JOY OIL LIMITED (PLAINTIFF).....PLAINTIFF;

AND

McCOLL FRONTENAC OIL CO. LIMITED (DEFENDANT) ..... RESPONDENT.

1942
*Nov. 23, 24.
1943
*Feb. 2.

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

Practice and procedure—Inscription in law—Action in damages resulting from series of offences and quasi-offences—Alleged conspiracy—Declaration containing 117 paragraphs—Inscription in law against all paragraphs but four, the latter being mere recitals—Conclusions not attacked—Offences and quasi-offences committed over two years before service of action—Prescription of damages—Some paragraphs containing libellous statements—Plaintiff alleging knowledge within a year before service of action—Such paragraphs not to be rejected on inscription-in-law—Delay of prescription under article 2262 (1) C.C. reckoning from day libel came to knowledge of party aggrieved—Conspiracy alleged to constitute continuous delict—Whether prescription runs from date of cessation of conspiracy—Damages prescribed from date of each of overt act constituting conspiracy—Libellous statements contained in legal proceedings—Whether prescription runs from date of service or from date of final judgment—Dismissal of action in toto, although conclusions not attacked—Joinder of causes of action—Articles 2232, 2261, 2262 (1), 2267 C.C.—Articles 87, 177 (6), 192 C.C.P.

The appellant company, owning and operating a number of stations for the sale of gasoline and oil in the province of Quebec, brought an action against the respondent company, a competitor in the same trade. The appellant, alleging the existence of a conspiracy, between the respondent and four other parties not before the Court, to prevent it from operating or to hinder its business, claimed damages resulting from a series of offences and quasi-offences alleged to have been committed by the respondent. The declaration, or statement of claim, contained 117 paragraphs. The respondent filed an inscription in law against all but the three opening paragraphs and the last one, the former being purely introductory recitals and the appellant merely stating in the latter its option for a jury trial. The offences and quasi-offences were alleged to have been committed in 1934, 1935, 1936 and 1937. The writ of summons was served upon the respondent on August 5th, 1940. More particularly, paragraphs 95 to 110 inclusive contained allegations of libellous statements made by the respondent against the appellant; and it was further alleged, as a fact (par. 116), that the appellant learned only in the month of December, 1939, that these statements were due to the acts and deeds of the respondent. The Superior Court maintained the inscription in law on the ground that the appellant's action was prescribed (art. 2261 C.C.) and the debt absolutely extinguished (art. 2267 C.C.), and, although not prayed for, dismissed the action *in toto*. This judgment was affirmed by the appellate court.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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Held that paragraphs 95 to 110 inclusive, part of paragraph 115 and paragraph 116 should not have been rejected by the courts below and that, otherwise, the judgment appealed from, as to the other paragraphs, should be affirmed. The appeal to this Court was allowed accordingly, with costs.

Held, also, that, the appellant alleging (par. 116) that, in fact, he acquired knowledge of his rights against the respondent (those stated in par. 95 to 110 inclusive) less than a year before he served his action upon the latter, the appellant's action as brought, and on the strength of that allegation, was well founded in law, as far as those paragraphs were concerned, by force of articles 2232 and 2262 (1) C.C., it should not have been dismissed on an inscription in law but should have been allowed to go to trial *pro tanto*. *Charpentier* v. *Craig* (Q.R. 22 K.B. 385) and *Beaubien* v. *Laframboise* (Q.R. 40 K.B. 196) foll.—There was clearly, in these paragraphs, allegations of libellous statements by the respondent, and the appellant learned only in December, 1939, that these statements were due to the acts and deeds of the respondent. On an inscription in law, all allegations of fact must be taken as proven. Therefore, as to the above paragraphs, the course of prescription was suspended, as, up to that date, it had been "absolutely impossible for" the appellant "in law or in fact" to bring its action against the respondent (art. 2232 C.C.) and such action was brought *en temps utile,* i.e. within one year from that date (art. 2262 (1) C.C.—Under this last article, an action for libel is prescribed by one year, reckoning not merely "from the day that it came to the knowledge of the party aggrieved", but from the day the party aggrieved acquires the knowledge of the identity of the person who has made the libellous statement; this is a question of fact which cannot be disposed of on an inscription in law. It is a well-known principle of the law of prescription, recognized by the Civil Code (art. 2232), that *contra non valentem agere non currit prescriptio.*

As to the appellant's ground of appeal that, its action being wholly based on a conspiracy between the respondent and other parties, it constituted therefore a continuous delict with the result that prescription would run only from the date of the cessation of the conspiracy,

Held, concurring with the opinion of the appellate court, that prescription is distinct and separate in respect of each of the overt acts alleged to have been committed by the respondent and that the damages suffered as a consequence of these overt acts are prescribed from the date on which each one of them has been committed.

