1911
Feby. 28.

BROWN, LOVE AND AYLMER,.....PLAINTIFFS;

AND

HIS MAJESTY THE KING.....DEFENDANT.

Public Work—Trent Canal—Contract—Claims thereunder—Sec. 38, R.S. 1906, c. 140—Meaning of word "Claim"—Waiver—Validity—Reference of questions of quantities and prices.

Held,—That the word "claim" as used in section 38 of *The Exchequer Court Act* (R.S. 1906, c. 140) must be construed to mean a cause of action.

2. Upon a construction of sec. 48 of The *Exchequer Court Act*, that a waiver by the Crown of stipulations in a contract respecting (a) the fixing of rates and prices by the Engineer; (b) The limitation of time for the performance of the contract; (c) The finality of the Engineer's decision of certain matters in controversy between the parties; (d) The obtaining of written directions and certificates of the Engineer as conditions precedent to recovery for extra work; and (e) The formal making and repetition of claims by the contractor, such stipulations constituting technical defences to claims by the contractor, might be validly made by a Minister of the Crown under the authority of an order-in council in that behalf. *Pigott* v. *The King* (10 Ex. C.R. 248; 38 S.C.R 501) considered.

3. Upon a reference to the court of a claim by the Minister of Railways and Canals under the provisions of Sec. 38 of the *Exchequer Court Act*, in connection with which the above waivers were made, the court held that, under the circumstances, it might be declared that the contractors were entitled to recover in respect of certain items of work, leaving the questions of quantities and prices therefor to be fixed by the Engineer to whom by consent of parties such questions were referred.

THIS was a reference of a claim to the court by the Minister of Railways and Canals.

The facts appear in the reasons for judgment.

February 21st, 22nd, 23rd and 24th, 1911.

The case was now heard at Ottawa.

R. J. McLaughlin, K. C., for the plaintiffs;

T. Stewart, for the defendant.

1911

BROWN *et al.* v. THE KING.

Argument of Counsel

Mr. *McLaughlin:*—The plans of the Department were incorrect. The profile on the general plan showed that at a distance of one hundred feet from the margin of the river where Canal No. 1 entered, there was deep water. That was quite incorrect as it required two and one-half feet of excavation at that very point.

[THE COURT:—Is the contractor not bound to examine the ground before he makes his tender?]

I submit not, on the authority of *Pearson* v. *Mayor of Dublin* (1) The contract in that case provided that the corporation would not be liable for any mistake or inaccuracy or imperfection in the plans, or the truth of any statement contained in the specifications, when the contractor could examine the ground himself. It was found afterwards that the specifications were untrue and not fraudulent actually; but the engineers made statements in the specifications as to the nature of an ancient wall beneath the river that they had no good reason for making, and the House of Lords held generally in this way:—That it was impossible for people to take the responsibility of making reckless statements in a document that they knew was a matter of fact and when they knew that the Contractor would act upon it, and then protect themselves from all liability for the statements. By such clauses as that in the contract the Court held that it amounted to legal fraud—that is the making of statements without knowing them to be true or believing them to be true.

[THE COURT:—The contractors here knew they had to look at more than one plan. The large plan (No. 2) was not all; the contractors knew they had to consult others. If they had examined plan No. 19 they would have discovered that the line marked out on plan No. 2

(1) [1907] A. C. 351.

1911

BROWN *et al.* v. THE KING.

Argument of Counsel.

was not what was contemplated. It would at least have put them upon enquiry, and they would have been able to get the necessary information.]

I fully appreciate the position. That the plans were notoriously incorrect is beyond question. The contractor examining a general plan would undoubtedly look at the detail plans—but he would look for the details of the matters shown on the general plan. Plan number 19 is not a detail of anything—it is simply a piece that ought to have been part of the general plan. There is nothing there to shew the width and line of excavation. The contractors were misled by the plans. In this way the case before the Court is very similar, if not altogether on all fours with the case I have cited. I also would refer to *Walton* v. *Moran* (1); *Wood* v. *City of Fort Wayne* (2); *Pigott & Ingles* v. *The King* (3).

[THE COURT:—Your argument, as far as it is affected by the *Piggott* case, is this: Had the parties kept to the original contract the plaintiffs would have been bound by the stipulations—but if they choose to open up the contract then it leaves it at large for a *quantum meruit*.]

