

8433

No. _____

Supreme Court of Illinois

Jonas Hite et al

vs.

James Hoss

71641  7

State of Illinois
Marion County } 55

Pleas and proceedings had in
the Circuit Court in and for the
County of Marion and State of Illinois
in a certain suit heretofore pending
in said Court between James Hoss
Complainant and Jonas Hite, Jacob
Mack and Amos Clark Defendants.

Be it Remembered that on the 18th day of June
A.D. 1860 said Complainant filed in the office of
the Clerk of the Circuit Court of said County his
Bill for Relief against said Defendants which
is in the words and figures following to-wit

State of Illinois } Of the August Term A.D. 1860
Marion County } of Marion County Circuit Court

James Hoss } Bill for Relief

vs
Jonas Hite, Jacob

Mack and Amos Clark } To the Honorable W. H. S.
O'Melroy Judge of the
second Judicial Circuit of the State of Illinois
in Chancery sitting. Honorably complaining your
Orator James Hoss a citizen and resident of said
County of Marion State of Illinois sheweth.

That the Defendant Jacob Mack
and Mary S. Mack his wife by their Warranty
and bearing date second October in the year of
our Lord One thousand Eight Hundred and fifty seven

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in Consideration of the sum of one thousand Dollars granted, released and conveyed to your orator his heirs and assigns the following described Real Estate situate lying and being in the County of Marion and State of Illinois known and designated as follows to wit The West half of the North West quarter of section thirty four all in Township Number three North of Range Number three East of the third Principal Meridian

I, have and do hold same in fee simple, the said Jacob Mack thereby Covenanting for lawful seizure of said Lands and premises, and that they were free from all Incumbrances and with the usual Covenant of Warranty. That said Deed so executed was acknowledged on said 2nd October 1857 before James S. Martin Clerk of the County Court of said County by said Jacob Mack and his said wife, she then relinquishing her right of Dower in and to said Lands and premises, which said Deed so executed acknowledged and delivered was by your orator filed for Record in the Recorder's office of said County on the fifth day of October 1857 and was duly recorded in Book N pages 530 and 531 of Marion County Records and to which ^{Deed} your orator refers.

Your Orator further shows that to secure the sum of \$230 part of said sum of \$1000 the Consideration money in said Deed and which \$1000 was the purchase money of said Lands and premises he did on said 2nd October 1857 execute and deliver to said Jacob Mack his certain promissory

Note of said date thereby promising to pay twelve months after ^{said} date for value received to the order of said Jacob Mack said sum of \$230 with Interest from date at six per cent per annum and to further secure said sum of \$230 he duly executed and delivered to said Jacob Mack on same day his Deed Conveying said Lands and premises to said Jacob Mack in fee simple subject however to a Covenant or condition of defeasance on the payment of said sum of money in said promissory Note specified with Interest as aforesaid according to the tenor and effect of said promissory Note which deed or mortgage was filed of Record in said Recorder's office on the 2nd July 1858 and recorded in Book A of Mortgages page 317 in said Marion County Records

And your orator further shows unto your Honor that the said Jacob Mack sold and conveyed said promissory Note and Mortgage to the Defendant Amos Clark who has in March term 1860 of this Honorable Court obtained a Judgment on Scire facias to foreclose said Mortgage on the Confession of your orator and said Mack for the sum of \$72.78 with Judgment that said Lands be sold to satisfy said Judgment and costs as by the Records of said Judgment in this Court appears

And your orator shows unto your Honor and avers the fact and truth to be and so

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emphatically charges same that he acted in perfect good faith in the premises and in good faith and in full reliance on the good faith of said Defendant Mack he accepted said Warranty Deed and the Covenant therein contained that said Lands and premises thereby conveyed were at the time of the execution and delivery of said Warranty Deed Dated 2nd October 1837 free from all Incumbrances and in like good faith and reliance he paid the purchase money thereof to said Mack and he avers that he was utterly and entirely ignorant of any Incumbrance whatever then affecting said Lands and that he caused search to be made in the Records office of said County for Incumbrances affecting said Lands, and that there was then none of Record. Your orator therefore charges and insists that in Law and in Equity no Incumbrance prior to your orator's said Deed then affected said Lands and premises. And your orator avers the fact and truth to be that ^{had} he then known or been informed there was any Incumbrance affecting said Lands and premises he would not have accepted said Warranty Deed nor said Covenant against Incumbrances nor have paid the Consideration therefor in said Deed nor have executed and delivered to said Mack his said Promissory Note and said Mortgage.

And your Orator now shows unto your Honor that the Defendant Jacob Mack

being indebted to said Defendant Jonas White did on the 13th day of May 1857 with his said wife execute and deliver to said Jonas White a certain Deed bearing said date Conveying in fee simple said Lands and Premises herebefore described and also the East Half of the North West Quarter of said Section 35 in said Township and Range to secure payment of \$800 part of the purchase money of said Lands and Premises and to further secure payment of two promissory notes bearing said date of 13 May 1857 each for the sum of \$400 one payable on or before 1st January 1858 and the other payable on or before the first April 1858 with interest on each at 10 per cent per annum which said Deed or Mortgage contained a condition of defeasance on the payment of said sum of money in said two notes specified with interest according to the tenor and effect of said two promissory Notes.

