43, 1937

In the Privy Council.

No. 72 of 1936.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

BETWEEN

WILLIAM I. BISHOP LIMITED and THE BANK OF MONTREAL (Plaintiffs and Cross-Appellants before Court of King's Bench) ... ... *Appellants,*

AND

THE JAMES MACLAREN COMPANY LIMITED (Defendant and Cross-Respondent before Court of King's Bench) ... *Respondent.*

CASE FOR THE APPELLANTS.

1. This is an appeal from two majority judgments of the Court of King's Bench for the Province of Quebec (Appeal Side) dated the 27th of December, 1935, reducing the amount awarded to Appellants by the Superior Court for the District of Montcalm, from $293,585.84 with interest on $87,444.68 from the date of the institution of the action, 9th December, 1930, and on the balance, $206,061.16, from the date of the Superior Court judgment 10th June, 1934, to $1,429.60 with interest thereon from the said 9th December, 1930, and dismissing the cross-appeal taken by the Appellants with respect to the interest on the said $206,061.16. Record. Vol. 9, pp. 91 & 166. Vol. 6, p. 1258. Vol. 9, pp. 3, 166.

The dissenting judge in the Court of King's Bench, St. Germain, J., would have awarded $219,232.63 with interest thereon from the said 9th December, 1930, and would have maintained the cross-appeal to that extent. Vol. 9, p. 165.

2. The action was for the cost and value of work performed under contract by the Plaintiff, William I. Bishop Limited, for the Defendant in the years 1928, 1929 and 1930, in the construction of a storage dam known as the Cedar Rapids storage dam on the Lievre River in the County of Labelle. The Bishop Company had obtained advances to carry out the contract from the Bank of Montreal and had assigned their claim to that Bank, and both joined in praying that the amount of the condemnation be paid to the Bank. Vol. 1, p. 2. Vol. 1, p. 19, l. 1; p. 36, l. 37. Vol. 1, p. 19, l. 13.

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3. The Lievre River is a tributary of the Ottawa River, running from north to south and emptying into the latter about twenty miles below the
Vol. 1, p. 59, l. 25. city of Ottawa. The dam was to be erected at a point some sixty miles up the river at a point thirty miles distant from the Canadian Pacific Railway at Gracefield in the valley of the adjoining River Gatineau and fifty miles distant from the same railway at the town of Buckingham which is on the Lievre River some five or six miles up from its mouth. The purpose
Quebec Streams Commission's Report, 1929, p. 73. of the dam was to impound the head-waters of the Lievre River during freshet periods and control the outflow thereof to raise the minimum flow of the river from 1,200 cubic feet per second to 3,400 cubic feet per second for use at a hydro-electric power plant being erected at the same time by the Defendant a few miles lower down at a point known as High Falls.

4. The work to be performed consisted of the complete construction of a concrete storage dam about seven hundred and fifty-five feet long to a given elevation of one hundred and forty-one feet on the Engineer's datum and expected to go to a depth of about sixty feet below that elevation at its
Vol. 1, p. 3, l. 1 & p. 23, l. 10. deepest section. In point of fact, it proved necessary to go considerably deeper and the Respondent admitted and paid for work to the amount of
Vol. 9, p. 92, l. 17. $916,723.57 although the contract price based upon the original estimates was only $609,100.00.

Vol. 6, p. 1086, l. 15. **5.** The plans for the work had been prepared by an American engineer, Hardy S. Ferguson, of New York, and it was carried out under the general supervision of a resident engineer appointed by and representing Mr.
Vol. 5, p. 907, l. 10. Ferguson and engineers of the Quebec Streams Commission, to whom the works were to be turned over to operate when completed.

Vol. 6, p. 1063, l. 12. **6.** The Bishop Company tendered in writing for this work in July, 1928, and their tender was accepted on the 15th November, 1928. Operations were commenced immediately but it was not until the 23rd May, 1929, that the formal contract was signed by the parties, the delay being due to some difficulty in securing the formal approval of the plans by the Provincial Government. The form of the document had, however, been agreed upon at the outset and when it was signed there was inserted the following clause :—

Vol. 6, p. 1100, l. 45. "This contract shall avail and be binding on the parties hereto "as if signed on November 15th, 1928."

7. It was the Plaintiffs' case that the work to be done proved to be substantially different from that shown by the original plans and specification but that under the express and implied terms of the contract :—

(A) The Bishop Company was required to complete the undertaking, and

(B) was entitled to be compensated for all the work which this necessitated.

8. The contract provided for the payment of:— Record.

(A) A principal sum for the quantity of work originally estimated; Vol. 6, p. 1097, l. 3.

(B) Additions to such principal sum for quantities of units larger than those set out in the schedule of estimated quantities, according to unit prices expressed in the contract; Vol. 6, p. 1097, l. 20.

