THE PRELOAD COMPANY OF CANADA LIMITED (*Plaintiff*) ..... APPELLANT;

AND

THE CITY OF REGINA (*Defendant*) ....RESPONDENT.

1959

*May 18, 19, 20, 21, 22

**Nov. 2

HARRISON COOLEY HAYES, TRUSTEE (*Plaintiff*) ..... APPELLANT;

AND

THE CITY OF REGINA (*Defendant*) ...RESPONDENT.

THE CITY OF REGINA (*Plaintiff by Counterclaim*)

AND

HARRISON COOLEY HAYES AND THE GUARANTEE COMPANY OF NORTH AMERICA (*Defendants by Counterclaim*)

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Agreement to manufacture and deliver concrete pipe—Bond furnished for performance—Defective pipe—Breach of contract treated by one party as a repudiation—Whether breach of implied conditions under s. 16(1) and (2) of The Sale of Goods Act, R.S.S. 1953, c. 353—Whether contract wrongfully repudiated—Damages.

*PRESENT: Locke, Cartwright, Fauteux, Abbott and Martland JJ.
**Locke J., owing to illness, took no part in the judgment.

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Surety—Whether variations in contract without knowledge or consent of surety—Whether surety liable for breach of contract by principal.

The plaintiff company contracted with the defendant municipality to manufacture and deliver a type of prestressed concrete pipe. The defendant surety company bonded the plaintiff for the due performance of the contract. The pipe produced was defective, the cause of the failure being the use of calcium chloride in the manufacturing process. The municipal engineer, who by the contract was made the sole judge of all matters connected with the proper carrying out of the works, rejected the pipe. The municipality elected to treat the alleged breach of contract as a repudiation, and the plaintiff company sued for damages on the ground, *inter alia*, that the contract had been wrongfully repudiated. The municipality obtained the pipe from another source and, by counterclaim, sued for damages for breach of contract and also claimed against the surety the amount of the bond. Subsequently, the trustee for the plaintiff company, which had made an assignment in bankruptcy, commenced a second action.

The trial judge dismissed the actions and allowed the counterclaim for damages, and also directed payment by the surety in the amount of its bond. These judgments were affirmed by the Court of Appeal. The trustee and the surety appealed to this Court.

Held: Both appeals should be dismissed.

The contention, based on the municipality's conduct before entering the agreement and on the terms of the agreement itself, that s. 16(1) of *The Sale of Goods Act* did not apply because the municipality did not rely upon the plaintiff's skill or judgment, could not be entertained. That question of fact was decided by the Courts below in favour of the municipality. There was ample evidence on which to base such a finding and a preponderance of evidence justified the conclusion reached.

The Courts below found that there had been a breach of the implied condition contained in s. 16(2). The only issue remaining in this Court on this point was the question as to whether or not the goods had been bought by description. That question must be answered in the affirmative, and, therefore, there was a breach of the statutory condition. The use of calcium chloride, in itself, was not a breach of the specifications. The plaintiff made the decision to use it and informed the municipality which took no action. By the terms of the contract the municipality had the right to reject the pipe containing calcium chloride; furthermore, it had the right to refuse pipe which failed to satisfy the implied conditions of s. 16(1) and (2) of the Act. In the light of all the circumstances, the municipality was entitled to infer that the plaintiff did not intend to be any longer bound by the contract and, therefore, the municipality was justified in electing to treat the breaches as a repudiation.

On the issue of damages, the municipal engineer's right to take over the plant was optional. Furthermore, there was no evidence to conclude that the municipality was able to take over the plant and to produce satisfactory pipe.

As to the liability of the surety. The first main ground of defence on this point was that the municipality had improperly agreed to variations in the contract without the knowledge or consent of the surety. The use of calcium chloride did not involve a variation in the specifications relating to materials. As to the use of hot water instead

of steam in the curing process, this kind of variation was recognized by the bond as being permissible and, consequently, the rule in *Holme v. Brunskill* (1878), 3 Q.B.D. 495 at 505, did not apply so as to assist the surety in this case.

The further contention that the municipality, having acquiesced in the use of calcium chloride, could not as against the surety claim damages resulting from the defects in the pipe so processed, could not be entertained. The municipal engineer was not asked to make a decision as to its use or of that of hot water. He had no reason to forbid their use. The municipality did not acquiesce in the breaches of the contract which resulted from the failure to fulfil the implied conditions of s. 16(1) and (2) of the Act. All that the municipality was doing was to rely upon the plaintiff's skill and judgment, which it was entitled to do.

APPEALS from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Graham J. Appeals dismissed.

C. F. H. Carson, Q.C., R. M. Balfour, Q.C., A. Findlay, Q.C., and *J. R. Houston,* for the plaintiff, appellant.

E. C. Leslie, Q.C., and *D. O'C. Doheny, Q.C.,* for the defendant by counterclaim Guarantee Co. of North America.

J. L. McDougall, Q.C., E. D. Noonan, Q.C., and *G. F. Stewart, Q.C.,* for the defendant City of Regina.

The judgment of the Court was delivered by

MARTLAND J.:—The respondent, the City of Regina (hereinafter referred to as "the City"), in order to augment its water supply, decided to construct a pipe line from Buffalo Pound Lake to Regina, a distance of some 36 miles. In 1949, its officials commenced to collect information in connection with this project, including the type of pipe proposed to be used.

On April 5 of that year Mr. Shattuck, the assistant superintendent of Waterworks for the City, wrote to the appellant, The Preload Company of Canada Limited (hereinafter referred to as "Preload"), at Montreal, requesting, for purposes of estimating and design, information as to prices on several sizes of pre-stressed concrete pipe. Information was

[1] (1958), 13 D.L.R. (2d) 305, 24 W.W.R. 433.

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furnished by Preload and thereafter there was further correspondence between Shattuck and Preload respecting prestressed concrete pipe. Preload opened an office in Regina and discussions took place between City officials and officials of Preload.

During the course of these discussions Mr. Doull, the general manager and later the president of Preload, told Shattuck that the pipe they proposed to supply was a good quality product, would have a long life and would be satisfactory for the job. He stated that it would be as good as, or better than, steel pipe. He also stated that Preload was expert in prestressed concrete. Similar statements were made by Doull to Mr. Farrell, then the superintendent of Waterworks for the City.

In August, 1950, the City issued instructions to bidders who would tender on the supply of pipe for this line. The type of pipe specified in these instructions was steel pipe, or concrete pipe with a steel shell. The instructions then went on to say:

> Contractors may submit alternate bids. Where bids are submitted on pipe other than those specified, the contractor shall submit with his tender complete specifications. Where possible, reference should be made to American Water Works Association Standard Specifications.

The pipe proposed to be manufactured by Preload was concrete pipe without a steel shell. There were no specifications for this type of pipe recognized as standard.

A tender was submitted by Preload, accompanied by specifications for the supply of pipe for the project. In the letter, dated October 13, 1950, accompanying the tender it was stated, among other things:

> Our Company is the only one specializing in the design and construction of prestressed concrete on this Continent. Our associated companies operate in many parts of the world, including the United States, Great Britain, South America, South Africa and Australia, thus making available the technical knowledge and experience of many countries—through our organization.
>
> * * *
>
> We have provided a design utilizing the most up to date techniques available in this field of manufacture. Prestressed concrete, over the past decade, has been recognized by the engineering world as a material of ever increasing usefulness, and its application to pressure pipe and other circular structures is one in which we have played a major part in world development.

