

Jacob Markell
as
Grayson Eichelberger
Trustee of George
Fisher & others

Court of Appeals December Term 1857 Bartol
delivered the opinion of the Court

The facts in this case are very fully set out in the agreement of the solicitors appearing in the record and may be briefly stated as follows: George F. Fisher was indebted to Conilla H. Smith and Philemon M. Smith in the sum of \$535 on his promissory note dated the 12th day of March 1850 and Jacob Markell was liable as his surety on said note Fisher in order to indemnify secure and save harmless said Markell from all loss by reason of his liability as surety aforesaid on the 26th Nov 1850 executed to said Markell a mortgage with the condition that the said Fisher should pay the aforesaid sum of money with legal interest thereon and should well and truly indemnify and save harmless the said Markell from all and every loss by reason of his liability as surety as hereinbefore recited which mortgage was duly executed and recorded after which the said Fisher executed another mortgage conveying the same property to other persons for the purpose of securing other debts and sureties The note due Conilla H. & Philemon M. Smith was placed by the payee after its maturity in the Farmers & Mechanics Bank of Frederick County for collection with instructions to institute suit thereon if not paid by a certain day The cashier they told Fisher if he would pay a part of the sum due on said note the bank would discount a note for him to enable him to pay the balance Whereupon the said Markell together with one Joseph Beran united with said Fisher in giving a note dated Nov 8. 1850 for \$475 payable in six months to Thomas Morgan Cashier on order and the money raised by said note together with the sum paid by Fisher was applied to the payment of the note due to H. & P. M. Smith At the time Markell put his name on said note for \$475 it was understood by him and Fisher that the money to be raised upon it was to be applied to the payment of the balance due on the note to the Smiths The name of Beran thereon was procured by Fisher because the bank required another security or drance and the same remains unpaid and is held by the Bank It is also admitted that Fisher is insolvent and was generally known to be very heavily indebted at the time the said note was discounted The mortgaged property was sold under a decree of the Circuit Court for Frederick County sitting in Equity passed upon a bill filed by former incumbents and the fund arising from the sale was brought into Court The cause being referred to the auditor he stated an account - applying the proceeds of sale to the payment of the claims of prior mortgages and to parties claiming under the subsequent mortgage to the exclusion of the said note for \$475 held by the Bank on which said Markell is surety and the said Markell filed receipts to the auditor report claiming that he is entitled under the mortgage of the 26th Nov. 1850 to have the said note for \$475 paid out of the fund The Circuit Court by its order of the 25th Sept 1857 overruled the receipts and satisfied the auditors account and from that order this appeal is prosecuted It is admitted that the fund is insufficient to pay all the mortgage claims and that the claims Nos 11 & 12 allowed in the said account are claims secured by the last mortgage which was executed

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