Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Ontario Bank v. *William George Murray and others, from the Superior Court for Lower Canada, in the Province of Quebec, sitting in Review, delivered* 30*th July* 1892.

Present:

LORD WATSON.
LORD MORRIS.
SIR RICHARD COUCH.
LORD SHAND.

[*Delivered by Lord Morris.*]

This is an appeal from the judgment of the Superior Court of Quebec, sitting in Review.

By agreement dated the 1st November 1881, and made between the Montreal and Sorel Railway Company, of the one part, and Alexander Murray and John Rankin, of the other part, in consideration of Alexander Murray and John Rankin agreeing to endorse and discount upon their credit the promissory notes of the Railway Company to the amount of 300,000 dollars, the Railway Company agreed to re-pay the said sum, and to transfer to Murray and Rankin 1,500 first mortgage sterling bonds of 100*l.* each, bearing interest at the rate of 6 per cent.; and it was provided by the agreement that Murray and Rankin should have the right to transfer

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the said bonds to the persons or bank with whom they might discount the notes of the Railway Company, by way of collateral security for the payment thereof. Murray and Rankin obtained the funds which they advanced to the Montreal and Sorel Railway Company from the Montreal Bank to the amount of 330,000 dollars, and the 1,500 bonds were duly handed over by the Railway Company, in pursuance of the agreement, to Murray and Rankin, who deposited them with the Montreal Bank.

By agreement of the 3rd January 1882, and made between the Montreal and Sorel Railway Company, of the first part, and John Rankin, of the second part, it was agreed that John Rankin should advance to the Company the sum of 63,000 dollars on promissory notes of the Company, and it was further provided, as collateral security, that the Company should transfer to Rankin the 1,500 bonds, but subject to the pledge and lien which Murray and Rankin had on the said bonds, so that, on the proceeds of the sale of the bonds, Murray and Rankin should rank before and take in the first place the sum of 330,000 dollars, and that Rankin should then rank for the advance made under the said agreement.

By agreement dated the 26th May 1882, and made between Leonard Fosbrooke, of the first part, the Montreal and Sorel Railway Company, of the second part, and Thomas Turnbull, of the third part, after reciting advances made for and goods sold to the said Company or to the said Fosbrooke their contractor, it was agreed by the said Company and by the said contractor that the said Thomas Turnbull should be secured by the said Company and by the said contractor by the bonds of the said Company then deposited in the Bank of Montreal, and that Turnbull

should rank, in his privilege and lien on the said bonds, next in order to the said Rankin, to the amount of 75,000 dollars. It was also agreed by and on behalf of the said Company and of the said contractor that the said Rankin and Murray, and the said Rankin, should, upon being paid the amount of their advances, hand over and surrender the said bonds so held by them to the said Turnbull.

By agreement dated the 26th October 1882 Turnbull, who was indebted to the Appellants, in security for his said indebtedness, with the consent of the Company, assigned to the Appellants all his rights on the said bonds of the Montreal and Sorel Railway Company, and Rankin on his part consented and agreed that the claim of the Appellants should take priority of and rank before his claim on the said bonds for 63,000 dollars, and next after the claim of Murray and Rankin for the said sum of 330,000 dollars. Notice of the said agreement was given to the Bank of Montreal by the Appellants. The Railway Company being unable to pay Murray and Rankin the money due to them, the President of the Railway Company went to London to negotiate the sale of the said 1,500 bonds. The bonds were, by direction of Murray and Rankin, sent to London to the said President of the Railway Company. The letter of authority was in the following terms:—

"The Manager, Bank of Montreal, Montreal.

"Montreal,

"Dear Sir, 8th February 1883.

"Be good enough to forward to your London (England) office, to be handed to C. N. Armstrong, on payment of 100,000*l.* (one hundred thousand pounds), the Montreal and Sorel Railway bonds, amounting to 150,000*l.* (one hundred and fifty thousand pounds), with the proceeds of which you will please take payment of the overdue notes of the Montreal and Sorel Railway for $300,000 and $15,000, together three hundred and thirty thousand* dollars with interest to date of payment, after which pay the Ontario Bank the amount of their

* *Sic.*

claim of about seventy thousand dollars, and hold the balance remaining at our disposal.

" (Signed) JOHN RANKIN.
" A. MURPHY (MURRAY?).

" We consent to the foregoing for the Ontario Bank.
" (Signed) W. W. L. CHIPMAN."

