HORACE FAIRBANKS *et al.* (PLAINTIFFS)..... } APPELLANTS;

AND

BRADLEY BARLOW *et al.* (DEFENDANTS)..... ;

AND

JAMES O'HALLORAN (INTERVENANT) RESPONDENTS.

1886
*Nov. 16.

1887
*March 14.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Pledge without delivery—Possession—Rights of creditors—Art. 1970 *C. C.*

B., who was the principal owner of the South Eastern Railway Company, was in the habit of mingling the moneys of the company

* PRESENT—Sir W. J. Ritchie C. J., and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

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with his own. He bought locomotives which were delivered to, and used openly and publicly by, the railway company as their own property for several years. In January and May, 1883, B., by documents *sous seing privé*, sold with the condition to deliver on demand, ten of these locomotive engines to F. *et al.*, the appellants, to guarantee them against an endorsement of his notes for $50,000. but reserved the right on payment of said notes or any renewals thereof to have said locomotives re-delivered to him. B. having become insolvent, F. *et al.*, by their action directed against B., the South Eastern Railway Company, and R. *et al.*, trustees of the company under 43 and 44 Vic. ch. 49, P.Q., asked for the delivery of the locomotives, which were at the time in the open possession of South Eastern Railway Company, unless the defendants paid the amount of their debt. B. did not plead. The South Eastern Railway Company and R. *et al.*, as trustees, pleaded a general denial, and during the proceedings O'H. filed an intervention, alleging he was a judgment creditor of B., notoriously insolvent at the time of making the alleged sale to F.

Held, affirming the judgment of the court below, that the transaction with B. only amounted to a pledge not accompanied by delivery, and, therefore F. *et al.*, were not entitled to the possession of the locomotives as against creditors of the company, and that in any case they were not entitled to the property as against O'H., a judgment creditor of B., an insolvent.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (1) affirming the judgment of the Superior Court dismissing the appellants' action.

The facts and pleadings are fully stated in the judgements hereinafter given. See also report of the case in M. L. R. 2 Q. B. (2).

Church Q.C. for appellants:

Was this an agreement to pledge and not a sale? This seems to me the important question to be decided on this appeal.

That it was not a contract of pledge is, I contend, sufficiently established by two facts:—

1. The plaintiffs were not creditors of Barlow, to whom a pledge could be given, because the notes which they endorsed were to be held, and were held, by the Bank of Montreal; and

(1) M. L. R. 2 Q. B. 332. (2) P. 332 *et seq.*

2. The parties did not intend to make a pledge, because a pledge would have involved the transfer of possession of the locomotives from Barlow to the plaintiffs; on the contrary, they called their contract a sale in terms, and acted upon it as such—Art 1025 C. C.

The consideration of the sale appears by the documents to have been the endorsation of notes drawn by Barlow in favor of third parties, which notes the appellants undertook to pay. Barlow, however, reserved the right practically (although not in formal terms) to intervene and pay the notes himself at maturity, or pay them after maturity, in which case he was entitled by the agreement to a re-delivery of the locomotives sold. The accepted principle of construction and interpretation, made a rule of law in the Province of Quebec by Art. 1013 of the Civil Code, which provides that when the meaning of the parties to a contract is doubtful their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract, should be applied here if there is any doubt of what was meant; and the subsequent rules laid down in articles 1014 and 1015 concur in showing that no ambiguity of meaning or expression shall be permitted to defeat the real meaning of the contract. These rules would manifestly be overlooked and set at naught if this agreement or contract were taken as a pledge. Moreover, the defendant Barlow and the other defendants could say that the contract was inchoate, because no delivery had been made, and therefore no pledge given, and the whole transaction, like the agreement, would become purposeless and meaningless. Moreover, the words of the contract show that a sale was intended; "I have this day sold" are the words of the contract. The

