No. 12200 1/2

Supreme Court of Illinois

Skerry, et al

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vs.

Benjamin, et al

IN THE ILLINOIS SUPREME COURT.

APRIL TERM, 1859.

AMORY T. SKERRY, JONAS GOSS, ANTHONY LANE, STEPHEN MONTAGUE AND SAMUEL W. BRACE, Appellants,

AGAINST

IRA BENJAMIN, WILLIAM N. BRAINARD AND CYRUS R. JONES, Appellees.

Appeal from the Winnebago County Circuit Court.

ABSTRACT.

THE persons above named as appellants filed their bill of complaint in
18 chancery, 27 Dec. 1858, stating that Skerry on 12 August, 1858, became
1 general assignee of Richard Montague of Rockford, for benefit of creditors,
2 and received an assignment of all his property, and choses in action except his homestead, and personal property exempt from execution, and his interest in certain lands in Michigan, belonging to a partnership consisting of Richard Montague, Hunter Savidge and James Fraser, under the name of Montague, Savidge & Co., and that the other said persons
6 named as appellants were some of his creditors, and brought this bill for
0 themselves and other creditors. Richard Montague, Savidge and Fraser were made defendants below, but did not appear, and no further notice was taken of them.

1 Among the lands conveyed by the assignment to Skerry, was a tract of
2 15 69-100 acres, situate in the city of Rockford, described in the bill.

3 At the time of assignment, that tract of land was subject to a mortgage executed by Richard Montague to Ira Benjamin, in trust, to secure a promissory note made by Montague, Savidge & Co., to William N. Brainard, of Syracuse, N. Y., for $4,500. with a power of sale.

The reason the note and mortgage happened to be given, was that in the latter part of October, 1857, Montague, Savidge & Co. being engaged in carrying on a saw-mill at Mill Point, Ottawa county, Michigan, and manufacturing lumber and selling it there and at Rockford, were in urgent
4 need of several thousand dollars to keep the concern in operation, and applied to Ira Benjamin at Rockford, for the loan of $3,500. Benjamin informed them that he had some thousand dollars belonging to Brainard, and would lend them $3,500 of it, provided they would pay one thousand dollars for the use of it one year, and would give good security by mortgage of lands in Rockford, with power of sale upon default. It being absolutely necessary for them to have the money, and having no other means to raise it, they consented.

The promissory note of the partnership was then executed, and signed also individually by Richard Montague and James Fraser, bearing date 28 October, 1857, for $4,500 payable to William N. Brainard in one year, and a warrant of attorney was annexed, making what is called a judgment note.

Mr. Montague then executed the mortgage to Benjamin, and conveyed
5 the tract of land in fee to him, in trust, according to the face of the indenture, to secure the payment of the money specified in the note, empowering him, in default of payment, to sell and dispose of the land at public sale to the highest bidder, for cash, at the door of the court house, first giving notice of the day, hour, place, and terms of sale, by advertisement in a public newspaper, inserted at least once a week for three successive weeks, the last publication to be not less than thirty days before the time of sale, to satisfy the mortgage money and pay the incidental expenses of sale, and of the administration of the trust.

6 About 19 August 1858, at Chicago, Brainard made a writing purporting to make an equitable assignment of the mortgage and note to defendant Cyrus R. Jones, attorney and counsellor at law of that city, and it was acknowledged and recorded; but Jones did not purchase the note or mortgage, or pay any thing for them; had notice and well knew what the consideration
7 was, and that the note and mortgage were given for money loaned and usurious interest; and he also knew of Montague's assignment to Skerry. The assignment to Jones was for the purpose of collection only, and to avoid any defence of usury; and Jones never paid the $4,300, mentioned as consideration in the assignment to him, or any other consideration for that assignment.

No part of the money being paid, on 6 Nov. 1858, Benjamin gave notice in a newspaper, that on 29 Dec. 1858, he should sell to the highest bidder for cash, all and singular the premises described in the mortgage, or so much as should be sufficient to satisfy the monies secured by the mortgage, and the costs and expenses of the proceeding.

The land is advantageously situated for division into city lots; and has actually been surveyed into streets, blocks and lots, and if disposed of in lots, would bring double the mortgage money, and the sale in the manner proposed would be unjust; and part of the motive of Brainard and Benjamin is to get title to the land for speculation, greatly below its value.

8 The assignment of Mr. Montague is not sufficient to pay the debts for which he is liable; and this land ought not to be sacrificed to pay unjust and usurious claims.

Complainants insist that by the laws of this state, no interest can be allowed on the $3,500; but Skerry submits to pay such sum for redemption as the court may decree.

10 Defendants to answer upon oath. Prayer for injunction and general
11 relief.

19 Injunction ordered and issued, enjoining the sale.

The defendants Benjamin, Brainard and Jones filed their answers under oath, 10 March 1859, in the ~~April~~ July term.

