JAMES MURRAY AND MERRITT A. CLEVELAND..... .... } CLAIMANTS; 1895 Nov. 23.

AND

HER MAJESTY THE QUEEN .....DEFENDANT.

Contract for construction of canal works—Progress estimates—Certificate of engineer—Condition precedent to right to recover—Position of court in regard to revising same—Refusal to give certificate.

By their contract with the Crown for the construction of certain works on the Galops Canal the claimants agreed, *inter alia*, that cash payments, equal to 90 per cent of the work done, approximately made up from returns of progress measurements and computed at contract prices, should be made to them monthly on the written certificate of the engineer, stating that the work so certified by him had been executed to his satisfaction and amounted to a sum computed as above mentioned. This certificate was to be approved by the Minister of Railways and Canals, and to constitute "a condition precedent to the right of the contractors to be paid the said 90 per cent or any part thereof." It was further agreed that the remaining 10 per cent "should be retained until the final completion of the whole work to the satisfaction of the chief engineer for the time being having control over the work, and that within two months after such completion, the remaining 10 per cent would be paid." It was also agreed that the written certificate of the engineer certifying to the final completion of said works to his satisfaction should be a condition precedent to the right of the contractors to be paid the remaining 10 per cent or any part thereof.

Held, that as the parties had agreed to be bound by the judgment of the engineer, the court had no power to alter or correct any certificate given by him in pursuance of the terms of the contract.

2. That in the absence of fraud on the part of the engineer in declining to give a certificate for a claim put forward by the contractors, the court will not review his decision.

THIS matter came before the Exchequer Court upon a reference from the Department of Railways and Canals of Canada, under the provisions of section 23

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of *The Exchequer Court Act*, 50 and 51 Vict. Cap. 16. No pleading were filed on either side, the case being heard and the evidence taken upon the reference.

The claimants alleged that the sum of $8,907.30 was due to them upon a contract, dated the 14th November, 1888, for the enlargement and deepening of the upper or western end of the Galops Canal on the St. Lawrence River and the construction of the necessary locks, weirs and other works to effect that object.

At the time the alleged claim arose the work under contract had proceeded for several years, and the contractors had received and been paid a large sum on progress estimates, from time to time, as the work progressed.

The claimants complained that by the progress estimate of the 26th September, 1893, which covered the work done and material delivered on the contract up to the 31st August, 1893, the Chief Engineer of the Department of Railways and Canals had undertaken to re-classify some of the work which had appeared in the former progress estimate of March, 1893: that by this re-classification the total amount certified for payment was $9,897.00 less than it should be, and that the said sum less ten per cent drawback, reducing it to $8,907.30, should have been paid them on the September estimate, in addition to the amount they then received.

The particular work in question with respect to which the re-classification had been made, came under item No. 6 of the schedule in the contract, which read as follows:—

"Earth excavation—Over water-line for the widen-
"ing of canal on the north side, from a point 100 feet
"east of present guard-lock to end of section, includ-
"ing all kind of material (solid rock and boulders con-
"taining one-fourth of a cubic yard excepted), hauling

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"the same across canal and for a distance of 700 feet to "3,600 feet to form a dam on Round Bay shoal to in- "close space for lock.....per cubic yard 50 cents."

The specifications showed that a lock and dam were to be constructed. The earth material for the making of the dam was to be procured from a point on the side of the river opposite to the site of the dam, which point was called "McLaughlin's Hill." The quantity of material in this hill proved to be insufficient by some 39,588 cubic yards for the completion of the work. For the hauling and placing of material from the place named and depositing in the dam, the contractors were entitled under item No. 6, to be paid 50 cents per cubic yard of the schedule of prices. The deficiency was made up with the approval of the engineer in charge of the works, by using the material taken from the lock-pit to complete the work of the dam. The lock-pit was immediately adjacent to the dam and by the 8th item of the said schedule, the material from the lock-pit was to be carried a distance of 1,500 feet and deposited in Round Bay, and for so hauling and depositing such material, the contractors were to be paid 60 cents per cubic yard.

