

Shillaber Vs. Robinson

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Appeal No. : 97 U.S. 68

Appellant : Shillaber

Respondent : Robinson

Judgement :

Shillaber v. Robinson - 97 U.S. 68 (1877)

U.S. Supreme Court Shillaber v. Robinson, 97 U.S. 68 (1877)

Shillaber v. Robinson

97 U.S. 68

APPEAL FROM THE CIRCUIT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF NEW YORK

SYLLABUS

1. A deed of land, with a power of sale, to secure the payment of a debt, whether made to the creditor or a third person is in equity a mortgage, if there is left a right to redeem on payment of such debt.

2. Sales under such a power have no validity unless made in strict conformity to the prescribed directions. Therefore a sale made on a notice of six weeks, instead of twelve, as required by the mortgage and the statute of the state where the lands are situate, is absolutely void and does not divest the right of redemption.

3. A person holding the strict legal title, with no other right than a lien for a given sum, who sells the land to innocent purchasers must account to the owners of the equity of redemption for all he receives beyond that sum.

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The original transaction which gave rise to the present suit was a sale by John Shillaber of about three thousand acres of land in the State of Illinois to John Robinson, the appellee. The contract was evidenced by a written agreement by which it appears that Robinson, in part payment of the Illinois land, was to convey to Shillaber three different parcels of land lying in the State of New York -- one in Kings, one in Sullivan, and one in Essex County.

On this contract, a suit in the nature of a bill for specific performance was brought, in the Circuit Court of Ogle County, Illinois, by Robinson against Shillaber. The latter having subsequently died, his sole heir, Theodore Shillaber, was substituted as defendant. The suit resulted in a decree which, among other things, established an indebtedness of Shillaber to Robinson, on final accounting, of \$4,249.58, and ordered that, on the payment of this sum, Robinson should convey to Shillaber the lands in New York already mentioned. In order that the whole matter should be finally disposed of, the decree then ordered that Robinson and wife should make and deposit with the clerk of the court a good and sufficient conveyance for said lands, as an escrow, to be delivered to Shillaber on his payment of the sum aforesaid within ninety days. It further provided that if the money was not paid by Shillaber within that time, Robinson should convey the lands in trust to Silas Noble, who "should proceed to sell the same, in such manner, and after giving such reasonable notice of the time and place of such sale, as might be usual or provided by law in the State of New York," and out of the proceeds pay the

expenses of the trust and the money due Robinson, with interest, and hold the remainder, if any, subject to the order of the court.

Shillaber did not pay the money as ordered by the decree. Robinson then made the deed of trust to Noble in strict accordance with the terms of the decree, and Noble, after giving notice of sale, by publication once a week for six weeks successively in the "Brooklyn Standard," sold, at public auction, on the sixteenth day of March, 1861, the lands to John A. Robinson, for the sum of \$1,950, and made to him a conveyance of

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the same. Said John A. Robinson purchased the lands for the benefit of John Robinson. Neither the deed from John Robinson to Noble nor that from the latter to John A. Robinson was placed upon record.

Since that time and before the commencement of the present suit, John Robinson sold all these lands to divers and sundry individuals for sums amounting in the aggregate to \$9,628.

The present suit was commenced in November, 1870, in the Circuit Court for the Eastern District of New York by Theodore Shillaber against John Robinson, requiring him to account for the value of the New York lands on the ground that he had never acquired any other title to them than that which he held when the decree of the Illinois court was made, and that, since the purchasers from him were innocent purchasers, without notice of Shillaber's rights, their title was perfect and Robinson was liable to him on a final settlement for the value of the lands less the sum which Shillaber owed him, as ascertained by the decree in the Illinois court.

The court, on hearing, dismissed the bill, whereupon Shillaber appealed here.

The provisions of the New York Revised Statutes regarding notice, are as follows:

"SEC. 3. Notice that such mortgage will be foreclosed by a sale of the mortgaged premises or some part of them shall be given as follows:"

"(1) By publishing the same for twelve weeks successively, at least once in each week, in a newspaper printed in the county where the premises intended to be sold shall be situated, or, if such premises shall be situated in two or more counties, in a newspaper printed in either of them."

"(2) By affixing a copy of such notice, at least twelve weeks prior to the time therein specified for the sale, on the outward door of the building where the county courts are directed to be held in the county where the premises are situated, or, if there be two or more such buildings, then on the outward door of that which shall be nearest the premises. And by delivering a copy of such notice at least twelve weeks prior to the time therein specified for the sale to the clerk of the county in which the mortgaged premises are situated, who shall immediately affix the same in a book prepared and kept by him for that purpose, and who shall also enter in said

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book at the bottom of such notice the time of receiving and affixing the same, duly subscribed by said clerk, and shall index such notice to the name of the mortgagor, for which service the clerk shall be entitled to a fee of twenty-five cents."

"(3) By serving a copy of such notice at least fourteen days prior to the time therein specified for the sale upon the mortgagor or his personal representatives and upon the subsequent grantees and mortgagees of the premises, whose conveyance and mortgage shall be upon record at the time of the first publication of the notice, and upon all persons having a lien by or under a judgment or decree upon the mortgaged premises subsequent to such mortgage, personally or by leaving the same at their dwelling house in charge of some person of suitable age or by serving a copy of such notice upon said persons at least twenty-eight days prior to the time therein specified for the sale by depositing the same in the post office, properly folded and directed to the said persons at their respective places of residence

"

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the Court.

The principal, in fact the only, defense which merits any consideration in this case is that by the trust deed which Robinson made to Noble under the decree of the court, and by the sale which Noble made in conformity to the terms of the decree and of that deed, Shillaber's rights were completely divested in the land, and since it did not bring, at that sale, as much money as was due to Robinson, which, by the terms of both the decree and the deed of trust, was to be paid to him out of the proceeds of that sale, nothing was left for Shillaber in the matter.

