THE ROYAL ELECTRIC COMPANY (PLAINTIFFS)..... } APPELLANTS ;

AND

THE CORPORATION OF THE CITY OF THREE RIVERS (DEFENDANTS)..... } RESPONDENTS ;

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*Mar. 2.

*May 1.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Contract—Electric Plant—Reference to Experts by Court—Adoption of report by two courts—Appeal on question of fact—Arbitration clause in contract—Right of action.

The Royal Electric Company having sued the City of Three Rivers for the contract price of the installation of a complete electric plant, which under the terms of the contract was to be put in operation for at least six weeks before payment of the price could be claimed, the court referred the case to experts on the question whether the contract had been substantially fulfilled, and they found that owing to certain defects the contract had not been satisfactorily completed. The Superior Court adopted the finding of fact of the experts, and dismissed the action. The Court of Queen's Bench for Lower Canada (appeal side) on an appeal affirmed the judgment of the Superior Court and on an appeal to the Supreme Court of Canada.

Held, affirming the judgments of the courts below, that it being found that the appellants had not fulfilled their contract within the delay specified, they could not recover.

Held also, That when a contract provides that no payment shall be due until the work has been satisfactorily completed, a claim for extras, made under the contract, will not be exigible prior to the completion of the main contract.

Quære : Whether a right of action exists, although a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration : *Quebec Street Railway Company* v. *City of Quebec* (1) referred to.

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*PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King, JJ.

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APPEAL from a judgment of the Court of Queen's Bench, for Lower Canada (appeal side), confirming a judgment of the Superior Court, District of Three Rivers, by which appellants' action was dismissed.

The action was brought by the Royal Electric Company against the Corporation of Three Rivers, in May, 1891, to recover the price stipulated in the contract made between the parties for the erection of all the material necessary for the electric light in the City of Three Rivers by the plaintiffs, and also, for extras. A further sum of $5,331.99, for goods sold and delivered, and work done, and freight paid by appellants, to and for respondents, as specified in the account furnished ; the whole amounting to $39,040.81.

This contract was entered into on the 17th May, 1890.

The clauses of the contract upon which the contestation in the case arose are the following :

"7th. The said city shall pay for said installation and plants as above the sum of $35,000, $33,000 whereof after the plant had been kept in satisfactory operation by the said company for the term of 30 days as above, and balance $2,000, after the said plant has been in satisfactory operation for a term of six months from the date of starting from the permanent station."

"8th. In case of dispute between the parties with reference to the present contract or the execution thereof, all question of differences between them shall be settled by arbitration to be appointed in the ordinary manner."

Arbitrators were appointed by the court to report upon certain questions, and among others the following :

3. Should said experts find that the plaintiff has failed to fulfil any part of said contract, as to said steam plant, they are directed to state specially what part,

how the defects they have found can be remedied, and at what costs."

To this question the arbitrators found certain defects in the steam plant, and stated that it would cost some $957 to remedy these defects.

The Superior Court after argument dismissed the action on the ground that the plant was not completed according to contract and that until it was no right of action accrued to the plaintiffs.

Beïque Q.C. and *Geoffrion* Q.C. for the appellants:

The question in this case is whether there has not been any delivery but an acceptance by the company? Although respondents may originally have been entitled to insist on minute performance, and to postpone payment till it was obtained, it does not necessarily follow that they could do so after using the plant, as they have done, both for the purposes connected and unconnected with the contract. By so using it, they plainly waived strict performance as a preliminary to payment; appropriated the plant to themselves; and made it a question not as to whether they were bound to pay, but merely as to the amount due.

The case of *Roëckt* v. *Deruttis* reported in Dalloz (1) is here in point. See also on arts. 1521 and 1527 C.C.

As to the claims for carbons which were furnished and used by the corporation, they do not form part of the contract and the corporation should pay for them.

Now as to the right of action notwithstanding the clause in the contract relating to arbitration.

