

posed to be at the present time in some way detrimental to the appellants' interests, which creates the right to inquire whether the patent is valid; and, as the injunction has already been dissolved by the death of the patent, we cannot consent to indulge in the inquiry last aforesaid, unless it shall become necessary to do so hereafter for the purpose of determining whether the appellants are liable for damages and profits for infringing the deceased patent. We may never be called upon to decide the latter question.

Concerning the plea which was somewhat pressed on the argument that the dismissal of the present appeal will compel the appellants to bring the case here again, at great expense, after the account has been taken and stated, it is only necessary to say that, should an appeal be taken after the decree becomes final, an order will be made, on a proper application by counsel for the appellants, whereby the case may be heard on the present record and briefs, without bringing up any of the proceedings of the trial court, except those which have been taken subsequent to the present appeal.

It results from these views that the order heretofore made dismissing the appeal will stand confirmed.

BEECHER v. STEVENS et al.

PARDEE et al. v. SAME.¹

(District Court, D. Connecticut. September Term, 1876.)

1. PARTNERSHIP—MORTGAGE OF PARTNER'S INTEREST.

In pursuance of an agreement between M. and S., partners, and T., that S. should sell out his interest to T., who should thereupon form with M. a new firm, the sale was made, the interest of S. in partnership real estate conveyed to T. by deed describing it as an undivided half of certain land, a mortgage given thereon by T. to S. to secure the purchase money, and thereafter, on the same day, a partnership formed between M. & T., the latter contributing thereto the property thus acquired. *Held*, that there being no fraud in the transaction, it being known by M. that the property contributed by T. was burdened with such mortgage, and it being recorded, it could not be treated as a mortgage of the interest of T. in the new firm, so as to be defensible to an adjustment of the accounts between M. and T., as partners, or to the debts of the firm of M. and T., though the latter were to a large extent for money used in paying the debts of the old firm.

2. SAME.

Where a mortgage given on an undivided half interest in land by T. to S., before T. formed a partnership with M., and contributed to the firm such half interest (the other half interest being contributed by M.), was released to enable the firm to give a first mortgage on all the land, with an understanding that thereafter S. should take a second mortgage from T. on the undivided half interest, the mortgage so given to S. will, so far as the rights of M. and subsequent mortgagees of land are concerned, be considered a continuation of his original mortgage, and not a mortgage by a partner of his interest in firm property.

Petitions by Ebenezer B. Beecher and Henry E. Pardee and others, assignees in bankruptcy, against Hiram Stevens and others.

¹ Published by request.

H. E. Pardee, for petitioners.
J. I. Hayes, for respondents.

SHIPMAN, District Judge. On February 1, 1873, John McLagon and Hiram Stevens were, and for a long time had been, partners in New Haven in their business of foundrymen and machinists. As partners, they owned their foundry property and other real estate and machinery, which real and personal estate had been purchased with partnership funds, and was partnership property. At this time the partnership owed, in secured debts, \$26,300; in notes unsecured, \$34,286; by book accounts, \$9,686,—making a total of \$71,282; and their assets amounted upon book to \$138,240, of which sum \$21,909 was in accounts due the firm. About \$11,000 only of this amount was subsequently paid. At this time the firm was financially embarrassed, and was in need of more cash capital or of more cash funds. It was agreed between the partners and Henry Smith that Stevens should sell out his interest to said Smith, who was thereupon to form with McLagon a new firm, under the name of McLagon & Smith. Stevens sold and conveyed to said Smith his interest in said firm of McLagon & Stevens, and, by deed, conveyed his interest in said real estate and machinery, said interest being described in the deed as one undivided half part thereof, subject to mortgages to the New Haven Savings Bank for \$20,000, and a mortgage to Eli Whitney for \$7,500. Smith mortgaged back to Stevens the same undivided half part of said real estate and machinery, to secure several notes for the purchase price, which was to be paid to Stevens, all amounting to \$17,050, which deed was duly executed and recorded. Smith agreed also to pay Stevens' share of the debts of the old firm, except a certain specified portion, and said mortgage also secured the fulfillment of said agreement. The mortgage of Smith was also to be subject to an additional mortgage of \$8,000 to be placed thereafter upon the property. McLagon & Smith thereupon, on the same day, went into partnership; and, by their partnership agreement, each partner contributed to the new firm his interest in the property and assets of McLagon & Stevens, as his contributory share of the capital stock of McLagon & Smith, and said Smith agreed to pay said Stevens' share of all the liabilities of McLagon & Stevens, except as expressly excepted, and that all the property so conveyed by said Stevens to said Smith should be held subject to the payment of said share as fully as if the same had remained in the name of said Stevens. The entire arrangement in regard to sale, dissolution, and formation of a new firm was made in good faith, without fraud, and in the hope that additional pecuniary advantages would be furnished thereby, so that a successful business might be done by the new firm. On June 10, 1874, McLagon & Smith mortgaged said partnership real estate and machinery to Beecher & Todd, to secure their indorsements for the benefit of the mortgagors to the amount of \$30,000. In September, 1874, another mortgage on said partnership property was executed by McLagon & Smith to Beecher & Todd, to secure indorsements in all amounting to \$35,000. In September, 1875, McLagon &

