Supreme Court of Canada
Komnick System Sandstone Brick Machinery Co. v. B.C. Pressed Brick Co, (1918) 56 S.C.R. 539
Date: 1918-05-14

The Komnick System Sandstone Brick Machinery Company *(Plaintiff) Appellant;*

and

The B.C. Pressed Brick Company *(Defendant) Respondent.*

1918: May 8; 1918: May 14.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Statute—Construction—Legislation declared ultra vires—Amendment granting right to "maintain anew" action—Jurisdiction—"Supreme Court Act," section 2 par.(e).

An action brought by the appellant was dismissed by the trial court upon the merits and by the Court of Appeal for British Columbia on the ground that the appellant, being an unlicensed extra provincial company, had been prohibited by the "Companies Act" of 1897 from making the contract sued upon. Later on this legislation was held by the Judicial Committee of the Privy Council to be *ultra vires* of the provincial legislature. The "Companies Act" was subsequently amended by enacting the following provision:—

"Where an action, suit, or other proceeding has been dismissed or otherwise decided against an extra-provincial company on the ground that any act or transaction of such company was invalid or prohibited, by reason of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered as required by this Act and upon such terms as to costs as the court may order, maintain anew such action, suit, or other proceeding as if no judgment had therein been rendered or entered."

Held, that the appellant was not obliged to bring an action *de novo,* but had the right to ask for a re-instatement or revivor of the dismissed action at the stage at which it was when the judgment based upon the statute subsequently held *ultra vires* was pronounced.

The judgment appealed from holding that the action must be begun *de novo* is a final judgment within the meaning of par. (e) of section 2 of the "Supreme Court Act."

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APPEAL from the judgment of the Court of Appeal for British Columbia[1], maintaining the judgment of Clement J. at the trial, by which the plaintiff's action was dismissed with costs.

The material facts of the case and the issues raised in the present appeal are fully stated in the above head-note and in the judgments now reported.

H. J. Scott, K.C. for the appellant.

Chrysler K.C. for the respondent.

THE CHIEF JUSTICE:—The appellants brought suit which after trial was, on the 22nd of March, 1911, dismissed upon the merits. An appeal from the judgment was dismissed not on the merits but on the ground that the transaction in respect of which the action was based was invalid by reason of the plaintiff not having been licensed pursuant to the "Companies Act" then in force.

The "Companies Act Amendment Act" 1917 (7 &8Geo. v., ch. 10) repeals sections 168 and 169 of the "Companies Act" (R.S.B.C. 1911, ch. 39) and substitutes a provision therefor as sec. 168. Subsection 3 of the said substituted section is as follows:—

> Where an action, suit or other proceeding has been dismissed or otherwise decided against an extra-provincial company on the ground that any act or transaction of such company was invalid or prohibited by reason of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered as required by this Act, and upon such terms as to costs as the Court may order, maintain anew such action, suit or other proceeding as'if no judgment had therein been rendered or entered.

The marginal note is "remedial provision."

The form of the legislation would seem rather unfortunate. The sub-section does not appear to be properly placed in the "Companies Act" for it cannot

[1] 17 B.C.R. 454; 8 D.L.R. 859.

be read without reference to the Act by which it was passed. No doubt the intention is that any suit decided prior to the Act of 1917 can be maintained anew and presumably only suits so previously decided.

It is unnecessary to refer to the circumstances. which led to the passing of this remedial provision, it is sufficient to say that they are such as to render it incumbent on the court to afford every possible relief that the terms made use of will admit in favour of those litigants for whose benefit it was passed and this in accordance with the intention of the legislature which cannot be doubted.

Now this was a motion to the Court of Appeal

> for an order that the appeal herein, for which notice was given on the 17th day of June, 1911, be entered for rehearing as if no judgment had been rendered or entered herein.

The Court of Appeal dismissed the motion on the ground that it had no jurisdiction to make the order sought. That

> to maintain anew in these circumstances means to bring and maintain, that is to say, an action *de novo.*

The question therefore, is, whether the Court of Appeal is right in holding that the statute cannot be construed so as to enable the appellants to take up and continue their action at the point when the court decided that their action could not be maintained by reason of their not having been licensed as if such judgment had not been rendered.

