THE GREAT EASTERN RAILWAY (OPPOSANTS)..... } APPELLANTS;

AND

WILLIAM B. LAMBE, *èsqual.* (PLAINTIFF)..... } RESPONDENT.

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*Oct. 10.

*Nov. 2.

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

Opposition afin de charge—Pledge—Art. 419 *C. C.—Agreement—Effect of —Arts.* 1977, 2015 *and* 2094 *C. C.*

The respondent obtained against the Montreal and Sorel Railway Company a judgment for the sum of $675 and costs and having caused a writ of *venditioni exponas* to issue against the railway property of the Montreal and Sorel Railway, the appellants, who were in possession and working the railway, claimed under a certain agreement in writing to be entitled to retain possession of the railway property pledged to them for the disbursements they had made on it, and filed an opposition *afin de charge* for the sum of $35,000 in the hands of the sheriff. The respondent contested the opposition. The agreement relied on by the appellant company wasentered into between the Montreal and Sorel Railway and the appellant company, and stated amongst other things that "the Montreal and Sorel Railway Company was burthened with debts and had neither money nor credit to place the road in running order, etc." The amount claimed for disbursements, etc., was over $35,000. The Superior Court, whose judgment was affirmed by the Court of Queen's Bench for Lower Canada, dismissed the opposition *afin de charge.*

On appeal to the Supreme Court the respondents moved to quash the appeal on the ground that the amount of the original judgment was the only matter in controversy and was insufficient in amount to give jurisdiction to the Court. The Court without deciding the question of jurisdiction heard the appeal on the merits, and it was

Held, 1st. That such an agreement must be deemed in law to have been made with intent to defraud and was void as to the anterior creditors of the Montreal and Sorel Railway Company.

* PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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2nd. That as the agreement granting the lien or pledge affected immovable property and had not been registered, it was void against the anterior creditors of the Montreal and Sorel Railway Company. Arts. 1977, 2015 and 2094 C. C.

3rd. That art. 419 C. C. does not give to a pledgee of an immovable who has not registered his deed a right of retention as against the pledger's execution creditors for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an *opposition afin de conserver* to be paid out of the proceeds of the judicial sale. Art. 1972 C. C.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court which dismissed the appellants' opposition *afin de charge* to the writ of *venditioni exponas* issued against the company.

On the 9th October, 1889, the respondent, acting for the crown, as Collector of Revenue for the District of Montreal, obtained a judgment against the Montreal and Sorel Railway Company in the Superior Court for the District of Montreal, for the sum of $675.00 with interest and costs. This sum represented the arrears of taxes due to the Government of the Province of Quebec, for the working of the Montreal and Sorel Railway, under the special act passed by the legislature of this Province, imposing a tax on railways.

On the 10th January, 1890, at the instance of respondent, a writ of execution *fieri facias de bonis et terris* issued against the Montreal and Sorel Railway Company, and the respondent caused to be seized by the sheriff of the district of Montreal all the railway of said company consisting of a line of railway of about fifty feet in width and forty-five miles in length.

The Montreal and Sorel Railway (defendant in the Superior Court) met this execution by an opposition *afin d'annuler;* and after contestation, this opposition was dismissed with costs by a judgment rendered on the 20th September, 1890.

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On the 10th September, 1890, a writ of *venditioni exponas* issued at the instance of respondent, and the sheriff caused to be published the necessary notices for the sale of the said line of railway.

On the 23rd December, 1890, the appellant filed an opposition *afin de charge* in answer to the writ of *venditioni exponas*, praying by its conclusions that the immovables of the defendant be sold subject to the payment by the highest bidder of the sum of $35,000; and praying further that, by the judgment to be rendered, the said appellant be given the right to retain and keep possession of said immovables until said sum should be paid in full.

The appellant alleged in said opposition :—

"That on the 1st June, 1889, a written lease was passed between the Montreal and Sorel Railway Company and said appellant, by which the latter undertook to work the line of railway, so seized by the respondent, and to make the repairs necessary to put the line in working order, the railway standing pledged to the appellant until the repayment of the advances that were to be made for such repairs."

"That the appellant entered upon the possession of this railway about the 1st June, 1889, that since that time the said appellant has worked the railway and made repairs and improvements amounting in value to the sum of at least $35,000, and said appellant by his conclusions claims the right to keep possession of the railway as long as such advances shall not have been repaid, and further, that the railway be sold subject to this charge."

