Anthony Vs. Butler

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Decided On : 1839

Appeal No. : 38 U.S. 423

Appellant : Anthony

Respondent : Butler

Judgement :

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Anthony v. Butler

38 U.S. (13 Pet.) 423

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF RHODE ISLAND

SYLLABUS

A mortgage was executed by D. G. as the agent of the Union Steam Mill Company, conveying to the mortgagee certain lands in Rhode Island, with a woolen mill and other buildings, with the machinery in the mill. D. G. was, and had

been the general agent of the company, and as such had made all purchases and sales for the company, and the mortgage was executed by him, with the consent and authority of the persons who at the time of its execution were members of the company. The machinery and other movables had been taken in execution by the Marshal of Rhode Island, under an execution issued on a judgment obtained after the mortgage against the company. The Court held that although the mortgage was not valid as the deed of the corporation, it was sufficient to convey a title to the mortgagee in the machinery, and that he could maintain an action of replevin for them against the marshal.

The mortgage was recorded by the town clerk of the place where the property was, he being the proper officer to record such instruments under the statute of Rhode Island. He kept two books, in one of which he recorded mortgages, which included real estate, and in the other mortgages upon personal property only. The mortgage in this case was first recorded in the book kept for recording mortgages on real estate. And he gave a certificate

"lodged in the town clerk's office to record, November 20, 1837, at 5 P.M., and recorded same day, in the record of mortgages in East Greenwich, book No. 4,"

&c.; The Court held that this certificate was properly received in evidence in the circuit court.

It is a well settled rule, though a very technical one, that one partner cannot bind his co-partners by deed. And it is equally well settled that one partner may dispose of the personal property of the firm. One partner may bind his co-partner by deed, if he is present and assent to it. The seal of one partner, with the assent of the co-partner, will bind the firm.

Where a statute requires that mortgages on personal property shall be recorded in a book to be specially kept for the purpose, and says nothing as to the book in which mortgages on real and personal property shall be recorded, and in the conveyance the personal and real property is so blended as to be inseparable, to require a double record would seem to be an unreasonable construction of the

statute. The record of the mortgage in the book kept for recording mortgages on real estate is within a fair construction of the Rhode Island statute.

The defendant in error, Cyrus Butler, in 1838 instituted an action of replevin against Barrington Anthony, the Marshal of the United States for the District of Rhode Island, to recover from him certain machinery and articles used in the manufacture of goods which had been the property of the Union Steam Mill Company, and which were claimed by the plaintiff under a mortgage alleged to have been executed to him by the Union Steam Mill Company on 20 November, 1837, to secure to him the payment of sixteen thousand four hundred and fifty-nine dollars loaned to the company by Cyrus Butler.

The defendant in the circuit court, the Marshal of the District of Rhode Island, ordered the taking of the goods under an execution issued out of the circuit court of the United States for that district on a judgment against Daniel Greene, William P. Salisbury, and Rufus W. Dickinson, which execution had been so levied upon

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the goods as of said Greene, Salisbury, and Dickinson for the purpose of satisfying the debt and costs.

The cause was tried before a jury in November, 1838, and a verdict and judgment were rendered for the plaintiff. The defendant prosecuted this writ of error.

The matters of law arising in the case were presented on a bill of exceptions taken by the counsel for the defendant on the trial.

The bill of exceptions stated that the plaintiff in support of his title to the articles named in the replevin, produced a certain deed dated 20 November, 1837, executed by one Daniel Greene as agent for the Union Steam Mill Company, the said company being a corporation, conveying the property of the company, the articles mentioned in the replevin included, to the plaintiff on mortgage, and proved the execution of the deed, and produced the act of the Legislature of Rhode Island incorporating the company, and produced the record of the corporate proceedings

of the company, having duly proved the said proceedings. The execution of the deed of 20 November, 1837, was in the following form. "Union Steam Mill Company, Daniel Greene [L.S.]." The plaintiff also produced and read in evidence a deed dated 18 May, 1837, from William P. Salisbury to Daniel Greene by which all the property of said Salisbury, in the Union Steam Mill Company was conveyed to Daniel Greene. The plaintiff also proved that Daniel Greene was and had been agent from the time of the formation of the company, and that the deed to the plaintiff was executed by him by and with the consent and authority of the company.

The plaintiff insisted that the deed of Daniel Greene was the corporate deed of the Union Steam Mill Company, and conveyed to him the articles mentioned in the replevin, and he further insisted that if it was not their corporate deed, it was sufficient to convey a valid title to the property to him, inasmuch as the said deed was made and executed by and with the consent of those who at the time were members of the company, and that Daniel Greene, as the general agent of the company, was authorized to convey the articles named in the plaintiff's writ.

The defendant objected to the deed as inoperative, the Union Steam Mill Company having had no corporate existence at the time it was executed, and the court decided that the corporate existence was not so proved as to allow the deed to be given in evidence as the deed of the corporation, but if inoperative as the corporate deed, it was sufficient and competent to convey the articles in the replevin to the plaintiff. To this opinion the defendant excepted.

