1939

CLOUTIER v. THE KING.

Rinfret J.

toute la preuve des deux parties. Vous devez avoir cette vue d'ensemble, et c'est de cette vue d'ensemble que doit sortir une conclusion de culpabilité ou de non-culpabilité. Et en ayant cette vue d'ensemble-là, *vous ne pouvez pas perdre de vue que vous devez le bénéfice du doute raisonnable à l'accusée.* Si vous avez un doute raisonnable, je vous dirai encore que vous devez ce doute à l'accusée; il lui appartient, c'est à elle.

Déjà antérieurement le juge avait dit aux jurés:

Si après avoir étudié la preuve, vous avez un doute raisonnable de la culpabilité de l'accusée, c'est votre devoir de l'acquitter.

C'est après avoir reçu une direction de ce genre que le jury en est arrivé à son verdict de culpabilité. Il avait devant lui tous les faits et toutes les circonstances. Il avait également les déclarations de l'appelante, nullement provoquées, et qui, il faut le dire, étaient d'une extrême gravité.

Avec la majorité des juges de la Cour du Banc du Roi, nous sommes d'avis que le jury pouvait certainement tirer des circonstances et des déclarations qui ont été prouvées la conclusion raisonnable que l'appelante était coupable du crime dont on l'accusait; et nous ne nous croirions pas justifiables pour cette raison de mettre de côté le verdict qui l'a condamnée.

Pour ces motifs, nous croyons que l'appel doit être rejeté.

Appeal dismissed.

1939

* May 10.
* Dec. 9.

FRED. CHRISTIE (PLAINTIFF) .....APPELLANT;

AND

THE YORK CORPORATION (DEFENDANT) ..... } RESPONDENT.

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

Damages—Tavern—Refusal to serve beer to coloured persons—Discrimination—Freedom of commerce—Monopoly or privileged enterprise—Licence Act, R.S.Q., 1925, c. 25—Alcoholic Liquor Act, R.S.Q., 1925, c. 87—Alcoholic Liquor Possession and Transportation Act, R.S.Q., 1925, c. 38.

The appellant, who is a negro, entered a tavern owned and operated by the respondent in the city of Montreal and asked to be served a glass of beer; but the servants of the respondent refused him for

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1939

CHRISTIE v. THE YORK CORPORATION.

the sole reason that they had been instructed not to serve coloured persons. The appellant brought action for damages for the humiliation he suffered. The respondent alleged that in giving such instructions it was acting within its rights; that its business was a private enterprise for gain and that, in acting as it did, it was merely protecting its business interests. The trial judge maintained the action on the ground that the rule whereby the respondent refused to serve negroes in its tavern was illegal according to sections 19 and 33 of the Quebec *Licence Act*. But the appellate court reversed that judgment, holding that the above sections did not apply and that, as a general rule, in the absence of any specific law, a merchant or trader was free to carry on his business in the manner he conceived to be best for that business.

Held, Davis J. dissenting, that the appeal to this Court should be dismissed.

Per Duff C.J. and Rinfret, Crocket and Kerwin JJ.: The general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal: he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public order; and the rule adopted by the respondent in the conduct of its establishment was not within that class. Also, as the law stands in Quebec, the sale of beer in that province was not either a monopoly or a privileged enterprise. Moreover, the appellant cannot be brought within the terms of section 33 of the Quebec *Licence Act*, as he was not a traveller asking for a meal in a restaurant, but only a person asking for a glass of beer in a tavern. As the case is not governed by any specific law or more particularly by section 33 of the Quebec *Licence Act*, it falls under the general principle of the freedom of commerce; and, therefore, the respondent, when refusing to serve the appellant, was strictly within its rights.

Per Davis J. dissenting—Having regard to the special legislation in Quebec establishing complete governmental control of the sale of beer in the province and particularly the statutory provision which prohibits anyone of the public from buying beer in the glass from anyone but a person granted the special privilege of selling the same, a holder of such a permit from the government to sell beer in the glass to the public has not the right of an ordinary trader to pick and choose those to whom he will sell. The old doctrine that any merchant is free to deal with the public as he chooses has still now its application in the case of an ordinary merchant; but when the state enters the field and takes exclusive control of the sale to the public of such a commodity as liquor, then such doctrine has no application to a person to whom the state has given a special privilege to sell to the public.

