

THE ONTARIO CONDITIONAL SALES ACT

WHAT ARE THE RIGHTS OF AN UNPAID SELLER, WHOSE CHATTELS HAVE BEEN AFFIXED TO REALTY?

In view of the expressed wish in certain quarters for a revision of The Conditional Sales Act the following discussion may not be wholly inopportune.

In the first place, stated briefly and very generally, the common law rights of an owner and unpaid seller who retains the ownership but parts with the possession of chattels (separate from the question of their affixion to realty) seems a proper premise with which to begin. It is said that ownership of goods draws to it the possession thereof and the rights of an owner or seller of goods who retains the property therein, apart from the terms of any conditional sale, are such that he may assert his right to possession against all, except a purchaser for value without notice in market overt, (but see the Ontario Sale of Goods Act), even against that purchaser where the goods had been stolen and the owner had prosecuted the thief.¹

If then, such owner or seller can assert his rights against all, can he do so against the owner or mortgagee of land to which the chattels have been affixed and become part? In England in a long series of cases ending with *Hobson v. Gorringe*² and *Reynolds v. Ashby & Son*,³ it was held as against a seller under a hire purchase agreement that chattels affixed to realty passed to the mortgagee or purchaser thereof without notice of the hire purchase.

The earlier view in Ontario was quite different. See *Hall Manufacturing Co. v. Hazlitt*,⁴ *Stevens Manufacturing Co. v. Barfoot*,⁵ *Polson v. Degeer*.⁶ In the last named case, at page 280 a Divisional Court held that: "The affixing of the property of a stranger to the freehold of another did not operate to deprive the stranger of his right to the property when it could be removed without serious damage to the freehold."

In justice, it seems that the English cases are more nearly right in principle. In *Gough v. Wood*,⁷ Lord Justice Lindley

¹ WILLIAMS ON PERSONAL PROPERTY, 18th Ed., pp. 16, 25, 55; R.S.O. 1937, c. 180, sec. 23.

² [1897] 1 Ch. 182.

³ [1904] A.C., 466.

⁴ (1885), 8 O.R. 463.

⁵ (1885), 9 O.R., 692.

⁶ (1886), 12 O.R., 275.

⁷ [1894] 1 Q.B., 713.

quotes Bac. Abr. to this effect: "If a piece of timber which was illegally taken has been used in building or repairing, this, although it is known to be the piece which was taken, cannot be retaken, the nature of the timber being changed; for by annexing it to the freehold it is become real property," and he adds: "If I employ a builder to build me a house and he does so with bricks that are not his, I apprehend they become mine and their former owner cannot recover them or their value from me." It seems plain therefore, that, in principle, chattels affixed become land and lose their identity as chattels.

It is hinted in cases hereinafter referred to that the English cases, being later, were followed in preference to *Polson v. Degeer*. This last named case, a decision of a Divisional Court, however, would seem binding on our Courts, even though section 31 of the Judicature Act⁸ has been since repealed. Be that as it may, it should be kept in mind that while the Ontario cases held that the chattels affixed did not pass to the owner or mortgagee of the realty, the English cases held that they passed only *if there was no notice of the hire purchase or conditional sale*. This latter point is an important consideration, for the Conditional Sales Act, first passed in 1888, had as its main provision and purpose, the requiring of a seller who retains ownership but parts with possession of goods, to give notice thereof to the world by filing his sale agreement or putting his name plate upon the goods sold. Now if in Ontario, prior to this Act, the seller could remove his chattels sold, though affixed to realty, he could *a fortiori* remove them if he had complied with the provisions of the Act in filing his contract, etc. While it was said that a seller who did not comply with present section 2 of the Act, could not assert his common law rights,⁹ it was, however, definitely held by two different Divisional Courts, subsequent to the passing of what is now section 2 (requiring the filing of the contract, etc.), and before the enactment of present section 8 (giving the seller the right to remove his chattels though affixed), that a seller who had complied with section 2 of the Act, could remove his chattels though affixed to the realty. See *Utterson Lumber Company Limited v. Petrie*,¹⁰ and *Canadian Westinghouse Co. v. Murray Shoe Co.*¹¹

⁸ R.S.O. 1927, c. 88.

⁹ (1914), 31 O.L.R. 11, 14.

¹⁰ (1909), 17 O.L.R. 570, 575.

¹¹ (1914), 31 O.L.R. 11, 14.

