No. 13082

Supreme Court of Illinois

Hooper

---

vs.

Winston, Trustee,

71641 7

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

E. R. HOOPER,
vs.
FREDERICK H. WINSTON, Trustee, *et al.*

We shall confine ourselves to the points of evident error, with which we deem this decree is chargeable.

1. That the Court erred in charging the receiver with interest from the 2d June, 1856, being more than one month before the last instalment was due and payable, to wit, July 18, 1856.

2. That by the decree, interest upon moneys actually paid out by the receiver in the discharge of his official duties, is charged against him, to the extent of *expenses disbursed*, $2,442.01.

3. That the Court erred in exercising a discretion to discriminate between the payments made by the receiver, this being a matter solely confided to his judgment by the stipulation and order referred to in the abstract.

4. That the fact of payment being conceded, the receiver was not responsible for error of judgment, but only *mala fides* or gross misconduct, amounting to legal fraud.

Hill on Trustees, 492 and note (1.)
4 John. C. R. 628–29–30.
1 Sanford C. R. 359.
5 Paige 485.
3 Madd. 208.

5. That the Court in its action, as well as the parties to the case, were bound by the terms of the stipulation, which being passed by consent into a decretal order of the Court, and remaining unvacated for fraud or collusion, is not susceptible of *collateral* impeachment or revision.

11 Illinois 542.
3 Edw. C. R. 410.
Adams Equity 406.
2 Daniel C. P. 1179–80.
Adams' Equity 916–17.
Ibid. 396–99, note 1.

6. That if Hooper, as attorney, exceeded his authority by entering into said stipulation, such misconduct cannot attach to his official character, *as this would make his sureties liable for his malfeasance in office before appointment, and for breaches of the conditions of the bond before it was executed by them.*

3 Edwards C. R. 410.
2 Daniels C. P. 1179–80.

7. Again, by participating in the profits of the sales made by Hooper in his character of receiver, the defendant is estopped from denying the full legality of the proceedings leading to the appointment.

8. That by the stipulation the receiver was clearly authorized and directed, not only to disburse for future liabilities "necessary to incur and pay in order to keep said house in operation," but also "such demands and liabilities" "as it *has been*" "necessary to incur and pay in order to keep the said house in operation." *Such payments were not to enter into the fund required to be paid into Court and subject to distribution by its order.*

It appears, then, conclusively, that the extent and propriety of incurring such liabilities, "to keep the house in operation," were exclusively confided to the judgment of the receiver, and never designed to be subjected to the scrutiny or approval of the Court.

We repeat, that the exercise of such judgment could only be impeached by *directly* assailing its propriety by a charge of fraud supported by proof, and that, for mere error of judgment, (even if such were apparent, which we emphatically deny,) the receiver cannot be held responsible.

JOHN M. S. CAUSIN,
E. R. HOOPER,
Attorneys for Appellants.

No 84

E. R. Hooker

v

Jno H. Martin

et al

Points & authorities for appellants

Filed Apr 19. 1860

L. Leland

Clerk

Wm L. Cunnison

E. R. Hooker

Sup. Court

E. R. Hooper

Plff in Error

vs

Frederick H. Winston

Trustee &c. Deft in Error

In addition to the points submitted by me as Counsel for Jonas H. Crane one of the mortgagees & defendants in the Court below in this suit, I desire to submit the following considerations.

Hooper, was appointed Receiver on the 12th of June 1855, he sold the property the 15th of July 1855 for $18000 to Law, of which $8000 was paid in cash & the residue secured by Notes of the purchaser on a credit of six & twelve months, with Interest at 6 per cent per annum

Abstract page 7 – Record pages 57 & 58.

Now, Hooper as Receiver received Interest on the $18000 from July, 15th 1855 til the 19th of Nov. 1859, at 6 per cent, upon such portions of it as he was legally chargable with, or else had the money in his own possession, or used it in his own business for about 4 years & 4 months (some of it longer) All the Interest he credits the Estate with is included in the credit of $18565, and is $4350

Although he made the sale in July 1855, he made no report of his doings to the Court until June 1856 about a year after the sale, and then only upon the order of the Court; then reported the whole amount of $18365. as in his hands, he never brought the money into Court, nor could the Creditors in any way get it out of his hands, until about the 22 day of October 1859. when an order was made by the Court requiring Hooper to bring into Court about $18000. (the Record not being before me the precise amount is not recollected). In pursuance of this order he paid into Court $2138.52 still keeping the balance in his own hands.

The Court only charged Hooper with Interest on the balance in his hands after deducting the credits allowed him from June 2 - 1856 the date of his report - Abstract page 10 - We say therefore he should pay interest 1st. Because Laws on his purchase was to pay Interest.

2. Because it was the duty of the Trustee to have tendered his ofe. & brought the Money into Court. Instead of that he kept them & the legal presumption is, used the moneys from four to five years, after Laws Notes became due, & when money was worth from 2 to 3 per cent per month.

3. He not only kept the monies, but kept

the creditors at bay, & protracted the litigation, throwing every possible obstacle in the way of a speedy settlement of the matter.

4. Because he has abused his Trust — as attorney, he acted in a double capacity & Atty for two conflicting claimants. Crane & the Commercial Bank — He signed a stipulation compromising the rights of Crane for whom he acted as Atty, without any authority — as Receiver, he has presented claims of which there is no proof he ever paid.

He charges for monies paid for Rents & other items; he had no right to pay & before he was appointed Receiver

He charges for enormous sums of money which he claims to have expended in keeping Tavern, to the great loss of the Creditors.

He himself enjoyed the luxuries of eating & drinking with himself & friends at the Hotel without paying for it or giving any account.

He has refused to give any account or credit the Estate with any of the monies received at the Hotel, while he has claimed some $6000 for "Keeping the House" in operation

He has in short deliberately & purposely squandered the Estate which he was appointed to take charge of for the benefit of creditors.

He has rendered an unfair & false account of his doings.

For all these unparalleled abuses he claims shelter under the stipulations which Hooper drew up & which Hooper signed without authority

The stipulation gives the Receiver no power of itself, it was a stipulation only authorizing the Court to appoint him Receiver &c and until he was appointed by order of the Court, he was not a Receiver & could not act as such & when appointed by the Court he was an officer of the Court, and like all Receivers ~~could only act~~ was subject to the directions of the Court, & his conduct was subject to the review & control of the Court.

The Receiver claims that he was vested with discretionary power & therefore the Court had no power to examine into the mode of the discharge of the discretionary power.

The answer to this is —

1 He is not a private agent, but as already been said, he is an officer of the Court of Chancery, appointed by the Court of Rec and subject to the action & control of the Court.

