

**WALTER E. OLSEN & CO. AND HARRY THURBER, PLAINTIFFS
AND APPELLANTS, VS. MATSON, LORD & BELSER COMPANY,
DEFENDANT AND APPELLEE.**

G.R. No. 5759. August 22, 1911

Ponente: MORELAND, J.

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MORELAND, J.:

This is an appeal from a judgment of the Court of First Instance of the city of Manila dismissing the plaintiffs' complaint upon the merits after trial with costs.

The action is founded upon a written agreement between the plaintiffs and the defendant, Matson, Lord & Belser Company, for the construction of a reservoir constituting a part of the water system of the city of Manila. The plaintiff, the Manila Construction Company, is a subcontractor, the original contract for the construction of said reservoir having been made between the Matson, Lord & Belser Company and the city of Manila. Upon application to the court soon after the action was commenced, the city of Manila was made a party defendant and is, in reality, the only defendant in the case which is defending. The contract between the Manila Construction Company and the Matson, Lord & Belser Company was exactly the same in its terms as the contract between the Matson, Lord & Belser Company and the city of Manila except as to the prices to be paid for the various classes of work. As a necessary result, if the Matson, Lord & Belser Company is liable to the plaintiffs upon the contract between them, then the city of Manila is liable to the Matson, Lord & Belser Company upon the contract between them, the question before us being simply a construction of the terms of the contract.

The matter in controversy relates solely to the building of the reservoir. Paragraph 14 of division E of said contract provides:

"The entire inner surface of the reservoir shall then be lined in the following manner: Over all surfaces in solid rock without defects a plaster coat shall be applied of the same consistency and by the same methods as specified for unlined sections of the tunnel. On all surfaces of embankments, defective rock, or elsewhere where ordered by the engineer a layer of concrete 4 inches in thickness shall be placed, and this layer shall be finished with a top skim coat conforming in all respects to the skim coat specified for lined sections of the tunnel. All linings shall be kept wet and protected from the sun until entirely set and to the satisfaction of the engineer,"

The references contained in the foregoing paragraph to lined and unlined sections of the tunnel refer to paragraphs 17 and 18 under division D of said contract, which read as follows:

"17. All interior surfaces of unlined tunnel sections shall be given a plaster coat of cement mortar composed of 1 part cement and 1 part sand upon the scored surfaces heretofore described. This plaster coat shall be as thin as possible, flowed and troweled to a smooth and true surface, and shall in surface and appearance be equal to a plaster's finish coat.

"18. All lined sections or portions of sections and all chambers shall, immediately after forms are removed and

pointing done, have a skim coat of cement mortar, consisting of 1 part cement and 1 part sand, applied by a skillful plasterer in a workmanlike manner. This skim coat shall in surface and appearance be equal to a plaster's finish coat."

The plaintiff alleges that it has placed upon the inner surface of the reservoir a plaster coat to the extent of about 43,000 square yards, for 41,592 of which it has not received pay. Under the contract between the Matson, Lord & Belser Company and the city of Manila the contractor was to be paid 55 cents gold for each square yard of plaster coat placed on the inside of the reservoir. In its subcontract with the plaintiff the Matson, Lord & Belser Company agreed to pay to the plaintiff the sum of 44 cents gold for each square yard of plaster coat placed on the inside of said reservoir. The city asserts that it is not liable to the Matson, Lord & Belser Company and, therefore, the latter is not liable to the plaintiff, for the placing of said 41,592 square yards of alleged plaster coat for the reason that said 41,592 square yards is not plaster coat but skim coat, the city maintaining that there is a vital distinction between the two. The city contends that under the terms of the contract it is not liable to pay anything whatever for the so-called skim coat, as it is a part of the concrete lining and other work for which the contract specifies plaintiff shall be paid \$9.18 per cubic yard, claiming that the plaintiff, in order to complete the work under the terms of the contract, was obliged to place upon the outside surface of the concrete lining of the reservoir the skim coat mentioned in the contract, and that the payment for said skim coat was included in the \$9.18 per cubic yard paid by the city to the plaintiff for the concrete work in said reservoir.

