

PROVINCIAL TRANSPORT COM- }  
PANY (INTERVENANT) . . . . . }

APPELLANT; <sup>1932</sup> \*Oct. 24, 25.  
\*Dec. 23.

AND

MONTREAL SIGHT SEEING TOURS  
LIMITED (PLAINTIFF)

AND

GENERAL MOTORS PRODUCTS OF  
CANADA LTD. (DEFENDANT)

AND

MONTREAL SIGHT SEEING TOURS }  
LIMITED (CONTESTANT) . . . . . }

RESPONDENT.

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

*Sale—Deed—Sale of undertaking as “going concern”—Certain rights and things specifically mentioned—Claim against third party—Whether included in the sale.*

When, in a deed of sale, an autobus company “conveys, sells, assigns and transfers to the purchaser the whole of its enterprise and undertaking as a going concern, including its good will and clientele” and further specifically mentions as sold certain equipment and parking rights, such a sale includes a contract with a third party, as an accessory of and as forming part of the enterprise; and a claim made in respect of said contract also forms part of the rights and interests assigned and transferred, together with any action already brought to enforce that claim. If, at the time of the sale, the action against the third party by the vendor be pending before the courts, the purchaser has the right to substitute himself to the plaintiff vendor by way of intervention, and deal with the case as he thinks fit.

APPEAL from the decision of the Court of King’s Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Surveyer J. and maintaining respondent’s contestation of the intervention filed by the appelland company.

The material facts of the case and the questions at issue are stated in the judgment now reported.

*Thomas Vien K.C.* for the appelland.

*P. Bercovitch K.C.* and *J. J. Spector* for the respondent.

\*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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The judgment of the court was delivered by

CANNON J.—This appeal is asserted from the unanimous judgment of the Court of King's Bench for the province of Quebec, which set aside the judgment of the Superior Court in favour of the intervenant, which declared that respondent, on the 28th November, 1928, sold to Louis P. Gélinas his whole undertaking as a going concern and further all his rights, title and interest whatsoever in all movable property forming part of its undertaking; that the said Gélinas, on the 28th November, 1928, transferred his rights to J. E. Savard; that, on the 27th November, 1928, the said J. E. Savard had transferred all such rights to the appellant; that on the date on which the appellant acquired the rights and assets of the respondent, the present action was pending before the court; that appellant automatically acquired all the respondent's rights against the defendant in the present action.

As appears from the above, the whole question to be determined is whether or not the intervenant did, on or about November 28, 1928, acquire from plaintiff its claim against defendant and whether or not, as a consequence, it is authorized to substitute itself to plaintiff and deal with it as it thinks fit.

The Provincial Transport Company purchased, not from respondent, but from J. Ernest Savard, under the following deed:

Whereas the vendor has previous to this date entered into various contracts of sale in favour of the present vendor as purchaser whereby he has acquired as a going concern various organizations for the operation of autobus transportation and sightseeing service throughout the province of Quebec; and

Whereas the company-purchaser was incorporated on the 22nd of November, 1928, for the purpose of carrying on the business of operating omnibusses, sightseeing busses, cabs, taxicabs and other vehicles, and of carrying on the business of running motor busses and motor trucks both on regular routes and for special trips, and of acquiring franchises or rights to operate the same, with an authorized capital divided into twenty thousand (20,000) shares having no nominal or par value and into twenty thousand (20,000) Six per cent (6%) non-cumulative preference shares of the par value of one hundred dollars (\$100) each.

Now, therefore, it is hereby agreed by and between the parties as follows:—

1. The vendor sells and the company-purchaser purchases all the vendor's rights, title, interest and good-will whatsoever in the various contracts of sale entered into by various individuals and companies carrying on the operation of autobus transportation and sightseeing services, in

favour of the present vendor as purchaser, which said contracts, in each case, transfer to the present vendor *the whole of the enterprise and undertaking of the respective vendors mentioned therein*, the said contracts of sale being enumerated in the schedule annexed hereto, \* \* \*

2. The company-purchaser hereby acknowledges the receipt of the original contracts of sale set forth in the schedule mentioned above, which contracts have been delivered to it previous to this day.

One of the contracts enumerated in the schedule annexed to the memorandum of agreement was one with the company respondent therein acting and represented by its president and its treasurer, *thereunto* duly authorized by a resolution of the shareholders of the company adopted at a regularly constituted meeting held on the 24th day of November, 1928, of which a certified copy annexed to the contract reads as follows:—

It was regularly moved, seconded, and unanimously carried, that an offer of sale made by J. Ernest Savard of the entire assets of the company for cash consideration of forty thousand dollars (\$40,000) be and is hereby accepted, and that the president Mr. W. N. Karp, and the treasurer, R. Rutenberg, be hereby authorized on behalf of the company to sign any documents necessary for the completion of the sale.