Yes. It might throw some light on Burbridge, J's decision in that case. If we considered what the general law would be if there was a just contract to dig out a canal in so many words. As far as I have been able to find among the authorities, I am free to say that I do not think there is any uniformity among them. We have practically no authorities in this country but there are a great many American cases. There is *Collins* v. *United States* (4). Under the order of the engineer in charge in that case the contractors had to excavate below grade, and in excess of the amount contracted for. The

(1) *Hudson on Building Contracts*, 3rd ed. Vol. II, p. 400.
(2) 119 U. S. R. 312.
(3) 10 Ex. C. R. 248.
(4) 34 Ct. Clms. R. 294.

1911

BROWN *et al.* v. THE KING.

Argument of Counsel.

claimants also demanded compensation for losses caused by delays. The plaintiff's claim was allowed. And that case agrees with the case of *Ford* v. *United States* (1). And it would also seem to agree with the decision of Burbidge, J. in the *Pigott* case (2).

The defences waived by the Minister of Railways and Canals in this case are justified under the decision in the *Pigott* case.

Mr. *Stewart* contended that if the contractors had carefully examined the plans they would have discovered the excess of excavation they are claiming for.

As to Claim I, I would draw the attention of the court to paragraph 9 of the contract. It reads:—

"9. It is hereby distinctly understood and agreed, "that the respective portions of the works set out or "referred to in the list or schedule of prices to be paid "for the different kinds of work, include not merely "the particular kind of work or materials mentioned "in the said list of schedule, but also all and every "kind of work, labour, tools and plant, materials, "articles and things whatsoever necessary for the full "execution and completing ready for use of the respec- "tive portions of the works to the satisfaction of the "Engineer. And in case of dispute as to what work, "labour, material, tools and plant are or are not so "included, the decision of the Engineer shall be final "and conclusive." The question under that section is, are they not bound by the schedule of prices?

The great body of the increased work here was of the more costly kind, and it seems beyond conscience to ask these men to add that on at the ordinary price. But in regard to the other feature of it, I submit with confidence to your lordship that the excavation shown on exhibit 19—profile No. 9—is part of the contract. Mr.

(1) 17 Cl. Clms., p. 60.

(2) 10 Ex. C. R. 248; 38 S. C. R. 501.

1911

BROWN *et al.* v. THE KING.

Argument of Counsel.

Greenwood one of the engineers in charge of the work, had observed the defect in the general plan, Exhibit 2, and he drew the attention of the Superintending Engineer to this—and said they would show it on the profile plan of the river bed itself,—and it was shown on that and came down here, and was exhibited,—and you cannot separate them,—they are all part of the contract, and you cannot take that away any more than you could take Exhibit 2 away, I submit that taking it below lock I, there can be no doubt they indicated the excavations there. And perhaps I might go farther, and say that the extra allowance would not be allowed with reference to the entrance into the canal, because the specification itself provides for an extra width there.

My submission is that in all the other claims put forward by the plaintiffs the contract prices must prevail where the work is such as could be said to be of a class contemplated by the contract. In the *Pigott* case the contract prices were adhered to. The prices were not changed there by by the lowering of the grade.

CASSELS, J. now (February 28th, 1911) delivered judgment.

This is an action referred to the Exchequer Court by the Minister of Railways and Canals under section 38 of the *Exchequer Court Act*, which reads as follows:

"Any claim against the Crown may be prosecuted "by petition of right, or may be referred to the Court "by the head of the department in connection with "the administration of which the claim arises."

Section 38, sub-section 2 reads as follows:

"If any such claim is so referred no fiat shall be "given on any petition of right in respect thereof."

The reference is in the following form:

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

"By virtue of the powers vested in me in that "behalf by section 38 of the *Exchequer Court Act*, "Chapter 140 of the Revised Statutes of Canada, "of 1906, I hereby refer to the Exchequer Court of "Canada for adjudication thereon the hereunto "annexed claim dated the 15th day of February, 1909, "of Messrs Brown, Love and Aylmer against the "above named respondent.

"Dated at Ottawa this seventh day of April, 1909.

(Sgd.) GEO. P. GRAHAM,
Minister of Railways and Canals.

The word 'claim' as used in the statute must be read in its technical sense.

