sub-sections (2) and (3). The case is consequently distinguishable in our opinion from *Jones* v. *Robson* and the requirements as to notices in sub-section (4) of section 11 of the Game and Wild Birds Protection Law, 1922, are conditions precedent to the validity of any Order in Council made under the section and are not directory merely. It follows that in order to establish that an area had been validly described as a permanent reserved area proof of the notices mentioned in sub-section (4) of the section was necessary and no such proof having been given it was not established that the area was validly prescribed as a permanent reserved area under Law of 1922. If it was not so validly prescribed then there was nothing which by virtue of section 14 (2) of Law 3, 1934, could be deemed a Game Reserve.

FUAD, J.: I concur.

Conviction set aside.

[STRONGE, C.J., AND THOMAS, J.]

ANTONIS KONTEADES, *Plaintiff-Respondent,*

v.

GULAN YUSUKJIAN, *Defendant-Appellant.*

(*Civil Appeal No.* 3554.)

Building contract — Clause providing that orders for extras must be in writing — Verbal orders for extras given by building owner — Liability of building owner for — Supervising engineer — Building owner's power to dismiss.

Where the defendant, a building owner, (1) resisted payment for building extras on the ground that she had not given any written order therefor as required by the contract, and (2) refused payment of the final instalment, payable by the terms of the contract on handing over the completed work, on the ground that the certificate of completion by the supervising engineer was not binding, because before that certificate was given he had been dismissed as supervising engineer.

Held as to (1), that the defendant by giving oral orders for extras which from their nature she must be taken to know would entail extra cost to carry out, and having seen the expenditure being incurred on them, was liable to pay for them.

Held as to (2), that the approval or condemnation of works and materials having been left by the contract to the sole discretion of the supervising engineer it was not competent to the defendant to revoke his authority as sole judge of the work or dispute his judgment.

Appeal by the defendant against a judgment of the Nicosia District Court (Abbott, P.D.C.) dated 10th February, 1936, awarding plaintiff £77. 7*s.* 5½*p.* and costs.

C. Tornaritis for appellant:

Completion and handing over is a condition precedent to payment of the final instalment and here the evidence shows that the work was not in fact completed. Halsbury's

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Laws of England, 2nd Ed., Vol. 3, paras. 357, 363, 372—*Appleby* v. *Myers* (1867) L.R., C.P. 615: 2 C.P. 651: *Newfoundland Government* v. *Newfoundland Ry.* 1888, 13 App. Cas. 199: *Eshelby* v. *Federated European Bank*, 1932, 1 K.B., 254: Hudson, Building Contracts (6th Ed.) pp. 170, 177 and 180, and cases there cited. Defendant had power to dismiss the architect. Question is, is the house in accordance with the plans and specifications.

As to extras, defendant is not liable, for it was a condition precedent that all orders therefor must be in writing and no such order was given. Hudson on Building Contracts pp. 314 and 315, and cases there cited: *Brown* v. *Lord Rollo*, 7 E. & E. Digest, 384: Halsbury Laws of England (2nd Ed.) Vol. 3, para. 487.

G. Chrysafinis for respondent:

Respondent under the contract was only bound to satisfy the supervising engineer and nobody else. His certificate as to completion and extras was binding on the appellant and she could only dispute it on grounds of fraud or collusion. Halsbury (2nd Ed.) Vol. 3, paras. 413, 486. She could only dismiss the engineer for fraud or dishonesty and no such conduct by him is alleged.

Appellant requested the extras to be done, saw the expenditure going on and now disputes liability on the ground that the expenditure was incurred without being properly ordered. Submit an implied promise to pay should in such circumstances be inferred by the Court. Halsbury (2nd Ed.) Vol. 3, para. 490.

Cur. adv. vult.

