No. 12554

Supreme Court of Illinois

Donlevy

vs.

Gray

71641 7

143-163

143

1858

12554

State of Illinois }
LaSalle County } ss.

Pleas Proceedings and judgments held and taken in and before the LaSalle County Court, in the state of Illinois at the Court House in Ottawa in said county of LaSalle of March term thereof to wit on the first day of March A.D. 1858 and of the Independence of the United States of America the Eighty Second –

Heretofore to wit on the 31st day of December 1857 a plaint and affidavit was filed in the office of the Clerk of said court in the words and figures following to wit

State of Illinois }
LaSalle County } ss

County Court of said County March term A.D. 1858 – Nathan Gray Plaintiff complain=ins of Peter Donlevy defendant of the county of La Salle of a plea of taking and wrongfully and unjustly detaining from him the goods, chattles and personal property to wit: One pair of bay horses formaly owned by John Sloats of the value of four hundred dollars, to wit: at said County – to the damage of said plaintiff of one hundred dollars Command the Sheriff to replevy and deliver said goods, chattles and personal property to said Plaintiff and Summon the said Defendant to appear in the said La Salle County Court at said term thereof and answer according to the course and practice of said Court – Dated the thirty first day of December A.D. 1857

To the Clerk of La Salle County Court Illinois } Nathan Gray By Leland & Leland his Attys

State of Illinois }
LaSalle County } ss County Court of said County – March term 1858
Nathan Gray vs Peter Donlevy – Replevin –

Nathan Gray being duly sworn, doth depose and say that he is the plaintiff in the above precceipe named

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and ~~named~~ that he is lawfully entitled to the possession of the property therein described, and that the said property has not been taken for any tax, assessment, or fine, levied by virtue of any law of this State nor seized under any execution or attachment against the goods and chattles of the said Plaintiff liable to execution or attachment — Nathan Gray

Subscribed and sworn to before me, the 31st day of December A.D. 1857

P Sindley Clerk

Afterwards to wit: on the same day a writ was issued out of the office of the Clerk of said Court in the words and figures following to wit:

State of Illinois }
LaSalle County } ss

The People of the state of Illinois, To the Sheriff of said County, Greeting:

If Nathan Gray shall give you good and sufficient security to prosecute his suit to effect and without delay, and to make return of the following described goods and chattles the possession of which he is lawfully entitled to wit: One pair of bay horses formerly owned by John L Coats, of the value of four hundred dollars, which Peter Donlevy of said County took, and unjustly detains — and return the said property, if return thereof be awarded — and further to save and keep you harmless in replevying said property: then you are to cause the said goods and chattles to be replevied and delivered to said Plaintiff without delay. And summon the said Defendant personally to be and appear before our County Court in and for said LaSalle County on the first day of the next term thereof, to be holden at the Court House in said County, on the first Monday of March A.D. 1857, to answer to the said plaint of the said Plaintiff for unjustly detaining the goods and chattles

aforesaid. And make due return of the ~~Board~~ Bond to be taken of the said plaintiff as aforesaid together with this writ to the Clerk of our said Court with an endorsement hereon as to your doings in the premises

Seal

Witness Philo Lindley Clerk of said Court and the seal thereof at Ottawa in said County this 31st day of December A.D. 1857

P. Lindley Clerk

The above writ was returned with the following endorsement – to wit:

Served by reading this writ to Peter Dowlevy this 31st day of December 1857 and delivering the within described property to plaintiff – Fees = $8 8 cet etc 1.90 and pd by Pltff

E.S. Waterman Shff
for A Brown Dpty

Filed in the County Court this 2nd day of March 1858

P. Lindley Clerk
J Herrick

~~Afterwards to wit on the same day a replevin Bond Second day of March the foll~~

Afterwards to wit on the 2nd day of March a Replevin Bond was filed in the words and figures following to wit:

State of Illinois
La Salle County } Know all men by these Presents, That we Nathan Brady and Henry Bostrom of the County of La Salle and state of Illinois, are firmly held and bound unto Eric Waterman Sheriff of said County, in the penal sum of Eight Hundred Dollars good and lawful money of the United States: which sum to be well and truly made, we bind our heirs executors and administrators

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firmly by these presents.
Witness our hands and seals this 31st day of December A.D. 1857.