If the Receiver relies upon the Stipulation for his protection, he has a poor shield to protect him in the gross abuses of the Trust reposed in him for the reasons set forth in our printed points,

Again the Stipulation does not give any discretionary power, which he would not have had without it, the Stipulation authorizes him to pay such demands, "as it has been or may be necessary " to incur & pay in order to keep said House " in operation", Abstract pg 4,

The discretion is a legal discretion, he may pay such expenses as may be necessary — necessary for what? necessary to keep the house in operation, the matter was not submitted to Horsfall's "judgment" as he claims, The Court of Chancery did not divest itself of its rights to judge of the necessity & propriety of the payments, it did not put its conscience in the keeping of Mr Horsfall, all the power he had, he derived from the Court, and he is as much amenable to the judgment of the Court as any other Receiver, It is very probable that the Receiver has acted upon the assumption that he was not amenable to any Court,

2 Story Eq Jur 2nd Ed 1276 & 1285

and thereby he could squander and plunder the Estate with impunity.

The cases referred to by the Counsel are all cases where the Trustee was appointed by private persons & not by the Court.

It is conceded however that if the Trustee has not acted in good faith, then he is liable for the consequences.

It was an easy matter in this case, as it is in all similar cases for the Trustee to avoid any personal liability, he might, as it was his duty to do, bring the money into Court, & have it paid out under the order of the Court. instead of that, his whole conduct is characterised by reckless extravagance & gross dishonesty.

The abstract contains a very meagre account of the proceedings in the case. And I regret that I have not while writing this argument the Record before me so that I can refer to the proceedings. I will here remark that the Record is much more voluminous than it ought to have been, It contains several affidavits, that were never in the case & had no business among the papers, It also contains a long petition made by Hoopes, which is improperly

in the Record. It is a kind of drawn argument entitling him to no credit for conscientious scruples.

To Horton first Report he annexed a statement of his disbursements as follows.

" Statement of Bills paid & cash advanced to pay Expenses of carrying on McCandel House & to extinguish liens.

1855 May	To Cash loaned House	$ 105,00
	" pd Chicago Water Works	75,00
	" Gas Company	107,70
	" C Bently (rent)	285,00
	" JM Stuth "	1111,00
	" H L Wilson (Mdse)	477,38
	" Ira Couch (rent)	25,00
June	" Loaned House	1111,00
	" Chicago Gas Co	131,35
	Jay & Trisbe (2cr)	30,00
	Loaned House	34,00
	" fa Cloud-fa House	2,25
	" " Census license	20,00
	Loaned House	80,00

Paid for advertising sale of House in Cincinnati, St Louis, Cleveland, Detroit Buffalo, Albany, Troy, New York, Boston Philadelphia & Pittsburg papers $5 each 35,00

July To Cash loaned McCandel house 300,00

" pd Jay & Trisbe 2cr 136,25

	Sill & Diversey (for ale)	136,00
	Chicago Ice Co	127,05
	Journal office for ad	26,00
	C P Albe for meat	126,89
	Times office (ad & Pr)	52,50
	" " for posting bills	75
Aug.	Chicago Gas Co	78 40
	Eddy & Watkins (Segars &c)	303,50
	E. T Watkins & Co	735,00
	Amt brot forward	2540,82
	To Cash pd Ira Couch for rent	25,00
	Cyrus Bentley	400,00
	Sill & Diversey (ale)	108,00
	for printing Bills	1,00
	" plumbing	19,59
	Sill & Diversey (ale)	8,00
	for 1 Box Pop	75
	George G Levy, auctioneer	75,00
	for plumbing	2,00
	for sundries	11,50
	J H Phillips (Cigars Wine &c	237,49
	Cash pd City Collector taxes	56,00
	To Cash assumed to pay J M Stuh	
	Execution Olim on property	388,00
	To Cash paid for watering street	10,00
	For Hotel & Saloon License	75,00
	Wages of Clerk	55,86
	" "	8,80
	Housekeeper	13.30

2 Gibb		2,75
G Martin		11,00
Finch Clk		20,00
		6268,08
By Cash pmt on ah of Quitan	15,00	
" " received pmt on Safe Co for 2 Mo rent of Stockings	100,00	115,00
		6153,08

On the first of May 1857 he filed another report to which was annexed the following account.

To Cost of Sales of the Leased Furniture &c of Mc Candle House as per Rpt.		$ 18,000,00
Interest —		450,00
		$ 18,450,00
By balance due receiver for advances & pmts paid Claims & Mortgages extinguished as per statement accompanying first report		6153,08
		12,296,92
By Cash paid Ashley Gilbert on Mortgage	6000,00	
Cash paid J H Crane Assignee of A M Crane on Mortgage	2273,40	$ 8273,40
		4023,52

To Amt rec^d from sale of Guitars
& for rent of Store rooms see account;
annexed to first report.

The first charge in the Bill is dated in May 1855 for "Cash loaned house $115." There is no evidence that the money was ever loaned to the house or went into the concern. Another objection to it is, it purports to have been loaned before he was appointed receiver. He has no right therefore to with hold it from the Creditors. There is another charge of same amount same month.

What right had he to charge the Creditors with monies paid to Gas company, for rents, & water works in May? or at any other time, and apply the avails of the furniture in that way?

But it is needless to go through this extraordinary account by items, out of $18,000, received, the Receiver charges as necessary items for keeping open the house about one Month $6268,08. In addition to this he modestly asks the privilege of using the ballance for 4 or 5 years without interest & then to be allowed $1,800 Commissions. Hooper asks, "is the sum extravagant? I answer, in my judgment it is not only extravagant but robbery. He say the house was at expense from May until July this is

a mistake, he had no profession until his appointment as Receiver until 12th June 1855. He did have the mortgage of the Commercial Bank, but he had no profession for the creditors until he was appointed receiver, and no matter how long he had it, if he saw, it was running under at the rate of about $60,000 a year. He should have sold the property at once, not kept it open in the name of the Court of Chancery, but ostensibly to enable him & his friends to enjoy the benefit of dinners, suppers & liquors at the expense of the Creditors.

It is the duty of a Trustee "to prevent any waste, or delay or injury to the Trust property & to keep regular accounts, to afford accurate information to the cestui que trust of the disposition of the property xxx finally; he is to act in relation to the trust property with reasonable diligence xx for if he should deliver over the whole management to the Trust, and betray ~~suspicious~~ supine indifference ~~suspicion or distress~~, or gross negligence in regard to the interests of the cestui que trust, he will be held responsible". 2 Storys Eq Jurisprudence Sec 1275.

