

No. 8853

Supreme Court of Illinois

John D. Hawkins

vs.

James Taber, et al

State of Illinois vs
Marion County

Pleas and proceedings had in the
Circuit Court in and for the County
of Marion and State of
Illinois in a certain cause
heretofore pending in said Court
Wherein John D Hawkins was
Plaintiff and Warren Tabor
Jennimah Kiser James M Tabor
and Sarah Breakhouse were de-
fendants

Be it remembered that
on the 8th day of March AD
1866 the above named Complain-
ant filed in the Office of the
Clerk of the Circuit Court
in and for the County in the
State aforesaid his certain
Bill for Partition which is
in the words and figures
following to wit

State of Illinois } March Term of the Marion
Marion County } Circuit Court A.D. 1866

John D. Hawkins }

vs.

Warren Taber.

Alvin Kiser

James M. Taber.

Sarah. Groatthouse

Bill for Partition

To The Hon^{orable} Silas L. Bryan
Presiding Judge. in and. for the 2nd
judicial Circuit in the County of Marion
and State of Illinois in Chancery Sitting
Your Petitioner John D. Hawkins
who is a Citizen of the County of Clinton
and State of Illinois, would respectfully
show to your Honor that one. Warren Taber.
who now deceased, previous to his death
was a citizen of the County of Marion and
State of Illinois. was. during his life
time and at his death the owner of the
North East $\frac{1}{4}$ of the South East $\frac{1}{4}$
of Section number (8) Eight Town.
Number (3.) North of Range. No. one East
of the third principal Meridian, and
also. The West half of the South
East quarter of Section number

Eight Township (3) North Range
 No. one, East in Marion County
 Illinois containing Eighty acres
 That Said Warren Tabor In deed
 died seized of Said Lands and
 left him Surveying, James M. Tabor
 Wesley Tabor, Jefferson Tabor, Warren
 Tabor, ^{William Tabor} ~~James Tabor~~ ^{Sarah Ann Tabor} ~~Jeremiah Tabor~~
 and Jeremiah Tabor.
 who is now ^{inter} married with John Kinsner
 and John Tabor, and Love Tabor that
 Since the death of the Said Warren
 Tabor Sr. the Said John Tabor,
 departed this life leaving his widow
 Sarah Tabor. Since intermarried with
 William, ^{Greathouse} ~~Greathouse~~ and having no
 children and that Since the
 death of the Said Warren Tabor
 Sr. the Said William Tabor son
 of Said Warren died leaving no
 widow nor children nor descendants
 That Since the death of the Said
 Warren Tabor Sen the Said Love Tabor
 has died leaving no wife nor chil-
 dren — That at the time of Said
 Warrens. death the Said Estate

8
above described was divisible unto
ten parts but ^{that} by the death of
the Said John Tabor the one half
of his interest Vested by inheritance
in Sarah Tabor now ~~Great~~^{Greathouse}
and the other half vested in his Bro
thers and Sisters - That Said John
died about the Year 1857 and
before the Conveyances to your petitioners
hereafter mentioned that ~~Said~~ Said
William died about the year 1863
leaving no widow nor children and
That Said Love ~~and~~ died about
the Year 1864 - That at the death
of Said Lowell his rights had been sold
under Execution to James Williams and
Joseph Kiser. To be amended - Sold to James
Williams Surviving partner of the firm of
Robert Atton and James Williams
That at the death of Said Warren an
Each heir was Entitled to 12 acres - That
by the death of John ~~and~~ the remaining
heirs were Entitled to $12\frac{6}{10}$ acres - That
by the death of William Each heir Surv
iving became Entitled to 14 acres and
one tenth. That the Said Sarah Tabor
now Greathouse by marriage was Entitled
to Six acres by reason of inheriting

A
from the Said John her husband now
Deceased. That in 1859 James M. Tabor
Executed a bond for a deed to Wm. Greathouse
for his interest to which he was then Enti-
tled. - Herewith filed and marked "A"
That his interest at the time of making Said
Bond was 14 ¹/₁₀ acres of Said land
That in A.D. 1860 The Said Sarah Ann
daughter of Said Warren having
married One George W. Campbell Executed
a quit Claim deed to the Said William
Greathouse for her interest which was
then 14 ¹/₁₀ acres marked "B." that in
1862 the Said Wesley Tabor and wife
Executed a deed of quit claim to the
Said Wm. Greathouse for their undi-
vided interest in Said land he being
then entitled to 14 ¹/₁₀ acres Exhibit "C"
that the Said Sarah widow of the
Said John. Decd. having having interm-
arried with the Said Wm. Greathouse
and being Entitled to Six acres of land
or the ~~one~~ half of the interest of the
Said John her husband joined with
the Said Wm. Greathouse in making a quit
Claim deed to her share and also the shares
of the Said William to your petitioner

5 Making in all. conveyed to him three
Shares in full of $14\frac{1}{2}$ acres each and
the half Share. of the Said Sarah Six
acres total forty Eight $\frac{3}{4}$ acres that
+ the ~~Said~~ interest of the Said ^{Love} and the
Said Jefferson were sold under Execution
+ in the life time of the Said ^{Love} to Kisner
and Williams and since that time con-
veyed. to the Said James M. Sabor who
is now entitled to $28\frac{1}{10}$ tenths acres
That Jane Sabor and Jemimah and
and Warren are each entitled to $14\frac{1}{2}$
acres and that Sarah Scoatthous
is entitled to Dover in the $\frac{1}{2}$ interest
of John her former husband
That Since the purchase of Said lands
by petitioner to wit in August 1864
large rents have accrued and been
collected by the Said James M. Sabor
from Said lands to which Said petiti-
oners is Equally Entitled according to his
interests - That Jemimah and ^{Warren} ~~James~~
Sabor are minors and ~~that~~ as the
Said interests are undivided your
petitioner asks That the Said land
shall be partitioned - That the writ of
Subpoena may issue to Clinton County

