DAVID GUILLOT (PETITIONER) ..... APPELLANT;

AND

R. ERNEST LEFAIVRE AND OTHER (DEFENDANTS) ..... } RESPONDENTS;

AND

ÉLÉODORE ROUSSEAU (BANKRUPT)

1946

*Feb. 20
*Mar. 29

Bankruptcy—Agreement between contractor and mason—Brick-work for houses under construction—Contractor supplying bricks, mortar and nails and mason furnishing labour and scaffolding—Mason hiring several helpers to perform work—Contractor becoming bankrupt—Claim by mason to be paid in priority for amount representing his own labour and wages paid to helpers—Whether claim is "compensation of workman in respect of services rendered to the bankrupt", within the provisions of section 121 of the Bankruptcy Act, R.S.C., 1927, c. 11.

The bankrupt, a general contractor, entered into an agreement with the appellant who, described as master-mason on his business letter-head, was also known as a working mason. The work to be done was the labour, including the scaffolding, for the brick-work (*lambrissage*) of four houses under construction by the bankrupt, the latter to furnish the bricks and nails. The mortar was in fact supplied by the bankrupt, though the appellant was to furnish it under the agreement. The work was actually performed by the appellant and by his son and some other workmen who were hired and paid by him. The appellant filed with the trustees in bankruptcy a claim for $1,018.20, being the amount due for his own work and the wages paid to his helpers, in order that the same be paid in priority under section 121 of the *Bankruptcy Act*, out of the distribution of the bankrupt's property. The trustees disallowed the claim for priority, the Superior Court sitting in bankruptcy affirmed such disallowance and the appellate court maintained that judgment.

Held, affirming the judgment appealed from, that the appellant's claim was not for "compensation of * * * workman in respect of services rendered to the bankrupt" within the meaning of paragraph 3 of section 121 of the *Bankruptcy Act*. The word "compensation" may include personal work or labour performed by the claimant personally, but does not include wages earned on the work by his son and the other helpers employed and paid by the appellant.—Upon the facts of the case, the appellant should be considered as a sub-contractor and not as a "workman."

APPEAL (1) from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court sitting in bankruptcy,

(1) Leave to appeal to this Court was granted by The Chief Justice in Chambers.

*PRESENT: Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

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Savard J. and disallowing the petitioner's claim filed with the trustees in bankruptcy that the same be paid in priority.

Guy Hudon K.C. for the appellant.

Jacques Dumoulin K.C. and *Jean Turgeon* for the respondents.

The judgment of The Chief Justice and of Estey J. was delivered by

The CHIEF JUSTICE: Je ne vois aucune raison d'infirmer le jugement de première instance confirmé par celui de la Cour du Banc Roi (en appel).

Tout le litige dépend de l'interprétation de l'article 121 de la *Loi de Faillite.*

Cet article a trait à la priorité des réclamations de certains ouvriers et il stipule au troisième paragraphe que:

toutes les dettes du failli ou du cédant autorisé en vertu de toute loi de compensation ouvrière et tous les gages, salaires, commissions ou rémunérations des commis, domestiques, voyageurs de commerce, journaliers ou ouvriers, pour services rendus au failli ou cédant durant trois mois avant la date de l'ordonnance de séquestre ou de la cession * * * doivent être payés suivant l'ordre de priorité.

Pour déterminer le sort de cet appel, il s'agit d'interpréter dans le paragraphe que l'on vient de citer, les mots " rémunérations ", " ouvriers " et " services ".

En effet, ce que l'appelant réclame ne peut être classé dans la catégorie des "gages", "salaires" ou "commissions "; non plus dans celle des " commis ", " domestiques ", " voyageurs de commerce " ou " journaliers ".

Pour réussir, il fallait qu'il démontre que sa réclamation est pour " rémunération " à titre d'ouvrier " pour services rendus au failli ".