"These remarks apply to the ordinary case of a Trustee, having a general discretion; And exercising his powers without

any special directions", sec 1276

Now in this case he has violated every principle contained in the Authority cited.

It is claimed that $1,800, for Liquor is not extravagant because he says, "but for the Bar, the expenses would have been far heavier." If that is so, perhaps the Creditors ought to be thankful that they kept a bar, but inasmuch as they sold about $50 worth of liquor a day, which generally yields a profit of at least 100 per cent, we submit they should at least have rendered an account for the avails of that liquor, not kept both Capital & profit.

The Receiver not only charges us with $6268.08 expenses in one Month & five days "for keeping the house in operation" but he does not give any account of the receipts, during that time, he has not credited the estate with a dime. It was his duty to keep an accurate account of the receipts & disbursements. It seems by the evidence that there was a book containing an account of the receipts, we gave him notice to produce that Book which he never did, but makes the stale excuse that it is lost; we have a right to have

the whole of this "Operation"

We Claim

1st. That the Receiver should not have been allowed $6000, paid the Commercial Exchange Co on the mortgage to Gilbert;

1 Because it had been paid as stated in our printed points,

2 Because the Mortgage was void, it not having been acknowledged before a Justice of the Peace.

2d. We say, that there is no proof of the payment of a large number of the items charged in his account, none of the monies "loaned house" & none of the accounts for groceries except pamphlet bills of the latter, no proof they were used at the House

3d. He should not have been Credited with any monies paid by him in May, or before he was appointed Receiver,

4th. He should not have been allowed for monies paid for rents, gas, water works, Ligours, monies loaned House, and in fact only for such monies as were actually necessary to keep the House in operation until he could sell the furniture.

As to the dishonesty of Hooper in selling to Law & himself and his Speculation out of the Trust fund, we have commented upon it, in our

printed points.

The Receiver makes all his calculations upon the basis that his account is to be allowed just as he makes it, that he is to be allowed no Interest, and that he is to be rewarded for his abuse of the Trust reposed in him by giving him 10 per cent commissions.

In my Judgment the Court below allowed Hooper a much larger amount than he ought to have done and he should also have charged him with the speculations he made out of the Estate. The writ of Error should have been brought by the mortgagee instead of Hooper

E Van Dunn
Sol for Deft Crane

Supreme Court:

84-68

Ezekiel R Hoosier
Plff in Error

vs

Frederick A Winston
Trustee &c

Arg of Defl. Counsel
Brief for defendant in Error

E Van Buren
Solr for defl. Counsel

Filed May 19, 1860
L Leland
Clerk

SUPREME COURT

OF ILLINOIS.

Third Grand Division.

E. R. HOOPER,

vs.

F. H. WINSTON,

TRUSTEE.

} ERROR TO COOK.

Upon the assumption that enough is disclosed by the record, to enable this Court to pass a final decree, the plaintiff in error will contend,

1. That there being no evidence to charge the Receiver with a breach of trust—nothing to show that in the payments made on account of the expenses of the McCardle House, he expended more than was necessary to keep it "*in operation*" until the sale—the fact of such payments being sufficiently established by the vouchers on file—his report, made on the 1st day of May, A. D. 1857, to which no exceptions have been interposed, should be the basis of such decree.

Upon this hypothesis, the account would stand thus:

Amount in Receiver's hands, by his report,		$2,138.00
Deduct commissions at	per ct. on $18,565,	———
Int. on balance from 1st May, A. D. 1857, Oct. 18th, 1859,	1/6	———
Then paid into Court,		$2,138.00
Balance due,		

The balance will be payable either by ~~bearer~~ Grant or the receiver, as the credits allowed fall short or exceed the amount charged against him. Upon subject of liability of Trustee to interest, see 1 Sandf. Ch. Rep. 404.

J. M. S. CAUSIN,
E. R. HOOPER,
Attorneys for Plaintiff in Error.

SUPREME COURT

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J. M. S. CAUSIN,
E. R. HOOPER,
Attorneys for Plaintiff in Error.

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Hooper vs Winsler

Pl'ffs Brief

Printed by Beach & Barnard, 14 South Clark Street.

IN THE SUPREME COURT,

Third Grand Division,

APRIL TERM, A. D. 1860.

EZEKIEL R. HOOPER,
Plaintiff in Error.

VS.

FREDERICK H. WINSTON,
Trustee, &c. et al. Defendants in Error.

The bill in this case was filed against several mortgage creditors of McCardle, and against the defendant, E. R. Hooper, as receiver, to settle the right of the several mortgagees and requiring the receiver to account.

The following is a synopsis of the facts. McCardle gave a chattel mortgage to Gilbert in trust for various persons, composing the Commercial Exchange Company, on the 30th day of August, 1854, for $2000, and future advances. On the 6th day of September, 1854, he also gave one to A. M. Crane to secure $7,200, which mortgage was afterwards assigned to the defendant, Jonas H. Crane. He next gave a mortgage to Henry L. Wilson, on the 14th day of December, 1854, to secure $360, and afterwards gave several to other mortgagees, which is not necessary to refer to more particularly as there is no funds to reach them.

Hooper, as receiver, rendered his accounts, upon which considerable testimony was taken.

In his account, he credits the estate for $18,565.00 avails of property sold by him as receiver, and charges the estate for $6000 paid upon the mortgage to Gilbert, and about $6000 for expenses in keeping open the house from 12th of June, 1855, the day he was appointed a receiver, until the 17th of July, 1855, when he sold the property.

The mortgage to Gilbert having been paid, the mortgage to Crane was the next oldest, and entitled to be paid. At the date of the decree in this case, there was due on the chattel mortgage to Crane $5,323.48. The Court ordered and decreed that there should be paid upon this $2,138.52, monies brought into Court by Hooper and the further sum of $2,298.85 monies in the hands of Hooper. From this decree Hooper appeals, and claims that the Court charged him with too much money, or in other words did not allow him sufficient credits.

Although we have not filed cross errors, we may show that the Court allowed Hooper more credits than he was entitled to, to show that the decree is not for too much. We claim then:

I.

That the Court below should not have credited Hooper with the $6000 paid upon the mortgage to Gilbert, because it was not a valid and operative mortgage as against Crane.

The mortgage was given to secure an indebtedness of $2000 and future advances to $4000, making, in all, $6000. It appears by the testimony in the case, that the Commercial Exchange Company (doing a banking business) charged McCardle with the two thousand dollars he owed them and the monies he afterwards drew out, and credited him with the payments—such payments largely exceeded the amount for which the mortgage was given, though in the end there was a balance of $6000 against McCardle. The payments thus

made to them should have been applied upon the mortgage and operated as an *extinguishment* of the mortgage.

