

THE LISCOMBE FALLS GOLD  
MINING COMPANY AND  
ROBERT BROWNELL (PLAIN-  
TIFFS) ..... } APPELLANTS;

1904  
\*Dec. 1, 2,

1905

\*Jan. 31.

AND

JAMES R. BISHOP, AND A. J. O.  
MAGUIRE AND OTHERS DOING  
BUSINESS AS THE ALBION LUM-  
BER COMPANY (DEFENDANTS).. } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA  
SCOTIA.

*Mining lease—Prospector's license—Testing machinery—Annexation to free-  
hold—Trade fixtures—Fi. fa. de bonis—Sale under execution.*

The licensees of a mining area in Nova Scotia, erected a stamp mill on wild lands of the Crown, for the purpose of testing ores. All the various parts of the mill were placed in position, either resting by their own weight on the soil or steadied by bolts, and the whole installation could be removed without injury to the freehold.

*Held*, that the mill was a chattel or, at any rate, a trade fixture removable by the licensees during the tenure of their lease or license and, consequently, it was subject to seizure and sale under an execution against goods.

Judgment appealed from (36 N. S. Rep. 395) affirmed, but for different reasons.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial dismissing the plaintiff's action with costs.

The case is stated in the judgment of the court as delivered by His Lordship Mr. Justice Davies.

*Ross K.C.* and *Lovett* for the appellants.

\*PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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*Henry* for the respondent, Bishop.*Mellish K.C.* for the respondents, the Albion Lumber Company.

The judgment of the court was delivered by :

DAVIES J.—The substantial question argued upon this appeal and on the determination of which the appeal must either be allowed or dismissed is whether a “five stamp gold mining mill” with boiler and all necessary machinery, erected by the appellant company on the waste lands of the Crown in Nova Scotia under a mining license given to it by the Commissioner of Mines, could be sold by the sheriff under an execution against the appellant company authorizing and directing a sale of its goods and chattels. The determination of this question depends upon the other questions whether the mill had been so annexed to the soil as to have been part of the land or whether it was a trade fixture capable of being removed by the appellant company as the tenant or licensee of the mining area during the term of its lease or license. Many questions were raised at the trial and before the Appeal Court in Nova Scotia but they were all with the exception of those above referred to either practically abandoned before this court or disposed of at the argument.

The learned trial judge held that, as a matter of fact, no parts of the mill were fixtures in the soil so as to have become and form part of the land, and in that finding I concur.

All the various parts of the mill were either resting by their own weight on the land or were only bolted down and all could be removed by unscrewing the bolts and lifting the parts out of their places. The only part to which it was contended this did not

strictly apply was the boiler, but the facts shew that the land was wilderness and that no injury could possibly be done to it by removing the boiler. The mill was only erected for testing purposes and the degree and object of the slight annexation which was apparent convinces me that it never was the intention of the parties to make it a fixture or part of the land.

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The authorities all seem to show that it is not solely the fact of the chattels being annexed to the soil which determines whether or not they have become part of the soil but that the object and purpose and intention of their annexation must be looked to.

In *Hellawell v. Eastwood* (1), a question arose as to whether certain machinery used for manufacturing purposes was attached to the freehold so as to be exempt from distress. The court held they had not become part of the freehold and in delivering the judgment of the court Parke B. said,

they were slightly attached so as to be capable of removal without the least injury to the frame of the building or to themselves; and the object and purpose of their annexation was not to improve the inheritance but merely to render the machines steadier and more capable of convenient use as chattels.

See also *Huntley v. Russell* (2); and *Waterfall v. Penistone* (3), in which case the court acted upon the rule laid down in *Hellawell v. Eastwood* (1). It seems to me that every word of that rule is applicable to the erection of this temporary machinery for mining purposes on the waste lands of the Crown. It was erected for testing purposes; it was only slightly attached to the land, in fact the only part of it which could be said to be even so slightly attached or affixed was the boiler; and it was not even attempted to be

(1) 6 Ex. 295.

