1955

*Jun. 9
*Oct. 4

GERARD AND FERDINAND BELLAVANCE (*Defendants*) ..... APPELLANTS;

AND

ORANGE CRUSH LIMITED AND KIK COMPANY (*Plaintiffs*) ..... RESPONDENTS.

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

Contract—To bottle and sell soft drinks—Termination of—Whether reciprocal obligation to sell and buy supplies on hand.

The appellants, by contract with the respondents, were granted a franchise to bottle and sell soft drinks made from concentrates manufactured by the respondents. The appellants had to buy the concentrates and all the supplies such as bottles, cases, stationery, advertising materials, vehicles etc. Clause 5(*c*) of the contract provided that, at the termination of the contract, the appellants "shall collect and make available for inspection" all supplies on hand, and by clause 5(*d*), it

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

was stipulated that the respondents "shall purchase" all supplies in good condition, and what was not so purchased "shall not be sold" except to other licensees.

The contract was terminated and the respondents brought action to enforce their right to purchase the supplies which the appellants contended they were not obliged to sell. The trial judge dismissed the action, but this judgment was reversed by a majority in the Court of Appeal.

Held (Rand J. dissenting): That the appeal should be dismissed.

Per Taschereau, Estey, Fauteux and Abbott JJ.: The parties were reciprocally obligated; the respondents, to buy the supplies and the appellants, to sell them at the termination of the contract. If the appellants were not obliged to sell, there would be no reason for clause 5(*c*) nor for the last paragraph of clause 5(*d*). Furthermore, the use in the bottle trade of the trade mark of another person without the consent of that person, is prohibited by Art. 490 of the *Criminal Code*.

Per Rand J. (dissenting): Clause 5(*d*) of the contract created an obligation to purchase but for the benefit only of the appellants, that is to say that the appellants were not bound to sell but could require the respondents to purchase. To interpret the language as implying an obligation to sell would be in direct conflict with what was in fact contemplated.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing, Galipeault, C.J.A. and Marchand J.A. dissenting, the judgment at trial and maintaining the action.

Louis Philippe Rioux for the appellants.

Renault St-Laurent, Q.C. for the respondents.

The judgment of Taschereau, Estey, Fauteux and Abbott JJ. was delivered by:—

TASCHEREAU J.:—Je crois que cet appel doit être rejeté. L'analyse du contrat me conduit nécessairement à la conclusion que non seulement les intimées ont l'obligation d'acheter les concentrés, bouteilles, étiquettes, bouchons, caisses, ainsi que matières publicitaires, mais que les appelants ont l'obligation de vendre à l'expiration du contrat. Malgré que les appelants aient acquis la propriété des choses qui font l'objet du procès, ils se sont bien engagés à les remettre à l'expiration du contrat moyennant paiement. Il s'agit d'obligations synallagmatiques.

Il ne faut pas juger ce litige par la lecture d'une seule clause du contrat. Toutes les clauses doivent s'intepréter les unes par les autres, et il faut donner à chacune le sens

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qui résulte de l'acte entier (C.C. 1018). De plus, lorsque la commune intention des parties dans un contrat est douteuse, elle doit être déterminée par interprétation, plutôt que par le sens littéral des termes de ce contrat (C.C. 1013).

Ici, il est dit que les intimées devront acheter, mais il n'est pas clairement stipulé que les appelants devront vendre. Ces derniers ont cependant l'obligation, aux termes du contrat, de rassembler et préparer pour inspection tout ce qui fait l'objet de la convention et s'obligent de ne plus s'en servir. Ce n'est que ce que les intimées choisiront de ne pas acheter, que les appelants auront la liberté de vendre.

Pourquoi faire inventaire, tenir ces effets à la disposition des intimées; pourquoi se réserver le droit de ne vendre à d'autres que ce que les intimées décideront de ne pas acheter, si les appelants ne se sont pas engagés, par l'ensemble du contrat, de vendre aux intimées toute la marchandise qui sera en bon état? D'ailleurs, l'emploi de la marque de commerce d'autrui dans le commerce des bouteilles, est prohibé à moins d'une permission écrite du propriétaire de cetter marque. (Code Crim. Art. 490).

Il me semble, en conséquence, qu'il y a une réciprocité d'obligations, qui me conduit à la conclusion que l'appel doit être rejeté avec dépens.

RAND J. (dissenting):—The matter in controversy is a contract, by which, generally, the respondents granted to the appellants, whom I shall call the purchasers, an exclusive franchise to use certain concentrates to be sold by the respondents for the making and sale, within a defined territory, of beverages known in the trade as Orange Crush, Gurd's Dry Ginger Ale and Kik-Cola. The purchasers were to buy bottles from specified manufacturers of different styles and sizes to be used as to each type only for bottling the specified beverage. Advertising was to be done by them, including labels on bottles, cases, stationery and vehicles. Other supplies included approved crowns or stoppers and cases or bottle containers.

The dispute arises over the disposal of such of those supplies as, upon the termination of the contract, were on hand. This feature is covered by express provisions. After declaring that upon termination the rights and privileges of the purchasers shall "absolutely cease and determine", and

stipulating that the purchasers shall at once discontinue all use or exercise of the names, trademarks or other trade rights of the grantors, they proceed:—

"D"

5(c) The BOTTLER shall collect and make available for inspection at the BOTTLER'S premises all concentrate, bottles, authorized labels and crowns, cases and advertising matter used in connection with the production and sale of the Beverages and also such property of the BOTTLER as has been permanently marked with or bears any such trade-mark, name, design or copyright not to be used further by the BOTTLER; and

(*d*) ORANGE CRUSH and/or KIK shall purchase all of the said concentrate, bottles, authorized labels and crowns, cases and advertising matter which is in good condition at the cost thereof less freight and transportation charges and less a cumulative annual depreciation of 10% of the cost of all bottles and of 20% of the cost of all cases.

