BANQUE CANADIENNE NATIONALE (*Defendant*) ..... APPELLANT;

1961

*May 18, 19
Oct. 3

AND

DONATO MASTRACCHIO (*Plaintiff*) ...RESPONDENT.

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

Contracts—Disappearance of money from safe deposit box—Bank's contractual liability—Whether failure to take ordinary precautions—Master key used by unauthorized person—Burden of proof—Evidence—Civil Code, arts. 1018, 1242—Code of Civil Procedure, art. 312.

For a number of years the plaintiff, through a prête-nom, had a safety deposit box in one of the defendant's branches in Montreal. Clause 7 of the agreement provided that the bank's liability was limited to taking ordinary precautions to prevent the opening of the box save by the plaintiff or his agent; and that the total or partial loss of the contents of the box did not constitute a presumption that the box had been opened by a person other than the plaintiff or his agent. The master key in the possession of the bank and one of the duplicate keys in the possession of the plaintiff were required to open the box.

In January 1956, the plaintiff placed in the box a total of $12,750 in Canadian and American currency. When he opened the box again some two weeks later, this amount was missing. The plaintiff claimed that the bank's employees had not taken sufficient care or precaution. The bank pleaded that it was only obliged to take ordinary precautions to prevent the box from being opened by a person other than the plaintiff or his agent. The trial judge maintained the action, and this judgment was affirmed by a majority in the Court of Appeal. The bank appealed to this Court.

Held (Taschereau J. dissenting): The appeal should be dismissed.

Per Kerwin C.J.: The plaintiff's evidence that he had put the money in the box and that it had disappeared was believed by the trial judge and the majority in the Court of Appeal. There was no reason to disturb their findings in view of the evidence of carelessness on the part of the bank.

Per Fauteux, Abbott and Martland JJ.: The evidence went beyond the mere proof of the disappearance or loss of the contents of the safety deposit box. It established not only the occurrence of that loss, but also the fact that the plaintiff had not, nor any person authorized by him, removed those contents and thus that the money had been removed by an unauthorized person. The evidence also established that there had been specific instances of failure by the defendant to exercise ordinary precautions to prevent the opening of the box by an unauthorized person and that one of these failures might have contributed to the opening of the box by an unauthorized person. Clause 7 did not go so far as to require the plaintiff to prove by other evidence that an unauthorized person had gained access to the box. The plaintiff

*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Abbott and Martland JJ.

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had made out a *prima facie* case. The defendant had failed to discharge the burden of showing that on the balance of probabilities none of these breaches of its duty had caused the loss.

Per Taschereau J., *dissenting*: This was not a contract of deposit, but one of ordinary lease. There was no presumption against the defendant, either under the civil law or the contract. The burden was on the plaintiff to establish that the defendant had not taken the ordinary precautions to prevent the opening of the box by an unauthorized person and that the consequence of that negligence, if it existed, was the loss for which he was claiming. The plaintiff had failed to establish by a balance of probabilities that the defendant was responsible.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Prévost J. Appeal dismissed, Taschereau J. dissenting.

C. A. Geoffrion, Q.C., A. Gerin-Lajoie, Q.C., and *Hazen Hansard, Q.C.,* for the defendant, appellant.

M. G. Robitaille, Q.C., for the plaintiff, respondent.

THE CHIEF JUSTICE:—I agree that it is necessary first to construe the "bail de coffret de sureté" and that the important clause is no. 7. The first sentence limits the responsibility of the bank to take the ordinary precautions to prevent the opening of the safety deposit box by a person other than the respondent or his "fondé de pouvoir". The second sentence reads as follows:

> La disparition ou la perte totale ou partielle des objects et valeurs déposés dans la coffret ne constitue pas une présomption que le coffret a été ouvert par une autre personne que le sous-signé ou son fondé de pouvoir.

It is quite true that the box cannot be opened without one of the two keys given by the bank to Miss Sawka as "prête-nom" of the respondent and which, according to his testimony, had been in his possession continuously. However, on the other hand, the box could not be opened without the master key retained by the bank.