As to another ground of appeal: some of the allegations in the declaration referred to certain actions, termed illegal and vexatious, brought before the courts against the appellant by different individuals at the alleged instigation of the respondent, and it was contended by the appellant that the period of prescription should not be computed from the date of the service of these actions, but from the date when they had been finally disposed of by judgment. Decisions relied on mainly in support of this ground of appeal were *Bury* v. *The Corriveau Silk Mills Co.* (M.L.R. 3 S.C. 218); *Lapierre* v. *Lessard* (Q.R. 38 K.B. 373) and *The mayor of the city of Montreal* v. *Hall* (12 Can. S.C.R. 74). The appellate court held that these cases did not apply because the appellant's action was not directed so much

towards the merits of the proceedings instituted by the individual parties, but towards the conspiracy of which these actions were alleged to have been overt acts.

Held that the appellant's declaration may be susceptible of such interpretation; but, in any event, the proceedings in question were not instituted by the respondent, and, for that reason, there is a doubt that the above decisions can find their application in an action in damages brought, not against those who instituted the proceedings, but against the respondent, which was not a party to those proceedings.

Paragraphs 1 to 3 and 117 of the declaration were not attacked by the inscription in law, nor were the conclusions thereof, and the respondent did not pray for the dismissal of the action. Nevertheless the Superior Court dismissed the action *in toto,* and that judgment was affirmed by the appellate court. The appellant contended that the court had no such authority, or that, at least, he should have had an opportunity of being heard on that point.

Held that, it being unnecessary to express any opinion on the merits of this point, it is doubtful whether the point could have been considered as a mere question of practice and procedure in which this Court should not have interfered; but that the present judgment, at all events, should not be taken as an approval of the course followed in the premises by the courts appealed from.

Quære whether, in view of the declaration setting out several causes of action, this joinder of causes was permissible under art. 87 C.C.P. and whether such procedure should not have been inquired into by the Superior Court, had the respondent raised the point by dilatory exception under paragraph 177 (6) of that code.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Savard J., which had maintained a partial inscription in law made by the respondent and which also had dismissed *in toto* the appellant's action with costs.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

John G. Ahern K.C. for the appellant.

Hugh E. O'Donnell K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET J.—The declaration which the appellant has annexed to its writ of summons against the respondent sets out, no doubt, several causes of action; and the question whether this joinder of causes was permissible under

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article 87 of the Code of Civil Procedure might have been inquired into by the Superior Court, if the respondent had raised the point by dilatory exception under paragraph 6 of article 177 of that Code.

However, the respondent elected to contest the action as it stood by means of a partial inscription in law and, so far at least as this appeal is concerned, that is the only issue at present before this Court.

The declaration contains 117 paragraphs and prays for judgment against the respondent, and other defendants not at the moment before us, for the sum of $49,932.15.

The respondent's partial inscription in law prayed that paragraphs 4 to 116 (enumerating them one by one, both in the body and in the conclusion of the inscription in law) be rejected with costs.

Thus, paragraphs 1 to 3 and 117 of the declaration were not attacked, nor were the conclusions thereof. That is to say: By its inscription in law, the defendant did not pray for the dismissal of the action, but merely for the rejection of certain enumerated paragraphs of the declaration.

Nevertheless, the Superior Court, by its judgment, dismissed the action *in toto*, and that judgment was confirmed by the Court of King's Bench.

The appellant, of course, complains that the courts below had no authority to dismiss the action completely, and that, upon the proceedings as they stood, the only power which the courts could exercise was to render a judgment in accordance with the conclusions of the partial inscription in law and, therefore, to limit their adjudication solely to the paragraphs demurred against.

It is to be noticed that article 192 of the Code of Civil Procedure prescribes that an inscription in law must " contain all the grounds relied upon" and that"no ground which is not therein alleged can be urged at the hearing". It would seem, therefore, that the action was dismissed without there having been, in the inscription in law, either allegations or conclusions to that effect, and without the appellant, at least in the Superior Court, having even had an opportunity of being heard on the point, which clearly was not raised by the pleadings then before that Court.

Under the circumstances, there is much to be said in favour of the appellant's complaint in that respect. Were

it not for the fact that, in the view I take of the case, the point becomes a matter of indifference, it is doubtful whether it could have been considered as a mere question of practice and procedure in which this Court should not have interfered.

The present judgment, at all events, should not be taken as an approval of the course followed in the premises by the courts appealed from.