"The word 'claim' has been considered a word of art; and long since was defined by Dyer, C.J., (*Stowell* v. *Lord Zouch* (1), to be "a challenge by a man, of the property or ownership of a thing which he has not in possession, but which is wrongfully detained from him." (*Kneedler* v. *Sternbergh* (2).

"In practice the word 'claim' and the phrase 'cause of action' relate to the same thing and have one meaning." (*Minick* v. *Trow* (3).

"A claim in a just juridical sense, is a demand of some matter as of right, made by one person upon another to do or to forbear to do some act or thing as a matter of duty." (*Prigg* v. *Commonwealth* (4).

After the reference pursuant to the orders of the Exchequer Court, an amended statement of claim was filed. As part of the amended statement of claim the following Order-in-Council is referred to;

(A Report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 5th December, 1908.)

(1) Plow. 353.
(2) 10 How. Pr. 67, 72.
(3) 83 N.Y. 514, 516.
(4) 16 Pet. 541.

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

"On a Memorandum, dated 1st December, 1908, from the Minister of Railways and Canals, representing that under date the 27th August, 1895, a contract was entered into with Messrs. Brown, Love and Aylmer for the construction of Section No. 1 of the Peterborough and Lakefield Division of the Trent Canal. The works embraced in this contract were duly completed."

"The Minister further represents that the contractors subsequently put forward certain claims for extras and otherwise, and these claims were, to some extent, the subject of investigation, on the 20th of July, 1906, but that no decisive conclusion was reached in the matter."

"The Minister submits a report, dated 24th April, 1908, from the Chief Engineer of the Department of Railways and Canals, upon the said claims."

"The Minister observes that it appears to him, therefore, that, apart from any question of strict legal obligation, the contractors have a meritorious claim, having done work of which the Government has received the benefit, under the direction of the Government officers, at very considerable cost to the contractors, and for which they have not been compensated."

"The Minister, in view of these circumstances, considered that it would be fair and reasonable to refer the said claim to the Exchequer Court of Canada for adjudication, subject to certain modifications of the contract, and upon the conditions hereinafter stated."

"The Minister further observes that he does not consider it expedient or desirable to submit to the Court the determination of quantities or prices as to

work of any class in respect of which the Court may find the contractors entitled to recover."

"The Minister accordingly recommends that he be authorized to waive, at his discretion, for the purposes of a reference of the said claim to the Exchequer Court of Canada, the following provisions of the contract, that is to say:—

1. Provisions prescribing limitations of time.

2. Provisions requiring the making and repetition of claims.

3. Provisions excluding implied contracts.

4. All provisions and conditions in respect of the fixing of prices by the Engineer, the requirement of directions in writing and certificates from him, and the finality of his decision contained in clauses 5, 8, 9 and 25 of the contract, and similar provisions, if any, in other clauses.

If and when the contractors agree that, upon the determination by the Court of the questions of liability affecting their said claims under the contract as so modified, the quantities and prices necessary to be ascertained in order to fix the amount of the liability, if any, found by the Court, shall be determined not by the Court but by the Chief Engineer of the Department of Railways and Canals, and that the judgment shall be entered for the amount so found by the said Chief Engineer.

"The committee submit the same for approval.

(Sgd.) RODOLPHE BOUDREAU,
Clerk of the Privy Council."

To this Statement of Claim the defendant pleaded as follows:—

"The defendant further says that on the fifth day of December in the year 1908, an Order-in-Council was passed respecting certain claims of the plaintiffs,

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

a copy whereof is annexed to the said statement of claim, to which said Order-in-Council, for greater certainty, the defendant craves leave to refer, and except as the Honourable the Minister of Railways and Canals may have power to waive the clauses of the said contract and specification set forth in the said Order, and as the said Minister, may, at his discretion, hereafter waive the said Clauses, the Defendant hereby pleads and relies upon the Clauses of the said Contract and Specification, and particularly, upon those herein set forth or referred to."

The defence then proceeds to deal with each claim in detail, setting out the different clauses of the contract claimed to be a bar to the right of action of the plaintiffs.

