

8649

No. _____

Supreme Court of Illinois

M.Fitts et al

vs.

Thomas Davis et al

71641  7

State of Illinois
Williamson County 3rd In the Williamson Circuit
} Cont. 1860 March Term

To the Honorable William Allen Judge
of the 26th Judicial Circuit and Judge of
the Williamson Circuit Court in Chancery sitting
Your Orators Morn Terrillo

Hills and Wiley Marcus citizens of
Ponton Franklin County Illinois humbly
complaining sheweth unto Your Honor
that one John P. Garner formerly a
Citizen of Williamson County and now
residing in Jackson County Illinois
on or about the 2^d day of April 1855
purchased of your Orators a certain
tract of Land together with a certain
Steam saw and grist mill situated therein
the said tract of Land lying and being
in the County of Williamson and State
of Illinois and known and described
as follows to wit North East $\frac{1}{4}$ of the
South East quarter and the South East
 $\frac{1}{4}$ of the North East quarter of Section
No 16. Township No 8 South of Range
No 11 East. Containing 80 acres more or
less that the consideration agreed
to be paid for said Land and Mills
was \$1800 $\frac{00}{100}$ for which said amount
the said John P. Garner then and there
executed to Your Orators one promisory

Notes due and payable Twelve Months
after date for the sum of \$1800⁰⁰/₁₀₀
to secure the payment of which notes
the said John B Farmer by his certain
deed of that date conveyed to your
Orators in fee simple the above
described tract of Land and
premises subject however to a condition
of defeasance upon the payment
of the said sum of \$1800⁰⁰/₁₀₀ according
to the tenor and effect of the said notes
all of which will more fully appear
by reference to said notes which is
herewith filed marked (A) and made
a part of this Petition.

Your Orators further represent
that said Mortgage was duly filed
and recorded in the Records Office
of Williamson County Indiana on the
6th day of April 1855 in Book "K"
Pages 185 & 186 and that after the
execution and record of said Mortgage
aforesaid tract on or about the 24th day
of April 1855 one John J Davis
since deceased obtained a Judgment
in the Circuit Court of Williamson
County against the said John B Farmer
for the sum of \$193²²/₁₀₀. That subsequent
to the rendition of said Judgment
tract on or about the day of 1855.

the said John T Davis departed
this life that Letters of administration
upon his said Estate was afterwards
granted on or about the 14th day of
August 1855 duly issued by the
Probate Court of Williamson County
to Chancy Davis and Thomas D Davis
that afterwards to wit on or about
the 17th day of January 1857 the said
Chancy Davis and Thomas D Davis
Admins and Adms. as aforesaid caused
an Execution on said Judgment
to be levied upon the above described
Land and by virtue thereof sold
the same and they the said Chancy
& Thomas D Davis became the purchasers

Your Orators further charge
that the said Chancy Davis and
Thomas D Davis Admins and Adms.
as aforesaid conspiring and
colluding together for the purpose
of defrauding Your Orators claim
and pretend that by virtue of said
Execution sale to be the owners
of said Land and premises when
in trust and in fact the same in
law and equity the same belong
to your Orators. That after making
of said Mortgage before the maturity
of said debt secured by the Mortgage

an aforesaid Court on the 14th day
of June 1855 Your Orators at
the request of the said John B Farmer
delivered to him to be cancelled the
above mentioned Note given as aforesaid
to secure the purchase money of said
Land & in consideration thereof
and concurrently therewith the said
John B Farmer by Warranty Deed
in fee simple conveyed to your Orators
the said Land and premises thereby
meaning & intending to direct himself
of & interest your Orators with
whichever interest or title he might
have therein. And your Orators
directly charge that said Mortgage
debt never was paid satisfied or
discharged in any other way than
by the execution & delivery of the
above mentioned deed as herein
before stated and the Complainants
aver & charge that the said Land
Mortgaged as aforesaid conveyed
back to Complainants together
with the Mills therein was scant
security for & in fact was not really
worth \$1800⁰⁰ the price given therefor
& the amount for which the same was
Mortgaged and Complainants further
aver that Defendant Farmer was at

that time wholly irresponsible &
misolvent, & unable to pay the said
\$1800⁰⁰ independant of the Lands &
Mills Mortgaged as aforesaid, of
all which the said Dancy & Thomas D
Davis then & there had Notice

In view of the premises Your
Orators would therefore pray that the
said John B Farmer and Dancy Davis
and Thomas D Davis be compelled
to appear in this Honorable Court,
and then and there upon their corporal
oaths to answer all and singular
the allegations and charges in this
Your Orators Bill of Complaint

That upon a final hearing of this
cause if it should appear from the
proofs that a sale ought to be
made of the premises under said
Mortgage, that an account be
taken of what is due Your Orators
on said Mortgage and that the
proceeds of said sale when made
be applied to the payment of Your
Orators debt. That in a case a
sale cannot be made and the
proofs should warrant that there
be a strict foreclosure of said
Mortgage and that the title in
and to said premises be confirmed
in Your Orators

and that said sale under the said
Execution be declared null and
void and that the clouds over
your Orators title be dispelled
and that the same be quieted and
conformed unto your Orators
and that your Honor will grant
unto your Orators such other
and further relief in the premises
as the nature of the case may
require. Will you grant your
Orators your most gracious writ
of Summons to be directed to the
said John B Garner, Nancy Davis
& Thomas D Davis. Commanding
them to be and appear before your
Honor upon a certain time to be
therein ^{to be} specified and then and there
answer the premises and abide the
order and decree of this Honorable
Court.

