INMAN v. CRAWFORD.

(Circuit Court, N. D. Georgia. May 19, 1898.)

MORTGAGE OF TRUST PROPERTY — POWERS OF TRUSTEE — EQUITIES OF MORTGAGEE.

A husband became trustee under a will which left property in trust for his wife, and after her death in trust to be conveyed to her heirs. After the death of the wife, he continued to act as trustee for his minor daughter, and, as such, obtained an order of court authorizing him to mortgage the trust property for money with which to pay taxes and other liens thereon. *Held* that, whether the trust be held an executed or an executory one, the facts that the mortgagor was still acting as trustee, and was the natural guardian of his daughter, that he borrowed the money by leave of court, and was shown to have used the most of it for the legitimate and necessary protection of the trust property, entitled the mortgagee to enforce the mortgage.

Bill to Foreclose Mortgage.

The report of the special master in this case is as follows:

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Georgia:

I herewith submit my report upon the facts and law of the above-stated case:

Margaret H. Crawford filed a petition to the superior court of Fulton county, on January 12, 1895, alleging, in substance, that Margaret C. Inman was about to foreclose a mortgage upon certain property, situated in the city of Atlanta, in which she owned a one-half undivided interest; that said property had been illegally mortgaged by her father, George H. Crawford, affecting to act as her trustee, especially as to two-thirds of her one-half undivided interest; admitting that one-third of her undivided half interest was subject to the lien of Mrs. Inman's mortgage; and praying that said mortgage be decreed void as to two-thirds of her half interest. Miss Crawford claims under a deed made by Jonas S. Smith, dated May 27, 1871, to George G. Crawford, as trustee for his wife, Margaret R. Crawford, the last-named party being the mother of the complainant. Margaret R. Crawford died, intestate, December 20, 1872, leaving three heirs, her husband and two children, the youngest being Miss Margaret H. Crawford. Complainant insists that the trust under the Jonas S. Smith deed, above mentioned, terminated at the death of her mother, and the land in controversy became absolutely the property of her father, her brother, and herself. In December, 1881, George G. Crawford, father of the complainant, conveyed to himself, as trustee for his two minor children, his one-third undivided interest in the property described in the deed from Jonas Smith to himself, as trustee for his wife. The defendant, Margaret C. Inman, being a resident of the state of New York, an order was taken removing the case from the superior court of Fulton county to the circuit court of the United States; and in October, 1896, the defendant, Margaret C. Inman, filed a cross bill, in which she avers that George G. Crawford, as trustee for his daughter, filed a petition, in which he set forth to the proper court that it was necessary in order to preserve the property in question from sale by reason of certain judgments and tax liens, and to improve the property, and to realize certain sums for the support, maintenance, and education of his daughter, Miss Margaret, the complainant in this case, to incumber her interest by making the loan of $5,500. The petition was heard; a guardian ad litem appointed for Miss Crawford. He consented, and recommended the court that the loan should be obtained, and that it would, in the light of the facts set forth in the petition of the trustee, be most beneficial to the estate of his ward that the petition be granted. It was granted, and the loan of $5,500 obtained from Mrs. Margaret C. Inman. The complainant testified that at the time of this transaction, in August, 1892, she was about 20 years of age; that she was served with some paper, the contents of which she did not know; that she received but little, if

