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49 ER 846

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Text

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ROLLS COURT

Greenwood
and
Churchill

[314] greenwood v. churchill. Feb. 3, 22, 23, April 29, 1843. A. B. was entitled to a legacy, which was charged on real estates devised to C. D. A. B. by a deed, to which C. D. was a party, and which recited that it had been agreed that the legacy should remain on the security of the estate, assigned it to E. F. A. B., without the concurrence of E. F., afterwards released the charge upon the estate, and A. B. and C. D. together afterwards mortgaged the estates, first to SBBAV.S15. GREENWOOD V. CHURCHILL 847 Lord C. and afterwards to the Plaintiff, a judgment creditor, who released his judgment. Held, that the Plaintiff had priority over E. F. A mortgage was made, "subject to prior incumbrances." Held, under the circumstances, that a prior equitable charge was not included, it being unknown to the mortgagee, and it not appearing to have been the intention of the mortgagors to include it. Samuel Churchill the elder, by his will dated the 17th of April 1808, gave to his son Benjamin Churchill a legacy of £8000, to be paid within twelve months after the testator's death, with interest at 4 per cent, in the meantime, and he charged all his real estates in Doddington with the payment of that legacy. Subject to the charge, the estates in Doddington (which were said to comprise Clifton) were devised to Samuel Churchill the son in fee. The testator died in April 1808. The will was proved by Samuel Churchill the son, who was sole executor; and in October 1809, Benjamin Churchill being entitled to receive the legacy of £8000, and being about to marry Eliza Harriot Frome, an indenture of settlement, made between Benjamin Churchill of the first part, Eliza Harriot Frome of the second part, Theodosia Frome of the third part, John N. Fazakerly and John Churchill of the fourth part, and Samuel Churchill of the fifth part, was executed by the several parties thereto; and thereby, after reciting the will of Samuel Churchill the elder, and that the legacy of £8000 was unpaid, and that in respect thereof, Samuel Churchill had agreed to pay interest at 5 per cent., in lieu of interest at the rate of 4 per cent, as directed by the will; and that upon the treaty for the intended marriage between Benjamin

Churchill and Eliza Harriet Frome, and for the considerations therein [315] mentioned, the said Benjamin Churchill had proposed and agreed to settle the sum of £6000, part of the legacy of £8000 (which it had been agreed should remain at interest upon the security of the estates of the late Samuel Churchill, and then of Samuel Churchill, party to the indenture, charged therewith), upon the trusts in the indenture mentioned, it was witnessed, that Benjamin Churchill assigned £6000, part of the legacy of £8000, to the trustees, on the trusts of the settlement, and the better to enable them to recover the £6000, they were appointed the attornies of Benjamin Churchill for the purpose. The legacy was not paid, and under the circumstances aforesaid, by the will of the testator, and the agreement of the devisee, the devised estates were charged with and remained as a security for the payment. Samuel Churchill the devisee, having become embarrassed in his circumstances, executed indentures of the 17th and 18th days of July 1826, made between himself of the one part, and Benjamin Churchill and James James of the other part, and he thereby conveyed his freehold estates, subject to the incumbrances affecting the same, to Benjamin Churchill and James James, in fee upon trust to sell the same, or raise money by mortgage thereof as therein mentioned. Whilst this deed was in preparation, Mr. James discovered, that the legacy of £8000 to Benjamin Churchill, and another legacy to the like amount to John Churchill had not been paid, but remained as charges on the estate of the testator Samuel Churchill, and he thereupon required that releases should be obtained; and accordingly, and without any reference to the settlement of October [316] 1809, by indentures respectively dated the 14th and 15th of July 1826, those legacies were released by John Churchill and Benjamin Churchill respectively. Under these circumstances, and on the 8th of August 1826, Benjamin Churchill and James James executed a mortgage of the estates to Lord Carrington, to secure to him the payment of £5000, and the legal estate was now vested in him. Samuel Churchill and Benjamin Churchill, being parties to the settlement, were aware of it, but it was said, that Mr. James did not know of it till towards the end of September 1826. During these transactions, Samuel Churchill was indebted to the Plaintiffs or to Mrs. Greenwood, in the sum of £2200, to secure the payment of which, he executed a bond, dated the 24th of April 1826, and the condition of the bond being broken, Mrs. Greenwood commenced an action against him, and in or as of Trinity term 1826, obtained judgment against him for the sum of £2273 and costs of suit, and 848 GREENWOOD V. CHURCHILL 6BEAV.317. thereupon, Samuel Churchill and his trustees Benjamin Churchill and James James, for the purpose of preventing execution on the judgment, proposed to Mrs. Greenwood to execute to her a mortgage or security on the estates in question, if she would acknowledge satisfaction upon her judgment. This proposal was accepted, and thereupon, an indenture, dated the 27th of October 1826, and made between Benjamin Churchill and James James of the first part, Samuel Churchill of the second part, and Mrs. Greenwood of the third part, was executed by the parties thereto, and Benjamin Churchill, James James, and Samuel Churchill, subjected and charged the estates, which, by the indentures of the 17th and 18th of July 1826, were [317] conveyed to Benjamin Churchill and James James (but subject and without prejudice to the incumbrances affecting the same estates respectively), to and with the payment of the sum of £2200 to Mrs. Greenwood, with interest at the rate of 5 per cent In this state of things, a suit being instituted by Mrs. Greenwood, it was referred to the Master to ascertain the priorities. The Master, by his report dated the 24th day of November 1841, found that the Plaintiff Mrs. Greenwood, in respect of the principal and interest due to her as in the report mentioned, was entitled to a first charge upon the estates mentioned in the fourth schedule to his report. To this finding an exception was taken by John Nicholas Fazakerly and John Churchill, the trustees of the settlement made on the marriage of Benjamin Churchill, who alleged, that the Master ought not to have found that the Plaintiff Mrs. Greenwood, in respect of