The evidence shows that the bank throughout was very careless. Although at the conclusion of the period for which one rents the box the lock is supposed to be changed before renting it to another, that was not done in the case of the respondent with respect to the box in question. The previous rentor testified that he had kept the keys while he had rented the box and returned the keys to the bank upon giving it up, but in not one instance with relation to the

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particular box was the respondent required to sign the list of "authorized signatures" when he used the box, and we were told by counsel for the appellant that this occurred with reference to about five per cent of all the boxes. Again the rules and instructions to the bank employees provide that the "locataire" of a box or his representative is never to have access alone in the vault; someone should accompany each such person. Contrary to these instructions, to quote the appellant's factum, "it was also shown that visitors to the safety deposit boxes at the branch in question were occasionally left alone in the vault".

The respondent testified that he had put the money in the box on January 5, 1956, and that when he returned and opened the box on January 17, 1956, the money was gone. The trial judge believed the respondent and I am unable to read his reasons as indicating that he merely did so because he felt that otherwise he would be in effect declaring that the respondent was a perjurer. The trial judge referred to the peculiar circumstances but I can read his reasons in no other way than that, notwithstanding these circumstances and in view of all the evidence, he believed the testimony of the respondent. The majority of the Court of Appeal agreed with him and I can see no reason to disturb their findings in view of all the circumstances set out above.

The appeal should be dismissed with costs.

TASCHEREAU J. (*dissenting*):—Depuis de nombreuses années, le demandeur-intimé est un client de la Banque Canadienne Nationale, où il a gardé un dépôt d'épargnes substantiel à la succursale rue Ste-Catherine 334 est, Montréal. En octobre 1949, mademoiselle Anna Sawka loua de la Banque un coffret de sûreté, et signa le bail habituel qu'on lui présenta. Il n'est pas contesté que la Banque-appelante savait que cette demoiselle représentait bien l'intimé dans la présente cause, et qu'elle agissait en son nom. Il est arrivé qu'au début de l'année 1956 une somme de $12,750 disparut de ce coffret, et l'intimé, alléguant la négligence de la Banque, l'a poursuivie devant les tribunaux. L'honorable Juge Prévost de la Cour Supérieure a

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maintenu cette action, et la Cour du Banc de la Reine[1], MM. les Juges Pratte et Choquette dissidents, a confirmé ce jugement.

Mon collègue M. le Juge Martland a récité tous les faits essentiels de cette cause et il me semble inutile d'y revenir. Je veux cependant insister sur les faits suivants qui me semblent être les points déterminants de cette cause.

Il ne s'agit sûrement pas entre l'appelante et l'intimé d'un contrat de dépôt et l'on ne peut, en conséquence, trouver dans l'entente intervenue les caractéristiques des obligations du dépositaire, qui sont essentiellement *de conserver la chose,* et de la rendre à première réquisition. Il s'agit plutôt, à mon sens, d'un louage ordinaire où la Banque, moyennant un prix stipulé, a mis un coffret à la disposition de l'intimé. Ce dernier en avait la clé et la Banque conservait la clé maîtresse, de sorte qu'il fallait le concours des deux pour en pratiquer l'ouverture. Mais il est clair que ce n'est seulement qu'à la réquisition du locataire que le coffret pouvait être ouvert. Lui seul en contrôlait l'accès. Seul il pouvait exiger que la Banque participât à l'ouverture, et la Banque ne pouvait exercer une pareille autorité.

Dans le bail intervenu, on y lit la clause suivante:

> 7°. La responsabilité de la banque en vertu du présent bail est limitée à l'obligation pour celle-ci de prendre les précautions ordinaires pour empêcher l'ouverture de ce coffret par une personne autre que le sousigné ou son fondé de pouvoir. La disparition ou la perte totale ou partielle des objets ou valeurs déposés dans le coffret ne constitue pas une présomption que le coffret a été ouvert par une autre personne que le soussigné ou son fondé de pouvoir.

