

ANNA L. WHITING (DEFENDANT).....APPELLANT;

1904

AND

*Feb. 29.

*March. 10.

ADRIEN BLONDIN AND OSCAR }
DAOUST (PLAINTIFFS) } RESPONDENTS.ON APPEAL FROM THE SUPERIOR COURT, PROVINCE OF
QUEBEC, SITTING IN REVIEW AT MONTREAL.*Contract—Condition precedent—Right of action.*

In a contract for the construction of works, it was provided that the works should be fully completed at a certain time and that no money should be payable to the contractors until the whole of the works were completed. In an action by the contractors for the full amount of the contract price, the trial judge refused leave to amend the claim by adding a count for *quantum meruit*; found that the works were still incomplete at the time of action; but entered judgment in favour of the plaintiffs for a portion of the contract price with nine-tenths of the costs. The defendant alone appealed from this decision and the trial court judgment was affirmed by the Court of Review.

Held, reversing the judgment appealed from, that, as the whole of the works had not been completed at the time of the institution of the action, the condition precedent to payment had not been accomplished and the plaintiffs had no right of action under the contract.

APPEAL from the judgment of the Superior Court, sitting in review, at the City of Montreal, affirming the judgment of the Superior Court, District of Saint Francis, which maintained the plaintiffs action, to the amount of \$3,791.71, with costs.

The questions at issue on this appeal are stated in the judgment of the court, delivered by His Lordship, Mr. Justice Girouard.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

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Lafleur K.C. and *Cate* for the appellant.

Belcourt K.C. and *Panneton K.C.* for the respondents.

The judgment of the court was delivered by :

GIROUARD J.—On the 26th March, 1900, in the City of Sherbrooke, the firm of A. Blondin & Co., plumbers and gas fitters, at St. Hyacinthe, undertook to perform certain work of plumbing and heating in a certain building of the appellant then in course of construction in the City of Sherbrooke. The work was stipulated to be finished on the 1st July, 1900 ; the price as stipulated for the plumbing job was \$1,500, and for the heating \$4,000. Two contracts were signed containing about the same clauses, especially as to the completion and payment of the work. In the plumbing contract the respondents agreed

to furnish all the labour and material for a first class plumbing job al complete,

according to certain plans and specifications fully set out. The price of \$1,500

was to be paid when the work is all completed satisfactorily to said Whiting.

Finally the two following clauses are to be found in the plumbing contract :

All work to be completed and tested by July 1st, 1900, any work on this contract left undone after that date shall be deducted from our contract price, twenty dollars per day for each and every day, and retained by said Whiting as liquidated damages and the same shall be satisfactory to us. * *

Should the contractors not complete this contract, that is, fail so to do, they shall then pay to the said Whiting one thousand dollars within thirty days from such failure for damage she will have sustained thereby.

In the heating contract the respondents agreed

to furnish all labour and material necessary for a first class heating apparatus to heat the entire building

according to certain plans and specifications fully set out. The respondents guaranteed to heat the whole building to seventy degrees Far. when the temperature would be ten degrees below zero, and that

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they shall not receive any pay on this contract until the work is all completed to the satisfaction of the said Whiting.

It was also understood between the parties

that the price agreed upon by the said contractors will be \$4,000, to be paid when all such work is completed, not any pay before the completion of all this contract.

The following clauses are also to be found in the heating contract :

The contractors hereby agree to commence working on said contract within eight days after signing this contract, also to complete all said contract by the first day of July, 1900, that is to say all work above basement. Should the said contractors fail to complete any of the contract above basement by that date, then the said contractors shall pay to the said Whiting twenty dollars per day for each and every day the said contract remains incomplete, and the said Whiting shall deduct such from the contract price and retain such as liquidated damages.

All work on this contract in basement must be completed by July 1st, 1900, if not, the same forfeit by the contractors, twenty dollars per day, shall be made by them from their contract price. * *

Should the contractors not carry out their part of this contract, that is, fail to complete, they then, within thirty days, shall pay to the said Whiting one thousand dollars for damages that she has sustained by them not fulfilling their contract.

The work was not completed on the first July, 1900, and in fact late in the fall, on the 10th November, 1900, and on the 15th December of the same year, the respondents were protested and requested to complete their work, giving particulars at the same time.

On the 1st February, 1900, the respondents sued the appellant for the full contract price of the two jobs, and also for certain damages, alleging that they were complete and that any defect or delay in the comple-

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tion of the work was due to the fault of the appellant and her agents.

