

SMITH V. FINKELSTEIN—DIVISIONAL COURT—MARCH 17.

Contract—Work and Labour — Non-completion — Payment—Certificate of Engineer.—Appeal by the defendant from the judgment of the District Court of Nipissing in favour of the plaintiffs in an action to recover \$460 for sinking a shaft on the defendant's mining property. The appeal was based on three grounds: (1) that the certificate of the defendant's engineer was a condition precedent to the right of the plaintiffs to recover; (2) that the plaintiffs failed to complete their contract; (3) that the flow of water into the shaft was not a sufficient reason for abandoning the work. LATCHFORD, J., delivering the judgment of the Court (BOYD, C., MAGEE and LATCHFORD, JJ.), said that there was little merit in the appeal. The plaintiffs did their work as directed, and were willing to continue to do any further work the defendant or his engineer might ask them to do. They were willing to sink another shaft, if asked, but they were not asked, and no other work was assigned to them. It was unreasonable to expect that the plaintiffs should keep themselves and their men for days, at large expense, upon the property, awaiting instructions. They were justified, in the circumstances, in abandoning the work. Further sinking in the last shaft was impossible. The strong in-flow from a source several feet below the bottom of the shaft rendered the shaft useless as a mining shaft. It could be worked (if at all) only at very great expense. The engineer's statement in his telegram to the defendant that the water was surface water was untrue. He asked the defendant whether he should withhold payment; and the defendant, misled by his false statement, so directed him. Whether there was or was not such an interference with his discretion as was discussed in *Wallace v. Temiskaming and Northern Ontario Railway Commission*, 12 O. L. R. 126, 37 S. C. R. 696, is immaterial. The report was, in the circumstances, not a condition precedent to the plaintiffs' right to recover. Appeal dismissed with costs. J. H. Spence, for the defendant. J. P. MacGregor, for the plaintiffs.