Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Moore and another v. *Lamoureux and others, representatives of S. Peters, deceased, from the Court of Queen's Bench, Lower Canada; delivered 28th June* 1898.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

On the 2nd of May 1877 the present Appellants and Simon Peters (since deceased) entered into a contract of that date with the Quebec Harbour Commissioners for the execution by them of certain works and improvements at the mouth of the river St. Charles in the Harbour of Quebec. The contract price was a lump sum of $554,296. 31 including a provisional sum of $25,000 to meet the expenses of any extra works. But that lump sum was founded on the bills of quantities and rates and prices set forth in the tender by the Contractors which was annexed to the contract and described as Specification B.

The contract contained a clause by which the Harbour Commissioners were empowered to substitute a stone facing backed with eight to one Portland cement concrete to the quay walls for the whole length of the walls (three thousand and five hundred and fifty feet in all) or for any less length thereof in lieu of the fine Portland cement concrete and timber face as

shown on the contract drawing for the sum of $18,393. 58 for the whole length of the walls or a proportionate sum for any length of such walls as may be ordered. In the Specification B it was further provided that in event of the Commissioners determining to carry out the stone face to walls in lieu of the timber and concrete face and should the Contractor be called upon to dress the stone wall " Rough Bouchard " instead of " quarry faced " as mentioned in the specification the Contractor should be paid an extra sum of two cents and three-quarters per cubic foot of wall beyond the sum of eighteen thousand and three hundred and ninety-three dollars and fifty-eight cents. It is agreed that the latter provision added a sum of $3,547. 3 to the previous amount making the total extra sum payable in respect of the alteration $21,940. 61. The concrete described in these clauses as 8 to 1 cement concrete was called throughout the case " coarse concrete " and the 4 to 1 cement concrete was called " fine concrete." It may be presumed that this sum of $21,940. 61 was arrived at by calculating the cost of the estimated quantity of stone wall at a certain price and deducting therefrom the cost of the work that would be saved by the substitution but the contract itself does not show the mode in which it was arrived at nor does the list of prices contain any price or rate for the stone work except that for " Rough Bouchard."

Clause 48 contained a power to add to or omit from and generally to modify or alter the works and materials. In event of any works being ordered for which the scheduled prices should not apply it was provided that the Engineers should measure value and price on such additions and measures as they should think reasonable.

Clauses 54 55 and 56 provided for advances at the rate of 90 dollars for every 100 dollars

worth of the contract and extra works executed being allowed to the Contractors as the work proceeded and upon the certificate of the Engineers and for a final certificate being given on completion of the works and by clause 58 it was provided that all works as they progressed should be measured from time to time by the Engineers and proper accounts bills of quantities or pay bills should be made up and priced out according to the rates and prices of the annexed schedule.

The Appellants and Peters were not partners in the main contract. As between themselves their rights were determined by an agreement between them dated the 4th May 1877 by which Peters undertook to execute all the timber and iron work and pitching of outer slopes and forming of roadway and the Appellants undertook all the works contracted for except those specially undertaken by Peters. It was agreed that the parties should be paid by the Commissioners for these aforesaid works as the same should progress in accordance with the schedule of prices annexed to the main contract and upon certificates to be granted by the Resident Engineer of the Commissioners and also that with respect to any incidental expenses attending the said works which had hitherto been unanticipated or unprovided for the same should be borne by the parties *pro rata* to the value (to be established by the schedule of prices annexed to the main contract) of the amounts of work to be by them respectively executed under this contract. The agreement then contained the following clause :—

" And whereas it hath been stipulated in and " by the said Main Contract that it shall be " optional with the said Quebec Harbour Com- " missioners to demand that a certain wall " mentioned in the specification lettered B, and " annexed to the said Main Contract be faced

" with stone, it is hereby agreed that should the " Quebec Harbour Commissioners decide that " the same shall be done the said Simon Peters " shall execute the said work at the rates set " forth in the said specification lettered B and " annexed to the said Main Contract, but in the " event of the said work being so performed or " executed by the said Simon Peters, neither he " the said Simon Peters nor the said Moore " and Wright shall have any claim against each " other respectively by reason of the deduction " caused by such modification in the mode of " constructing the said wall from the gross " amount of the work by them respectively " undertaken."

