

JUNE 30TH, 1910.

SMALLWOOD BROTHERS v. POWELL.

Building Contract—Construction—Payment — Performance of Work — Satisfaction of Architect — Proof — Certificate — Changes in Specifications—Authority of Owner or Architect—“They” — Extras — Deductions — Arbitration — Progress Certificates—Evidence—Rejection—New Trial.

Appeal by the defendant from the judgment of CLUTE, J., of the 22nd December, 1909, in favour of the plaintiffs, contractors, in an action to recover \$1,470 for work alleged to have been done for the defendant in the erection of a house and stable in Toronto, and for a declaration of a lien on the defendant's lands for that amount. Judgment was given for the full amount of the plaintiffs' claim. There was also a counterclaim, which was dismissed.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

C. A. Moss, for the defendant.

I. F. Hellmuth, K.C., and D. Urquhart, for the plaintiffs.

MAGEE, J.A.:—The defendant's undertaking was that, in consideration of the plaintiffs strictly performing their covenants and agreement, he would pay in the manner specified, that is, 75 per cent. fortnightly on account of the contract as the work should proceed, the balance of the contract and all extras to be paid within 33 days from the completion of the work, and after the contractors should have rendered to the architect a statement of the balance due. The plaintiffs covenanted to perform the work well and thoroughly agreeably to the plans and specifications, to the satisfaction, and under the direction, of the architect, and to provide such material as should be proper and sufficient for completing the works shown on the plans and specifications—but this was subject to the right of the defendant or his architect to require changes. What, then, was this right of change? The provision in clause “third” is, that, should the defendant or his architect require alterations, deviations, or omissions, “they shall have the right and power to make such change or changes . . . and the same shall in no wise affect or make void the contract.” The fair construction of the word “they” is, I think, “whoever so requires.” It might be very proper to provide for joint action