The decree in the Illinois suit, in which Theodore Shillaber had appeared after his father's death, is binding and conclusive on both parties. The deed of trust made by Robinson to Noble is in accordance with the decree and conferred an authority on him to sell the land. The purpose of this sale, as expressed in the deed of trust and the decree, was to pay to Robinson the \$4,249.58 which was a first lien on the land, and the balance into the court for the use of Shillaber.

Much discussion has been had in the case as to the nature of the conveyance to Noble, one party insisting that it is a simple

mortgage with power of sale and the other that it is, under the statutes of New York, the creation of a valid trust in lands. The point of this discussion is found in the question whether the sale by Noble, under that instrument, was valid or was void. The counsel of defendant insists that Noble became vested with a perfect title to the land by the deed of Robinson, and that his sale and conveyance are valid whether he pursued the direction of the deed in regard to advertising or not, and that if any such advertising were necessary, there was no usual notice, nor any provided by law, for such sales in the State of New York.

It is shown by the evidence that Noble did publish a notice that the three pieces of land in the three different counties would be sold on a day mentioned at Montague Hall in the City of Brooklyn. This notice was published for six weeks preceding the day appointed for the sale in the "Brooklyn Standard," a weekly paper printed in Kings County. But the statutes of New York then in force prescribed publication of such notice for twelve weeks successively before the sale.

If the instrument under which Noble acted is a mortgage with power of sale, it is beyond dispute that the sale is void because it was not made in conformity with the terms on which alone he was authorized to sell. That the sale under such circumstances is void is too well established to admit of controversy. We refer specially to the recent case in this court of [*Bigler v. Waller*](#), 14 Wall. 302. The list of authorities cited by the appellant are to the same effect.

Without entering into the argument of the question whether the instrument under which Noble acted is in all respects a mortgage, the case of *Lawrence v. Farmers' Loan & Trust Co.*, 13 N.Y. 200, shows that it is an instrument which, for the purposes of the sale under the power which it contains, comes under the provisions of the statute we have cited as regards publication of notice. It also decides that a sale made without such notice is void. It is the well settled doctrine of courts of equity that a conveyance of land for the purpose of securing payment of a sum of money is a mortgage if it leaves a right to redeem upon payment of the debt. If there is no power of sale, the equity of redemption remains until it is foreclosed by

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a suit in chancery or by some other mode recognized by law. If there is a power of sale, whether in the creditor or in some third person to whom the conveyance is made for that purpose, it is still in effect a mortgage, though in form a deed of trust, and may be foreclosed by sale in pursuance of the terms in which the power is conferred, or by suit in chancery. These instruments generally give specific directions regarding the notice to be given, and of the time, place, and terms of the sale. In some states the statute prescribes the manner of giving this notice, and in

such case it must be complied with. In either case, the validity of the sale being wholly dependent on the power conferred by the instrument, a strict compliance with its terms is essential.

If this is not a mortgage to which the notice of the New York statute is applicable, we do not see that the defendant's position is improved by that circumstance, for there is then no provision for a sale or foreclosure of the equity of Shillaber but by a decree of an equity court. This has never been had, and it still remains that there has been no valid execution of the trust reposed in Noble by the deed. If the matter had remained in this condition, Shillaber would, on payment to Robinson of the \$4,249.58, with interest, have had a right enforceable in this suit to have a conveyance of the New York land by Noble to him. But neither the conveyance by Robinson, which remained an escrow, nor that to Noble was ever placed on record, and Robinson, in whom, according to the records of the proper counties in New York, the title still remained, sold all these lands to persons who, as innocent purchasers for a valuable consideration, now hold them by a good title. This title is equally beyond the reach of Robinson, of Shillaber, and of the court. Indeed, although Robinson alleges in his answer that the purchase of John A. Robinson was made for his benefit, he seems to have attached no importance to it; for he does not aver that John A. Robinson ever conveyed to him, nor does he, while giving copies of all the deeds on which he relies, including the deed to John A. Robinson, show any evidence of a conveyance from John A. Robinson to him.

The defendant, therefore, when he sold and conveyed this land to the parties who now hold it under him, did it in violation

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of the rights of Shillaber as settled by the Illinois decree. By that decree, Robinson had no right to sell. By the conveyance made to Noble under that decree, he had nothing left in the New York lands but a lien for his \$4,249.58. The sale by Noble was void, and conferred no rights on Robinson whatever. His belief in its validity did not change the matter. By availing himself of the title which was in him originally, and which appeared by the records to be there yet, he sold the lands for

twice as much as his lien, and received the money. That he must account to Shillaber in some way is too plain for argument. If Shillaber could, by paying his debt to Robinson, redeem the lands from their present holders, it is the relief which he would prefer, and to which as against Robinson he would be entitled. But Robinson has put this out of his power by a wrongful sale and conveyance to innocent purchasers.

There is no evidence to show that the lands are now worth any more than Robinson sold them for; no evidence that they were worth more when he sold them. His answer gives the precise sum received by him for each parcel of land and the date when he received it. He probably believed the land was his own when he sold it, but, as we have seen, he must be considered as holding such title as he had in trust, first for his own debt due from Shillaber, and the remainder for the use of Shillaber. Treating him, then, as trustee, he must account for the money received for the lands according to the trusts on which he held them. The decree of the circuit court dismissing Shillaber's bill must be reversed and the case remanded to that court with instructions to render a decree on the basis of charging Robinson with the sums received by him for the lands, and interest thereon until the day of the decree, deducting therefrom the sum found due him from Shillaber by the Illinois decree, with interest to the same time, and rendering a decree for the difference in favor of Shillaber against Robinson, with costs, and it is

So ordered.