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A moving experience: couple picked up and left

In bizarre case of title fraud, they stole the house

Two lenders turned to courts to decide complex case

Title fraud is in the news a lot lately, with stories of unfortunate homeowners having the title to their houses stolen out from under them.

I can only imagine that finding someone else claiming ownership to your house can ruin an otherwise pleasant day, both for the owner and the mortgage lender.

As distressing as that may be, however, it's not nearly as bad as finding out that the house itself has been stolen, leaving nothing but the foundations and a vacant parcel of land.

It actually happened to the Toronto-Dominion Bank a few years ago, and it's one of my favourite stories of title theft.

It all began in Goulbourn Township, a pleasant rural area of eastern Ontario just southwest of Ottawa.

In the summer of 1977, a lawyer whom I will call Brian owned a house located on the 11th Concession of Goulbourn.

He arranged to borrow $50,000 from the Toronto-Dominion Bank, and a mortgage for that amount was signed and registered on the title to the property.

Two years later, Brian wanted to move, but he liked his house so much that he decided to take it with him.

His wife, whom I will call Liz, owned a parcel of land in West Carleton, about 30 kilometres northwest of Goulbourn, and they decided to relocate the house there.

In July 1979, the house was lifted off its foundations and moved to the new location. Brian and Liz neglected to tell Toronto-Dominion that the house the bank thought it had a mortgage on was no longer there.

After relocating the house, Brian and Liz completed extensive renovations, giving the house the appearance of a newly constructed dwelling.

Only a careful interior inspection of the concrete block foundations and colour variations in the grouting and mortar on the old concrete blocks at the time would have revealed that the house in West Carleton was not sitting on its original foundations.

I also imagine it would have been somewhat difficult to conceal from the neighbours a house travelling down the local back roads on a lovely summer day back in 1979.

In March of the following year, Liz transferred the title to that property to the joint names of herself and her husband.

On the same day, Brian and Liz mortgaged the property and the relocated house to Crown Trust for $55,080.

At the time of registration of the Crown Trust mortgage, there was no other mortgage registered against the house at that location.

When it advanced the money on its new mortgage, Crown Trust was unaware that the house had been moved from its original location, and was subject to a mortgage registered on the same building but a different parcel of land in Goulbourn Township.

It wasn't long before the two lenders were suing each other and the owners to establish who had a prior mortgage claim against the house in its new location.

TD, of course, claimed that its mortgage accompanied the house on its trip down the local sideroads, and it wanted priority over the Crown Trust mortgage. Opposing TD, Crown Trust claimed it had a registered first mortgage on the West Carleton land, along with the house that was sitting on it.

The issue for the court to decide was whether the house itself was subject to the TD mortgage, the Crown Trust mortgage, or both.

If you were the judge, what would you do?

The case came up for trial in 1987, six years after Brian had been disbarred for misappropriating client funds and registering forged documents in a land registry office. The trial judge ruled that TD had a valid first mortgage against the house in priority to Crown Trust because the house was a fixture attached to the original parcel of land even though TD's mortgage was not registered on the West Carleton property.

Three years later, the Ontario Court of Appeal took a second look at the case and reversed the trial decision. The appeal judges ruled that Crown Trust had priority over TD in both the second property and the house sitting on it.

The reasoning of the appeal court is interesting. Both mortgage lenders, the court said, had an equal claim against the house.

TD's claim was based in equity the court's authority to do what is fair and just, whether or not there is any written law to support it. In equity, and in fairness, TD had a claim against the house, the court said.

Crown Trust's claim was a valid legal claim, since it was a registered first mortgagee.

In awarding priority to Crown Trust, the appeal court said that where two parties have claims of equal merit, the one with the legal (as opposed to the equitable) claim will prevail.

In 1991, TD applied to the Supreme Court of Canada for permission to appeal the decision of the Ontario Court of Appeal, and the justices turned it down effectively endorsing the correctness of the appeal court's ruling.

The next time you see a house travelling down the street, ask yourself: Is this a genuine house move, or is it a clumsy attempt at a title transfer?

