FRANK L. BOONE (SUPPLIANT)..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1933
* Oct. 18, 19.
1934
* April 24.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Contract—Construction of ice pier for Crown—Alleged delay of contractor—Work and contractor's plant, etc., taken over by Crown for completion of work—Claim by contractor for damages—Proposed change in plan of work—Lack of instructions in writing—Alleged conduct of Crown's engineers as excuse for contractor's delay—Petition of Right—Parties—Non-joinder of co-contractor.*

Appellant and one V. (who was not a party to the action) contracted with the Crown to build an ice pier, and did some of the work. In the foundation work, the contract required excavating the bottom to bed rock by dredging. Dredges chartered by appellant abandoned the work because of difficulties encountered, and appellant complained to the Crown's District Engineer that the dredging was impossible of performance. The District Engineer changed the plan of the work so as to eliminate the dredging and secure the foundation by other means, and directed appellant to proceed on the plan as changed. The District Engineer and appellant differed in their estimates of the nature of the change made and of the extra cost involved, and appellant asked for written instructions, which were not given. A

* PRESENT:—Rinfret, Lamont, Smith, Crocket and Hughes JJ.

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deadlock ensued and the time within which, under the contract, the work was to be completed, expired. The Crown's Chief Engineer gave notice to the contractors, in pursuance of a clause in the contract, to put an end to their "default and delay" and that, if within a certain time satisfactory progress was not made, the Crown would take the work out of their hands and complete it; and, the work not being proceeded with, the Crown, on further notice, and purporting to act under said clause, took over the work and appellant's materials and plant and proceeded to complete the work according to the plan as changed. Appellant sued (on petition of right) for damages.

*Held,* reversing judgment of Maclean J., President of the Exchequer Court, [1933] Ex. C.R. 33, Lamont and Hughes JJ. dissenting, that, upon all the facts and circumstances and the proper construction of the contract, the appellant was entitled to succeed.

*Per curiam:* The nature of the change made in the plan was such as required, under the contract, written instructions from the Chief Engineer; also, in the absence thereof, the Chief Engineer's said notice requiring satisfactory progress to be made, must be taken to mean to proceed under the original plan.

*Per* Rinfret and Crocket JJ.: Previous to the change of plan there was no delay of which the Crown could now complain; and the delay after the change of plan was directly attributable to the Crown itself, because, while its District Engineer (a recognized departmental representative and the real controlling spirit in all that pertained to the contract and its execution throughout) had directed to proceed on the new plan, it failed to give written instructions, in accordance with the contract, to do so; therefore the taking over by the Crown of the work and materials and plant was not justified (*Roberts* v. *Bury Improvement Commissioners,* 39 L.J.C.P. 129, *Lodder* v. *Slowey,* 73 L.J. P.C. 82, cited). Further, the Crown did not bring itself within the clause under which it purported to act, as that clause, fairly construed, contemplated that the contractors should be made aware of the specific default or delay with which the engineer was dissatisfied, and, to justify under it, the Crown must show that the contractors were guilty of some default or delay in diligently executing some part of the contract work to the engineer's satisfaction (the intention being that the engineer in the exercise of his judgment should act justly and reasonably); and the facts failed to discharge that onus and, further, absolutely negatived justification of the Crown's act. The case should be sent back to the Exchequer Court for assessment of damages, with right to appellant to join V. in the petition (though *quaere* whether this was necessary, in view of the terms of the partnership agreement between appellant and V. *Atkinson* v. *Laing,* 171 E.R. 901, referred to).

*Per* Smith J.: There was actually little delay on the contractors' part that counted, except what was caused by the miscalculation that it was practicable to do the dredging in the manner attempted. This was a miscalculation of the engineers that was relied on by the contractors, though they were not warranted in doing so by the terms of the contract. But, when the District Engineer directed the change of plan, the contractors were justified in insisting upon approval thereof by the Chief Engineer in writing before proceeding further. Although the notice by the Chief Engineer to proceed could mean only, in the absence of written instructions to the contrary, to proceed on

the original plan, yet, as the Crown subsequently proceeded on the changed plan, the latter was the one clearly contemplated, and there was never any intention of resorting to the original plan. The contractors were never in default as to the changes, and appellant should succeed on his claim. The case should be sent back for assessment of damages in the manner directed by Rinfret and Crocket JJ.

*Per* Lamont J. (dissenting): There was unreasonable delay by the contractors in engaging dredges. It was not established that the dredging was impossible of performance; on the evidence, it could have been done, though probably at considerable expense. Moreover, in view of provisions of the contract, appellant was not entitled to recover from the Crown his expense in connection with the attempt to operate the dredges on the footing of impossibility of performance. The contractors, with the contract before them, must be held to have known of the lack of authority to make the proposed change in the plan of the work in the absence of written instructions from the Chief Engineer. The trouble arose by reason of their failure to examine the bottom, though a certificate in their tender indicated they had done so. They should have known beforehand whether dredges such as were employed were sufficient for the work. The Crown could not be mulcted in damages for alterations made by an official who had no authority to make them. The judgment of the Exchequer Court should be affirmed, with the variation suggested by Hughes J.

*Per* Hughes J. (dissenting): The District Engineer had no power to make the proposed alteration in the work, and, in the absence of written instructions from the Chief Engineer, the contract, plan, and specifications remained as they were originally. The contractors must have been aware of said lack of power in the District Engineer. The contractors were in default on the date limit set by the contract for completion; and the difficulty in dredging was not a valid excuse for such default (*Thom* v. *The Mayor and Commonalty of London,* 1 App. Cas. 120, at 132; *Connolly* v. *City of Saint John,* 35 Can. S.C.R. 186, referred to). Under the terms of the contract the Crown was entitled to take over and use appellant's materials and plant to complete the work, even with changes in plan. The appeal should be dismissed, but the judgment should be without prejudice to any proceedings in proper form which appellant might, if so advised, subsequently take against the Crown for the return of, or damages in respect of, any materials or plant not used up by the Crown in accordance with the contract and improperly withheld.

APPEAL by the suppliant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that he was not entitled to the relief sought by his Petition of Right herein, in which he claimed damages from the Crown in respect of a contract for the construction of an ice pier at Barrington Passage, Nova Scotia, the Crown having, by reason of alleged default and delay in the work, taken the work out of the contractors' hands and taken possession of appellant's materials and plant

(1) [1933] Ex. C.R. 33.

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for purposes of completion of the work. The material facts of the case are sufficiently stated in the judgments now reported. The appeal was allowed with costs and the judgment of the Exchequer Court was set aside and the case sent back to that court for the assessment of damages, with a reservation of the right of the suppliant, if deemed advisable, to join in the Petition one Voye, who had, with the suppliant, been a party to the said contract. Costs in the Exchequer Court were left in the discretion of that court. Lamont and Hughes JJ. dissented.

*P. J. Hughes K.C.* for the appellant.

*A. N. Carter* for the respondent.

The judgment of Rinfret and Crocket JJ. was delivered by

CROCKET J.—I find it impossible upon the evidence to avoid the conclusion that the real reason for the action of the Department of Public Works in terminating this contract and confiscating the contractors' material, plant and equipment was the impossible situation in which the contractors were placed by the failure of Locke, the supervising resident engineer, or the Chief Engineer himself to provide the necessary written confirmation of the radical change which the former had ordered in August, 1929, in the contract plans and specifications regarding the construction of the foundation for the pier, and not any default or delay on the part of the contractors before that time, as the Department is now contending.

Locke admitted that on August 13, 1929, after the powerful dredge *Leconsfield* had tried unsuccessfully to do the required dredging for the foundation of the pier, following the failure of the dredge *J. A. Gregory,* he told Boone that it was not feasible to excavate by a dredge to the rock, as required by the contract specification, and that he would make a change in the plans. He admitted that he did make a change in the original plan, for another foundation than that specified in the contract, which it was not denied affected not only the foundation itself but necessitated the reduction in the height of the crib, which the contractor at that time had built on the shore, all ready to float and place in position on the site as soon as the foundation was

prepared. He admitted that he delivered a copy of the changed plan to the contractor and another to Mr. McKay, the inspector, and that he notified Mr. Allison, an engineer also employed in his office and to whom much of the supervision of this contract work was entrusted. On August 28 he telegraphed Boone to start the bag concrete foundation on the changed plan. Boone wrote Locke the following day acknowledging this telegram and requesting, as he had previously personally done, to have the instructions concerning the proposed changes made in writing before commencing the new work. This letter Locke did not acknowledge and in his testimony, under questioning by the respondent's counsel, admitted that he deliberately waited until the expiration of the contract and then reported to the Chief Engineer of the Department at Ottawa and that the Chief Engineer then notified the appellant's firm of the expiry of the contract.