Your Orator shows unto your Honor that said Mortgage was not recorded in the office of Recorder of Deeds until the 8th day of March 1858 long subsequent to the Recording of said Deed by Mack to your Orator and though outstanding yet not being previously recorded is in Law subsequent as an Incumbrance affecting the Lands and premises conveyed to your Orator by said Defendant Mack and is subsequent to your Orators said Warranty Deed. And your Orator submits and

charges that he bring an innocent purchaser for valuable
Consideration and without notice in Equity entitled as to
said Lands and premises to priority to said Mortgage
to said Hite. And your Orator charges that there was
nothing patent to put him on his guard as purchaser and
notice being given to him he is in Equity entitled to such
priority. Your Orator admits he did receive notice of said
Mortgage to Hite being outstanding from Tunis A Spittler
agent as he believes of said Jonas Hite, but such verbal
notice was subsequent about fourteen or fifteen months sub-
sequent to your Orators taking said Warranty Deed, and he
admits said Mack subsequently informed him said
Mortgage was outstanding, but your Orator avers he had no
notice whatever of said Mortgage to Hite before or at the
time of the creation and delivery of said Warranty Deed
either from said Hite, or said Spittler or said Mack or any
other person. And your Orator shows unto your Honor
that the said Jonas Hite in the March term 1859 of this
Honorable Court filed his Bill to foreclose said Mortgage
of 13 May 1857 making said Jacob Mack & Mary E his wife
and your Orator parties Defendant therein. That the Bill
of Complaint therein set out said Mortgage to Hite and
the Book & page in which same was recorded but not
the date of record, that it set out the Deed to your
Orator but not its being recorded and omitted your
Orators Mortgage to Mack, all which omissions are material
and tended to mislead your Orator in his defense & so
this Court in its Decree. That said Jonas Hite Complainant
though well aware of the fact that your Orator had prior

rights did not refer to same. That said Bill of Complaint was the usual formal Bill in foreclosure. That the usual Decree pro confesso, and reference to the master in chancery was made. That said Master reported the amt due on said Mortgage to be the sum of \$951.72 and on the return of said report the Court made the usual Decree for sale &c of the Lands including those conveyed to your orator. That under said Decree the Master in Chancery made sale of said Lands on 4 June 1859 to said Jones Hite and executed his Certificate of purchase and reported said sale to this Court at the August term 1859 of this Court. since when this cause has not been docketed

Your orator shews unto your Honor that he did not appear to defend said cause, and now sets forth the reason. Your Orators avers the fact and truth to be that he employed as his solicitor to defend him therein W Willard Esq. That Jacob Mack being a defendant was attending on his own and your Orators part to said Cause and was in direct communication thereon in that capacity with Mr Willard. That said Willard was writing your Orators answer and directed said Mack to bring him from the office of the Clerk of this Court in order to prepare said defence a memorandum of the filing of said Hite Mortgage & that of your Orators Deed that said Mack got a certificate or memorandum from said Clerk which memorandum reversed the order of date of filing said Mortgage ^{and Deed} giving that of said Hite priority in date that said Willard on examination thereof advised

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said Mack, and through him your orator that they had
no defence in the premises. Your Orator avers the fact
and truth to be that said Memorandum was an error of
said Clerk but your Orator believed it thus to be correct
and on said Mack reporting to him said Memorandum
and said advice of Mr Willard supposing same to be correct
took no further steps. Your Orator shows unto your Honor
that he did not know same to be an error until after the
sale and only a few weeks before the filing of this Bill
of Complaint. that had he known the error at the time
he would have defended his rights. And your Orator sub-
mits that said mistake and surprise ought not in equity
to bar him of Relief by a rehearing of said Cause and
review of the decree therein. That your Orator acted in
good faith and now acts in perfect good faith
and prays relief accordingly being ready and
willing to do equity in the premises

Your Orator shows unto your Honor
that the other Lands in said mortgage to Hite
County the E¹/₂ of the N¹/₂ of said section and
Township Range are an ample security to said
Hite and he further shows unto your Honor that
said Defendant Mack is insolvent and that
his consent in said Warranty deed is therefore
worthless that the time for redemption of said
Lands will expire on 4th September 1860

Your Orator shows unto your
Honor that unless said Defendant Hite & the

Master in Chancery be restrained by the Injunction or order of this Court he said Hite will succeed for said Lands from said Master whereby your Orator will be entirely barred of Relief and your orator stated that if he be compelled to redeem said Lands by payment of said Amount decreed to said Hite he will be compelled to pay more than said Lands are worth.

