

anything that was the subject-matter of this litigation. So that the defence to the action and the ground of the counterclaim really were that the plaintiffs did not supply the timber needed to enable the defendant to do his work in accordance with the contracts, though the plaintiffs had contracted with the defendant to supply it.

The learned Chief Justice's conclusion, upon the whole evidence, was that the plaintiffs did not fully comply with their undertaking in this respect; and that, if the defendant had refused to accept that which the plaintiffs did supply, he might well have been within his rights in treating the contract as broken and in seeking damages from the plaintiffs for the breach of it. But the defendant did not take that position; and in the end the length of the timbers had no substantial part in the rejection of the work. If the work had been well done, and all that was necessary had been cut off the piles, the only effect would have been that the plaintiffs should eventually have been paid only for the exact length, in the work, of the piles, not the whole length of the timber as supplied.

The main cause of the defendant's failure to do good work was the height of the water. The plaintiffs did not contract with the defendant to lower the water, and he did not, on his own account, lower it.

Knowing the terms of the major contract, it was the bounden duty of the defendant and the plaintiffs to perform the work substantially according to it—reliance upon the inspector's views of how the work might be done was inexcusable.

No objection was made to the form of the judgment, either upon the question of liability or that of damages.

The appeal should be dismissed.

LENNOX, J., in a written judgment, said that he concurred in the judgment of the Chief Justice. If the piles were in fact not long enough to enable the defendant to perform the work according to the plans and specifications, he was bound to take a far more definite stand than he did, for in his contract with the plaintiffs he bound himself to comply with all the terms and conditions imposed upon the plaintiffs under the main contract.

The learned Judge, however, upon this point, preferred to rest his judgment upon the finding of fact of the trial Judge that the piles furnished were of sufficient length to enable the defendant, properly handling them, to comply with his contract, and the additional fact that it was the method of execution adopted by the defendant, and not the alleged lack of length, that led to the ultimate rejection of the work under the terms of the overriding contract. Undoubtedly the trial Judge took all the