

Toke v. Andrews, 8 Q.B.D. 428, followed.

Semble, the claim for liquidated damages might have been pleaded merely as a set-off, and if it had been the plaintiff could not have replied matters arising subsequent to action brought.

Fletcher v. Dyche, 2 T.R. 32, referred to.

The contract in question provided for the making of alterations and doing additional work during the progress of the buildings without affecting or avoiding the contract; the amount to be paid therefor to be agreed upon, and such agreement to state the extension of time (if any) to be granted by reason thereof. It also provided that the contractor should pay fifty dollars a week liquidated damages if he failed to finish the work at or before the time agreed upon; due allowance to be made for extension of time for additional work or alterations. Also that the contractor should take care to have the work completed by the day named, "subject only to such provision for an extension of time as is herein provided." Also that should any delay occur by reason of inclemency of the weather or of strikes, the architect should have power to extend the time for completion. The work was not completed until more than twelve weeks after the day agreed upon. The plaintiff attempted to excuse his delay on the ground that it was caused by extras and alterations; but he had never asked for or been granted any extension of the time in consequence.

Held, that by the terms of the contract the onus was thrown upon the plaintiff of showing that certain extensions of time had been actually determined upon before action brought, and, not having shown this, that he was not entitled to any extension; and there being no allegation that the plaintiff was prevented by any act or default of the defendants from completing the work by the time stipulated, and no application for relief having been made under s. 52, s.s. 3, of the Judicature Act, R.S.O., c. 44, and no case made upon which such relief could have been granted, that the defendants were entitled to the liquidated damages claimed.

G. G. Mills for the plaintiff.

McMichael, Q.C., and *J. A. Mills* for the defendants.

CHATFIELD v. CUNNINGHAM.

Mortgage—Foreclosure—Action on covenant—Opening foreclosure—Redemption—Sale after foreclosure—Validity of, as an exercise of the power of sale—Private sale—Inadequacy of price—Previous efforts to sell—Diligence—Presumption of fraud—Judgment creditor—Status of, to attack sale—Judgment recovered after sale.

Mortgagees brought an action upon their mortgage to foreclose the equity of redemption, and after judgment for foreclosure, but before final order, brought another action and recovered judgment therein against the executors of the mortgagor upon the covenant contained in the mortgage. Under this judgment, after final order of foreclosure in the other action, the mortgagees issued a writ of *fi. fa.* lands and placed it in the hands of a sheriff, who sold under it certain lands not comprised in the mortgage, the mortgagees becoming the purchasers.