

1953
 *Mar. 25, 26
 *June 26

MUZAK CORPORATION APPELLANT;
 AND
 COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED } RESPONDENT;
 AND
 ASSOCIATED BROADCASTING COMPANY LIMITED and MARTIN MAXWELL } DEFENDANTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Practice—Exchequer Court—Copyright—Infringement—Writ of Summons—Service of Notice out of jurisdiction—Whether an Exchequer Court interlocutory judgment includes an order—Whether English O.11 applies—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 75, 82(1)(b) as amended—Rr. 42, 76.

The respondent in an action for infringement of copyright applied under Exchequer Court r. 76 for leave to issue notice of a statement of claim for service outside the jurisdiction upon the appellant, a corporation incorporated under the laws of the State of New York and having its chief place of business therein. The application was supported by an affidavit stating that in the belief of the deponent the plaintiff (respondent) had a good cause of action. The application was allowed and the appellant then, by leave granted it under s. 82(1)(b) of the *Exchequer Court Act* R.S.C. 1927, c. 34, as amended by 1949,

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Cartwright JJ.

c. 5, s. 2, appealed on the grounds that the court below had erred in applying *Falcon v. Famous Players Film Co.*, had proceeded upon a wrong principle, and that the material relied upon was not sufficient to entitle an order to be made.

Held: 1. That an "interlocutory judgment", within the meaning of s. 82(1)(b) of the *Exchequer Court Act*, includes an order and therefore there was jurisdiction to hear the appeal.

2. (Taschereau and Rand JJ. expressing no opinion), that the combined effect of s. 75 of the Act and of rr. 76 and 42 is to make applicable O. 11 of the Supreme Court of Judicature in England.
3. (Kerwin and Taschereau JJ. dissenting), that the evidence adduced in support of the application was not sufficient to establish that the case was a proper one for service outside the jurisdiction. *Vitkovice Horni A Hutni Tezirsto v. Korner* [1951] A.C. 869 referred to.

Falcon v. Famous Players Film Co. [1926] 1 K.B. 393; [1926] 2 K.B. 474, distinguished.

Decision of the Exchequer Court (not reported), reversed.

APPEAL from the judgment of Thorson P. of the Exchequer Court of Canada wherein leave was granted to the respondent to issue notice of the Statement of Claim for service out of the jurisdiction against the appellant.

G. F. Henderson for the appellant.

H. E. Manning Q.C. for the respondent.

KERWIN J. (dissenting):—By leave granted by Mr. Justice Estey under s-s. 1 of s. 82 of the *Exchequer Court Act* as enacted in 1949, Muszak Corporation appeals from an order of the President of the Exchequer Court granting Composers, Authors and Publishers Association, the plaintiff in an action in that Court, leave to issue a notice of the statement of claim for service out of the jurisdiction against the appellant. S-s. 1 of s. 82 reads as follows:—

82. (1) An appeal to the Supreme Court of Canada lies

(a) from a final judgment or a judgment upon a demurrer or point of law raised by the pleadings, and

(b) with leave of a judge of the Supreme Court of Canada, from an interlocutory judgment,

pronounced by the Exchequer Court in an action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars.

Unless "interlocutory judgment" in this subsection includes "order", there is nothing to which it applies, and the paragraph would be nugatory. Notwithstanding the use of the word "judgment" and "order" in other sections of the Act and in the Rules, I am not prepared to hold that Parliament in enacting a provision, which so far as (b) is concerned was new, meant and accomplished nothing thereby.

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There being jurisdiction to grant leave, should the President's order be set aside? The action was commenced by a statement of claim filed April 16, 1952, the plaintiff being the present respondent and the defendants Associated Broadcasting Company Limited (hereinafter referred to as Associated), Martin Maxwell, and Muzak Corp. Presumably after the statement of claim had been served in Canada upon the first two defendants, an affidavit was made by Harry Houghton, described as President of Muzak Corporation, a company incorporated and organized under the laws of the State of New York, and also as President of Muzak Corporation, a company incorporated and organized under the laws of Delaware, and stating that the New York company succeeded to the business carried on by the Delaware company. This affidavit, to which further reference will be made, was sworn to on June 16, 1952. As a result, the statement of claim was amended by striking out Muzak Corp. as a party defendant and any reference to it and by making Muzak Corporation, the present appellant, the third defendant. Notice of the motion for leave to issue notice of the statement of claim for service out of the jurisdiction was served upon the appellant and the other defendants. The order in appeal was made after considering the statement of claim, two affidavits upon which the motion was based, and the affidavit of Harry Houghton.