The Chief Engineer's notice appears under date of September 11, 1929, and recites the making of the contract on September 22, 1928, and that by the terms thereof the work should have been satisfactorily executed and completed within twelve months from the date of notification of the acceptance of the firm's tender, viz., on or before September 1, 1929, and then proceeds:

> And Whereas, you have made default and delay in diligently continuing to advance or execute the said works to the satisfaction of the undersigned;
>
> Therefore, the undersigned, in pursuance of Clause 19 of said contract, hereby requires you to put an end to said default and delay, and if within six days from the service hereof on you, satisfactory progress is not made with the said works, His Majesty the King, represented by the Minister of Public Works, intends to avail Himself of the provisions of said Clause and take the said works out of your hands and complete them.

To this notice the appellant's firm replied on September 18, giving, as my brother Smith states in his judgment, an accurate account of the situation which had developed in connection with the dredging, calling the Chief Engineer's attention to the fact that he had asked for written instructions covering the changes which had been made by the resident engineer in the plan and stating that as soon as the Department gave them these instructions they were prepared to deal with the work just as expeditiously as they reasonably could and asking that the written instructions

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be given them without delay. This letter, it seems, was not acknowledged either. On September 25, after receiving a long telegram from Locke, which shews that the Chief Engineer had forwarded to him the contractors' letter of the 18th, and which telegram advised that the Department was fully justified in completing the work itself, the Chief Engineer on September 25 again wrote the appellant's firm that,

> as no satisfactory progress has been made since my notice has been served upon you it has been decided to take the work out of your hands, in pursuance of Clause 19 of [the contract],

and that "the materials, tools, equipment, etc., become the property of the Department." This letter stated that "the required instructions have been given Mr. District Engineer Thomas J. Locke," to whom the firm was referred for any further information.

The Department afterwards proceeded with the work itself under Mr. Locke's supervision and upon the changed plan which the latter had made, using the appellant's materials and equipment therefor.

The Chief Engineer's notice of September 11, 1929, was the first complaint made to the contractors by that official of any default or delay in diligently executing any part of the work to his satisfaction after the signing of the contract by the Deputy Minister on September 22, 1928. There is not a written line of any such complaint by any officer or representative of the Department in the whole record from the date of the signing of the contract until that notice was served. The only exhibit containing even so much as a suggestion that there had been any delay of any kind on the part of the contractors is Locke's letter of May 8, 1929. This is the letter in which Locke confirmed his conversation of the previous day regarding the creosoting of the timber for the crib after six weeks' seasoning instead of four months' seasoning which the creosoting plant usually insisted upon. "This concession," Locke stated in that letter, "was made you in order to expedite commencement of this work at the earliest possible date," and he added:

> I wish to emphasize the importance of your not neglecting any opportunity of procuring a suitable dredge quickly for the purpose of having the foundation excavated and work commenced June 1, 1929.

It is true that on the trial he said, in answer to questions by the respondent's counsel, that he was not satis-

fied with the progress the contractors had made up to May 7, and that he felt that they should have made arrangements the first part of September when they heard they had the contract—that was before the contract was signed—and it was the first of May when they were trying to procure dredges. In cross-examination, however, he admitted that he approved of the creosoted timber; that he did not expect any actual work to be commenced before spring; and that the earliest time he would expect the contractors to undertake the dredging would be between the middle of May and June 1. His letter of May 8 itself, it will be noted, made no complaint of any delay that had occurred in connection with the dredging, but merely impressed upon the contractors the importance of procuring a suitable dredge quickly in order that work might be commenced on June 1, 1929. As a matter of fact, the contractors had tried to secure a dredge some time before that from the Saint John Dredging Company, which was unwilling on account of the small quantity of material to be dredged to undertake the job, and Boone on the very day of the conversation mentioned, May 7, according to Locke's own testimony, negotiated with the manager of the Beacon Dredging Co. of Halifax to do the dredging, and informed him that the latter had agreed to do the work. It was May 27, however, before the formal charter was signed, whereby the Dredging Company agreed to send its dredge *J. A. Gregory* from Parrsboro, where it was, to the site within a week of that date with a tug boat and scows with three days' allowance to make the trip. On account of repairs which had to be made, this dredge did not arrive at the site until late in June and it did not make its unsuccessful attempt to do the dredging until July 2. No complaints were made by Locke or by the Chief Engineer or anybody else of the delay caused by the dredging company, and after its failure Locke himself made arrangements for the contractors with the manager of the Saint John Dry Dock Co. to send the *Leconsfield* into the site while on its way to Liverpool, N.S. McKay, the resident engineer's inspector, admitted that at the time Locke made the changes in the plan all that could reasonably be done on the crib had been done by the contractors, and it is obvious that no progress could be made with the

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actual erection of the crib and pier until the foundation was prepared.

So far, therefore, as the Chief Engineer's notice of September 11 is concerned, although it recites the fact that the time for performance of the contract had then expired, it conclusively shews that this was not the reason for the contemplated action. The notice on its face carries with it an extension of time and commits the Department to the second preamble as its justification, viz., that the contractors had "made default and delay in diligently continuing to advance or execute the said works to the satisfaction of the undersigned." If this preamble refers to any default or delay in the execution of the work before the resident engineer changed the foundation plans, it is clear from what has already been stated that there is no evidence whatever that there was any default or delay of any kind on the part of the contractors before that time in diligently continuing to advance or execute the work to the satisfaction either of the Chief Engineer himself or of the resident engineer or of any other officer or representative of the Department. It must accordingly be taken as referring to the delay which took place afterwards. If there had been any delay of any kind previously it could only have been in relation to the contractors not having arranged immediately after being notified of the acceptance of their tender for the procuring of the timber for the crib and for the hiring of a dredge, notwithstanding that the dredging for the foundation was not expected by the resident engineer or the Department itself to be commenced before June 1. These were the only pretended grounds of previous delay suggested on the trial. If they were real or in any light fell within the terms of the contract they were clearly condoned, as clause 55 of the contract shews that any breach or default might be condoned, though providing that no such condonation shall operate as a waiver of any term of the contract if it is a breach or default "similar to that for which any action is taken or power exercised or forfeiture is claimed or enforced against the Contractor."

What then are the true facts as to the delay for which it must be taken, as already intimated, that the Depart-

ment's action was taken and the forfeiture of the contractors' materials, plant and equipment claimed?

The resident engineer finds the original foundation plans unfeasible, informs the contractors to that effect and that he is going to change them and substitute a new foundation, furnishes the contractors and his own inspector with copies of the changed plan, admits that the substituted plan involved the abandonment of ten feet of the crib the contractors already had constructed, new work in the rock talus and many other important items for which no provision was made in the original contract, telegraphs the contractors on August 28 to start work on the new plans, notifies his assistant supervising engineer, ignores the contractors' request for written confirmation covering the changes in accordance with the terms of the contract, deliberately waits until the date for completion expires, and then advises the Chief Engineer to take the work out of their hands. The Chief Engineer consequently directs the necessary notice to the contractors. The resident engineer's report which brought this notice to the contractors was not produced on the trial for some reason, but the notice to the contractors brought a letter from them to the Chief Engineer, which advised him of the true facts and that the contractors were awaiting the written confirmation to which they were entitled from him before proceeding to construct the new foundation which Locke had ordered them to do. The Chief Engineer, without acknowledging this letter or either confirming or repudiating Locke's order to the contractors to proceed on the changed plans, sends a copy of it to Locke. The latter replies on September 23 with a telegram of over 500 words. In his telegram he states that he instructed the contractors on August 13 to immediately proceed with the foundation work on the changed plan; that their complaint as to non-receipt of written confirmation did not bear on subject as his instructions were given in the presence of three witnesses and that the change was not a sufficient radical departure to justify their complaint, and then he proceeds to formulate complaints of previous delays on the part of the contractors in connection with the procuring of the dredge, alleging, quite contrary to the evidence adduced on the trial, that the contractors made no move to procure

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a dredge until practically compelled by him to do so, and that their entire conduct had been unsatisfactory and unprogressive. Not content with this he went on to bolster up a case against the contractors by stating that he had learned from outside sources that Mr. Boone did not intend to move "until he received a letter from me promising much larger prices than he was getting"—a statement for which no justification whatever is to be found in the record, and concludes with the statement that he considers the Department fully justified in completing the work itself and "not trusting contractor who pursues such dilatory methods with the evident intention of forcing our hand if possible to receive a larger remuneration for work which he should have completed long ere this date" and an urgent recommendation "for early action" to this end. Then follows the final notice of September 25, from the Chief Engineer, taking the work out of the contractors' hands without any acknowledgment having been made of their letter of September 18, though a later note of September 20, referring to a claim received from the Beacon Dredging Co. for its futile attempt to do the dredging, was acknowledged on September 24 with the mere statement: "the contents of which have been noted."

