1907

*May 15.
*June 24.

HENRY K. WAMPOLE ET AL. (PLAINTIFFS) ..... } APPELLANTS;

AND

GEORGES A. SIMARD ET AL. (DEFENDANTS) ..... } RESPONDENTS.

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

Breach of contract—Conspiracy—Fraud—Assessment of damages.

APPEAL from the judgment of the Court of King's Bench, appeal side, (Trenholme J. dissenting,) affirming the judgment of Archibald J. in the Superior Court, District of Montreal, which maintained the plaintiffs' action, without costs, to the extent of a balance found to be due to them after deducting damages assessed in favour of the defendants upon an incidental demand which was maintained with costs.

The action was for the price of medicinal pills, called "red pills" which the plaintiffs had manufactured for the defendants according to a special formula, supplied by the defendants, under a contract with a condition that pills manufactured according to that formula should not be manufactured for or sold to any persons other than the defendants. The defendants denied liability, counterclaimed for damages for breach of the condition of the contract and charged the plaintiffs with having sold a quan-

*PRESENT: Fitzpatrick C.J., and Girouard, Davies, Idington and Maclennan JJ.

tity of similar pills to certain persons who had infringed their trade-mark and with having participated, with these persons, in a fraudulent conspiracy to injure the defendants' business. The learned trial judge maintained the plaintiffs' action in part, without costs, maintaining the incidental demand in respect to damages sustained by loss of profits through the wrongful sale of the pills and for expenses in obtaining evidence as to breach of contract, with costs, but disallowed certain other expenses incurred in the prosecution of the conspirators by the defendants, and he also found that the plaintiffs had not participated in the conspiracy.

The Court of King's Bench affirmed this judgment, and the plaintiffs appealed.

The majority of the judges of the Supreme Court of Canada were of opinion that the appeal should be dismissed. Davies and Maclennan JJ. dissented in respect to the damages allowed on the incidental demand for loss of profits alleged to have been sustained in consequence of the sale of the pills supplied in breach of the contract.

The following notes of reasons for the judgment were delivered.

THE CHIEF JUSTICE.—This appeal is dismissed with costs. I am of opinion that the appeal should be dismissed for the reasons given in the court below.

GIROUARD J.—This case involves only questions of fact decided by two courts. The respondents charge fraud against the appellants; it has been found by the two courts below, and I do not think that the evidence would justify me in disturbing their findings. For that

1907

WAMPOLE v. SIMARD.

Girouard J.

reason, I do not feel disposed to quarrel with the principles they applied to assess the damages. Arts. 1065, 1073, 1074 C. C.

In my opinion, the appeal should be dismissed with costs.

DAVIES J. (dissenting).—This was an appeal from the judgment of the court of appeal for the Province of Quebec confirming a judgment of Mr. Justice Archibald of the Superior Court in favour of the appellants for the sum of $413.67 and condemning each party to pay his own costs.

The amount of the judgment given in favour of the plaintiff was reached by allowing him $2,435.33 for goods sold and delivered to the defendants (respondents) and deducting therefrom a sum of $2,021.66 for damages claimed to have been sustained by the defendants by reason of a breach of contract made between the parties by which the plaintiffs received a private formula from the defendants for the manufacture of a particular pill and agreed not to manufacture and sell pills from the formula to others than the defendants.

The items which were found by the trial judge as damages were for

Loss of profits on a quantity of these pills manufactured and sold by plaintiffs to one Gauvreau and his associates.	$1,586.66
Expenses paid by defendants in employing detectives and analysts in finding out the necessary facts. . . .	435.00
	$2,021.66

There was some argument on the appeal as to the correctness of the amount found in plaintiffs' favour of $2,435.33 it being contended on his behalf that they were entitled to a much larger amount for pills which they were in process of manufacturing for defendants, but which were not delivered to them owing to their breaking off business relations with plaintiffs on discovery of the latters' breach of their contract. On this point, however, we were all of opinion that the judge's findings were correct and should not be disturbed.

