MATTHEW RYAN (PLAINTIFF).....APPELLANT; 1900

AND *Oct. 31, Nov. 2.

WILLIAM WILLOUGHBY (DEFENDANT)..... } RESPONDENT. *Nov. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Contract—Municipal work—Condition as to sub-letting—Consent of council.*

Where a contract with a municipal corporation provides that it shall not be sub-let without the consent of the corporation it is incumbent on the contractor to obtain such consent before sub-letting, and if he fails to do so he cannot maintain an action against a proposed sub-contractor for not carrying on the portion of the work he agreed to do.

In an action against the sub-contractor the latter pleaded the want of assent by the council whereupon the plaintiff replied that the assent was withheld at the wrongful request and instigation of the defendant and in order wrongfully to benefit said defendant and enable him, if possible, to repudiate and abandon the contract. Issue was joined on this replication.

*Held*, that the only issue raised by the pleadings was whether or not the defendant had wrongfully caused the consent to be withheld and that the plaintiff had failed to prove his case on that issue.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) which affirmed the verdict for the plaintiff at the trial.

In 1895 the plaintiff, Ryan, entered into a contract with the Town Council of Carleton Place, County of Lanark, whereby he undertook to erect a town and fire hall for the sum of $23,320, the contract containing the following condition: "The contractor shall not sub-let the works, or any part thereof, without

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

(1) 27 Ont. App. R. 135. (2) 30 O. R. 411.

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the consent, in writing, of the architect and corporation."

In the spring of 1896 the plaintiff and defendant entered into a sub-contract by which the defendant agreed to do the mason and brick work of the building for $3,700. The defendant was at the time a member of the town council. The sub-contract contained the following provision: "It is understood and agreed that this agreement, save as herein otherwise provided, is made subject to all the terms and conditions made and entered into by and between the said party hereto of the second part and the town of Carleton Place."

The plaintiff made no application to the council for its consent to the sub-contract but the defendant tendered his resignation as a member which was refused by resolution as follows:

"Moved by Mr. Begley, seconded by Mr. Cram, that this council decline to accept Mr. Willoughby as a sub-contractor under Mr. Ryan for the mason work of the town and fire hall, as we believe that his many years of practical experience will be of great benefit to the building committee in seeing that this contract is faithfully executed, and that being a member of this council he is disqualified to take such contract and that the clerk is hereby authorized to notify Mr. Ryan."

A copy of this resolution was sent to the defendant who thereupon notified the plaintiff that he would be unable to perform the work for which he had agreed The plaintiff therefore completed the construction of the building and brought action against the defendant for the cost of the mason and brick work in excess of the sum for which defendant had agreed to do it. In this action he charged defendant with having wrongfully procured the passage of the above resolution.

The pleadings are set out in the judgment of Mr Justice Gwynne on this appeal.

At the trial the plaintiff obtained a verdict which was affirmed by a divisional court. The Court of Appeal, however, reversed the latter judgment and dismissed the action whereupon the plaintiff appealed to the Supreme Court.

*Shepley Q.C.* for the appellant. Defendant had an interest in the contract within the meaning of the Municipal Act; *Reg.* v. *Francis* (1); and had forfeited his seat in the council. *Nutton* v. *Wilson* (2); *Barnacle* v. *Clark* (3); *Prince Election Case* (4).

As to the obligation on plaintiff to obtain the assent of the council see *Mackay* v. *Dick* (5).

*Watson Q.C.* for the respondent referred to *Rashleigh* v. *South Eastern Railway Co.* (6); *Day* v. *Singleton* (7); *Le Feuvre* v. *Lankester* (8).

GWYNNE J.—The plaintiff in his statement of claim alleges that prior to the 1st of May, 1896, he had entered into a contract with the Town of Carleton Place to erect and complete a town and fire hall for the corporation according to plans and specifications referred to in the contract. That on the 1st of May, 1896, he had entered into a sub-contract with the defendant for the performance by him of a portion of the said work. The statement of claim then avers performance by the plaintiff of all things necessary upon his part but that the defendant wholly neglected to perform his part though frequently requested so to do, whereby the plaintiff was obliged to perform the work himself at a cost double the price for which the

(1) 18 Q. B. 526.
(2) 22 Q. B. D. 744.
(3) [1900] 1 Q. B. 279.
(4) 14 S. C. R. 265.
(5) 6 App. Cas. 251.
(6) 10 C. B. 612.
(7) [1899] 2 Ch. 320.
(8) 3 E. & B. 530.