(C) The actual cost of material and labour plus 37 per cent. for overhead expenses and profits for extras certified by the engineer; Vol. 6, p. 1092, l. 1.

(D) Such sums as might be determined in an award of arbitrators if any dispute arose "as to the interpretation of the terms of this "contract as to cost of changes and extra work performed or in "regard to any other matter regarding the execution or final settle- "ment of this contract" any such award to be "final and binding on "both parties." Vol. 6, p. 1096, l. 32.

9. The following is a tabulated statement of the heads of claims asserted by the Plaintiffs and which fell to be dealt with by the Court in the same manner as if submitted to arbitrators, and of the disposal thereof made by the Trial Court:—

		Amount Claimed.	Allowed by the Trial Court.	
Item No.	1. Hardpan Excavation	$21,601.45	$13,919.45	Vol. 6, p. 1258.
,, ,,	2. Handling of Defendant's logs...	4,103.72	2,995.42	Vol. 9, p.92, l.24.
,, ,,	3. Increased costs of Cofferdams and Unwatering	148,857.15	117,075.22	
,, ,,	4. Cofferdam, lower end Bypass ...	5,563.50	000.00	
,, ,,	5. Additional cost of rock excavation	35,100.74	35,100.74	
,, ,,	6. Handling and trimming rock excavation	1,990.82	000.00	
,, ,,	7. Excavating frozen materials in river bed	2,530.32	2,530.32	
,, ,,	8. Work under winter conditions...	96,832.45	81,282.62	
,, ,,	9. Overcharge on logs	7,220.19	1,429.60	
,, ,,	10. Cement for apron in bypass channel...	2,239.46	1,879.83	
,, ,,	11. Shortage on payments for class one concrete	31,549.15	31,549.15	
,, ,,	12. Plant removal under expensive conditions	5,823.49	5,823.49	
,, ,,	13. Standby and overhead expenses	49,147.41	000.00	
,, ,,	14. Interest on overdue payments	286.90	000.00	
		$412,846.75	$293,585.84	

10. The Appellants accepted the amounts awarded, but the trial Judge had awarded interest from the date of the action only with respect

Record. Vol. 9, p. 3, l. 40. to items Nos. 1, 2, 5, 7, 9 and 11 and when the Respondent appealed the Appellants cross-appealed, claiming that interest should also have been allowed from the date of the institution of the action with respect to items 3, 8, 10 and 12.

Vol. 9, p. 98, ll. 15-31. **11.** On the hearing of the appeal Respondent admitted item 9, overcharge on logs, $1,429.60, and their contestation of all the other items was upheld by four of the five judges constituting the Court (Bernier, Rivard, Létourneau and Hall JJ.).

The fifth judge (St. Germain J.) would have confirmed the judgment Vol. 9, p. 165, l. 45. with respect to all but items No. 5, Additional cost of rock excavation, $35,100.74 ; No. 11, Shortage on payments in class 1 concrete, $31,549.15 ; and No. 12, Excessive cost of plant removal, $5,823.49, and he would have Vol. 9, p. 168, l. 32. awarded interest from the date of the institution of the action with respect to all the amounts awarded.

Vol. 6, p. 1250, l. 12. **12.** It was found by the trial Court that neither of the parties was fully aware of the magnitude of the undertaking or of the difficulties which would be encountered in its carrying out, but that the intention of the parties was that no matter how difficult the work might prove to be, the contractor was to complete it and the owner was to pay for it. This construction of the contract as to the contractor's obligations was confirmed by the Court of Vol. 9, p. 92, l. 10. Appeal, Rivard J. expressly states in his notes as follows :—

Vol. 9, p. 102, l. 29.

> " En conséquence, il n'y avait pas lieu pour la compagnie Bishop
> " de demander l'annulation du contrat, quelque changement qu'on ait
> " fait dans les plans au cours de l'entreprise, parce qu'il était spéciale-
> " ment convenu que ces changements pourraient en effet être ordonnés
> " et qu'elle serait tenue de les exécuter aux conditions stipulées."

This is not only because of other terms of the contract, but because it contained an express stipulation that provided for arbitration as follows :—

Vol. 6, p. 1096, l. 29.

> " *Arbitration.* It is understood and agreed by both parties that the
> " Engineer's decision regarding the quality of the materials or work-
> " manship to be furnished under the terms of this contract shall be
> " final and binding. Should any dispute arise as to the interpretation
> " of the terms of this contract, as to cost of changes and extra work
> " performed, or in regard to any other matter regarding the execution
> " or final settlement of this contract, it shall be referred to a Board
> " of three Arbitrators."