Now as if to put the matter beyond the slightest doubt the Legislature enacted in 1905¹² what has become section 8 of the present Act in the following language: "Should any goods or chattels subject to the provisions of this Act be affixed to any realty, such goods and chattels shall notwithstanding remain so subject but the owner of such realty or purchaser or any mortgagee or other encumbrancer on such realty shall have the right as against the manufacturer, bailor or vendor thereof or any person claiming through or under them, to retain such goods and chattels upon payment of the amount due and owing thereon."

There seems to be little opportunity from this enactment for any doubt as to the intention of the Legislature concerning the rights of the seller whose chattels have been affixed to realty. In three cases the Ontario Court of Appeal seemed to have effectively left the matter beyond reasonable doubt. These cases are: *Liquid Carbonic Co. Ltd. v. Rountree*,¹³ *Dominion Lock Joint Pipe Co. Ltd. v. Township of York*,¹⁴ *Collis v. Carew Lumber Co.*¹⁵ In the first named case Middleton J. says: "In our Courts it has been held that the affixing of chattels which were subject to the terms of a conditional sale agreement conferred no right upon the owner of the lands; *Polson v. Degeer*;¹⁶ but by a later English decision, *Hobson v. Gorringe*,¹⁷ it was held that the fact of a chattel being converted into realty was enough to defeat the title of anyone claiming title to the chattel as a chattel. A statute was immediately passed by our Legislature which has taken final form in the section which I have quoted (Sec. 9) of The Conditional Sales Act¹⁸ for the purpose of preventing the law as laid down in England prevailing in this Province; and even when somewhat obscurely worded in its original form, it has been held to have that effect."

In *Dominion Lock Joint Pipe Co. Ltd. v. Township of York*,¹⁹ the same Judge points out: "It was next argued that this case is governed by sec. 9 (now 8) of The Conditional Sales Act which provided that, where goods sold under a conditional sale have been affixed to realty, they shall remain the property of the vendor as fully as they were before being so affixed, but

¹² 60 Vict., c. 14, s. 80.

¹³ (1923), 54 O.L.R. 75.

¹⁴ (1929), 64 O.L.R. 365.

¹⁵ (1930), 65 O.L.R. 520.

¹⁶ (1886), 12 O.R. 275.

¹⁷ [1897] 1 Ch. 182.

¹⁸ R.S.O. 1914, c. 136. Now R.S.O. 1937, c. 182, sec. 8.

¹⁹ (1929), 64 O.L.R. 365.

the owner of the realty shall have the right to retain the goods upon paying the balance to the vendor. This argument entirely misapprehends the obvious effect of this section. It was passed to give the vendor of goods, whose title was otherwise unimpeachable, the right to force the owner of the lands to which they had been affixed to pay the balance due, notwithstanding the fact that the goods had become fixtures — in effect to render inapplicable the decision of the Court of Appeal in England in *Hobson v. Gorringe*."

In the last case of *Collis v. Carew Lumber Co. Ltd.*,²⁰ again the same Judge stated the matter in this way: "When a chattel has become a fixture, the section of the Act governing the rights of the parties is section 8, and assuming in other respects a valid conditional sale, the purchaser of the land is given the right to retain the fixture upon payment of the amount due. Otherwise upon the occurrence of default the seller may remove the fixture as fully and freely as if it had never been affixed to land.

"This statutory enactment, as has been more than once pointed out, makes inapplicable here, many English cases of which *Hobson v. Gorringe*;²¹ *Reynolds v. Ashby & Son*²² are outstanding examples. The law laid down in the Ontario cases: *Hall Manufacturing Company v. Hazlitt*,²³ and *Polson v. Degeer*,²⁴ has thus received legislative sanction and prevails over the English cases where there is no corresponding legislation. See *Liquid Carbonic Co. Ltd. v. Rountree*."²⁵

One might have considered the matter thus concluded but, what is quite astonishing, the Court of Appeal in less than a year after deciding *Collis v. Carew Lumber Company*, in the case of *Hoppe v. Mannors*²⁶ executed a *volte face*, and notwithstanding compliance with sec. 2, and notwithstanding sec. 8 of The Conditional Sales Act and its decisions in the above cited cases of *Utterson Lumber Company v. Petrie*, *Canadian Westinghouse Co. Ltd. v. Murray Shoe Company*, *Liquid Carbonic Company Ltd. v. Rountree*, *Dominion Lock Joint Pipe Co. Ltd. v. Township of York* and *Collis v. Carew Lumber Company*, held as against an unpaid seller, that chattels which had become affixed to the realty passed to the owner of the realty unless there was

²⁰ (1930), 65 O.L.R. 520.

²¹ *Supra*.

²² *Supra*.

