the contractor to procure the means to start his works. No money afterwards was paid until September, 1873, as the works were only then sufficiently advanced to warrant the engineer to give another certificate for eight thousand seven hundred and ninety-six dollars. Certificates were granted in October, November and December of the same year, also in January, February, March, April, May, June, July, September and October, 1874. The certificate for August was refused because the engineer was not satisfied of the progress made in the "bracing" which he had ordered as forming part of the work included in the contract, and which the suppliant refused to go on with because he wanted to be paid for it as an extra. Here the engineer only exercised such powers as were given him by the contract, and it was for the suppliant to comply with the directions received, and thus not prolong the delay.

"The last but one of the certificates was for the \$4,185.55 granted in October, 1874. From that date until the 17th of March, 1875, no certificate was granted, because the suppliant neglected to perform works ordered by the engineer in his letter of the 10th of November, 1874. He was endeavoring to have them declared extra before executing them.

"It was only on the 17th of March, 1875, when the wharf was sufficiently completed to be accepted, that the engineer granted his final certificate, for the amount which was paid to the suppliant, as appears by his receipt dated the 30th April, following. The engineer positively declares that this certificate was granted by him in his professional capacity, without favor and in

good faith. The suppliant has not adduced any evidence to contradict this statement, and I have failed to discover anything in his conduct which can lead me to believe that he acted otherwise than in good faith.

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"For these reasons I am satisfied that the suppliant's claim under this item is as ill-founded as under the preceding items.

"By reviewing these different items I have shown, I think, that none of them can properly be classed as extra; but that on the contrary they are for work which either formed part of the contract or were rendered necessary (through the contractor's fault) to complete the works in accordance with the agreement. I am, therefore, of opinion that the receipt of the 30th April, 1875, produced with the plea of payment in full, covers not only the items admitted by the defence, but also those claimed under this petition of right. The suppliant cannot, after being paid the amount and after giving a receipt in full of all demands, now endeavor to avoid the consequences of this receipt by alleging that it was given under protest. It is true that on the same day, immediately after he received the sum of \$9,681, he wrote to the Minister of Public Works to inform him that when he signed this receipt he had no intention of abandoning his claim for extras, and of which, till that moment, he had not spoken. Why did he not then press his claim and refuse to sign the final receipt they demanded? Can he now repudiate his own act, or does he give a good reason? No, certainly not. I consider the plea of payment is legally proved and is a complete bar to all the items claimed by the petition, and covers the prices agreed upon by the contracts as well as the extra work ordered in writing by the engineer.

"The Crown has moreover invoked another plea, which is to be found in the eleventh paragraph of the defence, and is as follows:

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That by the 9th clause of the contract the determination of the Minister of Public Works on all differences which might arise during the execution of the works, was final and conclusive.

The clause in the contract reads thus :

Ninthly. Should any difference of opinion arise as to the construction to be put upon any part of the specification or plans, the same shall be determined by the Minister alone, and such determination shall be final and conclusive, and binding upon the parties to this contract and every of them.

"As it has not been proved that such a determination was ever made by the Minister of Public Works, the Crown could not take advantage of this clause. It appears by the evidence that the report on which the final settlement of the 30th April, 1875, was based, was made by Mr. *Schreiber*, the engineer in chief, but as there is no power given to the minister to appoint a substitute to fulfil this duty, I cannot give to this report the same effect as I would to the determination of the minister himself as mentioned in the ninth clause. The learned counsel for the Crown contended on this point, that it was an error in the contract, and that the word *engineer* should be read instead of the word *minister*. Nothing in my opinion warrants such an interpretation or modification of the contract. A party cannot for any reason whatever, without the consent of the other party, modify his obligation. However, from what I have already said, it is evident that this point is of no importance to the decision of this case.

"The conclusion at which I have arrived is founded on the reasons which I have before given at length, and which can be summed up in the following words: 1st. The want of a written authorization in accordance with the terms of the contract to perform the *extra work*; 2nd. The fact that part of the works for which extra payment is claimed, are works within the terms of the contract; 3rd. That part of the works alleged to be extra were rendered necessary on account of the sup-

pliant's negligence and unskilfulness; 4th. That the payment and final settlement which took place on the 30th April, 1875, comprised all the items of the claims.

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"For these reasons I must dismiss the petition with costs."

On the 16th April, 1878, the suppliant took out the following rule *nisi* :

It is ordered that the defendant, upon notice of this rule to be given to Her Majesty's Attorney General for *Canada*, and to Messrs. *Walker, McIntyre, & Ferguson*, the agents of the Attorney General, shall at the expiration of eight days from the date of this order, or so soon after as the case can be heard, show cause why the verdict or judgment rendered for the defendant in this cause should not be set aside, and, instead thereof, a verdict or judgment entered for the suppliant for such sum or sums as the Court shall see fit, or why a new trial should not be directed in this cause on the following grounds :

1. On the grounds disclosed in the affidavit of the suppliant filed.
2. For the erroneous admission as evidence for the defence of certain reports and written papers signed by one *William Marshall*, the same not having been duly verified nor the statements therein proved by evidence.
3. For the erroneous finding of the learned Judge that there had been a final settlement between the parties before action brought.
4. For the erroneous omission of the learned Judge to find that the damage to works was caused by the dumping of stone and earth against the cribs as also by change of the plans and weight of superstructure added to the work, as also by the omission to provide for any solid foundation for the cribs and for dredging the bottom, and also by the general weakening of the binding of the works (as provided by the contract) necessitated by the superstructure and change of plan.
5. For the erroneous finding of the learned Judge that certain extra works charged for had been done without the written authority of the engineer, whereas such written authority was proved and is in evidence.
6. For the erroneous finding of the learned Judge that it was the suppliant's duty under the contract to do more than he was proved to have done before sinking the cribs in regard to securing a more firm foundation.
7. For that the claims for scarfing and for piles and fenders and the sum paid for divers, for ballasting and other extras enumerated in his Lordship's judgment were not allowed, although the same were

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ordered and adopted by the engineer and accepted by the Government, and the same are not mentioned or estimated for in the contract.

8. For that certain of the charges are in connection with the trestle work and are necessary to that work and extras to the verbal contract, and should have been allowed the special conditions of the written contract not applying thereto.

9. For the discovery of new and important evidence as set forth in the affidavit so filed as aforesaid.

10. That the verdict was against law and evidence and against the weight of evidence.

11. For not finding for the suppliant some damages or compensation for the delays in the payments as required by the contract. And in the meantime it is ordered that all proceedings be stayed.

On the 29th April, 1878, this rule *nisi* was discharged and the suppliant thereupon appealed to the Supreme Court of *Canada*.

Mr. *Cockburn*, Q. C., for appellant :

This petition of right was brought to recover extras and additions under a contract under seal, with the Minister of Public Works, to construct a deep sea wharf at *Richmond Station*, at *Halifax, N. S.*, and claimed compensation for serious changes in, and damages to, the works already constructed, entailing expense, and for delays in the monthly payments made to the suppliant.

The new works required by the Government, consisting in a coal floor and a trestle work and railway upon the floor, materially weakened the wharf, as so far constructed under the contract, and suppliant contends that the damage caused to the whole works was by weight of this superstructure, by the settling and canting of the cribs.

The contract for the wharf is dated 4th Dec., 1872. The 7th section, which provides for alterations during the progress of the work, is the one on which the case will turn. We contend the estimates of the engineer is



not a condition precedent, but the only condition precedent is that authority in writing to do the work must be given in advance. But we do not admit that we claim for extra work, with the exception perhaps of a small part of our claim, as to which there may be a doubt, and it can only be as to this part that this condition precedent can apply.

