POTTER, JOHN C v STEVENS, ANDREW J. L. MARCH 1867 COUNTY OF ST. LOUIS

583/4

FOLDER 2 OF 2

OLD AFFIRMED
659/2

INVOLVED:
FRAUDULENT CONVEYANCE

John C. Potter
Resp.
vs.
Andrew J. L. Stevens
Appellant.

IN SUPREME COURT,
October TERM, 1866

AND now comes the said Appellant and says that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellant assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Respondent.
2. That said Court rejected proper and legal testimony offered by Appellant.
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Appellant.
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Respondent when it should have been rendered for the Appellant
10. That said Court overruled the motion for a new trial, made by Appellant
11. Because the finding of said Court was against the evidence and the weight of evidence.
12. Because the finding ought to have been for the Defendant under the instructions given at instance of the Court.
13. Because all the parties interested in said suit were not parties either as plaintiffs or defendants in said cause.

Cline & Jamison
attys for Appt

And now come the Respondent and for joinder in error say, that there is no error in the record and proceedings of said Court
in said cause, as assigned by said Appellant

Knox Kelly
Atty for Resp

196

John C. Potter
vs.
Andrew J. L. Stevens.

Supreme Court
Oct. term 1866
No. 196

Assignment of Errors.

Filed Oct 13 1866
O. T. Fisteback
Clk

Cline & Jamison
for Appts.

Potter
vs
Stevens

In the Supreme Court
March Term 1867

This is a suit brought to cancel a deed executed by John Mc Dowell and wife to the defendant Stevens dated March 31st 1858 on the ground that said deed was fraudulent and void as to the creditors of said Mc Dowell, The deed purported to convey 182 feet of ground on St Ange Avenue on which there was a large and valuable house The property is known as the St Ange property -

Plaintiffs firm Potter, Mute, White and Bailey instituted suit by attachment against said Mc Dowell on the 7th day of April 1858, prosecuted said suit to final judgment, recovering judgment for the sum of $1432 31/100 debt and $201 22/100 costs, on which judgment execution was issued and said property was sold and purchased by plaintiff

At the trial of the cause plaintiff read in evidence a deed from John Mc Dowell to A. J. L. Stevens the defendant in trust for Judith Mc Dowell wife of said John Mc Dowell for the St Ange property described in plaintiffs petition The deed bears date October 14th 1857, consideration stated therein is $ 5000, The deed was duly recorded on said 14th day of October,

Plaintiff also read in evidence

a deed dated October 14th 1857, executed by said John McDowell to said Stevens Trustee of said Judith McDowell certain other land therein described which deed was also duly recorded on said 14th day of October 1857,

Plaintiff also read in evidence a deed dated February 25th 1858 from John McDowell and wife to William C. Tyler Trustee of A. J. L. Stevens for all household furniture in the dwelling house of said McDowell on St Ange Avenue as well as all other house and farming utensils on the Stevens farm. This deed purports to secure said defendant Stevens the sum of $4606 4/100 in two years and was duly recorded February 26th 1858

Plaintiff also read in evidence a deed from John McDowell and wife to A. J. L. Stevens dated March 31st 1858 by which in consideration of $25000. paid the aforesaid St Ange property is conveyed to said Stevens—

Plaintiff also read in evidence a deed of trust executed by the said A. J. L. Stevens to William C. Tyler & George McDowell to secure John McDowell and Judith McDowell five notes each for $5000. all dated March 31st 1858 and payable in one, two, three, four and five years after date This deed conveys the St Ange property aforesaid and was filed for record July 17th 1858 pages

107. et fol.

Plaintiff also read in evidence a deed of trust from said A. J. L. Stevens, to William C. Tyler and George McDowell dated March 31st 1858 conveying to said trustees the negro slaves conveyed by the aforesaid deed of October 14th 1857 by said John McDowell to said Stevens also the land conveyed by said John McDowell and wife to said Stevens on said 14th day of October 1857. This deed March 31st 1858 conveys said property in trust to secure the said John and Judith McDowell. Two promissory notes for the sum of $4450. each drawn by the said defendant Stevens one payable two years after date and the other three years after date and both dated March 31st 1858, Satisfaction of this deed was acknowledged by John McDowell March 21st 1865, (page 114)

Plaintiff then proved

+ ~~[illegible]~~ that said John McDowell & John McDowell & Co. were greatly embarrassed in the Summer and Autumn of 1857, and in the Summer of 1857 arranged an extension of their creditors

Plaintiff read in evidence a deed of trust dated Feby 12th 1858 from John McDowell to Stevens & Colemans trustee for the Sappington farm (pages 98 et fol.) Also two deed of trust one dated ~~July~~ February 15th 1858 and one March 5th 1858 executed by said

Mc Dowell for all his bank & Insurance stocks to secure the Pacific Ins. Co. and the Citizens Ins. Co debts due them (pages 103-4-5-6)

Plaintiff read a great number of letters from the firm of John Mc Dowell & Co. written by them to their creditors during the Summer and and autumn of the year 1857, asking indulgence and extension (see pages 46 and following) These letters show the insolvency of the firm in the Summer of the year 1857

Plaintiff read in evidence notes and judgments on notes owing by J & W. Mc Dowell & Co. before the 14th day of October 1857 for upwards of $60.000

From the Sheriffs return in the suit of Potter, Nute, White and Bailey (see pages 56-7) as Mc Dowell it appears that said defendant Stevens was summoned as garnishee on the 10th day of April 1858

Plaintiff read in evidence a portion of said defendant Stevens answer as garnishee (see pages 67-8-9) in which said Stevens swears "that the fee simple title of said real estate" (meaning the St Ange property) "has never been conveyed to this garnishee that there is no valuable or valid consideration for the said five notes" The answ was filed Sept 26th 1864

Plaintiff then read in evidence the depositions of George McDowell who testified that he was 33 years of age that he and his brother John composed the firm of J and H McDowell & Co. in 1857 until they discontinued business in the spring 1858, in March or April, Witness became a partner in 1856, Was East twice in 1857 on the business of the firm Went there to make some arrangement with the creditors and get an extension (page 71) He got an extension, The indebtedness of the firm in 1857 was more than $60.000 that more than $50.000, is still unpaid, Do not know if so much as $100.000. remains unpaid, I put in no capital in the business and never had any property except my interest in the business, Never owned any real estate, The Stevens farm is about 25 miles from the City, I have known Andrew Stevens since 1847, John lived on St Ange Avenue until he moved into the country in 1858 or 1859. Before he moved he lived in the house on St Ange Avenue and then went to live with Andrew Stevens, The firm could not pay its debts as they matured in 1857 nor have they since been able to do so, I did not go into business again until 1860 when I went to Forsyth Tracy & Mu to

attend to some business for Mr Huger I was to have a part of what I could make, Andrew Stevens bought out Huger and I continued in Stevens employ and was to have a part of the profits, Stevens did not attend to the business there, Stevens had never been engaged in merchandizing, He was there once was not there much, a day or two only, I was there for Stevens about one year, There was goods to the amount of $10.000 or $12.000 when I quit, I went to Yellville Ark when I left ——— and remained about two years, Yellville was then within the rebel lines, After this I was Clerk for Anderson & Milton in St Louis, for 3 weeks ~~for I~~ then for Anderson & Thompson two months then with S Thorpe & Co for a while part of the time for $900. part of the time for $1000. per annum, I did some writing in General Moores office and then went to Illinois, first to Long Prairie and then to Xenia where I am doing business at no stated salary am paid whatever the business justifies

The reason I left Forsythe was because the federal army came there and took all of the goods I left before the army arrived being afraid to remain I was the last man who left the place (page 90), I left because I was

afraid to stay (page 90) There were three other stores in the town and all shared the same fate, I never saw Andrew Stevens until 1863 when I came to St Louis, The store was destroyed on the 22nd day of July 1861, Stevens said he thought I aught not to have left the store because he said several of the [illegible] would have protected the goods, I first came to St Louis in 1847 and was supported by my brother John from that time until I went into business as a member of the firm in 1856, John educated me and paid for my clothes and schooling, I helped about the store when ever I could but never had any means of support except what I got from John until I went into the firm, I went to Washington Mo. to attend a store for J & W McDowell in 1853 and was there 9 or 11 months, I was to have 1/3 of the profits of the business at Washington for my services (pages 91-2) When I speak of the value of the effects I include the St Ange property, in the amount (page 93) also the Sappington farm

The ideas of witness as to what constitutes solvency are interesting and may be seen by reference to pages 95-6

McDowell offered just before

the institution of the attachment- suit- to give Potter security on the St- Ange property. Potter objected to the length of time that Mc Dowell required

John Mc Dowell transferred to me two notes signed by A. J. & Stevens in 1857 or 1858 such notes being for about the amm of $4500. each The Consideration of the transfer was the services I rendered the house previous to the time I went into the firm in 1856, John gave me these notes and said "if those notes would pay me it would be all right- and I could have them" (pages 87-8) These notes were renewed and were settled. They were settled in this way. When I saw Andrew Stevens in 1863 in St Louis he told me that I ought not to have left the store and goods at Smyth That if I had remained the goods would have been saved and that I ought to give him up the notes for this reason I then gave him the notes. He never paid anything on either of them. When I went East in 1857 I asked for 18 months time of our creditors (page 94)

None of the merchandize was levied on in the attachment- suit

Plaintiff then read in evidence the depositions of A. J. & Stevens the defendant who testifies amongst other things as follows to wit

I am the brother in law of John McDowell, I bought property of him in 1858 in March and gave my notes for $25.000 in all five notes each for $5000. The other two notes were for two and three years, I assumed a balance due from McDowell on the St Ange property, about $3000, a portion of this $3000 I have paid, I can't tell whether I have paid $500 of it. Cant tell when I made the last payment. That I have paid some within the last five years. I paid the first note of $5000. to A Christy, never paid either of the other notes. I have paid the two other notes of $4500. each. "the way that came, the way I suppose, one main reason was George was in my debt and he settled with me and settled up the notes" (See pages 117, 118 & fol.)

