

13439

No. _____

Supreme Court of Illinois

Senior

vs.

^B
Bre~~X~~ner et al

71641  7

342 ~~332~~ 74

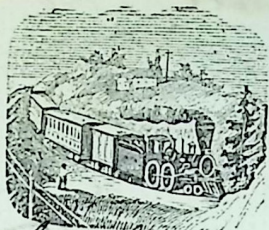
William Senior

vs

Alexander Prebner

1845

13439
Refused



OFFICE OF THE
United States Express Co.

Chicago

April 19th 1860

L. Leland Esq
Clerk of the Supreme
Court Ottawa Ills.

My Dear Sir,
I send you

by the U. S. Ex. Co. three Appeal
Cases; viz; Plund et al vs Zimmerman;
Ross vs Butts; King et al vs Aiken et al, which you will
please mark filed as of this
day. You will also find herein
enclosed fifteen dollars to pay
your fees for filing the same.
Please do not fail to mark
them filed as of this day
(April 19th 1860), as I could
not possibly send them
sooner. If you cannot

do it, telegraph to me, so
that I may have writs of
Error. You will also please
find a petition for a re-
hearing in the Case of Letty
M. Clark vs Buckner S. Morris
et al decided at the last
Term of the Supreme Court
and reported in the 22^d
of Ill. R. which also, must
be filed, Also the abstract
on the above first men-
tioned Cause of Fund et al
vs Zimmerman.

I also enclose Mr Burgess
argument in Clark vs Morris
et al on the proposed re-hearing
which please hand him.

Yours Truly
R S Mackwell

No 4. Metropolitan Hall

State of Illinois }
In the Supreme Court
At Passaic N.J. 1860
William Senior }
v. } On Rehearing.
Alexander B. Brewer }
Ans. Brewer }

Points of the Argument
of Charles C. Bonney
for the plaintiff in error -

1. The opinion given by the court, is upon a question of pleading, in the petition - the cause was determined in the court below, and brought to this court upon a question of variance in the proof.
2. If the defect mentioned in the opinion of the court, did originally exist in the petition, it was both waived and expressly supplied by the answers of the defendants. As the issues were made, no question of this

sufficiency of the petition could arise upon that trial.

3. If the defect could have been properly noticed by the court, the bill should not have been dismissed, but the cause should have been remanded with leave to amend.

The sum of the whole matter is, that the parties ought not to lose their rights, and have the trouble and expense of this litigation, for a decision of a point upon which they have never been heard, and about which they have never disputed.

4. Beside this, it is at least a grave question, whether the statute of limitations would not defeat any new proceeding.

5. The true question was, whether it was material to prove the date of a verbal contract as laid in the petition? The

plaintiff in error maintains
the negative, and believes it
sustained by the authorities.

The plaintiff in
error asks the attention of the
court to his printed brief, and
especially to the minutes of
the argument at the bar last
term on file with the papers
in the case.



