FRANCIS HYDE (PLAINTIFF) ..... APPELLANT;

AND

GEORGE M. WEBSTER (DEFENDANT) ..... RESPONDENT.

AND

LA COMMUNAUTÉ DES SŒURS DE LA CHARITÉ DE L'HÔPITAL GÉNÉRAL ..... MIS-EN-CAUSE.

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*May 15, 18.
*Oct. 13.

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

Partnership—Lease—Scope of authority—Resiliation—Form of action —Appropriate relief—Pleading—Practice.

A partnership, consisting of H. and W., which was to expire by efflux-ion of time on 31st December, 1912, held a lease of warehouse property in Montreal, of which the term expired on the 30th April, 1913. During the absence of H., in September, 1912, and without authority from him to do so, W. obtained a renewal of the lease for three years, from the 1st of May then following, which was repudiated by H. on his return to Montreal. In action by H. to have the renewal lease declared null and void:—

Held, (the Chief Justice and Brodeur J. dissenting), that the plaintiff had a sufficient interest to enable him to maintain the action and obtain a declaration that the lease was not binding upon the partnership or upon himself as a member of the firm.

Per Fitzpatrick C.J. dissenting.—In the Province of Quebec distinct and consistent pleading is essential and, as the plaintiff did not bring his action to obtain relief from his obligation under the renewal lease, but merely to have that lease declared null and void, he could not, in the action as brought, have a declaration that the lease was not binding upon him. *Forbes* v. *Atkinson* (Pyke K.B. 40) referred to.

Per Brodeur J. dissenting.—As the partnership was benefited by the renewal of the lease it should be declared valid and binding on all the partners.

Judgment appealed against (Q.R. 23 K.B. 1) reversed.

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*PRESENT: Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of Lafontaine J., in the Superior Court, District of Montreal, by which the plaintiff's action was dismissed with costs.

The action was brought by the appellant, in the circumstances mentioned in the head-note, against the respondent to have the renewal lease declared null and void and set aside on the ground that it had been obtained clandestinely and without authority, and the *mis-en-cause* was impleaded for the purpose of hearing judgment rendered to that effect. At the trial, in the Superior Court, District of Montreal, Mr. Justice Lafontaine dismissed the action, on the following grounds:—

"That, as the partnership between plaintiff and defendant, according to their agreement, was to expire on the 31st of December, 1912, and as the lease of the premises occupied by the firm was to expire on the 1st of May, 1913, only so that a sufficient time was left to the partnership after its expiration, up to the expiration of said lease, for the liquidation of the affairs of the partnership, without the necessity of a renewal of said lease the defendant had no authority in the absence of his partner, and without having consulted him, to enter into negotiations, with the landlord, in the month of September, and conclude with him a renewal of the lease of the premises occupied by the firm, on behalf of the firm for a period of three years beginning on the 1st of May, 1913, viz.: four months after the dissolution of the partnership;

"That the lease made by the defendant, although

(1) Q.R. 23 K.B. 1.

in the name and on behalf of the firm, but without authority from plaintiff, could not and does not bind the partnership, unless plaintiff chooses to ratify the act of his partner and approves of it, and that the plaintiff, on the contrary, having repudiated the conduct of his partner, said lease *quoad* plaintiff, is *res inter alios acta,* and consequently does not effect him (arts. 1855 and 1727 C.C.);

"That plaintiff not being bound by said lease, the question of its existence and its validity cannot be raised by him, but can arise only between the parties to the deed, viz., the defendant and the *mis-en-cause,* that plaintiff has no interest to interfere with the agreement between them and ask that a lease which does not concern or effect him, be set aside, especially, when the landlord does not try to enforce said lease against plaintiff, and when defendant is ready to assume alone all its responsibility and to guarantee the plaintiff against any liability;

"That although it appears by the evidence that plaintiff, prior to defendant, having entered into a conversation with the *mis-en-cause's* agent to have a lease of the premises occupied by the firm in his own name, and for himself alone, that all that defendant could obtain was a lease on behalf of the firm only while lease would have been granted to plaintiff for himself alone, that if the present lease was not blocking the way, plaintiff could still obtain from the *mis-en-cause* a lease in his own name, as shewn by the correspondence filed in the record, that such a lease would confer on plaintiff a material benefit of a great commercial value, in permitting plaintiff to carry on after the dissolution of the partnership, in the pre-

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mises occupied by the firm, the same business that was done by the firm, this advantage plaintiff could have obtained and can still obtain, does not contsitute an interest in the lease, in the sense of the law, giving plaintiff the right to complain of it and that it be set aside;

"That no person can bring a suit at law, unless he has an interest therein (art. 77 C. Pr. C.);

"That during the existence of the partnership it was not allowed for any of the partners to secure for himself a renewal of a lease of the partnership property and that a renewal could be obtained only the way it was done, viz., for and on behalf of the firm."

