1897

*Oct. 19.
20, 21.

*Dec. 9.

ROBERT HAGGERT (PLAINTIFF).....APPELLANT;

AND

THE TOWN OF BRAMPTON, RICHARD BLAIN AND JOHN McMURCHY (DEFENDANTS).. ..... } RESPONDENTS.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage, construction of—Trade fixtures—Chattels—Tools and machinery of a "going concern"— Constructive annexation — Mortgagor and Mortgagee.

The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of moveable articles in permanent structures with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold, and where articles have been only slightly affixed but in a manner appropriate to their use and shewing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding that both as to the degree and object of the annexation, they became parts of the realty.

APPEAL from the judgment of the Court of Appeal for Ontario affirming with some variations the decision of the Chancery Division of the High Court of Justice which had, with variations, affirmed the judgment of the trial court dismissing the plaintiff's action with costs.

The liquidator of an insolvent manufacturing company claimed certain articles as chattels from mortgagees of the company's lands who had gone into possession and claimed the same articles as fixtures attached to the freehold. In the trial court the learned judge,

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(MacMahon J.), who dismissed the plaintiff's action, held that upon the construction of the mortgage the property had been mortgaged as a "going concern," and that all the articles in the factory premises incident to and necessary for the manufacturing business of the company were covered by the mortgage, and that the plaintiff's claim did not extend to certain other articles to which he would otherwise have been entitled to recover by the judgment. The judges in the Divisional Court, although divided in their opinions, agreed with the principle of construction laid down by the trial judge but granted to the plaintiff the other articles which had been refused him in the trial court. The plaintiff appealed from the Divisional Court judgment in so far as it had allowed the defendants the articles claimed by them as fixtures, but as he only partially succeeded in the Court of Appeal he took the present appeal to the Supreme Court of Canada as to all machinery and other chattels for which judgment had not already been delivered in his favour and which were not permanently affixed in May, 1891, when the company went into liquidation, or, at the latest, which were not so affixed on the 15th of January, 1894, when the respondents, the Town of Brampton, took possession of the mortgaged premises.

Aylesworth Q.C. and *Justin* for the appellants. The security is expressly restricted to the freehold "including all machinery annexed to and known in law as part of the freehold." Some of the machinery although slightly attached to the floor for the purpose of steadiness in working could not be operated if permanently fastened down, it being necessary to shift them when reversed. The appellant has made out at least a *prima facie* case that the machinery was not attached at the time possession was taken by the town, and the burden of proof was thus shifted upon the respondents to

1897

HAGGERT v. THE TOWN OF BRAMPTON.

show that the machinery had been attached by some person with the authority of the insolvent company. No such proof was given, and the conclusion is inevitable that it was attached by some person without such authority and as a mere wrongdoer, and therefore that such annexation in no way affected the character of the property as chattels.

In considering the intention of the parties in giving the mortgage, the learned trial judge seems to start with the view, that, because the mortgagors were then carrying on, and intended to continue carrying on the manufacture of engines, threshing machines and agricultural implements in the mortgaged premises, they were mortgaging their factory premises, machinery, tools and business, treated as one "going concern." This is an entirely erroneous idea. The company was mortgaging nothing but its lands and buildings, including therewith, of course, all machinery which in law would be deemed part of the freehold. The grant in the mortgage is of the land only. What this grant carries with it, defendants are entitled to, but the interpretation of the grant cannot be widened. The learned trial judge treats this mortgage as including all the machinery in question because all of it was "necessary to the carrying on of the business and operations of the company;" but that circumstance, even if the evidence established it, cannot afford any indication whether or not the company, when the various pieces of machinery were put into the buildings, intended them to become parts of the buildings, or to still remain chattels.