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defendant had contracted. This is the whole substance of the statement of claim. By way of defence the defendant pleaded in short substance as follows: That the plaintiff had entered into a contract with the corporation dated the 24th of October, 1895, for the erection and completion of a town and fire hall at Carleton Place. That it was made a term and condition of the said contract that the plaintiff should not sub-let the said work or any portion thereof without the consent in writing of the architect and the corporation. He admits that on the 1st May, 1896, he entered into an agreement with the plaintiff for the performance of a portion of the work subject to the terms and conditions contained in plaintiff's contract with the corporation and to complete such portion within three months after he should be, within one month from said 1st of May, notified by the plaintiff to proceed with the work. That defendant has always been ready and willing to proceed with the work, but that the plaintiff never did obtain the consent in writing of the architect and corporation to the sub-letting to the defendant of the said portion of the work, but that on the contrary the corporation refused to assent to the subletting to the defendant or to allow the defendant to proceed with the said work. To this statement of defence the plaintiff replied that the said corporation refused their consent to the sub-letting of the works in the statement of claim mentioned

*at the wrongful request and instigation of the defendant and in order wrongfully to benefit said defendant and enable him if possible to repudiate and abandon the contract* made between him and the said plaintiff.

Upon this replication the defendant joined issue, and upon the issue so joined the case went down for trial, the whole burthen of proving the issue being upon the plaintiff.

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At the trial the plaintiff produced the agreement of the 1st of May, 1896, between him and the defendant and he also proved that on the 16th May he had called upon the defendant to proceed with the portion of the work mentioned in the agreement of the 1st of May, and that on the 22nd May he had informed the defendant by letter that, as he had not proceeded with such portion, he, the plaintiff, would himself proceed with it and charge all extra cost to the defendant. Upon this the plaintiff rested his case without offering any evidence whatever upon his replication upon which the sole material issue to be tried was taken, and the burthen of proving which rested wholly on the plaintiff.

The plaintiff not having produced his contract with the corporation, a copy of it produced by the defendant's counsel was accepted as correct. A resolution of the council of the 11th May, 1896, and a copy of a letter enclosing the same addressed by the town clerk to the plaintiff, also a letter dated the 6th May, 1896, and a further letter dated the 13th May from the plaintiff to the architect were put in by defendant's counsel and read.

The resolution of the 11th May was as follows:

Moved by Mr. Begley, seconded by Mr. Crain, that the council refuses to accept Mr. W. Willoughby as a sub-contractor under Mr. Ryan for the mason work of the town and fire hall as we believe that by his many years of practical experience his services will be of great benefit on the building committee in seeing that this contract is faithfully executed, and that he being a member of this council is disqualified to take such contract and that the clerk is hereby authorized to notify Mr. Ryan.

This the clerk did by enclosing a copy of the resolution to the plaintiff in a letter dated the 12th May. Now the plaintiff never having offered any evidence of his having made any application whatever to the town council for the purpose of obtaining their con-

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sent to the plaintiff sub-letting to the defendant the portion mentioned in the agreement and having offered no evidence in support of his replication it does not appear why it should have been thought necessary to proceed any further with the case, or why judgment should not have been rendered for the defendant. The defendant however was called by his counsel on his own behalf and naturally had nothing of any importance to say upon his examination by his counsel, but the plaintiff's counsel was permitted as by way of cross-examination to subject the defendant to a very rigorous examination in the endeavour to obtain some admission from him in support of the matters alleged in the plaintiff's replication which constituted the sole issue in the case. The learned counsel for the plaintiff failed however to extract any thing from the defendant in support of the replication (as indeed the learned counsel for the appellant in his argument before us freely admitted) but he extracted from him that he was elected a councillor of the town of Carleton Place in January, 1896, and that he was on the building committee of that council, and that in the month of April, when plaintiff was dealing with him about taking the sub-contract, he had said that he should resign if he went into the contract; that on the 1st of May, when the agreement of that day was signed, he did not know it was a condition of the plaintiff's contract with the corporation that the plaintiff should not sub-let without the consent of the corporation—that he learned that afterwards from one of the councillors—that the matter was a subject of conversation on the streets—that the councillors told defendant they would not let him go—that he should not leave the council.

