

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Allan McPherson and another v. The Temiskaming Lumber Company, Limited, from the Court of Appeal for Ontario; delivered the 19th November 1912.

PRESENT AT THE HEARING :

EARL OF HALSBURY.

LORD MACNAGHTEN.

LORD ATKINSON.

LORD SHAW.

SIR CHARLES FITZPATRICK.

[DELIVERED BY LORD SHAW.]

This Appeal arises out of Interpleader issues. As put in the question for trial, the issue was whether certain goods and chattels consisting of saw-logs seized in execution by the Sheriff of the District of Nipissing, in the Province of Ontario, under the writs of *feri facias* after mentioned, "for the having in execution of the judgments" upon which the writs were issued, "were at the time of the seizure by the said Sheriff exigible under the said executions of the said execution creditors as against the said claimants The Temiskaming Lumber Company, Limited."

The execution creditors were the Appellants, Allan McPherson and William Booth. Executions had been issued upon judgments recovered by these Appellants respectively, the judgments being for the amounts of debts due by A. McGuire

and Company, who were or had been lessees or licensees of certain timber lands in the District of Nipissing, in the Province of Ontario. The writs dealt with by the Trial Judge were three in number and were duly received by the Sheriff as follows, namely, (1) at the instance of McPherson, received on the 2nd December 1909, this being for the sum of \$3,961; (2) and (3), at the instance of Booth, received on the 26th February 1910, for \$729 and \$317, respectively. These two latter appear to have been repetitions of previous executions for the same amounts received by the Sheriff on the 16th June 1909.

The material circumstances of the case so far as the McGuires are concerned, are as follows:—Annie McGuire, wife of Cornelius McGuire, obtained a timber license in ordinary form from the Government of Ontario of certain parcels of land in the townships of Bryce and Beauchamp on the 11th January 1907. The license was subsequently renewed until the 30th April 1912. Annie McGuire was the sole partner of A. McGuire and Company, and she appointed Cornelius McGuire, her husband, as Manager. She obtained advances from, and incurred debts to, the Appellants, who obtained judgments therefor. Writs of *feri facias* were issued and delivered in regular form for payment of the moneys due against (to use the exact language of the writs) “the goods and chattels, lands and tenements, of A. McGuire and Company, in your bailiwick.” In the course of the months of January, February, and March, 1910, considerable cutting operations were made and the logs cut were placed on the ice and floated down the rivers to Lake Temiskaming. The sheriff acting under the execution took exclusive possession of these logs on the 11th June 1910. The Interpleader Order was issued on the 22nd of that month.

There is no objection to the form of these proceedings. By the Execution Act in force in Ontario at their date, namely, the Consolidation Statute of the 13th April 1909, "A writ of execution shall bind the goods and lands against which it is issued from the time of the delivery thereof to the sheriff for execution. Provided that subject to the provisions of the Bills of Sale and Chattel and Mortgage Act, no writ of execution against goods shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title had notice that such writ had been delivered to the sheriff and remains in his hands unexecuted."

There is no dispute in this case that the Respondents, The Temiskaming Lumber Company, Limited, had at least full knowledge of the writs of execution at the instance of the Appellant McPherson. (The position of the Company with regard to the rights of Booth and of McGuire's indebtedness in general is hereafter dealt with). Accordingly, no question arises as to the application of the proviso, it being an admission that The Temiskaming Lumber Company, thus charged with notice of the execution and proceedings, is in no better position to resist legal effect being given to these than the original debtors, Messrs. A. McGuire and Company, would have been. The point, however, which has been taken by the Respondents is this, that while it is conceded that under the law of Ontario execution may proceed against both the goods and the lands of a debtor, a timber license and all the rights, privileges, and interests of the licensee thereunder, constitute, so long as the timber stands, neither the one nor the other, but form an unattachable legal entity. This point, and it is accordingly of much importance to the Province, gravely

affects the rights of timber licensees, their mercantile credit, and the security which they are able to afford in commercial dealings.

