

This conclusion having been reached, it was unnecessary to decide whether the appellants had not acquiesced in the propriety of the action taken by the respondents in terminating the contract; but the learned Chief Justice, as at present advised, was of opinion that they did acquiesce. They brought an action to recover and recovered the 10 per cent. held back, which was not payable until the completion of the contract, and therefore treated it as completed, which it could not be when any of the houses which they were to build had not been constructed.

*Appeal dismissed with costs.*

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FIRST DIVISIONAL COURT.

JUNE 11TH, 1920.

COLEMAN v. POWELL.

*New Trial—Amendment of Pleadings—Costs.*

Appeal by the defendant Powell from the judgment of MASTEN, J., of the 10th December, 1919, in favour of the plaintiff in an action for the recovery of money alleged to have been paid to the defendants the Union Bank of Canada in respect of an option for the purchase of an interest in certain mining claims.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and FERGUSON, JJ.A.

J. M. Ferguson, for the appellant.

T. R. Ferguson, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the case was not in a satisfactory position to be disposed of upon the material before the Court, and should go down for a new trial, with liberty to both parties to amend as they might be advised, and that the costs of the last trial and of the appeal should be costs in the cause to the party ultimately successful, unless the Judge before whom the new trial takes place should otherwise direct.

*New trial ordered.*