1956

ST. LAWRENCE METAL AND MARINE WORKS INC. (*Defendant*) ..... APPELLANT; *Mar. 13, 14 *Jun. 27

AND

THE CANADIAN FAIRBANKS-MORSE COMPANY LIMITED (*Plaintiff*) ..... RESPONDENT;

AND

SOCIEDADE GERAL DE COMMERCIO, INDUSTRIA E TRANSPORTES LDA. ..... MISE-EN-CAUSE.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Shipping—Privilege—Materials furnished for construction of four ships—Conservatory attachment—Privilege claimed on two ships—Arts. 1983, 2383 C.C.

By a contract of sale, the respondent sold to the appellant certain equipment to be installed in four ships being constructed by the appellant, for a price of $415,276.49 payable in five instalments. Prior to the institution of this action brought by the respondent to recover a balance of $48,611.18, now reduced to $44,832.16, owing under the contract, two of the ships had been completed and delivered to the mise-en-cause. The action was accompanied by a conservatory attachment on the two remaining ships to protect the privilege claimed under art. 2383 C.C. The privilege was maintained by the trial judge and by a majority in the Court of Appeal.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Abbott J.: There was one contract of sale for a single price and not four separate sales for four separate prices. Therefore, no question of the apportionment or imputation of payments could arise.

A privilege is indivisible in its nature. The last paragraph of art. 2383 C.C. refers in terms to a single ship, and where, as here, materials are sold for a single price and used in the construction of more than one ship, it may well be that the privilege can only be exercised upon each ship to the extent of that portion of the price assignable to the materials used in that ship. In the present case, it was established that the portion of the price represented by the equipment installed in each ship was $103,819.12. The claim for the much smaller amount is secured by privilege upon each of the remaining ships.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Abbott JJ.

1956

ST. LAWRENCE METAL AND MARINE WORKS INC. v. CANADIAN FAIRBANKS-MORSE CO. LTD.

Per Taschereau and Locke JJ.: There was but one contract of sale affecting the four ships, there was but one debt, and there was no imputation of payments.

Since the privilege is indivisible in its nature, if the privileged object is fractioned, each part of the object guarantees the whole debt. Consequently the privilege covered the four ships. Since the debt is only $44,832.16, it follows that it is guaranteed by privilege on the two remaining ships and the question does not arise as to whether one or two ships could guarantee by privilege the totality of the debt of $415,276.49, if it had remained unpaid.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), affirming, Rinfret J. dissenting, the judgment at trial maintaining a privilege under art. 2383 C.C.

A. Geoffrion, for the appellant.

Y. Pratte, for the respondent.

The judgment of Kerwin C.J. and Abbott J. was delivered by

ABBOTT J.:—The contract upon which the respondent's claim is founded provided for the sale by respondent to appellant of the propulsive equipment to be installed in four ships constructed by appellant, the various items of equipment for each ship being described in the contract as a "ship set". The sale price of all the machinery and equipment, at various unit prices specified in the contract, was $415,276.49 payable in five instalments of 20% each. In its action respondent claimed $48,611.18 as the balance owing under the contract. Prior to the institution of the action, two of the ships constructed by appellant had been completed and delivered to the mise-en-cause, and the claim for $48,611.18 was accompanied by a conservatory attachment on the two remaining ships to protect the privilege claimed by respondent. This claim was maintained to the extent of $44,832.16.

While the amount of appellant's claim and certain other questions were in issue in the Courts below I understand that there is now no controversy except as to whether, and to what extent, respondent's claim for $44,832.16 is privileged and as such entitled to be paid out of moneys set

(1) [1955] Que. Q.B. 438.

aside for that purpose. In the event that I am mistaken as to the appellant's concurrence in the views of the Court of Appeal upon the other matters, I should say that I am in agreement with those views.

The determination of this question involves the consideration of two points, (1) whether the contract referred to provided for a single sale with one sale price, or for four separate sales, one for each ship set, at four separate prices and (2) to what extent, if any, the respondent is entitled to be paid its claim by privilege.

