CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

THE REVEREND E. G. DOE (TRUSTEE) AND THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF LONDON, IN ONTARIO (PLAINTIFFS) ..... } APPELLANTS;

AND

THE CANADIAN SURETY COMPANY (DEFENDANT) ..... } RESPONDENT.

1936

*Mar. 25, 26.
*Nov. 27.

B. BLONDE (DEFENDANT) ..... APPELLANT;

AND

THE REVEREND E. G. DOE (TRUSTEE) ET AL. (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Building contract—Action for damages for alleged faulty performance by contractor—Terms of contract—Interpretation—Nature of work—Nature of alleged defects—Basis and measure of damages recoverable, if any—Surety company guaranteeing performance by contractor—Alleged alteration of contract without surety's consent—Alleged failure to notify surety of certain matters—Release of surety.

The defendant B. contracted with plaintiffs to erect for them a church building. It was of a design unique on this continent and of difficult work. The defendant surety company gave its bond to plaintiffs, guaranteeing performance by B. The time for completion under the contract was May 15, 1931. The building was completed by August 13, 1931, on which date the architect's final certificate was issued. There had been, and continued to be, leakages of rain into the building, which plaintiffs alleged were due to faulty workmanship and B. alleged were due to faulty design. On September 28, 1931, plaintiffs paid the balance of the contract price (which, by arrangement, was paid direct to unpaid sub-contractors), after obtaining on that date from B. a written undertaking as follows: "I hereby acknowledge having received notice from you and your architect * * * that certain defects have been discovered by your architect, and that there is water leaking into the church * * * , the cause of which has not been exactly determined. * * * I hereby acknowledge that

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

the said notice has been given to me in pursuance of the specifications which form part of the contract * * * . I further agree and covenant to repair same according to the directions given by your architect." The undertaking as drawn by plaintiffs had contained, after said words "to repair same," the words "according to the terms of the contract," but as B. (who denied faulty performance by him) would not sign it in that form, the latter words were deleted. Article 16 of the general conditions in the specifications read as follows: "Neither the final certificate or payment * * * shall relieve the contractor from responsibility for faulty materials or workmanship, which shall appear within a period of one year from the date of completion of the work, and he shall remedy any defect due thereto and pay for any damage to other work resulting therefrom which shall appear within such period of one year, but beyond that the contractor shall not be liable. * * *"

Plaintiffs sued B. and the surety, claiming for damages resulting from the leakages. At trial they obtained judgment against both defendants. B.'s appeal from this judgment was dismissed by the Court of Appeal for Ontario, which, however, allowed the surety's appeal and dismissed the action as against it. B. and the plaintiffs appealed to this Court.

Held (*per* the majority of the Court: Duff C.J., Crocket and Davis JJ.): (1) In view of the issue of the architect's final certificate and payment of the full amount of the contract moneys, and there being no suggestion of fraud or mistake, the question of B.'s liability must be confined to his said undertaking of September 28, and said article 16 (being the only relevant reservation in the contract available to plaintiffs, once the work was completed and accepted, the final certificate issued and the contract moneys paid).

(2) B.'s obligation under his undertaking of September 28 was limited to obeying directions of the architect; and in the absence of proof that directions were given and not obeyed, B. was not liable under the undertaking.

(3) B.'s responsibility under article 16 was limited to faulty materials or workmanship which did not "appear" until after the completion and acceptance of the work. Assuming (what plaintiffs contended) that B. had not properly bonded the bricks and tiles with the mortar, yet article 16 must be read in the light of the necessity for the architect's constant supervision of this particular work (the bricklaying being a job of more than ordinary difficulty) and of the fact that there was no suggestion of bad faith or fraud or concealment on B.'s part; (discussion of an architect's duties in such cases, and of the extent of a contractor's liability in damages if the architect fails to supervise properly and check defects and have them remedied as they occur); and if the defects complained of were such as the architect would observe if he gave the requisite supervision to the work, then it could not fairly be said that the defects were not apparent within the contemplation of article 16 before the completion and acceptance of the work. The date of the "appearance" of faulty workmanship or materials (if any) was important; and the case against B. had not really been dealt with, at trial, from that point of view. Further, if there was liability upon B. under article 16, it rested upon plaintiffs to establish upon a proper measure of damages what were in fact the actual damages; and the evidence was not such as could establish that. The principle of measuring damages on the basis of

the cost of repairing the building as it stood at the date of the trial (February, 1934) was clearly wrong, quite apart from the very unsatisfactory nature of the evidence adduced even on that basis. It was impossible to say from the evidence whether any liability had been incurred under article 16.

(4) For reasons aforesaid, the judgment against B. should be set aside; with liberty to plaintiffs to proceed to a new trial on the issue arising out of article 16.

(5) The action as against the surety should be dismissed. Acts of the plaintiffs in connection with the contract (anticipatory payments, the arrangement aforesaid for payment direct to sub-contractors owing to B.'s financial difficulties in completing the work, the settlement covered by said undertaking of September 28, etc.) which, under all the special circumstances of the case should have been, but were not, done with the knowledge and consent of the surety, operated to discharge the surety. (The law as to the effect of alterations in a contract as affecting a surety's liability, discussed, and *Holme* v. *Brunskill*, 3 Q.B.D. 495; *Calvert* v. *London Dock Co.*, 2 Keen's Rep. 638, *General Steam Navigation Co.* v. *Rolt*, 6 C.B. (N.S.) 550, and other cases, referred to. Any agreement or transaction between the principals in variation of the contract without the surety's consent, unless it is self-evident that the variation is unsubstantial or necessarily beneficial to the surety, operates to discharge the surety. The application of this principle with regard to the circumstances of the present case discussed).

(6) After B.'s bid had been accepted, he notified plaintiffs that he had made two substantial omissions in estimating costs for the purpose of it, and requested release or an increased contract price, which plaintiffs refused. B., faced with threatened forfeiture of deposit and loss of materials on the site of the work, decided to proceed with the work. It was subsequent to this that the surety delivered its bond in the blanket form in which plaintiffs required it. When these facts had come out at the trial (which had then proceeded for a week) counsel for the surety asked leave to plead non-disclosure thereof by plaintiffs to the surety and consequent release of the surety, which request was refused except on terms of adjournment and payment by the surety in any event of all costs of the trial up to that time, which latter term was declined. The majority of this Court expressed the opinion that under all the circumstances the surety should have been allowed to amend its pleadings unfettered by such an onerous term as to costs; and that, had judgment not been given for dismissal, on other grounds, of the action against it, a new trial would have been necessary to determine the issue sought to be raised. The questions involved in such an issue were to some extent discussed.

Per Rinfret J. (dissenting in part): The trial judge's finding that leakages were attributable to faulty workmanship of B. which did not "appear" until within one year after the completion of the work, within the contemplation of article 16, was fully warranted on the evidence. But in any case the undertaking of September 28, 1931, created a new and independent obligation on B., which was not qualified by restrictions in article 16, to repair the defects; and directions within the meaning of said undertaking were given by the architect. The judgment against B. should be affirmed. But said undertaking of September 28 was a material alteration in the contract, and the surety was thereby released of its liability under its bond, and the judgment of the Court of Appeal dismissing the action as against it should be affirmed.

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Per Kerwin J. (dissenting): Upon the evidence, the trial judge's findings against B. should not be interfered with. The leaks arose through B.'s failure to comply with the specifications. The conditions in the building shortly before the trial of the action, shewn in evidence, were, upon the evidence, substantially unchanged from those existing within a year after completion of the building; and the defects had arisen within that year. There was ample justification for the amount fixed as damages by the trial judge. Directions were given to B. to repair, within the meaning of the undertaking of September 28. The judgment against B. should be affirmed. As to the surety's liability:—Having regard to article 16 (aforesaid), and to other terms in the contract which (*inter alia*) required the work to be done in accordance with the plans, drawings, etc., and such "instructions as may from time to time be given" by the architect, the undertaking of September 28 did not subject B. to anything more onerous than had been required by the contract; it did not effect any change in the contract; nor, consequently, any release of the surety. As to B.'s alleged mistake in omitting to estimate certain costs for the purpose of his bid (even assuming the point was now open to the surety): there was no obligation on plaintiffs to notify the surety thereof; there was no charge of fraud or misrepresentation nor any suggestion that it occurred to plaintiffs or the architect to withhold the information as something of which the surety should be apprised; the error was not such a circumstance the mere non-disclosure of which would release the surety. As to certain matters which occurred during the work—including B.'s financial difficulties and the arrangement for making payment to sub-contractors—they did not give rise to any obligation on plaintiffs to notify the surety thereof. There was no alteration in the terms of the contract; nor was the surety prejudiced. The judgment at trial against the surety should be restored.

