

William I. Bishop, Limited, and Others - - - - *Appellants*

v.

The James Maclaren Company, Limited - - - - *Respondents*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE
OF QUEBEC (APPEAL SIDE)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 19TH MARCH 1937.

Present at the Hearing :

LORD BLANESBURGH.

LORD ATKIN.

LORD THANKERTON.

LORD MAUGHAM.

LORD ROCHE.

[*Delivered by* LORD ROCHE.]

This is an appeal from two judgments of the Court of King's Bench for the Province of Quebec (Appeal Side) dated 27th December, 1935, reducing by the first judgment the amount awarded to the appellants by the Superior Court for the District of Montcalm from \$293,584.84 with interest on \$87,444.68 from the date of the institution of the action (4th December, 1930) and with interest on the balance (\$206,066.16) from the date of the judgment of the Superior Court (10th June, 1934) to \$1,429.60 with interest thereon from the date of the institution of the action. By the second judgment the Court of King's Bench dismissed the cross-appeal of the present appellants which was brought to secure a decree for interest on the above-mentioned sum of \$206,061.16 from the date of the institution of the action instead of from the date of the judgment of the Superior Court. In the Court of King's Bench St. Germain J. dissented from the judgments in that he would have allowed the judgment of the Superior Court to stand as to \$219,232.63 and would have allowed the cross-appeal in that he would have awarded interest on that sum from the date of the institution of the action.

The litigation arose under the following circumstances: The appellant company, William I. Bishop, Ltd., hereinafter called the contractor, by contract dated 23rd May, 1929,

agreed to construct for the respondent company a storage dam known as the Cedar Rapids storage dam on the Lievre River in the Province of Quebec. The purpose of the dam, which was to be about 755 feet in length with abutments, was to raise and store the water of the river above the dam and so to regulate its flow that it might be used for hydro-electric power purposes. The appellant bank as assignee of the contractor was joined as co-plaintiff in the action and no question arises to distinguish the rights of the appellants the one from the other. The contract, though not in fact finally settled or signed until 23rd May, 1929, after the work had been proceeding since November, 1928, provided expressly that: "This contract shall avail and be binding on the parties hereto as if signed on 15th November, 1928."

It will be necessary hereafter in discussing the various items of the appellants' claim, which are in question, to refer to various detailed provisions of the contract. But its general nature and scope must be first stated.

The contract was not a simple lump sum contract. It provided that the consideration to be paid to the contractor should be a sum called the principal sum and amounting to \$609,100 "provided that the quantities of the various classes of work required to construct the dam shall prove to be the same as those given in the schedule of quantities hereinbefore contained." The schedule of quantities referred to provided as follows:—

"quantities of excavation, concrete masonry, forms, reinforcing steel, and other classes of work required to completely construct the dam, and which have been calculated from the dimensions and depths to the bottom of the dam that are shown or indicated on the drawing referred to herein, will be as follows."

Then followed a schedule of the amount of earth excavation and of ledge (rock) excavation and of the amount of various classes of concrete and of steel work and so forth. Then the contract proceeded:—

"It is further agreed that, should the quantities of excavation, concrete and other classes of work which are listed in the above schedule required for the satisfactory completion of the structure be different from those contained in said schedule, additions or deductions from the principal sum of money herein named shall be made in the manner hereinafter provided.

"But it is expressly understood and agreed, however, that:

"(a) The quantities given in the foregoing table do not include any additional excavation which the contractor may choose or be required to do for by-passing or handling the flow of the river during the construction of the dam; nor any materials and labour used for the construction of coffer dams; nor any other work or materials extraneous to the permanent structure of the dam itself which are required for the construction of the dam.

"(b) All of said additional excavation and extraneous work and materials are to be performed and furnished by the contractor as a part of the work for which the said principal sum is to be the compensation."

The contract also contained the following clause:—

“ Changes of design and dimensions.

“ It is agreed between all parties hereto that the owner shall have the right to make such changes in the design and dimensions of the dam as the engineer may deem necessary or advisable, and that changes shall not invalidate this contract. If such changes shall be made and they increase or decrease the quantities of the various classes of work required for the construction of the dam, the principal sum of money to be paid to the contractor hereinafter specified, shall be correspondingly increased or decreased by amounts which shall be calculated and determined in the manner hereinafter provided.”

