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Mortgages-Release-Farmers & First Nat. Bank of New Castle v. Citizens State Bank of New Castle Priorities

MORTGAGES—RELEASE—PRIORITIES.—In 1915, the mortgagor gave appellee a mortgage on certain land to secure a purchase-money note. In May, 1919, the mortgagor executed a mortgage on the same land to appellant as security for a promissory note given for a pre-existing indebtedness. Both mortgages were duly recorded at those respective times. In August, 1919, the mortgagor gave appellee a new mortgage on the same land to secure a renewal note. This mortgage was recorded, and contemporaneously therewith the mortgage of 1915 was released of record. In 1921, the mortgagor gave appellee a new mortgage on the same land to secure a second renewal note. This mortgage was duly recorded, and contemporaneously therewith the mortgage of August, 1919 was released of record. Appellee brought suit on his note and to foreclose the mortgage. Appellant filed a cross-complaint upon his promissory note and

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25 Clark Distilling Co. v. Western Maryland R. Co. (1917), 242 U. S. 311, 37 S. Ct. 180. Kentucky Whip and Collar Co. v. Illinois Central R. Co. (1937), 57 S. Ct. 277.

26 Willis, Constitutional Law of the United States, pages 300-303.

27 Hammer v. Dagenhart (1917), 247 U. S. 251, 38 S. Ct. 529.

28 Reid v. Colorado (1902), 187 U. S. 137, 23 S. Ct. 92.

29 Champion v. Ames (1903), 188 U. S. 321, 23 S. Ct. 321.

30 But see Baldwin v. Seelig (1935), 294 U. S. 511, 55 S. Ct. 497, as a case where the Supreme Court refused to recognize the social interest in the welfare of local industry as a valid reason for the exercise of state police power. The court said that all state regulations enacted with the purpose, and having the effect of supressing extrastate competition are unconstitutional, regardless of the incidence of the regulation. See also 3 Univ. of Chicago L. R. 556.

31 For notes on the decisions of the district court [12F Supp. 37, and of the circuit court of appeals 84 F (2d) 168] in the case of Ky. Whip and Collar Co. v. Ill. Cent. R. Co. See 49 Harvard L. R. 466, 13 New York University L. Q. Rev. 287, 26 Journal of Criminal Law and Criminology 765, 21 Cornell L. Q. 357.

to foreclose his mortgage. The question presented was as to which mortgage was to be given priority. Held, for appellee.[1]

There is no dispute among the cases that equity may restore the lien of a renewal mortgage to its original position of priority over intervening liens when the old mortgage has been released of record and the new mortgage contemporaneously recorded. Equity will look to the circumstances of the transaction and, without regard for the form, will consider the new mortgage a mere continuation of the lien of the original mortgage as security for the same debt.[2] But it must be in fact a continuation of the security for the old debt; for if the court finds that a new note and mortgage have been taken in satisfaction and payment of the old note and mortgage, intervening liens will then be held to be prior in time as well as of record.[3] Thus, this question of fact—the intent of the parties—must be determined in every case that arises on the subject.

The appellant, in the instant case, evidently thought that the court should determine the further question as to whether or not the appellee had knowledge of the intervening lien at the time he released his original mortgage of record; for the appellant objected to the authorities cited by the court on the ground that they did not discuss the question of knowledge or lack of knowledge. Of course, if the original mortgagee is seeking to have the priority of his lien restored on the ground that he released his original mortgage as a result of fraud or misrepresentations of the mortgagor or of his own mistake of fact as to the existence of another lien, the question of knowledge would necessarily be in issue.[4] Or, even if a case did not involve any of the above elements, the fact that an original mortgagee released his mortgage with knowledge of intervening liens might give rise to a presumption that the parties intended the transaction to be in satisfaction and payment of the original debt and mortgage; and if evidence were not given to prove a contrary intent, this question of knowledge would then control the decision of the case.[5]

Although there has not been a very satisfactory decision upon the matter, it would seem that in the absence of any of the things referred to above the question of knowledge should be immaterial. The transaction wherein the mortgagee records a new mortgage and releases the old mortgage does not constitute a payment of the debt which the old mortgage secured unless the parties intend thereby to create a new debt; and equitable relief should be given on this ground, without regard to the mortgagee's knowledge of intervening lienholder as a result of the transaction, there is no equitable reason for giving him the benefit of a windfall at the expense of the original mort-

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[1] Farmers & First Nat. Bank of New Castle v. Citizens State Bank of New Castle (Ind., 1937), 5 N. E. (2d) 506.

[2] Cherry v. Welsher (1923), 195 Iowa 640, 192 N. W 149; Cansler v. Sallis (1877), 54 Miss. 446.

[3] Workingman's Bldg. & Savings Ass'n. v. Williams (Tenn., 1896), 37 S. W 1019; Travers v. Stevens (1933), 108 Fla. 11, 145 So. 851.

[4] Sidener v. Pavey (1881), 77 Ind. 241; Bormann v. Hatfield (1917), 96 Wash. 270, 164 P. 921; Island Pond Nat. Bank v. Lacroix (1932), 104 Vt. 282, 158 A. 684. A

[5] New England Mortgage Security Co. v. Hirsch (1892), 96 Ala. 232, 11 So. 63.

gagee.[6] However, the rule should be strictly applied, and if the new mortgage is given to secure a different debt from the old,[7] or an additional debt,[8] or if the transaction actually prejudices intervening lienholders,[9] equitable relief should be denied the original mortgagee. One thing further must be said. Innocent third persons will always be protected, and if their rights have intervened, equity will deny the above relief in so far as it would impinge upon those rights.[10]

The instant case did not involve any intervention by innocent third persons. It was established that the appellee and the mortgagor intended their transaction to be nothing more than a continuation of the original lien. And the appellant, as intervening lienholder, has not shown himself to have been prejudiced in any way as a result of the transaction. Therefore, the decision of the court in holding appellee's lien to be superior seems eminently correct.[11]

R. H. N.

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[6] Cherry v. Welsher (1923), 195 Iowa 640, 192 N. W 149; Shanks v. Phillips (1932), 165 Tenn. 401, 55 S. W (2d) 258, Higman v. Humes (1900), 127 Ala. 404, 30 So. 733.

[7] See note (3) supra.

[8] Lomas & N. Co. v. Isacs (1924), 101 Conn. 614, 127 A. 6, Bank of Oakman v. Thompson (1932), 224 Ala. 87, 139 So. 238.

[9] Foster v. Whitenton (1923), 96 Okla. 187, 221 P 52.

[10] Etzler v. Evans (1878), 61 Ind. 56, Burton v. Reagan (1881), 75 Ind. 77, Smith v. Lowry (1887), 113 Ind. 37, 15 N. E. 17, Wells v. Huffman (1919), 69 Ind. App. 379, 121 N. E. 840.

[11] See generally· Hirleman v. Nickels (Minn., 1934), 258 N. W 13, Union Loan & Savings Ass'n. v. Simmons (Neb., 1936), 267 N. W 449; Sullivan v. Williams (1923), 210 Ala. 363, 98 So. 186, Kellogg Bros. Lumber Co. v. Mularkey (Wis., 1934), 252 N. W 596, Prairie State Bank v. S. J. Safford & Son (1934), 140 Kan. 339, 36 P (2d) 1015, Walters v. Walters (1881), 73 Ind. 425, Pouder v. Ritzinger (1889), 119 Ind. 597, 20 N. E. 654, Hanlon v. Doherty (1886), 109 Ind. 37, 9 N. E. 782; 33 A. L. R. 149; 98 A. L. R. 843.