

MASTEN, J.

OCTOBER 25TH, 1919.

NORMAN McLEOD LIMITED v. ORILLIA WATER LIGHT
AND POWER COMMISSION.

*Contract—Building—Action for Balance of Price—Extras—Work
Done under Contract—Counterclaim—Penalties for Delay—
Recovery for Actual Loss and Damage only—Reference—Costs.*

An action on a building or construction contract. The plaintiffs, the contractors, claimed a balance due for work done, and the defendants, duly incorporated as a commission, set up a counterclaim for penalties for delay etc.

The action and counterclaim were tried without a jury at a Toronto sittings.

J. A. Paterson, K.C., for the plaintiffs.

R. McKay, K.C., and A. B. Thompson, for the defendants.

MASTEN, J., in a written judgment, set out the facts and referred to the evidence with particularity. In respect of the plaintiffs' claim he found: (1) that the work was done under a written contract and subject to its provisions, and not otherwise; (2) that no extras were recoverable by the plaintiffs unless covered by a written order of the engineer; (3) that the plaintiffs were not entitled to recover anything in respect of the "Berm" after the first removing, spreading, and levelling on the beach in front of the building of the material excavated; (4) that the plaintiffs were not entitled to recover two sums of \$170.89 and \$25 claimed by them. Subject to deductions made by the learned Judge and to the admissions made in the defendants' statement of defence and counterclaim, the several items in the plaintiffs' claim were referred to the Master to inquire and report what, if anything, was due to the plaintiffs in respect thereto.

With regard to the counterclaim of the defendants for penalties for delay, the learned Judge found that unexpected difficulties were discovered in the course of the work, and that the consequent changes in plan largely contributed to the delay in finishing the work; but that the conduct of both the plaintiffs and the defendants was also a contributory cause to this delay, and that the plaintiffs were chargeable with three months of the total delay. The penalties provided by the contract were not recoverable as such. The defendants were entitled to recover for the delay, but only the actual loss and damage occasioned to them by the three months' delay. Upon the reference the Master should inquire and report the amount of the loss and damage so occasioned to the defendants. Further directions and costs should be reserved.