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*Mar. 18.
*May 6.

THE COLLINS BAY RAFTING AND FORWARDING COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

THE NEW YORK AND OTTAWA RAILWAY COMPANY (PLAINTIFFS) AND WILLIAM LESSLIE (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Divisibility—Completion.

By a contract to remove spans from a wrecked bridge in the St. Lawrence the contractors agreed "to remove both spans of the wrecked bridge and put them ashore for the sum of $25,000, we to be paid $5,000 as soon as one span is removed from the channel and another $5,000 as soon as one span is put ashore and the balance as soon as the work is completed. * * * It being understood and agreed that we push the work with all reasonable despatch, but if we fail to complete work this season we are to have the right to complete it next season."

Held, reversing the judgment of the Court of Apppeal, Taschereau and Davies JJ. dissenting, that the contract was divisible, and the contractors having removed one span from the channel and put it ashore were entitled to the two payments of $5,000 each notwithstanding the whole work was not completed in the second season.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial in favour of the defendant company.

The contract which gave rise to this action was as follows:

"This agreement made and entered into this day of October, 1898, by and between the Collins' Bay Rafting and Forwarding Company, Limited, party of the first part; and the New York and Ottawa Company, party of the second part, witnesseth:

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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"Whereas the said second party invited bids for the removing from the St. Lawrence River the two wrecked spans of its bridge now in the south channel of the St. Lawrence River, including all the metal work of bridge, and erecting plant connected therewith; and said first party submitted two propositions for the accomplishment of said undertaking, one based on the payment of fixed prices per day for the labour and machinery required to do the work, and the other proposing a fixed price for a completed job and for the accomplishment of which said first party proposes to assume all risk and furnish all the labour, machinery and appliances required for and suited to said undertaking, which said latter proposition is in words and figures following, viz:

"KINGSTON, September 30th, 1898.

"GEO. W. PARKER, ESQ.,

"Pres. N. Y. & O. R. Co., Cornwall.

"DEAR SIR,—Since seeing you I have had personal interview and correspondence with my partners, and as you seem to prefer having the spans of the bridge removed by contract, the contractors to assume all risk in the matter, we have decided to make you another proposition, leaving it optional with you to accept either offer.

"We will contract to remove both spans of the wrecked bridge and put them ashore for the sum of ($25,000) twenty-five thousand dollars, we to be paid ($5,000) five thousand dollars as soon as one span is removed from the channel, and another ($5,000) five thousand dollars as soon as one span is put ashore and the balance as soon as the work is completed.

"It being agreed that you get us permit from the U. S. Government to allow us to use our plant, vessels and men to do the work. We to commence operations with two gangs and outfits next week, one to work at

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the middle span and the other at the south span, it being understood and agreed that we push the work with all reasonable despatch, but if we fail to complete work this season we are to have the right to complete it next season.

"Security to be given us that we will be paid as above, and on completion of our contract.

"Awaiting your reply, I remain,

"Yours respectfully,

"(Sgd.) COLLINS' BAY RAFTING AND FORWARDING COMPANY, LIMITED.

W. LESSLIE,

Manager.

"Upon due consideration said second party accepted said latter proposal in words and figures following, namely:

"CORNWALL, Ont., October 3rd, 1898.

"COLLINS BAY RAFTING AND FORWARDING CO.,

W. LESSLIE, Manager,

Collins Bay, Ont.

"DEAR SIR,—After considering your propositions we have decided to accept the one dated Sept. 30, 1898, in which you propose to remove the entire wrecked spans of our St. Lawrence bridge, and all metal material connected therewith, and place them on shore for twenty-five thousand dollars ($25,000) with the understanding that your agreement is to take out the middle span whole, so that the material can be used in the construction of another bridge.

"The rest of the wrecked metal is to be taken out unbroken, so far as practicable, but to be cut up by blasting if it is found impossible to take the material out otherwise.

"It is further understood that you are to commence the work this week and prosecute it with all possible

vigour, with a view of completing the undertaking at the earliest practicable moment.

"We of course understand that unless we can secure the necessary permit from the United States Government for you to work in American waters, we are to take all risk incident to or connected therewith.