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In the first place the suppliant contends, that he was not required by his contract to prepare a solid foundation to receive the cribs, (a contention put forward on part of defendant at the trial). On the contrary, the provision as to stepping the bottoms of the cribs after soundings was all that suppliant was required to do, and all this was faithfully done under the daily inspection of the engineer or his officers in charge, without objection, and no such objection was ever urged till after this action was brought.

Now, it was some months after work was in progress that the engineer in charge entered into a verbal contract with the suppliant to put up the coal floor and railway on the wharf. This, we maintain, was a distinct work. There is nothing in the contract to show the wharf was to be used for shipping coal. The foundation of wharf had been constructed by suppliant for a wharf, and not for any superstructure of 200 tons. There was no guarantee of any kind. Under the contract, the cribs were to be bound together at the top, but when the superstructure was required, this building had to be cut through, so that, not only by the weight of superstructure, but also by the loosening of the bonds, the cribs canted.

The contract relates to the wharf. The coal floor was done under the personal inspection of the engineer, as to the sufficiency of the work. It was an independent work not contemplated at first. There were certain extras flowing out of this new work for which we claim,

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 O'BRIEN and also certain extras entailed on former work by this  
 new work.  
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 THE QUEEN. The answer admits the work was all completed and  
 the government entered into possession, and have had  
 possession ever since.

The provision in the contract, that the minister shall "determine, &c.," applies only to the work under the contract, and, in any event, the evidence shews the minister was applied to, but failed to comply; and there are cases to show that where what is to be done is in the power of one of the parties, and everything has been done by the other to have that done, this is equivalent to performance of the condition (1).

Another defence is, there was a receipt in full. This is only in full of items mentioned in it, and does not apply to the extras, the subject-matter of this action. The evidence shews suppliant received the money with a qualification, *Read v. Lancashire* (2).

The contractor was ordered to desist until the cribs should find a solid foundation, showing that no other foundation was contemplated. The steps cannot be used where there is a rock foundation.

[The learned counsel then referred to the evidence to show that the new work had weakened the original structure, and had it not been for this new work the cribs would not have canted.]

This claim for compensation does not come within 31 *Vic.*, ch. 12.

The question comes back to this—whose duty was it to prepare the foundation for these cribs?

Mr. *MacLennan*, Q.C., for respondent:

The contract in question was made under the Public

(1) *Hotham v. E. India Co.*, 1 *W. Ry. Co.*, 2 McN. & G. 74. D. & E. 638; *McIntosh v. G.* (2) L. R. 6 Chy. 527.

Works Act, 31 *Vic.*, c. 12, and every provision in that Act applies to it.

The tendency has been towards the curtailment of the powers of Ministers by the Legislature. This has been shown in all departments, (see especially 31 *Vic.*, c. 5,) as regards the contingencies, and the various statutes provide as to how the Crown shall be bound for articles furnished.

Sec. 7 of the Act therefore disposes of all claims outside the contract, for there was no authority to bind the Crown in any other way than provided for by the statute.

Moreover, the evidence does not show any claim upon the favour of the Crown—the case is one without merit. The learned judge, who tried the case, has so found. In the court below my learned friend did not contend he had any claim outside the contract. It is put on a *quantum meruit* for the first time in appellant's factum.

Under the terms of the contract the plaintiff is not entitled to recover.

The evidence shows the wharf was to be constructed to bear the heavy traffic of the ocean steamships.

To entitle the appellant to be paid for work outside of the contract, the written authority of the engineer was required therefor previous to its execution. No such authority was given for the works claimed as extras, except what has been paid for.

The engineer told him certain things would have to be done in connection with the work before a final estimate would be given. The contractor does these things without claiming extra pay. The coal floors, trestle work and railway, were not separate work and could only be done under the contract. When the changes were made, the contractor was informed of them, and he was paid for them under the terms

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of the contract. It was the Minister who was to determine what alterations were to be made. The appellant has been paid for everything he had the written authority of the engineer to do. There is no evidence that any particular question was submitted to him for his decision under this clause.

Then as to the adaption of the cribs to the bottom. The contract shows what the duty of the contractor was as to the soundings. The suppliant was told he should do this extra work as part of his contract, and to make his contract good, and he agreed to do it. Sec. 28 of contract says the work throughout must be executed to the satisfaction of the engineer, who had full power and authority to reject work and materials not in accordance with the specifications, as expressed or understood. The cribs tilted from causes apart from the coal floor, and the engineer required certain things to be done which were proper and reasonable. The engineer acted in a manner favorable to the contractor as may be seen by referring to the correspondence.

The item of \$2,000 for "cutting off, &c.," was for work he was bound to do in accordance with the specifications.

The structure had made no great progress when the coal floor was agreed upon. It was an alteration coming within the contract. The original structure was altered. This he was bound to give up in a business workmanlike manner. He contracted to do it for \$18,000. He paid to sub-contractors \$6,000 for doing it. The original contract was for a work which might be varied.

The wharf was intended to bear thousands of tons, and yet the trestle work disturbed his cribs. *Keating* was obliged to admit that the superstructure could not be the cause of the tilting of the cribs, if the cribs

had been put down in a proper manner in the first place.

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When the engineer required the protective works, he required only what was his duty to require, and his determination is binding upon the suppliant.

The two first items in the settlement have been abandoned. The learned Counsel then referred to :

*Ferguson v. Corp. Galt* (1); *Diamond v. McAnnany* (2); *Ekins v. Corp. Cy. of Bruce* (3); *Elliott v. Roy. Ex. Ins. Co.* (4); *Stodhart v. Lee* (5); *Sharp v. San Paolo Ry.* (6); *Scott v. Liverpool* (7); *Clarke v. Watson* (8); *Ranger v. Great Western Ry. Co.* (9); *Roberts v. Bury* (10).

As to the receipt : Mr. O'Brien does not say it was given under any mistake. The documents annexed to the receipt show how careful the Public Works Department were in such matters. The receipt not having been signed under any mistake or misapprehension, and with a full knowledge, (for all the substantial items of his claim had been agitated before,) it should be binding on him.

Mr. Cockburn in reply :

The clause in the Public Works Act does not apply to executed contracts.

Our claim does not come within the contract and sec. 20 shows that it is not an invariable rule that the contractor should be bound by a written contract.

RITCHIE, C. J. :—

This was an appeal from the judgment of Mr. Justice Fournier, dismissing the suppliant's petition with costs.

[After referring to the pleadings, His Lordship continued as follows:]

(1) 23 U. C. C. P. 67.

(2) 16 U. C. C. P. 9.

(3) 30 U. C. Q. B. 49.

(4) L. R. 2 Exch. 237.

(5) 3 B. & S. 372.

(6) L. R. 8 Chy. 597.

(7) 3 DeG. & J. 334.

(8) 18 C. B. N. S. 278.

(9) 5 H. L. 72.

(10) L. R. 5 C. P. 310.

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I have no hesitation, at the outset, in saying that the suppliant's contention that this contract and the work done under it, and his claim for compensation, is not to be subject to the provisions of the Act 31 *Vic.*, ch. 12, "An Act respecting the Public Works of *Canada*," cannot be sustained. The contract was undoubtedly made by virtue of the authority of that Act, and was duly executed under seal, in accordance with, and must be governed by, its provisions. By the seventh section of this Act it is provided that

No deeds, contracts, documents or writings, shall be deemed to be binding upon the department, or shall be held to be the acts of the said minister, unless signed and sealed by him or his deputy, and countersigned by the secretary.

And by section 21, which provides that security shall be taken where any public works are being carried out by contract, and makes provision when the lowest tender is not taken, it is enacted :

But no sum of money shall be paid to the contractor on any contract, nor shall any work be commenced until the contract has been signed by all the parties therein named, nor until the requisite security shall have been given.