Que l'on invoque la loi civile de la province, ou le contrat qui est la loi des parties, aucune présomption n'existe contre la Banque. C'est au demandeur-intimé à prouver que la Banque n'a pas pris des précautions ordinaires pour empêcher l'ouverture du coffret, et à établir que comme conséquence de cette négligence, si elle existe, il a subi la perte pour laquelle il réclame.

La preuve révèle que le 5 janvier 1956, Fortin employé de la Banque qui connaissait bien l'intimé, et en possession de la clé maîtresse, a ouvert le coffret à la demande de Mastracchio, qui avait aussi sa propre clé. Il est établi qu'il y avait dans le coffret $12,750 qui furent en partie comptés par Fortin à la réquisition de l'intimé. Pendant quelques

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minutes, Fortin n'a pas observé tous les mouvements de l'intimé, mais a constaté qu'il a «joué» dans son coffret. Celui-ci a été ensuite fermé à clé par l'intimé et par Fortin. Il est aussi en preuve que le 17 janvier, soit douze jours plus tard, quand l'intimé est revenu à la Banque et a ouvert son coffret, l'argent était disparu. Personne ne sait où il est allé. Mais l'on sait également que dans l'intervalle, soit entre le 5 janvier et le 17 du même mois, l'intimé, qui seul avait en sa possession la clé qui permettait l'ouverture de ce coffret, n'est pas venu à la Banque, et que les préposés de l'appelante qui contrôlaient la clé maîtresse n'ont pas participé à son ouverture. A part cette clé maîtresse, toujours en possession de la Banque, il n'en existe que deux et c'est l'intimé qui les gardait toujours dans sa poche, et il jure qu'il ne s'en est pas départi.

La détermination de cette cause va donc dépendre de l'interprétation de la preuve, et il est impossible de se baser sur des hypothèses pour prouver où résulte la responsabilité. Il faut exclure les conjectures et les possibilités, car la loi interdit de pareilles spéculations pour faire reposer une conclusion juridique. Les droits des parties à un litige, en matière civile, doivent être jugés suivant la balance des probabilités, et il faut également examiner si le demandeur-intimé qui avait évidemment le fardeau de prouver la négligence de l'appelante, a démontré la responsabilité de celle-ci.

Je crois que l'intimé n'a pas réussi à établir sa cause. Pour conclure que l'appelante a manqué à ses obligations, il faudrait supposer qu'un employé de la Banque avait une clé semblable à celle de l'intimé, que la serrure a été forcée avec la connivence de la Banque, qu'une nouvelle clé a été fabriquée avec un modèle en cire, ou enfin qu'un tiers a volé la clé de l'intimé et a trompé la vigilance des employés négligents de la Banque. Mais aucune réalité ne correspond à ces hypothèses, à ces possibilités qui ne sont appuyées sur aucun élément de preuve. Au contraire, l'intimé se charge de nous dire qu'il a toujours eu ses deux clés en sa possession, et il est établi hors de tout doute qu'il n'en existe que deux. Les employés de la Banque jurent également que l'on ne s'est pas servi de la clé maîtresse pour ouvrir ce coffret.

Non seulement je crois que la demandeur-intimé n'a pas prouvé les allégations de sa demande, mais je trouve étrange certains aspects de sa conduite, qui sans être conclusifs,

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n'aident pas à faire pencher en sa faveur la balance des probabilités, et qui font planer dans mon esprit des doutes très sérieux. Je m'explique difficilement, en effet, que cet homme qui est un parieur reconnu aux courses et aux jeux de hasard de Las Vegas, prenne la peine, malgré que cela soit déjà arrivé, de faire compter par l'employé Fortin le 5 janvier en question le montant d'argent qu'il avait dans son coffret, et particulièrement la somme qu'il avait en devises américaines et dont il avait sans doute besoin pour son voyage projeté dans le Nevada. Je trouve également suspect qu'il ait été le dernier à "jouer" dans son coffret alors que l'attention de Fortin était attirée ailleurs momentanément, et qu'une fois le coffret fermé il ait gardé les clés en sa possession durant quinze jours. Il a été le dernier à avoir accès à ce coffret, et rien ne peut justifier de penser, à moins d'entrer dans la sphère des conjectures, qu'il ait été ouvert par qui que ce soit. Je m'obstine à croire que l'on ne peut pas dire que les probabilités nous entraînent à conclure à la négligence de l'appelante.

