SIMON PETERS AND OTHERS.....APPELLANTS ; 1891

AND

THE QUEBEC HARBOUR COMMISSIONERS..... .... } RESPONDENTS.

*Feby. 25, 26, 27.
Mar. 2, 3.
*Nov. 17.

ON APPEAL AND CROSS-APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Contract—Engineer's certificate—Finality of—Bulk sum contract—Deductions—Engineer's powers of—Interest.

In a bulk sum contract for various works and materials, executed, performed and furnished on the Quebec Harbour Works, the contractors were allowed by the final certificate of the engineers a balance of $52,011. The contract contained the ordinary powers given in such contracts to the engineers to determine all points in dispute by their final certificate. The work was completed and accepted by the commissioners on the 11th October, 1882, but the certificate was only granted on the 4th February, 1886. In an action brought by the contractors (appellants) for $181,241 for alleged balance of contract price and extra work.

Held, 1st, that the certificate of the engineers was binding on the parties and could not be set aside as regards any matter coming within the jurisdiction of the engineers, but that the engineers had no right to deduct any sum from the bulk sum contract price on account of an alleged error in the calculation of the quantities of dredging to be done stated in the specifications and the quantities actually done, and therefore the certificate in this case should be corrected in that respect.

2. That interest could not be computed from an earlier date than from the date of the final certificate fixing the amount due to the contractors under the contract, viz., 4th February, 1886. Fournier J. dissenting.

Strong and Gwynne JJ. were of opinion that the certificate could have been reformed as regards an item for removal of sand erroneously paid for to other contractors by the commissioners and charged to the plaintiffs.

APPEAL AND CROSS APPEAL from a judgment of

*PRESENT :—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing a judgment of the Superior Court for Lower Canada (2).

In 1876 the Quebec Harbour Commissioners, having resolved on the construction of extensive works on their property, lands and foreshore, between the Ballast Wharf at the City of Quebec and the Gas Works at the mouth of the River St. Charles, caused specifications and bills of quantities of the proposed undertaking to be prepared by their engineers, Messrs. Kinipple & Morris, of Greenock, and advertised for tenders on the part of contractors for their execution.

On the original proposition, the contract works were to be briefly these :—The construction, the completion and maintenance of a wall and embankment, forming the North Quay of a proposed South Tidal Harbour, inclusive of an 80 foot entrance and bridge over the same; a wall and an embankment, forming the North Quay of the proposed South West Dock; the dredging out and the formation of a channel way parallel to both walls; cribwork at the end of the embankment next the Gas Works; cribwork and retaining wall adjoining the Ballast Wharf, and other works; and the offer of the party tendering "was to be in a lump sum, based upon the prices filled in against the various items of work in the bills of quantities."

The appellants' offer was accepted and the contract awarded to them. On the 2nd May, 1877, the formal agreement was executed and soon after the undertaking was begun. From time to time great changes were made in the nature of the works, additions and modifications being largely made, and additional dredging was called for. In December, 1881, the contract was completed and the works handed over to the commissioners who, on the 22nd of

(1) 16 Q. L. R. 129. (2) 15 Q. L. R. 277.

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that month by letter, asked for a final detailed statement showing the balance due the contractors, which was duly furnished. These accounts were submitted to the engineers, who in the judgment of the contractors were disqualified from personal interest from giving a fair decision, and objection was therefore taken to their acting, the contractors asserting that they would not be bound by the decision. Ultimately it was agreed that the respective claims of the parties should be referred to the Dominion Arbitrators, this course being sanctioned by an Order in Council of the Executive Government of Canada. The arbitrators heard the matter, and awarded the contractors $118,333.34, a sum considerably less than their demand, but in excess of the sum stated to be due by the engineers. This award was made in October, 1882. After keeping the parties in suspense for many months the commissioners repudiated the award on the ground that there was no submission, and that the reference did not fall under the statutory powers of the arbitrators. Negotiations for settlement went on for some time without success. Ultimately, after obtaining with some difficulty the consent of the commissioners, a final certificate showing a balance due of $52,011 was issued by the engineers on the 4th February, 1886, four years and two months after the contract was ended and the works handed over, but the contractors did not accept this balance and the present suit was brought.