6
to James M Sabor and to Pike County
to Warren Sabor and to - and to Marion
County to Jemimah Kisner Commanding
them to appear and answer this bill
and that a Guardian ad Litem -
May be appointed for Warren Sabor
and Jemimah and that they shall
be required to answer and that after
a full hearing the Said lands may
be divided according to the respective
interests of Said parties that the
Dower Interest of Said Sarah
may be assigned to her and that
Commissioners may be appointed
to set aside Said Dower and parti-
tion Said lands. that an account
of the Said rents may be taken
and that upon a full hearing
of this Cause your Honor will decree
a partition of Said lands and
that Said Dower may be assigned
and that the Share of each in Said
rents may be set apart and if Said
lands shall not be ~~acceptable~~ of
division that Said lands may
be sold and that that the attorneys

7 for which I am to pay \$25 dollars.
Shall be apportioned in Said decree
and that all costs may be Equally
taxed to the respective Parties and
that your Honor will grant
any and all relief as may seem
meet &c.

B. B. Smith
Sol for petitioner

State of Illinois
Barren County

I John D Hawkins
being duly Sworn according
to law Says that he is the Com-
plainant in the foregoing petition
and that the matters and things
in Said petition Contained are
true in Substance and fact

Subscribed and Sworn to before
me this ~~the~~ 20th day of August
A.D. 1867

H. C. Moore clk
by J. C. Moore
Dept

John D^{his} X Hawkins
mark

John D. Hawkins
vs.

Jemimah Kisner
Nancy Tabor
James M. Tabor

Petition for Partition

Filed March 8th 1866
H. C. Moore, Clk

Please issue, to Pike
County for Warren
Tabor. To Chilton
County for James
M. Tabor and to
Marion County for
Jemimah Kisner

B. B. Smith
for Compt

8 / Summons

State of Illinois } ss { The people of the state of
Marion County } Illinois, to the Sheriff of said
County. Greeting:

We Command you to summon Jeremiah
Kissner, James W. Sabu, Warren Sabu and
Sarah Meathouse, if to be found in your County,
to appear before the Circuit Court of Marion ~~County~~
County on the first day of the Term thereof, to be holden
~~County~~ at the Court house in Salem on the third Monday
in the Month of March Instant to answer John
D. Hawkins in his petition for Dower and
partition, and hereof make due return to
said Court as the Law directs.

Witness, Henry C Moore Clerk of
our said Court and the seal
thereof, at Salem this 8th day
of March A. D. 1866

H C Moore clerk

By J. O. Chance, Dept



Summons

No 307

March Term 1866

J. D. Hawkins,

vs

Jeremiah Risner, James
Mc Gaber, Warren Gaber
and Sarah Quethouse

Summons in Chancery

Service — — \$

Mileage — — \$

Returning — — \$ 10

The within named
parties not found
in Madison County
March 30th 1866
J. W. Shively
Attorney

March Term ad 1866.
John Q Hawkins

vs.
Jennah. Kiser

Walter Taber

James M Taber

and
Sarah Greathouse

Over My Partition

Wednesday March 21st 1866.

Ordered that this Cause stand
continued to the next Term
of this Court for service

August Term ad 1866

No 263 John, D. Hawkins
vs,

Jemimah, Kiersey, Haneu Taber

James M. Taber ~~James M. Taber~~

and Sarah Greathouse

Part & Dower

Tuesday August 21st 1866

Comes Complainant and on his motion
this is continued to the next term
of this Court for Service and an
alias Writ Ordered

State Of Illinois } ss (The People of the State of Illinois
Marion County) } to the Sheriff of said County
Greeting

We command ^{you} as here before to summon
Jesseiah Kiser, James ^m Tabor, Warren Tabor,
and Sarah Greathouse if to be found in your
County to appear before the Circuit Court of Marion
County on the first day of the Term thereof
to be holden at the Court house in Salem, on
the third Monday in the Month of March next
to answer John D Hawkins in his petition for
Dower and partition, and hereof make due
return to said Court as the law directs.

Witness, Henry C Moore, Clerk of our
said Court and the Seal thereof
at Salem, this 29th day of
November A. D. 1866

H C Moore. Clerk

Seal

or
Served by copy

Summons

No

March Term 1867

J. D. Hawkins
vs

Jessiah Wiser

Summons in Chancery

Service	\$ 2.00
Mileage	\$ 3.00
Returning	\$ 1.00
	<u>\$ 5.00</u>

Served by reading a
by copy to Jessiah
Wiser and James
Yabir, Warren Co
and Sarah Wether.
Not found in this Co
This 21st day of Feb
1867 J. D. Gear.

Shire,

March Term 1867

John D. Hawkins }

vs.

Jemmal Kiser }

Harren Taber }

James M. Taber }

and Sarah Greathouse }

Lower & Partition

Monday March 18 1867

this Cause is called and continued
for further service

19
Sircuit Court of Marion County Illinois
August Term 1867

John D Hawkins

as

Feminah Kisner - et al,

} Petition for Dower

} and Partition

} and the said Warren

Gaber, infant - defendant in said Petition
by M Schaeffer his guardian ad Litem
appointed by this Court, for answer to said
petition, says that he is of tender years, and
ignorant of the matters in said petition set
forth, and prays the protection of this Hon
Court in the premises

By M Schaeffer Guardian
ad Litem

Guardian of fee \$5.00

John D Hawkins
as
Prinimal Hissur
et al

Answer of
Q ad Liter

Filed August 20th
1867

H C Moore cl R

\$500

Quardions for \$500

11/
John D Hawkins } In Circuit Court
as } August Term A D 1867
Jesse Mohr Winer }
et al }
vs }