13. Disputes did arise and Plaintiffs sought in vain to obtain arbitration and it is common ground that the Courts were entitled to determine the disputes in the same manner as they might have been determined by Vol. 9, p. 93, l. 21. arbitration. The formal judgment of the Court of King's Bench contains the following :—

> " Considerant que faute d'avoir eu recours à cet arbitrage, les
> " parties se sont pour tout ce qui aurait pu en être l'objet, soumis à
> " une décision du tribunal compétent " ;

and Mr. Justice Rivard in his notes described the situation as follows :— Record.

" Aucun arbitrage n'a eu lieu, la compagnie Bishop prétend Vol. 9, p. 104, l. 35.
" justement que, n'ayant aucun moyen de forcer la compagnie
" MacLaren à ce recours de l'arbitrage, elle est en droit de demander
" aux tribunaux de prononcer sur le différent surgi entre les parties."

14. The point of difference between the judgments of the trial Judge and St. Germain J. on one hand and that of the majority in the Court of King's Bench on the other hand, as to the construction of the contract, appears to be a narrow one. All agree with the contractor's contention that whatever were the conditions encountered in carrying out the work, it had to be pursued to completion. It will be submitted that they also all agree Vol. 4, p. 716, l. 25. that it was intended to provide in the contract means whereby the contractor's compensation would be adjusted according to the actual amount of work performed and that neither party was fully aware of the magnitude of the undertaking and of the difficulties actually involved. The trial Judge and St. Germain J. held that the contract is to be construed as providing some method whereby the contractor may be adequately compensated according to the conditions encountered for doing work which had not been foreseen. One method was by obtaining a proper certificate from the owner's Engineer as to the fact, cost and value of unforeseen work, and another was by resorting to arbitration if the contractor felt he was entitled to a certificate which the owners' engineer was unwilling to give him. The view adopted by the majority of the Court of Appeals was that though the contractor had to do everything that might be necessary to complete the work, he could not, even under the arbitration clause, be awarded anything for necessary work unless it fell within one of the classes for which some unit price had been expressly agreed, or unless it had been authorised as an " extra " by the engineer.

15. Another difference of viewpoint with far-reaching consequences turns upon the proper construction and effect of the following clause in the specification :—

" He (the contractor) shall so construct the cofferdams and arrange Vol. 6, p. 1103, l. 20 et seq.
" and manage the construction of the works as a whole, that logs of the
" owner, or of others, may be driven by the site of the dam during the
" driving season of 1929, and shall provide such opportunities for the
" passage of logs as the construction work may render necessary."

This clause was construed by the majority of the Court of Appeals as imposing upon the contractor the obligation " de faire ce qui était opportun Vol. 9, p. 111, ll. 43-44. pour le passage du bois à travers les obstructions du barrage temporaire."

This construction of this clause accounts for the rejection in the Court of King's Bench of items 2, 3, 7 and 8 of Appellants' claims.

16. Item 1.—Hardpan Excavation.

No hardpan excavation was expressly provided for in the contract. The Vol. 6, p. 1251, l. 20. trial Judge found that the evidence showed beyond doubt that a considerable

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amount of hardpan had to be excavated at an additional cost over earth excavation and that a price per unit equal to two-thirds of that for rock excavation was fair and meant an increase in the payments due to the Plaintiffs of $13,919.45—Bernier J., who presided in the Court of King's Bench, gave no detailed reasons. Rivard J., expressly agreed that the material with respect to which the trial Judge awarded $13,919.45 was hardpan, but he held, however, that as the contract only provided for two classifications—earth and rock—and that as hardpan was not rock, the contractor could only be compensated for excavating it at the rate stipulated for earth. Letourneau J., expressed doubt as to whether the material actually found really was hardpan or not, but refrained from making a finding that it was not, and Hall J., stated that he did not venture to express an opinion on this controversy, as in view of the terms of the contract itself, it appeared to him to be irrelevant. Both these judges based their judgments on the fact that the contract contained only two classifications and held that everything which was not really rock, had to go into the lower classification.

Vol. 9, p. 99, l. 1.
Vol. 9, p. 107, l. 10.
Vol. 9, p. 107, l. 42.
Vol. 9, p. 127, l. 38.
Vol. 9, p. 138, l. 1.

17. St. Germain J. expressly found that the material was hardpan and stated that if he had to put it into one or other of the classifications mentioned in the contract, he would classify it as rock rather than earth, because as regards the difficulty of excavation, it is much nearer rock than earth. This Judge discussed what has been called in the case the undue hardship clause which is in part as follows :—

Vol. 9, p. 150, l. 40.

> " It is the intention of these specifications to secure thoroughly
> " first-class construction in both material and labour for each of the classes
> " included herein without working an undue hardship on the Contrac-
> " tor. The omission of any clause necessary to obtain the fulfilment
> " of the intention and purposes of the specifications shall not preclude
> " the Engineer from requiring any such omitted necessary requirements."

