

1935
 Oct. 3.
 Oct. 7.

CANADIAN GENERAL ELECTRIC }
 COMPANY LIMITED } PLAINTIFF;
 AND
 NATIONAL ILLUMINATION COM- }
 PANY } DEFENDANT.

Practice—Service of statement of claim—Patent action—Registered firm in Province of Quebec—Exchequer Court Rules—Code of Civil Procedure—English practice.

Held: That service of the statement of claim at the place of business of defendant, a registered firm doing business in the Province of Quebec and owned by one G. who was not served with the statement of claim personally, constitutes good service and is regular, valid and legal.

MOTION to set aside the service of the statement of claim herein.

The motion was heard before the Honourable Mr. Justice Angers, at Ottawa.

W. G. Pugsley, K.C. for the motion.

E. G. Gowling contra.

ANGERS J., now (October 7, 1935) delivered the following judgment:

Motion by the defendant asking that the service of the statement of claim be declared irregular, illegal, null and void and that the said statement of claim be dismissed with costs, *sauf recours*.

The action is one for infringement of letters patent for invention, with the usual conclusions.

The motion sets forth in substance: that National Illumination Company is a registered firm doing business in the Province of Quebec and not an incorporated company; that Arnold Goldstein is the registered owner of the said firm; that the said Arnold Goldstein was not served with the statement of claim either at his residence or personally at his place of business, as required by law; that the defendant suffers prejudice.

The motion is supported by Goldstein's affidavit stating that the facts alleged therein are, to the best of the deponent's knowledge and belief, true and correct.

In further support of the motion the defendant produced a duly certified copy of a declaration reading as follows:

I, the undersigned, Arnold Goldstein, bachelor, of the City of Montreal, declare that I have this day commenced to carry on the business of wholesaling and retailing electrical equipment, under the firm name and style of "National Illumination Co."

I declare that I am unmarried and that there is no one else associated with me in conducting the said business.

In witness whereof I have signed these presents at Montreal, this eleventh day of December, nineteen hundred and thirty-four.

(Signed) ARNOLD GOLDSTEIN.

Witnessed by:

(Signed) MAX CARMAISE, N.P.

The copy in question shows that the original of this declaration was filed and registered with the Prothonotary of the Superior Court of the Province of Quebec, District of Montreal, on the 12th of December, 1934, in compliance with Article 1834a of the Civil Code of the Province of Quebec.

It was argued on behalf of defendant that the action should have been taken against the registered owner, namely Arnold Goldstein, instead of National Illumination Company which is only a firm name. In support of this contention counsel for defendant cited the case of *Browne et al v. Taylor* (1), in which it was held as follows:

1. A commercial partnership is not a jural person or entity distinct from the several members who compose it. It cannot be a plaintiff in an action and as all the individual partners must be named as such in the writ, any one of them who does not reside in the province may be required to give security for costs.

This decision is in accordance with the requirements of Article 122 of the Code of Civil Procedure of the Province of Quebec, the material provisions whereof read as follows:

122. The writ must state the names, the occupation or quality and the domicile of the plaintiff, and the names and the present or last known residence of the defendant.

* * * * *

If a commercial partnership, having its principal place of business outside the district, is not registered therein, it may be summoned by its firm name, with mention of the place where such principal place of business is situated; but the judgment rendered against it is executory only against partnership property.

So long as a registered commercial partnership is not dissolved it may be sued under its firm name, but the judgment rendered against it is executory only against partnership property.

(1) (1905) R.J.Q., 28 S.C., 462.

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There are no similar provisions in the rules of this Court and it has been the practice, perhaps not commendable, to designate in a statement of claim a partnership or a person carrying on business under a firm name solely by the firm name. I do not think that Article 122 of the Code of Civil Procedure applies and that a decision based thereon can be of any assistance.

My attention was drawn to rule 42 of the rules of this Court. This rule, which, in matters of patents of invention, copyrights, trade marks and industrial designs, is an exception to the general rule laid down in rule 2, provides that:

In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trade-mark or industrial design, the practice and procedure shall, in any matter not provided for by any Act of the Parliament of Canada or by the Rules of this Court (but subject always thereto) conform to, and be regulated by, as near as may be, the practice and procedure for the time being in force in similar proceedings in His Majesty's Supreme Court of Judicature in England.

