SYLVESTER NEELON (PLAINTIFF).....APPELLANT; 1895

AND *Oct. 14, 15, 16.

THE CITY OF TORONTO AND E. J. LENNOX (DEFENDANTS).... } RESPONDENTS. 1896

*Feb. 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract, construction of—Inconsistent conditions—Dismissal of contractor —Architect's powers — Arbitrator—Disqualification—Probable bias— Evidence, rejection of—Judge's discretion as to order of evidence.

A contract for the construction of a public work contained the following clause "in case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper the architect shall be at liberty to give the contractors ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work." The contract also provided that "the general conditions are made part of this contract (except so far as inconsistent herewith), in which case the terms of this contract shall govern." The first clause in the "general conditions" was as follows: In case the works from the want of sufficient or proper workmen or materials are not proceeding with all the necessary dispatch, then the architect may give ten days' notice to do what is necessary, and upon the contractor's failure to do so, the architect shall have the power at his discretion, (with the consent in writing of the Court House Committee, or Commission as the case may be), without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractor."

Held, Sedgewick and Girouard JJ. dissenting, that this last clause was inconsistent with the above clause of the contract and that the latter must govern. The architect therefore had power to dismiss the contractor without the consent in writing of the Committee.

At the trial, the plaintiff tendered evidence to show that the architect had acted maliciously in the rejection of materials, but the trial judge required proof to be first adduced tending to show that the

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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materials had been wrongfully rejected, reserving until that fact should be established the consideration of the question whether malice was necessary to be proved and if necessary what evidence would be sufficient to establish it. Upon this ruling plaintiff declined to offer any further evidence, and thereupon judgment was entered for the defendants.

Held, that this ruling did not constitute a rejection, but was merely a direction as to the marshalling, of evidence within the discretion of the trial judge.

APPEAL from a decision of the Court of Appeal for Ontario dismissing the plaintiff's appeal from the judgment of the Chancery Division, which affirmed the judgment dismissing the plaintiff's action in the court below.

The material facts sufficiently appear from the above head-note and are more fully set out in the judgments reported.

S. H. Blake Q.C. and *W. Cassels* Q.C. for the appellant. The first clause of the conditions is not inconsistent with the contract within the meaning of that term as used. The court must, if possible, harmonize the whole and only reject what is absolutely at variance with the whole. *In re Phœnix Bessemer Steel Co.* (1); *Anderson's Case* (2); *Fitzgerald* v. *Moran* (3).

The trial judge should have permitted evidence of malice on the part of the architect to be given. His ruling was not as to the mere marshalling of evidence, but a determination on matters of law. *Kemp* v. *Rose* (4); *Pawley* v. *Turnbull* (5); *Jackson* v. *Barry Railway Co.* (6).

As to notice by the architect, see *Roberts* v. *Bury Commissioners* (7).

McCarthy Q.C. and *Fullerton* Q.C. for the respondent, the city of Toronto. The general conditions are in

(1) 44 L.J. [Ch.] 683.
(2) 7 Ch. D. 75.
(3) 47 N.Y. 379.
(4) 1 Giff. 258.
(5) 3 Giff. 70.
(6) [1893] 1 ch. 238.
(7) L. R. 5 C. P. 326.

force only "if not inconsistent with the contract." The court is not, therefore, to read the documents as one, but only to say whether they are or are not consistent. See *Pauling* v. *Mayor of Dover* (1).

Nesbitt and *Grier* for the respondent Lennox, referred to *Vanderlip* v. *Smyth* (2).

TASCHEREAU J.—I agree with the opinion of Mr. Justice Gwynne. I think the appeal should be dismissed.

GWYNNE J.—Whatever cause of action, if any, the plaintiff has upon the matters alleged in his statement of claim, it is the same as he had when the action was commenced upon the 5th of September, 1892, and when he thereupon made the application for an injunction, which application resulted in the order of 10th of September, 1892.

Now, first, with reference to that order it may here be observed that the undertaking of the defendants therein recited—that they would keep proper accounts in respect of the work as it should progress—is no more than seems to have been provided for by the 8th clause of the contract, and the 10th and 11th clauses seem to provide sufficiently for all damages upon a settlement after the completion of the works, of all disputes which may have arisen during the progress of the works from whatever cause arising; what the order substantially does, as it appears to me, is that it refuses the injunction as asked for the removal of the architect and authorizes the work being proceeded with under the terms of the contract, as in the case when the contractor is dismissed for non-compliance with the requirements of the architect after the lapse of ten days from the service of notice as provided in the con-

(1) 24 L.J. [Ex.] 128. (2) 32 U.C.C.P. 60.

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tract. Nothing whatever appears upon the papers produced in evidence by the appellant in relation to the matters in dispute between the contractors and the architect, before the Court House committee and the council, which afford any warrant for the extraordinary relief asked for in the motion for the injunction, namely of interfering with the contract by removal of the architect from the discharge of the duties imposed upon him by the contract.