The calculation and determination of increases and decreases was provided for by a clause which after fixing the principal sum as before stated in this judgment at \$609,100 proceeded as follows:—

“ If, however, the quantities of any of the various classes of work required to build the dam shall be different from the corresponding quantities hereinbefore given, due to changes of design or depth of foundations from those used for calculating said quantities, there shall be added to or deducted from said principal sum according to whether said quantities are increased or diminished, sums computed according to the following table and the net sum produced by these additions and deductions plus the value of any extra work performed by the contractor and computed in the manner hereinbefore provided, shall become the total amount to be paid by the owner to the contractor for all of the work performed by him under the terms of this contract.”

Then followed detailed stipulations of the figures relating to the additions and deductions to be made for earth and ledge excavation and for concrete and steel and other work according as the quantities proved to be in excess of or less than the scheduled quantities in the various sections or parts of the contract work.

The time for completion of the work was 31st March, 1930, and no question arises in respect of delay in completion. There was an arbitration clause in the contract but the parties did not avail themselves of that method of determining the questions which arose between them and it is not disputed that it was competent to the appellants to bring their action.

The quantities of various classes of work particularly of excavation and therefore of concrete work proved to be largely in excess of the estimated and scheduled quantities and accordingly the appellants became entitled to and were paid instead of the provisional principal sum of \$609,100 the larger sum of \$916,723.57.

But beyond the sum so paid the appellants put forward claims under 14 heads, amounting in all to \$412,846.75, and this sum constituted the claim in the action and was claimed as money due for work done and required for the construction of the dam but not provided for in the contract or as damages for faulty and deceptive and erroneous information supplied and representations made by the respondents. The

items of the appellants' claim and the amounts allowed in the Superior Court are as set out in the following table:—

Title of Claim.	Amount claimed by the action.	Amount allowed by the Judge- ment of the Superior Court.
	\$	\$
No. 1—Hardpan Excavation	21,601.45	13,919.45
No. 2—Passing Logs	4,103.72	2,995.42
No. 3—Cofferdams and Unwatering	148,857.15	117,075.22
No. 4—Cofferdam Lower End By-pass	5,563.50	—
No. 5—Additional Cost of Rock Excavation	35,100.74	35,100.74
No. 6—Handling and Trimming Excavated Rock	1,990.82	—
No. 7—Excavating Frozen Material in River Bed	2,530.32	2,530.32
No. 8—Work under Winter Conditions	96,832.45	81,282.62
No. 9—Overcharge on Logs	7,220.19	1,429.60
No. 10—Cement for Apron in By-pass Channel	2,239.40	1,879.83
No. 11—Shortage in payment for Class 1 concrete	31,549.15	31,549.15
No. 12—Plant Removal	5,823.49	5,823.49
No. 13—Standby and Overhead Expense	49,147.41	—
No. 14—Interest on Deferred Payments	286.90	—
Total	\$412,846.75	\$293,585.84

Thus 4 items—No. 4, No. 6, No. 13 and No. 14 disappeared as a result of the judgment of the Superior Court. On appeal to the Court of King's Bench Item 9 was not contested by the present respondents and in the result that small item of \$1,429.60 alone survived the appeal to the Court of King's Bench. The remaining nine items which were all disallowed *in toto* by the Court of King's Bench formed the subject of this appeal.

Their Lordships can now consider and deal with those nine items in order.

Item No. 1: Hardpan excavation.—Hardpan, as was proved by a geologist called by the appellants, is boulder clay. It had not been found in certain test pits dug by or for the respondents prior to the letting of the contract, and the learned Judge of the Superior Court found in terms that there was no misrepresentation in this matter. This material was, however, found in considerable quantities as the work proceeded and the appellants claimed to be paid for excavating it at two-thirds of the price for ledge. Except as to quantities found and excavated in the way of the by-pass, where the learned Judge held that it was the contractor's risk, he held that the claim was well founded. He appeared to base his judgment on a reference in the contract to hardship, but this reference does not support any such conclusion and before their Lordships the claim was supported on a different ground, namely, that excavation of hardpan was not provided for at all in the contract and that accordingly, though the work of excavation was within the contract no price for excavating it was stipulated, and a reasonable or proper price had to be paid. Section 989 of the Civil Code was relied upon in support of this contention. It provides that "a contract without a consideration or with an unlawful consideration has no