²³ (1885), 11 A.R., 749.

²⁴ (1886), 12 O.R., 275.

²⁵ *Supra*.

²⁶ (1931), 66 O.L.R., 587.

a notice registered in the Registry Office of the seller's interest. *Hoppe v. Manners* has been followed by the Court of Appeal in *Fess Oil Burners Ltd. v. Mutual Investments Ltd.*²⁷

In attempting to distinguish *Collis v. Carew Lumber Company*, the late Mr. Justice Orde said in *Hoppe v. Manners*: "The Collis Case was relied upon by counsel for the defendant as having settled the question, but it is clear that the judgment was confined solely to the question of the validity of the vendor's claim to the furnace. . . . The defendants did not set up the protection afforded by The Registry Act at all, and the point was not in issue. I do not think that the Collis Case has any application to the point under discussion."

These remarks seem to show the occasional tendency of looking for cases instead of principles. In *In re Hallett's Estate*,²⁸ Sir George Jessel M.R. says: "The only use of authorities is the establishment of some principle which the judge can follow out in deciding the case before him." It may also be useful to add here what Sir William Markby says in his book, *Elements of Law*:²⁹ "The nature of the process of reasoning which has to be performed in order to extract a rule of law from a number of decided cases by elimination of all qualifying circumstances is a very peculiar and difficult one. The opinion of the judge apart from the decision, though not exactly disregarded, is considered extra judicial and its authority may be got rid of by any suggestion which can separate it from the actual result. Unless therefore, a proposition of law is absolutely necessary to a decision, however emphatically it may be stated, it passes from the province of *auctoritas* into that of mere *literatura*. Curiously enough, it is not the opinion of the judge, but the result to the suitor which makes the law."

Now what was the main principle dealt with in these cases? There is the explicit rule that chattels in certain definite circumstances affixed to land, become part of the realty. It seems plain that there was in these cases simply the endeavour by decision and later by statute to relax this somewhat rigid rule, in favour of an unpaid seller of chattels affixed to realty.

In England we have seen that such chattels passed to the owner or mortgagee of the realty if he had no notice of the hire purchase. In Ontario it was first held that the seller could remove such chattels affixed to the realty and later with the

²⁷ [1932] O.R. 203.

²⁸ 13 Ch. D. pages 696, 712.

²⁹ Paragraph 99.

enactment of The Conditional Sales Act (but without the assistance of section 8 thereof) it was held that after the seller had complied with section 2 of the Act by giving notice, etc., he could remove his chattels though affixed to the land. This was made indubitable by the passing of section 8 and subsequent decisions thereunder above referred to.

In *Hoppe v. Manners* the endeavour was made to distinguish these previous cases on the ground that the protection of The Registry Act had not before been set up.

Now what was the protection given by the Registry Act? It was supposed to be under present section 73, 74 and 75, which are as follows :—

73. (1)—After the grant from the Crown of land, and letters patent issued therefor every instrument affecting the land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice unless such instrument is registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims.

74. Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration.

75. No equitable lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same person, his heirs or assigns and tacking shall not be allowed in any case to prevail against the provisions of this Act.

Now it is plain from these sections that an unregistered interest cannot prevail against a registered instrument unless there has been actual notice. Secs. 73 and 74 expressly specify actual notice and sec. 75 is to be so construed. See *Thompson v. Harrison*,³⁰ *Peebles v. Hislop*,³¹ *Paramount Theatres Ltd. v. Brandenburger*.³² The whole purpose of the enactment of what is now section 2 of The Conditional Sales Act, as has been stated, was to give notice to the world of the seller's interest. It was said by Mr. Nairn, the sponsor of the original bill, that the principle involved in it had been enacted and acted upon in regard to real property and the tendency of all legislation in respect to personal property was that the possessor and apparent owner should be the real owner for the purpose of sale and where possessor and apparent owner were not the real owner for the purposes of sale, notice of the fact must be given to the world

³⁰ (1920), 60 O.L.R. 484.

³¹ (1913), 30 O.L.R. 511.

³² (1928), 62 O.L.R., 579.

by the registration of an instrument setting out the fact. Another supporter of the Bill stated that its purpose was to give notice to the world of the seller's interest.³³

If registration under The Registry Act constitutes actual notice to all subsequently dealing with the land,³⁴ it is hard to see why filing, etc., in the County Court Clerk's Office, under sec. 2, should not also constitute actual notice to all subsequently dealing with the chattels. In *Re Potter*,³⁵ it was said that sec. 3 (1), (now sec. 2 (1) of The Conditional Sales Act) was framed for the protection of subsequent purchasers or mortgagees for value without notice; and it seems quite impossible that there should be a subsequent purchaser for value *without notice* when sec. 2 has been complied with by the seller.

