ARTHUR H. BROOK (DEFENDANT) ... APPELLANT; 1908 *Nov. 3.

AND

G. M. BOOKER AND OTHERS (PLAINTIFFS) ..... RESPONDENTS. 1909 *Feb. 12.

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

Conditional sale—Price payable before delivery—Title to goods—Rescission of sale—Action—Legal maxims—Attachment—Execution—Possession by judgment debtor—Ownership—Procedure by bailiff—Guardian to second seizure—Sale super non domino et non possedente—Adjudication upon invalid seizure.

The hull of a steamer sunk in a canal had been attached under judicial process and, while standing on the bank at a distance from which he could not see or touch the materials, a bailiff assumed to make a second seizure, gave no notice of his proceedings to those on board the hull, and appointed a guardian other than the one placed in charge of the hull at the time of the first seizure. The execution debtor, named in the second writ, had made a bargain for the purchase of the hull subject to the price being paid before delivery, but had not paid the price nor had the property been delivered into his possession. Subsequently, the bailiff adjudicated the hull to the appellant by judicial sale at auction.

Held, that there had been no valid seizure under the second writ; that the purchaser acquired no title to the property, by the adjudication, and the sale to him should be rescinded; that, under the circumstances, there could be no application of the maxim "en fait de meubles possession vaut titre" and that the maxim "main de justice ne dessaisit pas" must be taken subject to the qualification that a seizure under judicial process places the goods seized beyond the control of an execution debtor. *The Connecticut and Passumpsic Rivers Railroad Co.* v. *Morris* (14 Can. S.C.R. 319) distinguished, and the judgment appealed from (Q.R. 17 K.B. 193) affirmed.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Idington, Maclennan and Duff JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Montreal(2), by which the plaintiffs' action was maintained with costs.

The circumstances of the case and the questions raised upon this appeal are stated in the judgment of the Chief Justice now reported.

T. Chase-Casgrain K.C. and *Alex. Casgrain* for the appellant.

Errol Languedoc for the respondents.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of King's Bench for the Province of Quebec, sitting at Montreal, confirming (Bossé and Blanchet JJ. dissenting), a judgment of the Superior Court (Archibald J.) by which a sale of movables purporting to have been made under judicial process was set aside. I would dismiss the appeal with costs.

The facts out of which the suit arose are few, and, as found by the court below, offer, in my opinion, little or no difficulty in the appreciation of their legal consequences.

In July, 1906, the respondents, marine underwriters, sold to one Légaré the hull of the steamer "Sovereign," then lying partially destroyed by fire in the Lachine Canal, a condition of the sale being "cash before delivery." It appears that, in violation of his agreement, Légaré entered into possession of the hull which he proceeded to dismantle; whereupon the re-

(1) Q.R. 17 K.B. 193. (2) Q.R. 32 S.C. 142.

spondents, as unpaid vendors, took an action against him to set the sale aside, and joined to their action a conservatory attachment. While the hull was under seizure and in the custody of the guardian in that case, one Griffin, a judgment creditor of Légaré, attached, or rather assumed to attach, under a writ of execution issued long previously, the hull, which the bailiff subsequently purported to sell under the authority of this writ to the appellant; and the present action is brought to set that sale aside. The appellant relies upon arts. 668 C.P.Q. and arts. 1490, 2005 (*a*) and 2268 of the Civil Code, and says that, in the absence of an allegation of fraud and collusion in the declaration the plaintiffs, now respondents, cannot succeed. The two courts below found that fraud was proved, although not alleged in the declaration; but I prefer to maintain the judgment on the ground that no valid seizure of the hull was made in the case of *Griffin* v. *Légaré* and that, not having been taken in execution, there could be no sale of the hull "under execution," or "under authority of law," in that case, as required by the articles above referred to. I appreciate the importance of giving effect to the maxim *en fait de meubles possession vaut titre* (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 movables at a judicial sale (art. 668 C.P.Q.). 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

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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 movables sold under authority of law cannot be reclaimed. The commentators on the articles in the Code Napoléon, which correspond with the articles of the Quebec Civil Code—there being no article in the French Code which corresponds with art. 668 C.P.Q.—say that this exception to the general rule is based upon the maxim *en fait de meubles, possession vaut titre.* Planiol, vol. 1, no. 1119. But the same author says, at no. 1124:

> *La possession vaut titre.* Il faut donc être possesseur. Ceci exclut les personnes qui n'ont pas encore la possession; *par exemple l'acheteur à qui la chose n'a pas été livrée.* Cet acheteur ne peut pas invoquer la maxime à son profit.

Here the sale was made "cash before delivery" to Légaré, the defendant in *Griffin* v. *Légaré,* and the hull of the steamer "Sovereign" was, at the time of the seizure and sale in this case, undoubtedly the property of the respondents, notwithstanding the clandestine acts of possession exercised by Légaré and, further, was then attached and *sous-main de justice,* in the case of *Booker et al.* v. *Légaré.* Admittedly, as said by Mr. Justice Bossé, in his dissenting judgment, *main de justice ne dessaisit pas;* but that legal maxim must be read according to Pothier with this qualification:

> La saisie exécution rend les meubles indisponibles et restreint, sans toutefois le supprimer, le droit qu'a le saisi d'en jouir comme propriétaire. Le saisi ne peut ni les aliéner, ni les mettre en gage, ni les prêter, ni les détruire, déplacer ou détourner d'une façon quelconque à peine de poursuite correctionnelle.

