

ANDREW T. DRUMMOND.....APPELLANT;

1877

June 13, 28.*

AND

JAMES BAYLIS.....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR
LOWER CANADA (APPEAL SIDE).*Bonds—Collateral security—Replevin.*

B., as trustee for *H. C. & Co.*, deposited with *D.* twelve bonds of the *M. C. & S. Railway Company*, as collateral security, to be availed of only subsequent to the failure of the Government to pay \$10,000 subsidy previously transferred to *D.*, and obtained a receipt from *D.* that on the subsidy being paid *D.* would return these bonds to *B.* The subsidy was paid and *B.* sued *D.* to recover back the twelve bonds. *H. C. & Co.* did not intervene.

Held: That *B.*, being a party personally liable on the bills held by *D.*, which the Government subsidy of \$10,000 transferred was intended to pay, and having complied with all the conditions mentioned in the receipt entitling him to recover possession of the bonds, was, as against *D.*, the legal owner of the bonds.

THIS was an action to recover back twelve bonds delivered by Respondent to Appellant under the conditions set forth in the following receipt:—

“ MONTREAL, September 4, 1874.

“ Received of *James Baylis, Esq.*, twelve bonds of the *Montreal, Chambly and Sorel Railway Company*, for \$1,000 each, Nos. 0,316 to 0,327 consecutive and inclusive, say 0,316, 0,317, 0,318, 0,319, 0,320, 0,321, 0,322, 0,323, 0,324, 0,325, 0,326, 0,327, held in trust by me for him for Messrs. *Hibbard, Cameron & Co.*, in accordance with letter 30th May last, which bonds I agree

*PRESENT:— Richards, C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

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to deposit with the *Ontario Bank*, until arrangements for traffic guaranty have been completed or the Government subsidy transferred to me is paid, and upon payment of said subsidy I agree to return these bonds to said *J. Baylis*. They are to be regarded as security to be availed of only subsequent to the failure of the Government \$10,000, transferred to me in March last, being paid by 1st January next, or there being a definite agreement to pay it. It being understood that these arrangements for traffic guarantee are now in progress, and will be completed in a reasonable time.

“(Signed),” “A. T. DRUMMOND.”

The declaration alleged in effect :

That prior to the 31st March, 1874, the Defendant, *Drummond*, at the request and on the credit of the Plaintiff, undertook to buy, and did buy on commission, large quantities of iron girders, and iron rails, &c., for the *Montreal, Chambly & Sorel Railway Company*, of which *Hibbard, Cameron & Co.* were the contractors, and furnished invoices to Plaintiff for the goods so purchased, charging them against Plaintiff, and undertook to receive payment by means of drafts of *Hibbard, Cameron & Co.* indorsed by *Baylis*.

That a transfer to Defendant was passed before *Light-hall*, N. P. of date the 31st March, 1874, made by the contractors, declared to be represented by *Baylis*, as their Attorney. The thing transferred, and the consideration and objects of the transfer are in the transfer stated in the following terms as being “a transfer of the sums of ten thousand dollars currency of Canada, of the Government subsidy, funds, or debentures, to be had and taken by the transferee out of the first, or by preference out of such subsidy, funds, or debentures granted by the Provincial Government of

Quebec, and by the Legislature, in favor of the *Montreal, Chambly & Sorel Railway Company*, which this Company is obliged to pay to the said *Ashley Hibbard*, under contract and agreement passed before the undersigned Notary, this 31st day of March, 1874, which is additional and supplementary to that between said *Hibbard, Cameron & Co.*, passed before *J. S. Hunter*, Notary Public, of *Montreal*, the 16th day of October, 1872. This transfer is thus made in consideration and in payment of certain drafts or bills granted by the said *Hibbard, Cameron & Co.* upon said *James Baylis*, and accepted by him, payable to the order of the said *Andrew T. Drummond*, dated the 26th (should be the 28th) day of March inst, 1874, payable two months after date thereof, as follows, to wit: First, one for fourteen hundred dollars; a second, for twenty-two hundred and sixty-nine dollars and thirty-nine cents; a third, for forty-two hundred and twenty-five dollars fifteen cents; and a fourth for twenty-one hundred and four dollars and twelve cents, thus forming the sum of nine thousand nine hundred and ninety-eight dollars and sixty-six cents currency in all, it being understood, that should the drawers or acceptors take up or pay any or any part of said drafts, or any of them, before or after falling due, said *Andrew T. Drummond*, his heirs or assigns shall be bound to retransfer sufficient of said sum so transferred as shall repay such amount or amounts as may be so paid."

That this sum of \$9998.66 was the amount due the Defendant on the said iron, &c., so purchased, and for all interest and commission to the date of the drafts.

