WILEY, WICKS AND WING ....APPELLANTS; 1877

June 7.*

AND

ROBERT HALL SMITH .. ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Stoppage in transitu—Goods in bond.

The Appellants, merchants in *New York*, sold to *E. B. & Co.*, at *Toronto*, 250 barrels of currants on credit, and consigned the same in bond. A bill of lading thereof was duly received by *E. B. & Co.*, who paid the freight thereon and gave their acceptance for the price of the said goods, as well as for the cartage and American bonding charges. The goods, on arrival, were entered and bonded in the consignees' name, and placed in one of the Customs Bonded Warehouses subject to the payment of the duties. *E. B. & Co.* sold and delivered 150 barrels, and the remaining 100 barrels were bonded under 31 Vic., Ch. 6, D., in a portion of *E. B. & Co.'s* warehouse, partitioned off and used by the Customs authorities. Before the acceptances matured, and while the portion of goods remained in bond, *E. B. & Co.* became insolvent.

Held,—Affirming judgment of the Court of Error and Appeal, that the *transitus* was at an end, and that the Appellants had lost the right to stop the goods remaining in bond.

Howell v. *Alport* (1) and *Graham* v. *Smith* (2) over-ruled.

This was an Appeal from the judgment of the Court of Appeal for Ontario (3).

The action was brought by the Appellants (Plaintiffs) against the Respondent (Defendant), as assignee of *Bendelari & Co.*, by consent of parties, for the recovery of $1,497.88, and by such consent, and by order of *Robert G. Dalton*, Esq., dated the 26th day of May, 1876,

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

(1) 12 U. C. C. P. 375. (2) 27 U. C. C. P. 1.

(3) Reported 1 App. R. Ont. 179.

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according to the *Common Law Procedure Act*, the following case was stated for the opinion of the Court, without pleadings:

"1. The Plaintiffs, merchants in *New York*, sold to *E. Bendelari & Co.*, merchants of *Toronto*, 250 barrels of currants, on credit. On arrival of the said currants in *Toronto*, a bond was given to the Customs authorities for the same, a copy of which is hereto annexed marked "A," ordinary warehouse bond. Of the said quantity 150 barrels were sold and delivered by *E. Bendelari & Co.*, prior to the insolvency hereinafter mentioned, to a purchaser in *Hamilton*. The remainder thereof, being 100 barrels, were bonded under 31 Victoria, Cap. 6, in a portion of the warehouse of said *E. Bendelari & Co.*, for which they pay rent, partitioned off, and called and used by the Customs authorities as Her Majesty's Bonded Warehouse, No 4.

2. The said currants had been shipped by rail from *New York* on the 7th of January last, at the risk of *E. Bendelari & Co.*, and they arrived here on the 12th of said month of January. A bill of lading thereof was duly received by said *Bendelari & Co.*, *who paid the freight thereon*, and, in the usual course of business, gave their two several acceptances to the Plaintiffs (who are the unpaid holders thereof,) dated the 7th day of January last, and payable thirty days after date, for the price of the said 250 barrels of currants, and for the cartage and the American bonding charges, copies of which are hereto annexed, marked "B" and "C."

3. On the 31st of January last, the said *E. Bendelari & Co.*, held a meeting of their creditors, and at such meeting informed them of their inability to meet their engagements in full, and the creditors agreed and demanded that an assignment under the Insolvent Act of 1875 should be made by the said *E. Bendelari &*

Co., but the Plaintiffs were neither present nor represented at said meeting.

4. On the 7th of February, the said *E. Bendelari & Co.*, in compliance with the said demand, made an assignment under the said Act to the Defendant, who accepted the same and became, and is now, the duly appointed assignee in insolvency of the said *E. Bendelari & Co.*

5. On the 8th day of March last, the Plaintiffs served on the Collector of Customs at *Toronto* a notice and demand, a copy of which is hereto annexed, marked "D."

6. On the 9th of March last, the Plaintiffs served on the said Collector two notices, copies of which are hereto annexed, marked "E" and "F," and at the same time tendered him the duties payable in respect of the said goods, and offered to indemnify him against the consequences of the delivery of the same to them.

7. The said Collector refused to consent to the deliv ery of the said goods to the Plaintiffs, on the ground that they had been claimed by the Defendant as assignee as aforesaid; and the papers hereto attached, marked from "G" to "I" inclusive, passed between the Collector and Bonding Waiter (*McCarthy*), and the Collector and the Locker (*McCaffrey*), relative to the said goods."