APPEAL by the plaintiffs and appeal by the defendant Blonde from the judgment of the Court of Appeal for Ontario.

The defendant Blonde contracted with the plaintiffs to erect for them a church building at Windsor, Ontario. The defendant The Canadian Surety Company gave its bond to the plaintiffs as security for payment of any loss or damage directly arising by reason of the failure of Blonde faithfully to perform the contract.

The action was brought to recover from the defendants damages for alleged faulty performance of the work by Blonde. At trial, Hope J. gave judgment against both defendants for $19,173.25 and a further sum of $330 against Blonde. Both defendants appealed to the Court of Appeal for Ontario, which (by a majority in each case) dismissed Blonde's appeal but allowed the appeal of The Canadian Surety Company (for dismissal of the action as against it). The plaintiffs appealed to this Court from the judgment of the Court of Appeal in so far as it allowed The Cana-

dian Surety Company's appeal, and the defendant Blonde appealed to this Court from the judgment against him.

The material facts of the case and questions in issue are sufficiently stated in the judgments now reported, and are indicated in the above headnote.

S. L. Springsteen K.C. and *A. Racine K.C.* for the plaintiffs (appellants).

D. L. McCarthy K.C. and *A. E. Knox* for the defendant (respondent) The Canadian Surety Company.

J. R. Cartwright K.C. for the defendant (appellant) Blonde.

The judgment of the majority of the Court (Duff C.J., Crocket and Davis JJ.) was delivered by

DAVIS, J.—This is a building contract case. The defendant Blonde entered into a contract in writing with the plaintiffs to erect a church building in Windsor, Ont., and the defendant, Canadian Surety Company, gave its bond to the plaintiffs guaranteeing the performance of the contract by Blonde. The building was in due course completed, the final certificate of the architect was issued and the then balance of the contract price was paid in full. The contract price was $88,500 and the surety bond was for half that amount. Though the building was completed on or before August 13, 1931, as found by the trial judge, it was not until April 5, 1933, that the plaintiffs commenced this action in the Supreme Court of Ontario against the contractor and the surety company claiming $44,695.15 damages for alleged negligence in construction. The trial judge gave judgment against both defendants in the sum of $19,173.25 and an additional sum of $330 against the contractor. Upon appeal to the Court of Appeal for Ontario, the judgment against the surety company was set aside and the action against it dismissed, but the judgment against the contractor was affirmed. The plaintiffs then appealed to this Court against the judgment in favour of the surety company and the contractor Blonde appealed against the judgment in favour of the plaintiffs against him. The two appeals were heard together.

The case should have been a fairly simple one if the parties had directed themselves to the only issues that

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Davis J.

were properly open and had confined themselves to relevant evidence on those issues. As between the contractor and the plaintiffs, in the absence of fraud or mistake, neither of which was suggested here, the issue of the architect's final certificate and the payment of the full amount of the contract moneys put an end to the matter except in so far as any rights and liabilities of the parties to the contract were expressly reserved by the terms of the contract itself or by some agreement made between the parties at the time of the final payment. That was a fundamental principle that should have been recognized and applied at the very outset of the trial of the action. Had that been done, it would have become at once apparent that the evidence should have been focussed on two points: firstly, on a special undertaking in writing (Exhibit 25) obtained by the plaintiffs from the contractor before the final payment was made, and, secondly, on article 16 of the General Conditions, which reads as follows:

> Neither the final certificate or payment, nor any provision of the contract document shall relieve the contractor from responsibility for faulty materials or workmanship, which shall appear within a period of one year from the date of completion of the work, and he shall remedy any defect due thereto and pay for any damage to other work resulting therefrom which shall appear within such period of one year, but beyond that the contractor shall not be liable. The owner shall give notice of observed defects with reasonable promptness. Questions arising under this article shall be decided as provided in Articles 10 and 44.

Firstly, then, the question is, what is the precise meaning of the written undertaking, and what, if any, liability arose under it? Secondly, what is the scope and extent of the reservation in article 16, and what, if any, liability arose under that article? The minds of those engaged at the trial of this action do not appear to have been focussed upon the fundamental points. The case was thrown wide open without regard to the fact that the building had been completed and accepted, the architect's final certificate issued and the contract moneys paid. The inevitable result was a mass of evidence that took thirteen days of the trial court at intervals during the months of January, February and March, 1934, and the vital points in the litigation were lost track of. Lord Tomlin (then Tomlin, J.) said in *Graigola Merthyr Co. Ltd.* v. *Swansea Corporation* (1):

(1) [1928] Ch. 31, at 38.

> Long cases produce evils; * * * In every case of this kind there are generally many "irreducible and stubborn facts" upon which agreement between experts should be possible, and in my judgment the expert advisers of the parties, whether legal or scientific, are under a special duty to the Court in the preparation of such a case to limit in every possible way the contentious matters of fact to be dealt with at the hearing. That is a duty which exists notwithstanding that it may not always be easy to discharge.

As far as the contractor's liability was concerned, there were only the two "irreducible and stubborn" points in the case. Firstly, was there any breach by the contractor of his written undertaking (Exhibit 25), and if so, what was the amount of damages; and secondly, did "faulty materials or workmanship" in the sense in which those words are used in article 16 "appear within the period of one year from the date of the completion of the work," and if so, the amount of the damages.

Before discussing these points in detail, it is convenient to mention here that it was "a very original design" for a church and "it was difficult brick work," in the words of the architect himself. The centre section of the church was a twelve-sided figure and the ornamentation for the building was in the brickwork itself. There appears to have been nothing like this design on this continent, though there is a considerable amount in northern Europe. Mathers, an experienced Toronto architect, said

> that the whole of the masonry work on that particular building would require very close supervision. I know I would be most interested in how it was done. I would want to take a hand in it—almost become the foreman on the job.

Having regard to the climatic conditions in western Ontario, it is evident that it was a bold move to attempt this extreme type of architectural construction there, and that those who undertook it were bound to give very close supervision to the masonry work during the progress of the work. The contract was taken at a very low figure by a man nearly seventy-five years of age who had built churches in many small towns, but was plainly without the skilled experience necessary to undertake the difficult work involved in the construction of this type of building.

Turning now to the written undertaking (Exhibit 25) that the contractor gave to the plaintiffs in order to secure payment of the balance of the contract moneys. There had been considerable leakages of rain into the building before the completion and acceptance of the building and the

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Davis J.

plaintiffs sought to "safeguard" themselves by obtaining from the contractor, before handing over the balance of the contract moneys, a written undertaking as follows:

I hereby acknowledge having received notice from you and your architect, Mr. Lothian, to the effect that certain defects have been discovered by your architect, and that there is water leaking into the church constructed by me, the cause of which has not been exactly determined.

I hereby acknowledge having received notice from your architect and from you of same. I hereby acknowledge that the said notice has been given to me in pursuance of the specifications which form part of the contract entered into between you and myself. I further agree and covenant to repair same *according to the terms of the contract* according to the directions given by your architect, Mr. Lothian.

Dated at Windsor, Ontario, this 28th day of September, A.D. 1931.

The words in italics, "according to the terms of the contract," were deleted before the document was signed by the contractor. The solicitors for the plaintiffs had drafted the document, but the contractor had consistently taken the position that the leakages were not due to any failure on his part to perform the contract but were inherent in the architect's faulty design and inadequate structural specifications. He would not give an undertaking with the words, "according to the terms of the contract" in it, and the plaintiffs finally accepted the undertaking from him without those words. There could be no misunderstanding of the position taken by the contractor. He was not affirming an obligation under the contract; he was undertaking a new obligation outside the contract. The court was entitled to definite evidence by the plaintiffs as to what directions, if any, were given by the architect, when they were given, and what, if any, failure in compliance therewith was made by the contractor. There is a singular dearth of evidence on this aspect of the case. Exhibit 36 is a letter from the plaintiffs' solicitors to the contractor under date of March 2, 1932, in which they say:

Referring to your letter of February 4, 1932, you mention in paragraph 2 of the said letter that the repair work has been done according to the instructions of Mr. Lothian. We have showed this letter to Mr. Lothian, and he has asked us to say that he gave no instructions to you as to how to make repairs. You have discussed the matter with him and he has only given suggestions, and not instructions.