Vol. 6, p. 1106, ll. 20-28.

He said :—

> " I agree with the Appellant (Respondent here) that all the above
> " clause says is that the requirement that material and workmanship
> " be first-class shall not be enforced so as to work undue hardship on
> " the contractor, but on the other hand that clause may be helpful
> " for interpreting the fair character of the contract as a whole and seeing
> " that hardpan excavation is almost as costly as rock excavation, would
> " it not be also an undue hardship and unfair to the Respondent to
> " classify hardpan excavation, in the present case, as earth excava-
> " tion ? "

Vol. 9, p. 151, ll. 8-18.

18. Letourneau J. called attention in his notes to the fact that the omission of hardpan from the estimate of the excavation should not be looked upon as an oversight ; the contract called for the building of a dam and the erection of an earth embankment ; the dam was to go down to solid rock foundation, whilst for the embankment the surface was to be " excavated to hardpan or other impervious material." This is something which had not been mentioned in argument and which the learned judge himself discovered while considering the case. It is submitted that the proper

Vol. 9, p. 126, l. 27.
Vol. 6, p. 1115, ll. 21-22.

inference to be drawn from the circumstances that hardpan is here mentioned is rather as follows :—If the engineer who drew the contract and specifications felt that there was rock upon which to place the dam, and hardpan or other impervious material upon which to place the embankment, and then, after investigating the site of the dam, prepared an estimate of quantities showing no hardpan, this constituted an implied representation to the contractor that though hardpan might be present where the embankment was to go, none of it would be found where excavation was necessary. Record.

19. When hardpan was first encountered in the excavation the contractor applied for a special price with respect to it, and the matter was held in abeyance by the engineer in the expectation that the quantity might be small. The contract had not been signed at this time and later—before it was signed—arbitration in that respect was applied for by the contractor and acquiesced in by the engineer. Now, it was contended on behalf of the contractor—both at the trial and on the appeal—that when the contract was subsequently signed, containing the arbitration clause, these circumstances made it apparent that arbitration was intended to apply to a situation such as this, and in such a manner that the arbitrators might allow the claim for a special classification for hardpan, if it was shown that it had really been encountered, and if it was shown that it would be a serious hardship upon the contractor to pay him only the earth price for excavating something which was nearly as difficult to handle as was rock, when the stipulated price for the one was $1.23 per yard and that for the other $4.35 per yard. Vol. 6, p. 1069, l. 15; p. 1071, l. 10. Vol. 6, p. 1080, l. 46; p. 1081, l. 46; p. 1083, l. 38; p. 1084, l. 30. Vol. 3. p. 511, l. 10. Vol. 6, p. 1097, ll. 30-40.

20. Item No. 2.—Handling Respondent's logs.

While the Bishop Company was endeavouring to unwater the site for the dam in the bed of the stream, Respondent sent about 500,000 logs down the river. These logs jammed against the cofferdams and it is not disputed that Appellants expended $2,995.42 in labour and material to get them away. The clause of the contract upon which the validity of this claim depends has already been cited (supra p. 5). Vol. 3, p. 441, l. 22.

The trial Judge found that in all the circumstances of the case this clause meant that during the driving season, the contractor should leave sufficient space through its cofferdams to enable the Respondent, using its knowledge and skill as a log-driver—which is its line of business—to drive its logs through, and that it did not mean that the contractor, who was not in the log-driving business, should undertake, apart from leaving the necessary space for the logs to be driven through, either to do the driving of the logs or to suffer such damage as they might occasion if no one attended to them. He said :— Vol. 6, p. 1252, l. 40.

> " . . . not only does the Defendant claim that it is under no " obligation to drive or take care of the logs in any way, but actually " wants to hold the Plaintiff responsible for any additional expense in " driving the logs which they might be put to by reason of the works " which Plaintiff was doing for Defendant under the contract in question " . . . the position taken by Defendant is in my opinion untenable." Vol. 6, p. 1253, l. 9.

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Vol. 9, p. 154, l. 3.

21. St. Germain J. agreed with the trial Judge, and held that the words " to provide such opportunities " did not suggest that the contractor should furnish anything necessary for the actual execution of the work of driving, but only favourable circumstances of time and place.

22. Rivard, Letourneau and Hall JJ. really put upon the contractor the obligation of seeing to the driving of the logs through his works.

Vol. 9, p. 111, l. 43.

23. It is submitted that Rivard J. has apparently been led astray by similarity in appearance of the English word " opportunity " and the French word " opportun " stating, as he does in his notes, that under the words used the contractor was himself obligated to do everything that was " opportun " for the passage of the logs.

Vol. 3, p. 441.

R.S. Que. 1925, ch. 46, sec. 44.

