HIS MAJESTY THE KING (RESPONDENT) ..... } APPELLANT.

AND

ARCHIBALD STEWART (SUPPLIANT)..... } RESPONDENT.

1901
*Nov. 4, 5, 6.
1902
**Mar. 11.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Public work—Breach of contract—Appropriation of plant—Damages—Interest.*

The judgment appealed from (7 Ex. C.R. 55) was affirmed, Taschereau J. dissenting.

APPEAL and Cross-Appeal from the judgment of the Exchequer Court of Canada (1), awarding damages to the suppliant on his petition of right.

The case is stated by the Exchequer Court Judge in his reasons for the judgment appealed from and in the dissenting judgment of His Lordship Mr. Justice Taschereau, now published.

*S. H. Blake K.C.* and *Lawlor* for the appellant (*Kerr* with them).

*C. Robinson K.C.* and *Glyn Osler* for the respondent (*Hogg K.C.* with them).

The CHIEF JUSTICE and their Lordships Justices SEDGEWICK and GIROUARD were of opinion that the judgment of the Exchequer Court should be affirmed and that both the appeal and the cross-appeal should be dismissed, but no written notes of reasons for the judgment of the majority of the court were delivered.

*PRESENT :—Sir Henry Strong C.J. and Taschereau, Sedgewick and Girouard JJ.

(His Lordship, Mr. Justice Gwynne was present during the hearing but died before judgment was rendered.)

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

1902

THE KING v. STEWART.

Taschereau J.

TASCHEREAU J. (dissenting.)—The respondent alleges by his petition of right that, on the 24th of September, 1892, a contract was entered into between him and Her Majesty for the construction of sections 1 and 2 of the Soulanges Canal and the completion thereof on or before the 31st of October, 1894, for the prices and under the conditions mentioned in the said contract.

The approximate value of the work so contracted for was over $800,000.

The petitioner further alleges that he was greatly delayed in the fulfilment of his part of the said contract by acts of the Minister of Railways and Canals and of his officers, which he details at some length, in paragraphs 3, 4, 5, 6 and 7 of his petition, and that "for the reasons aforesaid and not otherwise (as he alleges in paragraph 8 thereof) your petitioner was unable to complete the said contract works at the time mentioned in said contract which he otherwise would have done." The petitioner then alleges that on the 9th of November, 1897, whilst the said contract was still subsisting and he was proceeding thereunder, Her Majesty took forcible possession of the said works and of all the plant belonging to him of the value of $90,000, and, by thus preventing him from completing his contract, deprived him of the profits he would otherwise have made thereupon amounting to $150,000, which sum he claims as damages from the Crown for breach of the said contract, in addition to $90,000 for the value of his plant as aforesaid.

On the part of Her Majesty, the respondent's claim was met by a plea denying generally that it was through any neglect or fault of Her officers that the respondent had not completed his contract, but exclusively through the respondent's own fault, as well in not providing the proper organisation necessary

for such an undertaking, and the sufficient plant, machinery, engineers and workmen therefor, as from his financial embarrassments and want of sufficient funds; that the breach of contract was not on Her part but on the part of the respondent; that up to the end of the year 1895 the total amount of work done on the ground amounted to only $157,142.35; to only $186,500 at the end of 1896; and in 1897 when the Crown took possession, to only $285,616; that

from time to time the proper officer in that behalf remonstrated with the suppliant and urged him to furnish better and more plant, and more workmen, and to proceed more quickly with the undertaking. This proceeded until the suppliant had been given three years in addition to the original twenty-five months that he was to have for the completion of the work, and, as there was no prospect or promise or apparent intention of finishing the said work, it became necessary for the Crown to undertake it, which after repeated notices to the suppliant given duly under the contract, the Crown was obliged to do. At the time that Her Majesty so undertook to complete the work, the suppliant had made no preparations to hasten the completion of or to complete the same, and it was only when it was found that the work would not be completed for many years to come that Her Majesty was driven to adopt the course which she took and which is above set forth.

