FRANK LAKIN.....APPELLANT; 1879

AND

THOMAS NUTTALL *et al*.....RESPONDENTS.

*Feb'y. 10.
*May 9.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Special Agreement, non fulfilment of—Indebitatus counts.

L. sued *N. et al* to recover from them, under specially endorsed writ, the balance of account due under and in pursuance of an agreement under seal providing that "*L* was to run accord-

* PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

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ing to his best art and skill a tunnel of 200 feet for the sum of four dollars per running foot; that $150 should be advanced on account of the contract, the balance to be paid on the satisfactory completion of the work." *L.* made five tunnels, none of which were 200 feet, but claimed he had done in all 204 feet. In addition to the count on the agreement the plaintiff inserted in his declaration the common counts for work and labor.

Held: That there was not a sufficient fulfilment of the agreement, and inasmuch as *L.* had given no particulars nor any evidence under the indebitatus counts, the rule absolute of the court below ordering judgment to be entered for the defendants should be affirmed and the appeal dismissed with costs.

THIS was an action commenced in the Supreme Court of *British Columbia*, for breach of a contract to pay for work and labor in running a tunnel to test a supposed formation of anthracite coal on defendants' land.

The declaration contained two counts *ut seq*:

1. For that in consideration that the plaintiff would run, according to his best art and skill, a tunnel for the purpose of thoroughly testing the presence of a formation of anthracite coal on the ground of the defendants, situated on the *Kokesalia* river, the said tunnel to be of the following extent and dimensions: The length to be two hundred feet, the floor to be five feet wide, the width of the roof to be four feet, and the height to be six feet; the mud sills, caps, and all the necessary timbers to be substantial and serviceable, the defendants promised to the plaintiff to pay to the plaintiff four dollars per running foot for the said tunnel. And the plaintiff did, according to his best art and skill, run a tunnel for the purpose aforesaid, in conformity with the terms of the said agreement. And all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to payment for the said tunnel at the rate of four pollars per running foot aforesaid. Yet the defendants did not pay the plaintiff for the said

tunnel at the rate of four dollars per running foot as agreed.

2. The second count consisted of the indebitatus counts.

The writ was specially endorsed as follows:—

"To balance of account due plaintiff by defendants for work and services of the plaintiff done and rendered for the defendants, under and in pursuance of an agreement under seal dated 12th July, 1876, and made between the plaintiff and one *Thomas C. Nuttall* on behalf of the defendants, $400."

The respondent pleaded:

1. The defendants say to the first count of the declaration that they did not contract as alleged.

2. And for a second plea the defendants, other than the said *Thomas C. Nuttall*, say that the said alleged agreement in the said count mentioned was by deed and in the words and figures following and no other, that is to say:—

Memorandum of Agreement entered into the twelfth day of July, 1876, between *Thomas C. Nuttall*, acting for and on behalf of the *Kokesalia* Mining and Agricultural Company, of the first part, and *Frank Lakin*, miner, *Victoria*, of the second part. That is to say, the said party of the second part agrees to run according to his best art and skill a tunnel for the purpose of thoroughly testing the presence of a formation of anthracite coal on the ground of the above company, situated on the *Kokesalia* river, the said tunnel to be of the following extent and dimensions: The length to be two hundred (200) feet, the floor to be five (5) feet wide, the width of the roof to be four (4) feet, and the height to be six (6) feet, the mud sills, caps and all the necessary timbers to be substantial and serviceable; and the said party of the second part agrees to do all the work as specified, for the sum of four (4) dollars per running foot, he finding himself

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with all the tools, provisions, labor, freight, and passages necessary for the performance of the said work; in other words he is to receive four (4) dollars per running foot in full of all demands whatsoever. And the parties of the first part agree to allow the party of the second part the use of whatever tools may be on the ground free of charge, and the parties of the first part agree to advance to the party of the second part the sum of one hundred and fifty ($150) dollars on account of this contract, the balance to be paid on the satisfactory completion of the work; and it is further agreed between the said parties that the work is to be commenced with all possible dispatch.

IN WITNESS WHEREOF we hereunto set our hands and seals the day and year first above written.

