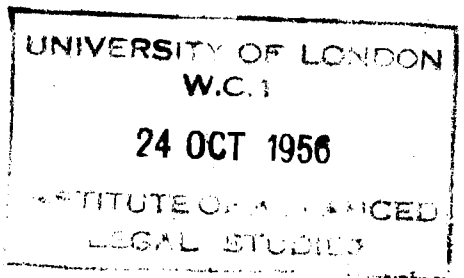


In the Privy Council.

No. 90 of 1897.



ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

BETWEEN

EDWARD MOORE AND AUGUSTUS R. WRIGHT
(Defendants) Appellants,

SIMON PETERS AND
Plaintiff (deceased),

AND

ELIZA JANE LAMOUREUX, HENRY JOSEPH
PETERS, ALBERT HYACINTH PETERS,
JOSEPH BERNARD PETERS, AND MARTIAL
CHEVALIER

(Plaintiffs in continuance of suit) Respondents.

RESPONDENTS' CASE.

1. This is an appeal from a judgment of the Court of Queen's Bench for the Province of Quebec (Appeal side) confirming, in part, a judgment of the Superior Court of the said Province, and awarding the Respondents a sum of \$27,667.73, with interest at four per cent. from the 29th of October 1892. R., pp. 725-728

2. The Quebec Harbour Commissioners having decided to carry out certain improvements in the said harbour, had plans and specifications of the proposed works, and Bills of quantities of the same (bill of works or blue book) prepared. R., pp. 24-64 R., pp. 64-99

3. These preparations being completed, the Harbour Commissioners invited tenders for the execution of the works. Tenderers were required to tender for a bulk sum, but, at the same time, to give the detailed prices put by them on each kind of work, on which prices their bulk sum tender was based. R., p. 27, 1.02

4. Mr. Simon Peters, having put in the lowest tender, was awarded the contract; but he was authorized by the Harbour Commissioners to associate with R., p. 20

RESPONDENTS' CASE.

- R., p. 4, l. 41 himself the present Appellants for the execution of his contract, and he did so on the terms hereinafter mentioned in consideration of the sum of \$5,000 which the Appellants undertook to pay him.
- R., pp. 14-24 5. By a deed passed before Angers, Notary, on the 2nd May 1877, the Harbour Commissioners entered into the contract with Peters and the Appellants jointly for a bulk price of \$529,296.31. That price was to be paid by instalments according to the progress of the works, on certificates to be given by the Resident Engineer representing the Engineers in chief in charge of the works, Messrs. Kinipple & Morris of London England. These certificates of the Resident Engineer were to be based on the scale of the detailed prices, sent in as aforesaid. 10
- R., p. 18, l. 26 From each certificate there was to be a drawback of 10 per cent., which was to be paid only after the completion of the works, when a final certificate showing the balance due the contractors was to be given by the Engineers in chief (hereinafter called the Engineers).
- R., pp. 33-34 The Harbour Commissioners were at liberty to make any alterations they chose in the works, the price being increased or decreased on account of such alterations according to the scale of prices aforesaid. A crib-wharf was to be built to support the embankment inside of the basin, but the Harbour Commissioners were to be at liberty to substitute for the superstructure of wood backed by fine concrete a stone wall, in which case the contractors were as hereinafter 20 explained to be entitled to an extra sum of \$18,393.58.
- R., p. 35, l. 16 6. On the 4th day of May 1877, Peters and the Appellants in pursuance of their understanding entered into a contract with each other before Strang, Notary, by which it was declared and agreed that, although the contractors were held as partners in their relations with the Harbour Commissioners, they were not to be considered as partners in their relations with each other. Peters was to do all the wood and iron work and the pitching of a slope of the Northern embankment, and the Appellants were to do all the other works, which works consisted of dredging and concreting. In case a stone wall was substituted for the superstructure of the crib wharf, it was to be built by Peters. Each party was to get what was 30 paid by the Harbour Commissioners for or in respect of the works executed by such party.
- R., p. 32, l. 1, et seq. 7. Immediately after the signing of these contracts, the contractors began work, and they completed their enterprise in the autumn of 1881.
- R., p. 16, l. 46, et seq. 8. During the course of the works the Harbour Commissioners made great alterations in the plans and specifications; and amongst them, in pursuance of the special provisions in that behalf, a stone wall was substituted for the superstructure of wood backed by fine concrete provided for in the contract.
- R., p. 17, l. 10 9. Many payments were made during the execution of the works on progress estimates. In such cases the general mode of payment was as follows: one 40 cheque was made for the works executed by Peters, and another for those executed by the Appellants. Both cheques were to the order of the contractors jointly, who endorsed each of them in favour of the contractor who was entitled to the money represented by it.
- R., p. 2, l. 40, et seq. 10. Five years after the completion of the works, a final certificate was given by the Engineers. That certificate dated the 4th of February 1886, gave no details of the works covered by the contract, giving only details of the extra works. It fixed the sum of \$52,011.21 as the balance due to the contractors.