It cannot seriously be pretended, that we are precluded from taking suit, by reason of this clause in the contract. The right of a citizen to seek redress from the courts, is a matter of public order, and he cannot deprive himself of this right, in advance, and with regard to disputes which have not yet arisen. An existing dispute may be legally submitted to arbitration

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by a deed of submission which complies with the requirements of the law (art. 1341 Code of Civil Procedure), and the parties to such a deed, are no doubt bound to carry it out. But no such deed of submission, was ever passed between the parties. See article 1344, C. C. P. which says: "deeds of submission made out of court, must state *the names and addition of the parties and arbitrators, the object in dispute, and the time within which the amount of the arbitration must be given.*

We may add that appellants would have been willing to arbitrate, but as their *garants*, Leonard & Sons, refused to agree to this, and as an award of the arbitrators to which they did not consent, and were not parties, could not bind the latter, appellants had no other recourse but to sue in the ordinary way.

Irvine Q.C., for respondents. Up to the time of the bringing of the action the property was not in the possession of the respondents, but was run by and under the control of the appellants, and as the experts and two courts have found that the work was not then completed, the company could not claim payment. As to the claims for extras, while the proof of it would have been sufficient had it been the only transaction between the parties, it was insufficient to show it to be independent of the contract. The first question in the case, is: whether the plaintiffs, appellants, had a right to resort to the tribunals direct, as they did by bringing the present suit, or whether they were not bound first to offer to the defendant to submit the questions in dispute between them to arbitration. I contend that the contract contains a distinct agreement that in case of any dispute between the parties with reference to their contract or the execution thereof, all question of difference between them should be settled by arbitration to be appointed in the ordinary manner. This agreement is express and most distinct, and in this case

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is the law of the parties. It is a stipulation permitted by our laws, and the plaintiff had no power to override it without the consent of the defendants. See *Quebec Street Railway* v. *The Corporation of Quebec* (1).

The judgment of the court was delivered by :

Fournier J.

FOURNIER. J.—By their action, the appellant company claim from the City of Three Rivers $33,000, being part of the price of the electric light plant, which they had agreed by the contract of the 17th May, 1890, to instal for the City of Three Rivers; and also a further sum of $5,000 for sundry materials, &c., and for extra work.

This contract, made *sous seing privé*, is given at length in the case. The contestation rests upon the two following paragraphs of the contract in question :

"7th. The said city shall pay for said installation and plants as above, the sum of $35,000, $33,000 whereof after the plant had been kept in satisfactory operation by the said company for the term of 30 days as above and balance $2,000 after the said plant has been in satisfactory operation for a term of six months from the date of starting from the permanent station.

"8th. In case of dispute between the parties with reference to the present contract or the execution thereof, all question of differences between them shall be settled by arbitration to be appointed in the ordinary manner."

By the present action the appellants allege that on the 8th December, 1890, they had fulfilled the greater part of their obligations in the contract ; they offered to complete the works remaining to be done, upon payment of $33,000, the first instalment of the contract price, and upon payment of $5,000 for extras.

The respondents pleaded to this action, that the appellants had no right of action for the following reasons : 1st, because they had not fulfilled the conditions of the contract, and that their works had not

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been put in operation for thirty days after their completion. 2nd, because, under the contract, the appellants were obliged, before taking any action against the city, to submit to arbitration any difficulties which might arise on the subject of the execution of the work.

The first question to be decided is, then, whether the appellants had the right to appeal directly to the tribunals as they have done by their action, before giving the respondent an opportunity of referring the questions in dispute between them, to arbitration.

Although this question is an important one, it is not my intention to discuss it. I shall content myself with citing a recent case in which the Court of Queen's Bench at Quebec, maintained the legality of a similar condition, viz., the case of *Quebec Street Railway Co.* v. *The Corporation of Quebec* (1), where it was decided "that the court has jurisdiction to appoint an arbitrator to act on behalf of a party refusing to appoint such arbitrator, where the parties have covenanted that the matter in dispute should be determined by arbitration." In that case, the Hon. Mr. Justice Tessier made the following remarks: "The second point is the arbitration. The parties desired and agreed to it; consequently one party cannot fail to comply with his obligations. Arbitration experts, are methods of determining litigious contestations, and can be utilised by our laws, and according to our rules of procedure. In demanding arbitration, the parties wished to follow the rules of ordinary arbitration, unless they have stipulated the contrary, or particular rules."