2 Selden R. 162.

II.

Hooper was appointed receiver, 12th of June, 1855, and sold out the property 17th July, 1855. He charges for expenses for keeping the house open $6,263; of this amount, $1,594.24 was for liquor, $126 for meat, and not a dime for bread. $2,025.15 was paid, as appears by his account, in May, before Hooper was appointed a receiver. $679 is charged for monies loaned the house, and of which there is no proof, except, in some instances, Hooper's checks, in which he says: "for McCardel House," but are in no way traced to or connected with the McCardel House. And it is a singular fact, that the receiver does not give credit for a cent received or taken in by the house. He runs a tavern for the Court of Chancery, and charges $6,268 for running it about five weeks, and does not give credit for a farthing of the receipts, although frequently called upon to produce his books.

We claim, that the trustee should not be credited with any monies expended for stores or otherwise in running the house *as a hotel*, nor for back rents.

2 Story Equity Jurisprudence Sec 1275-1276

It was the duty of the receiver to convert the property into money with reasonable dilligence; he had no right to keep a hotel for five or six weeks at a ruinous loss to the creditors. It is claimed that the stipulation appointing him receiver, gave him the right to keep the house in operation. Then we answer:

1. The stipulation does not authorize him to keep open the *house as a hotel.* It authorized him to pay such demands as "might be *ne-*

cessary to incur and pay to keep the house in operation;" that is, so long as would be necessary to keep it open to sell the property. It gave him no greater right than the law gave him—that is to keep it open until he could sell it; and it was his duty to sell it, without any unreasonable delay. He might have sold it in ten days. Was it necessary to keep open the house for the purpose of making sale of the furniture, that he should purchase $1,594.24 of liquor within a few days? What became of that liquor? where are the avails of it?

It seems to me, therefore, that this receiver cannot find shelter behind this stipulation.

Again, there is a peculiarity about this stipulation. Crane and the Commercial Bank had conflicting interests, and this same Mr. Hooper signs this stipulation, as attorney for Crane, and, also, the Commercial Exchange Company.

But the stipulation, we say, was void as against Crane, because it was not signed by him, or any one authorized by him.

8 Wend. 494. Story on Agency, sec. 21.

As a mere attorney, he had no authority to sign it. "An attorney at law only represents the plaintiff or defendant *in Court* to do such act as the plaintiff or defendant, if in Court, might do himself, but he has no right to enter into private or executory contracts."

2 Calls (Virginia R.) 498.

He has no right to do anything that will affect or impair his client's security nor in any way affect his substantial rights.

5 Con. 55. 1 Pick. 347. 14 Johns. R. 464. 5 Peters, 113.

We say, then, that the Judge not only did not err in not allow-

ing the receiver more than $3,710.97, but that he allowed him more than he ought to have done.

The Judge charged the receiver with interest on the balance in his hands from the date of his report, 2nd June, 1856, a year after the sale.

This was right.

1 Because in his sale of the furniture to Law he received interest.

2. Because it was his dnty to bring the money into Court, he was an officer of the Court; instead of that he has had the money in his hands for about six years, and it has been impossible for the creditors to get hold of it to this day. If a trustee has applied the trust funds to his own benefit, or has conducted himself fraudulently, he will be charged with interest. It is discretionary with the Court to charge him with interest upon equitable principles.

Story, Eq., jurisprudence 1277.

The Court below might with great propriety have charged the receiver with a much larger balance, and we suppose if this Court is satisfied that the receiver has not been charged with too much, in other words, that no injustice has been done him, they will not reverse the judgment.

Now in this case the Court will see that the receiver has himself speculated out of the estate and that he has grossly abused his trust.

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It appears by the record that McCardel had a lease for the premises he occupied, dated 1st February 1854, for ten years. On the 15th of August, 1855, Hooper assigned his interest in that lease as receiver to Robert Llaw. On the 22nd of August, 1855, Law assigned back one half of the lease to Hooper.

p. 240

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E. VAN BUREN,

Solicitor for Defendant.

Supreme Court

Ezekiel R Hooper

vs

Frederick A Winston

~~Abstract~~

Points

E Vant Dunn

Sol for deft-Appt

Filed April 18. 1861

L. Ladson Jr

Clerk

SUPREME COURT

OF ILLINOIS.

Third Grand Division.

E. R. HOOPER,

vs.

F. H. WINSTON,

TRUSTEE.

} ERROR TO COOK.

Upon the assumption that enough is disclosed by the record, to enable this Court to pass a final decree, the plaintiff in error will contend,

1. That there being no evidence to charge the Receiver with a breach of trust—nothing to show that in the payments made on account of the expenses of the McCardle House, he expended more than was necessary to keep it "*in operation*" until the sale—the fact of such payments being sufficiently established by the vouchers on file—his report, made on the 1st day of May, A. D. 1857, to which no exceptions have been interposed, should be the basis of such decree.

Upon this hypothesis, the account would stand thus:

Amount in Receiver's hands, by his report,	$2,138.00
Deduct commissions at per ct. on $18,565,	———
Int. on balance from 1st May, A. D. 1857, Oct. 18th, 1859,	———
Then paid into Court,	$2,138.00

Balance due, Grand

The balance will be payable either by ~~bearer~~ or the receiver, as the credits allowed fall short or exceed the amount charged against him. Upon subject of liability of Trustee to interest, see 1 Sandf. Ch. Rep. 404.

J. M. S. CAUSIN,
E. R. HOOPER,
Attorneys for Plaintiff in Error.

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Hooper v Winslow

Pl Aff's. argt

Filed May 2 1860
L. Leland
Clerk

Printed by Beach & Barnard, 14 South Clark Street.

IN THE SUPREME COURT,

Third Grand Division,

APRIL TERM, A. D. 1860.

EZEKIEL R. HOOPER,
Plaintiff in Error.

VS.

FREDERICK H. WINSTON,
Trustee, &c. et al. Defendants in Error.

The bill in this case was filed against several mortgage creditors of McCardle, and against the. defendant, E. R. Hooper, as receiver, to settle the right of the several mortgagees and requiring the receiver to account.

The following is a synopsis of the facts. McCardle gave a chattel mortgage to Gilbert in trust for various persons, composing the Commercial Exchange Company, on the 30th day of August, 1854, for $2000, and future advances. On the 6th day of September, 1854, he also gave one to A. M. Crane to secure $7,200, which mortgage was afterwards assigned to the defendant, Jonas H. Crane. He next gave a mortgage to Henry L. Wilson, on the 14th day of December, 1854, to secure $360, and afterwards gave several to other mortgagees, which is not necessary to refer to more particularly as there is no funds to reach them.