"Very truly yours,

"(Sgd.) GEO. W. PARKER,

"Accepted, President.

(Sgd.) COLLINS BAY RAFTING AND FORWARDING COMPANY, LIMITED.

(Sgd.) W. LESSLIE, Manager.

CORNWALL, Oct. 3rd, 1898.

"Now in consideration of the premises and of the sum of one dollar paid by each of the said parties hereto to the other, said first party stipulates and agrees to commence work immediately on said undertaking and will furnish all the men, machinery and appliances necessary and proper for the speedy and efficient accomplishment of the removal of said bridge, spans and erecting plant, in the time and manner specified in said correspondence, and assume all risk of accident, and damage incident thereto, except as otherwise herein provided.

"Upon the accomplishment of said work in the way and manner specified above, said second party agrees to pay the sums of money therefor to said first party at the times and upon the conditions above stipulated and is to secure such payments by acceptable security, or by the deposit of the cash covering same with the Bank of Montreal at Cornwall, or some other bank to be agreed upon.

"It is mutually agreed that the work shall be done and the job completed under the supervision and to the acceptance of the chief engineer of said second party.

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"Said second party to secure the approval or consent of the United States Government for the craft and men of said first party to do said work in American waters, or to protect and save harmless said first party from and against all hindrances or seizure resulting from the failure to have such consent.

"IN WITNESS WHEREOF said parties have hereunto subscribed their corporate names by officers thereunto duly authorized, in duplicate, the day and date above stated.

"(Sgd.) COLLINS BAY RAFTING AND FORWARDING CO., LIMITED.

"(Sgd.) W. LESSLIE, Manager.

"(Sgd.) NEW YORK AND OTTAWA COMPANY by GEO. W. PARKER, President.

At the time this contract was made a considerable part of the south span projected out of the water, and it was entirely broken up by its fall and tangled up in every way and there was no attempt made to save it; and the middle span lay crosswise of the stream in from 26 to 34 feet of water. It was twenty-four feet wide and the depth of water above it was from three or four feet at one end up to ten feet at the other end, and was apparently whole, but it was afterwards found that it was broken at the ninth point.

By the end of the season of 1898 the defendant company had put ashore about one-quarter of the south span and had turned the middle span parallel with the stream, and had dragged it down the stream about five hundred feet, and on the 30th December, 1898, the defendant company wrote to the plaintiffs "under the terms of our contract with your company for the removal and putting ashore of the wrecked spans of the Cornwall bridge, we are entitled to a payment of ($5,000) five thousand dollars when we remove the span from the channel, and this we claim we have

done as far as it affects your company. We have lifted it from its position where it lay directly across the channel and formed a dam and would have obstructed the ice, and so possibly been detrimental to the remaining piers and span of the bridge, and have taken it down the river so that its upper or west end is now about five hundred feet below the line of the bridge, and it lies parallel with the current and to the south side of the centre of the channel so that at least three-fourths of the ice now remaining passes to the north side of the span."

"As you know, we have spared no expense to push the work ahead as rapidly as possible and trust you will instruct Mr. Pringle to join in signing the cheque for $5,000 in favour of our company."

This $5,000 was paid by the plaintiffs to the defendant company and a receipt taken from the defendant company for it, in which it was stated to be paid under protest and that the payment of it was not to be construed as an admission or an acquiescence on the part of the plaintiffs that any moneys were due under the said contract or for the work to be performed thereunder so far as to call for the payment of any moneys. During the season of 1899 the defendant company completed the putting ashore of the balance of the south span, but were unable to remove the middle span from where it was left at the end of the season of 1898.

The whole work not having been completed by the end of the season of 1899 an action was brought by the New York & Ottawa Co. to recover back the $5,000 so paid and to have the amount deposited with trustees as security for payment of the contract price returned. The defendant by counterclaim demanded $5,000 more having placed one span on the shore. The trial judge dismissed the action and gave defendant the sum so

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claimed. The Court of Appeal reversed this judgment and ordered judgment to be entered for plaintiff as prayed in the statement of claim. The defendant appealed.