The plaintiff's right to recover damages in the present action depends upon the result of the action as to the plaintiff's contention, namely, that nothing had occurred which afforded any justification to the defendants for dismissing the contractors from the work and proceeding with it themselves under the provisions of the contract in that behalf, or in other words, that the plaintiff was right and the architect wrong as to the sufficiency of the stone within the terms of the contract, and that the delay which had arisen in proceeding with the work was not the fault of the contractors, but of the architect, who had erroneously condemned, as not in compliance with the terms of the contract, material which the contractor insisted was in perfect compliance with the contract. This constituted the sum and substance of the controversy between the contractor and the architect up to the time of the commencement of this action and the motion for the injunction therein.

The undertaking of the defendants recited in the order is to pay such damages, if any, as should be awarded in the action "if the defendants were not justified in," (that is to say, had no jurisdiction, as was contended by the plaintiff, no justifying cause within the terms of the contract for) "taking the work out of the contractors' hands and proceeding with it themselves under the provisions in the con-

tract." No idea is suggested of the recovery of damages which would be purely nominal, occasioned merely by the non-fulfilment, if any there was, of some purely technical mode or form in the procedure to dismiss the contractors and to proceed with the work in the manner provided by the contract in a case where the justifying cause specified in the contract as authorizing the dismissal of the contractor and procedure with the work by the defendants under the provisions in the contract in that behalf existed. It never was supposed nor contended that if the justifying cause for taking the work out of the contractor's hands existed the plaintiff could in the present action recover substantial damages, for which alone the action could be maintained, if maintainable at all, because of the defendants not having taken some formal step, if any such was necessary, in the mode of procedure adopted for taking the work out of the contractor's hands when abundant cause for taking the work out of their hands existed under the terms of the contract. When this action was commenced on the 5th September, 1892, and when the motion for an injunction was made to the court on the 8th September, 1892, nothing had been done beyond giving the notice contained in the letter of the 29th August, which notice beyond all question the architect, without any concurrence of the Court House committee or of any other authority, was by the contract empowered to give and as the agent of the corporation not as a judge or arbitrator. The ten days given by that notice for the fulfilment of the architect's requirements had not elapsed. Whatever was the plaintiff's cause of action, any he had upon the 5th November, 1892, constitutes his cause of action now, and that involves this simple inquiry:—Was the plaintiff right in his controversy with the architect, and the architect wrong, as to the sufficiency of the stone which was

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provided by the contractor and condemned and rejected by the architect, as had been the contention of the plaintiff before the Court House committee, the mayor of the city and the city council, and was the delay which had taken place in the progress of the works, occasioned by such erroneous condemnation and rejection of the stone?

The frame of this statement of claim with its prayer of relief therein, which points to nothing short of altering wholly the contract between the parties and procuring the court to assume the architect's duty of approving of the materials to be used in the work and in other respects assuming the duties which the contract imposes upon the architect, and demanding his removal, is based, as it appears to me, upon a misconception of the position occupied by the architect under the contract in the exercise of the functions vested in him thereby of rejecting and condemning or accepting material supplied by the contractors for the work and of giving notice to the contractors to supply proper material, etc., etc.

The contract is that the contractors will execute the work and provide all proper materials of the kind specified to the satisfaction of the corporation's architect or the clerk of the works, and that if they fail to provide such material as the corporation's said architect or the clerk of the works shall deem proper or shall fail to carry on the work with the expedition the architect or the clerk of the works shall deem necessary, then the architect may give them notice to the effect specified in the contract. In the exercise and discharge of his duty in respect of these matters it is not in the character of a judge or an arbitrator between the corporation and the contractors that the architect is by the contract authorized to act, but as an expert agent of the corporation in respect of those matters.

When he rejects as not in compliance with the contract material, which, as contended by the plaintiff in the present case, was in perfect compliance with the contract, it is the corporation who rejects, and if any actionable wrong be done by the rejection it is the corporation who are responsible in an action for damages for wrongful interference with the plaintiff in the fulfilment of his contract; to such an action the architect is not a necessary party. This, in my opinion, is the true conclusion to be arrived at from *Roberts* v. *Bury Improvement Commissioners* (1) as applicable to the present case.

Now, if there be anything in the above statement of claim which is cognizable in this action, it is simply this allegation that the architect wrongfully rejected and condemned, as not being in compliance with the contract, certain of the material supplied by the contractors for the work, and would not suffer such material to be used, although, as the plaintiff alleges and insists, the material so rejected and condemned was in perfect compliance with the terms of the contract. In such an action the architect would neither be a necessary or a proper party; the plaintiff's right of action would be established if he should be able to establish that the material so rejected was, as the plaintiff insists, in perfect compliance with the contract and so wrongfully rejected. The additional averment in the statement of claim in the present case that the architect in rejecting the material was actuated by malice towards the plaintiff, can be attributed solely to the draftsman being, and as I think erroneously, of opinion that the architect in the discharge of the powers vested in him by the contract as to rejecting material and superintending the work, was acting in the character of a judge or arbitrator and not as the

(1) L.R. 5 C.P. 310.