The statement of claim is to the following effect. The plaintiff was the owner of the sole right to perform in public throughout Canada numerous musical works and at all relevant times it was entitled to require the defendants, and each of them, to take out a licence to perform such works in Canada and to pay the fees prescribed, and none of the defendants obtained such a licence. The appellant caused recordings known as electrical transcriptions to be made of musical works specially arranged for the purpose of enabling such transcriptions to be performed by means of transcription turntables. Transcriptions were furnished by the appellant to Associated of several musical works, the sole right to perform which in public throughout Canada was owned by the plaintiff. Associated performed (and the defendant Maxwell as principal shareholder, director and executive officer, counselled, authorized and procured it so to do) a number of musical works in which the respondent had the appropriate copyright. The appellant furnished

the transcriptions only to those entering into contracts with it. By paragraph 8 it was alleged that such a contract was entered into between the appellant and Associated whereby the latter became a franchise holder on terms that it should receive from the appellant programs suitable for performance and reproduction and pay the appellant a percentage of ten per centum of the gross receipts from all contracts made by Associated with its subscribers for the musical programs. Paragraph 13 reads:—

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13. The Defendant Muzak, by virtue of the agreement set forth in paragraph 8 hereof and the acts performed by it thereunder, and the Defendant Maxwell, by virtue of the acts hereinbefore set forth, have infringed the Plaintiff's copyright in the said musical works by authorizing the performances of the said musical works, the sole right to perform which in public in Canada is the property of the Plaintiff.

One affidavit filed on behalf of the plaintiff was made by its counsel, who stated that he had advised the plaintiff that in his opinion he believed that the plaintiff had a good cause of action against the appellant in respect of the matters disclosed in the statement of claim. The second affidavit filed on behalf of the plaintiff was made by C. R. Matheson, paragraphs 4 and 5 whereof state:—

4. The statement of claim should be served upon the Defendant Muzak Corporation because it authorizes and did authorize all the performances in question in this action and it is a necessary and proper person to be joined in the present action.

5. The Defendant Muzak Corporation is engaged in the business of providing electrical transcriptions and programme schedules to enable musical works to be performed in the manner in which they are alleged to be performed in the statement of claim in this action and collects very substantial fees from the so-called franchise holders to whom pursuant to contracts entered into by Muzak Corporation the electrical transcriptions and programme schedules for performance are made available to franchise holders including the Defendant Association Broadcasting Corporation Limited.

Paragraphs 6 to 11 of the affidavit of Harry Houghton, referred to earlier, are as follows:—

6. The New York Company lets and supplies to the Defendant, Associated Broadcasting Company Limited, (hereinafter called Associated) in the United States of America under contract a library of electrical transcriptions containing musical selections.

7. The New York Company delivers to Associated the library in the United States of America, Associated being responsible for all customs duties and other taxes that may be levied in respect of the importation of the said library into Canada.

8. By contract with the New York Company Associated is granted a territorial franchise in respect of the use of the said library of transcriptions.

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9. The contracts between the New York Company and Associated were entered into in the State of New York and are governed in their interpretation and construction by the laws of the State of New York and all payments are made in the said State of New York.

10. The New York Company does not do any act in Canada.

11. The New York Company denies that it has authorized Associated to use any musical selection in infringement of the rights of any person.

I take it that "lets" signifies that the appellant leased the electrical transcriptions to Associated and did not sell them.

Rules 76 and 42 of the *Exchequer Court Act* read:—

Rule 76. When a defendant is out of the jurisdiction of the Court, then upon application, supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, the Court or a Judge may order that a notice of the information, petition of right, statement of claim or other judicial proceeding be served on the defendant in such place or country or within such limits as the Court or a Judge thinks fit to direct, and the order is, in such case, to limit a time (depending on the place of service) within which the defendant is to file his statement in defence, plea, answer or exception, or otherwise make his defence according to the practice applicable to the particular case, or obtain from the Court or a Judge further time to do so.

