

THE DUTTON ENTERPRISE

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DUTTON, ELGIN CO.

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DUTTON Ont.

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DUTTON, DEC. 25TH, 1884

MENNIE VS. LEITCH.

Owing to the many misrepresentations made, and for fear that incorrect opinions might be formed in regard to the above case, which would do me an injury publicly and otherwise, I have considered it advisable to publish Chief Justice Wilson's Charge to the Jury, as taken by the shorthand reporter at the trial, in order that the public would have an opportunity of seeing matters in their true light and judge for themselves. I have the honor to be your obedient servant,

A. J. LEITCH.

AGREEMENT.

"Agreement made and entered into on the eighteenth day of September, 1882, between A. J. Leitch, of the village of Dutton, postmaster, of the one part, and John Mennie, of the township of Dunwich, contractor, of the other part, witnesseth that the said A. J. Leitch hath agreed to furnish money to the said John Mennie, for the construction of the Mennie Drain, to the amount of \$7,500 at any time, and to pay the same to the said Mennie as often, and in such sums as he may require, and the said John Mennie hath agreed to give the said Leitch his note of hand for each and every sum of money requisite to make up the amount above mentioned, and to pay the said Leitch interest at the rate of 12 per cent. per annum for the use of said moneys, said notes to be used by the said Leitch only as collateral security, and not for any other purpose, and the said John Mennie hath agreed to produce an estimate of work done on each section of said drain as soon as such section is completed and assign such estimate to the said Leitch, the proceeds of which are to be applied to the payment of notes given to said Leitch and interest on same."

A. J. LEITCH.

JOHN MENNIE.

CHARGE—WILSON, C. J.—The contract, gentlemen, is worded in a way which is perhaps not perfectly clear, but I think it can be interpreted. It states very shortly that Leitch has agreed to furnish money to Mennie for the construction of this drain, not to exceed the sum of \$7,500 at any one time, and to pay the same to the said Mennie as often and in such sums as he may require. I think that the fair interpretation of that agreement is that Mennie would be entitled to claim from Leitch more money than his work came to if it were really necessary. For instance, if he required to procure tools or machinery of any kind, I think he would be entitled to make a demand upon Leitch to furnish him money for that purpose, it being required for the purposes of the drain; so if there happened to be a particularly expensive portion of the work, say there happened to be about a thousand yards of rock excavation, which is particularly expensive, and instead of costing 13 1/2 cents a yard, suppose it had cost a dollar a yard, I think so long as it was required for the purposes of the drain, that Mennie would have had a claim upon Leitch to advance him money, to enable him to carry on that expensive part of the work, because these tenders of Mennie, and all these tenders, are founded upon a general average of the whole work. Some portion of the work is very light, easy, and profitable, and some portion hard and very expensive, and I think that the party came to an expensive piece of work and had to lay out a good deal of money, it would be necessary for him that his men should be paid, and I think that the plaintiff, under the contract, it being required for the purposes of the drain, could have made a demand upon Leitch, and Leitch could have been required to furnish money for that piece of work, although it was a losing concern to Mennie so far, because the contract could be based upon the assumption that the whole work would nevertheless be a paying job. And so also Mennie was not to be paid the hundred per cent. of his work; he was to be paid 80 per cent. of the work, and in that way 20 per cent. would be at all times kept back from him. Well, for the first estimate or two, perhaps

20 per cent. would not amount to a great deal, but as the work went on 20 per cent. retained from large estimates would be a considerable sum, and I think that, although Mennie was not entitled to get the 20 per cent. from the township of Dunwich, he would, nevertheless, be entitled to ask Leitch to make the necessary advance in order to cover that for the payment of his men, so that I don't think that Mennie was restricted in his demands upon Leitch to just the exact sum of money he was entitled to receive under the different estimates and certificates of the Engineer in charge; he would be entitled to receive more if it were really and truly and fairly required for the purposes of the work. Well, I don't know that anything particular turns upon that, but that would be my construction of the contract. Now, as to what took place before the making of the contract, we had better leave that out of consideration, that small piece of paper spoken of; it was something before the contract was made, when the parties were trying to come to some terms, and whether Mr. Leitch gave a satisfactory account of it or not, I don't know. If he took it down by dictation, then the word used would be the exact word he would put in, because if Mennie were dictating it, it would be so and so is to be done, and you—that is, if Mennie was speaking—and you—that would be Leitch—to do so and so. If it was taken down by dictation, you see the expression Mennie would use.