Mr. Begley, the mayor of Carleton Place in 1896, was called as a witness for the defence and he testified

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that the resolution of the 11th May, 1896, was passed upon his motion. The learned counsel for the defendant proceeded to examine him for the purpose of eliciting how the resolution came to be moved and passed with the view plainly of shewing that the defendant had nothing to do with it, and it may be also of shewing that the plaintiff had never applied to the council for their consent to the sub-letting contract, and of showing also how the council had acquired knowledge of the contract between the plaintiff and the defendant having been entered into. This inquiry bore very materially upon the issue joined upon the plaintiff's replication, but it was persistently objected to by the plaintiff's counsel who insisted that no explanation should be given of the circumstances under which the resolution came to be moved and passed, and this objection was acceded to by the learned judge who refused to receive the evidence as irrelevant; and the testimony of seven others of the councillors offered upon the same point was objected to and rejected.

The only ground upon which such evidence could have been rejected appears to me to have been that as the onus to prove the affirmative of the issue joined upon the plaintiff's replication rested upon the plaintiff, and as he had offered no evidence in support of his replication it was quite unnecessary for the defendant to adduce evidence which should have the effect of proving the negative side of the issue, but it was not upon this ground that the evidence was rejected for upon the defendant's counsel offering no further evidence, judgment was immediately rendered for the plaintiff. But although the defendant was thus prevented from proving how the resolution came to be passed there is some evidence on the record before us from which we may gather grounds for a reasonable

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assumption of what were the circumstances occas on ing the passing of the resolution. It was not passed in answer to any application by the plaintiff for the consent of the council to his sub-contract—no such application was ever made by him—that is admitted in the argument before us. The plaintiff's counsel had also objected to the defendant's counsel asking the defendant whether he had anything to do with it—that objection was also acceeded to by the learned judge.--How then could the council have had knowledge of the agreement of the first of May having been entered into? An answer to this question may perhaps be found in the plaintiff's letter of the 6th May, 1896, to the architect of the corporation wherein occurs this sentence:

> I have let the contract of the mason work to one of the building committee; the committee is willing he should get it. I will have them write you to that effect. This is a good move because he was one of the principal kickers.

It is not too much to suppose that this letter addressed to and received by the architect was communicated by him to the mayor and some one or more of the councillors which might account for the defendant having in his evidence stated that the fact of the plaintiff's contract containing a condition prohibiting sub-letting without consent of the corporation was first communicated to him by a member of the council and that the members of the council said they would not let him leave the council. It might account also for the objection taken by the plaintiff's counsel to the evidence of the mayor and the seven councillors who might possibly have given evidence that this passage in the plaintiff's letter had opened their eyes to the importance of retaining the services of the defendant and of refusing their assent to the sub-letting contract in advance of any application by the plaintiff for their assent to it.

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We quite agree with the views expressed by the Court of Appeal for Ontario to the effect that the defendant's verbal promise to resign if he should go into the contract, evidence of which promise was got in the manner above stated, has nothing whatever to do with the issue joined in the present action. If the plaintiff had been advised that he had a good cause of action founded upon that promise and a breach of it, he should have asked leave to amend in the court in which this action was instituted. Whether or not, in view of the plaintiff's failure to prove the matter alleged in his replication, he could state a case founded upon that promise in which he would have better success than in the present action we are not called upon to express an opinion. But as to the argument pressed upon us upon a question whether the contract of the 1st of May being signed by the parties thereto, did or not constitute an avoidance of the defendant's seat in the council that is a matter quite irrelevant to the issue joined in the present action. For whether it had or had not such effect the plaintiff knew that the contract of the 1st of May did not constitute a binding agreement unless nor until the plaintiff should obtain the consent of the council, necessary to its validity, and the fact that he made no application for such consent, and the fact that in the present action he has failed to prove the truth of the matter pleaded by him in his replication would need have to be given their due weight in whatever form action might be instituted by the plaintiff in the premises.

The appeal must be dismissed with costs.

KING J.—(Oral).—I agree to the dismissal of the appeal but I wish to confine the reasons to a single ground. It was a condition precedent of the contract which the plaintiff seeks to enforce that he should

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obtain the consent in writing of the architect and of the corporation to the sub-contract, and in this he wholly failed. This went to his capacity to enter into the contract. The consent of the corporation could be effectually given without the necessity of Willoughby taking part in it, and, therefore, the observations at page 263 in *Mackie* v. *Dick* (1), are not applicable. The reasons given by the corporation are not material. They were not bound to give any reasons, and whatever may be surmised, it is not proved that Willoughby was instrumental in procuring their refusal or took any part in the proceedings of the corporation in respect thereto. Although he was present at the council meeting he sat amongst the spectators.

TASCHEREAU, SEDGEWICK and GIROUARD JJ. concurred in the dismissal of the appeal for the above reasons.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Lavell, Farrell & Lavell.*

Solicitor for the respondent: *Colin McIntosh.*

(1) 6 App. Cas. 251.