In 1882 a new contract was entered into between the commissioners and the firm of Larkin, Connolly & Co., involving additional dredging and the construction of a cross wall, and during the years 1883 and 1884 these latter excavated and deposited on the embankment large quantities of material.

The alleged final certificate, together with the de-

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tailed statement upon which it is based, were filed in the case. The former reads thus:

"FINAL CERTIFICATE.

"We hereby certify that Messrs. Peters, Moore & "Wright are entitled to a final payment under their "contract of the sum of Fifty-two thousand and "Eleven dollars ($52,011).

"KINIPPLE & MORRIS."

By their action the contractors objected to this certificate on five grounds. They objected to two deductions, which they asserted were improperly made by the engineers—the first of $34,720 for "Clerical error and dredging under Tidal cribs;" and the second of $13,326, "for removal of sand left on Louise Embankment." And they claimed that in three particulars, sums that were fairly and honestly due to them were omitted by the engineers.

The commissioners met this demand by various pleas.

1. On the 20th October, 1886, they filed a confession of judgment for $52,011 with interest from the 4th February, 1886 (the sum awarded by the certificate), and costs of suit, and consented that judgment be entered up against them pursuant to such confession.

2. By temporary exception they alleged that the engineers should have been made parties to the suit.

3. By demurrer that fraud and collusion were insufficiently set out.

4. By perpetual exception alleging:—

That by the contract between the parties it was agreed that in the event of any difference of opinion between the engineers and the plaintiffs the decision of the engineers upon such dispute should be final.

The 48th clause of the contract provided that alterations, deductions and modifications of the works might be made by the engineers without rendering void the contract; that the value of such additions,

deductions, modifications and omissions, should be determined by the engineers according to the schedule of prices specified in the contract ; that if any work or material was ordered to which the schedule prices did not apply, the engineers should price out the additions or omissions and their decision as to such price should be binding ;

The 55th, 56th and 57th clauses of the contract provided that on the termination of the contract all the accounts relating thereto between the plaintiffs and the defendants must be submitted to and adjusted and settled by the engineers who thereupon should issue their certificate fixing the balance due to the contractors, which certificate should be conclusive and binding on both parties without any appeal ; that the contractors should not be entitled to demand and the commissioners should not be bound to pay any sum for work completed, extras or any other cause until a certificate had been granted that such sum is due ;

By the 67th clause all disputes connected with the contract in any way were left to the final decision of the engineers ;

That the works claimed for by the declaration, in so far as done at all, were done under the provisions of the contract ; that all the accounts relating thereto including all the claims now put forth were submitted to the engineers and adjusted by them and they thereupon issued the final certificate attached, which certificate is conclusive and final between the parties ; and the defendants tender a confession of judgment for the amount thereof with interest from the date of the certificate and costs of suit up to the filing of the confession;

That with the exception of the amount of the final certificate the plaintiffs were fully paid for all work, &c., done by them.

5. By a further plea they set up a penalty fixed by

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the contract for failure to deliver the works at the agreed time—an alleged delay of 56 weeks, amounting to $6,500; and damages $5,834, due from a supposed fault in the wall; and they prayed compensation for so much of these two sums as might turn out to be due as against the confession.

To these pleas the plaintiffs replied specially, that large extra works had been ordered and executed; that great modifications had been made; that there had been strikes during the pendency of the contract; that there had been remarkably high tides interfering with the progress of the work, and that for these reasons, under section 52 of the agreement, the penalty could not be claimed.

Upon these issues the parties went to proof and hearing and in the result the Superior Court at Quebec overruled in part the certificate of the engineers, the confession based upon it, and the special pleas of the defendants, and awarded the plaintiffs $91,809.72 with interest on $119,586.17, from the 11th October, 1882, to the 22nd September, 1883; on $113,009, from the 22nd September, 1883, to the 13th October, 1883; on $111,809, from the 13th October, 1883, to the 28th February, 1884; and on the sum of $91,809.72, from the 28th February, 1884, till paid, with costs and interest on the whole debt from the 11th October, 1882.