Walkem K.C. and *Shepley K.C.* for the appellant. There was no time limit for completion of the work but appellant had to finish it within a reasonable time. See Addison on Contracts (9 ed.) p. 801. *In re Canadian Niagara Power Co.* (1).

The contract was clearly divisible. Addison on contracts 9 ed. 802.

Aylesworth K. C. and *J. A. C. Cameron* for the respondent.

TASCHEREAU J (dissenting).—I am of opinion that that this appeal should be dismissed for the reasons given by Moss J., in the Court of Appeal.

As I read the agreement of the fourth of October, 1898, the appellants undertook to complete the works and earn the $25,000 during the season of 1898, but, if it turned out that it was impossible for them to complete it in that time, they were given the season of 1899, as a peremptory delay, to complete it. If they had at all intimated to the respondents that they did not then and there intend to be bound to complete in 1899 at the latest, the respondents would not have given them the contract.

SEDGEWICK J.—I agree with the opinion of Mr. Justice Girouard.

GIROUARD J.—I am of the opinion that the appeal should be allowed with costs before this court and the Court of Appeal, and the judgment of the High Court of Justice for Ontario restored for the reasons given by Mr. Justice Maclennan.

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DAVIES J. (dissenting).—I am of opinion for the reasons given by Chief Justice Armour and Mr. Justice Moss, that this appeal should be dismissed with costs and judgment entered for the plaintiffs.

MILLS J.—This is an appeal by the defendants, the Collins Bay Rafting and Forwarding Company (Limited), from the judgment of the Court of Appeal, pronounced on the 21st day of September last, whereby the appeal of the plaintiffs from the judgment of the Honourable Mr Justice Street, pronounced at the trial of the action, in favour of the Rafting Company, allowing them $5,000 on their counter-claim and otherwise dismissing the action with costs was allowed and judgment given in favour of the plaintiff with costs. William Lesslie is merely a stake-holder between the parties and has no substantial interest in the appeal.

In this case, the plaintiffs are a corporation under the laws of the State of New Jersey, carrying on business in Canada, with their head office at Collins Bay.

The defendant Lesslie is the manager of the Rafting Co., and resides in the City of Kingston, in Ontario. In 1898, this company entered into negotiations with the New York and Ottawa Railway Company for the removal of two spans of their bridge which had fallen into the south channel of the River St. Lawrence, and the Rafting Company submitted to the New York and Ottawa Railway Company, two propositions for the accomplishment of this work, the one based on the payment of a fixed price for labour and machinery, upon terms and conditions set out in an agreement of the 26th day of November, 1898, being accepted.

The time having expired for the completion of the work according to the condition of the New York and Ottawa Railway Co., they notified William Lesslie and

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Robert Pringle, trustees, in whose names the money had been deposited, requiring them to indorse over to the New York and Ottawa Railway Company the deposit receipt issued by the Bank of Montreal, and on the 21st day of December, 1899, the Collins Bay Rafting Company were requested by the trustees to indorse over to the New York and Ottawa Railway Company the deposit receipt for $20,000 which they did not do.

The trustees had expressed their willingness to indorse over the said deposit receipt, at any time that direction was received to do so from the Collins Bay Rafting and Forwarding Company. The Collins Bay Rafting and Forwarding Company and William Lesslie, one of the trustees, refused to comply with this notice and request to have the deposit receipt of $20,000 indorsed over to the New York and Ottawa Railway Company. The plaintiffs maintained that the time for completing the said contract had expired and they claim the right to recover back the $5,000 paid by them to the Collins Bay Rafting and Forwarding Company. They claim that they have suffered damage to the extent of $20,000 by reason of the non-fulfilment of the contract. They ask that the trustees be required to indorse the deposit receipt of the $20,000 to them; that the Collins Bay Rafting Co. be directed to pay back to them the $5,000 received with interest, and that $20,000 damages for non-performance of the contract be awarded to them, together with the costs of the action.