11. The contractors refused to abide by it, alleging that it was incorrect, and they brought an action against the Harbour Commissioners for the balance which they alleged to be due to them. By a judgment of the Supreme Court of Canada, this contention was maintained and it was adjudged that the real balance was \$87,468.71, with interest from the 4th of February 1886, which the Commissioners were ordered to pay the contractors.

R., pp. 100-101

12. The contractors, not having been able to come to an understanding between themselves as to the division of that money, agreed to deposit it in the Union Bank of Canada. They deposited the sum of \$68,972.00, being the amount due in respect of the said balance after deduction of certain sums paid on account since the commencement of the action. It was stipulated that the money was to be paid by the Bank only on cheques signed by both parties.

R., p. 11, l. 15, *et seq.*

13. No agreement as to the division of that money having been arrived at by the Contractors, Peters brought against the Appellants, on the 16th of October 1893, the action which has resulted in the present Appeal.

R., p. 1, *et seq.*

14. Peters' action was practically and in substance an action of account, by which he asked that the Appellants should be ordered to give an account of all the works executed by them, and of the moneys received by them on account of such works. With his action he filed his own account, showing that he was entitled to the sum of \$38,532.55 out of the money deposited in the Bank. He asked that the Appellants should be ordered to sign a cheque in his favour for that sum, and that, in default of their so doing the Bank, which was made a party to the action, should be ordered to pay it to him.

R., pp. 101-119

15. The Appellants pleaded the general issue and an exception. By this exception the Appellants, after citing the contract of the 4th of May, alleged that a final certificate which, with the exception of some deductions on the dredging work, had been declared by the Supreme Court to be binding between the Harbour Commissioners and the parties, had been issued by the Engineers under the contract, that the certificate in question was the law between the parties, and should be treated as the only basis of the division of the money in question and that the Appellants were entitled to all the moneys save such as Peters should show himself entitled to. The plea further alleged that, under that certificate, Peters was not entitled to any portion of the money, but had actually received more than he was entitled to.

R., pp. 120-127

The plea admitted a large number of the items of Peters' account but disputed the remainder. It invoked prescription as to several items of Peters' account, and compensation by a contra-account due to the Appellants.

16. To that exception Peters made a special answer which says in substance: it is not true that the Appellants are entitled to every sum of money paid by the Harbour Commissioners which Peters does not prove to belong to him. Under the contract of the 4th of May each party is entitled to the price paid by the Commissioners for work executed by him and to no more. Taking into account the Bill of Works and the Schedule of prices, if no alterations had been made in the contract by the Harbour Commissioners, the Appellants would have been entitled to \$383,868.00 and Peters to \$145,868.76. But that state of affairs was changed by the great alterations made by the Harbour Commissioners; the stone wall, if substituted, as it was, for the superstructure, was to give the contractors a

R., pp. 162-172

R., p. 121, l. 15

R., p. 193

- right to an extra payment of \$18,393.58, plus $2\frac{3}{4}$ cents per foot for rough Boucharding; the building of that stone wall was estimated by the contractors themselves to cost \$77,378.40, and to do away with fine concreting to the amount of \$27,531.25. From the manner in which the contractors were paid by the Harbour Commissioners and the bargain between the parties the progress estimates were of special importance in the decision of the question. These progress estimates show that at the close of the working season of 1880, in respect of the stone wall, which was entirely constructed by Peters, he was entitled already to \$52,824.57; and by the synopsis of accounts by the Resident Engineer brought down to the close of the working season of 1881, it appears 10 that the stone wall had cost, then, \$82,834.00; and that amount is what Peters should in truth have been paid. The final certificate of the Engineers did not determine the share of each in the sum covered by it. The Appellants' exhibit No. 1A. made by Kinipple & Jaffrey purporting to give the details of the final certificate is a false document made by parties who did not know what work had been executed by each contractor; in contradiction to the progress estimates; and not binding on the parties.
- R., pp. 177-190
R., pp. 535-561
R., p. 575
R., p. 237, l. 30, *et seq.*
R., pp. 232-234
17. To that special answer the Appellants filed a Special Replication, in which they alleged that, if they did not execute the fine concrete which had been contemplated by the contract before the stone wall was substituted for the Crib- 20 Wharf, they did execute coarse concrete to a greater amount: As to the progress estimates it says that they were not binding either between the Harbour Commissioners and the contractors, or between the contractors themselves, and the final certificate alone is of any value to determine the rights of the parties. It further says that the engineer had full power to alter the works and determine what should be paid, and that, as the contractors are only entitled to the price of works certified by the Engineers, their certificate is the only basis of the division between the contractors of the moneys payable for the works thus certified.
- R., pp. 261-472
R., pp. 242-260
18. On the issues thus joined much evidence was taken. Mr. Kinipple, the only survivor of the firm of Kinipple & Morris, who had been the Engineers, 30 being in London, was examined under a Commission, but it appeared that Morris had really done the business, of which Kinipple had practically no knowledge.
19. Peters having died before the trial of the Case, the suit was continued by the Respondents, his legal representatives.
- R., pp. 649-652
R., p. 652-657
20. The trial took place before Mr. Justice Routhier, and, on the 30th of June 1896, he delivered judgment awarding the Respondents one half of the amount deposited in the Union Bank. The ground of his judgment was that, as the evidence did not in his opinion sufficiently disclose what share each party was entitled to, each should have one half under section 1848 of the Civil Code, which provides that when the shares of partners are not fixed by the contract, 40 they must be held to be equal.
- R., p. 725, *et seq.*
21. An Appeal was taken from that judgment by the Appellants to the Court of Queen's Bench for the Province of Quebec. That Court did not adopt the view taken by Mr. Justice Routhier, but finding sufficient evidence to establish the share of each party fixed at \$27,667.73 the amount coming to the Respondents. Hence the present Appeal.

