1911

*Feb. 23.
*May 15.

WILLIAM LAIDLAW (DEFENDANT) . . . APPELLANT;

AND

TREVOR J. VAUGHAN-RHYS (PLAINTIFF) . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Timber license—Crown lands in British Columbia—Real estate—Personalty—Contract—Sale—Exchange — Consideration — Payment in joint stock shares—Vendor's lien—Evidence—Onus of proof—Pleading and practice.

A sale of rights under licenses to cut timber on provincial Crown lands in British Columbia is a contract for the sale of interests in real estate, and the timber berths are subject to a vendor's lien for the unpaid purchase money.

The doctrine of vendor's lien for unpaid purchase-money is applicable to every sale of personal property over which a court of equity assumes jurisdiction. *In re Stucley* ((1906) 1 Ch. 67) followed.

In order to protect himself against the enforcement of a vendor's lien, a defendant relying on the equitable defence of purchase for value without notice is bound to allege in his pleadings and to prove that he became purchaser of the property in question for valuable consideration and without notice of the lien. *In re Nisbett and Potts' Contract* ([1905] 1 Ch. 391; [1906] 1 Ch. 386), followed. *Whitehorn Brothers* v. *Davison* ([1911] 1 K.B. 463), distinguished.

(Leave to appeal to the Privy Council was refused on the 29th of July, 1911.)

APPEAL from the judgment of the Court of Appeal for British Columbia reversing the decision of Morrison J., at the trial, and maintaining the plaintiff's action with costs.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

The action was brought against the present appellant and two other defendants for the declaration and enforcement of a vendor's lien upon certain timber limits, held under licenses from the Government of British Columbia, which had been transferred to the said appellant by the other defendants.

The circumstances of the case and the questions in issue on the appeal are stated in the judgments now reported.

Wallace Nesbitt K.C. and *Coutlée K.C.* for the appellant.

Travers Lewis K.C. for the respondent.

THE CHIEF JUSTICE and DAVIES J. agreed in the opinion stated by Duff J.

IDINGTON J.—The respondent alleges in his amended statement of claim, and the appellant's pleading admits that he was at all the times in question herein the lawful holder of timber licenses issued by the Province of British Columbia on the 24th day of September, 1907.

He alleges a sale thereof to one Clarry and claims to be entitled to enforce his vendor's lien in respect of $2,500, balance of the purchase-money.

The agreement of sale under which the respondent claims is peculiar in this, that it sets out at first a consideration of $5,000 and then proceeds to provide conditionally that shares of the value of $2,500 in a proposed corporation to be created should be given in addition to the said sum of $5,000.

It provides that the amount of said shares should abate proportionally to any deficiency found as the

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result of cruising to exist in the specified quantity of timber.

A question not free from doubt is raised of whether or not here can exist a vendor's lien in respect of an exchange of land for shares of unascertained value in a concern to be created in the future.

The phraseology of the provision is ambiguous. It may be read as a bargain that the shares must be of the value of $2,500, or that the contemplated price of the land sold is $5,000 plus $2,500 for which the shares are to be accepted in lieu of the $2,500 balance.

To solve ambiguity in a document it is competent to look at the acts of the parties immediately before and after the conclusion of the bargain to ascertain its meaning.

Surrounding circumstances may be considered to remove ambiguity. The gist of the question to be determined is whether or not there was an intention to abandon any claim to a vendor's lien or to form a contract inconsistent with its presumed existence.

The proposal was made by letter written on the 9th of November, 1907, by the respondent from Vancouver, to Clarry, at Toronto, and a deed of conveyance carrying out in part the sale was made on the 21st of November, 1907, by Chandler, of Vancouver, who held the property in trust for the respondent. If we make allowance for the distance the parties were apart, the deed may be almost taken as immediately following the offer, and, in truth, the final and formal expression of the concluded bargain.

It certainly must have been executed before the cruising could have taken place and before the suggested alternative of delivering shares instead of paying money was determined.

That deed expressed the consideration to be $7,500.

Reading both documents can there be a shadow of doubt that such was held by the parties to be the actual price of the property, but with an added term that if shares were delivered within a given or reasonable time they must be accepted in lieu of $2,500 which, *primâ facie,* according to the terms of the deed, was to be cash.

The fact that one Myers, first proposed to be the person, on whose report the matter was, finally, to be dependent was substituted by one Jarvis shews, at least, that some things transpired between the parties which renders it unsafe to rely too much upon the exact terms of the written offer to the exclusion of the deed which must, I submit, be taken as the final expression of the consensus of the parties.

And this more especially so when we find, as we do, that it was understood a deed was to be executed and delivered as an escrow as a means of carrying out the understanding of the parties and this deed is an instrument pursuant to the final decision or expression of the will of the parties.

