9FED.CAS.—6

Case No. 4,798.

FIRST NAT. BANK v. CALDWELL et al.

{4 Dill. 314.}[1]

Circuit Court, D. Nebraska. 1876.

EQUITABLE MORTGAGE—DEPOSIT OF TITLE DEEDS—JUDGMENT LIEN.

The plaintiff corporation, holding as security from its debtor certain railroad coupons, which were convertible into lands at the option of the holder, and which were so converted, and the deed taken in the name of the debtor, and not recorded, but deposited, in pursuance of an agreement to that effect by the debtor with the plaintiff, as a substituted security in place of the coupons, was *held* to be an equitable mortgagee, and to have an equity in the lands obtained for the coupons and embraced in the deed, superior to the lien of a general judgment creditor of the common debtor.

The bill in this case is filed to establish an equitable lien upon certain lands described therein. The material facts are these: The defendant {Jonas} Gise, January 1st, 1874, made a loan of money from the plaintiff, and, after various payments and renewals, the amount became $2,500 on July 10th, 1875, evidenced by two notes, payable in sixty and ninety days thereafter. Upon these notes a judgment was recovered by confession in this court, on November 15th, 1875. An execution was thereupon issued on the 20th, and returned on the 23d of November, 1875, no property found. It appears that Gise, being the owner of certain railroad bonds with coupons attached, deposited the coupons with the plaintiff, as security for payment of this demand. These coupons being convertible into lands at the option of the holder, by an arrangement between the parties interested, these coupons were withdrawn by Gise, and located by him upon the lands mentioned in the bill, with the agreement between the plaintiff and defendant Gise, that the deed from the railroad company, as soon as obtained, should be deposited, and the lands described therein become security for the payment of the debt in lieu of the coupons. Gise obtained a deed from the company, which was deposited with plaintiff in pursuance of the agreement of the parties, and this deed is now held by the plaintiff. This instrument was never recorded. Upon this state of facts the plaintiff claims a lien, in the nature of an equitable mortgage. The defendants, Caldwell, Hamilton & Co., obtained a general judgment, in the district court of Douglas county, against the defendant Gise, October 29th, 1875, for $2,142.40 and interest, and on the 3d day of November, 1875—twelve days before the plaintiff obtained its judgment—filed a transcript thereof in the clerk's office of Nuckolls county, where these lands are situated, and thereby the judgment became, it is claimed, a lien upon the property of the debtor in that county. It appears that the consideration of the note upon which this judgment was obtained, was money loaned in July, 1873, to Gise, by the defendants. This judgment remains unpaid. It is sought by the bill to postpone the lien of this judgment to the equitable lien claimed by plaintiff. The bill alleges notice of

this equity of plaintiff, on the part of Caldwell, Hamilton & Co. The answer fully denies notice on the part of the defendants. The plaintiff failed to make any proof to support the allegations of the bill in that regard.

J. M. Woolworth, for plaintiff.

G. W. Ambrose and Clinton Briggs, for Caldwell, Hamilton & Co.

DILLON, Circuit Judge. Counsel have largely argued this cause as if it involved the question whether the English doctrine of equitable mortgages, arising from the mere deposit of title deeds, prevails in the state of Nebraska. It may be admitted, for the purposes of this case, that the deposit of recorded title deeds, without more, will not create an equitable lien against the debtor, or a general judgment creditor of his and yet the equity of the present cause is with the plaintiff.

The plaintiff corporation held coupons, convertible into lands, as a specific security for its debt Without the debtor's consent, it could have converted these coupons into lands, and taken the deed in its own name. Both the plaintiff and Gise, however, thought it advantageous to exercise the option of exchanging the coupons for lands. Gise made the selection of the lands, and the deed was taken in his name, but not recorded, and was delivered at once to the plaintiffs, and is now held by them in virtue of an agreement with Gise, made at the time, that the deed should be a substituted security in lieu of the coupons. Gise does not controvert the plaintiff's rights. The defendants, Caldwell, Hamilton & Co., do not dispute the above facts, but contend that their rights, as a general judgment creditor of Gise, without levy or sale, are superior to the plaintiff's. There is no statute of Nebraska which, in terms, gives such effect to a general judgment lien, nor any decision of the supreme court of the state that a judgment lien overrides existing specific equities in lands, in favor of others. The plaintiff's rights, as the equitable mortgagee of the lands, or having an equitable lien upon them, are superior to the rights of a general judgment creditor, who has not become a purchaser under the judgment, in good faith, and without notice of the rights of the equitable mortgagee. Brown v. Pierce, 7 Wall. [74 U. S.] 205, 217. Decree for the plaintiff.