The contention of the parties in this action is clearly presented by the letters passing between the various companies interested and the chief engineer of sewer and waterworks construction on behalf of the city prior to the termination of the work and the commencement of the action. They follow: "

"EXHIBIT A.

"MANILA, P. I., April 14, 1908.

"MATSON, LORD & BELSER CO.,

"Contractors, Manila, P. I.

"Gentlemen: From estimates submitted by the Government engineer for work done on the reservoir by the undersigned, for the months of February and March, 1908, it appears that only four hundred and ninety-five square yards of plastering has been allowed, whereas eight thousand five hundred square yards of plastering has been laid and completed on the base or bottom of the reservoir and approximately one thousand square yards of plastering has been placed and completed on the corewall, this prior to April first.

"A protest is hereby entered and made against the action of the Government engineer in neglecting to include in his estimates submitted as above stated, the quantity of plastering that has been laid and completed. We hereby make claim for payment for the plastering laid and completed on the inner surface of the reservoir as above stated, which had been completed prior to April 1, 1908, at the contract price.

"We feel that this protest and claim is just and is in accordance with the specifications and with the contract between us.

"Yours, very respectfully,

"MANILA CONSTRUCTION CO.,

By "H. THURBER.

"EXHIBIT B.

"MANILA, P. I., April 30, 1908.

"Major J. F. CASE,

"Chief Engineer,

Sewer and Waterworks Construction, Manila, P. I.

"DEAR SIR: We beg leave to transmit, herewith, a copy of a letter of the Manila Construction Company, the subcontractor for the reservoir gatehouse, protesting against the estimates made for work done on the reservoir for the months of February and March, 1908. It appears from said letter that an error was committed in estimating the amount of plastering done during those months.

"This letter is transmitted to you for the purpose of requesting a rectification of the error, if any, and making an estimate covering the actual amount of plastering done during those months.

"Very respectfully, yours,

" _____

"EXHIBIT C.

"MANILA, P. I., May 5, 1908.

"THE MATSON, LORD & BELSER CO., Manila, P. I.

"(Per Mr. Wagner.)

"SIR: I have the honor to acknowledge receipt of your letter of the 30th April, inclosing copy of a letter to you from the Manila Construction Co.

"It appears that Mr. Thurber confounds the plaster coat on unlined sections with the skim coat required as the finish for concrete lining. This skim coat finish is included in the price for concrete lining as per par. 17, page 63, of the contract.

"The estimates are approximately correct.

"Respectfully,

"J. F. CASE, Chief Engineer,

"EXHIBIT D.

"MANILA, P. I., May 8, 1908.

"THE MANILA CONSTRUCTION CO., Manila.

"GENTLEMEN : Referring to your letter of April 14 relating to estimate made by the chief engineer of sewer and waterworks construction for plastering in the inner basin on the reservoir, we beg leave to state that the same was forwarded to the chief engineer and we are in receipt of a reply thereto, a copy of which is inclosed herewith for your information.

"Very respectfully, yours,

" _____

"EXHIBIT E.

"MANILA, P. I., October 12, 1908.

"MATSON, LORD & BELSER CO., Manila, P. I.

"GENTLEMEN : On behalf of the Manila Construction Co., whom I represent, I beg to make formal demand of you for the payment of P36,600.96 Philippine currency, due the said Manila Construction Co. by you for 41,592 square yards of plaster coating on the inner surface of the reservoir, constructed by the said Manila Construction Co.

"This demand is based upon the contract entered into between yourself and the Manila Construction Co. on the first day of August, 1906, and the amount is computed from the estimated quantity of plaster coating that has been finished on the inner surface of said reservoir, and accepted by the engineer in charge.

"An early answer is requested,

"Yours, very truly,

"LIONEL D. HARGIS,

"Attorney for Manila Construction Co.

"EXHIBIT F.

