

Convictions of Morley McKay and Anne Emerson of Dresden were quashed by County Judge Henry E. Grosch when he ruled yesterday on racial discrimination charge appeals.

In his written judgment, Judge Grosch did not rule on the validity of the Fair Accommodation Practices Act. He based his judgment on the defence contention that there was no actual denial of service by the two accused when negroes entered their restaurants, last October.

In McKay's case, the judge quoted testimony involving a restaurant waitress and two complainants Hugh Burnette, Dresden, and Bromley Armstrong, Toronto, then pointed out: "This waitress was not charged under the act..... we can only guess or surmise that McKay was fully aware of, and approved of her alleged conduct."

NO GUESSWORK

But, Judge Grosch added: "Surely one should not in such a criminal or quasi-criminal matter convict on surmise or guesswork. I find that McKay is not personally guilty in connection with this particular incident."

According to evidence, the waitress told Armstrong she wasn't going to serve him. McKay later told Burnette who is secretary of the National Unity Association, that he was "too busy" to serve him.

On the charge against Mrs. Emerson, Judge Grosch pointed out that there had been a recent inquiry by Judge William Schwemler prior to the incident and that,

in view of the publicity given that, "could there not have been any other logical or rational reason why service might be denied"

In the original hearing of charges by Magistrate Ivan B. Craig, QC, W. A. Donahue of Sarnia argued that the Fair Accommodation Practices Act is ultra vires of the provincial legislature. It is, he claimed, criminal law and as such, falls exclusively within federal jurisdiction.

In finding there was no evidence of actual denial of service Judge Grosch said that "there is no necessity on my part of reviewing and reaching a conclusion on the highly important and lengthily presented and argued question as to whether . . . the act falls within the jurisdiction of the federal parliament."

Evidence in the Emerson case indicated that Mrs. Bernard Carter, a negro woman living near Dresden, and her brother entered Emerson's Restaurant in Dresden. They stayed for about half an hour and, in that time, "no

one ever came out to wait on us . . . talk to us or tell us why we were not being served."

NO DENIAL

The section of the act, Judge Grosch stated, does not refer to discrimination in service, nor to deferment, delay or postponement but to denial. "I'm not satisfied that there was denial as required by the act."

The section under which McKay and Mrs. Emerson were tried reads that "No person shall deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted because of the race, creed, color, nationality, ancestry or place of origin of such person or class of persons."

The judge continued that "even if I did hold that there was a denial of service, it must be shown that the food requested was available" There were evidently no soft drinks, while milk which Mrs. Carter saw and ordered "may have been reserved specifically by some other customer . . ."

In McKay's case, "would it not be natural under these circumstances (concerning the public hearing by Judge Schwemler) that McKay would not wish to become involved with Burnette or with Armstrong, with whom he was sitting, and who had previously addressed McKay, but had not succeeded in extracting any answer or refusal or denial?"

Judge Grosch emphasized that "there quite possibly could also be reasons other than color if service was, in fact, denied, and accordingly, I am not satisfied that the prosecution has satisfied the admitted onus of proving beyond any reasonable doubt that service was denied because of color."

REQUIREMENTS

In dealing with denial, the judge said the prosecution, handled by Crown Attorney A. Douglas Bell, QC, must show compliance with three requirements when prosecuting under the section.

First, he said, it must be shown that the proprietor did actually deny service or facilities. Secondly, it must be shown that such denial is in a place to which the public is admitted, and thirdly, it must be proven that the denial for the reasons set out in the act.

He pointed out there was no evidence that McKay, the proprietor of Kay's Grill had an opportunity to approve, confirm or disapprove of his waitress' action when she told Armstrong she wouldn't serve him.

Predict Frost Sunday Night

TORONTO (CP)—Frost is forecast for all of southern Ontario Sunday night.

The weather office at suburban Malton said in a special weather warning today it is expected damage will be heaviest in low-lying areas.

"Much colder air is forecast to reach the lower lakes region this evening but strong winds will keep ground minimum temperatures to about 40 to 45 degrees tonight.

"However, frost is expected in all of southern Ontario Sunday night. Ground minimum temperatures will range from 25 to 30 degrees."

Frost was experienced Wednesday night in the Norfolk county tobacco-growing section of southwestern Ontario. Weather men said they expect Sunday night's frost

