1934

Oct. 18.
Nov. 15.

BETWEEN:

CANADIAN GENERAL ELECTRIC CO. LTD. ..... } PLAINTIFF;

AND

TORONTO ELECTRIC SUPPLY CO. LTD. ..... } DEFENDANT.

Contempt of Court—Attachment—Limited Company—Penalty—Jurisdiction.

Held: That although the Court cannot order the issue of a writ of attachment against a limited company for contempt of court, it can, where it is satisfied that a contempt has been committed, inflict the appropriate punishment, namely, order the company to pay a fine.

APPLICATION for an order directing the issue of a writ of attachment against the defendant company for contempt in disobeying the terms of a judgment of this Court.

The motion was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

E. G. Gowling and *H. K. Thompson* for the plaintiff.

O. M. Biggar, K.C. and *M. B. Gordon* for the defendant.

The facts and questions of law raised are stated in the reasons for judgment.

The PRESIDENT, now (November 15, 1934) delivered the following judgment:

This is a motion for an order that a writ of attachment be issued against the defendant company, its officers, directors or agents, for its contempt in disobeying the terms of a judgment of this Court rendered on the 30th day of September, 1932, restraining the defendant company, its officers, workmen, servants and agents, from infringing letters patent owned by the plaintiff, numbered 209,751 and 223,518, and which relate to Tipless Incandescent Lamps. This motion relates only to the last mentioned patent.

It would seem that any distinction that once prevailed between committal for contempt and attachment for contempt, is now abolished. Rule 193, of the Exchequer Court Rules, provides that a judgment requiring any person to abstain from doing anything, may be enforced either by writ of attachment or by commital.

In the case of a corporation, breach of an injunction cannot be done by the corporation itself, as the corporation can only act by its officers, agents or servants, but if the act is in fact done, it is no answer to say that, done, as it must be, by an officer or servant of the corporation, the corporation is not liable for it, even though it may have been done by the servant through carelessness, neglect, or even in dereliction of duty. See *Stancomb* v. *Trowbridge Urban Council* (1): Halsbury (Hailsham Edition) Vol. 7 p. 31. If an injunction is granted against a corporation which afterwards does or permits an act in breach of the injunction, in or upon its usual place of business, the onus rests, I think, upon the corporation to show any facts which would relieve it of the act of disobedience to the order of the Court, and particularly where such facts are or should be peculiarly within the knowledge of the officers or servants of the corporation. In such cases the burden of adducing evidence is shifted from the party on whom it would naturally fall, and where the truth of a party's allegation lies peculiarly within the knowledge of his opponent the burden of disproving it lies upon the latter. If the plaintiff here shows that there has been sold, in or upon the defendant's business premises, a patented article prohibited by an injunction, it makes out a prima facie case of breach of the injunction and throws the onus on the defendant to show that it was the licensee of the plaintiff, or that it bought the article from a person who was authorized by the plaintiff to manufacture the same.

It is correct, I think, to say that upon the hearing of an application of this nature, no new evidence can be received to vary the construction already given to the patent in question, nor can the defendant attack the validity of the injunction nor the correctness of its interpretation by the Court. The only point at issue, is the performance by the defendant of the alleged acts of breach of injunction.

With that brief statement of what I conceive to be the law I shall now state the facts of the case. In an undefended action between the parties hereto, the plaintiff recovered judgment against the defendant for infringement of letters patent no. 223,518, and as already stated, the defendant, its officers, servants and agents were restrained

(1) (1910) 2 Ch. D. 190.