Judgment of the Court of King's Bench (Q.R. 65 K.B. 104) aff., Davis J. dissenting.

1939

CHRISTIE v. THE YORK CORPORATION.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), (under special leave of appeal granted by this Court (2)), reversing the judgment of the Superior Court, Philippe Demers J., and dismissing the appellant's action for damages.

The material facts of the case and the question at issue are stated in the above head-note and in the judgments now reported.

Lovell C. Carroll for the appellant.

Hazen Hansard for the respondent.

The judgment of the Chief Justice and of Rinfret, Crocket and Kerwin JJ. was delivered by

RINFRET J.—The appellant, who is a negro, entered a tavern owned and operated by the respondent, in the city of Montreal, and asked to be served a glass of beer; but the waiters refused him for the sole reason that they had been instructed not to serve coloured persons. He claimed the sum of $200 for the humiliation he suffered.

The respondent alleged that in giving such instructions to its employees and in so refusing to serve the appellant it was well within its rights; that its business is a private enterprise for gain; and that, in acting as it did, the respondent was merely protecting its business interests.

It appears from the evidence that, in refusing to sell beer to the appellant, the respondent's employees did so quietly, politely and without causing any scene or commotion whatever. If any notice was attracted to the appellant on the occasion in question, it arose out of the fact that the appellant persisted in demanding beer after he had been so refused and went to the length of calling the police, which was entirely unwarranted by the circumstances.

The learned trial judge awarded the appellant the sum of $25 and costs of the action as brought. The only ground of the judgment was that the rule whereby the respondent refused to serve negroes in its tavern was "illegal," according to sections 19 and 33 of the Quebec *Licence Act* (Ch. 25 of R.S.P.Q., 1925).

(1) (1938) Q.R. 65 K.B. 104. (2) [1939] S.C.R. 50.

1939

CHRISTIE v. THE YORK CORPORATION.

Rinfret J.

The Court of King's Bench, however, was of opinion that the sections relied on by the Superior Court did not apply; and considering that, as a general rule, in the absence of any specific law, a merchant or trader is free to carry on his business in the manner he conceives to be best for that business, that Court (Galipeault, J., dissenting) reversed the judgment of the Superior Court and dismissed the appellant's action with costs (1). The appeal here is by special leave, pursuant to sec. 41 of the *Supreme Court Act* (2).

In considering this case, we ought to start from the proposition that the general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public order. This is well illustrated in a case decided by the Tribunal de Commerce de Nice and which was confirmed by the Cour de Cassation in France (S. 93-2-193; and S. 96-1-144):

* * * le principe de la liberté du commerce et de l'industrie emporte, pour tout marchand, le droit de se refuser à vendre, ou à mettre à la disposition du public, ce qui fait l'objet de son commerce; * * * le principe de la liberté du commerce et de l'industrie autorise le propriétaire d'un établissement ouvert au public, et à plus forte raison le directeur d'un casino, à n'y donner accès qu'aux personnes qu'il lui convient de recevoir; son contrôle à cet égard est souverain et ne peut être subordonné à l'appréciation des tribunaux.

Cependant la liberté du commerçant ou de l'industriel de n'entrer en rapport qu'avec des personnes de son choix comporte certaines restrictions, basées sur des raisons d'ordre public. Il en est de la sorte, par exemple, lorsque le commerçant ou l'industriel jouit, ainsi que les compagnies de chemin de fer, d'un monopole de droit ou même de fait.

This principle was followed by the Court of King's Bench in the case of *Loew's Montreal Theatres* v. *Reynolds* (3), where the facts presented a great deal of similarity with those of the present case. The plaintiff, a coloured man, sued Loew's Theatres Ltd. in damages because he had been denied a seat in the orchestra at its theatre, on account of his colour, for the reason that

(1) (1938) Q.R. 65 K.B. 104. (2) [1939] S.C.R. 50.
(3) (1919) Q.R. 30 K.B. 459.

the management had decided that no person belonging to that race would be admitted to the orchestra seats. The Court decided that the management of a theatre may impose restrictions and make rules of that character. In the course of his reasons, Chief Justice Lamothe said:

Aucune loi, dans notre province, n'interdit aux propriétaires de théâtres de faire une règle semblable. Aucun règlement municipal ne porte sur ce sujet. Alors, chaque propriétaire est maître chez lui; il peut, à son gré, établir toutes règles non contraires aux bonnes mœurs et à l'ordre public. Ainsi, un gérant de théâtre pourrait ne recevoir que les personnes, revêtues d'un habit de soirée. La règle pourrait paraître arbitraire, mais elle ne serait ni illégale ni prohibée. Il faudrait s'y soumettre, ou ne pas aller à ce théâtre. Tenter de violer cette règle à l'aide d'un billet, serait s'exposer à l'expulsion, ce serait s'y exposer volontairement.