any, money from her father in her life, except for tuition at school; that she had lived with, and been supported by, an uncle most of the time since her mother's death; that she had always understood her father, George G. Crawford, was guardian and trustee for her property. Defendant introduced in evidence a copy of the will of John Gordon Howard, the grandfather of complainant; and, by the eighth item of said will, the property left his daughters was in trust for the term of their natural life, and, from and after their death, in further trust to be conveyed to the heirs of such deceased daughter. Defendant also introduced in evidence a copy of petition and order from the superior court of Chatham county, in which Margaret R. Howard, mother of complainant, joined with George R. Jessup, one of the executors and trustees under the will of Howard, to have W. W. Gordon, of Savannah, made the trustee of Margaret Howard. Defendant introduced copy of petition and order thereon from the superior court of Chatham county, in which Margaret Reed Crawford (formerly Howard) and her husband, George G. Crawford, asked that W. W. Gordon, the then trustee of Margaret R. Crawford, be authorized to turn over the property he held as trustee under the Howard will for Margaret R. Crawford, to her husband, George G. Crawford, reciting the fact that an heir had been born unto them, and they desired to obtain the money to invest in a home in the city of Atlanta. Gordon acknowledged service of the petition, and consented to the order, which was granted, directing W. W. Gordon to turn over to George G. Crawford the proceeds of the sale of the trust property held by him, and in trust to apply the same to the purchase of real estate in the city of Atlanta, to be used as a home for Margaret Reed Crawford and her children, and to be held by said Crawford upon the uses and trusts upon which said property is now held. This order was passed on November 28, 1870. Defendant did not prove that Gordon ever delivered the proceeds of the trust property belonging to Margaret R. Crawford to her husband, George G. Crawford, but she proved by a competent witness that no deeds to real estate in the city of Atlanta were to be found on the records of Fulton county, into George G. Crawford, as trustee, except the Jonas S. Smith deed, on May 27, 1871. Defendant also introduced in evidence the petition of George G. Crawford, trustee, filed in office of the superior court of Fulton county, August 10, 1892, in which Crawford represents himself as trustee for his daughter, the complainant in this case, and the trust property he asks the permission of the court to mortgage is a one-half undivided interest in property deeded by Jonas S. Smith on May 27, 1871. The petition is verified by the affidavit of George G. Crawford. There were various other papers introduced, showing how the money borrowed by Crawford from Mrs. Inman was disbursed, which do not need special mention.

I find that George G. Crawford was trustee for his wife and children by virtue of an order of the superior court of Chatham county, dated November 28, 1870, and that he was to hold the property in trust, under the will of John Gordon Howard, for the use of his wife during her life, and at her death he should in further trust convey it to the heirs of his wife. His trust under the will was executory; and when, in 1881, he conveyed to himself, as trustee for his children, one-third undivided interest in this property, the fee to the property was then absolutely in him, as trustee for his children. It is doubtful if, under the will, Crawford was an heir. If so, he relieved the situation by the conveyance of December 23, 1881.

I find further that inasmuch as the money borrowed from Mrs. Inman was used for the most part to satisfy liens for taxes, judgments, and other legitimate charges, as set out in the petition of the trustee against this property, before the contentions of the plaintiff could prevail, it would devolve upon her to show by competent proof that the property in question was not bought by funds delivered to her father, as successor in trust to William W. Gordon; and, though the evidence has some missing links, I think it fair to draw the inference that the deed from Jonas Smith ought to be in terms of the order of the superior court of Chatham county of November 28, 1870, and, in my opinion, it was the carelessness or design of George G. Crawford that it is not so recorded.

I find that it may be fairly concluded from the evidence before me that the property in question described in the mortgage deed from Crawford as trus-

tee to Mrs. Inman was held by Crawford as trustee for his daughter, Margaret H. Crawford; and that the lien is binding upon the one-half undivided interest of Margaret H. Crawford in said described property, for the principal sum of $5,500, $2,420 interest to February 9, 1898, and future interest at 8 per cent. per annum; and that defendant, Margaret C. Inman, have a decree of foreclosure against complainant, Margaret H. Crawford, for said principal, interest, and costs of court.

Respectfully submitted, Wm. P. Hill, Special Master.

Ellis & Gray, for complainant.
John C. Reed, for defendant.

NEWMAN, District Judge. This case may be disposed of without going into it elaborately, as follows:

1. I think the special master was justified in finding, under the evidence, that the money paid by Dr. Crawford for the property in controversy, in the city of Atlanta, was the same money that he received from W. W. Gordon, former trustee for Mrs. Crawford, as to her interest in the estate of her father, John Gordon Howard. While the evidence might be more satisfactory, it is deemed sufficient to justify the special master in reaching the conclusion he did.