Montemello Fitts
Wiley Mar 26

Duff & Mackey
Flannigan & Allen
Attys for Compliments

(Marked)

Filed March 1st 1860

Signed Jm Pradd cler

State of Illinois, Of the March Term of
Williamson County ^{2⁰⁰} the Williamson Circuit
³ Court A D 1860

The joint and several answers of
Thomas D Davis and Nancy Davis
Admrs and Admstrs of the estate of
John S Davis dec'd to the Bills of
Complaints of Mortimerello Filts and
Wiley Marshall.

These Defendants now and
at all times hereafter saving and ~~reserving~~
reserving all manner of benefit and
advantage to themselves of exception
to the many errors and insufficiencies
in said Bill contained for answer thereto
or any or much or such part thereof
as these defendants are advised is
material for them to make answer
unto, they answer and say, They
admit that on the 2nd day of April
A D 1855 that John D Garner purchased
of Complainant the Real Estate described
in Complainant's Bills mentioned and
for the consideration in said Bills of
Complaint mentioned and that said
deed of Conveyance was filed for record
in the Recorders Office of Williamson
County on the 16th day of July A D 1857
and was duly recorded by said Recorder
on the 20th day of July A D 1857.

They further admit that the said John B Farmer mortgaged to Complamants the Real Estate described in Complamants Bills for the consideration mentioned in said Mortgage and upon the conditions therein mentioned on or a 2^d day of April A D 1855 which said Mortgage deed was recorded in the Office of the Recorder of Williams County on the 6th day of April A D 1855 These Defendants further answering say that they have been informed and they verily believe that the said Farmer did not make default neglect and refuse to pay to Complamts according to the conditions of said Mortgage the said sum therein specified but that the same Mortgage in Complamants Bills mentioned was satisfied for and in consideration of the sum of \$ and for said consideration the said John B Farmer made and executed a Warranty deed of Conveyance to the said Complamts Fitts & Marsels for the Lands and Real Estate described in Complamants Bills in satisfaction of said Mortgage described in Complamants Bills which said deed from the said Farmer to the said Complamants Fitts & Marsels was acknowledged by the said Farmer

before one Elijah Ross an acting
Justice of the Peace within and for the
County of Franklin on the 14th day
of June A.D. 1855 and that on the
29th day of January A.D. 1857 the Clerk
of the County Court within and for the
County of Franklin attached his
Official Certificate certifying that
the said Ross was an acting Justice
of the Peace in and for said County
of Franklin and that on the 25th
day of May A.D. 1857 the said deed
was recorded in the office of the
Recorder of Williamson County
wherefore these defendants deny
that the legal Estate in said premises
described in Complainants Bill
was vested in Complt. but that the
same was in said Farmer for the
reason that the said Fitts & Maxwell
and the said Farmer cancelled the
Mortgage and the said Farmer
conveyed back by Warranty Deed
to the said Complt. Fitts & Maxwell
the Land and Premises described
in Complainants Bill to wit on the
14th day of June 1855. They further
admit that on the 24th day of April
A.D. 1855 one John J. Davis since
deceased obtained a Judgment.

in the Circuit Court of Williams
County against the said John P
Farmer for the sum of \$193 $\frac{27}{100}$
that subsequent to the rendition of
said Judgment. to wit on or about the
day of 185 the said John P Davis
departed this life They further admit
that letters of administration was granted
to these respondents by the Court at the time
mentioned in Compl't Bills They further
admit that on the 17th day of February
1857 these respondents caused an execution
to issue on said Judgment and levied upon
and sold the Lands and premises in
Compl't Bills described by virtue thereof
And these defendants deny all unlawful
combination in said Bills charged without
that any other matter or thing material
for them to make answer to and out hereto
sufficiently answered avoided or denied in true
to the knowledge or belief of these defendants
all which matters and things these defendants
are ready to aver and prove as this Court shall
direct and pray to be hence dismissed with
their reasonable costs and charges in this
behalf most wrongfully sustained
Subscribed and sworn to by Thomas P Davis
before me this day of James Davis
March A D 1860

G W Bradford Clerk Circuit Court.

Marked
Filed March 27th 1860
(S. J. W. C.) G W Bradford cler

Felts & Marcell 4
do do 3 In Chancery
Davis and others 3

Exceptions taken by the said
Complainants to the joint & several answers
of Thomas D Davis & Chancery Davis
party Defendants to the Bills of Complaint
of said Complainant.

1st For that said answer is uncertain
& evasive in this that it is alleged that
said Mortgage was satisfied for & in
consideration of a blank sum of money
without stating what amount was paid
or that any amount was paid by whom
it was paid or to whom it was paid

2nd That said answer is uncertain repug-
nant and deficient in this that it is
alleged that said deed of Mortgage
was satisfied by paying a blank sum
of money & that in consideration of
which blank sum of money the said
John B Farmer made his Warranty
Deed for said Lands to Complainants

In all which particularly said
answer is evasive uncertain repugnant
& insufficient wherefore they pray
that Defts may be compelled to amend
or answer over.

