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*Mar. 2.

*May 1.

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

AND

FRANK C. LEONARD *et al* (DEFENDANTS IN WARRANTY) ..... } RESPONDENTS.

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

Action en garantie—Contract—Sub-contract—Legal connection (Connexite).

The appellants, who had a contract with the city of Three Rivers to supply and set up a complete electric plant, sublet to the respondents the part of their engagement which related to the steam engine and boilers. The original contract with the city of Three Rivers embraced conditions of which the defendants had no knowledge, and included the supply of other totally different plant from that which they subsequently undertook to supply to the appellants. The appellants, upon completion of the works having sued the city of Three Rivers for the agreed contract price, the city pleaded that the work was not completed, and set up defects in the steam engine and boilers, and the appellants thereupon brought an action *en garantie simple* against the respondents.

Held, affirming the judgments of the courts below that there was no legal connexion (*connexité*) existing between the contract of the defendant and that of the plaintiffs with the city of Three Rivers, upon which the principal demand was based, and therefore the action *en garantie simple*, was properly dismissed.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, confirming a judgment of the Superior Court for the district of Three Rivers, which dismissed an action in warranty by appellants against respondents, in connection with the preceding case of *The Royal Electric Company* v. *The City of Three Rivers.*

The plaintiffs by their declaration alleged that they had fulfilled all the greatest part of obligation of their

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

contract since the 8th December, 1890, and offered to complete those works which remained to be done concluded by praying for $33,000, the amount of the first instalment of payment under the contract.

The respondent pleaded that no right of action lay on behalf of the appellants until, 1st, they had fulfilled all the undertakings of their contract and had the works in satisfactory operation for thirty days, and 2nd, that with reference to any dispute under the contract the plaintiff was bound before instituting any action to submit the matter to arbitration.

After a long *enquête* the court, with the consent of the parties, referred the case to experts, who were to report, and did report *inter alia :*

1. Whether the plaintiff had on the 8th of December 1890, or ever since, substantially fulfilled its part of said contract as to quality, capacity, installation and saving of fuel of said steam plant ;

Question 1st.—In answer to the first question submitted by the interlocutory judgment of the twenty-first day of May last past.

We find that the contract was not satisfactorily completed on the eighth day of December, one thousand eight hundred and ninety, nor is it yet, owing to certain defects existing which are hereinafter mentioned.

"*a.* Quality :—We find the quality of materials used throughout to be good and to fulfil contract, but the workmanship to be defective in some points.

"*b.* Capacity :—We find the capacity of steam plant to be up to guarantee and to fulfil contract, when existing defects as hereinafter mentioned are remedied.

"*c.* Installation :—(Setting up). We find the installation good and to fulfil contract. However, from evidence taken, we find that the engine foundations were defective on the eighth day of December, one thousand eight hundred and ninety, but have since been repaired and are now in good condition.

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"*d.* Saving of fuel:—We find that as regards saving of fuel, the steam plant fulfils the contract."

2nd. "Whether the joints in the said electric plant on both incandescent and arc lights, were on the eighth day of December, 1890, well made and soldered, or have ever since been well made and soldered by the plaintiff;"

"Question 2nd. To the second question submitted by said judgment:"

"Joints:—We find from evidence taken that on the eighth day of December, one thousand eight hundred and ninety, the joints in both incandescent and arc lights were not well made and soldered, but that they have since been and are now all well made and soldered."

Beïque Q.C. for appellant: The whole question at issue on this appeal, is as to whether there is any connection at all between the contract forming the basis of the main action and the contract forming the basis of the action in warranty. For if any such connection exists, to whatever small extent it may be, we respectfully submit that the judgments appealed from are clearly unfounded.

By their contract with the corporation of the city of Three Rivers, appellants undertook to supply them "with a steam and power plant consisting of two compound condensing engines of a total capacity of 250 indicated horse power," and "with four boilers of a total capacity not less than of 300 indicated horse-power," and to "set up said engines and boilers and properly connect the same."

Respondents admit and allege in their plea, "that defendants *en garantie* (to wit, respondents) by their contract with plaintiff *en garantie* (to wit appellants) agreed to furnish two Leonard Ball Automatic cut-off Tandem compound engines of a certain determinate

kind as therein set forth, and to be respectively of 100 and 150 horse-power, the material and workmanship to be of the very best throughout and the working parts of large and substantial proportions."

