Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Isaac Bartlett v. *William P. Bartley & Co., and on Cross Appeal between William P. Bartley & Co.* v. *Isaac Bartlett, from the Court of Queen's Bench for Lower Canada in the Province of Quebec; delivered, March 8th,* 1879.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS Appeal arises out of an action brought by the Plaintiffs, William P. Bartley and another, in which they sought to recover the sum of 4,000 dollars, alleged to be due to them as the last instalment of a sum of 16,000 dollars which the Defendant Isaac Bartlett had agreed to pay for a compound screw propeller engine and boilers, bed plate, shafts, screw propellers, and other articles which the Plaintiff had agreed to construct, make, and supply for a vessel of the Defendant, and also to recover the sum of 1,400 dollars for extras.

The action was tried in the Superior Court for Lower Canada at Montreal, by Mr. Justice Johnson, who awarded to the Plaintiffs the sum of 4,000 dollars and interest, and rejected the demand of 1,400 dollars for extras. The case was appealed to the Court of Queen's Bench for Lower Canada, by the Defendant, on the ground that the suit ought to have been dismissed, and by the Plaintiffs on the ground that the 1,400 dollars claimed for extras ought to have been awarded to them.

K 972. 100.—3/79. Wt. B 80 E. & S.

The Appeal was heard before the Chief Justice Dorion, and three other Judges, Mr. Justice Monk, Mr. Justice Ramsay, and Mr. Justice Tessier, who affirmed the judgment of the Superior Court, with costs. No reasons for the affirmance have been transmitted, and it must therefore be assumed that none were given, and that the judgment was unanimous. It is unfortunate that their Lordships have not the benefit of knowing the precise grounds upon which the judgment was affirmed by the four learned judges of the Court of Queen's Bench.

The contract was dated the 6th July 1871. It appears that at that time the Plaintiffs carried on the business of boiler makers and mechanical engineers at Montreal, and that the Defendant was building at Quebec a vessel, subsequently named the "Tigress," which he intended to employ in the ensuing season in the seal fishery at Newfoundland. The contract will be found at page 16 of the record. By that contract the Plaintiffs engaged to make, construct, build, and finish in a good, neat, proper, and substantial manner, and of the best materials, and according to certain specifications, and of the dimensions marked thereon, a compound screw propeller, engine, and two boilers, with two furnaces in each, with return tubes, the cylinders to be one high and one low pressure, of 24 and 40 inches diameter, respectively, both 24 inches stroke of pistons, erected on a strong cast-iron framing or foundation plate with pillow-blocks cast on for the receiving of the crank shaft, and as the whole is more fully set forth by the specification thereunto annexed. And for the purposes aforesaid the said contractors engaged to supply at their own costs and charges all iron, metal, and materials which should be necessary to be used or applied in and about the said engines and boilers, and,

at their the said contractors own risks, costs, and charges, place and fit up the same on board the hull of a steamer to be ready by the 1st day of September then next (1871) to receive the bed-plate, shaft, and screw propeller, with stern bearings and other journal bearings and thrust block engine, kelsons to be thoroughly bolted and fastened to receive the engines, all bolts and spikes to be kept clear of engine fastenings, the whole of the work to be complete and ready and steam up on the 1st day of November then next ensuing. The bed-plate, stern bearing, and all pillow blocks to be fastened by the proprietors, the parties of the second part, the parties of the first part—that is, the Plaintiffs—furnishing the bolt points, said bolts to be adjusted to proper length and headed by the proprietors, and also plates or washers for the same, as well as conveying shafts, cranks, boilers, and other things from Montreal to Quebec, and putting them on board of the new vessel at the costs and risks of the proprietors. Any boring of bolt holes throughout to be done by the proprietors, either to fasten bed-plate, stern bearing, inserting tube, or anything else connected with the erecting of the said engines and boilers. The vessel to be delivered at a convenient wharf in Montreal for receiving the engines and boilers, not later than the 10th day of October then next, to enable the said contractors to have the engines erected by the 1st day of November then next; and should the vessel not be delivered by the said 10th day of October, then the contractors are to have one additional day, without damages, after the 1st day of November then following, for every day's delay in the delivery of the boat to them in Montreal; and should the vessel not be ready to receive the bed-plate

on the said 1st day of September then the contractors were to have an additional day's extension for each and every day's delay in such delivery in order to enable them to complete the contract. And it was declared that the contract was made for and in consideration of the price or sum of 16,000 dollars current money of the said province, payable in manner as follows; to wit, the sum of 4,000 dollars paid in cash at the passing of the said agreement, the further sum of 4,000 dollars on the 1st day of August 1871, the further sum of 4,000 dollars on the 15th day of September 1871, and the balance of 4,000 dollars so soon as the engine and boilers should be proved satisfactory. But it was thereby specially provided that, should the work not be completed on or before the 1st day of November 1871, the sum of 50 dollars for each and every day for the next 10 days, and 100 dollars for each and every following day for the next 10 days, and if not ready by the expiration of the aforesaid 20 days the whole amount of the last instalment, to wit, 4,000 dollars, to become forfeited. By the specification, page 15, it was stated that each boiler was to be well and thoroughly stayed to carry a steam pressure of 80 per square inch, and to be tested to a hydrostatic pressure sufficient to enable them to run with that amount of steam pressure; the smoke boxes to be designed to connect into one chimney for both boilers. The engine and boilers were to be a strong, substantial, and thoroughly reliable job, erected in hull, and put in running order to the entire satisfaction of the proprietors.

