AHEARN & SOPER, LIMITED (OPPOSANTS) ..... } APPELLANTS;

AND

THE NEW YORK TRUST COMPANY (CONTESTANTS) ..... } RESPONDENTS.

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*May 10, 11.
*Oct. 5.

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

Privileges and hypothecs—Tramway—Operation on highway—Title to land—Immobilization by destination—Sale of tramway by sheriff as "going concern"—Unpaid vendor—Lien on price of cars—Pledge—Contract—Construction of statute, 3 Edw. VII. ch 91 (Que.)—Priority of claim—Collocation and distribution—Arts. 379, 2000 C.C.—Art. 752 Mun. Code.

A company operating an electric tramway, by permission of the municipal corporation, on rails laid on public streets vested in the municipality, to secure the principal and interest of an issue of its debenture-bonds hypothecated its real property, tramway, cars, etc., used in connection therewith, to trustees for the debenture-holders, and transferred the movable property of the company and its present and future revenues to the trustees. By a provincial statute, 3 Edw. VII. ch. 91, sec. 1 (Que.), the deed was validated and ratified. On the sale, in execution, of the tramway, as a going concern:—

Held, that whether, at the time of such sale, the cars in question were movable or immovable in character the effect of the deed and ratifying statute was to subordinate the rights of other creditors to those of the trustees, and, consequently, that unpaid vendors thereof were not entitled, under article 2000 of the Civil Code of Lower Canada, to priority of payment by privilege upon the distribution of the moneys realized on the sale in execution.

Per Girouard J.—Duff J., *contra*.—After the cars in question had been delivered to the tramway company and used by it in the operation of their tramway, they became immovable by destination.

In the result, the judgment appealed from (Q.R. 18 K.B. 82) was affirmed.

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*PRESENT:—Girouard, Idington, Duff and Anglin JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Quebec, by which the appellants' *opposition afin de conserver* was dismissed with costs.

The property of the Lévis County Railway Company, consisting of certain real estate and other property, including an electric tramway and the cars used in the operation of the tramway system, was sold in execution and the appellants filed an *opposition afin de conserver* claiming the right to be paid, by privilege as unpaid vendors, the amount due to them by the railway company for the price of a number of the tramcars, a rotary plough and a tower-waggon which they had sold and delivered to the railway company some time previously. The cars, etc., were operated by the company as part of their electric tramway system upon rails laid, by permission of the municipal corporation, upon public streets, the title to which remained vested in the municipality, the railway company never acquiring any title as proprietor to the soil in these streets which were public highways of the municipality.

The opposition was contested by the trust company, which claimed the whole amount levied by the sheriff as prior mortgagees or hypothecary creditors. Their claim was based upon a deed of hypothec by which, under art. 5132 R.S.Q., the railway company, in order to secure the payment of an issue of debenture-bonds held by the trust company, mortgaged and hypothecated to the trust company certain parcels of land and the electric railway of the company with all

(1) Q.R. 18 K.B. 82.

the real property thereof, * * * the rails, cars * * * rolling stock and equipment appurtenant thereto or used in connection therewith; and, further, to secure the interest on the bonds, the company transferred to the trust company all its movable property and all its present and future revenues. This deed and the issue of the debentures were validated and ratified by the statute, 3 Edw. VII. ch. 91, sec. 1 (Que.), prior to the sale of the cars, etc., by the appellants.

By the judgment appealed from, the judgment of Mr. Justice Lemieux dismissing the opposition was, in effect, confirmed. In rendering his judgment in the court below (not printed in the report), Mr. Justice Cross concludes as follows: "It is contended for the appellant that the cars, etc., of which the price is claimed were movables and I incline to think that, as regards the cars, though perhaps not as regards the tower-waggon and sweeper, this view would be the correct one, if it were merely a case of determining in a general way whether these objects fell within the terms of article 384 C.C. or within those of article 379 C.C. These cars can be taken from place to place and it is common enough for such vehicles to be found from time to time in use on the lines of other railway companies, so that they are such objects as are mentioned in article 384. However, even if they be considered movables, the special statute has declared them to have been validly pledged, and, this being so, the privilege of the unpaid vendor would, by article 2000 C.C., have been subordinated to the right of the pledgee. The correct conclusion appears to be that the mortgage was intended to be a charge upon the railway company's undertaking

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as a "going concern" and that, in so far as may be necessary to give effect to the intention, the cars, sweeper and tower-waggon are to be considered as having been made part of the realty. I would, consequently, confirm the judgment."