The condition of the above obligation is such that whereas, the above named Nathan Gray on the 31st day of December A.D. 1857, sued out of the County Court of La Salle County a Writ of Replevin against one Peter Donlevy for the following Goods and Chattles viz: One pair of bay Horses formerly owned by John L. Coats of the Value of four Hundred dollars And said writ is returnable at Ottawa, in said County on the first ~~day of~~ Monday of March next A.D. 1858 Now, if the said Nathan Gray shall appear at the next term of said Court, and prosecute said Suit of Replevin to effect, and without delay, and make return of said property, if return thereof be awarded, and secure and keep harmless the said Sheriff in Replevying said property, then the above obligation to be void and void. Otherwise, to be and remain in full force and effect –

Nathan Gray (Seal)
Henry Le Strange (Seal)

Heretofore to wit on the 4th day of January a declaration was filed in the office of the Clerk of said Court in the words and figures following to wit:

State of Illinois } County Court of said County
La Salle County } ss March term A.D. 1858

Nathan Gray }
vs } Replevin
Peter Donlevy }

Peter Donlevy the defendant in this suit – was summoned to answer Nathan Gray the plaintiff in this suit of a plea of taking and wrongfully and unjustly detaining from said plaintiff

goods & chattles &c and thereupon said plaintiff by Leland & Leland his Attorneys. complains for that the said defendant heretofore to wit, on the thirtieth day of December A.D. 1857. took the following goods and chattles then and there being the property of the plaintiff viz: one pair of bay horses formerly owned by John L. Coats, of great value, to wit, of the value of four hundred dollars & wrongfully & unjustly detained the same from said plaintiff from thence hitherto, to wit: at said county to the damage of said plaintiff of one hundred dollars, & therefore he brings his suit &c

Leland & Leland
pltffs Attys

Afterwards to wit: on the first day of March 1858 being one of the days of the March term of said court for 1858 the following proceedings were had and entered of Record to wit

Nathan Gray
vs } Replevin
Peter Donkey

This day comes the plaintiff by Leland & Leland his Attorneys and on their motion leave was granted to amend the declaration herein —

Declaration as amended as above looked,

Afterwards to wit on the 3rd day of March the same being one of the days of the March term of said court for 1858 the following pleas were filed in the words and figures following to wit;

State of Illinois }
La Salle County } And County Court Thereof
March term 1858

Nathan Gray
vs } Replevin —
Peter Donkey

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And now comes the said Defendant by Glover & Cook his Attys and defends &c when &c & says Actio non because he says that he never took and detained the goods & chattles &c of the plaintiff to wit one pair of Bay horses formerly owned by John W. Coats as is in the plaintiffs declaration above alledged against him And of this he puts himself upon the country —

And pltff doth the like

By Leland & Leland his Attys

And for a further plea in this behalf defendant says Actio non &c because he says that the said plaintiff is not nor was at the time of the supposed unlawful taking the owner of of nor entitled to the possession of the pair of Horses in said declaration mentioned and of this he puts himself upon the country

And pltff doth the like

By Leland & Leland his Attys

And ~~further~~ for a further plea in this behalf defendant says Actio non &c because he says that the pair of horses in said declaration mentioned were and are the property of the defendant & not of the plaintiff as is in plaintiffs declaration above alledged and of this he puts himself upon the country —

And pltff doth the like

By Leland & Leland his Attys

Glover & Cook

Defts Attys

Afterwards to wit on the 5th day of March the same being one of the days of the March term of said Court the following proceedings were had ~~in the words & figures following~~ to wit —

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Nathan Gray
vs
Peter Donley } Replevin

This day comes the plaintiff by Leland & Leland his attorneys and the defendant by Glover & Cook his attorneys. whereupon came the following jurors of a jury to wit; Dolphus Clark John Stevens Hiram Olmstead. Phillip Cole. Benjamin Flemming Wright Knapp. William E Bell William McGregor Elisha Card James Prescott. P. G. Dimmick and Sylvester Brown who were duly elected tried and sworn to well & truly try the issues herein according to the evidence and after hearing the evidence and argument of counsel. the jury retire to consider of their verdict. and after due deliberation thereon had returned into court, the following verdict to wit. "We the jury find the issues herein for the plaintiff"

Whereupon the defendant by his said attorneys enters his motion herein for a new trial —

Afterwards to wit on the 6th day of March the same being one of the days of the March term of said court the following proceedings were had to wit

Nathan Gray
vs
Peter Donley } Replevin

This day again come the parties herein by their said attorneys and after hearing the arguments of counsels upon the motion for a new trial entered herein the said motion is overruled by the court.