NOTE. The question, in the foregoing cause, as to the respective rights of the equitable mortgagee and the judgment creditor, was very fully argued, and fie following, on that point, is condensed from Mr. Woolworth's brief:

The rule in England is stated by Sir Edward

Sugden, when lord chancellor of Ireland, in Abbott v. Stratten, 9 Sugd. Dec, 3 Jones & L. 603, 614. He says: "Does such a mortgage take precedence, or not, of the subsequent judgments, however bona fide they may be, and supposing them to have been obtained for valuable consideration, and without notice of the equitable mortgage? I can only say that, ever since I have been in the profession, I have considered that a settled point; and down to the time a question was raised upon it, in Whitworth v. Gaugain, reported in Craig & P. 330, I never entertained a doubt upon the subject; and I have repeatedly acted in this court upon the rule that an agreement binding property for valuable consideration, though equitable only, will take precedence over a subsequent judgment, whatever may be the consideration for it, and whether obtained in invitum or by confession. This is not denied to be so in the case of a purchase, and an equitable mortgage is, pro tanto, a purchase in the strict sense of the term. The agreement (for that is really the question) is, in this court, the mortgage—it is the pledge. The mere legal operation of the instrument goes for nothing; the agreement itself is, in the view of a court of equity, equivalent to the execution of a mortgage. It would be pedantry to go through the eases on this subject, after the full review of them in the case to which I have referred, when it was before Vice Chancellor Wigram. I must, therefore, overrule the master's report, and declare that this Is a valid, equitable mortgage, binding on the property as against subsequent judgment creditors."

The case referred to by the lord chancellor, In Whitworth v. Gaugain, 3 Hare, 416, states not only the rule, but the reason of the rule, with that satisfactory fullness and precision for which Vice Chancellor Wigram was very distinguished; and as in his judgment he considers all the arguments which might be in any way alleged, I shall set them out here:

"The more I consider the case, the more satisfied I feel that I stated the general principle correctly, in Langton v. Horton [5 Beav. 9], when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, nothing more. He stands in the place of his debtor. He only takes the property of his debtor subject to every liability under which the debtor himself held it. First, take the case of an ordinary trust. It could not for a moment be contended that this court would not protect the interest of the cestui que trust against the judgment creditor of the trustee. The judgement of Lord Cottenham, in Newlands v. Paynter [4 Mylne & C. 408], is decisive upon that point, and the other cases cited at the bar prove the same thing. Secondly, take the case of a purchaser for value before conveyance. Lodge v. Lyseley [4 Sim. 70] is an authority, if authority could be wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment creditor of the vendor. Again, take the case of an equitable charge to pay debts, or legacies, or any other equitable interest, except that of an equitable mortgagee, and I apprehend the right of the equitable incumbrance to be preferred to the

judgment creditor of the debtor in whom the legal estate in the property charged might be, will be, as indeed it properly was, admitted. And if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case of Williams v. Craddock [unreported] the counsel, as well as the court, were of the opinion that an interest by way of an equitable mortgage was entitled) in this court, to the same protection against judgments as other equitable claimants.

"In the argument of this case both parties referred to, and drew conclusions from, the proposition that, in a court of equity, a purchaser for value, who obtains a conveyance of the legal interest without notice of an equity affecting the specific subject of his purchase, in equity as at law, has a better title to that subject than the mere equitable claimant. The proposition thus admitted, and necessarily admitted by both parties, is pregnant with consequences which go a great way towards deciding the question now before me. If the tenant by elegit is (as was argued) to be considered as a purchaser for value without notice under a conveyance, all trusts and all equitable interests of every description, must be subject to the judgments against the trustee; for a purchaser for value, without notice from a fraudulent trustee, having got the legal estate, will unquestionably be preferred in equity to the cestui que trust; and it appears to me to be impossible, except by a merely arbitrary decision, to distinguish the case of an ordinary trust, or other equitable interest, from the present, in considering merely the effect of a judgment upon it, unless it can be shown that the interest of the equitable mortgagee is, for the present purpose, distinguishable from that of an ordinary cestui que trust. Again, it follows, conversely, that if the equitable interest of an ordinary cestui que trust, or any other equitable interest, is not subject to judgments against the trustee, though executed, then those judgments are not analogous to purchasers for value. In other words, the judgment creditor of a trustee is not a purchaser for value, in the contemplation of a court of equity. The proposition that a judgment creditor is a purchaser for value would prove too much for the defendants' purpose. It would affect all equitable interests alike.