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Toronto-Dominion Bank v. Faulkner et al.

60 O.R. (2d) 529

Ontario High Court of Justice

Callon J.

September 1, 1987.

Counsel:

H.R. Shanbaum, Q.C., for plaintiff.

P.A. Fellen, for defendants.

1 CALLON J.: This is a dispute between two mortgagees arising out of the removal of a dwelling-house from one property to another unrelated property. The plaintiff, the Toronto-Dominion Bank, was a mortgagee of the first property and the defendant, the Crown Trust Company, was a mortgagee of the second property.

2 The issue in this action is whether the plaintiff retains the title to or the ownership in, as mortgagee, the dwelling-house notwithstanding its removal to a different property.

3 By mortgage dated August 9, 1977, and registered on September 29, 1977, the defendant Ronald John Faulkner mortgaged the lands and premises known as part of Lot 24 in the 11th Concession of the Township of Goulborn to the plaintiff for the amount of $50,000. The property so mortgaged consisted of the lands and a dwelling-house. On July 29, 1979, the dwelling was moved without the knowledge or consent of the plaintiff to the lands known as part of the south half of Lot 1, in Concession 3 of the Township of West Carleton, which lands were owned by the defendant Anne Kille who is one and the same person as the defendant Elizabeth Anne Faulkner. By deed dated January 25, 1980, and registered on March 12, 1980, Anne Kille conveyed the property to herself in the name of Elizabeth Anne Faulkner and to Ronald John Faulkner as grantees. By mortgage dated March 10, 1980, and registered on March 12, 1980, Ronald John Faulkner and Elizabeth Anne Faulkner mortgaged the property which then consisted of the lands in the Township of West Carleton and the dwelling-house which had been moved from the Township of Goulborn property to the defendant Crown Trust Company for $55,080. When the mortgage was taken by Crown Trust Company, there was no registration on title of any encumbrance or claim by the plaintiff to the dwelling-house.

4 It is agreed that all of the mortgage funds were advanced to the mortgagors on each of the mortgages to the plaintiff and to the defendant Crown Trust Company respectively.

5 The plaintiff adduced evidence that there were indications from a view of the interior of the basement that the dwelling- house had been moved. These indications related to difference in appearance of the one row of original cement blocks which supported the dwelling-house while being moved and the new cement blocks that had been installed after the move, as well as the difference in colour and size of the concrete grouting made after the move and the mortar on the old cement blocks. Those indications would only be apparent to a person making a careful inspection from the interior of the basement and, in any event, were insignificant when considered with the extensiveness of the renovations carried out to the dwelling-house after the move which resulted in giving it the appearance of a newly constructed building.

6 To attribute any fault to the defendant Crown Trust for failing to discover that the house had been moved prior to the advance of moneys under its mortgage is, on these facts, to put too high a duty on a mortgagee. I therefore find that Crown Trust did not have constructive notice of the plaintiff's interest in the house. It is clear on the evidence that Crown Trust did not have actual notice that the house had been moved or of the plaintiff's claim until some time after it had advanced the mortgage funds.

7 The defendant Crown Trust submitted that the Registry Act, R.S.O. 1980, c. 445, as amended (the "Act"), disposes of the issue in the case at bar. As set out above, the priority of mortgages in this case turns on the question: who held legal title to the house at the time the mortgage was given to Crown Trust? I cannot see how the Act is of assistance in answering this question. It is trite law that registration under the Act does not cure defects in title: see for example Falconbridge on Mortgages, 4th ed. (1977), at p. 210. If legal title remained in the plaintiff notwithstanding the removal of the house and its attachment to a different property, then the subsequent registration of the Crown Trust mortgage did not cure any flaw inherent in the mortgage by virtue of the mortgagors' defect of title.

