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 \*May 23.  
 \*Dec. 14.

HER MAJESTY THE QUEEN } APPELLANT ;  
 (DEFENDANT)..... }

AND

MICHAEL STARRS, JOHN HER- }  
 BERT AND JOHN LAWRENCE } RESPONDENTS.  
 POWER O'HANLY (CLAIMANTS).. }

APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Contract—Claim against Government—Certificate of engineer—Condition precedent—Arbitration—31 V. c. 12.*

*S. et al.* made a contract with Her Majesty the Queen, represented by the Minister of Public Works, for the construction of a bridge for a lump sum. After the completion of the bridge a final estimate was given by the chief engineer, and payment thereof made, but *S. et al.* preferred a claim for the value of work, not included in such final estimate, alleged to have been done in the construction of the bridge, and caused by changes and alterations ordered by the chief engineer of so radical a nature as to create, according to the contention of the claimants, a new contract between the parties.

*Held*, reversing the judgment of Henry J. in the Exchequer, Fournier J. dissenting, that the engineer could not make a new contract binding on the crown ; that the claim came within the original contract and the provisions thereof which made the certificate of the chief engineer a condition precedent to recovery, and such certificate not having been obtained, the claim must be dismissed. The Crown having referred the claim to arbitration instead of insisting throughout on its strict legal rights, no costs were allowed.

APPEAL from a judgment of the Exchequer Court of Canada (Henry J.) (1), setting aside the award of the official arbitrators, and allowing the respondents (claimants) the sum of \$11,393.71,

The claim in this case arose out of a contract for constructing a bridge across the Ottawa River at Des Joachims, for the lump sum of \$25,300. The bridge

\*PRESENT : Sir W. J. Ritchie C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

(1) See vol. 1 of the Exchequer Court Reports shortly to be issued.

was completed by the respondents in the summer of 1885, and in the month of August of that year, the chief engineer of the Department of Public Works made out and certified, under contract, the final estimate of the contractors in respect to the work on the bridge at \$41,896.50, and the balance due upon that certificate was paid to the respondents in October of the said year of 1885.

The respondents after the completion of the bridge presented a claim to the Department of Public Works, claiming the sum of \$81,100.17 as the value of the work done by them, alleging that the chief engineer had made such radical changes in the plan of the work that the original contract was virtually superseded and they requested the department to recommend to the Government of Canada the payment of this sum, after deducting the amount of the said final certificate of \$41,896.50, and they asked that in the event of their claim not being so entertained and paid it should be referred to the board of official arbitrators for their award, and on or about the 29th day of December, 1885, the said claim was duly referred by the said Department of Public Works to the board of official arbitrators for investigation and award.

The claim was heard by the said arbitrators in the month of November, 1886, when evidence both on the part of the claimants and the crown was submitted, and on the 8th day of December following the arbitrators made and published their award in the matter.

The award as made by the arbitrators was for the sum of \$44,279.

The contractors not being satisfied with the award as made appealed therefrom to the Exchequer Court of Canada, and by their notice of appeal they in effect asked the court to declare that the sum awarded by the official arbitrators, was a balance due them by the crown in respect to the said bridge works, after deducting all previous payments made to them, and they

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asked to have the award amended in such manner as to carry into effect their request that the amount awarded should be declared a balance due to the contractors over and above all payments already made.

A cross-appeal was taken on behalf of the crown by which it was contended that the claimants were not entitled to be paid any sum upon their claim, and that it was clear that the amount awarded was intended to be, and was in fact, in full payment and satisfaction of all the work performed on the bridge, and that from the said sum so awarded should be deducted all payments previously made to the contractors, which would leave the amount the arbitrators intended to award to be the sum of \$2,382.50, and in support of the latter contention the arbitrators filed affidavits, stating in effect that their intention was that the award was in full of all work done by the contractors on the bridge works, from which was to be deducted the amount of the chief engineer's certificate, leaving the balance only to be paid to the respondents.

The appeal and cross-appeal came on for hearing in the Exchequer Court before His Lordship Mr. Justice Henry, when His Lordship stated that he would in the first place hear argument upon the question of the validity of the award which was then proceeded with, and on a subsequent day His Lordship gave his judgment setting aside the award, and he then announced that the case being open he would hear arguments on the whole case and dispose of it on the evidence in the same manner, and as if no award had ever been made, and such argument having taken place judgment was reserved, and on the 10th day of October, 1887, His Lordship rendered his judgment, by which he ordered and adjudged that Her Majesty should pay to the respondents the sum of \$11,393.71 in full of all claims against the crown.