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corporation's agent, and that so his decision was by the contract made conclusive, assuming his judgment to be honestly exercised, and that therefore in order to nullify his decision it would be necessary to aver and prove not only that his decision was erroneous, but that it was maliciously so; that he had in fact not exercised an honest judgment, but had through malice given a false and dishonest decision.

In either case the very gist and foundation of the plaintiff's claim for redress would be that the material rejected was in perfect compliance with the contract and so was wrongfully rejected.

Clauses 28 and 29 in the statement of claim seem to me to call for remark. In these clauses the plaintiff refers to the agreement of the 21st July, 1892, and gives an explanation of his reasons for that agreement being entered into. Now, accepting this explanation it is obvious therefrom, and from the terms of the agreement, that the plaintiff acknowledged that the architect had exercised a sound judgment in condemning the stone which he had condemned and refused to permit to be put into or to remain in the work, and that the plaintiff agreed to submit completely in future to the architect's judgment in relation to the stone and the manner of dealing therewith, and the plaintiff withdrew all the accusations which he had made against the architect before the Court House committee and the city council, such accusations having been that he had acted wrongfully in condemning stone as insufficient which was in perfect compliance with the requirements of the contract, so that he had acted not only wrongfully but maliciously and fraudulently so. In fact that agreement and the plaintiff's explanation of the object of its having been entered into as well as the papers produced in evidence by the plaintiff as to what took place on the plaintiff's application to the Court House committee, the city council

and the mayor afford the most complete evidence of the great indulgence and forbearance shown to the plaintiff and of the utterly frivolous nature of the accusations that in the discharge of his duties the architect was actuated by malice.

The appeal arises upon what took place at the trial upon issue joined by the plaintiff upon statements of defence filed by the defendants which cast upon the plaintiff the whole burthen of proof necessary for the maintenance of the action as stated in the statement of claim. Upon this issue being joined the plaintiff recognizing, and as I think correctly, that his allegation that the material condemned by the architect was in perfect compliance with the requirements of the contract constituted the very foundation of his action obtained, and at very great expense to both parties had executed, a commission or commissions for the taking of evidence upon this point at divers places in the United States. At the trial the plaintiff produced the evidence so taken and also put in as evidence the several papers already referred to, in relation to the several appeals made by the plaintiff to the Court House committee, the mayor, and the city council, in relation to the matters therein appearing. Counsel for the defendants contended that none of this matter constituted any evidence upon which this action could be maintained. The plaintiff was then put into the box for the purpose of giving evidence on his own behalf and he was asked when he first entered into a contract for getting stone for the work, and he answered in October, 1889, and he produced a contract dated the 26th October, 1889, entered into by Elliott and Neelon with one Craig and a Mrs. Elliott, whereby the former agreed to accept from the latter all the gray Credit Valley dimension stone required by the former according to dimensions to be given by them for the erection of the city

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hall and court house, and in another contract of the date of the 19th May, 1891, between Elliott and Neelon, per S. Neelon and the Credit Valley Quarries Company, whereby the latter company assumed and agreed to fill the contract of the 26th October, 1889, in the place of the firm of Craig & Elliott, parties to that contract. The learned counsel for the defendants objected that the defendants could not be affected by these contracts. The object of the plaintiff in putting in this evidence was stated to be to shew that the contractors were guilty of no delay in progressing with the work as was evidenced by these early contracts being entered into.

These contracts, it will be observed, as appears by the papers produced in evidence by the plaintiff, especially in the letter of the plaintiff to the Court House committee of the 31st October, 1891, and that from the architect to the corporation solicitor of the date of the 30th March, 1892, were not acted upon, and for the reason as stated in the plaintiff's letter of the 31st October, 1891, when applying for permission to substitute Orangeville stone for Credit Valley stone, that the latter could not be procured in quantities sufficient, of the quality required by the contract. The fact therefore, of these contracts having been entered into, must, I think, be admitted to have been wholly irrelevant to the issue between the parties. Then the counsel for the plaintiff contended that as evidence of the malice of the architect, he was entitled to prove by the plaintiff with reference to the statement which was a privileged confidential statement made by the architect to his principals as appearing on the papers put in as evidence by the plaintiff, notably in his letter of the 20th May, 1892, to the mayor in answer to the latter's letters of the 27th April and 19th May to the effect: "If the contractors would attend to the execution of

