
Statement of the case.

PARMELEE v. SIMPSON.

1. Where a deed to A., though executed before a mortgage of the same property to B., is not delivered until after the execution and record of the mortgage, the mortgage will take precedence of it.
2. The placing of a deed to a party on record, such party being wholly ignorant of the existence of the deed, and not having authorized or given his assent to the record, does not constitute such a delivery as will give the grantee precedence of a mortgage executed between such a placing of the deed on record and a formal subsequent delivery.
3. As a general thing a ratification of a grantor's unauthorized delivery can be made by the grantee; but not when the effect would be to cut out an intervening mortgage for value.

APPEAL from the Supreme Court of the Territory of Nebraska; the case being thus:

Parmelee filed a bill of complaint against Megeath, Bovey, and one Simpson, in the District Court for Douglas County, Nebraska Territory, sitting in chancery, for foreclosure and sale under a mortgage.

The bill set forth a mortgage executed by Megeath and Bovey, duly acknowledged *on the 17th April, 1858*, and duly recorded on the same day. It stated that Simpson claimed some interest in the mortgaged premises, and prayed that he also be made a defendant.

The bill was taken *pro confesso* against Megeath and Bovey.

Simpson admitted the making and recording of the mortgage, as alleged in the bill, but set up this defence:

"That he (Simpson) is the lawful owner of a portion of the premises and lands [defining it] described, *and was such lawful owner at the time the mortgage and note were executed, and for some time before*; that he was so seized of said premises in fee simple on the 15th day of April, 1858" (two days before the mortgage), "by virtue of a deed from Bovey, and that on the same day the deed was duly recorded, after having been duly acknowledged, &c.," before one Sayre, a notary public. *And that this defendant paid to the said Bovey a valuable and adequate consideration therefor, as is expressed in said deed.*

"That some time in the month of August, A. D. 1860, he learned

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for the first time that a pretended deed, purporting to have been made and executed by him to Bovey, conveying the premises, dated April 17th, 1858, but without being duly acknowledged, was upon the records of the register's office, but that the same was a forgery; that he never executed such or any other deed conveying the premises; that he never received any consideration for the deed from Bovey, or anybody else; nor did he ever authorize any one to execute the said deed for him."

A proved copy of the deed of April 17th, 1858, set up, from Bovey to Simpson, was produced from the office of the recorder of deeds of the county, but not an original.

The testimony of Simpson himself showed the following facts: He had come from California to Nebraska, arriving there for the first time in his life, April 18th, 1858 (three days after the date of the deed). He first there saw Bovey, who was an acquaintance of his, on the afternoon of that day. On the following day, the 19th, Bovey took him out to the land and showed it to him, stating that he had conveyed it to him in consideration of certain money previously received; showing Simpson, then, for the first time, the deed. Simpson had no knowledge of any intention on Bovey's part thus to convey the land further than a letter from him written at Chillicothe, Ohio, early in December, 1857; that he "intended conveying some property he had pre-empted." Simpson took the deed and put it in his trunk at his hotel, from which, in June, 1858, he missed it along with other papers. Bovey had been allowed access to the trunk to look for another paper. Simpson wrote to Bovey in the winter of 1860 about it, but received no answer. A diligent search failed to discover it.

The official index at the register's office stated that the deed had been indexed as received for record, April 15, 1858. But two witnesses, one of whom had been requested to attend to the drawing of the mortgage, and another who had gone with him as a friend to examine the records in the register's office, testified, in a positive way, that they had examined very carefully records and indexes on the morning of the 17th, and that nothing was then on record; that they

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had made the examination carefully, because, in a previous transaction, Bovey had been found "tricky and unreliable," and was "pretty well known for turning sharp corners." Sayre, the notary, before whom the deed purported to be acknowledged, testified that he had not taken any acknowledgment of a deed from Bovey.

No deed from Simpson to Bovey, it seemed pretty clear, had ever been executed at all.

The District Court decreed for the complainant, directing a sale. The Supreme Court of the Territory reversed the decree; and on appeal from such reversal the case was now here.