342 - 110

Senior

✓

Breton
& al -

~~~~~

Plaintiffs'  
Argument

---

Filed May 9, 1860

L. Deland  
Clerk

Print & Print with  
L. Deland  
Clerk



# SUPREME COURT OF ILLINOIS.

*Third Division—April Term, 1859.*

WILLIAM SENIOR

*vs.*

ALEXANDER BREBNER,  
ANN BREBNER.

} *Error to Peoria Circuit Court.*

## BRIEF OF DEFENDANTS IN ERROR.

1st. The testimony of petitioner was properly excluded from the jury on the trial below. The allegata and probata must coincide. Here, the contract set out in the petition, was made *on* or *about* the 5th of December, 1854. The proof related wholly to a contract made prior to August, 1853, all the work under which was done and possession delivered, before December, 1853; the variance is fatal. Under this statute the *contract* must be set out; *time* is material, and the proof must correspond.

Mech. Lien Law, section 4; 3 Scam. 189, 544.

1 Gil. 423; see page 425; 4 do. 566.

3 Watts & Serg. 259; 9 Watts and Serg. 186.

2d. There being no evidence before the jury, the verdict was, of course, right; besides, the original answers of the defendants showed payment in full, and were responsive to the bill on this subject, and, therefore, evidence of that fact.

3 Gilman, 268; 1 Gilman, 433.

That the payment was made in lumber, does not alter the case; moreover, no replications are filed to these answers; the only replication put in, is limited expressly to the *amended* answers, which relate to the title to the lot only; so that, whether responsive to the bill or not, the allegation of payment stands admitted on the record.

3d. The contract was with Alexander Brebner alone. Ann claimed the property in her own right, by deed of gift from her father, and not as trustee for him. In this, both the answers concur, and are distinctly responsive to the bill, and there is no proof to the contrary. The petition was filed on the 22d of February, 1856. The proof clearly is, that the work was done, and possession delivered in November, 1853, and the petition alleges that the payments fell due as the work progressed. As to Ann Brebner, then, the proceeding was not commenced in due time; more than six months had elapsed, and she is protected by the limitations of the act. It is only as against the *debtor* that the limitation does not apply.

3 Gilman, 261; 4 Scammon, 531.

COOPER,

*For Defendants in Error.*



332-110

Senior vs. Bretton

Defendants Briefs

Filed May 6. 1859

A. Leland

Clerk.



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

OF THE APRIL TERM, A. D. 1859.

WILLIAM SENIOR,  
vs.  
ALEX'R BREBNER & ANN BREBNER. } ERROR TO PEORIA CIRCUIT COURT.

Page  
of  
Record.

ABSTRACT.

- 1 Petition for Mechanics' Lien, filed February 22, 1856, alleging verbal contract made on or about Dec. 5, 1854, to furnish materials and erect buildings on L. 7, B. 63, M., V. & L.'s addition to Peoria, without unreasonable delay, for what same reasonably worth, payable as work should progress. Performance averred, buildings' reasonable value \$2000. Ann holds legal title for use of Alexander, real owner, usual prayer, &c.
- 43 Specification of petitioner's demand.
- 9 Answer of Alexander, filed Dec. 1, 1856. States contract in writing for house June 13, 1853, and verbal contract for other buildings shortly after. Contract price for all \$877.30. Payment mostly in lumber furnished between June 1, 1853, and last of October, 1855. Charges copy of contract in writing attached.
- 45 Further answer of Alexander, admitting that he bought the lot and gave it to Ann, his daughter.
- 49 Answer of Ann, filed Nov. 15, 1858, denying knowledge of contract, &c. She owns lot; Senior erected buildings; *believes* there was a written contract, and that Senior has been paid, &c.
- 51 Further answer of Ann, admitting gift of premises, &c., as stated by Alexander. Cannot give dates.
- 21 The several answers are on oath.
- 55 Replication filed March 3, 1859.
- 69 Proceedings of court.
- 78 Trial by jury. Verdict for defendants.
- 67 Motion for new trial. Overruled and judgment.
- 63 Bill of Exceptions, to wit:
- Proof by five witnesses that in 1853 petitioner furnished materials and erected buildings as charged, under personal orders of Alexander. Buildings not erected under any written contract or specifications. Worth \$2010. Defendants took possession in Nov., 1853, but house not wholly finished or accepted till some time in 1855, *when it was finished by Senior and accepted by Brebner.*
- 67 The court, against the objection of petitioner, excluded all his evidence for the reason that there was a *variance* between the *time laid* and the *time proved* for the making of the contract.
- The answers of the defendants had been read. There was no other evidence.

ERRORS, TO WIT:

- 81
1. Excluding petitioner's evidence.
  2. Misdirecting the jury.
  3. Verdict against evidence.
  4. Verdict against law.
  5. Overruling motion for new trial.
  6. Judgment for defendants.
  7. Refusing decree for petitioner.
- 53 Joinder in error.



## BRIEF OF PLAINTIFF IN ERROR.

1. The allegation of *time* is *immaterial*, and there is no *variance*. The *material* questions between these parties were,—Did the petitioner furnish the materials and erect the buildings? If so, how much ought he to receive therefor?

Statute of Mechanics' Lien, Sec. 2, 4, 13, 17, 20, 22, and 23.

2. The petition, *like a declaration*, must contain a statement of the cause of action.

3 Scam. R. 544.

3. If a parol contract is stated to have been made on a particular day, the plaintiff is not confined in his proof to the day laid.

Gould Pleading, p. 89 sec. 64, p. 90 sec. 65.

1 Chitty Pleading, 257, 258.

1 Greenleaf Evidence, sec. 61.

4. It is sufficient if the *SUBSTANCE* of the issue be proved.

1 Greenleaf Evidence, sec. 56, 61.

5. Even in a criminal case the time laid is not material.

Wharton's Criminal Law, 220.

6. The petitioner was entitled to a decree for the amount claimed. The answers of the defendants were not evidence that the petitioner received lumber from Alexander, nor that there was a special *agreement* to receive such lumber in *payment* of petitioner's demand. The petition charges that *money* is due. It contains nothing about any *lumber transactions* between the parties. The petitioner does not call for the oath of the defendants in any such behalf, and cannot be bound thereby. Answers in chancery, and the like cases, are received as evidence upon the sole ground that the complainant calls on the defendant to answer upon his oath touching the matter in controversy. The judgment below ought to be reversed, and a decree entered for the amount of the petitioner's demand.

CHARLES C. BONNEY,

*Attorney for Plaintiff in Error.*



<sup>332</sup>  
In the Supreme Court

William Linnon

vs.

Alexander Brebner Cal.

Error to Peoria Circuit Court

Abstract of Record &

Brief of Plaintiff

Filed May 6. 1859

L. Kellner  
Clerk



William Senior Plaintiff in Error

vs.

Alexander Brebner et al. Defendants in Error

The Defendants in Error by H. B. Hopkins their Attorney move the Court. to correct the Record in this case, and enter an order recalling an execution issued against said Defendants

Hopkins  
Atty.

### Suggestions in support of motion

Suit below was a petition for Mechanics lien, brought by Plaintiff in Error against Defendants in Error,

Judgment below was for defendants.

Case brought to this Court on writ of Error by Plaintiff, and tried at the last term of this Court.

Judgment of the Court below, sustained by the opinion of this Court, but by mistake as we suppose concludes with an order reversing the judgment below instead of sustaining it, and in consequence of this order, execution has been issued against Defendants for costs which should have issued against



Plaintiff.

Vide 22. Ill. 252. where the cause  
is reported and said error in the Record  
corrected by the reporter. but the same  
still stands erroneously entered upon the  
Record of this Court

H. B. Hopkins  
J. Hough



342 -110  
Senior

<sup>as</sup>  
Bretton

Motion to correct Record

Filed April 24. 1860  
L. Leland  
Clerk

The hearing  
ordered - the  
order of judgment  
is by mistake  
& execution made



# SUPREME COURT OF ILLINOIS.

*Third Division—April Term, 1859.*

WILLIAM SENIOR  
vs.  
ALEXANDER BREBNER,  
ANN BREBNER. } *Error to Peoria Circuit Court.*

## BRIEF OF DEFENDANTS IN ERROR.

1st. The testimony of petitioner was properly excluded from the jury on the trial below. The allegata and probata must coincide. Here, the contract set out in the petition, was made *on* or *about* the 5th of December, 1854. The proof related wholly to a contract made prior to August, 1853, all the work under which was done and possession delivered, before December, 1853; the variance is fatal. Under this statute the *contract* must be set out; *time* is material, and the proof must correspond.

Mech. Lien Law, section 4; 3 Scam. 189, 544.

1 Gil. 423; see page 425; 4 do. 566.

3 Watts & Serg. 259; 9 Watts and Serg. 186.

2d. There being no evidence before the jury, the verdict was, of course, right; besides, the original answers of the defendants showed payment in full, and were responsive to the bill on this subject, and, therefore, evidence of that fact.

3 Gilman, 268; 1 Gilman, 433.

That the payment was made in lumber, does not alter the case; moreover, no replications are filed to these answers; the only replication put in, is limited expressly to the *amended* answers, which relate to the title to the lot only; so that, whether responsive to the bill or not, the allegation of payment stands admitted on the record.

3d. The contract was with Alexander Brebner alone. Ann claimed the property in her own right, by deed of gift from her father, and not as trustee for him. In this, both the answers concur, and are distinctly responsive to the bill, and there is no proof to the contrary. The petition was filed on the 22d of February, 1856. The proof clearly is, that the work was done, and possession delivered in November, 1853, and the petition alleges that the payments fell due as the work progressed. As to Ann Brebner, then, the proceeding was not commenced in due time; more than six months had elapsed, and she is protected by the limitations of the act. It is only as against the *debtor* that the limitation does not apply.

3 Gilman, 261; 4 Scammon, 531.

COOPER,

*For Defendants in Error.*



332

Senior to Bremer

Left Brief



William Senior } In the Supreme Court =  
vs. } an Error to Baria Cu. et.  
Alexander Brebner } April Term A.D. 1859 =  
Sam Brebner }

on behalf of the defendants in  
Error I desire to submit a few additional suggestions on  
the points made in the printed Brief =

And first = The 4<sup>th</sup> section of the act under  
which this proceeding is brought, requires that the "petition  
"shall contain a brief statement of the contract on  
"which it is founded" That the time when the contract was  
made is material under this statute, seems to me clear =  
Even as to the debtor, the time for completing the contract  
cannot be extended longer than three years, nor the time of  
payment more than one year thereafter = This is the plain pro-  
vision of the Statute = see sec. 2 = applicable alike to all par-  
ties, - as may be also seen from the case of Muller vs. Smith,  
3 Scam. 543 - As to the time then, when the contract was made  
it must be set out with reasonable certainty; else, how is  
it possible to determine whether, as to the time of its com-  
pletion, it is a contract within the purview of this  
act, for which this remedy will lie? And if it be neces-  
sary to state accurately the time when the contract was  
made, in the Petition, will it be said that the proposed  
in no manner correspond? That you may allege a  
contract made in December 1854, and prove a con-  
tract made some 18 months before that time? Surely  
this is too gross a departure from the plain purport



of the Statute, not to speak of the well established rule that the Allegata & the prohata should agree =

But when the matter is looked at in reference to the rights of other parties than the debtor, the impropriety of the rule contended for on the other side is still more evident = As to them, the petition must be filed within six months after the last payment becomes due = ~~Now, here the petition was not filed till Feb. 22/56, while the work was in course of being done & was due before December 15/54. And how are they to know, from the petition, how to protect themselves, if a totally different time for the date of the contract, and consequently for the performance of the work &c. Under it, may be proved on the trial from that laid in the petition? This would certainly contravene the the evident purposes of the Act - see sec. 4 - which requires that "all material facts & circumstances necessary to a full understanding of the rights of the parties" shall be set out in the petition = Now, here, Ann Brehner, who is not the debtor with whom the contract was made, and who claims the property in her own right, is made a defendant, and her rights sought to be concluded under a contract, proved to be completed, more than two years prior to the filing of the petition, while, from the time laid in the petition, the ~~proceeding~~ <sup>proceeding</sup> might well have been ~~commenced~~ <sup>commenced</sup> within six months after the reasonable time alleged in the petition for the ~~completion~~ <sup>execution</sup> of the work =~~

Some steps was laid in argument below upon the phraseology on or about the 5<sup>th</sup> December 1854. But,



by no reasonable intendment, can this be made to mean the summer of 1853 = The proof was therefore properly ruled out, on the ground of variance between ~~the~~ it & the time laid in the petition =

As to question of payment set up in the answers = this is distinctly answered in both the answers, especially that of Alexander Brebner, and, upon the authority of the cases cited in the printed Brief of defendants, is directly responsive to the allegation in the petition, that the whole debt remained unpaid =