See pages 119, 120. for the deposition of A. J. L. Stevens.

How Stevens debt to George McDowell was paid appears on pages 121.2-

It depended on a mans politics whether it would have been safe to remain at the store (pages 122-3)

George never demanded payment of the notes of me. When I met George after the maturity of the notes I told him I did

not have the money and I wanted to renew them. He said he was willing (page 123) One was renewed for two years and one perhaps for one year. The loss occured about the time of the maturity of these notes. I never knew that George had any property (124) I have known George Mc Dowell ever since he was 15 years of age. When he came to St Louis he was a small boy, and his brother educated him.

When John Mc Dowell left St Louis he went with his family to live with me at my house This was in the Fall of 1858 or Spring of 1859. He lived with me until my house was burnt down on the 30th of September 1864. I paid some taxes on the St Ange property and some I have not paid. Cant say how much I have paid. Cant tell if I have paid any of the taxes for the last five years. Suppose I have (125) I do not know how much is due. Never occupied the house I purchased of Mc Dowell, have received the rents for it up to the present time. It rents for $1200 per annum —

When I purchased this property I was farming in this County 28 miles from St. Louis where I have lived from my boy hood I was 36 years old March 7th When I purchased the the St Ange property I had more than

30 niggers including what I purchased of Mc Dowell, the farm and the stock, This was all the property I had, The fair market value of the land negroes and stock was from $20.000 to $30.000 (128)

As to defendants liability at the time see page 129, I knew that the firm of J & W Mc Dowell & Co. were hard up in February, March & April 1858 (130) I never paid any money for any conveyance of property to my sister or in trust for her (131) We were indebted to R. H. Stevens in the winter or spring of 1858, I gave the two notes which George finally had, the consideration was 1/5 of my fathers estate and the negroes (132) I do not remember the number of negroes, John & I were farming together 5 or 6 years,

At the time of the sale to me I assumed to pay the indebtedness of John & myself to my mother & Dr Stevens, I never considered that George ever had any thing except those notes of mine, The two notes held by George were renewed on March 31st 1860, one for $4984. for two years and one April 3rd 1861 for $5251. at two years, My sister owned 1/5 interest in the land belonging to my fathers estate which interest was worth from $2000. to $3000, John owed me between $4000. & $5000 when I gave him the notes

which is still unpaid (140)—

In behalf of defendant

Andrew Christy testified that one note for $5000 given by Andrew Stevens was paid a little before maturity

James Pleasants testified that he received a note of A. J. L. Stevens for $5000 dated March 31st 1858 of John McDowell as collateral security February 1861 the note is payable three years after date, McDowell owed said witness since 1858

Henry Tyler testified that his father received a note of John McDowell drawn by A. J. L. Stevens dated March 31st 1858 payable five years after date as collateral security for other notes held against McDowell, This note for $5000 was received in March 1861

W. D. Shumate testified that as administrator of W H Dusett he held one of the $5000 notes referred to dated March 31st 1858 payable four years after date, It was received by Dusett as collateral security

R. H. Stevens testified that he held one of said notes for $5000. as security for debt of J W McDowell & Co. McDowell is my brother in law, My fathers estate was worth about $50.000 He died in November 1852, Andrew had no

property except what he received from his fathers estate

Defendant called John McDowell as a witness who testified that he sold the St Ange property in March 1858 for $25.000 and took five notes for $5000 each for it, I occupied the house for a few months after the 30th of March until I removed to the house of A. J. L. Stevens, 28 miles from St Louis where I remained until 1864, I never paid any ~~rent~~ board or rent to Stevens -

On 31st March 1858 I was solvent and worth $200000 more than my debts, Have used my best endeavors since 1858 to pay my debts and still owe $75.000 which I have been unable to pay "I regard any man as solvent who can pay his debts in 30 years after due" R. A. Stevens was accommodation endorser for me in 1857 to the amount of $30,000 and M Tennaway was accommodation endorser for me in 1857 for over $30,000 I offered Potter security in the St Ange property, He objected that the time I asked was too long, I transferred a note for $5000 to A Christy April 1st 1858 and the other notes before their maturity

Defendant then read in evidence 3 deeds (163-4-5-6) conveying some land to him in various places valued as follows to wit, one lot for $192. one for

$520 66/100 and one for $320.

The finding and decree of the Court are on pages 8. 9 & 10.

Knox J. Smith
Attys for Res.

No 75

In the Supreme Court
March Term 1867

John C Potter Res
vs
A. J. L. Stevens
appellant
vs
Statement of case

Kane & Smith
for Res

Filed May 7th 1867
O T Fishback Clk
per E P McCarty Dep

C

John C Potter }
vs
A. J. L. Stevens }

In the Supreme Court
March Term 1867

By the record in this case it appears that John McDowell was and actually insolvent in the Summer of the year 1857, That said McDowell in the Summer of 1857 applied for an extension from his Eastern Creditors and allowed such extension —

That after said extension on the 14th day of October said McDowell executed two voluntary conveyances of property to the defendant A. J. L. Stevens, in trust for the wife of said McDowell one of said deeds being for the property described in the petition filed in this case

That in the month of February 1858 said McDowell executed a deed of trust to W. C. Tyler Trustee of said defendant Stevens of all household furniture of said McDowell in the dwelling house on St Augustine Avenue as well as all utensils and stock on the Stevens farm to secure two notes each for $4606 43/100 in two years

That on the 31st day of March 1858 John McDowell conveyed to said defendant in consideration of $25.000 the property described in plaintiffs petition

That said Stevens on said 31st day of March conveyed the property described in plaintiffs petition to Wm. C Tyler & George Mc Dowell to secure to John Mc Dowell five notes each for $5000 payable in one, two, three four and five years after date which deed of trust was filed for record July 17th 1858.

That on the 31st day of March 1858 the said A. J. L. Stevens & Tyler conveyed to Wm. C. Tyler and George Mc Dowell certain Negro slaves conveyed by said John Mc Dowell to said Stevens by deed dated October 14th 1857. Also the land conveyed by said John Mc Dowell and wife to said Stevens on said 14th day of October 1857 This deed dated March 31st 1858 conveys said property to secure to said John Mc Dowell and wife two promisory notes each for $4450 both drawn by said defendant Stevens, one payable two years after date and one peyable three years after date

That said John Mc Dowell executed a deed of trust conveying the Sappington farm to the Trustee of Coleman and Stevens dated Feby 12th 1858, On the 15th of Feby and 5th of March 1858 John Mc Dowell conveyed all his insurance stocks in trust to secure indebtedness due the Ins. Companies for borrowed money, borrowed some on and some before the

date of the deed of trust—

That from the 14th day of October 1857 until the Autumn of the year 1858 John McDowell & family lived on the property in dispute without paying rent and then removed to the house of the defendant in the country where he and his family resided until the Autumn of the year 1864 paying neither for board or rent,

That said defendant was one of five heirs of his father who died in the year 1851 intestate leaving property worth not to exceed $50.000, That said Stevens had no other property save what he inherited from his father That said defendant had ever been a farmer in the County of St Louis about 25 miles from the City of St Louis and was so engaged until the year 1864

That said defendant Stevens in Feby & March 1858 executed to the order of John McDowell 7 negotiable notes in the aggregate amounting to the sum of $33,900 and all payable within five years

That said defendant Stevens had full knowledge of the insolvency during the whole time of the transactions above referred to

That said Stevens was at the time of the above transactions indebted to his

mother and brother Dr R.H. Stevens to the amount of several thousand dollars

That the only means the said defendant had of paying his debts was by the products of his farm