The defendants set out the agreement between them and the New York and Ottawa Railway Company by which the Collins Bay Rafting and Forwarding Company agreed to effect the removal from the St. Lawrence River of the two wrecked spans of the bridge of the New York and Ottawa Railway Company from the south channel. They assume all risk in the matter,

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and make this further proposition to remove both spans of the wrecked bridge, and put them ashore for the sum of $25,000; $5,000 to be paid as soon as one span is removed from the channel, and another $5,000 as soon as one span is put ashore and the balance that is $15,000, as soon as the work is completed. This is agreed to if the permission from the United States is secured by the New York and Ottawa Railway Company to allow the company to use their plant, vessels and men to do the work.

On the 3rd of October, the president George Parker, of the New York and Ottawa Railway Company accepted the proposal of the 30th September, in which the defendant company proposed to remove the entire wrecked spans of the St. Lawrence bridge and all metal material connected therewith, and place them on shore for $25,000, with the understanding that the Collins Bay Rafting and Forwarding Company agree to take out the middle span whole, so that the material can be used in the construction of another bridge. The rest of the material was to be taken out unbroken as far as practicable. It was further understood that the work was to be commenced that week, and prosecuted with all possible vigour. Accordingly an agreement was entered into to carry into effect the understanding so had. The defendants contend that the time for completion of the said contract was not limited to the fall of 1899, but that they were entitled to such reasonable time for the performance of their work as might be necessary, and they contend that they have so proceeded in the execution of the said contract in accordance with the terms thereby imposed and they claim by reason of the refusal of the plaintiffs to regard the said contract as still subsisting, to recover the full amount as though the same had been completely fulfilled, and they claim that the contract was made upon the

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assumption by both parties, that the middle span of the bridge was unbroken, so that the same could be taken out whole, whereas the said middle span was, at the time of making the contract, so much fractured and broken that it was impossible for the defendants to take the same out whole. The defendants contend that the provision for arbitration has been waived or cancelled between the parties. The defendants maintained that the plaintiffs received the material composing the south span as it was taken out of the river and disposed of the same to their own use, and that the defendants are entitled to recover the contract price for their services for the same. The defendants have removed the middle span to such a position as to relieve the plaintiffs from any danger of claims for damages by reason of the obstruction in said channel of the river and the only loss to the plaintiffs from not having put it on shore, is, its value as scrap iron or steel.

The defendants, by way of counter-claim, ask that the plaintiffs be ordered to pay the full amount agreed to, less any sum that may have been paid already, and payment to them by the plaintiffs, in any event, of the value of the work and services performed in connection with the removal of the said wreck.

The case came on for trial before Mr. Justice Street on the 26th June, 1900. The Rafting Company maintain that they had not contracted to complete the work in any particular time. They proposed in their letter of the 30th of September, 1898, to remove both spans of the wrecked bridge and put them ashore. They stipulated that if they failed to complete the work during the then current season, they should have the right to complete it in the season following. The plaintiffs stipulated that the middle span should be taken out whole, so that the material might be

used in the construction of another bridge. In the actual contract these letters of the 30th of September, and the 3rd of October, are set out as part of the contract as agreed upon between the parties.

The trial judge found that the defendants were entitled to keep the sum of $5,000 which they had received from the plaintiffs, because, although they had not, at the time they received it, removed the one span of the bridge, namely, the south span, ashore, they have since done so. Two of the iron spans of the bridge had fallen over into the water, and caused a dangerous obstruction to the navigable channel which passes between two of the piers, and, if allowed to remain would form an immense dam, the back water from which might carry away the piers themselves; besides it would be a source of danger to vessels navigating the river. This danger would be greatly diminished by the removal of the south span from the channel and putting it on shore, and the removal of the centre span which was a complete barrier to navigation where it had fallen. It is not shown that the channel in which the south span lay, ceased to be obstructed until it was drawn ashore. The centre span, instead of lying across the channel, was drawn bodily down the stream some 500 or 600 feet where it still lies; the danger of a flood has, by what has been accomplished, been entirely provided against, and the channel between the piers of the bridge has been cleared by the centre span being turned parallel with the flow of the water, although it is still in the channel of the river, upon its south side.