The appellant met this action by referring to the above clauses of the contract and that as the respondents had not completed their work no action had accrued to them for any part of the price money and that the action taken was premature, reserving to herself a right to recover such damages as the respondents might be liable for. At the closing of the *enquête*, the respondents moved to amend their declaration by adding a count for *quantum meruit* which was rightly refused three days later.

Finally on the 21st March, 1902, after a voluminous *enquête* covering over a thousand pages of the printed case, Mr. Justice Lemieux, who heard and saw the witnesses, found that the respondents had not completed their work and proceeded to deduct from the contract price, first, the sum of \$1200 from the price of the heating apparatus contract, and one hundred dollars from the price of the plumbing contract, and finally condemned the appellant to pay the sum of \$3,791.71 with interest and costs, the appellant paying nine tenths of the cost of *enquête*. The learned judge has left no notes of his judgment, but his formal judgment is fully *motivé*. I extract from it three *considérants* bearing upon the point which is the ground for our judgment :

Considérant que les dits Demandeurs, bien que dûment requis par protêt de compléter le dit contrat et de poser la quantité additionnelle tuyaux requise par les spécifications qui faisaient partie du dit contrat, ont refusé de ce faire et que la Défenderesse avait le droit de faire compléter le dit contrat et de retenir sur le prix arrêté entre les parties le coût additionnel de travaux de complétion. * *

Considérant que telle somme de douze cents piastres doit être déduite de celle de trois mille six cents piastres, montant réclamé par les demandeurs, en vertu du dit contrat laissant en leur faveur une balance de deux mille quatre cents piastres qui est la valeur des tra-

vaux de posage du dit appareil de chauffage, faits par les demandeurs, prouvée par nombre de témoins et non contredite par la défense * *

Considérant, néanmoins, comme le disent plusieurs témoins, les nommés Lamarche et Ballentyne, qu'il est inévitable dans les grands contrats de cette nature, que quelques pièces de plomberie ne soient pas quelque peu défectueuses et incomplètes et qu'il y a lieu pour éviter de nouvelles litigations entre les parties, et ce bien que le montant n'en ait pas été parfaitement déterminé par la preuve de retrancher et déduire sur la somme de quinze cents piastres, montant du dit contrat pour travaux de plomberie, celle de cent piastres pour la réparation ou complétion de certaines pièces de plomberie incomplètes ou défectueuses etc.

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The appellant appealed from this judgment to the Court of Review in Montreal, which, on the 18th June, 1903, purely affirmed the same with costs. (Tasche-reau, Loranger and St. Pierre JJ.)

The appellant now appeals from that judgment to this court.

That judgment establishes beyond doubt that the work contracted for by the respondents, either for heating or plumbing, was not completed when they took their action. In fact the evidence shews that it was so completed by the appellant after the institution of the action. The respondents cannot complain of this judgment as they did not appeal from it and they are consequently found in default within the terms of the contract. As we read the contract the full completion of the work was a condition precedent or suspensive of the payment of any money under the contract and until it is accomplished the respondents have no action; such is the well settled jurisprudence of Quebec: *Bender v. Carrier* (1) in 1887; *Saumure v. Les Commissaires d'Ecole de St. Jerome* (2), in the Court of Review, in 1888; *Stanton v. La Compagnie du Chemin de Fer Atlantique Canadien* (3), in 1891, in the Court of Queen's Bench, and *The Royal*

(1) 15 Can. S. C. R. 19.

(2) 16 R. L. 214.

(3) 21 R. L. 168.

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Electric Co. v. The Corporation of the City of Three Rivers (1) in 1894, in this court.

We fully realise the desire of the learned judge to put an end to a very expensive litigation, but to do so there must be a proper issue between the parties, that is, an action by one or other of the parties to have the various accounts and claims between them adjusted and settled after the completion of the work. Two witnesses were examined to establish the value of the work remaining to be done, but this was done only incidentally in support of the allegation of the defence that the work had not been completed. The evidence was never intended to establish the claim of the appellant for expenses in finishing the work or liquidated damages under the contract.

The appeal is, therefore, allowed with costs in all the courts, *sauf recours*.

Appeal allowed with costs.

Solicitors for the appellant: *Cate, Wells & White*.

Solicitors for the respondents: *Panneton & Leblanc*.