That in fact the only note said Stevens ever paid of all the notes above referred to was the note for $5000 endorsed by John McDowell to Andrew Christy

That John McDowell with the knowledge and consent of said defendant transferred without any consideration and for the purpose of defrauding his (McDowell's) Creditors, to George McDowell brother of John and partner in the business firm of J & W McDowell & Co. two notes each for $4450. one payable in two years and one in three years after date which notes were renewed one for two years and one for [illegible] years. That neither of these notes were ever paid, but to cheat creditors the same were executed in the manner stated in the depositions of said defendant Stevens and George McDowell

That on the 7th day of April 1868. the plaintiffs instituted a suit by attachment against the said John McDowell in which suit the property in question

was attached and the said Stevens the defendant was summond as garnishee, That said defendant in his answer as garnishee denied that he was ever the legal owner of the land described in plaintiffs petition and denied that there was any consideration for $5000 cash

That the four outstanding notes each for $5000 were transferred long after the said Stevens was summoned as garnishee they were transferred only as collateral security for debts out-standing before the suit in attachment was commenced and were transferred for the purpose of cheating this plaintiff

That the deed of John McDowell dated October 14th 1857 to his wifes trustee conveying the property in dispute was annulled by the decree of the Court for the reason that the same was fraudulent and void as to his creditors

That the four outstanding notes of $5000 each were transferred some years after they were executed, were transferred merely as collateral security, and were most manifestly transfers for the purpose of cheating and defrauding the plaintiff and other creditors

The opinion of the Supreme Court of the above transactions may be seen by reference to 31 Mo. Rep. page 62

The Respondent insists that for the reasons above stated as well as for various other reasons appearing on the record the judgment of the Court below should be affirmed

Howe & Kellogg
for Res

No 75
In the Supreme Court
March Term 1867

John Lee Potter Res
v
A J L Stevens Appellee
Statement of cons
Knox & Smith
for Res

Filed May 7th 1867
C T Fishback Clk
per E P McCarty Dep

John C. Potter
Respt
vs.
Andrew J. L. Stevens
Apps

Supreme Court.
March Term. 1867.

Appellants Brief:

~~It appears that~~ This is a suit brought by the Pltf- against Andrew J. L. Stevens to set-aside a deed of certain property situated on St. Ange Av. in the City of St. Louis. made by Jno W. McDowell and wife by warranty deed to said Defdt. Stevens and dated March 31st 1858. -(As to the deed of trust of Oct 14th/57 from McDowell to Stevens in trust for his McDowell's wife the Defdt. made no controversy at the trial and so it was annulled without opposition from the Defdt.) This deed of March 31st/58 was filed for record February 19th 1861 (See p. 8 of statement) The Defendant Andrew Stevens gave for the property $25.000 in notes aside from assuming an indebtedness on said property of about $3000. a part of which was afterwards paid - The notes covering the $25.000cc were for $5.000 each due severally in one two three four and five years from date - ~~The note due one year from date was paid by Stevens~~. These notes were secured by a deed of trust on the St Ange property made on the same day as the purchase. and given by Stevens to McDowell and wife to secure the payment of said notes - The note due one year after date was transferred by McDowell before maturity to Andrew Christy in payment of a debt and at maturity was paid by Stevens -
The note due two years from date was transferred to Richard H. Stevens by McDowell in 1858 to secure him for endorsement made for McDowell & Co. and Stevens testified that he held the note still on the day of trial -
The note due three years after date was transferred in Feby

1861 before maturity by McDowell to James Pleasants as collateral security for notes he held against McDowell - who still holds the same -

The note due four years after date is held by Walker D. Shumate as Admr of Walker H. Dorsett to whom in his life time it had been assigned to indemnify him for accommodation endorsements made for McDowell

The note due five years after date is held by Henry Tyler to whom it was transferred in March 1861 as collateral to secure other notes held by him against McDowell -

The deed of trust securing these notes was recorded July 17 1858 -

The Sheriffs deed under which Plff claims title was made Nov 4th 1861 and was filed for Record Nov. 23 "1861 - The levy was made Sept. 28 "61 on the St. Ann property -

None of the judgments against John McDowell under which the property was sold were rendered before ~~April 20th~~ March 21st 1861 - and the executions were issued in the ~~same~~ month of April ~~It does not~~ It will ~~thus~~ be seen ~~that~~ The deed from McDowell to Stevens (sought to be set aside) was recorded Feby 19 "1861

It will then be seen that all these note holders received the notes before maturity, and before the rendering of the judgments and before the levy by the Sheriff on said property, or the date or recording of the Sheriffs deed to Plff - Also that the deed of March 31st 58 ~~was~~ from McDowell to Stevens and the deed of trust from Stevens to McDowell were recorded before the said levy and the making of the Sheriffs deed -

A.

The question then arises at the outset as to whether these note holders were interested in the property in controversy and whether their interest was of such a nature that they should have been before the court as parties to the suit before the court could proceed to set aside the deed in controversy -

The deed of March 31st 1908 ~~was~~ from McDowell to Stevens was the one which alone vested the title in Stevens. and upon it is based the deed of trust from Stevens to McDowell to secure the payment of the five notes for $5000.00 each. And if the said deed from McDowell to Stevens is annulled then the deed of trust from Stevens back to McDowell fails to afford any title or security to the note holders. since Stevens title which alone can support it is annulled = So that if these note holders had any interest in this property which ought to have received protection in accord of law or equity; this interest has been destroyed or vitiated in a suit in which they were not parties. There has been an adjudication without an opportunity of a hearing as to them -
Were they then such parties in interest ?

II Now though the deed in controversy from McDowell to Stevens may have been fraudulent in fact as to both those parties, yet if these note holders stood in the position of subsequent purchasers in good faith. without any notice ~~of it~~ that such original conveyance was fraudulent. they take a good title, to the extent of their interest to the property, and are unaffected by the nature of the original deed as regards both the grantor and grantee -

Section 3 p 803 1 Rev. Statutes (1845) declares.

"No such conveyance or charge shall be deemed void in favor of a subsequent purchaser if the deed or conveyance shall have been duly acknowledged or proved and recorded or the purchaser have actual notice thereof at the time of the ~~purchase~~ payment of the purchase money, unless it shall appear that the grantee in such conveyance or person to be benefitted by such charge was party or privy to the fraud intended."

"For all the purposes of a valid title in a bona fide purchaser under a fraudulent grantee, such grantee is in contemplation of law, vested with a legal and perfect title" if the purchaser acquires his title before creditors acquire a lien on the property." Fox vs. Clark 1 Walkers. Chane. (Michigan) p 338 And in the same case it is declared p. 340 that the creditors may levy upon the property and sell it to pay their debts the same after such fraudulent conveyance as before, provided it has not been conveyed by the fraudulent grantee to a bona fide purchaser without notice.

In Knox vs. Hurst 18 Mo. 174. it is declared that if A. fraudulently transfers property to B., a third party who receives the property from B. in payment of a just debt without notice of the fraud between A and B. will hold it as against the creditors of A.

There is no intimation in the case that these note holders had any knowledge or notice that the conveyance from McDowell to Stevens was fraudulent. or that they knew that the deed of trust from Stevens to McDowell to secure the payment of the note was fraudulent. So that if they are to be regarded as purchasers in the sense of the statute and of the above cases they are also innocent purchasers.

2d The transfer of the notes to the present holders made them such purchasers.

In Anderson vs. Baumgartner 27 Md. 80 it is said that the "doctrine is well settled that the transfer of a debt carries with it in Equity the mortgage security. And if several notes secured in the same mortgage are assigned to different persons. as a general rule the holder of each note will acquire by the assignment an equitable interest in the mortgage -- the security is only an incident to the debt and if the principal be assigned and there be no agreement to the contrary the mortgage will pass with it."

The same doctrine is also laid down in the following cases. and in none of them is it held that there need be any separate assignment of the mortgage distinct from the debt --

Thayer vs. Campbell 9 Md. 277
Keyes vs. Wood 21 Vt. 331
1 Hill'd on Mortgages. Chap 11 Sec 10 + —

And the fact that some of these holders took their notes as collateral security for antecedent debts, does not affect their rights. They are, ~~not~~ having taken the same before maturity and without any notice of any infirmities attached to them — under the decisions of this State and of almost every State in the union ~~State~~ regarded as good faith holders for value —

Grant vs. Kidwell 30 Mo. 455 —
Swift vs. Tyson 16 Peters 19-20-22.
Blanchard vs. Stevens 3 Cushing 168 —
26 Vt. 569 — 1 Zab (N.J.) 667
11 Ohio 141-2 1 Smith (Ind.) 89
8 Calif. 266 — Story on Bills § 192.

