Christie v. York Corp.

Fred. Christie (Plaintiff), Appellant; and
The York Corporation (Defendant), Respondent.

[1939] S.C.J. No. 37

[1940] 1 D.L.R. 81

Supreme Court of Canada

1939: May 10 / 1939: December 9.

Present: Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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

Lovell C. Carroll, for the appellant.
Hazen Hansard, for the respondent.

Solicitor for the appellant: Lovell C. Carroll.
Solicitors for the respondent: Montgomery, McMichael, Common & Howard.

The judgment of the Chief Justice and of Rinfret, Crocket and Kerwin JJ. was delivered by

RINFRET J.:-- The appellant, who is a negro, entered a tavern owned and operated by the respondent, in the city of Montreal, and asked to be served a glass of beer; but the waiters refused him for the sole reason that they had been instructed not to serve coloured persons. He claimed the sum of $200 for the humiliation he suffered.

The respondent alleged that in giving such instructions to its employees and in so refusing to serve the appellant it was well within its rights; that its business is a private enterprise for gain; and that, in acting as it did, the respondent was merely protecting its business interests.

It appears from the evidence that, in refusing to sell beer to the appellant, the respondent's employees did so quietly, politely and without causing any scene or commotion whatever. If any notice was attracted to the appellant on the occasion in question, it arose out of the fact that the appellant persisted in demanding beer after he had been so refused and went to the length of calling the police, which was entirely unwarranted by the circumstances.

The learned trial judge awarded the appellant the sum of $25 and costs of the action as brought. The only ground of the judgment was that the rule whereby the respondent refused to serve

negroes in its tavern was "illegal," according to sections 19 and 33 of the Quebec Licence Act (Ch. 25 of R.S.P.Q., 1925).

The Court of King's Bench, however, was of opinion that the sections relied on by the Superior Court did not apply; and considering that, as a general rule, in the absence of any specific law, a merchant or trader is free to carry on his business in the manner he conceives to be best for that business, that Court (Galipeault, J., dissenting) reversed the judgment of the Superior Court and dismissed the appellant's action with costs [(1938) Q.R. 65 K.B. 104.]. The appeal here is by special leave, pursuant to sec. 41 of the Supreme Court Act [[1939] S.C.R. 50.].

In considering this case, we ought to start from the proposition that the general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public order. This is well illustrated in a case decided by the Tribunal de Commerce de Nice and which was confirmed by the Cour de Cassation in France (S. 93-2-193; and S. 96-1-144):

> ... le principe de la libertÈ du commerce et de l'industrie emporte, pour tout marchand, le droit de se refuser ‡ vendre, ou ‡ mettre ‡ la disposition du public, ce qui fait l'objet de son commerce; ... le principe de la libertÈ du commerce et de l'industrie autorise le propriÈtaire d'un Ètablissement ouvert au public, et ‡ plus forte raison le directeur d'un casino, ‡ n'y donner accËs qu'aux personnes qu'il lui convient de recevoir; son contrÙle ‡ cet Ègard est souverain et ne peut Ítre subordonnÈ ‡ l'apprÈciation des tribunaux.
>
> Cependant la libertÈ du commerÁant ou de l'industriel de n'entrer en rapport qu'avec des personnes de son choix comporte certaines restrictions, basÈes sur des raisons d'ordre public. Il en est de la sorte, par exemple, lorsque le commerÁant ou l'industriel jouit, ainsi que les compagnies de chemin de fer, d'un monopole de droit ou mÍme de fait.

This principle was followed by the Court of King's Bench in the case of Loew's Montreal Theatres v. Reynolds [(1919) Q.R. 30 K.B. 459.], where the facts presented a great deal of similarity with those of the present case. The plaintiff, a coloured man, sued Loew's Theatres Ltd. in damages because he had been denied a seat in the orchestra at its theatre, on account of his colour, for the reason that the management had decided that no person belonging to that race would be admitted to the orchestra seats. The Court decided that the management of a theatre may impose restrictions and make rules of that character. In the course of his reasons, Chief Justice Lamothe said:

> Aucune loi, dans notre province, n'interdÓt aux propriÈtaires de thÈ,tres de faire une rËgle semblable. Aucun rÈglement municipal ne porte sur ce sujet. Alors, chaque propriÈtaire est maÓtre chez lui; il peut, ‡ son grÈ, Ètablir toutes rËgles non contraires aux bonnes moeurs et ‡ l'ordre public. Ainsi, un gÈrant de thÈ,tre pourrait ne recevoir que les personnes, revÍtues d'un habit de soirÈe. La rËgle pourrait paraÓtre arbitraire, mais elle ne serait ni illÈgale ni prohibÈe. Il

> faudrait s'y soumettre, ou ne pas aller ‡ ce thÈ,tre. Tenter de violer cette rËgle ‡ l'aide d'un billet, serait s'exposer ‡ l'expulsion, ce serait s'y exposer volontairement.

In the particular case of the hotel keepers, the jurisprudence is now well established; and we read in Carpentier and du Saint, RÈpertoire du droit franÁais, Vo. Aubergiste, nos 83 et 84, that

> Le principe de la libertÈ de l'industrie a fait dÈcider aux auteurs de l'EncyclopÈdie du droit que l'hÙtelier est toujours libre de refuser le voyageur qui se prÈsente.
>
> * * *
>
> C'est en ce dernier sens que se prononce une jurisprudence constante; et la question aujourd'hui ne prÈsente plus de doute sÈrieux.

In a similar case, in the province of Ontario, where the facts were practically identical with the present one, Lennox, J., decided according to the same principle and referred to a number of English cases on which he relied (Franklin v. Evans) [(1924) 55 O.L.R. 349.].

This, moreover, would appear to have been the view of the learned trial judge in his reasons for judgment, and it would seem that he would have dismissed the case but for his opinion that sec. 33 of the Quebec Licence Act specifically covered the case. Referring to the decisions above mentioned, he said in the course of his reasons:

> Je suis d'avis qu'aucune de ces causes n'a d'application. Elles sont bas]es sur le fait qu'il n'y a pas de loi restreignant la libertÈ du propriÈtaire; que chaque propriÈtaire de thÈ,tre ou de restaurant est maÓtre chez lui. C'est la prÈtention que la dÈfenderesse voulait faire triompher dans cette cause. Malheureusement pour elle, la loi des licences, ch. 25 S.R.P.Q., Art. 33, dit: "Nulle personne autorisÈe ‡ tenir un restaurant ne doit refuser sans cause raisonnable de donner ‡ manger aux voyageurs."

We will discuss later the effect of sec. 33 of the Quebec Licence Act, but for the moment it may be stated that, in this case, either under the law or upon the record, it cannot be argued that the rule adopted by the respondent in the conduct of its establishment was contrary to good morals or public order. Nor could it be said, as the law stood, that the sale of beer in the province of Quebec was either a monopoly or a privileged enterprise.