Hooper, as receiver, rendered his accounts, upon which considerable testimony was taken.

In his account, he credits the estate for $18,565.00 avails of property sold by him as receiver, and charges the estate for $6000 paid upon the mortgage to Gilbert, and about $6000 for expenses in keeping open the house from 12th of June, 1855, the day he was appointed a receiver, until the 17th of July, 1855, when he sold the property.

The mortgage to Gilbert having been paid, the mortgage to Crane was the next oldest, and entitled to be paid. At the date of the decree in this case, there was due on the chattel mortgage to Crane $5,323.48. The Court ordered and decreed that there should be paid upon this $2,138.52, monies brought into Court by Hooper and the further sum of $2,298.85 monies in the hands of Hooper. From this decree Hooper appeals, and claims that the Court charged him with too much money, or in other words did not allow him sufficient credits.

Although we have not filed cross errors, we may show that the Court allowed Hooper more credits than he was entitled to, to show that the decree is not for too much. We claim then:

I.

That the Court below should not have credited Hooper with the $6000 paid upon the mortgage to Gilbert, because it was not a valid and operative mortgage as against Crane.

The mortgage was given to secure an indebtedness of $2000 and future advances to $4000, making, in all, $6000. It appears by the testimony in the case, that the Commercial Exchange Company (doing a banking business) charged McCardle with the two thousand dollars he owed them and the monies he afterwards drew out, and credited him with the payments—such payments largely exceeded the amount for which the mortgage was given, though in the end there was a balance of $6000 against McCardle. The payments thus

made to them should have been applied upon the mortgage and operated as an *extinguishment* of the mortgage.

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Hooper was appointed receiver, 12th of June, 1855, and sold out the property 17th July, 1855. He charges for expenses for keeping the house open $6,263; of this amount, $1,594.24 was for liquor, $126 for meat, and not a dime for bread. $2,025.15 was paid, as appears by his account, in May, before Hooper was appointed a receiver. $679 is charged for monies loaned the house, and of which there is no proof, except, in some instances, Hooper's checks, in which he says: "for McCardel House," but are in no way traced to or connected with the McCardel House. And it is a singular fact, that the receiver does not give credit for a cent received or taken in by the house. He runs a tavern for the Court of Chancery, and charges $6,268 for running it about five weeks, and does not give credit for a farthing of the receipts, although frequently called upon to produce his books.

We claim, that the trustee should not be credited with any monies expended for stores or otherwise in running the house *as a hotel*, nor for back rents.

2 Story Equity Jurisprudence Sec 1275-1276

It was the duty of the receiver to convert the property into money with reasonable dilligence; he had no right to keep a hotel for five or six weeks at a ruinous loss to the creditors. It is claimed that the stipulation appointing him receiver, gave him the right to keep the house in operation. Then we answer:

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It seems to me, therefore, that this receiver cannot find shelter behind this stipulation.

Again, there is a peculiarity about this stipulation. Crane and the Commercial Bank had conflicting interests, and this same Mr. Hooper signs this stipulation, as attorney for Crane, and, also, the Commercial Exchange Company.

But the stipulation, we say, was void as against Crane, because it was not signed by him, or any one authorized by him.

8 Wend. 494. Story on Agency, sec. 21.

As a mere attorney, he had no authority to sign it. "An attorney at law only represents the plaintiff or defendant *in Court* to do such act as the plaintiff or defendant, if in Court, might do himself, but he has no right to enter into private or executory contracts."

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He has no right to do anything that will affect or impair his client's security nor in any way affect his substantial rights.

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The Judge charged the receiver with interest on the balance in his hands from the date of his report, 2nd June, 1856, a year after the sale.

This was right.

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The Court below might with great propriety have charged the receiver with a much larger balance, and we suppose if this Court is satisfied that the receiver has not been charged with too much, in other words, that no injustice has been done him, they will not reverse the judgment.

Now in this case the Court will see that the receiver has himself speculated out of the estate and that he has grossly abused his trust.

Record
R. 234-5
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E. VAN BUREN,

Solicitor for Defendant.

68
Supreme Court
84.

Ezekiel R Draper
vs
Frederick H Winston

~~Abstract~~
Points

C Van Buren
Solr for Defts Trause

Filed Apr: 18. 1860
G. Leland
Clerk

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Clerk of the Superior Court of Chicago, ~~Court for the~~ County of Cook Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Superior Court of Chicago, Cook County, before the Judge thereof, between Frederick H. Winston Trustee for Alexander Stewart & Co. John Taylor James I. Johnson, Edwin Boswell, Alexander H. Hitchcock & Co. and James Burton & Co. plaintiff, and Roswell Carter, Jonathan Blinn, James Long, James Peck, John S. Newhouse, Isaac Colvin, Seth M. Warner, Philander Roby, Thomas Richmond, John R. Case, Ashley Gilbert, S. S. Russell, Ashley Gilbert Trustee, Ezekiel R. Hooper, H. Crane, E. Cornning & Co. J. W. B. Davidson, and H. L. Wilcox defendants, it is said manifest error hath intervened, to the injury of the aforesaid Ezekiel R. Hooper one of said defendants as we are informed by his complaint and we being willing that error should be corrected, if any there be, 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 the 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 Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April 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. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 28th day of January in the Year of Our Lord one thousand eight hundred and ~~fifty~~ sixty.

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy

Ezekiel R. Hooper
Impleaded &c. 85

v

Frederick H. Winston
Trustee.

Writ of Error

This writ of error is
made a Supersedeas
and as such is to be
obeyed by all concerned.

L. Leland Clk
by J. R. Rives Deputy

Filed January 28. 1860
L. Leland
Clerk

Printed by Beach & Barnard, 14 South Clark Street.

IN THE SUPREME COURT,

Third Grand Division,

APRIL TERM, A. D. 1860.

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Plaintiff in Error.

VS.

FREDERICK H. WINSTON,
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E. VAN BUREN,

Solicitor for Defendant.

Supreme Court

84

Ezekiel R. Hoosen

vs

Frederick H. Winston

~~Abstract~~

Points

C. Van Buren

Dob for defts Exam

Filed Apr. 18. 1860

L. Leland

Clerk

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

E. R. HOOPER,

vs.

FREDERICK H. WINTON, Trustee, &c.

} ERROR TO COOK.

The evident error in the decree, charging the Receiver with interest, from a date even anterior to the payment of the last instalment of purchase money, has been sufficiently commented upon. The only material point to which we desire to direct the attention of the Court is, the disallowance of expenses reported by the Receiver to have been "incurred and paid" in keeping the McCardle "house in operation."

