72/4

July 1847, #4
David Bailey
vs.
H. B. Wing + others, Trustees of Lincoln Academy } foreclosure
Lincoln County

on mortgage

Attys - Carter Wells
Porter

land
mortgage
schools?

State of Missouri
County of Lincoln } Be it remembered that on the 15th. day of March, 1842, David Bailey, filed in the office of the Clerk of the Circuit Court in and for said County of Lincoln, in the State of Missouri, a Petition to foreclose a mortgage against, Horace B. Wing, Francis Parker, John A. Woolfolk, John Snethen and William Porter, Trustees of the Lincoln Academy - which said Petition is in words and figures following, to wit:

State of Missouri
County of Lincoln } In the Lincoln Circuit Court
For March Term, 1842.

Petition

To the Hon. the Judge of the Circuit Court within and for the County of Lincoln -

Your petitioner, David Bailey, respectfully sheweth that on the thirtieth day of December in the year of our Lord one thousand eight hundred and thirty seven, there was a balance of eleven hundred and ninety two dollars due your petitioner for building the Lincoln Academy, in the County aforesaid, and to secure the payment thereof the Trustees of said Academy, on the said 30th. day of December A.D. 1837, made, executed, and delivered to your Petitioner, the following Instrument of writing under their hands and seals, and now shown to the Court, the date whereof is the day and year aforesaid, and therein and thereby mortgaged to your Petitioner four certain lots of ground therein mentioned, to secure the payment of the aforesaid sum of money - to wit:

"Know all men by these presents that we

"Richard H. Wolfolk, Horace B. Wing, Emanuel
"Block, Valentine J. Peers, and Francis Parker Trus-
"tees of the Lincoln Academy, in the County of
"Lincoln, and State of Missouri, for and in consider-
"ation of the sum of Eleven hundred and ninety
"two dollars to us in hand paid as Trustees aforesaid
"for the use and benefit of said Academy by David
"Bailey of said County and State have granted,
"bargained and sold, and do by these presents grant,
"bargain and sell as effectually as we as Trustees afore-
"said can dispose of four certain lots of ground,
"situate, lying and being in the Town of Troy in
"said County of Lincoln known and designated on
"Collier's addition to said Town as lots numbered (336)
"Three hundred and thirty six, (337) Three hundred and
"thirty seven, three hundred and fifty (350) and (351)
"Three hundred and fifty one, on which lots, the Lin-
"coln Academy is situated. To have and to hold the
"said lots of ground together with the improvements
"thereon, situated; unto him the said David Bailey his
"heirs and assigns forever. The condition of these
"presents are such that whereas the said sum of
"Eleven hundred and ninety two dollars is due to the
"said David Bailey as a balance for building the
"said Academy. Now therefore if the Trustees afore-
"said or their successors in office shall pay or cause
"to be paid to the said David Bailey or his legal
"representatives on or before the first day of Janu-
"ary, in the year one thousand eight hundred and
"forty, the said sum of Eleven hundred and ninety
"two dollars, with ten per cent interest thereon
"from the date hereof until paid then this deed
"of mortgage to be void and of no effect. It is

"expressly understood that we as Trustees aforesaid
"are not to be personally liable for the payment
"of said sum of money due to said Bailey, in
"any manner whatsoever. In testimony whereof
"we as Trustees aforesaid have hereunto set our hands
"and affixed our seals this thirtieth day of December
"Eighteen hundred and thirty seven.

"(Signed) Richd H. Woolfolk (Seal)
"Horace B. Wing (Seal)
"Emanuel Block (Seal)
"V. J. Peers (Seal)
"Francis Parker (Seal)

"State of Missouri
"County of Lincoln } Be it remembered that on this
"nineteenth day of January in the year of our
"Lord one thousand eight hundred and thirty eight,
"before me the undersigned a justice of the peace
"in and for the County aforesaid came Richard H.
"Woolfolk, Horace B. Wing, Emanuel Block, V.
"J. Peers, and Francis Parker, all of whom are
"personally known to me to be the persons whose
"names are subscribed to the foregoing instrument
"of writing, as having executed the same, and severally
"acknowledged the said instrument to be their
"act and deed of mortgage for the purposes therein
"mentioned. Taken and certified the day and year
"aforesaid.

"(Signed) Charles Wheeler J. P.

"State of Missouri
"County of Lincoln } I Francis Parker Recorder
"in and for the County & State aforesaid, certify
"that I have recorded the within and foregoing
"deed in book D. page 460 & following.