This letter rather confirms the construction put upon the undertaking by counsel for the contractor that the undertaking necessarily involved the giving of future directions. The architect, Lothian, was asked in cross-examination:

I understood you to say you simply went up there when Mr. Blonde was there, and only went there if there was further evidence of leaking. Am I right?

to which he answered, "Yes, sir." There is really no evidence directed to show any breach by the contractor of his obligation under this written undertaking. We agree with what Mr. Justice Riddell said in the Court of Appeal:

> As against Blonde, his obligation was to obey the direction of the architect; the architect swears that he did not give any directions; and the solicitors for the plaintiffs say so specifically in their letter of March 2, 1932. It seems to me that no action lies against Blonde on this undertaking unless and until it is proved that he omitted to obey a direction of Lothian.

Now we turn to the reservation contained in article 16 of the General Conditions of the original contract itself. That is the only reservation in the contract (except article 28 respecting unpaid liens which are not involved in this case) available to the plaintiffs once the work was completed and accepted, the final certificate issued and the contract moneys paid. Very little precise evidence was directed to this provision. There are the most casual references here and there throughout the evidence to proof of the discovery of faulty materials or workmanship within the exact period of one year from the completion of the work, i.e., August 13, 1931. The plaintiffs did engage within the year two independent experts, one an architect and one an engineer, to examine the building and make a detailed report upon it, and this was done about February, 1932. The evidence discloses that these men made a careful and minute investigation and rendered a detailed report, but neither of these gentlemen was called at the trial nor was any part of their report disclosed. Instead of calling these men the plaintiffs called two expert witnesses from Montreal—Macdonald, an architect, and Harrington, a contracting engineer, both capable, experienced men, but neither of them saw the building until the time of the trial, which did not commence till January, 1934. The real complaint that the plaintiffs advanced was that during rainstorms water leaked in through the building at different places and caused a great deal of damage. That the building was leaking before the final payment was made and that the plaintiffs feared a continuance of that condition is perfectly plain from the very language of the written undertaking (Exhibit 25) which the plaintiffs sought and obtained from the contractor before the final payment was made. That the building continued to leak thereafter is

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Davis J.

beyond dispute. Leakages appear to have broken out in different parts of the building. The evidence is that in August, 1932, the clerestory wall was torn down and it was then discovered, the architect says, that the difficulty was due to the contractor not having properly bonded the bricks and tiles with the mortar. If this could be treated in law as something which "appeared" during the year within the contemplation of article 16 rather than something which in the progress of construction should have been observed and condemned by the architect and the work stopped to insure the proper execution of the contract (clause 2 of the contract, and article 9 of the General Conditions), then one would have expected something more definite in the way of proof of the exact date of this alleged appearance having regard to the date of the completion of the work. There was a good deal of competent evidence, however, that there were two real causes of this leakage. Firstly, that the combination of hollow tile, brick and mortar was a very serious mistake in the construction specified by the contract, in that the combination of them was inherently bad because the hollow tile naturally absorbed the moisture from the mortar with great rapidity and therefore the combination should never have been used in the construction of the building. And, secondly, that there was no bracing of the steel work in the roof of this building. There was much competent and reliable evidence that in a building of this sort there should have been adequate steel bracing of the trusses in the roof of the building. There was evidence by several witnesses that when a person stood in the building on his toes and let his heels come down, the building shook, and, further, that the heavy motor traffic on the street caused the building to shake. All that was attributed to lack of specification of adequate steel work. In fact it was admitted by the architect, in reply, that in the choir loft this vibration was apparent, but he did not think the vibration was "of a magnitude to endanger the building." Macdonald, in reply, said that he had noticed vibration in the choir gallery "by rising on the toes and striking the floor with my heels." If the building shook from time to time because of passing motor traffic or of some slight movement inside the building itself, it is quite apparent that the building would crack

here and there and that the cracks would increase with the passing of time and that rain water would very readily work itself into the building through the cracks and cause a progressive state of disturbance and damage. Those two problems, one the improper use of hollow tiles with brick and mortar, and the other the absence of bracing in the steel work, were vital matters in the case and deserved very special analysis and consideration, and we do not consider a bare finding of fact, inconsistent with these explanations of the causes of the trouble, presents any serious difficulty to a complete review of the evidence.

But assuming in favour of the plaintiffs that these cracks in the walls were caused by faulty masonry work of the contractor in not having properly bonded the bricks and tiles, is that "faulty materials or workmanship which shall appear within a period of one year from the date of completion of the work" within the contemplation of article 16? Is that the sort of thing that was covered or intended to be covered by that provision in the contract reserving the rights of the owner? The effect of article 16 is plainly to limit the responsibility of the contractor to faulty materials or workmanship which do not appear until after the completion and acceptance of the work. Manifestly no remedy is preserved against the contractor after completion and acceptance of the work if the defects had appeared before that time. What constitutes an "appearance" is a matter of construction, and, to determine whether or not faulty materials or workmanship did appear, one must know the facts. If the work was done in the open and the architect in the ordinary course would see the work and the fault was of such a character that it must have been apparent to any competent architect observing the work, it could not be said that the fault was not apparent within the meaning of article 16 before the work was accepted and paid for. The failure of an architect to note what was before his eyes, or to realize the possible ultimate consequences, is really of no relevancy to the question whether or not the fault was apparent. Assuming, and it was the basis of the plaintiffs' case, that the mortar was not properly laid and that that was the cause of the damages sought to be recovered, it was the duty of the architect to ascertain that at the time the mortar was being put into the building.

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Davis J.

Construction commenced about the middle of November, 1930, and by December 4 or 5 the architect had left for England and did not return till about January 7 or 8. It was the architect's duty to give close supervision to the construction. If he is now right in his contention that it was faulty masonry work and not defective design and specifications, that could have been observed and remedied during the progress of the building with very little, if any, expense or loss to any one. Architects are not required to do everything in the way of watching the construction of buildings under their charge, but they are required to give such care and attention to the work while it is in progress, as the nature and difficulties of the particular work reasonably demand. To check just such defects in masonry as it is suggested occurred during the progress of the work in this building was one of the very things under the special circumstances of this case that the architect was in duty bound to do. It was admittedly a bricklaying job of more than ordinary difficulty. Where an architect fails to do that which he ought to have done he may himself be liable to the owner for very large damages on the basis of the cost of tearing down and reconstructing that which may not become known to the owner for a very considerable time after the work is completed and at a time when the cost of remedying the defects has become very heavy, and yet the contractor himself may remain liable only for what it would have cost to have remedied those defects at the time they occurred had the architect done his duty and required the contractor then to remedy the faults. (Halsbury, 2nd ed., Vol. 3, pp. 277, 340 and 341.)

Article 16 must be read in the light of the necessity for the constant supervision of this particular work and of the fact that there is no suggestion of bad faith or fraud or concealment on the part of the contractor. If the defects now complained of were the sort of thing that the architect would observe if he gave the requisite supervision to the work, then it can not fairly be said that the defects were not apparent within the contemplation of article 16 before the completion and acceptance of the work.

If we can regard the physical conditions which permitted the water to leak through as in themselves constituting faults within article 16, then it is clear that they were

apparent before the completion of the work. If it is said that the leaks themselves did not constitute faulty workmanship within the meaning of article 16 and that it was not until after the completion of the work that the fact that they were due to faulty workmanship was ascertained, the fact of the faulty workmanship to which they were ascribed appeared during the progress of the work. If, on the other hand, the leaks are to be treated as the consequences of the fault found by the trial judge (the failure to bind the bricks and mortar), then that fault is one which became apparent during the progress of the work.