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price was clearly the payment by the plaintiffs, at their maturity, of the notes. The delay of payment was the period which would elapse between the signing of the notes and their maturity. Considered as a contract of sale, this delay in payment, and non-delivery at the time of the sale, did not affect it, because article 1025 C. C. provides that a contract for the alienation of a thing certain and determinate, makes the purchaser owner of the thing by the consent alone of the parties, although no delivery be made; and this interpretation makes the document a binding obligation, and avoids its miscarriage as a pledge. The things sold in this instance were certain and determinate, because the defendant Barlow sold ten locomotive engines of the make of the Rhode Island Locomotive Works then owned by him—"which I now own" are the words of the contract—and it appears from the statement that of the fifteen locomotives of the make of the Rhode Island Locomotive Works, which were sold to the parties in this cause, ten only were sold to Barlow individually.

See also arts. 1472, 1027, C. C.

As to the trustees of the bondholders they have no *locus standi*.

The bondholders could, if they wished, have intervened, as they had been notified through their trustees of the suit. Our code in terms declares "no person can plead in the name of another," and that "corporations plead in their corporate names," and that only those who have not the free exercise of their rights plead through others representing them. *Vide*, art. 19 C. C. P. *Brown* v. *Pinsonneault* (1); *Robillard* v. *La Societé de Construction* (2); *Valliers* v. *Drapeau* (3).

Now, as to the intervenant's remedy, we contend that

(1) 3 Can. S. C. R. 102. (2) 2 L. N. 181 S. C. 1879.
(3) 6 L. N. 154 Q. B. 1883.

his only legal remedy would have been to take an attachment by garnishment of these locomotives in the hands of the South Eastern Railway Company, and the trustees, and the appellants; and that certainly he could have no greater right, even if allowed to intervene in the present cause, than to ask that when the appellants had recovered possession of the engines, they should be ordered to hold them in the interest of the insolvent Barlow's creditors generally, or that the seizure avail as a conservatory attachment in the interest of all Barlow's creditors, or some conclusion of that nature. But this he has not asked; he merely seeks to defeat appellants' action; and appellants submit that his prayer is not justified, and should be rejected.

O'Halloran Q.C. for respondents contended that there had been no sale, no price mentioned, no absolute vesting of the property in the appellants, and cited and relied on *Cushing* v. *Dupuy* (1); *Grand Trunk Railway* v. *Eastern Townships Bank* (2); as to the intervenant's claim it is clear that having proved Barlow's insolvency, plaintiffs cannot be entitled to the property of these locomotives in the possession of a third party as against the intervenant a judgment creditor of Barlow.

Sir W. J. RITCHIE C.J.—By their action the appellants, Fairbanks and his partners, sought to recover possession of ten locomotive engines, which they alleged had been sold to them by Bradley Barlow, one of the respondents, to secure them against the endorsement of three promissory notes, of the aggregate amount of fifty thousand dollars, endorsed at his request, and which had been renewed and the renewals taken up by them. The suit was accompanied by a

(1) 5 App. Cas. 409. (2) 10 L. C. Jur. 11.

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seizure and was directed as well against Barlow as against the South Eastern Railway Company, and against Redfield, Farwell & McIntyre, trustees, under a statute of Quebec, 43 and 44 Vic. ch. 49.

The defendant, Barlow, made default. The South Eastern Railway Company by their plea claimed the locomotives as their property, and denied having given Barlow any authority to sell or pledge them.

The trustees pleaded their possession and ownership under the statute of Quebec 43 and 44 Vic. ch. 49, having in good faith received the locomotives from the South Eastern Railway Company.

The railway company pleaded that the locomotives belonged to them, and never were the property of Barlow, nor was he ever authorized to sell or pledge the same. The appellants produced the title under which they claimed being a *sous-seing privé* document dated 16th January, 1883, which declares that Barlow sold them.

After a certain amount of evidence had been taken on these issues, the respondent, James O'Halloran, intervened, alleging that he was a creditor of Barlow, and denying any right, whether of ownership or authority, in Barlow to pledge the locomotives, or to guarantee them against an endorsement of his notes for $50,000; Barlow's insolvency long before the institution of the action; the non-delivery of the locomotive to the appellants, and a denial of appellants having any right to or lien or privilege on the locomotives, and his right as a creditor, to have the pretended sale or pledge declared invalid. He concluded that the plaintiffs be declared to have no lien on the locomotives, and that their action should be dismissed.