The substance, then, of suppliant's complaint is, that independent of the original structure agreed for at \$78,000, and the coal floor at \$18,400, and the sum of \$2,700 for additional bracing estimated by the engineer, all which sums were duly paid to the suppliant, the engineer required the suppliant to perform a vast amount of extra works, involving additional labor and expenditure of materials not provided for in any former contracts or estimates, for which the suppliant claimed extra payment, but which the engineer refused to allow, and obliged suppliant to do the work which, he alleges, he did under protest, always claiming that such work should be paid for as extra.

The suppliant also complains that such outlay and expenditure of labor and material was rendered abso-

lutely necessary from want of proper foresight in making the original plans, and for not providing for the additional strain or pressure on the work, occasioned by the alterations and additions.

He likewise complains of damage and loss from inequality of payments, falling short of what he was entitled to, and that he sustained heavy loss and damage from irregularity of payments. The answer denies that, with the exception of the sums so paid, and the \$400 paid for the costs of repairs to a crib, to which it is alleged the suppliant had no just claim, any other work was performed by the suppliant, for which he was, or is, entitled to be paid over and above the contract price.

The rights of the suppliant must be determined by the contract and the statute, and by these alone. It is not necessary to enquire into or express any opinion as to the legal binding effect on the Crown of the verbal contract for the coal structure, assuming that work to be outside of and *dehors* the original contract, because it was submitted to the Minister of Public Works, assented to by him, and the amount agreed on by him has been paid; but it cannot, I think, be too unequivocally put forward, that neither the engineer, nor the clerk of the works, nor any subordinate officer in charge of any of the public works of the Dominion, have any power or authority, express or implied, under the law to bind the Crown to any contract or expenditure not specifically authorized by the express terms of the contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract.

In examining the contract we find that the contractor undertook for a lump sum to construct, complete and finish, in every respect to the satisfaction of the minister, all the work required for the construction of a deep

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water wharf agreeably to the plans in the engineer's office and specifications, and with such directions as would be given by the engineer in charge during the progress of the work; and while the specification and plan exhibited are to be taken to give a general idea of the work required, omissions in them are not to be considered as invalidating the contract, but the contracting parties must, as the specification says, embrace everything in their tender, whether mentioned or not, as they will be required to complete the work, according to the true intent and meaning of the specification and plan, for the contract sum; and, as if to prevent the possibility of any doubt arising as to the whole work and everything connected with it necessary for its full and final completion being done and provided by the contractor, it is expressly declared:

The bulk sum in the tender must include the entire cost of furnishing all labor, materials, tools and machinery, and every contingency connected with the work, and the contractor is to assume all risks, and make good, at his own cost, any damage which may result from loss of materials, or otherwise, by storms, or from any other cause whatever during the progress of the work, and up to its full and satisfactory completion.

And while provision is made for any change or alteration of any part of the work which shall be required by the minister, and whether it should entail extra expense, or should be a saving to the contractor, the amount was to be determined by the estimate made by the minister, his engineer, or officer in charge, and while providing that every such change or alteration shall be made subject to the conditions, stipulations and covenants in the agreement expressed, as if such change or alteration had been expressed or specified in the terms of the contract, it is provided that if the contractor is required to do any work, or furnish any materials, for which there is not any price specified in the contract, the same shall be paid for at



*the estimated* prices of the engineer in charge of the works. But it also expressly provided that

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No change or alteration whatever, and no extra work whatever, shall be done without the written authority of the engineer in charge, given prior to the execution of such work, nor will any allowance or payment whatever be made for the same, in case it should be done without such authority.

And in case of a difference of opinion as to the construction to be put upon any part of the specifications or plans, the same shall be determined by the minister alone, and his determination shall be final and conclusive and binding on all parties to the contract.

Now, to enable the contractor to fulfil his contract and construct such a wharf as he undertook to build, it was absolutely necessary that a good, solid and sufficient foundation should be obtained. This the contractor, I think, clearly undertook to secure. He undertook to complete the whole work with every thing that was requisite for the purpose of completion from the beginning to the end for a lump sum.

There is not a word in the contract from which any covenant, agreement or undertaking, express or implied, can be inferred, indicating that the Crown in any way guaranteed the foundation or assumed any responsibility therefor. On the contrary, secs. 4, 26, 29 and 30, of the specifications most clearly shew that the entire risk and responsibility was thrown upon the contractor, who could not possibly do what he undertook to do with a defective foundation.

[The learned Chief Justice then read these sections (1).]

A great portion of the labor expended and materials furnished for which the suppliant claims compensation, with reference to both the wharf and coal floor, was unquestionably caused by the defective foundation, and this arose from the want of a thorough and proper

(1) See p. 541

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examination of the bottom, which does not appear to have been made by the contractor till he found his work in danger, when he says he got divers to explore the bottom to find if any obstructions lay in the sites of the cribs, when they found several large boulders at the bottom.

And as he was, in my opinion, responsible for the foundation, and could not complete the wharf and coal floor as he agreed to do, by reason of his not having placed the original wharf on a proper foundation, the risk and burthen of securing which, I think, he assumed under his contract, he has no claim whatever, in my opinion, on the Crown for any such expenses or outlays occasioned by his own failure to perform his own undertaking. But I have gone through the items of his claim, and I cannot discover from his own showing, that under the terms of his contract he has established a claim to any one of the items.

The suppliant admits the receipt of the contract price, and also the \$18,400 for the coal floor and additional trestle work, and \$2,781 for extra work, which "was agreed on" (he says) "between engineer and himself, and accepted and paid for," and \$400 for rebuilding two cribs which were injured by another contractor, which, he says, was paid for as an extra. The amounts he now claims to recover are as follows: [His Lordship read the statement of claim (1) ]

I have numbered them in the order put forward in the suppliant's statement of claim ; they are 15 in all. As to Nos. 1 and 2, which refer to removing the boulder stones and fixing ballast to sustain the cribs, they are, in my opinion, most clearly matters the contractor was bound to do under his contract ; in addition to which he says :

They were not ordered. I did it because the work was in jeopardy.

(1) See p. 544.

They were done without any instructions or order, but simply because the damage to the cribs was imminent, and I had to protect them at this cost.

This, no doubt, arose from not securing a proper foundation, by reason of which the cribs were likely to shift their ground. His cross-examination clearly shows that he made no proper exploration of the bottom, as he was bound to do, but relied, he says, on the engineer's and his own soundings, which conveyed no adequate idea of the bottom, or what was necessary to be done to secure a solid and proper foundation. He says, on cross-examination, in the winter of 1873-'74 he began to find the cribs sliding away.

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Q. And it was in consequence of this sliding away that you made this work to protect it? A. When I found my first cribs likely to change their position, and having great trouble to take them up and remake parts of them, when I got them into position again, I thought that what led to that trouble might lead to further trouble with the other cribs. I got divers to explore the bottom, and to find if any obstructions lay in the sites of the cribs. They found there were several large boulders at the bottom which they leaded and attached a piece of cork to a line so as to indicate their presence.

Q. What I asked you was this: it was when you found the cribs subsiding or giving way, you did this work to protect the cribs for which you claim payment? A. Not at all. It is a distinct thing altogether.

Q. I am asking you about the two first items? A. It was when I found that these cribs were likely to shift their ground, and were shifting their ground, I protected them.

Q. What month was that in? A. Possibly it was March or April. About April, as near as I can guess, the first year.

Q. Then I understand you had to take some of the work up? A. Yes, I had.

Q. What was that owing to? A. Owing to the subsidence this same way, and the work breaking asunder in consequence of the cribs slipping away.

Q. After you put them down? A. Yes.

Q. Were these the first you put down? A. Yes.

Q. Were they sinking in the mud? A. Not so much that as slipping out into deeper water.

Q. So you took them up, and what did you do? A. I did not take

1880      them up altogether, one went away and I had to tear it to pieces and  
 O'BRIEN      put it together again.  
 v.      Q. What was the cause of that? A. The unevenness of the bot-  
 THE QUEEN. tom and the want of a level surface for those narrow cribs to rest  
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Q. That was just one of the difficulties of the situation? A. The surface below was exceedingly irregular. It was a very difficult place to build crib-work on.

