IN THE MATTER OF THE PETITION OF RIGHT OF

ARCHIBALD STEWART.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1900
Dec. 15.
1901
Feb. 26.

*Contract for public work—Delay in executing same—Notice by engineer—Withdrawing work from contractor—Damages—Plant—Interest.*

1. There may be some question as to whether *Walker* v. *The London and North Western Railway Company* (L. R. 1 C. P. D. 518) should be accepted as establishing a general proposition that if in contracts creating a forfeiture for not proceeding with work at the rate required, a time is fixed for its completion, the forfeiture cannot be enforced on the ground of delay after that date.

But at all events any notice given after such date to determine the contract and enforce the forfeiture must give the contractor a reasonable time in which to complete the work, and the contractor must, with reference to such reasonable time for completion, make default or delay in diligently continuing to execute or advance the work to the satisfaction of the engineer. The engineer is to decide, having regard to a time that in the opinion of the court is reasonable, and the contractor is to have notice of his decision.

2. Where there is a breach of contract the damages are to be measured as near as may be by the profits the contractor would have made by completing the contract in a reasonable time.

3. In this case the contractor claimed for loss of profits in respect of certain extra work not covered by the contract.

*Held*, that inasmuch as it was not possible to say either that the engineer would have directed it to be done by him had the work remained in the suppliant's hands, or that in case the engineer had done so, that he would have fixed a price for it from which a profit would have been derived, it could not be taken into consideration.

4. Where in such a case the Crown dispossessed the contractor of his plant and used it for the purposes of the completion of the work, the contractor was held entitled to recover the value of such plant as a going concern, that is, its value to anyone situated as the contractor himself was at the time of the taking of the plant.

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5. Where the contractor was not allowed interest upon the value of such plant, it was held that he was not to be charged with interest upon the balance of the purchase price of a portion of the plant which, with his consent, the Crown had subsequently paid.

Argument of Counsel.

PETITION OF RIGHT for damages arising out of a breach of contract for the construction of part of a public work, by reason of the Crown withdrawing the works from the contractor, before completion, for alleged delay in prosecuting such works.

The facts are stated in the reasons for judgment.

The case came on for trial on the 6th of September, 1899, and was continued on the following dates:—September 7th, 8th and 9th, 1899; January 25th, 26th, 27th, 29th, 30th, 31st, 1900; February 1st, 1900; March 3rd, 5th, 6th, 7th, 8th, 12th, 1900; April 16th, 17th, 18th, 19th, 20th and 21st, 1900.

The following counsel appeared for the respective parties:

*B. B. Osler, Q.C., W. D. Hogg, Q.C.* and *Glyn Osler* for the suppliant;

*S. H. Blake, Q.C., W. H. Lawlor* and *W. A. H. Kerr* for the respondent.

At the request of counsel the arguments for both parties were submitted in writing.

The following is an abridgement of the argument on behalf of the suppliant:

The suppliant submits three grounds in support of his contention that a breach of the contract was committed by Her Majesty, and these grounds are as follows:

1. That the notice of the 13th of October, 1897, was invalid inasmuch as it gave no intimation to the suppliant as to what he was required to do to satisfy the chief engineer.

2. That even if the notice was sufficient in substance and information, it could not be effectual to put an end

to the contract, as the time had expired within which an effectual notice could be given, and no contract then existed within or under which an effectual notice for the said purposes could be given.

3 Even assuming the first and second objections to be untenable, the notice was not effectual to end the contract, as the default in diligently prosecuting the work, which the Crown complains of, was not that of the suppliant; but was the result of neglect on the part of the engineers in charge in not laying out the work, giving plans and detailed drawings, &c., and the engineer is not the conclusive judge where the default is occasioned by himself.

With reference to the first point, assuming that the original contract was still in force at the time when the notice of the 13th of October was given, it is submitted that the notice was not in itself sufficient to entitle the Government to act, in pursuance of that notice, by taking the contract out of the contractor's hands. The notice, in order to be effectual, should have indicated what the matters of delay and default were, in order that the contractor might have remedied them; it contained no indication in respect to what the contractor should do as regards expedition, material and workmanship, so that during the six days mentioned in the notice, the contractor might have opportunity in removing the engineer's objection, or satisfying his requirements (*Smith* v. *Gordon* (1). If, therefore, this notice had been given while the original contract was in force, and action had been taken upon it by the chief engineer by the removal of the contractor, it is quite plain upon the case above cited that the Government would have been in error, and that a breach of the contract would have taken place entitling the contractor to sue and recover damages for the

(1) 30 U. C. C. P. at. p. 562.

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breach The reasonableness of this requirement is justified by the actual facts in this case, assuming, for the moment, that a notice dismissing the contractor could be given at all.

2. It is therefore submitted upon the second ground, that even if the notice were sufficient in substance and information, it could not be effectual to put an end to the contract, as the time of the original contract had expired, and no contract existed within which or under which an effectual notice for the said purpose could be given.

At the date of the notice the original contract as to time of completion was entirely abandoned by the parties. The work was still proceeding in a much altered form, changes in structures had been decided upon and were being constructed, new prices had been arranged for masonry and concrete. The contract, therefore, which existed between the Government and the suppliant in November, 1897, was a new contract for the performance and completion of the work within a reasonable time, and the Government were not entitled at that time to give the notice of the 13th of October, 1897, purporting to be within the requirements and stipulations of the contract of the 24th September, 1892. (*Walker* v. *The London & North Western Railway Co.* (1); *Wood v. Rural Sanitary Authority of Tendring* (2); *The Mayor of Essendon* v. *Ninnis* (3); *Smith* v. *Gordon* (4); *Law Quarterly Review* (5).

All that can be said with reference to the contract existing at the time the notices were given in October and November of 1897, is that both parties having permitted the work to be proceeded with after the time

(1) L. R. 1. C. P. D. 518.
(2) 3 T. L. R. 272.
(3) 5 Victorian L. R. 236.
(4) 30 U. C. C. P. at p. 562.
(5) Vol. 16, No. 62, p. 117.

originally specified had expired, a new contract arose so far as time was concerned, under which the contractor would be entitled to perform the work within a reasonable time. As to what that reasonable time might be, it was not, it is submitted, within the province of the Government to finally indicate. It is entirely a question for the court to say whether the time specified in the notice of the 20th of March, 1897, whereby it was notified to the contractor, in effect, that the work should be completed by the 31st of October, 1898, was or was not a reasonable time within the meaning of the cases bearing upon that subject. But it is submitted upon the evidence that the court cannot say that the suppliant was allowed a reasonable time to complete the work remaining to be done.

Where a contract exists in which the time for the completion of the work is not specified, or where the time mentioned in a contract for the completion of the work has been waived, either contracting party may give notice to make time of the essence of the contract, which of course must be a reasonable time. *Taylor* v. *Brown* (1); *Green* v. *Sevin* (2).