"MANILA, P. I., October 15, 1908.

"LIONEL D. HARGIS, ESQ.,

"Attorney for the Manila Construction Co., Manila.

"DEAR SIR: Your letter of October 12, 1908, to Matson, Lord & Belser Co. demanding payment of the sum of P36,600.96, alleged to be due the Manila Construction Co. 'for 41,592 square yards of plaster coating in the inner surface of the reservoir/ has been referred to us.

"As you know, the Matson, Lord & Belser Co. has paid for all plaster coating done by the Manila Construction Co. that was allowed by the chief engineer. We refer you to the letter of the Manila Construction Co. to the Matson, Lord & Belser Co., dated April 14, which was referred to the chief engineer. His reply of May 5 was transmitted to the Manila Construction Co.

"It will be noted that the chief engineer claims that 'plaster coating on unlined sections is confounded with the skim coat required as the finish for concrete lining.' He claims 'this skim coat finish is included in price for concrete lining as per paragraph 17, page 63 of the contract.' According to the chief engineer's construction of the contract, the plaster coat referred to by you is in fact the skim coat required on concrete lining. He therefore refuses to make an estimate for this plaster coat which you claim and takes the position that the contractor is entitled to no pay for that work.

"The Manila Construction Co., as subcontractor, agreed to carry out the Matson, Lord & Belser contract, and its right to this sum claimed by you depends entirely upon the proper construction of the contract. If you are correct, then the chief engineer is wrong, but in no event is the Matson, Lord & Belser Co. liable to the Manila Construction Co. unless the city is liable to the contractor. It may be that the city engineer is wholly wrong in his construction, but until he is convinced of his error, if any, and recognizes the liability of the city, no liability attaches to the Matson, Lord & Belser Co. In short, their liability to your clients depends wholly upon the liability of the city for this work. All that can be done at this time is to submit your letter to the chief engineer and request that he make an estimate for the work as claimed by you. This we will do and his reply will be transmitted to you immediately upon receipt thereof.

"Very respectfully, yours,

"HAUSSERMANN & COHN,

pp" _____

"EXHIBIT G.

"OCTOBER 15, 1908.

"Major J. F. Case, Chief Engineer, Manila.

"DEAR SIR: We beg leave to call your attention to our letter to you dated April 30, 1908, in which we inclosed a copy of a letter dated April 14, 1908, of the Manila Construction Co. to ub. Under date of October 12, 1908, the attorney of the Manila Construction Co. has made a formal demand upon us for payment for 41,592 square yards of plaster coating on the inner surface of the reservoir. You as chief engineer refused to allow pay for the plaster coating on the inner surface of the reservoir on the ground, as we understand it, that the contractor is not entitled to pay for such work. This action on your part, as we understand it, is based on your construction of certain parts of the contract. Inasmuch as the subcontractor is carrying out our contract which we made with the city, his right to pay for plaster coating depends upon a proper construction of our contract with the city. As we have received no pay for this work we can not, of course, pay the subcontractor for the same. However, to avoid any question about this matter, we transmit that demand to you, requesting that you submit an estimate of the amount of plaster coating done on the inner surface of the reservoir. As you know, bur contract with the Manila Construction Co. for the construction of the reservoir is an exact duplicate of our contract with the city for that work, save and except that part relating to the prices.

"We hope that you will give this matter your earnest attention, because we do not desire to be thrown into litigation over this matter.

"Very respectfully,

"MATSON, LORD & BELSER COMPANY,

By " _____

"EXHIBIT H.

"OCTOBER 29, 1908.

"Messrs. MATSON, LORD & BELSER, Manila, P. I.

"GENTLEMEN: Replying to your letter of October 15, re plaster coating of reservoir, I have the honor to state that the total amount of plaster coat placed at the reservoir under your contract with the city is 1,224.5 square yards. This work was only completed during the present month, and has not yet been fully estimated to you. It will be included in the next estimate.

"You are mistaken in your statement of my knowledge of your contract with the Manila Construction Company. I know nothing of its terms.

