

14040

No. _____

Supreme Court of Illinois

March

vs.

Mayers

2 2345-6

with interest after due at the rate of ten per cent. per annum, it being an account of money lent.

JOHN MAYERS,
W. J. MAYERS,
LINUS GRAVES.

STATE OF ILLINOIS.

SUPREME COURT.

CENTRAL GRAND DIVISION.

JANUARY TERM, A. D. 1876.

OLIVER MARCH } *Case No. 176 in the Supreme*
vs. } *Court of Illinois, Janu-*
JOHN MAYERS, *et al.* } *ary Term, 1876.*

ABSTRACT OF RECORD.

1 On the 29th day of June, 1872, the original complainants, William J. Mayers, and Linus Graves filed their bill in the McLean Circuit Court, in substance as follows.

To the Hon. Thomas F. Tipton, Judge of the 8th Judicial Circuit of the State of Illinois:

1-2 Complainants, Wm. J. Mayers and Linus Graves, represent, that on the 20th day of February, 1856, complainants, and one John Mayers, executed to Oliver March their note, as follows, to-wit:

“\$858.00

BLOOMINGTON, Feb. 20th, 1856.

2 “For value received, we or either of us promise to pay
“Oliver March, or order, eight hundred and fifty-eight
“dollars, on or before the fourth day of December next,

7 Also avers that one Emanuel Ensminger is in possession of part of (mortgaged premises,) lot 10, in block 7, aforesaid.

7-8 Also, that inasmuch as complainants are in equity bound to pay said note, to said March, they ask aid of Court in premises, and make John Mayers and Emanuel Ensminger, defendants, for usual process against them to appear and answer the bill, but without oath, being waived. And that upon hearing, an account be taken of amount due on note, and that the Court will decree :

8 1st. That lots 9 and 10, in block 7, aforesaid, be sold under direction of Court, and proceeds be applied on payment of said amount due on said note.

8-9 2nd. If amount not sufficient, Court will order sale of other lands described in mortgage, and proceeds applied to further payment of amount so found due on note, and costs of suit. Concludes with prayer for general relief.

WILLIAM J. MAYERS,
LINUS GRAVES.

By GEORGE O. ROBINSON, Solicitor for Complainants.

10-11-12-13 - Mortgage, by John Mayers, to Wm. J. Mayers and Linus Graves, dated July 29th, 1856, recites, whereas party of first part is justly indebted to Oliver March, by note of hand, on which said party of the second part are his security, which note is for \$858, dated Bloomington, Feb. 20th, 1856, and payable on or before December next, with interest after due at 10 per cent. Now to secure his said sureties, Mayers and Graves, from the payment of said sum of money, and in further consideration of one dollar, conveys to them lots 9 and 10, in block 7, in John Nicolls & Co.'s addition to Bloomington, McLean County, Illinois, (and other premises, described by metes and bounds), with proviso of defeasance upon the payment by John Mayers to Oliver March, of said note and interest, and save and keep harmless the parties of second part, heirs, &c., from said note.

Signed by JOHN MAYERS.

Acknowledged August 26th, 1856, before Theron Pardee, Notary Public. Certificate and seal of Notary. Filed

for record Sept. 2d, 1856, and recorded Sept. 18th, 1856,
in book D of mortgages, page 588.

WM. McCULLOUGH, Clerk,
By M. L. PERKINS, Deputy.

Re-filed for record Sept. 29th, 1869, and recorded in
book 30, at page 564. Recorder's office, McLean Co., Ill.

R. E. GUTHRIE, Clerk,
By S. F. DOLLOFF, Deputy.

14-15 Summons to John Mayers and Emanuel Ensminger.
Service on both defendants, July 17th, 1872.
Sheriff's return. R. OSBORN, Sheriff.

16-17 On Aug. 27th, 1872, John Mayers, by W. M. Hatch, his
attorney, filed his demurrer to said bill, assigning five spe-
cific causes of demurrer as follows:

1st. Complainants have not paid said note to March,
or any part of it.