Rule 42. 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.

In my opinion this has the effect of making applicable Order XI, Rules 1 and 4 of the English Rules:—

Rule 1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever . . .

(e) The action is founded on a tort committed within the jurisdiction.

(f) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

(g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

Rule 4. Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or Judge that the case is a proper one for service out of the jurisdiction under this Order.

A reference to the following authorities is sufficient to indicate the tests that have been laid down in applying these rules. In *Badische Anilin und Soda Fabrik v. Chemische Fabrik vormals Sandoz* (1), Joyce J. said at page 491:—

I am invited on this application to try the question whether there has been infringement or not. I am not going to do anything of the kind; but it is perfectly clear that questions of fact are raised and also a very serious question of law.

In the Court of Appeal, Collins M.R. said at page 494:—

Now, it does not appear to me that in conferring this jurisdiction—which I agree is an important one and one to be carefully exercised—the Legislature has imposed on the courts the duty of trying the case before they allow the plaintiff to put it in suit. That would be going much too far in favour of persons outside the jurisdiction.

* * *

If the court has got before it a *primâ facie* case which is not completely displaced by the evidence on the other side, then it seems to me that the plaintiff has not lost his right to have that case tried.

On appeal to the House of Lords (2) the order was again affirmed. Lord Davey said at page 735:—

This does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient. On the other hand, the court is not, on an application for leave to serve out of the jurisdiction, or on a motion made to discharge an order for such service, called upon to try the action or express a premature opinion on its merits,

* * *

If the Court is judicially satisfied that the alleged facts, if proved, will not support the action, I think the court ought to say so, and dismiss the application or discharge the order. But where there is a substantial legal question arising on the facts disclosed by the affidavits which the plaintiff *bonâ fide* desires to try, I think that the court should, as a rule, allow the service of the writ.

In *Vitkovic Horni A Hutni Tezirstvo v. Korner* (3), Lord Simonds stated at page 878:—

. . . the obligation of the plaintiff is, not to “satisfy” the court that he is right, but to make it sufficiently appear . . . that the case is a “proper one for service out of the jurisdiction under this order.”

referring to the remarks of Lord Davey in 90 L.T.R., p. 735, (*supra*) Lord Simonds, at page 879, stated:—

It is, no doubt, difficult to say precisely what test must be passed for an applicant to make it sufficiently appear that the case is a proper one.

and at page 880:—

The description “a good arguable case” has been suggested and I do not quarrel with it.

(1) (1903) 88 L.T.R. 490. (2) (1904) 90 L.T.R. 733.

(3) [1951] A.C. 869; 2 All E.R. 334.

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In my opinion a good arguable case has been suggested by the combined effect of the statement of claim and the three affidavits. Upon the trial of the action, difficult questions of law will no doubt emerge but as to these I express no opinion. The reasons of the President in granting the motion are short:—

I grant the motion based upon *Falcon v. Famous Players Film Co.* (1), and on appeal (2).

Kerwin J.

I agree that the case cited is distinguishable from the present but that fact does not, in my opinion, indicate that the President proceeded upon a wrong principle. I would dismiss the appeal with costs.

TASCHEREAU, J. (dissenting):—I have reached the conclusion that the “order” given by the learned President of the Exchequer Court, authorizing the respondent to issue a notice of the statement of claim for service out of the jurisdiction against the appellant, is an “interlocutory judgment”, within the meaning of s. 82(1)(b) of the *Exchequer Court Act*, and that therefore this Court has jurisdiction to hear the present appeal, leave having been granted.

As to the second point, I do not think that this Court should interfere with the conclusion of the trial judge. When by affidavit or otherwise, it is shown, that the plaintiff has a “good arguable case” against the party intended to be served, the court or the judge may properly issue the order. It is not the function of a court or a judge who considers an application, as the one made in the present case, to go into all the merits of the litigation, and to dispose of the ultimate rights of the parties.

I would dismiss the appeal with costs.