I think the position is the same as if the appeal had not yet come on for hearing, and that I think is certainly in accordance with the intention of the Act.

It is not to be expected in such a special case that we can find any guidance in the rules or in authority. We have nothing but the obvious intention of the statute to assist in construing the terms made use of.

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It would have been difficult to provide for every possible case, impossible perhaps to foresee a suit left in such a position as this. Now the Court of Appeal has said

> that to maintain anew in these circumstances means to start the action all over again

and it is precisely in the words

> in these circumstances

that the error in the decision is to be found. Even if it be conceded that under some circumstances the words

> to maintain anew

might bear the meaning put upon them by the Court of Appeal, I do not think they can or ought to be so interpreted in the actual circumstances.

I think the provision for maintaining

> anew such action, suit or other proceeding as if no judgment had therein been rendered or entered

may very properly be held to mean that the Court of Appeal should hear the appeal as if its previous decision had never been rendered and I certainly think that this will be only giving effect to the intention of the legislature in enacting the measure of relief to those who suffered hardship through the mistaken view of the law then held.

DAVIES J.—My impression at the close of the argument in this case and of the motion to quash for want of jurisdiction was that the motion should be dismissed, the appeal allowed and the case remitted back to be heard on the merits, with costs on the motion and in the appeal. Further consideration has satisfied me that my impression was right.

On the question of our jurisdiction to hear the

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appeal, I am of the opinion that there was alike finality in the judgment appealed from and also that a substantial right on plaintiff's part to continue the present action was adversely determined upon.

On the merits, I am of the opinion that subsec. 3 of sec. 2 of the "Companies Act" should not be construed as giving the unlicensed company whose action had been dismissed on that ground simply a right to begin another action after it had become licensed but a right to maintain or continue the dismissed action at and from the stage at which it was when dismissed. I construe the words maintain anew, as used in that sub-section, as meaning continue anew.

The result would be the same as if this court had on appeal reversed the judgment dismissing the action.

I would therefore refer the case back to the Supreme Court for hearing on the merits.

IDINGTON J.—There are two appeals; both and motions to quash each of them herein were argued together.

The respondent has moved to quash these appeals and relies upon the decision in *Saint John Lumber Co. v. Roy*[2] wherein it was held that an order allowing the service of a writ out of the jurisdiction of the court could not become the subject of an appeal to this court.

Inasmuch as the only question there was of the forum before which the parties were held bound to appear and submit to its jurisdiction, and these appeals in the last analysis involve only the question of forum, the point seems well taken if that decision is to be held binding.

However, those who decided that case are agreed

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it does not govern and I am content; especially because in each case there was, in my opinion, a substantial right in controversy in the action involved in the appeal. I do not think there should be any costs of the motions.

The British Columbia Legislature has passed a rather drastic licensing Act relative to foreign corporations doing business in that province and thereby attempted to deprive those failing to comply therewith of all rights to contract or sue upon contract made there in the British Columbia courts. This legislation was held by the Judicial Committee of the Privy Council to be *ultra vires* the legislature. Meantime an action had been tried and on the merits dismissed by the learned trial judge who declined to rely upon the said statute. Upon appeal to the Court of Appeal that court relied upon the said statute and dismissed the appeal. To rectify the possible wrongs done a suitor in cases wherein effect had been given to the said *ultra vires* statute the legislature in 1917, by the "Companies Act," ch. 10, sec. 2, repealed the said statute and re-enacted by

[2] 53 Can. S.C.R. 310; 29 D.L.R. 12.

section 168 thereof new licensing provisions applicable to companies, and amongst other things in the said section subsection 3 enacts as follows:—

> Where an action, suit or other proceeding has been dismissed or otherwise decided against an extra-provincial company, on the ground that any act or transaction of such company was invalid or prohibited, by reason of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered, as required by this Act, and upon such terms as to costs as the court may order, maintain anew such action, suit or other proceeding as if no judgment had therein been rendered or entered.

