

M. A. PIGOTT AND J. C. INGLES TRADING UNDER THE STYLE OF PIGOTT & INGLES, (SUP- PLIANTS).	}	APPELLANTS.	1907 *Mar. 15, 18 *April 2.
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AND

HIS MAJESTY, THE KING, RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Public works—Contract—Change in plans and specifications—Waiver by order in council—Powers of executive—Construction of statute—Directory and imperative clauses—Words and phrases—“Stipulations”—Exchequer Court Act, sec. 33—Extra works—Engineer’s certificate—Instructions in writing—Schedule of prices—Compensation at increased rates—Damages—Right of action—Quantum meruit.

The suppliants, appellants, were contractors with the Crown for the widening and deepening of a canal and, by their petition of right, contended that there were such changes from the plans and specifications and in the manner in which the works were obliged to be executed as made the provisions of their contract inapplicable and that they were, consequently, entitled to recover upon a *quantum meruit*. In order to afford relief, an order in council was passed waiving certain conditions, provisoes and stipulations contained in the contract. By the judgment appealed from, the judge of the Exchequer Court held (10 Ex. C.R. 248) that there had been no such changes as would entitle the contractors to recover on the *quantum meruit*, as in the case of *Bush v. The Trustees of the Town and Harbour of Whitehaven* (52 J.P. 392; 2 Hudson on Building Contracts (2 ed.) 121); that the words “shall decide in accordance with the stipulations in such contract” in the thirty-third section of “The Exchequer Court Act” might be treated as directory only and effect given to the waiver in respect to the absence of written directions or certificates by the engineer in regard to works done, but that the remaining clauses of the section were imperative and there could be no valid waiver whereby a larger sum than the amount stipulated

*PRESENT:—Girouard, Davies, Idington, Maclellan and Duff JJ.

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in the contract could be recovered, *e.g.*, on prices for the classes of work, so as to give the contractors a legal claim for higher rates of compensation without a new agreement under proper authority and for good consideration. On appeal to the Supreme Court of Canada:

Held, per Girouard, Davies and Maclellan JJ., that the decision of the judge of the Exchequer Court was correct.

Per Idington and Duff JJ.—That the word “stipulations” in the first part of the section referred to, should be construed as having relation entirely to the second part of the section and as applying to the rates of compensation fixed by the contract; that, on either construction, the result would be the same in so far as the circumstances of the case were concerned; that it did not warrant an implication that the executive could without proper authority, exceed its powers in relation to a fully executed contract or confer the power to dispense with the requirements of the statute, and that, consequently, there could not be a recovery upon *quantum meruit*.

APPEAL from the judgment of the Exchequer Court of Canada(1), by which the petition of right of the suppliants was in part allowed and certain items of the claim made by them were dismissed, the question of costs being reserved.

The suppliants claim was for works executed in widening and deepening a portion of the Grenville Canal, a public work of Canada, under a contract with the Crown, acting through the Minister of Railways and Canals for Canada, which referred to certain plans and specifications describing the works to be done. The claim was for \$154,244.93, with interest, for construction works, including dry masonry walling, most of which had been disallowed by the engineer in charge of the works, and was classified as follows according to the grounds upon which the items were based, namely:

(1) The contract and specifications contemplated that the work should be done in open season and un-

(1) 10 Ex. C.R. 248.

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watered and required performance in such a way as could be done only during the summer season and could not properly be done during the season of frost. The contractors were nevertheless required to carry out the work in the winter season and claimed for the increased cost of its execution. (2) The contractors claimed that there was mutual error and misunderstanding in respect of a part of the material to be excavated, much of which was "hard pan," and a special price ought to have been and, if it had been known, would have been fixed for excavation of this material. The contract ought to be reformed in this respect or other relief granted so as to allow for such price. (3) The specifications provided for a higher price and quality of stone and masonry in the walls of the weir than for the side-walls. The engineer required them to furnish the higher quality of stone for the side-walls and to execute that work in the same manner as the weir-walls and they were allowed for this work at the lower rate instead of the higher prices. (4) They claimed for delays and damages caused by reason of the fact that the work had to be done during the season of frost and during winter and by reason of mistakes, alterations and erroneous directions of the resident engineer.

