1961
Nov. 27

1962
Jan. 23

THE GUARANTEE COMPANY OF NORTH AMERICA (*Defendant by Counterclaim*) ..... APPELLANT;

AND

HARRISON COOLEY HAYES, the Trustee of THE PRELOAD COMPANY OF CANADA LIMITED, a bankrupt, (*Defendant by Counterclaim*)

AND

THE CITY OF REGINA (*Plaintiff by Counterclaim*) ..... RESPONDENT.

THE PRELOAD COMPANY OF CANADA LIMITED ..... (*Plaintiff*)

AND

THE CITY OF REGINA ..... (*Defendant*)

HARRISON COOLEY HAYES, the trustee of the said The Preload Company of Canada Limited, a bankrupt, (*Plaintiff*)

AND

THE CITY OF REGINA (Defendant)

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Judgments and orders—Judgment against surety—Interest claimed on judgment and costs—Whether a judgment debt created within meaning of the Interest Act, R.S.C. 1952, c. 156, s. 15.

In a judgment, dated November 30, 1956, and subsequently sustained by the Court of Appeal for Saskatchewan and in this Court, the respondent municipality was found to have suffered damages by reason of non-performance of a contract by P. The latter was, at all relevant times, in bankruptcy. The appellant surety company bonded P for the due performance of its contract. On December 31, 1959, the appellant paid the respondent a sum comprising the amount of the bond plus the taxed costs. The respondent claimed interest on this sum to December 31, 1959, and interest on the amount so claimed, at five per cent per annum, from that date. It caused a writ of execution to issue against

*PRESENT: Locke, Cartwright, Fauteux, Abbott and Martland JJ.

the appellant for the amount claimed. The appellant applied to have the writ set aside, contending, on the hearing of the application, that the respondent was not entitled to claim the interest. The application was refused and an appeal from that decision was dismissed unanimously by the Court of Appeal. The appellant then applied to this Court for leave to appeal and the case was argued on the merits at the same time. The position of the appellant was that the judgment did not create a judgment debt within the meaning of the *Interest Act*, R.S.C. 1952, c. 156, because as of its date, there was no specific sum of money made payable by the appellant to the respondent.

Held: The appeal should be dismissed.

The effect of the judgment was that, at the expiration of thirty days from the date thereof, the respondent should recover from the appellant a sum of money then immediately ascertainable; *i.e.* the amount of the bond, minus any sum which, during that period, had been realized from P. That amount was a sum of money made payable by a judgment, within the meaning of s. 15 of the *Interest Act*. There was no reference by the Court to determine the amount of the damages, for the obvious reason that no such reference was necessary. There was no requirement that the matter be brought back before the Court after the thirty-day period, because that, too, was unnecessary. Interest, therefore, began to run, applying s. 15 of the Act, as soon as the amount payable became ascertained. *Gibbs v. Flight* (1853), 22 L.J.C.P. 256; *Garner v. Briggs* (1858), 27 L.J. Ch. 483, distinguished; *Ashover Fluor Spar Mines, Ltd. v. Jackson*, [1911] 2 Ch. 355, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Thomson J. declaring the respondent, a judgment creditor, to be entitled to interest on its judgment and costs. Appeal dismissed.

R. A. MacKimmie, Q.C., and *R. M. Balfour, Q.C.*, for the defendant by counterclaim, appellant.

J. L. McDougall, Q.C., *E. D. Noonan, Q.C.*, and *G. Fraser Stewart, Q.C.*, for the plaintiff by counterclaim, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—In this action the respondent, the City of Regina, was found to have suffered damages in the amount of $1,281,407.55 by reason of non-performance by The Preload Company of Canada Limited (hereinafter referred to as "Preload") of its contract with the respondent to manufacture and deliver a type of prestressed concrete pipe. Preload was, at all relevant times, in bankruptcy. The appellant, The Guarantee Company of North America, bonded Preload for the due performance of its contract, the bond being in the amount of $1,209,258.57. The judgment at the

[1] (1961), 35 W.W.R. 529, 29 D.L.R. (2d) 183.

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trial was sustained by the Court of Appeal of Saskatchewan and in this Court[1]. In due course the costs against the appellant were taxed and allowed at $10,588.87.

On December 31, 1959, the appellant paid the respondent a total sum of $1,219,847.44, being the amount of the bond, plus the taxed costs. No payment was made in respect of interest on the judgment. The respondent claims interest of $183,925.15 on the judgment and taxed costs to December 31, 1959, and interest on that amount, at 5 per cent per annum, from that date. It caused a writ of execution to issue against the appellant on March 22, 1960, for the amount claimed. The appellant applied to have the writ set aside, contending, on the hearing of the application, that the respondent was not entitled to claim the interest. The application was refused and an appeal from that decision was dismissed unanimously by the Court of Appeal of Saskatchewan[2]. The appellant applied for leave to appeal from that decision and the case was argued on the merits at the same time. In view of the decision which I have reached on the merits, it is unnecessary for me to express any view as to whether leave to appeal was necessary or whether, if it was necessary, it should have been granted.

