Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Forman and Company Proprietary, Limited, v. *The Ship "Liddesdale," from the Supreme Court of Victoria; delivered 17th February* 1900.

Present at the Hearing:

LORD HOBHOUSE.
LORD DAVEY.
LORD ROBERTSON.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

This suit is in form a proceeding in the Vice Admiralty Court to make the ship *Liddesdale* answerable for the cost of repairs executed upon her. In substance it does not differ from other litigations between one who has done work on a chattel, and the owner of the chattel who denies his liability to pay for it. The Plaintiffs, now Appellants, are a Joint Stock Company, who carry on the business of building and repairing ships at Melbourne. The *Liddesdale*, the nominal Defendant and Respondent, is a British steamer built of steel. The real Defendant, her owner, is Mr. Robert Mackill surviving partner of a firm of merchants carrying on business in Glasgow. Her master was Captain Alexander Clark.

In the month of October 1896 the ship ran aground off the coast of West Australia, but she was got off, and continued her voyage to several West Australian ports. Having then discharged

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her cargo, she made for Sydney to get a fresh one, but on the way put into the harbour of Melbourne, which she reached on the 25th of November. When there she was examined by the Marine Board of Victoria who detained her and required that the damage done to the structure of the vessel by its stranding should be repaired before she could be allowed to depart. That led to a correspondence by cable between Captain Clark and the Defendant, out of which arises the most material question in the suit, viz., what authority was vested in the ship's master.

The messages which passed are set out consecutively and in the most convenient form in the judgment of the learned Judge below (Rec., p. 176). They have been read frequently during the argument and need not be quoted at length now. The Defendant was very anxious that nothing should be done to the ship beyond what would enable her to come safely home with a cargo, such as replacement of broken plates and so forth, and he forbade Clark to make contracts before being authorised to do so. Clark on the other hand informed him that Lloyd's Agent and the Marine Board held that more permanent repairs were necessary for safety. Upon this the Defendant sent a message dated December 6th "Arrange as best you can "permanent, must do nothing whatever beyond "repairing stranding damage."

In the meantime Clark had got specifications of the work necessary to repair the stranding damage, and had advertised for tenders. The Plaintiffs' tender was the lowest. An interview took place on 8th December between Mr. Forster the Managing Director of the Plaintiffs, and Capt. Clark, and Mr. Brodie who represented the firm of Sanderson & Co. That firm acted as the Defendant's Agents in the matter of the *Liddesdale*, and in their office all the negotiations

took place. There is no discrepancy in the accounts of this interview. Some discussion took place as to a schedule of prices for possible additional work; and when that had been settled Clark and Brodie informed Forster that they could not accept the Plaintiffs' tender without authority from home, but that they would recommend it.

Brodie and Clark cabled at once to the Defendants "Lowest reliable tender 6,000*l*. "Twenty days. Repairs commence acceptance "tender."

On the 10th Defendants replied, "Contract "with Lloyd's Agent's approval. Twenty days, "payment must be accepted by contractor, in "banker's guaranteed drafts, ninety days' sight, "on Clydesdale Bank, London."

The parties met again at Sanderson's office after receipt of the message of the 10th. All agree that Mr. Warne the Secretary of the Plaintiffs' Company objected to the mode of payment stipulated for by the Defendants, saying that the payment ought to be in cash, but that his objection was overcome and the contract then signed. Clark adds that when Warne's objection was made he answered it by saying, "That is all the authority I have" (Rec., p. 386).

By the terms of the contract the Plaintiffs undertake to effect repairs as per specifications for the sum of 5,995*l*. 10*s*. in twenty working days. The repairs specified are strictly confined to the damage by stranding. By Clause 14 it is said that "this contract to repair and renew "shall mean that the vessel shall be restored in "every respect to her original condition prior "to the accident." There are two clauses relating to repairs not specified, which have been the subject of a great deal of discussion both in

the Court below and at this Bar. They run as follows:—

Clause 8,—

"The contractor shall not make any alteration or deviation "from the specification agreed upon, nor shall he be entitled "to make any charge or claim for extras or for anything "whatever beyond the lump sum agreed upon, unless he "obtain the written sanction of the captain or his agents at "the time of making such additions or alterations which shall "be at a price agreed upon."