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their contract and spend less time in lobbying, etc., to effect changes in their contract with an eye to their own interests" that in point of fact the plaintiff did not desire to have the change made in his contract for his own benefit, nor did he lobby with such view as suggested by the architect. Then he contended the architect's objection to Pigott being taken in as plaintiff's partner and his reasons given to his principals for such objection, which are to be found in the letter from the architect to the solicitor of the corporation of the 30th March, and in a letter also from him to the chairman of the Court House committee of the date of 12th May, 1892 (exhibit no. 10 produced at the trial) afforded evidence of malice. A very long argument upon these matters and others of like character and also upon the construction of a particular part of the contract took place. This latter arose upon a contention raised by counsel for the plaintiff that a condition numbered "1" in a paper entitled "general conditions" was by a recital or preamble in the instrument containing the contract so incorporated into the contract that this condition numbered "1" is to be read with clause no. 8 in the contract as together to form one contract as regards the matters specified in the clause no. 8. The object of this contention (not really of any importance as it appears to me in the present case) was to insist that the provision in clause no. 8 vesting power in the architect to dismiss the contractors if they should fail to comply with the terms of a notice served on the contractors to the effect in clause 8 mentioned, is to be construed as qualified by the following words found in the condition numbered "1," viz.:— "with the consent in writing of the Court House committee" and that therefore clause 8 of the contract gave to the architect no power to dismiss the contractors, as the language of the clause 8 read alone

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purports to convey; but that in dismissing under clause 8 the architect can only act with and by virtue of the consent in writing of the Court House committee.

The defendants on the contrary contended that as to the particulars mentioned in clause 8, that clause and that alone operated, and that in so far at least as the same matters were mentioned in the condition numbered "1" and in the clause 8 of the contract the latter prevailed; and so that the architect had by clause 8 power vested in himself without any consent in writing of the Court House committee to dismiss the contractors under clause 8 for non-fulfilment by them of the requirements contained in a notice given to them by the architect under the provisions of the clause 8. The frame of this condition numbered "1" is certainly very confused and imperfect. It provides that in the event of the contractor becoming bankrupt or insolvent or of his compounding with his creditors, or of his attempting to transfer the contract without the assent of the proprietors, or in the event of his refusing or neglecting, within 48 hours after notice given by the architect to him, to take down, rebuild, repair, alter, or amend any defective or unsatisfactory work, or to comply with any order given by the architect to that effect,

> or in case the works, from the want of sufficient or proper workmen or materials are not proceeding with all the necessary despatch, or if the contractor shall persist in any course violating any of the provisions of his contract, then the architect may give ten days' notice to do what is necessary, and upon his failure to do so

Here is a break in the sentence for the purpose plainly of introducing an alternative provision in the case of bankruptcy, insolvency, etc., etc. The sentence proceeds:

> Or in case of bankruptcy, insolvency, compounding with his creditors or any proposition therefor, or of his assigning or transferring his contract or any attempt to do so, then without previous notice the

architect shall have power at his discretion with the consent in writing of the Court House committee without process or suit at law, to take the work or any part thereof mentioned in such notice, out of the hands of the contractor, and either to relet the same to any other person or persons without its being previously advertised, or to employ workmen and provide materials, tools and other necessary things at the expense of the contractor, or to take such other steps as may be necessary in order to secure the completion of the said work.

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It has been argued with considerable force that all difficulty in giving a plain, consistent and sensible meaning to the whole condition, can be removed by a very slight transposition of the words "the architect shall have the power at his discretion." To the words "at his discretion" in the sentence effect must be given. Something is by these words left to the architect's discretion, and whatever it is that is so left it cannot be subject to the control of the Court House committee. These words "at his discretion," cannot be read in connection with the words immediately following, viz.:—"With the consent in writing of the Court House committee." What then is it that is thus left to the discretion of the architect? Some transposition of these words seems to be necessary in order to give any sensible grammatical construction to this complicated confused sentence of so many parts. The alternative provision is limited to the event of the contractor becoming bankrupt, insolvent, or compounding with his creditors, etc., already provided for in a clause preceding the words "then the architect may give ten days' notice to do what is necessary, and upon his failure to do so." All that the architect could order a bankrupt or insolvent contractor to do would be to proceed with the work in some specified manner deemed necessary. The object of the draftsman seems to me to have been to provide that in the case of bankruptcy or insolvency, etc, of the contractor, that might be done without notice, but with the consent of the

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Court House committee, which was authorized to be done upon failure of the contractor to comply with the requirements of a notice. That is to say in all cases including bankruptcy and insolvency, the architect is empowered to give a notice calling upon the contractor to do what the architect deemed to be necessary, and upon his failure to do so, or in the case of bankruptcy, insolvency, etc., then without notice with the consent in writing of the Court House committee, the architect should have power at his discretion, without process of law, etc., etc., either to relet without advertisement or to employ workmen, etc., or to take such steps as he may consider necessary in order to secure the completion of the work.

Then, again, there is another view depending upon the construction of the words in the recital or preamble of the instrument containing the contract. The condition numbered "1" in the paper intituled "general conditions" forms no part of the contract except in so far as it is, if it be, specially introduced in terms into the contract. Now in this recital or preamble where alone reference to the "general conditions" is at all made, such reference is made only in a recital of the fact that the contractors had put in a tender for performance of the work according to the specifications and general conditions referred to in the schedule hereto, which specifications and general conditions are made part of this contract except so far as inconsistent herewith, in which case the terms of this contract shall govern.