G. F. Henderson K.C. and *Cannon,* for the appellants.

G. G. Stuart K.C., for the respondents.

GIROUARD J.—Article 2000 of the Civil Code does not apply. The thing sold is not in the same condition. Before delivery the cars were movable property; after delivery and being operated as part of a railway system they became immovable by destination. Art. 379 C.C. Therefore the appellants fail in their appeal and in dismissing the same we merely follow the well settled jurisprudence of the Province of Quebec, especially the following cases: *Wallbridge* v. *Farwell* (1); *Lainé* v. *Béland* (2) and *Redfield* v. *Corporation of Wickham,* in 1888 (3). At all events the mortgage deed, ratified by statute, gives a preference to the holders of the debentures over the vendors.

IDINGTON J.—In *Toronto Railway Co.* v. *City of Toronto* (4) the Privy Council was asked to hold cars to be real estate and their Lordships, at p. 814, say

> they cannot accede to the argument addressed to them or adopt the reasoning of Osler J. in *Kirkpatrick's Case* (5) (where such a proposition was maintained) without doing violence to the English language and to elementary principles of English law.

That case is not decisive of this one, but is most suggestive.

(1) 18 Can. S.C.R. 1.
(2) 26 Can. S.C.R. 419.
(3) 13 App. Cas. 467, at p. 473.
(4) [1904] A.C. 809.
(5) 2 Ont. L.R. 113.

There was not, when the earlier Quebec cases relied on herein were decided holding locomotives to be immovable property when owned and used by a railway company, so much difference between the English law and the law of Quebec as to what *constituted real property* (widely different as the respective laws of these provinces *governing* real property were and are) that we should expect to find now such a wide divergence as will result from following in Ontario cases the reasoning in the Privy Council above referred to, and in Quebec cases the reasoning of certain cases in the courts of that province and in this court in the cases of *Wallbridge* v. *Farwell*(1), and *The Ontario Car and Foundry Co.* v. *Farwell*(1).

It is not expedient that such a divergence should be needlessly developed.

The agreement relied upon by the respondent was validated by the competent authority of the Legislature of Quebec and the charges it was intended to secure declared binding to all intents and purposes in comprehensive language that needs no support from any judicial theories as to the development of art. 379 of the Civil Code.

When we see the rather absurd results these theories may, if adopted, produce in the case of interprovincial railways and other cases, we should, I respectfully submit, refrain from helping to embarrass by saying that which may do so.

That article cannot cover the quite possible case of a street railway that never was the proprietor of any real estate on which to place its cars. But what of such a railway which had parted with its real estate and yet continued to run cars? On the theory put

(1) 18 Can. S.C.R. 1.

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forward would the cars after the company's sale of its real estate be possessed of exigible or inexigible real estate whilst running by virtue of a temporary license on His Majesty's highway?

I by no means feel that the last word has been spoken in this court on the question. It may be quite as open to the Privy Council to find that what has been said in Quebec and in this court did as much violence to the elementary principles of Quebec law and to the language of the Civil Code as that court declared the reasoning above referred to did the English law and language.

In view of all that I do not desire to commit myself to any expression of opinion upon the bearing of the decision and emphatic expression of the law in the judgment in the case of *Toronto Railway Co.* v. *The City of Toronto*(1), upon the case now in hand. Indeed, I do not think it has much to do with it. I prefer to rest on the safe ground the validating statute above referred to gives.

The appellant seeks to enforce, after the time for revendication had elapsed, a privilege in respect of the proceeds of a judicial sale of property which the legislature had, by validating the deed, in effect declared charged with the payment of other liabilities; and which became operative and charged on the property now in question the moment the appellant had delivered the goods or immediately after its rights of revendication were gone. Moreover, I incline to hold it may fairly be inferred their condition had changed and they had not remained, as required by the art. 2000 C.C. giving the privilege in the same state as when sold. The privilege is given by the Code on the

(1) [1904] A.C. 809.

proceeds of sale. But the validating Act provides specifically for the distribution of the proceeds in question and thereby overrides the general law by words that ignore such a privilege. It provides for superior *liens* which I take it means liens upon the property.

This privilege claimed herein can hardly be held to fall within the term "liens on the property."

The point raised of the intention of the legislature in a private Act, such as this now in question, in regard to the rights of parties concerned but not named does not seem to me to have much force when we find the claim rested on transactions taking place long after the passing of the Act.

If the privilege had been in existence or the transaction out of which it might have arisen had taken place before the passing of the Act I think the point taken might have been more arguable.

I hardly think the rule of interpretation invoked to except this case could ever have been intended to apply to a non-existent class of persons or personal rights.

The claim set up anent the payment to debentureholders of interest in preference to the current expenses does not seem to be open in this proceeding, and the opinion expressed in the case of *Farwell*(1) above cited seems to indicate might fail in any proceeding.

The appeal should be dismissed with costs.

DUFF J.—There are two questions raised by this appeal; first: Were the cars in respect of which the appellants claim a preference *immeubles par destina-*

(1) 18 Can. S.C.R. 1.

