

"The whole to be of good material, and to be finished in a good workmanlike manner, and to be finished on the 1st July, 1873. In consideration the parties of the first part agree to pay the party of the second part the sum of \$708, one-half on the 15th May, and the other half when the said school-house is completed." Then followed the signatures of the three school trustees, with their corporate seal, and the signature of the plaintiff. It bore no date, but was proved to have been executed by the parties about the 1st March, 1873. It referred to no plan, but the trustees furnished the plaintiff with a plan to work by, and they paid to him \$400 on account. They refused to pay the balance, or to accept the building, alleging that it was not properly constructed, but the learned Queen's Counsel, who tried the case without a jury, found for the plaintiff for the balance of the \$708.

Held, that it was sufficiently clear from the instrument itself, and the acts of the parties, that defendants were the parties covenanting with the plaintiff, and that the instrument was intended so to operate; and the verdict was upheld.

DECLARATION, on a covenant in an agreement for the building of a school-house, and on the common counts.

Pleas: 1st. Did not covenant as alleged.

2nd. That the plaintiff did not erect and finish the school-house in a workmanlike manner, and of good material, and according to the specifications furnished him as alleged.

To the common counts, never indebted, and payment.

The case was tried at the Spring Assizes, at Chatham, before S. Richards, Q. C. sitting for GWYNNE, J.

On the trial the plaintiff put in an instrument signed by the trustees individually, and with the seal of the defendants' corporation.

This instrument was headed, "Specification of school-house in school section No. 4, Tilbury East;" and then followed detailed specifications of the building, &c.; concluding, "The whole to be of good material, and to be finished in a good workmanlike manner, and to be finished on the 1st of July, 1873. In consideration the parties of the first part agree to pay the party of the second part the sum of \$708 of lawful money of Canada, one half on the 15th day of May, and the other half when the said school-house is completed." Then below were the signatures of the three trustees, and the seal of the corporation, with the corporate name engraved, and below that the signature of the plaintiff.

The plaintiff stated in his evidence that that was the agreement between the defendants and himself, and that under that agreement he proceeded to build the school-house: that it was built on a lot belonging to the defendants, and a plan, which was produced at the trial, was by the trustees given to him, by which he was to work: that the contract, which bore no date, was signed by the trustees about the 1st March, 1873, and the seal of the defendants put to it: that he was asked by one of the trustees to tender for the work; that he did so and his tender was accepted: that he built the house according to the specifications and the plan, and that he completed it about the middle of July: that it was built of good material and in a workmanlike manner: that no objection was made to the work not being done by the 1st of July: that he was paid \$400 on account of the contract, \$200 in the beginning of June, and \$200 on 4th July: that he demanded payment of the amount due: that the defendants told him that if he would throw off \$58, and put in four more abutments under the building, they would pay the balance \$250: that he put in all the abutments shewn in the plan, the reason assigned for the deduction by the defendants being on account of their being no collar beams in the roof, and that the building was twisted at one end: that the collar beams were not called for by the specifications, and the twist complained of was from one-half to three-quarters of an inch, and no injury to the building, and that it could not be noticed unless examined closely: that he put in the building things not called for by the specifications, and that he changed the size of some of the timbers by order of the defendants: that one of the trustees worked at the building for the plaintiff, and that he heard of no complaint until the day for payment.

Several witnesses, among them two carpenters who worked on the building, and two others who examined the work, were called and testified generally to the good character of the work and materials.

One other witness said that after the work was done, except the painting, he had a conversation with one of the trustees, who made no complaint, but said that he thought they were going to have a pretty good school-house; he said he did not think it a very good job or finished in a good workmanlike manner; he said, however, that he never inspected the building.

At the close of the plaintiff's case the defendants' counsel objected that the plaintiff could not recover on the first count, as the instrument produced could not be treated as the covenant of the defendants; and that the plaintiff failed on the common counts, as there was no acceptance of the work.

On the defence the three trustees gave evidence, who testified generally that the building was not completed in a workmanlike manner: that it was defective, and not built of proper material:

that they had made the plaintiff a conditional offer, that if he would put in additional abutments and put on another coat of whitewash they would pay him \$650. It appeared from their testimony that the plaintiff had put in all the abutments shewn in the plan.