That the Railway Company intervened and became parties to the transfer; that the four drafts mentioned in the transfer were all renewed by four other drafts payable at *four* months, dated 31st May, 1874, for a like amount of \$9998.66, all falling due on the 4th Sept.,

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1874; also the payment by Plaintiff to the Defendant of all the interest charges, stamps, &c., on the renewals of the drafts, namely, \$266.74 and \$235.30.

That on the 4th September, 1874, the Plaintiff, in order further to secure payment of the drafts so renewed, delivered to the Plaintiff, twelve bonds or debentures of the said Railway Company on the terms set forth in the above receipt.

The declaration also sets up Defendant's undertaking and liability in law to return to the Plaintiff the four paid drafts or Bills to secure the payment of which the Government subsidy of \$10,000 had been transferred, and the 12 debentures delivered to Defendant; also defendant's refusal to return either the bonds or bills. Conclusion, that Defendant be condemned so to do, or to pay \$15,000.

Defendant pleaded that the twelve bonds or debentures of the *Montreal, Chambly and Sorel Railway Company*, referred to in Plaintiff's declaration, are not now, and never were the property of the said Plaintiff, and the Plaintiff had not, at the time of the institution of this action, any interest in said bonds or any right of action to recover the same from the Defendant.

That the said bonds were received by Defendant from the said *Hibbard, Cameron & Co.*, mentioned in the Plaintiff's declaration, through the hands of the Plaintiff, who only had them in his possession as Attorney of said *Hibbard, Cameron & Co.*

That said Plaintiff, previous to the institution of this action, became insolvent, and was not then, and had long ceased to be, Attorney of the said *Hibbard, Cameron & Co.*

That the said bonds were so received from the said *Hibbard, Cameron & Co.*, as collateral security for the payment of the drafts of said *Hibbard, Cameron*

& Co., mentioned in Plaintiff's declaration, and all renewals thereof, and the costs and charges in connection with said drafts due the defendant by said *Hibbard, Cameron & Co.*, and as security for Defendant's charges as a commission merchant in buying the goods mentioned in Plaintiff's declaration, and for commissions in renewing said drafts, and for interest on the same, and for monies paid and expended in and about the same.

That the Defendant, as such commission merchant, had a *lien* on the said bonds for the payment of his said charges, amounting to \$1,599.80, as per detailed statement thereof, filed as Defendant's exhibit number one, and had a right to retain the same until payment of said sum.

The judgment of the Superior Court dismissed Plaintiff's action upon the ground that "in the dealings and transactions mentioned in his declaration, he acted in the capacity of Attorney of *Hibbard, Cameron & Co.*, who paid the drafts and bills, and who were owners of the bonds claimed by said Plaintiff, and that said Plaintiff hath no right to recover the same from Defendant."

The judgment of the Court of Queen's Bench reversed the judgment of the Superior Court.

The question submitted to the Supreme Court was whether the Plaintiff *Baylis* had a right to the twelve bonds referred to ?

Mr. *John L. Morris* for the Appellant :—

These bonds did not belong to Respondent, but to *Hibbard, Cameron & Co.*

The receipt discloses the fact that *Baylis* received and delivered the bonds to *Drummond*, in his *then* capacity of agent for *Hibbard, Cameron & Co.*, and *Drummond* only agrees to hand them back to *Baylis* in that capacity. This is the only fair and reasonable way in which

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to read the receipt. It must be taken as a whole in order to get at its signification.

The agreement is one with the principal and not with the agent.

There is no proof that there was ever any money due by *Hibbard, Cameron & Co.* to *Baylis*, for his evidence is not admissible under Article 251, *Code of Civil Proc. L. C.*

The action should have been instituted by *Baylis* as agent, and not otherwise. But *Baylis* admits that he had ceased to be the agent of *Hibbard, Cameron & Co.* long before he brought this action.

The powers of factors or agents is determined by their revocation. *Vide Story* on agency (1). The judgment of the Superior Court was in accordance with the evidence, and well founded in law.

Mr. A. Robertson, Q.C., for Respondent:—

The first dealing was between *Baylis* and *Drummond*. The payment, given at first in the shape of notes, was endorsed by him, and afterwards bills were accepted by him. *Baylis* had a possession, presumably legal, of the bonds in question, and by the receipt *Drummond* is justified in returning the bonds. *Hibbard, Cameron & Co.* have not intervened, nor has Appellant called them into the case to protect any rights they had.

The extent of *Baylis'* interest in the bonds, or his right as against the contractors, not being in issue, it was not necessary for *Baylis* to prove what these rights were, or the agreements under which *Baylis* bought the iron, and became liable for so large sums for the contractors. *Vide Pothier Nantissement* (2); *Story* on Bailments (3); *Jarvis v. Rodger* (4); *Addison* on contracts (5).