Now the general conditions contain provisions which equally with the specifications relate to the execution of the work by the contractors, and the reference to the general conditions being thus made in connection with the specifications and merely in a recital of the fact that the contractors had tendered for the performance

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of the work according to the specifications and general conditions, it appears a reasonable construction that the general conditions thus recited as being part of the contract are those only which, like the specifications in connection with which they are mentioned, relate to the performance of the work for which the contractors had tendered, which only, except in so far as they might be altered by the contract, were made part of the contract. This construction would exclude wholly the condition numbered "1," which relates not to the performance of the work by the contractors, but to the action of the corporation in the event of the contractors not doing so or in the event of their becoming insolvent, etc., etc., or otherwise incapable of doing or unwilling to do so. And this would be abundantly sufficient for every reasonable purpose, for by clause 15 of the contract all material deposited on the ground for the work is made the property of the corporation, and clauses 8 and 9 of the contract make ample provision for every case, even for those of bankruptcy, insolvency, composition with creditors, etc., to the full as well as the condition numbered "1," if it operated alone, purports to do. But there remains the view in which all the courts below have concurred, namely, that in respect of the matters specially enumerated in clause 8 of the contract, the provision thereby made is complete in itself, without incorporation with the condition numbered "1," and it is consistent with the provision in that condition made with reference to the same matters, assuming the true construction of that condition, if standing alone, to be that the architect could not dismiss the contractor from the work for non-compliance with the architect's requirements, contained in a notice served upon the contractors without the consent in writing of the Court House committee

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and therefore that the provision in clause 8 by itself must prevail.

For my part I cannot entertain a doubt that the decision of the courts below is correct. That provision in clause 8 of the contract which purports to enable the architect to act alone in a particular matter, is quite inconsistent with a provision which forbids his acting in that matter except upon the authority in writing of another body or power. There would be no sense whatever in clause no. 8 being in the contract at all if it was not intended to contain the whole provision made by the contract in respect of the matters therein enumerated. The words "except so far as inconsistent herewith" are simply equivalent to "except as herein otherwise provided," and clause 8 does provide for everything mentioned in condition no. 1, and in respect of the particular matter under consideration differently from the provision in condition no. 1, assuming the true construction of the sentence of that condition under consideration to be as contended for on behalf of the appellant Moreover a reference to the provisions of the condition numbered "1" consequential upon the dismissal of a contractor are so different from those made as consequential upon dismissal under clause 8 of the contract that both cannot operate together and it appears to me to be clear that by the contract clause 8 was intended to operate alone in respect of the matters therein contained and that in all those matters it is as agent of the corporation and on their behalf that he is empowered to act and not as a judge or arbitrator.

By the condition numbered "1" upon dismissal, the contractor forfeits expressly all moneys then due under the contract, except that such moneys may be applied in payment of unpaid workmen, and that upon completion of the work by the corporation the contractor

shall be paid what sum, if any, as shall be certified by the architect whose certificate shall be absolutely conclusive and not appealable, whereas by clause 8, all moneys paid by the corporation in completing the work are to be deemed payments on account of the contract and the certificate of the architect after completion of the work is not made final and conclusive but is subject to arbitration if necessary. That clause 8 then wholly unaffected by anything in the condition numbered "1" must prevail in the present case cannot, I think, admit of a doubt. But the point is, as I have already suggested, really immaterial in the present action the gist and foundation of which is that the architect prior to the commencement of this action and consequently prior to the motion for the injunction therein which is also prayed for by the statement of claim, and prior also to his giving the notice of the 29th August, 1892, had wrongfully condemned, and prevented the plaintiff from using in the work, material as not sufficient within the terms of the contract which the plaintiff contends was in perfect compliance with those terms, and was therefore wrongfully condemned by the architect, whereas what is now contended to have been done without the consent in writing, assuming such consent to be necessary, was not done and could not have been done for the time had not elapsed as mentioned in the notice until after the commencement of the action and after the application therein for the injunction which is also prayed for in the statement of claim.

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Moreover there is not even an allegation in the statement of claim that it was the architect who claiming to have authority in himself dismissed the contractor; on the contrary the allegation is that it was the defendants, that is to say, the corporation and the defendant Lennox, their servant or agent, and whatever wrong,

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if any there be in the corporation having done so they not being named in the condition numbered "1" cannot be attributed to the absence of the consent in writing of a committee of their body. There is, as I have said, no doubt that under the contract the architect alone without the consent of the Court House committee had by clause 8 power to give the notice mentioned in that section.

After a long argument upon all the points the learned trial judge held:—

1st. That the architect was not bound to have the consent in writing of the Court House committee prior to serving the notice (of the 29th August, 1892).

