9TH FEBRUARY, 1888.

DISCUSSION ON HIS HONOR JUDGE OWEN'S RULING ON THE CASE STEWART AND ANOTHER *VERSUS* THE MUNICIPAL COUNCIL OF SYDNEY.

The following is a resumé of the case.

Mr. G. B. Simpson, Q.C., and Mr. C. J. Manning and Mr. Walker (instructed by Messrs. Salter and Barker), appeared for the plaintiffs, John Stewart and Reuben Harrison; Mr. Salomons, Q.C., with Mr. Barton and Mr. Lingen (instructed by Mr. George Merriman, city solicitor), appeared for the defendants, the Municipal Council of Sydney.

This matter came before the Court under an application made by plaintiffs for an injunction to restrain the defendant council from entering upon and taking possession of plaintiffs' contract works or interfering with them in the exercise of their rights under the contract. By consent the matter was turned into a motion for decree.

Plaintiffs' case was that in December, 1885, the plaintiffs contracted with the defendants for the erection and completion of the Centennial Hall, in connection with the Sydney Town Hall, in accordance with certain drawings and specifications therein referred to. By the specification annexed to the contract it was provided in clause 172 that the whole of the iron used in plates, angle and and T iron rivets, &c., "*are to be of the best Staffordshire iron for girders*," &c., to be approved of by the architect or clerk of works, who would have the power to test any portion of the work fit to ascertain that it would stand the test of the quality stated: In the iron and building trades the term "*best Staffordshire iron*" had a well-known technical meaning, and indicated Staffordshire iron of a certain (but not the highest) degree of excellence.

The superior kinds were technically known as "best best" and "best best best." The contract showed 3-ft. box girders to be supplied and fixed by the plaintiffs, and the defendants urgently requested that the space for the great organ should be ready by November, 1887, to receive the organ, and for this purpose it was necessary that two out of the seven girders required should be speedily fixed in position. During the year 1886 the plaintiffs made repeated applications to the defendants and the city architect for details of the girders required, but unsuccessfully, though it was the duty of the defendants to supply the plaintiffs with said details. On January 8, 1887, the city architect gave orders to the plaintiffs to supply, in place of the box girders, seven 5-ft. web girders, the contract for the box girders to be cancelled, the iron for two of the seven girders to be procured in Sydney or Melbourne, or some other local market, and the iron for the remaining five girders to be imported as soon as possible, and the orders therefor to be cabled home. Accordingly the plaintiffs, through their sub-contractors, Messrs. D. and W. Robertson, cabled home the order for the iron required for the five girders, and proceeded to manufacture in Sydney the two girders, which were more immediately required, from iron obtained in the local market. The imported iron arrived in Sydney in May, 1887, and was thereafter always open to the inspection of the defendants and their officers in the sub-contractors' yard, and was seen particularly by the city architect long prior to its rejection. After the imported iron arrived in Sydney, and when the two girders were under construction by the sub-contractors, the defendants again altered their plans, and required the plaintiffs to supply, in lieu of the 5-ft. girders, 6ft. 3in. web girders. On October 4, 1887, the city architect wrote to plaintiffs, intimating that the iron proposed to be used for the girders was not in accordance with the requirements of the specification, and therefore would not be allowed to be used in the construction of the girders. The plaintiffs then discovered that defendants in their absence had tested the iron, and alleged that such tests showed that the iron was not satisfactory. The plaintiffs insisted that the iron was of the quality they were

bound to supply, and that the same would successfully stand all tests that could be properly applied to it. They further insisted that the rejection of the iron was not *bonâ fide*, but that it was vexatiously rejected, not on account of its inferiority, but with a view to putting pressure on plaintiffs, and force them to submit to receive such remuneration only for their trouble and expense, as the defendants might think fit to allow. The plaintiffs submitted that they were under no legal objection to execute the ironwork lastly required of them, or at least that they could not be required to proceed with it until they were supplied with the necessary details therefor. The plaintiffs submitted and insisted that in the circumstances of the case the defendants were not entitled to enter upon or take possession of the contract works, and that they ought to be restrained from interfering with the plaintiffs in the exercise of their legal rights.