Allen Duff & Mackey

marked
Filed Aug 18th 1864
(Signed) W. H. Standard ex

State of Illinois } Of the August Term of the
Williamson County } Williamson Circuit Court.
} No. 1860 in Chancery sitting

Thomas & Nancy Davis
Admin of the estate of

^{vs}
Hiltz & Marble

The defendants by protestation
not confessing any of the matters in the said
Bill complained of to be true in manner
and form as in Complainants Bill set forth
generally say that they are advised that
there is no matter or thing in said Bill
good & sufficient in law or equity to call
the Defendants to account in this Honorable
Court. but that there is good cause of
Demurrer thereto And the defendants
do demurr thereto and cause of demurrer
say that in case the said Bill were true
contains no matter of equity to which
this Court can grant a decree Therefore
the Defendants humbly crave Judgment
of this Honorable Court whether they are
compelled or ought to answer thereto
other wise than as aforesaid & the Defendants
humbly pray dismissed with their
costs and charges &c

Thomas & Nancy Davis

per their Doer

Ernan & Pierce

28249-12
marked
Filed Aug 23rd 1864
Signed by J. H. Haddard ex.

Friday March Term 2^d 1860

Gilts & Marrel

vs

Pills to Amelise

Davis & Tanner

At this day upon Motion
of Sol for Complainant a rule is taken
on Thomas D & Nancy Davis Adversus
to answer by Friday the 27th Inst.

Saturday the second Week March Term 1860

Gilts & Marrel

vs

Pills in Chy

Davis Tanner Etas

At this day come again
the parties and this cause is set for
hearing at the next term of this Court.

Saturday 2^d Week ~~March~~ August Term A D 1860

Monterville Gilts &

Wiley Marrel

vs

Pills in Chy

John P. Tanner Etas

At this day come the
said Defendants and demurr to the
Complainants Pills and upon hearing
the arguments the Court takes it
under advisement.

Friday 2nd Week March Term A.D. 1861

Hitts & Marvel

J. P. Farmer Etas

At this day came
the parties and it is ordered by
the Court that the demurrer herein
to Complainants Bills be sustained
and that said Bills be dismissed and
that Complainants pay costs of this suit

State of Illinois
Williamson County $\frac{1}{2}$ I John M. Cunningham
 $\frac{2}{3}$ Clerk of the Circuit
Court in and for said County and
State do hereby certify that the
 foregoing are true copies of the
orders and decrees in the above
 styled cause, and entered of record
 at the terms above mentioned as
 appears from the records of my
 office

Given under my hand
and official seal of office
at Marion this 31st day
of July A.D. 1865

John M. Cunningham
Clerk Circuit Court
Williamson County Illinois

And now comes the Jefferson error by James Healey
his atys. and say that there is manifest error in the
Sua Reca and for error assigns as follows to wit

- 1 The Court was in sustaining the Demurrer to
Compl'ts Bill
- 2 The Court was in dismissing Complain'ts
Bill and rendering a decree against
Compl'ts for cost -

And for these and other manifest
errors the Judgment and decree of the Court
in this case ought to be reversed

James Healey
atys for plff in error

~~72~~ 7-54

Pitts & Manno

do

John P. Lamm

Clk

Copy of Reca

~~888~~

Filed Oct. 13. 1865

N. Johnston Clk

Paid by Lamm \$5.00.

IN THE SUPREME COURT,

First Grand Division,---State of Illinois.

NOVEMBER TERM, A. D., 1865.

MONTREVILLE FITTS, *Pl'ff in Error,*
Impleaded below with WILEY MARVEL,

vs.

NANCY DAVIS, *Adm'r,*
THOMAS D. DAVIS, *Adm'r*
of the goods of John T. Davis, dec'd,
Impleaded with JOHN B. TANNER,
Def'ts in Error.

Error to Williamson.

Page

This was a suit in Equity, brought by pl'ff in error, for the strict foreclosure of deed of Mortgage, executed by John B. Tanner, or that an acct. be taken and the Mortgage premises sold. And also for the vacation of a sale of the Mortgaged premises made by Sh'ff of Williamson county in favor of def't's in error, upon a Judgment rendered in favor of their contestate, and for questing title, &c. Bill filed March 1st, 1860, and heard by the Hon. W. J. Allen, Circuit Judge at the March Term, A. D. 1861.

1 Bill states that Compl'ts on the 2d of April, 1855, conveyed to Tanner, in fee simple, an 80 acre tract of land, containing a steam saw and grist mill, lying in Williamson county, Ill., and described as NE SE qr, and SE NE qr, sec 16, T 8 S, R 4 E, for the sum of \$1800.90, and took from said Tanner his promissory note for said sum, payable one year from date.