La négligence que l'on reproche à la Banque c'est que presque toujours l'intimé ne signait pas le livre constatant ses visites à son coffret. Ceci est exigé par les règlements de la Banque et, apparemment, il est arrivé qu'ils n'ont pas été suivis, et la raison donnée, c'est que l'intimé était bien connu des employés de la Banque. On savait qu'il était locataire du coffret et qu'il était seul porteur des clés qui y donnaient accès. L'obligation d'exiger la signature du client est une question de régie interne destinée à la protection de la Banque qui a intérêt à surveiller qui a accès aux coffrets. Souvent, les corporations ou les sociétés imposent à leurs employés des règlements de régie interne qui ne peuvent augmenter ou diminuer les droits des tiers. Ces droits ne se créent pas plus qu'ils ne se perdent comme résultat de conventions intervenues *inter alios*. Un employeur peut sûrement exiger de son employé un standard de prudence beaucoup plus élevé que ne l'exigent les règles normales de la responsabilité. Mais la violation de ces règles imposées ne peut bénéficier aux tiers.

A tout événement, dans le cas qui nous occupe, que l'absence de signature dans les registres soit ou non une négligence, il n'existe aucune relation entre cette faute alléguée et la disparition des argents du coffret. Il n'y a pas

là de cause à effet. En effet, du 5 au 17 janvier, l'intimé ne pouvait pas signer car il jure qu'il n'est pas allé à la Banque. Sans doute, la situation eut été différente si un tiers, inconnu des employés, en possession des clés de l'intimé, et sans être porteur d'un procuration, eut voulu avoir accès au coffret en question. On lui aurait évidemment refusé l'accès. Mais ici, cette situation ne se présente pas. Il a été établi que personne n'est venu à la Banque pour obtenir l'ouverture du coffret, et l'absence de signature me paraît immatérielle, car la vigilance de la Banque a été autrement prouvée. Aucun des employés durant la période en question n'a été requis de se servir de la clé maîtresse, et aucun preuve ne démontre ce fait essentiel.

D'accord avec MM. les Juges Pratte et Choquette de la Cour du Banc de la Reine, je suis d'opinion que le demandeur-intimé qui avait le fardeau de la preuve, n'a pas prouvé sa réclamation et qu'il n'a pas démontré la responsabilité de la Banque.

Je maintiendrais l'appel et rejetterais l'action avec dépens de toutes les Cours.

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

MARTLAND J.:—By agreement entitled "Bail de Coffret de Sûreté" dated October 28, 1949, one Miss Anne Sawka, acting, to the knowledge of the appellant, as *prête-nom* of the respondent, leased from the appellant safety deposit box no. 544 in the vaults of the appellant's branch situated at 334 Ste. Catherine Street East, Montreal. Clause 7 of that agreement provided as follows:

> 7. La responsabilité de la banque en vertu du présent bail est limitée à l'obligation pour celle-ci de prendre les précautions ordinaires pour empêcher l'ouverture de ce coffret par une autre personne que le soussigné ou son fondé de pouvoir. La disparition ou la perte totale ou partielle des objets et valeurs déposés dans le coffret ne constitue pas une présomption que le coffret a été ouvert par une autre personne que le soussigné ou son fondé de pouvoir.

The respondent was well known at this branch of the appellant. He had kept an account there for many years and had had, for over two years, to his credit in his savings account, the sum of $50,000, from which there had been no withdrawals. To the knowledge of the appellant, he used to keep substantial sums of money in this safety deposit

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box. It was of the usual type, the evidence showing that it had a double lock, the first part of which could only be opened by a master key, which remained in the possession of the bank, and the second by a key which was delivered in duplicate to the respondent at the time of execution of the agreement and of which no copy remained in the possession of the bank. In order to gain access to the box, the master key had first to be inserted in the lock and the first portion thereof unlocked, then the respondent would insert one of his keys, turn it in the lock and open the box.