It is therefore considered by the court that said plaintiff have and recover of said defendant his costs and charges ~~herein~~ herein expended and that he have execution therefor —

Thereupon the defendant by his said attorneys prays an appeal herein to the supreme court which is allowed on his filling a bond in the penal sum of Two hundred dollars with

Jeremiah Wood as security said Bond to be filed on or before the first day of April next

Afterwards to wit on the 8th day of March 1858 being one of the days of said March term of said court a bill of exceptions was filed with the clerk of said court in the words & figures following to wit:

Nathan Gray
vs
Peter Dowling
} LaSalle County Court
March term Thereof 1858
Replevin

Be it remembered that when this cause came up for trial the plaintiff to maintain the issues on his part read in evidence a chattle Mortgage in substance as follows:

Chattle Mortgage
John S. Woods
To
Nathan Gray
} Know all men by these presents that I John S. Woods of the county of LaSalle in the state of Illinois of the first part for and in consideration, of One dollar to me in hand paid by Nathan Gray of Bureau County of the second part, the receipt of whereof is hereby acknowledged, do hereby grant Bargain and Sell, unto the said party of the second part, his heirs and assigns, the following Goods, and Chattles, to wit – 63 three years old Steers. 29 Cows. 3 Mares & colts. 240 Hogs. 1 pair Gray horses 1 pair Bay horses. 1 pair Mules. 1 pair Mules. 1 pair Black horses. 2 Yearling Colts. 1 two year old colt. 240 Yearlings and two year olds – To have and to hold, all and singular the Goods and chattles unto the said party of the second part his heirs and assigns forever. And the said party of the first part for himself his heirs, executors, and administrators do the hereby covenant to and with the said party of the second part, and his assigns, that he is lawfully possessed of the said goods and chattles as his own property that the same are free from all

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incumbrances and that he will warrant and defend the same to him, the said party of the second part and his assigns, against the lawful claims and demands of all persons. Provided, nevertheless, that if the said party of the first part, his heirs executors and administrators shall well and truly pay unto the said party of the second part, his heirs executors administrators or assigns for the redemption of the above bargained goods and Chattles the first and full sum of Six thousand dollars, on or before the twenty fifth day of November next, with Interest according to the tenor and effect of a certain promissory note, given by the said party of the first part to the said party of the second part bearing even date herewith, then this mortgage to be void otherwise to remain in full force and Virtue. And provided further that until default be made by the said party of the first part in the performance of the conditions aforesaid it shall and may be lawful for him to retain the possession of the said goods and chattles, and to use and enjoy the same, but if the same or any part thereof shall be taken on execution, attached or claimed by any other person or persons, at any time before payment or if the said party of the first part shall attempt to sell the same without the authority and permission of the said party of the second part in writing expressed, then it shall and may be lawful for the said party of the second part, or his assigns to take immediate and full possession of the whole of said goods and chattles to his and their own use—

In witness whereof the said party of the first part has hereunto set his hand and seal this 25th day of May 1857

John S Coats (Seal)

State of Illinois }
La Salle County } This Mortgage was acknowledged before me by John S Coats this twenty first day of May 1857

Patrick M Killduff J.P. (Seal)

[12564-5]

The within Mortgaged property is on the premises lately owned and occupied by Henry J. Miller And Edward Hale in the town of Hale Bureau County State of Illinois

Seal

Filed June 6th 1857 at 3¾ o'c. P.M. } Patrick McKilduff Not Public

Plaintiff then read in evidence a note described in said Mortgage and also the following entry on the docket of Patrick McKilduff. to wit:

John S. Coats
To } Chattle Mortgage of the following property
Nathan Gray } Viz. 63. 3 year old Steers - 29 cows & calves 3 Mares & colts. 40 hogs. 1 pair Gray Horses - 1 pair Bay Horses. 1 pair Mules - 1 pair of Mules. 1 pair of Black horses. 1. 2 year old colt. 2 yearling colts. 40 yearlings & 3 year old cattle. Acknowledged before me the 25th day of May A.D. 1857.

