GILBERT BROTHERS ENGINEERING COMPANY, LIMITED,

SUPPLIANTS,

AND

HIS MAJESTY THE KING,

RESPONDENT.

1917
April 26.

Public work—Contract for construction—Progress estimate—Allowance to contractor not made therein—Claim in writing—Engineer's certificate—Right of engineer subsequently appointed to review—Condition precedent—Right of contractor to recover.

By the provisions of a contract for the construction of a public work every allowance to which the contractor was fairly entitled should not be paid the full amount due him under the contract until if the contractor had any claims which were not so included it was necessary for him to make such claims in writing to the engineer within a specified time.

Held, that the failure to comply with these provisions disentitled the contractor to recover the amount of such claims.

2. It was further provided by the contract that the contractor should not be paid the full amount due him under the contract until he had obtained the certificate of the engineer "for the time being", having control of the work, that the same had been completed to his satisfaction. B. was the engineer "for the time being" when the work was completed. He drew up a document which was intended to be a final certificate. In this certificate a certain claim was neither expressly allowed nor disallowed, but it was left for the determination of the Exchequer Court under a clause in the contract which provided that all matters of difference between the parties arising out of the contract, the decision whereof was not especially given to the engineer, should be referred to the Exchequer Court of Canada.

Held, that as it appeared that B. had intended to give a final certificate, an engineer subsequently appointed had no power to re-open the matter.

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PETITION OF RIGHT to recover for work performed under a building contract.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, June 20, 21, 22, 1916; March 12, 1917.

R. A. Pringle, K.C., and *L. Coté,* for suppliants.
Howard and *E. E. Fairweather,* for respondent.

CASSELS, J. (April 26, 1917) delivered judgment.

A petition of right filed on behalf of the petitioners, The Gilbert Brothers Engineering Company, Limited, claiming the sum of $115,000 and interest. The claim is made for work alleged to have been performed by the petitioners, under the terms of a contract bearing date September 15th, 1897.

It is admitted that the contract is correctly set out in the petition of right with the correction made at the trial of clause 12 of the contract as there set out.

The contract provided for the payment of the sum of $425 per day of 12 hours, during which the said plant is in actual operation, etc., but nothing turns upon that portion of the contract.

Clause 12 proceeded: "And further, if it should "be determined upon by Her Majesty's Minister of "Railways and Canals to improve the said channel "by deepening and widening the same below the "original or contract grade, then Her said Majesty "will pay the said contractors for such work of "drilling, blasting and dredging as may be ordered "by the said Minister in the deepening and widen-"ing the said channel below said grade, the sum of "$8.40 per cubic yard *for rock necessarily excavat-*

"*ed*, the said sum of $8.40 per cubic yard to cover all "cost of removal and deposit of excavated material, "drilled, blasted, dredged below and outside of the "prism described in the specification annexed to the "original contract of William Davis and Sons, of "the 5th day of August, 1879."

The contention of the petitioners is that work to the extent of over one hundred and thirty thousand odd dollars was performed, for which work they have not been paid. Their contention is that Mr. Rheaume, the engineer in charge of the work, acting under the directions of the Chief Engineer of Railways and Canals, issued a certificate certifying that the Gilbert Brothers Engineering Company, Limited, were entitled to the sum of about $115,000.

By the prayer of the petition the Gilbert Brothers Engineering Company, Limited, submit that they are entitled to a final certificate for the sum of $115,000, or thereabouts, and to interest thereon since the completion of the work.

The 20th and 21st paragraphs of the petition of right read as follows:

"20. The said L. N. Rheaume, acting under direc- "tions of the Chief Engineer of Railways and Can- "als, did revise his figures, as shown in the state- "ment of final quantities and claims, and issued a "certificate showing that the Gilbert Brothers En- "gineering Co., Ltd., were entitled to a sum of "about $115,000.

"21. That the certificate is in the hands of the De- "partment of Railways and Canals and is the final "certificate as required by the contract."

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In these clauses the petitioners claim that the final certificate under the terms of the provisions of the contract had been signed. If no such certificate had been given, the petitioners' action would fail, as there is no case made on the face of the petition entitling them, as asked by the prayer, to a final certificate.

Since the trial and the argument of the case I have gone carefully over the evidence and the various authorities cited by counsel. A late case of *Hampton v. Glamorgan* (1) may be referred to as showing how little assistance is afforded from the citations of numerous decisions determined on different contracts. Regretfully I have come to the conclusion that the defence raised by Mr. Howard on behalf of the Crown is a valid defence.