In the particular case of the hotel keepers, the jurisprudence is now well established; and we read in Carpentier and du Saint, Répertoire du droit français, Vo. Aubergiste, nos 83 et 84, that

Le principe de la liberté de l'industrie a fait décider aux auteurs de l'Encyclopédie du droit que l'hôtelier est toujours libre de refuser le voyageur qui se présente.

* * *

C'est en ce dernier sens que se prononce une jurisprudence constante; et la question aujourd'hui ne présente plus de doute sérieux.

In a similar case, in the province of Ontario, where the facts were practically identical with the present one, Lennox, J., decided according to the same principle and referred to a number of English cases on which he relied (*Franklin* v. *Evans*) (1).

This, moreover, would appear to have been the view of the learned trial judge in his reasons for judgment, and it would seem that he would have dismissed the case but for his opinion that sec. 33 of the Quebec *Licence Act* specifically covered the case. Referring to the decisions above mentioned, he said in the course of his reasons:

Je suis d'avis qu'aucune de ces causes n'a d'application. Elles sont basées sur le fait qu'il n'y a pas de loi restreignant la liberté du propriétaire; que chaque propriétaire de théâtre ou de restaurant est maître chez lui. C'est la prétention que la défenderesse voulait faire triompher dans cette cause. Malheureusement pour elle, la loi des licences, ch. 25 S.R.P.Q., Art. 33, dit: "Nulle personne autorisée à tenir un restaurant "ne doit refuser sans cause raisonnable de donner à manger aux voya- "geurs."

(1) (1924) 55 O.L.R. 349.

1939

CHRISTIE v. THE YORK CORPORATION.

Rinfret J.

We will discuss later the effect of sec. 33 of the Quebec *Licence Act*, but for the moment it may be stated that, in this case, either under the law or upon the record, it cannot be argued that the rule adopted by the respondent in the conduct of its establishment was contrary to good morals or public order. Nor could it be said, as the law stood, that the sale of beer in the province of Quebec was either a monopoly or a privileged enterprise.

The fact that a business cannot be conducted without a licence does not make the owner or the operator thereof a trader of a privileged class.

The license in this case is mainly for the purpose of raising revenue and also, to a certain extent, for allowing the Government to control the industry; but it does not prevent the operation of the tavern from being a private enterprise to be managed within the discretion of its proprietor.

The only point to be examined therefore is whether sec. 33 of the Quebec *Licence Act*, upon which the learned trial judge relied in maintaining the appellant's action, applies to the present case.

The view of the majority of the Court of King's Bench was that it did not; and we agree with that interpretation.

Section 33 reads:

> No licensee for a restaurant may refuse, without reasonable cause, to give food to travellers.

For the purpose of our decision, there are three words to be considered in that section: "restaurant," "food," and "travellers."

The word "restaurant" is defined in the Act (sec. 19-2):

> A "restaurant" is an establishment, provided with special space and accommodation, where, in consideration of payment, food (without lodging) is habitually furnished to travellers.

The word "traveller" is also defined in the same section as follows:

> A "traveller" is a person who, in consideration of a given price per day, or fraction of a day, on the American or European plan, or per meal, *à table d'hôte* or *à la carte*, is furnished by another person with food or lodging, or both.

With the aid of those two definitions in the Act, we think it must be decided that, in this case, the appellant

was not a traveller who was asking to be furnished with food in a restaurant.

Perhaps, as stated by the learned trial judge, a glass of beer may, in certain cases, be considered as food. But we have no doubt that, in view of the definitions contained in the Act, the appellant was not a traveller asking for food in a restaurant within the meaning of the statute. In the Act respecting alcoholic liquor (ch. 37 of R.S.P.Q., 1925) we find the definition of the words "restaurant" and "traveller" in exactly the same terms as above. But, in addition, the words "meal" and "tavern" are also defined (Sec. 3, subs. 6 and 9).