Your Orator shows unto your Honor that by the rules of the Common Law he is remediless and that a court of Equity can alone afford him adequate relief - That the doings of said Defendant Mack and Hite in the premises are contrary to Equity and good Conscience and tend to the manifest injury and wrong of your orator. In the end therefore that the said Defendants Jonas Hite Jacob Mack and Amos Park and James S Martin Master in Chancery may be compelled (Their oaths being waived) to make full true and perfect answers to all and singular the matters and things herein set forth and that the said Decree and proceedings thereunder be reviewed amended and modified to meet the equity in this cause and your Orator declared and decreed a prior incumbrance on said Lands to said Defendants Jonas Hite, and that said Master in Chancery be restrained by the order or Injunction of this Honorable Court from making Debt to said Jonas Hite for said Lands sold to your orator Douth the West half of the North West quarter

2842-57
(2)

(10)

of said section twenty four Township three North
of Range three East of the third principal Meridian
in Marion County aforesaid until the further order
of this Court and that upon final hearing hereof
said Master in chancery be perpetually enjoined from
making said deed to said Sands and that the usual
summons issue returnable to the August Term of
this Court and that your Honor will grant such
further or other relief in the premises as to equity and
good conscience may appertain and as in duty bound
will ever pray.

Willard & Goodnow ^{ad}
James Bassett Sol^r
for Compl^t

State of Illinois
Marion County O James Hoss the above named
Complainant being duly sworn saith
that the foregoing Bill of Complaint which he
has heard read is true to his own knowledge and
belief in substance and in fact sworn to and sub-
scribed before me
This 17th August Ad 1860 James Hoss
James S Martin cl^k
By James Bassett

Sept."

Complainant also on said 18th June 1860 filed in the
office of the clerk of said Court his affidavit of nonresi-
dence &c in words & figures following Court

" State of Illinois
Marion County

James Hoss

vs

Jonas White &

Jacob Mack et al

James Hoss being first duly sworn deposes and says that Jonas White one of the defendant in this suit is a non resident of the State of Illinois as he is informed and believes
Subscribed and sworn to
before me this 18th day of June 1860

James Hoss."

W. W. Eagan Clerk

By Dechaux Dept

Whereupon summons issued against said Defendants on said date in words & figures following to wit

" State of Illinois
County of Marion } ss The People of the State of Illinois, to the Sheriff of said County Greeting

We command you to summon Jonas White, Jacob Mack and Thomas Clark if to be found in your county to appear before the Circuit Court of Marion County, on the first day of the next Term thereof, to be holden at the Court House in

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Salem on the third Monday in the month of August next, to answer James Hoss in his Bill for Relief and huss make due return to our said Court as the Law directs.



Witness; W. W. Eagan, clerk of our said Court and the official seal thereof, at Salem, this 18th day of June A.D. 1860
W. W. Eagan. clerk

Per J. O. Chaucey Deputy.

which summons was endorsed as follows

"Served by reading & giving copy of the within writ to Jacob Mack Shuss Clerk Aug 2nd 1860

Note not found

Jo Shultz Shff"

And afterwards, at the August term A.D. 1860
(The Hon. A. H. S. O'Neil presiding)
of said Marion Circuit Court, the following order was made Court

"James Hoss
vs
Jonas Hiterstab } Bill for Relief & Injunction
Monday Aug 20th 1860

And now at this day came the Complainant by Bassett Willard & Goodson his solicitors and on motion the Court rules the defendants herein to answer plead or demur to the Bill of Complaint in this cause by 9 O'Clock A.M. of Thursday next."

Whereupon said Defendant Jonas Hite on the 21st
day of Aug 1860 filed his Demurrer to said Complainants
Bill in words & figures following Court

Marion County Circuit Court Aug 18th Term AD 1860
James Boss
vs
Jonas Hite et al } Bill for Relief

And the said Jonas Hite one of
the said Defendants by protestation not confessing
or acknowledging all or any of the matters and things
in the said Complainants Bill set forth to be true in
manner and form as the same are therein set forth
and charged doth demur thereto and sheweth to the
Court here that he has not by his said Bill of Complaint
made such a case as entitled him in a court of equity
to relief from or against this Defendant touching the
matters contained in said Bill. Therefore and
for divers other good causes of demurrer appearing in
said Bill of Complaint, this Defendant prays judg-
ment of this Hon Court whether he shall be compelled
to make any further or other answer to said Bill;
and he prays to be heard dismissed with his reason-
able costs in this behalf unjustly sustained &c
Jonas Hite
Per Bryan & Schaffer et al

And the said Dept leg leave &c sheweth the following
causes of Special Demurrer

- (14)
- 1st The said Complainant in his said Bill shews patent and culpable negligence on his own part and now seeks to rectify a supposed injury resulting from and consequent upon his own personal indifference and neglect.
 - 2nd The said Complainant in his said Bill seeks and prays an injunction against the Master in Chancery who is not made a party in the Bill.
 - 3rd The facts set forth in said Bill are not verified by affidavit."

And afterwards at said Aug term of said Court Dourt on the 23rd day of Aug 1860 the following order was made by the Court Dourt

"The Defendant Jonas Hite having filed Demurer to the Bill of Complaint, the same came on for argument on this day and the Court having heard Messrs Bryan Schaffer for Defendant and said Complainant's Solicitors and having duly considered said Demurer and the arguments of Counsel doth sustain said Demurer with leave to Complainant to amend his Bill by Tuesday next."