(2) 13 Q. B. 572.

(3) 6 E. & B. 876.

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argued that it was so attached with the object and purpose of improving the inheritance. All of the machinery was capable of being removed without any injury to the soil. The object and purpose and intention of its erection was the testing of the areas for minerals tentatively and temporarily. In *Holland v. Hodgson* (1), at p. 335, Blackburn J. in delivering the considered judgment of the court stated the rule deducible from the cases to be that

an article which is affixed to the land, even slightly, is to be considered as part of the land unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel.

In the case at bar the circumstances convince me beyond reasonable doubt that it was intended this machinery should all along continue as a chattel and not be part of the Crown's wild land.

The case of *Wake v. Hall* (2), is one relating to mines and buildings and machinery erected for mining purposes and affixed to the soil, and to the right of the miner to pull down and remove them from the soil even though annexed. Though that decision depended largely upon custom and statute, the observations of the several law Lords on the broad general question raised in this appeal are most pertinent. Lord Blackburn, at pages 204-5 says :

Whenever the chattels have been annexed to the land for the purpose of the better enjoying the land itself, the intention must clearly be presumed to be to annex the property in the chattels to the property in the land, but the nature of the annexation may be such as to show that the intention was to annex them only temporarily ; and there are cases deciding that some chattels so annexed to the land as to be, whilst not severed from it, part of the land, are removable by the executor as between him and the heir. Lord Ellenborough, in *Elwes v. Maw* (3), says that those cases " may be considered mainly on

(1) L. R. 7. C. P. 32<sup>a</sup>.

(2) S App. Cas. 195.

(3) 2 Sm. L. C. (11 ed.) 189.

the ground that where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle) was an accessory to a matter of a personal nature, that it should be itself considered as personalty." Even in such a case the degree and nature of the annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land; and as Lord Hardwicke said, in *Lawton v. Lawton* (1), "you shall not destroy the principal thing by taking away the accessory to it," and, therefore, as I think, even if the property in the chattel was not intended to be attached to the property in the land, the amount of damage that would be done to the land by removing it may be so great as to prevent the removal. But in the case now before the House there can be no doubt on the admissions that the machinery and the buildings were from the first intended to be accessory to the mining, and that there was not at any time an intention to make them accessory to the soil; and though the foundations being, as is stated in the 12th and 13th admissions, below the natural surface, they cannot be removed without some disturbance to the soil, it is, I think, impossible to hold that the amount of this disturbance is so great as to amount to the destruction of the land, or to show that the property in the materials must have been intended to be irrevocably annexed to the soil.

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Lord Bramwell says at page 209:

But if no reason can be given why the maxim (*quicquid solo plantatur solo cedit*) should apply to this case, plenty of reason can be given why it should not. The defendants are lawfully in possession of the premises. They or their predecessors lawfully built these buildings, which are essential to the working of the mine, being accessorial to the engine and works; and it would be most unreasonable that they should have to leave them on the premises—as unreasonable as that they should leave the engine. On this ground alone I should advise your lordships to affirm the judgment.

Similar reasons and observations are to be found in the judgments delivered by Lord Watson and Lord Fitzgerald, and every word of them is applicable to the case before us.

There is this peculiarity in this case which, so far as my research has extended, cannot be found in any other case, that the Crown is not as a party to these pro-

(1) 3 Atk. 13.