2. It is entirely clear from the evidence that the greater part of the money received from Mrs. Inman, all except something over $500, was used to pay off existing liens on the property in controversy. The balance of the money was paid to Dr. Crawford, to be used, as authorized by the order of court, in the support and education of the minor, Margaret Crawford.

3. In view of the foregoing conclusions, it is really immaterial as to whether the trust created by the will of John Gordon Howard was an executed or an executory trust. It may be conceded that there is some doubt as to the character of this trust, under the decisions of the supreme court of Georgia; but I am not sufficiently clear that Dr. Crawford was not a legal trustee to justify me in denying to complainant here the right to foreclose, for money advanced by her to him as such trustee, authorized, as he was, to make such loan by an order of a judge of the superior court of Fulton county. Dr. Crawford was unquestionably acting as trustee. He was the natural guardian of his daughter. He obtained this money by order of court, as stated, for legitimate and even necessary purposes; and the evidence traces almost all of the money so borrowed, and shows that it paid off liens against the trust estate and on the property mortgaged. There can be no question that, as to the amount used to pay off liens, complainant is entitled to foreclosure. Harvey v. Cubbedge, 75 Ga. 792. As to the remainder, while in some doubt, I think the complainant is also entitled to foreclosure. I do not feel justified, at least, in setting aside the master's report, which is in favor of the complainant. The exceptions to the report of the special master will be overruled, the same confirmed, and a decree may be taken accordingly.

ILLINOIS TRUST & SAVINGS BANK v. OTTUMWA ELECTRIC RY. (DOUD, Intervener).

(Circuit Court, S. D. Iowa. September 8, 1898.)

No. 203.

1. CORPORATIONS—STREET RAILROADS—FORECLOSURE OF MORTGAGE—PREFERENTIAL CLAIMS.
   One furnishing money to an electric street-railroad company to pay maturing interest on its bonds is not entitled to its repayment as a preferential claim as against the mortgagee, though the amount was a part of an advance originally made for the purpose of making necessary additions to the company's plant, to be repaid from current earnings, and was diverted to the payment of interest for convenience, to enable the company to meet the interest promptly, and under an express agreement with the company that the current earnings which would otherwise be used in paying the interest should be devoted to the completion of the improvements, which was done, and that such earnings should afterwards be used to repay the advance.
2. SAME—ELECTRIC LIGHT COMPANIES.
   The doctrine of preferential claims is applicable to electric lighting companies, having a municipal franchise, with the right to use the streets, and being engaged in furnishing public lighting to the city as well as supplying private consumers.
3. SAME—STREET RAILROADS—ADDITION TO PLANT.
   An advance made to an electric railway company, which was also engaged in furnishing electric lights, to build a power house to supply additional power, which was necessary to keep the company a going concern and to enable it to carry out a profitable contract to supply lights to the city, as well as to the inhabitants, for which it had a franchise that would otherwise be forfeited, constitutes a preferential claim as against the mortgagees of the company, where the advance was made on an express agreement that it was to be repaid from the current net earnings, and the amount expended was not greater than general business prudence might properly have regarded as necessary.
4. SAME—ADVANCES BY STOCKHOLDER.
   The fact that one advancing money to a street-railroad company for necessary improvements is a stockholder or bondholder does not affect his right to a preferential lien as against a mortgagee, where he acted in good faith.
5. SAME—APPLICATION OF PARTIAL PAYMENTS.
   Where one who had made advances to a street-railroad company, a part of which was entitled to allowance as a preferential claim on a subsequent foreclosure and a part was not, received partial payments thereon, which neither he nor the company applied to any particular part of the debt, such payments will, at the instance of the mortgagee, be applied to the preferential claim.

Upon Exceptions to Report of Master as to Intervening Petition of Levi P. Doud.

McNett & Tisdale, for intervener.

E. E. McElroy, for defendant Ottumwa Electric Ry. and for plaintiff trustee.

WOOLSON, District Judge. Upon April 14, 1896, on application of complainant above named, who was the trustee in the trust deed given by defendant (the Ottumwa Electric Railway) which is sought to be foreclosed herein, a receiver was by this court appointed for the