From this judgment Her Majesty appealed to this court, and contended that the said judgment was not warranted by the evidence in the case or the law respecting it.

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The respondents filed notice of cross-appeal.

The principal clauses of the contract are the following:—

4. That the several parts of the contract shall be taken together, to explain each other, and to make the whole consistent; and if it be found that anything has been omitted or mis-stated which is necessary for the proper performance and completion of any part of the work contemplated, either in the drawings hereinbefore referred to or the specification hereunto annexed, the explanation and interpretation given by the Chief Engineer shall be received and shall be final, binding and conclusive upon the contractors, and the contractors will, at their own expense, execute the same as though it had been properly described, and the correction of any such error or omission shall not be deemed to be an addition to or deviation from the works hereby contracted for.

5. The engineer shall be at liberty at any time either before the commencement or during the construction of the works or any portion thereof, to order any extra work to be done and to make any changes which he may deem expedient in the dimensions, character, nature, location or position of the works or any part or parts thereof, or in any other thing connected with the works whether or not such changes increase or diminish the work to be done or the cost of doing the same, and the contractors shall immediately comply with all the written requisitions of the engineer in that behalf, but the contractors shall not make any change in or addition to, or omission or deviation from the works, and shall not be entitled to any payment for any change, addition, omission, deviation or any extra work, unless such change, addition, omission, deviation, or any extra work shall have been first directed in writing by the engineer, and notified to the contractors in writing, nor unless the price to be paid for any addition or extra work shall have been previously fixed by the engineer in writing, and approved of by the Minister of Public Works for the time being, and the decision of the engineer as to whether any such change or deviation increases or diminishes the cost of the work, and as to the amount to be paid or deducted, as the case may be, in respect thereof, shall be final, and the obtaining of his decision in writing as to such amount shall be a condition precedent to the right of the contractors to be paid therefor. If any such change or alteration constitutes, in the opinion

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of the said engineer, a deduction from the works, his decision as to the amount to be deducted on account thereof shall be final and binding.

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

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

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

25. Cash payments equal to about ninety per cent. of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of this contract, will be made to the contractors monthly if practicable, on the written certificate of the Engineer that the work for, or on account of, which the certificate is granted, has been duly executed to his satisfaction, and stating the value of such work computed as above mentioned, and upon approval of such certificate by the Minister of Public Works for the time being for the Dominion of Canada, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractors to be paid the said ninety per cent. or any part thereof. The remaining ten per cent. shall be retained till the final completion of the whole work to the satisfaction of the chief engineer for the time being, having control over the work, and within two months after such completion the remaining ten per cent. will be paid. And it is hereby declared that the written certificate of the said Engineer certifying to the final completion of said works to his satisfaction shall be a condition precedent to the right of the contractors to receive or be paid the said remaining ten per cent., or any part thereof.

26. It is intended that every allowance to which the contractors are fairly entitled will be embraced in the Engineer's monthly certificates; but should the contractors at any time have claims of any description

which they consider are not included in the progress certificates, it will be necessary for them to make and repeat such claims in writing to the engineer within fourteen days after the date of each and every certificate in which they allege such claims to have been omitted.

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

34. It is hereby agreed that all matters of difference arising between the parties hereto, upon any matter connected with, or arising out of this contract, the decision whereof is not hereby specially given to the Engineer, shall be referred to the award and arbitration of the Chief Engineer for the time being having control over the works, and the award of such engineer shall be final and conclusive; and it is hereby declared that such award shall be a condition precedent to the right of the contractors to receive or be paid any sum or sums on account or by reason of such matters in difference.

35. It is distinctly declared that no implied contract of any kind whatsoever, by or on behalf of Her Majesty, shall arise or be implied from anything in this contract contained, or from any position or situation of the parties at any time, being clearly understood and agreed that the express contracts, covenants and agreements herein contained and made by Her Majesty, are and shall be the only contracts, covenants and agreements upon which any rights against her are to be founded.

*Hogg* Q. C., for appellant.—The only contract that could be made binding on Her Majesty for such a work as the construction of this bridge, is a contract made in pursuance of the 7th section of the Public Works Act, 31 Vic. ch. 12, which must be “signed and sealed by “the Minister of Public Works or his deputy and “countersigned by the secretary,” and the contract of the 8th September, 1882, was so executed, so that the contract which the suppliants say superseded the contract of the 8th day of September, 1882, could not, if it

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ever had any existence, be binding upon Her Majesty. *Wood v. The Queen* (1); *O'Brien v. The Queen* (2).