P. McKilduff J.P.

The plaintiff proved that said Kilduff was a justice of the peace residing in the town of Peru in LaSalle county at the time said Mortgage was acknowledged and that John S. Coats resided in the same town at the time the Mortgage was acknowledged. The defendant objected to the entry on the Docket of said Kilduff being read in evidence. the Court then & there overruled the objection and received said docket entry in evidence to which decision of the Court the defendant then and there excepted the defendant offered in evidence one of the record books books of the office of the recorder of LaSalle County in which said chattle Mortgage was recorded on the day of 1857 - the defendant objected to the said record. the court overruled the objection and permitted the record of said mortgage to be read in evidence to which decision of the Court the defendant then and there excepted. The evidence showed that the bay horses mentioned in said mortgage were in

the possession of Coates when the mortgage was made, and remained in his possession until the 28th day of December A.D. 1857 – when he sold them to defendant for $400 – and received his pay therefor and that they are the horses replevied in this suit –
There was evidence tending to show that the chattle Mortgage was fully paid before this suit was brought and evidence tending to show that some substantial amount remained unpaid on said mortgage when this suit was brought and that plaintiff demanded the horses from defendant before the suit was brought and that defendant refused to surrender them, this was all the evidence in the case –
At the request of the plaintiff the court instructed the jury as follows –

1st That if on the thirty first day of December last there was a balance due & unpaid on the chattle mortgage, and if the horses in the mortgage & in the declaration mentioned had not then been discharged by Gray from the mortgage – And if the horses were sold by Coates the mortgagor to Donley on the 28th day of December 1857, and if the mortgage was duly acknowledged and a schedule of the property mentioned therein, noted by the justice on his docket and recorded in the Recorders office in La Salle County in the State of Illinois before the sale by Coates to Donley, & if on the 31st day of December 1857 & before the bringing of this suit, the horses were demanded by the plaintiff & the defendant refused to give them up, the plaintiff is entitled to recover –

Given

2nd If Gray received property of Coats as a payment of indebtedness, consisting in part of the note in the Chattle mortgage mentioned & in part of other indebtedness, and there was no application of the payment to the mortgage by the debtor & receipt of it by the creditor on that particular indebtedness, then the law allows the debtor to apply it to such indebtedness as he pleases –

Given

12 3rd

Given

Will the Court instruct the jury that if the Mortgage was executed & acknowledged before the justice Foilduff & was duly recorded in the recorders office, the fact that the justice in entering the list of articles, added to the cows the word "calves" would not vitiate the mortgage if the one introduced in evidence is the same one entered on the docket—

To the giving of each of which instructions the defendant then and there excepted—

The Defendant asked the Court to instruct the jury as follows—

If Gray permitted Coates to retain possession of the horses after the time specified in the mortgage for Coates to retain possession of the same, and after the 25th day of November A.D. 1857— permitted the horses in question to remain in the actual exclusive possession of Coates, and Coates while he so remained in possession on the 28th day of December A.D. 1857— sold said horses to defendant, and if defendant was a bona-fide purchaser of said horses from Coates, then plaintiff cannot hold the horses under the mortgage as against defendant—

Refused

Which instruction the Court refused to give. To which decision of the Court the defendant then and there excepted and prays this his Bill of exceptions be signed sealed and made a part of the record which is done—

John C Champlain (Seal)

Afterwards on the 17th day of March an appeal Bond was filed in the office of the Clerk in the words and figures following to wit—

Know all men by these presents that we Peter Gourley and Jeremiah Wood are held and firmly bound unto Nathan Gray in the penal sum of Two hundred dollars lawful money of the United States which payment well and truly to be made we bind

ourself our heirs and administrators jointly and severally firmly by these presents. Witness our hands and seals this 16th day of March A.D. 1858 –

The condition of the above obligation is such that whereas the said Nathan Gray did at the March Term A.D. 1858 of the County Court of LaSalle County State of Illinois, recover a judgment against the above bounden Peter Donlevy in an action of Replevin for the recovery of a certain span of horses of the value of Four Hundred Dollars and also for costs in said cause, from which said judgment the said Peter Donlevy has taken an appeal to the supreme court of said state –

Now if the said Peter Donlevy shall prosecute his appeal with effect and without delay, and shall pay or cause to be paid all judgments costs interest and damages adjudged against him in case said judgment be affirmed by said Supreme court or in case said appeal is dismissed then this obligation to be void otherwise to remain in full force

Peter Donlevy (Seal)
Jeremiah Wood (Seal)

State of Illinois
LaSalle County } ss

I, Philo Lindley, clerk of the County Court of said County hereby certify the foregoing to be a full, true and complete copy of the record and proceedings had in said court in the case wherein Nathan Grey is plaintiff and Peter Wonling is defendant

Witness my hand and the seal of said Court at Ottawa this 13th day of April A.D. 1858

Philo Lindley Clk.
E. L. Henick Dep.