Or, les syndics intimés ont, à mon avis, justement représenté que l'appelant n'avait jamais été à l'emploi du failli à titre de salarié, que les travaux qu'il avait faits pour le failli lui-même étaient accordés par contrat à forfait et que sa réclamation, par conséquent, ne pouvait être acceptée autrement que comme créance chirographaire par opposition avec une créance privilégiée.

La réclamation de l'appelant représente: l'ouvrage en brique à la maison de Yvon Lepage, située dans la paroisse de St-Sacrement à Québec, et à deux autres maisons situées sur la rue Vitré; la construction d'une cheminée à une maison vendue à un monsieur Marcoux.

Ces ouvrages ont été confiés à l'appelant au moyen d'un contrat sur lequel ce dernier s'est donné comme entrepreneur-maçon. Il s'y est engagé à faire le lambrissage des maisons ci-haut mentionnées pour le compte du failli, à raison de $180.00 pour les petites maisons et $205.00 pour les plus grandes; la brique et les clous devaient être fournis par le contracteur général (le failli), le mortier et les échafaudages devant être fournis par le briquetier (l'appelant). Le failli s'y engageait à payer un estimé de 90% à toutes les semaines.

Le montant total, auquel l'appelant a droit pour ces ouvrages, s'élève à la somme de $1,018.20.

Le mot "rémunération" est sans doute très large et, pour les fins de cet appel, je serais certainement disposé à prendre pour acquis qu'il peut comprendre les montants stipulés au contrat en faveur de l'appelant et qui font l'objet de sa réclamation.

Mais, d'autre part, il est admis que dans cette somme sont inclus les salaires qui ont été payés par l'appelant à quelques ouvriers qui lui ont aidé à accomplir les travaux qu'il avait entrepris.

Il ne s'agit donc pas ici exclusivement de sa rémunération personnelle, mais également de la rémunération de ceux qui lui ont aidé dans ses ouvrages.

Déjà, par conséquent, nous nous éloignons des "services rendus au failli". Il ne réclame pas seulement pour ses services mais pour ceux de ses employés; et précisément où je ne puis me rendre à l'argumentation de son procureur, c'est lorsqu'il s'agit de le faire entrer sous la désignation d'ouvrier.

Je crois que le savant juge de première instance a eu raison de dire que nous sommes en présence d'un contrat dont les termes laissent voir qu'il s'agit d'un contrat à forfait

et que l'appelant

doit être considéré comme un entrepreneur et non pas comme un ouvrier.

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Ce n'est pas nécessairement parce que l'appelant devait fournir lui-même ses échafaudages et le mortier que cette stipulation du contrat l'exclut de la catégorie des ouvriers; mais c'est parce que dans l'exécution du contrat, il a engagé des ouvriers qu'il a choisis, dont il devait le temps et qu'il a payés.

C'est bien ainsi que le contrat devait être exécuté de la part de l'appelant, et c'est ainsi que les deux parties contractantes l'ont compris.

A raison de cela, l'appelant agissait comme entrepreneur indépendant; il ne réclame pas le loyer de son ouvrage, il réclame le prix fixe de son contrat. Il ne peut être considéré comme un ouvrier au sens de l'article 121 de la *Loi de Faillite*. Il n'a donc pas droit à la priorité qui y est mentionnée, et je crois que les jugements dans cet appel doivent être confirmés.

L'appel doit être rejeté avec dépens.

KERWIN J.:—The appellant David Guillot filed with the trustees in bankruptcy of Eléodore Rousseau a claim to be paid $1,018.20 "thirdly" in priority in the distribution of the bankrupt's property under section 121 of the *Bankruptcy Act*. No question arises as to the amount or that the appellant is entitled to rank as an ordinary creditor but the trustees disallowed the claim for priority, a judge of the Superior Court in Quebec sitting in bankruptcy affirmed such disallowance, and the Court of King's Bench (Appeal Side), by a majority, dismissed an appeal from the order of the Superior Court. By leave granted under section 174 of the *Bankruptcy Act*, Guillot now appeals to this Court.