STRONGE, C.J.: The contract sued on in this case is dated 6th June, 1933. By it the plaintiff undertook to build a house for the defendant for £350 payable in 13 instalments of unequal amounts as the work progressed. The final instalment was to be paid on handing over the completed work. The contract provides that the building is to be erected in accordance with the plans and specifications and that all the material to be used in the construction is to be of good quality to the satisfaction of the engineer in charge and according to the specifications.

There is a provision that the whole supervision of the work is to be performed by Mr. D. N. Davidian and he is empowered to reject any material not to his liking and to estimate any extra work which may be required.

The contract further provides that all extra work which may be required is to be notified to the contractor in writing including the cost thereof.

The plaintiff sues in the present action to recover—(1) £45 the amount of the 13th or final instalment; (2) £6 being the balance of amount of £20 for extras which the defendant admits she ordered about three weeks or so after the signing of the contract; (3) £26. 7*s*. 5½*p*. for extras as to which the plaintiff's case is that part were ordered by the defendant in writing—since lost—as required by the contract, and the remainder were ordered by her orally.

The defendant counterclaimed for £36 in respect of work not in accordance with the contract, plans and specifications and work improperly done. The learned P.D.C. who tried the case found in favour of the plaintiff for the full amounts claimed totalling £77. 7*s*. 5½*p*. and in respect of the counterclaim he gave judgment for defendant for £5. Against the whole judgment the defendant appeals.

As regards the item of £6 claimed by the plaintiff for extras it is unnecessary to say more than that the defendant does not deny that she signed the itemized and priced list of these extras which forms Exhibit 13 nor does she dispute that they were supplied by the plaintiff. The other extras in respect of which the respondent claims £26. 7*s*. 5½*p*. are contained in Exhibit 4—a list of priced items—which is signed by D. N. Davidian and opens with the statement "On the 28th September, 1933, I examined the house of Miss K. Yusukjian and found the following extra work which has been done by Mr. A. Konteati, the contractor". The defendant's case as to these extras is that she is not liable to pay for any of them as she ordered none of them either verbally or in writing. The evidence at the trial was conflicting. That of the plaintiff was to the effect that these extras were all ordered by the defendant, part of them verbally and the rest in writing, and that as regards the part ordered in writing he had lost the order. Plaintiff also said that all these extras were approved of by Davidian who signed Exhibit 4 as approved and estimated on 28th September, 1933. Davidian says with reference to Exhibit 4 that the extras were done under express orders of the defendant and that none of them were included in the contract. That the extras in Exhibit 4 were done prior to 11th September, 1933. He said that he was unable to recall the date on which it was made and would not be positive it was not made on 21st October, 1933.

As against the evidence of respondent and Davidian the defendant's evidence is that the respondent executed all these extras of his own accord and that none of them were ordered by her.

It is highly improbable that the learned P.D.C. should have given judgment in favour of the plaintiff as regards this item of £26. 7*s*. 5½*p*. if he was satisfied that no order of any kind had been given by the defendant for the various

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items contained in it. It must be inferred that he believed the evidence of the plaintiff and came to the conclusion that they were not supplied by the plaintiff of his own initiative but upon defendant's request or authority. It was not elicited from the plaintiff at the trial which of these extras were the ones alleged by him to have been ordered in writing. The question we have to consider is whether assuming that plaintiff's authority for any or all of them consisted only of a verbal request or order is she liable to pay for such items in view of the provision in the contract " all extra work required as such is to be notified to the contractor in writing including costs thereof ".

The evidence for plaintiff was that the defendant gave express orders so that the case is not one of the building owner taking a great interest in the work while the extras were being done and refraining from challenging it as unauthorized, as was the case in *Brown* v. *Lord Rollo*, the Scotch case to which we were referred by Mr. Tornaritis. The present is rather the case of a building owner ordering by word of mouth works which from their very nature he must know or be taken to know will entail extra cost to carry out as, for instance, to take a few of the items in Exhibit 4, the kitchen oven and grates, the addition of three steps to a staircase, the making of a roof 7 feet high instead of three. It is open in such cases to a Court to find there was an implied promise by the building owner that the work as ordered should be paid for as an extra, although the order is verbal instead of in writing as required by the contract.