It appears that the Plaintiffs had not had very great experience in the construction of marine steam engines. They drew out a plan, which is designated as plan A, a working plan

to enable them to complete the works according to the contract. The works were to be done to the satisfaction of the proprietors, and consequently Mr. Forbes, who was an engineer in the employment of the Defendant, was frequently at Montreal for the purpose of inspecting the works as they proceeded. He gave instructions from time to time—whether they were instructions or orders is not very material—with reference to the construction of the works; and in consequence of his suggestions a plan B was drawn out, which added to the works in some respects, and altered them in others. It is on account of those alterations and additional works that the Plaintiffs claim the 1,400 dollars for extra work.

It will be convenient to consider, in the first place, whether the Plaintiffs were entitled, under the circumstances, to recover the 1,400 dollars for the extra works.

It was contended that the Plaintiff was not entiled to recover for the extra works, in consequence of Article 1690 of the Civil Code of Lower Canada. By that article it is enacted that "when "an architect or builder undertakes the construc- "tion of a building or other works by contract "upon a plan and specifications at a fixed price, he "cannot claim any additional sum upon the ground "of a change from the plan and specifications, or "of an increase in the labour or materials, unless "such change or increase is authorised in writing "and the price of them is agreed upon with the "proprietor." The plan A was not a plan which was a part of the contract, but it was a plan which was prepared by the Plaintiffs for their own use in carrying out the works, and consequently the contract was not one for the construction of works upon a plan, if, according to the said article of the Code, by the word "plan" a drawing as well as a specification

was necessary. The learned judge, Mr. Justice Johnson, in delivering his judgment at page 178 of the record, says, " The section of our " Code which treats of this subject is sec- " tion 4, 'Of work by estimate and contract,' " and the first article under this head is 1683, " which says, 'when a party undertakes the " construction of a building or *other work*,' and " the provisions that follow would seem not " to be restricted to contractors for any one kind " of work, but to apply to all. The Court now, " therefore, sees reason to revise the ruling at " *enquête*, and to grant these motions. Conse- " quently, there being no written authority for " any change or increase in the work contracted " for at a fixed price, there is no legal evidence " before the Court to sustain the demand for " extra work." Their Lordships, not having the reasons of the Court of Queen's Bench before them, cannot say whether the judgment with regard to the extras was affirmed by putting a construction upon the article similar to that which Mr. Justice Johnson had put upon it, or upon other grounds.

Their Lordships feel that there is considerable difficulty in the construction of Article 1690 of the Code. The heading of the section is " Of " work by estimate and contract," and the words of the 1st Article of that section, 1683, upon which the learned Judge relies, are, " When " a party undertakes the construction of a " building or other work by estimate and contract, " it may be agreed either that he shall furnish " labour and skill only, or that he shall also " furnish materials." But Article 1690 appears, as far as the wording of it is concerned, not to apply to all works by estimate and contract, but only to particular works, namely, those which are mentioned in that Article itself. The Article does not say, " When any work is

" done by estimate and contract;" but "When " an architect or builder undertakes the con- " struction of a building or other works by " contract upon plans and specifications;" then the extra work is not to be paid for unless the extra work is contracted for in writing. Their Lordships however think it is unnecessary to decide what is the construction of that Article of the Code, for they are of opinion that Forbes, according to the evidence, though he might have had authority to give instructions as to the manner of executing the works specified in the contract, had no authority to bind the owners to pay anything beyond the contract price on account of extras. Moreover, there is no evidence to show that at the time when those orders or suggestions were made there was any stipulation on the part of the Plaintiffs that if they carried them out they should require an extra price to be paid. It appears that the Plaintiffs were commencing business, and had said that they did not much mind if they did not make a profit in this particular case. It may therefore be reasonably supposed that when Forbes made the suggestions the Plaintiffs, who were anxious to carry out the work in a satisfactory manner, may have been content to act upon the suggestions without any extra money being paid for them. At any rate there is no evidence that they ever intimated to Forbes their intention to charge an extra price, or indeed that they entertained such an intention.

Under these circumstances their Lordships are of opinion that the Plaintiffs are not entitled to recover the 1,400 dollars on account of extra works.