This involves two questions: 1st. The right of the Court to look beyond the fact of payment, and to determine whether such disbursements were "necessary" to the purpose of the stipulation, "the keeping the house in operation," until the sale.

2d. Conceding for the argument, this *right*—was the judgment of the Court correct?

Page 4 of abstract.

The stipulation provides, that if the leases and goods and chattels are sold as a whole, Gilbert's mortgage shall be "paid out of the proceeds of said sale, and not paid into Court."

That the Receiver is "authorised to pay the mortgage debt, etc., of Henry L. Wilson, before the proceeds are paid into Court."

Further, that "the proceeds of said sale of said goods and chattels, after the payment of such liens as are undisputed, and *such demands* and *liabilities* against said McCardle house, *as it has been*, or *may be necessary* to incur and pay, *in order to keep said house in operation*," shall bo paid into Court.

P. 5 & 6 of abstract. The petition presented upon the basis of the stipulation is sworn to *May* 21st, and recites that the stipulation "*has been* signed by some and approved by others" of the parties interested in the mortgages.

So far then—as to Wilson's claim, Gilbert's mortgage—the leases and fixtures having been sold together, the undisputed liens and the expenses necessary in order to keep the house in operation, the sums appropriated to these objects, were never designed to be paid into Court, as subject to its supervision or direction; the parties themselves, competent to act, made the appropriation of the proceeds of sale to that extent—and to *such extent Hooper was their agent* not *Receiver* or officer of the Court—an agent with undisputable discretion of opinion, as to the *necessity* of the expenditures "in order to keep the house in operation."

Hooper *had no right to close the house prior to the sale, no matter what expense the keeping it in operation involved.*

Its ordinary routine was not to be interrupted, and he would have been guilty of a breach of trust, had he closed it earlier.

The terms of the stipulation were distinct and explicit on this point.

It is equally apparent, that the intervention of the Court, was only contemplated as necessary to adjust the *disputed* liens. Had all parties agreed upon the validity and order of priority of the liens, no Receiver would ever have been appointed by the Court—the stipulation would have specified the agent to sell, and the mode of distributing the proceeds. The original bill contains no prayer for a Receiver.

A dispute about the validity and effect of the mortgages, rendered it advisable to have a Receiver appointed, to distribute the *balance remaining*, and which by the terms of the stipulation, was to be paid into Court, according to the direction of the Court.

We should like to learn from our adversary, under what specific head of equity jurisprudence, the Chancery Court is invoked to exam-

ine into the mode of the discharge of discretionary power by a *private agent, as to disbursements of funds which, by express agreement of parties, were never to be paid into said Court.*

Again—treating Hooper in the strongest view against him, as a *trustee* vested by the terms of the order of the Court incorporating the stipulation, with a discretion as to the expenditures *necessary* to keep the "house in operation."

What is the character of that discretion, and how far is it subject to the control of the Court, passing such order ?

The phraseology of the stipulation by legal construction, would thus read, such sums as in his Mr. Hooper's *judgment* and opinion, it *has been* or *may be necessary, &c.*

It is a discretion as to matter of *opinion*, not a judgment *on facts;* though even if construed to be the latter, it would not, it is respectfully submitted, avail the defendant in error.

At one time, such distinction was occasionally drawn by English Judges, and while they repudiate a right to control a discretion, as to matter of opinion, reserved the right of supervising a judgment upon "matters of fact," such was the ruling in *Mainwing vs. Gower*, 2 Vesey 87. Hill in commenting upon this and a similar case thus observes : "And the current of the more recent authorities renders it very doubtful whether the case in question would meet with a similar decision at the present day. At all events, it would be found extremely difficult to make any practical application of this distinction between matters of fact and those of mere judgment and opinion, and it remains yet to be seen whether this distinction would meet with the sanction of the Judges at the present time." Hill on Trustees, 3d Am. Edition p. 488.

To show the ruling of modern Courts upon this supposed distinction between *mere opinion* and judgment *on facts*, the Court are referred to the case of *Barnar vs. Storm*, 1 Sand. Chan. R. 359, cited in the points filed.

This was a bill to fix the construction of a will, the testator directed the bulk of his estate, to be sold by his executors, "at such time and upon such terms, etc., as in their judgment should be most conducive to preserve the interest of all concerned," "*if an equal valid satisfactory division thereof in part or in whole could not otherwise be made.*"

"The testimony showed that a partition *could not be made*, but the Court say, "no declaration to that effect can control the exercise of the discretion of the executors, as to the execution of the power of sale." They held this discretion extended to the determination whether such partition, as was contemplated by the will, could be made—a clear case of a "judgment upon facts," and proceed—"a *valid* partition could only be made by agreement of competent parties, or a *Court having jurisdiction*" and adverting to the use of certain words in the will, proceed—"It is evident the testator did not contemplate a *resort to the Court*, to determine whether the contingency had occurred in which the executors were empowered to sell." The terms of the will, excluding a reference to a Court, were not stronger or more emphatic, than the explicit language of the stipulation. The amount necessary, in the judgment of the Receiver, to be expended for the uses of the hotel, etc., were not to be brought under the supervision of the Court. If in the case cited, the terms of the will were deemed sufficient to exclude the jurisdiction of the Court, over the exercise of the power to sell, the terms of the stipulation are equally potent to exclude it from judgment of the necessity of expense actually incurred for the specific object by the Receiver.

This decree is quoted with approval in *Arnold vs. Gilbert*, 3rd Sand. Ch. Reports p. 556.

An equally strong case will be found in 3 De Gex & Small,—*Attorney General vs. Mosely*, 398–403. In 3 Maddoc 208, *French vs. Davidson, et al*, the Court gave a construction to the terms of the power, directly analogous to the case submitted, defining the discretion conveyed by the use of words computing an exercise of judgment. Thus, the words of the codicil, provided for the payment of an annuity out of a certain fund by his executors, "Unless circumstances should render it *unnecessary*, inexpedient and impracticable." A bill was filed to enforce the payment of the annuity. The complainant was proved to be in distressed circumstances, and without any property. It was contended for complainant, that the executors were to continue the annuity, unless it was unnecessary, inexpedient and impracticable; it is *necessary* and expedient, because the plaintiff has no other means of support; it is not impracticable, because the executors admit assets. The executors *assign no reason* for withdrawing this annuity. The Court will not say, they have an *absolute discontinuing authority*, unless compelled by the terms of the will, as such an *authority would be subject to great abuse.*"

The Court ruled—"The executors are to exercise the authority,

unless circumstances shall render it unnecessary, inexpedient and impracticable, by *which must be meant,*" shall in *their opinion* render it unnecessary, inexpedient and impracticable. If *they had distinctly stated in their* answer, that they had not made the payment, because *using their best discretion* upon the subject, *they* had come to a conclusion, that circumstances had rendered the payment unnecessay, inexpedient and unpracticable, *a Court of equity could not have contested their judgment, unless it appears they had acted mala fide.* Construe the stipulation by the reasoning of this case, and it is clear, the Court cannot assume to control, what Hooper, in his opinion and judgment, deemed *necessary* to incur and pay, "in order to keep the house in operation." No *mala fides* being charged in any bill or other proceeding, and, unquestionally, no such fault established by proof.