The learned trial judge describes the appellant's action as constituting "toute une série de délits et de quasi-délits"; and, on the ground that they dated back to the years 1934, 1935, 1936 and 1937, while the writ of summons had been served upon the respondent only on August 5th, 1940, he declared that the action as against the respondent was prescribed by force of article 2261 of the Civil Code, that the debt was absolutely extinguished under article 2267 C.C. and that, accordingly, the action could not be maintained.

In the Court of King's Bench, Létourneau C.J., who delivered the main judgment with which the other members of the Court concurred, thought that the allegations of the declaration could be brought into six groups:

1. Plusieurs réunions tenues à Montréal pour décider de faire de l'opposition à l'appelante et organisation des moyens à prendre; ceci aurait été vers la fin de l'année 1934 (allégations 5 et 6).

2°. Demande d'un permis par la demanderesse pour poste de distribution rue Notre-Dame est; opposition suivie d'un refus des autorités municipales. Ce dernier résultat est en date du 1er février 1935. Un bref de mandamus aurait finalement eu raison de cette opposition illégale et vexatoire de la défenderesse, mais il en aurait coûté à la demanderesse une somme de $636.60. Ceci se serait passé avant le premier mai 1935 (allégations 7, 8, 9, 10, 11 et 12).

3°. La défenderesse aurait induit un nommé Edouard Forget, distributeur de Imperial Oil, à demander en justice et avec injonction, l'annulation du permis obtenu comme susdit, fournissant à cette fin tous les fonds requis. Cette demande aurait été finalement rejetée par jugement du 10 mai 1935, mais il en aurait coûté à la demanderesse pour se libérer de cette opposition illégale, une somme de $6,000.00 outre ses dommages (allégations 13, 14, 15, 16, 17, 18).

4°. Plus tard, vers juillet 1935, la demanderesse ayant pour la construction de divers postes de distribution, fait ses contrats avec Reinforced Concrete Builders Limited, la défenderesse aurait trouvé le moyen, par l'intermédiaire d'un nommé R. Benoît et du fils de celui-ci, de faire instituer contre la demanderesse sept poursuites en Cour Supérieure, toutes subséquemment rejetées, et de faire suivre cette première tentative, et toujours pour ennuyer la demanderesse et ruiner ses efforts, d'une pétition de faillite qui a été à son tour rejetée. Ceci se passait avant la fin de

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juillet 1935, selon que nous l'avons déjà signalé, et aurait occasionné à la demanderesse des frais d'avocats au montant de $6,000.00 et, en outre, des dommages au montant de $5,000.00 (allégations 19 à 29 inclusivement).

5°. Vers le 15 novembre 1935, la défenderesse aurait réussi à s'attacher un nommé Henri Joseph Bourbonnière que la demanderesse avait eu à son emploi du mois de décembre 1934 à venir au 28 octobre 1935 pour le choix et l'établissement de ses postes de distribution à Montréal, et elle l'aurait employé à précisément contrecarrer tous les plans de la demanderesse, à contester ses demandes de permis et à lui faire systématiquement échec partout où elle le pouvait. Ceci aurait réussi quant à un poste que la demanderesse a tenté d'établir en novembre 1935, coin avenue Atwater et rue Ste-Emélie. Ce dernier échec de la demanderesse aurait impliqué pour elle une perte de $15,000.00. Semblable procédé aurait été répété quant à un poste coin Sherbrooke et Amherst, faisant subir à la demanderesse un autre dommage, cette fois de $1,000.00. Ceci se serait également répété en août 1936 quant à un poste coin St-Hubert et St-Grégoire, et cette fois, on aurait eu recours à de fausses signatures. Ce dernier incident aurait donné lieu à des plaintes contre un nommé Martineau d'abord, puis contre Bourbonnière lui-même; tous deux auraient été condamnés, et à cette occasion John Pritchard, l'un des plus hauts officiers de la défenderesse, de même qu'un nommé Griffiths pour la Imperial Oil Limited, auraient assuré Bourbonnière "that they would not let him down in his criminal case" et de fait lui auraient fourni tous les fonds requis. Plus tard, on aurait chargé Bourbonnière de surveiller les requêtes que faisaient signer les représentants de la demanderesse pour l'établissement d'un poste coin Atwater et Albert, et effectivement l'employé de la défenderesse aurait à ce sujet procédé à des contre-requêtes. Ceci aurait conduit à l'arrestation pour *faux* de deux des employés de la demanderesse, presque aussitôt après acquittés, avec toutefois ce résultat que Bourbonnière aurait été, par suite de sa dénonciation, poursuivi et condamné à des dommages; un appel interjeté par lui aurait été rejeté le 15 septembre 1938. Et pendant que Bourbonnière purgeait à la prison une sentence pour *faux*, d'un mois, la défenderesse aurait versé à sa femme une allocation de $25 par semaine.