Under the provisions of the contract, the court would have no power to order payment of any sum beyond what the engineer had certified. Emden on building contracts, (3); *Jones v. The Queen* (4). By the 35th clause of the contract, no implied contract can in any way arise between the respondents and the crown in respect to the work. It is therefore quite plain, that the only contract binding on either party, is the contract of the 8th September, 1882. See *O'Brien v. The Queen* (5); *Sharpe v. San Paulo Ry. Co.* (6).

However, the evidence shows that the respondents have been liberally paid for all the work done by them upon the bridge, both as regards the work alleged to have been contracted for, and the extra or additional work caused by changes and alterations in the designs and works as finished.

*O'Gara* Q. C. for respondents.—The plans and the evidence show there was a radical difference between the bridge contracted for by the contract made in 1882, and the one actually built, and the fact of the department accepting the work and, when the respondents put in their claim, agreeing to refer the matter to arbitration, is evidence that the written contract was set aside.

But it is now urged that the respondents should get nothing. 1st. Because there was no contract in writing between the respondents and the Minister authorizing the work or changes. 2nd. There is no certificate of the Government engineers allowing the amount.

By the Public Works Act, 31 Vic. ch. 12, secs. 10 and 15, Parliament has entrusted to the Minister of Public

(1) 7 Can. S.C.R. 634.

(2) 4 Can. S.C.R. 575.

(3) Page 125.

(4) 7 Can. S.C.R. 606.

(5) 4 Can. S.C.R. 529.

(6) 8 Ch. App. 597.

Works the absolute control of the erection of bridges, &c. 35 Vic. ch. 24, sec. 1, again repeats this.

42 Vic. ch. 7, sec. 4, divides the Public Works Department into two departments—Railways and Canals and Public Works—and sec. 5 defines their duties, and to the latter department is again given the absolute jurisdiction to erect bridges, &c.

Sec. 10 defines the duties of the chief engineer, &c.

The Minister of Public Works having by these acts the absolute authority to undertake the work, the provisions in the subsequent sections of these acts are only for the guidance and direction of the Minister himself. They cannot take away the power conferred by the previous clauses.

As regulations for the working of the department they do not affect the outside public, and even if they did, they could be waived, as they were in this case: 1° by the conduct of the department, the chief engineer and the Minister, in making payments on account of the work from time to time.

2nd. By the Minister and chief engineer advising an arbitration.

3rd. By the order in council referring to arbitration.

4th. By the letter of the department enclosing the account to the arbitrators.

See *Park Gate Co. v. Coates* (1), which shows that negative words in a statute do not take away a power conferred by a prior clause, and that the provisions contained in these negative clauses are only directory and may be waived.

Sec. 20 of ch. 12, 31 Vic. provides that tenders are to be always invited unless there is a pressing emergency.

Sec. 6 defines the duty of the chief engineer.

(1) L. R. 5 C. P. 634.



1889      Sec. 34 provides for the reference of disputed claims  
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Sec. 36. No arbitration is allowed where it is the duty of the Minister or of the engineer to determine the matter themselves.

The statutes do not declare that there is to be no claim for work done unless there is a writing executed by the Minister.

Sec. 7. No deeds, contracts, documents, or writing shall be deemed to be binding, &c., unless executed in a certain way. The word "contract" in that section means, from the context in which the word is found, a writing of some kind on which it might be sought to enforce some claim as for the breach of an executory contract.

That clause does not apply here, as this claim is not brought for a breach of an executory contract.

The claim being for work done and accepted the Government is liable, because :

1st. The certificate of the engineer is not necessary. The work is not done under the old contract, and the new agreement made did not require a certificate.

2nd. The Government engineer, by his certificate of the 5th January, 1885, had certified the value of the work to the department to be \$39,000, and having thus, previously to all the work being done, bound himself to a particular sum, with the knowledge and at the request of the department, he has become unfit to act as an unbiassed judge. *Kimberley v. Dick* (1), *Kemp v. Rose* (2).

3rd. Even if the old contract applied, it was waived by the department by the reference to arbitration. See *Parke Gate Co. v. Coates* (3).

4th. As by section 36 of ch. 12, aforesaid, no arbitra-

(1) L. R. 13 Eq. 1.

(2) 1 Giff. 258.

(3) L. R. 5 C. P. 634

tion can be allowed where it is the duty of the Engineer or Minister to settle the matter, the allowance of the arbitration by the Minister and Government shows conclusively that the Government and the Minister and his agents did not consider that any certificate was required, or that it was the duty of the Minister to give a final certificate, otherwise they would, by permitting an arbitration, be violating the statute itself, which must not be supposed or should not be urged on their behalf.

