JAMES P. LANGLEY (PLAINTIFF) ....APPELLANT.

AND

WALDEMAR KAHNERT (DEFENDANT) ..... RESPONDENT.

1905

*June 8.

*June 13.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Title to goods—Sale or transfer—Retention of ownership—R.S.O. [1897] *ch.* 148, *sec.* 41.

K., a manufacturing furrier, by agreement with a retail trading company, placed a quantity of his goods with the latter which could sell them as they pleased, paying on each sale, within 24 hours thereafter, the price mentioned in a list supplied by K. K. had the right to withdraw from the company any or all such goods at any time and all remaining unsold at the end of the season were to be returned. While still in possession of a quantity of K.'s goods the company made an assignment for benefit of creditors and they were claimed by the assignee.

Held, affirming the judgment of the Court of Appeal (9 Ont. L.R. 164), which maintained the verdict for defendant at the trial (7 Ont. L.R. 356) that the property in and ownership of the goods never passed out of K. and the transaction was not one within the terms of R.S.O. [1897] ch. 148, sec. 41.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial (2) in favour of the defendant.

The facts of this case are stated in the following admissions signed by counsel for the respective parties.

"The plaintiff and the defendant by their counsel for the purposes of this action mutually agree to admit the following to be facts, to be added to by such evidence as either party sees fit to offer at the trial:

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Idington JJ.

(1) 9 Ont. L.R. 164. (2) 7 Ont. L.R. 356.

1905

LANGLEY v. KAHNERT.

"The defendant was a manufacturing furrier, also engaged in the retail fur trade, during the time that the matters in question arose. The plaintiff is the assignee for creditors of the Richard Simpson Company, Limited, lately doing business on Yonge street, Toronto. The Richard Simpson Company became insolvent and assigned to the plaintiff on or about January 16th, 1903.

"Early in November of 1902, the Richard Simpson Company and the defendant entered into an arrangement by which the defendant agreed to place with the Richard Simpson Company to be exposed for sale, at their place of business, certain furriers' goods for which that company gave to the defendant, amongst others, the receipts produced. The goods so to be placed were manufactured by the defendant, but bore no mark or label containing the name or address of the manufacturer. The arrangement was verbal, no attempt being made to comply with the provisions of R.S.O. ch. 149 (if applicable, which is not admitted by the defendant), nor with the provisions of sec. 41, R.S.O. ch. 148 (if applicable, which likewise is not admitted by the defendant). The Richard Simpson Company were to have the right to sell any of such goods to whom they pleased, without reference to Kahnert, and for such prices as they saw fit, but the company undertook to pay to the defendant within twenty-four hours after any sales being made of such goods, the amounts of the net cash prices placed by the defendant upon such goods so sold, and the company had the right to retain for itself any sum realized on such sales over and above such fixed net prices. The defendant had the right to withdraw from the Richard Simpson Company any or all such goods at any time. During the season certain goods

so placed were at the defendant's request returned to him by the Richard Simpson Company. Any of the said goods unsold by the Richard Simpson Company, at the end of the season, were to be returned to the defendant. The goods were at first placed with the Richard Simpson Company only until the 1st of January, but later it was arranged that they might be kept for an indefinite further period. By agreement these goods, while with the Richard Simpson Company, were to be at their risk as to loss or destruction by burglary, fire, etc. When these goods were sent out by the defendant they were entered in a special account in his shipping book at pages 132 and 133. Whenever the Richard Simpson Company remitted proceeds of sales of such goods the defendant entered the same as part of his cash sales upon the date of receipt as "cash received from sales of merchandise."

"Certain other goods were sold by the defendant to the Richard Simpson Company during the same period on terms of credit, 7 per cent. off for payment within thirty days, and 10 per cent. off for payment within ten days. These goods were entered in a separate account in the shipping book of the defendant at page 250. Some of this latter class of goods, taken in the first place by the Simpson Company on approbation, were retained by them without payment and treated by both parties as part of the account first above mentioned.