The Court of Queen's Bench for Lower Canada (appeal side) reversed the judgment of the Superior Court and awarded the appellants the amount of $56,418.71 with interest from the 11th October, 1882.

The principal questions which arose on this appeal were:—Have the engineers, properly or improperly, made the deductions of $34,472 and $13,326, as stated in the detailed schedule of their final certificate? Was the quantity of the concrete placed behind the

wall by the engineer's orders other and different from that stipulated; and if so, what loss did the change occasion to the contractors? Have the engineers allowed for the whole quantity of concrete actually placed; and if not, what is the amount and value of the portion not allowed for? And have the engineers pursued the contract in measuring by the ton of 2,240 lbs.?

From what date should interest be allowed the appellants on the amount to be awarded? Can the certificates of the engineers be reformed by the court?

Osler Q.C. and *Cook* Q.C. for appellants contended:

(1.) That the deduction of $34,472 for dredging is unjustifiable; that in fact there was no substantial error; that by the express clauses of the contract, and notably by clause 48, no deduction was to be made from the contract sum, except on a corresponding deduction from the work made on the written orders of the engineers—none such being made in the present instance; that no covenants in the contract empower the engineers to deal with errors in the specifications; that no reference in this respect was ever made to them by the parties, and that their action in dealing with the pretended error is wholly *ultra vires;* that under the circumstances their assuming to exercise powers not entrusted to them is a breach of duty amounting to fraud.

(2.) That the deduction of $13,326, now reduced by the Court of Queen's Bench to $8,918.50, for alleged levelling of sand is unjustifiable; that the proof shows that both in fact and to the knowledge of the engineers, no sand was left above grade, with the exception of a few yards at their request for concrete; that the time, manner, and circumstances of this deduction establish clearly its fraudulent nature, originating with the

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Commissioners and adopted by the engineers in the interest of the succeeding contractors, Murphy, Connolly & Co.

(3.) That the engineers having under their extensive powers, with a view to improve the permanent character of the works, compelled the contractors to substitute for the stipulated concrete behind the walls a concrete of a different nature, and unquestionably more expensive, in wholly refusing reasonable compensation for the change have violated both the letter and the spirit of the contract, and are guilty of a breach of duty, and that the contractors are entitled to additional remuneration at the rate of $1.50 per cubic yard.

(4.) That having increased the thickness of the concrete backing in rear of the stone the engineers, in violation of the agreement and of the special undertaking contained in the correspondence between the contractors and the resident engineer, wrongfully refused payment for 3,074 out of 16,079 cubic yards, thus injuring the contractors to the extent of $14,000.

(5.) That the engineers had violated the contract in computing the value of material to be furnished under the contract by the English ton of 2,240 lbs., in lieu of by the Canadian statutory ton of 2,000 lbs.

(6.) That the appellants are entitled to interest on the balance due (less 10 per cent) from December, 1881, the date of the entry of the commission into possession of the works, and upon the ten per cent withheld, from December, 1882.

(7.) That the proof of record establishes disqualification on the part of the engineers, and fraud and collusion between them and the commissioners.

(8.) That in these various respects the certificate should be reformed.

The learned counsel also relied on the points of argu-

ment and cases cited in the court below (1), and art. 283 C. C.; Pothier, Vente (2).

Irvine Q.C. and *G. Stuart* Q.C. for respondents, contended:

1st.—The plaintiffs had not made a beginning of proof of fraud or collusion on the part either of the commissioners or the engineers.

2nd.—The plaintiffs had not shown even error in law or in fact though the court would not be justified in going into either in default of fraud.

3rd.—That one partner having admitted in formal terms that this certificate is just and equitable and that he is satisfied therewith his declaration binds his partners.

4th.—That the plaintiff's pretensions with reference to the concrete both as to quality and quantity are so entirely without foundation as to cast a grave suspicion on the sincerity of the demand with reference to the other items.