Upon the case being opened I declined to try it until counsel for the Crown formally waived whatever provisions of the contract it was intended should be waived. I was and am still of the opinion that my jurisdiction was confined to the trial of the legal rights, and that it was no concern of mine to pass upon the meritorious claims unless the claimants were entitled in law to a judgment for the amount of such claims. Thereupon counsel for the Crown filed the following document:—

"In pursuance of and under the authority of a Report of the Committee of the Privy Council approved by His Excellency the Governor General on the fifth day of December, 1908, the Minister of Railways and Canals for the purpose of a reference of the claims referred to in the said Report to the Exchequer Court of Canada, waives certain provisions of the Contract referred to in the said Report as hereinafter set forth, namely:—

1. The waivers hereinafter contained are made for the purpose of this action only and shall apply only to those items or claims now on fyle in this action in this Court.

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

2. Notwithstanding anything herein contained the Minister of Railways and Canals makes all waivers herein contained only so far as he has power to do so under the authority of the said Report and of the Statute Law or other Law applicable to or concerning the said Contract or the matters in question in this action.

3. The Minister waives that part of paragraph 143 of the Specification requiring that rates or prices should be fixed by an authorized officer as a condition precedent to the bringing of an action, and agrees that any rates or prices which might come under the said paragraph may be fixed under the provisoes of the said Report by the Chief Engineer of the Department of Railways and Canals.

4. The Minister waives the limitations of time provided for in paragraph 145 of the Specification and clauses 3 and 18 of the Contract, provided that the plaintiffs shall not under this waiver, be entitled to recover for any increased or additional work occasioned by their own delay or default.

5. The Minister waives that part of clause 4 of the contract which provides that the decision of the Engineer shall be final.

6. The Minister waives all provisions and conditions in respect of the fixing of prices by the Engineer, requirement of directions in writing and certificates from him and the finality of his decision contained in clauses 5, 8, 9, and 25 of the Contract.

7. The Minister waives the provisions in Clauses 26 and 27 of the Contract requiring the making and repetition of claims.

Ottawa, Feb. 21, 1911.

(Sgd.) GEO. P. GRAHAM,
Minister of Railways and Canals."

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

Counsel also on behalf of the Crown agreed to these waivers.

I understand the effect of this waiver is that if the plaintiffs be entitled to succeed for all or some of the claims, any technical defences not going to the root of the legal right are withdrawn. The reason no doubt for the course taken is that the plaintiffs should not be deprived of their legal rights by mere technical defences not affecting the merits.

Section 48 of the *Exchequer Court Act* reads as follows:

"In adjudicating upon any claim arising out of any contract in writing the Court shall decide in accordance with the stipulations in such contract, and shall not allow,—

(*a*) compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein; or,

(*b*) interest on any sum of money which it considers to be due to such claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown."

The effect of this clause was dealt with in the case of *Pigott & Inglis* v. *The King* (1). The learned Judge Burbidge after dealing with certain provisions states as follows:

"All of the provisions mentioned are in this case "waived by the order in council cited. Such matters "may, if the Crown sees fit, be set up as defences to any "action the contractors may bring on the contract, but "I do not see that the Crown is bound to set them up. "It is true of course that they are stipulations in the "contract, and the thirty-third section of *The Exchequer*

(1) 10 Ex. C. R. 263.

"*Court Act* provides that in adjudicating upon any "claim arising out of any contract in writing the court "shall decide in accordance with the stipulations in such "contract. But that general provision may perhaps be "treated as directory only and not as one that imposes "on the court the obligation of giving effect to a defence "disclosed by the contract which the Crown has not "pleaded." That at least has been the practice that "has hitherto prevailed in such cases both in this court "and in the Supreme Court of Canada. The section, "however, "goes further and provides that the court "shall not in adjudicating upon any such claim allow "compensation to any claimant on the ground that he "expended a larger sum of money in the performance of "his contract than the amount stipulated for therein; "nor shall it allow interest on any sum of money which "it considers to be due to such claimant in the absence "of any contract in writing stipulating for payment of "such interest, or of a statute providing in such a case "for the payment of interest by the Crown. These "negative enactments limiting, as they do, the power "and authority of the Court, must be construed not as "directory merely, but as imperative."