If the work is taken away without a reasonable time to complete it being allowed, the contractor is entitled to damages. (*Startup* v. *MacDonald* (3); *Hudson on Building Contracts* (4); *Roberts* v. *Bury Commissioners* (5); *Comyn's Digest*, vo. "Condition" L. [6]; *Holme* v. *Guppy* (6); *Westwood* v. *Secretary of State for India* (7); *Russell* v. *da Bandeira* (8).

Then, as to the measure of damages. The measure of damages when there is a wrongful forfeiture of a

(1) 2 Beav. 180.
(2) 13 Ch. D. 589.
(3) 6 M. & G. 593.
(4) 2nd ed. (1895) pp. 212, 213.
(5) L. R. 5 C. P. 310.
(6) 3 M. & W. 387.
(7) 7 L. T. N. S. 736.
(8) 13 C. B. N. S. 149.

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contract is stated by Lord Cranworth in the case of *Ranger* v. *The Great Western Railway Co.* (1):

"The right of the appellant [the contractor] would be to recover such amount of damages as would put him as nearly as possible in the same position as if no such wrong had been committed, that is, not as if there had been no contract, but as if he had been allowed to complete the contract without interference."

It is submitted that the suppliant is entitled to whatever profit he would have made upon the extra work, no less than to the profit which he would have made upon the work actually specified or ordered before the 5th of November, 1897, when the works were taken out of his hands. That is the plain meaning of the rule laid down by Lord Cranworth, as above cited.

In cases where the contract price is a bulk sum and the contract provides that extra work must be done without any additional compensation, the measure of damages to the contractor is the difference between the contract price and the cost of performing the work, including the extra work. *Ranger* v. *The Great Western Railway Co.* (2).

With regard to the backing, that was the subject of an independent contract between the Minister of Railways and Canals and the suppliant. It is a well established rule of law that oral evidence is admissible for the purpose of showing that the writing between the parties does not in fact contain the agreement in respect of which the dispute has arisen, and that evidence is always admissible for the purpose of showing that the real contract between the parties is not in writing, and that the subsequent written contract does not contain, and was not intended to contain, the whole agreement between them. (*Harris* v. *Rickett* (3); *Rogers* v. *Hadley* (4).

(1) 5 H. L. C. 72.
(2) 5 H. L. C. 72.
(3) 4 H. & N. 1.
(4) 2 H. & C. 227.

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The following is a synopsis of the written agreement submitted on behalf of the respondent:

As to the question of the contractor's delay in proceeding with the works, and the withdrawal from him, on that account, of the completion of the contract, it is submitted that the only answer that can be given from the evidence as to why the work which was to have been done in 1894 was not finished in 1897 is that the contractor was incompetent and did not desire to get on with his work, and that his means, force and plant were entirely inadequate. Such cases as *Roberts* v. *Bury Commissioners* (1) can have no application here. There the complaint was that no extension of time had been given, whereas here it is evident that the time was extended for a period greatly in excess of any delays caused by the respondent. Making a summary of the delays as accurately as they can be taken from the statements made by the suppliant and his witnesses, it would appear that to the end of 1896 the number of months of delay complained of was five; that the additional time given was two years and one month. So that even if the delay were chargeable to the Crown, there has been given to the suppliant some twenty months of time for the five months of delay by the Government of which he complains. Long prior to the notice of March 20th, the suppliant had been frequently urged by the Department of Railways and Canals, beginning in July, 1893, to proceed more vigorously with his work. It cannot be said, therefore, that there was anything unreasonable in giving the notice of March, 1897.

The contract between the suppliant and the Crown is contained in the original agreement of the 24th September, 1892, with the modification in prices

(1) L. R. 5 C. P. D. 310.

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effected by the agreement of the 20th August, 1895, and by order in council of 21st September, 1895. The acceptance was upon the express terms that there should be no deviation in the contract prices or any extra charge. At this date, therefore, the original agreement stood with the only alterations as to time of completion and as to certain rates. In November, 1897, when the breach of contract complained of by the suppliant is said to have taken place, these documents were in force between the parties and contained the whole contract between them. The breach complained of must therefore, be a breach of some term contained in these instruments, or a breach of an implied contract arising apart from them. Let us examine the suppliant's contentions. He says the action of the Crown in taking the work out of his hands and dismissing him therefrom was a breach of the contract existing between him and the Crown in November, 1897. He complains that taking the work out of his hands is the breach of contract. The contract he relies on as having been broken is therefore a contract to allow him to perform the work. It is beyond question that no such express contract appears on the written documents. A perusal of the thirty-four clauses of the contract and of the one hundred and forty-five paragraphs of the specification will not reveal a single word of obligation on the part of the Crown to permit the doing of the work; neither will any such obligation be found in the agreement above referred to of August and September, 1895, introducing the three-lock system. Therefore, the contract which the suppliant says has been broken must be an implied contract. (*Hudson on Building Contracts* (1)). But there can be no implied contract here, because section 34 of the written contract between the parties expressly

(1) 2nd ed. p. 228.

declares that no implied contract shall arise between the parties in respect of any of the works thereby contracted for. (*The Queen* v. *Starrs* (1)).

As to the generality of the terms of notice withdrawing the works from the control of the contractor, it is submitted that, where the objection is that the whole work is being neglected and not prosecuted with the vigour called for by the contract, the engineer is entitled to give a general notice. (*Pauling* v. *Mayor of Dover* (2)).

It is argued by the suppliant that the Crown had no power to give a notice under clause 14 of the contract and to follow it up by taking the work out of the contractor's hands, because it is contended that the penalty clauses of the contract were not in force in 1897. The answer of the respondent is that such penalty clauses were in full force and effect then. After an extension of time, the contractor must still complete the work within a reasonable time. (*McDonell* v. *Canada Southern Railway Company* (3)).

*Walker* v. *London and North Western Railway Company* (4) is the leading case upon which the suppliant relies to establish that the Crown was not entitled to give the notice of 13th October, 1897, and to follow it up by taking the contract out of the suppliant's hands. Now, that case is entirely different from the present. There was no provision for an extension of time, and what was there sought to be done was to avoid the contract and to forfeit all plant, materials and money due to the contractors. Here there is a provision for extending the contract, and, moreover, the Crown did not seek to avoid the suppliant's contract; what has been done is simply to carry out the provisions of the contract. Neither has the contractor's plant and

(1) 17 S. C. R. at p. 129.
(2) 24 L. J. Ex. 128.
(3) 33 U. C. Q. B. 313.
(4) L. R. 1. C. P. D. 518.

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material been confiscated or seized as was done in the *Walker* case; nor is it sought here to forfeit any moneys due to the contractor. On the contrary, the moneys payable under the estimate for October, 1897 were paid for the benefit of the contractor after the work was taken out of his hands, and at that time the contractor was largely overpaid. (*Berlinguet* v. *The Queen* (1).

