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*May 13, 16.
*June 17.

IN THE MATTER OF THE AUTHORIZED ASSIGNMENT OF HOTEL DUNLOP, LIMITED, DUNLOP BROS., LIMITED, J. T. DUNLOP, DOING BUSINESS UNDER THE FIRM, NAME AND STYLE OF HOTEL DUNLOP, LIMITED, DUNLOP BROS., LIMITED, DUNLOP BROS., DUNLOP HOTEL, OR HOTEL DUNLOP, AUTHORIZED ASSIGNOR.

PAUL C. QUINN, AUTHORIZED TRUSTEE.....APPELLANT;

AND

HERBERT GUERNSEY, LANDLORD.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION, SITTING IN BANKRUPTCY

Bankruptcy—Landlord and tenant—Bankruptcy of tenant—Extent of landlord's right to priority over other creditors—Bankruptcy Act (D., 1919, c. 36), s. 52, as enacted 1923, c. 31—New Brunswick Act Respecting Landlord and Tenant, ss. 47, 48, 49, 51, as enacted 1924, c. 30—"Trader"—"Retail merchant"—"Ostensible occupation."

D. conducted and managed an hotel, and in the outer lobby thereof conducted a cigar stand and sold cigars, cigarettes and tobacco, both to guests and to the general public, and at the rear of the premises he sold beer to the general public at a bar. D. made an assignment in bankruptcy. His landlord had previously issued a distress warrant for 11 months rent.

Held, D. was a "retail merchant" and also a "person who, as his ostensible occupation, bought and sold merchandise ordinarily the subject of trade and commerce," and was, therefore (under either of such descriptions), a "trader" within s. 47 of the New Brunswick *Act Respecting Landlord and Tenant,* as enacted 1924, c. 30, and, therefore, under the application of s. 48 of said Act and of s. 52 of the *Bankruptcy Act* (D. 1919, c. 36) as enacted 1923, c. 31, his landlord's priority for rent over other debts was limited to three months rent accrued due prior to the date of the assignment.

Judgment of the Supreme Court of New Brunswick, Appeal Division, reversed, and judgment of Barry C.J. restored.

A person may be held to be a "trader" although he has, at the time he carries on his trading, another occupation which is his chief means of livelihood; and, it being shown that D. sold cigars, etc., to the public generally, the *quantum* of his trading therein was immaterial in determining whether or not he was a "trader." Cases reviewed.

An "ostensible occupation" is the employment of a person's time in a certain calling or pursuit so openly and conspicuously that the members of the public coming in contact with him would know that he was following that calling or pursuit. It does not import an exclusive, nor a chief, occupation, but it must be in the general way of business and not an intermittent or spasmodic employment.

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

APPEAL, by special leave granted by the Chief Justice of this Court (1), from the judgment of the Supreme Court of New Brunswick, Appeal Division, which, reversing the judgment of Barry C.J., held that the above named respondent, landlord of J. T. Dunlop, was entitled to be paid by the above-named appellant, authorized trustee in bankruptcy of the said Dunlop, all the money in his hands realized from the sale of Dunlop's property, towards satisfaction of eleven months rent due from Dunlop to the respondent. Barry C.J. had held that the respondent should be paid, in priority to all other debts, three months rent accrued due prior to the date of the assignment, and no more—leaving it to the landlord to prove as a general creditor for the surplus rent, if any, due at the date of the assignment. The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was allowed with costs, the judgment appealed from set aside, and the order of Barry C.J. restored.

H. A. Porter for the appellant.

E. P. Raymond K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—The facts of this case are not in dispute. Prior to May 11, 1926, J. T. Dunlop had been conducting and managing an hotel, known as the Dunlop Hotel, on premises owned by the respondent Guernsey. On April 26, 1926, the sheriff, acting under writs of execution in his hands, made a seizure of the goods and chattels of Dunlop in said hotel. On May 4, the landlord Guernsey issued a distress warrant for $3,025, being eleven months' rent at $275 per month, then due in respect of said premises, and sent it to one W. C. Wheaton with instructions to distrain on the goods and chattels of Dunlop in the hotel. On May 5 the sheriff, feeling that the property in the hotel seized by him was no longer safe without a man in possession, employed the said Wheaton and one Gibbons to remain in possession of the goods he had seized. Wheaton and Gibbons went into possession immediately. On May 11 J. T. Dunlop made an assignment under the *Bankruptcy Act* and the

(1) [1927] S.C.R. 134.

