

Bank of Georgia Vs. Higginbottom

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Decided On : 1835

Appeal No. : 34 U.S. 48

Appellant : Bank of Georgia

Respondent : Higginbottom

Judgement :

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Bank of Georgia v. Higginbottom

34 U.S. (9 Pet.) 48

APPEAL FROM THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF SOUTH CAROLINA

SYLLABUS

South Carolina. G., the executor of his father, who had devised his estate to G. and his other children, sold the estate and became himself the purchaser of it, and in order to secure the portions of the other devisees, who were minors, confessed

a judgment, June 1, 1819, on a promissory note in favor of two persons without their knowledge in a sum supposed to be sufficient to be a full security for the amount of the portions of the minors. The judgment was kept in full operation by executions regularly issued upon it, so as, under the laws of South Carolina, to bind the property of G. He was then engaged in mercantile pursuits, and had other property than that so purchased by him. G. afterwards became insolvent, and the claims of the devisees of his father under the judgment were contested by his creditors as fraudulent, the plaintiffs in the judgment, having no knowledge of it when it was confessed, the amount of the sum due to the co-devisees not having been ascertained when it was confessed, no declaration of trust having been executed by the plaintiffs, and false representations of his situation having been made by G. after the judgment whereby his creditors were induced to give him time on a judgment confessed to them subsequently.

The judgment of June 1, 1819, was held to be valid, and the plaintiffs in that judgment entitled to the proceeds of the sales of the estate of G. for the satisfaction of the amount actually due to the co-devisees by G.

The appellants, on 4 April, 1827, filed their bill in the Circuit Court of the United States for the District of South Carolina to set aside a judgment or postpone the effect of the same, which had been confessed by William S. Gillett, in the Barnwell District Court of the State of South Carolina for the sum of \$30,000.

The judgment was founded on a promissory note drawn by William S. Gillett, in favor of James Higginbottom and William Provost for \$30,000, dated 1 June, 1819, and payable on demand. The judgment was confessed on 1 June as of the fourth Monday of March, 1819. William S. Gillett was the acting executor of the last will and testament of his father, Doctor Elijah Gillett, by which a specific portion of the estate was devised to him and other parts of the estate

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were given to the children of the testator. By the terms of the will, the executors had power to sell such part of the estate devised, as it might be beneficial or

expedient so to dispose of. William S. Gillett was also, at the time of the confession of the judgment, the guardian of his infant brothers and sisters, the devisees of his father of all the estate not specially devised to him.

In December, 1818, the personal estate of the testator, Elijah Gillett, was appraised and \$56,474, and on 22 March, William S. Gillett, after having selected or taken by lot a portion of the estate to which he considered himself entitled, sold at public auction a large number of the negroes and all the personal estate of the testator. The proceeds of the sale exceeded \$40,000, and William S. Gillett was the principal purchaser at the sale.

The judgment for \$30,000 was confessed for the use and benefit of the younger children of Elijah Gillett, the testator, all at that time minors, was for about the sum which was supposed to be in the hands of their guardian after the sale, and was alleged to have been given in trust to the said Higginbottom and Provost to secure to them their interest in the estate of their father.

At the time of the confession of this judgment of 1st June, 1819, William S. Gillett was largely indebted to the complainants and concerned in a mercantile house in Savannah, the affairs of which, a witness stated, he did not seem to consider very prosperous; he did not represent the house to be bankrupt or likely to become so, but, on the contrary, he then and long afterwards appeared confident that the affairs of the house would wind up satisfactorily.

On 21 October, 1821, William S. Gillett confessed a judgment in the Circuit Court of the United States for the South Carolina circuit for the sum of \$7,849 in favor of the Bank of Georgia under an agreement that time should be given to pay the amount thereof, *viz.* one, two, three and four years.

The bill states that, the debt due on that judgment being unpaid, the complainants, to have satisfaction thereof, lately sued out a *fieri facias* against William S. Gillett on it, under which a sufficient sum was made to pay the debt due on the

same, but the proceeds of the said execution are claimed under the judgment in favor of Higginbottom and Provost for the payment and satisfaction of the same. The bill prays for general relief, &c.;

It appeared in evidence that on 12 April, 1825, James Higginbottom and William Provost, the plaintiffs in the judgment of June 1, 1819, at the request of Robert, Isaac and William Scarborough, who had been named as co-executors of the will of Doctor Gillett, assigned over, under their respective hands and seals, to them the judgment of June 1, 1819, to the use and benefit of the testator's younger children for the purpose of securing and assuring to them respectively their interest in the testator's estate.

