1954
*Apr. 1
*Jun. 17, 18
*Oct. 13
*Nov. 23

1955
*May 24

SYSTEM THEATRE OPERATING COMPANY LIMITED ..... APPELLANT;

AND

HARRY PULOS ..... RESPONDENT;

AND

ALBERT LAMARRE ..... MIS-EN-CAUSE.

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

Winding-up—Provisional liquidator—Setting aside of appointment and winding-up order—Liability for fees of liquidator—Winding-up Act, R.S.C. 1927, c. 213, ss. 28, 94, 106, 138—Civil Code, Arts. 1117, 1823(3) —Code of Civil Procedure, Art. 594.

On the petition of the respondent, the Superior Court made a winding-up order against the appellant and appointed a provisional liquidator. Provisional execution of the order in so far as the appointment of the provisional liquidator was concerned was granted by the Court of Appeal. Subsequently, the Court of Appeal set aside the winding-up order and dismissed the petition. The appellant now appeals from that part of the judgment of the Court of Appeal directing it to pay the fees, charges and expenses, other than court costs, of the provisional liquidator.

*PRESENT: Taschereau, Rand, Kellock, Fauteux and Abbott JJ.

Held: The appeal should be allowed, the provision complained of struck out and the matter referred back to the Superior Court to determine the amount of the fees, including their apportionment between the parties pursuant to Art. 1117 C.C.

By reason of ss. 106 and 138 of the *Winding-up Act,* Article 594 of the *Code of Civil Procedure* constitutes ample authority for the order granting provisional execution. The appointment of the provisional liquidator was legally made under s. 28 of the Act and he was, therefore, entitled to his fees and disbursements.

There having been no liquidation and therefore no assets, s. 94 of the Act does not apply, but by s. 138, the ordinary practice of the Superior Court in analogous cases is invoked and, consequently, Art. 1823(3) C.C., respecting judicial sequestrators, whose functions are closely analogous to those of the provisional liquidator, is the appropriate rule to be looked at. Following the authorities, both parties must be held to be jointly and severally liable for the fees of the provisional liquidator, the same as they are held to be in respect of the judicial sequestrator appointed under Art. 1823(3) C.C.

As there is no tariff in the province for the taxation of the judicial sequestrator's fees, s. 42(1) of the *Winding-up Act* applies and the liquidator is to be paid such salary or remuneration by way of percentage or otherwise as the court directs upon such notice to the shareholders as the court orders.

APPEAL from that part of the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), directing the appellant to pay the fees of the provisional liquidator.

N. Levitsky for the appellant.

E. Lafontaine for the respondent.

J. Perrault for the mis-en-cause.

The judgment of the Court was delivered by:—

KELLOCK J.:—This is an appeal by leave pursuant to the provisions of *The Winding-Up Act,* from that part of the judgment of the Court of Queen's Bench, Appeal Side (1), dated April 28, 1953, which directed payment by the appellant of the fees, charges and expenses, other than court costs, of the provisional liquidator.

On June 17, 1948, on the petition of the respondent, the Superior Court made a winding-up order against the appellant and appointed one Albert Lamarre as provisional liquidator. The company having appealed, the Court of Appeal on the 23rd of September following, on the petition of the respondent, granted provisional execution of the

(1) Q.R. [1953] Q.B. 524.

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order in appeal in so far as the appointment of the provisional liquidator was concerned. In the result Lamarre remained in possession as provisional liquidator until the judgment now in appeal. Lamarre was made a party to the appeal in this court and appeared by counsel in support of the judgment in appeal.

The winding-up order was set aside on the 23rd of June, 1949, and a new trial ordered, as a result of which the Superior Court, on the 23rd of February, 1950, again found the appellant insolvent and ordered it to be wound up. This was, on a further appeal, set aside and the petition dismissed by the judgment of April 28, 1953.

For the respondent, reliance is placed on Art. 549 of the *Code of Civil Procedure,* it being contended that the remuneration of the liquidator is part of the "costs" dealt with by that article. It is past question, of course, that in order for the respondent to succeed in this contention, it is essential there be found in *The Winding-Up Act* itself some provision conferring jurisdiction upon the Court of Appeal to make the order in question; *Boily* v. *McNulty* (1). It may be observed that there are no provisions in *The Winding-Up Act* as are to be found in Rules 91 and 92 under *The Bankruptcy Act,* which make express provision for a matter of this kind. It is said for the respondent, however, that *The Winding-Up Act* does sufficiently provide for the jurisdiction which was asserted by the court below.

The appellant objects, in the first place, to the order granting provisional execution in so far as the appointment of the provisional liquidator is concerned. The contention is that Art. 594 of the *Code of Civil Procedure,* under which the order was made, does not apply to these proceedings. The appellant does not appear to object to the operation of the Code in bringing about the stay of execution itself by reason of the lodging of the appeal from the winding-up order of June 17, 1948. If the provincial Code could operate to bring about a stay, it would seem that it must have equal application as to removal of that stay. In my opinion, the Code is operative in both situations by reason of s. 106 of *The Winding-Up Act,* which provides that "all appeals shall be regulated, as far as possible, according to the practice in other cases of the court appealed to". S. 138 also provides

(1) [1928] S.C.R. 182.

that until rules and regulations are made as to proceedings under the statute, the "various . . . procedures", in cases under the Act, shall be the same "as nearly as may be" as those of the court in other cases. In my opinion, Art. 594 becomes applicable by analogy and paragraphs (6) and (8) of that article constitute ample authority for the order granting provisional execution.