The questions in dispute were thus reduced down to those arising out of the defendants' counter claim for damages.

These naturally divide themselves into two, first the claim for defendants' expenditure in employing detectives to discover and discovering through their own agency the fact that plaintiffs had manufactured and sold pills from their private formula to other parties (one Gauvreau a chemist and his associates) and the expenses paid by them to analysts to analyze the pills so sold in order to prove that they were made from their private formula. Secondly, damages in the nature of loss of profit claimed by reason of the subsequent sale of the pills by Gauvreau and his associates to the public in wrappers counterfeiting defendants' trade mark.

With regard to the first items amounting to $435 I am of opinion that they were properly allowed because I think there was a contract proved between the parties of which the plaintiffs were guilty of a breach and these expenses were under the circumstances necessary and legitimate in view of the fact that plaintiffs when charged with the breach emphatically denied the facts through their manager and threw the onus upon defendants of proving them.

1907

WAMPOLE v. SEMARD.

Davies J.

That the manager's denial may have been hasty and *bonâ fide* when made with the knowledge he then had can avail nothing in the light of the facts subsequently proved that the alleged sales had been made.

The evidence of Brick, plaintiffs' manager, is conclusive as to the existence of the contract claimed by defendants because he frankly states, that all their trade circulars issued to the public contained the explicit statements and assurances that

> private formulæ entrusted to our temporary care are treated and handled in the strictest confidence in manufacture. Numbers and not names are invariably used.

It was on these assurances defendants contracted with them and the sales made by them (even if inadvertent and unintentional) to the chemist Gauvreau and his associates were in breach of such contract.

The other main question argued was as to the plaintiffs' liability to pay the damages claimed by defendants by reason of the sales to the public by Gauvreau and his associates of a portion at least of the 300,000 or more pills sold to them by plaintiffs. Can these alleged damages be held in any way under the facts as proved to be the direct result of plaintiffs' breach of contract ?

The parties Gauvreau and others who purchased these pills from the defendants did so according to the evidence alike of Gauvreau, who ordered the pills, and Pineo, the plaintiffs' agent in Montreal, who received the orders from him and transmitted them to the plaintiffs in Toronto as "Blaud's Nux Vomica No. 4 pill," a standard preparation which if it had been supplied would have been a sufficient answer to defendants' claim, they not having any special right or property in the formula.

As the evidence shewed, however, the pills supplied Gauvreau and his associates contained the two additional ingredients which defendants had added to Blaud's Nux Vomica No. 4 pill and so came within the private formula of defendants supplied to the plaintiffs for manufacture. Whether this arose from carelessness or negligence matters not; it was clearly such carelessness or negligence as under their contract with defendants they would be liable for, so far as any direct damages are concerned.

But Gauvreau, who bought the pills, had entered into a conspiracy with one Cloutier and others fraudulently to counterfeit the defendants' trade mark, enclosed the pills in boxes similar to those in which defendants sold their pills, and wrapped them up in defendants' counterfeited trade-mark.

This alone would constitute a wrong as between Gauvreau and the defendants. A mere sale by the latter parties of the pill without any violation of defendants' trade-mark would not have rendered them liable to defendants. But, of course, without using and counterfeiting of the defendants' trade mark there would not probably have been any sales. There is no pretence under the evidence for saying that the plaintiffs were parties in any sense to these fraudulent sales or fraudulent attempts to sell. On the contrary the criminals themselves, who were afterwards indicted and punished for their crimes expressly in their evidence in this suit exonerated Pineo, plaintiffs' agent, from any complicity in or knowledge of their intended fraud and Pineo's evidence is to the same effect.

There is no evidence to the contrary and the learned trial judge, speaking of the only bit of evidence

1907

WAMPOLE v. SIMARD.