The learned Judge seems to divide the section and to treat the first part of section 48, namely, in ajudicating upon any claim arising out of any contract in writing, the court shall decide in accordance with the stipulations in such contract as separate from sub-sections "a" and "b". Entertaining that view he seems to be of the opinion that the earlier part of the section may be treated as directory only; but the latter part as being imperative. Unless bound by the decision of the Supreme Court I would find it difficult to hold that the word "shall" in the earlier part of the section is to be treated in any different

1911

BROWN *et al.* v. THE KING.

manner from the word "shall" in the two sub-sections. It was not necessary so to hold in the case of *Pigott & Ingles* v. *The King* (supra).

Reasons for Judgment.

In the Supreme Court of Canada Mr. Justice Idington expressly deals with this question. Mr. Justice Duff concurred with Mr. Justice Idington. Mr. Justice Girouard, agreed with the reasons stated by His Lordship Mr. Justice Burbidge in the court below. Mr. Justice Davies said:—"For the reasons given by the learned Judge of the Exchequer Court, I am of opinion that this appeal should be dismissed with costs". Mr. Justice Maclennan concurred in the opinion of Davies J.

It was not necessary in the *Pigott* case to decide the point referred to by Mr. Justice Burbidge. The language of the Judge in the court below as quoted is "but that general provision may perhaps be treated as directory only."

The Supreme Court in the judgment quoted probably were merely affirming the result arrived at by Mr. Justice Burbidge, and probably did not intend to pass upon the construction of this particular section. I may be wrong in this view. It is not of much importance in considering the present case, because it is quite clear as to certain of the waivers contained in the document produced, that both the Exchequer Court and the Supreme Court have upheld the right to waive such stipulations as are important in this particular case. I have referred to the matter, as I do not wish to be bound hereafter, if the case ever arises, by a construction of section 48 of the *Exchequer Court Act* that would make the first part of the section, if construed as it was construed by Mr. Justice Burbidge, directory.

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

As to some of the claims there is considerable room for different views. The views for and against the right of the claimants were presented by counsel ;— and during the trial and since the trial I have considered the various claims produced. The 1st, 3rd and 4th claims were tried together.

CLAIM No 1.

The first claim is for sub-marine excavation in the river below Lock No. 1.

The profile plan upon which the contract was let indicated the submarine excavation to a less extent than the actual amount of submarine excavation made in the bed of the river below Lock No. 1. This was about 2,500 lineal feet in length. There is a slight difference of opinion as between the plaintiffs and the Crown as to whether it was 2,400 or 2,500 feet. The Claim Number 1 referred to me treats it as if the government engineer had allowed for the 2,500 feet. The plaintiffs base their claim upon the ground that by the profile plan a less quantity was indicated. In answer the Crown produced a plan Exhibit No. 19 which would indicate sub-marine work at the point in question of 2,500 feet or thereabouts. This plan, Mr. Aylmer the witness for the plaintiffs said he did not see; that had he seen the plan he would not have made the tender which he did. Upon the other hand, it was proved that this plan was exhibited with the other 18 similar plans which Mr. Aylmer admits having seen. I think it must be held Mr. Aylmer is bound by this particular plan. If he did not see it it was there to be seen, and it formed part of the contract plans. It may seem a hardship on the plaintiffs that excavation of this character should be paid for as earth excavation when in fact it was earth excavation under water; never-

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

theless the contract is express on the point and no allowance other than for rock and earth excavation is to be allowed. It is obvious from the specifications that a certain quantity of excavation under water had to be performed. This excavation is provided for by the contract as being earth excavation. So far as this particular claim is concerned, I think the plaintiffs are not entitled to succeed.

CLAIM No. 3.

Claim No. 3 is for submarine excavation in the bed of the river below Lock No. 3, about 900 lineal feet in length. The plan exhibited and the only plan referring to the length of this submarine excavation showed a less quantity. It was the same way with Claim No. 4. The claim is for the cost of submarine excavation in the bed of the river below Lock No. 5 about 600 feet in length. The contract plan upon which the tender was based showed a less quantity. The specification provided that the canal shall be generally 50 feet wide on the bottom except at the entrances to the canals and to the approaches to the locks which shall be excavated to the lines as shown upon the plan exhibited. There was a material change from the dimensions of the work after the contract was entered into. The width instead of being limited to 50 feet was extended to the width of 100 feet. I am of the opinion that as to the extensions of the work, referred to in claims 3 and 4, and as to the extra width from 50 to 100 feet, except so far as the specifications required the extra width at the entrances to the canals and to the approaches to the locks, that they should be classified as extra work governed by clause 5 of the contract. This section of the contract reads as follows:—