As to the first of these points, I am satisfied there was no error in the decision of the Court below that there was one contract of sale for a single price, not four separate sales for four separate prices. This being so, no question of the apportionment or imputation of payments can arise.

Respondent's claim to be paid by privilege is based upon the provisions of the last paragraph of article 2383 of the Quebec *Civil Code,* which reads as follows:—

> 2383. There is a privilege upon vessels for the payment of the following debts:
>
> * * *
>
> If the ship sold have not yet made a voyage, the seller, the workmen employed in building and completing her, and the persons by whom the materials have been furnished, are paid by preference to all creditors, except those for debts enumerated in paragraphs 1 and 2.

The privilege provided for under this article, in common with other privileges created under the *Code,* gives to the creditor a right to be preferred to other creditors according to the origin of his claim and is indivisible of its nature (C.C. 1983).

Article 2383 of the *Civil Code* is similar to article 191 of the *Code de Commerce* as that article stood prior to the substantial amendments made in 1949 and both articles had their source to a very large extent in the provisions of *l'Ordonnance de la Marine* of 1681. Each of these provided, among other things, for a privilege to secure payment of the price of materials furnished for the construction of a ship and to secure payment of insurance upon the ship for the last voyage. Moreover, the civil law of France concerning privileges upon moveable property was substantially the same as that of the Province of Quebec.

1956

ST. LAWRENCE METAL AND MARINE WORKS INC. v. CANADIAN FAIRBANKS-MORSE CO. LTD.

Abbott J.

Decisions of the French Courts and the works of the French commentators may therefore usefully be considered in determining the effect of article 2383 of the Quebec *Code*. In France, where insurance on a ship had been effected for a single premium but for a fixed period of time during which the ship made more than one voyage, the Cour de Cassation has held that the insurer's privilege must be limited to that portion of the premium assignable to the period covered by the last voyage, his claim for the balance of the premium being an unsecured one. Civ. rej. 20 juillet 1898, et le rapport de M. le Conseiller Durand: Dalloz, Jurisprudence Générale, 1900, 1. 231. See also Baudry-Lacantinerie, Privilèges, Vol. 1. No. 696.

The last paragraph of article 2383 refers in terms to a single ship, and where, as in the case at bar, materials are sold for a single price and used by the purchaser in the construction of more than one ship, it may well be, as suggested by the learned Chief Justice of Quebec in the Court below, that the privilege of the seller can only be exercised upon each ship to the extent of that portion of the price assignable to the materials used in that ship. Under certain circumstances this might present some difficulty as to proof but this does not arise in the present case as it was established that the portion of the price represented by machinery and equipment installed in each ship was $103,819.12. It is clear therefore that the respondent's claim for the much smaller amount of $44,832.16 is secured by privilege upon each of the ships seized under the conservatory attachment.

The appeal should be dismissed with costs.

The judgment of Taschereau and Locke JJ. was delivered by

TASCHEREAU J.:—J'ai eu l'avantage de lire le jugement de mon collègue M. le Juge Abbott, et je m'accorde avec sa décision. Je ne veux ajouter que quelques notes pour appuyer la conclusion à laquelle je suis arrivé.

Il est évidemment inutile de réciter de nouveau les faits qui ont donné naissance à ce litige. Il me sera suffisant de rappeler que l'intimée réclame $48,611.18, étant la balance due en vertu d'un *unique contrat de vente* au montant de

$415,276.49, pour marchandises vendues et livrées à l'appelante, payable en cinq versements égaux de 20% chacun. Ce montant représente le prix de quatre machines à propulsion et accessoires, à être installées à bord de quatre navires qui ont été baptisés sous les noms de "CARTAXO", "COLARES", "COVILHA" et "CORUCHE".

