

1896 EDWARD WARNER (DEFENDANT)..... APPELLANT ;
 *May 5, 6. AND
 *June 6. PATRICK C. DON AND CHARLES }
 O. ROGERS (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mortgage—Mining machinery—Registration—Fixtures—Interpretation of terms—Bill of sale—Personal chattels—R. S. N. S. (5 Ser.) c. 92, ss. 1, 4 & 10 (Bills of Sale)—55 V. (N. S.) c. 1, s. 143 (The Mines Act).

The “ fixtures ” included in the meaning of the expression “ Personal Chattels ” by the tenth section of the Nova Scotia “ Bills of Sale Act,” are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting the land, and the “ delivery ” referred to in the same clause means only such delivery as can be made without a trespass or a tortious act.

An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the Nova Scotia “ Bills of Sale Act ” (R. S. N. S. 5 ser. c. 92), and there is now no distinction, in this respect, between fixtures covered by a licensee’s or tenant’s mortgage and those covered by a mortgage made by the owner of the fee.

APPEAL from the judgment of the Supreme Court of Nova Scotia in *banc* affirming the decision of the trial court in favour of the plaintiffs.

A sufficient statement of the facts and questions at issue appears in the judgment of the court rendered by Mr. Justice Sedgewick.

Harris Q.C. for the appellant argued that the mortgage should have been registered as a bill of sale, citing *In re Eslick* (1); *In re Trethowan* (2).

Harrington Q.C. for the respondents referred to *Ex parte Moore & Robinson’s Banking Co. In re Armytage* (3); *In re Yates* (4).

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

(1) 4 Ch. D. 503.

(2) 5 Ch. D. 559.

(3) 14 Ch. D. 379.

(4) 38 Ch. D. 112.

The judgment of the court was delivered by :

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SEDGEWICK J.—The appellant Warner had recovered judgment in the Supreme Court of Nova Scotia against the Symon-Kaye Syndicate (a company formed in England under "The Companies Act"), had issued execution, and the sheriff had levied upon certain fixtures and other chattels at the gold mines of the company at Montague, Halifax County, N.S. The goods so levied upon were claimed by the present respondents, two London merchants, who claimed title under a mortgage executed in their favour by the company long previous to the judgment, and an interpleader issue was directed to settle the question. Upon the trial the learned Chief Justice decided in favour of the mortgagees, and that decision was unanimously affirmed by the Supreme Court in *banc*. It is from that judgment that this appeal is taken.

The facts are simple and practically undisputed. On the 24th of May, 1893, the company obtained from the Crown a statutory lease of a large number of gold mining areas at Montague, and subsequently placed upon the work engines, boilers and other plant and machinery necessary for the working of the mines. On the 29th of June following the company mortgaged the property to the respondents to secure repayment of an advance of \$25,000. The granting clause in the mortgage was as follows :

And this indenture also witnesseth that in pursuance of the said request, and for the consideration aforesaid, the company hereby assigns, grants, bargains, sells, transfers and sets over to the mortgagees, and the survivor of them, and the executors or administrators of such survivor, their or his assigns, all and singular the demised premises particularly specified in the schedule hereunder written, and also all the messuages, buildings, erections, engines, works, plant, machinery, tools, fixtures, goods and chattels of what kind or nature soever which have been, or shall be at any time during the continuance of the present security, erected, constructed or brought upon the said demised prem-

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ises hereinbefore expressed to be granted and assigned, or any of them or any part thereof, and all the estate, right, title, interest, claims and demand of the company into and upon the same premises, to have, hold, use and enjoy the said demised premises from hereafter for the residue now to come of the said term of 40 years, subject to the rents, covenants, conditions and agreements by and in the said indenture of the 27th day of May, 1893, reserved and contained, and henceforth on the lessees' part to be paid, observed and performed, and subject also to the proviso for redemption hereinafter contained. And to have, hold, use and enjoy all such and so many of the said messuages, buildings, erections, engines, works, plant, machinery, tools, fixtures, goods and chattels as were not so demised as aforesaid, and are not and shall not be of the nature of Crown fixtures, unto the mortgagees and their assigns forever, subject nevertheless to the provisos, conditions and covenants in the said indenture of lease contained concerning the same, and subject also to the said proviso for redemption.

This mortgage was registered in the office of the Commissioner of Mines under "The Mines Act" (ch. 1 of the Nova Scotia Acts of 1892) and under section 143 was valid as against subsequent purchasers, etc., although not registered in the registry office for the county of Halifax. It was not, however, filed in the registry office as a chattel mortgage or bill of sale under ch. 92 R. S. N. S. (5th ser.), and in so far as it is a mortgage of personalty as distinguished from a mortgage of realty it may be admitted that it is void as against the present appellant, an execution creditor, both under section 1 and section 4 of that Act.