It is therefore expedient to consider the position of those holding timber licenses under the law of Ontario, in view of the contention that, valuable as these licenses may be to the licensees, they nevertheless constitute no source of legal credit, because they are unavailable to execution creditors.

The Statute regulating the effect of timber licenses in Ontario is that of 1897, chapter 32, of the Revised Statutes, known as the Crown Timber Act. After making provisions for the grant of licenses to cut timber on the ungranted lands of the Crown, at such rates and subject to such conditions, regulations, and restrictions as may be established by the Lieutenant-Governor in Council, Section 3 provides :—

“(1.) The licenses shall describe the lands
 “ upon which the timber may be cut, and shall
 “ confer for the time being on the nominee the
 “ right to take and keep exclusive possession
 “ of the lands so described, subject to such
 “ regulations and restrictions as may be
 “ established.

“(2.) The licenses shall vest in the holders
 “ thereof all rights of property whatsoever in all
 “ trees, timber, and lumber, cut within the limits
 “ of the license during the term thereof, whether
 “ the trees, timber, and lumber are cut by
 “ authority of the holder of the license, or by
 “ any other person, with or without his consent.

“(3.) The licenses shall entitle the holders
 “ thereof to seize in revendication or otherwise,
 “ such trees, timber, or lumber where the same
 “ are found in the possession of any unauthorised
 “ person, and also to institute any action against
 “ any wrongful possessor or trespasser, and to
 “ prosecute all trespassers and other offenders to
 “ punishment, and to recover damages, if any.”

Provisions are made for the continuation of the grant to licensees, Section 5 of the Statute being to the effect that "license holders who have complied with all existing regulations shall be entitled to have their licenses renewed on application to the Commissioner." A variety of provisions occurs with reference to the obligations of licensees, who are bound, *inter alia*, to keep, and keep open to inspection, such records and books as may be required, and to furnish satisfactory proof of the number of pieces and descriptions of timber, saw-logs, &c. It should be added that, in respect of these rights, the licensee comes under liability to taxation and assessment.

With reference to the land itself, the right of the licensee therein is clear and distinct, namely, it is a right to take and keep exclusive possession of the lands described, with, in the second place, a power to cut and remove timber therefrom. As regards the timber, the property therein, when cut, is vested in the licensee, and this vesting takes place whether the operations of cutting are carried out with or without the licensee's consent.

In the present case, Meredith, J. observes :--
 "I am still unfortunate enough to be unable
 "to understand why the interest in land of a
 "licensee under the Crown Lands Timber
 "License is not an interest in land liable to
 "seizure and sale under a writ of execution
 "as well as liable to assessment for the
 "purpose of taxation." Their Lordships find themselves in the same position. The learned Judges of the Court of Appeal, however, hold that the matter is concluded by authority, and, in particular, by the authority of *The C.P.R. Company v. The Rat Portage Lumber Company*, in 1905, reported in 10 O.L.R., p. 273. This case will be immediately referred to. But it is

important to note that the scheme of the Execution Acts of the Province of Ontario was plainly meant, and, in their Lordships' opinion, it is fitted, to attach not only goods and chattels, but also landed rights. In their Lordships' view, the observation of Lord Davey in *The Glenwood Lumber Company, Limited, v. Phillips* (A. C. 1904, p. 408), is applicable to the present case. The Act there being construed was a Newfoundland Statute of a character similar to that now under construction. It was decided that, in ascertaining what was the nature of the rights under such a Statute, the question was not one of words, but of substance. "If," said Lord Davey, "the effect of the instrument is " to give the holder an exclusive right of occupation of the land, though subject to certain " reservations, or to a restriction of the purposes " for which it may be used, it is in law a demise " of the land itself. . . . It is enacted that " the lease shall vest in the lessee the right to " take and keep exclusive possession of the lands " described therein, subject to the conditions in " the Act provided or referred to, and the lessee " is empowered (amongst other things) to bring " any actions or suits against any party unlaw- " fully in possession of any land so leased, and " to prosecute all trespassers thereon. The " operative part and habendum in the license is " framed in apt language to carry out the " intention so expressed in the Act; and their " Lordships have no doubt that the effect of the " so-called license was to confer a title to the " land itself on the Respondent." All this language is applicable in terms to the Statute of Ontario now being dealt with, similar provisions occurring therein. Their Lordships see no reason to doubt the soundness of the view thus expressed by Lord Davey, or its applicability to rights of a similar character in the Province of