Also on the 27th August 1860 the following additional order was by the Court made Dourt

"The Complainant having filed his amended Bill, and the Defendant Hite having filed Demurer thereto, the same came on this day for argument

and the Court having heard argument thereon
and having duly considered the said Bill of com-
plaint and the Demurrer and the arguments of
counsel thereon doth overrule said Demurrer and
doth now rule Defendants to answer plead or Demur to
said Bill of Complaint by 2 O.C. P.M. of this day.

Came again the parties at 2 O.C. P.M.
and the Defendants fail to answer plead or Demur
as they were ruled, and the said Defendants stand by
their Demurrer. On Motion of Complainant by his
Solicitors the Court doth now order and adjudge that
Injunction issued pursuant to the prayer of said
Bill of Complaint restraining James S. Martin Master
in Chancery from further proceeding as prayed and
that Complainant give Bond in \$1000. Conditioned
as the Law directs with Amos Clark as security and
that the clerk approve said Bond, which is done."

Whereupon Injunction issued Sept. 4th 1860
in words & figures following Court

"State of Illinois }
County of Marion } ss. The People of the
State of Illinois } to James
S. Martin Master in Chancery of said County
Greeting
Whereas James Hoos has lately

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exhibited his Bill of Complaint to the Judge of
the Circuit Court of said County in said State on
the chancery side thereof against Jones Hite and
others defendants wherein among other things it is
alleged that James S Martin Master in Chancery of
said County will unless restrained by the injunction
or order of this Court execute and deliver a certain
Deed of Lands therein described to said Hite to the
damage in Equity of said Complainant said
Lands being the W^{1/2} of NW^{1/4} of Section 34 Town
ship 3 N R 3 E of the 3rd P. M. in said County.

We therefore in consideration of the premises aforesaid do strictly enjoin and command you the
said James S Martin Master in Chancery from
making executing and delivering a deed to said Jones
Hite his heirs or assigns for said Lands until the
further order of this Court to the contrary. And thereof
fail not under the penalty of what the Law directs.
Do the Sheriff of said County to execute

Witness W M Eagan, Clerk of our said
Circuit Court and the seat thereof this
4th day of Sept A D 1860
W M Eagan Clerk

Endorsed as follows

"Served as commanded & given Jas S Martin
Master in Chancery a copy of the written writ Sept 15th
1860
Jos Shultz Shff."

Said Complainant on the 4th Sept 1860 filed his Bond as required which is in words following

Know all Men By these Presents that we James Cross & Amos Clerk of the County of Marion State of Illinois are held and firmly bound unto James Hite and James S Martin Master in Chancery of said County their heirs Executors Administrators & successors in the sum of one thousand Dollars for which payment well and truly to be made we and each of us bind ourselves our heirs Executors and Administrators jointly and severally firmly by these presents

Witness our hands and seals this 3rd day of Sept A D 1860 - The Condition of the above obligation is such that whereas the above bounden James Cross has prayed for and obtained an injunction from the Circuit Court of Marion County Illinois restraining and enjoining the said James S Martin Master in Chancery from executing and delivering to the above named James Hite a deed of certain Lands in the said County mentioned and described in a certain Bill in Chancery as follows Court W¹/₂ of N¹/₂ of Section 34 Township (S 3) N. R. 3 E of the 3rd P. M. in said County filed by said James Cross in said Court against said Hite and said James S Martin until the said Court shall make order to the contrary.

Now if the said James Cross shall pay or cause to be paid

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suits the said Jonas Hite and James Martin
Master in Chancery all money and costs due or to
be due to them in said suit and also all
such costs and damages as shall be awarded
against the Complainant in case the Disjunction
shall be dissolved, then this obligation shall
cease and determine otherwise to remain in full
force and virtue

Amos Clark as the
Security approved

by the Court approved
by one as to form

attested as to signature

This 3rd day of Sept 1860

H. W. Eagan Clk.

Seal

James Hoss Seal

Amos Clark Seal

*

State of Illinois
Marion County

I H. W. Eagan Clerk of the Cir-
cuit Court of said County do
hereby certify the foregoing to be a true & complete
transcript of the Records and proceedings had
in our said Court in said above entitled cause
as the same remains now on file in my office

In Testimony whereof I hereunto
set my hand and affix the seal of
said Court at my office in Salem
this 6th day of October A.D. 1860

H. W. Eagan Clk.
By J. O. Hance
Supt

*

2 nd Bill App v atty 15	Doc Suit 10	Fil Proc & New 10	35	
Sums of fil 40	Ent default 20	Order for Judgt 20	80	
Order for Dam 20	Order for costs 20		40	
Doc Judgt 25	Taxing costs 20		45	
Bill costs 80	Cap Do 20	Shffs Ret 10	Sat 15	Tax Bond 50
			1.25	
Sweary to 2 affds 20	Ent 7 orders 2 nd tra 140		1.60	
Fil & papers 25	Exfil Disjunction 40		65	5.30

