

1949

Jan. 28
Feb. 17

BETWEEN :**HIS MAJESTY THE KING.....PLAINTIFF;****AND****PETER BOYD COWPER, ET AL.....DEFENDANTS.**

Practice—Motion to add new defendant to an action—Applicability of Exchequer Court Rules 227 and 228 to an action in which Crown is a party—Assignability of claim against the Crown—Implicit acquiescence—Applicability of Art. 81, Code of Civil Procedure of the Province of Quebec—Exchequer Court Rules 2, 226, 227 and 228.

Motion under rules 227 and 228 of the General Rules and Orders of the Exchequer Court to add a new defendant to the action.

Held: That rules 227 and 228 of the General Rules and Orders of the Exchequer Court also apply in an action in which the Crown is a party.

2. That a claim against the Crown is assignable when there is an implicit acquiescence by it.
3. That under rule 2 of the General Rules and Orders of the Exchequer Court article 81 of the Code of Civil Procedure of the Province of Quebec is applicable.

MOTION to add a new defendant.

The motion was heard before the Honourable Mr. Justice Angers at Montreal.

André Forget and Robert Dufresne for the motion.

Antoine Geoffrion contra.

ANGERS J. now (February 17, 1949) delivered the following judgment:

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This is a notice of motion on behalf of defendants Alfred Abraham Lessor and dame Ethel Lessor, wife of I. L. Weiner, for an order directing that Léopold Paré, tavern-keeper, of the City of Montreal, be joined as a defendant in the action and that the aforementioned defendants be placed out of court.

The action is one in expropriation. The information alleges in substance that: the land and real property therein described was taken under the provisions of the Expropriation Act by His Majesty the King for the purpose of a postal station by depositing a plan and description thereof in the registry office for the registration division of Montreal, wherein the said land and real property is situated, on May 26, 1947, whereby the said land and real property has become and remains vested in His Majesty; the defendant Cowper claims to have been the owner in fee simple of the said land and real property and of the buildings and improvements thereon at the time of deposit of the said plan and description and claims that he has sustained loss and damage in respect of his title and estate in said land and real property and buildings and improvements thereon by reason of said entry and taking thereof; under a lease passed before H. E. Herschorn, N.P., on May 16, 1944, and registered in the said registry office on May 22, the defendant Cowper leased to the defendants Alfred Abraham Lessor and dame Ethel Lessor part of the said property described in the lease as: "those certain premises in the City of Montreal bearing civic number 1254 University street, which premises are occupied as a tavern, including the storage room and space in the cellar at the north-west corner", the lease being for the term from May 17, 1944, until April 30, 1949, with the privilege for the lessees of continuing it upon the terms and conditions therein specified for a period of five years from May 1, 1949, by giving to the lessor three months previous notice in writing to that effect; the rental specified in the said lease is \$3,000 per annum, payable by equal monthly payments of \$250 each; among the conditions stipulated in the lease it is provided that the lessees shall not transfer their right

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therein nor sublet any part of the leased premises without the consent in writing of the lessor, which shall not be unreasonably withheld; subsequent to the deposit of the plan and description aforesaid and the vesting of the land and real property above described in His Majesty, the defendants Alfred Abraham Lessor and dame Ethel Lessor by deed passed before H. E. Herschorn, N.P., on July 29, 1947, sold and transferred to Léopold Paré the business which they were then carrying on together at civic number 1254 University street under the name of "Oxford Tavern", including the goodwill, the rights of the vendors to the Quebec Liquor Commission tavern licence and the furniture in the premises and purported to transfer unto the said Léopold Paré their right, title and interest in and to the lease aforesaid and undertook to obtain the necessary consent from the lessor for the transfer of the lease to the purchaser; in a letter to the defendants Alfred Abraham Lessor and dame Ethel Lessor, dated July 30, 1947, the defendant Cowper stated that he was prepared to make the transfer of the lease to the said Léopold Paré with the proviso that the latter was aware of the fact that the defendant Cowper had been given notice of expropriation by the Department of Public Works of the property situated at 1250-1254 University street and that there shall not be any guarantee that the said Paré would remain in the premises, for the reason that the site was vested in His Majesty the King; the defendant Cowper has been allowed to remain in possession of the said land and property until August 1, 1948, and has used them for his own benefit and has collected the rentals thereof without paying any rental or other compensation to His Majesty since the expropriation; on March 25, 1948, a demand was made on behalf of the Minister of Public Works requiring the defendants to furnish the said Minister with a statement showing the particulars of any estate and interest and every charge, lien and encumbrance to which the same is subject, which they may have or claim to have in the expropriated land and property, as required by the Expropriation Act R.S.C. 1927, chapter 64, section 26, the said statement to also show the claim made by any of them in respect of the estate or interest therein described; in reply to this demand the defendants Alfred Abraham Lessor and dame Ethel Lessor