Certain provisions of the contract are important. Clause 1 provides that the word "Engineer" shall mean the "Chief Engineer," for the time being having general control over the work.

Clause 12 reads as follows:

"12. And Her Majesty, in consideration of the "premises and of the supplying by the contractors "of all the necessary plant for the purpose of sur- "veying the bottom of the channel through the "Galops Rapids, in the River St. Lawrence, and of "removing alleged obstructions therefrom which "may be discovered above the original or contract "grade, as above recited, covenants with the con- "tractors that they will be paid for said work the "sum of four hundred and twenty-five dollars per

(1) [1917] A.C. 13 at p. 18.

"day of twelve hours, during which the said plant "is in actual operation, time to commence when the "plant is in position as designated by the engineer "in charge. The length of time that the plant is to "be so employed to be determined by the Depart- "ment of Railways and Canals, it being distinctly "understood that this agreement of survey may at "any time be determined by a three days' notice. "And further, if it should be determined upon by "Her Majesty's Minister of Railways and Canals "to improve the said channel by deepening and "widening the same below the original or contract "grade, then Her said Majesty will pay the said "contractors for such work of drilling, blasting and "dredging as may be ordered by the said Minister "in the deepening and widening the said channel "below said grade, the sum of $8.40 per cubic yard "for rock necessarily excavated, the said sum of "$8.40 per cubic yard to cover all cost of removal "and deposit of excavated material, drilled, blasted, "dredged below and outside of the prism in the "specification annexed to the original contract of "William Davis and Sons of the 5th day of August, "1879."

Clause 15 is as follows:

"15. That in the event of its being determined by "the said Minister of Railways and Canals to im- "prove the said channel by deepening and widening "the same, then, and in that event only will this "clause Number 15, and clauses Numbers 16, 17 and "18 apply and form part of this contract. Cash "payments equal to about ninety per cent. of the "value of the work done, approximatively made up "from returns of progress measurements and com-

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"puted at the prices agreed upon, or determined "under the provisions of this contract, will be made "to the contractor monthly, on the written certifi- "cate of the engineer stating that the work, for or "on account of which the certificate is granted, has "been performed, and stating the value of such work "computed as above mentioned, and the said cer- "tificate shall be a condition precedent to the right "of the contractor to be paid the ninety per cent., "or any part thereof; the remaining ten per cent. "shall be retained till the final completion of the "whole work to the satisfaction of the engineer for "the time being, having control over the work, and "within two months after such completion the re- "maining ten per cent. will be paid. And it is here- "by declared that the written certificate of the said "engineer certifying to the final completion of the "said works to his satisfaction shall be a condition "precedent to the right of the contractor to receive "or to be paid the said remaining ten per cent., or "any part thereof."

Clauses 16, 17 and 18 are as follows:

"16. It is intended that every allowance to which "the contractors are fairly entitled will be em- "braced in the engineer's monthly certificates; but "should the contractors at any time have claims of "any description which they consider are not in- "cluded in the progress certificates, it will be neces- "sary for them to make such claims in writing to "the engineer within thirty days after the date of "the despatch to the contractors of each certificate "in which they allege such claims to have been "omitted.

"17. The contractors in presenting claims of the

"kind referred to in the last clause must accompany "them with satisfactory evidence of their accuracy, "and the reason why they think they should be al- "lowed. Unless such claims are thus made during "the progress of the work, within thirty days, as in "the preceding clause, the contractors shall be for- "ever shut out and shall have no claim on Her Maj- "esty in respect thereof.

"18. The progress measurements and progress "certificates shall not in any respect be taken as "binding upon the engineer, or as final measure- "ments, or as fixing final amount; they are to be "subject to the revision of the engineer in making "up his final certificate, and they shall not in any "respect be taken as an acceptance of the work or "release of the contractors from responsibility in "respect thereof, but they shall at the conclusion of "the works deliver over the same in good order, ac- "cording to the true intent and meaning of this con- "tract."

Clause 23 of the contract, on which a good deal of stress is laid by Mr. Pringle, is as follows:

"23. It is hereby agreed that all matters of dif- "ference arising between the parties hereto upon "any matter connected with or arising out of this "contract, the decision whereof is not hereby espe- "cially given to the engineer, shall be referred to "the Exchequer Court of Canada."