Three carpenters were called, who said they had examined the building, and they stated in general terms that it was not built as it ought to have been done, nor of the proper kind of material, and that it was not done in a workmanlike manner, pointing out what they considered defects; and they were of opinion that \$100 ought to be deducted from the contract price.

The learned judge, on the evidence, found for the plaintiff, for the full amount claimed, \$311.

During Michaelmas Term (21 November, 1873,) *Robinson, Q. C.*, obtained a rule nisi to enter a verdict for defendants, or for a new trial on the ground that the verdict was against law and evidence: that the covenant declared on was not proved, and that the building was not finished in accordance with the covenant: and that there was no evidence of acceptance of the school-house by defendants, or any evidence sufficient to render them liable.

During Easter term (30th May, 1874,) *M. C. Cameron, Q. C.*, shewed cause. The case of *McDonald v. Clarke*, 30 U. C. R. 307, is an authority for the plaintiff succeeding here. The contract sufficiently shews who the parties were. It appears to be signed by the school trustees, and it relates to building a school-house. The verdict can also be supported on the count for work and labour. The house was built, and no complaints were made during its erection. Two instalments, \$400, were paid.

C. Robinson, Q. C. contra. As to the construction of the instrument, *McDonald v. Clarke*, 30 U. C. R. 307, does not apply. In that case, by looking at the document one could see the two parties. This is simply the case of a deed purporting to be *inter partes* with no parties mentioned in it, and they cannot become parties to it either by their signatures alone or by their conduct: *Addison on Contracts*, 7th ed., 31; *Dacey on Parties to Actions*, 103; *Chesterfield and Midland Silkstone Colliery Co. (Limited) v. Hawkins*, 3 H. & C. 677; *Reeves v. Watts*, L. R. 1 Q. B. 412; *Sunderland Marine Insurance Co. v. Kearney*, 16 Q. B. 925, 928. On the merits the defendants should succeed. They have refused to take the key, and have never used the school-house. They would not have been justified as trustees, in accepting the building or paying the contract price. The disinterested witnesses all said the work was not well done, and the plaintiff's witnesses who said otherwise, were interested. With regard to acceptance, the school-house is on defendants' land, who have done nothing to accept, and the common counts, therefore, do not apply. Payment cannot make a contract under seal, nor imply acceptance under the facts proved here. He cited *Hamilton v. Myles*, 23 C. P. 293; *Behn v. Burness*, 3 B. & S. 761, and notes; *Munro v. Butt*, 8 E. & B. 738; *Smith v. Brady*, 17 N. Y. 173; *Shaw v. Lewiston and Kishacoquillas Turnpike Road Co.*, 3 Penn. 444.

December 22, 1874, *MORRISON, J.*, delivered the judgment of the Court.

The instrument produced at the trial, and upon which the plaintiff relied to support the first count in his declaration, and which was in fact the contract between the parties, is certainly inartificially drawn, although no doubt at the time well understood by the parties who put their names and seals of the defendants to it.

It is headed, "Specification of a school-house in school section, No. 4, Tilbury East." Then follows in detail the size of the building, and the details of the work and materials to be employed, and the fitting up of the interior of the school-house.

It did not refer to any plan, but the defendants furnished the plaintiff with a plan, which was produced at the trial, and after stating how it was to be painted, the instrument ended as follows:

"The whole to be of good material, and to be finished in a good workmanlike manner, and to be finished on the 1st July, 1873. In consideration, the parties of the first part agree to pay the party of the second part the sum of seven hundred and eight dollars of lawful money of Canada; one half on the 15th day of May, and the other half when the said school-house is completed. Underneath is the seal of the defendants with impression on it: "Tilbury East S. S. No. 4," with the names of the three trustees opposite it, and below that again the signature of the plaintiff.

It bore no date, but from the evidence it was executed by the parties about the 1st March, 1873.

It seems to us very clear upon the face of the instrument itself, its terms, the position of the seal of the defendants affixed to it, and the other signatures, who are meant and who are designated as the parties of the first part, and the party of the second part viz., the defendants as the former and the plaintiff as the latter. It is quite apparent from the whole instrument that it was intended to operate as a covenant on the part of the defendants, whose seal was affixed to it, as well as the signatures of the members of the corporation, and delivered by them to the plaintiff as such.