Valentine Ward being duly sworn in
this cause on the part of plaintiff deposes as
follows, I am acquainted with the parties to this
suit, I am acquainted with the custom of
renting lands in the neighborhood in which
I live. Land rent there for from two to two
dollars and a half per acre for purposes
of cultivation, my judgment is that the
orchard on the land described in the petition
in this suit would make the use of the farm
worth from seventy five to one hundred
dollars more per year than the price of
the rent of the land alone. There are about
fifty acres of land in cultivation on the place
David Thurmon lived on the farm in 1864
and Monroe Gabor told me that he rented
the farm to David Thurmon for that year
for \$100. Mr. Gabor said he rented the farm to
Mrs. Pugh in 1865 Mr Pugh occupied it that
year. Mr Pugh also occupied the farm during
1866 and up to this present time

Subscribed and sworn to }
before me this 24th day of } his
August A D 1867 } Valentine X Ward
J. B. Hagg, Master in Chancery } mark

John L. Hawkins
vs

Jenniah Kinschals

Master's Rpt of
Testimony

Fee \$2.00
Pdt

Valentine Ward
Witness fee \$1.00

Filed August 1-26th
1867

H C Brown CLK

John D Hawkins
vs

2 August Term A.D. 1867

Frederick Kiser
Warren Taber

Partition and Dower

James M Taber and
Sarah Greathouse

August 19th and now on this
day came the Complainant by B. B. Smith
his Solicitor, and it appearing to the Court
that the adult defendant had been duly
served with process on Motion of Complainant's
Solicitor Mr Schaeffer is appointed Guardian
ad Litem for the minor heirs, and a rule
is entered upon the adult defendants to
answer by 1st Monday of this term August
21st and it appearing to the Court that
Mr Schaeffer Guardian ad Litem has
filed his answer, and the adult defend-
ants having failed to answer on Motion
of ^{Complainant's} Solicitor for Complainant a decree pro
Confesso is entered upon the Court and it
is ordered adjudged and decreed that
partition shall be granted as prayed in
Complainant's petition and absolute Stet-
fessie Bolance and Samuel Phelps are
appointed by the Court as Commissioners -
It is ordered adjudged and decreed by the
Court that the said Commissioners so ap-
pointed shall divide said lands as follows

13/

selling off to the said John D Hawkins
 forty eight $\frac{3}{4}$ acres, and to the said James
 M Gaber Twenty Eight $\frac{2}{10}$ tenth acres and
 to James Gaber $\frac{14}{10}$ acres, and to Jeremiah
 Kisser and Warren Gaber each $\frac{14}{10}$ acres.
 That these are the respective quantities
 to which the said parties are entitled
 as shown to the satisfaction of the Court
 from the evidence — And that this cause
 is referred to the Master for testimony,
 August 26th and now comes the said
 Commissioners and make report that
 said lands are not susceptible of ^{division} partition
 which report is approved by the Court and
 on motion of Complainants solicitor the
 said property is ordered to be sold
 on the premises after giving four week
 notice by publication in some public
 news paper in ^{Marion County, Indiana} the County, August 28th
 The Cause is ^{now} referred to Mr Schaeffer Special
 Master appointed by the Court to take testi-
 mony who makes his report of testimony
 and after hearing the testimony
 in said Cause it is found by the Court
 that James M Gaber has received rents
 and profits of said lands to the amount
 of four hundred and fifty five dollars, where
 is rendered by the Court that the said
 James M Gaber shall account to the
 said parties for the sum of four hun-
 dred and fifty five dollars and that

14 Each party, plaintiff and Defendant shall be entitled to his respective share and that execution shall issue therefor.

It also ordered and adjudged by the Court that Mr Schoffer shall be appointed special Commissioner to sell said lands in said Bill mentioned on the premises that notice of said sale shall be given by four weeks notice in some public News paper published in the county.

Terms of sale ten per cent in hand and balance in six months, Purchaser giving note with good personal security and Mortgage on the premises, and that he report to the next term of this Court and for this purpose this Cause is, by ~~continued~~ the Court ordered to stand continued.

(Decree written by S. C. B. B. Smith)

1176
John D Hawkins
res

Gabor et al

Deere

Filed Feb 19th
1868

H. C. Moore
Clerk

State of Illinois }
Marion County } Marion County Circuit Court
To the March Term A.D. 1868

John D Hawkins }
vs }
Warren Gabor }
Jennimah Kismu }
James M Gabor }
Sarah Mathews }

Petition for Partition.

B. B. Smith atty for Complainants
in the above entitled cause take notice
That we will, as attys, for the said
Defendants, make at the March Term of
said Court in said above entitled cause
motion to correct said decree, and set
aside said judgment, which was rendered
at the last term against said Warren
Gabor one of the Defendants.

Omelung H Murrill

Sol for Deft

Dated 17th Feb 1868

No 7
John D Hawkins
vs
Warren John Hall

Notice of Mr

Served Copy of written
Notice on B. B. Smith
This 15th of Feb 1868
J E Morris

Filed March 6th
1868

H C Moore

CLR

State of Illinois } March Term Marion County
Marion County } Circuit Court A D 1868

John D Hawkins }
vs }
Warren Taber } Petition for Partition
Jenniah Kiser }
James M Taber }
Sarah Greathouse }

Charles Sherman after being duly sworn deposes and says, that before the trial of the above entitled cause, at the last term of this Court, August Term A D 1867 of the Circuit Court, he went and had a settlement with the complainant John D Hawkins on or about the 12th day of January A D 1867 and that he paid the said Hawkins all the rent on his the said Hawkins share of the land, ascribed in said petition. And that said Hawkins was to give the receipts in full to James Taber for the rents, and also gave up bond for said, that he held against the said James Taber, and was to dismiss the above case at the March term 1867 of this Court for a partition of said Land, upon the payment of half of the Atty's fee, which amt was \$12,50 and that the said Hawkins agreed to have the suit dismissed, and notified the defendant

17) of the facts, and told them not to attend
Court as the case, would be dismissed, and
according to that understanding or agreement
The defendants in the said case for Partition
did not appear on that occasion defend
against said suits, and that that in the
absence of said defendant the said Hawkins
did not dismiss the said suit, as he had
promised to do, but obtained judgment
of four hundred & fifty five dollars against
the said James Tabor, did then & there ^{fraudulently} ob-
tain said judgment, against ~~James Tabor~~
Charles ^{his} Sherman
mark

Subscribed & sworn to }
before me this 1st of }
February A D 1868 }
H. C. Moore clk

James Tabor one of the defendants in the above
entitled cause after being duly sworn according
to law, deposes and says that the said John
D Hawkins did before the trial of this cause,
send his son Ruben Hawkins to officiant
and told him that he need not attend
the Court because he in Sherman and his
Father had settled the matter, and he said
that his Father had got him to write a letter
to B B Smith the Atty in said cause of

18)

the fact of settlement of same, and upon this understanding the said affiant did not attend Court, thinking the matter was settled, and that the affiant was informed that the rent was all paid and that the said John D Hawkins was to give him receipt in full, and know not of said judgment having been obtained until after the last August term of said Court 1867.