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stated that they had sold the "Oxford Tavern" on August 29, 1947, to Léopold Paré and that they hold no lien on said property; in reply to the aforesaid demand the defendant Cowper, through his attorneys, stated that he was the owner of the property, that a part thereof was affected by a lease in favour of Léopold Paré, assignee of the defendants Alfred Abraham Lessor and dame Ethel Lessor, and that he claims as compensation for the expropriation of his estate or interest in the said property the sum of \$180,000; subsequently Cowper's attorneys gave a breakdown of the sum of \$180,000 as comprising \$138,000 for the land, at the rate of \$30 per square foot for an area of 4,600 feet, and \$42,000 for the value of the building; His Majesty the King is willing to pay to the defendants, or to whomsoever may be adjudged entitled thereto, the sum of \$159,146.04 to be apportioned between them as the Court may decide, in full satisfaction of their respective rights, titles and interests, free from all privileges, hypothecs and encumbrances whatsoever, in the said land and real property and in full satisfaction of all their claims of every nature and kind whatsoever arising out of the expropriation; His Majesty the King has paid the defendant Cowper, as an advance on the amount of compensation to be adjudged in respect of the said land and real property, the sum of \$110,000.

In support of their motion, the defendants filed an affidavit of Alfred Abraham Lessor in which the affiant, after referring to the lease between the defendant Cowper as lessor and the defendants Alfred Abraham Lessor and dame Ethel Lessor, wife of Isidore Leslie Weiner, as lessees and to the agreement dated July 29, 1947, between the defendants Alfred Abraham Lessor and dame Ethel Lessor on the one part and Léopold Paré on the other part, by which the former sold to the latter the business which they carried on together at 1254 University street under the name of "Oxford Tavern", including the goodwill and the right to the license issued by the Quebec Liquor Commission, the furniture and their right, title and interest in the lease aforesaid, and by which they undertook to obtain the necessary consent from the defendant Cowper for the

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transfer of the lease to the purchaser, states that: on July 30, 1947, the defendant Cowper wrote a letter to dame Ethel Lessor and himself in which he agreed to the transfer of the said lease, with the proviso that the said Léopold Paré be made aware of the fact that the defendant Cowper had been given notice of expropriation by the Department of Public Works of the property situate at 1250-1254 University and that there should not be any guarantee that the said Paré would remain in the premises for the reason that the site was vested in His Majesty the King; he informed the said Paré of such notice of expropriation and of the remainder of the contents of the said letter; Paré thereupon commenced to exercise the right which he had acquired; unless and until the right of Paré to be a party to the present proceedings has been adjudicated upon, he is unable to make a statement of defence to the information.

During the argument on the motion, counsel for defendants put in evidence documents, which I deem apposite to quote partly or summarize briefly. The first one, marked as Exhibit A, is a letter from J. Alex. Prud'homme, K.C., on behalf of the Minister of Public Works to the defendants Cowper, Alfred Abraham Lessor and dame Ethel Lessor and to Léopold Paré, dated March 25, 1948, requesting that, pursuant to section 26 of the Expropriation Act, they furnish to the Minister a statement showing the particulars of any estate and interest and every charge, lien or encumbrance to which the same is subject, which they may have or claim to have in the property known as the "Oxford Hotel", situate at Nos. 1250-54 University street, being lots 1345-31 and 32 and part of lot 1346 on the official plan and book of reference for St. Antoine ward, City of Montreal, which has been acquired by His Majesty the King for the construction of a public work, according to a notice of expropriation and plan filed in the Registry Office of the Registration Division of Montreal on May 26, 1947. The letter says that the statement should also show the claim made by any of them in respect of the estate or interest therein described and that it should be furnished within ten days.