RAND J.:—On the argument, Mr. Manning gave us a very full statement of the scope of copyright in musical composition. It is distributed into a number of interests both “vertical” and “horizontal”. By s. 3 of the statute the copyright holder has the sole right “to produce, reproduce”, say, a song in sheet form for ordinary sale; to perform it in public; to make a record of it by means enabling it to be performed mechanically; to adapt and present it publicly by cinematograph or radio communication. These rights,

(1) [1926] 1 K.B. 393.

(2) [1926] 2 K.B. 474.

again, may be limited to sale or production or performance in specified areas of specified countries and they may be exclusive to one person or open to the market.

The material on which the order for service out of the jurisdiction was made shows that Muzak Corporation carries on in New York the business of furnishing electric transcriptions and programme schedules by way of hire as the means by which Associated Broadcasting Company can perform the compositions in Ontario. The units are shipped from New York at the entire cost of Associated, including customs duties and other taxes and fees payable in this country. Furnishing the transcript in New York violates no law or copyright there and it is done in the ordinary course of business. All payments to Muzak by Associated are made there. The privilege enjoyed by Associated within Ontario is exclusive and is of the same nature as another "franchise" granted to a different company for Quebec.

It is, then, the simple situation of a hiring in New York by a Canadian company of a means or instrument for performing a copyright musical composition in Canada. Muzak is in no other sense related to the business in Canada of Associated; and there is no more connection between that company and the payment of performance fees than the payment of customs duties at the border.

But it is said that the sole rights enjoyed under s. 3 include that "to authorize any such acts as aforesaid", which Muzak has violated. Obviously, in one sense, Muzak authorizes Associated to make use of instruments which it owns but that use is to be in accordance with regulations dealing with it. There is not a syllable in the material to suggest that Muzak has made itself a party in interest to the performance either by warranting the right to perform without fee or by anything in the nature of a partnership or similar business relation. If by letting a device the owner is to be taken as engaging himself to its use in defiance of regulations, the very distinction between the right to make a record and the right to give a public performance by means of it which Mr. Manning made and the Act provides for, is wiped out. It would be as if a person who lets a gun to another is to be charged with "authorizing" hunting without a game license.

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It is urged that in some manner or other the exclusive "franchise", as it is called, to make use of the transcription in Ontario supports the contention that Muzak has "authorized its use" within the meaning of s. 3, but how that has anything to do with the conditions under law which relate to public performances I am at a loss to see. The word "franchise" is here simply a commercial use of the term meaning an exclusive right within a given territory; it has nothing whatever to do with the conditions in law under which that right is to be exercised.

The rules of the Exchequer Court dealing with service of this nature are of a most skeletal form. By r. No. 2 the practice and procedure not otherwise provided shall conform to and be regulated as near as may be by that at the time in force in the Supreme Court of Judicature in England; but it is not necessary, for the purposes of this appeal, to treat the rules of Order No. 11 as being applicable by reason of that provision. An order for such service is the exercise of an unusual power by the domestic forum, and it has at all times been limited to such situations as are consistent with a proper appreciation of the limitations to be placed on exercising jurisdiction beyond a country's territorial boundaries. If the person beyond those limits has been a party to an act within them, that is a basic fact to which the power may be related; but in all cases the minimal requirement is that a prima facie case be shown. This attempt to attach Muzak to the activities of Associated would be futile were it not for the retained ownership of the instruments which it hires to Associated; and it is by the coercion made available by that fact that the effectiveness of a service out of the jurisdiction could be realized. On the facts laid before the Court as I find them, there is not the slightest warrant for exercising this power.

Agreeing as I do that for the reasons given by my brother Cartwright, a right to bring the case here lies, I would allow the appeal and set aside the order below with costs both here and in the Exchequer Court.

KELLOCK J.:—In *Vigneux v. Canadian Performing Right Society Ltd.* (1), Lord Russell of Killowen, in delivering the judgment of the Judicial Committee, said, at p. 123,

(1) [1945] A.C. 108.

with reference to the owners of the mechanical device and suppliers of the records there in question:

. . . their Lordships think, they neither gave the public performance . . . nor did they authorize it. They had no control over the use of the machine; they had no voice as to whether at any particular time it was to be available to the restaurant customers or not. The only part which they played in the matter was, in the ordinary course of their business, to hire out to Raes one of their machines and supply it with records, at a weekly rental of ten dollars.