James M^{his} x Tabor
mark

Sworn to & subscribed
before me this 1st day
of Feb^y 1868

H C Moore clk

The said James M Tabor, swears positively that he did not owe one dollar of the rent, decreed against him, that the said rent was all settled for by said Shuman as said affiant swears was stated to him by said Shuman, and that is the same indebtedness decreed in said suit to be paid by affiant.

James M^{his} x Tabor
mark

Sworn to and subscribed
before me this 26th day of
March 1868,

H C Moore clk

By J. H. Moore
Deft

County
Marion, Circuit Court
To The Mich Term AD 1868

John D Hawkins
vs
Warren Taber et al

Affidavit of
Defendants

Filed March 6th 1868

H. C. Moon
etc

John D Hawkins }

as

James M Gabor }

et al

Mo to sit, aside chcy

19)

Mary Sherman being first duly sworn says that some time in the forepart of the year 1867 as she believes in January of that year, she heard John D Hawkins say that if he could purchase out the interest of Charles Sherman in the land in the bill described he would bring the suit then pending

Subscribed to and sworn before me this 26th March 1868

Mary ^{her} Sherman
Mark

H C Moore CLK

John Sherman being sworn says that he heard the foregoing remarks by the said John D Hawkins, and that the affidavit of Mary Sherman is true; and that he has no interest in this suit or motion

John Sherman

Subscribed and sworn to before me this 26th

March 1868, H C Moore CLK

State of Illinois }
Marion County } 33

20)

John Boster being first-duly sworn says that he heard John D Hawkins state in substance, that he had agreed to dismiss the suit of Partition against the Gabor, at the last March Term of this Court; but that he said that was based upon an agreement that James Gabor was to surrender the possession, & that because sd James had not surrendered possession, he had gone on with the suit. This conversation was last summer sometime.

John Boster

Subscribed & sworn
to ~~Before~~ This 26th day of March
1868

H C Moore Clerk
By J N Moore
Deft.

John D Hawkins
as
Jas M Guber et al

Chy. Mo. in chy.

- 21) John Morris being duly sworn say that sometime last summer, at a trial between sd Hawkins & Charles Sherman, he heard Hawkins expressing himself to the effect following, that he had purchased out Charles Sherman's interest in the land, and had in the trade give up the rent, but he contended he was to get possession & that because the possession was not surrendered to him, he was not bound by the bargain. He admitted that he got the possession without a law suit by putting a man in possession.

John Morris

Subscribed and sworn to
before me this 31st day
of March 1868.

H C Moore clerk

By S N Moore

Deft

B 800

Hawkins

vs

Gobar et al

31st March 1868

H C Moore UK

State of Illinois } March Term Marion Circuit
Marion County } Court A D 1868

Hawkins

vs

Meathouse &

James M Gabor

Debts

24) Reuben Hawkins being duly sworn before H.C. Moore clerk &c states that he knows John D Hawkins and James M Gabor - that he is informed that said James M Gabor has stated that he affiant was instructed by John D Hawkins complainants to tell the said James M Gabor, that the original suit in this case of Partitions and account had been dismissed - or that John D Hawkins sent him to said Gabor to tell said Gabor, that the said suit would be dismissed. Affiant says that the said John D Hawkins never did instruct him to tell said Gabor that said suit was dismissed, nor did the said Hawkins ever tell him that he would dismiss said suit - and he states that said John D Hawkins never instructed him to tell said Gabor that he had dismissed said suit, or that he would dismiss said suit, and he also states that the affiant never

did tell said James M Gabor that his father had told him to tell said Gabor that he had or would dismiss said suit. Affiant states that he heard John D Hawkins tell said Gabor that if he Gabor and others would give said Hawkins possession of the farm known as the Gabor farm that he would dismiss the said suit of Partition and account. Affiant says that this conversation was before the decree in this case and while said suit was pending Affiant says that said Gabor and others did not give possession to said J D Hawkins of said place before the said decree was rendered. Affiant states that about the last of July 1867 or first day of August he had a conversation with said Gabor. That said Gabor was then talking about the said law suit. And said to Affiant who is the son of Hawkins, that he Affiant and he Gabor, he believed could settle this lawsuit. That said Gabor then knew said law suit was pending, because he was talking ^{with} Affiant about it. He stated that Affiant and he could be believed settle said suit but that said J D Hawkins and said

Garnis Labor could not, as they did
not speak without quarreling

Sworn to and
subscribed before
me this 31st March 1868

H C Moore

CLK

Reuben Hawkins

J. D. Hawkins
per
Menthouse
Gabor. etc

Filed March 31st
1868

H C Moore

Clerk

308

State of Illinois }
Marion County } March Term Marion
Circuit Court A D 1868

Hawkins }
vs }
Greathouse }
Gabor Ebal }

(27) John Raster being duly sworn
says that he knows John D Hawkins and
Monroe Gabor. That about July 20th 1867
I heard a conversation between John D.
Hawkins and Monroe Gabor at 229
Philippe and Hawkins Gabor were talking
about the back rent for the farm I known
as the Gabor farm embraced in the origi-
nal Bill - and Hawkins told Gabor that
he Hawkins was prosecuting his right to
the rents of said farm in the court I
understood him to mean the circuit court
and he told Gabor that it would all come
right at court - They were disputing about
the rent - Hawkins told him the suit was
going on - In this conversation Hawkins
said he would dismiss the suit on con-
ditions, that the defendant gave him posses-
sion,

