

No. 12930

Supreme Court of Illinois

Van Court

vs.

Bushnell et al

71641  7

STATE OF ILLINOIS, SS. . . . IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

BENJAMIN P. VANCOURT,
Impleaded, &c.
vs.
ALVIN W. BUSHNELL & DAVID MCKINNEY.

ERROR TO PEORIA CIRCUIT COURT.

BRIEF OF PLAINTIFF IN ERROR.

1. The Statute of Mechanics' Lien provides an extraordinary and cumulative remedy, and is therefore to be strictly construed against the party seeking to enforce it, especially where the rights of third persons are concerned.

2. The demurrer to the bill of complaint should have been sustained. The settlement with Hunt, and the giving of his note bearing interest at the rate of TEN per cent., satisfied the alleged original contract, and discharged any lien upon the premises therefor.

And the suit was brought to enforce, not the original contract with Hunt & Bailey, but the subsequent and different contract with Jared C. Hunt—a contract altogether unknown to the statute.

See minutes of argument 3, 4,

3. The answer of VanCourt raised the following issues, namely:

1. Whether a contract was made with "the owner of the land."
2. Whether *any* lumber was used on the premises?
3. *How much* lumber (if any) was used thereon.
4. Whether the price and value of the lumber was due and payable December 12th, 1857, or *more than six months* before the filing of the bill.
5. Whether the *time* for the payment of the price of the lumber *was extended* from the 12th December to the 1st April following.

6. Whether the *estate of* VanCourt in the premises, acquired by purchase on the 11th January, 1858, and on which he had paid \$400, and become bound to pay \$800 on the title-bond from Underhill, was subject to the statutory lien at the suit of the complainants.

The verdict of the jury, to wit: "We the jury find for the complainants, and assess their *damages* at four hundred and twenty-seven dollars, and sustain the lien as against VanCourt," does not find these issues. It does not show that *any* sum is due upon the *original contract*: it does ^{not} show *by whom* or *to whom* the sum mentioned ought to be paid: it does not show "*what right and interest*" in the premises is subject to the lien. For these reasons the verdict should have been set aside and a new trial allowed.

See minutes of argument 5,

4. The court admitted improper evidence for the complainants. The note of J. C. Hunt is not evidence of the contract, under which, if at all, the complainants must recover; and still less can it be evidence against VanCourt, a stranger to all the transactions between Hunt & Bailey and the complainants.

Nor was it ever before gravely insisted, that an *innocent stranger*, in a position such as VanCourt occupies, could be prejudiced by the *mere conversations and declarations* of parties standing in the relation which Hunt & Bailey, the complainants, and the witness House bear toward him in this case. Yet the court below admitted such declarations at the *instance of the complainants*, and *in their favor*, against the objections of VanCourt. For these reasons, the verdict ought to have been set aside and a new trial allowed.

See minutes of argument 6.

5. The verdict is at *first blush* clearly against *the weight of evidence*. The witness HOUSE argued that the lumber was not to be paid for till the spring of 1858; but the testimony of JOHN O. PETRIE, sustained by the *answer* of VANCOURT under oath, and confirmed by the evidence of GEORGE CLARK, shows, not merely by a "weight of evidence," but "beyond all reasonable doubt," that the price of the lumber was due on the 12th December, 1857, and consequently *more than six months* before the filing of the bill of complaint. Nor is this all. The testimony of PETRIE also shows that when the complainants settled with Hunt, they took not only the note for *ten per cent. interest*, but also *an assignment of a policy of insurance as a further security*.

But the evidence for the complainants, touching the contract, the amount of lumber *used on the premises*, and *the value of the same*, is altogether too vague, uncertain and insufficient to warrant the finding of the jury.

The evidence may be examined in vain for *proof* that any *particular quantity* of lumber, of any *particular value*, was used in the erection of the buildings. For these reasons, the verdict ought to have been set aside, and a new trial awarded.

See minutes of argument 1. 2. 7. 9. 10. 11.

6. The instructions given for the complainants are contrary to the law, and calculated to mislead the jury. The first and second instructions are bad for uncertainty, and because not confined to the issues in the case. The third instruction contains the proposition that *if when the lumber was furnished, there was no time SPECIFIED when PAYMENT was to be made, and AFTERWARDS a day of payment was fixed upon, such latter day would be the time when the money would be DUE AND PAYABLE under THE CONTRACT!* Proviso, that "*such payment should not extend over three years from the time of such contract.*" As "there are some things which a Court, constituted as this is, may be presumed to know," the plaintiff in error deems it unnecessary to argue here, that unless a credit had been definitely given, an action might have been maintained as soon as "the lumber was furnished," to recover the price thereof. For these reasons, the verdict ought to have been set aside, and a new trial allowed.

See minutes of argument 8. 12.

7. The decree is, that unless Hunt & Bailey pay \$427, &c., "all the title, &c., of Hunt, Bailey and VanCourt, and each of them, be sold," &c. Yet VanCourt acquired part of the right he had in the premises at the date of the decree from Isaac Underhill, the obligor in the title-bond. The decree is also otherwise unsupported by, and variant from the verdict. For these reasons, the motion to vacate the decree ought to have been allowed.

AUTHORITIES:

- Statute of Liens, Sec. 1, 2, 3, 4, 12, 14, 17, 24, 25, 26, &c.
- Carroll v. Craine, 4 Gil. R., 566.
- Logan v. Dunlap, 3 Scam. R., 189.
- Hunter and al. v. Blanchard, 18 Ill. R., 318.
- Shaffer v. Wend and al., 3 Gil. R., 511.
- Underhill v. Corwin and al., 15 Ill. R. 526.
- Greenleaf's Evidence—Title *Admissions*, particularly pt. 2, ch. xi. sec. 190 and cases cited.

CHARLES C. BONNEY,
of Counsel for Plaintiff in Error.

In the Supreme Court

Benjamin P. Van Court &c.

v.

Alvin W. Bushnell &c.

Error to Peoria Circuit Court

Brief of Plaintiff

State of Illinois
In the Supreme Court at Ottawa.
Of the April Term A.D. 1859 -
Benjamin P. VanCourt
impleaded with &c.

v.
Alvin W. Bushnell &
David McKimsey

Error to Peoria
Circuit Court.

Minutes of Argument
for plaintiff in error.

Upon the facts set out in the
abstract, and the points made
in the printed brief of the
plaintiff, he makes the following
suggestions &c.

1. The bill of complaint states a contract
with Hunt and Bailey. The evidence
(if it shows any contract at all) shows
that it was made with Hunt alone.
The partnership between Hunt & Bailey,
extended only to the butchering bu=
=siness; Bailey had no interest in
the Lot; the title-bond was
assigned to Hunt only and he
alone assigned and transferred
it to VanCourt. So the contract

2

alleged is not proved.

2 The evidence shows that Bailey was not in any sense, the owner of the Lot. The statute must be strictly construed against the party seeking to enforce it, and hence there was no contract with the owner of the lot within the meaning of the statute, and the suit cannot be maintained. Sections 1. 17. A joint contract with owners and others is not enforceable under this statute.

3 It is said by the defendants, that the causes of demurrer, were waived by the answer. A defective statement of a good cause of action, is cured by answering over, but if the matters stated cannot constitute a sufficient cause of action, the objection may be taken in arrest of judgment, or on error. The bill shows that if there ever was an original contract as charged in the bill, it was satisfied by the new contract with Hunt; - a negotiable contract drawing interest at the rate of ten per

cent. Otherwise, why was this ten per cent added? The bill charges that the contract price was not payable till the first of April, the settlement and agreement to pay the ten per cent, were not made till the 23^d day of January, yet the time of payment was not changed. And let it be remembered that at the time of this transaction Vanbourn had become the purchaser of the premises, and that his title was of record.

