

New Jersey Court of Errors and Appeals.

Between

SAMUEL ROSS,
Appellant, and
JOSEPH ENGLE, and
ABRAHAM HAINES,
Appellees.

} *An Appeal from the Court of Chancery.*

The bill in this cause is filed by Joseph Engle, assignee of Stacy Haines, to foreclose a mortgage on a farm, situated in Evesham, in the county of Burlington, executed by Abraham Haines, one of the appellees, bearing date March 25, 1821, to secure the payment of two thousand dollars, in three years, with interest. The bill states, that Stacy Haines assigned the bond and mortgage to Hinchman Haines, on the 3d day of May, 1823, and that Hinchman Haines, on the 26th October, 1841, duly assigned the said bond and mortgage to the said Joseph Engle.

That on or about the 19th day of March, 1839, the said Abraham Haines and Agnes his wife, by deed, conveyed a certain portion of the mortgaged premises, to wit: twenty-four-and-a-half acres, to one Barclay Haines, and the said Barclay Haines and wife, by deed of bargain and sale, under their hands and seals, bearing date the 3d day of April, in the year 1839, conveyed the same to one John W. Stitt, and the said John W. Stitt conveyed the same by deed of bargain and sale, under his hand and seal, bearing date the first day of July, 1840, to Charles H. White and John F. White, and the said Charles H. White and John F. White, together with Rachel C., wife of the said John F. White, conveyed the same by deed, under their hands and seals, bearing date the 11th day of June, 1841, to one Samuel Ross, by virtue of which last mentioned conveyance the said Samuel Ross claims to have some interest in that portion of the said mortgaged premises, so as aforesaid, conveyed to him. That all the said several conveyances were made subsequent to and with full knowledge of the mortgage so, as aforesaid, given to the said Stacy Haines, and subsequently assigned to the complainant. And that no part of the principal sum of two thousand dollars, mentioned in the condition of the said bond or writing obligatory, and in the proviso of redemption of the said deed or indenture of mortgage so as aforesaid, given by the said Abraham Haines and Agnes his wife, to the said Stacy Haines, and by him subsequently assigned, as aforesaid, to the said Hinchman Haines, and by the said Hinchman Haines to the complainant, has been paid, save and except such payments as are marked and endorsed upon the said bond or obligation. And that there is now due to the complainant, a large amount of the said principal sum of two thousand dollars, together with a large arrear of interest, which has accrued and become due thereon.

The bill then prays for a decree of foreclosure and sale in the usual form.

The answer of Samuel Ross admits the execution of the bond and mortgage, as stated in the bill, and also the conveyance to Barclay Haines, of twenty-four-and-a-half acres for the consideration of fifteen hundred dollars. The conveyance to Stitt, and from Stitt to the Whites, and from the Whites to the defendant, with other lands in the county of Burlington. The defendant insists that the said Abraham Haines having conveyed the twenty-four-and-a-half acres, and received a full consideration therefor, the mortgage ought to be satisfied by the said Abraham Haines, or money raised out of the residue of the mortgaged premises, before the twenty-four-and-a-half acres could be sold, or the defendant could be called upon in equity to contribute, and he alleges that the residue of the mortgaged premises are amply sufficient to pay the mortgage debt and costs, and prays that the residue may be first sold, &c.

The answer of Abraham Haines, admits the mortgage of the complainant, and the conveyances to Ross. He states, that the conveyance to Barclay Haines was in consideration of one thousand five hundred dollars, one thousand dollars thereof being paid to him by the said Barclay Haines, and the balance of five hundred dollars, being the amount due upon the said mortgage, and that it was expressly agreed by and between this defendant and the said Barclay Haines, at the time of said sale and conveyance, that the said tract of land so conveyed to him, was to be subject to the payment of the said sum of five hundred dollars so, as aforesaid, due upon the said bond and indenture of mortgage, together with the interest thereon, from the 25th of March, 1839, in relief of the residue of the said mortgaged premises, which was not to be subject to the payment of any part of the said sum of five hundred dollars or the interest that might accrue thereon, after the 25th March, 1839.

That the sale made of the said tract of land, by the said Barclay Haines and wife, to the said John W. Stitt, was made with a full knowledge on his part of said agreement, and that the said John W. Stitt purchased the same, subject to the payment of the whole of the said sum of five hundred dollars, and gave to the said Barclay Haines, a memorandum in writing, under his hand, of which the following is a true copy: "I, John W. Stitt have bought of Barclay Haines, a certain tract of land containing about twenty-four acres, subject to a mortgage of five hundred dollars, held by Hinchman Haines, and to pay the interest up from the 7th day of March past, the certain tract of land above mentioned, is situate in Evesham township, state of New Jersey, which the said Barclay Haines bought of his father Abraham Haines, and all the rails on the road leading up to the grave yard, belong to the said Abraham Haines, and he has the liberty to move them for his own use any time after the 25th day of March next, 1840." Which said memorandum of agreement is now in the possession of this defendant, and ready to