5th.—The plaintiffs after adopting a standard for the calculation of stone and clayey material, using it throughout the works and finally sending in a statement of the money claimed in connection with this part of the contract, have no right to demand an additional sum exceeding $5,000 on the assumption that a new legal measure, which became law four days before the signing of the contract, was not used.

6th.—The plaintiffs could not complain of the rectification of a manifest error in the specification of the dredging, and at the same time adopt a rectification made in their favour of the quantity of concrete in the works.

7th.—The plaintiffs attempt to deny the error in the amount of dredging because of the non existence of the scale on the plan showing it when they know quite

(1) 16 Q. L. R. 144. (2) No. 283.

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well that any engineer can establish the scale without difficulty.

8th.—If the final certificate be set aside the only amount which the plaintiffs can recover is the $12,807.29.

9th.—The judgment awards interest from the year 1881, where interest under any circumstance was payable only from the date of the final certificate.

And in addition to the cases cited in the court below (1) relied on *Jones* v. *The Queen* (2); *McGreevy* v. *McCarron* (3); *McGreevy* v. *Boomer* (4); Troplong Vente (5); Larombière (6); Guyot Répertoire (7); Demolombe (8); Arts. 1070, 1077 C. C.

Sir W. J. RITCHIE C.J.—I think the certificate of 4th February, 1886, is not binding on the contractors as to what has been called a clerical error, which, in my opinion, was no error at all. The engineers acted beyond their duty or jurisdiction in respect to this, and in fact changed the contract, which was for a lump sum, by deducting $34,472 by, as they allege, a clerical error in the amount of dredging set out in the specification which they had no right to do, and which was not within the terms of the contract, the quantities specified therein being, in my opinion, final between the parties.

As to the sand, for the removal of which the defendants paid and now claim as a set-off, I have had very considerable doubt, but as this was a question of fact on which there was very considerable contradictory testimony I do not feel able to say that the conclusion arrived at was so clearly incorrect as to justify this

(1) 16 Q.L.R. p. 136 & seq.
(2) 7 Can., S.C.R. 570.
(3) Cassels's Dig. 79.
(4) Cassels's Dig. 73.
(5) Nos. 598 and 599.
(6) 1 Vol. p. 475.
(7) Vol. 3 Vo. Demeure p. 396.
(8) 24 Vol. p. 492.

court in reversing the conclusion arrived at by both the courts below on such a pure question of fact.

As to the difference claimed on the long and short tons, the Dominion Revised Statute ch. 104, sec. 15, declares that 2,000 lbs. shall be a ton, but it does not appear that the long ton was adopted. Boxes were used as standards by agreement between the parties and the determination of this question comes within the powers of the engineers.

I also think the item for cement or concrete was clearly by the contract to be determined by the engineers.

Then should interest be computed from the date of the termination of the contract, 11th October, 1882, the time fixed by the judgment of the Court of Queen's Bench, or, as the commissioners claim, from the 4th February, 1886? The plaintiffs claim that the work was completed and accepted on the 1st December 1881, and that they are entitled to interest from that date, but until the certificate the plaintiffs had no right of action and until the amount was established there was nothing on which interest could be computed.

The appeal and cross-appeal should be allowed with costs.

STRONG J.—For the reasons which I fully expressed during the long argument of this appeal I am of opinion that the judgment of the Court of Queen's Bench should not be interfered with as regards the item relating to concrete, and that the judgment of the court below should also stand as to the long and short ton, all objection to which I consider to be concluded by the certificate of the engineer.

Then as regards the clerical error, that is the error made by the engineer in calculating the number of yards of dredging as set out in the specifications, I am

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of opinion that this was a matter beyond the jurisdiction of the engineer under the contract to deal with. They had no power to make the allowances which they did and therefore the appeal to the extent of that amount should succeed.

As to the sand—I think it was within the jurisdiction of the engineers and they did assume to deal with it. But it is clearly established that they never exercised their own judgment in regard to this matter and therefore, in my opinion, the proper conclusion is that the certificate is not binding as to this item.