By the judgment now appealed from the judgment in the Superior Court was affirmed.

The questions in issue on the appeal are stated in the judgments now reported.

Lafleur K.C. for the appellant.

Mignault K.C. and *E. G. Place* for the respondent.

THE CHIEF JUSTICE (dissenting).—This is an action to set aside a lease. The real point in issue is, in my opinion, largely one of practice and procedure; and, in that view, it is important, as we have the concurrent judgments of both courts below, to carefully consider the relief which the plaintiff prayed for. The conclusions of the declaration are as follows:—

Wherefore the plaintiff brings suit and prays that *the said agreement* purporting to be a lease between the *defendant* acting on behalf of the firm of Hyde and Webster, and the *mis-en-cause*, be *declared null, void and of no effect, to all intents and purposes que de droit*, that the *mis-en-cause* be called in to hear the said judgment rendered to the same end, the plaintiff reserving his right to take such further action against the defendant as he may be advised in damages or otherwise.

This prayer of plaintiff's declaration by which he is bound contains a clear unambiguous statement of his position in this action. He asks that the lease entered into under the circumstances hereinafter set forth should be declared null for all purposes and there is no conclusion for a declaration that the lease is not binding upon the partnership or upon the plaintiff personally.

It is a settled rule of the Quebec law that the court cannot adjudicate beyond the conclusions of the plaintiff's declaration (art. 113 C.P.Q.) and no amendment can be allowed even before judgment by the trial court which changes the nature of the demand. (Art. 522 C.P.Q.)

The parties to the action (plaintiff and defendant) were partners under the firm name of Hyde & Webster and as such occupied under a lease certain premises for the purposes of their business. During the existence of that partnership and before the expiration of the then current lease, the defendant obtained in the name of the firm a renewal of the lease for a further period of three years from the date of its expiration.

The partnership expired by lapse of time before the new lease began to run and the defendant remained in possession of the leased premises. The plaintiff, as I have just said, brings this action not to be relieved of his obligations under the renewal lease, as was his right, but to have that lease declared "void, null and of no effect for all purposes," on the ground that the defendant without his consent took in the name of the firm a lease which would begin to run after the expiration of the partnership.

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There is no doubt that the plaintiff was not bound to accept the benefit of the new lease and could not without his consent be made subject to its provisions. This is admitted by the defendant in the letter written by his attorneys before the institution of the present proceedings. But the plaintiff could not object to the defendant continuing in the possession of the premises in his own individual right after the expiration of the partnership if the landlord was content to keep him as a tenant. That was a matter which concerned the landlord and the defendant exclusively and the plaintiff, relieved of all liability the moment he gave notice to the landlord that he repudiated the action of his partner, was without interest to interfere. The landlord only could complain and he is content to allow the defendant to remain in possession of the premises. The defendant was thereafter solely bound to the due fulfilment of all the obligations of the new lease when the plaintiff repudiated his authority to enter into it (art. 1855 C.C.). Planiol in his commentary on the corresponding article of the Code Napoleon, art. 1764, states the law with his usual lucidity and accuracy in these words:—

L'engagement est pris au nom de la société par un seul des associés. Cet engagement ne lie pas les autres à moins qu'ils ne lui aient donné pouvoir à cet effet.

In view of what I understand is the opinion of the majority of this court I deem it necessary to emphasize the fact that the defendant does not in his pleadings or in his factum say that the lease is binding on the late firm or on his partner the plaintiff appellant, and no such contention was put forward by his counsel during the argument before this court. His position throughout has been that his partner was free to

accept or decline the benefit of the lease and that in the latter alternative he, the defendant, was entitled to remain in possession of the premises under the renewal.

I venture to insist upon the nature of this action because apparently some misconception exists as to it.

