

13084

No. _____

Supreme Court of Illinois

Moore

vs.

Smith

No. 160.

William Moore } April Term 1860
vs } Third Grand division
George Smith } in Supreme Court
of Illinois.

The clerk will stay the entry
of any judgment in the above en-
-titled case until further ordered by
the justices of ^{the} Supreme Court.

J. H. Walker
"

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Wm. Moore

251

George Smith.

Ardu.

~~June 22~~

Frid June 22 1860.

L. Leland

Class

130.84

Supreme Court of Illinois,

APRIL TERM, A. D. 1860, AT OTTAWA.

WILLIAM MOORE, *Appellant*,

vs.

GEORGE SMITH, who, with said Moore,
was Defendant in Bill of Interpleader
filed by ISAAC N. Ash.

APPEAL FROM

SUPERIOR COURT OF CHICAGO.

POINTS AND AUTHORITIES FOR GEORGE SMITH.

The money in controversy in this case was decreed by the Court below to belong to Smith and not to Moore, it having been derived from the sale of fixtures admitted to have been forcibly and wrongfully detached, removed and torn off from a distillery building, the fee in which, and in the land on which the building was situated, being in Smith, and by the detaching of which fixtures said building was rendered unfit for a distillery. (See Stipulation in the record, pp. 99, 101.)

Moore claimed the money by virtue of Mechanic's Lien proceedings instituted by himself against Ray, Todd & McMahon, who had gone into possession of the building under a land contract made by Smith to Ray. A decree having been rendered in said Mechanic's Lien proceedings, Moore, at the sale under the decree, bid off the property for \$500, and obtained a deed from the Commissioner.

At the time of the making of said land contract, said building had been fitted up for and was in use as a slaughtering and packing establishment and warehouse. Afterwards, it was turned into a distillery by said Ray, Todd & McMahon.

Smith was not made a party to the Mechanic's Lien proceedings, although he had never conveyed the premises except by said land contract: (Stipulation, p. 99 of Record;) nor were the judgment creditors of Ray made parties, although there were sundry judgment liens (pp. 74, 81 of Record.)

Before the detaching of said fixtures, viz: March 26, 1859, Smith had filed his bill against Ray, Todd, McMahon and Moore, alleging the non-payment of the purchase money under said contract; that by default in payment of the interest due December 31, 1858, persons in possession became thenceforth tenants at will of Smith; that all the original purchase money, with said interest due Dec. 31, 1858, and subsequent interest or rent, with taxes, remained unpaid; that Smith's only security for the purchase money was in the real estate itself, the chief value of which was in the distillery and its machinery and fixtures; and that Moore refused to pay the purchase money, and yet threatened and was about commencing, to do irremediable injury to the premises, and greatly impair Smith's security, by detaching and taking away the machinery and fixtures. On said bill an injunction was awarded against Moore. (See pp. 87-97 of Record.)

Under said land contract, the whole of the principal sum of the consideration money was due on the 31st day of December, A. D. 1859. (See contract. p. 70 of Record.) The stipulation filed thereafter on the hearing of this cause in the Court below showed it all, with interest, etc., to be due. (See Stipulation, p. 101 of Record.)

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Moore's only claim of title comes from the deed from the Commissioner under the decree for a Mechanic's Lien. It could only give him the interest, if any, of Ray, Todd & McMahon,

who had possession under the contract from Smith, by the terms of which contract they became, by the non-payment of interest, on December 31, 1858, Smith's tenants at will. Smith's title was in no wise affected by the decree, for he was not a party thereto; nor were the liens of judgment creditors affected by the decree. Moore took, by the deed, the interest of Ray, Todd & McMahon, under the contract from Smith to Ray, but subject, as well to all rights of Smith, as to the liens of judgment creditors not made parties to Moore's petition for Mechanic's Lien. It was an interest of a tenant at will; an interest in *real estate alone*, and not in any particular part of the property distinguished from the rest—Moore's lien, if any, being merged in the decree, which related to the whole real estate and not to any particular part or portion thereof.

