

No. 8771

# Supreme Court of Illinois

Thomas

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vs.

Sloe

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71641  7



State of Missouri in the Supreme Court

William Thomas Trustee  
of the Bank of Missouri

against

James C. Stos & others.

This appeal brings ~~before~~ before the Court  
two cases, which were consolidated, and  
decided as one Cause in the Circuit Court.

The facts presented by the Record rest  
reference to the time of their occurrence,  
but without reference to the order of Statute  
in the Record are as follows:

On the 11<sup>th</sup> March 1847 James C. Stos  
executed two notes to Caldwell and Ryan  
as assignees of the Bank of Missouri, for  
\$4014.26 each 1<sup>st</sup> payable 10<sup>th</sup> April  
1848, 2<sup>nd</sup> payable 10<sup>th</sup> April 1849 with  
interest - See page 17 of Record To  
secure the payment of these notes Stos  
and wife executed a mortgage or two  
lots in Shannontown and 14 lots of land  
containing in the aggregate 1720 Acres,  
Mortgage Recorded 28<sup>th</sup> Oct 1847 See  
page 19, 20 & 21

On the 13<sup>th</sup> April 1848 Stos executed  
a mortgage to Katharine Foreman to  
secure the payment of a \$1000, upon  
six lots of land containing 765 Acres,  
Mortgage Recorded 19<sup>th</sup> April 1848  
See page 81 & 82 of Record.

On the 26<sup>th</sup> of August 1848 Stos executed  
a mortgage to A. G. Caldwell in his own  
individual right to secure the payment of  
\$323.98 upon two lots of land containing



220. Acers one of which was included in the Mortgage executed to Nathaniel Forman Mortgage Recorded 11th Dec 1848. See page 83, 84, & 85

On the 3rd May 1849. Also executed three Mortgages as follows, 1<sup>st</sup> To Caldwell & Ryan as assignees as additional security for the payment of said two notes provided for in the previous mortgages and to secure other claims referred to in the mortgage upon 15 lots of land and 9 lots in Placemtown, Mortgage Recorded 3rd May 1849 See page 23 of Record

2<sup>nd</sup>. A Mortgage to W & G Fuller & Co to secure the payment of \$1411.22 Cents upon lands and lots included in the mortgage to Caldwell & Ryan of same date. Mortgage Recorded 3rd May 1849 See page 87 & 88 of Record

3<sup>rd</sup> A Mortgage to James Higgins to secure the payment of \$1930 upon five lots of land included in mortgage to assignees of the Bank, and also in the mortgage to Forman & A G Caldwell and Caldwell & Ryan. Recorded 3rd May 1849 See page 91 of Record

On the 3rd May 1849. Also Mortgage and conveyance articles of personal property to James Higgins to secure a part of the debt due him. On the 6th of April 1848. Also executed a Mortgage to O Pool & Co to secure the payment of \$1472. 42 Cents upon a part of the lands & lots included in the second Mortgage to Caldwell & Ryan under which on the 30th November 1850 a part of the property was sold



having two lots of land and three town  
lots subject to the Bank Mortgage Pool  
No. 1 and not made parties to the suit  
nor are the purchasers of the lots mortgaged  
to them, because this mortgage was prior  
to the others, and the Complainant does  
not propose to redeem. A statement  
with reference to this mortgage and  
sale will be found at page 55 of Record  
7<sup>th</sup> January 1850. Also executed to  
Michael K. Scholes upon various parts of  
the same mortgage to assign to indemnify  
him against loss in consequence of being  
security for Mrs. as administrator of  
William Costello's estate. On the 19<sup>th</sup> November  
1850 Caldwell & Mrs. entered into an  
agreement which was signed by Caldwell  
alone for himself & E. J. Ryan assigning  
by which it was stipulated that Caldwell  
& Ryan should receive a compromise  
and settlement of the two notes, also  
for the amount of the Corporation debt  
due the Bank — on lots of Mrs. in  
Shawmuton. Also his debt to the Bank  
on a judgment against W. H. McCrackin  
& others, and also the liability of Q.  
Sexton on the last named judgment  
lands conveyed by the mortgage of  
the 10<sup>th</sup> March 1847, at the date and  
appraisal to be fixed by John Hall  
and John Crawford, and should  
they assign their accession to be  
determined by an umpire to be selected  
by them — the whole of the lands in said  
mortgage to be conveyed to the assignees