It is true, it is afterwards said, the payment was made in lumber. But what difference can this make, if Senior received it in payment as alleged - and whether he so accepted or not, Brebner was not entitled to set it off against the claim for the work = Now, there is no proof to contradict the answers in this respect - and if they are evidence on this point - then Senior was fully paid upon this claim = ~~He was, and had no business in court, as against the~~  
~~defendants =~~

As to the question, when the work was shown by the proof to be done = this will be found in the testimony of Merrill, called by Senior, who says, on page 64. that he worked on the buildings, for Senior, from about the first of August till about the 25<sup>th</sup> of October 1853; and on page 65. that Brebner took possession of said house & premises in November 1853 = And again, on page 66. "The buildings were completed & Brebner took possession of them in November or December 1853;" and



further down on the same page - "The House was finished when Beehner moved into it" - It is true he says, on page 65 - "said House was not wholly finished nor was it accepted by Beehner until sometime in the year 1855, when said House was finished by said Senior and accepted by said Beehner" - And on page 66 - "But some of the doors were defective & the petitioner made & hung new doors in place of the others some time in A.D. 1855" - When the slippery & one-sided character of this testimony is considered, it is palpable, that this talk about the building not being accepted, is the most subterfuge, to bring the completion of the job within the 6 months required by the Statute. Besides, the witness himself admits, on page 66, that the doors were the only thing that stood in the way of a full acceptance - that these were hung, but were defective, and in 1855 were taken out & new ones hung in their places in 1855 - This, <sup>repairing of a bad job,</sup> is not the completion of the work under the contract, intended by the Statute, to keep up & continue the lien - Moreover, it doesn't appear what time in 1855, the ~~new~~ <sup>new</sup> doors were hung so as to bring the filing of the petition clear within the time limited in the act:

As against Ann Beehner then, the proceeding could not be maintained -

Ottawa, May 7/59 =

J. K. Cooper  
for Opt in Error =



332

Senior

vs.

Behr vs. Val.

Argument for  
Optim Error =

Filed May 2, 1859  
L. Leland  
Clerk



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

OF THE APRIL TERM, A. D. 1859.

WILLIAM SENIOR,  
vs.  
ALEX'R BREBNER & ANN BREBNER. } ERROR TO PEORIA CIRCUIT COURT.

Page  
of  
Record.

ABSTRACT.

- 1 Petition for Mechanics' Lien, filed February 22, 1856, alleging verbal contract made on or about Dec. 5, 1854, to furnish materials and erect buildings on L. 7, B. 63, M., V. & L.'s addition to Peoria, without unreasonable delay, for what same reasonably worth, payable as work should progress. Performance averred, buildings' reasonable value \$2000. Ann holds legal title for use of Alexander, real owner, usual prayer, &c.
- 43 Specification of petitioner's demand.
- 9 Answer of Alexander, filed Dec. 1, 1856. States contract in writing for house June 13, 1853, and verbal contract for other buildings shortly after. Contract price for all \$877.30. Payment mostly in lumber furnished between June 1, 1853, and last of October, 1855. Charges copy of contract in writing attached.
- 45 Further answer of Alexander, admitting that he bought the lot and gave it to Ann, his daughter.
- 49 Answer of Ann, filed Nov. 15, 1858, denying knowledge of contract, &c. She owns lot; Senior erected buildings; *believes* there was a written contract, and that Senior has been paid, &c.
- 51 Further answer of Ann, admitting gift of premises, &c., as stated by Alexander. Cannot give dates.
- The several answers are on oath.
- 55 Replication filed March 3, 1859.
- 59 Proceedings of court.
- 78 Trial by jury. Verdict for defendants.
- 67 Motion for new trial. Overruled and judgment.
- 63 Bill of Exceptions, to wit:
- Proof by five witnesses that in 1853 petitioner furnished materials and erected buildings as charged, under personal orders of Alexander. Buildings not erected under any written contract or specifications. Worth \$2010. Defendants took possession in Nov., 1853, but house not wholly finished or accepted till some time in 1855, *when it was finished by Senior and accepted by Brebner.*
- 67 The court, against the objection of petitioner, excluded all his evidence for the reason that there was a *variance* between the *time laid* and the *time proved* for the making of the contract.
- The answers of the defendants had been read. There was no other evidence.

ERRORS, TO WIT:

- 81
1. Excluding petitioner's evidence.
  2. Misdirecting the jury.
  3. Verdict against evidence.
  4. Verdict against law.
  5. Overruling motion for new trial.
  6. Judgment for defendants.
  7. Refusing decree for petitioner.
- 85 Joinder in error.

Brief over



## BRIEF OF PLAINTIFF IN ERROR.

1. The allegation of *time* is *immaterial*, and there is no *variance*. The *material* questions between these parties were,—Did the petitioner furnish the materials and erect the buildings? If so, how much ought he to receive therefor?

Statute of Mechanics' Lien, Sec. 2, 4, 13, 17, 20, 22, and 23.

*See minutes of argument 1.*

2. The petition, *like a declaration*, must contain a statement of the cause of action.

3 Scam. R. 544.

*See minutes of argument 6.*

3. If a parol contract is stated to have been made on a particular day, the plaintiff is not confined in his proof to the day laid.

Gould Pleading, p. 89 sec. 64, p. 90 sec. 65.

1 Chitty Pleading, 257, 258.

1 Greenleaf Evidence, sec. 61.

4. It is sufficient if the *SUBSTANCE* of the issue be proved.

1 Greenleaf Evidence, sec. 56, 61.

*See minutes of argument 3.*

5. Even in a criminal case the time laid is not material.

Wharton's Criminal Law, 220.

6. The petitioner was entitled to a decree for the amount claimed. The answers of the defendants were not evidence that the petitioner received lumber from Alexander, nor that there was a special *agreement* to receive such lumber in *payment* of petitioner's demand. The petition charges that *money* is due. It contains nothing about any *lumber transactions* between the parties. The petitioner does not call for the oath of the defendants in any such behalf, and cannot be bound thereby. Answers in chancery, and the like cases, are received as evidence upon the sole ground that the complainant calls on the defendant to answer upon his oath touching the matter in controversy. The judgment below ought to be reversed, and a decree entered for the amount of the petitioner's demand.

*See minutes of argument 4. 5.*

CHARLES C. BONNEY,

*Attorney for Plaintiff in Error.*

*On defendants first point, see minutes of argument — 1.*

*On 2<sup>d</sup> — see Lbb. 7. 8.*

*on 3<sup>d</sup> — 1. 2. 9.*



In the Supreme Court

William Senior

v.

Alexander Brebner & al

Error to Peoria Circuit Court

Abstract of Record &  
Brief of Plaintiff



State of Illinois  
In the Supreme Court at Ottawa  
Of the April Term A.D. 1859 -  
William Senior

v  
Alexander Brebner &  
Ann Brebner

Error to Peoria  
Circuit Court

Minutes of argument  
for plaintiff in error -

The plaintiff submits to the court  
with his printed brief, the following  
minutes of his argument in support  
of the errors assigned -

- 1 The leading question in this case  
is, whether the averment of the  
time when the parol contract  
mentioned in the petition, was  
made, is material to be proved  
as laid.

In the case of Muller v. Smith 3 Scam.  
R. 544 this court decided what  
certainty is required in cases  
of this kind. The court says  
"The petition like a declaration, must



contains a statement of the cause of action<sup>2</sup>. Such certainty as is required in a declaration is sufficient; what must be proved as laid in a declaration, must be proved as laid under the statute of Limitations.

It is admitted that the rule of construction is strict against the petitioner, but it cannot be more strict than in criminal cases: and even in a criminal case the time of the offence is not material to be proved as laid. But it is said that there are limitations in the statute. Granted; are there not also limitations of all criminal prosecutions?

See authorities cited in printed brief.

2 But statutes of limitation must be specially pleaded and insisted on, otherwise they constitute no defence. In this case, no such defence is set up or even mentioned in the answers or either of them. The rule prevails both at law and in equity.



1 Chitty Pleadings 479 and cases cited.

1 Selwyn's Nisi Prius 142, text, notes and cases cited -

The proviso of limitation is only matter of defence - Sedg. Stat. & Con. Law, 62-3

3 The substance of the issues joined, is

(1.) whether there was a contract;

(2.) whether there was a compliance with the contract, or (what is the same thing) an acceptance of the work and materials;

(3.) what compensation the petitioner ought to have therefor;

(4.) whether payment has been made?

The material question in every proceeding for the recovery of money, is, whether the defendant has received a sufficient consideration for the demand against him; not when he received the consideration, - not where he violated his obligation.

As a matter of pleading time and place are always laid as with certainty, but it is rarely or never that these averments are material to be proved as laid, except when they form a part of the description of a contract or other instrument in writing.



See cases cited in printed brief -

4 The answers themselves show that they are untrue, and ought to be discredited. They charge

(1.) that all the work and materials amount under the contract to no more than

\$ 877.00

(2.) that there was paid between June 1, 1853 and last Oct. 1855 in lumber,

1837.38

(3.) that there is due from petitioner to Alexander &c. for overpayments 125.00 thus leaving the sum of 835.38 which it seems the defendants altogether omitted to notice in making up the account.

Honest transactions are not stated — just claims are not made up in this manner. Note the language on page 13 of the record, in the answer of Alexander, "according to the understanding of the parties — to be applied on said contract, on settlement" &c.

5 But as stated in the printed brief, the answers are not evi-



=dence of the payment claimed. It is true that it has been said that an answer of payment is responsive to a demand, but this evidently applies only to a simple payment in money, not to any new and distinct matter which by some special agreement between parties may extinguish a demand, and so be regarded as payment. In the present case, there is nothing in the petition concerning any receipt of lumber by petitioner from defendants, or any agreement thereabouts. Hence an answer of such matters cannot be held responsive to the petition. The answers are evidence against the petitioner only so far as he has made them so, by calling upon the defendants to respond under oath, to the particular matters alleged in the petition. So there is no evidence in the case, tending to show a payment of the petitioner's demand.

In *Garrett v. Stevenson & al.* 3 Gil. R. 268, the court say



"the allegations of payment are responsive to the petition — non-payment of the money is one of the facts therein alleged &c." and on page 269 the court adds "but if defendant only claims that he is not legally bound to pay such demand, by reason of his having a subsisting account or setoff he cannot establish such account or setoff, by his own oath &c."

Again in this connection the plaintiff in error calls the attention of the court to the language of the answer on pages 13 and 14 of the record — to the manifest disposition to "swear the case out of court", and at the same time secure protection from a prosecution for perjury by a variety of "saving clauses". First, a plain statement of payment, then an explanation that petitioner had received lumber which was "to be applied on said contract, on settlement". First, (page 11) a plain statement of "compliance with said contracts" — by which



pretended contracts the buildings were to be completed by Nov. 1. 1853, and payment made by January 20. 1854, — and then (page 13) a "sort of round-about" charge of payment (?) of \$1837.<sup>38</sup> between June 1. 1853 and last of Oct. 1855. But by the pretended "contract in writing", payment was not to be commenced till Oct. 20. 1853 !! and then money was to be paid; there is no mention of lumber. But to don't travel such a crooked road as the respondent has come over.

6 The petition avers an acceptance of the work and materials. Hence l<sup>y</sup> particularity is required. The witnesses prove the acceptance alleged, hence the petitioner ought to have a decree in his favor.

7 The case in 3 Watts & Serg. cited by defendants is not in point. There the question was, whether if no year be mentioned in the scirefacias, one may nevertheless be proved.



So is the case in 9 Watts & Serg. and the proceeding and statute in Penn. are different from our own.

8 The objection that the replication is only to the amended answers is altogether frivolous. There are no other answers in the case. Exceptions were sustained <sup>to</sup> the original answers of both defendants and leave given to amend. The answers were amended, and replication filed thereto.

9 The question whether the pretended interest of Ann in the premises should also be subjected to the lien, was not before the jury. The facts charged in the petition are admitted in the answers so far as the title to the lot is concerned, and the whole lot should be subjected to sale, see Statute, Sec. 21. 22. 23.

10 The plaintiff deems the "points and authorities" of the defendants sufficiently answered and moves this court to reverse the judgment below and rescind the cause with directions to