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by an order of this Court from infringing the said letters patent. The defendant is engaged in the retail business of selling electric lamps, and electrical fixtures, on the ground floor of the building numbered 342-44 Queen Street West, in the City of Toronto. On September 4th, 1934, one Horner purchased in the ordinary way at the defendant's place of business, from one presumably in the employ of the defendant company, three 200 watt 120 volt incandescent electric lamps, contained in wrappers bearing the name "Supreme Incandescent Lamps," and at a cost of fifty cents each. The person actually selling those lamps to Horner is not identified. Two of the lamps so purchased were examined on behalf of the plaintiff by two persons experienced in such matters and in their several affidavits produced on the motion they swear that the lamps were made in accordance with the disclosures contained in patent no. 223,518; and I may here say that with that I agree. On the hearing of the motion the affidavit of one Bloodsworth was produced on behalf of the defendant, and therein the affiant is described as Office Manager of the Defendant company; the important paragraphs of that affidavit are the following:

3. That I have read the affidavit of Cyril F. Horner and I have made a careful search of the records and books of the Defendant Company and I can find no record that the Defendant Company ever purchased or sold lamps bearing the name of Supreme Incandescent Lamps.

4. In my capacity as Office Manager I have charge of the purchases made by the Defendant Company and of the stock on hand and the only lamps ever purchased by the Company so far as the books and records show and as far as I myself am aware of are licensed lamps known as Mazda, Solax and Sunbeam. These lamps are purchased from such firms as Superior Electric Company Limited, Regent Electric Company Limited and Community Electric which companies, I verily believe, are licensees or have the right to sell the said lamps. I am satisfied that no lamps have been kept in stock by the Company, except lamps so purchased from the said companies as aforesaid, and in particular I say the Defendant Company has never bought from any person any lamps marked "Supreme Incandescent Lamps" and has never had any lamps so marked in stock.

5. If the said Horner bought lamps bearing the name Supreme Incandescent Lamps on the premises of the Defendant Company, such purchase was not made from the Company, but must have been made from a person who had no authority from the Company and such lamps did not belong to the Company. If the said Horner had called the attention of the Company to such purchase at the time it was made, I could have caused investigations to be made and any misunderstanding cleared up, but under the circumstances I have not been able to ascertain anything concerning the said purchase and I have not been able to discover what employee, if any, made the alleged sale.

The material in this affidavit appearing to me to be evasive and generally unsatisfactory I directed that Bloodsworth be produced for cross-examination upon his affidavit, and the motion was adjourned to a subsequent date.

On the resumption of the hearing of the motion Bloodsworth was cross-examined by Mr. Gowling for the plaintiff, and the following facts were disclosed. Bloodsworth is but a part-time employee of the defendant, devoting only about one-third of a day on the average to the affairs of the defendant, and his duties relate only to bookkeeping and accounting; he had nothing to do with the purchase or sale of the articles dealt in by the defendant. The defendant company seems to be a family corporation, or a so-called one man company. One Paul Kamin is president of the defendant company; a son and a daughter are employed about the business, the latter assisting Bloodsworth; two others, including Bloodsworth, are there employed. The building in which the defendant's business is conducted is apparently owned by the wife of the president of the defendant company, and the whole of the building is rented by her to that company. The three floors of the rented building are occupied more or less in the conduct of the defendant's business, but it is alleged that on the second floor there is space, three rooms, rented from the defendant by a concern known as the Premium Lamp Company, and the case now set up on behalf of the defendant is that it is this concern, and not the defendant company, that sells Supreme Incandescent Lamps in this building, and this lamp is apparently the only article sold by the Premium Lamp Company. One Edwards is said to be the manager of this concern. It is to be inferred from Bloodsworth's evidence that he had seen Edwards make sales of lamps, the offending lamps I assume, to customers, in the defendant's shop, presumably just as would any regular employee of the defendant company, but, he would suggest, they were not the lamps of the defendant; that the defendant's employees would sometimes assist in handling the goods of the Premium Lamp Company but just in what way is not quite clear; and Bloodsworth would not deny that the lamps in question were purchased in the shop of the defendant, in fact he would seem to concede this. And it would appear from Bloodsworth's evi-