"In testimony whereof I have hereto set my hand
(L.S.) "and affixed my official seal at office the 21st day
"of February, 1838.

"Francis Parker Recorder
pr. Thos. L. Hutt D.R."

Your petitioner further states that the said lots of ground mentioned and described in the aforesaid mortgage, to wit, Lots numbered three hundred and thirty six, three hundred and thirty seven, three hundred and fifty and three hundred and fifty one, are lying and being in the town of Troy, and County of Lincoln aforesaid - And further, that there has been the sum of eight hundred and eighty six dollars and twenty cents, at different times, leaving a balance of three hundred and five dollars and eighty cents yet due and unpaid of the principal, exclusive of interest, and all of which lots of ground the said Trustees were at the time of executing said mortgage or pretended to be seized of in fee for the use and benefit of said Academy - And your petitioner states that the said mortgage has long since become absolute, and that John A. Woolfolk, John Smethen and William Porter are the successors of the said Richd. H. Woolfolk alias Richard H. Woolfolk, Emanuel Block and V. S. Pers, alias Valentine S. Pers (who executed said mortgage) as Trustees of the said Lincoln Academy - And your Petitioner further states that the said Trustees, Horace S. Wing, Francis Parker, John A. Woolfolk, John Smethen and William Porter, reside in the County of Lincoln aforesaid; and he prays that a summons may issue for the said Horace S. Wing, Francis Parker, John A.

Woolfolk, John Snethen and William Porter the Trustees aforesaid, directed to the Sheriff of the County of Lincoln, and that they may be compelled to answer this Petition, and declare whether the facts herein stated are not true - And your Petitioner prays that the equity of redemption of the said mortgaged premises may be foreclosed, and that the lots of ground therein mentioned and described, sold to satisfy the amount yet due on said mortgage to your Petitioner, and that he may have such other and further relief as to your Honour may seem meet &c.

C. Wheeler Atty
for David Bailey Petitioner"

And afterwards a summons was issued in said cause, which is in words and figures following, to wit:

State of Missouri
County of Lincoln } The State of Missouri to the Sheriff of Lincoln County - Greeting: You are hereby commanded to summon Horace B. Wing Francis Parker, John A. Woolfolk, John Snethen and William Porter, if they be found in your County, that they be and appear before the Judge of our Circuit Court on the first day of the next term, to be begun and held at the Court house, in the town of Troy, in and for Lincoln County, State of Missouri, on the third Monday in the present month (March) then and there to answer unto David Bailey plaintiff on a petition to foreclose a mortgage against them the said Horace B. Wing, Francis Parker

Summons

John A. Woolfolk, John Snethen and William Porter as Trustees of the Lincoln Academy, Defendants, And have you then there this writ.

Witness Francis Parker Clerk of our said Circuit Court with the seal thereof affixed at office in the town of Troy, in and for said County of Lincoln this 5th day of March, 1842.

Francis Parker Clerk
Fr. S. G. Hutt D. C.

On which summons is the following return, endorsed by the Coroner of said County, to wit.

Return

"Executed the within writ on the within named defendants Horace B. Wing, Francis Parker, John A. Woolfolk, John Snethen and William Porter severally, by reading the same in their hearing, in the town of Troy, Lincoln County, Missouri, on the fifth day of March, 1842 and then delivering to Horace B. Wing the first named defendant in said writ, a copy of the petition hereto attached, certified under the seal of the Circuit Court of said County.

Alex. Wilson Coroner."

And afterwards, to wit: at a Circuit Court, begun and held at the Court house in Troy, in and for said County of Lincoln, on monday the 21st day of March 1842, to wit: On Saturday the sixth day of said term and the 26th of said month, the following proceedings were had in said cause and entered of record in said Court, in words and fig-

7 ures following, to wit:

David Bailey
v.
Horace B. Wing, Francis Parker, John A. Woolfolk, John Snethen & William Porter } Petition to foreclose mortgage.

Alias Writ awarded

"On motion of the Plaintiff's attorney, an alias writ is awarded against the Defendants and this cause is continued. Wheeler pq."

Which said alias writ is in words and figures following, to wit:

"State of Missouri
County of Lincoln } The State of Missouri to the Sheriff of Lincoln County — Greeting: You are hereby commanded to summon Horace B. Wing, Francis Parker, John A. Woolfolk, John Snethen and William Porter, if they be found in your County that they be and appear before the Judge of our Circuit Court, on the first day of the next term, to be begun and held at the Court house in the town of Troy, in and for said County of Lincoln, on the third monday in July next, then and there to answer unto David Bailey, on a petition to foreclose a mortgage against them the said Horace B. Wing, Francis Parker, John A. Woolfolk, John Snethen and William Porter, as Trustees of the Lincoln Academy Defendants — and have you then there this writ.