These claims were represented to the Minister of Railways and Canals, who, thereupon, reported to the Governor-General in Council and, upon his recommendation, there was passed an order in council which recited the four grounds of claim and directed that, in the event of a petition of right being preferred, the provisions of the contract and specifications which would or might bar any of the claims in so far and in so far only as they would prevent a consideration of any such claims on its merits aside from such

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provisions should be waived; and particularly also all provisions and conditions in respect to the fixing of prices by the engineer the requirements and the directions in writing and certificates from him and the finality of his decisions referred to in certain clauses and all similar provisions and conditions in other clauses of the contract.

The judgment appealed from allowed part of the amount claimed and dismissed the petition as to the remainder, holding, in effect, as stated in the head-note of the report.

Watson K.C. and *Neil Sinclair* for the appellants. The suplicants contend that the circumstances under which the works were executed were so changed from those contemplated that the special conditions of the contract were inapplicable and that the contractors were therefore entitled to recover upon a *quantum meruit*; that it was contemplated that the works should be done in open season and with the canal unwatered, whereas, with the exception of short periods in the spring after the frost was out of the ground and before the canal was open to navigation and shorter periods in the autumn after navigation closed and before winter set in, the work was done either in winter or with the water in the canal; that the work of unwatering was a part of the work, which could not be done without unwatering, and a condition precedent to the proper performance of the work.

In accordance with the order in council, the claims stood for consideration upon a *quantum meruit*, and so the trial judge states, but, through error he further states that the appellants contended that they were entitled on two grounds—one of which existed at the

time the final estimate was made, while the other had arisen since. Here the learned trial judge misconceived the position of the appellants and their rights under the order in council. He was not asked to review or consider the circumstances and conditions which led to the granting or passing of the order in council. Those circumstances and conditions had been fully considered, passed upon and approved by His Excellency in Council and the order formed the basis of the claim and the foundation of the petition.

It was not for the judge at the trial to consider and determine whether the appellants were entitled to claim upon the *quantum meruit*; that had been previously considered and passed upon by the Crown and the petition came before the court to be determined upon the *quantum meruit*.

The judgment below considers the circumstances and conditions and passes upon the question as to whether the appellants were entitled to recover upon a *quantum meruit*, refers to provisions and clauses of the contract and paragraphs of the specifications and concludes that the case is not one in which the contractors are entitled to treat the contract as at an end and to recover upon a *quantum meruit*, which conclusion was not warranted. It is wholly inconsistent with the position of the appellants and of the respondent and at variance with the whole basis and foundation of the petition of right.

The judgment decides that it is not possible for it to give effect to the contention of the appellants based upon the order in council, even if it were thought to be well founded, because the provisions of the "Exchequer Court Act," section 33, would stand in the way of that being done and that the waiver of the clauses of the contract may not, therefore, be

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properly regarded by the court. We submit that the court should have proceeded in accordance with the order in council having regard to the fact that provisions of the contract and specifications had been waived and were not then being set up in answer to the claim, and, on the other hand, that such claim was to be disposed of without regard thereto and therefore upon a *quantum meruit*.

It was quite competent for the Crown to make this contract, to vary the same, to modify or waive provisions and conditions and so to fix a basis of determination of the rights as they existed between the Crown and the subject in litigation, and it is erroneous to hold that the relation of the parties should be based solely upon the original contract without regard to modifications therein intended to have full force and effect and to govern in the adjudication of the claim which was founded upon the highest legal consideration. Work and services had been done and material supplied to the Crown, the benefit of which had been obtained and received by the Crown, the value of which had not been paid.

The rulings of the learned trial judge throughout were quite consistent, and the result substantially a dismissal of the claim. With regard to almost every item the conclusion was that there was no ground in law for allowing the claim; that the terms of the original contract must prevail and that the order in council should be disregarded as illegal and not binding. In this respect the judge should not have taken any higher or different ground in considering the claim upon its merits than was presented to him or urged and taken by the respondent.