2 On same day, Tanner, to secure the purchase money, to Compl'ts executed and delivered to them a mortgage upon said premises. The mortgage was duly filed and recorded in Recorder's office in Williamson county, in Book "K," pages 185-6, on the 6th of April, 1855. On the 24th of April 1855, John T. Davis, since dec'd, recovered a Judgment in the Williamson Circuit Court against said Tanner for \$193.22. That after the rendition of said Judgment, Davis died, intestate, at said county of Williamson. On the 14th of August, 1855, letters of administration were issued to the def't's in error; and on the 17th day of Jan'y, 1857, they caused an execution to be issued on said Judgment, said premises to be sold, and they became the purchaser's. Def't's charged with fraud and collusion, in sitting up claim to said land by virtue of said sale. After the execution of said mortgage and before the maturity of the said note, to-wit: on the 14th day of June, 1855, the Compl'ts, at the request of said Tanner, surrendered to him said note, and Tanner re-conveyed the fee simple title of said premises to Compl'ts, which was the only way that said mortgage debt was ever paid, and said note cancelled. That the re-conveyance of said lands at the time was not in reality worth the amount of the note which was therefor surrendered and cancelled. Tanner at the time was wholly insolvent, of which fact def'ts in error had notice.

5 Bill prays that Tanner and the def'ts in error may answer said bill under oath; and upon final hearing for a sale of the mortgaged premises, or, if consistent with the interest of all parties, that a strict foreclosure be decreed, and title at once vested in Compl'ts.

6 That the sale made said execution be set aside and declared null and void; and that all clouds over Compl'ts' title be dispelled. And for general relief, that summons issue for Tanner and def'ts in error, returnable, &c.

- 7 Bill answered March Term, '60, by def'ts in error. They admit that Tanner purchased said lands as in Compl'ts' bill set out and for the consideration mentioned. And allege that Tanner's deed was filed in Recorder's office in said Williamson county, Jan'y 16, '57, and recorded Jan'y 20, 1857.
- 8 Admit, also, the execution of the mortgage by Tanner in all respects as set up in Compl'ts' bill. Deny that Tanner made default in payment of mortgage debt, but allege that the same was satisfied by \$— and for said consideration, Tanner by warranty deed conveyed the said premises to Compl'ts. That the deed from Tanner to Compl'ts was acknowledged before
- 9 Elijah Ross, a J. P. for the county of Franklin, Ill., on the said 14th of June, '55, and on 29th Jan'y, '57, the official certificate as the qualification of such Justice was attached by the County Clerk of said Franklin county. And on the 25th May, '57, said deed was recorded in Williamson county aforesaid. They deny that the legal estate in said lands was vested in Compl'ts, but affirm that the same was in Tanner, for the reason that Compl'ts and Tanner cancelled said mortgage, and Tanner conveyed back to Compl'ts on the 14th of June, '55. Admit that John T. Davis, their
- 10 intestate, obtained a Judgment on the 24th of April, '55, against Tanner, as in Compl'ts' bill alleged, and soon after died, and that letters of administration were duly granted to them. Also, that they caused an execution to issue on said Judgment, and the lands to be sold as in Compl'ts' bill mentioned. Deny all unlawful and fraudulent combination as charged. Conclude with a prayer to be dismissed with costs &c., and sign and make oath to said answer. Filed March 27, '55.
- 11 Compl'ts except to said answer. 1st, That it states that the mortgage was satisfied with a blank sum of money. 2d, Said answer is uncertain and repugnant and insufficient, in this, that it states that said mortgage was satisfied by the payment of a blank sum of money, and that in consideration of said blank sum of money the said Tanner made a warranty deed for said lands to Compl'ts. And conclude with a prayer that def'ts' answer further.
- 12 Def'ts in error demur to Compl'ts' bill, and set out as cause for demurrer a want of equity.
- 13 Clerk's certificate as to true and correct copies of files, &c.
- 14 Friday, March 23, '60. —Rule taken upon def'ts in error to answer Compl'ts' bill by Tuesday next. Cause set for hearing at the next term of Court.
- August Term, 1860.—Def'ts in error demur to Compl'ts' bill. Demurrer taken under advisement.
- 15 March Term, 1861.—Demurrer sustained; bill dismissed at Compl'ts' costs. Orders of Court certified.
- And now come plaintiffs in error, by Tanner & Casey, his att'ys, and say there is manifest error in the said record, and for error assign as follows, to-wit:

ERRORS ASSIGNED.

- 1 The Court erred in sustaining the demurrer to Complainant's bill.
- 2 The Court erred in dismissing the Complainants' bill and motioning a decree against Complainants for cost.
- And for these and other manifest errors the Judgment and decree of the Court in this case ought to be reversed.

TANNER & CASEY,

Att'ys for Pl'ff in Error.

IN THE SUPREME COURT,

First Grand Division,---State of Illinois.

NOVEMBER TERM, A. D., 1865.

MONTREVILLE FITTS, *Pl'ff in Error,*
Impleaded below with WILEY MARVEL,

vs

NANCY DAVIS, *Adm'r,*
THOMAS D DAVIS, *Adm'r*
of the goods of John T Davis, dec'd,
Impleaded with JOHN B TANNER,
Def'ts in Error

Error to Williamson.

BRIEF.

The pl'ff in error filed his bill in the Circuit Court of said county at the March term thereof, A. D. 1860, for the strict foreclosure of a deed of mortgage executed by said Tanner, or that an account be taken between the pl'ff and Tanner, and the mortgaged premises be sold; or for a vacation of a sale of the mortgaged premises made by the Sheriff of Williamson county, in favor of def'ts in error, upon a judgment rendered in favor of their intestate, and thereby quiet the title of the pl'ff to the mortgaged premises.