Then we have the following statement in the fourth paragraph of the respondent's statement of claim:

> At the request of the plaintiff and in accordance with the directions of the defendant Clarry, the said E. R. Chandler executed a proper assignment of the said timber licenses to the defendant, Clarry, and the same were, on or about the 21st day of November, 1907, delivered to the defendant, Clarry, who, thereupon, paid the plaintiff the sum of $5,000, but the balance of the purchase price, namely, $2,500, to be paid by the delivery of the said twenty-five shares in the said B.C. Pressed Brick Company, was not paid to the plaintiff.

This is admitted in the appellant's defence and thus there seems to be an end to any dispute of the

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possible meaning I have ventured to put on the original offer or that coupled with the deed.

Unless we are to fritter away justice by over-refinement, I do not think we should allow the appellant to withdraw from the position this admission puts him in.

All this is followed by a suit against Clarry to enforce payment of the balance of $2,500, and judgment for the plaintiff therefor, on the 29th of March, 1909.

The deed under which the appellant claims is dated the 2nd of April, 1909, and from the said Clarry to him. I will, presently, deal with its peculiarities.

I merely note the date and, for the present, pass on to consider its relation to this branch of the case I have been and am dealing with.

Now, can a man, resting upon a bargain made in face of the concurrence of the parties, thus finally adjudicated between them, claim to put any other interpretation upon the meaning of their bargain than all these things imply ?

What right has he to say it was not for cash, but on other terms than thus adjudged before his intervention ?

It is further said, however, that the subject-matter of the sale was such that a vendor's lien could not, in law, exist. In that aspect, whether a volunteer or not, the appellant is quite within his right in making such a contention.

For no matter how weak his right or title may be he is attacked by virtue of the alleged legal existence of a lien which is not the creation of the will of the parties. It is a thing that may be waived by a vendor but is given quite independently of his will in any other sense than as to a question of intention to waive it.

It can usually only thus arise without intention in respect of a transaction entirely relative to real estate.

Liens on chattels (having no relation to realty) sold are gone the moment possession has changed. Other liens may arise from the express or implied intention of the parties.

In regard to real estate dealings a vendor's lien arises in favour of the vendor independently of such considerations.

Can this sale of a license to cut timber mean anything but a sale of real property ?

In principle it seems clear. In some cases the bargain may be relative to the price of timber when cut and, hence, have no relation to the land. I think confusion apt to arise, and has in some cases arisen, out of a non-observance of this distinction.

I can see no room here for doubt or difficulty.

I find, moreover, that, in *Mitchell* v. *McGaffey* (1), Chancellor Blake, as far back as 1858, decided a lien arose out of such a transaction as a sale of the right to cut timber.

His test there, put in the first sentence of a well-reasoned judgment, was, could specific performance be decreed of such a bargain, and his deduction from the authorities that it could, and other consequences follow, seem to me unanswerable.

This case was not cited to us. *Scott* v. *Benedict* (2), decided in this court, and of which only a note is reported in our reports, was cited.

Tracing its history back to 5 Ontario Reports, at page 1, we find there a divided court and those

(1) 6 Gr. 361.

(2) 14 Can. S.C.R. 735.

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holding no lien existed do not rely upon any such doctrine as suggested here, but upon the peculiar circumstances of that case. No doubt the same reasons led to the decision noted in the reports of this court (1). Other cases cited have equally no bearing upon this point.

Nor can I find anything in the distinction sought to be made out of these licenses by the Crown being renewable from year to year for twenty-one years. The presumption is in favour of renewal and, if not cancelled, that the right continues. There is no evidence of interruption and, hence, the lien attaches to the right subject to the liability to such interruption.

I conclude that, on principle, a lien may arise upon a sale of such an interest as now in question.

This brings me to the defence set up of a purchase for value in good faith and without notice.

There is no evidence given to support it. The respondent's pleading certainly does not; and the deed to the appellant, alleged to have been put in by the respondent, does not. It refers to some previous indenture of the month of February. What that is, I have no knowledge of. I tried, in argument, to find out. It was said to be clear, on the reading of the pleadings. Now, in the pleadings, we have the following statement of the appellant's defence:

> 9. The said defendant says that, on the 2nd of April, 1909, he bought and received a transfer of all the interest of defendant, Clarry, in the said timber-licenses and paid valuable consideration therefor, and the said defendant claims to be the owner of the said timber licenses.

We have no reference to the indenture of February which that of April purports to assign or to be made

(1) 14 Can. S.C.R. 735.

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in pursuance of. I can find nothing in the record to define or make clear what that of February may be.

The respondent's pleadings merely charge the defendant Clarry had sold or pretended to have sold to the appellant and sought to get his deed registered.

How that renders this curious deed appellant has put in evidence any more definite I am unable to say. It shews what an intangible thing the respondent has been contending against, indeed a mere cloud on his right.

All these references to that matter I should have put aside but for one thing, and that is the claim the appellant's counsel makes to proof furnished by admission in this deed of payment for some property the deed relates to. It may be for that in question or something else.

It seems to me, therefore, this defence fails.

Again, it was suggested in argument, that, inasmuch as the respondent's deed, on its face, shews an acknowledgment of the receipt of consideration, though proven to be untrue, the respondent is estopped from shewing that.