of the Bank, and of the appraisement  
of the whole exceeded the amount due  
then the assignees were to convey the excess  
to be designated by the appraisers to  
Judith Sloo wife of said James. This  
Contract was never Recorded.

At the December Term 1850 of the Circuit  
Court of the U. S. for the District of  
Illinois, Trustees were appointed to  
take charge and to execute the Trust  
created and existing under & by virtue  
of the several acts of the Legislature on  
the subject of the Bank in the ~~book~~  
and that of the assignees then acting  
and Gillispie, Brown & Caldwell were  
appointed such Trustees, Caldwell alone  
acted, who in June 1851 died, and  
in July 1851 William Thomas was  
appointed sole Trustee of said  
Bank see page 181 of Record

On the 27th October 1851 Ryan,  
Smith and Mulple Garrison assignees  
of the Bank executed their deed  
and power of Attorney in compliance  
with the decree of the U. S. Court, coming  
to William Thomas. "All and singular  
the Lands, Tenements, Hereditaments,  
and Real Estates, the title to which  
had or might be vested in them,  
or either of them as such Assignees  
Also all the personal effects, rights  
and Credits including accounts, judgments,  
~~and~~ <sup>mortgages</sup> Bonds, Notes, Bills, and  
all other evidences of indebtedness, the  
right or title to which, had been or  
might be vested in them"



to have and to hold He had authorizing  
and empowering the said Thomas  
to use them or either of them  
in making collections and winding  
up the business and affairs of the  
Bank. See page 27, 28, 29 & 30 of  
Record.

On the 5<sup>th</sup> December 1851 the Thomas  
Trustee of the Bank filed his bill in  
Chancery in the Circuit Court of  
Gallatin County for the purpose of  
obtaining a decree of foreclosure  
of the two mortgages executed by Stoo  
to the Assignees of the Bank, without  
making any of the other mortgages  
himself before named or purchasers  
under them parties, process was  
issued and notice given, returnable  
to a special Term of the Court held  
in February 1852. See page 3 of Record.

The Bill sets out 1<sup>st</sup> the making of  
the two notes and the execution of the  
two mortgages to secure the payments.

2<sup>nd</sup> The appointment of Thomas  
as Trustee and the assignment of  
the notes and mortgages to him by the  
succeeding Assignees, showing his right  
to collect the money.

3<sup>rd</sup> The making of the contract of  
Compromise by Caldwell with Stoo  
and exhibits a copy.

4<sup>th</sup> The Refusal of Thomas to ratify  
or execute that compromise, alleging  
as reasons for not doing so 1<sup>st</sup> That  
said compromise was made by  
Caldwell alone without the knowledge



or concurrence of either of the other  
assigns, 2<sup>nd</sup> That Glos was indebted  
to Caldwell on private account and  
was so embarrassed as to render payment  
doubtful if all the property mortgaged  
to the assigns should be required to  
pay the indebtedness to them (there is  
no evidence in the case on this point)

3<sup>rd</sup> That no reason existed for said  
Caldwell agreeing to take in payment  
of the debt less property than was  
mortgaged to secure said debts  
and that Caldwell had no right  
to make such a contract with  
Glos or any other person.

5<sup>th</sup> That Mrs Glos had joined in the execution  
of the first Mortgage and relinquished  
her dower in due form and that the  
stipulation in the Contract of Com-  
promise that her dower should be  
relinquished formed no reason or  
consideration for making such a  
Contract.

