

tracting for a lien, which, as between themselves, will be good after delivery. So, ordinarily, when the possession of a pledge is relinquished, the rights of the pledgee are gone. In this case, however, Morris was not willing to rely upon the lien which the law gave him as vendor, or upon a mere pledge of the property, but required a special contract on the part of Gregory, securing his rights. This contract created a charge upon the property, not in the nature of a pledge, but of a mortgage. The lien, as between the parties, was not made to depend upon possession, but upon a contract, which defined the rights both of Morris and Gregory, and the power of Morris for the enforcement of his security."

That it was competent for the parties here to agree that the pumping-engine should remain personalty until paid for, is not to be doubted under the Pennsylvania authorities. *Shell v. Haywood*, 16 Pa. St. 523; *Harlan v. Harlan*, 20 Pa. St. 303. In *Shell v. Haywood*, *supra*, the court declared that the rule of severance and removal is one subject to the control and modification of the parties representing the property, who may vary the same according to their convenience, pleasure, or regard for right; for, (said CHAMBERS, J.,) "whether attached to the realty or not, or in whatever manner attached, is immaterial, when the parties agree to consider it personal property." All the Pennsylvania cases (and they deal with boilers, engines, and machinery generally) concur in the view that it is not the character of the physical connection which constitutes the test of annexation, but intention is the true legal criterion. *Hill v. Sewald*, 53 Pa. St. 271; *Benedict v. Marsh*, 127 Pa. St. 309, 18 Atl. Rep. 26. It was therefore held in *Vail v. Weaver*, 132 Pa. St. 363, 19 Atl. Rep. 138, that the engine, machinery, and appliances of an electric light plant erected upon and firmly attached to real estate do not pass to a purchaser of the real estate at a sale upon a mortgage of the realty, made and recorded before the plant was placed by the mortgagor on the mortgaged premises, unless it was the intention to make the plant a part of the realty when it was erected. This decision seems to us to be a decisive answer to the argument that the pumping-engines, as after-acquired property, come within the grasp of the mortgage of April 1, 1887, to the Farmers' Loan & Trust Company, in such a manner that the Holly Company's lien was displaced.

This case belongs rather to that class of cases of which *U. S. v. Railroad Co.*, 12 Wall. 362, is the exponent, than to the class represented by *Porter v. Steel Co.*, 122 U. S. 267, 7 Sup. Ct. Rep. 1206. The subject-matter of contest in the former of these two cases was after-acquired rolling stock of a railroad, which by the purchase contract was charged with a lien for the price. To the proposition that a prior general mortgage which in terms covered after-acquired property attached to this rolling stock as soon as acquired, to the displacement of the contractual lien, the court, speaking by Mr. Justice BRADLEY, said:

"That doctrine is intended to subserve the purposes of justice and not injustice. A mortgage intended to recover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time."

It was there added that the result would be different in the case of rails or other materials which became a part of the principal thing. In the case of *Porter v. Steel Co.*, *supra*, railroad bridges were the subject-matter of controversy. But rails and bridges necessarily become an actual part of the permanent structure of a railroad, and are inseparable from it without destruction to the road. In that respect they are like the stones and bricks of a house. But detachable and removable machinery is susceptible of ownership distinct from the land and buildings, and may be the subject of particular and separate liens. *Harlan v. Harlan*, *supra*; *Benedict v. Marsh*, *supra*; *Vail v. Weaver*, *supra*. In the present case it is clear from the terms of the contract of August 3, 1887, that the parties thereto did not intend that the pumping-engines should be converted from personalty into realty until paid for, and the evidence shows beyond any doubt that the engines can be easily detached from their fastenings, and removed without any injury to them or damage to the building.

