Hughes Vs. Edwards

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Appeal No. : 22 U.S. 489

Appellant : Hughes

Respondent : Edwards

Judgement :

Hughes v. Edwards - 22 U.S. 489 (1824)
U.S. Supreme Court Hughes v. Edwards, 22 U.S. 489 (1824)

Hughes v. Edwards

22 U.S. 489

APPEAL FROM THE CIRCUIT

COURT OF KENTUCKY

SYLLABUS

Where the mortgage deed contained a defeasance that the mortgagor should pay the debt according to the condition of a bond recited in the deed, by which it was payable on a day already past at the time of the execution of the deed, *held* that

this circumstance did not avoid the mortgage deed in equity where it was to be considered as a conveyance absolute at law, but intended as a security merely, and to be treated in the same manner as an ordinary mortgage.

A court of equity looks to the substantial object of the conveyance, and will consider an absolute deed as a mortgage wherever it is shown to have been intended merely as a security for the payment of a debt.

So also the grantee in such deed may treat it as a mortgage, and acknowledging it to be such, may apply to a court of equity to foreclose the equity of redemption, which will be decreed in like manner as if an unexceptionable defeasance were attached to the deed.

In the case of a mortgagor coming to redeem, a court of equity has, by analogy to the statute of limitations, which takes away the right of entry of the plaintiff, after twenty years' adverse possession, fixed upon that as the period, after forfeiture, and possession taken by the mortgagee, no interest having been paid in the meantime, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored.

In respect to the mortgagee, who is seeking to foreclose the equity of redemption, the general rule is that where the mortgagor has been permitted to retain possession, the mortgagee will, after a length of time, be presumed to have been discharged by payment of the money or by a release, unless circumstances can be shown sufficiently strong to repel the presumption, as payment of interest, a promise to pay, an acknowledgement by the mortgagor that the mortgage is still existing.

The mortgagor after forfeiture has no title at law, and none in equity, but to redeem upon the payment of the debt and interest.

His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can, no more than the mortgagor, assert that equity against the mortgagee without paying the debt or showing that it has been paid or released or that there are circumstances in the case sufficient to warrant the

presumption of these facts or one of them.

A purchaser with notice from the mortgagor is not entitled to have the value of the improvements made by him upon the mortgaged premises deducted from the price at which the premises sold under a bill of foreclosure.

Where there are different purchasers of mortgaged premises, if either pays more than his proportion of the debt according to the relative value of his property, he may compel contribution from the others, but it would be unreasonable to force the mortgagees into the delay and expense incident to the adjustment of these differences between persons with whom he has no concern.

The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but it is a circumstance of no inconsiderable importance, if the vendee must be restrained to his principal and interest, that principal and interest should be secure. It is therefore a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case, but it must exist in order to justify a construction which overrules the express words of the deed.

In the case either of a legal or equitable mortgage, the mortgagee may pursue his legal remedy by ejectment and at the same time file his bill to foreclose the equity of redemption.

Effect of the impossible condition contained in the mortgage deed.

Improvements made upon the mortgaged property.

Page 22 U. S. 490

Under the ninth article of the treaty between the United States and Great Britain of 1794, it is not necessary for the alien to show that he was in the actual possession or seizin of the land at the date of the treaty, which applies to the title, whatever that may be, and gives it the same legal validity as if the parties were citizens. The

title of an alien mortgagee is protected by the treaty.

But, independent of the stipulations of the treaty, an alien mortgagee has a right to come into a court of equity and have the property which has been pledged for the payment of the debt sold for the purpose of raising the money. His demand is merely a personal one, the debt being considered as the principal and the land as an incident.

A mortgagor cannot redeem after a lapse of twenty years after forfeiture and possession by the mortgagee (which period has been adopted in equity by analogy to the statute of limitations), no interest having been paid in the meantime and no circumstances appearing to account for the neglect.

Where the mortgagee brings his bill of foreclosure, the mortgage will, after the same length of time, be presumed to have been discharged unless circumstances can be shown to repel the presumption, as payment of interest, a promise to pay, an acknowledgement by the mortgagor that the mortgage is still existing, and the like.

A *bonae fidei* purchaser under the mortgagor, with actual notice of the mortgage or constructive notice by means of a registry, can only protect himself by the lapse of time or other equity under the same circumstances which would afford a protection to the mortgagor.

Such a purchaser is not entitled to have the value of the improvements made by him deducted from the proceeds of the sale of the mortgaged premises.