"At the time of the assignment to the plaintiff the Richard Simpson Co. had a large quantity of the aforesaid goods in their possession, which the plaintiff went into possession of along with the general stock, but which, on demand of the defendant and under threat of action, the plaintiff handed over to the defendant, without prejudice to the rights of creditors

1905

LANGLEY v. KAHNERT.

of the Richard Simpson Co., and pursuant to the terms of four certain letters now produced which passed between Messrs. Anglin & Mallon, acting for the defendant, and the plaintiff and his solicitor. The goods so handed over are, with the exception of one article (a mink ruff, No. 533, $15.00), the articles contained in the list produced and market Exhibit 1 on the examination of the defendant for discovery. All the articles contained in the said list were articles placed with the Richard Simpson Co. under the agreement first above mentioned, except No. 16, a coon and Persian caperine, $15.50; No. 19, coon and Persian caperine, $15.50; No. 20, Isabella fox ruff (557) $30.00, and No. 29, mink ruff (533) $15.00, not returned. These four articles were sent to the Richard Simpson Co. upon sale account, but "on approbation," and were never returned by the Simpson Co. They remained in the hands of the company at the time of the assignment, either still on approbation or treated by the parties as part of the goods under the agreement first above mentioned.

FRANK A. ANGLIN,
Counsel for defendant.
W. R. SMYTH,
Counsel for plaintiff."

The plaintiff contended that under these facts the arrangement was governed by sec. 41 of R.S.O. [1897] ch. 148, which is as follows:

41—(1) In case of an agreement for the sale or transfer of merchandise of any kind to a trader or other person ,for the purpose of resale by him in the course of business, the possession to pass to such trader or other person, but not the absolute ownership until certain payments are made or other considerations satisfied, any such provision as to ownership shall be against creditors, mortgagees, or purchasers be void and the sale or transfer shall be deemed to have been absolute, unless. * * * *

1905

LANGLEY v. KAHNERT.

A. C. Macdonell for the appellant cited *Ex parte White*(1); *Mason* v. *Lindsay*(2).

Day for the respondent referred to *Helby* v. *Matthews*(3); *Whitfield* v. *Brant*(4); *Ex parte Bright* (5).

THE CHIEF JUSTICE.—It seems to me clear that Simpson & Co. never bought the goods now in question from the defendant, and never were possessed of them *animo domini*. They were invested by the defendant with the *jus dispondendi*, but not exclusively.

The fact that the defendant had at any time, as long as they remained in the company's store, the right to have them returned to him, at his will, seems to me totally incompatible with any claim of ownership by the company. It was surely *his* goods that would be so returned, not the company's, and on the date of the assignment they had never ceased to be his property. And I fail to see how a sale can be implied where on the face of the agreement there was actually no sale.

As to those now in question the defendant never had an action against the company for goods sold and delivered. He never was as to those a creditor of the company. That he became their creditor by the assignment, as appellant would contend, seems to me untenable. I cannot see that this assignment cut out the defendant from the right he had under the agreement of ordering the goods back to his own store; nor how it would have the effect of forcing on the company a purchase which, under their agreement, they had a right to make but never made.

It is argued, however, by the appellant that by sec.

(1) 6 Ch. App. 397.
(2) 4 Ont. L.R. 365.
(3) [1895] A.C. 471.
(4) 16 M. & W. 282.
(5) 10 Ch.D. 566.

1905

LANGLEY v. KAHNERT.

The Chief Justice.

41, ch. 148 R.S.O., the absolute ownership of the goods must, as against him, be deemed to have passed to the company. That section reads as follows:

> In case of an agreement for the sale or transfer of merchandise of any kind to a trader or other person, for the purpose of resale by him in the course of business, the possession to pass to such trader or other person, but not the absolute ownership until certain payments are made or other considerations satisfied, any such provision as to ownership shall as against creditors, mortgagees or purchasers be void and the sale or transfer shall be deemed to have been absolute * *

This case, in my opinion, is not governed by that section.

These goods cannot be said to have been intended for a *resale* by the company. The word resale would import, in this case, if appellant's contention prevailed, that the defendant had sold them, but he never did. Neither was there any agreement for a sale by the defendant to the company of goods to be resold by them. There was to be no sale at all by the defendant to the company at any time, where the company sold the goods to third parties in the course of their business. When the company sold it was not their title to the ownership of the goods that they passed to the purchasers; they never had it. Till then it had remained in the defendant. The statute contemplates a sale or transfer by which a conditional or qualified ownership passed, or an ownership with a resolutory clause on default of payment, such as was the case, for instance, in *Forristal* v. *McDonald*(1), or *Banque d'Hochelaga* v. *Waterous Engine Works Co.*(2). When it says that the *absolute* ownership shall only pass under certain subsequent conditions it assumes that a qualified ownership had previously passed.