We submit that, in so far as the claims have been

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dismissed, disallowed or only partially allowed, such dismissal and disallowance or partial allowance are contrary to law and the weight of evidence and that the judgment in respect thereto should be set aside and reversed and judgment pronounced upon the merits of the claim; that all items of claim should be considered and determined as upon the *quantum meruit* for the amount as claimed in accordance with the evidence or, in the alternative, that a new trial should be directed or provision made by reference for the ascertainment and determination of the amount proper to be allowed as upon the *quantum meruit*.

Chrysler K.C. for the respondent upheld the judgment appealed from upon the terms and conditions of the contract and for the reason stated by the Exchequer Court judge. It was also urged that the order in council was not intended to have the effect of altering the terms of the contract and, in fact, did not do so. Section 33 of the "Exchequer Court Act" was relied on.

GIROUARD J.—Th's appeal is dismissed with costs. I agree in the reasons stated by His Lordship Mr. Justice Burbidge in the court below.

DAVIES J.—For the reasons given by the learned judge of the Exchequer Court, I am of opinion that this appeal should be dismissed with costs.

IDINGTON J.—This is an appeal from the judgment of the Exchequer Court upon a petition presented therein by the appellants to recover from the respondent for certain work alleged to have been done on

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a public work and damages sustained by the sup-
 pliants (now appellants) in doing that work.

I agree in the results arrived at by the learned
 trial judge and in the general reasoning by which he
 reached such results in a careful and exhaustive
 judgment.

This appeal turns upon the construction of sec-
 tion 33 of the "Exchequer Court Act" which is as
 follows:

33. In adjudicating upon any claim arising out of any contract
 in writing, the court shall decide in accordance with the stipulations
 in such contract, and shall not allow compensation to any claimant
 on the ground that he expended a larger sum of money in the per-
 formance of his contract than the amount stipulated for therein.

I am not quite sure that the learned trial judge's
 interpretation or mode of interpreting this section
 is absolutely correct.

At first I was disposed to think the first part sev-
 erable from the latter as the learned judge seems to
 hold; that is, the one directory and the other impera-
 tive.

I am, however, disposed now, upon full considera-
 tion, to think that the word "stipulations" in the first
 part is to be read as relating entirely to the second
 part.

Reading the section as a whole and considering
 the obvious purpose and scope of it, are not the
 "stipulations" referred to those which refer to the
 compensation fixed by the contract?

The result of either interpretation is the same so
 far as it concerns this case; and possibly in almost all
 cases may be the same.

I can, however, conceive of cases arising wherein
 the interpretation I suggest might lead to other re-

sults than the interpretation of the learned trial judge.

I cannot add beyond this anything useful regarding his judgment.

The argument of the appellant's counsel here, I think, possibly calls for one or two observations.

He pressed upon us the view that his client was entitled to compensation as upon a *quantum meruit*, for the whole work done. He put this on alternative grounds. He claimed that the case comes within *Bush v. The Trustees of The Town and Harbour of Whitehaven*(1), and such cases, or that the order in council, in effect, so directed the case to be treated at trial that the basis of a *quantum meruit* must be adopted as to all the appellants' claims, else the order would have no effect; or that it should be read as if amending the contract and forming one that would be deleted of everything statutory or otherwise affecting appellants' claims to their right to have these allowed upon the *quantum meruit* basis.

I cannot see how on the facts the *Bush and Whitehaven Case*(1) can apply. Nor can I read the order in council as capable of either of these several interpretations.

It has been given by the learned trial judge all the effect it expresses. I do not think we should seek in it an implication that might exceed the powers of the executive in relation to a contract fully executed, or an assertion, without parliamentary sanction, of a dispensing power over the imperative requirements of a statute.

The appeal should be dismissed with costs.

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(1) 52 J.P. 392.

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J. MACLENNAN J. concurred in the opinion of Davies

DUFF J. concurred with Idington J.

Appeal dismissed with costs.

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

Solicitor for the respondent: *F. H. Chrysler.*