Clause 23,—

"The contractor to state schedule prices as follows for any "work that may be required to be done in addition to what "is attributable to damage that is to say for any repairs due "to deterioration in water ballast under boilers."

The claim made by the Plaintiffs is divisible into three portions. First, they claim the lump sum mentioned in the contract. Secondly, they claim for extra work at the schedule rates stated by them under Clause 23 of the contract. And thirdly, they claim for extra work not specified in the contract at all, but done in pursuance of orders given by Clark during the progress of the work, and said to be authorised either by his inherent authority or by virtue of Clause 23 in the contract. The whole sum claimed is 15,587*l.* and a fraction.

As regards the first portion of the claim the Defendants say that the lump sum never was earned because the stipulated work was not done; and indeed the Plaintiffs do not assert that it was. What they allege on this point is that the equivalent of the stipulated work, or something better, was done, and that they had authority for the variation. As regards the second portion, the Defendant insists that Clark did not order the work, and that if he had done so, he had no authority to do it. As regards the third portion, there has been a separate dispute on each item with respect to its necessity for the liberation or for the safety of

the ship, and with respect to Clark's orders for it, whether given in fact and whether binding on the Defendants in law. The learned Judge below disallowed the whole of the two first portions of the claim. Of the third portion after detailed examination, he allowed items amounting to about 1,700*l.* and disallowed the rest. The Defendants put in counterclaims for penalties on account of demurrage and for damages, but all were disallowed.

The third portion of the Plaintiff's claim, which was the subject of a great deal of argument during the opening of this Appeal, may be disposed of at once. The Defendant meets it by the preliminary objection that it is not the subject of appeal; and in this their Lordships agree with him. The decree is as follows:—

"The Judge having heard Counsel for the Plaintiff and the "Defendant respectively pronounced the sum of one thousand "seven hundred pounds eighteen shillings and fivepence "(1,700*l.* 18*s.* 5*d.*) to be due to the Plaintiff in respect of "that part of its claim which claimed for necessary materials "work and repairs other than those supplied and executed "under or in pursuance of the written contract and conditions "and specifications mentioned in paragraph 4 of the petition "together with the costs of the action up to the nineteenth "day of May 1897 and pronounced that nothing was due in "respect of such materials work and repairs supplied and "executed under and in pursuance of such written contract "and conditions and specifications and he condemned the "Defendant and its bail in the said sum and in such costs as "aforesaid."

This decree bears date 5th May 1898. On the 30th May the Plaintiffs gave the notice which is the foundation of this Appeal:—

"Take notice that Forman & Co. Proprietary Limited "Plaintiff appeals from so much of the decree of the Judge "of said Court made the fifth day of May 1898 as pronounced "that nothing was due in respect of materials work and "repairs supplied and executed under and in pursuance of the "written contract and conditions and specifications mentioned "in paragraph 4 of the petition and as deprived the Plaintiff "of costs.

"Dated the thirtieth day of May 1898."

It is quite clear that the Appellants were then satisfied with the decree except as regards the contract with its conditions and specifications, and the claims arising thereunder; that they did not intend to appeal as to that which lay outside the contract; and that the Defendant has been right in avoiding discussion of this part of the controversy, both in his lodged case, and at the Bar.

As regards the work done, no doubt exists but that it was good work and that it added value (how much it is impossible to say) to the ship; which after release from arrest was sold for upwards of 18,000*l*. Indeed the Defendant tendered the sum of 4,786*l*. 10*s*. on the 19th May 1897, and on the Plaintiffs' refusal paid that sum into Court. As the litigation proceeded however, and the Defendant learned more of the details of the case, he was led to dispute more of the Plaintiffs' claims, with the result above mentioned.