It is further alleged in the Bill that  
the other parties to the debt not named  
as mortgagors had judgments against  
Glos operating as liens upon the  
mortgaged premises and they therefore  
made assignments. New notes and  
mortgages and the deed from assigns  
to Thomas are made exhibits and  
Copies filed H. To this bill Glos filed  
a Demurrer which was overruled  
see pages 47 & 133. Glos & wife  
Answer (see page 51 of Record) admitting



the execution of the mortgages and stating  
the subsequent agreement with Caldwell  
which they insist shall be specifically  
performed.

On the 27<sup>th</sup> December 1851 the said James  
C. Stoo and Judith his wife exhibited  
to Thomas Trustee of the Bank, a copy  
of the agreement of Compromise made  
with Caldwell — and the appraisment  
of Hall & Crawford made under that  
agreement of the lands conveyed by  
first mortgages and induced a deed  
executed by them to them as conveyors  
said lands to him as Trustee of Bank  
demanded a re-conveyance of a  
portion of said lands to the said  
Judith Stoo in compliance with  
the said Caldwell's contract. Thomas  
refused to release the deed, and also  
to re-convey, in connection with  
this demand & refusal, it may be  
stated that on the 31<sup>st</sup> October 1851 Hall  
& Crawford made an estimate of  
the amount due from Stoo on the  
several claims against him, and an  
appraisment of the lands, which  
appraisment exceeding the amount  
due \$5000, they designated certain  
parts of the mortgaged premises to be  
re-conveyed by the trustee to the said  
Judith Stoo. See the agreement of  
appraisment, and Thomas letter of  
refusal on pages 145, 146, 147, 8 & 9  
On the 21 May 1852 James C.  
Stoo and Judith Stoo his wife filed



their bill in Chancery in the Gallatin  
Circuit Court against Thomas, as  
Trustee of the Bank for the purpose  
of compelling him to perform the Con-  
tract of Compromise made with  
Caldwell. Exhibiting to the Court the  
Contract - the Appraisement - the  
decrees of the Circuit Court & of ap-  
pointing Thomas Trustee, and the  
Statement of Thomas in writing ack-  
nowledging the Sundry of a debt,  
the demand upon him to execute  
Caldwells Contracts and that he actually  
executed the same. This bill and  
exhibits are copied on pages 137 to 157  
inclusive.

At December Term 1852 of the Court  
Thomas filed his answer to the bill of  
Glor & Wife in which he states as  
various for not executing the said  
Contract of Compromise. First, that  
Caldwell had no right to make such  
an agreement.

Second That said agreement was made  
without any consideration good  
or valuable in Law.

Third That neither or nor all of said  
allegues had the right to make an agree-  
ment, whereby the Trust funds in their  
hands would necessarily be lessened.

Fourth the said agreement is not such  
a compromise as was contemplated  
within by the Legislature in passing the  
Law, or by the officers of the Bank  
in making the assignment - in respect  
to the property mentioned in the agreement there.



there was no assent.  
And as additional reason he states  
1<sup>st</sup> That the whole of the property conveyed  
by said first Mortgage is bound for  
the payment of the notes, and he does  
not believe that upon a sale at auc-  
tion it will produce more than half  
the amount due  
2<sup>nd</sup> That defendant is not bound to  
execute such an agreement. The  
said Thomas also asserts that upon  
the showing of the bill, it appears that  
he (said Thomas) is acting under a  
Decree of a Court having power to  
compell him to do his duty, and that  
if Complainants are entitled to any  
relief in the premises it is in the  
Court appointing Trustee &c He  
asserts that this Court has no power  
over him as Trustee of the Bank &c  
For this answer see page 118 &c. To  
this answer ~~of caption~~ Complainants  
filed exceptions see page 171 &c.

December 1852 James C. Stoo filed a  
Demurrer to the original bill filed by  
Thomas see page 47 of Record, and  
Stoo and wife filed an answer to  
said bill (page 51)

This answer admits the statements  
in the bill not deemed to refer to  
the agreement of compromise with  
G. Caldwell and asserts that defendant  
is entitled to its specific execution  
See page 51.