Rule 11 of Order XLVIII A of the Rules of the Supreme Court, 1883 (Eng.) enacts that:

Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply.

This rule applies apparently to actions of any nature, including actions respecting patents of invention, copyrights, trade marks and industrial designs. I will venture to say nevertheless that, when the names of the partners or the name of the person carrying on business under a firm name can be ascertained, as was the case in the present instance, it seems to me advisable to mention them in the designation. However it may be, the motion before me does not take objection to the designation of the defendant but merely invokes the irregularity and illegality of the service of the statement of claim; this is the only question with which we are concerned.

It was urged on behalf of defendant that the statement of claim should have been served on the defendant personally in compliance with rule 64 of the rules of this Court, which is in the following terms:

Service upon a defendant of an office copy of the information or statement of claim is to be effected personally, except in the cases hereinafter otherwise provided for; but it shall not be necessary to produce the original information, statement of claim or petition of right at the time

of service. The affidavit of service may be in the terms of Form 15 in the Appendix to these Rules.

Counsel for defendant submitted susidiarily that, if personal service was not imperative, service should have been effected by leaving the statement of claim with a reasonable person at the defendant's domicile or ordinary place of residence, as required by Article 128 of the Code of Civil Procedure and that service at the place of business was only permitted in the absence of a regular domicile or ordinary residence. Article 128 of the Code of Civil Procedure, on which counsel for defendant relied, reads as follows:

128. Service must be made either upon the defendant in person, or at his domicile or at the place of his ordinary residence, speaking to a reasonable person belonging to the family.

In the absence of a regular domicile or ordinary residence, service may be made upon the defendant at his office or place of business, if he has one.

Counsel contended that, as the defendant had, at the time of the service, a regular domicile and place of ordinary residence, the statement of claim should have been left there and not at his place of business.

I do not think that Article 128 has any application in the present case.

It was argued on behalf of plaintiff that service at the place of business was valid and legal under the provisions of rule 66, which reads thus:

When partners are sued in respect of any partnership liability, the information, statement of claim or petition of right may be served either upon any one or more of the partners, or at the principal place (within the jurisdiction) of the business of the partnership upon any person having, at the time of service, the control or management of the partnership business there; and such service shall be deemed good service upon all the partners composing the firm.

The adoption by a person of a firm name does not constitute a partnership and National Illumination Company, although apparently a partnership, is not one in reality. But under rule 11 of Order XLVIII A aforesaid, a person carrying on business alone under a firm name is assimilated to a partnership. For this reason I believe that the service at the place of business was in order.

In the Code of Civil Procedure, where we find provisions concerning the service of an action on an individual (Article 128) and provisions concerning the service on a partnership (Article 139), there is no provision dealing with service on a person doing business alone under a firm

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name; still service of an action at the place of business in the latter case was held to be valid and legal by the Court of Review in the case of *Bourdon v. Bradshaw* (1), in which Lemieux J., rendering the judgment of the majority of the Court, said (p. 391):

Les personnes prenant une raison sociale et formant une société nominale, comme Bradshaw & Co., se constituent apparemment en société en nom collectif.

Cette raison sociale ou société nominale indique apparemment une pluralité de membres dans la raison sociale, et laisse généralement croire, par cette appellation ou autre que celle de son nom, qu'un individu faisant ainsi affaires est en société avec d'autres.

L'objectif de ces raisons sociales est de faire le commerce sous un nom particulier ou d'emprunt.

Je classe ces raisons sociales dans la catégorie des sociétés en nom collectif, et elles doivent être considérées et traitées comme telles, en matière d'assignation, c'est-à-dire, suivant l'article 139 C.P.C., qu'elles peuvent être assignées au bureau d'affaires de cette raison sociale.

For the reasons above stated I have reached the conclusion that the service of the statement of claim at the place of business of the defendant was regular, valid and legal.

The contention propounded by counsel for plaintiff that Arnold Goldstein was not a party to the action and that he had no right to appear therein is, in my opinion, unfounded. Goldstein is the registered owner of National Illumination Company and as such he has an interest in contesting the suit taken against it.

The motion is dismissed with costs against the defendant.

The defendant will have fifteen days from the date hereof to file a statement in defence.

Judgment accordingly.