Sawyer to and subscribed }
before me this 31st March } John Raster
1868. H C Moore CLK }
By J O Chace SPT }

308

Filed March 21st
1868

H. C. Moore
Clerk

State of Illinois } March Term of Marion Circuit
Marion County } Court A D 1868

Hawkins }
vs }
Gabor et al }

(28)

John D Hawkins being duly sworn says that he is plaintiff in this suit - that he never sent word to James M Gabor that he would dismiss the suit in this case only on the condition that he Gabor would give up possession of the Gabor farm and have no more to do with it. That said Gabor did not ^{nor} would give possession of said place affiant went to Monroe Sherman and told him to talk with James M Gabor and get him to give the possession of said farm - Gabor farm, and the said Sherman told affiant that he had talked with Monroe Gabor and that he could not get him to do any thing, and affiant then told Sherman it would have to go ahead, affiant says that he never told said Gabor nor any other person that he would dismiss this suit, only on the condition that said Gabor would give possession of said farm, and that Gabor did not nor would give possession of same

But ~~just~~ affiant for the back rents
 before A Phelps agent of the peace
 sworn to and
 subscribed before
 me this 31st August
 1868

his
 J. D. Hawkins
 mark

H. C. Moor CLK

J. D. Hawkins

vs

Wentworth

Debtors etc

808

Spoken March 9th

1868

W. C. Moore

clock

State of Illinois } March Term of the Marion
 Marion County } Circuit Court A D 1868

John D Hawkins }
 vs } Bill for Partition
 Warren Gabor } And account affidavit
 Jeremiah Risner }
 James M Gabor }
 Sarah Greathouse }

State of Illinois } John D Hawkins being duly
 Marion County } sworn before Henry A. Moon clerk of the
 of said } Circuit Court and state and depose that he
 is plaintiff in this suit - That he denies
 that he ever stated to Warren Gabor
 that he would dismiss the suit in this
 case - And denies that he obtained the
 decree in this cause by fraud - but alleges
 that he has not made any agreement
 with said Warren at any time about
 the dismissal of said cause - and
 denies that he ever made an agreement
 with Charles Sherman to dismiss this
 cause - and he denies that he ever
 authorized his son Ruben to go to said
 Warren Gabor and state that he would
 dismiss this bill and he denies that he
 ever instructed his attorney B B Smith
 to dismiss this suit - and denies
 that he has ever induced or author-

ized any body to induce said Sabar
to not appear in this suit
Sworn to and

Subscribed before

Me this 3 March 1868

H C Moore Clerk }

by J N Moore }

Dept }

his
John D. & Howkins
Clerk

Verd 308

Howkins

no

John Howkins

21st

affidavit filed

March 17th

1868

H C Moore

Clerk

State of Illinois } March Term Marion Circuit
Marion County } Court A. D. 1868

John D. Hawkins }

vs

Granthouse }

Gabor Ebal }

23)

Samuel Phelps being duly sworn says that he knows J. D. Hawkins and James M. Gabor, that he lives in the neighborhood of the said parties and has known them for number of years. That the fact of the suit of Hawkins against the defendants in this suit for Partition of the lands in controversy was a matter that was publicly known in that neighborhood — That Gabor lived about 2½ miles from the land. That affiant was one of the Commissioners who was appointed to divide the land, that while he and Ballance, another Commissioner were dividing the land on the premises, the said James M. Gabor was at one of the houses on the farm and saw us pass. That the pendency of the suit was matter of public talk. That Gabor was in the possession of the land by tenant at and before the commencement of the suit.

Sworn to and subscribed }
before me this 31st March 1868 } Samuel Phelps

H C Moore

CLK

Hawkins
as
Greathouse
Gobar Ebal

Filed March 31st
1868

H C Moore
CLR

Boe

John L Hawkins

vs.

Dower and Partition

Jemimah Kiener Hansen

Jacob James M Jacob and the Parties by their Solicitors and Sarah Eneathouse

And now at this day to wit Thursday March 26th A.D. 1868 come the defendant Waneu Tabor by Ouelvey and Bennett his Solicitors enter Motion to correct the decree

Entered in this cause, at the August Term A.D. 1867 of this Court and to set aside the Judgment therein for the sum of four hundred and fifty five dollars against said Waneu Tabor.

Afterwards to wit on Tuesday March 31st A.D. 1868 - the parties by their Solicitors come and the Court hears said motion and being fully advised in the premises doth allow same. And said decree of August Term 1868 of this Court herein is modified so that said Judgment against said Tabor for the sum of \$455. is set aside but in all other respects that said decree decree stand. The Court Ordered that the costs of this term be assessed against the Complainant Hawkins. Afterwards to wit On Thursday April 2nd A.D. 1868 - Comes Michael Shaeffer Special Commissioner to sell &c and presents his report of Sale herein which Report the Court examined and approved and Ordered that same be

Confirmed. Filed and recorded which is
done as follows, to wit

Circuit Court of Marion County, Ills.

John D. Hawkins)

March Term 1868.

vs.