The neat point involved in each of these appeals is whether or not any suitor desiring to take advantage of the relief thus provided must do so by bringing a new action. The Court of Appeal has so held. It

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might be possible, following the refining and technical means of interpretation of the section which has been so adopted, to maintain that view. I prefer, instead of such critical way of approaching the interpretation and construction of such a statute, to have due regard to the rules laid down for construing an enactment by the Barons of the Exchequer in *Heydon's Case*[3] which rules can be found either in Maxwell on Statutes or Hardcastle on Statutory Law, as follows:—

> For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered. (1) What was the common law before the making of the Act. (2) What was the mischief or defect for which the common law did not provide. (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. (4) The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtile inventions and evasions for the continuance of the mischief and *pro privato commodo,* and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico.*

[3] 3 Coke 7b.

I venture once more to quote these rules as the most cogent and concise argument in answer to the reasons in support of the appeal. I am clearly of the opinion that the appeal ought to be allowed with costs and the appellant permitted to renew or revive its motion for appeal before the Court of Appeal and have its case heard upon the merits.

ANGLIN J.—In *John Deere Plow Co., v. Wharton*[4], the Judicial Committee of the Privy Council held that:

> Part VI. (sections 139—173) of the "Companies Act" of British Columbia (R.S.B.C. 1911, ch. 39), which in effect provides that companies incorporated by the Dominion Parliament shall be licensed or registered under that Act as a condition of carrying on business in the province or maintaining proceedings in its courts, is * * * ultra vires the provincial legislature under the "British North America Act," 1867.

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In 1917 (ch. 10) the legislature repealed secs. 168 and 169 of the "Companies Act" (R.S.B.C. 1911, ch. 39; sec. 123 of the "Companies Act," 1897, ch. 44) and substituted therefor the following:

> 168 (1) No unlicensed or unregistered company shall be capable:—
>
> (a) of maintaining any action, suit or other proceedings in any court of the province in respect of any contract made in whole, or in part, within the province, in the course of, or in connection with, its business; or,
>
> (b) of acquiring or holding land, or any interest therein, in the province, or registering any title thereto under the "Land Registry Act."
>
> (2) Where an extra-provincial company has heretofore become licensed or registered under this, or any former Companies Act, or becomes licensed or registered under this Act, or a licence or certificate of registration of any such company is suspended, revoked or cancelled, and is subsequently restored or reinstated, the provisions of the foregoing subsection and any prohibition having a like effect formerly in force, shall be read and construed as if no disability thereunder had ever attached to the company, notwithstanding

[4] [1915] A.C. 330; 18 D.L.R. 353.

that any such contract was made or proceeding in respect thereof instituted, or any land or interest therein acquired or held, before the first day of July, 1910.

(3) Where an action, suit or other proceeding has been dismissed or otherwise decided against an extra-provincial company on the ground that any act or transaction of such company was invalid or prohibited by reason of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered as required by this Act and upon such terms as to costs as the Court may order, maintain anew such action, suit or other proceeding as if no judgment had therein been rendered or entered.

While the chief purpose of these amendments unquestionably was to meet the objections which had prevailed against the former legislation, there can be little room for doubt that subsection 3 was designed to undo as far as possbile whatever injustice had been sustained by extra-provincial corporations whose actions had been dismissed for non-compliance with the legislation which the Privy Council held to be invalid.

When these amendments were enacted the plaintiff company found itself in this position: This action brought by it in 1909, while still unlicensed, to recover

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the price of machinery furnished by it to the defendants had been dismissed at the trial in 1911 on the merits, the trial judge holding that the machinery did not fulfil the requirements of the contract under which it had been sold. On the 8th Nov., 1912, the Court of Appeal, by a majority of the judges, upheld the judgment dismissing the action, but on the ground that the plaintiff, as an unlicensed extra-provincial company, had been prohibited by the "Companies Act" of 1897 from making the contract sued upon and that its licence, obtained in September, 1909, after the commencement of this action, did not entitle it under an amendment of 1910 (ch. 7) further to maintain and prosecute it. Two of the four judges who constituted the court expressed views favourable to the appellants on the merits [5].