The fact that a business cannot be conducted without a licence does not make the owner or the operator thereof a trader of a privileged class.

The license in this case is mainly for the purpose of raising revenue and also, to a certain extent, for allowing the Government to control the industry; but it does not prevent the operation of the tavern from being a private enterprise to be managed within the discretion of its proprietor.

The only point to be examined therefore is whether sec. 33 of the Quebec Licence Act, upon which the learned trial judge relied in maintaining the appellant's action, applies to the present case.

The view of the majority of the Court of King's Bench was that it did not; and we agree with that interpretation.

Section 33 reads:

> No licensee for a restaurant may refuse, without reasonable cause, to give food to travellers.

For the purpose of our decision, there are three words to be considered in that section: "restaurant," "food," and "travellers."

The word "restaurant" is defined in the Act (sec. 19-2):

> A "restaurant" is an establishment, provided with special space and accommodation, where, in consideration of payment, food (without lodging) is habitually furnished to travellers.

The word "traveller" is also defined in the same section as follows:

> A "traveller" is a person who, in consideration of a given price per day, or fraction of a day, on the American or European plan, or per meal, ‡ table d'hÙte or ‡ la carte, is furnished by another person with food or lodging, or both.

With the aid of those two definitions in the Act, we think it must be decided that, in this case, the appellant was not a traveller who was asking to be furnished with food in a restaurant.

Perhaps, as stated by the learned trial judge, a glass of beer may, in certain cases, be considered as food. But we have no doubt that, in view of the definitions contained in the Act, the appellant was not a traveller asking for food in a restaurant within the meaning of the statute. In the Act respecting alcoholic liquor (ch. 37 of R.S.P.Q., 1925) we find the definition of the words "restaurant" and "traveller" in exactly the same terms as above. But, in addition, the words "meal" and "tavern" are also defined (Sec. 3, subs. 6 and 9).

Those definitions, so far as material here, are as follows:

> 6. The word "meal" means the consumption of food of a nature and quantity sufficient for the maintenance of the consumer, in one of the following places:
>
> * * *
>
> (b) In the dining-room of a restaurant situated in a city or town, and equipped for the accommodation of fifty guests at one time, and which is not only licensed for the reception of travellers but where full meals are regularly served.

> 9. The word "tavern" means an establishment specially adapted for the sale by the glass and consumption on the premises of beer as hereinbefore defined, or, in a hotel or restaurant, the room specially adapted for such purpose.

It will be seen therefore that the appellant cannot be brought within the terms of sec. 33 of the Quebec Licence Act. He was not a traveller asking for a meal in a restaurant. According to the definitions, he was only a person asking for a glass of beer in a tavern.

As the case is not governed by any specific law or more particularly by sec. 33 of the Quebec Licence Act, it falls under the general principle of the freedom of commerce; and it must follow that, when refusing to serve the appellant, the respondent was strictly within its rights.

But perhaps it may be added that the Quebec statutes make a clear distinction between a hotel or a restaurant and a tavern. The Act (sec. 32) provides that "no licensee for a hotel may refuse without just cause to give lodging or food to travellers" and that (sec. 33) "No licensee for a restaurant may refuse without reasonable cause, to give food to travellers."

No similar provision is made for taverns; and, in our opinion, it would follow from the statute itself that the legislature designedly excluded tavern owners from the obligation imposed upon the hotel and restaurant owners.

For these reasons, the appeal ought to be dismissed with costs.

DAVIS J. (dissenting):-- The appellant is a British subject residing in Verdun near the city of Montreal in the province of Quebec. He came from Jamaica and has been permanently resident in the said province for some twenty years. He is a coloured gentleman -- his own words are "a negro" though counsel for the respondent, for what reason I do not know, told him during his examination for discovery that he wanted it on record that he is "not extraordinarily black." He appears to have a good position as a private chauffeur in Montreal. He was a season box subscriber to hockey matches held in the Forum in Montreal and in that building the respondent operates a beer tavern. Beer is sold by the glass for consumption on the premises. Food such as sandwiches is also served, being apparently purchased when required from nearby premises and resold to the customer. The appellant had often on prior occasions to the one in question, when attending the hockey matches dropped into the respondent's tavern and bought beer by the glass there. On the particular evening on which the complaint out of which these proceedings arose occurred, the appellant with two friends -- he describes one as a white man and the other as coloured -- just before the hockey game went into the respondent's premises in the ordinary course. The appellant put down fifty cents on the table and asked the waiter for three steins of light beer. The waiter declined to fill the order, stating that he was instructed not to serve coloured people. The appellant and his two friends then spoke to the bartender and to the manager, both of whom stated that the reason for refusal was that the appellant was a coloured person. The appellant then telephoned for the police. He says he did this because he wanted the police there to witness the refusal that had been made. The manager repeated to the police the refusal he had previously made. The appellant and his two friends then left the premises of their own accord. The appellant says that this was to his humiliation in the presence of some seventy customers who were sitting around and had heard what occurred.

The appellant then brought this action against the respondent for damages for breach of contract and damages in tort. No objection was taken to the suit having been brought both on contract and in tort on the same set of facts and I assume that this form of action is permissible under the Quebec practice and procedure. The appellant recovered $25 damages and costs at the trial. This

judgment was set aside and the action was dismissed with costs upon an appeal to the Court of King's Bench (Appeal Side), Galipeault J. dissenting [(1938) Q.R. 65 K.B. 104.].

The learned trial judge found that the appellant had been humiliated by the refusal and was entitled to be compensated upon the ground that the tavern was a restaurant within the meaning of the Quebec Licence Act, R.S.Q. 1925, ch. 25, sec. 19, and that as such the respondent was forbidden by sec. 33 to refuse the appellant. By sec. 19(2) a restaurant is defined as

> an establishment, provided with special space and accommodation, where, in consideration of payment, food (without lodging) is habitually furnished to travellers.

By sec. 33,

> no licensee for a restaurant may refuse, without reasonable cause, to give food to travellers.

The Court of King's Bench did not consider the above statute, which deals with various licences granted by the government under the Act, applicable to the facts of this case, and, I think rightly, dealt with the case of the tavern under another statute, the Alcoholic Liquor Act, R.S.Q. 1925, ch. 37, and the majority of the Court took the view that "chaque propriÈtaire est maÓtre chez lui" on the doctrine of freedom of commerce -- "la libertÈ du commerce et de l'industrie." Pratte, J. ad hoc agreed with the conclusion of the majority but upon the single ground that the respondent's refusal was made under circumstances such that it could not cause any damage to the appellant. Galipeault, J. dissented upon the ground that the conduct of the respondent towards the appellant was contrary to good morals and the public order -- "contre les bonnes moeurs, contre l'ordre public," and considered that under the special legislation in Quebec governing the sale of liquor the respondent was not entitled to the "freedom of commerce" applicable to ordinary merchants and places like theatres, etc. Galipeault, J. would have affirmed the trial judgment.