effect: but it is not the less valid though the consideration be not expressed or be incorrectly expressed in the writing which is evidence of the contract." To this it was answered that the consideration was expressed and correctly expressed in the contract as being the principal sum with specified variations of which this was not one. It was also answered that this was material which was not ledge or rock and was earth within the meaning of the contract. It is unnecessary to deal with the first suggested answer upon which there has been no pronouncement in the Courts below. Their Lordships find themselves in agreement with the Court of King's Bench as to the second answer in the disallowance of this item of claim for that reason. It is not necessary to enter into a discussion of the geological category into which boulder clay should properly find a place. In their Lordships opinion there was no *casus omissus* in this contract and the material was earth within its meaning. It is not insignificant that in another connection, namely, as a permissible foundation for the embankments hardpan was mentioned in the contract and therefore it clearly was not outside the contemplation of the parties and further that the material was being excavated in quantity before the contract was actually signed.

Item No. 2: Passing logs.—The respondents had a lumber business and drove floated logs in the summer season down the Lievre from above and through the Cedar Rapids to lower waters. The matter was thus dealt with in the contract:

" He [the contractor] shall so construct the coffer dams and arrange and manage the construction of the works as a whole, that logs of the owner, or of others, may be driven by the site of the dam during the driving season of 1929, and shall provide such opportunities for the passage of logs as the construction work may render necessary."

When the log driving season began in June, 1929, trouble through logs jamming at the site of the works was feared by the contractor's men in charge and actually occurred. Correspondence took place, the contractor asking the respondents to take measures to attend to the passage of the logs. The respondents claimed that the sole responsibility lay with the contractor and repudiated any obligation to do anything. The contractor then did his best to minimise trouble and the expenses now awarded were incurred in respect of the material and labour employed to effect this object. Before their Lordships it was contended that in any case the contractor's efforts were in themselves mis-directed and that further requests ought to have been made to the respondents to deal with the situation. There is in their Lordships' view no substance in these contentions. The respondents had unambiguously repudiated responsibility and if they were wrong about the contractual obligations of the parties they can hardly complain if the contractor who was not a lumberman did not do his work as well as they could have done it themselves. As to the meaning of the contract: the trial judge and St. Germain J. took the contractor's view: the

majority in the Court of King's Bench held that the contractor had the sole responsibility in the matter and in effect had to do everything to see logs, in whatever quantity they might be sent down, safely past the works. Their Lordships are unable to agree with this latter view and think that the better opinion was that of the trial judge and of St. Germain J. They would desire to adopt as their own the language of the latter learned judge. He said:

"It is impossible for me to construe these words 'to provide such opportunities for the passing of the logs,' as meaning that respondent obligated itself to provide whatever booms or other equipment were necessary to guide the logs into the opening in the dam. These words 'to provide such opportunities for the passing of logs' cannot but mean to provide times or places favourable for executing the passing of the logs. These words 'to provide such opportunities' do not, according to me, suggest the obligation of furnishing anything necessary for the actual execution of the work, but only favourable circumstances of time or place."

The award to the appellants by the Superior Court in respect of this item must therefore be restored.

Item 3: Increased cost of cofferdam and unwatering.—

Part of the large claim made under this head arises out of the same matters as have been dealt with under the head of Item 2. Part of it depends upon different considerations and questions of considerable difficulty arise in connection with that part of the case. The trouble which gave rise to the claim was this: The construction of the cofferdam involved the sinking in the river of certain cribs or frames of logs filled with rock. These cribs were designed to support or buttress the timber sheeting of which it was intended to construct the up-river side of the cofferdam. This work of sinking cribs and forming the cofferdam and certain other parts of the work were interfered with and rendered both slower and more expensive by trouble with respondents' logs. But when the cofferdam was constructed even more serious trouble followed. The cofferdam was not water-tight and the space to be pumped dry before the erection of the dam could proceed, could not be pumped dry. The water came under the sheeting. A great and unusual amount of toe-filling or earth-facing to the cofferdam was tried as a remedy but eventually the trouble was only got over by the use of steel sheeting in addition to the original timber sheeting and this sheeting had to be driven down into what was the cause of the trouble namely a heavy overburden of pervious soil over the ledge. Through this overburden of soil water naturally penetrated below the timber sheeting which could not be driven through the overburden and the work of the contractor's pumps was thus rendered ineffective. The delay and extra expense were in consequence very great and the trial judge finds with regard to the matter:—"All the delay, trouble and expense are due to two things:

(a) The fact that instead of ledge at the line on the ground where the dam was to be built there was pervious overburden.

