

of the respondent Wishart in a mining claim was not exigible under a writ of *feri facias* against his lands and goods.

The appeal was heard by LORD ATKINSON, LORD SHAW and LORD MOULTON.

Sir Robert Finlay, K.C., Archibald Read and M. Gordon, for the appellants.

J. M. Godfrey, for the respondents.

LORD SHAW:—The facts are very simple. Wishart was the holder of an undivided interest in a certain mining claim. He had complied with the provisions applicable to prospecting, staking out his claim, and applying to have it recorded; and he had in point of fact received a certificate of record. All this was duly done under secs. 34, 35, 53, 59, and 64 of the Mining Act of Ontario, 1908. Wishart having thus his interest in the mining claim—an interest the nature of which will be afterwards analysed—the Farmers' Bank of Canada, who were Wishart's creditors for \$53,552, on the 29th September, 1911, obtained a judgment against him for that sum. On the same day there was issued to the sheriff on that judgment a writ of *feri facias* against his goods, chattels, lands, and tenements. The form is not objected to; it correctly followed the provisions of the Execution Act. Although Wishart at the date of that execution was, as stated, the duly recorded holder of a mining claim under the Act, no patent had been granted to him in respect thereof.

About three weeks thereafter Wishart, plainly seeking to avoid as against his mining claim the effect of the execution as laid on, purported to sell it to the respondent Myers. At the end of the same month, namely, on the 31st October, the appellant Clarkson, who is the liquidator of the execution creditor, the Farmers' Bank proceeded to sell the execution debtor Wishart's interest in the mining claim. The sale took place, but the recorder refused to record. His principal ground for doing so was that there had not been, in his view, a compliance with the Statute, by reason of the absence of any duly executed transfer from Wishart himself. So far it is manifest that Wishart, by failing to execute a transfer to his creditor and by selling to a third party and ignoring the execution already laid on, had been