No. 14819

Supreme Court of Illinois

Colby

vs.

Smull

71641

William Colby
Albert G Ellithorpe Appellants } Supreme Court
vs 3rd Grand Division
Thomas Snull April Term 1864
appelle

The decree shows that Colby and Ellithorpe the appellants executed the mortgage to Wright who after wards assigned it to Snull the appellee to secure moneys due from Wright to Snull -

Snull foreclosed the mortgage making Wright a defendant -

The decree provides that the land shall be sold by the Master and out of the proceeds, the Master shall pay to Snull the sum of $4664.00 due to him from Wright and the balance up to the amount of $885.00 which is the sum due upon the mortgage to be shall pay to Wright -

No decree is taken against the defendants in personam -

The question is - upon the dismissal of the appeal, is the appellant entitled to damages

No. 297.

Appeal from Leavenworth

Leahy et al

vs

Arnold.

Statement of points arising upon motion to dismiss appeal.

Filed May 11. 1864.

L. Leland

Clk.

Keasner & Peck

for appellee.

Motion to dismiss.

E. G. Peck

for appellee

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the Fifth day of May in the year of our Lord One Thousand Eight Hundred and Sixty Two and of the Independence of the United States of America the Eighty Sixth

Present, The Honorable John M Wilson Chief Justice of the Superior Court of Chicago.

Van H Higgins and Grant Goodrich Judges.

_____ Prosecuting Attorney.

Anthony C Hesing Sheriff of Cook County.

Attest, Thomas D Lawler Clerk.

Be it remembered that heretofore to wit: on the Fourteenth day of May in the year of our Lord one Thousand Eight Hundred and Sixty two. the same being one of the days of the May Term of said Court the following among other Proceedings were had and entered of record in said Court to wit:

Thomas Small

vs.

Decree of Foreclosure and Sale.

Theodore Colby.
Albert G. Ellithorp and
Timothy Wright

This cause came on to be heard on the bill of complaint filed therein taken as confessed by the said Defendants and upon the report of L. G. Fame Esq. master in Chancery of this County appointed a special commissioner by this Court which bears date the first day of May A. D. 1862, and was made in pursuance of an order of this Court entered in this cause referring it to the said L. G. Fame Esq. as a special commissioner to take proofs in said cause, of the material allegations of the Bill of complaint filed therein including the amount due on said Bond in said Mortgage, and Bill of Complaint described

On reading and filing said report from which it appears that on the first day of June A. D. 1858, the Defendants Theodore Colby and Albert G. Ellithorp executed to the defendant Timothy Wright a bond dated on said first day of June A. D. 1858, in the penal sum of Eighteen Thousand and Nine Hundred Dollars conditioned for the pay-

ment of nine Thousand Four Hundred and Sixty Dollars as follows. Fifteen hundred and Sixty five Dollars (1565) on the first day of June A.D. 1859. and the same amount annually, on the first day of June in each of the years respectively of 1860. 1861 1862 1863. and 1864 with interest thereon on the whole amount unpaid to be computed from the date of said Bond. after the rate of ten per cent per annum. and payable annually. that by the condition of said bond, it was agreed that should any default be made in the payment of any of the said annuities or the interest thereon, or any part thereof, on any day whereon the same is made payable as expressed in said Bond. and should the same or any part remain in arrear for thirty days then all of said sums of money with the arrearages of interest should become due at the option of the said Timothy Wright or his assigns that on the same day. said Colby and Elethea duly executed and delivered to the said Wright and his assigns a Mortgage under their hand and seal respectively conditioned for the payment of the said sum of money in said bond described at the time mentioned therein and as in said Mortgage

that if default be made in the payment of said amount mentioned in said Bond either of principal or interest on the day & day & whereon the same should become due and payable the whole of said principal sum and interest thereon secured by said Bond should thereupon become due and payable and said Mortgage might be immediately foreclosed to pay the same by the said Timothy Wright or his assigns

