

CANADA / JUDGMENT

Jellett v. Wilkie

(1896) 26 SCR 282

COURT

Supreme Court of Canada

DECIDED

18 May 1896

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Jellett v. Wilkie Collection Supreme Court Judgments Date 1896-05-18 Report

(1896) 26 SCR 282 Judges Henry, William Alexander; Strong, Samuel Henry; Taschereau, Henri-Elzéar; Sedgewick, Robert; King, George Edwin; Girouard, Désiré On appeal from Northwest Territories Subjects Priorities and hypothecs Decision Content Supreme Court of Canada Jellett v. Wilkie, (1896) 26 S.C.R. 282 Date: 1896-05-18 St. George Jellett (Defendant) Appellant; and Daniel R. Wilkie and Others (Plaintiffs) Respondents. St. George Jellett (Defendant) Appellant; and The Scottish Ontario & Manitoba Land Company (Plaintiffs) Respondents. St. George Jellett (Defendant) Appellant; and Robert W. Powell (Plaintiff) Respondent. St. George Jellett (Defendant) Appellant; and Jacob Erratt (Plaintiffs) Respondent. 1896: February 28, 29; 1896: May 18. Present:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ. ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES. Real Property Act—Registration—Execution—Unregistered transfers—Equitable rights—Sale under execution—R. S. C. c. 51; 51 V. (D.) c. 20. The provisions of sec. 94 of the Territories Real Property Act (49 V. c. 51) as amended by 51 V. (D.) c. 29 do not displace the rule of law that an execution creditor can only sell the real estate of his debtor subject to the charges, liens and equities to which the same was subject in the hands of the execution debtor, and do not give the execution creditor any superiority of title over prior unregistered transferees but merely protect the lands from intermediate sales and dispositions by the execution debtor. If the sheriff sells, however, the purchaser by priority of registration of the sheriff's deed would under the Act take priority over previous unregistered transfers. APPEAL from a decision of the Supreme Court of the North-west Territories reversing the judgment at the trial in favour of the several defendants. The plaintiffs respectively purchased lands from the Edmonton and Saskatchewan Land Company of Canada on 7th March, 1891, for valuable consideration and the said company then executed and delivered to them respectively transfers of the lands so purchased executed under "The Territories Real Property Act" ([1]). The plaintiffs neglected to register the transfers and on the 20th of June, 1893, the sheriff had in his hands a writ of execution against the lands of the said company issued by the defendant Jellett, and filed a copy of the writ of execution against the said lands as being the lands intended to be charged thereby with the registrar of the registration district within which

they are situate, and a memorandum thereof was made in the registry of the said lands of which the said company still appeared to be the registered owners under uncanceled certificates of title. On the 14th December, 1893, the plaintiffs registered the transfers of the said lands to them from the company, but the registrar refused to issue certificates of ownership to the plaintiffs except marked as being subject to the execution, and accordingly certificates of ownership in favour of the plaintiffs were issued, but marked as affected by the writ under the provisions of the amended sec. 94 of "The Territories Real Property Act." The defendant Jellett maintained the execution in force and directed the sheriff to advertise the lands for sale. The actions asked for declarations that the execution was a cloud on the plaintiffs' titles; that the entry of the execution should be cancelled and removed from the register, and for an injunction restraining the sale of the lands and for damages. Taylor Q. C. for the appellants. Difficulty may arise by reading sections placed for a distinct purpose under one heading, with sections placed for different purposes under different headings of the Act. To get the correct bearing, each section must first be considered with reference to the particular purpose it is intended to serve under the heading where it is found. *Eastern Counties Railway Co. v. Marriage* ([2]); *White v. Neaylon* ([3]); for otherwise we may legislate an intention into the statute. *Lawless v. Sullivan* ([4]); Bowen L. J. in *The Queen v. Liverpool Justices* ([5]); Willes J. in *Abel v. Lee* ([6]); also Lord Coleridge in *Coxhead v. Mullis* ([7]): "It is better to suppose that Parliament meant what Parliament clearly said." Under "The Territories Real Property Act" unregistered transfers create nothing, and form the basis of no equities to defeat executions prior in registration. Registration alone causes a transfer to create or pass an interest; sec. 3, subsec. c. See also secs. 41, 59 and 60. *McEllister v. Biggs* ([8]); *Registrar of Titles v. Patterson* ([9]). *Taylor v. The Land Mortgage Bank* ([10]). Transfers would not, apart from the Act, pass any title. The Act substitutes a new method of passing title, and must be complied with to give the transferee the benefit of the Act. *McGuire J. in Re Rivers* ([11]); *Re Herbert and Gibson* ([12]). In *White v. Neaylon* ([13]), the learned judge deals with the absurdity of the idea that unwritten equities would be stronger than written ones, but says, as Parliament excluded written ones from protection, and said nothing about unwritten ones, the court would conclude that it meant to leave them unprovided for. See *Hagarty C. J. in Peterkin v. McFarlane* ([14]), where he strongly upheld the same theory. *Foy Q.C. and Chrysler Q.C. for the respondents*. The execution bound only the beneficial interest of the debtor. *Eyre v. McDowell* ([15]); *Morton v. Cowan* ([16]). This law has not been changed by "The Territories Real Property Act," which recognizes the creation and existence of equitable or beneficial estates as distinguished both from the legal estate and from a mere personal right against the registered owner. See sec. 3a as substituted by 51 Vict. ch. 20, sec. 3 and other sections. Jones, *Torrens System* 82, 128 and cases cited. Equitable mortgagees can be protected. *Re Maloney* ([17]); *Colonial Bank of Australia v. Pie* ([18]); *Cunningham v. Gundry* ([19]); *Re Massey and Gibson* ([20]) explaining *Herbert and Gibson* ([21]). The respondents were the beneficial owners of the land and the execution debtors owners of the bare legal estate in equity. Upon the delivery of the transfers the lands ceased to be exigible under any subsequent execution against the plaintiffs. *Parke v. Riley* ([22]); *Walson y. The Royal*