These duly authorized officers of the respondent signed a contract which contains the following:

Whereas the company-vendor is at present carrying on a system of sightseeing tours and the operation of sightseeing autobuses in the city of Montreal; and

Whereas the said company-vendor is authorized by its charter to sell its enterprise, franchises and rights, in whole or in part, for such consideration as may be deemed advisable; and

Whereas the purchaser is desirous of purchasing *the whole of the undertaking of the company-vendor as a going concern*,

Now, therefore, it is hereby agreed by and between the parties as follows:

1. The company-vendor conveys, sells, assigns and transfers to the purchaser, hereby accepting, *the whole of its enterprise and undertaking as a going concern*, including its good-will and clientele and, in particular, the company-vendor hereby sells, conveys, assigns and transfers to the purchaser all its rights, title and interest whatsoever in the following equipment, namely:

“(a) Three (3) autobuses, namely:

Autobus	Number of Passengers	Series	Engine	Year
1. Reo Sedan	25 . . . . .	S.D. 679	C18656	1928
1. Reo Sedan	24 . . . . .		59587	1926
1. Reo Sedan	24 . . . . .		94937	1926

“(b) All the accessories and autobus parts actually possessed by it and *all moveable property of any nature whatsoever composing and forming part of the undertaking* presently carried on by the company-vendor;

“(c) Two (2) parking permits allowing it to park its cars at the corner of Metcalfe and St. Catherine streets, in the city of Montreal, and at the corner of Peel and Cypress streets, in the said city;

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2. The company-vendor further undertakes to do all in its power to transfer and assign to the purchaser all licences, permits or franchises of any nature or kind whatsoever presently held by it in connection with the operation of its undertaking.

3. The present sale is made for and in consideration of the sum of forty thousand dollars (\$40,000), which has been paid cash this day, and the company-vendor hereby acknowledges having received the said sum from the purchaser and gives a full and final discharge therefor.

4. The company-vendor declares that the only debts due by it do not exceed in amount the sum of six thousand dollars (\$6,000), and the company-vendor undertakes to pay the said sum not later than the 15th of December, 1928, it being understood between the parties that the purchaser will not be held responsible for any debts incurred by the company-vendor prior to signing of the present agreement.

5. The said company-vendor hereby undertakes and agrees to sign and execute all deeds, documents, matters and things which are convenient or necessary, or which counsel may advise for more completely and effectually carrying out the intention of these presents, and for vesting in the purchaser the property comprised in this agreement.

6. The present sale shall take effect from the date hereof and the purchaser shall, from the signing of these presents, have possession of the whole of the enterprise and undertaking above mentioned.

The trial judge gives the following reasons for his finding in favour of the intervenant (present appellant):

Considering that what the resolution intends plaintiff to sell, and the purchaser intends to buy, is "the entire assets" of the company plaintiff; that is that no sort of assets, whether corporeal or incorporeal, was excluded from the said sale (Words and phrases judicially defined, 10th series, *Vo. Assets*; 3rd series, *Vo. Entire*).

Considering that the preamble of the contract entered into between the parties states that the purchaser is desirous of purchasing the undertaking of the company-vendor as a going concern;

Considering that by clause 1 of the said contract, "The company-vendor conveys, sells, assigns and transfers to the purchaser, hereby accepting, the whole of its enterprise and undertaking as a going concern, including its good-will and clientele";

Considering that subsequently to the said agreement, the president of the plaintiff company, who was its principal representative, handed to the purchaser's assignee the charter and minute book of the plaintiff company; that the said charter and minute book were secured for the purpose of securing a surrender of plaintiff company's charter; that whatever may have been the outcome or legality of such negotiations, they show that the parties intended a complete transfer of plaintiff's assets of whatever nature, plaintiff, by the said contract, assuming its own liabilities;

Considering that rules of interpretation cannot be invoked to restrict the scope of a contract when the words used and the parties' behaviour show no intention to restrict it;

It might be added that, under its charter, the company-respondent was authorized to dispose, by lease, sale or otherwise, of the business, assets and undertaking of the company, or any part thereof.