As to the respondent's claim for the value of the plant forcibly taken possession of by the Crown, the plea was that

Her Majesty did not take forcible possession of the works, plant and material, but, as she was entitled to under the contract, the plant and material was taken for the purpose of completing the work. Such plant and material were taken under the express terms of the said contract, and have been used in completing the same, and, the purposes for which such plant and material were so taken having been accomplished, the same are at the disposal of the suppliant and can be by him had on payment of the amount which may be found due by him to Her Majesty on the taking of the accounts between Her Majesty and the suppliant. Her Majesty's Attorney General submits that, under the terms of the contract, the only claim of the suppliant in this respect is for a return of such part of the plant and material as may be unused when the contract is completed.

1902

THE KING v. STEWART.

Taschereau J.

With this plea, a counter-claim was filed on the part of the Crown for:

| | | |
|---|---|---|
| 1st. Balance due on the cash account between the parties up to November 1897 | $ | 101,223 39 |
| 2nd. Excess of cost incurred in finishing the contract | | 83,942 00 |
| 3rd. Interest | | 26,558 29 |
| 4th. Additional salaries | | 6,779 36 |
| 5th. The amount paid for re-cutting stone. | | 14,443 37 |
| 6th. Paid for the use of the quarry | | 20,000 00 |
| | $ | 252,946 41 |

The Exchequer Court determined that the respondent's claim for damages for breach of contract was well founded, and gave judgment against the Crown for $28,415.79, which amount was arrived at as follows:—

| | | | |
|---|---|---|---|
| Loss of profits that would have been made had the respondent been allowed to finish the work | $ | 87,000 00 | |
| The value of his plant taken by the Crown | | 45,410 14 | |
| The drawback retained by the Crown for the money earned for work done up to the time the contract was taken from him | | 16,638 75 | |
| | | | $ 149,048 89 |

As against this amount the Crown was found entitled to the following credits:

Amount advanced to the respondent on the Potsdam

| | | |
|---|---|---|
| sandstone excavated on the work ..... | $ 57,000 00 | |
| Amount advanced on certain backing stone..... | 48,500 00 | |
| Amount paid to Hugh Ryan & Co., by the Crown on the respondent's order and account..... | 7,500 00 | |
| Amount paid Ryan & Co... | 7,577 00 | |
| An admitted over-payment.. | 56 10 | |
| | | $ 120,633 10 |
| | | $ 28,415 79 |

From that judgment an appeal and a cross-appeal have been taken.

The facts upon which the Crown's appeal as presented to us must be disposed of, as I view the case, are not very numerous. I lay aside all the dealings between the parties and their complaints and cross-complaints anterior to 1897. They are, in my opinion, quite immaterial and can have no influence on the result of the appeal. It is merely what passed between the parties in 1897 that has to be considered for the determination of the controversy as it now stands.

The first incident of that year appears to be a letter from the Chief Engineer to the respondent, dated the 20th March, which reads as follows:

OTTAWA, 20th March, 1897.

DEAR SIR,—As we are now approaching the season when the resumption of active work under your contract upon the Soulanges Canal may be looked for, I am instructed by the minister to say that he cannot permit the work upon the canal to be further delayed. The intention of the government is to push forward the completion of the undertaking as rapidly as possible; and I am to further notify you that if the *Chief Engineer* has any reason to fear that your contract will not be fully executed by the 31st October, 1898, the work will he

1902

THE KING
v.
STEWART.

Taschereau J.

taken off your hands, and the conditions of the existing contract as to penalties rigidly enforced.

Yours, &c.
C. SCHREIBER,
Deputy Minister & Chief Engineer.

That letter remained unanswered, and the respondent did not remonstrate that the time so given to him was too short. On the contrary, the Minister, Mr. Blair, being asked:

Did he at any conversation with you in 1897 make any statement as to the time (October, 1898) being too short for him to do the work?

Answers:

Not that I can recall.

And later, being asked:

In any of your discussions with Mr. Stewart was there any talk of extending the time for completing his contract to any later date than 1898?

The Minister answers:

No, Sir, I did not have any.

On the 17th May, the Chief Engineer wrote to the respondent as follows:

OTTAWA, 17th May, 1897.

MY DEAR SIR,—I hereby give you notice that unless you at once proceed to prosecute the work of canal construction on sections 1 and 2 of the Soulanges Canal vigourously, it will be my duty to take action under the contract to ensure the delay in diligently continuing to prosecute the work to my satisfaction being put an end to.

