HOUSE OF LORDS.

Friday, August 5.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten, James of Hereford, and Lindley.)

REYNOLDS *v.* ASHBY & SON.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Heritable or Moveable—Fixtures—Machinery—Mortgagor and Mortgagee—Hire and Purchase Agreement.

Under a hire and purchase agreement there was supplied to the lessee of land upon which he was erecting a factory, machines which, having power supplied by gearing, were fastened down to concrete beds by bolts and nuts, and could be removed by undoing the nuts without injury to the building. The land upon which the factory was being erected, "together with the buildings, fixtures, machinery, and fittings erected thereon," had previously been mortgaged by the lessee, who, after the machines had been fastened down, failed to pay the instalments due under the hire and purchase agreement. The mortgagee having entered into possession, the seller of the machines claimed them.

Held that the machines were fixtures which passed with the factory to the mortgagee.

On August 30th 1900, Reynolds, a manufacturer of machines, made a hire and purchase agreement with Holdway, a lessee for 99 years of land in Reading, upon which he was erecting a factory for joinery business, whereby Reynolds was to supply certain machines for use in the factory, which were to be paid for by instalments, but were to remain his property until the final instalment was paid. Holdway had on April 7th mortgaged the premises, "together with the buildings, fixtures, machinery, and fittings erected thereon," and this mortgage had been followed by two later ones, the last dated August 27th to Ashby & Son, who subsequently acquired right to the earlier ones. The machines, which were heavy carpenters' tools, were in due time supplied, and were set down on the ground floor of the factory on concrete beds, and were fastened down with bolts and nuts. Power was supplied to them by means of gearing, and by undoing the nuts the machines could be removed without injury to the building.

In November the mortgagees took possession of the premises, and Holdway failed in the payment of the instalments under the hire and purchase agreement. Reynolds terminated the agreement and demanded the return of the machines. The mortgagees having refused this demand, he raised an action claiming the machines or damages. The Judge (LAWRANCE) held that there were no facts to go to the jury, and gave judgment for the defendants, and on appeal this judgment was affirmed by the Court of Appeal (COLLINS, M.R., ROMER and MATHEW, L.JJ.)

The plaintiff appealed.

At delivering judgment—

LORD CHANCELLOR (HALSBURY)—I cannot say that I am satisfied with the mode in which this case has been disposed of. There are various modes by which things when they are trade fixtures can be protected from being absorbed by the owner of the freehold or by a mortgagee, and I should hesitate very much before I agreed that such fixtures as are in question here, which could only be used when fixed, must necessarily belong to the freeholder or to the mortgagee. By an express or implied contract between the parties interested machinery for the purpose of working in a factory might be protected so that an unpaid vendor who has lent on the hire system machinery to a person who wanted to use it in his mill might make it safe from being absorbed either by creditor or landlord. There is nothing, however, here from which I can infer either an express or implied contract for the removal of these articles which undoubtedly were fixed; and under these circumstances I do not dissent from the conclusion at which your Lordships have arrived. I only desire to say that I agree to affirm this judgment upon the special facts which I find, and from the absence of any evidence which can alter the rule, which has been many times affirmed, upon which the learned Judge acted when the case was before him.

LORD MACNAGHTEN concurred.

LORD JAMES OF HEREFORD—In this case the question for your Lordships' decision is whether certain machines employed for use in a factory had by virtue of their being fixed to the building become a portion of it, or whether they were chattels, and so to be regarded as moveable property. It appears that the plaintiff sold certain machines to a person named Holdway on what is known as a hire-purchase agreement. The plaintiff knew that the machines would be used under ordinary conditions in a factory then in course of erection. This factory belonged to Holdway, who executed three mortgages upon the land upon which the factory was being built, "together with the buildings, fixtures, machinery, and fittings erected thereon." The defendants were the third mortgagees, but having paid off the two preceding mortgages they are now entitled to the land and building of the factory, the further question being raised whether the machines have or have not become part of the mortgaged property. The purchaser Holdway, the mortgagor of the factory, did not fulfil his contract with the plaintiff, so that the goods were unpaid for. On the other hand, it must be taken that the plaintiff was aware that the machines would be used in a factory and would be fixed in the usual manner to the building. There is also nothing unusual in

