No. 13297

Supreme Court of Illinois

Jones et al

---

vs.

Skerry et al

71641

In the Supreme Court.

CYRUS R. JONES, WILLIAM N. BRAINARD, and IRA BENJAMIN, *Ads.*	APPELLEES,
AMORY T. SKERRY, JONAS GOSS, ANTHONY LANE, STEPHEN MONTAGUE, and SAMUEL W. BRACE.	APPELLANTS.

BRIEF.

Where the borrower seeks relief in a court of equity against an usurious contract, relief will only be granted upon payment of the debt and lawful interest, but where the lender seeks to enforce an usurious contract in equity, the court will administer the law.

Story's Equity Jurisprudence, § 301.
Fanning *vs.* Dunham, 5 Johns Ch. R. 138.

LATHROP & BROWN, for Appellees.

ARGUMENT.

The record shows that Richard Montague on or about the 28th of October, 1857, loaned of Defendant, Brainard, $3,500, for one year, and was to pay $1,000 for the use thereof for that time; and that for such loan and interest the note of Montague, Savidge & Co. to said Brainard for $4,500 was made, at one year, and also signed by said Richard Montague and James Frazer; that to secure this note for $4,500, said Richard Montague and wife executed their Trust Deed to Def't., Ira Benjamin, as Trustee, with power to sell in case of default in payment; that said Ira Benjamin acted as the agent of said Brainard in the negotiation of said loan; and that Brainard assigned the note and Trust Deed to Def't. Jones; that default was made in the payment of said moneys, and that said Ira Benjamin, as such Trustee, advertised said premises to be sold for the payment of said note, in pursuance of the power in said Trust Deed contained.

After the execution of said Trust Deed, said Richard Montague made a general assignment to Amory T. Skerry for the benefit of his creditors:

And the bill in this case was filed by the assignee and certain creditors of said Richard Montague, to restrain the sale of the lands described in such Trust Deed, on the ground of usury in said note. An injunction was granted, and upon the coming in of the answers of the Defendants, Jones, Benjamin, and Brainard, the cause was set for hearing upon bill and answer at the February Term, 1859, of the Winnebago Circuit Court.

The answers of Benjamin and Brainard admit that the original loan was but $3,500, and that $1,000 was included in the note as interest thereon for the one year. Brainard's answer also shows that he sold to Def't. Jones the note and security in question before the same became due, for $4,300, in good faith, and took his notes therefor.

The answer of Jones shows that he so bought said note and securities, and at the price of $4,300; that his purchase was in good faith and without knowledge of the usury in the note, or any defence thereto. Def't. Jones also, in his answer (to relieve himself of litigation) offered to submit to the decree of the court, making the injunction perpetual, as to all the note above the original loan of $3,500, and six or ten per cent interest thereon, as to the court would seem equitable, in case he had had notice of the consideration of the note.

Upon the hearing. the court dissolved the injunction as to the said $3,500, the original loan, and six per cent interest thereon, and made the injunction perpetual as to the collection of the remainder of the note.

The Appellant *complains* that the court allowed any interest on said loan of $3,500; and that the court did not enjoin the collection of all interest.

The Appellant comes into a court of equity in this case, and asks relief against the contract, on the ground of usury; and this he was only entitled to upon payment, or offering to pay, the money actually loaned and lawful interest thereon.

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Fanning *vs.* Dunham, 5 Johns Ch. Rep. 138.

The Appellant in this case has nothing to complain of. He and his co complainants in the court below, had no right to equitable relief except from the voluntary offer of Def't. Jones (to avoid litigation) to be treated as a purchase with notice; and the court below certainly showed him no favor, but imposed upon him as rigorous terms as if he had been payee in the note.

As to the several parts of the second error assigned, (if error it is,)

1st, We say that it could be no abuse of a trust on the part of a Trustee to attempt to carry out the powers conferred upon him. It was Mr. Montague that conditioned his Deed for the payment of the note (loan and usury) and not the Trustee; and it was not the Trustee's business of his own motion to reform the contract.

The second clause of the error, wherein it is supposed that the Trustee's "answer substantially acknowledges that it was his object to acquire title to the trust property to himself," is simply founded upon a mistake of the contents of, or is a mistaken deduction from, the Trustee's answer; as an inspection of the record will show.

The facts failing, we apprehend that the conclusion drawn therefrom as the remainder of said 2nd assignment of error would fail also. That "the Circuit Court should therefore have perpetually enjoined his (said Trustee's) selling, and have left the mortgage to be foreclosed in the usual way, or have had the land sold in lots, by its officers, under its own direction."