Yours truly,
COLLINGWOOD SCHREIBER.

On the 22nd May, the following Order in Council was passed:

On a memorandum dated 27th April, 1897, from the Minister of Railways and Canals, representing that application has been made by Mr. A. Stewart, contractor for sections 1 and 2 of the Soulanges Canal, for payment from the amount of his ten per cent drawback of the sum of $10,000.

The minister states that in a report dated the 10th February, 1897, of the Chief Engineer of the Department of Railways and Canals, it is shewn that there remains to be executed under these contracts, exclusive of the value of materials paid for, work to the value of about $355,000 (the total estimated value of the contract work having been $818,310) as security for which the Government hold the ten per cent drawback, $21,300, and a deposit security mortgage for $40,900, a total of $62,200. Deducting from this the amount of $48,-500, being an advance made on backing stone (which the contractor has to repay under his agreement in connection with the change from a four lock to a three lock system) the amount of security left in the hands of the Government would be $13,700.

The minister further states that the Chief Engineer observes that delay in the prosecution of the work last season has been caused by no fault of the contractor, but is owing to his not been allowed by the Superintending Engineer to use certain stone, of which the Chief Engineer had approved.

The minister, under the circumstances of the case, recommends that authority be given for payment to Mr. Stewart of the sum of $10,000 from the drawback in hand.

The committee submit the above from your Excellency's approval.

Owing to objections made by the Auditor General, these $10,000 were not then paid to the respondent. But he continued to press the minister for the advance, and finally got it upon his undertaking to complete his contract by the 31st October, 1898, as he had previously been requested to do by the Chief Engineer on the 20th March preceding. Mr. Blair, the minister, in his evidence says:

Mr. Stewart was very anxious to get this drawback as he was to get the other amount, and told me himself when I pointed out to him as I did that he was not getting along, he was delaying, he was humbugging, it would be years before the work would be completed in the peddling way he was prosecuting it—he told me that his main trouble was that he was hard up financially, he needed these amounts, and particularly when the payment for the $10,000 came up. He had got the other amount I think earlier. He gave me his own personal assurance that he would be able to do the work and would do the work in the time named if this payment was made to him. It would be re-instating him with the bank, and he would be able to get what additional plant he required to complete his organisation and

1902

THE KING v. STEWART.

Taschereau J.

get right on and he would do it in the time we named, I think the 31st October—the last October at all events, 1898. He gave me a positive assurance upon that.

Acting upon these assurances Mr. Blair felt justified to report to council on the 26th June, 1897, that

the minister is assured in the most positive manner by the contractor that with this assistance he will be able to continue the work, and will have no difficulty in fully performing his contract by the close of the year 1898. From independent enquiries the minister is led to believe it to be probable that the contractor may be enabled to do this if the present application is acceded to.

And Mr. Dobell, another minister of the Crown, also swears that in May, 1897, the respondent, upon his pressing to get the said drawback,

most distinctly told me that he would complete his work within two years, if he got that advance made him,

and that upon this assurance, he recommended the respondent's application to council. Being asked:

Now, did he at all complain of the date or the reasonableness of the time fixed by the minister for the completion.

Mr. Dobell answered:

Not in the least.

On the 2nd of June, the Chief Engineer sent the following notice to the respondent:

To Archibald Stewart, of the City of Ottawa, Province of Ontario, Contractor:

Take notice, that as you have made default and delay in diligently continuing to execute or advance to my satisfaction the works contracted to be performed by you under your contract with Her Majesty, Queen Victoria, represented by the Minister of Railways and Canals of Canada, dated the twenty-fourth day of September, 1892, whereby you contracted to execute and provide the several works and materials required in and for the formation of sections numbers one and two, Cascades entrance of the Soulanges Canal, you are hereby notified to put an end to such default or delay.

You are also notified that if such default or delay shall continue for six days after the giving of this notice, Her Majesty may proceed

under the powers conferred upon Her by clause No. 14 of the said contract.

Dated at Ottawa, this second day of June, 1897.