According to the decision of the learned Chief Justice the only question before him on the trial was as to the horizontal engine in the pump house. From the judgment of the court in *banc* it does not appear that any other question was there raised. Upon this appeal we were asked by counsel for the appellant to consider and adjudicate upon another question, viz.: the title of certain smaller articles levied upon under the appellant's execution, which articles are specified in the formal judgment upon the trial, but bearing in mind the statements of the only judges whose opinions

are before us in the case as to what was the question in the courts below, we cannot, in the absence of any correction by them or amendment of the case, presume that these statements are inaccurate, and allow another question not adjudicated upon below to be raised here for the first time. The discussion in the present case must therefore be confined to the horizontal engine, referred to by the Chief Justice.

Section 10 of the Nova Scotia "Bills of Sale Act" (ch. 92, R. S. N. S. 5th ser.) enacts, in part, as follows :

The expression "personal chattels" shall mean goods, furniture, fixtures and other articles capable of complete transfer by delivery and shall not include chattel interests in real estate \* \* \*

This provision was taken from the corresponding provision of the English "Bills of Sale Act," 1854, and is an exact copy of it. The English clause has been altered by the "Bills of Sale Act" of 1878, and the amending Act of 1882, but these changes have not yet been adopted by the Nova Scotia Legislature.

The question upon this appeal is:—Is the engine here a "personal chattel" or a "fixture" within the meaning of section 10, or is it a part of the real estate? If it is such a fixture the appellant's view must prevail, the engine being liable to seizure under execution against the mortgagor.

Now there is no doubt that at common law this engine, attached as it was to the freehold, was a "fixture" within the primary meaning of that word. Apart from any question as between landlord and tenant, or as between mortgagee and execution creditor or trustee in bankruptcy, it was a fixture. If it had been erected and attached by a tenant he doubtless as against his landlord might during his term remove it as a trade fixture, but that was because the law gave to the tenant that special right out of regard to public policy and the interests of agriculture and manufactures, but

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apart from that and similar exceptions it was as much a part of the realty as the land itself. Then the expression "fixtures" in the section does not purport to embrace all kinds of fixtures. There are of course fixtures not attached to the realty; there are fixtures, such for example as some of the smaller articles enumerated in the pleadings here, which "are capable of complete transfer by delivery," and I think it was such fixtures, and such fixtures alone, which the legislature had in view. A fixture attached to the freehold and forming part of it is not capable of transfer by delivery. An engine or building may be forcibly detached from the land on which it is erected and therefore "delivered," but it is not a delivery that is capable of being exercised only by a trespass, or a tortious act, that the statute has in view. It has reference, I think, to such articles as, although technically called fixtures, are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting land.

Stress was laid at the argument before us upon the fact that this was the case of a mortgage by a licensee or tenant and not by the owner of the fee, and cases were cited (to which I shall presently refer) distinguishing between fixtures covered by a tenant's mortgage and those covered by that of an owner. Admitting for the moment that the mortgage in question is a tenant's and not an owner's mortgage, I have come to the conclusion that there is now no such distinction to be made and that it has been so declared as well by the House of Lords as practically by the Imperial Parliament in the amending Act of 1878, to which I have referred.

It was decided in 1856 by Lord Hatherly when V. C. Sir William Page Wood that if an instrument which conveys an interest in land conveys also machinery

affixed to the land such instrument does not require registration under the "Bills of Sale Act." *Mather v. Fraser* (1). The Court of Queen's Bench in 1869 followed that decision in *Longbottom v. Berry* (2), and in the Court of Exchequer Chamber in 1872, where judgment was delivered by Lord Blackburn, in *Holland v. Hodgson* (3) Lord Hatherly's view in *Mather v. Fraser* (1) was referred to and entirely adopted. And so too in the case of *Boyd v. Shorrocks* (4) decided in 1867, where the mortgage in question was made not by the owner but by a tenant. In *Hawtry v. Butlin* (5) also, in 1873, in a case of a tenant mortgaging fixtures the general law above stated was apparently departed from and *Boyd v. Shorrocks* (4) was in terms disapproved. Following this case in the same year came *Ex parte Daghish, In re Wilde* (6) in which it was likewise held that when a tenant mortgaged trade and other fixtures the mortgage must be registered as a bill of sale, otherwise all the fixtures would pass to the trustee in bankruptcy, *Boyd v. Shorrocks* (4) being in that case also dissented from.