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dence that Edwards spent most of his time in the defendant's shop. The evidence of Bloodsworth was of a negative character and I was left with the impression that he knew more than he disclosed concerning the matter in issue here. In order to reach the space said to be occupied by the Premium Lamp Company on the second floor it is necessary to pass through the shop of the defendant on the ground floor. An inconspicuous cardboard sign bearing the name of the "Premium Lamp Company" is affixed to one of two doors in the defendant's shop and fronting on the street, and this sign, as I understand it, does not indicate that the Premium Lamp Company's place of business is to be found on the second floor. The suggestion now is that in some way, Edwards of the Premium Lamp Company, must have sold the lamps in question to Horner on the first floor of the defendant's shop, but, it is said, they were the lamps of the Premium Lamp Company. No evidence of any kind was forthcoming from the president of the defendant company, or from any of its other officers or employees other than Bloodsworth its part-time employee, nor from any one representative of the Premium Lamp Company. It should not have been difficult for the defendant to have obtained from its sub-tenant, the Premium Lamp Company, or some of its employees, evidence if any were available, as to how the lamps in question came to be sold from its business premises, in order to lift the suspicion which at once occurs to anybody that the business of the Premium Lamp Company is only a cloak under cover of which the infringements were committed by the defendant. I should have mentioned the fact that the plaintiff caused to be paid to Paul Kamin, president of the defendant company, conduct money to attend upon the motion at Ottawa, but he did not attend; Kamin was not however served with a subpoena.

I think the plaintiff has made out that part of its case which deals with the breach of the injunction. The defendant has, in my opinion, failed to discharge the onus resting upon it to show that the lamps in question were not sold by its authorized servants. I do not think it would have been difficult for the defendant to exculpate itself of the charge of contempt, if it were genuinely possible to do so. The evidence of Bloodsworth alone, does not, in my

opinion, constitute an answer to the charge of a breach of the order of the Court, by the defendant. One cannot avoid the conviction that the introduction of the Premium Lamp Company into the picture is merely a cloak intended to hide contemplated infringements of the patent in question, by the defendant. But, in any event, the sale of the lamps in question from the defendant's shop, in the ordinary course of its retail business, and apparently by some one authorized to make such a sale, none of whom were heard from, has not been explained. If in the facts and circumstances disclosed here the plaintiff's motion would fail it is difficult to see just how the plaintiff could protect itself against infringements of its patent rights, or prevent continuing breaches of the outstanding injunction. Believing therefore that the Supreme Incandescent Lamps in question were sold by the defendant company, it follows that a breach of the injunction was committed by the defendant, and the plaintiff's motion must succeed.

The plaintiff's counsel asks that a money penalty be imposed against the defendant for breach of the injunction. The Court cannot order a writ of attachment to issue against the defendant company and commit it to prison, for a reason which is obvious. A limited company cannot be committed for contempt of Court because it has no corporeal existence. See *Re Hooley* (1). But that does not prevent the Court from availing itself of the remedy which it possesses, as was held in *Rex* v. *J. G. Hammond & Co. Ltd.* (2). In that case it was held by Darling J., concurred in by Avory and Rowlett JJ., that the fact that a rule nisi called upon a limited company to shew cause why it should not be attached, did not prevent the Court from inflicting the appropriate punishment, namely, ordering the company to pay a fine and the costs of that application; this, I assume, on the principle that the greater includes the less. That is precisely this case. My conclusion is that there has been a breach of the order of the Court, which constitutes a contempt of Court, and that the Court has inherent jurisdiction to impose a fine against the defendant company therefor, and I do order that defendant company pay a fine of $100—which in the circum-

(1) (1899) 79 L.T. 706.

(2) (1914) 2 K.B. 866.

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stances here I think is sufficient—and the costs of this motion, the fine and costs to be levied on the goods of the defendant company.

In a case of this kind I think costs ought to be given as between solicitor and client and I so direct. As was stated in the case of *Stancomb* v. *Trowbridge Urban Council*, already referred to, this is a case where the plaintiff should receive a complete indemnity so far as solicitor and client costs will give him one against the expenses of this proceeding.

Judgment accordingly.