"Respectfully,

"_____, Chief Engineer.

"EXHIBIT I.

"NOVEMBER 4, 1908.

"Major J. F. CASE,

"Chief Engineer,

Sewer and Waterworks Construction, Manila, P. I.

"DEAR SIR: We beg leave to acknowledge receipt this date of your letter dated October 29, 1908, in reply to our letter of October 15 in re plaster coating of reservoir. In reply thereto we hereby enter our protest to your ruling and construction of the contract in the matter of the plaster coat of the reservoir.

"In this connection we beg leave to state for your information that section 34 of the contract between the Matson, Lord & Belser Company and the Manila Construction Co. is identical with section 14, page 63, of the contract of the Matson, Lord & Belser Company with the city of Manila, that sections 35 and 36 of the contract with the above-mentioned subcontractor are identical with section 15, page 63, of this company's contract with the city; that section 37 of our contract with the subcontractor is identical with section 16, page 63, of our contract with the city; and that section 38 of our contract with the subcontractor is identical with section 17, page 63, of the contract between the city and this company. Section 18 of the contract between this company and the subcontractor is as follows:

""All the work described herein shall be done under the general supervision of the chief engineer of the city of Manila, and to his satisfaction, and his decision in relation to estimates, classification of materials, or the interpretation, meaning or intent of the specifications, as well as other technical questions, shall be conclusive and binding on both parties to this contract.'

"Section 1 of the contract between this company and the subcontractor is as follows:

""The subcontractor hereby agrees to provide all the necessary machinery, including all suitable cars and necessary tracks, tools, apparatus, and other means of construction, which shall be efficient, appropriate, and large enough to effect a satisfactory quality of work, and at a rate of progress sufficient to complete the work within the time specified, and to do all the work and furnish all the materials necessary for the construction and completion of the reservoir and gatehouse, as per contract of January 10, 1906, entered into by and between the contractor and the city of Manila, and mentioned in said contract and according to the specifications issued by the department of sewer and waterworks construction, city of Manila, for the construction of a gravity water supply for the said city. The said work to be done to the satisfaction of the chief engineer of the said city of Manila, and if at any time the subcontractor's plant appears to the chief engineer or contractor, to be inefficient, inappropriate or insufficient to fulfill the above-named conditions, he may order that the subcontractor shall increase the efficiency of his plant, change its character, and increase the amount of plant, and the subcontractor shall conform to this order. The failure of the engineer or contractor to give such order shall not relieve the subcontractor of his obligation to insure the quality and quantity of work herein provided.'

"Section 14 of the contract between this company and the subcontractor is as follows:

""The estimate of the amount of work done each month shall be made by the engineer as provided in section 20 on page 24 of the contract with the city hereinbefore mentioned. But the value of such work will be fixed by the contractor or its duly authorized agent according to the rate provided in this agreement. The contractor shall retain ten (10) per cent of the estimated value as fixed by the said contractor or his duly authorized agent as part security for the fulfillment of this agreement by the sub-contractor, according to the plans and specifications of the Chief Engineer of the city of Manila, and to his satisfaction, and shall pay monthly, between the 1st and 10th day of each month, provided the chief engineer has made and submitted estimates and the same have been approved by the city, to the subcontractor while carrying on the work, the balance not retained as aforesaid, after deducting therefrom all previous payments and all sums to be retained or expended under the provisions of this contract.'

"Section 73 of the contract between this company and the subcontractor is as follows:

"All of the work under this contract shall be done to the satisfaction of the chief engineer, who shall, in all cases, determine the amount, quality, acceptability, and fitness of the several kinds of work and materials which are to be paid for hereunder, and who shall decide all questions which may arise as to the fulfillment of this contract on the part of the subcontractor, and his determination and decision shall be precedent to the right of the subcontractor to receive any money hereunder."