Le permis d'un poste coin Sherbrooke et Amherst qui avait été refusé à la demanderesse au mois d'août 1936, lui aurait été accordé le 7 janvier 1937, vu que dans l'intervalle, elle avait pu faire condamner pour *faux* le dénommé Martineau.

6°. En juillet 1936, les représentants de la défenderesse auraient induit Bourbonnière à susciter à la demanderesse des poursuites de la part d'un certain nombre d'employés qu'elle avait jugé bon de démettre de leurs fonctions. Ces actions ont toutes été rejetées, sans toutefois qu'il ait été possible à la demanderesse de recouvrer ses frais. Mais trois de ces actions, celle d'un nommé Channing Call, pour $78.16, celle de Joseph Trainor pour $11.50 et celle de Gérald Renaud pour $277.61, prises le 24 juillet 1937 n'auraient toutefois été renvoyées qu'en octobre 1939, soit moins de deux ans avant la poursuite en dommages que vise l'inscription en droit qui sert de base au présent appel.

Tout ceci aurait entraîné la demanderesse dans des frais et déboursés et à des dommages considérables, dont je ne crois pas nécessaire de relever les précisions, mais dont le total entre pour une large part dans la réclamation de la demanderesse-appelante.

Ce qu'il importe de retenir c'est que, sauf la décision même des trois dernières poursuites dont la demanderesse-appelante aurait eu à souffrir, tout remonte à plus de deux ans avant l'institution de sa présente action.

Nous en sommes ainsi arrivés à l'allégation 109 de la déclaration.

Notons encore que les allégations 110, 111, 112, 113 et 114, 115, 116 et 117 énoncent substantiellement:

110.—Qu'en suscitant ces poursuites, la défenderesse-intimée et ses co-défendeurs auraient agi illégalement et avec l'intention de nuire à la demanderesse et de lui causer des dommages.

111.—Que la défenderesse McColl Frontenac n'a cessé de participer et a dirigé elle-même la conspiration comme aussi toute la campagne contre la demanderesse dont parle la déclaration.

112.—Que le défendeur John Pritchard a lui-même été partie à tous ces actes et a lui-même dirigé la conspiration et cette campagne en sa qualité d'officier représentant de la défenderesse-intimée McColl Frontenac.

113.—Que la défenderesse Imperial Oil a aussi été partie, fournissant sa part des fonds requis.

114.—Que les défendeurs sont responsables pour les actes de Bourbonnière qui, dans les circonstances, agissait comme leur employé, sous leur contrôle et leur direction, et c'est dans l'exercice de ses fonctions même qu'il aurait exécuté les actes qui lui sont attribués.

115.—Que les sommes successives de $636.30, de $6,000.00, de $3,000.00, de $6,000.00, de $5,000.00, de $15,000.00, de $1,000.00, de $400.00, de $4,500.00, de $890.00, de $2,000.00, de $5,505.85 que représentent comme déboursés ou dommages les différents paragraphes de la déclaration, accusent un total de $49,932.15 pour lequel la demanderesse demande condamnation conjointe et solidaire contre les défendeurs.

116.—Que ce ne serait qu'en décembre 1939 que la demanderesse aurait appris que ses tracas et dommages en question étaient dus aux actes et manœuvres des défendeurs, bien qu'elle eut déjà soupçonné cette participation des dits défendeurs dès le moment où elle eut à en souffrir.

117.—Cette allégation se borne au choix par la demanderesse d'un procès par jury.

Jusqu'au bout, on s'est en la déclaration borné à parler d'intention de nuire, de mauvaise foi, de poursuites abusives, de conspiration enfin dont les " overt acts " ne seraient, dans le résumé que je viens de terminer, que bien succinctement rapportés.

In an elaborate judgment, the Chief Justice of the province of Quebec examines the grounds of appeal from the judgment of the Superior Court, which he sums up under four headings; the first being that the trial judge should not have dismissed the action *in toto,* in view of the fact that the respondent had filed only a partial inscription in law. This ground has already been mentioned at the beginning of this judgment and need not be again referred to.

The second ground of appeal examined in the judgment *a quo* is that some of the allegations referred to certain actions termed illegal and vexatious, and that the delay of prescription in respect of those allegations was not to be computed from the date of service of the actions, but from the date when they were finally disposed of by judgment.

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The third ground examined was that the action itself was wholly based on an alleged conspiracy between the respondent and the other defendants and that, therefore, it constituted a continuous delict, as a consequence of which prescription would have run only from the date of the cessation of the conspiracy.