This will be the convenient place to state their Lordships' view of authority possessed by Captain Clark, because both on the first portion of the claim, and on the second portion, the question of the validity of an order is continually mixed up with the question of fact whether or no it was given; and because for every failure to comply with the contract and for every excess of work beyond the specified repairs the Plaintiffs seek to shelter themselves under the authority of Clark either directly given, or given through Mr. Watson who was Lloyd's Agent. It is true that instructions conveyed by cable in abbreviated language or by artificial and cryptic symbols are open to doubts and disputes. In this case the learned Judge has pointed out that the message of 10th December 1896 is susceptible of various meanings. But connecting it

with the whole series the meaning is reasonably clear. It means that Clark is to contract on the footing mentioned in his last message of the 8th, provided that the tender is approved by Lloyd's Agents; and with the addition, that the payment is to be made by draft. And it is made clear by the Defendant's message of the 5th that the tender, though it may provide for repair of a permanent character, is not to provide for the repair of any damage except the damage by stranding. Clark then was limited, in respect of price to 6,000*l.*, in respect of the nature of repairs to stranding damage, in respect of time to twenty days, and in respect of judgment on details to things approved by Lloyd's Agent. Within these limits it seems to their Lordships that Clark was free to contract, and that where he was free to contract he might vary the contract as might be found expedient in the progress of the work. But he could not transcend the limits imposed upon him by his principals.

As regards the most important of these limits it is clear that the Defendant had an eye not only to expense which he says is excessive in Melbourne but to the liability of the underwriters, and attached great importance both to the approval of Lloyd's Agent, and to the complete separation of stranding damage, for which the underwriters would be liable, from other damage for which they would not be liable.

The Plaintiffs contend that they are not bound by all that passed between the Defendant and his Agents in Melbourne, that they knew nothing of such matters except the message of the 10th December, which apparently gave Clark a free hand to make any contract whatever subject only to the approval of Lloyd's Agent, and to the conditions respecting time and the mode of

payment. The answer is that Clark had refused to make a contract except such as his principal might authorise; that the Plaintiffs knew that Clark and his principal were in correspondence by cable; they knew that the message of the 10th was in answer to Clark's advice of their tender sent on the 8th; if they did not really know the extent of Clark's authority it was their business to learn it; and thus, that whatever restrictions existed between Clark and his principal were equally binding as between his principal and the Plaintiffs.

Now that the Plaintiffs have not done the work specified by the contract is undisputed. The learned Judge mentions four matters in which they have failed (Rec., p. 182). Two of them are apparently trivial, and such perhaps as would not by themselves have any greater effect than to give the Defendants a cross claim if damaged by the variation. The other two are much more important. Under Clause 15, the Plaintiffs were bound to renew 20 of the injured steel shell plates, and to straighten 37 others, or if they would not bear straightening to renew them at a stated price. This work of renewal the Plaintiffs never did, and never could have done, at least within the 20 days, and never intended to do. Forster says "such plates could "not be obtained in this country, the only means "of getting them would be from England . . " . . It certainly looked a bit awkward for "us if we had to carry out contract as to "renewing plates, as they were not to be got "here. If surveyor stuck out and refused us "time to straighten old plates and put them on "instead of renewing, it would have been very "awkward for us . . . . We calculated we "would not have to carry out our contract fully. "I see in estimate, we charge 20 plates to be "renewed, we thought we could get out of

" that and so kept price pretty low " (Rec., pp. 102, 103).

The Plaintiffs had not any kind of authority for this variation. The two persons from whom they claim to have received authority for some other unspecified work were, 1st Captain Clark, and 2ndly Mr. Watson Lloyd's Agent. Forster says (Rec., p. 101) " in January I went with " Watson, explained how the plates were coming " in. Clark was staying at Malvern. I said " ' I think all the plates will work in and " ' straighten well.' He said ' That is first " ' rate ' . . . . ' After contract signed ' " I had no conversation with Watson, as to " replacing the straightened plates, instead of " new ones. I later on told Clark I was putting " them on. This was all that occurred between " me and any of them as to this."

Under Clause 16 a number of girders or plate frames, more or less damaged and buckled, were to be straightened where practicable, and to be renewed where the buckles could not be satisfactorily taken out. The evidence is somewhat confused in parts, but it clearly shows the following things: that all these girders could have been straightened; that some were not touched by the Plaintiffs at all, being as Forster says, still straight; that some were straightened but in the process it was found that the material was deteriorated; that Watson thought it expedient though not necessary to substitute new material; that iron was substituted for steel; and that the deterioration was not due to stranding damage.