8 In determining who held legal title to the house at the time the Crown Trust mortgage was given, I am faced with two legal principles which, when applied to the above facts, present conflicting results. The first principle is that where a fixture which forms part of the security for a mortgage is removed, the mortgagee retains title in the object, even as against a subsequent innocent purchaser: Scottish American Investment Co. v. Sexton et al. (1894), 26 O.R. 77 (Ch. D.). Applying this principle to the facts, the house was a fixture on the Goulborn property and its removal and subsequent attachment to the West Carleton property did not extinguish plaintiff's title as mortgagee. The plaintiff would then have a legal mortgage, the defendant Crown Trust an equitable mortgage, and by the ordinary rules governing priorities, the plaintiff would be entitled to prevail.

9 The second, and in this instance conflicting principle is derived from the law of fixtures. It states that title to fixtures is in the owner of the land to which they are affixed, irrespective of title of the person who affixed them: Reynolds v. Ashby & Son, [1904] A.C. 466. Thus, the owner of a chattel will lose his legal title to it by permitting it to be annexed to the land of another person. According to Megarry and Wade, The Law of Real Property, 5th ed. (1984), at p. 738, even a stolen chattel, if annexed to real property, will become the property of the owner of the land.

10 If this second principle is applied, then the removal of the house and its subsequent attachment to the West Carleton property extinguished the plaintiff's legal title and vested legal title to the house in the defendant Anne Kille as the owner of the second property. Her conveyance to Ronald John Faulkner and herself would then have passed good title and their mortgage to the defendant Crown Trust would be a legal mortgage, leaving the plaintiff with an equitable claim only. Again applying the priority rules, since Crown Trust did not have notice of the plaintiff's claim prior to the advance of the mortgage funds, the defendant Crown Trust's legal mortgage would have priority over the plaintiff's mortgage.

11 In resolving this apparent conflict, I am assisted by the Supreme Court of Canada's decision in Travis-Barker v. Reed, [1923] 3 D.L.R. 927, [1923] 3 W.W.R. 451 (S.C.C.); reversing in part 66 D.L.R. 426, [1921] 3 W.W.R. 770, 17 A.L.R. 319 (Alta. App. Div.); varying 54 D.L.R. 405, [1920] 3 W.W.R. 623 (Alta. S.C.). Reed was also a dispute between two mortgagees over a dwelling-house which had been moved. The court found that the second mortgagee was entitled to priority. It stated that the first mortgagee, in seeking a lien on the dwelling-house or its restoration to the original property, was invoking the equitable jurisdiction of the court and as a condition of relief, was required to do equity. It failed in this respect because after it discovered the removal of the house, it did nothing to warn innocent third parties that it had a prior claim on the property. The first mortgagee was therefore estopped from succeeding in its equitable claim. Although not expressly stated, it is a reasonable inference from the reasons that the first mortgagee would otherwise have succeeded.

12 A second case of assistance to me is Scottish American Investment Co. v. Sexton et al., supra. The defendants had obtained a loan upon the security of seven houses, including the furnaces. One of the defendants removed five of the furnaces from the mortgaged properties and placed them in certain houses belonging to his mother. The court held [at p. 79] that:

[A]ssuming that the plaintiffs as mortgagees, were owners of the furnaces, that is, to the extent of their right, the wrongful taking of them by the defendant Francis Sexton, the younger, would not place him in a position to pass title to the property in them to his mother, even if it were to be supposed that she was an innocent purchaser for value, a thing that I do not on the evidence suppose.

13 Thus, title in a fixture which formed part of the security for a mortgage did not pass to the purchaser, even where the objects in question had been affixed to the purchaser's property. The reference to the innocent purchaser is obiter. However, I do not rely on it in disposing of the case at bar given that here, as in Sexton, the facts do not support an innocent purchaser.

14 Applying these cases to the case at bar, I find that the plaintiff should succeed. The mortgagor and defendant, Ronald John Faulkner, wrongfully removed the house to the new location. The fact that the new property belonged to the mortgagor's wife at the time the house was moved and that the wife was also a party to the mortgage to Crown Trust is, in my view, immaterial. There is no question but that as against the defendant Ronald John Faulkner the plaintiff would be entitled to damages for the value of the house. I find that it is also entitled to an order for the establishment of a lien upon the house in its present location unless there is some conduct or omission on its part which in equity disentitles it to such an order.