"Under date of October 12, 1908, the subcontractor, through its attorney, demanded pay for '41,592 square yards of plaster coating on the inner surface of the reservoir.' Pursuant to your letter of October 29 you claim that only 1,224.5 square yards of plaster coat was placed at the reservoir. You will see there is a great discrepancy between the claim of the Manila Construction Co. and your statement under date of October 29, 1908, as to the amount of plaster coat placed in the reservoir. We understand that the Manila Construction Co. claims that this difference arises in this way:

"The subcontractor claims that the entire inner surface of the reservoir has been covered with a plaster coat, and that this surface amounts to more than 41,000 square yards. The subcontractor claims, as we understand, that the price stipulated for the concrete lining mentioned in section 17, page 63, of the city's contract, does not include the plaster coat thereon. In other words, that the concrete lining is complete in itself without the plaster coat, and that the engineer is in error in not making an estimate of the amount of plaster coat placed on the concrete lining and inner surface of the core wall. This matter is now of vital importance, inasmuch as suit has actually been commenced against this company by the subcontractor for payment for that plaster coat.

"We therefore request that you again make an estimate of the amount of plaster coat placed on the inner surface of the reservoir and submit the same to the Municipal Board for payment, and that you state your reasons for a refusal so to do. if such be your final decision.

"Respectfully yours,

"MATSON, LORD & BELSER COMPANY,

By " _____

"EXHIBIT J.

"NOVEMBER 15, 1908.

"MATSON, LORD & BELSER COMPANY, Manila, P. I.

"GENTLEMEN : In reply to your letter of November 4, I have the honor to state that the estimate of work done during the month of October has been sent to the Municipal Board, and 'the amount of plaster coat placed on the inner surface of the reservoir is therein fully estimated.'

Respectfully,

" _____, Chief Engineer."

The contention thus presented is admirably summed up in that portion of Major Case's letter which says:

"It appears that Mr. Thurber confounds the plaster coat on unlined sections with the skim coat required as the finish for concrete lining. The skim coat finish is included in the price for concrete lining as per paragraph 17, page 63, of the contract"

The plaintiffs assert:

"Our contention is that the contractor has placed on the interior surface of the reservoir 43,300 square yards of plaster coat for which it has been paid for only 1,719 1/2 square yards, leaving 41,588 square yards that have

not been paid for. According to the proofs, there is absolutely no distinction between the 1,719 1/2 square yards paid for and the 41,588 square yards not paid for, that is to say, the only distinction is that the one quantity is paid for and the other not, and the case is submitted to this court for the resolution of that question."

We are of the opinion that the judgment must be affirmed. Our affirmance is based on the following grounds:

- There is, by the terms of the contract itself, a vital difference between "plaster coat" and "skim coat."

In the first place, there is no provision in the contract anywhere relative to payment for services rendered and materials furnished in putting on skim coats; independent of other work. In other words, under the terms of the contract, "skim coat" has no separate, independent existence as a thing apart. It is regarded as something in connection with other things and other services. On the other hand, "plaster coat" has its own individual existence, its own independent functions, and forms no integral part of any other work. It is given a separate paragraph in the contract and a value is therein set for the services rendered and materials furnished in putting it on, namely, 55 cents gold per square yard. From this point of view, nothing could be recovered, under the terms of the contract, for placing the skim coat alone. Its existence has no set financial value.

In the second place, while the plaster coat and the skim coat perform some functions which are identical, they perform others quite different. Both fulfill the office of making a smooth surface for the free passage of the water, of preventing the adherence of foreign substances, and of rendering easier the cleansing of the reservoir. It is true also that their composition is the same. Each is composed of 1 part cement and 1 part sand. But the point which is important is that the functions which are vital to each are the very functions which show the difference between them. Under the terms of the contract plaster coat was to be placed on those portions of the reservoir upon which, aside from the mere excavation, no work of any kind had theretofore been done, that is to say, on solid rock free from defects; while the skim coat was to be placed only on concrete surfaces. The difference between them consists in the different ends they were to subserve as indicated by the different surfaces on which they were to be put. A plaster coat placed on a surface of solid rock torn apart by the forces making the excavation would evidently perform a service different from and additional to that of a skim coat placed on the level, even and comparatively smooth surface of concrete adjusted to forms. It is thus seen that, apart from the difference in meaning signified by the technical definition of the two terms, plaster coat and skim coat, there is a real difference in their use and the results obtained thereby. Such difference is emphasized by those provisions of the contract relative to the construction of the tunnel, which, at a reading, disclose the different ends to which the two substances were destined by the contracting parties. We conclude, then, that plaster coat and skim coat are not the same thing under the contract we are construing.