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tion at the time of the sale of them? And secondly: If not, is the right of the respondents under their mortgage superior to the preference to which the appellants are entitled as unpaid vendors?

The first question must, I think, with great respect, be answered in the negative. Article 379 provides as follows:

> Les objets mobiliers que le propriétaire a placés sur son fonds à perpétuelle demeure, ou qu'il y a incorporés, sont immeubles par destination tant qu'ils y restent;

and it is well settled law that this *immobilization par destination* takes place only when the *"propriétaire"* of the *fonds* is also the *propriétaire* of the *meuble* affected. The weight of the opinion appears to be to the effect that in this provision the word *"propriétaire"* is to be construed *stricto sensû*.

Thus Laurent, at Vol. V., No. 437:

> Du principe que nous venons de poser, suit que le locataire et le fermier ne peuvent pas immobiliser les objets mobiliers qu'ils placent sur le fonds, ni par destination agricole ou industrielle, ni par perpétuelle demeure. Aubry et Rau t. II., p. 12, note 33, et les auteurs et arrêts qui y sont cités. Il en est de même des detenteurs qui ont un droit réel sur la chose; l'usufruitier, l'emphytéote, le superficiaire ne peuvent pas immobiliser.

The other authorities are referred to in 2 Mignault, p. 417. Does it appear that the railway company was the *propriétaire* of a *fundus* upon which the cars in question were placed by it *à perpétuelle demeure?* There is here, of course, no question of incorporation. The railway company was empowered to operate an electric railway in the town of Lévis; that is to say, they were authorized to lay their tracks and run their cars in the streets and so on. They were the owners, doubtless, of depots where the cars would be when not in use; when in use, they would be upon the company's tracks which would mainly be situated in the streets.

Now it seems quite impossible to hold in respect of the depots where they were put when not in use that the cars were placed there *à perpétuelle demeure* within the meaning of this article. One might as well say that the pictures in a gallery built for their reception become *immeubles par destination;* or the taximeters in a garage. The car, no more than the automobile, is the accessory of the building which serves to protect it when not in use; rather the inverse. And there is a stronger case for the *immobilization* of the pictures than that of the cars; for the car does not perform its normal function while within the car barns. Then: Did the track constitute a *fundus* of which the company was the *propriétaire* and to which the car became attached *à perpétuelle demeure?* That cannot, I think, be affirmed because the track was mainly in the highway and I am unable to doubt that the agreement between the company and the municipality and the statute ratifying that agreement did not confer upon the company any proprietary interest in subsoil or surface of the highway. Precisely what the rights of the company in respect of the highway were it may not be easy to say; probably they cannot with accuracy be expressed in the terms of the Civil Code. They were statutory rights and, I should prefer to say, *sui generis.* I can, however, entertain no doubt, having regard to the settled legislative policy declared in article 752 of the Municipal Code (under which alienation of any part of a municipal road is forbidden), that the statute and agreement cannot fairly be read as investing the company with any proprietary interest in the streets upon which its tracks might be laid. The legislature could have departed from its settled policy, of course; but

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the *concessionaires* who contend they have done so must, in support of this view, point to language much more clearly exhibiting such an intention than any found in the agreement under which the company was operating.

It cannot, moreover, be said, without blinking the facts, that the cars were accessory to the tracks. The truth plainly is that depots, cars, track, all were means employed in working an enterprise of transportation. Each of these instruments was in a practical sense essential to the enterprise. They were all accessories to it; as among the instruments themselves it involves, I think, some glossing of the actual facts to describe any one of them as an accessory in relation to another.

On principle, therefore, I think the *immobilization* of these cars is not established. There are, however, authorities which my learned brother Girouard thinks decide the point, and in the opposite sense. The cases bearing on the point are referred to in *Ontario Car and Foundry Co.* v. *Farwell*(1). I do not, of course, question the authority of that decision so far as it goes. But, with great respect, I do not think it can be held to involve any principle governing the determination of the question actually before us. The decision in *Farwell's Case*(1), as well as the decisions of the Quebec courts upon which it was founded, related solely to railways owning the land upon which their cars would normally be in use. The first of the objections indicated above obviously would have no application in such a case and is, therefore, I think, not met by those decisions.

The appellants, however, fail, I think, on the second point.

(1) 18 Can. S.C.R. 1.

There is some difference of opinion respecting the legal character of the preference attached to the claim of an unpaid vendor by art. 2000 C.C. The preferable view, I think, is that it is not in the nature of a *droit réel* in the thing itself since it affects no dismemberment of the property and confers neither any dominion over the thing nor the *droit de suite*, but is merely a right incidental to the vendors' personal claim resting upon a *privilegium inter personales actiones;* 3 Aubry et Rau 256; 2 Planiol 2548.

