PROVOST & PROVOST (1961) LIMITÉE (*Petitioner*) ..... APPELLANT;

AND

SPOT SUPERMARKETS CORPORATION (*Intervenant*) ..... RESPONDENT;

AND

CONSERVERIE ST-DENIS LIMITÉE (*Debtor*);

AND

ARMAND GAGNON and LLOYD H. PAUL (*Mis-en-Cause*).

1968
*Dec. 9
1969
Jan. 28

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

Sale—Purchase of canned vegetables—Goods paid for in advance but not delivered—Goods not weighted, counted or measured before winding-up of seller—Whether ownership has passed to buyer—Sale of stock in trade by liquidators—Buyer has only pecuniary claim against assets—Civil Code, art. 1474.

In 1963, the petitioner contracted to purchase a large quantity of canned vegetables from C Co., against which a winding-up order was subsequently made. Under the contract, the goods were paid for in advance but not delivered. Some of them were not in existence at the time of the contract. In subsequent weeks some of the goods were delivered but when the winding-up order was made against C Co., a substantial quantity remained to be shipped. The liquidators invited tenders for the purchase of all the stock in trade of C Co. and accepted the tender of the respondent S Co. The petitioner filed a petition asking that it be declared owner of the goods of which it had not received delivery. The liquidators did not contest the petition. S Co. intervened and claimed ownership of the disputed goods. The trial judge granted the petition, but his decision was reversed by the Court of Appeal. The petitioner appealed to this Court.

Held: The appeal should be dismissed.

Since the goods had not been identified before the liquidation pursuant to art. 1474 of the *Civil Code*, the petitioner had only a pecuniary claim against the assets of C Co. and not a right in rem to the goods over which it claimed ownership.

Vente—Achat de conserves alimentaires—Marchandises payées d'avance mais non livrées—Marchandises non pesées, ni comptées ni mesurées avant la mise en liquidation du vendeur—Propriété non transférée à l'acheteur—Vente du fonds de commerce par les liquidateurs—Acheteur a seulement un droit de créance contre la masse—Code Civil, art. 1474.

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*PRESENT: Fauteux, Abbott, Martland, Hall and Pigeon JJ.

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En 1963, la requérante a acheté de la compagnie C, qui fut subséquemment mise en liquidation, une grande quantité de conserves alimentaires. En vertu du contrat, les marchandises étaient payées d'avance mais non livrées. Certaines de ces marchandises n'existaient pas au moment du contrat. Une certaine quantité a été livrée durant les semaines subséquentes, mais lorsque la compagnie C a été mise en liquidation une grande quantité n'avait pas encore été expédiée. Des soumissions furent demandées par les liquidateurs pour l'achat du fonds de commerce de la compagnie C, et celle de la compagnie S fut acceptée. La requérante a produit une requête demandant d'être déclarée propriétaire des marchandises dont elle n'avait pas encore reçu livraison. Les liquidateurs n'ont pas contesté la requête. La compagnie S a produit une intervention et a revendiqué la propriété des marchandises en question. Le juge au procès a accueilli la requête, mais sa décision fut renversée par la Cour d'appel. La requérante en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

Puisque les marchandises n'avaient pas été identifiées avant la liquidation conformément à l'art. 1474 du *Code Civil*, la requérante avait seulement un droit de créance contre la masse et non pas un droit réel sur les marchandises dont elle revendiquait la propriété.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], renversant un jugement du Juge Montpetit. Appel rejeté.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Montpetit J. Appeal dismissed.

Jules Dupré, Q.C., for the petitioner, appellant.

R. S. Litvack, for the intervenant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—In August 1963, appellant contracted to purchase a substantial quantity of canned vegetables from Conserverie St-Denis Ltée, (against which a Winding-Up Order was subsequently made and which is hereinafter referred to as the Insolvent). The contract was of a nature known in the trade, apparently, as G.I.N.D., "goods invoiced and not delivered". The merchandise was paid for in advance, but not delivered. Some of it was not in existence at the time the contract was made.

In subsequent weeks, some of the merchandise was delivered but, as at October 26, 1963, some 9,541 cases of assorted vegetables remained to be shipped.

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Shortly thereafter a fire occurred at the premises of the insolvent and, on November 8, 1963, the latter wrote appellant, confirming the undelivered quantities and informing appellant that its merchandise had been destroyed.