Mr. Carlisle, for the mortgagee, appellant:

It is impossible to read the case without being satisfied that the pretended conveyance from Bovey to Simpson, on the eve of the execution of the mortgage, where the terms doubtless had been already agreed upon, was a mere trick of Bovey, of which Simpson was then wholly ignorant (he not having arrived in Nebraska till several days afterwards), but of which he subsequently took advantage.

Independently of actual fraud, however, merely executing a deed, and delivering it to the register for registry, is no delivery, unless the grantee so direct it or subsequently agrees to it.*

But even if the deed were recorded, it was not acknowledged, and so passed no title. The deed itself is not produced by Simpson, but a copy only. Simpson says he has lost the original. But Sayre, the notary public, proves that he never took such an acknowledgment.

For some unexplained reason, Bovey placed on record, on the same day of the execution of the mortgage, a reconveyance from Simpson. Doubtless he knew that he was the real owner all the time, and perhaps he thought, by this ingenious contrivance, to cut out the mortgage, executed in the interim between the two days, and while the title was

* *Younge v. Guilbeau*, 3 Wallace, 636.

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apparently in Simpson. This reconveyance is proved to be a forgery.

Upon the whole case, Bovey and Simpson appear to be confederates in the attempt to defraud the mortgagee, and to have the land between them, free of its obligation.

Messrs. Redick and Briggs, contra:

The deed from Bovey to Simpson was in law properly delivered on the 15th of April, 1858.

There are two kinds of delivery.

1. An *express* delivery, as where the deed is placed directly in the grantee's hands, or in the hands of his agent.

2. *Implied* or *constructive* delivery, as where a deed is placed in the hands of the recorder for the use and benefit of the grantee, or when it is transmitted by mail to the grantee, or otherwise. The same is in law a good delivery. The delivery of the deed in question comes within the latter class.*

3. In the case at the bar the arrangement for the sale of the land was made in December, 1857, by letter from Bovey to Simpson. It appears that Bovey was indebted to Simpson, who then resided in California, and that to pay that debt Bovey wrote to Simpson that he would convey the land to him. In view, perhaps, of this fact Simpson left California and arrived in Nebraska on the 18th of April, 1858, and on the next day went with Bovey to the land to see it. Now what was the *intention* of Bovey in this matter? Was it not to make a complete conveyance of the land to Simpson? And this intention is what the authorities point to as decisive of the delivery. If this is wanting, then there is no delivery, even though the deed may be put into the hands of the grantee; and if the grantee intends to pass the title, it is wholly immaterial whether the grantee ever obtains the cor-

* Verplank et al. v. Sterry et al., 12 Johnson, 536, 545; Dawson v. Dawson, 1 Rice's Eq. 243; Ingraham v. Porter, 4 McCord, 198; Tate v. Tate, 1 Devereux and Battle, 26; Merrills v. Swift, 18 Conn. 257; Lady Superior v. McNamara, 3 Barbour's Ch. 375; Rathbun v. Rathbun, 6 Barbour, 93; Lessee of Mitchell v. Ryan, 3 Ohio, New Series, 377.

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poreal possession of the instrument or not. It would be wholly unsafe for persons living at a distance from each other to do business affecting the title to real estate, if the rule set up by the appellee were to obtain.

The deed was properly recorded on the 15th day of April, 1858, two days before the mortgage was executed. The index, which was exhibited to the court below, shows the entry fairly made, and in its order.

But the appellants seek to impeach and set aside a public record, by the oral testimony of witnesses years after the transaction. All this testimony is incompetent. If public records can be set aside in this cheap way, what safety can there be in dealing in real estate? What avail are recorded titles if this kind of testimony be permitted to overturn them! If the register has failed to do his duty, he is liable on his bond to the party injured.

Mr. Justice DAVIS delivered the opinion of the court.

