1959

*Jan. 29
Feb. 26

MORRIS ROBERT PALMER and NATHAN PALMER, carrying on business under the name of HULL PIPE & MACHINERY COMPANY (*Plaintiffs*) ..... APPELLANTS;

AND

MIRON & FRERE, MIRON & FRERES and MIRON & FRERES LIMITEE (*Defendants*) ..... RESPONDENTS.

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

Damages—Land used by tenant expropriated by Crown—Failure of tenant to remove chattels as requested—Contractor removing same to commence excavation—Damages claimed from contractor—Liability of mandatary for delict or quasi-delict—Civil Code, arts. 1053, 1716, 1727.

The plaintiffs used a certain piece of land, of which they were tenants, as a scrap yard. The land was expropriated by the Crown in 1947 but the plaintiffs continued their occupation and, although requested to do so several times, did not remove their scrap. When the defendants were granted the contract by the Crown for the excavation work to be done on the site, they used a bulldozer to push the scrap for a distance of 35 feet. The plaintiff's action, claiming damages for alleged wrongful removal of the scrap, was dismissed by the trial judge. This judgment was affirmed by the Court of Appeal.

Held: The action should be dismissed.

In an action based on s. 1053 of the *Civil Code,* the plaintiff has to show that a delict or a quasi-delict was committed, that it was imputable to the defendant, and that it resulted in damages for the plaintiff. The defendants, in this case, were not guilty of any fault. In any event, the plaintiffs could not succeed as they have failed to discharge the burden placed upon them of establishing that they sustained any damage. What was done to the scrap did not in any way depreciate its value.

The proposition that because the defendants were acting under the orders of the Crown, they could not be held liable, was not sound. If a delict or a quasi-delict is committed, its authors cannot escape liability on the mere ground that they acted under orders of their principals. *Desrosiers v. The King,* 60 S.C.R. 105. Moreover, the defendants were not the mandataries of the Crown.

Even if it were assumed that the plaintiffs were monthly tenants of the Crown, which is not conceded, they would not be entitled to claim from the defendants, who were not the lessors, damages which they have not proven.

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*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Abbott and Judson JJ.

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PALMER et al. v. MIRON & FRERE et al.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Fortier J. Appeal dismissed.

R. Quain, Q.C., and *H. Quain,* for the plaintiffs, appellants.

Honourable R. Pinard, for the defendants, respondents.

The judgment of the Court was delivered by

TASCHEREAU J.:—The plaintiffs, who carry on business under the name of Hull Pipe and Machinery Company, claim from the respondents the sum of $33,540. They allege that during September 1949, the respondents wrongfully removed with the use of bulldozers, some scrap steel, iron, airplane parts, brass fittings, etc., belonging to them, from a certain piece of land situated in the City of Hull and caused them the damages which they claim.

It appears that for some months previous to March 1947, the appellants were the tenants of this land belonging to the City of Hull, and to whom a monthly rental of $15 was paid. In March 1947, the Federal Government started proceedings in expropriation, and acquired full ownership of these lots for the purpose of erecting the Printing Bureau.

The appellants nevertheless continued their occupation of the land, did not remove their scrap, although requested to do so several times, and particularly by a letter addressed to them by the City of Hull on April 2, 1948, by telegrams of the Chief Architect of the Department of Public Works, and finally by a formal notice sent by the Secretary of the same Department on August 23, 1949.

In the meantime, the Department of Public Works had asked tenders for the excavation to be done on the site of the Printing Bureau, and as the respondents' tender was accepted, they were authorized to proceed with their work on August 30, 1949. As the appellants still persisted in not removing their scrap, thus preventing the excavation work to be proceeded with, it was decided after consultation between the Department and the respondents, that the latter would remove it, which was done during the middle of September with the use of a bulldozer. The operation

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merely consisted in pushing all the scrap metal for a distance of 30 to 35 feet, and letting it lie on the ground, near a fence, so that the excavation work could be started without delay.

It is because this cleaning operation was performed that the plaintiffs claim $33,540. The action was dismissed by the learned trial judge and his judgment was unanimously confirmed by the Court of Queen's Bench[1]. I agree with the conclusions of both Courts.

The action is based on s. 1053 of the *Civil Code* of the Province of Quebec, and the plaintiffs have therefore to show that a delict or a quasi-delict was committed, that it was imputable to the defendants and that as a result of their wrongful act, the appellants suffered damages.

Respondents were not guilty of any fault, but in any event, the appeal must be dismissed on the ground that the appellants, whose burden it was to do so, have not established that they sustained any damage. The mere pushing of the metal, near the fence, for a distance of approximately 35 feet, did not in any way depreciate the value of this scrap. The only possible claim, if any exists, is for the cost of removing it, now that it is mixed with mud and sand, but no evidence whatever has been adduced to show what that excess cost would amount to.

The appellants tried to establish that at a later date, the respondents have again removed this scrap metal, as a result of which operation, they could not salvage any. They have totally failed on that point, as found by the trial judge and the Court of Queen's Bench[1]. In fact the appellants admit that they could not hope to have this Court reverse these concurrent findings.

I must state, however, that I do not agree with the reasoning of the learned trial judge that as the respondents were acting under the orders and instructions of the Crown, represented by the Chief Architect of the Department of Public Works, when they removed the material, they cannot be held liable. I do not think that this proposition

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is sound. If a delict or a quasi-delict is committed, its authors cannot escape liability on the mere ground that they acted under the orders of their principals.

The following "considérant" appears in the judgment of the trial judge:

> CONSIDERING that defendants, in executing their contract for said excavation, became in a certain manner towards third parties mandatary of the Crown in virtue of a tacit mandate, and as such if acting within limits of their contract, in good faith, they could not be held responsible in place of the Crown their mandator.

This sweeping proposition concerning the respective liability of mandators and mandataries towards third parties does not state the law as it exists in the Province of Quebec, and a careful reading of arts. 1716 and 1727 C.C., and of what has been said in this Court in *Desrosiers v. The King*[1] will show the inaccuracy of this statement. Moreover, the trial judge errs, when he assumes that the respondents in the present case were the mandataries of the Crown. There remains to be noted that the trial judge referred to proceedings taken by the appellants against Her Majesty the Queen in the Exchequer Court. This can have no bearing on the issues in the present action.

Finally, the appellants argued that for the months of July, August and September 1949, they paid the monthly rent of $15 to the Canadian Government and that, therefore, having become monthly tenants of the Crown, they could not be evicted in such a summary manner. Even assuming that they were monthly tenants of the Crown, which is not conceded, this does not entitle them to claim from the respondents, who were not the lessors, any amount for damages which they have not proven.

The appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the plaintiffs, appellants: Quain & Quain, Ottawa.

Attorneys for the defendants, respondents: Pinard, Pare & Pigeon, Montreal.

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[1] (1919), 60 S.C.R. 105, 55 D.L.R. 120