That the fact of substantial leakages, whatever the cause, was known to the owners before they accepted the work and paid the balance of the contract price, is made abundantly plain by the language of the letter, Exhibit 25. There is no finding by the trial judge that the architect did not know of the faulty materials or workmanship or that the circumstances were such that knowledge is not to be imputed to him. The trial judge dealt with the ascertainment of the cause of the leakages and so doing misdirected himself on the essential point on that branch of the case, which was the appearance rather than the cause of the trouble. A new building that is leaking throughout plainly indicates either bad workmanship or materials, on the one hand, or faulty design and inadequate specifications, on the other hand. Article 16 confines the contractor's responsibility to the former, and the date of the appearance thereof becomes of great importance. The case against the contractor has not really been dealt with from that point of view.

The precise scope of the letter, Exhibit 25, is really a question of fact, and, when the words which appear in the letter, "certain defects" and "water leaking into the church," are interpreted by reference to the circumstances under which the letter was delivered and accepted, it may well be that the undertaking covered by the letter had the effect of superseding, to the extent of the matters covered by the letter, the obligation of the contractor imposed by article 16; and as the action against the contractor is based entirely upon the claim for damages resulting from the leakages throughout the church, that would in itself be an end to the claim. In view of our conclusion to grant a new

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Davis J.

trial on the issues arising out of article 16, we refrain from further discussion of the meaning and effect of Exhibit 25 in this connection, as this aspect of the case will, no doubt, be fully developed on the rehearing.

But in any event the action was one for damages, and if there was liability upon the contractor under article 16, it rested upon the plaintiffs to establish upon a proper measure of damages what were in fact the actual damages. No such attempt was made in this case. The two expert witnesses of the plaintiffs at the trial never saw the building until January, 1934. Harrington admitted in cross-examination that time had its effect on the conditions as he saw them; that the defects would have been more easily dealt with in the spring of 1932; and that each application of frost unquestionably made the condition of the joints and bondings worse. Lothian, the architect, agreed with the statement in the Sheppard report that Blonde reported having flooded the roof about September, 1931, with the drains blocked, for a period of three hours, with no visible sign of leakage. Neither Macdonald nor Harrington, the two expert witnesses upon whose evidence the trial judge fixed the amount of damages, attempted to estimate the cost of making the repairs except at the date they were giving their evidence, February, 1934—two and a half years after the completion of the building. The cost of reconstruction at that date was not the measure of damages, but even if it were their evidence as to the amount of damages was entirely unsatisfactory. Harrington in examination in chief was asked

> Now then, from your observations, and having regard to your experience in these matters, what would you estimate as the cost of making what you consider the necessary repairs to remedy so far as possible the conditions of which you have spoken?
>
> Ans. I would not hazard making any estimate.

Pressed further by counsel, he said,

> I would not attempt to make an estimate of that,

and then proceeded to give some figures which

> I would think * * * would be necessary to put that work to some extent back to what it was intended to be originally. * * *

and gives as his explanation for not being able to make an estimate of costs, that you have

> to have something before you in the form of drawings or specifications from which you get your quantities and judge the amount of work.

Cross-examined on the figures he gave, he said,

I have made a few calculations here which I would not care to class as an estimate, but a guess.

Macdonald, when asked his opinion of the cost of making repairs to the conditions as he found them, said,

I must make the same statement as Mr. Harrington as regards that * * *

That was the evidence upon which the trial judge based his assessment of damages. The principle of measuring damages on the basis of the cost of reconstruction of the building as it stood at the date of the trial, was clearly wrong, quite apart from the very unsatisfactory nature of the evidence adduced even on that basis. Lothian, the architect, under cross-examination, after describing the conditions of the mortar and brick, gave this evidence:

Q. These conditions are the result of an examination in October?

A. Early in 1932.

Q. The attack from within had been made when?

A. Sometime late in 1931.

Q. If the investigation had been made before the final certificate was issued, it would have revealed the conditions we find now?

A. Yes, sir.

Ibbetson, a building contractor called by the plaintiffs, who had been employed by the plaintiffs to make repairs in the fall of 1932 and "a little work" the following spring, was asked why he did not go on and make what he considered the necessary repairs and alterations at the time. His answer was,

The main reason was the lack of funds available for the work

on the part of the plaintiffs. The plaintiff Doe, when asked by his own counsel why Ibbetson was not instructed to proceed and remedy the whole situation that appeared when Ibbetson was there, said,

Approaching winter would render his work imperfect. He had other work to do. I arranged with him to return the next year to finish the work.

Q. Anything else?

A. Yes, finances. I do not wish to mention that, though.

When Ibbetson was asked by the trial judge what would be the total cost of putting the building in proper repair, he answered,

I would ask to be excused from saying that.

Mr. Justice Riddell in the Court of Appeal said he was wholly unable from the evidence to say whether any liability had been incurred under article 16, and we entirely agree with that statement. He concluded that if the plaintiffs so desired, they should be allowed to have a new trial on that issue alone. Now after the whole matter has been

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Davis J.

heard again on appeal to this Court, it would be most unfortunate for all parties if there had to be a new trial. But what can we do? The evidence was never really directed to the vital issue. When a trial for any reason becomes abortive it is a privilege and the duty of the court to come to the assistance of the parties to prevent the defeat of rights that may actually exist (to adapt the words of Lord Shaw of Dunfermline in *Cameron* v. *Cuddy* (1). We cannot, however, in this case supply the defects that have occurred, and we can only hope that the parties may be able to agree upon a settlement of their differences. If not, the appeal of the contractor should be allowed and the judgment against him set aside, with liberty to the plaintiffs, if so advised, to proceed to a new trial on the issue arising out of article 16. There should be no costs of the first trial to either party, but the contractor should have his costs of his appeal to the Court of Appeal for Ontario and of his appeal to this Court. The costs of the new trial as well as of the action to be in the discretion of the trial judge.

Now as to the plaintiffs' appeal against the surety company. Article 25 of the General Conditions of the contract, under the heading "Application for Payments," expressly provided that the contractor should submit to the architect an application for each payment with receipts and vouchers showing payments made for materials and labour, including payments to sub-contractors as required by article 23. The plaintiffs paid the contractor on December 3, 1930, the sum of $4,000; on January 10, 1931, $5,000; on February 6, 1931, $12,000; on March 6, 1931, $10,000, and on April 8, 1931, $12,500 (a total of $43,500); and there is no evidence that the contractor submitted any application as contemplated by article 25 for any of these payments. The evidence does not disclose any progress application or estimate having been made until April 30, 1931. By a statement of that date the contractor showed $65,528 had been spent on materials and labour up to that date on a total contract of $88,500. As early as March it had become so evident that the building would not be completed within the specified time under the contract that the plaintiffs instructed the architect to write to the surety company call-

(1) [1914] A.C. 651, at 656.

ing its attention to the condition of affairs due to the unnecessary delays, but the architect did not do so. The plaintiffs kept paying moneys to the contractor. On May 8, 1931, they made a further payment of $12,500 and on June 3, 1931, another sum of $12,000, bringing the total payments then up to $68,000, with the work far from completion, although the date fixed by the contract for completion had been May 15. The evidence discloses that the work had been dragging on in an unsatisfactory manner for several months, and yet the contractor was allowed to go on with the work and the surety company was in no way notified of the really serious conditions that had developed. On June 2, 1931, the surety company wrote the architect that it was desirous of ascertaining what progress had been made with the work and asking for answers to specific questions on a form which the surety company supplied, which form called for a statement of the percentage of the work completed to that date, the amount retained by the owners on the contract, the amount of money paid on the contract, whether any extras had been allowed and whether any unusual conditions had been encountered. No answer was given to the enquiry.

During the month of June the situation became more serious. The time for completion of the contract had expired, the contractor was without funds to carry on the work, he was heavily indebted to his bank, and the sub-contractors and material men were pressing for payment. Meetings of sub-contractors were being held, and it was a question as to whether some kind of adjustment could be made between the contractor and his creditors or whether liens would be registered against the property. The whole situation had become acute but nothing was said to the surety company. Their requests for information were ignored until July 15, 1931, when the architect reported to the surety company that 98% of the work had been completed, that the owners were retaining $14,869, that they had paid to the contractor $74,250 and that the extras allowed to date were $619. In answer to the question of the surety, "Have any unusual conditions been encountered?" the architect wrote in the word "No" and then apparently drew his pen through it, and when asked the probable date of completion, he fixed it at August 1, 1931.