5th. The chief engineer, moreover, shows in his evidence that he made out his prices without ever seeing the work, making any inquiries as to the value of materials there, the difficulties of the place, &c., all which showed such gross carelessness and disregard of the rights of the respondents as to amount to fraud, and such misconduct renders him unfit to be an umpire.

6th. The chief engineer, in giving his estimate, disregarded the contract, calculating the price of the works at a scale of prices fixed by himself according to measurements, and not the contract price.

The respondents then should be allowed to recover, and the amount they are entitled to is a matter of detail, and a final certificate is not required.

When the case was before Mr. Justice Henry in the Exchequer Court that learned judge only allowed the respondents for their expenditure and \$3,000 for loss of time.

On the cross-appeal, I submit that the claimants should be allowed for their work the prices established, namely: \$61,905.85 for the bridge as it stands, and \$18,195.22 for their other claims, which they incurred by reason of the changes and the instructions from time to time given to them by the officers of the Department of Public Works.

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*Hogg* Q.C., in reply, referred to sec. 41 of the Public Works Act, 31 Vic. ch. 12, which provides, that "in awarding upon any claim arising out of any contract in writing, the arbitrators shall decide in accordance with the stipulations in such contract, and not award compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated therein;" and pointed out that while the amount stipulated in this contract was the sum of \$25,300, that sum was increased by reason of extra work caused by changes and alterations in the character of the structure, to the sum of \$41,896.50, which latter sum must be taken under the provisions of this section to be the amount stipulated in the contract.

Sir W. J. RITCHIE C.J., after stating the facts as hereinbefore set out, proceeded as follows:—

The claimants in this case claim that the position of the bridge contracted for was changed and that radical changes were made in the plan of the bridge. There is no doubt that the position of the bridge was changed and that great changes and alterations took place in the character and nature of the works, but it was in consequence of these changes and alterations that the chief engineer made out under the requirements of the contract a final certificate and allowed the contractors \$41,896.50 instead of \$25,300.

It has been contended that the engineer and contractors had altered the original contract, in fact, had put it aside and that there was a new contract. But neither the engineer nor contractor could put an end to the contract and make a fresh verbal contract binding upon the crown. The work clearly was done under the contract and it must be governed by the provisions of the contract.

As to the contention that there was an implied contract, there is an express provision declaring that there could be no implied contract. The contract that binds the parties is that of the 8th September, 1882, and under that contract the engineer's certificate is indispensable. These clauses 4, 5, 6, 7, 8, 25, 26, 27, 34 and 35 cannot be got over, and the final estimate and certificate having been paid, the contractors can have no further claim.

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The only objection the crown appears to have raised in the first instance to the award was that the amount of the certificate, \$41,896.50, should be deducted from the amount awarded by the arbitrators \$44,279.32, leaving a balance of \$2,382.82. The contractors claimed that the award was in addition to the certificate and the crown claimed that the payment of the certificate should be deducted, leaving the above amount \$2,382.82. Had this been acquiesced in by the contractors, in all probability the controversy would have been at an end. Had the crown intended to rely on its strict legal rights, as it has done throughout this case, this matter should never have been sent to the arbitrators, for in such a case there was nothing for the arbitrators to adjudicate on, and this reference caused all the subsequent litigation. If the circumstances could have permitted me to come to the relief of the respondents, I should have been disposed to allow the contractors the balance of \$2,482.82, but the crown insisting on its strict legal rights I am bound to give them. While conceding to these rights which we are bound to do, we can only mark our disapproval of this reference, in consequence of which these claimants have been put to the enormous expenses of this litigation, by depriving the crown of costs in any of the courts.

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FOURNIER J.—En 1882, les intimés ont contracté à forfait avec le département des Travaux Publics pour la construction d'un pont sur l'Ottawa au-dessus de Pembroke, aux rapides des Joachims, pour le prix de \$25,300. Le pont devait être en bois, construit dans un endroit spécifié, avec deux culées, six piliers et sept arches (*spans*), suivant certains plans et spécifications.