It is submitted that *Hoppe v. Manners*, by which the Court felt bound in the *Fess Case*, was not rightly decided. At page 591, the late Mr. Justice Orde says: "But is section 8 to be so interpreted as to take the transaction out of the operation of all existing laws framed for the protection of purchasers of real property? It is elementary that the intention of the Legislature must be found in the language of its enactments; but I wonder, if the members of the Legislature had been told that the possible result of the passage of this section would be to render it unsafe hereafter when buying a house to trust to The Registry Act, and that a purchaser might find himself saddled with a heavy liability to some one of whom he had never heard, whether they would have passed the section in its present form."

In answer to this it may be said: "Yes, a purchaser would be so saddled with a heavy liability unless he did one simple thing: make a search in the County Court Clerk's Office, even as he does now in the Sheriff's Office for executions and in the City or Township Treasurer's Office for arrears of taxes."

Be that as it may, it is submitted that the ordinary rules of statutory construction were not followed.³⁶ See Craies' *Hardcastle*, 3rd ed. 67, 69. "The fundamental rule governing the interpretation of statutes is that the object of interpretation and of the rules which have been laid down with respect to it is to ascertain and give effect to the intention of the Legislature, and when that intention is ascertained it must be allowed to prevail. . . . If the words of the statute are in themselves

³³ See *Toronto Globe*, March 10th, 1888.

³⁴ *Rooper v. Hoofstetter* (1886), 26 S.C.R. 41.

³⁵ (1922), 22 O.W.N. 159, 160.

³⁶ See CRAIES' *HARDCASTLE*, 3rd ed., 67, 69.

precise and unambiguous, then no more is necessary than to expound these words in their natural and ordinary sense."³⁷

In *Warner v. Foster*,³⁸ another competition between an unpaid seller of chattels, affixed, and a land mortgage, The Court of Appeal did not follow *Hoppe v. Manners*, and hold that the chattels passed to the land mortgagee, who had no registered notice of the conditional sale. It held that the conditional sale vendor could remove his chattels because the land mortgage was a prior mortgage and not a subsequent mortgage for value without notice. This decision seems questionable. It is plain that the title of the mortgagee arose upon the affixion of the chattels to the realty, a matter subsequent to the conditional sale agreement.³⁹ The chief difficulty with this decision, is that it holds that an unregistered equitable lien has priority over a registered instrument, which is contrary to section 75 of the Registry Act. Should not the real *ratio decidendi* of the case be that the unpaid seller, having complied with The Conditional Sales Act, the registered mortgagee (whether prior or subsequent) is fixed with actual notice of the conditional sale at the time of the affixion of the chattels to the realty?

Another recent case, before a single judge, involving a controversy between an unpaid seller and the land mortgagee was *California Wall Bed Co. v. Prudential Life Assurance Co.*⁴⁰ Here the chattels affixed, were delivered between June 6 and August 6, 1930. The land mortgage was dated March 25, registered April 7, 1930, and the money advanced thereunder on July 23 and September 5, 1930. Following *Warner v. Foster* it was held that the mortgage being prior the chattels affixed did not pass to the mortgagee and the seller could remove them. Here again an equitable lien was, it is submitted, wrongfully given priority over a prior registered instrument contrary to section 75 of the Registry Act. It might also be here observed that section 76 of the Registry Act provides that a mortgage shall be security for its face value on the land comprised in such mortgage as against an instrument executed and registered after, though the mortgage moneys are advanced subsequently to such subsequent instrument, unless there is actual notice. From this section it would appear that the mortgage in this case was a valid security for the amount thereof *on the land*

³⁷ 10 C.E.D. (Ont.) 214, 215.

³⁸ [1934] O.R., 519.

³⁹ See *Northern Life Assurance Company v. Ward Cook Co.*, 38 O.W.N. 464.

⁴⁰ [1935] O.R. 59.

comprised therein, which would include the chattels affixed as against the subsequent conditional sale agreement. There is confusion in all these cases unless the view is accepted that a seller who files his conditional sale contract fixes with actual notice all dealing subsequently with the chattels sold and affixed.

It is submitted that the true conclusion of the whole matter seems to resolve into this; that as against an unpaid, seller chattels affixed to land pass to the owner or mortgagee thereof unless he has notice of the seller's interest; and he is deemed to have such notice if the seller has complied with section 2 of The Conditional Sales Act.

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