The Harbour Commissioners exercised their option to substitute a stone wall for timber backed with fine concrete and required the contractor to dress the stone wall " Rough Bouchard " so that the whole additional sum of $21,940 61 became payable and a great many other changes were made from time to time in the works. During the progress of the works certificates were delivered in accordance with the contract. The course of business was as follows. Mr. Browne the Engineer of the Contractors in the first instance made an estimate of the work done by them and the amount due in respect thereof from which he deducted 10 per cent. The Resident Engineer of the Commissioners revised this estimate and issued his own estimate stating the quantity and description of the work done the rate allowed and the balance due after the like deduction and then gave his certificate for the amount so arrived at. Usually separate certificates were given for the work done by Peters and that done by the Appellants but in a few instances the work done by each of them was included in the same estimate and certificate and in those cases a note was added by the

Resident Engineer stating the proportion of the certified sum payable to Peters and the Appellants respectively. Throughout these estimates and certificates it is to be observed (1) that there is no charge for fine concrete backing and none was in fact executed to the stone wall (2) that the coarse concrete work done by the Appellants is allowed at the scheduled rate and (3) that the stone wall is allowed to Peters and priced at 60 cents per cubic foot. There is evidence by letters and otherwise that this was done with the knowledge and acquiescence of the Appellants.

The Engineers made their final certificate dated the 4th February 1886 by which they certified that a sum of $52,011. 21 was owing to the Contractors. In this certificate the Engineers credited the Contractors in the first instance with the lump sum of $529,296. 13 and under the head of "additional work" with "in stone wall and Rough Bouchard" $21,940. 61 and also with two sums making together $57,597. 40 for "cubic yards in concrete in rear of stone wall "tidal basin and wet dock" and a further sum of $4,190 for "cubic yards in concrete in rear of "stone wall wet dock understated in bills of "quantities or error." It was stated by counsel for the Respondents and not denied that the two first sums for concrete in rear of stone wall were the sums of the amounts allowed for the same work in the progress certificates. Their Lordships have not thought it necessary to verify this statement. On the other hand the Engineers made a deduction expressed to be "as agreed with Contractors in Quebec" of $116,104. 32. The deduction appears to have included the coarse concrete in bills 1 and 4 which must have been required according to the quantities in Schedule B. if the original plan of a timber face with fine concrete backing had been adhered to.

It should be mentioned that before the final

certificate was given there had been litigation between the Contractors and the Commissioners in which the Contractors contended that the contract had been so far departed from as to be inapplicable and claimed to be paid by measure and value. This litigation failed from want of the certificate. After the final certificate had been given the present Appellants were dissatisfied with it and a second action was commenced in the names of Peters and the Appellants against the Commissioners. This action resulted in a judgment of the Supreme Court of Canada of the 17th November 1891 by which a sum of $35,457. 50 was added to the balance found due by the certificate making a total sum of $87,468. 71 which it was adjudged that the Contractors were entitled to receive from the Commissioners in settlement of their claims. An examination of the declaration in this action shows that the matters in respect whereof a rectification of the final certificate was sought affected the present Appellants exclusively and letters were put in evidence indicating that Peters was prepared to acquiesce in the balance found by the final certificate. The balance found due by the judgment of the Supreme Court was reduced by certain payments on account and other payments made by the Commissioners and the balance $68,972. 95 was by an arrangement between the parties paid into the Union Bank of Canada on deposit in joint names until the respective shares of the parties should be finally established.

The present action was commenced by Peters on the 16th October 1893 for the purpose of determining what sum he was entitled to receive out of the deposited moneys and to obtain payment thereof. Peters died during the progress of the action and his representatives were substituted. They are the present Respondents.