For the defendants it was contended that the architect was by the contract to have power to require the removal from the premises of all material which in his opinion were not in accordance with the specification, and in case of default the employer was to be at liberty to employ other persons to remove the same. The materials throughout the building were to be of the best of their respective kinds and of such brands as the architect approved of and well tested to the satisfaction of the architect whenever considered desirable. Defendants denied that the term "*best Staffordshire iron*" was used in its technical meaning, or that it had any other meaning in the 172nd clause referred to than Staffordshire iron of the very best quality for girders. The defendants submitted that under the clauses of the contract the architect was appointed sole arbiter of the quality of the iron and the nature of the construction and erection of the girders, and that there was no appeal from his decision either by reference to arbitration or a suit in the court. The defendants denied the statements with regard to procuring the iron. The iron was tested by Professor Warren, of the University, in May last, when it was found to be inferior to the *best Staffordshire iron*. The defendants were informed that it would be unsafe and dangerous to the lives of any audience to be

assembled in the Centennial Hall to allow the girders proposed by the plaintiffs to be executed.

Evidence was called for plaintiffs.

Reuben Harrison, one of the plaintiffs, stated that the contract was signed in December, 1885, and several alterations were made in the size of the girders. The clause in the contract that the iron was to be "*of the best Staffordshire*" had a well-known meaning in the trade.

Mr. Salomons held that the witness could not answer a question of this kind. There was no question of technicalities or of trade terms. The words of the contract were that best Staffordshire iron was to be used. The architect was to be the sole judge of the matter, and the contractors must submit to his decision. Plaintiffs themselves had admitted that the best iron was not used.

Mr. Simpson contended that the question was a fair one to be asked. The term "*best Staffordshire iron*" was one recognised in the trade, and he would be able to show by the evidence that the contractors were quite within the terms of their contract. The iron used was thoroughly suitable for the work for which it was intended.

Further argument ensued.

His Honor said the point which was formally before him was simply the question as to whether the witness Harrison should be allowed to answer the question whether the words "*best Staffordshire iron*" had a special meaning in the trade. The answer to this question really lay at the root of the whole case. He must look at the question in the light of the pleadings to see clearly what plaintiffs were intending to get at when the question was asked from the witness. By the statement of claim plaintiffs pointed out that there were three classes of Staffordshire iron, and that he was bound to supply not the very best quality, but the third best, as the words "*best best*" or "*best best best*," representing the other two qualities, were not used. That really was the whole contention between the plaintiffs and the defendants. There was one very simple rule of construing the meaning of words like this, and that was to construe them according to the

ordinary meaning of the words used under the contract unless there was something in the context to show that some special meaning was to be used. The two clauses 172 and 170, must be read together. The latter clause stated that the whole of the iron used in the building must be of the best quality. The contention of plaintiffs was that although under this clause the whole of the iron was to be of the best quality, a portion was not to be of this very best quality, and that the iron to be put in the girders was to be of the third best quality, and he based his contention on the assertion that the words "*best Staffordshire iron*" had a technical meaning. He (his Honor) could not put this construction on the words. It was quite clear that plaintiffs had not supplied Staffordshire iron of the best quality, and they contended that they were not bound to do so, and submitted that the tests applied by defendants were those referring to the very best Staffordshire iron. He decided that plaintiffs were bound to bring iron of the best quality of Staffordshire iron, and this question of test did not accordingly apply. The only thing he had to determine was whether this particular question could be put to this particular witness, and he held it could not, and the reason was that he thought that under the contract the parties were bound to supply Staffordshire iron of the best quality. There evidently had been considerable difficulty in dealing with the question of this roof in the endeavour to secure an absolutely safe one, and it would be a serious thing if the court were to hold that he was not bound to put in iron of the best kind.

Mr. Salomons submitted that the case was virtually decided by what his Honor had stated.

His Honor said it appeared to him that it was possible plaintiffs might try to show that in respect of the iron used there was a variation in the contract and in the specifications. Further evidence might therefore be taken.

Mr. Harrison continued his evidence and gave particulars with regard to the variations in the form of the girders, and supported the contention in this statement of claim with reference to procuring the iron.

The PRESIDENT, in opening the discussion said, he hoped it would be distinctly understood that though we, as a body, felt perfectly justified in discussing this subject, we did so as a matter of principle, without prejudice, and without having any personal interest in this particular case. That ought to be distinctly understood. No one for a moment questioned the Judges' impartiality. On the contrary, anyone who read his ruling must feel satisfied, and admit that he used every care and caution in arriving at his decision. His ruling was in harmony with the reading of the specification, that was, according to the ordinary method of reading and understanding the English language. But there was another view of the same subject which was most material to the profession, and it was this, that if we allowed the Judge's *legal interpretation* of a technical specification to pass unchallenged, and without criticism it would form a precedent which must result, in the event of disputes, in a heavy loss to the contractors who tendered for work according to the standard practice and customs of the trade. That was the point we had to consider.