(b) The damage caused by Defendants logs."

As far as (b) is concerned their Lordships have already held that the respondents were in breach of their contract and accordingly there is here a good cause of action. The damages due respectively to (a) and to (b) are so interwoven and intermixed that they probably could not be separated and certainly never were separated in the evidence or in the findings of the Superior Court and it is therefore of great importance to consider whether there is also a good cause of action in respect of (a): the difficulty caused by the overburden. The case for the appellants on the facts was this: The contract provided that the dam was to be built "at a line established on the ground the location of which is indicated on a map attached hereto and forming part hereof" and that the "drawings which have been prepared showing the general form and details of the dam and the manner of the construction and which form a part of this contract are as follows: B 2444—Topography at Site of Dam" and a number of other plans which are not now material. The plan B 2444 or topographical plan showed the situation where the cofferdam was to be erected and indicated or seemed to indicate by the letter L the presence of ledge at the bottom of the river in a number of places with figures showing the elevation of the ledge at those places above a certain datum. No indication was given on this plan of the presence of overburden at the places where the letter "L" appeared thereon. The plan was prepared by a Mr. Stratton, an assistant to Mr. Ferguson the engineer who acted for the respondents as engineer in the matter of the plans and the contract. Mr. Stratton admitted in evidence that he in fact found a quantity of overburden. This overburden in fact caused the trouble. Mr. Ferguson could not remember whether Mr. Stratton told him of the overburden and certainly its presence was not indicated on the plan and the contractor was not told it was there. Mr. Ferguson admitted frankly that if he was not told there was anything over the rock he would assume that the topographical plan showed the contours at the surface of the bed of the river. He agreed that the topography of the surface of the river bed and the nature of the material of which the surface was composed were matters of extreme importance to the contractor in the unwatering; also that if the plan showed an elevation of say 89.2 L a person without opportunity of conversation with Mr. Stratton would naturally assume that the surface of the river bed was ledge at that elevation. He also said that he thought that Mr. Stratton should have given without being asked any information in his possession which contradicted the information on the plan and he admitted that Mr. Stratton had such information in his possession. It was clear that there was no such disclosure. Mr. Ferguson's point was that the contractor should have made his own investigations and this point was urged in the Courts below and before this Board. It was also contended that in fact the contractor's employes made soundings which either

did lead them or ought to have led them not to rely on the topographical plan. But these soundings made for the purpose of sinking the cribs were made by persons not of the skill supposed to be possessed by the designer of the dam and his assistants and were made not to ascertain the position and elevation of ledge but the depth at which the river bed was to be found and its contour for the purposes of the construction and placing of the cribs. There was no suggestion that Mr. Stratton or Mr. Ferguson acted otherwise than honestly but for reasons to be discussed hereafter negligent though innocent misrepresentation was relied upon as giving by the law of Quebec a good cause of action. As to the facts necessary to found such cause of action the evidence already detailed and the evidence of Mr. Bishop and his witnesses were in their Lordships' judgment amply sufficient to justify the findings of the trial judge that:

“ The plan B-2444 was certainly not accurate, and plaintiff was misled as to the difficulties which he would have to face in the placing of cofferdams and the unwatering operations generally. Stratton was the man who obtained the information upon which the plan B-2444 was made, and his evidence shows that he had not had sufficient experience to be entrusted with such an important piece of work.”

Their Lordships agree with those findings and with the conclusions of St. Germain J. to the same effect and it follows that they are impelled to disagree with the conclusions of the majority of the judges in the Court of King's Bench in the contrary sense. One other matter of fact must be dealt with. It was contended for the respondents before their Lordships that the elevations, some four in number, appearing in the topographical plan on the actual line of the cofferdam were not proved to be inaccurate—in other words that the presence of overburden at those spots was not established. Their Lordships do not agree. In the nature of things the amount of overburden at those particular spots could not be established with precision but that overburden was there in considerable quantity seems to their Lordships to be established by the evidence and by the facts of the case and in particular by the percolation of water beneath the timber sheeting and by the results obtained with steel sheeting which could be driven deeper. As to the law the appellants' case was rested upon section 1053 of the Civil Code which reads as follows:—

“ Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.”