You will note that under our design a much smaller tonnage of steel is required. This we believe is a most important consideration, in view of the critical shortage of this material in our National economy. We are able to achieve this by the nature of our process and design; by the use of extremely high quality wire for the prestressing; and by the use of concrete of a much higher strength than that used in other processes. The reduction in steel tonnage will of course be reflected most favourably to you should there be an upward swing in freight rates or steel prices, necessitating the application of escalator clauses contained in your contract form.

Bids for the supply of pipe for the project were received by the City on October 16, 1950. Shortly afterwards Preload issued a letter, addressed to the councilmen and citizens of Regina, in which it was stated:

The pipe, proposed by the Preload Co. of Canada, is a high grade, durable concrete pipe, bound with finest grade spring steel wires and is fully responsive to all requirements set out by your engineers. Further, the performance of this proposed pipe is backed up by this company's bond for faithful performance in excess of one million dollars.

* * *

In these days of world preparedness we cannot overlook the importance of steel conservation in the natural interest. A steel pipe line for your project alone would require about 11,000 tons of critical steel plate. Our product employs much less critical material and the spring steel for our pipe, which, while being of a less critical variety, requires only 1,500 tons. This saving in critical steel, in no way detracts from the quality of the finished product. This staggering fact is accounted for by the very great superiority of strength of the steel employed.

Messrs. Farrell and Shattuck, having received advice from a firm of consulting engineers, recommended to a meeting of the City council, held on October 23, 1950, in favour of the acceptance of the tender submitted by The Vancouver Iron Works, which had bid for the supply of steel pipe, although its bid (the second lowest) was, comparatively, some $275,000 in excess of that submitted by Preload. Their reason was the fact that the pipe proposed to be supplied by Preload was a comparatively new type of pipe and had not yet been widely accepted. On October 26, 1950, the Regina City Council resolved to accept the tender of The Vancouver Iron Works.

On October 23, 1950, Preload wrote a letter of protest to the City council, regarding the recommendation of the engineering department, in which it was stated:

We do not believe there are any technical objections applying to our product, which do not also apply to the pipe recommended. We do firmly believe there are many favourable features inherent in our product, which

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are not common with the pipe recommended. We further believe that any objection brought forward, can be reasonably answered and we request that an opportunity be given us to provide these answers.

On October 26, 1950, Preload wrote to the Mayor of Regina, enclosing telegrams and reports received from various authorities regarding its design and pipe experience and a brief with respect to the experience and background of Preload. This letter concluded with the sentence:

> This clearly proves that this type of pipe has been in use for eight years and has been satisfactory in every way.

Because of a shortage of steel, The Vancouver Iron Works was unable to carry out its contract. Negotiations were then carried on by the City with Preload, which ultimately resulted in the submission of a bid by Preload on February 19, 1951. It was proposed by Preload that the pipe would be made, at the City's option, under one or other of the specifications already submitted. One of these was the set of specifications accompanying the tender of October 13, 1950; the other a set referred to as Canada Gunite Specifications, which had been sent to the City by Mr. Doull as president of that company on February 5, 1951.

Specimen pipe manufactured by Preload in Montreal was subjected to tests in that city in the presence of Mr. Shattuck and Professor de Stein of McGill University, an expert retained by the City.

Shattuck also corresponded with an engineer in Australia regarding the performance there of Rocla pipe, a type similar to that proposed to be manufactured by Preload. Prior to the execution of a contract with Preload, Shattuck visited Chicago to see the city engineer and his assistants there to discuss their experience in the use of prestressed concrete pipe.

A contract was finally made between the City and Preload on July 13, 1951. It consisted of a short agreement, a longer agreement, attached specifications and drawings. In the agreements Preload is referred to as "the Contractor".

Clause 2 of the short agreement provided as follows:

> 2. THAT the Contractor will manufacture and deliver to the City approximately One Hundred and Eighty-seven Thousand and Thirty (187,030) Feet of Thirty-six (36) Inch non-cylinder, prestressed concrete pipe, and specials, for the Supply Line from Buffalo Pound Lake Filtration Plant to Regina, as set out in the attached Specifications, Addendum and

Drawings, in accordance with the terms and conditions shown in the said Specifications and Addendum, for the sum of Two Million, Four Hundred and Eighteen Thousand, Five hundred and Seventeen Dollars and Thirteen Cents $2,418,517.13), subject to escalation occasioned by changes in the cost of labour, materials or freight rates referred to in the attached agreement.

The short agreement also provided that Preload should furnish a bond for the proper performance of its agreement, conditioned in the sum of 50 per cent. of the tender price and that time should be of the essence of the agreement.

The long agreement, which appears to have been patterned on a building contract, contained a number of provisions. I will refer only to those which were submitted by counsel to be material to the issues involved in this appeal.

Clauses 1, 3 and 4 read as follows:

1. *COVENANT TO DO WORK*

That in consideration of the mutual covenants herein contained the Contractor covenants and agrees to and with the City that he will well and sufficiently do, execute, perform and finish in a true, perfect, thorough and workmanlike manner all the works as set out in the plans, specifications and addenda hereto attached, for the prices stated in the tender as accepted by the City, which plans, specifications and addenda are incorporated in and form parts of this contract.

3. *WORK TO BE COMMENCED*

The work of setting up a pipe manufacturing plant shall be started within ten days of being awarded the contract. The sequence of operations shall be such as to insure the manufacture of completed pipe not later than Dec. 1, 1951.

4. *DELIVERY*

Delivery shall be made at the Contractor's plant in Regina, beginning not later than May 15, 1952. Pipe manufacture shall be completed by April 1, 1953 unless the period of completion is extended by the Engineer under the powers herein conferred on him. At least 1/16 of the total length of pipe and specials to be supplied under this contract shall be completed each month between Dec. 1, 1951 and April 1, 1953. The capacity of the Contractor's construction plant, sequence of operations, method of operation and the forces employed shall, at all times during the continuance of this contract, be subject to the approval of the Engineer and shall be such as to insure the completion of the work within the specified period of time.

Clause 6 empowered the engineer to grant extensions of time for the completion of the work. Clause 7 related to applications by the contractor for such extensions of time, which were to be made to the engineer in writing. It stated

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that the failure or neglect of the contractor to make application for extensions as provided should constitute a waiver on his part of any right to the same.

Clause 8 provided:

8. *ENGINEER IN CHARGE FOR CITY*

The Engineer shall have full charge of the works and if not personally present he shall be represented by an assistant Engineer or Inspectors, and the Contractor at all times shall have on the works some competent person who he has advised the Engineer has full power to act for him in all matters pertaining to the contract.

Clause 9 empowered the engineer to appoint an assistant engineer or inspectors to aid him in carrying on the works.