The case then stands as though this property had been carved up into five different mortgages for the benefit of the creditors being the five note holders in question. four of whom still remain unpaid — that is as to them the mortgage is still outstanding —

And it can make no difference whether these note holders be regarded as deriving their title as mortgagees immediately from Stevens, or from Stevens through the intervention of Mc Dowell as payee and endorser of the note. A party can as well take a good title from a fraudulent grantor as from a fraudulent grantee. provided he be himself an innocent purchaser for value —

Wheaton vs. Sexton 4 Wheaton 507
Pope vs Andrews. 1 Smede & Marshall Chanc. 135 —
Stones vs. Herrington 7 Alabama. 151 —

III. And it is well settled that a mortgagee is a purchaser. To the extent of his interest in the premises within the meaning of the term purchaser as used in the Statute of Fraudulent Conveyances.

Ledyard vs Butler 9 Paige Chanc. Rep. 137 —
and numerous cases there cited —

The case of Ledyard vs. Butler above cited is where the owner of land made a fraudulent conveyance thereof and the grantee went into possession. — and afterwards mortgaged the same to a bona fide mortgagee upon a loan of money on the security of the mortgage which mortgagee had no notice of the fraud — held that the mortgage was a valid security upon the land as against the creditor of the original owner —

IV. There can be no doubt that the note holders had a priority of title so far as the recording of their deeds are concerned — Both the deed from McDowell to Stevens and the deed of trust from Stevens back to McDowell were recorded before the property was sold by the Sheriff to the plaintiffs and before it had even been levied upon. Although the deed from McDowell to Stevens was not recorded until Feby 19. 1861. 7 months before the levy by the sheriff — and also before the rendering of any of the judgments — In Davis vs Clousby 14 Mo. 170 it was held that a bona fide purchaser of property who has failed to record his deed until after an

judgment has been recovered against his vendor, but who records it prior to any sale under the judgment, can hold it against ~~any~~ the person holding under the judgment -

The court p 176 say that the statute does not refer to a creditor - and that it would be useless to give notice of an unrecorded deed to a creditor with a view to affect the person who might afterwards become a purchaser under the judgment of the creditors -

A creditor by obtaining a judgment acquires a lien that binds the estate of the defendant against any subsequent act of his but he acquires no interest or estate in the property. The purchaser of the property under the judgment of the creditor is the first person to be affected with notice either actual or constructive - and the recording of the deed before the purchase is notice to him -

The same doctrine in

Valentine vs. Havener. 20 Mo. 133 -

Sedgard vs. Butler 9 Paige Chanc. 136 -

And though it may be true that the suit brought in April 1858. in favor of Potter et ali. by attachment - yet as the Pltf failed to show that the levy on the execution issued under said judgment was made before the return day of said execution he can claim no benefit from any lien which might arise under that attachment -

These note holders are then good faith mortgagees of the property in controversy in this suit. and their interest in or lien upon the property in controversy attached before the Plaintiff in this case acquired any interest in said property which could prevail or have any effect against any party other than McDowell himself - And if they have such interest it is evident that their rights have been impaired if not destroyed by the action of the court below in setting aside the deed from McDowell. for thereby

a most important link in their chain of title has been taken away —

V The question then arises here as to whether these note-holders should have been made parties to the suit before the court could proceed to set aside the deed in controversy —

And here it is to be noticed that John McDowell and Judith McDowell — the grantors in the deed sought to be set aside and who gave to Stevens a warranty deed — are not made parties to the suit as we contend they should have been. And it will be convenient to consider the point as to whether McDowell and wife, and the note holders (mortgagees) should have been made parties at the same time:

The court will also notice that the deed from Jno. McDowell to Andrew Stevens in trust for Judith McDowell was clearly void. Neither McDowell or said Judith being parties but only Stevens who was by virtue of said deed of Dec. 1st 1857 simply a dry trustee — and no parties being before the court to protect either the interests of the grantor or the cestui que trust —

This is a question that may be raised at any time either by demurrer or plea, or at any time during the trial by motion for new trial or in the appellate court —

In Story's Equity Pleading § 75 it is said —

"If the proper parties are not made, the defendant may either demur to the bill, or when the cause comes on to a hearing he may object that the proper parties are wanting or the court itself may state the objection and refuse to proceed to make a decree — or if a decree is made it may for the very reason be reversed on a rehearing or on an appeal. Or if it be not reversed yet it will

bind none but the parties to the suit and those claiming under them. So that all the evils of fruitless and inadequate litigation may be visited upon the successful party in the original suit - by leaving his title still open to future question and controversy.

And in the same work § 77. it is said. If complete justice between the parties before the court cannot be done without other parties being made whose parties rights or interests would be prejudiced by a decree - then the court will altogether stay its proceedings even though those other parties cannot be brought before the court. for in such cases the court will not by its endeavors to do justice between the parties before it, risk the doing of positive injustice to other parties not before it whose claims are or may be equally meritorious -

And in numerous cases it is incumbent on declared to be incumbent on the court when a decree will have the effect of depriving third parties of their legal rights. To notice the fact at the hearing and cause them to be brought in. and that the court ought to order the cause to stand over to enable the plaintiffs to bring such necessary parties before the Court - and that it is an error that will be fatal though such the objection may not have been made at any time before the final hearing in the appellate court -

Shaver vs. Brainard - 29 Barbour. 251.
O'Brien vs. Heeney 2 Edw. Chanc. 242-
Morse vs. Wabis Power Co. 42 Maine - 119.
Felch vs. Hooper. 20 Me. 159
Clark vs. Long. 4 Randolph. 451.
Woodward vs Wood. 19 Alabama-213.
Prentice vs. Kimball 19. Ill. 320 -

And is a rule in Equity that all ~~parties~~ persons who have remote and future interests or equitable interests only, or who are directly affected by the decree, should be made parties; and if they are within the jurisdiction and capable of being made parties - the court will not proceed to make a decree without them -

It is the great object of courts of Equity to put an end to litigation and to settle if possible in a single suit - the rights of all parties interested or affected by the subject-matter in controversy.

Storys Equity Jurisp. Vol. 11 § 1526

~~If~~ complete justice between the parties before the court cannot be done without other parties being made whose rights or interests would be prejudiced by a decree then the court will altogether stay its proceedings - even though those other parties cannot be brought before the court, for in such cases the court will not by its endeavors to do justice between the parties before it risk ~~the doing~~ of positive injustice to other parties not before it whose claims are or may be equally meritorious.

Story on Eq. Pleading § 77

So in 1st Daniel Chanc. Pleading & Practice. p. 238 it is said. "Where an individual has an interest in the subject matter either in possession or in expectancy which is likely either to be defeated or

diminished by the plaintiffs claims; in such cases he has an immediate interest in resisting the demand and all persons who have such immediate interests are necessary parties to the suit--
And there may be other persons who though not immediately interested in resisting the plaintiffs demands are yet liable to be affected by them consequentially because the success of the plaintiffs against the defendants who are immediately interested may give those defendants a right to proceed against them for the purpose of compelling them to make compensation either in whole or in part for the loss sustained. those persons therefore as being consequentially liable to be affected by the suit must frequently also be made parties to it. —

and p. 239. it is said. by those having an interest is meant not only those who are beneficially interested but also all persons who have any estate either legal or equitable in the subject-matter whether such estate be beneficial to themselves or not —

In Prentice vs. Kimball 19 Ill. 322. it is said -
"It is a rule in courts of Equity that all ~~parties~~ persons are to be made parties to a suit whom who have any substantial legal or beneficial interest in the subject matter of the litigation and who are to be materially affected by the decree that may be rendered."
and p. 323. it is held. "that where the rights of the parties not before the court are intimately connected with the matter in dispute so that a final decree cannot be made without materially affecting their interests the objection may be taken at the hearing or on appeal or on error. Courts will ex officio take notice of such ~~sole~~ omission. and rule accordingly —

So far as regards McDowell the case of Burby vs Littlefield 31st N.H. 193. is in point.

There the bill was brought to reform a deed made to L. on the ground that the same was made by mistake and fraudulently of which L. had knowledge it was held that the grantors ought to have been made parties. The court say p. 198.

"The exception that Jordan and Crawford should be made parties to the bill we think is well taken. The general rule is that all who are to be affected either immediately or consequentially by the decree sought for should be made parties. The success of a plaintiff against a defendant who is immediately interested may give such defendant a right to proceed against others, for the purpose of compelling them to make compensation either in whole or in part for the loss sustained or to do some act toward reinstating him in the situation in which he would have been but for the success of the plaintiff. Those persons therefore who are liable to be thus affected by the suit must frequently be made parties." and p. 199 it is further said.