- 4 The question as to the satisfaction of the original contract, by the note of Hunt, is, not whether under any circumstances the original contract could be enforced between the parties, but whether under all the circumstances of the case, the lien, (if any had attached), was discharged as against Vanbourn, who ~~permanently~~ the premises after the building had been completed, was not a party to the alleged contract, and who is not even charged with any knowledge thereof. The cases

cited by the defendants are not authority on this point. But it might well be insisted, that even as between the parties, the alleged original contract was absolutely discharged.

5 The answer of Van Court shows that he is an innocent purchaser of the premises, and had no notice either actual or constructive of the complainants' claim. He cannot therefore be compelled by inferences or presumptions to pay the alleged debt of Hunt & Bailey to the complainants. As against him, they must be held to strict proof of their whole case. The law would rather refuse them the extraordinary remedy they seek, and leave them to their action at the common law, than take the money of Van Court to pay their demand without a conclusive warrant therefor.

6 There is no legal and sufficient proof of any original contract for the materials. The cases in Greenleaf show that the conversations and declarations of Hunt,
 # see printed brief.

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 # see printed brief.

[admitted,

Bailey, House &c. were improperly, Hunt held the premises by virtue of a "personal contract", which he afterwards sold and assigned to Van Bort, without any "notice of the state of his title as affected by the admissions in question.

7 It is clear that the price of the material was due and payable under "the original contract" on the 12th day of December 1857, and so the suit was not brought within the time allowed by law therefor. There was no contract for any credit, till the giving of the note. But ^{it} is pretended that there was an understanding that some credit would be given. Any such understanding would be void for uncertainty. It would not bind the complainants, and could not be pleaded in bar, or in abatement of their demand. But the testimony of Petrie shows conclusively against the complainants, that no credit was given.

8 The limitations in Section 2 do not affect this case. They refer to the

"original contract." In the case at bar the credit was not given till after the last item was delivered, and the right of action had accrued.

- 9 Not only was the note given, and the ten per cent added, but the policy of insurance was assigned as a further consideration for the discharge of the "original contract."
- 10 It is manifest that gross injustice has been done. The record shows that all the jury did, was to compute the amount due on the note, and say that Van Court ought to pay it! The amount of lumber used on the premises is not shown. It is plain that no such sum of money as \$427. could be due from Hunt and Bailey to the complainants. They sue on an alleged contract with two, and recover on a different contract with one. They take a decree to sell even the interest in the premises, acquired by Van Court from Henderson!

11 The defendants in error talk eloquently about the protection and encouragement of architecture, and the intention of the legislature! To all this, the plaintiff in error replies that if the legislature intended to encourage lumber-merchants by the plunder of the innocent it intended an outrage on which this court ought to put "an eternal quicquid". But the legislature intended no such thing. The statute of heirs was enacted to protect the innocent and the vigilant, not the guilty and the supine: to encourage honest industry and good faith in trade, not to promote such questionable adventures for gain as that in which the complainants below embarked.

12 But in what language shall the plaintiff in error speak of the sulings of the court below against him? — Does the plaintiff err in insisting that there was an extraordinary violation of the fixed rules and the true spirit of the

law? that the jury were prevented
from doing "substantial justice"
and led to render a verdict mani-
-festly against the weight of the
evidence, manifestly against the
law of the land, and manifestly
against the rights of the plaintiff
involved in the case?

Charles C. Bonney
attorney for plaintiff
in error -

"

Benjamin P. Vanbourn & Co.

v-

Bushnell & McKinney

Minutes of
agreement for
plaintiff

Filed May 6, 1859
H. Deland
Clerk

Bonney -

Be it remembered that heretofore, to wit: on the twenty second day of July in the year of our Lord one thousand eight hundred and fifty eight there was filed in the Office of the Clerk of the Circuit Court in and for the County of Peoria in the State of Illinois a Bill for Mechanics Lien in the words and figures following, to wit:

Bill.

"State of Illinois

Peoria County.

To the Honorable Elisha N. Powell, Judge
of the Circuit Court of said County
in Chancery Sitting —

Complaining Sheweth unto Your Honor Your Orator Abner W. Rushnell and David McKinney doing business under the style and name of Rushnell & McKinney, That in the latter part of the month of October A.D. 1857, Isaac C. Hunt & Adolphus R. Bailey doing business under the name & style of I. C. Hunt & Co. Contracted with Your Orators, under the name & style aforesaid, at Peoria, in said county, for the sale and delivery to them of a quantity of lumber to be used by them the said I. C. Hunt & Co. in the erection and construction of certain dwelling houses for themselves upon Lot One (1) in Block Thirty (35) Five in Underhill addition to the City of Peoria in the County & State aforesaid, which said lumber was to be delivered to the said I. C. Hunt & Co. by Your Orators, at the customary market prices as the said I. C. Hunt & Co. might want & call for the same (and was to be paid for by the said I. C. Hunt & Co. on the first day of April 1858

And Your Orators show that pursuant to said contract

Orators sold and delivered to the said J. C. Hunt & Co. between the second day of November and the twelfth day of December A.D. 1857, lumber of various descriptions as the same was called for and designated to the amount in all of four hundred & fifteen ⁵³/₁₀₀ dollars upon which they paid the sum of fifteen ⁵³/₁₀₀ dollars - leaving still due and unpaid the sum of four hundred dollars - for which sum last named, the said Jared C. Hunt executed his promissory note to your Orators on the 23rd day of January 1858 payable on or before April 1st 1858 with interest at the rate of ten per cent per annum until paid, as will more fully appear by the said note and the account marked "A" which said account and a copy of said note are attached and made part of this Bill, and the original of which said note will be produced in evidence on the trial of this cause; the said Jared C. Hunt having assumed the payment of all debts against the said firm of J. C. Hunt & Co. which said firm was dissolved about the 1st January last past.

And your Orators show that the whole of the Lumber and Materials in said Bill mentioned were received by the said J. C. Hunt & Co. and by them used in and about the construction & erection of said dwelling houses upon the lot or piece of ground above named. Your Orators are unable to find any title of Record to the said J. C. Hunt & Co. or Jared C. Hunt, But that the legal title to the same is in one Isaac Underhill who on the first day of February A.D. 1850 gave a title bond for the property above described to one Charles C. Thoughton. And your Orators charge upon information and belief that the said Jared C. Hunt

has either a title bond for the said property from the said Houghton or else has received from the said Houghton a transfer of the title bond from the said Underhill to him the said Houghton, which said title bond from the said Underhill or from the said Houghton is for some purpose about which your Orators are not informed, now in the possession of one Benjamin P. Tim Court.

Your Orators further show that six months have not yet elapsed since the last of said Bill of lumber was furnished and the price thereof became due and payable. They further show that said note so given for the amount aforesaid has long since become due & payable & that no part of it has been paid, although the same has often been demanded - all which is contrary to equity and good conscience, and tends to the wrong & injury of your Orators in the premises, and inasmuch as your Orators can only be adequately relieved in a court of equity, your Orators pray that the said Jared E. Hunt and Adolphus R. Bailey, Isaac Underhill, Charles E. Houghton and Benjamin P. Tim Court, be each duly summoned to appear and answer the Bill, and each and every part thereof - and that as fully as if the same were repeated, and they severally interrogated thereto. That they further answer and set forth their respective rights & interests in said lot, and whether they the said Jared, Adolphus, Charles, Benjamin or any or either of them has title by deed or otherwise to the said lot or any part of it, and what part, and that they set out, and attach to their said answer a copy of the deed, agreement or contract under which they or either of them hold, and in case they, the said ~~Jared~~ ^{Jared}, Adolphus, Charles and Benjamin, or any or either of them have no deed for any part of said lot.