This Court gave special leave to the appellant to appeal to this Court from the judgment of the Court of King's Bench upon the ground that the matter in controversy in the appeal will involve "matters by which rights in future of the parties may be affected" within the meaning of sec. 41 of the Supreme Court Act and also because the matter in controversy is of such general importance that leave to appeal ought to be granted [[1939] S.C.R. 50.].

The question in issue is a narrow one but I regard it as a very important one. That is, Has a tavern keeper in the province of Quebec under the special legislation there in force the right to refuse to sell beer to any one of the public? There is no suggestion that in this case there was any conduct of a disorderly nature or any reason to prompt the refusal to serve the beer to the appellant other than the fact that he was a coloured gentleman.

The province of Quebec in 1921 adopted the policy of complete control within the province of the sale of alcoholic liquors. (The Alcoholic Liquor Act, 11 Geo. V, Quebec Statutes 1921, ch. 24, now R.S.Q. 1925, ch. 37.) The words "alcoholic liquor" in the statute expressly include beer (sec. 3(5)). The word "tavern" means an establishment specially adapted for the sale by the glass and consumption on the premises of beer or, in a hotel or restaurant, the room specially adapted for such purpose (sec. 3(9)). The sale and delivery in the province of alcoholic liquor, with the exception of beer, is forbidden expressly, except that it may be sold or delivered to or by the Quebec Liq-

uor Commission set up by the statute or by any person authorized by it, or in any case provided for by the statute (sec. 22). The sale of beer is specifically dealt with by sec. 25, which provides that

> The sale or delivery of beer is forbidden in the province, unless such sale or delivery be made by the Commission or by a brewer or other person authorized by the Commission under this Act, and in the manner hereinafter set forth.

The Commission is given power by sec. 9d to control the possession, sale and delivery of alcoholic liquor in accordance with the provisions of the statute and by sec. 9e to grant permits for the sale of alcoholic liquor. By sec. 33 the Commission may determine the manner in which a tavern must be furnished and equipped in order to allow the exercise therein of the "privilege conferred by the permit." Beer may be sold by any person in charge of a grocery or of a store where beer only is sold, on condition that no quantity of less than one bottle be sold, that such beer be not consumed in such store, and that a permit therefor be granted him by the Commission, and that such permit be in force (sec. 30(4)). Now as to the sale of beer by the glass, sec. 30(5) provides as follows:--

> Any person in charge of a tavern, but in a city or town only, may sell therein beer by the glass, -- provided that it be consumed on the premises, and provided that a permit to that effect be granted him by the Commission ... and that such permit be in force.

Section 30 further provides that in every such case the beer must have been bought directly by the holder of the permit from a brewer who is also the holder of a permit. Section 42(3) fixes the days and hours during which any holder of a permit for the sale of beer in a tavern may sell. Then by sec. 43, certain named classes of persons are forbidden to be sold any alcoholic liquor:

> 1. Any person who has not reached the age of eighteen years;
>
> 2. any interdicted person;
> 3. any keeper or inmate of a disorderly house;
>
> 4. any person already convicted of drunkenness or of any offence caused by drunkenness;
>
> 5. Any person who habitually drinks alcoholic liquor to excess, and to whom the Commission has, after investigation, decided to prohibit the sale of such liquor upon application to the Commission by the husband, wife, father, mother, brother, sister, curator, employer or other person depending upon or in charge of such person, or by the curÈ, pastor, or mayor of the place.

But no sale to any of the persons mentioned in 2, 3, 4 or 5 above shall constitute an offence by the vendor unless the Commission has informed him, by registered letter, that it is forbidden to sell to such person. Sec. 46 provides that no beer shall be transported in the province except as therein defined.

By a separate statute, the Alcoholic Liquor Possession and Transportation Act, 11 Geo. V (1921), ch. 25, now R.S.Q. 1925, ch. 38, which Act is stated to apply to the whole province, no alcoholic liquor as defined in the Alcoholic Liquor Act (which includes beer) shall be kept, possessed or transported in the province except as therein set forth. Subsection 3 of sec. 3 excepts:

> in the residence of any person, for personal consumption and not for sale, provided it has been acquired by and delivered to such person, in his residence, previous to the 1st of May, 1921, or has been acquired by him, since such date, from the Quebec Liquor Commission.

It is plain, then, that the province of Quebec, like most of the other provinces in Canada, took complete control of the sale of liquor in its own province. The permit system enables the public to purchase from either government stores or specially licensed vendors. A glass of beer can only be bought in the province from a person who has been granted by the Government Commission a permit (sec. 33 refers to it as a "privilege") to sell to the public beer in the glass for consumption on the premises. The respondent was a person to whom a permit had been granted. The sole question in this appeal then is whether the respondent, having been given under the statute the special privilege of selling beer in the glass to the public, had the right to pick and choose those of the public to whom he would sell. In this case the refusal was on the ground of the colour of the person. It might well have been on account of the racial antecedents or the religious faith of the person. The statute itself has definitely laid down, by sec. 43, certain classes of persons to whom a licensee must not sell. The question is, Has the licensee the right to set up his own particular code, or is he bound, as the custodian of a government permit to sell to the public, to sell to anyone who is ready to pay the regular price? Disorderly conduct on the premises of course does not enter into our discussion because there is no suggestion of that in this case. One approach to the problem is the application of the doctrine of "freedom of commerce." It was held by the majority in the Court below, in effect, that the licensee is in no different position from a grocer or other merchant who can sell his goods to whom he likes. The opposite view was taken by Galipeault, J. on the ground that the licensee has what is in the nature of a quasi monopolistic right which involves a corresponding duty to sell to the public except in those cases prohibited by statute. Pratte J., ad hoc, did not take either view; his decision rests solely upon the ground that the respondent's refusal was made under circumstances such that it could not cause any damage to the appellant.

Several decisions were considered and discussed by the judges in the Court below. One of the cases relied upon for the majority view was the Quebec case of Loew's Theatre v. Reynolds [(1919) Q.R. 30 K.B. 459.], where it was held that a negro who buys a ticket of general admission to the theatre and knowing the rule of the theatre that only persons wearing evening dress are allowed in the dress circle, is refused the right to sit there, has no right of action. It was said in that case that a theatre can make rules, such as requiring evening dress in the dress circle, which applied to all, white and coloured alike, and it did not constitute discrimination because it was a rule that was not against public order and good morals. Carroll, J., dissented in that case. Martin, J. who rendered the majority opinion of the Court, said, at p. 465:

> While it may be unlawful to exclude persons of colour from the equal enjoyment of all rights and privileges in all places of public amusement, the management has the right to assign particular seats to different races and classes of men and women as it sees fit, ...