Shffs fees on Sums	(Shultz)	2.85	
" " " Disjunction	"	1.00	3.85
			<u>89.15</u>

(187) [8-133-16]

Jones v. White one of the defendants to the original
Cause set out in the foregoing Recd. & plaintiff in
Error herein comes by Silas W. Bryan his Sel and
assigns for Error in some original Cause

1st That the Court Erred in Rendering judgement against
the Master in Chancery not being a party to trial in original
Cause, 2^d The Court Erred in entering decree en-

tyring Master without first - rendering a decree
pro confesso against - plaintiff in Error like
3^d The Court Erred in not rendering judgement against
the defendants Mott & Clark
4th The Court Erred in overruling demurrer
of White plaintiff in Error
5th ~~That~~ informal & defective - title W. Bryan & Assigns

Jones v. White
And the said defendant prors
in Error
William Bassett & Stoker
Attorneys for Defendants

20
Jones v. White
vs
Jones v. White
" "

Record
Jones v. White

W. W. in error

vs

Jones v. White

Sept in error

Filed October 18. 1860.

W. W. in error

Filed by Bryan \$0.75

Record Fee \$4.25
Paid by Dept

JONAS HITE. et al. }

vs.

JAMES HOSS. }

BRIEF.

1st. The bill contradictory and absurd—the court should have sustained the demurrer—
Story's equity pleading, sec. 638.

2d. A total want of diligence manifest from the bill.—Story's equity pleading, sec. 404, 414;
Mas. R. 312, 20, 21; 3 McLain R. 41; 7 Blackford 329; 15th Ohio R. 313, 26;
Maine R. 11; Jack's. R. 243; 3d. Johnson's chan. R. 124; 3d Paige R. 204; 2 John-
son's ch. R. 488.

3d. The bill would not have been filed as a matter of right, but simply by leave of the
court. No leave asked or granted. Story's equity pleading, sec. 412.

SILAS L. BRYAN, Att'y. for Plt'ff.

court. No leave asked or granted. Story's equity pleading, sec. 41. The bill would not have been as a matter of right, but simply leave the

Acte
by
Hoss

Pltffs Brief

Filed Nov. 14th
1860.
N. Schuster M^y

29. A total want of diligence manifested from the bill.—Story's equity pleading, sec. 404, 414; Story's equity pleading, sec. 433.

1st. The bill contradictory and absurd—the court should have sustained the demurrer—

BRIEF.

JAMES HOSSE

vs
JONAS HILL et al.

SILAS T. BELLEVILLE, CLERK OF COURT.

May I send the boxes in the
kite case - send writ to me
I have given to you a card to your
name in another case from our friends

State of Illinois,
SUPREME COURT,
First Grand Division.

} SS

The People of the State of Illinois,
To the Sheriff of Maion County.

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Maion county, before the Judge thereof between

James Hoss plaintiff and Jonas Hite, Jacob Mack and Amos Clark

defendants it is said that manifest error hath intervened to the injury of said Jonas Hite

as we are informed by his complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mount Vernon, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said James Hoss

that he be and appear before the justices of our said Supreme Court; at the next term of said Court, to be holden at **Mount Vernon**, in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said James Hoss notice together with this writ.

WITNESS, the Hon. John D. Catton Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this eighteenth day of October in the year of our Lord one thousand eight hundred and sixty.

Noah Johnston
" "
Clerk of the Supreme Court.

I have this day served the within
writ by Reading to James Atts
November 3rd 1860

Seam 50
Mfg 40
Mfg 100

Geo. Shultz Sheriff
M. Co. Ill.

70
SUPREME COURT.
First Grand Division.

James Atts

Plaintiff in Error,

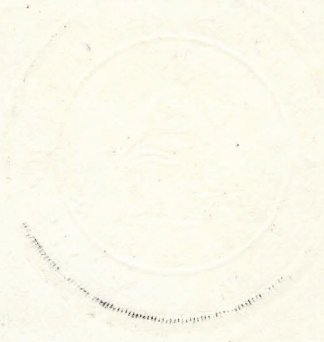
VS.

James Atts.

Defendant in Error.

SCIRE FACIAS.

FILED.



ABSTRACT.

JONAS HITE,
JACOB MACK,
AMOS CLARK,

vs.
JAMES HOSS,

} ERROR TO MARION COUNTY.