Respondents also undertook to furnish four boilers of the dimensions indicated in the specifications, which dimensions imply a capacity exceeding 300 indicated horse-power, and "to set up the said engines and boilers and connect the same with a steam pipe, furnishing the necessary pipe and fittings, and make an A1 plant in first-class running order."

Now, after respondents had furnished and made the installation of the engines, boilers and steam pipe connections, appellants having sued the town of Three Rivers for, amongst other things, the price of said engines, boilers and steam pipe connections, they are met with a plea on the part of the said town to the effect "that the engines, boilers and other material used and supplied by the plaintiff in the making of said plant are not of the power, quality and capacity required by the contract, and are badly connected together; that the shafts of said engines, are not of proper thickness, nor first-class in material or workmanship; that generally said engines, boilers and accessories composing said plant, are defective, badly made and of inferior quality.

How can the connection between the contracts be made more apparent? The obligation to furnish a first-class steam plant being common to both contracts; and the respondents knowing at the time of the contract the purpose for which such plant was intended. If the principal defendants succeeded in proving the above allegations, appellants would suffer damage from the non-execution of respondents' undertaking, and would have a recourse against the latter. They therefore have an action in warranty. Respondents' whole

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argument is that the requirements of the two contracts are in some respects different, and that non-compliance with the one contract is quite consistent with compliance with the other. But the fact that respondents are not liable in warranty on the matters wherein the contracts differ, does not prevent such liability with respect to the matters wherein said contracts agree. So long as the principal defendants allege defects amounting to a breach of both contracts the action in warranty arises so far as such defects are concerned, and such right of action is not impaired by any additional allegations with regard to matters with which respondents have nothing to do. Appellants have recognized this distinction in their action in warranty, as they ask respondents to warrant them only against such allegations as refer to defects in material and workmanship on engines, boilers and steam connections.

J. A. Oughtred for respondents: The two contracts were perfectly separate and distinct. No communication was ever had by the respondents of appellants' contract with the city of Three Rivers, and it was not stipulated in any way that respondents should be responsible for the performance of any part of appellants' contract with the city of Three Rivers. A perfect compliance by respondents with the conditions of their contract with the appellants might be a very imperfect fulfilment of the requirements of the contract between appellants and the city of Three Rivers. Indeed, it would appear that the city of Three Rivers complains of the type of engines furnished, and considers it unfit for the performance of the work required by the contract with the appellants.

We urge that there is no such *connexité* between the principal action and the action in warranty as would justify a judgment granting the motion to unite them

for purposes of evidence. And further, that there is no such *connexité* between the two contracts as would justify the action in warranty at all.

The principle which has been laid down by the authors and confirmed by the courts in France, whence our law as to the actions in warranty is derived, clearly justifies the judgments which have been rendered in the Superior Court and in the Court of Queen's Bench in this cause. That principle is fully expressed in the following quotations:

Guyot, Répertoire (1); Delzers (2); Pothier (3); Dalloz (4).

The judgment of the court was delivered by:

FOURNIER J.—The appellants have appealed to this court from a judgment of the Court of Queen's Bench rendered at Quebec, confirming unanimously a judgment of the Superior Court which dismissed the appellants' action in warranty.

By a contract entered into between the appellants and the city of Three Rivers on the 17th May, 1890, the appellants undertook to supply to the said city the necessary plant for lighting the said city with electricity, the contract price being $35,000.

The respondents, who are manufacturers of engines and boilers were requested by the appellants to tender for two stationary engines and four boilers, with their connections, to be set up in the city of Three Rivers. On the 19th May, a tender was submitted by the respondents, accompanied by specifications of the engines and boilers and their connections, and was accepted by the appellants, after some modifications. This tender forms the contract between the parties.

The appellants, claiming to have completed their contract with the city of Three Rivers, brought an action

(1) Vo. Connexité 480.
(2) 2 Vol., Proc. Civ. p. 183.
(3) Proc. Civ. No. 89.
(4) 90, 2, 222.

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against the said city to enforce payment. To this action the city pleaded that the appellants had not fulfilled the conditions of the contract and it complained of the quality of the electric light plant, as well as of the engines and boilers supplied to the appellants by the respondents.