" It would ", says Turner, L.J., in *Hill* v. *South Staffordshire Railway* (1865), cited in Hudson's Building Contracts, 6th Ed. at p. 313, " be a fraud on the part of the employer to have desired these alterations and additions to be made, to have stood and seen the expenditure going on upon them, to have taken the benefit of that expenditure, and to refuse payment on the ground that the expenditure was incurred without proper orders having been given for the purpose."

It was contended by Mr. Tornaritis that plaintiff was not entitled to rely on the oral order of the defendant inasmuch as there was no plea by him that the defendant had waived the condition of the agreement requiring writing. I think, however, on looking at paras. 5 and 6 of the written statement for issues of plaintiff's case that plaintiff did indicate though perhaps not quite as clearly as he ought to have done that there was a distinction between the order for the extras mentioned in para. 5 and those in respect of which he was claiming in para. 6, for as to those in para. 5 he says they were done on the written instructions, while as to those claimed for in para. 6 he says they were done by the order of the defendant. " I shall rely ", he

says in effect, "upon defendant's *written* instructions as to one set of extras and as to the other upon her order which I do not assert was a written order." Viewed as a matter of pleading—and these written statements are not in the strict sense pleadings—it was for the defendant to raise the point clearly in her defence, by stating that as to para. 6 of the plaintiff's claim the defendant says it was a term of the agreement that all extras must be notified in writing to the contractor including cost thereof, and the extras claimed for by the plaintiff in the said para. 6 were not so notified. The plaintiff, had such a contention been put forward, would have had to admit that such a term was in the contract and would have had to go on to destroy the effect of the defendant's contention by alleging that the defendant herself ordered the items knowing that they would entail extra cost—in other words he would have had to put in a plea in confession and avoidance.

As the matter stood, however, I am of opinion that the plaintiff, by his paras. 5 and 6 of his case for issues, did indicate that it was a verbal order or orders he was going to rely on in respect of the extras referred to in para. 6. Para. 3 (*d*) of the defendant's case for issues showed that the defendant was going to dispute liability for extras not ordered in writing and the question was consequently raised whether there was any verbal order given, and whether in the circumstances of the case such an order imposed any liability upon the defendant. The Court below must, as I have said, have come to the conclusion on the evidence that defendant did in fact order the extras. Having done so and knowing that they would cause extra cost and having seen the expenditure being incurred upon them she ought in my view to pay for them, for to hold otherwise would be to allow her to perpetrate a fraud.

Remains the claim of the plaintiff for the 13th or final instalment of £45 as to which the contract provides that it is payable "on handing over completed work". The defendant disputes her liability to pay this sum on the ground that, owing to defective work and the use of bad and inferior material, the work was never completed by plaintiff in accordance with the contract and specifications. The defendant further maintains that the certificate of the supervising engineer, Davidian, which appears in the concluding portion of Exhibit 4 and states that "all the other works"—that is, work other than extras therein mentioned—"are in accordance with the contract" is not conclusive or binding on her inasmuch as she had dismissed Mr. Davidian from the position of supervising engineer before that certificate was given. The contract, it may be pointed out, does not empower the appellant either to dismiss the architect or to appoint another architect.