For the *Kokesalia* Mining and Agricultural Company

THOS. C. NUTTALL,

HIS

FRANK X LAKIN,

MARK

Signed, sealed and delivered by both parties in the presence of

H. C. COURTNEY.

And the defendants, other than the said *Thomas C. Nuttall*, further say that the parties in the said indenture named of the first part, is the defendant, *Thomas C. Nuttall*, and that the party therein named of the second part, is the plaintiff, and the said defendants, other than the said *Thomas C. Nuttall*, further say the causes of action in the second count mentioned are the same as those in the first count.

3rd, 4th and 5th pleas in substance denied the completion of the contract, and alleged that certain parts of the work done were not serviceable.

Plea to the second count, "never indebted as alleged."

The appellant took issue on all the pleas.

The facts of the case are as follows:

The respondents, an unincorporated company owning land on the *Kokesalia* river, *British Columbia*, supposed to contain anthracite coal, sanctioned and accepted the above contract, under seal, signed by *Nuttall*, one of the respondents, for and on behalf of the company. The appellant immediately after his arrival at the scene of the work, wrote to Mr. *Nuttall* the following letter:

"SUNDAY, July 23, 1876.

"*Mr. Thomas Nuttall:*

"SIR,—I embrace the opportunity to write a few lines to the Coal Company of the *Cocosila* river. I am starting on the north side, the south side is not worth anything at all. I am commencing now as low down as I can for water but the face of the coal does not look so well as I would like to see it I have a hard job to get my provisions and tools into the mines I will be able in a little time to give you further information.

"I remain your humble servant

"F. LAKIN."

And on the 13th August, 1876, he wrote to respondents the following letter:

"AUGUST the 13, 1876.

"*To the Gentlemen of the Cocosila Company.* As far as I have run tunnel No 1, it is as far as it is necessary to run it; it is in forty eight feet but no indications of coal. No 2 tunnel is across the seam, no indications of coal, and the two tunnels run one hundred and ten feet. I am going to turn this tunnel in another direction. I am thinking to run another tunnel in Robertson's top seam. I am now gentlemen doing the best that lies in my power to find the seam, may be it will bother you, the reason that I started two tunnels, by starting two tunnels I have cut off about a hundred feet which will give a much better test. I will be through in about

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three weeks. I hope that some of the Company will be up soon.

"I remain gentlemen your humble servant

"F. LAKIN."

Respondents did not reply, but sent one *James Johns*, a coal miner, to report, and he reported that the tunnels run by appellant were of no use.

Appellant made five tunnels, none of which were two hundred feet, but claimed he had done in all 204 feet.

The learned Judge at the trial ruled as follows:

1st point.—As to construction of agreement, plaintiff has failed. His course was pointed out. It was not discretionary with him.

2nd point.—As to 2nd point, agreement binding on defendants and adopted. *Nuttall* had authority, etc., to execute, etc.

3rd point.—Under particulars plaintiff at liberty to go to Jury as to whether benefit conferred exceeded amount paid.

Case to go to Jury, subject to Mr. *Drake's* right to move Court that non-suit or verdict be entered for defendants, in case of verdict for plaintiff, if I am right in my construction of the agreement, or wrong as to the question under the particulars. As to the construction of the agreement, if wrong, and there should be a verdict for the defendants, Mr. *Robertson* to be at liberty to apply for new trial, as in case of misdirection.

In answer to several questions submitted to them in writing, the Jury found a verdict for appellant for $350.00

A rule was afterwards obtained to set aside the verdict, and enter a non-suit, or a verdict for defendants, or a new trial.

The Rule was argued before *Begbie*, C. J., and *Gray*, J., on the 17th December, 1877. and the following order was made:

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IN THE SUPREME COURT OF BRITISH COLUMBIA.
The 17th day of December, A.D. 1877.

Upon reading the Rule *Nisi* in the cause on the 15th day of November, 1877, and hearing Mr. *Robertson*, of Counsel for the plaintiff, and Mr. *M. W. Tyrwhitt Drake*, of Counsel for the defendants, it is ordered that the verdict found for the plaintiff, on the issues joined, be set aside, and that judgment be entered for the defendants an those issues.

(Signed) M. B. BEGBIE, C. J.

After the appeal was allowed this rule was twice altered—first, by directing that judgment of non-suit be entered for the defendants on the ground reserved at the trial; secondly, by striking out all the words after the word "plaintiff" and inserting in lieu thereof, "be set aside and a non-suit entered on the following grounds reserved at the trial," setting them out at length.

It was, however, decided by the Supreme Court of *Canada* when the case came up for argument that the only rule which could be taken into consideration was the one made before the allowance of this appeal.

