

DEERING v. LADD, Assignee, and another.¹

(Circuit Court, D. Minnesota. December Term, 1884.)

1. CHATTEL MORTGAGE — FRAUDULENT PREFERENCE — MINNESOTA INSOLVENT LAW.

On examination of the evidence, *held*, that it does not show that the mortgagee had reasonable cause to suppose that the mortgagor was insolvent at the time the chattel mortgage sought to be foreclosed was given.

2. SAME — ELEVATOR BUILT ON RAILROAD LAND UNDER LICENSE — PERSONALTY.

An elevator built on land owned by a railroad company, under a license allowing the owner to operate it for the mutual benefit of himself and the company, and with a right to remove it, though the removal might injure the structure, is personal property, and a mortgage thereon a chattel mortgage.

In Equity.

D. S. Griffin and *L. C. Spooner*, for plaintiff.

C. H. Benton, for defendant.

NELSON, J., (*orally*.) This is a suit brought by the plaintiff to foreclose a chattel mortgage. Just previous to the foreclosure the mortgagor made an assignment under the insolvency law of this state. The assignee intervenes in this case, and has filed his answer opposing the suit of the plaintiff, who is the mortgagee. The question raised is that the mortgage was a preference contrary to the insolvency statute of the state of Minnesota, and that at the time it was given the mortgagor was insolvent, and the mortgagee had reasonable cause to believe that he was insolvent. Another question is presented by the pleadings: the claim is made by the intervenor that the property is real, and not personal. The property embraced in the mortgage is an elevator built on the land by permission of the Hastings & Dakota Railroad Company. That permission is a license; there is no written contract, and all the testimony with regard to it is oral. But it is very clear, from the evidence of the agent and of the superintendent of the railroad company and of the mortgagor, that the latter had a license to go upon the property of the company and build the elevator. He did so, and operated it in connection with the railroad company as a benefit both to himself and to it.

I have examined the evidence in the case, and think there is nothing to show that the mortgagee had reasonable cause to suppose that the mortgagor was insolvent at the time the mortgage was given. The mortgagee resided in Chicago, and the mortgagor in this state, and it is true that he sent an agent to look after his claim, which was a promissory note, and in the conversation with the mortgagor there is, perhaps, something that might lead the agent to suspect that the mortgagor was not in a solvent condition, or might not be solvent within the strict view of the insolvent law, and that he was not able to pay his paper on its maturity. At that time the mortgagor said

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

that, while he could not pay it all at once, he could pay a portion of it, and in a few days would pay the balance. There was nothing to show that he was even pressed by the mortgagor, and in their conversation it was manifest that both parties—both the agent and the mortgagor himself—supposed he was worth thirty or forty thousand dollars. I do not think the evidence is sufficient, even within the decisions of the supreme court of the United States under the bankrupt law, to show the mortgagee had reasonable cause to believe that the mortgagor was insolvent at the time this mortgage was taken. As to the question raised by the intervenor that this was a mortgage on realty, and not on personal property, there can be no doubt; for, under the license, the owner of the elevator had a right to remove the structure; and, though it was so fixed that it might be injurious to the building to remove it, yet the mortgagee had a right to take the property away, and the owner of the land had no authority over or claim to it as a part of, and appurtenant to, the land itself. It was a chattel mortgage. A decree of foreclosure will be entered, and the case will be referred to a master, to take an account and report. Decree entered accordingly.

MAISH v. BIRD and others.

(Circuit Court, S. D. Iowa, C. D. November 18, 1884.)

1. FRAUDULENT CONVEYANCE — CHATEL MORTGAGE — MORTGAGOR RETAINING POSSESSION, WITH POWER OF SALE.

A chattel mortgage, executed to a creditor on a stock of goods, providing that the mortgagor may retain possession of the goods, and dispose of them in the ordinary course of trade, from time to time adding to the stock, under the Iowa statute is not void as to other creditors where it does not appear that the proceeds of sale were to be used for any other purpose than the payment of the mortgage debt.

2. SAME—BURDEN OF PROOF—EVIDENCE OF FRAUD.

The burden is upon the party claiming such a chattel mortgage is a fraud on the creditors of the mortgagee, to establish its invalidity. This may be done, either by showing that the provisions of the mortgage are such as to prove that the parties thereto intended to commit a fraud upon the rights of others, or by showing that the acts of the parties have been such that fraud is the necessary inference. Evidence held not to show a fraudulent intent, and mortgage sustained.

In Equity.

Wright, Cummins & Wright, for complainant.

Finkbine & McClellan, for defendants.