MR. JUSTICE WASHINGTON delivered the opinion of the Court.

This is an appeal from a decree in equity of the Circuit Court for the District of Kentucky. Edwards and wife, the plaintiffs in the court below, filed their bill in that court on 8 June, 1816, in which they charge that the female plaintiff, before her coverture, advanced, by way of loan, to James Hughes, her brother, the sum of 770 2s. 4d., for which he gave his bond bearing date 10 September, 1793, with condition to pay the same on the 12th of the same month, and for securing the

said debt, she took from the said

Page 22 U. S. 491

Hughes a mortgage upon sundry lots situate in Lexington, in Kentucky, which are particularly described. It further charges that the debt still remains due and unpaid and that the defendant, Hughes, subsequent to the execution of the mortgage deed, had sold part of the mortgaged premises to Gabriel Tandy, David and James McGowan, Robert Wilson, Samuel Patterson, James Wilson and John Anderson, John Parker, and William Bowman, all of whom are alleged to have purchased with legal notice of the plaintiff's lien on the said property, the deed having been duly recorded in the County Court of Fayette, agreeably to law. The mortgagor and the purchasers under him, all of whom are stated to be citizens of Kentucky, are prayed to be made defendants, and the prayer of the bill is that the defendants may be decreed to pay the aforesaid debt, with interest, &c.;, and on failure that the equity of redemption of the defendants be foreclosed and the mortgaged property decreed to be sold to satisfy the said debt, &c.; The bill alleges the plaintiffs to be aliens and subjects of the King of Great Britain. The deed of mortgage, dated 14 February, 1794, which (as well as the bond referred to in it) is made an exhibit, contains a defeasance, that the mortgagor should pay the said sum of 770 2s. 4d., with lawful interest thereon, according to the condition of the bond recited in it. It was duly proved and recorded in the County Court of Fayette, on 11 March, 1794.

Tandy and Patterson severally answered this bill, each of them admitting himself to be in possession

Page 22 U. S. 492

of certain parts of the mortgaged premises, under a *bona fide* conveyance, for valuable consideration paid, from the mortgagor or others claiming under him, and without notice of the mortgage other than the constructive notice given by the record of the same. They allege the continued possession of the mortgaged premises from the date of the mortgage by the said Hughes or those claiming by

purchase under him, and rely upon the length of time and uninterrupted possession as grounds for presuming that the debt has been paid or released in bar of the relief sought.

McGowan, and Hughes, the mortgagor, having died pending the suit, the guardians *ad litem* of their heirs and representatives severally answered, not admitting any of the charges in the bill and relying upon the presumption of payment or a release of the debt from length of time.

The bill was dismissed, as to all the defendants except Hughes' heirs, Patterson and Tandy, upon their answers coming in, and after one or more interlocutory decrees, the court pronounced a final decree of foreclosure as to the above defendants, and in case the balance found to be due by the report of the commissioner should not be paid by a certain day, a sale of the mortgaged property in which the equity of redemption was foreclosed was decreed.

It was admitted by the parties that the defendants had made lasting and valuable improvements on the mortgaged property claimed by them, and that the female plaintiff, shortly after the date of

Page 22 U. S. 493

the mortgage, left the United States, and that neither she nor her husband has been since within the United States.

Amongst the exhibits filed in the cause are two letters from James Hughes, the mortgagor, to the female plaintiff, the one bearing date 24 February, 1803, and the other 17 December, 1808, in the former of which he recognizes distinctly the existence of the mortgage, and in both promises to make remittances as soon as it should be in his power.

The counsel for the appellants insist upon the following objections:

1. That the mortgage deed is a void instrument, the defeasance being to pay the money on the day it became due by the bond, *viz.,* on 12 September, 1793, which was impossible, that day having already passed.

2. The plaintiffs, being aliens by their own showing, cannot hold lands in Kentucky, and therefore, cannot maintain a bill to foreclose this mortgage.

3. The plaintiffs are barred of their right to foreclose by length of time.

4. That the mortgaged property ought not to have been made liable to the payment of this debt beyond its unimproved value.