"But it was said that the interest of an equitable mortgagee was distinguishable from that of an ordinary cestui que trust, and other equitable interests (charges, for example, to pay debts and legacies paramount to the title of the debtor), which it was admitted would be preferred in equity—that the interest of the equitable mortgagee was imperfect, that of the cestui que trust perfect. In what respect is the equitable mortgagee imperfect? As between the mortgagor and mortgagee it is absolute and complete. In what respect is it imperfect as between the mortgagee and those who claim under the mortgage, as his creditors by judgment? The interest of the equitable mortgagee is liable to be defeated by a fraudulent dealing with the legal estate, and in that respect, no doubt, it is imperfect. But that is an infirmity to which all equitable interests are subject: and if other equitable

interests are to be protected against judgments obtained against the trustee or other party in whom the legal estate may be, why is the interest of the equitable mortgagee to be unprotected? The debt was no more contracted upon the view of the land (if that were material, which I think is not) in the one case than in the other.

"The most plausible way of stating the case in favor of the judgment creditor is by supposing his right to be founded in contract, and not the result of a proceeding in invitum; and this, no doubt, may be true of the case, when the judgment is voluntarily confessed: and I paid the greatest attention to the arguments of counsel on that point. But, admitting that view to be correct, how does it alter the ease? The question remains: what was the contract? It was a general contract for a judgment, and the fruits of a judgment; and the original question, therefore—what right does a judgment confer?—remains wholly untouched by the concession.

"If a party contracts specifically for a given property, pays the purchase money, and obtains the legal title, without notice up to the time of obtaining the conveyance, as well as of paying his money, that may give him a right to be preferred to an equitable claim which is prior in point of time. But there is no principle upon

which a court of justice can be required to imply that a general contract to give a judgment is a contract to give that which does not belong to the debtor. If the trustee were to confess a judgment, am I to imply that it amounts to a specific contract to give the creditor an interest in that which belongs to the cestui que trust? That appears to me to be the true distinction. In one case a party contracts for a specific thing; in the other he merely takes a judgment; that gives him nothing more than a right to that which belongs to his debtor. The above propositions, which, separately taken, I believe to be unimpeachable, will be found to meet every argument that was addressed to me in support of the defendant's case independently of the late statutes. I am clear that the late statutes make no difference in the case. So far as the judgment creditor claims to be a mortgagee, in writing, under the statute, he is posterior, in point of time, to the plaintiffs. But it was said that the equity of the judgment creditor was equal to that of the equitable mortgagee, and that he has, by the force of the elegit executed, an estate at law in addition to his equitable interest, and therefore it is to be preferred. I need not, after what I have already said, proceed to expose the fallacy of this argument; it takes for granted the whole question in dispute. That the tenant, by eiegit, has an estate in that which he may lawfully take (that which belongs to his debtor), I do not deny; but to say that, by force of the elegit, he acquires a rightful interest, in this court, in that which in equity does not belong to his debtor, is taking the whole matter in contest for granted; the whole question being what he may take.

"I can only repeat that it appears to me impossible, except on the most arbitrary distinction, to say that the interests of an equitable mortgagee are not to be protected, and yet that that protection is to be afforded to the interests of an ordinary cestui que trust, and other equitable interests. I do not go into the reasoning of the cases which have been cited; all of them, however, appear to me to support the view I have taken. If my judgment cannot be supported upon propositions which are indisputable in themselves, whether properly applicable to the case or not, no explanation I can give of the 'cases will at all strengthen the foundation of that judgment. I must hold that the plaintiffs have a right to the payment of their debt out of the estate comprised in the deed."

