

OHIO LIFE INSURANCE AND TRUST
COMPANY

vs.

JAMES ROSS AND WILLIAM WINN
ET AL.

} SEPTEMBER TERM, 1848.

[MORTGAGE—EFFECT OF PRIOR REGISTRATION—ASSIGNMENT—NOTICE.]

H. & M., to secure an indebtedness they were about to contract with the firm of D. & N., by means of promissory notes and bills of exchange, to be made, accepted or indorsed by H. & M., and by them passed to D. & N., to an amount not to exceed \$50,000 at any one time, on the 31st July, 1845, executed to the latter a mortgage of certain real and personal property, which was not recorded until 6½ o'clock, P. M., of the 16th of June, 1846. On the 11th of April, 1846, the same parties executed a second mortgage of the same property to the same mortgagees, to secure a like indebtedness, not to exceed \$75,000, which was recorded at 5 o'clock, P. M., of the 16th of June, 1846. This also not having been recorded in time, with respect to the personalty, a third mortgage, embracing the same and some additional personal property, was executed to the same parties on the 16th, and recorded on the 17th of June, 1846, as a further security, and confirming the preceding one of the 11th of April. Notes to a large amount, drawn and indorsed according to the provisions of these mortgages, were discounted by various parties, and both drawers and indorsers became insolvent. Upon a bill to subject the property to the payment of the debts secured by these mortgages, according to the rights of the respective parties—the contest being, between the plaintiffs, who had discounted the acceptances of H. & M., made subsequent to the second, and in ignorance of the existence of the prior unrecorded mortgage, and the defendants, Winn and Ross, trustees of Samuel Jones, Jr., an insolvent, who had taken these notes, dated both before and after the date of the recorded, but with knowledge of the existence of the prior, mortgage, in exchange for his own notes, which were negotiated for account of H. & M. It was HELD—

That three bills of exchange, dated the 2d, 7th and 14th of May, 1846, drawn by L. S. N., one of the firm of D. & N., on H. & M., payable to the order of D. & N., and accepted by H. & M., having been previously indorsed by said L. S. N., in the name of the firm of D. & N., and which were discounted by the plaintiffs, were within the tenor of these deeds of mortgage, and secured by them.

That the unrecorded mortgage of the 31st of July, 1845, is invalid against the plaintiffs and others holding acceptances secured by the recorded mortgage of the 11th of April, 1846, and that the notes held by Winn and Ross, dated prior to the date of this mortgage, are not entitled to the benefit of the security, and must be excluded from any participation in the fund raised by the sale of the mortgaged property.

Where a fund is to be applied to one of two sets of creditors, a party liable to both, and who has been released from the costs of the suit, is a competent witness in the case.