

Venable Vs. Mcdonald

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Court : US Supreme Court

Decided On : 1829

Appeal No. : 27 U.S. 107

Appellant : Venable

Respondent : Mcdonald

Judgement :

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Venable v. McDonald

27 U.S. (2 Pet.) 107

APPEAL FROM THE CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF KENTUCKY

SYLLABUS

The Court set aside a conveyance which had been made to defeat the ,claims of creditors.

In proceedings to set aside a conveyance of real estate made in fraud of the rights of creditors, it is not necessary to make a mortgagee of the estate a party, his rights under the mortgage not being brought into question.

The appellees, at the May term 1822 of the Circuit Court for the District of Kentucky, obtained a decree against Venable and others for the sum of \$4,700 with interest and costs upon which execution was issued and levied by the marshal upon 367 acres of land and sundry slaves and other property, named in the return, dated September 2, 1822, shown, as the marshal says, "as the property of Abraham Venable, and not sold for the want of time."

On 26 November, 1822, the appellees exhibited their bill, in which, after giving a history of their case, and stating the facts of the levy on the property of Venable as above, they charge that on 9 February, 1822, the said Venable executed two several deeds, whereby he conveyed all the land, slaves and effects, which belonged to him to George McDonald, who is made defendant; that

"the said deeds are fraudulent, intended to defraud the creditors of the said Venable, particularly the complainants, and were executed without any valuable or legal consideration passing between the parties, with that fraudulent purpose and intent,"

&c.; The complainants pray that the said estate and property be decreed to be sold to discharge the debt aforesaid for an injunction and for general relief.

The defendant, McDonald, by his answer admits that he claims the property as his own by virtue of a contract and the conveyances which are referred to, and also in virtue of a mortgage executed long anterior to the decree against

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Venable by said Venable to him and George Norton in order to indemnify them for their joint liability as the security of Venable in two bonds, the one as the administrator of the estate of George Adams and also as the security for said Venable as the guardian of the infant heirs of said Adams, states the probable

extent of that liability, and denies all fraud or intention of fraud.

The evidence and proceedings and other matters in the case are stated more at large in the opinion of the Court.

The court below by decree declared the conveyance to McDonald fraudulent and void and directed the sale of the estate, under the execution, *subject however to the mortgage executed by the defendant Venable to the defendant George McDonald and George Norten dated 22 May, 1820, which deed of mortgage is not in any manner to be affected by said decree.*

The defendants below prosecuted this appeal, and claimed to reverse the same on the ground:

1. That the court erred in the decree in annulling the deeds of Abraham Venable to George McDonald.
2. The court ought not to have directed a sale of the real and personal estate conveyed by Abraham Venable to George McDonald and George Norten and in their possession until the mortgage was satisfied or the condition it contained was performed.
3. Want of parties. No decree should have been pronounced by which the interest of George Norten in the mortgaged premises could be affected as he was not before the court.

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MR. JUSTICE STORY delivered the opinion of the Court.

The Bank of the United States, at Lexington, Kentucky, on 3 July, 1819, discounted a note of the same date for \$4,700, signed by one George Norten, payable sixty days after date, to one Daniel Halstead or order and by him endorsed to Abraham Venable and subsequently and severally endorsed by William Adams and Joshua Norten and by the latter to the bank. The note was not

paid at maturity, and due diligence having been used to obtain the amount from the maker according to the local law, a suit in equity was brought in the circuit court in November, 1821, against all the endorsers (as is course by the local law) in which a decree for principal, interest, and costs was rendered in May, 1822. An execution issued upon this decree against the parties, upon which a tract of land of 200 acres, a tract of 113 acres, several negroes, and some other personal property of Venable were levied on, but the same were not sold, the former for want of proper bidders, the latter on account of a claim set up to the same by the defendant, George McDonald.

The present bill, after stating these facts, charges that on 9 February, 1822, Venable made two deeds to McDonald by which he conveyed the tracts of land and other property to McDonald, and that the same deeds were

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colorable and fraudulent, and the prayer of the bill is that the deeds may be declared fraudulent and the property may be decreed to be sold and an injunction granted in the meantime, and for further relief.

