

he failed the plaintiff might do it and keep the option alive. In that case, however, he would keep it alive for his own advantage only, and while the language is used in clause 4: "If Harris fails in carrying out the said option, etc.," it is obvious what is meant is the acts necessary to keep the option alive during its contemplated currency up to the end of December—otherwise the provision that on such default Kennedy was to exercise the option for his own benefit, would be wholly nugatory. But clause 3 contemplates something quite different. In the recital it is provided that the defendant is to agree with the plaintiff that "he shall in case the annexed option is not carried out and completed, that he will . . . pay to Kennedy the sum of \$5,000." There is in clause 3 an agreement which is inserted to implement this. But the express agreement goes further and provides that the defendant shall "in case he fails to carry out the said option and complete the purchase . . . within one month after default, on or before the 1st day of June, 1912, to pay to Kennedy the sum of five thousand dollars." I think this contemplates the final failure of the defendant to complete the purchase: and that it is quite independent of the provisions of clause 4. Whether had the plaintiff succeeded in selling the defendant would still have been liable is a curious question, but we need not consider it here.

I do not think that the liability of the defendant to pay the \$5,000 arose so long as the option was in existence, but that the right of action accrued one month after the company cancelled their option—which was well before this action began.

Nor do I think that this sum is due only on the 1st June, 1912, the clause 3 is perfectly specific.

Nor is it a penalty—the Divisional Court has so recently dealt with the question of penalty *aut non*, that I need not further discuss it.

McManus v. Rothschild (1911), 25 O. L. R. 138.

The plaintiff will have judgment for the sum of \$5,000 (without interest) and costs.

In case of conflict, the evidence of the plaintiff and of Ferguson is to be given full credit.