1. The first objection is well founded in point of fact, but as to its legal consequences, it was in a great measure answered by the concession which the learned counsel, who urged it, was constrained to make. He admitted the law to be, as it unquestionably is, that if a deed for land is to be

made void by the happening of a subsequent condition, the performance of which is impossible at the time the deed is made, the condition only is void and the estate of the grantee becomes absolute. But the use which he endeavors to make of the objection was to turn the respondents out of the court of equity, and to leave them to their legal remedy by ejectment to recover the possession of the granted premises, in which it was supposed they might be successfully encountered by the statute of limitations. But in what respect the situation of a grantee in a deed without a defeasance, but which was intended by the parties to operate only as a security, differs from that of an ordinary mortgagee in respect to jurisdiction and the act of limitations is not perceived by the Court. The latter may pursue his legal remedy by ejectment, and he may at the same time file his bill for the purpose of foreclosing the mortgagor of his equity of redemption. The objects of the two suits are totally distinct, and it is no objection to the remedy sought in equity that the plaintiff has another remedy which he may pursue at law. In the one, he seeks to obtain possession of the mortgaged premises, and in the other to compel the mortgagor to pay the debt for the security of which the mortgaged property was pledged. Whether the defendant could avail himself of the act of limitations in the former case whilst the equitable remedy of the plaintiff is subsisting is a question which need not be decided in the present case, as the parties are now before a

court of equity. The effect which length of time may have upon

Page 22 U. S. 495

the plaintiff's rights in that court will be considered under another head.

The principles here laid down are not less applicable to the case of an absolute deed which is intended by the parties to operate as a security for a debt than they are to that of a common mortgage. A court of equity looks at the real object and intention of the conveyances, and when the grantor applies to redeem upon an allegation that the deed was intended as a security for a debt, that court treats it precisely as it would an ordinary mortgage, provided the truth of the allegation is made out by the evidence. So too the grantee in such a deed may treat it as a mortgage and, acknowledging it to be such, may apply to a court of equity to foreclose the equity of redemption, which will be decreed, in like manner as if an unexceptionable defeasance were attached to the deed. That court directs its attention to the real object of the deed and the intention of the parties, and will compel a fulfillment of both. Now what was the object of the present deed? It is admitted by all the parties to this cause that it was to secure a debt due by James Hughes, the grantor, to Martha Hughes, the grantee, and it is apparent from the instrument itself, exclusive of the condition, that the debt to be secured was that of which the bond recited in the deed was the evidence, which was payable on 12 September, 1793, with interest from the date of the bond. This then being the contract of the parties, it ought to be carried into execution unless

Page 22 U. S. 496

there should be objections to such a decree other than the one which has been just disposed of.

2. The next objection relied upon is the alienage of the respondents. This objection would not, we think, avail the appellants even if the object of this suit was the recovery of the land itself, since the remedies as well as the rights, of these aliens are completely protected by the treaty of 1794, which declares

"That British subjects, who now hold lands in the territories of the United States . . . shall continue to hold them, according to the nature and tenure of their respective estates and titles therein, and may grant, sell, or devise the same to whom they please in like manner as if they were natives, and that neither they nor their heirs or assigns shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens."

In the cases of *Harden v. Fisher,* 1 Wheat. 300, and *Orr v. Hodgson,* 4 Wheat. 463, it was decided that under this treaty it was not necessary for the alien to show that he was in the actual possession or seizin of the land at the time of the treaty, because the treaty applies to the title, whatever that may be, and gives it the same legal validity as if the parties were citizens. Now it is unquestionable that at the time this treaty was made, the female plaintiff was entitled to assert a legal claim to the possession of this land or to foreclose the equity of redemption unless the debt with which it was charged was paid, in which case, equity would have considered her as a mere trustee for the mortgagor.

Page 22 U. S. 497

But the objection is deprived of all its weight, and would be so independent of the treaty, in a case where the mortgagee, instead of seeking to obtain possession of the land, prays to have his debt paid, and the property pledged for its security sold for the purpose of raising the money. Under this aspect, the demand is in reality a personal one, the debt being considered as the principal and the land merely as an incident, and consequently the alienage of the mortgagee, if he be a friend, can upon no principle of law or equity be urged against him.

3. It is objected in the third place that the respondents are barred of their right to foreclose by length of time. It is not alleged or pretended that there is any statute of limitations in the State of Kentucky which bars the right of foreclosure or redemption, and the counsel for the appellants placed this point entirely upon those general principles which have been adopted by courts of equity in relation to this subject. In the case of a mortgagor coming to redeem, that court has, by

analogy to the statute of limitations, which takes away the right of entry of the plaintiff after twenty years adverse possession, fixed upon that as the period, after forfeiture, and possession taken by the mortgagee, no interest having been paid in the meantime, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored. In respect to the mortgagee, who is seeking to foreclose the equity of redemption, the general rule is that where the mortgagor has been permitted

