

It was proved by the evidence of the plaintiff's witnesses that it had been agreed at a general meeting of the subscribers to build the rectory first, and that the list was intended to form part of the fund intended for the building of the church and rectory, and that the rest of the money required was to be raised in other ways. The defendant was proved to have been present at this meeting. A number of the other subscribers had paid their subscriptions.

No evidence was given on behalf of defendant. A nonsuit was asked for, which however was not granted, but leave was reserved to move in term. It was left to the jury to say whether the promise was obtained in good faith, and whether the position of refusing to pay was or was not only afterwards assumed by the defendant, and that the promise was binding if there was a part performance of it, with the defendant's knowledge. And some other observations were made to the jury, which sufficiently appear in the judgment. A verdict was found for the plaintiff.

Cameron, in October term, obtained a rule nisi to enter a nonsuit pursuant to the leave reserved, on the following grounds:

1st. That the promise set out in the declaration is *nudum pactum*, and not enforceable at law.

2nd. That the consideration and contract set out in the declaration is not stated or proved in the evidence. The allegation in the declaration is, that in consideration that Watson and others would severally subscribe and promise the defendant to pay to the plaintiff one hundred dollars each, for the purpose of building an Episcopal church and rectory, the defendant promised to pay him one hundred dollars for that purpose, whereas, in fact, the promise (if any) proved by the plaintiff was a separate and distinct promise, by each of the persons named in the declaration to the plaintiff, to pay him the sum of one hundred dollars each, and not a promise by one of them to pay the plaintiff, as is alleged.

3rd. That there is no evidence of any kind that the plaintiff incurred any loss or damage, or subjected himself to any charge or obligation, at the instance of the defendant, with respect to the subject matter of the suit.

4th. That the written or printed contract produced by plaintiff on the trial does not sustain the declaration, and that no other evidence was or could be given to sustain such declaration. That in fact the oral evidence offered and given by plaintiff clearly established that there was no such consideration for defendant's alleged promise as that set out in the declaration.

5th. That plaintiff's evidence clearly proved that the building a church and rectory, was the consideration for which defendant, and others named in the said declaration, promised to pay the amount set opposite to their names, and that in fact no church was built nor even commenced, and that the building of such church was a condition precedent to the defendant's being called on to pay any sum.

6th. Or why there should not be a new trial without costs, or with costs to abide the event, on the grounds, that the verdict is contrary to law and evidence, and for misdirection.

Mr. Cameron cited *Morrow v. Butt*, 8 E. & B. 738; *Neill v. Ratcliffe*, 15 Ad. & Ell., N.S. 916; *Street v. Blay*, 2 B. & Ad. 456; *Baker v. Vanluven*, 14 U.C.C. P. 414; *Sinclair v. Bowles*,

9 B. & C. 92; *Reid v. Rann*, 10 B. & C. 438; *Elliott v. Hewitt*, 11 U. C. Q. B. 292; *Cutter v. Powell*, 6 T. R. 320; 2 Smith's L. C. 9.

McDermott shewed cause, citing *Elliott v. Hewitt*, 11 U. C. Q. B. 292; *Taylor on Evidence*, 1570; *Chitty on Contracts*, 47. He contended that the evidence was not wrongly received and that the contract was complete in its inception.

COOPER, Co. J.—The misdirection, as stated, was this. That the jury had been told, that if defendant's conduct was such as to lead them to believe that the defendant sanctioned the building of a rectory first, then they might find for the plaintiff; whereas this was not part of the issue, nor in any way in question.

I did charge to that effect, and am still of opinion that it was a proper way of putting the case to the jury.

Again, that the Judge told the jury that if the defendant's conduct was not such as to put the plaintiff on his guard, that if both buildings were not completed he would not pay; then they might find for the plaintiff.

Some observations of this kind were made in the course of the charge, and I still think they were fully warranted, if, as I shall have occasion to observe, the part performance of the intended consideration has any thing to do with the question of the defendant's responsibility.

It is further objected, that the jury should have been charged that "if defendant subscribed for building a church and rectory, and if the church was not built, nor commenced, nor any liabilities incurred on account of it, to find the issue on the second plea in favor of defendant."

I did charge somewhat to the effect which the learned counsel contends I should have done, and distinguished the issues, leaving the jury to take their own course, and expected a verdict on that issue for the defendant; but the issue does not go to the whole cause of action, and the verdict the other way would only affect the question of costs, and I do not feel at liberty to grant a new trial on that ground alone. The counsel on both sides do not appear inclined to consent to any alteration of the verdict, and, if my judgment is correct, it must stand or fall as it is, upon all the issues, and an alteration of the verdict on the one issue is not asked for by the rule.

Again, it is contended that the jury should have been told, that if defendant subscribed for the purpose of building a church and rectory, and if the plaintiff and others, without defendant's sanction, agreed to apply the first \$2,400 subscribed towards building a rectory, then, if the church was not commenced, nor any liabilities incurred on account of it, to find the third plea for the defendant.

It was not at all necessary to charge the jury in that way, unless the law is such that the defendant is entitled to have the first part of his rule, for the entry of his nonsuit, made absolute.

The declaration states, that "in consideration that Jas. Watson, Thomas B. VanEvery, Charles Warr, and other persons, would severally subscribe and promise the defendant to pay to the plaintiff, &c., &c., &c., for the purpose of building an Episcopal church and rectory in the town of Goderich." The defendant promised to pay, and the declaration goes on to aver that all things necessary were done to entitle the plaintiff to re-