It is conceded by Mr. Pringle, counsel for the petitioners, that the petitioners received progress estimates from time to time, and that all the money certified as due by the progress estimates has been paid.

It is also conceded that the drawback of ten per cent. referred to in the contract has also been paid.

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Mr. Pringle stated further that the drawback had been paid prior to the 43rd estimate.

On the opening of the case the following discussion took place:

THE COURT—Does the $115,000 represent the drawback or what?

Mr. Pringle—I think not.

THE COURT—You got your progress estimates from time to time?

Mr. Pringle—Yes, all signed properly in accordance with the contract.

THE COURT—Has the money been paid on the progress certificates?

Mr. Pringle—Yes.

THE COURT—Then those are not in question?

Mr. Pringle—No.

THE COURT—Then what is before me in the form of the claim of $115,000—is it the ten per cent. drawback, plus a rectification of the progress estimates?

Mr. Pringle—I would not like to say that the ten per cent. drawback was included. I think that was paid to them.

It is important to bear in mind that the drawback has been paid, as the 15th clause of the contract provides:

"And it is hereby declared that the written certi-
"ficate of the said engineer, certifying to the final
"completion of the said works to his satisfaction,
"shall be a condition precedent to the right of the
"contractor to receive or to be paid the said remain-
"ing ten per cent., or any part thereof."

The certificate there required is as to the drawback of ten per cent. not now in question.

Mr. T. S. Rubridge was the Superintending Engineer of the works until he died in the year 1904.

Mr. L. N. Rheaume, a witness in the case, and upon whose evidence the petitioners rely, was appointed Superintending Engineer on the 25th June, 1904. Mr. Killaly was the local engineer in charge from 1898.

Mr. M. J. Butler was the Chief Engineer from 1905 until 1910, when he retired from the service, and Mr. W. A. Bowden was appointed Chief Engineer.

It is conceded by counsel for both parties that Mr. Butler was the Chief Engineer for the time being, having control over the work during his appointment, and Mr. Bowden after the retirement of Mr. Butler. Counsel for the petitioner undertook to file copies of the orders-in-council making these appointments. They have not been filed. If it becomes of importance they may be put in. There is no dispute on the part of counsel as to these facts.

The Crown by their defence rely on the provisions of clauses 16 and 17 of the contract, and as I have stated, I have come to the conclusion that the defence is well founded in law.

The work under the contract was completed in September of 1906. It is alleged by the petitioner that the claims in question were not placed in the progress estimates and it is conceded that no objection or claim was made by the contractors, as required by the provisions of these clauses 16 and 17. It is alleged that an agreement was entered into between the petitioner and the engineers in charge.

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The 12th paragraph of the petition of right reads as follows:

"12. That estimates were given from time to time "as the work progressed, but there was a thorough "and distinct understanding between the Gilbert "Bros. Engineering Co., Ltd., and the engineers in "charge that the question of excavation below grade "done by the Gilbert Bros. Engineering Co., Ltd., "was absolutely necessary in order to obtain grade, "and should remain in abeyance until such time as "there was a final sweeping of the channel and the "quantities could be ascertained, and in the esti- "mates given by the engineer in charge, at different "times, there was a clear reservation in regard to "the work done below grade. For instance, in esti- "mate No. 43 the engineer puts in 'Allowance on "rock necessarily excavated below grade pending "a final adjustment of this item.' Again, in esti- "mate No. 42 there are several allowances for neces- "sary excavation above grade which had not pre- "viously been measured, and there is an allowance "on rock necessarily excavated below grade, pend- "ing final adjustment. So that the estimates of the "engineer in charge bear out the contention of the "Gilbert Bros. Engineering Co., Ltd., that the ne- "cessary excavation below grade for the purpose of "completing the work, was to be considered and dis- "posed of in the final estimate after the sweeping "was done."

If any such agreement was entered into it was with Mr. Killaly, and he had no authority to vary the terms of the contract. The claims in question should, if allowable, have appeared in the progress estimates, and the course provided by clauses

16 and 17 adopted, if not so included. Mr. Killaly in his evidence states as follows, referring to work now claimed for:

"Q. Now were those quantities obtained at that "time in such a shape that they could have been "included in the progress estimates?—A. So far as "the soundings off the dredge were concerned, they "might have been included in the estimate. They "might have been included in the estimates.

"Q. What estimates?—A. In the monthly pro- "gress estimates.