The plaintiff's claim is on two instruments, the one dated the 16th January, 1883, and the other the 10th of May, 1883, as follows:—

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ST. JOHNSBURY, VT., January 16, 1883.

Hon. Horace Fairbanks and Hon. Franklin Fairbanks having endorsed for my accommodation two notes for twenty thousand dollars each, one dated January 1st, 1883, and one dated January 10th, 1883, and payable in four months at the Bank of Montreal, and one note of ten thousand dollars, dated January 16th, payable at the Bank of Montreal, in three months from date,—now in consideration of the said endorsement, I have this day sold to the said Horace and Franklin Fairbanks, ten locomotive engines of the make of the Rhode Island Locomotive Works, which I now own, and which I agree to deliver to the said Horace and Franklin Fairbanks on demand, to be held by them as collateral security for the payment of said notes at maturity, and when said notes are paid, the said ten locomotives are to be re-delivered to me.

(Signed), BRADLEY BARLOW.

ST. JOHNSBURY, VT., May 10, 1883.

Whereas, as appears by my agreement of the 16th of January, 1883, Horace Fairbank and Franklin Fairbanks endorsed for me certain notes to the amount of ($50,000) fifty thousand dollars, described in an agreement, signed by me, pledging ten locomotives as collateral security for the payment of said notes, the names of said locomotives now declared to be as follows: "C. W. Foster," "Bradley Barlow," "B. B. Smalley," "L. Robinson," "Longueuil," "Newport," "North Troy," "A. B. Chaffee," "Richford," and "Farnham," said locomotives to be held as collateral security for the payment of said notes, or any renewals thereof, for value received.

(Signed), BRADLEY BARLOW.

As regards this document, I quite agree with Judge Cross that

It is obvious that it does not make any evidence of a sale, or that the transaction amounted to a sale. It was a mere pledge of the locomotives in security for the appellants' endorsement of notes for Barlow's accommodation. A pledge that was wholly inoperative as against any party having an adverse interest in the absence of an effective delivery to and a lawful possession by the pledgee of the locomotives, the subject of the pledge. The conclusions I deduce from the foregoing remarks, is that the appellants have shewn no grievance entitling them to relief in any respect from the judgment they have appealed; it must consequently be confirmed.

The appellants' claim is based entirely on the property being the property of Barlow. Assuming such to be the case, of which, on the evidence, I should very much doubt, then the appellants are out of

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court, and the conclusions taken by the intervention of O'Halloran must prevail.

Whether the locomotives were owned by the railway company or by Barlow, who was insolvent, the plaintiffs proved no title to them, and no right to their possession, as against a *bonâ fide* creditor of Barlow, which O'Halloran clearly was.

STRONG J.—For the reasons given by the majority of the court below, I am of opinion that the appeal should be dismissed with costs.

FOURNIER, J. :—Les Appelants, demandeurs en Cour Supérieure, ont réclamé des Intimés dix locomotives qu'ils allèguent leur avoir été données en gage, par Bradley Barlow l'un des défendeurs, comme sûreté du paiement d'un billet de $50,000 qu'ils ont endossé pour lui.

L'action allègue que Barlow qui a reçu le produit des billets endossés pour lui était alors le gérant de la dite compagnie et qu'il a disparu depuis pour se soustraire aux actions de ses créanciers.

Les Appelants font reposer leur droit sur les deux lettres suivantes (1).

La compagnie intimée a plaidé à cette action par défense au fonds en fait, et par exception péremptoire que lorsque Barlow a fait les écrits ci-dessus cités les locomotives en question étaient la propriété et en la possession de la dite compagnie, et non celle de Barlow qui n'a fait les dits écrits qu'en son nom personnel et non pas comme le représentant autorisé de la dite compagnie.