effecting a mortgage upon a factory (whatever that may include) in the terms which I have mentioned. In consequence of Holdway's default the plaintiff claimed the machines as his property. The defendants resisted the claim upon the ground that the machines being fixed to the mortgaged building the property in them passed under the mortgage deed. At the trial, which took place before Lawrance, J., and a jury, the learned Judge held that as there were no facts in dispute there was no question for the jury, and following the decision in *Hobson* v. *Gorringe*, L.R. [1897] 1 Ch. 182, held that the contention of the defendants was correct and directed a verdict for them. The Court of Appeal has confirmed this judgment. In the first instance I was disposed to think that the question of chattel or fixture being one of fact ought necessarily to have been submitted to the jury, but apparently the course taken by the learned Judge in treating the question as one of law or as one of fact upon which the jury were bound to accept his directions and apply the law as declared by him was correct and certainly was acquiesced in by both parties to the suit. The manner in which the machines were fixed to the buildings has been clearly brought to the notice of your Lordships. This fixing of the machines is to obtain steadiness, and effects the usual condition under which such machines are used. The authorities controlling the questions respecting the difference between fixtures and chattels are very numerous and have been raised between different parties. The rights of landlord or tenant, of mortgagor or mortgagee, and liability to being rated, have all brought this question to a legal issue for the determination of our courts. I do not propose to review those authorities in detail, but having consulted and considered them I have come to the conclusion that the weight of authority is in favour of the view that these machines must be held to be affixed to the building so as to pass under the mortgage as being a portion of the factory. The cases supporting this view are very numerous, but the principal case now generally referred to is that of *Hobson* v. *Gorringe*, the authority upon which Lawrance, J., acted. Doubtless there are cases and dicta upon which the appellants are entitled to rely—*Hellawell* v. *Eastwood* (6 Ex. 295), *Chidley* v. *Churchwardens of West Ham* (32 L. T. Rep. 486), *The Tyne Boiler Works* v. *Longbenton* (1886, L.R., 18 Q.B.D. 81), *Wake* v. *Hall* (1883, L.R., 8 A.C. 195), and several other cases, were relied upon at the Bar to show that these machines should be regarded as chattels, but in none of these cases did the question come up between mortgagor and mortgagee, and in some of them the decisions are explained upon grounds other than those existing in the present case. In the same way *Trappes* v. *Harter* (1833, 2 W. and M. 133), a case arising out of a mortgage, was decided principally upon a question of local custom, and in *Lyon* v. *London City and Midland Bank* (L.R. [1903] 2 K.B. 135) the decision in favour of some chairs being chattels appears to have been correctly decided upon the special facts of that case. It was argued at the bar that as Holdway had not paid for the machines they remained the property of the plaintiff, and could not by any act of Holdway be dealt with as fixtures. But the argument cannot, I think, prevail. The machines were sold by the plaintiff for the purpose of being used in the manner in which they were used. In order so to use them it was necessary that they should be fixed, and so become part of the building. For these reasons I feel that, following a great preponderance of authority, your Lordships' judgment should be in favour of the respondents.

Lord Lindley—This is an action brought to recover certain machines bought from the plaintiff by one Holdway on what is called a hire-purchase agreement. Holdway did not pay the instalments of his purchase money as they became due, and the machines therefore never became his property. The plaintiff knew that the machines were wanted in order to fit up a factory which Holdway was building, and he put the machines into the factory on beds of concrete prepared for them. The machines were worked by steam power transmitted from a steam engine by shafts, wheels, and gearing in the usual way. Each machine was complete in itself. Each was fastened down to its concrete bed by bolts and nuts. The bolts were firmly fixed in the concrete and passed through and projected beyond holes in the machine. The nuts were screwed on the ends of the bolts where they projected, and the machines were thus held fast. By unscrewing the nuts each machine, although heavy, could no doubt be raised up and removed without injury to the building containing it, and without injury to its concrete bed and to the bolts embedded in it. Whilst the factory was being erected, but before any of the machines in question were put into it, Holdway mortgaged to Burrows the land on which the factory was being built, "together with the buildings, fixtures, machinery, and fittings erected thereon." Holdway afterwards executed a second mortgage to one Hatt, and at a later date he executed a third mortgage to the defendants. The machines in question were put into the factory soon after it was mortgaged to the defendants. After they had been fixed, the second mortgagee took possession, and the defendants then paid off the two prior mortgages and took transfers of them. The purpose for which the machines were obtained and fixed appears to me unmistakable; it was to complete and use the building as a factory. It is true that the machines could be removed if necessary, but the concrete beds and bolts prepared for them negative any idea of treating the machines when fixed as moveable chattels. The question is whether they passed by the mortgage. But for the fact that Holdway had *not paid* for them the question would not, in my opinion, be open to the slightest doubt.

