Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of the St. Andrews and Quebec Railway Company and others v. *Brookfield and another, from the Supreme Court of New Brunswick; delivered December* 20, 1860.

Present:

LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JOHN T. COLERIDGE.

THIS is an appeal from a Decree of the Supreme Court of New Brunswick affirming a Decree of the Master of the Rolls of that province in a suit instituted by the Respondents against the Appellants, for the purpose of obtaining an account, and also a specific performance of a contract entered into for the construction of about seventy miles of the St. Andrews and Quebec Railroad.

The Respondents and James Sykes, since deceased, at the time of the contract were contractors for the construction of railways and other public works, carrying on business in England under the firm of James Sykes and Co.

Before entering into the contract in question, Brookfield, one of the Respondents, visited New Brunswick, and went over the line.

The articles of contract (as the deed is called) are dated on the 29th April, 1852, and are made between James Sykes and the Respondents, of the first part, the St. Andrews and Quebec Railway Company, of the second part, and the Class A shareholders of the St. Andrews and Quebec Railroad Company, of the third part (the parties of the third part called the English Company having an interest in the railroad

to the extent of a moiety). This contract, which is under the seals of the respective parties, recites that the Railroad Company had made about ten miles of the railroad, commencing at St. Andrews and ending at Bartlett Mills, and contains a covenant on the part of the contractors to construct and finish, within three years after the date of the contract, such part of the railroad as was not then made, so that the same should form one continuous line of railroad from St. Andrews to Woodstock, both in the province of New Brunswick, and that the works should be executed under the superintendence of the engineer, and to his reasonable satisfaction in all respects.

The articles of the contract 12 to 15 contain important stipulations for putting an end to the contract, in case the contractors should fail to use proper expedition in carrying on the works in the following terms:—

"12. If the Contractors at the expiration of three calendar months from the day of the date hereof, or at any time thereafter, fail to proceed with the works so as in the opinion of the engineer to insure the completion thereof within the three years, then and in every such case the engineer may by notice in writing under his hand require the Contractors to prosecute the works with greater despatch, and in case any additional means required by any such notice be not taken and adopted by the Contractors within fourteen days after the delivery thereof the Railroad Company or the English Company may take possession of the land and works, or any part thereof, and proceed with the execution of the works, and upon any such entry this contract shall (subject to its revival under Article 13) thereupon cease to have any effect except for the purpose of such revival.

"13. Provided always, that the Contractors, at any time within six calendar months after any such entry, may resume the execution of the works and the possession of the land requisite for that purpose, on giving to the company which made the entry one calendar month's notice in writing of their intention so to do, and on payment to that Company of all sums properly expended by them in and about the works, and the taking of such possession, with interest after the rate of six pounds per centum per annum on all such sums from the respective times of the payment to the time of the repayment thereof, and thereupon this contract shall revive and be in full force.

"14. Entries and re-entries under Articles 12 and 13 may be made as often as occasion requires.

"15. Provided always, that any entry under Article 12 shall not be made while any payment to the Contractors to be made under this contract is due and in arrear."

Then follow provisions as to the amount to be paid under the contract and the mode of payment

(Articles 16, 17, 18, 19, 23, and 24); stipulations with respect to extras (Articles 25, 29); and as to certificates to be given by the engineer (Articles 27 and 28).

There are two schedules to the contract, the first containing a specification of the works to be done, and referring to the second schedule in a passage which has occasioned considerable difficulty.

It is in these terms:—

"The average amount of the whole earthwork is estimated to be 12,500 cubic yards of earth and 1000 yards of rock per mile. Where the average amount of material per mile exceeds this amount it will be paid for according to a schedule annexed to the contract. And where the quantity of material per mile is reduced below this average a corresponding reduction shall be made."

The second schedule, to which reference is thus made, is preceded by a statement of the assumed quantities of the different kinds of work to be done, and of the materials to be supplied for each mile at 2,300*l.* sterling, which, for 70 miles, would amount to 161,000*l.*, the contract price, and which is described as "Quantities on which the tender for one mile of the above railway is based, and all additions to, or deductions from, to be made according to the annexed schedule;" and the second schedule consists of columns of amounts to be added or deducted respectively, as the work might exceed or fall short of the quantities thus assumed per mile.

Contemporaneously with this contract, a deed of arrangement provided for by the 23rd Article was entered into between the parties, by which it was covenanted and agreed that the English Company should stand and be seised and possessed of the moiety of the Crown lands belonging to them upon trust to secure the payment of the sum of 31,000*l.* on the day of the expiration of seven years next after the day on which the railroad should be completed, and interest by half-yearly payments in every year. And with respect to the sum of 10,000*l.* that the contractors might require, that the Crown lands conveyed to the Railroad Company, or the English Company, or any part thereof not exceeding 10,000 acres, should be conveyed absolutely to them for their absolute use and benefit, and the contractors agree to accept the 10,000 acres in satisfaction of the 10,000*l.*, and so in proportion, after the rate of one acre for 1*l.* as regarded any quantity less than 10,000 acres.

