

8595

No. _____

Supreme Court of Illinois

Robert Moore et al

vs.

John Bracken

71641  7

Clerk's Office - Supreme Court -
First Grand Division.
Mount Vernon Illinois.
Feb. 20 - 1862.

Gentlemen.

I have your letter of the 18th - and
below, furnish the information you desire - and
the amount of costs due here in the cases.

No 31 - O. & M. R. Co vs Milley Misener & Co - Appeal
from Clay - Reversed and Remanded -
Costs due here from Appellee - \$29.77.

No 32 - O. & M. R. Co vs Levi H. Jones - Appeal from
Clay - Reversed and Remanded -
Costs due here from Appellee - \$40.92.

No 39 - Hamish Rayburn vs Day & Matlock - Appeal
from Clay - Reversed and Remanded -
Costs due here from Appellees - \$21.04.

Rushville Ills
Mar 20 1862

Major A Johnston
Mt Vernon
Ills.

Dear sir

I have

with return the opinion in
the case of Meant et al vs Black
- in with an order for a change
of the judgment heretofore in-
- tered in the case.

I am sir yours &c
P. H. Walker



Majr. Noah Johnston
Clerk of Supreme Court
Mt Vernon
Illinois.

April 4 31-32

L 39

Noah Johnson Esq
Clerk Supreme Court
Mt Vernon Ill

ABSTRACT.

ROBERT MOORE, & P. P. HAMILTON, PLT'FFS IN ERROR, }

v s.

} ERROR FROM MARION.

JOHN BRACKEN, DEFENDANT IN ERROR,

Pgs. 1 to 13 The Bill in this cause was filed in Marion County Circuit Court, for Review and general relief, States, that Complainant Bracken, is non-resident of the State of Ohio.

1 That on 27th Feb. 1861, Defendant Moore filed his petition for a Mechanic's Lien in said Court which states, that on 12th Oct. 1860, said Bracken contracted with him (Moore,) to pay him \$377; if he would by 1st Nov. 1860, erect a house, of certain dimensions stated, one story high or if two stories high to be paid for additional in proportion. Said \$377, to be paid when the work was completed according to contract. The building to be erected on a piece of ground known as lots 91, 92, 69, and 70, in Block 6, in Urial Mills' addition to Salem, more fully described, as follows: Beginning at a stone 60 feet west of Dr. W. M. Elliot's property at north-west corner, thence south 100 feet, thence west 210 ft, thence north 100 feet, thence east 210 ft.

2 Which Real Estate said Bracken purchased and held a title Bond for from one Urial Mills.

3 That Moore pursuant to said contract did erect said house, and finish and deliver it to Bracken before 1st of Nov. 1860.

4 That Moore did in addition to said contract at Bracken's request make and deliver certain parts of work in and about said house over and above the original contract, which are set out in petition (the amount and charges per statement filed with petition,) which additional work amounts to \$92, which am't Bracken on 5th Jan. 1861, promised to pay.

5 That Bracken paid on said contract and extra work at various times before said 5th Jan. 1861, about \$300, leaving, on said day, due on said contract and extra work \$169, and being so indebted, Bracken on said day promised to pay same, which he has failed to pay.

6 Prays, That Bracken be made Defendant. That summons issue. That he make answer.— That on final hearing, Plaintiff Moore be decreed to have a valid and subsisting Mechanic's lien, on said house and Lot. That same be ordered to be sold for cash, the proceeds to be applied in payment of amount due Plaintiff, and for further relief.

7 The Bill then sets out the Decree thereon of March 27th 1861, which states,

8 That defendant Bracken made default to answer as ruled. That the suit being on an account, a Jury was called to assess damages.

9 That the Jury assessed same at \$171.11. Decree—That Defendant pay said \$171.11 and costs in thirty days. In default of which that James S. Martin, Master in Chancery sell the premises in petition described, to-wit: (the description is given at length as in Petition,) at public auction to the highest and best bidder for cash—first advertising according to Law. Sale to be at south door of Court House in Salem. That Master execute conveyance to the purchaser. Said sale to be for Judgement of the damages and costs in first place, the overplus to be paid to Bracken. That Master Report; and cause continued for Report.

10 The Bill then states that on 23 May, 1861, the Master published a notice of sale, which notice is set out, and states:

11 That pursuant to said decree he (the Master) would sell on 14 June then next. Lots 91, 92, 69 & 70 in Block 6 in U. Mills addition to Salem with the buildings thereon—Sale for cash—purchaser to get Deeds.