- 1 Bill filed 18th June, 1860, Summons returnable to August term. Cause entitled, Bill for Relief. Allegations of bill that Jacob Mack and wife on the 2nd of October in 1857, in
- 2 consideration of \$1000 conveyed by deed with the usual covenants of warranty, the west-half of north-west quarter of section (34) town three north range three east in Marion county, Ills., to complainant, deed duly acknowledged and filed for record 5th October 1857, complainant gave Mack mortgage on said lands to secure the payment of \$230 part of
- 3 consideration of said \$1000—mortgage filed for record 2d July 1858—Mack transferred note and mortgage to Amos Clark—at March term of said court Clark obtained an order for the sale of said lands to satisfy judgment for 72 dollars and 78 cents.
- 4 Complainant alleges total ignorance of any incumbrance on said lands on said 2d Oct. 1857—time of buying said lands. Alleges that he caused the records of Marion county to be searched with a view to determine whether the said lands was incumbered and that there was no incumbrance on the same at the date of purchase on RECORD—would not have bought
- 5 if there had been any. That said Mack was indebted to said Hite for the purchase money of said land or a part of the purchase money—800 dollars, and did he and his wife on the 13th May 1857 execute to him a mortgage on the said land and the east-half of the north-west quarter of said section (35) said mortgage not recorded till 8th March 1858.
- 6 Admits that T. A. Spidler agent of Hite notified complainant of the existance of said mortgage some fourteen or fifteen months after the deed to complainant, that Mack also informed complainant of the said fact after executing deed, but denies knowing anything of the outstanding mortgage—that Hite filed his bill to foreclose his mortgage to the March term of the Marion Circuit Court for 1859 making said Mack and wife and complainant defendants to his bill that the bill set out mortgage to Hite, and the fact of record in Book and Page but not the date of record—it set out the deed to complainant but not the fact of record and omitted to set out mortgage to complainant.
- 7 Decree of foreclosure in usual form. Reference to master in chancery and lands ordered to be sold to satisfy decree for 951 dollars and 92 cents.
Lands sold on the fourth of June 1859. Hite bought in the same and took certificate of purchase, Master reported sale to the August term of said court for 1859—complainant Hoss did not appear and defend said cause—reason for not appearing—had employed W. W. Willard to attend to the case for him. Mack being a defendant was attending to the case on his own and complainants account communicated with Willard touching the case that Willard was preparing complainants answer and directed Mack to bring him from the Clerk's or Recorder's office a memorandum of the Hite mortgage and of complainants deed. Mack obtained a certificate or memorandum from the Recorder which reversed the order of the dates of filing said mortgage and deed—giving the mortgage of Hite priority over complainant's deed.
- 8 Willard solicitor advised Mack and through him complainant that they had no defense. Relying on correctness of said certificate or memorandum complainant made no further defense. Complainant did not find out said mistake till after the sale of the land and a few weeks before filing his bill.
Alleges that the other lands in the Hite mortgage were an ample security for his debt leaving out the lands bought by complainant—that Mack is insolvent and time of redemption expire on 4th Sept. 1860. That unless master restrained by injunction Hite will get
- 9 deed and complainant will be without REMEDY. That if complainant has to pay off the Hite mortgage he will have to pay more than the lands are worth.

Prayer that the original decree in the case of foreclosure be reviewed, annulled and modified so as to give complainant the benefit of his deed and that the master be restrained by injunction from making a deed to Hite for that part of said land bought by complainant.

Prayer for general relief.

- 10 Subscribed and sworn to by complaint 27th August 1860.
- 11 Affidavit---that Hite one of defendants is a non-resident of the State.
Summons in the usual form to Sheriff of Marion county returned served on Mack and Clark, Hite not found in the county.
- 12 August term 1860, defendants rule to answer.
- 13 14 Hite answers by general demur and assigns special causes of demurrer---complainant shows in his bill culpable negligence on his own part,
Complainant seeks and prays a decree against the master in chancery who is not made a party to the bill that the facts set forth in bill are not sworn to---demurrer sustained and leave to amend the bill. Bill amended and demurrer refiled.
- 15 Demurrer overruled and defendant stood by his demurrer and on motion of complainant the court ordered and decreed an injunction pursuant to the prayer of the bill restraining James S. Martin, master in chancery from further proceeding as prayed and that complainant bond in 1000 dollars conditions as the law directs with Amos Clark as security and that the clerk approve said bond.
- 16 Injunction issued September 4th 1860.
Injunction writ conformed to prayer in bill served by sheriff 5th September.
- 17 Injunction bond in usual form.
- 18 Certificate of clerk in usual form.

ERRORS ASSIGNED.

- 1st. The court erred in overruling demurrer of plaintiff in error---Jonas Hite.
- 2d. The court erred in rendering judgment against Martin master in chancery not being a party to bill.
- 3d. The court erred in not rendering a decree pro con fesso against plaintiff in error Jonas Hite before rendering a final decree in the cause.
- 4th. The court erred in not rendering a decree by default against defendants Mack and Clark before entering a final decree in the cause.
- 5th. Decree of the Circuit Court is informal and defective and not responsive to the nature of the case,

SILAS L. BRYAN, Atty. for Pl'ff.

Will that the Bill be dismissed

20

Hiltz

by

Hoss

66
15
330

66
990

100
70

Filed Nov. 14. 1880
A. Johnston Clk

State of Illinois,
SUPREME COURT,
First Grand Division.

} SS

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Marion Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Marion county, before the Judge thereof between

James Hess plaintiff and Jonas Hite, Jacob Mack and Amos Clark

defendants it is said manifest error hath intervened to the injury of the aforesaid Jonas Hite

as we are informed by his complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at **Mount Vernon**, in the County of Jefferson, on the 1st Sunday after 2^d Monday of November next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. John D. Catron Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this eighteenth day of October in the year of our Lord one thousand eight hundred and Sixty.