The next document, marked as Exhibit B, is a copy of a letter from Beaubien, Dufresne & Gagnon, Solicitors for Léopold Paré, to Geoffrion & Prud'homme, dated April 8, 1948, which reads thus:

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Re: Le Gouvernement & Léopold Paré

Pour faire suite a la conversation au téléphone de ce jour entre notre M. Dufresne et votre M. Prud'homme nous devons vous dire que notre client, M. Paré, n'a reçu votre lettre du 25 mars dernier que le 5 courant et s'occupe présentement de réunir les données nécessaires pour lui permettre de faire sa réclamation et, à cet effet, il a besoin d'un délai additionnel. En conséquence, nous vous demanderions de bien vouloir lui accorder jusqu'au 16 avril afin de produire sa réclamation.

The third exhibit, marked C, is a letter from J. Alex. Prud'homme to Beaubien, Dufresne & Gagnon, dated April 9, 1948, in which there is, among others, the following statement:

Quoi qu'il en soit, nous n'avons pas d'objection à vous accorder jusqu'au 16 courant mais pas plus tard, pour la production de sa réclamation.

The last document filed in support of the motion, exhibit D, includes a copy of a declaration by the solicitors of Léopold Paré setting forth his interest in the "Oxford Hotel" and a copy of his claim arising from the expropriation of the said property, both dated April 15, 1948.

The declaration relates the deed of sale passed before H. E. Herschorn, N.P., on July 29, 1947, by which Alfred Abraham Lessor and dame Isidore Leslie Weiner agreed to sell to Léopold Paré the business carried on at No. 1254 University street under the name of "Oxford Tavern", including the goodwill, the right of the vendors to the tavern license issued by the Quebec Liquor Commission, the furniture and the right and interest in a lease executed in their favour by Peter Boyd Cowper, dated April 13, 1944, for the premises occupied by the said business, the said lease being for a period commencing on May 17, 1944, and ending on April 30, 1949, and for a rental of \$3,000 per year, payable \$250 on the 1st of each month.

The claim, totalling \$170,212.69, is made up of various items which I do not think necessary to reproduce.

Counsel for plaintiff filed as Exhibit 1 an agreement between Alfred Abraham Lessor and dame Ethel Lessor, wife of Isidore Leslie Weiner, as parties of the first part and Léopold Paré as party of the second part, dated

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January 22, 1949, which, after referring to the aforesaid deed of sale by the parties of the first part to the party of the second part passed before H. E. Herschorn, N.P., on July 29, 1947, and the lease granted by Peter Boyd Cowper to the parties of the first part by deed passed before the same notary on May 16, 1944, and stating: that the premises covered by the lease form part of a building erected on lots Nos. 1345-31 and 32 and part of lot No. 1346 of the official plan and book of reference of St. Antoine ward; that the said property was taken under the authority of the Expropriation Act by His Majesty the King for the purpose of a public work, namely a postal station, by the deposit of a plan and description of said land and real property at the Registry Office for the Registration Division of Montreal on May 26, 1947, and had thus become vested in His Majesty the King; that as a consequence of these facts and in accordance with article 1660 of the Civil Code the said lease had become cancelled before the said sale of the tavern business of the parties of the first part, although the parties of the first part and, after the sale, the party of the second part were allowed to remain in possession of the premises temporarily; that the parties of the first part, in consequence of the expropriation and the cancellation of the lease, had a right to an indemnity from His Majesty in respect of the damages suffered on account of the said expropriation and cancellation and that proceedings are now pending before the Exchequer Court of Canada wherein His Majesty the King is plaintiff and the parties of the first part and the said Cowper are defendants, for the fixing of the indemnities respectively payable to the defendants, stipulates as follows:

The parties of the first part confirm having transferred and do hereby transfer to the party of the second part their right, title and interest in and to an indemnity due by His Majesty the King by reason of his having taken possession on May 16, 1947, under the authority of the Expropriation Act, of the said land and real property and on account of the fact that the parties of the first part were entitled as lessees to the use of part of the property built on said land, under a lease passed between the parties of the first part and Peter Boyd Cowper before H. E. Herschorn, N.P., on May 16, 1944, duly registered;

The consideration for the said transfer is included in the consideration for the sale of the said tavern business under the deed of sale entered into by the parties of the first part and the party of the second part before H. E. Herschorn, N.P., on July 29, 1947;