enter a decree in favor of the petitioner for the amount of his demands, providing that if the same be not paid within some reasonable time to be fixed by the court, the Lot described in the petition, and all the right, title, interest and estate of the defendants and each of them therein be sold &c.

Charles C. Downey  
counsel for  
plaintiff in  
error  
"



332 = 144

William Senior

v

Alexander Brebner

Ann Brebner

---

Minutes of  
Argument for  
Plaintiff

---

Filed May 9, 1859

L. Leland

Clerk

Referred

Bonney



State of Illinois *vs* -  
In the Supreme Court  
Ottawa Term A.D. 1860  
342 William Senior  
v. Error to Peoria.  
Alexr. Biehnervall.

Suggestions of Plaintiff on Motion  
of Defendant to amend record.

---

1. For the present, all exceptions are  
saved, and a general appearance  
to the motion is not entered.
2. Whether it is not now too late  
to enter the motion — that is  
whether it should not have been  
made at the last Term?
3. Whether the plaintiff can be com-  
pelled to appear to the motion  
without the usual ten days  
notice before the term?
4. The error appears to be in the  
report of the case, rather than  
in the record.



2

5. The attention of the clerk, and it is believed, of the Chief Justice, was called to the judgment before the record was made up; and the clerk entered what he intended to enter, and it is supposed the court intended he should enter. The judgment — decree reversed and bill dis-  
missed, was the occasion of surprise when it was an-  
nounced, but the under-  
standing supposed the attention of the C. J. had been called to it, and that a motion to set it aside would not be entertained.

6. The plaintiff cannot, however, understand how the opinion filed could properly have been given in the case. It is upon a point which was not made, either in this court or in the court below, and beside this, the answers of the defend-  
ents expressly cure any defects in the petition, by



particularly alleging a contract containing the very provisions mentioned in the opinion filed. See record, p. 25, 26. Had the point raised by the court been made in the case below, it could have been cured; had it been made here it would have been answered by the reply that it had been repeatedly waived. Under the issues formed, the sufficiency of the petition could not arise. The case came upon a question of variance, but this question has never been decided by the court. The opinion filed is upon an objection never made by the defendants and on which the plaintiff has never been heard.

7. It seems to the undersigned that beyond all question the action of the court was erroneous and unjust, and without regard to the



4

questions of notice and the  
time of entering the motion,  
the plaintiff will consent,  
if it please the court, to  
have this cause set down  
again for argument upon  
the errors assigned, at the  
present term.

In this way, and in no  
other, can justice be done,  
and one party or the other  
be saved from the costs of  
a trial here, upon a point  
which was never in dispute  
between them.

Charles C. Bourne  
counsel  
for plaintiff  
in error



342

William Senior

Breuer & al

---

Pls suggestions  
on ms. to correct  
record -

---

Filed April 24, 1860  
L. Leland  
Clk B

Bonner



Be it remembered that heretofore to wit: on the twenty second day of February in the year of our Lord one thousand eight hundred and fifty six there was filed in the office of the clerk of the Circuit Court in and for the County of Peoria in the State <sup>of Illinois</sup>, a Petition in the words and figures following, to wit:

((

State of Illinois *SS.*  
County of Peoria

In the Circuit Court for said County  
Of the March Term A.D. 1856-

The Petition of William  
Senior, against Alexander Brebner  
and Ann Brebner, for sale under  
mechanics lien.

To the Honorable Judge of said Court.

Your petitioner, William Senior,  
of the county and state aforesaid, re-  
spectfully represents to your Honor, that  
heretofore and on or about the 5th  
day of December A.D. 1854, your  
petitioner did verbally contract with  
Alexander Brebner, defendant, his



suit, in substance, briefly as follows, to wit; that your Petitioner should without unreasonable delay procure materials and build a certain dwelling house, stable, and other appurtenances thereto, on Lot number seven in Block number sixty three in Morton, Voris & Laveille's addition to the city of Peoria for him the said Alexander Brebner and that he, the said Alexander Brebner, should well and truly pay your Petitioner for such materials, and for the work and labor of erecting said dwelling house, stable, and appurtenances so much money as the same should be reasonably worth, payable from time to time as the building thereof should progress. Your Petitioner further represents to your Honor, that he has furnished all such materials, and that he did without any unreasonable delay, complete the building of the said dwelling house stable and appurtenances, that the same were furnished and completed according to the said contract between your Petitioner and the said Alexander Brebner, and were by him the said Alexander Brebner duly accepted and received; that



the said materials and the building of the said dwelling house, stable and appurtenances were and are reasonably worth the sum of two thousand Dollars, the whole of which sum has long been and still remaining due and unpaid from the said Alexander Brebner to your Petitioner. Your Petitioner further represents to your Honor that the said Alexander Brebner is the owner of the lot number seven aforesaid; that heretofore that is to say on or about the <sup>the</sup> 5<sup>th</sup> day of December A.D. 1853 the said Alexander Brebner bought the same Lot of one George C. Bestor and procured a deed therefor to be made to Ann Brebner defendant in this suit. Your Petitioner further represents that the said Lot was in fact paid for by and with the money of the said Alexander Brebner, and that the said Ann Brebner holds the apparent legal title to said Lot as the mere trustee of the said Alexander Brebner, and for his use and benefit.

Wherefore your Petitioner prays



that the said Alexander Brebner and  
Ann Brebner may duly answer  
the matters and things hereinbefore  
stated and set forth, fully, and in  
all things as the law requires; that  
the premises hereinbefore described may  
be sold, and that the proceeds thereof  
may be applied to the discharge of  
the demand of your Petitioner in the  
premises; and for such further or other  
relief as the nature of his case may require,  
and equity and good conscience approve  
&c.

Charles C. Bonney  
Solicitor for Petitioner—

Indorsed on back

William Lenson  
vs.  
Alexander Brebner  
Ann Brebner

Petition

Filed February 22nd 1856  
Jacob Gale Clerk

Amendments inserted  
in original Petition  
by leave of defendants'  
solicitors

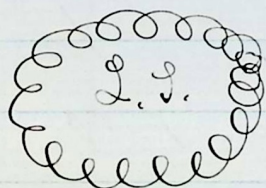
Bonney—



And on the same day, to wit: on the twenty second day of February in the year of our Lord one thousand eight hundred and fifty six there was issued out of the office of the clerk of said Court in said cause a writ of Summons under the seal of said Court which with the return endorsed thereon are 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 Abraham Prebner & Ann Prebner if they may be found in your county, to appear before our Circuit Court on the first day of the next term thereof, to be held at Peoria, within and for the said County of Peoria, on the first Monday of March next then and there, in our said Court to answer the matters and things contained in a Petition for Sale under Mechanics Lien exhibited against them in our said Court by William Senior petitioner - 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 <sup>the</sup> said Court to be held as aforesaid



Witness Jacob Gale, clerk of our said Court,  
and the seal thereof, at Peoria, this 22nd day  
of February in the year of our Lord one thousand  
eight hundred and fifty six

Jacob Gale, clerk.

Endorsed  
(serve by copy)

"Served on Alexander Prebner and Ann Prebner by reading and giving each of them a true copy of this writ, February 22nd 1856.

David D. Irons, Sheriff P. C."



And afterwards, to wit; on the first day of December in the year of our Lord one thousand eight hundred and fifty six there was filed in the office of the clerk of said Court in said Cause an Answer of Alexander Prebner in the words and figures following, to wit:

" Wm Senior

vs  
Alexander Prebner  
Ann Prebner.

Peoria County Circuit Court  
November Term 1856  
For Lien.

The said Alexander Prebner having and reserving to himself &c, Answering says that he did make a contract with the said William Senior on the 13th day of June A 1853 to build a house on the lot described in said petition for the sum of eight hundred dollars - three hundred payable on or before the twentieth day of October of the same year and the balance on or before the twentieth day of January then next following - which contract was reduced to writing and signed by himself and the said William Senior and which was in the possession of the said Senior and is still in the hands of the said Senior as this defendant is informed and believes - that a true copy of said contract is hereto annexed marked A and made part of this answer and the said house was to be built in conformity to said contract - and was finished and completed in conformity with said contract except as hereinafter stated - that is to say one extra door - one extra window - setting certain studding around the walls of said house and an addition to the height of the walls of said house the price for all which was agreed upon between this defendant and the said Senior



11  
at twenty four dollars and thirty cents as per bill annexed marked B, and also made a part of this answer—

This defendant further answering saith that shortly after making the contract aforesaid, he made a further contract with said Senior to build a stable and fence upon said lot. for which when completed he was to pay said Senior fifty-three dollars—only that said last-mentioned contract was not reduced to writing, and that the said stable and fence were the only appurtenances the said Senior made built, or erected on said lot or contracted to make, erect or build—on said lot and that the said House, fence, stable comprises and includes all the contracts for buildings and appurtenances and all the buildings, stables and appurtenances ever built, erected and made by said Senior on the premises aforesaid or elsewhere for this defendant, and that said House, stable, fence were built by the said Senior according to and in compliance with said contracts and were accepted as such by this defendant

11



but that no part of said sum or sums remains due and unpaid, but that this defendant has wholly paid the said contract price for said buildings and fence to said Senior, and more than paid all that was due him for said work on said contracts, this defendant further answering says the said Lot in said bill mentioned is the property of Ann Brebner a daughter of this defendant and the title is in her name.

This defendant further says that said Senior was paid for said work from time to time mostly in lumber from the lumber yard of this defendant which lumber the said Senior received in payment, but this defendant kept ~~an~~ account of such items as the said Senior from time to time received according to the understanding of the parties which was to be applied on said contract or settlement, and affiant further says the said Senior did have and receive from him from time to time between the first day of June A.D. 1853 and the last day of October Eighteen hundred and fifty five.



13  
lumber to the amount of Eighteen hundred and thirty seven dollars and thirty eight cents according to the bill of particulars annexed to and made part of this answer marked C. and for money paid by this debt for materials justly chargeable to said Senior eight dollars and twenty five cents more which after deducting all credits which can justly be claimed by the said Senior and after paying the contract prices of the house, stable and fence still leaves the said Senior indebted to this defendant in the sum of more than One hundred and twenty five dollars.

A. Brebner—

Subscribed and sworn to before me  
this 29th day of November A.D. 1856

Geo. L. Blakeley

Notary Public

Peoria Co. Ills.



A.

## Specifications

For the materials and workmanship of a 2 story brick building to be erected for A. Brebner on Lot 7 block 63 on Morton Poris & Lavelles addition to the City of Georgia

### Size of Building

Front building to be  $23\frac{1}{2}$  feet by  $30\frac{1}{2}$  out to out & to be 2 storeys high  
1<sup>st</sup> Story to be 9 feet in the clear from floor to ceiling 2<sup>d</sup> Story to be 8 feet in the clear from floor to ceiling a Kitchen to be attached as marked on the plan size to be  $12 \times 14$  feet from out to out and 8 feet in the clear from floor to ceiling

### Size & Thickness of Walls

Foundation of main building and Cellar under Kitchen to be of the thickness of  $12^m$  or  $1\frac{1}{2}$  brick 1<sup>st</sup> Story - - - - -  $12^m$

" " 2 Storey Kitchen walls above cellar 8

— — — — — First joists to be placed not less than one foot from the surface of the ground to the lower edge of said joists -

### Timbers

Flooring Joists  $2 \times 10$  & placed  $16^m$  to centres



15

|                |   |      |   |   |   |
|----------------|---|------|---|---|---|
| Ceiling        | " | 2+6  | " | " | " |
| Rafters        |   | 2+6  | " | " | " |
| Parlour joists |   | 3+12 |   |   |   |
| Studing        |   | 2+4  | " | " | " |

### Flooring

1<sup>st</sup> Storey & Kitchen floor to be of good sound timber  $1\frac{1}{4}$  In thick tongued & grooved  
 2<sup>d</sup> Story to be laid with good plump 1 In tongued and grooved of sound timber but must not be laid with any plank where the tongue is deficient nor having loose knots -