There is a long series of decisions of the highest authority showing conclusively that as between a mortgagor and a mortgagee machines fixed as these were to land mortgaged pass to the mortgagee as part of the land. The decisions in question begin with *Walmsley* v. *Milne* (7 C.B., N.S., 115), and include *Ex parte Barclay* (5 De G., M. & G. 403), *Mather* v. *Fraser* (2 K. & J. 536), *Climie* v. *Wood* (1869, L.R., 4 Ex. 328), *Longbottom* v. *Berry* (1869, L.R., 5 Q.B. 123), *Holland* v. *Hodgson* (1872, L.R., 7 C.P. 328), *Gough* v. *Wood* (L.R. [1894], 1 Q.B. 713), and *Hobson* v. *Gorringe* (L.R. [1897], 1 Ch. 182). Others were referred to in the argument, but I need only mention *Southport and West Lancashire Banking Company* v. *Thompson* (1887, L.R., 37 Ch. Div. 64), where it was held that whether the mortgagor is an owner in fee or only a leaseholder (as in this case) is immaterial with reference to the question now under consideration. It is quite impossible to overrule these decisions. It must be conceded that there are dicta in other cases and even decisions which show that for some purposes even machines more or less like these have been treated as chattels. There is *Hellawell* v. *Eastwood* (6 Ex. 295), a case of distress which has been much commented on in later cases, and is of questionable authority; there are rating cases, such as *Chidley* v. *West Ham* (32 L.T. Rep. 486) and *Tyne Boiler Works Company* v. *Overseers of Longbenton* (1886, L.R., 18 Q.B.D. 81); there is the case of the miners' huts—*Wake* v. *Hall* (1883, L.R., 8 A.C. 195)—which was raised between miners in the Peak district and landowners and turned entirely on a local custom; there is the tapestry case—*Leigh* v. *Taylor* (L.R. [1902] A.C. 157)—which was raised between a tenant for life and remainderman; there is *Fisher* v. *Dixon* (12 Cl. & F. 312), which was raised between the heir and the executors of the deceased owner of the land and the machinery fixed to it. I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment but to the circumstances under which it was attached, the purpose to be served, and last, but not least, the position of the rival claimants to the things in dispute. In this case, and still regarding the question for the present as concerning the mortgagor on the one side and the mortgagee on the other, it is, in my opinion, impossible to hold that the machines did not pass with the mortgage. The only authorities on mortgages which present any difficulty are *Trappes* v. *Harter* (2 Cr. & M. 153), and the very recent case of *Lyon & Co.* v. *London City and Midland Bank*. *Trappes* v. *Harter* was a reputed ownership case, and turned on the facts stated in a special case. The Court there held that some trade fixtures did not pass by a mortgage of the property to which they were attached. The special case, however, stated facts showing that the machines as fixed were locally regarded as chattels, that the partners who put them up so regarded them, and that the mortgagee knew this and so treated them. This accounts for the decision. In *Lyon & Co.* v. *London City and Midland Bank* some chairs were hired from the plaintiffs by the owner of a place of public entertainment in Brighton. The Brighton Town Council required the chairs to be fastened so as not to be easily displaced, and this was done. The chairs were screwed to bars fastened to the floor. The building and fixtures were then mortgaged to the defendants. The mortgagees took possession and claimed the chairs, but the Court held they did not form part of the property mortgaged, but remained so many chattels. Having regard to the nature of the things fixed, the mode of fixing, and the order of the town council, the decision was, in my opinion, quite right, and in accordance with the authorities above referred to. I pass now to consider whether in this case the fact that the mortgagor Holdway had not acquired the ownership of the machines by paying for them entitles the plaintiffs to recover their value from the defendants. The title to chattels may clearly be lost by being affixed to real property by a person who is not the owner of the chattels. This was pointed out in *Gough* v. *Wood* (*cit. supra*), and is very old law. Holdway agreed to buy the machines, but the plaintiff knew what he wanted them for, and that before paying for them he intended to put them up in his factory and to use them. He knew that the factory was mortgaged, and he ran the risk of the machines being claimed as fixtures. In effect, Holdway was authorised by the plaintiff to convert the chattels into fixtures, subject to the right of the plaintiffs to enter and retake them if he did not pay them. But, apart from this knowledge and authority, the result would be the same, although not so obvious. After the machines were fixed, and before the plaintiff claimed them, the second mortgagee took possession; the plaintiff's right to enter and remove the machines resting as it did on their contract with Holdway ceased to be exerciseable. The plaintiff has no greater right against the defendants than they had against the second mortgagee, whose rights the defendants have acquired. The machines had ceased to be chattels belonging to the plaintiff; they were not chattels wrongfully detained by the defendants. The machines had become fixtures which the plaintiff was not entitled to remove from the possession of the mortgagees. This was the view taken by both Lawrance, J., and by the Court of Appeal, and was in accordance with *Hobson* v. *Gorringe* (*cit. supra*), which in my opinion was correctly decided. There were really no facts in dispute, and nothing would have been gained by leaving the question to the jury. The legal questions raised on the undisputed facts were in my opinion rightly decided, and the appeal ought to be dismissed with costs.