There is no evidence appellant ever saw this deed or was led to rely upon it.

I think the appeal must be dismissed with costs.

DUFF J.—I think the fair inference from the facts in evidence is that the sale as finally concluded was a sale for $7,500 cash. That being the case it is not necessary to consider whether a lien or charge would arise in favour of the vendor as security for the performance by the vendee of an agreement to deliver shares in a company to be formed as part of the consideration for the purchase where the subject-matter

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and circumstances of the sale justify the presumption that the expectation of all parties was that the property sold should be available for sale in the hands of the vendee. We were furnished by counsel with a list of authorities upon the point, but it is desirable, I think, to refrain from expressing any opinion upon it until a case arises requiring the determination of it. Mr. Nesbitt based the appeal upon two grounds; the first being that the subjects of the sale in question were not land; and that a vendor's lien attaches to that description of property only. It is not, I should think, seriously open to doubt that the interests created by the instruments transferred from the vendor to the purchaser were interests in land. But the immediate point is, quite irrespectively of that, settled by the decision of the Court of Appeal in *Re Stucley*(1). The principle of that decision is stated thus by the present Master of the Rolls, then Cozens-Hardy L.J., at pages 83 and 84:

> But it has been argued that a vendor's lien is limited to land, and does not extend to personal estate. Now, there is the distinct authority of the Court of Appeal, in *Davies* v. *Thomas*(2), to the contrary; and, that being so, I do not think it necessary to go back to the earlier authorities, nor to discuss the principles upon which those authorities were decided. I see no reason, in principle, why the doctrine should not apply to every case of personal property in which the court of equity assumes jurisdiction over the subject-matter of the sale.

The point of substance in the appeal is whether the property is bound by the respondent's lien in the hands of the appellant, who says he is a purchaser for value without notice of the lien.

On this point I agree with the court below that, in order to avail himself of that position as against

(1) (1906) 1 Ch. 67. (2) (1900) 2 Ch. 462.

the vendor's claim, Mr. Laidlaw was bound to allege and prove that he was a purchaser for value and a purchaser for value without notice of that claim. The question of the incidence of the burden of proof in such cases has recently been before the courts in *Re Nisbett and Potts' Contract*(1). The substance of the decision as affecting that question is thus stated, by Cozens-Hardy L.J., in the last mentioned report, at page 410:

> But, what must he prove in order to claim this exemption? He must prove that he is a purchaser for value of the legal estate without notice. If in the old days, he had simply pleaded, "I am a purchaser for value," such a plea would have been demurrable; he would have had to go further and allege and prove that he was a purchaser for value without notice, and he must do the same at the present day.

Since the argument Mr. Nesbitt has called our attention to the decision of the Court of Appeal in *Whitehorn Bros.* v. *Davison*(2). The effect of this decision is that, where the purchaser of personal chattels (who has acquired them under a contract voidable because of fraud practised by him in the matter of the purchase) pledges or re-sells them, the seller, in order to establish his right to avoid the sale as against the pledgee or subsequent purchaser, must prove that the latter has taken them with notice of the fraud or otherwise than in good faith. The reasoning upon which this decision is based has, I think, no application whatever to the question before us. Where a purchaser of chattels procures the delivery of them to him by fraud, his fraud may affect the transaction in one of two ways. If, for example, the owner has been deceived as to the

(1) (1905), 1 Ch. 391; (1906), 1 Ch. 386.

(2) (1911), 1 K.B. 463.

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identity of the person with whom he is dealing and, in fact, never intended to pass the property to that person, then no title passes. Speaking generally in such a case the purchaser cannot pass a title to a third person; *Cundy* v. *Lindsay*(1). Where, on the other hand, there is an intention to pass the property, but that intention has been brought about by the collateral fraud of the purchaser, then a title does pass, but it is a title voidable at the option of the seller. In such a case it is settled law that the seller may assert his right to avoid the contract against the author of the fraud, against volunteers claiming under him, or against purchasers for value acquiring otherwise than in good faith. But when the seller seeks to assert his right he must, of course, as plaintiff, make out his case, and, as against persons other than the author of the fraud, he must shew either that they were volunteers or that they were acting in bad faith. All this is beside the question upon which we have to pass. The lien of a vendor is an equitable interest in the property itself. Persons acquiring subsequent interests which come into competition with the vendor's interest can displace the latter only by shewing some superior equity. The subsequent acquisition of the legal estate, in itself, gives no superiority even when it is acquired for value. The person relying upon it must go further and prove something else before he can successfully claim to occupy a higher position than that of the vendor standing on his lien. One thing he may do is to shew that at the time he paid his purchase-money he had no notice of the existence of the lien. But, if he is rely-

(1) 3 App. Cas. 459.

ing upon his position as purchaser for value without notice he must prove that defence in its entirety.

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ANGLIN J. agreed with Duff J.

Appeal dismissed with costs.

Solicitors for the appellant: *MacNeill, Bird, Macdonald & Bayfield.*

Solicitors for the respondent: *Smith & Woodworth.*