There is no difficulty in this case. It is claimed by Simpson, that he holds, free from the obligation of the mortgage, the lands, which Bovey conveyed to him, two days before its execution. The mortgagors, Megeath and Bovey, owned in severalty the lands mortgaged, and Parmelee seeks to sell, whatever is embraced in the mortgage, in order to make his debt. He denies that Simpson's deed can take precedence of the mortgage, because, if given for a valuable consideration, executed and recorded in conformity with the laws of Nebraska, it was never delivered until long after his security was taken. If this position is sustained by the evidence, there is an end of the controversy, for nothing passes by a deed until it is delivered.

It is a circumstance of great suspicion that the original deed was not produced on the trial, as the date of its registry was disputed, and Sayre, the notary public, denied having taken the acknowledgment. It is very clear that Bovey was capable of any fraud, as it is proved that the pretended conveyance from Simpson to him, which was placed on record

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the same day the mortgage was executed and recorded, was a forgery.

But, conceding that there is not proof enough to discredit the record, and that Sayre is mistaken, still, the deed cannot defeat the mortgage, because the delivery—one essential part to its due execution—did not occur until after the mortgage was admitted to registry. Simpson was on his way from California, when Bovey, without his knowledge or authority, delivered it to the register of deeds for record, and he did not arrive in Nebraska until three or four days afterwards, when he first learned what had been done. The only information which Simpson had concerning the matter was contained in a letter from Bovey, informing him of his intention to convey to him some pre-empted lands in Nebraska on his arrival there, in the spring of 1858. To this letter there was no reply, and there is nothing to show that Simpson knew the quantity or value of the lands, or ever agreed to receive a conveyance for them in satisfaction of Bovey's indebtedness to him. And there is not a particle of evidence that any one was authorized to receive the deed for him. The placing the deed on record was Bovey's own act, and done without the assent of Simpson. Under this state of facts there was manifestly no delivery. The execution and registration of a deed, and delivery of it to the register for that purpose, does not vest the title in the grantee.*

If Simpson had agreed to accept the deed in liquidation of his debt, and constituted the register his agent to receive it, then the delivery of the deed to the register would have been in legal contemplation a delivery to him. But it is said that he could ratify the acts of Bovey and the register. This is true, but he did not do this until after the execution and registration of the mortgage; and this ratification cannot relate back so as to cut out the mortgage. Simpson acquired no title until after the rights of the mortgagee had accrued, and he holds it encumbered with the lien of the mortgage.

* *Maynard v. Maynard*, 10 Massachusetts, 456; *Samson v. Thornton*, 3 Metcalf, 281; *Younge v. Guilbeau*, 3 Wallace, 641.

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The decree of the Supreme Court of the Territory is REVERSED, and this case is remanded to that court with directions to enter an order

AFFIRMING THE DECREE OF THE DISTRICT COURT.

WOODWORTH v. INSURANCE COMPANY.

Where, in case of a collision, one of two parties injured institutes proceedings against the vessel in fault, and at his own expense prosecutes his suit to condemnation of the vessel, or of the proceeds of her sale in the registry, another party injured by the same collision, who has contributed nothing to the litigation to establish the vessel's liability, but has stood by during that contest, and taken no part in it, cannot share in the proceeds of the sale of the vessel, until the claim of the first party is satisfied in full.

THIS was a question involving the proper disposition of the surplus proceeds of the sale of the schooner Harriet Ross in the Admiralty Court of the Northern District of Illinois.

The schooner had been libelled in that court for supplies furnished, to the value of \$72, and sold for about \$5000.

While the surplus proceeds of this sale were still in the registry, the Corn Exchange Insurance Company filed a libel against them. The libellant alleged that shortly before the schooner was seized at Chicago by the process of the District Court, a collision had occurred on Lake Ontario, between her and the schooner Flora Watson; that the Flora and her cargo were sunk by the collision; that this was caused solely by the want of care and skill on the part of the crew of the Harriet Ross; and that the libellant had taken risks on the Flora and her cargo, which it had been compelled to pay, to an amount exceeding \$8000.

Bradley, owner of the Harriet Ross at the time of the collision, appeared as claimant of the proceeds of her sale, and defended this suit. An answer was filed by him and testimony taken, and the matter litigated on a considerable body