In the Quebec system of procedure, distinct and consistent pleading is held to be essential to the right administration of justice. As far back as 1810, Sewell C.J. in *Forbes* v. *Atkinson*(1) found it necessary to draw the attention of the bar to the difference in this respect between the French and English systems. The Chief Justice said:—

> In the law of England it is a general rule in pleading that a mere prayer for judgment without pointing out the appropriate remedy is sufficient, and that, the facts being shewn, the court, *ex officio*, is bound to pronounce the proper judgment. But the reverse of this rule is the principle of the law in Canada. With us the conclusions are held to be essential to the proceedings, and must contain, *à peine de nullité*, all that the judgment of the court must comprehend. For although the conclusions may by the court be allowed or rejected *in toto*, or modified or allowed in part, and rejected in part, *still what is omitted in the conclusions cannot be supplied* by the court, not even if it appears in substance in the body, or libel, of the pleading.

The rule in *Forbes* v. *Atkinson*(1) is still followed in Quebec. See *Préfontaine* v. *Cie de Publication de La Patrie*(2).

It did not occur to any one, in the Quebec court to ask for leave to amend because no effective amendment could be made except by substituting one form of remedy for another which obviously could not be permitted.

This case affords an apt illustration of the necessity of adhering to the rule that this court is bound by the issues raised in the courts below. If this action

(1) Pyke K.B. 40. (2) 6 Que. P.R. 183.

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had been brought to obtain relief of his obligation under the lease, different issues of fact would have been raised, the plaintiff would have been met by the offer of the defendant's solicitors to relieve him of all obligation under the lease to which I have already referred and the issue would have been limited to a mere question of costs.

As a result of this judgment the plaintiff gets what he did not ask for and the defendant is mulcted in heavy costs on an issue which is not raised by the pleadings.

I agree entirely with the two courts below and am of opinion that this appeal should be dismissed with costs.

IDINGTON J.—The appellant and respondent were partners in a firm holding a lease running three months beyond the terms of the existing partnership.

The respondent, without authority, secured in the name of the partnership a renewal of the lease for three years.

It is admitted neither could by the law of Quebec acquire such an advantage to himself as to have acquired such an embarrassing renewal in his own interest.

When the renewal secured in the name of the firm came to the knowledge of appellant be made a protest against such dealing and by this suit sought to have it set aside. The lessors stand neutral and make no objection to the rescission.

It is, of course, admitted that under the circumstances they are entitled to hold respondent liable to them and to indemnify them against loss for his unauthorized conduct of the business in hand.

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It is said appellant has no interest such as to entitle him to maintain this suit.

It is pretended, notwithstanding that alleged want of interest, that to put himself in a position to obtain a new lease or deal with the lessors therefor, he must be held bound to treat with this quondam partner on the basis of said lease being a valid renewal for such purpose.

I am, with deference, unable to assent to such impotent conclusions as existing in law. The interest seems to me self-evident. In applying the law to the practical affairs of life we must see that the consequence of our reading and interpretation of the law is not such as to defeat its very purpose by means of some illusory dialectical skill in the use of words.

I, therefore, submit that the appeal should be allowed with costs without prejudice to the lessors' right to insist, if necessary, upon respondent's liability to fully indemnify them.

This latter it is quite clear, in view of the correspondence had with appellant, is a matter of no consequence in this case.

DUFF J.—The respondent (without authority as regards the appellant) professed in the name and on behalf of the appellant (as well as on his own behalf) to execute the lease in question. I think the appellant is entitled to come into court to obtain a declaration that the instrument produced by this wrongful exercise of pretended authority is not binding on him.

I think the appeal should be allowed with costs in all courts.

ANGLIN J.—The appellant and the respondent were engaged in business in the City of Montreal as

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partners. The partnership terminated by effluxion of time on the 31st December, 1912. The business was carried on in premises No. 43 Common Street, leased from the Grey Nuns, the lease of which expired on the 30th April, 1913. In September, 1912, in the absence of the plaintiff Hyde, the defendant, Webster, approached St. Cyr, the agent for the Grey Nuns, seeking a renewal of the lease in his own name. Hyde had already spoken to the agent with a view to obtaining a lease for himself on the expiration of the partnership. When Webster saw St. Cyr the latter refused to give him a lease in his own name, but offered to give him a three years' lease from the 1st of May, 1913, for the partnership. This Webster agreed to take. A formal agreement which bears date the 20th September, 1912, was accordingly prepared and executed.