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nor any writing in relation thereto, then that they set ^{out} and declare respectively what interest they, or any, or either of them have therein, and the nature of the arrangement, understanding or agreement between the parties, under and in virtue of which the said J. C. Hunt & Co or the said David C. Hunt has erected said house upon said lot -

And Your Orator further pray, that on the final hearing of this Cause, an account be taken of the amount due to them from the said J. C. Hunt & Co or David C. Hunt on said lumber & note. That Your Orator be allowed a lien upon said Lot, or upon said house as the nature of the case may render proper for the amount & that in default of payment thereof, with costs by a short day to be fixed by the court, the said premises be decreed to be sold to pay and satisfy the same - and that Your Orator may have such other and further relief in the premises, as to your Honor may seem meet, to equity shall appertain, and as the nature of the case may require - and as in duty bound your Orator will ~~ever~~ ever pray &c.

Alvin W. Bushnell
David McKinny
By Cooper & Reynolds
their Solicitors

Precipe
for
Summons.

"Alvin W. Bushnell, David McKinny

vs

David C. Hunt, Adolphus R. Baily.

Isaac Undehill, Charles B. Boughton, Benjamin P. VanCout

said defendants returnable to the next November Term. Term July 22^d 1855

To Enoch P. Hoan, Cleric }

Cooper & Reynolds."

For Mechanics Lien
The clerk will please issue
Summons in Chancery for

Copy of
note

" Peoria Jan. 23^d 1858

On or before April 1st 1858 I promise to pay to the order of
Bushman & McKinney four hundred dollars, on acc of Lumber and
Shingles furnished by said Bushnell & McKinney and used in the
erection of buildings situated on Lot (1) Block (35) Underhills
addition to Peoria, with interest at ten per cent. per annum until paid
\$400.
J. C. Hunt."

Account

"Peoria, Ill.

185

J. C. Hunt & Co

Bought of Bushnell & McKinney
Dealers in Lumber, Shingles & Lath
Corner of Water and Chestnut Streets.

1857

Nov	2	120 ft. $\frac{1}{6}$ - 20 Timber	25	3.00
		240 .. $\frac{1}{6}$ - 12 & 16 "	22	5.28
		132 .. $\frac{2}{4}$ - 18 Scant.	25	3.30
		234 .. $\frac{4}{4}$ - 12 & 16 "	21	4.91
		1100 .. 12 ft. Cembds.	20	22.00
		3000 18 in Shingles	$\frac{5}{2}$	16.50
"	3	474 .. Cembds & $\frac{2}{8}$ - 16 Joist	20	9.48
		99 .. $\frac{2}{4}$ Scant	21	2.08
"	5	492 .. Cembds & 2 in plank	20	9.84
		84 .. $\frac{4}{4}$ - 16 Scant	21	1.76
"	7	681 .. long timber	25	17.02
		912 .. Cen "	22	20.06
		228 .. Scant.	21	4.79
		762 .. Joist	20	15.24
"	30	66 .. $\frac{2}{4}$ Scant.	21	1.39
5		120 .. $\frac{1}{6}$ - 20 Timber	25	3.00

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Dec.

	387	"	Cen. bds	20	7.74
1	1306	"	Com bds.	20	26.12
	380	"	$\frac{2}{4}$ - 16 scant	21	7.98
"	2	214	" $\frac{2}{4}$ scant.	21	4.49
	378	"	$\frac{2}{8}$ - 20 Joist	25	9.45
	252	"	$\frac{1}{6}$ Timber	22	5.54
	1423	"	Cor. bds	20	28.46
"	3	495	" $\frac{2}{4}$ scant	21	10.39
	48	"	$\frac{1}{6}$ - 16 Timber	22	1.06
	1000	"	Cen bds	20	20.00
	453	"	Cull bds.	16	7.25
"	4	143	" $\frac{2}{4}$ - 20 scant.	25	3.57
	220	"	$\frac{2}{4}$ - 16 "	21	4.62
	420	"	$\frac{2}{8}$ - 16 Joist	20	8.40
	848	"	Cull bds	16	13.57
	3000	18 in	shaved shs.	5 $\frac{1}{4}$	15.75

\$ 314.04

(Carried Forward)

Amount Brought Forward — \$ 314.04

Dec.	5	3000	18 in shingles	5 $\frac{1}{4}$	15.75
"	7	1217	ft. Cen bds	20	24.34
		400	" Cull bds.	16	6.40
		84	" clear siding	24	2.02
"	8	405	" Cull bds	16	6.48
"	9	156	" 1 $\frac{1}{2}$ in Cen bds	20	3.12
		400	" Corn siding	20	8.00
		400	" Corn inch bds.	20	8.00
		3000	shingles	5 $\frac{1}{4}$	15.75

"	10	346	"	Can bds.	20	6.92
		64	"	Timber	22	1.41
"	12	132	"	1/6 - 22 Timber	25	3.30

\$ 415.53

Payment on above bill due April 1st 1858

Bill originally sold to J. C. Hunt & Co. — Partnership
 dissolved about Jan'y 1st 1858 — Hunt assuming the
 payment of all debts against firm

Firm of J. C. Hunt & Co. { Jared C. Hunt
 Adolphus R. Bailey. "

On the same day, to wit: on the twenty second day of July in the year of our
 Lord one thousand eight hundred and fifty eight there was issued out of the office of the
 clerk of said court under the seal thereof a Summons which with the endorsement
 thereon is in the words and figures following, to wit:

"The People of the State of Illinois

To the Sheriff of Peoria County, Greeting:

We Command You to Summon Jacob C. Hunt, Adolphus R. Bailey, Isaac Underhill, Charles C. Houghton Benjamin P. Van Court if they may be found in your County, to appear before our Circuit Court on the first day of the term thereof, to be held at Peoria, within and for the said County of Peoria, on the 3^d Monday of November next then and there, in our said Court, to answer the matters and things contained in a certain bill of Complaint lately exhibited before our circuit court by Alvin W. Rushnell & David McKinney for Mechanic Lien, and make return of this writ with an endorsement of the time and manner of serving the same, on or before the first day of the term of the said court, to be held as aforesaid.



Witness Enoch P. Sloan, clerk of our said court, and the Seal thereof, at Peoria, this 22^d day of July in the year of our Lord one thousand eight hundred and fifty eight.
Enoch P. Sloan, clerk

[Endorsement]

Endorsement

"I have served the within writ on the within named Isaac Underhill, Benj. P. Van Court by reading & giving them a true copy of of the same July 30th 1858

Jacob C. Hunt, Adolphus R. Bailey & Charles C. Houghton is not found in my ^{and} Court November 15 1858

J. W. Smith, Sheriff."

And afterwards to wit: on the fifteenth day of November in the year of our Lord one thousand eight hundred and fifty eight there was filed in the office of the clerk of said court in said cause the demurrer of said defendant Benjamin P. Van Court to the bill in the words and figures following, to wit:

"State of Illinois ss.
County of Peoria

In the Circuit Court
Of the November Term A.D. 1858

Alvin W. Bucknell &
David M. Kinney

— versus —

Jared C. Hunt
Adolphus R. Bailey
Isaac Underhill &
Charles C. Houghton &
Benjamin P. Van Court

Mechanics Lien

The demurrer of Benjamin P. Van Court defendant impleaded with Jared C. Hunt, Adolphus R. Bailey, Isaac Underhill, & Charles C. Houghton to the bill of complaint of Alvin W. Bucknell & David M. Kinney Complainants

The defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said Complainants bill to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto and for cause of demurrer sheweth, that the said Complainants have not in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as thereby sought, and prayed for, from, or against this defendant, wherefore, this defendant demands the judgment of this Honorable Court whether he shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in

9 1/2

this being sustained

And the said Defendant states and shows to the court here following Special Causes of Demurrer to the said bill, to wit:

- 1 The Settlement of the indebtedness, and the taking of the note therein discharged the lien if any had attached
- 2 The Contract which the court is asked to enforce is one wholly unknown to the Statute of Mechanics Lien
- 3 The Petition is otherwise defective

Charles C. Donney

Sol. & Counsel for Dft."