Those definitions, so far as material here, are as follows:

6. The word "meal" means the consumption of food of a nature and quantity sufficient for the maintenance of the consumer, in one of the following places:

* * *

(*b*) In the dining-room of a restaurant situated in a city or town, and equipped for the accommodation of fifty guests at one time, and which is not only licensed for the reception of travellers but where full meals are regularly served.

9. The word "tavern" means an establishment specially adapted for the sale by the glass and consumption on the premises of beer as hereinbefore defined, or, in a hotel or restaurant, the room specially adapted for such purpose.

It will be seen therefore that the appellant cannot be brought within the terms of sec. 33 of the Quebec *Licence Act*. He was not a traveller asking for a meal in a restaurant. According to the definitions, he was only a person asking for a glass of beer in a tavern.

As the case is not governed by any specific law or more particularly by sec. 33 of the Quebec *Licence Act*, it falls under the general principle of the freedom of commerce; and it must follow that, when refusing to serve the appellant, the respondent was strictly within its rights.

But perhaps it may be added that the Quebec statutes make a clear distinction between a hotel or a restaurant and a tavern. The Act (sec. 32) provides that "no licen- "see for a hotel may refuse without just cause to give "lodging or food to travellers" and that (sec. 33) "No "licensee for a restaurant may refuse without reasonable "cause, to give food to travellers."

No similar provision is made for taverns; and, in our opinion, it would follow from the statute itself that the

1939

CHRISTIE v. THE YORK CORPORATION.

Rinfret J.

legislature designedly excluded tavern owners from the obligation imposed upon the hotel and restaurant owners. For these reasons, the appeal ought to be dismissed with costs.

DAVIS J. (dissenting).—The appellant is a British subject residing in Verdun near the city of Montreal in the province of Quebec. He came from Jamaica and has been permanently resident in the said province for some twenty years. He is a coloured gentleman—his own words are "a negro" though counsel for the respondent, for what reason I do not know, told him during his examination for discovery that he wanted it on record that he is "not extraordinarily black." He appears to have a good position as a private chauffeur in Montreal. He was a season box subscriber to hockey matches held in the Forum in Montreal and in that building the respondent operates a beer tavern. Beer is sold by the glass for consumption on the premises. Food such as sandwiches is also served, being apparently purchased when required from nearby premises and resold to the customer. The appellant had often on prior occasions to the one in question, when attending the hockey matches dropped into the respondent's tavern and bought beer by the glass there. On the particular evening on which the complaint out of which these proceedings arose occurred, the appellant with two friends—he describes one as a white man and the other as coloured—just before the hockey game went into the respondent's premises in the ordinary course. The appellant put down fifty cents on the table and asked the waiter for three steins of light beer. The waiter declined to fill the order, stating that he was instructed not to serve coloured people. The appellant and his two friends then spoke to the bartender and to the manager, both of whom stated that the reason for refusal was that the appellant was a coloured person. The appellant then telephoned for the police. He says he did this because he wanted the police there to witness the refusal that had been made. The manager repeated to the police the refusal he had previously made. The appellant and his two friends then left the premises of their own accord. The appellant says that this was to his humiliation in the presence of some seventy customers who were sitting around and had heard what occurred.

The appellant then brought this action against the respondent for damages for breach of contract and damages in tort. No objection was taken to the suit having been brought both on contract and in tort on the same set of facts and I assume that this form of action is permissible under the Quebec practice and procedure. The appellant recovered $25 damages and costs at the trial. This judgment was set aside and the action was dismissed with costs upon an appeal to the Court of King's Bench (Appeal Side), Galipeault J. dissenting (1).

The learned trial judge found that the appellant had been humiliated by the refusal and was entitled to be compensated upon the ground that the tavern was a restaurant within the meaning of the Quebec *Licence Act*, R.S.Q. 1925, ch. 25, sec. 19, and that as such the respondent was forbidden by sec. 33 to refuse the appellant. By sec. 19 (2) a restaurant is defined as

> an establishment, provided with special space and accommodation, where, in consideration of payment, food (without lodging) is habitually furnished to travellers.

By sec. 33,

> no licensee for a restaurant may refuse, without reasonable cause, to give food to travellers.