The issue is as to the respondent's right to claim interest from the appellant and that right depends upon the application of ss. 12 to 15 inclusive of the *Interest Act*, R.S.C. 1952, c. 156, which provide as follows:

MANITOBA, BRITISH COLUMBIA, SASKATCHEWAN, ALBERTA AND THE TERRITORIES.

12. Sections 13, 14 and 15 apply to the Provinces of Manitoba, British Columbia, Saskatchewan and Alberta and to the Northwest Territories and the Yukon Territory only.

13. Every judgment debt shall bear interest at the rate of five per cent per annum until it is satisfied.

14. Unless it is otherwise ordered by the court, such interest shall be calculated from the time of the rendering of the verdict or of the giving of the judgment, as the case may be, notwithstanding that the entry of the judgment upon the verdict or upon the giving of the judgment has been suspended by any proceedings either in the same court or in appeal.

15. Any sum of money or any costs, charges or expenses made payable by or under any judgment, decree, rule or order of any court whatsoever in any civil proceeding shall for the purposes of this Act be deemed to be a judgment debt.

[1] [1959] S.C.R. 801, 20 D.L.R. (2d) 586.
[2] (1961), 35 W.W.R. 529, 29 D.L.R. (2d) 183.

In his reasons for judgment at the trial the learned trial judge said:

For the above reasons the City is entitled to payment by the Surety of the amount of damages suffered by the City as a result of non-performance of the contract by the Preload Company and the Trustee up to and including the amount of the bond, namely $1,209,258.57, or such lesser amount as remains unrealized within a reasonable time by the City from its claim filed with the Trustee in bankruptcy. This claim amounts to $1,281,407.55.

If, therefore, at the expiration of thirty days from the date hereof there is any amount up to and including the said sum of $1,209,258.57 unrealized by the City, the City will have judgment against the Surety for such amount together with its costs.

The formal judgment was dated November 20, 1956, and provided as follows:

6. AND IT IS HEREBY FURTHER ORDERED AND ADJUDGED that The City of Regina, Plaintiff (by counterclaim), is entitled to payment by The Guarantee Company of North America, Defendant (by counterclaim), of the amount of damages suffered by the said The City of Regina as a result of non-performance of the said contract by The Preload Company of Canada Limited up to and including the amount of the bond given by the said, The Guarantee Company of North America to The City of Regina, namely, $1,209,258.57, or such lesser amount as remains unrealized by The City of Regina from its said claim for the damages referred to in clause 3 hereof, namely, $1,281,407.55.

7. AND IT IS HEREBY FURTHER ORDERED AND ADJUDGED that if, at the expiration of thirty days from the date hereof, there is any amount up to and including the said sum of $1,209,258.57 unrealized by The City of Regina from its said debt provable against the said The Preload Company of Canada Limited, in bankruptcy, for the amount of damages referred to in clause 3 hereof, namely $1,281,407.55, that The City of Regina recover against The Guarantee Company of North America the said sum of $1,209,258.57, or such lesser amount as remains unrealized by The City of Regina from its said claim for the damages referred to in clause 3 hereof, namely, $1,281,407.55.

It further provided:

9. AND IT IS HEREBY FURTHER ORDERED AND ADJUDGED that proceedings under this Judgment be stayed for a period of thirty days from the date hereof and that if an appeal is taken from this Judgment then that proceedings under this Judgment be stayed until the matter is finally disposed of.

No payment was ever received by the respondent from Preload, save the costs taxed against the trustee personally, which were paid on March 29, 1960.

The appellant's position is that the judgment did not create a judgment debt within the meaning of the *Interest Act* because, as of its date, there was no specific sum of money made payable by the appellant to the respondent. The judgment, it is said, was conditional and was for an

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uncertain amount, whereas, to constitute a final judgment, it would have to be in terms sufficient in itself to adjudge payment of a specific sum of money. It was contended that some further step was necessary to have the amount of the judgment finally determined and that no such step had been taken. Reliance was placed on the English decisions of *Gibbs v. Flight*[1], and *Garner v. Briggs*[2].

In my opinion, while this argument might lead to the conclusion that there was not a judgment debt, within the meaning of s. 15 of the *Interest Act,* in existence on November 20, 1956, the date of the judgment, I think there was a judgment debt in existence after the expiration of thirty days from that date. Paragraph 6 of the judgment adjudged that the respondent was entitled to payment of its damages up to the amount of the bond, or such lesser amount as remained unrealized from Preload. Paragraph 7 then went on to provide that, if, at the expiration of thirty days from the date of the judgment, any amount up to $1,209,258.57 was unrealized by the respondent from its debt against Preload in bankruptcy, the respondent should recover that sum, or such lesser amount as remained unrealized from the appellant.