Should the complainant succeed against the defendant the latter would have at least a prima facie cause of action against his grantor for a breach of his covenants of warranty. Whether these actions would be successfully prosecuted it is unnecessary for us to determine at this time. but it is apparent that there is a contingent liability which we think should be passed upon in this proceeding.

So in Shaver vs. Brainard 29 Barbour 25 it was determined that in a bill to set aside as fraudulent a conveyance of real estate made by a

judgment-debtor to one of the Defendants and a subsequent conveyance from such grantee to another Defendant. the judgment debtor is a necessary party

See Burk vs. Flournoy 4 Mo. 116
Coates vs. Day 9 Mo. 304

In Carey vs. Hoxey 11 Georgia 648. the court in speaking of the rule that all ~~parties~~ persons in interest should be made parties say - "This rule prevents multiplicity of suits by enabling the court to decree at once upon the rights of all the parties interested. When all the parties are before the court with the privilege of being heard. the court is enabled to see the whole merits of the case. no one's rights are adjudged behind his back and comprehensive justice can be administered --

In Storys Eq. Pleading. § 137. it is asserted that whether a person's interest in the subject matter of the suit be legal or equitable - a present direct and immediate interest or a future remote fixed interest, if his interest will be bound or affected by the decree he must be made a party —

See also. §§. 138 192. 193 -

Society &c. vs. Town of Hartland 2 Paine (C.C.) 536
Crocker vs. Higgins. 7 Conn. 342.
Trist. vs. Randall - 2 Mason - 181 -

B.

I. It is proved in this case that the amount for which this property was sold by McDowell to Stevens was the fair and full value of the property at the time of the sale and for aught that appears by record is its full value at the present time. Also that the defendant Charles Stevens at that time was worth from $20,000 to $30,000 and so fully responsible as to ability for the payment of the notes. It also appears and is not controverted that a portion of the $3000 or thereabouts outstanding as an encumbrance on said property at the time of the purchase has been paid by Stevens. Also that he has paid the first note for $5000 which went to pay one of the creditors of McDowell. Also that all the other $5000 notes had been transferred by McDowell to secure or pay his creditors before the lien of the Pltf. to the property had attached. It is also evident that Stevens is absolutely liable for the payment of all of these notes though the consideration may have failed as to him since they have all come into the hands of the holders as good faith endorsees before maturity.

Thus then it must be conceded that by the subsequent action of McDowell this property of so its full value has been devoted to the payment of his debtors and that before any lien of the plaintiffs had attached to said property - (For though the original suit of Rotherdale may have been brought by attachment yet it does not appear by the record that the levy was made previous to the return day of the execution which the Pltf was bound to do before he could claim the benefit of any lien arising from such attachment.)

Now we contend that it is a well established principle of equity that a deed which is originally void as declared by our Statute in reference to fraudulent conveyances may become confirmed by matter ex post facto

and by such a state of facts as is presented in this case -

It is to be remarked that it is now universally held by the courts - that under the Statute of Elizabeth ~~of~~ in reference to Fraudulent conveyances of which our Statute is a transcript - a deed made to defraud creditors is not void - but voidable - For instance, though declared void in absolute terms - yet it is good as between the grantor and grantee - and their respective heirs and representatives, and so may give a good title to a good faith purchaser from the fraudulent grantor or grantee either. And though not thus limited by the Statute is still valid as against all the world but creditors and subsequent purchasers notwithstanding the express provision of the Statute that it shall be absolutely void

Oriental Bank vs. Haskins 3 Met. 332.

A

And being voidable it may become confirmed and legalized by matter ex post facto — - -

In Agricultural Bank vs. Dorsey. 1 Freeman's chanc. 338 the facts of the case were as follows.

Samuel Dorsey on Nov. 13th 1839 conveyed all his estate real and personal to his son Edward - who on the same day reconveyed the same property to his father by way of mortgage in consideration of an alleged indebtedness to him to the amount of $40.000. $26.000 of which was to be paid to different creditors of the father and the remainder to his other children - There were in the mortgage various stipulations in favor of the father as to the property conveyed - A full satisfaction of this mortgage was afterwards entered upon the record by the father - On Feby 18th 1840 the father being indebted to Blakely & co. for which debt

the son was also ~~endorser~~ liable as endorser -
The son to secure these claims mortgaged the property
to Blakely & co . who obtained a decree of foreclosure by
confession on the same Nov. 26 1840 - The complainant
in the case obtained judgment against the father Nov. 26
1840 for $10.000 . and filed his bill enjoining the enforce-
ment of said decree and insisting that the deed from
the father to son was fraudulent and void as against
creditors

The court then say p. 243.

" Although the original conveyance may be voidable
for fraud as against creditors . yet if by agreement between
the creditor and the fraudulent grantee a portion of the
property is applied to pay the debt of such creditor ;
it seems to me that the conveyance should be
held good to that extent because the property
would then have received the same direction
and application that the law would give to it upon
declaring the deed void. If the grantee does what
which the law would compel him to do ?
can see no reason for disturbing the act - A
conveyance which is voidable only as being con-
trary to the statute against fraudulent conveyances
may be confirmed by matter ex post facto
We think that the mortgage by E Dorsey (the son)
to these defendants on account of the previous
debts of the grantor . were such confirmation and
that the conveyance was thus to the extent of
the property mortgaged rendered valid and effectual"

So in Sterry vs. Arden 1 Johns. Chanc. 271
it is said -

" It has been a principle of long standing

and uniformly recognized that a deed voluntary or fraudulent in its creation and voidable by a purchaser may become good by matter ex post facto.

Also 4 Kent Comm. (*) 463 —

So a voluntary deed and so void (voidable) as against subsequent purchasers is made good by a subsequent marriage - a marriage being held as the highest consideration in the law -

Story vs. Arden. 1 Johns. Chanc. 270
Verplanck vs. Story - 12 Johns. Rep. 536

In Fox vs. Clark. Walkers. Chanc. Rep. 538 where the controversy was between a judgment creditor and a mortgagee as to right of property of the debtor the Court says. p. 542

"If property fraudulently conveyed may be taken and sold on execution by a creditor why may he not take a mortgage on the same property from his debtor for the security of his debt. It seems difficult to assign a reason why he should not. Why drive him to a judgment and execution. Why not allow the fraudulent debtor to repent, and, so far as in his power, to retrace his steps? Why render the title of the fraudulent grantee more secure by fortifying it against the assaults of creditors unless they are made from a particular quarter. With a mortgage from a fraudulent grantor. The creditor is in as good a position to test the validity of an assignment with a fraudulent grantee, as he would be with a judgment and execution levied on

the same property - It is said it will enable fraudulent grantors to give a preference among creditors after a suit has been commenced to test the validity of an assignment - This is true; but a debtor has a right to prefer one creditor to another at any time before the latter has obtained a lien on the debtor's property for his debt. It not unfrequently occurs a creditor who has prosecuted for his debt, when on the point of obtaining judgment, is met with an assignment giving other creditors a preference over him."

In Oriental Bank vs. Haskins 3 Met. 332. the Court say -

"We think that conveyances fraudulent as against creditors or against subsequent purchasers are voidable only and not absolutely void - and that if the fraudulent grantee conveys the estate to a bona fide purchaser for a valuable consideration the conveyance is good and the first grant will be purged of the fraud. And so we hold that such a fraudulent grant may be purged of the fraud by matter ex post facto, whereby the fraudulent intent is abandoned and the grant confirmed for a good and adequate consideration bona fide -

It has also been decided that where one who is summoned as trustee (garnishee) had received goods of the principal debtor under a fraudulent contract but before the service of process upon him had paid or in good faith had assumed

to pay debts of the principal debtor to the amount of the value of the goods received - he was entitled to be discharged. The court holding that in such cases there is a locus penitentiae of which the garnishee may avail himself before the process is served upon him - and that a bona fide payment or assumption of payment ~~of~~ to the value of the goods made to the creditors of the principal is tantamount to a restoration of the goods -

Hutchins vs. Sprague 4 M.H. 469

Thomas vs. Goodwin - 12 Mass. 140

"C"

It is submitted that the facts in this case do not warrant the finding of the court that Stevens knew of the insolvency of McDowell at the time he took the deed in question. It matters not what amount of evidence the Plaintiffs may have produced to show the insolvency of McDowell at the time of the making of the deed Stevens is not affected thereby only so far as he is shown to have had knowledge of such insolvency. So far as the deeds of Oct 24th "97 to him as trustee is concerned. It is shown that he never had any knowledge of the same until after the deed to him of March 31st "98. and a party cannot be invested with the character of trustee against his will or knowledge nor will he be presumed to have any notice of it except he consent to act under it.

Hill on Trustees 2 ed.

The defendant Stevens is not shown to have had any dealings immediately with the firm of McDowell & Co nor any knowledge of their pecuniary standing except that he knew that they were embarrassed like all other business firms in "97 and "98 and it is further shown that among business men in Minneapolis this firm was not reputed to be insolvent in March "98.