Clause 10 provided that, in case of failure or neglect by the contractor to carry on the work with the expedition or in any other manner as directed by the engineer, or the contractor's refusal or neglect to do or abstain from doing anything which, by the terms of the contract, he was required to do when authorized, directed or required by the engineer, the engineer was entitled to take over the works or any part of them.

Clause 11, dealing with plans, specifications and details, provided, inter alia:

The plans and specifications will be supplemented by details when found necessary. Before proceeding with any part of the work the Contractor shall consult the Engineer as to whether details are necessary. In event of the Contractor failing to take such action he shall make good at his own expense any defect or alteration caused thereby.

All directions given by the Engineer to the Contractor or arrangements made adding to or varying the plans, specifications and details incorporated in the contract shall be in writing.

Clause 13 read as follows:

13. *THE CONTRACTOR TO SUPPLY MATERIALS, LABOUR AND PLANT*

The Contractor, unless it is herein specified otherwise, shall provide and furnish all materials, labour and plant together with all proper and required facilities for removing and transporting same that shall be necessary for the proper carrying out and completion of the works.

Clause 14 enabled the engineer to obtain samples of material required to be supplied by the contractor for approval before delivery of the same at the site of the works.

Clause 15 provided that plant or materials which the engineer decided were not in accordance with specifications or up to sample should not be brought upon the site of the works.

Clause 19 provided for the suspension of operations on the direction of the engineer, if he decided they could not satisfactorily proceed.

Clause 22 reserved the right to the City to change the alignment, grade, form, length, dimensions or materials of the work under the contract whenever any conditions or obstructions were met that rendered such changes desirable or necessary.

Clause 23 read, in part, as follows:

23. *PAYMENTS*

The Contractor shall receive monthly payments at the rate of eighty per cent (80%) of the estimated value of the pipe actually completed and shop tested. No payments shall be made for the cost of materials which have been delivered to the Contractor's fabrication plant, but which have not been fabricated into pipe. Payments will be made monthly at the rate of fifteen per cent (15%) of the estimated value of pipe which has been laid down and field tested. These payments will be made on Progress Certificates, which certificates shall not be taken or considered as an acceptance of the work or that portion of it then done, or as an admission of the City's liability to the Contractor in respect thereof. The operation or acceptance by the City of a portion of the work before the completion of the whole is not to be considered an acceptance of the same by the City.

Clause 31 dealt with the responsibility of the contractor regarding the laying of pipe. It was contemplated that the actual laying would be done by another contractor, but the contractor was required to furnish a competent representative to advise regarding the pipe laying. This clause contained the following provision:

The pipe manufacturer shall replace in site any materials furnished by him which shall have been proved to be defective at any time up to two years after the pipe line has been laid and tested and the Completion Certificate has been issued to the pipe-laying Contractor.

Pipe, specials, etc., so replaced shall be properly installed, jointed, and bedded in place by the pipe manufacturer.

Clause 40 provided as follows:

40. *ENGINEER SOLE JUDGE*

The parties to this contract have agreed each with the other that the Engineer shall be the sole judge of all matters connected with the proper carrying out by the Contractor of the works herein described and that all difference between the parties as to whether the Contractor has or

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has not complied with the provisions of this contract are left to the judgment and decision of the Engineer as sole arbitrator, and his decision shall be final and shall not be varied or set aside on any grounds other than those on which the award of a sole arbitrator appointed under the "Arbitration Act" would be, and no action or suit shall be commenced by either party hereto to enforce any of the provisions of this contract until after the Engineer has given his decision with respect thereto, or has on request neglected or improperly refused same. No action shall be brought by the Contractor against the City to recover any portion of the contract price or for extras, except upon a Progress Certificate or upon the Completion Certificate.

The specifications attached to the contract were those submitted by Mr. Doull and referred to as the Canada Gunite Specifications, but varied to some extent as a result of meetings between Doull and Shattuck. Shattuck requested and obtained provision for more stringent test requirements, which were incorporated in an addendum to the agreement.

The provision for final inspection at the plant provided:

5. *FINAL INSPECTION AT PLANT*

The pipes shall be given final superficial inspection at the manufacturer's yard just prior to loading for delivery. This inspection to be made by a representative of the project engineer and his stamp shall signify his inspection.

This inspection shall not be considered a waiver of the responsibilities of the manufacturer for the ultimate performance of the pipe under the contract, but rather a check control of the handling of the pipes by the various parties involved in the work.

After execution of the contract, Preload proceeded with the construction of a plant at Regina and commenced the manufacture of pipe in February, 1952. A request for extension of the completion date was made on February 4, 1952, and as a result the completion date was extended from April 1, 1953, to June 15, 1953. No further request for extension of time was ever made by Preload.

Pipe production was carried on by Preload from February, 1952, to the beginning of December of the same year. There were many difficulties in production and Preload was never able to meet the delivery requirements of the contract. There was a high percentage of rejections of pipe in relation to the total pipe produced. Such rejections resulted from failure to pass the test requirements at the plant.

In November, 1952, some sections of line having been laid, line tests were conducted. Serious failures occurred in pipe in the line. By December 3, 1952, this situation had

become so serious that it was agreed that production should cease until the cause of the failures could be ascertained. Studies were then made by both Preload and the City, each of which called in experts to assist, and information was freely exchanged.

On the hearing of the present appeal it was not disputed by any party that the cause of the failure of the pipe was the use of calcium chloride in connection with its manufacture.

In making the pipe a steel mould was used to which were affixed 24 longitudinal steel wires, which were then placed under a condition of tension. A mixture of sand and cement was then placed on the steel mould by means of compressed air. The pipes were of the bell and spigot type and this latter process was effected while the pipe was standing on the bell end. After this first application of sand and cement to create the core of the pipe it was subjected to heat and humidity, a process called "curing". This involved the hardening of the substance. Following this, further steel wire was wound around the core in the form of a spiral. After this a further "covercoat" of cement sand mortar was applied by means of compressed air. Finally the steel mould was removed.

It was discovered that there was a tendency for the mixture for the core and for the covercoat to "slump" as the pipe stood upright if it did not set quickly enough. To counteract this difficulty Mr. Chiverton, then Preload's superintendent of the plant, in April, 1952, decided to use an admixture of calcium chloride in the mix, the result of which would be to hasten the setting process. The use of calcium chloride for the purpose of hastening the hardening of a concrete mixture was not novel, but, on the contrary, had often been used in practice for such a purpose.

It appeared later, however, that the result of its use in this particular process had created a condition in which corrosion of the spiral steel wires developed. No one had suspected, prior to the failure of the pipes, that such a consequence would result from the use of calcium chloride. Calcium chloride had been used in the manufacture of all pipes made between February and December of 1952, after the first 85 pipes.

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Chiverton advised Shattuck of his intention to use calcium chloride about the time that it commenced to be used. Chiverton did not give evidence at the trial, but Shattuck described what occurred in the following portion of his examination for discovery:

Q. Preload considered it necessary? A. Yes.

Q. And did you . . . A. I didn't consider it in any way at all. They wanted to use it.

Q. Now I gathered from your evidence in chief, Mr. Shattuck, that you felt that if Preload wanted something done, like the addition of calcium chloride, it was really no concern of yours, subject to you having the right—but it wasn't really up to you, to use that expression, it was really up to Preload—they told you what they needed at the time, but it was really up to Preload to . . . A. I think that is a fair description of it.