29 Benjamin admits the assignment to Skerry, and that the tract of land
30 described was subjected to the mortgage alleged; that Montague was a partner in firm of Montague, Savidge & Co., in carrying on the business alleged, until summer of 1858; cannot admit that the concern was in an embarrassed condition 7 Oct. 1858, as alleged; admits Montague applied to him for the loan of $3,500, but denies that it was for the firm; admits he informed Mr. Montague that he had some thousand dollars belonging to Brainard, and would loan the same to him to the amount of $3,500, provided he would pay for the use of it one year, $1,000, making in all $4,500, to be paid at the end of the year; and would give his individual
31 note, also signed by the firm of Montague, Savidge & Co. and would secure the payment by a mortgage of land within the city of Rockford, with power of sale, in case of default; and that an agreement was accordingly made, the note to have a warrant of attorney to confess judgment.

32 He admits the making of the note and mortgage accordingly; and that
33 Mr. Montague received $3,500, and no more or other consideration.

32 He admits that 19 August 1858, Brainard made a writing under seal,
13 purporting in consideration of $4,300, to make an assignment of the note
32 and mortgage to Jones as stated; that no part of the money was paid, and that he gave the notice of sale.

He denies that the land is worth a large amount over $4,500; and that it is situated advantageously for division into city lots; says he has been informed and believes that some part of it has been laid out into streets

and lots; but he denies that the land would sell better in parcels than it would in one body.

He denies that it was a part of the motive of himself and Brainard to acquire a title to the property greatly below its value and on speculation.

24 Brainard admits the assignment to Skerry, on 12 August 1858; and
25 that the tract of land described was then subject to the Benjamin mortgage, dated 27 Oct. 1857; that the said mortgage or trust deed was made to secure the payment of a promissory note made by Montague, Savidge & Co. to respondent, then residing in Syracuse, Onondaga Co., New York; that Montague was then partner with Hunter Savidge of Mill Point, Ottawa Co., Michigan, and James Fraser of Rockford, in carrying on the said saw-mill and selling lumber there and at Rockford, under the name of Montague, Savidge & Co., and until the summer of 1858; but whether the concern was embarrassed in October 1857, he has no knowledge.

Montague in October 1857, applied to Benjamin for a loan of money. Benjamin had a large amount of respondent's money for the purpose of loaning on security, and purchasing secured paper. He informed Montague that, he would purchase the note of Montague, Savidge & Co. for $4,500, due in one year, upon its being secured by trust deed or mortgage,
26 and that he did purchase the said note for respondent, and pay $3,500 for it, Montague having executed the mortgage or trust deed to secure it on the premises described; respondent then resided at Syracuse, and had no knowledge of the purchase until after the $3,500 was paid. He denies that the money was for Montague, Savidge & Co., but believes it was for Montague; and he admits that the mortgage is correctly stated.

He did on 19 August 1858 sell the note and mortgage to Cyrus R. Jones, for $4,300, receiving in payment two negotiable promissory notes made by Jones, dated 19 August 1858, payable to respondent, one for $2,000, payable 28 October after date, and one for $2,300, payable 28 December after date; the sale was bona fide for that consideration. At the time he did not inform Jones what consideration was paid by Brainard for the note, and believes that Jones did not have notice, directly or indirectly what consideration was paid by respondent or Benjamin for the note, or that it was given for usurious interest; but the purchase by Jones was bona fide, made in the regular course of business, for a discount of two hundred
27 dollars. Respondent states that the sale was not for collection, or to avoid the defence of usury, but on the contrary he was assured on or about the time of the transfer to Jones and repeatedly thereafter, that no defence of the kind would be made, nor effort be made to hinder its collection; and
13 he admits that the copy of his assignment attached to the bill is correct.

27 Since the making of the assignment to Skerry, respondent has seen it at Rockford; and he was specified as a creditor to the amount of $4,500; admitting it as a true debt; and upon his return he informed Jones of the fact.

Respondent has no knowledge of the notice of sale; it was not published at his request, or under his direction; he had no interest or control over the advertisement, having sold the note.

When he sold the note to Jones, he did not inform him about the thousand dollars or usurious interest, and he believes Jones was entirely
28 ignorant of the fact. He denies that the property is worth a large amount above $4,500; and only considers it good security for that amount; and he denies that he intended to acquire title to the property greatly below its value, having at the time of publication parted with all interest thereto.

34 JONES admits the assignment to Skerry, and the note and mortgage
35 stated, and his belief that there was a partnership of Montague, Savidge & Co. but has not been informed whether it was embarrassed; and he denies knowledge of the negotiation for the loan made by Brainard through Benjamin.

35 On 19 August 1858, Brainard executed and acknowledged the assign-
13 ment to him stated; and on same day he purchased of Brainard the note
35 and mortgage stated, giving him therefor two several promissory notes of that date; one for $2,000, payable 28 October then next, and the other
36 for $2,300, payable 28 December then next; the two notes and assignment were delivered the same day of date; and respondent did not have notice, and did not know the consideration for the note and mortgage was beyond what appeared on their face, that they were for $4,500, and as he was informed for money loaned; and he did not know they were for usurious interest thereon.

At the time of the assignment to him, respondent did not know of the assignment from Montague to Skerry; and he believes the assignment from Brainard to him was not made for the purpose of collection only, and to avoid defence of usury, and his purchase was bona fide.

