

At the request of counsel for the defence his lordship further explained to the jury that the escape referred to in the Code meant escape from the flight then going on and that the possibility of the fugitive being found and apprehended subsequently need not be considered.

Hagel, K.C., and Patterson, for the Crown. Bonnar, Potts and Howell, for accused.

Mathers, J.]

FENSON v. BULMAN.

[Nov. 27, 1907.]

Contract—Performance—Completion prevented by fire—Acceptance of insurance money on property destroyed, effect of.

The plaintiffs contracted to put a passenger elevator into the defendants' four-story block in course of erection for \$2,800 to be paid as follows. One-half on delivery of machinery at the building, one-quarter when machine is in place, and the balance on completion. The machinery was delivered at the building in July, 1904, and defendants paid one-half of the price. The building and all its contents were destroyed by fire on the 11th of October following. At that time the "controller," although it was in the basement of the building, had not yet been put in its place.

Held, that the plaintiffs had not earned the second payment stipulated for.

Fairchild v. Rustin, 39 S.C.R. 274, and *Ross v. Moon*, 17 M.R. 24, followed.

The plaintiffs claimed in the alternative that they were entitled to recover the price of the elevator quantum meruit because the defendants had insured the elevator for its full value and had collected and received the full amount of the insurance, having included the value of the elevator in their proofs of loss sent in to the insurance companies, and should, therefore, be deemed to have accepted it. It appeared, however, that the defendants had left the placing of the insurance upon their property in the hands of their agent and had not instructed him to insure the elevator and were not aware, when their proofs of loss were made, that the elevator had been so included, and that their total loss was much in excess of the total insurance.

Held, that the defendants, having paid \$1,400 on the elevator, had an insurable interest in it and a right to receive the insurance money, and that what they had done in connection