As to the specific articles claimed upon this appeal, the safe is clearly shown not to have been fastened. The fact that "pigeon holes" were built around it is not material. This was not done with the intention of fastening the safe, but as a matter of convenience. It

is merely in the position of a chattel placed in a room, and subsequently the room or doorways, so changed that the articles will not come out without being taken apart, or the doorway enlarged. The character of the property is not changed. See *Longbottom* v. *Berry* (1), at pages 129 and 139, and *Park* v. *Baker* (2). The lathes, bending machine, Bradley forges, iron wheel clamp, Daniels planer, band sawing machine, platform scales, anvils and other similar machines rested in position by their own weight only; they were not permanently affixed in any way. See *Ex parte Astbury; In re Richards* (3); *Mather* v. *Fraser* (4). The scales in connection with the dynamometer are simply a pair of ordinary weigh scales, and they do not become a fixture from the circumstance that it may have been customary to use them with a fixed machine, when in fact they have never been in any way attached to, or made part of that machine, any more than a chisel becomes a fixture by the circumstance of a workman using it in turning a piece of wood upon a turning machine which is fixed; it may be taken away and used for any other purpose, and is not a part of the machine, though it may be impossible to use the machine itself for any purpose without using the other article as well.

Appellant is entitled to damages for illegal detention of the machinery; *Dreyfus* v. *Peruvian Guano Co.* (5); *Cockburn* v, *Muskoka Mill and Lumber Co.* (6); and the difference between the value of the property at the time of the demand made therefor, or, the time of the commencement of the action, and the value at the time of delivery thereof. *Henderson* v. *Williams* (7);

(1) L. R. 5 Q. B. 123.
(2) 7 Allen (Mass.) 78.
(3) 4 Ch. App. 630.
(4) 2 K & J. 536.
(5) 42 Ch. D. 66; 43 Ch. D. 316.
(6) 13 O. R. 343.
(7) [1895] 1 Q. B. 521.

1897

HAGGERT v. THE TOWN OF BRAMPTON.

Blakely v. *Dooley* (1); *Auger* v. *Cook* (2). We also refer to *La Banque d'Hochelaga* v. *The Waterous Engine Works Co.* (3); *Hobson* v. *Gorringe* (4); *Joseph Hall Manufacturing Co.* v. *Haslitt* (5); *Stevens* v. *Barfoot* (6).

The case of *Keefer* v. *Merrill* (7) explains *Crawford* v. *Finlay* (8), and shows it to have no application in this case.

Blain and *Cameron* for the respondents. The articles, though loose, belonging to the fastened or fixed machinery, belong to the freehold, and the annexation may be actual or constructive. Constructive annexation arises when the thing is fitted for use in connection with the premises and is more or less necessary to their enjoyment. On this principle not only the machines but even the patterns and tools belonging to the fixed machinery pass with the realty, as they were essential to the profitable user of an agricultural implement factory. Such effect must be given to the language used in the mortgage as to include all things which were annexed to the freehold with their essential parts whether fixed or loose. *Hobson* v. *Gorringe* (4); 8 Am. & Eng. Encyclopœdia of Law, 8, p. 43.

The evidence shows that there is a counter-shaft to each of the machines consisting of a short piece of shafting on which are fitted two or more pulleys. Each counter-shaft runs in cast iron hangers, which are firmly bolted to the joists and beams of the ceilings. Each counter-shaft is connected by belting, both with the line shafting and with the machine below to which the counter-shaft belongs. Power is

(1) 18 O. R. 381.
(2) 39 U. C. Q. B. 537.
(3) 27 Can. S. C. R. 406.
(4) [1897] 1 Ch. 182.
(5) 11 Ont. App. R. 749.
(6) 13 Ont. App. R. 366.
(7) 6 Ont. App. R. 121.
(8) 18 Gr. 51.

conveyed to the line shafting then through the counter-shaft to the machine on the floor. Another function of the counter-shaft is to enable the machine below to run at varying speeds. This is effected by what are called cone pulleys, which are really groups of pulleys of different sizes; the counter-shaft is firmly annexed and is as much a part of the machine as the rudder is of a ship. See judgment of Brett L. J. in *Sheffield, &c, Building Society* v. *Harrison* (1). The machine, its belting and its counter-shaft form one fixed piece of machinery.