) Petition for Partition

Josiah Kiser)

) Report of Sale

Marion Jaber et als)

To the Hon. S. L. Bryan Judge of
the Second Judicial Circuit of the State of Illinois

The undersigned Special Commissioner charged
with the Execution of the Decree and order
of Sale entered at the August term of
this Hon Court for the year A.D. 1867
in the above entitled Cause would respec-
tfully Submit the following report of his acts
and doings under said order to wit,

That under said Order he did have ^a notice
of Sale, published for six consecutive weeks
prior to the day of Sale in the Salem Republican
a weekly Newspaper published in the City
of Salem in the County of Marion and State
of Illinois a copy of which advertisement
with the publishers certificate of due pub-
lications thereof is hereto attached marked -
Exhibit "A," and made a part of this report
that in pursuance of said Order of Sale
and said notice he did on the 9th day of
November, A.D. 1867 on the premises

Sell at public Sale the Said real Estate
to wit The N. E. $\frac{1}{4}$ of S E. $\frac{1}{4}$ and the W. $\frac{1}{2}$
of S. E. $\frac{1}{4}$ all in Section No Eight (8) in T. 3 N. R.
1. E. in Marion County Illinois to John D.
Hawkins of Said County of Marion and State
of Illinois the Complainant in this cause
for the Sum of two dollars per acre his being
the highest and best bid therefor for ten per
cent Cash and the balance in Six Months
and your Commissioner would further report
that he first ^{offered} the Said lands at Said Sale
in their legal Subdivisions of forty acres
each and that the bids when so offered
did not in the aggregate amount to more
than Seven hundred and eighty dollars.
Whereas when offered altogether
the bid of Said John D. Hawkins
being two dollars per acre as aforesaid
amounted in the aggregate to twelve hundred
dollars - And thereupon the Said John
D. Hawkins having complied with the terms
of Said Sale. your Commission Executed
and delivered to Said John D. Hawkins a
deed to and for the Said premises - That your
Commissioner has rec^d ten percent of the proce^s
ds of Said Sale - — \$ 120.00

That he has paid as follows to wit

Costs of this court	— — —	\$ 38.05
Printed fees	— —	6.00
Commissioners deed	— —	5.00
Stamp on deed		1.50
Commissioners 3 per ct		<u>36.00</u>
		\$ 86.55

Bal. to be divided \$ 33.45

All of which is respectfully Submitted and
an order Confirming the same prayed
for

Exhibit "A" Copy notice
and published Certificate
attached

W. B. Shaeffers
Special Commissioner
to Sell &c

State of Illinois }
Marion County } ss
J. A. C. Moore
Clerk of the Circuit Court in and
for the County in the State afore
said do hereby certify the foregoing
to be a true and correct transcript
of the Records and proceedings had
in the above entitled cause as the
same remain on file and of
Record in my office
Witness my hand

and Official Seal
at Office This 23d
day of May 1888
H C Moore
Clerk

Errors Assigned

- 1 The Court Erred in entertaining
the Motion to set aside the Judgment
- 2 The Court erred in modifying
the decree of August Term
1887 by setting aside the
judgment

Shaffer & Smith
for plaintiff

7
Under in error

10

A H & O'Connell for
defendant
in error

40

Hawkins

VS

Sabor et al

For \$12.00
Pd y Plff

Jul 22 June 2. 1868 -

Р. А. Д. Мелованский

Paul by Schaeffer

8500

In the Supreme Court.

First Grand Division--State of Illinois.

June Term, A. D. 1868.

John D. Hawkins, Plaintiff in Error,

vs.

Warren Taber, Mima Kisner, Jas. M. Ta-
Taber, Sarah Greathouse, Deft's in Error.

Error to Marion County.

Page
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Address—Shows that Warren Taber died owning N-E $\frac{1}{4}$ S-E $\frac{1}{4}$, Sec. 8, T 2, R 1, Marion county; also W $\frac{1}{4}$, S-E said section. That his heirs were as follows: James M. Taber, Wesley Taber, Jefferson Taber, Warren Taber, Wm. Taber, Sarah Ann Taber, Jane Taber, Jemimah Taber, John Taber, and Love Taber.

2

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Shows that the complainant had purchased three shares, forty-eight and three-tenth acres, that James Taber held two shares, 28 and two-tenth acres; Jane Taber, Jemimah and Warren Taber each was entitled to 14 and one-tenth acres. That Jemimah and Warren are minors. That large rents had been collected by James M. Taber from said lands.

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Prayer—

For partition and for accounts of rents.

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Affidavit of petitioner.

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Summons—not served.

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Summons served by reading and by copy on Jemimah Kisner, James M. Taber, Warren and Sarah Greathouse not found.

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Answer of Guardian, ad litem, for Warren Taber.

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Master's report of testimony. Valentine Ward testifies: Knows the parties to the suit. Knows the custom of renting lands, where the lands lie, price is \$2,50 per acre. There is an orchard on the land, would make the rent worth \$75 to \$1,00 more per year. 40 acres in cultivation. James M. Taber stated to me that he rented the farm to David Sherman for 1864, and to Mrs. Phyle for 1865 and 1866, up to 24 August 1867.

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Decree—19 August 1867—Service of summons on adult defendants. M. Schaeffer appointed Guardian, *ad litem* for minors. Ruled to answer. Adult def'ts failed to answer. Decree pro confesso as to adults. Commissioners appointed to partition lands as follows: setting out to Hawkins 48 and two-tenths, to James M. Taber 28 and two-tenths, and to balance their respective shares. Commissioners report lands not susceptible of division. Order for sale of land, and special masters to take testimony of rents. Masters reports evidence and it is found by the court after considering the evidence that James M. Taber has received rents of said land to the amount of \$455. Decrees that he shall account to said parties co-tenants for \$455, and each party plaintiff and defendant shall have respective shares thereof and for execution. That commissioner sell said land and report, &c. Cause continued.

14

15

16

Notice that a motion will be made at March Term, 1868, to correct decree and set aside judgement rendered at last term against Warren Taber. Notice duly served. Affidavits in support of motion.

17

Charles Sherman states under oath that before the trial of this cause he affiant paid complainant all the rent due him on Hawkins' share of the described land, and that Hawkins was receipt James Taber for the rents in full, and was to dismiss the said cause at March Term, 1867, upon payment of half the atty's fees, \$12,50, and that said Hawkins was to dismiss the suit, and notified defendants of the fact and told them not to attend, as the case would be dismissed, and according to that understanding defendants did not appear to

defend said suit but that Hawkins in his absence took judgment for \$455, and did then and there fraudulantly obtain said judgment against said James Taber.