COLLINGWOOD SCHREIBER,
Chief Engineer of Railways and Canals.

No action, it appears, was taken on this notice. On the 28th June, Mr. Munro, the engineer on the works, reported that the work done by the respondent that season up to date was so small that he could not, as requested by the Chief Engineer, send a statement of the quantity of each class of work executed daily.

On the 3rd of July he reported that it was impossible for him to conjecture when, under existing circumstances, the work contracted for by the respondent would be completed, and that to complete the masonry alone by October, 1898, would require the building of about as many yards in one day as had been laid up to date that season.

On the 23rd September Mr. Munro reported that it was quite evident that the progress made by the respondent did not hold out the slightest hope of the work being finished in 1898. On the 25th September he reported that

unless a wholly different management of affairs be established on the respondent's contract, it was impossible to conjecture when the work would be completed, and that he could not see how it was possible for him to complete his contract in 1898.

On the 29th September, the Assistant Engineer reported to Mr. Munro that the condition of affairs on respondent's contract necessitated some special action.

On the 4th of October, Mr. Munro reported that there were but a few masons on respondent's works and apparently no organisation fit for carrying on such work, which was falling into such a confusion that it was impossible to make any conjecture as to when these sections might be finished.

1902

THE KING v. STEWART.

Taschereau J.

On the 14th of October, the following notice was served on the respondent:

To Archibald Stewart, of the City of Ottawa, Province of Ontario, Contractor:

Take notice that as you have made default and delay in diligently continuing to execute or advance to my satisfaction the works contracted to be performed by you under your contract with Her Majesty Queen Victoria, represented by the Minister of Railways and Canals, dated the 24th day of September, 1892, whereby you contracted to execute and provide the several works and materials required in and for the formation of sections Numbers One and Two Cascades Entrance of the Soulanges Canal, you are hereby notified to put an end to such default or delay.

You are also notified that if such default or delay shall continue for six days after the giving of this notice, Her Majesty may proceed under the powers conferred upon Her by Clause No. 14 of the said contract.

Dated at Ottawa, this thirteenth day of October, 1897.

(Sgd.) C. SCHREIBER.

On the 30th of October, the Chief Engineer reported to the minister, as the result of his personal inspection, that he found no improvement in the progress made by the respondent and that at the rate he was going on the masonry and concrete work would not be completed before 1900 and the earth work not before 1903. The evidence fully supports that report, upon which, on the 5th of November the following notice was served upon the respondent:

To Archibald Stewart, of the City of Ottawa, Province of Ontario, Contractor:

Whereas you have made and are making default and delay in diligently continuing to execute and advance to the satisfaction of the engineer, the works contracted to be performed by you under your contract with Her Majesty Queen Victoria, represented by the Minister of Railways and Canals of Canada, dated the 24th day of September, 1892, whereby you contracted to execute and provide the several works and materials required in and for the formation of Sections One and Two Cascades Entrance of the Soulanges Canal, and that such default and delay has continued for more than six days after notice has been given by the engineer to you, requiring you to put an end to such default and delay and such default and delay still continue:

Now take notice that Her Majesty, represented by me, the Minister of Railways and Canals of Canada, does hereby, under the provisions of the fourteenth clause of your aforesaid contract terminate the said contract from this date, and take the work out of your hands and will employ such means as She may see fit to complete the work;

And further take notice that you shall have no claim for any further payment in respect of the works performed, and that you will nevertheless remain liable and be held responsible for all loss and damage suffered or which may be suffered by Her Majesty by reason of the non-completion by you of the said work, or by reason of your breaches of the said contract.

Dated at Ottawa, the fourth day of November, 1897.

(Sgd.) AND. G. BLAIR,
Minister of Railways and Canals,
On behalf of Her Majesty.

The respondent filed a protest in answer to this notice, and notified the minister that he would hold the Government liable for damages if they interfered with his work, but the Government took possession of the works a ew days afterwards, and put an end to the contract.

