Downs Vs. Kissam

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Court : US Supreme Court

Decided On : 1850

Appeal No. : 51 U.S. 102

Appellant : Downs

Respondent : Kissam

Judgement :

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Downs v. Kissam

51 U.S. (10 How.) 102

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SYLLABUS

Where the circuit court instructed the jury

"that if any one of the mortgages given in evidence conveyed more property than would be sufficient to secure the debt provided for in the mortgage, it was a circumstance from which the jury might presume fraud,"

this instruction was erroneous.

Any creditor may pay the mortgage debt and proceed against the property; or he may subject it to the payment of his debt by other modes of proceeding.

A writ of *fieri facias* issued on 5 January, 1842,

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from the Circuit Court of the United States for the Southern District of Mississippi at the instance of Joseph Kissam the defendant in error, against one James J. Chewning, for $2,336.22, besides costs, and was levied by the marshal, April 14, 1842, on negro slaves Nancy and her child, Milley and her child, Viney and her child, Tempey and her child, Mary, Louisa, Juliana, and Charlotte, as the property of the said Chewning, and these negroes were claimed by the plaintiff in error as his property. And thereupon the defendant in error, by plea, averred in the said circuit court that the said slaves, at the time &c.;, were the property of the said Chewning, and upon this plea issue was tendered and joined between the defendant in error and the plaintiff in error. This issue was tried at November term, 1846, when a verdict passed for the defendant in error as to all the slaves except Juliana, and a bill of exceptions was tendered by the plaintiff in error, and upon the judgment rendered upon the verdict, this writ of error is brought.

From the bill of exceptions, the case appears to have been this:

On the trial of the issue, the defendant in error produced the deposition of the said Chewning, taken by consent of parties. On his examination, the counsel for the plaintiff in error exhibited to the witness a mortgage, marked A, made by him to the Commercial and Railroad Bank of Vicksburg, dated 31 December, 1839, and in answer to questions proposed by said counsel he deposed that he executed the mortgage on the day of its date, that he then owed the bank $130,000 &c.;, that all

the slaves seized under the execution were embraced in the mortgage except Juliana. The counsel also exhibited to the witness mortgages made by him, as follows: one to William M. Beal dated 7 March, 1842, and marked B; one to James Cuddy dated 13 July, 1840, and marked C; one to F. Sims, dated 13 July, 1840, and marked D; one to the plaintiff in error, dated 8 September, 1841, and marked E; and witness deposed to the execution of the same at the times of their respective dates; that some of the slaves in controversy were embraced in each of the said mortgages, and in that to the plaintiff in error, all except Juliana; that he was indebted to the mortgages respectively in the sums mentioned in the instruments; that all the salves in controversy, except Juliana, were on December 31, 1839, in Carroll Parish, Louisiana, and so remained until removed by the witness into Mississippi in March, 1842, in consequence of his having sold his lands in Louisiana.

The mortgages were referred to in and accompanied the deposition.

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Exhibit A recited a debt evidenced by a promissory note bearing even date with the mortgage for $130,000, to be paid as provided in the mortgage in yearly installments, one of $500, and nine of $13,888.88, besides accruing interest.

Exhibit B recited a debt of $7470.60, contracted in January preceding.

Exhibit C recited a debt of $1,200, evidenced by notes bearing even date with the mortgage.

Exhibit D recited a debt of $4,871.92, evidenced by a note dated four days preceding.

Exhibit E was made to indemnify plaintiff in error as surety of Chewning, on an administration bond in the penal sum of $50,000, and also to secure two debts, in amount $6,000.

On the trial, the defendant in error, having read to the jury the whole examination of the witnesses excepting said exhibits, refused to read them to the jury, whereupon the counsel for the plaintiff in error moved the court to exclude the whole deposition, which motion was overruled, and the counsel excepted.

The said counsel then read to the jury the said exhibits, as evidence for the plaintiff in error, and produced the note for $130,000 recited in Exhibit A, which was admitted to be in the handwriting of Chewning.

And the court, on the prayer of the defendant in error, gave the following instructions to the jury:

"1st. If the jury find that anyone of the mortgages conveys more property than would be sufficient to secure the debt provided for in such mortgage, such mortgage is fraudulent -- that is, the fact of more property being conveyed in the mortgage than was necessary to secure the debt is a circumstance from which the jury may presume the mortgage was fraudulent."

"2d. If a mortgage is made to cover more property than is sufficient to pay the debt intended to be secured, for the purpose of preventing other creditors from levying, it is fraudulent and void, though the debt intended to be secured be *bona fide* -- that is, the fact of more property being conveyed than was necessary to secure the debt is a circumstance from which the jury may infer fraud."

"3d. If the jury believe that the object of Chewning was to hinder, delay, or defraud his *bona fide* creditors by the execution of the mortgages, then the mortgages are void, and the jury should find for the plaintiff in the execution, but, in coming to your conclusion on this subject, you must recollect that Chewning, the defendant in the execution, was authorized to prefer one of his creditors to another, provided his object only was to enable such creditor to collect his debt; he had no right,

in enabling one creditor to collect his debt, to give him control of an amount of property much larger than was necessary to pay the debt."

To which instructions the plaintiff in error excepted.

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

An execution having been levied on certain slaves as the property of one James J. Chewning, at the instance of the defendant in error, which slaves were claimed by the plaintiff in error, an issue was joined under the laws of Mississippi to try the right of property. On the trial, a mortgage was given in evidence, executed by Chewning in 1839, long prior to the levy, to secure to the Railroad Bank of Vicksburg a debt of $130,000. This mortgage embraced all the slaves levied on except one. Other mortgages were given in evidence, executed by Chewning, to secure the payment of several other debts.

On the trial, the circuit court instructed the jury that if "any one of the mortgages conveyed more property than would be sufficient to secure the debt provided for in the mortgage, such mortgage was fraudulent," and that the fact of more property being conveyed as aforesaid was a circumstance from which the jury might presume fraud.

This instruction is erroneous. It is no badge of fraud for a mortgage, which is a mere security, to cover more property than will secure the debt due. Any creditor may pay the mortgage debt and proceed against the property, or he may subject it to the payment of his debt by other modes of proceeding.

The judgment of the circuit court is

Reversed and a venire de novo awarded.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this

Court that the judgment of the said circuit court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said circuit court with directions to award a *venire facias de novo.*