In another portion of his examination for discovery, when asked whether he had approved of the use of calcium chloride, Shattuck said: "I knew of it. I did not approve of it or disapprove."

After the investigations into the cause of the pipe failures had been completed Shattuck, as project engineer, on May 1, 1953, wrote the following letter to Preload:

May 1, 1953.

Attention—Mr. R. M. Doull

Preload Company of Canada Ltd.,
7325 Decarie Blvd.,
Montreal, Quebec.
Gentlemen:

The causes of corrosion of prestressing wire have now been ascertained beyond reasonable doubt. As you have expressed the wish to resume work under your contract, you will no doubt be doing so shortly. When you do start operations, you are to commence the manufacture of class 2 pipe and continue with that class until further notice. The following points shall be observed in future operations;

1— Calcium chloride shall not be used in the making of either concrete cores or concrete covercoat. Calcium chloride was not specified so its elimination does not require a change in specification.

2— All curing of concrete shall be done using steam. Steam curing was specified, therefore reverting to steam curing requires no change in specification.

3— Your method of prestressing the circumferential wire shall be revised and improved. You have already taken steps to revise the prestressing procedure. No change in the specification is required for this.

4— The concrete cores shall be trowelled so as to offer a smooth and regular bearing to the circumferential prestressing wire in order to eliminate potential corrosion cells. I believe you have already taken

steps to provide for smoothing of the concrete cores. Here again, no change will be required in the specification which states that work shall be performed to the satisfaction of the Engineer.

There is no evidence to support the idea that Kalicrete cement had any part in the corrosion of the circumferential steel wire and provision for no contact between steel and kalicrete is therefore not considered necessary. If, however, you wish to apply ¼ inch of Portland cement gunite mortar over the prestressing wire before the Kalicrete covercoat is applied, you may do so at your own expense.

All of the pipe made with calcium chloride which have been examined show that the circumferential prestressing wire is corroded and the pipe are therefore defective. I consider that all the pipe made with calcium chloride do not conform to the requirements of the specifications for pipe to be provided under your contract with the City and they are hereby rejected.

The specifications call for the replacement of pipe found to be defective. You will therefore replace all the pipe which is now rejected. The pipe which are defective may be reconstructed by rewinding them and placing a new covercoat. Before rewinding they should have a thin coat of mortar shot on and trowelled smooth. The method of reconstructing these pipes has been discussed with you and I think we are in agreement regarding the method to be used.

Since at best the completion of this pipeline will be delayed far beyond the completion date as set out in the contract, you will be expected to make every effort to speed the manufacture of new pipe and the necessary reconstruction or replacement of pipe already made.

Further payments on new pipe will not be made until the pipe already paid for has been satisfactorily dealt with by the Company, or until the value of new pipe exceeds the value of pipe which was accepted on the basis of the shop test and which is now being rejected.

Yours very truly,

AS/mg
cc-Preload-Regina.
Airmail

A. SHATTUCK,
Project Engineer.

Preload replied, by letter dated May 18, 1953, as follows:

May 18th, 1953.

Mr. Allan Shattuck,
Buffalo Pound Project,
CITY OF REGINA,
Sask.

Dear Sir:—

This is to acknowledge receipt of your letter dated May 1st, 1953.

We note your comment: "The causes of corrosion of prestressing wire have now been ascertained beyond reasonable doubt." We would be glad if you would advise us specifically to what causes you refer.

You state that all the pipe made with calcium chloride does not conform to requirements of the specifications, that such pipe is rejected and you presume it to be defective. These allegations are unfounded. The use of calcium chloride was undertaken with all requisite consent and accordingly does not represent a departure from the specifications adopted by you.

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There is no evidence that any substantial number of pipe is defective, we deny that they are, and in any event we deny your right retroactively to reject, without any examination, pipe which has been previously approved, tested, and accepted by you, both in all tests envisaged in these specifications and under other more onerous tests not therein contemplated.

As you have been previously advised, the City's actions have enormously accentuated the difficulties and expenses to which we have been subjected and have placed us in a position of sustaining heavy losses and operating costs during the protracted period in which you have withheld your approval to resume operations.

In dealing with your proposed changes as set forth in your letter of May 1st, we would again draw your attention to the recommendations of Dr. J. P. Ogilvie that the circumferential steel wire should be protected from contact with Kalicrete, but, naturally, this is a matter in respect of which final responsibility must rest with you.

We must respectfully submit that there is nothing in the agreement or otherwise to justify the arbitrary decision embodied in your letter of May 1st to withhold progress payments by reason of any claims that the City has or may have in respect to past operations on the production of pipe tested and approved by you.

Notwithstanding our difference of opinion we are as we always have been prepared to proceed with the completion of the contract in an expeditious manner following the manufacturing procedure set out in your letter of May 1st, provided that payments on your part conform to the contract. We would therefore invite you to reconsider your decisions not to effect progress payments.

We would also expect that the City honor its outstanding payments owing to us, payments of which has now been deferred for a considerable period of time, without any justification whatsoever.

In the event that we are unable to agree on these points and on the question of responsibility in respect of past operations, we are nonetheless prepared to continue production of pipe on the basis of the regular progress payments, with the elements of difference between us being submitted to adjudication by the Courts.

You will appreciate that the present communication is written without prejudice to our claims against the City of Regina.

We would appreciate a reply to these proposals at your earliest convenience.

Yours very truly,

THE PRELOAD COMPANY OF CANADA LIMITED

Per: (signed) R. M. Doull

R. M. Doull, President.

RMD:c

Further correspondence ensued, but neither party varied from the position which it had taken in these letters. No application for an extension of time was made by Preload and on June 16, 1953, the day after the extended date of final delivery, Shattuck, as project engineer, wrote to Preload referring to the unfulfilled delivery requirements of

the contract, to the fact that no new pipe had been manufactured after December 3, 1952, and stating that, in his opinion, for these reasons and those stated in his letter of May 1, 1953, Preload had not properly carried out the work in accordance with the contract. At that time Preload had delivered approximately 50,000 feet of pipe out of a total contract requirement of 187,030 feet.

On June 15, 1953, Preload had made a proposal of compromise or arrangement under *The Companies' Creditors Arrangement Act*.

On June 19, 1953, Preload commenced action against the City, seeking a declaration that pipe made with calcium chloride conformed to the requirements of the specifications contained in the contract, or as amended, that the responsibility for defects in the pipe was that of the City and that Preload was entitled to complete the contract and for a reasonable time to do so. Alternatively it asked for damages.

There were subsequent Court proceedings in relation to cl. 40 of the contract to determine whether the matter in dispute should be arbitrated, which resulted in a decision by the Court of Appeal of Saskatchewan that the clause did not have that effect.

On November 13, 1953, the City wrote to Preload, setting out alleged breaches by Preload of the contract going to the root of the contract and alleging that Preload had evinced an intention no longer to be bound by the contract. The City elected to treat this as a repudiation of the agreement.