The material was not returned in the monthly estimates, from time to time, at fifty cents a cubic yard for the taking of it over and putting it into the dam, the resident engineer saying that he had no formal instructions from Mr. Page, the then Chief Engineer, to return it under any particular item of the schedule so far as the work of taking it over and putting it into the dam was concerned. The claimants had then already been paid for the excavation of it under items 8 and 13 of the schedule.

Mr. Page died in July, 1890, and no material had up to that time been so included in the estimates. In September, 1890, on the contractors further urging

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that it be included in the monthly estimates, the resident engineer, Mr. Haycock, as directed by the then Chief Engineer, the late Mr. Trudeau, with the approval of the then Minister of Railways and Canals, the late Right Hon. Sir John A. Macdonald, returned it, one-half in the October estimate and one-half in the November estimate for 1890, under item 6 of the schedule of prices, that is to say fifty cents a cubic yard, the same as the material taken from McLaughlin's Point.

These estimates were duly signed by the Chief Engineer and approved of by the Minister and paid over to the claimants, and from month to month thereafter until March, 1893, the works progressed and estimates were duly issued and paid.

In December, 1892, Mr. Trudeau ceased to be chief engineer, and was succeeded by Mr. Schreiber, who certified the monthly estimates for December, 1892, and February, 1893, there being none for January. After February, 1893, Mr. Schreiber caused an examination and re-measurement of the works to be made; and in consequence, although the works were being still prosecuted, no estimate was issued after February until September, 1893, the one numbered 45, which takes the place of estimates 43, 44 and 45.

By the examination and re-measurement referred to, Mr. Schreiber, having ascertained that the claimants had been paid for the excavating of the 39,588 cubic yards according to the prices partly of item 8 and partly of item 13 of the schedule, and also at fifty cents a cubic yard for carrying it over and putting it into the dam, formed the opinion that they should not have been paid for it under both these classifications, and reported that the fifty cents a cubic yard should be taken back from them as having been improperly paid. The result of this re-classification was that the

progress estimate of September, 1893, certified the total value of work performed and materials furnished by the contractors under their contract up to the 31st August, 1893, at the sum of $722,592.53, instead of, as the contractors claimed it should have been, the sum of $732,489.53. The difference between these sums with the ten per cent drawback deducted, is the sum of $8,907.30, the amount of the claim.

The case came on for hearing on the 14th December, 1894, before the Judge of the Exchequer Court, who, on the same day, gave judgment declaring the claimants to be entitled to the amount of their claim and costs, leave being reserved to the defendant to move to set aside the judgment upon matters of law.

On the 29th March, 1895, the defendant moved to set aside the judgment, pursuant to leave.

W. D. Hogg, Q.C., in suppport of motion :—

This action, being brought on a progress estimate, will not lie. (*Emden on Building Contracts*, p. 121; *Hudson on Building Contracts*, pp. 272, 273. *Tharsis Sulphur Co.* v. *McElroy*) (1).

2ndly. Even if my first point were refuted, claimants have no right of action because the certificate upon which they rely is not made within the requirements of the contract; and it did not have the approval of the Minister of Railways and Canals.

3rdly. The Chief Engineer had no right to deviate from the contract, and it is only upon a deviation that the claimants could have a *locus standi* here.

D'Alton McCarthy, Q.C., (with whom was *A. Ferguson*, Q.C.) *contra.*

The Crown has not paid the full amount of the value of the work done between the end of the period covered by estimate No. 42, and the end of that covered by estimate No. 45, as certified to in the latter.

(1) 3 App. Cas. 1040.

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The balance is the equivalent of the amount in question, and is not paid because Mr. Schreiber assumed a right, which he had not, of revising the estimates for October and November, 1890, and of reducing the price previously paid for putting into the dam the 39,588 cubic yards of material in question, and of trying to force the claimants to pay back the difference between what they had been paid for this item and what he allowed for it in estimate No. 45.

There is no authority under the contract for the successor of the Chief Engineer to revise the progress estimates of his predecessor; and, even if the price of fifty cents a yard was not regularly fixed and determined, and even if the order to do the work was not regularly given under the contract, these objections cannot now be raised, as they have by the payment of the estimates been waived.