Alias

Witness Francis Parker clerk of our

said Circuit Court with the seal thereof affixed, at office in the town of Troy in and for Lincoln County, this 31st day of March, 1842.

Francis Parker Clerk
Jno. T. G. Hutt D. C.

On which summons is the following return endorsed by the Sheriff, to wit:

Return

"Executed the within writ on the within named H. B. Wing in Lincoln County by delivering to his wife a free white woman of lawful age a copy of the within writ, on the 31st day of March 1842, and also on Francis Parker John A. Woolfolk, John Smithers and William Porter by reading the same in their hearing and delivering to John A. Woolfolk, the declaration attached hereunto as certified under the hand and seal of the Clerk of the Circuit Court in Lincoln County, on the 31st day of March 1842.

William Sitton Sheriff
Per Will. E. Dudley Deputy"

And afterwards to wit at a Circuit Court begun and held at the Court house in Troy, in and for said County of Lincoln, on monday the 18th day of July 1842, to wit: on Thursday the fourth day of said Term and the 21st of said month the following proceedings were had in said cause and entered of record in said Court in words and figures following, to wit

"David Bailey

vs.

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Petition to foreclose a mortgage

vs

H. B. Wing, Francis Parker, John A. Woolfolk, John Prether & Wm. Porter

Oyer of Deed craved

Now here the defendants by their attorney, crave Oyer of the supposed deed in said petition mentioned - and thereupon said deed is produced by the plaintiff:-

Which said deed is in words and figures following, to wit:

Deed

"Know all men by these presents that we Richard H. Woolfolk, Horace B. Wing, Emanuel Block, Valentine S. Pears, and Francis Parker, Trustees of the Lincoln Academy in the County of Lincoln and State of Missouri, for and in consideration of the sum of Eleven hundred and ninety two dollars to us in hand paid as Trustees aforesaid, for the use and benefit of said Academy, by David Bailey of said County and State have granted, bargained and sold and do by these presents grant, bargain and sell as effectually as we as Trustees aforesaid can dispose of, four certain lots of ground, situate lying and being in the town of Troy, in said County of Lincoln known and designated on Collier's addition to said town as lots numbered (336) Three hundred and thirty six, (337) Three hundred and thirty seven, Three hundred and fifty (350) and (351) Three hundred and fifty one, on which lots the Lincoln Academy is situated -

To have and to hold the said lots of ground together with the improvements thereon situate, unto him the said David Bailey his heirs and assigns forever - The conditions of these presents are such, that whereas the said sum of Eleven

hundred and ninety two dollars is due to the said David Bailey as a balance for building the said Academy. Now therefore if the Trustees aforesaid or their successors in office, shall pay or cause to be paid to the said David Bailey or his legal representatives on or before the first day of January in the year one thousand eight hundred and forty the said sum of Eleven hundred and ninety two dollars, with ten per cent interest thereon from the date hereof until paid; then this deed of mortgage to be void and of no effect. It is expressly understood that we as Trustees aforesaid, are not to be personally liable for the payment of said sum of money due to said Bailey in any manner whatever. In testimony whereof we as Trustees aforesaid have hereunto set our hands and affixed our seals this thirtieth day of December Eighteen hundred and thirty seven.

Richd H. Woolfolk (Seal)
Horace B. Wing (Seal)
Emanuel Block (Seal)
V. J. Peers (Seal)
Francis Parker (Seal)

State of Missouri
County of Lincoln } Be it remembered that on this nineteenth day of January in the year of our Lord one thousand eight hundred and thirty eight, before me the undersigned a Justice of the peace in and for the County aforesaid came Richard H. Woolfolk, Horace B. Wing, Emanuel Block, V. J. Peers and Francis Parker, all of whom are personally known to me to be the persons whose names are subscribed to the foregoing instrument of writing as having

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executed the same and severally acknowledged the said instrument to be their act and deed of mortgage for the purposes therein mentioned.

Taken and certified the day and year aforesaid.

Charles Wheeler J.P.

State of Missouri
County of Lincoln } Ss. I Francis Parker Recorder in and for the County & State aforesaid, certify that I have recorded the within and foregoing deed in book D. page 460 & following.