Dans l'hiver suivant, les intimés se procurèrent à grand frais les matériaux nécessaires. Ils se préparaient à commencer l'ouvrage dans le mois d'avril suivant, lorsque le département, à la demande des intimés, envoya sur les lieux un ingénieur pour localiser l'endroit des piliers et des culées du pont. Cet ingénieur constata que l'endroit choisi par l'ingénieur Austin employé à cet effet par le département ne convenait aucunement et que les plans et spécification qu'il avait faits ne pouvaient nullement servir à cette construction, et il en fit rapport à l'ingénieur-en-chef, qui, avec l'appropriation du département, les changea tellement qu'il fallut faire une construction tout à fait différente de celle originairement projetée et beaucoup plus coûteuse.

De nouveaux plans et spécification furent donnés aux intimés par Perley, l'ingénieur-en-chef, avec instruction de s'y conformer dans la construction du nouvel ouvrage—les prix des ouvrages devant être déterminés plus tard. En conséquence de ce nouvel arrangement, les contracteurs se mirent à l'œuvre et s'acquittèrent avec diligence de la tâche qu'ils avaient ainsi acceptée.

Plusieurs témoins, ainsi que l'ingénieur Perley, prouvent que tel a été l'arrangement pour la construction du pont après que le contrat originaire et les premiers plans et spécification eurent été mis de côté. Si les intimés eussent insisté sur l'exécution des ouvrages du premier contrat, comme ils en avaient le

droit, le gouvernement ne pouvait les faire exécuter à cause de l'imperfection des plans et spécification, et aurait eu, dans ce cas, des dommages à leur payer.

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FOURNIER J.

C'est alors que sur les représentations des officiers du département, ils renoncèrent à ce premier contrat et s'engagèrent, à la demande de l'ingénieur-en-chef, à construire un pont d'après des nouveaux plans et spécification qui devaient leur être fournis. L'ouvrage a été fait conformément à ces nouveaux plans et spécification, et leur présente demande a pour objet d'être payés de la balance qu'ils réclament comme leur étant due sur la valeur de ces ouvrages.

La construction qu'ils ont eu à faire est essentiellement différente de celle mentionnée au premier contrat. Hamel, l'ingénieur qui a fait les nouveaux plans, ceux qui ont été exécutés, dit à ce sujet :—

There was evidently an error in the original plans. In September, 1883, I got orders to change the site of the piers. I found original plan would not do.

Perley dit :

In August, 1883, difficulty as to finding centre line, I got Austin to go and pick up centre line and the work proceeded. When we found that Austin's soundings were wrong we took fresh soundings and revised the bridge and readjusted the spans to suit the altered circumstances. I never saw the work, but I was in the locality before the work was begun. The contractors were paid the progress estimates as the work went on. I never had such radical changes as there was in this contract. Before making out my final estimate, I asked the contractors for a detailed statement of their claim, but I did not get it before making final estimate.

O'Hanly, l'un des intimés qui est lui-même un ingénieur civil, dit en parlant de ces changements :

The whole thing was changed. There was a new location of the piers and abutments, the lengths of the spans and the number of the spans. The result was to put the piers in a much greater depth of water than the original.

Being asked to specify the depth, he answers :

Where there was five feet of water shown on the plan, there was 20

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1889 feet. Of course the bottom was very irregular at the time. I have soundings of the whole to show.

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Il est inutile d'entrer dans le détail des différences entre les deux plans de construction de ce pont, les différences sont bien établies par la preuve et mentionnées en détail dans l'exhibit du dossier. Elles sont tellement considérables qu'après les avoir indiquées spécialement, l'ingénieur Bell, employé du département dit :

They bear a certain resemblance to each other. They are both made of wood, but they are different structures.

Q. You could not, in other words, take out of the second plan the first one, say so much is extra and so much is according to the original plan.

Oh, no.

La différence dans le coût des deux plans est également donnée et elle est beaucoup plus élevée dans le deuxième (celui qui a été exécuté) que dans le premier.

En conséquence de ces changements, il était absolument impossible d'exécuter le premier plan conformément au contrat. Le délai pour son exécution était même expiré et le contrat avait cessé d'exister lorsque les nouveaux plans et spécification pour l'ouvrage exécuté, ont été fournis aux intimés.

Dans cette situation d'affaire, l'intimé O'Hanly s'adressa à M. Perley, l'ingénieur-en-chef, pour connaître d'après quel arrangement se ferait l'ouvrage du deuxième plan. Voici comment il rapporte ses entretiens à ce sujet avec Perley :

Q. What did you say to him ?

A. I said to Mr. Perley, everything being radically changed there was not a shred left of the original design : and I asked him now as we had neither plans nor anything to guide us whether we would have a written order for everything we did.