The clauses in the specification referring to the quality of the material to be used in the construction of the Centennial Hall girders were:—Clause 172, "that the whole of the iron used in plates, angle bars, tie bars, rivets, etc. are to be of the "*best Staffordshire iron for girders*" to be approved of by the architect or clerk of works, who shall have the power to test any portion of the work to ascertain whether it will stand the test of the quality stated." The other clause provided that "the whole of the iron wrought or cast, is to be of the best quality." He brought these two clauses before us, because, as the Judge very justly remarked, the issue of the case depended entirely on the interpretation given to them. Personally, and he thought they would all agree with him, he must acknowledge that the specification was very crude.

Mr. WALTER SHELLSHEAR said that the case of the Town Hall girder iron was one of more than passing interest, and there were several points which deserved the consideration of the Association. A Contractor accepted a contract under a most vague specification, the contract included certain ironwork, and as

the work proceeded it is found that those responsible for the design either did not understand the work, or did not know their own minds, for the design was altered three times.

That the contract for such an important work, should be let before proper plans had been prepared, was to say the least a most unbusiness-like proceeding; but the point which more immediately concerned us, was the specification of the iron to be used in the structure, and there they found the language most ambiguous, it was stated that "the whole of the plates &c. are to be of the *best Staffordshire Iron* for girders." Now, the question was, what this expression was intended to convey? It was quite evident that if ordinary B Staffordshire iron had been used, those in charge could have passed it and still been within the letter of the specification, or, on the other hand, it could have been interpreted as meaning the best iron made in Staffordshire, which all knew was a most expensive material, and possessed qualities quite unnecessary for ordinary girder work.

The properties of materials at the present day were so well known that it had become almost a universal practice to specify the tests that the iron was to stand in important structures. If this were done there could be no possibility of any dispute arising, and the contractor would not be at the mercy of any autocratic individual who might pass ordinary B iron, or, as in the present instance, take the case before a Court of Law, where the legal meaning of the specification would be enforced, regardless of trade terms and usages.

The following were some of the test clauses for girder work adopted by leading engineers:—

Mr. George Berkeley, Vice-President of the Institute of Engineers, provided that the Iron for the roofing and girders of the Bombay Passenger Station, should stand the following tests:—"The plate, angle, tee and channel iron, must bear a tensile strain of 12 (twelve) tons to the square inch without any permanent set, and the testing must show, they will bear an average strain of 21 (twenty-one) tons and a minimum strain of 20 (twenty) tons to the square inch, with on extension of one inch and one quarter in a length of 12

(twelve) inches before fracture. In any case where the average strength of 21 (twenty-one) tons is not maintained, or does not stretch as specified, the whole quantity, of which the piece forms a part, will be rejected."

Mr. W. H. Barlow, in his specification for the new Tay Bridge, provided that—"The wrought iron used is to be capable of bearing a tensile strain of 22 tons, and extending $6\frac{1}{4}$ per cent. of its length without fracture; testing samples to be 8 inches long."

In America, where iron bridge building had been brought to a high state of perfection, both as regards material and workmanship, the specification provided very fully for proper tests of the iron. The following were the test clauses for the Cincinnati Southern Railway Bridges:—"Wrought iron must be tough, ductile, uniform in quality, and must have a limit of elasticity of not less than 26,000 lb. per square inch. When tested in specimens of uniform sectional areas, of at least $\frac{1}{2}$ square inch for a distance of 10 inches, it must stand without breaking the following strain and elongation in the distance of 6 inches:—

'For bar iron, 52,000 lb. per square inch; elongation, 20 per cent.
'For other sections, 50,000 lb. per square inch; elongation, 15 per cent.
'For plates, 48,000 lb. per square inch; elongation, 10 per cent.
'The iron shall bend cold, without fracture—
180 degrees for bar iron.
135 ,, ,, shape ,,
90 ,, ,, plate ,,

In conclusion, he (Mr. Shellshear) wished to point out that the moral to be learned from the case under discussion was that, firstly, contractors should insist on an arbitration clause in all contracts of any magnitude, and secondly, that if an architect does not understand iron construction he should get the assistance of a competent engineer if his work involved the extensive use of iron.

Mr. G. A. Key said he considered the matter under discussion one of very great importance to the profession, and the principal point appeared to him to be how the judge's ruling in the present instance would affect any future case.