The defendant also objected to the deed as it did not appear to have been recorded according to the law of Rhode Island regulating the recording of mortgages on personal property prior to the defendant's levy on the goods.

On the back of the deed was the endorsement of the town clerk of the place where the property was situated stating that the deed had been

"lodged in the town clerk's office, to record, November

20, 1837, at 5 o'clock, P.M. and recorded same day in the record of mortgages in East Greenwich, book No. 4, pages 49, 50 and 51."

The town clerk is the proper recording officer by the laws of Rhode Island.

The defendant's counsel objected to the sufficiency of the certificate as evidence that the deed was duly recorded, and produced evidence that there was a book kept by the town clerk in which mortgages of personal property only were recorded, and other mortgages which included real estate were recorded in other books kept in the office, and after recording the deed in the book of mortgages of real estate on 20 November, 1837, the deed was taken by him to the office of the town clerk, on 14 November, 1838, and was recorded in the book kept for mortgages on personal property. The court decided that the certificate was sufficient evidence that the said deed was duly recorded. The defendant excepted.

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MR. JUSTICE Mc LEAN delivered the opinion of the Court.

The defendant, Cyrus Butler, commenced an action of replevin against the plaintiff in error for various articles of personal property specified in the writ of replevin and claimed by him under a mortgage dated 20 November, 1837. The defendant had taken possession of the property by virtue of an execution directed to him as marshal on a judgment against the mortgagors.

On the trial, certain exceptions were taken to the rulings of the court, which bring the questions decided before this Court.

The mortgage was executed by one Daniel Greene as the agent of the Union Steam Mill Company, said company being a manufacturing corporation, conveying to the plaintiff below certain lands, with a woolen mill and other buildings, with the machinery in said mill, &c.; And the incorporating act and several acts amendatory thereto were read in evidence. And also a deed from William P. Salisbury to the said Greene dated 18 May, 1837, conveying all his interest in the real and personal property of the Union Steam Mill Company.

And it was proved that Daniel Greene who executed the deed first aforesaid, was and had been from the time of the formation of said company the general agent, and as such had made all purchases and sales for the company, and that the deed was executed by him with the consent and authority of said company, and also by and with the consent and authority of the persons who at the time of the execution thereof were members of said company.

The court decided that the said corporation was not so proved as to entitle the deed to be read to the jury as the deed of the said corporation, but that the deed was good to convey a valid title to the articles named in the writ of replevin. To this decision the counsel for the defendant excepted.

And it was further objected to said deed that it did not appear that the same had been recorded prior to the defendant's levy on the articles by the writ of replevin, in conformity to the statute on the subject. The counsel for the plaintiff produced and read to the court an endorsement on the back of said deed, signed by the clerk of the town of East Greenwich, in the words and figures following, to-wit:

"Lodged in the town clerk's office, to record, Nov. 20, 1837, at 5 o'clock P. M., and recorded same day in the records of mortgages in East Greenwich, book No. 4,"

&c.;

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It was proved that the said clerk kept a book in which all mortgages of personal property only were recorded, and all other mortgages, which included real estate, were recorded in other books kept in the office. After the deed was recorded, it was taken away by the plaintiff below, and afterwards, on 14 November, 1838, was returned by him to said office, when it was recorded in the book kept for mortgages of personal property. And the court decided that said certificate was sufficient evidence that the deed was duly recorded. To which decision the defendant excepted.

The above exceptions present two points for examination.

1. Whether the mortgage deed was valid.

2. Whether it was duly recorded.

To the decision of the court that the evidence did not show that the stockholders had organized themselves under the act of incorporation so as to enable them to execute a corporate deed there was no exception. This ruling of the circuit court is not, therefore, brought before this Court.

The deed of mortgage purports to be executed by the corporation. The Union Steam Mill Company is the name of the corporation, and on the face of the deed, the company is stated to have been legally incorporated. Daniel Greene as the agent of the company, and in its name, signed the deed, and affixed to it the seal of the corporation.

And the counsel for the plaintiff in error insist that this mortgage can only be operative as the deed of the corporation. That if it be not the deed of the corporation, it is no deed. And that in no sense can it be considered the deed of the stockholders of the Union Steam Mill Company, as partners, independent of the act of incorporation.

This, it is said, would be giving a different effect to the deed from that which was intended by the parties who executed it. They bind themselves as corporators, and convey, as such, the property of the corporation, and to hold that the deed binds them in any other capacity, or conveys the property in any other, would not only essentially vary the terms of the deed, as clearly expressed upon its face, but it would be a fraud against the creditors of the company. And it is also insisted that the deed, being under seal and executed by only one of the partners, cannot bind the company.

From the record it appears that this company did business before the act of incorporation was passed, and that Daniel Greene acted as its agent. And that after the deed of William P. Salisbury conveying to the company all his interest in the property in May, 1837, Daniel Greene and R. W. Dickinson composed the stockholders of the company. And it appears, after they assumed their corporate

functions, much formality was observed in the record of their proceedings.