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In the case at bar the respondent claims to be the owner of the sole right to perform the works here in question in Canada, and alleges infringement on the part of the appellant because, as it is said, the appellant has "authorized" the performance of the said musical works under its contract with the defendant broadcasting company. The business of the appellant is to supply in the State of New York, in consideration of fees payable in New York, electrical recordings of musical works adapted for performance on certain mechanical contrivances, to persons entering into contracts with the appellant in New York, under which a territorial "franchise" is granted with respect to the use of such recordings. It is by reason of the entry by the appellant into such a contract with the defendant broadcasting company with respect to some part of Canada that the respondent rests its claim.

For any performance on its own part of any musical work which is the subject of copyright, the evidence is that the appellant obtains a licence from the copyright owner and also, with respect to franchise holders from the appellant in the United States, the former obtain their own licences, as is also the case with respect to the only other franchise holder in Canada.

The learned President who made the order permitting service upon the appellant outside the jurisdiction did so "upon *Falcon v. Famous Players Film Co.* (1), and on appeal (2)." In my opinion, with respect, when this decision is examined, it has no application in the circumstances here present. It is not in fact a decision upon any question as to the propriety of permitting service outside the jurisdiction. It is a decision upon the merits in an action.

(1) [1926] 1 K.B. 393.

(2) [1926] 2 K.B. 474.

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In that case a United States company had made a film of a literary work, the copyright in which was the property of the plaintiff. It then sent the negative and two positives to an English company, who made further copies and handed them to a second English company which let out a copy to the proprietor of a picture theatre for exhibition. All three companies participated in the moneys paid by the theatre proprietor and it was conceded by their counsel that no distinction was to be drawn between any of them but that they were all to be treated as on the same footing. The contract with the actual exhibitor contained the following clause: "the company shall grant to the hirer the *right* to exhibit the film" for the sum of £20, "which sum the hirer agrees to pay on the first day of exhibition of the said film, and in any event not later than the final day of such exhibition."

On the terms of that contract Scrutton L.J., considered that the defendants had imposed an obligation upon the exhibitor to exhibit the film in order that they should receive the moneys provided for by the contract, and that in so doing the defendants were themselves involved in performance.

In the view of Atkin L.J., as he then was, the hiring out of the film

on the terms of the contract of hiring, which is before us amounted to an "authorization" to the exhibitor to perform the play. He said at p. 499:

For the purposes of this case it appears to me that to "authorize" means to grant or to purport to grant to a third person the *right to do the act complained of*, whether the intention is that the grantee shall do the act on his own account or only on account of the grantor;

It is plain, therefore, that in *Falcon's* case the defendants did not merely supply the film but purported to confer upon the exhibitor the *right to perform* in opposition to the right of the true owner.

The theory of the respondent in the case at bar assumes that the grant of a "franchise" extending to this country necessarily involves the grant of the "right" to perform in this country. Evidence of any such element in the contract in question in the case at bar is entirely lacking.

The word "franchise" connotes nothing more than "privilege" and nothing more on the evidence as to the contents of the contract can reasonably be inferred than that it confers the privilege of using the recordings. It is not, therefore, to be assumed that the appellant purported to grant to the defendants any *right to perform* in Canada and certainly not the right to perform in opposition to the title of the true owner of that right.

In *Falcon's* case, Bankes, L.J., with whom Atkin L.J., agreed, approved of earlier expressions of opinion as to the meaning of "authorize", namely, that it is to be understood in its ordinary dictionary sense of "sanction, approve, and countenance". Unless what is done by a defendant is to sanction, approve or countenance actual performance, it cannot be said, in my opinion, that it has "authorized" performance. While it is true that to perform by means of such a mechanical contrivance as is here in question involves the use of recordings, and while the appellant, on the evidence, has authorized the use of the recordings in performing, it has not authorized the performance itself and has, therefore, not invaded any right of the respondent. Performance was clearly contemplated and authorized in *Falcon's* case, while in the case at bar the appellant is in the position of the appellant in *Vigneux's* case, as described by Lord Russell in the passage from the judgment above cited.