24. These logs had been cut from timber limits under lease by Respondent from the Crown. The owner of such logs is made liable by statute for all damages caused in the driving thereof on rivers, streams, creeks, lakes or ponds, or the banks thereof.

> " 44. No person may exercise the rights and privileges conferred " by this division without being liable for all damages caused by his " operations on rivers, streams, creeks, lakes, or ponds, or on the banks " thereof."

See *Dumont* vs. *Fraser*, 48, S.C.R. 137, confirmed in the Privy Council on the 27th July, 1914 (19, D.L.R. 104).

See also *Ward* v. *Township of Grenville*, 32, S.C.R. 510, and *Ste. Anne Fish and Game Club* v. *Riviere Ouelle Pulp and Paper Company*, 45, S.C.R. 1.

25. As to the general construction of the clause, Appellants rely upon the general principle of our law expressed with respect to servitude in Article 552 of the Civil Code : " He who establishes a servitude is presumed " to grant all that is necessary for its exercise." Here the Respondent had not only authorised the placing of obstructions in the river, but had bound the Bishop Company by contract to erect them.

26. Item No. 3.—Cofferdams and unwatering.

The dam was to be built in the river on a site which had to be unwatered so that the concrete could be poured on a solid and dry foundation. The unwatering was to be accomplished by the erection of temporary cofferdams both above and below the site, and then by pumping out the water thus enclosed. Serious difficulties were encountered and much time was lost in performing this part of the work because water continued to find its way into the enclosed space either through or under the cofferdams.

Vol. 6, p. 1255, l. 37

It is not disputed that the additional cost of such work amounted to the sum awarded by the trial Judge, $117,075.22. This additional expenditure is said to have been necessitated :—

(A) by reason of the damage caused to the cofferdams by the Respondent's logs ;

(B) by the fact that the cofferdams were built and placed on the assumption that the river bottom was ledge as it was shown to be on the plan upon which the tender was made, while as a matter of fact, it was not ledge at all but had an overburden of a porous nature of a thickness in some places of as much as nine feet, through which steel sheet piling had ultimately to be driven to prevent the water seeping through. Record.

27. Rivard J. held that the Respondent was not responsible for the errors in the plan concerning the bed of the river, and that the Bishop Company was itself responsible for the damages caused by the logs. Vol. 9, p. 115, l. 18.

28. Letourneau J. came to the same conclusion. Vol. 9, p. 129, l. 21.

29. Hall J. was of opinion that the logs were the biggest factor in these difficulties, and was further inclined to belittle the seriousness of the errors. Vol. 9, p. 140, l. 31.
He himself committed a very serious error in reading from the plan an elevation of 72.9—which at first sight it does appear to be—instead of 79.7 which it is in fact—and which it was admitted to be by the man who prepared the plan when he was cross-examined upon it. This error can only be explained by the fact that the honourable Judge was studying the case in Chambers and that he saw this figure on the plan and drew an argument from it which had not been used at the hearing nor in the factum, and that he overlooked the fact that the man who had prepared the plan had been cross-examined upon it and had expressly admitted that though the figure might appear to be 72.9 it really was 79.7. Mr. Justice Hall's reasoning was that this plan showed the elevation of part of the bed of the river at 72.9 whilst the lowest actual sounding found by the contractor's engineers was 79.7. He added that this was a clear indication that the former had thrust his sounding rod through several feet of overburden. As a matter of fact the elevation of the water when engineer Stratton did this sounding was 94.7 and he did all his sounding with a 16-foot rod, which could not go much below 78.7.

Vol. 9, p. 141, l. 23.

Vol. 3, p. 605, l. 25.

Vol. 3, p. 605, ll. 17-30.

Vol. 3, p. 586, l. 48; p. 587, l. 11; p. 592, l. 12.

30. St. Germain J. cites extracts from the examination of the owner's engineer, Mr. Ferguson, in which he was forced to admit that the information as to the topography of the riverbed and as to the material of which it consisted were of extreme importance to the contractor from the point of view of unwatering, and that his assistant, Mr. Stratton, had secured information in this respect which his plans had not disclosed. Vol. 9, p. 159, l. 40.

31. Neither Rivard, Letourneau nor Hall JJ. refers to this evidence at all, apparently treating it as having no bearing on the issues. Letourneau J. even says that there is no relation of cause to effect established between the alleged false indications on the plan and what actually took place either with respect to the installation of the cofferdam or with respect to its sufficiency. Vol. 9, p. 129, l. 21.

This is a finding of fact contrary to that of the trial Judge which he, Letourneau, J., is the only one to make and which it is submitted was not justified because there was ample evidence to support the contrary finding of the trial Judge.