the principal and interest due to her as in the report mentioned, was entitled to a first charge upon so much of the estates mentioned in the fourth schedule as were situate in Dodclington and Clifton, because, as they said, by the settlement, they were entitled to a charge prior to that of Mrs. Greenwood upon such parts of the estates mentioned in the fourth schedule as were situate in Doddington, and also upon such parts thereof as were situate in Clifton, and were, at the time of the death of Samuel Churchill the elder, parts of his estate. The question therefore was, whether the charge of the trustees or that of the Plaintiffs had priority. [318] Mr. Kindersley, Mr. Turner, and Mr. Calvert, in support of the exception. Assuming the effect of Benjamin's release to have been this :- That as between the trustees of his settlement and a subsequent incumbrance for valuable consideration without notice obtaining the legal estate and relying on the validity of such release, the latter would prevail, still that principle will not affect the present question. Here neither party has the legal estate, both have mere equities, and therefore that which is prior in time is prior in charge. The legacy was charged on the estate both by the will and the settlement. The owner of the estate, who was a party to the settlement, contracted to give an equitable charge on it, and the assignment afterwards executed by Benjamin could not prejudice the rights of the trustees; it could not have a more extensive operation than the first assignment. The charge of the trustees was originated in 1808, that of Mrs. Greenwood in 1826; the former must therefore have priority. Again the Plaintiff took "subject to prior incumbrances," and consequently subject to the equitable charge of the trustees. Besides this, she had notice of their charge, or must, in equity, be assumed to have had notice of it, for if she had made due inquiry, she would necessarily have been led to a knowledge of the interest claimed by the trustees. Mr. Pemberton and Mr. Cole, contra, for the Plaintiff. This is not a case in which the parties have an equal equity; the equity of the trustees is inferior to that of the Plaintiff. The legacy was only an incumbrance in the event of the personal estate proving deficient, and until that fact [319] had been established, Benjamin had no right to resort to the real estate for payment. The assignment to the trustees was, at law, a mere nullity, the interest could not at law be passed by an assignment, and after its execution, Benjamin still remained the only person who, at law, was entitled to receive the legacy, to give a discharge, and to release the estate. He effectually released the estate, and Samuel became, at law, the absolute owner. A mortgage was 8BEAV.3SO. GREENWOOD V. CHURCHILL 849 then executed to Lord Carrington, which is admitted to be the first charge; the Plaintiff who had a legal charge by judgment affecting the estate, and on which she might have taken the estate in execution, gave it up for a mortgage of the equity of redemption of that estate which remained after satisfying Lord Carrington's mortgage, namely, of an estate discharged of the legacy. The Plaintiff has what is equivalent to a declaration of trust of the parties who are entitled to the equity of redemption of an estate discharged from the legacy. Where equities are equal, time decides priorities, but where one has got in the legal estate, or an assignment of a term, or a declaration of trust, or anything equivalent, his right will prevail. It is said the Plaintiff takes subject to the trustees' claim, because she took "subject to prior incumbrances," but was this legacy an incumbrance? Had it not been legally released? It is clear also that it was not in the contemplation of either party. Mr. Geldartj for other parties. Mr. Kindersley, in reply. Both parties have mere equities, the Plaintiff has no greater right to call for the legal estate than the trustees. It is said that the [320] charge could not be assigned but has been released. If the charge was equitable, it could no more be released than assigned. The judgment only affected the interest of the owner, and it has been released. The following authorities were referred to during the argument: Jones v. Jones (8 Simons, 633), Beda-tt v. Cardley (1 B. C. C. 353), Wilkes v. Bodington (2 Vern. 599), Ex parts Knott (11 Ves. 609), Frere v. Moore (8 Price, 475), Janes v. Smith (1 Hare, 43), Evans v. Bicknell (6 Ves. 174), Willoughby v.

