

MITCHELL v. MASON.

Opinion delivered December 21, 1931.

1. MORTGAGES—CONVERSION OF MORTGAGED CHATTEL.—Sale of a mortgaged chattel by the mortgagor without consent of the mortgagee constitutes a conversion, for which both the mortgagor and the purchaser are liable.
2. MORTGAGES—SALE OF MORTGAGED CHATTEL.—If a mortgagee consents to a sale of the property by the mortgagor, the purchaser takes title free from the lien.
3. MORTGAGES—WAIVER OF LIEN.—Waiver of a mortgage lien may be shown by either direct or circumstantial evidence.
4. MORTGAGES—AUTHORITY TO SELL MORTGAGED PERSONALTY.—Where a mortgagee gives the mortgagor verbal authority to sell the property, and the property is sold to a *bona fide* purchaser for value, the purchaser acquires a good title, whether he knew of the existence of the mortgage or not.
5. MORTGAGES—WAIVER OF LIEN.—That a mortgagee gave his written consent to the sale by the mortgagor of certain bales of cotton did not establish a course of dealing that authorized other sales of cotton by the mortgagor without the mortgagee's consent.
6. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of facts will be affirmed unless against the preponderance of the evidence.

Appeal from Mississippi Chancery Court, Chickasawba District; *J. M. Futrell*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellees brought this suit in equity against appellants to recover an amount alleged to be due them for certain cotton secured by a chattel mortgage which had been unlawfully conveyed to appellants. The suit was defended on the ground that the mortgaged property had

been sold by the consent of the mortgagees, and that they had thereby waived their mortgage lien.

Appellee, Will Pyles, was the attorney in fact for appellees, W. S. Mason and Addie M. Mason, husband and wife, who were the owners of something over 400 acres of land in Mississippi County, Arkansas. For more than ten years, the Masons had resided in El Paso County, Colorado, and Pyles had been their agent and attorney in fact to manage their farm, rent or lease the same, and collect the rents therefrom. On the 22d day of May, 1922, the Masons executed a written power of attorney to Pyles, authorizing him to exercise a superintending control over the said 406 acres of land in Mississippi County, Arkansas, and to rent or lease the same, with power to enter into contracts to carry out the terms of said lease, to collect the rents, and to do and perform all acts necessary to the proper management of said premises, and to all intents and purposes to do and perform with regard to the management thereof anything that the Masons might do.

In 1927, Pyles rented the farm to Mrs. E. R. Dickerson, Sr., and E. R. Dickerson, her son. A written contract was executed, by the terms of which the Dickersons were to pay \$5,500 as rent. On the 5th day of April, 1927, the Dickersons executed to Will Pyles, as attorney in fact for W. S. and Addie M. Mason, a chattel mortgage on all the crops to be grown for the year 1927 on said land, and on certain personal property named in the mortgage. The indebtedness recited in the mortgage was the rent note for \$5,500, another note for \$2,500, due on or before October 15, 1927, with eight per cent. interest; a third note, dated April 11, 1927, due on or before November 15, 1927, for \$2,314.05, at eight per cent. interest; a fourth note, dated April 1, 1927, due on November 15, 1927, for \$2,400, with interest at eight per cent., and a fifth note dated April 26, 1927, due November 15, 1927, for \$678.55, at eight per cent. interest.

According to the testimony of Will Pyles, the note for \$2,314.05 was to be paid to Mitchell & Bollard. Later on in his testimony he said that he was mistaken in this, and that the \$2,400 note was the one that was due them. A part of the amount secured by the mortgage was for past indebtedness, a part for the rent for 1927, and a part of the amount was for supplies to be used in making the crop for said year. Pyles testified in detail as to the amounts due appellees under the mortgage, and to the payment received on the indebtedness secured by it. According to his testimony, appellees had received \$10,020.61 on said mortgage indebtedness, leaving a balance due by the Dickersons of \$5,251.36, with interest thereon at the rate of six per cent. after January 1, 1928; that the balance due by H. G. Mitchell and J. S. Bollard, under their firm name of Mitchell & Bollard, amounted to \$3,153.74, with interest thereon at the rate of six per cent. from January 1, 1928. Pyles admitted that the Dickersons had sold cotton in the seed to Mitchell & Bollard at various times in the amount of \$1,297.66. This sum was derived from the sale of cotton by the Dickersons at the gin to Mitchell & Bollard on sixteen different occasions from November 22, 1927, to January 14, 1928. On each occasion, the weigher at the gin gave to Richard Dickerson an order payable at the office of Mitchell & Bollard for the amount of cotton so purchased in the seed. Each one of these orders was indorsed on the reverse side of the same as follows: "Richard Dickerson, Will Pyles." Early in the fall, Dickerson had also delivered to Pyles sixty-two bales as rent.