The first and principal question between the parties is as to the sum which Peters was entitled to be paid in respect of the stone wall substituted for a timber face with a fine concrete backing. The Respondents claim so much of the lump sum as represented the price according to the scheduled rates of the timber facing and fine concrete backing originally contemplated and in addition the extra sum of $21,940. 61 allowed in case of the substitution being made. These sums amount in the aggregate to $77,378. 50. Or alternatively they claim the actual quantity of stone wall at 60 cents. per cubic foot which they say amounts to the same sum. On the other hand the Appellants admit that the Respondents are entitled to the extra sum of $21,940. 61 but they claim to be entitled to so much of the lump sum as was appropriated to or represented the price of work falling within their department whether such work was done or not and they contend therefore that they are entitled to so much as represents the price of the fine concrete backing originally contemplated and that the Respondents are entitled only to so much of the lump sum as represented the price of the wood and iron work which was within Peters's department. Both sides appeal to the clause in the contract of the 4th May 1877 between themselves quoted above. The Appellants say that the Respondents are thereby precluded from making any claim against (*i.e.*, in opposition to) them by reason of the deduction from the gross amount of concrete work undertaken by them or (in other words) they are not to be losers by reason of the modification in the mode of constructing the wall. The Respondents on the other hand contend that each party was to be paid and paid only for the work within his own department actually executed by him and that the effect of the proviso according to its true

construction is to preclude the Appellants from making any claim as against them for loss of profit or otherwise by reason of the gross amount of concrete work undertaken by the Appellants being reduced by the modification.

The Court of Queen's Bench decided this question in favour of the Respondents—on the general ground that there was sufficient evidence of an agreement between the parties that Peters should be paid for the stone wall at the rate of 60 cents per cubic foot and that he should have allotted to him to the sum representing the price of the fine concrete rendered unnecessary as well as that of the timber and iron work. Their Lordships agree in the result with the Court of Queen's Bench. They doubt whether a document dated prior to the deed which was put in evidence showing how the extra sum of $21,940. 61 was in fact arrived at was properly admissible for the purpose of explaining and supplementing the deed. But their Lordships think that the want of a rate for stone work in Specification B must be treated as a *casus omissus* either by oversight or because the parties knew what was meant and that the omission must be supplied by agreement or in default of agreement by evidence of a reasonable rate. The allowance of 60 cents per cubic foot in the progress estimates and certificates and the actings of the parties thereon do in the opinion of their Lordships afford evidence on which they can act of an agreement between them fixing the rate mentioned as the rate applicable to the contract or if not so then sufficient evidence of what was in the opinion of the Engineers as well as of the parties a reasonable rate to supply the lacuna in the Specification. The estimated number of cubic feet in the stone wall is shown by a document dated 9th November 1881 (Plaintiffs Exhibit A 38) and

verified by Albert H. Peters. It shows the balance claimed on masonry less ten per cent. by letter to the Chairman of the Harbour Commissioners signed by Peters Moore and Wright. The masonry is calculated at 128,964 cubic feet at 60 cents making a total of $77,378. 50 and the total amount of the previous estimates $62,784. 57 leaving a balance of $14,593. 93 less 10 per cent. $1,459. 39 thus bringing out a balance due of $13,134. 54. The Respondents show that the amounts representing the price at scheduled rates of the estimated quantities of wood and iron and fine concrete in Bills Nos. 1 and 4 together with the extra sum of $21,940. 61 (subject to a small correction) bring out the same figure of $77,378. 50 and on the whole evidence their Lordships entertain no doubt of the intention of the parties that so much of the lump sum as represented the price of wood and iron and fine concrete backing which was rendered unnecessary by substitution of the stone wall should together with the extra sum be appropriated as the price at 60 cents per cubic foot of the stone wall.