The facts set up in the bill are briefly as follows: On the 2d day of April, A. D. 1855, the pl'ff, one Marvel, conveyed the fee simple estate of an eighty acre tract of land, lying in Williamson county, to John B. Tanner and took a note for the purchase money, secured by a mortgage upon the premises executed simultaneously with the deed. The mortgage was recorded in the Recorder's office for said county four days after its execution. Eighteen days after the mortgage was recorded the def't's intestate recovered a judgment in the Williamson Circuit Court against the said Tanner. On the 14th day of June, A. D. 1855, Tanner, in satisfaction of the mortgage, reconveyed the land to pl'ffs. That the premises were not worth the mortgage debt, and the mortgage was satisfied in no other way. The mortgaged premises were sold on execution by def'ts in January, A. D. 1857, and by them brought in to satisfy the judgment; that Tanner was insolvent at the time. It also charges fraud upon def'ts in confederating to obscure the title of pl'ffs, &c. The demurrer to pl'ffs bill should have been overruled.

The execution of the mortgage by Tanner was simultaneous to the conveyance and placed upon the records of the proper office before the rendition of the judgment upon which the mortgaged premises were sold.

The mortgage being for the purchase money takes precedence of the judgment against Tanner. *Curtis vs. Root*, XX Ills. 57. The judgment was a lien upon Tanner's equity of redemption. R. S. chap. 56, sec. 1, and the def't's sold nothing more on execution. *Curtis vs. Root* XX Ills. 57. Had the satisfaction of the mortgage by the pl'ff been in consideration of the payment of the purchase money the title of Tanner would have become absolute. R. S. chap. XXIV, sec. 86, and the fee-simple estate of Tanner

would have been sold on execution. But in this case Tanner was insolvent and the mortgaged premises being hardly worth the purchase money, the mortgage was satisfied by Tanner transferring his equity of redemption to his mortgagee, the pl'ff. In equity this mode of satisfying the mortgage does not give the judgment of the def't's intestate, precedence to the mortgage. But the sale on execution placed a cloud upon the pl'ff's title; and in a suit in ejectment the pl'ff could not prevail against the def't's deed based upon the judgment and sale aforementioned by showing the deed from Tanner, nor by setting up the mortgage from Tanner. See

Ample regard was shown by the pl'ff in his bill for the rights of the def't's by asking that an account should be taken between himself and Tanner and the mortgaged premises sold, &c.—this procedure would have given the def't's all that they could have acquired under their judgment, if the pl'ff had foreclosed his mortgage by bill at any time after the rendition of the judgment, or all that they could have got had the pl'ff foreclosed by *scire facias* and a proceeding in garnishment been instituted for the overplus if any should arise.

~~The~~ The sale under the def't's execution does not give them a better title at law than the pl'ff's ^{deed} clearly places such a cloud upon it as will induce a court of equity to interfere.

Whereupon it is respectfully submitted that the court erred in dismissing the pl'ff's bill for the want of equity.

TANNER & CASEY,

Att'ys for Pl'ff.

~~27~~
7-34

M. Titter et al

vs

Thomas D Davis
et al

Abstract & Brief

8649

Filed Nov. 8th 1868-

N. Johnston
Clerk

~~Warrant~~ This was a writ in chancery, brought by Monteville Hitts and Wiley Maxwell, in the Williamson Circuit Court, against Nancy Davis administratrix, and Thomas Davis administrator of the estate of John S. Davis deceased, and John B. Garner, for a strict foreclosure of a mortgage, and for an account and a sale of the mortgage premises, to satisfy ^a the debt. Also to vacate and set aside a ~~sale~~ ^{sale of the premises} made by the Sheriff of Williamson County, in favor of defendants, on an execution ~~issued~~ ^{issued} out by them, on a judgment in favor of their intestate.

The bill alleges, that on the second day of April 1855, complainants conveyed to Garner the fee, in an eighty acres of land, on which there was a steam flour and saw mill, for the sum of \$1800.00, and took the promise by note of Garner payable ~~for~~ one year after date for the purchase money. And to secure the payment of the same Garner executed a mortgage to them on the premises, which was duly recorded on the sixth day of April 1855. That on the 24th day of that month, John S. Davis since deceased, recovered a judgment in the circuit Court against Garner for the sum of \$193.22. That Davis subsequently died intestate and letters of administration, were granted, on the 14th day of August 1855, to Nancy and Thomas

D Davis; and on the 14th day of January 1857, they caused an execution to issue on the judgment, which was levied upon the premises in controversy, which were sold thereunder, and they became the purchasers.

Sheldon
The bill charges, that the Davises are fraudulently setting up a claim of title to the premises by virtue of that sale. That after the mortgage was executed and before the purchase money became due; on the 15th day of June, 1855, complainants at the request of Garner, surrendered to him the note, and he conveyed to them the premises in fee, which was the only means by which the mortgage was ever paid or discharged. That the land was not worth the amount of the note when it was surrendered. And that Garner was then wholly insolvent. The bill prays, that the sale made by the sheriff to the Davises be set aside, or that the mortgage premises be sold, or that a strict foreclosure be had and the title vested in complainants.