The appellants then brought an action in warranty against the respondents, citing the pleas of the city of Three Rivers, and alleging that by law the respondents were bound to warrant them against all portions of the defence of the city which urged the insufficiency and defects of the engines and boilers, with the exception of the warranty to effect a saving of 30 per cent of the consumption of fuel. They concluded by praying that the respondents be ordered to intervene in this action, and that they be condemned to guarantee the appellants against that portion of the pleas of the city of Three Rivers, which complained of the quality of the engines and boilers, which should be dismissed; and in default of so doing, that the respondents be condemned to indemnify the appellants against any condemnation which might be rendered against them.

The respondents filed a declinatory exception, which was dismissed and which is not now in issue.

They also pleaded that they were not parties to the contract between the appellants and the city of Three Rivers; they had nothing to do with the fulfilment or non-fulfilment of the obligations arising out of that contract, which formed the basis of the principal action, and that they were not in any way responsible for those works.

By their last plea the respondents alleged that by their contract with appellants, they agreed to supply two Leonard Ball Automatic Cut-off Tandem Compound Engines of a certain determinate kind, the size of the cylinder wheels and of the governor wheels, of

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the main journals and crank pins was also specified and a list of the fixtures was attached to the tender.

They also agreed to furnish four stationary boilers for brick work of specified dimensions, and in conformity with the Montreal boiler by-law and in addition thereto the necessary steam pump, tubular pressure heater, smoke, flue and connections, for the price mentioned in their letter of 17th June, 1890, the condensers, however, were to be supplied by appellants.

They also alleged that they carried out their contract according to its terms, and according to the instructions of the appellants during the construction of the said works.

They endeavoured to show that the work done by them was well done, and had none of the defects alleged by the appellants. It is not necessary to follow this contention. The first question to be decided is whether there was a legal warranty. If the respondents are not warrantors by law there being no conventional warranty it is quite useless to discuss the manner in which the works were executed.

It is clear that the contracts in question have no connection with one another. They are two acts, entirely distinct and separate one from the other, containing no condition of warranty in favour of the appellants. As the Hon. Mr. Justice Burgeois said in his judgment "there is no connection between the contract entered into between the plaintiffs in warranty and the corporation of the city of Three Rivers, and the contract between the defendants in warranty and the said plaintiffs in warranty."

"Connexité c'est le rapport et la liaison qui se trouvent entre plusieurs affaires qui demandent à être décidées par un seul et même jugement (1)."

(1) Guyot Vo. connexité p. 480.

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"Il y aura connexité si les points à juger ressortent des mêmes faits, s'ils reposent sur l'interprétation des mêmes actes, s'ils dépendent des mêmes moyens, si la décision rendue sur les uns est de nature à influencer la décision des autres (1)."

Pothier, Procédure Civile, defines a warranty, simple or personal, as follows :

Celle qui a lieu dans les actions personnelles qui résultent de l'obligation qu'une personne a contractée d'acquitter quelqu'un en tout ou en partie d'une dette dont il est tenu envers un tiers et qui a lieu toutes les fois qu'il est poursuivi pour cette dette.

It follows from this definition that if the respondents are in any way responsible, it can only be as warrantors, then how could they be in a direct action of damages?

See also the case of *Robert de la Marche* v. *Deveille*, Cours d'Appel-Orléans (2).

Qu'en effet, en matière de garantie simple, le garant est celui qui se trouve tenu vis-à-vis d'une personne de répondre des suites d'une action qui lui est intentée par un tiers ; qu'il faut donc pour pouvoir appeler en garantie, que la demande principale et la demande en garantie se rattachent l'une à l'autre par une relation nécessaire de dépendance et de subordination ; que la base des deux actions ne doit pas consister en deux obligations de nature différente ; que ce n'est qu'autant qu'il en est ainsi qu'on peut invoquer la connexité existant entre les deux causes et la contrariété possible des décisions.

See also *La Compagnie l'Industrie Nationale* v. *Lemaire* (3).

These authorities clearly show that the respondents are not warrantors of the appellants ; the appeal must therefore be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for respondents : *Hutchinson & Oughtred.*

(1) 2 Delzers, Procédure Civile, p. 183.

(2) Dalloz 90, 2, 222.

(3) Dalloz 89, 2, 295.