MEREDITH, Q.C.—It is the opposite way—it is "You to assign the certificates." It would refer to Mennie.

WILSON, C. J.—That would alter it. If it were taken down by dictation, "You" would be the proper expression, but the word "You" expressed in some other language there would show it might not have been taken down by dictation. There are really many things brought into a case which have nothing to do with it. We have to sift the case, and apply ourselves fairly to that evidence which has been given. That is often the greatest part of the trouble. Now, let us begin with the contract; the contract is plain enough. The substance of it is that Leitch was to find money for Mennie to enable him to perform this contract. There does not seem to be any question between the parties about the advancing or not advancing till some time in June I think it is; and then the plaintiff says that Leitch told him he would not make any more advances, but it so happened upon that very day Leitch did endorse a note for Mennie for \$200 payable at one month. It appears very hard to understand how Leitch could have said that, and yet endorsed the note for him. That was done. I think there must have been some expression, perhaps not quite as much said, not anything like a positive refusal to go on, otherwise he would not have done that. Ten days afterwards he endorsed a second note for \$300. That does not show there was anything like a positive refusal to go on with the work. Whatever language was used then would seem to be utterly inconsistent with the conduct of the parties after that. Nothing seems to have taken place between the parties until about the 10th of July, and the plaintiff says that as Leitch had refused to make advances that he was entitled to use these sums; that he had to use it, as the other said he would not go on with the contract; and so he went and drew the money on the certificate of the Engineer of the 13th July. Well, Leitch says there was nothing of that kind took place at all; that he signed the certificate, the Estimate of the Engineer, as he was required to do, as the Reeve of the Township, along with the Township Clerk, before the money could be drawn from the Township Treasurer, and Mennie was walking out of the room, and he said "Stop; are you going to assign this over to me?" And he says he hesitated a little while; he said, "I will go down and draw the money anyway, and bring it to you." That is Leitch's account, and Mennie did not come back, but went off. That is his account of the difficulty, and looking at the evidence fairly, that would seem almost to have been the first of the difficulty, because what was said about the 10th June, from what I have said, could hardly have been said either in the sense in which Mennie puts it, or to the extent to which he repeats it; because, as I have said on that very day Leitch did advance him \$200, and in ten days afterwards advanced \$300 more, or it was done by way of advance under that agreement. He endorsed a note for him, and by reason of that endorsement he got the money. Now, the way the accounts would stand up to the 13th June would be in this way. It is admitted by both parties that Mennie had received up to the 14th July \$2,040, and then, if the proceeds of these notes are added in, they come to \$4,790.50, \$500 less discount and that would make \$5,290.50, and he had paid for wages to the 14th July \$2,415.70, and he paid for tools \$150, \$2,665.70 altogether. He had received to within about \$46 of all the money he had paid out. Well, I do not think the parties would have quarrelled upon that state of things. I do not think they should. One had paid out so much money, and the other had got within \$46 of that very amount. Down to the 14th July it does not seem to me there is anything for them to quarrel about. Look at the conduct of the parties. The effect of these advances was that it paid the plaintiff for all the work he did up to the 13th or 14th July to within about \$46. If that is the state of things, it is for you to say whether you think there is any harm done to anybody. Whatever took place is rather after the 14th of July than before it. After the 14th of July to 28th of December he says he paid for wages \$1,555.69, and he got on the estimates \$1,100, and it is said