Q. You had considerable difficulty and one crib you had to tear to pieces and re-build in consequence of its not standing after its being put down? A. Yes.

Q. Was it to prevent a recurrence of that you performed this work? A. It was that led me to explore the whole ground, to see if there were any difficulties in the way that we did not see before and remove them. The soundings did not give them before.

Q. This expenditure was incurred in removing those difficulties and protecting the cribs from the injuries you feared? A. Yes.

Q. To make the work safer, in point of fact? A. Yes, to provide that the future work, I would put down, would be safer.

Q. That was done without any orders from the engineer or any body else? A. I had none.

He says he had no written order, nor any communication with the engineer on the subject. And if any inference is to be drawn from his conduct, it is very strongly to the effect that he did not suppose he had any past claim to them; for on his cross-examination in answer to the question: "Did you submit the first two items of your account to the engineer?" he says: "I did not." "Q. You never made any claim for those items until you filed your petition? A. No." And this was years after the work was done and the receipt to be spoken of hereafter given.

Item No. 3.—Suppliant says: "Those timbers were not specified in the contract to be those lengths. The engineer insisted I should put in those lengths. I demurred to it. We had a correspondence. He finally ordered it and I did so." He says the engineer refused to allow the contractor to put in shorter pieces. The engineer required it to be done according to his con-

struction of the specification ; he says he demurred and claimed it was an extra. I think it was clearly within the contract, but if an extra no estimated price or written order is shewn, without which the contractor is expressly prevented from claiming or recovering.

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Item 4—For extra payment to *Graham Bros.* This item grew out of what the suppliant calls the second subordinate or verbal contract. He appears to have proceeded with the work without waiting for a plan which was promised him. He says the engineer, after some work was done, changed the plan. So far from this being a change or alteration under the contract for which the suppliant has a claim against the Crown, not only was there no estimate of the cost, or written authority, but the suppliant says: "I telegraphed to Mr. *McNabb* about this \$300, and requested him to pay it to me, but he said he had no authority to pay it." *McNabb's* answer, which he received, says: "I have no authority to increase contract price." He says: "It was deemed necessary, and I had to bow." Clearly this is not a claim enforceable against the crown.

As to items 5 and 6, the necessity for this expenditure grew out of the yielding of his own work by reason of the defective foundations, and therefore, for the reasons before assigned, not chargeable against the government ; but in addition to this the suppliant could not recover if the work had been extra, because he has shewn no estimated price or written authority. He says in answer to the question: "Had you any orders as to this too ? A. I had none but verbally, that I know of." And here again, like the first two items, the inference from his answers on cross-examination are certainly not favorable to his own belief in his present contention, for he says in answer to the question—

You made a claim for that as for extra work ? A. Yes, the engineer ordered the work and I did it. I conceived at the time that every

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THE QUEEN. Q. Did you submit these two items to the engineer? A. I think not.

Ritchie, C.J. As to No. 7, it appears by the suppliant's statement he was putting in the timbers in a manner objected to by the engineer, and as to which the suppliant says :

My own way was not strictly in accordance with the plan but it was far better.

And again :

Q. Then you were not following the plan? A. No. I was putting them in a way I believed to be better.

He failed to convince the engineer of this, he says his work was not approved of—

And I was ordered to put in a sort of notch called a scarf in the timbers. It was not in the specification or in the plan. I protested against it, but it was insisted on. It was extra work.

He says he put it before the engineer as an extra work which should be paid for. "Q. What did he say? A. He insisted it should be done as part of the contract."

As to item No. 8, 135 fenders not in the specifications, suppliant says : "they are upright timbers that fend off vessels," "such things are attached to wharves more or less, but they are not in my specification or plan." And in answer to the question :

And they are not mentioned in the specifications anywhere? A. No, not in this specification anywhere, but the clerk of the works showed me a specification in his hands where they were mentioned, and I felt if they were in any specification they should be put in.

On his cross-examination he gives this account of the transaction :

Q. What distinction do you make between items 8 and 9? A. The first item, "135 fenders at \$7," were properly to fend off vessels. They were put all around the whole structure. These extra fenders were added with a view of putting a false face upon some of the cribs that went backward out of line, and to bring them back to a true line. Timbers were put down in front and braced back, and a floor run out to make a smooth surface.

Q. It was to remedy the defect in the way in which the cribs rested on the bottom? A. No; you beg the question there. It was not to remedy the defect on the bottom, it was to remedy the defect that accrued from the alteration of the plan.

Q. These cribs did not lie evenly on the bottom? A. They did lie smoothly, but they did not lie on the same bottom. They press on the ground the same as before, but they will tilt—the front will not be perpendicular as it was before.

Q. At all events it was to protect vessels from the effects of the subsidence of the cribs, the fenders were put in? A. No; it was not. It was to bring the frontage out, so as to make one uniform line.

Q. Why was it not a uniform line? A. Because the cribs had moved a year after they were built.

Q. So the outer wall of the crib was uneven and dangerous to vessels—was that it? A. That was not the intention of the work. The work was merely to please the eye.

Q. So it was not dangerous to vessels then? A. It was dangerous—just as dangerous after it was done. They were put on to please the eye merely.

Q. Whose eye was it intended to please? A. Everybody's eye.

Q. That was your intention in putting them there? A. It was, and it was the intention with every one.

Q. How did you gather that? A. I gathered it from conversation. I explained to Mr. McNabb before that, I intended to do it.

Q. So you put that particular item in of your own motion? A. Yes; so as to give a good appearance to the work.

Q. Without any request or order for it? A. It was done without any order, but there was a verbal instruction.

Q. On what ground did you expect pay for it? A. For improving the wharf and rendering it more uniform; I did not do it to please myself.

I am at a loss to conceive what legal claim under this evidence can be set up against the Crown.

No. 9. He says he has no writing for this item. I think there is no doubt that the contractor was bound to put them in, in consequence of his own defective work, but as he admits there was no estimate or written authority, it is clear he has no claim.

As to No. 10, "22 piles," there appears to be no writing authorizing these. They became necessary in consequence of defendant's bad work and bad founda-

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tion ; they became necessary in order to make his work satisfactory, and from *McNabb's* evidence it was an indulgence to him, instead of requiring him to build a new crib, and the suppliant admits that he went on with the work and did the work in the face of the distinct declaration that he was not to be paid for it.

The items 11, 12, 13, 14, the suppliant was, in my opinion, clearly bound to do to fulfil his contract, and were not extra, but he claims them as such, and that he had a written order to do them as such ; but a reference to the letter from the engineer to him, which he claims contains the authority to do the work as extra work, shows the exact opposite. So far from treating or ordering the works as extra they were expressly required to be done by the contractor as part of his contract in these words :

It is necessary that the following works (reported on by the clerk of works) should be performed by you under your contract for the construction of *Richmond* wharf, and I beg to request that you will lose no time in their execution.

And on the 19th Nov., the engineer writes to *O'Brien* :

My letter to you on the 10th instant did not specify any payments for items 1 to 4 inclusive, for the reason it forms part of your contract for the construction of the wharf.

As to the item for damage and loss sustained by deficiency in and irregularity of payments, and expense incurred in procuring money elsewhere, the only merit that this claim has, is that of novelty. It has not, in my opinion, the slightest legal foundation, to rest on.