The fourth ground of appeal examined was based on art. 2232 of the Civil Code, the appellant alleging that, up to the date of the service of the writ of summons, it had been absolutely impossible for it, in law or in fact, to bring the actions against the several defendants, and, in particular, against the respondent.

In the judgment appealed from, all these grounds were declared of no avail and the dismissal of the action by the learned trial judge was confirmed.

As to the third ground of appeal discussed by the Court of King's Bench, I find the disposition thereof made by that Court satisfactory; and I do not deem it necessary to deal with it.

In support of its second ground of appeal, the appellant relied mainly on three judgments upon cases instituted in the province of Quebec.

In the first one, rendered by Davidson J., in *Bury* v. *The Corriveau Silk Mills Company* (1), the opinion was expressed that

> prescription of any right of action which may arise out of a pleading does not run from its date, but from its disposal by the Court.

The second case was that of *Lapierre* v. *Lessard* (2). The holding of the Quebec Court of King's Bench was:

> La prescription d'une action en dommages à raison d'une poursuite malicieuse ne commence à courir que de la date du jugement final de cette poursuite.

The third case relied on was one which came before this Court (*The mayor of the city of Montreal* v. *Hall* (3)). It was held that the action was for a malicious prosecution by proceedings instituted in the courts maliciously and without any just cause, and prescription did not begin to run until termination of such proceedings.

Létourneau C.J. discussed these three cases and came to the conclusion that they did not apply, because the appellant's present action was not directed so much

(1) (1887) M.L.R. 3 S.C. 218.
(2) (1924) Q.R. 38 K.B. 373. (3) (1885) 12 Can. S.C.R. 74.

towards the merits of the proceedings instituted by Graham, Neil, Trainor and Renaud, but towards the conspiracy of which these actions were alleged to have been overt acts.

I would not say that the appellant's declaration is not susceptible of that interpretation. At all events, it should be pointed out that the proceedings in question were not instituted by the present respondent; and, for that reason, at least, I would doubt that the authorities referred to by the appellant can find their application in an action in damages brought not against those who instituted the proceedings, but against the respondent, which was not a party in those proceedings.

There remains, therefore, the fourth ground of appeal discussed in the judgment appealed from; and, in reviewing it, I find it necessary to point out that this ground ought really to be divided in two separate parts, one of which, I say it with due deference, is not mentioned in either of the judgments submitted to us.

This fourth ground of appeal was disposed of as a result of the conclusion reached by both courts that it did not come within the terms of article 2232 of the Civil Code. The possible bearing of article 2262-1 upon the question at issue was not considered.

In order to examine the appellant's declaration from the latter point of view, it is important to look more closely at some of the allegations of the declaration.

Beginning at allegation no. 95, the appellant states that, on July 24th, 1937, three actions were brought against it by three of its former employees.

Then comes the following paragraphs:

98. In the said three actions the declarations follow the same pattern and all contain the same false and slanderous allegations to the effect that the plaintiff in order to reduce its operating costs had illegally taken away from the managers and assistant managers of each of its eleven gasoline stations in Montreal part of the salary paid to them every two weeks and that the plaintiff was continually changing its managers and assistant managers and dismissing them without consideration for their services and their needs and without reason; that the plaintiff had dismissed at least seventy-five of its managers and assistant managers on the pretext that there were shortages in their sales; that the said managers and assistant managers had to agree to the holdback made by the plaintiff on their salaries under threats and that any ratification given by the said parties to the holdback in their salaries was obtained from them by threat, fraud and fraudulent representation.

99. The said three parties, Call, Trainor and Renaud, on whose behalf the actions were so taken, never made to defendants' attorneys

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the allegations mentioned in the foregoing paragraph, but said allegations were included in the proceedings on the instructions of defendants for the sole purpose of hurting and damaging plaintiff.

I pass over paragraphs 100 to 109, which I do not find material for the purpose of the present discussion.

But paragraph 110 is important:

110. In promoting the litigation mentioned in paragraphs 77 to 109 the defendants were acting illegally and with the intent and purpose of hurting the plaintiff and damaging it, and are responsible for the loss, expense and damages incurred and suffered by it, to wit:

A. Attorney's costs paid by plaintiff: $21.60, $176, $98.05 and $87.60, etc., $505.85.

B. Damages to plaintiff's reputation by false, trumped-up and slanderous statements contained in said proceedings, as alleged in paragraph 98, $5,000.

Total, $5,505.85.