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32. Hall J. also points out that while the cribs for the cofferdam were being installed both Mr. Bishop and his Chief Engineer, Mr. McEwan, were away. That is true in fact ; it was not, however, charged as improper by the owner in his pleadings nor was it referred to in argument, nor is it referred to by any of the other judges, and there is not the slightest suggestion in the record that there would or could have been done anything different from what was actually done during their absence. In the absence of any argument whatsoever on such a point, it is submitted that it is not a finding upon which a judge in an appeal court should base a reversal of a trial judgment.

33. Item No. 4.—Cofferdam at the lower end of the bypass. This claim was disallowed.

34. Item No. 5.—Additional cost of rock excavation.

Vol. 6, p. 1256, l. 2. Vol. 9, p. 97, l. 12; p. 116, l. 10; p. 131, l. 1; p. 143, l. 15.

The trial Judge found that the amount claimed on this head, $35,100.74, had been expended and that could be recovered. In the Court of Appeals no finding was made as to the amount expended but it was unanimously held that nothing could be recovered. The basis of the claim is that though the Bishop Company was paid at the unit price stipulated in the contract for all the rock excavated, the quantity actually was 21,564 cubic yards, whilst that estimated was only 8,000 cubic yards and the engineers caused the additional quantity to be removed in shallow lifts, and the surface cleaned off as if for a definite foundation after each such lift, only to begin over and over again and have others similarly removed instead of determining by core drilling, which was something which was to be done at the cost of the owner, how much really had to be removed, and then allow the contractor to go ahead and blast it out in the manner which was usual and anticipated and that with respect to which the unit price had been fixed.

Vol. 6, p. 1092, l. 35.

Vol. 6, p. 1167, l. 13.

The contractor was entitled to arbitration and requested arbitration in respect of this claim, as he did in respect to all the others, and it is submitted that in view of the fact that no core drilling was resorted to, though contemplated in the contract, and that this unusual and much more expensive method of excavation was adopted, arbitrators thoroughly conversant with usual methods would have given consideration to the fact that " the contract was expressly framed or drafted with the definite idea in view that " if excavation was to go deeper there would be a provision to pay for it," and would not have left the contractor under the undue hardship of having to feel his way down by trial and error at great expense, which could have been avoided had the owner provided the contemplated core drilling.

Vol. 4, p. 716, l. 24.

35. Item No. 6.—Trimming and handling excavated rock. This claim was disallowed.

36. Item No. 7.—Excavating frozen materials in the riverbed.

This amounted to 811 cubic yards of boulders and loose material frozen together. The contractor was paid for excavating it at the price of earth excavation and claimed that it should have been paid for at the price

of rock excavation, a difference of $2,530.32. This amount was allowed by the trial Judge and would have been allowed by St. Germain J. It is admitted that it was not rock. But it is conclusively shown that it was even more difficult to excavate than rock. The majority in the Court of King's Bench held that because it was not rock, it could only be paid for at the rate provided for excavating earth. It is common ground that in the quantities to be excavated from the bed of the river, only rock was in contemplation of the parties, but that after the unwatering was completed, it was found that there was there, instead of ledge as shown on the plans, an overburden consisting of boulders, stones, gravel and sand, and at the season when this had to be excavated, that it was all frozen together in a solid mass. It had to be excavated and the work had to be done at that time, and it was work for which there was no provision in the contract. It is admitted that the contractor was entitled to be paid for doing it and it is submitted that there is no justification in the contract for limiting his compensation to the price stipulated for ordinary earth excavation elsewhere.

Record.
Vol. 6, p. 1256, l. 10.
Vol. 9, p. 162, l. 40.
Vol. 9, p. 96, l. 29.

37. Item No. 8.—Work under winter conditions.

Because of the difficulties in unwatering, much of the concrete had to be poured during the winter months, when the materials had to be heated, the site of the work enclosed by tarpaulins, etc. The contractor had claimed his actual expenditure $70,680.62 with the 37 per cent. added as provided for in the contract for extra work. The trial Court allowed the $70,680.62 plus 15 per cent. for overhead and plant, instead of 37 per cent., or $81,282.62, expressly holding that the delay was caused by the porous nature of the overburden at the place marked "ledge" and the delay caused by Defendant's logs. This finding was expressly confirmed by St. Germain J. and was not disputed by the other judges in the Court of Appeals, but the latter held, as they had held in respect of the unwatering, that the owner was not liable. It is submitted that the decision with respect to this item should follow that with respect to items 2 and 3.

Vol. 5, p. 912, l. 13.
Vol. 1, p. 11, l. 40.
Vol. 6, p. 1256, l. 30; p. 1256, l. 22.
Vol. 9, p. 163, l. 17.
Vol. 9, p. 96, l. 46.

38. Item No. 9.—Overcharge on logs.

Claimed $7,220.19; allowed $1,429.60, which allowance is not contested.