Smith desired to obtain an additional savings bank loan. It was agreed that Beecher & Todd should release their mortgages on the foundry property, and that Stevens should release his mortgage, which had been reduced to \$10,000, and allow a new savings bank mortgage to be placed on said property for \$35,000, and that Stevens should then take a second mortgage from said Smith on the undivided half part of the said real estate for \$10,000, and that Beecher & Todd should take a new partnership mortgage on the foundry property to secure indorsements and debts to the amount of \$47,000, all which was done, and the releases and mortgages were duly recorded. Beecher & Todd's new mortgage specified that it was subject to the Stevens mortgage for \$10,000, upon an undivided half part of said real estate. The amount now due upon Beecher & Todd's mortgage is \$41,689.74, and interest to July 14, 1876, of \$1,303.04. In addition, Mr. Beecher has paid interest on the savings bank mortgage and insurance premiums amounting to \$2,926.96, which sum, it is agreed, shall take precedence of the Stevens mortgage. McLagon & Smith are now in bankruptcy. Their secured debts, not including the Stevens mortgage, are \$80,919; their unsecured proved debts are about \$19,000,—making a total of \$99,919. All the McLagon & Stevens debts have been paid, except about \$300 or \$400. Beecher is the real owner of the Beecher & Todd mortgage, as he has paid all the indorsements which it was given to secure. Smith has drawn out of the new firm at least \$8,179 more than his partner. The new firm is largely insolvent. The debts of the old firm were paid in great part from moneys for which the new firm is still indebted.

Beecher & Todd have brought their petition, claiming that the mortgage to them should be preferred to the Stevens mortgage, upon the following grounds: (1) That their mortgage is for a firm debt, secured by a firm mortgage, for the benefit of the firm, while the Stevens mortgage is to secure an individual debt of Henry Smith to Stevens; (2) because, in equity, Smith & Stevens should be regarded as representing substantially the same interest, and that the indebtedness existing against the firm of McLagon & Stevens has been by their payments changed only in form, but has not been diminished in amount; (3) that the claim of Hiram Stevens should be deferred to the claims of general unsecured creditors of the firm of McLagon & Smith, of which the claim of Beecher is the largest, and that he has the right, if the previous propositions are not true, to abandon his mortgage, and prove as a general creditor. The assignees have also brought their petition, praying that the Stevens mortgage shall not be paid, and shall not be a lien upon the property until after the payment of the debts of the firm of McLagon & Smith to their firm creditors, and until after the adjustment of the accounts between the partners, and the payment to the fund belonging to the individual creditors of McLagon of the amount that may be due to him as between the two partners. Stevens claims that his mortgage is a valid mortgage, subject only to the savings bank mortgage. His \$10,000 debt is represented by four notes of \$2,500 each, all of which he owns, except one note, which has been

assigned to one Rosenblatt, to secure a note of \$650. All the parties have appeared, and submitted themselves to the jurisdiction of the court, and waived any question whether a summary petition or a bill in equity was the proper mode of procedure.