When a party has by his own act or default put it out of his power to fulfil his contract, the other party may at once treat this as a breach of contract without waiting for the time of performance to arrive; so the Crown was justified in treating the contract as broken by the suppliant in 1897. The Crown was also within its rights in retaining the plant, &c., for, under the terms of the original contract, the plant, &c., remained the property of the Crown until the completion of the contract.

It is argued for the suppliant that having fixed a reasonable time for the completion of the work the respondent was bound to allow the suppliant the whole of that time to do it. The only authority cited for this proposition is *Startup* v *Macdonald* (2), which is a case involving the delivery of oil at night. The plaintiff had until the 31st of March to deliver the oil which he had sold to the defendant. He delivered it in the evening, and the jury found that thereafter the defendant would have had time to examine and store the oil on that day. It was, therefore, held that the plaintiff had fulfilled his contract.

The suppliant contends that if the respondent is liable to him for having taken the contract out of his hands, the action of the respondent in taking possession of the suppliant's plant was also wrongful, and that the suppliant is entitled to recover the value

(1) 13 S. C. R. at pp. 125, 126. (2) 6 M. & G. 593.

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thereof. The cause of action with regard to the plant is not clearly stated in the argument for the suppliant. But it would seem that a wrongful act is complained of, and so the argument amounts to this, that if the Crown was not justified in taking the plant under the contract, the taking was a tort. Now, it is not necessary to argue in this court that the Crown cannot be made liable for a tort in the absence of statutory provision therefor. *Julien* v. *The Queen* (1).

As to the counter-claim, the suppliant is liable to make good to the respondent all moneys that he has been paid in excess of the value of the work done by him. Again, the suppliant having failed in his contract, he is liable to make good all loss and damage suffered by the Crown by reason of the non-completion by him of the works. (*Hudson on Building Contracts* (2). It was owing to the suppliant's default that it, became necessary to relet the contract, and he cannot complain if the works were carried out at reasonable cost. (*Ranger* v. *Great Western Railway Company* (3); *Fulton* v. *Donwell* (4).

By the written reply to the respondent's argument counsel for suppliant submitted, amongst others, the following contentions:

When the works were taken from the suppliant the time for performance was no longer of the essence of the contract. The Crown, by allowing the time to run beyond the original fixed time, had abandoned, as a matter of law, the right to enforce the penal clauses of the contract. *Mayor of Essendon* v. *Ninnis* (5).

The suppliant contends that clause 34 of the contract, forbidding any contract by implication between the parties, does not apply to the position of affairs

(1) 3 Ex. C. R. at p. 242.
(2) 2nd Ed. 390.
(3) 5 H. L. C. 72.
(4) 5 N. Zeal. L. R. S. C. 207.
(5) 5 Vict. L. R. (Law) 236.

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between them here because, first, the contract, in respect of which breach by the Crown is alleged, is not an implied contract; and, secondly, that clause 34 has application only within the original contract time.

As to the right of the suppliant to recover the value of the plant in the hands of the Crown, suppliant relies on *Tobin* v. *The Queen* (1); *Feather* v. *The Queen* (2); *Clode on Petition of Right* (3). It is not a matter of trover or conversion; but we seek here a remedy simply for a breach of contract. Therefore the case of *Julien* v. *The Queen* does not apply.

THE JUDGE OF THE EXCHEQUER COURT now (December 15th, 1900) delivered judgment.

The suppliant, by an indenture made on the 24th of September, 1892, entered into a contract with Her Majesty the Queen, represented by the Minister of Railways and Canals of Canada, to construct sections one and two of the Soulanges Canal and to deliver the same complete to Her Majesty on or before the 31st day of October, 1894. By the 18th clause time was declared to be of the essence of the contract. By the 16th clause it was agreed that the suppliant should not make any claim or demand, or bring any action, suit or petition against Her Majesty for any damage which he might sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents; but that in the event of any such delay the contractor should have such further time for the completion of the works as might be fixed in that behalf by the Minister for the time being. There was a good deal of delay of that kind, but the authority to extend the time was never in terms exercised by the Minister. There was no request to him to exercise it, and it was

(1) 16 C. B. N. S. at p. 358. (2) 6 B. & S. 257.
(3) Pp. 88, 89.

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not exercised. The provision, like that contained in the 29th clause, whereby also the Minister had power, under the circumstances therein stated, to extend the time for the completion of the contract, has no present importance beyond showing that such power was vested in the Minister. By the 13th clause of the contract the Chief Engineer of Railways and Canals was given authority at any time, and at the contractor's expense, to increase the plant or materials, or force employed upon the work in case he considered them "insufficient for the advancement" of the works "towards completion within the limited times", or if such works were not being carried on with due diligence. This authority was not exercised and the only bearing the clause has on the present controversy is that, differing in that respect from the 14th clause, on the true construction of which the case depends, it contains an express reference to the times limited for the completion of the contract. The 14th clause of the contract is in these terms: —

"In case the contractor shall make default or delay in diligently continuing to execute or advance the works to the satisfaction of the engineer, and such default or delay shall continue for six days after notice in writing shall have been given by the engineer to the contractor requiring him to put an end to such default or delay, or in case the contractor shall become insolvent, or make an assignment for the benefit of creditors or neglect either personally or by a skilful and competent agent to superintend the works, then in any of such cases Her Majesty may take the work out of the contractor's hands and employ such means as She may see fit to complete the work, and in such cases the contractor shall have no claim for any further payment in respect of the works performed, but shall nevertheless remain liable for all loss and damage

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which may be suffered by Her Majesty by reason of the non-completion by the contractor of the works, and all materials and things whatsoever, and all horses, machinery and other plant provided by him for the purposes of the works shall remain and be considered as the property of Her Majesty for the purposes and according to the provisions and conditions contained in the twelfth clause hereof."

There were undoubtedly great delays in the execution of these works and there is a large mass of evidence in respect thereto, and to the controversies that have arisen between the parties because of such delays. The fault was not all on one side, but there is, I think, no occasion to weigh the fault on this side or on that, or to attempt to apportion the blame. One thing, however, is very clear, and that is that the suppliant has no ground of complaint with respect to the financial support and assistance that the Crown afforded him during the progress of the work.

At an early date in the execution of the work the Crown commenced to make to him large advances that it was, so far as I can see, under no obligation to make. On undressed stone at Rockland quarry, that as things turned out was never needed for the work, advances amounting in all to forty eight thousand five hundred dollars were made. On potsdam sandstone excavated during the progress of the work—the stone being the property of the Crown subject only to the right of the contractor to use what he needed of it in making concrete—one dollar a cubic yard was advanced. When the work was taken out of his hands the amount of the advance stood at fifty-seven thousand dollars, while the value of work then done on it, in preparing it for use in concrete, was only some three thousand dollars. These two items of forty-eight thousand

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five hundred dollars and fifty-seven thousand dollars now form part of the Crown's counter-claim.