The next question to be considered is, whether the Plaintiffs are entitled to recover the 4,000 dollars the last instalment of the 16,000 dollars.

Two objections are made to the Plaintiffs'

recovery of that amount. First, it is said that the time had not arrived at which the last instalment of 4,000 dollars was to be paid according to the terms of the contract; that it had not been proved that the engines were satisfactory, and consequently that, according to the strict terms of the contract, the Plaintiffs were not entitled to recover. But further it was contended that, even if the time had arrived for the payment of that 4,000 dollars, the Plaintiffs were not entitled to them, in consequence of the forfeiture clause; and that by reason of the delay which had occurred in finishing the work, the Plaintiffs had forfeited the full amount of the last instalment, and consequently that they were not entitled to recover anything. That defence was set up in the plea. At page 22 "the De- " fendant further avers that at the time of the " institution of this action the said engine and " boilers were not fully made or finished, nor " were they fitted up and into the said vessel, " nor were they proved satisfactory, nor were " they in working order, nor could steam be " got up, but the same were unfinished and im- " perfect, whereby, more than 20 days having " expired after the said 1st day of November, " the whole of the last instalment, to wit, 4,000 " dollars, even had the work been completed, " which Defendant denies, on the day the present " action was instituted, would have been for- " feited to the Defendant."

By the terms of the contract three days were mentioned. There was the 1st September, by which the Defendant was to have his vessel ready for the reception of those portions of the articles to be supplied, which were to be put on board at Quebec. It was stated in the contract, amongst other things, that should the vessel not be ready on that day to receive the bed plate, then the said contractors were to have

an additional day's extension for each and every day's delay in such delivery in order to enable them to complete the contract. With regard to the bed plate, it was not put on board at Quebec, but that was in consequence of an arrangement between Mr. Forbes and the Plaintiffs that it would be better to leave it to be put on board at Montreal. Their Lordships think that in pursuance of that arrangement there was no default on the part of the Defendant in not having the vessel ready to receive the bed plate, and that the Plaintiffs were not entitled to any extension of time under the article which stipulated that, should the vessel not be ready to receive the bed plate on the 1st September, the contractors were to have additional days.

Another thing that was to be put on board at Quebec was the shaft, and it was not put on board until a day long subsequently to the 1st September. It was at first contended that though the time was fixed at which the Defendant should have the ship ready to receive the bed plate and shaft and other things which were to be put on board at Quebec there was no stipulation in the contract that the Plaintiffs should be bound to put them on board at Quebec on or before the 1st September. Their Lordships think that the reasonable construction of that portion of the contract was that the Defendant should have the vessel ready by the 1st September to receive those articles; that the Plaintiffs were not bound to put them on board precisely on that day, but had a reasonable time after the 1st September to put them on board, so that the vessel might be launched in time to arrive at Montreal by the 10th October. It is clear that the shaft was not put on board until after the 10th October, for there is a letter from the Plaintiffs, dated the 10th October, stating "We have shipped the shaft this evening."

It appears that it was not put on board until the 12th October, and that the vessel was not launched until the 14th October. Whether the Plaintiff was liable or not for those four days delay, in their Lordships' view of the case is not very material; because their Lordships agree with the learned Judge of the Superior Court that, in consequence of the alterations and extra works the Plaintiffs, although they were not entitled to be paid for them, were entitled to a longer time to complete them than they would have had if they had performed the contract strictly according to the terms of it, without making any variations in consequence of Mr. Forbes' suggestions. But even if the Plaintiffs were liable for the delay which occurred in putting the shaft on board, the vessel was launched on the 14th of October, and might have arrived at Montreal by the 16th or 17th instead of the 10th of that month, on which day it was stipulated that the vessel was to arrive at Montreal. The vessel was to be delivered at a convenient wharf in Montreal for receiving the engines and boilers not later than 10th October. The vessel was launched on the 14th October, but it did not arrive at Montreal until the 19th. There was some delay, after the vessel had been launched, before it started, but this was in consequence of the stern bracket being out of line, which it was the duty of the Defendants, according to the contract, to fasten. Therefore any delay that arose from this cause was not attributable to the Plaintiffs. At any rate the vessel did not arrive until the 19th October. It is found as a fact by the learned Judge of the Superior Court, and their Lordships think upon sufficient evidence, that the vessel, although it arrived at Montreal on the 19th October, was not delivered at a convenient wharf in Montreal for receiving the engines and boilers until the 1st November.