That the Chief Engineer's notice of September 11 was directed to the contractors at the instance of the resident engineer cannot, in my opinion, be doubted. That the contractors had previously been advised by the resident engineer of material alterations he had made in the original plans and definitely ordered by him to proceed with their work under the altered plans and at the time they received the Chief Engineer's notice were awaiting the written confirmation of the resident engineer's directions, which they had requested of the latter, is also beyond question. That the Chief Engineer's notice can only be interpreted as a notice to proceed with the work under the original plans is self-evident. The learned President of the Exchequer Court so construed it, and held that, at the time the Chief Engineer gave notice, the original plans and specifications remained unaltered because of the failure of that official to approve the changes and instructions made and given to the contractors by the resident engineer.

The result of the whole situation is that we have the Department terminating the contract and declaring a forfeiture of the contractor's materials, plant and equipment because of the Department's own failure to approve the resident engineer's orders in accordance with the terms of the contract, and refusing to do so upon the representations and advice of the resident engineer himself, and then immediately proceeding to do the work itself, not upon the original contract plans and specifications, but upon the very plans, as altered by the resident engineer, which it had refused to confirm in writing for the contractors.

This seems to me, not only to constitute harsh treatment of the contractors and to have placed them in a most awkward position, as stated by my brother Smith, but to constitute on the part of the Department itself conduct which cannot be defended or justified under any of the very onerous and oppressive terms of the contract which the contractors were required to sign before entering upon their work. It surely ought not to be permitted to justify its harsh and arbitrary action by putting forward as a default or delay of the contractors "in diligently continuing to advance or execute the said works," a default or delay which is directly attributable to the Department itself. That the law precludes the Department from doing so is clearly shewn by *Roberts* v. *Bury Improvement Commissioners* (1), and *Lodder* v. *Slowey* (2). In the former case Blackburn, J., enunciated this principle in the following words at p. 136:—

> for it is a principle very well established at common law that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself.

Kelly, C.B., in delivering the judgment of himself and Channell, B., in the same case, said:—

> In this case we should have been content to have simply adopted the judgment of my brother Blackburn, in which we in substance concur, and observing that, inasmuch as it is admitted on the record that the alleged failure by the plaintiff to use such diligence and to make such progress as to enable him to complete the work by the day specified, was caused by the failure of the defendants and their architect to supply plans and set out the land necessary to enable the plaintiff to commence the work, the rule of law applies, which exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party.

(1) (1870) 39 L.J.C.P. 129. (2) (1904) 73 L.J.P.C. 82.

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And again:

> Now, in considering this question, we agree that we are not to assume a jurisdiction which we do not possess, to mitigate the hardship upon contractors of clauses, however oppressive, which are sometimes, and indeed most commonly introduced into agreements of this nature; but we must take care also not to add to their severity, and to the injustice which they are often the means of inflicting upon a contractor, by imagining stipulations which are not to be found in the contract, and which the parties have never entered into or contemplated.

In *Lodder* v. *Slowey* (1), in delivering the judgment of the Judicial Committee of the Privy Council, Lord Davey pointed out that the jury had found that the corporation, meaning the borough council acting by their engineer, prior to the seizure of the works improperly prevented the respondent from proceeding with the works in the manner authorized by his contract and also prevented him from proceeding with the works with sufficient expedition, and said:—

> Their Lordships hold that a party to a contract for execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress when the alleged default or delay of the contractor has been brought about by the acts or default of the party himself or his agent

—citing *Roberts* v. *Bury Improvement Commissioners* (2).

In this case the Chief Engineer and the resident engineer between them just as effectually held up the contractors as if they had directed them to suspend all work. One was ordering them to proceed with the foundation work on a new plan, while refusing to obtain for them the written confirmation which they demanded and to which they were entitled, and the other, knowing this fact, was notifying them to proceed on the original plan, while ignoring their specific request to him for written confirmation of the resident engineer's orders to such an extent that he would neither signify to them his approval or disapproval thereof.

Apart, however, from this feature of the case, I go further and hold that the Department did not bring itself within the terms of clause 19 of the contract, under which it pretended to act. I have already pointed out that the Chief Engineer's notice committed the Department to the second preamble as the justification for its action, and did not claim to exercise the power of re-entry and confiscating the contractors' property because of their failure to complete within the contract time, but in point of fact notified

(1) (1904) 73 L.J.P.C. 82. (2) (1870) 39 L.J.C.P. 129.

them to proceed with the work after the time fixed for completion had expired. The Department, therefore, was bound to justify under the following words of that clause:

> In case the Contractor shall make default or delay in commencing, or in diligently executing any of the works or portions thereof to be performed, or that may be ordered under this contract, to the satisfaction of the Engineer, the Engineer may give a general notice to the Contractor requiring him to put an end to such default or delay, and should such default or delay continue for six days after such notice shall have been given by the Engineer to the Contractor * * * the Minister * * * may take all the work out of the Contractor's hands * * *

On a fair construction of this language it must, I think, be taken to pre-suppose the existence of some specific, definite default or delay on the part of the contractors in diligently executing any of the works or portions thereof to the satisfaction of the Engineer, of which complaint has been made to them; otherwise what effect can be given to the words of the notice "to put an end to *such* default or delay"? If by "the Engineer" is meant, as is contended, the Chief Engineer, he certainly had never apprized the contractors of any dissatisfaction on his part with the progress of the work in any manner or form, and there is no evidence of any complaint having been made by the resident engineer or any of his representatives other than that already pointed out of any default or delay prior to the time when the resident engineer recognized the unfeasibility of the provision in the original specifications requiring that the footing for the pier be excavated to the rock by means of a dredge. The words of clause 19, under which the Department purported to act, clearly contemplate that the contractor shall be made aware of the default or delay with which the Engineer is dissatisfied. Otherwise how could the contractor reasonably be expected to put an end to such default or delay within six days? The clause is a confiscatory clause and as such should be strictly construed against the party seeking to enforce its provisions. It was incumbent on the Department, in order to justify under it, to prove by a preponderance of testimony that the contractors were guilty of some default or delay in diligently executing some part of the contract work to the satisfaction of the Engineer, the intention of the clause, of course, being that the Engineer in the exercise of his judgment should act justly and reasonably. The undisputed and indisputable facts al-

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ready pointed out not only fail, in my opinion, to discharge that onus, but absolutely negative the claim that the Department was justified in taking the contract work out of the contractors' hands and confiscating their material, plant and equipment.

Notwithstanding the one-sided character of the contract and the limitation prescribed in clause 37 of the specifications as to the power of the Department's supervising District Engineer in respect of it, I can find nothing in that clause or in any other clause of the contract or the specifications from beginning to end, by which it is provided that the action of the District Engineer or any other representative of the Chief Engineer or of the Department may not be relied upon by the contractors as an excuse for any default or delay which may be charged against them in the execution of the contract work, even though such action may not be approved in writing by the Chief Engineer. The question to be decided here is not whether the contractors are to receive compensation for work ordered by the District Engineer, without the written authority of the Chief Engineer, but whether they are to be debarred from claiming for the work which they performed under the original contract and specifications because they declined to proceed with their work on the foundation on the orders of the District Engineer under plans delivered to them which constituted a radical departure from their contract without the changed plans and the resident engineer's order to execute these changes first being approved in writing by the Chief Engineer in accordance with the terms of the contract. That the Department entrusted the whole supervision of the work to the District Engineer cannot be disputed, and I am not at all sure that, apart from the limitation prescribed in clause 37 of the specifications, the words "the Engineer" used in many other clauses of the contract should not be construed as the District Engineer. The definition of the term "Engineer" provides that it "shall extend to and include any of the officers or employees of the Department of Public Works acting under the instructions of the Chief Engineer or Chief Architect," while the introductory words of the interpretation clause provide that it is only where the context does not otherwise require,

that the definitions stated shall apply. It is a matter of common knowledge that the Chief Engineer himself does not personally witness the progress of any of these works, and that he necessarily relies entirely on the reports of the supervising district engineers throughout the country, and moreover, that these District Engineers are permanent and highly responsible representatives and agents of the Department in the supervision and direction of the execution of all such works. Indeed in the case at bar the evidence indicates that Locke's was really the controlling mind from the very inception to the termination of this contract. The original plan of August 7, 1928, bears his signature as having been checked by him as Supervising Resident Engineer. It was he who notified the contractors by telegram on September 1, 1928, that he had been advised directly by the Minister of the passage of the order in council accepting their tender, and of his anxiety to have the work commenced at the earliest possible date, as the Minister wished to make "important announcement in address Clarks Harbour his constituency Monday matter urgent." It is true that he denied on the trial that this message was dictated by his desire for political reasons to get something which could be seen on the ground, even before the contract was signed, but the message none the less shews to what an extent the Department relied upon him as its representative in the district, and the facts as above outlined as to what occurred in connection with the creosoting of the timber, the dredging, the changing of the plans, the giving of the notice terminating the contract, the appropriation by the Department of the contractors' materials, plant and equipment, its immediate approval after the termination of the contract of his change in the plan, and the prosecution of the work by the Department under the changed plan and under his supervision and direction, are, in my opinion, conclusive as to his being, not only a recognized representative and agent of the Department, but, as I have already said, the real controlling spirit in all that pertained to this contract and its execution from beginning to end.