In my view of the case, this point does not require to be further elaborated. The substantial defect in the appellants' title results from the fact that there was no seizure and consequently "no

sale under execution" (art. 668 C.P.Q.), or under "authority of law," arts. 1490 and 2268 C.C. Such a sale necessarily implies that the thing sold must be placed for that purpose by legal process in the hands of justice; *placé sous main de justice,* to use the very expressive French phrase; and I agree absolutely with the two courts below that it is impossible to hold on the facts that a valid seizure was made in the case of *Griffin* v. *Légaré,* assuming the hull to have been in the possession of Légaré. Describing how a seizure is made, *La Coutume de Paris,* tome 8, nos. 2 and 3, says:

> La justice entre dans la maison du débiteur, elle prend et gage ses meubles et après l'en avoir dessaisi pour en faire un gage de justice, elle en exige la vente pour payer le saisissant.

And Judge Taschereau says, at page 94(*b*) of the case:

> Qu'est-ce qu'une saisie? Il faut, après tout, qu'il y ait un acte matériel par l'officier saisissant pour mettre la chose saisie sous la main de la justice. Si, d'une part, il n'est pas nécessaire qu'il porte la main sur les objets saisis, d'autre part il faut quelque chose de plus qu'une opération purement intellectuelle ou imaginaire. On n'a jamais prétendu qu'un huissier pouvait faire une saisie du fond de son étude.

It cannot be said that in this case the hand of justice was ever laid upon the hull of the steamer under the second seizure. Marsan, the seizing bailiff, says that he stood, when he professed to make his seizure, on the bank of the canal 500 or 600 feet distant from the hull, and his recors, Hanraty, puts the distance at 500 yards. Then Beaudoin, the new guardian in the case of *Booker et al.* v. *Légaré,* swears that, at the time the seizure is supposed to have been made, he was on or near the hull and he never saw the bailiff Marsan or his assistant, Hanraty, and, in this statement, he is corroborated by

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Rivet and Barbarie, *père*. To reverse the findings of two courts and hold that a bailiff might, under such circumstances, make a valid seizure to which he could appoint a guardian would be, in my opinion, to establish a most dangerous precedent. The seizure of movable property must be recorded by minutes made by the bailiff intrusted with the writ of execution (art. 629 C.P.Q.) and these minutes must contain a detailed description of the things seized, their number, weight, and measure, according to their nature (art. 639 C.P.Q.). How could the bailiff give these necessary details in a proper case under the conditions described by the witnesses here? To every seizure a guardian is appointed who is bound under pain of coercive imprisonment to produce at the time fixed for the sale the effects seized which were placed in his charge (arts. 657, 658 C.P.Q.). How can it be said that the guardian was ever put in possession of this hull? What sort of possession could a guardian have when he never went nearer than 600 feet to the thing seized, the waters of the canal covering the intervening space? I agree unhesitatingly with the trial judge and with the majority in appeal that no valid seizure was made and that the appellant could not acquire a title from the bailiff in the circumstances. We have been referred to the case of *The Connecticut & Passumpsic Rivers Railroad Co.* v. *Morris*(1), in which it was held that

> where a number of shares of railway stock were seized and advertised to be sold in one lot, neither the defendant nor any one interested in the sale requesting the sheriff to sell the shares separately, and such shares were sold for an amount far in excess of the judgment debt for which the property was taken in execution, such sale in the absence of proof of collusion was held good and valid.

(1) 14 Can. S.C.R. 318.

I do not for one moment intend to cast any doubt upon that judgment. In that case the question of the validity of the seizure was not considered and could not have arisen. So much was this the case that in the Superior Court and in the court of appeal, art. 668 C.P.Q. (then art. 559 C.P.C.) was not even referred to (1). The effect of that article seems to have been considered in that case for the first time in this court. But the cases are clearly distinguishable. In *Connecticut & Passumpsic Rivers Railroad Co.* v. *Morris*(2), the shares were admittedly properly seized and advertised to be sold in one lot and neither the defendant nor any one interested in the sale requested the sheriff to sell the shares separately, and it did not appear that there was any intention to defraud, or that any loss had been sustained in consequence of the shares being sold in one lot, but, on the contrary, that such mode of sale was advantageous to the creditors; the sale was held good and valid, although the amount realized thereby was far in excess of the judgment debt for which the property was taken in execution.

Here I hold that the hull was never seized and cannot, therefore, be said to have been sold under execution. In *Connecticut & Passumpsic Rivers Railroad Co.* v. *Morris*(2), there is a quotation from Bioche "Dictionnaire de Procédure" which might mislead. To avoid misunderstanding I quote the whole paragraph from which the words are taken:

> L'inobservation des formalités prescrites par les art. 617, 618 et 619 (V. *sup.* nos. 297 à 301), n'entraîne pas la nullité de la vente; *on ne peut dépouiller des adjudicataires de bonne foi;* mais elle soumet le saisissant et l'officier ministériel aux dommages-intérêts du saisi et des autres créanciers, si elle leur a causé un préjudice. Chauveau, 19,408; Pigeau, Com. 2,207; Demiau, 408; Biret, 2,169; Thomine, 2,132.

(1) See M.L.R. 2 Q.B. 303.

(2) 14 Can. S.C.R. 318.

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The formalities prescribed by arts. 617, 618 and 619 refer to the place of sale and the advertisement and not to the seizure or preliminary step of taking in execution.

The appeal is dismissed with costs.

GIROUARD J.—I have some doubts in this case, but they are not strong enough to induce me to dissent.

IDINGTON, MACLENNAN and DUFF JJ. concurred in the opinion stated by the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Casgrain, Mitchell & Curveyer.*

Solicitors for the respondents: *Greenshields, Greenshields & Languedoc.*