15 I find on the facts that there was not such conduct or omission. The plaintiff did not know and could not easily have determined that the house had been removed from the Goulborn property before the defendant Crown Trust advanced the mortgage funds. To suggest that the plaintiff should have dispatched employees to all the properties on which it holds security on a monthly, weekly or even daily basis to ensure that all buildings are still in place is impractical and without merit.

16 Accordingly, the plaintiff is entitled to a declaration that it is a mortgagee of the property described in the mortgage to Crown Trust in priority to the mortgage held by Crown Trust with the dwelling-house situated on those lands as security for its mortgage. The plaintiff is also entitled to its costs of the action.

Judgment for plaintiff.

Toronto-Dominion Bank v. Faulkner, Faulkner (a.k.a. Kille),

Crown Trust Co., Municipal Savings and Loan Corp.

and Micic (c.o.b. Micic Heating)

74 O.R. (2d) 92

Action No. 630/87 ONTARIO

Court of Appeal

McKinlay, Catzman and Carthy JJ.A.

June 25, 1990.

* An application for leave to appeal from this decision to the Supreme Court of Canada was dismissed with costs (Gonthier, Cory and Stevenson JJ.) on January 31, 1991. S.C.C. File No. 22122. S.C.C. Bulletin, 1991, p. 274.

APPEAL from a decision of the High Court of Justice (1987), 60 O.R. (2d) 529, 41 D.L.R. (4th) 182, 46 R.P.R. 1, granting order that priority to first mortgagee.

I.V.B. Nordheimer, for Crown Trust Co., appellant.

H. Richard Shanbaum, Q.C., for respondent.

The judgment of the court was delivered by

CATZMAN J.A.:

The contest

This appeal involves an unusual contest between two mortgagees of two different parcels of real estate. What makes the contest unusual is its subject-matter: a house -- the same house -- which was situated on each of the parcels at the time each of the mortgages was given.

The facts

In 1977, a lawyer, since disbarred, named Faulkner mortgaged property in the Township of Goulbourn (the first property) to the Toronto-Dominion Bank (the bank) for the sum of $50,000. At the time the bank's mortgage was given, the house stood on the first property. The bank's mortgage was duly registered in the local land registry office.

In 1979, without the bank's knowledge, Faulkner physically moved the house from the first property to lands owned by his spouse in the Township of West Carleton (the second property).

In 1980, Faulkner's spouse conveyed the second property to herself and Faulkner as grantees. At the same time, Faulkner and his spouse mortgaged the second property to Crown Trust Company (Crown Trust) for the sum of $55,080. At the time the Crown Trust mortgage was given, the house stood on the second property. There was no registration on the title to the second property of any encumbrance or any claim by the bank to the house. The conveyance and the Crown Trust mortgage were duly registered in the local land registry office.

All of the mortgage funds were advanced by the bank and by Crown Trust on their respective mortgages.

The trial judge, whose findings of fact were not disputed on the appeal, found that Faulkner wrongfully removed the house from the first property to the second property; that Crown Trust did not have actual notice that the house had been moved nor actual notice of the bank's claim until some time after it had advanced its mortgage funds; and that Crown Trust did not have constructive notice of the bank's interest in the house.

The judgment at trial

In reasons for judgment reported at (1987), 60 O.R. (2d) 529, 41 D.L.R. (4th) 182, 46 R.P.R. 1 (H.C.J.), the trial judge held that the bank had priority. He concluded that, as against Faulkner, the bank would be entitled to damages for the value of the house, and that the bank was also entitled to an order for a lien upon the house at its location on the second property unless there was some conduct or omission on its part which in equity disentitled it to such an order. He found that there was no such conduct or omission, and that the bank did not know and could not easily have determined that the house had been moved from the first property before Crown Trust advanced funds under its mortgage on the second property.

