

*Held*, that a creditor who had benefited by the realization of the assets and by his action gives the body of the creditors reason to believe that he had adopted the new arrangements, could not repudiate the transaction upon the ground that the new arrangements were not fully understood, without at least a surrender of the advantage he had received through them.

The debtor's assent to allow such repudiation and grant better terms to the one creditor, would be a fraud upon the other creditors, and as such inoperative and of no effect.

Appeal dismissed with costs.

*Kappele*, for the appellants.

*Lougheed*, Q.C., for the respondent.

Exchequer Court.]

[May 18.

MURRAY & CLEVELAND v. THE QUEEN.

*Contract—Public work—Progress estimates—Action for payment on—Engineer's certificate—Revision by succeeding engineer.*

A contract with the Crown for building locks and other work on a Government canal provided for monthly payments to the contractor of 90 per cent. of the work done at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer that the work certified for had been executed to his satisfaction, approved by the Minister of Railways and Canals; the certificate and approval was to be a condition precedent to the right of the contractor to receive payment of the 90 per cent., and the remaining 10 per cent. of the whole work was to be retained until its final completion; the engineer was to be the sole judge of work and material, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final, and he could make any changes or alterations in the work which he should deem expedient.

The work to be done included the construction of a dam, and after it was begun the engineer decided that the state of the river bed required such dam to be made much deeper than was first intended. The earth for the dam was all to be brought from a certain place, but owing to the change that place could not supply enough, and by direction of the engineer the material excavated from the lock pits and entrances thereto was used for the purpose, and paid for at the same rate as that first used, and the contractor was also paid the price specified in the schedule for carrying away the excavated material and depositing it in a bay in the vicinity. The engineer who certified to these payments having resigned, his successor caused a new examination and measurement of the work to be made, and decided that the contractors should not have been paid for the excavated material under both classifications as above mentioned, but allowed them a smaller sum than was paid as extra cost of depositing the material, which the contractors refused to accept, and a reference was had to the Exchequer Court to determine whether or not they were entitled to the larger amount.

*Held*, reversing the judgment of the Exchequer Court, that the engineer