12 The Bill states that said Master did on said 14th June, 1861, sell said premises *en masse*, without offering to sell them separately. That defendant P. P. Hamilton, one of the Attorneys in said cause for said Moore bought said four lots with the improvements for \$193.

13 That said house is on but one of said lots and the said house is worth in cash \$800—That Bracken paid said Moore \$300 for same and about \$200 to others for work and labor done and materials purchased.

14 That he (Bracken) did not appear and defend said suit, at March Term, 1861, because that shortly before said term, it was understood and agreed between him, Moore and said Hamilton, that Moore should have a lien for balance on said contract of \$97. That Moore would give time to pay same and not force sale for a reasonable time on pretence of friendship and assurance no advantage would be taken, That Bracken would save expense of Attorney to defend him—otherwise he would have defended said suit.

15 That immediately after said sale, said Hamilton took forcible possession of said premises, evicted the tenant and deprived Bracken of the use and rents thereof worth from \$4 to \$10 per month.

16 The Bill states errors in the Record and Decree, in said original suit.

I. It does not appear what Estate Backen had the premises ordered to be sold.

II. The Judgment is for \$171 while the pleading shows only \$77 due on the contract, and cites 4 Gillmans Reports; page 566.

III. The decree limits the time of payment to 30 days and cites 24 Ill. Reports page 551.

IV. The Decree orders sale of 4 lots without limitation, and accordingly the sale was *in masse* and cites 1 Gillmans Reports, page 442 and cases there cited.

V. The premises were sold to the Plaintiff's Attorney in the cause, who knew all the errors in Decree.

12. The Bill prays, that Moore & Hamilton be parties—That Summons issue—That they answer—

That on final hearing prays the Decree in said mechanics lien suit be set aside—That the complainant Bracken be allowed to defend same—That Hamilton be decreed to pay rent for time he held said premises, and be decreed to surrender possession to complainant and for further relief.

13 The usual security for costs was filed, and set out.

The affidavit of M. Shaeffer verifying the Bill sworn 31 Aug., 1861, is appended and set out.

14 The Summons is set out.

15 16 Defendant's demurrer general, is set out.

17 Decree of August Term 1861 is set out, which shows that on 19 August, 1861, Defendant Moore appeared by Defendant Hamilton his Attorney—That on 30 August, 1861, Demurrer was argued and overuled in all particulars except that the Bill herein be verified by oath or affidavit—Defendants except and stand by their Demurrer, which is still on file.

That on 31 August in said August Term came Complainant by his solicitor and Bill is amended by attaching affidavit—Defendants ruled to answer, &c., to amended Bill by 8 o'clock in the evening—That at 8 o'clock p. m. cause called—Defendants failed to answer—Bill taken for confessed by them—Court hears the cause on Bill as confessed. Court finds apparent error on face of the Decree on mechanics lien in two particulars.

I. Not giving longer time to pay the debt.

II. In ordering sale of all the premises when a part would have paid the debt and discharged the lien.

Decree that said Decree on mechanics lien be set aside—That the sale be set aside—That Defendant Hamilton surrender the premises sold—which are described as in said Bill for mechanics lien. The parties consent that the said Demurrer be considered as refiled to said the amended Bill—be overruled—Defendants stand thereby—and that the Decree be considered as amended in these respects and join in error. The said appellants Moore and Hamilton assign for error in said Decree as follows:

POINTS.

I. The Court erred in overruling the Demurrer to Bill of Review.

II. The Court erred on Bill of Review in allowing the Bill to be sworn to, after its filing and argument on Demurrer.

III. The Court erred in admitting Bill of Review to be sworn to on affidavit of Attorney in the form filed. The Bill is not sworn to, according to Law. The Bill should have been dismissed.

IV. The Court erred in assigning two insufficient reasons for error as the basis of its Decree on Bill of Review.

V. The Court erred in setting aside the original Decree and sale.

VI. The Court erred in overlooking the fundamental principles regulating Bills of Review, to-wit: error in original Decree ~~on~~ newly discovered facts, not known on original hearing. After Decree *pro confesso* in original suit Bracken should not be allowed to defend on insufficient cause shown.

