

SUPREME COURT OF ALABAMA

Hartley v. Matthews

96 Ala. 224 (1892) · Decided November 15, 1892

OPINION

THORINGTON, J.

THORINGTON, J. The bill in this case seeks the cancellation of a mortgage and an injunction to restrain the purchaser at the mortgage sale from prosecuting separate actions for rent and unlawful detainer instituted by such purchaser. Complainants in the bill are the widow and heirs of the deceased mortgagor. It is shown that no administrator of the mortgagor's estate was ever appointed, and that all the debts against his estate were paid before the filing of the bill.

The respondents are the transferee of the mortgage, and the purchaser at the mortgage sale, the latter being the wife of such transferee. The grounds for relief are that the power of sale contained in the mortgage is personal to the mortgagee and did not pass to his assignee by the transfer of the mortgage, and that the mortgage debt was fully paid before the transfer of the mortgage to appellee, A. S. Matthews.

The bill contains an offer to do equity by paying whatever may be found due on the mortgage debt, if anything, and by submitting to such decree as the court might render. An answer was filed by the transferee of the mortgage, which denies all the facts constituting the equity of the bill, and alleging and exhibiting written acknowledgments by the mortgagor and by appellant of a subsisting indebtedness under the mortgage.

This answer is verified by the affidavit of the respondent A. S. Matthews. His wife, and corespondent, filed an answer by which she adopts as her own the answer filed by her husband, but her answer is not verified by her own oath.

The cause was submitted, as the decree of the court recites, "on motion of the defendant to dissolve the injunction for the want of equity in the bill and on the denials in the answer." The Chancery Court dissolved the injunction, and in its decree directs a reference to take an account of the mortgage debt, "by consent of the parties without prejudice to the right of appeal, and without settling any equity in the case." The appeal is taken from that decree by appellant in her name, alone, and there is a joinder in error -without objection on that ground.

The demurrers were not passed on by the Chancery Court, and the only assignment of error is the decree dissolving the injunction. The facts alleged in the bill of complaint, if established by proof, are sufficient to authorize relief as against the mortgage.— *Tipton v. Wortham*, 93 Ala. 331;

Whitley & Trimble v. Dunham Lumber Co., 89 Ala. 493. But, as averred in the bill, they defeat any right in the complainants to relief by an injunction in limine.

It is obvious from the averments of the bill that neither the action for rent, nor of unlawful detainer, can be maintained if appellant should avail herself of the defenses- open to her at law, and which the bill shows she has the opportunity of doing. While an injunction against an action at law is sometimes retained in aid of the main purpose of the bill and in order to settle the whole controversy in one suit, notwithstanding there may be a valid defense at law to the suit enjoined, it is not matter of absolute right that it should be so retained, *226and under the facts disclosed in the bill we can not hold that the court erred in decreeing a dissolution of the injunction.

Wingo v. Hardy, 94 Ala. 184. It can not be clearly discerned from the record whether the injunction was dissolved because of an adequate defense at law, or because of the denials in the answer of the facts constituting the equity of the bill. But it may be inferred from the consent portion of the decree that the court predicated the dissolution of the injunction on the denials of the answers.

In Jackson v. Jackson, 10 So. Rep. p. 31, Chief Justice Stone speaking for the court said: "When the bill avers facts, the burden of proving which is entirely on complainant, then, if the sworn answer is made on knowledge and contains an unequivocal denial of the charges on which the right to an injunction rests, the general rule is that the injunction must be dissolved on the denials in the answer." In this case the right of complainant to an injunction, and to any relief whatever under her bill, rests upon the fact of the mortgage debt having been paid as averred, and the burden of proving that fact is clearly on her.

The answer of A. S. Matthews is full, and its denials of the facts constituting the equity of the bill are positive and complete and under oath. The case is, therefore, clearly within the general rules, and the injunction was properly dissolved. — L. & N. R. R. Co. v. Philyaw, 94 Ala. 463.

The fact urged by appellant, that the answer of Mrs. Matthews was not verified by her affidavit as required by the rule in such cases, can not change the result. It is a reasonable inference from the averments of the bill that the transactions in respect of which answers are required are within the knowledge of A. S. Matthews rather than of his wife, who is simply made a party under a general allegation that she claims some interest in the property, without even showing that her claim arises under or in connection with the mortgage.

Furthermore, the injunction runs against both the defendants, and no objection was made in the Chancery Court that the answer of Mrs. Matthews was not verified. Under these circumstances the objection can not prevail as a ground for reversing the chancellor's decree. — Mobile School Coms'rs. v. Putnam, 44 Ala. 506; Dunlap v. Clements, 7 Ala. 539, To the claim made in the bill

that the power of sale in the mortgage was personal to 'the mortgagee and did not pass to the assignee of the mortgage debt, the statute is a complete answer.

By the terms of the statute the power is made part of the security for the mortgage debt, and may
*227be executed by any person who, by assignment, or otherwise⁵ becomes entitled to the money
so secured,- — -Code, 1886' § 1844. _ The decree of the Chancery Court dissolving the injunction
must be affirmed. Affirmed.