In his subsequent annual report to Parliament, filed in the case, the Chief Engineer says:—

The season of 1897 arrived when it was expected the contractor would go energetically to work, to complete his contract by the 31st October, 1898, as called for by a notice sent him in March last by me. However, little progress was made with the work, and in June, I served him with a notice that if he did not proceed with greater vigour within six days, the work would be taken out of his hands; the minister, however, not desiring to act in any way harshly, deferred further action in the matter; still the contractor, though with apparent sincerity promising from time to time to increase his force and plant to enable him to carry the work to completion within the required time, for some unexplained reason made no improvement. Not a stick of timber was laid in the crib approach piers, nor was a yard of excavation done until about the middle of October last, when the steam shovel was started, but from want of rolling stock and rails, was not properly served; it therefore excavated only about 250 to 300 cubic yards a day instead of at least 1,000 cubic yards. On the 14th October, I served him with another notice, and on the 6th of November instant, an Order in Council was passed taking the works out of

1902

THE KING v. STEWART.

Taschereau J.

his hands. At this time, the favourable working season was about closing. It is due to the contractor that I should mention that the lock work, which was very nearly all built by him, is strong, substantial and of excellent quality, satisfactory both as to the workmanship and material, the walls being of massive masonry of large sound stone, and well mixed concrete, such as no fault can be found with. The only complaint has been as to the slow progress made, which was such that, if continued, it would take several seasons to complete the work.

In his evidence, the Chief Engineer, who all along seems to have acted with the utmost fairness and impartiality towards the respondent, says that his contract was cancelled in 1897 because the respondent was not making sufficient progress to complete it within a good many years.

The fourteenth clause of the contract under which the minister took the works out of the respondent's hands as aforesaid, reads as follows:

14. In case the contractor shall make default or delay in diligently continuing to execute or advance the works to the satisfaction of the engineer and such default or delay shall continue for six days after notice in writing shall have been given by the engineer to the contractor requiring him to put an end to such default or delay, or in case the contractor shall become insolvent or make an assignment for the benefit of creditors, or neglect either personally or by a skilful and competent agent to superintend the works, then in any such cases Her Majesty may take the work out of the contractor's hands and employ such means as she may see fit to complete the work, and in such cases the contractor shall have no claim for any further payment in respect of the works performed, but shall nevertheless remain liable for all loss and damage which may be suffered by Her Majesty by reason of the non-completion by the contractor of the works.

It is not possible for the respondent to contend upon the evidence, that he diligently continued to execute or advance the works to the satisfaction of the engineer after the notice of the 13th of October, requiring him so to do, or that he had at any time in 1897 attempted to get on so as to complete within a reasonable time. He failed to pay any attention what-

ever to it, and when later on the minister himself visited the locality, he found the works in a condition of absolute inertia and was satisfied that if he allowed them to remain any longer in the respondent's hands, the whole policy of the Government, as he testified, would have been paralysed and defeated, and the canal would not have been finished within anything like the time it was then determined it should be finished in. The respondent contends, however, that the 14th clause of his contract was not in force in October, 1897, and that the Government could not then take away the contract from him as they have done. That contention is, to my mind, untenable. The contract of 1892 was in full force. It was clearly under it that the respondent had gone on with the works. He himself alleges, in his petition of right, that it was a valid and subsisting contract in November, 1897. Then clearly, to claim damages, as he does, for a breach in November, 1897, of a contract made in 1892, is an admission that, in November, 1897, that contract was still in force. Now, if the contract was then in force, extended as to time by mutual consent, how clause fourteen thereof can be singled out of it, I fail to understand. If the contract survived, it must have survived subject to the powers of the engineer.

If, for instance, the respondent had become insolvent in 1896 or 1897, the Government, if his contention were well founded, would not have had the power conferred upon them in that event by that same clause to go on with the works themselves. The clause is a penal one certainly, and one that left the respondent at the mercy of the Crown to a certain extent. But whether unreasonable or not that is what he has agreed to. And it is not a more unreasonable one during the extended time than it was during the time at first agreed upon. If his contention prevailed,

1902

THE KING v. STEWART.

Taschereau J.

it is the Crown that would have been at his mercy for having been lenient to him in not forfeiting his contract in 1894. He would contend that up to the 31st October, 1898, he had the right to fold his arms and stop the work entirely.