The Court of King's Bench, however, has reached the conclusion that the plaintiff's claim against the General Motors Products of Canada, Ltd., was not included in the above sale, for the following reasons:

Considering that the appellant's claim for damages against General Motors as set forth in its action is not expressly mentioned in the said contract of sale nor is it included by implication among the rights and things or categories of rights and things specifically mentioned; in particular it is not part of the equipment set forth in paragraphs "a" and "c" of the clause hereinabove quoted, nor does it form part of the auto-bus accessories or parts referred to in paragraph "b";

Considering that the said claim is for the return of moneys paid and for the loss of profits which the appellant pretends would have been earned for it by autobus contracted for, if it had been delivered by the defendant as stipulated, and if such profits had been earned they would have been distributed to the shareholders or held in reserve for dividend purposes and so would not have formed part of the enterprise and undertaking carried on by the appellant at the time of the sale to the respondent;

Considering that the said claim was not at the time of the sale established as being an asset of the appellant, and that whether it will eventually prove to be an asset or a liability is contingent upon whether the action will be successful or not, and so it could not be included in the moveable property of the appellant which composed or formed part of its undertaking at the time of the sale;

Considering, therefore, that the said claim or right of action was not transferred by the sale to the respondent and that its intervention in the said action is unfounded:

It seems to me that the wording of the resolution, the preamble of the contract, and the first clause of the contract, mentioning the whole of the enterprise and undertaking as a going concern and all moveable property of any nature whatsoever composing and forming part of the undertaking then carried on by the company respondent is clear and unambiguous, if one is to give the words their ordinary meaning. The Court of King's Bench limits the scope of the deed to the particulars: three autobuses, all their accessories and autobus parts then possessed by the respondent, together with the two parking permits.

This interpretation, to my mind, goes against the well known rule which is embodied in 1021 C.C.

When the parties in order to avoid a doubt whether a particular case comes within the scope of a contract, have made special provision for such case, the general terms of the contract are not on this account restricted to the single case specified;

and also against the other found in article 1018:

All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act.

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The application of these two articles, however, must be tempered by article 1020:

However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract.

It appears by the title deed of the intervenant company that it purchased Savard's right, title, interest and goodwill whatsoever in the contract signed by the respondent which, as represented to the appellant, was transferring to Gélinas and Savard, the whole of the enterprise and undertaking of the respective vendors as a going concern. The contract entered into between the appellant and the General Motors Products of Canada, Ltd., which forms the object of the original action into which the appellant wishes to intervene, was transferred to the appellant as an accessory of and as forming part of the enterprise and undertaking of the respondent; and the claim made in respect of the said contract must, in our opinion, also form part of the rights and interests assigned and transferred to the appellant for the cash consideration of \$40,000.

Moreover, the contract with the General Motors Products, basis of the present action, is essentially connected with the business undertaking of the plaintiff, has not yet been resiliated and therefore is still in existence. Plaintiff's declaration sets forth their demand as follows:

Wherefore plaintiff prays that the contract entered into between the parties and herewith filed as plaintiff's exhibit P-1 be resiliated for all purposes of law and that the defendant be condemned to pay and satisfy unto the plaintiff the said sum of \$5,960 damages, a further sum of \$500 in cash paid to the defendant at the time that the said contract was entered into, the return of the Packard Twin Six motor car with two bodies, or the value thereof, to wit, \$900, and a further sum of \$1,300 the difference between the price he was to pay the defendant for the bus in question, and the price he is obliged to pay for a new bus of a similar kind, or a total in all of eight thousand six hundred and sixty dollars (\$8,660), the whole with interest from date of service hereof, and all costs.

If the purchasers of the transportation business of the respondent deem it advisable to withdraw the demand for cancellation and damages, and will rather carry out this agreement, or substitute thereto another agreement with the General Motors Products of Canada, Ltd., it seems to me that the letter and the spirit of the sale, for which the respondent received \$40,000 cash, would entitle the intervenant to their conclusions, and that the trial judge was right when he declared the intervenant to be, for the pur-

poses of this suit, in all the rights of the plaintiff in the present action; that the transfer of rights from plaintiff to Gélinas and Savard and from the latter to the intervenant did include all the plaintiff respondent's right in the present action and allowed intervenant to follow up, in plaintiff's place and stead and to the exclusion of plaintiff, the last valid proceeding originally had in the suit.

I would therefore maintain the appeal and restore the judgment of the Superior Court with costs against respondent in the Court of King's Bench and here.

*Appeal allowed with costs.*

Solicitors for the appellant: *Vallée, Vien, Beaudry, Fortier & Mathieu.*

Solicitors for the respondent: *Bercovitch, Cohen & Spector.*

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