

JONES & LYTTLE v. MACKIE.

1918

*Mar. 1.

*Mar. 11.

ON APPEAL FROM THE APPELLATE DIVISION OF THE
SUPREME COURT OF ALBERTA.

Contract—Stoppage of work—Owner's lack of funds—Contractor's claim for damages—Guarantee as to cost not exceeding estimate—Fraud—Practice and procedure—Pleading—Amendment of defence on appeal—Allowance of.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment of Stuart J. at the trial and dismissing the appellant's (plaintiff's) action with costs.

The respondent, desiring to erect a large business building, made an agreement in writing with the appellant that the cost would be \$189,000, with the condition that if the estimate was exceeded the appellant would pay to the respondent 20% of the excess and if the cost fell below the estimate, the appellant should be paid 20% of the sum thus saved, it being agreed that \$15,000 would be paid at all events. After the appellant had done about \$50,000 worth of work, the construction was suspended owing to the respondent's lack of funds, and \$5,000 had then been paid to the appellant by the respondent. Later on the respondent advertised for tenders for the continuation of the works according to new plans and specifications; and the new contract was not given to the appellant.

The appellant claimed damages for breach of contract; and the respondent contended that the contract had been rescinded. The trial judge awarded the appellant \$10,000 subject to a reference to the

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Anglin and Brodeur JJ.

Master to ascertain whether the costs of completing the contract would have exceeded or been less than \$189,000. The Appellate Division reversed this judgment and found there had been fraud on appellant's part which vitiated the contract, although there had never been any such defence pleaded or alleged during the trial or in the notice of appeal.

On the appeal by the plaintiff to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, allowed the appeal with costs.

Appeal allowed with costs.

G. F. Henderson K.C. and *J. A. Wright* for the appellant.

A. H. Clarke K.C. for the respondent.

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