The trial judge [at p. 532 O.R., p. 184 D.L.R.] considered himself to be faced with:

... two legal principles which, when applied to the above facts, present conflicting results. The first principle is that where a fixture which forms part of the security for a mortgage is removed, the mortgagee retains title in the object, even as against a subsequent innocent purchaser: Scottish American Investment Co. v. Sexton et al. (1894), 26 O.R. 77.

. . . . .

The second, and in this instance conflicting principle is derived from the law of fixtures. It states that title to fixtures is in the owner of the land to which they are affixed, irrespective of title of the person who affixed them: Reynolds v. Ashby & Son, [1904] A.C. 466. Thus, the owner of a chattel will lose his legal title to it by permitting it to be annexed to the land of another person. According to Megarry and Wade, The Law of Real Property, 5th ed. (1984), at p. 738, even a stolen chattel, if annexed to real property, will become the property of the owner of the land.

He noted that, in resolving this conflict, he found assistance in two decisions: that of the Supreme Court of Canada in Travis-Barker v. Ree, infra, and that of the Chancery Division of the High Court of Justice of this province in Scottish American Investment Co. v. Sexton (1894), 26 O.R. 77. Applying those decisions to the present case, he found in favour of the bank and granted two declarations, which, in the form in which they appear in the formal judgment, declared the bank to be a mortgagee of the property described in the mortgage to Crown Trust (that is, the second property) in priority to the Crown Trust mortgage, and declared the house situated on the lands described in the Crown Trust mortgage to be held as security for the bank's mortgage.

Crown Trust now appeals from this judgment.

Travis-Barker v. Reed

It will be convenient to deal with the two cases from which the trial judge indicated that he derived assistance in the order in which they were considered by him.

The first is Travis-Barker v. Reed. In that case, Travis-Barker sold a portion of a subdivision of land, subject to a mortgage, to Sutherland under an agreement by which the purchase price was to be paid in instalments. Sutherland in turn entered into an agreement to sell, by instalments, one lot in the subdivision to Punt, who erected upon it a house which he occupied as his home. Sutherland subsequently defaulted under his agreement with Travis-Barker, who obtained an order foreclosing Sutherland's interest in the land. The order had the effect of terminating any interest which Punt had in the lot he had agreed to buy from Sutherland. Thereafter, Punt and his father-in-law, Reed, who knew of the interests of Travis-Barker and the mortgagee, without notice to them removed the house to a second lot, title to which was then in the name of Mrs. Reed and was subsequently transferred to her daughter, Mrs. Punt. Mrs. Punt mortgaged the second lot, on which the house then stood, to Nettleton, who was found to be a bona fide investor acting in good faith throughout.

After Travis-Barker and the mortgagee learned of the removal of the house to the second lot, they instituted court action but took no steps to obtain an injunction for registration in the land titles office or otherwise to warn the public against purchasing the lot or lending on mortgage against it. In the action, they sought damages or, in the alternative,

permission to remove the house or a charge upon the lot on which it stood.

The trial judge awarded damages against Punt and his father-in-law, Reed, for having wrongfully removed the house and ordered a charge against the property of Mrs. Punt, which he declared to be secondary to the Nettleton mortgage: (1920), 54 D.L.R. 405, [1920] 3 W.W.R. 623 (Alta. S.C.).

On appeal, the Appellate Division of the Supreme Court of Alberta, reversing the finding of the trial judge in this respect, concluded that the house erected by Punt was not intended by him to become a fixture and was thus not part of the freehold, and that Punt had the right to remove it from the lot on which it stood. The Appellate Division therefore ordered that the action be dismissed: (1921), 17 Alta. L.R. 319, 66 D.L.R. 426, [1921] 3 W.W.R. 770.

On further appeal, the Supreme Court of Canada, by a majority (Davies C.J.C., Duff, Anglin and Mignault JJ.; Brodeur and Idington JJ. dissenting), restored the judgment of the trial judge: [1923] 3 D.L.R. 927, [1923] 3 W.W.R. 451. Anglin J., with whom Davies C.J.C. concurred, distinguished between the plaintiffs' right to damages for wrongful removal of the house and their right to relief in regard to the house itself in the following terms, at pp. 455-56 W.W.R., pp. 930-31 D.L.R.:

It follows that the removal of the building to lot 13 was a wrongful act as against the plaintiffs, who were respectively the owner and the mortgagee of lot 11, and that the defendant Reed who so removed it is answerable to them in damages. In demanding that relief, the plaintiffs are asserting a purely common-law right and cannot be put upon terms as a condition of obtaining it.