Proceedings at a term of the Circuit Court began and held at the Court house in the City and County of Peoria, State of Illinois, on the third Monday in the Month of November in the year of our Lord one thousand eight hundred and fifty eight, it being the fifteenth day of said Month. Present, C. V. Powell, Judge of the sixteenth judicial Circuit in said State, Francis W. Smith, Sheriff and Enoch P. Sloan, Clerk - to wit:

Saturday November 9th A. D. 1858

Alvan W. Bushnell

David McKinney

vs

Mechanics Lien

James C. Hunt, Adolphus R. Raily,
Isaac Underhill, Charles C. Throughton

Benjamin P. VonaCourt

This day Came the Plaintiffs by Cooper their attorney and moved to the satisfaction of the court due notice of the Pendency of this suit had been given to the said James C. Hunt and

Adolphus R. Bailey by the publication of an advertisement thereof six weeks successively in a newspaper printed and published weekly in the City of Peoria in this County the first publication whereof was on the 30th July 1858

The defendant Van Court by Bonney his attorney filed his demurrer to plaintiffs petition and this cause now coming on to be heard on said demurrer, and the court being fully advised in the premises, is of opinion that the petition aforesaid and the matters therein contained, are sufficient to support this action, and therefore overrules said demurrer;

And thereupon on motion of the defendant Van Court by his attorney, leave is given him by the court to file his answer herein.

And on the same day, to wit: on the twenty seventh day of November in the year of our Lord one thousand eight hundred and fifty eight there was filed in the office of the clerk of said court in said cause the Answer of the said defendant Benjamin P. Vancourt in the words and figures following, to wit:

"State of Illinois
County of Peoria, ss.

In the Circuit Court
November Term A.D. 1858

Alvin W. Bushnell
et al - v
Jared C. Hunt
et al -

Mechanics Lien

The Separate Answer of Benjamin P. Vancourt
defendant impleaded with Adolphus R. Bailey, Isaac Underhill & others

Houghton, to the bill of complaint of Alvin W. Rushnell and David McKinney Complainants -

This Defendant, having all exceptions...
 For answer to said bill &c. Says that he is the owner of the premises described in said bill, by title derived from Isaac Underhill as hereinafter mentioned, to wit: that said Isaac Underhill conveyed said premises to said Charles C. Houghton by bond for deed dated February first 1857; that said Charles C. Houghton conveyed said premises by assignment of said bond to said Jared C. Hunt, dated the 26 day of October 1857 and that said Jared C. Hunt conveyed said premises to this defendant by assignment of said bond, dated and made on the 11th day of January 1858 - and said bond was filed for record in the office of the Recorder of deeds for said Iowa County on the same 11th day of January 1858 and recorded on pages 354, 355 & 356 of book Y.A. as by the said bond and the Recorder's Certificate thereto attached which will be produced if required at the trial of this cause, will more fully and at large appear. -

And this defendant further answering says, that as said petitioners allege and contract with said Hunt and Bailey jointly and not with said Hunt only this defendant insists and will contend that the contract aforesaid was not made with the owner of said lot within the meaning of the statute, in manner and form as is alleged in said bill of complaint -

And this defendant further answering says that he does not know, and therefore cannot state whether any of the lumber mentioned in said bill was used on said premises and he demands proof thereof; and this defendant is informed and believes, and so states and charges the truth to be that if any part of said

lumber was used on said premises as stated in said petition, no more thereof was used thereon, than would amount in value to the sum of two hundred dollars.

And this defendant further answering says that he is advised and so charges that if any such lien as is claimed by said petitioners over attached to said premises, the same was lost and discharged long before the filing of their Complaint herein; and that the giving of the credit, and the taking of the note of said Jared B. Hunt as stated in said complaint, were an abandonment in law and in fact of any and every claim which said Bushnell & McKimney may have had against said premises for any such lien as is set up in their said bill of complaint. This defendant is informed and believes, and so states and charges the truth to be that the whole of the said bill of lumber mentioned in said petition was due and payable on or before the 12th day of December A.D. 1857, and accordingly this defendant denies that by any contract under which said lumber or any part thereof was furnished, the price thereof was not payable till the first day of April 1858. And this defendant is also informed and believes and charges the truth to be that the time for the payment of the price of said lumber or any part thereof was not anywise extended from said 12th day of December A.D. 1857, till after the partnership between said Bail and Hunt had been dissolved, nor till after said Hunt had alone assumed to pay said alleged indebtedness to said complainants, and they had accepted his promissory note for the payment thereof; nor till after this defendant had purchased said premises from said Hunt, to wit; until the 23^d day of January 1858 —

And this defendant further Answering Says, that he purchased the premises described in said petition in good faith on the said eleventh day of January A.D. 1858 = that this defendant paid for said premises at or about the time of said purchase about the sum of three hundred and fifty dollars in a promissory note, which this defendant held against said Hunt and Paine and interest thereon; and that this defendant has since paid about the sum of fifty dollars on said bond to said Underhill besides taxes &c - and this petitioner is bound to pay the further sum of eight hundred dollars or thereabouts and interest to said Underhill on said bond -

And this defendant further answering says that at the time when he purchased said lot and appurtenances, said Hunt ^{alleged} ~~assumed~~ this defendant, and this defendant believed that there was no lien or incumbrance on said premises; and this defendant did not know of said claim of Buchnell & McMinney until after his purchase of said premises as aforesaid

And now having fully answered this defendant prays to be hence dismissed with his costs &c. -

Benjamin P. Vanfount. "

Charles J. Torrey
of Counsel &c " "

State of Illinois

County of Peoria

Benjamin P. Vanfount being first duly sworn upon his oath says that the foregoing answer by him subscribed is true to the best of his knowledge remembrance and belief, and further says not

Subscribed & sworn to before me this
17th day of November A.D. 1858 C. J. Sloan, clk. "

And afterwards to wit: on the thirtieth day of November in the year of our Lord one thousand eight hundred and fifty eight there was filed in the office of the Clerk of said Court in said cause the Exceptions of the plaintiff to the Answer of defendant Benjamin P. VanCourt in which is in the words and figures following, to wit:

John P. Rushnell

David McInney

vs
James C. Huntals

Circuit Court
November Term 1858

And now come the Complaints by the ^{vs} ~~vs~~ except to the several answer of said Benjamin P. VanCourt for insufficiency - in this -

1st So much of said answer as is contained in the first paragraph on the 3rd page of said answer is irrelevant & impertinent, and at most is mere matter of demurrer to said Bill -

2nd That part of said answer on the 4th page beginning with the 4th line and extending to the 21st line of said page inclusive is excepted to as hypothetical - as neither admitting nor denying any thing stated in said Bill - as being evasive & as setting up matter of demurrer alone -

3^d That part of said answer beginning with the 9th line of page 5 and extending to the foot of said page, is bad for irrelevancy & impertinence - for assuming a fact, without directly affirming it - Because the matter set out is no defense to said action, and because the same is evasive, uncertain and otherwise defective

4th Said Answer from the top of the 6th page to the end setting up matter which cannot be a defense to said action & is irrelevant &

and because the parts so excepted to are not responsive to said bill
14 impertinent - wherefore, and for other good &
sufficient reasons, Complainants ~~move~~ move
to strike from said answer the several
parts above excepted to

Cooper & Reynolds
Sols. for Complainants."