Dr. *McMichael*, Q. C., for appellant:

The written contract is very open, and if the appellant has done what is reasonable and fair, it should be read in that way.

Appellant was to use his best art and skill. He understood this left him a large discretion, and he exercised it, advising the respondents from time to time as to what he was doing, and they did not dissent. The true meaning of the contract, it is submitted, is therefore that appellant should, by his best art and skill, test the presence of the supposed seam of coal, and that he was not to run a single tunnel of 200 feet, if such a tunnel obviously would not tend to the accomplishment of the

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object proposed in the contract. If respondents intended to select and determine mode of testing the presence of a seam, they would have indicated their views by annexing a plan and specifications of the work to the contract, shewing initial point of tunnel, direction, dip and curvature (if any).

It is contended that respondents were not parties to this sealed instrument and therefore are not liable under the contract. The evidence, however, clearly shows that the contract was adopted by the defendants, and it cannot be said that appellant cannot recover because one of the parties only has verified the document. See *Thomas* v. *Wilson* (1).

Moreover, in this case there is evidence of a verbal agreement with defendants to do this very work in accordance with the sealed instrument. See *Whitehaven* v. *Buffalo and Lake Huron Rly. Co.* (2); *Ottawa Gas Company* v. *Currier* (3).

Now, assuming that the special contract was unperformed, a new contract is to be implied from the conduct of the parties, and the plaintiff is entitled to recover on an implied assumpsit arising from work done under the deed. When work is done by one party under a special contract, but not according to its terms, and the other party accepts and takes the benefit, he may be sued for the value. Acceptance is a question of fact, and the Jury have found there was an acceptance.

The action here is for work done and accepted by the company.

Mr. *Cockburn*, Q. C. for respondents:

The agreement was signed after the interview between appellant and the respondents, and the parol agreement was merged in and destroyed by the sealed instrument.

(1) 20 U. C. Q. B. 331. (2) 7 Grant 361.
(3) 18 U. C. C. P. 202.

To enable appellant to recover against *Nuttall*, he must prove the performance of his contract.

The evidence of the plaintiff shows that, instead of one tunnel, two hundred feet long, he ran five tunnels, none of which were two hundred feet long, and none of which, in other respects, accorded with the specifications in the contract: *Appelby* v. *Myers* (1).

The appellant limited his demand by the particulars endorsed on the writ, and no other particulars of demand were furnished under the common counts of the declaration; the result is that he was bound to prove that he had performed his contract, and that there was a balance due under it.

If the appellant had proved a substituted contract in lieu of the one sued upon, he would be in a dilemma, because the action having been brought on the original contract, he could not recover on the first count of the declaration, and neither could he recover on the second count, because he is restricted by his particulars of demand to the original contract.

THE CHIEF JUSTICE was of opinion the judgment of the Court below should be affirmed.

FOURNIER, J., concurred.

HENRY, J.:—

The appellant in this case seeks to recover from the respondents money claimed to be due to him for work done under a contract under seal for the respondents.

By sec. 2 of ch. 104 of the Acts of *British Columbia*, 1869, "The English Common Law procedure Acts, and the rules and practice of pleading made in pursuance thereof," were adopted, as far as practicable, to regulate the practice and procedure of the Superior Courts of the Colony in all actions and proceedings at law.

(1) L. R. 2 C. P. 657.

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The evidence on the trial on both sides shows clearly that the contract was not completed, and consequently that the appellant could not recover under the first Count of his declaration. The issue under the pleadings was simply and singly as to the question of performance of the contract, and any side issues found by the Jury cannot affect the case as to the first Count.

At the conclusion of the plaintiff's case the Counsel for the respondents moved for a non-suit on the grounds, substantially: 1st. That the contract was shown by the plaintiff's evidence not to have been fulfilled; 2nd. That the defendants other than *Nuttall* could not be sued on the covenants; 3rd. That the plaintiff could not give evidence under the Common Counts, being limited by his particulars.

The learned Judge decided the first point in favor of the respondents, but the other two in favor of the appellant—the "case to go to the Jury subject to Mr. *Drake's* right to move the Court that a non-suit or verdict be entered for defendants in case of verdict for plaintiff. If I am right in my construction of the agreement or wrong as to the question under the particulars. As to the construction of the agreement, if wrong, and there should be a verdict for the defendants, Mr. *Robertson* to be at liberty to apply for a new trial, as in case of misdirection." The verdict being for the appellant for $350, a rule *nisi* was subsequently granted to shew cause why the verdict should not be set aside and a verdict entered for the respondents, or a non-suit, on the first two grounds taken for the motion for non-suit—for the erroneous admission of evidence under the Common Counts, or for a new trial, 1st, on the ground that the verdict was against the weight of evidence, and 2nd, that the verdict was contrary to the evidence and perverse.