Another case relied upon by the majority was the Ontario case of Franklin v. Evans [(1924) 55 O.L.R. 349.]. That was a restaurant case in which the plaintiff, a negro, had been refused food on the ground of colour. There was no statutory law in Ontario requiring a restaurant to receive. Lennox, J., who tried the case, said that he had been referred to no decided case in support of the plaintiff's contention that the restaurant was bound to serve him. But he said that in his opinion the restaurant-keeper in that case was

> not at all in the same position as persons who, in consideration of the grant of a monopoly or quasi-monopoly, take upon themselves definite obligations.

The English case of Sealey v. Tandy [[1902] 1 K.B. 296.] was referred to by those who took the majority view. That was a case of assault stated by a metropolitan magistrate. It was held that the occupier and licensee of licensed premises (not being an inn) has a right to request any person to leave whom he does not wish to remain upon his premises. But I would refer, in connection with that case, to the editors' footnote in the new Halsbury, vol. 18, p. 144 (k), where after citing Sealey v. Tandy [[1902] 1 K.B. 296.], they say:

> But in Attorney-General v. Capel (1494, Y.B. 10 Hen. 7, fo. 7, pl. 14, Hussey, C.J., said that a "victualler" will be compelled to sell his victual if the purchaser has tendered him ready payment, otherwise not. Quod Brian affirmavit. And in Anon. (1460) Y.B. 39 Hen. 6, fo. 18, pl. 24, cited in Bro. Abr., tit. Action sur le case, pl. 76, it is said: "It is decided by Moyle, J., if an innkeeper refuses to lodge me I shall have an action on the case and the same law if a victualler refuses to give me victuals.

A victualler (see Murray's Oxford Dictionary) is one who sells food or drink to be consumed on the premises; a publican.

The question is one of difficulty, as the divergence of judicial opinion in the courts below indicates. My own view is that having regard to the special legislation in Quebec establishing complete governmental control of the sale of beer in the province and particularly the statutory provision which prohibits anyone of the public from buying beer in the glass from anyone but a person granted the special privilege of selling the same, a holder of such a permit from the government to sell beer in the glass to the public has not the right of an ordinary trader to pick and choose those to whom he will sell.

In the changed and changing social and economic conditions, different principles must necessarily be applied to the new conditions. It is not a question of creating a new principle but of applying a different but existing principle of the law. The doctrine that any merchant is free to deal with the public as he chooses had a very definite place in the older economy and still applies to the case of an ordinary merchant, but when the State enters the field and takes exclusive control of the sale to the public of such a commodity as liquor, then the old doctrine of the freedom of the merchant to do as he likes has in my view no application to a person to whom the State has given a special privilege to sell to the public.

If there is to be exclusion on the ground of colour or of race or of religious faith or on any other ground not already specifically provided for by the statute, it is for the legislature itself, in my

view, to impose such prohibitions under the exclusive system of governmental control of the sale of liquor to the public which it has seen fit to enact.

The appellant sued for $200. The learned trial judge awarded him $25 damages. I would allow the appeal, set aside the judgment appealed from and restore the judgment at the trial with costs here and below.

Appeal dismissed with costs.

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HALIFAX FIRE INS. CO. v. MCGILVRAY.

Ewing J.

quasi-contracts growing out of the principle of unjust enrichment.'

"My Lords, notwithstanding the wide scope of the remedy so described, I think that it must be taken to have been given only, as I have already said, where the law could consistently impute to the defendant at least the fiction of a promise."

In *Stimson* v. *Hamilton* (1906), 7 Terr. L.R. 281, Scott J. held, after review of certain authorities, that a claim on a covenant contained in a mortgage was a liquidated demand within the rules governing the issue of a garnishee summons. In *Connors* v. *Egli*, [1923] 4 D.L.R. 1199, Simmons J. held that a claim under 13 Eliz., c. 5, s. 3, for a penalty or forfeiture arising out of a feigned, covinous or fraudulent gift of goods was a claim which under our Rule 648 would support a garnishee summons.

I was referred by counsel for the defendant to *Smith* v. *Baker* (1873), L.R. 8 C.P. 350. In that case a trustee in bankruptcy obtained a declaration that a bill of sale made by the bankrupt previously to bankruptcy was fraudulent and void. The trustee also obtained an order that the purchaser who had sold the goods previously to the bankruptcy pay over the proceeds to the trustee. Having received the money from the purchaser the trustee then sued in trover to recover the difference between the amount realized and the value of the goods. The Court, after referring to the admitted principle that if a plaintiff brings an action for money had and received such an action is a conclusive election to waive the tort, held that the bankruptcy proceedings taken by the trustee were a clear affirmance of the wrongful sale. This seems to be the only point in the case. The right of the plaintiff to sue for money had and received was not questioned. The plaintiff at bar has sued for the money which it paid over but the effect of this action on the tortious act does not seem to be in issue on this application.

I am of opinion that the action herein is one of *assumpsit* and is an action for a debt or liquidated demand. The application to set aside the garnishee summons will, therefore, be dismissed. The costs will be costs in the cause to the plaintiff in any event.

Appeal dismissed.

CHRISTIE v. YORK CORP.

Can.

S.C.

1939.

Supreme Court of Canada, Sir Lyman P. Duff, C.J.C., Rinfret, Crocket, Davis and Kerwin JJ. December 9, 1939.

Hotels—Intoxicating Liquors I—Refusal to sell to negro—Freedom of commerce—Whether contrary to good morals and public order—Effect of liquor legislation.

In virtue of the doctrine of freedom of commerce a licensed tavern-keeper in Quebec has the right to refuse to sell beer to a coloured person solely on the ground of his colour, there being nothing contrary to good morals or public order in such refusal and no specific enactment abrogating the right. Davis J. dissented on the ground that the effect of Quebec liquor legislation, conferring on licensed tavern-keepers a *quasi*-monopoly of the sale of beer by the glass, was to place a restriction on their right to pick and choose those to whom they would sell.

Cases Judicially Noted: *Loew's Montreal Theatres* v. *Reynolds*, 30 Que. K.B. 459; *Franklin* v. *Evans*, 55 O.L.R. 349; *Scaley* v. *Tandy*, [1902] 1 K.B. 296, consd.

Statutes Considered: *License Act*, R.S.Q. 1925, c. 25, ss. 19(2), 33; *Alcoholic Liquor Act*, R.S.Q. 1925, c. 37, ss. 3(5), (6) and (9), 25, 30(5), 43; *Alcoholic Liquor Possession and Transportation Act*, R.S.Q. 1925, c. 38.