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

"5. The Engineer shall be at liberty at any time, "either before the commencement or during the con- "struction of the works or any portion thereof to "order any extra work to be done, and to make any "changes which he may deem expedient in the dimen- "sions, character, nature, location, or position of the "works, or any part or parts thereof, or in any other "thing connected with the works, whether, or not "such changes increase or diminish the work to be "done, or the cost of doing the same, and the Contract- "ors shall immediately comply with all written re- "quisitions of the Engineer in that behalf, but the "Contractors shall not make any change in or addition "to, or omission, or deviation from the works, and "shall not be entitled to any payment for any change, "addition, deviation, or any extra work, unless such "change, addition, omission, deviation, or extra work, "shall have been first directed in writing by the Eng- "ineer, and notified to the Contractors in writing, "nor unless the price to be paid for any addition or "extra work shall have been previously fixed by the "Engineer in writing, and the decision of the Engineer "as to whether any such change or deviation increases "or diminishes the cost of the work, and as to the am- "ount to be paid or deducted as the case may be in "respect thereof shall be final, and the obtaining of his "decision in writing as to such amount shall be a "condition precedent to the right of the contractors "to be paid therefor. If any such change or alter- "ation constitutes, in the opinion of the said Engineer, "a deduction from the works, his decision as to the "amount to be deducted on account thereof shall "be final and binding."

Section 25 of the contract reads that cash payments equal to about ninety per cent. of the value of the work

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

done, approximately made up from returns of progress measurements and computed at the prices agreed upon, or determined under the provisions of this contract, will be made to the Contractor monthly.

Clause 143 of the specification reads as follows:—

"The plans now exhibited are only intended to "show the general mode of construction adopted; but "detail drawings which must be strictly carried out, "will be supplied for the guidance of the Contractor "as the work proceeds.

"If any alteration becomes necessary from any "cause, or if any work required for the entire construc- "tion and completion of the said Section No. 1, save "as hereinbefore expressly excepted, shall be found "to have been omitted from or not enumerated in "these specifications, the contractor must, when direct- "ed, carry them out in the same manner as if they "formed a part of the original design, and at rates or "prices fixed by an authorized officer for the additional "or reduced expenses that may be caused by such "alterations."

Now, it seems to me in reference to these items other than the extended length referred to in Claim 1, namely, the excavation in the bed of the river below Lock No. 1, were changes in the dimensions etc., by the clauses of the contract and specifications referred to, this extra work was to be performed at prices to be settled by the Engineer. It might or might not be that the Engineer would consider the schedule rates as being sufficient compensation. Be that as it may, it was left at large for him to determine what was the proper amount to be allowed. As the case stands before me if the plaintiffs are legally entitled to be paid for the extra cost occasioned by these changes then it is for the Engineer to whom the reference is directed

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

to ascertain the quantities and the prices. It is solely a matter for him to say what ought to be allowed. It is open to him to allow higher prices than those referred to in the schedule of rates. The waiver leaves it open to have these amounts ascertained as if the prices were to be settled for this work under the provisions I have quoted. I do not wish to say anything that in any way will limit the right of the Chief Engineer to whom by consent the questions of quantities and prices are to be referred. I merely declare that in regard to these claims the matter is at large.

CLAIM No. 2.

Claim No. 2, submarine excavation at the upper entrance. This claim I think should also be left to the findings of the Chief Engineer. It is stated by counsel for the Crown that the change in the location and the pier in question effected no change whatever in the quantity of submarine excavation that would be required at the upper entrance to the canal at Lakefield. If this be so then the plaintiffs should not be entitled for any extra excavation. If on the other hand the contention of the plaintiffs is well founded, then I think they will be legally entitled to have the question determined on the reference by the Chief Engineer. It is for him to decide and to settle the quantities if the plaintiffs be entitled, and the prices.

CLAIM No. 5.

Claim No. 5 is for the cost of putting on a mortar coat on the face and coping of the concrete wall. I think the plaintiffs are entitled to have this matter dealt with under the reference. It is in no way provided for in the specifications that a mortar coat shall be placed on the face of the concrete walls. It is for the Engineer to whom the question is re-

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

ferred to ascertain the quantities and the price to which plaintiffs would be entitled.

CLAIM No. 7.