The proposition that what is commonly called in England innocent misrepresentation may constitute “ fault ” within the meaning of the above section and may therefore found an action for damages was not disputed nor was it disputed that under section 1054 of the Code, the fault of Mr. Stratton and Mr. Ferguson would give rise to responsibility in the respondents for the fault of them or either of them. But in addition to the answers of fact put forward, with which

their Lordships have dealt, it was said that this claim was barred by prescription under section 2261 of the Civil Code as not having been brought within two years. Action was taken on 4th December, 1930, and the topographical plan was sent before 15th November, 1928. Therefore if 15th November, 1928, was the critical date the action was out of time. To this plea of prescription several answers were made. One of them which seems to their Lordships to be sufficient of itself is that the critical date was certainly not earlier than 23rd May, 1929, when the contract was signed. The representations and fault complained of were continuing down to that date and it was then that the contractor by signing the contract in reliance on the representations, did that which gave him the right of action for damages which he is asserting. It should be observed that no judgment in the Courts below refers to this point of prescription and it is doubtful whether it was debated there and it is taken obscurely if at all in the respondents' case. In these circumstances their Lordships lacking the assistance of judgments from the Courts of Quebec do not pronounce upon the more important point argued namely whether the date from which prescription should run was not the date of the discovery of the inaccuracy of the representations that is to say August, 1929.

As to the figures going to make up this item they were criticised as excessive but the trial judge had the whole matter before him and their Lordships have neither the duty nor the inclination to interfere with his decision as to a matter of amount where no error of principle is made out. It should however be observed for its bearing on other parts of the claim that the figures going to make up the amount awarded in their Lordships' opinion embrace and cover all the expense and damage due to delay from the specific causes (a) and (b) which are the foundation of the contractor's claim under this head.

Item 5: Additional cost of rock excavation.—It was the basis and ground of the contractor's claim in the Courts below that the engineer ordered him to remove the rock in shallow lifts, a more expensive method than he would have adopted if left to himself. But inasmuch as the contractor had to comply with the orders of the engineer under the contract it is difficult to understand why this item was allowed in the Superior Court and the learned judge gave no reason. In the King's Bench the judges were unanimous in allowing the appeal to this item. Before their Lordships this pleaded contention was entirely abandoned and with it a substantial part of the amount claimed. The claim for part of the rock excavation carried out in what was called the non-spilling section of the dam was retained and supported upon the ground that excavation in this section was not dealt with in the contract schedule and was therefore to be paid for on the basis of its cost. This case was not made below nor was it made in the appellants' case upon this appeal. It depends largely if not entirely for its foundation in fact upon evidence

which might have been given as to the meaning attached locally and by the parties to the terms used to describe different parts of the work—such as the term “in the main river channel”. All that is known to their Lordships is that the work was paid for at all times as work provided for by the contract and at the contract rates for rock excavation. In these circumstances their Lordships are not prepared to entertain a ground of claim which is so belated and which the appellants have not taken any opportunity of supporting by the necessary proof.

Items 7, 8 and 12.—These items can be dealt with together and quite briefly. They are really claims for delay and extra expense thereby occasioned. In particular the contractor's case was that the delay and expense were occasioned by the respondents' breaches of contract and faults, as for example about the logs and the overburden, and that he was thereby driven into the winter of 1929-1930 with work which he would have done before November, 1929, and was driven into the spring and summer of 1930 for the removal of plant and materials which he would have got away over easier and frozen ways in the winter before. The trial judge allowed these items but in their Lordships' opinion the disallowance of them by the Court of King's Bench was correct. The contractor and his representatives before the trouble about logs and overburden had developed committed themselves by letters and diary entries to the position that the amount of unexpected excavation and concreting required had already involved the result that the work would be extended into the winter and the spring. These matters of excavation and concreting which involved these consequences were within the contract and can form no ground for a claim and the claim to recover them as items of damage for breach of contract fails if the contractor's letters and the diary entries represent the true facts. Their Lordships see no reason to doubt but that they do so and that accordingly these items should be disallowed.

Claim No. 10: Cement for apron in by-pass channel.—This was in effect a claim that because an extra was ordered contract work was rendered more expensive. The trial judge allowed it but the judges of the Court of King's Bench unanimously disallowed it. Their Lordships think that they were right in so doing. The claim was altogether too remote and unjustified by anything in the contract.

