

Parmelee Vs. Simpson

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Court : US Supreme Court

Decided On : 1866

Appeal No. : 72 U.S. 81

Appellant : Parmelee

Respondent : Simpson

Judgement :

Parmelee v. Simpson - 72 U.S. 81 (1866)

U.S. Supreme Court Parmelee v. Simpson, 72 U.S. 5 Wall. 81 81 (1866)

Parmelee v. Simpson

72 U.S. (5 Wall.) 81

APPEAL FROM THE SUPREME COURT

OF THE TERRITORY OF NEBRASKA

SYLLABUS

1. Where a deed to A., though executed before a mortgage of the same property to B., is not delivered until after the execution and record of the mortgage, the mortgage will take precedence of it.

2. The placing of a deed to a party on record, such party being wholly ignorant of the existence of the deed and not having authorized or given his assent to the record, does not constitute such a delivery as will give the grantee precedence of a mortgage executed between such a placing of the deed on record and a formal subsequent delivery.

3. As a general thing, a ratification of a grantor's unauthorized delivery can be made by the grantee, but not when the effect would be to cut out an intervening mortgage for value.

Parmelee filed a bill of complaint against Megeath, Bovey, and one Simpson in the District Court for Douglas County, Nebraska Territory, sitting in chancery, for foreclosure and sale under a mortgage.

The bill set forth a mortgage executed by Megeath and Bovey, duly acknowledged *on the 17th April, 1858*, and duly recorded on the same day. It stated that Simpson claimed some interest in the mortgaged premises and prayed that he also be made a defendant.

The bill was taken *pro confesso* against Megeath and Bovey.

Simpson admitted the making and recording of the mortgage as alleged in the bill, but set up this defense:

"That he (Simpson) is the lawful owner of a portion of the premises and lands [defining it] described, *and was such lawful owner at the time* the mortgage and note were executed *and for some time before*; that he was so seized of said premises in fee simple on the 15th day of April, 1858 [two days before the mortgage] by virtue of a deed from Bovey, and that on the same day the deed was duly recorded, after having been duly acknowledged &c.;"

before one Sayre, a notary public. *And that this defendant paid to the said Bovey a valuable and adequate consideration therefor, as is expressed in said deed.*

"That some time in the month of August, A.D. 1860, he learned

for the first time that a pretended deed, purporting to have been made and executed by him to Bovey, conveying the premises, dated April 17, 1858, but without being duly acknowledged, was upon the records of the register's office, but that the same was a forgery; that he never executed such or any other deed conveying the premises; that he never received any consideration for the deed from Bovey, or anybody else; nor did he ever authorize anyone to execute the said deed for him."

A proved copy of the deed of April 17, 1858, set up, from Bovey to Simpson, was produced from the office of the recorder of deeds of the county, but not an original.

The testimony of Simpson himself showed the following facts: he had come from California to Nebraska, arriving there for the first time in his life, April 18, 1858 (three days after the date of the deed). He first there saw Bovey, who was an acquaintance of his, on the afternoon of that day. On the following day, the 19th, Bovey took him out to the land and showed it to him, stating that he had conveyed it to him in consideration of certain money previously received; showing Simpson, then, for the first time, the deed. Simpson had no knowledge of any intention on Bovey's part thus to convey the land further than a letter from him written at Chillicothe, Ohio, early in December, 1857; that he "intended conveying some property he had preempted." Simpson took the deed and put it in his trunk at his hotel, from which, in June, 1858, he missed it along with other papers. Bovey had been allowed access to the trunk to look for another paper. Simpson wrote to Bovey in the winter of 1860 about it, but received no answer. A diligent search failed to discover it.

The official index at the register's office stated that the deed had been indexed as received for record, April 15, 1858. But two witnesses, one of whom had been requested to attend to the drawing of the mortgage, and another who had gone with him as a friend to examine the records in the register's office, testified, in a positive way, that they had examined very carefully records and indexes on the morning of the 17th, and that nothing was then on record; that they

had made the examination carefully because in a previous transaction Bovey had been found "tricky and unreliable," and was "pretty well known for turning sharp corners." Sayre, the notary before whom the deed purported to be acknowledged, testified that he had not taken any acknowledgment of a deed from Bovey.

No deed from Simpson to Bovey, it seemed pretty clear, had ever been executed at all.

The district court decreed for the complainant, directing a sale. The supreme court of the territory reversed the decree, and on appeal from such reversal the case was now here.

MR. JUSTICE DAVIS delivered the opinion of the Court.

There is no difficulty in this case. It is claimed by Simpson that he holds, free from the obligation of the mortgage, the lands which Bovey conveyed to him two days before its execution. The mortgagors, Megeath and Bovey, owned in severalty the lands mortgaged, and Parmelee seeks to sell whatever is embraced in the mortgage in order to make his debt. He denies that Simpson's deed can take precedence of the mortgage because, if given for a valuable consideration, executed and recorded in conformity with the laws of Nebraska, it was never delivered until long after his security was taken. If this position is sustained by the evidence, there is an end of the controversy, for nothing passes by a deed until it is delivered.

It is a circumstance of great suspicion that the original deed was not produced on the trial, as the date of its registry was disputed and Sayre, the notary public, denied having taken the acknowledgment. It is very clear that Bovey was capable of any fraud, as it is proved that the pretended reconveyance from Simpson to him, which was placed on record

the same day the mortgage was executed and recorded, was a forgery.

But conceding that there is not proof enough to discredit the record and that Sayre is mistaken, still the deed cannot defeat the mortgage, because the delivery -- one essential part to its due execution -- did not occur until after the mortgage was admitted to registry. Simpson was on his way from California when Bovey, without his knowledge or authority, delivered it to the register of deeds for record, and he did not arrive in Nebraska until three or four days afterwards, when he first learned what had been done. The only information which Simpson had concerning the matter was contained in a letter from Bovey, informing him of his intention to convey to him some preempted lands in Nebraska on his arrival there in the spring of 1858. To this letter there was no reply, and there is nothing to show that Simpson knew the quantity or value of the lands, or ever agreed to receive a conveyance for them in satisfaction of Bovey's indebtedness to him. And there is not a particle of evidence that anyone was authorized to receive the deed for him. The placing the deed on record was Bovey's own act, and done without the assent of Simpson. Under this state of facts there was manifestly no delivery. The execution and registration of a deed, and delivery of it to the register for that purpose, does not vest the title in the grantee. *

If Simpson had agreed to accept the deed in liquidation of his debt, and constituted the register his agent to receive it, then the delivery of the deed to the register would have been in legal contemplation a delivery to him. But it is said that he could ratify the acts of Bovey and the register. This is true, but he did not do this until after the execution and registration of the mortgage, and this ratification cannot relate back so as to cut out the mortgage. Simpson acquired no title until after the rights of the mortgagee had accrued, and he holds it encumbered with the lien of the mortgage.

The decree of the supreme court of the territory is reversed and this case is remanded to that court with directions to enter an order affirming the decree of the district court.

* *Maynard v. Maynard*, 10 Mass. 456; *Samson v. Thornton*, 3 Metcalf 281; [*Younge v. Guilbeau*](#), 3 Wall. 641.

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