No. 13304 ½

Supreme Court of Illinois

Dunlap et al

vs.

Gatewood

71641

It will be conceded that the mortgage from Stickney to the bank was valid in its inception, that it was recorded in due season, and that the Bank thus acquired a priority over all subsequent incumbrances. Dunlap had constructive notice (by the registry) of its existence and its execution is recited in the mortgage to Newcomb & Co. Did the arrangement of August 19. 1843. disturb the ~~[illegible]~~ order of priority thus affixed by the law and the facts? When that arrangement was made the condition of the Stickney mortgage was broken, and the legal estate was placed beyond the reach of the mortgagor and his assignees, except by a redemption in equity. This naked equity passed by the deed from Stickney to Gatewood, and was subsequently incumbered by the mortgages from Gatewood to Dunlap and Newcomb & Co. Their respective rights are therefore no greater than those which attached to the equitable estate in the hands of Stickney. There has been no payment in fact of the Stickney mortgage, either by Stickney himself, or those claiming his equitable interest. The Bank has in fact received no absolute satisfaction of her mortgage debt. The assignees of the Bank are purchasers of all the effects of that Corporation under the act of the Legislature for a valuable consideration; they are charged with the execution of a trust created for the benefit of the stock and bill holders and other creditors of the Bank, and bound in equity to preserve and increase the trust fund by any means in their power. The entire effects of the Bank passed to them by the general assignment made in pursuance of the statute. ~~[illegible]~~

they are the only legal Representatives of the [redacted] creditors of the Bank, and they as such [redacted] are bound to avail themselves of all equities [redacted] existing in favor of those creditors. [redacted] The creditors are entitled to the benefit of all [redacted] the property and effects of the Bank, as they [redacted] existed at the passage of the Laws, putting the [redacted] Bank into liquidation, and it is through the [redacted] agency and actions of the Assignees only [redacted] that they can be secured in those rights. It is [redacted] not pretended that the creditors have done, or omitted [redacted] to do any act, justifying or sanctioning any [redacted] change of securities, they had no agency in making the [redacted] Assignments, or the schedules, neither they, or the Assignees are [redacted] concluded by the action of the Board, in making the schedules, [redacted] Such is the equity of the assignees of the Bank. How stands the case with Dunlap and Fellows? They do not present themselves in the attitude of _subsequent_ _bona fide_ mortgagees for a valuable consideration without notice of the Stickney mortgage. They never acted upon the faith of the entry of satisfaction; but claim their rights by virtue of mortgages made _subsequent_ to the Stickney mortgage and _anterior_ to the release by Siddall. They come into a court of equity therefore, with no just claim to relief founded upon a security acquired upon the faith of the release of the Stickney mortgage; and if they are now postponed in equity they are in the precise condition which they would have been in, had the _release_ never been executed. The general principles which entitle the assignees of the Bank in this case to priority of payment over Dunlap and Fellows are few simple and of easy application. A second mortgage for the same debt, does not extinguish the first as a security, unless there is an express release, or a covenant not to ~~sue~~ one from which a release may be implied. The application of this principle is much stronger where the same property is embraced in both mortgages as in the case here. Nothing but the payment of the debt or release of the security will have the effect of discharging the lien of a mortgage once created by the voluntary act of the parties. Again, in equity the cancellation or release of a mortgage on the records, is only prima facie evidence of its discharge, and when it ~~is~~ appears that the cancellation or release was effected by mistake, accident or fraud, the mortgage will be established lien against subsequent mortgagees without notice, if they become such anterior to the cancellation or release; and if they have actual or constructive notice the mortgage will be revived as a security at all events. In such cases the maxim "once a mortgage always a mortgage." applies with great force and a court of equity will keep the mortgage lien alive or consider it extinguished as will best subserve the purposes of justice. It is equally true that the cancellation ~~of a~~ or release of a mortgage by a stranger, or one who has no authority ~~to~~ from the party in interest to discharge the mortgage, will be of no avail, even in favour of a subsequent mortgagee or purchaser. The principle is likewise well established that a release obtained by fraud, actual or constructive, will have no effect upon the original rights of the mortgagee. The maxim that fraud vitiates every thing applies as well to records as to ordinary transactions. Tested by these principles the rights of the assignees of the bank remain unaffected by the transaction of the 19th of August 1843. The substituted mortgage embraced the same identical property described in the original one, with the addition of some other property; but this latter was already incumbered by a prior mortgage to the bank. There is no pretence of a payment in fact of the original mortgage. And the only fact set up to avoid the operation of these equitable principles is the execution of the release by ~~Siddall~~ ~~Siddall~~ Siddall. This release is a nullity upon two grounds. First. Siddall as cashier of the Bank had no power to execute the release. The act of incorporation is silent as to his powers and duties ~~The cashier~~ He has no ex officio authority to release the securities of the bank. His power must therefore depend upon the bye laws, usage, or legal vote of the board of directors. The complainants claiming their priority on the ground of a ~~valid release~~, ~~or a bona~~ release of the Stickney mortgage, are bound to show by affirmative and satisfactory evidence the authority of the cashier to execute it. That authority cannot be presumed. ~~That the cashier [illegible]~~