Q. What did Mr. Perley say ?

A. Mr. Perley said that the whole design having been entirely recast and radically changed altogether, that now, to go on and do whatever we were ordered verbally or otherwise.

Q. And leave the prices to be settled afterward ?

A. There was nothing said about prices ; but I wanted to know how we stood, and this is the answer I got.

*By Mr. Cowan.*

Q. Repeat it.

A. That work having been entirely changed, and everything in connection with it re-cast, and the designs being set aside, and no designs being yet ready, we were to do whatever we were ordered by the inspector or the engineer in charge.

*By Mr. O'Gara.*

Q. There is no difficulty between you and Mr. Perley as to that ?

A. I think not ; I am not aware of any.

Q. Will you look at the paper, Mr. Perley's report of the 25th January, 1885, when he was asked to state why the money paid exceeded the original contract ?

A. I have read it.

Q. That admits the fact that things were changed, and that the original plans were all wrong and had to be recast ?

A. Yes, it admits it ; as a necessity they had to do it.

Q. And that before he had to do the best he could to provide additional money to complete the structure.

A. Yes. (Report filed as exhibit "I.")

Q. When did you get any plans upon that ?

A. We got no detailed plans at all of any pier from beginning to end. We got a plan of the first span in January 1884 ; and we got a plan of the remaining spans in the end of March 1884. We never got any plan of the sub-structure at all.

Q. You have those plans ?

A. Yes.

Q. Have you got them here ?

A. No.

Q. When were you made aware of the sizes of the piers and changes in the abutment ?

A. Just as the work went on. Wherever they located it they told us to build there.

Q. And gave you the description and sizes &c. ?

A. Yes, and sometimes they got no sizes to work on, as the inspector told us. The inspector was changing every day.

Q. What effect had those changes upon the first material that you got out ?

A. The timber and iron, a great deal of it, was valueless in consequence of the changes, worthless to us.

Q. And where did you get the material for the new design ?

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A. We had to hunt round everywhere we could, and from the lumbermen principally we got what we required for the design for the new piers.

Q. You had to pick it up wherever you could?

A. Yes, from the lumbermen.

Q. Had you any time to get it cut in the woods?

A. No, there was no chance of getting it out that season. It was impossible.

A. You were getting orders gradually, and you had to give the orders gradually for the timber?

A. Yes.

Q. Is there any difference in the expense to yourself of timber so acquired and of timber got out regularly by contract in the woods?

A. There is a great difference, oftentimes double the price besides the loss of time and trouble the expense in hunting round for it, getting a little here and a little there.

Q. What was the result in this particular case?

A. It nearly doubled the price.

Q. What was the effect of it upon your iron?

A. A great deal of the iron was worthless. We could not use it at all. When the spans were changed, bolts for the one would not do for the other.

Q. You said that after these changes were ordered and the new piers were to be put in that you saw Mr. Perley and told him about the changes and difficulties that were going to take place?

A. I do not know if I said difficulties or not.

Q. You said there was a new class of work which would be more difficult to do, etc., and that he told you to go on and what you were ordered?

A. Yes, that is the answer he made. He said that the whole work was changed and that we were to carry out the instructions of the inspector and engineer in charge.

Q. Did he say that you were to carry out the instructions of the engineer and inspector because the work was changed?

A. Yes; because the work was radically changed, he said.

Q. Did you infer from that that you were to carry out the orders of the inspector and engineer whether the work was changed or not—under your contract originally?

A. No, of course we knew that under the contract and specification we had to carry out the instructions of the engineer, but that was another thing altogether.

Q. I want to get the exact words that Mr. Perley said, that because the work was changed radically you must go and carry out the work under the instructions of the engineer and inspector.

A. I went to Mr. Perley specially to ask him whether, as everything had been changed, the whole character of the work changed, would it be necessary for us to have a written order for everything that was to be done. He said, no, in consequence of this entire change, you will have to carry out every instruction that you will get either from the engineer in charge or the inspector. "All right," I said.

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C'est d'après l'arrangement mentionné dans ce témoignage que l'ouvrage en question a été fait. Plusieurs autres témoins font preuve que c'est sous la direction immédiate du département et sans aucun contrat en forme, comme il en avait été fait un pour l'exécution du premier projet, que le deuxième plan a été exécuté.

Dans un cas semblable, quelle est la responsabilité du département des Travaux Publics vis-à-vis des intimés? Est-il vrai qu'en l'absence d'un contrat par écrit entre le ministre des Travaux Publics et les intimés, ceux-ci n'ont droit de rien réclamer pour la valeur de leur ouvrage et des matériaux fournis? Est-il nécessaire, dans le cas actuel, qu'ils produisent comme condition préalable à l'exercice de leur action, un certificat de l'ingénieur-en-chef des travaux en question?

