

United States Bank v. Peter.

consideration whereof it is decreed and ordered by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*123] *THE BANK OF THE UNITED STATES, Appellants, v. GEORGE W. PETER and others, Appellees.

Subrogation.

It is a well-settled principle in equity, that a judgment-creditor, when he is compelled to pay off prior incumbrances on land, to obtain the benefit of his judgment, may, by assignment, secure to himself the rights of the incumbrancers; and the same rule applies, where a junior mortgagee is obliged to satisfy prior mortgages; he stands as the assignee of such mortgages, and may claim all the benefits under the lien that could have been claimed by his assignor.¹ But the effect of this principle may be controlled by acts of the parties.

APPEAL from the Circuit Court of the District of Columbia, and county of Washington.

This case was argued by *Sergeant* and *Coxe*, for the appellants; and by *Key*, for the appellees.

MCLEAN, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court for the district of Columbia. The facts out of which the controversy arises are substantially as follows:

At April term 1822, the Union Bank of Georgetown recovered two judgments against George Peter, amounting, exclusive of costs, to the sum of \$7934. On the 9th April 1824, George Peter executed a deed of trust to Thomas Peter and Robert P. Dunlop, which was supposed, at the time, to include all the real property owned by George Peter within the district of Columbia. The conveyance was made in trust to indemnify Thomas Peter, who had become the indorser of George to a large amount. A great number of debts were enumerated in the deed, and among others, one to the Bank of the United States of \$12,000, which were designed to be paid, in whole or in part, by the sale of the property included in the deed of trust. The judgments of the Union Bank, above stated, were not embraced by the deed of trust. Before any act was done under this deed, Dunlop relinquished the trust to Thomas Peter, his co-trustee. On the 19th of May 1824, the Bank of the United States recovered a judgment of \$5000 against George Peter, as indorser or drawer with John Peter. In September 1829, the property conveyed in trust was sold, by Richard Smith, cashier of the branch Bank of the United States, who had been appointed by Thomas Peter, with the consent of the creditors, to act as agent in the premises. The net proceeds of the sale, deducting certain charges, were \$37,285.90, an amount insufficient to discharge all the debts.

*124] The judgments of the Union Bank, though not included in the deed of trust, constituted a lien on all the real property of George Peter

¹ The doctrine of subrogation applies, when a party is compelled to pay the debt of a third person to protect his own rights, or to save his own property. *Cole v. Malcolm*, 66 N. Y. 363. Thus, an insurance company that has paid a loss is entitled to be subrogated to the rights of the

assured, against a common carrier, who was primarily liable. *Hall v. Nashville and Chattanooga Railroad Co.*, 13 Wall. 367; *The Ocean Wave*, 5 Chicago Leg. News 565. And see *Sun Mutual Ins. Co. v. Mississippi Valley Transportation Co.*, 17 Fed. Rep. 919.

United States Bank v. Peter.

in the district ; and in order to give unincumbered titles to purchasers at the above sale, Richard Smith, with the consent of the creditors, and Thomas Peter, paid those judgments out of the proceeds of the sale ; but satisfaction was not entered upon the record. The payment was stated to be for the use of the Bank of the United States ; and writs of *scire facias* have been brought to revive the judgments.

It having been discovered, that the trust deed of the 9th April 1824 did not include all the property of George Peter within the district ; on the 1st October 1829, he executed another deed of trust to Thomas Peter, for ten lots in the city of Washington, which were required to be sold, and the proceeds applied in paying certain judgments against George Peter, as drawer, and Thomas Peter, as indorser. One of the judgments specified was obtained by the Bank of the United States. And on the 7th May 1830, another deed of trust was executed by George Peter to Thomas Peter, including the above ten lots and one other lot in the city of Washington. This deed was designed to remedy some defect or informality in the first deed for the ten lots, and to convey one other lot ; the same judgments are recited as in the first deed, and the same trust declared. These eleven lots were sold by Richard Smith, in October 1829, and May 1830, for \$5280.70.

In 1834, Thomas Peter died, and this proceeding is carried on by his executors ; who, with George Peter, filed their bill, stating the above facts, and praying that Richard Smith and the Bank of the United States be decreed to pay over the proceeds of the sale of the eleven lots, in their possession, to the creditors named in the trust deed of 9th April 1824. This application is made on the ground, that as the judgments of the Union Bank were a lien upon the eleven lots, and were paid out of the trust funds, the trustee, in behalf of the creditors and himself, has a right, in equity, to the proceeds of the sale of these lots, under the lien of the judgments.