The answers are to be taken as true, and are the only evidence in the case, and certainly there is nothing in either of the answers tending to establish the conclusion sought to be assigned as the second error. They show the default in payment and that the Trustee had advertised the premises for sale, strictly in pursuance of the power, for the payment of the debt, and nothing more; and it is a strange conclusion that fairly pursuing a power is an abuse of it on the part of the Trustee. The Trustee has done nothing, under the power, more than Mr. Montague fairly provided for having done by his Deed, in case of default; and if the Deed was executed without fraud, then neither Mr. Montague nor the Appellant in this case have any cause of complaint against the Trustee.

We think the Complainants were not entitled to any relief in this cause under their bill. There is no pretence in the bill that Complainants, or any of them, have tendered the money loaned and lawful interest, nor in their bill do they offer to pay the same, or any part thereof, although the bill set up the loan and admits the default. It is true, the Defendants below did not object on that account preferring to interpose no delays, yet we think the objection should not be entirely overlooked in a case where the Appellant is seeking to avoid the simplest equity to the Appellees.

LATHROP & BROWN,

Attorneys for Appellees.

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In Supreme Court

Cyrus R. Jones
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ads.
Amory I. Skerry
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Points &c
Filed May 5. 1884
H. Kellum
Clerk

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The record shows that Richard Montague on or about the 28th of October, 1857, loaned of Defendant, Brainard, $3,500, for one year, and was to pay $1,000 for the use thereof for that time; and that for such loan and interest the note of Montague, Savidge & Co. to said Brainard for $4,500 was made, at one year, and also signed by said Richard Montague and James Frazer; that to secure this note for $4,500, said Richard Montague and wife executed their Trust Deed to Def't., Ira Benjamin, as Trustee, with power to sell in case of default in payment; that said Ira Benjamin acted as the agent of said Brainard in the negotiation of said loan; and that Brainard assigned the note and Trust Deed to Def't. Jones; that default was made in the payment of said moneys, and that said Ira Benjamin, as such Trustee, advertised said premises to be sold for the payment of said note, in pursuance of the power in said Trust Deed contained.

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The answers of Benjamin and Brainard admit that the original loan was but $3,500, and that $1,000 was included in the note as interest thereon for the one year. Brainard's answer also shows that he sold to Def't. Jones the note and security in question before the same became due, for $4,300, in good faith, and took his notes therefor.

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Upon the hearing, the court dissolved the injunction as to the said $3,500, the original loan, and six per cent interest thereon, and made the injunction perpetual as to the collection of the remainder of the note.

The Appellant *complains* that the court allowed any interest on said loan of $3,500; and that the court did not enjoin the collection of all interest.

The Appellant comes into a court of equity in this case, and asks relief against the contract, on the ground of usury; and this he was only entitled to upon payment, or offering to pay, the money actually loaned and lawful interest thereon.

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As to the several parts of the second error assigned, (if error it is,)

1st, We say that it could be no abuse of a trust on the part of a Trustee to attempt to carry out the powers conferred upon him. It was Mr. Montague that conditioned his Deed for the payment of the note (loan and usury) and not the Trustee; and it was not the Trustee's business of his own motion to reform the contract.

The second clause of the error, wherein it is supposed that the Trustee's "answer substantially acknowledges that it was his object to acquire title to the trust property to himself," is simply founded upon a mistake of the contents of, or is a mistaken deduction from, the Trustee's answer; as an inspection of the record will show.

The facts failing, we apprehend that the conclusion drawn therefrom as the remainder of said 2nd assignment of error would fail also. That "the Circuit Court should therefore have perpetually enjoined his (said Trustee's) selling, and have left the mortgage to be foreclosed in the usual way, or have had the land sold in lots, by its officers under its own direction."

The answers are to be taken as true, and are the only evidence in the case, and certainly there is nothing in either of the answers tending to establish the conclusion sought to be assigned as the second error. They show the default in payment and that the Trustee had advertised the premises for sale, strictly in pursuance of the power, for the payment of the debt, and nothing more; and it is a strange conclusion that fairly pursuing a power is an abuse of it on the part of the Trustee. The Trustee has done nothing, under the power, more than Mr. Montague fairly provided for having done by his Deed, in case of default; and if the Deed was executed without fraud, then neither Mr. Montague nor the Appellant in this case have any cause of complaint against the Trustee.

We think the Complainants were not entitled to any relief in this cause under their bill. There is no pretence in the bill that Complainants, or any of them, have tendered the money loaned and lawful interest, nor in their bill do they offer to pay the same, or any part thereof, although the bill set up the loan and admits the default. It is true, the Defendants below did not object on that account preferring to interpose no delays, yet we think the objection should not be entirely overlooked in a case where the Appellant is seeking to avoid the simplest equity to the Appellees.

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Points &

Filed May 5. 1859
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