Permanent Building Society ([23]); Britain y. Rossiter ([24]); Maddison v. Alderson ([25]); Huntley v. Huntley ([26]). Concurrently with the old rule of law was admitted the rule of equity, that the estate did pass if the intention was clearly indicated. The same rule of equity still exists concurrently with the provisions of section 59. McEllister v. Biggs ([27]); Mathieson v. The Mercantile Finance and Agency Co. ([28]). Section 59 must be read also in conjunction with section 64, and restricted by the words "as against any bond fide transferee." "Transferee" probably includes "encumbrancee" but an execution creditor is neither. A writ of execution filed under section 94 is not an "instrument" within the meaning of the Act. Sections 63, 103 (d), 104, 105 and 124, place a bond fide purchaser for value in a distinct category. This interpretation fulfils the object of the Act. Gibbs v. Messer ([29]). As to priority between instruments filed without production of certificate, see Re Bentley and Morris ([30]). Secs. 60, 61 and 62 are for the benefit of the registered owner, in whose hands the certificate is conclusive evidence sub modo as against persons claiming interests or estates adversely to the certificate, i.e. in the sense of attacking its validity, but not as against persons claiming under the very title evidenced by the certificate, as the respondents claim. Jones, Torrens System 80, 81, 82, 100, 101. Cunningham y. Gundry ([31]). This filing of the execution operates as a caveat merely and a caveat is not an "instrument" within the meaning of the Act (sec. 3, subsec. b). National Bank of Australia v. Morrow ([32]); Giles v. Lesser ([33]). Massey and Gibson ([34]) is followed in Ontario Bank v. McMicken ([35]), where the converse of the point involved in this case is established, viz., that the beneficial interest of a cestui qui trust is exigible under an execution filed under the Act. The certificate can only be evidence when produced, and in favour of him who produces it. The purchasers had it in custody when they received their transfers, and the appellant never had it and cannot appeal to it as evidence in his favour. The Shamrock Co. v. Farnsworth ([36]). Moreover, a certificate cannot be conclusive evidence of more than appears on its face, namely, that at its date the title was in the person named. The sheriff has been properly and of necessity made a party. See Ontario Industrial Co. v. Lindsey ([37]). The judgment of the court was delivered by: The Chief Justice.—This appeal involves a question of law arising upon undisputed facts. Four actions brought by different plaintiffs against the same defendant have been consolidated, the substantial question being the same in each. The plaintiffs in the three several actions of Wilkie, the Scottish Ontario & Manitoba Land Company, and Powell, were each the purchasers of certain lands from the Edmonton and Saskatchewan Land Company, who had obtained transfers of the lands respectively purchased by them, against which the appellant, Jellett, an execution creditor of the last named company had, subsequent to the transfers, but before their registration, procured his writ of execution to be registered under section 94 of "The Territories Real Property Act" as amended by 51 Vict. ch. 20. Erratt, the plaintiff in the remaining action, is also a purchaser for value from the execution debtors under an unregistered contract, prior in date to the registry of the appellant's execution. The questions are the same in all the four cases, viz., whether the registrar was right in refusing to register the transfers and contract except subject to the lien or charge of the execution, and whether the appellant is entitled to sell the lands so as to cut out the titles