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The party of the second part shall cause this agreement to be served upon His Majesty the King;

The parties of the first part shall endeavour on the basis of the prior agreement between the parties and of this agreement and its service upon His Majesty the King to have the party of the second part added as a party to the proceedings pending before the Exchequer Court of Canada wherein His Majesty the King is plaintiff and the parties of the first part and the said Peter Boyd Cowper are defendants, said proceedings having been issued in order to fix the indemnities payable to the respective defendants;

Should the parties of the first part be successful in adding the party of the second part as a party to the said proceedings, all obligations of the parties of the first part under this agreement shall cease;

Should the parties of the first part be unsuccessful in their endeavours to add the party of the second part as a party to the said proceedings, then the parties of the first part shall file such defence as the party of the second part will direct and shall prosecute the indemnity claim therein contained with due diligence, under the direction of the party of the second part; the preparation and filing of such defence and the prosecution thereof to final judgment shall be at the expense of the party of the second part who shall retain his own counsel to represent the parties of the first part in that regard, the latter, however, retaining the right at their own expense to have their own counsel act in an advisory capacity;

The parties declare that, subject only to due compliance with the terms of this agreement and to the balance due by the party of the second part to the parties of the first part under the deed of July 29, 1947, between them, neither has against the other any claim.

It was submitted on behalf of defendants that the addition of parties to a suit is permitted by rules 226, 227 and 228 of the General Rules and Orders of the Court. A brief review of these rules seems expedient.

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Rule 226 deals with cases of marriage, death, insolvency or devolution of estate by operation of law of any party to an action; obviously it does not comprehend the case with which we are concerned.

Rule 227 relates to the continuation of an action in case of an assignment or devolution of an estate or title *pendente lite* and enacts that "the action may be continued by or against the person to or upon whom such estate or title has come or devolved". This rule is certainly broader than the previous one. It covers the "assignment . . . or devolution of any estate or title *pendente lite*".

Rule 228 again widens the field within which the addition or change of parties in an action may take place. Its terms are practically unlimited. I deem it advisable to quote it textually:

Where by reason of marriage, death or insolvency, or any other event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, or for any other cause, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action and such new party or parties, may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence.

I do not think that the meaning of the words "or any other event" contained in rule 228 can be restricted so as to apply only to events of the same kind or, to use the expression generally adopted by the authors, *ejusdem generis*. If it could be so restricted, the words would have no bearing: indeed I fail to see events which can be said to be of the same kind as marriage, death or insolvency. One must give this phrase its full implications. It is trite law that words and sentences must be given a meaning: Craies, *Treatise on Statute Law*, 4th ed., p. 68. Regarding the doctrine *ejusdem generis* see Craies, *op. cit.*, p. 167; Maxwell, *Interpretation of Statutes*, 9th ed., p. 337; Beal's *Cardinal Rules of Legal Interpretation*, 3rd ed., 356; *Anderson v. Anderson* (1); *Owners of S.S. Magnhild v. McIntyre Brothers & Co.* (2); *Tillmanns & Co. v. SS. Knutsford, Limited* (3).

(1) (1895) 1 Q.B. 749, 755.

(3) (1908) 2 K.B. 385, 405.

(2) (1920) 3 K.B. 321, 329.

There is no genus or category in the present instance and the doctrine *ejusdem generis* has no application.

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There is no doubt, to my mind, that rules 227 and 228 are fully applicable in cases between private parties. Do they also apply in a case in which the Crown is one of the parties? This is the problem which I have to solve.

Counsel for defendants relied on the decision in *Price v. The King* (1). I do not think that this case has any relevance; section 19 (c) of the Exchequer Court Act, with which it deals, is not pertinent.

The fact that Paré might have been unaware of the expropriation and have continued to pay his rent to the defendant Cowper is, as I think, immaterial.

It was argued on behalf of plaintiff that the assignment by the defendants Alfred Abraham Lessor and dame Ethel Lessor to Léopold Paré has no effect against the Crown and that the only persons who may have a claim are the assignors. It is generally recognized that a claim against the Crown is not assignable in the absence of acquiescence. Was there acquiescence by the Crown in this particular case? I shall deal with the question in a moment.

In *Powell v. The King* (2) it was held (*inter alia*) that the provisions respecting the assignment of choses in action found in the Revised Statutes of Ontario are not binding upon the Crown as represented by the Government of Canada.