2nd. That complainant, *Craves*, and defendant, John
Mayers, have been discharged in bankruptcy, as to said
note.

3d. Does not appear by bill that complainants are lia-
ble to pay said note, or have been asked to do so.

4th. Suit is not brought for benefit of March, but for
themselves alone.

5th. It does not appear by bill, but that complainants
are both and each of them "kept harmless from said note."

Wherefore, and for divers other good causes of demur-
rer, appearing in bill, defendant demurs, and asks to be
discharged, with costs, &c.

19-20 On May 10th, 1873, demurrer heard and sustained, and
leave given complainants to amend bill.

20 May 12th, 1873, rule entered to file amended bill by
4th Monday of term.

20 May 19th, 1873, following papers filed:

20 "I hereby order this suit dismissed.
May 14, 1873. WM. J. MAYERS."

21 "I never ordered the above suit to be commenced,
May 14th, 1873. WM. J. MAYERS."

21 May 19th, 1873, motion filed by Hatch, attorney for John Mayers, to dismiss as to plaintiff, Wm. J. Mayers.

33 May 27th, 1873. Motion denied.

33-34 June 12th, 1873. Disclaimer filed by Wm. J. Mayers, and on motion of defendants suit allowed to progress in name of other complainants. Complainants' counsel objecting.

22 On May 26th, 1873, complainants filed their amended bill, as follows :

22 First. Making Oliver March a party complainant with themselves.

22-23-24-25-26-27-28-29 Second. Copying the original bill as to the loaning of the money. Execution of the note by John Mayers, as principal, and Wm. J. Mayers, and Linus Graves, as sureties, to Oliver March, as payee, the execution of mortgage by John Mayers to Wm. J. Mayers and Linus Graves, to secure payment of note to March, and keep them (mortgagees), harmless, recording and re-recording of same. That note and interest is overdue and unpaid, except the sum of one hundred and fifty dollars paid by Wm. J. Mayers to Oliver March, Feb. 29th, 1868, as hereinafter particularly set forth. Also, fact of bankruptcy by Linus Graves and John Mayers, and averment that March did not get any portion of assets. Also, that on or about Feb. 9th, 1868, Wm. J. Mayers declared to Oliver March his intention to become a voluntary bankrupt, that he had compromised with all his other creditors, except said March, and the claim growing out of his security for John Mayers, on said note to said March, and he, the said William, then and there offered said March \$150 on said note to be realized from his liability thereon, reserving to March all his rights by virtue of said mortgage, which sum of \$150 it was believed was more than would be realized to said March out of the other assets of Wm. J. Mayers, should he go into bankruptcy. Whereupon said March accepted the sum of \$150 on said note from Wm. J. Mayers, and executed to him a receipt therefor, of which the following is a true copy.

STATE OF ILLINOIS, }
McLEAN COUNTY, } ss.
Bloomington.

5 cent Int. Rev. Stamp.

29-30

"In consideration of \$150 to me paid, by Wm. J. May-
"ers, this 29th day of Feb., 1868, I hereby release him, the
"said William J. Mayers, from all obligation on one certain
"promissory note, for \$858, dated Bloomington, Ills.,
"Feb. 20th, 1856, payable on or before the 4th day of De-
"cember next, after said date, with interest after due at
"the rate of ten per cent. per annum, and executed by
"John Mayers, and the said Wm. J. Mayers and Linus
"Graves to Oliver March, except so much, or such amount
"of said note as can by due diligence be made on the
"same by virtue of a certain mortgage executed by John
"Mayers to said Wm. J. Mayers and L. Graves, on the
"29th day of July, 1856, and recorded in mortgage rec-
"ords of McLean countv. Illinois book D. page 588
"Bloomington, Ills., Feb. 29th, 1868.

"OLIVER MARCH."