We think it would be a work of supererogation to enlarge upon the proposition that, as against Samuel R. Bullock & Co., the Holly Company's contractual lien is good. They at least cannot gainsay its validity. Has the New Chester Water Company, upon the undisputed facts of this case, any better right? That company, indeed, was not formally a party to the contract of August 3, 1887, but, if regard be had to the substance of things, it must be treated in this matter as subject to the terms of the contract. For the purpose of the erection of the works at Chester, the water company, as we have seen, had put itself in the "absolute control" of Bullock & Co. In the expressive language of Mr. Bullock "the *personnel* of the New Chester Water Company was subordinated to the management, direction, and control" of his firm. To all intents and purposes the directors and other officials of the water company were the mere servants of Bullock & Co. It appears that some of the directors had positive knowledge of the terms of the contract with the Holly Company, and, under the circumstances, notice thereof is to be imputed to them all. Moreover, the open control which Lockman exercised over the pumping-engines was sufficient to affect the water company with notice of his principal's lien. But, in truth, with respect to this transaction, the distinction between Bullock & Co. and the water company is purely formal and fictitious. Bullock & Co. were the water company in everything but name. They really held the entire capital stock. Now, no court has ever yet decided that an incorporated company in this artificial capacity can be deemed to be ignorant of a matter affecting the company which is known to every individual stockholder. In our judgment, to treat the water company as a *bona fide* purchaser or possessor of the engines without notice of the contractual lien of the Holly Company would be unreasonable and unjust. The water company cannot honestly retain the engines without paying the balance of the purchase price. But to defeat the Holly Company the defendants invoke the decision in *Foster v. Fowler*, 60 Pa. St. 27, that the land and buildings of an incorporated water company

are not subject to a lien under the mechanic's lien act. The Holly Company, however, claims nothing under the mechanic's lien law, nor a lien of the character thereby given. It is asserting a contractual lien, which binds a certain removable piece of machinery, which was not delivered absolutely, but *sub modo*. It would, then, be a misconception of the principle of that decision to apply it here. If a water company should contract for a pumping-engine, to be paid for when set up and satisfactorily tested, would any one contend that, having got the engine within its walls, it could hold on to it without paying for it? But what difference does it make that a short credit of 60 days is given, the contract reserving to the vendor a lien with a possessory right as further security? We fail to see that any one has equities superior to those of the Holly Company. No rights of third persons have intervened. When William G. Hopper & Co. and R. D. Wood & Co. first acquired knowledge of the contract of August 3, 1887, is the subject of dispute; and the testimony is conflicting. Those firms, however, stood in close relations to Bullock & Co., and the facts about the contract for the pumping-engines were easily discoverable by them. The tripartite agreement of October 26, 1887, discloses that they were not unmindful of the possible existence of "liens ahead of the securities held by William G. Hopper & Co.," and it was thereby agreed that the firm should be protected by Wood & Co. against all such liens. Certain it is that neither of those firms advanced any money on the faith of the pumping-engines. Neither did the water company itself part with any of its bonds or stock on the faith thereof. Finally, it appears that the bonds of the water company are still in original hands, Hopper & Co. and Wood & Co., between them, owning substantially all of them, and really representing the whole issue.

But the jurisdiction of the court is challenged because of the joinder as co-plaintiffs with the Holly Company of Samuel R. Bullock & Co., whose true place the defendants contend is on their side; and it is insisted that when so placed the jurisdiction is gone, they being citizens of the same state with the Holly Company. Bullock & Co. were brought upon the record after the bill was filed by an amendment, which set forth that they joined as parties plaintiff, "not as seeking any special or distinct relief in the premises in this proceeding, but in affirmance of the rights of their co-plaintiff, the Holly Manufacturing Company, and in order to invest the court with full jurisdiction in the premises, so that a complete decree protecting the rights of all parties can be made." Their voluntary joinder, with respect to the Holly Company's supposed equitable rights against Wood & Co., is put upon the ground that Bullock & Co. stood to the Holly Company in the relation of trustees, holding the legal title to the contract; and, their interest being with that company, they might arrange themselves on the same side with it, agreeably to the principle recognized in *Railroad Co. v. Ketchum*, 101 U. S. 299. This position we need not discuss, our conclusion upon that branch of the case being adverse to the Holly Company, upon a consideration of the merits of the controversy. So far as the bill seeks to enforce the Holly Company's

lien, it is manifest that there is no dispute between the company and Bullock & Co. Samuel R. Bullock, indeed, was one of the principal witnesses in the case on behalf of the Holly Company to establish its lien, and hence a decree in its favor would conclude him and his firm, if there were any open question on that subject affecting them. But there is no such open question. The Holly Company is not seeking any relief, and needs no decree against Bullock & Co. It is urged, indeed, that that company is proceeding as for a foreclosure without making its debtor, who is the owner of the property, a party defendant. But this is a mistaken view. The ownership of the engines is not in Bullock & Co., and, in truth, was never intended to be in them, for in the purchase they acted in the interest and behalf of the New Chester Water Company. But there can be no longer any pretense of ownership in Bullock & Co., for Samuel R. Bullock, by his deed, has conveyed the title to the real estate to the water company. It is laid down in 2 Jones, Mortg. § 1404, that in an equitable suit for foreclosure the mortgagor, after he has conveyed the whole of the premises mortgaged, is not a necessary party to the suit. Moreover, Bullock & Co. have assigned all their interest in the bonds and stock of the water company to Wood & Co. Therefore they have no longer any interest, near or remote, in this particular controversy. They are altogether formal parties, whose presence does not oust the jurisdiction of the court, coming within the rule laid down in *Wormley v. Wormley*, 8 Wheat. 451, where the applied test was whether a decree was sought against the party. Here the Holly Company seeks to enforce a charge *in rem*, and Bullock & Co. have neither title to nor interest in the thing.