(1) Nos. 470, 473, and also No. 225. (3) No. 291, p. 250

(2) No. 7. (4) 13 Mass. Rep. 105.

(5) 4th edtn., p. 467.

THE CHIEF JUSTICE :—

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The Defendant *Drummond*, by the agreement and receipt, undertook to deposit the bonds sued for with the *Ontario Bank*, until * * * * the Government subsidy transferred to him was paid, and upon payment of said subsidy, he agreed to return these bonds to said *Baylis*, the Plaintiff. This further statement was also included in the memorandum signed by the Defendant :

They are to be regarded as a security to be availed of only subsequent to the failure of the Government subsidy of \$10,000, transferred to me in March last, being paid by January next, or there being a definite agreement of the Government to pay it.

The bonds were deposited with Defendant and were to be returned to Plaintiff on payment of the subsidy. It is admitted the subsidy was paid, and, therefore, the Plaintiff has made out a *prima facie* case to have the bonds returned to him. The Defendant contends that the Plaintiff was acting as agent for *Hibbard, Cameron & Co.*, that they owned the bonds, and that he is not bound to return to Plaintiff, but holds them as the property of *Hibbard, Cameron & Co.*, who alone can sue him for them.

If *Baylis* were the mere agent or servant of *Hibbard, Cameron & Co.*, and the contract was in truth their contract, and the agreement to return to him was meant and understood only as an agreement to return to them through *Baylis* as their servant or agent, there might be some force in their contention. But it appears that *Baylis* was a party personally liable on the bills or notes which the Government subsidy of \$10,000 transferred to *Drummond* was intended to pay, and these bonds were deposited to secure payment of that subsidy. They came from *Baylis*' possession, and the reasonable inference from the evidence is, that he had a lien on them to

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guarantee the payment of his own liabilities for *Hibbard, Cameron & Co.*, which were very large. If he *paid* he was entitled to their possession, even against *Hibbard, Cameron & Co.* But if he held them as a trustee for *Hibbard, Cameron & Co.* only, and stipulated they should be returned to him on the payment of the \$10,000 subsidy, he, as against this Defendant, would have the right to recover them from him.

If *Hibbard, Cameron & Co.* had notified Defendant that the bonds were theirs and not to return them to Plaintiff, then Plaintiff might have been called on to shew that he had a right to them against *Hibbard, Cameron & Co.*, but in the absence of any such claim on the part of *Hibbard, Cameron & Co.*, there can be no right in Defendant to retain them. If he anticipated difficulty because, as he says, *Baylis* ceased to be *Hibbard, Cameron & Co.*'s Agent, he could have notified them of the claim of *Baylis* to the possession of the bonds and called on them to intervene, but in the absence of any such proceedings I fail to see what right Defendant has to keep these bonds. If *Hibbard, Cameron & Co.* are content to let *Baylis* have them and set up no claim or right to keep them from him, I fail to see what right the Defendant has to set up a claim on their behalf, which they do not desire to advance, and which, as between them, they are satisfied it would be unjust for them to set up.

TASCHEREAU, J. :—

By the action in this cause the Appellant was called upon to return to the Respondent twelve bonds of the *Montreal, Sorel and Chambly Railroad Company*, transferred to him and held by him as collateral security for drafts accepted by the Respondent for *Hibbard, Cameron & Co.*, contractors for the building of the said Rail-

road, and which, according to the Respondent, he undertook to return to him, as well as the paid drafts (four in number) accepted by Respondent.

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In the Superior Court of the District of *Montreal*, where the action originated, the Respondent's action was dismissed on the ground that he had not shewn an interest in the bonds or in the drafts, and that he acted simply as the Attorney of *Hibbard, Cameron & Co.*, owners of the bonds. But in appeal, in the Court of Queen's Bench at *Montreal*, the judgment was reversed, and hence the present appeal by *A. T. Drummond*.

It is evident, from the whole transaction, that the Appellant's contract and undertaking was purely with the Respondent to restore to the latter the bonds in question, or pay him \$10,000, as soon as a certain condition should have been fulfilled, to wit: the payment of the Government subsidy, and certain arrangements for traffic guarantee. The condition has been fulfilled in its entirety, and therefore the Appellant is bound to restore bonds given as security only till the performance of the condition.

Appellant contends also, that he has a right to retain these bonds as a security for certain commissions due him for *Hibbard, Cameron & Co.* by Respondent. He has, in my opinion, no such right, for his contract with the Respondent was, that he should return the bonds on a certain and specific condition, which has been complied with, and no mention of such a thing as commission was made so as to give him a lien on the bonds.

I think the appeal should be dismissed with costs.

RITCHIE, STRONG, FOURNIER, and HENRY, J. J., concurred.

Appeal dismissed with costs.

Solicitor for Appellant: *John L. Morris*.

Solicitors for Respondent: *A. & W. Robertson*.