2nd. That the rejection of the stone which the architect condemned as not being in his opinion in accordance with the terms of the contract, but which the plaintiff contended was in perfect compliance with those terms, was the very gist and substance of the action, and that before the architect could be adjudged to have acted maliciously in the discharge of duties devolved upon him by the contract, it must be shown that he acted wrongfully, and as the evidence was not sufficient, and indeed was not contended to be sufficient upon that point, he called upon the plaintiff's counsel to proceed with his evidence tending to show the stone to have been wrongfully rejected, and reserving until that should be established to be the fact, the consideration of the question whether malice in such wrongful rejection was necessary to be proved, and if necessary, what evidence would be sufficient to establish it. Upon this ruling counsel for the plaintiff declined to offer any further evidence, and thereupon the learned judge rendered judgment for the defendants. This judgment has been sustained by the Divisional Court in which the action was brought, and by the Court of Appeal for Ontario. The ruling of the learned judge

and his judgment thereon must, in my opinion, be maintained, and the appeal must be dismissed with costs, and the plaintiff must be remitted to his remedies under the contract, which has provided for the case of the work being proceeded with by the corporation to completion, after it should be taken out of the contractor's hands for non-compliance with a notice given to him by the architect under clause 8 of the contract.

SEDGEWICK J.—In my view the only point in this appeal calling for special notice is as to the construction of the contract between the appellant and the city of Toronto. Attached to the main contract, and in a modified sense forming part of it, was a document called "general conditions." This instrument was prepared with the idea of using it, not only in connection with the main building contract, but with reference to all other contracts—heating, plumbing, &c., as well.

The main contract provided as follows:

The general conditions are made part of this contract (except so far as inconsistent herewith) in which case the terms of this contract shall govern.

And its eighth clause was in part as follows:

8. In case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper, the architect shall be at liberty to give the contractors ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same, it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work.

The first clause in the general conditions was in part as follows:

In case the works from the want of sufficient or proper workmen or materials are not proceeding with all the necessary despatch, then the architect may give ten days' notice to do what is necessary, and upon his failure to do so, the architect shall have the power, at his discretion,

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(with the consent in writing of the Court House committee, or commission as the case may be) without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractor, and either to relet the same to any other person or persons, without its being previously advertised, etc.

So that the only substantial difference between the two clauses is that while the first gives the architect the absolute right to dismiss the contractor upon the happening of a certain contingency, the second gives him that right, subject however, to the consent in writing of the Court House committee.

The question then is: Is this latter provision "inconsistent" within the meaning of the contract, with the former? If not the appeal must be allowed, for that consent was not obtained. If otherwise, a breach of contract has not been proved and the appeal fails.

I have arrived at the conclusion that there is no inconsistency between the two clauses. The contract must be interpreted by giving the words employed their ordinary meaning unless that will defeat the intention of the contracting parties to be gathered from the instrument as a whole. Now, in my view, in order that the charge of inconsistency between two stipulations may be sustained, they must be mutually exclusive of each other; they cannot stand together. Being repugnant or irreconcilable, the one to the other, one or other or both must give way. The natural meaning, either gathered from usage or from the etymological origin, of the word "inconsistent," is, not capable of standing together, and I think it was in that sense, and in that sense only, that the word was here used.

If the two stipulations had been in the main contract itself there is no possible question but that effect would be given to both. No one would presume to argue that they were, in that case, even apparently, not to say inherently, inconsistent. The second, it is

true, would modify, limit, qualify, cut down, the sweeping generality of the first, but it would not destroy or take away the right of dismissal thereby provided; both being capable of standing together, effect would be given to both.

Now if the reproach of inconsistency could not be made against these clauses if both were in the same document, if courts without hesitation would give efficacy to each, how do they become inconsistent when they appear in different documents all combined together for the purpose of making one complete contract? Why should they be held repugnant or irreconcilable (for both these adjectives in this connection are synonyms of "inconsistent") in the one case, and not in the other? I cannot follow any reasoning which leads to such a result.

I regard the clause in the condition so far as this right of dismissal is concerned as only a limitation of the power created by the contract or a direction specifying how that power was to be exercised. These general conditions, as I have said, were intended to be applicable to all contracts entered into by the city having reference to the building, furnishing and full completion and equipment of the new city building. Suppose one of these conditions had been "the city engineer alone shall have the right to dismiss a contractor." That would have been plainly inconsistent with the first clause in question here, and would therefore have been void. Suppose, however, another was: "The architect alone shall have the right to dismiss a contractor, but such dismissal shall be in writing and shall be signed by the architect in the presence of, and attested by, the city clerk." Would a stipulation of that character be inconsistent with the main one? The architect might say: "The contract gives me the right to dismiss. It does not prescribe the mode by which I am to exercise

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it. It does not fetter by rules or regulations my methods of procedure. The contractor is in default. I have orally dismissed him, and propose to finish the building myself. That condition about the written dismissal and the attestation of the clerk is a limitation of the despotic power which the contract gives me, and I do not propose to be bound by it." Can there be any doubt as to what answer there would be to this ?