The judge of first instance and the majority of the Court of King's Bench proceeded, in part at least, upon a reference to the provisions of the Quebec Civil Code, articles 1684 et seq., and particularly 1696. This is not a correct approach to section 121 of the *Bankruptcy Act*, which is a law of general application throughout the Dominion. The relevant part thereof reads:—

> Subject to the provisions of section one hundred and twenty-six as to rent, in the distribution of the property of the bankrupt or authorized assignor, there shall be paid, in the following order of priority:—
>
> * * *

Thirdly, all indebtedness of the bankrupt or authorized assignor under any Workmen's Compensation Act and all wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman, in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment:

Once a person falls within the enumeration "clerk, servant, travelling salesman, labourer or workman," it would be difficult to exclude the remuneration to which he was entitled from the preceding words "wages, salaries, commissions or compensation."

But there is an additional feature to be considered,—that is as to whether such remuneration was "in respect of services rendered to the bankrupt or assignor." Now it appears to have been generally assumed in the cases in the provincial courts to which our attention was drawn that it was not necessary that the workman should have rendered services exclusively to the bankrupt, and with that view I agree. Cases may be envisaged where he would be an independent contractor and still fall within the section and I am, therefore, unable to agree with certain expressions used in some of the decisions indicating that it was considered that the element of control must be present. In contracts for certain jobs to be done by workmen, the employer might, or might not, have the right of supervision over the manner of execution and for this reason it should not weigh against the appellant that the sheet of note-paper on which the first contract was written had a letter-head indicating that he was an "entrepreneur-maçon".

However, the services must, in the main, consist of personal work or labour on the part of the claimant but they will not lose that character merely because a claimant, in order to perform the labour, requires the use of the tools of his trade or the assistance of a helper. Just what would be included in tools may be a question of some nicety in particular circumstances. In the present case the use by Guillot of his own scaffolding and the ordinary bricklayers' tools could properly be included but the fact that he had the assistance of his son and several other workmen, all of whom were hired and paid by him, is fatal to his claim.

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Mr. Hudon relied upon two decisions, one of Chief Judge Bacon in *Ex parte Allsop* (1) and the other of Cave J. in *Ex parte Hollyoak, Re Field* (2). While the first may fall within the rules mentioned above, it is difficult to say the same of the latter although the short report of the case that appears in the Weekly Reporter and in Morrell, may omit something of importance. In any event, if these decisions are at variance with what has been stated, they should not be considered as authoritative in Canada.

Although a question was raised from the bench as to whether the appellant's claim could be divided so as to show the amount paid by Guillot to his helpers, leaving, presumably the balance of the claim to represent his own labour, no endeavour was made by counsel for either party to do this. Upon an examination of the record, I gather it was felt that this would be impossible since the appellant had contributed to the Workmen's Compensation Commission and to the Joint Committee of Construction in relation to the work done for the bankrupt.

The appeal should be dismissed with costs.

The judgment of Hudson and Rand JJ. was delivered by

RAND J.:—The question in this appeal is whether the appellant is a workman within section 121 of the *Bankruptcy Act,* and entitled to be preferred as for compensation for services rendered to the bankrupt. The material part of the section reads as follows:

121. (1) Subject to the provisions of section one hundred and twenty-six as to rent, in the distribution of the property of the bankrupt or authorized assignor, there shall be paid, in the following order of priority:—

First, * * *

Secondly, * * *

Thirdly, all indebtedness of the bankrupt or authorized assignor under any Workman's Compensation Act and all wages, salaries, commission or *compensation* of any clerk, servant, travelling salesman, labourer *or workman,* in respect of services *rendered to the bankrupt* or assignor during three months before the date of the receiving order or assignment: Provided that any commissions earned more than three months before the date of a receiving order or assignment, but not payable (by the terms of the creditor's agreement) until the shipment, delivery or payment of the good sold, shall be deemed to have been

(1) (1875) 32 L.T. 433.