But in seeking further or alternative relief in regard to the building itself -- either its restoration to lot 11 or the establishment of a lien upon it in its present location on lot 13 -- they invoke the equitable jurisdiction of the Court and may, as a condition of being granted any such relief, be called on themselves to do equity. On that footing I think they were properly required to recognize the priority of the claim of Mrs. Nettleton. Her good faith is unquestioned. She became mortgagee of lot 13 in the belief that the building was lawfully upon and formed part of the land included in that lot. The plaintiffs might by taking proper steps have affected her with notice of their claim to the building and she would then doubtless not have advanced her money to Mrs. Punt on mortgage on lot 13. Having failed to do so, they should not, in my opinion, be now allowed to assert an equitable claim in respect to the building to her prejudice.

(Emphasis added)

In an evident reference to this passage, the trial judge in the present case drew the conclusion [at p. 533 O.R., p. 185 D.L.R., emphasis added] that the claim of the first mortgagee in Travis-Barker for a lien or for the restoration of the house to the original property failed:

... because after it discovered the removal of the house, it did nothing to warn innocent third parties that it had a prior claim on the property. The first mortgagee was therefore estopped from succeeding in its equitable claim. Although not expressly stated, it is a reasonable inference from the reasons that the first mortgagee would otherwise have succeeded.

and, in purported reliance on this inference, determined that the bank's claim to priority in the present case should succeed.

With respect, nothing in the reasons given in Travis-Barker supports such an inference. It is nowhere suggested in the quoted passage or elsewhere in the reasons of Anglin J., and the separate reasons for judgment of Mignault J., who also formed part of the majority, are expressed in language which does not admit of any such inference. He said, at pp. 457-58 W.W.R., pp. 932-33 D.L.R.:

I have no doubt that the removal of the house was a wrongful act in so far as Travis-Barker and the Imperial Canadian Trust Company, the mortgagee, are concerned. The house was a fixture and part of the land, and Punt in removing it was a wrongdoer. The appellants therefore are entitled to the damages which they obtained from the trial Court.

Their alternative demand for the restoration of the house to its original location, if possible, is met with the difficulty that the respondent, Jennie W. Nettleton, loaned money on mortgage on the land to which the house was removed in good faith and without notice of the appellants' rights therein. The appellants cannot claim a lien on the house or the land to which it was removed without submitting to Mrs. Nettleton's mortgage. The trial Judge granted them a lien on this land, but second to the Nettleton mortgage. In this I think he was clearly right, for the appellants must get their lien from the Court in the exercise of its equitable jurisdiction, and the Court would grant this lien only upon terms that the Nettleton mortgage be paid in priority to the appellants' claim.

The present case is similar to Travis-Barker in one respect and dissimilar in another. In the present case, as in Travis-Barker, both the mortgagee of the first property and the mortgagee of the second property were innocent of any wrongdoing. In the present case, unlike Travis-Barker, the mortgagee of the first property had no knowledge of the removal of the house to the second property before the mortgage on the latter property was given. As I read Travis-Barker, however, this factual distinction is not a distinction in principle which would dictate a different result. Travis-Barker and his mortgagee were subordinated to Nettleton because their claim was equitable whereas the claim of Nettleton, as mortgagee of the legal estate of the second property, was legal. The event that transformed the position of Travis-Barker and his mortgagee in respect of the house into an equitable claim was the removal of the house from the first property, to which they held the legal title, to the second property, to which they held no legal title. Where equities are equal, legal title prevails: if two claims are equally meritorious, there is no ground for depriving the claimant who has the legal estate of the priority which that estate confers: W.B. Rayner and R.H. McLaren, eds., Falconbridge on Mortgages, 4th ed. (Toronto: Canada Law Book, 1977), at p. 114.