EDITORIAL NOTE: This would appear to be the first authoritative decision on a highly contentious question and is the law's confirmation of the socially enforced inferiority of the coloured races. The principles upon which the judgment is based, though derived from *Code* sources, will be found equally applicable to the common law. The authorities are considered in *Franklin* v. *Evans*, *supra*.

APPEAL from judgment of Quebec Court of King's Bench, Appeal Side, 65 Que. K.B. 104, which reversed the judgment of Demers J., 75 Que. S.C. 136, awarding a negro $25 damages for humiliation suffered in being refused beer by a licensed tavern-keeper. Affirmed.

Lovell C. Carroll, for appellant.

Hazen Hansard, for respondent.

SIR LYMAN P. DUFF C.J.C., concurs with RINFRET J.

RINFRET J.:—The appellant, who is a negro, entered a tavern owned and operated by the respondent, in the City of Montreal, and asked to be served a glass of beer; but the waiters refused him for the sole reason that they had been instructed not to serve coloured persons. He claimed the sum of $200 for the humiliation he suffered.

The respondent alleged that in giving such instructions to its employees and in so refusing to serve the appellant it was well within its rights; that its business is a private enterprise for gain; and that, in acting as it did, the respondent was merely protecting its business interests.

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It appears from the evidence that, in refusing to sell beer to the appellant, the respondent's employees did so quietly, politely and without causing any scene or commotion whatever. If any notice was attracted to the appellant on the occasion in question, it arose out of the fact that the appellant persisted in demanding beer after he had been so refused and went to the length of calling the police, which was entirely unwarranted by the circumstances.

The learned trial Judge awarded the appellant the sum of $25 and costs of the action as brought. The only ground of the judgment was that the rule whereby the respondent refused to serve negroes in its tavern was "illegal", according to ss. 19 and 33 of the *Quebec License Act*, R.S.Q. 1925, c. 25.

The Court of King's Bench, however, was of opinion that the sections relied on by the Superior Court did not apply; and considering that, as a general rule, in the absence of any specific law, a merchant or trader is free to carry on his business in the manner he conceives to be best for that business, that Court (Galipeault J. dissenting) reversed the judgment of the Superior Court and dismissed the appellant's action with costs. The appeal here is by special leave, pursuant to s. 41 of the *Supreme Court Act*, R.S.C. 1927, c. 35.

In considering this case, we ought to start from the proposition that the general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public order. This is well illustrated in a case decided by the Tribunal de Commerce de Nice and which was confirmed by the Cour de Cassation in France (S. 93-2-193; and S. 96-1-144):

". . . . le principe de la liberté du commerce et de l'industrie emporte, pour tout marchand, le droit de se refuser à vendre, ou à mettre à la disposition du public ce qui fait l'objet de son commerce; le principe de la liberté du commerce et de l'industrie autorise le propriétaire d'un établissement ouvert au public, et à plus forte raison le directeur d'un casino, à n'y donner accès qu'aux personnes qu'il lui convient de recevoir; son contrôle à cet égard est souverain et ne peut être subordonné à l'appréciation des tribunaux.

"Cependant la liberté du commerçant ou de l'industriel de n'entrer en rapport qu'avec des personnes de son choix comporte certaines restrictions, basées sur des raisons d'ordre public. Il en est de la sorte, par exemple, lorsque le commerçant ou l'industriel jouit, ainsi que les compagnies de chemin de fer, d'un monopole de droit ou même de fait."

(Translation): ". . . . the principle of freedom of commerce and industry means that every merchant has the right to refuse to sell or to put at public disposal whatever is the subject-matter of his business; the principle of freedom of commerce and industry permits the proprietor of an establishment open to the public, and with even greater reason the director of a club, to allow admission only to persons whom he wishes to admit; his authority in this respect is sovereign and may not be subordinated to review by the Courts. However, the freedom of the business man and industrialist to do business only with persons of his choice is subject to certain limitations, based on reasons of public order. Such is the case, for example, when a business man or industrialist enjoys a monopoly, whether a legal or merely a *de facto* one, as in the case of railway companies."

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This principle was followed by the Court of King's Bench in the case of *Loew's Montreal Theatres* v. *Reynolds* (1919), 30 Que. K.B. 459, where the facts presented a great deal of similarity with those of the present case. The plaintiff, a coloured man, sued Loew's Theatres Ltd. in damages because he had been denied a seat in the orchestra, at its theatre, on account of his colour, for the reason that the management had decided that no person belonging to that race would be admitted to the orchestra seats. The Court decided that the management of a theatre may impose restrictions and make rules of that character. In the course of his reasons, Chief Justice Lamothe said (pp. 460-1):

"Aucune loi, dans notre province, n'interdit aux propriétaires de théâtres de faire une règle semblable. Aucun règlement municipal ne porte sur ce sujet. Alors, chaque propriétaire est maître chez lui; il peut, à son gré, établir toutes règles non contraires aux bonnes moeurs et à l'ordre public. Ainsi, un gérant de théâtre pourrait ne recevoir que les personnes revêtues d'un habit de soirée. La règle pourrait paraître arbitraire, mais elle ne serait ni illégale ni prohibée. Il faudrait s'y soumettre, ou ne pas aller à ce théâtre. Tenter de violer cette règle à l'aide d'un billet, serait s'exposer à l'expulsion, ce serait s'y exposer volontairement."

(Translation): "No law in this Province forbids theatre proprietors to make such a rule. No municipal by-law bears on the subject. Therefore, each proprietor is master in his own house; he may, at his choice, establish any rule not contrary to good morals and public order. Thus, a theatre manager may allow admission only to persons in evening clothes. The rule might seem arbitrary, but it would be neither illegal nor prohibited. One must either submit to it or not go to that theatre. To endeavour to violate such a rule with the aid of a ticket would be to expose oneself to expulsion, and to do so voluntarily."

In the particular case of the hotel keepers, the jurisprudence

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is now well established; and we read in Carpentier and du Saint, Répertoire du droit français, Vo. Aubergiste, nos 83 et 84, that

"Le principe de la liberté de l'industrie a fait décider aux auteurs de l'Encyclopédie du droit que l'hôtelier est toujours libre de refuser le voyageur qui se présente. . . . C'est en ce dernier sens que se prononce une jurisprudence constante; et la question aujourd'hui ne présente plus de doute sérieux."

(Translation): "The principle of freedom of industry has caused the authors of the Encyclopedia of law to decide that the hotel keeper is always at liberty to refuse a traveller who presents himself . . . . A constant jurisprudence sustains this last view, and the question no longer offers any serious difficulty."

In a similar case, in the Province of Ontario, where the facts were practically identical with the present one, Lennox J. decided according to the same principle and referred to a number of English cases on which he relied (*Franklin* v. *Evans* (1924), 55 O.L.R. 349).