In this case, a discretion is vested, not by order of a Court in regular course of *hostile litigation,* but by agreement of parties.

What, treating Hooper, as *Trustee,* by such appointment, is the rule as to the revisory power of the Court and the basis of its execution ?

"As a Court of equity will not, in general, assume the exercise of a discretionary power vested in Trustees, so it will not interfere to *control* the Trustees, acting *bona fide* in the exercise of their discretion."

Hill on Trustees 488, Note 1, on same page, thus lays down the result of a large number of authorities, collated and cited there, upon this point, i. e.

"A Court of equity will not interfere with the exercise of a discretionary power, while Trustees *are acting in good faith and with ordinary prudence.*"

Further upon this point of control, on same marginal page, Hill says :

"However, if a trustee is actuated by *fraudulent or improper motives* in exercising, or refusing to exercise, his discretionary powers, a Court of equity, *upon proof of improper* conduct, interposes its jurisdiction, on a totally different principle ; not for the purpose of exercising the discretion committed to the trustees, but to check or relieve from the consequences of an improper exercise of that discretion."

There was no discretion as to keeping the house in operation—that was mandatory. If the trustee unnecessarily prolonged the time of sale, it might have been competent for the parties *possibly* to expedite it. No application for this purpose was made; no murmur or complaint uttered; it was reserved for the ingenuity of the counsel for Crane to discover, years after the act complained of, that his client had been injured by such delay.

We repeat, there is no controlling power of the Court over the exercise of a discretion, while *good faith* exists. But consider for the argument, that there was *error of judgment* upon part of Hooper, and *loss sustained in consequence.* We assert, upon clear authority, that such loss, resulting *from mere error* and not *from "corrupt motives,"* could not be visited upon the Receiver.

It would be difficult to discover any corrupt motive in delaying the sale, and consequently the receipt of the proceeds. If, as has been charged, the Receiver was inclined to speculate upon the trust fund, it is very evident, that each day's delay in the sale, postponed the fulfilment of such purpose.

But in determining the action of a trustee, through whose ignorant, but not "corrupt" management, loss has been sustained by the fund, what is the rule of justice and of law? This—"That if not chargeable with any *wilful* default or *fraud*, he is not held responsible for loss."

4 John, Ch. Rep. 628–9.
3 Atkyns, 480. Case of a Receiver.
3 Vesey, 565. Case of an executor.
1 Vesey, Junr. 41.
5 Vesey, 144.

Acting with the best judgment they could form, *or* on professional advice, relieved from loss.

Take then any view—say the Court has power to determine what was necessary to be incurred or paid for keeping the house in operation—that there was unnecessary delay in the sale, and that loss resulted—under the proceedings, charging no fraud or corrupt motive, the Receiver is not responsible.

But we deny that there was error or ignorant misconduct or extravagance. Not one single witness proves any fact of extravagance—the contrary is clearly established. Not one witness shows—*if it had been, which it was not,* discretionary with the Receiver to close the house, that to close it before the sale, would have been *less* prejudicial

to the interests of parties concerned, than to keep it in operation even at a loss.

He was appointed June 12. The *private sale* was July 18. In the meantime a public sale, after such timely notice above, and in distant cities, as would call attention to it, and give an opportunity for preparation for purchase was had, and $17,500 was bid for it. The parties failing to comply, a private sale was resorted to, and realized $500 additional. No unnecessary time intervened between the appointment and sale.

Was the sum extravagant? What witness has shown the house could have been kept in operation for less? The house was at expense from May until July, over two months—in possession of Hooper as attorney for the Bank as early as the 1st. of May, when injunction issued—his possession was never disturbed, and the stipulation covered expenses, not only from appointment of Receiver but what had been pecuniarily incurred "in keeping the house in operation."

$1,800 for liquor during this period is deemed extravagant, indeed it is altogether denounced; yet Scanlan says, p. 134, that but for the bar, the expense would have been far heavier. To keep a hotel in operation without a bar, might possibly be good and profitable management in Portland, but would have been a presumptive violation of trust in Chicago.

The items of payment *in May* are objected to—the Court will perceive that they consist almost entirely of preferred liens necessary to be paid to relieve the sale from embarrassment and provided for by stipulation.

The dates of items in August, are dates of *pagment* of bills, as appears by vouchers, contracted during the receivership.

It is asserted that the Receiver speculated upon the funds; the decree itself refutes the assertion, and the testimony of Gilbert, introduced by defendant, deprives the charge, even of a plausible pretence for its basis.

It is attempted to involve him in a culpable connection with the purchase of the property by Law.

Law, who was defendant's witness, proves clearly:

1. That Hooper had no *interest* until *after the sale*, and then only temporary.

2. That neither Hooper or Law derived any profit from the connection.

Upon the supplemental points, we contend for the adoption of the report of May 1st. 1857, as the basis corrected by the payment to Crane of $2,000 in 1856, allowed in the decree.

Page 93 of Record. The Receiver then would be responsible for the balance 2,018.52, subject to a deduction for commissions, &c.

The balance so ascertained would be liable to the further credit of the sum paid Oct. 18, 1859, by order of Court, $2,138.52, which, allowing commissions, would leave a balance in favor of Receiver to be repaid by Crane.

The rate of commissions allowed to Trustees in absence of fixed rules or statutes, provision is discretionary with the Court, and such discretion is directed by the labor, care and fidelity of the Trustee—frequently the analogy to rates allowed executors is observed.

Now take the admission of the decree as the basis of a claim for highest commissions.

By that decree, Hooper is charged as of 2d June 1856, more than a month before the maturity of the last instalment with balance due,.....$3,680 32

Deducting com. at 5 per cent.
Now deduct amount of disbursements disallowed,..... 2,564 68

Would leave due,.....$1,115 55

Only allowing com. at 5 per cent.; now deduct additional commission for promptness in discharge of duties of 5 per cent. in purchase money of 18,000,..... 900 00

Would leave due,..... $215 55

And the estate is settled, with exception of this sum, even before last instalment of purchase money is paid.

