1925
*Nov. 12, 13.
*Dec. 10.

GEORGES DANSEREAU (DEFENDANT)....APPELLANT;

AND

RICHELIEU TRANSPORTATION CO...(DEFENDANT),

AND

J.-BTE. LAFRENIERE AND OTHERS (PLAINTIFFS) .... RESPONDENTS.

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

Contract—Repairs—Barge—Sale—Notice to contractors—Novation—Arts. 1171-1173, 1174 C.C.

D., being the owner of a barge, gave instructions to the respondents to have some repairs done upon it. After some repairs had been made, D. entered into a conditional promise of sale of the barge to the R. Co., which, apparently, undertook to pay for the repairs. D. wrote to the respondents that he had "sold" his barge to the R. Co. "who will take immediate possession. The R. Co. will arrange with you about payment of repairs which have been done thereon." The R. Co. became insolvent and D. retook possession of the barge, the purchase money being unpaid. The respondents sue both D. and the R. Co. to recover the whole costs of repairing the barge.

Held, Duff J. dissenting, that D. was liable for all the repairs done to the barge. While, as directed by D., the respondents appear to have rendered their account for repairs to the R. Co. and to have made some arrangement with it for payment, the evidence does not establish intent on their part to discharge D. as their debtor—an intent essential to novation (Art. 1173 C.C.) and never to be presumed (Art. 1171 C.C.). In the absence of this "evident intention" the notification given by D. is to be deemed to be a simple indication by him of a person who was to pay in his place, which does not suffice to effect novation. (Art. 1174 C.C.).

Per Duff J. dissenting.—The letter of notification by D. to the respondents was an unmistakable intimation of his intention not to be responsible for any repairs done after its date and, as the possession of the barge then passed to the R. Co., the respondents had no authority to proceed with the repairs except with the latter's consent. Upon the evidence, the inference is justified that both the respondents and the R. Co. understood that the repairs were to be charged to the latter only.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court and maintaining the respondents' action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

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

T. Brosseau K.C. for the appellant.

P. St-Germain K.C. and *P. N. Pontbriand* for the respondents.

The judgment of the majority of the court (Anglin C.J.C. and Mignault, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—The respondents sue to recover the cost of repairing a barge. The instructions for these repairs were given by the owner, the defendant Dansereau. After some repairs had been made, Dansereau entered into a conditional promise of sale of the barge to his co-defendant the Richelieu Transportation Co., which, apparently, undertook to pay for the repairs. Dansereau notified the respondents of this arrangement, without, however, disclaiming responsibility for work yet to be done, and he instructed them to deliver the barge when ready to the company. Delivery was made accordingly. The barge was used by the company until it became insolvent. When this occurred, the purchase price being unpaid, Dansereau retook possession under the terms of his agreement with the Richelieu Transportation Company.

While, as directed by Dansereau, the respondents appear to have rendered their account for repairs to the Richelieu Transportation Company, and to have made some arrangement with it for payment, the evidence does not establish intent on their part to discharge Dansereau as their debtor —an intent essential to novation (Art. 1173, C.C.) and never to be presumed (Art. 1171, C.C.). In the absence of this " evident intention " we have a case of simple indication by the debtor of a person who is to pay in his place which does not suffice to effect novation. (Art. 1174, C.C.). The text of these articles of the code is so clear and explicit that recourse to authorities to elucidate their scope or application is quite unnecessary.

The evidence negatives the giving of orders for any part of the repairs by the Richelieu Transportation Co. They were all made upon Dansereau's orders. It is sufficiently shewn that all the repairing done was necessary and that the charge therefor is reasonable. The findings of fact in the following *considérant* in the judgment of the Court of King's Bench are warranted by the evidence:

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Considérant que les demandeurs ont prouvé qu'ils ont fait les réparations à cette barge, au montant de $2,785.89, suivant les instructions données par l'intimé Dansereau, que ces réparations ont été utiles, nécessaires même, ont ajouté à la valeur de la barge et qu'elles l'ont été pour le bénéfice et avantage du dit défendeur qui en était le propriétaire et que, quant à la question de novation, il n'y a aucune preuve de novation expresse, et que bien qu'il y ait quelques éléments de preuve de l'existence de novation tacite, ou par les faits, notamment, dans le fait de l'acceptation, par les demandeurs, des billets de la compagnie "Richelieu Transportation Co., Ltd.", de l'envoi de compte des demandeurs uniquement à cette compagnie, pour des réparations, de la production, par les demandeurs, dans la faillite de cette compagnie, de leur réclamation, néanmoins, ces quelques éléments de preuve sont insuffisants pour démontrer l'existence de telle novation, la novation, d'ailleurs, ne pouvant pas se présumer, l'intention de l'opérer devant être évidente, (article 1171, C.C.) et cette intention n'étant pas évidente dans l'espèce et que dans le cas de doute sur l'existence de la novation, la cour doit juger qu'il n'y a pas de novation.

The appellant has had the full benefit of the work for which payment from him is claimed. The barge on which the repairs were made admittedly always remained his property. He alone gave instructions for the making of these repairs. His only substantial defence to this action was novation. His attempt to establish that has failed. There was a simple delegation which may have given to the respondents a new debtor, but did not amount to a complete novation because proof of evident intent to effect novation by discharging the debtor who made the delegation is lacking.

Taking this view of the case it is unnecessary for us to pass upon the alleged misrepresentation by the appellant of the nature of his sale to the Richelieu Transportation Co., or upon its effect on the novation claimed. This we might have been called upon to do had the essential elements of a novation been established.

We accept the view taken in the Superior Court and maintained in the Court of King's Bench that the respondents had lost the privilege on which they based their conservatory attachment.

The appeal fails and must be dismissed with costs.

DUFF J. (dissenting).—Certain undisputed facts seem to me to be conclusive in their effect against the respondents. The letter of the 31st of July, informing the respondents that the barge had been sold to the Richelieu Transportation Company, who would take possession of it immedi-

ately, and advising the respondents that this company would arrange about the payment of repairs already done, was an unmistakable intimation of the intention of the appellant Dansereau not to be responsible for any repairs done after that date. As the learned trial judge finds, it sufficiently expresses the intention, as regards work to be done in the future at all events, to put an end to the contractual relations between the parties. It is undeniable, also, as the learned trial judge also finds, that the respondents acquiesced in this declaration of Dansereau. Not only did the respondents treat the Richelieu Transportation Company as their debtors; they accepted their promissory notes, extending the time for the payment of the debt, without consulting Dansereau. It is impossible to maintain that, consistently with good faith on the part of the respondents, this conduct can, after the notification of the 31st of July, be reconciled with the continued existence of an intention on their part to hold Dansereau responsible for repairs executed subsequent to that date. If Dansereau's own evidence be accepted as to the nature of the original arrangement between himself and the respondents, there could be no question that he was at liberty at any time to direct the continuance of the work. The learned trial judge appears to have been satisfied with his evidence.

It should be observed, also, that the possession of the barge passed to the Richelieu Transportation Company. It is difficult to see how, without the consent of the Richelieu Transportation Company, and in face of the notification of the 31st of July, the respondents possessed any authority to proceed with the repairs. The respondents deny that any authority was in fact given by the Richelieu Transportation Company, but this denial does not appear to have impressed the learned trial judge, and that contention is open to the destructive criticism that the respondents, although required to produce their books by subpoena, failed to do so. In view of all the facts, the inference is justified that both the respondents and the Richelieu Transportation Company understood that the repairs were to be charged to the Richelieu Transportation Company, and that the repairs proceeded on that footing; and the question, consequently, whether there was or was not an explicit arrangement between the Richelieu Transporta-

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tion Company and the respondents, appears to have little importance.

As to the repairs done before the 31st of July, a different question arises. In respect of them, the obligation to pay was in existence, and the appellant Dansereau is responsible, in the absence of sufficient evidence of release. The question is a doubtful one, and on the whole I am disposed to think that as regards that question, the conclusion of the Court of King's Bench ought not to be set aside. The respondents have failed to establish in this action the amount to which they are entitled under this head, and the learned trial judge appears to treat that amount as negligible. It will be sufficient, I think, to protect them by reserving any right they may have to recover for such repairs.

The appeal should be allowed, with costs, and the judgment of the learned trial judge restored.

Appeal dismissed with costs.

Solicitor for the appellant: *J. G. Magnan.*
Solicitor for the respondent: *P. N. Pontbriand.*