The respondents rely on the following authorities: *Longbottom* v. *Berry* (2); *Holland* v. *Hodgson* (3); *The Sheffield &c. Building Society* v. *Harrison* (1); Ewell on fixtures p. 21; *Keefer* v. *Merrill* (4); *Rogers* v. *Ontario Bank* (5); *Sun Life Insurance Co.* v. *Taylor* (6); *Dickson* v. *Hunter* (7); *Crawford* v. *Finlay* (8).

The judgment of the court was delivered by:

KING J.—The question is whether certain things were rightly adjudged to be fixtures in a case between mortgagor and mortgagee. The mortgage recited that the Haggert Bros. Manufacturing Co. had applied to the town of Brampton for a loan of $75,000 upon certain undertakings to carry on all their manufacturing business in the town, during a period of twenty years, and it was agreed that the company should give in security their bond in double the amount and a mortgage for the amount of the loan, and interest "upon all the real estate of them the mortgagors, including all the machinery there was or might thereafter be annexed to the freehold, and which should be

(1) 15 Q. B. D. 358.
(2) L. R. 5 Q. B. 123.
(3) L. R. 7 C. P. 328.
(4) 6 Ont. App. R. 121.
(5) 21 O. R. 416.
(6) 13 Can. L. T. 106.
(7) 29 Gr. 73.
(8) 18 Gr. 51.

1897

HAGGERT v. THE TOWN OF BRAMPTON.

King J.

known in law as part of the freehold." The mortgaged premises were conveyed by description of the several parcels or tracts of land.

The articles in question are pieces of machinery and other articles used on the premises in connection with the manufacturing.

A mortgagor in fee has not the same right as against the mortgagee, nor a grantor as against his grantee, that a person having a limited interest only, as a tenant, has to remove things annexed for the purposes of trade or domestic convenience.

In *Holland* v. *Hodgson* in 1872 (1), it is said:

> There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz. the degree of annexation, and the object of annexation.

The circumstances indicating the intention are such as are patent for all to see, and not such as rest in mere agreement with the third party. In *Hobson* v. *Gorringe* (2), an assignee of a mortgage was held to be entitled to treat an engine affixed to the building by bolts and screws as part of the land, notwithstanding that it was brought upon the land under a contract with the maker of the engine, by the terms of which contract the engine was, under the circumstances that existed, to continue the property of the seller (as between vendor and vendee).

Articles no further attached to the land than by their own weight may become fixtures if the circumstances are such as to show that they were intended to be part of the land, though of course the onus of shewing that they were so intended lies on those who

(1) L. R. 7 C. P. 328. (2) [1897] 1 Ch. 182.

assert that they have ceased to be chattels. *Holland* v. *Hodgson* (1).

In a number of cases were articles were held to be affixed to the land, the affixing was by means of bolts and screws. In *Holland* v. *Hodgson* (1), already referred to, looms were so held which were attached to stone floors of a mill by means of nails driven through holes in two of the four legs of each loom, in some cases into beams built into the stone, and in other cases into plugs of wood driven into holes drilled in the stone for the purpose.

In *Hellawell* v. *Eastwood* in 1851 (2), spinning machinery fixed by screws to the floor in much the same way were held not to be fixtures, the court considering that they were attached slightly so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object of the annexation being in their opinion not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels. In recent cases it is questioned whether the principles of law laid down in this case were correctly applied to the facts.

The circumstance that the fastening is merely to steady the machines when in use is now held not to be inconsistent with the inference that the object was to permanently improve the freehold. *Longbottom* v. *Berry* (3).