There is another penal clause in his contract which would also have been inoperative, he would contend, after the time at first fixed for the completion of the works. I mean the seventeenth under which, in the event of any assignment of his contract without the consent of the Crown, the Crown could forfeit it. What was to his advantage in the contract would alone have remained, but anything empowering the Government to ensure a satisfactory completion of his contract would have been wiped out. I cannot accede to these propositions. The parties must be taken to have intended all along that the engineer should continue to control the works and be vested with the same powers. The case of *Walker* v. *The London & North Western Rway. Co.* (1), upon which the respondent chiefly relies, does not seem to be in point. Here, by clause sixteen of the contract, it is agreed that the contractor

> shall not have or make any claim or demand, or bring any action or suit or petition against Her Majesty for any damage which he may sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents, and it is agreed that in the event of any such delay the contractor shall have such further time for the completion of the works as may be fixed in that behalf by the minister for the time being.

In the *Walker Case*, there was no such clause. I would think it incontrovertible that clause fourteen would apply to any time fixed under this said clause sixteen by the minister subsequent to the time originally agreed upon. And if that be so, I cannot see upon what ground that same clause fourteen could be

(1) 1 C. P. D. 518.

held not to apply to any time during which the contract was continued by consent subsequently to the term originally fixed.

In *Walker's Case*, it was with reference to the time agreed upon in first instance that the court held that the rate of progress could exclusively be determined, *no new agreement as to time having been made.* But here, it is to the rate of progress with reference to the time fixed by the new agreement of 1897 that the engineer certified under the said clause fourteen of this contract.

Under that clause sixteen, I may as well here remark, the respondent's contentions as to the delays caused to him in 1897 by the change in the recesses for the gates of the locks, and the delay in the plans for the weirs are untenable. He never asked for an extension of time on account of those delays. The minister consequently was never called upon to fix any. And he cannot contend that by the sole fact of his not asking for any such extension, this clause became inoperative and he thereby became entitled to make any claim as to such delay, independently of the minister's authority in the matter, as expressly vested in him exclusively.

The case of *Wood* v. *The Rural Sanitary Authority of Tendring*, (1), also cited by the respondent has no application. The *ratio decidendi* there was that a new contract had been entered into, *without a fixed time for its completion*, and the old one repudiated, a state of things which cannot be contended for in the present case. A similar contention was put forward in the *Berlinquet Case*, (2), but did not prevail. Then here, both parties in their pleadings, as I have already remarked, admit that the contract of 1892 was in force

(1) 3 Times L.R. 272.

(2) 13 Can. S.C.R. 26.

1902

THE KING v. STEWART.

Taschereau J.

up to the time that the Government put an end to it in November, 1897.

In *McDonnell* v. *Canada Southern Rway. Co.* (1), it was held that a forfeiture clause of this nature continued to apply after the day fixed for the completion of the contract, the parties, as here, having continued the work according to the contract and as if the contract still governed. There, by the contract the question of reasonableness of time had not been left to the engineer, but here, no such question can arise.

> In many cases, said Wilson, J., a certain number of days is specified in the contract. That is not so here. And we are, therefore, of opinion, that the question of reasonableness of time has not been left to be, and cannot be, determined conclusively by the engineer.

Here, the contract specifies the number of days after which, upon notice, the work might be taken out of the contractor's hands. And the question of the reasonableness of that delay does not arise.

The case of *Roberts* v. *The Bury Improvement Commissioners* (2), in which a great difference of opinion in the Court of Common Pleas and in the Exchequer Chamber, cannot but be noticed, is distinguishable. There was no stipulation in the contract there under consideration, as there is in clause 16 of the contract now under consideration I have previously referred to, that

> the contractor shall not have or make any claim or demand * * * for any damage which he may sustain by reason of any delay in the progress of the work, arising from the acts of any of Her Majesty's agents.

Here, there is no question of delay or negligence on the part of the Crown or of its officers after the notice to the respondent of the 13th of October. In fact, in 1897, but the trivial delay of a few days at the begin-

(1) 33 U.C.Q.B. 313.

(2) L.R. 4 C.P. 755; L.R. 5 C.P. 310.

ning of the season is relied upon by the respondent. That these short delays in May and June can be held as an excuse for leaving the works in a state of stagnation during the rest of the season is to my mind an untenable contention.