of the respondents. The consolidated actions having been heard in the first instance before Mr. Justice Rouleau, who dismissed them, were brought by way of appeal before the Supreme Court of the North-west Territories in banc, which court reversed the judgment of Mr. Justice Rouleau and entered a judgment for the respondents declaring the writs of execution clouds upon the respondents' titles and directing the registrar to cancel the entry of the executions, and further restraining the sheriff from selling the lands under the executions. I am of opinion that this judgment and the reasons given for it in the opinion of the court, written by Mr. Justice Maguire, were entirely right and that there is no foundation for the present appeal. By the North-west Territories Act the law of England as it existed on the 15th of July, 1870, so far as it has not been altered or varied by competent legislative authority, is; by the 11th section of the Act, made the rule of decision in those territories. No proposition of law can be more amply supported by authority than that which the respondents invoke as the basis of the judgment under appeal, namely, that an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor. In a dissenting opinion delivered in the case of *Miller v. Duggan* ([38]), I brought together a number of authorities bearing on this point. I may here refer to the following cases as conclusively establishing the principle in question, viz.: *Eyre v. Mc Dowell* ([39]); *Beaven v. Lord Oxford* ([40]); *Whitworth v. Gaugain* ([41]); *Kinderley v. Jervis* ([42]); *Benham v. Keane* ([43]); *Wickham v. The New Brunswick Railway Co.* ([44]); *Watts v. Porter* ([45]); *Langton v. Horlon* ([46]); *Mc Master v. Phipps* ([47]); and *Strong v. Lewis* ([48]). The rule thus well established must have become the law of the territories unless it has been displaced by some statutory provision to the contrary; and if no such enactment can be referred to it must be conclusive of the question raised by this appeal, as the Supreme Court has held it to be. It is, however, said in behalf of the appellant that section 94 of the Territories Real Property Act (49 Vict. ch. 51) as amended by 51 Vict. ch. 20, does alter the law so as to give the appellant the priority he claims for his writs of execution over the prior unregistered transfers and contract of the respondents. That section is as follows: Every sheriff or other officer charged with the execution thereof shall after the delivery to him of any writ or process affecting land or lien, mortgage or encumbrance or other interest therein deliver a copy of every such writ or process so in his hands or that may thereafter be delivered to him, certified under his hands, together with a memorandum in writing of the lands intended to be charged thereby, to the registrar within whose district such lands are situate, and no land shall be bound by any such writ or other process unless such copy and memorandum have been so delivered; and the registrar shall thereupon, if the title has been registered, or so soon as the title has been registered under the provisions of this Act, enter a memorandum thereof in the register; and from and after the delivery of a copy of any such writ or other process and memorandum to the registrar the same shall operate as a caveat against the transfer by the owner of the land mentioned in such memorandum or of any interest he has therein, and no transfer shall be made by him of such land or interest therein except subject to such writ or other process. Now, as I have already said, the sheriff having delivered a copy of the appellant's writs of execution to the