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Davis J.

Three days before giving this information to the surety company the architect had notified the contractor that unless progress was made immediately on the work the owners would, at the expiration of 72 hours, call in another contractor to complete the roofing work so as to avoid further damage. At that time it appears that the claims of the sub-contractors amounted to about $20,000 and that they had declined to do any more work. By the end of July the workmen had left the job and the sub-contractors had put their claims in the hands of one Roach, as trustee to whom they had assigned their accounts, and it was subsequently arranged between the plaintiffs, the contractor, the Royal Bank and Roach that the balance remaining unpaid under the contract, $14,990.33, should be paid direct to Roach for the sub-contractors. It would appear from the evidence of the witness Marcott that all work ceased on the church on July 31, 1931, except that the contractor and one or two of his workmen went there on one or two occasions to try to rectify the leaks. In any event the architect's final certificate was dated August 13, 1931. But trouble in regard to the walls and roofing still continued and the plaintiffs were pressing the contractor to take steps to remedy the situation. He was declining to do so, pointing out that in his opinion the difficulties were not due to faulty workmanship but to faulty design. Then, on September 28, 1931, the settlement of the matter between the plaintiffs and the contractor took place, which was covered by the letter (Exhibit 25), and the plaintiffs paid the balance remaining unpaid under the contract direct to Roach, with the consent of the contractor, and the moneys were distributed among the sub-contractors. The undertaking of the contractor (Exhibit 25) operated to discharge the original contract, save and except any obligations that might arise under article 16 thereof, and a new and independent obligation upon the contractor came into being.

In *Holland-Canada Mortgage Co. Ltd.* v. *Hutchings* (1), we had occasion recently to consider and discuss the authorities on the effect of alterations or changes in the contract as affecting the liability of the surety. It is desirable to again state the principles with particular

(1) [1936] Can. S.C.R. 165.

reference to the type of contract with which we are now dealing, the performance of which the surety guaranteed.

In *Holme* v. *Brunskill* (1), Cotton, L.J., said:

The cases as to discharge of a surety by an agreement made by the creditor, to give time to the principal debtor, are only an exemplification of the rule stated by Lord Loughborough in the case of *Rees* v. *Berrington* (2): "It is the clearest and most evident equity not to carry on any transaction without the knowledge of him [the surety], who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."

The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged. This is in accordance with what is stated to be the law by Amphlett, L.J., in the *Croydon Gas Company* v. *Dickenson* (3).

Materiality of any change or alteration in the contract is not a question of fact for the court—it is for the surety to judge—except in those cases where it can plainly be seen without inquiry that the change or alteration was unsubstantial or necessarily beneficial to the surety.

In *Blest* v. *Brown* (4), Lord Westbury said:

It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, "The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end."

In *Miller* v. *Stewart* (5) it was remarked by Mr. Justice Story that it matters not

(1) (1878) 3 Q.B.D. 495, at 505.
(2) (1795) 2 Ves. J. 540.
(3) (1876) 2 C.P.D. 46, at 51.
(4) (1862) 4 deG. F. & J. 367, at 376.
(5) (1824) 9 Wheat. 680, at 703.

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Davis J.

that a surety may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal.

There is to be read into that general statement the qualification set out in *Holme* v. *Brunskill* (1) that where it is self-evident that the alteration or change was necessarily beneficial to the surety or utterly unsubstantial, the surety is not to be thereby discharged.

Calvert v. *The London Dock Company* (2) was a building contract case. The contractor, named Streather, undertook to perform certain works for The London Dock Company and it was agreed that three-fourths of the work as finished should be paid for every two months, and the remaining one-fourth upon the completion of the whole work. It was held that the sureties for the due performance of the contract were released from their liability, by reason of payments exceeding three-fourths of the work done, having, without the consent of the sureties, been made to the contractor before the completion of the whole work. Lord Langdale said:

> The defendants do not dispute the fact that their advances to Streather exceeded the sums which they were bound to advance under the contract, but they say, that the increased advances were made for the purpose of giving Streather greater facility to perform the contract. It is said that the performance of the work by Streather was impeded by his want of funds; and that by the advances made to him, he was enabled to do more, than he otherwise could have done—and that to assist him, was to assist his sureties; and it was only for the purposes of affording that assistance, that the company did more than they were obliged to do.
>
> The argument, however, that the advances beyond the stipulations of the contract, were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety—and the answer has always been, that the surety himself was the proper judge of that—and that no arrangement, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security.
>
> In this case, the company were to pay for three-fourths of the work done every two months; the remaining one-fourth, was to remain unpaid for, till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work, if he did not; and thus it materially tended to protect the sureties.

(1) (1878) 3 Q.B.D. 495.

(2) (1838) 2 Keen's Reports, 638.

What the company did, was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure, which by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances, I think, that their situation with respect to Streather, was so far altered, that the sureties must be considered to be discharged from their suretyship.

Much of the same sort of argument was presented to us in this case—that the payments made facilitated the contractor in performing the contract and that what assisted the contractor was really a benefit to the surety. That argument, however, Lord Langdale said, could be of no avail in a case such as this.

In *The General Steam Navigation Co.* v. *Rolt* (1), A. contracted with B. to build for him a ship for a given sum to be paid by instalments as the work reached certain stages and C. became surety for the due performance of the contract on the part of B., the builder. A. allowed B. to anticipate the greater portion of the last two instalments, and, B. becoming bankrupt before the ship was finished, A. was compelled to spend a larger sum of money than the unpaid portion of the purchase money in completing her. Willes, J., at p. 599, said:

As to the first point, Mr. Knowles says, that, as the £2,000 was paid to Mr. Rolt or to his account, he sustained no prejudice from its being an anticipatory payment. But I must confess I do not see how the receipt of the money from Mare, or by means of Mare's order, in satisfaction of a debt due to him from Mare, can establish that proposition. A case of *Samuell* v. *Howarth* (2) was cited on the former argument (*ante*, p. 574), which is a decision of Lord Eldon's very much in point. His Lordship there says: "A creditor has no right,—it is against the faith of his contract,—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." It is clear, therefore, that there must be an assent by the surety to the creditor's dealing with the principal debtor otherwise than in the manner pointed out by the contract: and it is no answer to say that it is for the advantage of the surety, or that he has sustained no prejudice. Here, there was an unauthorized payment of £2,000 to Mare; and, as this payment was made without Rolt's assent, that, according to *Samuell* v. *Howarth* (2), was such a prejudice to him as surety as to discharge him.

While that was a case of the giving of time, the same principle would apply to the unauthorized payments that were made in the case before us. Further, in the *General Steam Navigation Company* case (1) it was contended that if the surety had inquired he would have found that the instal-

(1) (1859) 6 C.B. (N.S.) 550. (2) (1817) 3 Meriv. 272.

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Davis J.

ments had been all paid more than two months before and, as he abstained from inquiry, he must in equity be presumed to have knowledge of, and consequently to have assented to, the payment. As to this Willes, J., said at p. 600:

> But no authority has been cited which goes that length: and the doctrine of constructive assent is not one which ought to be admitted, certainly not one which a court of law ought to extend. No case has been cited to shew that any such duty to inquire is imposed on a surety.

The real point in that case was that it was necessary to prove knowledge of the payments by the surety, and the judgment of Willes, J., practically negatived constructive notice. To the same effect were the judgments of Cockburn, C.J., and Crowder, J. The case went on appeal to the Exchequer Chamber and was heard by a powerful court composed of Lord Chief Baron Pollock, Wightman, J., Channell, B., Hill, J., and Blackburn, J. The appeal was dismissed.