The Court of King's Bench did not consider the above statute, which deals with various licences granted by the government under the Act, applicable to the facts of this case and, I think rightly, dealt with the case of the tavern under another statute, the *Alcoholic Liquor Act*, R.S.Q. 1925, ch. 37, and the majority of the Court took the view that "chaque propriétaire est maître chez lui" on the doctrine of freedom of commerce—"la liberté du commerce et de l'industrie." Pratte, J. *ad hoc* agreed with the conclusion of the majority but upon the single ground that the respondent's refusal was made under circumstances such that it could not cause any damage to the appellant. Galipeault, J. dissented upon the ground that the conduct of the respondent towards the appellant was contrary to good morals and the public order—"contre les bonnes moeurs, contre l'ordre public," and considered that under the special legislation in Quebec governing the sale of liquor the respondent was not entitled to the "freedom of

(1) (1938) Q.R. 63 K.B. 104.

1939

CHRISTIE v. THE YORK CORPORATION.

Davis J.

commerce" applicable to ordinary merchants and places like theatres, etc. Galipeault, J. would have affirmed the trial judgment.

This Court gave special leave to the appellant to appeal to this Court from the judgment of the Court of King's Bench upon the ground that the matter in controversy in the appeal will involve "matters by which rights in future of the parties may be affected" within the meaning of sec. 41 of the *Supreme Court Act* and also because the matter in controversy is of such general importance that leave to appeal ought to be granted (1).

The question in issue is a narrow one but I regard it as a very important one. That is, Has a tavern keeper in the province of Quebec under the special legislation there in force the right to refuse to sell beer to any one of the public? There is no suggestion that in this case there was any conduct of a disorderly nature or any reason to prompt the refusal to serve the beer to the appellant other than the fact that he was a coloured gentleman.

The province of Quebec in 1921 adopted the policy of complete control within the province of the sale of alcoholic liquors. (The *Alcoholic Liquor Act,* 11 Geo. V, Quebec Statutes 1921, ch. 24, now R.S.Q. 1925, ch. 37.) The words "alcoholic liquor" in the statute expressly include beer (sec. 3 (5)). The word "tavern" means an establishment specially adapted for the sale by the glass and consumption on the premises of beer or, in a hotel or restaurant, the room specially adapted for such purpose (sec. 3 (9)). The sale and delivery in the province of alcoholic liquor, with the exception of beer, is forbidden expressly, except that it may be sold or delivered to or by the Quebec Liquor Commission set up by the statute or by any person authorized by it, or in any case provided for by the statute (sec. 22). The sale of beer is specifically dealt with by sec. 25, which provides that

> The sale or delivery of beer is forbidden in the province, unless such sale or delivery be made by the Commission or by a brewer or other person authorized by the Commission under this Act, and in the manner hereinafter set forth.

The Commission is given power by sec. 9d to control the possession, sale and delivery of alcoholic liquor in accord-

(1) [1939] S.C.R. 50.

ance with the provisions of the statute and by sec. 9e to grant permits for the sale of alcoholic liquor. By sec. 33 the Commission may determine the manner in which a tavern must be furnished and equipped in order to allow the exercise therein of the "privilege conferred by the permit." Beer may be sold by any person in charge of a grocery or of a store where beer only is sold, on condition that no quantity of less than one bottle be sold, that such beer be not consumed in such store, and that a permit therefor be granted him by the Commission, and that such permit be in force (sec. 30 (4)). Now as to the sale of beer by the glass, sec. 30 (5) provides as follows:—

> Any person in charge of a tavern, but in a city or town only, may sell therein beer by the glass,—provided that it be consumed on the premises, and provided that a permit to that effect be granted him by the Commission * * * and that such permit be in force.

Section 30 further provides that in every such case the beer must have been bought directly by the holder of the permit from a brewer who is also the holder of a permit. Section 42 (3) fixes the days and hours during which any holder of a permit for the sale of beer in a tavern may sell. Then by sec. 43, certain named classes of persons are forbidden to be sold any alcoholic liquor:

> 1. Any person who has not reached the age of eighteen years;
>
> 2. any interdicted person;
>
> 3. any keeper or inmate of a disorderly house;
>
> 4. any person already convicted of drunkenness or of any offence caused by drunkenness;
>
> 5. Any person who habitually drinks alcoholic liquor to excess, and to whom the Commission has, after investigation, decided to prohibit the sale of such liquor upon application to the Commission by the husband, wife, father, mother, brother, sister, curator, employer or other person depending upon or in charge of such person, or by the curé, pastor, or mayor of the place.