I may venture to suggest that there is a fallacy in the conclusions arrived at by the courts below in holding that there is an inconsistency between the stipulation in the contract and the stipulation in the conditions. May not the inconsistency exist, not in the stipulations themselves, but in the powers which they respectively give to the architect? One may provide that the architect may dismiss the contractor, the other that such dismissal must be approved by the committee. The first gives to him the exclusive right, the second prescribes a condition to the exercise of that right.

Due effect may be given to both, both being read together. The stipulations themselves are therefore not inconsistent. But the right to dismiss given by the first is apparently an absolute, unfettered right, whereas by the second it is limited by, or made subject to, the supervision of the committee. If the architect has in his own person the absolute right of dismissal the committee cannot derogate from it. The two rights are inconsistent. But the contract does not refer to inconsistent rights, but to inconsistent stipulations, and if it had contained a provision to the following effect: "When any rights or powers are by the general conditions conferred upon the architect, inconsistent with the rights or powers upon him herein conferred, this contract shall govern;" in that case the respondent's contention would prevail; the right

purporting to be created by the one would override and make nugatory the right or power created by the other; the inconsistency would be established.

I admit that were there in the whole contract taken together something to indicate that this word "inconsistent" had an extraordinary or special meaning, that it did not refer to inconsistency but to something else, effect should be given to that intention; but, as I regard the matter, a reasonable view of the circumstances adds force to the conclusion to which I have come.

The general conditions gave a voice to the Court House committee. Several contracts and contractors were contemplated, this contract doubtless being the principal one. It seems to me to have been a most proper and reasonable stipulation in the interest of both the contracting parties, that no contract should be put an end to upon the mere dictum of the architect and without the assent of a committee of the city council, specially charged as the immediate representatives of the citizens with the oversight of the work. The architect might change from time to time. He might be reasonable or unreasonable. He alone had the right of dismissal, which right he might exercise with discretion or otherwise. To guard the city as well as the contractor against the unfair or despotic exercise of that right a certain amount of supervision and control, practically a right of veto, was given the committee. Now, I do not gather from the contract as a whole that so far as this contract was concerned it was intended that that veto right should be taken away. Why should it be taken away? This was by far the largest of the contemplated contracts. Why leave to the committee this right in the smaller contracts of heating, or lighting or painting or furnishing, circumscribing, limiting the architect's power there, but giving him absolute and uncontrolled authority here? I do not see

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a reason, and I cannot conclude that such was the intention of the parties.

On the whole I am of opinion that the contract was taken from the appellant in a manner not authorized by it, and that he is therefore entitled to a reference as to damages upon the terms stated in the case.

In consequence of the view I have taken as to the construction of the contract it is unnecessary for me to discuss at length the other points raised by the appellant. My view, however, is that the appeal cannot succeed upon those grounds, for the reasons set out in the opinion of Mr. Justice Osler in the court below.

KING J.—The principal question in this appeal is as to the meaning of a couple of clauses in a building contract.

A recital in the contract states that the city of Toronto had advertised for tenders in connection with the building of a court house and city hall, and that the appellant had tendered to do certain of the work according to certain specifications and general conditions "which specifications and general conditions (it was declared) are made part of this contract except so far as is inconsistent herewith, in which case the terms of this contract shall govern," and that it was then recited that the tender was accepted by the city on the terms hereinafter mentioned.

By the 8th clause of the contract it is provided that:

In case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper, the architect shall be at liberty to give the contractors ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same, it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work; and all payments made on account thereof to such other persons shall be deemed payments on account of the contract, but without prejudice to the right of the proprietors

to recover from the said contractors any money in excess of the contract price which may be paid for so finishing the works, or any other damage caused by any breach of this contract. But if any balance on the amount of this contract remains after completion the same shall belong to the contractors or the person legally representing them.

The first clause of the general conditions deals *inter alia* with the same or like matters, and gives power to the architect, in certain cases after notice, and in certain other cases without notice, but in both classes of cases only with the consent in writing of the Court House committee or commission as the case may be, to take the work or any part thereof mentioned in the notice out of the hands of the contractor, and to take such steps (either by reletting the work or by days' work, or in any other manner) as he may consider necessary in order to secure the completion of the said work.

Such clause in its material parts is as follows:

In case the works, from the want of sufficient or proper workmen, or materials, are not proceeding with the necessary despatch, or if the contractor shall persist in any course violating any of the provisions of his contract, then the architect may give ten days' notice to do what is necessary, and upon his failure to do so, or in case of bankruptcy, insolvency, compounding with his creditors or any proposition therefor, or of transferring or assigning this contract, or any attempt to do so, then without previous notice the architect shall have the power at his discretion (with the consent in writing of the Court House committee or commission as the case may be), without process or suit at law, to take the work, or any part thereof mentioned in such notice, out of the hands of the contractor, and either to relet the same to any other person or persons, without its being previously advertised, or to employ workmen and provide materials, tools and other necessary things at the expense of the contractor, or take such other steps as he may consider necessary, in order to secure the completion of the said work.