SHIRAS, J. The question for determination, submitted to the court, turns upon the validity of two chattel mortgages now owned by complainant, executed in January, 1882, by W. K. Bird upon his stock of merchandise, as against the claims of certain attaching creditors. The stipulation of facts upon which the cause was submitted shows

that Bird had been engaged in business in Des Moines, Iowa, and had become indebted to the Iowa National Bank in the sum of \$14,000, and that, upon the officers of the bank demanding security for this indebtedness, Bird agreed to execute a chattel mortgage upon his stock, provided the bank would loan him a further sum of \$4,000. This additional sum was advanced by the bank, and a chattel mortgage to secure the entire amount due was executed under date of January 6, 1882. Upon receipt of the mortgage the bank proposed to record the same at once. But upon the representation that Bird would be able to procure from H. B. Claffin & Co., of New York, a loan of \$15,000 to \$20,000, wherewith to pay off the mortgage, the bank consented to withhold the mortgage from record until Bird could proceed to New York and endeavor to negotiate the loan from Claffin & Co., it being understood that Bird was to notify the bank of the result by telegraph. Bird at once went to New York and telegraphed that the negotiation was proceeding favorably. He failed, however, to secure the loan, and Claffin & Co. at once sent to Des Moines and caused the stock covered by the mortgage to be attached. Thereupon the mortgage was at once recorded, and the property replevied from the seizure under the writ of attachment. The mortgage in question having been assigned to George H. Maish, he filed a bill to foreclose the mortgage, to which proceeding the present defendants became parties, they being attaching creditors who had caused the levy of attachments on the goods after the same had been replevied by complainant.

The defendants now contest the validity of the chattel mortgage, on the ground that the same comes within the rule laid down in *Robinson v. Elliott*, 22 Wall. 513, and *Crooks v. Stuart*, 2 McCrary, 13, S. C. 7 FED. REP. 800. The facts in the case show that the debts due defendants were created before the execution of the mortgage to the bank, and there is nothing in the record which tends to show that these defendants were in any way misled to their injury through the failure to promptly record the mortgage. The element of estoppel is therefore not in the case. There are not found in the mortgage any express provisions authorizing the mortgagee to sell the property for his own benefit, nor do the facts show that such was the real intent and design of the parties. The reason why the mortgage was not promptly recorded is fully explained, and as against creditors who were not misled thereby, the fact that it was not recorded until the nineteenth of January, 1882, would not invalidate it. The radical difference in the facts of this case and those upon which the ruling in *Robinson v. Elliott* was based is clearly apparent. In the latter case the mortgagors had remained in possession for 25 months, the debt secured being overdue 21 months, and had sold the goods without accounting, or being bound to account, for the proceeds, and the terms of mortgage expressly provided for continued renewals of the notes evidencing the debt. The acts of the parties clearly dem-

onstrated the intent with which the mortgage was executed; and, construing the terms of the mortgage in the light of the acts of the parties thereto, the court held the mortgage fraudulent and void.

In the case now before the court there is nothing in the evidence which shows that the parties contemplated the idea of allowing the mortgagors to sell the goods and apply the proceeds to their own use. If Bird had succeeded in his negotiations with Claflin & Co., the mortgage would have been at once canceled. If, after learning of the failure to make the negotiation for the loan, the bank had permitted Bird to continue in business, sell the goods, and use the same for his own purposes, instead of applying the proceeds to the payment of the mortgage debt, then the facts would bring the case within the rule in *Robinson v. Elliott*. As soon, however, as the bank learned of the failure to make the loan, possession of the goods was taken under the mortgage. Under these circumstances the court is not permitted to indulge in speculations touching what might have been done if the facts had been different. The burden is upon the defendants of establishing the invalidity of the chattel mortgage. This may be done, either by showing that the provisions of the mortgage are such as to prove that the parties thereto intended to commit a fraud upon the rights of others, or by showing that the acts of the parties have been such that fraud is the necessary inference. Although some of the provisions of the mortgage may be open to criticism, still, taken as a whole, it does not appear therefrom that the parties intended thereby to commit a fraud upon the rights of others, and there is nothing in the evidence which shows that such was the purpose of the parties. Consequently, it must be held that the mortgage is valid in the hands of complainant. The same conclusion must follow in regard to the second mortgage executed to complainant. The decree, therefore, must be for complainant; and it is so ordered.

ON REHEARING.

(December 2, 1884.)

SHIRAS, J. A petition for rehearing, and argument in support thereof, has been filed in above cause by Finkbine & McClellan, attorneys for certain attaching creditors. It is claimed that the court had not properly considered the terms of the mortgages under which complainant's rights arise, and that these mortgages are clearly void within the rule laid down in *Robinson v. Elliott*, 22 Wall. 513. In the argument for rehearing it is claimed that in the case of *Robinson v. Elliott* is established the proposition "that a mortgage or other conveyance of a stock of goods in trade, made to seem a *bona fide* indebtedness, if coupled with an agreement reserving to this mortgagor the potential control of the goods, with the privilege of disposing of them at discretion, in the usual course of trade, is fraudulent

and void as to other creditors; a recognized, absolute legal rule resting upon this solid pedestal of the common law." The argument of counsel is based upon the assumption that the foregoing proposition is absolutely correct, and contains an exact statement of the rule laid down in *Robinson v. Elliott*. Standing just as it does it omits one very essential fact, and that is, that the disposition of the goods, in the usual course of trade, is for the benefit of the mortgagor. There can be no question, that, under the statutes of Iowa, a mortgagor of personal property may retain possession of the property, if the mortgage be recorded, at least until the maturity of the debt. He can, therefore, lawfully retain "potential control of the goods." Can he sell them at retail in the usual course of trade? The supreme court, in *Robinson v. Elliott*, 22 Wall. 524, answer:

"We are not prepared to say that a mortgage, under the Indiana statute, would not be sustained which allows a stock of goods to be retained by the mortgagor, and sold by him at retail, for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors."