I believe the majority of the court are of opinion that the sand was left on the embankment by the appellants, and they were properly charged for its removal, and as both courts have found this as a matter of fact it is conclusive. In my opinion the evidence strongly establishes that, as contended for by the appellants, the sand was placed on the embankment not by the appellants but by other contractors. I arrive at this conclusion, not from the mere testimony of witnesses, but from all the surrounding circumstances which point to this as the true result. The amount charged for the removal of this sand should therefore, in my opinion, have been allowed, and the judgment ought therefore to be rectified in this respect.

The interest can only run from the date of the certicate under the terms of the contract, and therefore the cross-appeal upon this head should prevail.

The result is that the appeal should be allowed as regards two items, the clerical error and the sand, and the cross-appeal allowed as to the interest. The costs should be apportioned as proposed by my brother Patterson.

FOURNIER J.—Je concours dans le jugement qui va être prononcé en cette cause, excepté dans la partie

concernant les intérêts. Il est en preuve que les parties étant incapables de s'entendre sur le montant de la réclamation des appelants, consentirent à s'en rapporter à la décision des arbitres officiels du Canada. Le ministre des Travaux Publics ayant donné son consentement à cette référence, il fut passé le dix-neuf août 1882 un ordre en conseil à cet effet, et plus tard, le onze octobre de la même année, la majorité des arbitres après avoir entendu les parties et leurs témoins, décida que l'intimée devait payer aux appelants la somme de cent dix-huit mille trois cent trente-trois piastres et trente-quatre centins ($118,333,34.)

Bien que les appelants ne se soient pas prévalus de cette sentence, parce qu'ils en trouvaient le montant insuffisant, le consentement de l'intimée à cette procédure ne peut pas être considéré autrement que comme un abandon formel de sa part du droit stipulé dans le contrat du 2 mai 1877, de ne payer la balance du prix du contrat, qu'après la production du certificat final des ingénieurs, constatant la complète exécution des travaux. La balance due étant alors devenue exigible par l'appelant en conséquence de cette procédure qui a été une véritable mise en demeure et demande judiciaire les appelants ont alors acquis le droit aux intérêts sur ce qui leur était dû. Pour cette raison, je serais d'avis de condamner l'intimée, comme l'a fait la Cour Supérieur, au paiement des intérêts à dater du onze octobre 1882.

Une autre raison de la condamner à payer les intérêts, c'est que la propriété dont il s'agit étant de nature à produire des fruits et revenus, l'intimée en a pris possession en 1881. Par ce fait elle s'est soumise au paiement des intérêts qui, dans ce cas courent de plein droit et sans qu'il soit besoin d'aucune mise en demeure, en vertu de l'art. 1534 du code civil.

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Taschereau J.

TASCHEREAU J.—I agree with what has been said in the reasons given for the dismissal of the appeal on all the items except the one known as the clerical error. It is the only amount which should be added to the judgment of the Court of Queen's Bench. The costs of the *enquête* before the Superior Court are very heavy and we must therefore make a distinction, and I agree with the result arrived at by my Brother Patterson.

GWYNNE J.—I agree with my Brother Strong on the two items he thought should be allowed.

The item of sand was deducted not only because it was a matter of compulsion by letter addressed to them by the commissioners but also upon the fact that the work had been accepted and taken over long before the subsequent contractor removed any sand. However, the majority of the court are of opinion that only one item should be added.

PATTERSON J.—The engineer's certificate dated the fourth of February, 1886, must in my judgment be regarded as the final certificate under the contract. It may, however, be properly read in connection with the details afterwards furnished showing how the amount of $52,011.21 (the odd cents were omitted in the certificate) was arrived at, so that without questioning the decision of the engineers upon the matters respecting which they were authorised to certify any matters outside of their jurisdiction may be eliminated. One of these is what they call a clerical error, being a part of the amount estimated by them in the specifications as the number of cubic yards to be dredged. They deduct $31,050 from the contractors' earnings on the ground that the actual dredging fell short of the estimate by the number of yards which at 25 cents a yard made up that sum. But the contract was for a lump sum, the

price per yard being named for the purpose of progress certificates, or for computing the price to be paid or allowed for additions to or deductions from the specified work, if such additions or deductions had been made in manner provided by the contract. No such additions or deductions were made in this instance.