[5] 17 B.C.R. 454; 8 D.L.R. 859.

Conceiving itself entitled to prosecute its action under the legislation of 1917

> as if no judgment had therein been rendered or entered

dismissing it on the ground that its contract sued upon was invalid or prohibited by reason of the company not having been licensed or registered under the "Companies Act" of 1897 (ch. 44, sec. 123), in order to meet the requirements of the "War Relief Act" (1916, ch. 74) and the "War Relief Amendment Act" (1917, ch. 74), the plaintiff company applied for and obtained from Mr. Justice Gregory, on the 30th of October, 1917, an order declaratory of its rights to proceed with the action, notwithstanding the provisions of those statutes.

It then applied to the Court of Appeal upon motion

> for an order that the appeal herein, for which notice was given on the 17th day of June, A.D. 1911, be entered for hearing as if no judgment had been rendered or entered therein upon such terms as to costs as the

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> court may order, and for such further order and directions as to the court may deem fit.

This motion was dismissed on the 20th Nov., 1917, the court (Martin, Galliher and McPhillips JJ.A.) holding that the statute of 1897 did not entitle the plaintiff to prosecute the action which had been dismissed in 1911-12, but enabled it to bring and maintain a new action for the same cause of action.

> Maintain anew * * * means bring again.

It is from this order that appeal No. 1 is now brought to this court.

Meantime the defendants had appealed from the order of Mr. Justice Gregory. Adhering to the view that the action in which that order purported to be made had been finally dismissed in

1911-12 and was not resuscitated by the legislation of 1917, the Court of Appeal on the 22nd January, 1918, allowed this appeal and set aside Mr. Justice Gregory's order. This judgment forms the subject of appeal No. 2.

The respondent moves to quash both appeals on the ground that the judgments appealed from are not "final judgments" within the meaning of paragraph (e) of section 2 of the "Supreme Court Act," as enacted by 3 & 4 Geo. V. ch. 51, sec. 1. The motions and the appeals were heard together.

Both the judgments of the Court of Appeal determined that the plaintiff's action was at an end and negatived the right to maintain or prosecute it further. In my opinion that right is

> a substantive right in controversy in the action

which has been determined adversely to the plaintiff, within the definition of section 2 (e) of the "Supreme Court Act" I find it difficult to appreciate the argument that a judgment which holds that an action is at an end, with the result that it stands forever dismissed,

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is not a final judgment. Its finality seems to be so obvious that it scarcely brooks the aid of definition. The definition of "final judgment" now found in the "Supreme Court Act" was required to bring within that term judgments, which, though finally dispositive of substantive rights in controversy therein, did not terminate the actions or judicial proceedings in which they were rendered. *St. John Lumber Co. v. Roy*[6] It was not needed to meet the case of a judgment dismissing an action or declaring it to be finally disposed of and terminated.

[6] 29 D.L.R. 12; 53 Can. S.C.R. 310, at p. 319.

It was also urged that the orders appealed from were discretionary and dealt with mere matters of procedure and were therefore not appealable. I cannot understand how an order denying a claim of statutory right on the ground that, properly construed, the statute does not confer it can be said to be in any sense discretionary. Neither in my opinion is the matter disposed of by the orders one of procedure only. I regard it as one of substantive right—the right to maintain this action. The motions to quash, in my opinion, fail.

With deference, I am unable to agree in the construction placed by the Court of Appeal on subsec. 3 of sec. 168 of the "British Columbia Companies Act" as enacted in 1917. The word "maintain" is obviously equivocal. As Mr. Chrysler frankly admitted in the course of his able argument, it may mean either to bring or institute an action or proceeding or to continue or further prosecute an action or proceeding already commenced. It is, however, coupled in the statute with the word "anew," and, no doubt, not a little may be urged in support of the view that "maintain anew," if standing alone, would imply

> commence or begin afresh.