By the text of the law it yields to the express *nantissement* of the pledgee and to the implied pledge of the lessor (art. 2000 C.C.); and it obviously cannot successfully be asserted against the *droit de retention.* The question is: Ought it to prevail against a security of the character constituted by the respondents' mortgage? With great respect I have a good deal of difficulty in holding that this security falls within the class described as pledge in art. 2000 C.C.; but putting that question aside I think the security created by the mortgage is such that by its very nature it must prevail as against the vendor's preference.

The mortgage unquestionably establishes a *droit réel* in all the personal as well as the real property of the company. The property in the *meubles* in question passed to the company and it is this property which by the express terms of the instrument is transferred to the mortgagees as security for the company's indebtedness. It would, I think, require an express text to justify the recognition of a preference resting as I have said upon a mere *privilegium inter personales actiones* as superior to such a security.

It was vigorously argued that we ought not to give to the legislation ratifying the mortgage such a mean-

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ing and effect as would prejudice pre-existing rights. But to that there seem to be several answers. The appellants' right to a preference had not accrued when the statute was passed and might never accrue. In these circumstances it may be questionable whether the rule invoked could have any application at all. Then the rule is only a canon of construction and must yield when a contrary intention sufficiently appears. Now under the "Railway Act" the company was expressly authorized to "mortgage" its movable property. Used in the context "hypothecate, mortgage and pledge" the word imports a legal process differing from both that of hypothecation and that of pledging; and having regard to the well known practice throughout Canada in respect of railway mortgages, of which one cannot suppose the legislature to have been ignorant, there can be no doubt that it imports the power to transfer the property as security while retaining the possession. Nobody would, of course, doubt the power of the legislature to create a form of security unknown to the common law of Quebec; and the legislative sanction of a security of the kind indicated implied an authority to the company to burden its *meubles* (while retaining possession of them) with charges superior to the preference of the unpaid vendors. It would unduly strain the principle invoked to hold that legislation validating the particular form in which that had been done was inoperative in respect of claims of preference advanced after the date of the legislation solely on account of such preference arising out of sales which took place before the statute was passed.

ANGLIN J.—Assuming that the opposants have a right of appeal from the interlocutory judgment upon

demurrers dealt with in the Court of King's Bench, I am of opinion that upon this part of their appeal they must fail. I find nothing in the instrument of hypothecation or in the statute by which it was ratified, which confers upon them any right of preference over the claim of the respondents. It is not revenue of the company (upon which working expenses may be a prior charge), but proceeds of the sale of its property with which the court is dealing. The respondents' mortgage is no doubt in the form of a trust deed, but the appellants are not *cestuis que trustent* and the deed certainly does not create any lien in their favour superior or equal to that of the bond-holders, whom the respondents represent.

If we were here dealing with cars of a railway system operating upon a right of way of which the railway company was the proprietor, I would deem this case concluded by the decisions of this court in *Ontario Car and Foundry Co.* v. *Farwell*(1), and *Lainé* v. *Béland*(2), approving and adopting what has been uniform jurisprudence of half a century in the Province of Quebec.

The law of Quebec upon the question of immobilization is derived not from English, but from French sources; *Morrison* v. *Grand Trunk Railway Co.*(3), at p. 319; and in the *Farwell Case*(1) Strong J., for that reason, guards himself against being taken to establish a precedent in cases arising in provinces subject to the English system of law. The decision of the Privy Council in *Toronto Railway Co.* v. *City of Toronto*(4), which proceeded upon the principles of English law in force in Ontario, was not intended to

(1) 18 Can. S.C.R. 1.
(2) 26 Can. S.C.R. 419.
(3) 5 L.C. Jur. 313.
(4) [1904] A.C. 809.

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be and, in my opinion, is not an authority upon the law prevailing in the Province of Quebec and would not warrant this court in treating its own decisions in the *Farwell Case*(1) and in *Lainé* v. *Béland*(2), as overruled. But, in the case of a street railway operated upon highways of which the tram company is in no sense proprietor, it may well be that the foundation for an application of the provisions of art. 379 C.C. is lacking; and, in some future case in which it may be necessary to deal with that question, the status of the rolling stock of such a railway may be held not determined by the decisions of this court which have been cited.

In the present case whatever the character of the rolling stock in question—whether movable or immovable—the language of the respondent's security is sufficiently comprehensive to include it. The efficacy and the validity of that security have been declared by an Act of the legislature. It contains provisions for the distribution of the proceeds of a sale of the property covered by the security which seem to be inconsistent with the existence in regard to that property of such a right as the appellants assert. Upon this ground I concur in the judgment dismissing this appeal.

Appeal dismissed with costs.

Solicitors for the appellants: *Taschereau, Roy, Cannon & Parent.*

Solicitors for the respondents: *Pentland, Stuart & Brodie.*

(1) 18 Can. S.C.R. 1.

(2) 26 Can. S.C.R. 419.