In the present case, the party in the position of Travis-Barker and his mortgagee is the bank; the party in the position of Punt and Reed, who wrongfully removed the house from the first property, is Faulkner, against whom, the trial judge correctly concluded, the bank would be entitled to damages; and the party in the position of Nettleton is Crown Trust, to whose mortgage the bank's claim for a lien must, on my reading of Travis-Barker, be subordinate.

Scottish American Investment Co. v. Sexton

The second case from which the trial judge derived assistance was Scottish American Investment Co. v. Sexton, supra. In that case, the plaintiff granted a loan to Elizabeth and William Francis Sexton upon the security of mortgage on seven houses on Shaw Street in the City of Toronto. By agreement, the mortgage money was not advanced until the completion of the house on all seven properties, including the installation of hot air furnaces. After default in payment of the mortgage, the plaintiff discovered that William Francis Sexton had removed five of the furnaces to houses belonging to his mother, Mary Sexton, on Clinton Street. The plaintiff brought two actions: the first, against the younger Sextons to restrain the removal of the two furnaces still in the Shaw Street houses; the second, against Mary Sexton to compel the return of the five furnaces in her houses on Clinton Street.

The plaintiff recovered judgment in both actions. In the action against the younger Sextons, Ferguson J. granted a permanent injunction and a mandatory order for the restoration of the five missing furnaces. In the action against Mary Sexton, he granted a declaration that the five furnaces in her Clinton Street houses were the property of the plaintiff as mortgagee and ordered their delivery to the plaintiff. In a passage quoted by the trial judge in the present case, he said, at p. 79 O.R.:

... assuming that the plaintiffs as mortgagees, were owners of the furnaces, that is, to the extent of their right, the wrongful taking of them by the defendant Francis Sexton, the younger, would not place him in a position to pass title to the property in them to his mother, even if it were to be supposed that she was an innocent purchaser for value, a thing that I do not upon the evidence suppose.

(Emphasis added)

As the trial judge in the present case noted (at p. 533 O.R., p. 186 D.L.R.), Ferguson J.'s reference to the position of an innocent purchaser is obiter, for, as appears from the closing words of the quoted passage -- "a thing that I do not upon the evidence suppose" -- he clearly concluded that Sexton's mother was not an innocent purchaser. Given that premise, I have no quarrel with the result reached in Scottish American. However, to the extent that the case is said to be authority for the proposition that the first mortgagee would succeed to priority even over an innocent purchaser -- and it is cited as such authority in 21 C.E.D (Ont. 3rd), Title 96, Mortgages, Paragraph27 -- it is at odds with the subsequent decision of the Supreme Court of Canada in Travis-Barker and is, in my respectful view, wrong in law. Read without the offending obiter, Scottish American is in conformity, rather than in conflict, with the decision of the House of Lords in Reynolds v. Ashby & Son, [1904] A.C. 466, [1904-7] All E.R. Rep. 401, 53 W.R. 129, and with the passage in R.E. Megarry and W.R. Wade, The Law of Real Property, 5th ed. (London: Sweet & Maxwell, 1984), at p. 738, which were cited (at p. 532 O.R., p. 184 D.L.R.) as authority for the second of the two principles which the trial judge considered to be in conflict in their application to the facts of the present case.

Disposition

For the foregoing reasons, I consider that Scottish American does not support the position of the bank, and that the present case is indistinguishable in principle from Travis-Barker, which, properly considered, supports the position of Crown Trust. Applying Travis-Barker, the bank's claim to a lien on the house or the land to which it was removed, asserted in the exercise of the court's equitable jurisdiction, must yield to the mortgage on the second property, and the trial judge ought to have accorded priority not to the bank, but rather to Crown Trust.

I would therefore allow the appeal, set aside the judgment at trial and substitute in its place an order declaring that the Crown Trust mortgage has priority over any interest claimed by the bank in the second property or the house situated on that property. The appellant should have its costs both at trial and on appeal.

Appeal allowed.