December 1852 The Complainants,



Thomas: by leave of the Court filed  
an amended bill making additional  
parties: This bill and exhibits occupy  
from page 55 to 97 inclusive.

By this amended bill Nathaniel Tom-  
man, James Higgins, W & C Sellers H.  
John E Hall and Charles C Caldwell  
executors of A G Caldwell are brought  
before the Court: the object being to  
operate upon property upon which  
they have liens, or claims:

The bill sets out and shows

1<sup>st</sup> The execution of a Mortgage to Pool & Co  
upon parts of the property conveyed by  
second Mortgage to the assignees of the  
Bank: and the sale of sufficient  
to pay their debts - leaving parts  
subject to said second Mortgage - the  
statement with reference to this property  
& Mortgage is made to show the disposition  
of property included in the Mortgage to  
assignees

2<sup>nd</sup> The execution of the Mortgage to K  
Tomman on the 15<sup>th</sup> April 1828, a decree  
in his favor for closing the Mortgage  
and a sale to him of all the mortgaged  
premises except the West Tract Section  
25. in Town 8. S. R 14 & in satisfaction  
of his debt interest and costs (In  
respect to this case to Sec 25 a statement  
is made in this bill which is not  
sustained by any evidence in the  
Record: and no question will be made  
in respect to that in this case) <sup>except that</sup>  
<sup>3<sup>rd</sup> the rights shall be sold under the mortgage to C. Higgins</sup>  
3<sup>rd</sup> The execution of the Mortgage to A G  
Caldwell on the 6<sup>th</sup> August 1828



upon lands delinquent, mortgaged  
to the Assignees of the Bank - the death  
of Caldwell in June 1851 and the ap-  
pointment of Elmer Caldwell as  
executor

4th The execution of the mortgage to  
de Villiers & Co on the 3rd May 1849 - a  
judgment upon the mortgage in a proceeding  
by de Villiers & Co and the sale of the  
property in satisfaction of the debt,  
interest & costs &c. From the sale  
made under this judgment, I was  
a judgment creditor of Geo. W. Martin  
of a judgment of June Term 1849 of  
Gallatin Circuit Court Redeemed  
Lot 873 and the undivided half of  
Lots 865 & 866 in Shawmuton and  
that they were purchased by defendant  
Wm. H. Hall at the sale after said  
Redemption

5th The execution of the mortgage to  
James Hoggins on the 3rd of May 1849  
and that Hoggins obtained a decree  
of foreclosure under which he  
procured the whole of the property  
in satisfaction of his debt, interest  
& costs

6th The execution of the mortgage to  
Hoggins on personal property &c.

7 The execution of a mortgage on  
the 15th of January 1850 to Michael  
H. Fowler upon parts of the land con-  
veyed to the assignees by the second mortgage  
to indemnify him against loss or damage  
in consequence of his being security for



Shew an administration of the estate of  
William Castle, deceased,

8<sup>th</sup> The execution of a deed to defendant  
Orr, Sexton on the 13<sup>th</sup> Nov 1851 con-  
veying to him in fee the lands of section  
25 Town 8 S. R. 10 & (with respect  
there will be no doubt in this case)

9<sup>th</sup> It is alleged that the two mortgages  
executed on the 3<sup>rd</sup> May 1849 appear to  
have been signed and acknowledged at  
one and the same time, and filed for  
Record at one and the same time - but  
that the mortgage to the assignees was in  
fact signed and delivered first (upon  
this point the Record shows that the  
mortgages bear the same date, and  
were filed for Record on the same day  
all being acknowledged the same day)

10<sup>th</sup> That neither Ryan or Caldwell, or  
any of the assignees of the Bank, or  
the latter were made parties to the  
proceedings had upon the mortgages  
to Forman, Sellers & Co and Hoggins  
and that neither of them had any  
notice of the Decree judgments and  
sales under the mortgages

11<sup>th</sup> That the mortgage to Caldwell shows on  
its face that it was made subject to the  
mortgage to Forman in respect  
to one ~~quarter~~ section of land

12<sup>th</sup> That the mortgage to Hoggins was  
made subject to the mortgage to  
Forman & A. Caldwell in the



Respect to the property embraced in the mortgages previously executed to them,

13<sup>th</sup> That the mortgage to Lavelle was executed subject to all the mortgages before referred to.