30-31

Which instrument complainants claim constitutes an
equitable assignment by Wm. J. Mayers, of said mortgage
to said Oliver March, or that it is, and effects a subroga-
tion of said March, to all the rights of Wm. J. Mayers in
said mortgage, except his right to be reimbursed the sum
of \$150, so paid to March on said note, bill further avers
that previous to the giving of said receipt by March to
Wm. Mayers, Graves had been discharged in bankruptcy.

31

That several years previous to commencement of suit,
John Mayers ceased to occupy any of said premises as a
homestead, but had abandoned the same as such, that the
said premises nor any part thereof were not included nor
reckoned in his assets as a bankrupt, and that Emanuel
Ensminger claims some interest in the mortgaged prem-
ises; and bill prays that defendants be required to answer
amended bill without oath; oath waived. That an ac-
count be taken to find amount due on note, and due to

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32

Wm. J. Mayers on account of his payment, and that on
final hearing a decree be rendered for a sale of mortgaged
premises and out of proceeds, amount found due on note

32 and amount found due to Wm. J. Mayers be paid, but in case proceeds are insufficient to pay both, then that they be paid *pro rata*. Prayer for general relief.

GEO. O. ROBINSON,

M. W. PACKARD.

Solicitors for Complainants.

34 June 17th, 1873. Defendant John Mayers files demurrer to amended bill with seven specific reasons:

35 - First. Amendment not german to the original bill.

Second. Original bill not filed by March, nor for his benefit, nor was he a party to it.

Third. Statute of limitations.

Fourth. Mortgage was not executed for the benefit of March, nor has it been assigned to him; was made solely to save and keep harmless Graves and Wm. Mayers, on said note. Graves is harmless through his discharge in bankruptcy and Wm. J. Mayers is not complaining, he having been released by March.

Fifth. One being released, all are released.

36 Sixth. John Mayers is released in bankruptcy. Graves is released in bankruptcy. Wm. J. Mayers is released by March, therefore no obligation existing to Oliver March.

Seventh. March cannot complain of proceedings in bankrupt court; cannot complain that he received no share of the assets, not having proved his claim.

36-37 June 23, 1873, demurrer overruled. Rule on defendants to answer by 15th August. Leave to complainants to reply and continued.

41-42-43-44-45-46-47 - August 12, 1873, defendant John Mayers, by Hatch, his attorney, filed answer to amended bill. After formal commencement admits the execution of the note at time, and for amount stated in bill. Admits that Graves and Wm. J. Mayers were securities for John Mayers, and received no part of the consideration of the note. Admits the execution of the mortgage to secure said securities from the payment of said note, and delivery of same on or about August 26th, 1856, and was filed for record on

or about September 2, 1856, and re-filed as respondent supposes, as stated in the amended bill, but denies that he executed and delivered a mortgage to said property described in bill on the 29th day of July, 1856. Admits that he has paid no money on said note, and denies that William J. Mayers paid \$150, or any other sum on said note on the 29th day of February, 1868. Admits that he and Linus Graves have since the execution of the note and mortgage, been discharged in bankruptcy; that March got nothing in distribution of assets, and avers that respondent's estate had nothing to disburse—and believes Graves was in same condition as to assets. Denies that it was represented in the bankruptcy proceedings of either himself or Graves; that Oliver March was amply secured by the mortgage filed in this cause, and declares such representation to be immaterial, if made, as to success of bankrupts in procuring their discharge. Avers that bankrupt court allowed and set off mortgage premises to Wm. J. Mayers for a homestead, upon his claim thereto as such. Avers that by the mortgage he did not release his homestead. Admits that on February 29th, 1868, Wm. J. Mayers paid March \$150, and that thereby March expressly released Wm. J. Mayers from all obligation on said note, and claims also that by such release, all the makers were released therefore. Denies that the paper given by March to Wm. J. Mayers, releasing him from said note, was an equitable assignment of the mortgage, or that the same is a subrogation of March to all the rights of said Mayers therein, and claims that if it were such an assignment or subrogation, it is entirely worthless to said March, because the mortgage was but a security to Wm. J. Mayers and Graves, in case they paid said note, and not having paid it, nor incurred any liability to pay it at all, and March having slept on his own rights, until after sixteen years, it was barred by the statute before March filed his amended bill for that purpose, and expressly sets up the statute of limitations as a bar; that the original bill was filed by Wm. J. Mayers and Linus Graves, for their sole benefit, and not for the benefit of March, and that the note being barred, so was the mortgage. Further avers, that the amended bill is not