To the objection that the Farmers' Loan & Trust Company is not joined as a defendant in this suit, it is sufficient to say that, as substantially the whole body of bondholders is before the court, the presence of their trustee is wholly unnecessary. Moreover, the enforcement of the Holly Company's specific lien does not involve the validity of the trust mortgage, nor affect its standing as respects the principal mortgaged thing, the controversy relating to a mere incidental matter. Again, as the joinder of the trust company might oust the jurisdiction of the court, the omission to make it a party defendant is fully warranted by equity rule 47. That equity has jurisdiction to enforce liens, whether upon real or personal property, is clear. 2 Story, Eq. Jur. § 1216; 1 White & T. Lead. Cas. Eq. 1108, note to *Cuddee v. Rutter*. In *Schotsmans v. Railway Co.*, L. R. 2 Ch. App. 332, it was declared that a bill in equity will lie to enforce the claim for the price of goods of a vendor who, by the exercise of his right of stoppage *in transitu*, had reinvested himself with the legal title. Lord CAIRNS there said (page 340:)

"I should be prepared to hold this to be a case entirely within the province of this court, and depending on the ordinary principles which regulate in equity the relations of mortgagor and mortgagee, whether of real or personal property, although, for obvious reasons, cases of this kind are more generally and more conveniently brought into a court of law."

It will be remembered that in *Gregory v. Morris*, *supra*, Chief Justice WAITE observed that the contract there created a charge upon the cattle for the purchase-money in the nature of a mortgage. In *Fletcher v. Morey*, 2 Story, 555, 565, Judge STORY said:

"In equity there is no difficulty in enforcing a lien or any other equitable claim constituting a charge *in rem*, not only against real estate, but upon personal estate, or upon money in the hands of a third person, whenever the lien or other claim is a matter of agreement against the party himself and his personal representatives, and against every person claiming under him, voluntarily or with notice; * * * for every such agreement for a lien or charge *in rem* constitutes a trust, and is, accordingly, governed by the general doctrine applicable to trusts."

We have only to add that this case seems to be peculiarly one for a court of equity, in view of the situation of the property, and because the court can grant a reasonable time for the payment of the lien, and, in the event of a sale, may prescribe equitable terms.

Upon the whole case, then, we are of the opinion that the contractual lien of the Holly Manufacturing Company upon the pumping-engines here in question is valid and binding, and is enforceable in this suit. Counsel may prepare and submit the draft of a decree in accordance with the views expressed in this opinion.

ÆTNA INS. CO. v. BRODINAX *et al.*

(Circuit Court, S. D. Georgia. April Term, 1883.)

1. WIFE'S SEPARATE ESTATE—POWER TO CHARGE—INSTRUMENT OF SETTLEMENT.

Code, § 1783, declares that "the wife is a *feme sole* as to her separate estate, unless controlled by the settlement. Every restriction on her power must be complied with. But, while a wife may contract, she cannot bind her separate estate by any contract of securityship, nor by any assumption of the debts of her husband." *Held*, that where a husband settled property on his wife free from all his liabilities, except such incumbrances as the two together shall request the trustee to make, a mortgage given thereon to secure a debt of the husband is valid.

2. SAME.

Such an exception is not repugnant to the grant, but is merely a qualification thereof. Affirmed in 9 Sup. Ct. Rep. 61.

In Equity. Suit by the Ætna Insurance Company against Martha Brodinax and others to foreclose a mortgage. Decree for plaintiff.

Joseph Ganahl, for complainant.

J. B. Cumming and *Geo. A. Mercer*, for defendants.

MCCAY, J. On the 11th day of June, 1866, Benjamin E. Brodinax, of the county of Richmond, Ga., executed a deed in due form under the laws of Georgia, and in consideration of his love for his wife, Martha Brodinax, to a certain parcel of land in said county to William E. Brodinax, in trust for the said Martha during her life, with other limitations not here important to be considered. The deed contained various other