Ontario. In their opinion, a title to the land itself, subject, of course, always to the restrictions, conditions, and limitations laid down in the license, is in the licensee of timber lands.

When, accordingly, the Execution Act of Ontario (9 Edward VII., cap. 47), already referred to, states that a "writ of execution shall bind the goods and lands against which it is issued, from the time of the delivery thereof to the sheriff for execution," it would appear not open to doubt that timber lands and the rights of a licensee therein under a timber license are included under this description. This view appears to be expressly confirmed by Section 32 of the Execution Act, which provides that any estate, right, title or interest in land shall be liable to seizure and sale in execution in the same manner and on the same conditions as land. But apart from that section the nature of the title of a licensee is a title (it may be limited in character) to the land itself, and in their Lordships' opinion, accordingly, it falls within the scope of the Execution Act. In the Court of Appeal, however, the learned Judges did not apparently feel free, if they entertained this view, to give effect to it, on account of the decision in the Rat Portage case above referred to.

In the Rat Portage case the execution debtor was the holder of a permit to cut and remove railway ties from Crown Lands. He entered into partnership with another person, the object of the partnership being to remove the ties in order to fulfil a contract with a railway company. Undoubtedly the object of the partnership was that the ties when cut should be the property of the concern.

In the Court of Appeal it rather appeared that the broad question now to be determined was—by reason of a concession made at the bar—not one upon which a judgment was really asked.

It was conceded by the Counsel for the execution creditor that the writ " was not a lien or charge " upon any of the timber embraced in the Crown " Timber Permit until it had been severed from " the soil." But the contention was that, once severance of the timber took place, the execution attached, notwithstanding any agreements in respect of the timber made before the severance. The parties do not appear to have entered into actual contest upon the question of the real nature of the right of the timber licensee, in so far as the land itself was concerned, or in so far as affected the comprehensive rights of a licensee in land. In these circumstances, their Lordships do not feel that the true issue under the existing Execution Act of Ontario has been fully dealt with. It is interesting to observe from the dictum of the learned Chief Justice Moss that " if an agreement is not " entered into with a colourable purpose, or " with an intent to defeat or defraud creditors, " as by a mere pretended partnership, but is " entered into with the *bonâ fide* intention of " forming a partnership and carrying on a " business, it is not open to attack at the instance " of creditors." If this dictum points to the impossibility of defeating the execution creditor's rights by the colourable device of a partnership or other contract effecting a change of title, so formed as to defeat the execution, their Lordships agree with it. But the right of an execution creditor in no case interferes with the proprietary interests of the execution debtor, except to the effect that, while the execution debtor is free to deal with his property, the property so dealt with remains subject to the rights of the execution creditor therein ; these last remain unaffected and unimpaired. The circumstances of the present case in this regard, and the dealings of A. McGuire and Company, with their rights as

licensees while the execution stood, will be presently referred to. But when the learned Chief Justice states that "the interest transferred by the debtor is not one exigible under a writ of execution, and is not affected by any lien or charge arising therefrom; there is nothing to affect the debtor's interest, and by no process could he be compelled to use it for the benefit of his creditors," their Lordships find themselves unable to agree with these propositions. In practice they would seem to operate greatly to the diminution of the credit otherwise available to timber licensees, and they would manifestly destroy the security for advances upon timber lands, however valuable, until actual severance of the timber. But this consideration might, of course, be counter-balanced by others, and in any view would have to yield to the fair construction of the words of the Execution Act. These words have been already cited. The subject of execution being land, in the broad sense already referred to, there seems no reason to question the comprehension within that term of timber licenses, in accordance with the principle set forth by Lord Davey in the Glenwood case.

