Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Falkingham and Others v. *the Victorian Railways Commissioner, from the Supreme Court of the Colony of Victoria; delivered 6th April* 1900.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.

[*Delivered by Lord Davey.*]

On the 29th December 1886 the Appellants made a contract with the predecessors of the Respondent for the construction of a railway in the Colony of Victoria which has now been completed. The important conditions of the contract for the present purpose are the 83rd, 85th, and 87th. Clause 91 should also be referred to.

By the 83rd clause it was provided that the contractor on receiving a written notice from the engineer-in-chief should from time to time suspend the whole or any portion of the works as might be directed and such suspension should not vitiate the contract and all claims for loss or damage caused by such suspension should be settled by the engineer-in-chief. It should be observed in passing that by the definition clause the words "engineer-in-chief" include the acting engineer-in-chief for the time being of Victorian Railways.

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By the 85th clause it was provided that the contractor should complete the works in sections by certain dates the latest of which was the 1st May 1889 on which day the whole of the works were to be completed. It was then provided that for each and every day's delay in the completion of each portion of the works after the days stipulated the Corporation (*i.e.*, the Commissioners) should be entitled to deduct from any moneys due or to become due to the contractor under the contract as and by way of liquidated damages the sum of 15*l.* per working day and if from any cause whatever whether arising on the part of the Corporation or the Government or any officer or servant of the Corporation or otherwise howsoever the contractor should be delayed or impeded or represent that he has been delayed or impeded in the execution of his contract the engineer-in-chief should inquire into such detention assess the duration of the same and if he should think the cause sufficient he would suspend the imposition of the deductions or set off as aforesaid and allow by writing under his hand such extension of time as he should think adequate and at the expiration of the time so allowed the deductions or sets-off for delay should come into operation and unless and until the engineer-in-chief should allow such extension by writing the contractor should not be relieved from his liability for such liquidated damages. Nor should the Corporation be deprived of its right to deduct or set-off the said damages under this condition.

By the 87th clause it was provided that all matters left to the settlement or direction of the engineer-in-chief or to be governed by his certificate and all claims and demands of every kind of the contractor against the Corporation or of the Corporation against the contractor under or arising out of the contract or for the breach

or breaches thereof should be decided by the engineer-in-chief whose decision should be final subject to a reference to arbitration at the instance of either party in the following cases, viz.,—

All matters claims and demands—

(1) respecting any extras or alterations which in the opinion of the engineer are not contemplated or provided for in the contract.

(2) respecting any loss or damage sustained by the contractor by any error in the drawings which the engineer-in-chief deems material.

(3) respecting any delay hindrance impediment prevention or obstruction to the contractor in the carrying on of the works (*a*) caused by the Corporation failing to give possession of the ground within 30 days from the date of the execution of the contract, or (*b*) caused by the Corporation failing to provide permanent way materials as provided in the contract or (*c*) caused by the engineer-in-chief suspending the works of the contract.

Their Lordships observe the restricted terms of this reference to arbitration. There is no power to refer disputes generally or even claims for breaches of contract except in specified cases. The question whether any works alleged by the contractor to be extras are or are not contemplated or provided for in the contract is left to the decision of the engineer and it would seem that the amount only payable in respect of admitted extras is referable. Again claims and demands in respect of delay or hindrance to the contractor are confined to those arising from the particular causes above enumerated.

By the 91st condition it was provided (so far as material) that no award should be set aside or objected to on the ground of any technical defect or error of proceeding but that any matter made

the subject of any decision of the arbitrators should be held to have been properly submitted to them and be taken to have been properly adjudicated upon.

The works were not in fact completed until the 2nd June 1891. The engineer-in-chief made his final certificate dated the 29th June 1892 in which he found that the contractors had incurred liquidated damages under the 85th condition amounting (less certain sums allowed) to 18,896*l.* 18*s.* 3*d.* and that they had been overpaid to the amount of 1,423*l.* 18*s.* 10*d.*, making a total of 20,320*l.* 17*s.* 1*d.* due from them to the Respondent. The certificate contains the decision of the engineer-in-chief on various claims and demands made by the contractors. The only one which has become of importance is Item No. 66. This item was intituled "Loss through Department not giving "possession of various parts of the line within "one month after the contract was signed," and originally 15,000*l.* was claimed. It was afterwards amended and as amended was a claim of 30,625*l.* 10*s.* for detention for two years and three months arising from various causes which may be briefly summarised as follows: (1) the contractor not being supplied with necessary plans particularly for certain stations; (2) all earthworks at a certain place being stopped by a Mr. Tulk (who seems to have been an engineer employed on the works) and the contractor not getting letter to proceed till 12 months after contract had expired; (3) the Department not giving possession of various portions of the line; (4) failure to supply permanent way materials in accordance with the contract. The decision of the engineer-in-chief on this claim was in the following terms:—