In *Berlinquet* v. *The Queen* (1), the contractor had agreed to complete the works on the 1st July, 1871. He, however, did not do so, but went on by consent with his undertaking till May, 1873, when the Government took possession of the works under clause 6 of the contract (page 91), which enabled it to be done after seven days' notice to the contractor. Mr. Justice Fournier took the view that after the expiration of the time fixed by the contract, the Government had lost their right to so put an end to the contract, and cited the case of *Walker* v. *The London & North Western Rway. Co* (2), in support of his opinion, but the majority of the Court clearly did not adopt that view.

Another contention of the respondent as to the notice to him of the 13th of October, is that it was insufficient in that it did not point out to him in what respect the engineer was dissatisfied, and what he required to be done; citing *Smith* v. *Gordon* (3). There is nothing that I can see in this contention. In the *Smith* v. *Gordon* case, it was merely three special items that the architect had ordered. Here it is default and delay in diligently continuing to execute or advance the works to his satisfaction that the engineer charged the respondent with in the very words of the contract, and nothing more specific than that was required.

The proposition, on the part of the respondent, that under ordinary circumstances, the law implies a contract to allow a reasonable time to a contractor when the term originally fixed has been indefinitely extended,

(1) 13 Can. S. C. R. 26. (2) 1 C. P. D. 518.
(3) 30 U.C.C.P. 553.

1902

THE KING
v.
STEWART.

Taschereau J.

cannot perhaps be controverted. But that rule cannot under any circumstances have any application here, for it is specially provided by clause 34 of this contract that

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

Now that part of this contract is as binding as the rest of it. Where the parties have agreed that no implied contract will rule their dealings, the court cannot see any.

Then here, by the new agreement entered into between him and the minister in June, 1897, by which, upon the cash payment of $10,000, he bound himself to terminate his contract on the 31st of October, 1898, as requested by the Crown, the respondent is precluded from raising the question of the reasonableness of the time given to him. And this more specially differentiates this case from all those cited by the respondent, were any of them binding upon us. He has agreed to that time, and however unreasonable it might afterwards appear to have been, he must be bound by it. It was far more unreasonable for him to agree in 1892 that he would do all the work within two years. Yet, he could not contend that, at any time during these two years, the Crown had not the power, under clause fourteen, to terminate the contract.

The respondent's contention that this agreement of June, 1897, with the minister is not proved, cannot prevail. The minister's evidence, corroborated as it is by Mr. Dobell, and by the report to council of the 26th of June, leaves in my mind no room for doubt upon

this fact. Mr. Edwards' evidence is invoked by the respondent as supporting his contention. But, as I read it, it cannot preponderate over the direct and positive testimony of the two ministers. The occasion Mr. Edwards speaks of must be another one than that referred to by them. Then he, and the respondent, at most deny and do not remember, whilst the other two affirm. And under these circumstances, the rule laid down in *Lane* v. *Jackson* (1), has its application. The Master of the Rolls, Sir John Romilly, there said :

> I have frequently stated that where the positive fact of a particular conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place, and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstances. By this means, I give full credit to both parties.

That is a most rational rule. See also *Wright* v. *Rankin* (2); *Stitt* v. *Huidekopers* (3); *Lefeunteum* v. *Beaudoin* (4). In the civil law, it was said upon the same principle, *magis creditur duobus testibus affirmantibus quam mille negantibus.* Then no attempt has been made to discredit these two witnesses, and none was possible. They are men of the highest standing in the community, they gave their evidence, as I read it, in as fair and impartial a manner as could rightly be expected from men of their character, they are absolutely disinterested witnesses, this particular fact they depose to was a reasonable and most probable one under the circumstances, for there is ample evidence that then the extension to October, 1898, was considered to be a sufficient one; and not to give full credit to their statements in all particulars would seem to me an arbitrary act that nothing on the record would justify. Then there is the corroborative fact, uncontroverted and incontrovertible, that it was

(1) 20 Beav. 535.
(2) 18 Gr. 625.
(3) 17 Wall. 384.
(4) 28 Can. S. C. R. 89.

1902

THE KING v. STEWART.

