

1930
*Oct. 13.
*Dec. 23.

BREWSTER TRANSPORT COMPANY, } APPELLANT;
LIMITED (PLAINTIFF)

AND

ROCKY MOUNTAIN TOURS AND }
TRANSPORT COMPANY, LIMITED, }
ROCKY MOUNTAIN ROYAL BLUE }
LINE MOTOR TOURS LIMITED, } RESPONDENTS.
JAMES I. McLEOD, WILLIAM }
WARREN, AND C. E. SIBBALD }
(DEFENDANTS)

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Trade name—Action by first user in territory to restrain use by business competitor in that territory—Extensive prior use in similar business by another in other territories—Equitable principles.

The action was to restrain defendants from using a certain trade name in connection with motor passenger transportation business in Alberta; the plaintiff claiming, as first user in the territory, an exclusive right to the name in that business in that territory.

Held (Cannon J. dissenting), that the judgment of the Appellate Division, Alta., 24 Alta. L.R. 486, which (by a majority, reversing judgment of Ives J.) dismissed the action, should be affirmed, on the ground that, in view of the existing prior extensive use of the name by a certain company and its affiliated corporations in the tourist transportation business in other territories, the use by plaintiff of that name in a like business was not proper, being a use that would mislead the tourist public, and therefore plaintiff had not shown a right to the use entitling it to claim the protection of a court of equity (*McAndrew v. Bassett*, 4 De G. J. & S. 380, at 384; *In re Heaton's Trade-Mark*, 27 Ch. D. 570).

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1), which (Clarke and Lunney JJ.A. dissenting) allowed the defendants' appeal from the judgment of Ives J., and dismissed the plaintiff's action.

Each of the plaintiff and defendant companies had its headquarters at Banff, Alberta.

The plaintiff, in its statement of claim, alleged (*inter alia*) that it had been carrying on the business of motor passenger transportation under the trade name of "Royal

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

Blue Line" in the province of Alberta, and, until the alleged infringement hereinafter mentioned, had had the exclusive use thereof within that province; that the defendant companies caused the said name to be used in connection with their businesses, which were similar to, and were carried on within the same area as, the plaintiff's business; that the individual defendants were the directors of and in control of the first defendant company and caused to be incorporated the second defendant company for the purpose of using such trade name; that the defendant companies, and the individual defendants through the medium of one or other of such companies, threatened and intended to continue the use of such trade name; and that by such use the defendants were infringing on the plaintiff's right to the exclusive use of said trade name throughout Alberta; and it claimed an injunction, a declaration that it was entitled to the sole and exclusive use of the trade name in connection with such businesses throughout Alberta, and damages.

The defendants denied the plaintiff's allegations, and denied that plaintiff had any right to any exclusive use of the said trade name or that plaintiff had any rights therein or thereto.

A motor transportation company, of the State of Massachusetts, U.S.A., called the "Royal Blue Line Company, Inc.", had for a number of years (long before the plaintiff used the trade name in question) used the words "Royal Blue Line" in connection with its tourist sight seeing business. It carried on business in some cities in the United States and (by an organization which it controlled) in the province of Nova Scotia; and the same kind of business under the same name was carried on by affiliated companies under agreement with it in various other cities and places in the United States, and also in a number of cities in Canada, but not in the province of Alberta. The defendant, the Rocky Mountain Tours and Transport Co. Ltd., entered into an agreement with the Massachusetts company, which agreement contained a grant of a right to said defendant company to use (in Banff and within a certain radius therefrom) the name "Royal Blue Line". This agreement was entered into on a date some time after the plaintiff had begun to use the name, but the negotia-

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tions for an agreement had begun some time before the agreement and possibly, on the evidence, before such use by plaintiff. After the agreement the defendants advertised "Royal Blue Line", and the plaintiff complained and brought the present action.

The main question dealt with by the courts was whether or not the plaintiff had acquired a right to the name in the territory in question which enabled it to ask that defendants be restrained from using it.

Ives J. gave judgment for the plaintiff, declaring it entitled to the sole and exclusive use of the trade name in connection with motor transportation businesses and lines throughout Alberta, and granted an injunction against the defendants.

