GAYTES v. LEWIS.

Case No. 5,288.

{2 Biss. 136;[1] 2 Chi. Leg. News, 385.}

Circuit Court, N. D. Illinois. April, 1869.

CORPORATIONS—POWER TO MORTGAGE PROPERTY.

1. A corporation organized under the Illinois statute of February 18, 1857 {Gross' St. 1871, p. 130}, has the power to mortgage its property.

2. This statute is independent of the act of February 10, 1849 {Gross' St. 1871, p. 126}.

This was a bill in equity by Carol Gaytes, assignee of the Union Glass Company, bankrupt, to enjoin—Lewis from foreclosing a mortgage given to the defendant by the company prior to its bankruptcy.

Asay & Lawrence, for plaintiff.

Hitchcock & Dupee, for defendant.

DRUMMOND, District Judge. The only question in this case is as to the power of the Union Glass Company to make a mortgage of some property belonging to the company. It is contended on the part of the plaintiff that a mortgage made by the company was invalid, as being ultra vires, and not within the authority of the company to make. The question arises under the act of 1849 and the act of 1857 (Gross' St. 1871, pp. 126, 130, tit. "Corporations," etc.). It is claimed on the part of the plaintiff, that the act of 1849 operates upon the company and disables it from making a mortgage.

The second section of the act of 1849 provided that when a company had been created, as provided in the first section, and a certificate had been filed, properly signed and acknowledged, the persons who thus become a body corporate and their successors, should be a corporation by the name stated in such certificate; that they should have succession, sue and be sued; have a common seal, "and they shall by their corporate name be capable in law of purchasing, holding and conveying any real or personal estate whatever, which may be necessary to enable the said company to carry on their operations named in such certificate, but shall not mortgage the same or give any lien thereon."

Undoubtedly if this law was binding on the company, it would not have the power of making a mortgage such as was made in this case; but the act of 1857 contains no such restriction. In many respects it seems to be a duplicate of the act of 1849, but in some particulars, the act of 1857 is different; for example, the act of 1849 requires the certificate to be filed in the office of the clerk, of the county in which the business was to be transacted. The act of 1857 requires the certificate to be filed in the office of the clerk of circuit court, etc., and there are some minor differences in the two acts; and the second section of the act of 1857 declared that the capital stock of the company should not be less than $10,000, nor more than $500,000; the time of its existence was not to

exceed fifty years, and also provided that the capital stock should be fully paid within four years, otherwise it was to work a dissolution of the company, and then the third section declared, "when the certificate, shall have been filed, as aforesaid with the clerk of said court, and a duplicate thereof filed in the office of the secretary of state, the said clerk shall issue a license to the person who shall have signed and acknowledged the same, on the reception of which they and their successors shall be a body politic and corporate, in fact and in name by the

name stated in such certificate, and by that name shall have succession, and be capable of suing and being sued in any court of law or equity in this state, and may have a common seal, and alter the same at pleasure and be capable, in law, of purchasing and holding, conveying and disposing of any such real or personal estate," &c.

Now, it is admitted by the case that the company was organized under this law of 1857. The question is whether the provision contained in the second section of the act of 1849 operated upon it and continued as a binding condition upon a company organization under the act of 1857. Independent of that, there is no doubt that the language contained in the third section of the act of 1857 would be sufficient to enable the company to make a mortgage. The language is of such a character as in similar cases has been held to imply the power to encumber and mortgage property. "Shall be capable in law of purchasing and holding, conveying and disposing of any such real and personal estate, choses in action, and securities, negotiable or otherwise, as may be expedient and necessary to enable the said company to carry on their operations and business, named in such certificate."

Without some limitation upon that language, the necessary construction of it would be that the company would have the power to mortgage and encumber their real property.

I am inclined to think that this law of 1857 must be construed as independent of the law of 1849; that the condition annexed to the law of 1849 did not necessarily follow and operate upon the law of 1857. Therefore, I think the mortgage a valid lien. Bill dismissed.

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