

IN THE MATTER OF THE PETITION OF RIGHT OF
WARREN PEARSON SUPPLIANT;

1916
Dec. 30

AND

HIS MAJESTY THE KING RESPONDENT.

Contract—Building contract—Assignment—Subletting—Consent—Priority.

Under a building or construction contract the Crown is not bound to pay any claim asserted by a mere sub-contractor, although the Crown has consented to the contract being sublet.

2. Where the Crown declines to assent to any assignment there can be no implied assignment raised upon a consent to sublet so as to establish privity between the Crown and a third person to whom the original contractor has sublet the execution of the contract.

PETITION OF RIGHT for damages alleged to have arisen on account of improper classification and estimates in a sub-contract for a highway in the Rocky Mountain Park, in the Province of Alberta.

The case was heard before the Honourable Mr. JUSTICE AUDETTE, at Calgary, October 3, 1916.

M. B. Peacock, for suppliant.; *J. Muir, K.C.*, for respondent.

AUDETTE, J. (December 30, 1916), delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of \$15,000 for loss and damage alleged to have been suffered by him as the result, *inter alia*, of improper classification and estimates allowed by the chief engineer upon his (Pearson) works while engaged in the performance of his sub-contract for the construction of part of a highway known as sec. 4 of the Castle-Vermillion Highway, in the Rocky Mountain Park, from Station 120 + 90 to Station 478 + 60, in the Rocky Mountains in the Province of Alberta.

In the course of the year 1914, B. J. Reddick of Calgary, tendered for the works in question herein, and his tender

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being accepted, entered into a contract with the Crown to perform the same under the indenture filed of record herein as Exhibit No. 1.

Reddick had also another contract in respect of what he called the Banff road or Banff section, and he made a deposit of \$1,000 with respect to the two contracts.

Subsequently to signing his Castle-Vermillion contract with the Government, Reddick applied to the Crown for leave to assign that contract. The Crown while refusing him this leave to assign, as it had the right under the contract, allowed him to sublet the same.

Therefore, on July 30, 1914, Reddick did sublet the contract to the suppliant herein, as appears by Exhibit No. 3 filed herein. And it is here well to note that the contract was so sublet upon the suppliant paying Reddick 15% of the net profits on the work. In other words, giving that profit when realized on the performance of the contract, the price of remuneration as between Reddick and himself, would be different from that of the original contract. A clause indeed which will also tend to show, at least under one aspect, the difference between the assignment and the subletting of a contract.

All moneys paid by the Crown monthly or otherwise under the progress estimates, were so paid to Reddick with whom alone the Crown was dealing.

Reddick, in his evidence, states he received all the cheques from the Crown, coming as payment under the present contract. He cashed the cheques at a bank, and deposited the proceeds thereof at the Union Bank to the credit of the suppliant, and he adds, Pearson did all the work and he received all the moneys.

There is a balance still due under the contract, as returned and certified to by the chief engineer and Reddick exacts that that amount be paid over to him, as in the past he being the party to the contract with the Government. He further says that the balance should come to him, to protect himself under his contract with Pearson, and he is satisfied to pay the suppliant that balance, without exacting his 15% out of the profits—without asking any profit.

Now, for one to sublet or to allow another to do all or part of the work which he had contracted to do, is indeed

quite different from an assignment where the liabilities imposed or rights acquired thereunder are transferred to a person who was not a party to the original contract. And Reddick by his contract with the Crown was prohibited from assigning without written consent of the Minister. And, indeed, a transfer or assignment of liabilities constitutes, in reality, a new contract and strictly, is not an assignment at all. *Halsbury's Laws of England*¹.

The prices in subletting a contract might be entirely different from those of the contract, while in the case of an assignment they must be the same.

In the case where the contractor sublets while he can lawfully claim payment for the work so sublet, if properly done, on the other hand he is liable for the defaults of the sub-contractor.

The Crown paid back to Reddick the sum of \$1,000, the security deposited by him under both contracts. All of this going to show that all relations, with respect to this contract, was directly as between Reddick and the Crown. The suppliant was not known or recognized. The bond was given by Reddick who remained liable and answerable to the Crown for the due performance of the contract.

Under the circumstances above mentioned, I must come to the conclusion that there is no privity of contract as between the suppliant and the Crown and his action fails. *Hampton v. Glamorgan County Council*².

Having so found it becomes unnecessary to decide the other questions raised by the pleadings herein.

There will be judgment declaring that the suppliant is not entitled to the relief sought by his petition of right, which stands dismissed.

Petition dismissed.

Solicitors for suppliant: *Messrs. Peacock, Skene & Skene.*

Solicitors for Crown: *Messrs. Muir, Jephson & Co.*

¹ Vol. 7, p. 494, et seq.

² 33 T.L.R. 58.