- The skim coat is an integral part of the finished concrete lining and payment for the latter includes payment for the former.

That this is so we regard as having been clearly demonstrated by the proofs in the case. The arguments already adduced to show the difference between the plaster coat and the skim coat are equally effective in proving our present assertion, speaking from the standpoint of the contract itself. If the skim coat has no independent or separate existence of its own, then it must be an integral part of some other structure mentioned in the contract by which it is completely swallowed up. If it has no separate and independent value given to it as work performed and materials furnished, then its value must be included in that of some part or structure to which it is attached; for surely it was not intended that it should be composed and attached for nothing. If the contractor who provides and places it gets no pay for it as a separate part of the work, then he undoubtedly gets it as a part of some other work or structure.

As we have seen, it is provided in the contract that the whole interior of the reservoir was to be lined, certain parts

with plaster coat, certain parts with 4 inches of concrete surfaced with skim coat, and certain parts with skim coat alone. For part of this work payment was separately provided. For other parts no provision was made for separate payment. Unless such work, therefore, is paid for by being included as part of the price of other work, then the contractor, under the terms of the contract, is not entitled to pay for doing such work. This naturally and inevitably follows from the finding already made that the plaster coat is different from the skim coat and was intended for a purpose which the use of the latter would not accomplish. It can not fairly be assumed, however, that a contractor will voluntarily furnish materials and perform services for nothing; and we are accordingly forced to the conclusion that he received his compensation for the skim coat through the medium of the structure to which the skim coat was attached. And this is precisely the contention of the city in this case, as presented in the words of the chief engineer when he stated in his letter to the defendant, the Matson, Lord & Belser Co., that Mr. Thurber confounded the plaster coat on unlined sections of the tunnel with the skim coat "required as the finish for concrete lining" and asserted the proposition that the "skim coat finish is included in the price for concrete lining as per paragraph 17, page 63 of the contract." The paragraph referred to reads as follows:

"17. The prices hereinafter stipulated for concrete lining and for concrete in parapet walls and elsewhere shall include the entire cost of the materials and labor for the finished work. It shall include the cost of expansion joints as herein before specified, and shall also include the cost of all forms, centers, and any other work incidental to the mixing and placing of the finished concrete masonry."

When the excavation for the reservoir was complete the sides thereof were composed of various materials: a portion consisted of solid rock without defects; a portion was composed of rock with defects; while still another portion was earth. In finishing the reservoir, that is, in lining it, these various materials composing the sides as excavated, in order to finish the reservoir for satisfactory and enduring results, required different treatment, depending on the materials which composed them. That this was so is evident. The sides composed of earth or defective rock must be lined differently from the sides formed by solid rock free from defects, if the work was to be done in a workmanlike manner. To meet this requirement there was inserted in the contract paragraph 14, division E, above quoted. Under its provisions the plaster coat was the only thing required to be placed on the sides composed of perfect rock. But "on all surfaces of embankments (earth), defective rock, or elsewhere where ordered by the engineer, a layer of concrete 4 inches in thickness shall be placed, and this layer shall be finished with a top skim coat conforming in all respects to the skim coat specified for lined sections of the tunnel." Now, take this provision in connection with that in paragraph 17 above quoted which says that "the prices hereinafter stipulated for concrete lining * * * shall include the entire cost of materials and labor for the finished work," and the inference is clear that the skim coat is a part of the finished concrete lining. When paragraph 14 said that the 4-inch concrete layer should be "finished with a top skim coat," it meant that such lining would not be complete, as a lining, until it had received such skim-coat finish. This being so, it follows necessarily that the placing of the skim coat was paid for when the concrete was paid for. The payment for the latter was provided for in item 39, page 78 of the contract, which reads:

"Item 39. - For Portland cement concrete masonry lining on reservoir, composed of 1 part Portland cement, 2 1/2 parts sand, 5 parts broken stone or gravel, the sum of nine dollars and eighteen cents (\$9.18) per cubic yard."