On November 19, 1953, a contract was made by the City with Dominion Bridge Company Limited for the construction of a steel pipe line. Subsequently that company completed construction of the line.

The City filed a statement of defence and counterclaim, joining The Guarantee Company of North America (hereinafter referred to as "the Surety") as a defendant to the counterclaim, claiming against it the amount of its bond.

On January 22, 1954, Preload made an assignment in bankruptcy and the appellant Harrison Cooley Hayes (hereinafter referred to as "the Trustee") was appointed trustee.

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The trustee was, by Court order, substituted for Preload as plaintiff in the action and later, on March 15, 1955, he commenced a second action against the City which, by Court order, was consolidated with the first action. The second action was launched because of the changed position of the parties since the first one had been commenced.

At the trial the two actions by the trustee against the City were dismissed. It was declared that the City had a debt provable against Preload in bankruptcy for $1,281,407.55 and another debt, likewise provable, in the amount of $3,296.74. Judgment was given in favour of the City against the surety for the amount of the bond, $1,209,258.57, or such lesser amount as remained unrealized by the City against Preload in bankruptcy. Costs were given to the City.

Appeals from this judgment by the trustee and the surety were dismissed by unanimous decision of the Court of Appeal of Saskatchewan[1]. From that judgment the trustee and the surety have appealed to this Court.

The learned trial judge and the Court of Appeal reached the conclusion that Preload had been in breach of the implied conditions contained in subss. 1 and 2 of s. 16 of *The Sale of Goods Act* of Saskatchewan, R.S.S. 1953, c. 353. Section 16 of that Act provides as follows:

16. Subject to the provisions of this Act and of any Act in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:

1. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose;

2. Where goods are bought by description from a seller who deals in goods of that description, whether he is the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods there shall be no implied condition with regard to defects which such examination ought to have revealed;

[1] (1958), 13 D.L.R. (2d) 305, 24 W.W.R. 433.

3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Each of these Courts found as a fact that the City made known to Preload, expressly or by implication, the particular purpose for which the goods were required, so as to show that the City relied upon the skill or judgment of Preload.

On the argument of this appeal counsel for Preload conceded that the contract was one for the sale of goods, that the City made known to Preload the particular purpose for which the goods were required, that the goods were of a description which it was in the course of Preload's business to supply and that the pipe produced by Preload was not reasonably fit for the purpose for which it was required. The only ground upon which it was contended that subs. 1 did not apply was the contention that the City did not rely upon Preload's skill or judgment.

This contention was based upon the submission that the City, by its conduct before entering the agreement and by the terms of the agreement itself, showed that it did not rely upon Preload's skill or judgment.

With regard to the City's conduct before entering the agreement, reference was made to the fact that Preload's first bid was not accepted, but, instead, the higher bid of The Vancouver Iron Works was accepted on the strength of the report by Farrell and Shattuck that the pipe proposed to be supplied by Preload was of a comparatively new type and had not yet been widely accepted. It was pointed out that the letters written by Preload to the City regarding its ability to produce the type of pipe required were all written to persuade the City to accept Preload's first bid and that no further such letters were written after the tender of The Vancouver Iron Works had been accepted. Reference was also made to Shattuck's having read all available material on the subject of prestressed concrete pipe, his correspondence with engineers in Australia and his visit to Chicago, as well as the expert advice obtained by the City from other engineers.

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As against this, however, is the evidence of both Farrell and Shattuck, accepted by the learned trial judge, that they had both relied substantially on the statements of Preload, written and verbal, that it was expert in the manufacture of prestressed concrete and could make the pipe required for the project.

It seems to me that the studies and investigations of Shattuck were directed to the matter of the prior use in other places of prestressed concrete pipe. On the basis of this and the advice received from other engineers, the City concluded that it would be safer to purchase steel pipe where the difference in cost was some $275,000 on a job worth over $2,400,000. When steel was not available, the City decided to use prestressed concrete pipe, but, as to the ability to produce pipe of that kind satisfactory for the project, the City had to rely on the skill and judgment of Preload. Preload had said positively that it could produce satisfactory pipe and the officials of the City relied upon those statements.

Regarding the terms of the contract, reference was made to the wide powers which it conferred upon the project engineer and it was contended that it was Shattuck who was in charge of the whole operation, Preload's duty being merely to produce a product conforming with the contract specifications under his supervision.

The powers conferred on the project engineer were undoubtedly very broad, but, read as a whole, in my opinion the contract contemplated that Shattuck should have wide powers to supervise and to inspect, but that Preload was obligated itself to manufacture the pipe it had agreed to sell and to provide the necessary skill and judgment to effect that purpose.

The evidence would indicate that this was the view of the operation of the contract held by the parties themselves. There is no evidence that Shattuck ever managed the operation of the plant. In fact, prior to his letter to Preload of May 1, 1953, he gave no written directions regarding the plant's operations pursuant to the powers which he possessed under the contract. The process of manufacture was Preload's own. Plan no. 9, forming part of the contract, which detailed for each type of pipe the operating

pressure, test pressure, inside diameter, wall thickness and minimum wire spacing, uses the words "designed in accordance with the patented Preload System" and states that the particulars of design shown in it are fully covered by patents.

Referring to this point, the learned trial judge makes the following comments, with which I agree:

> The Company alone assumed the responsibility for the building of the plant, the securing and setting up of equipment, the supply of the necessary materials, the employment of staff, and workmen and the operation of the whole plant. At no time up to May 1st, 1953, by word or deed did the Preload Company ever suggest that the primary responsibility as outlined did not rest upon the Preload Company.
>
> Soon after production commenced the Project Engineer became concerned with the failure of the Preload Company to maintain a production schedule in conformity with the contract and complained to the Company. The Company replied setting out the unexpected difficulties that had arisen and stating that steps had been taken to eliminate these. The Company held out the full expectation that with these eliminated the Company could maintain the required schedule.
>
> Later when difficulties again arose the Company called in an expert in such matters, Mr. Knox from Texas, to find out the cause. His report was not filed as an exhibit nor was he called as a witness, but reference is made to it in the evidence of Mr. Hunter Nicholson. Still later Mr. Dobell, President of the Preload Enterprises Inc. of the United States came to Regina, made a survey of the plant operations and set out in a lengthy report to the Preload Company the changes that should be made in order to eliminate the difficulties.
>
> These steps were taken on the initiative of the Preload Company and without consultation with the City or the Project Engineer, and I think it is significant that such was the case. Some of the changes recommended by Mr. Dobell were made by the Preload Company, again without consultation with or approval by the Project Engineer. All of these, in my opinion, constituted an admission by the Preload Company of the responsibility of the Company for the operation of the plant and the production of pipe.
>
> Again, it should be noted that the Project Engineer never gave any specific direction as to the operation of the plant or the process of manufacture until he did so in his letter of May 1st, 1953. He did, as related, exercise his power to extend the time for completion of the contract at the request of the Preload Company. It is true that the Project Engineer and the managers of the plant had frequent discussions, and I have no doubt that on occasion he would make suggestions for improvements, but at no time is it suggested that these amounted to an exercise of his powers under the contract. This, in my opinion, strongly supports the conclusion that neither party to the contract considered the Project Engineer to be "in charge" of the plant operations or the production of the pipe.
>
> I have already pointed out that other than granting an extension of time the Project Engineer at no time exercised any of the powers of control and direction given to him under the contract until he wrote the

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letter of May 1st, 1953. The discontinuance of production in December, 1952, was the result of an agreement rather than a direction by the Project Engineer.