### Joiners Work

The Front door in Main building to be 7+3 feet with side lights & Transom to be 4 panneled & framed of  $1\frac{3}{4}$  In. timber clear of blemish & well seasoned moulded & finished with a good Lock.

Room & closet doors to be  $\frac{11}{16}$  In by  $\frac{1}{2}$  - 8 2 panneled and to be  $1\frac{1}{2}$  In thick closet doors excepted which may be  $1\frac{1}{4}$  In all doors fronting the hall or passage way also Front Room Dining Room & Front Room 2<sup>d</sup> Story to be moulded on both sides except where one side may shut into bedrooms or closets where such occurs to be moulded on one side. -



## Windows

To have good frames with parting strips, stop beads & shutter styles complete Window sash to be  $1\frac{1}{2}$  In. thick with projection meeting bars with stop springs on each window both upper & lower sash so as to lower or raise the same at pleasure <sup>place of</sup> ~~instead~~ of weights & pulley the size of the glass to be all on both fronts of Main building  $9 \times 16$  In. Kitchen and rear  $9 \times 14$  In.

## Finishing

The parlour to have 9 In base boards & mouldings with 5 or  $5\frac{1}{2}$  In Arcatures with band Moulding and Mantel piece to correspond hall to be finished the same as parlour Dining Room to be finished with arcatures & back mouldings & 9 In beaded base boards passage on top of stairs 2<sup>d</sup> story to have finishing similar to Dining Room, also front room 2<sup>d</sup> story except the base which may be 8 In dept & beaded bed rooms & closets Kitchen &c to have plain base boards 6 In dept & corn beaded casings Dining Room & front room 2<sup>d</sup> story to be finished with Mantel pieces to correspond with the other finishing.



One pair stairs to be built with  
 returned nosings and cove under Fin-  
 ished with Newel post & continued hand-  
 railing & turned banisters

Main building to have a plain, neat  
 moulded cornish on both sides and  
 with racking cornish and returns on  
 both ends with tin gutters and con-  
 ductors to eavens also tin gutters for  
 Kitchen & conductors complete -

Roof to be covered with 1<sup>st</sup> sheeting  
 & covered with good quality shingles &  
 laid not more than  $4\frac{1}{2}$  in. to weather

Cellar to be the same size as  
 Kitchen & 6 feet dept from floor to  
 joists in clear all door and windows  
 to have stone caps & seals cellar to have  
 a small 3 lights window & stairs to  
 same

Plastering to be good 2 coat work  
 well floated & troweled of except the  
 parlor hall stair case & dining room  
 which shall be finished with 3 coat  
 that is 2 good coat & skim coat

All doors fronting or opening  
 from hall or stair case as well as  
 outside in main buildings to have good  
 Locks bed rooms and closets good Knob



Mortice Latches Kitchen one lock, back door latch & back bolt closets to have all necessary shelving & strips complete. —

Cistern to be 10 + 10 ft built with 8 in brick wall arched over & curb well cemented & all complete —

The contractor is to furnish all materials & workmanship necessary to complete the building as above specified glazing and painting, only excepted the whole to be done in a substantial & good workmanlike manner if any alterations from the foregoing specifications are made during the <sup>pro</sup>~~pro~~secution of the building either in addition or deduction from the same the difference may be settled between the contracting parties or by 2 disinterested persons mutually chosen.

It is agreed this thirteenth day of June Eighteen hundred & fifty three by William Perrior to do the work & furnish the materials for the erection & completion of a building for St. Brebner agreeable to the foregoing specifications & accompanying plan, for the sum of Eight hundred dollars the Kitchen & lower story to be finished by the first of August & the whole to be completed



by the first of November /53

In consideration of William Senior truly and faithfully performing the stipulations of the foregoing Specifications & agreement I agree to pay the said William Senior on or before the twentieth day of October three hundred dollars and on or before the twentieth day of January Eighteen hundred & Fifty four five hundred dollars

Witness My hand & seal  
this 13th day of June 1853 } Alex Brebner

|        |                                  |         |
|--------|----------------------------------|---------|
| May 28 | By one extra door                | 1.80    |
|        | 12 lights Sash                   | .50     |
|        | extra door in house              | 5.00    |
|        | extra window                     | 3.00    |
|        | extra brick work 1612            |         |
|        | brick at $7\frac{1}{2}$ per ell. | 11.34   |
|        | Setting studs in second story    | 5.00    |
|        | Fence & stable by agreement      | 53.00   |
|        |                                  | \$79.64 |



Mr William Senior

Dr

1853

|       |    |         |                                  |    |    |    |        |
|-------|----|---------|----------------------------------|----|----|----|--------|
| June  | 8  | To 202" | Com                              | 17 | 3  | 44 |        |
|       | 9  | " 605"  | "                                | "  | 10 | 28 |        |
|       | 15 | " 149"  | Com. Brds. & Scantling           |    | 2  | 56 |        |
|       | 17 | " 45"   | Flooring & Siding                |    | 92 |    |        |
|       | 22 | " 38"   | Com                              | 17 | 65 |    |        |
|       | "  | " 210   | 3 <sup>d</sup> Clear for muleyer | 20 | 4  | 20 |        |
|       | "  | " 36"   | Com. " "                         | 17 | 54 |    |        |
|       | 25 | " 48"   | Scantling                        | "  | 82 |    |        |
|       | "  | " 66"   | Com. for Steards House           | "  | 1  | 13 |        |
|       | 29 | " 16"   | " Clear floor.                   | 23 | 40 |    |        |
|       | "  | " 437"  | Joists                           | 17 | 7  | 42 |        |
|       | "  | " 244"  | Clear siding                     | 19 | 45 |    |        |
|       | 30 | " 201"  | Clear Brds.                      | 24 | 4  | 82 |        |
|       | "  | " 454"  | 1 1/2 in Clear                   | "  | 10 | 90 |        |
|       | "  | " 400"  | Clear Siding                     | 19 | 7  | 60 | 56 13  |
| July  | 8  | " 414"  | 18" Joists                       | 20 | 8  | 22 |        |
|       | "  | " 368"  | 16" "                            | 17 | 6  | 25 |        |
|       | "  | " 132"  | 22" "                            | 20 | 2  | 64 |        |
|       | 9  | " 40    | Scantling                        | 17 | 68 |    |        |
|       | "  | "       | 7 Cash pa. laborer               |    | 2  | 25 |        |
|       | 12 | " 270"  | Joists                           | 18 | 4  | 86 |        |
|       | 14 | " 130"  | Com                              | 17 | 2  | 21 |        |
|       | 15 | " 3 1/2 | My Shingles                      | 4  | 16 | 00 |        |
|       | 18 | " 675"  | Joists                           | 18 | 12 | 15 |        |
|       | "  | " 70"   | "                                | "  | 1  | 26 |        |
|       | 19 | " 497"  | "                                | "  | 8  | 85 |        |
|       | "  | " 24"   | 2 <sup>d</sup> Clear             | 25 | 60 |    |        |
|       | "  | " 19"   | 1 <sup>d</sup> Clear             | 30 | 57 |    |        |
|       | "  | " 27"   | 3 <sup>d</sup> "                 | 20 | 54 |    |        |
|       | 20 | " 320"  | Scantling                        | 18 | 5  | 76 |        |
|       | 21 | " 80"   | "                                | "  | 1  | 44 |        |
|       | 22 | " 28"   | Clear                            | 30 | 86 |    |        |
|       | "  | " 27"   | Com                              | 18 | 48 |    |        |
|       | 25 | " 651"  | Com plke                         | 18 | 11 | 72 |        |
|       | 26 | " 360"  | " "                              | "  | 6  | 40 |        |
|       | 28 | " 350"  | " "                              | "  | 6  | 30 |        |
|       | 29 | " 121"  | Scantling                        | "  | 2  | 17 | 100 29 |
| Augst | 3  | " 252"  | Comp. Siding                     | "  | 4  | 53 |        |
|       | "  | " 716"  | Joists                           | "  | 12 | 88 |        |
|       | "  | " 208"  | Joists                           | "  | 3  | 74 |        |
| 29    | 6  | " 32"   | Scantling                        | "  | 57 |    |        |



|       |    |                                         |       |     |     |     |    |
|-------|----|-----------------------------------------|-------|-----|-----|-----|----|
|       |    | by back by order Dominique              |       | 10  | 80  |     |    |
|       | 8  | " 2242" 3" Clear                        | 20    | 44  | 840 |     |    |
|       | 9  | " 1739" 3"                              |       | 34  | 78  |     |    |
|       |    | " 65" Joists                            | 18    | 1   | 15  |     |    |
|       | 15 | To Casp                                 |       | 10  | 00  |     |    |
|       | 16 | " 304" Joists & Scantling               | 20    | 6   | 08  |     |    |
|       | 23 | " 32" Scantling                         | 18    |     | 57  |     |    |
|       | 24 | " 736" Joists                           | "     | 13  | 24  |     |    |
|       |    | " 1010" 1" Clear                        | 30    | 30  | 30  |     |    |
|       | 25 | " 530" " "                              | "     | 15  | 90  |     |    |
|       | 26 | " 507" " "                              | "     | 15  | 21  |     |    |
|       | 30 | by order for Wm Calhoun                 |       | 45  | 00  | 249 | 59 |
|       |    | Bro't Forward                           |       | 406 | 01  | 406 | 01 |
| Sept. | 1  | To S M Shingles                         | 3 1/4 | 11  | 25  |     |    |
|       | 3  | " 12" Clear Siding                      | 20    |     | 24  |     |    |
|       | 6  | " by order for Wm Calhoun               |       | 20  | 00  |     |    |
|       | 7  | " 1097" Flooring                        | 26    | 28  | 52  |     |    |
|       | 8  | " 1133" Flooring                        | "     | 29  | 45  |     |    |
|       | 10 | " 658" " "                              | "     | 17  | 10  |     |    |
|       | 13 | " 504" Joists                           | 20    | 10  | 08  |     |    |
|       |    | " 720" Com Bds                          | 18    | 12  | 96  |     |    |
|       | 14 | " 2923" " "                             | "     | 52  | 61  |     |    |
|       | 15 | " 502" " "                              | "     | 9   | 04  |     |    |
|       | 21 | " 282" Joists                           | "     | 5   | 07  |     |    |
|       | 22 | " 75" 18" Scantling                     | 20    | 1   | 50  |     |    |
|       |    | " 2350 Laths                            | 4 1/2 | 10  | 57  |     |    |
|       | 23 | " 420" Clear Siding                     | 20    | 8   | 40  |     |    |
|       | 24 | " 420" " "                              | "     | 8   | 40  |     |    |
|       | 27 | " 174" Clear Lumber                     | 32    | 5   | 54  |     |    |
|       |    | " 40" Com                               | 18    |     | 90  |     |    |
|       | 28 | " 225" 18" Scantling                    | 20    | 4   | 50  |     |    |
|       | 29 | " 96" Clear Siding                      | 20    | 1   | 92  |     |    |
|       |    | " 1100 Laths                            | 4 1/2 | 4   | 95  |     |    |
|       |    | " 1105" Com Bds                         | 18    | 19  | 84  |     |    |
|       |    | " 2440" Clear Siding                    | 20    | 4   | 80  |     |    |
|       | 30 | " 800 Laths                             | 4 1/2 | 3   | 60  |     |    |
|       |    | " 401" Com Bds                          | 18    | 7   | 21  |     |    |
|       |    | " 208" Clear Siding                     | 20    | 4   | 16  | 688 | 67 |
| Oct   | 3  | " paid Hawthorn for order for Laths     |       | 10  | 00  |     |    |
|       |    | " 206" Com Bds                          | 18    | 3   | 70  |     |    |
|       | 4  | " 888" Joists                           | 20    | 17  | 76  |     |    |
|       | 5  | " paid Ira Smith for order for Shingles | 20    | 32  | 00  |     |    |
|       | 17 | " 1714" Clear Siding                    | 20    | 34  | 28  |     |    |
| 31    |    | " 32" Clear Lumber                      |       | 1   | 04  |     |    |



|       |    |                           |    |        |        |
|-------|----|---------------------------|----|--------|--------|
| Nov   | 7  | 67" 2 <sup>d</sup> Clear  | 27 | 1 80   | 100 58 |
|       |    | 11 M Shingles             | 5  | 55 00  |        |
|       |    | 1 gross screws            |    | 1 50   |        |
|       |    | Cash                      |    | 1 00   | 57 50  |
| 1854  |    |                           |    |        |        |
| March | 10 | 202" Siding               | 20 | 4 04   |        |
|       | 21 | 558" Flooring             | 30 | 16 74  |        |
|       |    | 276" Scantling            | 20 | 5 52   |        |
|       | 22 | 132" Flooring             | 30 | 3 96   |        |
|       | 25 | 334" 3 <sup>d</sup> Clear | 24 | 8 01   | 38 27  |
| July  | 27 | 241" Joists               |    | 5 30   |        |
| Agst  | 17 | 130" Scantling            |    | 3 03   |        |
|       | 20 | 72" Joists                |    | 1 58   |        |
|       | 24 | 176" Scantling            |    | 3 96   |        |
|       |    | 96" 18" Duce              |    | 2 11   |        |
|       |    | 224" Joists               | 20 | 4 48   |        |
|       | 25 | 342" Joists               | 22 | 7 52   |        |
|       | 26 | 310" Culls                | 16 | 4 96   |        |
|       | 30 | 277" Joists               | 20 | 5 54   |        |
|       |    | 142" Scantling            | 21 | 2 98   |        |
| Sept  | 31 | 21" Joists                |    | 4 44   | 41 90  |
|       | 2  | 238" Joists               | 20 | 4 76   |        |