It seems not improbable that a judgment in the above sense would have been pronounced by the learned Canadian Judges had they not felt themselves foreclosed by this authority. In their Lordships' view, however, the construction of the Statute is clear. Under the Act the position of the holder of a timber license is, (1) that he is the possessor of an asset of the nature of land; (2) that that asset is, accordingly, subject to execution; (3) that the execution does not interfere with the property of the debtor or his power to assign or transfer, subject only to the security of the execution creditor not being impaired; (4) and when there is cut timber on the

land at the date of execution, that timber is, of course, the instant subject of seizure, (5) Should the timber be cut subsequent to the date of the execution, it is then instantly attached, and the execution cannot be defeated, because the cutting operations had been made by an assignee or transferee to whom, in the interval between the laying on of the execution and the cutting of the timber, the licensee had transferred his rights. And (6) the only exception to this is the case of a title being acquired by a third party in good faith and for valuable consideration and without notice of the writ having been delivered to the sheriff and remaining unexecuted. It seems to their Lordships that if these principles are violated the way is opened up to the defeat of the execution creditor's rights, and, as the circumstances of this case very plainly show, to transactions of a questionable nature under which debtors would endeavour to avoid their just obligations.

The principles now set forth are in entire accord with familiar law. That law was expressed thus by Baron Parke in what still stands as the leading case of *Samuel v. Duke* (3 M. & W. 622):—"Now it is perfectly clear " to me, both upon the decided cases and the " reason of the thing, that if a writ of execution " has been delivered to the sheriff, the defendant " may convey his property, but that the sheriff " has a right to the execution notwithstanding " the transfer. . . . the right " speaks from the time of the delivery of the " writ upon the receipt of which the sheriff is " to levy. But, subject to the execution, the " debtor has a right to deal with his property " as he pleases, and if he transfers it in market " overt, the right of the sheriff ceases altogether."

Under the Execution Act of Ontario the right of the execution creditor is only defeated

if the purchaser has acquired a title in good faith and for valuable consideration without notice of the execution, and has paid his purchase money. The only question therefore remaining in this case is whether the Temiskaming Lumber Company, the Respondents, so acquired in good faith and for valuable consideration and without notice. It is really unnecessary—the documents and admissions of parties standing as they do—to enter upon this question in detail. So far as the McGuires are concerned, they appear to have deliberately set themselves to defeat the rights of the Appellants as judgment creditors, and, in their Lordships' opinion, in this attempt they obtained the active assistance of one Murphy, of the Traders Bank, and of the Respondents. The scheme was to make a transfer of the license before any timber was cut, but to make the transfer in such a way that very substantial interests would still remain to McGuire. The scheme was to develop, and has developed, so that, after the transfer was made, the cutting thereof was to be ascribed to the transferees, and when the execution was levied upon the timber so cut, the execution was to be defeated on the plea that the property in the cut timber was by that time in the transferees, who were not the execution debtors. These, namely, McGuire and Company, would thus slip out of liability by the transfer of the license for valuable consideration, and by having divested themselves of the right to cut timber and invested others who could cut and remove it but yet would not be bound by the execution. This operation, which is essentially a transaction of bad faith, so far as the execution debtors were concerned, might, of course, have been possible on the footing that the rights of the licensee were not a title to land and were