Now it is to be observed that the anticipatory payments, the absence of the architect from the work during a critical stage of construction and the absence of the contractor himself through illness, the dealing with the sub-contractors and the payment of the total balance of the contract price to them, and the taking of the specific undertaking in writing (Exhibit 25) from the contractor as a condition to the payment of the balance of the contract price—were all positive acts done or sanctioned by the principal without notice to or knowledge of any of these acts by the surety. They cannot be said to be evidence of mere passive inactivity or of acts which by their very nature were so insignificant as to have no bearing on the surety's liability. It seems very plain that the plaintiffs should have brought in the surety and explained the whole matter to it and any arrangement or adjustments that were to be made, either with the sub-contractors or with the contractor himself leading to a final acceptance of the work and the payment of the balance of the contract moneys, should have been made, under all the special circumstances of the case, with the knowledge and consent of the surety. It cannot fairly be said that it is self-evident that these positive acts of the principal in dealing with the contract were not to the prejudice of the surety, and in the absence of any notice or knowledge on the part of the surety these acts operated to discharge the surety.

The majority of the Court of Appeal dismissed the action against the surety on these grounds, and the plaintiffs' appeal from that judgment to this Court should be dismissed with costs.

We would not care to be taken to have overlooked the very serious point raised at the trial by counsel for the surety company and renewed in the Court of Appeal and again in this Court, that the surety company was, in any event, entitled to be released upon the ground that before entering into its bond of indemnity in favour of the plaintiffs, the plaintiffs had knowledge of facts and circumstances materially affecting the position of him, the performance of whose contract the surety company proposed to guarantee to the extent of $44,250, and failed to disclose these facts to the surety company. The contractor put in his bid on the proposed building at $88,500. There were nine or ten other bidders, the next lowest to him was $10,000 in excess of his bid, and the other bids ran up as high as $130,000. The bid of the defendant contractor was immediately accepted and a contract was drawn up and signed at once. He had deposited a cheque for $4,450 with his bid, and, immediately the bid was accepted, he commenced putting substantial materials on the ground with which to proceed with the construction of the building. Within three or four days, he notified the plaintiffs that he had made two substantial omissions in estimating costs for the purpose of putting in his bid. He told them that he had entirely overlooked the glass for the windows and the labour of installing the glass which he said would cost him $6,000, and that he had entirely overlooked the cost of the tile, $7,000. He asked under the circumstances either to be released from his contract or to be given some increased amount to compensate him for these items. The plaintiffs declined to do either, telling him that if he threw up his contract he would not only lose his deposit of $4,450 but all the materials that he had delivered to the site of the proposed building. Faced with that alternative, he decided to go on and do the best he could. Even the architect on his own figuring at that time estimated the profit of the contractor on the contract figure would be only $637. Now the plaintiffs had in their hands at that time a bond from the surety company which contained special terms and conditions for the protection of the surety in a building con-

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Davis J.

tract of this kind. The plaintiffs, with the knowledge that they had acquired of the substantial errors on the part of the contractor in making up his bid, subsequently returned the bond to the surety company, refusing to accept it in that form and insisting upon a blanket form of bond. The surety company acceded to this request and delivered the bond upon which this action was brought. All this evidence was brought out by counsel for the plaintiffs in their examination of their own witnesses. There was no suggestion that the plaintiffs ever told the surety company anything about all this, and counsel for the surety company, when the facts had come out at the trial, very properly asked leave to expressly plead this non-disclosure. Counsel for the plaintiffs said they were taken by surprise by the proposed amendment and even in this Court suggested that they might have been able to prove that the surety company knew of the contractor's errors if the trial had been adjourned. It is difficult to conceive that any surety company carrying on a commercial business would have issued its bond for $44,250 (half the amount of the contract price) if it had even a suspicion that the contractor in his haste in making up his bid had overlooked items of cost aggregating $13,000. The trial had proceeded for a week before this matter came up, and the trial judge refused leave to the surety company to plead this non-disclosure except upon terms that the trial should stand adjourned and that the surety company should pay in any event all the costs of the trial up to that time. Counsel for the surety company very properly took the position that he was entitled upon the special circumstances to raise by amendment the defence of non-disclosure and that he could not submit his clients to such a burdensome term of costs as imposed. We should have thought, under all the circumstances, that there was not the slightest doubt of the right of the surety company to amend its pleadings without being fettered by a term as to costs so onerous as to be plainly unreasonable. If counsel for the plaintiffs had persisted in their position at the trial that they were taken by surprise and might be able to meet the proposed amendment if delay were granted, the case might appropriately have been adjourned for a convenient time, with costs reserved. If that course had been adopted, we suspect the action against the surety would have come to an end. Rowlatt on Principal and Surety, 3rd ed. (1936), p. 161, says that

A creditor must reveal to the surety every fact which under the circumstances the surety would expect not to exist; for the omission to mention that such a fact does exist is an implied misrepresentation that it does not.

As Lord Blackburn (then Blackburn J.) put it in *Lee* v. *Jones* (1), it is a question of fact whether in the circumstances you ought to disclose and whether the non-disclosure amounts to misrepresentation—that is, with intent to mislead. The question we have to ask ourselves, as a question of fact, is: would persons in the position of the plaintiffs acting in good faith and with common sense, have thought the surety would enter into a qualified bond (i.e., without the protection afforded by the special provisions of the first bond tendered) if the surety had known of the contractor's substantial mistakes in calculating his costs, his request to withdraw from the contract, the plaintiffs' refusal of his request and their virtual enforcement of the contract under threat of forfeiture of both the deposit moneys and the materials on the ground? If the surety had known all this, would it have given such a bond as it did?

Workington Harbour & Dock Board v. *Trade Indemnity Company* (2) is a very recent case in the House of Lords. In delivering judgment Lord Atkin said that the case had to be decided on the footing that the contract sued on was a guarantee and that it is clear that in whatever way any duty to disclose arises, the duty or the implied representation will depend upon the particular circumstances of each transaction, and he made it plain that it had been unnecessary to pass any opinion on the general law as to disclosure in respect of guarantees and that the case was decided upon its own facts. Here we have communications passing between the creditor and the surety with reference to the formation of the guarantee contract, and nothing that is said by Lord Atkin in the *Workington* case (2) determines the point raised in this case. But if that issue had to be determined in this case, there would have to be a new trial, because that issue has not yet been specifically pleaded or tried. It is unnecessary, however, to send the action back for a new trial on this issue, because, upon the other grounds above mentioned, we have concluded that

(1) (1864) 17 C.B. (N.S.) 482, at 503-504.
(2) (1936) 54 Lloyd's List Law Reports 103.

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Davis J.

the judgment of the Court of Appeal dismissing the action against the surety should be affirmed and the appeal therefrom should be dismissed with costs.

RINFRET, J. (dissenting in part).—The appellant Blonde undertook to erect a church building in Windsor, Ontario, for the Corporation of the Diocese of London; and the Canadian Surety Company gave its bond to the latter, guaranteeing the performance of the contract.

The building was found by the trial judge to have been completed on August 13, 1931.

On the ground that the contractor had failed faithfully to perform his contract, this action was brought by the plaintiffs against the contractor and the Surety Company, claiming damages in the sum of $44,695.15.

The trial judge gave judgment against both defendants in the sum of $19,173.25 and an additional sum of $330 against the contractor.

In the Court of Appeal for Ontario, the judgment against the Surety Company was set aside, but the majority of the Court was of opinion that the judgment against the contractor should be affirmed.

In this Court, the plaintiffs appealed against the judgment dismissing the action so far as the Surety Company was concerned; and the contractor again appealed from the concurrent judgments against him.

The trial judge made the following findings of fact:

* * * that the specifications requiring the construction of the wall with the brick and tile thoroughly bonded throughout with mortar were not complied with by the contractor—the joints between the bricks themselves having been improperly and insufficiently filled with mortar and there being a very general absence of mortar fill between the brick and tile save for what was squeezed in as the brick was laid. * * * that this failure to comply with the specifications for the construction of the wall resulted in an opening up of the bonding between the bricks and mortar and was to a very large degree responsible for the leaking which caused so much damage and may ultimately seriously impair the safety of the building. * * * that the flashing around the clerestory and other windows was not in accordance with specifications and that the lead coping was not applied in compliance therewith. * * * that the cracks found in the building were not the result of vibration caused by the brick work being improperly tied into the steel frame.

He added:

On the fullest consideration of the evidence, I find as a fact that there was such non-compliance with the specifications and such faulty performance of the contract as would entitle the plaintiffs to damages.