Noah Johnston
Clerk of the Supreme Court.

SUPREME COURT.
First Grand Division.

Jonas Hite

Plaintiff in Error,

vs.

James Hoss

Defendant in Error.

WRIT OF ERROR.

Issued & FILED 18th Oct. 1860.

H. Johnston Clk

State of Illinois,
SUPREME COURT,
First Grand Division.

} ss

To the Clerk of the Circuit Court for the County of *Sevier* Greeting:

Because, On the record and proceedings, on and in the case
of the judgment of a plea entered in the Circuit Court of
Sevier County, for the purpose of the said judgment, and
because, On the record and proceedings, on and in the case
of the judgment of a plea entered in the Circuit Court of
Sevier County, for the purpose of the said judgment, and



Witness the Great Seal of the State of Illinois, this 18th day of October, 1860.

Clerk of the Supreme Court

JONAS HITE. et al. }
vs. }
JAMES HOSS. }

BRIEF.

- 1st. The bill contradictory and absurd—the court should have sustained the demurrer—
Story's equity pleading, sec. 638.
- 2d. A total want of diligence manifest from the bill.—Story's equity pleading, sec. 404, 414;
Mas. R. 312, 20, 21; 3 McLain R. 41; 7 Blackford 329; 15th Ohio R. 313, 26;
Maine R. 11; Jack's. R. 243; 3d. Johnson's chan. R. 124; 3d Paige R. 204; 2 John-
son's ch. R. 488.
- 3d. The bill would not have been filed as a matter of right, but simply by leave of the
court. No leave asked or granted. Story's equity pleading, sec. 412.

SILAS L. BRYAN, Att'y. for Plt'ff.

ABSTRACT.

JONAS HITE,
JACOB MACK,
AMOS CLARK,
vs.
JAMES HOSS,

ERROR TO MARION COUNTY.

1 Bill filed 18th June, 1860, Summons returnable to August term. Cause entitled, Bill for Relief. Allegations of bill that Jacob Mack and wife on the 2nd of October in 1857, in
2 consideration of \$1000 conveyed by deed with the usual covenants of warranty, the west-half of north-west quarter of section (34) town three north range three east in Marion county, Ills., to complainant, deed duly acknowledged and filed for record 5th October 1857, complainant gave Mack mortgage on said lands to secure the payment of \$230 part of
3 consideration of said \$1000—mortgage filed for record 2d July 1858—Mack transferred note and mortgage to Amos Clark—at March term of said court Clark obtained an order for the sale of said lands to satisfy judgment for 72 dollars and 78 cents.

4 Complainant alleges total ignorance of any incumbrance on said lands on said 2d Oct. 1857—time of buying said lands. Alleges that he caused the records of Marion county to be searched with a view to determine whether the said lands was incumbered and that there was no incumbrance on the same at the date of purchase on Record—would not have bought
5 if there had been any. That said Mack was indebted to said Hite for the purchase money of said land or a part of the purchase money—800 dollars, and did he and his wife on the 13th May 1857 execute to him a mortgage on the said land and the east-half of the north-west quarter of said section (35) said mortgage not recorded till 8th March 1858.

6 Admits that T. A. Spittler agent of Hite notified complainant of the existance of said mortgage some fourteen or fifteen months after the deed to complainant, that Mack also informed complainant of the said fact after executing deed, but denies knowing anything of the outstanding mortgage—that Hite filed his bill to foreclose his mortgage to the March term of the Marion Circuit Court for 1859 making said Mack and wife and complainant defendants to his bill that the bill set out mortgage to Hite, and the fact of record in Book and Page but not the date of record—it set out the deed to complainant but not the fact of record and omitted to set out mortgage to complainant.

7 Decree of foreclosure in usual form. Reference to master in chancery and lands ordered to be sold to satisfy decree for 951 dollars and 92 cents.

Lands sold on the fourth of June 1859. Hite bought in the same and took certificate of purchase, Master reported sale to the August term of said court for 1859—complainant Hoss did not appear and defend said cause—reason for not appearing—had employed W. W. Willard to attend to the case for him. Mack being a defendant was attending to the case on his own and complainants account communicated with Willard touching the case that Willard was preparing complainants answer and directed Mack to bring him from the Clerk's or Recorder's office a memorandum of the Hite mortgage and of complainants deed. Mack obtained a certificate or memorandum from the Recorder which reversed the order of the dates of filing said mortgage and deed—giving the mortgage of Hite priority over complainant's deed.

8 Willard solicitor advised Mack and through him complainant that they had no defense. Relying on correctness of said certificate or memorandum complainant made no further defense. Complainant did not find out said mistake till after the sale of the land and a few weeks before filing his bill.