The Montreal and Sorel Railway Company (defendant) did not appear in answer to this opposition; but the respondent, as creditor, contested this opposition on the following ground amongst others :—

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"That furthermore, supposing this pretended right of pledge did exist, the appellant should have exercised it against the writ of *fieri facias*, because it was in existence at that time; and it should not have been exercised against the writ of *venditioni exponas*."

"That the contract upon which the opposition is based, having been made before the writ of *fieri facias* issued, all the pretended rights given to appellant ought to have been invoked against that writ, because appellant could only invoke against the writ *venditioni exponas* those rights of which he became possessed after the issuing of the writ of *fieri facias*."

"That the pretended lease or contract upon which the opposition is founded is illegal, having been made to defraud the creditors of the defendant, which company was completely insolvent and in bankruptcy at the time this contract was made, and even before that time, to the knowledge of the appellant, and therefore the defendant could not alienate nor pledge its property; and, besides, that such contract had not been registered and could not give any right of pledge as against the rights of third parties, particularly those of respondent whose claim existed at the time the contract was made."

"That, moreover, the defendant had not the right to lease its line of railway, nor to pledge its property, nor to alienate the same, without the assent of its directors duly ratified by the shareholders in conformity with."

The agreement relied on by the appellant was as follows:—

MEMORANDUM OF AGREEMENT.

"Made this 1st day of June, 1889, between the Montreal and Sorel Railway Company acting by Charles N. Armstrong, president, duly authorized; and the Great Eastern Railway Company, acting by James

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Cooper, its president, duly authorized, for the purpose of this agreement, respecting the operation of the line of the said Montreal and Sorel Railway."

"Whereas the Montreal and Sorel Railway is burthened with debts which it at present is unable to discharge and has neither money nor credit wherewith to place its road in running order or condition, nor rolling stock or equipment for the said purpose."

"And whereas the Great Eastern Railway Company is interested in the road of said Montreal and Sorel Railway, and anticipates using the same as a link in its own line, and it is to the advantage of the public and the municipalities through which the said road runs, that the same should be operated and available to the community."

"Therefore the Great Eastern Railway Company undertake to make the necessary repairs and put the said line of the Montreal and Sorel Company between St. Lambert and Sorel in proper running order; and as soon as the sanction of the government is obtained to open the road and provide sufficient equipment to maintain a useful train service between said points, and supply agents and the necessary assistance."

"The total receipts of such operation shall be received and be the property of the said Great Eastern Railway Company, and be applied after the payment of current expenses to recoup the outlay of the operating company in connection with the preparation of the road for traffic and train service."

"In the event of any balance remaining at the end of any quarterly term, after the payment of every expense and disbursement made and incurred by the said Great Eastern Company and the discharge of its obligations in connection therewith, such balance, less an amount equal to ten per cent of the gross earnings, shall be payable to or on account of the Montreal and Sore

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Railway Company, in such manner as its board of directors may advise, the said amount of ten per cent to be retained and applied by the directors of said Great Eastern Company to indemnify them for the said undertaking."

"In the event of any subsidies and bonuses being granted towards the opening and maintenance of the said line, the same shall, if made payable to the Montreal and Sorel Company, be transferred and paid over to the Great Easterm Company, the proceeds to be accounted for and disposed of as ordinary earnings mentioned above."

"The Great Eastern Company shall not be liable or responsible for any debt or obligation of whatever nature or kind of said Montreal and Sorel Company, and shall have a lien and pledge upon said Montreal and Sorel Company's property, chattels and effects or credits for the disbursements and expense made and suffered on account of the repairs, improvements and operation above mentioned and contemplated."

"This agreement may at any time be terminated on the demand of either company by giving one month's notice in writing; but if such demand be made by the Montreal and Sorel Company it shall only be effective upon tender therewith of whatever balance may be found to be due at that date to the Great Eastern Company for the reasons mentioned above."

Before the case was argued on the merits a motion was made to quash the appeal for want of jurisdiction.