Page 22 U. S. 498

to retain possession, the mortgage will, after a length of time, be presumed to have been discharged by payment of the money or a release unless circumstances can be shown sufficiently strong to repel the presumption, as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like. Now this case seems to be strictly within the terms of this rule. The two letters from the mortgagor to the female plaintiff, in 1803 and 1808, admit that the mortgage was then subsisting, that the debt was unpaid, and they contain promises to pay it when it should be in the power of the writer. In addition to these circumstances, credits were endorsed on the bond for payments acknowledged to have been made which, though blank, the court below ascertained to have been made on 15 January, 1798, 15 May, 1803, and 2 August, 1808. The mortgagor, then, cannot rely upon length of time to warrant a presumption that this debt has been paid or released, the circumstances above detailed having occurred from 8 to 13 years only prior to the institution of this suit.

But it is insisted that although these acknowledgments may be sufficient to deprive the mortgagor of a right to set up the presumption of payment or release, they cannot affect the other defendants, who purchased from him parts of the mortgaged premises for a valuable consideration. The conclusive answer to this argument is that they were purchasers with notice of this encumbrance. It must be admitted that it was but constructive notice, but for every purpose essential to the protection of the mortgagee against the effect of those alienations it is equivalent to a

direct notice, and such is unquestionably the design of the registration laws of Kentucky. A purchaser with notice can be in no better situation than the person from whom he derives his title, and is bound by the same equity which would affect his rights. The mortgagor, after forfeiture, has no title at law and none in equity but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can no more than the mortgagor assert that equity against the mortgagee without paying the debt or showing that it has been paid or released or that there are circumstances in the case sufficient to warrant the presumption of those facts or one of them. The Court is therefore of opinion that this objection cannot be sustained by either of the appellants.

4. The last objection is that the mortgaged property ought not to have been made liable to the payment of this debt beyond its unimproved value. The object of this suit is to recover a debt and to have the property pledged for its security sold for the purpose of paying it. The debt, as was before observed, is the principal, and the land is only as a collateral security for the payment of it. The mortgagee seeks not to obtain the possession of the land and to deprive the mortgagor or the purchaser of the improvements they have made upon it, and even if he did,

the question would not be materially changed. If by means of these improvements the value of the land has been increased, the mortgagor or purchasers are permitted to enjoy all the benefit of such increase by paying the debt charged upon the land. If he will not do this, but submits rather to a sale of the property, he has all the benefit of its increased value by receiving the overplus raised by the sale after the debt is discharged. His improvements were made upon property which he knew was pledged for the payment of this debt, and he made them solely with a view to his own interest. The land was in reality his own, subject only to the lien -- so much his own that he is not accountable to the mortgagee for the rents and profits received by him during the continuance of his possession, even although

the land, when sold, should be insufficient to pay the debt. Neither is the purchaser accountable for any part of the debt beyond the amount for which the land may be sold although it should have been deteriorated by waste, dilapidation, or other mismanagement. The claim, therefore, of a purchaser with notice to have the value of the improvements which may have been made from the fruits of the property itself deducted from the price at which the property may be sold seems to the Court too unreasonable to admit of a serious argument in its support. No case was cited, nor has this Court met with one, which affords it the slightest countenance. We must therefore overrule this objection.

Before concluding this opinion, it may be proper

Page 22 U. S. 501

to notice a point which was made by the counsel for the appellants, although it was not much insisted upon; it was that the balance due upon this mortgage ought to have been apportioned upon all the purchasers from Hughes. The bill was properly dismissed as to all the defendants, except the heirs and representatives of Hughes, Tandy, and Patterson, upon their answers denying the equity of the bill, and from these decrees no appeal was taken. As to Tandy and Patterson, who acknowledge themselves to be purchasers with notice, they stand precisely in the situation of the mortgagor, and the mortgagees have nothing to do with their relative rights to contribution amongst themselves. They are entitled to be paid the debt due to them and to call for a foreclosure and sale of all the mortgaged property, whether it be in the possession of the mortgagor or of others to whom he has sold it. If either of these defendants should pay more than his proportion of the debt according to the relative value of the property they possess, that is a matter to be settled amongst themselves. But it would be most unreasonable to force the mortgagees into the delay and expense incident to the adjustment of those differences between persons with whom they have no concern. The conveyances by the mortgagor to them are void as to the mortgagees, against whom they have no right except that of redeeming upon payment of the mortgage debt and interest.

Decree affirmed with costs.