Privy Council Appeal No. 68 of 1920.

La Société Maritime Française - - - - - - *Appellants*

v.

The Shanghai Dock and Engineering Company, Limited - - *Respondents*

FROM

HIS BRITANNIC MAJESTY'S SUPREME COURT FOR CHINA AT SHANGHAI.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH FEBRUARY, 1921.

Present at the Hearing :

LORD BUCKMASTER.
LORD DUNEDIN.
LORD SHAW.

[*Delivered by* LORD DUNEDIN.]

This is an action in which the appellants, owners of a motor ship, sued the respondents, a dock company in Shanghai, for damages in respect of damage done by a fire on board the vessel. The facts as found at the trial are as follows :—

The vessel, which was a new wooden motor vessel, had been put into dry dock for the purpose of being sheathed. While there in the dock the engineer of the vessel, a Mr. Relf, who died before the action was tried, discovered that some repairs were wanted in the motor engines. He asked the superintendent of the dock company, a Mr. Gray, if he would do them. Mr. Gray replied that his men had no experience of motor work. To this Relf replied that if he were given the men he (Relf) would do the work. Accordingly, some of the respondents' men were placed at his disposal. The sheathing was finished, and the vessel was then taken out of the dock and moored beside the dock, where she stayed for a few days. The work in the engine-room was also finished by the night of the 13th November, 1918, except a few trifling matters which had still to be done, and the workmen

were told by Relf to come back for that purpose on the morning of the 14th. At 8 o'clock the vessel was to be towed to a buoy where she was to be loaded. The workmen came back at 7. At about 7.15 a fire was discovered in the engine-room, which resulted in the ship having to be scuttled.

The appellants sued the respondents upon the averment that the fire was caused by the negligence of their servants for whom they are responsible.

The cause of the inception of the fire was not made quite clear by direct proof. It is certain that it originated in the engine-room, which was dirty and contained inflammable matter. None of the witnesses actually examined knew how it broke out, but they all say that at 7 a.m. there was no fire and at 7.15 there was. But in an enquiry before the Consul a workman, No. 12, who has since disappeared, admitted that at 7 he entered the engine-room with a lighted and unshaded candle, which he placed on one of the motors, and that soon after he perceived the ship was on fire.

The learned trial Judge has from this account—which was made evidence in the cause, as the statement was sent as a report by the respondents to the appellants—drawn the inference that the ship was set on fire by the lighted candle, and that to take a naked light into the engine-room in the condition it was in, was a negligent act. Their Lordships do not quarrel with the inference so drawn.

It accordingly becomes necessary to consider closely what led to this negligent act, and who as superior was responsible.

When the ship came into dock the engineer Relf began the work, using lighted candles. Gray, the dockyard manager, remonstrated and arranged for an electric connection from the shore, so that electric light was available, and in the engine-room a handlamp electrically connected could be used. When the ship left the dock, the electric connection from the shore had to be removed, and Gray then told Relf that he had better set the ship's dynamo working as the shore connection would be no longer available. It turns out, though there is no evidence that Gray knew this, that the ship's wire connection from the dynamo was not in order. The result was that the work in the engine-room was done with lighted candles. The only workman examined, Chen Pao Sho, a Chinaman, was quite explicit as to this. He said that only candles were used when the ship left the dock, that Relf told him to use the candles and gave him the candles to use, and that he took instructions from Relf in the engine job and from no one else. Gray had left the ship the night before the fire, and did not even know that Relf had ordered the workmen back to complete the snall matters in the engine-room.

The learned trial Judge seemed to think that the fact that the work was charged for by the respondents was conclusive that for the purpose of liability the servants were the servants of the respondents. This is not so. The truth is that no one circumstance is a complete test. Payment and the power to dismiss

are cogent circumstances and often help to determine the question, but neither circumstance is conclusive. Their Lordships are of opinion that the law on the matter was accurately laid down by Bowen, L.J., in the case of *Donovan* v. *Laing* (L.R. 1893, 1 Q.B. 629). His Lordship there said :—

> " We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. That was the test laid down by Crompton, J., nearly forty years ago, in *Sadler* v. *Henlock* (4 E. and B. 570), in the form of the question, ' Did the defendants retain the power of controlling the work ? ' Here the defendants certainly parted with some control over the man, and the question arises whether they parted with the power of controlling the operation on which the man was engaged. There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another—that is, he may lend them—and in that case he does not retain control over the work. . . . I have only to add, that I agree that no difference can arise whether the lending of the servant to another person is in consideration of some reward or not. Such a distinction obviously cannot affect the reasoning on which I have based my judgment "

The question here really turns on whether the work was Gray's work supervised by Relf—which is what the trial Judge thought—or was Relf's work performed by Gray's servants, whose services had been given over to Relf for a consideration. This latter is the view that their Lordships take. The order that led to the mischief was directly Relf's. Gray had provided electric light while the ship was in dock and had particularly told Relf to get his dynamo working for the period after the shore attachment was no longer available. Relf, being in command of the gang of workers, allowed them and enjoined them to use candles. He had been told by the captain to get the work done, and he was acting as the agent of the owners of the ship.

Their Lordships accordingly think that the trial Judge was right in entering judgment for the defendants and respondents, although they reach the result rather as indicated than by upholding a plea of *volenti non fit injuria*. They will humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

LA SOCIÉTÉ MARITIME FRANÇAISE

v.

THE SHANGHAI DOCK AND ENGINEERING COMPANY, LIMITED.

DELIVERED BY LORD DUNEDIN.

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