The bond, referred to in the first paragraph of the special case, was given by *E. Bendelari & Co.*, and contained the following recital:

"WHEREAS, the above bounden *E. Bendelari & Co.*, have lately imported into the Port of *Toronto*, in a ship or vessel called *The Great Western Railway*, from Suspension Bridge, the undermentioned goods, namely, 250 barrels currants, 2800, 73206, 17½, 490, £575 7s.

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3d., the duties in respect whereof have not been paid, and which goods we are desirous of disposing in Warehouse No. 4, at the Port of *Toronto*, under the provisions and regulations of "An Act respecting Customs, 31 Vic., Cap. 6."

The notice referred to in the fifth paragraph of the special case was as follows:

"TORONTO, March 7th, 1876.

"JAMES E. SMITH, ESQ.,
Collector of Customs, Toronto.

"SIR,—We hereby notify you not to deliver to the consignees Messrs. *E. Bendelari & Co.*, or their order, or to the assignee, one hundred barrels of currants, consigned by Messrs. *Wiley, Wicks & Wing*, of the city of *New York*, merchants, to Messrs. *E. Bendelari & Co.*, of this city, the said barrels being marked "G" or "G C," and now stored in Her Majesty's Bonded Warehouse, No. 4, in this city, the purchase money for the same not having been paid, and the said firm of *E. Bendelari & Co.* having become insolvent before the said barrels of currants had reached their hands; but you are to deliver the said barrels of currants to ourselves or to our order forthwith.

"Yours truly,

"O'DONOHOE & MEEK,
"*Attorney for Wiley, Wicks & Wing.*"

In the first instance, the case was heard before the Hon. Mr. Justice *Galt*, sitting for the full Court, who gave judgment in favor of the Respondent.

The case was reheard before the full Court of Queen's Bench, when judgment was given in favor of the said Appellants, reversing the judgment of the Hon. Mr. Justice *Galt*. From the judgment of the Court of Queen's Bench the said Respondent appealed to the

Court of Appeal for *Ontario*. The Court of Appeal allowed the appeal with costs, reversing the judgment of the Court of Queen's Bench.

The point for decision was: "Whether, under the circumstances and facts aforesaid, the Appellants (Plaintiffs) were entitled to a delivery to them, as against the Respondent (Defendant), of the said 100 barrels of currants, as having been duly stopped *in transitu*."

Mr. *John O'Donohoe*, for Appellants:

The judgment of the Court of Appeal, now appealed from, upsets the unanimous decisions of the Courts of Queen's Bench and Common Pleas (1), and a long and distinguished line of authority, by which those decisions are supported. The goods, in this case, were taken by the forwarders to the bonded warehouse by a series of papers. The duties not having been paid, the insolvent never had actual or constructive possession of the goods and could not have put his hands on them. *Howell* v. *Alport* (2), it is admitted, is on all fours with this case. That judgment and the language of Lord *Campbell* (3), there quoted, ought not to be disturbed but upon very weighty authority and consideration.

The mere fact of giving the bond cannot affect the rights between vendor and vendee. The bond is given merely as security, and cannot affect the right of property. The bond made no difference as to the holding of the goods, as Government would hold them equally if no bond had been taken.

The last case as to stoppage *in transitu*, is *Exparte Watson* (4). In that case, although delivery by bills of lading, which give right of selling, had taken

(1) Graham v. Smith, 27 U. C. C. P. 1.

(2) 12 U. C. C. P. 375.

(3) In *Heinekey* v. *Earle*, 8 E. & B. 423.

(4) 36 L. T. N. S. 75.

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place, the right of stoppage was held to exist in favor of the unpaid vendor. Reference is made to *Northey* v. *Field* (1).

The law favors the recaption of the goods at all times and places until they have actually come to the possession of the vendee, by himself or his agents. *Gibson* v. *Carruthers* (2); *Jackson* v. *Nicoll* (3).

The case first referred to by *Burton*, J., *Gibson* v. *Carruthers*, is in favor of rather than against the Appellant. There Lord *Abinger*, at p. 338, states the origin and principle upon which the right of stoppage rests; and at p. 345 says: "The law, which protects the vendor, in such a case, from the loss of his goods by delivery of them to an insolvent, may very properly be considered as proceeding on the principle that a contract to purchase goods by one who shortly afterwards becomes bankrupt or insolvent was a fraudulent contract and void as against the vendor, though not against the vendee, who could not set up his own fraud to avoid his contract."