Mr. Manning contends that the language of Lord Russell is quite inconsistent with the decision of the Judicial Committee in the earlier case of *Mellor v. Australian Broadcasting Commission* (1), but I find no such inconsistency. It would have been strange had it been otherwise in view of the fact that both Viscount Maugham and Lord Porter were members of the Board in each instance. In *Mellor's* case, the appellants, who carried on business as publishers of music and were the owners of the performing right in Australia in certain musical works which they had supplied to a band with a licence to perform the same, alleged infringement against the defendant broadcasting commission in respect of its broadcasting of the performance by a band of these musical works. In that case, however, it was shown, and indeed admitted, that the actual performance was one for which the defendant Commission was itself responsible.

(1) [1940] 2 All E.R. 20.

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With respect to Mr. Manning's contention as to the construction of r. 76 of the Exchequer Court Rules and s. 75 of the Statute itself that these provisions constitute a complete code of procedure and that r. 42 does not apply so as to invoke the practice in the Supreme Court of Judicature in England, I cannot agree. Such a contention is, moreover, opposed to the long-standing view implicit in the reference of the second edition of Audette, at page 436, to the seventh edition of Wilson's Judicature Act, page 151, which deals with O. XI of the rules relating to the Supreme Court of Judicature. In my opinion, this Order is invoked by r. 42 of the Exchequer Court Rules and it is not sufficient for the applicant for an order for leave to serve outside the jurisdiction, simply to file an affidavit or other evidence stating his belief that the plaintiff has a good cause of action.

The cause of action here alleged by the respondent is a tort committed within Canada. In such a case the question for the appellate court is, in the words of Lord Simonds in *Vitkovice Horni A Hutni Tezirstvo v. Korner* (1):

. . . whether the learned judge did exercise his discretion, and did so on the right principles.

In *Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks* (2), Lord James at 735 said:

. . . the court ought, I think, to be convinced by the proof brought before it that the applicant is in a position to present to the tribunals of the country a substantial case for their determination.

Lord Davey uses much the same language at 735:

But where there is a substantial legal question arising on the facts disclosed by the affidavits which the plaintiff *bonâ fide* desires to try, I think that the court should, as a rule, allow the service of the writ.

In *Vitkovice's* case Lord Simonds uses the words "a good arguable case."

In my view the respondent has failed to show, on the evidence presented, the existence of any such case.

As I agree that notwithstanding the employment of the words "judgment" and "order" throughout the *Exchequer Court Act* and Rules, it is difficult to give any meaning to the word "interlocutory judgment" without applying it to "order", the appeal should be allowed and the order below set aside with costs throughout.

(1) [1951] 2 All E.R. 334 at 336.

(2) 90 L.T. 733.

CARTWRIGHT J.:—This is an appeal, brought pursuant to leave granted by Estey J., from a decision of the learned President giving the respondent leave to issue a notice of the statement of claim for service out of the jurisdiction upon the appellant, a corporation incorporated under the laws of the State of New York and having its principal place of business in that State.

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The respondent questions our jurisdiction to entertain the appeal on the ground that the decision from which it is taken is an interlocutory order and that the *Exchequer Court Act* does not authorize an appeal from an order but only from a judgment. The relevant section is 82, s-s. (1) and (4) of which read as follows:—

82. (1) An appeal to the Supreme Court of Canada lies

(a) from a final judgment or a judgment upon a demurrer or point of law raised by the pleading, and

(b) with leave of a judge of the Supreme Court of Canada, from an interlocutory judgment, pronounced by the Exchequer Court in an action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars.

(4) A judgment shall be considered final for the purpose of this section if it determines the rights of the parties, except as to the amount of the damages or the amount of liability.

The order appealed from is in the form of a judgment, that is to say, the operative part thereof commences with the words:— “This Court doth order and adjudge that the Plaintiff be at liberty to issue a notice . . .”. Counsel for the appellant, however, concedes that the form in which the decision of the learned President was entered is not decisive, and in my opinion, it is more properly described as an “order” than as a “judgment” if those terms are used in contradistinction from each other. S. 75 of the *Exchequer Court Act* confers the power to permit service of notice of proceedings on defendants out of the jurisdiction of the Court. The words used are, in s-s. (1), “. . . a judge . . . may order . . . that notice . . . be served”, and in s-s (2), “The order shall in such case . . .”. The question is whether such an order falls within the words “an interlocutory judgment” in s. 82(1)(b) quoted above. In common parlance the word “judgment” is, I think, often used as a generic term including all judicial decisions. In the Shorter Oxford English Dictionary, Vol. 1, page 1071, one of the meanings given to it is:— “a judicial decision or order in court”. Blackstone appears to have used the word