In 1897, when the next incident, to which, in this statement of facts, it is necessary to refer, occurred, half of the work, approximately, remained to be done. In March of that year (1897) the following notice was given to the suppliant:—

"Ottawa, 20th March, 1897.

"Dear Sir,

"As you are now approaching the season when the resumption of active work under your contract upon the Soulanges Canal may be looked for, I am instructed by the Minister to say that he cannot permit the work upon the Canal to be further delayed. The intention of the Government is to push forward the completion of the undertaking as rapidly as possible; and I am to further notify you that if the Chief Engineer has any reason to fear that your contract will not be fully executed by the 31st October, 1898, the work will be taken off your hands, and the conditions of the existing contract as to penalties rigidly enforced.

"Yours &c.,

(Sgd.) C. SCHREIBER,

"*Deputy Min. and Chief Eng.*

A. STEWART, Esq.,
Contractor Sec. 1 and 2,
Ottawa, Ont."

On the 17th of May, Mr. Schreiber, the chief engineer, gave the contractor notice that, if he did not at once proceed to prosecute the work vigorously, steps would be taken under the contract to put an end to the delay. Early in June a further notice, on which, however, no action was taken, was given to him that if the delay continued beyond six days Her Majesty might "proceed under the powers conferred upon Her "by clause No. 14 of the said contract." The notice

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was in terms similar to the following, which was given in October of the same year:—

"To Archibald Stewart, of the City of Ottawa, Province of Ontario, Contractor:—

"Take notice that as you have made default and delay in diligently continuing to execute or advance to my satisfaction the works contracted to be performed by you under your contract with Her Majesty Queen Victoria, represented by the Minister of Railways and Canals of Canada, dated the twenty-fourth day of September A. D. 1892, whereby you contracted to execute and provide the several works and materials required in and for the formation of sections numbers one and two, Cascade Entrance of the Soulanges Canal, you are hereby notified to put an end to such default or delay.

"You are also notified that, if such default or delay shall continue for six days after the giving of this notice, Her Majesty may proceed under the powers conferred upon Her bv clause No. 14 of the said contract.

"Dated at Ottawa, this thirteenth day of October A. D. 1897.

(Sgd.) COLLINGWOOD SCHREIBER,

*Chief Engineer of Railways and Canals.*

This notice was followed by another whereby the work was taken out of the contractor's hands The latter notice was in these terms:—

"To Archibald Stewart, of the City of Ottawa, Province of Ontario, Contractor:—

"Whereas you have made and are making default and delay in diligently continuing to execute and advance to the satisfaction of the Engineer the works contracted to be performed by you under your contract with Her Majesty Queen Victoria, represented by the Minister of Railways and Canals of Canada, dated the

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twenty-fourth day of September A.D. 1892, whereby you contracted to execute and provide the several works and materials required in and for the formation of section numbers one and two Cascade Entrance of the Soulanges Canal, and such default and delay has continued for more than six days after notice has been given by the Engineer to you requiring you to put an end to such default and delay, and such default and delay still continues:

"Now take notice that Her Majesty, represented by me, the Minister of Railways and Canals of Canada, does hereby, under the provisions of the fourteenth clause of your aforesaid contract, terminate the said contract from this date, and take the work out of your hands, and will employ such means as She may see fit to complete the work;

"And further take notice that you shall have no claim for any further payment in respect of the works performed, and that you will nevertheless remain liable and be held responsible for all loss and damage suffered or which may be suffered by Her Majesty by reason of the non-completion by you of the said work, or by reason of your breaches of the said contract.

"Dated at Ottawa, this Fourth day of November A.D. 1897.

(Sgd) ANDREW G. BLAIR,
*Minister of Railways & Canals,*
*On behalf of Her Majesty.*

Witness,

(Sgd.) Collingwood Schreiber.

Now, if the contention which, on the authority of *Walker* v. *The London and North Western Railway Company*, (1) the suppliant makes that in October, 1897, the 14th clause of the contract under which the Crown took action was not in force and did

(1) L. R. 1 C. P. D. 518.

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not form part of any contract then existing between the parties, is a good contention, it is clear that there has been a breach of the contract, and that the suppliant is entitled to such damages as he has ustained by reason thereof. The contract under consideration in *Walker's* case contained a provision by which the defendants were entitled to take the work out of the plaintiff's hands if he did not complete it within the time limited for the purpose, or if he became bankrupt, or if from any cause whatever, not occasioned by the defendants, he was delayed or prevented in the completion of the work according to the specification. It was also a term of that contract that the engineer might, if he were dissatisfied with the rate of progress made, procure labour and materials to advance it, and pay therefor out of any money due or to become due to the contractor. The case turns, however, upon a provision of the contract which was in these words:—

"Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer..... or to maintain the said works, as hereinafter mentioned, to the satisfaction of the engineer, his contract shall at the option of the company, but not otherwise, be considered void, as far as relates to the works or maintenance remaining to be done, and all sums of money that may be due to the contractor, together with all materials and implements in his possession, and all sums named as penalties for the non-fulfilment of the contract shall be forfeited to the company and the amount shall be considered as ascertained damages for the breach of the contract."

Referring to this clause, Mr. Justice Archibald, delivering the judgment of the court (Brett and Archibald, JJ.) said (1):—

(1) L. R. 1 C. P. D. at p. 531.

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"The clause in our opinion can only be acted on and enforced within the time fixed for the completion of the works, for time is clearly of the essence of the contract; and it is only with reference to the time so agreed that the rate of progress can be determined. If, as has happened, the time has been exceeded, there may be a new contract to complete in a reasonable time; but to give the clause in question any application to a reasonable time, after the time originally fixed has expired, would be without any express provision to make the company judge in their own case of what was a reasonable time, and to enable them in their own favour to avail themselves of a most stringent and penal clause."

The case has, it appears, been accepted as establishing the proposition that in contracts creating a forfeiture for not proceeding with work at the rate required, if there is a time fixed for completion, it is only by reference to the time so agreed that the rate of progress can be determined, and that the clause can only be acted on and enforced on the ground of delay within the time fixed for the completion of the works, and confers no power of forfeiture after that date. (*Hudson on Building Contracts*, (1): *Wood v. Rural Sanitary Authority of Tendring* (2): *The Mayor of Essendon v. Ninnis* (3). But after all, each contract must be considered in the light of its own terms and conditions, and however satisfactory the decision in *Walker's* case may be with reference to the contract therein under consideration, in which there were other clauses clearly applicable after the time of completion had expired, it may, I think, be a very debatable question whether the same conclusion should be come to in respect of the 14th clause of the contract now under considera-

(1) 2nd ed. 447.

(2) 3 T. L. R. 272.

(3) 5 Victoria L. R. 236.