If suppliant's contention could prevail, that the Crown could be bound by verbal communications between himself and the engineer or officers superintending the construction of public works, or that he could, when called upon to do work as work which the engineer, to whose satisfaction under the contract the work was to be done, claimed he was bound to do under his con-



tract and which he would not be allowed for as extra, do the work and afterwards found thereon a legal claim against the Crown for the work so done, would be simply to permit him to repudiate the express provisions of his contract, ignore the authority of the Minister of Public Works and set at defiance all the statutory provisions enacted for the protection of the Crown and the public interest, and would allow, nay encourage, contractors to impose liabilities on the Crown without any authority or sanction recognized by law as competent to bind the Crown.

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From the suppliant's own account of these transactions, considered in connection with the statute and the contract, it is, to my mind, abundantly clear that he has established no case to justify this Court in reversing my brother *Fournier's* decision. But it is still clearer when the suppliant's evidence is considered in connection with that on the part of the Crown, all which has been so fully and so satisfactorily referred to in the able judgment of my brother *Fournier*, that it is unnecessary for me to go over it again. In addition to all which, after the work was completed, a final estimate, dated 17th March, 1875, was made out and signed by the engineer, "for work done and materials delivered up to 9th March, 1875, at *Richmond* deep water wharf," specifying the particulars on "contract work" and on "extra work," with a certificate signed by the engineer, that the above estimate is correct; that the *total value* of the work performed and materials furnished by Mr. *Wm. D. O'Brien* up to the 9th March, 1875, is \$99,581, and the net amount due \$99,581 less previous payments. This estimate is the final estimate of the engineer after the work was performed, and without which, nor till ten days after, the contractor could not claim the final balance as provided for by the contract, and beneath

1880 which is the following receipt, dated 30th April, 1875,  
 O'BRIEN signed by the suppliant :  
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 against the Government for works under contract, as follows : *Rich-*  
 mon*d* deep water wharf works for storage of coal, works for bracing  
 wharf, rebuilding two shore cribs, the sum of \$9,681.

I think this receipt was intended to cover, and does cover, as expressed in the engineer's certificate, the total value of work performed and materials furnished by Mr. *Wm. D. O'Brien* up to 9th March, 1875, notwithstanding any secret or open intention of Mr. *O'Brien* to put forward, after receiving this amount, further claims for more extra work than was included in the estimates and certificate.

Under all these circumstances, I have no hesitation in adopting and affirming the conclusions of my brother *Fournier*, which he sums up as follows :

1st. The want of a written authorization in accordance with the terms of the contract to perform the *extra* work ; 2nd. The fact that part of the works, for which extra payment is claimed, are works within the terms of the contract ; 3rd. that part of the works, alleged to be extra, were rendered necessary on account of the suppliant's negligence and unskilfulness ; 4th. That the payment and final settlement, which took place on the 30th April, 1875, comprised all the items of the claims.

It is quite unnecessary to cite any authorities, as the principles of law which govern contracts of this description have been so often and so clearly laid down, and are now so well understood and established. I will merely mention two or three cases in which the observations of several of the learned judges seem peculiarly applicable.

In *Westwood v. The Secretary of State for India in Council* (1) :

A contract contained a clause that the engineer for the time being should have power to make such additions to or deductions from the

work as he might think proper, and to make such alterations and deviations as he might judge expedient during the progress of the work; and that the value of all such additions, deductions, alterations and deviations should be ascertained and added to or deducted from the amount of the contract price;

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and further that if any doubt, dispute or difference should arise concerning the work, or relating to the quantity or quality of the materials employed, or as to any additions, alterations, deductions, or deviations made to, in or from the said work, the same should from time to time be referred to and decided by the engineer, whose decision should be final and binding on both parties.

In an action to recover the amount of certain extra works:

*Held*: that the ascertainment of the value of the extra works was a condition precedent to the right of the plaintiffs to maintain their action.

*Wightman, J.*:—

The great question in this case is, whether or no the 11th clause of this contract amounts to a condition precedent. The present case may be limited to the extra works, and the question is, whether there was a condition precedent, that the value of the additions should be ascertained before the plaintiff's are entitled to maintain their

Then it is said, that the uncertainty of having the value ascertained renders the provision inoperative. As a preliminary, it seems to me, that the value must be ascertained by agreement between the parties themselves; but supposing they do not agree, there is a provision in the contract that it is to be referred to the decision of the consulting engineer. I think, therefore, that on this point the defendant is entitled to judgment.

In *Sharpe v. San Paulo Railway Co.* (1), the head note is as follows:

In this case the engineer of a railway company prepared a specification of the works on a proposed railway, and certain contractors fixed prices to the several items in the specifications, and offered to construct the railway for the sum total of the prices affixed to the items. A contract, under seal, was thereupon made between the contractors and the company, by which the contractors agreed to construct and deliver the railway completed by a certain day at a sum equal to the sum total above mentioned.

(1) L. R. 8 Ch. App. 597.

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The contract contained provisions making the certificate of the engineer conclusive between the parties; and it was provided that all accounts relating to the contract should be submitted to and settled by the engineer, and that his certificate for the ultimate balance should be final and conclusive. \* \* \*

The railway was completed, and the engineer gave his final certificate as to the balance due the contractors. \* \* \*

The contractors filed a bill against the company, making claims on several grounds and praying an account and payment.

*Held:* That the contractors could not, on mere verbal promises by the engineer, maintain against the company a claim, to be paid sums beyond the sums specified in the contract under seal.

*Held:* That although the amount of the works to be executed might have been under-stated in the engineer's specification, the contractors could not, under the circumstances, maintain any claim against the company on that ground.

*Held:* That in the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties.

In the Exchequer Chamber, the Master of the Rolls allowed the demurrer, and Lord *Romilly*, M. R., said (1):

It is quite clear that the engineer had no power to vary the contract; he had power to give directions to do certain things upon the line within the limits of the contract, and, if the contractors thought that these things were not within the contract, they were not bound to do them. The bill alleged that the contractors had executed certain other works on the faith of the promises and agreements of Mr. *Brunlees*; that the contractors should be paid for those works by the company; but these were merely the inferences and opinions of the contractors on which the Court could not act, and the company certainly never led the contractors to take any such view. \* \* \*

Then, as to the extra works, the mere allegation that the contractors did these things upon certain vague statements of the engineer (*Brunlees*), and the allegation of their own feelings and opinions, and the reasons why they did these things, would not ground an equity by which they would be entitled to come for relief to this court. His Lordship was of opinion that they were bound by the contract, and that the contract was precise and distinct upon this subject, and that unless the plaintiff could show that the company had by some means or other in writing, not necessarily under seal,

(1) See *ibid* p. 605, note 1.

clearly and decisively bound themselves, the plaintiffs could not vary the contract, and make a new and substituted contract by reason of any conversations said to have been held with the engineer, which it was obvious, upon the bill itself, he had repudiated, and would not assent to. \* \* \*

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The plaintiff had no grounds for relief, because Mr. *Brunlees* had not given the certificates required. In *Kimberly v. Dick*, he considered the case very fully, and had held that if persons chose to enter into a contract by which they agreed that they should be paid what a certain engineer or a certain builder should certify is the proper amount, and nothing more, they were bound by that, if they could not show any dishonesty or any fraud or sinister motive. They must be bound by their contract, and they ought to have considered that before they entered into it.

The Master of the Rolls allowed the demurrer.

The plaintiffs appealed, when the decision of the Master of the Rolls was held right, and the appeal refused.

Sir *W. M. James*, L. J. (1):

In this case the contractors undertook to make the railway, not to do certain works; but they undertook to complete the whole line, with everything that was requisite for the purpose of completion, from the beginning to the end; and they undertook to do it for a lump sum, something short of two millions sterling, which was the amount upon which the *Brazilian* Government had undertaken to guarantee the interest.

The first contract was that the line should be completed for a fixed sum. But the plaintiffs say they are, upon several heads, entitled to a great deal more than that sum. The first head is, that the earthworks were insufficiently calculated, that the engineer had made out that the earthworks were two million and odd cubic yards, whereas they turned out to be four million and odd cubic yards. But that is precisely the thing which they took the chance of.