Deux navires complétés ont quitté le port de Québec, alors qu'il restait dû le montant réclamé dans l'action, qui était accompagnée d'une saisie-conservatoire pour garantir par privilège le paiement de la balance impayée. C'est la prétention de l'appelante que cette dette n'est pas entièrement privilégiée, car deux navires avaient déjà quitté le port et entrepris leur premier voyage. L'intimée se base sur les dispositions suivantes du *Code Civil* de Québec (article 2383):—

> Il y a privilège sur les bâtiments pour le paiement des créances ci-après:—
>
> * * *
>
> Si le bâtiment n'a pas encore fait de voyage, le vendeur, les ouvriers employés à la construction *et ceux qui ont fourni les matériaux pour le compléter,* sont payés par préférence à tous les créanciers autres que ceux portés aux paragraphes 1 et 2.

Les paragraphes 1 et 2 sont à l'effet que les frais de saisie et de vente, les droits de pilotage, de quaiage et de havre, et les pénalités encourues pour infractions aux règlements légaux du havre, ont préférence sur la créance de ceux qui ont fourni les matériaux pour compléter les navires.

Il est certain que l'article 2383 (C.C.) ne semble couvrir que le cas d'un seul navire, et que lorsqu'il n'y a qu'une seule créance due à un fournisseur de matériaux, employés à la construction de ce navire, elle ne peut être garantie par privilège sur un navire différent. L'intimée admet ce principe, qu'il serait d'ailleurs oiseux de contester sérieusement.

Mais dans le cas qui nous est soumis, la créance de l'intimée révèle en effet un caractère qui doit la soustraire à la rigidité de cette règle. Car le contrat est en effet rédigé dans les termes qui suivent et qui veulent que les "shipsets" devaient être livrés "le premier, le ou avant le 2 février 1948, et les trois autres, à raison d'un par mois pour chaque mois subséquent".

1956

ST. LAWRENCE METAL AND MARINE WORKS INC. v. CANADIAN FAIRBANKS-MORSE CO. LTD.

Taschereau J.

Les paiements devaient s'effectuer de la façon suivante:—

20% sur acceptation de la réquisition par le vendeur;
20% le 1er décembre 1947;
20% le 1er février 1948;
20% le 1er avril 1948;
20% soixante jours après la livraison du dernier "shipset of equipment".

On voit donc qu'il n'y a *qu'un seul contrat affectant les quatre navires, une seule créance comme une seule dette*, et qu'il n'y a aucune imputation faite quant à ces paiements.

Le privilège de sa nature est indivisible. On sait que c'est le droit qu'a un créancier d'être préféré à d'autres créanciers suivant la cause de sa créance (1983 C.C.). Cet article correspond à l'article 2095 du Code Français, sauf qu'en France on n'a pas jugé nécessaire de proclamer cette indivisibilité, vu l'évidence de ce caractère qui s'applique au privilège. (Planiol et Ripert "Droit Civil" vol. 12, 2e éd. p. 276) (Rodière "Solidarité et Indivisibilité" p. 379) (Beudant "Droit Civil Français" vol. 13, p. 318).

Il en résulte donc que si la chose que le privilège frappe vient à être fractionnée, chacune des parties de cette même chose répond de la dette, et le détenteur peut être poursuivi pour le recouvrement.

Dans le cas qui nous est soumis, il n'y a eu aucune précision quant aux fournitures faites respectivement à chacun des navires composant cette flotte. Il n'y a qu'un seul contrat, qu'une seule créance, qu'une seule dette, et en conséquence, le privilège à cause de son caractère d'indivisibilité, porte sur l'ensemble de la flotte. (Cour de Cassation, Dalloz "Jurisprudence Générale" 1913, p. 302.). Comme dans le cas qui se présente, la réclamation a été réduite à $44,832.16, il s'ensuit donc qu'elle est couverte par privilège sur les deux navires saisis, et qu'il n'est pas nécessaire, vu que la question ne se présente pas, de déterminer si un seul ou deux navires pourraient garantir par privilège, la totalité de la dette de $415,276.49, si elle était demeurée impayée.

L'appel doit être rejeté avec dépens.

FAUTEUX J.:—I agree with my brother Taschereau and my brother Abbott that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Bouffard, Larochelle, Duchesne & Amyot.*

Solicitors for the respondent: *Morin, Boivin & Verge.*