On returning to Montreal, Hyde repudiated this action of his partner, Webster, on the ground that he had acted without authority, and he brought the present action on the 7th November, 1912. In the conclusion of his declaration he prays

> that the said agreement purporting to be a lease between the defendant acting on behalf of the firm of Hyde & Webster and the *mis-en-cause* be declared null and void and of no effect to all intents and purposes *que de droit* that the *mis-en-cause* be called in to hear said judgment rendered to the same end, etc.

The Superior Court dismissed the action holding that the defendant had not authority to make the lease in question and that it did not bind the plaintiff or the partnership unless the plaintiff should choose to ratify and approve of it, and that, having repudiated the conduct of his partner, the lease *quoad* the plaintiff is *res inter alios acta* and consequently does not affect him and that he, therefore, has no interest to

maintain this action. This judgment was confirmed on appeal, Lavergne and Gervais JJ. dissenting.

I am, with respect, of the opinion that the plaintiff is entitled to the relief which he claims in his declaration, at least in part. Article 1855 C.C. which appears to govern the rights of the parties is as follows:—

1855. A stipulation that the obligation is contracted for the partnership binds only the party contracting when he acts without the authority, express or implied, of his co-partners, unless the partnership is benefited by his act, in which case all the partners are bound.

In the French version the concluding clause of the article reads as follows:—

A moins que la société n'ait profité de tel acte, et dans ce cas tous les associés en sont tenus.

In the corresponding article of the Code Napoléon, No. 1684, we find this similar provision:—

À moins que la chose n'ait tourné au profit de la société.

From the English version it might be deduced that the partnership would be bound by any advantageous contract made by one of the partners on its behalf; but, from the French version, and more particularly in the form which the excepting clause takes in the Code Napoléon, it seems reasonably clear that an unauthorized contract made in its behalf will bind the partnership, in the absence of ratification, only if it has in fact derived profit from it. Laurent, commenting on the article of the Code Napoléon, in vol. 26 at page 353, says:—

Si cependant il agit et que l'acte soit profitable à la société, la loi valide l'acte, mais seulement dans une certaine mesure, en tant que la société a profité; elle donne donc action à l'associé; mais ce n'est pas l'action du mandat, c'est une action moins favorable, que l'on appelle l'action *de in rem verso;* nous en avons traité au chapitre des *quasi-contrats;* c'est une espèce de gestion d'affaires, donc un quasi contrat; il en nait une obligation fondée sur l'équité. L'associé

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a agi au nom de la société sans pouvoir, il ne l'oblige pas; mais l'équité s'oppose à ce que la société s'enrichisse à ses dépens; la loi la déclare obligée en tant qu'elle s'est enrichie.

In the present case it is clear that the lease was made for the partnership, and it has been properly found that, in making it, Webster acted without authority, express or implied, from his co-partner. It is also clear that the lease is upon advantageous terms and would be of value to the partnership if its business should be continued and is an asset which can be profitably disposed of for the benefit of the partnership to one or other of the partners. On the other hand it has not been shewn that the partnership had actually derived any benefit from the lease at the time the action was instituted, *i.e.*, nearly two months before the partnership expired and five months before the lease in question would become operative. In his plea the defendant says:—

> The extension of the said lease creates a valuable asset of the firm of Hyde & Webster.

Having regard to the following considerations:—

(1) That the defendant in professed exercise of his authority as a partner of the plaintiff undertook to bind the partnership by an instrument in writing evidencing a lease of real property;

(2) That such a lease subjects the lessee to obligations towards his lessor;

(3) That, although made without authority, the lease might become binding on the partnership by ratification, express or tacit (art. 1727 C.C.);

(4) That, although made without authority, the lease may be binding on the partners to the extent to which the partnership is benefited by it:—

the plaintiff, in my opinion, had a sufficient interest

to enable him to maintain this action for a declaration that the lease is not binding upon the partnership. That is in substance the relief he asks.

We are not at present concerned as to the ultimate consequences of such a judgment — whether it will leave the lease binding upon the defendant or will open the door for the granting by the landlords of a new lease to either the plaintiff or the defendant. In his declaration the plaintiff states that

> the *mis-en-cause* through their authorized agents have declared their willingness to lease the premises to the plaintiff alone from and after the 1st of May, 1913.