|       | 8  | 23" Clear poplar          | 23 | 60     |        |
|       | 12 | 1240" " "                 |    | 31 00  |        |
|       |    | 38' 3 Clear pine          | 24 | 92     | 37 28  |
| 1859  |    |                           |    |        |        |
| Sep.  | 12 | Prot forward              |    | 964 20 | 464 20 |
|       |    | 123" 2 <sup>d</sup> Clear | 27 | 3 32   |        |
|       |    | 140" 18" Joists           | 22 | 3 08   |        |
|       |    | 1448" Clear Siding        | 26 | 37 00  |        |
|       | 15 | 256" Joists               | 20 | 5 12   |        |
|       |    | 340' 1 <sup>d</sup> Clear | 33 | 11 22  |        |
|       | 16 | 96" Joists                | 22 | 2 11   |        |
|       |    | 196" Clear plank          | 20 | 3 92   |        |
|       |    | 316" Scantling            | 33 | 10 42  |        |
|       |    | 176" " "                  | 21 | 3 70   |        |
|       | 20 | 208" " "                  |    | 4 37   |        |
|       |    | 402' Culls                | 16 | 6 43   |        |
|       | 22 | 3 1/2 M Shingles          | 5  | 17 50  |        |
|       |    | 36" Clear pine            | 33 | 1 22   |        |
|       | 23 | 406" " "                  |    | 18 40  |        |
|       |    | 311" 2 <sup>d</sup> Clear | 27 | 8 40   |        |
|       |    | 157' Clear Culls          | 18 | 2 82   |        |
|       |    | 1 M Shingles              | 5  | 5 00   |        |

33



|       |    |    |                |                                       |       |      |    |          |
|-------|----|----|----------------|---------------------------------------|-------|------|----|----------|
|       | 26 | "  | 1/2 M          | "                                     | "     | 2    | 50 |          |
|       |    |    | Bulls          |                                       |       |      | 65 |          |
|       | 27 | "  | 300"           | 1 <sup>st</sup> Clear                 | 33    | 9    | 90 |          |
|       |    |    | 1/2 M Shingles |                                       | 5     | 2    | 50 |          |
|       | 29 | "  | 364"           | Scantling                             | 21    | 7    | 64 |          |
|       | 30 | by | hump bulls     | posts & siding                        |       | 25   | 00 |          |
|       | "  | "  | 1587"          | com. plank                            | 20    | 31   | 74 | 1183 76  |
| Oct   | 2  | "  | 2636"          | "                                     | "     | 52   | 72 |          |
|       | 4  | "  | 469"           | Com Brds                              | 20    | 9    | 38 |          |
|       | 13 | "  | 32"            | Clear poplar                          | 25    |      | 80 |          |
|       | 17 | "  | 307"           | 1 <sup>st</sup> Clear                 | 35    | 10   | 13 |          |
|       | 18 | "  | 886"           | com.                                  | 20    | 16   | 12 |          |
|       | "  | "  | 454"           | 1 <sup>st</sup> Clear                 | 33    | 14   | 98 |          |
|       | 19 | "  | 507"           | Com                                   | 20    | 10   | 14 |          |
|       | "  | "  | 1014"          | 2 <sup>nd</sup> Clear                 | 27    | 27   | 38 |          |
|       | 20 | "  | 159"           | Com                                   | 20    | 3    | 18 |          |
|       | "  | "  | 466"           | 1 <sup>st</sup> Clear                 | 33    | 15   | 38 |          |
|       | 21 | "  | 300"           | Com                                   | 20    | 6    | 00 |          |
|       | 23 | "  | 92"            | "                                     | "     | 1    | 84 |          |
|       | 25 | "  | 118"           | "                                     | "     | 2    | 36 |          |
|       | 27 | "  | 62"            | "                                     | "     | 1    | 24 |          |
|       | 30 | "  | 336"           | "                                     | "     | 6    | 72 |          |
|       | 31 | "  | 420"           | Com Sdg.                              | 20    | 8    | 40 |          |
|       | "  | "  | 64"            | Scantling                             | 21    | 1    | 34 |          |
|       | "  | "  | 500"           | Flooring                              | 32    | 16   | 00 | 204 11   |
| Nov   | 14 | "  | 925"           | Com                                   | 20    | 18   | 58 |          |
|       | 15 | "  | 232"           | "                                     | "     | 4    | 64 |          |
|       | 17 | "  | 272"           | Flooring                              | 32    | 8    | 70 |          |
|       | "  | "  | 184"           | Com                                   | 20    | 3    | 68 |          |
|       | 21 | "  | 834"           | 2 <sup>nd</sup> Clear                 | 27    | 22   | 52 |          |
|       | 25 | "  | 60"            | Clear                                 | 33    | 1    | 98 |          |
| Dec   | 7  | "  | 1/2 M Shingles |                                       | 3 1/4 | 2    | 88 |          |
|       | 12 | "  | 207"           | 3 <sup>rd</sup> Clear                 | 25    | 5    | 17 |          |
|       | 14 | "  | 28"            | Clear Siding                          | 23    |      | 64 | 68 71    |
|       |    |    |                |                                       |       |      |    | 1456 58- |
| 1855  |    |    | Forward        |                                       |       | 1456 | 58 |          |
| March | 10 | To | 312"           | Clear                                 | 31    | 10   | 92 |          |
|       | "  | "  | 22"            | 2 <sup>nd</sup> Clear & 16" Scantling |       |      | 91 |          |
|       | 22 | "  | 113"           | Flooring                              | 32    | 3    | 63 |          |
| Apr   | 3  | "  | 40"            | Timber 20" L                          | 24    |      | 96 |          |
|       | 5  | "  | 45"            | Scantling                             |       |      | 95 |          |
|       | 17 | "  | 58"            | Clear Flooring                        | 35    | 1    | 75 |          |
| 35-   | "  | "  | 75"            | Com                                   | 20    | 1    | 00 | 1477 20  |



|         |  |                                      |       |     |        |        |
|---------|--|--------------------------------------|-------|-----|--------|--------|
|         |  | " 48" 2 <sup>d</sup> Clear           | 30    | 1   | 44     |        |
| 20      |  | " 9" Scantling                       |       |     | 20     |        |
| 21      |  | " 120" Siding                        | 20    | 2   | 40     |        |
|         |  | " 1 M Shingles                       | 5     | 5   | 00     |        |
| 24      |  | " 696" Clear Siding                  | 23    | 16  | 07     |        |
|         |  | " 704 Scantling                      | 21    | 14  | 70     |        |
|         |  | " 160 2-5 Joists                     |       | 3   | 20     |        |
| 25      |  | " 405 2 <sup>d</sup> Clear           |       | 12  | 15     |        |
| 26      |  | " 750 Laths                          | 4 1/4 | 3   | 19     |        |
|         |  | " 176" Scantling                     | 21    | 3   | 69     |        |
|         |  | " 264" Joists                        | 20    | 5   | 28     |        |
|         |  | " 96"                                |       | 1   | 92     |        |
| 27      |  | " 1160 2 <sup>d</sup> Clear Superior | 27    | 31  | 32     |        |
|         |  | " 800" Flooring                      | 32    | 25  | 60     |        |
|         |  | " 10500 Laths                        | 4 1/4 | 19  | 37     |        |
|         |  | " 216" Timber                        | 24    | 5   | 40     |        |
|         |  | " Cull Lumber Lump                   |       | 2   | 00     |        |
| 30      |  | " 266" Flooring                      | 32    | 8   | 51     |        |
|         |  | " 75" Scantling                      |       | 1   | 57     |        |
|         |  | " 144" 18" Joists                    | 22    | 3   | 17     |        |
|         |  | " 6 M Shingles                       | 5     | 30  | 00     |        |
|         |  | " 2 Doors                            | 1 1/2 | 3   | 00     | 198 98 |
| May 26  |  | " 650" Flooring                      | 32    | 20  | 80     |        |
| June 14 |  | " 275" Scantling                     | 20    | 5   | 80     |        |
| 16      |  | " 324"                               | 11    | 7   | 80     |        |
| 27      |  | " 1/2 M Shingles                     | 5     | 2   | 50     |        |
|         |  | " 2000 Laths                         | 4 1/4 | 8   | 50     |        |
| July 28 |  | " 5230" Corn                         | 20    | 104 | 60     |        |
| 2       |  | " 400 Laths                          | 4 1/4 | 1   | 70     |        |
| 3       |  | " 54" 2 <sup>d</sup> Clear           | 30    | 1   | 62     |        |
|         |  | " 37" Corn                           | 20    |     | 75     |        |
|         |  | " 24" Fencing                        | 22    |     | 53     |        |
|         |  | " 16" Clear                          | 35    |     | 56     |        |
| Sept 20 |  | " 22" 2 <sup>d</sup> Clear           | 30    |     | 66     |        |
| Oct 12  |  | " 112" 2 <sup>d</sup> Clear          | 30    | 3   | 36     |        |
| Oct 8   |  | " 38" Corn Flooring                  | 32    | 1   | 21     |        |
|         |  | " 15" Corn                           | 20    |     | 30     |        |
|         |  | " 17" 2 <sup>d</sup> Clear           | 30    | 51  | 161 20 |        |

paid Walker for Locks

For attention as per. rent 3 1/2 month '8 pr M

\$ 1837 80

\$ 25

28

\$ 1873 63



April 10/58 Omission in making up bill  
 To 649 corn

| Bill | Charges |
|------|---------|
| 1886 | 12      |



And afterwards, to wit: on the ninth day of May in the year of our Lord one thousand eight hundred and fifty seven there was issued out of the office of the clerk of said court in said cause under the seal of said court a writ of Summons which with the return endorsed 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 Alexander Brebner and Ann Brebner 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 said county of Peoria, on the second Monday of May inst. then and there, in our said court, to answer the matter and things contained in a petition for sale under mechanics lien exhibited against them in our said court by William Senior, petitioner, 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



42

Leona, this 9th day of May in the Year of our Lord one  
thousand eight hundred and fifty seven

L. J.

Enoch T. Sloan, clerk."

Endorsed

"Served on the within named Alexander Rebner Ann Rebner  
by reading to them this writ. May 9 1857

J. W. Smith, Sheriff."



And afterwards to wit on the sixteenth day of June in the year of our Lord one thousand eight hundred and fifty seven there was filed in the office of the clerk of said Court in said cause a Specification of Account in the words and figures following to wit:

Circuit Court  
Georgia County

William Senior

v.

Alexander Brebner &  
Ann Brebner

For Mechanics  
Lien

## Specification of Account

The petitioner claims his lien for all the work and materials used about the building of the tenements on the lot whereon the said defendants reside. The defendants being in possession of the premises this petitioner cannot visit and inspect the same as would be necessary to make up a bill of the items of such work and materials, which are more within the knowledge of said defendants than of this petitioner.

Charles C. Bonney

Solicitor for petitioner



5

-26-

Indorsed on back:

Senior vs Brebner  
Answer of Alexander  
Brebner

---

Filed December 1<sup>st</sup> 1858  
Enoch P. Hoar, Clerk

Johnson & Blakely

And after afterwards, to wit: on the fifteenth day of November in the year of our Lord one thousand eight hundred and fifty<sup>eight</sup> there was filed in the office of the clerk of said court in said cause an amended or further answer of A. Brebner in the words and figures following, to wit:

|                   |   |               |
|-------------------|---|---------------|
| "William Senior   | { | Peoria County |
| "                 |   | Circuit Court |
| Alexander Brebner |   | March Term    |
| Amr Brebner       | } | 1858          |

And the said Alexander Brebner for further answer to said petition of the said Senior filed herein answers and says that he



did purchase the said Lot mentioned in said petition of the said Bestor, as a present to his daughter Ann Brebner, and that he did present the said Lot to her as a free gift, and that the conveyance was made to her according to such intention and gift—

A Brebner

Subscribed and sworn to before me this 15<sup>th</sup> day of November, A.D. 1858.

Geo. S. Blakeley

Notary Public

Georgia, U.S.

Indorsed on back:

Senior

vs

Alexander Brebner

Ann Brebner

Amended Answer

Filed, Nov. 15<sup>th</sup>, 1858

E. P. Glavin clk

Johnson



And on the same day, 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 an answer of Ann Brebner in the words and figures following, to wit:

William Senior vs Peoria County  
Circuit Court  
March Term  
and Ann Brebner D 1858

And the said Ann Brebner named in said petition for answer to said petition says she is the legal owner of the said Lot and premises in said petition mentioned That she knows nothing of the claims of the said petition for a lien upon said premises only what she has heard from others - That she never contracted, agreed or requested or authorized the said Senior to erect the said buildings in said petition described upon said premises, but that she is informed and believes the said Senior made, built and erected the said dwelling house and other improvements upon said premises, by a special written contract with this defendants father Alexander Brebner for a specific sum in said contract named and specified not exceeding eight hundred sixty dollars in the whole - including fences, stable &c - that said contract was reduced to writing -