be produced when and where this honorable Court shall direct. That the said Charles H. White and John F. White, at the time of the said sale and conveyance to them, had notice of the said incumbrance, and that it was to be paid out of the land so, as aforesaid, conveyed to them, and that the said Samuel Ross, at the time of the said sale and conveyance to him, had full notice of the said incumbrance, and that the said land so, as aforesaid, conveyed to him, was alone chargeable with the payment thereof. And he submits to the Court that the twenty-four-and-a-half acres in the possession of Ross, ought to be chargeable with five hundred dollars and interest, and that the residue should not be sold unless the twenty-four-and-a-half acres should prove insufficient to satisfy the complainant. 10

REPLICATION BY COMPLAINANT.

(Prout the pleadings in this cause, and the deeds and papers referred to therein.)

DEPOSITIONS AND EXHIBITS ON THE PART OF THE COMPLAINANT.

Examination of Barclay Haines.—Barclay Haines, being duly affirmed—saith I am the son of the said Abraham Haines. On the 19th of March, 1839, I purchased of Abraham Haines and wife, a tract of land, situate in the township of Evesham, in said county of Burlington, containing about twenty-four acres and thirty-four hundredths of an acre. It is the same tract of land set out in the answer of the said Abraham Haines. I afterwards sold this property to John W. Stitt; said Stitt afterwards sold it to Charles H. White and John F. White, of the city of Philadelphia—they conveyed it to defendant, Samuel Ross. At the time of the conveyance to me, there was a mortgage upon this, together with the other property of Abraham Haines, it was held by Hinchman Haines. The amount due upon the mortgage, at the time of the sale to me, was five hundred dollars on the 25th of March, 1839, the balance of the mortgage and all the interest having been paid up. I was to give Abraham Haines one thousand five hundred dollars for this tract of land, one thousand dollars in trade between us, and five hundred dollars, the amount due upon the mortgage, which I was to pay. 20

(At this part of the examination, Thomas H. Dudley appeared in behalf of the defendant, Samuel Ross, and objected to the witness on the ground of incompetency. The examination then proceeded in the presence of parties.) 30

There was no written agreement between myself and Abraham Haines. It was the express agreement between myself and Abraham Haines, that this part of the land, (the twenty-four acres,) was to be liable for the amount remaining due upon the mortgage. When I sold this land to Mr. Stitt, I gave him notice that this twenty-four acres was liable, and alone liable for the amount due on the mort-

gage. There was no written agreement between myself and Mr. Stitt at the time of the sale, it was verbal, but reduced to writing upon the delivery of the deed. (Paper produced and marked exhibit A, on the part of Haines, defendant, being shown to witness, he says it is the agreement above referred to.) Saw John Stitt sign the agreement. Saw it witnessed by J. R. Value, at the time. Value is the clerk of Mr. Stitt, think his name is James, but am not certain. Do not know where Mr. Value resides. He lived in the state of Pennsylvania. Have never known him to be in the state of New

10 Jersey. The tract of land mentioned in the agreement, is the same tract of land that I have before mentioned, as having been purchased by me from Abraham Haines. Mr. Stitt was to give me for this land, one thousand six hundred dollars, one hundred dollars in cash, one thousand dollars in trade, and the five hundred dollars due on the mortgage. The five hundred dollars was a part of the consideration. I had paid up the interest up to 7th March, 1839. Stitt was to pay the interest after that time. I knew Charles H. White and John F. White; they resided at the time in Philadelphia, and to the best of my knowledge reside there still; had some conversation with

20 one of them about the time they purchased. I was at my father's in Evesham, when one of the Mr. Whites' and a scrivener who had his office in Arch street, drove up. They inquired for Abraham Haines, some one called him and he came, they had a conversation in my presence; they wished to know of him how this tract of land was situated; whether it was clear or whether it was incumbered. He told them that that tract of land was incumbered for five hundred dollars. I mean the twenty-four acres. They all spoke of that tract. And also told them that all the rails in the road around the property belonged to him, except the post and rail fence. The road

30 that my father spoke of was the Eldridge grave yard road. Curtis then said to Mr. White, that man Stitt, would have cheated you perhaps, if you had not have come up. My father told them my son (looking to me) sold Stitt that property, and has an agreement from Stitt, showing about that mortgage. They, Curtis and White, asked me if I had that paper, I told them I had and produced the paper to them, and they read it, both of them. Curtis replied to Mr. White, this shows the thing exactly, that there is a mortgage for five hundred dollars on that property. White requested Curtis to take a copy of this agreement, which he did. They then asked who held

