

unless authority for contracting the same can be shown by a certificate from the owner.

The view is taken in one case that a provision in a contract that the owner should have the right to make alterations and the contractor should comply with such as were ordered in writing was intended merely to require the contractor to perform such alterations or extras as were ordered in writing, but not to interfere with his recovery of the price therefor, if he chose to perform them other than upon an order in writing.

With reference to orders by architects and engineers it may be doubted whether a provision that no extra work shall be ordered, or that the contractor shall make no claim for extra compensation unless ordered by the architect or engineer in writing, is intended to apply to an order by the owner, notwithstanding the cases have assumed, rather than decided, that this is the case.

As stated above, the Courts sustain the validity of such provisions in a contract, and hold that they must control unless clearly waived or superseded. The theories on which the Courts have held such provisions in a contract to be superseded and a recovery allowed in the absence of a written order may be classified as, (1) independent contract, (2) modification or rescission, and (3) waiver. These theories have not always been kept distinct by the courts, although theoretically there is a distinction between them. One court, in speaking of the distinction between rescission and waiver, states that 'rescission of a contract is one thing, waiving some of its terms is quite another. Rescission required concurrent action by both parties,—a meeting of minds. A waiver is the act of the party for whose benefit the condition exists. The fact that the other party failed to comply with the condition is no evidence that the party to be benefited by it intended to waive it.'

In some cases no particular theory is referred to, the court under certain circumstances allowing a recovery for work done in the absence of a written order therefor notwithstanding the provisions of the contract. It is apparent that some of these courts at least, if not all, have had in mind some theory of avoid-