This claim is for rock excavation below grade and outside of the line as laid out by the Engineer for canals and lock pits.

CLAIM No. 8.

Claim No. 8 is for earth excavation below the grade line of canal.

CLAIM No. 15.

Claim No. 15 is for earth excavation outside of excavation lines of structures as laid out by the Engineer.

I think no case has been proved with respect to these last three claims.

CLAIM No. 10.

This claim is for extra filling etc., required to complete the lifting of the Grand Trunk Railway track at Sawer's Creek. The provisions of the specifications referring to this particular work are sections 124 and 125, and are as follows:

"124. The grade of the Grand Trunk Railroad at "Sawer's Creek will have to be raised 4½ feet above "its present grade, which shall be done by the Con- "tractor. The bed of the railroad shall be carried "up with a grade of 1 in 100 or such other grade as "may be ordered by the Engineer. The slopes of "the embankment shall be of such an inclination "and the top of the embankment of such width as "shall be directed by the Engineer. The material "used in making this embankment shall be approved "of by the Engineer and be placed as he may direct.

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

"125. The track shall be taken up, relaid and "ballasted and everything left in as good condition as "it was found when commencing the work of altera- "tion, and to the satisfaction of the Chief Engineer "of the G. T. Railway and the Engineer. The bal- "last shall be of a depth of 10 inches below the ties. "The cost of raising, taking up, relaying, ballasting, "and everything connected therewith, shall be in- "cluded in the schedule price for the ballast."

I am forced to the conclusion that the contention of Mr. Stewart upon the part of the Crown that the whole cost of this work is to be included in the schedule price for the ballast, must be given effect to. This seems to be the true meaning of these sections; and I think the plaintiffs are not entitled to any relief in respect to that particular claim.

CLAIM No. 11.

This claim is for excavation of rock and earth in ditches at sides of roads, and embankment and from borrow pits for roads.

In the schedule of prices, Number 66 is as follows:

"Broken stone or gravel, for road beds, furnished or laid as described in specification per cubic yard, $1.00." It is admitted that this has been paid for. The clauses referring to the roads are sections 14 and 15 of the specification and are as follows:

"14. Where roads are ordered they shall be formed "24 feet wide, unless otherwise ordered by the Engineer, "between the side ditches, properly graded, rounded off "and trimmed. In the centre a layer of broken stone "12 feet wide and about 1 foot deep shall be placed, the "stone to be broken so as to pass through a ring 2 inches "in diameter, and the whole to be properly blinded with "gravel and rolled, compacted and finished in a satis- "factory manner.

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

"15. Off-take drains, side-ditches, &c., shall be dug "wherever directed by the Engineer, and of such depth, "dimensions and side slopes as will be laid out. The "material arising from these will be paid for at the "ordinary price for 'earth excavation', which shall "include the cost of all trimming, sloping, grading, &c.

In the schedule of prices item 62 is as follows

"Grading and ditching of roads per 100 lineal feet $25."

It is contended by Mr. Stewart upon the part of the Crown that this covered side-ditches upon either side of the road as built. Section 15 very expressly provides that side-ditches shall be dug wherever directed by the Engineer, &c. The material arising from these will be paid for at the ordinary price for earth excavation. Section 14 provides that the road shall be formed, &c., between the side-ditches. I do not take Mr. Stewart's view as to the meaning of this contract. It is expressly provided that the excavation of these side-ditches shall be paid for. What is provided for by the schedule of prices, namely, the grading and ditching of roads, in my judgment, does not refer to the side-ditches. The side ditches are something other than the ditching of the roads. In forming the road embankment it is necessary to have certain drains or ditches across the road itself in order to properly drain the roadbed; and it seems to me that that is what was contemplated. That part of the claim which refers to embankment or borrow pits for roads, I think should not be allowed. There is no evidence whatever before me that it has not already been paid for. I think, however, the excavation for the side ditches is a proper claim, and should be considered by the Engineer to whom the question of quantities and prices are referred.

CLAIM No. 27

This claim is for the cost of putting in glance-booms and running logs past dams before permanent booms were constructed. I do not think this claim can be allowed. The contractors were bound to protect the works. The specification required that no rights should be interfered with; and the engineer ordered this protection. The contractors acquiesed in it; and I do not think they are entitled to any provisions of the contract, having regard to the specifications, as would entitle them to this claim.

