Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Commissioner for Railways v. *O'Rourke and McSharry, and Cross Appeal, consolidated, from the Supreme Court of New South Wales; delivered 27th June* 1896.

Present:

LORD MACNAGHTEN.
LORD MORRIS.
LORD JAMES OF HEREFORD.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The questions in these appeals have arisen in the taxation of costs in an action brought by O'Rourke and McSharry against the Commissioner for Railways in the Supreme Court of New South Wales for breach of contract and for work and labour done and materials supplied in the construction of a railway in New South Wales, in which action the Plaintiffs claimed to recover 100,000*l*. The 14th of September 1886 was fixed for the trial but it was on the 11th of September postponed to the 15th of November and again by consent to the 22nd when an order was made by consent referring the action and all matters in dispute therein to the final determination of three arbitrators, the award of a majority to be binding and to be for a sum certain for the Plaintiffs or an award for the Defendant. The party in whose favour the award should be was to be at liberty to enter it as the verdict in the cause and to sign final

91004. 100.—7/96.

judgment thereon, the costs of the action and the arbitration and of and incidental to the reference and of the award to follow the verdict to be so entered and to be taxed in the ordinary way. On the 10th of September 1887 an award was made by two of the arbitrators awarding to the Plaintiffs 20,433*l.* 10*s.* 11*d.* and on the 11th of October 1887 judgment for the Plaintiffs was signed for that sum with interest and costs to be taxed.

The Plaintiffs brought in a bill of costs for taxation amounting to 24,817*l.* 18*s.* 8*d.* and on the 10th of September 1888 the Supreme Court on proceedings taken by the Defendant ordered that judgment should be entered for the Plaintiffs for 20,433*l.* 10*s.* 11*d.* and for the Defendant for 79,566*l.* 9*s.* 1*d.* the residue of the original claim and declared that it would be competent for the Prothonotary of the Court on the taxation of the Plaintiffs' costs to satisfy himself by the evidence of the arbitrators or upon such other evidence as might be brought before him as to what parts of the Plaintiffs' claim the Defendant, having succeeded, was entitled to his costs. The Plaintiffs appealed to Her Majesty in Council against this order and it was on the 30th of June 1890 reversed and the cause was remitted to the Supreme Court with directions to the Prothonotary to tax the costs of the Plaintiffs upon the verdict entered for them pursuant to the award.

Accordingly the costs were taxed by the Prothonotary. 16,656*l.* 17*s.* was taxed off leaving a balance of 8,161*l.* 1*s.* 8*d.* which was awarded to the Plaintiffs as the amount due to them. On the 18th of August 1891 the Plaintiffs gave notice of motion for a rule directing the Prothonotary to review his taxation in respect of 367 items in the bill of costs mentioned in a schedule to the notice and on

the 28th the motion was by consent referred to Mr. Justice Stephen in chambers with liberty to either party to appeal to the Court. On the 3rd of August 1893 Mr. Justice Stephen ordered that there should be a review of certain enumerated items, and as to all the other items in the schedule there should be no review. Both parties were dissatisfied with this decision and appealed to the Court which by consent without argument dismissed both motions but without prejudice to the right of either party to appeal to Her Majesty in Council. Both parties have obtained the leave of the Court to appeal.

The principal appeal is by the Defendant who appeals from so much only of the order as refers to the items which relate to consultations, shorthand writers' charges and witnesses' allowances.

There is not in the Record any report of the Prothonotary but in the affidavit of A. G. Saddington, a clerk in the Crown Solicitor's office who had the conduct of the matter, he says the Prothonotary had informed him that the grounds set forth in the various paragraphs of the affidavit are the grounds *inter alia* on which he disallowed and reduced the various items therein respectively referred to. In the 14th paragraph of the affidavit it is said that about thirty-seven consultations and conferences appear in the bill of costs to have been held and charged for against the Defendant, and that the Prothonotary allowed thirteen or fourteen consultations and conferences disallowing the others on the ground that they were unnecessary. In his judgment Mr. Justice Stephen says he ordered no review as to the number of the consultations, but he thought he must as to the amounts to be allowed and he did so on the ground that the fees should be estimated according to the length of the

consultations and the importance of the occasions on which they were held. If this means that the taxing officer is bound to inquire into the length of each consultation and the occasion on which it was held their Lordships do not agree to it. The amount of fees to be allowed for consultations is in the discretion of the taxing officer and their Lordships do not think that he acted upon a wrong principle if in estimating the fees he took into consideration the number of the consultations which he allowed. A review of the taxation of this part of the bill of costs should not have been ordered.

