

JOHN HOUSTON AND THOMAS } APPELLANTS;  
N. WARD (DEFENDANTS)..... }

1901

AND

\*Mar. 28, 29.

THE MERCHANTS BANK OF } RESPONDENT.  
HALIFAX (PLAINTIFF)..... }

\*May 21,

*Banks and banking—Advances—Security—Bank Act, sec. 74—Chattel Mortgage.*

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

H. held a chattel mortgage on a sawmill belonging to G., with the machinery and lumber therein, and all lumber that might at any time thereafter be brought on the premises. The mortgage not being registered gave H. no priority over subsequent incumbrancers. Two months later G. gave H. a second mortgage on said property to secure a note for \$794. Shortly after this a contractor applied to G. for a large quantity of lumber for building purposes. G. being unable to purchase the logs asked the Merchants Bank for an advance. The bank, knowing G. to be financially embarrassed, refused the advances to him but agreed to make them if some reliable person would purchase the logs, which was done by G.'s bookkeeper, and in consideration of an advance of \$3,500 G. assigned the contractor's order to the book-

\*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, and Girouard JJ. (Mr. Justice King was present at the argument but died before judgment was delivered.)

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keeper and agreed to cut the logs at a price fixed and deliver them to the bookkeeper at the mill site. The latter then assigned to the bank all monies to accrue in respect to the contract, which assignment was agreed to by the contractor, and a day or two after also assigned to the bank three booms of logs by numbers in addition to one assigned previously. This purported to be done under sec. 74 of The Bank Act. Two or three days later G. made an assignment for benefit of his creditors, previous to which, however, the logs had arrived at the mill and were mixed with other logs of G. The greater part had been converted into lumber when H. seized them under his chattel mortgage.

*Held*, affirming the judgment of the Supreme Court of British Columbia (7 B. C. Rep. 465), that no property in the logs assigned to the bank had passed to G., and H. having no higher right than his mortgagor, could not claim them under his mortgage.

Shortly before G.'s assignment for benefit of his creditors his bookkeeper transferred to the bank a chattel mortgage given him by G. to secure payment of \$800. The judgment appealed from ordered the assignee in bankruptcy to pay the bank the balance due on said mortgage.

*Held*, reversing said judgment, that the assignee had been guilty of no acts of conversion and was not liable to repay this money. The mortgage was not given to secure advances and did not give the bank a first lien on the property. The bank was in the same position as if it had received the mortgage directly from G. when he was notoriously insolvent.

**APPEAL** from a decision of the Supreme Court of British Columbia (1) reversing the judgment at the trial in favour of the defendant.

The following statement of facts is taken from the judgment of Drake J. on appeal :

“The facts of this case are somewhat involved. Gray was a sawmill owner at Nelson, B.C., and being involved in financial difficulties, on the 25th of April, 1898, he made a bill of sale by way of mortgage to Houston of his sawmill and machinery and all lumber therein, and all lumber dressed or undressed which might at any time be brought on the mill premises.

“ This bill of sale was apparently not duly registered,  
 “ as the affidavit made in support of it was not sworn  
 “ until the 26th of September, 1898, and is therefore  
 “ not binding on subsequent incumbrancers. The  
 “ defendant undertook at the trial to furnish certified  
 “ copies of his bills of sale, but hitherto has not done  
 “ so. We must therefore take the bills of sale as they  
 “ appear in the appeal book to be correct.

“ On the 28th of June, 1898, Gray gave to Houston  
 “ a further bill of sale by way of mortgage to secure a  
 “ note of \$794.22 payable on demand with ten per cent  
 “ interest. This bill of sale was apparently regular.  
 “ On the 11th of August, 1898, Lawford assigned to the  
 “ plaintiffs a chattel mortgage given to him by Gray  
 “ on the mill and machinery to secure \$800. Gray  
 “ also made an assignment to Ward for the benefit of  
 “ his creditors of all his property, and Ward, according  
 “ to his evidence taken 27th January, 1899, contested  
 “ the plaintiff’s right to the machinery as being subject  
 “ to the security in favour of Gray’s creditors. Some  
 “ time about the 1st of August, W. H. Armstrong, a  
 “ contractor, applied to Gray to be supplied with a  
 “ large quantity of lumber for bridge building. Gray  
 “ had no means of buying the necessary logs, and  
 “ applied to the plaintiffs for an advance. The plain-  
 “ tiffs, aware of Gray’s position, refused, but the  
 “ manager, Mr. Kydd, said if some person whom  
 “ they could trust would undertake the contract they  
 “ would advance the necessary funds to him to buy  
 “ the logs, and Mr. L. C. Lawford, Gray’s bookkeeper,  
 “ with the approval of the plaintiffs, agreed to buy  
 “ the logs, and the plaintiffs agreed to advance him  
 “ the necessary funds for the purpose in order to  
 “ carry out the arrangement. On the 4th of August  
 “ Gray assigned the order of Armstrong to Lawford,  
 “ and agreed to cut the lumber at \$1.50 per M. and

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“ deliver the same to Lawford at the mill site. This  
 “ agreement purports to be made in consideration of  
 “ an advance of \$3,500 to Gray.