Any of the above described property not purchased by the COMPANIES shall not be sold by the BOTTLER except to other licensees of the COMPANIES.

The respondents brought the action to enforce what they contend is their right under par. (*d*) to purchase the supplies. The issue is whether par. (*d*) compels the purchasers to sell. At the trial Marquis J. dismissed the action, but on appeal (1) this was reversed, Galipeault C.J. and Marchand J. dissenting; and in that equal division in interpretation the case comes here.

The contract is lengthy and comprehensive and deals in great detail with the subject matter. It clearly indicates that nothing material was intended to be left to implication. That the property in the supplies became that of the purchasers is not disputed, and by clause 2 of s. B, the purchasers agree that they will not

deal with or dispose of said bottles, except by way of loan against deposit in the ordinary course of sale of the Beverages or by way of sale to the COMPANIES or their licensed BOTTLERS.

This contemplates a sale of bottles to other licensees while the contract remains in force. By clause 1 of s. D pars. (*a*) and (*c*) provision is made for the termination of the contract upon the expiration of thirty days from the giving of a written notice simpliciter by the purchasers or by the grantors in relation to curable defaults, the period mentioned being a locus penitentiae; and by pars. (*b*) and (*d*) upon notice by the grantors by reason of other defaults or

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the happening of specified events such as bankruptcy; but we are left in the dark as to the mode of termination in the present case. Within the notice period of pars. (*a*) and (*d*), the contract remaining in force, the purchasers could have sold the bottles, labels, crowns and other supplies to other licensees: is the case different as from the moment the termination becomes effective?

I think it clear that clause 5(*d*) providing that the grantors

> shall purchase all of the said concentrate, bottles, authorized labels and crowns, cases and advertising matter which is in good condition,

creates an obligation to purchase but for the benefit only of the purchasers, that is that the latter, not bound to sell, may require the grantors to purchase. This is put beyond question by the French version: "devront acheter" which I translate as "must" or "shall be bound" or "obliged" to purchase. The purchasers would otherwise be left with these supplies on their hands which they might not be able to sell to other licensees, and a special price is provided which insures them against excessive loss.

But the paragraph contemplates that the property may not be acquired by the grantors, in which event it can be sold to other licensees. If, as contended by the respondents, there is an implied obligation on the purchasers to sell as well as on the grantors to purchase and, as clearly appears to be the case, it lies within the judgment of the latter whether the supplies are or are not in good condition, then the only portion of the property which could be sold to other licensees would be what was judged to be not in good condition. How much would a licensee buy of what was so rejected? of what was declared unfit for the trade by the grantors? Can we seriously take the second paragraph to have that as its subject matter? But anything else means either that the purchasers are not bound to sell or that the grantors have an option to buy: and the courts below agree that it is not the latter.

I am unable to interpret the language as implying an obligation to sell: it would be in direct conflict with what is in fact contemplated. The property belongs to the purchasers; on the express language of the agreement, there is nothing to prevent the purchasers from destroying any part of it should they see fit to do so; and, on the other

hand, since they can sell only to licensees, they run the risk, in refusing to sell to the grantors, of being unable to dispose of it at all. But it would be imputing an unwarranted restriction upon their right to deal with what is their own to require them to sell to the grantors. The possibility of such a question arising is patent on the face of the provision and one that could not have escaped the mind of the draftsman. Since it is omitted I am bound to assume that clause (*d*) was intended only to give to the purchasers the right to require the grantors to buy without more.

Gagne J. interprets the second paragraph of that clause as implying by the words "property not purchased by the companies" an elective action by the latter. Although that is a possible interpretation, it is by no means the primary or a necessary one. The phrase means, I think, just what it says, goods that are not in fact purchased or acquired. That might result from either the objection that they were not in good condition or from the election by the licensees not to sell. Obviously it could only be goods not purchased that would fall within the second paragraph, but the grantors were not bound, when called upon, to acquire all, and this possibility simply refers us back to the first paragraph for the party who is given the election. Gagne J. seems to agree that the first paragraph, standing alone, confers the optional power upon the licensees. If that is so, then we must carry that assumption into the interpretation of the second paragraph unless the language clearly repels it: only when that appears are we to look for another interpretation; and that repulsion must be sufficient to override the admittedly plain meaning of the first. Gagne J. does not apply that test; he approaches the second paragraph independently of the first; but the second is a subordinate provision and unless radically incompatible with the principal, it should be interpreted consistently with it. This issue is, in fact, the crux of the controversy and as, in my opinion, there is no incompatibility, with the greatest respect I am unable to accept the view that appealed to him.

Clause 5(C) does not in any sense conflict with this view. It simply requires the purchasers to enable the grantors to inspect and determine the extent of the use of their trade rights which must disappear upon termination. The inclusion in the clause of the property of the purchasers,

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such as trucks, which has been "permanently marked" with the name, design, copyright or trademark of the grantors not thereafter to be used, excludes any other purpose.

I would, therefore, allow the appeal and restore the judgment at the trial with costs in the Court of Appeal and in this Court.

Appeal dismissed with costs.

Solicitor for the appellants: *L. P. Rioux.*

Solicitors for the respondents: *St-Laurent, Taschereau, Létourneau, Johnston, Noël & Pratte.*