39. Item No. 10.—Cement for apron in bypass channel.

This apron was an extra which was ordered in the Spring of 1930 and which was paid for according to the quantity of concrete it contained at the rate per cubic yard mentioned in the contract.

When it was ordered, the contractor had on hand sufficient cement to complete the work he had to do, but he had to use this cement to build this extra and then bring in a replacing quantity when the roads were practically impassable at this additional expense over winter handling. The figures are not in dispute, but it is contended :—

Vol. 3, p. 581, l. 20.

(A) that he was not entitled to be paid at any greater rate than the unit price rate stipulated in the contract; and

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(B) that by exercising greater diligence he could have brought in the additional cement over the winter roads.

As to "(A)" this being admittedly an extra, it is submitted that the contractor was entitled to the actual cost of the labour directly employed for and the materials used in performing this extra work plus 37 per cent. and that the cost of hauling the cement was part of the cost of the labour and materials.

Vol. 6, p. 1092, ll. 8-20.

As to "(B)" it is submitted that the evidence clearly shows that the trial Judge was right. Mr. Justice Hall even found that the first order for the extra which was given on the 13th of March, could have been given earlier by the owner's engineers if there had not been the delay over the unwatering for which in his view the contractor was liable and that winter roads were available up to the first of April and that there was therefore six weeks which would have been ample to bring in at ordinary cost the extra cement.

Vol. 9, p. 144, l. 35.

The amount allowed should have been only $1,454.03 instead of $1,879.83 because of a revision of the claim, which the trial Judge overlooked in making his award. Exhibit P-106 (not printed) is the diary of the owner's engineer, McIntosh, in which entries indicate the tremendous difficulties which had to be overcome to bring in this cement at this time, and the fact that the contractor had enough on hand to complete the rest of the job when the order for the apron was given is admitted by the owner's engineer, O'Shea.

Vol. 3, p. 470, l. 10.

Vol. 3, p. 581, l. 20.

40. Item No. 11—Shortage on payments in class one concrete.

The validity of this claim depends entirely upon the proper construction of the contract. It is common ground that the quantity of class 1 concrete without plums actually poured was 23,656 cubic yards, whilst the quantity scheduled in the contract was 9,690 cubic yards, an increase of 13,966 cubic yards. Under the contract there was to be added to the principal sum $18.92 for each cubic yard of class 1 concrete without plums by which the scheduled quantities were increased. This would amount to $264,236.72. It is also common ground that the actual quantity of class 1 concrete poured with plums was 6,781 cubic yards, whilst the scheduled quantity was 10,800 cubic yards. Under the contract there was to be deducted from the principal sum $9.31 for each cubic yard of class 1 concrete with plums by which the scheduled quantities were decreased. This amounted to $37,416.89 and left a net increase on these two items of $226,819.83. It is also common ground that for these changes there was paid to the contractor $195,270.68, leaving a difference which he now claims of $31,549.15. This amount was allowed by the trial Judge. The Court of Appeals disallowed this claim and held that the substitution of one class of concrete for the other did not bring into play the provision for increases and decreases in the contract, but constituted a substitution of one kind of building material for another, and that the contractor must be content with the $195,270.68 made up as follows :—

Vol. 1, p. 32, l. 32; p. 32, l. 25; p. 32, l. 40.

Vol. 6, p. 1098, par. j.

Vol. 1, p. 32, ll. 25-38.

Vol. 6, p. 1098, par. k.

Vol. 1, p. 33, l. 28.

Vol. 6, p. 1257, l. 15.

Vol. 9, p. 97, l. 44.

		Record.
Total increase in both classes of concrete, 9,947 cubic yards at $18.92	$188,197.24	Vol. 9, p. 120, l. 1.
Substitution of 4,019 cubic yards of concrete without plums for an equal quantity of concrete with plums, difference between unit price for each cubic yard $1.76	7,073.44	
TOTAL	$195,270.68	

The method of calculation contended for by the contractor was that first adopted in the monthly estimates, but it was subsequently changed by the resident Engineer upon instructions from the Chief Engineer. The owner had pleaded that as to 5,736 cubic yards of concrete the substitution of such concrete without plums for concrete with plums, was due solely to delays attributable to the contractor. This contention was not made good at the trial and the holding of the Court of Appeals is based solely upon the ground that the change in the building material did not amount to such a change as brought into play the provisions of the contract. It is submitted that this holding is unfounded

Vol. 6, p. 1224.

Vol. 1, p. 33, l. 22.