The answers of the defendants McDonald and Venable deny that the deeds of 9 February, 1822, were colorable or fraudulent, and on the contrary assert them to have been *bona fide* and for a valuable consideration. The answer of McDonald further sets up a mortgage executed by Venable on 22 May, 1820, to him, McDonald, and one George Norton, (who is not a party to the bill), of a tract of land of about 245 acres (part of the land in controversy) and of nine negroes (including those in controversy) to secure them against a bond executed by them as sureties, with Venable as principal, upon his appointment as guardian of the infant children of George Adams deceased, whose mother Venable had since married, she having previously administered upon Adams' estate. The guardianship bond was in the penal sum of \$4,000, and upon the usual condition.

The cause being put at issue, upon the final hearing the court decreed the deeds of 9 February, 1822, to be colorable and fraudulent and ordered the same to be

set aside and annulled, and that the plaintiffs might pursue their judgment and execution against the real and personal estate of Venable as if the said deeds had never been made, subject however to the mortgage aforesaid, *which was not in any manner whatever to be affected by this decree.*

It is upon an appeal taken by Venable and McDonald to this decree that the cause is now before this Court, and independently of the merits as to the asserted fraud or good faith of the deeds of 1822, two objections have been made by the counsel for the appellants.

The first is that the court erred in directing a sale of the estate conveyed to McDonald and Norton until their mortgage was satisfied or the condition thereof performed, because it had no right to change, by sale of the estate, the rights or interests of the mortgagees under a conveyance admitted to be valid unless by their consent. This objection is founded upon a misinterpretation of the decree, which

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does not authorize any sale to be made by virtue of it, but merely removes out of the way the deeds which obstructed a sale at law under the judgment and levy. The decree also leaves the mortgage wholly untouched, and consequently no sale could prejudice the rights appertaining to it.

The next objection is that George Norton, the mortgagee, is not made a party to the bill. But this objection falls for the same reason as the preceding. As the mortgage is not in any measure interfered with by the decree, it is wholly unnecessary to make Norton a party to the bill. He has no interests which are controverted or injured by declaring the nullity of the other deeds.

The real question then is whether the deeds of 1822 are fraudulent or not, and to that question the consideration of the Court will now be addressed. The answers of the defendants having denied all fraud, those answers are entitled to stand unless they are overcome by the testimony of two witnesses or of one witness and circumstances.

One of the deeds purports, for the consideration of \$6,260 paid and secured to be paid, to convey to McDonald the two tracts of land; the other, for the consideration of \$3,400, to convey certain slaves, household furniture, horses, wagons, hogs, sheep, cattle, &c.;, and other stock usually belonging to a farm. The bill charges that these constituted the whole estate of Venable, and this fact is not attempted to be denied in the answer. Except his liability as guardian and as endorser of the note to the bank, it does not appear that Venable was at this time indebted to any persons whatever; the fact is charged in the bill that he was not under any embarrassment, and it is supported by the proofs.

Here, then, is the case of a person upon the eve of a decree being rendered against him for a large sum of money, which it is admitted would go far to his ruin, making conveyances of his whole property real and personal to his brother-in-law for an asserted consideration equal to its full value. The brother-in-law is proved to be a thrifty, industrious man, but not at the time known to possess property sufficient to pay the purchase money, having other pursuits and as soon as

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the purchase is made suffering the estate to remain in possession of the former tenant.

How and in what manner is the consideration paid or received? McDonald in his answer states that Venable, under the administration of his wife on Adams' estate and his own guardianship of her infant children, was indebted for assets received to the amount of \$6,286.54, and that he, McDonald, finding that Venable had used this money and was wasting the estate of his wards and was involved in difficulties by his suretyship for others, &c.;, with a view to his own safety and that of George Norten (who is now insolvent), first tool the mortgage, and afterwards being fearful of the waste of the estate, was induced to purchase it, that he might have the control of it, and accordingly he did purchase it. The manner in which the consideration was paid and secured he states to have been as follows. He assumed by a written contract given to Venable to pay the debt due by Venable to his wards when they came of age, and in the meantime to pay annually a sufficient

sum for their maintenance and support, to be allowed in extinguishment of the interest that might become intermediately due. The contract itself is now produced, and it contains an agreement to pay to the wards not a specific sum of money, but "as much money as they shall have a right to demand of Venable, as guardian, when they become of age." It further contains a promise to furnish Venable "as much beef, pork, hay, corn, flour, &c.;, to the amount of what it shall be worth, to board, school and clothe" his wards.