The President of the Railway Company was unable to dispose in London of the said bonds for 100,000*l.*, but sold 748 of them ; the proceeds of the sold bonds were paid into the Bank of Montreal, and the 752 unsold bonds were returned. In December 1884, Murray paid the Bank of Montreal the amount due to them on their advances to him, when the 752 bonds were re-delivered by the Montreal Bank to Murray.

On the 21st February 1885, Murray recovered a judgment against the Railway Company for 58,540 dollars with interest, to secure payment of which the bonds had been pledged with him. In October 1885, Murray caused the 752 bonds, still in his hands, to be seised under the said judgment, and, having brought the bonds into Court, was by judgment of the 9th October 1885 discharged as *tiers saisi*, and was declared, pursuant to Article 1971 of the Civil Code, entitled to obtain payment by preference out of the proceeds. On the 27th October 1885, a writ for the sale of the bonds was issued. The sale was opposed by Fosbrooke, which opposition was finally dismissed on the 28th February 1888. On the 4th June 1888 a writ of *venditioni exponas* was issued, to which an opposition was lodged by the Montreal and Sorel Railway Company, which opposition was dismissed on the 1st June 1889. Murray having died during the litigation, the present Respondents, as his representatives, were made Plaintiffs in the suit, and on the 27th June 1889 they applied for an *alias* writ of *venditioni exponas*, which was awarded, and on the 8th July 1889

the bailiff filed notice of the sale of the bonds. On the 16th July 1889 the Appellants filed an opposition to annul the sale. The case came on for hearing before Mr. Justice Taschereau, who, on the 26th April 1890, dismissed the opposition. The Appellants appealed to the Superior Court, sitting in Review, who on the 30th November 1890 dismissed the appeal.

While several points were discussed before their Lordships, some of the merest technicality, the real questions are two. First. Whether the Appellants had any valid pledge of the bonds. Secondly. Whether the Appellants were not late in their opposition to the *alias* writ of *venditioni exponas*, by having allowed previous writs to be issued, and the opposition dismissed, while the present opposition is not founded on reasons arising subsequently. The first question goes to the entire merits of the case, and must be mainly decided on the documents in the case. To the original agreement of the 1st November 1881 neither Turnbull nor his assignees, the Appellants, were parties. On its execution, the bonds were handed over by the Railway Company to Murray and Rankin, who thereupon became pledgees of the bonds, pursuant to Article 1966 of the Civil Code. Neither Turnbull nor the Appellants ever had at any time possession of the bonds, and cannot, consequently, come within the terms of Article 1966; and it has been contended, on the part of the Respondents, that there cannot be a second pledge of moveables, as it would be impossible to have two pledges, the one to arise after the other had been discharged. However that may be, the agreement of the 26th May 1882 between Turnbull and the Railway Company is prospective in the enacting clause. That clause states that Turnbull shall be secured. It is only a contractual right that

is given, for the Railway Company could not actually transfer more than the transferor had, namely, a right to get the bonds after the pledge to Murray and Rankin was exhausted. The Appellants could only get Turnbull's right, whatever it was, with the additional advantage that Rankin agreed to give priority to them over his, Rankin's, personal advance of 63,000 dollars. But it has been contended on the part of the Appellants that Murray and Rankin agreed to hold the bonds in pledge for them. All the documents in this case point to Murray and Rankin as holding possession only for themselves. Murray never recognized any trusteeship for the Appellants. The letter of the 8th February 1883, as signed by Murray and Rankin, only authorized the payment of the claim of the Bank, after the payment of their own demand. The consent of the Appellants at the foot of the letter was obtained by the Montreal Bank in consequence of their having had notice of the Appellants' claim. The burthen of proof lies on the Appellants to show that Murray consented to incur any obligation to them, in which they have entirely failed, and whatever claim for a pledge of, or lien on, the bonds the Appellants might have had, it could impose no obligation on Murray in respect thereto.

Their Lordships consequently are of opinion that there was no valid pledge of the bonds to the Appellants within the meaning of the Code, nor was one constructively worked out against Murray, either by the documents or by acts of his, and consequently, as between Murray and the Appellants, they are only ordinary creditors of the Railway Company. It seems to be unnecessary in this view of the case to consider the effect of Article 664 of the Code of Civil Procedure on the proceedings. Their Lordships, however,

see no reason to differ on this question from the judgment of Mr. Justice Taschereau, affirmed by the Superior Court sitting in Review. Their Lordships will humbly advise Her Majesty to dismiss the appeal, with costs.