VII. The court erred in overlooking and setting aside the sound discretion of the Chancellor in original decree.

VIII. The court erred in making no provision for repayment of purchase money to Hamilton, it does not do equity, and has not decreed a resale.

IX. The court erred in divesting Moore of his equity without making Bracken in equity respond to him by payment.

X. The court erred in not declaring to whom Hamilton should surrender his possession.

XI. The Decree makes no provision for costs.

P. P. HAMILTON, Attorney for self and Moore, Plaintiff's in error.

Moore & Hamilton

by

Bracken

Shelton

Filed Apr. 12. 1861

N. Johnston Clk

P. P. HAMILTON, Attorney for said and Moore, Plaintiff, vs. in error.

XI. The Decree makes no provision for costs.

X. The court erred in not directing to whom Hamilton should surrender his possession.

IX. The court erred in directing Moore of his equity without making Bracken in equity respond to not do equity, and has not done a wrong.

VIII. The court erred in making no provision for repayment of purchase money to Hamilton, it does original decree.

VII. The court erred in overlooking and setting aside the second divestment of the Chancellor in his capacity in original and Bracken should not be allowed to defend an independent case shown over in original Decree of newly discovered facts, not known on original hearing. After Decree

VI. The Court erred in overlooking the fundamental principles regarding bills of Review to wit: The Court erred in setting aside the original Decree and said Bill of Review.

V. The Court erred in assigning two independent reasons for error as the Bill of Review is in error. The Bill is not sworn to according to law. The Bill should be dismissed.

IV. The Court erred in admitting Bill of Review to be sworn to on affidavits of Attorney in the amount of Defendant.

III. The Court erred in allowing the Plaintiff to Bill of Review. The Court erred in not making the Defendant to Bill of Review.

II. The Court erred in not making the Defendant to Bill of Review. The Court erred in not making the Defendant to Bill of Review.

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Not giving longer time to pay the debt. In ordering sale of all the premises when a part would have paid the debt and discharged the debt. The Decree on mechanics lien in two particulars. First, in not giving longer time to pay the debt. Second, in ordering sale of all the premises when a part would have paid the debt and discharged the debt.

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Moore & Hamilton }
John Bracken }
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The Bill of Review relies upon the following among other errors in the decree and pleadings in the Mechanics' Lien Cause

II The judgment is for \$171 while the Pleadings show only \$77. due on the Contract -

The Contract price was \$377. of which Bracken paid \$300. and then there was extra work amounting to \$92. which it is alleged that Bracken agreed to pay long after the work was done; and there is no Contract shown for said extra work some of which was done on a different building from the one Contracted for. The Lien should be for \$77. instead of \$171. See 4 Gillman Repts Page 566. 23 Ill Repts Page 79. 22 Ill Repts Page 252. 21 Ill Repts Page 425. and 431 and 437 as to variance between Contract laid and proof see 21 Ill Repts Page 624.

III The Decree Limits the time of payment to 30 days which should be at least 90 days - See 24 Ill Repts Page 551

IV The Decree orders a sale of 4 lots without limitation when one lot containing the building and was ample to pay the judgment - Purple's Ill Statutes 2 Vol Page 725 - sec 14 / Gillman's Repts Page 442 and Cases there cited -
A Mechanics Lien can only attach to the lot upon which the house is and not the adjoining ones

As to the 1st, 2nd & 3rd Errors assigned by Plff in Error -
the Deft in Error says, that this is a Bill of Review based upon
errors of Law apparent upon the decree & pleadings; which
requires no affidavit and if it did require to be sworn
to, that defect could not be reached by General Demurrer.

As to 4th & 5th & 6th Errors assigned - see authorities referred to under
3rd & 4th heads foregoing -

As to 7th - The discretion of the Chancellor is limited
by the Construction of the Law by this Court

As to 8th - It nowhere appears, that the money was paid by the
purchaser Hamilton - hence no bases for a decree
to refund to him.

As to 9th - If the Bill be true (as it confessedly is) Moore Comes
with a Confused face, and unclear hands, and asks
equity - see prayer in Bill of Review and if thought
proper let decree be modified to correspond with
prayer.

As to 10th - It is implied that the possession should be surren-
dered to him from whom it was wrongfully taken

As to 11th - The Costs will follow the suit - Perhaps, the decree
should be so amended

No 37- 1

Moore & Hamilton

vs

John Bracken

Error to Marion

Brief and reference
to authorities referred
to by

Deft in Error

Per

M. Schaeffer Atty
for Deft in Error

1858-59

ABSTRACT.

