Drury Vs. Foster

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Court : US Supreme Court

Decided On : 1864

Appeal No. : 69 U.S. 24

Appellant : Drury

Respondent : Foster

Judgement :

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Drury v. Foster

69 U.S. (2 Wall.) 24

ERROR TO THE FEDERAL

COURT OF MINNESOTA

SYLLABUS

A paper, executed, under seal, for the husband's benefit, by husband and wife, acknowledged in separate form by the wife, and meant to be a mortgage of her separate lands, but with blanks left for the insertion of the mortgagee's name and

the sum borrowed, and to be filled up by the husband, is no deed as respects the wife, when afterwards filled up by the husband and given to a lender of money, though one *bona fide* and without knowledge of the mode of execution. The mortgagee, on cross-bill to a bill of foreclosure, was directed to cancel *her* name.

Foster, of Minnesota, being about to engage in some enterprise and wanting money, asked his wife, who owned, in her separate right, a valuable tract of land in that state, to mortgage it for his benefit. What exactly was said or promised did not appear. However, Foster afterwards went to a notary, who exercised, as it seemed, the business of a scrivener also and directed him to draw a mortgage of the property, with himself and wife as mortgagors, but leaving *the name of the mortgagee, and the sum for which the land was mortgaged, in blank.* This the magistrate did. Foster acknowledged the deed at the magistrate's office *in this shape,* and the magistrate then took the instrument to Mrs. Foster at her husband's house, that she might sign and acknowledge it in the same shape. When the magistrate took the mortgage to her thus to execute, Mrs. Foster said

"she was fearful that the speculation which her husband was going into would not come out right; *that she did not like to mortgage that place,* but that he wanted to raise a few hundred dollars, or several hundred dollars, or something to that effect"

-- the magistrate, who was the witness that gave the testimony, did not recollect the exact expression which she used -- "and that she did not like to refuse him, and that so she consented to sign the mortgage." Mrs. Foster having signed the instrument in *this blank shape,* the notary, under his hand and seal, certified, in form, that the husband and wife, "the signers and sealers of the *foregoing deed,* " had personally appeared before him, "and acknowledged the signing and sealing *thereof* to be their voluntary act and *deed,* for the uses

and purposes expressed," and that the wife,

"being examined separate and apart from her said husband, and the contents of the foregoing deed made known to her by me, she then acknowledged that she

executed the same freely, and without fear or compulsion from anyone."

Such form of separate acknowledgment, it may be well to say, is required by statute, in Minnesota, to give any effect to a *feme covert's* deed. After taking the wife's acknowledgment, the notary gave the instrument to her husband. He, finding the complainant, Drury, willing to lend as much as $12,800 upon the property, himself filled up the blanks with the name of Drury, as mortgagee, and with the sum just mentioned as the amount for which the estate was mortgaged. In this form, the instrument was delivered to Drury, who, knowing nothing of the facts, advanced the money in good faith, and put his mortgage on record. There was no evidence that the wife derived any benefit from the money advanced, or that she ever knew that such a large sum was advanced.

On a bill of foreclosure brought four years afterwards by Drury against Foster and wife, in the Federal Court for Minnesota, the defense was that the mortgage was not the wife's deed -- a defense which the court below thought good as to her. It accordingly dismissed the bill as regarded her, giving a decree, however, against the husband. The correctness of its action as regarded the wife was the question on appeal here.

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MR. JUSTICE NELSON delivered the opinion of the Court.

By the laws of Minnesota, an acknowledgment of the execution of a deed before the proper officers, privately and apart from her husband, by a *feme covert,* is an essential prerequisite to the conveyance of her real estate or any interest therein. And she is disabled from executing or acknowledging a deed by procuration, as she cannot make a power of attorney. These disabilities exist by statute and the common law for her protection, in consideration of her dependent condition, and to guard her against undue influence and restraint.

Now it is conceded in this case that the instrument Mrs. Foster signed and acknowledged was not a deed or mortgage, that on the contrary it was a blank

paper, and that in order to make it available as a deed or mortgage, it must be taken to have been signed and acknowledged with the design to have the blanks filled by the husband or some other person before the delivery. We agree -- if she was competent to convey her real estate by signing and acknowledging the deed in blank and delivering the same to an agent with an express or implied authority to fill up the blank and perfect the conveyance -- that its validity could not well be controverted. Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient.

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But there are two insuperable objections to this view in the present case. First, Mrs. Foster was disabled in law from delegating a person, either in writing or by parol, to fill up the blanks and deliver the mortgage, and second, there could be no acknowledgment of the deed within the requisitions of the statute until the blanks were filled and the instrument complete. Till then, there was no deed to be acknowledged. The act of the *feme covert* and of the officers were nullities, and the form of acknowledgment annexed as much waste paper as the blank mortgage itself at the time of signing.

It is insisted, however, that Mrs. Foster should be estopped from denying that she had signed and acknowledged the mortgage. The answer to this is that to permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into the law an entirely new system of conveyances of the real property of *feme coverts.* Instead of the transaction's being a real one in conformity with established law, conveyances, by signing and acknowledging blank sheets of paper, would be the only formalities requisite. The consequences of such a system are apparent, and need not be stated.

There is authority for saying, that where a perfect deed has been signed and acknowledged before the proper officer, an inquiry into the examination of the *feme covert,* embracing the requisites of the statute, as constituting the acknowledgment, with a view to contradict the writing, is inadmissible; that acts of the officer for this purpose are judicial and conclusive. We express no opinion upon the soundness of this doctrine, as it is not material in this case. The case before us is very different. There is no defect in the form of the acknowledgment or in the private examination. No inquiry is here made into them. The defect is in the deed, which it is not made the duty of this officer to write, fill up, or examine, and for the legal validity of which he is no way responsible. The two instruments are distinct. The

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deed may be filled up without any official authority, and may be good or bad. The acknowledgment requires such authority. The difficulty here is not in the form of the acknowledgment, but that it applied to a nonentity, and was therefore nugatory. The truth is that the acknowledgment in this case might as well have been taken and made on a separate piece of paper, and at some subsequent period attached by the officer, or some other person, to a deed that had never been before the *feme covert.* The argument in support of its validity would be equally strong.

Our opinion is that, as it respects Mrs. Foster the mortgage is not binding on her estate.

We may regret the misfortune of the complainant from the conclusion at which we have arrived, but it seems to us impossible to extend the relief prayed for by the bill of foreclosure, without abrogating the protection which the law for ages has thrown around the estates of married women. Losses of the kind may be guarded against, on the part of dealers in real estate, by care and caution, and we think that this burden should be imposed on them, rather than that a sacrifice should be made of the rights of a class who are dependent enough in the business affairs of life, even when all the privileges with which the law surrounds them are left

unimpaired.

Decree affirmed.

N.B. A decree made below, on a cross-bill ordering the mortgagee to cancel the wife's name on the mortgage, was affirmed here. The cross-bill set up, substantially, the facts disclosed in the answer to the original bill, and the proofs taken in each case were the same.