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“judgments” to include decisions which would now more usually be referred to as “orders”—see Blackstone’s Commentaries, (1768), Vol. 3, page 396:—

All these species of judgments are either *interlocutory* or *final*. *Interlocutory* judgments are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action: in which it is considered by the court, that the defendant do answer over, *respondeat ouster*; that is, put in a more substantial plea. It is easy to observe, that the judgment here given is not final, but merely *interlocutory*; for there are afterwards farther proceedings to be had, when the defendant hath put in a better answer.

In *Ex Parte Chinery* (1), Cotton L.J. said:—

... Now, in legal language, and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a “judgment” and an “order”. No doubt the orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment; but still judgments and orders are kept entirely distinct. It is not said that the word “judgment” shall in other Acts of Parliament include an “order”. I think we ought to give to the words “final judgment” in this subsection their strict and proper meaning, i.e., a judgment obtained in an action by which a previous existing liability of the defendant to the plaintiff is ascertained or established—unless there is something to shew an intention to use the words in a more extended sense.

This language was adopted by Lord Esher, M.R. in *Onslow v. Commissioners of Inland Revenue* (2), but in both of these cases the order held not to be a judgment had been obtained in a proceeding other than an action and in the last mentioned case Lord Esther said at page 466:—

A “judgment”, therefore, is a decision obtained in an action, and every other decision is an order.

It will be observed that the judgments in both of the last mentioned cases envisage the possibility of there being something in the statutory provisions under consideration to show an intention on the part of Parliament to use the word “judgment” in a more extended sense. In the case at bar I think such an intention is shown by the circumstance, pointed out by my brother Kerwin, that if s. 82 is construed as dealing only with judgments falling strictly within the definition given by Cotton L.J. there would be nothing upon which clause (b) of subsection (1) of s. 82 could operate. A construction which would leave the clause without any effect must be avoided if possible, and, in this case, it can be avoided by giving to the word “judgment”, a sense in which it is often used and interpreting it as including orders.

(1) (1884) 12 Q.B.D. 342.

(2) (1890) 25 Q.B.D. 465.

While, in view of the decision of this Court in *British American Brewing Co. Ltd. v. The King* (1), I do not suggest that the interpretation section of the *Supreme Court Act* applies to s. 82 of the *Exchequer Court Act*, the words of clause (d) of s. 2 of the first mentioned Act furnish an example of the wide sense in which the word "judgment" is frequently employed. It reads as follows:—

2. (d) "judgment", when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof; and when used with reference to the Supreme Court, includes any judgment or order of that Court;

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I conclude that we have jurisdiction to entertain this appeal and it becomes necessary to consider its merits.

In my opinion, the combined effect of s. 75 of the *Exchequer Court Act* and of rr. 76 and 42 of that Court is to make applicable to motions for leave to serve out of the jurisdiction the provisions of Order XI of the Supreme Court of Judicature in England. The principles by which the Court should be governed in dealing with applications under that order have been recently re-stated by the House of Lords in *Vitkovice Horni a Hutni Tezirstvo v. Korner* (2).

The learned President was of the view that the motion before him was governed by the decision in *Falcon v. Famous Players Film Co.* (3), (4). For the reasons given by my brother Kellock I am of opinion that the material before us does not indicate facts sufficient to bring the case at bar within that decision. After a perusal of all the material I am of opinion that it was not sufficient to justify the making of an order for service out under any of clauses (ee), (f) or (g) of rule 1 of O. XI.

I would allow the appeal and set aside the order below with costs throughout.

Appeal allowed and order of the Exchequer Court set aside. Appellant allowed costs of its motion before the Exchequer Court and of this appeal.

Solicitors for the appellant: *Gowling, MacTavish, Osborn & Henderson.*

Solicitors for the respondent: *Manning, Mortimer & Kennedy.*

(1) [1935] S.C.R. 568.

(2) [1951] A.C. 869.

(3) [1926] 1 K.B. 393;

(4) [1926] 2 K.B. 474.