The evidence shows that on January 5, 1956, the respondent came to the bank and requested an employee of the appellant, one Donat Fortin, with whom he had become friendly and who had already performed similar services for the respondent in the past, to change into new bills a sum of $3,000 in old bills which the respondent had with him.

After having done this, Fortin, after securing the master key, accompanied the respondent to his safety deposit box and with him opened the box. Upon opening the box, the respondent removed therefrom some American currency which he requested Fortin to count. Fortin counted the currency which amounted to $5,500 and returned it to the respondent.

Thereupon the respondent busied himself with the box for some three or four minutes while Fortin remained close at hand.

The respondent testified that when he visited his box on January 5, 1956, he had in it $9,750 in U.S. and Canadian currency and that he deposited therein the $3,000 in new bills which he had obtained from Fortin in exchange for his old bills and then closed the box. The explanation given as to why the respondent asked Fortin to count the U.S. currency in his box is that he wished to know how much he had for travelling; this was not the first time that Fortin had counted money at the request of the respondent.

The respondent did not visit the bank again until January 17, 1956, on which date, accompanied by Fortin, he opened the safety deposit box when, except for some stock certificates and a ring, it was found to be empty. Fortin stated that he had been much surprised that the money was no longer there. There was no indication that anyone had forced open the box or made any attempt to this end.

The respondent alleged and proved various particulars of failure by the appellant to exercise ordinary precautions to prevent the opening of the safety deposit box by an unauthorized person. The appellant itself had given certain instructions to its employees and had established standards of practice for safeguarding the safety deposit boxes, which were not observed. The following are examples of this:

It was shown that the employees of the appellant's branch, in certain cases, did not require a person to sign the register, showing the date and time of his visit, if he was well known to them. As a matter of fact, the respondent himself never signed with respect to his safety deposit box no. 544.

Although the appellant purported to find "des locataires désirables", no particular investigation was made prior to leasing a safety deposit box to any person.

Visitors to the safety deposit boxes at the branch in question were occasionally left alone and unsupervised in the vault.

The lock on the respondent's safety deposit box no. 544 was not changed in 1949 when it was first leased to him. The reason given by the appellant was that the previous lessee had terminated his lease only three days before and there had not been time to change the lock. The former lessee said that when he gave up his lease he had to return both keys to the box, in his possession, to the bank. During the time he had held the box, these keys had not left his possession nor had duplicates thereof been made.

The master key of the appellant was not kept securely in safe custody, but was left in an unlocked desk drawer. Some ten to twelve employees of the appellant had access to it.

The appellant relies upon clause 7 of the agreement as an answer to the respondent's claim. By the terms of that clause the appellant's liability, under its agreement with the respondent, is limited to taking ordinary precautions to prevent the opening of the safety deposit box save by the respondent or his agent. The second portion of the clause provides that the total or partial loss of the contents of the box shall not constitute a presumption that the box was opened by a person other than the respondent or his agent.

I will deal with the latter portion of this clause first.

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The respondent has testified as to having left a certain sum of money in the box on January 5, 1956; that he did not return to the bank again until January 17; and that during that interval he had kept his safety deposit box keys in his own possession at all times. He stated, without contradiction, that he had not authorized anyone else to open the box on his behalf and that on the latter date, when he opened the box, the money had disappeared. By virtue of clause 7, the disappearance of the money, without other evidence, did not create a presumption that the box had been opened by someone other than the respondent or his agent. But the fact of the disappearance does create an inference that the box had been opened by someone. It is, then, established, by affirmative evidence, not only that the loss occurred from the box, but also that the box could not have been opened by the respondent or by any agent of his at the time the money was removed from it. Furthermore, in view of the absence of evidence to show that the box had been forced open, it is clear that the appellant's master key must have been used by some unauthorized person. In the light of that evidence, apart from any presumption, there is no other conclusion but that the box must have been opened by an unauthorized person.