The Appellants indeed say that on this basis they will not be paid for all the coarse concrete which they in fact executed. Their Lordships have already mentioned that in the final certificate they are allowed a sum of $4,190 for coarse concrete in rear of stone wall wet dock understated in bills of quantities or error. It is possible but by no means proved that this allowance is insufficient to cover all the concrete work done by them in rear of the stone walls and not allowed in the progress certificates. But it must be observed that the Appellants have not thought fit to bring in any account of the work executed by them as they were invited by the Respondents to do and it is as impossible for their Lordships as it was for the Court below to

correct any error in calculation or in substance if any error there has been.

Their Lordships ought to add that they entirely agree with the Court below that the so-called "detailed certificate" signed by Mr. Kinipple in May 1893 (Exhibit 1A) possesses no probative value whatever and they have discarded it from their consideration.

The other questions discussed at the Bar are of a different character. They arise out of claims and cross-claims between the parties for contribution to incidental expenses attending the works and costs of litigation between the Contractors and the Commissioners (which it is contended come within that description) and for services rendered and work done by the parties for each other in the course of the works and other similar matters. So far as the claims of the Appellants have been allowed or those of the Respondents have been rejected there is no appeal but the Appellants say that some of the Respondents' claims against them have been improperly allowed and to a large extent the claims of the Appellants have been disallowed by the Court below on the ground that they were either unproved or prescribed by limitation of time and can only be allowed to the extent admitted by the Respondents. These questions are for the most part questions of detail and figures but before discussing the details their Lordships will express the opinion they have formed so far as questions of principle seem to be involved :—

(1.) Their Lordships think that according to the true construction of the contract of 4th May 1877 the parties were bound to contribute to the incidental expenses attending the works not provided for according to the respective values (to be determined according to and for the purpose of the contract between them and the

Commissioners) of the work done by them respectively or (in other words) *pro rata* in proportion to the amounts receivable by them respectively out of the total payments made by the Commissioners; but as these respective proportions have not been finally ascertained and will only be finally ascertained by the result of the present appeal it is obvious that no right of action for an unascertained contribution could be maintained until the appeal is disposed of and therefore no question of prescription by limitation of time can arise.

(2.) Their Lordships do not think that the costs of litigation between the Contractors and the Commissioners after the completion of the works and for the purpose of settling the amount payable by the Commissioners are "incidental expenses attending the said works" within the meaning of the contract of 4th May 1877. The right of contribution between the parties must therefore depend on general principles. The mere fact that Peters allowed his name to be used as co-Plaintiff will not settle the question. With regard to the first action against the Commissioners it appears from the declaration that it was for the purpose of enforcing claims by Peters and for his benefit as well as for the benefit of Moore and Wright. In the absence of any special agreement the costs of this action would be a joint debt and their Lordships think that Peters would be bound to contribute his proportion of the costs of this action paid by the two Appellants. But the right to contribution would arise and prescription would run from the date of payment by the Appellants of the joint debt. As to the second action it appears from the proceedings that the claims made in it exclusively concerned the Appellants and it was for their benefit only. It further appears from letters in evidence that Peters was prepared to acquiesce

in the final certificate of the Engineers and was averse to further litigation with the Commissioners. In these circumstances their Lordships think that it must be presumed that Peters allowed his name to be used as a formal co-Plaintiff at the request and for the benefit of the Appellants and in the absence of any agreement there was no right to contribution towards the costs of the second action in favour of the Appellants.