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appellant Quinn was appointed trustee. On May 26 Quinn made an application to Chief Justice Barry, as Judge in Bankruptcy, for directions (*a*) as to how much of the bill presented by the sheriff should be paid as a preferred claim, and (*b*) as to what portion of the landlord's claim for rent should be treated as a preferred claim. The learned Chief Justice fixed the amount of the sheriff's bill at $252.21. As to the landlord's claim he held that Dunlop was a trader within the meaning of s. 47 of c. 30 of the Acts of New Brunswick of 1924, entitled *An Act in addition to chapter 153 of the Consolidated Statutes of New Brunswick, 1903, respecting Landlord and Tenant,* and that the landlord was, therefore, only entitled to three months' rent in priority to the other debts, but leaving it to him to prove as a general creditor for the surplus rent due at the date of the assignment. From that part of the order of Barry, C.J., decreeing that the landlord was entitled to only three months' rent an appeal was taken to the Supreme Court of New Brunswick. That court set aside the order appealed against and held that the landlord was entitled to be paid by the trustee the full proceeds of the assets of J. T. Dunlop in the hands of the trustee, as those assets had not realized the amount of the eleven months' rent due when Dunlop made the assignment. The ground upon which the court reversed the order of Barry, C.J., was that, on the evidence, J. T. Dunlop could not be said to be a trader within the meaning of s. 47 above referred to. The trustee now appeals to this Court, and the question we have to determine is: Upon an assignment in bankruptcy by a debtor what priority, if any, has a landlord for rent in arrear of the premises on which were situated the debtor's goods and chattels at the date of the assignment?

By c. 31 of the Acts of 1923 (Can.), s. 52 of the *Bankruptcy Act* was repealed and the following enacted in lieu thereof:—

> 52. When a receiving order or an assignment is made against or by any lessee under this Act, the same consequences shall ensue as to the rights and priorities of his landlord as would have ensued under the laws of the province in which the demised premises are situated if the lessee at the time of such receiving order or assignment had been a person entitled to make and had made an abandonment or a voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province; and nothing in this Act shall be deemed to suspend, limit or affect the legislative authority of any province to enact any law providing for or regulating the rights and priorities of landlords consequent upon any

such abandonment or voluntary assignment; nor shall anything in this Act be deemed to interfere or conflict with the operation of any such provincial law heretofore or hereafter enacted in so far as it provides for or regulates the rights and priorities of landlords in such an event.

The effect of this section is to give to a landlord in bankruptcy proceedings the same priority for rent in arrear as the law of the province would give him if his tenant had made an abandonment or a voluntary assignment of his property for the benefit of his creditors. What rights or priorities do the laws of New Brunswick give to a landlord where his tenant had made such a voluntary assignment?

The *Act respecting Assignments and Preferences by Insolvent Persons* (C.S. c. 141) contains no provision whatever giving a landlord priority for rent in case of an assignment under that Act. It is, however, provided for in the *Act respecting Landlord and Tenant* (C.S. c. 153). Section 21 of the Act provides that where a tenant's goods are seized under an *execution* against the tenant, the goods are not to be removed from the premises unless the execution creditor pays to the landlord the rent in arrear up to one year's rent. Sections 47, 48, 49 and 51 of the Act, which were enacted in 1924 (c. 30) presumably to meet the situation created by the enactment of the new section 52 of the *Bankruptcy Act* in 1923, read as follows:—

47. In this act, unless the context otherwise requires or implies, the word "trader" means and includes retail merchants, wholesale merchants, commission merchants, manufacturers and persons who, as their ostensible occupation, buy and sell goods, wares and merchandise ordinarily the subject of trade and commerce.

48. Where a tenant, having any goods or chattels on which his landlord has distrained or would be entitled to distrain for rent, has made an authorized assignment or has had a receiving order made against him under the Bankruptcy Act, being chapter 36 of the Dominion Statutes of the year 1919, and amendments thereto, the right of the landlord to distrain or realize his rent by distress shall cease from and after the date of the assignment or receiving order and the assignee or trustee under any such assignment or receiving order shall be entitled to immediate possession of the property of the tenant; but in the distribution of the property of the said tenant the assignee or trustee shall pay to the landlord, in priority of all other debts, an amount not exceeding the value of the distrainable assets, and not exceeding three months' rent accrued due prior to the date of the assignment or receiving order, and the costs of distress, if any.