Les autres Intimés, Redfield, Farwell et McIntyre ont plaidé qu'en leur qualité de fidéi commissaires, en vertu d'un acte créant un *mortgage* sur le South E. R., en faveur de ses porteurs de bons, la dite compagnie

(1) See p. 223.

leur avait transporté le dit chemin de fer et leur en avait confié l'administration, et que les locomotives en question qui se trouvaient alors faire partie du roulant du dit chemin de fer étaient aussi passées de bonne foi en leur possession, en leur qualité de fidéicommissaires et qu'ils avaient droit de les retenir en vertu de l'acte de fidéicommis. Ils ont aussi plaidé le statut autorisant la compagnie à constituer ce fidéicommis pour faire un emprunt.

Barlow mis aussi en cause comme défendeur n'a pas plaidé.

La contestation était liée et la preuve commencée lorsque l'Intimé O'Halloran présenta son intervention alléguant: 1o, qu'il était créancier de Barlow en vertu d'un jugement; 2, que longtemps avant l'institution de l'action des Appelants, Barlow était insolvable et en *déconfiture*; 3, qu'en admettant même la vérité des allégations de l'action des Appelants, ceux-ci n'avaient en conséquence de leur défaut de possession aucun droit de propriété ni privilège sur les dites locomotives à l'encontre des autres créanciers de Barlow.

Les Appelants ont répondu à l'intervention par une dénégation générale et par une réponse spéciale alléguant qu'à l'époque de leur transaction avec Barlow, celui-ci était solvable et en état de disposer librement de ses biens; ils ont aussi allégué que leur transaction était une vente avec droit de réméré,—que l'intervenant agit de connivence et collusoirement avec la compagnie. Cette réponse était accompagnée d'une défense en droit à l'intervention, soulevant des questions qui ne pouvaient aucunement affecter l'issue en cette cause et elle a été renvoyée.

Les différentes contestations liées entre les parties soulèvent les questions suivantes: 1. Lors de la transaction du 16 janvier 1883, Barlow était-il solvable et les locomotives en question lui appartenaient-elles? 2.

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La transaction du 16 janvier 1883 constitue-t-elle un contrat de vente ou un contrat de gage ?

Les Appelants après avoir dans leur déclaration qualifié la transaction du 16 janvier comme un contrat de gage se sont désistés de cette prétention par leur réponse spéciale à l'intervention. Ils l'ont également abandonnée par leur factum dans lequel à la page 5 ils donnent de fortes bonnes raisons pour démontrer l'erreur de cette prétention ; d'abord, qu'ils n'étaient pas créanciers pouvant prendre un droit de gage, et ensuite que l'intention des parties n'avaient pas été de faire un contrat de gage, parce que ce contrat aurait exigé la remise par Barlow aux Appelants de la possession des locomotives.

Après une enquête assez considérable, la Cour Supérieure, après audition sur le mérite de l'action et de l'intervention seulement, a rendu le 12 mars 1885, jugement déclarant que les Appelants n'avaient pas prouvé leur droit de propriété, et que la transaction alléguée n'était qu'une vente simulée pour obtenir un privilège sur les locomotives, sans donner la possession. Elle a maintenu l'intervention et renvoyé l'action des Appelants.

Ce jugement porté en appel à la Cour du Banc de la Reine a été confirmé.

Les Appelants ont produit plusieurs témoins pour prouver que Barlow était le propriétaire des locomotives en question. Après en avoir disposé comme de sa propriété personnelle, Barlow ne pouvait guère faire autrement que de déclarer comme il l'a fait dans son témoignage, que ces locomotives lui appartenaient. Mais le contraire de cette prétention a été démontré par les faits prouvés par lui-même dans ses transquestions et par le témoignage de A. B. Chaffee, le secrétaire-trésorier de la compagnie South Eastern Railway, dont Barlow était le président et le gérant général. Tous