Proceedings at a term of the Circuit Court began and held at the
Court house in the City and County of Peoria, State of Illinois, on the third
Monday in the month of November in the year of our Lord one thousand eight
hundred and fifty eight, it being the fifteenth day of said month.

Present, ~~the~~ E. N. Powell, judge of the sixteenth judicial circuit in said
state. Francis W. Smith, Sheriff and Enoch J. Sloan, clerk, to wit:

Wednesday December 1st A. D. 1858

Alvan W. Rushmell

David McKinney

vs

Mechanics Lien

James C. Hunt

Adolphus A. Daily

Grace Underhill

Charles L. Houghton

Benjamin P. Boncourt

This day came the plaintiffs by Cooper their
attorney and except to the answer filed herein

This day came the parties by their attorneys and this
cause came on to be heard on the Complainants exceptions to the answer filed herein,
and the Court having heard the argument of counsel and being satisfied in the
premises, overruled said exceptions.

And afterwards, to wit: on the second day of December in the year of our Lord one thousand eight hundred and fifty eight there was filed in the office of the clerk of the ~~at~~ said Court in said Cause an agreement or stipulation in the words and figures following, to wit:

"State of Illinois
County of Peoria f

In the Circuit Court
November Term A. D. 1858

Abner W. Bushnell
David M. Kinney

For Mechanics lien,

vs
Jared C. Hunt &
Adolphus R. Bailey &
Isaac Underhill &
Charles C. Houghton &
Benjamin P. Van Court

It is agreed that the petitioners will attend on the trial of this Cause and that the defendant Van Court may call and examine them or either of them as witnesses on his behalf - Van Court to give them notice if he wants them

Peoria December 2^d 1858

J. R. Cooper

for Compt^{pts} "

And afterwards, to wit: on the seventh day of December in the Year of our Lord one thousand eight hundred and fifty eight there was filed in the office of the clerk of said Court in said Cause the Replication of Petitioners to the several answers of said defendant Benjamin P. Van Court in the words and figures following, to wit:

"Alvin W. Bushnell & al

vs
David C. Hunt & al

Circuit Court Nov. T. 1858

For Lien =

The Replication of Petitioners
to the Several Answers of Benjamin P. VanCourt herein

These Repliants having all advantage of ex-
ception &c. say that they will aver, maintain & prove their
said petition to be true - and that the said answer is insuff-
icient, uncertain & untrue - all which these repliants will aver
& prove as this Court shall direct - Wherefore they pray as by
their petition they have already prayed &c

Cooper & Reynolds

for petitioners = "

Proceedings at a term of the Circuit Court began and held at the
Court House in the City and County of Peoria, State of Illinois,
on the third Monday in the month of November in the year of our
Lord one thousand eight hundred and fifty eight, it being the
fifteenth day of said month. Present, C. N. Powell judge of
the sixteenth judicial circuit in said state, Francis W. Smith
Sheriff and Crook T. Sloan, Clerk, to wit:

Thursday December 9th A.D. 1858

Alvin W. Bushnell, David McKinney

for lien

vs
David C. Hunt, Adolphus R. Bailey

Isaac Underhill, Charles C. Kington, Benjamin P. VanCourt

And now this cause

Coming on to be heard upon the bill, exhibits, replication and proofs

of the said Complainants, and the Answer of said defendant Vancouver and Complainants having dismissed their said bill as to the said defendant Houghton - and it appearing to the Court that all the other defendants have been duly notified of the pendency of said this suit to the present term - and said defendants Hunt, Bailly and Underhill having been severally three times solemnly called come not but make default - It is ordered and adjudged by the Court that as to them the said Hunt, Bailly and Underhill and each of them that the said bill be and the same hereby is taken for confessed - and thereupon a jury of twelve good and lawful men, (being called to assess the damages of the said Complainants and to try the issues joined between them and the said Vancouver) to wit: Samuel Dimon, J. W. Emory, James Deleno, Edwin Mathews, A. Richardson, Charles R. Hall, F. G. Hartshorn, Jacob Guyer, Richard Elken, James Elson, Josiah Fisher and John Lynch, who were duly chosen, tried and sworn to well and truly assess the damages of the said Complainants and to try the issues joined between them and the said defendant Benjamin P. Vancouver, and who, after hearing the evidence and the arguments of counsel returned their verdict into Court in the words and figures following, that is to say - "We the jury, find for the Complainants and assess their damages at four hundred and twenty-seven dollars and sustain the lien as against Vancouver." and it appearing satisfactorily to the Court that there is justly due to the Complainants from the said defendants Hunt and Bailly upon the contract in said bill stated, the sum of four hundred and twenty-seven dollars for lumber furnished and used upon the lot in said bill named, and that the same is a lien upon said lot and improvements in the hands of the said Vancouver; and the Court being sufficiently advised in the premises, do order, adjudge and decree that the defendants Hunt and Bailly

Pay to the Complainants the said sum so found to be due them as afore-
 said, with costs of suit, and that, as against them and the said Van-
 Court, they have and maintain their lien upon the said premises in said
 bill named therefor = and that in default of payment thereof, with inter-
 est by the first day of June next, the said premises, to wit: - Lot No.
 One (1) in block No thirty five (35) in Underhills additions to the City of
 Peoria, County of Peoria and State of Illinois, and all and singular
 the interest, right, title and estate, legal or equitable therein, of the said
 Hunt, Bailey and VanCourt and each of them, and any and all persons
 claiming under them or either of them, which they now have or may have had
 at any time since the making of the contract and furnishing of the
 materials and lumber aforesaid, or may acquire between this and the
 time of sale, be sold by the Master in Chancery of this court to pay and
 satisfy the same - that said sale be made at public auction to the
 highest bidder for cash after having first given twenty days notice of
 the time and place thereof, by publication in some newspaper published
 in said City of Peoria - and that upon said sale said Master make,
 Acknowledge and deliver to the purchaser a deed for said premises conveying
 absolutely all the right, title and interest of the said Hunt, Bailey and
 VanCourt, and each of them therein, Conformably to their decree - and
 that upon such sale and the execution of such deed the said defen-
 dants last named, and particularly the said VanCourt, do immediately
 surrender the possession thereof to the said purchaser - It is further
 ordered by the Court that out of the proceeds of such sale, the
 Master pay, first, the costs of this suit and of such sale -
 Second, - the said sum and interest, above named, to said com-
 plainants, and if any surplus remain, that he pay the same over
 to said VanCourt. It is further ordered and adjudged by the Court,

that, if said premises do not sell for sufficient to pay said debt, interest and costs, that the unpaid residue do stand as a judgment against the said Hunt and Bailey in favor of the said complainants - and that execution issue against them therefor, as in case of judgments at law: It is further ordered that said Master make report to the next term of this Court succeeding said sale.

Whereupon the defendant VanCourt by his attorney, entered his motion for a new trial of this cause.