"The Contractors were given possession of the "whole of the ground included in the Contract

" within thirty days after the execution of the " Contract by the Contractor. Having heard " the evidence placed before me by the Contractor " and also by the officers of the Corporation with " respect to this claim I have arrived at the " decision that the Contractor is not entitled to " any extra payment or extension of time beyond " what has already been allowed in my final " certificate."

It may be inferred from a passage in the judgment of the Chief Justice that it was admitted before him that the Contractors had physical possession of the ground but it was contended that they had not effective possession because from want of the necessary plans and other hindrances they could not make any use of the ground.

The Appellants gave notice requiring an arbitration and annexed thereto a copy of the claims made by them before the engineer-in-chief as particulars of the claims in respect of which they desired to arbitrate. In reply to an application for that purpose the Appellants on the 6th August 1892 furnished further particulars of this claim. Under Item 66 they gave details of the principal stoppages and hindrances complained of which included the following :—

" All earthworks stopped from 1 m. 60 c. to " 2 m. 10 c. 4th length 16th August 1887. " Altered plans and sections sent 3rd January " 1889.

" Clearing stopped from 3 m. 60 c. 4th length " to end of Contract 4 m. 35 c. 26th February " 1887 until 19th December 1888. . . . . All " earthworks stopped at Korumbuna end including " Korumbuna station yard and plans not re- " ceived until September 1890 16 months after " Contract time.

" Stopped for permanent way materials at all " stations beyond Cranbourne."

Arbitrators were duly appointed. The Respondent appointed his arbitrators under protest and subject to a reservation of the right of treating as a nullity any award upon any item other than a claim (if any) included in the 87th clause (quoting the words of the clause). The arbitrators made their first award dated the 10th October 1892, whereby they awarded a sum of 20,500*l.* to be paid to the contractors by the Corporation freed and exempt from all deductions on account of previous payments or of any claim for set off or on any other ground whatsoever.

The contractors commenced an action on this award. The action was tried by Hodges, J., who gave judgment for the Defendants and that judgment was upheld in the Supreme Court. This case is reported in the Victorian Law Reports (21 V. L. R. 9), and it there appears that the learned Judges held the award to be bad on the ground that it purported to adjudicate on the over payment of 1,423*l.* 18*s.* 10*d.*, which the arbitrators had no jurisdiction to do. In their judgment the learned Judges carefully explained that the only item referable was item No. 66.

By an Order of the 27th July 1896 it was on the motion of the contractors ordered that the matters referred to the arbitrators be referred back to them for reconsideration and redetermination.

The arbitrators made their second award on the 11th January 1897 and thereby found and determined in respect of the matters referred to them that the contractor was entitled under the said contract to and they thereby awarded the sum of 20,500*l.* to be paid to him by the Corporation and that the delay or delays in the completion of the works referred to in the said contract and of the various parts or sections thereof beyond the date or dates stipulated in such contract was or were due solely to the

default or defaults of the Corporation and that the Corporation was not entitled to recover from or deduct or set-off against any claim by the contractor any penalty or sum in respect of such delay or delays and that inasmuch as it appears by the certificate of the engineer-in-chief that irrespective of the allowance of the above-mentioned sum of 20,500*l.* and irrespective of any penalties for delay or delays the contractor has been overpaid the sum of 1,423*l.* 18*s.* 10*d.* the contractor was now entitled to be paid by the Corporation the sum of 19,076*l.* 1*s.* 2*d.* being the said sum of 20,500*l.* less the said sum of 1,423*l.* 18*s.* 10*d.*

The present action was brought by the Appellants on the second award. The Respondent's substantial defence is contained in paragraphs 12 and 16 of his statement of defence. In paragraph 12 he pleaded that the sum of 19,076*l.* 1*s.* 2*d.* awarded is one entire and indivisible and unseparated and unseparable sum and the sum included matters claims and demands in respect of which the arbitrators had not any jurisdiction and which were not referable to them under the terms of the contract. By paragraph 16 he pleaded that the arbitrators had no jurisdiction to deal with or disallow any claims or demands of the Respondent against the Appellants for set-off for delay caused by the non-completion of the works within the time mentioned in the contract. The Respondent also counterclaimed for the sum of 18,896*l.* 18*s.* 3*d.* the total amount of the deductions or sets-off for delay certified by the engineer-in-chief.