unattachable by execution. Such a state of the law facilitated an operation by which the execution debtor could evade the rights of his creditors by simply standing aside from the active operations of cutting timber under his license and by assigning his license, with the right to cut timber, to somebody else. What happened in the present case was upon these lines, and, without entering upon the matter at large, their Lordships think that the whole series of transactions was simply a juggle to defeat the rights of the execution creditors of McGuire. Teetzel, J. appears to be well justified in his observation:—"As respects the Company and "Murphy, both of whom had notice of the "injunction, it is perfectly plain that, while the "agreement for sale may not be impeachable as "fraudulent as against creditors, the method of "carrying it out was primarily adopted for the "purpose of enabling McGuire and Company to "evade the injunction and to circumvent the "Plaintiff McPherson in his efforts to realise his "judgment out of McGuire and Company's "interest in the license and the right to cut "timber thereunder, and I must say that upon "this record the course pursued by the Traders "Bank was such as without which the dishonest "purpose of McGuire and Company could not "have been so nearly accomplished."

So far as the Respondents, The Temiskaming Lumber Company, are concerned, their position does not appear to be one whit better. By the time of the formation of the Company in January 1910, things had reached the stage of legal proceedings against A. McGuire and Company, and an injunction had been obtained against that firm against parting with its property. When, accordingly, the offer to sell to the Temiskaming Company, dated the 11th January 1910—that is to say, more

than a fortnight before even the first meeting of provisional directors--was considered, "it was resolved that said offer be accepted subject to this: that the transfer of said license shall not be made until the pending injunction against A. McGuire and Company, restraining the transfer of the said license, shall have been disposed of, but in the meantime that the Company shall go upon the limits and carry on the operation of cutting and removing timber therefrom." The pending injunction was not disposed of *in foro contentioso*, but, as narrated in the Appellants' case, "a bond with sufficient sureties was executed by and on behalf of the Respondents, and approved by the Court for the sum of \$10,000, to secure an approximate amount sufficient for the payment of all the said writs of execution (*i.e.*, both McPherson's and Booth's), and the logs were taken possession of by the Respondents."

Their Lordships incline to the opinion that, with reference to the particular matter in issue in this Suit, namely, the cutting of the timber and the rights therein, McGuire and Company simply continued as before the formation of the Temiskaming Company, so far as the transaction of transfer was concerned Annie McGuire took the entire purchase price in \$9,000 of stock allotted to her in the Temiskaming Company. But this ostensible transaction made no real difference to the working of the license. For although the Company was constituted in January 1910, a document is produced, namely, the oath of Cornelius McGuire, furnishing a statement "of the total number of pieces of saw-logs, boom timber, and other timber, got out by or for the said A. McGuire and Company, or otherwise acquired by them, during the past winter." This statement was made in terms of the Crown Timber Act, and is dated

the 28th May 1910. It is in these circumstances impossible, in their Lordships' view, for the Respondents to set up the plea that they acquired the rights of McGuire and Company in good faith, and are so entitled to defeat the execution laid on at the instance either of McPherson or of Booth. As already mentioned, it was upon the timber so cut that execution was levied, and to relieve the execution upon it and to meet the issue in this action an arrangement as to the setting aside of \$10,000 was made. In their Lordships' opinion, the whole circumstances are such as to show that there has been an attempt to defeat the rights of the execution creditors, and that the Respondents were aware of this attempt and have pursued a course of conduct with a view to its success.

In the result, their Lordships are of opinion that the rights of both of the Appellants under the three executions referred to fall to be satisfied out of the \$10,000 secured by the bond, and that the Appellants should be found entitled to the costs of this Appeal and in the Courts below.

Their Lordships will humbly advise His Majesty that the Judgments appealed from should be reversed, that the cause be remitted to the Court of Appeal to dispose of the actions in accordance with this Judgment, and that the costs should be dealt with as above stated.

In the Privy Council.

ALLAN MCPHERSON AND ANOTHER

vs.

THE TEMISKAMING LUMBER
COMPANY, LIMITED.

DELIVERED BY LORD SHAW.

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