In *The Queen v. McCurdy et al.* (3) Burbidge J. made the following observations (p. 319):

In Canada the practice of the Crown is, so far as I know, against the recognition of the assignment by one person to another of a claim against it. By the third rule of the rules prescribed by the Treasury Board (February 1, 1870), under sanction of His Excellency-in-Council, it is provided in reference to the mode of acquittal of warrants for the payment of money that no power of attorney which partakes of the character of an assignment of the moneys to another party, or purports to be irrevocable or in any respect qualified, will be received by the Government for the payment of money. At the same time the practice has always been, I think, to give effect to transfers by operation of law, or by will, of claims against the Crown, and, although I do not recall any case in point, I have no doubt that the same course would be followed in respect of a voluntary assignment for the general benefit of creditors. It is, I think, free from objection and eminently fair and just that effect should be given to such assignments, but that perhaps is not conclusive. In *Flarty v. Odhum*, 3 T.R.

(1) (1906) 10 Ex. C.R. 105.
 (2) (1905) 9 Ex. C.R. 364.

(3) (1891) 2 Ex. C.R. 311.

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681, Buller, J, while concurring with the other members of the court that, on grounds of public policy, the half-pay of an officer is not saleable and cannot be assigned, expresses the view that salary accrued due might be assigned; and in the *Queen v. Smith et al*, 10 Can. S.C.R. 66, Mr. Justice Strong says, that had it appeared from the proof in that case that there had been an equitable assignment to the suppliants of the payments to arise from the performance of the work by the original contractors, the former would have been undoubtedly entitled to recover in respect of work actually performed by the latter; for such an equitable assignment would have been entirely free from objection, either upon the general law, or upon any provision contained in the contract, and the record would have been properly framed for relief upon such a state of facts. In the case of *The Queen v. Dunn*, 11 Can. S.C.R. 385, the suppliant's case rested upon a transfer to him of moneys alleged to be due from the Crown to one Tibbitts, but the petition in that case (P. 392) contained an allegation that the transfer had been communicated to the Government and accepted by them.

See also *Arbuckle et al. v. Cowtan* (1).

I had the occasion to examine the question of assignability of a claim against the Crown in *Chipman v. The King* (2) to which counsel for plaintiff referred. The facts in that case differed materially from those existing herein: particularly there was no acquiescence whatever on the part of the Crown.

In the present case the Crown became aware of the transfer from Alfred Abraham Lessor and Ethel Lessor Weiner to Léopold Paré of their right, title and interest in and to the indemnity due by the Crown by reason of its having expropriated and taken possession of, among others, the premises bearing No. 1254 University street, in the City of Montreal, occupied as a tavern. It acknowledged the transfer and acquiesced in it, at least implicitly, by the letter exhibit A requesting the defendants and Paré to furnish to the Minister of Public Works statements showing the particulars of their respective claims.

Counsel for defendants submitted that under rule 2 it is enacted that in all suits in the Exchequer Court not otherwise provided for by any act of the Parliament of Canada or by any general rule or order of the Court, the practice and procedure shall, if the cause of action arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits in the Superior Court of the Province

(1) (1803) 3 B. & P. 321, 328.

(2) (1934) Ex. C.R. 152.

of Quebec; he concluded therefrom that article 81 of the Code of civil procedure is applicable; its first paragraph, which is the only one relevant, reads thus:

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A person cannot use the name of another to plead, except the Crown through its recognized officers.

I think that counsel's submission in this respect is well founded. In support thereof he cited: *Savoie v. Rouleau et al.* (1) and *Bélanger v. Caron et al. and Morin et al., t.s. and Caron, contestant* (2). In addition to these decisions the following may be consulted beneficially: *Montreal Loan and Investment Co. v. Plourde* (3); *Bouchard v. Gagné et La Corporation du village de Mistassini* (4); *S. Chalfoux Ltée v. Côté* (5).

The motion of defendants Alfred Abraham Lessor and dame Ethel Lessor Weiner, in so far as it prays for an order that Léopold Paré be joined as a defendant in the action, is granted. I do not think however that the defendants Alfred Abraham Lessor and dame Ethel Lessor Weiner should, at least for the present, be put out of Court.

The costs of this motion will be costs in the cause.

Judgment accordingly.