The effect of subs. 1 of s. 14 of the English *Sale of Goods Act*, which, subject to the addition of a proviso not found in the Saskatchewan Act, is the same as subs. 1 of s. 16 of that Act, has been considered by the House of Lords in three cases.

Manchester Liners Ltd. v. Rea Ltd.[1] held that, if goods are ordered for a special purpose and that purpose is disclosed to the vendor so that, in accepting the contract, he undertakes to supply goods which are suitable for the object required, such a contract is sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment. The mere disclosure of the purpose may amount to sufficient evidence of reliance on the skill and judgment of the seller.

In *Medway Oil and Storage Company, Limited v. Silica Gel Corporation*[2], Lord Sumner, giving the judgment of the Court, stated the following propositions in respect of the operation of this subsection:

(1) The buyer's reliance is a question of fact to be answered by examining all that was said or done with regard to the proposed transaction on either side from its first inception to the conclusion of the agreement to purchase:— (2) The section does not say that the reliance on the seller's skill or judgment is to be exclusive of all reliance on anything else, on the advice, for example, of the buyer's own experts, or the use of his own knowledge or common sense nor would it ever be possible to be sure that the element of reliance on the seller entered into the matter at all, unless the buyer were so foolish as to volunteer some statement to that effect. It follows that the reliance in question must be such as to constitute a substantial and effective inducement, which leads the buyer to agree to purchase the commodity:— (3) This warranty, though no doubt an implied one, is still contractual, and, just as a seller may refuse to contract except on the terms of an express exclusion of it, so he cannot be supposed to assent to the liability, which it involves, unless the buyer's reliance on him, on which it rests, is shewn and shewn to him. The Tribunal must decide whether the circumstances brought to his knowledge shewed this to him as a reasonable man or not, but there must be evidence to bring it home to his mind, before the case for the warranty can be launched against him.

[1] [1922] 2 A.C. 74.

[2] (1928), 33 Com. Cas. 195.

In *Cammell Laird and Company, Limited v. The Manganese Bronze and Brass Company, Limited*[1], Lord Wright said:

> However the appellants are in my opinion entitled here to succeed on s. 14, sub-s. 1, on a narrower ground. I do not agree with the construction sought to be put by the respondents on s. 14, sub-s. 1: I do not agree that the reliance on the seller's skill or judgment must be total or exclusive. If it is conceded that in some cases under the section a distinction may be drawn, where articles are ordered to be made, between such part of the maker's obligation as is merely to follow precisely what is specified, and such part of his obligation as involves in its discharge the exercise of his skill and experience, then I think it follows that, to quote the language of Lord Macnaghten in *Drummond v. Van Ingen,* (1887) 12 App. Cas. 284, 297: "In matters exclusively within the province of the manufacturer the merchant relies on the manufacturer's skill."

Considerable reliance was placed by counsel for Preload on the actual decision in the *Medway* case, in which it was held that, on its facts, the appellant had not relied upon the skill or judgment of the respondent, but had relied upon its own judgment. In that case the appellant, a company whose business was that of refining petroleum, which had on its board of directors and in its employment persons whose scientific knowledge and practical experience made them highly competent to advise on and decide questions connected with oil and its treatment, after extensive investigations of its own, purchased from the respondent a product known as Silica Gel for use in its own refining process, known as the Cross patent cracking process. When Silica Gel was used in this process it was found that the petrol produced contained an excessive quantity of a gummy substance which rendered it unfit for use. The cause was later found to be that the Silica Gel did not have the same effect on the synthetic crude distilled by the Cross cracking plant which it would have had on a straight run petroleum. The question was whether there had been an implied condition by the respondent seller that Silica Gel was reasonably fit for the special process in which it was used by the appellant. It was held on the evidence, which included evidence regarding the negotiation of the terms of the agreement and the terms of the agreement for purchase itself, that the appellant had not relied upon the seller's skill or judgment.

[1] [1934] A.C. 402 at 427.

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In the present case there was nothing special about the purpose for which the City desired to use Preload's product. Preload was a manufacturer of pipe and the City wished to purchase pipe to carry water from one place to another. The City was assured, in positive terms, by Preload that its pipe was satisfactory for that purpose and the circumstances were such as to indicate to Preload that the City was relying upon it to provide such pipe.

In my view the circumstances in this case are more closely akin to those in the *Cammell Laird* case than to those in the *Medway* case. The *Cammell Laird* case involved the sale of certain ships' propellers. The blue prints in relation to their production were furnished by the buyer and gave the information necessary to enable the work to be carried out, including the thickness required along the medial lines of the blades. Apart from the information furnished by the buyer, the manufacture of the propellers was left to the skill and judgment of the seller.

It was contended on behalf of the seller that the buyer had relied upon his own skill and judgment and not upon that of the seller and that, if the buyer received a product manufactured in accordance with the drawings which the buyer had furnished, the contract had been fulfilled.

It was held that, in order to bring subs. 1 of s. 14 of the English *Sale of Goods Act* into operation, it was not necessary that the buyer should rely totally and exclusively on the skill and judgment of the seller, but that it was sufficient if reliance was placed upon the seller's skill and judgment to some substantial extent. As the propellers supplied by the seller had not proved satisfactory for use on the vessels for which they were supplied, the buyer was entitled to claim against the seller for breach of the implied condition.

The question of the buyer's reliance on the seller's skill or judgment, under subs. 1 of s. 16, is, as stated by Lord Sumner in the *Medway* case, a question of fact. That question of fact has been decided by the Courts below in favour of the City. In my view there was ample evidence

on which to base such a finding and I think that a preponderance of evidence justifies the conclusion which has been reached.

It was also held by both the Courts below that there had been a breach of the implied condition contained in subs. 2 of s. 16 of *The Sale of Goods Act*.

It was conceded in argument by Preload that Preload held itself out as dealing in pipe of the kind provided by the contract, that the proviso to this subsection is not applicable in this case and that the pipe supplied was not of merchantable quality. The only issue, therefore, in relation to the application of this subsection, is as to whether or not the goods in question had been bought by description.

This was a sale of unascertained or future goods to be manufactured by Preload and in my opinion, under s. 2 of the short agreement, the contract constituted a sale of those goods by description. There was, therefore, a breach of the statutory condition provided for in subs. 2 of s. 16.

It was contended on behalf of Preload that Shattuck had approved of the use of calcium chloride in the manufacture of the pipes and that the City could not, therefore, claim that its use constituted a breach of the contract.