Taschereau J.

upon the minister reporting that the respondent had so agreed to complete his contract in 1898, and the certificate of the Chief Engineer, that the Treasury Board who had repeatedly refused to sanction the payment to the respondent of the draw-back in question, at last yielded and allowed it to be paid, though it was not due. The respondent would virtually contend that it was upon a false representation that the minister succeeded to obtain this favour for him. Now, leaving aside all the various other considerations that suggest themselves against the reasonableness of such a contention, is it credible that the minister, in the respondent's sole interest, would have rendered himself guilty of obtaining this money upon false representations to his colleagues, or would have taken the responsibility of asserting a fact of which he was not perfectly sure?

That agreement by the respondent to complete his contract in October, 1898, being established, his claim against the Crown falls to the ground. Assuming that his contract, so far as the time of its completion was concerned, was up to that agreement a contract to complete it in a reasonable time, after that agreement, clause fourteen unquestionably continued in force, and the respondent is out of Court. That agreement of May 1897 constituted a mutual waiver of all anterior grievances. The respondent himself committed a breach of his contract, so renewed as to time, by putting himself, in October, 1897, in the impossibility to complete it as agreed upon in October, 1898. The reasonableness of time was no more in question. And it is the law that no one can sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately

be recoverable back as damages arising from his own breach of contract.

I have considered the case as if it turned altogether upon clause fourteen of the contract—and its being in force in 1897. But, assuming that this clause was not then in force, assuming even that it never had been in this contract, assuming that the contract was in May, 1897, to complete in a reasonable time, the respondent could not, in my opinion, succeed in his claim for damages against the appellant.

I would think it clear that, upon the respondent allowing, as he has done, the whole working season of 1897, to pass without making or attempting to make any reasonable progress, the Crown had the right at the end of the season to cancel the contract. The respondent had then committed a breach of his contract by putting himself in the impossibility to finish within a reasonable time. And it is preposterous, it seems to me, for him to contend, as he does, that the Crown had to wait till that reasonable time was over before they could turn him out. October, 1898, had been agreed by him, in May, 1897, to be then a reasonable time. And when, in October, 1897, he had put himself, as I take it incontrovertibly upon the evidence, in a position not to be able to finish in October, 1898, the Crown had the right to put an end to the contract.

No one has questioned his integrity, and it stands unimpeached. But, in taking this contract, he overestimated his capacity, or underestimated the cost and magnitude of his job, and perhaps relied too much on eventualities.

His claim for damages must be dismissed.

As to his claim for the value of the plant and material taken possession of by the Crown, it must also be dismissed.

1902

THE KING v. STEWART.

Taschereau J.

By the 12th clause of the contract it was provided that all machinery and other plant, materials and things provided by the contractor should, from the time of their being provided, become, and until the final completion of the work should be, the property of Her Majesty for the purposes of the said works; that the same should on no account be taken away or used or disposed of, except for the purposes of the works, without the consent in writing of the engineer; and that Her Majesty should not be answerable for any loss or damage whatsoever which might happen to such machinery or other plant, material or things; provided always that upon completion of the works, and upon payment by the contractor of all such moneys, if any, as should be due from him to Her Majesty, such of the machinery and other plant, material and things as should not have been used and converted in the works, and should remain undisposed of, should upon demand be delivered up to the contractor.

By the 14th clause of the contract it was provided that

> where the contract was taken out of the contractor's hands, under the circumstances therein stated, all materials and things whatsoever, and all horses, machinery and other plant, provided by the contractor for the purposes of the works should remain and be considered the property of Her Majesty for the purpose and according to the conditions contained in the 12th clause of the contract.

Under these clauses it is evident that no action as taken can be maintained against the Crown for the value of the said plant.

I would allow the appeal with costs, dismiss the petition of right with costs, and dismiss the cross-appeal with costs.

I take it that, upon this result of the appeal, the counter-claim of the Crown need not be adjudicated

upon according to what was intimated by counsel at the argument.

*Appeal and Cross-Appeal Dismissed.*

1902

THE KING v. STEWART.

Taschereau J.

Solicitor for the appellant: *H. W. Lawlor.*

Solicitor for the respondent: *Wm Wyld.*