The contractors contend that there was not in fact a smaller number of yards of dredging than the number assumed by the specifications. It is clear, however, that the dredging, whether more or less than the assumed amount, was included in the gross contract and that the deduction varies the contract, which the engineers had no power to do. The term "clerical errors" which is the euphemism under which they cover the supposed mistake in their preliminary calculations, which was seemingly no mistake after all, is not properly applied to the item.

Another deduction is of $13,326 for removal of sand said to have been left by the contractors on the embankment. We have here again a serious dispute on the question of fact, but a glance at the contract and at one or two undisputed facts makes it clear that the deduction was beyond the powers of the engineers. The contract works were completed by the contractors and handed over to the Harbour Commissioners in the autumn of 1881. A new contract was given to other contractors who continued dredging during the summers of 1883, 1884 and 1885, depositing sand on the embankment in question. In the winter of 1885 the new contractors were required to level the sand on the embankment and they did so, but they allege that a portion which, at 25 cents a cubic yard, made the amount of $13,320 had been left there by the plaintiff. The duty of the engineers with regard to the plaintiff, and their functions under the contract, are plainly provided for:

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"The contractor, on the completion of the works, shall give notice to the engineers in writing, and the engineers shall forthwith examine the whole of the works.....in the event of the works not being completed to the satisfaction of the engineers, they shall give notice to the contractor in writing to remedy such defects."—(Sec. 65. See also sec. 68.)

No such action was taken by the engineers, and it was at the instance and by the direction of the commissioners that the sum of $13,320 was charged to the plaintiff by the engineers who themselves knew nothing of the matter.

That proceeding was not authorised by the contract and was not binding on the plaintiff. It has, however, been found as a fact that the commissioners actually paid the other contractors $8,918\frac{50}{100}$ for work which the plaintiff ought to have done in removing or levelling sand, and they are entitled to set off that amount by way of compensation against the plaintiff's claim. Therefore we add to the nominal balance of $52,-011\frac{21}{100}$, the full $31,050 for the so-called clerical error, and in respect of the sand we add the difference between $13,326 and $8,918\frac{50}{100}$, or $4,407\frac{50}{100}$, making the whole claim of the plaintiff $87,468\frac{71}{100}$, which is the same amount adjudged by the Court of Queen's Bench plus the clerical error.

There are other items attacked by the appellants as improperly found against them by the engineers. Two of these relate to concrete, one referring to the quality and one to the quantity. Another item is the weight of stone which the appellants complain was computed at 2,240 lbs. to the ton in place of 2,000. These complaints were the subjects of much evidence and much argument, but they came within the scope of the duty of the engineers and we cannot put ourselves in their place.

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I do not see any tenable ground for allowing interest to the plaintiffs from any date earlier than that of the certificate, viz., the 4th of February, 1886. It is apparently a hardship on the plaintiffs that it cannot be computed four years farther back, but under the contract, clause 57, the money was payable only upon the engineer's certificate, and, in the absence of an agreement to pay interest it cannot be claimed until the debtor is in default.

We cannot undertake to say who was to blame for the long delay in procuring the certificate. The enquiry would be irrelevant, because even if the delay were occasioned by any contrivance or act of the commissioners of which the plaintiffs could complain their remedy would be by way of damages for the wrong, and not as interest upon a debt which by the terms of their contract was not yet payable.

The appeal and cross-appeal both succeed and should be allowed with costs. The plaintiff has failed on some items the investigation of which in the court below must have involved a good deal of expense on both sides. It would therefore seem just that each party should bear his costs of *enquête*. In other respects the plaintiffs should have the general costs of the action, including the costs of the appeal to the Queen's Bench, but should pay the costs of the cross-appeal to that court. The costs of appeal to this court allowed to the plaintiffs are not to include any costs of printing the *enquête*.

Appeal and cross-appeal allowed with costs.

Solicitors for appellants: *W. & A. H. Cook.*

Solicitors for respondents: *Caron, Pentland & Stuart.*