This case was affirmed by Lord Chancellor Cottenham. 1 Phil. Ch. 728. In Beavanv. Earl of Oxford, 6 De Gex, M. & G. 492, it is held that the judgment creditors were not purchasers within the meaning of St. 27 Eliz. c. 4, and the same rule has been held in many other English cases.

There are many American cases on this subject, but the supreme court of the United States has spoken decisively upon it in Pierce v. Brown, 7 Wall. {74 U. S.} 203. The court says, at page 217: Express decision of this court is, that the lien of a judgment constitutes no property in the land; that it is merely a general lien securing a preference over subsequently acquired interests in the property; but the settled rule in chancery is that a general lien is controlled in such courts so as to protect the rights of those who were

previously entitled "to an equitable interest in the lands, or in the proceeds thereof. Specific liens stand upon a different footing, but it is well settled that a judgment creates only a general lien, and that the judgment creditor acquires thereby no higher or better right to the property or assets of the debtor than the debtor himself had when the judgment was rendered, unless he can show some fraud or collusion to impair his rights. Correct statement of the rule is that the lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person," etc.

As to the deposit of title deeds as security for a debt, the English rule was first enunciated in Russel v. Bussel, 1 Brown, Ch. 209, by Lord Loughborough. The other early English cases are Plumb y. Fluitt, 2 Anstr. 438: Ex parte Coming, 9 Ves. 117: Ex parte Haigh, 11 Ves. 403; Norris v. Wilkinson, 12 Ves. 190; Ex parte Mountfort, 14 Ves. 606; Ex parte Coombe, 17 Ves. 370. In Ex parte Hooper, 1 Mer. 9, Lord Eldon regretted the latitude to which it had extended to cover future advances in Ex parte Langston, 17 Ves. 230. Although from the first the judges animadverted upon the doctrine, it has been enforced in England. Some of the most recent cases in which the doctrine has been applied without observation on its propriety are De Rochefort v. Dawes, L. R. 12 Eq. 540; Shaw v. Poster, L. R. 5 H. L. 321. At page 340 Lord Cairns says: "It is a well established rule of equity that a deposit of a document of a title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to." L. R. 7 H. L. 135.

The same reluctance to admit the doctrine into the jurisprudence of this country was shown by the American courts, but it has received recognition by many of the judges who have dealt with it: In New York, in Rockwell v. Hobby. 2 Sandf. Ch. 9; Chase v. Peck, 21 N. Y. 584: Jackson v. Dunlap, 1 Johns. Cas. 114 (Chief Justice Kent); Jackson v. Parkhurst. 4 Wend. 369. In South Carolina, in Welsh v. Usher, 2 Hill Eq. 166. In Georgia, in Mounce v. Byars. 16 Ga. 469. In New Jersey, in Robinson v. Urauhart, 1 Beasley {12 N. J. Eq.} 523, and Griffin v. Griffin, 18 N. J. Eq. 104. In Wisconsin, in Jarvis v. Dutcher, 16 Wis. 327. In Maine, in Hall v. McDuff, 24 Me. 311. In California, in Hill v. Eldred, 49 Cal. 398. In Mississippi, in Williams v. Stratton. 10 Smedes & M. 418. In Rhode Island, in Hackett v. Reynolds, 4 R. I. 512. In the United States court for Wisconsin, in Wright v. Shumway {Case No. 18,093},—and see Meador v. Everett {Id. 9,376},—the doctrine has been applied. In Pennsylvania, in a series of cases, it has been denied. In Ohio, it has been denied upon the peculiar terms of the recording act as construed by the court in Bloom v. Noggle, 4 Ohio St. 45. In Kentucky, it has been disapproved, but not rejected. Washburn, in his treatise on Real Property (volume 2, 4th Ed.

82), speaks as if in his view the doctrine had recently become established in this country (Id. p. 84. pl. 4).

The following authorities were referred to by Mr. Ambrose and Mr. Briggs as to deposit of title deeds: Brown, St. Frauds. 60; Story, Eq. Jur. § 1020; Coote, Mortg. 222; 2 Washb. Real. Prop. 85. As affected by the recording acts in Ireland: Agra Bank v. Barry (house of lords) 9 English, 106; Lee v. Clutton, 3 Cent. Law J. 177, before Sir George Jessel, M. R.

[1] {Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.}