In testimony whereof I have hereto set my hand and affixed my official seal, at office the 21st day of February 1858.

Francis Parker Recorder
pr. Thos. G. Hutt. D.R."

And afterwards to wit: on said fourth day of the Term last aforesaid, the following proceedings were had in said cause and entered of record in said Court in words and figures following, to wit:

"David Bailey
v.
Horace B. Wing, Francis Parker, John A. Woolfolk, John Guthrie & Wm. Porter } Petition to foreclose Mortgage.

Demurrer filed

Demurrer to Plaintiffs petition filed by Defendants attorney".

Which said Demurrer is words and figures following to wit:

"David Bailey
v.
The Trustees of Lincoln Academy } On petition to foreclose Mortgage

Circuit Court.
July Term, 1842.

Demurrer And the said Trustees of Lincoln Academy come by William Porter their duly constituted attorney, and defend the wrong and injury when &c. and say the said the Petition and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said David Bailey to have or maintain his action aforesaid thereof against them the said Trustees of Lincoln Academy, and that they are not bound by the law of the land to answer the same, and this they are ready to verify; wherefore for want of a sufficient petition is this behalf they pray judgment, & that the said David Bailey may be barred from having or maintaining his action aforesaid against them.

Wm. Porter, atto. of the
Trustees of Lincoln Academy".

And afterwards, to wit: on the sixth day of the term last aforesaid the following proceedings were had in said cause and entered of record, in said Court in words and figures following, to wit:

"David Bailey
v.
Horace B. Wing, Francis
Petition to foreclose mortgage.

Demurrer Argued Parker, John A. Woolfolk, John Snethen and William Porter.

Demurrer of Defendants being argued, is taken under advisement — and cause continued till next term".

And afterwards to wit: at a Circuit Court begun and held at the Court house in Troy in and for said County of Lincoln, on monday the 17th day of October 1842, to wit, on Thursday the fourth day of said term and the 20th of said month, the following proceedings were had in said cause and entered of record in said Court, in words and figures, following to wit:

David Bailey
v.
Horace B. Wing, Francis Parker, John A. Woolfolk, John Snelson and William Porter, Trustees of Lincoln Academy.
} Petition to foreclose Mortgage

Judgment in Plaintiff for costs

Now here come the plaintiff by C. Wells & Wheeler his attorney & said Defendants by Wm. Porter their attorney - and the Demurrer in this cause being duly considered by the Court it seems to the Court that the petition and the matters therein contained, in manner and form as the same are above stated and set forth are not sufficient in law for the said Plaintiff to have and maintain his action against the said Trustees defendants, and that they are not bound by law to answer the same. It is therefore considered by the Court that said Defendants do have and recover of said plaintiff David Bailey their costs and charges in this behalf incurred - to be taxed according to law and that they have therefor their Execution."

The following are all the costs taxed in said cause, to wit:

			$	cts.
	Alexander Wilson, Coroners fees to wit:			
Costs taxed	For 5 Services		5	00
	William E. Dudley Deputy Shiff's fees		5	00
	Francis Parker, clerks fees, to wit:			
	March 5th 1842. To filing petition 6¼ cts copy of same 1089 words	1.08 cts	1	14¼
	certificate & seal to copy, 50 cts. writ 1.00 cts		1	50
	Mich Term 1842. To filing Return 6¼ cts. motion 25 cts			31¼
	To order for alias writ 25 cts. continuance 25 cts			50
	July Term 1842. filing 4 papers 25 cts order on Oyer 25 cts			50
	Order on filing Demurrer 25 cts continuance 25 cts			50
	October Term 1842. issue on Demurrer 25 cts judgment 25 cts			50
	Order for Execution 25 cts Small	$5.20½		25
	Amount		$15	20½

For this Copy of Record 2950 words $2.95 cts
Certificate & seal to same .50
Certificate & seal to Return of Writ .50

Amount for this Record $3.95 $3.95

State of Missouri
County of Lincoln } I Francis Parker clerk
Certificate of the Circuit Court in and for said County and State, certify that the foregoing Fourteen pages contain a full and complete transcript of the record and proceedings in the cause of David Bailey Plaintiff against Horace B. Wing, Francis Parker, John A. Woolfolk, John Snelson & William Porter, Trustees of Lincoln Academy, Defendants, on a petition to foreclose a Mortgage, as the same remain of record and on file in my office.

Given under my hand and seal of Office at office, in said County, this 25th day of November 1847.