Fees. $4.50

Now comes the said appellant by Glover & Cook his attorneys and says that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid there is manifest error in this to wit

1st The court erred in admitting the evidence the entry on the docket of Esquire Kilduff

2nd The court erred in admitting in evidence of the record of the chattle mortgage

3rd The court erred in giving each of the instructions asked for by the plaintiff in the court below

4th The court erred in refusing the instruction asked for by the defendant in the court below

5th The court erred in overruling the motion for a new trial

6th The Court erred in rendering the judgment aforesaid in manner and form aforesaid

For which errors and others in said record manifest appellant prays that the said judgment be reversed

Glover & Cook
Attorneys for Appellant

And now comes the Appellee & says there is no error in said record proceedings & prays an affirmance of the judgment

Leland & Leland

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Peter Dowley
vs
Nathan Gray

Record

Filed April 12th 1858
L. Leland
Clk.

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Peter Donley
vs
Nathan Gray

In this case I make this additional point. It can not be contended in any case that if the continued possession of the mortgagor after the time for which the mortgage provides for his possession is not conclusive evidence of fraud. That it is not a badge of fraud and that a Jury have the right to pass upon the bona fides of the transaction if this be so the instruction given for plff below is wrong

B. C. Cook

[12554-9]

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Hooley is Man
p

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STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1858.

Peter Donley
vs
Nathan Gray

BRIEF OF POINTS AND AUTHORITIES.

1st. A sale of a chattel mortgage, where the possession does not accompany and follow the deed, is void as to creditors and *bona fide* purchasers.

Thornton vs. *Davenport*, 1 Scam. 296.

2d. So with chattel mortgages.

Murray vs. *Burtis*, 15 Wend. 212.
Look vs. *Comstock*, 15 Wend. 244.
1 Penn. R. 57.

3d. The provision, that the mortgagor may retain possession, is a mere limitation of the right of a mortgagee, and when the time limited expires, either the mortgagee must take possession of the property, or the law must sanction the rule, that the real ownership may be in one person and the ostensible ownership in another.

Hull vs. *Carnley*, 2 Hill 109.

4th. After default made, the mortgagee becomes the absolute owner of the property, and the possession must accompany such ownership, if the doctrine of *Thornton* vs. *Davenport* is to be sustained.

Burdick vs. *Mc Vanner*, 2 Denio 170.
Patchin vs. *Pierce*, 12 Wend. 61.
Fuller vs. *Aiker*, 1 Hill 475.

5th. But the statute itself is decisive in our favor on the question. It declares all mortgages of personal property void, unless possession is given to the mortgagee, except such as are acknowledged and recorded as the statute directs, and those are declared to be valid, if *bona fide*, for a space of time not exceeding two years, provided that the mortgage itself shall provide for the possession of the property *so* to remain with the mortgagor. In this case, the mortgage instead of providing that the

possession of the property *should* remain with the mortgagor at the time it was sold to the appellant, expressly provided that it should not.

Letcher vs. *Norton*, 4 Scam. 575.
Fox vs. *Burns*, 12 Barb. 677.
Carter vs. *Buckner*, 3 Blackford 314.

6th. If the lien is for two years, irrespective of the time limited in the chattel mortgage for the property to remain with the mortgagor, a very wide door for fraud is opened in two ways, viz.: 1st. Every credit for 30 or 60 days, secured by chattel mortgage, the property mortgaged would be protected from execution for two years, or the judgment creditor must prove that the debt is paid—a fact not at all within his knowledge.

2d. The possession of the mortgagor so long after the time, when by the terms of the mortgage he should have surrendered it, gives him an opportunity to dispose of it to innocent purchasers.

D. C. Cook.
attys for Appellants.

Cook, The limitation is merely of the sale — After default mortgagee must take possession of the property —

What does the word "to" mean in the Statute?