He further found:

* * * as a fact, that the architect did exercise ample supervision throughout the construction as might be expected from a supervising architect, and that he did from time to time object to and reject certain work, but that he could not have been expected to have suspected the failure of the defendant Blonde to comply with the specifications in the brick work until weather conditions would reveal the same, or unless he had from time to time torn down work which from its external appearance did not disclose its inward deficiency.

In the Court of Appeal, these findings were not disturbed, and the majority of the Court found that there was no adequate reason for interfering with the judgment of the trial judge as against the defendant Blonde.

The contract (article 16 of the specifications) provided that, notwithstanding the issue of the final certificate or the payment of the balance due under it and notwithstanding any provision of the contract document, the contractor shall not be relieved from "responsibility for faulty materials or workmanship, which shall appear within a period of one year from the date of completion of the work." The contractor was bound to "remedy any defect due thereto and pay for any damage to other work resulting therefrom which shall appear within such period of one year."

The trial judge found "as a fact that the defects claimed by the plaintiffs did arise within one year from the 13th of August, 1931."

At the hearing in this Court, the appellant Blonde laid stress on the point that the above finding was contrary to the evidence and that the trial judge had misdirected himself as to the true interpretation of the specifications in that regard, because the defects which the trial judge found to have existed had really "appeared" before the final payment was made, and consequently, it was claimed by the contractor, they were not discovered "within a period of one year from the date of completion of the work," but they had really become apparent previous to that time; and they were not, therefore, within the contemplation of Article 16 of the specifications. It is true that, before the issue of the final certificate and before the final payment to the contractor, it had been discovered that there was water leaking into the building; but the cause of the leaking had not yet been ascertained. It was only subsequently that it was found out that the real cause was a defect in construc-

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Rinfret J.

tion properly attributable to the faulty workmanship of the contractor. And, in that respect, I think the finding of fact of the trial judge is fully warranted on the evidence.

But, in my view, that point has ceased to have any bearing on the case, on account of the document signed by the contractor on September 28, 1931, before the final payment was made, not to the contractor himself, but to certain subcontractors and material men, in order to help the contractor. Under that document (recited in full in my learned brothers' judgments), the contractor acknowledged having received notice that certain defects had been discovered by the architect and that the cause of these defects had "not been exactly determined." He further acknowledged that the said notice had been given to him "in pursuance of the specifications which form part of the contract entered into between" himself and the Corporation of the Diocese of London. And he further agreed and covenanted "to repair same according to the directions given by the architect, Mr. Lothian."

In my humble view, this undertaking created a new and independent obligation upon the contractor, no longer qualified by the restrictions contained in Article 16 of the specifications, and which, therefore, made it incumbent upon him to repair the defects, whether they appeared or not "within a period of one year from the date of completion of the work." As for the directions to be given by the architect, I am in agreement with Masten, J.A., in the Court of Appeal, both as to the interpretation he gives to those terms in the letter of September 28, 1931, and as to the fact that "such directions were given directly by the architect and also indirectly by him, through the solicitors who were acting as the agents of the Plaintiff and the architect."

For these reasons, I am of opinion that the appeal of the contractor Blonde from the concurrent judgments of the trial judge and the majority of the Court of Appeal should be dismissed with costs.

However, for the same reasons: viewing, as I do, the document of September 28, 1931, as a material alteration in the contract between the Corporation of the Diocese of London and Blonde, I think the respondent, the Canadian Surety Company, was thereby released of its liability under

the bond, and I would dismiss the appeal against it and affirm the judgment of the majority of the Court of Appeal in Ontario with costs.

KERWIN J. (dissenting)—This is an appeal by the plaintiffs from the judgment of the Court of Appeal for Ontario, which, reversing the trial judge, dismissed the appellants' action as against the defendant Surety Company; and a cross-appeal by the defendant contractor, Blonde, from the same judgment, which affirmed the judgment at the trial against him in favour of the appellants.

The action was brought by the appellants, as owners, for damages, against the contractor for the erection of a church in Windsor, Ontario, under the terms of a contract dated November 8th, 1930, and against the Surety Company under the terms of a bond dated November 15th, 1930, in the sum of $44,250, conditioned upon the company indemnifying the Episcopal Corporation of the Diocese of London (one of the appellants) against any loss or damage directly arising by reason of the failure of the contractor faithfully to perform the said contract.

So far as the cross-appeal by the contractor is concerned, the learned trial judge has dealt exhaustively with the voluminous evidence, and, after reading all of the evidence, I can see no reason to interfere with the findings of the trial judge and of the majority of the members of the Court of Appeal. Realizing that he had concurrent findings against him, the *cross*-appellant (the contractor Blonde) sought to escape liability by pointing to a document dated September 28th, 1931, which the appellants required Blonde to sign before the cheque for the final payment under the contract was delivered. This document, Exhibit 25, is as follows:

The Reverend E. G. Doe,
and The Roman Catholic
Episcopal Corporation
of the Diocese of London.

I hereby acknowledge having received notice from you and your architect, Mr. Lothian, to the effect that certain defects have been discovered by your architect, and that there is water leaking into the church constructed by me, the cause of which has not been exactly determined.

I hereby acknowledge having received notice from your architect and from you of same. I hereby acknowledge that the said notice has been given to me in pursuance of the specifications which form part of the

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Kerwin J.

contract entered into between you and myself. I further agree and covenant to repair same according to the directions given by your architect, Mr. Lothian.

Dated at Windsor, Ontario, this 28th day of September, A.D. 1931.

The argument on Blonde's behalf is that no directions were given by the architect Lothian subsequent to the execution of this document and that, therefore, he, Blonde, was not in default. For two reasons I am of opinion that this contention cannot prevail. First, the leaks arose, as the trial judge found (and I agree), from Blonde's failure to *use sufficient mortar* in the construction of the brick and tile walls and in the space between these walls and thus neglected to comply with the specifications. Second, on February 1st, 1932, the solicitors for the appellants wrote Blonde:

Re—St. Clare Church

We have been in communication with Mr. Lothian, the architect for St. Clare church, and have discussed the matter with him relative to the leaks which have occurred in many places, particularly around the clerestory windows on the side walls, on the east and west naves near the corners, at a point about five feet below the ceiling, and also at one point about six feet above the floor, on the ceiling of the Baptistery, beneath the window on the west side of the Sanctuary, and over the east Confessional. Mr. Lothian is of the opinion that all of these matters can be remedied, and that same are within the province of the specifications, and should be attended to immediately. Under the guarantee called for in the specifications, you are held responsible for this work for a period of one year from final acceptance of the same, and we are now calling on you to carry out this work within seventy-two hours from this date.

Mr. Lothian is of the opinion also that a good many of the leaks are due to flashings not properly embedded in the brickwork, others through the improper joining of the flashings, still others through brickwork wrongly constructed, and further, between the frames of the clerestory windows and the walls.

Blonde replied on February 8th, 1932

Received your letter dated Feb. 1st, re leaks in the St. Clare church. I have spent to date about $450 trying to repair the leaks in the clerestory brick work and around the windows. I have come to this point where I refused to do any more work on this roof constructed of brick. I have the opinion of other architect and bricklayers and I have been told and believe that the leaks can not be repaired.

All the repaired work has been done according to Mr. Lothian instruction to no results.

These letters by themselves indicate that Blonde was notified and that he had endeavoured to some extent to remedy the condition and then refused to do anything further.

It was also contended on Blonde's behalf that the opinion of the experts, called as witnesses by the appellants and upon whose evidence the trial judge based his assessment

of damages, was founded upon conditions as these witnesses saw them shortly before the commencement of the trial. However, it appears from the evidence of the architect that those conditions were substantially unchanged as compared with conditions that existed within a year after the completion of the building. On page 88 of the case appear the following questions and answers when the architect was being examined in chief.

Q. Have you recently made an inspection of the church?

A. Yes, sir.

Q. Have you or have you not a general knowledge of the extent of the work that has been done by Mr. Ibbetson in the attempt to make repairs?

A. Yes, I have a general knowledge.

Q. With the exception of the work which you understand to have been done by Mr. Ibbetson in the way of reconstruction what do you say as to the condition of the remainder of the church and rectory as compared with its condition within a year after the completion of the building?