So far as the property in controversy is concerned it is shown that Stevens has enjoyed the use and profits of it without collusion with McDowell.

All the transactions are explained consistently with good faith as regards Stevens "and where all the facts bearing upon the intent of an alleged fraudulent conveyance, will as well consist with honesty as dishonesty and fraud. the court ought not to find the same to be corrupt and fraudulent. The proof

of fraud should be perfectly satisfactory.

Dallam vs. Renshaw. 26 Mo. 533.

And it matters not how abundant and conclusive the proof may have been as to the insolvency and fraudulent intent of McDowell. It must also be shown that the grantee participated in such fraudulent intent.

Pope vs. Andrews. 1 Smede & Marshall 135.
Glover vs. Herrington 7 Alabama 151.
Foster vs. Hall 12 Pick 100
4 Kents. Comm. p. * 464
Wallace vs. Waysman 12 Mo. 189.

And it is strong evidence in favor of Stevens that he gave for the property its full value and gave his notes. ~~which the~~ which he was able to pay. and though on time he could not avoid the payment of them for though they might not have been transferred by McDowell he would still have been liable for them by our law on garnishment process if remaining in the hands of McDowell.

The answer of Stevens in the garnishment suit read in evidence by the Plaintiff in this case is perfectly consistent. He is between two fires. on one hand the title to the property is jeopardized by this suit and on the other. ~~the notes~~ it is sought to hold him on the notes for which ~~those notes~~ the title to said property was the only consideration. More than this at the time he made this answer the deed of said property of Oct. 14th 57 from McDowell in trust for his wife was still in existence, and as the deed of March 31st 58. was acknowledged before a Justice of the Peace it was insufficient to pass the title of judge McDowell according to the law in force at that time. A subsequent acknowledgement before the clerk of the Court was made Feby

19th 1861 which gave Stevens a good title to the property as against both John & Judith McDowell.

22

But allowing that the evidence in the case is such that this court will not undertake to say that the court below committed error in finding that the deed was fraudulent as to Stevens - is he nevertheless entitled to an equitable consideration. At the most it can only be said by the respondents that the fraud of Stevens was inferable from the circumstances and relation of the parties - & it cannot be contended that the proof was direct or conclusive morally speaking —

Such being the fact and it having been already mentioned that Stevens has paid a part of the $2000 encumbrance existing upon the property at the time of the purchase, also one of the $5000 notes and that he still remains liable for the other four notes. — The question arises as to whether he is entitled to a consideration at the hand of the court for any or all of the above amounts before setting aside the deed in question —

In Parker vs. Holmes 2 Hill Chanc. 95 it is said "When actual fraud in a judgment or conveyance is clearly proved it is wholly void and will not be permitted to stand as a security for what is actually due - but when Equity infers fraud from the circumstances and relation

and character of the parties it is at the discretion of the court to allow the security to stand good for what is really due —

Parker vs. Holmes. 2 Hill Ch. 95.

In Anderson vs. Fuller it is said —

"In general when a conveyance is set aside for fraud it is within the discretion of the court to decree a conveyance to stand as a security for the money actually paid. This is commonly done where there is no imputation of moral fraud or the proof of actual fraud is in any degree doubtful — as it may be that there was no corrupt agreement between the parties, but a deed of spontaneous kindness and indulgence on the part of the grantee. perhaps it would be generally proper when setting aside a conveyance on the legal influence alone to decree it to stand as a security for any consideration advanced at the time —

In the case of Bean vs. Swift. 2 Mason 296. Justice Story says:

I agree with the doctrine that has been laid down in certain cases that a deed fraudulent in fact is absolutely void and is not permitted to stand as a security for any purpose of reimbursement or indemnity — but it is otherwise with a deed obtained under suspicious or inequitable circumstances or which is only constructively fraudulent. At law where a conveyance is found to be fraudulent against a creditor he comes in and avoids all without reservation

of any consideration. But it is said Equity can deal differently with it. and decree back principal and interest- and therefore in Equity a lesser matter will in such a case set a conveyance aside. Cases are not unfrequent in Equity where the court upon setting aside a conveyance has left some benefit to the grantee. But this is done only ~~in circumstances~~ where there are circumstances which do not immediately affect the party against whom the decree is sought with an original and meditated fraud.

The same doctrine in 1 John. Ch. 478
& Dunn vs. Chambers. 4 Barbour 376.

D.

The appellant offered a will of Wm McDowell in evidence and also a final settlement showing a large amount coming to John McDowell by virtue of such will and settlement and also deeds of various pieces of property made to J. & W. McDowell and dated in 1857 & 1858. some being before and some after the alleged fraudulent conveyance this evidence the court excluded — and wrongfully for it was certainly competent for the defts. to show the amount of property possessed by John McDowell at the time of the alleged fraudulent sale. Otherwise it would be impossible for a party to defend himself from a charge of insolvency. Numerous deeds were offered at the time. but only a few are inserted in the record. three being regarded as sufficient for the showing of this point. It is certainly difficult to imagine upon what principle of law this evidence could have been excluded — And as the most of the evidence in the case related solely to McDowell and to his pecuniary condition in 1857 & 8. It is impossible to say that the defendant was not or could not be injured by the exclusion of such evidence.—

Cline & Jamison

Todd C. Day. Attys for Appts.

John C. Potter Resp.
vs.
Andrew J. L. Stevens.
No. 75 App.

Supreme Court,
March Term. 1867

Appellants Brief,

Filed May 7th 1867
O T Fishback Ak
per E P McCarty Dep

Cline & Jamison
Attys for App.

(1)

John C. Potter
Resp.
vs.
Andrew J. L. Stevens
Apf.

Supreme Court
March Term. 1867.

Appellants Statement:

This was a Bill in Equity brought at the April Term of the St. Louis Circuit Court 1866. To set aside a conveyance of property situated on St Ange Avenue in the City of St. Louis made by John Mc Dowell and wife to Andrew J. L. Stevens the Defendant -

The petition alleges that on the 14th of October 1857 John Mc Dowell was largely indebted and in fact insolvent. That on said day he executed a deed of trust to Andrew J. L. Stevens as trustee of Judith Mc Dowell of the said property situated on St. Ange Avenue and consisting of seven lots. That the said deed was voluntary and and so void as to Plaintiff who was then a creditor of said Mc Dowell -

That the said John and Judith Mc Dowell also executed a deed to the said Stevens of the said St Ange property bearing date of March 31st 1858. for a consideration mentioned in said deed of $25.000. That at the time there was an incumbrance on said property amounting to about $3.000 which said Stevens assumed to pay - That at the time of making said deed said Mc Dowell was and has since been insolvent -

That Plaintiff paid nothing for said property but

(2) 2 Executed his five promissory notes each for five thousand dollars payable in one two three four and five years respectively with interest at the rate of six per cent.

That early in the month of April 1858 the plaintiff Jno. T. Potter instituted suit by attachment against said Jno. McDowell and attached the said property. that this suit was prosecuted to final judgment and was in favor of the firm of Potter Nute White and Bailey of which plaintiff was a member.

3 That the said property was afterward sold by the Sheriff on an execution issued on said judgment. bought by the plaintiff and a Sheriffs deed made to him of the same dated Nov. 6th 1861 -

That the said deed to Stevens was made to defraud the creditors of said McDowell and that the said Stevens being trustee to in a former deed had no right to purchase said property by said deed of March 31st 1858.

That said deed is a cloud upon his title and asks that the same may be annulled and the title vested in plaintiff.

The Defendant in his answer asserts:-

That at the time the Deed dated March 31st 1858 was made to him he did not know of the execution of said deed dated October 14th 1857. to him as trustee of Judith McDowell. (p. 7)

That he did not know that McDowell was insol

(3)

-next- When he took said deed of March 31st 1858 (p 6)

5 "This defendant further says that in the latter part of March 1858 the said John McDowell proposed to sell to this defendant the real estate described in the said petition at the price and sum of $25,000 payable in five equal annual instalments. and this defdt. believing at that time that the said McDowell had a good title to the same and this defendant thinking that he could make money out of the same accepted the proposition of said McDowell and thereupon the said McDowell and wife by deed dated March 31st 1858

6 conveyed the said property to this defendant at and for the price of $25,000 for which said sum he executed and delivered his five promissory notes dated March 31st 1858 payable to the order of said Jno. McDowell each for the sum of $5,000 with interest from date - one due one year after date and the others due respectively in two three four and five years after date - And also at the same time duly executed a deed of trust on said real estate to secure the payment of said notes - that when the said note payable due one year after date became due, he duly paid the same to Andrew Christy the holder and endorsee of said note - That said plaintiff and others caused this defendant to be garnished as a debtor to the said McDowell. which garnishment suits are still pending - and was the reason of this defendant not paying the other notes."

