

THE MINERAL PRODUCTS CO., AND OTHERS

V.

THE CONTINENTAL TRUST CO.

1906

*May 2, 3.

*May 28.

*Equitable mortgage—Mines and minerals—Lease of mining lands—
Sheriff's sale—Purchase by judgment creditor of mortgagee—
Registry laws—Priority—Actual notice—Lien for Crown dues
paid as rent—C.S.N.B. c. 30, s. 139.*

APPEAL from the judgment of the Supreme Court of New Brunswick(1), affirming a decree founded upon a decision of Barker J., as judge in equity(2), in favour of the plaintiffs, respondents.

By the judgment appealed from it was, in effect, held that mining leases of lands in the Province of New Brunswick and of the minerals therein, issued by the Crown to the appellant company, subsequent to a mortgage executed by it in the State of New York in favour of the respondent, a company incorporated under the laws of that state, which do not reserve the minerals to the state, were subject to the mortgage; that a judgment creditor of the mortgagor (who purchased the leases at a sherriff's sale in execution of his own judgment and afterwards obtained new leases in his own name from the Crown), took the new leases subject to the mortgage; that the mortgage, though not registered under the "General Mining Act," C.S.N.B. (1903) ch. 30, sec. 139, was not void as

*PRESENT:—Sedgewick, Girouard, Davies, Idington and Mac-
lennan JJ.

(1) 37 N.B. Rep. 140.

(2) 3 N.B. Eq. 28.

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against a judgment creditor who had actual notice of the mortgage and whose judgment was not registered under that section at the time of the commencement of the suit, and that the judgment creditor was not entitled to a prior lien for rent paid to the Crown on the licenses declared to be held in trust for the mortgagee.

After hearing counsel for the parties, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs, for the reasons given by Mr. Justice Barker upon the rendering of the judgment appealed from. His Lordship Mr. Justice MacLennan dissented, as follows:—

MACLENNAN J. (dissenting).—I am of opinion that the decree appealed from ought to be varied. It declares that the mining leases in question are subject to the plaintiff's mortgage. I think that is right so far as those leases cover the freehold lot, containing 150 acres; but that so far as they cover the leasehold lots, containing 100 acres and 300 acres respectively, they cannot be held to be subject to the mortgage.

The learned judge in his judgment at the trial has, I think, misconstrued the mortgage. He is of opinion that the words

and also all and singular the coal, albertite, etc., and all other minerals whatsoever which can, and shall, or may be found in or upon the herein particularly described premises,

refer to the whole of the parcels, the leasehold as well as the freehold. With great respect I do not think that is so. In my opinion those words relate solely to the freehold lot previously described, and not to the leasehold lots described afterwards. The mortgage first grants the freehold lot, and all the

estate therein, and all the minerals to be found therein, and the privileges and appurtenances belonging thereto. And, when it comes to deal with the two leaseholds, what is granted is the mortgagor's *right, title and interest* therein, and that only. That the first grant of the minerals is to be confined to the freehold lot is put beyond doubt because there is an express grant relating to the leasehold minerals, and it is not of the minerals but only of the mortgagor's *right, title and interest* therein.

There is, therefore, as I think, a clear distinction between the grant of the minerals in the freehold lot and in the leasehold parcels. As to the first the grant is absolute, but as to the other it is of the grantor's *right, title and interest* only.

In his judgment in the Supreme Court the learned trial judge seems to abandon and no longer to rely on the clause on which he rested his first judgment. He says:

It is true that in the case of the latter (the leaseholds), the mortgage, as well as the conveyance to the Products Co., professes to convey *only the right, title and interest* of the parties to the lots and minerals. But if the parties thought that conveyed a right to the minerals under the lease, and they intended to convey that interest, and were paid for it, why should they escape making good a defective title in the one case more than in the other?

It is true the mortgage contains a covenant by the mortgagors to deposit a sum with the mortgagees as a redemption fund, per ton of *manganese* shipped from the premises, and that this covenant is wide enough to be applicable to the leaseholds, as well as to the freehold lot. But, in my opinion, neither this covenant nor the covenant for further assurance, nor any other circumstance disclosed in evidence, can enlarge the grant of the leaseholds so as to give the mortgagees an equity to claim the benefit of the

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Crown leases so far as they apply to the leasehold lands. So far as the leaseholds are concerned the mortgagees got exactly everything the mortgagors could then give, and that is carefully expressed and limited in the mortgage, and there is no ground of equity on which they can claim what was subsequently required.

For these reasons, I am of opinion that the relief granted by the judge should be confined to the freehold lot of 150 acres.

Appeal dismissed with costs.

Pugsley K.C. and *Ewing* for the appellants.

Hazen K.C. for the respondents.