(2) (1886) 35 W.R. 396; 4 Morre 63.

earned within three months of the date of the receiving order or assignment, when the said good have been shipped, delivered or paid for within three months of the receiving order or assignment; and provided, moreover, that any advances made on account of such commissions shall be deemed to have been legally paid on account thereof.

The bankrupt was a general contractor who entered into an engagement with the appellant in the following terms:

> Le soussigné s'engage à faire le lambrissage de la série de maisons de St-Pascal pour le compte de monsieur Rousseau.
>
> La brique sera fournie par le contracteur général, monsieur Rousseau, ainsi que les clous.
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> La brique devra être déposée près des maisons.
>
> Le papier devra être posé d'avance pour ne pas retarder les briquetiers.
>
> Le mortier, les échafaudages seront fournis par le briquetier pour la somme de (cent quatre-vingt dollars) $180.00 pour les petites et deux cent cinq dollars) $205.00 pour les plus grandes.

(This is in error as to the mortar: it was supplied by Rousseau.)

> Le contracteur monsieur Rousseau devra donner un estimé de 90% à toutes les semaines.

Greater details of the work to be done were set forth in an exhibit to the proof of claim:

> (*a*) L'ouvrage en brique à la maison de Yvon Lepage, située près du Chemin Ste-Foye, à Québec, où j'ai posé de la brique à raison de $22.00 du mille, pour une somme globale de $607.20;
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> (*b*) L'ouvrage en brique à une maison située sur la rue Vitré, et construite sur le lot 114, pour lequel il m'est dû une somme de $182.00;
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> (*c*) L'ouvrage en brique à une maison située sur la rue Vitré, lot 115, pour lequel il m'est dû un montant de $207.00;
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> (*d*) La construction d'une cheminée à une maison vendue à un monsieur Marcoux, pour laquelle il m'est dû un montant de $22.00, soit une somme globale de $1,018.20;
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> Cette somme de $1,018.20 représentant la rémunération comme briqueteur-maçon, le failli m'ayant garanti un montant de $200.00 pour la première maison de la rue Vitré et $207.00 pour la seconde.

The appellant holds himself out, as his business letterhead indicates, as an entrepreneur, although he is also a working mason. The work done is seen to have been the labour for the brick work including the scaffolding for four houses under construction by the bankrupt. It was actually performed by the appellant assisted by three or four helpers. They were his employees exclusively and were paid in full by him; his claim includes their wages earned on the work and the balance represents the work done by him personally and the overall profit. There is

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nothing to indicate that his personal labour was at all bargained for: the entire work could have been done by others.

Mr. Hudon assimilated the case to that of a mechanic's lien with subrogation to the appellant of claims which his employees might have asserted; but this conception disregards the plain language of the statute. The claim, in order to obtain a priority, must be by "a workman" in respect of "services rendered to the bankrupt." "Services rendered" must be distinguished from work or labour furnished; and the enumeration of the persons shows the class and the nature of the service intended to be benefited.

The appellant in form and substance is a sub-contractor, and the logical conclusion of the contention made for him is that for the purposes of section 121 there cannot be a sub-contract for labour only. With that I am unable to agree.

Mr. Hudon relied on *Ex. parte Hollyoak; In re. Field,* (1). But that was a case of group production by persons dismissible by the bankrupt who divided total earnings between them, but who chose one of their number to represent them for all purposes vis à vis the employer. The representative was, in effect, treated as a trustee for the others. But the direct relations between the individual members of the group and the employer and between them and their representative distinguish the facts from those here.

I think the judgment below is sound, and would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Guy Hudon* and *Ives Prévost.*

Solicitors for the respondents: *Power, Bienvenue, Lesage & Turgeon* and *Dumoulin & Rémillard*

(1) (1886) 35 W.R. 396.