The next matter is the charge for shorthand writers' notes amounting to 672*l.*, which the Prothonotary disallowed. It appears from the affidavit of Mr. McLaughlin the Plaintiffs' attorney and of the Plaintiff McSharry that it was agreed between the parties that shorthand writers should be employed to take notes of the evidence and that each party should pay half the cost and leave it to the Prothonotary to say afterwards whether such notes being necessary they should be costs in the cause to the successful party. In the circumstances stated in the affidavits it appears to their Lordships that the shorthand notes were necessary, and that the Prothonotary was not intended to be the final judge of whether the costs of them should be allowed but was to decide it as the taxing officer subject to appeal to the Court. It is a case in which the costs ought to be allowed and as regards them their Lordships are of opinion the order for review was properly made.

The next question relates to the allowances to witnesses. The arbitrators' sittings began on the 29th of March and ended on the 20th of July 1887. The award was made on the 10th of September 1887. The Plaintiff McSharry in

his affidavit of increase swore he had paid to the witnesses altogether 11,000*l*. In this sum there was 1,200*l*. paid to one witness, J. E. F. Coyle, for 323 days. The Plaintiff said that on the 6th of September 1886 Coyle was temporarily in Sydney where he was on a visit and that to secure his attendance he had to arrange with him to remain in Sydney during the progress of the case, as if he had not done so he would have left the colony for his home at Dunedin where he had since gone and his evidence would have been lost. The Prothonotary disallowed the whole of this charge on the ground that he regarded Coyle as a town witness and that if he was not the amount should be disallowed on the ground that his evidence was unnecessary as it might have been obtained from skilled witnesses resident in Sydney or in the colony. To another witness Simpson a civil engineer who came from Melbourne 1,137*l*. 3*s*. was paid for 361 days from the 14th of September 1886 to the 10th of September 1887. He was examined on three days and for him 14 days were allowed. There were other witnesses who were said to have attended for a number of days varying from 386 to 50 and were charged for accordingly. Others were charged for a lesser number of days. In one of his affidavits referring to his affidavit of increase in which the payments he had made were fully stated McSharry swore that early in the hearing of the arbitration the arbitrators informed him and his counsel that he was not to let any of his witnesses connected with the works away until the case was closed as they might want to examine them themselves at any time and he was also advised by his counsel and solicitor that he could not safely let any of his witnesses away until the arbitrators had made their award; that

a number of his witnesses were men who had no fixed place of abode and who were working principally on railway contracts in the various Australasian colonies, and he verily believed that if any of these witnesses had been allowed to get out of the jurisdiction of the Courts of New South Wales they would either not have returned at all, or would have been too late to give evidence on his behalf when he had found out where they were.

Mr. Justice Stephen had before him a tabulated list of the Plaintiffs' witnesses with allowances and dates of examination which he had directed to be prepared from the affidavits. It is in the Record. Some of the witnesses appear to have been examined once, a few twice, some were sent away after giving their evidence, others remained till the award was made. The Prothonotary, as Mr. Justice Stephen says, seems to have allowed expenses of subsistence at a uniform rate, 14 days when the witness was examined twice, 7 days when examined only once. This is not the way in which the costs of witnesses should be taxed. The Prothonotary should act upon no fixed general rule but should take each case into consideration and determine what was a reasonable allowance to be made for the coming going and attendance both at the trial and the arbitration of each witness whom he did not consider to have been called unnecessarily, having regard to the character of his evidence and the probability of his having to be recalled. The allowance for the witness Coyle should also be determined according to this rule. Their Lordships are therefore of opinion that the order for review of the items in the schedule to the notice of motion for witnesses' expenses was properly made. The result is that in the principal appeal the order of the Full Court so far as it relates

to the consultations and conferences should be reversed and so far as it relates to the shorthand notes and witnesses' expenses should be affirmed, and their Lordships will humbly advise Her Majesty accordingly. No other question was argued in the cross-appeal and their Lordships will humbly advise Her Majesty that it should be dismissed. The parties will pay their own costs of these appeals.