“ On 6th August Lawford assigned to the plaintiffs  
 “ all moneys to accrue due to them from Armstrong  
 “ in respect of the contract which Armstrong accepted.  
 “ On the 8th of August L. C. Lawford assigned to the  
 “ bank booms 48, 49 and 50, aggregating 545,000 feet,  
 “ which were then in process of cutting, having  
 “ previously assigned boom 47. This assignment pur-  
 “ ported to be made under section 74 of the Bank  
 “ Act, 1890. On the 30th of August boom 49 was  
 “ assigned to the bank. On the 6th of September  
 “ boom 50 was also assigned, and on the 20th of  
 “ September a further deed confirming the former  
 “ assignments, and including boom 47, was made  
 “ by Lawford to the bank. These various documents  
 “ seem to have been executed by way of precaution  
 “ to make the bank secure in case any mistake had  
 “ occurred in the original transfers under the Bank  
 “ Act. All moneys necessary to pay the expenses  
 “ connected with the booms were advanced by the  
 “ plaintiffs to Lawford, and disbursed by him, and  
 “ Gray gave Lawford promissory notes for the sums  
 “ he had thus advanced, and these notes were indorsed  
 “ to the bank.

“ These booms arrived at the mill, and when there  
 “ Gray appears to have mixed the logs with other logs  
 “ in his boom, and the greater part were converted  
 “ into lumber, and immediately Houston, as alleged  
 “ mortgagee, claimed them under his chattel mort-  
 “ gage.”

*Taylor K.C.* for the appellant Houston.

*Garrow K.C.* for the appellant Ward.

*Sir Charles Hibbard Tupper K.C.* for the respondent.

The judgment of the court was delivered by :

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THE CHIEF JUSTICE.—This case, for the facts of which I refer to the judgments in the courts below, involves two separate appeals, one by Houston who claims a lien on the logs in question having priority over that of the respondent, and the other by Ward, the assignee, for the benefit of creditors of Gray who insists that he is not liable to the bank for the money which the judgment has directed him to pay.

As regards Houston's appeal there can, in my mind, be no doubt but that the proof established conclusively that the money advanced by Mr. Kydd, the agent of the bank, was so advanced to Lawford as the agent of Gray to enable the latter to purchase the logs required to carry out the Armstrong contract, and that the logs seized by Houston on the 16th of September included the logs purchased for that purpose. The legal consequence is that under the 74th and other sections of the Banking Act the bank had a first lien upon the logs so purchased with their money which they in good faith lent for the purpose to which it was thus applied and that Houston is bound to account for the logs he so possessed himself of.

As to Ward, it does not appear to us that he was guilty of any conversion or other wrongful act as regards the logs. The appeal by him should therefore be allowed and the action dismissed against him except in so far as it is considered to be in the nature of a mortgage action for the purpose of enforcing a security.

The first clause of the judgment which directs Ward to pay to the respondents \$530 being the amount secured by a chattel mortgage of the 15th of August, 1898, Gray to Lawford, assigned to the bank on the 16th of September, is manifestly wrong. The bank is

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not entitled to any security on those chattels giving them priority under the Bankers Act. It was not given to secure money advanced to buy the goods. It is conceded that Houston has priority over these tools and plant, Lawford having paid merely the vendors lien of A. C. Shaw & Co. did so presumably with the money of Gray and was entitled to no security from Gray, and the bank as assignee of Lawford can stand in no better position as against the creditors of Gray represented by Ward his assignee.

It is therefore just as if Gray, when he was notoriously insolvent to the knowledge of the bank and on the same day on which he executed an assignment for the benefit of his creditors, had made a direct mortgage to the bank; manifestly such a mortgage cannot be enforced.

Houston's appeal is dismissed with costs. Ward is entitled to the costs of his appeal here and also to all costs in the court below except (as regards the costs below) in so far as he is to be regarded as the representative of the mortgagor in an action to realize a mortgage security, and as to these latter costs, they are to be reserved until the final decree.

*Appeal of Houston dismissed with costs. Appeal of Ward allowed with costs.*

Solicitors for the appellant Houston: *Hanington & Taylor.*

Solicitors for the appellant Ward: *Elliott & Leanie.*

Solicitors for the respondent: *Macdonald & Johnson.*