The residue of the consideration for the purchase, *viz.*, \$2,060.50, McDonald asserts to have been paid by him in money to Venable, part of which he admits that he borrowed, but he does not state how much. By the contract above stated, he was to pay the money within three months after the purchase.

Such is the nature of the purchase and the consideration as disclosed in the answer of McDonald, and which Venable in his own answer adopts and supports.

The first remark that arises on this part of the case is that the whole consideration stated in the deeds is \$9,660,

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and that the answers state the amount actually paid or secured as no more than \$8,347. This discrepancy is utterly unaccounted for. In the next place, the debt assumed to be due by Venable to his wards is nowhere established to have been really due by any proofs in the record. Now this was a material fact in the case exclusively within the knowledge and power of the defendants, which they were bound to establish by competent evidence and which in its own nature was susceptible of proof beyond their answers. It was vital to the good faith of the transaction. The omission to do it would of itself throw some doubt upon the transaction. But the proof in the record, so far as it goes, affords a strong negative upon the assumed debt. The inventory of George Adams' personal estate is only \$2,032.07. His widow (independently of the charges of administration) was entitled to one-third part of it. One of the children (a daughter) died early, during her minority, and without stopping to inquire, whether her share in the personalty

would not fall to the mother, the remaining sum, deducting only the mother's third, left the sum of \$1,355 only as the distributable shares of Venable's wards. There is in the record a paper which is without any signature or proof of any sort, which puts Adams' personal estate at a much lower sum than the inventory, but which, by adding his real estate at \$2,200 and the rent for three years and the hire of negroes and interest, swells the aggregate of his estate to \$6,286.54. This paper can be viewed in no other light than a mere speculative statement, but if it were otherwise, it is obvious that it cannot be permitted to pass as proof of the balance then due to Adams' children.

In the first place, the real estate is not properly chargeable to the account of the administrator or guardian merely as such.

The suggestion is that it was afterwards sold and the proceeds received by Venable, for which he may be justly held accountable. There was no sale made, so far at least as we have any evidence, under the General Act of Kentucky on this subject passed 3 February, 1813, and therefore that may be laid out of the question, though it is

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observable that a guardian is not authorized under that act to sell without an order of court and giving a bond with sufficient sureties. The only proof of any authority to sell found in the record is the following order:

"Fayette County, to-wit, April court, 1818. On motion of Abraham Venable, Patterson Bain, E. Yieser, and Charles Humphreys are appointed commissioners under the act of assembly of the last session for the sale of the estate mentioned in said law as belonging to the heirs of George Adams deceased, situated in Lexington."

The act here referred to is not in the record, but so far as we can gather its contents by the order itself, the commissioners, and not the guardian were authorized to make the sale. Their proceedings under the order do not appear. The only evidence is from a purchaser at the sale, who states that he bought the

estate at about \$2,200, and with the exception of about \$300, he paid the money to Venable by direction of the commissioners. Whether this payment was authorized by the act is left uncertain, and indeed whether security was not directed to be taken from the commissioners on the sale, as in ordinary cases. It is far from being certain that the sureties on Venable's guardianship bond were liable for the sum so received. But we may assume for the present that they were.

