CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

J. O. HÉROUX AND MONTCALM ST-GERMAIN (DEFENDANTS) ..... APPELLANTS;

AND

LA BANQUE ROYALE DU CANADA (PLAINTIFF) ..... RESPONDENT.

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* Oct. 29, 30.
* Nov. 8.

O. E. ST-GERMAIN AND MONTCALM ST-GERMAIN (DEFENDANTS) ..... APPELLANTS;

AND

ALLAN S. NICHOLSON AND ALBERT E. CATES (PLAINTIFFS) ..... RESPONDENTS.

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

Practice and procedure — Judgment — Execution — Moveable property — Bailiff's sale—Seizure super non possidente—Validity of seizure and sale—Whether adjudicataire acquires title—Right of owner of property to revendicate it against adjudicataire—Articles 665 and 668 C.C.P.—Article 2268 C.C.

Judicial seizure and sale of moveable property not in the possession of a judgment debtor will not deprive the true owner of his title and will not confer on the *adjudicataire* a title which cannot be defeated and which he may oppose to the revendication of the true owner: neither in the doctrine nor in the jurisprudence can be found any expression of opinion to the contrary.

In order to justify the application of articles 665 and 668 of the Code of Civil Procedure and of article 2268 of the Civil Code, there must have been a lawful seizure and sale of moveable property, in which case only can it be said that "the thing has been sold under the authority of law."

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* PRESENT:—Rinfret, Crocket, Kerwin, Hudson and Taschereau JJ.

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When, under a writ of execution of a judgment, moveable property has been sold at a bailiff's sale, the owner of such property has the right to revendicate it against the *adjudicataire*, when the seizure has taken place *super non possidente:* there having been no valid seizure under the writ of execution, the *adjudicataire* has acquired no title to the property.

No opinion is expressed as to whether moveable property seized in the possession of the judgment debtor, although he be not the owner, may be revendicated by the true owner, after the judicial sale has taken place, against a purchaser who has paid the price (always saving the case of fraud or collusion).

Brook v. *Booker* (41 Can. S.C.R. 331; Q.R. 17 K.B. 193) foll.

APPEALS from two judgments of the Court of King's Bench, appeal side, province of Quebec, reversing the judgments of the Superior Court, Boulanger J. and maintaining the respondents' seizures in revendication of moveable property sold at a bailiff's sale.

The material facts of the cases and the questions at issue are stated in the above head-note and in the judgment now reported.

Gustave Monette K.C., L. Dussault K.C. and *D. Goulet* for the appellants.

Louis Morin K.C. for the respondents.

The judgment of the Court was delivered by

RINFRET J.—These two cases were heard together, on the same evidence, both in the Superior Court and in the Court of King's Bench (appeal side). They were submitted to this Court on the same argument; and the reasons for judgment apply to both.

The question is whether the owner of moveable property may revendicate it against the *adjudicataire* at a bailiff's sale, when the seizure has taken place *super non domino et non possidente.* In the Superior Court, it was held that the seizure in revendication was not open to the owner; but, in the Court of King's Bench, the majority of the judges held otherwise and maintained the seizure in revendication.

The plaintiffs-respondents, Nicholson and Cates, lumber merchants of Toronto, alleged that they were owners of lumber at Kanasuta, in Northern Quebec, and that their

lumber was sold in execution of a judgment obtained by the Quebec Workmen's Compensation Commission against James Charron and H. M. Charron, who had neither the property nor the possession of the lumber; that the sale was fraudulent; that all its proceedings were irregular, illegal and entirely null and void; and they asked that the sale be annulled and set aside; that they be declared the owners of the lumber and that the seizure in revendication thereof, which accompanied the action, be maintained.

Under the same circumstances and for the same reasons, The Royal Bank of Canada claimed possession against the *adjudicataires* of certain machinery seized in the mill at Kanasuta in execution of the same judgment obtained by the Quebec Workmen's Compensation Commission.