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tion. It will be observed that the provisions of the 13th clause expressly refer to the time limited for the completion of the contract, while in the 14th clause there is no such reference or limitation. Then by the terms of the 14th clause it will be seen that the power to take the works out of the contractor's hands was not confined to the case of want of diligence to execute or advance the work to the satisfaction of the engineer. It might also be exercised in case (*a*) the contractor became insolvent; or (*b*) made an assignment for the benefit of his creditors; (*c*) neglected either personally or by a skilful and competent agent to superintend the works. These appear to me to be circumstances under which as well after as before the time limited for the completion of the contract the power of taking the work out of the contractor's hands might be exercised. But if it may be exercised in these cases after the time agreed upon for the completion of the contract has expired, why may it not be exercised in case the contractor makes default or delay in diligently continuing to execute or advance the works to the satisfaction of the engineer? What is the difficulty? I can see none, except that the engineer's judgment as to the rate of progress and the advancement of the work must be exercised with reference to some date, some time when the work as a whole is to be completed; and the time agreed upon having expired there is no time to which reference can be made. But why may not his judgment as to the rate of progress being made be exercised with reference to a reasonable time for the completion of the whole work? Not that the Minister or the engineer could without the contractor's concurrence or consent (and there is in this case no such concurrence or consent) determine conclusively what such reasonable time

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was. To do that would be to permit them to impose upon the contractor a condition to which he had never given his assent; and as was said in *Walker's* case (1) to make them, as representing the Crown, judges in their own case. But suppose in such a case as this the Minister or engineer fixes a time—one that the court finds is reasonable—within which the works are to be completed, why should not the contractor continue to be within the engineer's judgment as to the rate of progress being made? Is it not reasonable that he should be? Is it not unreasonable that, short of acts amounting in themselves to an abandonment of the works, the contractor should practically have the matter of progress in his own hands once the time for the completion of the contract has passed and been waived, and that, in respect of a great public work involving the highest interests, the Crown should thereafter be at the mercy of the contractor? Of course the question is not whether the thing is reasonable or unreasonable, but whether the parties have agreed to it. By the express agreement of the parties the engineer is, during the time limited for the completion of the work, as much the judge of the progress made by the contractor with the work as by another clause he is of the quantity and quality of that work; and when, after that time has expired, the parties go on with the work and a new term or condition of the contract arises by implication, and by the acts of the parties, that the work will be completed in a reasonable time, then it seems to me that one does no violence to the contract as a whole to hold that having reference to such reasonable time the engineer may, if he is dissatisfied with the progress of the work, give the notice provided for in the 14th clause of the contract. It is not necessary, however, for me

(1) L. R. 1 C. P. D. 518.

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in the view I take of the case to solve the difficulties that I have ventured to suggest, or to support the judgment for the suppliant that I think he is entitled to, by the proposition that the 14th clause of the contract, or that provision of it directly in issue, could only be acted upon and enforced on the ground of delay within the time fixed by the contract for the completion of the works.

Assuming for the moment that the 14th clause of the contract was in 1897 in force between the parties, and could be acted on, it seems clear that the rate of progress must be determined by reference to a reasonable time for the completion of the whole work. The contractor must with reference to some specific time that is in the opinion of the court reasonable, make default or delay in diligently continuing to execute or advance the works to the satisfaction of the engineer. The engineer is to decide, having regard to a time that is reasonable, and the contractor is to have notice of his decision. Was the time fixed by the Minister in the present case reasonable? Were it proper for me to look at the matter from a standpoint other than that of the legal rights of the parties, and to express an opinion as to whether or not, as a matter of public policy or interest the Minister was justified in taking the work in question out of the contractor's hands, I should have no hesitation in saying that I think his apprehension and that of the chief engineer that the work on the two sections mentioned would be unduly delayed was well founded, and that he was on grounds of public policy fully justified in the action he took. I think, too, that in March 1897, one might have come to the conclusion that the remainder of the work could be completed by the 31st day of October, 1898. There is undoubtedly in this case a great deal of expert evidence from witnesses

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whose opinions are entitled to the greatest consideration (given with a full knowledge of the facts that compel me to an opposite conclusion) that the time given by the Minister for the completion of the work was a reasonable time. I cannot say how far, if at all, the witnesses referred to have, in giving their opinions, been influenced by the fact that in September, 1892, the contractor agreed to complete the whole work by the end of October, 1894. If the question were whether the time given by the Minister was reasonable in relation to the time limited in the contract, I should have no hesitation in answering in the affirmative. But there can, I think, be no doubt that the time mentioned in the contract was, from a business or practical standpoint, wholly inadequate, and neither party ever treated the limitation seriously, or acted as if it formed one of the terms of the contract, notwithstanding that they had agreed that "time should be deemed to be of the essence of the contract." Not that any such consideration would have availed the contractor if the powers given to the Crown to put an end to the contract had been exercised within the stipulated time. But the court is not now to impose upon him a condition as to time that it does not think to be reasonable because he, in signing the contract, agreed to one equally or more unreasonable. It is easy to be wise after the event, and judging by the event, by what has happened in respect to the completion of the work by contractors of whose financial standing, capacity and energy there is no question, I am compelled, against the opinions to which I have referred, to come to the conclusion that the time fixed by the Minister in March, 1897, for the completion of the works in question was not a reasonable time within which to complete them. That is the conclusion to which I am led by the facts that appear in evidence in this case. It

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is not disputed that the chief engineer's judgment as to the progress of the work was exercised with reference to the date so fixed, and that being the case, it appears to me that the proceedings taken by the Minister and chief engineer cannot as a matter of law be justified, that there has been a breach by the Crown of the contract on which this petition is brought, and that the suppliant is entitled to damages, to be measured, as near as may be, by the profits that he would have made by completing the contract in a reasonable time.

It was also contended for the suppliant that the notice of the 13th of October, 1897 was insufficient for the purposes for which it was intended; and that in any event the Crown was precluded from giving any such notice because the delay complained of was occasioned by the fault of the resident engineer and his staff—by their lack of initiative and energy. Having come to a conclusion on other grounds to enter judgment for the suppliant on the main issue in controversy, it is unnecessary for me to discuss these contentions.

On the question as to whether the contract in question was one on which the contractor finishing the work in a reasonable time would have made a profit or not, the parties are very far apart. Taking for illustration the quantities and prices given in Exhibit "AN" we find the work remaining to be done at the time the contract was taken out of the suppliant's hands stated at $570,967.08. On items amounting to $14,811 08 no profit is claimed. On the balance of $556,156 00 a profit (including the $57,000 advanced on potsdam sandstone) of $165,744.74 is claimed. That is of the amount of $556,156,00, $390,411.26 would represent the contractor's expenditure, and the sum of $165,744.74 his profit. In other words, he would make something over forty-two per cent. on his outlay on

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the items on which he claimed a profit, and nearly forty-one per cent. on his whole outlay. Now I am very sure that finishing his work in a reasonable time he would have made no such profit as that. The only sure test in such a case is to be found in the doing of the work. No statement, calculation or estimate of how the thing would have turned out is likely to provide for all contingencies, and the contingencies not provided for go, I think, according to common experience to eat up a large portion of anticipated or estimated profits. And when you add to this that other contingency, that the expert witness whose estimate or calculation is tendered for the court's assistance is likely to make the best showing he can for the party who calls him, such an estimate or calculation may, if not carefully examined, mislead, instead of aid the court.