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ceedings and has never contended that the engine and machinery had become annexed to its land and had ceased to be chattels of the appellant company. It is the latter company itself which puts forward the plea and bases an application upon it for a declaration that the sheriff's sale under the execution against it was as regards this machinery void, and the purchaser, who by the way had not removed the machinery, a trespasser. If the rule laid down by Lord Ellenborough in the leading case of *Elwes v. Maw* (1), at page 195 is followed that

where the fixed instrument, engine or utensil (and the buildings covering the same falls within the same principle) was an accessory to a matter of a personal nature it should be itself considered as personal there would be, in my judgment, small room for doubt in this case. That rule is only another way of stating the proposition submitted by Baron Parke in *Hellawell v. Eastwell*, (2) that "it is the object, purpose and intention of the annexation which is to be considered," and if these are not to improve the inheritance but if the chattels are annexed as an accessory to a matter of a personal nature such as rendering the machinery steadier and more capable of more convenient use as chattels they will still, notwithstanding the slight annexation, continue their character as chattels. Now who can doubt but that such slight annexation as there was in this case capable of severance without detriment to the soil had for its object the *personal* one of testing the area licensed to the appellant company for minerals and as accessory to the mining the company carried on? Personally I should not consider it open to argument that the object was not the improvement and enrichment of the lands of the Crown. No such argument was addressed to us, the counsel being content to take it for granted, as the court of appeal had

(1) 3 East 28; 2 Sm. L. C. (11 ed.) 189. (2) 6 Ex. 295.

found, that the slight annexation had worked the transformation from chattels to land.

I do not think, however, it is necessary to rest my decision upon that ground because even assuming the mill and machinery to have become fixtures I am still clearly of opinion that they were within the category of trade fixtures which as between the appellant company and the Crown the former had a right to remove during the existence of the tenancy or holding

The appeal court of Nova Scotia held that the mill was real estate and that the sheriff under an execution directing the sale of personal property could not sell it nor give any title to the purchaser. But they at the same time held that this present equitable action could not be maintained because it was unnecessary and if the purchaser attempted to exercise his assumed rights as such an action at law could be maintained against him for damages, and, on a proper case being made out, an injunction granted restraining the purchaser from interfering with the mill. On these grounds they dismissed the appeal.

To understand properly the respective rights and liabilities of the parties it becomes necessary to ascertain the facts, and the main and important question is: In what relation did the appellant stand towards the Crown? If in the relation of tenant or any analogous relation such as mining licensee there does not seem to be any reasonable room for doubt that the mill was a trade fixture which the appellant company had a right to remove, and if that be so it seems under the authorities reasonably clear that it might be seized and removed under a writ of *feri facias* or other similar process. See the authorities as collected in Amos & Ferrard on Fixtures, pp. 393-4, and in 13 Am. & E. Enc. p. 676. Then what relation did the appellant company occupy towards the Crown? The clerk of

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the mines office of Nova Scotia in giving his evidence says :

The mill is on areas 922 and 923, block 5, Millers Lake. \* \* \*  
 The plaintiffs have prospecting licenses for the areas referred to dated January 13th, 1902, for one year.

Under these licenses the appellants were not only entitled to enter upon these areas for the purpose of prospecting, but by section 159 of the Mines Act were entitled to a lease of such areas. Such lease if granted would be for forty years at an annual rental of fifty cents per area per annum—see sections 171 and 181 as amended. The appellants had put in an application to the Commissioner of Crown Lands for a lease of the surface which had been approved and they thereby became tenants at will. The appellants contended that this was a mistake and that the application was really for a grant and not a lease. But even if this was so their position as vendees in possession of the land before the passing of the grant would be that of tenants at will. Woodfall, Landlord & Tenant, 17 ed. p. 258; *Doe d. Stanway v. Rock* (1).

In his judgment in the case of *Wake v. Hall* (2) at p. 207, Lord Watson, in referring to the three classes of cases mentioned by Lord Ellenborough in his judgment in *Elwes v. Maw* (3) of which that of Landlord & Tenant was one, says :

I assume that the doctrine would receive a similar application in cases analogous to these.

If the appellant company could be held to be not a tenant of any kind but a licensee simply and only, its position must in reason with respect to this machinery as between it and the Crown be the same as if it was a lessee. The erections were not made in bad faith and without a title in the lands of another in which case they would become part of such lands but were

(1) 4 M. & G. 30.