Then there is a charge of \$900 for rent received upon the real estate for three years, and for hire of negroes for seven years \$490, although the inventory mentions only "one negro girl and child, valued at \$300," and to complete the amount, a charge of interest is added on the whole, of \$1,171.98. Now certainly there is no pretense for the last charge and no justification of it by any proof. The children were maintained during this whole period by Venable and his wife, and in the most favorable view, if Adams' estate had been completely settled, the interest and income from the children's shares of his whole estate could not be presumed to amount to more than, if to so much as, the reasonable expenses for their support and maintenance. At least if they did, that fact should have been made out by some probable evidence. Then again, the guardianship bond is in the penalty of \$4,000

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only, and this circumstance discredits the supposition that the sureties had incurred any liability beyond that amount. The usual practice is to take the penalty in double the amount of the supposed value of the property intended to be secured by it. The original administration bond of Mrs. Venable was in the penalty of only \$6,000, and the inventory of personal estate of George Adams, made by her on oath, which is not attempted to be impugned, covers but one-third of that amount. It has been said at the bar that by the laws of Kentucky, sureties may be charged beyond the penalty of their bonds, and to the same extent of liability as their principals. If this were so, it would diminish the force of any argument grounded on the penalty, though it certainly would not establish that there was in fact a debt due to the children beyond that sum.

But among the acts of Kentucky we cannot find any statute that leads to such a conclusion. The act 23 January, 1810, concerning the bonds of certain officers, guardians, administrators and executors, has no provision, which varies from the general law on this subject, limiting the responsibility of sureties to the penalty of the bond. It merely declares that "an action in one case on such bond shall in no wise abate or bar an action thereon for another cause," which is entirely consistent with a recognition of the general rule of law. And the Act of 15 January, 1811, which is supplementary to the former and gives a remedy against sureties beyond the penalty of the bond, is expressly limited to bonds given by *public officers*. No adjudged case has been cited which goes to establish the position that the statute of 1810 has been differently construed by the state courts. It is not in our view of the facts a very material consideration, because there is no evidence offered which proves that a debt was due to Venable's wards, even to the amount of the penalty. And in a case like the present, it was indispensable for the defendants to make out so material a fact with all due certainty. The court cannot presume it. The statement already alluded to as a statement of the administration or guardianship account contains no deductions whatever, either for charges, taxes,

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repairs, or even for debts due from the intestate, or for expenses incurred for the children. It assumes only one side of the account, and deals not in any credits, though the presumption of their existence is almost irresistible.

In respect, then, to this part of the assumed consideration of the deeds, there is the want of certainty as to any amount of debt due to the children, and the contract given to secure to Venable does not ascertain any amount as due. It merely provides in general terms that McDonald shall pay to the children "as much money as they shall have a right to demand," &c.;, when they shall come of age, and in the intermediate time they are to receive an amount sufficient for their support and maintenance. Even this contract is left wholly without any mortgage or other security for its fulfillment, either to Venable or to the children, and Venable strips himself of his whole estate and relies exclusively upon the good faith and solvency of McDonald to extricate himself from all future difficulties. Such a case may exist,

but it must involve some suspicion when the party who resorts to such measures has a demand hanging over him which goes deeply to affect his solvency and his interests and may furnish another and cogent motive for the transaction.

The provision in this contract for the support and maintenance of the children is somewhat extraordinary, and of a very indefinite nature and extent. McDonald agrees to deliver to Venable " *as much* beef, pork, hay, corn, flour, &c.;, to the amount *of what it shall be worth* to board, school, and clothe" them. So that even the amount is not fixed and is to depend upon the future pleasure of the parties. In case of a real purchase, such a provision could not be expected even though it went merely to keep down the accruing interest, and in the present case it is not by its terms confined even within that limit. The contract itself is not avowed upon the face of the deeds, and must be deemed a mere private and secret bargain, to be kept back by the parties.

Then again as to the remaining cash payment of \$2,060.50. The bill directly charges that it was a mere formal payment, and that the "money was by the said Venable

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returned back to McDonald, or to the person of whom McDonald borrowed it." The answer of McDonald admits that a part was borrowed, but his denial of its return is couched in terms of an ambiguous purport. He says that the sum of \$2,060.50 "was paid by this defendant in the presence of Moses S. Hall," &c.; That he

"borrowed a portion of the money to enable him to make the cash payment. That it was paid by him to his co-defendant (Venable) in good faith, and that no part of it was returned to him *by said Venable*, nor did this defendant receive any part of said money back from said Venable *by any fraudulent contrivance*, as the complainants have falsely alleged."