40 this mortgage. White was the person, I think, who asked. I told them Hinchman Haines held the mortgage, they asked if I knew whether that money, the five hundred dollars was wanted, I replied that I did not know whether it was or not. White asked if Hinchman Haines lived far distant, I told him I did not think it was half a mile. They then asked me if I would go over with them to see him. I went over with them to see him. Hinchman Haines was not at home. We were informed that he had gone to meeting. We went towards the meeting-house and met him returning home. I stopped him and

gave him an introduction to Mr. White and Mr. Curtis. White then asked Hinchman Haines whether he held a mortgage on this property, describing the property. He said he did. White then asked him whether he wanted his money. He said he would like the mortgage paid off, there were so many endorsements on the bond that it was covered. White told him that he had not bought the property as yet, but he expected he should, and if he did buy it, he would like to make some arrangement about the mortgage; he said that if he requested it, he would give him a new bond and mortgage on the property, in as much as the old one was so full of endorsements. He then told him that he would pay up the interest punctually, and pay up all the back interest. He also told Hinchman, that he thought he would be able to pay off all the principal and interest within the year, if he got the property. Upon these terms Hinchman consented to let the mortgage lay. White then asked Hinchman where he could send the interest money. Hinchman told him at the post office, in Swain's tavern, at Marlton. They then parted. I do not know which one of the Whites it was, they are in partnership together. I have a slight acquaintance with Samuel Ross, the defendant in this case. I had a conversation with Mr. Ross previous to his purchasing this property. Richard W. Howell, of Camden, counsel for Mr. Ross, called to me as I was passing his office, and wished me to tell him what I knew about the title of this property that John Stitt purchased of me, and how it was situated as to incumbrances. He said a client of his, Mr. Ross, was about purchasing it. I told him how the property was situated. I told him that it was liable for this five hundred dollars, and alone liable. He then asked me, if I would walk up with him to see Mr. Ross. I went up with him, and saw Mr. Ross at his factory, in Camden. I told Mr. Ross that this property was subject to the mortgage of five hundred dollars, as I had told Mr. Howell before. I told Mr. Ross about the agreement between myself and Abraham Haines, at the time I purchased it, in the same manner as I have stated it in this examination, and also that I had sold it to Mr. Stitt, subject to the mortgage, and that I had informed one of the Whites of its being liable. I do not remember that any thing else occurred at that time.

Cross examined on the part of the defendant, Samuel Ross.

I do not remember the time when it was Mr. Howell called on me, I do not remember the month it was in; do not know at what time the sale from White to Ross took place; do not remember that any persons were present in the factory at the time of the conversation, except myself, Howell and Ross. When Howell called to me, he told me that he wished me to go up and see Ross, as he was about purchasing it. I do not recollect that I called on Mr. Howell, to see about any business of my own. Do not recollect Mr. Ross saying any thing about his dealing with Mr. White, and that they would not deceive him. I am positive Mr. Howell told me he had not purchased the property at that time.

And being again examined in chief.

He further saith—I had not, prior to this visit with Mr. Howell, any acquaintance with Samuel Ross. At the time of our visit Mr. Howell stated the object of our visit. Do not recollect that there was any thing said about the consideration to be given by Mr. Ross for the property, either by Ross or Howell.

And being examined on the part of complainant.

Further saith—That the bond and mortgage marked exhibits B and C, on the part of the complainant, being shown to the witness, constitute the incumbrance above spoken of.

(Mr. Dudley, on behalf of defendant, objected to the whole of this evidence, and especially to paper marked exhibit A, above referred to.)

The re-examination of Barclay Haines prout the same.

Craig Moffett, a witness produced on the part of Abraham Haines, being duly sworn, deposes and saith, (Exhibit B, on the part of the defendant Abraham Haines, being shown to the witness, he says,) I am the subscribing witness thereto, it being a deed of release under the hand and seal of Abraham Haines the defendant, to Barclay Haines the witness examined in this case. I saw Abraham Haines sign, seal and deliver this release to Barclay Haines on the day it bears date.

(Mr. Dudley in behalf of Mr. Ross, objected to the examination and testimony of this witness, Craig Moffett.)

March 7, 1844.

ABRAHAM HAINES	}	Release, dated March 4, 1844, marked Exhibit B, exparte Abraham Haines.
to		
30 BARCLAY HAINES,		JOSEPH V. BURR, M. C.

EXHIBITS ON THE PART OF THE DEFENDANT, SAMUEL ROSS.

Exhibit A, on part of said Ross, a defendant.

“ B, on part of said defendant.

“ C, on the part of said defendant.

“ D, on part of said defendant.

