**Lenox Vs. Prout**

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**SooperKanoon Citation** : sooperkanoon.com/78804

**Court** : US Supreme Court

**Decided On :** 1818

**Appeal No.** : 16 U.S. 520

**Appellant** : Lenox

**Respondent** : Prout

**Judgement** :

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**Lenox v. Prout**

**16 U.S. (3 Wheat.) 520**

*APPEAL FROM THE CIRCUIT COURT*

*FOR THE DISTRICT OF COLUMBIA*

## SYLLABUS

The endorser of a promissory note, who has been charged by due notice of the default of the maker is not entitled to the protection of a court of equity as a surety; the holder may proceed against either party at his pleasure, and does not

discharge the endorser by not issuing or by countermanding an execution against the maker.

By the statute of Maryland of 1763, ch. 23, s. 8, which is perhaps only declaratory of the common law, an endorser has a right to pay the amount of the note or bill to the holder, and to be subrogated to all his rights by obtaining an assignment of the holder's judgment against the maker.

The answer of a defendant in chancery, though he may be interested to the whole amount in controversy, is conclusive evidence if uncontradicted by the testimony of any witness in the cause.

The facts of this case were as follows:

William Prout, the plaintiff in the court below, on 29 July, 1812, endorsed without any consideration a promissory note made by Lewis Deblois in his favor for $4,400 payable in thirty days after date. This note was discounted by the defendants as trustees for the late Bank of the United States for the accommodation and use of the maker, and not being paid, an action was brought against him and another against the endorser in the name of the trustees, and judgment rendered therein in the same circuit court in the term of December, 1813.

In the April following, Prout, fearful of Deblois'



failure, called on the defendant Davidson, who was agent of the other defendants, and requested him to issue a *fieri facias* on the judgment against Deblois, promising to show the marshal property on which to levy. On 16 April or thereabouts, Davidson directed an execution of that kind to issue, and Prout, on being apprised thereof, offered to point out to the marshal property of the defendant and to indemnify him for taking and selling the same. But before anything further was done, Davidson countermanded this execution, and on 2 May, 1814 or thereabouts a *ca. sa.* was issued against Deblois by the clerk through mistake, and without any order of Davidson or the other defendants. This

was served on Deblois on 10 May, who afterwards took the benefit of the insolvent laws in force within the District of Columbia, the effect of which was to divide all his property among his creditors, whose demands were very considerable. It appears from the evidence probable that if the *fieri facias* had been prosecuted to effect, a great part of the money due on the judgment against Deblois, which had been recovered on the note endorsed by Prout, would have been raised, and the latter, in that case, would have had to pay but a small sum on the one against him. But as matters stood, little or nothing was expected from the estate of Deblois, and of course no part of the judgment against Prout could be satisfied in that way, but the whole still remained due and unpaid.

The *fieri facias* appears to have been countermanded

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the day after it was received by the marshal, of which Prout had notice soon after.

On these facts, the circuit court decreed that the appellants should be perpetually enjoined from proceeding at law on the judgment which they had obtained against Prout, and that they should also pay him his costs of suit to be taxed. From this decree the defendants below appealed to this Court.

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MR. JUSTICE LIVINGSTON delivered the opinion of the Court, and after stating the facts, proceeded as follows:

The only ground on which this decree can be sustained is that the countermand by Davidson of the *fieri facias* which had issued on the judgment against Deblois absolved the complainant from all liability on the one which had been recovered against him on the same note, and this has been likened to certain cases between principals and sureties, but it does not fall within any of the rules which it has been thought proper to adopt for the protection of the latter. Although the original undertaking of an endorser of a promissory note be contingent, and he cannot be charged without timely notice of nonpayment by the maker, yet, when the holder

has taken this precaution and has proceeded to judgment against both of them, he is at liberty to issue an execution or not, as he pleases, on the judgment against the maker, without affording any cause of complaint to the endorser, or if he issues an execution, he is at liberty to make choice of the one which he thinks will be

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most beneficial to himself, without any consultation whatever with the endorser on the subject; nor ought he to be restrained by any fear of exonerating the endorser, from countermanding the service of any execution which he may have issued, and proceeding immediately, if he chooses, on the judgment against the endorser. And the reason is obvious, for by the judgment, they have both become principal debtors, and if the endorser suffers any injury by the negligence of the judgment creditor, it is clearly his own fault, it being his duty to pay the money, in which case, he may take under his own direction the judgment obtained against the maker. By an act of Maryland, it seems expressly provided, which is, perhaps, only declaratory of the common law, that an endorser may tender to a plaintiff the amount of a judgment which he has recovered against the maker of a note and obtain an assignment of it.

But it is alleged that in this case there was a positive agreement on the part of Mr. Davidson with Mr. Prout to issue a *fieri facias* and proceed therein, and that by not doing so, the latter was thrown off his guard and lost the opportunity of an indemnity out of the estate of Deblois. Without deciding what might have been the effect of such an agreement, it is sufficient to say that there is no evidence of it. Mr. Davidson expressly denies that he agreed with the complainant or even promised him to issue a *fieri facias* against the estate of Deblois, and that he went no further than to say that he would consult his lawyer. Not being able immediately to find his lawyer,

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and not knowing whether some advantage might not be taken if he refused to comply with the complainant's request, he directed a *fieri facias* to be issued,

which, for reasons assigned by him, was afterwards recalled. To this answer of Mr. Davidson it is supposed by the claimant's counsel no credit is due, because his commission on the sum in question gave him an interest in the controversy, and he might be answerable over to his principal for his conduct in this business, *non constat* that he would be entitled to any commission on this sum. It is quite as probable he was acting under a fixed salary which would not be affected by the event of the suit, and as to his responsibility, none could exist if he had acted within the scope of his authority, and if he had transcended his power as agent, it would hardly be fair that his constituents should suffer by his act. But admitting both objections, and they will not effect the verity of his answer, for if he had a direct interest in the event of the suit, and to the extent of the whole sum in controversy, still his denial of a fact directly alleged in the bill would be entitled to full credit, according to the rules of a court of equity, where not a single witness has been produced to disprove it and where the circumstances of the case and his own conduct render his account a very probable one. If he had not been made a defendant, which was not a very correct course, he might have been examined as a witness for the other defendant or for the complainant, but having been made a defendant, and being the only one acquainted with the transaction, the Court is of

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opinion that his answer, uncontradicted as it is, is proof against the complainant of the nonexistence of any such agreement as he alleges was made between them in relation to the issuing of the *fieri facias.*

Nor would Mr. Prout have suffered by the withdrawing of the *fieri facias,* which is the burden of his complaint, if he had done what he might and ought to have done. He had sufficient notice of this fact before the *ca. sa.* was served, to have called and paid the judgment against him, and thus have obtained a control over the one which had been recovered against Deblois. If he had done this, instead of censuring the conduct of Davidson, he might have issued a *fieri facias* himself, and secured a property, which if it has not been applied towards his relief, is owing more to his own neglect in not paying in time a debt justly due from himself than to any other cause whatever.

A person so regardless of his interest, as well as duty, as Mr. Prout has been, who has not only refused to pay a note endorsed by him when due, but has put the holders to the trouble, delay, and expense of proceeding to judgment against him, has but little right to be dissatisfied, if a court of equity shall not think itself bound by any extraordinary exertions of its powers, to extricate him from a difficulty and loss which he might so easily have avoided.

The decree of the circuit court is reversed, and the complainant's bill must be dismissed, with the costs of that court, to be paid by the complainant to the defendant.

*Decree reversed.*