Their Lordships will now deal with the various items in dispute. The first item objected to by the Appellants is Item 4 in the account of the Respondents' $6,838. 44 in respect of works in Bill No. 7. They contend that this item should be reduced to $4,184. 21 by reason that part of the work included in Bill No. 7 was not executed. No part of Bill No. 7 it should be observed is appropriated by the Respondents towards the stone wall. The whole amount of this bill represented work within Peters' department and as it has been allowed by the Commissioners their Lordships agree with the Court below that Peters is entitled to it. If the whole amount was not done as specified it is quite possible that the whole value was allowed as a set-off for other work done by Peters. The contention of the Appellants seems to be that they are entitled to every part of the sum on deposit which the Respondents cannot prove to be in payment for work actually executed by Peters. Their Lordships can see no ground for this contention or for differing from the Court below on this item. Item No. 5—Bill No. 8—stands on the same footing and should be allowed. Item No. 25 was also rightly allowed by the Court below. Peters undertook to do certain work for Moore and Wright at cost price and the question is whether he has charged too much but their Lordships were referred to no evidence on the point

beyond Moore's own opinion. Nor do their Lordships see any reason for differing from the Court below on any others of the items in the Respondents' account which were objected to. The judgment of the Court below will therefore stand subject to correction if any of the Appellants' claims should be allowed.

The claims made by the Appellants in opposition to the Respondents are comprised in their Exhibits 4 5 6 and 7. The account in Exhibit 4 no doubt is not strictly proved. The items in it are not vouched in the manner which would be required in taking an account adversely in Chambers but some of these items are very small. The account is largely for the expense of maintaining an office for the Resident Engineer and a boat and boatman for his use as required by the contract and for the services of the Contractor's Engineer. These seem to come under the description of incidental expenses attending the works and it is not really in contest that some such expenses were incurred and the amount does not seem excessive though it is contended that the account as a whole is not strictly proved. Jacobs the clerk of the Appellants swears that all the items after 19th April 1879 are correct and have been checked with the original entries made by himself and states generally that the different sums were paid for the purposes that are stated in the account at the time and the services that are charged were rendered at the time. He further states that the details of the last item in the account being the total of Peters Moore and Wright's engineering account £285. 05 have been checked with the books and with the exception of a small clerical error are correct and that they were given to him by Brown the Contractor's Engineer who is dead. He also states that the account was furnished to Peters in August 1883 and

apparently never objected to by him. On cross-examination he adheres to his statement that the services charged for were performed as well as the items of purchase. Colonel Moore one of the Appellants also swears generally to the correctness of the account but is unable naturally to swear to every item of the account. He was however cross-examined on several items and his answers tend to confirm the general correctness of the account. Their Lordships are of opinion that there is sufficient *primâ facie* evidence of the account to throw on the Respondents the burden of displacing it which they have not done and if as stated it was sent to Peters in 1883 and not objected to it must be taken not to have been seriously disputed by him. There are however a few items amounting to $352. 82 which were apparently expenses attending the arbitration and not expenses attending the works within the meaning of the contract. Exhibit 5 contains the details of one of the items in Exhibit 4. The account contained in Exhibit 6 includes the claims of which Exhibits 4 and 5 are itemized accounts. It is an account prepared for the purpose of this suit and so far as it relates to incidental expenses not included in Exhibits 4 and 5 does not appear to be satisfactorily proved. As to so much of the account as relates to expenses of litigation their Lordships think it should be disallowed for the reasons already given. Mr. Warrington stated during the argument that he did not claim Exhibit 7. Their Lordships have already expressed their opinion that the claim for incidental expenses attending the works is not barred by prescription.

Their Lordships therefore think that $352. 82 should be deducted from the amount due to the Appellants on the account contained in Exhibit 4 and that one-third of the remainder (which has been taken as the proportion payable

by Peters) with interest at 4 per cent. per annum from the 29th October 1892 the date of the deposit be deducted from the amount of the judgment given by the Queen's Bench. They will humbly advise Her Majesty accordingly and that subject thereto the Order appealed from be confirmed. In case the parties are unable to agree as to figures the case must be remitted to the Court of Queen's Bench.

With regard to costs it is of course impossible to do exact justice. The Respondents have succeeded entirely in the more important part of the appeal and in the larger number of the items brought into question. Their Lordships think that justice will be done if the Appellants pay to the Respondents three-fourth parts of their costs of this appeal and they so order accordingly and make no further order as to costs.