PAUL PELLETIER (*Defendant*) .....APPELLANT;

AND

BENNY SHYKOFSKY (*Plaintiff*) .....RESPONDENT.

1957

*Mar. 18, 19
June 26

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

Courts—Appeals—Inferences to be drawn from facts—Second appellate Court.

Where the validity of an appellant's claim depends upon an inference of fact to be drawn from all the facts proved and the application to that inference of a legal principle, and where a Court of Appeal has drawn an inference different from that of the trial judge, this Court will interfere with the judgment appealed from only if clearly satisfied that it is erroneous. *Demers v. Montreal Steam Laundry Company* (1897), 27 S.C.R. 537, applied.

Master and servant—Injuries to passengers in taxicab—Whether driver in the performance of the work for which he was employed—Civil Code, art. 1054.

*PRESENT: Taschereau, Rand, Locke, Fauteux and Abbott JJ.

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As the result of the negligence of D, the plaintiff was injured while a passenger in a taxicab owned by the defendant and driven by D. The plaintiff and D, an old friend of army days, embarked upon an extensive tour of the city of Montreal, visited at least two taverns and were both intoxicated at the time of the accident. The meter of the taxicab was not in operation during the tour but there was evidence that payment was to be made for the time spent on the trip. While there were inconsistencies in the evidence, there was little direct conflict. The trial judge found that D was in the performance of his work but this finding was reversed by the Court of Appeal.

Held: The Court of Appeal was justified in its view that the judgment at trial could not be supported and in drawing the inference that this was not a case of an engagement of carriage on behalf of D's employer. The judgment should therefore be affirmed.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), reversing the judgment at trial. Appeal dismissed.

G. Laurendeau and *L. Racicot,* for the defendant, appellant.

Hazen Hansard, Q.C., and *William Grant,* for the plaintiff, respondent.

The judgment of Taschereau, Fauteux and Abbott JJ. was delivered by

ABBOTT J.:—Appellant's claim is one in damages for personal injuries sustained while a passenger in a taxicab owned by respondent and driven by an employee, one Fernand Daigle.

The Superior Court maintained appellant's action to the extent of $13,296.91, being 75 per cent. of $17,729.21, established as being the amount of the damages sustained by appellant, held that the accident in which appellant was injured was caused by the fault of Daigle and that the latter was in the performance of the work for which he was employed by respondent within the meaning of art. 1054 C.C. so as to engage the vicarious responsibility of respondent.

There is no doubt that the accident was due to the negligence of Daigle, the facts are fully recited in the judgments of the Courts below and I need refer to them only briefly.

Appellant and Daigle both testified, the latter on discovery and the former at the trial. From their evidence it appears that the appellant, on the invitation of Daigle, an

(1) [1956] Que. Q.B. 83.

old friend of Army days, entered the latter's taxicab and the two then repaired immediately to the nearest tavern where they proceeded to refresh themselves with at least one bottle of beer apiece, paid for by appellant. They then embarked upon an extensive tour of the city of Montreal, a tour which the learned trial judge characterized by such terms as "fameuse course", "fantastique et extraordinaire". During the course of this tour they visited at least one more tavern where they partook of further alcoholic refreshment, again at appellant's expense, and were found by both Courts below to have been in a state of intoxication at the time of the accident.

There is some evidence that a part of the trip was to enable appellant to visit the office of his employer and to look for a customer whom appellant admitted he had never met or spoken to and whom they were unable to find. The meter on the taxicab was not operating during the tour but appellant testified that at some time during the evening he made an arrangement with Daigle to pay him at the rate of $4 an hour for the time spent on the trip while Daigle's version is that appellant was to pay him $3 to $4 for the evening.

On this evidence, the learned trial judge held that Daigle was in the performance of the work for which he was employed but this finding has been unanimously reversed by the Court of Queen's Bench (1), which held that the trip in question was in the nature of a joy ride and that at the time of the accident

> le conducteur du taxi ne conduisait pas dans l'intérêt de son patron mais pour se réjouir durant quelques heures en compagnie de l'intimé, en absorbant de la boisson qui devait augmenter l'agrément.

It is a truism, of course, to state that when a case is tried under the system known in Quebec as "enquête and merits", the trial judge, who acts as both judge and jury, speaks with preponderating authority when he determines the weight to be given to contradictory testimony: see *Montreal Tramways Company v. Sofio* (2). While there are some inconsistencies as between the evidence of appellant and that of Daigle there is little direct conflict. There is some conflict as to the degree of intoxication and as to the arrangements for payment, but the trial judge accepted the

(1) [1956] Que. Q.B. 83 (2) (1921), 27 R.L.N.S. 284 at 288.

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evidence of Daigle as to intoxication in preference to that of appellant. Presumably, therefore, he was not ready to accept the evidence of the latter without some reservations.

The validity of appellant's claim depends upon an inference of fact to be drawn from all the facts proved and the application to it of a legal principle. On this inference of fact the learned judges of the Court of Appeal have differed from the learned trial judge, as they were entitled to do. The position of this Court in such circumstances was clearly stated by Taschereau J., as he then was, when in rendering the unanimous judgment of the Court in *Demers v. The Montreal Steam Laundry Company* (1), he said at p. 538:

> . . . it is settled law upon which we have often acted here, that where a judgment upon facts has been rendered by a court of first instance, and a first court of appeal has reversed that judgment, a second court of appeal should interfere with the judgment on the first appeal, only if clearly satisfied that it is erroneous; *Symington v. Symington* L.R. 2 H.L. Sc. 415.

The appellant has failed to satisfy me that the judgment of the Court below is erroneous. On the contrary, I am in agreement with the view expressed by the learned judges of the Court of Queen's Bench that the judgment of the Superior Court cannot be supported.

The appeal should be dismissed with costs.

RAND J.:—I agree that this appeal should be dismissed. Several of the significant items of the story which, as presented, were suspect, could and should, if true, have been supported by more or less independent corroboration. In its absence the Court of Appeal (2) was justified in drawing the conclusion it did, that the case was one of the reunion of two comrades-in-arms and not an engagement of carriage by one of them on behalf of his employer.

LOCKE J.:—In my opinion, this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: Lomer Racicot, Montreal.

Solicitors for the plaintiff, respondent: McMichael, Common, Howard, Case, Ogilvy & Bishop, Montreal.

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(1) (1897), 27 S.C.R. 537. (2) [1956] Que. Q.B. 83.