The recital in the contract that the Railroad Company had made about ten miles of the railroad commencing at Saint Andrews, and extending to a point at or near Bartlett's Mills, was not correct, as that portion of the railroad was at the time in an unfinished state. But the contractors, with full knowledge of the real state of things, entered into an agreement on the 15th of June, 1852, to complete and finish this portion of the road. The Respondents, indeed, complain in their Bill that by reason of their being obliged to undertake and complete the first ten miles of the railroad from St. Andrews, they were obliged to expend their means, labour, and time in the first instance in completing the unfinished work on and along the said ten miles, and were thereby greatly retarded in executing the works contracted for in regard to the seventy miles of railroad to be constructed in continuation of the said ten miles. But they were obliged only by their own voluntary agreement, and must have known when they undertook this work that it would necessarily divert some portion of their force from the seventy miles' contract, and they cannot properly found any complaint against the Company on this ground.

The contractors commenced their work upon the seventy miles not very long after the execution of the contract, for the first monthly certificate is dated July 30, 1852. From this time the certificates appear to have followed each other in regular monthly succession down to the 30th April, 1854. In all of them the deduction of 25 per cent. was made, according to the terms of the contract, but they were based upon a mode of estimating the work which the contractors contend does not accord with the proper construction of the contract.

It appears that the contractors worked over a great number of different miles at one time, so that no one mile was completely finished during any month in which the work was going on. The certificates given by Light, the Company's Engineer, were not of work done during the month, and of the value and amount according to the contract price; but, acting upon his interpretation of the effect of the 1st and 2nd Schedules annexed to the contract, he ascertained the amounts due to the contractors upon an average obtained by taking into

account the month's actual work with that which had been previously done, and adjusting the sum to be paid upon the footing of this average.

Their Lordships are of opinion that the engineer's mode of estimating and certifying the monthly payments to be made to the contractors is incorrect. By the 17th Article of the contract, the engineer is to give "a certificate of the work done during the month and not previously certified for, and of the value or amount according to the contract price of such work;" and the certificates given by the engineer were not upon the footing of the contract price of the work actually done during the month, which is the form distinctly prescribed by this Article. What then, it may be asked, is to be done with the clause in the schedule respecting the average? It is difficult to reconcile the contract and the schedule with each other with reference to these certificates. If, during the progress of the work, the average had been taken upon each mile, the certificates being framed upon the footing of the contract price of 2,300*l.* a-mile on the assumption of certain quantities, and containing additions or deductions as the actual work exceeded or fell short of the assumed quantities, they might perhaps have more nearly approached to what was required by the contract: but then it is to be observed that these additions or deductions are not the subject of a distinct certificate, as the extras were to be under the 25th and 29th Articles of the contract; and that these additions and deductions were to be made, not according to the contract prices on which the certificates were to proceed, but according to the scheduled prices, which varied from the contract prices.

In the way in which the work was carried on—probably in the way in which railway work is usually carried on—by employing the workmen upon different parts of the line at once, this stipulation for additions or deductions per mile was hardly, if at all, practicable as the work proceeded; but that is no reason why, upon the completion of the entire work or the determination of the contract, the adjustment should not take place; and, undoubtedly, if it were postponed to the period when the whole work was done, it would be easier to obtain that which is required, namely, the average amount of the whole

earth-work, estimated at 12,500 cubic yards of earth and 1,000 yards of rock per mile.

Upon the whole, therefore, their Lordships think that, according to the true intent and meaning of this contract, the additions and deductions were not to be regarded for the purposes of these certificates, but were to be brought into account at the termination of the contract.

In the month of May 1854, the contractors were remiss in their work from causes which it is unnecessary to consider, and the Company under the 12th Article of the Contract, required them to employ an additional force of 1,000 men and 75 horses. It is alleged that this notice was not given *bonâ fide* for the purpose of insuring the completion of the work, but as Light, the engineer, admits, to put an end to the contract. It seems, however, to be clear upon the evidence that it was not possible for the contractors at this time to have finished the work within the prescribed period of three years.