I am equally unable to accept the view put forward for the Crown that the work to be done under the contract, when it was taken out of the suppliant's hands, would have been finished at a loss. On the item of concrete alone it seems to me clear that there would have been a profit of at least $60,000. The advance on potsdam sandstone, while nominally made upon the stone, was in reality made upon the profit to be earned on concrete. The chief engineer and the resident engineer concurred in recommending this advance, and no one was in a better position than they to form an opinion as to whether or not there was on this item the margin of profit of one dollar per cubic yard that was so advanced. I have no hesitation in coming to the conclusion that there was at least that margin of profit on the work of this class. The argument for the Crown is that the profit on concrete would have fallen short of the amount advanced on potsdam sandstone by a sum of

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$14,863; while the suppliant contends that it would have exceeded such advance by $21,203.60, a difference between the parties on this item alone of 36,000 odd dollars. This is but an illustration of the different conclusions to which the parties come by their respective calculations and estimates.

Now in this state of the case it seemed to me, when I came to consider it, that it would be a reasonable and safe thing for the court to have as to this question of profit, or no profit, or, if profit, how much profit, the assistance of competent, independent and impartial expert engineers to be named by the court and to be wholly independent of the parties. There are two ways in which this could be done: First, to direct a rehearing of the question mentioned and to sit with experts as assessors; and, secondly, to refer the question to experts as referees. Either course might have been adopted and the necessary direction given without the consent of either party; but at the present stage of proceedings I did not care to put the parties to the further delay and expense unless both were willing. The suppliant consented to the adoption of either course; the Crown was not prepared to agree to either. I had of course formed an opinion on the question, but it would have been a matter of great satisfaction to me either to have reconsidered it with the assistance of engineers in whose competence and impartiality I had confidence, or to have referred it to them for inquiry and report. But as the parties are not both agreed I have come to the conclusion to give effect to my own views.

Of the $582,000 (I use round figures), which the suppliant would have received for the finishing of the work, I would take $87,000 as representing profit; that is, that on an expenditure of $495,000 the contractor would make $87,000, approximately seventeen

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and one-half per cent. on his outlay. That, I think, is a fair contractor's profit. and I have no idea that the work in question, as a whole, would, if finished, have yielded the suppliant any greater profit than that. On the other hand I am convinced that it is not excessive. If one allows $60,000 profit on the concrete—and on the evidence one should, I think, allow that much at least—there remains only $27,000 of profit on an expenditure of some 386,000 odd dollars, or approximately seven per cent.

I have named as damages a round figure based approximately upon what I think is a fair percentage of profit on the work as a whole; but I have also gone into the details as to each item on which a profit is claimed as best I could on the evidence before me, with the result that I am confirmed in the view that the sum I have named is a fair one. I do not fancy that in respect of these details any two persons would as to all or the most of the items be altogether of one mind, and therefore no useful purpose can be served by giving my impressions as to what profits, if any, should be attributed to each item. Being myself satisfied that the amount named is, under all the circumtances, a fair one, I assess the damages for the breach of the contract in this case at eighty-seven thousand dollars. This includes the fifty-seven thousand dollars advanced on potsdam sandstone, for which the Crown will be given credit in striking the balance between the parties.

In the sum mentioned I have not included any profit on the extra work done by Ryan & McDonald in filling behind the piers, on which the suppliant claims that he should be allowed a profit of six thousand five hundred and seventy-nine dollars. This was work outside the contract, and I am not able to say either that the chief engineer would have

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directed it to be done, had the work remained in the suppliant's hands, or that in case he had done so that he would have fixed a price for it from which a profit would have been derived. I do not, therefore, take it into consideration.

In addition to the profit mentioned the suppliant would no doubt, if he had finished the contract, have had a considerable quantity of undressed stone at his quarry at Rockland. In getting out the dimension stone a good deal would have been quarried that would not have been available for that purpose, or for any purpose connected with the works in question, and would have been on hand at the conclusion of the work. But in view of the very large quantity of this class of stone (spoken of as backing) that the suppliant had on hand when the work was taken from him, and seeing that the market is so limited and slow, I have not thought that I should find any present money value in it. Its value in money would have been so speculative and remote that I think it should not be taken into account.

The suppliant is also entitled to the value of the plant taken over by the Crown. This matter of the plant was dealt with in part by the 10th paragraph of the judgment by consent of the 2nd December, 1899, whereby it was declared that the suppliant should receive from Her Majesty $10,000 worth of the plant referred to in the 11th and 12th paragraphs of the petition of right herein, to be selected by him, the value of the said plant to be computed upon the valuation as of a going concern upon the ninth day of November, 1897, set upon the articles to be selected and taken by the suppliant by the valuators named by him, as set forth in their schedule of valuation dated the 21st day of September, 1899, and filed on the day of the delivery of the said judgment; and

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that Her Majesty should be released from all claims in respect of the said $10,000 worth of plant, except the suppliant's claim, if any, to be paid a rental for said plant during the time which Her Majesty had been in possession thereof, if it should be found that Her Majesty was not entitled to use the said plant during the said period, free of all charge or claim under the contract in the second paragraph of the petition of right mentioned.

The main question now to be decided with regard to this matter is as to whether or not the value of this plant should be taken to be the value placed upon it by agreement as its market value or its value as a going concern. I adopt the latter view, which would put its value at the sum of $53,497.14. From this sum is to be deducted the $10,000 mentioned in the 10th paragraph of the judgment by consent before referred to.

I observe that the suppliant claims that the full amount of $10,000 ought not to be deducted, but a proportionate part of it only. As the case has, for reasons that appeared to be good, been submitted to me upon written arguments, and I have not had the benefit of an oral argument, I am not certain of the position which the Crown takes with regard to this matter. I am not sure that the Crown concedes the suppliant's contention that only a proportionate part of the $10,000 should be deducted. I shall, therefore, for the present, take the amount to be credited to the suppliant to be $43,497.14, reserving leave to him before the minutes of judgment are settled to move to have this sum increased.

I should not be disposed to allow the suppliant anything for the use of this plant or for interest upon its value. It seems to me that upon any taking of accounts between the parties the balance of account,

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apart from the question of damages for the breach of the contract, would, after giving credit for the plant, be against the suppliant. But this matter, too, may be spoken to, if the suppliant wishes, before the minutes of judgment are settled.

Then the suppliant is also entitled to the drawback retained. As to the amount ($16,638.75) there does not appear to be any dispute.