From the evidence of Lang one of the Plaintiffs' foremen it would seem that Clark either ordered this renewal to be done or agreed that it should be done. It is also made clear that the substitution of iron for steel not only added to the weight and to the expense, but

altered the structure of the vessel; to her advantage as the Plaintiffs contend, but, as the Defendant says, causing a rigidity in her framework which is a source of danger to her. That is a matter on which opinions vary, but there is no dispute that the alteration is not consistent with the Plaintiffs' obligation to restore the vessel to her original condition prior to the accident.

The Plaintiffs excuse their failure to do this by alleging the order of Clark. But assuming in their favour that such an order was given, the question of Clark's authority comes in. It is argued for the Plaintiffs that Clause 8 of the Contract contemplates his giving such an order as this, and that though he gave no written order as that clause requires, he could vary the contract in that respect as in others, and by his conduct did so vary it. It appears to their Lordships that the object of Clsuse 8 was to prevent the contractors from making claims on account of extra work unless they had a written order for it. It was quite reasonable to contemplate that in the course of repairing further stranding damage might be disclosed, or that variations of detail might be expedient. Under Clause 8 the Plaintiffs could not do work of this kind, or at least could not charge for it, unless they got Clark's written order. The clause was evidently intended as a check on the contractors, and to prevent disputes about what the parties must have contemplated would be small matters. But it was not calculated or intended to enlarge Clark's authority, nor, even if so expressed, could it have that effect as against his principals. It is now used to justify claims against the Defendant for a class of repairs which he had expressly prohibited. Authorised repair of stranding damage has passed into forbidden repair of

deterioration, which has the effect apparently (for the two classes of claim are so mixed up, that it is difficult to keep them apart) of doubling the stipulated charge. In fact so far as this line of argument is applied to the lump sum, it tends to show how completely the contract was broken, and how impossible it is for the Plaintiffs to maintain that they have given the article for which the Defendant bargained and promised to pay the lump sum.

In the case of *Appleby* v. *Myers* L. R. 2 c. p. 651 Lord Blackburn mentions two conditions under which a contractor for a lump sum who has not performed the stipulated work can recover something under his contract. He can do so if he has been prevented by the Defendant from performing his work, or if a new contract has been made that he shall be paid for the work he has actually done. Their Lordships are clearly in agreement with the learned Judge below that there is no evidence to support either of these conditions, and it is not necessary to travel into further detail upon this point.

Beyond the stipulated price the Plaintiffs claim the sum of 6,754*l.* for new girder plates, angle irons, and tank top repairs. There is great difficulty in understanding how far the claim for this work is identical with the claim for work done to earn the stipulated price under the contract as varied in the way for which the Plaintiffs contend. The learned Judge below appears to have found the same difficulty, for he says that having considered the girder plates and angles as authorised alterations of the specified contract, he has to consider them again as extras (Rec., p. 188). On his view of the case and on that taken by their Lordships, it is not necessary to work out this problem, nor is it

necessary to examine minutely into the questions what authority can be imputed by law to Clark, or what particular items are covered by his orders, or what was the necessity for each item. All this has been done by the learned Judge with great care, and with results adverse to the Plaintiffs. In the judgment of their Lordships Clark had no implied authority beyond the limits which they have before stated, viz., to adjust details falling within the terms of that contract which he had express authority to make. He was not only not authorised, he was expressly forbidden, to effect repairs of any damage except that by stranding.

In point of fact he did send a message on the 4th January as follows: "Under engines " boilers tank top damage excessive condemned " estimate total expenses will be 11,000*l.* propeller " blades engines boilers."