I have already disposed of the first objection, and

have only to repeat my opinion that the appellant is not entitled to recover on the first count. Such being the case, I need not consider the second objection, which is but subsidiary to and covered by the decision on the first.

At the conclusion of the respondent's evidence the learned Judge, at the instance and request of the appellant's counsel, submitted certain propositions to the jury in connection with the issue raised by the plea of "never indebted," to the second count. It is contended by the respondents, that under the particulars of the plaintiff applicable only to the first count, any evidence to sustain the common counts could not be legitimately received, and should therefore have been rejected. I am of the opinion that the evidence in question was improperly received and should have been rejected, and consequently that the Judge should have directed and the jury should, under the pleadings and particulars, have found a verdict for the defendants.

By C. L. P. Act 1852, sec. 25, it is enacted that the particulars endorsed on the writ of summons under that section shall be considered as particulars of demand.

Roscoe in his work on evidence at *nisi prius* p. 96, 13th ed., says:

> When the plaintiff has delivered a particular of his demand he will be precluded from giving any evidence of demand not contained in it (1).

If the appellant's counsel at the trial wished to have had the benefit of the second count, his only course, I take it, under the practice, was to have asked leave to amend his particulars, and his application would no doubt have been granted, subject to such terms, as to

(1) See *Moss* v. *Smith*, 1 M. & G. 228; *Breckon* v. *Smith*, 1 Ad. & E. 488; *Wade* v. *Beasley*, 4 Esp. 7; *Headley* v. *Bainbridge*, 3 Q. B. 316; *Mearing* v. *Hellings*, 14 M. and W. 711; *Law* v. *Thompson*, 15 M. and W. 541.

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the postponement of the trial, costs and otherwise, as the presiding judge might have considered proper, and which amendments the opposite party must always be prepared for; but without any such amendment, the statutes and rules very wisely provide that the particulars limit the plaintiff's right to what they contain.

The respondents here got notice by his particulars that the appellant intended only to try the question as to the performance of the contract, and it would be as irregular as unjust to allow the appellant to apply the evidence given under the first count to the second without any previous notice or intimation to the respondents of any such intention. For this issue, being totally different and requiring evidence of a different and more extensive character than that required for the issue on the first count, the respondents could not reasonably be assumed to be prepared.

I have, however, fully considered the value of the whole evidence, and can find nothing in it to sustain the second count. It cannot be doubted that if, in the event of the failure to perform the whole of a contract, the party accepts and gets the benefit of a partial performance, the law renders him liable to pay *pro rata* or a *quantum meruit* therefor. Here, however, the work was done on the property of the respondents, and in that case an express acceptance was necessary to be shown; and it is to be distinguished from a case wherein a change of possession might be evidence of acceptance. In this case I can see no evidence of any acceptance of the work, and there is evidence I think to show that what was done was of no value to the respondents; but even if it were, unless they adopted it either expressly, or by acts which amounted to the same thing, they would not be bound to pay for work they had never requested to be done for them. They bargained for a tunnel 200 feet long and of prescribed dimensions, and secured and

supported in a prescribed manner. What their object was, it was not for the contractor to consider. He was to be paid whether their object failed or not, and if he even found the coal sought for he could only claim payment for such work as was prescribed by his contract and he had fulfilled it.

For the reasons given I think the appeal should be dismissed and the judgment of the Court below affirmed with costs.

TASCHEREAU, J.:

I am of opinion, that taking all the circumstances of the case into consideration, the contract made by *Nuttall* with the plaintiff was binding on all the defendants. But I am also of opinion that the plaintiff failed to perform his contract. The evidence on this point seems to me conclusive. There can be no two interpretations of the memorandum of agreement of the 12th July, 1876. One tunnel, two hundred feet long, was what the plaintiff contracted for. He never ran such a tunnel. That is clear. But he contends that he ran four or five tunnels, and that these tunnels together are more than two hundred feet long. That was certainly not what he undertook to perform. The defendants contracted for one tunnel of two hundred feet in length; the plaintiff, for a certain consideration, bound himself to run that tunnel; he cannot now, not having performed his contract, claim the contract price. His right to sue on the contract depended on his performance of it.