The Appellate Division (1), by a majority, reversed the judgment of Ives J., and dismissed the plaintiff's action. Clarke and Lunney, JJ. A., dissented, upholding the judgment at trial, subject to a modification to confine the operation of the judgment to territory in which the plaintiff carried on its operations.

The plaintiff appealed to the Supreme Court of Canada (special leave to do so being granted by the Appellate Division). By the judgment now reported its appeal was dismissed with costs, Cannon J. dissenting.

A. J. Thomson, K.C., and *C. C. McLaurin* for the appellant.

H. G. Nolan for the respondent.

The judgment of Anglin C.J.C. and Rinfret and Lamont JJ. was delivered by

ANGLIN C.J.C.—The plaintiff in this action invokes the equitable jurisdiction of the court for the protection of its alleged right to the trade name of "Royal Blue Line" by an injunction to restrain the defendants from making use of that name. In such a case the well-known maxim of equity clearly finds its application,—“He who comes into equity must come with clean hands”.

As stated by Lord Westbury, L.C., in *McAndrew vs. Bassett* (2), dealing with a case of an alleged infringement of a trade mark,

(1) 24 Alta. L.R. 486; [1930] 1 W.W.R. 849. (2) (1864) 4 De G. J. & S. 380, at 384.

The essential ingredients for constituting an infringement of that right probably would be found to be no other than these: first, that the mark has been applied by the plaintiffs properly, that is to say, that they have not copied any other person's mark, and that the mark does not involve any false representation.

The first enquiry must, therefore, be whether or not the plaintiff has shown a right to the use of the trade name in question for which he is entitled to claim the protection of a court of equity. With Mr. Justice Mitchell (1), I am of the opinion that

the plaintiffs have not made out a case sufficient to entitle them to the sole and exclusive use of the trade name "Royal Blue Line" in connection with their motor transportation businesses * * *.

While the statement of defence does not directly charge fraud against the plaintiff in making use of the name "Royal Blue Line", at the outset of the trial of the case its counsel stated that the right of the plaintiff or defendants, or either of them, to the use of the name "Royal Blue Line" in Alberta was the issue to be tried. The plaintiff's exclusive right to use the name in the province of Alberta is also expressly denied in paragraph 2 of the statement of defence. Without, therefore, determining whether the plaintiff has been guilty of such fraud in the appropriation of that name as would justify an injunction being granted against them at the suit of the United States Company (The Royal Blue Line, Inc.), the evidence seems to establish that the plaintiff took this name for trade purposes knowing that it was already in use by the American company, and its affiliated corporations, in a large way, both in the United States and Canada, and that the reputation of the American Royal Blue Line would be quite likely to result in a large body of trade coming to the plaintiff through the use of this name, which it could not otherwise look for. This, in my opinion, amounts to a use of the name calculated to mislead the public to such an extent that its use by the plaintiff cannot be said to have been proper.

In *In re Heaton's Trade Mark* (2), the court was called upon to deal with the rights of persons outside its jurisdiction. The application was to register a trade mark which the applicant had used for half a century in the manufacture of steel. The application was opposed by a Swedish manufacturer who, and whose predecessors, had

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(1) 24 Alta. L.R. at 516.

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used, in the manufacture of steel, the same trade mark for more than a century and a half. They had learned quite recently of its use by the applicant. Kay J. refused an injunction because, in his opinion, to grant it would be sanctioning what he deemed to be a continuing misrepresentation. If that principle should govern in the present case, and I think it should, it cannot be said of the plaintiff that it is coming with clean hands to seek the aid of a court of equity. Its manager testifies that of the business of the Royal Blue Line buses operated by it, ninety-five per cent. comes from United States tourists. To them the use of the name by the plaintiff company would probably indicate connection with the United States Royal Blue Line, Inc.

I agree with the conclusions of the Chief Justice of Alberta, which he states in the following terms (1):

It seems clear, therefore, that the Court should not assist the plaintiff in its attempt to appropriate by prior use in [the province of Alberta] a name the use of which by it will deceive that public which it is particularly seeking to reach and serve.