It is clear, therefore, that the mere fact that the mortgagor remains in possession, and sells the goods at retail, does not *ipso facto* determine the question of the validity or invalidity of the mortgage. The query is, does he sell them for his own benefit or for benefit of the mortgagee? Now, this query may be answered from the stipulation expressly stated in the mortgage, or from the information derived from the acts of the parties. If from either or both sources it appears that the sales are made by the mortgagor with the consent of the mortgagee, for the benefit of the former, then the case is brought within the rule announced in *Robinson v. Elliott*. The court, in that case, construed the mortgage and its provisions in the light cast thereon by the acts of the parties, and, it appearing that the mortgagor had for 25 months remained in possession, selling the goods, using the proceeds for his own purposes, and not applying the same to the payment of the mortgage debt, the conclusion was reached that the mortgage was void. The mortgages executed by W. K. Bird contain provisions indicating that it was expected that the business would be continued and additions be made to the stock, but upon the face of the mortgage there is no statement made which proves that it was the intent to use the proceeds of the goods for any other purpose than for the payment of the mortgage debt. The terms used in the mortgage are open to either construction, in that it is not expressly stated what disposition was to be made of the proceeds; but that does not justify the court in assuming that the parties intended to commit a fraud. There is nothing in the evidence showing that the proceeds of sales were used by the mortgagor for his benefit, with the consent of the mortgagee, either express or implied. If the evidence in this case, as in *Robinson v. Elliott*, proved

that Bird had been allowed to carry on the business for months, buying and selling in the usual way of trade, and using the proceeds for his own purposes, but not paying therewith the mortgage debt, then the case would be similar to *Robinson v. Elliott*. It lacks, however, the essential element named, and therefore the court would not be justified in declaring the mortgages void as against creditors. The petition for rehearing is overruled.

MOBILE SAVINGS BANK v. BOARD OF SUPERVISORS OF OKTIBBEHA Co.

(District Court, N. D. Mississippi, E. D. October Term, 1884.)

1. COUNTY BONDS—NEGOTIABILITY—FAILURE OF CONSIDERATION—PLEADING.

In an action against a county on negotiable bonds issued by its board of supervisors in payment for the capital stock of a railroad company, a plea setting up that the bonds were issued upon a promise that the company would build a certain branch road through the county, and that it had only built a part of such branch road, and refused to complete it, but failing to state that plaintiff had any notice of such failure and intention not to extend the road further, is demurrable.

2. SAME—KNOWLEDGE OF HOLDER.

A plea averring that, at the time said bonds and attached coupons were received by plaintiff, the railroad company did not intend to extend said road, but not averring that plaintiff knew that said obligations were issued upon the condition that the road should be extended, or that it was not intended so to do, does not set up a valid defense.

3. SAME—FRAUD—COVIN—MISREPRESENTATION.

A plea alleging that the bonds were obtained by covin, fraud, and misrepresentation on the part of the company, must set out the facts constituting such fraud, covin, and false representations.

4. SAME—VALIDITY OF ISSUE—NUMBER OF VOTES.

A plea averring that county bonds are void because two-thirds of the qualified voters of the county did not vote at the election held to ascertain whether or not said bonds should be authorized to be issued, and that plaintiff knew when it received the bonds that two-thirds of the qualified voters did not vote in favor of their issuance, must also aver how many votes were cast in favor of, and how many against, authorizing the issue, so that the court may be enabled to decide from the face of the pleadings whether or not the defense is valid.

5. SAME—REQUISITE NUMBER OF VOTES—CONSTITUTION AND STATUTES OF MISSISSIPPI.

Where a majority of two-thirds of the votes actually cast at an election are in favor of the issuance of county bonds, this is a compliance with the constitution and laws of Mississippi, and it is not necessary that two-thirds of the registered voters of the county should vote in favor of the issuance. *Carroll Co. v. Smith*, 111 U. S. 556; S. C. 4 Sup. Ct. Rep. 539; and *Hawkins v. Carroll Co.* 60 Miss. 735, followed.

At Law.

E. L. Russell, B. B. Boone, and A. J. Russell, for plaintiff.

Butler & Carroll and Muldrow, Nash & Alexander, for defendant.

HILL, J. The questions now presented arise upon plaintiff's demurrer to defendant's third, fourth, fifth, sixth, and seventh pleas.