The trial judge found that the Collins Bay Company, having removed the south span from the channel became entitled to the payment of $5,000 and by putting it on shore, they became entitled to a further sum of $5,000.

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The plaintiffs in appealing to the Court of Appeal, claimed that the trial judge had erred in the construction of the contract. The New York and Ottawa Company maintained that the Rafting Company were to receive $25,000 for a completed job, that this work was to be wholly done by the end of the season of 1899. They also maintained that the trial judge erred in holding that the Collins Bay Company had performed their contract in so far as they were to furnish proper plant and appliances and all the men and machinery, necessary for the performance of the work; that he erred in finding that the Rafting Company had commenced their work in due time and had prosecuted it and had continued to prosecute it with due diligence and skill; that he erred in holding that they were entitled to keep the sum of $5,000 from the plaintiffs, as the contract is a specific contract for a completed job; that the trial judge has put an interpretation upon the contract inconsistent with its language, when he decided that they were to be paid $5,000 when one span was put ashore and $5,000 when one span was removed from the channel,

The Collins Bay Company in resisting this appeal assert that the agreement between the parties distinctly provides for the payment of certain sums for cetain work on certain parts of the said contract being fulfilled. These payments were intended to remain as payments for the performance of certain parts of the work. The terms of the contract shew that payment was to be made in the way spoken of, as the work progressed, which is conclusive against treating the contract as an entire indivisible contract.

In the Court of Appeal Chief Justice Armour, in his judgment, points out that the defendant company had, by the end of the season, put ashore about one quarter of the south span, and had turned the middle

span parallel with the stream, and had dragged it down the stream about five hundred feet. They demanded a payment of $5,000 on account, which was paid during the year 1899; they completed putting ashore the balance of the south span, but were unable to remove the middle span from where it was left at the end of the season of 1898. The railway company knew by the last of June, 1899, that the middle span would not be raised in time for use in the re-construction of the bridge, and they ordered a new one. The Chief Justice inferred from the contract that the whole of the work was to be completed during the season of 1899, if the defendant company failed to complete it during the season of 1898, as the offer says:—

> it being understood and agreed that we push the work with all reasonable despatch, but, if we fail to complete the work this season, we are to have the right to complete it next season.

The more difficult question, in the opinion of the Chief Justice, growing out of this contract, is as to the amount to which the defendant company are entitled in respect of what was done by them on the contract. The words are:

> We will contract to remove both spans of the wrecked bridge, and to put them ashore for the sum of $25,000, we to be paid $5,000 as soon as one span is removed from the channel, and another $5,000 as soon as one span is put ashore, and the balance as soon as the work is completed.

The difficulty hinges on the meaning to be ascribed to the word "channel" in this term of the contract. The river is here divided into two channels, called respectively, the north and south channels, by an intervening island, over which, as well as over these two channels, the bridge crossed, and if the word "channel" in this term of the contract, is taken to mean the whole of the bed of the south channel of the river, and that is the sense in which the word is used in the

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agreement where the two wrecked spans are described as being in the south channel of the St. Lawrence river, then the judgment of the learned judge, holding that the south span of the bridge was not only removed but also put ashore, the defendant company were entitled to $10,000, might be supported. But by taking this to be the meaning of the word "channel," the words "removed from the channel" and "put ashore" would mean the same thing, and it is evident that they were used in contradistinction to each other, as having different meanings, and the letter written by the defendant company to the plaintiffs on the 30th of December, 1898, above quoted, in which they claim that they had removed the middle span from the channel, as far as it affected the plaintiffs, so that they did not consider that these words meant the same thing. What the defendant company intended by the word "channel" in this term of the contract was, in the opinion of the Chief Justice, the navigable channel, in which the middle span of the bridge was then lying, and, upon the removal of which from that channel, they were to be paid $5,000, and this accords with the construction put upon this term of the contract by the defendant company themselves, in their letter to the plaintiffs of the 20th of December, 1898.