On the same day, to wit: on the ninth day of December in the year of our Lord one thousand eight hundred and fifty eight there was filed in the office of the Clerk of said Court in said Cause the motion of the defendant Benjamin P. VanCourt to arrest judgment, set aside verdict and award a new trial which said motion & reasons therefor are in the words and figures following, to wit:

"State of Illinois

County of Deoria

In the Circuit Court
Of the November Term A.D. 1858.

Alvin W. Bushnell

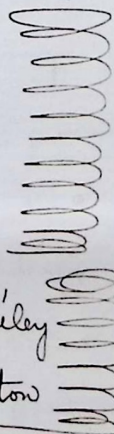
David McKinney

vs

Benjamin P. VanCourt impleaded

with Jared B. Hunt, Adolphus R. Bailey

Isaac Underhill & Charles B. Houghton



Mechanics
Lien.

The defendant Benjamin P. VanCourt moves the Court to arrest judgment on the verdict of the jury empanelled herein and set aside said verdict and award a new trial of this cause for the following among other reasons to wit:

1. Said verdict is not responsive to the issues submitted to the jury.
2. It is not found by said verdict that any sum is due from the defendants or either of them, to the complainants.
3. Said verdict is for damages generally, and not for any sum due.
4. It is not shown by whom or to whom the sum specified in said verdict ought to be paid -
5. Said verdict is void for uncertainty.
6. Said verdict does not show what interest in said premises or what title thereto, if any ought to be sold to satisfy the claims of said complainants.
7. Said verdict is contrary to the evidence submitted to the jury.
8. Said verdict is against the law of the land -
9. The Court gave improper instructions to the jury on behalf of the complainants.
10. Said verdict is otherwise informal, illegal and insufficient -

Charles C. Borney
of counsel for Defendant."

Proceedings at a term of the circuit court began and held at the Court house in the City and County of Peoria, State of Illinois, on the third Monday in the month of November in the year of our Lord one thousand eight hundred and fifty eight, it being the fifteenth day of said month. Present, E. N. Powell judge of the sixteenth judicial circuit in said state, Francis W. Smith, sheriff and Enoch P. Sloan, clerk. to wit:

Monday December 13th A.D. 1858

Alvin W. Rushnell

David McKinney

vs

Mechanics Lien

Jared C. Hunt

Adolphus R. Bailey

Isaac Underhill

Charles C. Houghton

Benjamin P. VanCourt

This day this cause came on to be heard on the motion of defendant Van Court by Bonney his attorney, for a new trial of this cause, and the Court having heard the argument of counsel and not being fully satisfied in the premises takes time to consider.

Friday December 17th A.D. 1858

Alvin W. Rushnell & al

vs

for Lien

Jared C. Hunt & al

This day this cause came on to be heard on the motion of defendant VanCourt for a new trial, and the Court being satisfied in the premises overruled said motion.

And afterwards, to wit: on the twentieth day of December in the year of our Lord one thousand eight hundred and fifty eight there was filed in the office of the clerk of said Court in said cause the motion of defendant VanCourt to vacate decree which is in the words and following, to wit:

In the Circuit Court

Alvin W. Rushnell

vs David M. Kinney

Benjamin P. Vanbont
impleaded with Jacob C. Hunt,

Adolphus R. Bailey

Isaac Underhill & Charles C. Boughton

For
Mechanics
Lien.

Upon the signing and
filing of the decree made in this cause the defendant Van
Bont moves the Court to vacate said decree for that the
same is not warranted by nor is it in accordance with the
verdict returned by the jury empaneled in this case -

Charles C. Bonney

Counsel for Vanbont."

Proceedings at a term of the circuit Court begun and held
at the Court house in the City and County of Peoria, State of Illinois,
on the third Monday in the Month of November in the year of our
Lord one thousand eight hundred and fifty eight, it being the fif-
teenth day of said month. Present C. N. Powell judge of the five-
teenth judicial circuit in said State. Francis W. Smith Sheriff
and Enoch P. Sloan, Clerk, to wit:

Tuesday December 21st A.D. 1858

Alvin W. Rushnell & al

as
Jacob C. Hunt & al

for lien

By agreement of parties it is ordered

that the bill of exceptions herein may be made up and signed in vacation, or at the next civil term of this court and it is further agreed that defendant may take an appeal to the Supreme Court at the next term of this court.

And afterwards, to wit: on the fourth day of March in the Year of our Lord one thousand eight hundred and fifty nine the was filed in the office of the clerk of said court in said Cause the motion of defendant Benjamin P. Vanbount to sign and seal the Bill of Exceptions and allow an appeal to the Supreme Court, which said motion is in the words and figures following, to wit:

"State of Illinois,
County of Peoria, f.

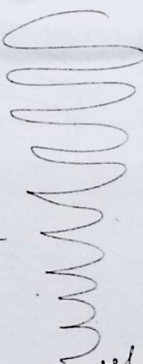
Alvin W. Bushnell

& al

Benjamin P. Vanbount

& als

In the Circuit Court
March Term A. D. 1859



Mechanics Lien

The said Benjamin P.

Vanbount Moves the Court here to sign and seal the bill of exceptions tendered in this Cause, and allow an appeal to the Supreme Court pursuant to leave granted at the last term &c.

Charles C. Donney
atty for Vanbount."

And Afterwards, to wit: on the twenty first day of March in the Year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the clerk of said Court in said Cause a Bill of Exceptions in the words and figures following, to wit:

"State of Illinois
County of Peoria f.

In the Circuit Court
Of the November Term A.D. 1858

Alvin W. Bushnell
David McKinney

vs
Benjamin P. Vanlount
impleaded with
Jared C. Hunt
Adolphus R. Bailey
Isaac Underhill &
Charles C. Bonney

Mechanics
Lien.

(Bill of Exceptions)

Be it remembered that on the trial of the issues joined herein between the complainants and Benjamin P. Vanlount defendant, before the Court and a jury the Complainants offered in evidence ~~the~~ a promissory note in the words and figures following, to wit:

"

Peoria Jan. 23^d 1858

On or before April 1st 1858 I promise to pay to the order of Bushnell & McKinney, four hundred dollars, on acc^t of Lumber and shingles furnished by said Bushnell & McKinney, and used in the erection of buildings situated on Lot. (1) Block (35) Underhills additions

Note

to Peoria, with interest at ten per cent per annum until
paid ~
\$400.

J. C. Hunt."

The Defendant Vanbourn then and there objected to the reading of said note for that the same was irrelevant to the issue, inadmissible as against him the said Vanbourn, calculated to mislead the jury and altogether unknown to the contract under which if at all the Complainants must recover. But the Court overruled the objections of said defendant and permitted said Complainants to read, and they accordingly did read said note to the jury, to which decision of the court and the reading of said note the said Vanbourn then and there excepted.

The Complainants then called De Witt C. House, who being sworn testified that he heard Hunt and Bailey talking - the defendant Vanbourn here objected that declarations of Hunt and Bailey or either of them ought not be received in evidence against him the said Vanbourn but the Court overruled the objection, and permitted the following testimony to be given to which the said Vanbourn then and there excepted - said

De Witt C. House then testified that he knew Hunt & Bailey got lumber of the Complainants to construct buildings and make improvements on Lot One Block 35 in Underhill addition to Peoria. The lumber was purchased in November and December 1857. Before they purchased the lumber Hunt called

De Witt C. House

on me to know if I would speak a good word for him to assist him and Bailey at as they were strangers in Peoria in obtaining lumber I understood from him that they Hunt & Bailey had not the money to pay down for the lumber and wished to get it on credit.