registrar together with a memorandum of the lands intended to be charged thereby, the latter officer entered a memorandum in the register accordingly, the title then being a registered title, and the respondents then being entitled under the transfers and contract before mentioned. According to the ordinary rules of courts of equity the appellant could have made his execution a charge on, and have sold for the satisfaction of his judgment, just what beneficial interest the execution debtor had in these lands and nothing more. And this, which is said to be a "broad rule of justice" and to depend, as is well pointed out by Wood V.C in *Benham v. Keene* ([49]), upon the obvious distinction between a purchaser who pays his money relying on getting the specific land he buys and a creditor who is in no such position, was from early times enforced by courts of equity in order to protect the title of equitable owners and chargees. And it must have been the obvious right of the respondents to have the benefit of this protection in the way in which the judgment now impugned afforded it to them, unless the statute has abrogated the principle. Had there been no difference of opinion I should have thought that there could be no reasonable ground for the pretense of the appellant that this 94th section gives him any priority. The construction of it seems to me to be obviously plain. The effect to be given to the entry on the register of the memorandum of the writ of execution is clearly and precisely stated in the section itself to be to operate as a caveat or warning to persons who might subsequently purchase or be about to purchase from the execution debtor, that he could only sell or transfer an interest subject to the lien of the writ. This in so many words is what Parliament has declared to be the effect and consequence of the registering of an execution. Surely there is nothing in this abrogating or pointing to the abrogation of prior interests. It follows therefore that the rights of prior parties remain as they were before the execution was registered, and these entitled the respondents to have their transfers registered without any reference being made in the certificate to the execution, and to have the sheriff's sale restrained. I have been through all the sections of the amended Lands Act, and I find nothing abridging the equitable rights of the respondents as they stood when the statute was passed. So far from equities being shut out there are numerous indications, as pointed out in Mr. Justice Maguire's judgment, that it was the intention to conserve them ([50]); particularly the right to specific performance which applies here to Erratt's case is conserved. As regards authority the *National Bank v. Morrow* ([51]), appears to me directly in point. In that case the Supreme Court of Yictoria held that an unregistered equitable mortgagee was entitled to priority over a registered execution, and not only over the execution creditor but also over a purchaser from the sheriff under the execution but whose transfer had not been registered. The 106th section of the Victoria Act is substantially identical with section 94 of the amended Lands Act, the object of both being, not to give the execution creditor any superiority of title over prior unregistered transferees, but merely to protect the land against intermediate sales and dispositions by the execution debtor. No doubt if the sheriff had sold and the purchaser had registered his transfer, the Act would apply, and would in that case invalidate prior unregistered transfers made by the execution debtor before the registry of the execution, but no such case as that is presented by this appeal, which must be dismissed with costs. Appeal

dismissed with costs. Solicitors for the appellants: S. S. & H. C. Taylor. Solicitors for the respondents: Beck & Emery.

- [1] R. S. C. c. 51.
- [2] 9 H. L. Cas. 41.
- [3] 11 App. Cas. 176.
- [4] 3 Can. S. C. R. 117.
- [5] 11 Q. B. D. 649.
- [6] L. R. 6 C. P. 371.
- [7] 3 C. P. D. 442.
- [8] 8 App. Cas. 314.
- [9] 2 App. Cas 110.
- [10] 12 Vic. L. R. 748.
- [11] 1 N. W. T. Rep. Part 4 p. 66.
- [12] 6 Man. L. R. 192.
- [13] 11 App. Cas. 176.
- [14] 9 Ont. App. R. 443 ; 13 Can. S. C. R. 677 sub nom. Rose v. Peterkin.
- [15] 9 H. L. Cas. 619.
- [16] 25 O. R. 529.
- [17] 14 Can. L. T. 240.
- [18] 6 Vic. L. R. Eq. 186.
- [19] 2 Vic L. R. Eq. 197.
- [20] 7 Man. L. R. 172.
- [21] 6 Man. L. R. 192.
- [22] 12 Gr. 69 ; 3 E & A. 215.
- [23] 14 Vic. L. R. 283 ; Hunter's Cases 185, 192.
- [24] 11 Q. B. D. 123.
- [25] 8 App. Cas. 467.
- [26] 114 U. S. R. 394.

- [27] 8 App. Cas. 314.
- [28] 17 Vic. L. R. 271.
- [29] [1891] A. C. 248.
- [30] 12 Can. L. T. 119.
- [31] 2 Vic. L. R. Eq. 197.
- [32] 13 Vic. L. R. 2.
- [33] 5 Vic. L. R. Eq. 38.
- [34] 7 Man. L. R. 172.
- [35] 7 Man. L. R. 203.
- [36] 2 Vic L. R. Eq. 165.
- [37] 3 O. R. 66.
- [38] 21 Can. S. C. R. 33.
- [39] 9 H. L. Cas. 619.
- [40] 6 DeG. M. & G. 507.
- [41] 1 Ph. 728.
- [42] 22 Beav. 1.
- [43] 3 DeG. F. & J. 318.
- [44] L. R. 1 P. C. 64.
- [45] 3 E. & B. 758.
- [46] 1 Hare 560. [47]5 Gr. 253. [48]1 Gr. 443.
- [49] 1 J. & H. 685 ; 3 DeG. F. & J. 318.
- [50] See sec 130.
- [51] Hunter's Torrens cases, p.306.

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Prepared on 29 October 2026 · Esheria