Again, paragraphs 111 to 115 inclusive need not be reproduced here, as not being essential to the point now under examination; and we reach paragraph 116 which reads as follows:

116. Although at the time the damages claimed herein were suffered by the plaintiff it suspected that they were caused by the illegal acts of the defendants, it was only in the month of December, 1939, that it learned that the said damages were due to the acts and deeds of the defendants as alleged herein.

Whether or not the main cause of action against the respondent be conspiracy, it must not be forgotten that the present appeal comes on an inscription in law and that consequently all the facts alleged must, for the present, be held as true. Upon such a proceeding, no issue of fact can be raised; the decision must be arrived at strictly upon the question whether, the allegations of fact being taken for proven, they give rise to the right claimed.

Now, what is the cause of action alleged in the paragraphs just above quoted and irrespective of whether it was rightly or wrongly joined in the present action?

The cause of action is that in proceedings instituted by three former employees of the appellant, there was contained some "false and slanderous allegations against the appellant"; that the said allegations were included in the proceedings on the instructions of the respondent for the sole purpose of hurting and damaging the appellant; that when promoting the litigation mentioned the respondent was acting illegally and with the intent and purpose of hurting the plaintiff and damaging it and it is responsible for the damages incurred, which are so described:

110B. Damages to plaintiff's reputation by false, trumped-up and slanderous statements contained in said proceedings, as alleged in paragraph 98, $5,000.

And that (paragraph 116):

Although at the time the damages claimed herein were suffered by the plaintiff it suspected that they were caused by the illegal acts of the defendants, it was only in the month of December, 1939, that it learned that the said damages were due to the acts and deeds of the defendants as alleged herein.

Those are clearly allegations of libellous statements made by the respondent against the appellant, and it is alleged as a fact that the appellant learned only in the month of December, 1939, that the said statements were due to the acts and deeds of the respondent.

On the inscription in law, we are bound to take the allegations as they are made. It must be admitted as a fact that the appellant learned only in the month of December, 1939, that the libellous statements were, in fact, the acts and deeds of the respondent. It may be that, when the case comes to trial, the appellant will be unable to prove that it did not know or could not have found out, by proper investigation, that the respondent was really the author or the instigator of the statements complained of; but that is strictly a question of fact upon which the Court may not speculate on the issue raised by the inscription in law. The allegation is that the knowledge came to the appellant aggrieved only in the month of December, 1939; and by that allegation, for the present purposes, the Court is absolutely bound.

As a consequence, the allegation in question comes strictly under paragraph 1 of article 2262 of the Civil Code:

2262. The following actions are prescribed by one year:

1. For slander or libel reckoning from the day that it came to the knowledge of the party aggrieved.

As the writ of summons was served on the 5th of August, 1940, the action was allegedly brought "en temps utile" and that part of the declaration could not be rejected on an inscription in law.

The respondent argued before this Court that the three actions, in which the false and slanderous allegations are said to have been made, were served upon the appellant in the course of July, 1937, and that, therefore, the appel-

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lant must be taken to have had knowledge of the libels as of the date when the actions were served. It adds that the true meaning of article 2262-1 C.C. is that the action is prescribed by one year reckoning from the day that the libel itself comes to the knowledge of the aggrieved party, whether the latter knows or does not know who is the author or the instigator of the libel.

I cannot agree with that view of the law. It is a well-known principle of the law of prescription, recognized by the Civil Code of Quebec, that *contra non valentem agere non currit prescriptio.*

This maxim was not embodied in the French Civil Code and, for that reason, the Commentators on that Code may not safely be relied on, although some of them, and even the " Cour de Cassation " have, sometimes at least, treated the law of France as if the maxim had been recognized by it.

But it is not to be doubted that the maxim is reproduced in article 2238 of the Quebec Civil Code as having formed part of the old French law; the article is to the effect that

> prescription runs against all persons, unless they are included in some exception established by this code, or unless it is absolutely impossible for them in law or in fact to act by themselves or to be represented by others.

The last part of the article is not to be found in the French Civil Code. I omit, therefore, to refer to the doctrine or the jurisprudence of France on the subject, although some decisions of the " Cour de Cassation " might be mentioned admitting the doctrine, notwithstanding the fact that it has not been inserted in the Code.

Moreover, I think article 2232, C.C., for the purpose of our discussion, need be relied on only in help of the interpretation of article 2262-1, C.C. It is absolutely impossible in fact for an aggrieved party to bring an action against a person who has made a libellous statement, at least until the aggrieved party finds out who is responsible as author or instigator of the libel. And that illuminates the meaning of article 2262-1, C.C. That meaning must be that the year by which the action for libel is prescribed must be reckoned from the day when the party aggrieved acquires the knowledge of the identity of the person who

has made the libellous statement; and that is a question of fact which cannot be disposed of on an inscription in law.