But no sale to any of the persons mentioned in 2, 3, 4 or 5 above shall constitute an offence by the vendor unless the Commission has informed him, by registered letter, that it is forbidden to sell to such person. Sec. 46 provides that no beer shall be transported in the province except as therein defined.

By a separate statute, the *Alcoholic Liquor Possession and Transportation Act*, 11 Geo. V (1921), ch. 25, now R.S.Q. 1925, ch. 38, which Act is stated to apply to the whole province, no alcoholic liquor as defined in the

1939

CHRISTIE v. THE YORK CORPORATION.

Davis J.

Alcoholic Liquor Act (which includes beer) shall be kept, possessed or transported in the province except as therein set forth. Subsection 3 of sec. 3 excepts:

> in the residence of any person, for personal consumption and not for sale, provided it has been acquired by and delivered to such person, in his residence, previous to the 1st of May, 1921, or has been acquired by him, since such date, from the Quebec Liquor Commission.

It is plain, then, that the province of Quebec, like most of the other provinces in Canada, took complete control of the sale of liquor in its own province. The permit system enables the public to purchase from either government stores or specially licensed vendors. A glass of beer can only be bought in the province from a person who has been granted by the Government Commission a permit (sec. 33 refers to it as a "privilege") to sell to the public beer in the glass for consumption on the premises. The respondent was a person to whom a permit had been granted. The sole question in this appeal then is whether the respondent, having been given under the statute the special privilege of selling beer in the glass to the public, had the right to pick and choose those of the public to whom he would sell. In this case the refusal was on the ground of the colour of the person. It might well have been on account of the racial antecedents or the religious faith of the person. The statute itself has definitely laid down, by sec. 43, certain classes of persons to whom a licensee must not sell. The question is, Has the licensee the right to set up his own particular code, or is he bound, as the custodian of a government permit to sell to the public, to sell to anyone who is ready to pay the regular price? Disorderly conduct on the premises of course does not enter into our discussion because there is no suggestion of that in this case. One approach to the problem is the application of the doctrine of "freedom of commerce." It was held by the majority in the Court below, in effect, that the licensee is in no different position from a grocer or other merchant who can sell his goods to whom he likes. The opposite view was taken by Galipeault, J. on the ground that the licensee has what is in the nature of a quasi monopolistic right which involves a corresponding duty to sell to the public except in those cases prohibited by statute. Pratte J., *ad hoc,* did not take either view;

his decision rests solely upon the ground that the respondent's refusal was made under circumstances such that it could not cause any damage to the appellant.

Several decisions were considered and discussed by the judges in the Court below. One of the cases relied upon for the majority view was the Quebec case of *Loew's Theatre* v. *Reynolds* (1), where it was held that a negro who buys a ticket of general admission to the theatre and knowing the rule of the theatre that only persons wearing evening dress are allowed in the dress circle, is refused the right to sit there, has no right of action. It was said in that case that a theatre can make rules, such as requiring evening dress in the dress circle, which applied to all, white and coloured alike, and it did not constitute discrimination because it was a rule that was not against public order and good morals. Carroll, J., dissented in that case. Martin, J. who rendered the majority opinion of the Court, said, at p. 465:

> While it may be unlawful to exclude persons of colour from the equal enjoyment of all rights and privileges in all places of public amusement, the management has the right to assign particular seats to different races and classes of men and women as it sees fit, * * *

Another case relied upon by the majority was the Ontario case of *Franklin* v. *Evans* (2). That was a restaurant case in which the plaintiff, a negro, had been refused food on the ground of colour. There was no statutory law in Ontario requiring a restaurant to receive. Lennox, J., who tried the case, said that he had been referred to no decided case in support of the plaintiff's contention that the restaurant was bound to serve him. But he said that in his opinion the restaurant-keeper in that case was

> not at all in the same position as persons who, in consideration of the grant of a monopoly or quasi-monopoly, take upon themselves definite obligations.