As to the objection which was raised on the trial regarding the non-joinder of Voye as a suppliant, I am in-

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clined to think, having regard to the terms of the partnership agreement between Boone and Voye whereby Boone was to supply without charge all plant, tools and equipment which he owned as well as all necessary funds for the completion of this and the two other contracts to which the partnership agreement was confined and that all moneys received by the partnership in respect of the three contracts were to be deposited in the name of Boone and that Voye's interest in the partnership was limited to his right to share only in the profits of the three contracts after payment of all moneys properly payable by the partnership, that Boone had a right to bring his petition in his own name. See *Atkinson* v. *Laing* (1). Whether I am justified in this view or not, it is clear that the mere failure to join Voye in the petition could have made no difference in the attitude of the Attorney General in granting his fiat and that the respondent was in no way prejudiced by such non-joinder on the trial of the cause. If, therefore, there should be any doubt upon this question of non-joinder, I have no doubt as to the right of the Exchequer Court to allow an amendment joining Voye in order that the petition should not be defeated upon that ground. The learned President of the Exchequer Court in his judgment expressed the same view, though, as he stated, not without some doubt, and granted leave to add Voye as a suppliant upon the condition that Boone indemnify Voye, if the latter so required, against any costs to which he might be subjected thereby. Apparently this suggestion was not accepted on the trial.

In my opinion this appeal should be allowed, the judgment of the Exchequer Court should be set aside and the case sent back to the said Court for the assessment of damages, with the reservation of the right of the suppliant, if deemed advisable, to join Voye in the petition.

I would therefore allow the appeal with costs and remit the case to the Exchequer Court for the purpose and with the reservation stated.

(1) (1822) 171 E.R. 901.

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SMITH J.—The appellant, having been the successful tenderer for the contract of Ice Pier No. 5 at Barrington Passage, Shelburne County, Nova Scotia, entered into a contract for its construction with the Department of Public Works.

The plan and specifications of the work, upon which the appellant tendered, required that the pier should be founded upon bed rock, necessitating the removal of an accumulated mass of what was called "sand, gravel and boulders," amounting to 975 cubic yards. The specification provides that the footing for the crib must be excavated by means of a dredge to the rock, and cleared off by a diver. A crib of the size of the proposed pier was to be built of 10" by 10" square creosoted timber, to be placed on the prepared foundation.

The contract was signed on 22nd September, 1928, and provided that the work was to be completed by 1st September, 1929.

The first question that arose was as to the timber. The appellant says that this timber could not be procured anywhere in a seasoned condition, and had to be cut from the woods, that the creosoting plant selected by the Department Engineer, pursuant to the terms of the contract, required that the timber should be seasoned for four months, and that this seasoning does not take place in winter, but commences about the 1st of April, so that the creosoting could not be commenced until the 1st of August, 1929. The appellant knew, or ought to have known, all about this at the time of entering into the contract.

The Resident Engineer, Mr. Locke, says that in his opinion seasoned timber could have been had, but at greater expense. This difficulty, however, has little bearing on the question, because it was surmounted by Mr. Locke persuading the creosoting plant that the seasoning referred to was not necessary, and the timber was on the site in time.

The real difficulty was in connection with the dredging. Mr. Locke says that the time he would expect Mr. Boone to do the dredging in this case would be from the middle of May to the first of June, and that he would not dredge any considerable time before being in a position to put the crib down. The reason for this, as I gather from the

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evidence, is that if the dredging were done much in advance of the time the crib could be placed, drift material would be lodged by the rapid current; and that it was therefore desirable to have the bottom cleared off and the foundation laid immediately after the completion of the dredging.

Mr. Locke had, after the appellant's tender was accepted, pointed out to him the need of having the work completed within the stipulated time. On the 7th May, 1929, the appellant was in Mr. Locke's office when the question of the creosoting was brought up, and finally disposed of in the manner I have already indicated. Mr. Locke made some complaints about delay, and reminded the appellant that he should make arrangements for a suitable dredge. Mr. Dunfield, of the Beacon Dredging Company, was present, and negotiations at once took place for a contract with his company; and he and Mr. Boone, as Mr. Locke says, went out with the intention of making a contract. A contract was entered into, dated 27th May, for doing the work with the dredge *Gregory,* which arrived at the site on the 2nd July, and utterly failed to do any work, owing to the dangerous current. Arrangements were then made, with the help of Mr. Locke, to get the dredge *Leconsfield* to do the work. This was the most powerful dredge available in the Maritime Provinces. This dredge attempted to do the work on 2nd August, and also found it impossible, owing to the nature of the material to be removed.

In the meantime, during the month of July, the crib had been built up to ten tiers, ready for floating, and all necessary material was on the ground.

Mr. Locke was notified of the failure of the *Leconsfield,* and decided to change the plans by having the material that he had intended to dredge remain, and by having the foundation built on this material after it had been properly cleared off.

The appellant went to Mr. Locke's office on the 13th August, when the latter told the appellant he did not think it feasible to have the dredging done, because to do this it would be necessary to bring a drill for the purpose of boring and blasting, and that he was substituting a change in the plan, and handed to the appellant a plan

on which the proposed change was indicated. A discussion took place as to what this change involved in the way of extra expense, Mr. Locke contending that it would increase the cost by $600, and the appellant contending that the increase would be $10,000. The latter asked for written instructions to proceed on the changed plan, which were not given, and on 28th August Locke telegraphed the appellant as follows:

> Kindly start bag concrete foundation for pier Barrington Passage Allison advises by wire to notify your representative at Barrington to this effect.

On the 29th August the appellant replied to this telegram, stating that in his opinion this change called for work quite outside the terms of the contract, that it was an entire change and a modification of the contract as to price and as to time for completion, and asking to have instructions concerning the proposed changes made in writing before commencing the work.

No further instructions were given, and Mr. Locke says he waited for the 1st September, when the time for completion of the work under the contract elapsed, and then recommended to the Chief Engineer that the work should be taken over by the Department, pursuant to the terms of the contract, owing to the delay. This recommendation does not appear to be printed in the records, but in pursuance of it the Chief Engineer of the Department wrote to the appellant reciting in part the terms of the contract, and stating that there was default and delay in diligently continuing to advance or execute the said works, and finally notifying the appellant that if within six days satisfactory progress was not made, the Minister intended to avail himself of the provisions of clause 19 of the contract and take the works out of the appellant's hands and complete them.

This brought a reply from the appellant, dated 18th September, in which he refers to the failure of the dredges, the change of plan made by Mr. Locke, his request for written instructions for such change, as required by the contract, and the failure to receive same; and promising, upon receipt of such instructions, to proceed with the work as expeditiously as possible.

On the 23rd September Mr. Locke sent a long telegram to the Chief Engineer, in which he stated that the appel-

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lant was instructed on August 13 to proceed with leveling the present foundation, as the material could not be moved by either dredge. He complains of the delay in obtaining the dredges, and says he was told from outside sources that the appellant did not intend to move until he received a letter promising larger prices; complains of delays and unsatisfactory actions of Boone in connection with the work; and concludes by saying that he considers the Department fully justified in completing the work itself rather than trust to the contractor, who pursues dilatory methods, with the evident intention of obtaining a larger remuneration for the work.

The result was that on the 25th September the Chief Engineer notified the appellant that it had been decided to take the works out of his hands pursuant to clause 19 of the contract, and that therefore the materials, tools, equipment, etc., had become the property of the Department.