Willoughby ([Ambler, 282](#)). April 29. the master of the rolls [Lord Langdale]. The question is, whether the trustees of the settlement of 1809 or the Plaintiffs, in respect of their several charges, are entitled to priority of charge upon the estate. For the exception to the report it is said, on behalf of the trustees of the settlement, that by the will of the testator, and also by the agreement of Samuel Churchill the devisee, the legacy was charged on the estates, and that the charge was never released, Benjamin Churchill having assigned his interest before he executed the release in July 1826 : that Mrs. Greenwood had no claim against the estate till October 1826, and that she then acquired a merely equitable charge, which was subject to all prior incumbrances affecting the estate: that the legal estate is now vested in Lord Carrington (and [321] which the claimant of a merely equitable charge cannot disturb), subject to one equitable charge vested in the trustees, and another vested in Mrs. Greenwood : and that the common rule, " qui prior est tempore potior est jure," must be applied, unless something has occurred to disentitle the first in time to the preference. There is a question of form, the exception suggesting that the Master has given to Mrs. Greenwood priority in respect of both Doddington and Clifton, whereas, in fact, he has only given her priority in respect of so much of Doddington as was not Clifton, and there being no exception to that part of the report, which finds the trustees to be second incumbrancers on Doddington; and a question was raised, whether any of the estates in the fourth schedule were derived from Samuel Churchill the testator ò but, in substance, the question seems to be, whether the trustees and Mrs. Greenwood can be said to have equal equities upon the estate or equity of redemption vested in the trustees of the indentures of the 17th and 18th of July 1826. If they have, the trustees, claiming under a security prior in time, may be entitled to the advantage. The legacy, as such, was charged on the land, and, in defect of the personal estate, might, at the suit of the legatee, have been raised out of the land after the testator's death; by the settlement, Samuel Churchill, the devisee, agreed that the legacy should remain on the security of the land, and after a long period of time, Benjamin Churchill the legatee, who had indeed assigned the legacy, but at law remained entitled to receive or release it, did actually execute a deed, whereby the land was purported to be released from the legacy; and, in this state of things, Samuel Churchill conveyed the legal estate to his trustees; the mortgage to [322] Lord Carrington was executed by them, and it is now admitted, that Lord Carrington's 850 SADLER V. LEE BEAV. 323. charge has priority over the claim of the trustees of the settlement. Lord Carrington's mortgage left the equity of redemption in Benjamin Churchill and James James, and they having the equity of redemption, gave the equitable charge to Mrs. Greenwood. Mrs. Greenwood, therefore, claims, as against those trustees and Samuel Churchill, who acquired their title to convey free from charges by the release of Benjamin Churchill the legatee; her claim is upon the estate which was vested in Samuel Churchill's trustees after the execution of the release, or upon the equity of redemption which remained with them after the mortgage to Lord Carrington, and although it appears to me, that the execution of the release was fraudulent as against the persons entitled under the settlement, yet the equity to have a charge upon the estate could not be made available, without first establishing an equity to set aside the release, and it was seen, that the trustees of Samuel Churchill, who had actually contracted to give the security to Mrs. Greenwood, could not have resisted her demand to have the money raised out of the equity of redemption, though they might have resisted the claim of the trustees of the settlement, calling upon them to raise the legacy which had actually, however improperly, been released. Whilst that release remained in force, Benjamin Churchill the legatee, who had himself released, could not, for his own assignees, set up the claim to be paid in priority to a bond fide claimant on the equity of redemption. The right to the legacy was to be made out through him. He had released the legacy, and he and his co-trustee had entered into a contract with Mrs. Green-[323]-wood to give her the

benefit of a charge, and she having a judgment, was, on the faith of that contract and of the estate supposed to be invested in Benjamin Churchill and James James, induced to enter satisfaction on the judgment, in consideration of the charge which she received; and it does not appear to me that the trustees of the settlement, who were to claim through the assignment of Benjamin, could, whilst the release of Benjamin remained unimpounded, establish any priority before Mrs. Greenwood. The trustees, under the deeds of July 1826, had the legal estate till they executed the mortgage to Lord Carrington; after that, they had the equity of redemption. They then engaged to hold the estate as a security for Mrs. Greenwood, and in that way, it appears to me, they gave her a preference. I think also that the argument founded on the words, "subject to prior incumbrances," cannot prevail. The settlement was not known to Mrs. Greenwood. The release of the legacy by the legatee had actually been executed, and was, or might have been known. It is, I think, clear, that the trustees of the deeds of July 1826 did not intend to include the unpaid part of the legacy amongst the "prior incumbrances," and I think that the words do not deprive Mrs. Greenwood of her right. Overrule the exception.