nor could it be proved except by the Recorded vote or orders of the Board of Directors, — the action of the Board upon such a question cannot be proven by parol.

The question is one of power, and as the Cashier derives his powers from the bye laws or orders of the Board, when an act of his is relied upon as binding upon the Bank & its assignees, it is proper to look to the bye laws and orders, which constitute his warrant of attorney, for the purpose of testing the validity of the act, — the party should have shown the authority by the production of the Bye Laws.

upon the face of the Records as they stood, on the 19 August 1843, and of which parties dealing with the Bank, were bound to take notice, the Entry of Satisfaction and Release of the mortgage, should have been Executed

by Caldwell who had power by a regular warrant, duly recorded, to execute all releases of mortgages on the County records; this power was then in full force and unrevoked. The release then should regularly have been executed by Caldwell. A concurrent power to release mortgages, existing in two different persons, leads to collision & confusion, and its existence will never be presumed, in the absence of positive proof

There is proof tending to establish the fact that this substitution and release of securities was by order of the board of directors; but it is too unsatisfactory to be relied upon. The witnesses do not ~~state~~ state when the board met, nor how many directors were present, so that it is impossible to tell whether there was a legal meeting of the board or not. Unless a majority were present and made the order their proceeding is a nullity. It devolves upon the Complainant to satisfy the court upon these points. Whether this evidence establishes a legal meeting of the board or not is immaterial as there is another objection to the release which is fatal. The Stickney mortgage vested the legal title to the mortgaged premises in the Bank, ~~so~~ a release of record has the effect of a reconveyance of that legal estate to the mortgagor. ~~And it is an established rule that a deed~~ And the release to be valid must be under seal. The only mode in which a corporation can convey release or lease its real estate is by deed under the seal of the corporation executed by some person authorized by the corporation. There is no evidence of a compliance with this rule. (2 Scam 187). An oral vote of the directory and a release by the cashier is a clear infraction of the rule. Besides it is unsafe and contrary to the policy of our recording acts and the statute of frauds to permit such acts to affect the title to real estate, especially when the bye laws of the bank required "a record of its proceedings"

Secondly. At all events the release cannot help Dunlap. When this substitution and release of security took place. Dunlap was President of the Bank And Gatewood the substituted debtor was a director. The Contract was in the teeth of the Statute of 1843. ~~[illegible]~~. The Bank by the act of 1843. was prohibited from loaning money under any and all circumstances, their powers were liquidating powers alone. Dunlap as president knew this to be the law, and it was his duty in substituting or changing securities to look to the records and ascertain whether he was prejudicing the interests of the bank by the proposed change. If he had performed his duty he would have ascertained the Newcomb mortgage, he is chargeable with actual notice of his own. His neglect to search the records and his concealment of his own mortgage was the exercise of bad faith, and ~~so~~ he shall not now be permitted to avail himself of his own wrong in securing priority over the assignees of the bank. His duty to the creditors of the bank required a full disclosure of his interests in the mortgaged premises.

The authorities in support of this argument are as follows.

Wright v Petrie 1 S & M Ch R. 282.
U S v Crookshank 1 Edwards Ch R 233
Walworth v Farmers Loan & Trust Co 4 Sand Ch R 51. Barnes v Camack 1 Barb Sup Ct R. 392. Gregory v Thomas 20 Wend 17. Crosby v Chase 17 Maine R. 369.

Head v Evans 1 Freeman Ch R. 79.
Robinson v Sampson 23 Maine Rep 388
Trenton Banking Co v Woodruff 1 Green Ch R 117. Lilly v Quick 1 Green Ch R. 97.

For these reasons the assignees of the Bank of Illinois are entitled to priority of payment over the complainants & specially over Irvin[?].

R S Blackwell
B. S. Edwards.

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