The answer admits, that Garner purchased the land as charged in the bill, and for the consideration named. That his debt was renewed on the 16th of January 1857. Also that he surrendered the mortgage as charged, but denies that Garner made default in paying the mortgage debt, and that he for a sum of money, not named

in the answer conveyed the premises in fee to complainants. Davis, that the legal estate was vested in complainants, but insists that it was in Garner, for the reason that he and complainants canceled the mortgage and reconveyed the property on the 14th day of June 1855. They admit that John J. Davis received the judgment on the 14th of April 1855, against Garner, and that the land was sold under it, as alleged. They deny all fraud as charged.

Exceptions were filed to the answer, but so far as we can discover from the record they were never disposed of by the court. If towards defendants filed a demurrer to the bill, which the court sustained, and rendered a decree dismissing the bill. Complainants bring the case to this court on a writ of error, and ask a reversal of the decree.

There is no pretense, that the transaction between plaintiffs in error, and Garner was tainted with fraud. The transaction then appearing to be bona fide, the question presents itself, what are the rights of the parties? When plaintiffs in error took the mortgage and had it recorded, it not only became a lien but notice of the lien to the whole world. It thereby became perfect, and prior to the lien of Davis' judgment. Being for the purchase

money, and Davis being chargeable with notice when he obtained his judgment, it became ^a ~~priority~~ ^{lien} to his, and was entitled to priority in satisfaction, and this priority still continued, unless plaintiffs in error, have done some act which has postponed or destroyed their lien. But the only act which seems to be relied upon for that purpose is the reconveyance by Garner, and the cancellation of the mortgage and note. When Davis obtained his judgment, it undoubtedly created a lien which attached, to the equity of redemption in Garner. And when he conveyed to plaintiffs in error it is equally true, that plaintiffs in error took the equity of redemption, subject to that lien. But the lien of the judgment was subordinate to the mortgage, and Davis could only sell the equity of redemption, and if he had acquired a title by Sheriff's sale to have rendered it available he would have been compelled to redeem from the mortgage. And if the administrators of his estate perfected ~~the~~ the lien by their Sheriff's sale and deed, then they occupy the same relation to the premises unless the mortgage has been paid by Garner.

28447-237
 How

There is no pretense that Garner can

paid a dollar on the mortgage debt, or even
a dollar worth of any thing but the mort-
-gaged premises. And plaintiffs in error, having
the lien on the premises to secure the payment
of the debt for the purchase money, they did
not, mean, satisfy or discharge their lien
by taking a conveyance of the equity of
redemption. They previously had the mort-
gage to secure the debt, but afterwards they
had the land, in place of the debt which was
satisfied. If the equity of redemption came to
them burdened with a lien junior to the
lien of the mortgage they still had the land
with their prior perfected lien, notwithstanding
-ing the satisfaction of the debt by taking
the equity of redemption. If defendants in
error, therefore have acquired Jarner's equity
of redemption by their sheriff's sale, still it
is subject to the payment of the mortgage
-debt. Had Jarner paid the mortgage debt with
money or other property, then it would have
been otherwise.

But the question still remains to be
determined whether, they ~~of~~ defendants in
error preserved their lien. The judgment was
rendered in April 1855, and the execution was
sent out on the 14th day of January 1857,
nearly twenty one months afterwards. And
we find nothing in the record to show, that

an execution had been previously issued on the judgment. The first section of the chapter entitled "Judgments and Executions" declares that judgments rendered in the circuit court shall be a lien on the real estate of the debtor for seven years after the last day of the term of the court at which it was rendered; provided an execution be issued thereon within one year on such judgment. The following section of the same chapter declares, that the collection of judgments in courts of record shall not be hindered or delayed by the death of the plaintiff, but the executor or administrator may cause the letters testamentary or of administration to be received in the court in which the judgment exists; after which execution is authorized to issue and proceedings to be had in the name of the executor or administrator. The party first section declares that the lien created by law on property shall not abate by reason of the death of the plaintiff.

Bealover
In this case there is nothing to show, that the lien was preserved by issuing an execution within a year after the judgment was rendered. There was nothing to prevent such a proceeding as the administrators were expressly authorized to act. If such an execution was not sued out within the year then the lien was gone, and the subsequent

^{under execution}
Sale conferred no title upon the purchaser.
And if the lien of the judgment was thus per-
mitted to expire, plaintiffs in error having
purchased the equity of redemption, became
the owners free from the incumbrance of
the judgment lien.

But if an execution was issued with-
in the year, then defendants in error became
by their purchase, the owners of the equi-
ty of redemption, and have the right to be-
come the absolute owners of the property
by paying the amount of the mortgage debt,
with interest. And until foreclosed, they
may exercise that right. If they are the own-
ers of the equity of redemption, plaintiffs
in error have the right to foreclose and
have their debt paid as the equity of redemp-
tion bears. Again this sheriff's deed casts
such a cloud upon the title of plaintiffs
in error, even if defendants in error have
no rights in the property as would warrant
a court of equity in entertaining jurisdic-
tion to remove it. Then the court should
have retained the bill for that purpose, and
if on the trial it appeared they owned the equi-
ty of redemption the Chancellor should have
foreclosed the mortgage. The decree of the court
below must be reversed and the cause re-
-anded.