On December 23, 1963, solicitors for appellant wrote the insolvent stating that, in view of the nature of the sale, title had not passed to appellant and, accordingly, any loss suffered as a result of the fire was to be borne by the insolvent. This letter contained the following statement:

. . . Ces marchandises ne sont donc pas, jusqu'au moment de leur livraison, spécifiquement désignées comme étant la propriété de nos clients et celles que vous prétendez avoir été détruites dans l'incendie—car il apparaît qu'une quantité considérable de ces marchandises a échappé au sinistre—ne sont pas nécessairement les marchandises de nos clients. Dans un genre de vente comme celle-ci, la marchandise ne devient individualisée qu'au moment de la livraison et la garde et les soins de détention de ces marchandises sont entièrement l'objet de votre responsabilité. Nos clients, en effet, ne sont pas appelés à payer de frais d'entreposage pour ces marchandises, parce que, précisément, la marchandise n'est pas déposée ou remisée en leur nom dans un endroit spécifique, comme la chose se rencontre dans les entrepôts publics.

In February 1964, appellant instituted an action against the insolvent before the Superior Court, asking for judgment ordering the latter to deliver the balance of the merchandise purchased, or, in the event of the insolvent's failure so to do, condemning it in the sum of $28,707.98. The action was accompanied by a conservatory attachment in virtue of which, assorted merchandise found by the bailiff at the premises of the insolvent, was placed under seizure, but the goods in issue here were not at that time identified by the bailiff.

The insolvent pleaded to the action, but subsequently confessed judgment and, on June 1, 1964, judgment was rendered declaring the conservatory attachment good and valid, ordering the insolvent to deliver the merchandise «jusqu'à concurrence des quantités et qualités décrites dans le bref», in default of which, the insolvent was condemned to pay to appellant the sum of $28,707.98, with interest and costs.

However, no further deliveries were made to appellant, and on August 20, 1964, a winding-up order was issued against the insolvent. By judgment of the Superior Court, the mis-en-cause were subsequently appointed joint liquidators.

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On or about September 14, 1964, appellant filed with the liquidators proof of claim, as an unsecured creditor, in the amount of $28,707.98 plus interest, in accordance with the terms of the judgment of June 1, 1964 above referred to.

Subsequently, the liquidators invited tenders for the purchase of all the stock in trade of the insolvent, and the tender of the respondent, for a total price of $226,000, was accepted, subject to the following condition:

> . . . In the event that it is subsequently established that any other party or parties have a right in the said merchandise, or in any part thereof, then, and to such extent, the purchase price hereinabove mentioned shall be proportionally reduced.

Delivery of this stock in trade was made from time to time to respondent by the liquidators following an inventory completed on December 8, 1964.

On February 5, 1965, appellant filed a petition, which initiated the present litigation, asking that it be declared owner of the specified quantity of canned vegetables above referred to. The liquidators did not contest the petition, but submitted to justice. The respondent intervened and claimed ownership of the merchandise in question under its contract with the liquidators. Appellant's petition was granted by the learned trial judge, but that judgment was unanimously reversed by the Court of Queen's Bench[1].

The facts which I have recited are set out somewhat more fully, in the reasons of Taschereau J., who delivered the unanimous judgment in the Court below. They are not now really in dispute.

The issue here, as in the Court of Queen's Bench, was stated concisely by Taschereau J. as follows:

> Il s'agit donc pour cette Cour de décider si, par l'application de l'article 1474 c.c., les marchandises réclamées par la requérante ont été comptées, pesées ou mesurées et ainsi identifiées avant la mise en liquidation de la débitrice, ce qui lui donnerait sur icelles un droit réel opposable à tout le monde, dès lors à l'intervenante. Dans le cas contraire, la requérante n'aurait qu'un droit personnel qui n'existerait qu'à l'encontre de la débitrice et ne pourrait être opposé aux tiers.

After discussing the authorities, and referring to certain evidence as to identification of the goods, he said:

> J'en conclus que les diverses quantités de conserves alimentaires qui font l'objet du présent litige n'ont pas été identifiées avant la faillite, conformément à l'article 1474 c.c., et que, dès lors, l'intimée n'a qu'un droit

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de créance contre la masse et non un droit réel sur les marchandises dont elle revendique la propriété. C'est d'ailleurs ainsi qu'elle a compris la chose, car autrement elle n'aurait jamais écrit la lettre du 23 décembre 1963 et son action du 7 février 1964 aurait été accompagnée d'une saisie revendication et non pas d'une saisie conservatoire.

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I am in agreement with those findings, I am content to adopt them, and I do not find it necessary to add anything to what the learned judge has said.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the petitioner, appellant: Duranleau, Dupré & Gagnon, Montreal.

Attorneys for the intervenant, respondent: Chait, Aronovitch, Salomon, Gelber & Bronstein, Montreal.