This allegation is not admitted in the plea of the defendant. The *mis-en-cause* are not made parties to the action for any other purpose than that they may be "called in to hear the judgment rendered." They have not pleaded or been represented in the action and there is nothing before us to shew whether they are or are not willing that the lease, if binding only on the defendant, Webster, should stand as a lease to him individually. Without their assent Webster cannot hold them bound to accept him as sole tenant. Neither is it clear that if the landlords should decline to accept Webster as their tenant and should execute a lease in favour of Hyde, he would not be bound to account for any profit made by him out of such lease on the ground that he had acquired it by reason of his having been a member of the firm of Hyde & Webster. That question is not before us for determination, and has not been tried.

Upon the findings that Webster made the lease without the authority, express or implied, of his partner Hyde, and that Hyde has not ratified, but on the contrary, has repudiated his act, and it not having

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been shewn that the partnership had profited (*a profité*) by the lease at the time this action was brought, I am of opinion that the plaintiff was entitled to have it declared that the lease was not binding on the firm of Hyde & Webster, or upon himself as a member of that firm. Beyond that nothing should or can be determined in this action.

I would, for these reasons, with respect, allow this appeal with costs throughout.

BRODEUR J. (dissenting).—The appellant and the respondent were carrying on business in Montreal in partnership on premises which they had leased from the *mis-en-cause, L'hôpital-général.* The contract of partnership was to expire on the 1st January, 1913. The lease which they had was to expire on May 1st, 1913.

In the month of August or September, 1912, the appellant, Hyde, went to see the agent of the lessor with a view to securing the premises for himself alone after the expiration of the partnership agreement. He did not, however, communicate his intention to his partner and nothing was said by Hyde to his partner about his intent to dissolve the partnership.

Mr. Hyde left in the month of September to take his holidays; and, during his absence, a large quantity of building materials arrived for the firm. As it was a matter of importance that these goods should not have to be removed after the 1st of May, 1913, Mr. Webster saw St. Cyr, the agent for the owner, and secured in the name of the firm a renewal of the lease for three years after the 1st of May, 1913.

The lease was then made to the firm of Hyde & Webster.

When Mr. Hyde came back, he protested against the lease, and wrote to that effect to the *mis-en-cause,* the lessor; at the same time he got from the lessor a promise that a lease should be made in his favour, in case the lease in favour of the partnership should be resiliated.

He then took the present action to set aside the lease, claiming that his partner was not authorized to pass it and had exceeded his authority.

The lessors were *mis-en-cause* and did not resist the action, shewing their willingness to see the lease cancelled.

The defendant, Webster, claimed by his plea that the lease should stand.

The lease was proved to be advantageous to the partnership.

I would have been inclined to think that the partner, Webster, acted within the sphere of his authority in making such a renewal of the lease, because he was doing that for the purpose of securing a safe place for the warehousing of the goods of the company. Those goods could not be consumed during the few months which were left for the existence of the partnership. However, they had been purchased by the partners for the benefit of the partnership and it was the duty of the partner who had the management of the affairs, in the absence of his co-partner, to look after the storing of these goods. But it is not necessary to decide this point in the present case.

If the partnership is benefited by the renewal of the lease then it should be declared valid (art. 1855 C.C.).

Mr. Hyde wants, of course, to secure the premises for himself, which would be contrary to justice and

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would put the other partner in a very awkward position when the partners would come to dissolve partnership and divide the assets.

We have, then, undoubtedly a lease which is a good asset for the firm.

We have, on one side, a partner who wants to set it aside for his benefit and we have, on the other side, the defendant who is anxious to have a partner's share in the transaction.

Supposing that the lease should be resiliated then what would be the position of Mr. Hyde? Of course, he could, as it has been understood with the lessor, take the lease in his own name. But he would be bound then to give to his partner a share of the profit that this lease would represent. Then virtually the lease would become an asset of the partnership.

In these circumstances, I am of the opinion that the action to set aside the lease should be dismissed and that the appeal from the judgment confirming the dismissal of that action should also be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Greenshields, Greenshields & Languedoc.*

Solicitors for the respondent: *Place & Stockwell.*