Decree reversed.

W. Davis study.

X M 34

W. Davis study

Spencer's



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~~Handwritten signature in blue ink~~

FD-357

8649

IN THE SUPREME COURT,

First Grand Division,---State of Illinois:

NOVEMBER TERM, A. D., 1865.

MONTREVILLE FITTS, *Pl'ff in Error*,
Impleaded below with WILEY MARVEL,

vs.

NANCY DAVIS, *Adm'x*,
THOMAS D. DAVIS, *Adm'r*
of the goods of John T. Davis, *dec'd*,
Impleaded with JOHN B. TANNER,
Def'ts in Error.

} Error to Williamson,

Page

This was a suit in Equity, brought by pl'ff in error, for the strict foreclosure of deed of Mortgage, executed by John B. Tanner, or that an acct. be taken and the Mortgage premises sold. And also for the vacation of a sale of the Mortgaged premises made by Sh'ff of Williamson county in favor of def'ts in error, upon a Judgment rendered in favor of their contestate, and for questing title, &c. Bill filed March 1st, 1860, and heard by the Hon. W. J. Allen, Circuit Judge at the March Term, A. D. 1861.

1 Bill states that Compl'ts on the 2d of April, 1855, conveyed to Tanner, in fee simple, an 80 acre tract of land, containing a steam saw and grist mill, lying in Williamson county, Ill., and described as NE SE qr, and SE NE qr, sec 16, T 8 S, R 4 E, for the sum of \$1800.90, and took from said Tanner his promissory note for said sum, payable one year from date.

2 On same day, Tanner, to secure the purchase money, to Compl'ts executed and delivered to them a mortgage upon said premises. The mortgage was duly filed and recorded in Recorder's office in Williamson county, in Book "K," pages 185-6, on the 6th of April, 1855. On the 24th of April 1855, John T. Davis, since dec'd, recovered a Judgment in the Williamson
3 Circuit Court against said Tanner for \$193.22. That after the rendition of said Judgment, Davis died, intestate, at said county of Williamson. On the 14th of August, 1855, letters of administration were issued to the def'ts in error; and on the 17th day of Jan'y, 1857, they caused an execution to be issued on said Judgment, said premises to be sold, and they became the
3 purchaser's. Def'ts charged with fraud and collusion, in sitting up claim to said land by virtue of said sale. After the execution of said mortgage and
4 before the maturity of the said note, to-wit: on the 14th day of June, 1855, the Compl'ts, at the request of said Tanner, surrendered to him said note, and Tanner re-conveyed the fee simple title of said premises to Compl'ts, which was the only way that said mortgage debt was ever paid, and said note cancelled. That the re-conveyance of said lands at the time was not in reality worth the amount of the note which was therefor surrendered and cancelled. Tanner at the time was wholly insolvent, of which fact def'ts in error had notice.

5 Bill prays that Tanner and the def'ts in error may answer said bill under oath; and upon final hearing for a sale of the mortgaged premises, or, if consistent with the interest of all parties, that a strict foreclosure be decreed, and title at once vested in Compl'ts.

6 That the sale made said execution be set aside and declared null and void; and that all clouds over Compl'ts' title be dispelled. And for general relief, that summons issue for Tanner and def'ts in error, returnable, &c.

- 7 Bill answered March Term, '60, by def'ts in error. They admit that Tanner purchased said lands as in Compl'ts bill set out and for the consideration mentioned. And allege that Tanner's deed was filed in Recorder's office in said Williamson county, Jan'y 16, '57, and recorded Jan'y 20, 1857.
- 8 Admit, also, the execution of the mortgage by Tanner in all respects as set up in Compl'ts bill. Deny that Tanner made default in payment of mortgage debt, but allege that the same was satisfied by \$—— and for said consideration, Tanner by warranty deed conveyed the said premises to Compl'ts. That the deed from Tanner to Compl'ts was acknowledged before
- 9 Elijah Ross, a J. P. for the county of Franklin, Ill., on the said 14th of June, '55, and on 29th Jan'y, '57, the official certificate as the qualification of such Justice was attached by the County Clerk of said Franklin county. And on the 25th May, '57, said deed was recorded in Williamson county aforesaid. They deny that the legal estate in said lands was vested in Compl'ts, but affirm that the same was in Tanner, for the reason that Compl'ts and Tanner cancelled said mortgage, and Tanner conveyed back to Compl'ts on the 14th of June, '55. Admit that John T. Davis, their
- 10 intestate, obtained a Judgment on the 24th of April, '55, against Tanner, as in Compl'ts' bill alleged, and soon after died, and that letters of administration were duly granted to them. Also, that they caused an execution to issue on said Judgment, and the lands to be sold as in Compl'ts' bill mentioned. Deny all unlawful and fraudulent combination as charged. Conclude with a prayer to be dismissed with costs &c., and sign and make oath to said answer. Filed March 27, '55.
- 11 Compl'ts except to said answer. 1st, That it states that the mortgage was satisfied with a blank sum of money. 2d, Said answer is uncertain and repugnant and insufficient, in this, that it states that said mortgage was satisfied by the payment of a blank sum of money, and that in consideration of said blank sum of money the said Tanner made a warranty deed for said lands to Compl'ts. And conclude with a prayer that def'ts answer further.
- 12 Def'ts in error demur to Compl'ts' bill, and set out as cause for demurrer a want of equity.
- 13 Clerk's certificate as to true and correct copies of files, &c.
- 14 Friday, March 23, '60. —Rule taken upon def'ts in error to answer Compl'ts' bill by Tuesday next. Cause set for hearing at the next term of Court.
- August Term, 1860.—Def'ts in error demur to Compl'ts' bill. Demurrer taken under advisement.
- 15 March Term, 1861.—Demurrer sustained; bill dismissed at Compl'ts' costs. Orders of Court certified.
- And now come plaintiffs in error, by Tanner & Casey, his att'ys, and say there is manifest error in the said record, and for error assign as follows, to-wit:

ERRORS ASSIGNED.

- 1 The Court erred in sustaining the demurrer to Complainant's bill.
- 2 The Court erred in dismissing the Complainants' bill and motioning a decree against Complainants for cost.
- And for these and other manifest errors the Judgment and decree of the Court in this case ought to be reversed.

TANNER & CASEY,
Att'ys for Plff in Error.

IN THE SUPREME COURT,

First Grand Division,---State of Illinois.

NOVEMBER TERM, A. D., 1865.

MONTREVILLE FITTS, *Pl'ff in Error,*
Impleaded below with WILEY MARVEL,
vs
NANCY DAVIS, *Adm'r,*
THOMAS D DAVIS, *Adm'r*
of the goods of John T Davis, dec'd,
Impleaded with JOHN B TANNER,
Def'ts in Error } *Error to Williamson.*

BRIEF.

The pl'ff in error filed his bill in the Circuit Court of said county at the March term thereof, A. D. 1860, for the strict foreclosure of a deed of mortgage executed by said Tanner, or that an account be taken between the pl'ff and Tanner, and the mortgaged premises be sold; or for a vacation of a sale of the mortgaged premises made by the Sheriff of Williamson county, in favor of def't's in error, upon a judgment rendered in favor of their intestate, and thereby quiet the title of the pl'ff to the mortgaged premises.

The facts set up in the bill are briefly as follows: On the 2d day of April, A. D. 1855, the pl'ff, one Marvel, conveyed the fee simple estate of an eighty acre tract of land, lying in Williamson county, to John B. Tanner and took a note for the purchase money, secured by a mortgage upon the premises executed simultaneously with the deed. The mortgage was recorded in the Recorder's office for said county four days after its execution. Eighteen days after the mortgage was recorded the def't's intestate recovered a judgment in the Williamson Circuit Court against the said Tanner. On the 14th day of June, A. D. 1855, Tanner, in satisfaction of the mortgage, reconveyed the land to pl'ffs. That the premises were not worth the mortgage debt, and the mortgage was satisfied in no other way. The mortgaged premises were sold on execution by def'ts in January, A. D. 1857, and by them brought in to satisfy the judgment; that Tanner was insolvent at the time. It also charges fraud upon def't's in confederating to obscure the title of pl'ffs, &c. The demurrer to pl'ffs bill should have been overruled.

The execution of the mortgage by Tanner was simultaneous to the conveyance and placed upon the records of the proper office before the rendition of the judgment upon which the mortgaged premises were sold.

The mortgage being for the purchase money takes precedence of the judgment against Tanner. *Curtis vs. Root*, XX Ills. 57. The judgment was a lien upon Tanner's equity of redemption. R. S. chap. 56, sec. 1, and the def't's sold nothing more on execution. *Curtis vs. Root* XX Ills. 57. Had the satisfaction of the mortgage by the pl'ff been in consideration of the payment of the purchase money the title of Tanner would have become absolute. R. S. chap. XXIV, sec 86, and the fee-simple estate of Tanner

would have been sold on execution. But in this case Tanner was insolvent and the mortgaged premises being hardly worth the purchase money, the mortgage was satisfied by Tanner transferring his equity of redemption to his mortgagee, the pl'ff. In equity this mode of satisfying the mortgage does not give the judgment of the def't's intestate, precedence to the mortgage. But the sale on execution placed a cloud upon the pl'ffs title; and in a suit in ejectment the pl'ff could not prevail against the def'ts deed based upon the judgment and sale aforementioned by showing the deed from Tanner, nor by setting up the mortgage from Tanner. See

Ample regard was shown by the pl'ff in his bill for the rights of the def't's by asking that an account should be taken between himself and Tanner and the mortgaged premises sold, &c.—this procedure would have given the def't's all that they could have acquired under their judgment, if the pl'ff had foreclosed his mortgage by bill at any time after the rendition of the judgment, or all that they could have got had the pl'ff foreclosed by *scire facias* and a proceeding in garnishment been instituted for the overplus if any should arise.

~~The~~ The sale under the def'ts execution does not give them a better title at law than the pl'ffs ^{bill} clearly places such a cloud upon it as will induce a court of equity to interfere.

Whereupon it is respectfully submitted that the court erred in dismissing the pl'ffs bill for the want of equity.

TANNER & CASEY,

Att'ys for Pl'ff.

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M. Fulton et al

vs

Thomas D David
et al

Abstract & Brief
8649

Filed Nov. 8th 1865

A. Johnston Clerk

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