"Q. We have been informed that they were not so "included?—A. No material below grade was re- "turned in progress estimates during the course of "the work, except in one estimate that has been re- "ferred to."

This estimate referred to is what they call Estimate No. 43.

Mr. Rheaume in his evidence states as follows:

"Q. Was there any way of arriving at the actual "quantity of excavation below grade until the chan- "nel was swept?—A. There was approximately, for "all practical purposes to establish the principle of "it. But the figures probably would not be correct, "but you would get a fair approximation.

"Q. Was it done, as a matter of fact, until the "channel was swept?—A. Not to my knowledge; it "might have been done."

He stated further:

"Portions of the work thus far completed, al- "though not swept, could have been approximately

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"estimated under this to show the quantity below "grade.

"By *Mr. Pringle*:

"Q. Was it?—A. It was not done in my time; it "might have been done before.

"Q. Was it done in your time?—A. Not in my "time."

Mr. Bowden states, "I would consider that sub- "stantially the whole of the amount should have "been included in the progress estimate.

"THE COURT—Subject to re-adjustment for the "final certificate?

"The Witness—Subject to re-adjustment for the "final."

Mr. M. J. Butler, as I have stated, was the Chief Engineer for the time being, having the control of the work at the time the contract was completed. The effect of Mr. Butler's evidence is that he finally dealt with the matter, and intended to give a final certificate. It is quite clear from his evidence that he neither intended to allow or disallow the claim in question. His view apparently was that under the clause of the contract to which I have referred, the claim in question should be left to the court. This was the view he entertained and he acted upon it and gave what he intended to be a final certificate.

Referring it to the court did not get rid of the legal difficulties raised by clauses 16 and 17 of the contract.

My view is that after what took place before Mr. Butler, the subsequent Chief Engineer, Mr. Bowden, had not the right to reopen the matter.

I think the principle laid down in *Murray v. The Queen* (1) is applicable to this case. The facts in the *Murray* case are not similar to the facts in this case, as in the *Murray* case the amount in question had been paid. If in point of fact Mr. Butler dealt with the case I do not think that the subsequent engineer had the right to reopen the matter.

In the case of *Murray v. The Queen,* supra (2), the learned Judge points out objections might have been raised to the right of the petitioner. He states: "These and other minor objections presented themselves to us as conclusive reasons, if urged and "relied on, why the contractors could not as a matter of technical law (*though not of natural justice*) maintain their action."

In the case before me, the Crown relies upon the objections.

Even if the dealing with the matter by Mr. Butler was not final, I do not think the subsequent reopening by Mr. Rheaume and Mr. Bowden could deprive the Crown of the defence which they have raised. Both of these gentlemen seem to be of opinion that the claim of the petitioner to the extent of $115,000 is a meritorious claim.

I have to deal with the case as it comes before the Court from the legal point of view. It is for the advisers of the Crown to say whether or not under the circumstances of the case such a claim should be paid. There may be reasons as suggested by Mr. Howard why the claim is not a meritorious one. It is not for me to pass upon this point.

(1) 26 Can. S.C.R. 203.
(2) At p. 212.

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In the case of *Gilbert Blasting & Dredging Co. v. The King* (1), the learned judge, the late Mr. Justice Burbidge states as follows:

"By the twenty-sixth and twenty-seventh para-
"graphs of the contracts the contractors agreed
"that they should have no claim on Her Majesty for
"anything not included in the progress estimates,
"unless the claim was made and supported by sat-
"isfactory evidence, and repeated every month.
"Nothing of the kind was done with respect to the
"present claim. Sometimes one feels that there
"may be some hardship in the Crown invoking these
"provisions against a contractor's claim. But per-
"haps one ought not to have that feeling where the
"contractor during the progress of the work lies
"back and does not give any intimation that he
"thinks himself entitled in any way to that for
"which afterwards he puts forward a claim. At all
"events it is for the Crown to say when these pro-
"visions shall be invoked against a claim, and when
"they may be waived. In the present case the
"Crown relies upon them, and they constitute, I
"think, a bar to the whole claim." This case was affirmed by the Supreme Court of Canada (2).

I have therefore come to the conclusion, as I have stated, that the petitioners fail in their action, which must be dismissed with costs.

Action dismissed.

Solicitors for suppliants: *Pringle, Thompson, Burgess & Coté.*

Solicitors for respondent: *McLennan, Howard & Aylmer.*

(1) 7 Can. Ex. 221 at 236.
(2) 33 Can. S.C.R. 21.