14<sup>th</sup> That Lavelle at the time of redeeming the lots from sales made to Sellers & Co had notice of the mortgage to assignees of the Bank; and that Hall the purchaser had notice — that this Redemption and purchase stands subject to the lien of the mortgage to the assignees of the Bank of 3<sup>rd</sup> May 1849 which was executed and recorded before the date of Judgment under which the Redemption was made.

15<sup>th</sup> It is alleged that the property conveyed by the first mortgage is wholly insufficient to pay the two notes to the Assignees and that resort will have to be made to the property conveyed by second mortgages to secure payment.

Upon the facts presented, the Complainant claims a decree of foreclosure & sale of property conveyed by both mortgages.

1<sup>st</sup> That the Lanes & Co conveyed by the mortgage of 10<sup>th</sup> March 1847 be first sold, and proceeds of sale applied to the payment of the mortgages.



2<sup>d</sup> That the property conveyed to Nathaniel Forman not included in the second Mortgage to Assignees, nor in the Mortgage to A G Caldwell be sold, and the proceeds applied to payment of his debt; and then property included in Mortgage to Caldwell, and if the proceeds exceed the amount due him, that the excess be applied to the payment of the debt due the executor of Caldwell but if such proceeds do not equal the amount due to Forman as aforesaid, that then the remaining lands be sold until the debt is satisfied

3<sup>d</sup> That the property conveyed in the Mortgage to A G Caldwell, and not included in the Mortgage to Forman is sold and proceeds applied to the payment of the amount due on the Mortgage to Caldwell; and the excess applied to the balance due the Complainant,

4<sup>th</sup> That the property included in the Mortgage to Hays's remaining mortgaged shall ~~not~~ be sold and the proceeds applied to the payment of the amount due him; and the Assignees of the Bank in the proportion to the amounts due each, after deducting the several amounts previously applied on the Mortgage to the Assignees

5<sup>th</sup> That the property included in the Mortgage to W & G Fellows & Co to be sold, and the proceeds applied



to the payment of the amount due  
them still due; the Assigns of the  
Bank in proportion to the amounts  
due to each.

It thus is a prayer in the bill for the  
sale of the personal estate properly mort-  
gaged to Higgins upon the sale of the  
Real estate - but from statement in  
the answers it is supposed that the  
property will hardly produce enough  
if it can be found to pay the  
expense of selling - the Complainant  
however still insists that this property  
should have been sold by Higgins.

It will be seen by reference to the  
Mortgages that none of the property in-  
cluded in the mortgage to Higgins is  
included in the mortgage to ~~Higgins~~  
Follows &c - then two mortgages  
appertain upon separate and distinct  
property; all of which is included  
in the mortgage to the Assigns of  
the Bank of 30th May 1849

To this amended bill Higgins filed  
a demurrer which was overruled  
by the Court see page 117 & 132. James  
& Stor also filed a demurrer which  
was overruled see page 119-132

James & Stor and Judith Stor  
answers; see page 121 of Record



They admit 1<sup>st</sup> the execution of the Mortgages to the Assignees of the Bank

2<sup>nd</sup> The execution of the mortgage to Hoggins on personal ~~estate~~ property

3<sup>rd</sup> The execution of the Mortgages to Fellows &c and Hoggins on the 3<sup>rd</sup> May 1849. The judgment and decree and sale of the property as stated in the Bill - but denies that the mortgage of the 3<sup>rd</sup> May 1849 to the Assignees of the Bank was first signed and delivered, and avers that the mortgage to Fellows &c & Hoggins was first written and then the mortgage to the Assignees and that they were all signed, acknowledged, and Recorded at the same time.