I would, accordingly, dismiss the appeal with costs.

NEWCOMBE J.—The plaintiff company, simulating the colour and name of the Royal Blue Line omnibuses, seeks to obtain fares, by thus imposing upon travellers stopping at Banff, in the Rocky Mountains of Canada, the belief that they are being served by the widely known and reputable line of that name, having its seat or headquarters at Boston, Massachusetts, with affiliations and agencies, such as are described in the evidence, in various parts of the United States, Canada and Cuba.

On behalf of the plaintiff company it is sought to justify this method of business upon two grounds. First, it is said that the plaintiff, having painted its cars so recently as August, 1927, had anticipated the defendants, who, a few months later, by leave and licence of the Boston company, advertised and, subject to the stipulated conditions, were preparing to operate a competing line as Royal Blue. Secondly, the plaintiff affirms in effect that it is entitled to the exclusive use of the Boston company's name and description in the province of Alberta, because, at the time when the plaintiff began to use them, the Boston line was

(1) 24 Alta. L.R., at 495.

not doing business there. These are the plaintiff's pretensions; and they are prompted by the fact that Banff is a tourist resort, frequented by visitors from the United States, among whom the name and service of the Royal Blue Line, and its affiliations, are so well known as to create a preference for their omnibuses, which thus become favoured competitors for the patronage that the plaintiff covets.

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The plaintiff is seeking an injunction; and it is, in my opinion, clear enough that its application is in conflict with equitable principles. I would dismiss the appeal, for the reasons stated by the learned Chief Justice of Alberta (1), and upon the authorities to which he refers.

CANNON, J. (dissenting).—The Appellate Division of the Supreme Court of Alberta granted special leave to appeal from its majority judgment dismissing the plaintiff's action for an injunction which had been granted by the trial judge; Clarke and Lunney JJ.A., who had dissented, were in favour of continuing the injunction with certain modifications.

The plaintiff, who had been carrying on a sightseeing business—with also a more or less incidental stage patronage—in and about Banff for many years, inaugurated in 1927 a service under the trade name of "Royal Blue Line" between Banff and Calgary. The buses were painted a cream colour with royal blue badges on each side and with the words "Royal Blue Line" in four-inch gold letters painted thereon; and, in addition, the words "Brewster Transport Company" in gold letters appeared on the windshields.

From 1927 until the date of the action, the plaintiff extended this Royal Blue Line service in sightseeing trips from Banff in different directions. It got out schedules, time-tables and tariffs, which were placed in hotels in Banff and on the prairie, and advertised in newspapers and by other means of publicity.

The evidence establishes the accuracy of the finding of the trial judge that the plaintiff's business under that name and its advertising increased during 1928 and 1929.

(1) 24 Alta. L.R., at 487-495.

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The plaintiff learned of the name "Royal Blue Line", being used by the first named defendant company in February, 1929, by seeing a folder of that company styled "Sightseeing in the Canadian Rockies", advertising tours to Banff, Lake Louise and other localities within the territory served by the plaintiff. This folder had printed on it "Royal Blue Line operated by Rocky Mountain Tours and Transport Company". On March 6th, 1929, the plaintiff's solicitors wrote the following letter:

Calgary, Alberta, Canada,

March 6th, 1929.

Rockymountain Tours and Transport Co., Ltd.,
 Banff, Alberta.

Dear Sirs:

It has been drawn to our attention that you are using the name Royal Blue Line in connection with your Sight Seeing Business, even going the length to issue a folder using that name and on behalf of the Brewster Transport Company, Limited, we have to point out that this name has been used quite extensively in this Province, and also we believe in British Columbia, by it for several years. Their busses have been operating between Banff and Calgary and other points with this name plainly printed on the bodies and the name in the minds of the public must signify that any busses or advertising matter bearing such name are operated, issued or sponsored by the Brewster Transport Company, with the consequence that your use of the name is necessarily calculated to deceive the travelling public and result in a considerable number to use your busses in the belief that they are patronizing the lines operated and controlled by our client.