[10554-11]

Peter Dowley

vs

Nathan Gray

Points & authorities

Adopted by

Cook May 22

Supreme Court - 3d Division
April Term 1858.

Peter Donlevy
vs.
Nathan Gray

When a chattel mortgage is duly acknowledged, recorded & is bona fide, & provides that the mortgagor may retain the possession until default, does the ~~right~~ neglect of the mortgagee to take the goods from the mortgagor upon the maturity of the debt, operate to make the mortgage thereafter fraudulent in law as to creditors ~~& creditors~~ & purchasers of the mortgagor?

The defendant in error insists that the registration is equivalent to, & a substitute for, the change of possession necessary before the statute, & that the mortgage would remain valid, (not however exceeding the two years fixed by the statute) till the mortgagee saw fit to assert his rights under it.

Where the sale is registered in compliance with law, the sale

[12554-12]

reason why conveyances of personal property, where there was no change of possession, were fraudulent in law, fails. They were fraudulent because the seller after the sale, was the apparent owner & could obtain credit as the visible owner, or might, as such apparent owner, sell again, & the second purchaser thereby be defrauded. Where notice is given in the place fixed by law for all to look, the reason ceases. Notice having been given of the execution of the mortgage, the mortgagee's rights were known, & it is known, of course, that they will remain till he is paid by the mortgagor.

To guard against the mortgage being permitted to remain <u>in terrorem</u>, after it has been paid, the legislature have fixed a limit to its vitality.

It cannot be that the mortgage is made fraudulent or invalid in law as against grantees or creditors of the mortgagor by the fact of the mortgagee omitting to take possession at the maturity of the debt, because he has not the legal right to the possession till <u>after</u> maturity. The mortgagor has the whole of the last day, in which to make his payment.

Consequently, the lien of an execution in the hands of an officer ~~must~~ would attach so as to deprive the mortgagee of his rights under the mortgage, & the mortgage would be valueless to the mortgagee. Could the mortgagor convey a good title discharged from the mortgage, at sunrise of the day following that when the debt matured? Could the mortgagor thus deprive the mortgagee of the security, & not make himself liable to the penalty in the 6th section? Has the mortgagee no way to protect himself, without taking the possession at midnight?

There must be a reasonable time after the maturity, within which the mortgagee may assert his rights*. We say the legislature has fixed this time at two years from the recording, & has not left it a question of fact for the jury as to what is reasonable.

In the absence of such limitation, we say the possession might remain with the mortgagor until, in the language of Chief Justice Marshall ~~in a dictum~~ in the case of the U.S. vs ~~Hoon~~ Wooe et al 3 Cranch 73, "the creditor becomes entitled to his money, and either chooses or is compelled to assert his right".

Suppose the mortgagor, by the mortgage, was

* and the greater or shorter length of this time would give more or less weight to the fact as evidence that the mortgage when made was fraudulent.

[12554-13]

to retain possession till default & there were two debts secured maturing at different dates, or with interest coming due at different times, would the possession of the mortgagor after the maturity of the first debt due, or of any interest, make the mortgage fraudulent?

Suppose it was to indemnify & save harmless the mortgagee on account of his having ~~been~~ become security for the mortgagor to a third person, would the default of the security to pay the debt of his principal at the day, & take possession instantly, make it fraudulent?

Suppose it is to secure a book account or due bill, or note over due, with a provision that the mortgagee should advertise & sell, pay himself, & pay the surplus to the mortgagor, must he take possession & advertise on the same day the mortgage is executed? *

There is no case in our own reports where the question has been raised, though in the 11 Ill. 617, it would seem to have been the opinion of the Judge writing the opinion, that the mortgage would be valid for two years, though maturing before the two years.

* Suppose a registered mortgage contains the provision that the mortgagor shall retain possession till default or until he shall remove the goods from the town, could the mortgagee take them to the next town & a day or two afterwards sell them released from the mortgage, because his regaining possession after he took them out of the town was after the mortgage had the right to the possession & therefore not consistent with the deed & would the mortgage for this reason be fraudulent as to the purchaser?

In Massachusetts the question has been decided.

Ballard vs. Williams 16 Pick. 33.

Shurtleff vs. Willard 19 Pick. 202.

The same ~~principal~~ principle has been decided in New York.