This action was tried by the Chief Justice who found for the Appellants in the action and for the Respondent on the counterclaim and gave the Appellants judgment for the balance with interest. Both parties appealed to the Full Court. The Appellants' appeal was dismissed

with costs and on the Respondent's appeal the judgment for the present Appellants in the action was discharged and the action was dismissed with costs.

The Appellants in the present appeal contend that the Chief Justice was wrong in allowing the counterclaim and that their appeal to the Full Court ought to have succeeded and also that the Full Court was wrong in reversing the Chief Justice's finding in their favour in the action. In other words they claim to be entitled to the sum of 19,076*l.* 1*s.* 2*d.* without any deduction or set off-in accordance with the award.

The Respondent's Counsel put his argument against the award in two ways. First he said that it was bad on the face of it because the arbitrators had awarded on "the matters so "referred" generally whereas the mass of the matters referred were not referable under the terms of the contract and outside their jurisdiction. Secondly he contended that the evidence showed that the arbitrators had in fact inquired into and considered matters which they should not have inquired into at all. In support of his argument he quoted the case of *Beckett* v. *Midland Railway Company* L. R. 1 C. P. 241 the judgment of Blackburn J. in *Duke of Buccleuch* v. *Metropolitan Board of Works* L. R. 5 Ex. 221 and the opinion of Cleasby B. in advising the House of Lords in the same case (L. R. 5 E. and I. Ap. 418). Their Lordships agree that if a lump sum be awarded by an arbitrator and it appears on the face of the award or be proved by extrinsic evidence that in arriving at the lump sum matters were taken into account which the arbitrator had no jurisdiction to consider the award is bad. In the present case the submission is to be found in the contract between the parties and the respective appointments by them of arbitrators

and the reference was only of those claims made by the Appellants which were within the terms of the submission. In *Beckett* v. *Midland Railway Company* and the older case of *Fisher* v. *Pimbley* 11 East 188 the excess appeared on the face of the award and not being severable the award was held bad. Mr. Haldane contended that this award was bad because it did not in terms state that the arbitrators had rejected from their consideration those claims of the Appellants which were not properly referable and it was therefore consistent with the award that those claims had in fact been considered by the arbitrators and had been taken into account by them in arriving at the lump sum awarded. Their Lordships are not aware of any authority for this position and they think it would be contrary to principle to hold an award bad because the possibility that matters not within the jurisdiction of the arbitrators may have been taken into account is not in terms excluded on the face of the account. It is true that in inferior Courts the maxim *omnia præsumuntur rite esse acta* does not apply to give jurisdiction as was laid down by the Court of Queen's Bench in *Rex* v. *All Saints, Southampton* (7 B. & C. 785) and by Willes J. in *Mayor of London* v. *Cox* (L. R. 2 E. & I. Ap. at p. 262). That rule is applicable to the award of an arbitrator where no jurisdiction is shown to make the award but where as in the present case there is jurisdiction to make an award and the question is only of a possible excess of jurisdiction it has no application. In such a case the award can only be impeached by showing that the arbitrator did in fact exceed his jurisdiction. Their Lordships therefore think that this award of the lump sum is not bad on the face of it.

It was then argued that the award was shown to be bad because it appeared from the evidence

that the arbitrators had spent some days in taking evidence on the claims which were admittedly not referable. The dictum of Cleasby B. was quoted that "a person exceeds "his jurisdiction by prosecuting a judicial "inquiry in a matter over which he has no "jurisdiction quite independent of the judgment "eventually given." This was no doubt right as applied to the circumstances of that case. But if it was intended to lay down that an award cannot be maintained whenever it is made to appear that the arbitrator took evidence on matters which turned out not to be within his jurisdiction (as contended by the Appellants) their Lordships cannot agree. It may be necessary to take evidence in order to ascertain whether the matter is within his jurisdiction or not and where the claims referred are so mixed up together as in the present case it is impossible to say that the evidence might not be received.