The defendant asserts that he bought the said

proper in good faith and for an adequate consideration and denies that the conveyance was made to defraud creditors

7 "This defendant says that the said plaintiff has not done equity. that he does not come into court with clean hands. that he is now annoying this defendant and prosecuting one of said garnishments and endeavoring to obtain the proceeds or amount of said notes. that he wants and is endeavoring to obtain by suits both the said purchase money for real estate and also the real estate itself.

Deft. says "that he has been informed and believes and avers that said McDowell in good faith transferred and used the said five notes for $5,000 each in paying and liquidating his McDowells debts as was his duty and as he had a right to do.

Wherefore he asks for judgment &c - -

9. The decree of the Court finds that McDowell at the time he executed the deed to Stevens in trust for his McDowells wife dated October 14th 1867 was in fact insolvent - that said deed was voluntary and that it was void as to the creditors of said McDowell of which said plaintiff was one -

That McDowell and wife executed to the said Stevens a deed of the said property dated March 31st 1868. That at the time said McDowell was in-

(5)

solvent and has ever since been. and that said
10 Stevens knew of said Insolvency when he received said last mentioned deed. that Defendant paid nothing for said property but executed his five notes therefor - That the property in question was sold under an execution issued against said McDowell, and was purchased by the Plaintiff. That said deed to Stevens was for the purpose of defrauding creditors - and the same is set aside and annulled -

12 At the trial - The plaintiff gave in evidence the deed of the premises in controversy from the Sheriff to the Plaintiff - dated Nov. 6th 1861.

18 The Judgments against John McDowell under which the property was sold ~~were~~ all rendered April 20th 1861
21 ~~and~~ except one which was dated March 21st of same year (1861)

The executions issued on these Judgments were all dated in April 1861.

30. The plaintiff offered in evidence and read a deed of Trust dated October 14th 1857 from John McDowell to Andrew J. L. Stevens of the said St Ange property. the same being conveyed to said Stevens in trust for Judith McDowell the wife of said John McDowell during her life time and after her death to pass to the heirs at law of said ~~of said~~ Judith McDowell.

This deed was recorded Oct. 14th 1857—

33. Also a deed of Trust from John McDowell to Andrew J. L. Stevens dated October 14th 1857. ~~of~~ certain negro slaves. in trust for the wife of said John McDowell during her life and in case of her death to descend to the heirs at law of his said wife.
This deed was filed and recorded Oct. 14th 1857

34. Also a deed of Trust from John McDowell to Andrew J. L. Stevens dated October 14th 1857. conveying various pieces of property in the County of St. Louis to said Stevens - in trust for Judith the wife of said John McDowell during her life time and in case of her death to descend to her heirs at law -
This deed was filed and recorded Oct. 14th 1857—

42 The Defendant objected to the introduction of the three above mentioned deeds of trust in evidence on the ground that they were irrelevant it not appearing that Stevens had any knowledge of this existence. ~~and~~ or that he had in any way consented to act under the same —

The plaintiff next offered in evidence a deed of trust from John McDowell and wife to William C. Tyler dated Feby 25th 1858 conveying household furniture belonging to his house, and cattle

(3)
(5)

Solvent and has ever since been. And that said
10 Stevens knew of said insolvency when he received said
last-mentioned deed. That defendant paid nothing for
said property but executed his five notes therefor.
That the property in question was sold under an execution
issued against said McDowell, and was purchased by
the Plaintiff. That said deed to Stevens was for
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J. L. Stevens of the said St Ange property. the same being con-
veyed to said Stevens in trust for Judith McDowell the wife of
said John McDowell during her life time and after her death
to pass to the heirs at law of said ~~of said~~ Judith McDowell.

and ~~family~~ farming implements belonging to his farm in the county. To said Tyler in trust for Andrew J. L. Stevens to secure the payment of a certain promissory note dated Feby 19th 1858 and drawn by J. W. McDowell & Co. of which firm said John McDowell is a member. The said note being for the sum of $4606 43/100 and payable one year after date - and the deed authorizes the trustee to sell if the said note should not be paid within two years from date -
This deed was recorded Feby 26th 1858 —

98 Also a Deed of Trust from John McDowell & wife dated February 12th 1858 - To Andrew J. L. Stevens. of certain property in the County of St Louis. (Suffington Farm) in trust for Richard H. Stevens and Robert G. Coleman to secure the payment to said Richard H. Stevens of a promissory note dated October 14th 1857 payable one day after date for the sum of $4209.38/100 - and to secure the payment to said Robt. G. Coleman of a promissory note dated August 30th 57 payable one day after date for the sum of $1650.00 and also to secure to said Coleman the payment of another note dated Jany 1st 58 for the sum of $2365.00 . and if the said notes are not paid within one year authorizing the trustee to sell.
This deed was Recorded Feby 16th 1858 —

111 Also a deed of Trust from Andrew J. L. Stevens dated March 31st 1858 - To Wm E. Tyler and J. W. McDowell of certain negro slaves and also an undivided one fifth interest in the Stevens -

[6] Sam. and Nick descended to said Judith wife of Jno. McDowell as one of the heirs at Law of ~~said Judith~~ Lewis Stevens her father. - in trust for John W. McDowell and his wife to secure the payment of two promissory notes for the sum of $1480.00 each of even date with this deed - payable in two and three years from date. the said notes being for the purchase money of the property described in said deed of trust.
This deed was recorded July 17th 1858 —
And it is acknowledged as satisfied March 21st 1865 —

142- The Plaintiffs next offered in evidence the deed sought to be set aside - Being a deed of warranty made on March 31st 1858 by John McDowell and wife to Andrew J. L. Stevens. and conveying the property in controversy in this suit -

145 This deed was acknowledged April 2nd 1858 before a Justice of the Peace.

And was reacknowledged Feby 19th 1861 - before Clerk of Court -
And was filed for record February 19th 1861 -

107 Plaintiffs also read in evidence a deed of trust of the property in controversy dated March 31st 1858. from

(9)

Andrew J. L. Stevens to William E. Tyler and George McDowell in trust for John W. McDowell and wife to secure the payment of the purchase money for the
108 said property. amounting to $25.000.00 represented by five promissory notes. each for the sum of $5.000.00 of even date with the deed of trust and due one two. three four and five years respectively from date - with interest at six per cent per annum -
Acknowledged April 15th 1858 -
Recorded July 17th 1858 -

The Plaintiff also offered in evidence various judgments existing against John W. McDowell all rendered after March 1858. also letters from the firm of McDowell & co written in the fall of 57 to their creditors asking for an extension of time on their paper and debts -

67 The plaintiff also gave in evidence an answer of Stevens as garnishee in a suit of John C Potter vs. John W McDowell. filed made and filed September 26th 1864 -
in which he said he is only indebted to said McDowell as
68 follows. That on the 31st of March 1858 he executed his seven promissory notes. all of said date. to the order of John McDowell. that two of said notes were for the sum of $4450. one due in one year and one in two years. - that he believes that before maturity the said John McDowell assigned for value the said notes to Geo. McDowell. and that he paid said notes at maturity as he was bound to do. -- that the other notes were each for $5000.00 payable one two three four and five years respectively from date. - that he believes that said notes have been assigned for value and before maturity by said McDowell to others. - that the said note due one year after date was

(107

transferred to Andrew Christy who was the owner and holder of the same at maturity. and that he paid the same at maturity. the said note due two years after date to Richard H. Stevens who is still the owner and holder of the same - the note due three years after date to Jas. Pleasants who still holds the same. the note due in four years to Walter H. Dorsett who still owns the same - and the note due in five years to Henry Tyler who still owns the same. — That said five notes each
69 for $5000 were given for the fee simple title of the St. Ange property - that the fee simple title of said estate has never been conveyed to this garnishee - that there is no valuable or valid consideration for the said five notes - that Jno. C. Potter under the attachment suits against said Jno. McDowell caused the said real estate to be sold by the Sheriff and that the same was purchased by said Potter. who claims to be the holder of the same. He further states that he has been garnished in six other attachment suits against said Jno. McDowell all returnable to the October Term 1858 of said Court —

70 The Plff. then gave in evidence the deposition of George McDowell the most of which related to the pecuniary condition of John H. McDowell in 1857-8. and afterwards -
87 the witness stated that the two notes for $5000 00 given by Stevens to McDowell were indorsed to him at the time they were made and that they were given to him in consideration of the services he had rendered to the house of McDowell & co. previous to the time of his becoming a member of the firm in 1856 - That when these notes were ~~finally renewed they~~ due they were renewed by Stevens and that they were finally given back to Stevens. That he was a clerk for Stevens at a store in Forsyth Mo. that the federal army made a raid upon the town and

that he left the store unprotected and that all the goods in the store were taken away — that he thought if he had remained there the goods would not have been interfered with — that Stevens thought the notes ought to be given up as a compensation for that loss and that he did so —

115 The plaintiff next read in evidence the deposition of the Defd. Andrew J. L. Stevens.

He testified that he was a brother in law of John McDonell — ~~He testified~~ that he gave the notes before mentioned for the St. Anye property — and that he also assumed an indebtedness on said property of about $3000.