This, moreover, would appear to have been the view of the learned trial Judge in his reasons for judgment, and it would seem that he would have dismissed the case but for his opinion that s. 33 of the *Quebec License Act* specifically covered the case. Referring to the decisions above mentioned, he said in the course of his reasons:

"Je suis d'avis qu'aucune de ces causes n'a d'application. Elles sont basées sur le fait qu'il n'y a pas de loi restreignant la liberté du propriétaire; que chaque propriétaire de théâtre ou de restaurant est maître chez lui. C'est la prétention que la défenderesse voulait faire triompher dans cette cause. Malheureusement pour elle, la loi des licences, ch. 25 S.R.P.Q., Art. 33, dit: 'Nulle personne autorisée à tenir un restaurant ne doit refuser sans cause raisonnable de donner à manger aux voyageurs.' "

(Translation): "In my opinion none of these cases applies. They are based on the fact that there is no law restricting the liberty of the proprietor, that every theatre or restaurant proprietor is master in his own house. It is this contention which the defendant company wishes to prevail in this case. Unfortunately for defendant, the *Quebec License Act*, R.S.Q. 1925, c. 25, s. 33, provides: 'No licensee for a restaurant may refuse, without reasonable cause, to give food to travellers.' "

We will discuss later the effect of s. 33 of the *Quebec License Act*, but for the moment it may be stated that, in this case, either under the law or upon the record, it cannot be argued that the rule adopted by the respondent in the conduct of his establishment was contrary to good morals or public order. Nor could it be said, as the law stood, that the sale of beer in the Province of Quebec was either a monopoly or a privileged enterprise.

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The fact that a business cannot be conducted without a license does not make the owner or the operator thereof a trader of a privileged class.

The license in this case is mainly for the purpose of raising revenue and also, to a certain extent, for allowing the Government to control the industry; but it does not prevent the operation of the tavern from being a private enterprise to be managed within the discretion of its proprietor.

The only point to be examined therefore is whether s. 33 of the *Quebec License Act*, upon which the learned trial Judge relied in maintaining the appellant's action, applies to the present case.

The view of the majority of the Court of King's Bench was that it did not; and we agree with that interpretation.

Section 33 reads: "No licensee for a restaurant may refuse, without reasonable cause, to give food to travellers."

For the purpose of our decision, there are three words to be considered in that section: "restaurant," "food," and "travellers."

The word "restaurant" is defined in the Act (s. 19(2)): "A 'restaurant' is an establishment, provided with special space and accommodation, where, in consideration of payment, food (without lodging) is habitually furnished to travelers."

The word "traveller" is also defined in the same section as follows: "(4) A 'traveler' is a person who, in consideration of a given price per day, or fraction of a day, on the American or European plan, or per meal, *à table d'hôte* or *à la carte*, is furnished by another person with food or lodging, or both."

With the aid of those two definitions in the Act, we think it must be decided that, in this case, the appellant was not a traveller who was asking to be furnished with food in a restaurant.

Perhaps, as stated by the learned trial Judge, a glass of beer may, in certain cases, be considered as food. But we have no doubt that, in view of the definitions contained in the Act, the appellant was not a traveller asking for food in a restaurant within the meaning of the statute. In the Act respecting alcoholic liquor (*Alcoholic Liquor Act*, R.S.Q. 1925, c. 37) we find the definition of the words "restaurant" and "traveller" in exactly the same terms as above. But, in addition, the words "meal" and "tavern" are also defined (s. 3(6), (9)).

Those definitions, so far as material here, are as follows: "6. The word 'meal' means the consumption of food of a nature and quantity sufficient for the maintenance of the consumer, in one of the following places,— . . . .

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"(*b*) in the dining-room of a restaurant situated in a city or town, and equipped for the accommodation of fifty guests at one time, and which is not only licensed for the reception of travelers but where full meals are regularly served."

"9. The word 'tavern' means an establishment specially adapted for the sale by the glass and consumption on the premises of beer as hereinbefore defined, or, in a hotel or restaurant, the room specially adapted for such purpose."

It will be seen therefore that the appellant cannot be brought within the terms of s. 33 of the *Quebec License Act*. He was not a traveller asking for a meal in a restaurant. According to the definitions, he was only a person asking for a glass of beer in a tavern.

As the case is not governed by any specific law or more particularly by s. 33 of the *Quebec License Act*, it falls under the general principle of the freedom of commerce; and it must follow that, when refusing to serve the appellant, the respondent was strictly within its rights.

But perhaps it may be added that the Quebec Statutes make a clear distinction between a hotel or a restaurant and a tavern. The Act (s. 32) provides that "No licensee for a hotel may refuse without just cause to give lodging or food to travellers" and that (s. 33) "No licensee for a restaurant may refuse, without reasonable cause, to give food to travellers."

No similar provision is made for taverns; and, in our opinion, it would follow from the statute itself that the Legislature designedly excluded tavern owners from the obligation imposed upon the hotel and restaurant owners.

For these reasons, the appeal ought to be dismissed with costs.

CROCKET J., concurs with RINFRET J.

DAVIS J. (dissenting):—The appellant is a British subject residing in Verdun near the City of Montreal in the Province of Quebec. He came from Jamaica and has been permanently resident in the said Province for some 20 years. He is a coloured gentleman—his own words are "a negro" though counsel for the respondent, for what reason I do not know, told him during his examination for discovery that he wanted it on record that he is "not extraordinarily black." He appears to have a good position as a private chauffeur in Montreal. He was a season box subscriber to hockey matches held in the Forum in Montreal and in that building the respondent operates a beer tavern. Beer is sold by the glass for consumption on the premises. Food such as sandwiches is also served, being apparently purchased when required from nearby premises and resold to the customer. The appellant had often on prior occasions to the one in question, when attending the hockey matches dropped into the respondent's tavern and bought beer by the glass there. On the particular evening on which the complaint out of which these proceedings arose occurred, the appellant with two friends—he describes one as a white man and the other as coloured—just before the hockey game went into the respondent's premises in the ordinary course. The appellant put down 50c on the table and asked the waiter for three steins of light beer. The waiter declined to fill the order, stating that he was instructed not to serve coloured people. The appellant and his two friends then spoke to the bartender and to the manager, both of whom stated that the reason for refusal was that the appellant was a coloured person. The appellant then telephoned for the police. He says he did this because he wanted the police there to witness the refusal that had been made. The manager repeated to the police the refusal he had previously made. The appellant and his two friends then left the premises of their own accord. The appellant says that this was to his humiliation in the presence of some 70 customers who were sitting around and had heard what occurred.

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The appellant then brought this action against the respondent for damages for breach of contract and damages in tort. No objection was taken to the suit having been brought both on contract and in tort on the same set of facts and I assume that this form of action is permissible under the Quebec practice and procedure. The appellant recovered $25 damages and costs at the trial. This judgment was set aside and the action was dismissed with costs upon an appeal to the Court of King's Bench (Appeal Side), Galipeault J. dissenting.