and that the said Senior has been fully paid by the said Alexander Brebner for all said work and mostly as she is informed and believes by the said Brebner in lumber and materials which the said Senior as she is informed and believes received as pay for and towards said contract and work and further said defendant knows nothing of the matters and things stated in said petition and having fully answered she prays to be hence discharged and for her costs.

Ann Brebner

The above answer  
was subscribed and sworn to  
before me this 15<sup>th</sup> day  
of November A.D. 1858.

Geo. S. Blakeley  
Notary Public  
Georgia Ill."

"And for further answer, in this behalf  
under rule of Court the said Ann Brebner  
answers and says that the said Lot was



purchased by the said Alexander Brebner and conveyed to her as she understood <sup>and</sup> it, as a gift - but the date of said conveyance or the nature of the same whether quit claim warrant or deed of trust she is not informed and therefore <sup>fore</sup> does not say - that she holds said premises as a gift and is in possession of the same & together with the said Alexander lives on said premises and that she is not aware of any condition of said gift of said premises

Subscribed & sworn Ann Brebner  
to before me this 25th  
November 1858

Geo. S. Blakeley  
N. P."

Indorsed on back:

Sworn  
as  
Alexander Brebner  
Ann Brebner  
Answer of Ann Brebner

Filed Nov. 15<sup>th</sup> 1858  
E. P. Sloan. clk

Johnson



And afterwards, to wit: on the third 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 Replication in the words and figures following, to wit:

State of Illinois SS  
County of Georgia

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

William Senior

v  
Alexander Brebner & Replication  
Ann Brebner

The replication of William Senior petitioner to the separate amended answers of Alexander Brebner and Ann Brebner respectively, defendants —

This replicant saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of Exception which may be had or taken to the manifold imperfections of the said separate amended



answers for replications thereto says, that he will aver, maintain and prove his petition to be true, certain and sufficient in the law to be answered unto: and the said separate amend answers of the said defendants respectively are uncertain, untrue and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto. Confessed and avoided, traversed or denied is true: all which matters and things this repliant is and will be ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays, as in and by his said petition he has already prayed: &c

Charles C. Bonney  
Solicitor for Petitioner

Indorsed on back:

William Senior

— vs —

Henry der Brebner  
and Ann Brebner

Replication

Filed, March 3, 1859  
C. C. Bonney

Bonney



And afterwards, to wit: on the tenth day of March in the year of our Lord one thousand eight hundred and fifty ~~and~~ nine there was filed in the office of the clerk of said court in said cause a Motion for new trial in the words and figures following, to wit:

"State of Illinois  
County of Peoria

In the Circuit Court  
Of the March Term  
A. D. 1859 -

William Senior

v-

Alexander Brebner  
Ann Brebner

Mechanics  
Lien -

The petitioner moves the Court to set aside the verdict rendered herein and award a new trial of this cause for the following among other reasons to wit:

- 1 The court excluded proper evidence of the petitioner -
- 2 The Court misdirected the jury
- 3 The verdict is against the evidence -
- 4 The verdict is contrary to law -



5 The verdict is otherwise irregular -

Charles C. Bonney  
Attorney for  
Petitioner."

Indorsed on back:

|                                |               |                                                            |
|--------------------------------|---------------|------------------------------------------------------------|
| Senior<br>v<br>Bretnor<br>& al | Mr. New Trial | Filed Mar 10/59<br>E. P. Sloan clk<br>R. O. Shulow<br>Dep- |
|--------------------------------|---------------|------------------------------------------------------------|



And afterwards to wit: on the twenty sixth 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 ) es.

County of Peoria )

In the Circuit Court  
March Term A.D. 1859

William Senior

vs

Alexander Prebner

& Ann Prebner )

Be it remembered that on the trial of this cause before the Court and a jury, after the statement of the case and the defence by the counsel for the respective parties, the petitioner read his petition and specification of accounts and the defendants their Answers and amended answers, and the exhibits attached thereto, the Court with the assent of the parties instructing the jury that the petition and specification were not evidence for the petitioner but that the answers were evidence for the defendants so far as responsive to the petition, unless rebutted by sufficient testimony for the petitioner - The petitioner then called Thomas Merrill who being sworn testified as follows, to wit: I am acquainted with said William Senior and said Alexander Prebner, my occupation is that of a house carpenter have been engaged in that business for over twenty five years -



was working for said Senior as such during the year 1853; know that he built a dwelling house, stable, privy, close board fence, and picket fence for said Alexander Brebner on the lot described in the petition in this case, during said year and furnished all the materials for the same - I worked as foreman for said Senior on said buildings from about the first of August to about the 25<sup>th</sup> of October of said year - I never knew of any written contract for said work. If there had been any written contract I would know it for I had charge of the books and papers of said Senior while I was acting as his foreman; I heard said Senior and said Brebner say prior to the building of said house, stable &c that said house should be built like a certain house known to the parties as the Widow Johnsons house, which cost about eight hundred dollars -

but I know that said house was not built like said Widow Johnsons house nor was it built according to any particular plan or specification whatsoever, but it was built according to the directions and dictates of said Brebner from time to time during the building of said house and appurtenances, - Brebner said he was a Carpenter and he gave me directions almost every time he visited the work; there were many alterations made in said house during the progress of its erection at the instance and request of said Brebner; I was authorized and instructed by Senior to follow the directions of said Brebner, and build the house as he Brebner might direct and have the buildings erected accordingly -

I know that said Senior furnished all the materials for the same and that said house, stable, privy, board fence and picket fence were



built as said Brebner desired and were accepted by him, said house was worth eighteen hundred dollars, said stable was worth sixty five dollars, said privy was worth twenty dollars, said board fence was worth sixty five dollars and said picket fence was worth sixty or sixty five dollars - said Brebner took possession of said house and premises in November A.D. 1853 -

but said house was not wholly finished nor was it accepted by said Brebner until some time in the year 1855, when said house was finished by said Senior and accepted by said Brebner

There were some specifications in writing for the building of the house when I first took charge of it, but the buildings were not constructed according to such specifications, or according to any specifications or directions in writing but according to verbal specifications given by said Brebner, while the work progressed; Brebner changed his specifications in some respect almost every time he came to the place, the house was much better in every respect than the Johnson house

(A.) That the house was built of the same size as originally <sup>contracted</sup> ~~intro-~~ ~~duced~~ - understood by the parties that the contract was to build a house like the Widow Johnson house for eight hundred dollars But during the progress of the house some alterations were made -

Witness stated that the alterations were as follows

- 1 a Ra Raing Corrice was put upon the house which would cost about \$100. dollars more than the Corrice of the Johnson house
- 2 the upper story was studded and that the cost of labor and materials for this work would amount to about \$30 dollars.



66 3 That the window frames in in the upper story required different Casings on account of the studding which would cost about \$17. dollars That one part of the upper story was was taken down and laid up again cost 8.00 These were all the alterations the witness could recollect were made but this house was every way better built than the Johnson house.

The witness further testified that the buildings were completed and Bribner took possession of them in November or December A 1853 - but that some of the doors were defective and that the petitioner made and hung new doors in place of the others some time in A 1855

(B.)

that after Bribner moved into said house no alterations were made in said house excepting that new doors were hung in place of those which were hung in the house at the time that Bribner moved in - and the doors were the only thing which Bribner refused to accept, or on account of which he refused to accept the building at the time when he moved into the house; The house was finished when Bribner moved into it - the doors were hung - but Bribner refused to fully accept the house on account of defects in the doors

The petitioner then called William Langdon, William Gold-  
brough, Henry Olsenbeck and Samuel Moss, who being sworn,  
severally testified that they worked for said Senior under said  
witness (Thomas Merrill) as foreman on the buildings described  
in the testimony of said Merrill, and said witnesses severally  
testified to the same facts stated by said Merrill in his testi-  
mony as above set forth



The plaintiff here rested.

The defendants then moved the court to exclude from the jury all the testimony for petitioner because of a variance therein from the time laid in the petition for the making of the contract between the petitioner and said Alexander Brebner, which said motion was opposed by the petitioner but on consideration the court sustained said motion and excluded all the testimony for the petitioner from the jury.

To which decision of the court the petitioner then and there excepted.

The foregoing is all the evidence offered in the case -

The issues were then submitted to the jury who rendered the following verdict - "We the jury find the issues for the defendants"

And thereupon the petitioner filed and entered his motion for a new trial, to wit:

"State of Illinois vs.

County of Peoria } In the Circuit Court Of the Marshfield  
A.D. 1859

William Senior

vs

Alexander Brebner

Ann Brebner

Mechanics lien

The petitioner moves the court to set aside the verdict rendered herein, and award a new trial of this cause for the following among other reasons, to wit:

1- The court excluded proper evidence of the petitioner -



- 68
- 2 - The Court misdirected the Jury
  - 3 - The verdict is against the evidence
  - 4 - The verdict is contrary to law.
  - 5 - The verdict is otherwise irregular

Charles C. Bonney  
attorney for petitioners."

Endorsed  
(Filed Mar. 10/59, E. P. Sloan clk for Thurlow Dep.)

And thereupon the petitioners filed

And afterwards, to wit, at the same term of said Court, the motion aforesaid came on to be heard and being duly argued by counsel was overruled by the Court, and thereupon the Court gave judgment against the petitioners for costs of suit - and the said petitioners then and there excepted to the opinions and decisions of the Court in overruling said motion and giving judgment for the defendants and prayed the Court to sign and seal this bill of exceptions which is accordingly done.

E. N. Powell (Seal)



Proceedings at a term of the Circuit Court begun and held at the Court house <sup>at</sup> in the City of Peoria, in and for the County of Peoria, in the State of Illinois, on the second Monday of May in the Year of our Lord one thousand eight hundred and fifty six, it being the twelfth day of said Month.

Present the Honorable Jacob Gale, Judge of the Sixteenth Judicial Circuit in the State of Illinois, David D. Irons, Sheriff and James S. Bartman, clerk, to wit:

Monday May 12th A.D. 1856

William Senior

vs

Petition for Sale under Mechanic's Lien.

Abraham Prebner

Ann Prebner

On motion of the plaintiff leave is given him to amend his petition in this cause and by agreement this cause is continued to the next November term of this court at the costs of the plaintiff, therefore it is considered that the defendants have and recover of the plaintiff their costs and charges at this term & that execution issue therefor.

Proceedings at a term of the circuit court begun and held at the Court house in the City of Peoria in and for the County of Peoria in the State of Illinois on the third Monday of November in the Year of our Lord one thousand eight hundred and fifty six, it being the seventeenth day of said Month - Present the Honorable Elisha N. Powell, Judge of the Sixteenth Judicial Circuit in the State of Illinois - David D. Irons, Sheriff and Noah P. Sloan, clerk, to wit:



70  
Saturday November 22nd A.D. 1856  
William Senior,

vs  
for Mechanics lien  
Alexander Brebner,  
Ann Brebner.

The petitioner by Charles C. Borney his solicitor enters a motion for a rule on the defendants respectively to file their answers to his petition herein by Monday Morning next.

Tuesday November 25th A.D. 1856  
William Senior

vs  
for Mechanics lien  
Abraham Brebner  
Ann Brebner

On hearing of the petitioners motion for a rule on the defendants to answer herein. It is ordered that the defendants answer the Petition in this cause by Friday Morning of next week.