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But this phrase may not be segregated from its context without doing violence to a fundamental canon of construction. Not only does the word "such," which precedes the words

> action, suit or other proceeding,

clearly referring back as it does to the

> action, suit or proceeding

mentioned at the commencement of the subsection, indicate that it is the very action, suit or other proceeding which has been dismissed or otherwise adversely decided that the extra-provincial corporation is empowered to "maintain anew," but the concluding clause of the sentence,

> as if no judgment had *therein* been rendered or entered

would appear to put the matter beyond doubt. It is the action which has been dismissed *(such* action)—the action *wherein* the judgment, based

> on the ground that (the) act or transaction of (an extra-provincial) company was invalid or prohibited by reason of such company not having been licensed or registered * * * has been rendered or entered

that the company is authorized to maintain anew.

With great respect, I fear that the significance of the words of reference, "such" and "therein," must have escaped the attention of the learned appellate judges. I cannot conceive of a legislature employing the terms of subsection 3 to express the idea that a new action might be brought for the same cause of action as was involved in that which had been dismissed. The language used clearly points to a reinstatement or revivification of the dismissed action or proceeding

> as if no judgment had therein been rendered or entered,

i.e., at the stage at which the dismissed action was when the judgment based upon the statute subse-

quently held *ultra vires* was pronounced. Not only are two well-known rules of construction—one, known as "The Golden Rule," that

> in interpreting all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument,

and the other that

> remedial statutes should be construed liberally and so as to suppress the mischief and advance the remedy,

thus given due effect, but the apparent purpose of the legislation of 1917—to place extra-provincial corporations, as far as possible, in the same plight and position as if, in litigation to which they were parties, judgments based on the statute held to be invalid had never been pronounced—is best attained. The costs of the litigation incurred up to the date of the judgment that should not have been rendered are not thrown away, as they would be if a new action should be brought. Moreover, if obliged to bring new actions, many plaintiffs, who had suffered dismissals based on the statute held to be invalid, would find their causes of action barred by statutes of limitations. It is most probable that the legislature had this in view and therefore authorized the prosecution of the very action so dismissed rather than the institution of new proceedings, in which the remedy which the legislature meant to afford might prove illusory. By empowering the court to deal with the costs—

> upon such terms as to costs as the court may impose—

it has been made reasonably certain that no injustice to any party will ensue.

While the use of the terms

> as if no judgment had therein been rendered or entered

might at first blush lead one to think that it was meant that in every case the action should stand for judgment before the trial court, although it had, as here,

been there dismissed on the merits and not because of any lack of status of the plaintiff, further consideration of the subsection as a whole I think warrants the view that the only judgment with which it was intended to interfere was a judgment based on the ground that the failure of the company to obtain licence or registration was fatal to the validity of the act or transaction forming the subject matter of the suit. It follows that the appellant company was right in applying to the Court of Appeal to reinstate this action in that court as it stood before it pronounced its judgment on the 5th of Nov., 1912—the first judgment which based the dismissal of the action on the ground of the invalidity of the plaintiffs' contract by reason of its not having been licensed or registered.

Whether the Court of Appeal should hear further argument, whether it should allow any amendments, if sought, or the introduction of any further evidence are questions of practice and procedure which that court may more properly deal with. Pronouncing the order which, in our opinion, the Court of Appeal should have made, we merely direct that the action of the plaintiff company be reinstated in the Court of Appeal of British Columbia and be dealt with by that court as if its judgment of the 5th Nov., 1912, had *not* been rendered or entered—subject to such terms as to costs as it may see fit to direct or impose.

The appellant is entitled to its costs in this court, of the appeals and of the motions to quash and also to the costs of the appeal to the Court of Appeal from the order of Mr. Justice Gregory.

BRODEUR J.—I concur with my brother Anglin.

Appeal allowed with costs.
Solicitors for the appellant: McPhillips & Smith.
Solicitor for the respondent: D. G. Marshall.