17 James M. Tabor swears: That John D. Hawkins before the trial of this cause sent his son, Reuben Hawkins, to affiant, and told him that he need not attend court because C. M. Sherman and his father had settled the matter, and that his father had sent a letter to B. B. Smith, his attorney, notifying him of the settlement of the same, and that affiant did not attend court upon this statement thinking the matter was settled, and that affiant was informed
18 that the rent was all paid, and that he did not owe one dollar of rent for which judgment was had against him. That Sherman had settled all the rent, as Sherman stated to him, affiant.

19 Mary Sherman says on oath that in the first part of 1867 she heard John D. Hawkins say that if he could buy out Charles Sherman's interest in the land described in bill he would bring the suit then pending.

John Sherman, on oath, says that he heard the foregoing remarks by Hawkins, and that Mary Sherman's affidavit is true.

20 John Buster says, on oath, that he heard John D. Hawkins state in substance that he had agreed to dismiss the suit of partitioner against Taber at the last term of court, but that he said was based on an agreement that James Taber would surrender the possession, and that because James had not given possession he had gone on with the suit—this was last summer.

21 John Morris, on oath, says that he heard Hopkins in effect say that he had bought Charles Sherman's interest in the land, and had in the trade given up the rent, but said he was to get possession, and that because the possession was not surrendered to him he was not bound by the bargain. He said he got possession without a law-suit by putting a man in possession.

22 Affidavits for complainant.

John D. Hawkins, on oath, says that he denies that he ever stated to Warren Taber that he would dismiss the suit in this case. Denies that the decree was obtained by fraud. Says that he has not at any time made any agreement with Warren to dismiss the suit. Denies that he ever agreed with Charles Sherman to dismiss this suit. Denies that he ever authorized his son to go to James Taber and state that he would dismiss this bill. Denies that he instructed his attorney, B. B. Smith, to dismiss this suit. Denies that he ever induced or authorized any body to induce James M. Taber to not appear in this suit.

23 Samuel Phelps, on oath, says that he knows Hawkins and Taber, resides in their neighborhood. That the fact of Hawkins suit against defendants was publicly known in their neighborhood. That Taber lives $2\frac{1}{2}$ miles from the land. Affiant was a commissioner to divide the land. That while he and the other commissioner was viewing the land on the premises, the said James M. Taber was on the farm and saw us pass. That Taber was in the possession of the land a tenant by at and before the commencement of the suit.

24 Reuben Hawkins, on oath, says he knows Hawkins and Tabor. That he is informed that James M. Taber has stated that he, affiant, was instructed by John D. Hawkins to tell Tabor that he had or would dismiss the suit in this cause. He says that Hawkins never did so instruct him to tell Tabor that he had or would dismiss said suit, and that affiant never did tell Tabor that
25 Hawkins had told him to tell Tabor so, and that affiant heard John D. Hawkins tell Tabor that if Tabor and others would give Hawkins possession of the farm that he would dismiss the suit of partition and account. This conversation was before the decree in this case and while the suit was pending. Affiant says that Tabor and Hawkins did not give said Hawkins possession of said place before said decree. That July, 1867, he had a conversation with Taber. Taber was then talking about the law-suit and said to affiant, who is the son of Hawkins, that he believed that affiant and Taber could
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That Taber then knew said law-suit was pending. He talked with affiant about it.

27 John Buster, on oath, says he knows Hawkins and Taber. That 20th July, 1867, he heard a talk between them. They were talking about back rent of the Taber farm in bill mentioned. Hawkins told Taber that he was prosecuting his right to the rent of said farm in court—the circuit court. He told Taber it would all come right at court. They were disputing about the rent. Hawkins told him the suit was going on he told Taber he would dismiss the suit on condition that Taber would give possession.

28 John D. Hawkins, on oath, says that he never sent word to James M. Taber that he would dismiss the suit in this case only on this condition, that he, Taber, would give possession thereof. That Taber did not nor would give possession of said place. That he saw Monroe Sherman and asked him to talk with Taber and get him to give him possession of the farm, and that Sherman told affiant that he had talked with Taber and that he would not do any thing. Affiant then told Sherman it would have to go ahead. That he never told any one that he would dismiss the suit only on condition that Taber would give possession of farm, and that he never gave it, but sued affiant for the rent before a justice of the peace.

Decree—

Motion allowed, and the decree of August term, 1867, modified so that the judgment against James M. Taber for \$455 is set aside, and balance of decree stands, Report of sale of commissioner approved.

B. B. SMITH, for Pl'tf in Error.

John D Hawkey
Off in Error
my
Labor Chas
Deft in Error

ERRORS ASSIGNED.

- 1st. The court erred in entertaining the motion to set aside the judgment.
- 2d. The court erred in modifying decree of August Term, 1867, by setting aside the judgment.

PLAINTIFF'S BRIEF.

1st. A motion to set aside or to modify a decree or judgment can be made only when error appears on the record, and can not be based upon alleged fraud not appearing on the record.

2. Relief from alleged fraud not appearing on the record, can be obtained only by bill of review.

3. The affidavits introduced herein are not evidence, because there was no privilege of cross examination, and if even they were they do not justify the order of the court; the preponderance of their weight is in favor of the decree as entered at August Term, 1867.

This was a chancery proceeding for partition and account, and Courts of Equity have jurisdiction in cases of partition and may in the same suit enter a decree in favor of a co-tenant for back rent. *Howey, et al., vs. Goins*, 13 Ill., 107.

5. The court could not rightfully on a mere motion enter a final decree setting aside the judgment, even if it could, under the facts presented, have set aside the default and allowed the defendant to file an answer so that an issue could have been made on the question of rent.

B. B. SMITH and M. SCÆFFER,
Atty's for Def't in Error.

John D. Hawkins
13

Warren Labor et
als

Pliff's Answer
and Brief

IN JUDICIAL RECORD.

John. June 2. 1868
R. A. D. Melbourny Ch

8853

40-10
Hawkins
vs.
Taber

Error to Marion

Deft's Brief

June 2nd June 1868
H. K. S. O'Melveny

Supreme Court, State of Illinois.