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This case was followed in 1874 by *Ex parte Barclay, In re Joyce* (7), before the same Lord Justices. It too was the case of a tenant mortgaging trade and other fixtures, and resembles in most particulars the case before us. Sir George Mellish L.J. in his judgment held that the instrument did not require registration as a bill of sale, upon the ground that the mortgagees had no power under the mortgage to sever the fixtures from the premises and sell them separately, but could only sell the premises with the fixtures upon them.

Most of the questions involved in these more or less conflicting decisions were set at rest in 1875 by the

(1) 2 K. & J. 536.

(2) L. R. 5 Q. B. 123.

(3) L. R. 7 C. P. 328.

(4) L. R. 5 Eq. 72.

(5) L. R. 8 Q. B. 290.

(6) 8 Ch. App. 1072.

(7) 9 Ch. App. 576.

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House of Lords in *Meux v. Jacobs* (1). There a leaseholder had mortgaged certain premises, and the contest was between the mortgagee and a person to whom the mortgagor had subsequently given a bill of sale of certain fixtures which had not been specifically mentioned in the first mortgage. In my view their Lordships in that case settled the principles upon which this case must be decided, at the same time putting at rest the conflict as to whether any difference in principle obtained as between the mortgage of a leasehold and of an absolute interest. What was held in that case is well stated by Mr. Brown in his work on "Fixtures" (2):

First: *As to the quality of fixtures as being REAL or as being PERSONAL estate.* Fixtures are real estate, and it was precisely for that reason that in the Bills of Sale Act, 1854, the legislature felt itself obliged for the purposes of that Act to declare them personal estate. But they are not otherwise personal estate, save and except for the purposes and to the extent of that Act, that is to say, in cases of a dispute arising between a mortgagee on the one hand and either the trustee in bankruptcy or an execution creditor on the other hand.

Secondly: *As to fixtures being IMPLIEDLY granted, demised or assigned.* When the freehold or leasehold hereditaments are granted, demised or assigned, and the grant, demise or assignment does not expressly grant, demise or assign the fixtures, but there is an indication upon the face of the deed that the fixtures were intended to form part of the grant, demise or assignment, then they are impliedly granted, demised or assigned.

Thirdly: *As to the question whether the fact of the principal hereditaments that are in mortgage being FREEHOLD or being LEASEHOLD makes any difference quoad the fixtures therein assigned.* That circumstance makes no difference whatever, provided the fixtures are dealt with similarly in both cases, that is to say, as part and parcel of the principal hereditaments that are respectively granted or demised or assigned.

All of these conditions are present in this case, and as there the mortgagee succeeded as against a subsequent purchaser, so here he must succeed as against the execution creditor.

(1) L. R. 7 H. L. 481.

(2) 4 ed. p. 137.

In the English "Bills of Sale Act" of 1878, the definition of the expression "personal chattels" was broadened so as to settle by statute what the decision of the House of Lords in *Meux v. Jacobs* (1) may not have expressly determined in regard to the judicial conflict to which I have referred.

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The expression "personal chattels," shall mean goods, furniture and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures * * but shall not include chattel interests in real estate nor fixtures (except trade machinery as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed (2).

We have the authority of the late Vice-Chancellor Bacon in 1880 in *Ex parte Moore & Robinson's Banking Co. In re Armytage* (3), for saying that so far as the present question is concerned the interpretation clause in the English amendment was passed, not to amend or change the law but to make it clear and remove doubts, it being admitted however, that in regard to trade fixtures there had been a change and doubtless a most beneficial one.

On the whole we are of opinion that the respondents are entitled to the engine under their mortgage to the exclusion of the execution creditor.

I deem it right to expressly state that we are not here dealing with the case of an instrument made by a tenant assigning only fixtures and other chattels which he has a right to sever. Such an instrument doubtless would come either wholly or in part within the "Bills of Sale Act." Nor does the question come up in the present case as to whether those articles, other than the engine, mentioned in the mortgage under which the respondents claim are within the Act. Neither is it necessary for us to determine whether this mortgage (assuming it to be a bill of sale) comes

(1) L. R. 7 H. L. 481.

(2) 41 & 42 V. c. 31 s. 4.

(3) 14 Ch. D. 386.

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within the Act which requires that the instrument be filed in the registry office of the county where the maker resides; nor the final question as to the continuance of an attaching creditor's lien after judgment and before the issue of the execution. The determination of these two questions would have been necessary only in the event of our having decided in the appellant's favour upon the main point in controversy.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Harris, Henry & Cahan.*

Solicitors for the respondents: *Harrington & Chisholm.*