Choquette for respondent. The original judgment being for the sum of $675.00, that is to say, a sum less than $2,000, the right of appeal to this court does not exist. Possibly the appellant will pretend that the right contended for is of a greater value than $2,000; to that pretension I would answer that in the matter of an opposition the jurisdiction of the court

is always determined by the original judgment. In the present case the respondent sued the defendant for a sum less than $2,000 (about $1,000) and judgment was given for $675. The opposition is an incident in the case and it appears contrary to law to allow an appeal upon an incident in a case when the court would not have jurisdiction to decide the case itself. The jurisprudence on that point appears to have been clearly established by this honourable court in the following cases: *Champoux* v. *Lapierre* (1); *Bourget* v. *Blanchard* (2); *Gendron* v. *McDougall* (3).

Lonergan, contra. The appellant claims over $35,000, and therefore the amount in controversy is over $2,000. It is also a question of revenue and comes within sub-sec. (b.) of sec. 29, ch. 135 R.S.C. We allege in our opposition that the sheriff has in his hands several writs and under art. 642 C.P.C. the seizure could be abandoned by the sheriff unless the amount due in the several writs were paid in and these amounts aggregate over $1,500.

STRONG J.—We will hear the case on the merits.

Lonergan for the appellant.

1. The company were entitled under the said lease to retain the railway property until its disbursements thereunder were paid; and even wholly disregarding said lease, as an occupant in good faith it had a right to remain in possession until reimbursed the *impenses utiles* and cost of improvements under the provisions of article 419 of the Civil Code.

2. Defendants' obligation as a railway corporation compelled them to keep their line open and run it, otherwise their charter might become forfeited. Thus

(1) Cassels's Dig. p. 244. (2) Cassels's Dig. p. 241.
(3) Cassels's Dig. p. 248.

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in whatever financial condition defendants were at the time, in leasing their property with the condition of keeping it in running order, they acted in the interest of their creditors in preserving their privileges and protecting the property from decay, *le gage commun des créanciers.* And if the company defendant were insolvent (although the ordinary tests are not applicable to a railway company and one heavily subsidized) yet it could enter into a contract necessary for the preservation of its estate and without onerous conditions. Here the only obligation in resuming possession was repayment of the actual outlay of the lessees in improving and maintaining the property—an expense alike advantageous to the lessor and its creditors.

3. When a sale of the immovable was imminent under the writ of *venditioni exponas* the defendants failing in their obligation to maintain the company appellant in the enjoyment of the property pledged for their advances and ameliorations, the lessees were compelled to file an opposition *à fin de charge* to protect their disbursements made upon the faith and pledge of the property they had so improved.

4. While I contend that the Montreal and Sorel Railway Company was capable of legally entering into the lease in question, and that this opposition must be sustained in consequence thereof,—still I further rely, independently of said lease, upon the provisions of the articles of the Civil Code relating to improvements made by occupants in good faith, and the right thereby provided to retain the immovable until the *impenses utiles* are paid.

5. The last point relied on in support of the judgment is one of procedure, viz., that under art. 664 C. P. C. the present sale cannot be stopped by opposition. In answer to this we say that the greater portion of this outlay was made between the issuing of the writs

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of *fieri facias* and *venditioni exponas*, and the amount of the expenditure or its usefulness is not seriously questioned. This opposition is identical with that upon which a similar opposition was maintained in appeal in *Stephens et al.* v. *Bank of Hochelaga* (1).

Choquette for respondent.

At the time the contract was made, on the 1st June, 1889, was the defendant competent to give a right of pledge upon its immovables, or to pledge them, or even to alienate them ?

The negative of this proposition cannot be controverted. The defendant was wholly bankrupt and in a state of insolvency at the date of the contract; this was within the knowledge of the appellant, the fact appearing on the contract itself. The plaintiff respondent, as well as the other creditors of the defendant, had an acquired right to the property of the defendant. The principle that a debtor's property is the common pledge of his creditors is elementary, and it is useless to discuss it.

Moreover, the appellant cannot exercise any right by virtue of this contract, because it had not been registered. It is only necessary to refer to the law and to read the articles 1633, 2128 of the Civil Code on this subject to gain the conviction at once that no right could be conferred upon the appellant by the contract prejudicial to the rights of third parties.