The plaintiffs say it is quite clear that this was a miscalculation. But that was a thing the contractors ought to have looked at for themselves. If they did not rely on Mr. *Brunlees*' experience and skill as an engineer, they ought to have looked at the consequences and made out their own calculations.

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The bill says that the original specification was not sufficient to make a complete railway, and that it became obvious that something more would be required to be done in order to make the line. But their business, and what they had contracted to do for a lump sum, was to make the line from terminus to terminus complete, and both these items seem to me to be on the face of them entirely included in the contract. They are not in any sense of the word extra works.

Then it is alleged that the engineer, finding out that this involved more expense than he had calculated upon, promised that he would make other alterations in the line, making a corresponding diminution so as to save the contractors from loss on account of that mistake. And then in the vaguest possible way it is said that all these promises of the engineer were known to and ratified by the company. I am of opinion you cannot in that way alter a contract under seal to do works for a particular sum of money. The plaintiffs cannot say that the company is to give more because the engineer found he had made a mistake and promised he would give more, and the company, verbally, or in some vague way, ratified that promise. To my mind it was a perfectly *nudum pactum*. It is a totally distinct thing from a claim to payment for actual extra works not included in the contract.

The very object of leaving these things to be settled by an engineer is that you are to have the practical knowledge of the engineer applied to it, and that he, as an independent man, a surveyor, a valuer, an engineer, is to say what is the proper sum to be paid under all the circumstances. That was the agreement between the parties. The contractors relied upon Mr. Brunlees, and the Railway Company relied upon Mr. Brunlees. That is the ordinary course between such companies and such contractors, and practically it is found to be the only course that is convenient for all parties, and just to all parties. I myself should be very loath to interfere with any such stipulation upon any ground except default or breach of duty on the part of the engineer.

Sir G. Mellish, L. J.:

I am entirely of the same opinion, and I agree with the reasons given by the Lord Justice.

In *Thorne v. Mayor of London* (1) the marginal note of which is:

The defendants being about to erect a bridge, an engineer prepared for them at their request certain plans and specifications, both of the

bridge and of the mode in which it would be constructed; the plaintiff on the faith of these plans and specifications, and without any independent inquiry whether the work could be done as specified, entered into a contract with the defendants to do it in accordance with the terms of the plans and specifications. After the plaintiff had incurred great expense, it was found the work could not be executed in the manner specified. The plaintiff sued the defendants on the ground of an implied warranty by them, that the work could be executed in the manner described in the plans and specifications.

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Held that no such warranty could be implied.

*Kelly, C. B.*, said (1):

We must beware how we hold, that in contemplation of law people have contracted for something which is not to be found within the written contract to which they have put their hands, or that they must have intended something which they have not declared they intended, and which one of the parties in this case certainly did not contemplate, namely, that the work contracted for could be performed in the time and mode contained in the specification. There is no authority for so holding, and, looking to principle, it appears to me that we should be making a contract for the parties and a different one from that into which they have entered, if we implied this warranty. It is said that the engineer was the agent of the corporation, and must be taken to have contracted for and on behalf of the corporation that the specification was sufficient, and that it was reasonably practicable to execute the work in the mode prescribed; but the contract entered into by the plaintiff was absolute and unconditional, that he would execute these particular works for a certain sum and in a certain time.

And *Amphlett, B.*, says (2):

The plaintiff, instead of employing on his own account a competent engineer, made his tender on the footing of the plans and specifications of the engineer of the corporation, who was known to him as an engineer of eminence and reputation. The contractor chose to rely on his well known ability. If there had been any case set up of an attempt to impose on the contractors, this matter would have assumed a different aspect, but nothing of this kind is suggested. The question, which underlies the whole matter, is whether the corporation impliedly contracted that the plans were such as to make the work reasonably practicable. To say that a contractor, who has chosen to rely on the name and reputation of the person employed

(1) *Ibid.* p. 172.

(2) *Ibid.* p. 175.

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by the other party, when he finds that he should not have done so, can make the principal liable, is going far beyond any case that has been cited.

This case went to the Exchequer Chamber, and the judgment of the Court of Exchequer was affirmed (1) :

*Blackburn, J.*, says :

Now, certainly when you have a formal document under seal without a warranty in express terms, we should not be likely to imply a warranty unless there is the clearest reason for it. Mr. *Benjamin* admits that he is unable to find any analogous cases in which a warranty has been implied under circumstances similar to these ; and it seems to me that the burden is on the plaintiff to show that a warranty is fairly implied. I may say that, far from seeing any reasons, legally or morally just, from which we should imply it, it seems to me that the convenience and the right of things are all on the other side. As was well expressed by Mr. Baron *Amphlett* on the occasion of the consideration of this case by the court below, the contractor might, if he doubted whether the scheme was practicable, have asked the corporation for an express stipulation, or he might have declined to enter into the contract. He has done neither. He has chosen rather to act on Mr. *Cubitt's* reputation or his own notions as to its being practicable, and has asked for nothing. It seems to me that if we were to introduce a warranty, we should be putting something into the contract, which not only the parties did not put in it, but which they did not intend to put in it, and which if it had been proposed to them, would probably have been refused, or if they had agreed to any at all, it would have been a warranty considerably modifying any provisions as to how the work was to be carried out. Taking that view of it, I agree with what is the substance of the judgment below, that the plaintiff cannot recover on an implied warranty, there being no express warranty in the contract, and consequently the judgment of the court below must be affirmed.

*Mellor, J.*, says :

The contractors were at liberty, if they pleased, to employ their own engineer to see whether or not these plans were such as could be executed, and executed within the time limited. Both of the parties were, I think, on equal terms.

*Lush, J.*, says :

I also concur in the opinion of my learned brothers, that the judgment of the court below ought to be affirmed ; and I do so on the short



ground that there is nothing in the contract which shows an intention on the part of the corporation to warrant the efficiency of the mode described of keeping out the water and so enabling the contractors to go on with the work of building up the piers of the bridge. It is admitted that there is no express contract of the kind, and there is nothing whatever, in my opinion, to justify the court in implying any such contract; therefore, to impose such an obligation on the corporation would be to introduce a stipulation into the contract which the parties, either from design or inadvertence, it does not matter which, omitted; and we should, by so doing, introduce a new term into the contract, which the court certainly is not competent to do.

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*Tharsis Sulphur Coy. v. M'Elroy* (1):

A contract for the construction of large iron buildings for a lump sum contained a clause that no alterations or additions should be made without a written order from the employer's engineer, and no allegation from the contractors or knowledge of, or acquiescence in, such alterations or additions on the part of the employers, their engineers or inspectors should be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations and additions during the execution of the contract; the contractors alleged it was impossible to cast certain iron trough girders of a specified weight, and subsequently they were allowed to erect girders of a much heavier weight, and the actual weights were entered in the engineers certificate issued from time to time authorizing interim payments. On the completion of the work the contractors claimed a considerable amount in excess of the contract price for the extra weight of metal required. *Held*:—That the engineer's certificates were not written orders, and the claim was therefore excluded by the terms of the contract.

STRONG, J., was of opinion that the judgment of the Exchequer Court should be affirmed, and delivered a written judgment to that effect.

FOURNIER, J., adhered to the judgment delivered by him in the Court below.

HENRY, J.:—

This action was brought by the suppliant by petition to recover payment for extra work alleged to have been

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done by him, in connection with two contracts entered into by him for the erection, in the first place, of a wharf at *Richmond, Nova Scotia*, and secondly, for a trellis work thereon for the shipment of coal. He was paid the contract prices for both, and also for some extra work done by him, for which he gave a receipt in full.