We are informed that the name Royal Blue Line is used by some transportation concerns in the States, but our client was the first to adopt it in this Province and has established a valuable good will by its use.

The use of this name by you is, therefore, unwarranted, and an infringement of our client's property in the same, and we must accordingly ask you to discontinue its use forthwith and recall any and all advertising matter you may have issued or caused to be issued in which your name is associated with the name Royal Blue Line, or in which you hold yourselves out as the operators of the Royal Blue Line in this Province.

We need hardly add that failure to comply with this request will result in our client being compelled to take steps to enjoin the infringement and to recover any damage it may have or may hereafter sustain by your user of this name.

Would you kindly acknowledge this letter shortly and we trust that having brought the fact of our client's right to your notice you will not delay in abandoning the use of this name in your business.

Yours faithfully,

FENERTY & McLAURIN,
 Per C. C. McL.

This communication was answered as follows:

600-603 Lancaster Building,
Calgary, Canada,
March 27th, 1929.

MESSRS. FENERTY & McLAURIN,
Barristers, Solicitors,
Calgary, Alberta.

DEAR SIRs:—

Re Rocky Mountain Royal Blue Line Motor Tours Limited.

Mr. McLeod has forwarded to us your letter to the Rocky Mountain Tours and Transport Co., Ltd., of March 6th, asking us to reply.

We have formed a company for him known as the "Rocky Mountain Royal Blue Line Motor Tours Limited" and this company and this company will carry on all business connected with their tours.

Mr. McLeod will not be back until about the middle of April, so that it is difficult for us to give you any more information until that time. You can take it, however, that the Rocky Mountain Tours and Transport Company will be making no use of the name Royal Blue Line or that any use made by them of that name will be by the Company, Rocky Mountain Royal Blue Line Motor Tours Limited.

Yours faithfully,

BENNETT, HANNAH & SANFORD.
Per P. L. Sanford.

PLS/JM

After further correspondence, an action was launched on the 10th May, 1929, setting forth the prior use by plaintiff for several years past of the trade name and style of "Royal Blue Lines" in the province of Alberta, which name had become a valuable asset to the plaintiff, and the defendants' infringement and illegal adoption of the same.

The plaintiff claimed:

(a) An injunction restraining the Defendants and each of them, their servants, agents and employees from using the trade name "Royal Blue Line" in conjunction with the motor transportation business or other business carried on by the Defendants or any of them of a similar nature within the Province of Alberta.

(b) A declaration that the Plaintiff is entitled to the sole and exclusive use of the trade name "Royal Blue Line" in connection with motor transportation businesses and lines throughout the Province of Alberta.

(c) Damages in the sum of \$1,000.

(d) Costs of this action.

The statement of defence amounts to a general denial of all the allegations and makes no reference to a contract between the defendant and the Royal Blue Line Company Inc. of Massachusetts, nor does it contain any allegation of fraud against the plaintiff in using in its operations the name and style of "Royal Blue Line".

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I have reached the conclusion that the appellant should succeed. It is common ground that the appellant was the first to use the name "Royal Blue Line" in the province of Alberta. It is also admitted by defendants' manager, McLeod, that the public is bound to be confused if both companies continue to use the same name in carrying on their business in the same territory, which means that the plaintiff would lose customers, who, by mistake, would go to the defendants under the impression that they were dealing with the plaintiff.

The majority of the Court of Appeal thought that the plaintiff could not succeed, because it had failed to establish its right to the use of the name which it adopted in 1927; the learned Chief Justice (1) considered its conduct as an "attempt to appropriate by prior use in [the province of Alberta] a name the use of which by it will deceive that public which it is particularly seeking to reach and serve". This view is based on the fact that, since 1912, a company incorporated in Boston has been doing an extensive business as "The Royal Blue Line" in some parts of the United States and Canada. This company had, however, never thought of doing business in Alberta before it granted, in the latter part of 1928, a licence to the "Rocky Mountain Tours and Transport Company, Limited" to use its trade name in connection with the "sight-seeing and motor touring business in said Banff and to operate in and from Banff for a radius of not exceeding five hundred miles. These tours to originate and terminate in Banff, Alberta". This agreement or licence, which, although not invoked in the pleadings, was filed, despite plaintiff's solicitor's objection, is *not transferable*, as appears by its last clause.