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It is clearly within the power of a building owner to dismiss the architect or engineer for any fraudulent or dishonest act, *e.g.* receiving a secret commission or a bribe from the builder, and such conduct besides dismissal renders him liable to an action on the part of the employer, but the appellant does not allege that she dismissed Mr. Davidian on either of these grounds. If the approval or condemnation of works and materials, as in the present case, is by the contract between contractor and building owner left to the sole discretion of the architect " it would seem " (according to Halsbury's Laws of England (Hailsham Ed.) Vol. 3 para. 595) " that as to these matters he is acting during the whole progress of the works in a quasi-judicial capacity ". " He is " to use the words of Collins, L.J., in *Chambers* v. *Goldthorpe* (1901) 1 K.B. at p. 638 " placed in a position in which he is bound to exercise his judgment impartially as between the two parties to the building contract ". When the architect or engineer occupies this position of being sole judge for the whole work, it seems clear, from the cases of *Mills* v. *Bayley* (1863) 133 R.R. 579; *Murray* v. *Cohen* 7 E. & E. Dig. p. 435 case 410, and the other decisions of Canadian & New Zealand Courts mentioned at p. 266 of Hudson on Building Contracts, that the building owner cannot revoke the engineer's authority nor dispute his judgment and that any remedy he may have for bad workmanship would appear to be against the engineer. It follows that the appellant could not revoke the authority of Mr. Davidian and that, as between herself and the plaintiff-respondent, she is bound by his certificate both as to the extras and the execution of the works under the contract.

For the reasons which I have given the appeal, in my opinion, fails and must be dismissed with costs.

THOMAS, J.: This is an appeal from the judgment of the President of the District Court, Nicosia, in favour of the Plaintiff for £77. 7*s.* 5½*p.* and costs. The plaintiff entered into a contract to build a house for the defendant in accordance with plans and specifications. The plaintiff brought an action to recover £45, which was the last instalment of the price agreed upon in the contract, and three amounts for extras. The learned President found that the plaintiff had performed his agreement, and that the extra work was done upon the defendant's order, and accordingly gave judgment for £45, being the last instalment of the contract price, and for two items of extras of £6, and £26. 7*s.* 5½*p.* The Court allowed the defendant £5 for certain defects in the construction of the house.

The defendant seeks to set aside this judgment, first on the ground that, as the contract was entire contract, the plaintiff was not entitled to recover the balance of the

price since he did not complete the construction of the house. This raises the question of whether or not the house was completed. If the contractor never completed the construction of the building, the final instalment set out in the contract is not payable. The judgment of the Court below cannot be interpreted in any other way than as finding that the contractor completed the house, and the learned judge finds expressly that the plaintiff built the house, except regarding one small item, in accordance with the contract and the specifications. If there is evidence to support these findings, they should not in my view be interfered with. Under the contract, Mr. Davidian was appointed architect to see that the plaintiff built the house in accordance with the plans and specifications. He was defendant's agent to protect her interests. His evidence is quite definite that the house was built according to the contract and specifications, and he does not appear to have been cross-examined on this point. In his certificate he says that apart from extras all the work was done in accordance with the contract. He says further that the house was delivered a fortnight late because of extra work done upon the defendant's express orders. It is clear that the Court below accepted the evidence of Mr. Davidian and it was therefore, justified in finding that the plaintiff had carried out his contract. The judgment for the final instalment of the price was therefore, in my opinion, correct.

The appellant further contends that the Court below was wrong in allowing plaintiff £26. 7*s*. 5½*p*. for extra work done, because it was not ordered in writing as required by the contract, and its value was not proved except by a certificate of Mr. Davidian given at a time when he had been dismissed from his position as supervising architect. It was a term of the contract that the building was to be constructed under the supervision of Mr. Davidian, who is given express power to estimate any extra work required. It does not require any authority to show that this term cannot be varied without the consent of both parties to the contract. The plaintiff did not consent to the appointment of any other architect, and the purported dismissal of the architect agreed upon was therefore invalid. The evidence of Mr. Davidian is that these extras were done upon the express orders of the defendant and under her supervision. The Court below found that the extras were ordered by the defendant and properly carried out. There was clearly evidence to justify the Court in finding an implied promise by the defendant to pay for work.

For the above reasons I am of opinion that the judgment of the learned President was right, and that this appeal should therefore be dismissed with costs here and below.

Appeal dismissed.