

CASE AND COMMENT

BERGER v. CUXOFF

Promise to purchase accepted on Sunday — Lord's Day Act 1952
R.S.C. c. 171, s. 4 — Sunday Observance Act 1941 R.S.Q.
c. 309, s. 2 & 3.

The case of *Berger v. Cuxoff*¹ brought to notice a question which has been controversial in Quebec jurisprudence for many years. The decision stands alone in that it validated a transaction performed on a Sunday, upon the authority of the Quebec Sunday Observance Act,² as opposed to the federal Lord's Day Act.³

The facts of the case are as follows: the defendant listed her property for sale with a real estate broker, to whom the plaintiff submitted an offer to purchase the property which was, according to the evidence, accepted by the defendant on a Sunday. Notwithstanding a notarial protest, the defendant refused to perform. The plaintiff, concluding that the promise of sale be set aside, prayed that the court award him damages. The defendant alleged that the offer to purchase, being accepted on a Sunday, was null and void in virtue of section 4 of the federal Lord's Day Act.

The relevant statutory provisions are:

The Lord's Day Act, section 4: .

It is not lawful for any person on the Lord's Day, except as provided herein, or in any provincial act or law, now or hereafter in force, to sell or to offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any person to do on that day any work, business, or calling.

The Sunday Observance Act, section 3:

No person shall on Sunday, for gain, except in cases of necessity or inquiry, do or cause to be done any industrial work, or pursue any business or calling, or give or organise theatrical performances or excursions where alcoholic liquors are sold, or to take part in or be present at such theatrical performances or excursions.

Mr. Justice Challies concluded that the special exemption contained in section 4 of the federal Act permitted the operation of the provincial law, if there be any such law (as there is in Quebec), to regulate the performance of certain activities on Sundays. The Quebec Sunday Observance Act, section 2, permits such activities, subject to the exemptions of s. 3, as are not prohibited by other provincial legislation. Section 3 forbids, except in certain circumstances, industrial work and the pursuit of any business or calling. The acceptance of the

¹[1958] R.L. 361 (C.S.).

²1941 R.S.Q. c. 309, s. 2 & 3.

³1952 R.S.C. c. 171, s. 4.

promise to purchase, was held not to fall within the restrictions of section 3 and was, therefore, validly signified on a Sunday. Consequently, the defendant was held liable in damages.

On March 1, 1907, the Lord's Day Act was proclaimed. It was set up in such a manner that past or future provincial legislation could introduce, alter, or exclude most of the prohibitions of the federal Act,⁴ but there were four kinds or "profanation" that could not be validated by a province. Even these, however, would not be regarded as offences under the Act if any permissive local legislation, antedating Confederation, was in force at the time of the passage of the federal Act.

Quebec is one of the few provinces which substantially altered, within its jurisdiction, the effect of the federal Act. On February 28, 1907, (one day prior to the coming into force of the Dominion enactment), Quebec enacted a statute providing that the provincial laws respecting Sunday observances were to be in force. It further stated that the people of the province should remain entitled to do on Sunday anything not forbidden by such laws and to enjoy on Sunday all the liberties of action recognized by the custom of the province.⁵ The Sunday Observance Act is still *en vigueur*. The Quebec statute contains nothing to prevent the sale of real estate on Sunday, provided that none of the parties may be described as exercising their business or calling. There appears to be no authority stating that the acceptance of an offer to purchase, made by a non-trader to another non-trader, will be outlawed by virtue of the terms of the Lord's Day Act. The Act explicitly states that any provincial Sunday observance legislation antedating the federal statute should prevent its application within that province: the Quebec statute is all-embracing as regards the observance of the Sabbath in the province, and its terms, not those of the Lord's Day Act, should be applied to regulate any activities on that day.

Mr. Justice Challies, in rendering judgment to validate the completion of a real estate contract by private agreement on Sunday, correctly based his decision on the terms of the Provincial Act. This decision, however, may lead to some confusion in Quebec jurisprudence, unless the foundation of the Court's conclusion is understood and appreciated. No specific reference was made as to why the Quebec statute over-ruled the prohibitions appearing in the Dominion Act (i.e. Lord's Day Act, section 15). Had this been express in the Court's reasoning, the judgment would appear clearly justified. The importance of its inclusion, and the seriousness of its omission, must be pointed out.

⁴The Lord's Day Act, s. 15, dismembers the jurisdiction of the federal power in respect of those provinces which had legislative measures in regard to Sunday observances:

Nothing herein shall be construed to repeal or in any way affect any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada when this Act comes into force.

⁵1941 R.S.Q. c. 309, s. 1.

Quebec courts have had occasion to render several judgments on the same question as that raised in *Berger v. Cuxoff*, namely the validity of real estate transactions performed on Sunday. The case of *Choquette v. Bourque*⁶ is particularly on point. The plaintiff, owner of immovable property, instituted an action to compel the defendant to sign a deed of sale; the latter set up as his defense the fact that the acceptance to purchase property, made under private writing, had been signed on a Sunday. The matter was held to come within the prohibitions of section 4 of the Lord's Day Act and, consequently, was held invalid. In a more recent case, *Gershevich Realty Sales Co. v. Greenberg*,⁷ the question of real estate dealings on Sunday was again before the courts. Here a sale of property had been perfected between two non-traders by avoiding the intermediary real estate agent to whom the defendant had given an exclusive option. The agent, claiming his commission on the sale, was met by the defense that the option, having been signed on a Sunday, was null and void under section 4, and it was held that he was obviously asserting his business function in an activity prohibited under the restrictions of the Sunday Observance Act.

The provincial legislation was not mentioned in either of these cases. With respect it is submitted that *Choquette v. Bourque* ought to have been reversed and the Quebec Sunday Observance Act applied. Similarly the decision in *Gershevich v. Greenberg* would have been reasoned the same way whether or not the Lord's Day Act had been applied. We humbly maintain, however, that here again the Quebec statute ought to have been employed. Had the court in *Berger v. Cuxoff* more clearly asserted the grounds upon which it correctly referred to the authority of the Provincial Act, the erroneous application of the Lord's Day Act in prior decisions might have been more readily visible. The holding merits clarification if it is to be followed in subsequent decisions. Quebec's Sunday observance legislation should be distinguished vis-à-vis legislation respecting Sunday observance in other provinces which have not taken advantage of the option given them by the federal parliament in the Lord's Day Act and in which there was no pertinent legislation on the statute books prior to the proclamation of the Federal Act.

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⁶(1932) 70 C.S. 254.

⁷[1957] C.S. 265.

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