The Chief Justice, therefore, considered that the defendant company could not be held to be entitled to this $5,000, for it could not be said that what they did do to this span was a substantial compliance with the contract, and they could only be entitled to $5,000 for putting the south span ashore, which sum they had already been paid, and, in the judgment of the Chief Justice, the appeal should be allowed with costs and the order go to the defendants for the indorsing over of the deposit receipts to the plaintiff; that the counter-claim should

be dismissed with costs, and the defendant company pay the costs of Lesslie.

Mr. Justice Osler was of opinion that the defendants must be taken to have proposed to complete the work at farthest by the end of the season of 1899; that the judgment at the trial dismissing the action must stand, as the plaintiff expressly disclaimed a desire to sue for anything but the deposit, which they could recover because time was not of the essence of the agreement, so as to entitle them to sue at once upon its non-performance, to recover back the security; that the contract to perform, and the contract to pay were independent agreements, otherwise the defendants might have performed nearly the whole of the contract within the time, and because this very small part was not performed they would lose their labour, without any opportunity of earning the price by completing the contract. The learned judge was of opinion that the defendants were entitled to judgment for the second instalment of $5,000. He did not think them entitled to the two sums of $5,000 for removing and putting ashore one and the same span; by putting one span ashore they earned $5,000; and by removing the other from the centre channel, even though not put on shore, they earned another $5,000. The centre span was removed that it might not dam back the ice and interfere with the navigation.

He thought the evidence shewed that they removed it from the channel so far as that was necessary to entitle them to a second instalment of $5,000, and that the judgment on the counter-claim should therefore be affirmed.

Mr. Justice Maclennan, among other things held that there was a contract to remove both spans of the wrecked bridge and put them ashore for $25,000, $5,000 of which was to be paid as soon as one span was

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removed from the channel, and a second $5,000, as soon as one span was put ashore, and the balance as soon as the work was completed. The learned judge said:

The St. Lawrence River, where this bridge was constructed, is divided into two great channels by an island, and the spans of the bridge which had fallen were two of the three composing the bridge, across the south channel. In the recital of the contract the word "channel" is used in the widest sense, and as including the whole of the stream from the island to the shore, but in this paragraph, the word is evidently used in some other sense, otherwise "removing from the channel" and the "putting ashore" would mean the same thing, and when one span was removed from the channel and put ashore, the whole work would be finished, and the whole $25,000 earned, instead of only two sums of $5,000 each.

There was an abutment on each shore and two piers in the stream; on these abutments and piers the three spans of the bridge rested. The piers divided the stream into three channels and, when the two spans fell, each of them filled up and obstructed one of the channels. I think these are the channels which are meant in this part of the contract. It was all important in the public interest that they should be removed with as little delay as possible. While they continued the plaintiffs might be held responsible for damage suffered by persons navigating the stream. * * What the parties meant by the language they employed was that every effort should be made to remove the wreck * * and the defendants were to have a payment of $5,000 as soon as one of the channels was clear, even if the span taken out had not been put ashore, and they were to have $5,000, when the other span was put * * ashore.

I think the middle span was removed from the channel according to the contract; it was removed from its position between the piers * * and turned parallel with the current instead of across it.

The learned judge then went on to say that about the south span there was no dispute, and that the defendants had earned and were entitled to two sums of $5,000 each; that the materials to be removed were the property of the plaintiffs, the middle span was supposed to be unbroken, the other span was known to be broken; that the middle span was found to be broken in two, and the parts were still clinging together; that the stipulation for payment by instal-

ments, at certain stages of progress, favoured the view that the time fixed for completion was not of the essence of the contract. He thought there was no time limited for completion and that the disposition of the action by the judge was right; that the deposit was a security for the payment of the contract price. The appeal of the plaintiff, both on the action and on the counter claim, Mr. Justice Maclennan held should be dismissed with costs.

Mr. Justice Moss held that the purpose of this action was to restore to the plaintiffs the sum of $20,000 in the Bank of Montreal to the credit of Lesslie and Pringle, and the repayment to the plaintiffs of $5,000 paid the Collins Bay Rafting Company.

His Lordship stated that in December, 1899, the plaintiffs claimed that the Collins Bay Rafting Company had not completed the work under their contract, and they claimed the repayment to them of the money held by the bank, to which the Collins Bay Rafting Company refused to agree. A suit was bronght by the railway company for this purpose and also for the repayment of the $5,000. The Collins Bay Rafting Company were to complete their contract in the season of 1898, if possible, but, if not, then by the end of the season of 1899.