Shortly afterwards Mr M Kinney one of the complainants came to see me to know if it would be safe to let Hunt or Hunt & Bailey have the lumber they wanted on credit. I told him I thought it would that I knew Hunt that I thought him an honest man and that I would be willing to let him have any thing I had to sell on credit.

Hunt & Bailey at this time were partners in the Butchering business I afterwards understood from both Hunt & Bailey that they were getting lumber from the complainants. The lumber got was used by them in putting up a slaughter house and barn on said lot above named and in putting other other improvements thereon I was frequently at the lot when they were receiving the lumber and putting up the buildings but cannot state how much lumber they got I learned from both Hunt & Bailey that they were not to pay for the lumber as they got it. But was told by them while they were getting it that they were to pay something upon it as they could along through the winter and the balance in the spring. There were two buildings and a close board fence around the lot put up by them with the lumber. One of the buildings was 16 feet by thirty feet and the other was 16 + 20 feet and each about 12 feet high to the eaves with shingle roofs on each they were made of rough boards. The floor of the Slaughter House was made of heavy plank. The witness stated on cross examination that he could not state the language used by Hunt & Bailey but thought he had given the substance—

George Clark

The Complainant then called George Clark
who being sworn testified as follows;

I worked for Mulholand in December 1857 - Hunt and Bailey put up a rough board slaughter house and barn as Houser has described, and built a fence around the Lot described in the bill - [The witness gave the size of the buildings precisely as the witness Houser] I don't know how much lumber was used in the improvements, never made any measurement, but should think as lumber was then selling there might have been from three to four hundred dollars worth, but can't say how much was used - I know nothing about the contract between Hunt or Hunt and Bailey and Buchnell & McKimney, except this, I was working for Mulholand and got afraid I would not get my pay, and talked of taking an order on Hunt & Bailey but found they were not paying for their lumber, and so thought I was about as safe with Mulholand as I would be with them - All the lumber brought on the lot was used in the erection of the buildings - I can't say whether Hunt or Bailey or Mulholand told me about their getting lumber from Buchnell & McKimney.

Isaac Luce

The Complainant then called Isaac Luce
who being sworn testified as follows, to wit:

I am a drayman. I drew three loads of lumber from Buchnell & McKimney's lumber yard to the place where Hunt & Bailey were building - I drew about five hundred feet of boards and scantling at a load - Another drayman drew more lumber away from their yard than I did.

I don't know where he drew it to except one load - I know he drew one load to Hunt or Hunt & Bailey - This was in the fall of 1857 - This drayman generally drew at a different time from what I did.

The Complainant then called Anthony Hunzon who being sworn testified as follows

Anthony Hunzon

I am foreman in the lumber yard of Bushnell & McKimney and have been for five years - In November and December 1857 - Hunt got about twelve thousand feet of lumber from Bushnell & McKimney - delivered by me, and the Complainant delivered considerable more. Bailey was never at the lumber yard to my knowledge - [but Hunt was there several times and got lumber at other times Hunt sent orders. I don't know where the lumber went to or where it was used - Nor anything about any contract about it. The last of the lumber was delivered about the tenth or twelfth of December 1857 - The prices in the bill are about as Bushnell & McKimney sold lumber in the fall of 1857 -

The Complainant then called Peter Lipp who being sworn testified as follows

Peter Lipp

I worked for Bailey in November 1857 - Hunt & Bailey were in the butchering business and Hunt was building some buildings on the lot described to be used in their business - The buildings they were putting up were somewhere in Blumtown - they were up near Forsyth's Brewery - Bailey sent me to a lumber yard

on Water street [on the upper side of the street, on the corner of a street running down and was the lowest yard down then on Water street and I got two loads.

The Complainants then re-called De Witt C. House

De Witt C. House

re-called.

who testified as follows

Hernt & Bailey built a stable on a lot on Monroe street in Peoria in the fall of 1857 - But this was finished

before the other buildings were commenced - I don't know of their

putting up any other buildings - think I should have known it

if they had because I saw them frequently - Bushnell & McKimney's lumber yard is on Water street in the City of Peoria, on the upper side and corner of either Walnut or Chestnut street -

and was the yard lowest down on Water street.

Forsythe Brewery is on the same or next block with the lot described in the petition - One of the buildings has been used as a dwelling house during the past season

The Complainants here rested their case -

The Defendant Vanbourn moved to exclude from the jury all testimony founded on the declaration of Hernt, Bailey the Complainants and third persons

or any or either of them alleging the above testimony of the witnesses aforesaid to be such testimony. But the Court overruled said motion, and the said Van Court then and there excepted to the ruling of the Court.

The Defendant Van Court then read his answer to the jury - He also read a bond for a deed of the premises in question, and the assignments written thereon, in the words and figures following, to wit:

Agreement,

"Articles of Agreement, made and concluded the 1st day of February eighteen hundred and fifty seven between Isaac Underhill of Peoria, State of Illinois, of the first part, and Charles C. Boughton of Peoria of the second part, witnesseth, that the party of the first part, at the request of the party of the second part, and in consideration of the money to be paid, and the covenants as herein expressed to be performed by the said party of the second part, (the prompt performance of which payments and covenants being a condition precedent, and time being the essence of said condition,) hereby agrees to sell to the said party of the second part, all 1 certain tract of land, situate in the County of Peoria, and City of Peoria, in the State of Illinois, known and described as follows, to wit: - Lot No One in Block No Thirty five (35) in Underhill's addition to Peoria, reference being had to the recorded plat, in the Recorder's office at Peoria, with the privileges and appurtenances therunto belonging. And the said party of the second part, in consideration of the premises, hereby agrees to pay the said party of the second part first part, or his executors or assigns, at the office of Isaac Underhill, in the City of Peoria eight hundred dollars, viz: One half in five years,

and the Residue in ten years from the date hereof, with interest at the rate of six per cent. per annum, from the date hereof, to be paid annually, on the 1st day of February in each year, on the whole sum from time to time remaining unpaid. And also, that he will well and faithfully, in due season, pay or cause to be paid, all taxes and assessments, ordinary, or extraordinary for any purpose whatever, levied or assessed upon the said premises or appurtenances, or any part thereof, subsequent to the year 1855. But in case the said party of the second part fail to pay any or all such taxes or assessments, upon the said premises or appurtenances, or any part thereof, whenever and as soon as the same shall become due or payable; and the party of the first part shall pay from time to time, or at any time, any or all such taxes or assessments, or cause the same to be paid, the amount of any and all such payments so made by the party of the first part shall immediately thereupon become an additional Consideration, and payment to be made by the party of the second part hereto, for the premises herein agreed to be conveyed. And the said party of the first part further covenants and agrees with the said party of the second part, that upon the faithful performance by the said party of the second part of his undertaking in this behalf, and of the payment of principal and interest of the sum above mentioned, in the manner specified, he the said party of the first part, shall and will without delay, well and faithfully execute, acknowledged, and deliver in person, or by attorney duly authorized, to the party of the second part, his heirs or assigns, a deed of conveyance of all the right, title and interest of the party of the first part, of, in and to the above described premises, with their appurtenances, with

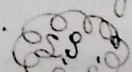
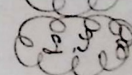
Covenants of warranty against the lawful claims and demands of all Persons whomsoever.