41. Item 12.—Plant removal under expensive conditions.—$5,823.49.

The trial Judge allowed the whole of this amount but Appellants admitted on appeal that it should have been $5,247.06 or $576.43 less than the amount awarded because of an adjustment of the figures made at the trial. The latter amount is the actual extra expenditure incurred because the plant could only be removed after the winter roads broke up. The figures are not disputed and if Appellants are entitled to succeed on items 3 and 8, because liability for the delay would rest on the owner, they should also succeed as to this claim. However, St. Germain J., agreed with the majority of the Court of King's Bench in disallowing it, his reason being that the contract originally contemplated that it might take up to the 31st of March, 1930, to complete it and that it was not established that there were still winter roads available at that time. It is submitted that there was clear evidence before the trial Judge establishing that without the extra delay resulting from the unwatering difficulties, the whole of the work would have been completed by December, 1929, and that the owner is liable for the consequences of the delay resulting from the unwatering difficulties, and one of these consequences is the loss by the contractor of this sum of $5,247.06, which he would have saved in the cost of the removal of his plant.

Vol. 6, p. 1206, l. 47.

Vol. 9, p. 165, l. 25.

Vol. 8, Ex. p. 24, Vol. 1, p. 68, l. 1.

Article 1073 of the Civil Code is as follows :—

> " The damages due to the creditor are in general the amount of the " loss that he has sustained and of the profit of which he has been " deprived ; subject to the exceptions and modifications contained in " the following articles of this section."

42. Item 13.—Standby and overhead expenses, $49,147.41 and Item 14 —Interest on overdue payments, $286.90.

These were disallowed.

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43. Interest from the date of the institution of the action should have been allowed on all heads of claims admitted in accordance with the principle applied in the following cases :—

Montreal Gas Company v. *Vasey*, 8 Q.K.B. 412 and 431, confirmed in the Privy Council, L.R. 1900, A.C. 595.

Great Northern Construction Company et al v. *Ross et al*, 25 Q.K.B. 385.

Quebec Harbour Commissioners v. *New Zealand and Shipping*, 50 Q.S.C. 305.

Articles 1077 and 1067 of the Civil Code are as follows :— 10

" 1077. The damages resulting from delay in the payment of " money, to which the debtor is liable, consist only of interest at the " rate legally agreed upon by the parties, or, in the absence of such " agreement, at the rate fixed by law.

" These damages are due without the creditor being obliged to " prove any loss. They are due from the day of the default only, " except in the case where by law they are due from the nature of the " obligation.

" This article does not affect the special rules applicable to bills " of exchange and contracts of suretyship. N. 1153—C. 313, 722, 20 " 1069, 1111, 1360, 1366, 1534, 1714, 1724, 1785, 1840, 1948."

" 1067. The debtor may be put in default either by the terms of " the contract, when it contains a stipulation that the mere lapse of " the time for performing it shall have that effect ; or by the sole " operation of law ; or by the commencement of a suit, or a demand " which must be in writing unless the contract itself is verbal. N. 1139."

Vol. 9, p. 100, ll. 43-47.

44. Except as to the admitted errors of $425.80 on item No. 10 and of $576.43 on item No. 12, the Appellants submit that the judgment of the Court of King's Bench insofar as it varied the judgment of the trial Court on the main appeal, should be reversed and that its judgment on the cross- 30 appeal should also be reversed and the cross-appeal allowed for the following among other

REASONS.

1. Because the Judge in the trial Court properly construed and applied the provisions of the contract between the parties, except as to interest on items 3, 8, 10 and 12.

2. Because the evidence before the trial Judge justified his findings of facts.

3. Because an Appellate Court ought not to set aside such findings of facts as to the cause of delays unless there is 40 no evidence to support them.

4. Because this was not a case where the contractor should have abandoned the work when confronted with unforeseen difficulties.

5. Because under the contract the contractor was entitled to have determined by arbitration any difficulty which arose and be paid such compensation as might be awarded by the arbitrators.

6. Because being unable to enforce arbitration, the contractor was entitled to have the Courts award him such compensation as might have been awarded by arbitrators.

7. Because Respondent was liable, both by statute and under a proper interpretation of the contract, for all damages caused by its logs in the course of its drive.

8. Because the contract expressly provided the basis for adjusting the compensation if the quantities of either or both classes of concrete were increased or decreased.

9. Because the judgment in the trial Court was a declaration of the rights of the parties and operated as such from the date the action was brought and interest was due on all sums found to be owing from the date payment thereof had been demanded.

LOUIS S. ST. LAURENT.

M. A. PHELAN.

In the Privy Council.

No. 72 of 1936.

On Appeal from the Court of King's Bench for the Province of Quebec.

BETWEEN

WILLIAM I. BISHOP LIMITED and THE BANK OF MONTREAL (Plaintiffs and Cross-Appellants before Court of King's Bench)

Appellants,

AND

THE JAMES MACLAREN COMPANY LIMITED (Defendant and Cross-Respondent before Court of King's Bench)

Respondent.

CASE FOR THE APPELLANTS.

BLAKE & REDDEN,
17, Victoria Street, S.W.1.