Judge Moss held that, by putting the south span ashore the defendant company were not able to claim $10,000 in respect to it, and he finds that during the season of 1898, efforts made towards the removal of the middle span were unsuccessful. His Lordship quotes their letter as follows:

> Under the terms of our contract with your company for the removal and putting ashore of the wrecked spans of the Cornwall bridge we are entitled to a payment of $5,000 when we remove the span from the channel. Now, this we claim to have done, as it affects your company, as we have lifted it from its position where it *lay directly across* the channel and have taken it down the river.

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All this (the learned judge says) is plainly descriptive of the one span to be removed from the channel, and it is in respect of this work that the claim is made. But the letter emphasizes the matter by reference to the south span as follows:

"We have hauled out and put upon the south shore alongside your railroad track about one-third of the broken span, and false work."

They say that it (the centre span) is in the south side of the centre of the channel, but they add that they have been prevented, owing to a break in the south end of it, from getting the whole span below the point as they anticipated. * * They make no higher claim than that they have moved the middle span into such a position as to relieve the plaintiffs from any danger of claim for damages by reason of the obstruction of the channel. They do not assert that they have removed it from the channel. The idea was that it was to be lifted bodily and carried into shallow water, but, in fact it was left in the swift current where it still lies, and the trial judge does not find upon the evidence that the contract has been performed in that respect. * * I am therefore of opinion that the defendants' counter-claim fails.

His conclusion was that the plaintiffs were entitled to the $20,000 in the bank, together with the accrued interest, and to an order that the defendant Lesslie indorse the deposit receipt.

Mr. Justice Lister agreed with Mr. Justice Moss and the Chief Justice.

It is most important to consider what was undertaken, and what the parties were required to do under their agreement. By the indenture of agreement signed on the 26th of November, it is stated that the Collins Bay Rafting Company and the New York and Ottawa Railway Company have entered into agreement in reference to the removal of two wrecked spans of the railway bridge in the south channel of the St. Lawrence, including all the metal work of the bridge and erecting plant therewith. They state in one of the terms of the agreement that the New York and Ottawa Railway Company should place $25,000 in the Bank of Montreal to the joint credit of William Lesslie and Robert A. Pringle, to be held by them as trustees as security for

the payment of all sums of money that may from time to time become due to the Rafting Company which arrangement the Rafting Company are required to accept upon the conditions hereinafter mentioned, the Rafting Company are to draw out of the said $25,000, such sums as they may from time to time be entitled to, under the contract, and Mr. Pringle agrees, when authorised by the New York and Ottawa Railway Company to pay to the Collins Bay Rafting Company, such sum as he may be directed to pay, and Mr. Lesslie is to join Mr. Pringle in paying to the Collins Bay Rafting Company such sum as he may be directed by the New York and Ottawa Railway Company to pay. This agreement also provides to refer to arbitration any question with reference to the performance of the work which may become a matter of controversy between them.

When the correspondence is referred to it does not afford very satisfactory information as to the specific work to be performed and the payments to be made. The agreement says that the first party,—the Collins Bay Rafting Company,—agrees to commence work immediately on the said undertaking, to furnish all men, machinery and appliances necessary and proper for the speedy and efficient accomplishment of the removal of the said fallen spans of the bridge, and the erecting plant in the time and manner specified in the said correspondence, and assume all risk of accident and damage incident thereto, except as otherwise hereinafter provided. There is nothing here indicated as to the work which was to be performed, but the correspondence is referred to from which that is to be ascertained. Upon the accomplishment of the work in the way and manner specified, the second party agrees to pay the sum of money therefor, at the time and upon the conditions stipulated, to the first party, and the

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second party agrees to obtain the approval and consent of the United States Government for the employment of the crafts and men of the said first party to do the work in American waters, and so we are sent back to the correspondence for the purpose of ascertaining what the Collins Bay Rafting Company have bound themselves to perform. In the letter of the 30th of September, the Collins Bay Rafting Company say to the president of the New York and Ottawa Railway Company:

> We will contract to remove both spans of the wrecked bridge and put them ashore for the sum of $25,000, we to be paid $5,000 as soon as one span is removed from the channel, and another $5,000 as soon as one span is put ashore, and the balance as soon as the work is completed.