The court in that case says:

> This fixing was clearly necessary, for they (the machines), could not otherwise be effectually used; as for the same reason the fixing was obviously not occasional but permanent. It is no doubt said in this case (referring to *Mather* v. *Fraser* (4),) that the object of fixing was to ensure steadiness and keep the machines in their places when worked; but the same thing could probably be said of most trade

(1) L. R. 7 C. P. 328.
(2) 6 Ex. 295.
(3) L. R. 5 Q. B. 123.
(4) 2 K. & J. 536.

1897

HAGGERT v. THE TOWN OF BRAMPTON.

King J.

fixtures from a steam engine downwards; and if the effect of this fixing is to cause the whole set of machines to be effectually used in the manufacture of wool and cloth, it seems very difficult to avoid coming to the conclusion that a necessary conveyance is to cause the mill to be put to a more profitable use as a wool mill than it otherwise would be. It is also equally difficult to conceive that a machine which at all times requires to be firmly fixed to the freehold, for the purpose of being worked, could truly be said never to lose its character as a movable chattel.

So also in *Holland* v. *Hodgson* (1), where the looms were attached by nails for the purpose of steadying them and keeping them in a true direction.

In passing upon the object of the annexation, the purposes to which the premises are applied may be regarded; and if the object of setting up the articles is to enhance the value of the premises or improve its usefulness for the purposes for which it is used, and if they are affixed to the freehold even in a slight way, but such as is appropriate to the use of the articles, and showing an intention not of occasional but of permanent affixing, then, both as to the degree of annexation and as to the object of it, it may very well be concluded that the articles are become part of the realty, at least in questions as between mortgagor and mortgagee. See the cases already referred to, and also *Walmsley* v. *Milne* (2), and *Wiltshear* v. *Cotterell* (3).

It was contended that, as to a number of articles, an inference upon the evidence ought to be drawn that the affixing did not take place until after the mortgagee went into possession, but the inference is by no means a necessary one, and the conclusions of fact should not be disturbed upon this account.

Certain articles (as the watchman's clock), are instances of constructive annexation. Certain other articles (as the dynamometer scales) are necessary parts

(1) L. R. 7 C. P. 328. (2) 7 C. B. N. S. 115.
(3) 1 E. & B. 674.

of fixed machines, neither being practically available for the purpose for which it was used without the other.

As to machines not themselves affixed at all, but connected with fixed countershafting, we do not think the machines became thereby affixed where they were not parts of the one article.

As to the safe, the learned judges of the Court of Appeal were evenly divided, and it is impossible to feel confident on such a question. But considering that the safe was put in a place structurally adapted for it, and was so enclosed in it by a wooden structure subsequently built that it could not be taken out without destroying what was a portion of the realty, and that it was put there not for a temporary purpose but to be permanently there, it would seem reasonable to conclude that it was so affixed as an adjunct to the building, to improve its usefulness as such, considering the purpose to which the building was applied.

Applying the principles enunciated to the several classes of articles in question, those which are considered to remain chattels are as enumerated hereafter, and the rest were affixed to and formed part of the realty. The chattels which were not annexed to the realty, nor became part of the realty, are as follows: In the office, one copying press and table; in the blacksmith's shop, No. 7, anvil; No. 9, four anvils; in the boiler shop, No. 11, two anvils; in the long wood shop, iron clamp for making engine wheels; in the wood finishing shop, the band sawing machine, and saws in connection therewith, also belting; in the outside yard, the platform scale on wheels. Amongst the miscellaneous articles, the fire hose, fire hose reel with all its hose, tools and couplings, including brass nozzles and branches.

1897

HAGGERT v. THE TOWN OF BRAMPTON.

King J.

The variations here indicated should be made in the judgment entered in the court below. The appeal is dismissed without costs.

Appeal dismissed without costs.

Solicitor for the appellant: *B. F. Justin.*

Solicitor for the respondents, the Town of Brampton: *J. W. Beynon.*

Solicitor for the respondents, Blain and McMurchy: *T. J. Blain.*