The writ of execution *de bonis,* on the authority of which the moveable property in question was seized, issued from the Superior Court, in the city of Quebec, in favour of the Quebec Workmen's Compensation Commission against James Charron and H. M. Charron, who are described in the writ as

> formerly doing business under the name and style of North Western Lumber Company and having a place of business at Kanasuta, Temiskaming, logging and shipping operations, Kanasuta, Temiskaming, P.Q.

The command contained in the writ was

> de prélever des biens mobiliers des dits employeurs (i.e., James Charron and H. M. Charron) dans votre district la somme de $527.35 courant, étant le montant de la dite dette, pénalités et des dépens pour lesquels la requérante est autorisée à exécuter comme susdit.

In 1937, the Charrons organized a limited company under the name of The North Western Timber Company Limited. This new organization, on the 26th of April, 1938, leased a mill from the respondent, The Royal Bank of Canada. The machinery now revendicated by the bank was included in that lease.

In 1939, the new company entered into a contract to sell to the respondents, Nicholson and Cates, 500,000 feet of sawn wood. The lumber was sawn and put in piles. The respondents Nicholson & Cates fulfilled all their obligations to the letter; and, in April, 1939, the operations under the contract were completed and the lumber was ready for shipment.

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The Court of King's Bench found that it was clearly established that the bank was the owner of the mill equipment; and the lease, already referred to, was made by the bank to the North Western Timber Company Limited.

The Court of King's Bench also found it to have been clearly established that the lumber seized in this case was cut by the North Western Timber Company, from logs belonging to it, for the respondents Nicholson and Cates, under a contract dating back to the 13th January, 1939, and that it had been delivered to the latter and paid for by them to the North Western Timber Company Limited prior to the bailiff's sale, which took place on the 25th of April, 1939.

As a matter of fact, it appears to us that the Court could have gone further and found, on the evidence, that the delivery had taken place prior to the seizure itself made by the plaintiff.

There can be no doubt that, at the time of the seizure, both respondents were respectively the owners of the moveable property which they revendicate and that such moveable property was in the legal possession of the respondents, while in the physical possession of the North Western Timber Company Limited.

The trial revealed that, after 1937, the Charrons, or their partnership, known under the name and style of the North Western Lumber Company, had not done any business at that place and, moreover, that they never had a mill in the province of Quebec.

The writ of execution itself, as already pointed out, described them as

> formerly doing business together under the name and style of North Western Lumber Company.

In 1939, and more particularly at the time of the seizure, the North Western Timber Company Limited was alone doing business. It had rented the mill from the bank, and it was that company which had entered into the contract with the respondents Nicholson and Cates, the Charron partnership firm having no interest therein.

It would appear that these facts were well known to the local people, and, in particular to the bailiff, M. St-Germain, and to the appellant Héroux, who was the postmaster in the locality.

At the bailiff's sale, the mill equipment belonging to the bank, the value of which approximately was $5,000, was adjudicated to the respondent Héroux for the insignificant sum of $70; and the lumber belonging to Nicholson and Cates, the value of which was approximately $9,000, was adjudicated to the appellant St.-Germain (brother of the bailiff) for the likewise insignificant sum of $200.

The judgment of the Superior Court, after having found that the essential formalities necessary for the validity of the seizure and sale appeared to have been complied with, and that there was no evidence of any collusion between the *adjudicataires* and the bailiff, and that there was equally no evidence of fraud, bad faith, or irregular dealings on their part, held that, the *adjudicataires* having paid the price in the regular way and having thereby become full and complete owners of the moveable property adjudged to them at the judicial sale, and the proceeds of the sale having been regularly remitted by the bailiff to the parties entitled to them, the *adjudicataires* were protected by article 668 of the Code of Civil Procedure by force of which

> Without prejudice to the recourse of the party aggrieved against the seizing creditor and those acting on his behalf, no demand to annul or rescind a sale of moveable property under execution can be received against a purchaser who has paid the price, saving the case of fraud or collusion.