The appellant sought to cast doubt upon the respondent's evidence, and to suggest that he had, himself, removed the money from the safety deposit box, by alleging that the respondent was a gambler, that his action in having some of the money counted by Fortin was a suspicious circumstance and that the respondent alone had been handling the contents of the box on January 5 after Fortin had counted the money and before the box was closed. As to the respondent being a gambler, the evidence was that the respondent had told Fortin on January 5 that he was going to Las Vegas "pour jouer". Fortin's evidence was that this was not the first occasion when he had been asked by the respondent to count money which the respondent had in his safety deposit box. It is not disputed that the respondent was handling the contents of the box after Fortin had counted the money and before the box was closed.

As against this evidence, which, in my opinion, falls very far short of establishing that the respondent was not, as every one is presumed to be, an honest person, is the evidence, previously mentioned, of the respondent's long

association with the appellant's branch and of the fact that he had kept a large sum of money on deposit in his savings account. The respondent's evidence was accepted by the learned trial judge and by the majority of the Court of Queen's Bench[1] and I see no reason for disturbing their conclusion.

The appellant contends that by virtue of clause 7 no inference of any kind whatever can be drawn from the loss of contents of the box. In other words, the respondent must prove by other evidence that an unauthorized person has gained access to his safety deposit box. In my opinion, the wording of the clause does not go that far. Furthermore, so to construe this portion of the clause would be to render the obligation of the appellant, defined in the first portion of the clause, virtually nugatory. Both portions of the clause must be considered together (Art. 1018 of the *Civil Code*). The second portion of the clause should not, if there is any doubt as to its meaning, be construed so as to have such an effect.

I now turn to the first part of the clause, which defines the appellant's liability. It has been established in evidence that the appellant did fail in various respects to take ordinary precautions to prevent an unauthorized person from opening the box. The appellant contends, however, that this is not sufficient in itself. It is argued that the respondent must go further and establish affirmatively that some one or more of the alleged defaults actually resulted in the opening of the box by an unauthorized person.

If this is so, obviously an almost impossible burden is placed on the respondent. But is this contention justified? The respondent has proved that his safety deposit box was opened by an unauthorized person. He has proved loss as a consequence and he has proved specific instances of failure on the part of the appellant to exercise ordinary care, one of which, at least, might have contributed to the opening of the box by an unauthorized person. In my view, a *prima facie* case has been made which the appellant had to meet. The appellant had to show that, on the balance of probabilities, none of these breaches of its duty would have caused the actual loss. In my opinion that burden has not been discharged. It is only necessary to consider one instance of the

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appellant's breach of its obligation. The evidence shows that the box was not opened by force. Consequently it must have been unlocked. It could not have been unlocked without the improper use, by someone, of the appellant's master key, either to open the box, or in order to have a duplicate made for that purpose. If that key had been properly safeguarded, it is unlikely that it could have been used for such a purpose. The evidence, however, is clear that the master key was not properly safeguarded. No adequate system was provided to prevent its improper use. This being so, I do not see how it can be contended, successfully, that this breach of its duty could not have been a cause contributing to the respondent's loss.

In summary, therefore, my conclusion is that the evidence in this case went beyond the mere proof of the disappearance or loss of the contents of the safety deposit box. It established, not only the occurrence of that loss, but also the fact that the respondent had not, nor had any person authorized by him, removed those contents and thus that the money had been removed by an unauthorized person. The evidence also established that there had been a failure by the appellant to exercise ordinary precautions to prevent the opening of the box by an unauthorized person and that such failure could have caused the loss which was sustained by the respondent. That being so, my opinion is that the decision of the learned trial judge and that of the Court of Queen's Bench was correct and, consequently, this appeal should be dismissed with costs.

Appeal dismissed with costs, TASCHEREAU J. *dissenting.*

Attorneys for the defendant, appellant: Gerin-Lajoie & Laprade, Montreal.

Attorneys for the plaintiff, respondent: Robitaille, Fabien & Dansereau, Montreal.