On the other hand, the suppliant is to be charged with the sum of $57,000 advance on the potsdam sandstone. I have mentioned the fact that the suppliant had done work upon this stone to the value of some $3,000; but that matter has been already taken into account in assessing the damages at $87,000, leaving the full advance to be deducted.

I am also of opinion that the suppliant should be charged with $48,500 advanced on backing at the Rockland quarry. This sum being taken into account the stone will be the property of the suppliant, free from any charge or lien in favour of the Crown in respect of this advance.

The suppliant is also to be charged with the sum of $7,500 mentioned in the 4th paragraph of the judgment referred to.

There is also a charge of a small sum of $56.10 overpaid on the last estimate, which the suppliant admits. The suppliant is also to be charged with the sum paid by the Crown to Ryan & Co. upon his order. There is a dispute between the parties as to whether this sum should be $7,577.00 or $7,862.17. The matter is referred to at page 193 of the first volume of the notes of evidence, but I am not able to determine the controversy between the parties without reference to the order that was given by the suppliant, and to the order in council mentioned in the notes. I have asked for these to be furnished to me, and in the mean-

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time I will take the item as being that first mentioned, viz: $7,577.00, giving leave to the Crown to apply, before the minutes are settled, to increase the sum to $7,862.17.

I shall also reserve leave to either party, within the time mentioned, to move to add any item which, because of the way in which the argument has been presented to me, I may have overlooked, or to correct any error in matters of calculation, if any should have occurred.

The sum of the amounts for which in my opinion the suppliant ought to have credit is $147,135.89; and the sum of the amounts with which he is to be charged is $120,633.10, leaving a balance in his favour of $26,502.79. For this sum, subject to the reservations I have mentioned, there will be judgment for the suppliant with costs.

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The questions reserved under the foregoing judgment were spoken to by counsel on behalf of both parties on the 4th February, 1901.

*W. D. Hogg, K.C.* and *Glyn Osler* for the suppliant contended, in respect of the plant, that instead of $10,000 being deducted from the valuation of the plant as a going concern, the proper amount to be deducted would be $8,951.97. The reason for this is that if the $10,000 is to be deducted from that valuation it would be in order that the amount should be reduced in the same proportion as the total or compromised valuation has been reduced. The amount of the valuation of the plant agreed on is $53,497.14 and the proportion which $10,000 would bear to this amount is $8,951 97. As to the question of interest on the amount paid by the Crown for certain plant purchased from Hugh Ryan & Co. by the suppliant, we submit that the facts are that the suppliant gave an order, dated 10th June,

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1898, authorizing the Crown to pay a certain amount to Hugh Ryan & Co. Had the Crown complied with this order and paid the money, there would have been no interest. Not having done so, we should not be held liable for the consequences of the delay of the officers of the Crown. It is sought not only to charge us with this interest, but rental upon the plant as well. Now clearly we are not responsible for rental when we were not in possession of the plant.

*S. H. Blake, K.C.* and *W. H. Lawlor* contended that no less than $10,000 could in any case be deducted because the parties had agreed to that amount.

With reference to interest and rental upon the plant, we are entitled to interest from the day we paid over the money to Hugh Ryan & Co. We are not entitled to charge the rental, of course, after the suppliant gave the order of 10th June, 1898.

The following judgment upon the questions reserved was delivered by THE JUDGE OF THE EXCHEQUER COURT on the 26th February, 1901:

In giving judgment in this matter leave was reserved to the parties to speak to the item of plant, for which the suppliant was credited with a sum of $43,497.14, and the item of $7,577.00 which was debited against him for money paid by the Crown to Hugh Ryan & Co. These two questions were discussed by counsel on the 4th instant, when it was found that the amount to be credited for plant could not be definitely ascertained until the suppliant had, under the judgment by consent of the 2nd December, 1899, to be referred to, selected a certain portion of this plant; and time was given to him to make his selection. That has been now done, as will appear by a paper signed by the solicitors of the parties, dated the 7th instant, and filed in the court on the 12th instant. The suppliant on the 18th instant also filed a memorandum showing that the

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value of the remainder of the plant as a going concern on the 9th of November, 1897, was $45,422.14. To this document I am informed the Crown does not intend to make any answer or reply. It does not, however, concede that the amount mentioned is correct, and it will perhaps be convenient that I should briefly state why I think he should be credited therewith.

By the 12th clause of the contract, for breach of which the petition was brought, it was provided that all machinery and other plant, materials and things provided by the contractor should, from the time of their being provided, become, and until the final completion of the work should be, the property of Her Majesty for the purposes of the said works; that the same should on no account be taken away or used or disposed of, except for the purposes of the works, without the consent in writing of the engineer; and that Her Majesty should not be answerable for any loss or damage whatsoever which might happen to such machinery or other plant, materials or things; provided always that upon completion of the works, and upon payment by the contractor of all such moneys, if any, as should be due from him to Her Majesty, such of the machinery and other plant, materials, and things as should not have been used and converted in the work and should remain undisposed of, should upon demand, be delivered up to the contractor.

By the 14th clause of the contract, set out in full in the reasons for judgment given herein, it was provided that where the contract was taken out of the contractor's hands, under the circumstances therein stated, all materials and things whatsoever, and all horses, machinery and other plant provided by the contractor for the purposes of the works, should remain and be considered the property of Her Majesty for the purposes

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and according to the conditions contained in the 12th clause of the contract.

By the 10th paragraph of a judgment by consent made herein on the 2nd day of December, 1899, by which a number of matters then in controversy between the parties were determined, it was ordered, as had been agreed between the parties, that the suppliant should receive from Her Majesty the Queen $10,000 worth of the plant referred to in the 11th and 12th paragraphs of the petition of right, to be selected by him. The value of said plant was to be computed upon the valuation as of a going concern on the 9th day of November, 1897, set upon the articles to be selected and taken by the suppliant, by the valuators named by him as set forth in their schedule of valuation dated the 21st day of September, 1899, and filed on the day of the said judgment. And that Her Majesty the Queen should be released from all claims in respect of the said $10,000 worth of plant, except the suppliant's claim, if any, to be paid a rental for said plant during the time which Her Majesty the Queen had been in possession thereof, if it should be found that Her Majesty was not entitled to use the said plant during the said period free of all charge or claim under the contract.

A further agreement between counsel in respect to this matter of the plant was come to on the 31st of January, 1900, in the terms following:—

"Counsel for both parties agree that the total value of the suppliant's plant referred to in the 11th and 12th paragraphs of the petition of right herein, and taken from the suppliant by Her Majesty at the time of the cancellation of the contract in the 2nd paragraph of the said petition of right herein, valued as the plant of a going concern on the 10th day of November, 1897, was the sum of $53,497.14, this amount being ascertained by

splitting the difference between the valuation of the valuators appointed by the suppliant and the valuation of the valuators appointed by the Crown, as appears by their schedule of valuation dated the 21st September, 1899, filed.