The work for which payment is now claimed is in reality part of the work done subsequent to February, 1893, and it has been certified to in estimate No. 45.

If the Chief Engineer has given a certificate once that the work claimed for has been done, and that it is worth so much at contract prices, that is all that is necessary. The contractor cannot be refused payment because the certificate is not in a certain form.

Each progress estimate ought, according to clause 25 of the contract, to show only the work done in the previous month; not for the whole period from the beginning of the work. If this mode had been adopted by the Department instead of the present one of including all the work over again in each month, the claimants' contention would be perfectly clear on the face of estimate No. 45.

Then who is to settle this question as to the price of the material? To determine whether it should be 25, 40, or 60 cents? I say that the authority to determine

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that fact must be found within the four corners of this contract. My contention is that it was quite within the competency of the engineer to make the arrangement he did with the contractors. The work that had to be done was the making of this dump. What was done was not new work not contemplated by the contract, and no new written order was required for it. What was done was merely a change made in order to make the work for which the contract was entered into, less expensive. What the engineer did he was clearly empowered to do under the provisions of the contract.

Clause 8 of the contract gives the right of deciding upon the price of the work to the engineer in charge, and it says that his decision shall be final. Now the engineer determined that this work had to be paid for under item 6 of the contract. If that be so, and it is so, how does the argument of my learned friend apply? Counsel for the Crown says that this is an alteration of the contract under clause 5. And he further contends that there should be an authority in writing for the work done before the claimants can maintain this action, although they have done the work. Now it is clear that in contracts of this class, of a class which provide that no claim should be made for additional work done without the written order of some person in authority—and they are usually building contracts —a written certificate of the work done made after the work is completed, is of itself sufficient, and bars the employer from denying the sufficiency of his servant's, that is the engineer's, authority. [He cites *Goodyear* v. *Weymouth* (1); *Connor and Olley* v. *Belfast Water Commissioners* (2); *Harvey* v. *Lawrence* (3).] Now it is true that all these cases are upon final certificates, there are

(1) 35 L. J. C. P. 12. (2) 5 L. R. (Ir.) C. L. 55.
(3) 15 L. T. N. S. 571.

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no cases in regard to progress estimates upon this point. But there is nothing in the facts of the case before your Lordship to exclude the principles of law as laid down in the cases I have cited. The case of *Tharsis Sulphur Co., etc.* v. *McElroy* (*ubi sup.*), does not apply to the facts of this case. In that case there was a positive expression of intention that nothing would be due until the work was done, but that advances might be made under the terms set out in the contract. Now in the case before your Lordship, we agree to do the work, and Her Majesty agrees to pay us advances on progress estimates. That is, we are to be paid in the manner set out in the contract at length. [He cites *Pickering* v. *Ilfracombe Ry. Co.* (1); also in *Hudson on Building Contracts* (2).]

Counsel for the Crown's next point was that no action would lie on this certificate because it was not approved by the Minister, but he loses sight of the fact that the money has been paid. I maintain that an action properly lies upon the certificate, and that inasmuch as the certificate has been acted upon by the parties it was not competent for the engineer, Mr. Collingwood Schreiber, to correct it. The certificate having had the approval of Mr. Trudeau, it was not open to Mr. Schreiber to correct it. [He cites *Freeman* v. *Jeffries* (3).] All the evidence points to the fact that there is no mistake in the certificate, and it could not be corrected on that ground. The certificate we are entitled to is the certificate of the engineer for the time being, and his successor cannot correct it. The work has been done and has been certified to in accordance with the law and the contract, and therefore we are entitled to recover. [He cites *Goodyear* v. *Weymouth* (4); *Harvey* v. *Lawrence* (5).]

(1) L. R. 3 C. P. 235.
(2) P. 276.
(3) L. R. 4 Ex. 189.
(4) 35 L. J. C. P. 12.
(5) 15 L. T. N. S. 71.

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THE JUDGE OF THE EXCHEQUER COURT now (November 23rd, 1895,) delivered judgment.