This is one of the "prices" referred to in paragraph 17 of division E, page 63 of contract, above quoted when it said: "The prices hereinafter stipulated for concrete lining and for concrete in parapet walls and elsewhere shall include the entire cost of materials and labor for the finished work." Moreover, the provisions of the contract relating to the tunnel require the contractor, under certain conditions, to introduce concrete as a lining for the tunnel. It appears clear that the concrete lining so required is of the same general character as the concrete lining required for certain parts of the reservoir and for the same reasons. Having this in mind, the terms of paragraph 20

of division D, page 60 of the contract, relative to the construction of the tunnel, are interesting and significant. They are:

"20. The quantity of concrete to be paid for shall be that actually built in accordance with the plans and specifications and the requirements of the engineer thereunder. The prices herein stipulated per cubic yard for concrete shall include the total cost of labor and materials, including the skim coat and water stop herein before described. The plaster coat on unlined sections or portions of sections shall be paid for at the stipulated price per square yard.. Said payments shall include all expenses incidental to the furnishing of materials and construction of the tunnel."

Here, as is seen, the skim coat is expressly required as a part of the concrete lining which would be incomplete without it. We can see no good reason for holding that concrete lining which is not complete without the skim coat in one place is complete without it in another when such lining is precisely the same and serves precisely equivalent purposes in both cases. We are aware that it may be urged that the skim coat having been in the one case expressly required to complete the lining and in the other not expressly required, the presumption might well be that it was not the intention to require it in the latter case. , This argument would be sound if it were not for the fact that the provisions of the contract under consideration on the subject, although not direct, are so clear in their general intentment as to amount in law substantially to express provision.

In addition it should be borne in mind that paragraph 30, page 66 of the contract, provides that:

"The entire specifications for all portions of the work of building the gravity water supply complete shall be considered as a whole, and items specified under one class of work which are applicable to another class shall be of force and effect though not specifically mentioned."

We also feel the force of plaintiffs' contention based on the fact that the fanners of the contract once used the words "plaster coating" as a substitute for the words "skim coat." We do not believe, however, that decisive weight ought to be given to that fact. The words used are not precisely the same as "plaster coat" and, as appears from the context, they were used in the general sense.

The plaintiffs lay much stress on the wording of paragraph 28 of Article IV, headed "General Specifications - General Conditions. Information for Bidders," wherein, estimating the quantities of work to be done, the amount of "plaster coat for reservoir" is estimated at 43,500 square yards. It should be borne in mind, however, in gauging the strength of plaintiffs' argument in this regard that, prior to actual excavation, the character of the soil to be met with could not accurately be determined. It could not be known to a certainty what proportion of the sides of the reservoir would be solid rock clear of defects, and what part defective rock or earth. As a matter of necessity, therefore, each party was obliged to take his chance on the amount of each particular kind of side, and, consequently, on the amount of plaster coat and skin coat that would be required. Paragraph 28 meets this condition of uncertainty by providing that the estimates of "quantities of work to be done" shall be "subject to change."

It is admitted by the plaintiff, by the testimony of Mr. Thurber, that all of the skim coat for the composing and placing of which it is in this action demanding payment was attached to the concrete lining inside the reservoir described in paragraph 14, page 63 of the contract.

The foregoing reasons lead us to affirm the judgment of the court below. No special finding as to costs. So ordered.

Torres, Mapa, Johnson, and Carson, JJ., concur.

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