Swift vs Hart 12 Barb. 530.

Nichie vs Townsend 2 Sandf. 299.

Bissell vs Hopkins 3 Cow. 166 n p 205

Howland vs Willett 3 Sand. 607

The section of the N.Y. Stat. on the subject may be found in the 1st of Denio on p. 164.

So in South Carolina.

Banhe vs. Gourdinet als 1st Speer's Eq. 439.

Maples vs. Maples — Rice's Ch. - 300.

Fishburn vs Kunkard — 2 Speers — 556.

Gist vs Pugh 2 Hills Ch 318 (1 Eq Dig p 560 Sec 538

And the fraud per se doctrine in relation to possession in the grantor of a chattel was the rule in S. Carolina.

See Mill's Const. Repts. 2d Vol. p. 125.

So in Alabama.

Simmerson vs The Branch Bank at Decatur 12 Ala. 205

Dearing vs Watkins 16 Ala. 20

So in Maryland.

Hudson vs Warner et al. 2 Har. & Gill 415.

Garrett vs Hughlett 1 Har. & John 3.

Roberts on Conveyances - p. 561. n. f.

So in Kentucky where the strict rule of pleading per se has obtained

McGowen vs Hoy 5 Littel 243

Head Hobbs et al vs Ward et al 1 J J Marsh 282

Snyder vs Hill 2 Dana 204

Leland & Leland

for appellee

~~appellants error~~

Peter Dorlery — Appt
vs
Nathan Gay — appee

appeal from Labalme

Reese Justice. This case is, in ~~all respects~~ principle, ~~nearly~~ identical with the case of Reed vs Eames ante.

The judgment is reversed and the cause remanded.

[12554-16]

Dunlap vs Bay
Brief of
Appellee

Sec 48
407

~~Ky~~ 127

Peter Dunlevy
vs
Nathan Gray

Opinion by Preston J.

143 = 163

Recorded. Page 602.

This case not worth observing. the case of Barnes being in the preceding volume

Supreme Court---State of Illinois.

THIRD GRAND DIVISION.

PETER DONLEVY,
vs.
NATHAN GRAY. } *Appeal from LaSalle County Court.*

This was an action of replevin, commenced by Gray against Donlevy, December 31st, 1857, for the recovery of one span of horses of the value of four hundred dollars.

Record page 4 Declaration in the usual form. Pleas, 1st. That defendant did not unlawfully take and detain the goods and chattels of plaintiff, &c.

Record page 6 2nd. That the plaintiff was not the owner of, or entitled to the possession of the horses.

3d. That the horses were the property of defendant, and not the property of plaintiff.

Page 8 On the trial, the plaintiff read in evidence a chattel mortgage executed by John L. Coates to him on the 25th day of May, A. D. 1857, for the following goods and chattels, to wit:

Sixty-three three year old steers, twenty-nine cows, three mares and colts, forty hogs, one pair gray horses, one pair bay horses, one pair mules, one pair mules, one pair black horses, two yearling colts, one two year old colt, forty yearlings and two year olds.

By said mortgage it was provided that if Coates should pay to Gray, Record page 8 for the redemption of the above bargained goods and chattels, the sum of six thousand dollars, ($6,000,) on or before the 25th day of November then next, with interest, according to the tenor and effect of a certain promissory note given by Coates to Gray of even date therewith, then said mortgage to be void. And it was further provided by said mortgage, *that until default* should be made by Coates in the payment aforesaid, it should be lawful for him, the said Coates, to *retain* the possession of said goods and chattels, and to use and enjoy the same; but if the same, or any part thereof, should be taken on execution, attached or claimed by any other person at any time before payment, or if Coates should attempt to sell the same without the written permission of Gray, then it should be lawful for Gray to take immediate possession of the whole of said property.

The following was endorsed on said mortgage:

STATE OF ILLINOIS, LaSalle County.

This mortgage was acknowledged before me by John L. Coates, this 21st day of May, 1857.

PATRICK M. KILDUFF, J. P. { SEAL }

Record page 10 The within mortgaged property is on the premises lately owned and occupied by Henry J. Miller and Edward Hull, in the town of Hull, Bureau county, state of Illinois.

Plaintiff read in evidence the note described in the mortgage, and proved that Patrick M. Kilduff was a justice of the peace, residing in the town of Peru, in the county of LaSalle, and at the time the mortgage was acknowledged, and that Coates then resided in the same town.