(2) 8 App. Cas. 195.

(3) 1 East 28; 2 Sm. L. C. (11 Ed.) 189.



made with their own materials and money as licensees from the Crown on the latter's waste lands and as necessary to test and carry on the very operations the lands were given into their possession for. The stamp mill in dispute having been erected by the company under these circumstances on these lands for testing purposes was, in my opinion, a trade fixture removable by them during the tenure of their lease or license and perhaps within a reasonable time afterwards, and consequently while so removable subject to seizure and sale under the execution issued.

The authorities do not seem to leave this proposition in any doubt. Mather on Sheriff law, 1894, pp. 249-257, especially on page 252 where, after reviewing the authorities the writer says

but now it is clear that all fixtures of whatever nature over which the person proceeded against has a right may be taken

and seized by the sheriff under writ of *fi. fa.* or other similar process.

Once it is conceded that the relation in which the company appellant stood towards the Crown with reference to this stamp-mill was that of a tenant towards his landlord or any analogous position which justified him in erecting his mill for purposes of a personal nature, such as mining or testing for minerals, then his right to remove the fixtures as being trade fixtures seems clear, and falling within the principle of being "an accessory to a matter of a personal nature" must be considered as personalty and not as an interest in land. The stamp-mill in this case was an accessory to the carrying on of mining or testing for minerals on the land and was a matter of a personal nature, mining, within the definition given by Lord Ellenborough. The tenant has an interest as well as a power. *Poole's*

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*Case (1); Minshall v. Lloyd (2); Saint v. Pilley (3).*

In *Place v. Fagg* (4), Bayley J., speaking for the court, says:

Fixtures which the tenant has a right to remove may be treated as chattels in a proceeding against the tenant.

The cases of *Hallen v. Runder* (5), and *Lee v. Gaskell* (6), shew that an agreement for the sale of such an interest as the tenant possesses in fixtures which he has the right to remove is not an agreement for the sale of an interest in land under the 4th section of the Statute of Frauds.

It is stated in *Barnard v. Leigh* (7), that the sheriff must separate and sell fixtures, over which he has a right of severance, apart from the leasehold if he cannot sell them together. And while that may be so, I cannot see why, under circumstances such as we have in this appeal, if the sheriff can sever the trade fixtures from the land and sell them, he cannot sell to a purchaser under his writ and confer upon him the same power of severance. On principle I cannot see why this should not be done and, in the absence of any express authority to the contrary, I am of the opinion that it can, and that a purchaser from a sheriff under such a writ, purchases as well the article which the tenant has the right to sever and remove as the right itself which the sheriff by virtue of his writ possesses.

The only other point pressed in argument was the alleged irregularity of the sale of the fixtures and other chattels *en bloc*. But whether or not by reason of such a sale an inadequate price was obtained, or whether or not as between the sheriff and the defendant (the now appellant) there was a wrong done the latter for which the former would be liable for damages, cannot arise in

(1) 1 Salk. 363.

(2) 2 M. & W. 450.

(3) 1 L. R. 10 Ex. 137.

(4) 4 Man. & R. 277 at p. 281.

(5) 1 C. M. & R. 266.

(6) 1 Q. B. D. 700.

(7) 1 Stark. 43

this appeal. The respondent, the execution creditor, in no way personally interfered in the execution of his duty by the sheriff and is not responsible even on the assumption (which I only adopt for the sake of argument) that a wrong was done by him to the execution debtor in the manner of the sale. The appellant company has waived any claim it might have against the sheriff and neither the execution creditor, who did not interfere, nor the purchaser at the sale are responsible for the sheriff's wrong doing, if any.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *H. A. Lovett.*

Solicitor for the respondent, Bishop: *W. A. Henry.*

Solicitor for the respondent, The Albion Lumber Co.:

*W. H. Fullon.*

Solicitor for the respondent, Maguire: *H. C. Borden*

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