The learned trial Judge found that the appellant had been humiliated by the refusal and was entitled to be compensated upon the ground that the tavern was a restaurant within the meaning of the *Quebec License Act*, R.S.Q. 1925, c. 25, s. 19, and that as such the respondent was forbidden by s. 33 to refuse the appellant. By s. 19 (2) a restaurant is defined as "an establishment, provided with special space and accommodation, where, in consideration of payment, food (without lodging) is habitually furnished to travelers."

By s. 33, "No licensee for a restaurant may refuse, without reasonable cause, to give food to travellers."

The Court of King's Bench did not consider the above statute, which deals with various licences granted by the Government under the Act, applicable to the facts of this case and, I think rightly, dealt with the case of the tavern under another statute, the *Alcoholic Liquor Act*, R.S.Q. 1925, c. 37, and the majority

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of the Court took the view that "chaque propriétaire est maître chez lui" on the doctrine of freedom of commerce—"la liberté du commerce et de l'industrie." Pratte J. *ad hoc* agreed with the conclusion of the majority but upon the single ground that the respondent's refusal was made under circumstances such that it could not cause any damage to the appellant. Galipeault J. dissented upon the ground that the conduct of the respondent towards the appellant was contrary to good morals and the public order—"contre les bonnes moeurs, contre l'ordre public," and considered that under the special legislation in Quebec governing the sale of liquor the respondent was not entitled to the "freedom of commerce" applicable to ordinary merchants and places like theatres, etc. Galipeault J. would have affirmed the trial judgment.

This Court gave special leave to the appellant to appeal to this Court from the judgment of the Court of King's Bench upon the ground that the matter in controversy in the appeal will involve "matters by which rights in future of the parties may be affected" within the meaning of s. 41 of the *Supreme Court Act* and also because the matter in controversy is of such general importance that leave to appeal ought to be granted. ([1939], 4 D.L.R. 723, S.C.R. 50.)

The question in issue is a narrow one but I regard it as a very important one. That is, Has a tavern keeper in the Province of Quebec under the special legislation there in force the right to refuse to sell beer to any one of the public? There is no suggestion that in this case there was any conduct of a disorderly nature or any reason to prompt the refusal to serve the beer to the appellant other than the fact that he was a coloured gentleman.

The Province of Quebec in 1921 adopted the policy of complete control within the Province of the sale of alcoholic liquors. (*Alcoholic Liquor Act*, 1921 (Que.), c. 24, now R.S.Q. 1925 c. 37.) The words "alcoholic liquor" in the statute expressly include beer (s. 3 (5)). The word "tavern" means an establishment specially adapted for the sale by the glass and consumption on the premises of beer or, in a hotel or restaurant, the room specially adapted for such purpose. (s. 3 (9)). The sale and delivery in the Province of alcoholic liquor, with the exception of beer, is forbidden expressly, except that it may be sold or delivered to or by the Quebec Liquor Commission set up by the statute or by any person authorized by it, or in any case provided for by the statute (s. 22). The sale of beer is specifically dealt with by s. 25, which provides that "The sale or delivery of beer is forbidden in the Province, unless such sale or delivery

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be made by the Commission or by a brewer or other person authorized by the Commission under this act, and in the manner hereinafter set forth."

The Commission is given power by s. 9d to control the possession, sale and delivery of alcoholic liquor in accordance with the provisions of the statute and by s. 9(*e*) to grant permits for the sale of alcoholic liquor.

By s. 33 the Commission may determine the manner in which a tavern must be furnished and equipped in order to allow the exercise therein of the "privilege conferred by the permit." Beer may be sold by any person in charge of a grocery or of a store where beer only is sold, on condition that no quantity of less than one bottle be sold, that such beer be not consumed in such store, and that a permit therefor be granted him by the Commission, and that such permit be in force. (s. 30 (4)). Now as to the sale of beer by the glass, s. 30 (5) provides as follows: "Any person in charge of a tavern, but in a city or town only, may sell therein beer by the glass,—provided that it be consumed on the premises, and provided that a permit to that effect be granted him by the Commission, . . . and that such permit be in force."

Section 30 further provides that in every such case the beer must have been bought directly by the holder of the permit from a brewer who is also the holder of a permit. Section 42 (3) fixes the days and hours during which any holder of a permit for the sale of beer in a tavern may sell. Then by s. 43, certain named classes of persons are forbidden to be sold any alcoholic liquor:

1. Any person who has not reached the age of 18 years; 2. any interdicted person; 3. any keeper or inmate of a disorderly house; 4. any person already convicted of drunkenness or of any offence caused by drunkenness; 5. any person who habitually drinks alcoholic liquor to excess, and to whom the Commission has, after investigation, decided to prohibit the sale of such liquor upon application to the Commission by the husband, wife, father, mother, brother, sister, curator, employer or other person depending upon or in charge of such person, or by the *curé*, pastor, or mayor of the place.

But no sale to any of the persons mentioned in 2, 3, 4 or 5 above shall constitute an offence by the vendor unless the Commission has informed him, by registered letter, that it is forbidden to sell to such person. Section 46 provides that no beer shall be transported in the Province except as therein defined.

By a separate statute, the *Alcoholic Liquor Possession and Transportation Act*, 1921 (Que.), c. 25, now R.S.Q. 1925, c.

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38, which Act is stated to apply to the whole Province, no alcoholic liquor as defined in the *Alcoholic Liquor Act* (which includes beer) shall be kept, possessed or transported in the Province except as therein set forth. Subsection 3 of s. 3 excepts: "in the residence of any person, for personal consumption and not for sale, provided it has been acquired by and delivered to such person, in his residence, previous to the 1st of May, 1921, or has been acquired by him, since such date, from the Quebec Liquor Commission."

It is plain, then, that the Province of Quebec, like most of the other Provinces in Canada, took complete control of the sale of liquor in its own Province. The permit system enables the public to purchase from either Government stores or specially licensed vendors. A glass of beer can only be bought in the Province from a person who has been granted by the Government Commission a permit (s. 33 refers to it as a "privilege") to sell to the public beer in the glass for consumption on the premises. The respondent was a person to whom a permit had been granted. The sole question in this appeal then is whether the respondent, having been given under the statute the special privilege of selling beer in the glass to the public, had the right to pick and choose those of the public to whom he would sell. In this case the refusal was on the ground of the colour of the person. It might well have been on account of the racial antecedents or the religious faith of the person. The statute itself has definitely laid down, by s. 43, certain classes of persons to whom a licensee must not sell. The question is, Has the licensee the right to set up his own particular code, or is he bound, as the custodian of a Government permit to sell to the public, to sell to anyone who is ready to pay the regular price? Disorderly conduct on the premises of course does not enter into our discussion because there is no suggestion of that in this case. One approach to the problem is the application of the doctrine of "freedom of commerce." It was held by the majority in the Court below, in effect, that the licensee is in no different position from a grocer or other merchant who can sell his goods to whom he likes. The opposite view was taken by Galipeault J. on the ground that the licensee has what is in the nature of a *quasi*-monopolistic right which involves a corresponding duty to sell to the public except in those cases prohibited by statute. Pratte J., ad hoc, did not take either view; his decision rests solely upon the ground that the respondent's refusal was made under circumstances such that it could not cause any damage to the appellant.