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- 5 Prays, That Bracken be made Defendant. That summons issue. That he make answer.— That on final hearing, Plaintiff Moore be decreed to have a valid and subsisting Mechanic's lien, on said house and Lot. That same be ordered to be sold for cash, the proceeds to be applied in payment of amount due Plaintiff, and for further relief.
- 6 The Bill then sets out the Decree thereon of March 27th 1861, which states, That defendant Bracken made default to answer as ruled. That the suit being on an account, a Jury was called to assess damages.
- 7 That the Jury assessed same at \$171,11. Decree—That Defendant pay said \$171,11 and costs in thirty days. In default of which that James S. Martin, Master in Chancery sell the premises in petition described, to-wit: (the description is given at length as in Petition,) at public auction to the highest and best bidder for cash—first advertising according to Law. Sale to be at south door of Court House in Salem. That Master execute conveyance to the purchaser. Said sale to be for Judgement of the damages and costs in first place, the overplus to be paid to Bracken. That Master Report, and cause continued for Report.
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That on final hearing prays the Decree in said mechanics lien suit be set aside—That the complainant Bracken be allowed to defend same—That Hamilton be decreed to pay rent for time he held said premises, and be decreed to surrender possession to complainant and for further relief.

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That on 31 August in said August Term came Complainant by his solicitor and Bill is amended by attaching affidavit—Defendants ruled to answer, &c., to amended Bill by 8 o'clock in the evening—That at 8 o'clock p. m. cause called—Defendants failed to answer—Bill taken for confessed by them—Court hears the cause on Bill as confessed. Court finds apparent error on face of the Decree on mechanics lien in two particulars.

I. Not giving longer time to pay the debt.

II. In ordering sale of all the premises when a part would have paid the debt and discharged the lien.

Decree that said Decree on mechanics lien be set aside—That the sale be set aside—That Defendant Hamilton surrender the premises sold—which are described as in said Bill for mechanics lien. The parties consent that the said Demurrer be considered as refiled to said the amended Bill—be overruled—Defendants stand thereby—and that the Decree be considered as amended in these respects and join in error. The said appellants Moore and Hamilton assign for error in said Decree as follows:

POINTS.

I. The Court erred in overruling the Demurrer to Bill of Review.

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VI. The Court erred in overlooking the fundamental principles regulating Bills of Review, to-wit: error in original Decree ~~on~~ newly discovered facts, not known on original hearing. After Decree *pro confesso* in original suit Bracken should not be allowed to defend on insufficient cause shown.

VII. The court erred in overlooking and setting aside the sound discretion of the Chancellor in original decree.

VIII. The court erred in making no provision for repayment of purchase money to Hamilton, it does not do equity, and has not decreed a resale.

IX. The court erred in divesting Moore of his equity without making Bracken in equity respond to him by payment.

X. The court erred in not declaring to whom Hamilton should surrender his possession.

XI. The Decree makes no provision for costs.

P. P. HAMILTON, Attorney for self and MOORE, Plaintiff's in error.

Moore & Hamilton

in

Pracker

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12 The Court ruled in denying two assignments received for error in the Decree on the ground that the bill is not sworn to according to law. The bill is not sworn to in the manner on Decree.

13 The Court ruled in admitting Bill of Review to be sworn to on the ground on Decree.

14 The Court ruled on Bill of Review in allowing the Bill to be sworn to after filing and argument on Decree.

15 The Court ruled in overruling and setting aside the original Decree and nisi.

16 The Court ruled in overruling and setting aside the second decree of the Chancellor in two causes in original nisi Pracker should answer the possession.

17 The Court ruled in not declaring to whom Hamilton should answer the possession.

18 The Court ruled in directing Moore of his equity without making Pracker in equity respond to not to equity, and has not directed a remedy.

19 The Court ruled in making no provision for repayment of purchase money to Hamilton, if does original decree.

20 The Court ruled in overruling and setting aside the second decree of the Chancellor in two causes in original nisi Pracker should not be allowed to defend on installment cause shown.

21 The Court ruled in overruling the fundamental principles regarding bills of Review, to wit: that Court ruled in setting aside the original Decree and nisi.

Abstract

Office

Julia Nov 12 1861

N. Johnston M

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Cross & Hamilton

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Geo. Beaker

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Cent Hill on 502