This claim is resisted by the Bank of the United States, on the ground, that the judgment obtained by the bank for \$5000, in May 1824, long before the execution of the deed of trust for these lots, constituted a lien upon them, after the discharge of the judgments of the Union Bank. There were other judgments against George Peter, rendered in May 1824, which were not provided for in the trust deed of April 1824, and which claim a proportionate interest with the Bank of the United States in the lien on the eleven lots. This claim is not resisted by the Bank of the United States, which claims out of the proceeds of the sale of the eleven lots, as its dividend, the sum of \$2428.62. And the question in this controversy is, whether the proceeds of the sale of the eleven lots shall be paid to the creditors named in the deed of trust of the 9th April 1824 ; to the Bank of the United States, on their judgment, and on the other judgments of May 1824, under which the lien is set up ; or to the creditors named in the trust deeds of these lots, of 1829 and 1830. [*125

Although the bill in this case, in its specific prayer, does not extend beyond an application of this fund under the first deed of trust ; yet there are certain agreements and admissions on the record, which authorize the court to make a final decision in the case. It seems, that satisfaction has not been entered on the judgments of the Union Bank, although they have been paid in full. The entry that this payment was made for the use of

the Bank of the United States, can have no effect, favorable to the bank, on the present question. Under the trust deed, the Bank of the United States had but a common interest with the other creditors named, in discharging or controlling the lien of these judgments. And it is on the discharge of this incumbrance by the trustee, out of the trust fund, that he sets up the right in equity, in behalf of himself and the creditors named in the deed, to be subrogated to all the rights of the Union Bank, as plaintiffs in the judgments.

It is a well-settled principle in equity, that a judgment-creditor, who is compelled to pay off prior incumbrances on land, to obtain the benefit of his judgment, may, by assignment, secure to himself the rights of the incumbrancers. And the same rule applies, where a junior mortgagee, to save his lien, is obliged to satisfy prior mortgages on the same estate; he stands as the assignee of such mortgages, and may claim all the benefits under the lien that could have been claimed by his assignor.

But the effect of this principle is controlled in the present case, by the subsequent acts of the parties. If the lien of the judgments of the Union Bank had been unconditionally extinguished, the lien of the judgment of the Bank of the United States, and the other judgments of the same date, would have attached to the eleven lots; but this effect has also been controlled by the acts of the parties. The judgments of the Union Bank were not paid until January 1830. So that prior to this time, on no principle, could the lien of these judgments be held to be extinguished. And before this time, the trust deed was executed.

This deed was executed on the 1st October 1829, and it contains the following recital: "Whereas, the said George Peter is indebted to the president, directors and company of the Bank of the United States; to the president and directors of the Union bank of Georgetown; and to the president and directors of the Farmers' and Mechanics' Bank of Georgetown, in divers large sums of money, for which the said George Peter gave his several promissory notes, payable to the said Thomas Peter, and by him indorsed to the said banks, upon which notes, judgments have been obtained," &c. And the lots are conveyed to Thomas Peter in trust for the payment of the above judgments; and were sold in October 1829, and May 1830, by Richard Smith, agent for the trustee and creditors named in *126] the deed. He was cashier of the branch Bank of the United States, at Washington, and represented the interests of the bank in the proceeding.

From these facts, it appears, that before the judgments of the Union Bank were satisfied, and consequently, before there was any pretence that the lien of these judgments on these lots was extinguished, with the consent and approbation of all the parties interested, the deed of the 1st October 1829 was executed. That this arrangement was made with the approbation of the Bank of the United States, is clear, from the face of the deed, and the agency of Smith in selling the property. Except by virtue of the trust deed, Smith had no right to sell the property; and acting as he did for the creditors named in the deed, among which the Bank of the United States was prominent, it is too late for the bank, after the sale, to disavow his agency.

The contingent lien of the bank on the eleven lots, by virtue of its judg-

United States Bank v. Peter.

ment, in May 1824, does not seem to have been considered by the bank or the trustee, when the trust deed was executed, as of any value. It depended entirely on the unconditional extinguishment of the lien under the judgments of the Union Bank.

It is contended, that as the judgments of the Union Bank were a lien upon all the real estate of George Peter in the district, the court would have directed executions on these judgments to be levied on the property of Peter, other than the eleven lots; so as to have left them to be sold under the judgment of the Bank of the United States. And that the same rule should now prevail. The answer to this is, that before the judgment of the Bank of the United States was rendered, the first deed of trust was executed, which embraced all the property of Peter in the district, except the eleven lots. That this deed was valid, and that the rule would have been applied as between the lien of the Union Bank and the grantee of the first deed of trust, but not as to subsequent liens.

Here are the judgment lien and the trust deed, covering the same property, except the eleven lots, which are covered by the judgments, but not by the deed. The judgment of the Bank of the United States created no lien. Under such circumstances, the court could not have postponed either the lien of the Union Bank or the rights under the deed of trust, in behalf of the judgment of the Bank of the United States; but would have directed that the eleven lots should be sold, under the judgments of the Union Bank. This would have been the correct rule under these conflicting rights; but the case turns on the deeds of trust of 1829 and 1830, which conveyed the title, subject only to the prior lien of the judgments of the Union Bank. And this was done, with the consent of the agent of the Bank of the United States. We think, this consent, as shown in the deeds, and the sale of the eleven lots, connected with the facts of the case, goes to establish the trust deeds; and that the proceeds of the sale of these lots must be paid over on the judgments specified in the deeds, according to their respective priorities. *As the decree of the circuit court is not in accordance with this [*127 view of the case, it must be reversed; and the case sent down for further proceedings.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed; and this cause be remanded to the said circuit court for further proceedings to be had therein, in conformity to the opinion of this court.