THE MONTERAL LIGHT, HEAT & POWER COMPANY (PLAINTIFF)... } APPELLANT;

AND

QUINLAN & ROBERTSON, LIMITED (DEFENDANT) ..... } RESPONDENT.

1928
*Nov. 16.

1929
*Feb. 5.

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

Negligence—Crown—Lease of property by the Crown—Clause denying any claim by the lessee against "His Majesty, His servants or agents" —Contractor performing government work on leased property—Damages suffered by the lessee—Liability.

The respondent company entered into a contract with the Minister of Railways and Canals, as representing the Crown, for the enlargement of the Lachine Canal, near Montreal. The appellant company had obtained under a lease from the Government the right to lay and maintain a gas main across the solum of the canal. Clause 6 of the lease stipulated that, in the event of its gas main being from any cause injured, the appellant company was to have no claim or demand against "His Majesty, His servants or agents." During the execution of the contract, a break occurred in the gas main; and the appellant company claimed damages alleging negligence of the respondent company in dredging the bed of the canal.

Held, reversing the decision of the Court of King's Bench (Q.R. 44 K.B. 230), that the respondent company was not a "servant" or an "agent" within the contemplation of clause 6 of the lease and was therefore liable in damages. *Kearney* v. *Oakes* (18 Can. S.C.R. 148) foll.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Surveyer J., and dismissing the appellant's action.

The material facts of the case are stated in the judgment now reported.

Aimé Geoffrion K.C. and *O. S. Tyndale K.C.* for the appellant.

J. L. Perron K.C. and *J. H. Michaud* for the respondent.

The judgment of the court was delivered by

DUFF J.—The appellant company appeals from the judgment of the Court of King's Bench, dismissing an appeal from the judgment of Mr. Justice Surveyer, who dis-

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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missed the appellant's action and incidental demand, by which he claimed $15,000 odd, as damages alleged to have been suffered in consequence of a break in the company's gas main, where it crosses the solum of the Lachine Canal. The appellant company's right to lay and maintain the gas main was derived from a lease of the year 1910, from the Minister of Railways and Canals. In April, 1913, the gas main was lowered, as the result of correspondence between the appellant company and the Quebec Superintendent of Railways and Canals, in order to allow for the enlargement of the canal then projected. This work was begun in the spring of 1914, and in May of that year the appellant company delivered to the respondent company, which had contracted with the Government to do the work, a blue print showing the position of its main and electric conduits, in order to enable the respondent company to take the necessary precautions to avoid injuring them in the execution of its contract. On the 28th of May, 1914, the gas main was broken; with the result that the supply of gas in a considerable section of Montreal was interrupted and the appellant company incurred heavy damages. The appellant company alleges that this break was caused by the negligence of the respondent company in dredging the bed of the canal, as part of the contract work; and the issue arising out of this allegation was one of the issues presented in the action.

The appellant company's action was instituted in January, 1915. The respondent company in its defence, in addition to denying responsibility for the injury to the main upon the facts, set up and relied upon clause 6 of the above-mentioned lease. The tenor of clause 6 is that in the event of its gas main being from any cause injured, the appellant company is to have no claim or demand against His Majesty, His servants or agents, therefor. The respondent company alleged that, in executing the work contracted for, it was, under the terms of the contract, constituted the servant or agent of His Majesty, and is consequently exempt in virtue of clause 6 from all liability to indemnify the appellant company. To this defence effect is given, both by the learned trial judge and by the Court of King's Bench, who unanimously held that under the terms of the respondent company's contract the department was entitled to exercise such a degree of con-

trol over the manner of the execution of the work, as to bring the respondent company within the category of agents or servants. The appellant company attacks this position, first, by denying that, in point of law, the respondent company has a status to set up the stipulations of clause 6, and second, by denying that the respondent company is a servant or agent within the contemplation of that clause.

On the first-mentioned contention no opinion is expressed.

The clauses in the contract upon which the respondent company relies are clauses 5, 7, 10, 11, 13, 14, 15, 16, 22, 29, 34 and 36, the effect of which is, according to the respondent's contention, that it was merely constituted "a workman and at most a foreman." By these clauses, the engineer is made sole judge of the work as to quantity and quality; the work is to be commenced, carried on, and prosecuted to completion by the contractor, in such manner and at such points and places as the engineer shall from time to time direct, and to his satisfaction. The contract repeatedly stipulates for direction and control by the engineer, for example in clauses 7 and 11, which require that all his orders and directions shall be properly and efficiently obeyed to his satisfaction. A competent foreman is to be kept on the ground, to receive the orders of the engineer, and this foreman may be discharged by him for incompetence or improper conduct; books, invoices and pay-lists are subject to inspection and control by the engineer.