As stated by Mr. Mignault, in vol. 9 of his "Droit Civil Canadien", at page 452, commenting on article 2232, C.C.:

> Du reste, l'impossibilité d'agir doit être absolue; mais elle peut exister en droit ou en fait. Comme je viens de le dire, je crois que notre code énonce tous les cas d'impossibilité d'agir en droit. L'impossibilité d'agir "en fait" échappe à toute définition.

I fail to see, therefore, how it can be decided, on an inscription in law, where the plaintiff alleges that he has acquired knowledge of the identity of the author or instigator of a libellous statement made against him only within the year, that his action is prescribed and should be dismissed on that ground. The question whether he has really acquired the knowledge only at the date alleged by him, even the further question whether, having suspicions, he did not make proper investigations to discover the author or instigator, are purely questions of fact which must be left to be gone into at the trial and which the courts are not allowed to dispose of as questions of law.

I find in an old commentator of the French law (to whom, indeed, the codifiers of the Quebec Civil Code have referred in their Report) the following excerpt, which seems to me in point:

> Il faut cependant remarquer que la prescription ne commence que du jour que le demandeur a eu connaissance de l'injure et qu'en ce cas il en est cru à son affirmation, à moins qu'on ne lui prouve le contraire, car enfin si je n'apprends qu'aujourd'hui que dans tel endroit, en mon absence, on a tenu des propos diffamants contre moi, il ne serait pas juste qu'on m'opposât un silence qui n'était fondé que sur l'ignorance où j'étais de ces mauvais propos. (2 Darreau, par Fournel, "Traité des injures" de 1785, p. 382.)

Naturally the ignorance by a plaintiff of the nature of his rights against a certain person, whom he knows and whom he has identified, is quite a different thing from the ignorance of the identity of the person herself. The mere knowledge of the existence of a libel, without knowing who is responsible for it, cannot be the knowledge referred to in article 2261-1 C.C. Until the aggrieved party knows the author, he is powerless to act.

It is absolutely impossible for him, in fact, to act by himself, or to be represented by others, within the meaning of article 2232 of the Civil Code.

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And, of course, one should not confuse the situation above mentioned with the other situation referred to in a case relied on by the respondent, in which it was held that, knowing the responsible party, a plaintiff is not warranted in invoking lack of knowledge within article 2262-1 C.C., just because he has not yet acquired sufficient evidence to warrant him in bringing his action against the known party.

The judgment of the Quebec Court of King's Bench in *Charpentier* v. *Craig* (1) seems to me a good illustration of the principles above mentioned. In that case, the headnote reads as follows:

> Le défaut de moyens de preuve d'un quasi-délit ne met pas la victime dans l'impossibilité absolue d'agir contre l'auteur, et son recours n'en est pas moins sujet à la prescription de deux ans.

In that case, Charpentier claimed from Craig certain damages on the ground that 996 cords of pulpwood had been destroyed by a fire set by the latter and his employees. The action was served only on the second day of January, 1911. The fire had taken place on the 28th September, 1908; and the Court of King's Bench found that the action was, therefore, prescribed by two years. Charpentier, however, claimed that he was within the proper delays, because it had been impossible for him before the month of October, 1910, "de se procurer les renseignements nécessaires pour intenter l'action." And the following passage, in the judgment rendered by Carroll J., for the Court, is interesting (p. 386):

> Dans l'espèce, cette impossibilité absolue en fait d'agir consiste en ce que les appelants n'auraient pu s'assurer du nom ou des noms de l'auteur du quasi-délit. Cette inscription en droit a été rejetée par la cour de première instance, dont le jugement a été confirmé par cette cour, mais je comprends que deux des juges étaient dissidents, et que le troisième a exprimé l'opinion que la preuve de l'allégation devait être faite avant de résoudre la question de droit. Le dispositif du jugement de cette cour est à l'effet que l'allégation en question est bien fondée en droit, et conséquemment il ne reste qu'à déterminer si, en fait, la preuve a établi l'impossibilité pour les demandeurs d'agir avant l'expiration des deux ans.

As will be seen by the above extract from the judgment, Charpentier, having alleged that he had been unable to obtain the necessary information to bring his action before the month of October, 1910, he was met, as here, by an inscription in law from the defendant; but that inscription in law was dismissed because the Court thought that the

(1) (1913) Q.R. 22 K.B. 385.

allegations in Charpentier's action held good in law and that the point whether he was unable to bring his action sooner was one of fact which should be left to be decided on its merits at the trial.

The judgment of the Quebec Court of King's Bench in *Beaubien* v. *Laframboise* (1) is also authority for the propositions already stated.