The work was accordingly taken out of the hands of the appellant, and the Department proceeded to do the work by day labour, and has spent so far, apparently, $27,000, the original estimate by the Department being $17,000, and the contract price $18,190. The work was apparently still incomplete at the commencement of these proceedings in 1932.

It appears to me that the appellant has been somewhat harshly treated. In the first place, the Departmental engineers had come to the conclusion that the sand and boulders to be removed in order to place the foundation of the pier on solid rock could be removed by dredges without drilling and blasting. It was not contemplated that any drilling outfit would be required, as Mr. Locke himself helped to arrange for the two dredges that attempted to do the work. On the failure of these dredges, he told the appellant that the dredging was not feasible, and it is therefore quite idle to talk of the possibility of doing this work by drilling and blasting.

The specifications provided that the excavation was to be done by means of a dredge, and there is no suggestion of blasting the material. There was, no doubt, some delay on the part of the appellant in getting the first dredge on the scene, but this was by reason of the appellant

having been informed by the creosoting company that they would require the timber to be seasoned for four months, so that the crib, according to this, could not be ready to place on the foundation before 1st August. It is admitted that the dredging should be done so that this could be followed up at once by laying the foundation and placing the crib.

The creosoting difficulty being surmounted, by the intervention of Mr. Locke, as already stated, the dredging was arranged for, and would have been completed in June in time for the placing of the crib, had it not turned out that the dredge was unable to do the work, by reason of the unexpected nature of the material to be removed. This unforeseen occurrence involved the delay that occurred in getting the other dredge, and it was quite unexpected that that powerful dredge would also fail. From these failures, Mr. Locke decided that it was not feasible to do the dredging at all, and altered the plan.

Under the terms of the contract, the appellant was perfectly right in requiring written instructions before proceeding upon this altered plan, and, while he received instructions from Mr. Locke by telegram to proceed, these instructions were altogether insufficient because, as admitted, Mr. Locke had no authority to give the required instructions, and he absolutely refused to give them. He never advised the Chief Engineer of the change of plan that he proposed. Instead of doing this, he deliberately, as he says, waited for the expiration of the time limit, and then advised the Chief Engineer to take over the work.

The appellant, on being shown the changed plan, took the attitude already referred to as to extra cost and the effect on prices and time limitation. Mr Locke, no doubt because of this attitude, considered it necessary to be careful not to give any written instructions that would involve such a result. He was quite right in not giving any such instructions in writing himself, as he had no authority. He no doubt went beyond his authority in changing the plan and telegraphing to the contractor to proceed upon that changed plan, because the Chief Engineer alone had authority to do all this. The result was that the contractor was placed in a most awkward position. He was asked by

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the Resident Engineer to proceed with the work on the changed plan, and at the same time was refused the necessary written instructions that would enable him to do so with safety under the terms of the contract.

The Chief Engineer, without any notice of this situation, was recommended to take possession of the work because of delay, and, acting upon this recommendation, notified the contractor to proceed with the work within six days, without informing him upon which plan he was to proceed.

The first intimation that the Chief Engineer seems to have received as to the actual circumstances was from the letter of the appellant of the 18th September, which was in fact an accurate representation of the real circumstances, but which was counteracted largely by the telegram of Mr. Locke of the 23rd September, in which he tells of the delays and insincerity and lack of real effort upon the part of the contractor, founded in large part upon what he had been told from outside sources as to the appellant's intentions in order to secure larger remuneration.

When Mr. Locke found, on the 2nd August, by the failure of the large dredge that dredging was impracticable, and resolved to change the plan, his proper course was so to inform the Chief Engineer and request his approval and written instructions to the contractor to proceed on the changed plan. This he knew to be a necessity under the terms of the contract. Instead, he altered the plan and asked the appellant to proceed on his own authority, and thus wasted the precious time from 2nd August until 1st September. If he had followed the proper course that I have pointed out, the work would probably have been completed, not on 1st September, but probably later that fall.

There was actually little delay that counted on the part of the appellant except what was caused by the miscalculation that it was practicable to do the dredging in the manner attempted. This was a miscalculation of the engineers that was relied on by the contractor, though he was not warranted in doing so by the terms of the contract.

If, immediately after the 2nd August, the Chief Engineer had received from Mr. Locke the information and request mentioned above, it is very improbable that he

would have failed to act accordingly. The time for completion was allowed to expire, and then Mr. Locke recommended that the work be taken out of the appellant's hands, but on what precise representations does not appear. The result was, the letter from the Chief Engineer to proceed with the work within six days, which, by the lack of written instructions to the contrary, could mean only a request to proceed on the original plan, which the engineers had determined to abandon as impracticable, and which they did in fact abandon when they took over the work. The appellant was then in the position of having been furnished a changed plan, with a telegram from the Resident Engineer to proceed on that plan, and then a formal notification from the Chief Engineer to proceed, without any intimation as to the plan that he was to proceed with.

I think that it is quite clear that the Chief Engineer had decided to change the plan as Mr. Locke intended. The contractor was quite right in insisting upon the approval of the Chief Engineer in writing before proceeding further. The Chief Engineer does not say in his notice anything about it, but he clearly contemplated a change of plan because, after the notice, he proceeded on the changed plan and carried on the work according to it.

No doubt the contractor made some complaint about the change, but all that was provided for in the contract; and the final claim that he made was that he had a right to have the changes made by the Chief Engineer in writing. He never got these changes approved in writing by the Chief Engineer, and he was never in default as to these changes, and there was never any intention on the part of Mr. Locke or the Chief Engineer of resorting to the original plan.

I would allow the appeal with costs, and would send the case back to the Exchequer Court for the assessment of damages in the manner set out by Mr. Justice Crocket.

LAMONT J. (dissenting).—The material facts in this appeal and the relevant clauses of the contract entered into between the appellant (hereinafter called the "Contractor"), and His Majesty the King, represented by the Minister of Public Works, are set out in the judgment of my brother Hughes.

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The contract, which was dated September 22, 1928, was for the construction of Ice Pier No. 5 at Barrington Passage, Shelburne County, N.S., according to the plans and specifications attached to the contract. The work was to be completed by September 1, 1929, and time was made of the essence of the contract.

The contract called for a crib built pier of a certain size and shape placed upon a level foundation. This foundation was to be secured by excavating the bottom to bed rock, a distance of some ten feet, by means of a dredge, clearing it off by a diver and then levelling it up with bags of cement. Clause 56 of the contract provided that it was made and entered into on the distinct understanding that the Contractor had, before execution, investigated and satisfied himself of everything and of every condition affecting the work to be executed, and the labour and material to be provided and that

> the execution of this contract by the Contractor is founded and based upon his own examination, knowledge, information and judgment, and not upon any statement, representation, or information * * * derived from any * * * tests, specifications, plans * * * furnished by His Majesty or any of His officers, employees or agents.

The tender of the Contractor contained the following:—

> (We) hereby certify that (we) have visited and examined the site of the proposed work, or have caused it to be visited and examined by a competent person on (our) behalf.

This certificate was not true. The Contractor, Boone, some years before, had gone through Barrington Passage in a boat, but the water where the pier was to be constructed was twenty-five feet deep, and he admits that he could not see the bottom. The bottom, according to a plan attached to the specifications, was shewn to consist of large and small boulders, gravel and sand, with the boulders covering the entire surface of the bottom. The contract further provided that if the Contractor should make default or delay in commencing or in diligently prosecuting the work, the Minister of Public Works, acting for His Majesty, might take the work out of the Contractor's hands and complete it himself.

On September 1, 1929, when the pier should have been completed, little work had been done beyond the building on shore of the frame work of the crib, the accumulation of materials for the construction of the pier, the blasting of a number of boulders on the bottom by a diver so that

the dredge would be able to operate, and the dredging of one hundred and twelve of the estimated nine hundred and seventy-five cubic yards. This one hundred and twelve cubic yards was dredged out on August 3, and was the only dredging which was done. In September the Minister took the work out of the Contractor's hands, and took over the materials he had on hand, and used his plant, equipment and tools for completing the work. After the work was taken out of his hands, the Contractor brought this action against His Majesty, claiming some $13,000 damages for being deprived, by the Minister, without just cause, of an opportunity to complete the contract. He alleged that if the work was delayed, the delay was due to a change in the plans made by the District Engineer, one Locke, and his refusal or neglect to give instructions to proceed with the work, according to the substituted plan, to which instructions he claimed to be entitled under the contract.