I agree with the view of the Courts below that the use of calcium chloride in the manufacture of the pipes by Preload did not, in itself, constitute a breach of the specifications forming part of the agreement. It is true that calcium chloride is not mentioned in those specifications relating to materials, but the evidence shows that it was used as a part of the manufacturing process in order to hasten the setting of the core and of the covercoat of the pipes. Its use was a part of the method of manufacture of the pipes decided upon by Preload as being proper and desirable. Shattuck was advised by Chiverton that it was being used. He was not asked to make a decision as to its use, but received this advice as a matter of information. Shattuck's position at that time was that Preload wished to use it and he had no reason to oppose its decision. It is clear that at that time no one contemplated the unfortunate consequences which did, in fact, later ensue as a result of its use.

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The point is, therefore, in my view, that Preload made a decision, regarding its method of manufacture, of which the City was informed and in relation to which it took no action. Unfortunately the use of calcium chloride resulted in Preload having been in breach of subss. 1 and 2 of s. 16 of *The Sale of Goods Act*. The obligation of Preload under those subsections was the same, it seems to me, whether the City was informed of Preload's decision or not. Preload was under an obligation to provide pipe reasonably fit for the City's purpose and of merchantable quality. The matter of the use of calcium chloride would only have assisted the legal position of Preload, in my view, if it had been compelled by Shattuck, against its own better judgment, to use it. In fact, the use of the calcium chloride was a part of the judgment of Preload on which the City was entitled to rely under subs. 1 of s. 16.

The next point argued by Preload was that the City did not have the right to reject the pipe containing calcium chloride. This argument was based upon the proposition that the governing provision of the contract in this regard was cl. 31 and that this clause only imposed upon Preload the obligation to replace in site any materials furnished by it which were proved to be defective within two years after the pipe lines had been laid and tested and the completion certificate issued. It was urged that "materials" did not mean "pipe". With respect to this contention, it is my opinion that "materials" in this portion of cl. 31 did include pipe, in view of the next following paragraph in cl. 31, which reads:

> Pipe, specials, etc., so replaced shall be properly installed, jointed, and bedded in place by the pipe manufacturer.

This paragraph immediately follows the paragraph imposing on Preload the obligation to replace in site defective materials.

Furthermore, it seems to me that wiring on the pipe which had become corroded within the period limited would constitute defective material within the meaning of the clause.

In addition, it is my view that the City had the right to refuse pipe which failed to satisfy the implied conditions contained in subss. 1 and 2 of s. 16 of *The Sale of Goods*

Act. Clause 5 of that portion of the specifications headed "MARKING, INSPECTION AND TESTING", which clause is headed "FINAL INSPECTION AT PLANT", provided, after making provision for a final superficial inspection at the manufacturer's yard just prior to loading for delivery:

> This inspection shall not be considered a waiver of the responsibilities of the manufacturer for the ultimate performance of the pipe under the contract, but rather a check control of the handling of the pipes by the various parties involved in the work.

Benjamin on Sale, 8th ed., states the rules as to the right of the buyer to reject goods as follows:

At p. 752 he says:

> When goods are sent to a buyer in performance of the seller's contract, the buyer is not precluded from objecting to them by merely *receiving* them, for receipt is one thing, and acceptance another.

At p. 983 he says:

> After the property in the goods has passed to the buyer, it may happen that he discovers them to be different in quality from that which he had a right to expect according to the agreement. If the goods do not conform to their description, or if any *condition,* express or implied, of quality be broken, *the property will not have passed,* and the buyer will, as already explained, have a right to refuse to accept them.

Shattuck had abundant evidence to justify the rejection of pipe in which calcium chloride had been used in the manufacture when he made his decision on May 1, 1953, and it is not now in dispute that the use of calcium chloride was the cause of the pipe failures.

It was then urged that the City had wrongfully repudiated the contract.

With respect to this argument it will be recalled that, by his letter of May 1, 1953, Shattuck gave certain specific directions to be followed by Preload in the manufacture of further pipe. He also stipulated that further payments on new pipe would not be made until pipe already paid for had been satisfactorily dealt with by Preload, or until the value of new pipe exceeded the value of pipe then being rejected.

Preload, in its reply of May 18, 1953, disputed Shattuck's statement that pipe made with calcium chloride was defective and denied the right of Shattuck to take the position

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which he had adopted regarding further payments. Preload was only prepared to resume the manufacture of pipe if it received payments from the City for the new pipe manufactured as it was delivered to the City.

No further pipe was, in fact, delivered to the City. No application was made for an extension of time, as provided in the contract. In June, 1953, Preload made a proposal under *The Companies' Creditors Arrangement Act* and sued the City.

I have already stated my conclusion that Shattuck had valid reason to reject pipe in which calcium chloride had been used in its manufacture.

Clause 40 of the contract provided that the engineer should be the sole judge of all matters connected with the proper carrying out by the contractor of the works therein described and that all differences between the parties, as to whether the contractor had or had not complied with the provisions of the contract, were to be left to the judgment and decision of the engineer as sole arbitrator.

The position was, therefore, that Preload had received payment for pipe which had been properly rejected by Shattuck, but refused to fulfil his direction as to the supply of further pipe unless it was paid for as manufactured, without any deduction for the payments already received by it for rejected pipe. It was already very much behind the contract schedule in the supply of pipe and, after June 15, 1953, was in default in relation to its contractual commitment for the completion of the work provided under the agreement.

In the light of all these circumstances, I think that the City was properly entitled to infer that Preload did not intend to be any longer bound by the provisions of the contract and that the City was justified in electing to treat the breaches of contract by Preload as a repudiation of the agreement, as it did by its letter to Preload of November 13, 1953.

I am, therefore, of the opinion, for the foregoing reasons, that Preload's appeal, in respect of the issue of liability, fails.

On the issue of damages, the only point taken in argument by Preload was that the City should have required Shattuck to exercise, pursuant to cl. 10 of the contract, his right to take over Preload's plant and either operate the plant or arrange for someone else to do so for him. It was argued that if this course had been followed the damage sustained by the City would have been reduced to such an extent that there would have been no damages payable to the City by Preload.

The short answer to this argument is that the project engineer's right, under cl. 10 of the contract, was optional to himself and that there was no duty imposed upon him to exercise it. The decision as to whether or not he would exercise those rights was entirely his own. I also agree with the view of the Court of Appeal that there was no evidence which would justify the conclusion that the City was able to take over the plant and to produce satisfactory pipe.

In my opinion, therefore, Preload's appeal should be dismissed with costs and the judgment of the Court of Appeal of Saskatchewan affirmed.

The next question is as to the liability of the surety. Preload and the surety executed a contract bond, dated July 17, 1951, in favour of the City, in the sum of $1,209,258.57, conditioned upon the carrying out by Preload of the work according to the terms and conditions of its contract with the City.

This bond contained the following provisions, which are of importance in connection with this appeal:

> Provided always and it is hereby agreed and declared that the said Surety will not be released or discharged from this Bond by any arrangements which may be made between the said Contractor and the said City of Regina either with the assent of the surety or without its assent after due written notice to it has been given at its principal office in the City of Montreal, Canada, and no written objection being made thereto, either for alteration of time or mode of payment or for variation of the works to be executed.
>
> And provided further that the said Surety shall be bound by all decisions, orders and directions of the Engineer referred to in said Contract, as if the said Surety were a principal party thereto.

