

Dean Vs. Nelson

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Court : US Supreme Court

Decided On : 1869

Appeal No. : 77 U.S. 158

Appellant : Dean

Respondent : Nelson

Judgement :

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Dean v. Nelson

77 U.S. (10 Wall.) 158

APPEAL FROM THE CIRCUIT COURT OF

THE UNITED STATES FOR WEST TENNESSEE

SYLLABUS

1. A sale of stock in a company at its par value, the consideration to be paid out of the net receipts of earnings of the stock, received quarterly by the company, and a note given therefor, with the condition that the principal should become due if the

installments were not regularly paid, *held* a valid sale under the circumstances.

2. Such a condition in the note is not a penalty, but is of the substance of the contract.

3. A mortgage to secure such note being given upon the grantee's interest as a stockholder in the property of the company, the equity of redemption is not extinguished by proceedings to foreclose the same during the war when such proceedings were taken within the Union lines whilst the defendants were absent in the Confederate lines and were prohibited from entering the Union lines.

Thompson Dean, of Cincinnati, prior to the breaking out of the late rebellion, was the owner of a large amount of capital stock in the Memphis Gaslight Company, a corporation of Tennessee, situated and doing business at Memphis in that state. In May, 1861, he transferred his entire stock to one Pepper, secretary of the company, to enable him (Pepper) to make some disposition of it in view of approaching hostilities.

On the 11th day of June, 1861, Pepper sold and transferred fifty shares, of \$100 each, to a certain Nelson, then of Memphis, at par, receiving for the consideration Nelson's note, under seal, dated June 11, 1861, whereby he promised to pay to the order of Pepper \$5,000, with interest at six percent per annum out of the net receipts of earnings on the sum of \$5,000 of the capital stock of the company, payable in quarterly installments, the interest being first paid and balance of said net receipts then to be applied upon the principal, which installments should amount to such sum of money as should be equal to the quarterly net receipts of earnings on \$5,000 of the capital stock of the company; it was further expressed in the note that it was given for the purchase money of \$5,000 of the capital stock of the company, sold and transferred to Nelson by Pepper; and that if Nelson failed to pay any of the installments quarterly, as aforesaid, after the receipt by the company of said net earnings, then the full sum of \$5,000, with interest, less interest and installments paid, should become due and payable.

To secure the payment of this note Nelson, on the same day, executed to Pepper a paper, in the ordinary form of a mortgage, conveying to Pepper, his heirs and assigns, the following real and personal property, viz.,

"so much of Nelson's individual interest, right, title, and estate in the property and premises of and belonging to the Memphis Gaslight Company as should be represented by and equal to the \$5000 of capital stock of said company at par,"

then

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describing the real and personal property which the company owned, being gas works and other property in Memphis, and concluding with the usual condition, to be void on the payment of the note according to the tenor and effect thereof. This instrument was duly acknowledged and recorded in the registry of mortgages for Shelby County. On the 20th day of July, 1861, Pepper sold and transferred to Nelson one hundred and fifty-four additional shares of said company, at the par value of \$15,400, and received a similar note and instrument for the consideration thereof. It appeared from the evidence in the case that Pepper sold this stock to Nelson and the remainder of Dean's stock to other persons, when he did, under apprehension that it would be confiscated by the Confederate authorities, as was threatened to be done, and from a desire to leave Memphis (which he soon afterwards did do, going north) for his own personal safety. But Nelson swore that he made the purchase of the stock in good faith, and that he received it without any trust or pledge for its return.

The war soon began to rage with severity, and all intercourse between the states in rebellion (including Tennessee) and the other states of the Union was not only interrupted, but was prohibited by President Lincoln's proclamation of August 16th, 1861, made in pursuance of the act of Congress of the 13th of July previous.

Nelson continued to reside at Memphis, within the Confederate lines, and received the regular quarterly dividends on the two hundred and four shares of stock, but did not and could not make any payment to Pepper or to Dean, to whom Pepper

assigned the notes and mortgages, they both being within the Union lines. The amount of dividends thus received by Nelson was \$3,672.

On the 1st of June, 1862, Nelson transferred one hundred and ninety-four shares of the stock to Miriam Nelson, his wife, having previously transferred ten shares to a certain Benjamin May. Both transfers were without consideration, except that the object of the transfer to May was to make him a director, and the professed object of the transfer to

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Nelson's wife was to make her a separate provision for maintenance.