deux établissent que tous les argents provenant soit de l'exploitation du chemin de fer, soit d'emprunts, étaient déposés au crédit personnel de Barlow et payés par lui sur son propre chèque. Il achetait tout ce qui était nécessaire pour le chemin de fer, même le droit de passage et prenait les titres en son nom. Il avait aussi fait mettre en son nom le compte pour l'achat des locomotives ; mais elles furent envoyées directement de la manufacture sur le chemin de fer de la compagnie qui en paya le fret. Elles furent, pendant plusieurs années, employées comme propriétés de la compagnie, sans aucune convention de loyer ou de paiement pour leur usage. Jamais Barlow n'éleva la prétention d'en être le propriétaire, avant sa fuite de la province de Québec vers le 5 d'août 1883. Au contraire, dans les rapports faits au gouvernement par la compagnie et signés par Barlow, comme président, elles sont mentionnées comme faisant partie des propriétés de la compagnie. Dans un autre état des affaires de la compagnie, préparé sous la direction de Barlow pour la négociation d'un emprunt avec Stephens et autres, ces mêmes locomotives furent comprises comme faisant partie du *rolling stock* de la compagnie. En conséquence les créanciers de la compagnie avaient droit de les considérer comme faisant partie du chemin de fer, et la conduite de Barlow était de nature à les confirmer dans cette croyance. La prétendue vente que leur en aurait fait Barlow ne peut avoir aucun effet quelconque parce qu'il n'était ni propriétaire ni en possession, qu'au contraire la compagnie en avait la possession ouverte et publique. La prétendue vente étant d'une chose qui n'appartenait pas au prétendu vendeur Barlow et dont il n'a jamais fait la tradition, est absolument sans effet à l'égard de la compagnie (1) qui en était en possession.

(1) Art. 1487 C.C.

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Quant au caractère de l'écrit dont les Appelants infèrent maintenant une vente après l'avoir traité comme un contrat de gage dans leur déclaration, je le considère absolument sous le même point de vue que l'honorable juge Cross qui, dans ses notes, en parle dans les termes suivants :

It is obvious that it does not make any evidence of a sale, or that the transaction amounted to a sale. It was a mere pledge of the locomotives in security for the Appellant's endorsement of notes for Barlow's accommodation. A pledge that was wholly inoperative as against any party having an adverse interest in the absence of an effective delivery to and a lawful possession by the pledgee of the locomotives, the subject of the pledge.

L'intervenant, ayant établi sa qualité de créancier en vertu d'un jugement obtenu par lui contre Barlow et la Compagnie du South Eastern Railway, avait droit d'intervenir dans cette cause pour sauvegarder ses intérêts en faisant maintenir la dite compagnie, sa débitrice, dans la possession des locomotives réclamées.

Je suis d'avis que l'appel doit être renvoyé avec dépens.

HENRY J.—I am of the opinion from the evidence afforded by the documents that the appellants were but the pledgees and not the *bonâ fide* owners of the locomotives in question, and that inasmuch as they had not, as such pledgees, the possession of them they cannot maintain this action, and that as the question of the ownership of them as between O'Halloran and the South Eastern Railway Company does not arise on the pleadings in this case, it is unnecessary I think to refer to it. The appellants, to recover, must show their rights to do so, and in that they have, in my opinion, failed. The appeal should, therefore, be dismissed with costs.

TASCHEREAU J.—The appellants were plaintiffs in the court of *première instance.*

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The respondents are the South Eastern Railway Company, William Farwell, Wm. C. Van Horne, and Warren R. Blodgett in their quality as trustees of the bondholders of the South Eastern Railway, who were defendants with Barlow, and the intervenant, James O'Halloran, a judgment creditor of Barlow. The plaintiffs allege that defendant Barlow obtained their endorsation to promissory notes to the amount of $50,000, and for their security, pledged to them ten locomotives then and still used and operated on the South Eastern Railway, but never delivered the locomotives to plaintiffs. That said locomotives are in the possession of said railway company or the trustees of its bondholders, and that plaintiffs having a lien on said locomotives are entitled to demand and have the same out of the possession of said railway company or said trustees, inasmuch as they have had to pay said notes; unless said defendants prefer to pay said sum of $50,000, interest and costs. They also allege that Barlow, who had received the money on said notes, was president and general manager of the South Eastern Railway, at the time, and that he has since absconded. Plaintiffs' action is accompanied with an attachment, *saisie-arrêt conservatoire*.