Item No. 11: Shortage on payments for class one concrete.—This considerable item amounting to \$31,549.15 was allowed by the trial judge but was disallowed by the Court of King's Bench. The contract schedules provided for prices for concrete with plums (that is to say with an admixture of large stones) and for concrete without plums. They also provided for deductions and additions to the price according as the amount of concrete of one sort or the other was in deficiency or excess. The rate for additions was higher than the rate for deductions and that fact is the explanation of this

item of claim. In the course of the work the engineer in control, as he properly might, decided that there should be more concrete without plums and less with plums. The former sort is of course better and stronger than the latter sort. This change was accordingly ordered and effected and thereupon, as the trial judge thought, the contractor was entitled to be paid at scheduled rates for the excess of concrete without plums, less the sum representing on the scheduled rates the deductions for the deficiency of the concrete with plums. The respondents, however, claimed to pay and did pay on an entirely new basis, viz., on a basis of setting off the amount of one sort of concrete which was in deficiency against the other sort which was in excess. On a calculation so based they arrived at the net excess of concrete over the contract estimate and then paid for that extra concrete. It was said that there had been a substitution and not a change within the meaning of the contract. The Court of King's Bench upheld this view and disallowed the claim. Their Lordships are clearly of opinion that the trial judge was right in this matter. There is no provision in the contract for any such process of so-called substitution. The contract provides for and speaks of change. There was a change within the meaning of the contract and the consequences provided for by the contract must follow—none the less because there may be here something in the nature of a windfall to the contractor. Elsewhere in the construction he has to face contingencies and un contemplated expenses. In the Court of King's Bench the judgment seemed to proceed upon the ground that the contract schedule for deductions and additions was only applicable to changes which were changes of design or depth and that this was neither. Their Lordships think that this was not so and are of opinion that this was a change of design within the meaning of the contract, that is to say, of the way the work was planned. Apart from any other consideration this would seem to be established by the terms of the specification which formed part of the contract. In clause 10 of that document occur the words: "In the design of the concrete mixtures the ratio, etc.". It is, therefore, unnecessary to discuss whether, if a more limited construction of the word "design" were adopted, changes made for other reasons would not fall under the schedule. Their Lordships, as at present advised, are not disposed to the view that there was here any more than there was elsewhere a case which the contract omitted to provide for. In the result their Lordships are of opinion that the award of \$31,549.15 by the trial judge should be restored.

The total of the items (Nos. 2, 3, 9 and 11) upon which the appellants are, on their Lordships' judgment, entitled to succeed is \$153,049.39 and that figure should be substituted for the figure of \$1,429.60 which alone was recovered pursuant to the judgment of the Court of King's Bench. As to interest their Lordships see no reason to interfere with the decision of the judge of the Superior Court, viz., that interest should run in respect of items (2) and (9)

and (11) from the date of the service of the action but as regards item (3) from the date of the judgment of the Superior Court. It was submitted for the appellants that interest on the last-mentioned item also ought to have been ordered to run from the date of the service of the action. It is no doubt a general principle that where damages such as are here in question are claimable they should include interest. This may be given specifically or taken into account and included in the general sum awarded for damages. That is in the discretion of the tribunal. There is here everything to indicate that the learned trial judge considered the matter and used his discretion when he differentiated between the various items in respect of the date from which interest was to run and there is nothing to indicate that he did not in his award of damages under item 3 award a sum which was in his opinion and in fact sufficient to cover everything down to the date of judgment. For this reason their Lordships are of opinion that the cross-appeal of the present appellants to the Court of King's Bench was rightly dismissed with costs and that the order of the Court to that effect should stand.

As to the other matters, including those of costs arising, their Lordships think that judgment should have been entered for the appellants in the Superior Court for the sum of \$153,049.39 with interest as stated above and with costs: that this appeal should be allowed with costs and the order of the Court of King's Bench varied to give effect to this judgment. Their Lordships also think that had the Court of King's Bench departed from the judgment of the Superior Court only to the extent that has now been held to be proper, the successes of the parties would have been approximately equal and that each party should bear his own costs in the Court of King's Bench. Any costs paid under the judgment of the Court of King's Bench (other than the costs of the cross-appeal) should be repaid. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council

WILLIAM I. BISHOP, LIMITED
AND OTHERS

v.

THE JAMES MACLAREN COMPANY,
LIMITED

DELIVERED BY LORD ROCHE.

Printed by His Majesty's STATIONERY OFFICE Press,
Pocock Street, S.E.1.

1937