Plaintiff offered in evidence the following entry in the docket of Patrick M. Kilduff, to wit:

JOHN L. COATES
TO
NATHAN GRAY. } Chattel Mortgage of the following property, to wit: 63 three year old steers, 29 cows and calves, 3 mares and colts, 40 hogs, one pair of gray horses, one pair bay horses, one pair mules, one pair mules, one pair black horses, one two year old colt, 2 yearling colts, 40 yearlings and two year old cattle.

Acknowledged before me the 25th day of May, A. D. 1857.

P. M. KILDUFF, J. P.

The defendant objected to the introduction of said entry: the Court overruled the objection: the entry was read in evidence, to which decision defendant then and there excepted.

The plaintiff offered in evidence one of the record books of LaSalle county, in which said chattel mortgage was recorded on the 6th day of June, 1857. The defendant objected to the introduction of said record; the Court overruled said objection, and permitted the record of said mortgage to be read in evidence, to which decision defendant then and there excepted.

The evidence showed that the bay horses mentioned in said mortgage were in the possession of Coates when said mortgage was made, and remained in his possession until the 28th day of December, 1857, when he sold them to Donlevy for $400, and received payment therefor; that they are the horses replevied in this suit. There was evidence tending to show that the chattel mortgage was fully paid before this suit was brought, and evidence tending to show that some substantial amount remained unpaid on said mortgage when this suit was brought; that plaintiff demanded the horses before the suit was brought, and defendant refused to surrender them. This was all the evidence in the case.

For the plaintiff, the court instructed the jury as follows:

1st. That if on the thirty-first day of December last, there was a balance due and unpaid on the chattel mortgage: and if the horses in the mortgage and in the declaration mentioned had not then been discharged by Gray from the mortgage: and if the horses were sold by Coates, the mortgagor, to Donlevy on the 28th day of December, A. D. 1857: and if the mortgage was duly acknowledged, and a schedule of the property mentioned therein noted by the justice on his docket, and recorded in the recorder's office in LaSalle county, in the state of Illinois, before the sale by Coates to Donlevy: and if on the 31st day of December, 1857, and before the bringing of this suit, the horses were demanded by plaintiff of defendant, and defendant refused to give them up, the plaintiff is entitled to recover.

2nd. If Gray received property of Coates as a payment of indebted-

ness, consisting in part of the note in the chattel mortgage mentioned and in part of other indebtedness, and there was no application of the payment to the mortgage by the debtor and receipt of it by the creditor on that particular indebtedness, then the law allows the debtor to apply it to such indebtedness as he pleases.

3rd. Will the Court instruct jury that if the mortgage was executed
page 12 and acknowledged before the justice Kilduff and was duly recorded, and was duly recorded in the recorder's office, the fact that the justice, in entering the list of articles, added to the cows the word "calves," would not vitiate the mortgage, if the one introduced in evidence is the same one entered on the docket.

To the giving of each of which instructions the defendant then and there excepted.

The defendant asked the court to instruct the jury as follows:

This goes to the point that a party cannot clothe another in this way, with the show of possession by which others may be deceived.

page 12 If Gray permitted Coates to retain possession of the horses *after* the time specified in the mortgage for Coates to retain possession of the same, and after the 25th day of November, A. D. 1857, permitted the horses in question to remain in the actual exclusive possession of Coates, and Coates, while he still remained in possession, on the 28th day of December, A. D. 1857, sold said horses to defendant: and if defendant was a bona fide purchaser of said horses from said Coates: then plaintiff cannot hold the horses under the mortgage as against defendant. Which instruction the Court refused to give; to which decision of the court the defendant then and there excepted.

The errors assigned are:

1st. The Court erred in admitting in evidence the entry in the docket of Esq. Kilduff.

2nd. The Court erred in admitting in evidence the record of the mortgage.

3rd. The Court erred in giving each of the instructions asked for by plaintiff in court below.

4th. The Court erred in refusing to give the instruction asked for by the defendant in the court below.

5th. The Court erred in refusing to grant a new trial.

GLOVER & COOK,
Att'ys for Appellant.

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Peter Doulevy

vs

Nathan Gray

Argued May 22

Filed April 22 1882

L. Leonard

Clerk

COOLEY & COOLEY

Atty's for Appellant.