In my opinion, this contract and the prior use of the name "Royal Blue Line" outside of the province of Alberta cannot be considered in deciding the issue between the parties. The non-transferable licence was granted to the "Rocky Mountain Tours and Transport Company Limited". That defendant undertook by its solicitors' letter of 27th March, 1929, to make no use of the name Royal Blue Line.

(1) 24 Alta. L.R., at 495.

As to the second defendant, Rocky Mountain Royal Blue Line Motor Tours Limited, this company was organized evidently with a view to providing a way of escape from the false situation in which the first-named defendant was found by its solicitors; this clearly appears from the same letter of March 27th, 1929. Moreover, this new company, whose corporate name includes the words "Royal Blue Line", was brought into existence in order to carry on an unfair competition with plaintiff's business in the Banff territory. They cannot rely to improve their position upon any dealing with the United States company, as they did not make any contract with the latter, and the only licence from this company contains a prohibition against the defendant Rocky Mountain Tours and Transport Company Limited transferring whatever rights they may have acquired under the agreement; so that the second-named defendant stands in the position of having been incorporated, under a name including the words "Royal Blue Line," after the plaintiff's solicitors had written to its co-defendant protesting against the use of that name for transportation purposes in the Banff territory.

As to the respective rights of the Boston company and the plaintiff, while they are really not at stake in this case, out of respect for the majority opinion of the learned judges of the appellate court, I cite, in support of my view that the Boston company has no status to object to the use made of the name "Royal Blue Line" by the plaintiff in Alberta, *Hanover Star Milling Company v. Metcalf* (1), where the Circuit Court of Appeal for the Seventh District found:

Where two parties independently employ the same trade-mark or name, not in general use and susceptible of adoption, upon goods of the same class but in separate and remote markets, the question of prior appropriation is legally insignificant in the absence of intent on the part of the later adopter to take the benefit of the reputation, or to forestall extension of the trade, of the earlier adopter.

While property in a trade-mark is not limited, so far as its use has extended, by territorial bounds, the earlier adopter may not monopolize markets that his trade has never reached and where the mark signifies not his goods but those of another.

I cannot conceive, for instance, that the Canadian Pacific Railway Company could enjoin an Alberta hotelkeeper, who did not claim to be in any way connected with that company, from calling his hotel "Chateau Frontenac" on

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(1) (1916) 240 U.S.R. 403.

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the ground that this name is now known and used in the city of Quebec to designate a hotel where the company's services give satisfaction to the travelling public.

Like most cases of this description, this suit must be decided upon the facts. We have before us the ordinary case of parties competing under the same trade name, in the same market; and prior appropriation settles the question in favour of the plaintiff. It has not been alleged, and it was not proved, that the Brewster Transport Company had selected the name with any design inimical to the interest of the Massachusetts company who, in 1927, were not doing business in Alberta and had not yet done anything to extend their trade to that territory. We must refrain, however, from deciding the rights of the Boston company as against the plaintiff, since it is not a party to the present case. Whether or not the foreign company can restrain the plaintiff is not a question before us.

It may be stated that no question relative to trade marks, or the right to particular designations or slogans which may be acquired under statutory enactment is involved in this appeal. The only rights which the plaintiff or the defendants could have, or could assert, in this action are those arising out of the actual appropriation and use by the plaintiff of a certain trade name in the particular vicinity, and out of the defendants' interference, through unfair competition with the business growing out of such use by the plaintiff. Manager McLeod, one of the individual defendants, admits that the Boston company never did business in Alberta until they got in touch with him and his company. It is clear that the Boston company never acquired any rights in or to the exclusive appropriation of the name in question through any use thereof in that province. Never having acquired that right, it is obvious that it could not transfer it to the defendants herein.