Venable in his answer says, "that the said sum of money was paid to him by his co-defendant [McDonald] *in good faith*, and that no part of it was returned *by him* to his co-defendant." Now it is remarkable that neither of these answers, in terms,

denies that the money so borrowed was returned back to the person of whom it was borrowed, which is the gist of the charge in the bill; nor does McDonald deny that he received it back, but only that it was not returned to him *by Venable*. Nor are these allegations thus loose from mere accident or carelessness. On the contrary, the proof is direct that the money borrowed was returned to McDonald and was by him returned to the lender. Moses S. Hall, in his testimony, says he was present when the money was paid and it was handed to Mrs. Venable. William Achison testifies that McDonald told him that the next morning after the money was paid, Mrs. Venable was at his house with the money, on her way to town to deposit it in bank, and he, McDonald, borrowed it of her and returned it to Hendley (the lender) the same day. Hendley himself, in his testimony, says

"McDonald came to me and told me that he had made a purchase; that I was a man of tolerable good sense, *I could tell by a little what a good deal meant*, and observed that he wished to borrow of me \$1,000, which I loaned him, and *stated he would return it in a few days*. He observed that Venable was *embarrassed by a debt on account of Norton, and that he had bought him out of every species of property*, and that he wanted the money to pay him. He also offered

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me a mortgage on a negro man and a tract of land for the payment of the money, but I declined receiving any security, &c.;, because I expected to receive the money back in a few days. I took a memorandum of the amount and numbers of the different notes loaned him, *thinking it was possible I should receive the same notes back, &c.*; *In about three or four days I received from said McDonald the same notes back again*. McDonald stated to me that he was security for Venable, as guardian of Mrs. Venable's children, to the amount of \$3,000 or \$4,000, and that he made this purchase to secure himself."

In point of fact, independently of the purchase, as we have already seen, he had a mortgage on the same estate as security for that very liability. But it is impossible to wink so hard as not to perceive that if this statement be true, and it is nowhere contradicted or denied, the borrowing of the money was merely to exhibit before

witnesses a formal payment, and that there was no real *bona fides* in this part of the transaction. It was an attempt, fruitless, as the event has shown, to throw a colorable gloss over the real transaction.

How the other part of the purchase money was obtained is not proved by the defendants, although there is some hearsay evidence that other money was borrowed, but the answers of the defendants furnish no statement of the amount.

There is also testimony in the case from several witnesses of the confessions of Venable as to the object of the deeds and of subsequent acts of control over the estate to some extent from which unfavorable inferences have been deduced at the argument against the validity of the deeds. It has been said at the bar that these confessions and acts, being subsequent to the execution of the deeds, ought not to be permitted to prejudice the title of McDonald, and are not evidence to bind him. It is true that neither the acts nor confessions of a grantor under such circumstances are admissible to defeat the title of the grantee. But they are certainly admissible to disprove the answer of the grantor when he is a party to the bill. If they discredit his answer, they withdraw from the case all the influence which his concurrence in the statement of the grantee would otherwise

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have, and to this extent they have a bearing upon the whole merits of the case, but not beyond it. Upon examination of these confessions, they certainly exhibit some misgivings on the part of Venable, and some proof that the sale of the estate was to defeat the debt due by him to the bank as security of Norton. The acts of control by Venable over the estate are more equivocal, and but for his subsequent liberal participation in all the produce of the estate, would perhaps of themselves not be very significant. As the case is, they cannot but have some weight.

Upon the whole, without going more at large into the case, the circumstances are such that it appears to us these deeds were not *bona fide* and for a valuable consideration, and therefore they were properly set aside by the circuit court. Looking to the nature of the transaction, the assumed confederations, the relation

and circumstances of the parties, the impending decree, the sweeping extent of the deeds, the nondisclosure, on the face of them, of the real considerations, the objects of the collateral and secret contract, the very great doubt as to what was due to the children, and the ambiguous explanations of the parties, we think the presumptions are so strong against the validity of the deeds that they ought not to be supported.

The decree of the circuit court is affirmed with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky and was argued by counsel, on consideration whereof it is considered, ordered, and decreed by this Court that the decree of the said circuit court in this cause be and the same is hereby affirmed with costs.

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