

## SUPERIOR COURT, ST. FRANCIS.

SHERBROOKE, December 20, 1889.

Coram BROOKS, J.

FLANNIGAN v. FEE et al.

*Immovables by destination — Seizure in hands of purchaser in good faith — Rights of mortgagee.*

**Held:**—That a mortgagee of an immovable on which was placed certain machinery which had become *immeuble par destination*, cannot attach said machinery by *saisie en revendication* in the nature of a *saisie-conservatoire*, in the hands of the defendant who has purchased the same in good faith.

**PER CURIAM:**—This was a *saisie-revendication* in the nature of a *saisie-conservatoire* to attach certain machinery, boiler, engine, bark grinder, &c., sold by defendant Fee to defendants Begin and Lemieux, alleging that plaintiff had a mortgage upon a certain tannery at South Durham for \$600 and interest. That on the 28th of May, 1889, plaintiff sold to defendant Fee his rights and pretensions to one-half of said tannery, and one undivided half of the land around the same for \$800 paid at date of sale, and also \$100 and interest due in one year from date of sale, and defendant mortgaged to plaintiff said tract of land so sold.

That there was on said tract of land, the property mentioned, which had become immovable *par destination*, *immeuble par destination*, altogether alleged to be of the value of \$689. That plaintiff has a special lien upon said machinery; that within fifteen days said machinery has been removed illegally, and that the defendants Lemieux and Begin illegally hold the same. That defendant Fee was insolvent to the knowledge of defendants Lemieux and Begin, and they combined and colluded with Fee to defraud plaintiff.

To this defendants Begin and Lemieux plead, first, a special denial; second, that they bought the articles seized about the 16th of May, that this purchase was made in good faith of defendant Fee, who delivered the articles, and they paid for them at Sherbrooke; that Fee has since left the

country, and defendants have been informed that he is insolvent.

The questions arising are two: 1. Had plaintiff a mortgage on this machinery, and if so, for how much? 2. Has plaintiff the right to pursue the defendants as they have under the circumstances *en revendication*?

As to the first question, plaintiff sold to defendant his right in one half the tannery and land, and one-half his interest in the partnership which had existed between them for \$800, \$100 paid, and for security for the balance it was declared "that the hereby sold tract of land was hypothecated under "this sale;" giving it the broadest interpretation, though it is badly expressed, one-half of the property was mortgaged to plaintiff.

The articles seized in the tannery were immovables by destination, our code says, so long as they remain there. C. C. 379. Now the evidence shows that defendants by their manager, bought this machinery of defendant Fee, and paid him \$350 on the 16th May, 1889, and it was removed about the 13th of May. There is no doubt that at least one-half of the machinery was hypothecated to plaintiff. Can he follow it?

He cites *Wyatt v. Senecal et al.*, 4 Q. L. R., page 76, where it was alleged that the defendants in that case had been for a long time in possession of the Levis & Kennebec Railway by hypothecated to him, plaintiff, as holder of bonds, which gave hypothec and also a privileged claim upon the movable property of the Company, and that defendants were removing a part of the movables from the railway. Here there is no allegation that defendants were ever in possession of the realty, but that defendants pleading colluded with Fee, to defraud plaintiff. If this is true, there cannot in my mind be any doubt as to validity of claim for one-half at least.

Mr. Justice Bourgeois in *Philon v. Bisson, & Graham*, Opp., 23 L.C.J. p. 32, decided that the hypothecary creditor could oppose sale of property when seized as movable, under similar circumstances. See also *Budden v. Knight*, 3 Q. L. R. p. 273; *Henderson v. Tremblay*, 21 L. C. J. p. 24, Q.B.

But the question which comes up here is,