The appointment of the provisional liquidator by the order of the 17th June, 1948, was made pursuant to s. 28 of *The Winding-Up Act*, which authorizes the court, i.e., the Superior Court, on the presentation of a petition for a winding-up order or at any time thereafter but "before the first appointment of a liquidator", to appoint a liquidator provisionally. S. 26 provides that no "liquidator" shall be appointed without notice to creditors, contributories and shareholders or members. Compliance with this provision was held by this court to be fundamental for the valid appointment of a liquidator; *Shoolbred* v. *The Union Fire Insurance Co.* (1).

S. 94 provides that "all costs, charges and expenses properly incurred in the winding up of a Company", including the remuneration of the liquidator, are payable "out of the assets of the company" in priority to all other claims. It is, however, impossible to apply this provision in the present case for the reason that, as the appellant was not wound up, there are no assets out of which payment may be ordered. It is therefore necessary to turn to other provisions of the statute.

It is provided by s. 137 that the judges of the Superior Court may make "forms, rules and regulations to be followed and observed in proceedings under this Act" and "rules as to the costs, fees and charges which shall or may be had, taken or paid" in all such cases by or to various named classes of persons or "other persons" or "for any service performed or work done under this Act."

S. 138 provides that, as already mentioned, until such forms, rules and regulations are made, the various "forms and procedures, including the tariff of costs, fees and charges in cases under this Act," shall, unless otherwise specially provided, be the same "as nearly as may be" as

(1) (1887) 14 Can. S.C.R. 624.

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those of the court in other cases. It would appear, therefore, that the ordinary practice of the Superior Court in analogous cases is thus invoked.

In my view Art. 1823(3) of the *Civil Code,* which provides for the appointment of a judicial sequestrator, is the appropriate rule to be looked to. The duties of such a functionary are custodial and therefore closely analogous to those of a provisional liquidator, the nature of whose functions is referred to in *Re Union Fire Insurance Co.* (1), per Hagarty C.J.O., at 269-70 and per Burton J.A., at 272-3.

It was held by the Court of King's Bench, Appeal Side, in *Maillet* v. *Fontaine* (2), that both parties to the proceedings are jointly and severally liable for the remuneration and expenses of a judicial sequestrator appointed under Art. 1823(3). It was there argued, upon the basis of the last paragraph of Art. 1825, that the person who procured the appointment of the sequestrator is alone liable, but this contention was expressly negatived, it being held that the terms of that paragraph do not apply in the case of a sequestrator appointed under Art. 1823(3).

It has been suggested that the court erred in the above decision in holding that the liability was several as well as joint. In my view, however, the case was rightly decided. It is true that, as provided by Art. 1105, such liability is not to be presumed, but that rule is not to prevail in cases where a joint and several obligation arises of right by virtue of some provision of law.

In *Baudry-Lacantinerie et Wahl,* Tr. de la sociéte, du prêt, du dépot, 3rd Ed. N. 1303, it is stated:

> On décide que le séquestre judiciaire a, pour le payementde son salaire et le remboursement de ses frais, une action solidaire contre toutes les parties qui ont figuré dans l'instance, par analogie de la règle adoptée en matière de séquestre conventionnel.

Again, on the 21st of December, 1929, the Court of Appeal of Paris (reported in Gazette du Palais, 1930, Vol. 1, p. 415) reached the same conclusion.

In *Planiol et Ripert,* Droit Civil, 2nd Ed., Vol. 11, p. 541, note 3, it is stated that as against the parties, the rules of mandate prevail over those of deposit so far as the obliga-

(1) (1886) 13 O.A.R. 268.

(2) Q.R. (1912) 21 K.B. 426.

tion to pay the fees and disbursements of a judicial sequestrator are concerned. In the same work at p. 542, the authors state:

> Le séquestre est en effet responsable envers les parties comme un dépositaire, et, relativement à ses actes juridiques, comme un mandataire.

As Mignault states in *Droit Civil,* Vol. 8, p. 5:

> . . . le mandat judiciaire est celui que la justice défère, *comme le séquestre.*

La Cour de Cassation in a judgment reported in *Gazette du Palais,* 1883. 1. 145, appear to take a similar view of the status of a liquidator receiving rents under the judgment there in question. It does not appear that the articles of the *Code Napoléon* differ in any substantial respect from the corresponding relevant articles of the *Civil Code.* In this view, Art. 1726 of the latter is pertinent. Accordingly, both the appellant and the respondent petitioning creditor are jointly and severally liable for the remuneration and disbursements of the provisional liquidator.

No tariff exists in the province according to which the fees and disbursements of a judicial sequestrator may be taxed but it is provided by s. 42(1) of *The Winding-Up Act* that a liquidator is to be paid such salary or remuneration by way of percentage or otherwise as the court directs upon such notice to the creditors, contributories, shareholders or members as the court orders. In the present instance, the winding-up order having been set aside, it would appear that shareholders are the only persons to whom the section would, in such circumstances as the present, have any application. While a distinction is made by s. 28 between a liquidator "appointed provisionally" and the first appointment of a "liquidator", I think there is no reason for holding that the word "liquidator" in s. 42 does not include a provisional liquidator. It is plain, I think, that the same word in s. 48 must include a provisional liquidator, and this is also true of s. 135.

Accordingly, the court below erred in applying Art. 549 of the *Code of Procedure.* The appeal should be allowed and the judgment of April 28, 1953 amended by striking out the provision complained of. The matter should be referred back to the Superior Court to determine in the winding-up proceedings the amount of fees and disbursements of the provisional liquidator and the payment thereof,

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including the division of liability as between the petitioning creditor and the company in accordance with Art. 1117 of the *Civil Code*. The appellant should have its costs in this court against the respondent. There should be no further order as to costs.

Appeal allowed with costs.

Solicitor for the appellant: *N. A. Levitsky.*

Solicitor for the respondent: *E. Lafontaine.*

Solicitors for the mis-en-cause: *Walker, Martineau, Chauvin, Walker & Allison.*