The English case of *Sealey* v. *Tandy* (3) was referred to by those who took the majority view. That was a case of assault stated by a metropolitan magistrate. It was held that the occupier and licensee of licensed premises (not being an inn) has a right to request any person to leave whom he does not wish to remain upon his premises. But I would refer, in connection with that case, to the editors'

(1) (1919) Q.R. 30 K.B. 459. (2) (1924) 55 O.L.R. 349.
(3) [1902] 1 K.B. 296.

1939

CHRISTIE v. THE YORK CORPORATION.

Davis J.

footnote in the new Halsbury, vol. 18, p. 144 (*k*), where after citing *Sealey* v. *Tandy* (1), they say:

> But in *Attorney-General* v. *Capel* (1494, Y.B. 10 Hen. 7, fo. 7, pl. 14, Hussey, C.J., said that a "victualler" will be compelled to sell his victual if the purchaser has tendered him ready payment, otherwise not. Quod Brian affirmavit. And in Anon. (1460) Y.B. 39 Hen. 6, fo. 18, pl. 24, cited in Bro. Abr., tit. Action sur le case, pl. 76, it is said: "It is decided by Moyle, J., if an innkeeper refuses to lodge me I shall have an action on the case and the same law if a victualler refuses to give me victuals.

A victualler (see Murray's Oxford Dictionary) is one who sells food or drink to be consumed on the premises; a publican.

The question is one of difficulty, as the divergence of judicial opinion in the courts below indicates. My own view is that having regard to the special legislation in Quebec establishing complete governmental control of the sale of beer in the province and particularly the statutory provision which prohibits anyone of the public from buying beer in the glass from anyone but a person granted the special privilege of selling the same, a holder of such a permit from the government to sell beer in the glass to the public has not the right of an ordinary trader to pick and choose those to whom he will sell.

In the changed and changing social and economic conditions, different principles must necessarily be applied to the new conditions. It is not a question of creating a new principle but of applying a different but existing principle of the law. The doctrine that any merchant is free to deal with the public as he chooses had a very definite place in the older economy and still applies to the case of an ordinary merchant, but when the State enters the field and takes exclusive control of the sale to the public of such a commodity as liquor, then the old doctrine of the freedom of the merchant to do as he likes has in my view no application to a person to whom the State has given a special privilege to sell to the public.

If there is to be exclusion on the ground of colour or of race or of religious faith or on any other ground not already specifically provided for by the statute, it is for the legislature itself, in my view, to impose such prohibi-

(1) [1902] 1 K.B. 296.

1939

CHRISTIE
v.
THE YORK CORPORATION.

Davis J.

tions under the exclusive system of governmental control of the sale of liquor to the public which it has seen fit to enact.

The appellant sued for $200. The learned trial judge awarded him $25 damages. I would allow the appeal, set aside the judgment appealed from and restore the judgment at the trial with costs here and below.

Appeal dismissed with costs.

Solicitor for the appellant: *Lovell C. Carroll.*

Solicitors for the respondent: *Montgomery, McMichael, Common & Howard.*

HIS MAJESTY THE KING (RESPONDENT) ..... APPELLANT;

1939

* May 1.
* Dec. 9.

AND

HOCHELAGA SHIPPING & TOWING COMPANY LTD. (SUPPLIANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Negligence—Construction of jetty by Dominion Government—Upper portion of it destroyed by storm and lower portion remaining under water entirely submerged—Vessel striking such portion—Damages not immediately ascertained—Subsequent sinking of vessel—Responsibility of the Crown—Whether damages limited to damages at the time of the collision.

The Dominion Government undertook, in 1931, the construction of a jetty, projecting at right angles to the large Dominion Government breakwater at Port Morien, Nova Scotia. Before the jetty was completed, about 50 feet of the upper portion of the outward end broke away during a storm in 1932, thus leaving the lower portion of the outer cribwork and its rock ballast remaining in position but entirely submerged. Some two years later, in September, 1934, the towboat *Ostrea,* the property of the suppliant, equipped for wrecking and salvage operations, became a total loss at sea as a result of having struck the submerged portion of the jetty which, the suppliant alleged, had been left without any buoy or other warning to indicate its presence there. It was established by the evidence that the master of the *Ostrea,* considering the collision as slight, did not ascertain immediately the extent of the damage caused to his vessel. The *Ostrea* continued on her way to

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.