It was held by the learned trial judge that, His Majesty having thus retained supervision of the work to be performed by the contractor, the relation of master and servant or principal and agent was constituted by the contract. In the Court of King's Bench some stress is laid upon section 9 of 35 R.S.C., by which it is provided that the Minister shall direct the construction, maintenance and repair of canals, and that the public canals are to be under the Minister's management and control.

It should first be observed that when this contract is looked at as a whole, it has few of the badges of hire and lease of services. Paragraphs 1, 3, 30, 37 and 48 may be mentioned specifically, as shewing that what the respondent company undertook under its contract was to execute

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a given work and supply materials of quantity and character ascertained or to be ascertained, and not to hire its servants to the department. The stipulations which the respondent company affirms have the effect of imparting to the contract the character of a contract of hire of services are precisely those usually found in contracts for the construction of extensive works.

In this court the controversy, on this branch of the appeal, seems to be concluded by a previous decision, *Kearney* v. *Oakes* (1). The defendants, the respondents in that case, had a contract with the Minister of Railways and Canals, by which they undertook to construct a branch line of the Intercolonial Railway at Dartmouth, N.S. One defence to the action was based upon section 109 of the Government *Railway Act* of 1881, which provided that "no action shall be brought against any officer, employee or servant" of the department, for anything done in virtue of his office, service or employment, except upon notice in writing. No notice had been given. Ritchie, C.J., who dissented, reviews carefully the provisions of the contract, which, as appears from that review, contained clauses corresponding to those now relied upon by the respondent company; in most cases, framed in identical terms, and in others, in equivalent terms. The majority of the court held that notwithstanding these provisions, the respondents were not officers, servants or employees of the department.

There is also the decision of the Court of Exchequer in *Reedie* v. *The London and North Western Railway Co.* (2). It was there held that the presence in a contract of a clause reserving to a railway company the power of dismissing the contractor's servants for incompetence had not the effect of clothing the contractors themselves with the character of servants, or of making the railway company responsible for the acts of the contractor's servants.

In *Kearney* v. *Oakes* (3), the decision turned upon the question whether the respondents, having contracted to construct the branch railway, were acting as "employees" of the Minister in entering upon the appellant's land for that purpose. Patterson J., who delivered the

(1) (1890) 18 Can. S.C.R. 148. (2) (1849) 4 Ex. 244.
(3) 18 Can. S.C.R. 148.

principal judgment of the majority, held that the word "employee," in section 109, was used in the sense of servant, and this he considered was decisive in favour of the respondents. That contractors, under such a contract, were not servants, he regarded as not susceptible of dispute. It does not appear to have been suggested, even by the dissentient minority, that, under such a contract, the contractors are servants in a sense which would make the owners of the railway responsible for their collateral acts of negligence.

This was a decision upon a contract of 1884, with the Minister of Railways and Canals, which, in all pertinent respects, appears to have been the same as that now before us. And the decision, pronounced in 1890, necessarily involves the point that contractors, under such a contract, are not servants or employees.

We have to construe a stipulation in an instrument of 1910 executed by the Minister of the same department, and to determine whether under the contract of 1913, also executed by the Minister of the same department, and expressed in terms equivalent to those of the contract of 1884, the contractors are "servants" or "agents" of His Majesty.

We should be taking liberties with the language selected by the parties to express their mutual stipulations, if, in pronouncing upon that question, we disregarded the decision or the judgments in *Kearney* v. *Oakes* (1).

For these reasons, in my opinion, the defence to which effect has been given in the courts below, cannot be sustained. The issues of fact have not been passed upon and, in pursuance of the intimation given on the argument, the case will be remitted to the Superior Court to be dealt with conformably to the decision of this court on the question of law.

The appellant company should have the costs of the appeals in the Court of King's Bench, and in this court. The costs of the abortive trial should abide the ultimate result of the litigation. *Appeal allowed with costs.*

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Beaubien & Lamarche.*

(1) 18 Can. S.C.R. 148.