I also contend that the Montreal and Sorel Railway Company could not lease their line of railway to the appellant or any other company without having obtained the sanction of its shareholders. This company was incorporated by the act 44 & 45 Vic. ch. 35, P. Q.; and by section 18 of its charter it was expressly enacted that the company can make any arrangement with any other company to lease its line, &c.,

(1) M. L. R. 2 Q. B. p. 491.

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&c., provided that such arrangements and agreements, respectively, have been first sanctioned by the majority of votes at a special general meeting of shareholders called for the purpose of taking them respectively into consideration after due notice given as laid down in the Railway Act of 1880 of the Consolidated Statutes of the Province of Quebec.

Then again, could the appellant invoke against the writ *venditioni exponas* the reasons alleged in the opposition?

The cause which gave rise to the appellant's opposition *afin de charge* was not subsequent to the writ *fieri facias*, but long anterior to it. This alone is a sufficient reason to dismiss the appellant's opposition, and it was so adjudged by the Superior Court and the Court of Appeals.

The judgment of the court was delivered by:

TASCHEREAU J.—Lambe, the respondent, having obtained a judgment for the crown in his quality of revenue collector, against the Montreal and Sorel Railway Company, seized in execution thereof the railway of the company. Divers oppositions having been filed to the said seizure the said respondent, after adjudication on said oppositions, took out a writ of *venditioni exponas*. Thereupon the Great Eastern Railway Company, the present appellants, filed an opposition *à fin de charge* to the said writ, alleging that by an agreement in writing, dated the 1st June, 1889, passed with the said Montreal and Sorel Railway Company, which instrument is called a lease in their answers to respondent's pleas, they undertook to put the railway in question and keep it in running order; that for their disbursements and expenses for that purpose it was expressly stipulated that they, the appellants, would have a lien and pledge upon the said railway; that

under that agreement they, the said appellants, took possession of the said road, and have since kept it in running order; that the amount for their disbursements thereon over the receipts is $35,000, and they pray that the said railway be sold *à charge* by the purchaser of paying to them, the said appellants, the said sum, with right of detention by them till payment.

The respondent contested this opposition on the grounds, amongst others:

That the pretended lease or contract, upon which the opposition is founded is illegal, having been made to defraud the creditors of the defendant, which company was completely insolvent and in bankruptcy at the time this contract was made, and even before that time, to the knowledge of the appellant; and therefore the defendant could not alienate nor pledge its property; and, besides, that such contract had not been registered and could not give any right of pledge as against the rights of third parties, particularly those of respondent whose claim existed at the time the contract was made.

That, moreover, the defendant had not the right to lease its line of railway, nor to pledge its property, nor to alienate the same, without the assent of its directors duly ratified by the shareholders in conformity with its rules and regulations, and the law; and that such assent and ratification were never obtained.

Special conclusions to these pleas were taken that the said agreement between the two companies be set aside as illegal and fraudulent

Issue having been joined and evidence adduced on this contention, the Superior Court gave judgment dismissing the appellants' opposition. This judgment was subsequently confirmed unanimously by the Court of Appeal. We are asked by the appellants to reverse those judgments.

We cannot do it, in my opinion. Their opposition could not possibly have been maintained. And this on various grounds, all equally fatal to their contentions.

First, that the agreement of June 1st, 1889, consented to by the Montreal and Sorel Railway Company

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when insolvent, to the appellants who knew of that insolvency, as appears by agreement itself, is deemed, in law, to have been made with intent to defraud and void as to its anterior creditors, of which the respondent was one. Arts. 1035, 1036 C. C. This is the first ground of the judgment appealed from, and one which, to my mind, remains unimpeached by the appellants.

The second ground of the judgment appealed from is, that the appellants have no lien on this railway, that is to say, I assume it to be meant, that they have no right of retention thereof for the payment of their claim, but that any right they may have against the Montreal and Sorel Railway Company should be adjudicated upon on an opposition *à fin de conserver* on the proceeds of the sheriff's sale. This ground I take to be as fatal to the appellants as the first one. A pledgee as a general rule, has not the right to oppose the sale of his pledge under a writ of execution by another creditor of the pledgeor. A thing pledged continues to be the common pledge of the pledgeor's creditors, subject to the special pledgee's right of preference. His right of retention of the pledge till he is paid is a right *quoad* his debtor only, and one which cannot be opposed to his co-creditors. Art. 2001 C.C.; Troplong, Priv. & Hyth. under art. 2092 (1); Troplong on Nantissement (2); Pont des Petits Contrats (3); Pothier, Nantissement (4); Laurent (5); *Fortier* v. *Hébert* (6).