The incorporation of the "Rocky Mountain Royal Blue Line Motor Tours Limited" following, as it did, the advertising campaign of the other defendant company, was, in my opinion, unfair trade dealing, even if it did not amount to the invasion of an exclusive right of property in a trademark. It may be accepted in principle that, in the interest of fair commercial dealings, courts of equity, at the

instance of a person who has been first in the field doing business under a given name, and has earned the good will of the public by a sufficient and satisfactory service and by extensive advertising, will protect him to the extent of making competitors take reasonable precautions to prevent deceit upon the public and consequent injury to the business of the person first in the field. Relief in such cases really rests upon the deceit or fraud which the later comer into the business field is practising upon the public—in order to annex the earlier comer's patronage. The United States courts have repeatedly applied the foregoing rule and would probably refuse to interfere, at the instance of the Boston Blue Line Corporation, if the latter, not having been actually engaged in business in the locality, and having no customers there, sought to enjoin a defendant from the use in the locality of the same trade name. *Eastern Outfitting Co. v. Manheim* (1).

In the case of *Sartor v. Schaden* (2), the court applied the principle in the terse statement that "there cannot be unfair competition unless there is competition".

In England, in *Knott v. Morgan* (3), it was held that persons operating omnibuses bearing the name "London Conveyance Company" were entitled to relief against the acts of the defendant in painting the words "Conveyance Company" and "London Conveyance Company" in such characters and on such parts of his omnibus as exactly to resemble the same words on the omnibuses of the plaintiffs, and in reproducing a symbol which was also painted on the omnibuses of the plaintiffs, and imitating the green livery and gold hatbands by which the plaintiffs distinguished their coachmen and conductors, the Master of the Rolls saying:

It is not to be said that the plaintiffs have any exclusive right to the words "Conveyance Company" or "London Conveyance Company," or any other words; but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages, really the defendant's, belong to, and are under the management of, the plaintiffs.

In *London General Omnibus Co. v. Felton* (4), it was decided that, while an omnibus proprietor is not entitled to

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(1) (1910) 110 Pac. 23.

(2) (1904) 125 Iowa 696.

(3) (1836) 2 Keen, 213.

(4) (1896) 12 T.L.R. 213.

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any monopoly in the construction of the omnibuses, or in such details as garden seats, special staircases, and the like, or in the colours employed in painting the wheels and body, a competitor is not entitled to arrange the general appearance of his omnibuses in such a way as to pass them off for those of another proprietor, the court remarking that the general appearance was to be looked at, and that it was therefore useless to compare the points of similarity one by one, and that this was certainly not less important when it was borne in mind that omnibuses are not merely stationary, but also moving objects.

An injunction should be granted in a form which is suitable and legitimate for the particular circumstances of the case. *Montgomery v. Thompson* (1). As to the exact form of the injunction, appellant's counsel, at the argument, stated that they would be satisfied to accept the limitations suggested by Mr. Justice Clarke, in his dissenting opinion, in the following words (2), which I am disposed to adopt:

I think, however, the judgment is objectionable in form inasmuch as it gives the plaintiff the exclusive use of the trade name in connection with motor transportation businesses and lines throughout the Province of Alberta. There is no suggestion that the plaintiff operates or intends to operate in the vast areas of the Province not at present occupied by it, viz., the territory including Jasper Park and the Peace River Country to the West, North and East of Edmonton and the part of the Province East of the Calgary and Edmonton route. In such parts I see no objection to the use of the name by others who would not be in competition with the plaintiff. I see no reason either for confining the plaintiff to the Province of Alberta in the use of its name. Trade knows no Provincial boundary. I think the proper order is to confine the operation of the judgment to territory in which the plaintiff carries on its operations.

With this modification, I would allow the appeal, with costs here and in the Appellate Division, and restore the judgment of the learned trial judge.

Appeal dismissed with costs.

Solicitors for the appellant: *Fenerty & McLaurin.*

Solicitors for the respondents: *Bennett, Hannah & Sanford.*

(1) [1891] A.C. 217.

(2) 24 Alta. L.R., at 515-516.