

I have said before this is not what the defendants bought. I doubt very much whether it would be held to be covered by the plaintiffs' patent, although this is not before me for decision in view of my opinion on the main issue. Mr. Maybee, patent solicitor, says that exhibit 7 more exactly fills the specification of the patent than does number 9, 7 being a definite hook which engages the gummed portion. Exhibit 9 shews a curved instead of angular disposition,—it inclines outward when in position, so is much less effective and is easily disengaged. Exhibit 9 has very little effect in preventing the extraction of the contents. Maybee opened one quite easily the first time he tried. But I have said before I am not called on to pass on this point.

I find that the consideration of the contract has wholly failed and that the plaintiffs cannot recover. Apart from any question of representation or misrepresentation by plaintiffs' agent the parties were contracting with reference to an article which would answer the requirements of the Canadian Post Office Department, so as to send the matter enclosed therein at the lower rate of postage, and this article failed to answer them.

There is another element in the case which I am also about to pass over, but it might present a serious difficulty in plaintiffs' way if I had otherwise taken a favourable view of their case, and that is the effect of the license granted by plaintiffs to the W. Dawson Company on the 10th August, 1911, for the manufacture and sale of the envelope east of Kingston, and the privilege of selling in Manitoba and western Canada. This is relied upon by defendants either as an adoption of or acquiescence in defendants' attempt to rescind the contract, or as an act in direct violation of the contract and so working a rescission.

The action will be dismissed with costs. Thirty days' stay.