That the said Mortgagor William Colby and Albert C. Ellithorpe by said Mortgage conveyed the real estate described in said Bill of complaint and is as follows. All that certain tract of land situated in the County of Cook and State of Illinois and known and described as Block one (1) in J.Q. and E. Wright's subdivision of the North East Quarter of Section Twelve (12) Township Thirty nine (39) North Range thirteen (13) East of the third principal Meridian containing Fifty Thirteen hundredths (10 13/100) acres more or less including said Tract That on the 11th day of April 1859 the Defendant Timothy Wright by his certain deed of assignment under his hand and seal transferred and assigned to Thomas Small the said Bond and Mortgage as the money to grow due thereon and in which

assignment~ said Wright~ constituted said
Complainant~ the lawful attorney of the
said Wright~ irrevocable in the Name of
the said Wright~ or otherwise, and to have use
and take all lawful ways and means for
the recovery of the said Money and interest
on the said assignment~ or deed made upon
the condition, that~ if the said Wright~ or
his representatives should pay unto Com-
plainant~ the Sum of $4664. with interest~
on or before the first~ day of May 1861.
said assignment~ should be void, and of
none effect~, that~ said assignment~ also pro-
vided that~ said complainant~ after receiving
the amount~ so due him from the said
Wright~, and his reasonable costs~ and charges,
should pay the surplus if any to the said
Wright~, and which said deed of assignment
was recorded in the Recorders office of Cook
County in the State~ of Illinois in Book 46.
of Mortgages on pages 326 & 327. That~
the said Timothy Wright~ by his certain other
deed of assignment~ under his hand and
seal and dated the first~ day of October 1861.
duly acknowledged and delivered to Com-
plainant~ (Whereas Small by that~ name
by which latter deed the said Wright~ con-
veyed to Complainant~ said Bond & Mortgage

, and by proper specification correcting the erroneous spelling of the name of the assignee in former deed from Thomas Small to Thomas Small. That the balance due on said Bond, and Mortgage, & principal and interest owing, and above all payments, due on the first day of May 1862 the date of said Report amount to the sum of Eight Thousand five hundred and Eighty Dollars ($8580).

Whereupon on motion of said George A. Ingalls solicitor for complainant it is ordered adjudged and decreed, that the said report be, and the same is hereby ratified and confirmed, and on like motion it is further ordered, ~~adjudged~~ and decreed that the mortgaged premises mentioned and described in said complainants Bill of complaint in this cause, or so much thereof as will be sufficient to pay the sum of $8580. the amount unpaid due, and interest thereon from the date of said special commissioners report together with the costs in this cause and the fees disbursements and commissions of the said special commissioner in the behalf be sold at Public Auction, at the north door of the Court House in Block 89 Old Town in the City of Chicago by P. B Same Juan Master in Chancery of said County at special

Commissioner appointed by this Court, for that purpose, the said Sale giving twenty days previous Notice of the time and place of such Sale, by publishing the same, in some daily newspaper published in the City of Chicago, for the period aforesaid, and, that the Complainant or any of the parties to this cause, may become purchaser or purchasers at said Sale.

And it is further ordered that said Special Commissioner Execute a Certificate of purchase to the purchaser or purchasers of said Mortgaged premises or any part thereof at said Sale entitling the said purchaser or purchasers of said premises or any part thereof his or their heirs or assigns to a deed of said premises so purchased as aforesaid at the expiration of fifteen months from the date of such Sale, if said premises shall not sooner be redeemed according to law, and that the said Special Commissioner execute &c. deliver a deed or deeds of said premises sold, under this decree, to said purchasers purchasers his or their heirs or assigns at the Expiration of said fifteen Months, if said premises shall not have been redeemed,

And it is further ordered that said Special

commissioner out of the proceeds of said sale retain his fees disbursements and commissions and that he pay over to the Clerk of this Court the Costs in the cause, and that he pay to the complainant Thomas Small the amount so reported due as aforesaid together with legal interest thereon from the first day of May 1862. the date of said Report. and that said special commissioner report such sale to this Court.

And it is further ordered that the person or persons to whom such deed or deeds shall be made if said premises are not redeemed according to law, be let into possession thereof upon the making of said special commissioners Deed and that any of the parties in this cause who may be in possession of said premises or any part thereof, and any person who since the commencement of this suit has come into possession under them, deliver possession thereof to such purchaser or purchasers or his or their assigns on production of such special commissioners Deed for such premises and a certified copy of the order confirming the report of such sale.

And it is further ordered that the defendants in this cause and all persons claiming or to claim from or under them, or any of

either of them. and all persons having a lien subsequent to said Mortgage. by Judgment or otherwise. upon the land. described in said Mortgage. and his or their heirs. personal representatives or assigns be forever barred. and foreclosed of and from all equity of redemption. and claim of in and to said Mortgaged premises so sold as aforesaid and every part thereof. if the same shall not be redeemed according to law.