That there was an unreasonable delay on the part of the Contractor in engaging dredges to excavate the foundation is, I think, established beyond question. The evidence shews that to complete the pier would require in the neighbourhood of four months' work after the dredging had been done. Although the attention of the Contractor had been called by Locke during the fall of 1928 to the necessity of arranging for the dredge to start work early in May, 1929, the Contractor did not get his first dredge on the job until July 2. This dredge—the *Gregory* —did not attempt to do any excavating. When it arrived it found the current so strong that the crew were afraid to operate, so it turned and went away. No further attempt at dredging was made until August 2, when the *Leconsfield,* a large bucket dredge, was procured and commenced dredging. It took out one hundred and twelve yards when it quit. The reason for quiting, so far as the evidence discloses, was that the surface of the bottom was covered with large boulders which, owing to their weight and size, were doing damage to the buckets. No further attempt was made to secure a suitable dredge, but the Contractor reported to Locke, through one Allison, who was an engineer in Locke's office, that the dredging part of the contract was impossible of performance. Locke,

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being anxious to get on with the pier, said he would see if he could make a change by which something else could be substituted for the dredging. On August 13 the Contractor came to Locke's office and Locke shewed him a plan of the work with changes on it marked in red ink. The suggested changes were that the dredging should be eliminated and that a level foundation upon which the pier could rest should be secured by levelling the bottom with bags of concrete, to the top of the boulders, and placing around this a talus, constructed also of bags of concrete. The Contractor and Locke had some discussion as to the cost of the suggested changes. Locke thought that the work, according to the plan as he had altered it, would cost about $600 more than the original work; the Contractor thought it would cost about $10,000 more, and that he should be given written instructions to proceed with the suggested alterations, as it entirely changed the contract, and he asked for written instructions. Locke told him to go down and start the work and he would get his instructions. The Contractor went away but he did not start the work. On August 24, Allison, who was making a tour of inspection, called at Barrington Passage and reported to Locke in these words:—

> Mr. Boone on the work and states he is waiting final instructions under a new scheme of foundation.

On August 28, Locke telegraphed the Contractor as follows:—

> Kindly start bag concrete foundation for pier Barrington Passage Allison advises by wire to notify your representative at Barrington to this effect.

On the following day the Contractor wrote to Locke as follows:—

> I received your wire yesterday *re* proposed changes in foundation. While I am willing and most anxious to do the work just as you wish it done, I wish to point out that in my opinion this change calls for work quite outside the provisions of the contract.
>
> By the terms of the contract it is provided that the footing of the crib must be excavated by means of a dredge to the rock. We had the largest and most powerful dredge available undertake to do this excavation, and it was found impossible to excavate because the material was such that a dredge could not remove it.
>
> The change now proposed is to meet the situation arising from the impossibility of using a dredge. I claim that this makes an entire change and a modification of the contract as to price and as to time for completion of the work should be made with us as a result.
>
> We have also been put to large expense in connection with the attempt made to operate the dredge which under the circumstances ought to be paid by the Department.

As already requested I would like to have the instructions concerning the proposed changes made in writing before commencing the work.

On September 11, the Chief Engineer, as required by the contract, gave the Contractor six days' notice to put an end to his default and delay and to make satisfactory progress, within that time, otherwise the work would be taken out of his hands. Nothing was done, so the Minister took the work away from the Contractor.

The position taken by the Contractor was that the alterations made an entire change in the character of the work to be done, and that the alterations should all be considered as work outside of the contract. The object of this is, I think, apparent: The Contractor, in his letter of August 29, said that he had been put to a large expense in connection with the attempt to operate the dredges for which he desired the Department to pay. He would only be entitled to this if the necessity for the alterations could be attributed to the fault of the Department. This he attempted to prove by claiming that the work as called for in the specifications was impossible of performance. In my opinion the Contractor is not entitled to succeed on that footing: first, because the Department has sufficiently protected His Majesty from an action of this nature by clause 56, above referred to, and clause 45, which negatives all implied covenants or agreements; and, secondly, because it is not established that the dredging was impossible of performance. The *Leconsfield* was able to take out one hundred and twelve cubic yards because a diver had been sent down to blast out a number of boulders so that the dredge could take hold. From the evidence I am satisfied that the rest of the surface could have been dealt with in the same way. No doubt blasting the surface with dynamite would have been expensive, but the Contractor had agreed to do the dredging. Furthermore there is evidence that this dredging could have been done by means of a dipper dredge.

The position taken by the Contractor raises the very important question of Locke's authority to alter the nature of the work to be done. Locke, as I gather from his evidence and communications, held the view that, as all the work was being paid for at unit prices, the alterations suggested were matters of detail and came within what

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was described as "small things necessary to secure good work," which he had authority to make without referring the matter to the Chief Engineer, and did not come within the clause requiring written instructions to be given. The trial judge, however, held that the alterations made by Locke were decided variations in the plans and not something of a mere trifling nature, and with that view I agree.

The contract provides that the Engineer may, in writing, order any additional work not covered by the contract to be performed by the Contractor, but it also provides that, as a condition precedent to being paid for such extra work, the Contractor must obtain and produce the order of the Engineer in writing and shew that the work ordered had been done.

In the contract "Engineer" is defined as meaning the "Chief Engineer" for the time being having control over the work, and extends to and includes any of the officers or employees of the Department of Public Works acting under the instructions of the Chief Engineer, but all instructions, or directions, or certificates given, or decisions made by anyone acting for the Chief Engineer, shall be subject to the approval of the Chief Engineer. In the specifications which were made a part of the contract, clause 37, in part, reads:—

> 37. POWER OF THE DISTRICT ENGINEER.—The District Engineer will have no power to order extra work or changes which will entail an increase or decrease in cost without referring the matter to the Chief Engineer, and being authorized by him to order such changes. The Contractor will have no claims for compensation if such changes, though ordered by the District Engineer, have not been authorized, in writing, by the Chief Engineer. * * *

Under those provisions the onus, in my opinion, was upon the Contractor to establish that, notwithstanding clause 37, Locke had express instructions to make the alterations which he in fact did make, or that the Chief Engineer had approved of the same. This onus the Contractor did not discharge. So far as the evidence discloses, the Chief Engineer had no knowledge that any alterations had been made or suggested until after the date on which the contract was to be completed, nor did he authorize the same. The Contractor, whose duty it was to obtain and produce an order, in writing, from the Chief Engineer, did not communicate with him at all in respect of the same, until after he received the Engineer's

notice, which lends some plausibility to the opinion expressed by Locke, in his testimony, that the Contractor found himself with a disadvantageous contract on his hands and was looking for a way to get rid of it. Locke, in my opinion, went beyond his authority when he so materially altered the character of the work to be done, and the Contractor, with his contract before him, must be held to have known of his want of authority to make the alterations, or to give written instructions, without which the Contractor would not proceed. The trouble in this case arises by reason of the failure of the Contractor to examine the bottom for himself, as he certified he had done. He should have known, before he put in his tender, whether or not the current was too strong for the small dredge he first employed, and he also should have known whether a bucket dredge was sufficient to remove the boulders which were indicated as being on the surface of the bed. As I see it, the real question in this appeal is, whether His Majesty can be mulcted in damages for alterations made by an official who had no authority to make them? The answer to this question must be in the negative.

The appeal should be dismissed with costs, and the judgment of the Exchequer Court affirmed, but with the variation suggested by my brother Hughes.

HUGHES J. (dissenting).—This is an appeal by the suppliant from a judgment of the learned President of the Exchequer Court of Canada dated the 6th day of December, 1932, whereby it was held that the suppliant was not entitled to the relief sought in a Petition of Right, in which the suppliant claimed damages from the Crown in respect of a contract for the construction of an ice pier at Barrington Passage, Nova Scotia. The contract provided for the completion of the work on or before September 1, 1929. On September 25, 1929, the Crown notified the contractor that it had been decided to take over the work in pursuance of clause 19 of the contract, and this was done.

The following contentions were presented to this Court by the appellant:—

1. That there was no default on the part of the contractors.

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2. That there was no order of the Minister of Public Works declaring the forfeiture.

3. That there was no justification for the forfeiture of the appellant's contract, goods and deposit.

4. That the respondent did not apply the appellant's goods and use the appellant's plant to complete the works mentioned in the contract, but for a new work substituted for the work called for under the contract and for other purposes.

The contract was between the appellant and one Alexander R. Voye, of the first part, and His Majesty the King, represented by the Minister of Public Works, of the second part, and was dated the 22nd day of September, 1928. Attached to the contract and made a part of it were specifications and a plan.