If there is a doubt, natural justice would entitle Appellants to succeed. The goods arrived in *Toronto* on the 12th January, and it was on the 31st of the same month that *E. Bendelari & Co.*, held a meeting of their creditors. By our law, 32 and 33 Vict. ch. 16, sec. 92, a purchase made with intent to defraud is a criminal act. Under the circumstances, it cannot be said that the purchaser came into actual possession of the insolvent.

In favour of this right, *Porter*, Senator, in *Mottram* v. *Heyer* (4), says: "If this right of stoppage *in transitu* is one that deserves to be favored and encouraged; one that promotes justice and honesty; one

(1) 2 Esp. 613.
(2) 8 M. & W. 336.
(3) 5 Bing N. C. 508.
(4) 5 Denio (N. Y.) 637.

that prevents the property of the vendor from being unjustly and often fraudulently appropriated to the payment of a bankrupt's debts who fails before the goods reach him, I think we should not give a latitudinary construction to pretended or constructive acts of ownership, but that we should hold that the goods must come into the actual possession or under the control of the purchaser, his agent or servant, before the right to stoppage shall be at an end."

The above extract is quoted with approval by *Richards*, C.J., then Chief Justice of the Queen's Bench, in the case of *Lewis* v. *Mason* (1); and he himself in that case says: "I must confess it seems to me more equitable, where a person in failing circumstances has goods sent to him, in case of his making an assignment when the property has not actually come into his possession, that the unpaid vendor should be allowed to retain the goods until he is paid for them, rather than that they should be applied to pay the general debts that were contracted long before the sale of the goods intended to be retained."

The following authorities, which review a great number of decisions bearing upon this point, were relied upon by Appellant's counsel:—

Northey v. *Field* (2); *Burr* v. *Wilson* (3); *Howell* v. *Alport* (4); *Lewis* v. *Mason* (5); *Graham, et al.*, v. *Smith* (6); *Gibson* v. *Carruthers* (7); *Bolton* v. *Lancashire and Yorkshire Railway Company* (8); *Fraser* v. *Witt* (9); *Wilds, et al.*, v. *Smith* (10).

Mr. *W. A. Foster* for Respondent:—

The trouble in deciding this case was that the case

(1) 36 U. C. Q. B. 590.
(2) 2 Esp. 613.
(3) 13 U. C. Q. B. 478.
(4) 12 U. C. C. P. 375.
(5) 36 U. C. Q. B. 590.
(6) 27 U. C. C. P. 1.
(7) 8 M. & W. 336.
(8) L. R. 1 C. P. 431.
(9) L. R. 7 Eq. 64.
(10) 41 U. C. Q. B. 136.

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was not distinguishable from *Howell* v. *Alport* (1), as there was no ground upon which distinction could be drawn, and the authority of that case had to be impugned. Now the case of *Howell* v. *Alport* was decided on the authority of *Burr* v. *Wilson* (2), and that case was found to be very distinguishable from the present case.

In *Burr* v. *Wilson* (3), there was no entry or bonding by the purchaser. It was based on *Northey* v. *Field* (4), a *nisi prius* decision, which is distinguishable, as pointed out in *Haig* v. *Wallace* (5).

Prior to notice of stoppage, the transit of the goods in question had been determined, and their delivery become complete, the purchasers, *Bendelari & Co.*, having bonded them under 31 Victoria, cap. 6, sec. 55, in their own names, duly perfected the entry, and caused them to be deposited in their own bonded warehouse.

Mottram v. *Heyer* (6); *Kent's* Commentaries (7); *Strachan* v. *Knox and Company's Trustee* (8); *Bell's* Commentaries (9); *Shaw's* Digest (10); *Bell's* Illustrations of Principles (11); *Haig* v. *Wallace* (12); *Orr* v. *Murdoch* (13); *Park* v. *Byres* (14); *Lewis* v. *Mason* (15).

By 21 Vict. ch. 55, which contains the provisions for warehousing goods in bond, it is evident that the party who has bonded the goods has all the rights of a proprietor, and that they are entirely under his control.

In the case of *Lewis* v. *Mason* (16), the learned Chief

(1) 12 U. C. C. P. 375.
(2) 13 U. C. Q. B. 478.
(3) 13 U. C. Q. B. 478.
(4) 2 Esp. 613.
(5) 2 Hud. & Brooke, 671.
(6) 5 Denio (N. Y.) 629.
(7) Ed. of 1866, p. 547.
(8) 19 Faculty Coll. 253.
(9) 5th Ed., p. 173.
(10) Vol. I, p. 873.
(11) Vol. 1, p. 388.
(12) 2 Hud. & Brooke, 671.
(13) 2 Ir. C. L. R. N. S. 9.
(14) I Lowell (Mass.) 539.
(15) 36 U. C. Q. B. 590.
(16) 36 U. C. Q. B. 590.