Several decisions were considered and discussed by the Judges

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in the Court below. One of the cases relied upon for the majority view was the Quebec case of *Loew's Montreal Theatres* v. *Reynolds*, 30 Que. K.B. 459, where it was held that a negro who buys a ticket of general admission to the theatre and knowing the rule of the theatre that only persons wearing evening dress are allowed in the dress circle, is refused the right to sit there, has no right of action. It was said in that case that a theatre can make rules, such as requiring evening dress in the dress circle, which applied to all, white and coloured alike, and it did not constitute discrimination because it was a rule that was not against public order and good morals. Carroll J. dissented in that case. Martin J. who rendered the majority opinion of the Court, said, at pp. 465-6:

"While it may be unlawful to exclude persons of colour from the equal enjoyment of all rights and privileges in all places of public amusement, the management has the right to assign particular seats to different races and classes of men and women as it sees fit, ..."

Another case relied upon by the majority was the Ontario case of *Franklin* v. *Evans*, 55 O.L.R. 349. That was a restaurant case in which the plaintiff, a negro, had been refused food on the ground of colour. There was no statutory law in Ontario requiring a restaurant to receive. Lennox J. who tried the case, said that he had been referred to no decided case in support of the plaintiff's contention that the restaurant was bound to serve him. But he said that in his opinion the restaurant-keeper in that case was "not at all in the same position as persons who, in consideration of the grant of a monopoly or quasi-monopoly, take upon themselves definite obligations." (p. 350).

The English case of *Sealey* v. *Tandy*, [1902] 1 K.B. 296, was referred to by those who took the majority view. That was a case of assault stated by a metropolitan Magistrate. It was held that the occupier and licensee of licensed premises (not being an inn) has a right to request any person to leave whom he does not wish to remain upon his premises. But I would refer, in connection with that case, to the editors' footnote in the new Halsbury, vol. 18, p. 144(*k*), where after citing *Sealey* v. *Tandy*, they say:

"But in A.-G. v. Capel (1494) Y.B. 10 Hen. 7, fo. 7, pl. 14, Hussey, C.J., said that a 'victualler' will be compelled to sell his victual if the purchaser has tendered him ready payment, otherwise not. Quod Brian affirmavit. And in Anon. (1460) Y.B. 39 Hen. 6, fo. 18, pl. 24, cited in Bro. Abr., tit. Action sur le case, pl. 76, it is said: 'It is decided by Moyle, J., if an inn-

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keeper refuses to lodge me I shall have an action on the case and the same law if a victualler refuses to give me victuals.' ''

A victualler (see Murray's Oxford Dictionary) is one who sells food or drink to be consumed on the premises; a publican.

The question is one of difficulty, as the divergence of judicial opinion in the Courts below indicates. My own view is that having regard to the special legislation in Quebec establishing complete governmental control of the sale of beer in the Province and particularly the statutory provision which prohibits anyone of the public from buying beer in the glass from anyone but a person granted the special privilege of selling the same, a holder of such a permit from the Government to sell beer in the glass to the public has not the right of an ordinary trader to pick and choose those to whom he will sell.

In the changed and changing social and economic conditions, different principles must necessarily be applied to the new conditions. It is not a question of creating a new principle but of applying a different but existing principle of the law. The doctrine that any merchant is free to deal with the public as he chooses had a very definite place in the older economy and still applies to the case of an ordinary merchant, but when the State enters the field and takes exclusive control of the sale to the public of such a commodity as liquor, then the old doctrine of the freedom of the merchant to do as he likes has in my view no application to a person to whom the State has given a special privilege to sell to the public.

If there is to be exclusion on the ground of colour or of race or of religious faith or on any other ground not already specifically provided for by the statute, it is for the Legislature itself, in my view, to impose such prohibitions under the exclusive system of governmental control of the sale of liquor to the public which it has seen fit to enact.

The appellant sued for $200. The learned trial Judge awarded him $25 damages. I would allow the appeal, set aside the judgment appealed from and restore the judgment at the trial with costs here and below.

KERWIN J., concurs with RINFRET J.

Appeal dismissed.

LEMAY v. MINISTER OF NATIONAL REVENUE.

Exchequer Court of Canada, Angers J. April 26, 1939.

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Courts III—Depositions — Exchequer Court — Commission to take party's evidence abroad.

Section 64 of the *Exchequer Court Act, R.S.C.* 1927, c. 34, does not permit a party to a suit in the Exchequer Court to obtain an order for a commission or letters of request to take his own evidence abroad.

Cases Judicially Noted: *L'Abbé Warré* v. *Bertrand & Labelle*, 40 Que. K.B. 509; *Worthington* v. *Walker*, 30 Que. P.R. 82, consd.

Statutes Considered: *Exchequer Court Act*, R.S.C. 1927, c. 34, s. 64, *Exchequer Court Rule* 169.

EDITORIAL NOTE: For other cases relating to the jurisdiction and practice of the Exchequer Court see ALL-CANADA DIGEST and CANADIAN ANNUAL DIGESTS under Courts III.

MOTION by appellant from income tax assessment for an order for a commission or letters of request to take her evidence at Paris, France. Dismissed.

E. A. Anglin, for the motion.

Roger Ouimet and *A. A. McGrory*, contra.

ANGERS J.:—This is a motion on behalf of the appellant for an order that a commission or letters of request issue, as may be appropriate under the laws of France, for the examination under oath by interrogatories or otherwise at the City of Paris, France, of the appellant.

The subject of the present suit is an appeal from an assessment by the Commissioner of Income Tax affirmed by the Minister of National Revenue.

The motion is supported by the affidavit of Mr. Louis S. St.-Laurent, K.C., counsel for appellant. The affidavit states (*inter alia*) that the appellant resides in Paris, France; that there are facts which, unless admitted, can only be established by the appellant's testimony; that counsel endeavoured to arrange with respondent's solicitor for a joint admission of these facts so as to avoid the necessity of obtaining the appellant's testimony in connection therewith and that he was advised recently that the proposed joint admission cannot be made; that counsel endeavoured to ascertain if there were any probability that the appellant might have to come to Canada at an early date and that he has been informed that there is no such probability; that the cost and inconvenience to the appellant of having to make a trip from France to Canada to give evidence would be much greater than the cost or inconvenience of