Greene acted as chairman and Dickinson as secretary; motions were made and, as it would seem, were unanimously decided. A special meeting of the stockholders was called on the subject of executing

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the mortgage, by a formal note addressed by R. W. Dickinson, as clerk, to Daniel Greene and another to himself.

In their business proceedings generally as well as in the execution of the mortgage, these individuals assumed to act as a corporation. But they were not authorized to act in this capacity. This fact must be taken as granted, at least so far as the decision of the present case.

And here a question arises whether the acts of these individuals in their assumed character as corporators are void. May they hold themselves out to the world as entitled to certain corporate privileges when they were not so entitled, and afterwards avoid their contract on this ground? This would be a somewhat new and certainly a most successful mode of practicing fraud. It would be enabling a party to take advantage of his own wrong.

As the present controversy involves only the right to the personal property named in the deed of mortgage, it is not necessary to consider the validity of that instrument beyond the effect it has on this property.

It is a well settled rule, though a very technical one, that one partner cannot bind his co-partner by deed. And it is equally well settled that one partner may dispose of the personal property of the firm.

In this case, had an absolute sale and delivery of this property been made by Greene, no one, in the absence of fraud, could have questioned the title of the purchaser. But the mortgage was executed under seal, and Greene, it is alleged, could not bind his partner by deed.

That these individuals, not being responsible on their contracts as a corporation or liable as co-partners, is too clear to admit of doubt. The property of the company, both real and personal, was vested in them, and they controlled its entire operations.

The mortgage deed was executed on 20 November, 1837. And it appears from the record that Greene and Dickinson unanimously resolved that the mortgage should be executed by Greene as agent of the corporation. And it was accordingly executed on that day.

Now that one partner may bind his co-partner by deed if he be present and assent to it is a well established principle.

The signature and seal of Greene are affixed to the mortgage, and that this was done with the assent of his co-partner Dickinson is unquestionable. But was Dickinson present at the execution of the mortgage, and did he then assent to it? We think the facts in the record will warrant such a conclusion. The resolve of the partners to give the mortgage and the execution of it bear the same date, and may well be considered the same transaction. This seems to be the fair result of the facts stated, and must be received as *prima facie* evidence of the due execution of the deed.

These facts are liable to be rebutted by anyone who questions the validity of the deed.

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All those parts of the deed which refer to the corporation, including the corporate seal, may be rejected as surplusage, which do not vitiate it. They are considered as merely descriptive, and being false in fact can have no effect on the deed.

The seal of one partner to a deed, with the assent of the co-partner, will bind the firm.

From these considerations, we think the circuit court did not err in receiving the mortgage deed in evidence, treating it was a valid instrument as it respects the rights involved in this suit.

2. Was this mortgage duly recorded? By an act of the Legislature of Rhode Island passed at the January session, 1834, entitled "an act to prevent fraud in the transfer of personal property," it is provided that no mortgage of personal property, except as between the parties, shall be valid unless possession accompany the deed or it be recorded in the office of the town clerk. In the second section it is made the duty of the clerk to record such mortgages in a book kept for that purpose.

It appears from the evidence that the town clerk kept a book in his office in which he recorded all mortgages of personal property, and all other mortgages which included real estate, or real estate and personal, were recorded in other books kept in said office, in one of which this mortgage was recorded. And the question is whether such a registration is sufficient under the statute.

The object of the recording act is to give notice to subsequent purchasers. The statute undoubtedly requires the clerk to record mortgages for personal property only in a book kept for that purpose. This being the requirement of the law, to which the clerk strictly conformed, there could be no uncertainty in searching the record for a personal mortgage.

But it seems that the statute did not expressly provide in what book a mortgage like the one under consideration, for both real and personal property, should be recorded. And it appears that it was the usage of the office to record such mortgages in the book which contains mortgages for real estate.

Now if this be insufficient, nothing short of recording such a deed in both books could be held a compliance with the statute.

And can this be necessary? The conveyance of the personal and real property is so blended in the mortgage as to be inseparable. To require a double record would seem to be an unreasonable construction of the statute, as it cannot be

necessary to effectuate its object. Both records are kept in the same office, and by the same person, who performs the duties of the office and must always be well acquainted with its usage. And inquiry of the clerk for the record of a mortgage like the one under consideration would as certainly lead to it under the usage as if it were recorded in both books.

If this mortgage had been recorded in the book for personal mortgages, the same strictness as now contended for might be urged

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against such record book, as it would not then be kept exclusively for personal mortgages.

We think that this mortgage has been recorded in a book kept, though not exclusively, for the purpose of recording mortgages which convey real and personal property, and that it is within a fair construction of the statute.

We think also that the circuit court did not err, in deciding that the certificate of the clerk was sufficient evidence that the mortgage deed was duly recorded. The judgment of the circuit court, not being erroneous, is

Affirmed with costs.