In answer to an interrogatory propounded to him on behalf of the complainants, the counsel who prepared the confession of the judgment of June 1, 1819, stated,

"The judgment confessed by William S. Gillett to Higginbottom and Provost was prepared by me as a security for the parts or portions of the younger children of Doctor Elijah Gillett deceased, of the estate of their father, and I think that at the time, I wrote or sketched off a draft of a declaration of the trust upon which the judgment was given, to be signed by Higginbottom and Provost, neither of whom were present. I do not recollect to have seen this paper after it was executed, although I may have seen it. Indeed, I always believed that I had seen it till I came to tax my recollection for the purpose of answering this interrogatory. My impression has always been that such a paper was executed, and I have now no doubt but that it was. I recollect perfectly that Gillett expressed a determination not to confess the judgment unless a declaration of its object was signed by the nominal plaintiffs."

The plaintiffs in the judgment of 1 June, 1819, issued a *fiery facias* to October term, 1819, of the Barnwell District Court, which was entered in the sheriff's office on 19 July, 1819; an alias *fiery facias* was lodged in the sheriff's office on 3 February, 1824; and a pluries *fiery facias* was "lodged to bind," in the sheriff's office on 31 December, 1824.

The accounts of William S. Gillett, as the executor of his father, were audited and a balance found due by him to the estate, including interest to July 11, 1831, of \$48,961.92.

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After appropriating to the payment of the balance due by the executor on the judgment to Higginbottom and Provost all the proceeds of the sales under the judgment of the Bank of Georgia, there would be a deficit, to make up the amount due by William S. Gillett to his co-devisees and legatees, of \$14,138.66.

On 25 June, 1825, the circuit court, by a decree, held that the declaration of trust contained in the assignment of the judgment of 1 June, 1819, executed by Higginbottom and Provost, under which the minor children of Doctor Elijah Gillett claimed precedence,

"was a sufficient declaration in writing, and that a regard to the interests of the minors, sanctioned the court in sustaining the judgment for any amount that should be justly due to them."

Afterwards, on 22 July, 1832, the circuit court gave a decree in favor of the defendants in that court, and the complainants entered this appeal.

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MR. JUSTICE Mc LEAN delivered the opinion of the Court.

In their bill the complainants ask the court to set aside or

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postpone a judgment for \$30,000, confessed by Gillett in favor of Higginbottom and Provost on the ground of fraud, and that certain moneys made by execution on a judgment subsequently obtained by the complainants be directed to be paid over in satisfaction of such judgment.

The judgment for \$30,000 was confessed in 1819, on which executions were regularly issued from time to time and entered in the clerk's office, so as, under the laws of South Carolina, to bind the property of the defendant.

The appellant insists that this judgment, which was held to be valid by the circuit court, should be set aside because the promissory note on which the judgment was confessed was given without consideration, and that the judgment must consequently be declared void or postponed to the demands of *bona fide* creditors.

From the facts of the case, it appears that William S. Gillett was the acting executor of the estate of his father, and that under the will he sold the property and became the purchaser of it to a much larger amount than the sum for which judgment was confessed. He was then engaged in mercantile business, and had other property than that which he purchased at this sale, and the judgment was confessed to secure the payment of the purchase money to the brothers and sisters of the defendant, who were the devisees in the will.

This sale, having been made by a trustee to himself, must have been set aside and annulled on the application of the *cestui que trust*, but no such application being made, it cannot be treated as a nullity as it regards strangers to the transaction.

The appellants insist that the plaintiffs in the judgment had no knowledge of it at the time it was entered; that the amount to which the devisees were entitled had not been ascertained; that false representations were made by Gillett, subsequent to this judgment, as to the extent of his property, through which the complainants were induced to give time on the judgment entered in their behalf; and that these facts are evidence of fraud.

The evidence does not show that at the time the judgment was confessed, Higginbottom and Provost had any knowledge of it, but this is not deemed material, as they subsequently recognized the trust and acted under it. Nor is it essential to

the validity of the judgment, that the distributive shares of the devisees should have been ascertained, provided they exceed in amount the sum for which judgment was entered. And this appears to be the fact from a final adjustment of the executor's account.

The false representations by Gillett respecting the extent of his property, if true, as charged by the complainants, could not affect the previous judgment, if entered in good faith. But, connected with other facts, they may go to show in its true light the conduct of the defendant. If he represented his property as wholly unencumbered after the judgment for \$30,000 had been confessed, it would show a design on his part to practice a fraud on the complainants, and might cast a suspicion over the first judgment. But these representations are not proved, as alleged in the bill. They were not, as made by the defendant, so incompatible with the facts of the case as not to be accounted for by a somewhat partial estimate of the value of his property, free from motives of fraud. The defendant subsequently became a bankrupt, but this was produced by various occurrences stated in his answer, which were not and could not be foreseen.

Shortly after the purchase, it appears the defendant was solicitous to secure the devisees, and he consulted counsel as to the best mode of effectuating this object. A mortgage was at first suggested, but afterwards a judgment was deemed preferable. This mode, it seems, is frequently adopted in South Carolina to secure the payment of money. A judgment being entered, it is only necessary to issue an execution from term to term, which may remain in the clerk's office, to create and continue a lien on the personal property of the defendant.