(1) 9 Can. S.C.R. 12. (2) 27 Can. S.C.R. 406.

Now here, I repeat, none whatever had passed to the company as to the goods now in question.

Had Kahnert failed instead of the company and assigned to his creditors, these goods would have passed to his assignee. The company could not have refused to deliver them up on the ground that they were their property.

I would dismiss the appeal with costs.

SEDGEWICK, DAVIES and NESBITT JJ. concurred.

IDINGTON J.—The defendant delivered some goods to the Richard Simpson Company, and got them back, after the company had made an assignment, without prejudice to the rights of either party to this suit. The learned trial judge, Sir William Meredith, stated in his judgment the facts upon which the questions raised here are to be disposed of:

> The arrangement was that the Simpson Company might sell the whole or any part of the goods to whomsoever they chose, and for such price, and on such terms as they might see fit; but they were, whenever a sale was made, to pay in cash to the defendant the price of the article sold, according to a price list which was furnished to them by the defendant when the goods were from time to time delivered to the Simpson Company. The company had also the right, according to the testimony of the defendant himself, whether they had made a sale or not, to become the owners of the whole or any part of the goods at the prices named in the list, and they had also the right at any time to return the whole or any of the goods which remained unsold.

Upon this concise statement of facts, which the appellant admits to be correct, it is contended that the Simpson Company having made an assignment to the appellant under and pursuant to R.S.O. 1897, ch. 147, and amending Acts, the title to the goods in question passed to him as such assignee. The company never

1905

LANGLEY v. KAHNERT.

Idington J.

did anything in the way of asserting the right to become purchasers of these goods.

As between the parties the respondent was entitled at the time of the assignment to a re-delivery of the goods by the Simpson Company.

It is claimed, however, that the provisions of sec. 41 of the Bills of Sale and Chattel Mortgages Act, R.S.O. ch. 148, had the effect upon and by virtue of this assignment of defeating this right and vesting the title to the goods in the assignee. The section reads as follows:

> 41.—(1) In case of an agreement for the sale or transfer of merchandise of any kind to a trader or other person for the purpose of resale by him in the course of business, the possession to pass to such trader or other person, but not the absolute ownership until certain payments are made, or other considerations satisfied, any such provision as to ownership shall as against creditors, mortgagees or purchasers be void, and the sale or transfer shall be deemed to have been absolute, unless * * in writing, etc.

The transaction not being in writing is not within the exception in the section, and, therefore, the questions raised must turn upon the interpretation of these words I have quoted.

It is not possible to call what took place a sale. It is urged that it was a transfer, and that as such it is within this section.

I am unable to understand how this helps the appellant unless the word "transfer" is given an unusual meaning and one that does not truly and correctly represent the transaction here.

There was nothing in the transaction in the way of the conveyance of right, title or property.

The company became merely the bailees of the property; and their right to it or dominion over it never extended beyond that, and never was intended to ex-

tend beyond that, until something should be done that never was done.

The section presupposes, by its very words, that there is some provision made between the parties; by the agreement it strikes at, that relates to such a conditional or suspensive ownership as if got out of the way would leave the property vested in the debtor. It makes or purports to make "such provision as to ownership" as against creditors void.

There was only one possible thing here that had or could have had any relation to ownership, and that was the option of the bailee to purchase. If that is made void what remains?

Having regard to the long past history by which the common law rights governing dealing with personal property have been invaded by one restriction after another for the purpose of protecting innocent purchasers and creditors, or one or other of them, and the principles of interpretation applicable to such legislation, I think it would be manifestly erroneous to give this latest attempt a wider meaning than the learned trial judge and the Court of Appeal have given it.

One can imagine many cases in every day's transactions in which, by giving to this section the meaning we are urged to give it here, the property of innocent men would be exposed to seizure under execution for debts they knew not of.

It is only the same right as an execution creditor would have that this kind of assignee has.

I think the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. R. Smyth.*

Solicitors for the respondent: *Day & Ferguson.*