The answer came next day :—

"Original contract must not be exceeded if " tank top damaged cut off filling pipe closing " tank Lloyd's will allow it. Are you following " out instructions telegram 5th December. "Repair nothing beyond stranding damage." That is all in accordance with the Defendant's previous instructions. Clark seems not to have given any order as to the tank tops. If and so far as he gave orders for repairs wanted on account of deterioration alone, he acted contrary to instructions, and his orders cannot be of any avail to the Plaintiffs who knew that he was acting under express instructions, and must be held bound by them.

On this part of the case the Plaintiffs rely also on Clause 23 of the Contract. They say that it gave them a right to believe that if Clark and Watson approved of work done in addition to what is attributable to damage (which must mean damage by stranding), it would be properly

chargeable against the ship at schedule rates. Their Lordships do not so read the clause. It binds the contractor to certain prices for additional work if required, but the requisition must still be made by due authority, and that was, as regards deterioration, the authority of the Defendant only. If the clause means what the Plaintiffs contend for, then Clark had no right to insert such a clause. He could not give himself indirectly an authority to order repairs for which he had been forbidden to contract directly.

Then the Plaintiffs rely on the fact that the Defendant took the ship and sold it; this being as they contend an acquiescence by the Defendant, and a ratification of all that the Plaintiffs had done. The mere fact that the Defendant took the ship which was his own property and made the best he could of it, cannot give the Plaintiffs any additional right. It is not like the case of an acceptance of goods which were not previously the property of the acceptor. But the Plaintiffs connect the possession and sale of the ship with communications which, as they say, showed that the Defendant had knowledge of the true state of the case. The messages passing on the 4th and 5th January have just been cited for another purpose. On the 6th Clark cabled as follows :—

"Contract provides renewals schedule prices. Girders "plates under boilers more badly damaged than first antici- "pated much deteriorated. Could not have remained in "their present condition. Surveyors order renewal. Will "make what repairs are absolutely necessary only through "stranding."

On the 28th the Defendant wrote, being then under the impression that the cost of repairs was 11,000*l.* which he treats as falling upon the underwriters. That however would not be the case with the cost of repairing deterioration. Up to that time nothing had been said to warn

the Defendant that he would be charged for repair of deterioration, and Mr. Mackill says that he had no suspicion of it.

After he had written his letter of 28th January he received a message bearing the same date from Clark, which informed him that the expense would be 16,000*l.*, and some particulars were added which showed that it was for other than stranding damage. Upon that the Defendant took legal advice and resolved to dispute the claim. Ever since that time the parties have been hostile. There is nothing in these communications to show acquiescence or ratification. When the Defendant wrote under the impression that 11,000*l.* would be charged he believed that it was all for stranding damage. He never in any way accepted the charge of 16,000*l.* It was only in the course of the action that he learned that the Plaintiffs had failed to perform their contract. The Plaintiffs have not been led by the Defendant's conduct to do anything prejudicial to themselves, and their Lordships cannot see in what respect the Defendant has precluded himself from disputing his legal liability.

There is one item of the Plaintiffs' claim, which the learned Judge, though he has disallowed it, has treated as standing on a peculiar footing. It is a small item for a single plate valued at 80*l.* It is one of the repairs provided for by Clause 15, and it was done efficiently but not according to contract. It seems to their Lordships that the Plaintiffs cannot on the most favourable view of the evidence claim more than that the plate should be taken as having been repaired according to contract. But then the price is covered by the lump sum. There is no doubt that many repairs were executed according to contract, but the cost cannot be recovered because the contract is an entire one and in its entirety has never been performed. There is no

reason why this particular plate should be differently treated.

The result is that their Lordships concur with the learned Judge below in his conclusions, and for the most part on the same grounds, as are taken by him. It seems hard that the Plaintiffs should not be paid for work which they have done, but such is the effect of contracting to work for a lump sum and failing to do the work. It would be hard upon the Defendants if they were made to pay for work which they did their best to prevent. And it must be said that the Plaintiffs have done a great deal to bring the hardship upon themselves by careless irregular proceedings in relying on verbal orders, or on the mere presence and knowledge of Watson and Clark, as if they were equivalent to orders coming from the owners, whom the Plaintiffs knew to be directing the business.

Their Lordships will humbly advise Her Majesty to dismiss this Appeal, and the Appellants must pay the costs.