The real estate was partnership property, and was liable to all the incidents attending such property. It was expressly known by both Stevens and Smith to be partnership estate at the time of the sale and mortgage, in February, 1873. Partnership real estate is treated in equity as if it was personal property. A sale of the interest of one partner in the partnership property conveys only his interest in the surplus, if any, which may remain after the payment of the partnership debts, and the discharge of the liabilities of the partners, *inter esse*; for "the property or effects of a partnership belong to the firm, and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts, and after a settlement of the accounts between the partners. Consequently, no greater interest can be derived from a voluntary sale of his interest by one partner, or by a sale of it under execution. In *Taylor v. Fields*, 4 Ves. 396, it was said that a party coming into the right of a partner (in any mode, either by purchase from such partner, or as a personal representative, or under an execution, or commission of bankruptcy) comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner, and it is an item in the account that enough must be left for the partnership debts." *Bank v. Carrollton R. R.*, 11 Wall. 624. But the right or equity that the interest, when sold, must be subject to the payment of partnership debts, is one to be enforced by the remaining partners, for the partnership creditors have no specific lien upon the partnership property, and the equity that the partnership property must be used to pay partnership debts must be worked out through the partners. Consequently, partners may, during the continuance of the partnership, by a sale without fraud, and made *bona fide*, transmute specific partnership property into separate property, and such property will be held as separate estate, not subject specifically to the payment of partnership debts; and, upon a dissolution, one partner may sell his interest to the remaining partner, who will thereafter hold the property so conveyed as separate estate, provided the sale was made without fraud. *Allen v. Center Val. Co.*, 21 Conn. 130; *Howe v. Lawrence*, 9 Cush. 553; *Hoxie v. Carr*, 1 Sumn. 173, Fed. Cas. No. 6,802; *Waterman v. Hunt*, 2 R. L. 298; *Potts v. Blackwell*, 4 Jones, Eq. 58. Where one partner conveys his interest in the partnership property to a third person, though the conveyance may be for the payment of an individual debt, the sale is not void as against the partnership creditors. The assignment is only of the partner's interest in the partnership property, and not of specific property, and the amount of interest is to be ascertained upon a settlement of the partnership accounts. The interest which is sold is "individual property, which he had a right to assign if his partners did not object. They had an equity to have the property sub-

jected to the payment of the partnership debts, and to this equity the partnership creditors might be subrogated, unless the partners themselves waived it. The creditors, as such, had no lien on the property. They could only operate through the lien of the partners, and, if this was given up, they were without remedy, unless they could show fraud." Case v. Beaugard, 1 Woods, 127, Fed. Cas. No. 2,487, per Bradley, J.

The sale by Stevens to Smith of the former's interest in the partnership property of McLagon & Stevens was one to which the creditors of McLagon & Stevens could not properly object. It was made bona fide, and with the knowledge and assent of the remaining partner, was expressed to be subject to the payment of a large share of the debts of the old firm, and was in fact subject to the payment of all the debts, unless, prior to the time of the enforcement of the equity by McLagon or his assignees in bankruptcy, it had been waived. A mortgage by a partner of his interest in partnership real estate, which is known by the mortgagee to be partnership property, is not a mortgage of a specific part of the real estate, but of his interest in the portion mortgaged, after the payment of the firm debts and the settlement of the partnership accounts between the partners. This interest is not available to the mortgagee until the partnership debts have been paid, and the partnership accounts have been discharged, if the other partner chooses to assert his equity, or if subsequent partnership mortgagees who have a specific lien upon the mortgaged property assert their priority. Lovejoy v. Bowers, 11 N. H. 404; French v. Lovejoy, 12 N. H. 458; Hiscock v. Phelps, 49 N. Y. 97.

It is claimed that the mortgage of Smith to Stevens is governed by the principles which have been suggested, and is a mortgage of the interest of Smith in the new partnership, and therefore subject to the equities of McLagon and his assignees, or of subsequent partnership mortgagees, because the agreement for the sale to Smith and the formation of the new firm were one transaction, and the fact that Smith was to enter into the new firm, and place this purchased property as a part of the capital of the new firm, was well known to Stevens. If the mortgage to Stevens had been a mortgage of the interest of Smith in the real estate of the new firm, it is true, upon the authorities already cited, that the security would be subject to the debts of the new business, provided the partner McLagon or his assignees in bankruptcy should not waive, but should assert and maintain, their equity. But in the absence of any evidence that the mortgage was, or was intended to be, a mortgage of the interest of Smith in the new firm, it is proper to regard the mortgage as a security in the order of time in which it was given, especially as the facts which are proved do not show that any different order of priority was intended. Stevens sold and conveyed his interest in the partnership of McLagon & Stevens, which interest was supposed to be valuable, and for which he was to receive \$17,050. This \$17,050 was liable to be diminished if Smith paid any of the debts of the firm which he had not assumed to pay. He did in fact pay \$7,050, which payment left \$10,000 as the agreed