The Court of Appeals' judgment, in that sense, in *Young* v. *Lambert*, delivered by Mr. Justice Badgely, is reported at full length in 6 Moore, P. C., N. S. 406. The Privy Council, it is true, reversed that judgment,

(1) P. 57, note 3 (ed. Belge.)
(2) Nos. 458, 574, 594, *et seq.*
(3) 2 vol. No. 1184.
(4) No. 26.
(5) 28 vol, no. 502; 29 vol. nos. 283, 291 and *seq.*
(6) 15 Rev. Lég. 476.

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but they passed over the question whether the pledgees, in that case, had rightly proceeded, probably because the point, as they remarked, had been taken before them for the first time. Then the cases had been heard *ex parte*, and the decision, and on that account, has less weight according to what their Lordships of the Privy Council themselves said of their decisions, under such circumstances, in *Tooth* v. *Power* (1). As to the pledge of immovables, the pledgee may perhaps, under certain circumstances, have a right of retention as against the other chirographary creditors of the pledgeor, though that is, in France, a mooted point (2). With us, I would be inclined to think that no distinction can be made, on this point, between the pledge of movables and the pledge of immovables. However, that may be questionable. It is sufficient for us, for the determination of the present controversy, to hold that, when a contract of pledge of immovables is unregistered, as this one is, it has no effect whatever against anterior creditors generally. Arts. 2015, 2094 C. C.

Under our system, as a general rule, no rights whatever on immovables exist against third parties without registration. All causes of preference, or privilege on immovables, and the right of retention by a pledgee is clearly a privilege in this sense, must be made public by registration to be effectual against third parties; art. 1977 C. C. There are a few exceptions to this rule, art. 2089 C. C., but they do not include the right of retention by a pledgee. Then, a deed as the one now in question, if registered, would perhaps, at most, only entitle the pledgee to ask, before

(1) [1891] App. Cas. 284.

(2) 3 Delvin p. 444; Martou, Priv. & Hyp., 1 vol., No. 259; Aubry & Rau., 4 vol., & 438, note 9; Pont, Priv. & Hyp., 1 vol., no. 21; Pont, Des Petit Contrats, no. 1292 *et seq.*; Laurent, 28 vol., nos. 561, 581.

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being compelled to surrender the immovable pledged, security that its sale will bring a sufficient price to ensure the payment of his claim, art. 2073 C. C., if he alleged that the value of the thing pledged does not exceed the amount of his claim, or that his security may be endangered by the sheriff's sale. The appellants here have failed to do this in their opposition. However, we have not to determine what may be the appellant's rights after the sale, or what they might have been if the deed of pledge had been registered. All that we determine is that they have no right of retention in the present case against their anterior creditor, the respondent.

Art. 419 C. C. invoked by the appellants does not apply. Upon the principle that guided the Superior Court in *Prowse* v. *Simpson* (1) and the Court of Appeal in *Matte* v. *Laroche* (2), that article does not give to a pledgee a right of retention against the pledgee's execution creditors for the payment of his disbursements on the property pledged (3).

The case of *Monnet* v. *Brunet* (4), cited by the appellants was not an action by a creditor and consequently does not support his contention. Here also, it must be remarked it is not the disbursements incidental to their possession that the appellants claim but the very debt for which the pledge has been given to them by the Montreal and Sorel Railway Company, and I have said why, in my opinion, they cannot succeed on their opposition.

Another serious objection to the appellants opposition, were it possible otherwise to maintain it, arises from their not having proved that the deed of June, 1890 had been ratified by the shareholders of the com-

(1) 13 Rev. Lég. 302.
(2) 4 Q. L. R. 65.
(3) See also Cabrye du Droit de rétention no. 108.
(4) 17 Rev. Lég. 681.

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pany as required by sec. 18 of their charter, 44 & 45 Vic. c. 35. The respondent specially denied such ratification and upon the appellants, it seems to me, was, on that issue, the *onus probandi*.

The deed, it may be remarked, was not an authentic one.

I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants : *M. S. Lonergan.*

Solicitor for respondent : *C. Beausoleil.*