Francis Parker Clerk
By Henry Parker D.C.

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THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the Third Judicial Circuit —— in said State, GREETING:

Whereas, In the record and proceedings in a certain cause lately pending in the Circuit Court of Lincoln County in the Judicial Circuit aforesaid. —— wherein David Bailey was plaintiff and Horace B Wing, Francis Parker, John A Woolfolk, John Snethen and William Porter were defendants. —— in an action of Petition to foreclose Mortgage manifest error hath intervened, to the great damage of the said plaintiff as by his complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the Second Monday in January — next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, HAMPTON L. BOON, Clerk of our said Supreme Court, at office, in the City of Jefferson, the fifteenth —— day of October —, in the year of our Lord one thousand eight hundred and forty-seven.

H. L. Boon

SEAL OF THE SUPREME COURT OF MISSOURI

22.

(4.)

David Bailey
vs. Copy of Record
& Writ of Error
H. D. Wing & others
Trustees of Lincoln
Academy.

Files March 29. 1848
Ft. L. Brown clk

Amount of costs taxed $15.20½
F. Parker clerks fees 2.95
for this record
Cert. & Seal 50
amount $18.65½
Cert. to this writ 50
of Error
Amount $19.15½

State of Missouri
County of Lincoln } In obedience to the within writ, I return the same with the record and proceedings of the cause therein mentioned, certified under my seal of Office and hereto attached, as fully as the same remain of Record in my Office.

Witness Francis Parker Clerk of the Circuit Court of said County of Lincoln with the seal thereof affixed at Office this 25th day of November A.D. 1847.

Francis Parker Clerk
Fr. Henry Parker D.C.

David Bailey
vs
A. B. Wing & others
Trustees of Lincoln Academy

§ Error to the Circuit Court of Lincoln County.

Bailey the plaintiff filed a petition ~~to foreclose~~ against Wing & others defendants to foreclose a mortgage executed to him by them as trustees of Lincoln Academy: The mortgage is as follows: (here insert it beginning at the last line on the first page) The petition after setting out the mortgage avers that there is a balance due the plaintiff of $305.80: That the mortgage has become forfeited; That the mortgagors were seized of an estate in fee in the mortgaged premises for the benefit of the said Lincoln Academy: That some of the original trustees had been replaced by successors who were made defendants and prays for a foreclosure of the equity of redemption: To this petition there was a demurrer filed which being sustained the cause was brought here.

It appears that the ground on which the demurrer was sustained, was, that the execution of the mortgage was a corporate act & that it could have only been evidenced by annexing the corporate seal. It is clear, that a corporation can only convey lands by deed, & that its assent must be evidenced by its common seal. But we do not consider that this principle is applicable to the present case. There is nothing on the face of the petition which shows that the defendants were ever incorporated: The statute creating the corporation is a private one & ~~should have~~ must be given in evidence. The act making the printed statute book evidence of private statutes, does not dispense with the requirement of the common law, that they must be produced in evidence.

The defendants having executed

the mortgage they certainly appear with a bad grace in denying that they had any authority to do so. It is a general rule, that a mortgagor & those claiming under him are estopped from saying that no title was conveyed to the mortgagee: for executing the instrument they hold forth that they have title or authority to convey & that title whether good or bad, the mortgagee is entitled to. This proceeding affects no body but the parties to it. If the defendants had no right to convey, nothing will be sold under the judgment in the case & the purchaser will be defeated in an action of ejectment against the corporation. Had this suit been brought against the corporation by its corporate name, the defence set up would have been more imposing, but as the individuals executing the mortgage & some of their alleged successors are the only persons implicated in this proceeding, they have no cause to complain. The petition moreover avers, that the mortgages were signed in fee of the mortgaged premises & on a demurrer that fact stands admitted. The act of incorporation not being shown, we cannot say what were the powers of the trustees. This case may be like that of De Peyng vs Beekman 2 Hill's Rep. 489 where by an act of the legislature, the trustees of a lot were declared to be a body corporate & it was provided, that the said trustees should have authority to sell the lot; and it was held that a deed executed by the trustees as such & not in the name of the corporation was a valid execution of the power & vested the title in the grantee.

The judgment is reversed the other judges concurring & the cause remanded

W. Scott

87.