Provided always, and these presents are upon the express condition, that in case of the failure of the said party of the second part, his heirs, executors, administrators, and assigns, in the performance of all or either of the covenants and promises on his part to be performed, the said party of the first part, or his legal representatives, shall have the right to declare this contract void, and thereupon to recover by distress, upon the premises, or otherwise, all the interest which shall have accrued upon this contract, as rent for use and occupation of said premises, and to take immediate possession thereof; to regard the person or persons, in possession, on such termination of the contract, as tenant or tenants holding over without permission, (if that should be necessary to regain the prompt possession of the premises,) and to recover all damages, sustained by such holding over without permission. Should said party of the first part clear the aforesaid real estate of all incumbrances, before the expiration of the ten years aforesaid, then or request of the party of the second part, said party of the first part, will execute, or cause to be made and executed, a warranty deed for the real estate aforesaid to the party of the second part or his assigns, and take promissory notes for the residue that may be then unpaid, secured by a deed of trust on the premises thus conveyed. In witness whereof, the party of the first part, and the party of the second part, in their own proper persons have hereunto respectively set their hands and seals, on the day and year first above written.

Sealed and delivered in presence of 3

Isaac Underhill

C. C. Houghton

Assignment

" Peoria Ill Oct 26th 1857

For value received I hereby assign all my right, title and interest in the within bond & Lot to Jared C. Hunt except the privilege to a portion of the lot where a building now stands owned by me which is to remain there until April 1st 1858 at which time said purchaser can have the building for one hundred & fifty dollars until that time there is to be no building erected nearer than 100 feet

C. C. Houghton
Jared C. Hunt "

Assignment

" For value received I hereby sell and assign, transfer and set over all of my right title and interest to the within contract and lot within mentioned and described and the appurtenances thereon situated to Benjamin P. Vanbunt and to his heirs and assigns
Peoria January 11th 1858.

Jared C. Hunt 

John O. Petrie.

The said Van Court then called John O. Petrie who being sworn testified as follows, to wit:
I know the parties to this suit, and the premises in question - Some time in October last A. D. 1858 I had a conversation with the complainant McKinney, and in that conversation he told me that no time was specified for the payment of the price or value of the lumber that Hunt or Hunt & Bailey had from him & Bushnell in November and December 1857 - He also said to me at the same time that they Bushnell & McKinney expected to get the money for the lumber along as it was delivered - That they tried to do so, and once thought that they

had a sure thing to get it, but failed to do so; and that afterwards they found they could not get the money as they had expected to, and therefore they gave Hunt time and took his individual note and an assignment of a policy of insurance on the buildings for security. I was present when Hunt sold the lot to Van Bunt - Hunt told Van Bunt there was no lien or incumbrance on it - Bailey was not present - This sale was made between the eleventh and the sixteenth of December 1857 - Witness further stated that at this time he was occupying one of the buildings erected on said premises as a tenant of said Van Bunt.

This was all the evidence.

The Complainants prayed the following instructions which were severally objected to by the said Van Bunt but were given by the Court and thereupon the said Van Bunt excepted to the opinions of the Court in giving said instructions, to wit:

1st That if the Jury believe from the evidence that Bushnell & McKinney furnished lumber to Jared C. Hunt and Adolphus R. Bailey under a contract with them or either of them and that said lumber was used in the erection and construction of the building or buildings & improvements upon the premises in question, then the said Bushnell & McKinney have a lien upon the buildings so erected, provided the bill plaintiffs bill was filed within six months from the time the last payment for the lumber so sold became due and payable under the contract for the purchase of such lumber.

Con
Jury

2nd

Given

That if the jury believe from the evidence that Bushnell & McKinney did after the delivery of lumber to the said Hunt & Bailey or either of them take a note from the defendant Hunt for the price of said lumber, still Bushnell & McKinney would have a lien for lumber furnished for the above purpose if they filed their bill for mechanics lien within six months from the time the last payment for the said bill of lumber became due and payable.

3^d

Given

If the jury believe from the evidence that at the time the lumber in question was furnished there was no time specified when payment was to be made, but that afterward a day of payment was fixed upon, such latter day would be the time when the money for such lumber would become due and payable ~~under the contract~~, provided such payment did not extend over three years from the time of such contract.

The Jury returned the following verdict, to wit:

" Bushnell & McKinney

vs

J. C. H. Lee, et al

We the Jury find for the complainant and assess the damage at four hundred and twenty seven dollars (\$427) and sustain the lien as against Vancourt of Guyer, Forame. "

The said Vancourt then and there entered his motion to set aside said verdict and for a new trial,

[for which said motion see page 2150. herein]

But the Court on the hearing of said motion overruled the same and made upon said verdict the following decree.

[for which decree see page 18 &c herein]

So which said ruling of the Court in overruling said motion and making said decree the said Vanbourn then and there excepted, and thereupon the said Vanbourn entered his motion to vacate said decree, to wit

[for which motion see page 23 &c herein]

But the Court on the hearing of said last mentioned motion overruled the same and thereupon the said Vanbourn excepted to the opinions and decisions of the Court against him as aforesaid, and prayed the Court to sign and seal this bill of exceptions which is accordingly done.

C. H. Lowell Seal

State of Illinois
County of Peoria

I Croch P. Sloan, clerk of the Circuit Court in and for the County of Peoria in the State of Illinois do hereby certify that the foregoing is a true and correct Transcript from the Records and files of my office in a certain cause entitled Alvin W. Bushnell & David McKinney against Jacob C. Hunt, Adolphus A. Bailey, Isaac Underhill, Charles C. Boughton and Benjamin P. Van Bourn.

In witness whereof, I have

hereunto set my hand and set
affixed the seal of said court
at office this 12th day of March
A.D. 1859, Enoch T. Sloan, clerk

In the Supreme Court at Ottawa, April Term A.D. 1859

Hereupon comes the said Benjamin P. Van Court by Charles
C. Bonney his attorney, and says that in the record and proceedings
aforesaid, and also in the rendition of the judgment aforesaid there is
manifest error in this, to wit:

- 1 The court erred in overruling the demurrer to the bill of complaint.
- 2 The court erred in admitting improper testimony for the complainants.
- 3 The court erred in giving improper instructions for the complainants.
- 4 The court erred in overruling the motion for a New Trial.
- 5 The court erred in making said decree upon said verdict.
- 6 The court erred in overruling the motion to vacate said decree.
- 7 The court erred in not decreeing that said complainants below had no lien
upon the premises as against said Van Court.
- 8 The court erred in decreeing an excessive sum against said premises.
- 9 The court erred in making a decree which is not warranted or supported by
the testimony in the case, but is manifestly against the same.
- 10 The record and proceedings of the court below are otherwise manifestly erroneous.

Wherefore the said Benjamin P. Van Court prays that the judg-
ment aforesaid for the errors aforesaid, and for other errors appa-
rent in the record and proceedings aforesaid may be reversed,
annulled and altogether held for nothing and that he may
be restored to all things which he hath lost by occasion of the
said judgment &c. Charles C. Bonney
Attorney for plaintiff in error.

Benjamin C. Van Court -
 Impleaded &c.
 Plaintiff in error

versus

Alvin W. Bushnell
 David Mc. Kinney
 Defendants in error

Error to Circuit Court -

Rec. 7.57 Pbs. 6. l. 5. pd. by Romney
 Record
 Errors
 Spender
 Romney for Pth.
 Cooper for 25th.
 Fred Spauld. 7. 1859
 Adeline
 Clerk

And hereupon come the said Alvin W. Bushnell and David Mc. Kinney by Jonathan K. Cooper their attorney and say that there is no error, either in the record and proceedings aforesaid, or in the rendition of the judgment aforesaid, and pray that the said Supreme Court, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed &c.~

Jonathan K. Cooper
^{septs in error}
 for ~~appellees~~ =