One defence set up is that the receipt in question is a discharge in full of all claims and demands, and it would be, if the amount stated in it was received and accepted as the full amount then due the suppliant or claimed by him. The receipt is in these words :

Received from the Intercolonial Railway, in full of all amounts against the Government *for works under contract as follows: Richmond* deep water wharf, works for storage of coal, work for bracing wharf, re-building two stone cribs, the sum of nine thousand six hundred and eighty one dollars, this 30th day of April, 1875.

(Signed,) WILLIAM D. O'BRIEN.

Preceding this receipt on the same sheet is a full statement of the items for which the suppliant was paid, shewing the amount stated in the receipt as the balance then due him for but four items which do not in any way include or refer to any of the items which form his present demand. The receipt or discharge is for other works than those in question in this suit, and, therefore, inapplicable to those latter items, and no release for them, and the issue raised by the sixth plea that the sum of \$9,681 " Was received and accepted by him in full satisfaction and discharge of all demands against Her Majesty in respect of the said works," is not proved, and must, therefore, in my opinion, be adjudged in favor of the suppliant.

The seventh clause of the contract provides for changes or alterations either in the position or details of the work, but no change or alteration whatever was to be made and no extra work whatever to be done: " Without the written authority of the engineer in charge given prior to the execution of such work."

The contractor, according to the terms of that clause, could only recover for such changes or alterations or extra work as had been so ordered in writing. He would not be bound to make any changes or alterations, or do any extra work, unless ordered in writing.

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The evidence on both sides, written and oral, shows that a large amount of the extra work for which the suppliant claims compensation was ordered in writing by the engineer in charge of the works, but he alleged, at the same time, that such work was a part of the contract, and that the compensation therefor was included in the lump sum therein named. The suppliant, however, at the time disagreed to that contention, but, being bound to perform the work so ordered, under the said seventh clause, he notified the engineer that he would perform the work ordered, but only under the terms of that clause.

The ninth clause of the agreement contains a provision that :

Should any difference of opinion arise as to the construction to be put upon any part of the specifications or plans, the same shall be determined by the *Minister alone*, and such determination shall be final and conclusive and binding upon the parties to this contract, and every of them.

There is nothing in the evidence to show that the question in difference in this respect between the engineer and the suppliant was ever submitted by the engineer for the decision of the Minister, or that he (the Minister) ever made any decision, or, in reference to such work, put any construction on the specifications or plans. That such was not done appears not to have been the fault of the suppliant, for he addressed letters to the Chief Engineer of the Intercolonial Railway (Mr. *Schreiber*), to Mr. *Brydges*, and also to the Minister, protesting against the ruling of the resident engineer, and asking for an investigation and decision, to which

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he received but one answer, and that was from Mr. *Schreiber*, declining to interfere. The work having been ordered in writing, and the Minister failing even to reply to the urgent request of the suppliant to decide the matters in dispute, and the resident engineer having no power to construe judicially the agreement, specifications, or plans, the question is an open one which we are called upon to decide as we best may from the evidence before us, and that, under the circumstances, I think we can legitimately do.

It is admitted on all sides that a great part of the extra work was rendered necessary by the sinking, tilting and upsetting of some of the cribs—caused in a great degree by their foundation being soft and unsustaining, and, as alleged by the suppliant, and, to some extent, admitted by the resident engineer, in consequence of a change made by the latter in the construction of the wharf, and the erection of a raised trellis work and coal-floor, in the building. by which, it is alleged, the connections of the cribs was weakened and unable on one side of the trellis-work to bear the extra weight of the added works. In respect, therefore, of the question of a sustaining foundation—the want of which seems to have created the necessity for the extra expenditure—we must see where the fault lies ; and, in doing so, we must first ascertain what the work was that the suppliant undertook to perform.

It was to build a wharf of certain dimensions, and in such a manner as the specifications and plans showed, and, undoubtedly, on the site and foundation selected by the engineer and pointed out to the suppliant.

Section 4 of the specification, referring to one of the plans, is as follows :

On figure one are laid down *three parallel lines of soundings* taken on west side, centre and east side of wharf, but contractors are re-

quired to verify the same before tendering for the work. As soon as the work is commenced accurate soundings for each crib must be made by the contractor that the *outline of the bottom* may be known previous to their being founded, and provision must be made for the *slope of the ground, by stepping the bottom courses* in the manner shown on the plan, as each crib must be carried up perfectly level.

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There is here no provision for a sustaining bottom. It was not the sustaining power of the bottom, but the correctness of the "three parallel lines of soundings" that was to be proved, and contractors were called upon to verify "the same." *The outline of the then existing bottom* was, therefore, alone to be verified by the contractors *before tendering*, and "accurate soundings were to be made for each crib and any unevenness in the *outline of the bottom*" was to be overcome by the "stepping of the cribs." Such, then, is the description of the work the contractor was expected, and contracted to do, and not in any way touching the question of a sustaining bottom. In fact, the contractor was not to alter or change the bottom, but to fit the cribs to it as it then was. If he had been expected to excavate and remove any accumulation of unsustaining matter or to make a sustaining bottom by means of stones thrown down and graded or levelled, or otherwise, the specification would have shown it; and the agreement would have included a reference to it and compensation for the outlay; and the schedule of prices for the monthly payments would have included the cost of that artificial sustaining foundation. Such a provision would have nevertheless been to some extent in conflict with the provision to erect the wharf by verifying the "soundings" to the top of the bottom as then existing, and on which the work was to be laid. The contract and specification contain no one expression to sustain the construction that the suppliant was to do anything more than to erect the cribs upon, and step them to suit, the form and shape of the then exist-

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ing bottom. All the documents show he was paid for nothing else, and when a contractor tenders for a work and enters into a contract to perform certain and defined works according to a specification and plans, how can he be expected to perform works not mentioned or included therein, and for which no compensation is provided.

Section 13 of the specification shows conclusively to my mind, that when the tenders were asked for and the contract entered into, the party who prepared the specification, acting for the Minister, fully intended that the cribs should be adapted to and settled upon the then *outline of the bottom*, under the belief it would be sufficiently sustaining, or that at least, if the cribs were stepped to suit the existing bottom, they would settle evenly. It provides that:

So soon as it is considered by the engineer or officer in charge that a *firm foundation* has been obtained and *the cribs have settled to their proper position*, they will be connected at the top both in a horizontal and transverse direction by three rows of timber, &c.

This shows plainly that it was expected there would be some settling, for which the stepping of the cribs was intended to sufficiently prevent to any great extent and to overcome. From such evidence of facts I can come to no other conclusion than that the suppliant in stepping and sinking the cribs on the then *outline of the bottom*, did exactly what he had contracted to do. He was bound to do the work: "With such directions as shall be given by the engineer or officer in charge during the progress of the work." It is shown that a man named *William Marshall*, apparently a very competent person, was the officer in constant supervision and direction of the works. The cribs were all made, stepped and sunk by his direction and with his approval. They were so sunk on the *outline of the bottom* then existing, with the exception of

the removal of some boulders by the suppliant which would have interfered with the proper settling of the cribs on the bottom. The cribs were properly ballasted and sunk, and stepped so as to be level and according to the specification. The work was done to the satisfaction of *Marshall*, and that is all the suppliant contracted to do. Although all this appears satisfactorily by the evidence, it is contended that, because during the progress of the works, after the completion of the cribs, some of them tilted and moved, and one tumbled over in consequence of the soft bottom, the suppliant was bound by fenders, piles, and other means not included in the specification to remedy the damage so as to render the wharf safe for vessels to lie beside and load at it. Under the true construction of the agreement, as far as I have yet referred to it and the work to be done under it, I feel bound to say, that such a conclusion would be wholly inequitable, and I think unwarranted. The suppliant was not only told by the specification to place the cribs where, and in the manner he did place them, but did so by the direction and with the approval of the other contracting party by his agent the officer in charge, as provided by the agreement; and how then can that other contracting party be permitted to transfer the blame of not providing in the contract for a proper sustaining bottom from the engineer who planned the work to the innocent contractor who erected the works according to his contract and to the satisfaction of the officers in charge? How can he be permitted to order the works to be erected on a certain foundation and then complain that his own orders were carried out, when his plans have failed; and to call upon the contractor to bear a heavy loss arising from the fault of his own specification. If I engage a contractor to build a stone wall in a trench a foot deep, and after two-thirds of it is set up and

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accepted and approved, wet weather supervenes, the foundations give way, and the wall topples over or sinks into a bog, could I either equitably or legally require him at his own cost to rebuild or repair it? That position is, in my opinion, identical with that in the present case.