CLAIM No. 41.

This claim is for extra unwatering of section over that contemplated in contract. I think this a proper matter of reference to the Chief Engineer. It will be for him to judge whether the plaintiffs were put to any extra cost having regard to the matters with which I have heretofore dealt.

CLAIM No. 50.

This is a claim for overhaul on earth from borrow pits, to make up filling in rear of north-west entrance pier at the upper entrance to Canal No. 1, Lakefield.

As I read the specifications there is no provision governing the subject matter of this claim. The excavations referred to are clearly in my judgment excavations required for the work contracted to be done, but do not refer to earth taken from borrow pits for the purpose of filling. I think this claim should be left to the Engineer; it is for him to say what ought or ought not to be allowed as respects both quantities and prices.

CLAIMS NOS. 16 AND 40.

These claims are for dry masonry retaining-walls at the sides of the river and raceway at Lakefield.

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

I think these claims should be entertained by the Chief Engineer. They are works not contemplated by sections 16, 17 and 127 of the specifications. They are extras on the same principle which applies to the earlier claims that I have referred to and apply to these particular claims.

By the agreement of the parties the questions of quantities and prices are to be left to the determination of the Chief Engineer. I do not wish in any way to hamper his judgment in regard to these matters so far as quantities and prices are concerned. I have considered the cases cited by Mr. McLaughlin in support of his contentions with respect to the claim for the 2,500 feet at the entrance to LockNo. 1, namely to the submarine excavation in the bed of the river below Lock No. 1. I do not think the case of *Pearson* v. *The City of Dublin* (1), assists his contention. That case is referred to in the Irish Reports, 1907, Vol., 2—K.B.D. The case is reported in the different courts at pages 27, 82, and 537. It might be well to consider the language in the court below at page 43. The *Pearson* case was an action of deceit. The groundwork of the action was fraud. It was an action of tort. In the case before me no suggestion of tort or wrongdoing on the part of the officials of the Crown has been suggested, nor would there be any room for such contention. In any event an action of tort would not lie against the Crown for the wrongs of its officers. The bearing of the *Pearson* case so far as this case is concerned is against the contention of Mr. McLaughlin. The action of deceit could not lie unless the plaintiffs had been damnified. The facts in that case show that the damage claimed was, that he had been misled into entering into a contract

(1) [1907] A. C. 351.

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

which was more onerous than he contemplated. It was conceded in that particular case that the contract had to be performed, and the damage claimed in the action of deceit was his loss occasioned by having entered into this contract which he was compelled to perform. I am dealing in the present case with a question of contract. If in the *Pearson* case notwithstanding what took place the plaintiffs were bound by their contract *a fortiori* they are bound in the present case. In the case of *Re Walton* reported in K.B.D. of 1905, and referred to in Hudson, 3rd Ed. Vol. 2, at p. 400, the contract was to lay the pipe to low water. This case is a case in favour of the plaintiffs upon the points upon which I have given judgment in their favour. It must be remembered that in the *Walton* case the contract was explicit and clear that the pipe was only to be laid to low water, having no reference in the schedule of prices to any work under water, and while the plaintiff was aware that work under water might be required, according to the findings of the learned Judge it should also be assumed that he took for granted that he would be properly remunerated. *Wood* v. *The City of Fort Wayne* (1), is also in favour of the plaintiffs' contentions on the questions which I decided in their favour.

I have given my reasons for coming to the conclusion that these matters were extra work and are governed by the clauses of the specifications which I have set out.

The question of costs will have to be dealt with after the report of the Chief Engineer, and can be spoken to before me, if the parties so desire. I think if the plaintiffs fail in obtaining any claim beyond that already allowed, that the action should be dis-

(1) 119 U. S. at p. 312.

1911

BROWN *et al.* v. THE KING.

Reasons for Judgment.

missed with costs. Upon the other hand if any substantial claim is proved I think it is a case, having regard to the fact that certain of the claims have been disallowed and that but for the waiver of the technical defences by the Crown the plaintiffs could not have succeeded, in which each party should bear its own costs. This matter, however, I have stated may be spoken to if the parties so desire.

Judgment accordingly.

Solicitor for plaintiffs: *R. J. McLaughlin.*

Solicitor for defendant: *T. Stewart.*