On the 6th of June, 1862, the federal forces entered the City of Memphis, and held military possession of that part of Tennessee until the close of the war. Dean visited Memphis during the summer and autumn of 1862, and saw Nelson there, who failed to make any payment on the notes. Nelson swore in the proceeding below that Dean refused to receive any payment, alleging that the stock was absolutely forfeited by the failure to pay. Dean swore that he asked Nelson what he proposed to do about the payment of the net earnings which he had received, and that Nelson answered that he was not disposed to pay it, because he might have to pay it again to the Confederate government. From the evidence in the case, this Court expressed itself as inclined to believe that this ground was assumed by Nelson, and that he did not make an unequivocal tender of the money due, and whilst it admitted that it was probably true that Dean insisted that the stock was forfeited, it was not satisfied that his conduct was such as to obviate the necessity of a tender by Nelson if the latter wished to prevent the principal from becoming due. At this time, Nelson was allowed to remain peaceably within the Union lines, and there was no reason why he should not have paid the money to Dean.

On the 5th of April, 1863, Nelson, with his family, was ordered to remove south of the lines of the United States forces, and not to return. This order was made in retaliation for some outrages committed by guerillas in the vicinity. In pursuance of

it Nelson and his family removed within the Confederate lines, and remained therein during the remainder of the war; and were not permitted to reenter Memphis, although Nelson at one time requested permission to do so. The other complainant, May, was within the Confederate lines during the entire contest.

On the 25th of April, 1863, General Veatch, then commanding the military district of Memphis, by a special order established and organized a court or civil commission for

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the hearing and determination of all complaints and suits instituted by loyal citizens for the collection of debts, enforcement of contracts, prevention of frauds, recovery of the possession of property, and generally to do whatever can be done by a court deriving its powers from military authority. Before this Court or civil commission, on the 1st day of September, 1863, Dean filed a petition setting forth the fact of the sale of the stock to Nelson, that Nelson had given a note, and to secure the payment of said note had executed and delivered *mortgages* on all the interest of said Nelson in said company, represented by said stock, which *mortgages* were recorded &c.; and praying for the foreclosure of the "*said mortgages,*" and sale of the two hundred and four shares of stock, in order to raise the amount due on the notes. Nelson and wife, and May, were made defendants but were returned "*Not found,*" and publication of notice to them to appear was made in accordance with the laws of Tennessee existing prior to the rebellion. No appearance being effected, a decree was made, execution issued, and the stock was sold by the marshal on the 23d day of October, 1863, to one Hanlin, and was subsequently transferred to him on the books of the company by the secretary pursuant to an order of the civil commission. Hanlin immediately transferred the stock to Dean. From that time till June, 1865, Dean drew the dividends on the stock.

In the month just named, Nelson, his wife, and May filed a bill in the court below praying in substance that the stock might be decreed to belong to them and that Dean might account for all the dividends received by him, to be applied to the

payment of the notes &c.;, and for general relief.

Dean, in his answer, set up and insisted upon two grounds of defense:

First, the forfeiture of the condition of the mortgage, which, under the circumstances of the case and from the unconscionable nature of the transaction, he insisted should be held to be an absolute forfeiture, without benefit of redemption -- in other words, that the instrument should be

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regarded as a conditional assignment or transfer, and not as a mortgage.

Secondly, he set up the proceedings before the civil commission, by which, as he contended, even if the instrument were a mortgage, all equity of redemption in the stock was foreclosed. The defendants, Nelson, his wife, and May, on the contrary, insisted that the paper was a mere mortgage; that the condition in the notes making the principal due if the installments were not regularly paid, was in the nature of a penalty, and should not have been enforced in an equitable proceeding; that the court or civil commission was illegal and without authority; that it never had any jurisdiction of the person of the appellants nor of the property attempted to be foreclosed; that the existence of the war and the residence of the appellees within the Confederate lines forbade any legal proceedings against them or their property; that therefore they had been illegally dispossessed of the latter and were entitled to have it restored to them without conditions, and finally that Dean was accountable to them for the dividends received by him, to be credited on the notes.

The court below decreed that Dean should transfer to Mrs. Nelson, for her sole and separate use, one hundred and ninety-four shares of the stock, and to May ten shares, so as to restore the stock to them respectively, as they had it prior to the decree of the civil commission divesting it out of them. And that a master should take and state:

An account of what amount of dividends had been declared and paid on the said two hundred and four shares since the sale to Nelson by Pepper, and when, how, and to whom they were paid:

And an account between Nelson and Dean, as assignee of Pepper, which should show the amount of principal and interest of the notes executed by Nelson to Pepper, for the two hundred and four shares, with all amounts of dividends and profits received on them by Dean, applied as credits according to the laws of Tennessee, as to the application of partial payments, and showing what balance, if any, was now

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due upon the said obligations, or what balance, if any, was due from Dean, after paying the said obligations in full.