germain to the original bill, and the latter cannot be considered as part of the case, nor the amended bill part of the original case. Further answering, admits that for a short time, temporarily he ceased to occupy the mortgaged premises as a homestead, but with the intention of returning thereto, which he did do, about June 1st, 1872, and has continued so to do to the present day. Admits that Ensminger lived on the mortgaged premises a short time, but now they are in exclusive possession of respondent, as his homestead. Avers his and Graves' discharge in bankruptcy, and Wm. J. Mayers was released by the act of March as stated in the amended bill, and March has now no remedy on said note or mortgage, for the reasons stated, and having fully answered, etc., prays to be dismissed with costs.

JOHN MAYERS,

By W. M. HATCH, Solicitor.

37-38 August 12, 1874, replication filed by Wm. J. Mayers, Linus Graves, and Oliver March, by their solicitors.

39 February 10th, 1874, motion by defendant for leave to amend answer.

48 Submitted to court for trial.

48-49 Order or submission set aside, and leave to complainant to amend bill and make new parties—and continued.

49 March 26, 1874, order of continuance set aside. Bill dismissed as to Linus Graves, and cause continued.

May 11, 1874, complainant March files his amended bill, making Wm. J. Mayers and Linus Graves defendants with John Mayers and Emanuel Ensminger. Sets out execution of note, by all of makers avers that Graves and Wm. J. Mayers were securities for John Mayers. Sets out making of mortgage on same premises described in original bill, and same condition of defeasance. Avers filing for record, and record of same on book and page, and the re-recording of the same to correct a mistake in the former record the same as the original bill, and also avers that by the terms of the note, it was payable on the 4th of December next, after date.

50-51-52-53-54-
55-56-57-58-59-
60-61.

63-64 Whereas, in the description in the mortgage of said note, the words, "the fourth day of," are left out; then avers the identity of the note and mortgage in this case, with the one actually given, as described. Avers that the note is due and unpaid, except \$150 paid by Wm. J. Mayers to Oliver March, February 29, 1868. Avers bankruptcy of John Mayers and Linus Graves, and makes same averments with regard thereto, as in original bill. Sets up the threat of Wm. J. Mayers to go into voluntary bankruptcy, and his offer to pay \$150, to be personally released from his liability on note; but giving March the benefit of the mortgage. March's acceptance of the proposition, and a copy of the receipt and release given by March to Wm. Mayers, as copied in amended bill. Avers that the instrument so given was an equitable assignment of the mortgage to March, or subrogation of March to all rights under same. Also charges that all rights and interests of Graves and Wm. Mayers in said mortgage, were held in trust for said March, for the payment of said mortgage debt, and could not be satisfied until it was paid.

Further avers, that previous to Feb. 29, 1868, Graves and John Mayers had entered into proceedings in bankruptcy. Avers that several years previous to commencement of suit, John Mayers had abandoned mortgaged premises as homestead, and that the same were not counted nor reckoned in, or as part of his assets in bankruptcy. Avers that Ensminger claims some interest, but same is subsequent, and subject to that of complainant. Calls for answer without oath. Oath waived. Prays for an account of what may be due on note, and for a decree to sell the mortgaged premises, and out of proceeds, pay balance found due on note and costs of suit. Concludes with prayer for general relief.

Signed,

OLIVER MARCH,

By his Solicitors, M. W. Packard and
Geo. O. Robinson.

61-62 Process.