by himself that out of the moneys he was getting from Black at a lower rate of interest (he was paying ten per cent. to Black and twelve to Leitch), the ten per cent. he appropriated \$300 to this drain. Well, that showed that he had money to the amount of \$1,400 to apply upon the drain, and the amount of wages he paid out was \$1,555.69. That would leave him about \$155 uncovered by any advances defendant had made to him; but in his examination before the Master, instead of saying he paid \$100 and \$200, he said he took \$500 or \$600 from the money he got from Black and put into the drain. Suppose that is called \$500, then he had \$1,100 estimates, and \$500 of that money, \$1,600 altogether and he had paid for wages \$1,555.69, so that he had got \$100 more than his outlay. What great harm was done during that time? The plaintiff is claiming damages, and substantial damages too. Look at the circumstances; what great harm was done? Then, in addition to that, it is very important. In October 1883, while that was the state of things plaintiff and defendant came to a settlement of their accounts, and the plaintiff admits that in October, 1883, he owed to the defendant \$651; and he held a mortgage for \$500 against some one, and he handed that over, and he gave a note with an endorsement upon it for \$300 more. These two sums made \$600, and deducting that from the \$651 admitted to be owing by him to defendant, he owed defendant \$51. Defendant says that was a settlement in full of all accounts between them, and I must confess it looks very much like it. Then on February 12th, after that, what is it the parties do? Remember, in October 1883, while that was the state of things plaintiff agrees to give over all his goods and lands to Leitch, against whom he is making this large claim, for the purpose of Leitch turning them into account and paying off all Mennie's liabilities, of which there is a list attached to this agreement. Well, it is for you to say whether, that being done in February last, whether you think such a transaction would have taken place at all if there had been any idea upon Mennie's part of having a claim for damages against him, or for preferring a claim against the balance of account was struck in October; that is, in four months after he not only strikes this balance and admits he owes it, but in February afterwards he hands over all his property to the other, and says, "I entrust you with my property; you pay all my debts, and I must get a certain remuneration." You must look at that to see how you think the parties were dealing, whether you think there was any real claim for damages or injury. If the party had sustained this large amount of damages, do you think all that would have taken place? Plaintiff then says "I never thought of damages at all until July, 1884, and that was the time of the damages then was this: he wanted to get a certificate from the Engineer for \$300, and he says that the defendant Leitch, who is Reeve, would not allow the Engineer to certify for \$300, and the Engineer in consequence certified only for \$100, and he got that. He represents that that was the reason he thought of damages, and why he is now claiming them. Well, now, Bell, when he is called upon to give an explanation, that he says defendant never told him to certify for Mennie at all at any time, but he told Mennie he could not certify without the approval of Leitch, the Reeve, and neither he could; but he says Leitch never told him not to certify.

MEREDITH, Q.C.—He says it must have been as early as December, he thought; he does not deny it.

WILSON, C. J.—Apply Bell's evidence to Mennie's account. He never thought of damages till June last, and the reason was that Leitch told Bell not to certify, and he did not certify, and he only got \$100. Bell says it could not have taken place at that time. That could not have been the reason then. It is not explained how or why he thought of damages. Now, the money he got altogether is as follows: \$2640 which he got up to July 13th; then if he got \$500 from Black—in the other he says \$300—that would make \$3140, and then from the 1st of October till the 28th of December he got \$1100 upon the estimates; that would be \$4,240 he had got altogether upon this work; that is by the 28th of December; but at that time the work still to be done to the amount of \$6,750, and if that sum be deducted from the contract price it would leave about \$3000 work done on the contract, and he had got \$4,240. That is very nearly the state of things, and it is a matter of difficulty with me altogether to see where the great loss is, but I will try and put questions to you about it. In my opinion the loss starts in this way very much; that the defendant may have been in default to some extent in not advancing in one case that I have mentioned between July and December. The plaintiff had got about \$50 more than the work he had earned, and up to the 14th of July, or thereabouts, he had not got to within \$45 of that which he ought to have got. Well, now, under these circumstances, it is astonishing that the plaintiff should not have thought of damages? It is not surprising at all. I think it would have been a little surprising if he had thought of damages under these circumstances. Then the other important point is this "whatever may have happened, we both agreed that this contract should be put an end to," and the defendant realized upon the settlement come to in October last, or in which plaintiff acknowledged he owed \$651 to Leitch, and he paid that off but \$51. Then in February afterwards he made an assignment of his goods and lands to Leitch, and he gave him authority to deal with his property for the purpose of getting him out of diff-