From this decree Dean took an appeal here.

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MR. JUSTICE BRADLEY, having stated the case, delivered the opinion of the Court.

In determining the questions raised by this record, the Court is of opinion, in the first place, that Dean must be regarded as concluded on the question of the sale of his stock. Had the transaction been merely an agreement for a sale upon the terms on which the sale was actually made, and this a bill by the vendees for a specific performance, we should find great difficulty in distinguishing this case from that of *Dorsey v. Packwood*. * But here the sale was actually made, and the stock was actually transferred to Nelson, so that, in the absence of fraud, it became absolutely his. And in support of the *bona fides* of the transaction, it may be said that in view of all the contingencies of the situation, the arrangement was at the time an advantageous one for Dean. At all events, he chose, on the whole, to acquiesce in it, and in his bill to foreclose the stock, presented before the civil commission, he makes no claim but that of holder of the mortgage, affirming and

claiming under Nelson's title throughout. And in his answer to the present bill, he nowhere hints that Nelson was guilty of any bad faith in the transaction, or made any agreement to hold the stock for him, or in any other way than as a *bona fide* purchaser thereof. And it is hardly correct to say that Nelson incurred no obligation in the transaction. He agreed to pay the whole amount immediately in case of failure to pay any installment after the receipt *by the company* of the net quarterly earnings. And this condition was not in the nature of a penalty, as surmised by the appellees, but was of the substance of the contract. So that, on failure to pay or tender the money received by him or by the company on account of the stock

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purchased, the whole debt became due and payable as a personal obligation of Nelson.

But, at all events, the stock was actually sold and transferred, and became the property of Nelson, and was possessed by him. The contract was an executed contract, and that transaction cannot now be impeached.

The next question relates to the character of the instrument given by Nelson to Pepper as security for the payment of his notes. Was it a conditional sale, or was it a mortgage? On this question hardly a doubt can be raised. The court is asked by the appellant, under the circumstances of the case, which the appellant asserts to have been unconscionable on Nelson's part, to *consider* the instrument as a conditional conveyance of the stock, and not a mortgage. But the court has no power over the transaction to make it other than, or different from, what the parties themselves made it. If it is a mortgage, it is the duty of the court to declare it a mortgage; and if it is a mortgage it has, perforce, all the incidents and privileges of a mortgage; and that it is a mortgage there is no room for question. The principal engagement is contained in the note, which creates a debt as soon as earnings or dividends are received. The other instrument is secondary, and is intended as security for the payment of the note. The appellee himself, in his proceedings before the civil commission, treats his claim as a debt, and the instrument of security as a mortgage. He calls it a mortgage; and the doctrine of "once a

mortgage, always a mortgage," applies to it.

Then, being a mortgage, whether of real or personal property, the mortgagor has an equity of redemption, unless it has been extinguished in some legal way. The great question of the cause is, whether the equity of redemption has been extinguished.

It is unnecessary to decide whether the mortgage was one of real or of personal estate, or whether it was a legal or only an equitable mortgage. As no attempt has been made to cut off the equity of redemption, in any other manner than by legal proceedings, the question is reduced to the

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simple one, whether those legal proceedings are valid and effectual for the purpose.

It is objected that the court or civil commission was not legally established; but it is not necessary to determine that question, as the proceedings themselves were fatally defective. The defendants in the proceedings (the appellees here) were within the Confederate lines at the time, and it was unlawful for them to cross those lines. Two of them had been expelled the Union lines by military authority, and were not permitted to return. The other, Benjamin May, had never left the Confederate lines. A notice directed to them and published in a newspaper was a mere idle form. They could not lawfully see nor obey it. As to them, the proceedings were wholly void and inoperative.

This leaves the equity of redemption in the mortgaged property unextinguished, and it is therefore the right of the appellees to redeem it.

In the opinion of the Court, the whole principal and interest of the notes have become due and payable, and a redemption and retransfer of the stock should be decreed only on condition of the payment of principal and interest in full, after giving to the appellees credit for the sums received by the appellant, legal interest on each side to be allowed.

The decree of the circuit court therefore will be so far modified that instead of requiring the appellant to forthwith transfer the stock, as directed in the decree, he be decreed to transfer it to the defendants, Miriam W. Nelson and Benjamin May, respectively, as therein directed, upon payment by the appellees to the appellant of the amount which shall be found to be due to him on the said two notes, after taking and stating the account in the said decree afterwards directed; neither party to recover costs of the other in this appeal.

Decree modified accordingly.

* [53 U. S. 12](#) How. 126.

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