What balance or further work was there to perform and for the performance of which the remaining $15,000 were retained? Did these two transactions, when completed, embrace all the work that was to be done for this sum of money? This paragraph of the contract is a species of progress estimate, and there is usually some relation between the amount of work performed and the payments made. Is it then the fact that this contract provides only for the payment of forty per cent of the estimate when both of the fallen spans of the bridge are placed on shore? I do not think so. I think the more reasonable construction of this part of the contract is that $5,000 are to be paid when one span is removed from the channel, and another $5,000 as soon as the span so removed from the channel is placed on the shore; so that with regard to the removal of each of those spans from where it was lying, to the shore, the Collins Bay Rafting Company became entitled to the payment, on this progress estimate, of $10,000 or $20,000 in all, for the entire accomplishment of this part of the contract.

The word "channel" as used in this part of the contract means "that part of the river in which vessels go on their voyage in sailing up and down the St. Lawrence, and in which either section of the fallen bridge, if permitted to remain where it had fallen, would become an obstruction to navigation."

The New York and Ottawa Railway Company desired to escape the danger which might arise to their structure if the water was dammed back and the ice there accumulated, as well as proceedings for obstructing the navigation of the river. They also sought to utilize the material of the fallen bridge in the construction of another. The president of the New York and Ottawa Railway Company, on the 3rd of October, wrote to the Collins Bay Rafting Company:—

> We have decided to accept your proposition of the 30th of September, in which you propose to remove the entire wrecked span of our St. Lawrence bridge, and all metal material connected therewith, and place them on shore for $25,000, with the understanding that your agreement is to take out the middle span whole, so that the material can be used in the construction of another bridge. The rest of the wrecked metal is to be taken out unbroken so far as practicable, but to be cut up by blasting, if it is found impossible to take the metal out otherwise. You are to commence the work this week and to prosecute it with all possible vigour, with a view of completing the undertaking at the earliest practical moment. We, of course, understand that unless we can secure the necessary permit from the United States Government for you to work in American waters we are to take all risks incident or connected therewith.

An agreement was entered into in October between these companies, in which it was stated that the New York and Ottawa Railway Company invited bids for removing from the St. Lawrence river, the two wrecked spans of the bridge now in the south channel of the St. Lawrence river, including all the metal work of the bridge, and erecting plant connected therewith, and the said first party submitted two propositions for the accomplishment of the said undertaking,

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one based on the payment of fixed prices per day for the labour and machinery required to do the work, and the other proposing a fixed price for the completed job, and for the accomplishment of which the said first party proposes to assume all risk and furnish all the labour, machinery and appliances required for and suiting to the said undertaking.

This latter proposition embraces the prices for which I have already quoted with this additional:—

> We to commence operations with two gangs and outfits next week, one to work at the middle span and the other at the south span, it being understood and agreed that we push the work with all reasonable despatch, but if we fail to complete the work this season we are to have the right to complete it next season.

I am of opinion that this contract is a divisible contract; that the payments authorized by it, if made from time to time, under it, as the work proceeds, cannot be recovered back; that the Collins Bay Company were to continue vigourously to prosecute the work until it was completed and that they were at liberty to continue this prosecution throughout the season of 1899 if, when working with all possible vigour, this was necessary. I hold that when the southern span was removed to the shore the company were entitled to receive $10,000; and when they removed the centre span from between the piers had they, in taking it down the channel, so placed it as to prevent it interfering with the navigation of that channel as well as from damming back the ice, they would have earned another instalment of $5,000. I hold that the judgment in their favour on the counterclaim by the trial judge should be upheld.

Appeal allowed with costs.

Solicitors for the appellants: *Walkem & Walkem.*

Solicitors for the respondent: *Leitch, Pringle & Cameron.*