The question then is, whether the words providing for the consent of the committee are to be read into the above recited 8th clause of the contract, or in other words, whether the power given to the architect by

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such clause is intended to be subject to the condition or limitation expressed in the general conditions as to the written consent of the committee being necessary.

Six learned judges have held that such limitation forms no part of the contract so far as relates to the subject of the 8th clause, and notwithstanding the able judgment to the contrary of Mr. Justice Burton I feel constrained to come to the same conclusion.

Things may be said to be inconsistent which are repugnant in their ordinary sense or as relating to the subject-matter. Where this happens in the same instrument, or in a series of instruments or documents duly authenticated as expressing the mind of the writer or writers, then inasmuch as one part is of equal authority with another it may be necessary, in order to give a meaning to every part, by reasonable implications and by the giving of an accommodated meaning to language, to harmonize with more or less of completeness what in the natural meaning is inconsistent.

But this necessity is not imposed until that which presents the inconsistency is authenticated as the language of the contract or other instrument, as the case may be. Here, whatever in the general conditions is inconsistent with the formal contract is excluded from it at the threshold.

When the parties speak of inconsistency, I take it that they refer to a repugnancy between the two things in their plain and natural and ordinary sense, or in the sense they bear as applied to the subject-matter; and so the clause of the recital means that if anything in the conditions is opposed to anything in the formal contract, when read in its plain, natural and ordinary sense, or as applied to the subject-matter, then, to the extent that such repugnancy exists, the conditions are

not to be taken as expressing the mind of the contracting parties.

Now, in plain, natural and ordinary language, and not less so as applied to the subject of a building contract, when it is said that B. may dismiss A. upon the happening of certain contingencies, there is a necessary implication that B. has of himself upon such contingencies the power and right to dismiss. And it is quite contradictory to this to say that he may not dismiss at all unless C. gives consent to his doing so. It is not a mere question as to the mode in which B. shall signify his action, but is fundamental as substantially changing the constitution of the dismissing authority. It is only when there is some force applied *ab extra* to mould the language, that it is possible to construe it otherwise than according to the plain import.

Passing from this, it is not easy to see why clause 8 was inserted at all, if it was not intended to effect an alteration of the conditions. If it effects a substantial alteration in the circumstances justifying dismissal, or in the substantial incidents of it (as some of the learned judges have thought) then certainly clause 1 of the conditions ought not to affect the interpretation of clause 8 of the contract. The only other apparent reason for the insertion of clause 8, was in order that the power of dismissal might be given to the architect alone in the cases provided for by it, *i e.* in cases where prior notice from the architect was necessary to constitute a default, leaving the other cases mentioned in clause 1 of the general conditions, where there might be a default independent of prior notice, to be still dealt with according to the original provisions.

It is immaterial that such original provisions might in some respects have been beneficial to both parties.

On these grounds, which are not different from those relied on by the learned judges in the other courts, I

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think that the dismissal was sufficient in point of authority. As to the form of the notice by the architect no question now arises, as any question upon it was formally abandoned.

Then as to the course taken at the trial in regard to the reception of evidence I do not feel altogether satisfied, but my doubts are not sufficient to lead me to differ from the concurrent opinion of so many learned judges.

In the result, therefore, I think that the appeal should be dismissed.

GIROUARD J.—If the contract had provided that the architect might dismiss the contractor without the consent of the Court House committee, this stipulation would certainly be inconsistent with the general conditions. But the two clauses, as they stand, do not cover exactly the same ground; I think that one helps the other, and I quite agree with my brother Sedgewick and Mr. Justice Burton that they are not inconsistent. Both can well be worked to the best advantage of the undertaking the contracting parties had in contemplation. Extensions or restrictions of a power already created, or directions for its exercise, contained in a contemporary deed, are not necessarily contradictions of the original stipulations. Before courts of justice can be called upon to sanction the exercise of a power so sweeping and so pregnant with most serious consequences as the one claimed by the respondents, it must be shown beyond doubt that it was conferred by the terms of the agreement; and if any reasonable doubt can be entertained the appellant should get the benefit of it. I cannot believe that the city of Toronto, which framed both the contract and the conditions, did stipulate for the intervention of a committee of its council between the architect and the contractor without some good and sound practical reasons; and I am

also inclined to think that the appellant had reason to see in it some protection against any unjust treatment from the architect. I am therefore disposed to give effect to this stipulation, rather than set it aside.

In my humble opinion the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for the appellant: *Blake, Lash & Cassels.*

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Solicitors for the respondent Lennox: *Beatty, Blackstock, Nesbitt, Chadwick & Riddell.*