Judgment appealed from affirmed and appeal dismissed

Counsel for the Plaintiff and Appellant—Haldane, K.C.—Herbert Reid, K.C.—Rowlatt. Agents—Scott, Spalding, & Bell.

Counsel for the Defendants and Respondents—J. A. Hamilton, K.C.—A. Powell, K.C.—Keeling. Agent—Thomas H. E. Foord.

PRIVY COUNCIL.

Monday, December 19.

(Before Lords Macnaghten and Lindley, Sir Ford North and Sir Arthur Wilson.)

COMMONWEALTH PORTLAND CEMENT COMPANY *v.* WEBER, LOHMANN & COMPANY.

(ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.)

Agent and Principal—Shipping-Agent—Negligence of Agent—Liability of Agent for Failure to Pass Goods through Custom-House before New Customs Act Imposing Duties.

A firm of shipping-agents were under contract to pass certain goods through the custom-house. By the existing law the goods were duty-free if passed within twenty-four hours of the ship being reported. It was, at the time of the arrival of the goods, common knowledge that the Government had in contemplation a new Customs Act whereby the goods might be made subject to duty. Before twenty-four hours from the reporting of the ship had expired, and before the goods were passed, the new tariff was imposed and the goods thereby became subject to a heavy duty. It was proved that there was ample time to pass the goods through the Customs on the day on which the ship was reported before the duty became chargeable. *Held* that the agents were not under any legal obligation to pay attention to what the Government might or might not do as regards altering Customs duties, and were not liable in damages to the amount of the duties which the owners had had to pay under the new Customs Act.

The Commonwealth Portland Cement Company contracted by letter with Weber, Lohmann, & Company, shipping-agents, stevedores, and lightermen in Sydney, for the lightering and loading on railway trucks of new machinery which they were about to erect at their works, and which was due to arrive shortly on board the s.s. "Karlsruhe." Weber, Lohmann, & Company also agreed without extra charge to pass through the Custom-House the machinery, which by the existing law was not liable in duty if passed at Sydney within twenty-four hours of the ship being reported. It was known that a change in the Customs duties was in contemplation, and it had been announced on the 25th September 1901 that the Budget statement would be made on the 8th October and that the tariff would then be known.

The "Karlsruhe" was reported at 9·10 a.m. on the 8th October, and the new tariff was laid on the table of the House of Representatives, and came into effect at 4 p.m. that day, by which time the Commonwealth Portland Cement Company's machinery had not been passed through the Custom-House. The duties payable on it, which had to be paid before it could be cleared, amounted to £997, 5s. 10d. This sum the company sent to Weber, Lohmann, & Company to enable them to have the machinery cleared, and afterwards sought to recover in an action of damages. The circumstances of the case are fully stated in their Lordships' judgment.

The Judge (OWEN J.) gave judgment for the defendants, and his decision was affirmed by the Supreme Court of New South Wales (STEPHEN, SIMPSON, & WALKER, JJ.)

The plaintiffs appealed.

Their Lordships' judgment was given by

LORD LINDLEY—This is an appeal from a judgment of the Supreme Court of New South Wales affirming a judgment of nonsuit in an action brought by the appellants against the respondents. The appellants are manufacturers of cement. Their head office and works are at Portland, New South Wales. They had ordered machinery from abroad and it was to arrive at Sydney in a steamer named the "Karlsruhe" consigned to the care of the respondents, who were shipping agents there. The ship arrived on Sunday the 6th October 1901. Monday was a holiday. The ship was reported early on Tuesday the 8th October. When the ship arrived no Customs duty was payable in New South Wales on machinery imported from abroad, but like other duty-free goods it had to be entered and cleared at the Customs-House at Sydney, and (as will be more fully explained presently) the respondents had undertaken to pass it through the Customs-House for the appellants. By the New South Wales Customs Regulations Act 1879 (42 Vict. No. 19), twenty-four hours from the date of the report of the ship were allowed for entering and clearing duty-free goods, Sundays and holidays not being counted. Before twenty-four hours for entering and clearing the machinery had expired, and before it had been cleared, viz., in the afternoon of the 8th October, the machinery became liable to a heavy duty of £900 odd, and it could not be afterwards cleared or landed until this duty was paid. It was proved at the trial that there was ample time to enter and clear the machinery on the 8th October before the duty became chargeable. It was also proved that on the morning of the 8th October the defendants did enter and clear some goods of their own brought by the "Karlsruhe." It was further proved that it had been for some time common knowledge in Sydney that the Government of New South