49. In the case of any such assignment or receiving order, the landlord may prove as a general creditor for—

(*a*) All surplus rent due at the date of the said assignment or receiving order; and

(*b*) Any accelerated rent to which he may be entitled under his lease, not exceeding an amount equal to three months' rent.

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51. Sections 48, 49 and 50 of this Act shall apply only to "traders" as defined by section 47 of this Act.

If, therefore, Dunlop was a trader s. 48 above quoted applies, and the respondent is entitled to priority for three months' rent only. To be a trader he must come within s. 47. The facts as found by Barry, C.J., and which are not disputed, are: That in addition to managing the hotel J. T. Dunlop in the outer lobby of the hotel conducted a cigar stand and sold cigars, cigarettes and tobacco not only to guests of his hotel but to the general public, and that at the rear of the premises there was a bar where he sold beer to the general public. Do these acts constitute him a trader within s. 47? On the facts proven he could not be said to be a wholesale merchant, commission merchant or manufacturer. Can he properly be termed either a retail merchant or a person who as his ostensible occupation buys and sells goods the subject of trade and commerce?

In Comyn's Digest, Vol. 5, at page 65 "Merchant" is defined as follows:—

> And generally every one shall be a merchant who traffics by way of buying and selling or bartering of goods or merchandise within the Realm or in foreign parts.

In Murray's New English Dictionary a "Merchant" is defined as:

> One whose occupation is the purchase and sale of marketable commodities for profit.

A retail merchant is one who deals in merchandise by selling it in smaller quantities than he buys. *U.S.* v. *Mickle* (1). If Dunlop, instead of conducting the cigar stand himself, had done as many hotel proprietors now do and had leased or sold to another the right to conduct the stand, and that other had sold cigars, cigarettes and tobacco to the general public for gain, there could not, in my opinion, be any question that such person would be a retail tobacco merchant within the meaning of s. 47. See *Josselyn* v. *Parson* (2). If that is so would the person conducting the stand be any less a retail tobacco merchant because he managed the hotel as well?

That a person may be an hotel-keeper and also a trader is, I think, well established by the authorities. In the old case of *Mayo* v. *Archer* (3), a farmer bought a quantity of

(1) (1805) 1 Cra. C.C. 268. (2) (1872) L.R. 7 Ex. 127.
(3) 1 Strange 513.

potatoes with the intention of selling them again for profit, which he did. Under the bankruptcy laws in force at the time a farmer could not be declared a bankrupt, but a trader could. It was held that the buying and selling of the potatoes for gain constituted the farmer a trader within the statute. In his judgment the Chief Justice said:—

I should think that if a Herdfordshire man bought apples to mix with his own and then sold the cider, he would be a trader.

And Mr. Justice Powys said:—

If a farmer should deal in wool or hops he will be a trader and so will an inn keeper who sells corn in quantities which are not consumed in his house.

The other two justices who comprised the court were of opinion that the quantities bought and sold should be shewn in order to see whether trading or farming was the debtor's chief business. It appears, however, now to be settled that the quantity sold is immaterial. In *Patman* v. *Vaughan* (1), the question was whether or not an inn keeper was a trader within the bankruptcy law. He was conducting an hotel and had on several occasions sold quantities of spirits to persons other than the hotel guests, and his servant testified that "if any person had sent for liquor he might have had it." The learned trial judge left the question to the jury with the direction that "if they were of opinion that the plaintiff had endeavoured to make a profit out of his trading and was ready to sell to anyone who applied to him and not merely as a favour, then the quantum and extent of the trading were immaterial." The jury found in favour of the defendant and the plaintiff moved for a new trial. In giving judgment Ashhurst J. said:—

I do not now consider the question of law to be governed by the quantum of the trading; but I take the rule to be this, that where it is a man's common or ordinary mode of dealing, or where if any stranger, who applies, may be supplied with the commodity in which the other professes to deal, and it is not sold as a favour to any particular person, there the person so selling is subject to the bankrupt laws.