Now, between the 10th October, at which the vessel ought to have arrived, and the 1st of November, the day on which, according to the terms of the contract, the work was to be completed, there were 21 days. Consequently if the vessel had been delivered at a convenient wharf in Montreal on the 10th of October, the Plaintiff would have had 21 days between that day and the 1st of November for the completion of the contract. According to the terms of the contract, should the vessel not be delivered by the 10th October, then the contractors were to have one additional day without damages after the 1st of November then following for every delay in the delivery of the vessel by them in Montreal, and as the vessel was not delivered at a convenient wharf until the 1st of November, the Plaintiffs had 21 days from the 1st of November, the day on which the vessel was delivered at a convenient wharf, to complete their contract. The 21 days after the first would give them to the 22d November to complete their works. If then they had completed their works on the 22d November they would have completed them according to the terms of their contract, and they would not have been liable to any penalty or forfeiture. But they did not complete the works by the 22d of November. They went on with them until the 28th of November. On that day the vessel was removed by the Defendant from the wharf, and carried out into the stream for the purpose of going down to Quebec in order to save time, and to enable her to get out upon her voyage before she should be prevented by the ice. It appears to their Lordships that the Defendant broke his agreement in not allowing the vessel to remain at that wharf for the purpose of the completion of the contract. It was contended on the part of the Defendant that

the days which were to be allowed in the event of the non-arrival of the vessel on the 10th October, were intended by the parties to apply not only to the time for completing the work according to the terms of the contract, but also to the 20 days mentioned in the forfeiture clause, which was likened to a clause of demurrage. According to that construction of the contract, which their Lordships are disposed to accept, the Plaintiffs had 21 days from the 1st of November to complete the contract without subjecting themselves to any penalty or forfeiture, and 20 additional days subject to the daily penalties provided by the agreement; that is to say, 10 days at 50 dollars a day, and 10 days at 100 dollars a day. The 21 days gave them until the 22nd November, for completion of the work without penalties, and 20 days beyond that for completion of the work, paying penalties. They did not complete until the 28th, and might have been liable to a penalty of 50 dollars a day for the non-performance of the work from the 22nd to the 28th November; but on that day the Defendant broke his contract by taking the vessel away, and putting an end to the Plaintiffs' power to complete the works at the place stipulated by the contract.

It is to be observed that these penalties are not claimed in the present suit.

In whatever way the case is looked at, their Lordships think that the delay in the completion of the contract did not constitute a bar to the action under the forfeiture clause.

But then it has been contended that the Plaintiffs' action has been misconceived in respect of the last instalment, and it is said that as that instalment had not become actually due, the Plaintiffs could not sue for the amount, and that, even if they had any cause of action, it was for unliquidated damages for remov-

ing the vessel, and thereby preventing the Plaintiffs from completing their contract. Although something remained to be done, and the engine and boilers could not strictly be said to have proved satisfactory, it has been found as a fact, and in their Lordships' opinion correctly found, that the contract had been substantially carried out by the Plaintiffs. If it could not be strictly found as a fact that on the 28th of November when the vessel left the wharf, the work was complete and ready, and, to use the words of the contract, "steam up," and that the engines and boilers had at that time been proved to be satisfactory, there were then remaining, according to the Defendant's construction of the contract, six days during which, subject to a forfeiture of 50 dollars a day, and ten days further during which, subject to a forfeiture of 100 dollars a day, the Plaintiffs might have done everything necessary to entitle themselves to the last instalment of 4,000 dollars upon the strict terms of the contract. The Defendant, by removing the vessel on the 28th of November, put it out of the Plaintiff's power to do those acts. The Plaintiffs were not bound to send their men in the vessel to complete the works on the voyage down the river during the remaining days allowed by the contract. They therefore elected on that day to commence their action by attachment of the vessel. Their Lordships are of opinion that the Defendant, by his act of removing the vessel from the place stipulated by the contract for the completion of the works during the time allowed by the contract for such completion, committed a breach which would have authorised the Plaintiffs to sue the Defendant for damages, or to rescind the contract and sue upon a *quantum meruit* for the value of the engines, boilers, and other things which they had actually supplied. The work having been sub-

stantially completed, the Plaintiffs in either of such actions would doubtless have been entitled to recover an amount not materially different from that stipulated to be paid as the last instalment. The Plaintiffs, as found by the learned Judge of the Superior Court, did their best and acted with the utmost good faith. It is clear that substantial justice has been done;—that the Plaintiffs were entitled to recover the amount awarded, if not strictly in the form in which they have claimed it in their declaration, at least in a form which they might have adopted.

Under these circumstances their Lordships cannot recommend Her Majesty to reverse the unanimous judgments of both the Lower Courts upon a mere technicality founded upon a mistake in the mode in which the Plaintiffs have shaped their claim, and which cannot and does not affect the case upon the merits. It is to be observed that the case was contested in the Court below principally upon the ground that the last instalment had been forfeited, and not upon the ground that if the Plaintiff was entitled to recover at all he was not entitled to 4,000 dollars.

Their Lordships, for the reasons above given, will therefore humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench, and to dismiss both these Appeals.

Under these circumstances there will be no costs of the Appeals on either side.