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June 4, 1874, defendant, by Hatch, attorney, filed his motion to strike "further amended bill" from files, and gives five reasons therefor, and afterwards adds twelve additional reasons for the same thing. The original reasons are as follows:

63-64

1. Not consistent with original bill.
2. Makes a new case.
3. Sets up new facts not in original bill, changing character of case without giving excuse for omitting them from original bill; from nature of such facts, must have originally known them.
4. Complainant in further amended bill was not party to original bill, nor was it filed for his benefit, now he is sole complainant, all others are made defendants.
5. Avers mistake in mortgage, but does not seek to reform it.

ADDITIONAL REASONS:

64-65-66

1. Sets up statute of limitations as to the amended and further amended bill.
2. When amendments were made there was no debt due from John Mayers to March, nor from said Graves. vs. Wm. J. Mayers.
3. Because said amended bills seek to establish an equitable assignment of an equity.
4. Because leave was not obtained to withdraw replication before amending bill.
5. Because leave was obtained to *amend* bill, not to file amended bill.
6. Because it does not appear in said amendments that March did not prove his claim in bankruptcy.
7. Because it would be a fraud upon other creditors to allow March to recover this property as against John Mayers.
8. Because the Court will not correct the mortgage at the instance of March.
9. The bill shows March to have a complete remedy at law.
10. Because complainant is guilty of laches in asserting his rights.
11. Because complainants allowed said lots to be set off as a homestead by the bankrupt court.

12. Because there is no prayer for the reform of the mortgage.

68 May 29th, 1875. Notice and motion by John Mayers for leave to withdraw his answer from the files, and enter a motion to strike amended bill from the files.

JOHN MAYERS,
By HATCH, Solicitor.

69-70-71-72 — July 26th, 1875. Another demurrer filed by John Mayers, by Hatch, Solicitor, to the amended bill giving *twelve* reasons why same should be sustained, all of which are covered by the *seventeen* reasons (above set forth), filed with the motion to strike said further amended bill from the files.

72 On July 26th, 1875, the Court rendered the following decretal order:

72-73 Cause comes on to be heard upon motion of John and Wm. J. Mayers to strike from files further amended bill. ~~also~~ upon motion of John Mayers for leave to withdraw his answer filed August 12th, 1873, to amend bill of Wm. J. Mayers, Linus Graves and Oliver March, filed May 26, 1873. After argument Court being fully advised, grants both motions, and orders said further amended bill to be stricken from the files, and also grants leave to John Mayers to withdraw his answer to said amended bill. Whereupon John Mayers, by leave of court, filed his demurrer to said amended bill, which having been considered by the court, and the court being fully advised, sustained said demurrer and dismissed said amended bill, and original bill with costs, to the defendants to be taxed. Costs of amended and further amended bill to be taxed to Oliver March.

Approved,

T. F. TIPTON,
Judge.

73 Prayer for appeal.
74-75 Appeal bond.

ASSIGNMENT OF ERRORS.

77

1st. The Court erred in granting the motion of defendant John Mayers, to strike from the files the further amended bill.

2d. The Court erred in granting the motion to withdraw his answer to amended bill of Wm. J. Mayers, Linus Graves, and Oliver March, filed May 26th, 1873.

3d. The Court erred in sustaining the demurrer to the amended bill.

4th The Court erred in not overruling the demurrer to the amended bill.

5th. The Court erred in not allowing the last amended bill to remain upon the files and proceeding to trial thereon.

6th. The Court erred in decreeing a dismissal of the original and amended bill.

GEO. O. ROBINSON,
M. W. PACKARD,
Solicitors for Complainant.

37

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No. 476.

144

STATE OF ILLINOIS.

SUPREME COURT,

CENTRAL GRAND DIVISION.

January Term, A. D. 1876.

OLIVER MARCH, *Appellant,*

—vs.—

JOHN MAYERS, *et al. Appellees.*

ABSTRACT OF RECORD.

GEO. O. ROBINSON,
M. W. PACKARD,
Attorneys for Appellant.

Leader Steam Print, Bloomington, Ill.

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JAN 10 1876
E. C. HAMBROKER
Clerk