If a party undertakes to perform work in a situation and under circumstances which he subsequently finds impracticable, he is, I admit, liable to the consequences of his failure, unless he has a guarantee from the other contracting party against the existence of the controlling causes of failure. Here the position is different, for when the cribs tilted and got into wrong position, the engineer, instead of leaving the suppliant to fulfil his contract as he best could, relieved him of his responsibility to have them replaced, if he were, under the circumstances, bound to do so, by ordering the execution of other and extra works not provided for in the specification. There was no *agreement* for the *substitution* of the works ordered and claimed as extra by the suppliant. If there had been, the suppliant would have been estopped from claiming compensation. The engineer had the right to order changes and alterations of the details of the works in progress, or any extra works. Those claimed for are clearly not in the shape of changes or alterations, but extra works. When the cribs got tilted or injured, and it was the duty of the suppliant to replace them, the engineer could have required him to do so; and the former could either have done so, or resisted the demand that he should do so. Or the engineer might have waived his replacing them, on condition that he, the suppliant, would perform the extra work as a compromise for not being required to replace them. Nothing of this was done, but the engineer peremptorily ordered the execution of the extra works, as being covered by



and included in the original specification, when such was not the case, and the necessity for which could not have been foreseen or anticipated. If the suppliant failed in his contract, of which I, however, see no evidence, he was legally answerable for the consequences; but I know of no law, and can discover no authority in the contract, to make the engineer judge of the *penalty* for such failure. The suppliant never agreed to perform, at his own cost, the extra labour, and furnish the materials, which became necessary from the giving way of the cribs, but did it, as he protested at the time, under the seventh clause of the agreement. I am therefore of the opinion that he is entitled to recover therefor a sufficient sum to indemnify him for his outlay.

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For the first two items of the suppliant's claim he cannot, in my opinion, recover, as he admits he had no orders to do the work charged for.

As to the third item, I have some doubts, owing to the absence of satisfactory scientific evidence, and as I feel unable to say that the specification would have been fulfilled by the use of shorter timbers breaking joints, as provided for in the case of the three large cribs, I do not feel justified in deciding the engineer had not the right, under the specification, to require the lengths insisted upon by him.

As to item four, I have some difficulty, arising from the want of explicit evidence, as to whether the alleged change was really made. From the evidence of the suppliant, I would say it was different from the original agreement for the coal structure, but the plan had not been prepared when the agreement was made. When it was, extra work appeared by it to be necessary, which cost the suppliant \$300. I am inclined to think him entitled to it, but, owing to the loose way the verbal contract was entered into, I have some doubt, and therefore do not feel justified in allowing for it.

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For the 5th and 6th items for raising trestle-work, and for timber for the same, I think the suppliant should be paid. The work was duly ordered and became necessary, as the engineer himself admits, in consequence, to a great extent, of the subsiding or canting of the cribs, caused by the soft foundation.

Item 7, I think also, he is entitled to be paid for, as the work was ordered but not included in the specification.

Items 8, 9 and 10 were not required by the specification, and, for the reasons already given, I think the suppliant is entitled to recover for 9 and 10 ordered by the engineer, but not for 8, which work was done by the suppliant himself without any such order.

Items 11, 12 and 13 were not included in the specification, but the work was ordered in writing to be done by the engineer. It was required in consequence of the upsetting or canting of the cribs by the yielding of the foundation, and, for the reasons already given, I think the suppliant is entitled to compensation for the extra work done.

Item 14, for cutting off the projecting ends of logs, although ordered by the engineer to be done, should not, I think, be allowed under the evidence. By the specification the ends of the logs were to be cut off at the distance of eight inches from the connecting notch for the junction with the side timbers, and if they had been so cut I cannot see how they could have been outside of the fenders which were 12 inches outside of the side timbers, and had the cross timbers been so cut they would certainly not only not have required cutting again, but would have been four inches inside of the fenders. All the cutting then to bring the ends of the logs even with the fenders was, in my judgment only pursuing the agreement as stated in the specification, and for which I cannot see the suppliant has any claim for compensation.

As to item 15, I think the evidence is insufficient to base any claim for damages. It is conflicting, and although delays did take place, and possibly unnecessary in some of the cases, there is shown no legal claim for damages. The payments were to be made monthly as the work proceeded, on the certificate of the engineer, and they were so made; but the suppliant complains the engineer improperly, on some occasions, withheld his certificate. This is denied by the engineer, and reasons are given by him for the delay; but although in one instance they may be considered hardly sufficient, I don't think the withholding of the certificate for a certain time under the circumstances, would warrant a judgment for special damages.

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There is one clause of the specification (No. 30) to which I am bound to refer :

The bulk sum mentioned in the tender must include the entire cost of furnishing all labour, materials, tools and machinery, and every contingency *connected with the work*, and the contractor is to assume all risks and make good, at his own cost, any damage which may result from loss of materials, or otherwise, by storms, or from any other cause whatsoever during the progress of the work, and up to its full and satisfactory completion.

This clause is not specially pleaded as an answer to the suppliant's claims, nor is it in any way alleged that under the sweeping and comprehensive expression therein: "or from any other cause whatever during the progress of the work," the suppliant took upon himself the risk of a sustaining foundation for the cribs—the want of which necessitated the performance of so much extra work. That issue was not raised by the pleadings, and we are, therefore, not called upon to decide it; but, if we were, I would feel bound to say, in addition to the views I have already expressed, that such a defence could not be set up where the cause of the extra work was solely

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to be attributed to the defect in the foundation of the cribs, by their having been placed with the concurrence and by the direction of the engineer, and provided for so plainly and palpably in the specification. The bulk sum mentioned was certainly to include compensation for "*every contingency connected with the work,*" but that work was the building of the wharf, as described in the specification, from "the outline of the bottom" then existing, and the "contingency" was limited to *that work*. The contractor was certainly to assume all risks, and make good, at his own cost, any damage which might result from loss of materials or otherwise by storms, and then follow the words "or from any cause whatsoever," but the latter cannot be construed to include the overt acts of the other contracting party, or to vary the true construction of the specification. The "causes" covered by the words in question must, I think, be *ejusdem generis* with the two preceding provisions and within the terms of the contract, as stated and set out in the specification, and within the compass of the work prescribed to be done. The law, as found in the cases cited by my learned Chief, is unquestionable; but, in my opinion, this case is essentially different from any of them.

I think for the reasons given the appeal should be allowed and that a judgment should be entered for the plaintiff for the amount of the items I have enumerated, with costs.

TASCHEREAU, J.:—

I concur in the reasons given by the Chief Justice for dismissing this appeal. I think that the appellant has been paid in full the contract price and all the extras done in pursuance thereof; that for the extras outside of the contract, the appellant has failed to produce a written authorization in accordance with the

clear terms of section seven of the said contract, and without which he can not claim such extras; and, lastly, that the receipt dated April 30, 1875, by the appellant to the Crown, is a complete bar to appellant's claim.

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I am of opinion the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitor for appellant: *Robert Motton.*

Solicitors for respondent: *Mowat, MacLennan &  
Downey.*

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