value of Stevens' interest in the partnership. The identical partnership interest which Smith bought, he mortgaged as security for the payment of the purchase price, and then contributed to the new firm, as his contributory share of its capital, the interest in the assets of McLagon & Stevens which he had purchased, and had incumbered. It can hardly be found as a fact that Stevens was to receive as his security, not the interest which he sold, but an interest in a new partnership. No creditor of McLagon & Smith was misled by the existence of this mortgage, because it was duly recorded. That the amount or interest which Smith contributed to the new firm was burdened with this mortgage was well known to McLagon, and was assented to by him. No secret trust existed in favor of the retiring partner, but his mortgage was understood by all persons. The equities in favor of the payment of the partnership debts of McLagon & Stevens have been so far satisfied that but \$300 or \$400 of those debts remain unpaid, and no person is before the court asking for interference with the mortgage upon account of that sum. It is true that the debts of the old firm were probably paid with moneys which are now in large part due from the estate of the new firm; but the creditors advanced their money with legal knowledge of the existence of the Stevens mortgage, and have no equity to be worked out through the assignees of McLagon which is superior to Stevens' equity. It is not material to the rights of the assignees that Stevens, in pursuance of the agreement which was made in September, 1875, quitclaimed his mortgage, in order to allow an additional savings bank mortgage to be placed upon the premises, and took a new mortgage as a substitute for the original one, to secure the original unpaid notes, no intervening lien existing upon the property at the time of the execution of the new mortgage. The new mortgage was in equity, so far as McLagon and the subsequent mortgagees are concerned, a continuation of the same security which Stevens originally had, and the transaction must have been so understood by all the parties. There was no satisfaction of the original mortgage. The release was merely for the purpose of allowing an additional first mortgage, and no intervening liens existed upon the property when Stevens' new mortgage was given. His rights were not changed in equity, except that a larger first mortgage had been placed upon the property. The assignees of McLagon have no superior equities to those which he could have claimed, and he could not have asserted a right as a member of the new firm to have the new mortgage subject to the new partnership debts. The mortgage of Beecher & Todd was expressly made subject to the mortgage of Stevens.

Let there be a decree dismissing the petition of Beecher & Todd, without costs. Upon the petition of the assignees, there should be a decree that the property, when sold, shall be sold subject to the mortgages as they now stand upon the records of the town.

O'HARA v. MOBILE & O. R. CO.

(Circuit Court, E. D. Missouri, E. D. December 30, 1895.)

No. 3,851.

1. MORTGAGE—RIGHT TO RENTS AND PROFITS—LEASE.

The R. Equipment Company leased to one O. a number of freight cars, the lease providing that, in case of default by O. in the payment of the monthly rent, all mileage or other earnings of the cars should be payable to the lessor, and be applied on the unpaid rent due to it, and thereafter falling due, and that the lessee should give notice to the proper parties to pay such earnings to the lessor, though such notice should not be necessary to enable the lessor to collect the same. It was also provided that, upon default, the lessor might take possession of the cars. O. subleased the cars to defendant, and, at the same time, made known to it the terms of the lease, and, upon the subsequent occurrence of a default in his payments to the equipment company, authorized defendant to pay its rental to the equipment company. *Held*, that the lease from the equipment company to O. amounted to a mortgage back of the cars to it, with the rentals accruing to O. under his sublease, as security for the rentals to the equipment company; that the provisions of the lease to O. took it out of the general rule that a mortgagee not in possession is not entitled to rents and profits; and that, after O.'s default, there was a privity of contract between defendant and the equipment company, binding the defendant to pay its rental to the equipment company, and constituting a defense to an action by O. against defendant for such rentals.

2. RES JUDICATA—TITLE.

At the expiration of the lease of the cars to O., a dispute arose between him and the equipment company as to the ownership and right of possession thereof, in consequence of which defendant refused to deliver possession thereof to either until their rights were settled. Thereupon a suit was brought by the equipment company, to which O. and defendant were parties, and in which a decree was rendered, adjudging that the title to the cars was in the equipment company, that O. should be barred and foreclosed of any interest therein, and awarding compensation to defendant for storage of the cars, after the termination of the lease to it from O. *Held*, that this decree was res judicata as to O.'s right to recover damages from defendant for the detention of the cars, after the termination of the lease to it.

Campbell & Ryan, for plaintiff.

R. P. Williams, for defendant.

ADAMS, District Judge. By an agreement of lease dated January 12, 1893 (hereafter called the "O'Hara Lease") the plaintiff in the above-entitled action leased to the defendant 200 box cars for a term of 12 months. The defendant agreed to pay therefor to the plaintiff a monthly rental of \$7.50 per car. The plaintiff sues on this agreement, and alleges in his petition that, pursuant to its terms, he delivered the cars to the defendant, and that the defendant failed and refused, at the end of the year, to return said cars to the plaintiff, but retained the same in its possession until August 1, 1894, whereby the plaintiff was damaged in the reasonable value of the use thereof, in the sum of \$10,290. The plaintiff also alleges that the defendant did not pay the rent reserved for said cars for the last two months of the above-mentioned term, amounting to \$2,540. The plaintiff therefore says there is justly due him for the aforesaid use and rental the sum of \$12,830, for which he asks judgment.