Such was his diligence, that it is made matter of complaint in defendant's brief, that in May 1855, before his appointment as Receiver, he advanced to the use of the parties interested, out of his own funds $2,000. We claim interest on this amount from time of advance, until July 15th, as money advanced for the use of the *cestui que* trust, under the stipulation.

Fonblanque's equity 444, note referred to in points filed.

Here then, is the singular spectacle of a trust estate almost entirely settled up, before even all the trust funds had been received.

How came then a delay in its final adjustment? The avaricious greed of others occasioned it.

The Trustees report of June 2d, 1856, was excepted to—attempts were thus early made to force the Receiver to pay twice over funds expended under their sanction and by their direction for "keeping the house in operation." This commenced a litigation over the petty balance remaining in June, 1856, which has continued ever since.

We have conceded, in the supplemental points, a liability for interest, from the date of the report of May, 1857, which was not excepted to. We have done this, because we deem it the *technical* duty of the Receiver to have paid the balance into Court; but we are not prepared to concede, that he is legally thus chargable with interest. The payment of the balance into Court would have been simply depositing it in bank—not *drawing interest* during the litigation. The fund would not have been increased by such depositing, for no interest would have accrued upon it. Out of such balance, Hooper was entitled to the larger share for commissions. Now shall he be charged interest upon this amount? If so, to whose benefit should it enure? We submit to the Court, that no proof being given that he has made interest—the fund itself being tied up by litigation not commenced by him, he acting on the defense throughout—he is not liable to be charged with any interest. The old strictness upon this subject has long since been abandoned, and we rely for our argument upon the authority before referred to in our supplemental points, 1st. Sandford's Ch. Reports, p. 404. If the proper balance conceded by the report of the date of May 1st. 1857, $2,018.52—is not liable to interest, (and we claim it should not be under the peculiar circumstances of the case, the larger part thereof, if not the whole of said balance being rightfully due to said Receiver for commissions, &c.,) and the Court should allow us commissions commensurate with the responsibilities of the trust, and the care and trouble and extraordinary services arising from the peculiar nature of our duties, and interest for the advances made by the Receiver out of his own private funds, to save the leases from forfeiture and the chattels from distraint, we claim that we have largely overpaid the fund, and are entitled to a decree for such excess against Jonas H. Crane, who has been the recipient of it, under the order of the Court below. We subjoin a statement, showing the amount for which we claim a decree, in accordance with the views here advanced, and the law and facts of the case.

J. M. S. CAUSIN,
E. R. HOOPER,
For Plaintiff in Error.

STATEMENT.

RECEIVER DR.

To balance due as per supplemental Report of May 1st. 1857,		$4,018 52

CR.

By Lovejoy's note, dated Sept. 1856, received by Crane as Cash—(see decree,)	$2,000 00	
By Commissions on sales and interest on sales, ($18,565.00) at 10 per cent.	$1,856 50	
By interest on $2,017.35 advanced by Receiver, average 45 days, at 10 per cent.	$25 20	
By amount paid into Court, by order of Court Oct. 18, 1859.	$2,138 00	
		$6,019 70
Balance due Receiver as of Oct. 18, 1859,		$2,001 18

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Hooper
vs
Winston

Plff's argument

Filed May 16, 1860
L. Leland
Clerk

Supreme Court

April Term 1862.

Ezekiel R Hoopes

vs

Frederick H Winstanley et al

And hereupon afterwards, to wit, in the April Term of this Court 1862 the said Frederick H Winstanley et al by Van Burns & Grey their Attorneys freely come here into Court & says, that there is no error in the record & proceedings aforesaid & in giving the judgment aforesaid. And they pray that the said Supreme Court before the Justices thereof may here may proceed to examine as well the record & proceedings aforesaid as the matters aforesaid, & them adjudge for error and that the judgment aforesaid in form aforesaid may be in all things affirmed &c

Van Burns & Grey
Attys

Supreme Court
84,

Ezekiel R Hoopes
Plff in Error
vs

Frederick H Winslow
Deft in Error

Joinder in Error

Van Buren & Jennys
Defts Attys

Filed Apr. 18. 1860
L Leland
Clerk

Know all men by these presents that we Ezekiel R. Hooper as principal and Aaron Haven, Fulton Jones, Albert Crosby, Charles Walker and Morgan L. Keith as sureties are held and firmly bound unto Frederick H. Winston, Trustee in the penal sum of Four thousand five hundred and ninety seven dollars and seventy cents, good and lawful money of the United States, for the payment of which well and truly to be made, the said Ezekiel R. Hooper, Aaron Haven, Fulton Jones, Albert Crosby, Charles Walker & Morgan L. Keith bind themselves, their heirs, executors and administrators, jointly, severally and firmly by these presents. Witness their hands and seals this 25th. day of January A.D. 1860.

The Condition of the above Obligation is such, that Whereas on the 18th. day of November A.D. 1859 a decree was rendered by the Superior Court of the City of Chicago, in a cause pending in said Court in which Frederick H. Winston, Trustee &c. was complainant, and Ashley Gilbert and others were defendants, against the said Ezekiel R. Hooper for the sum of Two thousand two hundred and ninety eight dollars and eighty five cents, to review which said ~~judgment the said~~ decree the said Ezekiel R. Hooper has sued out a writ of error from the Supreme Court, within and for the Third Grand Division of said State, which writ of error is made a Supersedeas. Now if the said Ezekiel R. Hooper shall duly prosecute said

writ of error, and pray or cause to be paid, the amount of said sum, and all sums, costs, interest and damages which the said Supreme Court shall adjudge against him, and abide the order and sum of said Supreme Court in this behalf, then this obligation to be void, otherwise to remain in full force and effect.

Ezekiel R. Hoops Seal
Aaron Hoops Seal
Nelson Jones Seal
Albert Leasley Seal
Charles Walton Seal
Morgan L Keith Seal

State of Illinois is
Cook county ss. } Morgan L. Keith, Albert Leasley & Aaron Hoops having been first duly sworn respectively state that they are residents of the County of Cook and State of Illinois, and that they are severally and respectively possessed of real and personal estate situate in said County worth the sum of four thousand five hundred and ninety seven dollars and twenty cents over and above all their respective just debts and liabilities, and over all incumbrances thereon.

Sworn to & subscribed before me } M L Keith
this 25th day of January 1860. } Albert Leasley
Witness my hand & Notarial seal. Aaron Hoops
L Proudfoot
Notary Public

L. PROUDFOOT NOTARY PUBLIC CHICAGO, ILL.

Bond.

84

Ezekiel R. Hooper

vs

Fred H. Newton Trustee

Filed January 28. 1860

L. Leland

Clk