A cette dernière question, je répondrai de suite qu'on ne peut exiger dans ce cas la production d'un tel certificat, parce qu'il n'y a eu aucune condition à ce sujet dans l'arrangement en vertu duquel les travaux ont été faits. Il est vrai qu'il en existait une dans le premier contrat, mais ce contrat a été complètement abandonné et remplacé par une entreprise toute différente, dont les travaux ont été exécutés sous la direction immédiate du département et sans contrat par écrit.

En outre, il n'est pas inutile de faire remarquer que l'ingénieur-en-chef déclare dans son témoignage qu'il n'a eu aucune connaissance personnelle des ouvrages; qu'il n'est allé sur les lieux qu'une seule fois, et ce avant le commencement des travaux. Quel certificat pouvait-il donner? Heureusement pour les intimés

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que ce certificat n'est pas nécessaire dans le cas actuel et qu'on ne peut leur opposer les décisions rendues en d'autres cas, où il existait une condition à ce sujet.

L'autre question semble au premier abord beaucoup plus difficile à résoudre, en conséquence de certaines dispositions des actes concernant les travaux publics. Elle s'est toutefois déjà présentée devant la cour d'Échiquier, dans la cause de *Wood v. La Reine*, (1) dans laquelle Sir William Richards ex-juge en chef de cette cour se fait deux questions tendant à définir la responsabilité du département des Travaux Publics.

Elles étaient posées comme suit :—

Can the crown in this Dominion be made responsible under a petition of right, on an executory contract entered into by the Department of Public Works, for the performance of certain works placed by law under the control of that department, when the agreement therefor was not in writing, nor signed or sealed by the Minister of Public Works or his Deputy, or countersigned by the secretary ?

If work had been done for and at the request of the Department, will a petition of right lie for the value of such, which causes an expenditure not previously sanctioned by Parliament ?

La loi alors en force, la 31 Vict. ch. 12, est encore la même, avec certaines modifications faites par la 42 Vict. ch. 7, qui a divisé en deux le département des Travaux Publics pour en faire le département des canaux et chemins de fer et celui des Travaux Publics.

La section 11 de ce dernier acte déclare bien qu'aucun contrat, document, ou écrit ne sera obligatoire pour l'un ou l'autre de ces deux départements, ou ne sera considéré l'acte de tel département à moins d'être signé et scellé par lui ou son député, et contresigné par le secrétaire ou autre personne autorisée à cet effet. Cette disposition qui est à peu près la même que la 31 Vict. ch. 12, est conçue en ces termes :—

Sec. 7. 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

(1) 7 Can. S. C. R. 634.

said Minister, unless signed and sealed by him or his deputy, and countersigned by the Secretary.

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La comparaison des deux textes fait clairement voir que la loi n'a pas été changée en ce qui concerne la responsabilité du département.

L'honorable juge après avoir décidé que le contrat allégué par Wood n'était pas obligatoire pour le département, et que le pétitionnaire n'avait pas droit à des dommages pour avoir été empêché de l'exécuter, s'exprime comme suit sur la deuxième question qui est la même que celle soulevée en cette cause (1).

I do not think, however, that the 7th section would prevent the suppliant recovering for the actual value of the work done by him and accepted by the department. I see no reason why the law may not imply a contract to pay for the work done in good faith, and which the department has received the benefit of. Suppose, instead of work done the contract had been to furnish a quantity of lumber, the lumber had been supplied and worked up by the workmen of the department in finishing one of the the public buildings; suppose for some reason the department repudiated the verbal contract and refused to be bound by it, could it be said that the property of the suppliant could be retained and used for the purposes of the department, and he not be paid for it, because the statute said the contract on which it was furnished was not deemed binding on the department. I should say not. The contract which is binding is that which arises from the nature of the transaction; having received the benefit of the contractor's property he ought to be paid for it—under the new contract which the law implies. For the same reason, for the value of all services actually rendered by the suppliant, before he was notified not to do any further work, he ought to be paid. If only the 7th section were considered, I should, as at present advised, say the suppliant is entitled to recover what the services rendered by him were worth under the implied contract. It may be, that on further consideration my views as to the suppliant's right on this point would be less favorable.

L'honorable juge, par ces dernières expressions, fait allusion à la 15ème section, défendant au ministre des travaux publics d'autoriser des dépenses qui n'ont pas

(1) 7 Can. S. C. R. at p. 645.