116 a portion of which he had paid — but could not tell the amount without examining the papers.

117 That he paid the first note for $1000.00 a few days before it ~~came~~ was due to Mr. Christy at the banking house of Benoist & Co. That he made the money with which he paid that note on his farm —

That he had not paid the other notes for the reason that he had been garnished in suits against McDonell — He states that the two notes to Geo. McDonell were paid by them being given up by Geo. McDonell on account of the loss of the goods in the store at Forsythe — for the

120 selling of which George was to receive a certain percentage — one third of what he could make — That when the notes became due he renewed them.

125 The witness testified that he had paid a portion of the taxes on the St. Anye property and that a part still remained unpaid —

126 That he had ~~paid~~ received the rents of the property ~~from~~ and had used the same as his own and had paid no part of them to McDowell or his wife.

That John McDowell left St. Louis with his family in the fall of '58 or spring of '59 and came to live at his or his mothers house in the country and remained there rented his house was burned in Sept. '64

127 The witness stated that at the time he purchased the ~~said~~ St. Ange property he was farming - in St. Louis Co. about 24 miles from the city.

128 The witness describing his property stated that he was worth at the time he purchased the St. Ange property from $20,000 to $30,000. and that he had no indebtedness except to his mother for the rent of the farm occupied by him -

130. The witness further declared that when he bought the St. Ange property he did not know that any deeds of trust had been made by John McDowell to him as trustee of McDowells wife - and that when he bought the property he believed it to belong to John McDowell - that there was no agreement between him and McDowell as to the time when the deed of trust that he had executed to secure the five notes should be recorded - That he did not know at what time either of those notes for $5000 were negotiated

That he knew that the firm of J. & T. McDowell & Co in Feby March and April 1858. were like most of the business men in St. Louis hard up but did not know that they were insolvent -

132. The witness stated that the two notes that Geo. McDowell afterward had were given to John McDowell for his undivided fifth of the estate of Louis Stevens (McDowells wife's father) and for negroes that McDowell ~~got of~~ wife got from her fathers estate and for his interest in some stock on the farm.

133 That he and John McDowell had been farming some 5 or 6 years together and were equally interested in the stock and produce of the farm.

That at the time of the sale he assumed to pay the indebtedness of himself and McDowell to his (Stevens') brother and to his mother. That he had also paid a judgment against McDowell in favor of one Mitchell and that this had never been repaid to

134 him - that the amount paid on this judgment was about $1200.00 That he paid this with his own money and got no portion of the same from McDowell.

That the debt which he and McDowell owed his brother Dr. Stevens was for rent of land and hiring of negroes. That this and the amount they owed his mother for rent was the only indebtedness of the firm of Stevens & McDowell.

The Plaintiffs have closed his case —

147. The Defendant then introduced as a witness Andrew Christy who stated that the note shown him (being the first one of the five notes for $5000.00 each made by Stevens) was formerly held by him against Stevens. That this note had been endorsed to him before maturity to pay another note which he held against McDowell & Co. and that it had been paid to him before maturity

James Pleasants called by the Deft. testified ~~said~~ that the note shown him - being the one of the five notes for $5000.00 and due 3 years after date - was endorsed to him in Feby. 1861 being before maturity and that it was received as collateral security for notes he held against McDowell which latter note was given for money loaned.

Henry Tyler testified that the note shown him being one of the $5000.00 notes and due five years after date belonged to his father who had received it some time in March 61 as collateral to secure other notes for about $6000.00 held by him against McDowell -

148 Walker D. Shumate testified that he held one of the said $5000.00 notes being the one due four years from date. That he held it as administrator of Walter H. Dorsett

and believed that he Dorsett took it as collateral security to indemnify him for accommodation endorsements made for McDowell. That he did not know the amount of the indebtedness of McDowell to Dorsett on account of these endorsements - but that one endorsement amounting to about $1200 or $1500 had been allowed against the estate -

128 Richard H Stevens testified that he held one of the $5000.00 notes - the one due two years after date. That this was transferred to him in '58 as security for endorsements made for McDowell Bro.

129 Moses Samuels testified that that he was acquainted with the house of McDowell Bro. That he was in the store every day. That he endorsed a large amount of McDowells paper and in March '58 thought that the house was solvent -
That the value of the St. Ange property in '58 was worth $25,000 or $30,000.

129 The defendant then offered to read in evidence a certified copy of the settlement in the Probate Court of John McDowell surviving partner of the firm of
138 J & W McDowell made Dec. 26th 1857. and showing a balance against said John in favor of said firm of $120,066 $\frac{35}{100}$

[16]

159 Also the Will of Wm McDowell giving to said John McDowell all his interest in the firm as well as with various ~~houses~~ commercial houses ~~in~~ on which he had an interest and also any land or stock in which he had an interest. Which Will was probated Feb. 22. 1856 —

Def- the court refused to receive either the said Settlement or the Will in evidence.

163 The Defendant also offered to give in evidence various deeds of ~~property~~ in the States of Mo. Ill. Iowa and Arkansas conveying real estate owned by J. & W. McDowell. and dated in Nov. 1857. and

169 one in July 1858 — Which said deeds the Court refused ~~to~~ the Defts. ~~objected~~ excepting.

162 John McDowell testified that he sold the St Ange property in March 1858 for $25,000 and ~~the~~ received the five notes for it. That he took the advice of some men as to the value of the property before he sold it. That he occupied the house on St. Ange Avenue together with his family for a few months after the 31st of March until he removed to the house of Andrew Stevens in the country and remained there until 1864. That he paid no rent or board to Stevens — That Stevens had had possession of the property ever since that time and

162 that he himself had received no benefit from it nor exercised any authority over it since the time he left -

That Stevens never accepted the deed of trust to him of October 14th/57 nor did he ever have knowledge of it.

That the negroes conveyed by the deed of trust in trust for his wife all came by his wife except three -

163 That in March 1858 he regarded himself as solvent but that he had not been able to pay his debts and still owed about $75,000. ~~which he~~ That he had offered to secure Potter (the Pt.) his debt but that he had refused to receive it on account of time asked and rate of interest.

That he transferred the note for $5000.00 spoken of by Christy to him on the first of April 1858. That the other notes had been transferred in the manner as told by the previous witnesses -

172 Several witnesses stated that the price for which the St. Anse property sold to Stevens was its fair value at the time of the sale -

This was all the evidence in the case

173 The Court refused all the declarations of law asked by the Defts - and

176 gave one instruction or declaration of law of its own motion -

177. And then gave judgment for the Pltf annulling the deed of March. 31st 08

177 The Defts in due time made a motion for a new trial urging besides the usual reasons of the finding of the Court being against the law and the evidence. "that all the parties persons interested were not parties either as plaintiffs or defendants in said cause —

This motion was overruled and hence this appeal —

Cline & Jamison & Day
Attys for Appts.

John C. Potter
Resp't
vs.
Andrew J. L. Stevens
App.

No. 75

Supreme Court
March-Term 1867

Appellant's Statement.

Filed May 7th 1867
O. T. Fishback Clk
per E. McCarty Dep

Cline & Jamison
for Appellant

John C. Potter appellant
v.
Richard H. Stevens et al
Respondents

IN SUPREME COURT,
Oct. TERM 1868

AND now come the said Appellant ~~Comes~~ and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellant assign the following, to-wit:

1. That said Court admitted improper andillegal testimony offered by Respondents
2. That said Court rejected proper and legal testimony offered by Appellant
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Appellant
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Respondents when it should have been rendered for the Appellant

That said Court overruled the motion for a new trial, made by said Appellant

10th That on the evidence in the case the Court should have entered judgment granting the prayer of appellant and annulling the deed of trust from A J L. Stevens to John McDonell Trustee

11 Because the [illegible] at General Term erred in offering the judgment awarded at the Special Term

Knox & Smith
Attys for Appellant

And now come the said Respondents — and, for joinder in error, say that there is no error in the record and proceedings of said Courts in said cause as assigned by said Appellant —

Gloner & Shepley
& Cline, Jamison & Day
Attys for Resp's

No 56
In the Supreme Court
Oct Term 1868

John C Potter appt
R H Stevens et al
Respondents

Assignment of Errors

Knowe & Smith
for Appellants

Filed October 19. 1868
O T Fishback Clk
Per E. P. McCarty Dp