

The action and counterclaim were tried without a jury at Toronto.

W. F. Kerr and C. W. Kerr, for the plaintiff.

W. R. Smyth, K.C., for the defendant.

LATCHFORD, J., in a written judgment, said that it was not disputed that the defendant did not complete the work under his sub-contract, which was to do certain excavation "according to plans." The defendant denied that he saw the plans referred to in the tender which he made to the plaintiff or that he received the letter notifying him that his tender had been accepted and enclosing specifications of the excavation work. Upon the evidence of the plaintiff's manager, the defendant did see the plans; and he probably received the letter, as it was sent to him by post.

Whether he received it or not, his contract was to do certain excavating according to plans. He did not perform his contract, owing to difficulties which arose after the steam-shovel work was completed. In sinking the sump and cable-pits, quicksand and water flowed in faster than they could be removed by the means which the defendant employed, and the defendant abandoned the work. He had received on account \$700. The completion of the excavation cost the plaintiff much more than the \$1,700 remaining in his hands and a certain allowance made to him by the owners of the building for the unusual difficulties encountered.

The plaintiff did not release the defendant from his obligations.

That the execution of the contract was difficult—not impossible—did not excuse the defendant's non-performance of it: *Taylor v. Caldwell* (1863), 3 B. & S. 826.

The contract was positive and absolute. It was subject to no express condition; and "a condition ought only to be implied in order to carry out the presumed intention of the parties:" per Romer, L.J., in *Herne Bay Steamboat Co. v. Hutton*, [1903] 2 K.B. 683, 691.

From the defendant's breach of his contract the plaintiff suffered damage which he estimated at \$1,560.46. That amount was in excess of his loss; \$1,000 would be a fair sum to allow him as damages.

Judgment for the plaintiff for \$1,000, with costs, subject to the right of either party, at peril as to costs, to a reference to the Master in Ordinary.

The counterclaim should be dismissed with costs.