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"And counsel for both parties further agree that the total market value of the said plant on the said 10th day of November, 1897, was the sum of $34,631.78, which is ascertained in the same way as the value of the plant as a going concern above set out.

"And counsel for both parties further agree that the value, as the plant of a going concern, or the market value of any individual article or piece of the said plant upon which the said valuators have not agreed in the said schedule of valuation, shall be arrived at by splitting the difference."

Now it is obvious that very different considerations would be applicable to this question of the plant if one came to the conclusion that there had been no breach of the contract. In that case the plant would be dealt with as therein provided. But if the finding that there was a breach of the contract by the Crown, and that it was not justified in law in taking the works out of the contractor's hand is right, then it seems clear that the Crown was not entitled to hold or keep the plant in the manner and on the conditions provided in the 12th and 14th paragraphs of the contract, already referred to. On the contrary, the suppliant is, it seems to me, entitled to recover the value of the plant at the time when he was turned out of possession thereof—that is, its value in November, 1897. That, I should have thought, to be the correct view of the respective rights of the parties as to the plant, irrespective of the agreements they have subsequently entered into, and from which I drew the inference that there was no serious controversy on this point,

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but that the main dispute between the parties on this branch of the case was as to whether or not such value should be ascertained by taking the value of the plant as a going concern, or at its market value, that is, as I understand it, its value to any one in the position the contractor was then in, or its value removed from the works in which it was being employed, and sold in the market. Under the circumstances found to exist in this case the suppliant is, I think, entitled to be credited with the value of the plant as a going concern in November, 1897.

It is argued, however, for the Crown that the contractor would have had to use this plant to make the profit of $87,000.00 which has been credited to him as damages, and that it would have been greatly depreciated in value; and that for that reason he ought not to be allowed its value in 1897. No doubt, to make the profit allowed he would have had to use the plant in question, as well as other plant and materials that he would have had to provide for the prosecution of the work; but all that is taken into account in determining the profits allowed at $87,000.00, which are net, and not gross, profits. Before arriving at such net profits it is necessary that the undertaking be charged with, and that there be deducted from the moneys earned, among other things, the loss arising from wear and tear and depreciation of plant; and the balance showing net profits, such as the $87,000.00 were intended to be, is ascertained after making all such allowances.

The amount of $53,497.14, which according to the agreement of the parties, is to be taken as the value on the 10th November, 1897, of the plant in question as a going concern, was arrived at in the manner following: The valuators for the suppliant and for the Crown, concurred in putting a value of $33,380.14 on on a portion of such plant as a going concern. The

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remainder of the plant so valued, the suppliant's valuators put at $26,380.00, and the Crown's valuators at $13,854.00, and the parties agreed to add the half of the sum of these two amounts to the $33,380.14 as to which the valuators were agreed. That gives the sum of $53,497 14.

Of the plant, the value of which went to make up the sum of $33,380.14, the suppliant has selected plant of the value of $2,000.00 thus reducing that amount to $31,380.14. Of the remainder of the plant, valued by his valuators at $26,380.00, the suppliant has selected plant so valued of the value of $8,000.00, thus reducing the amount to $18,380.00. The articles so selected to make up this $8,000.00 were valued by the Crown's valuators at $4,150.00. Deducting this sum from the $13,854.00 at which they valued as a going concern this portion of the plant, we have for the value of what is left of this portion the sum of $9,704.00. Taking then, according to the rule the parties have agreed to, the half of the sum of the two amounts of $18,380.00 and $9,704.00, that is $14,042.00, and adding this to the $31,380.14 mentioned above, we find the value of the plant as a going concern, other than that selected by the suppliant, to be, according to the agreement of the parties, $45,422.14. Deducting therefrom $12.00 for some additional plant taken by him, as appears from the paper of February 7th, 1901, before mentioned, there will be left the sum of $45,410.14 with which amount the suppliant is to be credited in lieu of the sum of $43,497.14 mentioned in the reasons for judgment.

Part of the plant which the suppliant had in his possession in November, 1897, and which was taken over by the Crown, had been purchased by the suppliant from Hugh Ryan & Co., conditionally that it was to become his property upon being paid for. The

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purchase price of this plant, consisting of derricks, scows and other machinery, was $8,650,00, of which the suppliant paid $2,383.33, leaving a balance due from him to Hugh Ryan & Co., of $6,266,67. It was a term of the agreement between the suppliant and Hugh Ryan & Co, that the suppliant should pay interest at the rate of six per centum per annum upon any balance existing at any time, and also a nominal rental of $3.00 per month. In November, 1897, when the Crown took possession of the suppliant's plant, the sum of $7,287.55 was due to Hugh Ryan & Co., from the suppliant on that portion of the plant he purchased from them. On the 10th of June, 1898, the suppliant gave the Minister of Railways and Canals a letter in which he stated that the scows, chains, castings and derricks on his Soulanges contract works were only purchased by him from Hugh Ryan & Co., conditionally that they were to become his property upon being paid for; and that there was due therefor to Hugh Ryan & Co., the sum of $7,577.00, and he authorized the Minister to pay this amount and to charge the same to him. This letter does not appear in terms to have been acted upon; but later, in March, 1899, the Minister of Railways and Canals, acting upon the advice of the Minister of Justice and under the authority of an order in council bearing date the 27th of that month, paid to Hugh Ryan & Co., the sum of $7,862.17, being the amount then due to Hugh Ryan & Co., in accordance with the terms of the suppliant's conditional purchase before referred to, and on behalf of the Crown it is now contended that the suppliant should be charged in the accounts with the sum of $7,862.17 and not with the sum of 7,577.00 which he had authorized the Minister to pay. It will be observed that in the sum of $7,577.00 is included interest on the price of the plant in question, and rent therefor subse-

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quent to November 1897; but the suppliant, having given the letter, makes no objection to being charged with that amount. He objects, however, to being charged with interest and rent subsequent to the date of the letter. On the whole, I am of opinion to give effect to his contention. The rent being nominal, the interest on the balance of the purchase price and such rent constituted in substance a rental for the use of the plant. That use, the Crown, and not the suppliant had the benefit of. If the suppliant were being allowed interest upon the value of the plant taken from him, the matter ought, I think, to be treated differently; but as he is not being allowed any interest upon the value of his plant, he ought not, I think, to be charged with any interest or rent in respect of the plant in question, other than that which he has himself consented by his letter that the Crown should pay.

The only change, therefore, that becomes necessary in my reasons for judgment is that which relates to the plant in respect of which the suppliant is to be credited with a sum of $45,410.14, instead of $43,497.14, the difference being $1,913.00, which being added to $26,502.79 will give the sum of $28,415.79, for which, with costs there will be judgment for the suppliant.

*Judgment accordingly.*

Solicitors for the suppliant: *O'Gara, Wyld & Osler.*

Solicitor for the respondent: *W. H. Lawlor.*