FIRST GRAND DIVISION.

June Term, A. D. 1868.

JOHN D. HAWKINS }
vs. } Error to Marion.
JAMES TABER, et al }

BRIEF.

The abstract indicates by its phraseology, that this is a chancery proceeding; but this is a mistake, it is a petition at law.

It will be noted, that the suit was still pending, and the report of the special commissioner to sell the premises had not been yet made, when due notice was given by Jas. Taber, that he would move to correct or modify the former judgment.

3. The evidence on the question as to whether Hawkins was guilty of fraud and deceit in procuring the judgment for rents, is very conflicting, manifestly so, looking at the affidavits in support of the motion to modify decree; but

1st. The Court in this form of proceeding was justified without proof, as soon as brought to its notice, while the cause was still pending before it, to correct its judgment.

2d. If the cause is one of conflict in the proof, the decision of the Court thereon, as a general rule, will not be disturbed.

3d. The rejection of the rent from the decree, on the ground stated, does not, it seems, prevent Hawkins from claiming it in a proper proceeding. (Gilman Rep. Louvalle, et al vs. Menard, p. 44.)

5th But really, this matter of rent seems, by Hawkins, to have been settled, but a part of the agreement with Sherman was that Jas. Taber should surrender possession. He denies that Taber gave up the possession, but admits that he got possession without a law suit; but seems to think, that because Taber declined to surrender, and because he got possession surreptitiously, he can abandon in toto his agreement with Sherman.

H. K. S. O'MELVENY,
For Defendants.

delivered the opinion of the court
Mr Chief Justice Reese, Ch. J. This was a bill in chancery
for partition ^{for an account of rents and profits} and ~~for an account of rents and profits~~
in which, such proceedings were had, that
a partition was decreed, and a ~~part~~ ^{part} ~~proceeds~~
decree rendered against James M. Taber one
^{of the defendants}
for certain rents alleged to have been received
by him, he being one of the parties entitled
to an undivided interest in the land, and
who had exercised control over them, receiving
the rents therefor. Commissioners were duly
appointed to make partition, who
reported the same could not be done without
prejudice to the proprietors of the land.
Whereupon, the court entered an order for the
sale of the land by a special master appointed
for that purpose, and that he be required to
take testimony as to the rents.

The master reported, that James M. Taber
had received rents amounting to four hundred
and fifty five dollars, and a decree was rendered
against him that he account to his co-tenants
for that sum. This was at the August Term
1887, and the cause was continued.

~~At the~~ In vacation, a notice was served
upon the plaintiff in error, that a motion
would be made at the next March Term, to correct
this decree and to set aside so much of the
same as demanded the payment of four hundred
and fifty five dollars rents, by James M. Taber.

This motion came on to be heard at the March term, and affidavits were read in support and against the same - the whole merits of the case being tried on the affidavits.

The Court modified the decree of August term in so far as it related to the payment of the rents ~~provisionally~~ by James M. Tabor, and then approved the report of sale by the Commission.

To remove this decree the complainant in the petition, brings the record here by writ of error, assigning this modification of the decree as error.

It clearly appears the case was still in Court, not finally determined, when the motion to modify the decree was made and entertained. It was, therefore, in apt time, and the Court had the power to let aside or modify the decree of the August term, on the affidavits submitted. The proper practice would have been, for the Court to have refused again, the grant of writs, to the Master for further evidence, or the Court might have heard ~~the~~ evidence - and doubtless would so have done it, had it been moved so to do, but the parties seem to have submitted, by consent, the

black question of not to be decided on the
affidavits presented on the hearing of the
motion to modify the decree. This being
by consent, however irregular it may
have been, we will not undo what has
been done, merely for this irregularity.

The plaintiff in error now contends
that these affidavits were not evidence, be-
cause there was no privilege of cross-examina-
tion, but he raises no objection to ~~these~~ the
mode of proceeding, but insists the facts
of the case should be determined on the affidavits
submitted on both sides.

~~However~~ Though it is true a Court
of Equity has jurisdiction in cases of partition,
and may, in the same suit, enter a decree
in favor of a cotenant for rent in arrears,
Romey et al. vs. Briggs 13 M. 95, the claim
for rent must be well established. The evidence
~~on that point~~ furnished by these affidavits, ^{as to the liability of Baker for rent} was very con-
flicting to say the least, and being so, we
could not disturb the decree finally made,
upon these affidavits.

As to the power to modify the decree as
to the rent, the case of Coughran vs. Hutchins
supl 2 18 M. 391, is file to the point.
As regards the whole proceeding, on the motion
to have taken as by consent, and "consensus
talit erorem". The decree must be

affirmed

affirmed

40 — 16

Harkins

47

Paper et al.

✓

opinion by

Messrs. Ch. J.

$$\begin{array}{r} 293 \\ \hline 87 \\ 8 \\ \hline 696 \\ 2. \\ \hline 13920 \end{array}$$

✓

O.K.

In the Supreme Court.

First Grand Division--State of Illinois.

June Term, A. D. 1868.

John D. Hawkins, Plaintiff in Error,

vs.

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Decree—

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B. B. SMITH, for Plff in Error.

Chas D Hawkins
Off in Earn
Fabr Kism etc
Sep in Earn

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2. Relief from alleged fraud not appearing on the record, can be obtained only by bill of review.
3. The affidavits introduced herein are not evidence, because there was no privilege of cross examination, and if even they were they do not justify the order of the court; the preponderance of their weight is in favor of the decree as entered at August Term, 1867.

5. The court could not rightfully on a mere motion enter a final decree setting aside the judgment, even if it could, under the facts presented, have set aside the default and allowed the defendant to file an answer so that an issue could have been made on the question of rent.

B. B. SMITH and M. SCÆFFER,
Atty's for Def't in Error.

John D. Hawkins

Warren Labor et
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Pltffs Abstract
and Brief

Julia, June 2. 1868
 R. A. Milbank, City
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and Brief