The claimants' demand to be paid the sum of $8,907.30, in controversy in this case, is, I think, on the merits of that controversy, a just one. But the Crown says, among other defences to which it will not be necessary to refer, that for this sum the claimants have not procured, as required by the contract on which the action is founded, the certificate of the engineer and the approval of such certificate by the Minister of Railways and Canals, and that for that reason the judgment for the claimants entered in this case should be set aside. That contention must, it seems to me, prevail.

For the claimants it is argued that the progress estimate or certificate of 26th September, 1893, is sufficient to sustain the action. That is a certificate that the total value of work performed and materials furnished by the claimants under their contract up to the 31st August, 1893, was $722,592.53, the drawback to be retained $72,252.53, and the net amount then due $650,340.00, less previous payments. The latter sum has been paid in full; there is no dispute about that. But what happened to give rise to the present controversy was this: In the progress estimate next preceding that of the 26th of September, 1893, that is in the certificate of March, 1893, the engineer had returned the total amount of work done under item 6 of the description of work given in the 24th clause of the contract at 160,810 cubic yards at 50 cents per cubic yard. In the progress estimate of the 26th of September certain reductions and a re-classification of the work done were made; and, among others not now in question, the total work under such item 6 was reduced by 39,588 cubic yards, which were elsewhere, under the re-classification, returned at 25 cents per cubic yard. The result was to reduce the total amount that but for

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such re-classification would have been certified for, by 25 cents a cubic yard on 39,588 yards, or by a sum of $9,897.00, from which, deducting the ten per cent. for drawback, we get the $8,907.30 now in question. Between these two progress estimates the new work described in item 6, referred to, amounted to only 1,209 cubic yards. If it had happened that such new work had amounted to 39,588 cubic yards, or more, it would have been obvious of course that the effect of what the engineer did was to prevent the claimants from getting for such 39,588 cubic yards of new work the price prescribed in item 6 and to give a lesser price under another classification. But because the work of the description mentioned in such item 6, done between the dates of the two progress estimates referred to, was less than 39,588 cubic yards the immediate result was that part, and as it happened the larger part, of the reduction occasioned by the re-classification of that quantity went to reduce the amount which the claimants were entitled to for other work about which there was no dispute and for which the engineer was certifying. For that reason it is argued that the court should treat the progress estimates of September 26th as being in fact and substance a certificate for $732,489.53, with an amount of $9,897.00 deducted from or charged against it for insufficient reasons; that in that view the engineer has in fact certified for $9,897.00, on which the sum of $8,907.30, for which judgment was entered, is actually due and has not been paid. With that view I cannot agree. What appears to me to be perfectly clear and plain about these certificates or progress estimates which the engineer has given, is that I have no right or authority to alter or correct them. To do so would be to substitute my judgment and certificate for his in a case in which the parties have agreed to be bound by his judgment and his certificate. Turning to the certificate of September 26th,

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1893, I find that he certifies that the total value of the work performed and materials furnished by the claimants up to the 31st of August, 1893, was $722,592.53. That sum may be right or it may be wrong. It is undoubtedly the sum that he intended to certify for. There is no mistake about that, and I must, I think, take the certificate as I find it and for the sum therein mentioned, neither more nor less. It is conceded that of that sum the claimants have been paid all that is due to them. If the amount now in controversy had been certified for it too would no doubt have been paid. It is because the engineer has refused to give his certificate for such amount that the parties are in court at all. That is the broad fact of the case, and although I do not think his reason for refusing to certify to be a good reason, the claimants have agreed to abide by his judgment. It is conceded, as I understand the argument, that if any mistake had in fact been made in the earlier progress estimates either as to quantity of work done, or in the classification of such work, the engineer might, in the certificate of September 26th, have corrected such mistake, and the claimants would have had no cause of complaint. That is, for a good reason he might have revised the quantities or classification. But then the engineer is, in the absence of fraud or improper conduct, of which there is not the slightest suggestion in this case, the judge of whether the reason or grounds upon which he acts or refuses to act are sufficient or insufficient, and what he has done or not done is in either case equally beyond review here.

The judgment for the claimants herein will be set aside, and judgment entered for the defendant with costs.

Judgment accordingly.

Solicitor for claimants: *A. Ferguson.*

Solicitors for defendant: *O'Connor & Hogg.*