In *Bartholomew* v. *Sherwood* (2), the question was whether a farmer who bought horses for the purpose of reselling them at a profit was a trader; it was held that he was. In that case Ashhurst J. said:—

The general principle is right, that a farmer, as such, is not an object of the bankrupt laws; and if a farmer in the course of his business buys a horse and, after using him for some time, sells him again, that will not

(1) (1787) 99 E.R. 1257; 1 T.R. 572. (2) (1786) 99 E.R., 1258 (note).

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subject him to the bankrupt laws. But in this case the evidence is that he bought horses for the express purpose of gaining by it.

And Buller J. said:—

It is like the case of a vintner who if he sell only a few dozen of liquor to particular friends cannot be made a bankrupt. But if he be desirous to sell to every person who applies that will subject him to the bankruptcy laws.

These cases, in my opinion, are instructive in that they shew that a man may be held to be a trader although he has, at the time he carries on his trading, another occupation, which is his chief means of livelihood.

In giving the judgment of the Supreme Court of New Brunswick, on appeal, in the present case, Mr. Justice Grimmer said:—

There can I think be no doubt the question or more properly the occupation of buying and selling must be the determining factor. I cannot conceive that the ostensible occupation of a hotel keeper can be held to be in any sense the buying and selling of goods, wares and merchandise such as is ordinarily the subject of trade and commerce or barter.

With great deference, I am of opinion that this statement begs the question, for it assumes that it was in his capacity as hotel keeper that Dunlop bought and sold cigars and tobacco, while the evidence shews that he sold to the public generally and not merely to accommodate those who patronized his hotel. It could not have been in his capacity as hotel keeper that he sold to the general public. To my mind the question here is not what was Dunlop's ostensible occupation as hotel keeper, for undoubtedly as an hotel keeper his ostensible occupation was managing the hotel. The question is: Was he ostensibly occupied in selling cigars, cigarettes and tobacco? Was that his ostensible occupation?

An occupation signifies the employment of a person's time in some calling or pursuit, not simply periodically or for a special purpose, but more or less continuously and in a general way of business. In *Creighton* v. *Chittick* (1), Strong J. quoted with approval the following statement from Robson on Bankruptcy:

So also the buying and selling ought to be in the general way of business and not in a qualified manner or only for a special purpose.

"Ostensibly" is defined as "open to view; open to public view; conspicuous." As ostensible occupation, therefore, is the employment of a person's time in a certain calling or pursuit so openly and conspicuously that the mem-

(1) (1882) 7 Can. S.C.R. 348, at p. 356.

bers of the public coming in contact with such person would know that he was following that calling or pursuit. It does not, to my mind, import an exclusive occupation, nor yet a chief occupation, but it must be in the general way of business and not an intermittent or spasmodic employment.

While the selling of beer was chiefly done by Dunlop through a bar-tender, the evidence is that the cigar stand was conducted by himself; it was conducted openly and in the general way of business and anyone who desired to do so could buy. It, therefore, seems to me that anyone frequenting the lobby of that hotel and purchasing cigars, cigarettes or tobacco would know that Dunlop was employing his time, or part of his time at least, in selling those articles in the general way of business and to the public. That he was doing it for profit may, I think, be presumed until the contrary is shewn. It was argued that there was here no evidence that he purchased any cigars, cigarettes or tobacco. He must have either purchased or manufactured those he sold. If he manufactured them he comes expressly within s. 47, as a manufacturer.

There is nothing in the material to indicate whether the cigar stand, the bar, or the hotel did the largest business or furnished the greatest profit, even if these could be considered as essential elements in the determination of an ostensible occupation, which I doubt.

Selling merchandise, as he did, openly to the public for the purpose of gain, brought Dunlop, in my opinion, within 1) a retail merchant, and (2) a person who as his ostensible occupation bought and sold merchandise the subject of trade and commerce. He was, therefore, a trader and s. 48 governs the respondent's priority. Having reached the conclusion that Dunlop was a trader it is not necessary to consider the priority, if any, to which a landlord is entitled where the debtor is a non-trader.

The appeal, in my opinion, should be allowed; the judgment appealed from set aside and the order of Barry C.J., restored. The appellant is entitled to his costs both here and on appeal below.

Appeal allowed with costs.

Solicitors for the appellant: *Porter & Ritchie.*

Solicitor for the respondent: *Edward P. Raymond.*