The 17th section of the Mechanic's Lien Act, p. 723 of Purple's Stat., would have governed the Mechanic's Lien case, as between Moore and Smith, if Smith had been a party. Under it, only the interest of Ray, Todd and McMahon, under the contract with Smith, was subject to sale; and the purchase by Moore, at the sale under the decree, could not give him the right to any particular part of the property, but only to take the place of Ray, Todd and McMahon, as vendees or lessees of Smith. It therefore became the duty of Moore, when he purchased at the sale under his decree, to pay Smith the money due him under the contract originally given to Ray, (Smith's right to that money having precedence over Moore's original lien as a mechanic, and Moore having purchased subject to that right.)

This is the only fair construction to be put upon said 17th section. In this way only can the rights of vendors be preserved. Hence, when Moore failed to pay Smith the money due on the land contract, and in fact thereby repudiated the contract, he had no further right to the property. The true reason of the smallness of his bid, (\$500,) at the sale under his decree, probably was because his lien was not enforced as to Ray's creditors, whose rights were in no manner affected by the decree, and also because of the purchase money for the property being wholly due to Smith.

Turney *et al.* v. Saunders, *et al.* 4 Scam. 527, 532.
Steigleman v. McBride, 17 Ill. 300, 302.

II.

Moore can take no benefit in this case, either from the 20th section of the Mechanic's Lien Law, (referred to as 19th section in Points of his Counsel,) or from Gaty v. Casey, 15 Ill. 189.

1st. The 17th, and not the 20th section, would have been applied in the Mechanic's Lien case, as between Moore and Smith, if Smith had been made a party in said case, and Smith's claim for the purchase money would have been preferred to that of Moore. The 20th section would have been applicable only as between the judgment creditors of Ray, Todd and McMahon, or persons having *incumbrances* on the land, created before the making of the contract with Moore as a mechanic. It was solely under the 20th section that Gaty v. Casey was decided, and that section does not apply as between Moore and Smith.

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If it were conceded that Moore got all the interest of Ray, Todd & McMahon under the contract from Smith, how would the matter then stand?

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THOMAS DENT,

Attorney for Geo. Smith.

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Moore vs Smith
~~Diff.~~ Drfts points
& authorities

Fldo May 1. 1866
L. Deland
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THOMAS DENT,

Attorney for Geo. Smith.

160

Moore vs. Smith

Depts - Points & Authorities

Filed May 1. 1860

L. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

ISAAC N. ASH, Appellee,
vs.
WM. MOORE and GEO. SMITH, Appellants. } *Bill of Interpleader.*

*Appeal from the Superior Court of the City of Chicago, by the
Defendant, William Moore.*

ABSTRACT OF THE RECORD.

Page of Rec. THE record in this case shews, that on the 31st day of December, A. D.
99 1854, George Smith became the owner, in fee, of real estate described in
57, 68 the answers of the said Moore and Smith. On the 1st day of February,
23, 24 A. D. 1855, Smith made a written contract with one William Ray, to sell
him the said real estate upon the following terms: Ray was to pay him
\$1,649.07 in five years from the 31st Dec., 1854, with interest at ten per
69, 72 cent., payable annually, and all taxes assessed upon the land; to keep
the premises insured for \$1,100, in Smith's name. If Smith paid the
taxes and insurance, the same was to be charged to Ray as part of the
purchase money. Smith covenanted to make a deed upon the perform-
ance of the contract by Ray. If Ray made default, he was to be con-
sidered the tenant at will of Smith, at a rent equal to 20 per cent. interest.
Payment by Ray was made a condition precedent, and time of the es-
sence of the condition.

At some time before the defendant, Moore, made his contract, to fur-
99 nish machinery and fixtures for a distillery, James J. Todd and James
McMahon had become interested with Ray, as partners, &c. Ray did
not comply with his contract. He paid none of the principal nor inter-
201 rest after Dec. 31, 1858. There was, at the time of the contract with
Ray, a building on the premises which had been fitted up and was in use
for a slaughtering and packing establishment.