Soon after respondent's purchase, he was informed that Richard Montague had made an assignment, in which he had set out the debt evidenced by the note and mortgage at its full amount of $4,500.

15 It is true no part of the money has been paid, and that Benjamin pub-
37 lished the notice of sale; but respondent denies all knowledge about the land, or its having been surveyed into lots, or whether by being sold in lots, it might be made to bring much more than the mortgage money.

Upon his information he does not believe that the sale in the manner proposed by the notice would be inequitable or unjust; and does not believe that the motive of Brainard and Benjamin is to acquire title of the land to themselves or one of them by way of speculation, and greatly below its value; and he believes the only motive of Benjamin is to sell the premises for the purpose specified in the mortgage, and that Brainard has no interest in the sale.

Respondent has not been informed whether the property assigned by Mr. Montague is sufficient to satisfy the debts for which he is liable.

8 He cannot of his own knowledge state what the consideration for the
37 note and mortgage was; and when they were assigned to him, he was not aware, and had no reason to believe that they were given for $1,000 over the sum advanced; or for any amount of usurious interest, nor did he then have any intimation thereof, nor was he so informed by Brainard or Benjamin.

38 Respondent has no remembrance that at the time of the assignment to
9 him he knew, was informed, or was aware, or had reason to believe, that
38 Montague, Savidge & Co., at date of note and mortgage, were carrying on the business referred to in the bill; and he cannot now recollect what his belief or reason for belief was as to whether the money was loaned to Montague, Savidge & Co., or to Montague himself, all his knowledge of the subject being derived from the note and mortgage; but he was informed and believed the note and mortgage were given for money loaned.

9 At date of note and mortgage, it was difficult to obtain the loan of money
38 in the northern part of this state, except at rates exceeding the legal; but whether it was almost universally the case, he did not know as he can now remember. It was known to him from information only, that judgment notes and mortgages like those stated were sometimes used as a cover for usury, but he did not know that such was the case to a great ex-

tent, or almost universally in this state; nor did he believe that such a state of facts existed so much so that a person proposing to purchase such notes and mortgages would naturally or reasonably infer that the same were given to secure usury; he did not and does not now believe they were oftener resorted to for that purpose than other securities. The
39 knowledge of such facts did not put him upon inquiry of Brainard or otherwise, and he was not informed that the note and mortgage were for more money than was advanced upon them.

He has set forth all the consideration for the assignment to him; and he cannot tell why $4,300 was the sum inserted in the assignment, further than that such was the amount for which he gave his notes. He did not receive the assignment of the note and mortgage for collection, or for any other purpose but collection for his own benefit of its amount therein expressed; and he did not know of any other purpose for such assignment.

45 While he in good faith purchased the note and mortgage, without notice of any defence, respondent is now informed and believes and admits the fact that Benjamin in some way obtained the note for $3,500, in substance by loan, and that the $1,000 was for the use of it one year; and for the purpose of ending litigation, he is willing and consents that the court by perpetual injunction restrain the collection of so much of the note as to it may seem inequitable; but he insists that he should be allowed to collect the amount of $3,500 and ten per cent. thereon, since the date of the transaction; and should the court be of opinion that he would be equitably entitled to collect the original note and interest at six per cent. (in case he had purchased with notice), then the respondent for the purpose of being relieved from litigation, consents to a perpetual injunction of all but the original loan and six per cent.

Respondent does not intend to admit notice of any defence to the note; but he makes this offer to relieve himself from litigation, and should the court believe he is not entitled to ten or six per cent. interest, he asks that these offers may be without prejudice to his defence.

42 The cause was submitted to the court as between the complainants and Benjamin, Brainard and Jones, on 12 March 1859, upon the bill and the
43 answers of those defendants, and it was decreed that the injunction be dissolved as to the $3,500 principal of the sum specified in the note and mortgage, and interest thereon at six per cent.; and that it be made perpetual, and extended to the note, as to all above that sum and interest, "it appearing to the court that all that part of the said principal sum which is over and above the said $3,500, is usurious and without consideration; and that the said sum of $3,500 ought by the rules of equity to bear interest at the rate of six per cent. by the year." Upon payment of the $3,500 and interest, the note was to be delivered up to be cancelled.

ERRORS ASSIGNED.

Sherry appealed.

47 1. That upon the offer of Jones to submit to a perpetual injunction against collecting more than $3,500, and six per cent. interest, if the court should be of opinion that he was equitably entitled to that interest, the circuit court ought to have found against such interest, and ought not to have dissolved the injunction as to such interest, on that ground, or for any other reason.

48 2. Benjamin had offered to abuse his trust, by selling the land for a large amount of alleged debt never due, and in his answer acknowledges substantially that it was his object to acquire title to the trust property to himself; the circuit court should therefore have perpetually enjoined his selling, and have left the mortgage to be foreclosed in the usual way, or have had the land sold in lots, by its officer, under its own direction.

No 57

Supreme Court

April Term 1859

Skerry and others

apt.

Benjamin and others

$200 ½

Abstract,

Filed May 18, 1859

L Leland

Clerk

Burnap & Harvey