On the *quantum meruit*, the plaintiff's action must also fail. What he did was under a contract, and that contract he did not perform. But even admitting the evidence adduced upon that count, I am of opinion that the plaintiff cannot succeed. There is not in the record a single proof of the value of the work done by the plaintiff. It cannot be contended that four dollars a

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foot was agreed upon by the contract, and that this is to be taken as the value of the work done and declared upon under the indebitatus counts. If the plaintiff, on these counts, leaves the contract aside, and says that he did for the defendants something else than that contracted for, he cannot have it taken for granted that what he did was of the same value as what was contracted for. He was bound to prove the value of what he did: he did not do so. He would probably have failed to prove that what he did was worth four dollars a foot, as it must generally be cheaper to run five tunnels of forty feet each than one of two hundred feet; at the mouth of a tunnel the work does not amount to much; it is as the sinking goes on that the difficulties and the cost increase.

The plaintiff argued that the defendants had accepted his work as performance of his contract. I can see nothing of the kind in the evidence.

Altogether, I am of opinion that the judgment of the Supreme Court of *British Columbia* in favor of the defendants must be confirmed and the appeal dismissed with costs.

GWYNNE, J.:—

It is unnecessary to enquire whether the instrument upon which this action has been brought is the deed of the defendant *Nuttall* alone, or whether, under the circumstances attending its execution, it might, upon the authority of *Ball* v. *Dunsterville* (1), be held to be the deed of all the defendants, who appear to have been present at its execution and to have authorized the defendant *Nuttall* to sign for them all; for, assuming the instrument to be the contract of all the defendants —whether their deed or their simple contract only, (as which latter it seems to have been declared upon,) matters not—it is quite clear that the plaintiff never did

(1) 4 T. R. 313.

fulfil what he had undertaken by the contract, and until completion of his part of the contract nothing was payable further than what was paid when the contract was made. The plaintiff therefore never could sustain an action upon the special contract. It is equally clear, that he could sustain no action as for work and labour upon a *quantum meruit;* for there was no evidence whatever to go to a jury of the defendants having accepted what work the plaintiff did do as a fulfilment of the special contract upon his part. Nor was there any evidence of any mutual abandonment of the special contract, and the substitution of a new implied contract to pay for the work done according to its value (1). Nor was there any evidence that the plaintiff was prevented from fulfilling the special contract upon his part by any default of the defendants (2).

The plaintiff at the trial rested his case upon the construction of the special contract, which he contended he had fulfilled by the work he did. The learned Judge thought the plaintiff should be non-suited, and I think he was right. He consented, however, to submit the case to the jury, reserving leave to the defendants to move the court in term for leave to enter a non-suit, or a verdict for the defendants, in case the jury should render a verdict for the plaintiff.

We must regard this reservation as having been made upon the consent of the plaintiff in the usual way—indeed, that is not disputed, and that, but for such consent, the learned Judge would have charged the jury, that upon the evidence they could render no verdict other than one in favor of the defendants.

Upon this reservation the Court rightly set aside the verdict which the jury, without any evidence whatever to warrant it, found for the plaintiff, and the Court made

(1) *Munro* v. *Butt*, 8 El. & Bl. 739.

(2) *Appleby* v. *Meyers*, L. R. 2 C. P. 651.

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absolute a rule to enter a verdict for the defendants, in accordance with the reservation at *nisi prius*. Afterwards, and after the plaintiff had appealed from that rule to this Court, the Court below changed the rule into a rule absolute for a non-suit. Whatever difference, if any, was made by this rule, was a difference in favor of the plaintiff, who, however, now objects here that the Court had no right to alter the former rule, which, as is contended, is the rule now before this Court on Appeal.

If the plaintiff is unwilling, as he says he is, to accept the non-suit, I see no objection to our holding him to the consent involved in the reservation of the case at *nisi prius*, and to our dismissing his appeal, and upholding the rule directing the verdict and judgment to be entered for the defendants, that being the only verdict which the facts warrant; or, if the plaintiff now consents, we may direct the rule to issue in the Court below for judgment of non-suit. It matters little which form the rule is in ,for in any case the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *A. Rocke Robertson.*

Solicitors for respondent: *Drake and Jackson.*