As a matter of form, a note was executed by the defendant for \$30,000, and this was made the foundation of the judgment. Was this note given without consideration? The defendant had purchased the property of the infant devisees, to a greater amount than that for which the note was executed. And was not the executor bound by every consideration arising from the agency he exercised, and the relation in which he stood to the devisees, to secure for their benefit the

purchase money?

They were infants, and consequently incapable of protecting

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their own interests. The defendant was enriched by the purchase of their property to a greater amount than the \$30,000. And if by the conditions of the sale, time was to be given for the payment of the money, that circumstance does not make either the note or the judgment fraudulent. The judgment was intended to operate as a security for the payment of the money, and the defendant was bound in good faith to give this security. Had he failed in this respect, he would have been guilty of a most aggravated fraud against his infant brothers and sisters, whose property had been placed at his disposal.

But the appellants contend if a judgment may be taken to cover a future debt, the intent should appear on the face of the proceedings, or at all events be evidenced by a contemporary written declaration. That in this case the judgment is assumed as a security for a debt to third persons not named in the proceedings, and whose interest in the judgment can only be proved by parol evidence.

No written declaration of the trust, made at the time judgment was entered, is in evidence, but the counsel who procured the judgment swears that at the same time he thinks he wrote or sketched off a draft of a declaration of the trust upon which the judgment was given, to be signed by Higginbottom and Provost, and his impression has always been that such a paper was executed; that in taking the judgment, he acted for the children of Doctor Gillett; and that William S. Gillett, the defendant, expressed apprehensions that the judgment, at some future period, might be used to his injury and contrary to his intention, and to obviate that difficulty it was concluded that a declaration of the trusts upon which it was given should be signed by Higginbottom and Provost.

From this evidence it is extremely probable that a declaration of trust was executed at the time of the judgment or shortly afterwards, but whether this was done or not, the trust is clearly established by the evidence, and the transaction is

not impeachable under the statute of frauds.

If, as contended by the appellants, the judgment was confessed by the appellee with a view of covering his property from his creditors, it would have been fraudulent. And if he had expressed to no one the object of the trust, the confession

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of a judgment for so large a sum to persons who had no claim against him would be evidence of fraud. But there are no facts or circumstances connected with the entry of the judgment which cast a suspicion of a fraudulent intent by the defendant.

It is insisted that this judgment is void, as it gave a preference to certain creditors and tended to delay others.

There was no unjust or illegal preference in the case, and it is not seen how creditors were delayed by the judgment. It did not prevent any creditor from bringing suit and obtaining judgment and execution. This was done by the appellants, and a large sum of money was made on their execution, by a sale of the defendant's property. This proceeding was in no respect embarrassed by the previous judgment for the benefit of the infant devisees of Doctor Gillett. But that judgment having been kept in force by the issuing of executions from term to term, the money made under the junior judgment must be applied in discharge of the prior lien. There is no injustice or hardship in this. After the first judgment shall be paid, any money collected from the defendant by execution would of course be paid on the judgment of the appellants.

But the counsel of the appellants contend that the continued possession by the defendant of the property on which the executions under the first judgment operated as a lien is conclusive evidence of fraud. And a number of authorities are cited to show that where an absolute bill of sale of property is made, and the possession does not accompany the deed but remains with the vendor, the transfer is not only voidable, but is absolutely void.

The authorities referred to seem to have no direct application to the case under consideration. The judgment does not purport to transfer the property of the defendant, nor was it intended to produce this effect. Connected with the executions which were issued, a lien was created, and this was not only the fair and legal effect of the proceeding, but the one which the parties to the transaction intended to secure.

The possession of the property by the defendant was perfectly consistent with the judgment, and affords no evidence of fraud. It was like every other case of judgment and execution, which bind the real and personal property of the

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defendant, though in his possession. By the laws of South Carolina, this lien may be continued for any time not exceeding twenty years.

No one could have been misled by this judgment. It was entered on the public record of the district, and the executions which were issued on it were duly noted on the clerk's docket, and these constituted the lien under the usages of South Carolina. It was therefore unnecessary to express on the record or in any other manner what the effect of these proceedings would be.

But it is contended that the lien set up under these proceedings cannot be sustained, as it covered the entire property of the defendant, and that this must be considered evidence of fraud.

The lien, it is true, extended to the entire property of the defendant within the State of South Carolina, but it could at any time be discharged by the payment of the judgment. This lien, therefore, neither withdraws the property of the defendant from the reach of his creditors nor delays the legal enforcement of their claims.

The circuit court, with the consent of parties, directed the sale of the entire property of the defendant, and as the proceeds of this sale fall many thousand dollars below the judgment and a still greater sum below the amount the executor owes the devisees, it cannot be necessary to examine some of the principles

settled by the circuit court preparatory to a final decree. We think the application made of the money arising from the sale, by the final decree of the court below, was right, and it is

Affirmed. The bill of the complainants must therefore be dismissed 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 South Carolina and was argued by counsel, on consideration whereof it is ordered, adjudged, 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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