Justice has reviewed the law on this subject, and, after referring to all the authorities, and particularly to the case of *Strachan* v. *Knox and Company's Trustee* (1), which is very similar to those now under consideration, says: "Here, however, there is an obvious distinction. The goods have never been really bonded in the name of the consignee. It may be doubted if the Crown had any remedy against him for the duties, the original bond taken in Montreal was the one, I apprehend, on which the Crown would be obliged to rely for the payment of the duties. But, under section 60 of the *Customs Act*, referred to, sub-sections 2 and 3, if the goods are transferred in the books of the Department to a purchaser, and stand there in his name, and he has given security for the payment of the duties, then, perhaps, the rule referred to in the judgment of Chancellor *Walworth*, and of the Scotch Court, might apply. But, as at present advised, it would not apply to this case, for the goods are not and were not bonded in the consignee's name."

In the present case the goods have left the possession of the carrier, and, as consignees of the goods, *Bendelari & Co.* bonded them in their own name, and *transitus* is at an end. To hold otherwise would be to lay down a rule that so long as the duties were unpaid the *transitus* continues.

As to stoppage *in transitu*, see *Lickbarrow* v. *Mason* (2); *Blackburn* on Sales (3); *Benjamin* on Sales (4); *Roger* v. *Comptoire d'Escompte de Paris* (5); *Cabeen* v. *Campbell* (6); *Covell* v. *Hitchcock* (7).

Mr. *J. O'Donohoe*, in reply.

(1) 19 Faculty Coll. 253.
(2) 1 Smith's L. C. 819.
(3) P. 224.
(4) 1st Am. Ed. 720.
(5) L. R. 2 P. C. 393;
(6) 30 Penn. 254.
(7) 23 Wend. 612.

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THE CHIEF JUSTICE:

I had occasion to consider the question of stoppage *in transitu* in cases discussed in the Court of Queen's Bench in *Ontario*, shortly before I left that Court, particularly in *Lewis* v. *Mason*, cited on the argument. I refered to many of the cases in the judgment which I delivered in that Court, and I have considered the cases reported, and referred to in the decision of *Lewis* v. *Mason*, and I do not think it necessary that we should delay giving judgment, as all my learned Brothers are agreed. I have also carefully read and considered the judgments of the learned Judges in the Court of Common Pleas of *Ontario*, in *Graham* v. *Smith*, and the learned Judges in this case in the Court of Appeals, and I have no doubt that the conclusion arrived at by the learned Judges in the Court of Appeals is correct. Further consideration has satisfied me, that when goods have reached their place of destination and have been delivered by the consignor to the consignee, who has bonded them in his own name, and who has sold and delivered part of the same consignment of goods, the *transitus* must be considered at an end. I have used the word delivered by the consignor to the consignee in the sense that the consignor has performed his contract by bringing the goods to their place of destination, and, as in this case, has been paid his freight, so that he has no lien on them.

RITCHIE, J.:—

The *transitus*, so far as the carrier was concerned, was clearly at an end, and though the consignee may not have had the actual corporal possession of the goods, I think entering the goods at the Custom House, warehousing them under the Revenue warehousing system,

and giving his bond for the duties, thereby satisfying all the requirements of the law, was an acceptance of the goods by the consignee, and equivalent to taking actual possession of them, and the warehouse became the warehouse of the vendee as between him and the vendor, and that, consequently, the *transitus*, so far as the vendor was concerned, was at an end, and his right of stoppage ceased to exist. I therefore concur with His Lordship the Chief Justice in dismissing the appeal with costs.

STRONG, J.:—

The possession by the Custom House authorities in this case was that of the vendee. The system of bonding is merely to facilitate trade, and numerous cases shew that goods in bond may be dealt with by a mere transfer of delivery orders. The Custom House officer undertook to hold, not for the vendor, but for the purchaser. The case is therefore precisely the same as if the goods had come into the actual possession of the vendee, and had then been deposited by him with a bailee. The Scotch case of *Strachan* v. *Knox and Company's Trustee* (1) is in point, and the doctrine laid down in that case is applicable to the present appeal.

TASCHEREAU and FOURNIER, J. J., concurred.

Appeal dismissed with costs.

Solicitor for Appellants: *John O'Donohoe.*

Solicitors for Respondent: *Foster, McWilliams & Clarke.*

(1) 1 *Bell's* Commentaries, 7th ed., 185; 19 Faculty Coll. 253.