Davies J.

which could be urged as supporting the contention of plaintiffs' complicity in the violation of defendants' trade-mark by Gauvreau and his associates, says:

> In this case I am not prepared to say that the plaintiffs in applying the red colour to the pills sold by them to Gauvreau, Massicotte and Cloutier did apply a false description to these goods within the meaning of the article of the Criminal Code or did *violate the trade-mark of the defendants.*
>
> I therefore come to the conclusion that the expense of the defendants in convicting the parties of forgery of their trade-mark in *which forgery the plaintiffs took no part* other than the rendering it possible, as above pointed out, cannot be charged against the plaintiffs.

In these findings I entirely concur and while I agree with the learned judge in striking out of defendants' claim the counsel fees paid by them in the prosecution of the fraudulent counterfeiters for counterfeiting defendants' trade mark, I cannot see on what principle these fraudulent sales under these counterfeited trade marks can in any way be held to give rise to a claim for damages against the plaintiffs who were not in any way parties to the fraud.

In the chain of events which led up to the fraudulent sales by Gauvreau and his associates the plaintiffs were parties to the extent of furnishing the goods. But they knew nothing whatever of the contemplated fraud and it certainly cannot be inferentially imputed to them in the face of the explicit denials of Pineo, their agent, on the one hand and of all the conspirators on the other.

The judgment of the court of appeal seems to proceed upon the ground stated by Lavergne J. that "the fraud was perfectly proved." So it was as against all the conspirators. But certainly not as against the plaintiffs, who in the words of the finding of the trial judge, did not "violate the defendants' trade mark" and "took no part" in the conspirators' forgery.

1907

WAMPOLE v. SIMARD.

Davies J.

At the utmost they did something, sold the pills, which enabled the purchasers without their knowledge subsequently to commit a crime.

People are not supposed to commit crimes and the protection against them is not the vigilance of the parties excluding the possibility of committing them, but the law of the land. See the judgment of the Judicial Committee in *Colonial Bank* v. *Marshall*(1), at pp. 567-8, where the authorities are referred to.

The damages, if any, sustained by defendants were so sustained because of sales by Gauvreau and his associates of a quantity of pills sold in boxes similar to those used by defendants and wrapped in the latter's trade-mark which Gauvreau *et al.* had counterfeited.

As I have shewn the plaintiffs were in no way parties to this fraud nor can it be imputed to them from the only fact which at all connects them with Gauvreau *et al.,* namely, that they sold him 300,000 or more of these pills and that such sale was a violation of their contract with defendants.

Such criminal action of Gauvreau's from which defendants suffered was, it is true, a sequence of the improper sale by plaintiffs to Gauvreau, but in no way a consequence of such sale.

They cannot be presumed to have had any knowledge of Gauvreau's criminal intentions as to the counterfeiting and use of defendants' trade-mark, which alone enabled him to make the sales and so damage defendants; on the contrary the evidence negatives such presumption.

These damages therefore not being the direct and

(1) [1906] A.C. 559.

1907

WAMPOLE v. SIMARD.

Davies J.

proximate cause of the plaintiffs breach of their contract with defendants are not recoverable against plaintiffs.

The result would be that the appeal should be allowed with costs in this court and in the court of appeal and the judgment of the Superior Court confirmed by the court of appeal amended by disallowing the $1,586 allowed for damages for loss of profits on the alleged fraudulent sales of pills, leaving a balance in favour of plaintiffs of $2,000.43 for which judgment should be entered for them.

The judgment of the Superior Court on the question of costs to stand.

IDINGTON J.—For the reasons assigned by the learned trial judge and in the court below, I think this appeal should be dismissed with costs.

MACLENNAN J. (dissenting).—I am of opinion that this appeal should be allowed with costs for the reasons stated by Mr. Justice Davies.

Appeal dismissed with costs.

Solicitors for the appellants: *Smith, Markey & Skinner.*

Solicitors for the respondents: *Brosseau & Holt.*