Plaintiffs action is based on the following documents (1):—

To this action the South Eastern Railway Company pleaded:—

1. A general denial.

2. That at the time when the plaintiffs allege that the foregoing letters of pledge were made to them by defendant Barlow, the ten locomotives claimed to have been pledged to plaintiffs, were the property of the South Eastern Railway Company, and not of Barlow, who had no property or ownership in said

(1) See p. 223.

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locomotives. That as appears by said letters and plaintiffs' declaration, Barlow, in his transaction with plaintiffs, was acting solely in his private individual capacity, and not as an officer of the South Eastern Railway Company, and that any transactions which Barlow may have had with plaintiffs was without the knowledge, consent or authority of said railway company. They conclude that this attachment be quashed, and plaintiffs' action dismissed.

The plaintiffs have adduced a large amount of evidence to prove that the locomotives were Barlow's; and Barlow himself as a witness for plaintiffs, swears that six of them, at least, were his. But his own cross-examination and the evidence of defendant's witness, A. B. Chaffee, fully disposed of his pretentions. He was president and general manager of the company. All monies belonging to the company, whether derived from earnings or loans, were placed to his credit individually, and he disbursed them as he pleased. He was in the habit of buying for the company even real estate for right of way and other purposes, and taking the deeds in his own individual name. He appears to have taken bills of sale of the locomotives in question in this manner, but they came directly from the manufacturer to the company's road, the company paid freight, and never until Barlow, on or about the fifth August, 1883, absconded from this province, was any pretension made by Barlow or any one else, that these locomotives were not the property of the company. Plaintiffs allege in their declaration that they never obtained possession of the locomotives, but that they then (at the time of the institution of the action) were in possession of the defendants, the South Eastern Railway Company or the Trustees of its bond holders. There is no pretense that Barlow had any authority from the railway company to pledge the locomotives,

or that the railway company ever received a dollar of the proceeds of the promisory notes.

The question of the ownership of these locomotives seems to me quite immaterial if the determination of the present case, and on the general issue alone, the plaintiffs' action must fail.

By the very documents upon which the plaintiffs base their claim, it is patent that there was no sale by Barlow of these locomotives.

They moreover admit it, for their own declaration in this case is based on the ground that there was no sale to them. They do not claim these locomotives as their property, they do not revendicate them as theirs; they purely and simply allege that they have a lien upon them. That is as clear an admission as possible that they do not own them, and that they did not purchase them.

Now if these documents did not operate a sale, if they did not vest the ownership of these locomotives in the plaintiffs, did they operate as a pledge in their favour? Clearly not. Since there can be no pledge without the delivery of the article pledged in the hands of the pledgee. This delivery is of the essence of the pledge, and the pledgee has no privilege if the article is not in his hands.

The plaintiffs are therefore not entitled to the possession of these locomotives, and their action was rightly dismissed by the two courts below. There is no ground for the contention that their action can be maintained because they might be entitled as against Barlow to the specific performance of his obligations to deliver them up, the said locomotives; for the gist of their action against the South Eastern Railway and the Trustees, is that Barlow is not in possession of these locomotives.

As to the intervention, it was rightly allowed.

O'Halloran had a clear right to intervene to protect

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his interest as a creditor of both Barlow and the South Eastern. For him, it is quite immaterial whether these locomotives belong to the company or to Barlow, but it is of the utmost importance for him that the plaintiffs do not get them.

GWYNNE J.—Concurred with Taschereau J.

Appeal dismissed with costs.

Solicitors for appellants: *Church, Chapleau, Hall & Nicolls.*

Solicitors for respondent: *James O'Halloran, O'Halloran & Duffy.*