According to the testimony of R. L. Dickerson, he went on the Mason farm with his father in 1920 and helped him work the land until his father died in May, 1924. After that, he and his mother continued to operate the farm until the spring of 1928, when he left it because Pyles refused to lease it to him any longer. He admitted renting the farm for the year 1927 and executing the mortgage in question in this case. He testified, however,

that in the previous year he had rented the place and had sold the cotton with the consent of Pyles, as attorney in fact for the Masons. He also testified that Pyles had given him permission to sell the cotton in the fall of 1927, and that he had delivered the proceeds to Mitchell & Bollard, except the amounts which he had paid to Pyles for rent and supplies.

There was a finding and decree in favor of appellees against the Dickersons and Mitchell & Bollard. The judgment against Mitchell & Bollard amounted to \$3,153.74, and they alone have prosecuted an appeal to this court.

Harrison, Smith & Taylor, for appellant.

Holland & Barham, for appellee.

HART, C. J., (after stating the facts). This court has held that the sale of mortgaged property by the mortgagor without the knowledge or consent of the mortgagee constitutes a conversion of the property, and that both the mortgagor and the purchaser are liable to the mortgagee for a conversion of the mortgaged property. *Sternberg v. Strong*, 158 Ark. 419, 250 S. W. 344.

On the other hand, if a mortgagee consents to a sale of the property by the mortgagor, the purchaser takes title free from the lien. In such cases, the waiver on the part of the mortgagee may be established by oral evidence, which may be direct and positive, or may be established by circumstances surrounding the transaction. *Fincher v. Bennett*, 94 Ark. 165, 126 S. W. 392; and *Vaughan v. Hinkle*, 131 Ark. 197, 198 S. W. 705. In these cases, the court expressly held that, where a mortgagee verbally authorizes a mortgagor to sell the property and the property is sold to a *bona fide* purchaser for value, the latter acquires a good title, whether he knew of the existence of the mortgage or not.

In the present case, the mortgage was duly recorded, and this gave Mitchell & Bollard constructive notice of its existence. Actual knowledge may be imputed to them from the facts and circumstances in the case, which it is not necessary to state because they had constructive

knowledge of the mortgage and were bound thereby. The Masons executed a written power of attorney to Pyles which was very broad in its scope. We have not copied it in full in the record on account of its length, and we deem such course unnecessary for the reason that we are of the opinion that, although it authorized Pyles to waive the mortgage in favor of Mitchell & Bollard, yet we are of the opinion that Pyles did not waive the mortgage or consent to the sale of the mortgaged cotton.

On the one hand, Pyles denied having given Dickerson the right to sell the mortgaged cotton; on the other hand, Dickerson was equally positive that Pyles gave him the right to sell the cotton. It is claimed that the testimony of Dickerson is corroborated by the tickets given by the ginner for the said cotton when he purchased it. There were sixteen of these tickets for sales, amounting in the aggregate to something over \$1,297.66, commencing on the 22d day of November, 1927, and ending on the 14th day of January, 1928. These tickets or orders, however, were shown in each instance to have been given to Pyles and indorsed by him before the proceeds were paid to Dickerson. The indorsement of Pyles in each case amounted to a consent of the sale of that much of the property, but it did not establish such a course of dealing as would give Mitchell & Bollard the right to think that Pyles had waived the mortgage on the remainder of the cotton. On the other hand, it would rather notify them that he did not intend to do so because his signature indorsing the order was secured by Dickerson before the proceeds were delivered to him by Mitchell & Bollard. *Imperial Valley Savings Bank v. Huff*, 126 Ark. 281, 190 S. W. 116.

We do not think that the evidence as disclosed by the record establishes any system or course of dealing between the parties which would warrant a belief that Pyles had by such course waived the rights of the mortgagee in the premises in favor of Mitchell & Bollard. A straight rental contract was entered into between the parties for each year, and the mortgage in question in

this case was executed in April, 1927, and contains the usual clause prohibiting the mortgagor from selling or removing the property.

According to the decree, the chancellor made a general finding of fact in favor of appellees, and it cannot be said that his finding is against the preponderance of the evidence. Therefore the decree will be affirmed.