1889 été préalablement sanctionnées par le Parlement. La  
 THE QUEEN clause est en ces termes :

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 STARRS. The minister shall direct the construction, in un-  
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 of all canals, harbors, roads, or parts of roads, bridges, slides or other  
 public works, or building in progress, or constructed or maintained, at  
 the expense of Canada, and which by this Act are, or shall hereafter be,  
 placed under his management and control ; but nothing in this Act  
 shall give authority to the minister to cause expenditure not previously  
 sanctioned by Parliament, except for such repairs and alterations as  
 the necessities of the public service may demand.

L'honorable juge, après avoir examiné les précédents et la pratique suivie en Angleterre à ce sujet, en vient à la conclusion qu'en vertu de cette section, si le Parlement n'a pas autorisé la dépense, il n'y a pas lieu à la pétition de droit pour ouvrage fait à la réquisition du département des Travaux Publics, à moins que ce ne soit pour des ouvrages de réparations, et de changements rendus nécessaires par les exigences du service public :

Unless it be for work done in connection with repairs and alterations which the necessities of the public service demanded.

That in this case, if Parliament has made appropriations for these works and so sanctioned the expenditure, and if the work done was of the kind that might properly be executed by the officers and servants of the department, under section 20 of said Act, then no written contract would be necessary to bind the department, and suppliant could recover for work so done.

Le principe ainsi posé par l'honorable juge est d'une application parfaite aux faits de la présente cause. On a vu que la preuve établit positivement que, en août 1883, même après l'expiration du délai pour l'exécution du premier contrat, on s'est aperçu que les plans et spécifications de cet ouvrage ne convenaient aucunement pour l'endroit où il fallait construire. En conséquence, de nouveaux plans et de nouvelles spécifications devinrent nécessaires et furent ordonnés et préparés. La saison étant alors avancée, l'ouvrage à faire étant d'une haute importance pour le public, la nécessité des communications à établir entre les deux

rives de l'Ottawa, urgente, et comme il n'y avait plus le temps nécessaire pour demander de nouvelles soumissions pour l'exécution des nouveaux plans et spécifications,—il fut alors décidé, comme on l'a vu plus haut, de faire faire les ouvrages en question sous la direction du département des travaux publics.

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Les circonstances justifiaient cette action en même temps qu'elles dispensaient de la nécessité de nouvelles annonces.

Dans la cause de Wood où il n'y avait comme dans celle-ci ni contrat par écrit ni annonces, Sir William Richards s'exprime ainsi sur le droit de recouvrer du département en pareil cas.

On the broad question whether the suppliant can recover, and in the view I take of the 15th section the suppliant can only recover if the work and services rendered come under the exception referred to in that section, and in which necessity would also justify the omitting to advertize for tenders under the 28th section.

L'honorable juge termine ses notes par l'observation suivante au sujet de l'autorisation de la dépense par le parlement :

It was contended on the agreement, that Parliament has made appropriations for those work and so sanctioned the expenditure. If that be so, and the work done was of that kind, that might properly be executed by the officers and servants of the department, then I apprehend no contract would be necessary to bind the department for work done, and so suppliant should recover for work so done ; and in every view also for the work actually done, if the expenditure was previously sanctioned by Parliament.

Dans cette cause, l'autorisation du parlement n'est pas mise en question ; non-seulement les deniers pour la construction du pont des Joachims ont été votés, mais ils ont été, en grande partie, payés par le département ; ce qui reste à payer n'est que pour la différence entre l'exécution des travaux des derniers plans et ceux des premiers. Les circonstances ont imposé aux officiers du département la nécessité de se charger de la direction

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des travaux et les ont justifiés de ne pas demander de nouvelles annonces. Je considère que sous tous les rapports cette cause est analogue à celle de *Wood et La Reine*, et que l'on doit y faire l'application des principes posés par Sir William Richards dans le jugement dont j'ai donné de si copieux extraits.

Par tous ces motifs, je suis d'opinion que les requérants ont droit à la confirmation du jugement rendu en leur faveur par feu l'honorable juge Henry.

Taschereau, Gwynne and Patterson JJ. concurred with Sir W. J. Ritchie C. J. (1).

*Appeal allowed without costs.*

*Cross-appeal dismissed without costs.*

Solicitors for appellant—*O'Connor and Hogg.*

Solicitors for respondent—*O'Gara and Remon.*

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(1) Owing to the death of Mr. Justice Henry, the appeal was twice argued.