~~Dim~~ Bailey

vs

H. W. Wing & al

Opinion

recd

Filed Dec. 21. 1848.
H. L. Boon clk

David Bailey
vs
Horace B King & others } Sup Court
July Term 1848

The said David Bailey by his Attorney appears and says that in the record and proceedings in the above Cause and in the giving of judgment therein there is manifest error in this Court

1st In sustaining the demurrer of the said defendants

2nd In giving judgment for the said defendants therein —

All which he is ready to verify

Carty Wells
for pltff in Error

Joinder in error admitted
Wells

David Bailey
vs
Horace B Ming
and others

Errors

Filed July 10. 1848.
H. L. Boon Clk.

David Bailey
vs
The Trustees of Lincoln Academy

On writ of error from Lincoln Circuit Court.

The Corporation by William Potter its duly appointed attorney, appears and shews the following facts and principles of law, to sustain the judgment of the Court below -

" The paper set out in the petition as a Mortgage, is not the Deed of the Corporation, because it is not sealed with the Corporate or common seal of said body - A Corporation cannot make a valid Deed or Covenant without the use of its Common seal, or seal ordered to be used for the particular case - Perry vs Price 1st Mo. R. P 664 - Van Vechten vs Randall or rather Randall vs Van Vechten 19 Johnson's R. P 60 -

It must appear on the face of the Deed that the seal used is the seal of the Corporation, or seal ordered to be used as such in the particular case. But suppose it could be proven by evidence other than the Deed, it would surely be necessary to allege in the petition that the impression used was the Common seal of the Corporation, or seal ordered by it to be used for the special case - If not so alleged, the proof could not be introduced -

It is the seal, and seal only, which unites the several assents of those who compose a Corporation aggregate, and makes a joint assent of the whole - 1st Chit. Blac. Top P. 386 -

A Corporation aggregate cannot convey real Estate, nor appoint an agent to do an act in which real estate is concerned, without the use of its corporate seal - Kyd on the law of Corporations -

The paper set out in the petition does not purport to be sealed with the Corporate seal, but with the private seal of each who executed it -

Nor is the paper set out in the petition, the Deed of the individuals who subscribed and sealed it,

1st Because it shows that they intended to act as Trustees -

2d Because the paper contains an express agreement that they are not to be personally liable under any circumstance -

Agents or Trustees are never personally bound unless they act without the sphere of their authority, and create no liability on the part of their principal - Walker vs Swartwout 12th Johnson's R. P 444 - Olney vs Wells 18 Johns. R. P 122. Randall vs Van Vechten 19 Johnson's R. P 60 -

The question in this case under the last stated principle, is not whether the security which the Trustees intended to give for the bal. of the debt, is binding on the Corporation, but whether the contract on which the demand accrued is so binding - That the Corporation is bound for the debt, and liable to the action of assumpsit, there can be no doubt - Danforth vs Schoharie Turnpike Company 12th Johnson's R. P 227 - Randall vs Van Vechten 19 Johnson P 60 -

Wm Porter,
Atto. of Corporation

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D. Bailey

v

Trustees of
Lincoln Academy

Brief of Deft. in
Error

David Bailey
vs } Sup Court
Horace B Wing & others } July Term 1848

Statement

The plaintiff filed his petition under the Statute, against the defendants to foreclose a Mortgage executed to him by them in the character of Trustees of Lincoln Academy

The defendants demurred to the petition and the demurrer is sustained -

This is the only error assigned.

The grounds on which the demurrer is sustained is understood to be these.

That Lincoln Academy is a Corporation & can therefore only be bound by its seal.

That the deed of Mortgage is not the deed of the Corporation & therefore can pass no title from it.

For the purpose of this Case let these positions be admitted although the record does not show them. Still the plaintiff in error insists

1st That in all Cases the Mortgagee has a right to foreclose his Mortgage & to sell whatever interest the mortgagors have conveyed to him. See the Statute

2nd That the question as to what title was conveyed by the Mortgage, or whether any Can not in this proceeding be inquired into.

3rd The makers of the deed are estoped from saying that they conveyed no title.

4th The Trustees are sued and not the corporation, if there be one, and they may hold this property by conveyance from some person, for this verry purpose and with power to dispose of it in this very manner — these are questions which can not arise here.—

5th The judgment of the Court will be to see what ever title the mortgage conveyed & the purchaser can then enquire into that right. It is given to the mortgagee as a security for his debt and he has a right to sell it.

6th It is no incumbrance on the title — If it be encumbered at all it is done by the mortgage

C Wells for
pltff in Error

C. Wells
f.q

July Term 1848 –

David Bailey
vs
Horace B. Wing et al

pltffs Brief

C. Wells