

No. 13717

Supreme Court of Illinois

Hadduck

vs.

Speer

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

BENJAMIN F. HADDUCK,	}
APPELLEE,	
ADS.	}
ISAAC SPEER,	
APPELLANT.	

POINTS AND AUTHORITIES OF APPELLEE.

This was an action of ejectment brought by Hadduck, appellee in the Superior Court of Chicago, against Speer, appellant.

The record shows a mortgage with power of sale, made by appellant, his wife joining, March 13th, 1856, to Calvin H. Goodman, (pp. 22, 23;)

Assignment of same, and also of bond which it secured, dated May 1st, 1856, by Goodman to Seth Terry, *for his own use and benefit*, (pp. 33-36;)

Assignment by Terry, bearing date April 1st, 1859, to Elisha S. Wadsworth, (p. 39;)

And a Deed from Wadsworth to Hadduck, appellee, bearing date June 7th, 1859, (p. 46.)

I.

Inasmuch as the mortgage under which appellee claims, bears date March 13th, A. D. 1856, the homestead question can cut no figure in this case; and the only questions that can arise for the determination of this court, must be upon the admissibility of the evidence for Haddock, the plaintiff below. (*Record*, p. 22.)

Ely vs. Eastwood, 26 Ill., 107.

Smith vs. Marc, 26 Ill., 150.

II.

There is nothing in the objection that the American Asylum at Hartford is a corporation, &c., because there was no proof of any such corporation, either on the trial or in the record.

The assignments of C. H. Goodman to Seth Terry, were made to him in person, for *his own use and benefit*, and do not even purport to be made to the American Asylum, (*Record*, pp. 32, 33;) and the same is true of the assignment by Terry to Wadsworth, (*Record*, pp. 36-39.)

Hence, the words, "Commissioner of the American Asylum at Hartford," both in the assignments by Goodman to Terry, and by Terry to Wadsworth, are merely words of identification, *descriptio personæ*.

Barker vs. Mechanic's Ins. Co., 3 Wend. R., 98.

Taft vs. Brewster, 9 Johns., 334.

Rundall vs. Van Vechten, 19 Johns., 65.

Tippetts vs. Walker et al., 4 Mass., 597.

Brinley vs. Mann. 2 Cush., 237.

Bank of Columbia vs. Patterson's Adm'r, 7 Cranch, 299, 304.

Berkly vs. Hanly, 8 Dowl. & Ryl., 102.

Angell & Ames on Cor., chap. 7, p. 183.

But it was not necessary to show authority from the Asylum to Terry to assign, supposing the title to have been in the corporation, because the mortgagee's lien before entry is a mere chattel interest, and not real estate, and does not require the formalities of a conveyance of real estate for its transfer, either at law or in equity.

Dougherty vs. Randall, 3 Mich., 581.

Bryan vs. Butts, 27 Barb., 503.

III.

The notice given by Wadsworth, assignee of mortgage, was a full compliance with the terms of the power, and sufficient. The mortgage provides that the mortgagee, his personal representatives or assigns, on default, or condition broken, may sell the premises therein granted, and all equity of redemption of the grantors, "after having first given thirty days notice of the time and place of such sale, by advertisement in any of the daily newspapers that may at that time be published in the city of Chicago." (*Record*, p. 25.)

And the certificate of publication shows, "that the annexed mortgage sale was published in the Chicago Daily Evening Journal, a newspaper printed and published in the city of Chicago, county of Cook, and State of Illinois, thirty times, the date of the first paper containing the same being the sixth day of May, 1859, and the date of the last paper containing the same being the sixth day of June, 1859, being published and issued on that day." (*Record*, p. 44.)

Hornby vs. Cramer, 12 *How. Pr.*, 470.

IV.

The objection that Wadsworth, assignee of mortgage, did not demand or enter into possession of the premises before sale to appellee, is futile.

The mortgage provides that on default, &c., "it shall be lawful for said party of the second part, his personal representatives or assigns, either in *person* or by *attorney* duly constituted, to enter into and upon all and singular the premises hereby conveyed, and also, either in *person* or by *attorney*, to sell," &c. (*Record*, p. 25.)

- This, then, is a cumulative or concurrent remedy, including both the right of entry and the right of sale.

The mortgagee has several distinct and independent remedies; he may, on default or condition broken, bring a suit at law on the bond, file his bill in chancery for foreclosure, enter upon the premises, and take the rents, bring *scire facias* upon his mortgage after maturity, or, as in this case, foreclose by sale under his power.

Carroll vs. Ballance, 26 *Ill.*, 20.

Delahay vs. Clement, 3 *Scam.*, 203.

4 *Kent's Com.*, 155 and 184.

Blaney vs. Bearce, 2 *Greenl. R.*, 132.

Erskine vs. Townsend, 2 *Mass.*, 493.

Hughes vs. Edwards, 9 *Wheat.*, 489.

And the execution of a power will be good, though it falls short of the full extent of the authority.

4 *Kent's Com.*, 148, marginal page.

Isherwood vs. Oldknow, 3 *Marble & Selw.*, 383.

1 *Sugden on Pow.*, 447, 432.

V.

The objection that the Deed of Wadsworth to appellee was in his own name, instead of that of the grantors in the mortgage, cannot be sustained, because Wadsworth, as assignee, stood in the place of the mortgagee, who not only has a power coupled with an interest, but after condition broken is the owner of the fee, and therefore at liberty to sell in his own name.

Gideon vs. Doe Ex. dem. Tout., 7 *Blackf.*, 210.

Vansant vs. Allman, 23 *Ill.*, 33.

Carroll vs. Ballance, 26 *Ill.*, 17.

Longwith vs. Butler, 3 *Gil.*, 32.

Bloom vs. Rensselaer, 15 *Ill.*, 506.

Story on Agency, §§ 150, 164.

Wilson vs. Troup, 7 *Johns. R.*, 25.

Curden vs. Morgan, 18 *Vesey*, 394.

Hunt vs. Rousmanieres' Adm'r, 2 *Mason*, 244.

Same case, 3 *Mason*, 294.

Bergen vs. Bennett, 1 *Caines' Cas. E.*, 1.

VI.

But in case the execution of the power of sale is held irregular or faulty by this court, as we think it will not, the appellee is still entitled to recover in this action as assignee of the mortgage and the deed from Wadsworth to him, will operate as an assignment of the mortgage.

"The conveyance by a mortgagee under the power of sale in his mortgage, even if the proceeding to foreclose be irregular, yet carries all his interest to the purchaser, as well in the debt as in the land mortgaged; such a deed operates as a good assignment of the mortgage, and the purchaser may claim as assignee of the mortgage."

Jackson vs. Bowen, 7 *Cowen R.*, 13.

Grosnover vs. Day, 1 *Clarke's Ch. R.*, 109.

Birch vs. Wright, 1 *Term.*, 383.

10 *Johns.*, 480; 4 *ib* 216.

Weaver vs. Belcher, 3 *East.*, 349.

Carroll vs. Ballance, 26 *Ill.*, 9.

Respectfully submitted by

WILLIAMS, WOODBRIDGE & GRANT,

Counsel for Appellee.

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Supreme Court

Haddock, Appellee

vs

Spurr, appellant

Points &c of

Appellee

13302

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Filed May 26 1862

L. Nelson

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