Borings, at and about the site of the pier proposed in the contract, had been made by the Department of Public Works in the year 1923. The plan attached to the contract was not lacking in information as to borings or the condition of the bottom, as it shewed a section on the line of the proposed ice piers, details of borings and materials above the surface of the rock, including information that large and small boulders covered the bottom. The contractors had examined the plan before tendering and had seen the references to the borings and to the condition of the bottom. They had also examined the specifications. The contractors, in their tender of August 25, 1928, certified that they had seen and examined the site of the proposed work or had caused it to be visited and examined by a competent person on their behalf, although, as a fact, they had not examined it or had it examined. The appellant had merely seen the site some time previously.

The contractors tendered for the total price of $18,190 as per the following unit prices:—

| | |
|---|---|
| Dredging, 975 c.y. at $3..... | $ 2,925 |
| Bag concrete, 66 c.y. at $24..... | 1,584 |
| Crib work, 14,500 c.f. at ·65..... | 9,425 |
| Concrete top, 133 c.y. at $32..... | 4,256 |
| | $18,190 |

On August 30, 1928, an Order in Council was passed accepting the above tender but the contract was not signed until September 22, 1928.

The crib was to be constructed of creosoted hardwood timber. Even before the contract was signed the District Engineer at Halifax, Thomas J. Locke, was asking the appellant about the timber and told the appellant that he, Thomas J. Locke, would like to get it to Barrington Passage that fall. The appellant told the District Engineer that it was impossible to get the timber to the creosoting plant for treatment that fall. The District Engineer thought the timber could be procured, and, as the appellant put it, was harping to get the timber down. The appellant testified, however, that he could not get the timber that fall, although he tried to do so. The contractors finally procured the timber and framed it and sent it to the creosoting plant about April 1, 1929. The appellant testified that there it had to be piled and stacked for seasoning purposes for at least four months before creosoting could be properly done. It must, therefore, have been fairly clear to the appellant before the contract was signed that the contractors could scarcely complete the work on or before September 1, 1929. On May 7, 1929, the District Engineer and the appellant had a conference and, on May 8, 1929, the District Engineer wrote the appellant that he would have the timber creosoted at the earliest possible moment, and emphasized the importance of procuring a suitable dredge for the purpose of having the foundation excavated and work commenced by June 1, 1929. As a result the timber had six weeks' treatment and was then delivered to Barrington Passage. The contractors then began to build the crib and ran it up ten courses, which was as high as it could usefully be built on land.

On May 27, 1929, the contractors entered into an agreement in writing whereby they hired the dredge *J. A. Gregory,* two dump scows and a steam tug to do the dredging. This dredge was a $1\frac{1}{2}$ yards, orange peel, bucket dredge. It proceeded to Barrington Passage and pulled over the site on July 3, 1929, but could do nothing because of the swift running of the tides and gave up. The contractors then procured the dredge *Leconsfield* which arrived at Barrington Passage on July 27, 1929. The *Leconsfield*

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was a powerful dredge but it also was a bucket dredge, which, according to the appellant, was the only kind procurable. This dredge took out 68 yards of material and then the superintendent gave up as the buckets were being torn to pieces.

The appellant, on August 3, 1929, went to Halifax and saw the District Engineer. The appellant testified that they looked over the plans and the District Engineer said that he would make changes.

It is important at this stage to mention some of the provisions of the specifications and contract.

"Engineer" is defined in the specifications as the Chief Engineer of the Department of Public Works of Canada.

Clauses 14 and 15 of the General Conditions are as follows:—

14. ALTERATIONS.—The Engineer shall have the power and right to make from time to time and at any time, additions to or deductions from the dimensions shown on the drawings or specified herein and to add to, omit, change, modify, cancel or alter the works and materials herein specified, or shown on the drawings, without rendering void or in any way vitiating the contract. The value or cost of such additions, deductions, omissions, modifications, or alterations, shall be determined in accordance with the rates or prices stated in the tender which prices are assumed, and will be taken to cover the cost of materials and workmanship measured in the works, or as specified herein, and to include the cost and expense of all plant, labour, machinery, tools, temporary works, cartages, freight, patterns, moulds, superintendence and profit; but the Contractor is not to make any change or alteration in the works or in the dimensions and character of the materials to be used without the consent and permission, in writing, of the Engineer. In case such permission is not obtained, unless the Contractor can show good and sufficient reason for his action, payment for such works will be refused.

15. MEANING OF TERMS, ETC.—Alterations, deductions, omissions, modifications or deviation are to be understood as applying to decided variations in the plans or designs, such as a decrease in width, an increase in depth, the substitution of one class of material for another, the addition of works neither shown nor described, etc., and for these or similar matters alone, will any sum be allowed to the Contractor or deducted from the contract, and then only upon the written orders of the Engineer. All other alterations, etc., consequent upon a better disposal of materials an improved mode of construction adopted, repairs required, and such like, as long as the costliness of the materials, workmanship, etc., are of a trifling nature, which shall be judged of by the Engineer, shall be deemed to be included in the contract, and for such no extra sum or amount will, under any consideration be allowed to the Contractor.

Clause 32 of the General Conditions is as follows:—

32. CLAIMS.—No claims for extras will be entertained by the Department on account of unforeseen difficulties in the carrying out of the works herein specified.

Clause 37 of the General Conditions is as follows:—

37. POWER OF THE DISTRICT ENGINEER.—The District Engineer will have no power to order extra work or changes which will entail an increase or decrease in cost without referring the matter to the Chief Engineer, and being authorized by him to order such changes. The Contractor will have no claims for compensation if such changes, though ordered by the District Engineer, have not been authorized, in writing, by the Chief Engineer. The District Engineer will see that the work is carried out exactly in accordance with the plans and specification, and in matters of detail, or small changes necessary to secure good work, where the question of extra cost cannot come into consideration, he must use his best judgment in the interpretation of the specification, and must conduct the work and carry out the plans with the idea that the best results are to be obtained and the Contractor must abide by the decision.

He shall give clear and detailed instructions in writing to all Inspectors, who will have no power to allow or make any changes in the work.

It will not be his duty to take the responsibility of advising the Contractor as to the way or best method of conducting his operations, and the Contractor must have his own Engineer in this connection. However, if in his opinion, the methods employed by the Contractor are such that the progress of the work is not satisfactory, or that they may lead to bad results, it will be his duty to warn the Contractor to change these methods, and force him to take such steps as will ensure the completion of the works in strict accordance with the plans and specification.

The provision of the contract defining "Engineer" and his duties is as follows:—

"Engineer" shall mean the Chief Engineer or Chief Architect, as the case may be, of the Department of Public Works of Canada, for the time being having control over the work, and shall extend to and include any of the officers or employees of the Department of Public Works, acting under the instructions of the Chief Engineer or Chief Architect, and all instructions or directions, or certificates given, or decisions made by any one acting for the Chief Engineer or Chief Architect, shall be subject to the approval of the Chief Engineer, or the Chief Architect, and may be cancelled, altered, modified and changed as to the Chief Engineer or Chief Architect may see fit: Provided always and it is hereby understood and agreed that any act on the part of the Chief Engineer or the Chief Architect in connection with and in virtue of the present contract, and any instructions or directions or certificates given, or decisions made by the said Chief Engineer or the Chief Architect, or by any one acting for such Chief Engineer or the Chief Architect shall be subject to the approval of or modification or cancellation by the Minister of Public Works of Canada.

Clause 7 of the contract is as follows:—

7. The Engineer may, in writing, at any time before the final acceptance of the works, order any additional work, or materials or things, not covered by the contract, to be done or provided, or the whole or any portion of the works to be dispensed with, or any changes to be made which he may deem expedient, in, or in respect of the works hereby contracted for, or the plans, dimensions, character, quantity, quality, description, location or position of the works, or any portion or portions thereof, or in any materials or things connected therewith, or used or intended

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to be used therein, or in any other thing connected therewith, or used or intended to be used therein, or in any other thing connected with the works, whether or not the effect of such orders is to increase or diminish the work to be done or the materials or things to be provided or the cost of doing or providing the same; and the Engineer may, in such order, or from time to time as he may see fit, specify the time or times within which each order shall, in whole or in part, be complied with. The Contractor shall comply with every such order of the Engineer. The decision of the Engineer as to whether the compliance with such order increases or diminishes the work to be done or the materials or things to be provided, or the cost of doing or providing the same, and as to the amount to be paid or deducted, as the case may be, in respect thereof, shall be final. As a condition precedent to the right of the Contractor to payment in respect of any such order of the Engineer, the Contractor shall obtain and produce the order, in writing, of the Engineer, and a certificate, in writing, of the Engineer, showing compliance with such order and fixing the amount to be paid or deducted in respect thereof.