And afterwards to wit on the Twentieth day of the Month and year aforesaid and during the said May Term of said Court. the following among other proceedings were had and entered of record in said Court to wit.

Thomas Small

vs

William Colby.
Albert G. Ellishape and
Timothy Wright

Decree

674
8 bfp

This day come said defendants William Colby and Albert G. Ellishape. and pray an appeal herein to the Supreme Court of this State. from the

judgment of this Court which is allowed to them upon condition that they file their bond in penalty of Five Hundred Dollars in thirty days from this date with security to be approved by a Judge of this Court.

And afterwards to wit on the thirty first day of the month and year aforesaid and being part of the said May Term of said Court the following among other proceedings were had and entered of record in said Court to wit:

474
8412

Thomas Gunnell.

vs

William Colby
Albert G. Eastaprooks
Timothy Dwight

Error

This day again came said Defendants William Colby and Albert G. Eastaprooks and on their Motion, it is ordered that former order in relation to bond be set aside and thereupon said Defendants Colby and Eastaprooks enter their application for an appeal to the Supreme Court of this State from the judgment of this Court which is allowed

to deem on filing bond in penalty of one
Thousand Dollars, note & security to be approved
by a Judge of this Court and to be filed by
the fourth day of June Next. including said
day, as part of the time in which said
bond shall be filed, and approved.

And afterwards to Wit on the Fourth day of
June in the year aforesaid, the said William
Colby, filed in the office of the Clerk of
said Court his certain appeal bond &
which is in the words and figures following
to Wit

State of Illinois
County of Cook } ss.

Know all men by these presents that We
William Colby and Osmond K. Colby
and George W. Swan and Henry Wash
and Harvey Danker are held and firmly
bound unto Thomas Snell in the penal
sum of one Thousand Dollars lawful money
of the United States, for the payment of which
well, and truly to be made we bind ourselves
our heirs executors, and administrators jointly
severally and firmly by these presents.

Witness our hands and seals this 4th day of June A.D. 1862

The condition of the above obligation is such that whereas the said Thomas Small did on the 14th day of May A.D. 1862 in the Supreme Court of Illinois in and for the County of Cook and State aforesaid on the Chancery side thereof and of the May Term thereof A.D. 1862 recover a decree against the above bounden William Colby impleaded with Albert G Ellithorpe and Timothy Knight for the sum of Eight thousand five hundred and Eighty Dollars besides costs of suit from which said decree of the said Supreme Court of Illinois the said William Colby impleaded as aforesaid hath prayed for and obtained an appeal to the Supreme Court of said State

Now therefore if the said William Colby shall duly prosecute his said appeal with effect and moreover pay the costs interest and damages rendered and to be rendered against him in case the said decree shall be affirmed in said Supreme Court then the above obligation to be void otherwise to remain in full force and virtue.

Taken and entered into } Wm Colby Seal

1

before me at my office
in Chicago this 4th
day of June A.D. 1862

C. V. Colby Seal
Geo. H. Davis Seal
Henry Nash Seal
Henry Davis Seal

Approved by me June 4/62.
John M. Nixon J.P.
Inspection Court of Chicago

State of Illinois }
Cook County } ss

I Thomas B. Carter Clerk of the Supreme Court of Chicago within and for the County and State aforesaid, do hereby certify the above and foregoing to be true copies of a certain decree made and entered of record on the Fourteenth day of May A.D. 1862. and of certain orders made and entered of record respectively on the 30th and 31st days of the month, and year aforesaid, and of a certain appeal bond filed in a certain cause then pending in said Court on the Chancery side thereof wherein Thomas A. Arnold was Complainant and William Colby Albert G. Ellithorpe and Timothy Wright were Defendants.

In Witness Whereof I have hereunto set my hand, and affixed the seal of said Court at Chicago in the County and State aforesaid this Tenth day of May A.D. 1862

Thomas B. Carter

Clerk

Appeal from Cook

William Colby
Albert G. Ellithorpe
Appellants
vs
Thomas Linnell
Appellee

297

Record

14819

Filed May 11, 1824
L. Leland
Clerk

Hoxmeier & Peck
for Appellee