The Superior Court admitted that the judicial sale could have been set aside if it had been established that no valid and regular seizure and sale had taken place; but it found that these conditions had not been established in the present case.

The majority of the Court of King's Bench, on appeal, accepted the proposition of law that

> the provisions of article 668, C.P., are predicated upon the assumption that the seizure itself was valid;

but it held that, in the premises, the seizure was absolutely null, because

> in virtue of article 613 C.C.P. a creditor may seize in execution the moveable property of his debtor in such debtor's possession and, therefore, the mandate of a bailiff in charge of a writ of execution does not extend to the seizure of any moveables of which the debtor is neither the owner nor in possession.

The Court further stated that the jurisprudence of the province of Quebec has repeatedly confirmed the rule that

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the seizure and the sale of property made *super non domino et non possidente* are absolutely null; and it referred to its own decision in *Brook* v. *Booker* (1).

It may be well to note at the outset that this is a case of the judicial seizure and sale of moveable property and that anything said in connection therewith may not be taken as necessarily applying to a judicial seizure and sale of immoveable property.

Article 613 C.C.P. on which the judgment appealed from is based reads as follows:

> 613. A creditor may seize in execution the moveable or the immoveable property of his debtor, in such debtor's possession, as well as any corporeal moveables in the possession of the creditors or of third parties who consent thereto.

For the purpose of this case, it is sufficient to note that, under that article of the Code, the creditor may seize in execution the moveable property of his debtor which is "in such debtor's possession." The remainder of the article may be disregarded here.

Thus the moveable property which may be seized in execution by a creditor must be the property of his debtor, and it must be in his debtor's possession. Such is the requirement of the Code; and the writ of seizure issued by the court in favour of the Quebec Workmen's Compensation Commission against the Charrons specifically orders "de prélever des biens mobiliers des dits employeurs" (that is to say: of the Charrons) the charges and the costs mentioned in the writ.

However, it is not to be denied, notwithstanding the clear wording of article 613 C.C.P., that it must be read in conjunction with other articles of the same Code and also with the articles of the Civil Code which may be found to have a bearing upon the subject. Of course, counsel for the appellants relied on this obvious argument and pointed to article 668 C.C.P., above reproduced, and also to article 665 C.C.P.:

> 665. The adjudication of moveable property under execution transfers by law the ownership of the things thus adjudged.

and then to article 2268 C.C. reading in part as follows:

> If the thing has been sold under the authority of law, it cannot, in any case, be revendicated.

(1) (1907) Q.R. 17 K.B. 193.

It is contended that, by force of these several articles, the moveable things, though belonging to the respondents, may no longer be revendicated, because they were purchased by the appellants at a sale made "under the authority of law" and that

> no demand to annul or rescind a sale of moveable property under execution can be received against a purchaser who has paid the price, saving the case of fraud or collusion;

and they point to the fact that no fraud or collusion has here been found.

The respondents, however, argue that, in order to allow articles 665 and 668 of the Code of Civil Procedure and article 2268 of the Civil Code to have their full play, there must have been a lawful seizure and judicial sale of moveable property, and that such is the only proper meaning to be attributed to these articles. That interpretation is clearly in accordance with ordinary principles of construction.

Indeed, in *Brook* v. *Booker* (1), as late as 1907, a sale by a bailiff pretending to act under a writ of execution of moveable things of which no lawful seizure had been made was held not to be "a sale of moveable property under execution," within the meaning of art. 668 C.C.P.; and an action to annul or rescind it was held, therefore, to lie against the *adjudicataire* who had paid the price. That judgment was confirmed in this Court (2) and Sir Charles Fitzpatrick, the then Chief Justice, delivering the judgment (with which all the other judges concurred), referred to the several articles of the Code above mentioned and said:

> I appreciate the importance of giving effect to the maxim "En fait de meubles, possession vaut titre" (article 2268 C.C.) and of maintaining the validity of a judicial sale; and I freely concede that irregularities of procedure should not invalidate the title of a purchaser in good faith of moveables at a judicial sale (art. 668 C.C.P.). But there is another principle of at least equal importance which is a necessary part of the judicial system of every British country, to this effect, that no man shall be deprived of his property except by consequence of the law of the land. The general principle of law is (art. 1487 C.C.) that the sale of a thing which does not belong to the seller is null. By way of exception to this general rule arts. 1490 and 2268 C.C. provide, in effect, that corporeal moveables sold under authority of law cannot be reclaimed. The commentators on the articles in the Code Napoleon, which correspond with the articles of the Quebec Civil Code—there being no article in the

(1) (1907) Q.R. 17 K.B. 193. (2) (1908) 41 Can. S.C.R. 331.

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French Code which corresponds with art. 668 C.C.P.—say that this exception to the general rule is based upon the maxim *en fait de meubles, possession vaut titre.*

And the learned Chief Justice referred to Planiol, vol. I, nos 1119 and 1124; and, pointing to the fact that, in the *Brook* case (1), there was no legal seizure, he added:

Consequently no "sale under execution" (art. 668 C.C.P.) or "under authority of law" (arts. 1490 and 2268 C.C.) ever took place.

This Court held, accordingly, that there having been no valid seizure under the writ of execution, the *adjudicataire* had acquired no title to the property and the sale to him should be rescinded.

Brook v. *Booker* (1) is, therefore, an authority binding on this Court to the effect that, in order to justify the application of arts. 665 and 668 of the Code of Civil Procedure and of art. 2268 of the Civil Code, there must have been a lawful seizure and sale, in which case only can it be said that "the thing has been sold under the authority of law."

In our view, this point does not require to be further elaborated. Interpreting the law in the light of *Brook* v. *Booker* (1) and of the jurisprudence in the province of Quebec, it must be held that the *adjudicataire* cannot hold moveable property, even if acquired through execution by a bailiff, if such moveable property was seized *super non possidente.*

It may be that art. 668 C.C.P. goes the length of declaring that moveable property seized in the possession of the judgment debtor, although he be not the owner, may not be revendicated by the true owner, after the judicial sale has taken place, against a purchaser who has paid the price (always saving the case of fraud or collusion). Such a consequence may result from the fact that the judgment debtor was found in possession of the moveable property at the time of the seizure and that, by force of art. 2268 C.C., *"en fait de meubles possession vaut titre"*; that is to say, in the wording of the article:

Actual possession of a corporeal moveable, by a person as proprietor, creates a presumption of lawful title.

This may be left for decision when a case of such a nature is before the Court.

(1) (1908) 41 Can. S.C.R. 331.

But we can find nowhere, either in the doctrine or the jurisprudence, that judicial seizure and sale of moveable property not in the possession of a judgment debtor will deprive the true owner of his title and will confer on the *adjudicataire* a title which cannot be defeated and which he may oppose to the revendication of the true owner.

In this case, the true owners, The Royal Bank of Canada (of the machinery) and Nicholson and Cates (of the lumber seized and sold), were entitled to revendicate their property which was not found in the possession of the Charrons, of whom the bailiff was warned by the writ of execution itself that they *formerly* were doing business in partnership under the name of North Western Lumber Company. There was no lawful execution and adjudication of that moveable property within the meaning of arts. 665 and 668 C.C.P., because the property was not seized in the judgment debtor's possession; but, on the contrary, it was in the physical possession of the North Western Timber Company Limited and, in fact, in the legal possession of the respondents themselves. There was no sale "under the authority of law" such as to give effect to art. 668 C.C.P. and to art. 2268 C.C., and the appellant *adjudicataires* cannot, for those reasons, prevent the revendication of the true owners, the respondents.

We do not find it necessary to discuss any of the other points of irregularity, for the fact that the seizure was executed *super non possidente* is sufficient to declare the judicial sale, in the premises, absolutely null and void, in accordance with the pronouncement of the judgment *a quo*.

The appeal in each case should, therefore, be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellants: *Donat Goulet* and *Léon Dussault*.

Solicitors for the respondents: *Morin & Morin*.