22. The Respondents maintain that the judgment of the said Court of Queen's Bench is correct, and should be sustained. They have proved all the items of their account which have been allowed by the judgment in question; and the Appellants have not proved their contra account; and, further, that demand is extinguished by prescription.

23. The only item of the Respondents' account, allowed by the Court of Queen's Bench, which requires any serious consideration is that of \$77,378.50 for the stone wall. Not only are the others, in almost every instance, admitted, but the Appellants have in respect of several items credited the Respondents with
 10 much more than they claim. The explanation of that fact is this: the Appellants rely entirely on the certificate given by Kinipple and Jaffrey, which cannot be maintained, purporting to give the details of the bulk sum of \$529,296.31, in the final certificate of the 4th February 1886. That certificate however is founded exclusively on the original contract, and gives the details of the works as contemplated, not as actually executed, and was not given on knowledge of the facts, or by those entitled to certify and is of no weight as has been adjudged in both Courts below. Now, as large quantities of the contemplated works were dispensed with by the alterations which took place during the execution of the contract, that certificate gives, on some points, to the Respondents much more than they claim
 20 to be entitled to. But, as the stone wall, if substituted as it was for the said superstructure, was to be paid in great part out of works dispensed with by its construction but still allowed for, that certificate allows only for such construction the extra amount of \$21,940.61.

R., p. 650, l. 40, & p. 653, l. 36, *et seq.*
 R., p. 730, l. 35, *et seq.*

24. The respective contentions of the parties, as to the stone wall, are as follows: the Appellants say that all that the Respondents should get for it is that extra sum of \$21,940.61 plus \$27,907.06, being the value of the wood and iron work which it replaced or in all \$49,847.67 and no more, and that the Appellants should obtain the \$27,531.25, the estimated price for the fine concreting dispensed with on the substitution of the stone wall, although the
 30 extra allowance for the stone wall was reduced by that amount.

The Respondents say that when the price was fixed for the stone wall it was calculated thus: Cubic feet $128,964^2$ at $57\frac{1}{4}c.$ \$73,831.89, being the price to be received by Peters apart from the addition for rough Boucharding. Of which price he was to receive \$27,907.06 being the cost of the wood and iron dispensed with, and \$27,531.25 being the cost of the fine concreting dispensed with, in all \$55,438.31; leaving as the extra cost \$18,393.58, the amount named in the supplementary contract, to which should be added \$3,546.51 for the rough Boucharding. It is thus plain that it was Peters and not the Appellants, who was to receive the price allowed for the fine concrete.

R., p. 197

40 25. The Respondents submit that the judgment of the Court of Queen's Bench was right and should be affirmed for the following, among other

REASONS.

1. Because, between the Harbour Commissioners and the contractors, the price of the work dispensed with for which other or additional work was substituted was to be applied towards the cost of the other work, the stipulated excess of cost being paid in addition.
2. Because the price of the stone wall with rough Boucharding was \$77,378.40 which was to be paid out of the deductions above mentioned in respect of the works it replaced, with an extra of \$21,940.61.
3. Because the progress estimates, and the payments made¹⁰ under them, constitute between the parties to this suit the best basis of the division between them of the moneys payable by the Harbour Commissioners.
4. Because the proof adduced in the case, and the documents filed by the Respondents, show that the parties have admitted and agreed that \$77,378.40 was to be paid to Peters for the construction of the stone wall.
5. Because the facts proved at the trial show that the Respondents have a good cause of action against the Appellants for the amount awarded by the Court of Queen's²⁰ Bench.
6. Because the reasons of Lacoste C.J. which are those of the whole Court of Queen's Bench are correct.

EDWARD BLAKE.

F. LANGELIER.

In the Privy Council.

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for the Province of Quebec (Appeal Side)*

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EDWARD MOORE & AUGUSTUS
WRIGHT . . . (*Defendants*) *Appellants*

AND

SIMON PETERS . . . (*Plaintiff*), *deceased*,

AND

ELIZA JANE LAMOUREUX, *et. al.*
(*Plaintiffs in continuance of suit*), *Respondents*

RESPONDENTS' CASE.

S. V. BLAKE,
17, Victoria Street, S.W