They set up the Agreement of Compromise with Caldwell of the 19<sup>th</sup> Oct 1850 and insist that they are entitled to the specific execution of the same.

5<sup>th</sup> That neither Hoggins or Fellows &c had received any thing upon their mortgages except by the purchase of the property as alleged in the Bill -

6<sup>th</sup> That part of the personal property mortgaged to Hoggins had been sold on execution and part remained in possession of Hoggins - that said mortgage was made without the knowledge or consent of Hoggins and that he had



was accepted or acted under the  
same, See page 121

Eleanor C Caldwell executrix of Abner  
C Caldwell, answers and alleges that  
the mortgage executed to her intestate on  
the 26<sup>th</sup> August 1848 has not been paid  
and exhibits the note for the money and  
asks that her rights be protected See  
page 118

John Olney executor of Isaac Cooper  
answers and says that the judgment  
in favor of Cooper against Sloss  
was paid to Cooper in his life time  
See page 131 of Record

Wm L Hester answers setting out a  
judgment in his favor against Sloss  
of the January Term 1850 of Gallatin  
Circuit Court for \$1370, 71 & 96<sup>ths</sup>  
cents and demands the payment of it.  
See page 43 of Record.

John E Hall answers and states his  
purchase of the property at sales made  
by the Sheriff under executions of  
Lawler vs Sloss and insists that  
he is entitled to the property. That in  
case the Court should decide that the  
Complainant has any interest in the  
property as joint mortgagor or otherwise  
with Sloss or that Sloss is to be



decided to hold the purchase money  
for the lots purchased by him, in  
Trust for the use of the parties in  
Interest &c. See page 107 of Record.

Followers &c made no answer, and  
the Bill as to them, as well as against  
all the parties not answering was  
taken as confessed, and came set  
down for final hearing, See pages  
133 & 134 of Record.

At this point the two causes came  
together - In the case of Sloe and  
wife against Thomas, the exceptions  
to Thomas' answer were overruled  
and a replication filed 2<sup>nd</sup> November  
1853 page 173 of Record.

October Term 1853

The two causes were consolidated  
and a pro forma Decree entered,  
1<sup>st</sup> Denying that the parties are bound  
by the Contract of Compromise  
between Caldwell & Sloe.

2<sup>nd</sup> That the Bill of Complaint against  
Thomas be dismissed with Costs.

3<sup>rd</sup> Requiring decree to be executed  
so as to carry out the Contract of  
Compromise &c. See page 175 of Record.



From this decree an appeal is allowed  
Thomas to be prosecuted without  
the execution any appeal bond

The Errors Assigned are

First, The Court Erred in Deciding  
that the Contract of Compromise  
between the Assignees of the Bank  
and James C. Sloo and accept  
is obligatory upon the said William  
Thomas as surety of the Bank of  
Illinois

Second In not deciding a foreclosure  
of the Mortgage as prayed for by  
Complainant Thomas

The Testimony in the Case consists of  
the exhibits filed with Bell and  
Answers. The deposition of E. J.  
Ryan and Copies of the Decree  
and Judgment in favor of Thomas  
or Sloo. Follows H.° against Sloo and  
Huggins in Sloo. pages 185 to 196

The object of taking the testimony of  
Ryan by Sloo was to prove that an



agreement or understanding existed  
between him and Caldwell whilst  
they were acting as Assignees of  
Bank — that each would concur  
in, satisfy and approve of any  
compromise that either might  
make, and that Ryan did satisfy  
the compromise in question.

The copies of the Decree and Judgment  
were intrusted to prove that neither  
Caldwell or Ryan or any assignee  
or the Trustees of the Bank were  
parties to or had notice of the proceeding  
in which said Decree & Judgment  
were obtained.

was v. Elwood & co.

Abstract,

8771