The effect of these two paragraphs is that, at the expiration of thirty days from the date of the judgment, the respondent should recover from the appellant a sum of money then immediately ascertainable; *i.e.,* $1,209,258.57, minus any sum which, during that period, had been realized from Preload. In my opinion, that amount was a sum of money made payable by a judgment, within the meaning of s. 15 of the *Interest Act.* There was no reference by the Court to determine the amount of damages, for the obvious reason that no such reference was necessary. There was no requirement that the matter be brought back before the Court after the thirty-day period, because that, too, was unnecessary. Interest, therefore, began to run, applying s. 15 of the *Interest Act,* as soon as the amount payable became ascertained.

The two English cases previously mentioned were concerned with the application of s. 18 of the *Judgments Act, 1838,* by which the effect of judgments was given to decrees and orders of Courts of Equity, rules of Courts of Law

[1](1853), 22 L.J.C.P. 256, 138 E.R. 1417.
[2](1858), 27 L.J. Ch. 483.

and orders in bankruptcy for the payment of money; all remedies given by the Act to judgment creditors were given to persons to whom any moneys were, by such orders or rules, directed to be paid.

The issue in *Gibbs v. Flight, supra,* was as to whether the rule of the Court in that case was within this section, so as to have the effect of a judgment. The question in issue was as to whether the order in question was an order to pay money. That order was that the defendants do pay, as costs, at a certain time and place, a certain sum of money "unless in the meantime the said sum be paid to the plaintiffs out of the funds of the Parish of St. Stephen, Walbrook". The plaintiffs in the proceedings were church wardens of the Parish mentioned and the earlier proceedings had indicated that the costs of both sides should be paid by the Parish.

The decision on this point is very brief, Jervis C.J. merely saying:

> But then comes the question as to the execution, founded on the Rule of Court, whether the order is an "order to pay money" under the Statute of Victoria and, upon that point, we think that the execution must be set aside; for we cannot consider that an order to pay money upon a condition, *under such circumstances as in the present case,* is such an order as will satisfy the statute.

The appellant contends that the order in the present case was similarly conditional and, therefore, was not an order for the payment of money under s. 15 of the *Interest Act.*

There is, however, a substantial difference between s. 18 of the *Judgments Act, 1838,* and s. 15 of the *Interest Act.* Section 18 provided:

> And be it enacted that all Decrees and Orders of Courts of Equity, and all Rules of Court . . . whereby any sum of money . . . shall be payable to any Person . . . shall have the effect of judgments in the Superior Courts of Common Law . . . .

This section is defining that kind of order which, by its terms, should be given the effect of a judgment in the Superior Courts of Common Law. Section 15 of the *Interest Act,* on the other hand, is defining those sums of money which shall be deemed to be a judgment debt.

The question in *Gibbs v. Flight* was as to the nature of the order which had been made and, rightly or wrongly, it was held that, in the circumstances of that case, the order, being conditional when made, was not an order for the payment of money so as to qualify for the benefits of the

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section. The order, once made, could not, thereafter, change its nature in the event that the Parish failed to pay the amount mentioned. The question in the present case, however, is not as to the nature of the order, but whether any sum of money was made payable by what is, undoubtedly, a judgment order. In my view, by the terms of that order, a sum of money, to be ascertained after the lapse of thirty days, was made payable.

In *Gibbs v. Flight*, after the failure of the Parish to pay the costs, I think there was, at that time, an order for the payment of a sum of money within the meaning of s. 15 of the *Interest Act*. But that was not the issue in that case. The sole question there was whether the order, at the time it was made, came within s. 18 of the *Judgments Act, 1838*, so as to have the effect of a judgment.

Garner v. Briggs, supra, decided only that an order, declaring that the executor of an estate was liable to make good to the estate a certain sum of money and that such sum should be charged in his account of the personal estate, was not, in its terms, an order for the payment of money by the executor, so as to fall within s. 18 of the *Judgments Act*, because it did not order the executor to pay it.

A statement of Eve J. in a more recent judgment, in *Ashover Fluor Spar Mines, Limited v. Jackson*[1], which also dealt with s. 18 of the *Judgments Act, 1838*, is of interest in considering the application of that section. At p. 359, dealing with the order then under consideration before him, he said:

> It belongs to a class of order with which we are all familiar, and stands somewhere between the two alternative forms in which such orders are usually made. In the first of the two alternative forms the inquiry is directed, and liberty to apply, after the result has been certified, is given. In the second alternative the Court, after directing the inquiry, goes on to order the defendant to pay to the plaintiff the amount certified. The latter of these orders is, in my opinion, within, and the former outside, the provisions of s. 18 of the Judgments Act, 1838.

I think it is clear that the judgment order in the present case is within the second classification, as it was an order for the payment of a sum of money to be ascertained after the lapse of thirty days from the date of the order.

[1] [1911] 2 Ch. 355.

For these reasons, in my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendant by counterclaim, appellant: Balfour & Balfour, Regina.

Solicitor for the plaintiff by counterclaim, respondent: G. Fraser Stewart, Regina.