Richard W. Howell, a witness produced on the part of Samuel Ross, one of the defendants, being duly sworn, deposes and saith—I am acquainted with Barclay Haines. I have had a conversation with him in my office, in relation to some part of the property bought by Mr. Ross, of Messrs. White, cabinet makers, of Philadelphia. My recollection of the matter is this—A short time previous to June term, 1841, of Gloucester county court, Mr. Haines called at my office to retain me as his attorney, in a suit brought against him by James Troth. After arranging the business, I mentioned to him I had seen his name in connection with some property that Mr. Ross had either purchased or was in negotiation for with the Whites, and that it might be important for Mr. Ross to

possess any information he might have in relation to it. He, Haines, having previously said he was acquainted with the property. Mr. Haines said he would accompany me in search of Mr. Ross, and we found him at his hair manufactory, in Camden. My impression is, Mr. Ross was just about starting for to visit this farm, he either had purchased or contracted for, with the Whites. I mentioned to Mr. Ross this was Mr. Haines, and introduced him, and stated that he, Haines, knew something about the property or some part of it. Mr. Haines went into an explanation of something relative to the property, which at the time I thought might be important for Mr. Ross 10 to know, but the particulars of which I do not now recollect. I had been spoken to by Mr. Ross, before that time, to draw a deed of conveyance from the Whites to him.

I do not recollect whether the conversation was before or after the 11th of June, 1841. I mean the conversation with Barclay Haines—it must have been about that time.

I remember that Mr. Ross had not been particularly pleased *with*, and rather cut short the explanation of Mr. Haines, by remarking that he was entirely satisfied. The substance of it was this, that the Whites were honorable men, and that he had nothing to fear 20 from them, or that they would do what was right in the matter.

Question proposed to witness by Mr. Jeffers, counsel for Ross.

From what passed in the conversation between Ross and Haines, did you not understand that Ross had already purchased the property of the Whites?

Objected to by Mr. Moffet.

Witness answers—My impression certainly is that the negotiation was settled at that time.

Being cross examined on the part of Abraham Haines, one 30 of the defendants, by Mr. Moffet, his counsel.

Witness saith—I drew the herein exhibit A, from White's to Ross. I can't recollect whether I drew the same before or after this conversation with Ross.

I can't say whether this deed was with me unexecuted at that time or not. My impression is that the papers connected with the property were with me at this time, and had been with me for some time. Exhibit A, is not the first deed I drew for that property, it was the only one that was executed on my drawing. I drew another deed which was not executed, there were some portion of it, can't 40 say what, but connected with the warranty, which I do not now recollect—that was objected to by one of the Mr. Whites. It might have been about the five hundred dollar mortgage or it may not—can't now recollect positively.

The conversation I had with Mr. Haines previous to going to Mr. Ross, was about an incumbrance on the property, or some part of it—the particulars of which I do not recollect. It was Mr. Haines' knowledge of that matter, whatever it was, that I desired Mr. Ross

to possess. I presume Mr. Haines made the same statement to Mr. Ross, which he had made to me in substance, in relation to this matter, whatever it was, but Mr. Ross checked the conversation. It struck me at the moment, that Mr. Ross was not particularly desirous of hearing Mr. Haines—his carriage was waiting for him at the door of his house at the time. I can't say whether at this time the deed was executed or not. I believe I should have taken up Mr. Haines to Mr. Ross whether the deed was executed or not.

10 The June term of Gloucester court, 1841, commenced the 15th of the month—on that day I filed a recognizance of special bail for Barclay Haines, at the suit of Troth. The conversation with Haines was previously to filing bail, can't say what day. The deed exhibit A, was not executed in my presence. I think there was a gentleman of the name of Davis, a student in Green's office, before whom the acknowledgement was taken by Green.

I had been employed previously to this, by Mr. Ross, to draw the deed.

Richard W. Howell, a witness produced on the part of the defendant, Abraham Haines, being duly sworn according to law (and
20 re-examined) deposes and says:—I have been previously examined as a witness in this cause on the part of Samuel Ross. In that examination I recollect stating that I had an interview with Barclay Haines in relation to some property purchased or about to be purchased by Samuel Ross of the Messrs. White, and on the day of that interview I was retained by Barclay Haines to defend a suit brought against him by James Troth, in one of the courts of Gloucester county. He paid me a retaining fee on that day in that suit, for which I gave him a receipt. The paper shown to witness and marked Exhibit C on the part of Abraham Haines, is that receipt
30 and is in the hand writing of the witness.

In Chancery of New Jersey.

Between

SAMUEL ROSS,
one of the Defendants in the Bill of
Complaint of
JOSEPH ENGLE,
Complainant, and
ABRAHAM HAINES,
Defendant,

} On Bill, proofs, &c.
} Appeal.

40 The said Samuel Ross, defendant, hereby appeals from so much of the final decree made in this Court, in the above stated cause, as declares that the amount of the balance due on the complainant's mortgage, shall be raised and made out of the twenty-four acres and thirty-one hundredths of an acre of land, which the said defendant purchased of Charles H. White and John F. White, to the Court of Errors and Appeals.