The appellant saw the District Engineer on August 13, 1929, and received from the latter a copy of the plan with proposed amendments shewn in red ink. By these amendments it was proposed to eliminate the dredging, to take ten feet off the height of the timber portion of the crib, to level off the bottom with concrete and to build a talus of concrete. The appellant said that he asked for instructions in writing and for an extension in time, and he testified at the trial that the District Engineer said the instructions would follow. At the trial before the learned President the District Engineer, Thomas J. Locke, testified that on August 13, 1929, he did tell the appellant that he was substituting a change in the plan, which would involve a number of extras. He estimated a net difference of $600 in favour of the contractors, made up of the excess of extras over deductions.

The contractors, however, claimed that there was an entire change, and asked for a modification of the contract as to price and time for completion. On August 28, 1929, the District Engineer sent to the appellant a telegram reading as follows:—

> Kindly start bag concrete foundation for pier Barrington Passage. Allison advises by wire to notify your representative at Barrington to this effect.
>
> T. J. LOCKE.

Written instructions, however, were not forthcoming from the Chief Engineer and thus the date for completion came and went with matters in a deadlock. This was most unfortunate for the contractors.

I agree with the finding of the learned President that the District Engineer could not alter the contract and that, in the absence of written instructions from the Chief Engineer, the contract remained to be executed according to the original contract, plan and specifications; that the alterations proposed were such as could be authorized only by the Chief Engineer, and, as he did not authorize them in writing, they were as ineffective as if they had never been proposed at all, and, as a consequence, the contract, plan and specifications remained as they were.

It must have been clear to the contractors that the power of the District Engineer was restricted by General Condition 37 and that the District Engineer had no power to order extra work or changes which would entail an increase or decrease in cost without authorization in writing by the Chief Engineer. Nor was the difficulty in dredging any answer to the contention of the respondent that there was default on September 1, 1929. The appellant was not misled in any way by the respondent before he undertook the work. Clause 32 of the General Conditions was clear. Even if the dredging was difficult or impossible without blasting, the contractors would not be excused.

In *Thorn* v. *The Mayor and Commonalty of London* (1), Lord Chelmsford said:—

> [The builder] before he made his tender, ought to have informed himself of all the particulars connected with the work, and especially as to the practicability of executing every part of the work contained in the specification.

See also *Connolly* v. *The City of Saint John* (2). It must be held, therefore, that there was default on September 1, 1929, and that the first contention of the appellant fails.

It is convenient now to set out clauses 19 and 20 of the contract:—

> 19. In case the Contractor shall make default or delay in commencing, or in diligently executing any of the works or portions thereof to be performed, or that may be ordered under this contract, to the satisfaction of the Engineer, the Engineer may give a general notice to the Contractor requiring him to put an end to such default or delay, and should such default or delay continue for six days after such notice shall have been given by the Engineer to the Contractor, or should the Contractor make default in the completion of the works, or any portion thereof, within the time limited with respect thereto in or under this contract, or should the Contractor become insolvent, or abandon the work, or

(1) (1876) 1 App. Cas. 120, at 132.

(2) (1904) 35 Can. S.C.R. 186.

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make an assignment of this contract without the consent required, or otherwise fail to observe and perform any of the provisions of this contract, then and in any of such cases, the Minister, for and on behalf of His Majesty, and without any further authorization, may take all the work out of the Contractor's hands and may employ such means as he, on His Majesty's behalf, may see fit to complete the works, and in such case the Contractor shall have no claim for any further payment in respect of work performed, but shall be chargeable with, and shall remain liable for all loss and damage which may be suffered by His Majesty by reason of such default or delay, or the non-completion by the Contractor of the works, and no objection or claim shall be raised or made by the Contractor by reason, or on account of the ultimate cost of the works so taken over, for any reason proving greater than, in the opinion of the Contractor, it should have been; and all materials, articles and things whatsoever, and all horses, machinery, tools, plant and equipment, and all rights, proprietary or otherwise, licences, powers, and privileges, whether relating to or affecting real estate or personal property, acquired, possessed or provided by the Contractor for the purposes of the work, or by the Engineer under the provisions of this contract shall remain and be the property of His Majesty for all purposes incidental to the completion of the works, and may be used, exercised and enjoyed by His Majesty as fully to all intents and purposes connected with the works as they might therefor have been used, exercised and enjoyed by the Contractor; and the Minister may also, at his option, on behalf of His Majesty, sell or otherwise dispose of, at forced sale prices, or at public auction or private sale, or otherwise, the whole or any portion or number of such materials, articles, things, horses, machinery, tools, plant and equipment at such price or prices as he may see fit, and detain the proceeds of any such sale or disposition and all other amounts then or thereafter due by His Majesty to the Contractor on account of, or in part satisfaction of any loss or damage which His Majesty may sustain or have sustained by reason aforesaid.

20. Whenever in this contract power or authority is given to His Majesty, the Minister, the Engineer or any person on behalf of His Majesty, to take any action consequent upon the insolvency of the Contractor or upon the acts, defaults, neglects, delays, breaches, non-observance or non-performance by the Contractor in respect of the works or any portion or details thereof, such powers or authorities may be exercised from time to time, and not only in the event of the happening of such contingencies before the time limited in this contract for the completion of the works, but also in the event of the same happening after the time so limited in the case of the Contractor being permitted to further proceed with the execution of the works.

Provided always that after the expiration of the time limited for the completion of the works the Minister shall be sole judge as to what additional time, if any, may be allowed to the Contractor for such completion, and is decision as to the reasonableness or sufficiency thereof for the purpose of completion shall be final and binding upon the Contractor.

On September 11, 1929, the Engineer notified the Contractor in writing that if within six days satisfactory progress was not made, the work would be taken over and completed in pursuance of clause 19 of the contract.

On September 25, 1929, as apparently the Contractors had not complied with that notice, the Engineer wrote them and advised them that it had been decided to take over the work, and that the materials, tools and equipment would thenceforth be the property of the Department of Public Works.

At this time Alexander R. Voye wrote the appellant an informal letter of withdrawal from their partnership.

The respondent then went ahead and constructed a pier at a cost very considerably in excess of the contract price above mentioned.

As the Minister was empowered by clause 19, for and on behalf of His Majesty, to take the works out of the Contractor's hands with the consequent forfeiture provided in that clause, it must be assumed that the forfeiture was the act of the Minister. Moreover the Minister resisted the claim of the suppliant in the Exchequer Court of Canada and in this Court. It must, therefore, be held that the second contention of the appellant fails.

The forfeiture of the contract and goods have just been discussed in connection with clause 19. As there was default on the part of the Contractors, it must be held that the deposit was forfeited under clause 54 of the contract, and the third contention of the appellant, therefore, fails.

The appellant lastly contended that the respondent did not apply the appellant's goods, and use the appellant's plant to complete the works mentioned in the contract, but for a new work substituted for the work called for under the contract, and for other purposes.

It may be true that the respondent did not complete the pier strictly in accordance with the original contract, plan and specifications. But the respondent did build a pier at the place designated on the plan, and the General Conditions and contract provided for very wide latitude in changing the original plan and specifications. See clauses 14 and 15 of the General Conditions, and clauses 7, 8 and 9 of the contract. Clause 8 of the contract is particularly in point. It reads as follows:

> All the clauses of this contract shall apply to any changes, additions, deviations, or additional work, so ordered by the Engineer, in like manner, and to the same extent as to the works contracted for.

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J. K. McKay, a civil engineer, testified before the learned President that the respondent took over the crib which the appellant had worked upon and launched it upon the proposed site, and built upon it. There is, moreover, no evidence in the record that the respondent refused to return to the appellant, before the Petition of Right was launched, any of the appellant's goods or any of the appellant's plant not used up by the respondent, in accordance with the provisions of the contract. *Clayton* v. *Le Roy* (1). Moreover, the appellant has not before this Court his partner, or former partner, Alexander R. Voye. The learned President gave leave to the appellant to join Alexander R. Voye, if possible, but the appellant has not taken advantage of that leave. Under the circumstances, however, this judgment will be without prejudice to any proceedings in proper form which the appellant may, if so advised, subsequently take against the respondent for the return of, or damages in respect of, any goods, tools or plant not used up by the respondent in accordance with the contract and improperly withheld.

With this variation the appeal should be dismissed with costs.

*Appeal allowed with costs.*

Solicitor for the appellant: *P. J. Hughes.*

Solicitor for the respondent: *H. A. Carr.*