Friday November 28th A.D. 1856  
William Senior

vs  
for Mechanics lien.  
Abraham Brebner  
Ann Brebner

This day came the plaintiff by Charles C. Borney his attorney and the defendants by E. G. Johnson their attorney. The defendants entered a motion for a rule on the plaintiff to give security for costs in this cause. Whereupon by agreement of parties it is ordered that the said William Senior file bond for costs in this cause by the first day of February next or this cause be dismissed, and this cause is continued to next term.



Proceedings at a term of the Circuit Court began and held at the Court house in the City of Peoria, in and for the County of Peoria and State of Illinois, on the first Monday of March in the year of our Lord one thousand eight hundred and fifty seven, it being the second day of said month. Present the Honorable Elisha N. Powell, Judge of the sixteenth Judicial Circuit in the State of Illinois, Francis W. Smith, Sheriff and Enoch P. Sloan, Clerk, to wit:

Monday March 2<sup>d</sup> A.D. 1857

William Senior,

vs

Petition for Sale under Freshman's Lien

Abraham Brebner,

Ann Brebner.

This day came the plaintiff by L. B. Doney his attorney and the defendants by G. I. Blakeley their attorney and by Agreement of the parties herein this cause is continued to the next term of this court.

Proceedings in the Circuit Court at a term thereof began and held at the Court house in the City of Peoria, in and for the County of Peoria and State of Illinois, on the second Monday of May in the year of our Lord, one thousand eight hundred and fifty seven, it being the eleventh day of said month. Present the Honorable Elisha N. Powell Judge of the 16th Judicial Circuit in said state, Francis W. Smith, Sheriff and Enoch P. Sloan, Clerk, to wit:



72

Wednesday May 20th A.D. 1857

William Senior

vs

Petition for sale under Mechanics lien.

Abraham Brebner

Ann Brebner

This day came the defendants by Johnson & Blakeley and moved the court for a rule on plaintiff to file a specific account in this cause by the first day of July next, which motion was allowed and the said plaintiff ordered to file his bill of particulars by the first day of July next.

Proceedings in the Circuit Court at a term thereof began and held in the Court house in the City and County of Peoria in and for said County, and State of Illinois, on the third Monday of November in the Year of our Lord one thousand eight hundred and fifty seven, it being the sixteenth day of said month. Present the Honorable Elisha N. Powell, Judge of the 16th Judicial Circuit in the State of Illinois, Francis W. Smith, Sheriff and Enoch P. Sloan, clerk, to wit:

Monday December 21st A.D. 1857

William Senior,

vs

Mechanics lien

Alexander Brebner,

Ann Brebner.

This day came the petitioner by Charles C. Bonney his solicitor and the said Alexander Brebner by Eldridge S. Johnson his solicitor and hereupon this cause came on to be heard upon the exceptions of said petitioner to the answer of said Alexander, and



the Court on consideration of said exceptions overruled the second and sustained the first, and on motion of said defendant gave him leave to file an amended answer to said petition by the first Monday of February next - and hereupon on motion of said defendant the said petitioner is ruled by the court here to file a further bill of particulars or specification of his demand by the same first Monday of February next - and hereupon the appearance of the defendant Ann Brebner is entered herein by the said E. G. Johnson her solicitor and by agreement of parties this cause is continued to the next term of this court.

Proceedings at a term of the Circuit Court began and held in the Court house in the City of Peoria, in and for the County of Peoria, and State of Illinois, on the first Monday of March in the year of our Lord one thousand eight hundred and fifty eight, it being the first day of said month. Present, the Honorable Elisha H. Powell, Judge of the sixteenth Judicial Circuit in said State, Francis Smith, Sheriff and Enoch P. Sloan, clerk, to wit:

Tuesday March 2<sup>nd</sup> A.D. 1858

William Senior

vs

Petition for sale under Mechanics Lien

Alexander Brebner

Ann Brebner

By agreement of parties this cause is continued,



...clearance at a term of the circuit court begun and  
held at the Court house in the City of Peoria, County of  
Peoria and State of Illinois, on the second Monday of May  
in the Year of our Lord one thousand eight hundred and fifty  
eight, it being the tenth day of said month, Present the  
Honorable Elisha N. Powell Judge of the Sixteenth Judicial  
circuit in said State, Francis W. Smith, Sheriff and Enoch P.  
Hoon, clerk, to wit:

Tuesday May 11 A.D. 1858

William Senior

vs

for Lien

Alexander Brebner

Ann Brebner

By agreement this cause is continued.



affidavit, and the Court being satisfied in the premises, do order said Cause to be continued, but at the costs of defendants.

Therefore it is considered that the said William Senior have and recover of said Alexander Brebner and Ann Brebner his costs and charges by him about his suit in this behalf expended and that he have execution therefor.

Proceedings at a term of the Circuit Court begun and held at the Court house in the City of Peoria in and for the County of Peoria in the State of Illinois, on the first Monday of March, in the year of our Lord one thousand eight hundred and fifty nine, it being the seventh day of said month.

Present the Honorable Elijah N. Powell Judge of the 16th Judicial Circuit in the State of Illinois. John Bryner, Sheriff and Enoch P. Sloan, clerk, to wit:

Monday March 7<sup>th</sup> A.D. 1859  
William Senior

vs for him  
Alexander Brebner & al

This day came the plaintiff by Bonney his attorney and withdraws his motion to suppress deposition taken in this cause

Tuesday March 9<sup>th</sup> A.D. 1859  
William Senior

vs for him  
Alexander Brebner  
Ann Brebner

This day came the petitioner by Bonney & O'Brien



78  
and Grove his attorneys and the defendant by Johnson & Manning his attorneys and it is ordered that a jury be empannelled to try the issues joined in this cause, whereupon came a jury of twelve good and lawful men, to wit: - Matthew Craig, J. H. Schnebly, R. B. McCulloch, W. C. H. Barton, Samuel Bandy, Harrison Smith, William C. Potter, Henry Moffitt, Jeremiah Brown, A. H. Swager, L. H. Kerr & Sanford Moon, who were duly chosen, tried and sworn to well and truly try the issues in this cause and a true verdict give according to the evidence, And the said jury not having heard all the evidence in the ~~cause~~ case were adjourned to meet the court at half past eight o'clock to-morrow morning.

Thursday March 10th A. D. 1859

William Senior,

vs

for lien

Alexander Brebner,

Ann Brebner.

This day came the parties and their respective attorneys and also came the jury empannelled yesterday to try this cause, and the said jury having heard the evidence given, upon their oaths do say "We the jury find the issues for the defendants. Therefore it is ordered and adjudged that the said defendants have and recover of the said William Brebner their costs and charges by them about their defense in this behalf expended, and that they have execution therefor."



72  
Saturday March 26th A.D. 1859

William Senior,

vs

for lien

Alexander Brebner,

Ann Brebner.

This day came plaintiff by Bonney his attorney and moved the court for a new trial of this cause and the court on consideration overruled said motion.

State of Illinois  
Peoria County.

I, Crook 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 copy from the Records and files in my office in a certain cause entitled William Senior against Alexander Brebner & Ann Brebner.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at office, this twenty first day of April in the year of our Lord one thousand eight hundred and fifty nine.



\$10.05

80





State of Illinois vs  
In the Supreme Court  
at Ottawa -  
Of the April Term A.D. 1859.

And hereupon comes the said William Senior, by Charles C. Boussey 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 below excluded proper evidence for the petitioner.
- 2 The court below misdirected the jury touching the law of the case.
- 3 The verdict of the jury is manifestly against the weight of the evidence.
- 4 The verdict is manifestly against the law of the land.
- 5 The court below overruled the motion of the petitioner for a new trial.
- 6 The court below gave judgment for the defendants.
- 7 The court below refused to render a decree for the petitioner, for -



82  
= enant to the prayer of the petition.

Therefore, for the errors aforesaid,  
and for other errors apparent in  
the record and proceedings aforesaid,  
the said William Senior prays that the judgment  
and decree 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 said judgment,  
&c.

Charles C. Bonney  
attorney for  
plaintiff in error  
"



|                   |   |                |
|-------------------|---|----------------|
| William Senior    | } | Superior Court |
| Alexander Brebner |   | Apr June 1839  |
| Ann Brebner       |   |                |

And now even the said  
 respondents in even can  
 say there is no such error  
 in the Record & proceedings  
 in said case as the said  
 plaintiff in error has  
 alleged and say that the  
 said judgment in the Court  
 below ought to be affirmed.  
 Wm. Senior  
 & Co. = for defendants



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

OF THE APRIL TERM, A. D. 1859.

WILLIAM SENIOR,  
vs.  
ALEX'R BREBNER & ANN BREBNER. } ERROR TO PEORIA CIRCUIT COURT.

Page  
of  
Record.

ABSTRACT.

- 1 Petition for Mechanics' Lien, filed February 22, 1856, alleging verbal contract made on or about Dec. 5, 1854, to furnish materials and erect buildings on L. 7, B. 63, M., V. & L.'s addition to Peoria, without unreasonable delay, for what same reasonably worth, payable as work should progress. Performance averred, buildings' reasonable value \$2000. Ann holds legal title for use of Alexander, real owner, usual prayer, &c.
- 43 Specification of petitioner's demand.
- 9 Answer of Alexander, filed Dec. 1, 1856. States contract in writing for house June 13, 1853, and verbal contract for other buildings shortly after. Contract price for all \$877.30. Payment mostly in lumber furnished between June 1, 1853, and last of October, 1855. Charges copy of contract in writing attached.
- 45 Further answer of Alexander, admitting that he bought the lot and gave it to Ann, his daughter.
- 49 Answer of Ann, filed Nov. 15, 1858, denying knowledge of contract, &c. She owns lot; Senior erected buildings; *believes* there was a written contract, and that Senior has been paid, &c.
- 51 Further answer of Ann, admitting gift of premises, &c., as stated by Alexander. Cannot give dates.
- The several answers are on oath.
- 55 Replication filed March 3, 1859.
- 69 Proceedings of court.
- 78 Trial by jury. Verdict for defendants.
- 67 Motion for new trial. Overruled and judgment.
- 63 Bill of Exceptions, to wit:
- Proof by five witnesses that in 1853 petitioner furnished materials and erected buildings as charged, under personal orders of Alexander. Buildings not erected under any written contract or specifications. Worth \$2010. Defendants took possession in Nov., 1853, but house not wholly finished or accepted till some time in 1855, *when it was finished by Senior and accepted by Brebner*.
- 67 The court, against the objection of petitioner, excluded all his evidence for the reason that there was a *variance* between the *time laid* and the *time proved* for the making of the contract.
- The answers of the defendants had been read. There was no other evidence.
- 81 ERRORS, TO WIT:
1. Excluding petitioner's evidence.
  2. Misdirecting the jury.
  3. Verdict against evidence.
  4. Verdict against law.
  5. Overruling motion for new trial.
  6. Judgment for defendants.
  7. Refusing decree for petitioner.
- 13 Joinder in error.



## BRIEF OF PLAINTIFF IN ERROR.

1. The allegation of *time* is *immaterial*, and there is no *variance*. The *material* questions between these parties were,—Did the petitioner furnish the materials and erect the buildings? If so, how much ought he to receive therefor?

Statute of Mechanics' Lien, Sec. 2, 4, 13, 17, 20, 22, and 23.

2. The petition, *like a declaration*, must contain a statement of the cause of action.

3 Scam. R. 544.

3. If a parol contract is stated to have been made on a particular day, the plaintiff is not confined in his proof to the day laid.

Gould Pleading, p. 89 sec. 64, p. 90 sec. 65.

1 Chitty Pleading, 257, 258.

1 Greenleaf Evidence, sec. 61.

4. It is sufficient if the SUBSTANCE of the issue be proved.

1 Greenleaf Evidence, sec. 56, 61.

5. Even in a criminal case the time laid is not material.

Wharton's Criminal Law, 220.

6. The petitioner was entitled to a decree for the amount claimed. The answers of the defendants were not evidence that the petitioner received lumber from Alexander, nor that there was a special *agreement* to receive such lumber in *payment* of petitioner's demand. The petition charges that *money* is due. It contains nothing about any *lumber transactions* between the parties. The petitioner does not call for the oath of the defendants in any such behalf, and cannot be bound thereby. Answers in chancery, and the like cases, are received as evidence upon the sole ground that the complainant calls on the defendant to answer upon his oath touching the matter in controversy. The judgment below ought to be reversed, and a decree entered for the amount of the petitioner's demand.

CHARLES C. BONNEY,

*Attorney for Plaintiff in Error.*



In the Supreme Court

<sup>332</sup>  
William Senior

v.

Alexander Brebner & al.

Errors to Peria Circuit Court

Abstract of Record &  
Brief of Plaintiff

Filed May 5, 1859

L. Leland

Clerk



332

William Senior  
vs

Alexander Peabner  
etal

---

Transcript and  
assgt of errors

Filed April 26. 1859  
Leland  
clerk