It is admitted that the first written notice given by the City to the surety in relation to the bond was a letter dated December 12, 1952, which advised as to the failure of the

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two pipes in the line, the closing of Preload's plant and the engaging by Preload of experts to ascertain the cause of the defect.

In addition to the defences raised by Preload which have already been considered, the surety raised two additional main grounds of defence. The first and chief one was that the City had agreed to variations in the contract without the knowledge or consent of the surety. The second was that the City was estopped from alleging as against the surety the breaches of the contract on which it had relied as against Preload.

The variations in the contract, in which it was argued the City had concurred, were in relation to the use of calcium chloride and in respect of the use of hot water instead of steam in the curing of the pipes.

I have already considered the matter of the use of calcium chloride and have agreed with the view of the Courts below that its use was a part of a method of manufacture which did not involve a variation in the specifications relating to materials. With respect to the matter of the curing process, clause 4 of the part of the specifications headed "MANUFACTURE OF PIPE" reads as follows:

4. *CURING CORES*

The concrete core shall be steam cured at a temperature of not less than 100 deg. F., and not more than 150 deg. F. and a humidity of not less than 90%, until its strength reaches the required minimum for prestressing. . . .

The evidence is that hot water curing instead of steam curing was used by Preload in the course of manufacture of pipe and that Shattuck had been made aware of this. When questioned about it at the trial, he was asked if he considered it to be a desirable change. He stated that he did not consider it in that way. Preload wished to use it and he had no objection.

The surety's argument is that this constituted a variation in the contract specifications of which, admittedly, the surety was not given notice and that, therefore, its obligation under the bond was determined. Reliance is placed on the proposition of the law stated by Cotton L. J. in *Holme*

v. Brunskill[1], and cited with approval by Davis J. in the majority decision of this Court in *Doe et al. v. Canadian Surety Company*[2]:

> The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged. This is in accordance with what is stated to be the law by Amphlett, L.J., in the *Croydon Gas Company v. Dickenson,* (1876) 2 C.P.D. 46 at 51.

The operation of the rule thus stated is, of course, dependent upon the variation in the contract provisions being made without the surety's consent. That consent may, however, be given before the variations are made, as well as after. This aspect of the operation of the rule in *Holme v. Brunskill* was considered, I think correctly, by Hodgins J. A. in *See v. London Guarantee and Accident Co.*[3], when he says:

> In the *Brunskill* case the basis of the contract was interfered with, and the rule laid down is a reasonable and proper one, namely, that where the contract between the parties which is the basis of the guaranty is to be varied the surety ought to be consulted.
>
> The case of *K. and S. Auto Tire Co. Ltd. v. Rutherford* (1915-16), 34 O.L.R. 639, 36 O.L.R 26 (affirmed in the Supreme Court of Canada), however, shews that where that basis is uncertain or is left to be arranged between the debtor and creditor, without requiring its details to be reported to the guarantor and made a basis of the guaranty, the guarantor is not entitled to set up what has been agreed upon as discharging him.

A similar view is stated by Anglin J. (as he then was) in *North Western National Bank of Portland v. Ferguson*[4], where he says:

> The guarantor's assent to an extension need be neither contemporaneous with it nor explicit. It may be implied in his own original contract assuming the liability. It may be involved in the arrangement or under-

[1] (1878), 3 Q.B.D. 495 at 505.
[2] [1937] S.C.R. 1 at 19, 4 I.L.R. 43, 1 D.L.R. 145.
[3] (1924), 56 O.L.R. 78 at 90.
[4] (1918), 57 S.C.R. 420 at 430, 44 D.L.R. 464.

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> standing between the principals which he has undertaken to guarantee—perhaps without sufficient inquiry. It must always be a question of the intention of the parties either expressed or, if not, to be inferred from the terms in which they have couched their agreement, construed, if they be "at all ambiguous," in the light of their relative positions and of the surrounding circumstances; . . .

This brings us to a consideration of the two terms of the contract bond which have already been cited. The first of these provisions relates to alteration of the time or mode of payment in the contract between Preload and the City or variation of the works to be executed. With respect to such alterations, notice to the surety is provided for and, unless the surety makes written objection, the variations bind the surety. In my opinion the variations in the contract suggested in argument by the surety are not within the provisions of this paragraph.

The next paragraph of the bond states that the surety shall be bound by all decisions, orders and directions of the engineer referred to in the contract, as if the surety were a principal party thereto. The bond itself, therefore, recognizes that there is an area within which the surety will be bound, as though a party, by the decisions, orders and directions of the engineer. The contract contemplated, by its terms, additions to or variations of the plans, specifications and details which form a part of it on the direction of the engineer, or by arrangement. With respect to variations of this type, the bond contemplates that the surety shall be bound by them. In other words, the surety has consented to variations of this kind in advance of their being made.

The change from steam to hot water curing was, it seems to me, the kind of variation recognized by the bond as being permissible and consequently I do not consider that the rule in *Holme v. Brunskill* applies so as to assist the surety in this case.

The defence of estoppel is based upon the proposition that the City, by reason of its acquiescence in changes made in the specifications, was estopped from saying as against the surety that Preload did not carry out its agreement.

In particular it was contended that the City, having acquiesced in the use of calcium chloride, could not then as against the surety claim damages resulting from the defects in pipes made in consequence of its use.

Reliance was placed by the surety upon the case of *The City of Oshawa v. Brennan Paving Company Limited*[1]. In that case, however, the engineer, while holding one view of the interpretation of the contract in question regarding quantities of material to be supplied by the contractor, knowingly permitted the contractor, who held an alternative view of such interpretation, to supply materials on the latter basis. That basis involved supplying greater quantities of material by the contractor than under the engineer's interpretation. The engineer then refused to certify the quantities of material supplied, except to the extent as calculated on his own interpretation of the contract. The engineer knew that the contractor was proceeding to perform the contract in a manner to its own detriment and permitted it to do so. In these circumstances the elements of an estoppel were present and the City was not permitted to refuse payment to the contractor for the quantities of material which it had, in fact, supplied.

I have already stated my view that the use of calcium chloride was the result of a decision by Preload as to its method of manufacture. The same can be said also of the method of curing by hot water. Shattuck was aware of both these procedures having been adopted, but there is no evidence that at the time he should have had any reason to think that the adoption of these procedures would involve harmful results. He was not asked to make a decision as to their use. He had no reason to forbid them. This being so, I cannot see how it can be successfully contended that the City acquiesced in the breaches of the contract which resulted from the failure of Preload to fulfil the implied conditions under subss. 1 and 2 of s. 16 of *The Sale of Goods Act*. All that the City was doing was to rely upon the manufacturing skill and judgment of Preload, which it was entitled to do.

[1][1955] S.C.R. 76, 1 D.L.R. 321.

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Martland J.

I am, therefore, of the opinion that the appeal of the surety should be dismissed, with costs, and that the judgment of the Court of Appeal of Saskatchewan should be affirmed.

Appeals dismissed with costs.

Solicitors for the plaintiff, appellant: Balfour & Balfour, Regina.

Solicitors for the defendant by Counterclaim Guarantee Co. of North America: MacPherson, Leslie & Tyerman, Regina.

Solicitor for the defendant the City of Regina: G. F. Stewart, Regina.