The circumstances in which both the first and the second award were made may legitimately be considered. The appointment by the Respondent of his arbitrators expressed the limits of their jurisdiction and the condition attached to their appointment. Before the arbitrators commenced their proceedings a protest was addressed to them by the Respondent against their considering any general claims or demands for delay other than a claim within the 87th clause the words of which are quoted in the protest. And when the arbitrators met to reconsider their award they had before them the judgment of the Court in the first action which told them in plain words what were the limits of their jurisdiction. But we are not left to presumption or conjecture on this point. Mr. Singleton the representative in the arbitration of the Respondent has given evidence in the action. He

says that Mr. Rogers one of the arbitrators had had several arbitrations in relation to Condition 87 and was well acquainted with it. He then says that he (very properly) read to the arbitrators the judgment of the Full Court and Hodges J. to show that the only question before them lawfully was that of permanent way material and he made this plain to them. After he had read some evidence the Chairman remarked that there was other evidence which materially qualified what he relied on but (the witness somewhat naively added) what the Chairman referred to was immaterial. The witness afterwards said that the Chairman repeated his point as to the only question referable or referred and (the witness admitted) repeated it correctly. The arbitrators therefore were made fully aware of the limits of their jurisdiction and if they disregarded them they must have done so wilfully and fraudently. No such case is pleaded in the defence to this action.

It would no doubt have been better and more regular if the arbitrators had specified the particular claim or claims in respect of which they awarded the sum of 20,500*l*. The Respondent might have asked as a condition of the first award going back for their reconsideration that they should do so, and it is a little surprising that his advisers did not take that course. But the 91st clause of the Contract has some bearing on this point. That clause would not enable the arbitrators to adjudicate on matters outside their jurisdiction but their Lordships think it does oblige them to look at the substance rather than the form and if they are satisfied that the award is one which the arbitrators could properly make they should give effect to it notwithstanding any defects in form. Their Lordships are of opinion that no sufficient reasons have been adduced for impeaching the award for 20,500*l*.

There remains the question whether the Respondent should succeed in his counterclaim for 18,896*l.* 18*s.* 3*d.* Both the Chief Justice and the Full Court held that this matter was entirely outside the jurisdiction of the arbitrators. Their Lordships do not agree in this opinion. It appears from the note of the chief engineer on the 66th claim that he declined to grant any extension of time to the Contractors. The 87th clause provides that all "matters claims and demands" respecting any delay arising from the specified causes may be referred. It is difficult to see why the decision of the engineer-in-chief not to allow any extra payment or to grant an extension of time on account of any delay arising from any of those causes is not therefore a matter which may be referred or why it was not within the jurisdiction of the arbitrators to determine that an extension of time coextensive with the period in respect of which the liquidated damages are claimed ought to have been granted by the engineer-in-chief. It is said that the words of the 85th clause are positive that until the engineer-in-chief allows such extension in writing the Contractor is not relieved from his liability for the liquidated damages. But the 85th and 87th clauses must be read together and if it appears that according to the true construction of the latter clause there is an appeal to arbitrators from the decision of the chief engineer not to grant an extension of time the words in the 85th clause must mean until the engineer-in-chief (subject to appeal to arbitrators) allows such extension. It was not necessary for the matter to go back to the engineer because it appears from the 95th clause of the Contract that the arbitrators may themselves make a final award upon which an action may be brought.

Their Lordships will therefore humbly advise Her Majesty that both Orders of the Full Court of the 29th of March 1898 and the 31st of March 1898 be reversed and instead thereof it be ordered on the Appeal of the Appellants against the judgment of the Chief Justice that the Respondent's claim for set off for 18,881*l.* 18*s.* 3*d.* (the figures in the judgment) be disallowed, and that the Cross Appeal of the Respondent be dismissed and that the Appellants have judgment for 19,076*l.* 1*s.* 2*d.* and also for 1,488*l.* 15*s.* being the costs of the award paid by him with interest on the said sum of 19,076*l.* 1*s.* 2*d.* at 5*l.* per cent. per annum from the 11th of January 1897 to the date of Her Majesty's Order in Council on this Appeal and that the Respondent do pay the whole costs of the action and of both appeals to the Full Court. The Respondent will also pay the costs of this Appeal.