The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

A. Cohen and W. C. MacKay, for the appellant.

R. G. Agnew, for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said, after stating the facts, that the retaining wall could have been built before the cellar was excavated; and the plaintiff must accept responsibility for the method actually adopted, it not being shewn that the defendant actively intervened to direct or superintend: Duncan v. Blundell (1820), 3 Stark. 6.

The plaintiff's work not having been finished, owing to the subsidence, he could not recover, even if this was caused by accident without negligence. He might have abandoned it, subject to the defendant's claim for damages; but, if he went on and did what was necessary to accomplish the designed end, in a different way, he must either prove a new contract for an additional sum, or be limited to his original contract price, if the new work was to be treated as a substituted performance of the old contract.

Reference to Thorn v. Mayor and Commonalty of London (1876), 1 App. Cas. 120.

Sufficient was not proved to warrant a finding that there was an express contract to pay, even on the basis of a quantum meruit. But the work as contemplated was probably improper from the beginning; and, when the inspector intervened, its further performance was both legally and practically impossible. The completion of the work under the old contract was prevented and the doing of new and additional work necessitated. This added to the value of the defendant's house. The direction by the defendant to the plaintiff to go on and do the work, which was fairly proved—coupled, shortly after, with a mention of damages—was sufficient to sustain the claim of the plaintiff to the extent of $324.50 found by the Referee.

But it did not follow that the defendant should pay for the work necessary to prevent further damage—the necessity for jacking up arose in consequence of the plaintiff's operations.

The defendant's damages should be assessed at $50, subject to the right of either party to take a reference back.

The appeal should be allowed and the judgment set aside. If no election to take a reference is made within one week, $50 will be allowed to the defendant and deducted from the $324.50, and judgment will be entered for the plaintiff for $274.50, with costs as allowed by the Referee in the report appealed from, but with no costs of appeal. If a reference is desired, it will be to the