On the 13th day of June, A. D. 1857, William Moore, one of the de-
fendants herein, filed in the Circuit Court of Putnam county, his petition
for a mechanic's lien on the premises, buildings, and machinery then
situated and being on the same; which Smith had contracted to sell to
Ray as aforesaid, against said Ray, James J. Todd, and James McMahon.

This petition was filed under a parol contract, made between Moore,
Todd, and McMahon, about the 11th June, 1856, under which said
Moore furnished them with gearing, fixtures, materials, and machinery
for a distillery, which they, the said Ray, Todd, and McMahon were
23, 38 erecting or about to erect on said premises. The petition is in due form,
(as is believed,) and contains an itemised account of all the materials and
machinery furnished by Moore, and which was put into the distillery,
amounting in the whole to \$3,061.95.

Page of Rec. On the 9th December, 1858, Moore obtained a decree for \$2,258.95,
 53, 3. which was adjudged and decreed to be a lien on the premises. An order of sale made, and upon the production of the commissioner's deed, defendants, &c., were ordered to surrender possession to the purchaser.

The property and premises were sold in February, A. D. 1859, to Wm. Moore, for \$500, and a deed was executed to him by the commissioner
 54, 55 who made the sale, all in due form, and which proceedings were approved by the Court.

About the day of May, 1859, James J. Todd forcibly broke into the distillery, without the consent of Moore or Smith, and detached, removed, tore off, and took away from the building the copper, lead, brass
 100—1 pipes, and other distillery fixtures, from the sale of which the money deposited in Court by the complainant was derived.

Todd shipped the various articles so taken by him to the complainant, Isaac N. Ash, who sold them for \$610.85; and Moore and Smith both claiming the property, or the proceeds of the sale, Moore under his decree and sale under his mechanic's lien, and Smith under his title and claim as owner of the fee. Ash filed this bill to compel them to litigate and settle their respective rights and claims to the money arising from said sales, and which *Ash* had deposited in Court, to await the judgment of the Court in the premises.

The Court below decided that Smith was entitled to the money, and
 111 Moore appealed to this Court, and now assigns for error:

1. That the Superior Court of the City of Chicago erred in deciding and decreeing that the said money belonged to the defendant, Smith, and that the same should be paid to him.

2. In not deciding and decreeing that said money belonged to, and should be paid over to defendant, Moore.

POINTS, &c.

The only point I make in the case is, that under the mechanic's lien law of this State, Moore, by his purchase and also by his lien under his contract, had a claim superior to that of Smith, to the extent of the value of the materials, and machinery, &c., put into the distillery.

Purple's Stat., vol. 2, p. 726, § 19.

Gaty et al. vs. Casey et al., 15 Ill. 189.

Ask no more coal

Abstract

Filed Apr. 20, 1860
Leland
Clerk

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2 Smith's Lead. Cas.

THOMAS DENT,

Attorney for Geo. Smith.

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More vs Smith

Depts. Points

Filed May 1, 1860

L. L. Linn
Clerk

Supreme Court of Illinois,

APRIL TERM, A. D. 1860, AT OTTAWA.

WILLIAM MOORE, *Appellant*,

vs.

GEORGE SMITH, who; with said Moore,
was Defendant in Bill of Interpleader
filed by ISAAC N. Ash.

APPEAL FROM

SUPERIOR COURT OF CHICAGO.

POINTS AND AUTHORITIES FOR GEORGE SMITH.

The money in controversy in this case was decreed by the Court below to belong to Smith and not to Moore, it having been derived from the sale of fixtures admitted to have been forcibly and wrongfully detached, removed and torn off from a distillery building, the fee in which, and in the land on which the building was situated, being in Smith, and by the detaching of which fixtures said building was rendered unfit for a distillery. (See Stipulation in the record, pp. 99, 101.)