In that case, an action in damages resulting from an automobile accident had been brought against one Roméo Laframboise, who was then driving the automobile. Beaubien obtained a judgment for $5,000 against the driver, but he was unable to collect the amount against the latter. The automobile stood registered in the name of Roméo Laframboise; and only much later did Beaubien discover that, although so registered, the automobile really belonged to the father of Roméo. He then brought action against the latter, alleging the fact that he had only found out about the true ownership of the car within a short time before the action was served upon the father.

In the Superior Court, the action against the father was dismissed as unfounded in law, on the ground that it was prescribed, since the accident had happened more than two years before the action was served.

In the Court of King's Bench, the appeal was maintained and the record was sent back to the Superior Court, there to be proceeded upon " suivant que de droit ". Dorion J. delivered the judgment of the Court of King's Bench; and he holds that, as the father was jointly and severally responsible with his son, the action served upon the son interrupted the prescription against the father.

But the Court of King's Bench also allowed the appeal for the following reason:

> Quoiqu'il en soit de cette question, l'autre réponse donnée par l'appelant au moyen de la prescription, à savoir que la prescription était suspendue par l'impossibilité où il était d'agir contre l'intimé, me semble bonne.
>
> Dans l'ancien droit, la maxime *contra non valentem agere non currit prescriptio* était admise pour les cas d'impossibilité d'agir (Pothier, Prescriptions no. 23).
>
> Le Code Napoléon l'a rejetée, (Pandectes Françaises, prescription no. 1094). Notre Code l'a adoptée expressément dans l'article 2232. Nos codificateurs, dans leur rapport, disent qu'il s'agit d'impossibilité absolue; mais encore faut-il rester dans l'ordre des choses pratiques, et prendre le mot " impossibilité ", qui est sans équivoque, dans son sens ordinaire. Il était impossible à l'appelant de poursuivre puis qu'il lui était impossible

(1) (1925) Q.R. 40 K.B. 194.

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même d'en avoir l'idée; il ignorait l'existence de l'intimé, sa qualité de propriétaire de l'automobile, sa responsabilité; il ignorait son propre droit d'action, et cette ignorance était invincible.

Le plaidoyer de prescription est donc mal fondé.

To my mind, the situation in *Beaubien* v. *Laframboise* (1) is strikingly similar to the one alleged by the appellant in the present case; and I do not see why a similar decision should not be rendered, at least on the inscription in law.

In the *Beaubien* case (2), the plaintiff, of course, knew of the accident and indeed he had sued the driver. He discovered that the father of the driver was the true owner of the motor car only much later. He then brought action against the father, alleging his lack of knowledge as an excuse for which prescription would not apply against him. It was held that, upon this allegation, there was no legal ground for dismissing the action; and then, upon the allegations being proven whereby the claim was taken out of the rules of prescription, the action was maintained.

Whether there was impossibility to act is a question of fact in each case and cannot, therefore, be disposed of by means of an inscription in law (*Canadian National* v. *Trudel* (3); *City of Montreal* v. *Cantin* (4).

Here, the appellant alleges that, in fact, he acquired knowledge of his rights against the respondent less than a year before he served his action upon the latter; and, by force of articles 2232 and 2262-1 of the Civil Code, its action as brought, and on the strength of that allegation, is well founded in law. It should not have been dismissed on an inscription in law; but, as happened in *Charpentier* v. *Craig* (5) and in *Beaubien* v. *Laframboise* (1), it should have been allowed to go to trial.

I consider that for those reasons, at least in so far as the respondent was concerned, the allegations 95 to 110 inclusive, that part of allegation 115 as follows:

> The above mentioned sum of $5,505.85 (paragraph 110) * * * the plaintiff is entitled to have and recover from the defendant * * * who refuses to pay the same, although requested so to do.

and paragraph 116 should not have been rejected by the judgments appealed from.

(1) (1925) Q.R. 40 K.B. 194.
(2) (1926) Q.R. 42 K.B. 476.
(3) (1904) 35 Can. S.C.R. 223.
(4) (1913) Q.R. 22 K.B. 335.
(5) (1925) Q.R. 40 K.B. 194.

As a consequence, paragraphs 1, 2, 3, and 117 and the conclusions (although for the reduced amount) of the declaration should also remain.

In my view, the appeal should be allowed accordingly, with costs here and in the Court of King's Bench; but the inscription in law was well founded with regard to the other paragraphs, and the respondent should, therefore, have its costs in the Superior Court.

Appeal allowed, with costs in this Court and the Court of King's Bench against the respondent and with costs in the Superior Court against the appellant.

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Solicitors for the respondent: *Magee, Nicholson & O'Donnell.*