What was required to be done was a reasonable demand, and one capable of being complied with (though not by the contractors with the means which they possessed); it is, therefore, quite immaterial to consider the motive by which the Company were actuated. The state of their own funds has no proper bearing upon their conduct. They were entitled, at all events, to clear the ground of persons who were unable to perform their contract, so as to open the way to others who might be willing and able to undertake the work. The notice of May 1854, and the entry consequent upon the failure to comply with the requisition it contains, appear clearly to have been abandoned; for it seems hardly possible to contend that the Company had taken the work into their own hands, and that the written orders which were given by Light to the Respondents, were given to them, not as the contractors, but as the servants of the Company. And it may fairly be asked if the entry in May was effective, and not subsequently waived, what necessity could there be for the fresh notice in October 1854, which, followed up as it was by the entry in November, clearly determined the contract at that period. The question as to the time at which the entry was made so as to put an end to the contract.

is only important with the view of ascertaining the period to which, if an account is to be directed, it ought to be taken.

The Appellants say that the Decree directing an account is altogether erroneous, as the remedy of the Respondents is at law and not in equity. It appears, however, that during the progress of the work, the 25 per cent. had been deducted from the monthly certificates, and retained by the Company.

These certificates showed, according to the 28th Article of the Contract, how much of the 25 per cent. so retained was applicable to the 31,000*l.*, and how much to the 10,000*l.* mentioned in the contract.

Upon the determination of the contract, without entering minutely into particulars, it is admitted that after giving credit for the 7,500*l.* advanced by the Company, there was still a balance in their hands, arising out of the contract. But a portion of this must be attributed to the 31,000*l.*, and the remainder to the 10,000*l.*, and the contractors, whether they are or are not entitled to have security for the portion which is attributable to the 31,000*l.*, or to any interest upon that portion (points on which their Lordships give no opinion, as they were not argued, and may properly be reserved for further directions), seem at least to be entitled, under the deed of arrangement, to have land conveyed to them in satisfaction of such portion of the 10,000*l.* as may be due to them.

This, in itself, would be sufficient to give a Court of Equity jurisdiction, and when once this ground is obtained, the right to direct an account, and to deal with the suit, follow of course. Their Lordships, therefore, think that the Respondents were entitled to maintain their suit in Equity, and to a Decree for an account; but they think the Decree is erroneous as to the plant and materials, and that it does not contain sufficient directions as to the mode in which the account is to be taken, and as to other matters which may be necessary to be ascertained, to enable the Court ultimately to adjust the rights of the parties. The contractors having failed in performing the contract, their Lordships think that there should be an inquiry as to any loss or damage arising from the non-performance of it.

They, therefore, will recommend to Her Majesty that the Decree be varied, and the case remitted to the Supreme Court of New Brunswick, with directions to carry it into effect as varied.

The form of Decree which their Lordships will recommend is as follows :—

"Declare that, according to the true intent and meaning of the Articles of Agreement of the 29th April, 1852, in the pleadings mentioned, the Defendants, the St. Andrews and Quebec Railroad Company, were well entitled to determine the said Articles of Agreement by the notice given by them on the 14th day of October, 1854, and that the said Articles of Agreement were well and effectually determined by the entry of the Company on the 15th November, 1854, consequent upon such notice.

"And declare that, according to the true intent and meaning of the said Articles, and of the Deed of Arrangement of even date, the Engineer of the said Company was bound to have certified monthly the work done during that month, not previously certified, and the value or amount of such work, according to the contract price, without regard being had for that purpose to the provisions contained in the specification appended to the said Articles.

"Let an account be taken of the work done by Plaintiffs under the said Articles of Agreement, and of what became payable to the said Plaintiffs in respect of such work ; and in taking such account regard is to be had to the provisions contained in the specification appended to the said Articles ; and the said Plaintiffs are to be allowed or charged on account, for the excess or deficiency per mile of the matters and articles mentioned in such provisions in respect of which additions or deductions are to be made.

"And it appearing that the amounts certified by the Engineer in his monthly certificates were not calculated in the manner in which, according to the declaration aforesaid, the same ought to have been calculated ;

"Let an inquiry be made what, having regard to the declaration aforesaid, ought to have been certified to be due to the said Plaintiff at the end of each month, from the inception of the said works until the termination of the said Agreement, and how

much of what ought to have been certified in each month was attributable to the 31,000*l.*, and how much to the 10,000*l.* in the said Articles mentioned.

"And without prejudice to any question let interest at the rate of 4 per cent. per annum be computed from the date of each certificate on what it shall be found was properly attributable to the said sum of 31,000*l.*

"Let an account be taken of all sums of money received by Plaintiffs and Sykes, or any of them, or by any person or persons by them, or any or either of them ordered, or for their or any or either of their use, for or in respect of the said works.

"Let inquiry be made whether Defendants have sustained any and what loss or damage by reason of the non-performance by the said Plaintiffs of the said Agreement.

"Let an inquiry also be made what grants of land have been made to the Railroad Company or to the English Company, and when the same were respectively made.

"Let the Decree be without prejudice to any question as to the right (if any) of the Plaintiffs to any payment in respect of the said sum of 31,000*l.*, or any interest thereon."

Their Lordships will also direct that there be no costs of the appeal.