A. Substantially unchanged, so far as I could see.

Mr. Ibbetson was the contractor subsequently engaged by the appellants to do certain repair work, and a comparison of that part of his evidence dealing with the conditions which he found at the time he did the repair work with the evidence of the experts as to the conditions they found, shows that the defects complained of had arisen within the year. In my opinion there is ample justification for the amount fixed as damages by the trial judge and the cross-appeal must be dismissed with costs.

In the Court of Appeal, Mr. Justice Riddell considered that the Surety Company was released by reason of the appellants having the contractor sign the letter of September 28th, 1931. Mr. Justice Masten was of opinion that the appeal to that Court by the Surety Company should be allowed. Mr. Justice Fisher dissented, being of opinion that the judgment of the trial judge was right on all grounds. The main contention of the Surety Company in support of the judgment in appeal was that the letter of September 28th, 1931, was a material alteration in the contract between the appellants and the contractor.

In my opinion this document did not effect any change in the contract. By the contract Blonde agreed to "complete in all its entirety all works" for the erection of the church with certain specified exceptions, "in the most sound, workmanlike and substantial manner, and in accordance with the plans, drawings, specifications and addenda

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Kerwin J.

to the specifications, and with such further drawings, details *and instructions as may from time to time be given*" by the architect.

Previous to the execution by Blonde of this letter, leaks had developed and certain repair work done. The architect was not satisfied that these leaks would not reappear and new ones be not discovered. He considered that flashings should be installed, while Blonde contended they were not specified. Article 16 of the specifications provides:

> Neither the final certificate or payment, nor any provision of the contract document shall relieve the contractor from responsibility for faulty materials or workmanship, which shall appear within a period of one year from the date of completion of the work, and he shall remedy any defect due thereto and pay for any damage to other work resulting therefrom which shall appear within such period of one year, but beyond that the contractor shall not be liable. The owner shall give notice of observed defects with reasonable promptness. Questions arising under this article shall be decided as provided in Articles 10 and 44.

Article 10, referred to is as follows:

> The architect shall within a reasonable time make decision on all claims of the owner or contractor, and on all other matters relating to the execution and progress of the work or the interpretation of the contract documents.
>
> The architect's decision in matters relating to artistic effect shall be final, if within the terms of the contract documents.

Article 44 referred to in Article 16 deals with the arbitration of disputes under the contract.

Accordingly we have this position at that time. The architect was not satisfied that the cause of the leaks had been located and the proper remedy applied, and as an added precaution he insisted on Exhibit 25 being signed. Under Article 16 of the specifications, the contractor was responsible for faulty materials or workmanship that might appear within one year from the completion of the work, which work was, according to the terms of the contract quoted above, to be done in accordance with the plans, drawings, etc., and such "instructions as may from time to time be given" by the architect. Under Exhibit 25, he was not subjected to anything more onerous, there was no change in the contract, and consequently the Surety Company is not released.

The next argument to be dealt with is based upon the alleged mistake of Blonde in omitting to estimate the cost of certain work and materials in the tender he submitted, and which was the tender finally accepted. It is doubtful if the point is open to the Surety Company, as an application by it for an amendment to its pleadings to cover

this feature was granted by the trial judge after the trial had been in progress for some time, but on terms, and these terms were declined by counsel for the Surety Company who stated he would proceed without the amendment.

However, assuming the pleadings are sufficient without amendment, I am unable to ascertain how the alleged mistake affects the matter. Blonde's tender exceeded the architect's estimate of the cost of the work, and while the appellants knew of Blonde's contention, there was no obligation on them to notify the Surety Company of the alleged error. Fraud or misrepresentation is not charged and there is no suggestion that it occurred to the plaintiffs or the architect acting for them to withhold the information as something of which the Surety Company should be apprised.

In *Railton* v. *Matthews* (1), a party became surety in a bond for the fidelity of a commission agent to his employers without having been informed that the agent had previously, while in partnership with another, misapplied the employers' funds while the partnership was acting as agents for the employers. It was held that the direction to the jury by the trial judge that the concealment by the employers of the previous defalcations to be undue must be wilful and intentional with a view to the advantages the employers were thereby to gain, was wrong in law and that mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with and within the knowledge of the person obtaining a surety bond, is *undue concealment,* though not wilful or intentional or with a view to any advantage to himself.

However, in *Hamilton* v. *Watson* (2) it was held that an obligation to a banker by a third party to be responsible for a cash credit to be given to one of the banker's customers is not avoided by the fact that at the time the obligation was signed the customer was indebted to the bank, nor by the fact that, immediately after the execution of the obligation, the cash credit was employed to pay off an old debt due to the banker.

In *London General Omnibus Company Limited* v. *Holloway* (3), following *Railton* v. *Matthews* (1), it was

(1) (1844) 10 C. & F. 934. (2) (1845) 12 C. & F. 109.
(3) [1912] 2 K.B. 72.

1936

DOE ET AL. v. CANADIAN SURETY CO.

BLONDE v. DOE ET AL.

Kerwin J.

decided that the non-disclosure by an employer to a proposed surety on behalf of a servant that the latter had previously been guilty of dishonesty in his employment, prevented the employer from enforcing the bond against the surety in respect of the servant's subsequent dishonesty, although such non-disclosure was not fraudulent.

In my opinion the effect of these and other relevant cases is correctly set forth in Rowlatt on Principal and Surety, 2nd Ed., in two paragraphs at pp. 157 and 158 respectively.

> A surety is not bound by his contract if it was induced by any misrepresentation by the creditor, whether fraudulently made or not, of any fact known to him and material to be known to the surety.
>
> Misrepresentation may, of course, be made by mere silence or concealment. This may vitiate a security without it being wilful and intentional or made with a view to advantage to be gained by the creditor. But a guarantee is not an insurance, and there is no obligation on the creditor to disclose to the surety every circumstance within his knowledge material for the surety to know.

In my view, the contention of the Surety Company at present under consideration fails.

The architect was away for about five weeks, leaving an assistant in charge. The evidence of all witnesses who testified on the subject is to the effect that the architect devoted as much time to this work as is customary.

Shortly after the architect's return, the contractor became ill but he had a foreman on the work who had been with him for a considerable time. In my opinion, the company's contention that these matters,—the absence of the architect and the illness of the contractor—should have been brought to its attention, is without substance, as is also its complaint that it was not notified of certain letters sent by the architect to the contractor referring to delays in the prosecution of the work.

Blonde did have financial difficulties; the bank appropriated one payment made by the appellants and as a result Blonde was unable to pay the sub-contractors and material men. Under an arrangement made between these people and Blonde the last payment was made not to the contractor, but to a solicitor who had been appointed for that purpose by these parties so as to prevent any action by the creditors. The architect endeavoured to assist the contractor in doing certain work after the date for completion had passed, but no agreement was made extending the period allowed to Blonde to fulfil his contract.

Here again, complaint is made that the Surety Company should have been notified. But on what principle? A company such as this, undertaking the business of supplying bonds for a premium, is entitled to certain rights under the law, but to be kept advised of everything that transpires in connection with the bonded work is not one of them. I cannot find that there was any alteration in the terms of the contract, nor can I find, after reading all the evidence in the case, that the Surety Company was prejudiced in the slightest degree.

Because of the view I have taken of the facts, *Rees* v. *Berrington* (1), *Holme* v. *Brunskill* (2), *Egbert* v. *National Crown Bank* (3), *Smith* v. *Wood* (4), and the many other cases cited, have no application. The appeal should be allowed with costs throughout and the judgment of the trial judge restored.

Appeal of the plaintiffs dismissed with costs.

Appeal of the defendant Blonde allowed with costs, and the judgment against him set aside, with liberty to plaintiffs to proceed to a new trial against him on the issue arising out of article 16 of the contract.

Solicitor for the plaintiffs (appellants): *A. Racine.*

Solicitor for the defendant (respondent) The Canadian Surety Company: *A. E. Knox.*

Solicitors for the defendant (appellant) Blonde: *Roach, Riddell & Dore.*

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(1) (1795) 2 Ves. J. 540.
(2) (1878) 3 Q.B.D. 495.
(3) [1918] A.C. 903.
(4) [1929] 1 Ch. 14.