Moore claimed the money by virtue of Mechanic's Lien proceedings instituted by himself against Ray, Todd & McMahon, who had gone into possession of the building under a land contract made by Smith to Ray. A decree having been rendered in said Mechanic's Lien proceedings, Moore, at the sale under the decree, bid off the property for \$500, and obtained a deed from the Commissioner.

At the time of the making of said land contract, *said building* had been fitted up for and was in use as a slaughtering and packing establishment *and warehouse*. Afterwards, it was turned into a distillery by said Ray, Todd & McMahon.

Smith was not made a party to the Mechanic's Lien proceedings, although he had never conveyed the premises except by said land contract: (Stipulation, p. 99 of Record;) nor were the judgment creditors of Ray made parties, although there were sundry judgment liens (pp. 74, 81 of Record.)

Before the detaching of said fixtures, viz: March 26, 1859, Smith had filed his bill against Ray, Todd, McMahon and Moore, alleging the non-payment of the purchase money under said contract; that by default in payment of the interest due December 31, 1858, persons in possession became thenceforth tenants at will of Smith; that all the original purchase money, with said interest due Dec. 31, 1858, and subsequent interest or rent, with taxes, remained unpaid; that Smith's only security for the purchase money was in the real estate itself, the chief value of which was in the distillery and its machinery and fixtures; and that Moore refused to pay the purchase money, and yet threatened and was about commencing, to do irremediable injury to the premises, and greatly impair Smith's security, by detaching and taking away the machinery and fixtures. On said bill an injunction was awarded against Moore. (See pp. 87-97 of Record.)

Under said land contract, the whole of the principal sum of the consideration money was due on the 31st day of December, A. D. 1859. (See contract. p. 70 of Record.) The stipulation filed thereafter on the hearing of this cause in the Court below showed it all, with interest, etc., to be due. (See Stipulation, p. 101 of Record.)

I.

Moore's only claim of title comes from the deed from the Commissioner under the decree for a Mechanic's Lien. It could only give him the interest, if any, of Ray, Todd & McMahon,

who had possession under the contract from Smith, by the terms of which contract they became, by the non-payment of interest, on December 31, 1858, Smith's tenants at will. Smith's title was in no wise affected by the decree, for he was not a party thereto; nor were the liens of judgment creditors affected by the decree. Moore took, by the deed, the interest of Ray, Todd & McMahon, under the contract from Smith to Ray, but subject, as well to all rights of Smith, as to the liens of judgment creditors not made parties to Moore's petition for Mechanic's Lien. It was an interest of a tenant at will; an interest in *real estate alone*, and not in any particular part of the property distinguished from the rest—Moore's lien, if any, being merged in the decree, which related to the whole real estate and not to any particular part or portion thereof.

The 17th section of the Mechanic's Lien Act, p. 723 of Purple's Stat., would have governed the Mechanic's Lien case, as between Moore and Smith, if Smith had been a party. Under it, only the interest of Ray, Todd and McMahon, under the contract with Smith, was subject to sale; and the purchase by Moore, at the sale under the decree, could not give him the right to any particular part of the property, but only to take the place of Ray, Todd and McMahon, as vendees or lessees of Smith. It therefore became the duty of Moore, when he purchased at the sale under his decree, to pay Smith the money due him under the contract originally given to Ray, (Smith's right to that money having precedence over Moore's original lien as a mechanic, and Moore having purchased subject to that right.)

This is the only fair construction to be put upon said 17th section. In this way only can the rights of vendors be preserved. Hence, when Moore failed to pay Smith the money due on the land contract, and in fact thereby repudiated the contract, he had no further right to the property. The true reason of the smallness of his bid, (\$500,) at the sale under his decree, probably was because his lien was not enforced as to Ray's creditors, whose rights were in no manner affected by the decree, and also because of the purchase money for the property being wholly due to Smith.

Turney *et al.* v. Saunders, *et al.* 4 Scam. 527, 532.

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