

14474


No. _____

Supreme Court of Illinois

Forrest et al

vs.

Tinkham et al

71641  7

In the Supreme court.

Philip R. Forrest et al

vs

Edward J. Tinkham et al

}
}
}

Error to Superior
Court of Chicago

This court in their opinion in
this cause say

"The mortgage executed by Carl Fabian and Ellis to secure the payment of a debt which they owed to Forrest was not acknowledged before a justice of the peace of the precinct in which either of them lived. It was not recorded nor had Forrest acquired possession of the property when Tinkham and Amble purchased of Carl Fabian & Ellis. Failing in these requirements whilst it was binding upon the parties to it yet it was void as to third ~~persons~~ "persons."

I had supposed that something more was necessary than merely not being a party to the mortgage to entitle a third person to protection against it: that bona fide intent somewhat into the qualification. The title in this case presented two aspects one that Tinkham & Amble when they bought expressly agreed to pay for the Forrest debt & took the property by the terms of their agreement expressly subject to it

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and the other that in law under the circumstances of this case they were not purchasers in good faith.

Upon the first point or aspect this court upon the facts found agreed with the court below that they did not express by agreement to pay or buy expressly subject to it which an equivalent in a court of equity the property being sufficient ⁱⁿ value to pay the debt.

But upon the second aspect of the case the court dismisses in the short statement I have above given. Is that in accordance with the main decision of this court.

In *Hathorn vs Lewis* 22 Ills 398. This court says "the mortgage is good as between the parties to it and as to all persons except creditors bona fide purchasers. The facts show, that when they purchased the goods of Alexander, he expressly told them they were subject to this mortgage, and they took the title subordinate to the mortgage. They acquired then, the right of redemption only as that was all the claims Alexander then had, the mortgage being valid as between him and Lewis, and Hathorn & Lewis by the purchase stood in Alexander's shoes, and were not bona fide purchasers in the

since we understand that relation."

Now in the case at bar. by the testimony of Clarkson & himself the leading witnesses for the defence. It appears that they were to pay the ~~the~~ "Forest Mortgage" if it was valid" valid as to whom - that it had not been recorded was patent to every one - but they knew of it and just as Hathorn and Lewis did; bought; their lawyers telling them the mortgage was good for nothing, because it did not comply with some of the requirements of the law. The court will see this in Armstrong's testimony in that case. If Hathorn and Lewis are not bona fide purchasers - how is it possible to hold Aubrey & Fincham & Co. - They knew of the existence of this Forest Mortgage and actively interfered to prevent Ellis from informing them of what Carl Fabian told us about 1880. They held in their hands the evidence that would consign two of these men to State Prison and they tell them significantly if you let ^{the} Forests know of what is going on it will break up our trade. In other words as Forests then can & will take the chattel mortgages and so we cannot get them away from them and cheat them out of their money we will send you to State Prison.

Again in Fuller vs Paige 26 Dec 359-
 "The mortgage was good as against Meyer
 the mortgagor without being recorded. If then
 the appellant purchased the goods of Meyer
 with the knowledge of the mortgage, and for
 the purpose and with the intent to enable
 Meyer to put the money in his own pocket
 and cheat the mortgage, that was
 such a fraud in fact as to avoid the sale
 to appellant."

In this case also Fuller purchased
 the goods knowing of the mortgage upon them
 but disregarding it because it was not
 recorded - ^{paid so told by his lawyers too just as in the case} ~~precisely as in the case at bar~~
 now why was this wrong because he did it
 "for the purpose and with the intent to
 enable Meyer" (the mortgagor.) "to put the
 money in his own pocket and cheat the
 mortgage." out of what not the money
 or consideration paid, for that the mortga
 ge had no ^{specific} right to, but out of his lien
 upon the mortgage property out of his right
 to convert that property into money & to
 pay his debt, for that is the only thing he
 could be cheated out of.

Now in the case at Bar - Fulkam
 & Ambler know of the existence of this marte
 gage they are advised as Fuller was that
 it is good for nothing. They buy to enable

Carl Fabian Ho to do what to pay off Forest
 Bros. no for they only pay them \$600. and
 the rest is an old debt due themselves
 a debt due Nottingham. & some ~~base~~
^{no part of which was intended by the parties} empty barrels. They did not intend ^{to} ~~intend~~
 by this to enable Carl Fabian Ho to pay off
 Forest Bros this debt. but they did intend
 to deprive them ^{Forest of me} of their right to take this
 property to satisfy the mortgage upon it
 It does not make any difference in prin-
 ciple whether the consideration was mon-
 ey or anything else if it was ^{knowingly} paid ~~not~~
 to the mortgagee not to be paid to the mort-
 gagee it is the same in effect so far as
 the mortgage is concerned. The attempt
 is made to deprive him of his lien know-
 ingly without payment of his debt -
 and that is all that was done or sought
 to be done in the case of Fuller vs Paige

I cannot but look upon this case
 of ~~that~~ Forest vs Fullingham as in
 effect annulling these cases in 22 & 26 Ill
 The statement in this case is "it was void
 as to third persons." Now they may be
 mere volunteers, if there is any qualification
 to it it must be that of bona fides, and can
 these parties knowingly injure this property
 in defiance of the rights of Forest Bros. to deprive
 them of their lien & without any the intent

that no part of the consideration paid should go to them to be called bona fide purchases.

I respectfully submit these suggestions. I carried on this case in the court below on the faith of the case in 22' J. U. principally for I knew of there would be a conflict of testimony upon the point of the express promise to pay. but as I understood that case a purchaser of chattels mortgaged the purchaser being in the same plight as he would be if the mortgage were needed. having actual notice of its existence having it in his hands could by no means be called a purchaser in good faith.

I therefore ask for withdrawal.

April 27. 1863.

W. J. Boyer
for app. in error

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Supreme Court

Forrest vs

Guthrie
vs

Petition for
a Rehearing

253

Filed April 29th 1863
S. Leland
14474 Coll

W. J. Dumps