If then, one of the parties refuses to name the arbitrators, the court has jurisdiction to enforce it, or to appoint them itself, and to appoint a third arbitrator in case of a difference of opinion between the two others.

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Courts of justice have this jurisdiction even in cases where the parties do not agree to it; why then, should they not have jurisdiction in a case, like the present, where the parties have themselves stipulated for it?

It is useless to discuss the question further, because its decision cannot in any way affect this case, the Superior Court having, in the first instance, ordered an arbitration, in which the arbitrators made a unanimous report which has been accepted by the two courts below, the Superior Court and the Court of Appeal.

The second question to be considered is whether the appellants had fulfilled all the conditions of the contract and put in satisfactory operation, for thirty days after their completion, the works contracted for.

The appellants do not contend they did. They merely allege that the delay of thirty days should begin to run on the 8th December, 1890, and that the greater part of their works were then finished, thus admitting thereby that they were not completely finished. The evidence on this part of the case showed that the work was incomplete and not properly executed, and the court with the consent of the parties, referred the matter to the arbitrators with instructions to report upon the following questions:—

1st. Whether the plaintiff had on the 8th day of December, one thousand eight hundred and ninety, or ever since, substantially fulfilled its part of said contract as to quality, capacity, installation and saving of fuel of said steam plant;

2nd. Whether the joints in the said electric plant on both incandescent and arc lights were on the 8th day of December, one thousand eight hundred and ninety, well made and soldered, or have ever since been well made and soldered by the said plaintiff;

3rd. Should said experts find that the plaintiff has failed to fulfil any part of said contract as to said steam plant, they are directed to state specially what part, how the defects they have found can be remedied and at what costs;

4th. Should said experts find that the plaintiffs have failed to make good joints in said electric plant, they are directed to say how many

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and in what they have so been found deficient, how the defects can be remedied and at what costs ;

The experts made a unanimous report, declaring as follows :

"We find that the contract was not satisfactorily completed on the eighth day of December, 1890, nor is it yet owing to certain defects existing which are hereinafter mentioned."

This is conclusive.

Independently of the first instalment of the contract price, the appellants, by their action, claim an additional sum of $5,331.99 for goods sold and delivered by the appellants to the respondents, for work done and freight and salaries paid by the appellants for the respondents, the whole upon the request and to the satisfaction of the latter, for their profit and advantage, in the City of Three Rivers, at the prices and times specified in the account produced in support of this claim, as exhibit No. 2 of the appellant.

The bill of particulars furnished by the appellants, comprises, first the amount of the contract, $35,000 ; then follows a long series of items for articles which they had agreed to furnish under the contract, and which were used for the purpose of operating the plant, boilers, machines, tools, &c., forming part of the contract, which amount to $5,331.99. They claim the right to be paid this amount independently of the contract price. But these items being part of the contract, or being extras, this pretension cannot be admitted, on the principle that the plaintiff cannot claim any amount before the execution of the contract. These items, being only accessories of the contract, can not be made the basis of an action outside of such contract. Moreover there is not sufficient evidence to justify a judgment granting the value to the appellant. True it was proved that this account was rendered to the respondents, and in part examined at an irregular meeting of some of the members of the

council. In addition to this there is the evidence of some of the employees, who stated that the goods were delivered and the work done. This evidence, which is not contradicted, would perhaps be sufficient in a separate action based solely on an account, but when a contract exists between the parties under which the appellants contract to furnish to the respondents, for $35,000, certain materials and work, evidence of delivery and value alone is not sufficient. It must be proved that these items are not included in the contract, and are entirely outside of the contract. There is no such evidence of record. Moreover the bill of particulars comprising all these items as well as the contract price, show that the two form part of the same demand and the same contract, and cannot be considered separately, the items of the account being only accessories of the contract.

I concur entirely in the reasons given by the Hon. Mr. Justice Hall, in the appeal from the judgment of the Court of Queen's Bench.

The appellants have no right, therefore, to claim the amount of their account, inasmuch as the works were not completed when the action was brought. For these reasons I am of opinion that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants : *Beïque, Lafontaine, Turgeon & Robertson.*

Solicitor for respondents : *L. D. Paquin.*