Alleges that the other lands in the Hite mortgage were an ample security for his debt leaving out the lands bought by complainant—that Mack is insolvent and time of redemption expire on 4th Sept. 1860. That unless master restrained by injunction Hite will get
9 deed and complainant will be without REMEDY. That if complainant has to pay off the Hite mortgage he will have to pay more than the lands are worth.

Prayer that the original decree in the case of foreclosure be reviewed, annulled and modified so as to give complainant the benefit of his deed and that the master be restrained by injunction from making a deed to Hite for that part of said land bought by complainant.

Prayer for general relief.

- 10 Subscribed and sworn to by complaint 27th August 1860.
- 11 Affidavit---that Hite one of defendants is a non-resident of the State.
Summons in the usual form to Sheriff of Marion county returned served on Mack and Clark, Hite not found in the county.
- 12 August term 1860, defendants rule to answer.
- 13 14 Hite answers by general demur and assigns special causes of demurrer---complainant shows in his bill culpable negligence on his own part,
Complainant seeks and prays a decree against the master in chancery who is not made a party to the bill that the facts set forth in bill are not sworn to---demurrer sustained and leave to amend the bill. Bill amended and demurrer refiled.
- 15 Demurrer overruled and defendant stood by his demurrer and on motion of complainant the court ordered and decreed an injunction pursuant to the prayer of the bill restraining James S. Martin, master in chancery from further proceeding as prayed and that complainant bond in 1000 dollars conditions as the law directs with Amos Clark as security and that the clerk approve said bond.
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- 2d. The court erred in rendering judgment against Martin master in chancery not being a party to bill.
- 3d. The court erred in not rendering a decree pro con fesso against plaintiff in error Jonas Hite before rendering a final decree in the cause.
- 4th. The court erred in not rendering a decree by default against defendants Mack and Clark before entering a final decree in the cause.
- 5th. Decree of the Circuit Court is informal and defective and not responsive to the nature of the case,

SILAS L. BRYAN, Atty. for Pl'ff.

13 14 His answers by General Court and assigns special causes of demurrer---complainant shows in his bill culpable negligence on his own part.

13 14 August term 1860, defendants wife to answer.

11 Clark, His not found in the county.

11 Affidavit---that His one of defendants is a non-resident of the State.

10 subscribed and sworn to by complainant SAM August 1860.

Hite
 by
 Hass

1860
 all 1860
 Office 8433
 1860

Filed Nov. 14. 1860
 N. Johnston Clk
 Office

... of the case.
 ... Decree of the Circuit Court is informal and defective and not responsive to the ... and Clark before entering a final decree in the cause.
 ... The court erred in not rendering a decree by default against defendants Mack ... James Hite before rendering a final decree in the cause.
 ... The court erred in not rendering a decree pro conesso against plaintiff in error ... The court erred in ...

WILLIAM A. BRYAN, ATTORNEY FOR PLAINTIFF

November Term of the Supreme Court
of Illis at Mt. Vernon for A.D. 1860

James Hoop }
vs } Bill in Chancery
Jonas Hite }

Jacob Mack & }
Amos Clark }
Hite of the County of Chisfield and State of
Ohio and Lewis & Spitzer of the County of
Mason and State of Illinois are held and firmly
bound unto James Hoop in the sum of one hun-
dred dollars lawful money of the United States
for the payment of which well and truly to be made
we jointly and severally bind ourselves, our heirs,
Executors, Administrators and assigns, firmly by
these presents, Witness our hands and seals, this
11th day of October A.D. 1860.

The Condition of the above obligations
is such that whereas the above bounden Jonas
Hite one of the Defendants in the above entitled
Cause has prosecuted his writ of Error from
the decision of the Mason County Circuit
Court, to the Supreme Court of the State of
Illinois, Now if the said Hite shall well and
truly and without delay prosecute his said
writ of Error; and upon the dismissal of said
writ of Error or the affirmance of the decree
in said Cause, by the said Supreme Court, will
well and truly pay or Cause to be paid all
such Costs as may be made by reason of
the prosecution of said writ of Error as above

said; and all costs, and damages that may be ad-
judged or awarded against him by the said Supreme
Court then upon the full payment thereof, this obli-
gation shall become null and void, otherwise to
remain in full force and effect.

Jonas Hite 
Lucius A. Spatter 

James Hop

Jonas Hite et al

Bond for Costs
in Supreme Court
1860

Filed October 18. 1860-

M. Robinson clk

November term Supreme Court

Mt Vernon Dec AD 1860

Jonas Hite implied with
Jacob Mook &
Amos Clark

} depts below

vs

} Em to Motion Co

James Ross

} depts below

} the clerk

Will please
issue the usual process in the above
entitled case returnable to November
term - direct to Sheriff of Motion
County for Service

Siles L Bryan
A. B. [unclear]

Hite says can hear

²⁰
Receipt for
Wm

James White enclosed
with Jacob Mack &
Amos Clough
ls

James Hoar

Titha Octob 18. 1860

A. Johnston M

Wm

No 20

Nov. Term 1860

Hits
by
Hoss-

Even Confession - judgment
Revised & cases reviewed -

~~8447~~

Certified on Page 429 -