culty and paying off all liability. Looking at these facts, do you think that the agreement was really put an end to between the parties? because after July Leitch, although he signed every per cent. of the estimates before Mennie could get his money upon them, he never kept one. He never asked after that July to assign any certificates over to him, and yet he, Leitch, had an opportunity whenever a certificate was given, to say to Mennie "I want you to endorse that to me, else I won't sign it." Well, he signed every one of these certificates, and never made any trouble about Mennie taking them away with him. Now, that was from July to the end of the year. In October this settlement took place. Now, do you think the parties had really put an end to their dealings in the month of October? The settlement, it seems to me, goes a very long way to establish it, and that is what Leitch says was done, and looking at the degree of confidence which Mennie afterwards placed in Leitch by giving him over all his property to pay off all his liabilities, I think it adds confirmation to it a good deal. But, if you think that Leitch really has broken his contract and brought about any serious damage to the plaintiff at all—I have made a note of my own view on the subject—if you think that is the case, then give to Mennie such damages as you think he ought fairly to get, looking at all the facts of the case between the parties fairly. They could put an end to the contract whenever they liked; Leitch says they did; it is for you to say.

MEREDITH, Q.C.—I ask your lordship to say to the jury that the mere failure to make an assignment is not sufficient to justify defendant in refusing to advance, and one other point, if Leitch had rescinded the contract he was not entitled to certificates after the 13th of July.

WILSON, C. J.—I can only say with regard to the rescission, there is no very great evidence about it one way or the other. The parties did come to a settlement after that, and it does seem to me that if the parties come to a settlement in that way about their accounts, it is a settlement. It is very true that Mennie was not obliged to say to Leitch, "I am going to claim damages from you," but he says, "I never thought of it; never thought of it at all until last June," and then he gives a particular reason for it which does not appear to me to be a reason at that time; the other gentleman said nothing to the Engineer about not giving that certificate for \$300. The only thing is that usually a person who has a claim speaks of it. We had a case here the other day in which the party said, "Well, I will settle, but I will not give up the damages." There is no such thing as that between the parties here.

Jury retire.

CATARH—A NEW TREATMENT.

Perhaps the most extraordinary success that has been achieved in modern medicine has been attained by the Dixon treatment for Catarrh. Out of 2,000 patients treated by this method, fully ninety per cent. have been cured of this stubborn malady. This is none the less a great fact when it is remembered that not five per cent. of patients presenting themselves at the regular practitioner are benefited while the patent medicines and other advertised cures never record a cure at all. Starting with the claim now generally believed by the most scientific men that the disease is due to the presence of living parasites in the tissue, Mr. Dixon at once adapted his cure to the existing condition, and accomplished, he claims the Catarrh is practically cured, and the permanency is unquestioned, as cases effected by him four years ago are still in the hands of his ever-attentive correspondents. No case has ever attempted to re-start in this manner, and no other treatment has ever cured Catarrh. The application of the remedy is simple, and can be done at home, and is not attended with any of the usual inconveniences of the year is the most favorable for a speedy and permanent cure, the majority of cases being cured at one treatment. Sufferers should correspond with Messrs. A. H. DIXON & SONS, 305 King Street West, Toronto, Canada, and enclose stamp for their treatise on Catarrh—Montreal Star, Nov. 17, 1882.

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A. H. SNIVELY.

Thanking my customers for their patronage in the past, I also ask from them as liberal support to Messrs. Glance & Campbell, my successors.

A. H. SNIVELY.

Dutton, Dec. 3, 1884.

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DUTTON.

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No. 3.—Hon. Edward Blake was issued October 18th, 1884.

No. 4.—Mr. W. R. Meredith, will be issued November 15th, 1884.

No. 5.—Hon. H. Mercer will be issued December 20th, 1884.

No. 6.—Hon. J. Norquy, will be issued January 17th, 1885.

No. 7.—Hon. Sir H. Langevin, will be issued February 14th, 1885.

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